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FSA "stonewalling" of NAD appeal decision condemned

In a sweeping victory for lenders with FmHA/FSA loan guarantees—as well as agricultural producers who are successful in appeals to the USDA National Appeals Division—United States District Court Judge Sam R. Cummings of the Northern District of Texas has declared unlawful FSA's long-standing practice of failing and refusing to properly and timely implement NAD appeal decisions. In a written opinion and judgment entered April 3, 1998 in *First National Bank v. Glickman* (Civil No. 5-97-CV-133-C), Judge Cummings held that FSA "violated (the agency's) governing statutes and regulations" by refusing to implement the NAD appeal determination, or to timely process the Bank's loan guarantee application following the NAD determination. Rather, said the judge, the FSA "stonewalled" the NAD determination altogether, conduct he declared to be "arbitrary, capricious and not in accordance with the law" (under the Administrative Procedures Act, 5 USC §706). The Plaintiff, First National Bank of Haskell, Texas, submitted a loan guarantee application to FmHA/FSA in September, 1995, seeking a guarantee of a $400,000 loan to a Texas cattle rancher. The rancher's farm plan submitted with the application demonstrated a positive cash flow that included income from the sale of some wheat. Although this rancher had previously grazed his wheat production, cattle prices were down and wheat prices were up in 1995, leading the rancher and the bank to conclude that it made better business sense that year to sell the wheat. Without inclusion of the wheat income, the plan would not have been feasible.

FSA/FmHA issued an "adverse action" decision October 20, 1995, denying the bank's guarantee application. The decision contained several grounds, including a determination that none of the projected wheat income could be included in the rancher's farm plan since he had historically grazed the wheat and that, without that income, the rancher could not demonstrate repayment ability.

The bank appealed this decision to the USDA National Appeals Division (NAD) pursuant to 7 USC §6991 *et seq.* At an appeal hearing held April 2, 1996, the agency withdrew on the record all of the grounds stated for its denial of the bank's loan guarantee application except the determination that income could not be counted from the sale of any wheat. On May 3, 1996 the NAD hearing officer issued an Appeal

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Government prevails in bankruptcy setoff case

The Bankruptcy Appellate Panel for the Tenth Circuit recently reversed the bankruptcy court decision in *In re Buckner*, 211 B.R. 46 (D. Kan. 1997), a case that had limited the government's right to setoff Conservation Reserve Program (CRP) payments in bankruptcy. The appellate panel held that the bankruptcy court "abused its discretion in failing to follow the law of the case"and that "the decision denying the government's right to setoff was incorrect." *In re Buckner*, Nos. 90-42105, 93-40549, Adv. No. 93-7189, 1998 WL 97233 (B.A.P. 10th Cir. Mar. 5, 1998). In so doing, it affirmed the dramatic holding that all CRP payments earned throughout the duration of the ten-year contract are considered as prepetition obligations so long as the original contract is signed prior to bankruptcy filing. Moreover, it implied that a confirmation order establishing the amount of a secured creditor's claim might not be determinative with regard to a creditor's future setoff rights. This decision, and the tortured procedural history of the case, highlights the difficulty encountered in litigating controversial issues, particularly against the government, while the business of running the farm must continue.

The Buckner decision is the result of consolidated appeals brought by the

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IN FUTURE ISSUES

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Determination reversing the agency's denial of the bank's application. The hearing officer noted FSA's withdrawal of all grounds for denial other than the wheat income, and concluded that the bank met its burden of proving that the wheat income should have been considered by the agency and that the rancher's plan was thus feasible. The hearing officer remanded the appeal back to the agency "to implement this determination."

On May 8, 1996, the FSA state office requested that the national office seek review of the hearing officer's decision by the Director of the NAD. The national office declined to do so, but instructed the state office to "update" all financial information, and to create a "revised" financial plan based upon "current marketing plans." On June 21, 1996, the agency wrote to the bank demanding this information, insisted that then current prices and appraisals be used in its "implementation" of the appeal decision, and preemptively asserted a ground for denial of the guarantee that had been raised, but withdrawn by the agency in the previous appeal.

The bank objected to the agency demanding new, revised, and updated financial information and wrote to the agency on several occasions asking that the hearing officer's appeal decision be implemented on the basis of the original 1995 application. In doing so, the bank relied upon statutory and regulatory provisions requiring FmHA/FSA to timely implement NAD's appeal decision on the effective date of the application, or the date of adverse action appealed from. The agency refused to implement the decision and, through the end of 1996, "stonewalled" the bank by continuing to demand new and updated information and refusing to process the original application.

The bank filed its action in federal court April 10, 1997. In the complaint, the bank claimed that, for nearly a decade, the FmHA/FSA had routinely ignored and refused to implement NAD/NAS appeal decisions with which it disagreed. The agency had done so, the bank alleged, through a "revolving door" procedure of demanding "new," "revised," or "current" information upon which it would then issue a new denial of the application, or by "stonewalling" the decision altogether by never acting on it. The bank asserted that this conduct violated 7 USC §6998 and 7 CFR §11.12(b), which provide identically that "a final determination issued by the Director shall be effective as of the date of filing an application, the date of the transaction or event in question, or the date of the original decision, whichever is applicable." The bank also relied upon 7 CFR §1900.59(l)(1994), a regulation that applied to the bank's appeal under 7 USC §6995 and which required the agency to "implement" the NAD appeal decision by taking "the next step in a loan processing...required by FmHA regulations that would occur had no adverse decision been made and appeal filed." The bank asked the Court to issue a judgment declaring that the agency's refusal to implement the NAD decision was unlawful and that the agency was required to issue the guarantee.

The court did just that in its sweeping decision. First, the court held that the agency decision "must be upheld, if at all, on the basis articulated by the agency itself," citing *Institute for Tech-Dev. v. Brown*, 63 F3d 445, 449 (5th Cir. 1995) and *Motor Vehicles Mfrs. Ass'n. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 2870, 77 L.Ed.2d 443 (1983). The court declared that this determination must be based upon the agency record that was before the decision-maker at the time of decision, *Milena Ship Management Co. v. Newcomb*, 995 F2d 620, 624 (5th Cir. 1993) and that, because it was reviewing an agency decision where the court concluded that facts were not at issue, the Court "owes no deference to the agency's determination." *Institute for Tech. Dev.*, 63 F3d at 450; *Pennzoil Co. v. Federal Energy Regulatory Comm'n.*, 789 F2d 1128, 1135 (5th Cir. 1986).

The court further held that the agency's effort to supplement the record in this case would be denied for two reasons. First, the court concluded that the government had failed to comply with Fed. R. Civ. P. 56 and the local rules of the court when it asserted unsupported factual allegations in response to the bank's summary judgment motion. Second, the court concluded that, even if the government had procedurally complied with these rules, the government's evidence submitted in opposition to the bank's motion for summary judgment was inadmissable as a matter of law under the Administrative Procedures Act because "courts may not accept counsel's post hoc rationalization of agency actions," citing *Doty v. United States,* 53 F.3d 1244, 1250 (Fed Cir. 1995).

The court next held that, on the basis of uncontroverted facts established by the bank, the agency violated the appeal statutes and regulations cited above when it failed to implement the NAD decision. The court squarely held that those provisions required the agency to implement the decision "on the basis of the facts existing at the time the application was made or the original adverse decision was issued." Those facts, concluded the court, demonstrated feasibility of the rancher's operation. "The agency clearly did not implement the NAD decision within its own governing statutes and regulations" said the court; "what the agency did was essentially 'stonewall' the appeal determination. These actions are arbitrary, capricious and not in accordance with the law."

Finally, the court held that

> This case will be resolved upon the merits, and will not be remanded for further administrative proceedings, as this case is purely a question of law. Where the record of a case leads to only one conclusion, as it does here, the district court need not remand to the agency for redetermination, but may declare the plaintiff's entitlement under the particular USDA program. *Justice v. Lyng*, 716 F.Supp 1570 (D. Arizona 1989).

To effect this determination, the court issued a judgment reversing the findings of the Secretary, stating that "plaintiff is entitled to the loan guaranty in question and " (the Court) ORDERS the Secretary to issue said guaranty."

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"*Stonewalling*"/*Cont. from p. 2*

The decision in *First National Bank v. Glickman* is the first clear federal court recognition and correction of a decade-long systemic FSA policy of refusing to implement NAD appeal decisions in which producers and guaranteed lenders have succeeded. The decision should serve as a warning to agency officials that this policy must come to an end.

—James T. Massey, P.O. Box 1689, Sisters, OR

Editor's note: First National Bank is represented by James T. Massey.

Setoff/*Cont. from p. 2*

government in the Buckner and the Tuttle farm bankruptcy cases. Both cases involved CRP contracts that were signed prior to the bankruptcy and CRP payments made after the bankruptcy filing. In both cases, the debtors were in default on farm loan obligations to the former Farmers Home Administration (FmHA). The Buckner case was a Chapter 13 bankruptcy filed in 1990. The issue of the government's setoff right initially arose in early 1991 as a motion for relief from stay brought by the government. The government sought permission to setoff CRP payments due to the debtor against the FmHA debt. *Buckner,* 211 B.R. at 50. The bankruptcy court held that the government could only setoff those payments that were due as of the filing of the bankruptcy; subsequent payments were postpetition payments that could not be setoff against prepetition debt. *Id.* (relying upon 11 U.S.C. § 553(a)). The government appealed to the federal district court.

While the appeal was pending, Mr. Buckner and the government entered into an agreement regarding a plan of reorganization. This plan set the FmHA's secured claim at the value of their collateral, Mr. Buckner's home. Although the plan provided that Mr. Buckner's CRP payments would be applied each year to his FmHA debt, the plan did not reflect an increase FmHA's secured claim due to its claimed right of setoff. Although the court stated that FmHA agreed to the plan, the government requested a continuance of the confirmation hearing, arguing that the district court should be allowed to resolve the government's setoff rights. The court rejected the request for a continuance and confirmed the debtor's plan. However, the court instructed the government that it could appeal the confirmation and seek consolidation of the case with the pending district court setoff appeal. The government elected not to appeal the confirmation. Apparently, the district court was not notified of the confirmation of the debtor's plan. The appeal remained pending before that court. *Id.*

The companion case, *In re Tuttle*, was filed in 1993. The debtors brought an adversary proceeding seeking turnover of CRP funds previously setoff by the government and also sought an injunction prohibiting future setoff. With regard to the postpetition payments, the government's right to setoff depended on the same issue on appeal to the district court in *Buckner*. Therefore, in January 1994, the bankruptcy court stayed the Tuttle proceedings on the setoff issue pending the result of the Buckner appeal. Buckner, 211 B.R. at 51; *Buckner*, 1998 WL 97233 at *2. Pending the results of the appeal, the court ruled that the Tuttles could use the CRP payments provided that they give FmHA a second mortgage as adequate protection. *Id.*

The district court did not issue its decision on the government's right to setoff until almost three years after the Buckner plan was confirmed, near the end of Mr. Buckner's plan period. *In re Buckner*, 165 B.R. 942 (D. Kan. 1994). That decision reversed the bankruptcy court, held that the government was entitled to setoff payments coming due postpetition, and remanded the case for consideration of the government's request for relief from the automatic stay. The debtors appealed to the Tenth Circuit, but the appeal was dismissed as interlocutory because of the remand order. Meanwhile, Mr. Buckner completed making his plan payments. The government brought an action to seek the final CRP payment, due after the debtor's plan was completed.

The bankruptcy court held a hearing at which it took testimony regarding the CRP and again ruled that only those payments due as of the bankruptcy filing could be setoff, despite the previous district court reversal on this issue. The court held that the government had no right to setoff against either Mr. Buckner or the Tuttles. The court held that the law of the case doctrine was inapplicable on several grounds. First, while the appeal was pending before the district court, the government failed to appeal the confirmation of the plan that treated FmHA as a secured claimholder only to the extent of the value of the debtor's home. The court noted that absent an appeal, an order of confirmation "has all of the preclusive effects of a final judgment from a federal court." *Buckner*, 211 B.R. at 55. When the plan was confirmed, it negated the government's setoff claim and mooted the appeal on that issue. Second, the court found that there was evidence that was not part of the record on appeal that had been presented to the court. This evidence "clearly showed that except for the 1990 payment, no CRP money was available to be set off" at the commencement of the case. *Id.*

Freed from applying the district court opinion, the bankruptcy court launched into its own detailed analysis of the CRP contract between the government and the debtors. Under § 553, setoff rights are limited to situations where both the debt and the claim existed prepetition. The critical issue to the bankruptcy court was whether the debtor's "claim" to the CRP payment. existed prepetition. *Id.* at 52 (citing 11 U.S.C. § 553).

With this test in mind, the court analyzed the rights and obligations of the parties throughout the term of the CRP contract. Relying upon both the contract itself and the regulations governing the program, the court found that the annual payments made to the debtors were not due until the government's fiscal year ended, the debtors were found to have complied with their obligations under the contract, and until Congress appropriated funds. Accordingly, the court concluded that the only the payments that were actually due to the debtors were those for the year before the bankruptcy filing. Only this payment could be considered a prepetition obligation subject to setoff. *Buckner*, 211 B.R. at 52, 56.

The government appealed the bankruptcy decision to the bankruptcy appellate panel, arguing that the bankruptcy court was not free to revisit the setoff issue in the Buckner's case because it was bound under the law of the case doctrine to apply the previous district court order allowing setoff. The appellate panel agreed and held that the failure of the bankruptcy court to apply the ruling of the district court to the Buckner case was an abuse of discretion. *Buckner*, 1998 WL at *3-*7. The court further held on the merits of the *Tuttle* case that the judgment of the bankruptcy court denying setoff rights to the government was in error. *Id.* at *7- *12.

The appellate panel initially referred to the law of the case doctrine as a "discretionary rule of practice in the courts." Id. at *3. Citing United States Supreme Court authority as well as Tenth Circuit law, however, the panel noted that "[u]nder the law of the case doctrine, when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." *Id.* at *4. Applying this to appellate decisions such as the district court order in *Buckner,* the panel stated that there were only three exceptions to the application of the law of the case doctrine. The court would not have to apply the decision if "the evidence on a subsequent trial was substantially different, controlling authority has since

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FSA Emergency Loans and FSA Disaster Set-Aside

By Stephen Carpenter

This article summarizes briefly two FSA programs that can be important for farmers in a disaster year. The Emergency Loan program provides loans to farmers affected by a natural disaster. The Disaster Set-Aside program allows current FSA borrowers to set aside an annual FSA installment and move it to the end of the loan. A more detailed description of these programs, as well as other programs, can be found in Farmers' Legal Action Group's publication, Farmers' Guide to Disaster Assistance (2nd edition).

Emergency loans

The Farm Service Agency (FSA)—formerly the Farmers Home Administration (FmHA)—provides emergency relief for farmer disaster victims in the form of loans, called EM loans. EM loans are intended to allow farmers to continue farming despite the disaster.[1]

Deadlines

Applications for all EM loans are accepted for eight months from the date the disaster was officially declared or designated. This declaration or designation may vary from county to county.[2]

Basic EM eligibility

To be eligible for an EM loan the farmer must: (1) be unable to get credit elsewhere;[3] (2) be an established family farmer who intends to continue farming;[4] (2) operate in a disaster area;[5] (3) not have received debt forgiveness from FSA;[6] (4) not be delinquent on any direct or guaranteed FSA loan;[7] (5) be creditworthy;[8] and (6) have suffered a qualifying loss.[9] There are two different ways to show such a loss: physical losses and production losses. Farmers can qualify on the basis of either or both.

Physical Losses

Farmers may be eligible for an EM physical loss loan to replace or repair any essential property. There is no minimum amount of loss required for eligibility.

Defining physical losses

FSA regulations limit the availability of a physical loss EM loan. Physical losses are damage to or destruction of physical property. Some types of physical property that can count as the basis for a physical loss include:[10] (1) damage or destruction to farmland;[11] (2) damage to the farmer's home and other structures on the land, such as buildings, fences, dams, and so forth; (3) damage to machinery, equipment, tools, and supplies on hand; and (4) damage or destruction of livestock and livestock production, either on hand or stored. The property that was damaged or destroyed must be essential to the successful operation of the farm.[12] Property must have been damaged or destroyed by the disaster or as a result of the disaster.[13]

Measuring physical losses

FSA measures the extent of the physical losses caused by the disaster. In general, FSA uses the market value of the damaged, destroyed or lost property—measured at the time of the disaster—as a basis to determine the farmer's loss.[14] This is the method used for machinery, equipment, and supplies on hand.

Special rules apply for measuring the farmer's losses on livestock. When the death of an animal is caused by the disaster, the physical loss is measured as the market value of the animal at the time of the disaster.[15] When animals are sold because of the disaster, the regulations are more complicated. In general, disaster-related damage to the animal's health which impairs or reduces the animal's normal production capacity and its market value qualifies as a physical loss.[16] This includes forced reductions of foundation breeding stock caused by the disaster. If farmers decide to sell feeder livestock early because of a feed shortage, the loss on the sale probably does not qualify as a physical loss. Valuation is complex when the animal survived the disaster but the disaster affected the animal's health and impaired its production capacity and market value. The physical loss is the difference between the dollar value per head, or unit, at the time of the disaster, and the dollar value received from a disaster-caused sale of the animal. In order to count as a physical loss, the livestock that was sold because of the disaster must be over and above the number culled in a normal year.

Farmers can claim as a physical loss the amount of money needed to repair or replace farm buildings and farm real estate.[17] Most crop losses will be figured as production losses. Under some circumstances, however, the loss of growing crops or pasture may be counted as physical losses.[18] If the disaster prevented a farmer from planting, the farmer's expenses may be considered as a physical loss.[19]

Hazard insurance requirement

In general, EM loan funds cannot be used for physical loss purposes unless that physical property lost was covered by general hazard insurance at the time the damage caused by the natural disaster occurred.[20]

Insurance and other disaster assistance

In general the maximum physical loss loan is the amount of actual physical loss minus any financial assistance received, and minus all compensation for disaster losses from any source.[21] Insurance compensation for losses to nonessential property is counted as compensation for essential property and therefore reduces EM loan eligibility.[22]

Physical losses to dwellings and household property

EM loan assistance is available to replace or repair dwellings and household contents.[23] These losses count as physical losses. The damaged or destroyed household property must be essential to the maintenance of the household.[24] Examples of household items considered essential to maintaining viable living quarters include a stove, refrigerator, furnace, couch, chairs, tables, beds, and lamps. The loss is the amount needed to repair or replace the dwelling or household contents with items of a similar size and quality.[25]

Maximum loan amount

The maximum EM loan a farmer can receive for repair or replacement of personal household items is $20,000.[26]

Flood and mudslide prone area restrictions

FSA regulations restrict the use of funds on farms in flood or mudlside prone areas.[27] FSA EM loan regulations say that if EM loan funds are to be used to construct or improve buildings, certain flood and mudslide restrictions apply.[28]

Production losses

Qualifying for a production loss loan

To qualify for a production loss EM loan, farmers must meet two requirements. First, to qualify as a production loss, the reduction in a farmer's output must be directly caused by the disaster.[29] Second, the disaster must have reduced crop or animal production by at least 30 percent in a single enterprise which is a basic part of the farming operation.[30] An

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enterprise is any single crop or livestock enterprise.[31] An enterprise is a basic part of the farming operation if it generates enough income to be essential to the success of the total farming operation.

Maximum amount

The maximum amount of an EM loan for production losses is 80 percent of the farmer's total actual production loss.[32]

Calculating production loss eligibility

In general there are four steps to calculating production loss eligibility.

Step one: figure normal production for each enterprise. The first step is to figure the farmer's normal yield for each enterprise. In general, the normal year's production is calculated by eliminating the poorest year of the five-year production history immediately preceding the disaster year and averaging the remaining four remaining years of production.[33]

Step two: measure actual losses for each enterprise. The second step for calculating production losses is to measure the actual losses for each farm enterprise. Actual loss figures serve two important purposes. First, they are used to establish that the farmer has at least a thirty percent loss in a single enterprise. This establishes that the farmer is eligible for the EM production loss loan program. Second, they determine the total amount of actual production losses for all enterprises. This becomes part of the formula that determines the maximum amount of the EM loan.[34] When calculating the actual production loss for a single enterprise, costs not incurred are subtracted from the gross dollar amount of production losses for the enterprise.[35] Other financial assistance does not affect the gross dollar amount of production loss for an enterprise.[36] It does affect the farmer's total loan eligibility.

Step three: determine if the farmer suffered a thirty percent loss.To qualify for an EM loan, the percentage production loss for any single enterprise which is a basic part of the farming operation must be at least thirty percent.[37] The total percentage loss is the dollar value of the actual production loss (calculated in Step Two) for the single enterprise divided by the normal dollar value of normal yield (calculated in Step One) for that enterprise.

This calculation establishes the percentage reduction in production from normal for that enterprise. In order to be eligible for a production loss loan, the farmer must have at least a 30 percent loss for a single enterprise which is a basic part of the farming operation.

Step four: measure total production losses. Once the farmer has established production loss eligibility, all production losses from every enterprise—even those which are not a basic part of the operation and that do not suffer a thirty percent loss—are counted toward the total production loss.[38] Once a farmer qualifies for an EM loan, FSA calculates total production losses. These losses include all production losses due to the disaster.

Total production losses are reduced by disaster assistance provided for the farming enterprises which contributed to the total production losses. This assistance includes all financial assistance already received or to be received. It also includes disaster relief programs and all compensation for disaster losses provided by a source for those enterprises.

Feed crop losses, including pasture losses, may be claimed as a production loss.[39] The FSA regulations specifically say that losses may be claimed on crops that were to be fed to the farmer's own livestock. These losses can be important because FSA regulations make it somewhat difficult to claim a production loss because of failed feed crops.

In general, FSA regulations make it difficult to claim production losses in livestock that are due to feed crop and hay losses. FSA rules instead encourage farmers to claim feed crop and hay losses for EM purposes. In some cases, however, livestock producers will be able to qualify for an EM production loss solely on livestock losses.[40]

The calculation of production losses to livestock may be based either on loss of production in feed crops to be fed to the farmer's own livestock or on losses from normal weight gain of the livestock or livestock production—but not both.[41]

According to FSA, normally production losses on livestock enterprises will be based on feed crop and pasture losses.[42] Several restrictions in the regulations make it difficult to claim production losses on livestock. If a farmer sells feeder livestock earlier than usual because the feed crop was lost due to the disaster, according to FSA regulations, this is a management decision. The difference between what the sale weight would have been if the livestock had been fed for the normal period and the disaster year's lighter premature sale weight may not be claimed as a loss.[43]

FSA regulations say that reductions in the production of feeder livestock and livestock products, or reductions in weight gain of these animals due to homegrown feed crop or pasture losses, are not production losses if replacement feed is available to purchase. This is true no matter how expensive the feed would have been to buy.[44]

If the disaster severely disrupts the usual feeding schedule of livestock because of extended utility failure or inaccessibility of the livestock, the loss in livestock production may qualify as an EM production loss. If this occurs, losses in production of milk or eggs, weight losses, and so forth, may be considered production losses.

FSA regulations acknowledge that in the case of foundation herds of breeding animals, the value of feed produced on native rangeland and pasture accounts for a small portion of the total input costs of maintaining a foundation herd of breeding animals and their offspring. In these cases, therefore, normally production losses will be based on reductions in the natural increase in numbers and animal unit weight of the offspring.[45]

Maximum EM Loan Eligibility

Several different types of maximum loan limitations affect EM loans. A farmer cannot borrow more than the calculations for production loss loans and physical loss loans created.[46] In addition, no borrower may have more than $500,000 total outstanding EM debt.[47] The maximum EM loan for replacing household contents is $20,000.[48]

EM Loan interest rates, terms, and security

Must either obtain crop insurance or waive emergency crop loss assistance

The 1996 FAIR Act requires that farmers getting an EM loan must comply with USDA linkage requirements.[49] This means that the farmer must either: (1) obtain Catastrophic crop insurance (CAT), if it is available, for each crop of economic significance; or (2) waive future eligibility for emergency crop loss assistance in connection with uninsured crops.[50]

Farmers must pledge property as security

Each EM loan must be secured by farm assets. In general, FSA requires that security for the loan be at least equal to the value of the loan. When practical, FSA will not take more than 150 percent of the value of the loan as collateral.

Interest rates

For all EM loans the interest rate is 3.75 percent.[51] This rate is subject to change.

Submitting a feasible plan

In order to apply for an EM loan, farmers must develop a Farm and Home Plan. It lists debts, assets, planned and actual production and sales, any major changes that are planned in the farming operation, specialized farming practices, and a complete cash flow analysis of farm and family finances.[52] FSA must believe that

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FSA EMERGENCY LOANS/*Cont. from page 2*

this plan is feasible.

Appeals

Adverse decisions in the EM loan program may be appealed by the farmer.[53]

FSA Disaster Set-Aside Program

The Farm Service Agency (FSA) disaster set-aside program is intended to allow FSA borrowers who suffered from a disaster to use their income on expenses instead of payment on FSA debts.[54] It does this by allowing some FSA borrowers to set aside one annual installment on an FSA direct loan and move it to the end of the loan payment period. The purpose of the disaster set-aside program is to relieve some of the farmer's immediate financial stress caused by the disaster and avoid foreclosure by the government. It is not intended to replace or circumvent regular FSA loan servicing.[55] Borrowers may only be considered for DSA once for each disaster.[56]

Deadline

Farmers must request a disaster set-aside within eight months of the date the disaster was officially designated.[57]

Loans that may be set aside

In general, the disaster set-aside program is available for FSA farm borrowers who suffered losses as a result of a natural disaster. This includes FSA Farm Ownership (FO) loans, Operating (OL) loans, Soil and Water (SW) loans, Emergency (EM) loans, and others.[58]

Eligibility

The following requirements must be met to be eligible for a disaster set-aside:[59] (1) the farmer must be a direct loan FSA borrower and have been outstanding at the time of the disaster; (2) the farmer must operate a farm or ranch in a disaster area;[60] (3) any nonmonetary defaults with FSA must be resolved; the farmer must be either current on FSA payments or no more than one installment behind on FSA farm credit loans; (4) as a direct result of the disaster, the farmer does not have sufficient income to pay his or her expenses, and after the scheduled installments are set aside, all FSA farm credit loans must be current; and (5) the farmer's FSA farm loan must not have been accelerated and the debt must not have been restructured with FSA loan servicing since the disaster occurred.[61]

Disaster set aside terms

Only one unpaid installment for each FSA loan may be set aside.[62] If there is an installment still set aside from a previous disaster, the loan is not eligible for disaster set-aside. If, however, the set-aside is later paid in full, the set-aside technically no longer exists and the loan may be considered for disaster set-aside under future disasters.[63] If the set-aside is later canceled through an FSA restructuring, the set-aside technically no longer exists and the loan may be considered for a disaster set-aside under future disasters. Interest continues to accrue on the principal of the loan that is set aside.[64]

Amount of the set-aside

The amount of the set-aside is limited to the lesser of the following:[65] the amount the borrower is unable to pay FSA from the production and marketing period in which the disaster occurred, and the amount the borrower is unable to pay other creditors and/or expenses rounded up to the nearest whole installment.

Expenses which the farmer is unable to pay may include the following year's operating and family living expenses under two circumstances. First, if may be included if the income or commodities lost from the disaster year would have been used for these purposes. Second, it may be included if the normal income security from the disaster year is approved for release to the farmer under FSA regulations.

Any portion of the loan payment not set aside must be paid by the farmer on or before the FSA documents controlling the set-aside are signed by the farmer.[66] A portion of the installments may not be set-aside if a balance due is still left after the set aside.

The amount of the set-aside will be the unpaid balance remaining on the installment at the time the borrower signs the FSA form allowing a set-aside.[67] This amount includes unpaid interest and any principal that would have been credited to the account if the installment were paid on the due date.[68]

In general, the installment to be set aside is limited to the first scheduled annual installment due immediately after the disaster occurred. If, however, that installment is paid, the next scheduled annual installment after that may be set aside.[69]

The amount set aside, including interest accrued on any principal set-aside, is due on or before the final date of the loan.[70]

Interaction between primary loan servicing and disaster set-aside

Pending requests for primary loan servicing will continue to be considered. Farmers are not eligible for servicing under both programs. The application for the program not received is automatically withdrawn at the time the installment is set aside or the loan restructured. The automatic withdrawal is not appealable because the borrower is no longer delinquent. If the borrower again becomes delinquent or in financial distress, or requests primary loan servicing, the borrower will be notified or the request processed normally.[71]

For more information on the *Farmers' Guide to Disaster Assistance*, contact FLAG at: Farmers' Legal Action Group, Inc., 1301 Minnesota Building, 46 East Fourth Street, St. Paul, MN 55101; (612) 223-5400.

[1] EM loans are authorized by 7 U.S.C. §§ 1961-1964.

[2] 7 C.F.R. §§ 1945.154(a), "Termination date," 1945.162(d) (1997).

[3] 7 C.F.R. § 1945.162(a) (1997).

[4] 7 C.F.R. § 1945.162(d), (1), 1945.154(a), "Established farmer," "Family farm," 1941.4, "Family farm," (1997).

[5] 7 C.F.R. §§ 1945.6(b), (d), 1945.20, 1945.162(d) (1997).

[6] FAIR Act § 648(b) (codified at 7 U.S.C. § 2008h(a)); 62 Fed. Reg. 9351, 9356 (1997) (to be codified at 7 C.F.R. § 1945.162(a)). Debt forgiveness, for this purpose, includes a write-down, write-off, debt settlement, discharge of a debt as a result of bankruptcy, or a loss paid on a guaranteed loan.

[7] 62 Fed. Reg. 9351, 9356 (1997) (to be codified at 7 C.F.R. § 1945.162(a)). This barrier is not mandated by the FAIR Act.

[8] 7 C.F.R. § 1910.5(c) (1997). Certain problems in making past payments do not indicate an unacceptable credit history.

[9] Other requirements also apply. See 7 C.F.R. 1945.162(g)-(k) (1997).

[10] 7 C.F.R. §§ 1945.154(a), "Physical loss," 1945.163(b)(1), (6) (1997).

[11] 7 C.F.R. § 1945.154(a), "Qualifying physical loss" (1997).

[12] 7 C.F.R. §§ 1945.154(a), "Qualifying physical loss," 1945.163(b)(1) (1997).

[13] 7 C.F.R. § 1945.162(b)(1997).

[14] 7 C.F.R. §§ 1945.163(b)(6)(i)-(v), 1945.154(a), "Market value" (1997).

[15] 7 C.F.R. § 1945.163(b)(6)(1997).

[16] 7 C.F.R. § 1945.163(b)(6)(i)(B) (1997).

[17] 7 C.F.R. § 1945.163(b)(8) (1997).

[18] 7 C.F.R. § 1945.163(b)(11) (1997).

[19] 7 C.F.R. § 1945.163(b)(12) (1997).

[20] 1996 FAIR Act § 621 (codified at 7 U.S.C. § 1961(b)); 62 Fed. Reg. 9351, 9357 (1997) (to be codified at 7 C.F.R. § 1945.167(a)).

[21] 7 C.F.R. § 1945.163(b)(5) (1997).

[22] 7 C.F.R. § 1945.163(b)(4) (1997).

[23] 7 C.F.R. § 1945.163(b)(14) (1997).

[24] 7 C.F.R. §§ 1945.163(c)(1), 1945.154(a), "Household contents" (1997).

[25] 7 C.F.R. § 1945.163(b)(7) (1997).

[26] 7 C.F.R. § 1945.163(c)(5) (1997).

[27] For EM loan regulations, see 7 C.F.R. § 1945.173(b) (1997). For general FSA regulations, see 7 C.F.R. pt. 1806 (1996).

[28] 7 C.F.R. § 1945.173(b) (1997).

[29] 7 C.F.R. § 1945.162(f) (1997).

[30] 7 C.F.R. § 1945.154(a), "Qualifying production loss," "Production loss" (1997).

[31] 7 C.F.R. § 1945.154(a), "Farming enterprise" (1997).

[32] 7 C.F.R. § 1945.163(a)(2)(x) (1997).

[33] 7 C.F.R. § 1945.163(a)(1) (1997).

[34] FSA sets the unit prices on a statewide basis. 7 C.F.R. § 1945.163(a)(2)(iv) (1997).

[35] 7 C.F.R. § 1945.163(a)(2)(v) (1997).

[36] This represents a change from past policy. See 59 Fed. Reg. 16,771 (1994).

[37] 7 C.F.R. § 1945.163(a)(2)(viii) (1997).

[38] 7 C.F.R. § 1945.163(a)(2)(ix) (1997).

[39] 7 C.F.R. § 1945.163(a)(2)(xv), (xvii) (1997).

[40] 7 C.F.R. § 1945.154(a), "Qualifying production loss" (1997).

[41] 7 C.F.R. § 1945.163(a)(2)(xvii) (1997).

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[42] 7 C.F.R. § 1945.163(a)(2)(xvii) (1997).

[43] 7 C.F.R. § 1945.163(a)(2)(xvi) (1997).

[44] 7 C.F.R. § 1945.154(a), "Qualifying production loss" (1997).

[45] 7 C.F.R. § 1945.163(a)(2)(xvii) (1997).

[46] 7 C.F.R. § 1945.163(a)(2)(x), (b) (1997).

[47] 62 Fed. Reg. 9351, 9357 (1997) (to be codified at 7 C.F.R. § 1945.163(e)).

[48] 7 C.F.R. § 1945.163(c)(5) (1997).

[49] FAIR Act § 193(a)(2) (codified at 7 U.S.C. § 1508(b)(7); 62 Fed. Reg. 9351, 9357 (1997) (to be codified at 7 C.F.R. § 1945.167(b)).

[50] FSA EM loans are not considered emergency crop loss assistance for this purpose.

[51] Farm Service Agency, Emergency Loan Assistance, Farm Program Fact Sheet (May 1996).

[52] 7 C.F.R. § 1945.154(a) "Feasible Plan" (1997); 7 C.F.R. pt. 1924, subpt. B (1996).

[53] 7 C.F.R. pt. 11 (1996).

[54] 7 C.F.R. § 1951.952 (1997).

[55] 7 C.F.R. § 1951.952 (197). For the regulations controlling FSA loan servicing, see 7 C.F.R. subpt. S (1997).

[56] 7 C.F.R. § 1951.953(b) (1997).

[57] 7 C.F.R. § 1951.953(b) (1997).

[58] 7 C.F.R. § 1951.951 (1997).

[59] 7 C.F.R. § 1951.954(a) (1997).

[60] 7 C.F.R. § 1951.954(a)(1) (1997).

[61] 7 C.F.R. § 1951.954(a)(7) (1997).

[62] 7 C.F.R. § 1951.954(b)(2) (1997).

[63] For relevant FSA regulations on restructuring, see 7 C.F.R. § 1951, subpt. S

[64] 7 C.F.R. § 1951.957(b)(2) (1997).

[65] 7 C.F.R. § 1951.954(b)(4) (1997).

[66] 7 C.F.R. § 1951.954(b)(4) (1997).

[67] 7 C.F.R. § 1951.954(b)(6) (1997).

[68] 7 C.F.R. § 1951.954(b)(6) (1997).

[69] 7 C.F.R. § 1951.954(b)(5) (1997).

[70] 7 C.F.R. § 1951.957(b)(3) (1997).

[71] 7 C.F.R. § 1951.957(a)(2) (1997)

Setoff/*Cont. from page 2*

made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice," the law of the case must be followed. *Id.* at 5 (citations omitted). The court noted that these exceptions were to be applied "narrowly." *Id.* (citations omitted).

The appellate panel interpreted the bankruptcy court decision as relying on both the first and the third exceptions: that the district court opinion was "clearly erroneous and would work a manifest injustice," and that "the evidence on a subsequent trial was substantially different" than that presented to the district court. *Id.* With regard to the bankruptcy court's ruling that the appeal to the district court became moot when the confirmation order was finalized , the appellate panel held that the district court was the appropriate court to decide whether the issue before it was moot, i.e., whether it had jurisdiction. It was not proper for the bankruptcy court to essentially vacate the district court's decision, holding that it had been moot. The appellate panel acknowledged, but did not discuss the fact that the district court was unaware of the plan confirmation. *Id.* at 6.

As to whether the confirmed plan modified setoff rights, the panel noted that the law is "not settled." The panel cited a Ninth Circuit opinion that held that prepetition setoff rights were unaffected by a confirmed Chapter 11 plan as well as a recent Third Circuit opinion contrary. On this basis, the panel stated that it was "arguable" that the bankruptcy court's confirmation order had no effect on the government's right to setoff. *Id.* It is likely that the court's dicta on this issue may give rise to future litigation, given the government's recently vigorous pursuit of its setoff rights in and out of bankruptcy.

The appellate panel also rejected the "substantially different evidence" claim of the bankruptcy court, finding that this exception only applied to evidence that was clearly unavailable to the parties during the earlier proceedings. Although the district court took substantial evidence at the hearing regarding the administration of the CRP, this evidence did not fall within the exception.

Finding that neither the "clearly erroneous" nor the "substantially different evidence" exception applied, the appellate panel held that the bankruptcy court was bound by the district court order holding that the government had a valid claim for setoff. Accordingly, the panel reversed the bankruptcy court judgment as to the *Buckner* case. Id. at *7.

After reversing the bankruptcy court judgment on the grounds that it violated the law of the case in Buckner, the appellate panel addressed the merits of the government's setoff claim in the Tuttle case. It held that the Tuttle's CRP contract represented a valid prepetition obligation for the term of the contract. *Id.* at *7- *12.

In reaching this conclusion, the panel relied on Tenth Circuit law that setoff can be allowed if a debtor's right to payment is "an enforceable obligation," or "valid and enforceable." The panel stated that a "debt for which liability attaches, although the amount remains unascertained, is nonetheless subject to setoff." As an example, it referenced a pre-code case that held that a tax refund, although not yet claimed or due as of filing, was subject to setoff. Id. at * 10 (citation omitted). Applying this to the CRP contracts at issue, the panel found them to constitute valid and enforceable contracts as of the day they were signed. The conditions on payment are "mutual promises" rather than conditions precedent. *Id.* at *11.

The panel noted the split in authority on the issue of CRP setoff rights and adopted what it termed the majority position. Unfortunately, its analysis of the cases that it cited reflects not only a misunderstanding of the differences between the various farm programs but also makes erroneous statements regarding these case holdings. For example, in a parenthetical explaining the holding of the often cited case of *Moratzka v. United States (In re Matthieson)*, 63 B.R. 56 (D. Minn.1986), the court stated that the *Matthieson* court held that a "setoff right exists because CRP debt is a prepetition debt; obligation to pay CRP payments was absolutely owing and definite as to liability prepetition, but not yet due or liquidated, because the contract requirements were contractual duties and promises rather than conditions precedent." Even a quick review of the *Matthieson* case reveals that the CRP program was not at issue, nor was it even discussed by the court. Rather, that case dealt with the deficiency program, a one year program that is much different from the long term CRP.

In conclusion, the long procedural history of this litigation has resulted in a victory for government setoff rights in farm program bankruptcies. Absent an appeal by the debtors, the issue that was first raised in 1991 is finally resolved seven years later when at least one of the farmer's bankruptcies is over and one ten year CRP contract has been completed and renewed. Surely the cost of the litigation to the government far exceeded the amount that was ever at issue in the individual cases. Even if one assumes that the court eventually reached the correct result, from the debtor's perspective, this case presents a troubling picture of a slow and disorganized judiciary and a government determined to create precedent in its favor.

—*Susan A. Schneider, Hastings, MN*

Federal Register *in brief*

The following is a selection of items that were published in the *Federal Register* from March 27 to April 28, 1998.

1. CCC; Conservation farm option; proposed rule; comments due 6/1/98. 63 Fed. Reg. 16142.

2. FSA; Subordination of direct loan basic security to secure a guaranteed line of credit; final rule; effective date 5/26/98. 63 Fed. Reg. 20295.

— *Linda Grim McCormick, Alvin, TX*

AALA Award nominations sought

The AALA Awards Committee is seeking nominations from the general membership for consideration in the following categories:

1. AALA Award for Excellence in Scholarship for 1998;
2. AALA Award for Excellence in Student Writing for 1998;
3. AALA Award for the ***Ag Law Update*** for 1998; and
4. AALA Distinguished Service Award for 1998.

The deadline for submitting nominations is July 1, 1998. Winners will be honored during the 1998 annual educational conference on Oct. 23-24 in Columbus, Ohio. Nominations should be submitted to the 1998 AALA Awards Committee Chairman: David C. Barrett, Jr., National Grain and Feed Association, 1201 New York Ave., N.W., Washington, DC 20005; phone: 202-289-0873; e-mail: **dbarrett@ngfa.org**.