THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY C. PIGFORD, *et al.*, Plaintiffs, v. TOM VILSACK, Secretary, United States Department of Agriculture, Defendant.	Civil Action No. 97-1978 (PLF)

CECIL BREWINGTON, *et al.*, Plaintiffs, v. TOM VILSACK, Secretary, United States Department of Agriculture, Defendant.	Civil Action No. 98-1693 (PLF)

MONITOR'S FINAL REPORT
ON GOOD FAITH IMPLEMENTATION OF THE CONSENT DECREE AND RECOMMENDATION FOR STATUS CONFERENCE

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I. INTRODUCTION

This is the Monitor's eleventh and final report on the good faith implementation of the *Pigford* Consent Decree. The Court approved the Consent Decree in 1999 as a fair, adequate, and reasonable settlement of the claims brought by the plaintiffs, a class of African American farmers. As a result of the Consent Decree implementation process, the following cumulative milestones were reached, as of December 31, 2011:

a. Approximately 22,721 claimants were found eligible to participate in the claims process.[1]

b. Approximately 22,552 claimants chose to resolve their claims through Track A. Approximately 15,645 (69 percent) prevailed in the Track A claims process.[2]

c. Approximately 169 claimants chose to resolve their claims through Track B. Approximately 104 (62 percent) prevailed in the Track B claims process[3] or settled their Track B claims and received a cash payment from the Government.

d. Approximately 5,848 claims were the subject of a petition for reexamination of a decision by the Facilitator (eligibility), Adjudicator (Track A), or Arbitrator (Track B). The Monitor directed reexamination of approximately 2,941 (50 percent) of the claims.

e. The Government provided a total of approximately $1.06 billion ($1,058,577,198) in cash relief, estimated tax payments, and debt relief to prevailing claimants (Track A and Track B).

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[1] This number includes claimants who filed claim packages on or before the October 12, 1999 deadline and claimants who received permission from the Arbitrator to file a "late claim" after the October 12, 1999 claims filing deadline. The 22,721 eligible claimants include those found eligible by the Facilitator in initial screening decisions and those found eligible by the Facilitator on reexamination of the eligibility screening decision.

[2] This number includes claimants who initially elected Track B, but who switched to Track A with the consent of the Government. The 15,645 claims approved by the Adjudicator as of the end of 2011 include both initial Adjudicator decisions and Adjudicator decisions on reexamination.

[3] This number includes both initial Arbitrator decisions and Arbitrator decisions on reexamination. A petition for Monitor review was filed in 2012 for one of the prevailing Track B claims. An additional 41 claimants who initially elected Track B prevailed in the Track A claims process after they switched to Track A with the consent of the Government. As of the end of 2011, there was one pending claim in which the Government agreed that a claimant who initially elected Track B could switch to Track A. As of the end of 2011, the claimant's Track A claim remained pending a final Track A decision. The Adjudicator issued a decision in this claim in 2012.

A. Background

The Consent Decree arose out of a complaint filed on August 28, 1997, by plaintiffs Timothy Pigford of North Carolina, Lloyd Shafer of Mississippi, and George Hall of Alabama. Plaintiffs alleged in their complaint that the United States Department of Agriculture (USDA) discriminated against them on the basis of race when they sought to apply for farm program loans, loan servicing, and farm program benefits. Plaintiffs alleged that when they complained of this discrimination, USDA: (1) avoided processing and resolving their complaints by stretching the review process out over many years; (2) conducted meaningless or "ghost" investigations; or (3) failed to take any action to investigate and resolve their complaints.[4]

In their complaint, plaintiffs cited a report issued by USDA's Office of Inspector General (OIG) in February 1997. The report stated that USDA's discrimination complaint system was at a "near standstill" and lacked integrity, direction, and accountability.[5] The complaint also cited a report issued by a USDA Civil Rights Action Team (CRAT) in February 1997, which summarized findings from a series of "listening sessions" held across the country.[6] Farmers who attended the listening sessions voiced concerns that black farmers were not treated fairly by county Farm Service Agency (FSA) officials and that a pattern of discrimination had caused

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[4] Plaintiffs amended their complaint to add additional named plaintiffs. The Seventh Amended Complaint, filed on October 26, 1998, contained allegations regarding twelve individuals who sought to apply for loans, loan servicing, and disaster assistance.

[5] United States Department of Agriculture, Office of Inspector General, *Report for the Secretary on Civil Rights Issues - Phase I* (Feb. 27, 1997).

[6] United States Department of Agriculture, Civil Rights Action Team, *Civil Rights at the United States Department of Agriculture: A Report by the Civil Rights Action Team* (Feb. 1997) (hereinafter "CRAT Report"). The Civil Rights Action Team was a team of USDA leaders appointed by Secretary of Agriculture Dan Glickman. In January 1997, the team sponsored twelve "listening sessions" in eleven locations across the country. Sessions were held in Albany, GA; New Orleans, LA; Memphis, TN; Halifax, NC; Tulsa, OK; Brownsville, TX; Window Rock, AZ; Salinas, CA; Woodland, CA; Belzoni, MS, and Washington D.C. The listening panels included the Secretary or Deputy Secretary of Agriculture, CRAT members, members of Congress, and members of the State Food and Agriculture Council. CRAT Report, at 3, 93-94.

African American farmers to lose their farms.[7] Farmers also described a complaints processing system which, "if anything, often makes matters worse."[8] The CRAT report concluded that USDA's process for resolving complaints of discrimination had failed.[9]

Finding common questions of law and fact regarding USDA's obligation to process and investigate complaints of discrimination, on October 9, 1998, the Court certified a class for purposes of determining USDA's liability.[10] On January 5, 1999, the Court preliminarily approved a proposed Consent Decree settlement the parties had submitted.[11] After notice of the settlement, a fairness hearing on March 2, 1999, the receipt of written comments, and the submission of a revised proposed Consent Decree, the Court approved the proposed Decree as a fair and efficient means of resolving class members' discrimination complaints. The Court of

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[7] CRAT Report, at 6-8, 14-16, 93. The CRAT Report cited the 1920 Census of Agriculture and noted that the number of African American farms had fallen dramatically from 1920 to 1992. CRAT Report, at 14. According to the 1920 Census of Agriculture, there were over 920,000 African American farm operators, including over 230,000 farm owners, located primarily in the southern states. See Fourteenth Census of the United States Taken in the Year 1920, Volume V, Agriculture, 189, 293, available at: http://www.agcensus.usda.gov/Publications/Historical_Publications/1920/Farm_Statistics_By_Color_and_Tenure.pdf and http://www.agcensus.usda.gov/Publications/Historical_Publications/1920/Farm_Statistics_By_Race_Nativity_Sex.pdf.

[8] CRAT Report, at 23-24. The CRAT was unable to gather historical data on program discrimination complaints at USDA because "record keeping on these matters has been virtually nonexistent." CRAT Report, at 24.

[9] CRAT Report, at 30-31.

[10] *Pigford v. Glickman*, 182 F.R.D. 341; 1998 U.S. Dist. LEXIS 16299 (D.D.C. 1998). On January 5, 1999, the Court vacated this order and recertified the class under Fed. R. Civ. P. 23(b)(3). The Court approved a revised definition of the class on April 14, 1999. *Pigford v. Glickman*, 185 F.R.D. 82, 1999 U.S. Dist. LEXIS 5220 (D.D.C. 1999), *aff'd* 206 F.3d 1212 (D.C. Cir. 2000). Appendix 1 contains a summary of the Court's Orders regarding class certification and approval of the Consent Decree. Significant Court Orders are available on the Monitor's web site. In early April 2012, the Monitor's web site will be available at http://www.dcd.uscourts.gov/pigfordmonitor/.

[11] *See Pigford v. Glickman*, 185 F.R.D. 82; 1999 U.S Dist. LEXIS 5220 (D.D.C. 1999), *aff'd* 206 F.3d 1212 (D.C. Cir. 2000).

Appeals affirmed this decision, characterizing the Consent Decree as "an indisputably fair and reasonable resolution of the class complaint."[12]

B. Summary of Relief Provided

From 1999 through 2011, the parties and the neutrals—the Facilitator,[13] the Adjudicator,[14] and the Arbitrator[15]—have been actively engaged in implementing the Consent Decree. Table 1 sets forth the cumulative amount of cash payments, tax relief, and debt relief the Government has provided to prevailing claimants, as of December 31, 2011.[16]

[12] *Pigford v. Glickman*, 206 F.3d 1212, 1219 (D.C. Cir. 2000). The primary contention on appeal was that paragraphs 19 and 21 of the Consent Decree permitted USDA to withdraw from the Consent Decree, leaving class members with no remedy. The Court of Appeals found the challenged provisions of paragraphs 19 and 21 did no more than: (1) assign to the class a risk it would have borne in any event and (2) limit the mode of enforcing the decree in the event of default.

[13] The Facilitator is Epiq Systems, formerly known as Poorman-Douglas Corporation. *See* Consent Decree, paragraph 1(i).

[14] The Chief Adjudicator is Lester Levy of JAMS, Inc., formerly known as JAMS-Endispute, Inc.

[15] The Chief Arbitrator is Michael K. Lewis of JAMS, formerly of ADR Associates. See Consent Decree, paragraph 1(b). On December 20, 1999, the Court delegated to Michael Lewis the additional responsibility of deciding requests for permission to file a late claim under paragraph 5(g) of the Consent Decree.

[16] Appendix 2 reports the cumulative amount of cash relief, debt forgiveness, and estimated tax relief provided to claimants by state of residence at the time they prevailed in claims process. The statistics in Appendix 2 report cash relief paid to claimants as of the end of 2011 and debt forgiveness provided by USDA to claimants as of the end of 2011. Appendix 2 also reports estimated tax deposits made on behalf of prevailing Track A credit claimants as of the end of 2011. Tax deposits are estimated due to confidentiality of Internal Revenue Service (IRS) tax account data.

Table 1: **Statistical Report on Total Track A and Track B Monetary Relief**[17]	
Statistical Report as of:	**December 31, 2011**
A. Total Amount of Cash Relief Paid for Track A Claims (Credit Claims and Non-Credit Claims)	$771,706,000
B. Total Amount of Cash Relief Paid for Track B Claims (Settlements and Damage Awards)	$35,611,830
C. Total Payments Due to IRS as Tax Relief for Track A Credit Claims (25% of $50,000 Cash Relief and 25% of Principal Amount of Track A Debt Relief)	$200,220,793
D. Total Debt Forgiveness for Track A Claims (Principal and Interest)	$43,474,995
E. Total Debt Forgiveness for Track B Claims (Principal and Interest)	$7,563,580
F. Total Track A and Track B Monetary Relief	$1,058,577,198

C. Good Faith Implementation and Final Report Summary

Both parties—USDA, and the plaintiffs through Class Counsel[18]—have acted in good faith to address and resolve many significant issues that have arisen in implementing the Consent Decree. This report summarizes the cumulative results of the parties' and neutrals' efforts from April 14, 1999, through December 31, 2011. Section II of this report summarizes the Monitor's responsibilities under paragraph 12 of the Consent Decree, including reports to the Court and the parties, resolution of problems brought to the Monitor's attention during the implementation process, decisions on petitions for reexamination of claims, and the operation of a toll-free line for class members. Section III reviews the process for filing a claim, including Facilitator eligibility screening decisions and Arbitrator decisions on requests to file a late claim. Section IV

[17] Table 1 statistics are provided by the Facilitator and USDA for cumulative relief provided to claimants as of the end of 2011. Numbers are rounded to the nearest dollar.

[18] Class Counsel is defined in paragraph 1(e) of the Consent Decree. On December 20, 2000, the Court issued an Order amending, by reference, the Consent Decree to include J.L. Chestnut as Co-Lead Class Counsel. On June 19, 2006, the Court approved a motion to substitute David Frantz as Co-Lead Counsel after Alexander J. Pires withdrew from the case. On January 9, 2009, the Court approved a motion to substitute Rose Sanders as Class Counsel and Co-Lead Counsel after J.L. Chestnut passed away.

reports on claimants' election of Track A or Track B of the Consent Decree claims process. Section V contains discusses USDA's implementation of the freeze on accelerations, foreclosures, and sale of inventory during the claims process. Section VI provides data and descriptions of Track A claims, including the results of the Track A claims process. Section VII provides similar data and descriptions for Track B claims. Sections VIII (cash relief), IX (debt relief), X (tax relief), and XI (injunctive relief) report on the relief provided to prevailing claimants. Section XII reports on the good faith implementation of the Consent Decree. Section XII includes a summary of remaining implementation issues. In Section XIII, the Monitor recommends the Court schedule a status conference in thirty days to review progress on the remaining tasks necessary to complete the implementation and wind down of the Consent Decree.

II. MONITOR RESPONSIBILITIES

Paragraph 12 of the Consent Decree sets forth the duties and responsibilities of an independent Monitor. The Monitor was appointed on January 4, 2000, and has served continuously since that date.[19] Paragraph 12(b) requires the Monitor to:

> 1. Make periodic written reports on the good faith implementation of the Consent Decree;
>
> 2. Attempt to resolve any problems that any class member may have with respect to any aspect of the Consent Decree;
>
> 3. Direct the Facilitator, Adjudicator, or Arbitrator to reexamine a claim where the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice; and

[19] The Monitor's appointment became effective March 1, 2000. Under the Consent Decree, the Monitor was to remain in existence for a period of five years, through March 1, 2005. Consent Decree, ¶ 12(a). The Monitor's appointment was extended through Stipulation and Orders. Under the terms of a January 10, 2012 Stipulation and Order, the Monitor's appointment expires on March 31, 2012.

> 4. Be available to class members and the public through a toll-free telephone number in order to facilitate the lodging of any Consent Decree complaints and to expedite their resolution.

To fulfill these duties, the Monitor worked closely with class members, the Court, Class Counsel, counsel for USDA, and the Facilitator, Adjudicator, and Arbitrator.

A. Reporting

1. Reporting to the Secretary of Agriculture

Paragraph 12(a) of the Consent Decree required the Monitor to report directly to the Secretary of Agriculture. During the twelve years of Consent Decree implementation, the Monitor met with Secretaries Dan Glickman, Ann M. Veneman, Mike Johanns, Edward Schafer, and Tom Vilsack. The Monitor also held frequent meetings with attorneys in USDA's Office of General Counsel. These meetings were important and helped to resolve significant Consent Decree problems and implementation issues raised by class members.

2. Written Reports

Paragraph 12(b)(i), as modified by a Stipulation and Order filed March 23, 2003, required the Monitor to report to the Court, the Secretary of Agriculture, Class Counsel, and USDA's counsel regarding the good faith implementation of the Consent Decree during each twelve month period, upon the request of the Court or the parties, or as the Monitor deems necessary.

The Monitor filed ten prior reports on the good faith implementation of the Consent Decree. The Monitor also filed more than twenty-five other reports on specific issues, as directed by the Court. Report topics included: (1) Class Counsel's compliance with Court orders regarding petition registers; (2) information concerning petitions filed after the deadline for petitions established in a July 14, 2000 Stipulation and Order; (3) amended Facilitator and Adjudicator decisions; and (4) USDA's implementation of debt relief and the tax implications of debt relief. All of the Monitor's reports are posted on the Monitor's website. This report is

submitted to fulfill the Monitor's obligation to report on the good faith implementation of the Consent Decree during calendar year 2011.

B. Resolving Any Problems

Paragraph 12(b)(ii) of the Consent Decree required the Monitor to attempt to resolve any problems that any class member may have with any aspect of the Consent Decree. From the time of the Monitor's appointment in January 2000 through 2011, class members have contacted the Monitor with problems and concerns.

1. Monitor Outreach to Class Members

To fulfill the Monitor's paragraph 12(b)(ii) responsibilities, the Monitor took steps shortly after her appointment to inform class members of the ways in which the Monitor's office could be contacted. The Monitor and attorneys from the Monitor's Office met in person with many class members. The Monitor's Office attended over seventy meetings sponsored by farm organizations and/or by USDA. At these meetings, the Monitor and/or an attorney from the Monitor's Office presented information about the Consent Decree and met individually with claimants to address concerns. The meetings took place in Alabama, Arkansas, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Washington D.C.

2. Monitor Efforts to Resolve Problems

The Monitor worked regularly with the parties and the other neutrals to address class member problems and concerns. The Monitor was in regular contact with Class Counsel and with counsel for USDA, and the Monitor often learned of class member problems and concerns through counsel. The Court also referred problems to the Monitor for investigation and

resolution.[20] Throughout the implementation process, the Monitor, the Facilitator, the Adjudicator, the Arbitrator, Class Counsel, the Department of Justice, and USDA's Office of General Counsel met in person at "Roundtable" meetings in Washington D.C. Many implementation issues were resolved through negotiated agreements, leading to Stipulations and Orders concerning Consent Decree provisions. Other problems were resolved through *ex parte* conversations and informal suggestions to the parties and the neutrals, an authority granted to the Monitor in the Court's Order of Reference.[21] Although the Consent Decree authorized the Monitor to file a report with the parties' counsel if the Monitor was unable to resolve a problem brought to the Monitor's attention, [22] the Monitor was able to resolve problems by working with the parties and did not formally file any paragraph 12(c) reports.

3. Problems Addressed in 2011

During 2011, the Monitor worked to review and resolve issues concerning the appropriate debt relief for prevailing class members who were entitled to *Pigford* debt relief. The Monitor also worked with the parties to address issues concerning payments for non-credit claims, problems with payments in estate claims, and problems related to tax reporting and delays in the establishment and funding of tax accounts for prevailing claimants. These problems are addressed more fully in later sections of this report.

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[20] A summary of the Court's Orders referring problems to the Monitor is provided in Appendix 3. The Court's Orders are available on the Monitor's web site. In early April 2012, the Monitor's web site will be available at http://www.dcd.uscourts.gov/pigfordmonitor/.

[21] Paragraph 1 of the Order of Reference authorized *ex parte* conversations with the Court. Paragraph 2 authorized *ex parte* conversations with the parties and with the Facilitator, Adjudicator, and Arbitrator on matters affecting the discharge of the Monitor's duties and the implementation of the Consent Decree. Paragraph 3 authorized the Monitor to make informal suggestions to the parties in whatever form the Monitor deemed appropriate in order to facilitate and aid implementation of the Consent Decree and compliance with Orders of the Court.

[22] Under paragraph 12(c) of the Consent Decree, if the Monitor was unable within thirty days to resolve a problem brought to the Monitor's attention, the Monitor could file a report with the parties' counsel who could, in turn, seek enforcement of the Consent Decree by filing a notice of violation with the Court.

C. Directing Reexamination of Claims

Paragraph 12(b)(iii) of the Consent Decree required the Monitor to direct the Facilitator, Adjudicator, or Arbitrator to reexamine a claim where a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim that has resulted or is likely to result in a fundamental miscarriage of justice. During 2011, the Monitor completed review of the last Track A petition for reexamination that was routed to the Monitor for review.[23] Many details with respect to how the Monitor review process would be implemented were addressed by the parties and the Court during the implementation process.

1. Petition for Monitor Review Process

On April 4, 2000, the Court issued an Order of Reference, which provided structure to the petition for Monitor review process.[24] Among other things, the Order provided that claimants or the Government may file petitions for Monitor review by sending the Monitor a letter that explains why the petitioner believes that a decision by the Facilitator, Adjudicator, or Arbitrator is in error. With respect to Track A claims, the Order permitted claimants or the government to submit additional documents to explain or establish that an error has occurred. The non-petitioning party could file a petition response that also included additional materials. The Monitor could consider the additional materials as part of the record for review when the materials addressed a potential flaw or mistake in the claims process that in the Monitor's opinion would result in a fundamental miscarriage of justice if left unaddressed. The Order

[23] On January 12, 2012, USDA filed a petition for reexamination of a Track B Arbitrator decision. The Monitor issued a decision on the petition on March 30, 2012. There are no other pending petitions for Monitor review.

[24] A table of the Court's Orders regarding the petition process is provided in Appendix 4.

required the Monitor to send a written explanation of her decision to direct reexamination in each case. The Monitor's letter was to clearly specify any error(s) identified by the Monitor.

Subsequent Stipulations and Orders set deadlines for filing petitions for reexamination of Track A, Track B, and Facilitator eligibility screening decisions and specified the process for routing petitions for review. The Court also issued Orders requiring the Monitor to comply with the Second Amended Supplemental Privacy Act Protective Order, permitting the Monitor to consolidate petitions from the same Adjudicator or Arbitrator decision, and establishing a process for the Monitor to recuse herself from decision-making. The Monitor exercised the option to recuse herself in three cases.

2. Resources for Class Members on Petition Process

The Monitor prepared a number of documents for class members explaining the rules for petitioning for reexamination.[25] Monitor Updates, a Question and Answer Booklet, and a form for *pro se* claimants were among the documents provided. Many claimants filed petitions without the assistance of an attorney.

3. Claimant Petitions

Prior to July 14, 2000, there was no deadline for petitions for reexamination. A Stipulation and Order filed July 14, 2000 (the "Bastille Day Stipulation"), set a deadline of November 13, 2000, for claims decided prior to July 14, 2000 and a deadline of 120 days after the claim decision for claims decided after July 14, 2000. After the deadline had been established, Class Counsel reported to the Court that many hundreds of claimants who were

[25] A table summarizing the materials prepared for class members is provided in Appendix 5. Monitor Updates and other information for class members are available on the Monitor's web site. In early April 2012, the Monitor's web site will be available at http://www.dcd.uscourts.gov/pigfordmonitor/.

denied relief wished to petition, and Class Counsel lacked the resources to complete the petition process for all claimants within the November 13, 2000, deadline.

On November 8, 2000, the Court issued an Order permitting Class Counsel to comply with the deadline by filing a Petition Register, including a list of the names and claim numbers of all claimants who sought Class Counsel's assistance in petitioning for reexamination of their claims.[26] The Court's Order contemplated a process of submission of materials in support of the petitions, depending on the number of claimants listed, in conformance with the schedule contained in the Court's Order. Subsequent Court Orders extended the deadline for submission of materials or withdrawal of the petitions for the claimants whose names appeared on the Register. The Court directed the Monitor to file reports with the Court on Register filings, and imposed sanctions on Class Counsel for Class Counsel's inability to meet the deadlines initially imposed by the Court for Petition Register filings. As of September 15, 2001, Class Counsel had filed supporting materials or withdrawals on behalf of all individuals listed on the Petition Register.

4. USDA Petitions

USDA filed petitions for reexamination of Track A and Track B claims. Track A petitions were prepared by USDA's Office of General Counsel and staff from USDA's Farm Service Agency (FSA). Track B petitions were prepared by attorneys from the Department of Justice. In most cases, USDA sought reexamination of a decision to award a claimant relief. Some petitions did not seek reexamination of the merits, but sought reexamination of the relief

[26] Many more claimants sought to file petitions after the deadline for petitioning. Class Counsel sought permission for some 350 claimants to file after the deadline, based on factors unique to those claimants. The Court denied Class Counsel's motion. A table of the Court's Orders regarding claimant petitions is provided in Appendix 6.

awarded by the Adjudicator or Arbitrator. More information on the results of the petition process is provided below.

5. Monitor Petition Decisions

The Monitor began issuing decisions on petitions for reexamination in 2001. The Monitor issued 5,848 petition decisions as of the end of 2011. In each of the decisions issued by the Monitor, the claimant received a one-page cover letter explaining the result of the petition process and an attached Monitor decision letter directed to the Facilitator, Arbitrator, or Adjudicator.[27]

The petition process led to reexaminations of approximately fifty percent of the claims in which petitions were filed. Most reexaminations were granted in response to petitions from claimants who had initially been denied relief. Table 2 sets forth statistics for Monitor petitions and decisions directing reexamination.[28]

[27] The decision letter generally contained a description of the record, the decision at issue, the arguments and information presented in the petition and petition response, and the Monitor's analysis of whether the Consent Decree standard for reexamination had been met. In cases where supplemental information could be submitted in the petition or the petition response, the Monitor's decision contained an Appendix describing the supplemental information and the Monitor's analysis of whether the information should be admitted into the record. As required by the Court's November 7, 2000 Order and the Second Supplemental Privacy Act Protective Order, all Monitor decisions used alphabetical designations for individuals identified by claimants to satisfy the Consent Decree's similarly situated white farmer requirement.

[28] Appendix 7 contains cumulative year-by-year statistics on petitions for reexamination through the end of 2010.

Table 2: **Statistical Report on Petitions for Monitor Review**[29]	
Statistical Report as of:	**December 31, 2011**
Petitions for Monitor Review	
A. Total Number of Petitions for Monitor Review	5,848
1. Claimant Petitions	4,981
2. Government Petitions	867
Monitor Decisions	
B. Total Number of Petition Decisions Issued by Monitor	5,848
A. Total Number of Petitions Granted	2,941
1. Claimant Petitions Granted	2,809
2. Government Petitions Granted	132
B. Total Number of Petitions Denied	2,907
1. Claimant Petitions Denied	2,172
2. Government Petitions Denied	735

6. Requests for Reconsideration

As the Monitor began the process of deciding thousands of petitions, the parties and the Monitor recognized that unintentional or administrative errors could occur. After consulting with the parties, the Monitor adopted a Reconsideration Policy for Correction of Clerical and Administrative Errors that permitted the Monitor to issue an Amended Decision to correct mistakes such as an incorrect file number or address or typographical errors, such as an incorrect state name. The policy was posted on the Monitor's website, and claimants who wrote the Monitor requesting reconsideration were informed of the policy.

[29] Table 2 statistics are provided by the Facilitator. The Monitor's database reports three additional Monitor decisions for claims that are not currently included in the Facilitator's database of *Pigford* claims. In these three claims, the Monitor issued a decision on a petition for reexamination. After the Monitor issued the decision, the Facilitator changed the status of the claims to "ineligible" because the claimants were deemed ineligible to participate in the claims process. Claims classified as "ineligible" are not reported as *Pigford* claims in the Facilitator's database.

D. Monitor Toll-Free Line

Paragraph 12(b)(iv) of the Consent Decree required the Monitor to be available to class members and the public through a toll-free telephone number in order to facilitate the lodging of any Consent Decree complaints and to expedite their resolution. From January 1, 2011, through December 31, 2011, the Monitor's toll-free operators staffed a total of 4,763 calls. On average, Monitor operators staffed 9,954 incoming calls per year. Operators also made outgoing calls to class members to provide requested information or to arrange a time for a phone conference with an attorney from the Monitor's Office.

The Monitor contracted with Epiq Systems (formerly known as Poorman Douglas) to staff the Monitor's toll-free line. Epiq's operators received training from the Monitor and regular updates on case developments, including a list of responses for common questions. Operators had access to the Facilitator's claims processing database and could provide callers with information regarding the status of their claim or their request for permission to file a late claim. Operators also handled many practical administrative questions, such as change of address forms, necessary paperwork when claimants passed away, and contact information for Class Counsel.

Throughout the implementation period, callers raised substantive concerns regarding the Consent Decree. Concerns expressed in calls related to:

1. Class members who failed to file a claim prior to the October 12, 1999, claims filing deadline;

2. The standard required for granting a request for permission to file a late claim;

3. The low approval rate of late-claims requests;

4. Delays in the claims process and the impact of delays on claimants with outstanding USDA farm program debt;

5. The denial rate in Track A adjudications, when many believed that relief would be "virtually automatic";

6. The litigious nature of Track B arbitrations;

7. Whether the appropriate people were prevailing in the claims process;

8. The timeliness of Track A cash relief payments;

9. The amount of non-credit cash relief;

10. USDA's implementation of debt relief and whether claimants received the appropriate relief;

11. Tax relief payments and the establishment of tax accounts for claimants who prevailed on Track A credit claims; and

12. The availability of injunctive relief and problems obtaining new FSA loans.

Operators referred callers with more complicated questions to attorneys in the Monitor's Office. Attorneys in the Monitor's Office worked closely with Class Counsel and USDA to address and resolve individual issues in many cases. The Monitor was not able to resolve to the callers' satisfaction all problems and concerns brought to the Monitor's attention through the toll-free line. In each case, however, callers received information about the Consent Decree and the rules that applied to its implementation.

E. Monitor Office Administration and Staffing

Under paragraph 12(a) of the Consent Decree, USDA was responsible for payment of the Monitor's fees and expenses. The Court's April 4, 2000 Order of Reference directed the Monitor to submit proposed budgets to the Court. Upon Court approval of the Monitor's proposed budget, USDA deposited the amount of the budgeted funds in the Court Registry. The Monitor filed monthly invoices, which were paid only after expiration of a ten-day period in which the parties had an opportunity to review and object to the invoices. After each completed budget cycle, the Monitor prepared and filed a statement that detailed the amount of unspent funds in the reserve of the Court Registry.

The Monitor hired attorneys and administrative staff to assist in the implementation of the Consent Decree. Over the course of the Monitor's appointment, the Monitor engaged a total of eighty-eight employees and contract staff for the processes of reviewing petitions for reexamination and responding to claimant problems and concerns.

The sections of the report that follow provide background, implementation milestones, and significant implementation issues for each of the major aspects of the Consent Decree addressed by the parties and neutrals during the implementation process.

III. FILING A CLAIM

The Consent Decree established a claims process for individuals who were members of the class certified by the Court. Paragraph 2(a) of the Consent Decree defined members of the class as:

> All African American farmers who:
>
> 1. farmed, or attempted to farm, between January 1, 1981, and December 31, 1996;
>
> 2. applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA's response to that application; and
>
> 3. filed a discrimination complaint on or before July 1, 1997, regarding USDA's treatment of such farm credit or benefit application.

Paragraph 4 of the Consent Decree set forth the process for notifying class members of the Consent Decree and the claims process established under the Decree. Paragraphs 5 and 6 of the Consent Decree described the process for filing a claim and for determining class member eligibility to participate in the claims process.

A. Background

At the time the Consent Decree was approved, neither the parties nor the Court knew the exact number of eligible class members. There was no readily available list or database of African American farmers who farmed or attempted to farm between January 1, 1981, and December 31, 1996. To provide notice to the eligible class members, the Court approved a mass media advertising campaign focused on African Americans living in Alabama, Arkansas, California, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, and the District of Columbia.[30]

1. Claim Sheet and Election Forms

To participate in the claims process, class members were required to file a Claim Sheet and Election Form ("Claim Sheet").[31] Class Counsel conducted "filling-out-the-forms" (FOF) meetings to assist class members in completing the required claim forms. From January 1999 through mid-October 1999, Class Counsel and Of Counsel held 235 days of group FOF meetings at 146 scheduled locations in twenty states, the District of Columbia, and the Virgin Islands.[32]

2. Completed Claim Packages

The first completed claim package was filed with the Facilitator in January 1999. The Facilitator used a checklist to determine if a claim package was "complete." Claimants who filed incomplete claim packages were generally provided an opportunity to cure deficiencies, such as

[30] *See* Hearing before the House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, 108th Cong. (Nov. 14, 2004) (Testimony of Jeanne C. Finnegan, Ex. 3, Declaration of Jeanne C. Finegan, dated Feb. 19, 1999, describing notice program).

[31] A sample Claim Sheet and Election Form is provided in Appendix 8.

[32] *See* Hearing before the House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, 108th Cong. 1665 (Sept. 28, 2004) (Supplemental Testimony of Alexander J. Pires, Jr., describing Class Counsel and Of Counsel meetings).

a missing social security number, attorney signature, or other required information.[33] Claimants whose claim packages were rejected by the Facilitator could request reconsideration by the Facilitator.

3. Deadline for Timely Claims

The deadline for timely claim packages was 180 days from the date of the Court's approval of the Consent Decree. The Consent Decree was approved on April 14, 1999. The deadline for timely claims was October 12, 1999. The Facilitator determined timely filing based on the postmark of the claim package.

4. Late Claims

Many thousands of putative claimants sought to file a claim after the October 12, 1999, deadline. The Consent Decree provided a process for requesting permission to file a claim after the October 12, 1999, deadline. Paragraph 5(c) of the Consent Decree set a high standard for late claim requests. To participate in the claims process, putative claimants had to show that they failed to meet the October 12, 1999 deadline due to extraordinary circumstances beyond their control. As part of the late claims process, putative claimants received a form on which they could explain the circumstances that prevented them from filing a timely claim.[34] Court orders established a September 15, 2000, deadline for requests for permission to file a late claim and delegated the task of reviewing late claims requests to Michael Lewis, who also served as the

[33] *See* Stipulation and Order, filed October 29, 2002 (describing, as of 2002, the status of completed and deficient claim packages); Exhibit 1 to Monitor's Progress Report on Amended Adjudicator Decisions (Jan. 16, 2007) (letter from Facilitator describing claim form filing and deficiencies).

[34] The Arbitrator's November 14, 2001 Report on the Late-Claim Petition Process describes the two forms created for those seeking permission to file a late claim. This and other Arbitrator reports on the late claims process are available on the Monitor's web site. In early April 2012, the Monitor's web site will be available at http://www.dcd.uscourts.gov/pigfordmonitor/. Sample late claim forms are provided in Appendix 9.

Arbitrator. If a request to file a late claim was granted, the putative claimant received a blank Claim Sheet with a deadline for submitting a completed claim package.

5. Facilitator Eligibility Screening

The first step in the screening process required the Facilitator to screen claim packages for completeness. The Facilitator used a checklist to determine if claims were complete.[35]

The Facilitator screened all timely filed complete claim packages to determine if the claimants were eligible to participate in the claims process. The Facilitator also screened any complete claim packages filed by individuals who were granted permission by the Arbitrator to file a late claim. If the Facilitator rejected a claim as ineligible, the Consent Decree permitted the class member to petition for Monitor review of the Facilitator's screening decision.

B. Implementation Milestones

More people than the parties or the Court anticipated sought to file timely claims and requested permission to file a late claim. Screening of claims by the Facilitator began in 1999 and continued as late claims requests were granted.

Table 3 sets forth statistics on the number of people who filed timely requests for permission to file a late claim, the number of people whose requests were granted, and the number of people whose requests were denied.

[35] Appendix 10 summarizes Monitor Updates for class members on correcting defects to claim packages and on the eligibility screening process. The full text of these Monitor Updates is available on the Monitor's web site. In early April 2012, the Monitor's web site will be available at http://www.dcd.uscourts.gov/pigfordmonitor/.

Table 3: **Statistical Report on Requests for Permission to File a Late Claim**[36]	
Statistical Report as of:	**December 31, 2011**
A. Number of People Who Made Timely Requests for Permission to File a Late Claim	61,252
1. Number of People Granted Permission to File a Late Claim	2,585
2. Number of People Denied Permission to File a Late Claim	58,667
B. Number of People Granted Permission to File a Late Claim Who Filed A Completed Claim Package	1,905

Table 4 contains statistics on the results of the Facilitator's eligibility screening process for all claimants—both those who filed a timely claim package and those were granted permission to file a late claim. Facilitator eligibility screening for all claims was completed in 2011.

Table 4: **Statistical Report on Eligibility Screening**[37]	
Statistical Report as of:	**December 31, 2011**
A. Total Number of Claimants Who Filed Completed Claim Packages	23,472
1. Total Number of Claimants Found Eligible in Facilitator Screening	22,721
2. Total Number of Claimants Found Not Eligible in Facilitator Screening	751

[36] Table 3 statistics are provided by the Facilitator. Table 3 reports the number of individual people who filed timely affidavits or requests for permission to file a late claim. Prior reports from the Arbitrator and the Facilitator provided data on the number of timely affidavits, rather than the number of people who requested permission to file a late claim. The number of affidavits is greater than the number of people because some people filed more than one affidavit.

[37] Table 4 statistics are provided by the Facilitator and report the cumulative number of eligible claimants as of the end of 2011.

C. Significant Implementation Issues

Throughout the implementation period, class members and organizations representing class members expressed concerns that many people who otherwise met the class definition failed to sign up for the lawsuit because the advertising campaign described in paragraph 4 of the Consent Decree did not reach them. Class members also voiced concerns regarding the lack of notice of the deadline for requests to file a late claim and the low rate of approval of late claims requests. The parties, the neutrals, and the Court considered these concerns and addressed several other significant issues in implementing the eligibility and late claims provisions of the Consent Decree.

1. Notice

Class members expressed concern regarding a lack of notice of the claims process and the deadlines for filing a timely claim and for requesting permission to file a late claim. The Monitor responded to these concerns by informing the parties and the Court about these concerns and by providing information to class members about the deadlines.[38] Congress held hearings on the notice provided to class members,[39] and the Government Accountability Office issued a report on the status of timely claims and requests for permission to file a late claim.[40] In 2008, Congress

[38] A table of the Updates prepared by the Monitor to inform class members of the deadlines is provided in Appendix 11. The full text of these Monitor Updates is available on the Monitor's web site. In early April 2012, the Monitor's web site will be available at http://www.dcd.uscourts.gov/pigfordmonitor/.

[39] The Constitution Subcommittee of the United States House of Representatives' Judiciary Committee held two hearings during 2004 regarding the Consent Decree. On September 28, 2004, the Subcommittee convened a hearing entitled "Status of the Implementation of the *Pigford v. Glickman* Settlement." On November 18, 2004, the Subcommittee received additional testimony in a hearing entitled "'Notice Provision in the *Pigford v. Glickman* Consent Decree." For more information, see generally http://judiciary.house.gov/legacy/constitution.htm.

[40] In response to a request by members of Congress, the Government Accountability Office (GAO) issued a report on March 17, 2006, entitled "Pigford Settlement: The Role of the Court-Appointed Monitor." The report contains information gathered by GAO investigators on the implementation of the Consent Decree, including the number of claimants who filed timely claims and the number of claimants

passed and the President signed legislation authorizing a new cause of action for certain individuals who sought to file a claim and who did not receive a decision on the merits of their claim.[41]

2. Late Claims

The Court, the parties, and the neutrals devoted significant attention to the process for consideration of late claims requests under the *Pigford* Consent Decree. The Arbitrator filed reports with the Court describing the late claims review process in detail.[42] The Arbitrator reported that requests were granted for extraordinary circumstances such as the impact of Hurricane Floyd and in cases involving serious medical problems or the death of a putative claimant. On more than one occasion, individuals who were denied permission to file a late claim sought review by the Court. In 2010, the parties stipulated and the Court ordered that the Arbitrator's review of late claims requests was complete.[43] The Consent Decree claims process

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who requested permission to file a late claim. The report also describes the role of the Monitor in conducting outreach activities to class members and in reviewing timely filed claims in response to petitions for Monitor review. See GAO, "Pigford Settlement: The Role of the Court-Appointed Monitor," Enclosure III, at 24 (March 17, 2006), available at http://www.gao.gov/new.items/d06469r.pdf. The Monitor was not appointed until after the October 12, 1999 deadline to file a claim.

[41] *See* Food, Conservation and Energy Act of 2008, Public Law No. 110-246, § 14012 (2008). Cases filed under the 2008 legislation have been consolidated as *In re: Black Farmers Discrimination Litigation*, Misc. No. 08-0511 (PLF), in the United States District Court for the District of Columbia. The *In re Black Farmers* case is separate from the *Pigford* case. A class has been certified and a settlement approved by the Court in the *In re Black Farmers Litigation.* The Court's October 27, 2011 Order approving a settlement in the *In re Black Farmers Litigation* case is available on the Monitor's web site. In early April 2012, Monitor's web site will be available at http://www.dcd.uscourts.gov/pigfordmonitor/.

[42] These reports describe the categorization process used to review late claims requests, the Arbitrator's reconsideration policy for late claim denials, and the audit of late claim denials completed by the Facilitator and the Arbitrator. All of the Arbitrator's reports on the late claim process are available on the Monitor's web site.

[43] A table of Court Orders regarding late claims requests is provided in Appendix 12.

was completed as of the end of 2011 for all claimants who were granted permission to file a late claim.[44]

3. Eligibility Screening

The Facilitator's eligibility screening was the first step in evaluating class member claims. A total of 22,721 claimants who filed completed claim packages were found eligible to participate in the claims process, as of the end of 2011.

a. Claim Sheet Questions

The Facilitator screened completed claim packages by reviewing questions 1 through 3 on the Claim Sheet. Questions 1 and 2 asked if a claimant was an African American farmer who farmed or attempted to farm between January 1, 1981, and December 31, 1996, and who applied to USDA to participate in a federal farm program during that same time frame.[45] Question 3 asked whether a claimant had filed a complaint of discrimination against USDA between January 1, 1981 and July 1, 1997, concerning the treatment the claimant received in the application process. These three questions tracked paragraph 2(a) of the Consent Decree class membership definition. Question 3 also required claimants to provide written documentation or "proof" of their prior discrimination complaint. Check boxes 3A through 3D on page 2 of the Claim Sheet specified the type of documentation that would be accepted.[46]

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[44] Many people whose requests to file a late claim were denied felt that they did not understand the claims process and were disappointed with the result. During 2011, the Monitor continued to receive calls and letters from individuals whose late claim requests had been denied. Many of these putative claimants had questions about whether they could file a claim in the "new case." During 2011, the Monitor referred individuals to the attorneys representing the plaintiffs in the *In re Black Farmers* litigation if they had questions regarding the "new case."

[45] Appendix 13 sets forth the Consent Decree elements for class membership eligibility and the corresponding Claim Sheet questions reviewed by the Facilitator in screening.

[46] As described in the Claim Sheet, this documentation could be: (A) a copy of a discrimination complaint filed with USDA or a USDA document referencing the complaint; (B) a declaration by a person who is not a family member which states that the person has first-hand knowledge that the

b. Equitable Tolling

If a claimant indicated that he or she had not complained of USDA discrimination between January 1, 1981, and July 1, 1997, the Facilitator sent the claimant a Supplemental Information Form.[47] The Supplemental Information Form requested an explanation of why the claimant had not lodged a discrimination complaint. Pursuant to paragraph 6 of the Consent Decree, the Adjudicator reviewed the reasons a claimant provided regarding why they did not lodge a complaint between January 1, 1981, and July 1, 1997, to determine if the reasons were sufficient to "toll" or excuse the prior complaint requirement.[48] The Adjudicator found claimants to have satisfied the very high standard for "equitable tolling" in a total of thirty-five cases.

c. Finality of Facilitator Screening Decision

The Consent Decree does not expressly address the issue of whether the Facilitator is the final decisionmaker on a claimant's eligibility, subject only to a petition for Monitor review of the Facilitator's eligibility decision. In some cases, USDA presented information to the Adjudicator in Track A and to the Arbitrator in Track B that brought into question a claimant's

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claimant filed a discrimination complaint with USDA; (C) a copy of correspondence to a member of Congress, the White House, or a state, local, or federal official stating that the claimant had been discriminated against; or (D) a declaration by a person who is not a family member which states that the person has first-hand knowledge that the claimant was explicitly told by a USDA official that the official would investigate the claimant's oral complaint of discrimination. See Claim Sheet, question 3.

[47] A sample Supplemental Information Form is provided in Appendix 14.

[48] To meet the equitable tolling requirement, claimants must have demonstrated that: (1) extraordinary circumstances beyond their control prevented them from filing a discrimination complaint; (2) they were induced or tricked by USDA's misconduct into not filing a complaint; or (3) they attempted to actively pursue their judicial remedies by filing a pleading that had been found defective. Paragraph 6 required the Adjudicator to apply the rules for equitable tolling of claims against the Government set forth in a United States Supreme Court case, *Irwin v. United States [Department of Veterans Affairs]*, 498 U.S. 89 (1990). In *Irwin*, the Supreme Court refused to allow a discrimination complaint to be filed after the deadline, finding that the reason for missing the deadline (the claimant's attorney was out of the country on a trip abroad) was not "extraordinary" circumstances," but instead amounted to no more than "excusable neglect." *Irwin*, 498 U.S. at 96.

proof of eligibility.[49] The Court denied the motion of at least one claimant whose eligibility was challenged in this manner.[50]

USDA also presented questions to the Adjudicator and the Arbitrator regarding whether a claimant was precluded from filing a claim because a separate claim was filed by another person. These questions required the Consent Decree neutrals to consider whether, for example, a claim filed by a farming partnership precluded a separate claim by an individual member of the partnership. Questions were also raised regarding whether a claim brought by one spouse precluded a separate claim by the other spouse. The Consent Decree does not clearly define whether a "claimant" or "farmer" is a single individual, a husband and wife or other family members who farm together, or an entity, such as a partnership composed of two or more members. It is common for family members to farm both individually and together.

Given that the class period in this case spanned many years, it is not surprising that a single individual person could farm as an individual or sole proprietor in one year and as a member of a partnership in another year. In reviewing the issues raised in the petition process concerning eligibility and claim preclusion, the Monitor found no indication in the Consent Decree or any governing Court Orders that precluded each individual claimant who met all of the criteria for class membership from filing his or her own individual claim.

IV. ELECTION OF TRACK A OR TRACK B

Paragraph 5(d) of the Consent Decree required claimants to elect whether they wished to pursue their claim under Track A or Track B of the claims process.

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[49] For example, in some cases, USDA questioned a claimant's proof on the ground that the person named in the Declaration as the person to whom the claimant complained of discrimination was not a USDA official.

[50] A table summarizing the Court's orders regarding eligibility is provided in Appendix 15.

A. Background

The choice between Track A and Track B was significant for claimants.[51] Track A claims were reviewed by the Adjudicator under paragraph 9 of the Consent Decree. The Adjudicator applied a "substantial evidence" standard,[52] based upon documents submitted by the claimant and USDA. Claimants who prevailed on Track A credit claims received a cash award of $50,000, debt relief for qualifying USDA farm program loans, tax relief, and injunctive relief. Claimants who prevailed in Track A non-credit claims received a $3,000 cash award and injunctive relief.[53] Claimants who elected Track B were subject to different standards and were eligible to receive different relief. Track B claims were reviewed by the Arbitrator under paragraph 10 of the Consent Decree. The Arbitrator applied a "preponderance of the evidence" standard,[54] and claimants had the opportunity to present written direct testimony and exhibits prior to an eight-hour arbitration hearing. Claimants who prevailed in Track B were entitled to receive actual damages, debt relief on qualifying USDA farm program loans, and injunctive relief.

B. Implementation Milestones

The vast majority of eligible claimants, approximately ninety-nine percent of the total, elected to pursue their claims under Track A. Approximately one percent of eligible claimants elected Track B.

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[51] *Pigford*, 185 F.R.D. at 96,107 (noting choice has "enormous" significance and rejecting argument that class members should be permitted to proceed in Track A if they lose in Track B).

[52] The Consent Decree defines "substantial evidence" as such relevant evidence as appears in the record before the Adjudicator that a reasonable person might accept as adequate to support a conclusion after taking into account other evidence that fairly detracts from that conclusion. Consent Decree, ¶ 1(l).

[53] On February 7, 2001, the Court signed a Stipulation and Order setting $3,000 as the amount of non-credit cash relief.

[54] The Consent Decree defines "preponderance of the evidence" as such relevant evidence as is necessary to prove that something is more likely true than not true. Consent Decree, ¶ 1(j). This is a higher standard of proof than the "substantial evidence" standard used in Track A.

Table 5 sets forth the total number of Track A and Track B claims, as of December 31, 2011.

Table 5: **Statistical Report on Track A and Track B Claims**[55]		
Statistical Report as of:	**December 31, 2011**	
	Number	%
A. Total Number of Eligible Claimants	22,721	100
B. Number of Claims Resolved under Track A	22,552	> 99
C. Number of Claims Resolved under Track B	169	< 1

C. Significant Implementation Issues

Although the Consent Decree indicated that the election of Track A or Track B was irrevocable, while claims were pending in the claims process, the Government offered to resolve selected individual Track B claims by permitting the claimant the opportunity to switch from Track B to Track A. Some claimants accepted the Government's offer to switch tracks. On January 6, 2000, the Court granted a joint motion filed by the parties to permit a specific claimant to switch from Track A to Track B. As of the end of 2011, a total of sixty-eight claimants who initially elected Track B were permitted, with the consent of the Government, to switch tracks and to elect to bring their claim under Track A. Claimants who were permitted to switch tracks were provided an opportunity to file a Claim Sheet with responses to all of the questions required for evaluation of their claim under Track A.[56]

[55] Table 5 statistics are provided by the Facilitator, as of the end of 2011. The Facilitator and the Arbitrator used different methodologies for tracking the number of Track B claims. In this Table, the Facilitator's statistics are used.

[56] Claimants who elected Track B were not required to answer questions on the Claim Sheet relating to the factual allegations of their claim.

Not all claimants who received the Government's consent to switch from Track B to Track A prevailed in the claims process. Nine of the claimants who were permitted to switch tracks did not file a completed Track A claim package within the timeframe permitted. Of the fifty-nine claimants who filed completed Track A claim packages, forty-one claimants prevailed in the claims process and seventeen were denied relief. One claim remained pending as of the end of 2011.[57]

V. FREEZE ON ACCELERATION, FORCLOSURES AND SALE OF INVENTORY PROPERTY

Paragraph 7 of the Consent Decree provides certain interim administrative relief for claimants who have or who had USDA farm program debt secured by real property.

A. Background

Under paragraph 7 of the Consent Decree, once USDA was notified by the Facilitator that a claimant had submitted a claim and had been found eligible to participate in the claims process, USDA was barred from taking certain actions while the claim remained pending in the claims process. USDA could not accelerate a claimant's farm program loans while the claimant's claim was pending. USDA also could not foreclose on any real property that secured a claimant's farm program loans while a claim was pending. Finally, USDA could not take any further action to dispose of inventory property formerly owned by the claimant while a claim was pending.[58]

[57] The Adjudicator issued a decision on this claim in 2012 denying the claimant relief.

[58] When USDA acquires title to a farmer's land, that land becomes known as "inventory property." USDA regulations set forth rules regarding inventory property. USDA could obtain title to inventory property through a voluntary conveyance, foreclosure, or as part of a loan servicing action.

B. Implementation Milestones

No statistics are readily available to determine the number of claimants whose debts or real property were affected by the paragraph 7 freeze on acceleration, foreclosure and sale of inventory property. USDA was allowed to take other types of actions to collect on outstanding loans during the claims process, and many claimants contacted the Monitor with concerns regarding their continuing obligation to repay loans that were the subject of a pending claim. USDA continued to demand payment on outstanding farm program loans and continued to use administrative or Treasury offsets to take and apply to farm loan debt payments claimants would otherwise have received from the government (such as Social Security checks, tax refunds, and other farm payments).[59]

If a claimant prevailed in the claims process and the claimant's outstanding farm program loans qualified for *Pigford* debt relief, certain payments and offsets could be refunded or reversed and reapplied to other, non-qualifying debt.[60] If the claimant did not prevail or the claimant's debt did not qualify for *Pigford* debt relief, once the claims process was concluded the freeze required by paragraph 7 was no longer in effect. Once the freeze was no longer in effect, USDA could resume action to accelerate or foreclose on delinquent loans and could take steps to dispose of real property formerly owned by a claimant that was held in USDA's inventory.

[59] Federal statutes authorize USDA to pursue an administrative offset against borrowers who become delinquent on their farm program loans. 31 U.S.C. § 3716(a),(c)(6) (2011). An "offset" diverts federal payments that otherwise would be paid to the borrower and applies the payments to the borrower's delinquent USDA farm loan account. *See generally* 31 U.S.C. § 3716(c)(1)(A) (2011); 26 U.S.C. § 6402(d) (2011).

[60] The process for determining the debt relief for qualifying loans is described more fully in Section IX of this report.

C. Significant Implementation Issues

USDA took several steps to comply with paragraph 7 of the Consent Decree. USDA issued Farm Loan Policy Notices (FLPs) to agency staff. USDA also voluntarily agreed to offer claimants loan servicing at the conclusion of the claims process, prior to taking an action to accelerate or foreclose on a claimant's delinquent debt.[61] USDA loan servicing includes actions such as debt write-down, reamortization, rescheduling, reduction of interest rates, and loan deferral.[62] USDA voluntarily agreed that County Offices would re-notify claimants of their loan servicing rights once a final decision had been rendered on their claim. The letter the County Office sent gave claimants sixty days from the date of the letter within which to apply for loan servicing.[63]

During the Consent Decree implementation process, many class members contacted the Monitor with individual questions and concerns regarding outstanding USDA farm program debt. Individual class members also filed motions with the Court seeking to delay USDA foreclosure proceedings and to prevent a sale of inventory property.[64] The Monitor prepared an

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[61] *See, for example*, USDA Farm Service Agency Notice FLP-279, 1951-S Servicing of *Pigford* Cases Whose Claims Have Been Closed and National Office FLP Programmatic Review (issued Oct. 24, 2002). This and other relevant FLPs are available on the Monitor's web site. In early April 2012, the Monitor's web site will be available at http://www.dcd.uscourts.gov/pigfordmonitor/.

[62] For a review of the loan servicing options currently available to farm program loan borrowers, see generally 7 C.F.R. §§ 761.2, 766.107-113 (2011).

[63] *See, for example*, FLP-279, 1951-S Servicing of *Pigford* Cases Whose Claims Have Been Closed and National Office FLP Programmatic Review, Exhibit 1, at 2 (Oct. 24, 2002), and FLP-299, Servicing of Pigford Claimants and National Office FLP Programmatic Review, Exhibit 1, at 2 (Apr. 3, 2003). *See* 7 C.F.R. part 1951, subp. S (2004).

[64] These motions were denied. A table summarizing the Court's Orders on foreclosure and sale of property is provided in Appendix 16.

Update for class members in an effort to explain the freeze on acceleration, foreclosure, and sale of inventory property.[65]

Some claimants expressed concern to the Monitor about the accumulation of interest on their farm program loans while they waited for claims to be resolved. The amount of interest accumulated by the end of the claims process for some claimants was substantial. The requirement that claimants continue to repay farm program loans during the claims process resulted in the repayment of some loans that would have otherwise qualified for *Pigford* debt relief had they remained outstanding.[66]

VI. TRACK A

The vast majority of claimants (22,552 of the 22,721 eligible claimants) elected to pursue their claims under Track A of the Consent Decree.

A. Background

Paragraph 9 of the Consent Decree describes two types of Track A claims: credit claims and non-credit claims. Credit claims involved alleged discrimination in USDA farm loan programs, including USDA's Operating Loan, Emergency Loan, Soil and Water Loan, and Farm Ownership Loan programs.[67] Non-credit claims involved alleged discrimination in USDA farm benefit programs, including disaster assistance, conservation, and commodity price and income

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[65] A summary of the Monitor Update is provided in Appendix 17. The full text of this Monitor Update is available on the Monitor's web site. In early April 2012, Monitor's web site will be available at http://www.dcd.uscourts.gov/pigfordmonitor/.

[66] Payments on qualifying loans that were made prior to the prevailing decision generally did not qualify for refund.

[67] Regulations for USDA Operating Loans, Emergency Loans, Farm Ownership Loans, Soil and Water Loans, and loan servicing programs set criteria for eligibility and described program purposes. *See generally* 7 C.F.R. Parts 1910 (loan application process); 1941 (Operating Loans); 1943, Subpart A (Farm Ownership Loans); 1943, Subpart B (Soil and Water Loans); 1945 (Emergency Loans); 1951 (loan servicing); 1956 (debt settlement) (1981-1996).

support programs.[68] Although the Consent Decree used the terms "credit" and "non-credit," USDA generally did not use these terms when describing programs to farmers, and credit and non-credit programs could offer assistance to farmers for a similar purpose.[69] For purposes of the Consent Decree, however, credit claims and non-credit claims had different elements of proof and offered different relief to prevailing class members.

1. Credit Claims

Paragraph 9(a) of the Consent Decree set forth the elements of proof required to prevail in a Track A credit claim. Claimants submitted their proof by responding to questions on the Claim Sheet directed to each of the required elements.[70] Some claimants provided documents with their Claim Sheets, including portions of farm loan program application records, correspondence, and records documenting farm program loans. Claimant allegations generally concerned interactions with county level officials, although some claims also alleged discrimination by state officials. From 1981 through 1994, the Farmers Home Administration

[68] USDA administered a variety of farm loan benefit programs during the class period. *See generally* 7 C.F.R. §§ 701.3-701.26 (Agricultural Conservation Program, providing cost share assistance for conservation practices) (1981-1996); 7 C.F.R. Parts 704 and 410 (1987-1996) (Conservation Reserve Program, providing annual rental payments and cost-share assistance for conversion of eligible crop land to vegetative cover); 7 C.F.R. §§ 1427.1, 1427.5 (1981-1991) (commodity price and income support); 7 C.F.R. Parts 723-726 (1987) (tobacco acreage allotments); 7 C.F.R. Part 1477 (1988-1996) (disaster payments).

[69] For example, USDA's Emergency Loan program is a credit program designed to help farmers recover from a natural disaster, such as a flood or drought. USDA also offered non-credit disaster programs that provided direct financial assistance or payments to farmers in the wake of natural disasters. This same type of overlap existed in USDA conservation programs. A USDA credit program, the Soil and Water Loan program, provided loans to farmers to accomplish certain conservation goals during the class period. Many USDA non-credit programs used other mechanisms, such as cost shares in the Agricultural Conservation Program or long-term contracts in the Conservation Reserve Program, to accomplish resource conservation goals.

[70] Appendix 18 sets forth the Consent Decree elements for Track A credit claims and the corresponding Claim Sheet questions.

(FmHA) operated USDA's farm loan programs. FmHA was then reorganized into the Farm Service Agency (FSA).[71] Both FmHA and FSA maintained state and county offices.[72]

2. Non-Credit Claims

Paragraph 9(b) of the Consent Decree set forth the elements of proof required to prevail in a Track A non-credit claim.[73] In general, from 1981 through 1994 the Agricultural Stabilization and Conservation Service (ASCS) administered non-credit farm program benefits. ASCS operated independently of FmHA until 1994. ASCS and parts of FmHA were incorporated into USDA's new Farm Service Agency (FSA).[74]

3. USDA Claim Responses

By agreement of the parties, the Facilitator routed eligible Track A claims to USDA in batches. FSA staff responded to each claim by completing a Claim Response, consisting of a questionnaire for providing information from agency files and contacts with county office staff. Portions of FSA farm loan files, computer loan records, archived loan records, and other documents were provided with USDA's Claim Response in some cases.

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[71] *See* P.L. 103-354, 108 Stat. 3178 (1994)(Federal Crop Insurance Reform and Reorganization Act of 1994).

[72] Under USDA regulations from 1981 through 1996, there was a two-step process for reviewing a loan application. First, a county committee composed of local farmers determined eligibility. Second, if an applicant was found eligible, the county supervisor determined whether the applicant qualified for a loan. Different standards applied at each step of the loan application process. *See generally* 7 C.F.R. Part 1910 (1981-1996) for a description of the application process throughout the class period.

[73] Appendix 19 sets forth the Consent Decree elements for Track A non-credit claims and the corresponding Claim Sheet questions.

[74] In some counties, FmHA and ASCS had separate offices. In other counties, building space was shared by FmHA and ASCS. Many farmers would have had interactions with both agencies.

B. Implementation Milestones

The Adjudicator began to issue Track A decisions in 1999.[75] Although some in the claimant community believed that relief in Track A would be virtually automatic, in fact, as of December 18, 2000, approximately forty percent of Track A claims had been rejected by the Adjudicator. Many claimants who were denied relief petitioned the Monitor requesting reexamination of their claim. Claimant petitions often included supplemental information in the form of additional claim details and additional named farmers. USDA also petitioned the Monitor for reexamination of Track A claims. USDA petitions often included supplemental information in the form of the results of searches for loan records regarding the claimant and/or identified white farmers.

The Monitor issued decisions on petitions for reexamination beginning in 2001, ultimately directing reexamination in approximately fifty percent of the cases. The Adjudicator began to issue Track A reexamination decisions in 2002. The claims process was completed and final decisions were issued for all but one of the eligible Track A claimants in 2011.

Table 6 sets forth cumulative statistics, as of December 31, 2011, for Track A claims.

[75] The Facilitator used an automated system to issue Adjudicator decisions in Track A claims. The Adjudicator's decision generally consisted of three pages. The first page of the decision included the name and address of the claimant, a summary of the elements required to prevail in a credit claim or in a non-credit claim, and an indication of whether the claimant had prevailed or had not prevailed. The second page of the decision included a narrative text summarizing the claim sheet allegations, the claim response, and the Adjudicator's reasoning for granting or denying relief. The last page of the decision included a summary of the relief, if any, the claimant was entitled to receive.

***Table 6*: Statistical Report on Track A Adjudications**[76]	
Statistical Report as of:	**December 31, 2011**
A. Total Number of Track A Claims	22,552
B. Total Number of Claims Track A Claims Approved by Adjudicator	15,645
1. Number of Claimants Who Prevailed on Credit Claims	15,145
2. Number of Claimants Who Prevailed on Non-Credit Claims	221
3. Number of Claimants Who Prevailed on Both Credit and Non-Credit Claims	279
C. Total Number of Track A Claims Denied by Adjudicator	6,906
D. Total Number of Track A Claims Pending Decision by Adjudicator	1
Petitions for Reexamination	
E. Number of Track A Claimant Petitions	4,940
1. Number of Claimant Petitions Granted by Monitor	2,798[77]
2. Number of Claimant Petitions Denied by Monitor	2,142
F. Number of Track A USDA Petitions	848
1. Number of USDA Petitions Granted by Monitor	128
2. Number of USDA Petitions Denied by Monitor	720
Final Result After Petition For Reexamination Granted	
G. Number of Adjudicator Reexamination Decisions After Claimant Petition Granted	2,776
1. Claim Approved by Adjudicator	2,464
2. Claim Denied by Adjudicator	312
H. Number of Adjudicator Reexamination Decisions After USDA Petition Granted	128
1. Claim Approved by Adjudicator	113[78]
2. Claim Denied by Adjudicator	15

[76] Table 6 statistics are provided by the Facilitator. For a year-by-year summary of Track A statistics through the end of 2010, see Appendix 20. For a year-by-year summary of Track A Adjudicator reexamination decisions through the end of 2010, see Appendix 21.

[77] This number includes 22 claimant petitions requesting reexamination of a Facilitator eligibility screening decision and 2,776 claimant petitions requesting reexamination of an Adjudicator decision.

[78] In some cases, the Adjudicator decision on reexamination approved relief, but changed the nature of the relief, such as by changing the prevailing claim from credit to non-credit or by specifying the loans that were affected by discrimination for purposes of implementing debt relief.

C. Significant Implementation Issues

The parties and neutrals addressed many significant issues as the Track A claims process was implemented.

1. Attempt-to-Apply Claims

Early in the claims process, the parties reached an agreement interpreting the word "applied" to include attempts to apply for loans. The parties agreed that attempt-to-apply claims would be evaluated under criteria contained in the "Constructive Application Principles" Agreement, which was reduced to writing on April 17, 2000.[79] The Constructive Application Principles are consistent with USDA regulations, which prohibited FSA officials from actively discouraging prospective borrowers from submitting an application. The regulations provided:

> [A]ny person wishing to submit an application will be permitted to do so. No oral or written statement will be made to applicants or to prospective applicants that would discourage them from applying for assistance, based on any ECOA "prohibited basis." The filing of written applications will be encouraged even though funds might not currently be available, since complete applications will be considered in the date order received, except when program regulations or veteran status provides for preference . . . .[80]

In general, a claimant could prevail on an attempt-to-apply claim if the Adjudicator found that: (1) the claimant sought to make a *bona fide* effort to obtain funds for farming purposes; (2) a USDA official refused to provide the claimant with an application or otherwise actively

[79] Appendix 22 contains a copy of the Constructive Application Principles.

[80] 7 C.F. R. § 1910.3(a) (1981-1988). The regulation was changed, effective in 1989, to state that "all persons wishing to submit an application shall be encouraged to do so" and the filing of written applications "*will be encouraged.*" 7 C.F.R. § 1910.3(a) (1989-1996) (emphasis in original).

discouraged the claimant from applying, and, (3) specifically identified similarly situated white farmers did not encounter similar barriers to the application process.[81]

2. Claimant Access to USDA Claim Response, Petition, and Petition Response

When the Adjudicator made decisions in Track A cases, the record before the Adjudicator included the claimant's completed claim package and the Government's response to that claim package. The information provided by the Government was confidential and could be disclosed only to those individuals identified in protective orders issued by the Court, to protect individual privacy and to comply with the federal Privacy Act. The parties worked together to reach agreement on the rules for access to the Government's response in individual cases, when needed by claimants' counsel to prepare a petition or petition response.[82]

3. Amended Adjudicator Decisions

In August 2005, a claimant wrote to the Monitor requesting assistance with the payment of relief in a Track A claim. The claimant had received an Adjudicator decision dated November 1, 1999, awarding a cash relief payment of $50,000. The claimant received an amended decision from the Adjudicator dated February 29, 2000, awarding relief under the Conservation Reserve Program, a non-credit farm benefit program. Under the terms of the February 7, 2001 Stipulation and Order, the claimant would receive $3,000 in cash relief for a prevailing non-credit claim.

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[81] The parties decided the principles should be applied prospectively (that is, the principles would be applied in all Adjudication decisions made on or after April 17, 2000). The principles were not used to change the decision in any Track A case that had already been decided.

[82] The Monitor described the rules the parties adopted in Monitor Update No. 7. For more information on updates issued by the Monitor regarding Track A claims, see Appendix 23. The full text of these Monitor Updates is available on the Monitor's web site. In early April, the Monitor's web site will be available at http://www.dcd.uscourts.gov/pigfordmonitor/.

On December 7, 2005, the claimant filed a motion with the Court requesting relief consistent with the Adjudicator's initial November 1, 1999 decision.[83] The Court ordered the Monitor to investigate and attempt to resolve the issues raised in this and other claims in which amended Track A decisions had been issued.[84] In some cases, the amendments affected whether a claimant qualified for Track A credit claim relief (cash relief payment of $50,000, tax relief, and debt relief) or whether instead they would receive non-credit relief (cash relief payment of $3,000). The parties were able to resolve the individual claimant's claim. The parties also resolved claims brought by a group of forty-six claimants the parties came to refer to as the "Conservation Loan" group. The claimants in this group each checked the "Conservation Loan" box on their Claim Sheet and Election Forms.[85] Under the terms of a Stipulation and Order filed on June 30, 2006, certain of the claimants identified as part of the Conservation Loan group received the relief provided in the original Adjudicator decision for their claim, subject to USDA's right to petition the Monitor for review of the issue of whether the claim in question concerned discrimination in a farm credit program or in a non-credit program.[86]

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[83] The motion was filed *pro se* on December 7, 2005.

[84] *See* Monitor's Report on Amended Adjudicator Decisions (April 7, 2006). The Monitor filed a number of reports on amended decisions. All of the Monitor's reports are available on the Monitor's web site. In early April 2012, the Monitor's web site will be available at http://www.dcd.uscourts.gov/pigfordmonitor/.

[85] Despite the use of the term "Conservation Loan" on the Claim Sheet and Election Form, USDA did not have a loan program titled "Conservation Loan." USDA had a Soil and Water Loan program that was largely available for conservation purposes. *See* 7 C.F.R. pt. 1943, subpt. B (1981-1996). USDA's Operating Loan and Farm Ownership Loan programs also have some authorized uses of loan funds consistent with conservation purposes. *See* 7 C.F.R §§ 1941.16, 1943.16 (1981-1996). In addition, USDA offered various non-credit programs (such as cost shares in the Agricultural Conservation Program or long-term contracts in the Conservation Reserve Program) to achieve conservation purposes. *See generally* 7 C.F.R. §§ 701.3-701.26 (1981-1996); 7 C.F.R. pts. 704 and 410 (1987-1996).

[86] USDA filed petitions for Monitor review of the relief received by prevailing claimants in 21 of the Conservation Loan group claims. Of the 21 claims, the Monitor directed reexamination of the type of relief awarded in seven claims. The Monitor denied reexamination of the type of relief awarded in 14 claims. For those 14 claims in which USDA's petition was denied, the claimants received relief for a

In addition to the Conservation Loan group, the parties considered the appropriate relief for seventy-eight other claimants who had received amended Adjudicator decisions outside of the petition for Monitor review process. The amendments included changes made by the Adjudicator after a second review of the claim (classified by the Facilitator as "substantive" amendments) and changes made by the Facilitator for clerical or administrative reasons (classified by the Facilitator as "technical" amendments).[87] Neither USDA nor Class Counsel objected to the final cash relief payments that had been made to any of the affected claimants, and the Monitor worked with the parties to identify the proper implementation of debt relief for each of the affected claimants who qualified for debt relief. With one exception, the steps needed to fully implement debt relief have been completed for each claimant whose debt relief may have been affected by the amended decisions they received.[88]

4. Processing Late Claims

The Arbitrator granted requests for permission to file a late claim throughout the implementation period. Once the Arbitrator granted permission to file a late claim, the Facilitator provided each individual the opportunity to file a completed claim package within an established

prevailing Track A credit claim, including a cash relief payment of $50,000, tax relief, and debt relief. For those seven claims in which USDA's petition was granted, the claimants received the relief awarded by the Adjudicator on reexamination.

[87] The Facilitator explained the reasons for amendments in a letter, attached as Exhibit 1 to the Monitor's Progress Report on Amended Adjudicator Decisions, filed January 16, 2007. Substantive amendments generally resulted from changes made after a review by the Adjudicator based on a request by a party (a claimant, Class Counsel, or the government), or, in a few cases, based on a review by the Chief Adjudicator when more than one Adjudicator decision had inadvertently been issued for the claim. Technical amendments affecting relief generally resulted from mistakes in the automated system used by the Facilitator to produce Track A decisions.

[88] In one amended decisions case USDA had implemented debt relief on an outstanding Operating Loan, but agreed to switch the claimant's debt relief from the Operating Loan program to the Emergency Loan program to reflect accurately the type of loan at issue in the claim. The claimant passed away prior to implementation of the switch. During 2011, the parties discussed how the debt relief for this claim should be resolved. The parties resolved this case in 2012.

timeframe. Once a claimant submitted a completed claim package and was deemed eligible to participate in the claims process, the Facilitator routed the claim to USDA for a response and then routed the Track A packages to the Adjudicator for a decision. Most late claims requests were granted after all timely claim packages had been processed and the parties tailored the claims processing "batches" to accommodate the processing of late claims.

5. Concerns Regarding Delay and Denial of Track A Claims

Throughout the Consent Decree implementation process, class members contacted the Monitor with concerns regarding the denial rate in Track A adjudications. Class members complained that some individuals who had a long and troubled relationship with USDA had been denied relief. Class members also expressed doubts about whether the appropriate people were prevailing in the claims process.[89]

Some claimants who petitioned the Monitor for reexamination contacted the Monitor by telephone or letter to express concern regarding the delay in receiving a final decision on their claim. Some claimants described health or financial problems that made it difficult for them to continue to wait for a decision on their petition or on reexamination. The Monitor informed claimants of the status of their claim if they contacted the Monitor during the time their claim was pending, and the parties and neutrals tracked claim status on a regular basis. As of the end of 2011, all except one of the Track A claimants had received a final decision on the merits of their claim.

[89] Some claimants who were denied relief filed motions with the Court, requesting that the Adjudicator be held in contempt. The Court denied these motions, reaffirming each time that the Adjudicator was the final decisionmaker in Track A claims, subject only to a petition for Monitor review. For a summary of these and other Court Orders regarding Track A, see Appendix 24.

VII. TRACK B

A relatively small number of eligible claimants (approximately 169 of 22,721 claimants) resolved their claims under Track B.

A. Background

Paragraph 10 of the Consent Decree set forth the process for deciding claims under Track B of the claims process.

1. Standard of Review

To prevail in a Track B claim, a class member was required to prove by a preponderance of the evidence[90] that the class member was a victim of discrimination and suffered damages as a result of that discrimination. In evaluating whether this standard had been met, the Arbitrator stated that discrimination may be proved through direct evidence of racial animus or through the discriminatory treatment analysis set forth by the Supreme Court in *McDonnell Douglas v. Green*.[91] To prove racial animus, a claimant generally was required to establish that a discriminatory motive played a substantial role in the challenged decision.[92] To prove discrimination through the *McDonnell Douglas* framework, a claimant generally was required to

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[90] Paragraph 1(j) of the Consent Decree defines preponderance of the evidence as such relevant evidence as is necessary to prove that something is more likely true than not true.

[91] 411 U.S. 792 (1973). The Arbitrator noted that *McDonnell Douglas* is an employment discrimination case, but the parties had agreed that the *McDonnell Douglas* framework was appropriate for cases brought under the Equal Credit Opportunity Act. The legislative history of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691 *et seq.* states that judicial constructions of anti-discrimination legislation in the employment field are intended to serve as guides in applying ECOA, especially with respect to the allocation of burdens of proof. S. Rep. No. 94-589 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 406.

[92] *See generally Thomas v. NFL Players Ass'n*, 131 F.3d 198, 202-205 (D.C. Cir. 1997) (requiring proof that a discriminatory motive played a substantial role in the challenged decision), *vacated in part on other grounds*, 1998 WL 1988451 (D.C. Cir. 1998).

first establish a *prima facie* case.[93] If the Arbitrator found sufficient evidence to establish a *prima facie* case, the burden shifted to the Government to articulate legitimate, nondiscriminatory reasons for its actions. The claimant then had the opportunity to prove that the articulated reasons were in fact a pretext for racial discrimination.[94]

2. Track B Arbitration Process

The Track B arbitration process included an exchange of exhibits and written direct testimony, a limited period for discovery, and the opportunity for cross-examination of witnesses at an eight-hour arbitration hearing. Paragraph 10 set forth specific deadlines for each of the steps in the process.[95] The submission of evidence was governed by the Federal Rules of Evidence, and class members who prevailed before the Arbitrator received an award of their actual damages, as well as debt relief and injunctive relief.[96]

B. Implementation Milestones

The Arbitrator began to schedule Track B claims for hearing in 1999, and the first Track B decision was issued in November 1999. That same month, the parties worked with the Arbitrator to revise the Track B process in response to the large number of Track B claims.[97] As

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[93] The Arbitrator generally stated that in order to establish a *prima facie* case of discrimination, a claimant must show:

(1) The claimant is a member of a protected class;
(2) The claimant applied for and was qualified for a loan or other benefit from FmHA;
(3) The claimant was denied credit or received some other adverse decision; and
(4) Other applicants outside the protected class received the benefit they were denied.

[94] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973).

[95] Appendix 25 sets forth the steps in the Track B process and the timeframes established in paragraph 10 of the Consent Decree for each of the steps.

[96] There was no tax relief provided for Track B claims.

[97] Some claimants who elected Track B received a letter from the Arbitrator explaining the situation:

> . . . . Your claim was one of 100 claims received by [the Arbitrator] for processing between November 5 and November 18. When the Type B arbitration process was designed, no one knew how many Type B claims there would be, but no one thought

the arbitration hearing process was completed in individual cases, the Arbitrator issued decisions granting and denying relief. In cases in which a hearing took place, the Arbitrator's decision contained an analysis of the evidence presented through documents and through witness testimony from claimants, USDA officials, and others, such as farm advocates and extension service employees. The Arbitrator also issued decisions prior to the completion of the hearing process in response to motions concerning discovery, pre-hearing deadlines, the admissibility of evidence, and whether a claim should be dismissed. Often both parties filed multiple motions prior to the completion of the claims process.

In many cases, claimants and/or the Government filed petitions for reexamination of the Arbitrator's Track B decisions. The Monitor issued decisions on petitions for reexamination beginning in 2002, directing reexamination in sixteen of the cases. The Chief Arbitrator reviewed claims on reexamination. The claims process was completed and Arbitrator decisions were issued for all eligible Track B claimants in 2011.[98]

Table 7 sets forth statistics, as of December 31, 2011, for Track B claims.

> there would be very many. Of course, at that time, the estimate of how many total claims, both Type A and Type B, would be received was approximately 2,000. As you may have heard, more than 22,000 African-American farmers filed claims before the October 12 deadline. The flood of Type B claims received in the space of two weeks has required some changes in the manner in which these claims will be processed.
>
> . . . . With the agreement of the government and of class counsel, which has been communicated to Judge Friedman, those claims are now being scheduled for hearings in the following manner:
>
> 1) the claims will be scheduled for hearings in the order in which they were received . . . .
>
> 2) the claims within each batch received will be scheduled for hearing according to the claim number given the completed claim form by [the Facilitator]. . . .
>
> 3) we are scheduling the claims by month, primarily in groups of 15;
>
> 4) all of the deadlines in Paragraph 10 of the Consent Decree will remain unchanged and will, as always, be determined by your hearing date.

[98] In January 2012, the Government filed a petition for Monitor review of one Track B claim. The Monitor issued a decision on this petition on March 30, 2012.

***Table 7*: Statistical Report on Track B Arbitrations**[99]	
Statistical Report as of:	**December 31, 2011**
A. Total Number of Claims Resolved Through Track B	169[100]
1. Number of Claims Resolved by Arbitrator Decision	88
a. Number of Claims Approved by Arbitrator	29
b. Number of Claims Denied by Arbitrator	59
2. Number of Claims Resolved Through Settlement	75
3. Number of Claims Withdrawn by Claimants	9
Petitions for Reexamination	
B. Total Number of Track B Petitions for Reexamination of Arbitrator Decision	61
1. Number of Track B Claimant Petitions	42
1. Number of Claimant Petitions Granted by Monitor	12
1. Number of Claimant Petitions Denied by Monitor	30
2. Number of Track B USDA Petitions	19
a. Number of USDA Petitions Granted by Monitor	4
b. Number of USDA Petitions Denied by Monitor	15
Final Result After Petition For Reexamination Granted	
C. Total Number of Track B Claims Reexamined	16
1. Number of Claims Reexamined After Claimant Petition Granted	12
a. Claim Approved by Arbitrator on Reexamination	7
b. Claim Resolved Through Settlement	4
c. Claim Resolved Through Agreement to Provide an Opportunity for Claimant to File a Track A Claim	1
2. Number of Claims Reexamined After USDA Petition Granted	4
a. Claim Approved by Arbitrator, Relief Reexamined[101]	4

[99] Table 7 statistics are provided by the Facilitator. During the initial years of Consent Decree implementation, statistics were provided by the Arbitrator. The Facilitator and the Arbitrator used different protocols for identifying the number of Track B claims. For a year-by-year summary of Track B statistics through the end of 2010, see Appendix 26.

[100] The total number of claims resolved through Track B reported by the Facilitator, as of the end of 2011, does not include three claims that were initially filed as Track B and routed to the Arbitrator. These three claims are not included in the Facilitator's database because two of the claims were determined to be defective and one of the claims was determined to be ineligible.

[101] In one case, the Arbitrator reexamined the loans identified as affected by discrimination for purposes of implementing debt relief. In three cases, the Arbitrator reexamined the amount of damages awarded to claimants.

C. Significant Implementation Issues

The parties and the Arbitrator addressed a number of significant implementation issues regarding the Track B claims process.

1. Claims Process Deadlines

Although the Consent Decree anticipated that a Track B hearing would be held within approximately 120-150 days of the date the Arbitrator issued a Hearing Notice, extensions of the pre-hearing and hearing deadlines were common. Revisions in arbitration schedules were made due to: efforts by the parties to explore settlement, discovery or pre-hearing motions and disputes, problems with securing representation for claimants, and/or difficulty encountered by the Government in providing representation for every claim.

2. Claimant Representation by Pro Bono Counsel

In early 2000, pro bono counsel were recruited to assist in representing claimants with pending Track B claims. In response to a motion by pro bono counsel who had recently taken over the representation of a class member in the Track B claims process, the Court held that the Arbitrator had discretion to revise Consent Decree deadlines in Track B proceedings, so long as justice required the revisions and provided that the burden on the Government was not so great as to outweigh the interests of the claimant in fully presenting his or her claim. The Government appealed this ruling, and the Court of Appeals reversed and remanded for further proceedings. On remand, following the decision by the Court of Appeals, the Court held that deadlines could be modified in Track B cases only if claimants were harmed in their ability to present their claim due to the actions of Class Counsel.[102]

[102] The Court's Orders regarding Track B claims are summarized in Appendix 27.

3. Government Representation by Counsel

The Court was presented with pleadings regarding an individual hired on a temporary basis to represent USDA in Track B claims. The individual in question was not a member of any bar, although she represented herself as an attorney. The Government informed Class Counsel of the cases in which the individual appeared on behalf of the Government, and Class Counsel contacted each of the claimants involved.

4. Pre-Hearing Discovery and Motion Practice

The Track B provisions of the Consent Decree set a deadline for discovery and indicate that each side may depose the other's witnesses. The Consent Decree is silent regarding other discovery. In the early stages of implementation, both USDA and claimants served interrogatories and exchanged document requests and both parties filed motions with the Arbitrator regarding discovery disputes. In some cases, USDA produced farm loan and benefit records for allegedly similarly situated white farmers. In other cases, USDA refused to produce documents for identified white farmers, maintaining that the Consent Decree did not require the production of documents in Track B claims. One Track B claimant sought an order from the Court regarding discovery and other pre-hearing issues. The Court denied the claimant's motion, ruling that only the Arbitrator could review interlocutory issues, subject to a petition for Monitor review once a final decision had been issued.

5. Motions to Dismiss

USDA filed numerous motions to dismiss Track B claims prior to completion of the hearing process. The Consent Decree is silent regarding whether the Arbitrator has the authority to dismiss a claim prior to completion of a Track B hearing, as provided in paragraph 10 of the Consent Decree. In ruling on the Government's motions to dismiss, the Arbitrator stated that a claim should not be dismissed prior to a hearing unless there was no conceivable way for a

claimant to prevail under the applicable standards of proof required for a Track B claim. The Arbitrator granted motions to dismiss claims based on grounds such as: (1) the claimant lacked adequate proof of eligibility to participate in the claims process; (2) the claim was precluded by a prior Track A claim filed by the claimant's spouse; (3) the claimant failed to comply with the timeframes established for the submission of evidence; and (4) the claimant failed to present sufficient evidence to establish a *prima facie* case of discrimination.

6. Concerns Regarding Delay and Denial of Track B Claims

Claimants raised problems and concerns regarding the Track B process, including concern about what was perceived as the litigious nature of Track B arbitrations and what seemed to some a low rate of approval of Track B claims. One claimant who believed his claim was settled contacted the Monitor for assistance after the Government refused to agree to the terms the claimant believed had been negotiated. Claimants also contacted the Monitor's office to express dissatisfaction with rulings that the Arbitrator made regarding discovery, witnesses, and other matters as they prepared for their hearings in Track B cases. Several claimants contacted the Monitor's Office to complain about the time it took to receive an initial Track B decision, a decision on a Track B petition, or a decision on a Track B reexamination.

VIII. CASH RELIEF

Paragraphs 9(a)(iii)(B), 9(b)(iii)(A), and 10(g)(i) of the Consent Decree contain provisions regarding cash relief for prevailing claimants under Track A and Track B. These provisions are explained in more detail below. As of the end of 2011, prevailing Track A and Track B claimants had been paid a total of approximately $807,317,829 in cash relief under the Consent Decree. This relief included cash payments for: (1) prevailing Track A credit claims; (2) prevailing Track A non-credit claims; and (3) Track B damage awards and settlements.

A. Background

The Consent Decree provided different cash relief for Track A and Track B claims. The payment mechanism for cash relief also differed, depending on the type of relief a claimant was entitled to receive.

1. Track A Cash Relief

A claimant who prevailed in a Track A credit claim, such as the denial of a Farm Ownership Loan, the late funding of an Emergency Loan, or the imposition of the restrictive condition of a supervised bank account on an Operating Loan, was entitled to receive a cash payment of $50,000. A claimant who prevailed in a Track A non-credit claim, such as the denial or underfunding of disaster relief, was entitled to a cash payment of $3,000.

a. Payments for Track A Credit Claims

Cash payments to Track A claimants who prevailed on their credit claims were made from the Judgment Fund authorized by 31 U.S.C. § 1304. Claimants generally were notified of the amount of their cash relief on the "relief" page of the Adjudicator decision, which indicated the claimant would receive $50,000. Claimants also received a letter from the Facilitator that told them to expect payment within approximately sixty or ninety days.[103]

b. Payments for Track A Non-Credit Claims

Cash relief payments for non-credit claims were made directly by USDA. Under paragraph 9(b)(iii)(A) of the Consent Decree, USDA was to pay prevailing non-credit claimants:

> the amount of the benefit wrongly denied, but only to the extent that funds that may be lawfully used for that purpose are then available . . . .

[103] In the beginning of the case, the standard letter told approved claimants to expect payment within approximately 60 days. In July, 2000, the standard letter was changed to say that approved claimants should expect payment within approximately 90 days.

Due to the wide variety of USDA non-credit programs and the difficulty of determining "the amount of the benefit wrongly denied" in each case, approximately 400 class members who had prevailed on non-credit claims remained unpaid as of the end of 2000. On February 7, 2001, the Court signed a Stipulation and Order setting $3,000 as the amount of non-credit cash relief.[104] Claimants began receiving $3,000 cash relief payments from USDA for prevailing non-credit claims after the February 7, 2001 Stipulation and Order was issued.[105]

2. Track B Settlements and Damages Awards

Claimants who prevailed in Track B received an award of actual damages in the Arbitrator's decision. In some cases, claimants settled their claims with the Government and received payments as part of the settlement agreements. Payments of Track B damage awards and settlements were made from the Judgment Fund authorized by 31 U.S.C. § 1304.

B. Implementation Milestones

Early in the implementation process, the Court issued an Order authorizing the Facilitator to issue checks to claimants on behalf of the Government for prevailing Track A credit claims. The Facilitator issued a check to an individual claimant after receiving approval for the payment from the Department of Justice and after the Judgment Fund wired funds for the payment to a specified account from which the Facilitator issued the check.

The Department of Justice represented the Government in Track B claims and was responsible for initiating requests for payment of Track B settlements and damage awards. These payments were made directly from the Judgment Fund to prevailing claimants.

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[104] The Court's Orders regarding cash relief are summarized in Appendix 28.

[105] One claimant petitioned the Court and was granted an exemption from the $3,000 cash relief award limitation. This claimant did not prevail in the claims process.

USDA was responsible for issuing payments of non-credit cash relief. USDA did not make any non-credit payments to claimants who prevailed on non-credit claims until after the February 7, 2001 Stipulation and Order setting $3,000 as the amount of cash relief in all non-credit claims.

Table 8 sets forth the responsibility for initiating the request for payment and the source of the payment claimants received for each type of cash relief.

Table 8: **Responsibility for Cash Relief Payments**		
Prevailing Claim	**Who Initiated the Payment**	**Source of the Payment**
A. Track A Credit Relief Payments ($50,000)	Facilitator	Judgment Fund
B. Track A Non-Credit Relief Payments ($3,000)	USDA	USDA
C. Track B Cash Payments (Settlements and Damage Awards)	Department of Justice	Judgment Fund

1. Track A Credit and Non-Credit Cash Relief

Claimants began receiving cash relief payments for Track A credit claims in November 1999. Claimants who prevailed on both credit and non-credit claims received a $50,000 check from the Facilitator and a $3,000 check from USDA, for a total of $53,000 in cash relief. Table 9 contains cumulative statistics on the cash relief awarded in final decisions for prevailing Track A claims, as of the end of 2011.

Table 9: **Statistical Report on Track A Cash Relief**[106]			
Statistical Report as of:		**December 31, 2011**	
Prevailing Track A Claims	**Number of Prevailing Claimants**	**Amount of Cash Relief Per Claim**	**Total Amount of Cash Relief**
A. Claimants Awarded Track A Credit Relief	15,069	$50,000	$753,450,000
B. Claimants Awarded Track A Non-Credit Relief	220	$3,000	660,000
C. Claimants Awarded Track A Credit and Non-Credit Relief	332[107]	$53,000	17,596,000
D. Total Amount of Track A Cash Relief			$771,706,000

2. Track B Settlements and Damage Awards

Claimants who prevailed in Track B were awarded actual damages by the Arbitrator, as provided by the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691e(a). Arbitrator damage awards included economic damages, such as lost farm income, and non-economic damages, such as mental distress, humiliation, and loss of reputation. Claimants who elected Track B were required to prove their entitlement to damages by a preponderance of the evidence, and most claimants offered expert testimony and a report from an expert containing calculations regarding their economic damages.[108]

[106] Table 9 statistics are provided by the Facilitator. The numbers reflect paid Track A claims, as of the end of 2011. Approximately 24 claims remained unpaid as of the end of 2011.

[107] The number of claimants who were paid both credit relief and non-credit relief (332) is greater than the number of claimants who are classified in the Facilitator's database as prevailing on both credit and non-credit claims (279, as reported in Table 6). This is because some claimants are classified in the Facilitator's database as receiving only credit or non-credit relief, when, after further review, the Government paid the claimants for both credit and non-credit relief.

[108] In most cases, USDA also submitted testimony from an economist. USDA's economist generally critiqued the claimant's expert's testimony and conclusions and offered an alternative economic analysis of the claimant's economic damages. Information about individual awards in Track B cases is provided in Appendix 29.

The Government agreed to settle approximately seventy-two Track B claims. The terms of the agreements varied, as did the amount paid to claimants who settled their claims with the Government. Table 10 provides information about settlements and damage awards in Track B claims, as of December 31, 2011.

Table 10: **Statistical Report on Track B Settlements and Damage Awards**[109]								
Statistical Report as of:							**December 31, 2011**	
Track B Settlements and Damage Awards	Total Number	Under $100,000	$100,000-$250,000	$250,000-$500,000	$500,000-$1,000,000	Over $1,000,000	Median Amount	**Cumulative Amount**
A. Number of Track B Settlements	75	30	39	6	0	0	$140,000	$9,343,293
B. Number of Track B Damage Awards	27	2	4	5	14	2	$594, 444	$28,268,537
C. Total Number of Track B Settlements and Damage Awards	102	32	43	11	14	2	$140,000	$35,611,830

C. Significant Implementation Issues

Early in the claims process, there were significant administrative issues in implementing payments to prevailing claimants. Throughout the case, issues regarding the appropriate payee in estate cases proved difficult to resolve.

[109] Table 10 statistics are provided by the Facilitator. Table 10 does not include two unpaid Track B damage awards. Two Track B claimants prevailed on reexamination in 2011. One of the two claims was paid in 2012. In the other claim, a final decision had not yet been issued as of the filing of this report. One Track B settlement was resolved through an agreement that did not involve a cash payment.

1. Delays in Payments Due to "Holds"

During the initial stages of implementation, payments to some prevailing Track A claimants were placed on "hold" due to uncertainties about the claimants' entitlement to payment. Payment holds were commonly due to one of two circumstances. The first circumstance involved implementation of the parties' agreement on the standards for relief for attempt-to-apply claims, as described in the Constructive Application Principles Agreement. Payments for approximately 1,209 claimants were placed on hold as the parties addressed whether the Adjudicator should re-examine claims that had been decided prior to the written Constructive Application Principles Agreement (April 17, 2000).[110] Once the parties agreed that no claimant would be denied relief who had previously prevailed in the adjudication process, payments were made to all 1,209 claimants.

The second circumstance in which approved claimants' checks were put on hold concerned Government petitions for Monitor review. Prior to the July 14, 2000 Stipulation and Order setting a deadline for petitions for reexamination, the Government placed claimants' checks on hold if the Government intended to petition for reexamination of the Adjudicator's decision. Once the 120-day deadline for filing petitions for Monitor review was established by the Court, checks generally were not issued until sometime after that deadline had passed and there were no more petition "holds."[111]

[110] Appendix 22 contains a copy of the Constructive Application Principles.

[111] The Government also placed a very few other payments on "hold" for other reasons relating to the claimant's entitlement to payment.

2. Administrative Delays

In some cases, claimants' cash relief payments were delayed due to administrative difficulties. These difficulties arose due to the large number of prevailing Track A claims and the requirements for payments to issue from the Judgment Fund. The Judgment Fund is a free-standing mechanism within the Treasury Department that is responsible for making certain types of payments on behalf of all federal agencies. The Government has explained that the Judgment Fund makes approximately 5,000 payments in a normal year, and it generally takes six to twelve weeks for the Fund to make a payment from the time it receives a qualifying request. Due to the number of successful Track A credit claims, the Judgment Fund had to process approximately 10,000 requests for payments to successful Track A claimants in one year, in addition to the approximately 5,000 non-*Pigford* payments that it otherwise had to process. Payment delays occurred due to the large number of requests for payment.

Payment delays also occurred due to the information required by the Judgment Fund to process the payment. The Government has explained that before a payment can be made by the Judgment Fund, the entity requesting the payment must complete a number of specified forms reflecting both the Government's liability and the propriety of the payment being made by the Judgment Fund. For example, if an individual claimant listed his or her spouse on the Claim Sheet, the Judgment Fund required social security numbers for both individuals in order to process the payment. In response to these and other administrative problems, the parties, the Facilitator, and the Monitor instituted regular payment status calls to review the reasons why specific claims remained unpaid. These calls helped to identify and resolve payment problems. The Facilitator and Class Counsel also contacted many individual claimants to request information necessary to process the claimants' payments.

3. Estate Claims

Special problems arose in cases involving deceased class members. Some class members passed away prior to the filing of a claim on their behalf. Other class members passed away during the time their claim was pending a final resolution.

a. Procedures 2002-2011

Since January 2002, the Facilitator has used "Estate of [Claimant]" as the payee on all checks for prevailing claims in which the class member is deceased. Before checks can be issued using this payee formulation, paperwork must be submitted establishing a personal representative, including the tax identification number of the estate and the Social Security number of the representative. Obtaining all of the necessary information has led to delays in payment in some cases. As of the end of 2011, the Facilitator reported that a total of approximately sixteen (16) estate claims remained unpaid.

b. Procedures Before 2002

Before January 2002, the Facilitator did not use a uniform approach. Counsel for the plaintiffs became very concerned about this issue in the early years of the case. It was counsel's concern that caused the change in the procedure as of 2002. At the request of Class Counsel, the Facilitator identified a total of 376 checks issued by the Facilitator prior to 2002 for prevailing claims brought by or on behalf of class members who passed away. In each of these 376 cases, the Facilitator had paid the class member's cash relief to a surviving spouse, family member, co-claimant, or named representative.

Class Counsel has analyzed the circumstances of the 376 claimants. Class Counsel believes that in some of these cases, the person who was paid is not the person who would have been entitled to payment under the relevant state's probate law. It is possible that in some of those cases, despite the payment formulation, family members shared the payments among

themselves in an appropriate manner. But it is also possible that in some cases, the people who ended up with the payments are not the people who should have ended up with the payments under state law.

This issue has been very troubling to the parties and neutrals, who discussed the issue on many occasions, trying to come up with a way to learn more about what transpired in these cases and to respond appropriately to any estates that may not have received payments that they deserved. The parties and neutrals were never able to solve this issue. It is one of the very few areas in which consensus could never be reached, and litigation to ask the Court to resolve the issue was never employed. The most recent estimate from Class Counsel indicated that likely there are five or fewer cases in which the funds ended up going to the wrong individual—but we can't be sure of that number. Class Counsel continues to be concerned that a miscarriage of justice occurred in these cases.

4. Uncashed Checks

In some cases, an envelope containing a check would be returned to the Facilitator as undeliverable, apparently because the class member was no longer living at the address on file with the Facilitator. When checks were returned uncashed, the Facilitator undertook efforts to locate the prevailing claimant. As of the end of 2011, there were fewer than ten remaining claimants whose cash relief checks were returned uncashed.

5. Determining Prevailing Non-Credit Claims

During 2011, Class Counsel and USDA completed a review of prevailing Adjudicator decisions in which questions had been raised concerning whether claimants who had prevailed on credit claims were also entitled to relief for a prevailing non-credit claim. Generally, in these cases, the "relief" page of the Adjudicator's decision did not specify non-credit relief, but the parties reviewed the text of the Adjudicator's decision to assess whether the Adjudicator had

found discrimination in a non-credit program. In those cases in which the parties agreed that the Adjudicator had approved a non-credit claim, USDA agreed to pay the claimant $3,000 in non-credit relief. As of December 31, 2011, the parties had resolved all but a small number of the claims that were under review.

IX. DEBT RELIEF

Paragraphs 9(a)(iii)(A) and 10(g)(ii) of the Consent Decree required USDA to discharge certain farm program loan debt for prevailing claimants. These paragraphs form the basis for *Pigford* debt forgiveness.

A. Background

Paragraph 9(a)(iii)(A) of the Consent Decree required USDA to discharge all outstanding farm loan program debt that was "incurred under" or "affected by" the program(s) that were the subject of a prevailing class member's Track A credit claim. Paragraph 10(g)(ii) contained similar provisions for Track B claims, requiring USDA to discharge all farm loan program debt that was "incurred under" or "affected by" the program(s) that were the subject of a prevailing Track B claim. These paragraphs stated that USDA's discharge of any outstanding debt "shall not adversely affect" a claimant's eligibility for future participation in any USDA loan or loan servicing program.

B. Implementation Milestones

As USDA began to address how the agency would implement debt relief, questions arose concerning how the Consent Decree debt relief provisions would be interpreted and applied in individual cases.

1. February 7, 2001 Stipulation and Order

On February 7, 2001, the Court signed a Stipulation and Order that further defined the debt relief prevailing claimants were entitled to receive. Paragraph 2 of the February 7, 2001 Stipulation and Order clarified that debts "incurred under" or "affected by" the programs that were the subject of the discrimination claims resolved in the class member's favor included: (1) those debts identified by the Adjudicator or the Arbitrator as having been affected by discrimination,[112] and (2) all subsequent loans in the same loan program as the loans identified by the Adjudicator or the Arbitrator from the date of the first event upon which a finding of discrimination was made.[113]

2. Debt Relief Review, Correction, and Verification

Pursuant to Court Orders, USDA, Class Counsel, and the Monitor began a review of the appropriate debt relief for all claimants who prevailed on credit claims and who had outstanding farm program debt during the class period.[114] A total of approximately 2,896 claims were identified for review as of the end of 2011. As part of the review process, the Monitor prepared a brief summary for each claimant that described the debt relief, if any, implemented by USDA.

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[112] Generally, the parties looked to the narrative text of the prevailing Adjudicator or Arbitrator decision to identify loans found to have been "affected by" discrimination. For a more detailed discussion of the reasons the narrative text of the Adjudicator or Arbitrator decisions was chosen for this purpose, see Monitor's Report and Recommendations on Amended Decisions, at pages 18-19 (filed July 7, 2007).

[113] Paragraph 2 of the February 7, 2001 Stipulation and Order requires USDA to discharge:

> all debts which were identified by the Adjudicator or Arbitrator as having been affected by discrimination. Additionally, such relief includes all debts incurred at the time of, or after, the first event upon which a finding of discrimination is based, except that such relief shall not include: (a) debts that were incurred under FSA programs other than those as to which a specific finding of discrimination is made by the Adjudicator or Arbitrator with respect to the class member. . . ; (b) debts that were incurred by the class member prior to the date of the first event upon which the Adjudicator's or Arbitrator's finding of discrimination is based, or (c) debts that were the subject of litigation separate from this action in which there was a final judgment as to which all appeals have been foregone or completed.

[114] A summary of Court Orders on debt relief is provided in Appendix 30.

As of December 31, 2011, the Monitor had issued summaries for a total of 2,882 of the 2,896 claims identified for review.

Table 11 provides statistics, as of the end of 2011, summarizing debt relief implemented as a result of the debt relief review process.

Table 11: **Statistical Report on Debt Relief Review**[115]	
Statistical Report as of:	**December 31, 2011**
A. Number of Claimants Who Received Debt Forgiveness as a Result of Debt Relief Review	162
B. Amount of Debt Forgiven (Principal and Interest) as a Result of Debt Relief Review	$5,439,870
1. Amount of Track A Debt Forgiveness	$5,304,646
2. Amount of Track B Debt Forgiveness	$135,224
C. Amount of Payment Refunds as a Result of Debt Relief Review	$2,149,517
D. Amount of Offset Refunds as a Result of Review	$538,467
E. Amount of Payments Reapplied to Non-*Pigford* Loans as a Result of Debt Relief Review	$109,821
F. Amount of Offsets Reapplied to Non-*Pigford* Loans as a Result of Debt Relief Review	$45,242

Table 12 provides statistics regarding the cumulative total amount of *Pigford* debt relief implemented by USDA for prevailing Track A and Track B claimants, as of the end of 2011.

[115] The statistics in Table 11 are based on information and statistics provided to the Monitor by USDA. As of March 30, 2012, the Monitor had issued debt relief summaries in each of the 2,896 claims identified for review. Cumulative statistics on debt relief implemented during the review process, as of March 30, 2012, are provided in Appendix 31.

***Table 12:* Statistical Report on Debt Relief Implementation**[116]	
Statistical Report as of:	**December 31, 2011**
A. Total Number of Claimants Who Received *Pigford* Debt Forgiveness	425
B. Total Amount of Debt Forgiven (Principal and Interest)	$51,038,575
1. Total Amount of Track A Debt Forgiveness	$43,474,995
a. Number of Track A Claimants Who Received Debt Forgiveness	400
b. Average Amount of Debt Forgiven Per Track A Claimant Who Received Debt Forgiveness	$108,687
2. Total Amount of Track B Debt Forgiveness	$7,563,580
a. Number of Track B Claimants Who Received Debt Forgiveness	25
b. Average Amount of Debt Forgiven Per Track B Claimant Who Received Debt Forgiveness	$302,543
C. Total Amount of Payment Refunds	$2,803,205
D. Total Amount of Offset Refunds	$1,656,369
E. Total Amount of Payments Reapplied to Non-*Pigford* Loans	$158,523
F. Total Amount of Offsets Reapplied to Non-*Pigford* Loans	$204,200

C. Significant Implementation Issues

Administrative hurdles delayed USDA's creation of a system for providing *Pigford* debt relief to prevailing claimants. Many class members contacted the Monitor to express concern about delay. Class members also expressed concern regarding the Government's use of administrative offsets to collect amounts due on outstanding farm program loans. Class members contacted the Monitor with questions about what loans qualified for debt relief and whether they had received all of the debt relief they were entitled to receive under the Consent Decree. Some

[116] The statistics in Table 12 are based on information and statistics provided to the Monitor by USDA. The statistics in Table 12 are cumulative and include the debt relief provided as a result of the debt relief review process, as well as the debt relief implemented by USDA prior to the review process. For a year-by-year summary of debt relief implementation through March 30, 2012, see Appendix 31.

of these class members reported facing stressful financial circumstances, such as a pending foreclosure or acceleration of their outstanding farm program debt.

In addition to the February 7, 2001 Stipulation and Order, USDA policies and agreements between the parties about debt relief implementation principles informed how USDA implemented debt relief for individual claimants.

1. Defining "Outstanding Debt"

The Consent Decree required USDA to forgive all "outstanding loans" but did not define how USDA was to determine the loans that were included in the phrase "outstanding debt." USDA implemented debt relief for outstanding qualifying loans and for debts for which a claimant could still have had continued liability for a resolved qualifying loan. For example, if a qualifying loan had previously been resolved through a charge-off debt settlement, the claimant might not have been released from liability for the debt.[117] As another example, if a qualifying loan was secured by real estate and had been the subject of a shared appreciation write-down or a net recovery value buyout, the claimant could still have been liable for all or a portion of the debt.[118] In these cases, USDA cancelled any remaining liability for debts that qualified for *Pigford* debt relief.

2. Debt Relief Principles

As the implementation and review of debt relief continued, the Monitor and the parties worked through issues identified in the review of individual cases. The parties reached agreements on specific principles USDA would follow in implementing *Pigford* debt forgiveness. In July 2008, the Monitor issued a revised Monitor Update memorializing

[117] *See* 7 C.F.R. § 1956.54(c) (1994).
[118] *See* 7 C.F.R. § 1951.909 (1994).

agreements the parties reached to more clearly define the general principles that should be used to implement debt relief in individual cases.[119]

3. Tax Implications of Debt Relief

During the debt relief review process, in addition to considering whether each claimant had received the debt forgiveness and refunds of payments or offsets that the claimant was entitled to receive, the parties also addressed the federal income tax implications of debt relief. Tax questions included whether USDA had appropriately issued IRS Forms 1099 reporting the amount and correct effective date of debt cancellation for loans that had been forgiven. Questions were also raised regarding whether tax accounts were properly established and funded for Track A claimants, as required by the Consent Decree.

4. Debt Relief Issues in 2011

During 2011, the Monitor and the parties worked to complete the review of USDA's implementation of *Pigford* debt relief. The Monitor also worked with the parties on tax questions regarding debt relief, including whether IRS Forms 1099 had been appropriately issued for debt relief, whether tax accounts had been established and funded for prevailing Track A claimants who received debt relief, and how claimants could be assisted with debt and tax relief issues after the case winds down.

X. TAX RELIEF

Paragraph 9(a)(iii)(C) of the Consent Decree provided tax relief for claimants who prevailed on a Track A credit claim. This relief involved a transfer of funds from the Judgment Fund directly into an Internal Revenue Service (IRS) tax account for partial payment of federal

[119] A summary of the Monitor Updates on debt relief is provided in Appendix 32. The full text of these Monitor Updates is available on the Monitor's web site. In early April 2012, the Monitor's web site will be available at http://www.dcd.uscourts.gov/pigfordmonitor/.

income taxes that the claimant might owe. Those who received $50,000 in cash relief were entitled to a tax payment of $12,500 to their IRS tax account. Those who received debt relief were entitled to a tax payment of twenty-five percent of the principal amount of loan forgiveness provided by USDA.

A. Background

All prevailing claimants (Track A and Track B) received at least one payment that the Internal Revenue Service (IRS) views as income for federal income tax purposes. According to the IRS, each of the following constitutes income for federal tax purposes:

> 1. the amount of cash relief paid in Track A and Track B claims (including $50,000 Track A credit relief payments; $3,000 non-credit relief payments, Track B damage awards, and Track B settlement payments);
>
> 2. the amount of debt cancelled as *Pigford* debt relief; and
>
> 3. the amount of tax relief payments prevailing Track A credit claimants receive as a credit on taxes they may owe.

For each of these events—the payment of cash relief, the forgiveness of farm loan program debt, and the payment of funds as a credit on taxes claimants may owe—the Government is obligated to report the date and amount of relief to the Internal Revenue Service (IRS). The Government must also issue IRS Forms 1099 to claimants for each type of relief they receive.

Claimants who prevailed on Track B claims receive no tax relief payments to help them pay any federal income taxes they may owe on the cash relief and/or debt relief they may receive. Claimants who prevailed on Track A non-credit claims also receive no tax relief for federal income taxes they may owe on their $3,000 cash relief. The Consent Decree tax relief provisions provide tax relief only for claimants who prevailed on Track A credit claims. Claimants who prevailed in Track A credit claims were entitled to receive tax relief in the

following amounts: (1) twenty-five percent of the claimant's $50,000 cash payment ($12,500); and (2) twenty-five percent of the principal amount of any loan forgiveness provided by USDA as *Pigford* debt relief.

Table 13 summarizes the entity responsible for issuing IRS Forms 1099 for each type of relief claimants receive under the Consent Decree. The table also indicates the amount of tax relief Track A credit claimants were entitled to receive as partial payment on any federal income tax liability.

Table 13: **Tax Relief and Tax Reporting**		
Type of Relief	**Tax Relief: What Amount is Transferred to a Claimant's IRS Tax Account**	**Tax Reporting: Who Prepares and Mails the Form 1099**
A. Track A Credit Relief Payments ($50,000)	25% of $50,000 award ($12,500)	Facilitator
B. Track A Non-Credit Relief Payments ($3,000)	—	USDA
C. Track B Cash Payments (Settlements and Damage Awards)	—	Facilitator
D. Track A Debt Forgiveness	25% of principal amount of debt relief	USDA
E. Track B Debt Forgiveness	—	USDA
F. Deposits to Claimants' IRS Accounts for Track A Cash Relief Payments ($12,500)	—	Facilitator
G. Deposits to Claimants' IRS Accounts for Track A Debt Forgiveness (25% of Principal Amount of Debt Forgiveness)	—	Facilitator

B. Implementation Milestones

Tax reporting and tax relief required significant time and attention during the Consent Decree implementation process.

1. Providing Information and Assistance to Class Members

Several efforts were undertaken to inform class members of the tax consequences of the relief they received under the Consent Decree. Some claimants received a tax information sheet that reported guidelines provided to help claimants correctly report their cash relief, debt cancellation amounts, and tax payments. The information sheet explained to claimants that if they did not owe taxes, they could receive a refund of the tax payment, but only if they filed a return within a certain time frame.[120]

Throughout the implementation of the Consent Decree, Class Counsel, the Facilitator, and the Monitor received many calls from class members with questions and problems relating to the tax implications of the Consent Decree relief. At the Monitor's request, the National Taxpayer Advocate (NTA) conducted trainings and provided a memorandum for all Taxpayer Advocate Service employees, describing *Pigford* tax issues and tax problems class members may experience.[121] The Monitor referred class members to the NTA for assistance with particular issues. Claimants also received assistance through Low-Income Taxpayer Clinics (LITCs) that were funded through grants made by the NTA.

2. Tax Reporting on Forms 1099

Responsibility for issuing Forms 1099 was shared by the Facilitator and USDA. Prevailing Track A claimants received at least two separate Forms 1099. Additionally, in many cases, claimants who received debt relief for a prevailing Track A claim received multiple Forms 1099 reporting relief received in multiple tax years.

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[120] A sample copy of the Tax Information on USDA Settlement that Class Counsel provided to claimants is provided in Appendix 33.

[121] The National Taxpayer Advocate (NTA) is an independent organization within the IRS. The NTA's role is to help taxpayers in resolving problems with the IRS. For more information, see http:///www.irs.gov/advocate/.

For example, a Track A claimant who prevailed on a credit claim and had one or more outstanding loans cancelled as *Pigford* debt relief received:

1. a Form 1099 from the Facilitator reporting $50,000 cash relief;

2. a Form 1099 from the Facilitator reporting $12,500 tax relief as a partial payment on taxes that might be owed on the $50,000 cash relief (usually received in the year following the $50,000 in cash relief);

3. one or more Forms 1099 from USDA reporting the amount of debt cancellation provided as *Pigford* debt relief (each loan was reported on a separate Form 1099); and

4. a Form 1099 from the Facilitator reporting the amount of tax relief provided for *Pigford* debt cancellation (usually received in the year following the debt cancellation in the amount of twenty-five percent of the principal amount of debt cancellation).

Some Track A claimants who prevailed on a credit claim also prevailed on a non-credit claim. All Track A claimants who prevailed on a non-credit claim received a separate Form 1099 from the Facilitator reporting the $3,000 cash relief.

Track B claimants who received an award of damages or settlement payment and debt relief received at least two separate Forms 1099:

1. a Form 1099 from the Facilitator reporting the amount of damages paid by the Government or the amount the Government paid the claimant in settlement of the claim; and

2. one or more Forms 1099 from USDA reporting the amount of debt cancellation provided as *Pigford* debt relief (each loan was reported on a separate Form 1099).

3. Tax Relief

Before tax relief payments could be transferred from the Judgment Fund to the IRS, the IRS required certain information in order to establish a tax account for each claimant. The Facilitator regularly reported to the parties and the Monitor on the number of tax accounts that remained to be established.

Once a tax account was established, a transfer of funds was requested from the Judgment Fund to the claimant's tax account. The transfer of $12,500 was generally requested in the year the claimant would potentially owe taxes on the $50,000 cash relief payment. The transfer of twenty-five percent of the principal amount of debt cancellation was generally requested after USDA notified the Facilitator that debt cancellation had been implemented.

Table 14 sets forth an estimate of the amount of tax relief payments from the Judgment Fund for deposit in claimants' IRS tax accounts, as of the end of 2011:

Table 14: **Statistical Report on Tax Relief for Track A Credit Claims**[122]	
Statistical Report as of:	**December 31, 2011**
A. Payments Due to the IRS of 25% of $50,000 Cash Relief Award	$192,512,500
B. Payments Due to the IRS of 25% of Principal Amount of Debt Relief	7,708,293
C. Total Estimated Payments Due to the IRS as Tax Relief	$200,220,793

C. Significant Implementation Issues

The tax consequences of *Pigford* relief proved to be one of the more complicated and challenging aspects of the settlement.

1. Establishing Tax Accounts

During the first few years of implementation of the Consent Decree, there were delays in establishing tax accounts with the IRS. During 2001, the Facilitator made progress towards solving many types of problems that made it difficult for the IRS to establish tax accounts. The

[122] These figures are estimated by the Facilitator. The Facilitator calculated the payments due to the IRS as tax relief for these claimants as follows: 25 percent of the $50,000 cash award ($12,500), to be paid on behalf of the 15,401 successful Track A credit claimants who were paid cash relief as of the end of 2011 equals $192,512,500. Rounding to the nearest dollar, 25 percent of the total principal debt forgiven for successful Track A credit claimants through the end of 2011 ($30,833,172) equals $7,708,293.

procedure for solving individual problem cases was complicated by the privacy restrictions on tax-related information. Despite these difficulties, the Facilitator was able to work with the IRS to resolve hundreds of individual tax-related problems.

2. Delays in Tax Relief Payments

Along with the delay in establishing tax accounts, there was a delay in depositing the tax relief owed to many Track A credit claimants. This delay led to a situation in which claimants were temporarily held responsible for satisfying their tax obligation on the $50,000 cash relief payment they received without the benefit of the $12,500 tax relief. Some claimants in this situation reported receiving tax deficiency notices from the IRS and/or were charged penalties and interest for past due payments. Once a tax payment was credited to the claimants' tax accounts, the penalty generally could be removed, but the IRS still required claimants to pay the interest that accrued on past due payments. The Office of the National Taxpayer Advocate provided critical assistance in these cases. Delays in tax deposits caused problems for many claimants.

3. Estate Claims

Special implementation issues arose in cases involving claims on behalf of deceased individuals who met the criteria for class membership. Many of the cases in which there was a delay in establishing the tax account involved estate claims. To establish a tax account for an estate, the IRS required an Employer Identification Number (EIN), which is one of the Taxpayer Identification Numbers (TIN) used in the administration of federal tax laws. An EIN is used for estates, rather than an individual's Social Security number.

There were also problems associated with linking tax relief to the tax liability associated with a prevailing estate claim. Prior to January 2002, in some cases, checks for $50,000 in cash relief were issued to payees other than the estate of the deceased person. In cases where the

identified payee was an individual (such as a spouse, family member, or personal representative), the tax liability attached to the individual, but the tax relief (the 25 percent amount) could be deposited in a tax account for the estate. The Facilitator and the Monitor worked with the IRS to establish a procedure for addressing these situations. This problem no longer occurred after January 2002, when all checks were issued to "Estate of [Claimant]," rather than to an individual representative.

4. Tax Reporting

Implementation issues concerning tax reporting included issues arising from a delay in the issuance of Forms 1099 for cash relief, debt relief, and tax payments, and the confusion that resulted for claimants who received multiple Forms 1099. Forms 1099 were not issued for Track B payments until 2003, due to a lack of notice to the Facilitator of the amount of the payments received by Track B claimants. Beginning in 2002, the parties and the neutrals annually reviewed whether Forms 1099 had been issued for cash relief, debt cancellation, and tax relief payments.

5. Tax Implications of Debt Relief

During 2008, as a part of the review of USDA's implementation of debt relief, the parties and the Monitor sought guidance from the IRS Office of Chief Counsel regarding the reporting of *Pigford* debt cancellation for federal income tax purposes.[123] The IRS advised the parties that claimants realize a discharge of indebtedness income for federal income tax reporting purposes when the last event necessary to effectuate a discharge of indebtedness occurred. Because of the way *Pigford* debt relief was implemented, according to the IRS, USDA generally must issue Forms 1099 using one or more of the following dates of realization of debt cancellation income:

[123] The IRS Office of Chief Counsel guidance memorandum is provided in Appendix 34.

1. the date an Adjudicator or Arbitrator decision becomes final;

2. the date of the February 7, 2001 Stipulation and Order regarding debt relief for "forward sweep" loans;

3. the date of July 11, 2008, the date when certain agreements between the parties regarding debt relief were published in revised Monitor Update No. 10, "Debt Relief for Prevailing Class Members"; or

4. the date the parties reach agreement on the appropriate debt relief in an individual case.

The Court ordered the Monitor to work with USDA and Class Counsel to implement the IRS guidance.[124] As USDA implemented the IRS guidance, USDA reprocessed the debt relief for some claimants and issued corrected IRS Forms 1099 to report the correct date and amount of debt cancellation income for federal income tax purposes.[125] The Monitor issued an Update for class members on Federal Income Tax and Debt Relief, which advised claimants with questions to seek expert tax advice and which provided claimants with contact information for the NTA and for Class Counsel.[126]

XI. INJUNCTIVE RELIEF

Paragraph 11 of the Consent Decree required USDA to offer all prevailing class members injunctive relief for a certain period of time. Paragraph 11 contained three types of injunctive relief:

1. Technical assistance from a qualified USDA official acceptable to the class member for any application for a Farm Ownership Loan, Operating Loan, or property owned by USDA—known as inventory property;

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[124] A summary of the Court's July 28, 2010 Order is provided in Appendix 30.

[125] USDA also issued IRS Forms 1099 for some claimants whose debt relief had been implemented more than three years after the tax realization date and who had not previously received an IRS Form 1099 reporting the debt cancellation income.

[126] A summary of Monitor Update 16, Federal Income Tax and Debt Relief, is provided in Appendix 35.

2. The review of any application for a Farm Ownership Loan, an Operating Loan, or inventory property in a light most favorable to the class member; and

3. Priority consideration for one Farm Ownership Loan, one Operating Loan, and one purchase, lease, or other acquisition of inventory property.

A. Background

The Consent Decree defined the three types of injunctive relief available to prevailing class members.

1. Technical Assistance

All prevailing claimants were entitled to technical assistance injunctive relief. Paragraph 11(d) of the Consent Decree required USDA to offer technical assistance from a qualified USDA official who is acceptable to the class member. Technical assistance means assistance in filling out loan forms, developing farm plans, and help with other aspects of the loan and loan servicing application process.

2. "Most Favorable Light"

Paragraph 11(c) provided "most favorable light" injunctive relief, which required USDA to review any application for a Farm Ownership Loan or an Operating Loan or for the purchase or lease of inventory property in the light most favorable to the class member. This means that when considering eligibility and credit criteria in a loan application, USDA must 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 an application, the applicant is to be given the benefit of the doubt.

3. Priority Consideration

Priority consideration injunctive relief was available only to certain prevailing class members. Paragraph 11 required USDA to provide the opportunity for priority consideration of: (1) one purchase, lease or other acquisition of inventory property; (2) one Farm Ownership Loan;

and (3) one Operating Loan. The Consent Decree stated that USDA would offer priority consideration for inventory property to the extent permitted by law.[127]

4. Consent Decree Deadline

The deadline in the Consent Decree for exercising injunctive relief rights was five years from the date of the Court's approval of the Consent Decree, or April 14, 2004.

B. Implementation Milestones

The Monitor's Office met with several farm organizations regarding injunctive relief and spoke at a number of claimant meetings at which injunctive relief was a primary topic. The Monitor's Office also prepared updates on injunctive relief and provided helpful links on the Monitor's web site to organizations and resources that might assist claimants who were interested in continuing to farm.[128]

FSA issued Farm Loan Program Notices (FLPs) describing how injunctive relief should be implemented by FSA officials.[129] USDA took steps beyond those required in the Consent Decree to assist borrowers, including successful claimants, by expanding access to technical assistance. In 2001, USDA authorized state FSA offices in Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, and South Carolina to hire contractors to help applicants

[127] Priority consideration is defined in the Consent Decree, ¶ 1(k) as follows: "The term 'priority consideration' means that an application will be given first priority in processing, and with respect to the availability of funds for the type of loan at issue among all similar applications filed at the same time; provided, however, that all applications to be given priority consideration will be of equal status." Generally, inventory property offered for priority consideration may be purchased for its appraised value before the property is put up for a public bid. USDA's procedures for implementing priority consideration are outlined in FLP-586, Guidance on Applications Submitted by *Pigford I* Claimants (April 11, 2011).

[128] A summary of the Monitor Updates on injunctive relief is provided in Appendix 36. The full text of these Monitor Updates is available on the Monitor's web site. In early April 2012, the Monitor's web site will be available at http://www.dcd.uscourts.gov/pigfordmonitor/.

[129] These notices are available on the Monitor's web site. The notices were periodically updated by USDA.

complete loan applications and develop feasible farm loan plans. In September of 2002, USDA announced a series of additional steps to assist minority and disadvantaged farmers, including the creation of the Office of Minority and Socially Disadvantaged Farmer Assistance to work with minority and socially disadvantaged farmers who had concerns and questions about loan applications. As the implementation process continued, USDA reported continued efforts by FSA to provide assistance and outreach to minority farmers.[130]

1. Extension of Deadlines

USDA extended the deadline for injunctive relief on several occasions. In January 2003, USDA announced plans to voluntarily extend the deadline until April 14, 2005, or for one year after a claimant completed the claims process, whichever is later.[131]

On April 15, 2005, the parties Stipulated and the Court ordered another extension of the deadlines. Under the April 15, 2005 Stipulation and Order, prevailing class members could exercise their right to technical assistance injunctive relief until April 14, 2006, or two years from the date on which the class member completes the claims process, whichever is later. Other injunctive relief rights for priority consideration and most favorable light review were available through April 14, 2005, or two years from the date on which the class member completes the claims process, whichever is later.

[130] These efforts include a toll-free help line for minority farmers; a Minority Farm Register to help ensure a more accurate count of minority farmers and to help increase assistance to minority farmers; spot-checks of denied loan applications from minority applicants; performance goals for utilization of loan funds for minority and female loan applicants; and guidelines to reform and improve the representation of minorities and women on FSA county committees.

[131] This announcement was publicly made in a press release dated January 16, 2003. In July 2003, FSA issued Notice FLP-313, "Priority Consideration for Prevailing Claimants" which extended the period for injunctive relief to April 14, 2005.

The deadline extension permitted class members who completed the claims process in the years from 2007 through 2011 to be eligible for injunctive relief for two years after the date they received a final decision from the Adjudicator or Arbitrator.

2. Use of Injunctive Relief

No statistics are available on the number of class members who sought to exercise their right to technical assistance or most favorable light injunctive relief. Table 15 provides statistics concerning the number of prevailing claimants who requested and received priority consideration injunctive relief.

Table 15: **Statistical Report on Priority Consideration Injunctive Relief**[132]	
Statistical Report as of:	**December 31, 2011**
A. Farm Ownership Loans 1. Number of Requests for Priority Consideration With Complete Application 2. Number of Applications Approved	 126 29
B. Farm Operating Loans 1. Number of Requests for Priority Consideration With Complete Application 2. Number of Applications Approved	 218 76
C. Inventory Property 1. Number of Requests for Priority Consideration 2. Number of Applications Approved	 10 1

C. Significant Implementation Issues

Class members and the leadership of the farm organizations expressed doubts regarding the prospects for injunctive relief to function as described in the Consent Decree. Class members expressed doubt that local FSA officials would actually provide the benefits described in the

[132] Table 15 statistics are provided by USDA. For a year-by-year summary of priority consideration injunctive relief statistics through the end of 2010, see Appendix 37.

Consent Decree. Class members pointed out that there was no system of accountability within USDA to ensure that loan making and other services were conducted in a nondiscriminatory manner. Class members raised doubts regarding whether the Consent Decree provisions will have any impact on this perceived problem. Class members also suggested that they would be the victims of retribution if they exercised their injunctive relief rights. These problems were compounded when class members learned that to qualify for a new loan they would still be required to meet all USDA loan eligibility requirements.

Throughout the implementation process, Class Counsel and others expressed concern that only a very small number of farmers made use of their right to priority consideration. It is difficult to know why this aspect of the Consent Decree did not provide relief for more class members. Several factors may be contributing to the low rate of use of injunctive relief. First, it is possible that only a small percentage of successful claimants remained interested in farming. Many class members are elderly; some have passed away. Farmers who lost their land and equipment prior to prevailing in the claims process may have moved to other off-farm jobs to support themselves and their families and may no longer have the interest or ability to farm. A second, related factor may be the difficult agricultural economy for small family farmers. A third factor may be statutory restrictions that make farmers ineligible for FSA loan programs. Finally, it is possible that despite the efforts by the parties and the Monitor to provide information and assistance, these efforts were not sufficient to overcome the skepticism that FSA would treat claimants fairly.

Individual class members contacted the Monitor by phone and by letter regarding problems in obtaining new loans after they had prevailed in the claims process. In some cases, the Monitor was able to work with USDA and Class Counsel to address individual problems or concerns. In other cases, the Monitor was able to provide information or to explain why an

individual claimant may not be eligible for the relief they sought. The Monitor offered to follow up on any complaints regarding USDA's implementation of injunctive relief if specific information was provided regarding the individual FSA officials involved. Throughout the implementation process, USDA responded appropriately if problems were brought to USDA's attention by the Monitor.

XII. GOOD FAITH IMPLEMENTATION

As J.L. Chestnut observed at the fairness hearing on the Consent Decree, the *Pigford* settlement was complicated. Hundreds of thousands of significant details were presented within more than 22,000 claims. Hundreds of Court orders were issued about details of implementation. Hundreds of thousands of letters were sent to class members. The neutrals and Class Counsel handled tens of thousands of phone calls. Details were tracked in multiple databases.

From the beginning, Class Counsel, the Government, and the neutrals recognized the importance of doing everything in our power to get every detail right. Throughout the implementation process, the Monitor has observed that Class Counsel has represented the class members' interests in good faith, and the Department of Justice and USDA's Office of General Counsel have represented the Government's interests in good faith. The Monitor has also observed good faith on the part of the neutrals—the Facilitator, the Adjudicator, and the Arbitrator—as they carried out their Consent Decree responsibilities.

As of the end of 2011, the neutrals had completed the review process for approximately 22,721 claims, and the Government had provided approximately $1.06 billion dollars in cash relief, estimated tax payments, and debt relief to prevailing claimants. During 2011 and this first part of 2012, the parties and the neutrals continued to work in good faith to complete the implementation process for all claims and to wind down the Consent Decree.

A. Remaining Implementation Issues

Although much has been accomplished as of the end of 2011, several important issues remain. General issues are summarized below. Specific tasks that need to be completed regarding specific claimants have been identified and summarized for the parties and the Court.

1. Wind-Down Stipulation

The parties and neutrals have been negotiating a global stipulation to wind down the Consent Decree provisions in an orderly fashion. The Arbitrator has served as mediator of the parties' negotiations. The parties have not yet fully resolved all of the outstanding issues involved in the wind-down stipulation.

2. Debt Relief Implementation and Verification

As of March 30, 2012, the Monitor had issued debt relief summaries in each of the 2,896 cases identified for *Pigford* debt relief review. The summaries describe the *Pigford* debt relief, if any, that USDA has implemented in each case. There are three claims in which a question remains regarding the appropriate relief. One of them is pending before the Court.[133] The other two are cases the parties are trying to resolve; they are not before the Court at this time.

3. Wind Down of Monitor's Office

The Monitor has completed the substantive Consent Decree duties described in this report. For those issues that the Monitor and the parties have been unable to resolve, paragraph 13 of the Consent Decree provides Class Counsel with an opportunity to bring any violations of the Consent Decree to the attention of the Court for resolution.

As of March 31, 2012, the Monitor will no longer respond to letters from class members raising problems regarding the Consent Decree. For a period of time, class members who call the

[133] This motion was filed on March 22, 2012, by Prentiss and Ellen Guyton. *See* Docket # 1806.

Monitor's toll-free line will hear a recorded message that includes Class Counsel's toll free number, 1-866-492-6200. As of March 31, 2012, the Monitor will no longer maintain the Monitor's web site, which will be transferred to the Court. The contents of the web site will continue to be available at http://www.dcd.uscourts.gov/pigfordmonitor/.

After March 31, 2012, the Monitor will complete the administrative steps required to wind down the Monitor's office pursuant to the terms of a Stipulation and Order dated September 21, 2011.[134] The Facilitator will temporarily retain certain Monitor records, including petition documents; Monitor petition decisions; correspondence to and from class members; debt relief summaries, loan records provided by USDA, and the amounts of any refunds, reapplied payments, and debt cancellation for each class member whose debt relief was reviewed; USDA information memoranda provided to the Monitor; and Monitor communications to the parties and the class.

This report is the Monitor's final report to the Court on the good faith implementation of the Consent Decree.

B. Concluding Observations

In terms of dollars, the *Pigford* case is the largest class action civil rights settlement in the history of the United States. Serving as Monitor in this case was a daunting task. Less than one page of the Consent Decree was devoted to describing the Monitor's duties. From that scant page, a system had to be developed to determine whether and when to direct reexamination of claims. In work over the years between the Monitor, the parties, the other neutrals, and the Court, systems had to be developed to handle issues that touched every class member in one way or

[134] This Stipulation and Order was modified by a Stipulation and Order filed January 10, 2012.

another. Those systems are described in this report. Some of the key factors that shaped the work of the Monitor's office are listed below.

1. *Intense Social Justice Issue*

Race discrimination is an issue that has very deep meaning for the individuals involved. Claimants who believe they experienced discrimination express a strong need for justice. Government personnel who believe they did not discriminate are upset by allegations and claims outcomes that seem to label them as persons who engaged in racially motivated actions. The thoughtfulness of the actions and sensitivity of the communications in this case had to be appropriate for the deep meaning they would have to those being touched by the work.

2. *No Easy Answers on Claims Outcomes*

Winning or losing in the claims process was not a function of a simple mathematical formula or a "check the box" matrix. The Consent Decree and governing Orders constructed a framework that required a fact-specific review to determine whether a claimant met the standard of proof required to obtain relief. The fact-specific reviews were against the backdrop of a complex regulatory scheme, which further complicated the analysis. This necessarily meant that careful, accurate work would be a time-consuming process.

3. *Multiple Forms of Relief*

Prevailing class members were entitled to multiple forms of relief: cash relief, debt forgiveness, payments toward federal income taxes, and three types of injunctive relief. The details of providing each type of relief required resolution of both substantive and administrative questions during the implementation process.

4. *Multiple Reviews by Neutrals*

The Consent Decree set up a system in which several different neutrals evaluated each claim at different steps in the process. The multiple reviews lengthened the time it took for some

claimants to receive a final decision, but provided a mechanism for addressing complaints in a fair and complete manner.

5. Low-Income Class

In general, USDA farm programs targeted family farmers who were unable to secure adequate credit elsewhere.[135] A significant portion of the *Pigford* class lives at or below the poverty line. This intensified the win-or-loss stakes for class members and made it all the more important to have accurate and understandable decisions in the claims process.

6. High Profile in News and Political Arenas

The press and the Congress have followed the case, making requests at various junctures for information and explanations.

These factors created a set of natural tensions. On one hand, class members and the Government wanted the claims process to be completed as quickly as possible. On the other hand, both parties wanted the disposition of each claim to be based on a consistent application of the governing legal standards. To add to these tensions, while the parties and neutrals were attempting to complete the steps needed to review each individual claim, stakeholders both inside and outside of the case spoke out in the public domain to evaluate, praise, or criticize how the *Pigford* settlement fit or did not fit into their overall conception of justice.

[135] *See, for example*, 7 C.F.R. § 1941.12(a)(7)-(8) (1981) and 7 C.F.R. § 1943.12(a)(7)-(8) (1981) that require Operating Loan and Farm Ownership Loan borrowers to operate a family farm and to be unable to obtain sufficient credit elsewhere to finance actual needs at reasonable rates and terms. Similar rules applied throughout the class period for the USDA farm loan program.

C. Guiding Principles

Despite challenging circumstances and specifications, the parties and neutrals have in large measure succeeded in making this settlement work. What principles have guided the Monitor's part of this work?

1. Neutral Engagement

To succeed in reaching class members required neutral engagement. The Monitor actively communicated with class members to inform them of the terms of the settlement. Monitor staff were compassionate and attentive to class members' concerns, but communicated with objective neutrality. The Monitor's role as a judicial adjunct allowed the Monitor to serve as a source of honest, credible information.

2. Consistency and Accuracy

To succeed in providing a review process for individual complaints of discrimination required consistency and accuracy in claims decisions. The Monitor and her staff brought a substantive knowledge and background in agricultural law and USDA farm loan and benefit program regulations to the review process. The Monitor used this background to analyze claims and explain why a particular claim should or should not be reexamined.

3. Common Sense Problem Solving

Many issues arose during the implementation process that needed to be worked out. The Monitor played a mediator role in some circumstances. The Monitor urged compliance with Consent Decree requirements when necessary and sought to serve as an honest broker when disputes arose. The ability to engage in *ex parte* communications with the parties, the other neutrals, and the Court gave the Monitor substantial resources to draw on in fulfilling this necessary function.

4. Trust

Finally, to succeed in implementing a complex settlement over a period of years required an ongoing trust between the Monitor and the Court, members of the class, counsel, and the other neutrals. The Monitor endeavored to earn and maintain this trust.

When all is said and done, what has the settlement accomplished?

It is not reasonable to ask whether the *Pigford* settlement "remedied" our nation's history of race discrimination against African American farmers. The settlement could never hope to make up for the history described in the first few pages of the Court's April 14, 1999 Opinion approving the settlement in this case.

It is reasonable to ask, though, whether this settlement made any difference. It did. Besides providing relief of more than $1 billion dollars to nearly 16,000 African American farmers as compensation for race discrimination as determined through the close examination of individual claims, this settlement communicated to more than 22,000 African American farmers that what happened to them *mattered*. The claimants in this case—most of whom prevailed on their claims and received cash relief, debt relief and more—observed that for the most part, their concerns, questions, and rights in this case were given careful, fair attention. Our hope was that everyone who touched this case was treated with dignity, and learned that the facts of their cases were very important.

In the opinion approving the settlement in this case, the Court said at the outset that of course *Pigford* could not undo all of the broken promises and years of discrimination. The Court wrote in 1999 that it hoped the settlement would be:

> . . . a good first step towards assuring that the kind of discrimination that has been visited on African American farmers since Reconstruction will not continue into the next century.[136]

Now we're in that next century. There are hundreds of lawyers, farm advocates, neutrals, county courthouse employees, and federal agency personnel who worked hard to get the details of individual claims right for more than 22,000 claimants over a period of more than twelve years. Their work put a shared spotlight on issues concerning race discrimination in agriculture. That work and that shared focus created a wave of education, conversation, and attention to this issue. From the vantage point of the Monitor's office, it seems safe to say that *Pigford* was a good first step, and more, towards accomplishing the goals that were at the heart of the settlement.

XIII. RECOMMENDATION FOR STATUS CONFERENCE

The Monitor's substantive duties will terminate as of March 31, 2012. A small number of tasks must be completed in order to fully implement the Consent Decree. The Monitor recommends that the Court schedule a status conference in approximately thirty days to review the status of the remaining tasks. The Monitor further recommends the Court consider regular

[136] *Pigford v. Glickman*, slip op. at 3; 185 F.R.D. 82 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000).

conference calls with the parties and neutrals until all tasks necessary to fully implement and wind down the Consent Decree have been completed.

Dated: March 31, 2012.

Respectfully submitted,

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