RURAL COMMUNITY INSURANCE COMPANY,	)	**AGBCA No. 2000-154-F**
	)	
and	)	
	)	
RURAL COMMUNITY INSURANCE AGENCY, INC., d/b/a RURAL COMMUNITY INSURANCE SERVICES, (1996 Prevented Planting)	)	
	)	
Appellants	)	
	)	
Representing the Appellants:	)	
	)	
Daniel N. Rosenstein Levin & Rosenstein, P.C. Suite 603 1101 Seventeenth Street Washington, D.C. 20036	)	
	)	
Representing the Government:	)	
	)	
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RULING OF THE BOARD OF CONTRACT APPEALS

February 12, 2002

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK. Dissenting opinion by Administrative Judge Vergilio.

This appeal, received at the Board May 25, 2000, is a successor to AGBCA No. 99-146-F, dismissed without prejudice December 14, 1999. Rural Community Insurance Co., AGBCA No. 99-146-F, 00-

1 BCA ¶ 30,698.[1] A principal issue in this appeal is a rule involving prevented planting published in the Federal Register November 8, 1995. It was filed as a final rule November 30, 1995, and published as a final rule December 7, 1995, with an effective date of November 30, 1995. The rule was to be applicable beginning with the 1996 crop year for spring crops. Rural Community Insurance Company of Minneapolis, Minnesota (Appellant), entered into a 1995 Standard Reinsurance Agreement (SRA) with the Federal Crop Insurance Corporation (FCIC or Respondent). In the current appeal, Appellant contends that it suffered underwriting losses of $7,336,249 and excess loss adjustment costs of $331,414 as a result of the implementation of the 1996 prevented planting rule. Appellant contends that the rule was implemented in an unlawful manner. Appellant also alleges that the rule made unilateral changes in the SRA, and resulted in compensable errors and omissions. In addition, Appellant asserts that FCIC's failure to cancel the 1995 SRA entitled Appellant to remedies allegedly provided by the 1995 SRA for having sold and serviced policies containing the planting provisions in question after the contract changes date.

Appellant originally filed an action in the U. S. District Court for the District of Columbia concerning these issues. On the Government's motion to dismiss, the court dismissed without prejudice with leave to reinstate in the event the Board issued an adverse decision. When Appellant subsequently appealed to the Board, the Board dismissed for lack of jurisdiction because there had been neither a request for a determination nor a final administrative determination. Rural Community Insurance Co., AGBCA No. 99-146-F, 00-1 BCA ¶ 30,698.

Thereafter, on April 24, 2000, FCIC issued a determination denying Appellants' claim for excess indemnities and excess loss adjustment expense alleged incurred as a result of the prevented planting rule at issue. Appellant requested, but did not receive, a final agency determination. Appellant appeals the deemed denial of its request for a final administrative determination pursuant to 7 CFR 400.169(a).

The Board has jurisdiction to decide this timely appeal under 7 CFR §§ 24.4(b) and 400.169(d).

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[1] The Government submitted an appeal file and Appellant a supplemental appeal file in AGBCA No. 99-146-F. After docketing of the instant appeal, the parties were asked to inform the Board whether each wished to have its submission in the prior appeal pertain to the instant appeal. The Government filed a new appeal file. Appellant did not. Therefore, the term appeal file (AF) will refer to the appeal file submitted in AGBCA No. 2000-154-F. The term supplemental appeal file (SAF) will refer to the supplement filed in AGBCA No. 99-146-F. Where reference is made to documents in the appeal file submitted in AGBCA No. 99-146-F and not contained in either of the other files, they will be identified as AF (99-146) followed by the appropriate page number of numbers.

FCIC has filed a Motion to Dismiss and Amended Motion to Dismiss on the ground that the decision of the Board in American Growers Insurance Co., AGBCA No. 98-200-F constitutes a holding equally applicable to the instant case under the doctrine of *stare decisis.*

FINDINGS OF FACT

1. Title 7, Code of Federal Regulations (CFR), section 400.169, Disputes, provided as follows:

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

2. Appellant and FCIC entered into an SRA (July 1,1994) for the 1995 reinsurance year. Section F.1.a thereof provided as follows:

> F. Insurance Operations
>
> 1. Plan of Operations
>
> a. This Agreement is not effective until FCIC has approved the Company's Plan of Operation (Plan). The Plan must be submitted to FCIC

> by April 1st preceding the reinsurance year. FCIC will not renew the Agreement if a Plan is not received by April 1st unless other arrangements are mutually agreed upon. 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 the Plan is approved will not be reinsured unless specifically accepted by FCIC.

(AF 321.)

3. Section J. of the SRA provided that the SRA would 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 would not be renewed. (AF 325.)

4. Manager's Bulletin, MGR-95-016 dated May 18, 1995 stated that as the term of the 1995 SRA was 2 years, submissions for the 1996 reinsurance year required only a submission of the 1996 Plan. MGR-95-016 extended the official deadline for receipt of 1996 Plans from April 1, 1995 to close of business June 19, 1995. (AF 49-50.) The 1995 SRA was amended by Prevented Planting Optional Amendment No. 2. which amended "for the 1995 reinsurance year only" the method of calculation for retention of ultimate net losses due to prevented planting. (SAF 24-38.) As of February 28, 1996, the 1995 SRA was amended for the 1996 reinsurance year (AF 338). By letter dated April 11, 1996, FCIC approved Appellant's SRA and Plan of Operation for 1996. The plan of operation was initially received August 2, 1995; revisions were received October13, October 19 and December 13, 1995, and January 11 and February 21, 1996. (AF 359-60.)

5. Manager's Bulletin, MGR-95-021, dated May 25, 1995, provided options to producers who were prevented from planting due to heavy rainfall in the Midwest during the 1995 crop year. These options permitted farmers who had been prevented from planting a crop to collect a prevented planting payment and enroll the affected acreage under the 50/92 and 0/92 provisions [2] of the 1995 wheat, feed grains, upland cotton, and rice programs authorized by the Agricultural Act of 1949. (AF 56.) MGR-95-021.1 dated May 26, 1995 revised MGR-95-021 (AF 60-62). MGR-95-022 restated the options and provided clarifications (AF 69-71). MGR-95-024 (AF 76), MGR-95-025 (AF 77) and MGR-95-028 (AF 83) provided additional clarifications for the 1995 preventing planting coverage. An interim rule published in the Federal Register June 7, 1995 to amend hybrid sorghum seed and rice endorsements; hybrid seed crop regulations; common crop insurance regulations; and sunflower seed crop insurance provisions stated that the amended regulations were applicable for the 1995 crop year only (AF 72). A similar interim rule also applicable for the 1995 crop year was published July 12, 1995. It revised prevented planting coverage for the small grains, coarse grains, cotton and extra long staple cotton crop provisions. (AF 90.)

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[2] The Final Rule published in the Federal Register January 8, 1993 provided that prevented planting coverage would not be provided for, among other things, land entered into any program administered by USDA that provides a payment for not planting the acreage, e.g., the 0/92 or Conservation Reserve programs (AF 2).

6. An Informational Bulletin dated June 23, 1995, Subject: Proposed Amendment to the 1995 Standard Reinsurance Agreement to Address Recent Prevented Planting Decisions, stated:

> FCIC does not expect private sector approved insurance providers to share in the amount of prevented planting losses which was not established as part of the crop insurance policy prior to the contract change date and actuarial prior to the effective date of the reinsurance year.

(AF 81.)

7. The term "contract change date" is not defined in the SRA. Volume 7, Code of Federal Regulations (CFR), § 457.8 provides terms for common crop insurance policies issued by FCIC (or a reinsured company). Therein, "contract change date" is defined as "the calendar date by which we make any policy changes available for inspection in the agent's office." "We" is defined as referring to "the insurance company providing insurance."

8. In a Decision Memorandum dated August 1995, (date is not legible on the AF copy but appears to be between August 20 and 24), Subject: "Prevented Planting Insurance Coverage for the 1996 Crop Year," the Acting Administrator, Consolidated Farm Agency, reviewed the changes made for prevented planting for the 1995 crop year and stated that it had been suggested that two of those changes remain as a part of the crop insurance coverage for spring planted crops in the 1996 crop year. He also stated that "these program changes cannot be implemented for the 1996 fall planted crops because the date by which changes in the crop insurance contract must be made has passed." The memorandum set out the issue under discussion, provided background into the purpose of prevented planting coverage, set out options, listed the pros and cons of each and made a recommendation to the Under Secretary for Farm and Foreign Agricultural Services as to which option to adopt for spring planted crops for the 1996 crop year. This discussion portion of the memorandum stated that a published final rule is required to allow prevented planting benefits for acreage that is planted to a substitute crop. It went on to say that in order to be effective for the spring-planted crops for the 1996 crop year, rulemaking must be completed before the contract change date for spring-planted crops.

9. The Decision Memorandum also asserted that the component in the present FCIC rate structure for prevented planting coverage was small, reflecting the relatively low frequency of prevented planting as well as the modest benefit level. If benefits were to be paid more frequently, as then under discussion, rates would have to be increased. The rates would have to cover not only the claims then being denied but also account for future claims. According to the memorandum, any failure to adequately include this increased risk in the rates would hamper FCIC's pursuit of actuarial soundness. The memorandum discussion provided examples to show that small changes in producer behavior resulting from the proposed prevented planting changes could have major rate impacts requiring rate increases to maintain a 1.00 loss ratio. For two of the three described options, including the one recommended, one of the "cons" listed was that many private sector insurance providers were concerned that allowing a ghost crop to be planted was similar to previous ad-hoc disaster programs and was not a sound insurance principal. (AF 93-102.) A shorter decision

memorandum for the Secretary of Agriculture was dated August 24, 1995. It adopted the option proposed to and adopted by the Under Secretary (AF 103-04).

10. An undated, unsigned Cost-Benefit Analysis contained in the AF described the Final Rule as permitting insured producers of the covered crops for 1996 spring-planted crops and all eligible crops in subsequent crop years to receive both a 0/92 or 50/92 payment and a prevented planting guarantee. The analysis explained that the expected net revenue to the various options depended to a large extent on the farmer's expectations concerning prices, yields, and Government (crop insurance, regular deficiency, and 0-50/92) payments. Both the substitute crop and the 0-50/92 provisions may increase the incidence of moral hazard, particularly if market prices (and/or yields) are expected to be low for the original crop, and net returns are expected to be relatively high for the substitute crop or 0-50/92 options. (AF 111.)

11. The proposed prevented planting rule for the 1996 reinsurance year was published in the Federal Register November 8, 1995. Written comments on the proposed rule were to be submitted by close of business November 20, 1995 to be considered. (AF (99-146) 43.) Appellant provided adverse comments on the proposed rule in a letter dated November 20 (AF (99-146) 64-81).

12. On December 12, 1995, on the behalf of Rural Community Insurance Services, Appellants' counsel wrote to Kenneth Ackerman, Acting Deputy Director for Risk Management, Farm Service Agency, questioning the legality of the FCIC final rule on prevented planting for 1996 spring crops published in the Federal Register on December 5, 1995. Therein, Appellants' counsel articulated seven arguments to support its contention that the rule had been illegally implemented. He argued that the final rule was not effective for any policy having a contract change date before December 7, 1995. He also argued that the final rule was not effective prior to being in the hands of crop insurance agents. He argued that FCIC had violated 7 U.S.C. § 1508(h)(7)(A) by not offering prevented planting coverage beginning with the 1995 crop year and that failure did not allow FCIC to avoid compliance with 5 U.S.C. § 553(d) requiring publication of a substantive rule not less than 30 days before its effective date. In addition, Appellant contended that the number and length of comments did not prove the adequacy of a comment period. Another argument was that the description of 0/92 payments in the 1996 final rule did not conform to the description of the same payments in the 1995 interim rule, demonstrating failure to provide reasoned analysis required by law. He argued that FCIC's failure to meet Administrative Procedures Act (APA) requirements for the imposition of a rule deprived the final rule of the force and effect of law. Finally, he disputed FCIC's statement that the prevented planting regulation for the 1995 crop year was already in place as the interim rule provided that comments, data and opinions would be accepted until the close of business September 11, 1995 and would be considered when the rule was made final. In addition he argued that the statement in the interim rule that administrative appeal provision at 7 CFR, part 400, subpart J or promulgated by the National Appeals Division, whichever is applicable, must be exhausted before judicial action may be brought was incorrect because neither set of provisions was applicable. His reasoning was that 7 CFR § 400.92 was on its face inapplicable to rulemaking; and, under 7 CFR § 400.93, the Director of Kansas City Operations Office lacked authority to review an interim rule signed by the Deputy Director for Risk Management. The letter referred to these questions as continuing. (AF (99-146) 112-14.)

13. The December 12, 1995 letter also stated that Appellants considered it a breach of contract for the FCIC to impose new work under the SRA without providing adequate new compensation for the new work. Appellant reserved the right to challenge the legality of the 1996 Final Rule on prevented planting should the administration of the rule prove burdensome. In addition, the letter stated Appellants' expectation of being held harmless for any underwriting losses suffered as a result of the rule's defect. The letter did not request a determination or a final administrative determination as provided for in 7 CFR § 400.169. (AF (99-146) 112-14.)

14. By letter dated February 8, 1996,[3] Government counsel wrote Appellants' counsel in response to the December 12, 1995, letter to Mr. Ackerman. She stated that she had been asked to respond on Mr. Ackerman's behalf. Her letter provided a response to some of the points raised by the letter on behalf of Appellants. The letter did not describe itself as a determination or a final agency determination. Nor did it cite 7 CFR § 400.169. (AF (99-146) 115-17).

15. Appellants' counsel wrote Mr. Ackerman again on November 15, 1996. Citing 7 U.S.C. § 508(j)(3), and referring to his previous arguments that the prevented planting rule had been illegally implemented, he demanded that Appellants be held harmless from the costs resulting from the rule. The letter did not request a determination or a final administrative determination, nor did it cite 7 CFR § 400.169. (AF 1 (99-146) 118-23.) The FCIC did not respond to the November 15, 1996 letter.

16. Appellant subsequently filed an action in district court arguing violations of the (APA) (SAF 150-92). After dismissal there, the previous appeal to the Board was filed and dismissed for lack of jurisdiction because there had been neither a final administrative determination nor a request for one. FCIC issued a determination April 24, 2000 (AF 418-25). Appellant requested (AF 416-17), but did not receive, a final administrative determination. The current appeal was docketed at the Board May 20, 2000 (AF 418-25).

DISCUSSION

Motion to Dismiss and Supplement to Motion to Dismiss

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

Appellant's amended complaint contains Counts I, II, III and IV. FCIC has moved to dismiss Counts I, II and IV. Appellant bases its motion on the principle of *stare decisis* relying on the Board's 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, appealed No. 1:01-CV-10053 (S. D. Iowa, Nov. 27, 2001). In American Growers, a divided panel of the Board granted FCIC's motion for summary judgment, the two judges in the majority basing their conclusions on different grounds. Both American Growers and the instant appeal involve the promulgation and application of a rule pertaining to prevented planting as applied to 1996 SRAs. Significant to the motion before the Board is the fact that the Appellant here filed comments in opposition to the proposed rule (Finding of Fact (FF) 10) and, when the rule became final, stated its objections in writing expressing the expectation of being held harmless for all underwriting losses suffered as a result of the rule's effect (FF 11-14). Both majority opinions in American Growers stated that American Growers had operated under the SRA without objection.[4]

While FCIC has not so described it, the basis for the motion indicates that it is in the nature of a motion to dismiss for failure to state a claim upon which relief can be granted, under Fed. R. Civ. P. 12(b)(6). In filing its motion and particularly the supplement thereto, FCIC has relied on matters outside the pleadings. There are numerous references to the facts in American Growers and the similarities between the two cases. There are, however, few statements of facts with specific citations to either the findings of fact in that case or the record in either case.

As stated in the Findings of Fact concurred in by the two majority opinions in American Growers, supra, American Growers alleged that FCIC materially breached its 1996 SRA in one or more of the following particulars: (1) failing to reimburse the insurance company for its 1996 prevented planting losses in the same manner and methods as its course of dealing in paying such losses under the 1995 SRA; (2) acting outside its legal authority causing damage to the company; (3) failing to adjust premium rates to reflect the 1996 prevented planting insurance changes for fall-seeded crops; (4) failing to set actuarially sound premium rates to reflect the 1996 prevented planting insurance changes for spring-seeded crops as required under the FCIA; (5) instituting the 1996 prevented planting changes without providing the company with adequate compensation for assuming the increased risks associated with said changes; (6) failing to deal fairly and in good faith with the

[4] Judge Vergilio's opinion states that the company sold and serviced policies "without notifying the FCIC that such policies were outside of the terms and conditions of the SRA and apparently, without objecting to any payments received from the FCIC, and without reserving the right to seek additional compensation." Judge Houry's opinion, in its separate FF 13, states that American Growers "apparently sold the insurance, retained premiums for its administrative expense, paid indemnities for losses, received reimbursement from FCIC, but failed to make any objection or file a claim, based on the fact that its income did not meet expectations."

company in performing the 1995 SRA; and (7) unilaterally modifying the terms of the 1996 SRA after the company had signed and submitted its 1996 Plan of Operation for reinsurance year 1996. The findings also state that the insurance company in that appeal requested that the Board determine, first, the terms of the 1995 SRA regarding reimbursement of its 1996 prevented planting insurance losses, and second, that FCIC was required to reimburse the company for its 1996 losses in an amount to be proven at a hearing.

While this appeal and American Growers both arise out of the factual circumstances surrounding the promulgation and application of the 1996 prevented planting rule and most of the operative facts are the same, as mentioned above, Appellant here provided comments to the proposed rule by the deadline date (FF 10). Also, after the proposed rule was made final on the date comments were due, Appellant objected in writing to the final rule (FF 11, 13). Given the emphasis placed on the lack of objection in American Growers, this factual distinction is more than sufficient to deprive the cases of identical facts. Moreover, the parties in the two cases have argued different legal theories. Appellant's legal theory, as evidenced by its correspondence with FCIC, its initial filing in district court and its arguments to the Board, is that the final rule regarding prevented planting was implemented in a manner contrary to law.

FCIC's motion argues that we should here apply *stare decisis* to holdings of American Growers it describes as follows: (1) a reinsured company is not entitled to recovery based on a failure to effect publication of a rule by the contract change date because if the policies were revised after that date no breach would have occurred because the policies would not have been covered under the SRA; (2) even if the policies were published after the contract change date, no cause of action ensues because there was no evidence that the 7-day delay caused "any damage to the reinsured companies"; (3) FCIC did adjust premiums to cover risk of loss and compensate the reinsured companies for any additional expenses; (4) a reinsured company must request a final administrative determination within 45 days after the publication of a final rule; and (5) acquiescence by a reinsured company demonstrates that recovery for the alleged breach is not appropriate.

FCIC's Supplement to Motion to Dismiss argues that the allegations of Appellant's complaint that specified SRA provisions were unilaterally amended prior to its expiration date over its objections and without consideration, entitling it to damages, were identical to American Growers' claim for damages allegedly resulting from a unilateral amendment to the SRA after submission of the Plan of Operations. Relying on *stare decisis*, FCIC submits this as an additional grounds for dismissal.

Appellant's Memorandum in Opposition

Appellant emphasizes its letters of objection and also the dissimilarities between the grounds on which American Growers' based its appeal and Appellant's grounds here. Appellant argues that its Count I alleged FCIC violations of the APA which is not mentioned in American Growers' complaint. Appellant concedes what it terms "a passing reference" to an APA issue in Judge Houry's opinion, but notes that Judge Houry stated that the issue need not be resolved. With no allegations of APA violations and the only mention of such an issue being made in a context of its not having to be resolved, Appellant argues that there is necessarily no holding on APA issues to which *stare*

decisis applies. Without citation of authority, Appellant posits whether *stare decisis* can ever be applied to rulings on summary judgment, and goes on to aver that summary judgment in a contract case is not a precedent that invokes *stare decisis* in an APA case.

Regarding Count II of its complaint, Appellant argues that, unlike American Growers, it recited specific SRA provisions violated by the final rule. Appellant contends that its claim for damages arises under the SRA and that the alleged FCIC violations of the SRA directly result from its violations of the APA. In response to the FCIC's Supplement, Appellant argues that the FCIC's reliance on the fact that the 1996 Plan of Operation and SRA were not approved until April 11, 1996 was an oversimplification. If there were no approved SRA and Plan of Operation until that time, asserts Appellant, then an implied-in-fact contract existed as the parties conducted business between themselves as if a contract were in existence. In addition, Appellant asserts that if no 1996 SRA existed, Appellant was authorized to continue to do business under the 1995 SRA as neither party gave the other the notice required under Section V.J., "Renewal," which provides that the SRA will continue in effect from year to year unless either party gives at least 180 days advance notice that the SRA will not be renewed. Appellant also contends that the parties were operating under the 1995 SRA because (1) the parties waived Section V.J. December 22, 1995 and (2) on January 11, 1996 FCIC informed all reinsured companies that the 1995 SRA would be terminated at the end of 1996 if Mandatory Amendment No.1 were not executed by each reinsured company and returned to FCIC by close of business January 26, 1996. According to Appellant, because it executed the Mandatory Amendment No. 1 by that date, its 1995 SRA, including Plan of Operation, was never canceled. Thus, argues Appellant, FCIC's April 11, 1996 approval of the 1996 SRA (FF 15) was, at best, a novation. Further, argues Appellant, the fact that FCIC did not cancel the 1995 SRA raises the question whether the hold harmless provision of the Prevented Planting Optional Amendment No. 2 to the 1995 SRA continued to hold Appellant harmless until April 11, 1996.

ANALYSIS

Although not so labeled, FCIC's motion is in the nature of a Federal Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. In such a case, if a court or board deciding such a motion is presented, and does not exclude, matters outside the pleadings, the motion shall be treated as one for summary judgment. The submissions of the parties here have referred to evidence in the appeal files and supplement and the Board has considered much of that evidence. Therefore, we decide this case pursuant to the standard of review for a motion for summary judgment.

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 non-moving 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 not to 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; 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.. 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.

Genuine Issue of Material Fact

At a minimum, this appeal differs factually from American Growers in that the reinsured company in this case presented adverse comments to the proposed prevented planting rule during the comment period after initial publication in the Federal Register. In addition, after the rule became final, Appellant twice informed FCIC of its view that the final rule was illegal and defective and demanded to be held harmless from losses resulting from its application (FF 12, 14). Given the reliance on the failure of the reinsured company to object to the rule by the judges comprising the majority in American Growers, this factual difference raises a genuine issue of material fact sufficient to make decision on summary judgment improper without testing the second prong of the summary judgment test, whether there is entitlement to recovery as a matter of law.

Doctrine of *Stare Decisis*

FCIC relies on the principle of *stare decisis* as grounds for dismissal. Citing Patterson v. McLean Credit Union, 491 U.S. 164, 172, FCIC asserts that the doctrine of *stare decisis* is of fundamental importance to the rule of law. We do not disagree. However, as the Supreme Court there cautioned, citing Boys Market, Inc. v. Retail Clerks, 398 U.S. 235, 241, 90 S.C. 1583, 26 L.Ed. 199 (1970), also cited by Appellant, it is a principle of policy and not a mechanical formula of adherence to the latest decision. In general, *stare decisis* is judicial policy based on the principle that, absent powerful countervailing considerations, like cases should be decided alike, in order to maintain stability and continuity in the law, and to insure that the judicial branch itself will not be above the law. Particularly, where a precedent or series of precedents has been treated as authoritative for a long time, courts are generally reticent to deviate from that policy, even if they would rule otherwise if the question were one of first impression. 20 Am. Jur. 2d *Courts* § 147. To be accorded the status of *stare decisis,* a principle of law will have become settled by a series of decisions. 21 C.J.S. *Courts* § 140.

The principle of *stare decisis* is not to be blindly followed. Its strength increases proportionate to, *inter alia*, the extent to which that interpretation has been fixed in the fabric of the law. 20 Am. Jur. 2d § 149. A single decision is not necessarily binding under the rule of *stare decisis.* In American Growers, the Board granted summary judgment in a case of first impression. Two of the three panel members granted FCIC's motion each on entirely different grounds. A single case by a split panel without a plurality of reasoning is not an appropriate case for the application of *stare decisis* which was intended to avoid relitigating settled issues of law. Here we deal in a developing area of law and one where the parties, FCIC and reinsured companies, have operated in a business context prior to the regulatory establishment of the Board's jurisdiction. In this and other cases, parties have made reference to established courses of dealing which have not been fully documented in the record. We are uncertain to what extent, if any, those courses of dealing may affect the outcome of this case. At any rate, we do not find that the American Growers ruling on summary judgment is so fixed in the fabric of the law as to require dismissal of this case depriving both parties of the opportunity to fully present evidence and argue their respective positions. In addition, we recognize that Appellant here argued its case on a legal theory quite different from those on which the American Growers opinions were grounded. We do not address the issue raised by Appellant that *stare decisis* can never attach to a decision on summary judgment. However, we do acknowledge that Appellant in this case from the outset has addressed the issues from a different legal theory than other companies affected by the same rule. Appellant initiated proceedings in a forum it determined appropriate for adjudication of the case according to that theory and on motion of FCIC was there dismissed. FCIC now wishes to invoke *stare decisis* (based on a case presented and decided on other theories) to deprive Appellant of the opportunity to argue its theory in this forum as well. We do not find that the principle of *stare decisis* compels such a holding on our part.

Moreover, the Board has recently issued a summary judgment ruling in another case involving the same 1996 prevented planting rule. There a divided panel[5] denied an FCIC motion for summary judgment finding disputed questions of fact regarding whether the prevented planted changes occurred before or after the change date as well as a number of mixed questions of fact and law regarding the meaning of the change date and the requirements for publication of a proposed rule change. Rain and Hail Insurance Service, Inc., AGBCA No. 97-182-F (Dec. 10, 2001). Not only do some of the same mixed questions of fact and law also pertain in the instant case, but the Rain and Hail ruling *in toto* demonstrates that American Growers is not so imbedded in the fabric of the law as to justify a dismissal of the instant case on the basis of *stare decisis.*

Comments on the Dissent

[5] The divided panel consisted of a two-judge majority and a dissent.

The assertion that the conclusion of the majority here is inconsistent with an earlier holding in this matter is based on what we consider to be an erroneous interpretation by the dissent of 7 CFR 400.169(a). That regulation provides that a reinsured company which believes that FCIC has taken an *action* that is not in accordance with the provisions of the SRA may, within 45 days after *receipt of such determination*, request in writing the Director of Insurance Services to make a final administrative determination addressing the disputed issues. It goes on to say that the Director will render the final administrative determination. (FF 1.) The dissent's interpretation equates the terms "action" and "determination" in the regulation and ignores the phrase "receipt of such determination." The result is to start the clock running on the 45-day period in which a final administrative determination may be requested when any action which may later be the subject of a dispute occurs. Because the majority in Rural Community Insurance Co., AGBCA No. 99-146-F, 00-1 BCA ¶ 30,698, did not construe "action," unaccompanied by a determination, as being the event triggering the time period for request of a determination, the conclusion reached by the majority here is by no means inconsistent with the holding in the earlier appeal. Prior conduct of the parties confirms that they have not interpreted the regulation to require a request for a final administrative determination within 45 days from any action believed not in accordance with the SRA. Moreover, the Board has had jurisdiction of FCIC appeals since 1996. In no case since then, has it interpreted the regulation as the dissent suggests. We are aware of no case, including any stage of the current appeal, in which either party has argued for such an interpretation. Our interpretation is that 7 CFR 400.169(a) describes three separate events, (1) an action; (2) the receipt of a determination concerning that action and (3) a final administrative determination. If FCIC's intent is to treat the publication of a rule as that initial determination, a clarification to the regulation is the appropriate course. However, we also suggest that such a requirement could unnecessarily hamper the conduct of day-to-day business between the parties.

The dissent would hold that Appellant's assertion of illegal rulemaking regarding prevented planting placed on it the obligation not to sell policies pursuant to those provisions because if the provision is illegal then FCIC lacked authority to reimburse indemnities and make payments pursuant to those provisions. Further, the dissent states that Appellant seeks to shift to the Government all risks and costs associated with such policies. We note that the prevented planting rule did not pertain to separate prevented planting policies but was a feature of policies pertaining to a number of crops. To abstain from selling prevented planting coverage would be to abstain from business generally. Our view is that this position carried to its logical conclusion would potentially force Appellant to breach the contract and rob it of its right to have disputes between FCIC and a reinsured company reviewed on the merits by the Board of Contract Appeals as provided in 7 CFR 400.169(a). While the parties do not consider SRAs to be Contract Disputes Act, 41 U.S.C. §§ 601-613 (CDA) instruments, we have in the past used the CDA as a model in deciding FCIC cases. We are aware of no provision in the SRA which would prevent our following the CDA model that requires parties to continue to perform pending resolution of a dispute. The dissenting judge, who would deny rather than dismiss this claim, sees Appellant's arguments as placing all risk of costs on FCIC. We see the dissent's position on this point as placing all risk of an incorrect interpretation on the company which could be open to litigation from both FCIC and producers if it refused to sell policies based on its own contention of illegal rulemaking. As to costs, we do not here address quantum, but we repeat the guidance of the majority in Rain and Hail Insurance Service, Inc., AGBCA No. 97-182-F,

(December 10, 2001) that in the event of a finding of entitlement on a prevented planting case, duplicative costs and the cost sharing nature of the SRA and other monetary issues will be areas of inquiry on quantum.

RULING

For the reasons set out in the opinion, we deny both the Government's Motion to Dismiss and Supplement to Motion to Dismiss, being treated together as a Motion for Summary Judgment.

_____
ANNE W. WESTBROOK
Administrative Judge

Concurring:

_____
HOWARD A. POLLACK
Administrative Judge

VERGILIO, Administrative Judge, dissenting.

I respectfully dissent from the decision of the majority to deny the Government's amended motion to dismiss counts I, II, and IV. Rather than dismiss the counts, as the Government requests, I would deny each of the enumerated counts in the amended complaint of the insurance company.

The majority here reaches a conclusion which is inconsistent with an earlier holding in this matter and my view of the law. By a majority, this Board has decided that the insurance company had not sought an administrative determination from the Federal Crop Insurance Corporation (FCIC) under the provisions of regulation, 7 CFR 400.169 (1996), prior to December 1999. Rural Community Insurance Agency, Inc., AGBCA No. 99-146-F, 00-1 BCA ¶ 30,698 at 151,649. Here, the disputed action is the publication of the final rule, which the insurance company maintains is illegal and contains an improper effective date. As a majority earlier held, the insurance company did not seek a determination within 45 days after the rule in dispute appeared in the Federal Register in December 1995. Therefore, because the insurance company did not pursue relief as dictated by the regulation and the Standard Reinsurance Agreement (SRA) underlying this dispute, for the reasons I have expressed in American Growers Insurance Co., AGBCA No. 98-200-F, 00-2 BCA ¶ 30,980,

mot. for reconsid. denied, AGBCA No. 2000-160-R, 00-2 BCA ¶ 31,107, appeal filed, No. 1:01-CV-10059 (S.D. Iowa Nov. 27, 2001), I would deny the underlying claims.[1]

Assuming that the insurance company timely sought a decision from FCIC, as I concluded in a dissent in Rural, the insurance company fares no better. In a letter dated December 12, 1995, to FCIC, the insurance company asserted that the prevented planting provisions detailed in the final rule in the Federal Register of December 7, 1995, are contrary to law and illegal. If its view is correct, the insurance company should not have sold insurance policies pursuant to those provisions. This conclusion is compelled, because if the provisions are illegal, as asserted, then FCIC lacks the authority to reimburse indemnities or make payments pursuant to those provisions under the SRA. The relief sought would not arise under the SRA, but outside of that agreement. Viewed another way, the insurance company seemingly collected premiums for policies (while retaining a percentage of the premiums as payment under the SRA) and indemnified growers pursuant to provisions which the insurance company maintained were contrary to law. The insurance company, which states that it acted in accordance with the provisions of the SRA in administering the prevented planting policies, seeks to shift to the Government all risks and costs associated with or incurred under and in administering such insurance policies. The insurance company seeks relief in addition to that provided in the SRA. Such a reimbursement is not in keeping with statute and the terms of the SRA.

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[1] A Board majority in American Growers Insurance Co., AGBCA No. 99-134-F, 00-2 BCA ¶ 31,050, concluded that a parallel provision, 7 CFR 400.169(b) (1996), which states that an insurance company "may" seek a determination within 45 days of a Government action, is permissive and not mandatory regarding the time frame; that is, the insurance company is permitted to seek a determination after the 45 days have elapsed (seemingly, at any time). The interpretation renders meaningless the language at issue. Such a reading is contrary to rules of interpretation.

Alternatively, the SRA specifies that, "unless specifically accepted," the Government will not reinsure any crop insurance contract written or renewed prior to the approval of the insurance company's plan of operation. The insurance company amended its plan of operation after the final rule was published, and after the Government had notified the insurance company that the Government deemed the rule to have been promulgated legally and therefore applicable as of the stated effective date. The plan of operation noted no exception regarding the prevented planting policies. In April 1996, the Government approved the revised plan of operation, without specifically accepting any crop insurance policies for the spring-planted crops. The insurance company demands that the FCIC fully reinsure policies under terms and conditions different from those offered by the Government to the insurance company. That is, the insurance company asks that the Government be liable for all indemnities paid out and be liable for alleged expenses of the insurance company which are in excess of those provided under the SRA. It is the province of the FCIC, not the insurance company, to determine the terms and conditions of insurance and reinsurance. 7 U.S.C. § 1508(a)(1). The terms of the SRA do not provide for the relief sought by the insurance company.

A separate basis exists to deny each of the claims here at issue. In requesting an administrative determination, the insurance company provided no documentation or reference to insurance policies to support its alleged losses or amounts for reimbursement. Regarding the underlying claims, the insurance company has not identified any insurance policy which forms a basis for the claim; therefore, the Government could not conclude when an insurance policy was issued, what crop was involved, when the change date was for the crop, what premiums the insurance company obtained, what payment the insurance company received from FCIC regarding the premium, what and when the insurance company paid indemnities to insureds, what and when FCIC reimbursed the insurance company for indemnities, or when and if the insurance company ever specifically disputed a premium or indemnity under the prevented planting provisions. Without such basic information, which the insurance company has not provided for this record, the Government correctly concluded that the insurance company had not supported its claim. The Government rightly denied the claim.

Further, because the insurance company has not detailed the insurance policies in dispute, it has not demonstrated that it has timely disputed the amounts it received for administering any policy or the indemnities reimbursed by the FCIC. For example, assume the insurance company received premiums from farmer C relating to the here-disputed prevented planting provisions. It paid farmer C $M in indemnities under those provisions. The Government reimbursed the insurance company $Q. The record does not indicate that the insurance company ever specifically sought the difference in indemnities $M - $Q, or disputed the portion of the premium it received under the SRA as its administrative expenses.

The majority decision merits a particular comment. At the end of the first paragraph of the majority's discussion of the dissent, the penultimate sentence states: "If FCIC's intent is to treat the publication of a rule as that initial determination, a clarification to the regulation is the appropriate course." This rationale of the majority reflects a misreading of the regulation, which specified what an insurance company was to do if it believed the FCIC had taken an action that is not in accordance with the provisions of the SRA or any reinsurance agreement. The insurance company may seek an administrative determination within 45 days of its receipt of a determination. I find that publication of a final rule in the Federal Register was the action which the insurance company believes to have

been contrary to the terms of the SRA. I do not expressly find the date of receipt by the insurance company of the determination, which was no later than December 12, 1995, because the exact date is not relevant. According to the earlier majority, the insurance company did not seek a final administrative determination under the regulation, 7 CFR 400.169 (1996), before December 1999. The 45 days in which an insurance company may seek review had long passed.

I believe the difference in interpretation relates, as I state above, to what "may" means in the regulation. I find that the regulation requires the insurance company to act within the 45-day period of its receipt of a determination, here the publication in the Federal Register or receipt of that final rule. The majority here gives no discernable meaning to the 45-day period. The interpretation I adopt coincides with the reading the FCIC suggests that it (and other insurance companies) held. In revising the regulation subsequent to the American Growers decision I reference in footnote one, the FCIC states in the published background comments: "A controversy has arisen with respect to whether the 45 day time frame is mandatory or permissive. Although FCIC has always treated the 45 day time frame as mandatory under both the old and new process, and the reinsured companies have routinely complied with this requirement, FCIC is revising the language to make it clear that the 45 day time frame is a mandatory requirement." 65 Fed. Reg. 3,781 (2000). The admonition of the majority to FCIC regarding clarifying the regulations thwarts the plain language of the regulation, as it existed and particularly as revised: "All requests for a final administrative determination must be in writing and submitted within 45 days after receipt after the disputed action." 7 CFR 400.169(a) (2001).

FINDINGS OF FACT

17. The SRAs for crop years 1995 and 1996 identify Rural Community Insurance Company (RCIC or the insurance company), not Rural Community Insurance Agency, Inc. or RCIS, as the party to the agreements. (Supplemental Exhibits A, B) (An exhibit in the supplemental appeal file in AGBCA No. 99-146-F, is identified as a "Supplemental Exhibit"; an exhibit in the appeal file of AGBCA No. 2000-154-F, is identified as "Exhibit.")

18. The SRA specifies:

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

(Supplemental Exhibits A at 1, B at 40).

19. The SRA provides for expense reimbursement to the insurance company. Generally, the insurance company receives 31% of the net book premium for all eligible multiple peril crop insurance contracts included under the SRA. Additionally, if the loss ratio on the insurance

company's total book of business in any individual fund in a state for the reinsurance year is in excess of 125%, the Government will provide an added reimbursement. Further, the FCIC reserves to itself the discretion to adjust expense reimbursement "to a level that FCIC determines to be equitable if issuing or servicing an eligible crop insurance contract or group of such contracts involve expenses that vary significantly from the basis used to determine the expense reimbursement provided under this section." (Supplemental Exhibits A at 11 (¶¶ IV.A, B, C), B at 50 (¶¶ IV.A, B, C).)

20. The SRA also dictates:

> This Agreement 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 the Plan is approved will not be reinsured unless specifically accepted by FCIC.

(Supplemental Exhibits A at 15 (¶ V.F.1.a), B at 54 (¶ V.F.1.a).)

21. Regarding disputes, the SRA provides, "If the [insurance company] disputes action taken by FCIC under any provision of this Agreement, the Company may appeal to FCIC in accordance with the provisions of 7 C.F.R. § 400.169" (Supplemental Exhibits A at 21 (¶ V.R), B at 60 (¶ V.R)). The referenced regulation provided, in pertinent part:

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

7 CFR 400.169(a) (1996).

22. The SRA addresses reinsurance, including the following "General Terms":

> 1. 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 [i.e., the Federal Crop Insurance Act, as amended, 7 U.S.C. § 1501 et seq.] will be reinsured under this Agreement.
>
> 2. In exchange for the reinsurance premiums provided by the [insurance company] in accordance with this Agreement, FCIC will provide the [insurance company] with reinsurance pursuant to the provisions of this Agreement.

. . . .

6. The [insurance company], in accordance with its Plan of Operation, may designate eligible crop insurance contracts to one of three funds for each reinsurance year: 1) Commercial Fund, 2) Development Fund, and 3) Assigned Risk Fund.

(Exhibits A at 4-5 (¶ II), B at 43-44 (¶ II).)

23. By letter dated November 3, 1995, the Government informed the insurance company that its "1995 Standard Reinsurance Agreement is not approved for the 1996 reinsurance year." The Government's review and evaluation of the submitted Plan of Operation did not result in the Government's acceptance of the plan. (Exhibit FF at 232-33.)

24. With an approval and acceptance date of December 22, 1995, by the insurance company, and of February 28, 1996, by the FCIC, the parties amended the 1995 SRA for the 1996 reinsurance year. The amendment is silent regarding the here-disputed prevented planting provisions. (Supplemental Exhibit A at 32.)[2]

25. By letter dated April 11, 1996, the Government notified the insurance company that, based upon the Government's review of the 1996 SRA and Plan of Operation, initially received on

[2] With a signature date of December 13, 1995, the insurance company agreed to prevented planting optional amendment two to the 1995 SRA, which specifies that the SRA "is hereby amended, for the 1995 reinsurance year only, as follows" (Supplemental Exhibit A at 24-30). Although the insurance company has not made clear its bases for the claims and calculations, it is not entitled to relief based upon provisions of the 1995 SRA specified as applicable only to the 1995 reinsurance year.

August 2, 1995, with revisions received on October 13, and 19, and December 12, 1995, and January 11, and February 21, 1996, the Government approved (with a limited exception) the plan of operations, thereby authorizing the insurance company to write up to $283,786,000 in requested reinsurable premium volume. (Exhibit TT at 359-60).

Prevented planting provisions and the dispute

26. The Federal Register dated December 7, 1995, 60 Fed. Reg. 62,710-30 (1995), contains what is described as a final rule with an effective date of November 30, 1995. As stated in the summary, for identified crop types, the rule is applicable beginning with the 1996 crop year for spring-planted crops with contract change dates on or after the effective date of the rule. The revisions to prevented planting coverage expand benefits available under the amended policies. (Exhibit JJ at 273.)

27. By letter dated December 12, 1995, to the Government, the insurance company voiced concerns about the legality of the final rule found in the Federal Register dated December 7, 1995. In part, that letter states:

> The rule the FCIC promulgated to effectuate [7 U.S.C. § 1508(h)(7)], however, can only be "binding on all who [seek] to come within the Federal Crop Insurance Act" and can only create "liability on the part of the Government", [Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947)], if that rule has the force and effect of law. Because the FCIC did not conform to the procedural requirements imposed by Congress in the APA, its rule does not have the force and effect of law. Chrysler v. Brown, 441 U.S. 281 (1979). Therefore, the FCIC's policy is not binding; it does not create liability on the part of the FCIC; and the FCIC does not have authority to use appropriated funds to pay prevented planting losses.

(Exhibit LL at 304-05.) Further,

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

(Exhibit LL at 305).

28. By letter dated February 8, 1996, the Government responded to the letter. The Government concluded that the final rule was legally promulgated, with the effective date correct.

The agency determination

29. By a majority, this Board decided that the insurance company had not requested an administrative determination from the Government under the provisions of regulation, 7 CFR 400.169 (1996), regarding the issues in dispute. Rural Community Insurance Agency, Inc., AGBCA No. 99-146-F, 00-1 BCA ¶ 30,698 at 151,649.

30. Subsequent to this Board's above-referenced decision, the insurance company submitted a letter dated December 27, 1999, to the Government, contending that the FCIC "promulgated the

prevented planting regulations for the 1996 crop year, 60 Fed. Reg. 62710 et seq., in violation of the Administrative Procedure Act and 7 U.S.C. § 1508(j)(3). RCIC also contends that these violations constituted breaches of the 1996 Standard Reinsurance Agreement." The insurance company maintains that it suffered damages in the amount of $7,336,249 in underwriting losses and $331,414 in excess loss adjustment costs. It demands compensation or an administrative determination in accordance with regulation, 400 CFR 400.169. (Exhibit DDD at 415.)

31. By letter dated April 24, 2000, the Government denied the claim for the alleged losses associated with the 1996 crop year. In denying the claim, the Government provided reasons, including: "First, you have provided no documentation to support the alleged losses." "Second, you have failed to provide any documentation supporting your claim for excess loss adjustment expenses." "If RCIC believed that the prevented planting changes did not have the force of law, it should not have offered such policy changes to its insureds. Once RCIC agreed to offer the policy under the revised terms, and the producers accepted those terms, RCIC became bound by those terms, and bound FCIC."

The amended complaint

32. The amended complaint in this case identifies a single appellant: Rural Community Insurance Company. The amended complaint asserts that the insurance company suffered underwriting losses of $7,336,249 that it would not have suffered but for the FCIC's allegedly improper actions (¶¶ 39, 55, 70, 73). The amended complaint asserts that the insurance company incurred excess loss adjustment costs of $331,414 because of the FCIC's allegedly improper conduct (¶¶ 40, 56, 70, 73).[3] The amended complaint provides no detail regarding the underlying bases for

[3] In the complaint and amended complaint filed previously in district court, the insurance company asserted that it was entitled to $7,336,249, described as underwriting losses it would not have suffered but for the FCIC's illegal rule. In that matter, the Rural Community Insurance Agency, Inc., d/b/a RCIS, maintained that it was entitled to $331,414, described as loss adjustment costs that it would not have incurred but for the FCIC's allegedly illegal rule. (Rural at 151,649 (dissent, ¶ 5).) The amended complaint before this Board does not attempt to explain the distinction regarding the second amount in dispute, and does not identify a basis for the Board's jurisdiction. The SRAs in the record identify Rural Community Insurance Company (not Rural Community Insurance Agency, Inc. or RCIS) as the party to the agreements.

and calculations of the claimed monetary amounts--for example, what policies were considered, when the policies were issued, when premiums were paid, when indemnities were paid by the insurance company, or when the insurance company may have sought reimbursement from the FCIC.

33. The insurance company has not identified (either in its request for an administrative determination or before this Board), a single policy it issued for the 1996 spring-planted crops, the premiums it collected (and when), and the indemnities it paid which would not have been payable, or which serve as a basis for any of its calculations in dispute.

34. In count I, the insurance company alleges that the FCIC violated its own regulations by making its final rule effective as of November 30, 1995 (¶ 29). Further, the insurance company alleges that the final rule, in excess of statutory authority, required the insurance company to pay indemnities to policy holders who did not have losses due to natural disasters and continued to make prevented planting benefits available to holders of catastrophic risk protection plans (¶¶ 30-31). The insurance company alleges violations of the Administrative Procedure Act, in general, and 5 U.S.C. §§ 553 & 553(d)(1), (2), or (3), in particular (¶¶ 32-35). Moreover, the insurance company alleges: "The FCIC's violations of the APA constitute a breach of the terms and conditions of its SRA with Insurance Company" (¶ 38).

35. In count II of its amended complaint, the insurance company maintains that the FCIC required the insurance company to pay indemnities to policyholders who did not suffer losses from natural disaster (¶ 43). Further, the insurance company asserts that over its objections, without its consent, and without providing adequate consideration, the FCIC unilaterally amended and changed sections I.I, I.AD, I.AE, I.AI, II.A.1, II.A.2, II.A.6, II.B, II.C, and II.D, of the SRA before its expiration date (¶¶ 44-53). The insurance company provides no detail. Also, the insurance company alleges that the FCIC did not administer section IV.C of the SRA in good faith or deal fairly with the insurance company (¶ 54). In conclusion, the insurance company contends that it suffered underwriting losses (of $7,336,249) and incurred excess loss adjustment costs (of $334,414) that it would not have incurred but for the "FCIC's unilateral amendments of and changes to the SRA" (¶ 55-57). The amended complaint provides no detail or specific example as to how the FCIC amended and changed any cited section.

36. Under count IV of its amended complaint, the insurance company propounds two substantive paragraphs:

> 72. Because the FCIC did not cancel Insurance Company's 1995 SRA, Insurance Company is entitled to all remedies provided by the 1995 SRA for having sold and serviced policies containing the planting provisions changes published on December 7, 1995, after the contract change date.
>
> 73. As a direct, proximate and legal result of the FCIC's continuing its 1995 SRA with Insurance Company, Insurance Company is entitled to be held harmless under

the 1995 SRA in the amounts of $7,336,249 for underwriting losses and $331,414 for excess loss adjustment costs.

37. In terms of the relief sought, the amended complaint requests that the Board hold the December rule to be arbitrary, capricious, an abuse of discretion or otherwise not in accord with law; to be in excess of statutory jurisdiction, authority, or limitations or that of statutory right; was promulgated without observance of the procedures required by law; was erroneous and contained omissions

DISCUSSION

In its motions, as amended and supplemented, to dismiss counts I, II, and IV, of the amended complaint, the Government relies upon analysis found in American Growers, AGBCA No. 98-200-F, as indicating that the Board has already decided the issues raised in this matter. The insurance company opposes the motions.

The issues are ripe for summary relief, which is the essence of the submissions of the Government. In my view, no material facts are in dispute; the legal questions regarding the interpretation of the provisions of the SRA may be resolved.

In addition to the analysis provided in the introduction to this dissent, I provide the following specific comments regarding the three counts here at issue.

Count I

One may assume (without so deciding) that the insurance company is correct that the Government promulgated the final rule in violation of the APA and statutory authority. However, these violations do not entitle the insurance company to relief under the SRA. By the language of the SRA, the Government does not reinsure policies issued in contravention of law or inconsistent with the terms and conditions of the SRA.

Despite its view that the final rule is illegal, revealed shortly after the rule was published, the insurance company wrote insurance policies utilizing the terms and conditions described in the final rule, accepted premiums as so dictated, and paid indemnities under those terms and conditions. The insurance company did this without an agreement that the Government would reimburse the insurance company for any costs incurred or indemnities paid in excess of the those described in the final rule. The insurance company paid indemnities after the Government had expressed its view that the rule was properly promulgated. Given its actions and knowledge, the insurance company has not described a compensable breach of the SRA.

Count II

One aspect of count II involves the insurance company assertion that the FCIC required the insurance company to pay indemnities to policyholders who did not suffer losses from natural disaster. The insurance company has not provided support to demonstrate a timely basis of complaint, or a factual and legal basis to pursue this issue raised.

The assertions that the FCIC unilaterally amended and changed particular sections of the SRA and failed to act in good faith and deal fairly, lack specifics as to what was done, when, and when (and if) the insurance company raised these objections.

Count IV

The insurance company seeks relief under the 1995 SRA for 1996 crop-year crops. By its terms, the 1995 SRA was applicable to insurance relating to 1995 crop year crops consistent with the approved plan of operations. Specific amendments to the 1995 SRA were applicable to 1995 crops only, thereby precluding relief under those provisions for the 1996 crop year. By its terms, the 1996 SRA was applicable to insurance relating to the 1996 crop year crops consistent with the approved plan of operations. The 1995 SRA does not provide a basis for the relief sought.

CONCLUSION

A majority here frustrates the provisions of the SRA and regulations. The majority permits the insurance company to pursue litigation which is inconsistent with the terms of its agreement with the Government and which fails to provide specifics demonstrating any basis for relief. I need no further record to deny the claims before the Board on the Government's motion.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
February 12, 2002