RAIN AND HAIL INSURANCE SERVICE, INC., (1996 Prevented Planting)	)	**AGBCA No. 97-182-F**
Appellant	)	
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RULING ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

December 10, 2001

Before HOURY, WESTBROOK and POLLACK, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK. **Separate Dissenting Opinion by Administrative Judge HOURY**.

This appeal arises out of a Standard Reinsurance Agreement (SRA) between Rain and Hail Insurance Service (RHIS or Appellant) and the U. S. Department of Agriculture, Federal Crop Insurance Corporation (FCIC). The appeal concerns a dispute involving prevented planting for the 1996 reinsurance year (July 1, 1995 through June 30, 1996). The SRA represents a cooperative financial assistance agreement to deliver multiple peril crop insurance policies (MPCI). The appeal involves RHIS's claimed reimbursement from FCIC for its prevented planting indemnity payments for fiscal year 1996 (July 1, 1995 through June 30, 1996) totaling $12,810,014 on 5,066 claims and premiums of $5,111,175; and on its administrative, processing, adjusting, investigating, training, servicing, and operational costs and expenses incurred thereon.

Prevented planting first appeared in FCIC regulations during the 1980s. It provided coverage when a farmer was unable to plant seed in the ground by the final planting date due to adverse weather conditions beyond the farmer's control. At the time prevented planting coverage first appeared, FCIC offered it to farmers as a separate and optional endorsement to its standard MPCI policies. Prior to the advent of prevented planting, the FCIC general crop insurance regulations only insured crops planted on or before the "final planting date." The availability of prevented planting in conjunction with late planting coverage provided farmers relief from the final planting date rules. Under late planting coverage, FCIC agreed to insure crops planted within a limited time after the final planting date but at reduced production guarantees. (Exhibit (Ex.) AA, (Transcript (Tr.) 101-02.)

In this appeal, Appellant charges that FCIC breached the SRA by changing the prevented planting provisions after the established change date for the contract, that FCIC's adjustment in premiums was inadequate compensation, that FCIC acted in bad faith in its calculation of the premiums, and that the changes made to the 1995 SRA which involved changes to prevented planting were equally applicable to the 1996 crop year SRA and therefore constituted a course of dealing.

FCIC denied Appellant's claim by means of a final determination dated April 11, 1997. Appellant filed a timely appeal on July 11, 1997. The Board has jurisdiction under 7 CFR 24.4(b) and 400.169(d). The existing record contains the appeal file, including supplements, letters of explanation, and various briefs.

On February 1, 1998, FCIC filed a Motion for Summary Judgment in which it asserted that summary judgment was warranted because: (1) its compensation to RHIS in 1995 did not constitute a course of dealings, (2) it made its 1996 prevented planting changes before the contract change date, consistent with custom and practice, (3) its 1996 prevented planting changes were not unilateral, (4) it compensated RHIS by adjusting its rates accordingly, and (5) it acted in good faith. FCIC made no other arguments in its initial motion. Appellant responded and thereafter both parties filed additional letters and supplements to the record. In September 2000, the Board gave each party the opportunity to file a further brief, in order to address this Board's 2-to-1 decision in American Growers Insurance Co., AGBCA No. 98-200-F, 00-2 BCA ¶ 30,980, *recon.denied*, AGBCA No. 2000-160-R, 00-2 BCA ¶ 31,107. That appeal involved similar factual and legal issues. In its supplemental brief, FCIC argued that the Board must grant the Motion on the basis of collateral estoppel or stare decisis, citing the American Growers opinions.

In this appeal, FCIC made a change in the prevented planting provisions of the 1996 SRA and adjusted the premiums in an attempt to compensate Appellant for that change. Appellant charges that FCIC made the changes after RHIS had already been "locked in" or committed to certain risk allocations, could not mitigate and the compensation included in the premium adjustment was inadequate to make it whole. While a number of other issues have been introduced by the parties, and other issues have been raised because of the decision in American Growers (particularly the effect and meaning of the Plan of Operation clause which FCIC raised in its Answer as an affirmative defense and which was addressed by Judge Houry in American Growers), our central focus is to determine whether, under the facts of this case, FCIC has established for summary judgment purposes that the 1996 SRA agreement permitted FCIC to make the prevented planting

changes it made, without having to compensate Appellant beyond what FCIC determined to be an adequate adjustment in premiums. To decide this appeal, we must examine the contract clauses and how the parties dealt with and understood various contract provisions. We must resolve a number of disputed factual issues. The findings of fact we set out below are comprised of a number of undisputed facts and facts drawn applying all reasonable inferences in favor of Appellant. Particularly central to our analysis is (1) the meaning and operation of the clauses involving the change date and Plan of Operation, (2) determining what, if any options Appellant had after FCIC made the changes to minimize or eliminate any adverse cost impact, and (3) reconciling the position of FCIC in its motion and supplement, with how FCIC treated the matter and clauses during the operation of the contract. For reasons set out below, we find that the record does not support granting summary judgment.

FINDINGS OF FACT

THE 1995 SRA

1. FCIC and RHIS had been party to a number of SRAs dating well prior to 1995. As part of that continuing contractual relationship, RHIS and FCIC entered into a Standard Reinsurance Agreement for 1995 (1995 SRA). Thereafter, the parties continued the SRA through 1996, pursuant to Section V(J) of the 1995 SRA (it appears that the 1995 SRA was a continuation of 1994). (Appeal File (AF) 175-97; Answer (Ans.) page (p.) 2.) This dispute involves the parties' obligations and rights during the 1996 crop year. References to clauses in the SRA apply to both the 1995 and the 1996 agreements.

2. The 1995 SRA authorized RHIS to sell MPCI policies during the July 1, 1994 to June 30, 1995 time period, while the 1996 SRA covered July 1, 1995 to June 30, 1996. The SRA was 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 for 1995 and for 1996 stated:

> This Standard Reinsurance Agreement including the Appendices, all referenced documents and Federal Crop Insurance ("FCIC") Manual 13 and 14 in effect at the start of the reinsurance year ("Agreement"), establishes the terms and conditions under which the FCIC will provide subsidy, expense reimbursement, and reinsurance on multiple peril crop insurance policies sold or reinsured by the above named Insurance Company (the "Company"). This agreement is authorized by the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 et seq.) (The "Act") , and regulations promulgated thereunder which are codified in title 7, chapter IV of the Code of Federal Regulations (C.F.R.). Such regulations are incorporated into this agreement by reference. . . .

(AF 175.)

3. Under the regulations incorporated into the SRA, the reinsurance company is obligated to reinsure policies written on terms, including premium rates, approved by the FCIC, on crops and in

areas approved by the FCIC. (AF 175, 7 CFR 400.166(a)). Private insurers cannot deviate from the rates determined by FCIC. Sections V.E.1 and 2. of the SRA specify that a reinsurer must submit for FCIC approval all multiple peril contracts of insurance as FCIC requires and that any such contracts cannot be used until approved by FCIC. Companies must submit contracts of insurance to FCIC for review and consideration of compliance with the provisions of the SRA. (AF 188-89.) 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]." (AF 178.) The SRA also provides at V.I. that if the reinsurance company does not fulfill all its obligations under the Agreement, FCIC may immediately terminate for cause. The Agreement also carries substantial liquidated damages. (AF 192.)

4. The "COMMON CROP INSURANCE REGULATIONS: REGULATIONS FOR THE 1994 AND SUBSEQUENT CONTRACT YEARS' are set forth at 7 CFR Part 457. Part 457.7, titled "The contract.", says the insurance contract becomes effective upon the acceptance by the reinsurance company of a duly executed application. It continues that "Changes made in the contract shall not affect its continuity from year to year." At Part 457.8, the regulation sets out the Common Crop Insurance Policy (hereinafter referred to as the MPCI) for reinsured policies. Just above the provisions is the wording "(This is a continuous policy. Refer to section 2)."

5. At section 4 of the MPCI, under Contract Changes the policy states:

> We may change the coverage under this policy from year to year. Your crop insurance agent will have changes in policy provisions, price escalations, amounts of insurance, premium rates and program dates by the contract change date contained in the crop provisions. In addition, you will be notified, in writing, of these changes. Such notification will be made at least 30 days prior to the cancellation date of the insured crop. (7 CFR 457.8(4)).

6. The contract change date, as set out in the MPCI, is defined in Section 1n., Definitions. There it reads:

> The calendar date by which we make any contract (policy) changes available for inspection in the agent's office (see section 4).

The contract change date provisions are from the MPCI, the policy between RHIS and producers. The provisions are not directly set out in the SRA between RHIS and FCIC.

7. "The COMMON CROP INSURANCE REGULATIONS: REGULATIONS FOR THE 1994 AND SUBSEQUENT CONTRACT YEARS" contained both an FCIC MPCI and a reinsurer MPCI. In contrast, the 1988 and subsequent year provisions set out only a single FCIC MPCI. The record contains no history to explain why the changes were made for 1994 and beyond or their significance.

8. Section 2 of the MPCI in part 457, titled Life of Policy, Cancellation and Termination provides in part:

> a. This is a continuous policy and will remain in effect for each crop year following the acceptance of the original application. After acceptance of the application, you may not cancel this policy the initial crop year. Thereafter, the policy will continue in force for each succeeding crop year unless canceled or terminated as provided below.
>
> b. Either you or we can cancel this policy after the initial crop year. This contract may be canceled by either you or us for any succeeding crop year by giving written notice on or before the cancellation date preceding such crop year.

9. We have no evidence as to how many, if any, of the 1995 policies were canceled during the 1996 SRA crop year nor do we have a number for how many 1995 contracts continued in force (as carry over contracts) for 1996. We do, however, have evidence that there were carry over policies in effect during the late fall and early spring 1995/1996 (1996 SRA crop year), the time frame when Appellant was seeking to amend its 1996 Plan of Operation. FCIC stated in its affirmative defenses (June 2, 1997 Ans. p.15), "To the extent that RHIS felt that it would be harmed by the changes to the 1996 prevented planting provisions, it could have exercised its options to amend its Plan of Operations and remove those crops for which prevented planting coverage was available in accordance with V.F.1.c. of the agreement. If the request was approved, RHIS would no longer have to sell any more policies with prevented planting coverage and RHIS could have terminated its carry over policies as long as termination was done by the termination date in the policy. Even though there was ample time, RHIS never made any such request." (Finding of Fact (FF) 38.) We find that in making that statement, FCIC confirms that carry over policies were in affect at the time of the request to change the Plan. We also find that for purposes of analysis of this Motion, a carry over policy would be a "contract previously written," as contrasted with a new policy written after the approval of the Plan. Taking all reasonable inferences in favor of Appellant, since policies were continuous and ran from year to year, we find it would be logical that some policies carried over from 1995 and thus some of these self-renewing policies or carry over policies were in effect at the time of the 1996 request for a change and FCIC's denial. The existence of carry over or continuous policies is important for purposes of interpreting clause V.F.1.c. of the SRA (AF 189), a matter discussed in more detail later in this decision.

10. In addition to provisions of the standard MPCI contract, the 1995 MPCI Coarse Grains Provisions (with a similar provision in 1996) (Ex. 5, 6), contains in the Definition for Written Agreement, the following definition confirming the existence of continuous policies:

> Written agreement - Designated terms of this policy may be altered by written agreement. Each agreement must be applied for by the insured in writing no later than the sales closing date and is valid for one year only. If not specifically renewed the following year, continuous insurance will be in accordance with the printed policy.

11. The above document (Ex. 5) further identifies the change date for the Coarse Grains contract as November 30 preceding the cancellation date. The contract change date, as noted above, is defined in the MPCI as the date by which private insurers must notify farmers of impending coverage changes. (Ex. 5.) In various letters and other writings, FCIC has stated that under the

contract it has the right to make changes shifting risk, as long as it does so before the change date (Ans. p. 13). We find the logical inference to be drawn that if FCIC fails to make the change by the change date, it may not shift the risk, without compensation to a reinsurer. The set change date logically allows a farmer to decide whether to purchase crop insurance under the terms and conditions of the amended coverage provisions. (Ans. p. 16.) Whether FCIC met the change date is a disputed question of material fact in this appeal.

12. Clause V.J. of the SRA, the agreement between Appellant and FCIC, provided 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." (AF 193.) Notwithstanding that language, the SRA also provided at Clause V.F.1.a. that the SRA "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." (AF 189.)

13. In its Plan of Operation, a reinsurer elects the states where it will sell insurance, and the crops within those states that it will insure (AF 179). As FCIC stated in its Answer to Appellant's initial complaint,

> Under Section II.A.1 of the 1995 and 1996 Agreements, the reinsured company specifies the crops for which it intends to sell insurance and the states in which it will sell such crop insurance policies in the Plan of Operation the reinsured company files each reinsurance year. FCIC admits that if the reinsured company elects to sell a crop insurance policy in a state, the policy must conform to the policy published in the Federal Register, unless otherwise approved by FCIC under Section V.E.1 of the 1995 and 1996 Agreements and the reinsured company is bound by such terms and conditions under normal contract law as applied to the parties of a contract. Therefore, if the crop insurance policy which the reinsured company elects to sell provides prevented planting coverage, then reinsured company must provide such coverage to all insureds who obtain the policy. (Ans. p. 3.)

14. On June 27, 1995, RHIS filed its 1996 Plan of Operation for the 1996 SRA year. The Plan was based upon the prevented planting coverage which was in effect prior to the 1996 prevented planting amendments. (Ex. EE, Tr. 57-58.) FCIC approved Appellant's 1996 Plan of Operation on October 27, 1995 (Ex. BB-3). The Plan of Operation is the document for ceding and retaining risks of loss for the upcoming insurance year. FCIC premium rates were and are not calculated to include a reasonable rate of return on investment. Rather, a reinsurance company's potential for profit or loss is the result of underwriting gains or losses through its fund designation in the Plan of Operation. Clauses II.6. and II.B.1.b. of the SRA provide that a reinsurance company, in accordance with its Plan, may designate eligible crop insurance contracts into one of three funds. Each fund places varying obligations on FCIC to reimburse the reinsurer for its "Ultimate Net Losses." The three insurance funds set forth in the SRA and the fund designations in the Plan of Operation, apportion the risk of loss between RHIS and FCIC for each policy later issued by RHIS.

(Ex. AA, Tr. 17-29.) Of the three funds, the Assigned Risk Fund provides a reinsurer with the greatest protection from losses. The SRA specifies a time frame-up to which a reinsurer can designate polices to that fund. (AF 179-85.) However, the SRA also provides that once a policy is designated in an approved Plan of Operation, the designation cannot be changed unless FCIC gives its permission (AF 189). Consequently, there is an apparent conflict between FCIC's claim that Appellant could shift or assign policies at will and restrictions on Appellant set out in the Plan of Operation clause for policies already designated to specific funds.

15. For summary judgment purposes, as of October 27, 1995, the date the Plan was approved, but before the changes were made to prevented planting, Appellant had set in place its risk of loss (based on status prior to changes) and was obligated to follow its Plan of Operation designations. Various letters reflect that both FCIC and Appellant recognized and operated on the basis that Appellant had to stay with its Plan of Operation designations, absent FCIC allowing it to do otherwise. (AF 386-87, 441-50, Ans. pp. 13-17.) In addition, the SRA obligated Appellant to make insurance available to all eligible producers for crops in areas which were stated in its Plan of Operation, as approved by FCIC (AF 178). This obligation raises questions as to whether Appellant, even if it wished, could have practically or legally culled out some policies. To the extent FCIC contends that Appellant could have canceled policies, that assertion is disputed by Appellant in letters and its briefing and further seems to run afoul of SRA requirement for Appellants to provide insurance to all producers for crops and areas stated in its Plan. As RHIS asserts, if, at the time it submitted its Plan of Operation, it had known of the precise terms and provisions of the final 1996 SRA (with the added prevented planting coverage), it could have assigned more policies with expected prevented planting losses to the assigned risk fund, thereby ceding a greater percentage of risk to the FCIC. It could have also designated crops with a greater probability of sustaining a prevented planting loss or counties with greater prevented planting claims to the Developmental Fund, in states with higher risks of prevented planting losses. (Appellant's Brief (App. Brf.), p. 46.) In that regard, Appellant set out the example that the SRA required RHIS to designate all policies to the Developmental Fund at the time that RHIS submitted its Plan of Operation. Appellant said that the Developmental Fund requires entire designations by crop or county within each state. Thus RHIS had to designate at the time of its Plan of Operation all crops in each county that it wished to have reinsured through the Developmental Fund or alternatively, all of a particular type of crop throughout that entire state. As noted above there is a conflict between the contention that Appellant could mitigate risk by using fund allocations and the apparent restriction in the Plan of Operation clause which indicates that Appellant could not change a policy designated to the Developmental Fund in the approved Plan of Operation to another lesser risk fund, without FCIC first permitting that action; permission FCIC refused to grant in this appeal. (AF 383-84, 388.)

16. We have referred above to the Plan of Operation clause in the SRA. Part of that clause V.F.1.c. addresses the process for an insurance company to seek to alter its fund designations during a reinsurance year:

> c. The Company may submit a request to amend an approved Plan at any time to reflect changing business considerations and sales expectations. Such amendments must be approved by FCIC before implementation by the Company. The request will be evaluated following procedures applicable to a timely filed original Plan of

> Operation, except that FCIC will consider, in addition the potential of adverse selection against FCIC. Requests for amendment which are determined by FCIC to increase the potential for adverse selection against FCIC will be favorably considered only if FCIC determines that its actions or those of the United States Department of Agriculture have substantially increased the risk of underwriting loss on eligible crop insurance contracts previously written by the Company with the expectation that the current policies and procedures would be continued.

(AF 189).

17. The SRA does not define various terms within the clause, such as "changing business considerations and sales expectations." It is not clear whether that term refers exclusively to a voluntary decision by a reinsurer or also includes an involuntary action due to an FCIC decision. The clause does not state that asking for a change to the Plan is the sole avenue of relief and remedy for a change such as the change at issue in this appeal. Neither the clause, nor the contemporaneous interpretations of the clause by the parties during the contract, establish that the parties interpreted the clause to mean that the right to make a request for change in the Plan was in lieu of or canceled a reinsurer's right to claim monetary damages for changes to the policy requirements made after the reinsurer had locked in its risk or portions thereof. Neither in the correspondence during the contract nor in FCIC's initial motion for summary judgment (prior to the American Growers opinion) did any official or representative of FCIC argue that an FCIC refusal to allow a change to the Plan per se barred a reinsurer's subsequent monetary claim. Rather, the silence as to this issue in FCIC's arguments and defenses indicates that FCIC did not interpret the Plan as the sole remedy for breach. FCIC did, however, see the Plan, as set forth in its Affirmative Defenses, as a necessary vehicle for Appellant to use to mitigate (Ans. p. 15).

18. Appellant's counsel in his letter to the Board of March 30, 2000, took issue with FCIC's contention that Appellant could have assigned additional policies to the assigned risk fund after FCIC published its 1996 prevented planting rule changes. He pointed out that FCIC was ignoring the "fact" that RHIS was to designate policies into other funds at the time it submitted its Plan of Operation, citing the requirements in the SRA as to designations to the Developmental Fund. (AF 178-85.) Considering Appellant's argument in light of the language in the Plan of Operation clause (which indicates that the approved Plan of Operation can only be changed with permission of FCIC) (AF 189), we find that it follows that at the time of the prevented planting changes in 1996, RHIS (because its Plan had been approved before the prevented planting changes) was locked into its Developmental Fund selection and designations. As such, Appellant arguably could not shift those funds to a lesser risk fund without FCIC permission.

19. In the above letter, RHIS addressed FCIC's contention that RHIS simply could have canceled all its policies as a reaction to the prevented planting changes. RHIS points out that the SRA, the Federal Crop Insurance Act, and FCIC's regulations require a reinsurance company to make crop insurance available to all eligible producers for the crops and in the areas stated in the company's Plan of Operation. "Rain and Hail simply could not have canceled all policies wherein the producer elected prevented planting coverage." (See AF 178, letter (ltr.) March 30, 2000.)

20. In regard to the requested change to the Plan, counsel for FCIC, in her supplemental brief of October 2000, argued her interpretation of Judge Houry's opinion in American Growers where he addressed the Plan of Operation clause. She acknowledged that unlike American Growers, here RHIS sought to revise its Plan of Operation. She then contended, however, that this was an immaterial distinction between the cases. She stated that Judge Houry had concluded that there is no requirement for FCIC to accept any revision to the Plan unless the standards identified in the Plan are met and those standards are consistent with the risk sharing provisions in the Act. She continued that while RHIS tried to have FCIC allow it to change its Plan and re-designate policies, RHIS had not provided FCIC with enough evidence at that time to show that the request would have met the criteria for favorable consideration. Whether RHIS's request was adequate and should have been granted requires us to weigh evidence, an inappropriate task in ruling on a Motion for Summary Judgment.

21. Contract correspondence and FCIC's initial brief show that FCIC's rationale for rejecting Appellant's change to the Plan had nothing to do with RHIS qualifying with the criteria in the clause. Rather, the refusal had to do with FCIC believing that it had already adequately compensated the Appellant through the premium adjustment and that FCIC had made the change to prevented planting before the change date. As FCIC stated in response to a request for admissions from Appellant:

> FCIC denies that it materially breached the 1996 Agreement or unilaterally modified the terms of the 1996 Agreement. The prevented planting changes did not modify the terms of the 1996 Agreement because at the time RHIS entered into the Agreement, it knew that the policies that it insured could be revised by FCIC if done on or before the contract change date. (Ex. BB 21.)

22. To the extent technical compliance with the terminology, "contracts previously written," as used in the Plan of Operation clause became an FCIC defense, it became so only after Judge Houry's opinion in American Growers. We will not here re-analyze and re-argue how he treated the matter in American Growers but instead refer the reader to his opinion. What is different here, however, is that unlike American Growers, FCIC's evidence shows that Appellant asked to change the Plan. What is also different in this appeal, is that here there is specific evidence through references to "carry over" policies and "continuous policies" from 1995, which establish for purposes of summary judgment, that the request to change the Plan included "contracts previously written," a point found not to be the case in Judge Houry's American Growers opinion.

HISTORY OF THE CHANGE IN ISSUE

23. 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. While the 1995 SRA covered some prevented planting, as a result of the rainfall and resulting flooding, FCIC clarified and expanded, through the use of Manager's Bulletins and press releases, at least through June 16, 1995, various terms and conditions for the 1995 prevented planting coverage. Among FCIC's actions was one to extend the final planting dates and to provide for greater rates of indemnity payment on late planting. (FCIC Brief (Brf.) pp. 2-3; App. Brf. pp. 13-18.)

24. FCIC has acknowledged that its 1995 prevented planting changes constituted a breach of the 1995 SRA (Ans. pp. 8, 15). It cited three reasons, (1) it promulgated and implemented the 1995 prevented planting changes after the 1995 MPCI policy change dates, (2) it acted after the prevented planting losses had already occurred, and (3) it did so without an increase in the premiums to cover the risk. FCIC recognized that as a consequence of the 1995 changes, Appellant incurred greater expenses associated with indemnity payments, loss adjustments, and administrative expenses, than it would have but for the 1995 prevented planting changes. FCIC paid breach damages through a special amendment to the SRA dated January 3, 1996 which noted that the SRA was amended, "for the 1995 reinsurance year only. . . ." (AF 44-52.)

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

25. RHIS filed its 1996 Plan of Operation for the 1996 SRA on June 27, 1995. The prevented planting rules contained in FCIC's regulations at the start of the 1996 reinsurance year and at the time FCIC accepted Plan of Operation on October 27, 1995 differed substantially from those adopted by FCIC in December 1995. (Appellant's Supplemental Brief (App. Supp. Brf.) p. 41, October 11, 2000; AF 381.) On November 8, 1995, FCIC published a proposed rule in the Federal Register to implement the 1996 prevented planting changes for the spring 1996 crops (Ex. 72). Under Summary, the proposed rule provided as follows:

> SUMMARY: The Federal Crop Insurance Corporation ("FCIC") hereby proposes to amend the General Crop Insurance Regulations, Hybrid Sorghum Seed and Rice Endorsements, the Hybrid Seed Crop Insurance Regulations, and the Common Crop Insurance Regulations, Small Grains, Cotton, Extra Long Staple Cotton, Sunflower Seed and Course Grains Crop Insurance Provisions, applicable beginning with the 1996 crop year for spring crops with contract change dates after the effective date of this rule, by revising prevented planting coverage. The intended effect of this regulation is to expand prevented planting benefits available under the various policies being amended.

(AF 342.)

26. The proposed rule required that comments be submitted by November 20, 1995. The rule proposed expanded 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. (Ex. 72.)

27. On November 30, 1995, at 4:56 p.m., FCIC filed the final rule as to the prevented planting changes. The final rule stated that it was effective November 30, 1995. The rule, however, was not published in the Federal Register until December 7, 1995. 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. (Ex. 73, BB 10.) FCIC takes the position that the rule was effective upon it being filed in the Federal Register on November 30, 1995 and cites for authority, Section 553(d) of the Administrative Procedures Act (APA). The final rule contained a statement of good cause. (Ex. 73.) See 44 U.S.C. § 1507. Appellant contends that filing is not publishing and cites in its brief case

law to support the proposition that agency substantive rules are not deemed published when filed at the office of the Registrar. Further, Appellant points out that even if FCIC filed the rule at about 5:00 p.m. (actually filed at 4:56 p.m.) on November 30, 1995, neither FCIC nor Appellant could not have sent new rates to various agents' offices by the end of the day. Appellant also provided the Board, as an attachment to Appellant's letter of March 30, 2000, a regulation of the Office of Federal Register (OFR), in effect since 1989, which stated that rules filed after 2:00 p.m. are assigned to the next day's schedule for processing and determination of the public inspection date. (1 CFR 17.2.) According to Appellant, under the OFR's publication and public inspection schedule, the FCIC filing here would not be processed until December 1 and not be available for inspection until December 5, 1995, at the earliest.

28. During the rulemaking process comment period, FCIC responded to comments. It claimed the increase it made in the premium rates was supported by actuarial documents and it used the best available data to determine those rates. (Ex. 72-73.)

29. By letter of January 31, 1996, to the Deputy Administrator, Office of Risk Management, RHIS addressed the impact of the proposed 1996 prevented planting changes on its potential underwriting and expenses. (AF 380). RHIS asserted that the 1996 prevented planting changes contained significantly more underwriting risk and administrative costs than existed at the time RHIS prepared its 1996 Plan of Operation and sought changes under the Plan of Operation. RHIS stated:

> RHIS would suggest that Section V.F.1.c. of the 1996 SRA clearly gives ORM the authority to address the increase in risk imposed by the November, 1995 Prevented Planting Policies and Procedures.
>
> In addition to the potential increase in underwriting risk referenced above, the prevented planting changes of November 1995, also increase the expense incurred to administer the Program with the inclusion of additional dates and options, which must be verified for integrity reasons.
>
> The companies options to address the above issues are compounded by Section II.A.1 which requires universal availability so normal underwriting criteria is not an option.
> While numerous options are available if addressed in a timely manner, RHIS would suggest the underwriting exposure could be addressed via the assigned risk option if only the premium and loss associated with prevented planting is an option. On the expense side, there are numerous costing methodology reviews for 1995, so the potential additional costs have been identified and can clearly be addressed via Section IV.C. "Adjustment to Expense Reimbursement" of the SRA, plus several other sections depending on methodology elected.
>
> We trust this issue will receive your timely consideration.

30. RHIS received no response. It wrote again on February 8, 1996, proposing that FCIC provide it the opportunity to amend the Plan of Operation by providing for separate Developmental Fund designations in the applicable states for the Income Protection and CRC programs and for the prevented planting provisions that have been incorporated into the policies. RHIS then set out proposed details. (AF 381-82.)

31. On February 21, 1996, FCIC replied to the above letter and said, "Regarding the 1996 prevented planting provisions, the Office of Risk Management (ORM) believes that 1996 prevented planting provisions have been properly rated to negate the need to revise 1996 Plans. Changes made in the 1996 prevented planting provisions were reflected in the basic premium rate, unlike the prevented planting provision changes made during the 1995 crop year." (AF 383-84.)

32. By letter of March 4, 1996, RHIS requested FCIC reconsider. It pointed out that a reinsurance company must make the program available to all eligible producers. It cited Section (F-1-C), p.15 of the SRA which addresses the right of a company to request a revision to its Plan. RHIS said that given the significant changes in the above programs it should be the company's option to manage the risk based upon their evaluation of the risk rather than an ORM directive. It summarized that the principle at issue was the right of an SRA holder to evaluate and manage risk once the program has been finalized. RHIS was not questioning FCIC's right to add or change programs, even after the Plan was submitted, however, RHIS charged that the SRA guaranteed the reinsurer the right to review and revise its Plan. (AF 386-87.) We understand RHIS to be saying that because it was being held to a risk assessment which had been reached on the basis of no prevented planting changes, once the changes were made, it should be allowed to adjust the risk to meet the new changes.

33. The record contains no response to the March 4, 1996 letter. The next letter addressing prevented planting was FCIC's April 8, 1996 letter responding to Appellant's January 31, 1996 letter. FCIC essentially repeated that it had adjusted rates and therefore nothing further was required. (AF 388.) Appellant thereafter wrote FCIC on September 16, 1996; however, by that point, it was addressing the 1997 crop year and again attempting to secure a remedy by setting up or using a separate fund (AF 436). FCIC responded to the letter on December 27, 1996, noting that RMA did not plan at that time to provide for establishment of a separate fund for prevented planting premium and loss (AF 437).

34. In a letter of February 10, 1997, from counsel for RHIS to the Director of Insurance Service, RHIS generally addressed procedural matters. In particular, RHIS was not sure if FCIC was intending the December 27, 1996 letter to be a final determination. (AF 438-39.) As an apparent protective measure, RHIS filed a timely appeal, which the Board docketed on March 28, 1997, as AGBCA No. 97-148-F.

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35. On April 11, 1997, FCIC wrote directly to RHIS in response to the February 10 letter (AF 441, 448-50). There the Risk Management Agency stated that although there is no provision of the agreement which requires FCIC to pay monetary damages, under the basic tenets of contract law, it must pay if it acts outside its legal authority and such conduct caused the insurance company to suffer damages. FCIC then asserted it has not operated outside of its legal authority and stated that

the Act authorizes FCIC to administer the program. Under Section 508(a) of the Act, if sufficient actuarial data is available, FCIC can offer a Plan of insurance and the Act further provides that it can include prevented planting. If sufficient actuarial data is available under Section 508(d) (1) of the Act, FCIC is required to set the premium rates in an actuarially sound manner. He continued that FCIC's Plans of insurance are published at 7 CFR 401 et seq. and the Plans of insurance are expressly incorporated by reference into the agreement. (the referred to Plans of insurance are the MPCI policies.) He then stated,

> These Plans of insurance authorize FCIC to change the terms of the policy from year to year, provided that such changes are made by the contract change date for the crop.

He distinguished the situation in 1996 from that in 1995, stating the following:

> 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 premium, FCIC determined that it acted outside the scope of its legal authority. As a result FCIC entered into an agreement with insurance companies to hold them harmless for any losses resulting from the unauthorized changes to prevented planting program.

36. FCIC further distinguished 1996 from 1995 stating that it "amended the prevented planting provisions for the spring planted crops by the applicable contract change date." FCIC continued that insurance companies were involved in the formulation of the new provisions throughout the process, changes were published in the Federal Register and parties given an opportunity to comment, and lastly, FCIC adjusted the premium rates to reflect the added risk associated with the changes implemented for the 1996 crop year, making such rates actuarially sound.

37. FCIC then addressed RHIS's request to amend its Plan of Operation so as to re-designate policies to different funds as a result of the changes. FCIC concluded that there was no basis to require FCIC to permit the insurance companies to amend their 1996 Plan of Operation. In explanation FCIC stated that under Section II.A.6. of the SRA, the insurance companies designate crop insurance to one of the risk funds. The amount of risk is different in each fund. Designations are made by policy, crop or county, depending on the fund. FCIC then set out Section V.F.1.c. dealing with amendment of the Plan of Operation and said:

> The insurance companies are seeking to amend their 1996 Plans of operation after prevented planting losses have already occurred, which will clearly shift the risk of loss to FCIC. Therefore, this amendment which increases the potential for adverse selection against FCIC, can only be approved if FCIC's actions substantially increased the risk of underwriting loss and the insurance companies had an expectation that current policies and procedures would be continued. The present situation does not meet these criteria.

38. The statement that RHIS sought to make the change after losses had occurred is contrary to fact. RHIS attempted to amend its Plan well before losses occurred. (AF 380-82, 386-87.) We attribute FCIC's position in the April 11, 1997 letter to a lack of information on the part of the writer. Secondly, FCIC says that the insurance company could not recover if it had an expectation that the policies in effect at the time of the Plan were going to continue. FCIC argues that the insurance companies did not have an expectation that the current policies and procedures (those used before prevented planting in 1995) would be continued, because throughout the 1995 crop year, and long before the start of the 1996 crop year for spring planted crops, FCIC was in contact with insurance companies and producer groups regarding proposed changes. We find, however, that FCIC ignores the fact that no official regulatory change was made until well after approval of the Plan of Operation. If Appellant should have known in early October that the changes were a certainty for 1996, one must then question the purpose of the comment period as well as the rulemaking procedure. FCIC next asserted that the crop insurance policy allows FCIC to make changes to the policy by the contract change date. Therefore, insurance companies can have no expectation that current policies will be continued until after the contract change date has passed. (AF 448-49.) Once again, FCIC ties its defense to making the change before the change date.

39. FCIC closed the letter with the assertion that it did not violate any provision of the agreement and the companies are not entitled to the relief sought. FCIC stated that the decision not to provide additional compensation to the insurance company or permit amendment of the Plan of Operation after a loss has occurred constituted the final determination of FCIC and provided RHIS its appeal rights to the Board of Contract Appeals. On May 2, 1997, Appellant filed its appeal to the above decision and asserted the following in its complaint: (1) FCIC breached by not reimbursing RHIS in the same manner and method as the course of dealing with RHIS in FCIC paying the 1995 prevented planting, (2) FCIC failed to deal in good faith in performing the 1996 SRA and in unilaterally modifying the terms of the 1996 SRA after RHIS had signed the 1996 SRA and filed its Plan of Operation for 1996. On July 16, 1997, the Board docketed the new appeal as AGBCA No. 97-182-F. The appeal, as the Board noted in its docketing letter, covered the same matters as those in the formerly docketed AGBCA No. 97-148-F. The parties confirmed that the two appeals covered the same matters and FCIC further confirmed that the April 11, 1997 letter was the final determination of FCIC. Accordingly, the Board dismissed the first appeal as premature and notified the parties that all matters and prior filings were to be consolidated into AGBCA No. 97-182-F.

40. FCIC filed an 18-page Answer. Some statements in the Answer are particularly pertinent to the findings of fact in this opinion. FCIC stated, "if the crop insurance policy which the reinsured company elects to sell provides prevented planting coverage, the reinsured company must provide such coverage to all insureds who obtain the policy." FCIC continued that the reinsurance company specifies the crops it intends to sell insurance for and the states in which it will sell crop insurance policies in the Plan of Operation which the insurance company files each reinsurance year. (Ans. p. 3.) We note that evidence in the record shows that under the SRA, the reinsurance company specifies the crops and states in its Plan of Operation and once that is approved, those designations are only subject to change with FCIC approval (FF 13).

41. From pages 13 through 17 of its Answer, FCIC set its out affirmative defenses. It said, FCIC is authorized to change the policy year to year as long as the crop insurance agent has the changes by

the contract change date stated in the policy. (Ans. p. 24.) FCIC said that nothing in the policy prevented it from making changes and, "FCIC has been making such changes in the crop insurance policies for years and has never compensated the reinsured companies for the increased costs associated with changes unless FCIC makes such policy change after the contract change date and the reinsured can prove they suffered actual damages." FCIC further asserted that to the extent RHIS thought that it would be harmed by the changes "it could have exercised its options to amend its Plan of Operation in accord with V. F.1.c. and remove those crops which prevented planting was available. If this request for a change to the Plan was approved, RHIS would no longer have had to sell any more policies with prevented planting coverage and RHIS could have terminated its carry over policies as long as termination was done by the termination date in the policy. Even though there was ample time, RHIS never made that request."

42. Several of the above statements merit additional discussion. FCIC said that to the extent that RHIS thought that it would be harmed by the changes, "it could have exercised its options to amend its Plan of Operation in accord with Section V.F.1.c. and remove those crops which prevented planting was available." FCIC also said, "if this request for change to the Plan was approved, RHIS would no longer have to sell any more policies with prevented planting coverage and could have terminated its carryover policies as long as termination was done by the termination date on the policy." Neither of these statements suggest that FCIC believed that RHIS was somehow technically barred from securing relief under the Plan of Operation clause. Rather, the above statements indicate that FCIC concedes that RHIS had a technical right to have an adjustment to its Plan, but FCIC acted appropriately in not granting it because RHIS failed to seek the right remedy. Further, by stating, "if this request for change to the Plan was approved," FCIC confirms that in order for RHIS to make changes to the FCIC referenced carry over policies, RHIS first had to have FCIC approve changes to its Plan. Thus to the extent FCIC charges that RHIS could choose not to sell more policies and could have terminated the carry over policies, that charge appears inaccurate and too broad. Finally, FCIC in its Answer identifies RHIS as having "carry over policies," and in fact says that if RHIS had asked to amend its Plan and the request had been approved, RHIS could have terminated carry over policies. We find that a carry over policy is a policy that has been written in a prior year and that continues into the next crop year, absent cancellation or termination under the regulations and policy provisions. Since a carry over policy would logically be in effect until or unless canceled, it would appear (drawing inferences in favor of Appellant), that such policies would constitute a "contract previously written." As noted earlier, that wording was an important component in Judge Houry's American Growers opinion.

43. On February 1, 1999, FCIC first filed its Motion for Summary Judgment. It argued, (1) its compensation to RHIS in 1995 did not constitute a course of dealings, (2) it made its 1996 prevented planting changes before the contract change date consistent with custom and practice, (3) its 1996 prevented planting changes were not unilateral, (4) it compensated RHIS by adjusting rates accordingly, and (5) it acted in good faith. FCIC made no other arguments in its initial motion.

44. At page 8 of its Motion, FCIC addressed RHIS's claim that since FCIC compensated RHIS for 1995 prevented planting changes, FCIC breached the 1996 Agreement because it did not compensate RHIS in the same manner as the "course of dealings in paying the 1995 prevented planting losses." FCIC pointed out that compensation in 1995 was through a special amendment to

the 1995 SRA, it had never occurred previously in dealings with RHIS; and the amendment which RHIS executed provided that the amendment only applied to the 1995 reinsurance year. FCIC concluded it is entitled to judgment as a matter of law on this issue.

45. FCIC then challenged RHIS's claim that FCIC unilaterally modified and thereby breached the 1996 SRA after it was executed and after RHIS submitted its Plan of Operation. FCIC stated that all crop insurance contracts published at 7 CFR chapter IV, and sold by insured companies have a contract change date by which date FCIC can make changes to the crop insurance policies. (7 CFR 401-457.) While contract change dates occur throughout the year those subject to this litigation had a contract change date of November 30, 1995. FCIC concedes that the change date is after the July 1 start of the 1996 reinsurance year, and after the date that FCIC approved RHIS's Plan of Operation. FCIC then defended (at p. 11 of its Motion) as follows:

> However, RHIS knew that FCIC had authority to make policy revisions and that it was the custom and practice of FCIC to exercise this authority since FCIC had made literally thousands of revisions to the crop insurance policies since the date it began publishing them in the Federal Register. See 7 C.F.R. parts 401-457. RHIS accepted that the terms of the crop insurance policies could change after the July 1 start of the reinsurance year when it first executed the Standard Reinsurance Agreement in the 1980s.
>
> Therefore, FCIC did not breach the Standard Reinsurance Agreement when it made the 1996 prevented planting changes after RHIS submitted its Plan of Operation.

46. FCIC further justifies its Motion by claiming that its revision was not unilateral because RHIS and other interested parties were permitted to comment on the proposed rules before it was made final. FCIC charged that RHIS knew that changes made to the crop insurance policies could potentially affect the gains and loss provisions and administrative expense reimbursement of the SRA and that to mitigate any potential affect of these crop insurance policy changes, Section V.F.1.c. of the 1996 SRA authorizes the reinsured companies to request a revision of an approved Plan of Operation to shift the burden of additional loss to FCIC.

47. FCIC also addressed RHIS's claim that FCIC failed to deal fairly and in good faith under the 1996 SRA, asserting that RHIS was aware of the proposed changes by October 18, 1995, and had known for years that the policy permitted changes after it submitted its Plan of Operation, that FCIC does that on an annual basis, and that FCIC acted consistent with its past practices and in accord with the Act and terms of the SRA. FCIC contended that it was accomplishing the purpose of promoting the national welfare by providing a sound insurance program. FCIC argued that it is required to operate the program in an actuarially sound manner, including setting the premium rates to hit the target loss ratio of 1.1 for the 1996 crop year (7 U.S.C. §§ 1506(o), 1509(d)(1)) and it was only required to make the whole crop insurance program actuarially sound, not a single crop or cause of loss.

48. An FCIC document titled "Blueprint for Financial Soundness" (Ex. 99) provides clarification as to the intention of Congress in providing a 1.1 ratio (included in the Omnibus Budget

Reconciliation Act of 1993 (7 U.S.C. § 1501 et seq.)). There FCIC states in regard to the projected overall loss ratio not exceeding 1.10 (110 percent) (Section 1501(a)) the following:

> Projected loss ratio (dollar amount of losses paid as a percent of the total premiums collected) is intended to be a performance standard, not an absolute ceiling for the operation of any particular crop year. Congress recognizes that adverse weather conditions (such as extreme drought or flood) will influence the financial results of each year's operations; however, when good and poor years are averaged over a long period of time (such as 50 to 100 years), the expectation must be that the program will operate with an average loss ratio of 1.10 or less.

49. Appellant filed a reply to FCIC's brief. Among other contentions, it alleged that there was a course of dealing regarding the compensation paid to it for the changes to the 1995 prevented planting and that carried over to the changes involving the 1996 SRA. Appellant ignores, however, that the modification agreement in 1995 which compensated Appellant for 1995 changes stated that the 1995 agreement to compensate Appellant was limited to 1995. (AF 44-52.)

50. RHIS also challenged whether FCIC adjusted the premiums "to reflect the added risk associated with the changes implemented for the 1996 crop year, making such changes, actuarially sound." Appellant claimed that the premiums did not reflect the added risk associated with the changes; the premiums were inadequate in amount, and the analysis that arrived at the premiums was based on faulty data. FCIC defended the above contending that as a matter of law it acted at all times fairly and in good faith, because it acted in accordance with custom and practice and because its rating process was a policy determination and therefore, this Board had to give deference unless arbitrary or capricious. FCIC continued: "The fact that such rates may have proven to be insufficient on a cause of loss basis for 1996 does not mean that they were contrary to the law." Given that we are deciding this Motion on other issues and basis, we will not address the above in more detail, other than to refer to the discussion of the adjustment of premiums in the various opinions in American Growers. We do, however, point out that even if there were an insufficient rate, it does not convert on the facts of this case to violation of law or establish bad faith or lack of fair dealing.

51. Even after initial briefing, a number of matters required additional clarification. Therefore, the Board asked the parties, by letter of March 21, 2000, to provide some additional explanation. Appellant's counsel responded by letter of March 30, 2000, and pointed out that according to clause II (A) (6) of the SRA, each reinsurance company, in its Plan of Operation, must designate its policies to the Developmental or Commercial Funds. (Initially counsel said assigned risk but then corrected that in a subsequent letter of April 4, 2000).

52. Appellant's counsel then asserted that to put this into practical terms, under clauses IV (B) (2) (a) and (b), the SRA required RHIS to designate all policies to the Developmental Fund at the time it submitted its Plan of Operation. The Developmental Fund requires entire designation by crop or by county within each state. Thus, RHIS had to designate, at the time it submitted its 1996 Plan of Operation (April 1, 1995), all crops in each county that it wished to have reinsured through the Developmental Fund or alternatively, all of a particular type of crop throughout that entire state.

53. Regarding FCIC's contention that RHIS could have canceled all its policies, Appellant pointed out that such action was not permitted under the SRA. The SRA, the Federal Crop Insurance Act and the FCIC regulations required reinsurance companies to make crop insurance available to all eligible producers for the crops in the areas stated in the company's Plan of Operation. (SRA clause II (A) (1), 7 CFR 400.168 (b)).

54. FCIC's counsel provided her response in a five-page letter dated April 10, 2000. She agreed that assignments to the Developmental and Commercial Fund are done at the time of the Plan of Operation. She said that under the SRA any eligible crop insurance contracts designated to the assigned risk fund are not included in the designation to the Developmental Fund and that policies may be designated to the assigned risk fund not later than "essentially" the 30th calendar day after the sales closing date. (SRA clauses II B.2c. and B1b.) She contended that most of the policies in issue had a sales closing date of March 15, 1996, and therefore, RHIS could have designated any policy to the assigned risk fund by at least April 15, 1996, until it reached its maximum cession, a term we understand to mean, "when Appellant could go no further." We find that her conclusions seem inconsistent with other parts of the record which indicate restrictions on cancellation. For example, the record shows that various policies appear to have been assigned to the Developmental Fund as part of the approved Plan of Operation. The parties have agreed that once the Plan of Operation was approved, Appellant could only change it with permission of FCIC. Thus, once the Plan was approved, Appellant could not move those policies to the assigned risk fund, absent FCIC allowing it to amend its plan. That appears to conflict with a contention that Appellant could shift policies at will.

55. As to the change date, FCIC counsel asserted that some crops had a December 30, 1995 change date, but did not identify the specific crops. Moreover, both parties have stated that the majority of the crops had a change date of November 30, 1995. At best, this factual assertion would only involve a portion of the appeal. FCIC counsel also contended that the change should not be considered a breach because producers allegedly had notice of changes.

56. Another argument put forth by FCIC in the letter is that RHIS could have canceled policies by acting by the cancellation date which FCIC states was March 15 for most crops (Clause 2(b) of the Basic Provisions (MPCI), 7 CFR 457.8). FCIC charges that nothing in the SRA abrogates this right and points to clause II 4 of the SRA which provides that there will be policies for which the reinsured companies elect not to assume the risk. FCIC says that in such cases, the reinsured company must simply notify FCIC. The implication from the FCIC's statements is that RHIS was free at will to cancel a policy; however, there are provisions which negate such a finding at this time. Clause II 4 appears to say that if the Company refuses to accept an application for insurance from someone who is not on an ineligible list, then it must refer that to FCIC. What happens then is unclear, although it is reasonable to infer that if Appellant has to refer the matter to FCIC, then FCIC and not Appellant controls the denial of insurance. (AF 179.) Moreover, we find that actions of RHIS to cancel a policy or deny an application also appears to run counter to the SRA obligation to provide insurance to all eligible producers and counter to portions of the Plan of Operation clause.

57. In addition to the earlier discussed arguments, FCIC, after acknowledging that under section V.F.1.c. of the SRA, RHIS had a right to ask for the change to its Plan, provides a new explanation to justify why it denied the Appellant's requested Plan of Operation change. FCIC states, "Unfortunately, RHIS sought to change its fund designations for the prevented planting coverage only. Since individual coverage cannot be separated from the rest of the policy for designation in a fund in the Plan of Operation, FCIC had to deny this revision." Here FCIC appears to say that Appellant had the right to have the Plan changed, but asked FCIC to approve an unavailable remedy. Appellant in contrast has asserted that it had the right to change the Plan. (AF 380-82.)

58. On June 15, 2000, this Board issued the earlier identified decision in American Growers. In summarizing his granting of the Motion, Judge Vergilio determined that FCIC'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. He stated, "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." Judge Vergilio also denied on the basis of a procedural issue involving timeliness of the appeal.

59. In the other majority opinion, Judge Houry primarily focused on two matters. He concluded that the clause dealing with modification of the Plan of Operation barred the claim since Appellant had not shown that any of the contracts were previously written policies (contracts previously written) under the language of the Plan of Operation clause. Second, he found that FCIC had essentially unbridled discretion as to setting rates and once it did so here, Appellant could not claim breach or bad faith on the basis of failure to properly set the rates. We will not here go into more detail as to this opinion, although we address aspects of that opinion as to the Plan of Operation in our discussion. For a detailed review of the facts in American Growers, we cite to the various opinions rendered by the Board.

DISCUSSION

A forum may grant a motion for summary judgment when no genuine issue of material fact remains 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); 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). When considering and assessing facts to determine if there is a genuine issue of material fact, we are obligated to apply to the evidence presented by the nonmoving party all reasonable inferences in its favor. Dairyland Power Coop. v. United States, 16 F.3d 1197 (Fed. Cir. 1994). We are not permitted to assess the moving party's evidence in that same favorable light. United States v. Diebold, 369 U.S. 654 (1962). Our 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. Mingus Constructors, Inc. v. United States, supra; Alvarez & Associates Construction Co., ASBCA No. 49341, 96-2 BCA ¶ 28,476; EFG Associates Inc., ASBCA No. 50546, 99-1 BCA ¶ 30,231. A material fact is one which will make a difference in the outcome of the case, Anderson v. Liberty Lobby, Inc., supra. Among material facts are factual development of circumstances surrounding contract interpretation, as well as courses of dealing, and past practices of the parties in interpreting the disputed or relied upon language. Appellant does not have to prove its case on summary judgment to the same degree that it must, when the appeal is heard on the merits. MCI Telecommunications Corp., ASBCA Nos. 47552, 49435, 98-2 BCA ¶ 29,904, Alvarez & Associates Construction Co., supra.

FCIC made changes in prevented planting rules after the effective date of the 1996 agreement and after FCIC had approved the Appellant's Plan of Operation for 1996 (FF 14-15, 25-27). The Plan of Operation is the mechanism by which a reinsurer allocates risk. In the Plan of Operation for 1996, RHIS designated policies covering various crops and states to specific funds. (FF 14-15, 51-52.) Once FCIC approved the Plan, RHIS was not permitted to change it, absent approval by FCIC (FF 13-16). Further, under another provision of the SRA, once the Plan was approved by FCIC, RHIS was required to provide that insurance to all similar eligible producers for the crops and in the areas stated in its approved Plan and thus as to those categories of policies, RHIS could neither cancel out policies nor pick and choose its insureds. (FF 3, 13, 15-16, 32, 40.)

FCIC contends that it made the prevented planting changes prior to the change date in the contract. FCIC took the legal position in several letters, in its pleadings and discovery, and in its brief that as long as it made the change to prevented planting before the change date, it acted in accordance with the terms of the contract and Appellant had no valid claim for breach. Throughout this dispute, FCIC has repeatedly and unequivocally stated (both in letters prior to the Motion, in its pleadings and in its Motion) that it had the right to make changes, as long as it made the changes before the contract "change date." That was the linchpin of FCIC's decision to deny Appellant's claim and the primary basis upon which FCIC filed its Motion for Summary Judgment. (FF 5, 11, 21, 33, 35-36, 38, 41, 45.)

As part of its change to prevented planting, FCIC adjusted upward the premium rates reinsurers could charge for 1996. FCIC did this in order to compensate reinsurers for expected added costs. RHIS did not consider FCIC's premium adjustment to be adequate compensation for the risks and added costs incurred due to the 1996 changes and made FCIC aware of that through its letters in early 1996. (FF 23-24, 50.)

There are disputed questions of fact regarding whether FCIC made the prevented planting changes before the change date. What appears to be the case is that the prevented planting changes were not published until December 7, 1995, which was after the change date of November 30, 1995 (for the largest segment of the crops). Moreover, there are a myriad of other mixed questions of fact and law associated with the change date, not the least of which involves the fact that the change date clause is part of the MPCI (the policy entered into between RHIS and the producer), and not directly part of the SRA between RHIS and FCIC. In its brief, FCIC has taken the position that the change date provision is somehow incorporated into the SRA. However, further explanation would be useful before we either rely on or reject the change date provision as having a controlling effect in this

appeal. Further, among the other matters that need to be addressed and resolved are matters relating to what constitutes publication; what constitutes the adequate filing so as to comply with the statute; the effect of filing the rule at the 11th hour and whether changes are required to be available to the agents in the field before the change date in order for the new rule or change to be effective. (FF 27.) Finally, as noted above, there are basic questions about the scope of the change date provision and whether it provides either a reason or a shield for a breach claim. (FF 5-6, 11.) Given the record before us, it is not appropriate for us to resolve on a summary judgment basis, FCIC's contention that it is shielded from breach because it met the change date in the contract.

Other issues arise through the Motion and through the opinions issued by the Board in American Growers. After FCIC made the change, RHIS made several attempts to amend its 1996 Plan of Operation. (FF 29-30, 32, 34.) At the time FCIC made the prevented planting changes and at the time RHIS made its requests to amend the Plan, RHIS had "carry over policies" or continuing contracts in effect between it and various producers. Such policies would logically fit into the category of contracts written prior to the change. We do not know the specific number of such contracts. That is not addressed in the record, but (taking all inferences in favor of Appellant) it follows that there were a significant number of carry over policies or continuing policies in place at the time Appellant had its Plan of Operation approved, at the time the prevented planting changes were made and at the time that Appellant requested a change to its Plan. (FF 8-10, 22, 41-42.)

When RHIS asked that it be permitted to amend its Plan, it was (without permission to change from FCIC) locked into the risk allocations through the earlier approved Plan. RHIS had established and elected the fund allocations in that Plan prior to FCIC making the 1996 prevented planting changes. Had the changes been made prior to approval of the Plan, RHIS could have chosen different allocations. Once FCIC approved RHIS's Plan of Operation in October 1995, however, RHIS no longer had the authority to change fund designations, absent FCIC's permission. Although RHIS requested the opportunity to amend its Plan, FCIC refused. (FF 31, 33, 35, 37, 39-42, 57.) Further, the SRA specified that once Appellant offered insurance, it was obligated to make that insurance available to all eligible producers for the crops and in the areas stated in the plan (FF 3). Reading these requests together, RHIS was thus in a position where it had chosen fund allocations based on pre-prevented planting conditions (FF 14-15, 25), those conditions were changed by FCIC to RHIS's detriment after the Plan was approved (FF 15, 25, 29) and RHIS had no ability to mitigate without FCIC permission. (FF 14-17, 37, 42, 57.) Moreover, it appears that RHIS was not only locked into its initial choices of allocations (despite the change) and had to continue reinsuring (under the initial fund designation) those producers covered by the approved Plan, but in addition, it also had to provide insurance to any other eligible producers who opted for the same coverage for those crops or states covered in the approved Plan (FF 3, 15). Thus, what appears to be the situation is that RHIS was required to provide prevented planting on policies with producers which were based on another premise (absence of prevented planting). In this appeal we do not have a situation where one can find that RHIS is making this claim solely on voluntarily entering new contracts or policies written after the prevented planting changes were in place. Rather, evidence establishes that RHIS had to provide prevented planting coverage to carry over producers as well as other eligible producers who wanted the same coverage provided others in RHIS's Plan of Operation.

Given the above, we conclude that if RHIS's facts are accepted, then RHIS has set forth a basis for breach. RHIS has described a situation where after it and FCIC entered into the contract and after RHIS had acted in reliance on the original agreement (no prevented planting), FCIC changed the agreement to the detriment of Appellant and refused to compensate Appellant for the additional costs incurred by those changes. That is a classic blueprint for breach. We stress that this matter is before us on summary judgment. Upon development of a full evidentiary record, we might find otherwise. We also may determine through additional evidence that the contract contains some clause or clauses which under the facts in this appeal shield FCIC from breach. We simply cannot and should not do that at this time, given the record before us.

While we recognize that arguments and interpretations of the contract by FCIC during performance, through the early stages of the dispute, and in its initial briefing are not absolutely binding upon it, nor do such arguments and positions constitute the only defenses that FCIC can raise, the fact remains that the positions taken by FCIC reflect how FCIC understood its obligations and defenses under the 1996 SRA clauses. It is our responsibility to interpret and enforce the contract which was made and intended by the parties. In order for us to determine how the parties understood their obligations, we need to take into account what the parties argued and did not argue during performance and briefing and what defenses FCIC relied on during the contract and why. We should not interpret contract terms by speculating and filling in blanks on our own, particularly when that speculation requires us to dismiss out of hand those clauses and arguments (operation of the change date) which FCIC relied upon. Instead, we need to allow the parties to explain and address the contract clauses and once we have a full understanding, then we can properly determine whether the contract was breached. If we give any weight at all to FCIC's contemporaneous contract arguments and its position in the brief that it had the right to make the changes as long as it did so before the change date, then this Motion cannot be granted. See Terra Advanced Servs. Corp., GSBCA No. 6713-NRC, 83-1 BCA ¶ 16,301.

It should be noted that in addition to taking the position that it had the right to make the changes as it did because it made the changes before the change date, FCIC also put forth in its Answer, the affirmative defense that RHIS assumed the risk of changes because RHIS could have exercised the option to amend its Plan of Operation and remove the crops for which prevented planting coverage was available. FCIC stated, "even though there was ample time, RHIS never made such request." This position was also asserted in FCIC's April 11, 1997 determination letter, where FCIC stated that RHIS had no claim relating to FCIC's denial of RHIS's request to change its Plan, because RHIS had not requested a change to its Plan until after losses had occurred. (FF 37-38, 51-54.) As noted earlier, the allegation that RHIS did not request a change to its Plan is clearly contradicted in the record. RHIS made several requests to amend the Plan and those changes were requested before planting and harvest dates and well before losses had occurred. (FF 29-32.) Accordingly, FCIC cannot prevail on this defense.

Later in the proceedings, FCIC counsel, in her letter of April 10, 2000, no longer claimed that Appellant had not requested the change to its Plan. Instead, FCIC took the position that although Appellant had the right to seek a change in its Plan, it asked for a remedy that could not be provided and therefore should not be allowed to seek compensation due to the changes. (FF 57.) While FCIC's position may be provable, FCIC's position is not clear from the clause. Moreover, RHIS has

contended otherwise and asserts that FCIC could have allowed it to make changes to its Plan. (FF 29-30, 32.) Clearly on this matter, disputed questions of fact exist. For us to decide whether RHIS made an adequate request to modify the Plan and whether FCIC had the right to refuse to allow RHIS to make a modification, the parties will have to provide significantly more evidence and explanation then currently before us. Given what we have at this time, we cannot find on summary judgment that RHIS was not entitled to have its request for modification approved and acted on.

Throughout its Motion and in its arguments, FCIC appears to give little weight to the legal principle that for summary judgment purposes, we must take Appellant's factual evidence over that of FCIC and treat Appellant's evidence in a light most favorable to Appellant, including all reasonable inferences in RHIS's favor. Appellant has contended that the changes it asked for could have been made. (FF 29-30, 32.) But for FCIC's blanket statement otherwise, we have no evidence to negate RHIS's contention (FF 57). Applying inferences in RHIS's favor, we must at this point conclude that RHIS can prove that its request was not outside the scope of changes permitted under the Plan.

Further, we have concerns over the fact that when RHIS sought to modify its Plan of Operation through letters of January 31, 1996, and later February 8 and March 4, 1996, it was presenting suggested options, and as such did not necessarily preclude other reasonable modifications due to prevented planting (FF 29-30, 32). For example, in Appellant's letter of January 31, 1996, Appellant stated, "While numerous options are available if addressed in a timely manner, RHIS would suggest the underwriting exposure could be addressed via the assigned risk option if only the premium and loss associated with prevented planting is an option." (FF 29.) Notwithstanding Appellant's apparent willingness to accept other options, FCIC conducted no dialogue but simply dismissed the request. FCIC did not dismiss the request because Appellant had asked for unacceptable relief. Rather the evidence indicates that it rejected Appellant's request because FCIC believed that it made the change before the change date and therefore had no obligation to allow a modification to the Plan. (FF 21, 35, 41.) Additionally, FCIC did not even respond to Appellant's March 4, 1996 letter. At this juncture, we have questions regarding how the parties operated under the Plan of Operation clause and whether FCIC in its actions is attempting to use form over substance as a shield.

Moreover, even if FCIC could establish as a matter of undisputed fact and law that Appellant failed to properly ask for a change, then we would still have before us issues of estoppel, for it appears that FCIC would have refused modification regardless of what was being asked. This conclusion is drawn from the evidence showing that FCIC denied a change to the Plan because of its belief that it had complied with the contract by making the changes by the change date. (FF 21, 35, 41.) Thus, the operative reason for rejection was not an inadequate request for remedy. In the face of the myriad of issues surrounding the rights and actions of the parties as to modifying the Plan, any determination in favor of FCIC which uses the Plan as a shield must at this point be rejected.

Further, on the subject of the Plan, we reiterate that FCIC, in its letters during the SRA, in its correspondence with the Board and in its initial brief, consistently failed to contend that Appellant was somehow technically barred from seeking a modification of its Plan of Operation. At no time did FCIC take the position that Appellant was barred from changing its Plan of Operation because the Plan did not involve "contracts previously written." What FCIC asserted was that Appellant

failed to ask for a change (which is contrary to evidence) and later that Appellant asked for relief that was not available. (FF 31, 33, 35.) As a result of FCIC's position, one can draw the reasonable inference that FCIC understood that Appellant had a right and was qualified to proceed with a request for a change to the Plan, and but for the two defenses, might have been granted the right to make modification as a result of the prevented planting changes.

In addition, even if FCIC could establish for purposes of summary judgment that it acted before the change date, that finding would not necessarily be dispositive of the appeal. Appellant has argued that the change date provision is neither a sword nor a shield and that it neither permits nor excuses FCIC from the ramifications of making the prevented planting changes. While FCIC, as noted above has consistently argued that the Change Date clause gives it the right to make the change in the manner it did, FCIC has provided little explanation as to why that is the case, nor has it pointed to any clause other than that dealing with the change date to support its Motion. We do not find the language of the Change Date clause to be so clear that it necessarily provides a shield. Rather, we see the issue in this case as whether FCIC is permitted under circumstances surrounding this SRA, to materially change the contract terms after the agreement was in place and after RHIS was locked into risk allocations. Assuming RHIS was locked into a risk allocation before the change, then absent FCIC showing some clause or clauses which permitted FCIC to make material changes or FCIC showing a course of dealing as to interpretation of the clause to that effect, we cannot properly find on the record before us that Appellant has failed to make a case for material breach.

Finally, FCIC also made a number of other arguments in its Motion. None are case dispositive. We agree with FCIC that to the extent Appellant argues that FCIC had the obligation to treat the 1996 changes in the same manner as FCIC treated the 1995 changes and to the extent that the 1995 actions constituted a course of dealing, Appellant's claim fails. The plain wording of the 1995 change establishes that the change covered that year and not 1996. (FF 24.) One does not establish a course of dealing in a single year on a single event. Accordingly, granting summary judgment as to this issue is appropriate. Similarly, RHIS has failed to show that FCIC breached the contract by bad faith or lack of fair dealing, when it adjusted the premiums as it did. While RHIS may contest the amount of adjustment FCIC made to the premiums, that adjustment is not an independent basis for breach. RHIS has provided no evidence of bad faith or lack of fair dealing; all it has provided is a dispute over the adequacy and calculation of the premium adjustment. Accordingly, this matter is appropriate for granting summary judgment. However, neither of the above dispose of the appeal, which as explained above, centers on whether FCIC breached by changing the prevented planting rules after Appellant was locked in to risk. Further, while we find that the adjustment to premium issue is not a matter of independent breach, Appellant can still address the adequacy of premium issue in relation to any damages for breach due to non-permitted changes to the agreement.

THE AMERICAN GROWERS OPINIONS:

But for the earlier decision of this Board in American Growers, we would end this opinion above. However, because in their respective opinions, two of this Board's judges, each for different reasons, granted summary judgment for FCIC on relatively similar facts; and our decision here is contrary to how they decided; we address that decision and their opinions. While many facts in the two appeals are parallel, there are two primary differences. First, in this appeal there is clear evidence that

Appellant attempted to have it Plan of Operation changed. Second, in this appeal there is evidence to establish that there were "contracts previously written" in effect at the time that Appellant made requests to change its Plan.

In Judge Vergilio's opinion in American Growers, he stated the following:

> The insurance company maintains that the FCIC breached the SRA by implementing 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 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 [to] fall outside of the SRA (that is, the breach allegation), then the SRA does not provide a mechanism for relief regarding prevented planting policies. The SRA dictates the legal obligations of insurance matters coming within the coverage of the SRA. As a matter of law, the FCIC is entitled to relief on this allegation.

As Judge Vergilio points out above, in addressing the dissent in American Growers, the dissent in that appeal understood Judge Vergilio to be putting the Appellant in a position where Appellant had to walk away from the SRA if it disagreed with the applicability of the prevented planting changes. Since Appellant did not and continued to provide insurance to various producers, it could not then claim monetary relief. He further states that the insurance company did not demonstrate that FCIC required or demanded that it sell the insurance in issue under the SRA. In this appeal, as to RHIS, the facts with reasonable inferences construed in favor of Appellant, the non moving party, show that RHIS (unlike how Judge Vergilio found the case to be in American Growers) did demonstrate that FCIC required and demanded that it sell the contested prevented planting insurance. Here, RHIS asked for the right to amend its plan and that was refused by FCIC. Once that occurred, RHIS had little practical choice but to proceed as it did. Thus, from a factual standpoint, this appeal and that of American Growers are distinguishable.

Moreover, as we address in our findings, there are a number of other independent legal and practical issues which make us question how much, if any flexibility, Appellant or any other reinsurer had to either walk away or modify their relationship and contracts with producers, once the reinsured's Plan of Operation for the 1996 SRA year was approved. Appellant has established in this appeal that once FCIC approved its Plan of Operation for the 1996 SRA year, Appellant was locked into various risk allocations. The record shows through language in the Plan of Operation clause and also by reference to statements by FCIC in its Answer and Motion that once it was obligated to provide insurance to some producers, it was prohibited under the SRA from denying coverage to any similarly situated eligible producers, absent permission from FCIC. (FF 41-42, 46, 51, 53-54.)

In addition, as a matter of law, a party is not legally 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. Here the facts are that Appellant made its objections known and sought relief through modifying its Plan of Operation. Had it walked away, it would have opened itself to FCIC claiming that Appellant had breached and subjected itself to substantial damages and litigation. Whether Appellant acted properly and whether FCIC can establish the factual basis for estoppel are matters for fact finding and factual resolution.

We also disagree with Judge Vergilio's reasoning where he asserts that the SRA provides no relief for a breach involving prevented planting such as that claimed in this appeal. Breaches by definition are actions which are beyond the agreement of the parties and thus technically outside the four corners of the agreement. We find nothing in the law, the SRA or the practice of the parties in dealing with SRA claims throughout the years to support the conclusion that a claim such as this is not appropriate for resolution by this Board.

Judge Vergilio also determined in that appeal, that Appellant failed to request a final administrative determination within 45 days of the publication of the final rule (which he equates with the receipt of a final determination within the meaning of 7 CFR 400.169(a)). Neither of the other opinions in American Growers adopted the position. To accept Judge Vergilio's conclusion would be to create an amorphous standard and initiate a practice inconsistent with the regulatory language and contrary to our understanding of the parties' past practices.

The other majority opinion, that of Judge Houry, focuses on two principal issues, the Plan of Operation clause and the setting of rates statute. As we interpret his opinion, he concluded that Appellant's claim had to fail in that appeal because an adjustment to the Plan of Operation was Appellant's sole remedy for a change in prevented planting coverage such as occurred here. He concluded that American Growers had never attempted to avail itself of the benefit of the Plan of Operation clause and further concluded that the relief sought by Appellant did not involve policies for which Appellant was already obligated (contracts previously written) at the time of the request for a change to the Plan of Operation. He concluded that it was immaterial whether FCIC implemented the prevented planting changes after the change date. He concluded that 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 as he finds was the case in 1995. According to him, in seeking relief for the prevented planting changes in American Growers, "Appellant is essentially requesting the Board to reform the SRA to provide a mechanism for relief that does not exist." We point out that in deciding that the policies in issue did not qualify as previously written, Judge Houry made two findings which are different in the record in this appeal. First, he concluded that American Growers had never requested to change the plan. Second, he found that Appellant did not allege or provide evidence that the crop insurance contracts in issue had been previously written prior to the MPCI change date. It is clear from the record in this appeal, that Appellant did request a change to its Plan. Thus, to the extent that served as the basis for Judge Houry's granting of the motion in American Growers, it is not pertinent to this appeal. As to his second basis, regarding a lack of evidence to show that the request for a change to the Plan involved "contracts previously written," the instant appeal is again distinguishable from his finding in American Growers. Here, the record shows evidence of previously written policies being affected by the Plan of Operation and by the request for change. First, various clauses in the MPCI make it

clear that at least a segment of the insurance being issued is through continuous policies which self renew absent being canceled. (FF 4, 8-12.) Second, in its affirmative defenses, FCIC specifically refers to the effect of denial of the changes on "carry over policies." (FF 42.) To us, a carry over policy would logically be a policy that has been previously written. Accordingly, the evidence in this appeal does not allow a finding at this point that there were no contracts previously written. In fact, the evidence indicates otherwise. The reasonable inferences drawn from the above are sufficient to make a factual finding in favor of Appellant on this matter.

We also must point out that we do not necessarily find on this record that even if there were no "contracts previously written," the Plan of Operation clause would apply as broadly as Judge Houry indicated it would in American Growers. We point out that the legal reasoning he used was not argued or identified in any of the contemporaneous correspondence of FCIC when it denied this claim or in the initial briefing in this appeal. In addition, FCIC did not make those arguments in its brief in American Growers. We cannot at this point ignore the fact that FCIC in contemporaneous correspondence and in its initial briefing did not use or identify the Plan of Operation clause as a sole and exclusive remedy or independent shield. At best, it used the clause to argue a failure to mitigate on the part of Appellant. (FF 41-42.) It is a fact that FCIC continuously relied for its defense on its contention that it made the change before the contract change date and thus had a contract right to act as it did without compensating Appellant for the sum claimed. Before we would interpret or apply the Plan of Operation clause as a bar to an otherwise mutual breach, we need FCIC to explain why it did not argue the issue and to explain and reconcile such a reading with the change date argument upon which FCIC so strongly relied. Absent explanation from FCIC, we will not treat its contemporaneous contract arguments as superfluous.

Further, we are not certain as to the meaning and the parties' understanding of a number of the terms of the Plan of Operation clause. Before we use that clause to bar Appellant relief, we need the parties to explain how they understood terms such as "sales and business considerations," "adverse selection," "FCIC or Government action" and "contracts previously written." At this point and without clarification and explanation, the clause arguably could be interpreted to require Appellant to proceed with the earlier approved Plan, even in the face of disagreement, but still retain a right to seek compensation, as long as Appellant complied with FCIC's change and provided the insurance as directed.

FCIC, as a result of American Growers and in response to the Board's letter giving the parties an opportunity to respond to that decision, filed a supplemental motion contending that summary judgment should be granted because of res judicata and collateral estoppel. First, while two judges decided to grant the motion in American Growers, they each did so for different reasons. Second, there are critical fact differences in this appeal relating to the fact that RHIS did request a modification to its Plan in this appeal and relating to the fact that this record has evidence that Appellant had carry over policies in place at the time the Plan was approved. Further, while counsel for the Appellant is the same in each case, the parties were different and points and facts were raised in this appeal that either did not come up or were not as well developed as in the earlier case. Finally, at best American Growers provides a plurality opinion. In that regard, when a specific issue or view fails to attract a majority of specific concurring votes, the threshold between dictum and rule of law is not crossed and no mandate is generated nor legal authority granted as to that issue or

view. 5 Am. Jur. 2d 602 (citing Northern Indiana Public Service Co. v. Citizens Action Coalition, Inc., 548 NE 2d 153).

As a final matter, the opinion issued by the dissent in this appeal concludes that there is no evidence to support that even a single policy was in existence prior to December 7, 1995. That conclusion, as is evident by our discussion above, is simply incorrect given the legal parameters of summary judgment. While the contract language in the MPCI did constitute evidence that there were "contracts previously written," the matter was even more directly addressed when FCIC contended that had Appellant properly availed itself of the Plan of Operation measures, Appellant could have canceled "carry over policies." Carry over policies by definition, would be pre-existing and thus "contracts previously written." Finally, we reiterate that we deny the Motion for more reasons than solely our findings that there were "contracts previously written." Among other unresolved issues that require a hearing or further development are serious questions as to operation of the change date clause and operation of Plan of Operation clause.

In addition, the dissent has set forth additional arguments in support of his position to grant the Motion. None of the arguments warrant changing our ruling. We find that much of the dissent involves weighing evidence and see the dissent, in some instances, applying inferences against, rather than in favor of the non-moving party.
As to the dissent's contention that the Board lacks jurisdiction over the claim for indemnification and the increase in premiums, we note that the April 11, 1997 final determination by FCIC addressed two matters. First, it addressed Appellant's claim for additional compensation, because FCIC's change was allegedly outside the contract agreement (breach). There FCIC discussed a number of issues, including FCIC's claim that as long as it complied with the change date, it had the right to make the changes it did without paying Appellant the additional compensation claimed. (AF 448.) Second, FCIC addressed the legal affect of its refusal to allow Appellant to change Appellant's earlier approved Plan of Operation (AF 449-50). In addition, FCIC's counsel has given no indication that a claim for damages is outside of the Board's jurisdiction, a position that is consistent with law and the understanding of her client, FCIC. Rather, by letter of August 28, 1997, where counsel addressed consolidation of the earlier filed AGBCA No. 97-148-F (filed prior to the April 11, 1997 determination) with this appeal (AGBCA No. 97-182-F), she said, "This is the same case." Throughout these proceedings involving the prevented planting appeals, FCIC has consistently and vigorously defended its actions on the merits. It has not denied that it could face liability, depending on proof of facts. Finally, we note that in the Notice of Appeal and Complaint in AGBCA No. 97-148-F, the Appellant made the same claim being challenged here by the dissent. In our decision of September 22, 1997, where we dismissed AGBCA No. 97-148-F as premature, we specifically stated that to effectuate the consolidation with AGBCA No. 97-182-F (the instant appeal), all records and filings in the earlier appeal were to be consolidated into the latter. Given the above, the proper scope of this appeal has not and should not be an issue. Accordingly, the concerns of the dissent as to jurisdiction are misplaced.

Regarding the concerns expressed by the dissent as to sovereign acts, we again find no validity in the dissent's position. As FCIC acknowledged in its April 11, 1997 letter of determination, FCIC would have to pay damages under basic contract law, if FCIC acted outside its legal authority under the contract. Whether FCIC acted within its authority is of course the issue before us. In fact, FCIC

says that in 1995, it did act outside its authority and that is why it issued a modification compensating reinsurers for unpermitted changes caused by 1995 prevented planting actions. FCIC explains the difference between what happened in 1995 and what happened in 1996, by noting that for 1996, it "acted well within the scope of its legal authority and insurance companies are not entitled to compensation." The quoted language reflects FCIC's acknowledgment that if the Appellant could prove that FCIC made the 1996 prevented planting changes in an improper manner and did not adequately compensate Appellant, then Appellant could be entitled to compensation. FCIC clearly believes that Appellant cannot produce that proof. Resolution of whether FCIC acted so as justify its refusal to compensate Appellant, is the matter before us. What we ultimately decide will rest on further proceedings.

Because we have decided not to grant FCIC's Motion, this matter will now resume to resolution. As noted in the introduction to this ruling, many of the Board's findings of fact rest on applying inferences in favor of Appellant and thus, do not necessarily reflect how those facts will be decided on the merits. Further, the Board anticipates the parties will each provide additional evidence, so as to more fully develop the record. All that will have an effect on the ultimate decision of the Board. Finally, while quantum was not addressed in our ruling, we find it useful to provide the following additional guidance to the parties. The Board notes that an upward adjustment to premium and a full adjustment for indemnity pay-outs would appear to be duplicative. Moreover, if recovery is warranted, any damages will have to take into account amounts already paid, as well as the categories under which those prior payments were made and the shared risk nature of the SRA.

RULING

For the reasons set out in the opinion, we deny the Government's Motion for Summary Judgment.

_____
HOWARD A. POLLACK
Administrative Judge

Concurring:

_____
ANNE W. WESTBROOK
Administrative Judge

Separate Dissenting Opinion by Administrative Judge HOURY.

This appeal arose under a 1996 Standard Reinsurance Agreement (SRA), a cooperative financial assistance agreement under which Rain and Hail (Appellant) sells and administers crop insurance policies on behalf of the Federal Crop Insurance Corporation (FCIC), and FCIC reinsures

Appellant's indemnity payments and provides expense reimbursement under the authority of the Federal Crop Insurance Act. The matter is before the Board on the Government's Motion for Summary Judgment. Contrary to the majority opinion denying the motion, I would grant the motion and deny the appeal.

First, as explained below, Appellant's Complaint before the Board goes far beyond the claim it presented to the FCIC, creating a serious jurisdictional question. I limit my analysis to the claim considered by the FCIC. Second, the Board decided American Growers Insurance Co., AGBCA No. 98-200-F, 00-2 BCA ¶ 30,980, recon. denied, AGBCA No. 2000-160-R, 00-2 BCA ¶ 31,107, a case virtually identical with the present including the same counsel. There, a Board majority comprising a different Board panel granted the Government's Motion for Summary Judgment and dismissed the appeal. Thereafter, for the present appeal, the Presiding Judge offered counsel an opportunity to distinguish the present facts from those in American Growers. Counsel failed to distinguish the present case in any material way. Consequently, as stated above, I would grant the Government's Motion and dismiss the appeal.[1]

The Facts

Here, as in American Growers, during the spring of 1995 prior to the expiration of the 1995 SRA, numerous states experienced flooding that prevented producers from planting crops. As a result of the flooding, FCIC expanded the 1995 prevented planting insurance[2] by, among other things, extending final planting dates and increasing indemnities during the late planting period. FCIC implemented most of these changes in the spring of 1995, after the approval of Appellant's SRA Plan of Operation (Plan), after the November 30 final change date,[3] and after at least some of the crop losses had already occurred, without increasing premiums to cover the added risks. As a consequence of FCIC's implementing these changes and not increasing the premiums, Appellant incurred greater indemnity payments and administrative expenses for which Appellant was compensated by FCIC. The 1995 events were unprecedented, and the compensation agreement between the parties was expressly limited to the 1995 SRA. The 1996 prevented planting changes which are the subject of the present appeal were prospective in their application, and involved premium rate increases. The facts construed in Appellant's favor, as the Board is obligated to do when the Government is the moving party, indicate the following sequence of events.

Appellant filed its 1996 Plan on June 16, 1995. The 1996 SRA became effective October 27, 1995, the date that FCIC approved Appellant's Plan. The contract change date for most crops was November 30. FCIC notified reinsurance companies of the proposed prevented planting changes

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[1] American Growers stands as written, not as revised and explained by the majority in the present appeal.

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

[3] The date by which changes to the MPCI contract such as policy provisions and premiums are made available for inspection in the agent's office (MPCI Sections 1(n) and 4).

October 18, 1995, sent an advanced copy of the proposed rule to the companies November 3, published the proposed rule in the Federal Register November 8, filed the final rule with the Federal Register November 30, and published the final rule December 7. One dispute between the parties centers around the date these changes became effective, either November 30 or December 7, 1995. For purposes of deciding this Motion, the December 7, 1995 date will be the effective date. Appellant concedes that the 1996 prevented planting changes were nearly identical to the 1995 changes (Appellant's Response to FCIC's Motion, p. 33). It is not disputed that these changes increased Appellant's prevented planting risks over what had been in effect prior to the 1995 SRA. However, it is also not disputed that, unlike 1995, FCIC increased premium rates for 1996. Appellant asserts the rate increases were inadequate.

Appellant's Claim/FCIC's Final Determination

Appellant filed a claim dated January 31, 1996, asserting that its 1996 Plan (submitted June 16, 1995) was based upon the assumption that the 1995 prevented planting changes were for 1995 only, that prevented planting would revert back to its 1993 terms and conditions, that the 1996 changes were not implemented until December 7, 1995, and that these changes contain significantly more underwriting risk and administrative expense. Appellant stated that there were several methods of resolving the issue, suggesting that one remedy was to amend the Plan to separate the prevented planting premiums and losses from other premiums and losses, and allocate these to the assigned risk fund of the SRA which obligated FCIC to pay a larger share of Appellant's indemnities. (Appeal File (AF) 380-82; Appellant's Response to FCIC's Motion, p. 16.)

By letters dated February 21, and April 8, 1996, FCIC denied Appellant's claim, closing off discussion of other resolution methods, asserting that the prevented planting changes were adequately reflected by the premium rate increase, that the premium rate increase would result in greater expense reimbursement to Appellant, and that no further adjustments were necessary (AF 383, 388). After further correspondence and reconsideration, by letter dated April 11, 1997, FCIC issued a final determination denying Appellant's claim, concluding that allowing Appellant to amend the Plan after prevented planting losses had occurred would shift the risk of loss to FCIC (AF 389-450). Appellant filed a timely appeal. Appellant never presented, and FCIC never considered, the $12,810,014 claim for indemnities, or the $5,111,175 in premiums it now seeks redress for.

The Appeal/Board Jurisdiction

Before the Board, Appellant presents an entirely different claim than had been presented to the FCIC. Here, Appellant claims $12,810,014 on 5,066 indemnities, $5,111,175 in premium expenses, and an unspecified amount for increased administrative expenses. The Board is empowered to decide appeals of final administrative determinations of the FCIC. 7 CFR 24.4(b). None exist on the claims before the Board. The majority has narrowly defined the Board's jurisdiction over FCIC appeals in far less egregious circumstances than the present. See American Growers Insurance Co. (Boilini), AGBCA No. 99-134-F, 00-2 BCA ¶ 30,967, recon. denied, 00-2 BCA ¶ 31,050. Further, Appellant fails to explain its claim basis before the Board, how the amounts relate to its claim, or how the amounts were calculated. Accordingly, I limit my dissent to what I view as the appeal the

Board has jurisdiction of; Appellant's claim proposing changes to its Plan that involved reallocating the prevented planting portion of the crop policies to the assigned risk fund, and FCIC's alleged improper rejection of these changes to the Plan.

The Merits/Prevented Planting Changes/FCIC Rejection Of Appellant's Proposed Changes To Plan

As with the American Growers decision, irrespective of whether FCIC implemented the prevented planting changes after the Plan was approved, or after the change date, the SRA provides a mechanism for adjusting the Plan, at any time, if the FCIC changes substantially increased Appellant's risks on crop insurance policies previously written. As in American Growers, Appellant has not shown or alleged that the FCIC changes substantially increased Appellant's risks on crop policies previously written. Nor has Appellant provided evidence that crop policies for the spring 1996 growing season existed before December 7, 1995, the date the changes became final. Consequently, as a legal issue relating to granting the Government's Motion, FCIC did not improperly rejected Appellant's proposed changes to its Plan.

First, and perhaps foremost, after being given the opportunity to distinguish the present case from American Growers, Appellant has not asserted that there were crop policies written previous to December 7, 1995, that were affected by the 1996 prevented planting changes. The majority reaches for a reference to "carry over policies" in the Government's Answer to conclude that there were. However, the "carry over policies" reference in the Government's Answer clearly relates to the time frame after December 7, 1995, when the prevented planting changes became effective, and Appellant could have requested changes to its Plan. The reference is not to 1995 policies that the majority concludes would become 1996 policies without further action and application by the producers. The majority also relies on the following language in section 2 of the crop policy to conclude that once insurance is issued, it remains in effect from year to year, and that, therefore, there may have been crop policies previously written to December 7, 1995, and that this is a materially disputed fact (even though Appellant has not asserted it) that precludes summary judgment:

> (a) This is a continuous policy and will remain in effect for each crop year following the acceptance of the original application. After acceptance of the application, you may not cancel this policy the initial crop year. Thereafter, the policy will continue in force for each succeeding year unless canceled or terminated as provided below.

The majority fails to account for the language in the regulations and the policy, and for the facts in the record that, rather than creating insurance in the absence of a specific application for insurance by a producer, merely commits FCIC to extend insurance to a producer in the event the producer continues to qualify for insurance, timely files a properly completed application for the insurance, and FCIC determines that its risks are not excessive. For example, 7 CFR 457.7 & .8 (1996) provide that:

> The insurance contract shall become effective upon acceptance by the Corporation or the reinsured company of a duly executed application for insurance. . . . The contract

> shall consist of the accepted Application, the Basic Provisions, the Special Crop Provisions, the county Actuarial Table, and any amendments or options thereto. Application for insurance . . . must be made by any person who wishes to participate in the program. . . . The Corporation or the reinsured company may reject or discontinue the acceptance of applications . . . upon the . . . determination that the insurance risk is excessive.

The Application, Basic Provisions, Special Crop Provisions, and county Actuarial Table change from year to year. There simply is no basis for an automatic renewal, as the majority suggests, absent a new application for insurance by a producer. A producer must consider these changes prior to deciding whether, what, and how to insure. Further, a producer cannot know the indemnity for each year, because the indemnity is determined by the prior year's production as indicated by the acreage report that the producer is required to file annually. For example, the policy in section 1(qq) defines Summary of Coverage as:

> Our statement to you, based upon your acreage report, by unit, specifying the insured crop and the guarantee or amount of insurance coverage provided.

The final rule for the changes was effective December 7, 1995, the final planting dates for many of the crops in issue were not until May or June 1996, with late planting coverage available in some instances 25 days thereafter. Prevented planting risks such as flooding may not occur until the final planting dates. It is obvious that producers would not be required to commit to insurance prior to December 7, 1995, for risks that would not even begin to become apparent until the spring 1996 planting season began. There is no evidence that insurance applications were submitted and accepted prior to December 7, 1995, for the 1996 spring crop year. Further, Appellant has not alleged that there were policies previously written. Accordingly, as a legal issue relating to granting the Government's Motion, FCIC did not improperly rejected Appellant's proposed changes to its Plan.

The Merits/FCIC Premium Rate Increases

At the outset it should be noted that it is within FCIC's interests as the ultimate reinsurer to set adequate rates. Regarding the adequacy of the rate increases, as in American Growers, the SRA does not address FCIC's rate setting powers. These powers are conveyed to FCIC by statute. If these statutory grants of authority are sovereign powers, even an ambiguous term in the SRA will not be interpreted as the conveyance of the sovereign power. United States v. Winstar Corp., 518 U.S. 839, at 878. Thus, contrary to the majority position, FCIC's acknowledgment of liability under the 1995 SRA for allegedly acting outside its authority, has nothing to do with FCIC's statutory rate setting power, whether this power is a sovereign grant, or whether the statute confers any rights on Appellant for monetary damages. **Indeed, FCIC acknowledged liability because it had not increased rates for the retroactive prevented planting changes it made 1995, unlike the prospective changes in 1996 at issue here, when rates were increased**. Appellant has not shown the creation of any rights to recover monetary damages, and the Board's analysis of the applicable statute in American Growers indicated that no such rights were created.

Among other matters addressed in American Growers, 7 U.S.C. 1506(o)(1) provides that FCIC shall take such actions as are necessary to improve the actuarial soundness of crop insurance 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 for losses after planting has occurred. It does not concern the loss ratio for particular crops. It does not concern the loss ratio of particular geographic locations. 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.

Conclusion/Ruling

In Anderson v. Liberty Lobby, 477 U.S. 242 (1986), in deciding a summary judgment motion, the Court held that there is no issue for trial unless there is sufficient evidence favoring the non-moving 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). The 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).

First, there is no evidence whatever that previously written polices existed prior to December 7, 1995, the date that the 1996 prevented planting changes became final. Neither Appellant nor the majority has pointed to evidence supporting a single policy in existence prior to December 7, 1995. Denial of a summary judgment motion must be based on material probative evidence, not hypothetical speculation, or mere possibility. Accordingly, as a legal issue, for purposes of deciding this Motion, FCIC did not improperly reject Appellant's proposed changes to its Plan.

Second, as the ultimate reinsurer it is within FCIC's interests to set adequate rates. The statutory grant of authority to FCIC to set rates, even if not a sovereign grant, has not been shown to confer rights on Appellant to recover the indemnities or premiums it seeks, and the Board's analysis in American Growers indicates that such rights were not created. Thus, contrary to the majority position, FCIC's acknowledgment of liability under the 1995 SRA for allegedly acting outside its authority in 1995, has nothing to do with FCIC's statutory rate setting power, whether this power is a sovereign grant, or whether the statute confers any rights on Appellant for monetary damages. **Indeed, FCIC acknowledged liability because it had not increased rates for the retroactive prevented planting changes it made in 1995, unlike the prospective changes in 1996 at issue here, when rates were increased**.

The balance of the issues raised by the parties was adequately addressed in American Growers. Accordingly, I would grant the Government's Motion and deny the appeal.

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EDWARD HOURY
Administrative Judge

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