RURAL COMMUNITY INSURANCE SERVICES	)	**AGBCA No. 98-162-F**
(P&L Farms),	)	
	)	
Appellant	)	
	)	
Representing Appellant:	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

August 15, 2000

Before HOURY, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge VERGILIO.

Rural Community Insurance Services of Anoka, Minnesota, has filed this appeal involving the respondent, the U. S. Department of Agriculture, Federal Crop Insurance Corporation (FCIC) and a compliance case, No. SA-EFAZ-173, under which the Government concluded that the insurance company overstated the premium and indemnity for an insured, a producer of upland cotton. This action arises under a Standard Reinsurance Agreement (SRA) between the parties, under which the insurance company provided multiple peril crop insurance coverage.

Regulation authorizes the Board to resolve this timely-filed matter. 7 C.F.R. §§ 24.4(b), 400.169. After submitting motions for summary judgment, and the further development of the record, the parties submitted the case for decision pursuant to Board Rule 11, without a hearing. The Board received briefs in May 1999, December 1999, and January 2000.

The insurance company maintains that it properly calculated the insurance premium and the indemnity. It contends that the insured had a 100% share in the cotton crop grown on 420 acres, and that the indemnity was paid on insurable losses (whiteflies and rain) on that acreage. The Government maintains that the insurance company utilized the incorrect acreage and share, and paid an indemnity on an uninsured loss.

Regarding the premium, the Board finds and concludes as follows. The insured applied for insurance for cotton to be grown on 420 acres. The insured did not own the land; as a lessee it leased many acres, on 420 acres of which upland cotton was to be raised. Under each of two leases, the insured was obligated to pay the lessor 25% of the net proceeds from the leased acreage (including the 420 acres and cotton crop here at issue). Further, through an agreement, the insured had divested itself of any share in the cotton crop grown on 80 of the acres. The insured could not obtain insurance for those 80 acres, because it lacked any share in the crop to be grown. The insured had an insurable share in only 340 of the 420 acres. Of the 340 acres, the insured, as a lessee, did not have a 100% share in the crop. The insured was to pay 25% of the net proceeds from the crops (including the cotton crop), under each of two leases. The insured possessed an insurable share of 50% of the cotton crop. In summary, the insured had a 50% share in the cotton crop to be grown on 340 acres.

The Board concludes that the insurance company improperly calculated the indemnity. Production was lost because of whiteflies. The record does not demonstrate that the loss was an insurable loss. The facts demonstrate that a reasonably avoidable loss occurred. Had the insured followed farming practices in the area, by applying additional insecticide treatments, the potential production of the cotton would have been greater than that realized. Under the terms of the SRA and incorporated regulations and materials, the insurance company should have concluded that the insured was not entitled to an indemnity.

Because the insurance company has failed to demonstrate the correctness of its assertions, in whole or in part, the Board denies the appeal.

FINDINGS OF FACT

1. The NAU Insurance Company of Anoka, Minnesota, entered into an SRA beginning July 1, 1993, for the 1994 crop year (Exhibit A (all referenced exhibits are in the Appeal File, either as part of the Government's initial submission, the Government's Supplemental file, denoted by the prefix "GS-", or a submission by the insurance company)).[1] The SRA represents a cooperative financial assistance agreement to deliver multiple peril crop insurance under the authority of the Federal Crop Insurance Act, as amended, 7 U.S.C. §§ 1501 *et seq.* (Act) (Exhibit A at 1). NAU appointed Rural

[1] To avoid confusion, the Board has renumbered the most-recently submitted exhibits 12 and 13 in the Insurance Company Supplement as exhibits 13 and 14, respectively. The final administrative determination, dated February 12, 1998, is referenced as Exhibit GS-S.

Community Insurance Services as its general agent in the matter of multiple peril crop insurance (Exhibit A at 42).

2. The SRA,

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

(Exhibit A at 1). The SRA incorporates by reference regulations, 7 C.F.R. Chap. IV, promulgated under the authority of that Act. Thus, the SRA and reinsured agreements issued by the insurance company incorporate terms and conditions of the general crop insurance policy and cotton endorsement. (Exhibit A at 1 (Preamble), 4 (¶ II.A.3)). The SRA dictates that the insurance company "must utilize loss adjustment standards, procedures, forms, methods, and instructions approved by FCIC" (Exhibit A at 16 (¶ V.E.4)). This makes applicable a loss adjustment module (Exhibit GS-E at 69-198).

<u>The formula for calculating the annual premium</u>

3. Both the general crop insurance policy, 7 C.F.R. § 401.8(d) (1994), and the cotton endorsement, 7 C.F.R. § 401.119 (1994), dictate how to compute the annual premium: multiply the production guarantee by the price election by the premium rate by the insured acreage by the share at the time of planting by any applicable premium adjustment factor for which the insured may qualify. 7 C.F.R. §§ 401.8(d) (¶ 5), 401.119 (¶ 3). At issue here are the insured acreage and the share at the time of planting.

<u>Insurable interest</u>

4. The SRA defines "insurable interest" to mean "the portion of a crop a person has at risk in the event of a loss covered by the crop insurance program" (Exhibit A at 2 (¶ I.M)). The SRA defines "eligible crop insurance contract" to mean a crop insurance contract which is sold and serviced in a manner consistent with the Act, 7 C.F.R. chapter IV, FCIC policy and procedure, and applicable rates, terms, and special limitations, and various other specific conditions (Exhibit A at 2 (¶ I.I)).

5. The general crop insurance policy addresses the crop, acreage, and share insured. In particular,

> a. The crop insured is the crop specified in the crop endorsement and no other, which is planted for harvest as the insured crop, which is grown on insurable acreage, and for which a guarantee or amount of insurance and premium rate are provided by the actuarial table.

> b. The acreage insured for each crop year is the insurable acreage . . . in which you have a share (as reported by you or as determined by us, whichever we elect).
>
> c. The insured share is your share as landlord, owner-operator, or tenant in the insured crop at the time insurance attaches. However, only for the purposes of determining the amount of indemnity, your share will not exceed your share at the earlier of:
>
> (1) The time of loss; or
> (2) The beginning of harvest.
>
> d. Unless the application clearly indicates that insurance is requested for a partnership or joint venture, insurance will cover only the crop share of the person making application for insurance.

7 C.F.R. § 401.8(d) (¶ 2). Paragraph c helps to define "insured share," and paragraph d specifies a limitation on insurance coverage. "Tenant" is defined to mean "a person who rents land from another person for a share of the crop or a share of the proceeds therefrom." 7 C.F.R. § 401.8(d) (¶ 17.q). "Insured" is defined to mean "the person who submitted the application accepted by us and does not extend to any other person having a share or interest in the crop such as a partnership, landlord, or other person unless specifically indicated on the application and accepted by us." 7 C.F.R. § 401.8(d) (¶ 17.j).

6. The general crop insurance policy includes a paragraph which addresses the "report of acreage, share, and practice (the acreage report)." In particular, the insured must report on an FCIC form its share at the time insurance attaches. Moreover,

> The report must indicate if you do not have a share of the insured crop in the county. This report must be submitted each year on or before the acreage reporting date for the crop for the county. This report may be used as the basis to determine your premium and indemnity or we may compute premiums and indemnities on the acreage, share, and practice which is determined to have actually been in existence.

7 C.F.R. § 401.8(d) (¶ 3).

7. In dictating the meaning of "Unit," the terms and conditions of the general crop insurance policy specify:

> Land rented for cash, a fixed commodity payment, or any consideration other than a share in the insured crop on such land will be considered as owned by the lessee. Land which would otherwise be one unit may, in certain instances, be divided

> according to guidelines contained in the applicable crop endorsement or by written agreement with us.

7 C.F.R. § 401.8(d) (¶ 17.r).

8. The applicable loss adjustment module contains direction on determining the insurable share, when an indemnity is requested:

> The insured establishes the insurable share on the acreage report at the time insurance attaches. However, only for purpose of determining the amount of indemnity, if during the final loss adjustment inspection, it is determined that the insured's share differs from what it was at the time insurance attached, the insured's share is the lesser of:
>
> - What it was at the time insurance attached, or
>
> - What we determine to be the share at the earlier of the time of loss, or the beginning of harvest of the unit, unless excepted by the specific crop policy.

(Exhibit GS-E at 77.5.) Under the first-quoted sentence, the insured establishes the insurable share at the time insurance attaches, while under the second-quoted sentence, the share may be less for purposes of determining the amount of indemnity.

9. The loss adjustment module also discusses lease agreements:

> If a lease agreement indicates only a cash consideration, the tenant's share is considered 100%. However, if the lease agreement indicates both a share of the crop and a cash consideration, and the primary consideration for the tenant's use of the land is a share of the crop produced, the tenant's share is considered to be less than 100% in the crop.

(Exhibit GS-E at 78.) The manual contains an example of an agreement where a share of the production is the primary consideration:

> The lease agreement states that the tenant shall pay to the landlord in kind as rent for the use of cropland, one-third of all the crop produced on the premises with the tenant guaranteeing that the value of such crops would average $35 an acre. In the event the landlord's share of the crop is worth less than $35, the tenant will pay the difference in cash to the landlord. The tenant would have two-thirds share of the crop.

(Exhibit GS-E at 78.)

10. As to any discrepancy in the reported share for the crop, the module specifies:

> Any discrepancy in reported share will result in using the same share for the crop as reported on the ASCS-424 (ASCS-578, if ASCS-424 is unavailable) unless the difference is verified by a signed, notarized and/or witnessed agreement that specified the lease or share arrangement. If the information is different, the ASCS is notified and provided copies of the appropriate documents.
>
> Include a copy of the signed, notarized and/or witnessed agreement specifying the lease or share arrangement in the insured's policy folder if the crop wasn't reported on the ASCS-424 or -578, unless an owner/operator is involved.
>
> In lieu of the signed, notarized and/or witnessed agreement, you can use marketing records, such as settlement sheets, canceled checks, seed receipts, fertilizer receipts, chemical receipts, etc.

(Exhibit GS-E at 79.)

<u>P&L Farms, the insured</u>

11. On March 29, 1993, P&L Farms (as lessee) and co-personal representatives of the estate of Frances D. Nutt (lessors) entered into what is captioned a "share crop farm lease agreement." P&L leased several acres of farming real property ("leased premises") on which cotton and other crops would be raised. The agreement specifies:

> As rent under this lease, Lessee shall pay Lessors a sum equal to twenty-five percent (25%) of the net proceeds (as herein defined) to be derived from the farming operations to be conducted on the whole farm.

(Exhibit GS-H at 225 (¶ 6).) The lease defines "whole farm" as these leased premises combined with a farm number 188 leased by P&L and a farm P&L was to lease from Rancho Tierra Prieta Co. (see Finding of Fact (FF) 12) (Exhibit GS-H at 223-24 (¶ 3)). The agreement defines "net proceeds" to mean "that sum remaining after all direct costs of crop production, as herein defined, have been deducted from gross proceeds, as herein defined" (Exhibit GS-H at 225 (¶ 6)). (Should direct costs exceed gross proceeds, the lessor has no liability or responsibility, and is not to make any contribution in connection with such loss (Exhibit GS-H at 228 (¶ 6)).) The agreement defines "direct costs of crop production" to include the costs of controlling weeds and insects, insecticides and herbicides, and crop, casualty and liability insurance (Exhibit GS-H at 226 (¶ 6)). The agreement specifies that "crops grown upon the Leased Premises shall be sold upon such terms and conditions as are jointly agreed to by Lessors and Lessee" (Exhibit GS-H at 229 (¶ 9)).[2]

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[2] P&L agrees, in the lease to plant and grow cotton and other crops "in accordance with good and prudent farmer-like methods and in the best course of farming practices in the geographic

12. On March 31, 1993, P&L (as lessee) and Rancho Tierra Prieta Co. (lessor) entered into what is captioned a "share crop farm lease agreement." P&L leased several acres of farming real property ("leased premises") on which cotton and other crops would be raised. The agreement specifies:

> As rent under this lease, Lessee shall pay Lessor a sum equal to twenty-five percent (25%) of the net proceeds (as herein defined) to be derived from the farming operations to be conducted on the whole farm.

(Exhibit GS-H at 211 (¶ 6).) This lease defines "whole farm" as these leased premises combined with a farm number 188 leased by P&L (there is no mention of the premises P&L leased from the Nutt estate, FF 11). (Exhibit GS-H at 209-10 (¶ 3)).[3] The agreement defines "net proceeds" to mean "that sum remaining after all direct costs of crop production, as herein defined, have been deducted from gross proceeds, as herein defined" (Exhibit GS-H at 211 (¶ 6)). (Should direct costs exceed gross proceeds, the lessor has no liability or responsibility, and is not to make any contribution in connection with such loss (Exhibit GS-H at 214 (¶ 6)).) The agreement defines "direct costs of crop production" to include the costs of controlling weeds and insects, insecticides and herbicides, and crop, casualty and liability insurance (Exhibit GS-H at 211, 213 (¶ 6)). The agreement specifies that "all cotton produced on the whole farm shall be included in the Western Cotton Service's pool for sale purposes" (Exhibit GS-H at 215 (¶ 9)).[4] Of the various crops grown, the parties contend that the cotton crop here in dispute was grown on 420 acres of land leased from Rancho (not land under the Nutt estate lease and not farm number 188).

13. With a date of February 16, 1994, P&L entered into a "field tenant agreement" with an individual, Charles Bush, under which for $40 per acre, P&L granted Bush the right to use 80 acres for growing, maturing, and harvesting upland cotton. The acreage is part of the "whole farm" of the combined lands described above in FF 11, 12; the parties contend that the 80 acres are part of the 420 acres of land rented from Rancho. The agreement sets the rent at $40 per acre (of this amount, $20 is to be paid in cash; $20 is to be paid by the tenant providing supervision). The agreement provides: "Tenant may encumber the crops to be planted on the farm parcel, but agrees not to permit the lien thereby created, or any other charge, to become a lien on the farm parcel. Landlord [i.e.,

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vicinity of the whole farm." P&L "shall devote such time, attention, skill and energies to the farming of the Leased Premises as may be necessary for the efficient management and operation of the farm and to maximize the production of the whole farm." (Exhibit GS-H at 228-29 (¶ 7).)

[3] This description of "whole farm" differs from that in the Nutt estate lease. Land P&L leased from Rancho is included in the description of "whole farm" found in the Nutt estate lease (FF 11).

[4] P&L agrees, in the lease to plant and grow cotton and other crops "in accordance with good and prudent farmer-like methods and in the best course of farming practices in the geographic vicinity of the whole farm." P&L "shall devote such time, attention, skill and energies to the farming of the Leased Premises as may be necessary for the efficient management and operation of the farm and to maximize the production of the whole farm." (Exhibit GS-H at 214 (¶ 7).)

P&L] shall have no ownership interest in any such crops, and Landlord does hereby waive any landlord's lien rights in connection with such crops" (Exhibit GS-I at 234-36 (¶¶ Recitals, Rent, Crop Loans).)

14. In an "amendment and confirmation of share crop lease agreements," executed jointly by the lessors of the two farm lease agreements referenced above in FF 11, 12, and Carla Lacey doing business under the name of P&L, Carla Lacey became the successor-in-interest to P&L, substituted as lessee in both leases (Exhibit H at 232-33).

15. P&L, through Carla Lacey, obtained insurance for a 1994 upland cotton crop to be grown on 420 acres. While the record does not identify the application for insurance coverage, the insurance company does not contend that either of the landlords were named on the application.[5] The Board here presumes, therefore, that P&L sought insurance with a 100% interest in the entire 420 acres. Such a presumption is consistent with the record and actions of the parties. (Exhibit 2 at 6 (On September 30, 1994, the Government met with and informed an insurance company loss supervisor of the share problem in the policy--P&L signed up for a 100% share but documents (FF 16) showed that P&L had a 50% share).) The insurance company determined the insured's share of the premium rate to be $10,598; the calculations utilize a 100% share in the cotton crop (Exhibits E at 93, 12 at 46).

16. With a signature date of August 1, 1994, Carla Lacey dba P&L Farms, as operator, submitted a report of acreage on ASCS-578 for the 1994 program year. The form specifies a producer share of 25% for Frances D Nutt, 25% for Rancho Tierra Prieta Co., and 50% for P&L Farms, for 420.0 acres of upland cotton, among other acres and crops. (Exhibit GS-R at 287.) With a signature date of February 8, 1995, a revision to that form specifies a producer share of 25% for the estate of Frances D Nutt, deceased, 25% for Rancho Tierra Prieta Co., 19.05% for Charles Bush, and 30.95% for Carla Lac[e]y dba P&L Farms, for 420.0 acres of upland cotton, among other acres and crops (Exhibit GS-R at 286). This revision occurred after the request for an inspection to verify the payment of an indemnity (i.e., after the notice of loss) (FF 30). Although the record does not contain a "signed, notarized and/or witnessed agreement that specified the lease or share arrangement" (FF 10), the record contains a Commodity Credit Corporation form, captioned Intention to Participate in the 1994 Price Support and Production Adjustment Programs, which identifies Carla Lacey as the operator, with a 30.95% share in 420 acres of upland cotton, and three producers and their respective shares, Bush (19.05%), Rancho (25.00%), and Nutt Estate (25.00%) (Exhibit GS-O at 276-77). Further, as indicated above, the record contains the leases, but nothing regarding farm number 188.

17. In the process of paying an indemnity, with a date of January 1, 1995, and a signature, a supervisor who manages the adjustment of claims for the insurance company (Exhibit 1 at 1) prepared a "fact sheet" with a section "verifying share":

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[5] As noted above in FF 5, the general crop insurance policy specifies: "Unless the application clearly indicates that insurance is requested for a partnership or joint venture, insurance will cover only the crop share of the person making application for insurance."

> the insured has a "percent of profit" lease. ASCS "578" shows P&L Farms 50% and the landlords 25% each (2). The insured pays all inputs and controls 100% of the crop. This policy was written at 100% share for P&L Farming. The two landlords do not have any crop insurance.

(Exhibit 6 at 26.)

<u>The formula for calculating indemnities</u>

18. The general crop insurance policy specifies that the indemnity will be determined on each unit in accordance with the applicable crop endorsement and the actuarial table. The total production to be counted for a unit will include all production determined in accordance with the crop endorsement. 7 C.F.R. § 401.8(d) (¶¶ 9.c, 9.e).

19. The cotton endorsement dictates how an indemnity will be determined on each unit: multiply the insured acreage by the production guarantee; subtract therefrom the total production of cotton to be counted (see FF 20); multiply the remainder by the price election; and multiply the product by the insured's share. 7 C.F.R. § 401.119 (¶ 7.a).

20. The total production to be counted for a unit includes all harvested production and the appraised production, which includes "potential production lost due to uninsured causes and failure to follow recognized good cotton farming practices." 7 C.F.R. § 401.119 (¶ 7.b).

<u>Insured Loss</u>

21. Regarding a claim for indemnity, the general crop insurance policy specifies:

> b. We will not pay any indemnity unless you:
>
> (1) Establish the total production and . . . that any loss of production or value has been directly caused by one or more of the insured causes during the insurance period.
>
> . . . .
>
> d. If the information reported by you on the acreage report results in a lower premium than the premium determined to be due on the basis of the share, acreage, practice or type determined to actually exist, the guarantee on the unit will be computed on the information contained in the acreage report but all production from insurable acreage, whether or not reported as insurable, will count against the guarantee.

7 C.F.R. § 401.8(d) (¶ 9).

22. The general crop insurance policy addresses causes of loss; it specifies that one can be "insured only against unavoidable loss of production directly caused by specific causes of loss contained in the crop endorsement." Moreover, there is no insurance against any loss caused by the "failure to follow recognized good farming practices for the insured crop." 7 C.F.R. § 401.8(d) (¶ 1.a, 1.b(2)).

23. Regarding causes of loss, the cotton endorsement specifies that the "insurance provided is against unavoidable loss of production resulting from the following causes occurring within the insurance period: . . . c. Insects; . . . unless those causes are excepted, excluded, or limited by the actuarial table or section 9 of the general crop insurance policy." 7 C.F.R. § 401.119 (¶ 2).

24. The loss adjustment module specifies under a section on uninsured causes of loss:

> The policy provides protection only against unavoidable loss of production due to the named causes. It is specific as to what causes of loss are insured against; therefore, all other causes of loss are not insured. Moreover, any loss from the cause(s) named is not insured if it was avoidable. For example, loss due to failure of the insured to take adequate measures to control insects, plant disease, or weeds when such measures are practical and have proven effective in the area *is avoidable* and is an *uninsured* cause of loss. However, if the insured carried out recognized and accepted measures to control insects or plant disease (if provided as insured causes) or weeds, these causes are considered *unavoidable insured causes*.

(Exhibit GS-E at 141.5.)

25. The same section of the loss adjustment module specifies action to be undertaken:

> When loss is due to uninsurable cause(s) do the following:
>
> - Consider production on same or similar crop(s) on other farms in the area.
>
> - Verify cause of loss. (For example, apparent loss may be poor weed control; however, the damage may have been indirectly caused by insufficient rainfall to activate a properly applied herbicide.)
>
> - Make an appraisal which represents only that part of the loss which is due to uninsured or avoidable cause, and a separate appraisal for potential production remaining.
>
> . . . .

- Determine efforts to prevent or control the situation (chemical used and/or methods followed). Record the number of applications and dates they were applied.

- Determine efforts neighbors and others in the community used to prevent or control the same situation.

- Photograph the evidence of the crop in question and surrounding farms, with identifying landmarks in each photograph.

- Compare productivity and yields of surrounding farms. The suggested comparison formula is found below in **Concepts for Determining Cause(s) of Loss.**

(Exhibit GS-E at 141.5-42.)

26. The same section of the loss adjustment module specifies a limitation of the insurance:

> The contract does *not* cover any loss which is due to the insured's failure to follow recognized good farming practices. Such farming practices vary by crop and area. Some of the more common uninsured causes of loss due to failure to follow recognized good farming practices are:
>
> . . . .
>
> - Failing to properly plant, care for, or harvest the insured crop
>
> - Failing to apply Extension Service-recommended methods to control insects, plant diseases or weeds in a timely, proper manner[.]

(Exhibit GS-E at 142.5.)

<u>Farming practices at issue</u>

27. During the growing season, there was, at most, one application of two insecticides to control whiteflies on the P&L acreage; this occurred on August 9, 1994 (Exhibit GS-J at 262). No other application occurred on the cotton in question (Exhibit D at 62). The record suggests that Bush made additional applications to his cotton crop, and that the Bush acreage had less of a whitefly infestation than the P&L acreage (Exhibits GS-A at 4-5 (¶¶ 10-11), GS-J at 263). Neighboring farmers sprayed cotton crops several times and had less of a whitefly infestation than the P&L acreage. The additional spraying of neighbors better controlled the situation, resulting in better yields. (Exhibits GS-A at 4-5 (¶ 10), GS-C at 7, 10-12.)

28. A supervisor, claims representative for the insurance company, who was involved in the claims adjustment, avers that on September 19, 1994, during a growing season inspection he (and a loss adjustor) determined that P&L lost approximately 120 pounds per acre due to whitefly damage (Exhibit 1 at 2 ("we estimated that P&L had lost about 120 pounds per acre in August when whitefly damage occurs but that P&L's estimated production was still more than 200 pounds over the production guarantees")). On 340 acres, 120 pounds per acre, amounts to 40,800 pounds lost because of whiteflies.

29. On September 30, 1994, there was agreement between the appraisers and producer that 11,063 pounds of production were lost because of an uninsured cause (weeds) on 30 acres (Exhibit 1 at 2-3).

30. On October 15 and 16, 1994, a rain storm damaged the cotton crop (Exhibit 1 at 4). Shortly thereafter, P&L submitted a notice of loss (Exhibits 1 at 4, GS-L at 269). As to the amount and cause of damage determined by both the supervisor and the loss adjustor for the insurance company, the supervisor avers:

> It is relatively easy to determine loss from rain. We were able to count the bolls that were open and on the ground to determine the loss to rain. It is difficult to assess loss due to whitefly damage because you cannot calculate what production would have been but for the whitefly damage. We counted bolls that had not opened due to whitefly and divided the total damage equally between the two causes because both had contributed to the loss. In our judgement, this was a reasonable allocation of cause.

(Exhibit 1 at 4-5.) The record does not document any such calculations.[6]

31. The harvested production, said to be 225,238 pounds, is not in dispute (Exhibit GS-M at 270).

32. In making its indemnity calculations, the insurance company utilized 420 acres with a guarantee of 779 pounds/acre. The multiplication resulted in a production guarantee of 327,180 pounds. The insurance company concluded that the production to be counted was 236,301 pounds, reflecting a harvested production of 225,238 pounds plus 11,063 pounds for an uninsured cause (weeds). (Exhibits 1 at 2-3, 12 at 45.) The insurance company concluded that the difference of 90,879 pounds--the production guarantee (327,180 pounds) less the production to be counted (236,301 pounds)--represented an insurable loss (51% due to whitefly infestation and 49% due to rain, with the 1% variation from equal distribution attributable to the computer system limitations for entering losses) (Exhibits D at 64, GS-C at 14, GS-L at 267-68). It multiplied the 90,879 pounds by the price guarantee ($0.61 per pound) to determine the amount of indemnity owing to P&L:

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[6] The loss adjustor for the insurance company states his opinion that lost production resulted from a heavy wind and rain storm and from whitefly infestation (Exhibit 8 at 30 (¶¶ 3, 4)).

$55,436 (Exhibit 12 at 45). From this figure it subtracted the net premium it had determined ($10,598, FF 15) which remained due and interest charges ($293) ($55,436 - $10,598 - $293 = $44,545). The insurance company provided P&L an indemnity check in the amount of $44,542 (with the $3 difference unexplained), dated February 6, 1995 (Exhibit 11).

33. Under a compliance case, No. SA-EFAZ-173, the Government reviewed the actions of the insurance company, in terms of the premium and the indemnity, in light of the insured's leases and share of the crop, and damage due to whiteflies and the farming practices. Ultimately, the Government issued its final administrative determination, 7 C.F.R. § 400.169(b) (1996), dated February 12, 1998. (Exhibit GS-S.) The determination was that P&L had a 75% share of the cotton crop. The determination, which discussed only one (FF 11), not both (FF 12), of the farm leases and the Bush lease (FF 13), concluded that P&L had entered into a share lease, and was obligated to pay the lessors a 25% share of the net proceeds on the total farming operations. (Exhibit GS-S at 9.) As to the farming practices:

> I have determined that the loss is the failure of the insured to take reasonable measures to control insects, plant disease, or weeds. Such measures were practical and proven effective in this area to avoid and would have mitigated P & L Farm's losses. The insured made a financial management decision to not spray, and not on recognized good farming practices carried out in the area.
>
> The insured failed to follow FCIC-approved procedures in paying the indemnity without considering the insured's failure to control whitefly infestation on the cotton crop in accordance with recognized good farming practices in the area. There were evidence of the presence of the insects prior to loss payment, but the adjuster failed to investigate and document the issue in accordance with LAM [loss adjustment module (FF 2)] procedures of the insurer.

(Exhibit GS-S at 10.) The determination was that the insurance company is indebted to the Government for a premium overstatement of $3,188, and an indemnity overpayment of $35,062 (Exhibit GS-S at 10). Although calculations are not included in the determination, they appear to have been derived as follows. The determination concluded that the insured had a 75% interest in the crop (such that the calculation with a 100% interest is overstated by 25%), the premium overstatement figure is 25% of $12,753, what the FCIC viewed to be the premium determined by the insurance company (Exhibit G at 103). The determination concluded that the insured had a 75% interest in the crop, and that the only insurable cause of loss was rain, which the insurance company had deemed to represent 49% of the damage. The FCIC had concluded that the insurance company determined an indemnity of $55,433. (Exhibit G at 103.) Taking 49% of that figure (for the insurable loss) and taking 75% of the result (for the insurable share) results in an indemnity of $20,371 (= $55,433 x .49 x .75, with rounding), the difference is $35,062 (= $55,433 - $20,371).

The dispute

34. In its notice of appeal and complaint, the insurance company requests that the Board find that: P&L had a 100% share in the entire cotton crop; P&L engaged in recognized good farming practices, or if P&L did not engage in such practices, its failure was not the proximate cause of the loss; P&L's loss was insured; the insurance company properly adjusted and paid the claim; and, the insurance company is not indebted to FCIC. (Exhibit K at 119.)

35. In response to the developed record, the Government has concluded that P&L had a cash lease with Bush, who farmed 73.7 acres of the 420 acres. The Government concludes that P&L had a 75% interest in the cotton grown on 346.3 of the 420 acres reported. The Government contends that the insurance company must reimburse the Government for an overpayment of $47,932 and must return $4,867 to P&L, which represents an overcharged premium. (Government Motion for Decision Based upon the Record at 14 (May 27, 1999).)

DISCUSSION

The insurance company disputes the Government's conclusions regarding the proper premium and indemnity. In accordance with the SRA and applicable regulations, the analysis must focus upon what was the insurable acreage and insurable share of P&L (the insured), as well as what constituted an insurable loss. The insurance company bears the burden of demonstrating that it is entitled to money under the terms of the SRA and regulations (FF 2, 21).

Insured acreage and insured share

The insurance company contends that P&L had a 100% insurable share in the cotton crop grown on 420 acres. The dispute requires the Board to consider the insurable interest P&L had in the acreage upon which cotton was planted. The general crop insurance policy specifies that the "acreage insured for each crop year is the insurable acreage . . . in which you have a share" (FF 5).

Under leases with a description of "whole farm," P&L was to farm upland cotton on 420 acres (FF 11, 12, 15). Under the field tenant agreement with Bush, P&L divested itself of any share in the cotton crop grown on 80 of the 420 acres to be used for the production of upland cotton (FF 13). Therefore, P&L had a share in 340 acres on which cotton was produced, and no share in the 80 acres.

This conclusion is not altered by the assertions of the insurance company:

> By the Appellees' own definition, the Bush lease was not a cash lease. Payment in-kind is not payment in cash. In-kind payments do not involve the transfer of cash and there are no records showing Mr. Bush's time expended or the value attributed to that time. Thus by any traditional definition of "insurable interest," P & L Farms had an insurable interest in the Bush lease to the extent rent was payable

> in cash and there was no transfer of a share to Mr. Bush to the extent rent was payable in-kind.

Opposition to Motion (Jan. 12, 2000) at 5. Contrary to the gist of the argument, what is controlling is the interest in the cotton produced on the acreage. P&L had no interest in the cotton grown on the 80 acres; the consideration it received was not calculated based upon the crop produced. P&L divested itself of any interest in consideration for $40 per acre, to be received half in cash and half in Bush's labor. Because the consideration P&L received did not relate to a share in the cotton crop, the general crop insurance policy indicates that the 80 acres will be considered as owned by Bush (FF 7). The language of the loss adjustment module (FF 9) supports this conclusion, in that Bush owned (had the entire share of) the crop grown on the 80 acres, P&L did not. Further, P&L ultimately reported Bush's share in the 420 acres as 19.05%; 420 acres x .1905 = 80.01 acres (FF 16). Thus, the Bush lease demonstrates that P&L had no insurable interest in 80 of the 420 acres; form ASCS-578 (FF 10) is consistent with the conclusion that Bush, not P&L, had an insurable interest in those 80 acres.

Regarding the cotton crop on the remaining 340 acres, the reports on form ASCS-578, which specify that P&L had a 50% share in the cotton crop (FF 10, 16), and the "share crop farm lease agreement" captions of the leases with P&L as lessee (FF 11, 12) are not alone determinative of P&L's insurable share.[7] The general crop insurance policy dictates that the "insured share is your share as landlord, owner-operator, or tenant in the insured crop at the time insurance attaches." "Unless the application clearly indicates that insurance is requested for a partnership or joint venture, insurance will cover only the crop share of the person making application for insurance." (FF 5.) P&L made the application for insurance in its name alone for 420 acres (FF 8, 15) (the loss adjustment module specifies that the insured establishes the insurable share on the acreage report at the time insurance attaches). But the application is not determinative (FF 2, 5, 6, 21).

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[7] The loss adjustment module largely resolves the dispute regarding the insurable share in the cotton crop: "Any discrepancy in reported share will result in using the same share for the crop as reported on the [ASCS-578] unless the difference is verified by a signed, notarized and/or witnessed agreement that specified the lease or share arrangement" (FF 10). Here, there is a discrepancy regarding the insurable share in the 420 acres. The indicated form, as initially submitted indicated that the landlords each had a 25% share (FF 11, 12); the insurance company became aware of the discrepancy before a loss was reported and before an indemnity was paid (FF 15, 17). The indicated form, as amended, specifies that Carla Lacey had a 30.95% interest in the 420 acres. This data is consistent with the Bush lease for 80 acres (with P&L as lessor), which is a cash lease involving a fixed sum. This data also is consistent with the two primary leases (with P&L as lessee) each of which is captioned as a "share crop farm lease agreement." The payment under each of those leases is not for a fixed sum of money; rather, the consideration involves a payment based upon a percentage of the net proceeds derived from the various crops, and each lessor maintains some control over the disposal of the cotton crop. The leases and fully developed record support use of the reported figures for the share of the cotton crop. The position of the insurance company is not supported.

The insurance company contends that P&L held a 100% share in the cotton crop under cash leases. While P&L was obligated to pay a cash amount to each lessor if the net proceeds on the "whole farm" was positive, such does not establish that cash leases were involved.[8] Unlike the Bush lease, the lessors to P&L did not divest themselves of all interest in the cotton crop produced. Payment under the lease was directly dependent on the proceeds from the cotton crop. Moreover, but of secondary consequence here, the lessors retained control over the disposal of the cotton produced. (FF 11, 12.)

P&L's payment obligation under its leases derives from a share of all crops with P&L's expenses subtracted to determine net proceeds. P&L was required to pay each lessor 25% of the net proceeds from the cotton and other crops on the "whole farm." (FF 11, 12). The cotton was grown on land leased from Rancho, and therefore, was to be included in each definition of whole farm. (FF 11, 12). Because the lease with the Nutt estate and the lease with Rancho differently define "whole farm," the actual net proceeds to be considered under each lease may differ, such that P&L's actual share in a crop could vary. However, the record does not reveal that P&L or those lessors so treated each lease or that P&L separately calculated net proceeds under each definition of whole farm. Under the simplified treatment by the leasing parties, each lessor had a 25% share in each crop and P&L a 50% share in each crop. (FF 5.) P&L's reports on form ASCS-578 (FF 16) support the conclusion that each lessor had a 25% insurable interest in the cotton and that P&L had a 50% share in the cotton, even though the Government and insurance company each reach a different conclusion. The record does not provide a sound basis to deviate from those reports.

The insurance company should have calculated P&L's premium based upon an insured acreage of 340 and a 50% share.

<u>The indemnity</u>

In its complaint, the insurance company maintains that it appropriately calculated P&L's indemnity, because P&L encountered an insurable loss, as P&L engaged in recognized good farming practices. Further, if P&L did not engage in recognized good farming practices, the failure was not the proximate cause of the loss. The insurance company asks the Board to find that the insurance company is not indebted to the FCIC.

A provision of the general crop insurance policy specifies that indemnities will not be paid unless the insured establishes the total production and that any loss of production has been directly caused by an insured cause. Moreover, "the guarantee on the unit will be computed on the information

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[8] If P&L leased land for raising cotton, with a provision that specified, "P&L shall pay the landlord 10% of the amount received from raising the cotton," P&L would be obligated to pay only cash. However, that payment would derive from a share of the crop. It is the share in the crop produced which is the primary consideration under the lease. Under this scenario, P&L's share is 90% of the crop. The landlord would have a share of 10%, as its income under the lease is dependent upon that percentage of the crop production. (FF 5-7, 9.)

contained in the acreage report but all production from insurable acreage, whether or not reported as insurable, will count against the guarantee." (FF 21.) Thus, the Government is not obligated to pay more than the record establishes as owing pursuant to the terms of the SRA and insurance policy.

To calculate an indemnity, one multiplies the insured acreage by the production guarantee. From that product, the total production is subtracted. The total production is the sum of the harvested production and the appraised production, which includes potential production lost due to uninsured causes and failure to follow recognized good cotton farming practices. (FF 19, 20.)

A factor in calculating the indemnity is the insured acreage (FF 19). The insurance company utilized 420 acres and a 100% interest (FF 32). The Board has concluded that the insured acreage for P&L was 340 acres, and that P&L had a 50% interest in the cotton crop. The insurance company's conclusions to the contrary in calculating the indemnity were not reasonable, particularly given that the record provides no sound basis to deviate from the shares in the crop ultimately reported by P&L (FF 16). The forms and the leases should have led the insurance company to reach a conclusion contrary to that reached. The record does not demonstrate that any of the crop production was for other than the P&L acreage. Thus, the indemnity calculation should utilize 340 insured acres and a harvested production of 225,238 pounds (FF 21, 31.)

The insurance company asserts that the whitefly damage fully was an insurable loss. The record does not support that conclusion. The record does not reveal that the actuarial yields were determined based upon the single application of two insecticides. Rather, producers in the area made several more applications to achieve greater yields than the P&L crop. (FF 27.) In short, the evidence does not demonstrate that loss due to whiteflies was unavoidable (FF 22, 23). The loss adjustment module directs an inquiry which results in the same conclusion that the loss was due to an uninsurable cause (FF 25, 26).

During the growing season, the insurance company, through its supervisor, claims representative, determined that 120 pounds per acre of cotton were lost due to whitefly damage (FF 28). Without information in the record reasonably supporting a contrary conclusion, the potential production to be counted in the indemnity calculation because of avoidable loss is 40,800 pounds (340 acres x 120 pounds per acre). As the following calculations demonstrate, in excess of 25% of this loss would have to be unavoidable (that is, for example, would have occurred even with additional spraying)--that is, an insurable loss--to alter the Board's ultimate conclusion that the total production exceeds the guaranteed production.

The total production to be counted for the indemnity calculation is derived as follows:

225,238 pounds	harvested production (FF 31)
51,863 pounds	appraised production
	40,800 pounds (whiteflies) (FF 28)
	11,063 pounds (weeds) (FF 29)
277,101 pounds	TOTAL PRODUCTION

Multiplying the production guarantee, 779 pounds per acre (FF 32), by the insured acreage, 340 acres, results in a guaranteed production of 264,860 pounds. Because the total production exceeds the production guarantee, the insured was not entitled to an indemnity, and the SRA does not obligate the FCIC to provide reimbursement (FF 2).

The insurance company faults the FCIC for finding that the insured did not engage in "good farming practices," because that phrase lacks an express definition. However, that phrase does have meaning, particularly given the prerequisite for recovery that a loss be unavoidable. The provisions of the insurance regulations (FF 21-23) and loss adjustment module (FF 24-26) are not without meaning. Not unlike the Government's contentions here, the insured was obligated, under its leases, to grow cotton in the best course of farming practices in the geographic vicinity and to maximize output (Footnotes 2, 4). The record does not support the application of the phrase "good farming practices" as suggested by the insurance company.

In support of its position, the insurance company contends:

> In any event, it cannot be gainsaid that by October 13, 1994, any whitefly damage that had occurred had not reduced P & L's production below its insurance guarantee of 779 pounds per acre. That fact is irrefutable because as of October 13, 1994, P & L Farms had not filed a notice of loss.
>
> According to the approved Loss Adjustment Module then used, (FCIC Supplemental Record at 69 et seq.), "[t]he insured must establish the cause of loss." (Id. at 107). By October 13, the insured had not filed a notice of loss due to whitefly infestation and the insured never did. Ipso facto, whitefly infestation did not reduce P & L's production below the insurance guarantee.

Memorandum in Support of Motion for Summary Judgement at 16 (footnote omitted). This approach, which focuses only upon events, actions or inactions reducing production below the insurance guarantee, is not faithful to the terms of the SRA and crop insurance policy. The insurance company seeks to establish a different standard of farming practice for different levels of insurance, and require an insured to expend no more effort than is required to meet the guaranteed production. The SRA, and applicable regulations, are not so premised. Rather, there is a standard under which a farmer is to engage in appropriate farming practices; avoidable losses are to be counted in the total production. (FF 19, 20.) While a farmer may elect to utilize a minimum effort approach in raising a crop, such has not been shown here to be the standard for establishing the insurance premiums and guarantees. Here, the failure to adequately spray for whiteflies resulted in an avoidable loss of cotton. (The loss adjustment manual uses the phrase "avoidable" if measures are practical and have proven effective (FF 24)). That potential production is to be counted for indemnity purposes, without regard to how the insured or insurance company treated it.

Reasonableness of actions

The insurance company seeks to avoid repayment of any amount. It contends that it acted reasonably in ascertaining the premium and indemnity amounts. The insurance company notes that it sought the written opinion from counsel, in January 1995, regarding the interpretation of insurable share as applied to the underlying leases is misguided. The insurance company also notes the changing positions of the Government. The facts do not demonstrate that the insurance company acted reasonably in reaching its conclusions or that it would be consistent with statute and regulation for the FCIC to provide reinsurance benefits under the circumstances. The three leases, the SRA, the applicable regulations, and the loss adjustment module do not support the views of the insurance company.

DECISION

The Board denies the appeal.

JOSEPH A. VERGILIO
Administrative Judge

We concur:

EDWARD HOURY
Administrative Judge

ANNE W. WESTBROOK
Administrative Judge

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