

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

JERRY DIBBERN,  
VERNA DIBBERN,

DEBTORS

CASE NO. BK84-1202

Hearing on Federal Land Bank's Motion to Prohibit Use of Collateral was held on July 9, 1985, with William Hadley appearing for movant Federal Land Bank and Norman Wright appearing for Debtors-in-Possession. Having reviewed the evidence presented at trial, this Court now enters the following Findings of Fact, Conclusions of Law, and Orders and Memorandum.

FINDINGS OF FACT

1. The Debtors-in-Possession are farmers operating 860 acres of farm land in Hall County, Nebraska, 400 acres of which are leased from others and are not subject to this motion. The land owned by Debtors-in-Possession is gravity irrigated and during the 1985 crop season is planted in corn.

2. In addition to the farming operation Debtors-in-Possession have cattle feeding operations in which they feed cattle owned by others.

3. At the beginning of the hearing the parties stipulated to the following facts, which the court accepts as correct for this hearing:

a) On August 24, 1979, the Debtors-in-Possession borrowed \$526,700 from the Federal Land Bank, secured by a mortgage on 160 acres, which land shall be referred to as Tract 1. The mortgage was properly recorded and is a perfected first lien on Tract 1.

b) On May 19, 1980, the Debtors-in-Possession borrowed \$602,600 from the Federal Land Bank, secured by a mortgage on 300 acres, which land shall be referred to as Tract 2. The mortgage was properly recorded and is a perfected first lien on Tract 2.

c) The Petition for Relief under Chapter 11 of the Bankruptcy Code was filed June 19, 1984.

d) On the date the Petition was filed the debt owed to the Federal Land Bank on Tract 1 was \$623,769.55 with interest accruing at \$235.19 per day. The debt on Tract 2 was \$646,420.02 with interest accruing at \$210.17 per day.

e) Accrual of interest is subject to Section 506 of the Code.

f) Since the filing date, June 19, 1984, Debtors-in-Possession have used the land and made no payments to Federal Land Bank.

g) Debtors-in-Possession have offered Federal Land Bank \$100 per acre cash rent or \$46,000, the agreed upon equivalent of fair market value cash rent as adequate protection for the creditor's security.

h) The Federal Land Bank Exhibits 1 and 2, consisting of Proofs of Claims with copies of the Promissory Notes and Real Estate Mortgages attached may be admitted without objection.

4. Testimony of Mr. Darrell Smith, a qualified appraiser, was presented by the Federal Land Bank concerning the land values as of June 19, 1984, the Petition date and as of date of hearing. In addition, Mr. Smith gave his opinion that during the twelve-month period since the Petition was filed, the land in question had declined in value 2% per month and he believed such decline would continue at the same rate through the 1985 growing season and through November of 1985.

Mr. Smith's appraisal of the land values at date of filing and date of hearing was:

	<u>Date of Filing</u>	<u>Date of Hearing</u>
Tract 1	\$640,200	\$524,342
Tract 2	\$510,510	\$418,132

Jerry Dibbern, one of the Debtors-in-Possession, testified that on the date of filing the total value of both parcels was \$828,000, as shown on the schedules included with the Petition for Relief.

Mr. Frank Frost, a real estate appraiser, testified on behalf of Debtors-in-Possession that although he agreed with Mr. Smith that most investors are sitting back and waiting for land prices to bottom out, he felt that land prices would not continue to decline over the next few months. His conclusion was that decline in land values had ceased.



The evidence of the Federal Land Bank concerning the value of the land on date of filing, the decline in value since that date, and the anticipated decline in value through this crop year is more persuasive than the evidence presented by the Debtor-in-Possession.

5. On the date of filing, June 19, 1984, the value of Tract 1 was \$640,000, the Federal Land Bank debt was \$623,769.55. On the date of filing the value of Tract 2 was \$510,510 and the debt was \$646,420.02. On the day of the hearing the value of Tract 1 was \$524,342 and the value of Tract 2 was \$418,312. The value of the Federal Land Bank collateral declined from June 1984 to June 1985.

6. The decline in value of the Federal Land Bank's interest in Tract 1 is \$99,427, the difference between the debt on date of filing and the land value on date of hearing. The debt on date of filing was \$623,769.55 and the land value on the date of hearing was \$524,342. Since the Federal Land Bank was undersecured on Tract 2 on the date of filing, the interest which the Federal Land Bank has a right to be protected is the difference between its maximum allowable secured claim (which is equal to the land value for Tract 2 on date of filing), \$510,510, and the land value on date of hearing \$418,132. This decline in value is \$92,368.

7. The total protectable decline in value from date of filing is \$191,805.

8. Evidence presented by the Federal Land Bank that the value of the collateral will continue to decline during 1985 is more convincing than contrary evidence presented by Debtors-in-Possession. The Court finds that the value of the collateral will continue to decline during the 1985 crop year.

#### CONCLUSIONS OF LAW

1. The interest of the Federal Land Bank in the collateral is not adequately protected.

2. The Debtors-in-Possession should be prohibited from using the collateral until they provide the Federal Land Bank with one or more forms of adequate protection as provided by 11 U.S.C. §361 in an amount equivalent to the decline in value of the collateral, or \$191,805.

MEMORANDUM

This matter comes before the Court on a motion by the secured creditor, Federal Land Bank, for an order prohibiting or conditioning the use of collateral pursuant to 11 U.S.C. §363(e). The Federal Land Bank has established that it has validly perfected mortgages on the tracts in question. It has further established that the value of its collateral has declined since the date of filing and will continue to decline.

The Debtor-in-Possession has cited three cases for the proposition that a payment of market rate cash rent is adequate protection for the creditor in this case. The cited cases are In Re Rowe, 43 B.R. 157 (E.D. Mo. 1984), In Re Rolanco, Inc., 43 B.R. 153 (E.D. Mo. 1984) and In Re Keller, 45 B.R. 469 (N.D. Iowa 1984). The cited cases were decided on a motion for relief from automatic stay under 11 U.S.C. §362 and in each the Court found that the value of the collateral had not declined since the date of filing. Based upon such factual findings, the Court, at least in one case, In Re Rolanco, Inc., 43 B.R. 153 at 156 (E.D. Mo. 1984), found that the creditor was entitled to compensation equal to the rental value of the land in question. The Debtors-in-Possession have offered the rental value of the land as "adequate protection" of the interest of Federal Land Bank.

Since in this case the value of the collateral has declined and will continue to decline, the cases cited by the Debtors-in-Possession are not applicable.

Cases which are applicable are In Re Murel Holding Corp., 75 F.2d 941 (2d Cir. 1935) and In Re Martin, 761 F.2d 472 (8th Cir. 1985).

In Murel, Judge Hand explained that "adequate protection" must be completely compensatory.

In Martin, the Eighth Circuit interpreted the meaning of adequate protection on a motion by Debtors-in-Possession to use cash collateral and provide the creditor a first lien on a future crop. The Court cited with approval the statement in In Re American Mariner Industries, Inc., 734 F.2d 426, 435 (9th Cir. 1984) that a debtor "should as nearly as possible under the circumstances of the case provide the creditor with the value of his bargained for rights."

To be fully compensatory as Murel requires and to give the creditor the value of his bargain, as stated in Martin, the debtor must provide as "adequate protection" value which is equivalent to the decline in value of the collateral.



The Debtors-in-Possession's offer of \$46,000 is not equivalent to the decline in value of the collateral of \$191,805. Therefore the secured creditor has not been offered adequate protection.

For the foregoing reasons, this Court sustains the motion of the Federal Land Bank and prohibits the further use of collateral by Debtors-in-Possession.

DATED: July 23, 1975

BY THE COURT:

Donald J. Mahoney  
U.S. Bankruptcy Judge

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