



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: June 6, 2017

CBCA 5169-FCIC

In the Matter of NAU COUNTRY INSURANCE COMPANY (In re: Knecht Farms, Inc.)

Daniel N. Rosenstein of Levin & Rosenstein, P.C., Rockville, MD, counsel for Appellant.

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Before Board Judges **DANIELS** (Chairman), **GOODMAN**, and **LESTER**.

DANIELS, Board Judge.

NAU Country Insurance Company (NAU) issued a crop revenue coverage (CRC) insurance policy for 2010 to Knecht Farms, Inc. (Knecht), which operates a farm in Brown County, South Dakota. The Federal Crop Insurance Corporation (FCIC) had drafted this policy and authorized NAU to sell it. NAU made a payment to Knecht under the prevented planting provision of the policy, and the FCIC made a reinsurance payment to NAU. The Department of Agriculture's Risk Management Agency (RMA), which supervises the FCIC, later determined that a portion of the reinsurance payment should not have been made. It claims that it is entitled to a refund of that portion. We grant NAU's appeal of the RMA's determination and preclude the agency from recovering the moneys covered by that determination.

Findings of Fact

Background

Congress established the Federal Crop Insurance Act “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.” 7 U.S.C. §§ 1501, 1502(a) (2006). Under this Act, the FCIC is to “encourage the sale of Federal crop insurance through licensed private insurance agents and brokers,” *id.* § 1507(c), and “provide reinsurance to insurers approved by the Corporation that insure producers of any agricultural commodity under 1 or more plans acceptable to the Corporation,” *id.* § 1508(k)(1).

An “approved insurance provider,” or AIP, is “a private insurance provider that has been approved by the Corporation to provide insurance coverage to producers participating in the Federal crop insurance program.” *Id.* § 1502(b)(2). This insurance “is sold and serviced by an [AIP] pursuant to a uniform contract agreement with the FCIC, referred to as the Standard Reinsurance Agreement (SRA).” *American Agri-Business Insurance Co.*, CBCA 4708-FCIC, 16-1 BCA ¶ 36,303, at 177,029; *see* 7 CFR 400.164 (2010). NAU is an AIP. It entered into an SRA with the FCIC which covered the 2010 reinsurance year. Appeal File, Exhibit 2.¹

This SRA provides that “[i]n exchange for the reinsurance premiums provided by the Company pursuant to this Agreement, FCIC will provide the Company with reinsurance in accordance with the provisions of this Agreement.” Exhibit 2 at 20. However, whenever an AIP fails to “substantially comply with a provision of this Agreement or procedures” in a way that “materially affects the existence or amount of the . . . prevented planting payment . . . or premium for an eligible crop insurance contract,” the FCIC may require the AIP “[t]o pay to FCIC any overpaid indemnity, prevented planting payment, . . . or underpaid premium and any subsidy that exceeds the amount the Company or policyholder was entitled to receive.” *Id.* at 43.

¹ All exhibits cited are in the appeal file submitted by the RMA (for the FCIC), except as otherwise noted.

Prevented planting

This case involves the prevented planting provisions of the FCIC-drafted CRC insurance policy for the crop year 2010. *See* Exhibit 4. This policy defines the term “prevented planting” to mean –

Failure to plant the insured crop with proper equipment by the final planting date designated in the Special Provisions for the insured crop in the county. You may also be eligible for a prevented planting payment if you failed to plant the insured crop with the proper equipment within the late planting period. You must have been prevented from planting the insured crop due to an insured cause of loss that is general in the surrounding area and that prevents other producers from planting acreage with similar characteristics.

Id. at 95 (as prescribed in regulation at 7 CFR 457.8). The prevented planting section of the policy states that “prevented planting coverage will not be provided for any acreage . . . [t]hat exceeds the number of eligible acres physically available for planting.” *Id.* at 110-11.

Under the CRC insurance policy, an AIP “will use the procedures (handbooks, manuals, memoranda and bulletins), as issued by FCIC and published on the RMA website . . . in the administration of this policy.” Exhibit 4 at 92. One of those procedures is the Prevented Planting Loss Adjustment Standards Handbook (PPLASH) for 2008 and Succeeding Crop Years. Exhibit 6. The PPLASH provides that “[a]creage eligible for PP [prevented planting] must be” both insurable and available for planting. *Id.* at 173-74.

Available for planting means land is free of trees, rocky outcroppings, or other factors that would prevent proper and timely preparation of the seedbed for planting and harvest of the crop for the crop year. Acreage not considered available for planting includes, but is not limited to, the following:

[1-3 – not relevant to this case]; and

4 Acreage that in normal weather patterns is normally wet throughout the final and late planting period and that would only be available to plant in abnormally dry conditions. Because of the normally wet conditions from year to year on such acreage, this acreage is likely to have well established cattails, perennial weeds, and perennial grasses that increase the likelihood of the acreage being unavailable for planting even in the driest year. Unavailability of such land increases in this situation because of

the time, expense, and labor needed to remove the well-established cattails, weeds, and grasses in time to plant the insured crop.

Id. at 174.

The PPLASH also contains this guidance:

How to handle when the same cause of loss from previous PP insurance period, even with normal weather/inflow within current PP insurance period, continues to prevent planting.

When available information indicates that the effects of drought, excess moisture, or flooding occurring prior to the insurance period for the current crop year are such that normal weather/inflow within the insurance period would still not allow crop production (e.g., the land became part of a marsh or lake), the loss would be attributable to events occurring outside the insurance period for the current year and no PP payment could be made on such acreage.

Exhibit 6 at 163-64.

The RMA also prescribed the following, in Informational Memorandum IS-10-002.1, “Claims Advisory – Eligible Acreage for Prevented Planting” (May 10, 2010):

AIPs must independently determine eligible acreage, prevented planting eligibility and indemnities based on FCIC-issued policies, procedures, information provided by the policy holder, and other generally available supporting evidence such as weather records, annual FSA [Farm Service Agency] aerial photographs, etc. It remains the responsibility of the policyholder to demonstrate their prevented planting loss, and AIPs must be careful to make payments only when there is an insurable cause of loss that occurs during the prevented planting insurance period.

Exhibit 7 at 266.

The RMA amplified this last statement in Final Agency Determination FAD-119, dated July 15, 2010:²

[I]t is the policyholder's responsibility to prove the loss was due to an insured cause of loss. Approved loss adjustment procedures require the AIP to verify that an insured cause of loss prevented planting. Therefore, FCIC agrees the documentation provided by the policyholder and verified by the AIP used in the determination of eligible acreage must be maintained in the policyholder's file.

FCIC agrees it would be improper to interpret the term "acreage unavailable for planting" to allow for a determination that specific acreage is not available for planting based solely on the acreage qualifying for prevented planting payments for a set number of prior years. There may be legitimate circumstances where there is excess moisture at or before planting that would prevent planting for a number of years in a row. . . .

FCIC does not agree a review of the normal weather patterns needs to be made based on a thirty year average data for the particular area where prevented planting claims are made. . . . [O]ther information . . . could be used.

. . . [W]eather patterns are changing and what was available to plant in the past may not be available to plant today. AIPs must independently determine eligible acreage and prevented planting eligibility based on each policyholder's individual circumstances and FCIC issued crop insurance policies, procedures, information provided by the policyholder, and other generally available supporting evidence.

Exhibit 9 at 275.

² FAD-119 is not applicable to the situation before us, since it was issued after coverage for prevented planting on Knecht's 2010 policy was issued, Supplemental Appeal File, Exhibit 20 at 12, but we note its provisions because the RMA references them in support of its position.

Actions regarding the Knecht Farms policy

For the 2010 crop year, Knecht purchased from NAU a CRC insurance policy on its soybean, corn, dry beans, and wheat crops in Brown County. Knecht reported that it was prevented from planting on 2472.9 acres of its property by the final planting date for this crop year. Exhibit 12 at 282. A NAU loss adjuster submitted a prevented planting inspection special report on this matter. *Id.* at 440. NAU later “acknowledge[d] that the loss adjustment conducted by the adjuster was not totally completed pursuant to NAU Country’s normal and customary loss adjustment procedures for prevented planting claims.” Exhibit 13 at 445. Nevertheless, NAU made payment for 2403.6 acres under the policy Knecht had bought, and the FCIC provided reinsurance to NAU for that payment. Exhibit 12 at 282, 290.

By letter dated August 1, 2011, RMA’s Northern Regional Compliance Office (NRCO) notified NAU that it was “investigating the possible failure of the company to verify eligible PP acres.” Exhibit 11 at 279. The NRCO issued its initial finding on February 27, 2013. The Office concluded that of the 2403.6 acres for which NAU paid Knecht a prevented planting payment, 1257.2 acres were not eligible for coverage. As a consequence, the NRCO concluded, NAU was liable to the FCIC for an indemnity overpayment of \$308,464 and a premium overstatement of \$43,699. Exhibit 12 at 282, 290. The NRCO based its findings on a review of “aerial photographs, planting history, weather records, and a 2011 field visit.” It “den[ied] reinsurance for 2010 on the acres not planted in 2009” because “those acres became wet and unavailable for planting prior to the start of the 2010 insurance period” and “[t]he claim file did not contain sufficient information to establish that the acres were affected by a new cause of loss.” According to the finding, “[b]ased on the planting history, many of these acres are not available for planting even during periods of normal moisture inflow,” such as 2009. *Id.* at 285.

In response, on April 26, 2013, NAU denied that 2009 was a year of normal precipitation, and it maintained that the “cause of loss occurred during the 2010 insurance period.” Exhibit 13 at 446. NAU asserted that “RMA is not following their own FAD by making a determination based solely on the ‘other generally available evidence’ and not taking into account the individual policyholder[’]s circumstances, which are supported by the weather records.” *Id.*

Sixteen months later, on August 25, 2014, the NRCO issued a final finding, rejecting NAU’s position and essentially confirming its initial finding (with a correction in the amount of premium overstatement to \$48,018). Exhibit 14 at 457. The NRCO explained:

In your response, you concede that the loss adjustment was not completed pursuant to your customary procedures. Additionally, you do not address the

lack of adequate documentation in the original loss file and do not address the original adjuster's failure to determine eligibility of acreage. These key failings are central to our findings. You also do not provide any additional documentation in your response that establishes the eligibility of acreage that received a PP payment. In the absence of any new information, we maintain our original position.

Id. at 458.

As authorized by 7 CFR 400.169(b), on October 8, 2014, NAU asked the RMA's Deputy Administrator of Compliance to make a final administrative determination addressing the NRCO's disputed final finding. Exhibit 15.

The SRA says that –

FCIC shall generally issue a fully documented decision within 90 days of the receipt of a notice of dispute accompanied by all information necessary to render a decision. If a decision cannot be issued within 90 days, FCIC will notify the Company within the 90-day period of the reasons why such a decision cannot be issued and when it will be issued.

Exhibit 2 at 47.

On October 30, 2014, the Deputy Administrator told NAU that she “will make the decision as expeditiously as possible.” Exhibit 16. The Deputy Administrator did not issue her FAD until more than a year later – on November 19, 2015. Exhibit 1. The RMA admits that it did not explain why it could not have issued the decision earlier. Supplemental Appeal File (SAF), Exhibit 20 at 13. In the FAD, the Deputy Administrator affirmed the NRCO's findings and noted:

[T]he NRCO agrees that over 1,000 acres were eligible for prevented planting and paid correctly in 2010. The question is, whether the 1,257.2 acres that are the subject of these findings are eligible acres. NAU has not provided evidence that they are.

. . . Adequate documentation is a critical part of loss adjustment, and is a procedural requirement as cited in the PPLASH, Section 12, and reiterated in FAD-119.

... Due to NAU's failure to maintain and provide the required documentation, the eligibility of the acreage cannot be established by RMA, the correct indemnity cannot be determined for these acres, and therefore, reinsurance on these acres is denied.

Exhibit 1 at 7. The Deputy Administrator advised NAU that if it disagreed with her FAD, it could appeal to the Civilian Board of Contract Appeals. *Id.* at 8. NAU has done so.

Further analysis of the situation

With the case before the Board, NAU has included in the record a January 22, 2017, letter from Dr. John J. Mewes to the AIP's counsel. SAF, Exhibit 8. Dr. Mewes is a meteorologist who has "develop[ed] and operat[ed] . . . techniques for remote-estimation of field-level weather conditions, development and operation of soil models, mesoscale meteorological modeling, soil nutrient modeling, and crop growth and disease prediction." *Id.* at 28. He has also been "actively engaged in the management of [his] family's 8000 acre southeastern North Dakota farm," near Brown County, South Dakota. *Id.*

Dr. Mewes concludes that "a review of planting records from previous years does not reliably establish a continuous cause of loss, [or] that certain acres are 'not normally available for planting'." SAF, Exhibit 8 at 28-29. He explains:

It is entirely possible, and in my own experience is frequently the case, that acreage that is wet in the spring and first half of summer will dry out before the end of the growing season. The mere appearance of water in the same locations in different years does not mean it is the same water, or that it relates to the same cause of loss, or that it is indicative of a continuous cause of loss. [Due to normal evaporation and inflow of water into the ground,] there is clearly potential for land with several feet of water atop of it in one season to be completely dried out a year later, even with "normal" precipitation. Abnormally-high new inflows are thus *required* in order for abnormally-high water levels on farmland to be sustained from year to year.

Id. at 29.

Dr. Mewes continues: Data developed by the National Oceanic and Atmospheric Administration (NOAA) shows that "there is little evidence for any sort of long-term trend in precipitation amounts across northeastern South Dakota," where Brown County is located. SAF, Exhibit 8 at 30. "Specifically with respect to this case, the 2009 and 2010 planting seasons fell toward the tail end of an unusual streak of wetter-than-normal years in

northeastern South Dakota.” *Id.* “[E]very year from 2005 through 2011 brought above-normal precipitation to the area.” *Id.* at 31. But –

[p]recipitation in the five years since this most recent wet spell ended has generally been *below* the long-term averages, continuing the pattern of cyclic periods of both wetter- and drier-than-normal conditions that has been repeated many times throughout the area’s history. Assessments of whether or not any particular piece of farmland in the area is “normally available for planting”, based only on data from one of the wettest periods of time in the area’s recorded history, clearly could not be expected to be indicative of the true “normal” state of the landscape.

....

There is also ample evidence of a new cause of loss for the 2010 planting season relative to the 2009 planting season, as an intervening period of generally drier-than-normal weather occurred across the area during the spring and summer months of 2009 . . . Speaking from personal experience on my own farm in southeast North Dakota, we had a relatively high number of prevented planting acres in 2009 due to this same general situation. Notably, however, we were also able to recover nearly all of those same acres later in the summer and early fall of 2009, such that assuming our 2009 wetness carried over into 2010 as a continuous cause of loss would have been entirely inappropriate.

Id. at 31-33.

Dr. Mewes concludes:

Extremely wet autumns in 2008 and 2009 were of primary importance in leading to poor planting conditions in the springs of 2009 and 2010. These were the two wettest autumns in the 120-yr recorded weather history for northeastern South Dakota. Further, these two wet autumns were separated by many months of normal-to drier-than-normal weather conditions.

....

NRCO’s use of 2009 to establish eligible acreage is also puzzling given that 1/3 of the corn acreage in Brown County went unplanted due to poor field conditions in 2009. The 2010 prevented planting claims owe substantially to

a new cause of loss (primarily the very wet autumn of 2009), which was separated from the 2009 planting season by an intervening period of drier-than-normal weather during the spring and summer of 2009.

SAF, Exhibit 8 at 33-34.

Of the 2472.9 acres for which Knecht claimed payment under its insurance policies with NAU due to prevented planting, NAU paid for 430.4 acres in 2008, 1299.1 acres in 2009, and 2403.6 acres in 2010. SAF, Exhibit 3. Reinsurance payments by the FCIC under the policies for 2008 and 2009 are not at issue in this case.

Discussion

The Board resolves disputes between the RMA (on behalf of the FCIC) and AIPs at the request of the Secretary of Agriculture, pursuant to the law now codified at 41 U.S.C. § 7105(b)(4)(B) (2012); *see* Letter from Secretary to Board Chairman (July 27, 2006). We review the RMA's final determinations de novo. *American Agri-Business*, 16-1 BCA at 177,032 (citing *Rain & Hail Insurance Service, Inc.*, AGBCA 97-198-F, 99-1 BCA ¶ 30,142, at 149,115 (1998)).

The RMA's position is that because NAU "failed to fulfill its co[n]tractual obligations to establish that the acreage in question was available for planting, as well as the obligation to maintain evidence of such eligibility, . . . reinsurance was properly denied." Brief at 11. "[T]he evidence is clear that [NAU] did not gather, maintain, or provide the documentation required to show that the acreage in question was eligible because it could not show that prevented planting was due to a new cause of loss rather than an ongoing or existing cause of loss that occurred outside of the 2010 insurance period." *Id.* at 14. Further, says the RMA, the weight of the evidence, as contained in the NRCO findings, also demonstrates that the acreage was not available for planting. *Id.* at 15-16.

NAU's position can be summarized by reciting the headings in its brief: (1) "RMA's delays in issuing the final finding and FAD breached the terms of the SRA, prejudiced NAU and were unreasonable." Brief at 9. (2) "The final finding and FAD are based on vague standards and subjective interpretations of policies and procedures." *Id.* at 15. (3) "The factual conclusions drawn from NRCO's inspection of Knecht's acreage are irrel[e]vant and mere conjecture." *Id.* at 23. (4) OIG [Department of Agriculture Office of Inspector General] audit corroborates NAU's argument that the policies and procedures governing prevented planting were vague, ambig[u]ous and inadequate." *Id.* at 29. (5) "DAC's [Deputy Administrator of Compliance's] evaluation of the evidence was inadequate and was

not based on either an objective evidentiary standard or expertise.” *Id.* at 34. (6) “The FAD seeks damages not authorized by the SRA.” *Id.* at 36.

As occurs often in litigated cases, neither party acted flawlessly here. We agree with the RMA – and with NAU’s own acknowledgment – that NAU’s loss adjuster did not follow proper procedures by documenting fully why payment for Knecht’s prevented planting was appropriate. And we agree additionally with the RMA that in response to various levels of RMA review, NAU did not present the best possible evidence in support of its position.

Notwithstanding the AIP’s failings, however, we conclude that the RMA’s determination to recover reinsurance and premium moneys from NAU is not soundly based. For the agency’s prevented planting claim to succeed, the 2008 PPLASH says that the land for which reinsurance was improper must have been “[a]creage that in normal weather patterns is normally wet throughout the final and late planting period and that would only be available to plant in abnormally dry conditions.” Exhibit 6 at 174. This standard is, as a 2013 OIG report urged, “not practical to implement and administer,” and “unworkable because it is too subjective for loss adjusters to apply in a uniform manner.” SAF, Exhibit 15 (OIG Audit Report 0560-0001-31, “RMA: Controls Over Prevented Planting” (Sept. 2013)) at 12.

The RMA admits that the 2008 PPLASH did not define “normal” or “abnormally dry,” did not establish a methodology for defining “normal,” and did not specify how loss adjusters were to identify the qualifying period for purposes of determining the “normal weather pattern.” SAF, Exhibit 20 at 11-12. The RMA’s Deputy Administrator of Compliance, who made the agency’s final determination which we review here, testified in deposition that “there has never been an attempt . . . that I’m aware of, to actually put anything in writing to define normal.” *Id.*, Exhibit 19 at 71. Further, she said, as to what is normal or abnormal, “[t]here’s always a possibility two people can look at something differently.” *Id.* at 75. The North Dakota Agricultural Weather Network (NDAWN), whose data the RMA references, says, “The use of the term ‘Normal’ in climatology and meteorology is often confusing.” Exhibit 12 at 299. NDAWN continues, “[U]se of the term Normal often implies that the varying weather conditions, or departures (deviations) from ‘Normal’ are somehow abnormal. This is not true.” *Id.*

In briefing this case, the RMA suggests that we use a dictionary definition of the term “normal.” Reply Brief at 6. What that definition should be is not clear, however. *Webster’s Third New International Dictionary* (1986) contains nineteen different definitions of the term. Those that might be applicable to the situation before us are number 2, “according to, constituting, or not deviating from an established norm, rule, or principle: conformed to a type, standard, or regular pattern: not abnormal”; number 6a, “approximating the statistical

norm or average . . . < ~ rainfall of the region>”; and number 7, “average over many years at a particular place and for a definite time, a certain day, or some other specified period – used of a meteorological element.” *Id.* at 1540. Or we could use a definition that seems to be agreed upon by three organizations whose weather information is included in the NRCO initial findings (NDAWN, NOAA, and PRISM Climate Group) – normal precipitation is the average over the preceding thirty years – *see* Exhibit 12 at 292, 299, 300 – although the RMA in FAD-119 says that it “does not agree a review of the normal weather patterns needs to be made based on” such an average.

Whatever definition the RMA used (if any) in making its determination is not clear. But the application of the definition is certainly wrong: the NRCO’s statement that 2009 was a “period of normal moisture inflow,” slightly restated in the RMA’s brief, at 15, is effectively demolished by the presentation of Dr. John J. Mewes. We find that presentation – by an individual who is experienced in both meteorology and farming – to be particularly persuasive. Dr. Mewes, pointing to NOAA data, explains that the 2009 and 2010 planting seasons “fell toward the tail end of an *unusual* streak of wetter-than-normal years in northeastern South Dakota,” and that the autumn of 2009 was “*extremely* wet” – one of the “two wettest autumns in the 120-yr recorded weather history for northeastern South Dakota.” SAF, Exhibit 8 at 30 (emphasis added). Dr. Mewes opines convincingly that because the summer of 2009 was drier than normal, the extremely wet autumn of that year was a new cause of loss for the 2010 crop, independent of the cause of loss for the 2009 crop.

The NRCO investigator who drafted his office’s initial findings relied not only on the unfounded view that 2009 was a period of normal precipitation, but also on Farm Service Agency aerial photographs and an August 2011 site visit in which he observed cattails growing on parts of Knecht’s property. Exhibit 12; SAF, Exhibit 16 at 37-41. The aerial photographs, of Knecht property in 2004, 2006, 2008, and 2010, are said to “show areas of fields that are consistently unplanted.” Exhibit 12 at 285. The data regarding prevented planting payments shows, however, that in at least one of those years (2008), only a small portion of the property (about a third of what the RMA believes to be the prevented planted acreage in 2010) was not plantable. The presence of cattails (indicating an unplanted area) in August 2011 does not indicate that cattails were present in the spring planting season of 2010, however, and the investigator does not know how quickly cattails grow. SAF, Exhibit 16 at 45-46. According to a Fish and Wildlife Service monograph, “Cattails are prolific and can quickly dominate a wetland plant community.” Exhibit 13 at 449. The documentation contained in the NRCO findings is unconvincing.

The RMA did not have the benefit of Dr. Mewes’ presentation when it made its final determination. This does not mean that we should ignore it now, however. In government contract cases, when an agency’s termination of a contract is disputed through the

contractor's appeal to us of that government claim, the parties are free to give us, and we are free to evaluate, arguments and evidence which were not before the contracting officer when the decision to terminate was made. *Empire Energy Management Systems, Inc. v. Roche*, 362 F.3d 1343, 1357 (Fed. Cir. 2004); *Pots Unlimited, Ltd. v. United States*, 600 F.2d 790, 793 (Ct. Cl. 1979); *JR Services, LLC v. Department of Veterans Affairs*, CBCA 4826, 16-1 BCA ¶ 36,238, at 176,808. We believe that a similar principle should apply here: We should make our analysis on the basis of all relevant information, regardless of when it was created, so that our decision can be based on the best data available. NAU would have been better advised to have submitted a presentation like Dr. Mewes' when it contested the NRCO's findings and when it asked for a FAD, but the fact that the presentation was not made until later does not disqualify it from consideration.

The Supreme Court has held that when an agency's interpretation of ambiguous regulations would –

impose potentially massive liability on [an entity] for conduct that occurred well before that interpretation was announced[,] [t]o defer to the agency's interpretation . . . would seriously undermine the principle that agencies should provide regulated parties "fair warning of the conduct [a regulation] prohibits or requires."

Christopher v. SmithKline Beecham Corp., 567 U.S. 142, _____, 132 S. Ct. 2156, 2167 (2012) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Commission*, 790 F.2d 154, 156 (D.C. Cir. 1986) (opinion by Scalia, J.)). Although the FCIC insurance policies like the one at issue here are not regulations *per se*, the rule established by the Court is applicable to our situation, as well. Deferring to the RMA's interpretation of the vague prevented planting provision of the CRC policy would not be warranted.³

³ The RMA may have appreciated this conclusion even before the case came to the Board. For 2014 and succeeding crop years, the agency issued Special Provisions of Insurance for Brown County which established standards for prevented planting payments that do not include the terms "normal" or "abnormal." The newer provisions state, more objectively:

In order for acreage to be "physically available for planting" . . . , the acreage must:

. . . .

(continued...)

We conclude that because the RMA's FAD was based on an ambiguous, unworkable standard which is not practical to implement and administer, and the factual support for the agency's position under that standard is suspect, that position cannot prevail.

Having disposed of the case in this way, we have no need to address NAU's first and sixth arguments.

Decision

We **GRANT** NAU Country Insurance Company's appeal of the final administrative determination by the Risk Management Agency's Deputy Administrator of Compliance. The agency may not collect the moneys it claims for an indemnity overpayment and a premium overstatement with regard to Knecht Farms, Inc.'s 2010 crop revenue coverage insurance policy.

STEPHEN M. DANIELS
Board Judge

³ (...continued)

5. In at least one of the four most recent crop years immediately preceding the current insured crop year, have been planted to a crop:
- a. Using recognized good farming practices;
 - b. Insured under the authority of the Federal Crop Insurance Act (Act); and
 - c. That was harvested, or, if not harvested, was adjusted for claim purposes under the authority of the Act due to an insured cause of loss (other than a cause of loss related to flood or excess moisture).

Once any acreage does not satisfy the criteria set-forth within 5 (a)[,] (b) and (c) in one of the four most recent crop years immediately preceding the insured crop year, such acreage will be considered physically unavailable for planting until the acreage has been planted to a crop in accordance with (a)[,] (b) and (c) above for two consecutive crop years.

We concur:

ALLAN H. GOODMAN
Board Judge

HAROLD D. LESTER, Jr.
Board Judge