

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

MONITOR'S REPORT AND RECOMMENDATIONS REGARDING
IMPLEMENTATION OF THE CONSENT DECREE FOR THE
PERIOD OF MARCH 1, 2000 THROUGH AUGUST 31, 2000

I. INTRODUCTION

This is the first in a series of Monitor reports concerning the implementation of the Consent Decree in this case. This report covers the initial six-month period of the Monitor's operations: March 1, 2000, through August 31, 2000. A second report addressing events between September 1, 2000 and February 28, 2001, will be released in the spring. In several places in

this report, footnotes provide brief interim updates regarding events that have transpired between September 1, 2000, and the present.

II. EXECUTIVE SUMMARY

Overall, significant progress was made in implementing the Consent Decree during this initial six-month period. Highlights of the progress during this reporting period include:

- Nearly 9,000 Track A cases were adjudicated.¹
- The Government paid out more than \$265 million to class members in Track A.²
- The Monitor reexamination process was defined in a series of Court Orders.
- Track B arbitrations began.
- The United States Department of Agriculture (USDA) issued important procedural rules regarding injunctive relief.
- The parties resolved issues that led to the processing of thousands of claims that had been on hold.

Notwithstanding this progress, important implementation challenges and problems remain. One of the most important

¹ In total, as of December 18, 2000, 19,770 Track A cases were adjudicated.

² In total, as of December 18, 2000, nearly \$492 million has been paid out to class members.

issues not resolved in this reporting period concerns relief for claimants who prevailed on non-credit claims.³

During this reporting period, the parties and the neutrals (the Facilitator, the Adjudicator, and the Arbitrator) all worked in good faith to implement this Consent Decree.

The background section of this report explains the Monitor's authority to issue reports and provides basic statistics concerning the processing of claims. Later sections of the report regarding this six-month period explain the Monitor's activities and observations, significant Court Orders, the status of several important issues, good faith implementation of the Consent Decree, and Monitor recommendations.

III. Background

A. Authority to Issue Reports

Paragraph 12(b)(i) of the Consent Decree in this case requires the Monitor to:

Make periodic written reports (not less than every six months) to the Court, the Secretary, class counsel, and defendant's counsel on the good faith implementation of this Consent Decree[.]

The chief goals of this report are to discuss key developments in the case and to assess the good faith

³ As of the filing of this report, this issue has still not been

implementation of the Consent Decree during this six-month period.

B. Statistics About Processing of Claims

Statistics regarding the number of claimants, adjudication rates and results, and payment rates as of March 1, 2000, and as of August 31, 2000, are summarized in the table below.⁴

Statistical Reports as of:	Mar. 1, 2000		Aug. 28, 2000	
Item	Number	%	Number	%
Eligible class members	19,427	100%	21,069	100%
Cases in Track A (Adjudications)	19,287	99%	20,878	99%
Cases in Track B (Arbitrations)	140	1%	191	1%
Adjudication Completion Figures:				
Adjudications complete	9,552	50%	18,347	88%
Adjudications not yet complete	9,735	50%	2,531	12%
Adjudication Approval/Denial Rates:				
Adjudication decisions approved	5,728	60%	11,083	60%
Adjudication decisions denied	3,824	40%	7,264	40%
Adjudication Approvals Paid/Not Paid:				
Approved adjudications already paid	1,839	32%	7,143	64%
Approved adjudications not yet paid	3,889	68%	3,940	36%
Dollars Paid Out to Class Members:	\$91,950,000		\$357,150,000	

resolved.

⁴ To provide a brief interim update, statistics as of December 18, 2000, are provided in Appendix 1. As of December 18, 2000, 19,770 Track A adjudications had been completed, and the Government had paid out nearly \$492 million dollars to class members. The USDA posts updated statistics on their web site: <http://www.usda.gov/da/status.htm>. Additionally, current statistics are available upon request from the Monitor's office (1-877-924-7483).

IV. MONITOR'S ACTIVITY AND OBSERVATIONS
DURING THE SIX-MONTH REPORTING PERIOD

The Court appointed the Monitor in an Order entered on January 4, 2000. The Order provided that the appointment was effective as of January 18, 2000, and that the Monitor was to begin operations on or about March 1, 2000.

A. General Start-Up of Operations

During this reporting period the Monitor's office undertook the necessary steps to start up Monitor operations. These steps included:

1. Conducting legal research and consultation regarding the scope of the Monitor's responsibilities and powers as a judicial adjunct;
2. Staffing, including hiring senior staff (Ed Cheeseboro as Deputy Monitor and Stephen Carpenter as Senior Counsel); hiring staff attorneys and support staff; recruiting contract attorneys; training staff and contract attorneys; contracting with, training, and providing support to phone operators;
3. Conducting introductory meetings with the parties' lawyers (Class Counsel, the Justice Department, and USDA's General Counsel) and with the neutrals (the Arbitrator, the Adjudicator, and the Facilitator);
4. Setting up and implementing a system of regular meetings with the parties and the neutrals;
5. Participating in introductory meetings with many groups of class members (see Appendix 2 for detailed listing);
6. Putting systems in place to implement the April 4, 2000, Order of Reference;
7. Preparing written materials for class members (a booklet that explains the rules for Monitor review, which is included as Appendix 3 and six Monitor Updates, which are included as Appendix 4);

8. Completing basic legal research regarding legal issues that arise in the petition process; and,

9. Leasing and setting up physical office space, and purchasing and configuring computer systems.

B. Reporting - Paragraphs 12(a) and 12(b) (i) of the Consent Decree

1. Reporting Directly to Secretary of Agriculture

Paragraph 12(a) of the Consent Decree says that the Monitor shall report directly to the Secretary of Agriculture. As Monitor, I met directly with Secretary Dan Glickman on January 19, 2000, and on May 3, 2000. Additionally, I have had many meetings and frequent phone conversations with USDA's General Counsel, Charles Rawls.

2. Written Reports to the Court, the Secretary, Class Counsel, and Defendant's Counsel

Paragraph 12(b) (i) of the Consent Decree says that the Monitor shall make periodic written reports (not less than every six months) to the Court, the Secretary, Class Counsel, and Defendant's Counsel on the good faith implementation of the Consent Decree. This report is being filed pursuant to that provision in the Consent Decree.

C. "Resolving Any Problems"--Paragraph 12(b) (ii) of the Consent Decree

Paragraph 12(b) (ii) of the Consent Decree says that the Monitor shall:

Attempt to resolve any problems that any class member may have with respect to any aspect of this Consent Decree

Thousands of class members contacted the Monitor's office, some by phone, some by letter, and others in person at the meetings listed in Appendix 2. Many of these class members expressed frustrations about problems they were experiencing. Some were problems that the Monitor's office could help with; others were not. The most significant recurring issues are explained below.

1. Injunctive Relief Problems

The Consent Decree's injunctive relief provisions provide successful class members with priority consideration for three types of benefits from USDA's Farm Service Agency (FSA): (1) the purchase, lease, or acquisition of some property that USDA owns - known as inventory property; (2) one FSA direct farm ownership loan; and (3) one FSA direct operating loan. The injunctive relief provisions also include technical assistance from USDA in getting operating loans and farm ownership loans and acquiring inventory property. Technical assistance and service must come from qualified USDA employees who are acceptable to the class member. Further, as a part of injunctive relief, class member applications are to be viewed in the light most favorable to the class member.

So far, the main focus of class member attention in the case has been on adjudications, late applications, and other issues that determine whether a claimant will prevail and receive the remedy provided for in the Consent Decree. The Monitor's office expects that class member concern will turn to injunctive relief issues. Several grass roots farm organizations have already concluded that for the purpose of a real, long-term remedy for the class, injunctive relief is as important as any other aspect of the case. The Monitor's Office has met with several such organizations regarding injunctive relief, and spoken at a number of farmer meetings at which injunctive relief was a topic.

Class members and the leadership of the farm organizations routinely express a deep cynicism regarding the prospects for injunctive relief to function as is described in the Consent Decree. These concerns typically raise three points. First, class members often doubt that local FSA officials will actually provide the benefits described in the Consent Decree. Second, class members often contend that there is no system of accountability within the Department to insure that loan making and other services are conducted in a nondiscriminatory manner. Class members raise vigorous doubts regarding whether the Monitor's office will be able to make any headway on this perceived problem. Third, class members frequently suggest that

they will be the victims of retribution if they exercise their rights for injunctive relief. This is an especially common response when class members are told that they have a right to technical assistance from a "qualified and acceptable" USDA employee and that class members may ask that an unacceptable USDA employee be removed from the class member's case and replaced by an acceptable USDA employee.

In sum, the Monitor's office expects that it will receive many requests to assist class members in making use of injunctive relief, and anticipates the need to attempt to resolve problems that class members have with this aspect of the Consent Decree.⁵

2. Payment Status Problems

When claimants were approved for payment of cash relief in Track A cases, they received a letter that told them to expect payment within approximately sixty or ninety days.⁶ For some

⁵ As of August 31, 2000, the Monitor's Office had little opportunity to evaluate the effectiveness and actual implementation of the injunctive relief portion of the Consent Decree. As of the filing of this report, the Monitor's office still does not have enough information to evaluate the implementation of the injunctive relief provisions by USDA's local offices.

⁶ In the beginning of this reporting period, 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.

claimants, the sixty or ninety days passed, but the check did not arrive.⁷ These claimants' situations fell into one of two categories: (1) cases in which checks were put on "hold" in the administration of this case, and (2) cases in which payment delays were caused by administrative difficulties regarding the payment mechanism used in this case.

a. Payment Suspension Due to "Holds"

The implementation process created two circumstances within which approved claimants' checks could be put on "hold." The first was "constructive application" holds. Constructive applications are explained in Section VI.A.2 below. A total of 1,209 claimants were on constructive application hold in this case. Claimants in this situation were able to find out about their "hold" status only by contacting their counsel or by contacting the Monitor's office. Class Counsel did not make any proactive effort to communicate with these claimants about their checks being held. As is noted in the constructive application section below, the constructive application issue has been resolved.

⁷ Of the 9,838 claimants who had been paid as of the date of the Facilitator report on this matter: (1) in 3,511 cases, checks were sent in less than 90 days; (2) in 2,936 cases, checks were sent in 90 - 120 days; (3) in 3,391 cases, checks were sent in more than 120 days. In the third group (3,391 cases), 1,008 were constructive application cases.

The second circumstance within which approved claimants' checks could be put on hold concerned Government petitions for Monitor review. In cases in which the Government intended to petition for Monitor review, the Government placed the claimants' checks on hold. The Government notified the Facilitator, Class Counsel, and the Monitor's office of the list of claimants who were in the status of "petition hold." Claimants in this situation were able to find out about their "hold" status only by contacting their counsel or by contacting the Monitor's office. Class Counsel did not make any proactive effort to communicate with these claimants about their checks being held.⁸

b. Administrative Difficulties

In some cases, administrative difficulties were the reason why payments were not made within the sixty or ninety-day timeframe. To understand this problem, it is helpful to understand the payment mechanism that was being used to process successful claimants' checks. The Consent Decree provides that payments to Track A claimants who prevail on their credit claims are to be made by the Judgment Fund.⁹

⁸ A system is now in place to communicate with claimants about "petition holds"; "constructive application holds" no longer exist.

⁹ For a description of the Judgment Fund, see 31 U.S.C. § 1304.

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 before a payment can be made by the Judgment Fund, the agency 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. The Government has further 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 has had to process approximately 10,000 requests for payments to successful Track A claimants in the past year, in addition to the approximately 5,000 non-Pigford payments that it otherwise had to process.

There have been instances in which payments have taken longer than ninety days despite the fact that the claimant's check is not on any kind of hold. These timing problems were due to administrative difficulties involving the Judgment Fund. Where the Government has been informed that a successful Track A claimant has not been paid within approximately ninety days, it has generally undertaken a prompt inquiry to determine the

source of the delay, and has generally resolved the situation quickly.

3. Other Problems

Claimants raised many other problems and concerns, including the following:

- Concern about the 40 percent denial rate in Track A adjudications - many in the claimant community had been under the impression that payment would be "virtually automatic" upon completion of claim forms;
- Concern about the litigious nature of Track B arbitrations;
- Cynicism about whether the appropriate people are being paid - many in the claimant community express suspicion that often individuals who had no real interaction with farming or USDA have been approved for payment, while individuals who had a long and troubled relationship with USDA have been denied relief;
- Concern about Federal Bureau of Investigation investigations in claimant communities;
- Concern that it is taking too much time for the Government to pay approved claims;
- Concern that the Farm Service Agency (FSA) county office staff is not sufficiently knowledgeable about the procedures for affording approved claimants their full rights to injunctive relief;
- Concern about difficulties in reaching Class Counsel to communicate about individual concerns;
- Concern about many of the issues described in Section VI below ("status of important issues").

In general, the Monitor has addressed these particular concerns by: (1) explaining how the Consent Decree works; (2) referring claimants to their Class Counsel; (3) making sure that the parties, the Secretary and the Court are aware of the concerns; and, (4) explaining how the petition for Monitor review process can be used to seek redress in individual cases in which errors occurred.

D. Reexamination of Claims - Paragraph 12(b)(iii) of the Consent Decree

The rules regarding reexamination of claims were set forth by the Court in the Order of Reference entered on April 4, 2000. On June 2, 2000, the Monitor's office sent to every class member an introductory letter along with a booklet entitled, "Questions and Answers About Monitor Review of Decisions" (included as Appendix 3). This booklet provided a plain-language explanation of the rules for petitioning for Monitor review.

During this period, the Monitor's office also focused on preparing to issue decisions in response to petitions for Monitor review. No petitions became ripe for decision in this period.

E. Toll-Free Telephone Number - Paragraph 12(b)(iv) of the Consent Decree

The Monitor's office established a toll-free telephone number (1-877-924-7483). Callers reach a bank of phone

operators who have been trained regarding the basics of the case and who have access to a database containing certain factual information about each claimant. The operators are able to answer specific categories of questions at the time of the call. For other categories of questions or complaints, the operators make appointments for the caller to speak with a lawyer from the Office of the Monitor. The toll-free telephone number became operational as of May 29, 2000. The line received approximately 10,157 calls between May 29, 2000 and August 31, 2000.¹⁰

V. COURT ORDERS

A. Major Court Orders Furthering Implementation of Consent Decree

During this reporting period the Court issued several Orders that further defined the rules for implementation of the Consent Decree. They include:

Date of Order	Title of Order	Major Issues Addressed Include:
March 9, 2000	Order	Review of interlocutory Arbitrator decisions in Track B cases
April 4, 2000	Order of Reference	Defines responsibilities, powers and protections of Monitor; sets forth many of the rules for Monitor review of petitions for reexamination

¹⁰ This number represents the number of calls, not the number of callers.

Date of Order	Title of Order	Major Issues Addressed Include:
July 14, 2000	Stipulation and Order	Late cures; deadline for seeking permission to file a late claim under paragraph 5(g) of the Consent Decree; for those who are granted permission to file a late claim, deadline for filing Claim Sheet and Election Form; deadline for petitioning for Monitor review of decisions under Track A or Track B; limits parties to only one petition for Monitor review in each case under Track A or Track B; decision of Monitor on petition, and decision of Adjudicator or Arbitrator on reexamination not subject to any further review in any forum.
July 14, 2000	Second Amended Supplemental Privacy Act Protective Order	Protective Order amended to allow Adjudicator and Arbitrator to release written decisions to counsel representing other class members in this action (but only after they have signed the Protective Order).

B. Appeal to D.C. Circuit Court of Appeals

One claimant appealed the Court's approval of the Consent Decree in this case. On March 31, 2000, the United States Court of Appeals for the District of Columbia Circuit entered an Order affirming Judge Friedman's approval of the Consent Decree.¹¹

C. Challenge to Fairness of Consent Decree

On January 18, 2000, seven claimants filed a challenge to the fairness of the Consent Decree in this case. A hearing on

¹¹ Pigford v. Glickman, 206 F.3d 1212 (D.C. Cir. 2000).

the matter was held on July 31, 2000. The Court did not rule regarding this challenge during this reporting period.

VI. STATUS OF IMPORTANT ISSUES

A. What Important Issues Were Resolved in This Six-Month Period?

1. Process of Monitor Review

In this period the process for Monitor review was established by the Order of Reference and was explained to the class in the Monitor's June 2, 2000, letter and booklet (Appendix 3).

2. Constructive Applications

This issue involves claimants whose allegations of discrimination focused on unsuccessful attempts to apply for credit or benefits.

The class definition in paragraph 2(a) of the Consent Decree begins as follows:

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 program¹²

Although the class definition includes language explicitly referring to individuals who attempted to farm, it does not include language explicitly referring to individuals who

¹² Consent Decree, paragraph 2(a) (emphasis added).

attempted to apply for credit or benefit programs. The Government took the position that these claimants were not eligible class members.

This issue is very important. Many class members allege that the way in which USDA discriminated against them was by refusing to give them application forms and/or by actively discouraging them from filing applications.

The parties entered into an agreement on April 17, 2000, stating that a claimant who had attempted to apply would be deemed to have "constructively" applied whenever certain criteria are met. The parties' agreement, called the "constructive application principles," is included with this report as Appendix 5.

Shortly after the parties entered into this agreement, they instructed the Adjudicator to review all of the Track A decisions that had been made in cases in which the claimants' allegations involved "attempts" to apply. The parties instructed the Adjudicator to identify those cases that failed to meet the new constructive application principles. This process was stopped before it was completed. The parties decided to apply the constructive application principles prospectively (that is, the principles would be applied in all Adjudication decisions made on or after April 17, 2000), but

they agreed that the principles would not be used to change the decision in any Track A case that had already been decided.

3. The Freeze

USDA voluntarily agreed to give all claimants who timely submit their petitions for Monitor review the protection of a "freeze" of certain USDA actions. Under the terms of the freeze, USDA agrees not to accelerate or foreclose on the claimant's loan(s) and agrees not to dispose of any inventory property that once belonged to the claimant. The details of the freeze are explained in Monitor Update No. 006, which is included with this report at Appendix 4.

4. Procedure for Reporting Suspected Fraud

Some members of the public attempted to call the Facilitator's office and the Monitor's office to report suspected fraud. Investigating and/or otherwise acting upon these reports of suspected fraud does not fall within the Facilitator's or the Monitor's duties. The Government has determined that individuals wishing to report suspected fraud should call the USDA Inspector General's hotline at 1-800-424-9121.

5. Late Cures

This issue involves claimants who submitted their Claim Sheets and Election Forms ("claim packages") on time, but who

had defects in their paperwork that were not corrected until after the deadline.

Paragraph 5(c) of the Consent Decree provides that:

[T]o be eligible for relief . . . a claimant must submit his completed claim package to the [F]acilitator postmarked within 180 days of the date of entry of this Consent Decree, except that a claimant whose claim is otherwise timely shall have not less than 30 days to submit a declaration pursuant to subparagraph (b)(iii), above, after being directed to do so without regard to the 180-day period.

This paragraph established that October 12, 1999, was the deadline for submitting a completed claim package (with the exception noted above).

There are approximately 1,270 claimants who: (1) submitted their claim packages on time; (2) were notified by the Facilitator that there were defects in their claim packages; and, (3) cured those defects after October 12, 1999 (or after their thirty-day deadline pursuant to paragraph 5(c) of the Consent Decree). For a number of months these claimants, who can be referred to as "late cures," were not processed because the parties had not reached an agreement about what rules should apply to their cases.

The July 14, 2000, Stipulation and Order established that:

All timely filed but defective Claim Sheet and Election Forms that were corrected and resubmitted after the conclusion of the period prescribed by ¶ 5(c) of the Consent Decree - October 12, 1999 -

shall be deemed to have been timely filed within the period prescribed by ¶5(c).

As a result of this Stipulation and Order, the Facilitator accepted all of the "late cures" for processing.

6. Deadline to Request Permission to File Late Claims

This issue involves individuals who sought permission to submit a completed claim package after the October 12, 1999, deadline. The procedure for doing so is set forth in paragraph 5(g) of the Consent Decree:

A claimant who satisfies the definition of the class in ¶2(a), above, but who fails to submit a completed claim package . . . [by October 12, 1999] may petition the Court to permit him to nonetheless participate in the claims resolution procedures The Court shall grant such a petition only where the claimant demonstrates that his failure to submit a timely claim was due to extraordinary circumstances beyond his control.

In Orders dated December 20, 1999, and July 14, 2000, the Court delegated to the Arbitrator authority to determine whether to grant the petitions referred to above.

In the July 14, 2000, Stipulation and Order ("Order"), the Court established September 15, 2000, as the final deadline for requesting permission to file late claims. The Order provided that:

All putative class members who seek relief under ¶5(g) of the Consent Decree shall submit written requests for such relief to the Facilitator--

without a Claim Sheet and Election Form--postmarked not later than September 15, 2000. No extensions of that deadline will be granted for any reason.

7. Injunctive Relief Policies Established by USDA

FSA issued two administrative notices that set out the agency's view of the meaning of injunctive relief, and set the procedure that the agency will use in providing injunctive relief within the context of existing FSA regulations.¹³ These notices track the requirements of the Consent Decree, and, if followed, should provide an effective mechanism through which class members may make use of injunctive relief.

8. Government Petitions After Payment

During this reporting period, many claimants expressed concern that although they have received their \$50,000 checks, they do not know whether they can count on the funds because they do not know whether the Government will petition for Monitor review in their cases. The Government responded to this concern by voluntarily agreeing that, in general, if a claimant has received a \$50,000 check, his or her approval for payment is final and will not be submitted by the Government for Monitor review. The Government noted that in extraordinary circumstances there might be exceptions to this rule.

9. Claimant Access to Government Submissions

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. In preparing their petitions for Monitor review, many claimants wish to see copies of that Government response. During this reporting period, the parties did much of the work of figuring out the rules that must govern when and how claimants may have access to those files.¹⁴

10. Track B Interlocutory Matters

Several claimants contacted the Monitor's office during this reporting period 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. These rulings, which come before the final ruling in the case, are called interlocutory rulings.

Court Orders issued during this reporting period established that while the case is in progress, the Monitor does not have the power to review Arbitrator actions for "clear and

¹³ These policy notices are available upon request from the Monitor's Office (1-877-924-7483).

¹⁴ The rules were finalized shortly after the end of this reporting period, and are described in detail in Monitor Update No. 7, which was issued on October 10, 2000 (included with this report in Appendix 4).

manifest error.”¹⁵ When a Track B case is completed, the claimant and the Government each have the right to petition for Monitor review.

11. Petition Response Time

Once a party files a petition for Monitor review, the non-petitioning party has a chance to file a response to the petition. In paragraph 8(d) of the Order of Reference, the response time was set at thirty days. Once the parties began participating in the petition process, they determined that the thirty-day timeframe was too short. In the September 12, 2000, Stipulation and Order the rule was changed to provide that

The non-petitioning party shall have 60 days from the date of his or her receipt of any such petition to file a response thereto.

12. Tax Problems

Under the Consent Decree, prevailing Track A claimants are entitled to a federal tax credit equal to 25 percent of the sum of the claimant's \$50,000 cash payment and the principal amount of any discharged debt. The Consent Decree also provides that the transfer of funds necessary to cover the tax credits is to be made through electronic means by the Judgment Fund directly

¹⁵ See the chart of Court Orders in Section V of this report: both the March 9, 2000, Order and the April 4, 2000, Order of Reference (paragraph 10) addressed this issue.

to the Internal Revenue Service (IRS). Once the transfer is accomplished, the IRS has the responsibility to ensure that the transferred funds are deposited to the claimant's individual IRS account.

In some instances, there was a delay in depositing the tax credit to the claimant's account resulting in a situation in which the claimant was temporarily held responsible for satisfying the tax obligation on the cash payment. Early on, claimants in this category received deficiency notices from the IRS. Eventually, however, the Government resolved this issue and the IRS stopped issuing deficiency notices.

In 1999, 752 claimants received their \$50,000 cash payment. However, some of these claimants received the \$12,500 tax credit that corresponded to this payment in the calendar year 2000, not in 1999. Difficulties resulted from the fact that these two events may have occurred in two different tax years. Also, during this reporting period none of the claimants received their IRS Form 1099 for the tax credit. Combined, these situations created for the claimants a significant amount of confusion regarding the tax consequences flowing from the receipt of the cash payment and the credit. Counsel and Of Counsel for the class worked to provide accurate tax advice to the claimants. The Government immediately started working on a

plan to resolve these difficulties and to avoid this sort of confusion in the future.

B. What Important Issues Remain to be Resolved in the Near Future?

1. Non-Credit Relief

This issue involves payments of approved non-credit claims. Although 137 claimants were approved for cash payment on non-credit claims during this reporting period, and at least 419 have been approved to date, none have been paid.¹⁶

Paragraph 9(b)(iii)(A) of the Consent Decree explains how the cash payments are to be calculated for approved non-credit claimants:

USDA shall pay to the class member 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

The parties have not yet agreed upon a method for calculating benefits for approved non-credit claimants. Processing of these payments will not proceed until either (1) the parties reach an agreement about a method for calculation of benefits; or, (2) the Court orders that payments

¹⁶ Some have been approved for both credit and non-credit claims: although they may have been paid on the credit portion of their claims, none have been paid on the non-credit portion of their claims.

be calculated in a particular way. This problem is the subject of the Monitor's recommendation in Section VIII of this report.

2. Tax Issues

The Government is working to implement a plan in which the tax problems described above do not repeat themselves in the year 2001.

Additionally, an issue arose as to whether or not prevailing claimants in the United States Virgin Islands are entitled to a tax credit on the cash payment and debt relief. Virgin Island residents are not required to pay United States federal income tax; however, they do pay an income tax that is collected by their highest taxing authority, the Internal Revenue Board of the Virgin Islands (IRB). Some of these claimants contend that the Consent Decree tax credit should be applicable toward their tax burden owed to the IRB. They argue that the Consent Decree language providing for the tax credit should be interpreted broadly to mean that the claimant should receive a tax credit payable to the claimant's highest taxing authority. This issue has not yet been resolved.

3. Injunctive Relief

The Monitor's office expects that class member concern will turn to injunctive relief issues, and that the work of the Monitor's office will increasingly be devoted to assisting

eligible class members with the difficulties they may have in exercising their right to injunctive relief.

The task of ensuring that injunctive relief is effective for class members divides into three types of issues. First, class members seek to understand the nature of injunctive relief and how it can be useful. The Monitor's office plans to assist class members by providing them with written materials, making presentations to farm groups, and providing individual assistance to class members upon request. Second, class members often need to be directed to groups or individuals that can help them with farm planning and provide advice regarding other aspects of farm production. Nongovernmental organizations, universities, USDA extension offices, and other entities are candidates for such referrals. Third, the office will assist claimants who feel that they have not received appropriate injunctive relief, and compile information regarding the effectiveness of the USDA in implementing this aspect of the Consent Decree.

4. Petitions for Monitor Review

Class Counsel, Of Counsel, other lawyers who represent members of the class, and individual claimants who choose to represent themselves are faced with filing thousands of petitions for Monitor review. Issues arising from this

obligation will be discussed in the Monitor's report covering the next reporting period.

VII. GOOD FAITH IMPLEMENTATION OF THE CONSENT DECREE

It is apparent to the Monitor that both of the parties and all three of the neutrals (the Facilitator, the Adjudicator, and the Arbitrator) are working on this case in good faith.

Class Counsel, the Government, and each of the three neutrals have highly demanding jobs in the implementation of this landmark settlement: it is virtually impossible to complete this kind of undertaking without making some mistakes and taking some unpopular positions. Although many may be critical of specific aspects of the work being done to implement this Consent Decree, it is important to keep in mind that the test for good faith focuses on honesty. One standard legal dictionary defines good faith as, "A state of mind characterized by honest belief, absence of malice or intent to defraud, absence of a design to seek unconscionable advantage or of knowledge that such advantage is likely to occur" ¹⁷

All of those who are charged by the Court with the responsibility for carrying out implementation of this Consent Decree met that test during this reporting period.

¹⁷ West's Legal Thesaurus/Dictionary (William P. Statsky ed., 1986)

VIII. RECOMMENDATIONS

As this report explains, the parties have not yet implemented paragraph 9(b)(iii)(A) of the Consent Decree regarding non-credit benefits. This is a serious problem that currently affects more than 400 claimants. The Monitor has repeatedly urged the parties to work out a mechanism to implement this provision of the Decree, but the parties have not done so. The Monitor recommends that the Court take action to require the parties to report directly to the Court regarding this problem by January 12, 2001. Once the parties have reported to the Court, the Court will have the information it needs to determine what further action, if any, is necessary.

Dated: December 26, 2000

Respectfully submitted,

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- Appendix 1 - Statistical Reports as of December 18, 2000
- Appendix 2 - List of Monitor Office Training Events
- Appendix 3 - Monitor's Letter Dated June 2, 2000, and Questions and Answers About Monitor Review of Decisions
- Appendix 4 - Monitor Updates
- Appendix 5 - Constructive Application Principles