



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 21, 2016

CBCA 4708-FCIC

In the Matter of AMERICAN AGRI-BUSINESS INSURANCE COMPANY and
ARMTECH INSURANCE SERVICES, INC.
(In re: G & C FARMS, INC.)

Michael D. Stevens of Henke-Bufkin, P.A., Oxford, MS, counsel for Appellant.

David M. Stauss, Office of the General Counsel, Department of Agriculture, Temple, TX, counsel for Federal Crop Insurance Corporation.

Before Board Judges **SOMERS, KULLBERG, and SULLIVAN.**

SOMERS, Board Judge.

Appellant, American Agri-Business Insurance Company and ARMtech Insurance Services, Inc. (ARMtech or appellant), sold a crop insurance policy to G & C Farms, Inc. (G&C or the insured), pursuant to a standard reinsurance agreement with the Federal Crop Insurance Corporation. The terms of the crop insurance policy required the insured to manage its crop as “an irrigated practice,” meaning that it should irrigate its crop as necessary throughout the growing season.

The insured suffered a loss in crop year 2005 when it diverted the water from the insured crop to another crop. Initially, ARMtech paid the insured for the loss despite the fact that the insured failed to irrigate the crop as required by the insurance policy. The United States Department of Agriculture (USDA), Federal Crop Insurance Corporation (FCIC), Risk Management Agency (RMA) (collectively referred to as the Government) indemnified ARMtech under the terms of the reinsurance agreement in the amount of \$7071.

After an audit, ARMtech agreed that it had failed to properly process the loss claim, but proposed that ARMtech be permitted to retroactively change the policy from one covering an irrigated crop to one covering a non-irrigated crop. The Government rejected ARMtech's proposed solution and issued a final determination seeking return of the indemnity payment. ARMtech appeals the final administrative determination.

The parties have elected to submit this appeal for decision on the written record pursuant to CBCA Rule 19, 48 CFR 6101.19 (2015).¹ The record consists of the pleadings, appeal file, ARMtech's memorandum of law, the Government's memorandum of law, the Government's statement of uncontested facts in support of its record submission, and the parties' responses. We deny ARMtech's appeal for the reasons set forth below.

Background

The Federal Crop Insurance Act

Congress enacted the Federal Crop Insurance Act (FCIA) as part of the New Deal legislation during the Great Depression. 7 U.S.C. §§ 1501 et seq. (2012); *Ace Property & Casualty Insurance Co. v. Federal Crop Insurance Corp.*, 517 F. Supp. 2d 391 (D.D.C. 2007); *Ace Property & Casualty Insurance Co. v. United States*, 60 Fed. Cl. 175 (2004). The FCIA established a federal crop insurance program in 1938 to be administered and regulated by the FCIC. 7 U.S.C. § 1503. The FCIA "is intended to 'promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance.'" *Ace American Insurance Co.*, CBCA 2876-FCIC, et al., 14-1 BCA ¶ 35,791, at 175,056 (quoting 7 U.S.C. § 1502(a)).

Originally, the FCIC provided crop insurance coverage to eligible farmers directly. In 1980, Congress revised the FCIA to require the FCIC to "contract with private companies" for insurance "to the maximum extent possible." *Ace Property & Casualty Insurance Co. v. Federal Crop Insurance Corp.*, 440 F.3d 992, 994 (8th Cir. 2006) (citing 7 U.S.C.

¹ By joint motion submitted on October 1, 2015, the parties advised the Board that they intended to submit the case on the record. The Board's scheduling order of October 1, 2015, set forth the due dates for these record submissions. Although the parties have designated each of their submissions as motions for summary relief with memoranda in support, the Board will evaluate the submissions as record submissions, consistent with the parties' express intent and the Board's order.

§ 1507(c)). The FCIA provides that the FCIC “may insure, or provide reinsurance^[2] for insurers of producers of agricultural commodities grown in the United States under 1 or more plans of insurance determined by the Corporation to be adapted to the agricultural commodity concerned.” 7 U.S.C. § 1508(a); *see also id.* § 1508(b)(1). In other words, the FCIC is responsible for providing catastrophic risk protection insurance by reinsuring private insurers, who, in turn, issue insurance policies to agricultural producers. “For the purpose of encouraging the broadest possible participation of producers in the catastrophic risk protection . . . and the additional coverage provided . . . the [FCIC] shall pay a part of the premium” for such insurance. *Id.* §1508(e)(1). However, the “reinsurance agreements . . . shall require the reinsured companies to bear a sufficient share of any potential loss under the agreement so as to ensure that the reinsured company will sell and service policies in a sound and prudent manner.” *Id.* §1508(k)(3).

“To qualify for coverage under a plan of insurance, the losses of the insured commodity must be due to drought, flood, or other natural disaster (as determined by the Secretary [of Agriculture]).” 7 U.S.C. § 1508(a)(1). Insurance issued under the FCIA does not cover losses due to the neglect or malfeasance of the producer. *Id.* § 1508(a)(3)(A)(i).

The Standard Uniform Contract between FCIC and Approved Insurance Providers

Federal crop insurance is sold and serviced by an approved insurance provider (AIP) pursuant to a uniform contract agreement with the FCIC, referred to as the Standard Reinsurance Agreement (SRA). 7 U.S.C. §§ 1501 *et seq.*; *Rain & Hail Insurance Service, Inc.*, AGBCA 99-125-F, *et al.*, 01-2 BCA ¶ 31,534. The AIP must offer coverage on the terms and conditions established by the FCIC. 7 U.S.C. § 1508(k)(2).

Section II, Reinsurance, A.1, of the SRA states that “[o]nly eligible crop insurance contracts will be reinsured and subsidized under this Agreement.” Paragraph A.3 of the same section provides that “[i]n exchange for the reinsurance premiums provided by the AIP pursuant to the Agreement, FCIC will provide the AIP with reinsurance in accordance with the provisions of this Agreement.” If the FCIC finds that the AIP has not complied with terms of the SRA, it can require the AIP to return any overpaid indemnity. SRA Section IV, General Provisions, H.7(a)(iii).

² Reinsurance is “[i]nsurance of all or part of one insurer’s risk by a second insurer, who accepts the risk in exchange for a percentage of the original premium.” *Ace Property & Casualty Insurance Co. v. Federal Crop Insurance Corp.*, 517 F. Supp. 2d 391, 397 n.1 (citing Black’s Law Dictionary 1312 (8th ed. 2004)).

The Contract between the Approved Insurance Provider and the Insured

G&C obtained crop insurance from ARMtech through a standard common crop insurance policy. The provisions for common crop insurance policies are published at 7 CFR 457.8 (2005), and include the following preamble:

This is an insurance policy issued by the Federal Crop Insurance Corporation (FCIC), a United States government agency. The provisions of the policy may not be waived or modified in any way by us, your insurance agent or any employee of the USDA unless the policy specifically authorizes a waiver or modification by written agreement. Procedures (handbooks, manuals, memoranda, and bulletins), issued by us and published on the RMA Web site at <http://www.rma.usda.gov/> or a successor Web site will be used in the administration of this policy, including the adjustment of any loss or claim submitted hereunder.

As noted in the regulations governing crop insurance, the FCIC issues handbooks, manuals, memoranda, and bulletins to be used in the administration of crop insurance. Among these is the Loss Adjustment Manual (LAM) Standards Handbook.³ The LAM is revised on an annual basis for each crop year. We provide the relevant provisions of the LAM before we return to a review of the pertinent facts of this appeal.

The 2005 Loss Adjustment Manual Standards Handbook

Part 1, paragraph 1(A) of the LAM for the 2005 crop year explains:

This handbook is the official publication of the Risk Management Agency (RMA) for all levels of insurance provided under the Multiple Peril Crop Insurance (MPCI) program. MPCI refers to the Multiple Peril Crop Insurance policies available under the Federal crop insurance program and written by Private Insurance Companies reinsured (hereafter called insurance providers) by Federal Crop Insurance Corporation (FCIC). If an insurance provider is audited by a government agency or is selected for an RMA compliance review, the applicable procedure in this FCIC-issued handbook will be the basis for all determinations.

³ See www.rma.usda.gov/handbooks/2500/2005/05_25010-1H.pdf (last visited Mar. 16, 2016).

Part I, paragraph 7(A) of the LAM states that:

The insurance provider is responsible for all loss adjustment responsibilities outlined in this handbook whether the requirement is performed by a contracted adjuster, employed adjuster, or other insurance provider employee. The insurance provider and other parties involved with FCIC's Multiple Peril Crop Insurance program are to administer general loss adjustment in accordance with the procedures (requirements) provided in this handbook.

Part 1, paragraph 7(B) lists the insurance company's responsibilities for adjusting a loss, which include, among many other things, the requirement to "[e]xplain to insureds their contractual responsibilities, filing procedures, and what will be done during the inspection" for determining whether to indemnify the insured for a loss.

The LAM defines an irrigated practice as:

A method of producing a crop by which water is artificially applied during the growing season by appropriate systems and at the proper times, with the intention of providing the quantity of water needed to produce at least the yield used to establish the irrigated production guarantee or amount of insurance on the irrigated acreage planted to the insured crop.

Part 2, section 6 (Insurable Farming Practices⁴), paragraph 40 (Irrigated Practice) addresses irrigated farming practices:

The crop insurance contract provides that insureds are to report as irrigated, and the insurance provider will insure as irrigated, only the acreage for which the insured has adequate facilities and adequate water or the reasonable expectation of receiving adequate water at the time coverage begins, to carry out a good irrigation practice for the insured crop. . . . In general, for annually planted crops, insurance attaches at the time the crop is planted. . . . It is the insured's responsibility to provide documentation, upon the insurance provider's request, of the information used to determine the adequacy of

⁴ "Insurable Farming Practices" as defined in the LAM include "continuous cropping practice," in which the land is continually cropped; "summerfallow practice," "carried out by using mechanical tillage and chemicals on uncropped land, during the summer, to control weeds and store moisture in the soil for the growth of a later crop"; and "irrigated practice," in which the insured provides irrigation of the insured crop.

irrigation water and facilities for the acreage reported for insurance under the irrigated practice.

....

Under the terms of the policy, the burden is on the insured to show that any prevented planting or loss on annually planted (or perennial) acreage was caused by an insured cause of loss. This includes failure of the irrigation supply. Insureds must show that such failure was caused by an insured cause of loss that occurred during the insurance period.

Insurance providers must verify and document that any failure of the irrigation water supply was due to an insured cause of loss before making any prevented planting payment or paying an indemnity.

Part 2, section 6, paragraph 40(B)(1)(a) of the LAM provides the following irrigated practice guidelines:

Insurance providers are to use the “Irrigated Practice Guidelines” to administer the following standards and to verify at loss time that the insured properly reported as irrigated only the acreage for which the insured qualified for an irrigated practice.

Part 2, section 6, paragraph 40(B)(2)(d) defines a “good irrigation practice” as:

Application of adequate water in an acceptable manner, at the proper times necessary to produce at least the yield used to establish the irrigated production guarantee or amount of insurance on the irrigated acreage planted to the insured crop.

Part 2, section 6, paragraph 40(B)(2)(g) defines the adequacy of irrigation facilities:

Irrigation facilities are considered adequate if it is determined that, at the time insurance attaches, they will be available and usable at the times needed and have the capacity to timely deliver water in sufficient quantities to carry out a good irrigation practice for the acreage insured under the irrigated practice.

In the event that the insured fails to carry out a good irrigation practice, part 2, section 6, paragraph 40(B)(4) of the LAM says:

Failure to carry out a GOOD IRRIGATION PRACTICE on acreage properly insured under the irrigated practice will result in an appraisal for uninsured causes against such acreage, unless the failure was caused by unavoidable failure (due to a specific cause of loss contained in the crop provisions) of the irrigation water supply after insurance attached. . . .

*** If a loss is evident, acreage reported under an irrigated practice that qualified as an irrigated practice at the time insurance attached cannot be revised to a non-irrigated practice after the acreage reporting date even if liability stays the same or decreases and even if the insured never applied any water.

Part 2, section 6, paragraph 40(D) requires insurance companies to provide specific guidelines for irrigated practices to the insured:

Insurance providers are to provide a copy of the “**Irrigated Practice Guidelines**” found in subparagraph B above and in the Prevented Planting Guidelines to all insured for whom the irrigated practice may apply. The “Irrigated Practice Guidelines” identify factors to be considered in determining the proper acreage to be reported and insured under an irrigated practice. Upon the insurance provider’s request, insureds must document the factors they considered in reporting acreage to be insured under the irrigated practice. Insurance providers must verify this documentation whenever a claim for indemnity is made due to failure of the irrigation water supply, as well as anytime the accuracy of the irrigated practice reporting is suspect.

The LAM spells out the process to be followed when an insured decides to divert water from an irrigated crop. Part 2, section 6, paragraph 40(K)(6) states:

Although it is preferred that the insured notify the insurance provider in advance of any diversion, failure to do so will not, in itself, result in appraisals for failure to carry out a good irrigation practice. However, advance notification allows the provider the opportunity to verify the appropriateness of such diversion at the same time that the insured makes the decision to divert the water.

Under this paragraph, the failure of an insured to notify the insurance provider of its intent to divert water is not fatal to a claim. Nonetheless, the insurance provider is still required to verify the appropriateness of the plan to divert water.

Part 2, section 6, paragraph 40(K)(6) states further that water may be diverted from one properly insured crop to another properly insured crop when both are insured as “irrigated practice” crops, and the insured follows (among other things) these steps:

1. Verify that a water shortage exists or whether wind and extreme heat conditions have caused evaporation of the irrigation water before the water can reach all areas of the crop, thus, creating a need to irrigate only a portion of the crop that initially was being irrigated (e.g., instead of irrigating the entire pivot which is not receiving enough water to survive, irrigate only half of the crop so that at least this part will survive). Also, verify whether recommendations from local CES [Cooperative Extension System] or NRCS [National Resources Conservation Service] (or other source recognized by CES, or NRCS to be an expert in this area) agree with the insured’s intentions or actions taken.

Verification of water shortage is done by verifying the insured’s water source and/or supplier (water district, etc). Verify wind and extreme heat conditions by obtaining and documenting the data from the National Weather Bureau for the closest location to the insured acreage and/or other local sources that keep records of wind and temperatures. Based on this data obtain the recommendations of local CES or NRCS as stated above.

2. Determine that such diversion is appropriate. Recommendations from local CES or NRCS (or other source recognized by CES, or NRCS to be an expert in this area) should be used to document this determination.

3. Document (on an appropriate form) the insured’s intention or action taken to divert water on the affected acreage. Include the circumstances affecting your determinations required by 1 and 2 above.

4. If the requirement in 2 above is not met, consider this as failure to carry out a good irrigation practice for the insured crop, and assess any appropriate appraisal(s) representing the additional indemnification anticipated as a result of the diversion. Use appraised and/or harvested production figures, APH [actual production history], yields, etc., of the acreage or units involved as a guide to establish any appropriate uninsured-cause appraisals that may be necessary to assess against the acreage or unit from which the water was diverted.

5. Inspect any acreage involved in the diversion and appraise any insured acreage that is not to be harvested.
6. Defer final settlement of claims of this type until total production of all involved acreage can be verified or determined.

Finally, the LAM expressly states, at part 2, section 6, paragraph 40(N)(1), when properly identifying a cause of loss:

Drought CANNOT be a Cause of Loss Under an Irrigated Practice

Insurance providers are responsible for ensuring that damage and losses due to failure of the irrigation water supply are properly identified as such, and are not misidentified as drought, excessive heat, hot winds, etc. The insurance provider MUST NOT pay drought losses on acreage under the irrigated practice, except where drought has caused the failure of the irrigation water supply, and in that instance, the cause of loss code must be shown as failure of the irrigation water supply, not drought.

The LAM prohibits, at part 3, section 2, paragraph 78(A)(2), an insurance provider from indemnifying an insured when all of the loss is due solely to the uninsured causes, including the failure to follow recognized good farming practices for the insured crop.

ARMtech Administers G&C's Claim for Loss

As noted previously, ARMtech issued a crop insurance policy to G&C for a soybean crop classified as “an irrigated practice.” The policy covered the 2005 growing season. When G&C submitted to ARMtech a notice of possible claim for crop loss, ARMtech dispatched a loss adjuster to investigate.

In his report, the loss adjuster stated that the insured had identified the crop as irrigated, but told the adjuster that the insured had not watered the soybeans during the growing season because the insured had to divert the water from the soybean crop to the higher value rice crop. ARMtech's adjuster reported the cause of loss as a failure of the irrigation system, contrary to the statement from the insured that it had intentionally diverted the water and despite the fact that the insured did not claim that the irrigation system had failed. ARMtech paid G&C \$7071 for its losses and received indemnification from the FCIC under the SRA.

Meanwhile, for that same crop year, G&C submitted a report certifying its crop practice to the Farm Service Agency (FSA), an agency under the USDA. According to the FSA records, G&C had identified its soybean acreage as non-irrigated. By contrast, G&C certified its crop as irrigated for insurance purposes in its report to the FCIC.

Upon noticing the apparent discrepancy, the FSA referred the case to the RMA, Southern Regional Compliance Office (SRCO).⁵ That office reviewed G&C's insurance policy file, which included a notation from the SRCO database indicating that ARMtech had reported to the SRCO that 100% of its soybean loss had occurred in June, with the loss identified as "code 13 – failure of irrigation (water) supply." This review led the SRCO to surmise that ARMtech had erroneously paid \$7071 for crop loss on G&C's policy.

The SRCO asked ARMtech to review the claim in light of the FSA documents and to provide it with any documents ARMtech had used to verify failure of irrigation or any other evidence that supported its conclusion that the insured was not able to pump enough water from its wells to irrigate both the rice crop and the soybean crop. Without producing any supporting documents, ARMtech claimed that all farmers in the area were watering more than usual due to the lack of rain and wells were not pumping as much water as necessary.

After an exchange of correspondence, ARMtech, through its compliance manager, acknowledged on August 19, 2008:

I responding [sic] to this once again as we both now [sic] the insured certified the 156.0 acres to us as irrigated and to FSA as non-irrigated acres on FSN 5014 tract #7549, Unit 0110. The irrigation facilities were there and operational at the time insured attached per insured [sic]. The insured had every intent of irrigation [sic] these beans during the growing season however [sic] with the extremely dry conditions in 2005 the insured had no choice but to divert his water from this Unit 0110 to a crop that was higher in liability as the county did not receive the rainfall it normally does and the insured had to use well water in order to irrigate and in doing so he had to divert water from the soybeans to the rice insured under our policy.

⁵ 7 CFR part 760, together with the Crop Disaster Program Handbook, requires FSA to refer cases to the RMA compliance offices pursuant to the 2005/2006/2007 Crop Disaster Program authorized by the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, § 9001, 121 Stat. 112, 211-14.

ARMtech confirmed that the original adjuster identified the claim as being caused by a failure of the irrigation water supply, but, in fact, irrigation facilities were present and operational, and the insured had every intention of irrigating the soybean crop unit at the time insurance attached. However, according to ARMtech, the insured had no choice but to divert its irrigation water from the soybean unit crop to a crop unit with higher liability in light of the extremely dry conditions in 2005. ARMtech's manager concluded by stating that "[t]he fact that the insured diverted water to rice from the soybeans prevented a rice claim and was to the benefit of both ARMtech and RMA (FCIC)."

In its initial finding dated August 27, 2008, the SRCO determined that the insured did not properly irrigate the soybean acreage. While noting that the rules permitted the insured to divert water to another crop, the SRCO stated that it is preferable for an insured to notify the AIP before it diverts water to another crop in order to give the AIP the opportunity to verify any alleged water shortage caused by extreme heat conditions. The SRCO pointed to part 2, section 6, paragraph 40(J)(1) of the 2005 LAM, which states that "[t]he QUANTITY of irrigation water will be considered to be adequate ONLY if the insured can demonstrate to the insurance provider's satisfaction that, at the time insurance attached, there was a REASONABLE EXPECTATION of receiving an adequate quantity of water at the times necessary to carry out a good irrigation practice on the acreage insured under the irrigated practice."

The SRCO concluded that ARMtech failed to follow FCIC-approved policies and procedures when it paid for the insured's crop loss. The SRCO asked ARMtech to provide a fully supported response if it disagreed with the SRCO's findings.

In a response dated December 3, 2008, ARMtech agreed that the insured had failed to demonstrate that adequate water and facilities existed at the time insurance attached. ARMtech stated that it would deny liability on the irrigated practice, revise the 156 acres on the soybean acreage to a non-irrigated practice, and correct the claim. As a result of revising the claim, ARMtech said that the indemnity overpayment would be \$2030 and the premium understatement would be \$154. However, ARMtech stated that it would not make the corrections until the SRCO approved the actions taken.

The SRCO issued its final findings on December 11, 2008, indicating that it did not agree with ARMtech's proposed revisions. Reciting the rules applicable to irrigated practices, the SRCO determined that ARMtech failed to follow the FCIC-approved procedures in determining an insurable cause of loss for the soybean acreage. The SRCO rejected ARMtech's proposal to retroactively change the insurance policy coverage from an irrigated policy to a non-irrigated policy. The SRCO concluded that ARMtech had overpaid

G&C's claim in the amount of \$7071. The SRCO advised ARMtech of its rights to appeal this final determination.

ARMtech appealed the SRCO's findings to RMA by letter dated February 3, 2009. While agreeing with the SRCO's findings of facts, ARMtech stated:

When we ask ourselves did the insured do the right thing according to procedure probably not but in the long run the cost avoidance is significant as the rice did not have a claim in 2005.

ARMtech concluded by stating that "ARMtech does not believe the crime fits the punishment the SRCO has determined."

In its final administrative determination, RMA upheld the SRCO's initial and final findings. RMA agreed that the SRCO had correctly determined that ARMtech failed to follow procedures regarding the cause of loss.

ARMtech appealed the agency's final determination to the Board.

Discussion

We possess jurisdiction to resolve disputes between the FCIC and insurance companies under an agreement with the Secretary of Agriculture, as permitted under section 42(c)(2) of the Office of Federal Procurement Policy Act, 41 U.S.C. § 438(c)(2) (2012); *see* 48 CFR 6102.201.⁶ We review the final determination *de novo*. *See Rain & Hail Insurance Service, Inc.*, AGBCA 97-198-F, 99-1 BCA ¶ 30,142, at 149,115 (1998) ("The Board considers appeals made to the Board on a *de novo* basis.").

The parties have elected to submit this case for a decision on the record without a hearing under Rule 19 of the Board's rules. The facts here are undisputed. The insured obtained crop loss insurance for an irrigated practice. The insured suffered a loss to the soybean crop when it diverted the water from the soybean crop to another crop. Initially, ARMtech paid the insured for the loss even though the insured failed to irrigate. After an audit, ARMtech agreed that it failed to properly adjust the loss claim but proposed that an

⁶ Prior to the creation of this Board, the Department of Agriculture Board of Contract Appeals resolved this variety of dispute pursuant to statute, 7 U.S.C. §§ 1501 et seq. (the FCIA), and by regulation, 7 CFR 24.4(b) and 400.169.

appropriate solution would be to permit ARMtech to retroactively change the policy to one covering a non-irrigated practice. The Government did not agree to ARMtech's proposed solution.

The SRA is Interpreted by Federal Common Law

The issue is whether ARMtech complied with the SRA when it indemnified the insured for the loss of the crop that had been insured as an "irrigated" crop when, in fact, the insured did not irrigate the crop as required. In order to resolve this issue, we must first understand which law to apply to interpret the terms of the contract. The SRA is not a standard government procurement contract and so is not governed by the Contract Disputes Act, 41 U.S.C. §§ 7101-8109 (2012). See *Ace Property & Casualty Insurance Co. v. United States*, 60 Fed. Cl. 175, 177 n.1 (citing *Rain & Hail Insurance Service, Inc. v. Federal Crop Insurance Corp.*, 229 F. Supp. 2d 710, 715 n.5 (S.D. Tex. 2002); *American Growers Insurance Co. v. Federal Crop Insurance Corp.*, 210 F. Supp. 2d 1088, 1093 (S.D. Iowa 2002)). As noted by the United States Court of Appeals for the Fourth Circuit, when examining a case of improper indemnification for drought losses under a crop insurance policy, contract principles of federal common law should govern the dispute:

As an initial proposition, "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *United States v. Winstar Corp.*, 518 U.S. 839, 895 . . . (1996) (internal quotation marks omitted). And, as the Federal Circuit recently observed, "[i]t is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law, which become federal common law." *Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1245 (Fed. Cir. 2007) (internal quotation marks omitted). The Federal Circuit further concluded that "[t]he Restatement of Contracts reflects many of the contract principles of federal common law." *Id.*; see also *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 608 (2000) (relying on Restatement of Contracts for principles of repudiation and restitution); *Franconia Assocs. v. United States*, 536 U.S. 129, 141-43 (2002) (applying principles of general contract law by relying in part on Restatement (Second) of Contracts). . . . [W]e will apply [principles of federal common law] in our assessment of the breach of contract issues. *Cf. Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607 (4th Cir. 2002) (concluding that "the law is well settled that federal common law *alone* governs the interpretation of insurance policies issued pursuant to the [National Flood Insurance Program]").

In re Peanut Crop Insurance Litigation, MDL-1634, 524 F.3d 458, 470-71 (4th Cir. 2008).

When we apply these general contract law principles, we find that ARMtech breached the SRA by failing to properly investigate the claim prior to paying for the insured's crop loss. The terms of the SRA expressly require ARMtech to comply with policies and procedures of the FCIC, including those set out in the LAM. Here, G&C's crop had been insured as an "irrigated practice." For such practices, insured parties are required to document, and insurance companies must verify, the existence of adequate water and facilities. The LAM tells an insured what must be done before diverting water from crops, and what an insurance company is required to do to verify the information gained from the insured. ARMtech must perform all of these steps before it can pay the insured for the loss.

ARMtech failed to show that the insured knew or should have known, prior to insurance attaching, whether it would have enough water to carry on a good irrigation practice on all of the acreage enrolled under an "irrigation" policy. Nor did ARMtech establish that the insured acted properly, using the factors set forth in the LAM, when it decided to divert the water from the irrigated crop to another crop. Finally, ARMtech failed to take any actions to verify the alleged water shortage.

The Supreme Court addressed the effect of a policyholder's noncompliance with his contractual obligations on a claim for indemnity in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). In that case, the Court concluded that the policy holder is bound by the regulations promulgated under the FCIA and the insured's failure to comply with those requirements required the denial of the policyholder's claim for indemnity. *Id.* at 385; *see also Ward v. Federal Crop Insurance Corp.*, 627 F. Supp. 1545, 1549 (E.D.N.C. 1986) ("The conditions precedent to payment of a claim pursuant to an insurance policy with FCIC parallel those required under any property insurance policy."). ARMtech's noncompliance with the requirements of the SRA mandates the same result.

ARMtech presents several arguments as to why it should prevail in this appeal. First, ARMtech alleges that "it has substantially complied with the rules, regulations, policies, and procedures of the FCIC in the administration of the subject federal crop insurance policy and that no action and/or omission on its part caused any financial loss or damage to the FCIC." Notwithstanding that assertion, ARMtech fails to provide evidence that it complied with any of the specific requirements for examining a claim for loss on an property insured as an "irrigated" property. As we noted previously, ARMtech did not verify that a water shortage existed, check to see whether any recommendations from local CES or NRCS supported the plan to divert the water, confirm in other ways that such diversion is appropriate, document the insured's action taken to divert the water, or inspect any acreage involved in the diversion and appraise any insured acreage that was not to be harvested. In the absence of evidence

that ARMtech performed any one of these steps, we do not find that ARMtech substantially complied with the rules, regulations, policies, and procedures of the FCIC in the administration of the federal crop insurance policy.

Second, ARMtech contends that the water diverted from the soybean crop was applied to a higher liability crop, and eliminated, or at least mitigated, any potential damage to the higher paying rice crop. In order to determine whether diverting the water met appropriate farming standards, ARMtech would have needed to obtain and analyze more evidence. One cannot evaluate, for example, whether the amount of irrigation water available to the insured could have been distributed in such a way as to salvage both crops. The LAM provides explicit instructions on how to determine whether it is appropriate to divert irrigation from one insured crop to another. ARMtech provides no evidence to establish that it complied with those instructions.

Third, ARMtech alleges that it should not be penalized because only the LAM, and not the SRA, required an insured to notify the insurance company prior to diverting water. ARMtech's contention is plainly wrong. ARMtech is bound to comply with the SRA, which, in turn, requires ARMtech to comply with the LAM:

[T]he SRA between FCIC and [the approved insurance company] provides . . . that the insurance company must be in compliance with the SRA, the laws and regulations of the United States, and all bulletins, handbooks, instructions, and procedures of FCIC. The LAM is an approved handbook of FCIC which provides procedures for handling adjustments for crop losses.

Ace Property & Casualty Insurance Co., CBCA 970-FCIC, 2009 WL 221104, at 11-12 (Jan. 23, 2009). In any event, the fact that the insured did not notify ARMtech prior to diverting the water does not change ARMtech's obligations under the LAM. While it may have been difficult for ARMtech to verify the appropriateness of the diversion at the time the insured decided to divert the water, the LAM required ARMtech to verify the basis for the loss claim before paying for the loss.

ARMtech proposed that, rather than being required to repay the overpaid indemnity amount, it be permitted to convert the insured's coverage post-claim to an insurance policy for a "non-irrigated" practice, which would reduce the amount of the overpaid indemnity. Not only does the LAM preclude such after-the-fact conversion of a policy (see part 2, section 6, paragraph 40(K)(9), and part 2, section 3, paragraph 29(A)(1)(c)), ARMtech's proposed remedy is inconsistent with sound reinsurance principles. ARMtech caused this overpayment by failing to follow a proper claims adjustment process.

In a case involving an insurance company seeking to keep monies received from the FCIC, despite the insurance company's failure to properly adjudicate the crop insurance claim, a court of appeals held as follows:

Old Republic [the insurance company] appears to be suggesting that regardless of the insurer's negligent or deficient claims adjustment process, it is entitled to keep whatever monies it receives from the FCIC. This argument is analogous to a taxpayer claiming that he is entitled to his tax refund, even though the Internal Revenue Service determines through an audit procedure that the taxpayer made mistakes in his return. The FCIC audited Old Republic's records and found errors. Requiring that Old Republic refund the monies paid on the basis of these errors, as the district court found, "will only serve to discourage such potentially wrongful or negligent adjustment practices by insurance companies participating in the federal program. This is a goal which the FCIC *should* pursue to efficiently administer its resources." [*Old Republic Insurance Co. v. Federal Crop Insurance Corp.*,] 746 F. Supp. [767] at 771 [(N.D. Ill. 1990)].

Old Republic Insurance Co. v. Federal Crop Insurance Corp., 947 F.2d 269, 275 (7th Cir. 1991). Applying the principle here, it is clear that requiring ARMtech to repay the overpaid indemnity will "discourage such potentially wrongful or negligent adjustment practices." *Id.* Under the FCIA, the FCIC has the power and duty to administer a crop insurance policy that is actuarially sound. *Ace American Insurance Co.*, CBCA 2876-FCIC, et al., 14-1 BCA ¶ 35,791, at 175,059. Permitting insurance companies to recharacterize the type of insurance policy after an insured has claimed a loss, amending the premium to be charged after the fact, and changing the amount to be paid for such a loss does not produce an actuarially sound program.

Decision

ARMtech's appeal is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

H. CHUCK KULLBERG
Board Judge

MARIAN E. SULLIVAN
Board Judge