AMERICAN GROWERS INSURANCE COMPANY, (1996 Prevented Planting)	)	**AGBCA No. 98-200-F**
Appellant	)	
Representing the Appellant:	)	
Frank W. Pechacek, Jr. Bruce B. Green Willson & Pechacek P.O. Box 2029 Council Bluffs, Iowa 51502	)	
Representing the Government:	)	
Kimberley E. Arrigo Office of the General Counsel U. S. Department of Agriculture Room 2449 - South Building 1400 Independence Avenue, S.W. Washington, D.C. 20250-1400	)	

DECISION OF THE BOARD OF CONTRACT APPEALS

June 15, 2000

Before HOURY, POLLACK, and VERGILIO, Administrative Judges.

Opinion by Administrative Judge VERGILIO; separate opinion (concur) by Administrative Judge HOURY; separate opinion (dissent) by Administrative Judge POLLACK.

Opinion by Administrative Judge VERGILIO.

On September 25, 1998, the Board received this appeal from American Growers Insurance Company (Appellant or insurance company), of Council Bluffs, Iowa, concerning prevented planting issues for the 1996 reinsurance year (July 1, 1995, through June 30, 1996). The respondent is the U. S. Department of Agriculture, Federal Crop Insurance Corporation (FCIC). The insurance company maintains that various FCIC actions constituted compensable breaches of the Standard Reinsurance Agreement (SRA) of the parties. The SRA represents a cooperative financial assistance agreement to deliver multiple peril crop insurance.

Regulation authorizes the Board to resolve this timely-filed matter. 7 C.F.R. §§ 24.4(b), 400.169. The parties have engaged in some discovery. The existing record contains the appeal file, including supplements. The Government has filed a motion for summary judgment on the issue of liability, to which the insurance company has filed a response in opposition.

The insurance company here seeks to recover from the FCIC what the insurance company characterizes as its alleged expenses and losses arising during the 1996 reinsurance year for prevented planting coverage. Initially, it quantified the amount sought as $13,579,120 on 3,452 claims and premiums of $3,741,800, as well as all related costs and expenses. Despite allegations of FCIC's contract breach and impropriety, the insurance company has failed to demonstrate a viable basis for recovery.

Because prevented planting provisions were different for the 1995 and 1996 crop years, the method and manner of compensation for the 1995 reinsurance year were not relevant to the 1996 reinsurance year.

If the prevented planting changes were issued so as to be outside of the coverage of the SRA, as the insurance company now asserts, then, under the SRA, the insurance company was not obligated to provide insurance and the FCIC was not obligated to reimburse the insurance company. The allegations do not demonstrate that the FCIC breached the SRA.

In any event, the insurance company utilized the prevented planting changes (in terms of providing policies and accepting premiums), without any timely objection. Both parties acted as if the SRA dictated the obligations of each party. Even if a breach occurred, no basis for compensation has been supported to permit pursuit of this matter.

Accordingly, I grant the motion for summary relief filed by FCIC and deny this appeal.

FINDINGS OF FACT

Background – the 1995 reinsurance year (fall of 1994 through spring of 1995)

1. For the reinsurance year beginning July 1, 1994 (and running through June 30, 1995), the FCIC entered into an SRA with Redland Insurance Company (not American Growers) (Exhibit 1 at 553-603 (all exhibits are in the appeal file)). The SRA,

> including the Appendixes, all referenced documents and Federal Crop Insurance Corporation ("FCIC") Manual 13 and Manual 14 in effect at the start of the reinsurance year ("Agreement"), establishes the terms and conditions under which the FCIC will provide premium subsidy, expense reimbursement, and reinsurance on multiple peril crop insurance policies sold or reinsured by the [insurance company].

(Exhibit 1 at 553) (emphasis added). The SRA represents a cooperative financial assistance agreement to deliver multiple peril crop insurance under the authority of the Federal Crop Insurance

Act, as amended, 7 U.S.C. §§ 1501 *et seq.* (Act). The SRA incorporates by reference regulations promulgated under the authority of that Act. (Exhibit 1 at 553.) Thus, the FCIC is obligated to reinsure policies written on terms, including premium rates, approved by the FCIC, on crops and in areas approved by the FCIC. 7 C.F.R. §§ 400.166(a), 457 (1994, 1995). A disputes clause specifies: "If the [insurance company] disputes action taken by FCIC under any provision of this Agreement, the [insurance company] may appeal to FCIC in accordance with the provisions of 7 C.F.R. § 400.169" (Exhibit 1 at 573 (¶ V.R)).

2. The SRA specifies that the insurance company "is required to make crop insurance available to all eligible producers for the crops and in the areas which are stated in its Plan of Operation as approved by FCIC. Only eligible crop insurance contracts written under the authority of the Act will be reinsured under this [SRA]." (Exhibit 1 at 556 (¶ II.A.1).)

3. The SRA provides for expense reimbursement. That is, the FCIC is to pay the insurance company 31% of the net book premium of all eligible multiple peril crop insurance contracts included under the SRA (but 27% for all eligible group risk plan crop insurance contracts), subject to specific provisions for reduction and increase. (Exhibit 1 at 563-64 (§ IV).)

4. The SRA specifies that it "is not effective until FCIC has approved [the insurance company's] Plan of Operation (Plan). . . . If the Plan is not approved by July 1st of the reinsurance year, eligible crop insurance contracts written or renewed with sales closing dates between July 1st and the date of the Plan is approved will not be reinsured unless specifically accepted by FCIC." (Exhibit 1 at 567 (¶ V.F.1.a).)

5. In accordance with its plan of operation, an insurance company may designate eligible crop insurance contracts to one of three funds (Exhibit 1 at 557 (¶ II.A.6)). The fund designation affects the liability between the insurance company and FCIC for ultimate net losses, underwriting gains, and associated net book premiums (Exhibit 1 at 557-62 (¶¶ II.B, C, D)). An insurance company may seek to alter its fund designations during a reinsurance year. The SRA expressly provides that an insurance company "may submit a request to amend an approved Plan at any time to reflect changing business considerations and sales expectations." (Exhibit 1 at 567 (¶ V.F.1.c).)

6. With a date of July 1, 1994, Redland submitted its plan of operation for the 1995 reinsurance year. The FCIC approved and accepted the plan on January 24, 1995. (Exhibit 1 at 575.)

7. The SRA "will continue in effect from year to year with an annual renewal date of July 1st of each succeeding year unless FCIC or the Company gives at least one hundred eighty (180) days advance notice in writing to the other party that the Agreement will not be renewed" (Exhibit 1 at 571 (¶ V.J)).

8. From May 1995 through January 1996, the FCIC amended its crop insurance regulations and policies relating to producers who were prevented from planting particular crops; those changes were applicable to the 1995 crop year only (Exhibits I-S, U, AA, BB, II, KK). The Government instituted the changes to assist producers where excessive rainfall prevented normal planting. With these

changes occurring at the end of, or after the reinsurance year, an informational memorandum issued by the Government in July 1995, specifies that the "changes ultimately may affect the risk sharing arrangements and administrative expenses provided by the 1995 Standard Reinsurance Agreement." Moreover, FCIC "does not expect private sector approved insurance providers to share in the amount of prevented planting losses which was not established as part of the crop insurance policy prior to the contract change date and actuarial [calculations] prior to the effective date of the reinsurance year. In addition, these changes may effect loss adjustment expense as well." (Exhibit R at 82.) The FCIC recognizes that it

> changed the prevented planting provisions by manager's bulletin[s] in 1995, long after the contract change date, without adjusting the premium rates to reflect the additional risks associated with the new coverages offered. . . .
>
> Since FCIC unilaterally made these changes after the contract change date, without providing the public with an opportunity for notice and comment, and failed to adjust the premiums, FCIC determined that it acted outside the scope of its legal authority. As a result, FCIC entered into an agreement with the insurance companies to hold them harmless for any losses resulting from the unauthorized changes to the prevented planting provisions.

(Exhibit SS at 475.) The "contract change date" is the calendar date by which changes in an insurance policy are to be made available for inspection in the office of a crop insurance agent (e.g., 7 C.F.R. § 457.8 (Common Crop Insurance Policy (¶¶ 1(n), 4)).

9. In January 1996, the FCIC approved and accepted an amendment to the SRA, "for the 1995 reinsurance year only," submitted by Redland. The amendment alters liabilities for ultimate net losses due to prevented planting, net book premiums attributable to prevented planting, and expense reimbursement. (Exhibit KK.)

1996 reinsurance year

10. For the 1996 reinsurance year, neither Redland nor FCIC provided notice that the SRA would not be renewed (Finding of Fact (FF) 7). Under cover letter dated June 27, 1995, Redland submitted a plan of operation for the 1996 reinsurance year. Thereafter, under cover letter dated July 14, 1995, American Growers (the insurance company) submitted an SRA, a plan of operation for the 1996 reinsurance year, and a letter which specifies that it agrees to assume all liability for the multiple peril crop insurance business written under past and present SRAs with Redland. (Exhibit LL at 359-449; Affidavit of President, American Growers, Exhibits A, B.) By letter dated November 1, 1995, to the insurance company, the FCIC stated that it does not approve the initially submitted SRA and plan. (Exhibit DD.) After November 1, the insurance company submitted an amended SRA and revisions to its plan of operation (Exhibit LL at 297, 348). On February 28, 1996, the FCIC approved and accepted an amendment to the SRA for the 1996 reinsurance year, which had been signed by the insurance company on December 27, 1995. The FCIC approved and accepted, with the changes, the SRA and plan of operation on April 9, 1996. (Exhibit LL at 297, 321, 337, 348.)

On May 3, 1996, the FCIC approved and accepted revisions to the 1996 plan of operation developmental fund retentions proposed by the insurance company over a signature dated March 15, 1996 (Exhibit MM). The SRA contains the terms set forth above, as described in Redland's SRA (FF 1-5) (Exhibit LL at 299, 302-10, 313).

11. The prevented planting program for reinsurance year 1995 was not applicable to reinsurance year 1996. For fall planted crops for 1995 (coming within reinsurance year 1996), the coverage reverted to what was in effect prior to the changes for the 1995 reinsurance year. (Exhibit W at 103).

12. The FCIC had published in the Federal Register on November 8, 1995, a proposed regulation to expand prevented planting benefits available under various policies being amended, beginning with the 1996 crop year for spring crops with contract change dates after the effective date of the rule (Exhibit FF). The FCIC had published in the Federal Register on December 7, 1995, a final rule amending regulations, expanding prevented planting benefits (Exhibit HH). The rule states that it is applicable beginning with the 1996 crop year for spring crops with contract change dates on or after November 30, 1995 (Exhibit HH at 256, 265). The rule specifies that it anticipates added costs to the Government due to higher reimbursements to reinsured companies and for premium subsidies for producers, although premiums will increase nationwide for the coverage (Exhibit HH at 257). The published version states, "Done in Washington, DC., on November 27, 1995." It was issued over the name of the manager of the FCIC, filed with the Federal Register November 30, 1995 at 4:56 pm. (Exhibit HH at 276.)[1] Both the proposed rule and final rule specify that a cost-benefit analysis is available (Exhibits X, FF, HH). The analysis reveals assumptions and conclusions regarding the proposed changes, including impacts on reinsured companies (Exhibit X).

13. In responses to comments received regarding the proposed rule, the final rule states that the "FCIC has promulgated premium rates that reflect the 1996 prevented planting provisions; thus, FCIC is not compelled to provide[] additional options to select among reinsurance funds or assume all the risk associated with the program change. . . . FCIC believes that administrative expense reimbursement and excess loss adjustment expense provided under the Standard Reinsurance Agreement effective for the 1996 reinsurance year are adequate to cover such expenses for the 1996 crop year." (Exhibit HH at 258-59.)

14. The existing record contains few or no details or assertions by the insurance company regarding what insurance policies it issued or when. The insurance company has not asserted that it issued policies between November 30 and December 7, 1995, nor has it alleged that it attempted to issue policies after December 7, with premiums or coverage different from that described in the

---

[1] The material in the Federal Register specifies: "So that these policy changes can take effect beginning with 1996 spring-planted crops, good cause is shown to make this rule effective immediately upon filing with the Federal Register and without the 30-day period required by the Administrative Procedure's Act to avoid the pressures on FCIC to make changes after the contract change date . . . . The contract change date for 1996 spring-planted crops is November 30, 1995, and this rule must be effective for those crops. Therefore, good cause is shown to make this rule effective in less than 30 days after publication." (Exhibit HH at 265.)

final rule appearing in the Federal Register on December 7, 1995. Further, the record contains no reference to any individual policy. The record does not suggest or demonstrate that the insurance company disputed any FCIC action or non-action (e.g., regarding premium reimbursement, indemnity coverage, or other determination) on any policy covered by the SRA for the 1996 crop year. The insurance company has not asserted that, at the time it issued insurance or serviced specific policies or obtained reimbursements from FCIC, it suggested to FCIC that the prevented planting changes for the 1996 crop year were outside the scope of the SRA. The first indication of a dispute in the record is a letter of June 10, 1998 (FF 17).

15. Without further elaboration or supporting documentation, the president of the insurance company asserts in an affidavit: "On several occasions, I and others at my direction, requested that the FCIC allow American Growers Insurance Company to amend its 1996 plan of operation due to FCIC's 1996 prevented planting changes. The FCIC refused these requests." "Had the FCIC allowed American Growers Insurance Company to amend the 1996 SRA in the same manner as it allowed it to amend the 1995 SRA, American Growers Insurance Company would have earned an additional $1,509,458.00." (Affidavit of President, American Growers at 3-4 (¶¶ 13, 16).) The affidavit does not address the fact that the initially approved SRA and plan of operation reflect changes made by the insurance company in December 1995 (Exhibit LL at 297, 348), which post-dates the prevented planting changes for spring crops (FF 10). Moreover, in March 1996, the insurance company proposed changes to its plan of operation, which the FCIC accepted and approved (FF 10).

16. Without further elaboration, the vice president of the insurance company, who is also the chairman of the MPCI Actuarial and Statistical Committee of the National Crop Insurance Service, avers: "The data used by the FCIC to determine the 1996 prevented planting rates, and the methodology used by the FCIC, as set forth in the various Exhibits attached to American Growers Insurance Company's Resistance to Summary Judgment, were not actuarially sound and reflect improper rating methods." (Affidavit of Vice President, American Growers at 2 (¶ 7).)

The dispute

17. By letter dated June 10, 1998, the insurance company demanded reimbursement

> regarding prevented planting indemnity payments for fiscal year 1996 (July 1, 1995, through June 30, 1996, inclusive) totaling $13,579,129.00 on 3,452 claims and premiums of $3,741,800.00, together with all related administrative, processing, adjusting, investigating, training, servicing, and operational costs and expenses incurred in connection with 1996 prevented planting coverages.

(Exhibit RR at 472.) The insurance company maintains that FCIC materially breached the 1996 SRA in one or more of the following particulars:

> a. In failing to reimburse [the insurance company] for its 1996 prevented planting insurance losses in the same manner and method as it paid 1995 prevented planting insurance losses.

b. In failing to deal fairly and in good faith with [the insurance company] in performing the 1996 SRA; and

c. In unilaterally modifying the terms of the 1996 SRA by virtue of the various changes to prevented planting implemented by FCIC after the 1996 SRA negotiations had taken place and the inception of the SRA itself.

(Exhibit RR at 472).)

18. By letter dated August 12, 1998, the FCIC's Reinsurance Services Division responded to the letter of June 10. The Government concluded that FCIC did not violate any provision of the SRA and that the insurance company was not entitled to the relief sought. The concluding sentence of the letter specifies, "If you disagree with this determination, you can appeal to the Board of Contract Appeals in accordance with 7 C.F.R. 400.169(c)." (Exhibit SS.) Because the final reference is misleading, the insurance company obtained confirmation that the Government intended the letter to constitute an appealable determination (Exhibits TT, UU).

19. On September 24, 1998, the insurance company submitted to the Board its notice of appeal (Exhibit TT at 498-510).

20. In its complaint, the insurance company expands upon its allegations that the FCIC materially breached the 1996 SRA in one or more of the following particulars:

a. In failing to reimburse [the insurance company] for its 1996 Prevented Planting Insurance Losses in the same manner and method as its course of dealings with [the insurance company] in paying the 1995 Prevented Planting Insurance Losses;

b. In acting outside its legal authority, thereby causing damage to [the insurance company];

c. In failing to adjust premium rates to reflect the 1996 Prevented Planting Insurance Changes for fall-seeded crops;

d. In failing to set actuarially sound premium rates to reflect the 1996 Prevented Planting Insurance Changes for spring-seeded crops as required under the Federal Crop Insurance Act, 7 U.S.C. § [1]508(d)(1);

e. By instituting the 1996 Prevented Planting Insurance Changes without providing [the insurance company] with adequate compensation for assuming the increased risks associated with said changes;

f. In failing to deal fairly and in good faith with [the insurance company] in performing the 1995 SRA; and

g. In unilaterally modifying the terms of the 1996 SRA after [the insurance company] had signed and submitted its 1996 Plan of Operation for reinsurance fiscal year 1996.

(Complaint at 11-12 (¶ 37).) Through the complaint, the insurance company requests that the Board determine, first, the terms of the 1995 SRA regarding reimbursement for its 1996 prevented planting insurance losses, and, second, that FCIC is required to reimburse the insurance company for its 1996 prevented planting losses in an amount to be proven at a hearing (Complaint at 13).

DISCUSSION

The insurance company maintains that various FCIC actions constituted material breaches to its SRA, thereby entitling it to relief. The FCIC filed a motion for summary judgment on the issue of liability. The insurance company filed a response, opposing the motion.

A forum may grant a motion for summary judgment when no genuine issue of material fact remains (viewing evidence in the light most favorable to the non-moving party) and the movant is entitled to judgment as a matter of law. Summary judgment may be granted if the non-moving party fails to present evidence sufficient to establish an essential element of its case. Fed. R. Civ. P. 56(e) (an affidavit must set forth specific facts showing that there is a genuine issue for trial); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 255 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Moreover, "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

Below, I address each allegation raised by the insurance company. In summary, the insurance company has failed to describe a compensable action because the allegations are premised on facts contrary to those established in the record or are premised on erroneous interpretations of the SRA or other applicable law. The Government's actions did not violate provisions of the SRA and/or, without timely objecting, the insurance company provided insurance and dealt with the FCIC (obtaining compensation and making payments) as if the SRA and changes were fully applicable, without disputing the FCIC's actions. If the insurance company is correct in its underlying premise, that Government promulgated prevented planting policies so as to be outside of the SRA, then the insurance company should not have sold and administered insurance pursuant to those policies and may not rely upon the SRA for compensation regarding that insurance. The insurance company now seeks to shift to the FCIC risks of insurance which the insurance company assumed throughout the 1996 reinsurance year.

1995 v. 1996 reinsurance year

The insurance company contends that the FCIC breached the SRA by failing to reimburse for the 1996 prevented planting insurance losses in the same manner and method as occurred for the 1995

prevented planting insurance losses. This allegation fails because the regulations and FCIC actions affecting the 1995 reinsurance year did not apply to the 1996 reinsurance year (FF 8, 11, 12). Given the different facts for the two reinsurance years, FCIC was not compelled to treat the two years alike. Accordingly, the insurance company has not established a basis for breach.

Legal authority

The insurance company broadly asserts that the FCIC acted outside its legal authority, thereby causing damage to the insurance company. Although the complaint lacks specificity, this allegation encompasses but one theory not raised elsewhere; namely, that the FCIC lacked the authority to impose changes either after the start of the insurance year or after the contract change dates of various policies. The final rule for spring-1996 crops did not appear in the Federal Register until December 7, 1995; this was after November 30, 1995, which was the contract change date for the policies here at issue. (FF 12).

For purposes of resolving the pending motion, the Board assumes, without deciding, that the prevented planting changes occurred too late to be covered by the SRA (that is, beyond the contract change dates of the policies or after the start of the insurance year). The conclusions of the insurance company rely upon facts which demonstrate that recovery is inappropriate.

The insurance company sold and serviced policies, presumably in accordance with the changed provisions. It did so without notifying the FCIC that such policies were outside of the terms and conditions of the SRA, and, apparently, without objecting to any payments received from the FCIC, and without reserving any right to seek additional compensation. The insurance company does not contend that it notified the FCIC of an alleged contract breach or constructive change to the SRA prior to June 10, 1998. (FF 14.) Thus, for approximately 30 months (from December 1995 to June 1998) the insurance company and FCIC proceeded as if the changes were applicable. The insurance company provided no indication that it believed the FCIC's action were not in accordance with the provisions of the SRA. The alleged violation (a contract change after the contract change date or after the start of the insurance year) was clear with the issuance of the final rule; the insurance company has provided no basis to have raised its allegations for the first time in 1998.

These alleged facts do not demonstrate that the FCIC breached the contract as alleged. If the changes expressed in the final rule occurred untimely, so as to be outside of the SRA, then, by the very terms of the SRA, the insurance company was not obligated to extend insurance and the FCIC was not obligated to provide premium subsidy, expense reimbursement, and reinsurance (FF 1, 2, 10). Thus, the SRA would not control payments or reinsurance under the prevented planting provisions, here assumed to be untimely issued. By the obligations and limitations expressed in the SRA, such FCIC actions would not constitute a breach of the SRA, but actions outside of the SRA. Hence, there is no legal basis for the insurance company to recover under the SRA.

Alternatively, the acquiescence by the insurance company demonstrates that recovery for the alleged breach is not appropriate, because it applied the prevented planting changes without objection and serviced the underlying policies without objecting to FCIC actions; the insurance company proceeded as if the changes came within the scope of the SRA. The insurance company raised

objections to the prevented planting changes, and FCIC's actions thereunder, in an untimely manner. 7 C.F.R. ¶ 400.169(a) (if an insurance company believes that the FCIC has taken an action that is not in accordance with the provisions of the SRA, it is to request a final administrative determination addressing the disputed issue within 45 days after receipt of the determination, here, the publication of the final rule on December 7 or the reimbursement of premiums, losses, or other FCIC actions on individual policies).[2]

1996 reinsurance year: fall crop premiums

The insurance company urges the Board to find a breach by the FCIC because the FCIC failed to adjust premium rates to reflect the 1996 prevented planting insurance changes for fall-seeded crops. The insurance company has not alleged facts which support its theory of breach.

The prevented planting insurance provisions for the 1995 reinsurance year were not applicable to the 1996 fall planted crops (FF 8, 11). This was known at the time the insurance company initially submitted its SRA and plan of operation for the 1996 reinsurance year. The premiums were established before the FCIC accepted the SRA and plan of operation. The insurance company has not supported a basis for a compensable breach.

1996 reinsurance year: spring crop premiums

The insurance company contends that a compensable breach occurred because the FCIC failed to set actuarially sound premium rates to reflect the 1996 prevented planting insurance changes for spring-seeded crops as required under the Federal Crop Insurance Act, 7 U.S.C. § 1508(d)(1).

The insurance company has not attempted to demonstrate that the referenced statute permits it to directly challenge the premium rates. The actuarial soundness of premium rates affects the short-term and long-term solvency of the crop insurance program–a direct interest of the Government. Although an insurance company is directly affected by such rates, the parties have not addressed whether the Government has waived its sovereign immunity to permit a challenge to the rates, which are incorporated into the SRA. Moreover, the conclusory statement of the insurance company's vice

---

[2] The conclusion reached by the majority in American Growers Insurance Co., AGBCA No. 99-134-F (Oct. 29, 1999), mot. for reconsideration denied (May 23, 2000), that the phrase "may within 45 days after receipt of such determination" does not limit the period for an insurance company to dispute a compliance review finding under 7 C.F.R. § 400.169(b) (1998), is contrary to principles of interpretation, in that it renders meaningless the enunciated period prescribed for submitting a request. The interpretation permits an insurance company to request a final administrative determination within 10, 20, 45, 80, 100, or any number of days. The use of "may" is proper, as it does not compel a company to seek a determination every time it disputes a Government action. Thus, a company's failure to pursue a disputed matter does not automatically connote its agreement or acquiescence in the Government's position. The passage of time, however, may bring finality to a given dispute if the insurance company does not timely pursue remedies. In interpreting 7 C.F.R. § 400.169(a) here, I do not expand the earlier decision.

president regarding the alleged unsoundness of the rates and methodology (FF 16), is not sufficient to avoid summary judgment. Mingus.

The allegation fails because a basis of the allegation is that statute requires actuarially sound premium rates. The statute does not so require. Statute directs the FCIC to "fix adequate premiums for all the plans of insurance of the [FCIC] at such rates as the Board [of Directors] determines are actuarially sufficient to attain an expected loss ratio of not greater than 1.1 through September 30, 1998, and not greater than 1.075 after October 1, 1998." 7 U.S.C. § 1508(d)(1). The section does not use the phrase "actuarially sound," but the phrase "actuarially sufficient" to attain a given expected loss ratio. The FCIC was obligated to "take such actions as are necessary to improve the actuarial soundness of Federal multiperil crop insurance." 7 U.S.C. § 1506(o) (emphasis added). The insurance company has not demonstrated that this obligated the FCIC to establish actuarially sound rates. The requirement in statute to improve actuarial soundness recognizes that actuarial soundness may not yet have been attained. Thus, a lack of actuarially sound premium rates does not violate the referenced statute.

The allegation fails for an independent reason. The statute does not require FCIC to establish actuarially sound or sufficient premium rates for a particular crop, county, or incidence (such as prevented planting). An insurance company is not guarantied actuarially sound or sufficient rates for the particular policies it administers; prevented planting policies may result in a loss. The insurance company reads requirements into the statute, as it attempts to shift risks of insurance to the FCIC.

In any event, the insurance company assented to provide insurance, at specific levels of expense reimbursement, on the basis of established premiums (FF 1, 3, 10). The FCIC accepted and approved the SRA and plan of operation for the 1996 reinsurance year after the final rules were implemented and adopted by the insurance company, and after the Government released its cost impact analysis and assumptions regarding the prevented planting changes (FF 10, 12, 13). The insurance company has not asserted that the FCIC compensated it at other than the established, agreed upon rates. Therefore, no compensable breach occurred.

1996 reinsurance year: compensation

The insurance company alleges that the FCIC breached the SRA by instituting the 1996 prevented planting insurance changes without providing the insurance company with adequate compensation for assuming the increased risks associated with the changes. As noted above, the insurance company assented to provide the insurance on the basis of established premiums, with the FCIC accepting and approving the SRA and plan of operation after the prevented planting changes were implemented. The FCIC adjusted premium rates when implementing the changes (FF 12, 13). The insurance company sold and administered the policies with knowledge of the premiums and reimbursements (FF 1, 3, 10) and without objection (FF 14). The facts do not suggest a compensable breach by the FCIC.

1995 SRA: fair dealing and good faith

Another assertion of FCIC breach, which the insurance company raises, is an alleged failure by the FCIC to deal fairly and in good faith with the insurance company in performing the 1995 SRA. The record fails to establish a basis to support the conclusion, particularly given that Redland was the signatory to the 1995 SRA and, in 1996, the signatory to an amendment which altered the obligations of those parties (FF 1, 9). Similarly, if the allegation relates to the SRA for the 1996 reinsurance year, the insurance company has not raised facts which suggest a lack of fair dealing or of good faith by the FCIC. Accordingly, I grant the Government's motion for summary judgment on this issue.

1996 SRA: unilateral modifications

The insurance company contends that the FCIC committed a compensable breach by unilaterally modifying the terms of the 1996 SRA after the insurance company had signed and submitted its 1996 plan of operation for reinsurance fiscal year 1996.

The insurance company did not have an SRA for the 1995 reinsurance year. The SRA specifies that documents and manuals in effect at the start of the reinsurance year establish the terms and conditions of the SRA. (FF 1, 10.) Thus, when the insurance company signs and submits material is not directly relevant. The terms of the SRA for the 1996 reinsurance year specify that they would not become effective until the FCIC approved the plan of operation (FF 4, 10). By letter dated November 1, 1995, the FCIC informed the insurance company that the FCIC did not approve the SRA and plan as submitted. After the prevented planting changes were effective, and with mutually agreed upon amendments to the SRA, on April 9, 1996, the FCIC approved and accepted the SRA and plan of operation. (FF 10.)[3]

In making this breach allegation, the insurance company imposes a requirement on the FCIC, which is not found in the SRA. The FCIC was not bound to accept or approve the initially submitted SRA for the 1996 reinsurance year. The allegation does not support a finding of a compensable breach.

The dissent

The comments found in the dissenting opinion are not faithful to the views and conclusions expressed in this opinion. Point-by-point discussion is not merited; however, a few words will serve to highlight some of the disagreements.

In terms of the issues properly before the Board, the dissent selectively reads the submissions and the record. As the FCIC states in reply to the insurance company's resistance to the motion:

---

[3] The affidavit of the insurance company's president that the FCIC refused requests to alter the plan of operation, provides no details or references to documents (FF 15) which suggest that requests were made pursuant to the SRA (FF 5, 10), or the contents of the requests or bases for the refusals. Such a general statement does not set forth facts showing a genuine issue for trial. Fed. R. Civ. P. 56(e); Mingus. Further, even if the FCIC unilaterally issued the prevented planting changes, the insurance company mutually agreed to the application of those changes by proceeding with its SRA and plan of operation through the time of FCIC approval.

> Appellant never challenged these late and prevented planting provisions or the premium rates based on them at the time they were implemented. Therefore, Appellant cannot challenge their implementation now. Further, no issue of fact has been created, nor has Appellant presented any evidence of why FCIC is not entitled to judgment as a matter of law. The regulations speak for themselves.

FCIC Reply at 1-2. Laches and estoppel, raised by the dissent, are not here relevant, given the time constraints found in regulation.

The dissent discounts and misconstrues the assertions by the FCIC regarding its bases for summary relief. Its motion is not predicated simply or solely on a comparison of its actions for the 1995 and 1996 crop years. Rather, the FCIC specifies that its actions regarding the 1995 crop year (which involved actions so different from the year here at issue) are not material to this appeal. FCIC Reply at 2-4.

The dissent chooses not to address the specific allegations of breach raised by the insurance company. The dissent finds that the insurance company "has established as a matter of law, that under certain circumstances, changes to prevented planting can constitute a breach of the contract." The issues before the Board are not raised in the abstract. I explore each allegation raised by the insurance company, in light of the record, and explain why no basis merits further pursuit. As a matter of law, based on the allegations raised, I conclude that the insurance company cannot prevail. In focusing on what occurred under the 1995 SRA as FCIC's sole basis for summary relief, the dissent is not true to the record or issues before the Board.

The dissent would await further development of a factual record to resolve what I view to be a legally unsupported allegation that, in contravention of statute, the FCIC set actuarially unsound premium rates to reflect the 1996 prevented planting insurance changes for spring-seeded crops. Assuming (without deciding) that the Board is an appropriate forum to challenge the alleged violation of statute, the statute does not demand expressly that the FCIC establish actuarially sound premium rates; the statute uses the phrase "actuarially sufficient" and addresses "all the plans of insurance" not "each plan of insurance." The conjecture in the record that the FCIC would have established different rates utilizing other or additional information legally is not material (thus, while the dissent values the insurance company's discussion and references to alleged failures when determining rates, the discussion both misrepresents the references and does not establish a basis to preclude summary relief). The statute vests the FCIC with the discretion to set rates and allocate risks; the insurance company has not established that the statute prohibits the rates and allocation of risks reflected in the prevented planting rates applicable in the particular counties affected under the insurance company's SRA. That is, the FCIC could have adopted the same rates for the counties in question even if the FCIC increased other rates in order to better achieve actuarial sufficiency. Moreover, the general rates and bases for the prevented planting rate making, were available to the insurance company while it was amending its plan of operation and before the FCIC accepted the plan of operation. Had the insurance company been dissatisfied with the allocation of risks, it should have withdrawn or revised its plan of operation before the SRA became effective.

The dissent misreads the dispute resolution regulation, 7 C.F.R. § 400.169(a):

> If the [insurance] company believes the [FCIC] has taken an action that is not in accordance with the provisions of the Standard Reinsurance Agreement or any reinsurance agreement with FCIC . . . it may within 45 days after receipt of such determination, request, in writing, the Director . . . to make a final administrative determination addressing the disputed issue.

The phrase "such determination" refers to "an action that is not in accordance with the provisions of the [SRA] or any reinsurance agreement with FCIC." The insurance company maintains that the prevented planting changes published in the Federal Register on December 7,1995, were contrary to the provisions of the SRA. The insurance company did not request a determination on that disputed issue. The insurance company has not timely pursued that alleged basis of breach. Moreover, a premise of this case is that the insurance company received from FCIC payments (administrative expenses, and portions of premiums and indemnities) for individual prevented planting insurance policies. The insurance company has not suggested that it disputed any of those FCIC payment actions. The regulation brings finality to a dispute which is not raised in a timely manner.

The insurance company maintains that the FCIC breached the SRA by implementing the prevented planting changes in an untimely manner. The dissent states: "To conclude that Appellant loses because it did what FCIC required and demanded, instead of taking the risk of walking away, has no legal foundation." The insurance company has not demonstrated or suggested that FCIC required or demanded that it sell the prevented planting policies under the SRA. The breach allegation fails, however, because if the insurance company is correct that the changes were implemented in a manner so as fall outside of the SRA (that is, the breach allegation), then the SRA does not provide a mechanism for relief regarding the prevented planting policies. The SRA dictates the legal obligations of the insurance company and the FCIC only with respect to insurance matters coming within the coverage of the SRA. As a matter of law, the FCIC is entitled to relief on this allegation.

DECISION

I grant the Government's motion for summary judgment and deny the appeal of the insurance company.

_____

JOSEPH A. VERGILIO
Administrative Judge

HOURY, Administrative Judge, concurring separately.

I concur in the Findings of Fact (FF), and in the conclusion of the presiding judge that the appeal be dismissed. However, I rely on the opinion below to reach this conclusion.

This appeal arose under a 1996 Standard Reinsurance Agreement (SRA) between the Federal Crop Insurance Corporation (FCIC), a wholly-owned Government corporation within the U. S. Department of Agriculture (USDA), and American Growers Insurance Company, of Council Bluffs, Iowa (Appellant). The SRA is a cooperative financial assistance agreement to deliver Multi-Peril Crop Insurance (MPCI) policies under the authority of the Federal Crop Insurance Act (Act).

Among other matters, Appellant alleges that FCIC has refused to compensate Appellant for changes to MPCI policies, increasing Appellant's 1996 crop year risks for the prevented planting[1] portion of Appellant's insurance liabilities, even though FCIC compensated Appellant for similar changes in 1995; and that FCIC failed to implement actuarially sound rates for 1996 prevented planting, commensurate with the increased risks. Appellant asserts that as a consequence of FCIC's actions, Appellant's "losses" exceeded premiums by $10,355,388 for the acreage on which prevented planting crop insurance was extended. Appellant makes no assertions regarding losses or profits on the balance of its crop insurance coverage.

This appeal is from a final determination of the FCIC rejecting Appellant's claim. The Board has jurisdiction under 7 C.F.R. §§ 24.4(b) and 400.169(d). FCIC has filed a Motion for Summary Judgment. Appellant has filed a Resistance to the FCIC Motion. FCIC has filed a Reply to Appellant's Resistance. Both parties have engaged in extensive discovery and have supported their positions with evidentiary supplements. The Complaint and Answer have been filed, and the Rule 4 file (7 C.F.R. § 24.4, Rule 4) has been filed and supplemented.

Briefly, regarding the FCIC's 1996 prevented planting changes, irrespective of whether FCIC implemented these changes after the contract change date, or after the agreement on the Plan of Operation (Plan), the SRA provides a mechanism for adjusting the Plan at any time, but only if the changes substantially increased Appellant's risks for MPCI contracts previously written. Appellant has not shown or alleged that FCIC's changes substantially increased Appellant's risks on MPCI contracts previously written, as in 1995. Appellant is essentially requesting the Board to reform the SRA to provide a mechanism for relief that does not exist.

Regarding the alleged improper rates, the SRA does not address the obligations of FCIC regarding setting rates for insurance. FCIC derives this authority and these rights from statute. If these statutes involve sovereign delegations of authority, FCIC is immune from liability. If these statutes are less than sovereign delegations, Appellant nevertheless has the burden of showing that the statutes are intended to confer on Appellant the recovery it seeks. Appellant has not shown that such statutes confer these benefits. In any event, a review of the statutes indicates that the Act confers broad authority on FCIC to fix adequate premiums that FCIC determines are actuarially sufficient to attain an "overall" expected loss ratio of not greater than 1.1. Appellant has not shown that this overall loss ratio was breached.

---

[1] Prevented planting insurance compensates the insured against losses arising from not being able to plant acreage because of defined perils such as flooding.

FINDINGS OF FACT

Background and 1995 SRA (7/1/94 - 6/30/95) Activity

1. FCIC and Redland Insurance entered into a 1995 SRA authorizing Redland to sell MPCI policies during the July 1, 1994 to June 30, 1995 period. The SRA is a cooperative financial assistance agreement to deliver MPCI under the authority of the Federal Crop Insurance Act. The SRA establishes the terms and conditions under which FCIC will provide premium subsidy, expense reimbursement and reinsurance. The SRA provides that Appellant retain a percentage of the premiums to cover its administrative expenses. Pursuant to clause V.J. of the SRA, the SRA would renew itself each July 1, unless one of the parties gave at least 180 days written notice of intent to cancel. In June 1995, American Growers (Appellant) and FCIC agreed to substitute Appellant for Redland for the 1995 and 1996 SRA.

2. Notwithstanding the renewal clause in V.J. above, the SRA provides at V.F.1.a. that the SRA is not effective until FCIC approves Appellant's Plan of Operation (Plan), and that crop insurance contracts written or renewed between July 1, and the date the Plan is approved will not be reinsured unless specifically accepted by FCIC. Clauses II.6. and II.B.1.b. provide that the Appellant, in accordance with its Plan, may designate eligible crop insurance contracts into three funds which place varying obligations on FCIC to reimburse the Appellant for its "Ultimate Net Losses," including the Assigned Risk Fund, which provides Appellant the greatest protection from losses. Appellant may designate MPCI contracts to this fund at any time within 30 days after the closing date on an MPCI contract. In the Plan Appellant also elects the states it will sell insurance in, and the crops within those states that it will insure.

3. Clause V.F.1.c. of the SRA allows the Appellant to request an amendment of its Plan at any time to reflect changing business conditions and sales expectations. However, FCIC is only obligated to "favorably consider" an amendment if, FCIC determines that FCIC or USDA action substantially increased the risk of underwriting loss on eligible crop insurance contracts previously written by Appellant with the expectation that current policies and procedures would remain the same.

4. Section V.E.1. of the SRA requires that MPCI policies sold must conform to FCIC regulations unless otherwise approved by FCIC. The MPCI policies generally specify a contract change date after which contract changes affecting the MPCI will not be made by FCIC. The particular contract change date is dependent on the crop being insured, and is specified in Section 9 of the MPCI policy. The contract change date for the crops in issue was November 30, 1995. See 7 C.F.R. §§ 101-146.

5. On December 22, 1993, prior to the effective date of the 1995 SRA, FCIC revised its regulations for rice (7 C.F.R. § 401.120), hybrid seed (7 C.F.R.§ 443.7), wheat, barley, oats, rye, flax (7 C.F.R. § 457.101), cotton (7 C.F.R. § 457.104), extra long staple cotton (7 C.F.R. § 457.105), corn, sorghum, soybeans (7 C.F.R. § 457.113) to provide insurance coverage for producers that were unable to plant during the late planting periods, or by the final planting date, as a result of an insurable loss. These changes were in effect when the parties executed the 1995 SRA and when

Appellant in its 1995 Plan had elected and specified the SRA fund designation, the states, and the crops within those states that it would insure.

6. Prior to the expiration of the 1995 SRA, during the spring of 1995, numerous states received excessive moisture which prevented producers from planting insured crops by the final planting date. As a result of the excess moisture and the resulting flooding, by Managers Bulletins and press releases at least through June 16, 1995, FCIC and USDA clarified and expanded the terms and conditions for the 1995 prevented planting coverage by, among other things, extending the final planting dates, and by providing for greater rates of indemnity payment on late planting.

7. FCIC concedes that it breached the 1995 SRA, by promulgating and implementing the 1995 prevented planting changes after the 1995 MPCI policy change dates, after the prevented planting losses had already occurred, and without an increase in the premiums to cover the risk. Consequently, Appellant incurred greater expenses associated with indemnity payments, loss adjustments, and administrative expenses, than it would have incurred prior to the prevented planting changes. FCIC asserts that it paid these expenses to Appellant because of the breach, not because of any course of dealing between the parties (Complaint, Answer, ¶¶ 21, 22; Appeal File (AF) KK, SS).

8. Appellant alleges that there was a course of dealing regarding the compensation paid to it for the changes to the 1995 prevented planting (Complaint, ¶ 22). However, the present record reflects no evidence of such course of dealing, and Appellant has offered no evidence of such a course of dealing in opposition to the Government's motion. Appellant also asserts that the method of compensating Appellant for the 1995 prevented planting changes impliedly became a part of the 1996 reinsurance year (Complaint, ¶ 22). However, the 1995 agreement to compensate Appellant is limited to 1995 (AF KK). In opposition to the Government's motion, Appellant has offered no evidence that the 1995 agreement to compensate Appellant impliedly extends to the 1996 reinsurance year.

1996 SRA (7/1/95 - 6/30/96) Activity

9. FCIC concedes that it did not increase premiums for the fall 1995 crops (FCIC Motion, ¶ 41). However, the 1995 prevented planting changes were not applicable to the fall 1996 crops (AF EE, FF, HH).

10. By letter dated June 27, 1995, Appellant (Redland) filed a 1996 Plan for the 1996 SRA (AF T). FCIC issued Managers Bulletins (MGRs) 95-44 and 95-46, dated October 18, 1995, and November 30, 1995, respectively, to all reinsured companies. These MGRs gave notice of the proposed, expanded prevented planting coverage for the spring 1996 crop year (AF CC, EE).

11. On November 8, 1995, FCIC published in the Federal Register a proposed rule to implement the 1996 prevented planting changes for the spring 1996 crops. The proposed rule required that comments be submitted by November 20, 1995 (AF FF). On November 30, 1995, the final rule stated that it was effective November 30, 1995. However, it was not filed until 4:56 p.m. November 30, 1995, and was not published until December 7, 1995 (AF HH). The proposed and

final rules included a Cost-Benefit Analysis that provided rating methodology and data relied upon to calculate the premium adjustments for the prevented planting changes relating to the spring planted crops (AF X, FF, HH). In opposing the Government's motion, Appellant asserts in an affidavit that the data used by FCIC were not actuarially sound and reflect improper rating methods. The FCIC addressed comments made regarding actuarial soundness during the rule making process (AF KK, page (p.) 259). FCIC estimated that premiums would be increased by an average of 6-7 percent above 1995 levels (AF X, p. 107, EE, p. 198, FF, p. 235). Actual premiums were increased by 4-30 percent, depending on the risk in the county (FCIC Motion, ¶ 42; AF Z; Driscoll Deposition 118 -119).

12. As stated in Finding of Fact 9, Appellant had submitted a Plan for approval on June 27, 1995. The Plan was revised July 17, August 2, October 18, October 21, and October 30, 1995. On November 1, 1995, FCIC formally rejected Appellant's Plan on the basis that Appellant did not meet financial requirements due to inadequate surplus to cover requested maximum reinsurable premium volume of $265,000,000. Appellant again revised its Plan on November 22, 1995, and January 26, 1996. FCIC approved the Plan and the 1996 SRA by letter dated April 9, 1996. (AF DD, LL.) In opposing the Government's motion, Appellant filed an affidavit that FCIC refused requests by Appellant to amend its 1996 Plan to address FCIC's prevented planting changes (Gibson Affidavit, pp. 3-4). As indicated above, the record shows that the 1996 Plan and the 1996 SRA were amended and signed by Appellant, after Appellant had received notice of the prevented Plan changes, and after such changes became effective by the formal rule making process. Appellant did not offer evidence of any written requests it had made.

13. For the 1996 crop year in issue, Appellant has not alleged that producers filed claims against Appellant, based on changes to prevented planting coverage being implemented after the MPCI contract change date of November 30, 1995, for eligible crop insurance contracts previously written. Comments in the Federal Register regarding the proposed rule from the crop insurance industry indicated that as of November 1995, only training and marketing activities had begun (AF KK, p. 258). The final planting dates for corn, sorghum and sunflowers were in June 1996 (AF J). For the spring 1996 crops, Appellant apparently sold the insurance, retained premiums for its administrative expense, paid indemnities for losses, received reimbursement from FCIC, but failed to make any objection or file a claim, based on the fact that its income did not meet expectations.

14. By letter dated June 10, 1998, Appellant filed a claim for damages under the 1996 SRA. By letter dated August 12, 1998, FCIC denied Appellant's claim. Appellant filed a timely appeal. Appellant alleges in Complaint ¶ 37 A-G that FCIC breached the SRA by:

a. not reimbursing Appellant for 1996 prevented planting losses, as in 1995;
b. acting outside legal authority causing damage to Appellant;
c. failing to adjust premium rates for changes to fall 1995 crops;
d. failing to set actuarially sound rates for 1996 spring crops as required by 7 U.S.C. § 1508(d)(1);
e. making prevented planting changes without adequate compensation for increased risks;

f. failing to deal fairly and in good faith with Appellant for the 1995 SRA; and
g. modifying 1996 SRA after Appellant signed the 1996 Plan.

15. The Complaint, Answer and Rule 4 Appeal File have been submitted. Appellant has supplemented the Rule 4 file. The Government has filed a Motion For Summary Judgment and supported such motion with evidentiary exhibits. Appellant has filed a Resistance to the Government's Motion (Resistance) with evidentiary exhibits.

DISCUSSION

The Basis for Considering the Government's Motion for Summary Judgment

The Board looks to Federal Rule of Civil Procedure (FRCP) 56, Summary Judgment, for guidance in deciding the Government's motion. The last two sentences of Rule 56(e) are of particular relevance and are set forth below:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

These sentences were added by a 1963 amendment to the Rules. The notes of the Advisory Committee on Rules are set forth below in pertinent part:

> The last two sentences are added to overcome a line of cases, chiefly from the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on the averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied if the averments are "well pleaded" and not supposititious, conclusory, or ultimate.

The Board's procedure requires the Government to compile and submit, as evidence already admitted, a Rule 4 file that includes the contract, drawings, specifications, correspondence, and other relevant documents. The contractor may add its own supplements to this evidence. Thus, the Board's procedure generally results in a fairly complete record being developed very early in the appeal procedure without the need for discovery. Given this record and any additional evidentiary supplements supporting a motion for summary judgment, any material facts must not only be controverted in the pleadings, there must be sufficient evidence in the Rule 4 file, as supplemented, or presented in opposition to the motion, to establish a reasonable possibility of proof at a hearing.

To hold otherwise would limit the granting of summary judgement motions to appeals that can be decided purely as a matter of law. This would be contrary to the intent of the amendments to Rule 56(e). As was stated in Donnelly v. Guion, 467 F.2d 290, 293 (2d Cir. 1972):

> A party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial. Summary judgment motion is intended to "smoke out" the facts so that the judge can decide if anything remains to be tried.

In Anderson v. Liberty Lobby, 477 U.S. 242, 248-52, the Court held that only disputes over facts that might affect the outcome of the suit will properly preclude the entry of summary judgment (at 248). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not sufficiently probative, summary judgment may be granted (at 249-50). If reasonable mind can differ, however, a verdict should not be directed (at 250-51). The mere existence of a scintilla of evidence in support of the nonmovant's position will be insufficient. There must be evidence on which a jury can find for the nonmovant (at 252).

The SRA in General

To begin with, the SRA is not simply an arm's length contract transaction, or even an arm's length Government contract transaction. It is, as its preamble states, a "cooperative financial assistance agreement to deliver crop insurance in accordance with the [Federal Crop Insurance Act]"(FF 1). Thus, the rights and obligations of FCIC and the insurer are controlled by statutory, regulatory and contractual provisions.

The purpose of the Act is to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance. 7 U.S.C. § 1502. The Act establishes the FCIC and authorizes it to enter into contracts and issue regulations necessary for the conduct of its business. 7 U.S.C. § 1506(l). FCIC may offer insurance "if sufficient actuarial data are available (as determined by the Corporation)." 7 U.S.C. § 1508(a)(1). Thus, FCIC is granted considerable discretion, and indeed has the sole discretion, for determining the sufficiency of actuarial data as a basis to offer insurance.

FCIC is obligated to provide reinsurance "to the maximum extent practicable," 7 U.S.C. § 1508(k)(1), and on such terms and conditions as the Board determines. 7 U.S.C. § 1508 (k)(2). The reinsurance agreements shall require the reinsured companies to bear a sufficient share of any potential loss under the agreement so as to ensure that the reinsured company will sell and service insurance in a sound and prudent manner. 7 U.S.C. § 1508(k)(3).

Appellant has fully developed the arguments first asserted in its Complaint, in its Resistance to the FCIC motion. The headings below are taken primarily from Appellant's Resistance in order to completely cover all issues presented.

A. The FCIC Breached the 1995 SRA When it Unilaterally Increased American Growers' Risks Under the 1995 SRA and its 1996 Plan of Operation

Appellant considers the 1996 SRA as the "second year of the 1995 SRA" (Resistance, p. 37, footnote 13), and it is sometimes difficult to determine whether Appellant is in fact referring to the 1995 SRA, or the 1996 SRA. Appellant asserts that "the Plan is **the** quintessential document for ceding and retaining risks of loss for the upcoming insurance year" (Resistance, p. 44). Appellant also asserts that since there is no contract change date in the SRA, and since the MPCI is a contract between Appellant and the producer, FCIC may not rely on the contract change date to impose changes that increase Appellant's risks (Resistance, pp. 41-42).

Appellant's position regarding the contract change date has merit. Further, the Plan does appear to be the quintessential document for risk sharing. However, these facts do not necessarily lead to the conclusion that the prevented planting changes implemented by FCIC for the benefit of flooded producers, even if after the submission of Appellant's 1995 or 1996 Plans, breached the 1995 or 1996 SRA, respectively. The SRA has a mechanism for revising the Plan in accordance with standards set forth in the SRA, though the SRA does not require FCIC to accept Appellant's revisions if those standards are not met (FF 3). These conditions are not inconsistent with the Act which requires reinsurers to bear a sufficient share of any potential loss. 7 U.S.C. § 1508(k)(3).

Turning to the arguments presented, Appellant is simply incorrect regarding its treatment of the 1996 SRA as the second year of the 1995 SRA. Notwithstanding the fact that the 1995 SRA contains a provision for automatic renewal, the 1995 SRA is a separate and distinct agreement from the 1996 SRA, incorporating a different Plan, with revised applicable regulations, including the terms and conditions of the MPCI contracts Appellant is authorized to enter into. They are separate and distinct contracts executed at different times, after separate negotiations.

While FCIC concedes it breached the 1995 SRA, the Board need not reach this issue. As stated in Finding of Fact 3, the SRA includes a provision allowing Appellant to revise its Plan at any time, and that FCIC must favorably consider these revisions if FCIC's actions substantially increased Appellant's risks for MPCI contracts previously written. This is precisely what FCIC did in 1995. FCIC's 1995 changes, which it was authorized to implement under the Act, required Appellant to pay indemnity to producers for losses which had not been insured, i.e. payment under MPCI contracts previously written. Since it was too late to meaningfully implement revisions to Appellant's 1995 Plan when FCIC imposed the changes, compensating Appellant for the Plan revisions Appellant reasonably would have made for changes authorized by the Act by FCIC, can be viewed as properly within the scope of the SRA.

The damages for the alleged 1995 SRA breach are not in issue for the present appeal. (FF 7, 14.) However, Appellant asserts in its Complaint that payment for the effects of the 1995 prevented planting changes was part of a course of dealing with FCIC, obligating FCIC to make these payments for 1996. Other than for 1995, Appellant offers no evidence of a course of dealing on this issue. Further, the facts and payment procedures for the 1995 SRA are fact specific and limited to 1995 by their terms. (FF 5-8.) Appellant has not established any of the essential elements for a course of dealing.

Even if there had been a course of dealing, the facts relating to the 1995 and 1996 prevented planting changes are readily distinguishable. In 1995 FCIC implemented the prevented planting changes, after the parties had agreed on the Plan, after the crop losses had occurred, and there had been no increase in premiums to cover the added risk to reinsurers such as Appellant (FF 7). Essentially, this was FCIC's method of compensating producers, for the unprecedented and unanticipated flooding, after the fact, for risks the producers had not even insured themselves against. For 1996, FCIC implemented the prevented planting before any losses had occurred. Moreover, FCIC increased premiums to cover the increased risks. While Appellant alleges otherwise, the changes were also implemented prior to the parties' agreement on the 1996 SRA and Plan. (FF 10-13.)

Appellant asserts that the November 30, 1995 contract change date affords no protection to it, because it had already apportioned its share of the risk for the MPCI policies in its Plan (Resistance, p. 46). In fact, the change date does not appear to be relevant for determining Appellant's rights. Therefore, only the effect of the Plan will be considered. Contrary to Appellant's assertions, the facts indicate that while Appellant first submitted its 1996 Plan on June 27, 1995, Appellant continued to make and submit revisions of the Plan to FCIC, and the parties continued to negotiate the Plan and the SRA, long after the time when Appellant had notice of the prevented planting changes, and even long after FCIC implemented these changes (FF 10-12). Thus, Appellant was in a position to revise its Plan, after the prevented planting changes were implemented, and before the Plan was mutually agreed to.

Further, even after the Plan was agreed to, under the terms of the SRA, Appellant is in a position to designate an MPCI contract to the most favorable SRA fund, at any time, within 30 days after the MPCI contract is sold to the producer. MPCI contract sales will generally occur even after the contract change date, because producers will wait until all changes are in before making decisions about their insurance coverage. (FF 2, 4, 13.)

Finally, Appellant could have submitted a revised Plan under the SRA at any time to reflect changing business or sales conditions (FF 3). Appellant now asserts in an affidavit that it had done so, and that FCIC rejected its revised Plan (FF 12). It is noted that Appellant submitted many revisions to its Plan and that the parties mutually agreed to the Plan after the prevented planting changes were made (FF 12). Appellant has failed to produce a copy of any rejected revision. If in fact this particular revision was rejected, Appellant has failed to show that its allegedly rejected Plan revisions would have met the criteria for FCIC to have favorably considered the revisions, i.e., that FCIC's actions substantially increased Appellant's risks for MPCI contracts previously written. Indeed, Appellant failed to seek an administrative determination regarding the propriety of the alleged FCIC rejection. See 7 C.F.R. § 400.169(a).[2] Finally, given the rather complete record that

---

[2] Under 7 C.F.R. § 400.169(a), if the Company believes the Corporation has taken an action not in accordance with the SRA (improperly rejecting revisions to Appellant's Plan), it may seek an administrative determination from FCIC, appeal such determination within FCIC within 45 days, and then seek further review from this Board within 90 days of a final administrative determination. Appellant has not alleged, nor has Appellant provided any evidence that it sought such an administrative review for an improperly rejected revision to its Plan.

presently exists on this issue, Appellant's bare affidavit is now insufficient to preclude granting summary judgment on this issue.

B. FCIC Failed to Make the 1996 Prevented Planting Changes Before the Contract Change Date

By way of background, the FCIC has been selling crop insurance for over 50 years through the use of regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). For at least the last 30 years, FCIC offered crop insurance policies to producers with contract change dates 15 days prior to the termination date for the policy. 7 C.F.R. § 401.111 (1970), Clause 7, Contract. This was at a time when FCIC dealt with producers directly and without the benefit of insurance companies. Thus, the contract change date was only relevant between FCIC and the producer. A review of the regulatory changes implemented by FCIC indicate that they were generally made prior to the contract change date. Moreover, the change dates generally did not relate to what has become to be known as the beginning of the reinsurance year, July 1. 7 C.F.R. §§ 401-436 (1980). The regulations did not provide for crop insurance sales by private insurers until 1983. 7 C.F.R. § 400.27 (1983). A review of the C.F.R. indicates that since then, changes to the crop policies were generally made by regulation, and that these changes have generally been implemented by the change dates.

There is no dispute that the contract change date for the affected crops is November 30, 1995. Appellant's position in the previous section that the contract change date offered it no protection has merit. Here, the parties argue over whether the prevented planting changes became effective on November 30, 1995, the date the rule itself states it was effective, and the date it was filed; or December 7, 1995, the date the rule was actually published. This dispute need not be resolved, since it does not affect the outcome of the appeal. In any event, in British American Commodity Options v. Bagley, 552 F.2d 482 (2d. Cir. 1977), the court declined to delay the effective date of a 15-day acceleration of the rule there in issue, where good cause was shown for the acceleration, and the plaintiff made no showing of prejudice. Here, Appellant has conceded that the contract change date offered it no protection. Moreover, Appellant has failed to show how the 7-day delay in the effective date of the rule damaged it.

C. FCIC'S Regulatory Changes do not Insulate it From Liability for Breach of Contract

Appellant relies on United States v. Winstar Corp., 518 U.S. 839, 116 S. Ct. 2432 (1996), and the fact that FCIC paid Appellant for 1995 SRA expenses that are similar to what it is claiming for 1996. Appellant states that FCIC should bear the added expenses resulting from its desire to promote the social elements of crop insurance, asserting that FCIC bows to Congressional pressure on behalf of constituents who complain that the insurance rates are too high. Appellant claims FCIC reacts to this pressure by refusing to set rates that are actuarially sound. (Resistance, pp. 48-56.)

In Winstar, the facts indicate that plaintiff was induced to enter into an arrangement based on Government representations that were later made improper by an Act of Congress. The Court in that instance found that while the Government always had the right to regulate, it had waived its defense of sovereign immunity against damages for such regulation, when it made improper the very inducements relied upon by the plaintiff. Under the present facts, Appellant has not shown that it

relied upon any specific Government inducement to enter into the SRA, that was later made illegal or improper as in Winstar. Thus, Winstar provides no basis for recovery under the present facts.

The question regarding the actuarial basis for the rates is considered below under the section where Appellant more specifically and directly addressed this issue.

D. Appellant has not Waived its Current Claim by not Bringing Similar Claims in the Past

I do not disagree, but see the reference to 7 C.F.R. § 400.169(a), footnote 2.

E. FCIC'S Rate Making is not Entitled to Deference

Relying on 7 U.S.C. § 1506(h) and § 1506(o)(1)(D), Appellant asserts that FCIC is required to assemble data for establishing actuarial sound bases for insurance, and to take other measures to improve the actuarial soundness of the crop insurance program. Appellant further asserts that FCIC may only offer insurance coverage if sufficient actuarial data is available, 7 U.S.C. § 1508(a)(1). Appellant also asserts that the law is clear that if an agency adopts a rule that is in contravention of the plain meaning of a statute, or provides only a poor interpretation of its rule, the agency's rule is not entitled to deference. Lastly, Appellant asserts that summary judgment is not appropriate because questions of fact remain as to whether FCIC's rates were actuarially sufficient to cover anticipated losses attributable to FCIC's 1996 prevented planting changes.

The SRA does not address the question of FCIC's rights "to offer insurance if sufficient actuarial data are available (as determined by the Corporation)." See 7 U.S.C. § 1508(a)(1). Nor does the SRA address FCIC's right to take such actions as are necessary to improve actuarial soundness of crop insurance coverage to achieve an "overall" loss ratio of not greater than 1.1 during the period in issue. See 7 U.S.C. § 1506(o)(1). These requirements are addressed by statute only. If these grants of authority are sovereign powers, even an ambiguous term in the contract will not be interpreted as a conveyance or surrender of sovereign power. Winstar, 518 U.S. at 878. Generally, with certain exceptions not relevant here, the Board is not empowered to reform the SRA by granting rights to Appellant, or ascribing obligations to FCIC, not addressed in the SRA.

Even if sovereign power is not in issue, Appellant must nevertheless show that the statutory provision it cites as having been violated, is intended to confer on Appellant the right to the monetary recovery it seeks. Appellant has failed to make such a showing. Thus, even if factual issues remain, the question of how much deference, if any, should be given to the actuarial sufficiency of FCIC's rates is not reached. Further, as indicated below, a review of the relevant statutory provisions fails to indicate that Appellant is entitled to recovery.

7 U.S.C. § 1506(o)(1) provides that FCIC shall take such actions as are necessary to improve actuarial soundness of crop insurance coverage to achieve an "overall" projected loss ratio of not greater than 1.1. Significantly, 7 U.S.C. § 1506(o)(1) concerns only the "overall" projected loss ratio. Thus, it does not concern the loss ratio for any specific natural disaster such as drought, flood, or disease. It does not concern the loss ratio for prevented planting, or for insurance after planting has occurred. It does not concern the loss ratio as a function of the type of crop planted. It does not

concern the loss ratio of particular geographic locations such as the state or county. It does not concern the loss ratio for only spring or fall crops. Most significantly, it does not concern the loss ratio experienced by an insurance company for a particular segment of its business, such as the prevented planting segment at issue in this appeal.

Further, 7 U.S.C. § 1508(a)(1) provides that FCIC may offer insurance "if sufficient actuarial data are available (as determined by the Corporation)." Thus, the Act vests FCIC with the authority to determine if sufficient actuarial data are available, consistent with the purpose of the Act, which is to improve the economic stability of agriculture through a sound system of crop insurance. There is no dispute that FCIC increased premium rates for 1996, in some instances rather significantly (FF 11).

Essentially, Appellant's alleges that Appellant's prevented planting indemnity exceeded premiums. Even if Appellant can show this, mutuality of obligation would require that Appellant repay FCIC in those areas where premiums exceed indemnity. Appellant has provided no basis for interpreting the SRA or the Act to achieve such a result. Moreover, this result would be contrary to the statutory requirement that reinsurers bear a sufficient share of any potential loss. 7 U.S.C. § 1508(k)(3).

Finally, the Act at 7 U.S.C. §§ 1508(d)(1) and (d)(1)(B) provides that the FCIC shall fix adequate premiums "as the [FCIC] determines are actuarially sufficient" to attain an expected loss ratio of not greater than 1.1. Appellant has not shown that FCIC failed to achieve this loss ratio for 1996. Even if FCIC had failed to achieve it, as stated above, Appellant has not shown that the loss ratio requirement was anything other a Congressional budgetary consideration, rather than a provision intended to confer rights on insurers through the SRA.

Thus, FCIC is entitled to summary judgment on this issue.

F. Appellant Suffered Losses on Account of the FCIC Breach of the 1995 SRA

Appellant asserts that the measure of damages for breach of contract is based on the expectation interests of the non-breaching party. As a general proposition, I do not disagree. However, Appellant has not shown a basis for entitlement.

G. This Board Should Deny Summary Judgment Because Discovery is not yet Complete

Appellant asserts that the FCIC's motion should be denied because it wishes to continue the depositions of FCIC's Senior Actuary and Chief of the Actuarial Design Section. There is considerable evidence of rate-making already in the record, and additional evidence on this subject would not be useful, for the reason expressed above.

H. FCIC Failed to Adjust Premium Rates for Fall 1995 Planting

FCIC concedes it did not increase the rates for the 1995 fall crops. However, there was no need to do so because the 1995 prevented planting changes were not made applicable to the fall 1995 crops (FF 9).

RULING

The Motion should be granted and the appeal denied.

_____

EDWARD HOURY
Administrative Judge

POLLACK, Administrative Judge, dissenting.

I respectfully dissent from the opinions of my colleagues and find that FCIC's motion should be denied. That said, however, as to several issues I agree that summary judgment is appropriate. I agree that summary judgment should be granted FCIC as to the Appellant's contention that the issued changes on the 1995 contract are binding as to the 1996 SRA, on the Appellant's claim for reimbursement for premiums associated with the fall planting, and on the Appellant's general claim of failure of FCIC to act with good faith and fair dealing.

BACKGROUND AND SUMMARY

Appellant has filed an appeal where it contends that it is entitled to compensation as a result of FCIC breaching the 1996 SRA between the parties, by FCIC unilaterally changing Appellant's risk under the 1996 SRA when FCIC made changes to the prevented planting provisions of the contract and did not adequately nor properly compensate the Appellant. FCIC made changes to the 1996 SRA after that contract was entered into by the parties. This dispute centers on whether FCIC had a right to make those changes without having to compensate the Appellant for the additional costs it incurred as a result of the change, beyond what FCIC paid Appellant in rate adjustments for 1996. Appellant makes several other arguments, one of which is that FCIC breached the contract by failing to provide actuarially sound rates in making the referenced rate adjustment. Although I find that the rate adjustment amount and procedure are issues which must be weighed in determining if there was a breach, I do not see that matter independently either allowing or defeating the claim. Rather, the matters surrounding the rate making and actuarial soundness of the rate adjustments made in 1996,

are one of a number of elements which go to the severity and effect of the disputed change to the SRA on the Appellant's contract obligation.

FCIC's MOTION

FCIC in filing its motion was very clear in setting forth why it believed the Board should grant summary judgment. FCIC contends that the method and manner it used to make the changes and the measures it took to compensate the Appellant were permitted under the contract and thus did not violate any contract obligation. As such, in its view, the FCIC actions did not constitute a breach. FCIC says that at all times it acted within its legal authority when it made the 1996 prevented planting changes. FCIC in filing the motion specifically stated that it acted within its legal authority because the changes were made (1) before the contract change date; (2) Appellant was compensated by rate adjustment in compliance with law; and, (3) the change occurred before any losses were incurred.

As a threshold matter, I find that Appellant has established as a matter of law, that under certain circumstances, changes to prevented planting can constitute a breach of the contract. FCIC does not have an absolute right to make changes without running the risk of committing breach. That conclusion is based on several factors.

First, and most important, the possibility of breach is demonstrated by what occurred between FCIC and the Appellant as to the 1995 SRA. In 1995, FCIC made prevented planting changes and made those changes after what has been characterized as the contract change date. FCIC acknowledged that the 1995 SRA changes were a breach of Appellant's 1995 SRA, and as a result of that admitted breach, compensated Appellant for the costs Appellant incurred because of the added risk. Further, FCIC states at its proposed (Finding of Fact (FF) 29) (in its memorandum in support of its motion), that FCIC can be liable for breach for actions it takes in making prevented planting changes. The fact that FCIC can be liable for breach does not necessarily defeat its motion. That is because FCIC's liability depends not on whether FCIC could breach, but rather whether its actions in relation to the 1996 SRA constituted breach.

That said, however, this matter is before the Board on summary judgment. In deciding this case on that basis, FCIC's interpretation of its liability under the contract must be given substantial weight and cannot legally be ignored at this stage of the proceedings. FCIC's actions in acknowledging breach in 1995 (albeit under somewhat different fact circumstances) would negate, at this point, the contention that there is some sovereign or other statutory or regulatory bar to Appellant claiming breach. It is also of no small import that FCIC does not contend in its motion that it has any regulatory or statutory immunity which would bar Appellant from seeking compensation for breach. Rather, what it says is that it performed in accordance with the contract, was entitled to make the changes here in the manner it did and therefore did not commit breach.

According to FCIC, as long as it (1) made the changes in prevented planting before the change date of the contract; (2) adjusted the premium rates to account for the additional risk; and, (3) completed those steps before any crop losses were incurred, FCIC acted within its contractual rights and did not commit breach. Therefore, deciding the motion as presented by FCIC requires the Board to examine

whether the elements put forth by FCIC were indeed met and second, if met, whether FCIC is correct as a matter of law that compliance with those steps will defeat any breach claim.

The first element which FCIC focuses on is FCIC's contention that it made the 1996 change before what it characterizes as the change date on the contract. As a preliminary point, the change date relied on by FCIC is not a contractual provision which appears in the SRA between Appellant and FCIC. Instead, it relates to a contract provision in the Multi Peril Crop Insurance contract (MPCI) between Appellant and the farmer. The operation of the change date, and more specifically how and why it gives FCIC a right to change the SRA without any cost, is not at all clear from the language relating to the change date (even from the MPCI). There is no statement or provision in either the SRA or MPCI which says that FCIC can change the prevented planting provisions of the contract without having to compensate (but for rate adjustment) an insurance company for any added costs incurred because of increased risk. Therefore, to the extent FCIC relies on the language of either the SRA or the MPCI, I find that it has failed to establish that the change date language gives it the legal right claimed.

Second, even if the change date is as interpreted by FCIC, there is considerable dispute over whether FCIC did or did not make the changes by what it characterizes as the change date. There is clearly a disputed fact as to whether the changes were made by November 30 as contended by FCIC. My colleagues have come to the same conclusion as to this limited matter. Accordingly, FCIC has not established one of the factual predicates to its own motion.

In looking at the motion as filed by FCIC, it is clear to me that the Board has a number of questions to be resolved before it can determine the legal effect of the change date and whether FCIC has complied with the interpretation put forth. FCIC's argument is replete with references to how the parties have operated in the past and how FCIC has made changes for years without compensation. FCIC charges that the Appellant has recognized FCIC's right to make changes. Appellant, however, has contested that later point, noting that while changes have been made to SRA contracts and Appellant has not objected in the past, the changes (where it did not object or pursue financial relief) were of a significantly different nature than the change at issue here. I am not prepared here, to conclude that FCIC either does or does not have a right to make changes, such as the one in issue in this appeal, without having to compensate the Appellant. There is evidence that this appeal could very well be decided on the basis of course of dealing and how the parties have interpreted their obligations in the past. However, a decision on that basis is not appropriate for summary judgment as it requires a weighing and a decision on disputed and incomplete facts.

As to the second prong of FCIC's motion, which deals with adjusting the premium rates, FCIC asserts that under the Federal Crop Insurance Act, it has the right and obligation to make rate adjustments and that deference should be given to its determinations. Accordingly, as I understand FCIC, it essentially says that the Board should accept without challenge that FCIC properly adjusted the rates (met all necessary statutory and regulatory requirements), and thus if it properly adjusted the rates, then it met its second prong or obligation. Even were I to accept FCIC's contention that it is entitled to deference, that does not provide a total shield. That may indeed make the Appellant's job harder in showing a failure of FCIC to meet its obligation, but it does not create a bar. Here the Appellant has asserted and provided evidence that the rates were not adequately adjusted to account

for risk. It has spent substantial time in its response to FCIC's motion, in pointing out considerable evidence and examples as to the various defects in the FCIC rate adjustment process and FCIC's calculation of the rate adjustment. I am not prepared to dismiss those assertions on the record presently before the Board.

For example, the Appellant challenges (1) that FCIC failed to consider the most recent data; (2) that for 1996 prevented planting rates, FCIC did not rely upon information reported to the Agricultural Stabilization and Conservation Service (ASCS) as prevented from planting, but rather used the number of acres reported to ASCS as ghost acres; (3) that FCIC refused to take into account its own 1995 prevented planting loss experience to calculate the proposed rates for the 1996 insurance year; (4) that FCIC wrongfully dismissed its 1994 prevented planting loss experience; (5) that FCIC used outdated rating techniques and lacked statistical databases for proper analysis of coverage levels; and, (6) that FCIC used ASCS data and rejected its own 1995 historical data which was data under similar rules to 1996. Appellant also raised issues as to the validity of FCIC's cost benefit analysis, which accompanied the 1996 prevented planting regulations. Whether Appellant can prove these claimed defects, whether it can establish that they are material and whether it can show that the impact and severity (taking into account that this is a risk sharing contract) were not within the contemplation or scope of the contract, are all matters which ultimately must be sorted out and resolved. Similarly, the parties will have to deal with how and to what extent these matters are affected by other contract clauses and the prior practices and course of dealing between the parties. If Appellant can show that the errors it identifies as to rate making are serious and represent a lack of due diligence on the part of FCIC and it can show that its costs on this contract disproportionately changed because of the changes to prevented planting, then potentially it could establish that the adjustment was so inadequate to not meet FCIC's contract obligation. All of the above are matters that in my view cannot properly be resolved at this time on summary judgment.

As to the last prong of FCIC's defense, which is that the losses had not yet occurred at the time of the change and adjustment, the record is clear that the changes in issue here predated the losses. However, what I do not know and cannot determine from the record is what weight or importance does FCIC contend that the Board should give to this particular matter in the context of the other two prongs. Is it FCIC's position that we are to give the various criteria equal weight, does FCIC believe that all must be present to avoid breach, or is something less sufficient?

Finally, as indicated above, FCIC is clear in its brief supporting the motion, that this case turns very much on what has been the parties' course of dealing through the years as to FCIC making changes to SRA's. FCIC has also put into play how the parties have interpreted clauses. These matters by their nature involve factual analysis and cannot be resolved on the record before the Board.

In summary, Appellant can establish for purposes of summary judgment that the change was made after the contract change date. It can establish that the premium was not adequately adjusted or arrived at with due diligence. Appellant can also arguably establish that the change date is of no importance and even if it were met, nothing in the clause and language gives FCIC the legal right to make changes without compensation. Essentially, Appellant can show that under the basis used by FCIC to justify summary judgment, FCIC has not met its burden.

I decide this case on the record and arguments before me. While FCIC may establish at some later date that other clauses in the contract operate to minimize the significance of its failure to meet the above prongs (assuming on a full hearing that we find that the prongs were not met) and while FCIC may be able to show a course of dealing and course of interpretation which establishes that changes were allowed and expected without compensation, those are all matters to be developed and resolved through a hearing or on the merits. They are not appropriate matters for resolution on this summary judgment record.

Finally, in denying FCIC's motion, I assume that FCIC understands its contract, how it has been interpreted and applied, and what defenses are properly available to it. I approach my analysis on the basis that one must infer from FCIC's decision to argue summary judgment on the basis it has that FCIC does not see, at this time, another summary judgement basis. I infer from FCIC's failure to argue other points (those relied on by the majority) that FCIC recognizes that any other defenses will require factual development and will require the Board to decide contested evidence. That in no way implies that FCIC cannot ultimately prevail on the merits but it does support denial of the motion at this time.

DECISION OF MAJORITY TO GRANT SUMMARY JUDGMENT ON OTHER BASIS

As a threshold matter, I point out that the opinions of my colleagues, in their respective grantings of summary judgment, are not based upon the theory and argument put forth by FCIC in presenting this motion. Further, the decisions of my colleagues do not in my view fully reflect the arguments put forth by the Appellant. While I recognize that there is clear authority for a tribunal to look at matters other than that raised by the parties, I believe that a tribunal must be careful in that regard. That is particularly the case where the new theories being relied on by the tribunal do not rest on purely legal basis and involve some weighing of facts and interpretation of clauses, regulation and statute. That is particularly the case here, where it is clear from FCIC's motion that interpretations have evolved through course of dealing and thus, pure reliance on language (without a full understanding of its history and context) may not be appropriate. Consequently, in this case, I believe the Board goes too far in deciding this motion on a basis other than the limited basis put forth by FCIC.

Where in a summary judgment motion, such as this, the Board moves into matters which involve some factual determinations, the Board deprives both parties of their right to address and clarify various matters. Appellant was presented with a motion from the Government which identified certain facts as not disputed and which addressed certain legal issues. To the extent the Board moves outside of those facts and into new legal theories, as I find is the case here, the Board runs the risk of prejudicing the non-moving party by not allowing it to factually develop its response. The object of summary judgment is not to throw the entire case up against the wall and make the non-moving party defend on every potential issue, whether or not raised by the moving party. Rather, summary judgment should be used to focus on specific and definable issues which require little, if any, factual development or controversy, and where disposition essentially rests on a legal basis.

Judge Vergilio at pages 2 and 8 of his opinion summarizes why he grants the motion. He concludes that summary judgment is justified because Government actions did not violate the SRA and/or the

insurance company provided insurance and dealt with FCIC as if the changes were fully applicable. The second "or" basis alternative for granting summary judgment appears to be that even if the change was made after the change date and even if the premiums may not have been properly adjusted, Appellant loses as a matter of law because Appellant proceeded with the contract and accepted the changed premiums and did not dispute FCIC's actions. I disagree that the record before the Board allows the Board to grant summary judgment on any of the bases relied on by my colleague.

Judge Vergilio concludes that the insurance company has not demonstrated that 7 U.S.C. § 1508 permits Appellant to directly challenge premium rates. He further finds that the adjustment of rates affects the direct interest of the Government. He then concludes that the "parties" have not addressed whether the Government has waived its sovereign immunity to permit a challenge to the rates, which are incorporated into the SRA.

I do not find any of the above to be an adequate basis for granting summary judgment. This appeal is not about a challenge to 7 U.S.C. § 1506 or § 1508, nor is it about sovereign immunity. The statute dealing with soundness of rates, is simply a statement as to the overall policy which FCIC is to attempt to achieve for its program. On the evidence before the Board, I do not see that statutory policy, as creating a bar to a breach claim even if the "soundness" applies to the overall program and I am not convinced as to what the legislative history holds. To find that the statute provides a bar, would essentially let the Government increase with total immunity, one contractor's risk a hundred or even thousand fold, as long as the overall program ratio met the statutory standards. I do not find that reasonable and cannot conclude that compliance with the ratio serves as a bar. Such a result would ignore how much of a disproportionate effect a change in prevented planting risk might have on an individual insurer or even particular crop category.

Moreover, in framing its motion as it did and in paying adjusted premiums in 1995 due to breach, FCIC clearly shows that it does not see 7 U.S.C. § 1508 as a barrier which negates consideration. What is relevant to this appeal is that, as conceded by FCIC, an element of avoiding breach is the proper adjustment of the premiums. That is one of FCIC's tests. I see no legal authority or basis which bars Appellant from proving that FCIC did not properly adjust the rates. To the extent determining the adequacy of the changed rates for 1996 involves examining compliance with 7 U.S.C. § 1508, that may be relevant, but in my view it is not at this stage dispositive.

As set forth above, the Appellant presented significant evidence as to where it believes Appellant failed to properly adjust rates and follow 7 U.S.C. § 1508. The Appellant has raised legal and factual questions as to the nature of FCIC's acts in implementing the statute and FCIC's obligation not to hinder or make more difficult Appellant's performance. The question here is not FCIC's right to make premium adjustments but rather whether in making those adjustments, FCIC complied with the law, and whether and to what extent the rates, as adjusted, properly compensated the Appellant, again taking into account the risk-sharing nature of this contract and the added risk.

Judge Vergilio also engages in statutory interpretation and the interplay of 7 U.S.C. § 1508 and § 1506. He concludes that all FCIC needs to do to meet its obligation as to properly fixing rates is for FCIC to improve the actuarial soundness of the program and if FCIC has done that then it has

met its contract obligations. Again this position is contrary to what FCIC has said all along. FCIC in its brief and in depositions has stated that it has an obligation to use actuarially sound rates. The Board is putting forth a different standard, one not argued by the parties. The Board is engaging in fact finding and interpretation without an adequate record before it. I am not prepared to make the legal conclusion, as does my colleague that all FCIC has to do to meet its obligation as to premiums in this case is to have adjusted the rates so it would improve the actuarial soundness. Finally, even if the obligation were improvement as Judge Vergilio finds, then we still would have to decide what constituted sufficient improvement.

Another basis found by Judge Vergilio is that Appellant cannot prevail because it failed to timely appeal. Here he seems to say that in order to pursue its claim, Appellant had to protest the FCIC action within 45 days of the rule making, the premium losses or other FCIC actions. This basis attempts to interpret the regulation at 7 C.F.R. § 400.169(a) which states in pertinent part:

> (a) If the company believes the Corporation has taken an action that is not in accordance with the provisions of the Standard Reinsurance Agreement or any reinsurance agreement with FCIC, except compliance issues, it may within 45 days after receipt of such determination, request, in writing, the Director of Insurance Services to make a final administrative determination addressing the disputed issue. The Director of Insurance Services will render the final administrative determination of the Corporation with respect to applicable issues.

I strongly disagree with his conclusion that the above provision justifies granting summary judgment. First, FCIC has not made this argument, which again reflects that it does not see any timeliness problem with the appeal. Second, his interpretation ignores the requirement that the 45 days are to run after "receipt of such determination." The use of the word "determination,"although not defined in the regulation, clearly contemplates a specific documentary notice to the contractor from an official authorized to take the action. Implicitly, to trigger the 45-day response time, the notice must either directly or constructively identify the document being received by Appellant, as a determination requiring a 45-day response.

To apply the regulation any differently would first substitute the Board's judgment for how the parties have heretofore appeared to apply the regulation. Again, I point out that FCIC has not argued the broad reading of the regulation which has been put forth by my colleague. Further, it would leave the matter of what is a determination (so as to trigger the 45 days) so vague, as to make it almost impossible to administer. Finally, to apply Judge Vergilio's reading would require a contractor to initiate requests for determinations every time anything was done that might potentially be an action that the contractor considers could be a violation of the contract. That type of open-ended reading is simply not logical nor what the regulation contemplates.

Accordingly, for purposes of being barred under 7 C.F.R. § 400.169, I read the regulation to implicitly require that there is either a written determination by FCIC which is either specifically identified as a "determination" or FCIC must show that the reinsurer knew or should have known that the relied on action put forward by FCIC as a determination was a "determination" under the regulation and was a "determination" which triggered a 45-day response. To allow Judge Vergilio's

conclusion to stand would open up an administrative nightmare of stealth determinations. To read the regulation as I do, simply provides certainty and order, which is also reflected in how the parties have applied the regulation in the past. To rule as does Judge Vergilio, has this Board provided an interpretation which is inconsistent with how FCIC has treated the application of the 45 days.

Judge Vergilio sets out a third reason for granting the motion. He concludes that if the claim were timely, then it is still not valid as the changes were outside of the SRA and thus not binding. He states that even if the changes were untimely, the changes were outside of the SRA and then by the terms of the SRA, the insurance company was not obligated to extend insurance and FCIC was not obligated to provide premium subsidy. As I understand his reasoning, the Appellant could have opted to walk away and since it did not, it now cannot claim monetary relief.

A party is not obligated to walk away from a contract in order to retain a claim. Among elements needed for continued performance to be relevant as a bar, there has to be prejudice shown to the breaching party. W. R. Tonsgard Logging, Inc., AGBCA No. 89-137-1, 94-2 BCA ¶ 26,925. See Northern Helex Co. v. United States, 455 F.2d 546, 197 Ct. Cl. 118 (1972); Scott Timber Co., IBCA No. 3771-97, 99-1 BCA ¶ 30,184. There may be circumstances where failure to walk or lack of notice may be a defense to a claim, and that may ultimately be proven here; however, that requires development of facts and requires the Board to engage in factual analysis beyond what is appropriate for resolving summary judgment. To conclude that Appellant loses because it did what FCIC required and demanded, instead of taking the risk of walking away, has no legal foundation. Second, it by necessity presumes that if the insurance company was not legally obligated to perform and nevertheless elected to continue the contract, it waived its rights. As to that latter point, it requires an estoppel analysis, which again was not the basis of FCIC's summary judgment motion and which again presents a scenario which needs significantly more factual development before it can be resolved.

I now address the second alternative basis which Judge Vergilio set out, which was that the insurance company dealt with FCIC as if the changes were applicable. To me this is an estoppel or laches basis and not appropriate for summary judgment in this case. Judge Vergilio concludes that Appellant is bound to the changes as a matter of law because the Appellant had the opportunity to change its risk before the contract became binding and did not protest until long after the losses had been incurred.

An important element of that segment of the decision is the conclusion of both majority judges that the Appellant did not protest the imposition of the changes in a timely manner. It is not clear to me whether in either of my colleagues' view, a proven protest by Appellant would have changed their respective determinations. However, I must point out that I strongly disagree with their factual conclusion. I find that the Appellant has clearly met its burden to raise a material factual dispute over whether Appellant protested. For my colleagues to find otherwise, is in my view, a much too narrow application of the principles on how to treat evidence for summary judgment.

The Appellant states in an affidavit from its vice president the following:

> 13. On several occasions, I and others at my direction, requested that the FCIC allow American Growers Insurance Company to amend its 1996 plan of operation due to the FCIC's 1996 prevented planting changes. The FCIC refused these requests.

Both my colleagues find that the affidavit is insufficient to raise a factual dispute. Both support their view in large measure by citing to the fact that the record contains several documents which deal with modifications or changes to the SRA and/or plan of operation and those changes occurred during the time frame after November 30, 1995, and continuing into April 1996. Both basically conclude that those documents negate the statement in the affidavit or that alternatively, the presence of the documents in the record requires that Appellant's affidavit be more specific then it is.

Appellant does not have to prove its case on summary judgment. It only has to show that there is a genuine dispute over a material fact. Mingus Constructors, Inc. v. United States, 812 F.2d 1387 (Fed. Cir. 1987). A material fact is one which will make a difference in the outcome of the case, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1981). Appellant has done that by identifying what it did, "it protested the refusal to let it change its plan of operation" and by identifying who did it, "the vice president of Appellant." It must be presumed that the vice president will be able to give specific dates and circumstances. That detail is not required for meeting the standard of establishing the existence of a material factual dispute. Moreover, while the documents cited as being inconsistent with the Appellant's affidavit, deal with changes to the SRA and plan of operation, the Board does not have details as to the dollar impact, if any; why those changes were made or required; and why Appellant chose to deal with them as he did. They further do not deal with prevented planting. Further, none appear to have been protested and denied, which creates a very different factual scenario. Finally, none of the documents specifically address the protest claimed by Appellant in his affidavit and thus what the majority is doing is drawing inferences in favor of FCIC from the documents. That is not the proper legal approach.

From a legal standpoint my colleague rejects the affidavit as insufficient on the basis that it is a mere allegation and thus not adequate under Federal Rule of Civil Procedure 56(c). That rule states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party pleading, but the adverse party's response, by affidavits or otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

I strongly disagree that the affidavit does not meet the Rule 56(b) standard. First, under Rule 56(b) there is no requirement that a defending party (in this case FCIC), filing a motion for summary judgment, must provide supporting affidavits. Thus, there was no legal requirement here that FCIC provide affidavits and other evidence in order to make its motion. This of course reflects the fact that some cases are decided on pure law. That said, however, while one need not provide affidavits to support its position, a party cannot prove a critical affirmative fact without an affidavit or other cite to evidence. In this case, the only allegation by FCIC as to Appellant's alleged failure to request a modification to its Plan of Operation is the bald statement, at page 27 of the FCIC brief, where

FCIC states, without citation to the record or affidavit, that "AGIC never requested a revision of its Plan of Operation to mitigate any perceived risk associated with the 1996 prevented planting changes." While I realize that FCIC is put in a difficult position on summary judgment of "establishing" an absence of protest, that does not change the fact that this is a summary judgment motion. On such a motion the law requires that we take Appellant's affidavit and apply to it all reasonable inferences in Appellant's favor. We do not attempt to apply favorable inferences to FCIC's allegations. United States v. Diebold, 369 U.S. 654 (1962). The Board's task is to not weigh competing evidence but rather to simply determine whether there exists a genuine disputed issue of material fact that is suitable for resolution at trial. Alvarez & Associates Construction Co., ASBCA No. 49341, 96-2 BCA ¶ 28,476, EFG Associates, Inc., ASBCA No. 50546, 99-1 B.C.A. ¶ 30,231. Further, it is important to recognize that FCIC does not in its brief argue the circumstances or impact of the letters now relied on by my colleagues. It is the Board which raises the contention that the letters are contradictory documents, which must be overcome by a stronger affidavit than that provided. Once again, I find that my colleagues have expanded the scope and fact finding on this motion, beyond what is legally permissible.

Further, in the explanatory note of Rule 56(c) of the Federal Rules of Evidence, the commentators note that the last sentences in the above-quoted portion of the rule (the language dealing with mere denials and averments) were added to overcome a line of cases which had impaired the utility of the summary judgment device. In describing what had raised this concern, the commentator references the scenario where the moving party has supported its motion with affidavits or other evidence, sufficient to show that there is no issue as to a material fact, and the adverse party in opposing, does not produce any or not enough evidentiary matter but instead rests on averments in pleading. In such instances the Third Circuit had taken the view that summary judgment must be denied if the averments were well pleaded, not suppositions, conclusory or ultimate. The change to Rule 56(c) was to make clear that a denial in pleadings was not adequate.

What Appellant has presented here is not merely a denial or avement in a pleading, but rather Appellant presents a statement of fact, by a corporate official of the Appellant who specifically states that he and others made protests. While Appellant has not identified dates and circumstances, this is far from a bald denial. A bald denial would be a statement in the affidavit that the Government is incorrect. There is more here. What we have is identification of the person making the statement and the nature of the statement he made. That is sufficient under the law.

Turning to another portion of the decision of Judge Vergilio, he finds it important that the plan of operation was still in effect at the time of the changes and Appellant could have changed the plan. I find the record very unclear as to the dates that the plan of operation and the contract came into binding effect and what if anything Appellant could do or was entitled to do as to modifying the plan of operation. The record requires amplification or otherwise we proceed on supposition and speculation. Although I am still unclear on the record as to when the plan of operation was approved, FCIC in its brief in support of its motion states at page 26 that "There is no question that the November 30 contract change date is after the July 1 start of the 1996 reinsurance year and after the date that AGIC submitted its plan of operations and after the date that plan was approved." Thus for purposes of summary judgment, to the extent that it is important when the change was made (in relation to the plan of operation), FCIC is saying in its brief that the change occurred after approval

of the plan. Further, regardless of whether the plan was approved or not, at the time of the changes, the question still remains as to what extent Appellant could modify that plan at the time and what was the legal effect of a denial to modify by FCIC.

Matters relating to whether and how Appellant protested the changes are all matters that go to the legal doctrines of estoppel or laches. Laches is essentially a matter of pure prejudice. The facts necessary for laches are not and have not been presented to this Board.

As to estoppel, again any decision on an estoppel basis is premature. That is the case even if my colleagues are correct as to their application of Appellant's affidavit. In order to prove estoppel, certain factual predicates must be met: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe that it is so intended; (3) the latter must be ignorant of the true facts; and (4) the latter must rely on the former's conduct to its injury. Emeco Indus., Inc. v. United States, 485 F.2d 652, 202 Ct. Cl. 1006 (1973). The burden of establishing estoppel is on the party using it. Here, FCIC in its motion made no serious argument that it should be granted summary judgment because of estoppel. Even more important, FCIC has not provided evidence as to the needed elements. Again, this is a Board-created issue and is simply not ripe for summary judgment. To make a legal finding on estoppel or one of the companion theories, the Board has to engage in various factual determinations, which this record currently cannot support on a summary judgment basis. Finally, as a matter of law, this time in the context of waiver, the Interior Board in Scott Timber Co., IBCA No. 3771-97, 99-1 B.A. ¶ 30,184, citing Cities Services Helix, Inc. v. United States, 543 F.2d 1306, 1313-14 (Ct. Cl. 1976), noted that if a party injured by breach elects to continue with the contract, it can retain its damage claim. Thus, even where there is no objection, a party as a pure matter of law does not necessarily lose its damage claim. Here, however, I find that Appellant has adequately established that it protested.

Finally on this issue, Judge Vergilio concludes as a matter of law that since the insurance company assented to provide insurance on the basis of established premiums, it cannot now claim relief. That, again, goes to the factual finding that Appellant posed no objection and further presumes that there is a legal obligation to object.

Among the various bases set out by Appellant as breach was its claim that FCIC breached the 1996 Reinsurance Agreement because it failed to set actuarially sound premium rates for the 1996 prevented planting changes effective for the spring crops as required by 7 U.S.C. § 1508 (d)(1). For purposes of this Board's jurisdiction, this dispute is a contract matter and not a dispute over FCIC's regulatory power and responsibilities.

The rates that were set for 1996 for "prevented planting" are relevant to this appeal because part of the determination of compensable breach is whether and to what extent Appellant was injured. I repeat here that this is a risk-sharing contract and as such, determination of whether a change is outside the scope of the contract and questions as to the propriety of rates must be considered in that context. One element of determining if there was a material change is to look at the adjustment to the premium rates which FCIC made to compensate Appellant for the changes. What is of significance in this case is whether FCIC's actions in making those adjustments were reasonable and

done with due care toward the end of fairly compensating Appellant; and, was the sum that Appellant received adequate compensation within the contemplation of the contract. It is important to recognize that FCIC does not contend as a matter of law in this case that it has the right not to fix the rate to reflect actuarial soundness. Rather, it says that it has the obligation and indeed complied. I do not see complete compliance or failure to comply with 7 U.S.C. § 1508 as being necessarily dispositive of this appeal. Rather, it is only one element which is part of determining the reasonableness of the rates. I do not see that this statute gives FCIC carte blanche authority to change the rates however FCIC desires, as long as the rate meets an overall 1.1 ratio. My position is supported by the arguments of FCIC, the party most familiar (along with Appellant) in operation of such contracts and application of statutes. FCIC has not argued the statute establishes a bar. Rather, FCIC says that it is required to set its rates in an actuarially sound manner and that if it fails to do so, then that could constitute a breach. (FF 40; Appellant's Brief). To support its position, in its motion, FCIC provided in detail the various steps, considerations and judgments that it conducted to meet its obligations as to actuarial soundness, including what data it looked at to determine the expected additional outlay and then estimated the premiums that would be needed to cover those expected outlays. It also addressed the role of Economic Research Service (ERS), another segment of the Department, which conducted a cost benefit analysis, and addressed other matters such as taking into account the risk of moral hazard. FCIC says, "these are material facts and, as shown above, FCIC can meet its burden demonstrating that no material issues of fact exist." While FCIC may be right on the facts, I cannot conclude that there are no material disputes, particularly given Appellant's detailed challenge in its brief.

Appellant spends approximately 15 pages detailing the history and analysis of premium setting for the 1996 SRA. Among additional facts beyond those above are statements by Mr. Driscoll, chief auditor for FCIC, commenting on a lack of credibility in FCIC prior rates, lack of formally defined criteria for credibility, and a myriad of other matters. Put bluntly, the information put forth by Appellant is such that I cannot fairly conclude on this record that if some or all the matters raised are true, that Appellant could not establish that FCIC failed to provide actuarially sound rates, even were that a dispositive issue. FCIC may be providing the proper interpretation of its statutory responsibility and certainly if there is no legal loss, then that could be determinative of the appeal. However, on this record, I cannot possibly conclude that from FCIC's overall analysis.

Finally, FCIC defends on the basis that even if there is a better rating methodology, it has the authority to make policy decisions and those decisions are to be granted deference absent showing arbitrary and capricious action on FCIC's part. It characterizes its decision to use the rating methodology as just such a protected decision. It supports this by making the argument that the Supreme Court has held that where a statutory term is ambiguous or undefined, the court construing a statute should defer to the reasonable interpretation of the term proffered by the agency. The problem here, however, is that we are looking not only at policy but also to ministerial acts and implementation. This is further complicated by the fact that the actions are taken in a contractual context. While I recognize that there is law as to deferring to an agency on policy, that does not decide this issue. Appellant can still challenge whether the policy was followed and provide evidence to determine whether what FCIC describes as policy was simply implementation. To qualify as policy, decisions must meet certain criteria and that predicate has not been established for many of the alleged FCIC wrongful acts.

As the respective briefs of the parties make clear, many matters regarding material issues of fact remain as to whether the FCIC increased the 1996 rates to account for the 1996 changes, the amount of those rates, whether those rates were actuarially sound and whether the rates were arbitrary and capricious. Under these circumstances, I cannot countenance summary judgment. Nothing is more illustrative of that than is the fact that one of the prime elements argued by FCIC as to rate making and the actuarial issue is the contention that FCIC acted in accordance with accepted custom and practice. Certainly the matter of custom and practice has significant factual elements and again is the type of issue not appropriate for resolution on summary judgment.

CONCLUSION

Taking all inferences in favor of Appellant, as this Board is required to do on a summary judgment motion, the Appellant has presented sufficient evidence to defeat FCIC's motion. The motion should be denied.

_____

HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D.C.
June 15, 2000