

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, 2005, THROUGH DECEMBER 31, 2005

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This is the fifth in a series of Monitor reports concerning the good faith implementation of the Consent Decree.¹ The Monitor submits this report for the period from January 1, 2005, through December 31, 2005, to fulfill the Monitor's obligation to make periodic written reports on the implementation of the Consent Decree to the Court, the Secretary of Agriculture, Class Counsel, and counsel for the United States Department of Agriculture (USDA).²

I. EXECUTIVE SUMMARY

During calendar year 2005, 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 2005, the following milestones had been reached:

a. The Adjudicator issued a cumulative total of 22,240 Track A decisions and completed the initial adjudication process for virtually all of the class members who had been found eligible to participate in the Track A claims process as of the end of 2005. The Adjudicator approved 14,257 (approximately 64 percent) of the claims.

b. The Government provided a cumulative total of approximately \$885,384,726 in monetary relief to successful Track A claimants, including cash awards, tax relief payments, and debt relief.

c. The Arbitrator issued a cumulative total of eighty-seven decisions in the Track B claims that had not been withdrawn, settled by the parties, or converted to Track A.

d. The Government provided a cumulative total of approximately \$18,585,091 in monetary relief to Track B claimants, including payments in settlement, damage awards, and debt relief. The Arbitrator's average damage award for a successful Track B claim was \$526,626.

¹ The Monitor's prior reports are available on the Monitor's website at <http://www.pigfordmonitor.org/reports/>.

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. On March 23, 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 Consent Decree and the Court's orders referenced in this report are available on the Monitor's website at <http://www.pigfordmonitor.org/orders/>.

e. The Monitor issued a cumulative total of 4,189 decisions in response to petitions for Monitor review. The Monitor directed reexamination of 2,049 claims.

f. The Adjudicator issued reexamination decisions in a cumulative total of 1,355 claims, granting relief to 1,189 petitioning class members and granting relief to the Government in fifty-two claims.

g. As of the end of 2005, the Government had paid a cumulative total of approximately \$903,969,817 in cash relief, debt relief, and tax relief to a total of approximately 13,998 class members who had prevailed in the claims process (either under Track A or Track B).

The remainder of this report provides additional information regarding the Consent Decree implementation process and significant developments in the case during calendar year 2005. 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 Court orders issued in 2005. 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 2005. 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 claims process has been completed for most of the 22,415 class members who have been found eligible to participate in the claims process. This section of the Monitor's report provides information about the results of the claims process for eligible class members.

The Monitor did not independently compile most of the data discussed in this report. The Monitor has obtained information about the results of the claims process from the Facilitator,³ the Arbitrator,⁴ and the United States Department of Agriculture (USDA).

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.⁵ If the Facilitator finds that a claimant meets the threshold requirements for class membership, the Facilitator refers the claim to the Adjudicator.⁶ The Adjudicator then determines whether the class member has demonstrated by substantial evidence⁷ that the class member was treated less favorably than a specifically identified, similarly situated white farmer and suffered economic damages as a result. As of the end of 2005, the Adjudicator had issued 22,240 decisions in Track A claims and had awarded relief in 14,257 (approximately 64 percent) of the claims.

³ The Facilitator is Poorman-Douglas Corporation. *See* Consent Decree, paragraph 1(i).

⁴ The Arbitrator is Michael K. Lewis of JAMS, formerly of ADR Associates. *See* Consent Decree, paragraph 1(b).

⁵ Under paragraph 3(a) 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.

⁶ Under paragraph 1(a) of the Consent Decree, JAMS-Endispute, Inc., is responsible for the final decision in all Track A claims. JAMS-Endispute, Inc. is now known as JAMS.

⁷ 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.

The relief awarded for a successful Track A claim depends on whether the claim involves a credit claim or a non-credit claim. Credit claims generally involve USDA farm loan programs (such as the Operating Loan, Farm Ownership Loan, Soil and Water Loan, and Emergency Loan Programs) and may also involve loan servicing programs.⁸ 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 other relief.⁹ Class members who prevail on non-credit claims receive a cash payment of \$3,000, as well as other relief.¹⁰

As of the end of 2005, the Government had paid a cumulative total of \$685,300,000 in cash relief to class members who prevailed in Track A credit claims and an additional \$1,326,000 to class members who prevailed in non-credit claims, for a total of \$686,626,000 in cash relief paid to class members who prevailed on Track A 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 2005 are summarized in Table 1.

⁸ These loan programs are currently described in USDA regulations at 7 C.F.R. Parts 1941 (Operating Loans); 1943, Subpart A (Farm Ownership Loans); 1943, Subpart B (Soil and Water Loans); 1945 (Emergency Loans); and 1951 (Loan Servicing).

⁹ 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 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 website 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 Claims¹¹		
Statistical Report as of:	End of 2005	
	Number	Percent
A. Eligible Class Members	22,415	100
B. Cases in Track A (Adjudications)	22,243	99
C. Cases in Track B (Arbitrations)	172	1
Adjudication Completion Figures		
D. Adjudications Complete	22,240	~100
E. Adjudications Not Yet Complete	3	~0
Adjudication Approval/Denial Rates¹²		
F. Claims Approved by Adjudicator	14,257	64
G. Claims Denied by Adjudicator	7,983	36
Adjudication Approvals Paid/Not Paid		
H. Approved Adjudications Paid	13,916	98
I. Approved Adjudications Not Yet Paid	341	2
J. Cash Relief Paid to Class Members for Track A Credit Claims ¹³	\$685,300,000	
K. Cash Relief Paid to Class Members for Track A Non-Credit Claims	\$1,326,000	

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 prove by a preponderance of the evidence¹⁴ that the class member was a victim of discrimination and

¹¹ These statistics are provided by the Facilitator and are valid as of December 31, 2005. 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 website at <http://www.pigfordmonitor.org/stats/>.

¹² These numbers include both credit and non-credit claims.

¹³ 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.

¹⁴ 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.

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 the amount of their actual damages, as well as debt relief and injunctive relief.

According to data provided by the Arbitrator, over half (144) of the 239 class members who initially elected Track B settled or withdrew their claims or converted their claims to Track A.¹⁵ As of the end of 2005, the Arbitrator reports that final decisions have been issued for eighty-seven of the ninety-five Track B claims that had not been settled, withdrawn, or converted to Track A. The Arbitrator awarded an average of \$526,626 to the nineteen class members who prevailed before the Arbitrator. Class members and/or the Government filed petitions for Monitor review in fifty-seven of the claims decided by the Arbitrator; twenty-eight of these petitions remained pending at the end of 2005.¹⁶

According to the Facilitator, eighty-two 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 2005. The Facilitator reports that the Government paid a total of \$15,682,425 in damage awards

¹⁵ 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.

¹⁶ More information about petitions for Monitor review is provided in Section IV(C) of this report.

or settlement payments to these eighty-two class members.¹⁷ Table 2 provides additional statistics regarding Track B claims, as reported by the Arbitrator.¹⁸

Table 2: Statistical Report Regarding Track B Claims¹⁹	
Statistical Report as of:	End of 2005
A. Eligible Track B Claimants	239
B. Track B Cases Settled	71
C. Track B Cases Converted to Track A	64
D. Track B Cases Withdrawn	9
Arbitrations Complete/Not Complete	
E. Contested Track B Cases in Claims Process (Not Settled, Converted or Withdrawn)	95
F. Arbitration Decisions Issued	87
G. Arbitration Decisions Not Yet Issued	8
Arbitration Results	
H. Claimant Prevailed Before Arbitrator	19
I. Average Award to Prevailing Claimants	\$526,626
J. Government Prevailed Before Arbitrator	68
Posture of Decision:	
1. Cases Dismissed Before Hearing	44
2. Full Hearing, Finding of No Liability	24

¹⁷ These figures do not include any awards for class members who converted their claims to Track A. Eight class members who prevailed before the Arbitrator or settled their Track B claim as of the end of 2005 had not yet received payment of their relief. In seven of the eight claims, petitions for Monitor review remained pending as of the end of 2005.

¹⁸ The Arbitrator and the Facilitator use different record-keeping protocols regarding Track B statistics.

¹⁹ These statistics are provided by the Arbitrator and are valid as of January 1, 2006. 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.

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 USDA 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 in the claims process. A Stipulation and Order filed on February 7, 2001, further defines the scope of debt relief.²⁰

Table 3 provides statistics regarding the debt relief implemented by USDA for prevailing class members. USDA reports that the Government has provided debt relief to a total of 285 prevailing class members as of the end of 2005, and has forgiven a cumulative total of \$26,093,911 in outstanding principal and interest.

²⁰ 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.

Table 3: Statistical Report Regarding Debt Relief²¹	
Statistical Report as of:	End of 2005
A. Total Amount of Debt Forgiven (Principal and Interest)	\$26,093,911
B. Debt Forgiven for Track A Claimants	\$23,191,245
C. Debt Forgiven for Track B Claimants	\$2,902,666
D. Number of Track A Claimants Who Received Debt Forgiveness	268
E. Number of Track B Claimants Who Received Debt Forgiveness	17
F. Average Amount of Debt Forgiven Per Track A Claimant Who Received Debt Forgiveness	\$86,535
G. Average Amount of Debt Forgiven Per Track B Claimant Who Received Debt Forgiveness	\$170,745

D. Total Track A Monetary Relief

In addition to cash awards and debt relief, successful Track A credit claimants receive relief, paid directly into claimants' Internal Revenue Service (IRS) income tax accounts, for partial payment of federal income 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 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 2005.

²¹ These statistics are based on information provided by USDA for debt relief (principal and interest) implemented by USDA through December 31, 2005. Appendix 4 provides information from prior reporting periods regarding debt relief as well as information on debt relief by state.

Table 4: Statistical Report Regarding Total Track A Monetary Relief²²	
Status of Payments	Amount
Cash Awards for Credit Claims (\$50,000 per prevailing claim)	\$685,300,000
Cash Awards for Non-Credit Claims (\$3,000 per prevailing claim)	\$1,326,000
Payments Due to IRS as Tax Relief ²³	\$175,567,481
Debt Relief (Principal and Interest)	\$23,191,245
Total Track A Monetary Relief	\$885,384,726

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 2005 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. Appendix 5 contains information on the amount of cash relief paid by state as of the end of 2005.

²² These statistics are based on information provided by the Facilitator regarding cash awards and tax relief through December 31, 2005. The debt relief statistics are based on information provided by USDA for debt relief implemented by USDA (principal and interest) through December 31, 2005.

²³ The tax relief in Table 4 is calculated based on information from the Facilitator about the amount of principal debt relief USDA has provided. Payments due to the Internal Revenue Service as tax relief include 25 percent of the \$50,000 cash award (\$12,500) for 13,706 successful Track A credit claims ($\$12,500 \times 13,706 = \$171,325,000$) plus 25 percent of the total principal debt forgiven for this group of successful claimants (reported by the Facilitator as $\$16,969,925 \times 25\% = \$4,242,481$). The Facilitator calculated the total tax relief payments due to the IRS as follows: $\$171,325,000 + \$4,242,481 = \$175,567,481$. The process of establishing tax accounts is discussed in more detail in Section V(C)(2) of this report.

Table 5: Statistical Report Regarding States With 100 or More Prevailing Claimants²⁴		
Claimants' Current Residence	Total Number of Prevailing Claimants (Track A and Track B)	Total Cash Relief Paid as of December 31, 2005 (Track A and Track B)
Alabama	3,186	\$156,148,500
Mississippi	2,798	140,360,866
Georgia	1,793	88,591,742
Arkansas	1,364	67,917,000
North Carolina	1,017	54,146,583
South Carolina	829	42,087,500
Oklahoma	560	27,613,000
Louisiana	504	25,118,000
Tennessee	431	21,921,955
Texas	303	16,695,400
Florida	255	12,251,000
Virginia	160	8,970,780
Illinois	165	8,253,000
California	133	7,184,600

F. Injunctive Relief

Paragraph 11 of the Consent Decree describes the injunctive relief that prevailing class members are entitled to receive from USDA. 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 (until April 14, 2004).²⁵ In 2003,

²⁴ These statistics are provided by the Facilitator and are valid as of December 31, 2005.

²⁵ The Consent Decree was approved on April 14, 1999. Five years from this date was April 14, 2004.

USDA voluntarily agreed to extend certain aspects of injunctive relief,²⁶ and in 2005 the parties stipulated and the Court ordered an additional extension of the deadline for some aspects of injunctive relief.²⁷

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 December 31, 2005.

Table 6: Statistical Report Regarding Injunctive Relief²⁸	
Statistical Report as of:	End of 2005
A. Farm Ownership Loans	
1. Number of Requests for Priority Consideration with Complete Application	124
2. Number of Applications Approved	29
B. Farm Operating Loans	
1. Number of Requests for Priority Consideration with Complete Application	210
2. Number of Applications Approved	72
C. Inventory Property	
1. Number of Requests for Priority Consideration	10
2. Number of Applications Approved	1

²⁶ 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 website at: <http://www.pigfordmonitor.org/flp/>.

²⁷ The April 21, 2005 Stipulation and Order is available on the Monitor’s website at: <http://www.pigfordmonitor.org/orders/>. More information about injunctive relief is provided in Section V(C)(4) of this report.

²⁸ These statistics are provided by USDA and are valid as of December 31, 2005. Appendix 6 contains statistics from prior reporting periods regarding injunctive relief.

III. COURT ORDERS

In 2005, the Court considered and ruled on issues relating to:

- a. Motions by individual class members to modify the Consent Decree and to disqualify Class Counsel;
- b. A stipulation by the parties to extend injunctive relief, permitting some prevailing class members more time to exercise their injunctive relief rights;
- c. Motions by individual class members regarding the Court of Appeals' June 21, 2002, Order concerning the Arbitrator's authority to extend Track B deadlines;
- d. Requests by individual class members to hold the Facilitator, the Adjudicator, or the Arbitrator in contempt based on decisions denying individual class members relief;
- e. A motion brought by Class Counsel on behalf of an individual class member to prevent USDA from proceeding with the sale of inventory property formerly owned by the class member; and
- f. Materials filed by Mr. James Myart and Class Counsel's request to enjoin Mr. Myart and others from disseminating misleading communications to class members.

Table 7 summarizes the Court's Orders on substantive matters during this reporting period.²⁹ Selected specific Orders are discussed in more detail in Section V of this report.

²⁹ Procedural Orders, Orders relating to approval of the Monitor's budgets and invoices, and Orders and Settlement Agreements relating to attorneys' fees are not included in this list.

Table 7: Court Orders

#	Court Docket Number	Date Filed	Title of Order	Major Issues Addressed Include:
1	1087-1088	01/03/2005	Opinion and Order	Denying motions to modify the Consent Decree under Rule 60(b)(5) of the Federal Rules of Civil Procedure and to disqualify Class Counsel filed by certain named class members. The Court's Opinion reviews the history of the case and addresses two overarching concerns (1) the fairness of the Consent Decree, given the awards actually received, the nature of the injunctive relief provided, and the adequacy of the notice of the claims process; and (2) the implementation of the Consent Decree, including the Government's response to individual claims, allegations of continued discrimination by USDA, and Class Counsel's actions during the implementation process. ³⁰
2	1089-1090	01/03/2005	Opinion and Order	Striking "notices" filed by Mr. James Myart as unprofessional, harassing, and irrelevant; stating that Class Counsel and only Class Counsel is authorized to speak on behalf of the class; admonishing Mr. Myart to file only documents with a legitimate, litigation-related purpose, and not documents that are a form of grandstanding for other audiences; and describing counsel for the Government, Mr. Sitcov, as an experienced and dedicated Department of Justice attorney. ³¹
3	1094	01/13/2005	Order	Denying as moot Class Counsel's motion seeking an inquiry into the Track A and Track B cases handled by Ms. Margaret O'Shea on behalf of the Government, because the Government had provided the requested information to Class Counsel.

³⁰ On February 25, 2005, the Court denied a motion by Counsel Mr. Charles Jerome Ware for reconsideration of the Court's Opinion and Order. Noting that Mr. Ware did not specify the names of any individual class members he was authorized to represent, the Court directed the Clerk's Office to remove Mr. Ware as counsel for the class, stating that only Class Counsel was authorized to file pleadings or motions on behalf of the class.

³¹ On February 25, 2005, the Court issued an Order granting Mr. James Myart's motion to withdraw as counsel for class member Thomas Burrell; the Court stated that Mr. Myart did not represent any other class member in the case.

Table 7: Court Orders

#	Court Docket Number	Date Filed	Title of Order	Major Issues Addressed Include:
4	1126	04/21/2005	Stipulation and Order	Extending injunctive relief under paragraph 11 of the Consent Decree for prevailing class members and requiring copies of the Stipulation and Order to be posted in every Farm Service Agency (FSA) County Office. The deadline for obtaining technical assistance injunctive relief is extended to April 14, 2006, or two years from the date on which an individual class member completes the claim process, whichever is later. The deadline for other aspects of injunctive relief, including “most favorable light” injunctive relief and the right to priority consideration for future Farm Operating and Farm Ownership Loans and for the acquisition of inventory property, is extended to April 14, 2005, or two years from the date on which a prevailing class member completes the claims process, whichever is later.
5	1133	05/05/2005	Memorandum Opinion and Order	Denying a motion by individual class members regarding the application of the Court of Appeals’ June 21, 2002, decision, stating that to be eligible for the relief described in the Court of Appeals’ decision regarding the extension of deadlines in the Track B claims process, class members must show they were represented by Class Counsel and that Class Counsel’s actions caused harm to the class member or caused the class member to miss deadlines.
6	—	07/15/2005	Court of Appeals decision	Affirming the District Court’s decision to deny reconsideration of Class Counsel’s motion seeking relief for approximately 300 claimants whose petitions for Monitor review were rejected as untimely. The Court of Appeals ruled that the District Court did not abuse its discretion in refusing to further modify the deadlines for petitioning for Monitor review as set forth in a Stipulation and Order dated July 14, 2000, and extended by Court Order for some claimants to September 15, 2001.

Table 7: Court Orders

#	Court Docket Number	Date Filed	Title of Order	Major Issues Addressed Include:
7	1166	08/09/2005	Order	Denying a request by class member Lywanda Looney to hold the Adjudicator in contempt for denying Ms. Looney's Track A claim. The Court's order states that under the Consent Decree, the Adjudicator's decision in each claim is final, subject only to a petition for Monitor review. The Court finds no grounds to hold the Adjudicator in contempt for denying the class member's claim due to insufficient evidence that a similarly situated white farmer was treated more favorably.
8	1167	08/09/2005	Order	Denying a request by class member Donald McDonald to hold the Facilitator in contempt for rejecting Mr. McDonald's petition for Monitor review as untimely filed. The Court's Order states that Mr. McDonald had contacted the Court on numerous prior occasions and had not presented any record to show his petition for Monitor review had been timely filed.
9	1168 1171 1172 1173	08/09/2005	Orders	Denying requests by class members Thelma Journey, Morris Wilson, Melvin Meltons, and Bernice Atchison to hold the Arbitrator in contempt for denying their petitions to file late claims under paragraph 5(g) of the Consent Decree. The Court's Order states that the Arbitrator has the sole authority to decide whether a class member has met the very high standard of showing that extraordinary circumstances beyond his or her control prevented the class member from filing a claim by the deadline established in the Consent Decree.
10	1169	08/09/2005	Order	Denying a request by class member John A. Wright to hold the Adjudicator in contempt for denying his claim after the Monitor had directed reexamination of the claim. The Court's Order states that the Adjudicator's decision on reexamination is final and there is no mechanism under the Consent Decree to obtain further review of the decision.

#	Court Docket Number	Date Filed	Title of Order	Major Issues Addressed Include:
11	1170	08/09/2005	Order	Denying a motion for a temporary restraining order and preliminary injunction filed on behalf of class member J. B. Black to prevent USDA from proceeding with the sale of inventory property formerly owned by Mr. Black.
12	1186	09/06/2005	Memorandum Opinion and Order	Denying without prejudice Class Counsel's motion to enjoin Mr. James Myart and Thomas Burrell from disseminating misleading communications to class members and for other relief. The Court's Opinion presumes that Mr. Myart and Mr. Burrell will not continue to disseminate information to the press or post information on the Black Farmers and Agriculturists Association, Inc. website that would give false hope to putative class members regarding the Consent Decree. The Court states that Class Counsel may renew their motion if the type of conduct which gave rise to the motion does not cease.
13	1201	09/19/2005	Order	Denying requests by fourteen named class members who filed identical "Motion for Contempt" letters with the Court, requesting that the Arbitrator be held in contempt for denying their petitions to file a late claim. The Court's Order reiterates that the Arbitrator's decision regarding any late-claim petition is final and not subject to review by the Court.

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 has not yet met directly with Secretary Mike Johanns, who became the Secretary of Agriculture in January 2005. The Monitor 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 2005 with James Michael Kelly, who was USDA's Acting General Counsel and who is now USDA's 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 fifth report on the good faith implementation of the Consent Decree in calendar year 2005 pursuant to paragraph 12(b)(i) and the March 24, 2003, Stipulation and Order.

During 2005, the Monitor also provided information regarding the Consent Decree claims process to the Government Accountability Office (GAO), which was conducting a review of the *Pigford* Consent Decree at the request of several members of Congress.³²

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 Counsel and with class members: (1) by phone; (2) through correspondence; (3) in person at meetings sponsored

³² On March 17, 2006, the GAO issued a report entitled "Pigford Settlement: The Role of the Court-Appointed Monitor." The report is available at <http://www.gao.gov/new.items/d06469r.pdf>.

by claimant organizations and/or by USDA; and (4) by sending out and otherwise making available “Monitor Updates” to disseminate important information to the whole class or to segments of the class affected by particular issues.

Concerns brought to the Monitor’s attention by class members through letters, telephone calls, and meetings in 2005 included:

- a. Concerns about the availability of injunctive relief and alleged continued discrimination by local Farm Service Agency (FSA) offices.
- b. Problems with debt relief, including determinations of the proper debt relief and the timing of implementation of debt relief.
- c. Concerns regarding the Government’s use of administrative offsets to collect amounts due on USDA loans while claims regarding those loans remain pending in the claims process.
- d. Concerns regarding the availability of loan servicing options once the claims process is completed.
- e. Concerns regarding the renewed possibility of USDA foreclosure actions once the claims process is completed.
- f. Questions about whether the case will be reopened through congressional action to permit additional class members to participate in the claims process.
- g. Concerns regarding the adequacy of notice for the claims process.
- h. Concerns about potential fraud in the claims process.
- i. Concerns about efforts by third parties not associated with the litigation to mislead or defraud class members.
- j. Concerns about delays in the claims process.

The most significant recurring 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’ concerns 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. To address class members' concerns regarding delays in the claims process, the Monitor has worked with the neutrals and the parties to identify priority cases, to expedite claims processing and the implementation of relief that has been awarded, and to track claims processing and relief statistics.

In addition to working to resolve individual class members' problems, the Monitor maintains a website to provide information for class members at <http://www.pigfordmonitor.org>. The Monitor's website includes information such as important Court Orders in the case, reports by the Monitor and the Arbitrator, statistics on the claims process, relevant Farm Loan Program (FLP) notices issued by USDA, and helpful links for class members seeking assistance with their farming operations. In 2005, there were 42,677 page "hits" to this website. The Office of the Monitor also continued to attend meetings sponsored by claimant organizations upon request. The meetings the Monitor's office attended during 2005 are listed in Appendix 7.

During 2005, the Monitor mailed information to class members regarding changes in the deadlines for exercising injunctive relief rights. Monitor Update No. 4, "Injunctive Relief in *Pigford v. Johanns*," revised on May 18, 2005, describes generally the three main types of injunctive relief under the Consent Decree. Monitor Update No. 15, "Injunctive Relief: A New Order Changes the Deadlines," issued on May 5, 2005, describes how the deadlines for injunctive relief have been extended. These Monitor Updates are included in Appendix 8 and are available on the Monitor's website 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 in response to petitions for Monitor review filed by class members and by USDA. The Facilitator reports that 5,668 timely petitions for Monitor review had been filed as of the end of 2005. The Monitor had issued decisions in response to approximately 4,189 of those petitions by the end of 2005. Table 8 provides statistics regarding Monitor petition decisions as of the end of 2005.

Table 8: Statistical Report Regarding Petitions for Monitor Review ³³	
Statistical Report as of:	End of 2005
Petitions for Monitor Review	
A. Number of Petitions for Monitor Review	5,668
1. Claimant Petitions	4,938
2. Government Petitions	730
Monitor Decisions	
B. Petition Decisions Issued by Monitor	4,189
1. Total Number of Petitions Granted	2,049
a. Claimant Petitions Granted	1,971
b. Government Petitions Granted	78
2. Total Number of Petitions Denied	2,140
a. Claimant Petitions Denied	1,622
b. Government Petitions Denied	518

³³ These statistics are provided by the Facilitator and are valid as of December 31, 2005.

1. Petitions for Review of Facilitator Screening Decisions

The Facilitator performs the initial screening of all Claim Sheet and Election Forms to determine if claimants meet the criteria for class membership.³⁴ As of the end of 2005, the Facilitator reports that a total of 22,415 claimants had been screened and found eligible for class membership.³⁵ If the Facilitator determines a claimant is not eligible to participate in the claims process, the Facilitator sends a Notification of Rejection to the claimant. By Stipulation and Order dated October 29, 2002, the parties and the Court set deadlines for certain claimants who received a Notification of Rejection from the Facilitator to file a petition for Monitor review of the Facilitator's class membership screening decision.³⁶ In response to a total of ninety-two petitions for Monitor review that had been filed as of the end of 2005, the Monitor directed the Facilitator to reexamine twenty-two claims. On reexamination, the Facilitator determined that all twenty-two claimants met the screening criteria. As of January 11, 2006, the Facilitator had notified all twenty-two claimants of their eligibility and had referred their claims to the Adjudicator or the Arbitrator for consideration of the merits of the claims.

³⁴ 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 and who believed that they were discriminated against on the basis of race in USDA's response to that application; and (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA's treatment of such farm credit or benefit application.

In addition to responding to questions on the Claim Sheet, claimants must also provide proof that a qualifying discrimination complaint was made or that the requirements of Consent Decree paragraph 6(a) are met. *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.

³⁵ This figure includes both timely filed Claim Sheets that the Facilitator had determined were complete and Claim Sheets filed by claimants who had been granted permission by the Arbitrator to file a late claim.

³⁶ The October 29, 2002, Order is available on the Monitor's website at <http://www.pigfordmonitor.org/orders/>.

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 April 4, 2000, Order of Reference,³⁷ 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.

As of the end of 2005, approximately 49 percent of the Monitor's Track A decisions direct the Adjudicator to reexamine the claim. Often the record on reexamination includes supplemental information. Some of the supplemental information is provided by claimants. This information often relates to the Consent Decree requirement for proof that USDA treated a specifically identified, similarly situated white farmer more favorably than the Claimant.³⁸ Other supplemental information is provided by USDA. This information often relates to searches of USDA computer databases of farm borrowers and archived records of borrowers' loan and repayment histories. The Monitor and the Adjudicator have relied on information provided by USDA explaining the agency's record-keeping systems in evaluating the information provided by USDA in its initial Claim Response and in the supplemental information provided in the petition process. In 2005, USDA provided revised information to the Monitor about its records

³⁷ The Order of Reference, dated April 4, 2000, addresses many aspects of the Monitor's duties and is available on the Monitor's website at <http://www.pigfordmonitor.org/orders/>.

³⁸ See Consent Decree, paragraph 9(a)(i).

practices. The Monitor is using this information in deciding the pending petitions for review of Adjudicator decisions.³⁹

Some class members whose claims remained pending during 2005 raised questions with Class Counsel, the Facilitator, and the Monitor regarding the status of their petitions or their Adjudicator reexamination decisions. As of the end of 2005, approximately 1,479 petitions for Monitor review remained pending with the Monitor. Some of these petitions involve claimants who were permitted to file late claims under paragraph 5(g) of the Consent Decree and whose claims therefore entered the Monitor petition process much later than other claims. Other petitions involve non-credit programs, which must be evaluated in light of a different set of regulations than those governing credit claims.⁴⁰ Other petitions remain pending for a variety of other reasons. The Monitor is continuing to work with the parties and neutrals to expedite the resolution of all class members' claims under the Consent Decree.

As of the end of 2005, the Adjudicator had issued a total of 1,355 reexamination decisions. After reexamination, the Adjudicator changed the result in 1,241 claims; petitioning class members prevailed in 1,189 of those claims and the Government prevailed in fifty-two of the claims on which it petitioned. Table 9 provides statistics regarding Adjudicator reexamination decisions issued as of the end of 2005.

³⁹ The Monitor is also undertaking a review of the Monitor's petition decisions that have already been issued to determine whether the result in any would have changed had the information provided by USDA in 2005 been available to the Monitor when the Monitor's petition decision was issued. The Monitor will provide more information to the Court regarding this issue in a future report.

⁴⁰ A Stipulation and Order signed by the Court on June 30, 2006, authorizes the Monitor to sever credit claims from non-credit claims after written notice is provided to the petitioning party. If the petitioning party does not object to severance, the Monitor may decide the credit claim(s) in one decision and the non-credit claim(s) in a separate decision.

Table 9: Statistical Report Regarding Adjudicator Reexamination Decisions⁴¹	
Statistical Report as of:	End of 2005
Reexamination Decisions Issued by Adjudicator	1,355
1. Reexamination Decisions After Claimant Petition Granted by Monitor	1,295
a. Claimant Prevailed on Reexamination	1,189
b. Claimant Did Not Prevail on Reexamination	106
2. Reexamination Decisions After Government Petition Granted by Monitor	60
a. Government Prevailed on Reexamination	52
b. Government Did Not Prevail on Reexamination	8

3. Petitions for Review of Arbitrator Decisions

The Monitor has received petitions for Monitor review of Track B decisions made by the Arbitrator. As of the end of 2005, the Monitor had received petitions for Monitor review from class members and/or from USDA seeking reexamination of fifty-seven of the eighty-seven decisions issued by the Arbitrator. As of the end of 2005, the Monitor had issued decisions in twenty-nine of those claims and directed reexamination in four of the claims. In three of those four claims, the Monitor's decision to direct reexamination was in response to petitions by claimants. These three claims had been dismissed prior to completion of the Track B hearing process and on reexamination the Arbitrator decided to resume the Track B process. The Monitor directed reexamination of one claim in response to a petition for Monitor review filed by the Government. In that claim, the Monitor granted reexamination of a debt relief order that the

⁴¹ These statistics are provided by the Facilitator and are valid as of December 31, 2005. Appendix 10 contains statistics for prior reporting periods.

Arbitrator had issued. On reexamination, the Arbitrator issued an amended decision regarding debt relief for the class member.

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 are knowledgeable 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 12,970 incoming calls during 2005. 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 925 outgoing calls in this period. The total number of calls staffed by the toll-free line operators was therefore 13,895 during 2005. Many of the callers requested information about the status of their claims. Others requested information about whether the case would be reopened to permit more putative class members to file claims. Some callers expressed concern about the relief they obtained in the claims process, including concerns about tax relief, debt relief, and injunctive relief. The most common concerns that class members raised in calls to the Monitor during calendar year 2005 are described more fully below in Section V, "Significant Consent Decree Implementation Issues."

V. SIGNIFICANT CONSENT DECREE IMPLEMENTATION ISSUES

As of the end of 2005, the Adjudicator and the Arbitrator had issued a cumulative total of approximately 22,327 decisions in claims filed by class members under the Consent Decree claims process. The Government paid approximately 13,998 prevailing class members a cumulative total of \$702,308,425 in cash relief for Track A and Track B claims as of the end of 2005. Over the same period, USDA also forgave a cumulative total of approximately \$26,093,911 in outstanding debt owed by 285 class members. Including the estimated \$175,567,481 in Consent Decree tax relief provided to Track A claimants, the total monetary relief awarded under the Consent Decree as of the end of 2005 reached approximately \$903,969,817.

These accomplishments were made possible because of the continued work of the parties and the neutrals during calendar year 2005 to implement the Consent Decree. The most significant Consent Decree implementation issues addressed by the parties, the neutrals, and the Court during calendar year 2005 are described more fully below.

A. Motion to Modify the Consent Decree and Remove Class Counsel

On January 3, 2005, the Court issued an Opinion and Order denying a request by individual class members to modify the Consent Decree and to disqualify Class Counsel.⁴² The Court's Opinion noted that the Court had approved the Consent Decree on April 14, 1999, and had previously refused to modify the parties' agreement in response to motions to reconsider the

⁴² The Court's opinion is published at 355 F. Supp. 2d 148 (D.D.C. 2005) and is available on the Monitor's website at www.pigfordmonitor.org/orders.

fairness of the Consent Decree and to vacate the Consent Decree.⁴³ The Court ruled that the individual class members who again challenged the fairness of the Consent Decree did not meet the requirements of Federal Rule of Civil Procedure 60(b)(5) for modification of the Consent Decree. The Court considered and rejected arguments relating to the sufficiency of awards under the Consent Decree claims process, the scope of injunctive relief provided in the Consent Decree, the adequacy of notice of the deadline for filing claims, and the actions of the Government and Class Counsel during the implementation process. The Court also considered and rejected a motion to disqualify Class Counsel.

B. Claims Processing Deadlines

Although the claims process has been completed for the vast majority of claimants who filed timely claims for relief, issues regarding Consent Decree deadlines continued to be significant in 2005. The Arbitrator continued to review reconsideration requests by individuals who had been denied permission to file a claim after the October 12, 1999, deadline. The Court issued a ruling concerning the Arbitrator's authority to extend deadlines set in the Consent Decree for Track B claims where class members were represented by attorneys other than Class Counsel. The District of Columbia Court of Appeals issued a decision regarding the fate of certain untimely petitions for Monitor review. These matters are discussed more fully below.

⁴³ The Court's April 14, 1999, Order is published at 185 F.R.D. 82 (D.D.C. 1999), and was affirmed by the Court of Appeals on March 31, 2000, 206 F.3d 1212 (D.C. Cir. 2000). The Court's January 4, 2001, Memorandum Opinion and Order is published at 127 F. Supp. 2d 35 (D.D.C. 2001). The Court's September 11, 2002, Memorandum Opinion and Order is published at 217 F. Supp. 2d 95 (D.D.C. 2002). These Court decisions are available on the Monitor's website, at <http://www.pigfordmonitor.org>.

1. The Late-Claims Process

Under paragraph 5(g) of the Consent Decree, class members who wished to file a claim form after the October 12, 1999, deadline were permitted to participate in the Consent Decree claims process only if the class members could show that extraordinary circumstances beyond their control prevented them from filing a completed claim package by October 12, 1999.

Michael Lewis, the Arbitrator for Track B claims, also serves as the decision-maker in the “late-claims” process.

In past years, the Arbitrator has found that some class members, including many who were affected by Hurricane Floyd in mid-September 1999, demonstrated the type of extraordinary circumstances needed to qualify for permission to file after the deadline. Many other individuals have been denied permission to file a late claim.

During 2005, the Arbitrator continued to review late-claim requests under the reconsideration process the Arbitrator established for claimants whose late-claim requests were initially denied by the Arbitrator.⁴⁴ As of November 30, 2005, the Arbitrator had approved a total of 2,229 of the approximately 66,000 timely filed requests to file a late claim.⁴⁵

Class members have continued to contact the Monitor’s office to express frustration with the low approval rate of late-claims requests. In addition, several individuals filed motions to hold the Arbitrator in contempt because the Arbitrator denied their petitions to file late claims.

⁴⁴ During 2005, the Arbitrator filed two reports on the late-claim process. These reports were filed on July 11, 2005 and on November 30, 2005. Arbitrator reports on the late-claim process are available on the Monitor’s website at <http://www.pigfordmonitor.org/arbrpts/>.

⁴⁵ Arbitrator’s Ninth Report on the Late-Claim Petition Process, dated November 30, 2005, page 6.

The Court denied these motions and reiterated that the Arbitrator has the sole authority to decide whether the very high standard of the late-claim process has been met. See item 9 in Table 7, above.

2. Track B Deadlines

Paragraph 10 of the Consent Decree sets forth several 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 2005, the Court again considered whether the deadlines established in the Consent Decree could be modified in individual claims absent the consent of both parties. The Court was presented with various motions by Track B claimants who were represented by counsel other than Class Counsel. In their motions, the claimants argued that to qualify for modification of the Track B Consent Decree deadlines, a claimant should not be required to show that he or she was represented by Class Counsel and show that Class Counsel's representation caused the claimant to miss deadlines or otherwise caused harm to the claimant in the Track B claims process. In a Memorandum Opinion and Order dated May 5, 2005, the Court ruled that the Court of Appeals' decision on this matter in 2002 was controlling and the Court of Appeals' decision requires a showing that the claimants were harmed during Class Counsel's representation. If such a showing is made, the Arbitrator is permitted to modify the Consent Decree deadlines for Track B claims. The Arbitrator has provided an opportunity for class

members who missed deadlines for filing evidence to show that they met the conditions for modifying the Track B deadlines set forth by the District Court and the Court of Appeals.⁴⁶

3. 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. The vast majority of petitions were filed on time.⁴⁷ However, other petitions were filed after their petition deadlines and thus deemed untimely. On June 2, 2003, the District Court denied Class Counsel's motion for relief for approximately 350 claimants whose petitions were deemed untimely by the Facilitator.⁴⁸ On March 10, 2004, the District Court denied reconsideration of the 2003 Order.⁴⁹ On July 15, 2005, the Court of Appeals affirmed the District Court's rulings refusing to modify the deadlines for filing petitions for Monitor review.⁵⁰

The Court of Appeals ruled that the class members who were represented by Class Counsel did not meet the requirements for modifying the deadlines for petitioning for Monitor

⁴⁶ Some of these class members have petitioned for Monitor review of the Arbitrator's decision dismissing their claims; these class members' petitions remain pending before the Monitor.

⁴⁷ The Court issued an Order on November 8, 2000, establishing a "Register of Petitions" process for a certain group of claims. Claimants whose names were listed on the Register were given additional time to file supporting materials with their petitions. The Court's November 8 Order is available on the Monitor's website at <http://www.pigfordmonitor.org/orders/>. The Court issued several subsequent Orders regarding the "Register" petitions, including a Memorandum Opinion and Order on April 27, 2001, published at 144 F. Supp. 2d 16 (D.D.C. 2001), and a Memorandum Opinion and Order on May 15, 2001, published at 143 F. Supp. 2d 28 (D.D.C. 2001).

⁴⁸ The District Court's Order dated June 2, 2003 is published at 265 F. Supp. 2d 41 (D.D.C. 2003) and is available on the Monitor's website at <http://www.pigfordmonitor.org/orders/>.

⁴⁹ The District Court's Order dated March 10, 2004 is published at 307 F. Supp. 2d 43 (D.D.C. 2004) and is available on the Monitor's website at <http://www.pigfordmonitor.org/orders/>.

⁵⁰ 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).

review under Federal Rule of Civil Procedure 60(b). The Court stated that the District Court had already taken into account the unusually high number of claimants with meritorious grounds for review of their claims, the workload borne by the two small Class Counsel firms, the exhaustion of Class Counsel's funds and credit in early 2001, and the work required by the Court's Order permitting a Register of Petitions when the District Court granted an extension of the deadline for submission of supporting materials to September 15, 2001. The Court of Appeals majority rejected the contentions of the dissenting judge that the unanticipated volume of meritorious petitions for Monitor review and Class Counsel's failures to meet the petition deadlines warranted relief.

The Court of Appeals further ruled that the class members who were not represented by Class Counsel also were not entitled to relief, even though the class members alleged that they did not receive notice of the deadline for petitions for Monitor review established in the July 14, 2000, Stipulation and Order. The Court of Appeals majority found the District Court did not abuse its discretion in citing the prejudice to the Government if untimely petitions for Monitor review were permitted to be considered, and rejected the contentions of the dissenting judge that the prejudice to the Government should have been considered only after the District Court determined whether the late petitions were the result of inadequate notice of the petition deadline.

C. Prevailing Class Members

Prior Monitor reports explained the types of difficulties 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. In 2005, the parties focused significant attention on the process for implementing debt relief. In

addition, individual class members, Elmore and Ludean Hicks, brought the issue of amended Adjudicator decisions to the attention of the Court and the Monitor. These and other implementation issues for prevailing 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. As of the end of 2005, the Government had paid a total of \$702,308,425 in cash relief to approximately 13,998 class members who prevailed in Track A and Track B claims. To facilitate the prompt payment of cash relief, the Monitor, the Facilitator, and the Department of the Justice conferred on a regular basis to identify and address any problems in the payment of cash relief for class members who prevailed in a final decision in the claims process. During 2005, the Facilitator reports that, on average, claimants were paid within sixty-nine days of the date on which they became eligible for payment. The Facilitator further reports that approximately 90 percent of class members who prevailed in Track A credit claims or in Track B claims received payment of their cash relief within 113 days of the date they became eligible for payment. The Facilitator reports that where there were significant payment delays in 2005, the delays often involved problems with obtaining the necessary payment information for claims by deceased class members.

In August 2005, an individual class member, Elmore Hicks, wrote to the Monitor requesting assistance with the payment of relief in a Track A claim. Mr. Hicks received an Adjudicator decision on his Track A claim dated November 1, 1999, awarding a cash relief payment of \$50,000. Mr. Hicks received an amended decision from the Adjudicator dated February 29, 2000, awarding relief under the Conservation Reserve Program, a non-credit farm benefit program. This amendment meant that his cash relief would be \$3,000, not \$50,000.

Elmore and Ludean Hicks filed a motion with the Court in 2005 to require the payment of the \$50,000 relief specified in the November 1, 1999, Adjudicator's decision.⁵¹ The parties have resolved the Hicks' claim and have also entered into a Stipulation to address the claims of forty other class members who received Amended Adjudicator Decisions affecting their relief.⁵²

2. Tax Issues

The Monitor has described the tax relief issues for successful class members in prior Monitor reports. At least three aspects of a successful class member's recovery may have tax consequences: (1) cash payments received by the class member; (2) payments made to prevailing Track A class members' Internal Revenue Service (IRS) accounts; and (3) the amount of any outstanding debt forgiven by USDA as debt relief. In the past, prevailing class members have experienced problems concerning the issuance of IRS Forms 1099, the establishment of tax accounts, and the deposit of tax payments. The parties and the neutrals have worked to clarify responsibility for the issuance of Forms 1099 and to address the timely deposit of tax relief payments for successful Track A claimants.

Responsibility for issuing Forms 1099 is shared by the Facilitator and USDA. The Facilitator is responsible for preparing and mailing Forms 1099 for (1) \$50,000 cash relief for Track A credit claims; (2) deposits made to IRS tax accounts for Track A credit claims; and

⁵¹ The motion was filed on December 7, 2005 *pro se*. Redacted pleadings associated with the motion were subsequently filed to protect individual class members' privacy. On February 23, 2006, the Court issued two Memorandum Opinions and Orders regarding Amended Adjudicator decisions and the problems raised by the Hicks' motion. The Monitor filed a report with the Court regarding Amended Adjudicator decisions on April 7, 2006. The report is available on the Monitor's website at <http://www.pigfordmonitor.org/reports/>.

⁵² The Stipulation and Order was signed by the Court and filed on June 29, 2006. On August 7, 2006, the Court ordered the Monitor to provide additional information on or before December 15, 2006. The Monitor will provide further information about Amended Adjudicator decisions as the Court has directed.

(3) Track B damage awards and settlement payments. USDA is responsible for preparing and mailing Forms 1099 for (1) \$3,000 cash relief for Track A non-credit claims; (2) Track A debt relief; and (3) Track B debt relief. For class members who received relief in 2004 and 2005, the Facilitator and USDA have reported that IRS Forms 1099 were provided on time.

The establishment of tax accounts has been problematic in hundreds of cases. Establishment of the account becomes an issue when the Facilitator cannot determine the correct Social Security Number or Tax Identification Number for the prevailing class member. This issue arises most often when the class member is deceased and the class member's representative did not provide the Tax Identification Number for the decedent's estate.

The Monitor has requested assistance from the IRS's National Taxpayer Advocate (NTA) regarding the tax problems experienced by class members as a result of problems in the implementation of their Consent Decree relief. The Monitor remains hopeful that, in addition to the assistance provided by the NTA staff, the NTA-funded Low-Income Taxpayer Clinics (LITCs) will be able to assist class members with *Pigford*-related tax difficulties. Class members who experienced *Pigford*-related tax difficulties continued to contact the Facilitator and Class Counsel for assistance during 2005.

3. Debt Relief

During 2005, the Monitor and the parties worked to address several issues regarding the proper implementation of debt relief. 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 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 set forth in the Consent Decree

and the Debt Relief Order to forgive all subsequent loans that are in the same loan program as the affected debt.⁵³

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 should not adversely affect a class member's eligibility for future participation in any USDA loan or loan servicing program.⁵⁴ If debt is not forgiven, the Government may offset other Government payments a class member is entitled to receive, such as a tax refund or other payments from the Farm Service Agency. During 2005, both Class Counsel and the Monitor received calls from successful class members who believed they did not receive the full amount of debt relief they were entitled to receive under the Consent Decree. In addition, class members reported delays in USDA's implementation of debt relief. The Monitor has worked with Class Counsel and USDA to accelerate the pace of implementation of debt relief for successful class members. The Monitor has also worked with the parties to resolve individual cases brought to the Monitor's attention regarding the appropriate scope of debt relief. 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 new Farm Service Agency (FSA) loans for prevailing class members who are continuing to farm. Under the

⁵³ 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).

⁵⁴ 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 website at <http://www.pigfordmonitor.org/updates/>.

Consent Decree, the parties agreed that USDA would offer injunctive relief for five years, which meant that injunctive relief was to expire on April 14, 2004. Later, USDA voluntarily agreed to extend injunctive relief through April 14, 2005, or one year from a prevailing class member's final decision, whichever is later. On April 21, 2005, the parties stipulated and the Court ordered another extension of the right to injunctive relief.⁵⁵ 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 for how USDA will implement injunctive relief under the April 21, 2005, Stipulation and Order.⁵⁶ The Monitor has also prepared information for class members to explain the new deadlines for injunctive relief.⁵⁷

Under the terms of the April 21, 2005, Stipulation and Order, prevailing class members can request technical assistance. Technical assistance includes assistance in filling out loan forms, preparing farm plans, and help with other aspects of the loan and loan-servicing process through April 14, 2006, or two years from the date on which the class member completes the claims process, whichever is later.⁵⁸ Prevailing class members may exercise their right to “most

⁵⁵ The Court's Order is available on the Monitor's website at <http://www.pigfordmonitor.org/orders/>.

⁵⁶ This and other FLP notices are available on the Monitor's website at <http://www.pigfordmonitor.org/flp/>.

⁵⁷ 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 website, www.pigfordmonitor.org/updates/, and are included in Appendix 8.

⁵⁸ 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,

favorable light”⁵⁹ and priority consideration injunctive relief⁶⁰ for two years after the date on which the prevailing class member completed the claims process, or April 14, 2005, whichever is later. Because the April 14, 2005, and April 14, 2006, deadlines have now passed, class members continue to have the right to injunctive relief only in the two years following the date the class member completed the claims process.

Class Counsel and class members continue to express concern about the low number of prevailing class members who have taken advantage of their injunctive relief rights. Class Counsel has expressed concern about individual reports by several class members indicating difficulty when they have sought to apply for new loans. USDA continues to respond to any individual problems that are brought to USDA’s attention. The Monitor will continue to 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 is in its eighth year. Although the vast majority of the class has completed the claims process, some claims remain pending with the Monitor and the other neutrals and some prevailing class members continue to experience problems obtaining their relief. The Government has responded on multiple occasions to requests

“Injunctive Relief: A New Order Changes the Deadlines,” available on the Monitor’s website at www.pigfordmonitor.org/updates/.

⁵⁹ “Most favorable light” injunctive relief means that 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. *See* Consent Decree, ¶ 11(c).

⁶⁰ “Priority consideration” injunctive relief means that 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. USDA lists properties in the agency’s inventory on the agency’s website.

from the Monitor for the information necessary to the implementation process and has worked conscientiously to address concerns brought to the Government's attention. Class Counsel has played a critical role in identifying and resolving individual class members' concerns and has also responded on multiple occasions to requests for information from the Monitor. During calendar year 2005, both of the parties and all of the neutrals (the Facilitator, the Adjudicator, and the Arbitrator) continued to work in good faith to implement the Consent Decree.

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Respectfully submitted,

s/Randi Ilyse Roth

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