

USDA Says “Flex” Leases To Be Treated As Cash Leases

- by Roger McEowen

October 22, 2008

Along with the increase in land values in recent years, and the associated increase in cash rent amounts, there has also been an increased use of “flex” leases – leases where the rent amount fluctuates based on yield and/or price. That type of lease raises a question as to how USDA would view the lease – is it a cash lease, or is it a crop-share lease? The question is important because any government payments (direct and counter-cyclical payments) associated with the property have to be split in accordance with the crop-share (if that’s what the lease is) or belong entirely to the tenant (if the lease is a cash lease).

Under existing USDA regulations, a lease is a “cash lease” if it provides for only a guaranteed sum certain cash payment, or a fixed quantity of the crop (for example, cash, pounds, or bushels per acre).” All other types of leases are share leases. In April 2007, FSA issued a Notice stating that if any portion of the rental payment is based on gross revenue, the lease is a share lease. However, according to FSA, if a flex or variable lease pegs rental payments to a set amount of production based on future market value that is *not* associated with the farm’s specific production, it’s a cash lease.

Under the new rule to come soon, flexible leases will be considered cash leases, even if the bonus calculation uses specific farm production figures (rather than county averages). The interpretive change is to be effective for the 2009-2012 crop years. The new regulation is to be out by the end of 2008, or shortly thereafter, and is to provide that a lease that provides for the greater of the guaranteed amount or share of the crop or crop proceeds, shall be considered a cash lease if the lease provides for a guaranteed amount and a share of the crop."

Thus, it looks like how the landowner and tenant figure any “bonus” (the “flex” amount) is up to them and will not affect how FSA categorizes the flexible lease – the lease will remain a cash lease.

We’ll have to wait to see how the actual language of the new regulation reads. The details could be different. *73 Fed. Reg. No. 126, pp. 36,839-36,840.*