House Judiciary Committee

Subcommittee on Constitution

Testimony of Randi Ilyse Roth

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I. Introduction

I have served as the independent, Court-appointed Monitor in *Pigford v. Veneman* for four and one-half years, since March 2000. For the sixteen years that preceded the Monitor appointment, I worked as a legal aid lawyer, first as an advocate for low-income residents of Chicago's south side, and then, beginning in 1986, at Farmers' Legal Action Group, Inc. (FLAG). At FLAG, I worked as an advocate for low-income family farmers nationwide. One of my main areas of focus involved representing African American farmer organizations.

Now, in the fifth year of the implementation of the *Pigford* Consent Decree, the case is the subject of intense public debate. *Pigford* represents an important chapter in civil rights history, and it is important that Congress, the press, and the public come to an accurate understanding of what *Pigford* did and did not accomplish. Some of the recent press is confusing—it is hard to tell what, if anything, went wrong. Some criticisms assert that the parties are failing to live up to the Consent Decree, and some assert that the Consent Decree did not go far enough towards meeting African American farmers' needs. It is critical that the debate be framed in a way that allows for a realistic assessment of the situation.

My testimony will primarily address the question of whether the terms of the Consent Decree have been honored.

II. Background

A. Litigation Background

It might be helpful to explain some background about the *Pigford* litigation. At least three things were notable about *Pigford* from the outset.

First, *Pigford* lawyers sought certification as a class action. Getting class certification in a case like this is tough; similar cases both before and after *Pigford* have failed to overcome that hurdle. In *Pigford,* however, class certification was granted.

Second, the *Pigford* case asked for monetary relief and for some injunctive relief for individuals, but it did not ask the Court to require the United States Department of Agriculture to undergo structural change. I was not involved with the case at this stage of the proceedings, but I have heard J.L. Chestnut, now Co-Class Counsel, speak many

times in public settings about the strategic judgment calls that went into making that choice.

Third, this lawsuit had very serious statute of limitation problems. When it was filed, the governing statute of limitations went back only two years. This problem was solved by Congress. Shortly after the class was certified, Congress passed a law that changed the statute of limitations to allow farmers to raise claims from the entire sixteen-year period of January 1, 1981, through December 31, 1996.

Eventually, the parties agreed to settle the case. They reached a preliminary agreement, and the Judge held a Fairness Hearing to hear potential class members' concerns. After the Fairness Hearing, the Judge required a few changes to the Decree, and in the end, the parties entered into a settlement agreement that included the following elements:

1. Forum to Prove Discrimination. Each class member would be given a forum in which to prove that he or she experienced discrimination.

2. Low Standard of Proof. Because so many class members lacked documents to prove their case, the forum would allow a very low standard of proof, much lower than the "preponderance" standard normally used in civil court.

3. Deadlines. The parties agreed to deadlines to govern the process.

4. Notice. The parties agreed to specific notice provisions.

5. Relief. The parties agreed to the types and amounts of relief that would be made available to prevailing claimants. There was no cap to the total amount of relief.

That settlement agreement is now a Court Order and is binding much like a contract.

B. Role of the Monitor

Next, I would like to explain my role in this case. The Court's Order of Reference in *Pigford* makes the Monitor an agent and officer of the Court.[1] Because my role is quasi-judicial, the topics about which I can testify are limited. In particular, I cannot testify regarding any matter that is currently pending before the Court.

Paragraph 12 of the Consent Decree gives the Monitor four jobs in the *Pigford* implementation process.[2]

1. Reporting. The Monitor reports to the Court about the good faith implementation of the Consent Decree. I have included my most recent report as Appendix 5 to this testimony. All of my reports are available on the Monitor's web site at http://www.pigfordmonitor.org/reports/. The reports give

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[1] Order of Reference, *Pigford v. Glickman*, Civ. No. 79-1978 (Apr. 4, 2000).

[2] The Monitor's role is further defined in the Order of Reference issued by the Court on April 4, 2000. The Order is available on the Monitor's web site at http://www.pigfordmonitor.org/orders/20000404oor.pdf.

detailed statistical information and conclude that the parties and the neutrals are working in good faith to implement the Decree.

2. Resolve Problems. The Monitor attempts to resolve problems that class members are having regarding the Consent Decree. There are more than 22,000 people in the class, and they raise many concerns. The most significant of these concerns are described in my reports. Historically, they have focused on debt relief, injunctive relief, tax relief, and payment status. The tools that my office uses in this problem-solving role include:

    a. Claimant Services. In the Claimant Services division of my office, Monitor staff attorneys are available to work closely with class members to attempt to solve their individual problems.

    b. Monitor Updates. My office issues Monitor Updates to the class. Copies of the Monitor Updates are included as Appendix 4 to this testimony and are available on the Monitor's web site at http://www.pigfordmonitor.org/updates/.

    c. Web Site. My office maintains and regularly updates a web site with information for the class at www.pigfordmonitor.org. Our web site gets an average of 3,200 hits each month.

    d. Meetings With Parties and Neutrals. I have frequent phone conferences and quarterly in-person meetings with the parties and neutrals.

    e. Attend Claimant Meetings. My office attends meetings sponsored by claimant organizations throughout the South.

    f. Correspondence. The Monitor's office receives and responds to approximately 100 letters each month.

3. Issue Petition Decisions. In approximately 5,400 cases, claimants and/or the government have petitioned to the Monitor for review of the decisions issued by the Adjudicator, Arbitrator, or Facilitator regarding individual claims. I issue Monitor decisions in response to these petitions. The Consent Decree and Order of Reference require complicated legal analysis in Monitor decisions. Based on that analysis, I decide whether the Adjudicator's, Arbitrator's, or Facilitator's decision contained errors that meet the Consent Decree standard.[3] In cases where I find this type of error, I direct the Adjudicator, Arbitrator, or Facilitator to reexamine the claim. So far, in the vast majority of cases, decisions on reexamination have followed the Monitor's recommendations. (Redacted sample Monitor decisions will soon be available on the Monitor web site.)

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[3] Paragraph 12(b)(iii) provides that the standard is "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."

4. Toll-Free Line. The Monitor's office staffs a toll-free line (1-877-924-7483) that class members and the public can use to lodge Consent Decree complaints. The toll-free line fields approximately 1500 to 2000 calls each month.

C. Status of Implementation

1. How Does the Consent Decree Process Work?

The Consent Decree set up a process through which each of the 22,369 claimants is given a chance to prove to a neutral third party that he or she experienced discrimination. Both sides—the claimant and the government—are allowed to submit information about the claim. Claimants are given the choice of proving discrimination through Track A or Track B. Track A allows claimants to prove discrimination at a much lower standard of proof than would be required in a court proceeding; cash relief for prevailing Track A claimants with credit claims is fixed at $50,000. Track B allows claimants to prove discrimination at the preponderance of the evidence standard of proof that would apply at a civil trial; there is no cap for damages in Track B. The vast majority of class members elected to proceed under Track A. Some characteristics of Track A and Track B are summarized in Table 1 below.

Table 1. Characteristics of Track A and Track B

	Track A	**Track B**
Claims Process	Adjudicator decides claim based on papers submitted with and in response to claim form	Arbitrator decides claim after submission of written direct testimony, documents, and one-day in-person hearing
Discovery	None	Limited
Standard of Proof	Substantial evidence[4]	Preponderance of the evidence[5]
Amount of Damages for Prevailing Claimants	$50,000 plus tax relief, debt relief, and injunctive relief	Actual damages (no cap) plus debt relief and injunctive relief
Elements of Proof of Discrimination	Specifically identified, similarly situated white farmer who was treated more favorably	Claimant was a victim of discrimination and suffered actual damages

2. What Is the Late Claims Process?

Paragraph 5(g) of the Consent Decree created a "late claims" process. This process gives people the chance to show that extraordinary circumstances beyond their control

[4] In this case "substantial evidence" means "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 in the record that fairly detracts from that conclusion." Consent Decree, paragraph 1(l).

[5] In this case "preponderance of the evidence" means "such relevant evidence as is necessary to prove that something is more likely true than not true." Consent Decree, paragraph 1(j).

prevented them from filing on time. If a person prevails in this process, he or she is given a new opportunity to file a Claims package.

This late claims process also had a deadline: September 15, 2000. About 66,000 people filed timely applications in this late claims process. The Consent Decree Arbitrator, who administers this process, has so far found that 2,231 people—fewer than 4 percent of the applicants—meet that high standard.

3. What Is the Success Rate?

About 61 percent of all claimants prevailed in their initial adjudications and arbitrations. So far the unsuccessful claimants who filed petitions are prevailing at a rate of about 50 percent in the petition process. Projecting solely based on historical percentages, one would conclude that once the petitions process and reexamination process are complete, close to 70 percent of the claimants will have prevailed on their claims.

Some recent press reports assert that there has been only a 10 percent success rate. Those assertions must be based on combining three groups: (1) the approximately 22,000 claimants, (2) the approximately 66,000 people who submitted timely applications for permission to file late, and (3) the approximately 8,000 people who sought entry into the late claims process after its deadline.[6] The three groups have very different rights in this settlement. People who did not file a claim on time and did not meet the late claims standard cannot obtain relief through this lawsuit.

4. How Much Has Been Paid Out?

Overall, about $831 million of relief has been distributed to more than 13,500 class members in this case.

Table 2. Status of Payments

Status of Payments	**National**
Dollars Paid Directly to Track A Class Members Cash Award ($50,000)	$ 651,250,000
Dollars Paid Directly to Track A Class Members Non-Credit Awards ($3,000)	1,296,000
Dollars to Which Track A Class Members Are Entitled as IRS Payments	162,812,500
Debt Relief	15,642,321
Total Track A Relief	$ 831,000,821

[6] There are 22,369 eligible claimants in this case. There are 65,950 people who timely sought entry into the class through the late claims process. There are 7,870 who sought entry into the class through the late claims process after the deadline for doing so. If all three universes are added together, the three groups—22,369 claimants plus 65,950 timely late claims applicants plus 7,870 untimely late claims applicants—create a total universe of 96,189. The 13,532 claimants who prevailed in Track A constitute 61 percent of the 22,369 eligible claimants. The 13,532 claimants who prevailed in Track A constitute 14 percent of the 96,189.

5. What Have Been the Results in the Various Processes?

My office has prepared charts for the Committee regarding the results to date of implementation of the various processes.

a. Those Who Filed Claim Sheets on Time. Chart 1, which is in Appendix 1 to this testimony, explains the status of implementation as to the 22,369 claimants who filed Claim Sheets on time (by October 12, 1999) and were found eligible to participate in the settlement.

b. Those Who Did Not File Claim Sheets on Time. Chart 2, which is in Appendix 2 to this testimony, explains the status of implementation as to the 65,950 individuals who did not file Claim Sheets on time and who timely sought to become claimants through the "late claims" process.

c. Those Who Were Allowed Into the Case through the Late Claims Process. Chart 3, which is in Appendix 3 to this testimony, explains the status of implementation for the 2,231 claimants who have been allowed into the case through the "late claims" process.

I would be happy to answer questions about these charts in the question and answer session.

III. Was the Consent Decree Honored?

This question simply asks whether the parties and the neutrals have done and are doing the things that they agreed to do under the Consent Decree. The answer is yes. Claims are being processed, prevailing claimants are being paid, debt relief is being awarded, and injunctive relief rights are being honored. As I have detailed in my court reports, where problems or administrative snags have arisen in individual claimant situations, the parties have worked in good faith to get the problems solved.

Recent press reports have focused on two main factual assertions to support the allegation that the parties did not honor the Consent Decree. I will address each in turn.

First, some in the press have reported that $2.3 billion was allocated for the case and that therefore the case is a failure if the ultimate payouts total less than that amount. The reality is that there is no dollar amount allocated in the case. All claimants who prevail are paid out of the Treasury Department's Judgment Fund; unlike many class action settlements, this settlement has no cap on the total amount of payments.

Second, some press accounts have reported that every class member should have "automatically" prevailed. The settlement did not provide for automatic payment. Instead, as explained above, it created a procedure through which each claimant has a chance to prove to a neutral decision maker that he or she was a victim of discrimination. While this process has not been "automatic," it has permitted thousands of claimants to recover based on far less proof than would typically be required in a court of law.

IV. Next Steps

It seems obvious that the settlement of one lawsuit could never provide everything that African American farmers need to overcome decades of discrimination. In his opinion approving the settlement, Judge Paul L. Friedman wrote:

> It is difficult to resist the impulse to try to undo all the broken promises and years of discrimination that have led to the precipitous decline in the number of African American farmers in the United States. The Court has before it a proposed settlement of a class action lawsuit that will not undo all that has been done. Despite that fact, however, the Court finds that the settlement is a fair resolution of the claims brought in this case and 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.

This lawsuit provided a first step.

The results of lawsuits are limited by the nature of the claims listed in the complaint, by the parties' desires about how to resolve those claims, and by the Court's ability to fashion relief. Congress is not bound by these limitations. I understand that several congressional committees are now interested in figuring out the right next steps for legislation to benefit African American farmers. Perhaps the lessons learned in this case and our testimony here today can contribute to a successful outcome in those new efforts.

Attachments

Appendix 1 - Chart 1: Steps in *Pigford* Claims Processing for Claimants Who Filed Claim Sheets on Time
Appendix 2 - Chart 2: Steps in *Pigford* Claims Processing for Claimants Who Did Not File Claim Sheets on Time
Appendix 3 - Chart 3: Steps in *Pigford* Claims Processing for Claimants Who Were Approved in the Late Claim 5(g) Process
Appendix 4 - Full Set of Monitor Updates; Questions and Answers About Monitor Review of Decisions
Appendix 5 - Monitor's Report and Recommendations Regarding Implementation of the Consent Decree for the Period of January 1, 2002, Through December 31, 2003