

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY C. PIGFORD, *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
 MIKE JOHANNNS, Secretary,)
 United States Department of)
 Agriculture,)
)
 Defendant.)

Civil Action No.
97-1978 (PLF)

CECIL BREWINGTON, *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
 MIKE JOHANNNS, Secretary,)
 United States Department)
 of Agriculture,)
)
 Defendant.)

Civil Action No.
98-1693 (PLF)

MONITOR'S REPORT REGARDING IMPLEMENTATION OF
THE CONSENT DECREE FOR THE PERIOD OF
JANUARY 1, 2004, THROUGH DECEMBER 31, 2004

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This is the fourth in a series of Monitor reports concerning the implementation of the Consent Decree in this case.¹ The Court approved the Consent Decree on April 14, 1999.² Paragraph 12(b)(i) of the Consent Decree requires the Monitor to make periodic written reports on the good faith implementation of the Consent Decree to the Court, the Secretary of Agriculture, Class Counsel, and counsel for USDA.

On March 24, 2003, the parties stipulated and the Court ordered the Monitor to report “regarding each twelve-month period, upon the request of the Court or the parties, or as the Monitor deems necessary.” The Monitor submits this report for the period from January 1, 2004, through December 31, 2004, to fulfill the Monitor’s obligations under the Consent Decree and the March 24, 2003, Stipulation and Order.³

I. EXECUTIVE SUMMARY

During calendar year 2004, the parties and the neutrals (the Facilitator, the Adjudicator, and the Arbitrator) continued to work in good faith to implement the Consent Decree. As of the end of 2004, the following milestones had been reached:

- a. The Adjudicator issued a cumulative total of 22,168 Track A decisions, completing the initial adjudication process for 99 percent of the 22,218 class members found eligible to participate in the Track A claims process. As of the end of 2004, the Adjudicator had approved approximately 13,676 (or 62 percent) of the claims.

¹ Earlier reports covered the initial six-month period following the Monitor’s appointment, from March 1, 2000, through August 31, 2000; the period from September 1, 2000, through December 31, 2001; and the period from January 1, 2002, through December 31, 2003. The Monitor’s prior reports are available on the Monitor’s web site at <http://www.pigfordmonitor.org/reports>.

² The Consent Decree and the Court’s order approving the Consent Decree are available on the Monitor’s web site at <http://www.pigfordmonitor.org/orders>.

³ The focus of this report is the period from January 1, 2004, through December 31, 2004, although limited information regarding Consent Decree implementation issues in 2005 is also provided. The Monitor will file another report after December 31, 2005, reporting more fully on implementation issues for calendar year 2005.

b. The Government provided an approximate cumulative total of \$843,640,853 in monetary relief to successful Track A claimants, including cash awards, tax relief payments, and debt relief.

c. The parties withdrew, settled, or converted to Track A a cumulative total of more than half (59 percent) of the 238 claims initially filed under Track B. The Arbitrator issued a cumulative total of eighty-one decisions in what were the remaining ninety-eight Track B claims.

d. The Government provided a cumulative total of approximately \$16,939,139 in monetary relief to Track B claimants, including payments in settlement, damage awards, and debt relief. As of the end of 2004, the Arbitrator's average damage award for a successful Track B claim was \$551,587.

e. The Monitor issued a cumulative total of 3,310 decisions in response to the 5,617 pending petitions for Monitor review. The Monitor directed reexamination of 1,510 claims.

f. The Adjudicator issued reexamination decisions in a cumulative total of 664 claims, granting relief to 571 petitioning class members and granting relief to the Government in thirty-one claims.

g. The Arbitrator completed review of 66,000 requests for class membership submitted under the process set forth in paragraph 5(g) of the Consent Decree (the "late claim" process). The Arbitrator found approximately 2,200 "late claim" applicants eligible to participate in the claims process.

The remainder of this report provides additional information regarding the Consent Decree implementation process and significant developments in the case during calendar year 2004. Section II of this report provides more detailed statistical information about the progress and outcomes of the claims process. Section III describes the issues presented to the Court and summarizes orders of the Court issued in 2004. Section IV describes the Monitor's activity, including efforts to resolve class members' problems, decisions issued in response to petitions for Monitor review, and calls received on the Monitor's toll-free line from class members and the public. Section V summarizes significant Consent Decree implementation issues addressed by the parties, the neutrals, and the Court during 2004. Finally, Section VI contains the Monitor's observations regarding the good faith of all of those who are charged with the responsibility of implementing the Consent Decree.

II. CLAIMS PROCESSING STATISTICS

The Consent Decree established a two-track process for adjudication or arbitration of individual class members' claims of discrimination. In this section, the Monitor provides information and results for the claims process as of the end of 2004. The Monitor did not independently compile most of the data discussed in this report. The Facilitator⁴ provided claims processing data, the Arbitrator⁵ provided statistics regarding Track B claims, and the United States Department of Agriculture (USDA)⁶ provided statistics regarding debt relief and injunctive relief. The Monitor relied on these sources for the information contained in this section of the report.

A. Track A

Paragraph 9 of the Consent Decree sets forth the process for deciding claims under Track A of the claims process. Class members who elect Track A submit information in response to a series of questions on a Claim Sheet and Election Form ("Claim Sheet") agreed to by the parties.⁷ If the Facilitator finds a claimant meets the threshold requirements for class

⁴ The Facilitator is Poorman-Douglas Corporation. See Consent Decree, paragraph 1(i).

⁵ The Arbitrator is Michael K. Lewis of JAMS, formerly of ADR Associates. See Consent Decree, paragraph 1(b).

⁶ USDA posts some statistics on the agency web site: <http://www.usda.gov/cr/OCR/pigford/status.htm>. General information about the litigation is provided by the agency at <http://www.usda.gov/cr/OCR/Pigford/consent.htm>.

⁷ Under paragraph 3(iv) and paragraph 5 of the Consent Decree, the Facilitator conducts an initial screening of the claim package filed by each claimant. If the Facilitator determines that the claimant meets the threshold eligibility requirements described in the Consent Decree, the Facilitator assigns the claimant a Consent Decree case number and routes the claim through the appropriate claims process for Track A or Track B.

membership, the Facilitator refers the claim to the Adjudicator.⁸ The Adjudicator then determines whether the class member has demonstrated by substantial evidence⁹ that the class member was a victim of discrimination. To satisfy this requirement, class members must show that:

1. They owned or leased, or attempted to own or lease, farmland;
2. They applied for a specific credit transaction at a USDA county office during the period January 1, 1981, through December 31, 1996;
3. The loan was denied, provided late, approved for a lesser amount than requested, encumbered by restrictive conditions, or USDA failed to provide appropriate loan service, and such treatment was less favorable than that accorded specifically identified, similarly situated white farmers; and
4. USDA's treatment of the loan application led to economic damage to the class member.¹⁰

Track A claims may include both credit claims and non-credit claims. Credit claims generally involve USDA farm loan programs (such as the Emergency Loan, Operating Loan, Farm Ownership Loan, and Soil and Water Loan Programs) and may also involve loan servicing programs.¹¹ Non-credit claims generally involve farm benefit or conservation programs. Class members who prevail in Track A credit claims receive a cash payment of \$50,000 as well as

⁸ Under paragraph 1(a) of the Consent Decree, JAMS-Endispute, Inc., is responsible for the final decision in all Track A claims.

⁹ Paragraph 1(l) of the Consent Decree defines substantial evidence as such relevant evidence as appears in the record before the adjudicator that a reasonable person might accept as adequate to support a conclusion after taking into account other evidence in the record that fairly detracts from that conclusion.

¹⁰ Consent Decree, paragraph 9(a)(i)(A)-(D).

¹¹ These loan programs are currently described in USDA regulations at 7 C.F.R. Parts 1941 (Operating Loans), 1943, Subpart A (Farm Ownership Loans), 1945 (Emergency Loans), 1951 (Loan Servicing), and 1943, Subpart B (Soil and Water Loans).

other relief.¹² Class members who prevail on non-credit claims receive a cash payment of \$3,000.¹³

As of the end of 2004, the Adjudicator had issued 22,168 decisions on Track A claims. The Adjudicator awarded relief in 13,676 (approximately 62 percent) of the claims. In response to the Adjudicator's decisions, the Government paid \$654,550,000 as cash relief to class members who prevailed in Track A credit claims and an additional \$1,269,000 to class members who prevailed in non-credit claims.

Additional cumulative statistics regarding the number of class members who elected Track A, adjudication rates and results, and cash relief payment rates through the end of calendar year 2004 are summarized in Table 1.

¹² 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.

¹³ 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.

Table 1: Statistical Report Regarding Track A Claims¹⁴		
Statistical Report as of:	End of 2004	
	Number	Percent
A. Eligible Class Members	22,391	100
B. Cases in Track A (Adjudications)	22,218	99
C. Cases in Track B (Arbitrations)	173	1
Adjudication Completion Figures		
D. Adjudications Complete	22,168	~100
E. Adjudications Not Yet Complete	50	~0
Adjudication Approval/Denial Rates		
F. Claims Approved by Adjudicator ¹⁵	13,676	62
G. Claims Denied by Adjudicator ¹⁶	8,492	38
Adjudication Approvals Paid/Not Paid		
H. Approved Adjudications Paid	13,300	97
I. Approved Adjudications Not Yet Paid	376	3
J. Cash Relief Paid to Class Members for Track A Credit Claims ¹⁷	\$654,550,000	
K. Cash Relief Paid to Class Members for Track A Non-Credit Claims	\$1,269,000	

B. Track B

Paragraph 10 of the Consent Decree sets forth the process for deciding claims under Track B of the claims process. To prevail in a Track B claim, a class member must submit sufficient evidence to the Arbitrator to prove by a preponderance of the evidence¹⁸ that the class

¹⁴ These statistics are provided by the Facilitator and are valid as of December 31, 2004. Statistics for prior reporting periods are summarized in Appendix 1. Current statistics are available upon request from the Monitor's office (1-877-924-7483) and are updated regularly for Track A claims on the Monitor's web site at <http://www.pigfordmonitor.org/stats>.

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

¹⁶ These numbers include both credit and non-credit claims.

¹⁷ This figure includes only the \$50,000 cash award component of relief in Track A credit cases. See Tables 3 and 4 below for other Track A relief statistics.

¹⁸ Paragraph 1(j) of the Consent Decree defines preponderance of the evidence as such relevant evidence as is necessary to prove that something is more likely true than not true.

member was a victim of discrimination and suffered damages as a result of that discrimination. The Track B process includes an exchange of exhibits and written direct testimony, a limited period for discovery, and the opportunity for cross-examination of witnesses at an eight-hour arbitration hearing. The submission of evidence is governed by the Federal Rules of Evidence, and class members who prevail before the Arbitrator may receive an award of their actual damages, as well as debt relief and injunctive relief.

Over half of the class members who initially elected Track B settled their claims or converted them to Track A.¹⁹ As of the end of 2004, the Arbitrator had issued decisions for eighty-one of the ninety-eight Track B claims that had not been settled, converted to Track A, or withdrawn. The Arbitrator awarded an average of \$551,587 to the eighteen class members who prevailed before the Arbitrator. Class members and/or the Government filed petitions for Monitor review in fifty-three of the eighty-one claims decided by the Arbitrator; many of these petitions remained pending at the end of 2004.²⁰

According to the Facilitator, seventy-seven class members who filed Track B claims had received payments in settlement or after prevailing in the Track B claims process as of the end of 2004. The Facilitator reports that the Government paid a total of \$14,535,184 to these seventy-seven class members. Table 2 provides additional statistics regarding Track B claims, as reported by the Arbitrator.²¹

¹⁹ Under the Consent Decree, at the time a class member submits a completed claim package, the class member must elect whether to proceed under Track A or Track B and a class member's election "shall be irrevocable and exclusive." Consent Decree, paragraph 5(d). Those class members who converted from Track B to Track A did so with the consent of counsel for USDA.

²⁰ More information about petitions for Monitor review is provided in Section IV(C) of this report.

²¹ The Arbitrator and the Facilitator use different record-keeping protocols regarding Track B statistics.

Table 2: Statistical Report Regarding Track B Claims²²	
Statistical Report as of:	End of 2004
A. Eligible Track B Claimants	238
B. Track B Cases Settled	69
C. Track B Cases Converted to Track A	62
D. Track B Cases Withdrawn	9
Arbitrations Complete/Not Complete	
E. Contested Track B Cases in Claims Process (Not Settled, Converted or Withdrawn)	98
F. Arbitration Decisions Issued	81
G. Arbitration Decisions Not Yet Issued	17
Arbitration Results	
H. Claimant Prevailed Before Arbitrator	18
I. Average Award to Prevailing Claimants	\$551,587
J. Government Prevailed Before Arbitrator	63
Posture of Decision:	
1. Cases Dismissed Before Hearing	40
2. Full Hearing, Finding of No Liability	23

C. 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. These provisions require USDA to discharge all of a prevailing class member's outstanding debt to the Farm Service Agency (FSA) that was "incurred under, or affected by" the program(s) that were the subject of the claim(s) resolved in

²² These statistics are provided by the Arbitrator and are valid as of January 1, 2005. Statistics for prior reporting periods are summarized in Appendix 2. The amount of each individual Track B arbitration award is set forth in Appendix 3. Claimant names and geographic locations are not disclosed.

the class member's favor in the claims process. A Stipulation and Order filed on February 7, 2001, further defines the scope of debt relief.²³

Table 3 provides statistics regarding the debt relief implemented by USDA for prevailing class members. USDA reports that the Government has forgiven a cumulative total of \$22,657,917 in outstanding principal and interest owed by prevailing class members under the Consent Decree debt relief provisions as of the end of 2004.

Table 3: Statistical Report Regarding Debt Relief²⁴	
Statistical Report as of:	End of 2004
A. Total Amount of Debt Forgiven (Principal and Interest)	\$22,657,917
B. Debt Forgiven for Track A Claimants	\$20,253,962
C. Debt Forgiven for Track B Claimants	\$2,403,955
D. Number of Track A Claimants Who Received Debt Forgiveness	239
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	\$84,745
G. Average Amount of Debt Forgiven Per Track B Claimant Who Received Debt Forgiveness	\$96,158

²³ Paragraph 2 of the February 7, 2001, Stipulation and Order states as follows:

The [debt] relief to be provided in . . . the Consent Decree to a class member who prevails on a claim of credit discrimination includes all debts which were identified by the Adjudicator or the Arbitrator as having been affected by the discrimination. Additionally, such relief includes all debts incurred at the time of, or after, the first event upon which a finding of discrimination is based, except that such relief shall not include: (a) debts that were incurred under FSA programs other than those as to which a specific finding of discrimination was made by the Adjudicator or Arbitrator with respect to the class member (e.g., the Operating Loan program [OL program], the Farm Ownership loan program [FO program], the Emergency Loan program [EM program], etc.); (b) debts that were incurred by the class member prior to the date of the first event upon which the Adjudicator's or Arbitrator's finding of discrimination is based, or (c) debts that were the subject of litigation separate from this action in which there was a final judgment as to which all appeals have been forgone or completed.

²⁴ These statistics are based on information provided by USDA for debt relief (principal and interest) implemented by USDA through December 31, 2004. Appendix 4 provides information from prior reporting periods regarding debt relief as well as information on debt relief by state.

D. Total Track A Monetary Relief

In addition to cash awards and debt relief, successful Track A credit claimants receive relief, paid directly into the claimant's Internal Revenue Service tax account, for partial payment of taxes. Under paragraph 9(a)(iii)(C) of the Consent Decree, the amount of tax relief for each successful Track A credit claim is 25 percent of the \$50,000 cash award (\$12,500) plus 25 percent of the principal amount of any debt that was forgiven. Thus, the total value of monetary relief to Track A claimants includes cash awards for credit and non-credit claims, payments to Internal Revenue Service (IRS) tax accounts, and relief from outstanding debt (principal and interest) as provided in the Consent Decree and the February 7, 2001, Stipulation and Order. Table 4 summarizes the total monetary value of relief provided to class members who elected Track A as of the end of 2004.

Status of Payments	Amount
Cash Awards for Credit Claims (\$50,000 per prevailing claim)	\$654,550,000
Cash Awards for Non-Credit Claims (\$3,000 per prevailing claim)	\$1,269,000
Payments Due to IRS as Tax Relief ²⁶	\$167,567,891
Debt Relief (Principal and Interest)	\$20,253,962
Total Track A Monetary Relief	\$843,640,853

²⁵ These statistics are based on information provided by the Facilitator regarding cash awards and tax relief through December 31, 2004. The debt relief statistics are based on information provided by USDA for debt relief implemented by USDA (principal and interest) through December 31, 2004.

²⁶ The tax relief in Table 4 is based on information provided by the Facilitator and includes 25 percent of the \$50,000 cash award (\$12,500) paid for successful Track A credit claims, plus 25 percent of the approximately \$15,721,564 in principal debt that was forgiven for this group of successful claimants.

E. Relief by State

The Facilitator reports that the Government has made payments to prevailing class members who currently reside in thirty-nine different states. Many prevailing class members currently reside in southern states; the states with the greatest number of prevailing class members who received cash relief payments from the Government as of the end of 2004 are listed in Table 5. In addition to cash relief, prevailing class members were also entitled to receive debt relief, tax relief, and injunctive relief as described in this report. Appendix 5 contains information on the amount of relief paid by state based on the current residence of all prevailing class members who were paid cash relief by the Government as of the end of 2004.

Table 5: Statistical Report Regarding States With 100 or More Prevailing Claimants²⁷		
Claimants' Current Residence	Total Number of Prevailing Claimants (Track A and Track B)	Total Cash Relief Paid as of December 31, 2004 (Track A and Track B)
Alabama	3,076	\$150,648,500
Mississippi	2,660	133,510,866
Georgia	1,725	84,337,500
Arkansas	1,310	65,217,000
North Carolina	937	50,146,583
South Carolina	794	40,337,500
Oklahoma	537	26,463,000
Louisiana	479	23,871,000
Tennessee	415	21,121,955
Texas	289	15,948,400
Florida	244	11,695,000
Virginia	152	8,570,780
Illinois	149	7,453,000
California	128	6,934,600

²⁷ These statistics are provided by the Facilitator and are valid as of December 31, 2004.

F. Injunctive Relief

Paragraph 11 of the Consent Decree describes the injunctive relief that prevailing class members are entitled to receive from USDA.²⁸ There are three types of injunctive relief for prevailing class members: (1) technical assistance from a qualified USDA official acceptable to the class member; (2) consideration of certain applications in the light most favorable to the class member; and (3) priority consideration for one Farm Ownership Loan, one Farm Operating Loan, and one opportunity to acquire farmland from USDA inventory property.

Paragraph 11 of the Consent Decree provides that injunctive relief is to be available for five years from the date of the approval of the Consent Decree, which meant injunctive relief expired on April 14, 2004.²⁹ In 2003 USDA voluntarily agreed to extend certain aspects of injunctive relief,³⁰ and in 2005 the parties stipulated and the Court ordered an additional extension of the deadline for some aspects of injunctive relief.³¹

Table 6 provides statistics reported by USDA concerning the cumulative number of requests for priority consideration for Farm Ownership Loans, Farm Operating Loans, and the acquisition of inventory property from the beginning of the claims process through January 25, 2005. Appendix 6 contains statistics from prior reporting periods regarding injunctive relief.

²⁸ Consent Decree, paragraph 11.

²⁹ The Consent Decree was approved on April 14, 1999. Five years from this date was April 14, 2004.

³⁰ In 2003, USDA voluntarily agreed to extend the right to injunctive relief for one additional year through April 14, 2005. See Notice FLP-313, "Priority Consideration for Prevailing Claimants," on the Monitor's web site at: <http://www.pigfordmonitor.org/flp>.

³¹ The April 21, 2005 Stipulation and Order is available on the Monitor's web site at: <http://www.pigfordmonitor.org/orders>. More information about injunctive relief is provided in Section V(C) of this report.

Table 6: Statistical Report Regarding Injunctive Relief³²	
Statistical Report as of:	End of 2004
A. Farm Ownership Loans	
1. Number of Requests for Priority Consideration with Complete Application	75
2. Number of Applications Approved	21
B. Farm Operating Loans	
1. Number of Requests for Priority Consideration with Complete Application	138
2. Number of Applications Approved	52
C. Inventory Property	
1. Number of Requests for Priority Consideration	4
2. Number of Applications Approved	1

III. COURT ORDERS

In 2004, the Court received numerous pleadings addressed to Consent Decree implementation issues. The Court received motions and considered issues relating to:

- a. The fate of untimely petitions for Monitor review;
- b. The application of the United States Court of Appeals' decision regarding the Arbitrator's authority to extend Track B pre-hearing deadlines for claimants who were not represented by Class Counsel;
- c. A request by a successful Track A claimant to prevent foreclosure action by USDA;
- d. A request by three putative claimants for permission to file a claim after the deadline;
- e. A request by several individual class members to modify the Consent Decree and to disqualify Class Counsel;
- f. The award of attorneys' fees and a request by Class Counsel for reconsideration of an Order concerning attorney sanctions; and
- g. A stipulation by the parties to extend the Monitor's appointment until her duties are completed or until March 1, 2007, whichever occurs first.

³² These statistics are provided by USDA and are valid as of January 25, 2005.

Table 7 summarizes the Court's Orders on substantive matters during this reporting period.³³ Specific Orders are discussed in more detail in Section V of this report.

Table 7: Court Orders				
#	Court Docket Number	Date Filed	Title of Order	Major Issues Addressed Include:
1	890-891	03/10/2004	Opinion and Order	Denying motions for reconsideration of the Court's June 2, 2003, Opinion and Order denying relief regarding untimely petitions for Monitor review; the Court ruled that modification of petition deadlines was not warranted under either Federal Rule of Civil Procedure 60(b) or Rule 6(b). The United States Court of Appeals for the District of Columbia affirmed this Order on July 15, 2005. <i>Pigford v. Johanns</i> , 416 F.3d 12 (2005).
2	892-893	03/10/2004	Opinion and Order	Denying Class Counsel's motions to vacate and reconsider sanctions provided for in the Court's Memorandum Opinion and Order of May 15, 2001, and imposing sanctions of \$308,000 on Class Counsel in accordance with that Memorandum Opinion and Order.
3	902-903 926-927 978-979 1054-1055	04/06/2004 05/18/2004 08/12/2004 11/23/2004	Stipulation and Order and Settlement Agreements and Orders	Approving Stipulation and Settlement Agreements regarding attorneys' fees for Class Counsel Conlon, Frantz, Phelan & Pires.
4	908	04/20/2004	Stipulation and Order	Approving Stipulation extending the appointment of the Monitor until her duties under the Consent Decree are completed, or until March 1, 2007, whichever occurs first.
5	918-919 1068-1069	05/10/2004 12/03/2004	Settlement Agreement and Order	Approving Settlement Agreement regarding attorneys' fees for Class Counsel Philip L. Fraas.

³³ Procedural Orders and Orders relating to approval of the Monitor's budgets and invoices are not included in this list.

Table 7: Court Orders

#	Court Docket Number	Date Filed	Title of Order	Major Issues Addressed Include:
6	938	06/08/2004	Order	Denying class members Theodie and Ceola Logan's application for a temporary restraining order and temporary injunctive relief to delay USDA foreclosure proceedings on their farm property. ³⁴
7	994	09/13/2004	Order	Ordering that the motion of Willie Ruth McNeil, Essie B. Faulkner, and Malissa Sharp for late filing under Consent Decree ¶ 5(g) will not be considered by the Court and directing that all putative class members seeking permission for late filing under Consent Decree ¶ 5(g) must seek permission directly from the Arbitrator, Michael K. Lewis.
8	1022	09/20/2004	Order	Denying motions to strike by USDA and by Class Counsel J.L. Chestnut, ruling no additional submissions of fee petitions for the period of July 1, 2001, to June 30, 2002, will be permitted.
9	1011	09/24/2004	Order	Approving the Monitor's Report and Recommendations Regarding Implementation of the Consent Decree for the Period of January 1, 2002 through December 31, 2003 and ordering that the Monitor's Report be posted on the District Court's web site at www.dcd.uscourts.gov/district-court-recent.html .
10	1018	09/30/2004	Order	Closing attorneys' fees motion filed by Counsel Butler, Snow, O'Mara, Stevens & Cannada for work on an identified Track B claim based on a settlement reached by the parties.
11	1019	9/30/2004	Order	Closing attorneys' fees motion filed by Counsel Othello C. Cross for implementation work based on a settlement reached by the parties.

³⁴ The Logans were successful Track A claimants who were granted debt relief for certain Operating Loans, beginning in 1981. The foreclosure action by USDA was based on delinquent debt that was incurred prior to 1981. On January 24, 2005, the Court of Appeals dismissed the Logans' appeal of the District Court's Order for failure to prosecute.

#	Court Docket Number	Date Filed	Title of Order	Major Issues Addressed Include:
12	1041	11/08/2004	Memorandum Opinion and Order	Ruling that the relief the Court of Appeals granted in its June 21, 2002, opinion relating to Track B arbitration deadlines is available only to claimants who were represented by Class Counsel.
13	1087-1088	1/3/2005	Opinion and Order	Denying motions to modify the Consent Decree and to disqualify Class Counsel.

IV. MONITOR'S ACTIVITY AND OBSERVATIONS

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 then Secretary of Agriculture Ann M. Veneman in early 2003, but not in calendar year 2004. The Monitor also fulfills this Consent Decree requirement in part through work with USDA's Office of the General Counsel. The Monitor had many meetings and frequent phone conversations during 2004 with James Michael Kelly, who was then USDA's Deputy General Counsel and who is now USDA's Acting 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 fourth 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.

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 2004 is listed in Appendix 7.

Problems and concerns brought to the Monitor’s attention by class members in 2004 included:

- a. Concerns about the adequacy of notice for the claims process.
- b. Questions about whether the case will be re-opened to permit additional class members to participate in the claims process.
- c. Concerns about delays in the claims process.
- d. Concerns about the approval rate in the late-claim process under paragraph 5(g).
- e. Problems with tax relief, including the establishment of tax accounts.
- f. Problems with debt relief, including determinations of the proper debt relief.
- g. Problems with obtaining appropriate relief in estate claims brought on behalf of deceased class members.
- h. Concerns about the availability of injunctive relief and alleged continued discrimination by local FSA offices.
- i. Concerns about potential fraud and efforts by third parties not associated with the litigation to mislead or defraud class members.

The most significant reoccurring problems and concerns are described more fully below in Section V, “Significant Consent Decree Implementation Issues.” In general, the Monitor has attempted to address class members’ problems by providing information to class members about the claims process; by providing information about class members’ concerns to the parties, the neutrals, and the Court; and by working directly with Class Counsel and USDA in an attempt to solve individual class members’ problems.

The Monitor maintains a web site in order to provide current information to class members about various aspects of the case: www.pigfordmonitor.org. The web site includes information such as important Court Orders in the case, reports by the Monitor and the Arbitrator, Monitor Updates and letters to the class, statistics on the claims process, Farm Loan Program (FLP) notices issued by USDA, and helpful links for class members seeking continued assistance with their farming operations. In 2004, there were 38,855 page “hits” to this web site.

In June 2004, the Monitor issued two Monitor Updates to convey information to class members about particular aspects of the Consent Decree implementation process. First, in response to continued requests for information about how to file a claim or get into the case, the Monitor’s office prepared Update No. 13, “The *Pigford* Case Is Closed: No One Can Get Into the Case if They Did Not Apply by Deadlines.” This update explains that the deadline for filing a Claim Sheet was October 12, 1999; the deadline for requesting permission to file a late claim was September 15, 2000; and anyone who missed both of these deadlines may not participate in the claims process.

Second, to assist prevailing class members, the Monitor’s office issued an update explaining the impact of Consent Decree debt forgiveness on future loan or loan servicing eligibility. This update, “No Adverse Effect: Future Loans and Future Loan Servicing for

Prevailing Class Members” (Update No. 14), explains the important difference between debt written off under the Consent Decree and debt discharged through other means, such as by a bankruptcy court order or under USDA loan servicing regulations. The Consent Decree provides that USDA may not disqualify a class member from future participation in USDA loan programs and loan servicing programs based on debt forgiven under the Consent Decree. Debt forgiven under other circumstances may render a class member ineligible for new USDA loans and loan servicing.³⁵ The Monitor has previously issued an update explaining how debt relief works under the Consent Decree.³⁶ Monitor Update No. 14 provides more information and examples regarding how USDA must treat debts forgiven under the Consent Decree when evaluating a class member’s eligibility for loans or loan servicing.

Monitor Update No. 13 regarding deadlines for the claims process and Monitor Update No. 14 regarding the effects of Consent Decree debt relief on future loan and loan servicing eligibility are included in Appendix 8 and are available on the Monitor’s web site at <http://www.pigfordmonitor.org/updates>.

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

Paragraph 12(b)(iii) of the Consent Decree 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

³⁵ See, for example, 7 C.F.R. §§ 1941.12(a)(10) (for operating loan applicants), 1943.12(a)(10) (for farm ownership loan applicants) (2005).

³⁶ Monitor Update No. 10, “Debt Relief for Prevailing Class Members,” is available on the Monitor’s web site at: <http://www.pigfordmonitor.org/updates>.

in response to petitions for Monitor review filed by class members and by USDA. The Facilitator reports that as of the end of 2004, 5,617 petitions for Monitor review had been filed. The Monitor had issued decisions in response to approximately 3,310 of those petitions by the end of 2004. Table 8 provides statistics regarding Monitor petition decisions as of the end of 2004.

Table 8: Statistical Report Regarding Petitions for Monitor Review³⁷	
Statistical Report as of:	End of 2004
Petitions for Monitor Review	
A. Number of Petitions for Monitor Review	5,617
1. Claimant Petitions	4,901
2. Government Petitions	716
Monitor Decisions	
B. Petition Decisions Issued by Monitor	3,310
1. Total Number of Petitions Granted	1,510
a. Claimant Petitions Granted	1,439
b. Government Petitions Granted	71
2. Total Number of Petitions Denied	1,800
a. Claimant Petitions Denied	1,319
b. Government Petitions Denied	481

1. Petitions for Review of Facilitator Screening Decisions

As of the end of 2004, the Monitor had received ninety-two petitions from claimants seeking reexamination of the Facilitator’s initial class membership screening decision.³⁸ In 2004,

³⁷ These statistics are provided by the Facilitator and are valid as of December 31, 2004.

³⁸ The Facilitator reviews the Claim Sheet and Election Form to determine if claimants meet the initial screening criteria for class membership. Paragraph 2(a) of the Consent Decree defines the class 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 program who believed they were discriminated against on the basis of race in USDA’s response to that application; and (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA’s treatment of such farm credit or

the Monitor completed review of all of the then-pending petitions for Monitor review filed by claimants who initially received a Notice of Rejection from the Facilitator in the screening process.³⁹ Many claimants who petitioned for Monitor review had been rejected as ineligible because their claim packages did not contain sufficient proof that they had complained of race discrimination by USDA between January 1, 1981, and July 1, 1997. The Monitor permitted some claimants to supplement the record for their claims and directed reexamination of twenty-two claims that initially had been rejected by the Facilitator. As of the end of 2004, the Facilitator had reexamined eleven of those claims.⁴⁰ On reexamination, the Facilitator determined the class membership screening requirements were met in those eleven claims and referred the claims to the Adjudicator and Arbitrator for further processing.

2. *Petitions for Review of Adjudicator Decisions*

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,⁴¹ the Monitor may admit into the record supplemental information provided in the petition or petition response

benefit application. In addition to responding to questions on the Claim Sheet, claimants must also provide proof that a qualifying discrimination complaint was made or that extraordinary circumstances beyond the claimant's control prevented a discrimination complaint from being made within the time frame set forth in the Consent Decree. *See* Consent Decree, paragraphs 5 and 6. The type of documentation required under paragraph 5(b) of the Consent Decree is described on page 2 of the Claim Sheet and Election Form.

³⁹ On October 29, 2002, the Court issued an order setting deadlines for petitions for Monitor review by claimants rejected by the Facilitator in the class membership screening process and permitting the Monitor to consider additional materials submitted with a petition or 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 October 29, 2002, Order is available on the Monitor's web site at <http://www.pigfordmonitor.org/orders>.

⁴⁰ The Facilitator reviewed the remaining claims in 2005 and determined an additional ten claimants were eligible to participate in the claims process.

⁴¹ 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>.

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. Many Track A petitions include supplemental information.

Approximately 50 percent of the Track A decisions issued by the Monitor as of December 31, 2004, direct the Adjudicator to reexamine the claim. Often the record on reexamination includes supplemental information from class members and from USDA. As of the end of 2004, the Adjudicator had issued a total of 664 reexamination decisions. After reexamination, the Adjudicator changed the result in 602 claims; petitioning class members prevailed in 571 of those claims and the Government prevailed in 31 of those claims. Table 9 provides statistics regarding Adjudicator reexamination decisions issued as of the end of 2004.

Table 9: Statistical Report Regarding Adjudicator Reexamination Decisions⁴²	
Statistical Report as of:	End of 2004
A. Reexamination Decisions Issued by Adjudicator	664
1. Reexamination Decisions After Claimant Petition Granted	631
a. Claimant Prevailed on Reexamination	571
b. Claimant Did Not Prevail on Reexamination	60
2. Reexamination Decisions After Government Petition Granted	33
a. Government Prevailed on Reexamination	31
b. Government Did Not Prevail on Reexamination	2

3. Petitions for Review of Arbitrator Decisions

The Monitor has also received petitions for Monitor review of Track B decisions made by the Arbitrator. As of the end of 2004, the Monitor had received petitions for Monitor review

⁴² These statistics are provided by the Facilitator and are valid as of December 31, 2004. Appendix 10 contains statistics for prior reporting periods.

from class members and/or from USDA seeking reexamination of fifty-three of the eighty-one claims decided by the Arbitrator. The Monitor issued decisions in sixteen of those claims. In two of those decisions, the Monitor granted reexamination for claims in which the Arbitrator, acting prior to a hearing, had dismissed the claims on the ground that the claimant had not provided sufficient proof of class membership. On reexamination by the Arbitrator, both claims were reset for a hearing under the Track B claims process.

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 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. When callers raise complex issues or problems that phone operators are not able to answer, the operator sets up a time when the caller can talk to an attorney in the Monitor's Office.

The Monitor's toll-free line received 17,143 incoming calls during 2004. Sometimes the operators also made outgoing calls to follow up with callers or to provide additional information. The operators staffing the toll-free line made 875 outgoing calls in this period, bringing the total number of calls staffed by the toll-free line operators to 18,018 during 2004. Many of the callers requested information about the status of a petition for Monitor review or a reexamination decision by the Adjudicator. Others described problems with specific types of relief such as debt relief, injunctive relief, or tax relief. Some callers requested information about filing a claim or

getting into the class. Many of the problems class members raised in calls to the Monitor are described more fully below in Section V, “Significant Consent Decree Implementation Issues.”

V. SIGNIFICANT CONSENT DECREE IMPLEMENTATION ISSUES

The parties and the neutrals continued to make progress in addressing and resolving issues in the implementation of the Consent Decree during calendar year 2004. The issues that received the most significant amount of attention during this reporting period are described below.

A. Filing a Claim

1. The Late-Claim Process

The Consent Decree required that Claim Sheets be filed by October 12, 1999.⁴³

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 claim” process.

On December 20, 1999, the Court delegated to the Arbitrator the review of the “late-claim” 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 has reported that approximately 66,000 late-claim requests were filed by the September 15, 2000, deadline.⁴⁴ By the end of calendar year 2004, the Arbitrator reported that all

⁴³ 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.

⁴⁴ During 2004, the Arbitrator filed two reports on the late-claim process. These reports were filed on June 4, 2004, and December 1, 2004. The Arbitrator’s most recent report was filed on November 30,

of the requests had been reviewed and decided by the Arbitrator. Of the timely filed late-claim requests, the Arbitrator has approved a total of approximately 2,200 late claims.⁴⁵

The Arbitrator has established a reconsideration process for claimants whose late-claim requests are denied. As of December 1, 2004, approximately 21,000 timely requests for reconsideration had been filed. The Arbitrator had decided 3,015 of these reconsideration requests as of the end of 2004, approving an additional 138 late-claim requests in the reconsideration process.⁴⁶ The Arbitrator has projected that the late-claim reconsideration process will be completed by early 2006.⁴⁷

On September 13, 2004, the Court issued an Order reaffirming the Arbitrator's authority to decide late-claim requests, stating that the Court would not consider any late-claim petition request "either at the first instance or following denial and/or reconsideration by the Arbitrator."⁴⁸ On September 28, 2004, at the request of the United States House of Representatives Judiciary Committee, Subcommittee on the Constitution, the Arbitrator offered testimony regarding the late-claim process under paragraph 5(g) and regarding the reasons claimants offered for not filing timely claims. The Subcommittee also heard testimony from

2005. All of the Arbitrator's reports on the late-claim process are available on the Monitor's web site at <http://www.pigfordmonitor.org/arbrpts>.

⁴⁵ After a late-claim request is approved by the Arbitrator, the Facilitator sends a Claim Sheet and Election Form, which must be filled out, signed by the claimant and an attorney, 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-claim process, see Monitor Update No. 1, "Late Claim Deadline," available on the Monitor's web site at <http://www.pigfordmonitor.org/updates>.

⁴⁶ Arbitrator's Seventh Report on the Late-Claim Petition Process, dated December 1, 2004, page 6.

⁴⁷ In the Arbitrator's Ninth Report to the Court, the Arbitrator reported that as of November 30, 2005, decisions had been made in 17,279 reconsideration requests. Arbitrator's Ninth Report on the Late-Claim Petition Process, dated November 30, 2005, page 5.

⁴⁸ *Pigford v. Veneman*, Order, at 2 (D.D.C. Sept. 13, 2004).

Class Counsel and individual black farmers regarding the late-claim process. The Monitor testified at the Subcommittee's request and provided information about the claims process and success rates.⁴⁹

2. Consent Decree Notice Provisions

In response to pleadings filed during 2004, the Court again reviewed the Consent Decree notice provisions and Class Counsel's efforts in assisting class members who wished to file claims. In response to motions to modify the Consent Decree and to remove Class Counsel, the Court issued an Opinion on January 3, 2005, which noted that notice of the settlement included individual mailings, newspaper and magazine advertisements, television commercials, and informational meetings in regions with the highest concentration of class members.⁵⁰ The Court expressed concern for the farmers who, because they failed to file on time, will be barred from participating in the Consent Decree claims process.⁵¹ The Court reaffirmed, however, that notice of the Consent Decree settlement and claims process was adequate and met the standards for class action settlements under the Federal Rules of Civil Procedure.

⁴⁹ The Constitution Subcommittee of the United States House of Representatives' Judiciary Committee held two hearings during 2004 regarding the Consent Decree. On September 28, 2004, the Subcommittee convened a hearing entitled "Status of the Implementation of the *Pigford v. Glickman* Settlement." On November 18, 2004, the Subcommittee received additional testimony in a hearing entitled "'Notice' Provision in the *Pigford v. Glickman* Consent Decree." The Hearing Transcripts are available through links to the Constitution Subcommittee from the House Judiciary Committee's web site at <http://www.judiciary.house.gov/oversightlist.aspx> (click on "Committee," then click on "Constitution"). On February 28, 2005, the Subcommittee conducted an Oversight Field Briefing. Scheduled witnesses included: George Hildebrandt, a claimant; Mr. Charlie Winburn, Commissioner, Ohio Civil Rights Commission; Vernon B. Parker, Assistant Secretary, Office of Civil Rights, USDA; and Dr. John W. Boyd, President, National Black Farmers Association. No transcript of that briefing is available.

⁵⁰ *Pigford v. Veneman*, Opinion, at 22-23 (D.D.C. January 3, 2005).

⁵¹ The Court noted the Arbitrator's estimate that 28,854 of the late-claim requests specified lack of knowledge as the primary reason for missing the claims-filing deadline. Opinion, at 20 (citing testimony of the Arbitrator before the Subcommittee on the Constitution of the United States House of Representatives Committee on the Judiciary).

At a November 18, 2004, hearing of the Constitution Subcommittee of the House Judiciary Committee, Jeanne C. Finegan, a representative of the Facilitator, described the notice program that was conducted to inform class members of the Consent Decree claims process.⁵² Bernice Atchison, an African-American farmer who filed a late-claim request, and Thomas Burrell, President of the Black Farmers and Agriculturalists Association, testified regarding why they believed the notice was not effective. Class Counsel J.L. Chestnut described his efforts to meet with black farmers around the country to help class members file claim forms. Subcommittee members discussed what action Congress could take to address the concerns of the people who filed late-claim requests but who failed to meet the Consent Decree requirements for late claims and thus will not be eligible to participate in the claims process.

B. Claims Processing

1. Timeliness of Process

Although many of the 22,391 timely filed claims have now been fully processed and resolved, class members whose claims remain pending continued to express concern during calendar year 2004 regarding the time it takes to process the claims. Most class members who filed timely claim packages have now received initial decisions from the Adjudicator or the Arbitrator. However, late-claim petitions and requests for reconsideration have resulted in newly filed claims packages. In addition, petitions for Monitor review and Adjudicator reexamination decisions remain pending. Due to the problems for active farmers who have debt that continues

⁵² The Hearing Transcript is available through the Judiciary Committee's web site, at <http://www.judiciary.house.gov/oversightlist.aspx> (click on "Committee," then click on "Constitution"; then click on 11/18/04 "Oversight Hearing on the 'Notice' Provision in the *Pigford v. Glickman* Consent Decree").

to accumulate interest as their claims are being processed, both USDA and Class Counsel have agreed that these claims should receive priority consideration.⁵³ The neutrals and the parties continue to track claims processing data.

2. Untimely Petitions for Monitor Review

By Stipulation and Order dated July 14, 2000, the parties and the Court adopted a 120-day deadline for filing petitions for Monitor review. On June 2, 2003, the Court denied Class Counsel's motion for relief for 350 claimants whose petitions for Monitor review were deemed untimely by the Facilitator.⁵⁴ The Monitor's prior reports describe in more detail the background regarding Class Counsel's motion and the Court's Order.⁵⁵ On March 10, 2004, the Court denied motions for reconsideration of the June 2, 2003, Order. The Court ruled that neither attorney error due to the high volume of petitions nor any other circumstances described by counsel in the negotiation of the July 14, 2000, Stipulation and Order justified modification of the 120-day petition deadline. The Court also ruled that the standards for "excusable neglect" were not met, given the prejudice to the government that would arise should the deadlines be extended. Class Counsel appealed the Court's March 10, 2004, Order to the United States Court of Appeals for

⁵³ Paragraph 7 of the Consent Decree provides that USDA must cease actions to foreclose or accelerate a class member's debt while his or her claim is pending. However, interest on that debt continues to accumulate while claims are being processed. The amount of accumulated debt at the end of the claims process can be substantial. USDA has voluntarily agreed to re-notify class members of their loan servicing rights and to offer them the opportunity to apply for loan servicing once a final decision has been rendered on their claim. USDA has issued several Farm Loan Program Notices (FLP-279, FLP-299, and FLP-371) that describe a class member's loan servicing rights. These notices are available on the Monitor's web site at <http://www.pigfordmonitor.org/flp>.

⁵⁴ *Pigford v. Veneman*, 265 F. Supp. 2d 41 (D.D.C. 2003).

⁵⁵ The Monitor filed a 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. For a more complete history of this issue, see The Monitor's Report and Recommendations Regarding Implementation of the Consent Decree for the Period of January 1, 2002 through December 31, 2003, at pages 30-32, available on the Monitor's web site at: <http://www.pigfordmonitor.org/reports>.

the District of Columbia Circuit. On July 15, 2005, the Court of Appeals affirmed the District Court's ruling.⁵⁶

3. Track B Claims

Paragraph 10 of the Consent Decree sets forth specific deadlines for Track B claims. These deadlines include: the pre-hearing exchange of witness statements and exhibits, the completion of depositions and discovery, the submission of written direct testimony, the designation of witnesses for cross-examination, and the submission of pre-hearing memoranda of factual and legal issues. In a Memorandum Opinion and Order issued on November 18, 2004, the Court interpreted a prior ruling by the United States Court of Appeals to preclude modification of the deadlines for individual class members who elected to be represented by counsel other than Class Counsel, absent consent by the Government to modification of the deadlines. The Court further ruled that if any individual class members were originally represented by Class Counsel and were injured by Class Counsel's actions, relief is warranted. The Arbitrator has resumed review of the remaining Track B claims brought by class members who at the relevant time had chosen counsel other than Class Counsel to represent them in the Track B claims process.

During 2004, the parties also filed pleadings with the Court regarding the involvement of Ms. Margaret O'Shea, one of a number of people hired by the Department of Justice on a temporary basis to defend the United States Department of Agriculture in Track B claims. On

⁵⁶ On October 19, 2005, the Court of Appeals denied Class Counsel's requests for rehearing and rehearing *en banc*. *Pigford v. Johanns*, 416 F.3d 12 (D.C. Cir. 2005), *rehearing denied*, 2005 App. LEXIS 22697 (D.C. Cir. Oct. 19, 2005), *rehearing en banc denied*, 2005 App. LEXIS 22696 (D.C. Cir. Oct. 19, 2005).

December 20, 2004, Class Counsel filed a motion seeking certain information regarding Ms. O'Shea's work on behalf of the Government. On December 30, 2004, the Government responded to that motion. The Government's response noted press accounts reporting allegations that Ms. O'Shea was not a member of any bar, although she represented herself as an attorney.⁵⁷ The Government reported that Class Counsel had been informed of the few cases the Government had identified as cases Ms. O'Shea handled for the Government during the time she worked for the Department of Justice in 2002.⁵⁸

On January 3, 2005, Class Counsel reported to the Court that counsel for each of the claimants had been contacted in order that counsel could determine what action, if any, should be taken on behalf of their clients. On January 13, 2005, the Court denied the motion filed by Class Counsel seeking such information, given the Court's understanding that information regarding the cases handled by Ms. O'Shea had been provided to Class Counsel.⁵⁹

C. Prevailing Class Members

Prior Monitor reports explained the types of problems class members have reported to the Monitor in obtaining their cash awards, tax relief, debt relief, and injunctive relief. During this reporting period, the parties and the neutrals continued to work to resolve these problems.

⁵⁷ Counsel for the Government further indicated that Counsel for the Government had learned only recently through press accounts that Ms. O'Shea's bar status was in question.

⁵⁸ Class Counsel confirmed in a reply filed on January 4, 2005, that on December 30, 2004, the Government provided Class Counsel with a list of four Track B cases in which Margaret O'Shea acted as counsel for USDA and another Track B case in which she provided limited assistance.

⁵⁹ On December 19, 2004, Mr. James Myart, as counsel for certain named class members, also filed a motion requesting that the Court order the Government to produce information regarding the cases handled by Margaret O'Shea. The Government's December 30, 2004, opposition to the motion noted that Mr. Myart did not represent any of the individuals whose claims had been handled by Ms. O'Shea. The Court denied Mr. Myart's motion on January 3, 2005, striking several pleadings associated with the motion.

Efforts during 2004 to address the implementation of relief for successful class members are described more fully below.

1. Payment of Cash Relief

In prior reporting periods, the Monitor reported delays in the payment of cash relief to class members who received a final decision awarding them cash relief. During this reporting period, the Monitor, the Facilitator, and the Department of the Justice continued to confer on a periodic basis to review the payment status of successful class members' claims and to facilitate the resolution of any problems in making payments to prevailing class members. At the end of this reporting period, very few claims remained in which class members had waited over 200 days to receive payment of their cash awards. The Monitor will continue to work with the Government and the Facilitator to ensure that any problems of delayed payments are properly addressed.

2. Tax Issues

The tax consequences for a successful class member can be complicated, and significant tax issues remain for successful class members. At least three aspects of a successful class member's recovery may have tax consequences: (1) cash payments received by the class member, (2) IRS payments made on behalf of a class member who prevailed in a Track A credit claim, and (3) the amount of any outstanding debt forgiven by USDA as debt relief. In addition, some farmers are self-employed; for these farmers, cash payments and the IRS tax payment may be subject to the self-employment tax.

To further complicate matters, some class members received "penalty notices" from the IRS. These claimants received cash awards, and it appears that their tax relief was not deposited into their IRS tax accounts until after April 15 of the following year. Estate claims may also

create special tax problems; many of the claims where tax accounts have been delayed are estate claims.⁶⁰

The Facilitator has continued to work with the IRS to attempt to resolve prevailing class members' tax problems. The Monitor has requested assistance from the IRS's National Taxpayer Advocate (NTA). The Monitor is hopeful that the Office of the NTA will be able to offer assistance to class members who have serious tax difficulties. Moreover, the Monitor is hopeful that Low-Income Taxpayer Clinics (LITCs) that are funded through grants made by the NTA will be able to assist claimants with *Pigford*-related tax difficulties. Class members may call the Facilitator at 1-800-646-2873, or the Monitor at 1-877-924-7483, or Class Counsel at 1-866-492-6200 for information about how to get help with tax problems associated with the Consent Decree claims process.

3. Debt Relief

During 2004, the Monitor continued to work with Class Counsel and USDA to implement the Consent Decree debt relief provisions. Successful class members are entitled to forgiveness of outstanding debt as described in paragraphs 9(a)(iii) and 10(g)(ii) of the Consent Decree and a February 7, 2001, Stipulation and Order. The Consent Decree together with the February 7, 2001, Stipulation and Order ("the Debt Relief Order") create a two-step debt relief process that USDA must implement for each prevailing class member. In the first step, the agency reviews the Adjudicator's or Arbitrator's decision and forgives all debts identified by the

⁶⁰ For example, the claim may have been filed on behalf of a deceased class member by a representative who is a family member of the decedent. Often, the representative listed his or her own social security number on the Claim Sheet. If the claim is successful, the Facilitator needs the tax identification number of the estate (rather than the representative's own social security number) in order to properly process the payment. It is sometimes time-consuming to acquire this information.

Adjudicator or Arbitrator as “affected by” discrimination. Then, in the second step, USDA implements what is referred to as “forward sweep” debt relief, applying the principles enunciated in the Consent Decree and the February 7, 2001, Debt Relief Order to forgive all subsequent loans that are in the same loan program as the affected debt.⁶¹

Consent Decree debt relief is important both because it relieves class members of the obligation to repay debts affected by discrimination and because debt forgiven under the Consent Decree cannot adversely affect a class member’s eligibility for future participation in any USDA loan or loan servicing program.⁶² USDA reports that the agency has developed internal processes to inform local FSA officials when debt relief has been provided for successful class members. However, disputes have arisen in individual cases regarding the proper scope of debt relief, and Class Counsel has been assisting class members with debt relief problems. The Monitor has also worked with USDA to resolve questions regarding the appropriate debt relief for successful class members. When the Monitor has contacted USDA on class members’ behalf, USDA has cooperated fully in providing debt relief to class members whose debt relief had not been implemented due to an administrative error. The Monitor will continue to work with the parties to help ensure that all successful claimants receive the debt relief to which they are entitled.

4. Injunctive Relief

Consent Decree injunctive relief offers additional opportunities for USDA assistance for prevailing class members who continue to farm. The Monitor has prepared information about

⁶¹ USDA typically grants forward sweep debt relief for all subsequent loans in the loan program of the affected debt through December 31, 1996 (the end of the class period).

⁶² For more information about the “no adverse impact” aspect of debt relief, see Monitor Update No. 14, “No Adverse Affect: Future Loans and Future Loan Servicing for Prevailing Class Members,” (June 28, 2004) available on the Monitor’s web site at <http://www.pigfordmonitor.org/updates>.

injunctive relief to help educate prevailing class members about their injunctive relief rights.⁶³

There are three main types of injunctive relief.

First, paragraph 11 of the Consent Decree requires USDA to offer all prevailing class members technical assistance from a qualified USDA official who is acceptable to the class member.⁶⁴ Technical assistance means assistance in filling out loan forms, developing farm plans, and help with other aspects of the loan and loan servicing application process. The deadline for technical assistance injunctive relief has been extended to April 14, 2006, for all prevailing class members. In addition, each prevailing class member has two years from the date on which the class member completed the claims process to use technical assistance injunctive relief.⁶⁵

Second, paragraph 11 also provides “most favorable light” injunctive relief, which means all prevailing class members are entitled to have every loan and loan servicing application they submit within a certain time frame viewed in the light most favorable to the class member.

⁶³ See Monitor Update No. 4, “Injunctive Relief in *Pigford v. Johanns*” (rev. May 18, 2005), and Monitor Update No. 15, “Injunctive Relief: A New Order Changes the Deadlines” (May 5, 2005). These updates are available on the Monitor’s web site, www.pigfordmonitor.org/updates, and are included in Appendix 8.

⁶⁴ Consent Decree, paragraph 11(d).

⁶⁵ A class member completes the claims process for injunctive relief purposes at one of three possible points. If the class member prevails before the Adjudicator or Arbitrator and no petition for Monitor review is filed, the class member completes the claims process 120 days after the date of the Adjudicator or Arbitrator decision. If a petition for Monitor review is filed and the Monitor denies reexamination, the class member completes the claims process on the date of the Monitor’s decision denying reexamination. If a petition for Monitor review is filed and the Monitor grants reexamination, the class member completes the claims process on the date of the reexamination decision. See Monitor Update No. 15, “Injunctive Relief: A New Order Changes the Deadlines,” available on the Monitor’s web site at www.pigfordmonitor.org/updates.

Third, 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. This is called, “priority consideration injunctive relief.”⁶⁶

The deadline for class members to exercise their right to most favorable light and priority consideration injunctive relief is two years after the date on which the prevailing class member has completed the claims process, or April 14, 2005, whichever is later. Because the April 14, 2005, deadline has now passed, class members’ continued right to most favorable light and priority consideration injunctive relief will depend on when they completed the claims process.⁶⁷

While the number of class members who obtained loans through priority consideration increased slightly during 2004, the Farm Services Agency (FSA) had approved a cumulative total of only twenty-one Farm Ownership Loans, fifty-two Farm Operating Loans, and one inventory property request through the *Pigford* priority consideration process as of the end of 2004. Prior Monitor reports described the possible reasons why the number of priority consideration injunctive relief requests is so low. It is possible that statutory restrictions may make successful class members ineligible for FSA loans, even though they wish to continue farming. It is also possible that class members have left farming and no longer have the interest in farming or the ability to farm. Finally, it is possible that class members are unaware of their

⁶⁶ Consent Decree, paragraph 11(a)-(b).

⁶⁷ On June 1, 2005, USDA issued a revised Farm Loan Program Notice, FLP-388: Priority Consideration for Prevailing Claimants (set to expire June 1, 2007), which provides guidance on how FSA is to implement injunctive relief. This notice, as well as other FLP notices, are available on the Monitor’s web site at <http://www.pigfordmonitor.org/flp>.

injunctive relief rights or fear retaliation by FSA if they seek to take advantage of those rights. USDA has informed the Monitor of the FSA's efforts to provide assistance and outreach to minority farmers.⁶⁸

The Monitor's Office will continue to provide information and assistance to prevailing class members who wish to exercise their injunctive relief rights. The Monitor will also work with class members, Class Counsel, and USDA to respond to any problems class members report in obtaining injunctive relief.

VI. GOOD FAITH IMPLEMENTATION OF THE CONSENT DECREE

The Consent Decree implementation process has been proceeding since April 14, 1999. Although the implementation process has taken longer than the parties anticipated due to many factors, the parties and the neutrals (the Facilitator, the Adjudicator, and the Arbitrator) have continued to act in good faith. The Monitor will continue to work with the parties and the neutrals to address class members' concerns and to address the challenges that arise in implementing the Consent Decree.

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Respectfully submitted,

s/Randi Ilyse Roth

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⁶⁸ These efforts include a toll-free help line for minority farmers, 1-866-538-2610; a Minority Farm Register to help ensure a more accurate count of minority farmers and to help increase assistance to minority farmers; spot-checks of denied loan applications from minority applicants; performance goals for utilization of loan funds for minority and female loan applicants; and guidelines to reform and improve the representation of minorities and women on FSA county committees.