RURAL COMMUNITY INSURANCE COMPANY	)	**AGBCA No. 99-146-F**
and	)	
RURAL COMMUNITY INSURANCE AGENCY, INC., d/b/a RURAL COMMUNITY INSURANCE SERVICES, (1996 Prevented Planting)	)	
Appellants	)	
Representing the Appellants:	)	
Larry M. Rosenstein Daniel N. Rosenstein Levin & Rosenstein, P.C. Suite 314 1130 17th Street, N.W. Washington, D.C. 20036	)	
Representing the Government:	)	
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RULING ON BOARD=S JURISDICTION AND TIMELINESS

December 14, 1999

Before HOURY, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK, Dissenting opinion by Administrative Judge VERGILIO.

WESTBROOK, Administrative Judge.

Rural Community Insurance Company and Rural Community Insurance Agency, Inc., d/b/a Rural Community Insurance Services of Anoka, Minnesota (Appellants), filed this appeal with the Board of Contract Appeals (BCA) as a result of a February 11, 1999 Order of the United States District Court for the District of Columbia. Appellants had previously filed a Complaint in the district court. The Government responded by filing a Motion to Dismiss, or in the Alternative, for Summary Judgment on the ground that the plaintiffs had failed to exhaust their administrative remedies. The Court granted the motion ordering that the plaintiffs may proceed to file their claims directly with the United States Department of Agriculture Board of Contract Appeals (BCA or Board); and further that the Motion to Dismiss, or in the Alternative, for Summary Judgment was granted and plaintiffs= action dismissed without prejudice and with leave to reinstate within 30 days of an adverse decision by the Board of Contract Appeals. Thereafter, on February 22, 1999, the Board received the Appellants= Notice of Appeal and Complaint. Upon review of Appellants= Complaint, the Board requested that the Government=s Answer address the issues of Board jurisdiction and timeliness. The Board also asked both parties to brief those issues making reference to facts, prior judicial history, regulation and law.

The Board has jurisdiction of disputes related to Federal Crop Insurance Corporation (FCIC) Standard Reinsurance Agreements (SRAs) under 7 C.F.R. ' 400.169(d) and 7 C.F.R. part 24.

Based on the record to date, including the briefs of both parties and for the following reasons, the Board *sua sponte* dismisses the appeal without prejudice.

FINDINGS OF FACT

1. On December 12, 1995, on behalf of Rural Community Insurance Services, Appellants= counsel wrote to Kenneth Ackerman, Acting Deputy Director for Risk Management, Farm Service Agency, questioning the legality of the FCIC final rule on prevented planting for 1996 spring crops published in the Federal Register on December 7, 1995. Therein, Appellants= counsel articulated seven arguments to support its contention that the rule had been illegally implemented.[1] His letter referred to his questions on behalf of his clients as continuing. The Appeal File contains earlier correspondence providing comments on the proposed rule. (Appeal File (AF) 112-14.)

2. Appellants= counsel=s letter also stated that Appellants considered it a breach of contract for the FCIC to impose new work under the SRA without providing adequate new compensation for the new work, thereby reserving the right to challenge the legality of the 1996 final rule on prevented planting should the administration of the rule prove burdensome. In addition, the letter stated Appellants= expectation of being held harmless for any underwriting losses suffered as a result of the rule=s defect. The letter did not request a determination or a final administrative determination. Nor did it cite 7 C.F.R. ' 400.169. (AF 112-14.)

[1] For the purposes of this ruling, it is unnecessary to recite and analyze Appellants= substantive arguments.

3. By letter dated February 8, 1996,[2] Government counsel wrote Appellants= counsel in response to the December 12, 1995 letter to Mr. Ackerman. She stated that she had been asked Ato respond on Mr. Ackerman=s behalf.@ Her letter provided a response to some of the seven points raised by the letter on behalf of Appellants. The letter did not address Appellant=s SRA assertions and did not describe itself as a determination or a final agency determination. Nor did it cite 7 C.F.R. ' 400.169. (AF 115-17.)

4. Appellants= counsel wrote Mr. Ackerman again on November 15, 1996. Citing 7 U.S.C. ' 1508(j)(3), and referring to his previous arguments that the prevented planting rule had been illegally implemented, he demanded that Appellants be held harmless from all losses under the SRA resulting from the rule. The letter also contained substantive arguments that need not be recited and analyzed for the purpose of this ruling. The letter did not request a determination or a final administrative determination. Nor did it cite 7 C.F.R. ' 400.169. (AF 118-23.)

5. The FCIC did not respond to the November 15, 1996 letter.

6. On September 17, 1998, these Appellants filed suit in the United States District Court for the District of Columbia against the FCIC and Kenneth D. Ackerman (AF 124-34). Appellants filed an Amended Complaint November 16, 1998. The Amended Complaint alleged jurisdiction pursuant to 28 U.S.C. ' 1331 and 7 U.S.C. ' 1506(d). Count One of the Complaint alleged a violation of the Administrative Procedure Act (APA).[3] Count Two demanded damages for underwriting losses in the amount of $7,336,249, excess loss adjustment costs in the amount of $331,414 and reasonable attorney fees for FCIC errors and omissions pursuant to 7 U.S.C. ' 1508(j)(3).[4] (AF 135-44.)

7. The Government filed a Motion to Dismiss, or in the Alternative, for Summary Judgment alleging a statement of material facts as to which there was no genuine issue. These were (1)

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[2] The stamp date on the copies in the Appeal File and attached to the Government=s brief are blurred with only 996 legible. The date February 8, 1996, is taken from the text of the Government=s brief.

[3] Appellants made various allegations relating to the length of the comment period, availability of actuarial and other data, and retroactivity of the final rule.

[4] Title 7 U.S.C. ' 1508(j)(3) requires FCIC to indemnify approved insurance providers including costs and attorney fees incurred due to errors and omissions on the part of FCIC.

plaintiffs were seeking restitution or money damages; (2) the Federal Crop Insurance Act (FCIA) includes a provision for claim of losses against the FCIC; (3) the FCIA requires exhaustion of administrative remedies; (4) plaintiffs failed to seek reconsideration of the FCIC=s decision to deny plaintiff=s request to be held harmless; (5) the BCA had not notified the Office of Insurance Services that plaintiffs had appealed FCIC=s decision; and (6) the SRA provides for the payment of specific losses and amounts of losses to plaintiffs. (AF 147-48.)

8. On February 1, 1999, the district court held a hearing on the motion. Thereafter, the court issued the February 11, 1999 Order that the plaintiffs may proceed to file their claims directly to the BCA; and that the Government=s motion was granted and the plaintiffs= action dismissed without prejudice and with leave to reinstate within 30 days either because of an adverse decision by the BCA, or a *sua sponte* dismissal by the BCA, not giving plaintiff=s claim due consideration.

9. Title 7 C.F.R. ' 400.169 reads as follows:

> (a) If the company believes that 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 the applicable issues.
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> (b) If the company believes that the Corporation=s compliance review findings are not in accordance with the applicable laws, regulations, custom or practice of the insurance industry, or FCIC approved policy and procedure, it may within 45 days after receipt of such determination, request, in writing, the Director of Compliance to make a final administrative determination addressing the disputed issue. The Director of Compliance will render the final administrative determination of the Corporation with respect to these issues.
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> (c) A company may also request reconsideration by the Director of Insurance Services of a decision of the Corporation rendered under any Corporation bulletin or directive which bulletin or directive does not affect, interpret, explain, or restrict the terms of the reinsurance agreement. The company, if it disputes the Corporation=s determination, must request a reconsideration of that determination in writing, within 45 days of the receipt of the determination. The determinations of the Director will be final and binding on the company. Such determinations will not be appealable to the Board of Contract Appeals.
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> (d) Appealable final administrative determinations of the Corporation under ' 400.169 (a) or (b) may be appealed to the Board of Contract Appeals in accordance with the provisions of part 24 of title 7, subtitle A, of the Code of Federal Regulations, 7 CFR part 24.

10. Section V, paragraph R., Disputes, of the SRA states that if the company disputes action taken by the FCIC under any provision of the SRA, the company may appeal to FCIC in accordance with the provisions of 7 C.F.R. ' 400.169.

11. Title 7 C.F.R. ' 24.4(b) grants the Board jurisdiction of appeals of final administrative determinations of the FCIC pertaining to standard reinsurance agreements under 7 C.F.R. ' 400.169(d).

DISCUSSION

Upon review of Appellants= Complaint, the Board *sua sponte* raised the issues of timeliness and jurisdiction. The parties have briefed the issues.

CONTENTIONS OF THE PARTIES

Timeliness

On the issue of timeliness, Appellants aver that the FCIA does not contain a statute of limitations for suits not involving adjustment and payment of claims for losses. Appellants further argue that the 1-year limitation on adjustment and payment for claims of losses specified at 7 U.S.C. ' 1508 (j) is by its own terms limited to the adjustment and payment for claims for indemnities on an insured farm and is inapplicable to the claim here. Further, Appellants argue that FCIC regulations, 7 C.F.R. ' ' 400.169(d) and 24.4(b) contain no limitation on filing appeals with the BCA. Neither, contend Appellants, did the 1996 SRA. Thus, in Appellants= view, the only limitation on this action is the 6-year statute of limitations in 31 U.S.C. ' 3702(b).

The Government asserts that the statute of limitations applicable to administrative appeals are at 7 C.F.R. ' 400.169 and 7 C.F.R. part 24. Section 400.169(a) states that if a reinsured company believes that the FCIC has taken an action not in accordance with the provisions of the SRA it may, within 45 days after receipt of such determination in writing, request in writing a final administrative determination from the Director of Insurance Services. Section 400.169(d) states that the reinsured company may appeal a final administrative determination in accordance which 7 C.F.R. part 24. Title 7, C.F.R. ' 24.5 provides for an appeal to the BCA within 90 days. The Government characterizes the February 8, 1996 letter as a determination, and cites the regulation specifying that a request for a final administrative determination is to be addressed to the Director of Insurance Services. Instead, argues the Government, Appellants addressed their November 15, 1996 letter to the Manager of FCIC. Even if the November 16, 1996 letter could be considered a request for a final administrative determination, the Government contends, it was not requested within the 45 days prescribed by 7 C.F.R. ' 400.169(a). The FCIC, says the Government, was not required to respond. Therefore, Appellants= failure to timely request a final administrative determination under 7 C.F.R. ' 400.169 divests the Board of jurisdiction to hear the case.

Jurisdiction

Regarding jurisdiction, Appellants simply state that the district court did not address the nature of their cause of action, but deferred to the FCIC=s interpretation of its regulation, i.e., that the plaintiffs there were required to exhaust administrative remedies by first appealing to the BCA.

The Government contends that Appellants= standing arises only as a result of its contractual relationship with FCIC and that the underwriting losses allegedly suffered arise under the SRA. Changes to a crop insurance policy can affect the reinsurance companies= underwriting gains and losses and improper changes constitute a breach of the SRA. The Government alleges that while other allegations in the Complaint before the court are directed to the rulemaking process, they nonetheless affect Appellants through the contractual relationship under the SRA and, if proven, would be breaches of the SRA subject to redress at the BCA.

Parties= Responses

In response to the Government, Appellants deny the applicability of 7 C.F.R. ' 400.169. Appellants do not characterize their Complaint as having alleged that the FCIC had taken an action not in accordance with the SRA. Appellants also argue that FCIC=s February 8, 1996 letter did not render a determination to trigger 7 C.F.R. ' 400.169(a) and (d). Appellants also contend that the FCIC=s contention that Appellants= action is untimely is an afterthought. Moreover, say Appellants, the Government acknowledges that the challenge to the administration of a rule is something different from a challenge to the rulemaking process.

The Government, in its reply, argues that the February 8, 1996 letter, while written and signed by counsel, was nonetheless a response from the FCIC. The Government asserts that it was unnecessary for that letter to cite the appeal provisions in 7 C.F.R. ' 400.169 since they are directly referenced in section V.R. of the SRA. The Government concedes that prior to the Board=s request to brief the timeliness issue, it had not considered whether the Board might lack jurisdiction based on timeliness. Its effort to brief that issue led to an examination of the documents and the presentation of applicable legal arguments. The Government reiterated its argument that to the extent that a rule is incorporated into the SRA, the process by which that rule is promulgated affects the SRA and is therefore within the subject matter jurisdiction of the Board. The Government concedes that challenges to the rule-making process under the APA are properly brought in the district court, but that the remedy at the court is only to set aside the rule, not to impose monetary damages that Appellant sought in its district court action. Those damages, according to the Government, are recoverable only under the SRA. The Government concludes that if the Board finds the appeal timely filed, the Board has subject matter jurisdiction to decide the case.

ANALYSIS

The regulations grant the Board jurisdiction to decide appeals of final agency determinations (Findings of Fact (FF) 9-11). Absent a final agency determination, or the deemed denial of a request for a final agency determination, the Board has no jurisdiction. The record contains three letters (FF 1-4) that the Board must examine to determine whether FCIC issued a final agency determination or

whether there is a deemed denial of a request for a final agency determination. Either of those events would satisfy the necessary prerequisite to Board jurisdiction.[5]

The first letter is Appellants= counsel=s letter of December 12, 1995, to Kenneth Ackerman, Acting Deputy Director for Risk Management, in which Appellants= counsel questioned the legality of the 1996 prevented planting rule and stated the expectation of his client to be held harmless for any losses suffered as a result of the defect in the rule. The letter did not request a determination or final agency determination. (FF 1-2.) The FCIC responded February 8, 1996, in a letter by Government counsel (FF 3). She responded to some of the points raised in the December 12, 1995 letter. On its face, the letter did not purport to be a determination of FCIC or a final agency determination. The third letter was written by Appellants= counsel to Mr. Ackerman, Acting Deputy Director of Risk Management, on November 15, 1996. Again he expressed his clients= views that the 1996 prevented planting regulation was promulgated in an unlawful manner. Again he requested that his clients be indemnified and held harmless from the effects of the regulation. This letter did not request a final agency determination and was not presented as an action contrary to the provisions of the SRA within the meaning of 7 C.F.R. ' 400.169(a). (FF 4.) FCIC did not respond to this letter.

The Government argues that its counsel=s letter constituted a Adetermination@ requiring Appellant to seek a final agency determination within 45 days. The Government also contends that Appellants= November 15, 1996 letter was both untimely and addressed to the wrong officer. The Government=s argument is not persuasive. First, Appellants= counsel=s letter of December 12, 1995, did not ask for either a determination or a final agency determination. Nor did FCIC=s response refer to itself as such. While Government counsel stated in the February 8, 1996 letter that she had been asked to respond on Mr. Ackerman=s behalf, she did not inform the recipient or any future reader of the letter that she was actually making a final determination under 7 C.F.R. ' 400.169(a) (FF 3).

On the issue of timeliness, we find that there has been neither a request for final administrative determination nor a final agency determination. The Board does not currently have jurisdiction for that reason.

The question remains whether there is subject matter jurisdiction which would allow the issues that are the subject of the district court action to be litigated in this forum. Our jurisdiction is over FCIC actions that a reinsurance company believes are not in accordance with the provision of the SRA or any reinsurance agreement with FCIC. Appellants dispute the failure of FCIC to reimburse it for

[5] While the Board also derives jurisdiction from the Contract Disputes Act of 1978, as amended, Appellants here do not make breach of contract allegations pursuant to that statute.

indemnifications paid to producers and costs incurred in excess of those it believes would have been payable had the 1996 rule not been implemented. The parties would not be in the position of quarreling over the payability of such amounts absent the contractual relationship arising out of the SRA. That the rule in question could affect the terms of the SRA is evident. Appellants may ask for a final agency determination that they should be reimbursed for indemnities and costs they would not have incurred but for the complained of FCIC rulemaking as it affected the SRA. They may then appeal either that final agency determination or FCIC=s failure to issue one.

RULING

The appeal is dismissed without prejudice.

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ANNE W. WESTBROOK
Administrative Judge

Concurring:

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EDWARD HOURY
Administrative Judge

VERGILIO, Administrative Judge, dissenting.

I respectfully dissent from the decision of the majority. The existing record does not support the conclusion of the majority to grant the motion it raises. In December 1995, Rural Community Insurance Services (RCIS) asserted that a regulation constitutes a breach of its Standard Reinsurance Agreement (SRA) with the Federal Crop Insurance Corporation (FCIC). Thereafter, RCIS requested the FCIC to provide indemnification on 1996 and 1997 crops relating to prevented planting. The FCIC did not provide a written response to either assertion, prior to a district court action, at which time the FCIC agreed to allow plaintiffs to proceed to file their claims directly to this Board. This FCIC agreement and refusal to indemnify creates an appealable final administrative determination under regulation, 7 C.F.R. ' ' 400.169(a), (d), which authorizes the Board to resolve the appeal. A focused, amended complaint and answer will clarify the issues and positions of the parties. I would retain this appeal and permit the parties to develop the record.

FINDINGS OF FACT

1. Kenneth D. Ackerman, as Manager, FCIC, had published in the Federal Register on December 7, 1995, a final rule. The rule is in the form of insurance regulations dealing with prevented planting coverage. The regulations specify an effective date of November 30, 1995. 60 Fed. Reg. 62,710-30 (1995).

2. By letter dated December 12, 1995, addressed to Mr. Ackerman (as Acting Deputy Director for Risk Management), RCIS states that it continues to question the legality of the final rule. Moreover, the insurance company states:

> Please be advised that RCIS also considers it a breach of contract for the FCIC to impose new work under the Standard Reinsurance Agreement without providing adequate, new compensation for that new work. Accordingly, RCIS reserves the right to challenge the legality of the FCIC=s 1996 Final Rule on prevented planting if the administration of that rule proves burdensome.

3. By letter dated February 8, 1996, the Government responded to those portions of the RCIS letter which questioned the legality of the final rule. The Government=s response does not address the assertion that the FCIC has breached the SRA.

4. By letter dated November 15, 1996, to Mr. Ackerman, RCIS requests FCIC to Aprovide RCIS with indemnification, including costs and reasonable attorney fees; specifically, we request the FCIC to assume all premiums and all losses arising from prevented planting claims on 1996 and 1997 crops and to calculate RCIS= ultimate net loss after the deduction of those premiums and losses.@ The FCIC did not respond to the letter.

5. Two plaintiffs, Rural Community Insurance Company (RCIC) and Rural Community Insurance Agency, Inc., d/b/a RCIS, filed an action in district court against the FCIC and Mr. Ackerman. In the complaint and the amended complaint before the district court, RCIC maintains that it is entitled to restitution of $7,336,249, described as underwriting losses it would not have suffered but for the FCIC=s illegal rule. The other plaintiff in the district court case maintains that it is entitled to $331,414, described as loss adjustment costs that it would not have incurred but for the FCIC=s illegal rule and that were not reimbursed.

6. The district court order of February 10, 1999, specifies that at the time of the hearing on the Government=s motion, Adefendants agreed to allow plaintiffs to proceed to file their claims directly to the United States Department of Agriculture Board of Contract Appeals and to give fair consideration and treatment to plaintiffs= claims before the board.@ Rural Community Insurance Co. v. Federal Crop Insurance Corp., Civ. Action No. 98-2215(SS) (D.D.C. Feb. 10, 1999).

7. On February 22, 1999, the Board received the underlying notice of appeal and complaint from RCIC and Rural Community Insurance Agency, Inc. d/b/a RCIS, as appellants. The appellants

maintain entitlement to the sums specified before the district court because the FCIC breached the terms and conditions of the SRA.

DISCUSSION

In December 1995, by letter, RCIS asserted breach of contract by the FCIC relating to its SRA. In November 1996, in writing, RCIS sought from FCIC indemnification relating to the 1996 and 1997 crops and prevented planting. FCIC did not provide a written response to either submission.

In the district court action, the FCIC agreed to allow both plaintiffs to proceed to file their claims directly to this Board. At that time, the FCIC had before it claims for specific dollar amounts from each plaintiff. The FCIC did not agree to pay all, or any portion, of the amounts sought. The agreement to permit a direct action to this Board and the refusal to pay creates an appealable final administrative determination within the meaning of the regulation, 7 C.F.R. ' ' 400.169(a), (d). Thus, I would permit the parties to develop the record in this appeal.

The existing record is not complete. For example, detail is lacking regarding the SRAs at issue. Also, the existing record lacks detail underlying the sum each insurance company seeks to recover. Regarding these amounts, it is unclear if the FCIC has already issued determinations, which have become final, on individual policies issued under the SRAs.

Were this case to continue, as an initial step, I would require each plaintiff to detail the factual and legal bases in support of its claim.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D. C.
December 14, 1999