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CLIMATE CHANGE AND FEDERAL CROP INSURANCE

CHAD G. MARZEN*
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Abstract: The federal crop insurance program is well-positioned today to promote resilient agricultural practices that mitigate the future impact of climate change. In light of climate change risk, this Article examines issues relating to climate change and the federal crop insurance program. Part I of this Article examines the present risk of climate change in agriculture and discusses recent steps taken to address climate change in agriculture in general, specifically within the federal crop insurance program. As a condition to federal crop insurance coverage, a farmer-insured must utilize “good farming practices” to obtain coverage for covered causes of loss. Part II examines the role of “good farming practices” determinations and its effects on climate change. This Article addresses three cases decided within the past five years and contends that the increasing number of cases in the federal courts indicate that an amendment to the “good farming practices” standard may have a significant effect in promoting climate change mitigation. This Article concludes by proposing an amendment to the “good farming practices” standard. The proposed standard dictates that if a farmer utilizes “sustainable, resilient and soil-building agricultural practices,” then such utilization must be weighed as a substantial factor in support of a “good farming practices” determination by the Risk Management Agency.

INTRODUCTION

Climate change poses clear and conspicuous risks to the future vitality of American agriculture. In remarks before the National Press Club in June 2013, United States Secretary of Agriculture Tom Vilsack stated that cli-

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mate change “is new and different than anything we’ve ever tackled.”¹ In those remarks, Secretary Vilsack noted that the year 2012 presented the second-most intense year on record for extreme weather events such as hurricanes, flooding, droughts, and wildfires.² The prospect of more intense and severe weather events not only presents a danger of reduced yields on crops for American farmers, but may also cause food supplies to become scarcer, leading to higher food prices.³

The insurance industry generally appears to be quite aware and cognizant of the risks presented by climate change.⁴ In early 2013, leaders of the insurance industry discussed concerns that the risk of climate change presents an “existential threat” to the insurance industry.⁵ In response, insurers are now increasingly active in encouraging states to adopt strengthened building codes and policies that reward sensible resource management consistent with mitigating climate change risk.⁶ An increasing amount of scholarly attention is being spent analyzing steps private insurers can take in the effort to reduce the harmful effects of climate change, such as the usage of risk modeling, which incorporates projections of climate change impact into results, as well as the implementation of incentives for policyholders to utilize energy efficient features in homes and vehicles.⁷

¹ Press Release, U.S. Dep’t of Agric. Office of Comm’ns, Agriculture Secretary Outlines Vision for Agricultural Solutions to Environmental Challenges in Speech to the National Press Club, <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2013/06/0113.xml> [https://perma.cc/HXX7-4WSJ].

² *Id.*

³ See Justin Gillis, *Climate Change Seen Posing Risk to Food Supplies*, NY TIMES (Nov. 1, 2013), http://www.nytimes.com/2013/11/02/science/earth/science-panel-warns-of-risks-to-food-supply-from-climate-change.html?_r=0.

⁴ See Eduardo Porter, *For Insurers, No Doubts on Climate Change*, NY TIMES (May 14, 2013), <http://www.nytimes.com/2013/05/15/business/insurers-stray-from-the-conservative-line-on-climate-change.html>.

⁵ See Bryant Rousseau, *Climate Change & Insurance: Existential Threat—Or Extraordinary Opportunity?*, PROPERTY CASUALTY 360° (Feb. 5, 2013), <http://www.propertycasualty360.com/2013/02/05/climate-change-insurance-existential-threat-or-ex> [https://perma.cc/MFW9-HWUG].

⁶ See Sean B. Hecht, *Climate Change and the Transformation of Risk: Insurance Matters*, 55 UCLA L. REV. 1559, 1610 (2008).

⁷ See generally William T.J. de la Mare, *Locality of Harm: Insurance and Climate Change in the 21st Century*, 20 CONN. INS. L.J. 189 (2013) (analyzing the systems relating to insurance in the United States, European Union, China, and the Middle East and comparing each with regard to their ability to address the risks of climate change); Hecht, *supra* note 6 (discussing the role of insurance products and reinsurance to help insurers transfer risk and the potential for insurance products to mitigate the impacts of climate change); Amy C. Johnsgard, Short Essay, *Agents of Change: How Collaboration Among Insurers and the Public Sector Can Manage Risk and Foster Climate-Neutral Behavior*, 6 HARV. L. & POL’Y REV. 233 (2012) (discussing how insurers have integrated risk modeling which incorporates analysis of the expected impact of climate change and incentives offered by insurers and the government relating to measures that reduce the effect of climate change).

The federal crop insurance program is well-positioned today to promote resilient agricultural practices that mitigate the future impact of climate change.⁸ First authorized by Congress in 1938, the federal crop insurance program, managed by the Federal Crop Insurance Corporation (“FCIC”) through the administration of the Risk Management Agency (“RMA”) within the Department of Agriculture, provides a safety net for farmers to hedge against the often significant risks that can arise when catastrophic weather events such as droughts occur.⁹ Approximately eighty percent of insurable farmland is covered by multi-peril crop insurance, where policies are issued either directly by the FCIC or through the nineteen currently approved insurance providers (“AIPs”), which can sell and service policies that are reinsured through the FCIC.¹⁰

Despite being a resilient and vital program for decades, the federal crop insurance program today faces many challenges. Critics have raised questions as to the program’s costs and expenses.¹¹ They have also contended that the subsidies benefit an excessive number of larger, wealthier farmers.¹² Waste, fraud, and abuse, although not necessarily a vast issue in the program, still remain a concern.¹³ Long term, just as with other insurance products, there looms a potentially larger risk: climate change; indeed, the title of an October 2014 Government Accountability Office report (the “GAO report”) is quite telling: “CLIMATE CHANGE: Better Management of Exposure to Potential Future Losses is Needed for Federal Flood and Crop Insurance.”¹⁴ The GAO report indicated that climate change could

⁸ See Chad G. Marzen, *Crop Insurance Bad Faith: Protection for America’s Farmers*, 46 CREIGHTON L. REV. 619, 621 (2013) (“In 1938, Congress enacted the Federal Crop Insurance Act (“FCIA”); the FCIA created the Federal Crop Insurance Corporation (“FCIC”) with the original purpose to issue crop insurance policies for farmers and to handle claims of loss.”).

⁹ See *id.*

¹⁰ See *id.* at 625–26; Christine Stebbins, *U.S. Crop Insurance Reformers Fume as Farmers Sign Up for 2014*, REUTERS (Mar. 14, 2014, 2:24 PM), <http://www.reuters.com/article/2014/03/14/usa-grains-insurance-idUSL2N0MB1A320140314> [<https://perma.cc/WW4S-9BNW>].

¹¹ See Stebbins, *supra* note 10.

¹² Brad Plumer, *The Farm Bill Is Up for a Final Vote Soon. Here’s Why So Many People Hate It*, WASH. POST WONKBLOG (Feb. 3, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/02/03/the-farm-bill-is-set-for-a-final-vote-soon-heres-why-so-many-people-hate-it/> [<https://perma.cc/L8EV-TYJB>].

¹³ See Dave Kolpack, *Farmers Find Unique Ways to Defraud Federal Insurance Plans*, SALON (Mar. 7, 2015), http://www.salon.com/2015/03/07/farmers_find_unique_ways_to_defraud_federal_insurance_plans/ [<https://perma.cc/8XDD-TEYC>]; see also Chad G. Marzen, *Crop Insurance Fraud and Misrepresentations: Contemporary Issues and Possible Remedies*, 37 WM. & MARY ENV’T L. & POL’Y REV. 675, 678 (2013) (discussing how issues surrounding fraud and misrepresentation plague the crop insurance industry).

¹⁴ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-28, CLIMATE CHANGE: BETTER MANAGEMENT OF EXPOSURE TO POTENTIAL FUTURE LOSSES IS NEEDED FOR FEDERAL FLOOD AND CROP INSURANCE 16 (2014) [hereinafter GAO].

substantially increase crop insurance losses by 2040, with even larger losses by the year 2100.¹⁵

In light of climate change risk, this Article examines issues related to climate change and the federal crop insurance program.¹⁶ As a government-administered program, the federal crop insurance program is in a position where it can implement policies and standards to reduce climate change risk.¹⁷ Part I of this Article examines the present risk of climate change in agriculture, discusses recent steps taken to address climate change in agriculture by the Obama administration, and generally discusses the Natural Resources Defense Council's proposal that has been offered to address the risk of climate change specifically within the federal crop insurance program.¹⁸

In liability insurance policies generally, as a doctrinal rule, insurers must satisfy conditions precedent under the insurance policy to obtain coverage.¹⁹ In the area of federal crop insurance, a farmer-insured must utilize "good farming practices" to obtain coverage for covered causes of loss.²⁰ If "good farming practices" are not followed and a negative determination is reached by the RMA, the FCIC, or an AIP, the farmer may be denied coverage.²¹

Part II examines the role of "good farming practices" determinations and its effects on climate change.²² As noted by the GAO report, the manner in which "good farming practices" determinations are currently structured does not specifically provide incentives for farmers to adopt practices consistent with increased climate change mitigation.²³ In recent years, several cases involving judicial review of "good farming practices" have been decided by the federal courts. Part III addresses three cases decided within the past five years, and contends that the increasing number of cases in the federal courts indicate an amendment to the "good farming practices" standard may have a significant effect in promoting climate change mitigation.²⁴ Fol-

¹⁵ *Id.* at 14.

¹⁶ See *infra* notes 26–158 and accompanying text.

¹⁷ See Marzen, *supra* note 8, at 621 (demonstrating the significant role the FCIC has played in assisting American farmers avoid catastrophic crop losses).

¹⁸ See *infra* notes 26–61 and accompanying text.

¹⁹ See Nicholas M. Insua & Matthew J. Delude, *The Restatement (Second) of Contracts as a Useful Tool for Addressing Common Insurance Law Issues*, 13 CONN. INS. L.J. 19, 30–31 (2007).

²⁰ See 7 U.S.C. § 1508(a)(3)(A)(iii) (2012). The statute states in pertinent part: "Insurance provided under this subsection shall not cover losses due to . . . the failure of the producer to follow good farming practices, including scientifically sound sustainable and organic farming practices." *Id.*

²¹ See J. Grant Ballard, *A Practitioner's Guide to the Litigation of Federally Reinsured Crop Insurance Claims*, 17 DRAKE J. AGRIC. L. 531, 545 (2012).

²² See *infra* notes 62–158 and accompanying text.

²³ See GAO, *supra* note 14, at 24.

²⁴ See *infra* notes 100–144 and accompanying text.

lowing the recommendations of the GAO report, this Article proposes an amendment to the “good farming practices” definition and standard: if a farmer utilizes “sustainable, resilient and soil-building agricultural practices” then such utilization must be weighed as a positive “substantial factor” in a “good farming practices” determination by the RMA.²⁵

I. THE RISK OF CLIMATE CHANGE ON THE FEDERAL CROP INSURANCE PROGRAM

A. *The Present Risk of Climate Change*

Studies indicate that the present risk of climate change may have deleterious effects on agriculture.²⁶ For instance, a 2013 report of the United States Department of Agriculture (“USDA”) entitled “Climate Change and Agriculture: Effects and Adaptation” indicated that while the effects of climate change may be mixed over the next twenty-five years depending on regional conditions, beyond 2050, “increases in atmospheric carbon dioxide, rising temperatures, and altered precipitation patterns will affect agricultural productivity.”²⁷

As noted above, in October 2014, the Government Accountability Office (“GAO”) released a significant report regarding the potential effects of climate change on the federal crop insurance program.²⁸ The report mentioned that in the next thirty-five years, temperatures could increase anywhere from 1.8° F to 5.4° F, and such temperature variations could cause declines in crop yields, despite technological advances made in agriculture.²⁹ Significantly, the report also warned that by the year 2100, climate change may potentially double crop losses.³⁰

The crop insurance industry itself also recognizes the threat of climate change. National Crop Insurance Services, a website that advocates for the crop insurance industry, contends that crop insurance has a role in the climate change debate; their website states: “At a minimum, climate change is projected to introduce a whole new level of uncertainty into production ag-

²⁵ See *infra* notes 145–158 and accompanying text.

²⁶ See *infra* note 27 and accompanying text (discussing government reports within the past several years which appear to note that while the short term effects of climate change may not be drastic, in the long term the effects may be significant).

²⁷ See Press Release, U.S. Dep’t of Agric. Office of Commc’ns, USDA Reports Synthesize Literature on Climate Change Effects and Adaptation Strategies for U.S. Agriculture and Forests (Feb. 5, 2013), http://www.usda.gov/oce/newsroom/archives/releases/2013/OCE_AgForestry.htm [<https://perma.cc/4DX7-BKKW>].

²⁸ See GAO, *supra* note 14, at 15.

²⁹ See *id.*

³⁰ *Id.* at 14.

riculture, bringing periods of more intense heat or cold, abnormally high or low moisture and altered weather patterns.”³¹

B. Recent Steps Taken to Address Climate Change in Agriculture by the Obama Administration

The effects of climate change on agriculture have not gone unnoticed by policymakers in recent years and the Obama administration has taken several steps with agricultural policy in an effort to mitigate the threat of climate change.³² Since 2010—when just over 2.5 percent of all farmland consisted of acreage where farmers utilized cover crops—it appears that usage of cover crops have been on the rise.³³ A cover crop is a crop that is primarily intended to improve soil health, in contrast to a commodity crop planted for economic purposes.³⁴ The utilization of cover crops carries many environmental benefits such as reducing soil erosion as well as nitrate and phosphate losses, suppressing weeds, and improving the overall sustainability and biodiversity of the soil.³⁵

1. Implementation of USDA Cover Crop Guidelines

Prior to 2013, farmers who utilized cover crops were reportedly at risk of losing their eligibility for crop insurance for cash crops due to rigid deadlines imposed by the USDA for termination of cover crops.³⁶ During this time, a system existed in which rigid calendar dates governed when cover crops were required to be terminated, rather than a more flexible policy that tied the termination date to the planting date of the cash crop.³⁷ In June

³¹ See *Does Crop Insurance Have a Role to Play in the Climate Change Debate?*, CROP INS., <http://www.cropinsuranceinamerica.org/just-the-facts/does-crop-insurance-have-a-role-to-play-in-the-climate-change-debate/#.VXx6kkaSZnk> [<https://perma.cc/6DUZ-PC37>].

³² See *infra* notes 39–43 and accompanying text.

³³ See Brian DeVore, *Crop Insurance: Good Enough for Monsanto—Good Enough for Sustainable Ag*, MINN. ENVTL. P’SHIP (Dec. 22, 2014), <http://www.mepartnership.org/crop-insurance-good-enough-for-monsanto-good-enough-for-sustainable-ag/> [<https://perma.cc/TSE2-7CMD>].

³⁴ See *Cover Crops*, SUSTAINABLE AGRIC. RESEARCH & EDUC., <http://www.sare.org/Learning-Center/Topic-Rooms/Cover-Crops> [<https://perma.cc/5QKF-ZMFX>].

³⁵ See NAT. RES. CONSERVATION SERV., U.S. DEP’T OF AGRIC., IOWA AGRONOMY TECHNICAL NOTE 38: COVER CROP MANAGEMENT 1–2 (2013), http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1166106.pdf [<https://perma.cc/Y6TT-TXJF>].

³⁶ See Rob Myers, *New USDA Guidelines on Crop Insurance and Cover Crops*, NSAC’S BLOG (July 18, 2013), <http://sustainableagriculture.net/blog/new-usda-cover-crop-guidelines/> [<https://perma.cc/KUY9-ME5N>]; see also *2015 Cover Crops Crop Insurance, Cover Crops and NRCS Cover Crop Termination Guidelines FAQs*, RISK MGMT. AGENCY, U.S. DEP’T OF AGRIC. (July 8, 2015), <http://www.rma.usda.gov/help/faq/covercrops2015.html> [<https://perma.cc/7JNL-4YFB>] (“Termination means growth has ended.”).

³⁷ See Myers, *supra* note 36.

2013, in remarks addressing agricultural initiatives to reduce climate change, United States Secretary of Agriculture Tom Vilsack announced that a new four cover crop termination zone system would be created to establish new cover crop guidelines that are more consistent with regional and local crop management systems, providing more incentives for farmers to adopt the usage of cover crops.³⁸

2. Executive Order 13653

Several months following the announcement of the USDA cover crop guidelines, on November 1, 2013, President Barack Obama signed Executive Order 13653, “Preparing the United States for the Impacts of Climate Change.”³⁹ Intended to facilitate the undertaking of “actions to enhance climate preparedness and resilience,” a key component of the executive order was the creation of an interagency Council on Climate Preparedness and Resilience (the “Council”). The Council was comprised of various government officials who were tasked with recommending and implementing federal government priorities relating to climate change, and working with regional, state, local, and tribal governments to address climate change preparedness as well as “resilience of communities.”⁴⁰

One of the directives of the executive order called for the Secretary of Agriculture and other governmental officials to inventory and evaluate policies, programs, and regulations in light of the goal of making natural resources “more resilient in the face of a changing climate.”⁴¹ In addition, the Council was tasked with reforming federal policies that may have the unintended consequence of increasing vulnerability to climate change risk.⁴² As the GAO has reported, the current standard for determination of “good farming practices” does not always incentivize the use of sustainable and resilient agricultural practices for farmers; thus, Executive Order 13653 appears to have direct application on the need to reformulate the “good farming practices” standard.⁴³

³⁸ *See id.*

³⁹ *See* Exec. Order No. 13653, 78 Fed. Reg. 66,819 (Nov. 1, 2013).

⁴⁰ *Id.* at 66,823.

⁴¹ *Id.* at 66,820.

⁴² *Id.* at 66,819–20.

⁴³ *See id.*; GAO, *supra* note 14, at 24.

3. April 2015 USDA “Building Blocks for Climate Smart Agriculture and Forestry”

In April 2015, additional efforts were announced by the Obama administration to combat the effects of climate change on agriculture, with a goal of reducing agricultural emissions to between twenty-six and twenty-eight percent below 2005 levels by 2025.⁴⁴ The ten “Building Blocks for Climate Smart Agriculture,” unveiled in a speech at Michigan State University by Secretary Vilsack, included initiatives to promote climate change mitigation in the areas of (1) soil health; (2) nitrogen stewardship; (3) livestock partnerships; (4) conservation of sensitive lands; (5) grazing and pasture lands; (6) private forest growth and retention; (7) stewardship of federal forests; (8) promotion of wood products; (9) urban forests; and (10) energy generation and efficiency.⁴⁵ Of significant importance to crop insurance, Secretary Vilsack opined that the initiative would promote producer-use of cover crops and other agricultural practices that improve soil resilience.⁴⁶ This promising initiative illustrates that the federal government is taking quite seriously the possible effects of climate change on the federal crop insurance program.⁴⁷

C. NRDC Proposal to Address the Risk of Climate Change in Federal Crop Insurance

In addition to these recent actions and initiatives of the government, the Natural Resources Defense Council (“NRDC”), a key environmental advocacy organization, has also lobbied for changes to address climate change with the federal crop insurance program.⁴⁸ Outside of the governmental actions taken in recent years, there are further steps that have been advocated to reform the federal crop insurance program to address the risk of climate change.⁴⁹ In insurance generally, many companies offer reduced rates to insureds who utilize energy-efficient features in buildings as well as

⁴⁴ See Chris Mooney, *The Obama Administration Is Taking on Agriculture’s Role in Climate Change. Here’s Why That’s a Big Deal*, WASH POST (Apr. 23, 2015), <http://www.washingtonpost.com/news/energy-environment/wp/2015/04/23/the-obama-administration-wants-to-slash-emissions-from-agriculture-heres-why-thats-a-big-deal/> [https://perma.cc/725G-QSBE].

⁴⁵ Press Release, U.S. Dep’t of Agric. Office of Commc’ns, Remarks as Prepared for Delivery by Secretary Vilsack on Rollout of USDA’s Building Blocks for Climate Smart Agriculture & Forestry Strategy at Michigan State University (Apr. 23, 2015), <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2015/04/0111.xml> [https://perma.cc/93P3-YH7H].

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ *See infra* notes 49–61 and accompanying text.

⁴⁹ *See infra* notes 50–51 and accompanying text (discussing the steps taken by both private insurers and the government alike).

vehicles.⁵⁰ Outside of the actions of private insurance companies, a number of state governments have also provided incentives for reduction of climate change risk.⁵¹

The NRDC has offered a proposal to incentivize climate change risk-reducing behavior by participants in the federal crop insurance program through lowered premiums tied to climate change risk mitigation.⁵² Generally, the Board of Directors of the Federal Crop Insurance Corporation (“FCIC”) authorizes pilot programs in the crop insurance area to be administered by the Risk Management Agency (“RMA”).⁵³ For example, pilot programs are now offered through the RMA for whole-farm revenue protection, which insures farm revenue instead of single, individual insurable crops, and crops such as cherries, chili peppers, pistachios, strawberries, and sugar beets.⁵⁴

The NRDC’s proposal would encourage the RMA to develop an additional pilot program.⁵⁵ To reform the crop insurance program, Claire O’Connor authored an NRDC proposal suggesting that the RMA should establish a pilot program to provide incentives to farmers who utilize cover crops and efficient irrigation management techniques that increase soil health

⁵⁰ Johnsgard, *supra* note 7, at 239–40 (“In recognition of recent increases in catastrophic losses, some insurers have begun to lobby for energy-saving and disaster-resilient practices. For example, insurers support, and sometimes require as a condition of coverage, use of hurricane shutters, wind-resistant glass, fire-resistant tile, and metal or slate roof tiles. One Canadian insurer collaborated with the Institute for Catastrophic Loss Reduction to build a disaster-resilient home. Insurers also widely support GHG reduction in the form of energy-efficient building codes, higher fuel economy standards, and tighter federal controls on speed limits. The American Insurance Association advocates telecommuting and public transportation.”).

⁵¹ *Id.* at 245 (“Governments may also incentivize climate change-mitigating behavior by policyholders by providing or mandating incentives. For example, the Federal Housing Administration (FHA) allows homeowners across the U.S. to finance the cost of adding energy efficient features as part of their FHA-insured loans. Massachusetts requires that insurers provide premium credits for policyholders who use primarily public transit or commute to work. An Oregon statute offers a \$100 per policy tax credit to insurers who offer PAYD insurance.”).

⁵² See *infra* notes 56–59 and accompanying text.

⁵³ See *Frequently Asked Questions: Crop Insurance Basics*, RISK MGMT. AGENCY, U.S. DEP’T OF AGRIC. (Aug. 14, 2008), <http://www.rma.usda.gov/help/faq/basics.html> [<https://perma.cc/Z72W-4FSY>] (“Congress requires that RMA strive for actuarial soundness in all Federal crop insurance programs that it administers. In support of this goal, RMA has a very deliberate process for new program development. New pilot programs must be approved by the FCIC Board of Directors before they are made available to producers. Under certain circumstances, new pilot programs must be authorized by Congress before RMA can begin program development.”).

⁵⁴ See *2015 Crop Policies and Pilots*, RISK MGMT. AGENCY, U.S. DEP’T OF AGRIC., <http://www.rma.usda.gov/policies/2015policy.html> [<https://perma.cc/N44V-U8DJ>]; *New Crop Insurance Option for Specialty Growers, Diversified Farms*, FARM & DAIRY (Jan. 22, 2015), <http://www.farmanddairy.com/news/new-crop-insurance-option-specialty-crop-growers-diversified-farms/236777.html> [<https://perma.cc/XE7K-QFJV>].

⁵⁵ See *infra* notes 56–59 and accompanying text.

and are consistent with the reduction of the risk of climate change.⁵⁶ The NRDC noted that such a pilot program would set premium rates lower than that of the current loss cost formula for crops.⁵⁷ In terms of program cost, the NRDC contends that the program would be an actuarially sound program, paying for itself, because the utilization of soil building agricultural practices would result in lowered or avoided loss payments.⁵⁸ The NRDC remarked that over time the usage of soil building techniques “will also reduce the need for and size of the [Federal Crop Insurance Program].”⁵⁹

While a number of steps have already been taken to reduce the effects of climate change—including the reform of the federal crop insurance program—more can be done by reforming an additional area: the “good farming practices” standard.⁶⁰ As several reported cases appear to indicate, a reform of the “good farming practices” standard may yield positive results in efforts to mitigate the effects of climate change in agriculture.⁶¹

II. CLIMATE CHANGE AND “GOOD FARMING PRACTICES” DETERMINATIONS

A. An Overview of “Good Farming Practices” Determinations

A determination that good farming practices have not been used by an insured row crop producer results in a finding that the producer’s crop is ineligible for crop insurance coverage. The Federal Crop Insurance Act itself provides that crop insurance will not cover losses due to “the failure of the producer to follow good farming practices.”⁶² Such determinations may initially be made by a private approved insurance provider or the United States Department of Agriculture (“USDA”) Risk Management Agency (“RMA”).⁶³ As a result, “good farming practices” determinations contain significant financial ramifications for America’s farmers.⁶⁴ The “basic provisions” of crop insurance, which are codified as federal law, define “good farming practices” as:

⁵⁶ See CLAIRE O’CONNOR, NAT. RES. DEF. COUNCIL, SOIL MATTERS: HOW THE FEDERAL CROP INSURANCE PROGRAM SHOULD BE REFORMED TO ENCOURAGE LOW RISK FARMING METHODS WITH HIGH REWARD ENVIRONMENTAL OUTCOMES 3 (2013), <http://www.nrdc.org/water/soil-matters/files/soil-matters-ip.pdf> [<https://perma.cc/8MQZ-J38K>].

⁵⁷ *Id.* at 10.

⁵⁸ *Id.* at 11.

⁵⁹ *Id.*

⁶⁰ See *supra* notes 26–59 and accompanying text.

⁶¹ See *infra* notes 81–144 and accompanying text.

⁶² 7 U.S.C. § 1508(a)(3)(A)(iii) (2012).

⁶³ See *generally id.* (demonstrating the role of both private providers and government agency in determining crop insurance qualifications).

⁶⁴ See *infra* note 67 and accompanying text.

The production methods utilized to produce the insured crop and allow it to make normal progress toward maturity and produce at least the yield used to determine the production guarantee or amount of insurance, . . . which are: (1) For conventional or sustainable farming practices, those generally recognized by agricultural experts for the area; or (2) for organic farming practices, those generally recognized by organic agricultural experts for the area⁶⁵

While the mandate that a farmer use “good farming practices” certainly seems reasonable and even necessary to maintain the integrity of the federal crop insurance program, the requirement has sparked much discussion in recent years.⁶⁶ Organizations such as the National Sustainable Agriculture Coalition have lobbied to ensure that organic and sustainable production practices may be recognized as “good farming practices.”⁶⁷ The concern is that the restrictions placed on production practices limit innovation, the use of organic production methods, and conservation practices.⁶⁸ Reform is needed in the area of “good farming practices” to ensure that production practices, which have consistently evolved over the course of modern history, are not restricted moving forward due to limitations on the availability of crop insurance coverage.⁶⁹

There is a very real concern that requiring insured farmers to use farming practices “generally recognized” by experts in an insured producer’s area to qualify for federal crop insurance discourages the use of non-traditional production practices.⁷⁰ A reading of the above-cited common crop insurance policy text demonstrates that the current state of the law regarding “good farming practices” determinations may unintentionally place significant limitation on the ability of farmers who seek to introduce or experiment with non-traditional production practices, including those that might serve to ease the impacts of climate change on agricultural production as well as the environment.⁷¹ The RMA itself has recognized the difficulties in applying the “good farming practices” requirement to non-traditional production practices by allowing an alternative “organic agricul-

⁶⁵ 7 C.F.R. § 457.8 (2015) (defining “good farming practices”).

⁶⁶ See *infra* notes 67–68 and accompanying text.

⁶⁷ See *What Does “Good Farming Practices” Really Mean?*, NSAC’S BLOG (Nov. 11, 2014), <http://sustainableagriculture.net/blog/good-farming-practices-hndbok/> [<https://perma.cc/3UD5-97ZR>].

⁶⁸ See *id.*

⁶⁹ See *id.* (depicting the importance of a process whereby disputes between policyholders and insurance providers regarding disagreements with GFP determinations can be resolved).

⁷⁰ See *supra* note 65 and accompanying text.

⁷¹ See *id.*

tural expert” criteria for organic production practices.⁷² It may be argued, however, that certain conservation practices, or other practices that would be beneficial to mitigate any potential climate change impacts, still fail to meet the current definition of good farming practices.⁷³

Non-traditional and conservation farming practices do not always fit into the mold created by the federal crop insurance regulations.⁷⁴ A prime example is the case of an insured crop producer who had been awarded a Natural Resources Conservation Service Conservation Innovation Grant for his work with cover crops on his farm, but was later denied crop insurance coverage by the RMA based on a “good farming practices” determination, in addition to an allegation that his use of cover crops violated the RMA “interplanting” regulations.⁷⁵ There can be no doubt that the media’s reporting of such actions by the RMA and its approved insurance providers against farmers who employ such production practices that vary from the community norm provides a significant disincentive for other farmers to experiment with production practices that may provide significant environmental benefit.⁷⁶

The inherent challenge to innovative production practices is that a strict construction of the current “good farming practices” regulatory mandate requires that a producer use farming practices “generally recognized by agricultural experts for the area.” Under this standard, a producer must find an expert in her area, which can prove to be a difficult proposition. The RMA has made a regulatory exception to the standard for organic production, thereby recognizing that the “good farming practices” requirement can provide a disincentive to nontraditional production practices.⁷⁷ Similar attention should be granted to innovative farming techniques, and the administrators of the federal crop insurance program should reform the applicable

⁷² See *id.* (depicting the role of “organic agricultural experts” in the general recognition of good farm practices).

⁷³ See *infra* notes 74–77 and accompanying text.

⁷⁴ See *infra* notes 75–76 and accompanying text.

⁷⁵ See *USDA Task Force Clearing Up Cover Crop Rules*, NO-TILL FARMER (June 4, 2013), <http://www.no-tillfarmer.com/articles/2156-usda-task-force-clearing-up-cover-crop-rules> [<https://perma.cc/A7JB-FDUK>]; see also COVER CROP SOLUTIONS, COVER CROPS FOR FRUIT & VEGETABLE GROWERS 2 (n.d.), http://www.covercropsolutions.com/documents/literature/CCS%20Fruit_Veg%20Handout.pdf [<https://perma.cc/ZHS2-8ZZA>] (“Interplanting involves growing cover crops and cash crops simultaneously in alternating rows.”).

⁷⁶ See *USDA Task Force Clearing Up Cover Crop Rules*, *supra* note 75.

⁷⁷ See 7 C.F.R. § 457.8 (2015); RISK MGMT. AGENCY, U.S. DEP’T OF AGRIC., GOOD FARMING PRACTICE DETERMINATION STANDARDS HANDBOOK: FCIC-APPROVED STANDARDS AND PROCEDURES FOR ADMINISTERING GOOD FARMING PRACTICE DECISIONS AND DETERMINATIONS FOR THE 2015 AND SUCCEEDING CROP YEARS 32 (2014) [hereinafter GOOD FARMING HANDBOOK].

“good farming practices” regulations to reflect that innovative production practices are not necessarily uninsurable.

B. The October 2014 GAO Report and “Good Farming Practices” Determinations

One of the key findings of the October 2014 GAO Report (the “GAO Report”) on the federal crop insurance program related to “good farming practices” determinations. Currently, many agricultural practices utilized by farmers help to maintain the historic yields of a crop over the short term, but long term may make the environment more vulnerable to the effects of climate change.⁷⁸ These practices are utilized due to the program’s structural loss cost ratemaking formula.⁷⁹ The GAO Report noted that not only may some of these practices contravene the spirit of Executive Order 13653, but that “[b]y not encouraging agricultural experts to recommend or incorporate resilient agricultural practices into their expert guidance for growers’ good farming practices, RMA is likely missing an opportunity to decrease existing and future fiscal exposures to climate change.”⁸⁰

As the cases discussed indicate, there is an increasing amount of litigation regarding crop insurance “good farming practices” determinations. These cases indicate that an amendment to the “good farming practices” standards may positively incentivize sustainable and resilient agricultural practices, which will mitigate the future effects of climate change.

⁷⁸ See GAO, *supra* note 14, at 24 (“RMA’s good farming practices provided acceptable farming methods for crop insurance policyholders to use in producing yields consistent with historical production. However, these practices are focused on maintaining historic crop yields over the term of the annual insurance contract . . .”).

⁷⁹ See O’CONNOR, *supra* note 56, at 7 (“Because loss cost ratemaking relies only on historical data, it depends on a constant relationship between yield and indemnities in order to remain actuarially fair; if either insured value or risk of loss (the two variables in the loss cost ratio) changes more quickly than the other, loss cost ratemaking will set inaccurate premiums. This means that if farm yields trend upward but the risk of loss remains unchanged, loss cost ratemaking would cause farmers to overpay for insurance. Conversely, if farming practices increase the risk of loss over time, loss cost ratemaking would set premiums too low. Indeed, studies have shown that loss cost ratemaking overcharges low-risk producers and undercharges high-risk producers. As a result, this underwriting technique attracts high-risk farmers and discourages low-risk farmers, and will continue to lead to increased levels of taxpayer-subsidized indemnities and program costs over time.”).

⁸⁰ See GAO, *supra* note 14, at 24–25.

C. Reported Cases Involving “Good Farming Practices” Determinations

1. The Early Cases—*Royalty v. FCIC* & *Hill v. FCIC*

Until several years ago, there had been a paucity of reported cases in federal courts concerning “good farming practices” determinations.⁸¹ Then, in the 1980s, two federal court cases delineated two situations in which farmers allegedly did not utilize “good farming practices.”⁸² In *Royalty v. Federal Crop Insurance Corp.*, two farmers worked jointly in the preparation of a tobacco crop for the 1983 crop year.⁸³ The farm on which the crop was to be planted had not been farmed in several years and was covered with various grasses and possibly alfalfa.⁸⁴ Due to heavy spring rains, ploughing of the field was not complete until less than a week before July 1, 1983, the due date for planting of the crop in order for federal multi-peril crop insurance to attach.⁸⁵ Allegedly, the tobacco crop was set “hurriedly” in the field several days before July 1.⁸⁶ Later, drought set in throughout the area, causing a substantial loss to the tobacco crop.⁸⁷

Not only did an adjuster for the Federal Crop Insurance Corporation (“FCIC”) note that an excessive amount of sod and rock was present in the field during an inspection, but a crop claims supervisor for the crop insurer also concluded that excessive rock was in the field and that it had been inadequately ploughed prior to planting the crop.⁸⁸ A third independent inspector also found that plants were lying on top of the ground with exposed roots, leading to his conclusion that the drought had not been sufficiently severe to be the cause of the tobacco crop loss; rather, he determined, the cause was inadequate ploughing.⁸⁹ Taking all of this evidence on the issue of good farming practices into consideration, the United States District Court for the Western District of Kentucky concluded that the farmers did not have sufficient time to plant the crop properly and thus “good farming practices” were not followed, relieving the insurer from liability.⁹⁰

⁸¹ See Ballard, *supra* note 21, at 546.

⁸² See *infra* notes 83–99 and accompanying text.

⁸³ See 618 F. Supp. 650, 650–51 (W.D. Ky. 1985).

⁸⁴ *Id.* at 651.

⁸⁵ *Id.*

⁸⁶ *Id.* (“On June 29 and 30, Jenkins, with the help of his daughter, son-in-law, set the tobacco in the hurriedly prepared field.”).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 651–52.

⁹⁰ *Id.* at 652 (“The overwhelming evidence in this case establishes that plaintiff . . . overextended himself in an attempt to raise between 80,000 and 90,000 pounds of tobacco and that the rainy spring simply did not allow him enough time properly to plant the tobacco That [plaintiff’s] other crops flourished as well as could be expected in the drought conditions is evidence

Similarly, in *Hill v. Federal Crop Insurance Corp.*, the United States District Court for the Eastern District of Arkansas found that “good farming practices” were not followed by rice growers.⁹¹ In *Hill*, Arkansas rice farmers planted 233 acres of Starbonnet variety rice in May 1983 for the 1983 crop year.⁹² Less than two weeks after the planting of the rice, on June 10, 1983, the growers contacted an employee of the insurance agency and notified her that the rice did not look healthy.⁹³ The employee advised them to replant the fields.⁹⁴ Apparently, it was feasible to replant the rice crop by June 20, 1983, but the growers failed to do so by that date.⁹⁵

The district court held that the cause of the loss of the rice crop was not due to cold temperatures, but rather partially because of the growers’ failure to replant the fields as well as a failure to flush the field with moisture.⁹⁶ It found that “good farming practices would have caused [the growers’] to flush the rice fields at issue to provide necessary moisture.”⁹⁷ Thus, no coverage was available for the crop loss.⁹⁸

After a lapse of over twenty years where the federal courts did not issue any reported opinions concerning “good farming practices” determinations or the federal crop insurance program, the past several years have seen three different cases where courts have taken varying approaches to these determinations.⁹⁹

2. The *Mountain Valley Farms* Case

While the courts in *Royalty* and *Hill* found that “good farming practices” were not utilized, in *Mountain Valley Farms and Lumber Products, LLC v. Federal Crop Insurance Corp.*, the court determined that “good farming

that he is a competent farmer but that his efforts simply strained his capabilities to the breaking point and that the reason his crop failed . . . was because he had insufficient time to prepare the land and to plant the crop properly.”)

⁹¹ 669 F. Supp. 928, 929–30 (E.D. Ark. 1987).

⁹² *Id.* at 929.

⁹³ *Id.* (depicting the communication wherein plaintiff phoned insurer to inform the agency that “the rice was not coming up to a good stand” and requested that a loss report be filed).

⁹⁴ *Id.*

⁹⁵ *See id.*

⁹⁶ *Id.* (“Plaintiffs’ loss was partially caused by their failure to flush the field. If the field would have been flushed with water, that would have added moisture for germination and dissolved the crust which may have formed on the surface of the field and prevented the germinated rice seed from breaking the surface of the ground.”).

⁹⁷ *Id.*

⁹⁸ *Id.* at 929–30.

⁹⁹ *See infra* notes 100–144 and accompanying text.

practices” were followed.¹⁰⁰ *Mountain Valley Farms* involved losses to growers’ 2009 apple crop after a late frost.¹⁰¹ Following the submittal of a loss claim, the approved insurance provider (“AIP”) sent out an adjuster to inspect the orchards.¹⁰² The AIP’s adjuster stated specifically in his first report in April 2009 that “at present inconsistent flowering and bud set appear on numerous trees and on numerous varieties, a result of cold weather damage.”¹⁰³ Successive reports conducted by the adjuster in June, July, and October 2009 also noted excessive rain, scabs, and rust as causes of further damage.¹⁰⁴

A representative of the county Farm Service Agency (“FSA”) also inspected the orchards in June 2009 and reported as to one orchard that there were “no concerns identified” but as to the other, noted “disease, damage, trees have generally unhealthy appearance; poor canopy density for this time of year.”¹⁰⁵ In addition, the AIP also hired a professor to inspect the orchards in August 2009, who issued a report that stated that the orchards had “Extensive Apple Scab Disease, lack of pruning and tree training, inadequate weed control, poor fertility, etc., all present week [sic] trees with poor fruit bud formation and poor fruit set.”¹⁰⁶

In November 2009, the AIP denied the plaintiffs’ claims on the orchards based upon the plaintiffs’ alleged failure to follow good farming practices.¹⁰⁷ After administrative review of the decision, the Raleigh Regional Office of the RMA found that the plaintiffs did not follow good farming practices, and upon reconsideration, the RMA upheld the Regional Office’s decision on three of the five grounds concerning good farming practices.¹⁰⁸

A United States Magistrate Judge of the United States District Court for the Middle District of Pennsylvania reviewed the good farming practices

¹⁰⁰ Compare *Mountain Valley Farms & Lumber Prods., L.L.C. v. Fed. Crop Ins. Corp.* (*Mountain Valley Farms I*), No. 10-2327, 2011 WL 7167013, at *6 (M.D. Penn. Oct. 31, 2011) (reversing RMA’s decision that the farmer failed to apply “good farm practices”), with *Hill*, 669 F. Supp. at 930 (concluding that growers failed to utilize “good farming practices”), and *Royalty v. Fed. Crop Ins. Corp.*, 618 F. Supp. 650, 652 (W.D. Ky. 1985) (also finding that two farmers failed to use “good farming practices”).

¹⁰¹ See *Mountain Valley Farms I*, 2011 WL 7167013, at *2 (detailing the crop damage due to an abnormal cold weather frost that occurred in the month of April).

¹⁰² See *id.* (inspections were conducted “frequently” during the claims process).

¹⁰³ *Id.*

¹⁰⁴ See *id.* at *3–4.

¹⁰⁵ *Id.* at *3 (demonstrating that while “[n]o [c]oncerns were identified,” the apple crop had a “generally unhealthy appearance; poor canopy density for [the month of June],” the leaves “ha[d] back spots, look burnt on edges,” and “very few if any apples [could] be found”).

¹⁰⁶ *Id.* at *4.

¹⁰⁷ *Id.* (noting that the AIP decision “largely ignor[ed] the reports of its adjuster”).

¹⁰⁸ *Id.*

determination.¹⁰⁹ In reviewing the various reports, the court found that the RMA's decision disregarded the "substantial majority" of the plaintiff's evidence and "gave insufficient weight" to the reports of the AIP's own adjuster.¹¹⁰ The judge specifically remarked that the AIP adjuster's reports noted that the peach crop of plaintiffs, which was adjacent to the apple crop, was in good condition and that the peaches were being pollinated sufficiently.¹¹¹ The court found that the RMA's conclusion that the plaintiffs' pollination practices were not good farming practices ran contrary to the evidence before the agency.¹¹²

In addition, the court also found that the RMA arbitrarily and capriciously made good farming practice determinations with regards to the plaintiffs' disease control and fertilization efforts.¹¹³ Thus, the court recommended reversal of the RMA's decision on good farming practices.¹¹⁴ After review of the Report and Recommendation of the Magistrate Judge, the district court adopted the Magistrate's Report and Recommendation in its entirety.¹¹⁵

The *Mountain Valley Farms* case illustrates that experts are critical in the review and analysis of good farming practices determinations.¹¹⁶ A key factor in the court's reversal of the RMA's decision appears to have been that the AIP essentially downplayed the reports of its own adjuster, who had more opportunities to visually inspect the orchard fields at issue, as opposed to the FSA representative and professor who were retained by the AIP.¹¹⁷

3. The *Hobbiebrunken* Case

While in the *Mountain Valley Farms* case a federal court overturned a negative good farming practices determination from the RMA, in *Hobbiebrunken v. Vilsack*, a federal court ruled the opposite way and affirmed a

¹⁰⁹ *Id.* at *5.

¹¹⁰ *Id.* at *6.

¹¹¹ *Id.*

¹¹² *Id.* ("RMA's conclusion that [plaintiff's] pollination practices were not GFP '[ran] counter to the evidence before the agency.'").

¹¹³ *Id.* at *12 ("RMA utterly 'failed to consider an important aspect of the problem' in more ways than one, making arbitrary or capricious its decision to uphold RRO and API's decisions that plaintiff's disease-control methods were not GFP.").

¹¹⁴ *Id.* at *14.

¹¹⁵ See *Mountain Valley Farms & Lumber Prods., L.L.C. v. Fed. Crop Ins. (Mountain Valley Farms II)*, No 10-2327, 2012 WL 400729, at *6 (M.D. Penn. Feb. 7, 2012).

¹¹⁶ See *Mountain Valley Farms I*, 2011 WL 7167013, at *12-14; see also *Mountain Valley Farms II*, 2012 WL 400729, at *6 (adopting the magistrate's decision "in its entirety").

¹¹⁷ See *Mountain Valley Farms I*, 2011 WL 7167013, at *12-14.

negative good farming practices determination of the RMA.¹¹⁸ In the *Hobbiebrunken* case, three farmers who planted corn in southwest Kansas during the 2009 crop year suffered a loss allegedly due to a moderate to severe hail storm in June 2009 as well as subsequent drought conditions.¹¹⁹ The private insurer in the case requested a good farming practices determination from the Topeka Regional Office of the RMA in February 2010.¹²⁰ At the regional office level, the plaintiffs received a negative good farming practices determination, and the “TRO found that plaintiffs failed to establish that they determined soil fertility or failed to carry out an adequate fertility plan, failed to implement adequate weed control, and failed to plant an appropriate seed selection.”¹²¹ The RMA affirmed the decision of the regional office.¹²²

The United States District Court for the District of Kansas upheld the RMA’s good farming practices determination and did not find evidence that the decision was arbitrary or capricious or contrary to substantial evidence.¹²³ The court also remarked that the evidence in the case revealed that the plaintiffs’ corn had substantial issues with bindweed and that the plaintiffs did not purchase an herbicide that would have better resolved the weed issue.¹²⁴ Significantly, this apparent lack of application of the herbicide occurred despite the advice of a crop consultant who advised the plaintiffs to start a weed control program.¹²⁵ Finally, not even the conclusion of the plaintiffs’ expert that the plaintiffs utilized the appropriate corn hybrid seed could overturn the RMA’s findings that the plaintiffs did not apply the appropriate seed selection.¹²⁶ Overall, the court gave much deference to the RMA findings that the plaintiffs failed to utilize good farming practices and that the findings were supported by the evidence presented.¹²⁷

¹¹⁸ Compare *Hobbiebrunken v. Vilsack*, Nos. 11-1385-MLB, 11-1386-MLB, 11-1387-MLB, 2013 WL 101611, at *6–7 (D. Kan. Jan. 8, 2013) (affirming an earlier negative GFP finding), with *Mountain Valley Farms II*, 2012 WL 400729, at *4–6 (affirming a magistrate decision to overturn an agency’s negative GFP finding).

¹¹⁹ *Hobbiebrunken*, 2013 WL 101611, at *2.

¹²⁰ *Id.*

¹²¹ *Id.* at *3.

¹²² *Id.*

¹²³ *Id.* at *6–7 (“The court finds there is substantial evidence to conclude that plaintiffs failed to employ good farming practices when they did not determine soil fertility or carry out a fertility plan.”).

¹²⁴ *Id.* at *7.

¹²⁵ *Id.*

¹²⁶ *Id.* at *5.

¹²⁷ See *id.* at *5–7.

4. The *Jagers* Case

The case of *Jagers v. Federal Crop Insurance Corp.* should put to rest any doubt that changes in production practices by insured producers may result in scrutiny regarding “good farming practices.”¹²⁸ The seven original plaintiffs in *Jagers* were denied crop insurance coverage for their non-irrigated corn crops after the RMA determined that all of the plaintiffs had failed to follow good farming practices.¹²⁹ There were two distinct good farming practices determinations in this case. First, the United States District Court for the District of Colorado vacated the earlier denial of insurance coverage for two of the plaintiffs that were found not to have used “good farming practices” due to the timing of a fertilizer application. Second, the court affirmed coverage denial to the remaining five plaintiffs due to their decision to plant corn on newly broken land, which was determined to not be a “good farming practice.”¹³⁰ A truly interesting fact in the *Jagers* litigation was that all of the plaintiffs attracted the initial scrutiny of the RMA not because of these aforementioned farming decisions, but instead, because the RMA was alerted to a significant increase in planted corn acres as well as general crop insurance program abuse in Baca County, Colorado.¹³¹

Changes in farming practices, including the conversion of pasture and rangeland into fields for corn production, resulted in a good farming practices investigation by the RMA.¹³² The plaintiffs in *Jagers* appealed the RMA’s good farming practices determinations and eventually found themselves before the district court, where the court wrote that the RMA’s “exchange of email communications in the record reveals the adoption of a strategy to use the failure to follow good farming practices exclusion from coverage to reduce the expected losses.”¹³³

The United States District Court reversed the RMA’s “good farming practices” decision pertaining to the two plaintiffs who failed to apply fertilizer at the planting of their crop because the plants did not emerge from the ground, reasoning that this practice was appropriate for the dry conditions of the 2008 farming season as “fertility was not the yield limiting factor.”¹³⁴

¹²⁸ See *Jagers v. Fed. Crop Ins. Corp. (Jagers II)*, 758 F.3d 1179, 1185–86 (10th Cir. 2014); *Jagers v. Fed. Crop Ins. Corp. (Jagers I)*, No. 10-00956-RPM, 2012 WL 2675262, at *5–6 (D. Colo. July 6, 2012).

¹²⁹ See *Jagers I*, 2012 WL 2675262, at *1.

¹³⁰ *Id.* at *10.

¹³¹ *Id.* at *3 (detailing that the RMA considered sending a “representative to Baca County to ground truth to the rumors” and investigate “ways to remedy the alleged abuse in the future”).

¹³² *Id.*

¹³³ *Id.* at *5.

¹³⁴ *Id.*

An important take-away from the district court in *Jagers* is the court's recognition that "the exclusion from coverage for the failure to follow good farming practices requires a showing that such failure had a causal connection with the loss of the crop."¹³⁵

The remaining five plaintiffs in *Jagers* did not fare so well.¹³⁶ The district court found that whether planting non-irrigated corn on newly broken pasture and rangeland was a different question.¹³⁷ The RMA relied on an expert opinion as well as published agricultural studies for its finding that the "newly broken" land should be fallowed for a season before planted.¹³⁸ Of course, the plaintiffs cast doubt about this evidence, arguing that the expert opinion was not procedurally adequate for a good farming practices opinion, and noted that certain opinions may not be directly applicable to their farms.¹³⁹ The district court noted that:

If the question were to be decided upon the basis of a preponderance of the evidence with the burden of proof on the RMA, the [p]laintiffs may prevail in their contention that these sources of information are insufficient. That is not the question. It is whether the RMA's reliance on the [expert] opinion and the publications was arbitrary or capricious. It was not. While this Court may disagree with the decision, it must give it the deference due an agency's determination¹⁴⁰

In summary, the district court drove home the point that challenging an adverse "good farming practices" determination can be a substantial hurdle for an insured producer.¹⁴¹ Undeterred, the "new breaking" plaintiffs appealed the district court's refusal to reverse the adverse "good farming practices" decisions to the United States Court of Appeals for the Tenth Circuit.¹⁴² The appeal was not fruitful for these plaintiffs, as the Tenth Circuit held that defendant, the RMA, had relied on "objective scientific evidence to conclude that planting non-irrigated corn on newly broken lands in eastern Colorado without a fallow period is not a good farming practice."¹⁴³ The plaintiffs'

¹³⁵ *Id.* at *5–6 (holding that the RMA's denials as to the two plaintiffs were "arbitrary and capricious decisions that must be reversed").

¹³⁶ See *infra* notes 137–139 and accompanying text.

¹³⁷ See *Jagers I*, 2012 WL 2675262, at *6.

¹³⁸ *Id.*

¹³⁹ See *id.* at *7–9.

¹⁴⁰ *Id.* at *9.

¹⁴¹ See *id.* (explaining that agency decisions are not overturned unless there is a clear showing that the agency acted in an arbitrary or capricious manner).

¹⁴² See *Jagers II*, 758 F.3d 1179, 1179 (10th Cir. 2014).

¹⁴³ *Id.* at 1185.

non-traditional farming practices, which were not recognized by any expert testimony, resulted in claim denials.¹⁴⁴

D. Proposal: Incorporating Climate Change Mitigation into “Good Farming Practices” Determinations

As the foregoing cases indicate, the courts in recent years have varied on good farming practices determinations.¹⁴⁵ The fact that the federal courts, in cases like *Hobbiebrunken* and *Jagers*, will uphold RMA decisions that farmers did not utilize good farming practices makes “good farming practices” determinations a key area which may see increased litigation in the future.¹⁴⁶ If there is a takeaway from all of these recent cases, it is that there is a strong incentive now for farmers to stringently follow good farming practices; otherwise, they risk claim denial.¹⁴⁷

Paradoxically, the current system in place concerning good farming practices determinations in the federal crop insurance program actually serves as a disincentive for farmers to utilize innovative, sustainable, and resilient agricultural practices.¹⁴⁸

Along with the “good farming practices” definition, a standard is outlined in the RMA’s Good Farming Practices (“GFP”) Determination Standards Handbook (the “Handbook”), issued in October 2014, which prescribes the proper basis for a good farming practices decision.¹⁴⁹ Factors tests are utilized in many areas of the law, including distinguishing between an independent contractor and an employee,¹⁵⁰ whether the “fair use” doctrine applies in a copyright claim,¹⁵¹ and whether a duty of care exists in a negli-

¹⁴⁴ *Id.* at 1185–86.

¹⁴⁵ See *supra* notes 100–144 and accompanying text.

¹⁴⁶ See *Jagers II*, 758 F.3d at 1185–86; *Hobbiebrunken v. Vilsack*, Nos. 11-1385-MLB, 11-1386-MLB, 11-1387-MLB, 2013 WL 101611, at *7 (D. Kan. Jan. 8, 2013).

¹⁴⁷ See, e.g., *Jagers I*, No. 10-00956-RPM, 2012 WL 2675262, at *9 (D. Colo. July 6, 2012) (explaining that agency decisions are not overturned unless there is a clear showing that the agency acted in an arbitrary or capricious manner).

¹⁴⁸ See 7 C.F.R. § 457.8 (2015); *supra* notes 81–144 and accompanying text.

¹⁴⁹ See generally GOOD FARMING HANDBOOK, *supra* note 77, at 10–11 (detailing the procedure applied in the “good farming practices” decision-making).

¹⁵⁰ See generally Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67 (2013) (discussing various tests utilized by courts and federal agencies to classify worker status as either an independent contractor or employee).

¹⁵¹ See Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1099–1100 (2007) (“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—1) the purpose and

gence case.¹⁵² Similarly, a factors test applies in good farming practices determinations.¹⁵³ Along with expert opinions and a review of the production method, the agronomic situation of a farmer-insured is analyzed.¹⁵⁴ The factors to be assessed concerning an agronomic situation are the following: (1) “material facts about the production methods that were used or will be used to produce the crop,” (2) “weather and climate factors,” (3) “pest or disease risks,” and (4) “other factors affecting the crop.”¹⁵⁵ Nowhere in the “Bases for GFP Decisions” in the Handbook are sustainable, resilient, and soil-building agricultural practices listed.¹⁵⁶

As discussed above, the Government Accountability Office (“GAO”) has previously reported that the current iteration of a good farming practices standard does not incentivize agricultural practices that mitigate climate change risk.¹⁵⁷ Following up on the October 2014 GAO report, this Article proposes the inclusion of “sustainable, resilient and soil-building agricultural practices” language into not only the Code of Federal Regulations’ “good farming practices” definition, but also the Handbook.¹⁵⁸

character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.”).

¹⁵² See Dilan A. Esper & Gregory C. Keating, *Abusing “Duty,”* 79 S. CAL. L. REV. 265, 313–14 (2006) (discussing *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), a leading California case on the duty of reasonable care owed by owners of land). The authors stated:

In *Rowland*, the California Supreme Court acknowledged this and abolished the distinction between the various categories, imposing a unitary standard of reasonable care on all landowners. A duty of reasonable care, the *Rowland* court stated, would be presumed in all circumstances. Only in special situations where policy considerations counseled strongly against duty would that presumption be overcome and an ordinary duty of reasonable care not be imposed. The *Rowland* court listed several factors that should be taken into account in deciding whether the presumption in favor of a duty of reasonable care should be overcome: the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id.

¹⁵³ See GOOD FARMING HANDBOOK, *supra* note 77, at 8.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See *id.* at 8–10 (demonstrating a basis for good farming practices but lacking consideration for sustainable, resilient, and soil-building agricultural practices).

¹⁵⁷ See GAO, *supra* note 14, at 24.

¹⁵⁸ See *id.* (supporting the notion that the current version of the good farming practices needs to incorporate an incentive scheme to encourage sustainable, resilient, and soil-building agricul-

Thus, to better mitigate the effects of climate change, an amended good farming practices definition would read as follows:

The production methods utilized to produce the insured crop and allow it to make normal progress toward maturity and produce at least the yield used to determine the production guarantee or amount of insurance, including any adjustments for late planted acreage, which are: (1) for conventional, sustainable, resilient, or soil-building farming practices, those generally recognized by agricultural experts for the area; or (2) for organic farming practices, those generally recognized by organic agricultural experts for the area or contained in the organic plan.

In addition, this Article also proposes the following amendment to the “agronomic situation” basis in the Handbook:

GFP Determinations will be based on the following:

- (1) Agronomic situation of the Policyholder, including:
 - (a) material facts about the production methods that were used or will be used to produce the crop;
 - (b) whether sustainable, resilient, or soil-building farming practices were utilized;
 - (c) weather and climate factors;
 - (d) pest or disease risks; and
 - (e) other factors affecting the crop.

NOTE: If the Policyholder utilizes sustainable, resilient, or soil-building farming practices, then such utilization shall be judged to be a substantial factor toward a finding that good farming practices were utilized.

Such an amendment simultaneously provides for an inclusion of sustainable, resilient, or soil-building farming practices in the good farming practices standard, and highly incentivizes such practices, because an AIP, Regional Office, or the RMA must judge such utilization as a “substantial factor” in weighing all of the relevant factors. Among the factors in the test, the utilization of sustainable, resilient, or soil-building farming practices would be weighed the most heavily. These revisions would be a further positive

tural practices); *see also* GOOD FARMING HANDBOOK, *supra* note 77, at 10–11 (demonstrating a basis for good farming practices but lacking consideration for sustainable, resilient, and soil-building agricultural practices).

step toward the federal crop insurance program promoting climate change mitigation.

One of the possible criticisms of the amendment is that it would place too high an emphasis on sustainable, resilient, or soil-building farming practices and may lead to a “reverse effect” where the non-utilization of such practices may result in an adverse good farming practices determination. These concerns, however, are already taken into account because such practices are considered, amongst other factors, and are not the sole factor in a “good farming practices” determination.

CONCLUSION

The ongoing risk of climate change is one of the many challenges facing America’s farmers today. Paradoxically, while a number of governmental initiatives seek to mitigate the risks of climate change, some of the very standards in the federal crop insurance program create a disincentive for adopting and implementing agricultural production strategies that minimize climate change risk. An amendment to the “good farming practices” standard concerning federal crop insurance claims can be a significant step toward creating a very vibrant incentive for farmers to incorporate sustainable agricultural practices into their land stewardship.

As United States Secretary of Agriculture Tom Vilsack notes: “Risk management and adaptation start on the farm. Farmers and ranchers are on the front lines of identifying threats and adapting to meet them.” The current federal crop insurance program is in a unique position to promote practices that encourage increased stewardship. Doing so will not only protect and preserve the interests of American farmers in the future, but also exemplify how insurance can reduce climate change risk.