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An Agricultural Law Research Article

## **The North Dakota Agricultural Mediation Service**

by

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# THE NORTH DAKOTA AGRICULTURAL MEDIATION SERVICE

L. ROGER JOHNSON\*

## I. INTRODUCTION

The North Dakota Agricultural Mediation Service (AMS) was borne out of the farm financial crisis of the early and mid-1980s.<sup>1</sup> This period was characterized by a leveling off and lowering of government support prices for farm commodities, record high real interest rates for farm borrowers,<sup>2</sup> narrowed and frequently negative debt servicing ability for highly leveraged farmers,<sup>3</sup> and rapidly declining farm real estate values.<sup>4</sup>

Highly leveraged and younger farmers were generally the early victims of this traumatic period.<sup>5</sup> Lower profit margins resulted in smaller contributions (often negative) to their financial net worth, and declining asset values rapidly converted remaining equity in the farm business to large negative values.

For the first time since the 1930s, agricultural creditors were faced with large numbers of nonviable and marginally collateralized agricultural loans. The creditors were faced with loans that could not be repaid by projected farm earnings, and loans that could not be repaid by voluntary or involuntary sale of the collateral securing these loans.<sup>6</sup> Farmers, farm supply dealers, and creditors were all faced with large financial losses.<sup>7</sup>

In the early 1980s, more than one-half of the nation's agricultural debt was held by two creditors:<sup>8</sup> Farmers Home Administration (FmHA),<sup>9</sup> and Farm Credit System (FCS).<sup>10</sup> Approximately 40% of FmHA's farm borrowers had become delinquent on their loans by the

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1. NEIL E. HARL, *THE FARM DEBT CRISIS OF THE 1980s* at xvii.

2. *Id.* at 12.

3. *Id.* at 34.

4. *Id.* at 39.

5. *Id.* at 41.

6. Harl, *supra* note 1, at 109.

7. *Id.* at 211.

8. James T. Massey, *Farmers Home Administration and Farm Credit System Update A-2-1 (1993)* (paper presented at the American Agricultural Law Association Fourteenth Annual Education Conference, November 11, 1993, San Francisco, California).

9. Farmer's Home Administration is an agency of the United States Department of Agriculture (hereinafter USDA) and is known as the "lender of last resort."

10. HARL, *supra* note 1, at 102. Farm Credit System is "the cooperative network of thirty-seven banks providing credit to farmers and farm cooperatives." *Id.*

early 1980s.<sup>11</sup> In 1983, a major class action lawsuit, *Coleman v. Block*,<sup>12</sup> was filed in North Dakota, which led to several injunctions that virtually precluded FmHA foreclosures from 1983 until 1987.<sup>13</sup> The *Coleman* action sought to force the FmHA to offer its borrowers certain loan servicing actions, including rescheduling, reamortization, deferral of debt repayments, and the opportunity for borrowers to appeal agency decisions.<sup>14</sup> The *Coleman* action served as the impetus for many of the statutory changes subsequently embodied in the 1987 Agricultural Credit Act.

## II. NORTH DAKOTA RESPONDS

Former Commissioner of Agriculture Kent Jones established the Farm Credit Counseling program (FCC) in the spring of 1984 with funds received from the State Industrial Commission.<sup>15</sup> This program was begun to help farmers obtain operating money for the 1984 crop year. It was intended to be only a temporary program. During its first year of operation, between eighty and ninety farm credit counselors were hired on contract. They served as counselors to and advocates for farmers who requested assistance. Because of the program's success during that year, the 1985 legislature officially established the FCC program and funded it through the North Dakota Department of Agriculture.<sup>16</sup> It was perceived as a highly successful, innovative program with significant public and political support.

The 1985 legislature also saw the need for a program to help farmers keep their home base, or home quarter, when the farming operation itself was severely impaired. To meet this need, it established the state Farm

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11. Massey, *supra* note 8, at A-2-3.

12. 562 F. Supp. 1353 (D.N.D. 1983), *vacated as moot*, 864 F.2d 604 (8th Cir. 1988).

13. *Coleman v. Block*, 562 F. Supp. 1353 (1983), *vacated as moot*, 804 F.2d 604 (8th Cir. 1988). The *Coleman* action was initially filed by now North Dakota Commissioner of Agriculture Sarah Vogel. *Id.* at 1354. *Coleman* sought to stop the FmHA from "starving out" farmers whose cases were on appeal. *Id.* at 1355. The agency would starve out farmers by accelerating loans and refusing to release normal farm income back to them even though they had an issue on appeal. *Id.* Appeals could take a considerable amount of time, and during that time, farmers were denied money for necessary farm operating and family living expenses. *Id.* Vogel argued that farmers were being denied due process because they were essentially "starved out" of farming while issues on appeal were being decided, rendering moot the outcomes of the appeals. *Id.* at 1364.

*Coleman* also sought to force the FmHA to allow farmer borrowers to apply for loan deferrals, which were provided for by law but which were not contained in agency procedure. *Id.* at 1357. A loan deferral does not release borrowers from any obligation to repay their debt or accrued interest, but simply pushes payments back while farmers work to increase their farm's production capacity, pay down other debts, or otherwise manage their farms to increase their ability to service debt after the deferral period expires. *Coleman* led to a June 1987 injunction in which 75,000-85,000 loan liquidation proceedings were halted. Massey, *supra* note 8, at A-2-7.

14. Massey, *supra* note 8, at A-2-7.

15. Industrial Commission of North Dakota, March 16, 1984, State Capitol, Bismarck, North Dakota, at 1. Fifty-five thousand dollars of undivided profits from the Bank of North Dakota were used to fund the program. *Id.*

16. Farm Credit Counseling Act, ch. 88, 1985 N.D. Laws 208 (codified at N.D. CENT. CODE §§ 4-01-19.2, 4-01-19.3 (1985)).

Credit Review Board (CRB)<sup>17</sup>. The CRB had the power to hire negotiators to negotiate with creditors on behalf of farmers to save the farmers' homes. A special fund, the Home Quarter Fund,<sup>18</sup> was created at the Bank of North Dakota (BND) to finance this effort.

Concurrently with these two programs, the North Dakota State University Extension Service established a Farm Financial Analyst program<sup>19</sup> to teach farmers how to prepare basic financial documents. The farm financial analysts taught groups of farmers the basics of financial documentation and later provided one-on-one assistance to farmers as they completed their own financial forms.<sup>20</sup>

Subsequent legislation in the 1987 session allowed for the continuation of both the FCC and CRB programs, provided that the CRB established policy for the FCC and its employees and that the Commissioner of Agriculture administered the program.<sup>21</sup>

The Legislature in the 1989 legislative session changed the name of the FCC to the North Dakota Agricultural Mediation Service (AMS), authorized the AMS to receive and expend federal funds, provided that fees could be charged for services, provided that all records were to be closed, and provided for formal mediation between the farmer and his or her creditors.<sup>22</sup>

### III. THE FEDERAL RESPONSE

North Dakota was not alone in experiencing high levels of farm financial stress during the early and mid-1980s. Other states, including many in the Midwest, were experiencing similar symptoms of the farm financial crisis and developed their own means, often widely divergent from the North Dakota approach, for dealing with the problem.<sup>23</sup>

In 1987, Congress passed the Agricultural Credit Act (ACA).<sup>24</sup> The ACA was of crucial importance to agricultural loan mediation because it

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17. Farm Credit Review Board Act, ch. 137, 1985 N.D. Laws 306 (codified at N.D. CENT. CODE § 6-09.10 (Supp. 1993)).

18. *Id.*

19. Farm Credit Review Board Act, Hearings on S.B. 2159 Before the House Committee on Agriculture (1987).

20. This program was ultimately terminated after two years of operation.

21. Credit Review Board Act, ch. 131, 1987 N.D. Laws 306, 307 (codified at N.D. CENT. CODE § 6-09.10-03 (1987)). FCC credit counselors and CRB negotiators were frequently the same persons reporting to two different agencies.

22. Agricultural Mediation Services Act, ch. 109, 1989 N.D. Laws 300 (codified at N.D. CENT. CODE § 6-09.10-03, -04, -10, -11 (1989)).

23. See Harl, *supra* note 1, at 199-201 (discussing some of the approaches taken in Iowa, Minnesota, Idaho, Montana and North Dakota).

24. Pub. L. No. 100-233, 101 Stat. 1568 (1988). Adoption of the LACA was driven by the lengthy litigation against the FmHA surrounding the *Coleman* action and by the continuing deterioration of the financial condition of FCS. HARL, *supra* note 1, at 102.

provided for the federal matching of funds to states who implemented mediation programs meeting its requirements.<sup>25</sup>

There are currently 18 states certified under the ACA.<sup>26</sup> Certification is provided through the USDA, and the federal mediation grants are coordinated by the Special Assistant to the Assistant Administrator of Farmer Programs at FmHA.<sup>27</sup> Because of the nature of the development of the various state responses to the farm financial crisis of the 1980s, and because the ACA was passed after much of that development, the federal government has provided wide latitude among the various states to develop and implement their mediation programs.<sup>28</sup>

#### IV. NORTH DAKOTA'S AGRICULTURAL MEDIATION SERVICE

The North Dakota Agricultural Mediation Service provides for two types of mediation: informal mediation<sup>29</sup> and formal mediation.<sup>30</sup> Both are available to any farmer<sup>31</sup> or rancher in the state. The AMS can mediate disputes between North Dakota farmers and anyone else.<sup>32</sup> Most disputes mediated involve farmers and creditors. However, the AMS can also mediate other disputes, such as landlord-tenant disputes, seed and chemical disputes, and federal and state agency disputes. The only limitation on AMS mediation is that at least one of the parties must be a farmer.<sup>33</sup>

Since the vast majority of mediated disputes are between farmers and creditors, this article will primarily focus on the process pertaining to farmer-creditor disputes.

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25. 7 U.S.C. § 5101(c) (1988). A state could be certified as a qualifying state under the ACA if its mediation program: "(1) provides for mediation services to be provided to producers, and their creditors, that, if decisions are reached, result in mediated, mutually agreeable decisions between parties under an agricultural loan mediation program; (2) is authorized or administered by an agency of the State government or by the Governor of the State; (3) provides for the training of mediators; (4) provides that the mediation sessions shall be confidential; and (5) ensures that all lenders and borrowers of agricultural loans receive adequate notification of the mediation program." *Id.*

26. Chester A. Bailey, Address at the national meeting of State FmHA Directors, Washington, D.C., December 14, 1993. Certified states include Alabama, Arkansas, Arizona, Indiana, Iowa, Kansas, Minnesota, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Wisconsin, and Wyoming. *Id.*

27. U.S. Government Printing Office, FmHA Item No. 477, *Me, In Mediation?*, at 22 (1993).

28. Leonard L. Riskin, *The Farmer-Lender Mediation Program: Implementation by the Farmers Home Administration* 18, Report presented for the consideration of the Administrative Conference of the United States, Washington, D.C. (Nov. 1991).

29. N.D. Admin. Code § 18.5-02-02 (1992).

30. N.D. Admin. Code § 18.5-02-03 (1992).

31. A farmer is defined as "a person who is or was involved in the production of an agricultural commodity or livestock." N.D. CENT. CODE § 6-09.10-01(2) (Supp. 1993).

32. N.D. Cent. Code § 6-09.10-03 (Supp. 1993).

33. Only farmer-creditor disputes are eligible for matching federal dollars.

### A. INFORMAL MEDIATION

Farmers may access informal mediation assistance by calling a toll-free telephone number in the North Dakota Department of Agriculture.<sup>34</sup> Information regarding the caller's name, address, telephone number, and a brief description about the nature of the problem prompting the call is recorded in the state office.<sup>35</sup>

A negotiator is subsequently assigned<sup>36</sup> and is required to make contact with the client within forty-eight hours of assignment.<sup>37</sup> Assignments are based on geographical proximity and on the expertise of the negotiator relative to the nature of the problem. Assignments to neighbors and personal or business acquaintances are usually avoided.

As part of this initial contact, the negotiator gathers more specific information on the nature of the problem, schedules a time to meet with the farmer,<sup>38</sup> and advises the farmer as to the type of information he or she is to assemble prior to the first meeting. The first meeting (and often subsequent meetings as well) is usually held at the client's farm.<sup>39</sup>

The negotiator then takes the farmer through a series of problem-solving steps. Together, they work to determine the nature of the problem and its causes, identify possible solutions and alternatives available to the farmer and to others, and develop plans that should be implemented.

It is important that these and related questions be explored in the broadest sense possible. Concentrating on an immediate financial cash flow solution may lead to long-term financial problems when subsequent legal or tax consequences manifest themselves. Equally important, a financial solution that ignores a lack of do-ability because of social, emotional, physical, or other constraints offers no real long-term benefit to the farmer. Negotiators must resist the temptation to "fix" the farm by looking only at the numbers.<sup>40</sup>

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34. The telephone number is 800/642-4752 (in North Dakota only).

35. No specific time lines apply to the informal mediation process.

36. The AMS employs 18 negotiators, most of whom are employed on a part-time basis. These negotiators are geographically located across the state, and most work out of their home or place of business. Some of the negotiators, however, work out of AMS field offices located in Dickinson, Minot, and McVie.

37. Elwood Barth, Chairman, Credit Review Board Policy, 5 (May 27, 1992).

38. Negotiators are encouraged to personally meet with the farmer *and spouse* whenever possible.

39. This arrangement tends to put the farmer at ease, better familiarizes the negotiator with the type of farm operation involved, and generally saves time, since most of the necessary information is usually located on the farm.

40. The term "numbers" refers to things such as: projected prices to be received by farmers, projected costs to be incurred, and yields or other measures of production. If, for example, the farmer has an alcohol problem that is progressively getting worse, using historical farm data for projection purposes may solve his "economic problem" today. However, if the alcohol problem is not addressed, no "real" solution is likely to be found.

The farmer, in conjunction with his or her spouse and other parties, is responsible for making the decisions required to resolve the problem. The negotiator's role is to assist the parties in the decision-making process, and to make appropriate referrals to other specialists whose input may be needed for legal, tax, emotional, and other problems.<sup>41</sup>

The typical format a negotiator uses in dealing with the financial component of a problem involves seeking answers to four basic questions about the farmer: 1) Where is the farmer today?; 2) Where has the farmer been?; 3) Where is the farmer headed?; and 4) What are the farmer's options? The following sections discuss each of these questions.

1. *"Where is the farmer today?"*

The answer to this question requires a full accounting of the client's assets and liabilities—the completion of a balance sheet or financial statement.<sup>42</sup> The negotiator must determine if the farmer's assets could generate enough money to pay all debts owed.

2. *"Where has the farmer been?"*

In answering this question, the AMS analyzes and summarizes historical records dealing with income, expenses, production levels, debt repayment, and debt added. Typically, the AMS looks back three to five years.<sup>43</sup>

The purpose of trying to answer "where has the farmer been?" is to understand what has been happening, and to identify areas that can or

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41. Before a negotiator can really begin to help the client deal with these questions, he or she must develop a confidential, trusting relationship with the farmer and, as time goes on, with the creditor as well.

42. Completing this document requires vast amounts of information. For example, the AMS needs to know the amount and value of feed and grain on hand, the number and approximate weight of livestock on hand, and whether the livestock is held for sale or breeding purposes. A list and description of machinery and vehicles owned also must be developed. The value and description of real estate owned and its original cost or basis must be determined. If the balance sheet is developed during a growing season, a value must be placed on growing crops.

Credit card and open account debts must be determined. Copies of notes and mortgages are often required to establish debt levels, due dates, and the position of creditors and their entitlement to proceeds during the normal course of business or during a liquidation of some or all farm assets. This balance sheet is particularly useful when compared to previous years' balance sheets. It can then be used to measure financial progress over time and frequently provides insight into the nature of the problem.

43. In looking at the farm enterprise for the past five years, the following questions are generally asked: How many acres of wheat were planted in each of the past five years? What was the production per acre for each of those years? How much income was received per acre from the sale of production, from government payments, and from insurance proceeds? How much did it cost to produce an acre or bushel of wheat? Were fertilizer, chemical, seed, fuel, or other costs per acre high or low when compared to industry standards?

Similar questions should be asked for other crop enterprises, for livestock enterprises, and for different farm units operated by the farmer. Some of these questions include: Is owned land or rented land making more money? Is some part of this farm operation costing too much? What is being spent for family living each year? If the farmer is involved with a nonfarm business, AMS may look at similar questions about that business.

should be changed. Further, answers to this question provide the basic information which will be used to answer the third question.

### 3. *"Where is the farmer headed?"*

In answering this question, the AMS seeks to develop both short-term and long-term budgeting plans for the farm enterprise. For short-term budgeting, the AMS looks at an annual cash flow projection of anticipated income and expenses related to the operation. Historical data assembled in answering the question of "where has the farmer been?" becomes the basis for making future projections. This short-term projected plan is developed to determine if delinquent accounts can be brought current in one year's time. If they cannot, the next question is whether debt payments can be reamortized or rescheduled to permit a positive cash flow. Frequently, at this point, it becomes apparent that changes need to be made in the operation. Yet, before one inquires into possible changes, one must look at the long-term projected plan of the farm enterprise.

Long-term budgeting requires the development of a plan. When developing long-term plans, the following questions need to be asked: Can machinery and equipment be replaced over time with projected earnings? Are provisions made to keep replacement livestock back for the breeding herd, or is it aging to the point where it will someday have to be liquidated, resulting in the loss of one's production factory? Will money be available to repair and replace buildings and to make the other necessary improvements to owned real estate? And, does the operation, over time, provide for additions to equity on the farm or in other assets, which can be used for retirement income?

### 4. *"What are the farmer's options?"*<sup>44</sup>

When the AMS looks at the short and long-term implications of the previous three questions, it develops a list of options or alternatives for the farmer to consider. The reason an AMS negotiator was initially assigned to work with the farmer is because he or she had some sort of problem. Since most problems can be solved in more than one way, the negotiator's role is to provide to the farmer various options or means of solving that problem. The negotiator describes the options and the pros and cons of each option to the farmer, but the decision as to which option(s) to pursue belongs to the farmer.

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44. The fourth question is really the culmination of everything previously discussed. See *supra* notes 42-43 and accompanying text.



Often, there is a wide range of possible options. These options range from simply rescheduling notes for longer terms (perhaps at a lower interest rate) to writing down or writing off debt,<sup>45</sup> to partial or total farm liquidation. However, when considering the possible options, many factors other than finances must be considered.<sup>46</sup>

Once the farmer has chosen which option he or she wishes to pursue, the negotiator will negotiate on behalf of the farmer with others whose concurrence with the plan is needed before it can be implemented.<sup>47</sup>

Over 7,400 farmers have been directly assisted by a negotiator (or credit counselor) over the past nine and one-half years since the inception of the program under the title of FCC. This represents about one-fourth of North Dakota's farmers.<sup>48</sup>

The table on the following page shows the number of total active and new clients assisted through credit counseling/negotiating services, or informal mediation, since 1984. The large number of farms assisted in 1989 was a direct result of FmHA loan servicing notices sent to 2,600 delinquent borrowers, many of whom were seriously delinquent.

## B. FORMAL MEDIATION

The formal mediation process is more structured than the informal mediation process, and it involves definite time constraints which must be adhered to or dealt with by the participants.<sup>49</sup> The following discussion will outline the requirements for formal mediation and will describe the usual course of the process.

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45. Writing *down* debt refers to a creditor forgiving some of a farmer's debt while holding the farmer liable for the balance of debt owed. It implies an ongoing relationship between the creditor and the farmer, and usually involves the continuation of the borrower-lender relationship.

Writing *off* debt, on the other hand, refers to a situation in which a creditor forgives an existing debt and severs the borrower-lender relationship with the farmer. It frequently involves liquidation of the farm assets. In both cases, future recapture of a portion of the forgiven debt is sometimes provided for, particularly in those cases where subsequent farm earnings are larger than anticipated, or where farm assets have significantly increased in value.

46. Some of these factors include: the farmers', spouses', and/or other family members' desire to continue farming, the availability of off-farm work or other careers, the relationship with existing creditors, the potential for new creditors, and the family's ties to the community, schools, churches, etc..

47. While the foregoing discussion might imply a very orderly, step-by-step, compartmentalized approach to problem solving, the actual process is often more blurred, and the steps less finite. Discussion and consultation among the farmer, negotiator, creditors, and other consultants to the farmer occur throughout the process. Ideally, the option chosen by the farmer is one which is realistically achievable and will meet with creditor acceptance.

48. This percentage is based on a 1989 estimate of 28,600 farmers who had annual farm sales of \$10,000 or more. 1993 North Dakota Agric. Stat. at 15.

49. See N.D. ADMIN. CODE § 18.5-02-03-02 (1992).

**New and Active Clients**

FISCAL YEAR (July 1-June 30)	NEW CLIENTS	ACTIVE CLIENTS
1985	683	683
1986	1,046	1,049
1987	1,055	1,324
1988	664	1,153
1989	1,240	2,577
1990	973	1,737
1991	632	1,311
1992	497	1,082
1993	649 (July 92-Oct. 93)	1,295

*1. Eligibility For Formal Mediation for Secured Debts*

To be eligible for formal mediation, a person must be a farmer as defined in section 6-09.10-01(2) of the North Dakota Century Code<sup>50</sup> and must have a loan secured by agricultural property in default.<sup>51</sup>

*2. Requests for Formal Mediation*

Although farmers, creditors, or others dealing with farmers may request formal mediation,<sup>52</sup> the vast majority of requests for formal mediation come directly from creditors. Three North Dakota creditors are responsible for nearly all formal mediation requests to date: FmHA, FCS, and BND.

The processes leading up to a request for formal mediation by FmHA and BND are similar. Pursuant to these preliminary processes, the farmer who is in default is notified by the creditor of his or her default and is requested to provide financial information to the creditor within a specific time period.<sup>53</sup> The creditor, after receipt of the information, then considers servicing options, including restructuring proposals made by the

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50. See *supra* note 31 (defining "farmer" under section 6-09.1-01(2) of the North Dakota Century Code).

51. N.D. ADMIN. CODE § 18.5-02-03-00.1 (1992).

52. N.D. Admin. Code § 18.5-02-03-01 (1992).

53. Generally, if the farmer fails to provide the requested information, the creditor does not request mediation but begins the legal foreclosure process.

farmer.<sup>54</sup> If the creditor agrees to a feasible servicing option, no formal mediation will be requested by the creditor. If no option can be agreed to, the creditor may request mediation by writing to the AMS.<sup>55</sup>

The FCS process differs from both the FmHA and the BND process in that it does not request formal mediation, but instead notifies the borrower of the availability of formal mediation.<sup>56</sup> At the same time, the FCS notifies the delinquent borrower of his or her restructuring rights<sup>57</sup> and requests certain financial information which must be provided before restructuring can be considered.

The farmer then has fourteen days to respond to the request (or notice) for mediation by filing a "request for formal mediation" with the AMS.<sup>58</sup> Receipt of this form from the farmer starts the formal mediation process.<sup>59</sup>

The table below shows the number and sources of requests (notices) for formal mediation from January 1989 through October

1993:

**Formal Mediation Requests**

	1989	1990	1991	1992	1993	Totals
FmHA	830	266	128	386	120	1,730
FCS	503	719	756	620	342	2,940
BND	61	66	42	31	11	211
Other	9	0	0	2	0	11
Totals	1,403	1,051	926	1,039	473	4,892

### 3. *The Formal Mediation Process*

Once the farmer has requested formal mediation, he or she is given fifteen days to provide the AMS with a list of all of his or her secured and

54. The servicing options considered by the creditors include: reamortization, rescheduling, partial or total deferral of existing debts, conservation easements, softwood timber, and debt write-down.

55. A BND request for mediation is typically issued three or four months after the loan becomes delinquent. A FmHA request is typically issued five to twelve months after a loan becomes delinquent.

56. North Dakota Agricultural Mediation Service Training Manual, Notice of Formal Mediation, Rvd. June 21, 1993, at 2013. This notice is typically sent to the borrower within days after default occurs. Since these notices are sent soon after the delinquency occurs, borrowers often pay their accounts shortly thereafter and the mediation process never really commences.

57. See 12 U.S.C. § 2202(a) (1988). Restructuring rights include: the borrower's right to an independent appraisal of secured assets; the right to have his or her loan restructured if, in the judgement of FCS, the cost of restructuring the loan is less than the cost of foreclosure; the right to seek review by an FCS credit review committee; and the limited right of first refusal to repurchase or lease foreclosed or deeded back property. *Id.*

58. N.D. Admin. Code § 18.5-02-03-01(2) (1992).

59. N.D. Admin. Code § 18.5-02-03-02(2)(b)-(3) (1992).

unsecured creditors.<sup>60</sup> At the same time, a negotiator is assigned to work with the farmer and a mediator is assigned to the case. Both the negotiator and the mediator have specific obligations during formal mediation.

#### a. Negotiator Duties

The negotiator is required to negotiate on behalf of the farmer if the farmer requests assistance<sup>61</sup> and to assist the farmer in completing the request for formal mediation and list of creditors forms. Negotiators also help the farmer complete, compile and verify certain information prior to the initial mediation meeting,<sup>62</sup> provide relevant financial information to primary creditors before an initial mediation meeting, and assist the farmer in drawing up desired agreements (this is particularly important for creditors who do not attend mediation meetings).<sup>63</sup>

Here, as with informal mediation, the negotiator is provided with wide latitude to do what he or she feels is appropriate given the uniquenesses of the situation.<sup>64</sup>

#### b. Mediator Duties

The mediator is required to contact the farmer within forty-eight hours of assignment to the case.<sup>65</sup> During this time, he or she explains the mediation process to the farmer and verifies that the required forms have been completed and returned.

The first mediation meeting must be held within forty-five days of the date on which the farmer requested formal mediation.<sup>66</sup> It is the mediator's responsibility to contact the farmer, the negotiator, the initiating creditor, and any other major creditors. In addition, the mediator schedules a date, time, and location for the initial meeting. After fulfilling all of those responsibilities, the mediator relays this information to the state AMS office and official notices are sent to all parties.<sup>67</sup>

60. N.D. Admin. Code § 18.5-02-03-02(3) (1992).

61. N.D. Admin. Code § 18.5-02-03-02(1) (1992).

62. This information includes a current financial statement, cash flow projections (current and typical year), a five year income, expense, and production history, the previous three years' income tax returns, and any other information the circumstances may require (such as copies of leases and contracts). AMS Training Manual, Formal Mediation Procedure, Rvd. January 17, 1991, at 9013.1 [hereinafter AMS Training Manual].

63. *Id.*

64. In some cases, the negotiator has had an earlier relationship with the farmer, and may have already helped the farmer with the preparation of information. In other cases, the relationship is new and much work needs to be done before the first mediation meeting.

65. AMS Training Manual, *supra* note 62, at 9013.1. The AMS employs three mediators located in Langdon, Mandan, and Mohall. Cases are assigned primarily on the basis of geography.

66. N.D. Admin. Code § 18.5-02-03-02(2)(b)-(3) (1992).

67. These notices are generally sent out fourteen days before the scheduled meeting. AMS Training Manual, *supra* note 62, at 9013.1.

The initial mediation meeting and any subsequent meetings are conducted much like other mediations might be conducted.<sup>68</sup> At the conclusion of the mediation meeting, the mediator is required to issue a final mediation report, usually describing what the parties agreed upon.<sup>69</sup> If no agreements are reached, the report serves as a "discharge from formal mediation and the creditor may proceed to enforce any debts owed by the farmer."<sup>70</sup>

Often, further negotiation beyond formal mediation is required to achieve agreements with other creditors, to implement phased plans agreed to at formal mediation, or to continue providing assistance to a client facing substantial financial or other constraints. Such assistance is generally provided by an AMS negotiator through the informal mediation process.<sup>71</sup>

#### 4. *Success of Formal Mediation*

As previously mentioned, formal mediation services were first offered by the AMS beginning in January 1989. The following tables show formal mediation requests, cases mediated, and rate of agreement reached<sup>72</sup> by the FmHA, the FCS, and the BND from January, 1989 through October 31, 1993.

68. For a discussion of a typical mediation process, see CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT*, 32-33 (1986). The mediator opens the meeting by establishing ground rules, explaining the process, reaffirming the confidentiality of the process, and describing the time lines. Each party gives an opening statement describing the nature of his or her problem, describes historical relationships, and discusses financial, production, and other information assembled prior to the meeting.

The mediator then identifies the issues and interests of the parties. He or she then lists these issues in the order with which they should be dealt and works to obtain an agreement. The mediator then brings the parties through a problem solving process for each issue. The parties brainstorm to generate options, which are discussed in an attempt to reach an agreement as to which options will be pursued.

As agreements are reached, the mediator makes note of them. He or she subsequently reduces the agreements to writing in a confidential Memorandum of Understanding, which is then signed by all parties. Often, only interim agreements are reached at the initial meeting, and subsequent meetings must be held in order to achieve final agreements.

69. N.D. ADMIN. CODE § 18.5-02-03-03 (1992). The final report must be issued within 75 days of the date the farmer requested mediation. *Id.*

70. *Id.* There are, however, two exceptions to the 75-day final report requirement. First, if both the farmer and the initiating creditor agree to extend formal mediation, it can be extended for as long as they so agree. Second, declaration of bad faith against a creditor or a farmer may result in an extension of the time for up to an additional 60 days, or may result in immediate termination of the mediation proceedings. N.D. ADMIN. CODE § 18.5-02-03-06 (1992).

71. Since the informal mediation process contains no time constraints, it can be, and often is, an ongoing process.

72. "Agreement reached refers to an agreement between the borrower and the initiating creditor. It usually is a substantive agreement, such as an agreement to refinance, to sell certain assets, to cash out, to change operation, to deed back property, etc. It usually is *not* a procedural agreement, such as an agreement to consider one of two or three options by a certain date, . . . [an agreement] to consider a new proposal, [or an agreement] to consider a new farm plan . . ." See North Dakota Agricultural Mediation Service *Explanation of Summary of Mediation Report Form* (7-90) at 2.

**FmHA Mediation Requests Received, Mediated,  
and Agreements Reached by Calendar Year**

	1989	1990	1991	1992	1993
REQUESTS	830	266	128	386	120
CASES MEDIATED	455	165	145	42	310
AGREE RATE (%)	66	64	42	79	47

**FCS Mediation Notices Received, Mediated,  
and Agreements Reached by Calendar Year**

	1989	1990	1991	1992	1993
REQUESTS	503	719	756	620	342
CASES MEDIATED	112	186	190	118	51
AGREE RATE (%)	66	83	72	66	69

**BND Mediation Requests Received, Mediated,  
and Agreements Reached by Calendar Year**

	1989	1990	1991	1992	1993
REQUESTS	61	66	42	31	11
CASES MEDIATED	1	95	37	28	7
AGREE RATE (%)	100	76	73	75	86

The weighted averages of all of the years' data from the information contained in the previous tables indicate that FmHA mediation requests result in agreements 58% of the time, FCS mediation notices result in agreements 73% of the time, and BND mediation requests result in agreements 76% of the time.<sup>73</sup>

The difference in agreement rates among the FmHA, the FCS, and the BND appears to be quite substantial. While no scientific studies have

73. These agreement rates are consistent with those achieved by other states with USDA certified mediation programs. Agreement rates in other certified mediation states ranged from 55.5% to 93%. Riskin, *supra* note 28, at 50-51.

been conducted to explain this difference, there are some possible explanations as to why the FmHA agreement rates are lower than both the FCS and the BND agreement rates.

First, the FmHA, as the lender of last resort, tends to loan money to borrowers who are in more precarious financial positions, who are more highly leveraged, and who have tighter repayment margins.<sup>74</sup> Second, FmHA mediations are often held with respect to borrowers who are seriously delinquent on their loan payments.<sup>75</sup> Finally, FmHA employees and FmHA borrowers must deal with numerous and often cumbersome regulations, which tend to constrain the parties from entering into the types of agreements which might be available with other creditors. This regulatory environment sometimes leads FmHA employees to view mediation as simply one more step which must be followed when processing delinquent accounts.

## V. CONCLUSION

The process of mediation has evolved over time and has responded to federal initiatives. What was previously viewed as a temporary response to the farm finance crisis of the early 1980s has developed into an important governmental activity supporting and maintaining farm and ranch operations jeopardized by macroeconomic conditions. The continuance of this program, however, is dependent on two factors.

First, as previously discussed, the North Dakota AMS has been remarkably successful in reaching settlements in difficult agricultural credit situations involving farmers and their creditors. This has generated a great deal of political support among both farmers and farm creditors. Without such success, the program could not have been successfully renewed in five consecutive legislative sessions.

Most people would agree that helping farmers and creditors voluntarily reach agreements out of court is something which should continue. Sometimes, however, the agreements reached result in debt forgiveness because that is the most practical solution to a difficult situation. Debt forgiveness, however, has begun to be viewed in a negative light, thus casting doubt on the AMS process. The AMS's existence, therefore, may be based upon how well the AMS is able to communicate the message that the AMS does not forgive debt, but rather, helps farmers and creditors solve very difficult problems.

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74. See 7 C.F.R. § 1941.6 (1993).

75. We have received mediation requests from FmHA on borrowers who were three or four months to five or six years behind on their payments.

Second, because agricultural operations generate relatively low profit margins, low commodity prices and/or crop failures have had a severe impact on individual farm operations, which can take years to resolve. To some extent, the farm income problems of the 1980s negatively affected all farmers in North Dakota. A significant number of farmers are still in financial jeopardy, because they will need many profitable years to regain their long-term viability.

One of the major strengths of the AMS program has been the development of a cadre of highly skilled financial negotiators who understand more about farming than just finance. Their delivery of that knowledge in a confidential and credible manner has earned them the trust and respect of both farmers and creditors. Getting that message across to state and federal government officials, as well as the message that society benefits from AMS services, will be essential to AMS's continued existence.