

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY C. PIGFORD, *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
 ANN M. VENEMAN, Secretary,)
 United States Department of)
 Agriculture,)
)
 Defendant.)

Civil Action No.
97-1978 (PLF)

CECIL BREWINGTON, *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
 ANN M. VENEMAN, Secretary,)
 United States Department)
 of Agriculture,)
)
 Defendant.)

Civil Action No.
98-1693 (PLF)

MONITOR'S REPORT AND RECOMMENDATIONS
REGARDING IMPLEMENTATION OF THE CONSENT DECREE
FOR THE PERIOD OF JANUARY 1, 2002, THROUGH DECEMBER 31, 2003

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This is the third in a series of Monitor reports concerning the implementation of the Consent Decree in this case. Prior reports covered the good faith implementation of the Consent Decree from March 1, 2000, through August 31, 2000, and from September 1, 2000, through December 31, 2001.¹ This report provides information regarding claims processing activities, Court orders, Monitor activities and observations, significant Consent Decree implementation issues, and the parties' good faith during the two-year period of January 1, 2002, through December 31, 2003. Current statistics regarding many of the items discussed in this report can be found on the Monitor's web site.²

I. EXECUTIVE SUMMARY

During this reporting period, the parties and the neutrals³ continued to work in good faith to implement the Consent Decree. Highlights of progress during calendar years 2002 and 2003 include:

- a. The Adjudicator issued initial adjudication decisions in 21,678 Track A claims as of the end of 2003.
- b. The Government paid out \$10,500,000 to successful class members in Track A credit matters in 2002 and an additional \$13,600,000 to successful class members in Track A credit matters in 2003. Combined with payments in earlier years, Track A cash payments for credit claims totaled \$638,350,000 as of the end of 2003.
- c. The Government provided debt relief by forgiving approximately \$21,930,937 in outstanding debt owed by prevailing class members (principal and interest) as of the end of 2003.
- d. The Arbitrator issued decisions in a total of 77 Track B claims as of the end of 2003. The average damage award for prevailing Track B claimants was \$545,686.

¹ Prior reports are available on the Monitor's web site at <http://www.pigfordmonitor.org/reports/>.

² The web site address is <http://www.pigfordmonitor.org>.

³ The neutrals include the Facilitator, the Adjudicator, and the Arbitrator.

e. The Arbitrator continued review of the requests for class membership submitted under the process set forth in paragraph 5(g) of the Consent Decree (the “late claims” process). The Arbitrator reported that 2,118 “late claim” applicants had been found eligible to file a “late claim” as of December 2003.

f. The Monitor’s Office continued to issue decisions in response to petitions for review. By the end of 2003, the Monitor had issued a total of 2,725 decisions in response to petitions for Monitor review.

g. The Adjudicator began issuing readjudication decisions for Track A claims. The Adjudicator issued 301 readjudication decisions as of the end of 2003.

Notwithstanding this good faith and substantial progress, important implementation challenges remain. This report provides information about both the progress and the challenges that occurred during calendar years 2002 and 2003. The report provides updated statistical information concerning the processing of claims under Track A and Track B during these years, as well as statistical information about the debt relief and injunctive relief provided by the Government from the beginning of the litigation. The report also describes substantive matters addressed by the Court during 2002 and 2003.

After summarizing the Monitor’s activities and observations during these two years, the report discusses significant Consent Decree implementation issues, including concerns presented to the Monitor by class members. The report concludes by discussing the parties’ good faith efforts to implement the Consent Decree.

II. BACKGROUND

A. Authority to Issue Reports

Paragraph 12(b)(i) of the Consent Decree, as modified by Stipulation and Order dated March 24, 2003, requires the Monitor to make periodic written reports on the good faith implementation of the Consent Decree.⁴ This report is submitted pursuant to the March 24, 2003, Stipulation and Order, which states:

The Monitor shall make periodic written reports to the Court, the Secretary, class counsel, and defendant's counsel on the good faith implementation of the Consent Decree, as specified in paragraph 12(b)(i) of the Consent Decree, regarding each twelve-month period, upon the request of the Court or the parties, or as the Monitor deems necessary.

B. Statistics About Processing of Claims

The Monitor did not independently compile most of the data discussed in this report.⁵ The Facilitator⁶ provided claims processing data, the Arbitrator⁷ provided statistics regarding Track B cases and the "late claims" process, and the United States Department of Agriculture (USDA)⁸ provided statistics regarding debt relief and injunctive relief. The Monitor relied on these sources for the information contained in this report.

⁴ In a Stipulation and Order dated April 20, 2004, the Court extended the Monitor's appointment until her duties under the Consent Decree are completed, or until March 1, 2007, whichever occurs first. The Monitor will continue filing reports pursuant to the March 24, 2003, Stipulation and Order through the conclusion of her appointment.

⁵ The exception is that the Monitor compiles data regarding Monitor decisions issued in the petition process.

⁶ The Facilitator is Poorman-Douglas Corporation. *See* Consent Decree, paragraph 1(h)(i).

⁷ The Arbitrator is Michael Lewis of ADR Associates and JAMS. *See* Consent Decree, paragraph 1(b).

⁸ USDA posts some statistics on the agency web site: <http://www.usda.gov/da/status.htm>. General information about the litigation is provided by the agency at <http://www.usda.gov/da/consent.htm>.

1. Track A

Paragraph 9 of the Consent Decree sets forth the process for deciding claims under Track A of the claims process. Prevailing class members with credit claims under Track A are entitled to a cash payment of \$50,000, as well as other relief.⁹ As of January 5, 2004, the Government had paid \$638,350,000 to class members who prevailed in Track A credit claims. Prevailing class members with non-credit claims under Track A are entitled to a cash payment of \$3,000.¹⁰ As of January 5, 2004, the Government had paid \$1,287,000 to class members who prevailed in non-credit claims under Track A. Additional statistics regarding the number of claimants, adjudication rates and results, and cash relief payment rates for calendar years 2002 and 2003 are summarized in Table 1.¹¹

⁹ Credit claims generally involve USDA farm loan programs. In addition to a cash payment of \$50,000, claimants who prevail on credit claims are also entitled to debt relief, injunctive relief, and tax relief pursuant to paragraph 9(a) of the Consent Decree.

¹⁰ Non-credit claims generally involve farm benefit or conservation programs. The Consent Decree does not specify the dollar amount of relief for non-credit claims. The parties have stipulated that successful claimants in non-credit Track A claims receive a cash payment of \$3,000. *See* Stipulation and Order, dated February 7, 2001, available on the Monitor's web site at <http://www.pigfordmonitor.org/orders/>. In addition to the \$3,000 cash payment, relief for successful non-credit claims includes some aspects of injunctive relief. *See* paragraph 9(b) of the Consent Decree.

¹¹ Statistics for prior reporting periods are summarized in Appendix 1. Additionally, current statistics are available upon request from the Monitor's office (1-877-924-7483) and are updated regularly on the Monitor's web site at <http://www.pigfordmonitor.org/stats/>.

Table 1: Statistical Report Regarding Track A Claims						
Statistical Report as of:	End of 2001¹²		End of 2002¹³		End of 2003¹⁴	
	Number	Percent	Number	Percent	Number	Percent
A. Eligible class members	21,541	100	21,774	100	22,276	100
B. Cases in Track A (Adjudications)	21,364	99	21,595	99	22,098	99
C. Cases in Track B (Arbitrations)	177	1	179	1	178	1
Adjudication Completion Figures						
D. Adjudications complete	21,324	~100	21,547	~100	21,678	98
E. Adjudications not yet complete	40	~0	48	~0	420	~2
Adjudication Approval/Denial Rates						
F. Claims approved by Adjudicator ¹⁵	12,848	60	12,987	60	13,260	61
G. Claims denied by Adjudicator ¹⁶	8,476	40	8,560	40	8,418	39
Adjudication Approvals Paid/Not Paid						
H. Approved adjudications paid as of specified date ¹⁷	12,285	96	12,690	98	12,968	98
I. Approved adjudications not yet paid as of specified date ¹⁸	563	4	297	2	292	2
J. Cumulative Dollars Paid to Class Members for Track A credit claims ¹⁹	\$614,250,000		\$624,750,000		\$638,350,000	
K. Cumulative Dollars Paid to Class Members for Track A non-credit claims	\$1,284,000		\$1,284,000		\$1,287,000	

¹² These statistics are valid as of January 2, 2002.

¹³ These statistics are valid as of December 31, 2002.

¹⁴ These statistics are valid as of January 5, 2004.

¹⁵ These numbers include both credit and non-credit claims.

¹⁶ These numbers include both credit and non-credit claims. In row G, the number of claims denied by the Adjudicator decreased from December 31, 2002 to January 5, 2004. This decrease is a result of claims that were originally denied by the Adjudicator, but were later approved by the Adjudicator upon reexamination.

¹⁷ These numbers include both credit and non-credit claims.

¹⁸ These numbers include both credit and non-credit claims.

¹⁹ This figure includes only the cash award component of relief in Track A credit cases. Other monetary relief including tax payments and debt relief are reported in Tables 3 and 4 below.

2. Track B

Paragraph 10 of the Consent Decree sets forth the process for deciding claims under Track B of the claims process. Class members who prevail under Track B are entitled to recover actual damages, as well as other relief.²⁰ Table 2 provides statistics regarding Track B.²¹ Please note that the information about Track B awards refers to Arbitrator decisions that may not be final. Some of these decisions are the subject of petitions for Monitor review that have not yet been decided by the Monitor. The amount of each Track B arbitration award is detailed in Appendix 3. Claimant names and geographic locations are not disclosed.

Table 2: Statistical Report Regarding Track B Claims			
Statistical Report as of:	End of 2001²²	End of 2002²³	End of 2003²⁴
A. Eligible Track B Claimants	235	236	237
B. Track B Cases Settled	57	61	71
C. Track B Cases Converted to Track A	50	54	55
D. Track B Cases Withdrawn	6	6	6
Arbitrations Complete/Not Complete			
E. Contested Track B Cases in Claims Process (Not Settled, Converted or Withdrawn)	122	115	105
F. Arbitration Decisions Issued	51	71	77
G. Arbitration Decisions Not Yet Issued (contested cases in which arbitration was not complete and/or decision was not yet issued)	71	44	28

²⁰ In addition to recovery of actual damages, successful class members are also entitled to debt relief and injunctive relief under paragraph 10 of the Consent Decree.

²¹ Most of these statistics are based on the Arbitrator's records, not the Facilitator's. There are differences between the record-keeping protocols of the Arbitrator and the Facilitator. The statistics are approximate. Statistics from prior reporting periods for Track B claims are set forth in Appendix 2.

²² These statistics are valid as of January 10, 2002.

²³ These statistics are valid as of January 1, 2003.

²⁴ These statistics are valid as of January 1, 2004.

Table 2: Statistical Report Regarding Track B Claims			
Statistical Report as of:	End of 2001²²	End of 2002²³	End of 2003²⁴
Arbitration Results			
H. Claimant Prevailed Before Arbitrator	8	15	17
I. Average Awards to Prevailing Claimants	\$531,373	\$560,309	\$545,686
J. Government Prevailed Before Arbitrator	43	56	60
Posture of Decision:			
J.1. Cases Dismissed Before Hearing	28	34	38
J.2. Full Hearing, Finding of No Liability	15	22	22
Petitions for Monitor Review²⁵			
K. Claimant Petitions for Monitor Review of Facilitator Decision (Regarding Class Membership Screening) in Track B Cases	8	9	14
L. Monitor Decisions Issued on Petitions for Review of Facilitator Decisions (Regarding Class Membership Screening) in Track B Cases	0	0	7
M. Claimant Petitions for Monitor Review of Arbitrator Decisions	26	33	38
N. Government Petitions for Monitor Review of Arbitrator Decisions	4	10	14
O. Monitor Decisions Issued on Petitions for Review of Arbitrator Decisions	0	7	12

3. *Debt Relief*

Paragraphs 9(a)(iii)(A) and 10(g)(ii) of the Consent Decree set forth the debt relief USDA must provide to prevailing class members. A Stipulation and Order filed on February 7, 2001, further defined the scope of debt relief. The following table provides statistics

²⁵ The Facilitator provided the statistics on the number of petitions for Monitor review; the Monitor's Office provided the statistics on the number of Monitor decisions issued.

reported by USDA regarding the debt relief implemented by USDA for prevailing class members. Because this is the first time the Monitor has reported statistics concerning debt relief, the information in Table 3 covers the period from the beginning of the Consent Decree implementation through January 12, 2004.

Table 3: Statistical Report Regarding Debt Relief²⁶	
Statistical Report as of:	January 12, 2004
A. Total Amount of Debt Forgiven	\$21,930,937
B. Debt Forgiven for Track A Claimants	\$19,583,425
C. Debt Forgiven for Track B Claimants	\$2,347,512
D. Number of Track A Claimants Who Received Debt Forgiveness	228
E. Number of Track B Claimants Who Received Debt Forgiveness	25
F. Average Amount of Debt Forgiven Per Track A Claimant Who Received Debt Forgiveness	\$85,892
G. Average Amount of Debt Forgiven Per Track B Claimant Who Received Debt Forgiveness	\$93,900

²⁶ These statistics are based on information provided by USDA for debt relief implemented by USDA through January 12, 2004.

4. Total Track A Monetary Relief

Table 4 details the monetary value of Track A relief provided to class members as of the end of 2003.

Table 4: Statistical Report Regarding Total Track A Monetary Relief²⁷	
Status of Payments	Amount
Cash Awards for Credit Claims (\$50,000 per prevailing claim)	\$638,350,000
Cash Awards for Non-Credit Claims (\$3,000 per prevailing claim)	1,287,000
Estimated Payments Due to IRS as Tax Relief ²⁸	163,387,500
Debt Relief (Principal and Interest)	19,583,425
Total Track A Relief	\$822,607,925

5. Injunctive Relief

Paragraph 11 of the Consent Decree describes the injunctive relief that prevailing class members are entitled to receive from USDA. Generally speaking, this relief requires USDA to consider any new Farm Ownership Loan, Farm Operating Loan, or inventory property application by the prevailing class member in the light most favorable to the class member.²⁹ It also requires USDA to offer prevailing class members technical assistance from a qualified

²⁷ These statistics are based on information provided by the Facilitator regarding cash awards. The debt relief statistics are based on information provided by USDA for debt relief implemented by USDA through January 12, 2004 (principal and interest). The tax relief payments are estimated based on the tax relief payments successful Track A credit claimants are entitled to receive.

²⁸ Under paragraph 9(a)(iii)(C) of the Consent Decree, successful Track A credit claimants receive a payment, made directly to the Internal Revenue Service, for partial payment of taxes. The amount for each successful claimant is 25 percent of the \$50,000 cash award (\$12,500) plus 25 percent of the principal amount of any debt that was forgiven. The tax relief in Table 4 was estimated as follows: 25 percent of the \$50,000 cash award (\$12,500) multiplied by the number of successful Track A credit claims (12,767) (this sub-total equals \$159,587,500), plus 25 percent of the approximately \$15,200,000 in principal debt that was forgiven for this group of successful claimants (this sub-total equals \$3,800,000). The total amount of estimated payments to successful claimants' IRS accounts is \$159,587,500 plus \$3,800,000, which equals \$163,387,500.

²⁹ Consent Decree, paragraph 11(c).

USDA official who is acceptable to the class member.³⁰ These two forms of injunctive relief are available to all prevailing class members. In addition, class members who prevail on credit claims are entitled to priority consideration for: one Farm Ownership Loan, one Farm Operating Loan, and one opportunity to acquire farmland from USDA inventory property.³¹ Under the Consent Decree, injunctive relief was to be available to prevailing class members for five years from the date of the order approving the Consent Decree.³² USDA has voluntarily agreed to extend the right to injunctive relief for one additional year through April 14, 2005.³³

Table 5 provides cumulative statistics reported by USDA concerning requests for priority consideration for Farm Ownership Loans, Farm Operating Loans, and the acquisition of inventory property.

Table 5: Statistical Report Regarding Injunctive Relief	
Statistical Report as of:	January 12, 2004
A. Farm Ownership Loans	
1. Number of Requests for Priority Consideration with Complete Application	56
2. Number of Applications Approved	15
B. Farm Operating Loans	
1. Number of Requests for Priority Consideration with Complete Application	112
2. Number of Applications Approved	39
C. Inventory Property	
1. Number of Requests for Priority Consideration	3
2. Number of Applications Approved	1

³⁰ Consent Decree, paragraph 11(d).

³¹ Consent Decree, paragraph 11(a)-(b).

³² Consent Decree, paragraph 11(a)-(c). The Consent Decree was signed April 14, 1999. Five years from that date is April 14, 2004.

³³ In July 2003, FSA issued Notice FLP-313, "Priority Consideration for Prevailing Claimants" which provides guidance about priority consideration and other injunctive relief and which extends the period for injunctive relief to April 14, 2005. FLP-313 is available on USDA's web site and on the Monitor's web site at: <http://www.pigfordmonitor.org/flp/>.

III. COURT ORDERS

Over the past two years, the Court has been presented with numerous issues relating to the implementation of the Consent Decree. In response to motions and stipulations by the parties, the Court has issued Orders relating to issues including:

- A. The Arbitrator's authority to alter deadlines in the Track B arbitration process;
- B. The requirements of the Second Supplemental Privacy Act Protective Order;
- C. The deadlines for responses by USDA to certain petitions for Monitor review;
- D. The request of certain individual class members to be excluded from the case;
- E. The request of certain individual class members to vacate the Consent Decree and remove Class Counsel;
- F. The deadline for petitioning for Monitor review when the Facilitator has rejected a claim on eligibility grounds;
- G. The award of attorneys' fees;
- H. The process for recusal of the Monitor;
- I. The fate of untimely petitions for Monitor review; and
- J. The impact of allegations regarding mail delays in the filing of late claims.

All substantive Orders filed during this reporting period are listed in Table 6.³⁴

Table 6: Court Orders				
#	Court Docket Number	Date Filed	Title of Order	Major Issues Addressed Include:
1	589	January 17, 2002	Memorandum Opinion and Order	Granting plaintiff's motion interpreting the Consent Decree to authorize Arbitrators to extend arbitration deadlines where justice requires. An appeal from this order was decided on June 21, 2002. See item #8 below. ³⁵
2	590	January 17, 2002	Memorandum Opinion and Order	Granting in part and denying in part defendant's motion for enforcement of the Second Amended Supplemental Privacy Act Protective Order and for sanctions; finding Class Counsel violated the Protective Order by providing Track A files to <i>pro bono</i> counsel, Covington and Burling, who serve as plaintiff's counsel in 16 Track B cases; finding that Covington and Burling may retain and consult the files under the terms of the Protective Order; permanently enjoining Class Counsel from releasing any similar protected files and directing <i>pro bono</i> counsel to seek from the government release of any additional protected files; and holding that the issue of sanctions against Class Counsel for the release of files will be decided at such time as the Court can consider all pending requests for sanctions.
3	595	February 15, 2002	Order	Denying defendant's motion for a stay pending appeal of the Court's January 17, 2002, Order concerning Arbitrators' authority to extend arbitration deadlines in Track B cases.
4	614	May 9, 2002	Order	Approving Arbitrator's second report on the late-claim petition process; posting the report on web site at http://www.dcd.uscourts.gov/district-court-2002.html .

³⁴ Procedural Orders that set briefing schedules, hearing dates, and the like and Orders relating to approval of the Monitor's budgets and invoices are not included in the list.

³⁵ On June 21, 2002, the Court's January 17, 2002, Memorandum Opinion and Order was reversed by the Court of Appeals and remanded for further proceedings. The Court of Appeals' opinion is described in more detail in item number 8 of Table 6. *Pigford v. Veneman*, 292 F.3d 918 (D.C. Cir. 2002).

Table 6: Court Orders

#	Court Docket Number	Date Filed	Title of Order	Major Issues Addressed Include:
5	615	May 14, 2002	Order	Ordering that petition for late filing under Consent Decree ¶ 5(g) will not be considered by the Court; directing that all putative class members seeking permission to late file under Consent Decree ¶ 5(g) must seek permission directly from the Arbitrator, Michael K. Lewis.
6	622	June 11, 2002	Order	Granting defendant’s motion for an extension of an additional 14 days in which to respond to Groups 35-37 of claimant petitions for Monitor review; ordering defendant to file responses to Group 35 petitions on July 5, 2002; Group 36 petitions on July 19, 2002; and Group 37 petitions on August 2, 2002.
7	628	June 20, 2002	Order	Granting defendant’s motion for an extension of an additional 14 days in which to respond to Groups 38 and 39 of claimant petitions for Monitor review.
8	—	June 21, 2002	D.C. Circuit Opinion	Reversing and remanding the Court’s January 17, 2002 Order interpreting the Consent Decree to allow extension of Track B deadlines; holding counsel’s failure to meet critical deadlines amounts to an “unforeseen obstacle” that makes the Consent Decree deadlines “unworkable;” and ordering on remand such further proceedings as may be just, including a “suitably tailored” order under Federal Rule of Civil Procedure 60(b)(5).
9	629	June 27, 2002	Memorandum Opinion and Order	Denying 11 motions by individual class members for exclusion from the certified class of plaintiffs; noting it is nearly two years past the deadline for opting out of the class; finding the individual class members provided no reason other than lack of individual service of process at the commencement of the action for missing the deadline to opt out of the class; and finding the lack of notice, while unfortunate, is not a sufficient reason to permit opt outs after the established period.
10	635	July 18, 2002	Stipulation and Order	Authorizing the Monitor to consolidate petitions for Monitor review when an individual class member and USDA petition for review from the same Facilitator, Adjudicator, or Arbitrator decision; authorizing the Monitor to obtain information from USDA regarding a class member’s debt in deciding petitions for Monitor review which raise an issue regarding debt relief.

Table 6: Court Orders

#	Court Docket Number	Date Filed	Title of Order	Major Issues Addressed Include:
11	665	Sept. 11, 2002	Memorandum Opinion and Order	Denying motion to vacate the Consent Decree and denying motion to remove lead Class Counsel.
12	666	September 12, 2002	Order	Denying emergency motion by <i>pro se</i> movant to order the government to reopen public facility; stating to the extent that any federal court has jurisdiction to act on this motion, it is the United States District Court for the Eastern District of Arkansas.
13	693	October 29, 2002	Order	Setting 120-day deadline for claimants to petition for Monitor review from adverse Facilitator decisions; establishing a reconsideration process for claimants who cannot petition for Monitor review; permitting the Monitor to consider additional materials with a petition for Monitor review of a Facilitator decision or with a response to such petitions; limiting claimants to one petition for review of the Facilitator's decision.
14	705	November 22, 2002	Order	Granting defendant's motion for a stay of consideration of counsel Conlon, Frantz motion for fees and costs; ordering any and all attorneys who wish to seek fees and/or costs for implementation work performed as Class Counsel or Of Counsel to submit petitions by December 6, 2002; and ordering the matter of fees and costs for implementation consolidated with the pending issue of sanctions.

Table 6: Court Orders

#	Court Docket Number	Date Filed	Title of Order	Major Issues Addressed Include:
15	727, 733	December 30, 2002; amended January 14, 2003	Amended Memorandum Opinion and Order	Ordering immediate payment in the amount of \$500,000 to Class Counsel for implementation fees and costs; ordering continued negotiation efforts toward settlement of the issues of fees and sanctions; setting forth briefing schedule should settlement not be reached; ordering continued negotiation on the issue of modified deadlines in Track B cases involving claimants who initially were represented by Class Counsel; setting forth process for quarterly filings for fees, costs, and expenses incurred by any Class or Of Counsel after June 30, 2002. An appeal from this order was decided on May 14, 2004. ³⁶
16	739	January 15, 2003	Memorandum Opinion and Order	Granting in part, denying in part, motion to extend time to pay \$500,000 to Class Counsel in fees and costs.
17	770	March 24, 2003	Stipulation and Order	Addressing the timing of the Monitor’s obligation to file reports on good faith implementation; establishing a process for the Monitor to recuse herself from rendering decisions regarding petitions for Monitor review in certain situations.
18	771	March 24, 2003	Stipulation and Order	Directing the Arbitrator to timely decide pending motions to dismiss and to schedule hearing in Track B claim of Edith Frazier.
19	790	April 14, 2003	Memorandum Opinion and Order	Granting defendant’s motion to strike from the record certain pleadings.
20	800	May 28, 2003	Memorandum Opinion and Order	Denying Class Counsel Chestnut, Sanders’ motion for reconsideration of April 14, 2003, Order and denying motion to strike from the record certain pleadings.

³⁶ The Court’s December 30, 2002, Memorandum Opinion and Order was superceded by an Amended Memorandum Opinion and Order issued on January 14, 2003. On January 15, 2003, the Court issued another Memorandum Opinion and Order pertaining to the \$500,000 fee payment. On February 2, 2003, USDA appealed these orders to the District of Columbia Court of Appeals. The Court of Appeals dismissed the appeal on May 14, 2004. *Pigford v. Veneman*, 369 F.3d 545 (D.C. Cir. 2004).

Table 6: Court Orders

#	Court Docket Number	Date Filed	Title of Order	Major Issues Addressed Include:
21	801	June 2, 2003	Opinion and Order	Denying plaintiffs' motion for relief for 350 claimants whose petitions for Monitor review were deemed untimely filed by the Facilitator. Class Counsel moved for reconsideration of the Court's June 2, 2003, Order. On March 10, 2004, the Court issued an Order denying reconsideration. On April 9, 2004, Class Counsel appealed this Order to the Court of Appeals. At the time of this filing, that appeal is still pending.
22	804	June 4, 2003	Memorandum Opinion and Order	Denying plaintiffs' motion to reopen all late claims due to allegations of mail delays.
23	805	June 5, 2003	Order	Awarding \$2,345 in attorneys' fees and costs on behalf of claimant Cal Greely.
24	810	June 23, 2003	Order	Denying without prejudice motion for attorneys' fees and costs on behalf of claimant Sandy McKinnon; directing that counsel for McKinnon may refile once a final disposition has been reached on the claim.
25	842	September 4, 2003	Order	Denying plaintiffs' motion for sanctions concerning alleged violation of Second Amended Privacy Act Protective Order
26	845	September 11, 2003	Memorandum Opinion and Order	Denying motion for review of Arbitrator's final decision in Track B claim of Clarence Hardy; directing that claimant Hardy may file a petition for Monitor review within 120 days.
27	858	October 8, 2003	Order	Denying plaintiffs' motion for reconsideration of September 4, 2003, Order concerning alleged violation of Second Amended Privacy Act Protective Order.

IV. MONITOR'S ACTIVITY AND OBSERVATIONS

The Consent Decree gives the Monitor four general areas of responsibility:

a. Reporting. Paragraphs 12(a) and 12(b)(i) give the Monitor reporting responsibilities.

b. Resolving Problems. Paragraph 12(b)(ii) gives the Monitor responsibility for attempting to resolve class members' problems relating to the Consent Decree.

c. Directing Reexamination of Claims. Paragraph 12(b)(iii) gives the Monitor responsibility for directing the Adjudicator, Arbitrator, and Facilitator to reexamine claims where the Monitor finds that a clear and manifest error occurred in the screening, adjudication, or arbitration of the claim that has resulted or is likely to result in a fundamental miscarriage of justice.

d. Toll-Free Line. Paragraph 12(b)(iv) gives the Monitor responsibility for being available to class members and the public to facilitate the lodging of any Consent Decree complaints and to expedite their resolution.

An update regarding the Monitor's activity and observations in each of these areas of responsibility follows.

A. 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 states that the Monitor shall report directly to the Secretary of Agriculture. The Monitor met with the Secretary, Ann M. Veneman, in early 2003. The Monitor also fulfills this Consent Decree requirement in part through work with USDA's Office of General Counsel. The Monitor had many meetings and frequent phone conversations during 2002 and 2003 with James Michael Kelly, who during this reporting period was USDA's Acting General Counsel and then Deputy General Counsel.

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

Paragraph 12(b)(i) of the Consent Decree, as modified by Stipulation and Order dated March 24, 2003, requires the Monitor to make periodic written reports to the Court, the Secretary, Class Counsel, and defendant's counsel on the good faith implementation of the Consent Decree regarding each twelve-month period, upon the request of the Court or the parties, or as the Monitor deems necessary. The Monitor submits this third report on the good faith implementation of the Consent Decree pursuant to paragraph 12(b)(i), as modified by the March 24, 2003, Stipulation and Order. During the reporting period covered by this report, the

Monitor also filed with the Court a report on late petition filings; a report on good faith implementation of the Consent Decree for the period September 1, 2000, through December 31, 2001; and a report on the notice class members received of the 120-day deadline for filing petitions for Monitor review.³⁷

B. “Resolving Any Problems” — Paragraph 12(b)(ii) of the Consent Decree

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

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

To fulfill this responsibility, the Monitor’s Office works with class members: (1) by phone; (2) through correspondence; (3) in person at meetings sponsored by claimant organizations and/or by USDA; and (4) by sending out “Monitor Updates” to disseminate important information to the whole class or to segments of the class affected by particular issues.

Information about the Office of the Monitor’s attendance at meetings sponsored by claimant organizations during 2002-2003 is listed in Appendix 4.

Copies of the written materials prepared or revised by the Monitor’s Office during 2002 and 2003 are attached as Appendix 5. During this reporting period, the Monitor issued two new Monitor Updates to convey important information to class members and putative class members.

³⁷ See Monitor’s Report on Late Petition Filings, dated February 27, 2002; Monitor’s Report and Recommendations Regarding Implementation of the Consent Decree for the Period of September 1, 2000, Through December 31, 2001, dated September 4, 2002; and Monitor’s Report to the Court Regarding Notice to the Class of the 120-Day Deadline to File a Petition for Monitor Review, dated May 30, 2003. The Monitor also filed reports regarding funds in the reserve of the Court Registry from the Monitor’s budget. These reports are dated February 12, 2002; August 7, 2002; February 28, 2003; and August 7, 2003. Copies of Monitor reports may be obtained from the Monitor’s office (1-877-924-7483). Reports regarding substantive issues are available at the Monitor’s web site at <http://www.pigfordmonitor.org/reports/>.

In November 2002, the Monitor issued an update on “Understanding Who Is Part of the *Pigford Case*” (Update No. 11). This update explains what the deadlines were for becoming a part of the case and explains that certain categories of people will not be able to become part of the case.³⁸

In February 2003, the Monitor issued an update entitled “Resources for *Pigford* Claimants” (Update No. 12). This update describes the types of problems the Monitor’s Office can help to resolve and the types of problems that the Monitor’s Office cannot help to resolve. The update provides contact information for entities that may be able to provide claimants with some types of help that the Monitor cannot provide. Entities listed in Update No. 12 include: university and extension programs, farm advocacy groups, legal organizations, and government entities that may be of assistance to class members.

The Monitor also issued revisions to existing “Monitor Updates” to keep information provided to class members current during this reporting period. In 2002, the Monitor revised the updates on Procedural Rules for the Track B Petition Process (Update No. 8) and on Eligibility and Monitor Review (Update No. 5). In 2003, the Monitor issued revised updates on “late claims” deadlines (Update No. 1); deadlines for petitions for Monitor review (Update No. 3); injunctive relief (Update No. 4); USDA’s freeze on accelerations and foreclosures during the petition for Monitor Review process (Update No. 6); claimant and claimant attorney access to USDA documents (Update No. 7); non-credit claims (Update No. 9); and debt relief (Update No.

³⁸ In telephone calls to the Monitor’s toll-free line and in meetings throughout the country, the Monitor’s Office has received an increasing number of questions about “reopening” the case. All deadlines for filing a claim, requesting permission to file a late claim, and/or opting out of the class have now passed. Nonetheless, the Monitor continues to receive inquiries from people who wish to join the case or make a claim, but who have missed the deadlines for doing so.

10).³⁹ The Monitor also revised “Questions and Answers About Monitor Review of Decisions,” as an aid to claimants in the petition process in 2002 (Version 2) and in 2003 (Version 3).⁴⁰

Many of the class members who contacted the Monitor’s office during this reporting period expressed frustration about problems they were experiencing. Earlier Monitor reports discussed the many concerns brought to the Monitor’s attention by class members.⁴¹ Many of these concerns continue. The most significant recurring problems during this reporting period (calendar years 2002 and 2003) are discussed in the “Significant Consent Decree Implementation Issues” section below.

C. Reexamination of Claims — Paragraph 12(b)(iii) of the Consent Decree

Paragraph 12(b)(iii) gives the Monitor responsibility to direct reexamination of a claim where the Monitor finds that a clear and manifest error has occurred in the screening, adjudication, or arbitration of a claim that has resulted or is likely to result in a fundamental miscarriage of justice. The Monitor considers whether reexamination is warranted in response to a petition for Monitor review by either a class member or USDA. As of the end of 2003, approximately 5,400 petitions for Monitor review had been filed and the Monitor had issued decisions in response to approximately 2,725 of those petitions.

³⁹ Copies of Monitor Updates are available on the Monitor’s web site at <http://www.pigfordmonitor.org/updates/>.

⁴⁰ Copies of these documents are available on the Monitor’s web site at <http://www.pigfordmonitor.org/class/>.

⁴¹ The Monitor’s Report and Recommendations Regarding Implementation of the Consent Decree for the Period of September 1, 2000, Through December 31, 2001, detailed these problems. A copy is available on the Monitor’s web site at <http://www.pigfordmonitor.org/reports>.

The vast majority of petitions for Monitor review seek reexamination of Adjudicator decisions in Track A claims. Under paragraph 8 of the Court’s Order of Reference,⁴² the Monitor may admit into the record supplemental information provided in the petition or petition response when such information addresses 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. Approximately 50 percent of the Track A decisions issued by the Monitor as of December 31, 2003, direct the Adjudicator to reexamine the claim. The Adjudicator began issuing reexamination decisions during 2002 and had issued a total of 301 reexamination decisions as of the end of 2003. Table 7 provides statistics regarding Monitor petition decisions and Adjudicator reexamination decisions issued as of the end of 2002 and the end of 2003.⁴³

Table 7: Statistical Report Regarding Petitions for Monitor Review		
Statistical Report as of:	End of 2002⁴⁴	End of 2003⁴⁵
Petitions for Monitor Review		
A. Number of Petitions for Monitor Review	5,160	5,401
A.1. Claimant Petitions	4,560	4,727
A.2. Government Petitions	600	674

⁴² The Order of Reference, dated April 4, 2000, addresses many aspects of the Monitor’s duties and is available on the Monitor’s web site at <http://www.pigfordmonitor.org/orders/>.

⁴³ Statistics regarding the Monitor’s activity for Track B claims are contained in Table 2 of this report. The Monitor began issuing decisions in response to petitions in the Track B process during 2002 and issued 19 decisions as of the end of 2003 (12 of the 19 were petitions from Arbitrator decisions, and 7 were petitions from Facilitator decisions).

⁴⁴ These statistics are valid as of January 2, 2003.

⁴⁵ These statistics are valid as of January 2, 2004.

Table 7: Statistical Report Regarding Petitions for Monitor Review		
Statistical Report as of:	End of 2002⁴⁴	End of 2003⁴⁵
Monitor Decisions		
B. Petition Decisions Issued by Monitor	1,743	2,725
B1. Total Number of Petitions Granted	676	1,218
B.1.a. Claimant Petitions Granted	631	1,162
B.1.b. Government Petitions Granted	45	56
B.2. Total Number of Petitions Denied	1,067	1,507
B.2.a. Claimant Petitions Denied	609	1,040
B.2.b. Government Petitions Denied	458	467
Reexamination Decisions		
C. Reexamination Decisions Issued by Adjudicator	39	301
C.1. Reexamination Decisions After Claimant Petition Granted	39	291
C.1.a. Claimant Prevailed on Reexamination	39	279
C.1.b. Claimant Did Not Prevail on Reexamination	0	12
C.2. Reexamination Decisions After Government Petition Granted	0	10
C.2.a. Government Prevailed on Reexamination	0	10
C.2.b. Government Did Not Prevail on Reexamination	0	0

The Court issued several Orders during 2002 and 2003 clarifying the petition process. On July 18, 2002, the Court filed a Stipulation and Order permitting the Monitor to consolidate petitions for Monitor review when an individual class member and USDA petition for review from the same Facilitator, Adjudicator, or Arbitrator decision. This Stipulation and Order also authorized the Monitor to obtain information from USDA regarding the status of a class

member's farm loan debt in deciding petitions for Monitor review that raise an issue regarding debt relief.⁴⁶

On October 29, 2002, the Court issued an Order setting a 120-day deadline for claimants to petition from adverse class membership screening decisions made by the Facilitator.

Deadlines for petitions from Adjudicator and Arbitrator decisions had previously been set in a Stipulation and Order dated July 14, 2000. These deadlines for petitions for Monitor review are discussed in more detail in the section on "Significant Consent Decree Implementation Issues" below.

During this reporting period, the parties also agreed to a process for designation of the record in Track B petitions for Monitor review. The process is designed to make the Track B review process more efficient. The process is described in Monitor Update No. 8, "Procedural Rules for the Track B Monitor Petition Process." In general, the petitioning party will file a designation of record with the petition for Monitor review. The designation will identify the materials that are part of the record that should be considered by the Monitor in the review process. The responding party may file a designation of record of additional material that should also be considered. The Monitor may, in her discretion, review material in the record before the Arbitrator that was not designated by the parties.

On March 24, 2003, the Court issued an order approving the parties' agreement for a process of recusal for the Monitor. For any claim in which the Monitor determines, in her discretion, that she should not be the decision-maker on a petition for review, the Monitor may

⁴⁶ Stipulation and Order, paragraphs 3 and 5. A copy of the July 18, 2002, Stipulation and Order may be found on the Monitor's web site at <http://www.pigfordmonitor.org/orders/>.

designate Kenneth Saffold of the Office of the Monitor to carry out the Monitor's duties under paragraph 12(b)(iii) of the Consent Decree. The Monitor anticipates Kenneth Saffold will be designated to act as Monitor regarding fewer than five petitions.

D. Calls to Toll-Free Telephone Number — Paragraph 12(b)(iv) of the Consent Decree

Paragraph 12(b)(iv) gives the Monitor the responsibility to staff a toll-free telephone line that class members and the public can call to lodge Consent Decree complaints. The Monitor's Office continues to operate a toll-free telephone number: 1-877-924-7483. Individuals who call this number will reach phone operators who have been trained regarding issues in the case and who have access to a database containing certain factual information about each claimant. The operators are able to answer certain categories of questions at the time the claimant calls. For other categories of questions, including questions about debt relief, injunctive relief, and other complex issues or complaints, the operators may make an appointment for the caller to speak with a lawyer from the Office of the Monitor. The operators also have access to documents that can be sent to individuals upon request, including Court Orders, Farm Loan Program Notices, Monitor Reports, and Monitor Updates.

The Monitor's toll-free line received 20,901 incoming calls during 2002 and 19,235 incoming calls during 2003. Sometimes the operators also made outgoing calls to class members to follow up with callers or to provide additional information. The operators staffing the toll-free line made outgoing calls in this period, bringing the total number of calls staffed by the toll-free line operators to 21,671 during 2002 and 19,932 during 2003. Many of the calls concerned problems discussed more fully below in the "Significant Consent Decree Implementation Issues" section of this report.

V. SIGNIFICANT CONSENT DECREE IMPLEMENTATION ISSUES

Claimants continued to raise many concerns regarding the implementation of the Consent Decree during this reporting period. Some of these concerns expressed to the Monitor included the following:

- a. Concern about the length of time the entire claims process takes and about accumulation of interest on claimants' Farm Service Agency (FSA) loans while they are waiting for their claims to be resolved;
- b. Concern about the amount of time the petition for Monitor review process is taking for some claimants;
- c. Concern about the amount of time the Adjudicator's reexamination process takes following the approval of a petition for Monitor review;
- d. Concern about options for loan servicing for claimants when their claims are resolved;⁴⁷

⁴⁷ Paragraph 7 of the Consent Decree provides that USDA must cease actions to foreclose or accelerate a claimant's debt while his or her claim was pending. Once the claimant receives the final decision on his or her Track A or Track B claim, paragraph 7 protections cease. For those who timely file petitions for Monitor review, USDA voluntarily agreed to extend the adverse action freeze through the time of final disposition of the petition.

The loan servicing concern focuses on the fact that the claimants who still owe debt to the agency are accumulating interest while their claims and petitions are being processed. At the end of the *Pigford* claims processing and petitions processing, the amount of accumulated interest could be staggering. Loan servicing is a term of art in FSA loan programs—it refers to a package of mechanisms that FSA can use to restructure debt to make it more manageable. One of the mechanisms would allow write-down or write-off of interest in certain situations.

FSA loan servicing regulations are quite specific about when loan servicing can be offered. Under a strict interpretation, many *Pigford* claimants would have no loan servicing opportunities remaining at the end of the *Pigford* process.

To attempt to address this problem, on October 24, 2002, USDA issued guidance for servicing *Pigford* claimants who are financially distressed or delinquent on their FSA farm loan program debt, but whose loans had not been accelerated by USDA prior to the time they filed a claim under the Consent Decree. USDA has voluntarily agreed to extend loan servicing opportunities for *Pigford* claimants. USDA has stated that County Offices will re-notify claimants of their 1951-S loan servicing rights once a final decision has been rendered on their claim. The letter the County Office must send gives a claimant 60 days from the date of the letter within which to apply for loan servicing. See 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) (set to expire Nov. 1, 2003, made obsolete on Apr. 3, 2003), and FLP-299, Servicing of *Pigford* Claimants and National Office FLP Programmatic Review, Exhibit 1, at 2 (Apr. 3, 2003) (set to expire Dec. 1, 2004). These FLPS are available on the Monitor's web site at

e. Concern 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;

f. Concern about the low rate of approvals in the late claims process;

g. 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;

h. Concern about the litigious nature and low claimant success rate in Track B arbitrations;

i. Concern that the FSA county office staff members are not sufficiently knowledgeable about the procedures for providing full injunctive relief to prevailing claimants;

j. Concern about USDA's failure to fully and promptly implement debt relief for prevailing claimants and failure to communicate that debt relief to the claimant's local FSA county office;

k. Concern that there will be retribution by FSA county office staff toward claimants who participated in the Consent Decree process; and

l. Concern about Federal Bureau of Investigation (FBI) investigations in claimant communities.

In general, the Monitor has addressed these concerns by: referring claimants to Class Counsel; making sure that the parties, the Secretary, and the Court are aware of the concerns; explaining how the petition for Monitor review process can be used to seek redress in individual cases in which errors occurred; using “other problem” authority to attempt to resolve individuals’ difficulties in the debt relief and injunctive relief processes; explaining how the Consent Decree works; and working with claimants to solve other problems where appropriate.

<http://www.pigfordmonitor.org/flp/>. Loan servicing includes actions such as debt write-down, reamortization, rescheduling, reduction of interest rates, and loan deferral. *See* 7 C.F.R. part 1951, subp. S (2004).

Many aspects of the Consent Decree implementation process received significant attention from the parties and the neutrals during this reporting period. The progress made in addressing implementation issues regarding becoming a class member, the claims process, and relief for prevailing class members, along with issues regarding attorneys' fees, are discussed more fully below.

A. Becoming a Class Member

1. 65,900 Late Claims Requests

The Consent Decree required that Claim Sheets be filed by October 12, 1999.⁴⁸

Paragraph 5(g) of the Consent Decree provides that claimants may request permission to file a Claim Sheet after the October 12, 1999, deadline if extraordinary circumstances beyond a claimant's control prevented the claimant from filing a completed claim package by the October 12, 1999, deadline. This process is referred to as the "late claims" process. During this reporting period, class members continued to express much anger and frustration regarding the late claims process, including the lack of notice that such a process existed, the high rate of rejection of late claims requests, the length of time required for the late claims process, and the lack of access to legal assistance during the time claimants were completing their late claims requests.

On December 20, 1999, the Court delegated to the Arbitrator the review of "late claims" requests filed pursuant to paragraph 5(g) of the Consent Decree. A Stipulation and Order dated July 14, 2000, set September 15, 2000, as the deadline for filing these requests. The Arbitrator

⁴⁸ Paragraph 5(c) of the Consent Decree required completed claim sheets to be filed 180 days from the entry of the Consent Decree. The Consent Decree was approved April 14, 1999.

has reported that approximately 65,900 late claims requests were filed by the September 15, 2000 deadline.⁴⁹ By the end of calendar year 2003, the Arbitrator reported that a total of approximately 64,200 requests had been reviewed and decided by the Arbitrator. Of these requests, the Arbitrator has approved a total of approximately 2,100 late claims.⁵⁰

The Arbitrator has established a reconsideration process for claimants whose “late claims” requests are denied. As of December 9, 2003, approximately 20,400 timely requests for reconsideration had been filed, and decisions had been made in a total of 715 reconsideration requests, with 86 requests having been approved in the reconsideration process and 629 having been denied.⁵¹

On June 4, 2003, the Court issued a Memorandum Opinion and Order denying a motion by Class Counsel J.L. Chestnut on behalf of certain plaintiffs to reopen all late claims due to allegations of mail delays. The Court ruled that the Arbitrator had been given the authority and had established procedures for deciding all requests to file late, including those where the claimant alleges that he or she filed a timely claim through the U.S. mail.⁵²

⁴⁹ During this reporting period, the Arbitrator filed reports with the Court on May 3, 2002; November 4, 2002; June 2, 2003; and December 9, 2003. All of the Arbitrator’s reports on the late claims process are available on the Monitor’s web site at <http://www.pigfordmonitor.org/arbrpts/>.

⁵⁰ After a late claims request is approved by the Arbitrator, the Facilitator sends a Claim Sheet and Election Form, which must be filled out and returned to the Facilitator no later than 60 days from the date of the cover letter that accompanied the Claim Sheet sent by the Facilitator. For more information on the late claims process, see Monitor Update No. 1, “Late Claim Deadline,” available on the Monitor’s web site at <http://www.pigfordmonitor.org/updates/>.

⁵¹ See Arbitrator’s Fifth Report on the Late-Claim Petition Process, dated December 9, 2003, pages 5-6.

⁵² Memorandum and Order, at 2-3. The Court’s June 4, 2004, Order is available on the Monitor’s web site at <http://www.pigfordmonitor.org/orders/>.

2. Petition Deadline for Claims Rejected by the Facilitator

Under the Consent Decree, the Facilitator may reject a claim package on the ground that the requirements for class membership have not been met, and a Claimant may seek review of that decision by submitting a petition to the Monitor. In the Monitor's second report on good faith implementation, the Monitor recommended that the parties set a deadline for Petitions for Monitor Review from decisions by the Facilitator. The Monitor further recommended that notice be provided to those persons eligible to petition from a decision by the Facilitator rejecting a completed claim package on eligibility grounds. The parties agreed with the Monitor's recommendation, and on October 29, 2002, the Court issued an Order setting deadlines for petitions from adverse Facilitator eligibility screening decisions.⁵³ The Court's Order permits the Monitor to consider supplemental information with a petition for Monitor review of a Facilitator class membership screening decision or with a response to such a petition in certain limited circumstances.⁵⁴ As of the end of 2003, the Monitor had received 92 petitions for review of eligibility screening decisions. As of the end of 2003, the Monitor had issued decisions in response to nine of those petitions.

⁵³ For claimants who filed a completed claim package that was rejected by the Facilitator on or before October 29, 2002, the Order required a petition for Monitor review be postmarked within 120 days of the date of the Order, or by February 26, 2003. For claimants who filed a completed claim package that was rejected by the Facilitator after October 29, 2002, the Order requires a petition for Monitor review be filed within 120 days of the date of the Facilitator's rejection notification. The Order required the Facilitator to mail a copy of the Order to every person rejected by the Facilitator in the screening process. The October 29, 2002 Order is available on the Monitor's web site at <http://www.pigfordmonitor.org/orders/>.

⁵⁴ The October 29, 2002, Order states that the Monitor may consider additional materials submitted with a petition or a petition response only when such materials address 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 decision to consider additional materials is within the discretion of the Monitor. Order, paragraph 5.

For those claimants rejected by the Facilitator for failure to submit a timely completed claim package, the Order requires the Facilitator to establish a reconsideration process. Through the reconsideration process, claimants may communicate with the Facilitator if they believe the Facilitator committed an error in determining that they failed to timely complete a claim package. The Facilitator reports that as of the end of 2003 it had received 116 requests for reconsideration. Of those 116, four were granted and 112 were denied.

B. The Claims Process

1. Untimely Petitions From Adjudicator and Arbitrator Decisions

In July 2002, Class Counsel filed a motion entitled “Plaintiffs’ Motion for Relief for Four Groups of Claimants Who Filed Petitions for Monitor Review.”⁵⁵ The motion addressed the application of the deadline for petitions for Monitor review to certain specific claimants. The Consent Decree did not provide a deadline for filing petitions for Monitor review. In the July 14, 2000, Stipulation and Order, a deadline was established.⁵⁶ For adjudication and arbitration decisions issued prior to July 14, 2000, the deadline for submitting a petition for Monitor review was 120 days from the date of the Order, or November 13, 2000. For adjudication and arbitration decisions issued after July 14, 2000, the deadline was 120 days from the date of the adjudication or arbitration decision.

⁵⁵ Plaintiffs initially brought this issue before the Court in a motion filed under seal on December 11, 2001. Plaintiffs withdrew this motion and filed a subsequent motion on July 19, 2002.

⁵⁶ A copy of the Order is available on the Monitor’s web site at <http://www.pigfordmonitor.org/orders/>.

Notice of the 120-day deadline was provided at various times to segments of the class through at least four different means.⁵⁷ However, it was not until November 15, 2001, that the Adjudicator's decision letters in Track A claims began to include notice of the 120-day deadline for petitions for Monitor review.⁵⁸ Thousands of claimants whose claims were decided prior to this date received decision letters that did not inform them of the 120-day deadline for filing a petition for Monitor review.

At the time of the second Monitor report on good faith implementation, the parties were in the midst of briefing plaintiffs' motion for relief for 350 claimants whose petitions for Monitor review were determined by the Facilitator to be untimely filed.⁵⁹ In May 2003, the Monitor filed a report with the Court on notice issues regarding the late petition filings.⁶⁰ On June 2, 2003, the Court issued an Opinion and Order denying the plaintiffs' motion for relief. The Court ruled that the deadlines established in prior Court orders govern when petitions for Monitor review must be filed. Class Counsel moved for reconsideration of the Court's June 2, 2003 Order. On March 10,

⁵⁷ First, the July 14, 2000 Stipulation and Order directed the Facilitator to send a copy of the Order to every person who requested a Claim Sheet and Election Form but did not submit a completed Claim Form to the Facilitator within the period prescribed by the Consent Decree. Second, the July 14, 2000, Stipulation and Order required that the Order be posted in a conspicuous public place in every USDA FSA county office. Third, on August 14, 2000, the Monitor's Office disseminated a Monitor Update explaining the July 14, 2000 Order as it applied to petition deadlines. Fourth, in meetings with class members and in phone calls, the Monitor's Office, the Facilitator, and likely Class Counsel orally explained the 120-day deadline to class members.

⁵⁸ Although the Arbitrator began to include notice of the 120-day deadline for petitions for Monitor review in Arbitrator decisions shortly after the July 14, 2000 Stipulation and Order, claimants whose claims had been decided by the Arbitrators prior to July 14, 2000, did not receive notification of the 120-day deadline other than through methods listed in the previous footnote.

⁵⁹ Plaintiffs originally sought relief for a total of 387 claimants. As the Court's Order of June 2, 2003, sets forth, the parties reached agreement on a number of claims, reducing the total to 350 claimants. Opinion and Order, at 2, footnote 2.

⁶⁰ Monitor's Report to the Court Regarding Notice to the Class of the 120-Day Deadline to File a Petition For Monitor Review, dated May 30, 2003.

2004, the Court issued an Order denying reconsideration. On April 9, 2004, Class Counsel appealed this Order to the Court of Appeals.⁶¹

2. Track B Hearing Deadlines

The issue of the authority of the Arbitrator to modify pre-hearing arbitration deadlines established by the Consent Decree was considered by the Court and the Court of Appeals during this reporting period.⁶² 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 District 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. Finding that the District Court had limited authority to modify Consent Decree deadlines that had been negotiated between the parties, the Court of Appeals reversed and remanded the case to the District Court to consider a modification that would be “suitably tailored,” suggesting a proposed modification for the one claim at issue in the appeal.⁶³

During this reporting period, the Monitor has reviewed many pending petitions for Monitor review in Track B files. This review suggests that changes in Consent Decree deadlines have been common in Track B claims. In the majority of the approximately fifty Track B petition

⁶¹ The Court’s Opinion and Order, issued June 2, 2003, and the Court’s order denying reconsideration on March 10, 2004, are available on the Monitor’s web site at <http://www.pigfordmonitor.org/orders/>.

⁶² Paragraph 10 of the Consent Decree contains deadlines pertaining to Track B arbitration claims.

⁶³ The Court of Appeals ruled that the District Court could modify the Consent Decree if the requirements of Federal Rule of Civil Procedure 60(b)(5) were met. *See Pigford v. Veneman*, 292 F.3d 918 (D.C. Cir. 2002).

files received by the Monitor through December 31, 2003, the record received from the Arbitrator shows changes to Consent Decree deadlines during the time the claims were pending before the Arbitrator. Records received from the Arbitrator show that revisions in arbitration schedules have been made due to: the unanticipated number of claims filed, 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.

The Court has previously ruled that arbitration deadlines may be changed by mutual consent.⁶⁴ The parties have submitted additional memoranda to the District Court on the scope of the Court of Appeals' remand and whether it extends to the claims of Track B class members represented by counsel other than class counsel. The Court of Appeals' remand order remains pending with the District Court.

C. Prevailing Class Members

1. Payment of Cash Relief

Prior Monitor reports explained significant delays in the payment of cash relief to prevailing class members, which had occurred early in the Consent Decree implementation process.⁶⁵ During this reporting period, the number of prevailing claimants who had to wait more than 180 days to receive their cash award was substantially reduced. A small number of claimants continue to experience payment status problems and to contact the Facilitator and the

⁶⁴ In an Order dated March 1, 2000, the Court delegated to the Arbitrator the authority to stay arbitrations or postpone evidentiary hearings beyond the Consent Decree deadlines when both parties consent.

⁶⁵ See Monitor's Report and Recommendations Regarding Implementation of the Consent Decree for the Period of September 1, 2000, through December 31, 2001, at pages 15-17.

Monitor for assistance in attempting to resolve these problems.⁶⁶ The Monitor will continue to work with the parties to help solve any remaining problems relating to payment delays to prevailing class members.

2. Tax Issues

While some progress has been made in resolving tax problems arising from implementation of the Consent Decree, class members continue to experience many of the tax-related problems that were explained in prior Monitor reports.⁶⁷ These problems are significant and include:

- a. General lack of information for the class about the tax consequences of prevailing under the settlement;
- b. Difficulties caused by a failure to issue Internal Revenue Service (IRS) Forms 1099 in a timely manner regarding cash relief, debt relief, and tax relief;⁶⁸
- c. Difficulties created by the treatment of tax relief as taxable income;⁶⁹
- d. The assessment and abatement of penalties against class members who failed to accurately report to the IRS regarding relief or failed to pay taxes owed or on behalf of whom the Government failed to make timely transfers to tax accounts; and
- e. Difficulties in providing tax relief to the decedents' estates when successful claims were brought on behalf of deceased class members.

⁶⁶ As of August 4, 2004, the number of claimants who have been waiting more than 180 days to receive a cash award has been reduced to two. Both of these claims are delayed due to paperwork requirements for estate claims.

⁶⁷ See Monitor's Report and Recommendations Regarding Implementation of the Consent Decree for the Period of September 1, 2000, through December 31, 2001, at pages 12-13, 29-30.

⁶⁸ For any year in which a class member receives cash relief, debt relief, and/or tax relief, the class member should receive an IRS Form 1099 regarding that cash relief, debt relief, and/or tax relief.

⁶⁹ Paragraph 9(a)(iii)(C) of the Consent Decree provides that relief to prevailing Track A credit claimants shall include a payment to the claimant's Internal Revenue Service account as partial payment of the taxes owed by the claimant. The payment is 25% of the principal amount of any debt forgiven under the Consent Decree plus 25% of the \$50,000 in cash relief granted pursuant to the Consent Decree provisions.

The parties and neutrals made progress in addressing possible solutions to tax-related problems. The Facilitator continued to be in regular contact with the IRS to attempt to solve tax problems related to individual claimants and was able to work with the IRS to resolve hundreds of claimant problems during this reporting period. Most of the successful resolutions relate to decedents' estate issues. The Monitor met with the National Taxpayer Advocate and with representatives of the Internal Revenue Service in an effort to seek additional assistance for class members with tax issues. Substantial work has been done to expedite issuance of Forms 1099 to claimants who have received cash payments or debt relief and to resolve the tax problems created when Forms 1099 were not promptly issued.

Many tax account problems involved proper identification of estates. The Facilitator has continued to work with the IRS to establish a procedure for processing claims brought on behalf of decedents in Track A. Class members may call the Facilitator at 1-800-646-2873 for information about what to do in this situation and for help with other tax problems associated with implementation of the Consent Decree claims process.

Notwithstanding these successes and the establishment of these procedures, many successful claimants still have unresolved tax-related problems, and there is reason to believe that as implementation progresses, many more tax-related problems will rise to the surface.

3. Debt Relief

The Consent Decree provides for the following debt relief for successful Track A credit claimants:

USDA shall discharge all of the class member's outstanding debt to USDA that was incurred under, or affected by, the program(s) that was/were the

subject of the ECOA claim(s) resolved in the class member's favor by the adjudicator.⁷⁰

The language for Track B is similar regarding the extent of debt relief.⁷¹

A Stipulation and Order filed on February 7, 2001, further defined the scope of debt relief available to class members.⁷² In essence, the Order provides that USDA is to grant debt relief regarding: (a) all loans found to have been affected by discrimination; and (b) all loans in the affected loan program(s) from the date of the discriminatory event through the end of the class period. Certain exceptions apply and are explained in detail in the Order.

During this reporting period, USDA made substantial progress in implementing debt relief. Many successful claimants contacted the Monitor for assistance with obtaining their debt relief awards. The Monitor and the parties worked together to solve many problems in the debt relief implementation process, and, at the end of the reporting period, continued to work on open issues regarding debt relief. USDA reports that as of January 12, 2004, the agency had forgiven \$21,930,937 in outstanding debt owed by 253 class members.

4. *Injunctive Relief*

Under the Consent Decree, class members who prevail are entitled to injunctive relief in addition to other remedies. The majority of claims under the Consent Decree are credit claims. Claimants who prevail on credit claims are entitled to priority consideration for one Farm Ownership Loan, for one Farm Operating Loan, and for one opportunity to acquire farmland

⁷⁰ Consent Decree, paragraph 9(a)(iii)(A).

⁷¹ Consent Decree, paragraph 10(g)(ii) states:

USDA shall discharge all of the class member's outstanding debt to the Farm Service Agency that was incurred under, or affected by, the program(s) that were the subject of the claim(s) resolved in the class member's favor by the arbitrator.

⁷² The Order is available on the Monitor's web site at <http://www.pigfordmonitor.org/orders/>.

from USDA inventory property.⁷³ During 2002 and 2003, however, relatively few farmers made use of their right to priority consideration. According to information provided by USDA, 171 successful claimants requested priority consideration from USDA from the beginning of this litigation through January 12, 2004.⁷⁴ These requests resulted in a total of fifteen Farm Ownership Loans, thirty-nine Farm Operating Loans and one lease or purchase of inventory property from USDA.

The Monitor's Office continued to receive questions, requests for assistance, and reports of concern from class members relating to the implementation of injunctive relief during this reporting period. Prior Monitor reports described this concern in detail. Many prevailing claimants are skeptical about whether local Farm Service Agency officials will act in a nondiscriminatory manner. They fear that FSA officials will try to retaliate against them because they prevailed in the Consent Decree claims process. Class members also report difficulty meeting the eligibility requirements for loans. Some claimants are concerned that injunctive relief may expire by the time they ultimately prevail on their claims.

Several factors may be contributing to the relatively low rate of use of injunctive relief. First, it is possible that only a small percentage of successful claimants wish to pursue farming at this time. A second, related factor may be the current difficult agricultural economy. A third

⁷³ Consent Decree, paragraph 11(a)-(b). The Consent Decree also requires USDA to consider any new application by a prevailing class member in a light most favorable to the applicant, and to provide technical assistance from a USDA employee who is acceptable to the prevailing class member. Consent Decree, paragraph 11(c)-(d).

⁷⁴ Under paragraph 11(a)-(b) of the Consent Decree, class members must notify USDA in writing that they are exercising their right to priority consideration.

factor may be statutory restrictions that make many farmers ineligible for FSA loan programs. Finally, many prevailing class members may lack a detailed understanding of their injunctive relief rights. The Monitor's Office has continued its efforts to give class members information about injunctive relief, both by distributing a Monitor Update on this topic,⁷⁵ and by making presentations about injunctive relief at claimant meetings.⁷⁶

To address the concern about the expiration of injunctive relief, in January 2003 USDA announced plans to voluntarily extend the time for prevailing class members to participate in injunctive relief. Under the terms of the Consent Decree, injunctive relief was to expire on April 14, 2004, five years from the date the Consent Decree was approved.⁷⁷ USDA has announced that prevailing class members will now have one year longer, until April 14, 2005, to participate in injunctive relief.⁷⁸

⁷⁵ This update, "Injunctive Relief in *Pigford v. Veneman*" (Monitor Update No. 4), is available from the Monitor's office (1-877-924-7483) or on the Monitor's web site at <http://www.pigfordmonitor.org/updates/>.

⁷⁶ See Appendix 4 for a listing of the meetings attended by the Office of the Monitor during 2002 and 2003.

⁷⁷ See Consent Decree, paragraph 11(a)-(c).

⁷⁸ This announcement was publicly made in a press release dated January 16, 2003. The press release is available on USDA's web site at <http://www.usda.gov/news/releases/2003/01/0017.htm>. In July 2003, FSA issued Notice FLP-313, "Priority Consideration for Prevailing Claimants" which provides guidance about priority consideration and other injunctive relief and which extends the period for injunctive relief to April 14, 2005. FLP-313 is available on USDA's web site and on the Monitor's web site at <http://www.pigfordmonitor.org/flp/>. In September of 2002, USDA also announced a series of 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 have concerns and questions about loan applications they have filed in their County Offices. The Office may be contacted toll-free by calling 1-866-538-2610 or sending an email to msda@wdc.usda.gov or writing to Office of Minority and Socially Disadvantaged Farmers, Farm Service Agency, USDA, 1400 Independence Ave SW, Mail Stop 0501, Washington D.C. 20250-0501.

D. Attorneys' Fees and Sanctions

Several Orders issued by the Court and referenced in the second Monitor report on good faith implementation discussed the issue of possible sanctions against Class Counsel. The parties submitted additional briefing on the issue of sanctions during this reporting period, and all sanctions issues were decided by the Court in March 2004.⁷⁹

Some aspects of attorneys' fees issues are still pending. During this reporting period, Class Counsel filed requests for attorneys' fees and costs associated with implementation of the Consent Decree. The Court ordered an interim payment of \$500,000 in an Amended Memorandum Opinion and Order, issued January 14, 2003, which the Government appealed. The Court of Appeals dismissed the appeal on May 14, 2004.

On November 25, 2003, the Arbitrator issued Findings and Recommendations to the Court regarding the January 1 through March 31, 2003, fee request of one of the Class Counsel law firms, Conlon, Frantz, Phelan and Pires, for time spent assisting in the implementation of the Consent Decree. Subsequent to the issuance of the Arbitrator's Findings and Recommendations, the parties resolved that fee petition. The issue of fees will be subject to further proceedings.

VI. GOOD FAITH IMPLEMENTATION OF THE CONSENT DECREE

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"⁸⁰ During this reporting period, January 1, 2002, through December 31, 2003, the parties and all three of the neutrals (the

⁷⁹ The Court's Opinion and Order, issued March 10, 2004, is available on the Court's web site at <http://www.dcd.uscourts.gov/district-court-2004.html>.

⁸⁰ West's Legal Thesaurus/Dictionary (William P. Statsky ed., 1986).

Facilitator, the Adjudicator, and the Arbitrator) continued to work to implement the Consent Decree in good faith.

The Monitor notes that despite significant challenges, substantial progress was made during calendar years 2002 and 2003 to implement the Consent Decree claims process and relief provisions. During this reporting period, the Monitor continued to meet and work on an ongoing basis with all of those who are charged by the Court with the responsibility for carrying out implementation of this Consent Decree. The Monitor believes all of the parties involved met the test for good faith during this reporting period.

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Respectfully submitted,

s/Randi Ilyse Roth

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