

adequately secured, taking into account the probable depreciation of the security. The loan approval official will also consider the repayment ability of the applicant, as reflected in the completed Form FmHA or its successor agency under Public Law 103-354 431-2, "Farm and Home Plan," or other similar plan of operation acceptable to FmHA or its successor agency under Public Law 103-354 when setting the terms. In any case, there must be an interest payment scheduled at least annually in accordance with the FMI for FmHA 1940-17, "Promissory Note." Loans may have reduced annual installments scheduled, of least partial interest, for the first five years.

(b) *Reamortization.* When the loan approval official determines that reamortization will assist in the orderly collection of any SW loan, the loan approval official may take such action under subpart S of part 1951 of this chapter.

(c) *Interest rate.* Upon request of the applicant, the interest rate charged by FmFA will be the lower of the interest rates in effect at the time of loan approval or loan closing. If an applicant does not indicate a choice, the loan will be closed at the interest rate in effect at the time of loan approval. Interest rates are specified in exhibit B of FmHA Instruction 440.1 (available in any FmHA or its successor agency under Public Law 103-354 office) for the type of assistance involved. A lower rate may be established in this exhibit for a limited resource applicant when loan funds are being used for soil and water conservation and protection purposes denoted in §1943.66 (a)(1) through (a)(5) of this subpart, subject to the following:

(1) The applicant meets the conditions of the definition for a limited resource applicant set forth in §1943.54 of this subpart.

(2) The Farm and Home Plan and Business Analysis—Nonagricultural Enterprise form, when appropriate, indicates that installments at the higher rate, along with other debts, cannot be paid during the period of the plan.

[53 FR 35706, Sept. 15, 1988, as amended at 58 FR 15074, Mar. 19, 1993]

#### §1943.69 Security.

Each SW loan will be secured by real estate, chattels, leaseholds, or a combination of these. Chattels and/or leaseholds, however, will only be taken as security as set forth in paragraphs (c) and (d) of this section. The total amount of security required will be the lesser of either 150 percent of the loan amount, or all real estate owned by the applicant. A loan will be considered adequately secured when the real estate security for the loan is at least equal to the loan amount. Security in excess of 150 percent of the loan amount will only be taken when it is not practical to separate the property, i.e., a tract of land. The specific items of security, along with the value of the security, will be documented in the case file. This information will be obtained from values established in accordance with §1943.75 of this subpart. If the applicant disagrees with the values established, FmHA or its successor agency under Public Law 103-354 will accept an appraisal from the applicant, obtained at the applicant's expense, if the appraisal meets all FmHA or its successor agency under Public Law 103-354 requirements. In cases, when a loan is being made in conjunction with a servicing action, the security requirements as stated in subpart S of part 1951 of this chapter will prevail. In unusual cases, the loan approval official may require a cosigner in accordance with §1910.3 (d) of subpart A of part 1910 of this chapter or a pledge of security from a third party. A pledge of security is preferable to a cosigner.

(a) *Real estate security.* (1) A mortgage will be taken on all real estate refinanced or improved with SW funds, and by any additional real estate security needed to meet the requirements of this section.

(2) Security will also include items which are considered part of the farm and ordinarily pass with the title to the farm such as, but not limited to, assignments of leases or leasehold interests having mortgageable value, water rights, easements, rights-of-way, revenues, and royalties from mineral rights.

(3) A first lien is required on real estate, when available. In addition, loans

will be secured by a junior lien on real estate provided:

(i) Prior lien instruments do not contain provisions for future advances (except for taxes, insurance, other costs needed to protect the security, or reasonable foreclosure costs), cancellation, summary forfeiture, or other clauses that may jeopardize the Government's interest or the applicant's ability to pay the SW loan unless any such undesirable provisions are limited, modified, waived or subordinated insofar as the Government is concerned.

(ii) Agreements are obtained from prior lienholders to give notice of foreclosure to FmHA or its successor agency under Public Law 103-354 whenever State law or other arrangements do not require such a notice. Any agreements needed will be obtained as provided in subpart B of part 1927 of this chapter, except as modified by the "Memorandum of Understanding-FCA-FmHA or its successor agency under Public Law 103-354," FmHA Instruction 2000-R (available in any FmHA or its successor agency under Public Law 103-354 office).

(4) Advice on obtaining security will be received from OGC when necessary.

(5) The designated attorney, title insurance company, or OGC will furnish advice on obtaining security when a life estate is involved.

(6) Any loan of \$10,000 or less may be secured by the best lien obtainable without title clearance or legal services as required in subpart B of part 1927 of this chapter, provided the County Supervisor believes from a search of the County records that the applicant can give a mortgage on the farm. This exception to title clearance will not apply when:

(i) The loan is made simultaneously with that of another lender.

(ii) This provision conflicts with program regulations of any other FmHA or its successor agency under Public Law 103-354 loan being made simultaneously with the SW loan.

(7) The Departments of Agriculture and Interior have agreed that FmHA or its successor agency under Public Law 103-354 loans may be made to Native Americans and secured by real estate when title is held in trust or restricted

status. When security is so taken on real estate held in trust or restrictive status:

(i) The applicant will request the Bureau of Indian Affairs (BIA) to furnish Title Status Reports to the County Supervisor; and

(ii) The BIA approval will be obtained on the mortgage after it has been signed by the applicant and any other party whose signature is required.

(b) *Exceptions.* The County Supervisor will clearly document in the file when security is not taken for any of the following reasons:

(1) A lien will not be taken on property that could have significant environmental problems/costs (e.g., known or suspected underground storage tanks or hazardous wastes, contingent liabilities, wetlands, endangered species, historic properties). Guidance is provided in part II, item H of exhibit A of FmHA Instruction 1922-E (available in any FmHA or its successor agency under Public Law 103-354 office) as to the action to be taken when the appraiser indicates that the property is subject to any hazards, detriments or limiting conditions.

(2) A lien will not be taken on property that cannot be made subject to a valid lien.

(3) A lien will not be taken on the applicant's personal residence and appurtenances, when the residence is located on a separate parcel and the farm tract being financed, refinanced, improved, or otherwise used for collateral provides primary security for the loan(s).

(4) A lien will not be taken on subsistence livestock; cash or special cash collateral accounts to be used for the farming operation or for necessary family living expenses; all types of retirement accounts; personal vehicles necessary for family living and farm operating purposes; household goods; and small tools and small equipment, such as hand tools, power lawn mowers, and other similar items not needed for security purposes.

(5) A lien will not be taken on marginal land, including timber, when a softwood timber (ST) loan is secured by such land.

(c) *Chattel security.* Ordinarily, SW loans will not be secured by chattels.

However, loans will be secured by chattels as follows:

(1) A first lien will be taken on equipment or fixtures bought with loan funds whenever such property cannot be included in the real estate lien and the best lien obtainable on all real estate will be taken and does not provide primary security for the loan.

(2) Chattel security will be obtained when real estate will not provide primary security for the loan and the best lien obtainable has been taken on all real estate.

(3) When a loan is made only for the purchase of shares of water stock, such stock will be pledged or assigned as security for the loan.

(4) If there is no real estate security available and a lien is taken on chattels only, the loan cannot be over \$100,000 and must be scheduled for repayment within 20 years or the useful life of the security, whichever is less.

(5) Chattel security will be obtained and kept effective as notice to third parties as provided in subpart B of part 1941 and subpart A of part 1962 of this chapter.

(d) *Loans secured by leaseholds.* A loan will be secured by a mortgage on the leasehold if it has negotiable value and is able to be mortgaged, subject to the following:

(1) The unexpired term of the lease should extend beyond the repayment period of the loan for a period sufficient to ensure the objectives of the loan will be achieved. If the loan repayment period is equal to or greater than the period covered by the lease, the borrower must provide other security to secure the loan or the lessor must agree in writing to compensate the borrower for any unexhausted value of the improvements when the lease expires or is terminated.

(2) The lessor must have good and marketable title to the real estate, which may be subject to a prior lien, or the lessor must have signed a contract to purchase the real estate. The contract to sell and the lien instruments must not contain covenants, such as short redemption periods or rights to cancel, which may jeopardize the Government's security. Any provisions which may jeopardize the Government's security must be limited, modi-

fied, waived or subordinated in favor of the Government.

(3) With respect to achieving the purpose of the loan, obtaining adequate security and being able to service the loan and enforce its rights, the Government, as holder of a mortgage upon a lease or leasehold interest, must be in a position substantially as good as if it held a second mortgage on the real estate. Besides the lessor's consent to the SW mortgage on the leasehold interest, FmHA or its successor agency under Public Law 103-354 should consider whether or not:

(i) There is reasonable security of tenure. The borrower's interest should not be subject to summary forfeiture or cancellation.

(ii) The right to foreclose the SW mortgage and sell without restrictions would adversely affect the salability or market value of the security.

(iii) FmHA or its successor agency under Public Law 103-354 has a right to bid at a foreclosure sale or to accept voluntary conveyance in lieu of foreclosure.

(iv) FmHA or its successor agency under Public Law 103-354 has the right, after acquiring the leasehold through foreclosure or voluntary conveyance in lieu of foreclosure, or in event of abandonment by the borrower, to occupy the property or sublet it, and to sell it for cash or credit. In case of a credit sale, the FmHA or its successor agency under Public Law 103-354 should take a vendor's mortgage with rights similar to those under the original SW mortgage.

(v) The borrower has the right, in the event of default or inability to continue with the lease and the SW loan, to transfer the leasehold, subject to the SW mortgage, to an eligible transferee who will assume the SW debt.

(vi) Advance notice will be given to FmHA or its successor agency under Public Law 103-354 of the lessor's intention to cancel, terminate or foreclose upon the lease. Such advance notice should be long enough to permit FmHA or its successor agency under Public Law 103-354 to ascertain the amount of delinquencies, the total amount of the lessor's and any other prior interest, the market value of the leasehold interest and, if litigation is involved, to

refer the case with a report of the facts to the United States Attorney for appropriate action.

(vii) There are express provisions covering the question of FmHA or its successor agency under Public Law 103-354's obligation to pay unpaid rental or other charges accrued at the time it acquires possession of the property or title to the leasehold, and those which become due during FmHA or its successor agency under Public Law 103-354's occupancy or ownership, pending further servicing or liquidation.

(viii) There are any necessary provisions to assure fair compensation to the lessee for any part of the premises taken by condemnation.

(ix) Any other provisions are necessary to obtain an interest which can be mortgaged.

(4) A State supplement will be issued in any State in which real estate or chattel liens may be taken on leasehold interests in farmland and recorded so as to protect the mortgagee.

(5) The following language or similar language which, in the opinion of OGC or the designated attorney, is legally adequate, will be inserted on the lien instrument:

"All Borrower's right, title, and interest in and to the leasehold estate for a term of \_\_\_ years beginning on \_\_\_, 19\_\_\_, created and established by a certain Lease dated \_\_\_\_, 19\_\_\_, executed by \_\_\_\_\_ as lessor(s), recorded on \_\_\_, 19\_\_\_, in Book \_\_\_, page \_\_\_ of the \_\_\_ Records of said County and State, and any renewals and extensions thereof, and all Borrower's right, title, and interest in and to said Lease, covering the following real estate:" (To be inserted just before the legal description.)

This additional covenant will be inserted in the mortgage:

Borrower will pay when due all rents and any and all other charges required by said Lease, will comply with all other requirements of said Lease, and will not surrender or relinquish without the Government's written consent, any of the Borrower's right, title or interest in or to said leasehold estate or under said Lease while this instrument remains in effect.

(e) *State supplements.* Each State will supplement this section to provide instructions on forms to be completed and other requirements to be met in order to obtain the required security. In each State where loans will be made

to Indians holding title to land in trust or restricted status, FmHA or its successor agency under Public Law 103-354 and BIA will decide on a way to exchange necessary information, and the procedure to be followed will be set out in a State supplement.

(f) *Special security requirements.* When SW loans are made to eligible entities that consist of members, stockholders, partners or joint operators who are presently indebted for an SW loan(s) as individual(s) or when SW loans are made to eligible individuals, who are members, stockholders, partners or joint operators of an entity which is presently indebted for an SW loan(s), security must consist of:

(1) Chattel and/or real estate security that is separate and identifiable from the security pledged to FmHA or its successor agency under Public Law 103-354 for any other farmer program insured or guaranteed loans.

(2) Different lien positions on real estate are considered separate and identifiable collateral.

(3) The outstanding amount of loans made may not exceed the value of the collateral used.

(g) *Same security.* Except as provided in paragraph (f) of this section, when an SW loan (insured or guaranteed) is made to a borrower who has other FmHA or its successor agency under Public Law 103-354 loans, the same real estate collateral may secure more than one loan so long as the outstanding loan amount does not exceed the total value of the security.

[53 FR 35706, Sept. 15, 1988, as amended at 57 FR 18678, 18679, Apr. 30, 1992; 59 FR 22962, May 4, 1994; 59 FR 25801, May 18, 1994]

§§ 1943.70–1943.72 [Reserved]

§ 1943.73 General provisions.

(a) *Flood and mudslide hazard areas.* Flood and mudslide hazards will be evaluated whenever the farm to be financed is located in special flood or mudslide prone areas as designated by the Federal Emergency Management Administration (FEMA). Subpart B of part 1806 of this chapter (FmHA instruction 426.2) as well as subpart G of part 1940 of this chapter will be complied with when loan funds are used to