RAIN AND HAIL INSURANCE SERVICE, INC., and RAIN AND HAIL L.L.C. (COASTAL BEND I, II, III and IV),	)	**AGBCA Nos. 98-195-F**
	)	**98-196-F**
	)	**98-197-F**
	)	**99-125-F**
Appellants	)	
	)	
Representing the Appellants:	)	
	)	
Bruce B. Green	)	
Willson & Pechacek, P.L.C.	)	
Attorneys at Law	)	
P.O. Box 2029	)	
Council Bluffs, Iowa 51502	)	
	)	
Representing the Government:	)	
	)	
David M. Stauss	)	
Office of the General Counsel	)	
U. S. Department of Agriculture	)	
101 South Main Street	)	
Suite 351, Federal Building	)	
Temple, Texas 76501-7686	)	

DECISION OF THE BOARD OF CONTRACT APPEALS

July 26, 2001

Before HOURY, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge HOURY.

These appeals arose under a 1996 Standard Reinsurance Agreement (SRA) between the Federal Crop Insurance Corporation (FCIC), U. S. Department of Agriculture (USDA), and Rain and Hail L.L.C. (RHLLC) of West Des Moines, Iowa (Appellant)[1]. The SRA recites that it is a cooperative assistance agreement between the FCIC and Appellant to deliver Multiple Peril Crop Insurance (MPCI) policies under the authority of the Federal Crop Insurance Act, 7 U.S.C. §§1501, et seq.

[1] The insurance entities on the SRA in the Rule 4 File, 7 CFR 24.21, are Cigna Insurance Company, and Rain and Hail Insurance Services, Inc. (RHIS). The shareholders of RHIS replaced RHIS with RHLLC, and FCIC approved the substitution of RHLLC for RHIS on the SRA. Cigna designated RHLLC as its Managing General Agent, and authorized RHLLC to conduct litigation regarding the SRA on behalf of Cigna. (Appellant's letter dated August 15, 2000, with attachments; Government letter dated August 17, with attachments; Complaint, Answer, para. 1-7.)

The SRA establishes the terms and conditions under which FCIC will provide expense reimbursement, premium subsidy, and reinsurance on the MPCI policies issued by Appellant.

USDA and FCIC received complaints that certain producers were receiving two or more indemnities for crop losses on the same acreage during the same planting season. One letter of complaint was sent by the Chairman, of the House Committee on Agriculture, to the USDA Inspector General. These complaints indicated complicity on the part of at least one company (not Appellant), an agent, and certain producers in allowing the multiple indemnities. Compliance reviews indicated the problems went beyond the one company. The FCIC Deputy Administrator for Risk Compliance issued four determinations of non-compliance with FCIC-approved procedures and policies against Appellant, alleging that MPCI indemnity overpayments were made by Appellant on 86 claims, totaling $1,511,607, on 36 MPCI policies. Appellant filed timely appeals from the determinations that were docketed as AGBCA Nos. 98-195-F, 98-196-F, 98-197-F, and 99-125-F. The docket numbers, related MPCI policies, issues, and amounts can be found in the table in Finding of Fact (FF) 32.

The claims arose during the spring 1996 growing season in a region of Texas, and involved cotton, grain sorghum, and corn crops that failed to emerge because of drought, or that emerged but did not mature. Where at least some crop emergence occurred, Appellant's adjusters used the "stand reduction method" of calculating crop losses, and indemnity payments based on these adjustments generally are not at issue, except where the insured could have replanted, but did not do so. Most of the indemnities at issue are those where no crop emergence was observed, and Appellant's adjusters determined crop loss based on their determination of seed viability. Generally, if seeds were determined to be no longer viable based on observation or a hand squeeze test, the adjusters then appraised the crop potential as zero, paid the indemnities, and released the acreage.

In some instances Appellant extended new insurance on the released acreage, or on nearby acreage, to producers who had planted other crops. The new insurance resulted in Appellant's receiving additional premiums and expense reimbursement under the SRA, and being liable to pay additional indemnities to the producers if the second crop failed to emerge. FCIC reinsured the additional indemnities. Replanting the original crop on the released acreage was required if practicable, and would have resulted in an extension of the original insurance coverage under the original policy. Although two or more indemnities were sometimes paid on the same acreage, FCIC seeks the return of the first indemnity only under these compliance cases.

The Board has jurisdiction under 7 CFR 24.4(b) and 400.169(d). A hearing was held in Dallas, Texas, May 9-10, 2000.[2]

[2] Judge Howard A. Pollack conducted Alternative Dispute Resolution (ADR) mediation in Dallas, Texas, September 14-15, 1999. The parties were unable to resolve the appeals. Thereafter, Judge Pollack recused himself from further participation.

The Positions Of The Parties

FCIC's position is that seed viability is not a proper basis for determining crop potential, that the SRA requires compliance with applicable loss adjustment manuals (LAMs), and crop handbooks that require deferral of appraisals when an accurate appraisal cannot be made, or require leaving representative strips where appraisals cannot be deferred. Further, FCIC asserts that the LAMs and handbooks specify the method for obtaining deviations if existing procedures are inadequate or inappropriate, that Appellant did not invoke these procedures, and that consequently, no deviations were granted.

Appellant agrees that the LAMs and handbooks require deferral of appraisals, or representative strips, but only when accurate determinations of crop potential cannot be made, and that accurate determinations were made based upon seed viability. Appellant also asserts that, in any event, a deviation allowing seed viability as a proper basis for determining crop potential was granted in discussions and by letters issued by the FCIC Regional Service Office (RSO).

FCIC also asserts that Appellant's adjusters knew or should have known that insureds were planting crops on contiguous acreage or nearby farms, and that it was therefore practical to replant the original crop on the released acreage. By accepting new liability for a crop planted nearby, Appellant recognized that planting such crop was a good farming practice, and that it therefore would not have been impracticable to replant the original crop on the released acreage. According to the LAMs, insured acreage can only be released if it is impracticable to replant the original crop.

Appellant responds that it did not acknowledge that it was practical to replant to the original crop, since it has no discretion to decline insurance to producers who initially plant during the late planting season, and that planting the released crop on different acreage amounted to "initial" planting, not replanting.

FINDINGS OF FACT

The SRA

1. Section II.A.4 of the SRA provides that FCIC will not provide reinsurance, expense reimbursement, or premium subsidy for any crop insurance contract that is sold or serviced in violation of the terms of the SRA (Appeal File (AF) 2-5). Sections V.E.4 and V.F.6 provide that the insurer must utilize loss adjustment standards, procedures, forms, methods, and instructions approved by FCIC in the sale and service of MPCI contracts. Section V.I. provides that FCIC may terminate the SRA if the insurer does not fulfill its obligations under it. Section V.H.3.b provides that in lieu of termination FCIC may require the insurer to refund the expense reimbursement, premium subsidy, or reinsurance with respect to crop insurance contract violations identified. (AF 15-18.)

2. Section V.U. provides that any amounts paid by FCIC which are later determined to have been improperly paid because of failure to follow FCIC-approved policies or procedures, or because of error or omission, whether intentional or unintentional, will be repaid to FCIC with appropriate interest (AF 22). FCIC's rules and procedures are set forth in the Code of Federal Regulations (CFR), the Loss Adjustment Manual (LAM), and various crop handbooks drafted by the crop insurance industry and approved by the FCIC (Complaint and Answer, para. 11).

The MPCI

3. Under Section 14(a) of the MPCI policy, an insured must provide notice to the insurer of damage to a crop within 72 hours of discovery, and leave representative samples intact for each field as may be required by the Crop Provisions. Section 14(b) provides that the insured must obtain the insurer's consent before abandoning any portion of the insured crop, or before putting the acreage to another use. Appellant may not give such consent if it is practical to replant the crop, or until Appellant has made an appraisal of the potential production of the crop. (AF 141.)

4. Section 1(ff) provides that it is the insurer's determination regarding the practicability to replant. This determination depends on factors including moisture availability, condition of the field, time to crop maturity, and the feasibility of replanting and harvesting the insured crop. It is not practical to replant more than 20 days after the final planting date for cotton, grain sorghum, or corn. (AF 138.) Section 13 provides for payment for replanting if allowed by the crop provisions (AF 141). "Replant" means planting the originally planted crop species, unless otherwise indicated (Transcript (Tr.) 203-04).

5. Section 9(a)(3) of the MPCI provides that acreage is not insurable acreage if the insured crop is damaged, it is practical to replant, but the insured crop is not replanted (AF 409). Under MPCI Section 12(b), Causes of Loss, only unavoidable losses are covered. Moreover, losses resulting from the insured's failure to follow recognized good farming practices are not covered (AF 140).

FCIC Crop Provisions And FCIC Special Crop Provisions

6. FCIC Cotton Crop Provisions, and FCIC Coarse Grains Provisions (covering sorghum and corn), provide that acreage damaged prior to the final planting date, where the remaining stand will not produce at least 90% of the production guarantee must be replanted unless Appellant agrees that replanting is not practical. It will not be considered practical to replant after the end of the late planting period unless replanting is generally occurring in the area. Replanting is defined as the replacement of the seed of the insured crop with the expectation of growing a successful crop. "Good farming practice" is defined as the cultural practices generally in use in the county of the insured crop to make normal progress toward maturity and produce at least the yield used to determine the production guarantee, and are those recognized by the Cooperative Extension Service as compatible with agronomic and weather conditions in the area. (AF 147, 149, 153, 155.)

7. The MPCI Special Provisions-Cotton and MPCI Special Provisions-Coarse Grains provide that it is practical to replant if weather conditions exist that permit the minimal preparation and

planting of a seed bed back to the original crop to a date determined by Appellant, if the crop is cotton, or before the final planting date on the State Endorsement for the particular county, if the crop is a coarse grain (AF 162, 165-66). It should be noted that if a conflict exists, the FCIC Crop Provisions control over the FCIC Special Crop Provisions, which in turn control over the MPCI (AF 147).

The LAM And FCIC Crop Handbooks

8. The LAM sets forth the standards for calculating MPCI losses in a uniform and timely manner (AF 183). Section 91.E.8.a of the LAM provides that during an inspection, if planted acreage will not be harvested, and an accurate appraisal of potential production cannot be made, the acreage should not be released to another use, or to be replanted, until an accurate appraisal can be made, or representative sample areas are left for later appraisals. If an accurate appraisal of estimated production can be made, and the crop is not being carried to harvest, the production should be appraised by unit and written consent granted to put the acreage to another use. (AF 239.)

9. Section 102.A. provides that when insureds give notice of damage before harvest to replant, or to obtain consent to put acreage to another use, written consent must not be given until the adjuster is satisfied that it is too late to replant to the same crop, and it is possible to make an accurate appraisal of potential production (AF 241). In determining whether it is practical to replant, the insurer's determination must be based on factors including, but not limited to: moisture availability, condition of the field, and time to crop maturity. It is not practical to replant after the end of the late planting period or the final planting date for a crop with no late planting period, except if replanting is generally occurring in the area (Definition of "Practical to Replant" AF 373.)

10. The LAM at 102.A.1.b provides that certain types of damage or conditions require delays in appraisals; e.g. frost, freeze, hail, crop is still in dormancy, etc. (AF 241). For purposes of extending insurance to new crops, paragraph 252.A.1 provides that the insurer will not insure acreage that will not produce 90% of the production guarantee, if it is practical to replant, and the insured does not replant. Paragraph 252.B provides that the insurance provider will not pay an indemnity on acreage that the insurance provider determines is practical to replant, if the insured fails to replant. (AF 343.) Paragraph 138 provides that appraisals must not be made until an accurate appraisal can be made, and refers to 138.B for the reasons why an appraisal must be delayed in order to make accurate appraisals. Paragraph 138.B.2 requires that an appraisal be delayed anytime a more accurate appraisal can be made at a later date. Paragraph 138.B.4 provides that when an insured wants immediate release of acreage to put the acreage to another use, the insured must agree to leave representative sample areas which will be used to perform the deferred appraisal. (AF 262-63.)

11. The LAM in section 139 provides that appraisal deviations require the RSO Director's written authorization, after approval from the FCIC Product Development Branch. The deviations are identified in the specific crop handbook (see FF 13), or are not identified, but are necessary to provide an accurate determination of crop potential. The insurer will notify the RSO Director of the situation with a recommendation and justification before proceeding with a deviation. After internal FCIC coordination, the RSO will provide the insurer with written authorization to use the deviation

approved by the FCIC Product Development Branch. (AF 265.) The particular form of the appraisal deviation was not prescribed

12. The FCIC Cotton Handbook identifies crop specific requirements for adjusting MPCI losses and is intended to supplement the LAM with crop specific instructions. The requirements include crop appraisal methods and claim instructions. Insurable Acreage, Section 2.B.2, provides that acreage is not insurable acreage if it is practical to replant, but the insured crop is not replanted (AF 409). The Handbook defines plant growth from the time of emergence to maturity, and provides for three appraisal methods: stand reduction, hail damage, and boll count, none of which are applicable to plants which have not emerged. The stand reduction method is applicable to plants from emergence until maturity (AF 410). Emergence means emergence from the ground by as little as 1 to 3 inches (AF 411, 414).

13. The FCIC Cotton Handbook provides:

> I Appraisal Deviations.
>
> When authorized by the County Farm Service Agency (CFSA) authorized representative (after written authorization from the RSO), use the following appraisal deviations if documented on an FCI - 6.
>
> . . . .
>
> 4 Nonirrigated Cotton Acreage Dry-Planted Due To Drought Conditions
>
> When little or no rain occurs in a cotton growing area and insured producers dry-plant nonirrigated cotton acreage by the applicable final planting dates . . . use the following procedure AS AUTHORIZED by the CFSA authorized representative.
>
> If nonirrigated cotton acreage is dry-planted, delay releasing such acreage for other use at least 7 days after the applicable published final planting date to allow for germination.

(AF 421, 423.)

14. The FCIC Grain Sorghum Handbook identifies crop specific requirements for adjusting losses, and is intended to supplement the LAM. The handbook defines plant growth from just headed through maturity, and provides for four appraisal methods, none of which are applicable to plants which have not emerged. The deviation section of the handbook is "reserved." (AF 546-609.)

Planting Begins

15. The coastal bend region of Texas borders on the Gulf of Mexico and includes the following counties: Bee, Refugio, San Patricio, Nueces, Jim Wells, and Kleberg (AF 1099; Tr. 142). The final planting dates in 1996 for cotton, grain sorghum and corn for these counties were April 15. The late planting period for these crops ended May 10, and the insurance period ended September 30. (7 CFR 457.104.1.c and j, and 457.113.1c. and j (1996); AF 650-65; Tr. 210.) Crops planted before the final planting date, April 15 which are damaged, must be replanted if it is practical to do so or the insured will not be entitled to an indemnity for the loss (AF 343). Crops initially planted during the late planting period (April 16-May10) may be insured, but the indemnity is proportionately reduced for each day after the final planting date the initially planted crop is planted. (7 CFR 457.104, Para. 12(c); AF 168-73).

16. A severe drought existed before, during and after the planting season. At the time FCIC provided insurance for "prevented planting," insurance for a producer's inability to plant, for example, because of a flood. Drought was not a basis for prevented planting insurance coverage at the time (AF 147, 149, 153, 169, 1121). Because of the severe drought soil was dried down to the "clay pan." Producers were planting seed in dry soil by "dusting in" and hoping for rain. The seed was "dry-sown," and because of the lack of rain, seeds generally would not receive enough moisture to germinate and emerge. (Tr. 89, 141-42.) Insureds generally planted cotton seed 3 inches apart, although there was testimony that spacing as close to 1 inch apart was sometimes used (Tr. 118, 137 -38). Insureds planted at the rate of more than 80,000 seeds per acre (Exhibit (Ex.) 50, page (p.) 35-36; Ex. 52, p. 16-17). There are 43,560 square feet in an acre, roughly a 209 foot square. With 40 inch spacing between rows (Tr. 109); there would be approximately 63 rows per acre, or 13,167 feet of rows of planting per acre.

Adjusting Claims; "Stand Reduction" Appraisals

17. Stand reduction appraisals performed where some plant emergence occurred are generally not at issue in these appeals, except where the insured could have replanted but did not do so (Tr. 406-09). Appraisals where the stand reduction method was used when there was no plant emergence are at issue. As stated above, the stand reduction appraisal method is the method to be used from the time of plant emergence until plant maturity. After losses were experienced by insureds and claims were filed, where Appellant's insurance adjusters found at least some plant growth (some plant growth was found 40-50% of the time), the adjusters determined production losses using the stand reduction method. This method essentially involves determining the percentage of normal plant emergence, and calculating the loss in production (Tr. 56-57, 71, 107, 126-27, 142).

18. In performing stand reduction appraisals, the adjusters would review 100 feet of a row of planting, and subtract skipped plants (plants that had not emerged) from the estimated production to determine the projected production. This was the general method used, even when production was very sparse such as only 2% of estimated production, or a pound per acre. However, based on the documentation, there would be no way of knowing whether some adjusters concluded that sparse

production was a total loss.[3] (Tr. 73, 105-09, 367, 406-09, 412.)

19. There was no requirement to determine seed viability in areas without plant growth when performing a stand reduction appraisal, although seed viability was sometimes checked for a recent planting, as opposed to a planting 2 or 3 weeks old (Tr. 110-11, 136). There was testimony that the LAM required 400 feet of row (or 4, 100 foot rows) to be sampled for the first 40 acres, and 100 feet of row for each 40 acres thereafter (Tr. 92-93, 118-19). The FCIC Cotton Handbook provided that for each sample, representative 100 foot rows, or any combination of rows totaling 100 feet, are to be selected. A minimum of three samples are to be selected for up to 10 acres, four samples for 10 to 40 acres, and one sample for each additional 40 acres. (AF 414, 460). However, these samples are taken for purposes of measuring the skips in plant emergence in order to determine losses when using the stand reduction method of appraisal. The samples were not taken to determining seed viability.

Adjusting Claims; Seed Viability

20. A distance of a "couple of miles" could have a drastic affect on crop production (Tr. 115-16). Moisture in any given field is generally not uniform except immediately after a rain (Tr. 170, 180), and sandy soils do not hold moisture as well as loamy soils (Tr. 179). Under normal conditions (1996 was not an ordinary year in the Coastal bend (Tr. 370)), cotton seed will emerge from 5-14 days after planting, depending upon the vigor of the seed, moisture conditions and temperature (Tr. 169-70; AF 411). Seeds were examined by squeezing between the fingers and/or visually. If seed received some moisture, but an insufficient amount, the seed became swollen or soft and mushy, and would deteriorate rather than sprout. Sometimes there was sufficient moisture to germinate the seed, causing a small tail to grow, but the tail would become brittle before poking through the soil due to insufficient moisture. Some seed simply dried out. The adjusters did not consider seeds in these conditions to be viable seeds, irrespective of additional moisture (Tr. 98, 117, 131-32, 143-45, 168-69).

[3] For the year 1999 and succeeding crop years, FCIC extended the use of the stand reduction method to circumstances when there is no crop emergence, when enough time is allowed for the crop to emerge, and it was not practical to replant. Appraisals are delayed at least 10 days after the final plant date. (Tr. 367-70, 432; Ex. 60, 68.) However, these provisions were not in effect at the time of the present controversy.

21. A scientific study showed that approximately 23% of the seed found to be cracked or swollen after remaining in the ground for 37 days (from February 26, 1996, to April 3, 1996), had vigorous growth after being collected and placed in the dark with moisture at room temperature for 9 days. Approximately 35% of the dry seed collected showed vigorous growth under the same circumstances. A second study showed that no seed found to be cracked or swollen in the field had vigorous growth after remaining in the ground for 17 days (from April 9-25, 1996), after being collected and placed in the dark with moisture at room temperature for 11 days. However, approximately 68% of the dry seed collected showed vigorous growth. A third study resulted in no cracked or swollen seed being found for collection after remaining in the ground for 25 days (from April 9, 1996, to May 3, 1996). All seeds planted for the third study had either germinated in the field or remained dry and hard. Approximately 48% of the dry and hard seeds had vigorous growth after being collected from the field under the same condition as in the first two studies. An average of 88.3% of seed taken directly from a seed bag showed vigorous growth when placed in the dark with moisture at room temperature after 10 days. The tests were conducted by the Nueces County Agricultural County Extension Agent. He agreed that determining seed viability by appearance might be appropriate for assessing whether a field is capable of producing a stand worth taking to harvest; however, a more accurate method would have required the insured to leave strips for a determination at a later date. He stated, and his studies support the conclusion, that not all seeds laying in dry soil are non-viable. (AF 1171, 1282, 1386-88; Tr. 224-27.)

22. Appellant's expert testified that seed that is planted and remains dry is less likely to germinate with the passage of time, but this seed is capable of germinating for an extended, but unknown, time (Tr. 100, 173, 175). Seed viability is a time-honored way for producers to determine whether cotton needs to be replanted (Tr. 177, 183-84, 253-54). Grain sorghum seed is much smaller than cotton seed, and sorghum seed will produce some grain on less water than cotton seed will produce some cotton. It was not shown whether sorghum seed was more viable than cotton seed given the same conditions (Tr. 187-88; Ex. 49, p. 39; Ex. 50, p. 22-25; Ex. 51, p. 26). Seed viability had not been approved for appraising a crop's potential as a basis for the payment of an insurance indemnity (Tr. 252).

23. In mid-April, Appellant conducted a training session for adjusting crop losses affected by drought, based on seed viability. Prior to this time, it was not generally known by FCIC that seed viability was being used as a basis to release acreage. (Tr. 341, 345, 348, 382, 429, 443-44; Hand Deposition 6, 14-17; Ex. 61.) Further, acreage for any spring crop was generally not released until after the end of the late planting period (Tr. 376).

24. If an adjuster was called to determine a loss and seed was found to be viable, no release of the acreage was made, and the appraisal was deferred to a later time. If the adjuster determined that seed was no longer viable, the production potential was determined to be zero and the acreage was released. Seeds were dug out of 30 to 40 feet, "maybe 50" feet, of each 100 foot row sampled (Tr. 117- 20, 137-38, 143). A "seed spoon" was used for digging up the seeds, and every seed that was found was examined, though not all seeds were found (Tr. 132, 138). Certain adjusters would squeeze the seeds in addition to visual observation, and if the seed crumbled it was considered dead (Tr. 143). On April 16, adjusters were advised by Appellant that acreage could be released if the

seed was no longer viable (Tr. 145). Some acreage was released after April 16 based upon seed viability, and some producers planted second, and even third crops (Tr. 146, 381-82). Appraisals were made after April 16, and releases were implemented, generally without consideration of whether it was practical to replant (Tr. 146, 384).[4] Adjusters were advised by Appellant to allow the insureds to make replanting decisions (Ex. 61).

Actions Of The RSO

25. In the coastal bend region of Texas during the time frame in issue, there were eight insurance companies essentially competing for the same crop insurance business (Tr. 241-42). During the claims adjustment process, Appellant's vice president for claims and quality control learned that an agent for another insurance company was coaching producers how to abuse the insurance system by obtaining as many as three different crop losses on the same acreage during the same planting season. Appellant was running into tremendous problems in the field when producers insured by Appellant were hearing what Appellant's competition might offer. (Tr. 44-45, 80.) Discussions resulted involving Appellant, other insurers, the National Crop Insurance Service (NCIS), the insurance industry's representative, and the RSO. No written request for a deviation from procedures was filed by Appellant (Tr. 255-60).

26. After a discussion amongst the parties above, the RSO issued a letter dated April 9, 1996, prior to the end of the April 15 final planting date (AF 967-68). The letter related primarily to grain sorghum experiencing difficulty due to insufficient moisture, not to cotton. The letter recited that the meeting was held in an attempt to agree on the production to count for grain sorghum where the seed remained viable, but had not germinated. The letter also related that some producers plant after the late planting period (May 10), that this practice was generally referred to as "summer planted," that this planting is normally harvested in the fall, and that questions had been asked about the insurability of the summer planted sorghum.

27. The RSO noted in the letter that Section 14 of the MPCI provided that in case of damage the insured must leave representative sample areas intact for each field, obtain the insurer's consent before putting the insured acreage to another use, and that such consent will not be given if it is practical to replant, or until an appraisal of the crop's potential had been made. Moreover, Section 1 of the Coarse Grains Provisions, relating to sorghum, provided that it would not be practical to replant after the late planting period (May 10) unless replanting is generally occurring in the area,

[4] There was testimony that adjusters made determinations as to whether it was practical to replant, generally finding that it was not practical to replant, based upon the various factors. The Board does not rely on this testimony, because it was provided by a witness who did not begin his responsibilities until early May 1996, and because his testimony was elicited to a large extent based upon leading questions (AF 192-95).

and that only under "prevented planting" could coverage attach to acreage initially planted after the late planting period.

28. The RSO also noted in the letter that grain sorghum acreage could be released after the final planting date (April 15), if it is not practical to replant, and the appraisal accounts for all potential production; but that appraisals of drought affected sorghum should be deferred until the earlier of, when the seed is no longer capable of germination even with adequate moisture, or the end of the late planting period (May 10). Insureds who want immediate release of grain sorghum to plant other crops must agree to leave representative sample strips as required by the LAM and Coarse Grain Provisions. Finally, if released sorghum acreage is timely planted to a different crop, insurance will attach if all other insurability requirements are met. Appellant understood the letter to be limited to grain sorghum (Tr. 48), but that acreage could be released based upon seed viability (Tr. 48-49). FCIC did not intend the letter to be a deviation of appraisal standards (Tr. 422). The writer of the letter wrote it with the understanding that adjusters were not capable of determining seed viability and that an accurate appraisal could not be made based upon seed viability (Tr. 423, 429-30). The RSO did not become aware that seed viability was being used as a basis for acreage release until sometime in May 1996 (Tr. 341-48, 429, 443). Although the Chief Investigator was aware of the early acreage release based on seed viability relating to other insurance companies approximately April 23, he did not become aware of Appellant's activities until June 3 (AF 379-82, 397; Ex. 61).

29. The RSO issued a letter dated April 19, referred to the April 9 letter as an intended clarification of the release of grain sorghum acreage when it was not practical to replant after the final planting date, and indicating that questions had surfaced regarding the applicability of the same provisions to cotton and corn (AF 969). An additional issue was whether insurance would attach to a subsequent crop on the affected acreage if the drought still existed. The RSO stated that if sorghum or cotton acreage was being released under the provisions of the April 9 letter, "any acreage subsequently replanted to sorghum would not be reinsured for the same purpose identified above." The RSO also stated:

> If cotton, as the initially planted crop, failed and other producers in the area are still planting or replanting to cotton, insured producers would be expected to replant the failed cotton acreage.
>
> In any other situation, if the initially seeded insured crop (cotton, corn, or grain sorghum) failed due to a lack of moisture and soil moisture conditions have not improved, acreage replanted to any subsequent crop would not be eligible for insurance. Since the same conditions that caused the first crop to fail would also exist for any subsequently planted crop, such acreage would not be eligible for insurance per the definition of "practical to replant" and "poor farming practices" in the applicable policies.

Appellant understood this letter to extend the provisions of the April 9 letter to cotton and corn, but that if the initially insured acreage failed because of a lack of moisture, replanted acreage to a different crop could not be reinsured, if growing conditions had not improved (Tr. 53).

30. By letter dated April 25, confirming a meeting of the parties on April 23, the RSO rescinded its April 19 letter, advising that the April 9 letter would remain as the "advisory" for determining the release and subsequent insurability of crops on drought-affected acreage planted to corn and cotton in addition to sorghum (AF 970). Appellant understood the letter to have rescinded the April 19 letter, and extended the April 9 letter to include cotton and corn (Tr. 54, 83-84).

31. The RSO handles all matters excluding compliance and the SRA. The RSO has no authority to approve deviations, which are generally issued in the form of a "manager's bulletin." It was the RSO Director's opinion that if seed viability could be determined, acreage could be properly released and the claim paid, after the final planting date (April 15) and before the end of the late planting period (May 10), if it was not practical to replant (Tr. 413-14, 416, 418, 438-39, 442, 444.)

The Compliance Cases

32. The compliance cases, with three exceptions (cases 34, 36, and 37) involve claims where the seed was planted but did not emerge from the soil (Tr. 69-70, 74). The following table sets forth a summary of the individual compliance cases. The compliance case numbers missing from the numbering order represent small dollar value cases or cases resolved after the preliminary determinations were issued. Findings 33-39 highlight additional facts related to the particular compliance cases listed, and group the cases by the applicable issues.

No.	Insured Policy No. Crop AF & Ex. No.	County/ Acres	Plant Date	Adjuster/ Release Date	Issue	Indemnity	Appeal No.
1	W. & M. Schubert 039923 Cotton (AF 711-16, 962, 997-99)	Refugio 162.2	4/10	Delong 5/3	Seed Viability	$25,808	98-197-1
2	Leander Niemann Farms 039880 Cotton (AF 717-25, 962, 1000-02)	Refugio 33.3 57	4/3 4/4	Delong 5/3 5/3	Seed Viability Seed Viability	$18,340 $15,357	98-197-1
4	B & B Cattle 176272 Cotton (AF 732-37, 962, 1003-08)	San Patricio 34.5	3/27	Baker 4/23	Seed Viability	$ 7,445	98-197-1
5	E. Pollasek 200981	Bee 292	4/6	Delong 4/18	Seed Viability	$33,879	98-197-1

No.	Insured Policy No. Crop AF & Ex. No.	County/ Acres	Plant Date	Adjuster/ Release Date	Issue	Indemnity	Appeal No.
	Cotton (AF 738-49, 962, 1006-08)	38 42	4/2 4/2	4/16 4/16	Seed Viability Seed Viability	$ 3,798 $ 5,269	
6	TM & DH Bernsen Farms 200982 Cotton (AF 750-55, 962, 1009-11)	Nueces 9	2/27	Wells 4/24	Seed Viability	$ 1,283	98-197-1
7	D. Mengers 200983 Cotton (AF 756-63, 962, 1012-14)	Bee 292	4/6	Baker 4/18	Seed Viability	$ 7,355	98-197-1
8	A. Pollasek 201116 Cotton (AF 764-69, 963, 1015-17)	Bee 38	4/2	Delong 4/16	Seed Viability	$ 1,266	98-197-1
9	Bill J. Carriger 210667 Cotton (AF 770-75, 963, 1018-21)	Bee 186	4/11	Delong 4/26	Seed Viability & Practical to Replant	$16,049	98-197-1
10	Andrew Salge 232955 Cotton (AF 776-81, 963, 1022-24)	?/4	3/29	Wells 4/29	Seed Viability	$ 671	98-197-1
11	E. Prochaska 244574 Cotton (AF 782-87, 963, 1025-28); Ex. 67	Nueces/ San Pat. 90	3/12	Wemken 4/27	Seed Viability & Practical to Replant	$ 4,110	98-197-1
12	M. Claybrook 246944 Cotton (AF 788-93, 963, 1029-31)	Refugio 162.2	4/10	Delong 5/3	Seed Viability	$ 4,333	98-197-1
13	E. Zabel	Refugio		Delong			98-197-1

No.	Insured Policy No. Crop AF & Ex. No.	County/ Acres	Plant Date	Adjuster/ Release Date	Issue	Indemnity	Appeal No.
	276837 Cotton (AF 794-96, 963, 1032-34)	40	4/13	5/2	Seed Viability	$ 2,340	
14	Zabel Farms 307989 Cotton (AF 797-802, 963, 1035-37)	Refugio 76	4/10	Delong 5/2	Seed Viability	$ 6,187	98-197-1
19	CA Lowman 308443 Cotton (AF 827-34, 964, 1038-41); Ex. 66	Nueces 417.8	3/25	Baker 4/26	Seed Viability & Practical to Replant	$ 5,758	98-197-1
20	K. Wallek 308569 Cotton (AF 835-40, 964, 1042-45)	Bee 104	4/10	Delong 4/25	Seed Viability	$15,142	98-197-1
21	E. Group 308771 Cotton (AF 841-46, 964, 1046-49); Ex. 63	Nueces 165.1	3/22	Baker 4/16	Seed Viability & Practical to Replant	$ 5,119	98-197-1
23	GSH Land Ltd 309650 Cotton (AF 852-57, 964, 1050-52)	Refugio 220	4/9	Delong 5/2	Seed Viability	$ 7,057	98-197-1
24	M.D. King 310416 Cotton (AF 858-65, 964, 1053-55)	Nueces 390	4/13	Delong 5/3	Seed Viability	$18,949	98-197-1
25	A. Rossi Landi Trust 310418 Cotton (AF 866-71, 964, 1056-58)	Nueces 87.9	4/9	Delong 5/3	Seed Viability	$ 696	98-197-1

No.	Insured Policy No. Crop AF & Ex. No.	County/ Acres	Plant Date	Adjuster/ Release Date	Issue	Indemnity	Appeal No.
26	B. Rossi Landi Trust 310419 Cotton (AF 872-77, 964, 1059-61)	Nueces 87.9	4/9	Delong 5/3	Seed Viability	$ 679	98-197-1
27	E. Rossi Landi Trust 310420 Cotton (AF 878-83, 964, 1062-64)	Nueces 87.9	4/9	Delong 5/3	Seed Viability	$ 679	98-197-1
28	JV Lowman 310536 Corn (AF 884-88, 964, 1065-67)	Nueces 400	4/5	Baker 5/6	Seed Viability	$25,736	98-197-1
29	B. F. Vaughn 310829 Cotton (AF 889-94, 964, 1068-70)	Nueces 87.9	4/9	Delong 5/3	Seed Viability	$ 2,071	98-197-1
32	Franke Farms 196150 Sorghum (AF 914-19, 973-77, 980-82, 984, 1122-24); Tr. 147-53, 204-05	Nueces 105	3/4	Delong 3/12	Practical to Replant & Destroyed WO Consent	$ 4,465	98-196-1
34	T. Bentonville Farms 308556 Cotton (AF 927-34, 971-72, 1071-77, 1095-98)	Jim Welles 51	3/11	Baker 4/18	Practical to Replant	$ 2,013	98-195-1
35	M.D. King 310416 Sorghum (AF 935-40, 973-77, 981, 983-85)	Nueces 105	3/4	Delong 3/12	Practical to Replant & Destroyed WO Consent	$ 1,488	98-196-1

No.	Insured Policy No. Crop AF & Ex. No.	County/ Acres	Plant Date	Adjuster/ Release Date	Issue	Indemnity	Appeal No.
36	J. Harwicke 246579 Cotton (AF 941-48, 971-72, 1071-77, 1095-98)	Jim Wells 51	3/10	Baker 4/18	Practical to Replant	$ 941	98-195-1
37	L'Dell Harwicke 246580 Cotton (AF 949-56, 971-72, 1071-77, 1095-98)	Jim Welles 51	3/10	Baker 4/18	Practical to Replant	$ 941	98-195-1
38	L. Bernsen, Jr. Farms 307806 Cotton (AF 1188-1231, 1366-94)	Nueces Jim Wells 99.8 108 432.6 112.3 403.7 118.4 120 139 311	 3/11 3/12 4/14 3/10 3/12 2/17 2/17 3/16 4/13	Baker/ Wells 4/30 4/30 5/6 4/19 4/19 4/30 4/30 4/30 5/1	Seed Viability & Practical to Replant	$13,623 $14,742 $64,112 $13,796 $49,332 $22,857 $23,166 $26,834 $73,785	99-125-1
39	Franke Farms 196150 Cotton (AF 973-77, 1232-41, 1343-65)	Nueces 390 87.9	4/13 4/9	Delong 5/3 5/3	Seed Viability	$56,848 $12,427	99-125-1
40	T. Zabel 276840 Cotton (AF 1243-53, 1343-65)	Refugio 40 220 76	4/13 4/9 4/10	Delong 5/2 5/2 5/2	Seed Viability	$ 7,547 $44,723 $18,562	99-125-1
41	Lowman JV 310536 Cotton (AF 1254-69, 1366-94); Ex. 65	Nueces 107 98 160 36.7 91.3	4/2 3/20 4/5 3/26 3/29	Baker 4/29 4/29 4/29 4/19 4/22	Seed Viability & Practical to Replant	$23,995 $20,352 $30,030 $ 4,849 $18,041	99-125-1

No.	Insured Policy No. Crop AF & Ex. No.	County/ Acres	Plant Date	Adjuster/ Release Date	Issue	Indemnity	Appeal No.
42	M & L Morris 244572 Cotton (AF 1270-83, 1366-94)	Nueces 33.5 251.4 49.5 366.5	 3/12 3/31 3/29 4/5	Baker 4/18 4/18 4/22 4/18	 Seed Viability & Practical to Replant	 $ 4,638 $49,514 $ 6,854 $81,473	99-125-1
43	Morris Farms, Inc. 244570 Cotton (AF 1284-99, 1366-94); Ex. 62	Nueces 132.4 285 330 283.8 307.2	 3/25 3/25 4/8 4/9 4/9	Baker 4/16 4/16 4/22 4/30 4/22	 Seed Viability & Practical to Replant	 $23,430 $51,268 $53,395 $41,645 $50,020	99-125-1
44	Morcot Farms Inc. 246756 Cotton (AF 1300-14, 1366-94); Ex. 63	Nueces 165.1 39.7 193.4 461.3 232.5	 3/22 4/1 4/1 4/3 3/26	Baker 4/19 4/19 4/19 4/19 4/19	 Seed Viability & Practical to Replant	 $ 3 3,241 $ 6,097 $ 35,450 $119,038 $ 44,280	99-125-1
45	L.R. Bernsen 211266 Cotton (AF 1315-42, 1366-94); Ex. 64	Nueces 9 99.8 108 432.6 331.9 283.8 307.2 171.7 76.1	 2/27 3/11 3/12 4/14 4/8 4/9 4/9 4/8 4/2	Baker 4/24 4/30 4/30 5/6 4/22 4/30 4/22 4/22 4/22	 Seed Viability & Practical to Replant	 $ 28 $ 3,422 $ 4,159 $ 24,042 $ 14,724 $ 13,882 $ 14,926 $ 36,495 $ 14,741	99-125-1

Compliance Cases Limited To The Issue Of Seed Viability

33. All acreage appraised for compliance cases 1, 2, 4-8, 10, 12-14, 20, 23-29, 39 and 40 listed in the table above, were appraised as stand reduction appraisals, indicating that the combined length of skipped space between plants was 100 feet in each 100 foot row (no plants had emerged). The remarks by the adjuster generally indicated:

> Seed planted and had several showers of .2 to .4 inches rain but seed only sprouted and never emerged. Seed inspected - they are brown to black due to seed sprouting and never receiving enough moisture to emerge. Seed no longer viable - Zero appraisal given. - - - All seed found were sprouted or bad - no moisture. - - - No live

> plants were found and no viable seeds were present. Adjustment was in accordance to the cotton adjusters handbook. - - - Seed failed to germinate due to a lack of moisture. Seed had dried turned dark inside and was soft. Few had sprouted and died before emergence. - - - No harvest potential. There were no plants showing and all seed found were sprouted or rotten. Field was planted with marginal soil moisture. Loss due to severe drought. - - - No stand - All seed found were sprouted or bad. No moisture. - - - Land brought back into production from CRP was plowed in October many clods never melted very rough. No seed germinated. no soil moisture.

The FCIC generally concluded that Appellant over-paid the indemnity because:

> [T]he loss file lacks documentation as to the number of seeds examined, the criteria used to determine and define seed viability, the number of samples taken and the length of rows sampled.

Relying on chapter III of the 1996 LAM, Adjuster Responsibilities, the FCIC also noted that the LAM provided that:

> If during an inspection any crop acreage is not going to be carried to harvest and an accurate appraisal of potential production CANNOT be made, do not release acreage to another use or to replant until an accurate appraisal can be made or representative sample areas are left for later appraisals. Refer to section IV-4 for further details.

34. Compliance cases 1 and 12 are related in the sense that they involved cotton crops on the same farm (serial number 69), but different fields. The insured in compliance case 1 had 13 other fields with production ranging from 67 pounds per acre to one field with 1 pound per acre and three with 0 pounds. Compliance cases 1 and 12 involve only two of the 15 fields. The insured in compliance case 2 planted on 14 separate insurable units, six of which Appellant found to have had no production. Only two of the latter six cases are at issue. Compliance case 6 involved unit 102 on farm serial number 255 containing 61 acres. Fifty-two of the acres yielded an average of 46 pounds per acre of cotton upon which an indemnity was paid. Appellant concluded that nine acres had no production based on a seed viability determination, 57 days after planting, and released the acreage on April 24, prior to the end of the late planting period. Only the nine acres are at issue. Similarly, compliance case 10 involved unit 405 on farm serial number 348 containing 34.2 acres. Thirty acres yielded an average of 65.6 pounds per acre of cotton upon which an indemnity was paid. Appellant concluded that four acres had no production based on a seed viability determination, 31 days after planting. Only the four of the 34.2 acres are at issue.

35. Compliance cases 25-27, and 29 all involved different insureds, policies, and shares of the same farm unit identified as unit 100 on indemnity calculation sheets (the accompanying work sheets identified the unit as “3.00") of farm serial number 1185. A portion of compliance case 39 also involved farm serial number 1185. The work sheets identified this unit as 3.00. The remaining portion of compliance case 39 is related to compliance case 24. These cases involve farm serial

number 2174, unit 2.00, consisting of 140 acres on field number T-11487-2C, and 250 acres on field number T-11487-1B. The 40 acre portion of compliance case 40 involves the same 40 acres on farm serial number 131 as in compliance case 13. Two insureds owned a share of the production under separate policies. The 76 acre portion of compliance case 40 also involves the same 76 acres on farm serial number 1044 as in compliance case 14. Two insureds own a share of the production under separate policies. The 220 acre portion of compliance case 40 also involves the same 220 acres on farm serial number 116 as in compliance case 23. Two insureds own a share of the production under separate policies.

Compliance Cases Involving Practicability Of Replanting After Seed Viability Releases

36. For compliance cases 9,11,19, 21, 38, and 41-45, in addition to the seed viability issue, FCIC concluded that Appellant erred by not requiring the insureds to replant to cotton, since the insureds demonstrated the practicability of replanting when the insureds elected to replant to grain sorghum in compliance cases 9 and 19, and to corn in case 11, after the release of the cotton crops, and Appellant extended new insurance to the new crops. In compliance case 11 the acreage was planted to corn on April 25, 2 days prior to the release of the same acreage that originally had been planted to cotton. Moreover, there was production of corn and an $1,827 indemnity was paid for the corn. In compliance case 19, 132.4 acres were planted to sorghum, 9 days prior to the release date, and 285 acres were planted to sorghum May 4, with no sorghum losses reported on any acreage. In compliance case 21 the acreage was planted to sorghum April 19 with the sorghum being released on May 13 with an indemnity of $11,784 being paid on the sorghum (see compliance case 44.)

37. In compliance case 38, after the release of the cotton acreage by the adjuster based on seed viability, the insured planted and insured grain sorghum on 7 of the planting units where cotton had been planted. In compliance case 41, 3 days prior to the release by the adjuster based on seed viability, corn was planted on one of the units. There was production and an $8,732 corn indemnity paid. In compliance case 42, after the release of the cotton acreage by the adjuster based on seed viability, the insured planted grain sorghum. In compliance case 43, after the release of the cotton acreage by the adjuster based on seed viability, the insured planted grain sorghum. There was production on the grain sorghum acreage, and a total of $55,549 in indemnities was paid for grain sorghum. In compliance case 44, after the release of the cotton acreage by the adjuster based on seed viability, the insured planted grain sorghum. There was production on the grain sorghum acreage, and a total of $72,745 in indemnities was paid for grain sorghum. In compliance case 45, after the release of the cotton acreage by the adjuster based on seed viability, the insured planted grain sorghum. There was production on the acreage planted to grain sorghum, and a total of $40,548 in indemnities was paid for grain sorghum.

Compliance Cases Involving Practicability Of Replanting After Wind Erosion

38. For compliance cases 32 and 35, the record indicates that the fields had been planted March 4, that the fields had been deep-plowed March 7 because of strong winds causing severe erosion, and that the appraisals had been made and the acreage released on March 12, before the April 15 final plant date for the sorghum. The adjuster checked with Appellant who gave

permission to the insureds to perform the plowing. Section 245.A of the LAM provides that a planted field may be plowed in unusual circumstances to help stop soil erosion. However, if more than 25% of the field is to be plowed "[FCIC] must be notified immediately so that such acreage can be inspected prior to tilling. The DSO Director may waive this requirement . . . ONLY under extremely unusual circumstances." (Tr. 204-05; AF 337.) Although there is evidence that the dry soil conditions did not warrant replanting, the same insured planted cotton in an adjoining field on April 13, after the adjustments and releases, but before the final plant date of April 15 (AF 981, 984; compliance cases 32 and 39).

Compliance Cases Involving Practicability Of Replanting After Some Plant Emergence

39. In compliance cases 34, 36, and 37 seed viability was not an issue, because there had been some plant emergence, and use of the stand reduction appraisal method was deemed proper. FCIC based its decision that the indemnity was overpaid on the fact that a companion policyholder elected to plant cotton and corn on three farm parcels in the area on April 29, and 30, after the April 18 release date for the acreage in issue. Appellant extended insurance to the late planted corn and cotton. Appellant notes that the planting relied upon by FCIC was initial planting, not replanting, and that planting was not generally occurring.

DISCUSSION

Compliance Cases Involving Practicability Of Replanting After Some Plant Emergence

Compliance cases 34, 36 and 37, totaling $3,895 in indemnities, involve cotton crops, and comprise appeal AGBCA No. 98-195-F. These cases do not involve instances where seed viability was an issue. These were all cases where some plant emergence had occurred and where the adjuster, therefore, properly applied the stand reduction method of appraisal to determine the losses. However, the indemnity was disallowed by FCIC because Appellant allegedly should have required the insureds to replant. The FCIC based the indemnity disallowance on the fact that Appellant extended insurance to a companion policy holder and operator of a farm in the same area who planted cotton on three different farm serial numbers on April 29 and 30, after the April 18 acreage release date on compliance cases 34, 36 and 37. (FF 32, 39.)

An indemnity should not have been paid on the compliance case acreage if it was practical to have replanted the acreage (FF 5, 10, 15). Indeed, the Federal Crop Insurance Act at 7 U.S.C. §1508(a)(3) specifically provides that insurance shall not cover losses due to the neglect or malfeasance of the producer, **the failure of the producer to reseed to the same crop in such areas and under such circumstances as it is customary to reseed**, or the failure of the producer to follow good farming practices as determined by the Secretary (emphasis added).

FCIC argues that Appellant's decision to extend insurance on the same acreage which was initially planted, or on nearby acreage, indicated that it was practical to replant the released acreage. Generally, appraisals were made and releases were implemented without consideration of the practicability of replanting (FF 24).

There is evidence that a "couple of miles" could have a drastic affect on whether a crop is released or carried to production, and that moisture and soil conditions can vary from field to field (FF 20). However, neither party introduced specific evidence that would indicate distance, soil type, moisture, or micro-climatological factors might have influenced the specific planting decisions in issue. Therefore, absent evidence of more suitable soil and moisture conditions in the nearby fields or farm, initial planting on the nearby field or farm is indicative of the practicability to replant the released acreage.

According to the LAM, it is not practical to replant after the end of the late planting period, in this instance May 10, unless replanting is generally occurring in the area (FF 9). According to the MPCI, it is not practical to replant more than 20 days after the final planting date, April 15 in this instance. Thus, it is not practical to replant later than May 5. However, the acreage releases in issue were allowed by Appellant April 18, 3 days after the final planting date of April 15, but 17 days prior May 5. Thus replanting was at least possible at the time of the acreage release. In determining the practicability of replanting, the factors for consideration include moisture availability, the condition of the field, and time to crop maturity (FF 6, 7, 9). However, as stated above, neither party introduced specific evidence that would indicate distance, soil type, moisture, or micro-climatological factors might have influenced the specific planting decisions in issue.

Appellant contends that FCIC relies on the actions of a single insured, that replanting was not generally occurring, and that the planting accomplished on April 29 and 30 was initial planting not replanting. The fact that replanting might not generally have been occurring, even if proven by Appellant, is only relevant for replanting decisions after the end of the late planting period (FF 9). There is no specific evidence of more suitable moisture availability or field condition on the fields in issue. Further, the record indicates no sound rationale as to why initial planting should be distinguished from replanting for purposes of determining the practicability of replanting. Finally, as stated above, appraisals were made and releases were implemented without consideration of the practicability of replanting (FF 24).

What is known is that after releasing the acreage in compliance cases 34, 36, and 37, Appellant extended insurance to a companion policy holder and operator of a farm in the same area who elected to plant cotton on three different farm serial numbers on April 29 and 30, after the April 18 acreage release date on compliance cases 34, 36 and 37. Given the record before the Board (FF 32, 39), the preponderance of evidence supports a conclusion that it would have been practical to replant the acreage in compliance cases 34, 36, and 37, and that therefore, FCIC's disallowance of indemnities was proper.

Compliance Cases Involving Practicability Of Replanting After Wind Erosion

Compliance cases 32 and 35, totaling $5,953 in indemnities, involve grain sorghum crops, and comprise appeal AGBCA No. 98-196-F. These cases do not involve instances where seed viability was an issue. These are cases where shortly after planting, strong wind conditions began to cause soil erosion, and deep plowing was performed to minimize soil and crop damage. While the initial

documentation indicated that the fields had been plowed before appraisal, subsequent evidence indicated that the fields had been reviewed and appraised prior to approval for the deep plowing. FCIC denied reimbursement of the indemnities, concluding that the released acreage could have and should have been replanted, because the acreage was released March 12, long before the final planting date of April 15, and because the same insured planted cotton in an adjoining field on April 13, after the adjustments and releases, but before the final plant date.

For the same reasons as under the previous heading, and given the record before the Board (FF 32, 38), the preponderance of the evidence supports a conclusion that it would have been practical to replant the acreage in compliance cases 32 and 35, and that therefore, FCIC's disallowance of indemnities was proper.

Compliance Cases Involving Practicability Of Replanting After Seed Viability Releases

Compliance cases 9, 11, 19, 21, 38, and 41-45, totaling $1,157,312 in indemnities, involve cotton crops and comprise portions of appeals AGBCA Nos. 98-197-F and 99-125-F. These are all cases where both seed viability and the practicability of replanting were reasons why FCIC denied the reinsurance of the indemnities. Even with seed viability as an issue, the propriety of the reinsurance disallowance turns on the practicability of replanting.

For the same reasons as the previous headings and given the record before the Board (FF 32, 36 and 37), the preponderance of the evidence supports a conclusion that it would have been practical to replant the acreage in compliance cases 9, 11, 19, 21, 38, and 41-45, and that therefore, FCIC's disallowance of indemnities was proper.

Compliance Cases Limited To The Issue Of Seed Viability/ Actions Of The RSO

Compliance cases 1, 2, 4-8, 10, 12-14, 20, 23-29, 39 and 40, totaling $344,450 in indemnities, involve cotton crops and one corn crop, and comprise portions of appeals AGBCA Nos. 98-197-F and 99-125-F. These are all cases where there was no plant emergence. The adjusters nevertheless applied the stand reduction method of appraisal, which is only applicable if there has been plant emergence (FF 12, 17-19). The adjusters concluded that there would be no emergence based upon their determination that the seeds were no longer viable, and authorized the payment of indemnities on this basis. FCIC denied the reinsurance of the indemnities because the loss files lacked documentation as to the number of seeds examined, the criteria used to determine and define seed viability, the number of samples taken and the length of rows sampled. (FF 32, 33.)

An appraisal deviation allowing dry-planted, non-irrigated cotton, as in these compliance cases, to be released 7 days after the final planting date of April 15 (FF 13), was never sought by Appellant. Thus, there simply was no appraisal method specified where no plant emergence had occurred. Further, while seed viability was a time-honored method way for producers to determine whether crops should be replanted, seed viability had not been approved for appraising a crop's potential as a basis for the payment of an insurance indemnity (FF 22).

Appellant asserts at page 18-19 of its Post-Hearing Brief that:

> FCIC advised all its private partners that it could release and pay claims (and not defer claims) if an accurate appraisal could be made. This involved making seed viability determinations. The RSO was aware that the insurance providers were using the thumbnail test to make seed viability determinations. The RSO gave no specific direction as to how the insurance providers were to make seed viability decisions.

Appellant is referring to a series of three letters issued by the RSO on April 9, 19, and 25, 1996.

Appraisal deviations can be authorized by the RSO after internal FCIC administrative approval. The RSO letter dated April 9, 1996, while limited in its effect to grain sorghum, addressed seed viability and seed no longer capable of germination as a basis for appraisals. Appellant understood the letter to be limited to sorghum, but that acreage could be released based on seed viability. Notwithstanding the wording of the letter, the RSO testified that he did not believe that an accurate appraisal could be based upon seed viability. He did not become aware that acreage was being released based on seed viability until sometime in May, and did not intend the letter to be an appraisal deviation, calling it an "advisory." Although the RSO might not have intended the letter to be a deviation, it is not difficult to see that Appellant reasonably understood the letter to allow seed viability as a basis to adjust grain sorghum which had not emerged because of drought (FF 26-28). In reaching this conclusion, no reliance is placed on the fact that the RSO called the letter an advisory. Further, it matters not that the RSO might not have coordinated the matter within the FCIC, since the requirement to coordinate appears in the LAM, which is not a regulation. See LDG Timber Enters., Inc. v. Glickman, 114 F.3d 1140 (Fed. Cir. 1997), Cf. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 387 (1947) .

The April 19 letter, while not a model of clarity, extended the seed viability basis for adjusting grain sorghum, to cotton and corn, and this is what Appellant understood (FF 29, 30). Whatever other effect the April 25 letter had on the April 19 letter, the April 25 letter retained the effects of the April 19 letter that extended the seed viability basis for adjusting grain sorghum which had not emerged because of drought, to cotton and corn (FF 30). It is noted that compliance cases 1, 2, 4, 6, 10, 12-14, 20, 24-29, 39 and 40 were adjusted after April 19, and that cases 5, 7 and 8 were adjusted before. However, the fact that the RSO letters introduced seed viability as a basis for appraisals does not mean that acreage appraisals and adjustments could be made without regard to other applicable requirements. Thus, we must determine whether the adjustments in issue complied with other applicable requirements, including the accuracy of the appraisal.

Compliance Cases 1, 2, 4-8, 10, 12-14, 20, 23-29, 39 and 40 Limited To The Issue Of Seed Viability/ Propriety Of Adjustments

The LAM provides that if planted acreage will not be harvested, and that if an "accurate" appraisal cannot be made, the acreage should not be released to another use, until an accurate appraisal can be made, or representative sample areas are left for later appraisal (FF 8, 9). The LAM also requires

representative sample strips if an insured wants an immediate release of acreage to put the acreage to another use (FF 10). However, this section is not applicable because these compliance cases do not involve immediate releases and the insured putting the acreage to another use. Further, section 138.B.2 of the LAM requires that an appraisal be deferred anytime a more a "accurate" appraisal can be made at a later date. Thus, since representative sample strips were not required, and appraisals were not delayed to a later time frame, these compliance cases turn on the question of fact of whether the seed viability determinations made provided an "accurate" appraisal, and whether a delay in the appraisal would have resulted in a more accurate appraisal.

There is virtually no specific evidence on the question of what constitutes an accurate appraisal. The inherent assumption for the use of the stand reduction appraisal is that where the crop has had a proper opportunity to emerge, and there has been actual emergence, plants that have not emerged, will not emerge. The damage assessment is then made by determining the number of plants that have not emerged (skipped plants) in a prescribed length of planted row (FF 17, 18). The established sampling procedure calls for 400 feet of row to be evaluated for the first 40 acres sampled (FF 19). Considering that there could be over 13,000 feet of planted cotton rows per acre (FF 16), the required sampling is infinitesimal, less than .0008 of the number of planted row-feet.

While the stand reduction sample requirement appears to be very small, even this limited standard did not appear to be implemented or complied with for the appraisals based on seed viability. The evidence indicates that 30-40, "maybe 50," of each 100 foot row (the number of rows sampled is not known) was sampled. However, there was no indication of the number of samples taken or the sampling method used, or documentation presented that adherence even to the minimal stand reduction standards had been accomplished (FF 24, 33).[5] Thus, the seed viability determinations were not necessarily accurate in comparison with stand reduction appraisals because the sample size of the former was smaller and because of the lack of documentation.

In addition to the size of the sample and the adequacy of the documentation, seed viability determination, while a recognized method of determining whether replanting should occur, was not an approved method of determining indemnity payments. Seed viability determinations were also inconsistent with a scientific study, which in many respects, showed that swollen, cracked or mushy seed (considered by adjusters to be non-viable), capable of vigorous growth (FF 18, 20-22, 28). An additional consideration relating to the reasonableness of the seed viability determinations is the length of time the seeds had been planted and when the appraisal was performed. While seed that remains in the ground and encounters no moisture (as opposed to some moisture) is less likely to germinate with the passage of time, it is capable of germinating for an indefinite length of time (FF

[5] In this regard, at first blush, it appears that adjusters Delong and Baker each determined that seed had no viability whatever on nine farms totaling over 1600 acres, and four farms totaling over 1600 acres, in just one day, May 3 for Delong, and April 22 for Baker (FF 32). If the sampling rate for stand reduction appraisals were applied (400 feet of row for the first 40 acres and 100 feet for each 40 acres thereafter (FF 19)), Delong would have had to sample approximately 60, 100 foot rows on nine farms in Refugio and Nueces counties on May 3. However, it must be noted that Delong adjusted 730 acres rather than 1600 acres, because many of the adjustments involved two or more insureds with separate policies, but fractional interests in the same acreage (FF 32, 34, 35). Thus Delong would have only been required to sample approximately 30, 100 foot rows.

21). Further, acreage for any spring crop was generally not released until after the end of the late planting period (FF 23).

All the present compliance cases involved seed that had been in the ground for only 12 to 30 days, except for compliance case 6 where the seed had been in the ground for 56 days. Further, all acreage had been released before the late planting date of May 5, the time before which acreage is not generally released (FF 23). It is noted that 40 to 50% of the stands in the coastal bend region of Texas where crop adjustments were requested had at least some growth (FF 17). Thus, if the adjusters had waited for more than the 12 to 30 days, or until the end of the late planting period when crops had traditionally been released (FF 23), some crop growth would have been possible.

If we were to utilize the sampling standards for stand reduction method as a reasonable standard of acceptable accuracy, based upon the record before the Board, seed viability determinations, as implemented in the present compliance cases, were significantly less accurate, and therefore, not in compliance with the LAM. The preponderance of the evidence is that the appraisals based on seed viability determinations lacked adequate sampling and/or documentation. There is no question but that some would have been more accurate if a delay in the appraisal had been imposed. Thus, the FCIC properly denied reinsurance of these indemnities, even though the RSO might have authorized the seed viability based adjustments.

Appellant points out (and the record supports) that some of these compliance cases involve adjusters' work on only a part of a planted field, or a single unit out of several nearby units, where the nearby units had no growth, or very little growth (FF 34, 35). However, the honesty, integrity, or good intentions of the adjusters is not at issue. It may well be that an adjuster viewed a particular field and concluded that based upon a sample or two, that further sampling or documentation was not needed. However, in the absence of minimal sampling and documentation standards, or appraisal timing standards imposed by Appellant, each adjuster was free to make their own subjective seed viability determinations, apply their own documentation standards, and appraise and release acreage just 12 days after planting, early during the late planting period, as did occur.

The preponderance of the evidence is that the appraisals based on seed viability determinations lacked adequate sampling and/or documentation. There is no question but that some adjustments would have been more accurate if a delay in the appraisal had been imposed. Were this not the case, this portion of the appeal might have turned out differently.

Applicability Of The Follow The Fortunes Doctrine

At page 21 of its Post-Hearing Brief, Appellant asserts that the "follow the fortunes doctrine" generally applies even if a reinsurance treaty, as under the present facts, does not contain an express follow the fortunes clause. International Surplus Lines Ins. Co. v. Certaint Underwriters at Lloyd's, 868 F. Supp. 917 (S.D. Ohio 1994); Ruthardt v. Lloyd's of London, No. 91-7877C (Mass. Super., Suffolk Co. Mar 12, 1998); Lexington Ins. Co. v. Prudential Reinsurance Co., No. 95-4083 (Mass. Super. June 24, 1997). This doctrine requires reinsurers to indemnify reinsureds for good faith liability determinations made by the reinsured, or for good faith payments that are at least arguably

within the scope of the reinsured insurance. American Marine Ins. Group v. Neptunia Ins. Co., 775 F. Supp. 703 (S.D. NY 1991), aff'd 961 F.2d 372 (2d Cir. 1992); Uniguard Sec. Ins. Co. v. North River Insurance Co., 4 F.3d 1049 (2d Cir. 1993); Mentor Ins. Co. v. Norges Brannkasse, 996 F.2d 506 (2d Cir. 1993); Christiana Gen. Ins. Corp. v. Great American Ins. Co., 979 F.2d 268 (2d Cir. 1992).

However, as the Government notes, a reinsurance contract, like any other contract is first governed by the rules of construction applicable to contracts in general. Christiana Gen. Ins. v. Great American Ins., 979 F.2d 268, 274 (2d Cir. 1992). Thus the follow the fortunes doctrine is not applicable where the reinsurance contract excludes coverage, or when the issue is whether the claim is within the scope of the policy coverage. Aetna Cas. and Sur. v. Home Ins., 882 F. Supp. 1328, 1343 (S.D. NY 1995); Michigan Township Participating Plan v. Federal Ins. Co., 233 Mich. App. 422, 592 N.W.2d 760 at 764-65.

Under the present facts, the SRA excludes from reinsurance coverage amounts paid contrary to FCIC-approved policies and procedures, or because of error or omission, whether intentional or unintentional. FCIC-approved policies and procedures are set forth in the CFR, the LAM, and in the various crop handbooks and special provisions (FF 1, 2). Thus, to apply the follow the fortunes doctrine to the present facts would require the Board to disregard the terms and conditions of the SRA.

Due Process Considerations

At page 24 of its Post-Hearing Brief, Appellant asserts that the Due Process Clause of the Fifth Amendment precludes FCIC from depriving Appellant of property without fair notice. Specifically, Appellant asserts that FCIC authorized Appellant to make determinations of seed viability, knowing adjusters and insureds were using the "thumbnail" test, and failed to provide any other method for determining seed viability. We presume that in making this assertion, Appellant is not waiving the assertion that the RSO letters granted Appellant a deviation to use seed viability for purposes of making the adjustments in issue.

At the outset we note that the due process argument was made for the first time in Appellant's brief, and it was not made an issue prior to the FCIC determinations resulting in these appeals. The assertion is, however, grounded in the identical facts resulting in the appeal, and thus, we address the theory of relief. Inherent in Appellant's assertion is the fact that the SRA and the incorporated FCIC-approved policies and procedures gave Appellant no choice but to make seed viability determinations for which it is now not being fairly reimbursed. This assertion is one involving the interpretation of the contract, not a takings issue.

While Appellant is correct that no FCIC-approved appraisal method existed for the situation where there was no plant emergence, Appellant had viable options. First, it could have delayed appraisals, or required insureds to leave representative sample strips for later appraisal (FF 8,10). Appellant could have sought a deviation (FF 11, 13). Further, in applying the seed viability determinations, Appellant could have imposed requirements on its adjusters requiring sampling methods,

procedures, and documentation to ensure appraisal accuracy commensurate with stand reduction appraisals, and to preclude premature release. Thus, Appellant had reasonable opportunity to avoid having FCIC conclude that it would not reinsure these compliance cases.

Unlawful Forfeiture Considerations

Appellant asserts that the Government is prohibited from demanding strict compliance with its rules and regulations if the result would be inequitable, arbitrary, irrational or unjustified, citing Granite Construction Co. v. United States, 962 F.2d 998, 1005 (Fed. Cir. 1992), cert. den., 113 S. Ct. 965 (1993). Appellant notes that FCIC took no issue with Appellant's loss adjustments where only a few plants emerged. There, Appellant was not required to determine seed viability. In this regard, see FF 17-19.

Appellant's assertion that FCIC took no issue with Appellant's loss adjustments where only a few plants emerged is a two-edged sword. The evidence indicated that there was no way of knowing whether some adjusters concluded that sparse production was a total loss (FF 18). It is not known why FCIC elected to draw this particular line in the sand, but we can draw no conclusions that because the line was drawn where it was, that the appraisals on the other side are accurate or beyond reproach. It is noted that in the Government's opening remarks counsel stated that the Government "probably" had grounds to recover the expense reimbursement and premium subsidy on the present compliance cases, as well as the reinsurance indemnity on the second crops, but elected not to (Tr. 12). We make no more of these issues.

Granite Construction, relied upon by Appellant, applied the concept of economic waste to a construction contract. In Granite the Government directed a rip out and rework of the construction rather than considering the adequacy of the work as completed, which was adequate for its intended purpose, i.e., substantially complete. Granite had complied with the Government's direction, and sought recoupment of its added expenses. While the court allowed the recoupment, the court also held that a proper remedy under such circumstances for the Government would have been a downward adjustment in the contract price. Granite, at 1006-07. Under the present facts, Appellant's actions essentially precluded a determination of substantial compliance. Had Appellant sought a deviation, required representative sample strips, or imposed requirements on its adjusters requiring sampling methods and procedures to ensure accurate appraisals, and to preclude premature release, there simply is no way of now knowing how many of the present compliance cases would have achieved more than zero production.

Retroactivity Of FCIC Compliance Determinations

Appellant at page 37 of its Post-Hearing Brief asserts that FCIC's compliance findings are retroactive, because they impaired Appellant's rights when Appellant was required to act, increased its liability for past conduct, and imposed new duties with respect to completed transactions. Appellant would be correct had FCIC imposed new requirements, that is, those that did not already exist. However, here, FCIC did not do so. While it is true that an adjustment method to measure crop losses where there was no crop emergence did not exist, the compliance matters for which

Appellant is being held responsible already existed. As stated above, these included the opportunity to request deviations, the requirement to leave representative sample strips for later adjustment, and the requirement that Appellant perform accurate appraisals.

DECISION

For the reasons expressed above, appeals AGBCA Nos. 98-195-F, 98-196-F, 98-197-F and 99-125-F are denied.

_____
EDWARD HOURY
Administrative Judge

Concurring:

_____
JOSEPH A. VERGILIO
Administrative Judge

_____
ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D.C.
July 26, 2001