

## **USDA APPEALS and MINNESOTA FARMER-LENDER MEDIATION**

### **USDA's National Appeals Division (NAD) Appeal Process**

The NAD appeal process begins when a USDA program participant requests an appeal of an “adverse decision” issued by a USDA agency, such as the Farm Service Agency (FSA). An adverse decision is any administrative decision made by an agency that is adverse to a participant, including the failure to act on a request.

### **The NAD Director Has Ultimate Authority to Decide What Is Appealable**

Although the definition of “adverse decision” under NAD rules is very broad, there are certain limitations on what decisions can be appealed. USDA agencies often take the position that a particular adverse decision is not appealable and include such a statement in their decision letters. In such cases, the participant can request review by the NAD Director to decide the issue.

- Thirty-day deadline—A participant must submit and personally sign a written request for Director review of appealability within 30 calendar days of receiving notification from an agency that an agency decision is not appealable.
- The Director's decision on the issue of appealability is final and binding on the agency and the participant.

### **How to Request an Appeal of an Adverse Action**

A participant must request an appeal and deliver the request to NAD within 30 calendar days after first receiving written or oral notification of an adverse decision.

- The written request for an appeal must meet the following requirements:
  - It must be in writing.
  - It must include a brief statement explaining why the participant believes the agency decision is wrong.
  - It must include a copy of the adverse decision letter (if available).
  - The participant must personally sign the appeal request.
- The participant must also send a copy of the hearing request to the agency, and may send a copy of the adverse decision to be reviewed to the agency, but failure to do either will not constitute grounds for dismissal of the appeal.

### **Informal Review Requirements in the NAD Appeals Process**

For some adverse decisions, the participant must first seek “informal review,” or reconsideration, by the agency before appealing to NAD. In other cases, reconsideration and/or mediation are optional steps that a participant may pursue before requesting an appeal.

Procedures and deadlines for requesting an informal review are set out in each agency’s regulations. For example, requests for informal review of FSA decisions must be made within 30 days of after written notice of the decision is “mailed or otherwise made available” to the participant.

- Participants are not required to seek informal review of FSA decisions made at the field office level for farm credit programs. Informal review at the field office level (called “reconsideration”) of farm credit decisions is optional.
- For FSA decisions outside the farm credit programs, whether informal review is mandatory or optional will depend on who made the adverse decision.

If the adverse decision was made at the field service level by an officer or employee of FSA or by an employee of an FSA county or area committee, the participant must seek informal review by the county or area committee having responsibility for the decision. For example, an NRCS technical determination relating to certain farm programs must be appealed to the FSA county or area committee before the participant can request a NAD appeal.

If the adverse decision was made at the field service level by an FSA county or area committee, the participant may seek informal review by the county or area committee, but it is not required.

- Participants in all other USDA programs have the option of requesting an informal review by the agency of any adverse decision, if agency rules provide for such review, but it is not required.

### **Mediation and NAD Appeals**

The specifics of Minnesota’s Farmer-Lender Mediation Program are discussed at the end of this handout. More generally, the NAD rules recognize a participant’s right to request mediation of an adverse decision with the agency. But the decision to pursue mediation can affect the participant’s available time for pursuing an appeal.

- If mediation is requested prior to filing an appeal with NAD, the 30-day deadline for requesting an appeal hearing stops running until mediation is concluded. If mediation is unsuccessful, the participant only has the remaining days to request a NAD appeal.
- Mediation can be requested at any time prior to a NAD hearing. Many attorneys and advocates advise farmers to file an appeal request at the same time they request mediation. This way there is less risk of missing the appeal deadline.

### **The NAD Appeal Hearing**

After the appeal request is filed, a date will be set for an in-person evidentiary hearing before a NAD hearing officer. Shortly before this date, the hearing officer and the parties will have a pre-hearing conference (usually on the telephone) to narrow the appeal issues and make sure that everyone is prepared for the hearing.

- Unless waived by the participant, the hearing must be conducted within 45 days of the appeal request. NAD must provide the parties with notice of the hearing date, time, and place at least 14 days prior to the hearing.
- The participant has a right to request and receive a copy of the agency record. The record should be provided within 10 days of the agency's receipt of the request.
- The participant and the agency are required to provide certain documents before the hearing. The hearing officer will set the date for submission of these documents.
  - a. The participant must provide:
    - (1) A short statement of why the agency decision is wrong;
    - (2) A copy of any document not in the agency record that the participant anticipates introducing at the hearing; and
    - (3) A list of anticipated witnesses, if any, and brief description of the evidence each witness will offer.
  - b. The agency must provide:
    - (1) A copy of the adverse decision being challenged;
    - (2) A written explanation of the agency's position, including the regulatory or statutory basis for the decision;
    - (3) A copy of any document not in the agency record that the agency anticipates introducing at the hearing; and
    - (4) A list of anticipated witnesses, if any, and brief description of the evidence each witness will offer.
- The appeal hearing will be the participant's last chance to raise claims and get evidence into the record. From this stage forward, all the way through any judicial review, the claims and record will be whatever was established at the NAD hearing.
- The hearing officer must issue a decision within 30 days after the hearing or the closing date of the hearing record.

### **Further Review by the NAD Director Is Available**

Depending on the outcome of the hearing, either the participant or the agency may ask the NAD Director to review the hearing officer's decision.

- A participant who desires Director review must request it within 30 calendar days of being notified of the NAD hearing officer's decision.
- A Director review request must be in writing and signed by the participant and must state why the hearing officer's determination is wrong. A copy of the request for Director review must be simultaneously provided to the other party or parties to the appeal.
- The Director must complete the review and either issue a final determination or remand the decision to a hearing officer within 30 business days of receiving a written request for Director review from a participant, or within 10 business days after receipt of the request for review from the head of an agency.

### **Guide to the NAD Process Available on FLAG Website**

A detailed guide to the NAD appeal process can be found on the FLAG website at [www.flaginc.org/topics/pubs/arts/NADarticle\\_NatlAglawCtr2003.pdf](http://www.flaginc.org/topics/pubs/arts/NADarticle_NatlAglawCtr2003.pdf).

### **Minnesota Farmer-Lender Mediation**

The Minnesota Farmer-Lender Mediation Act requires that, before a creditor may enforce a debt against agricultural property, the creditor must offer to meet with the farmer and try to resolve the problem through mediation. This category of mediation is referred to as "mandatory" because the creditor must offer mediation to an eligible farmer-debtor. If the farmer chooses to pursue mediation, the farmer and the creditor meet with a neutral mediator and try to work out an agreement about payment of the farmer's debts. While the mediation process is on-going, the creditor cannot take collection action against the farmer's property.

### **Farmer Eligibility for Farmer-Lender Mediation**

To qualify for mandatory farmer-lender mediation, the debtor must operate a family farm, a family farm corporation, or an authorized farm corporation. Farmer-lender mediation is not required if both of the following are true: (1) the farmer owns and leases a total of less than 60 acres; and (2) the farmer had less than \$20,000 in gross sales of agricultural products in the preceding year.

Mandatory farmer-lender mediation is available only if the amount of the debt in question is more than \$5,000. This means the remaining debt must be more than \$5,000, not the original amount owed. For example, the cancellation of a contract-for-deed triggers mandatory farmer-lender mediation only if the remaining balance on the contract is more than \$5,000, and the foreclosure of a mortgage on agricultural property requires farmer-lender mediation only if the amount of outstanding debt secured by the mortgage is more than \$5,000.

In general, creditors may not ask farmers to waive their rights under the mandatory Farmer-Lender Mediation Program. If a farmer signs such an agreement, the waiver is not legally enforceable.

#### **Farmer Must File Mediation Request Within 14 Days of Receiving Notice from the Creditor**

A farmer who wishes to pursue mediation must file a mediation request form with the coordinator of the Farmer-Lender Mediation Program within 14 days after receiving the mediation notice from the creditor. Mediation request forms are available from the county recorder or county extension office.

#### **Mediation Proceeding Notice Will Be Sent Within 10 Days After Farmer's Request Is Filed**

Within 10 days after a farmer has filed a request for mediation, the coordinator of the Farmer-Lender Mediation Program must send a "mediation proceeding notice" to the farmer and to all creditors identified in the farmer's mediation request. The mediation proceeding notice sets out the basic process for the mediation and informs creditors of their rights and obligations during the mediation period.

The mediation proceeding notice shall state the name and address of the farmer, the time and place of the mediation orientation session, and the time for the initial mediation meeting. The initial meeting must be held within 20 days of the mediation proceeding notice.

#### **Creditors Must Provide Financial Information to the Farmer and File a Claim Form**

The mediation proceeding notice informs creditors of the prohibition on enforcing debts against the farmer and their duty to provide the farmer with specified financial statements related to the farmer's debts by the time of the initial mediation meeting. These obligations apply to all of the creditors identified by the farmer in the mediation request.

Every secured creditor identified by the farmer in the mediation request will receive a claim form. Whether or not a creditor must actually participate in the mediation meetings depends on how the creditor was brought into the process and what degree of protection the creditor is seeking. The creditor who first served the mediation notice must participate in mediation. Any other creditor, which believes that its debt is not subject to mandatory farmer-lender mediation, must return the claim form and other supporting documents to the coordinator of the Farmer-Lender Mediation Program and explain why it believes its debt is not subject to mediation. The coordinator will decide whether mediation of the debt is required and notify the farmer, creditor, and mediator of the decision.

#### **Role of the Mediator**

At mediation meetings, it is the job of the mediator to: (1) listen to the farmer and the creditors; (2) advise the farmer and creditors of assistance programs available; (3) attempt to arrive at an agreement to fairly adjust, refinance, or pay the debts; and (4) advise, counsel, and assist the farmer and creditors in attempting to arrive at an agreement for the future conduct of financial relations among them.

Mediators do not have a duty to advise either farmers or creditors about the law or to encourage or assist them in reserving or establishing their legal rights.

### **Mediation Orientation Session**

An orientation session by phone or in person must be held at least five days before the first mediation meeting. The farmer, a financial analyst, and a mediator attend the orientation session. Creditors participating in the mediation may attend the orientation session if they choose, although the farmer may meet privately with the financial analyst.

At the orientation session, the financial analyst will review the farmer's financial and inventory records to make sure that they are complete and explain what additional records are needed.

The mediator will explain to the farmer the requirements for mediation and will remind the farmer that he or she has the right to seek a lawyer or other expert for advice on the legal and tax consequences of any mediation agreement.

Farmers going to the orientation session should bring financial and inventory records, including, if possible: (1) a depreciation schedule for major farm assets; (2) agricultural production and financial income records for the past three years; (3) a current financial statement; and (4) a projected farm budget for the current year. Farmers who do not have these records have at least five more days after the orientation session to prepare records before the first mediation meeting.

### **Length of Mediation Period—Up to 60 Days**

Mediation may continue through several sessions, as needed, and may last up to 60 days after the initial mediation meeting. When mediation ends, the mediator must sign and serve to the parties a termination statement which explains that mediation has ended and describes or refers to any agreement reached among the farmer and the creditors. If the mediation period ends without an agreement, creditors will then be allowed to begin collection and enforcement actions against the farmer's property.

### **Mediation Agreements Are Legally Binding**

If an agreement is reached in farmer-lender mediation and the parties put it in writing, the mediator will sign the written mediation agreement and witness it being signed by the farmer and creditors. Copies of the signed agreement are sent to all creditors who have filed claim forms. A mediated agreement has the effect of a legal contract and can be enforced by the district court.

### **The Farmer's Obligations in Mediation**

The farmer must attend and participate in all mediation meetings. The farmer must also provide full and complete information about his or her financial obligations. In general, information gathered by a mediator in the farmer-lender mediation process is confidential.

If the creditor submits a debt restructuring plan and the farmer decides not to accept it, the farmer must state in writing his or her reasons for rejecting the proposal. The farmer's statement should explain exactly which parts in each proposal are unacceptable and explain the specific reason for rejecting each of them.

If a farmer requests mediation, he or she must allow secured creditors who are participating in the mediation to inspect the farmer's secured agricultural property. Failure to allow this inspection or destruction of the security property will be considered evidence of a lack of good faith, and the farmer may be denied further mediation rights.

### **Creditors' Obligations in Mediation**

By the first mediation meeting, each creditor listed on the mediation request form must provide: (1) detailed information about the farmer's debt to the creditor and valuation of the security property, and (2) a statement of any debt restructuring programs offered by the creditor.

If a creditor rejects a farmer's proposal to restructure a debt, the creditor must explain its reasons for the rejection in writing. The written statement must explain why each alternative is unacceptable and explain the specific reasons for rejecting each of them.

During the mandatory farmer-lender mediation process, creditors must release funds from the sale of farm products to be used by the farmer for necessary living and operating expenses. If the farmer and creditor cannot agree on the amount that should be released for necessary living expenses or farm operating expenses, either party can seek a court determination of the amount that should be released.

The creditor that sent the mediation notice to the farmer must participate in mediation. Other creditors identified by the farmer in the mediation request may choose not to attend the mediation meetings. If a creditor does participate in mediation, the creditor must send to the mediation meetings a person who has authority to make binding commitments within 24 hours to fully settle or compromise debts.

### **All Parties Are Obligated to Mediate in Good Faith**

All parties are required to mediate in good faith. Among other things, a lack of good faith can be demonstrated by repeated failure to attend and participate in mediation sessions without cause, failure to provide full information, a creditor's failure to designate a representative with authority to make binding commitments within one business day, either parties' failure to explain why a restructuring proposal is unacceptable, a creditor's failure to release funds for the farmer's living and farm operating expenses, a farmer's concealment or transfer of secured agricultural property during the mediation period, or a farmer's refusal to allow inspection of secured property.

A creditor's refusal to agree to reduce, restructure, refinance, or forgive debt is not, in itself, evidence of a lack of good faith.

### **Voluntary Mediation Also Available for a Small Fee**

For certain non-credit disputes and credit disputes not covered by the mandatory mediation requirement, the Minnesota Farmer-Lender Mediation Program also offers voluntary mediation services for a small fee. In voluntary mediation, both the farmer and the other party must agree to participate in the mediation process. Various USDA agencies—including the Farm Service Agency (FSA), the Natural Resources Conservation Service (NRCS), Rural Development (RD),

and the Risk Management Agency (RMA)—offer mediation as one step in the review of administrative decisions.

**More Detailed Description of Mediation Process Available on FLAG Website**

A detailed description of the Minnesota Farmer-Lender Mediation process can be found in Chapter 7 of FLAG's *Farmers' Guide to Minnesota Lending Law*, available from the FLAG website at [www.flaginc.org/topics/pubs/mnlend/FGMLL2003\\_f.pdf](http://www.flaginc.org/topics/pubs/mnlend/FGMLL2003_f.pdf). ■

If you have any questions about the information in this handout or any other appeal or mediation issue, contact the Minnesota Family Farm Law Project:

St. Cloud

St. Cloud Area Legal Services  
320-253-0121  
888-360-2889 (toll-free)

Mankato

Southern MN Regional Legal Services  
570-387-1211  
800-247-2299 (toll-free)

St. Paul

Farmers' Legal Action Group (FLAG)  
651-223-5400  
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