

For: State and County Offices

Priority Consideration for Prevailing Claimants

Approved by: Acting Deputy Administrator, Farm Loan Programs



1 Overview

A Background

The Consent Decree entered into between the Government and plaintiffs in the class action suit *Pigford vs. Johanns* and approved by the United States District Court specifies injunctive relief in the form of special considerations in loan processing and inventory property purchases. These provisions apply to all prevailing claimants who were determined by an adjudicator or arbitrator to have a valid claim under the decree. Many prevailing claimants have begun submitting applications for loans or proposing to purchase inventory property. Any claimant who prevailed on a claim under the civil action *Pigford vs. Johanns* shall be accorded the rights given them by the Consent Decree.

B Purpose

This notice:

- extends the period that a prevailing claimant has to exercise priority consideration and other injunctive relief
- provides guidance on processing requests for priority consideration
- provides guidance on consideration of debts forgiven outside the Consent Decree process
- provides direction to State and County Offices about the procedures to follow when processing loan and inventory property purchase applications from prevailing credit claimants
- provides answers to frequently asked questions about processing requests received from prevailing claimants (Exhibit 1)
- provides a revised prevailing claimants priority consideration letter (Exhibit 2)
- obsoletes Notice FLP-385.

Disposal Date	Distribution
June 1, 2007	State Offices; State Offices relay to County Offices

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1 Overview (Continued)

C Contacts

If there are questions about this notice:

- County Offices shall contact the State Office
- State Offices shall contact either of the following:
 - James Radintz, Director, LMD at 202-720-1632
 - Mike Hinton, Branch Chief, LMD at 202-720-1472.

2 Special Consideration Provisions of the Consent Decree

A Credit Claim Prevailing Claimants

In most cases, claimants who prevail on a credit claim under the Consent Decree are entitled to the following.

- Priority consideration, on a 1-time basis for:
 - purchase or lease of inventory property to the extent permitted by law
 - 1 direct farm ownership (FO) loan and 1 operating (OL) loan.
- Note:** This right must be exercised no later than April 14, 2005, or 2 years after the date the prevailing claimant is complete in the Consent Decree claims process, whichever is later. The request for priority consideration must be submitted with the actual loan application or an applicant may request priority consideration on a pending loan application. The prevailing claimant must notify FSA in writing that this right is being exercised. See Exhibit 2.
- Any application for OL, FO, or purchasing an inventory property will be viewed in a “light most favorable” to the applicant and the amount and terms of the loan will be the most favorable permitted by law and regulations.

Note: This consideration applies to any loan request submitted by a prevailing claimant until April 14, 2005, or 2 years after the date the prevailing claimant is complete in the Consent Decree claims process, whichever is later, and is not limited to loans for which priority consideration is requested.

The date a prevailing claimant's right to priority consideration and “light most favorable consideration” expires will be in the Automated Discrepancy Processing System (ADPS) prevailing claimant's database.

Prevailing claimants must meet all regulatory requirements for loans. Debt forgiven under the Consent Decree shall not have any adverse impact on future loan requests.

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2 Special Consideration Provisions of the Consent Decree (Continued)

A Credit Claim Prevailing Claimants (Continued)

- Upon request of the applicant, FSA will provide technical assistance in connection with any application. This includes assistance from FLP employees who are acceptable to the applicant.

Note: This consideration applies to any new loan request or pending loan application submitted by a prevailing claimant until April 14, 2006, or 2 years after the date the prevailing claimant is complete in the Consent Decree claims process, whichever is later, and is not limited to loans for which priority consideration is requested.

The Consent Decree requires that priority consideration be requested in writing. Copies of Exhibit 2 to request priority consideration shall be provided to applicants upon request.

Note: Applicants exercising priority consideration are not required to use Exhibit 2. Any written request is acceptable as long as it states what is being requested.

B Farm Programs Benefits and Prevailing Claimants

Prevailing claimants whose claim involved only farm programs benefits, for example; disaster and emergency conservation program, and no loan programs, are entitled to “light most favorable” and technical assistance according to subparagraph A. Noncredit claimants are not entitled to priority consideration.

3 Implementing the Consent Decree Provisions

A Notifying Prevailing Claimants

All claimants are notified by the adjudicator or arbitrator about the outcome of their claim. A database of prevailing credit claimants is accessible through ADPS. Refer to ADPS manual, chapter 22 for instructions on accessing the database.

Prevailing credit claimants will be notified about how to proceed when exercising priority consideration. No action by State or County Offices is necessary.

B Notifying Prevailing Farm Program Benefits Claimants

Claimants who prevailed but whose claim only involved farm program benefits are not entitled to priority consideration. These claimants are notified by the adjudicator or arbitrator about the outcome of their claim.

3 Implementing the Consent Decree Provisions (Continued)

C Monitor Petitions and Injunctive Relief

A prevailing claimant may not obtain injunctive relief within 120 calendar days of the date of their initial adjudicator or arbitrator decision. This court-ordered delay in implementing injunctive relief will enable the Agency or a prevailing claimant to request a Monitor review of the initial decision, if necessary. Requests for injunctive relief will be accepted, but not processed during the 120-calendar-day period after the adjudicator or arbitrator decision. Any applications submitted during the 120-calendar-day period will be handled according to normal processing procedures.

D Priority Consideration in Loan Processing

Handle applications in which priority consideration is exercised according to the following.

- Regardless of other incomplete applications on file in the County Office, the loan official will immediately take action to process the priority consideration application.
- To the extent practicable, an office appointment or farm visit, as applicable, will be scheduled to occur within 5 business days of receipt of the written notice of exercise of priority to provide technical assistance to the applicant.
- At any time in the processing of a priority consideration application, a need for an appointment to complete documents, or any other action necessary to complete a priority application, shall take precedence over any other incomplete application on file in the County Office.
- All communication with applicants exercising priority consideration will be by telephone unless the applicant indicates a preference for written communication exclusively.

Note: All conversations about application information will be confirmed in writing within 3 business days. Every effort will be made to avoid processing delays because of mailing.

- If at any time while a priority consideration application is incomplete, 5 business days pass while awaiting information from the applicant, on the 6th business day the loan official responsible for the application will:
 - contact the applicant by telephone to advise that the necessary information has not been received
 - offer assistance in obtaining the information to complete the application.

3 Implementing the Consent Decree Provisions (Continued)

D Priority Consideration in Loan Processing (Continued)

Note: The results of this contact will be documented and a letter confirming the conversation sent to the applicant within 3 business days.

- When an appraisal, environmental assessment, or other service must be obtained from non-FSA sources, the loan official responsible for the application, to the extent practical, will require that if the outside source has multiple requests pending from FSA, the outside source performs the next service on matters related to the application on which priority has been requested.
- When a priority application has been determined to be complete according to FmHA Instruction 1910-A, Section 1910.4 (b), (including items (19) FmHA 1924-1, if necessary; (20) FmHA 1940-22, Class I or Class II assessment, whichever is applicable; or (21) completion of the assessment according to FmHA Instruction 1924-B, Section 1924.55) a final decision must be made within 3 business days and the applicant notified according to applicable regulations. No nonpriority completed applications shall have a final decision until a decision has been made on any completed priority application. If 2 complete priority applications are pending at the same time, they shall be acted upon in the order received.
- Prevailing claimants, who submit a written request for priority consideration without an application, should be cautioned that submitting the written request without an application will **not** preserve their rights to priority consideration beyond the injunctive relief expiration date. Under the Pigford Consent Decree, prevailing claimants receive priority consideration on a specific loan request. The priority consideration request should **not** be accepted unless it is accompanied by a signed application or the prevailing claimant has a loan request pending.
- If a prevailing claimant wants to submit an application for a loan to be used months or years in the future:
 - **remember** that FSA **cannot** refuse to accept the application
 - a member of the local farm loan staff should explain to the applicant:
 - the requirements for a complete application
 - that FSA procedures specify application timeframes that must be met
 - that unless they are able to complete the application within the timeframes the application will be withdrawn
 - the availability of technical assistance.

3 Implementing the Consent Decree Provisions (Continued)

E Priority Consideration for Loan Funding

Prevailing claimants shall receive priority for funding when a loan on which priority consideration was requested is approved. By definition, prevailing claimants are socially disadvantaged applicants (SDA's) and shall receive SDA targeted funds to the extent these funds are available. If State Office's remaining SDA allocation is insufficient to immediately fund a priority consideration loan, SED shall immediately forward the claimant's name, amount, type of loan request, and date of initial application to the National Office, LMD by FAX at 202-690-1117. Once additional funding is available, the subject applicant will be the first to receive funding, regardless of how many other applications have earlier initial application dates. In the event there are multiple priority consideration applications awaiting funds, the applications will be funded according to the earliest initial application date.

F Priority Consideration for Inventory Property

By law, qualified beginning farmers have first priority to purchase FSA inventory property. A prevailing claimant must be a qualified beginning farmer to receive priority consideration over other beginning farmers to purchase inventory property. If a claimant does not qualify as a beginning farmer, the claimant will not receive priority over beginning farmers. However, according to the definition of priority consideration provided in section 1(k) of the Pigford Consent Decree, if the property is not sold to a beginning farmer, a prevailing claimant will have priority and may purchase the property at the appraised value before it is put up for public bid.

Farm Loan Chiefs (FLC's) shall follow Notice FLP-358, or any subsequent notice on this issue, to obtain current data on inventory properties. This information will be provided to prevailing claimants upon their request. Alternatively, FLC's may develop a procedure to ensure that any prevailing claimant who requests a list of inventory properties in the State receives the list on a timely basis. FSA will also provide public notice of inventory property for sale as required by law. FSA employees will offer and, if requested, provide assistance to prevailing claimants in completing the necessary documents to submit a bid on FSA inventory property.

G Viewing Applications in a "Light Most Favorable"

When processing a loan application, loan officials may exercise judgment in applying applicable regulations. When considering eligibility and credit criteria in a loan application submitted by a prevailing claimant, loan officials shall view the criteria in a way that would be most beneficial to the applicant. In other words, where there is a legitimate issue as to an item in the application, the prevailing claimant shall receive the benefit of the doubt within FSA procedures and regulations.

3 Implementing the Consent Decree Provisions (Continued)

G Viewing Applications in a "Light Most Favorable" (Continued)

When there is an issue that would affect if a loan can be made:

- borderline or marginal decisions shall be made in favor of the applicant
- loan officials will be prudent when reconsidering their assumptions
- the rationale for all conclusions about factors such as yields, prices, expenses, debt repayment history, and similar components of the credit decision must be thoroughly documented in the loan file.

However, viewing loan criteria “in a light most favorable” does not mean using any assumptions necessary, no matter how unrealistic or unreasonable, to justify determining an applicant eligible for a loan.

Examples: Farmer Smith has had corn yields over the last 5 years of 100, 105, 110, 115, and 120 bushels per acre for a 5-year average of 110 bushels per acre. The county average is 120 bushels per acre. Farmer Smith needs a corn yield of 125 bushels to generate a positive cash flow. Under “light most favorable” the 125 bushels per acre could be used even though it is higher than Farmer Smith’s 5-year average or the county average. The yield has gone up 5 bushels per acre for each of the last 5 years so a yield of 125 bushels could be made this year.

Using the same example information, assume 135 bushels an acre is needed for a positive cash flow. In this case, the yield of 135 bushels per acre could not be used because the yield is higher than any indicators of what Farmer Smith could reasonably expect to receive.

3 Implementing the Consent Decree Provisions (Continued)

H Claimants With Past Debt Forgiveness

The following are exceptions to debt forgiveness limitations.

- Loans written off at the direction of the adjudicator, arbitrator, or under the Consent Decree Stipulation and Order dated February 7, 2001, are not considered debt forgiveness. These loans are identified in a prevailing claimant's record in the ADPS database.

Notes: This includes loans previously written off or debt settled by FSA or FmHA, but that, if they still existed, would have been written off at the direction of the adjudicator, arbitrator, or under the Consent Decree Stipulation and Order dated February 7, 2001. These loans are identified in a prevailing claimant's record in the ADPS database.

Example: The applicant had a 1982 FO and 1983 and 1985 OL's all of which were written off in 1990. The adjudicator finds in favor of the claimant only his claim that discrimination occurred in relation to the 1983 OL. However, the claimant does not prevail on the 1982 FO. Under the Stipulation and Order, any OL between 1983 and 1996 would be discharged. Since the 1983 OL and 1985 OL were already written off, neither of these write offs will be held against the claimant. However, the prior write off of the 1982 FO on which the claimant did not prevail will be counted against the claimant and thus may make the claimant ineligible for certain future loans.

Any loan application received which falls under the above exception should be sent to the National Office for guidance and concurrence on whether the applicant is eligible. State Offices shall forward those applications by express mail to:

USDA-FSA-DAFLP-LMD
1280 Maryland Avenue, SW, Suite 240
Washington DC 20024.

- Any debt forgiven under the Consent Decree, or previously written off debt that would have been discharged had it still existed, will not be considered in evaluating creditworthiness on future loan applications.

I Loan Term Limits for Prevailing Claimants

Loans received by prevailing claimants will count towards their term limits. This includes loans which were written off for those years in which discrimination was found to have occurred.

3 Implementing the Consent Decree Provisions (Continued)

J Technical Assistance From a USDA Employee Acceptable to the Applicant

FmHA Instruction 1910-A, Section 1910.4 (b) requires that loan officials provide assistance as necessary to all applicants in completing an application. In addition, loan officials must offer assistance to a prevailing claimant when a loan application has been submitted. This assistance will cover the full range from helping fill out the application to developing a farm plan, verifying debts, and locating specialists for advice on new or improved enterprises, and all other aspects of the loan application process. The loan official providing the technical assistance must be acceptable to the applicant. Prevailing claimants may request that SED's assign a different employee to assist them if the staff in the State or County Office is not acceptable.

K Denial of Requests by Prevailing Claimants

Denial of a request for priority consideration for which the applicant does not qualify, for example, a second request for priority consideration for OL, does not require appeal rights but is subject to a review by NAD for a determination if the decision is otherwise appealable.

Claimants may also ask the court-appointed monitor for assistance regarding FSA's determination.

Notification of denial of assistance based upon regulatory requirements, for example, delinquency on a Federal debt, inadequate security, or lack of repayment ability, will be completed according to applicable regulations subject to communication requirements in this notice.

Frequently Asked Questions and Answers

Questions and Answers
<p>How can I verify that someone is a prevailing claimant?</p> <p>Claimants can be verified through the ADPS Civil Rights database. See Chapter 22 of ADPS Manual.</p>
<p>Is a handwritten request for priority consideration acceptable?</p> <p>Yes, as long as the request is in writing and states what is being requested, such as priority for OL, FO, or inventory property, it is acceptable.</p>
<p>A prevailing claimant applied for OL and emergency loan (EM) assistance and requested priority consideration. How should the EM application be processed since priority does not apply to EM applications?</p> <p>Although the EM loan does not get priority, both applications should move forward at the same time according to the OL processing priority.</p>
<p>A claimant's daughter has applied for an FO loan and submitted a written document assigning her father's priority consideration to her together with a written request for priority consideration. Does she receive priority consideration?</p> <p>No. Rights under the Consent Decree cannot be transferred or assigned. Process the application in the normal manner according to regulations.</p>
<p>Can the heirs of a deceased prevailing claimant receive priority consideration?</p> <p>No. If a claimant is deceased, the entitlement to the special considerations in the Consent Decree ceases.</p>
<p>Should the \$50,000 or other settlement amount and elimination of FSA debt be considered in determining a prevailing claimant's eligibility?</p> <p>Prevailing claimants must be eligible for the loan requested. Therefore, the test for credit applies. The settlement payment and forgiveness of FSA debt might enhance a prevailing claimant's financial condition to the point that commercial credit may be available, with or without an FSA guarantee. Remember that while the forgiven FSA debt may have a positive effect on the applicant's financial condition, the forgiveness will not be considered in evaluating creditworthiness and is not counted in eligibility.</p>

Frequently Asked Questions and Answers (Continued)

Questions and Answers
<p>If an application under priority consideration is rejected or withdrawn, has the applicant used their 1 time priority for that type of loan?</p> <p>If an application under priority consideration is rejected, the claimant has used their priority consideration for that type of loan. In the case of withdrawal, if the applicant requests the application be withdrawn, it is to be assumed the request for priority consideration is withdrawn as well. The claimant can request priority consideration again. However, if the Agency withdraws the application, for example, as the result of a failure to respond to a letter requesting additional information, the priority consideration for that type of loan has been exercised and cannot be used again. If there are questions in a specific case, obtain guidance from the contacts listed in subparagraph 1 C.</p>
<p>Can an entity applicant exercise priority consideration on behalf of 1 of its members?</p> <p>Possibly. OGC has advised that because each entity is different, an OGC determination will be necessary on a case-by-case basis. If there are questions in a specific case, obtain guidance from the contacts listed in subparagraph 1 C.</p>
<p>Can an applicant withdraw a request for priority consideration, and if so, at what point in the process is the priority consideration considered irrevocable?</p> <p>An applicant may withdraw a request for priority consideration at any time until the loan application, on which priority consideration was requested, is determined to be complete. When an application is determined to be complete, the applicant has received priority consideration in loan processing and cannot withdraw the request.</p>

Prevailing Claimant Priority Consideration Letter

Notification of Exercise of Priority Consideration under Consent Decree

To: Farm Service Agency

_____ (Fill in the address where the loan application was or will be submitted.)

This memorandum constitutes written notification that I am exercising priority consideration granted to me in accordance with paragraph 11 of the Class Action Consent Decree. I am using my priority consideration for: (Please see instructions below and mark one box below; a separate form must be used for each item in which priority is sought)

- [] An operating loan.
[] An ownership loan.
[] Purchase or lease of farm property in FSA inventory.

I am entitled to this consideration by virtue of my claim approved as follows:

Name: _____ Claim Number: _____

Address: _____

Phone: _____

I hereby exercise my priority as set forth above.

Claimant/Applicant Signature Date

Instructions

The Consent Decree under which your claim has been approved entitles you to priority consideration for the purchase or lease of one inventory property from FSA, one direct farm ownership loan, and one direct operating loan. YOU MUST EXERCISE YOUR RIGHT TO PRIORITY CONSIDERATION ON ANY OF THESE BY THE LATER OF APRIL 14, 2005, OR TWO YEARS AFTER THE DATE ON WHICH YOU ARE COMPLETE IN THE CONSENT DECREE CLAIMS PROCESS, WHICHEVER IS LATER. YOUR LOAN APPLICATION MUST BE SUBMITTED ALONG WITH YOUR PRIORITY CONSIDERATION REQUEST. YOU MAY ALSO REQUEST PRIORITY CONSIDERATION ON A PENDING LOAN APPLICATION. The agreement requires that you request this priority in writing. Your use of this form is not required but it is designed to make it easy for you to request your priority consideration. If you do not use this form you must give FSA other written notice of your intent to exercise your priority. If FSA does not receive written notice of your exercise of priority, your application will be processed in the normal manner. You should note that priority consideration does not guarantee you will receive a loan. You must be otherwise eligible and qualified to receive the loan.

Marking the boxes- If you are applying for a loan to buy equipment or livestock, pay production expenses like seed, feed, fertilizer, and chemicals, OR pay general farm expenses and family living expenses, please mark the box for "An operating loan." If you are applying for a loan to buy a farm or farm land and/or build buildings on a farm please mark the box for "An ownership loan." If you wish to buy or lease a specific farm property owned by FSA, please mark the box for "Purchase or lease of farm property in FSA inventory."

Additional Help- If you need help filling out this form letter, a loan application, or any other forms needed to apply for a loan, please ask FSA staff- they are required to help you. If you have questions about your rights under the Class Action Consent Decree you should consult an attorney, FSA staff cannot give legal advice.