

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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TIMOTHY C. PIGFORD, et al.,  
Plaintiffs,  
v.  
EDWARD T. SCHAFER, Secretary,  
The United States Department  
of Agriculture,  
Defendant.

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Civil Action No. 97-1978 (PLF)

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CECIL BREWINGTON, et al.,  
Plaintiffs,  
v.  
EDWARD T. SCHAFER, Secretary,  
The United States Department  
of Agriculture,  
Defendant.

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Civil Action No. 98-1693 (PLF)

MONITOR'S FIFTH PROGRESS REPORT ON AMENDED DECISIONS AND  
DEBT RELIEF IMPLEMENTATION

## I. BACKGROUND

The Monitor has filed several prior reports with the Court regarding cash relief and debt relief implementation for class members who received “amended” Adjudicator decisions.<sup>1</sup> On February 29, 2008, the Court issued an Order directing the Monitor to report to the Court regarding the tasks identified by the parties as necessary to ensure the proper implementation of debt relief for the amended decisions group of claims and for all prevailing claimants who are entitled to debt relief.<sup>2</sup> The tasks are explained in detail in the Monitor’s July 9, 2007, report and are reiterated in the Monitor’s February 8, 2008, report. The tasks include completing implementation of systems for: (1) determining the proper loan type for debt relief; (2) refunding certain voluntary payments; (3) refunding certain offsets; (4) managing the tax consequences of debt relief; and (5) ensuring that the resolution of loans subject to *Pigford* debt forgiveness has “no adverse affect” for each prevailing class member. The Monitor files this progress report to comply with the Court’s February 29, 2008, Order.

As described more fully below, the Monitor reports that all cash relief issues have been fully resolved and debt relief has been fully implemented for all but one of the group of

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<sup>1</sup> These reports include: Monitor’s Fourth Progress Report on Amended Decisions (Feb. 8, 2008); Monitor’s Third Progress Report on Amended Decisions (Oct. 11, 2007); Monitor’s Report and Recommendations on Amended Decisions (July 9, 2007); Monitor’s Second Progress Report on Amended Adjudicator Decisions (Mar. 29, 2007); Monitor’s Progress Report on Amended Adjudicator Decisions (Jan. 16, 2007); Monitor’s Interim Follow-Up Report on Amended Adjudicator Decisions (Dec. 14, 2006); and Monitor’s Report on Amended Adjudicator Decisions (Apr. 7, 2006). These reports are available on the Monitor’s website at [www.pigfordmonitor.org/reports/](http://www.pigfordmonitor.org/reports/).

<sup>2</sup> The Court ordered the Monitor to report to the Court on or before June 27, 2008. On June 27, 2008, the Court granted the Monitor’s request for an extension of time and ordered the Monitor to report to the Court on or before July 11, 2008.

claimants who received amended Adjudicator decisions.<sup>3</sup> The Monitor recommends no additional reporting regarding this group of claimants.

The Monitor has continued to work with the parties on the development and implementation of debt relief policies and procedures applicable to all prevailing claimants who are entitled to debt relief. Agreement has been reached on many outstanding issues. The parties have agreed to participate in a research, correction, and verification process to ensure that appropriate debt relief is provided to all prevailing claimants who are eligible for debt relief. As described in more detail below, the parties have begun implementing this process. The government has implemented a system to ensure that prevailing claimants have “no adverse affect” as a result of receiving *Pigford* debt forgiveness. And, finally, the parties have also made progress in creating a system to manage the tax consequences of initial awards of debt relief and the potential tax consequences of corrections of debt relief.<sup>4</sup> The Monitor recommends that the Court order the Monitor to report to the Court on or before December 15, 2008, regarding the progress of debt relief implementation for all prevailing claimants who are entitled to debt relief, including the system for managing potential tax consequences.

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<sup>3</sup> Issues arose in the implementation of debt relief for one claimant. The parties have agreed to the appropriate debt relief, and USDA is in the process of implementing the debt relief. The single case for which debt relief has not been fully implemented is described in more detail in footnote 8 below.

<sup>4</sup> Under the Consent Decree, USDA is required to provide tax relief to claimants who prevail in the Track A claims process. This tax relief includes a payment to the Internal Revenue Service in the amount of 25 percent of the total principal debt forgiven under *Pigford*. See Consent Decree, ¶ 9(a)(iii)(C). This report will not address in detail the tax issues relating to debt relief implementation. However, the Monitor will continue to work with the parties to create a system to manage the potential tax consequences of the debt relief implementation steps outlined in this report.

## II. RELIEF FOR AMENDED DECISIONS CLAIMS<sup>5</sup>

Prior Monitor reports have described the circumstances that led to the issuance of amended Adjudicator decisions for a group of claimants who elected Track A of the *Pigford* claims process. Those prior reports described the review of each claim to ensure that appropriate cash relief and debt relief has been or will be implemented for this group of claims.

### A. Cash Relief

In the Monitor's Fourth Progress Report on Amended Decisions, the Monitor reported that implementation of proper cash relief for all claimants in the amended decisions group is complete.

### B. Debt Relief

The Monitor's Fourth Progress Report indicated that progress was being made regarding debt relief, but that additional tasks remained to ensure proper debt relief implementation. As described more fully below, the parties have reached agreement on the procedures that will be used to research, correctly implement, and verify debt relief for all prevailing claimants who are entitled to debt relief. These procedures have been completed for all but one of the amended decisions group of prevailing claimants.

The parties have examined the loan records for each amended decisions claimant who prevailed on a credit claim to determine whether the claimant had loans that are entitled to *Pigford* debt relief. As a result of this review process, USDA has made corrections to the debt

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<sup>5</sup> On August 7, 2006, the Court issued a Memorandum Opinion and Order directing the Monitor to further investigate and report to the Court regarding a specific group of 84 amendments to Adjudicator decisions that occurred in 78 claims. The 84 amendments include 23 "substantive" amendments and 61 "technical" amendments. *See* Memorandum Opinion and Order, dated August 7, 2006, available on the Monitor's website at <http://www.pigfordmonitor.org/orders/>. The phrase "amended decisions claims" in this report refers to this group of 78 claims that were affected by 84 amendments.

relief provided for several of the amended decisions claims. In some cases, USDA has refunded voluntary payments, administrative offsets, and/or Treasury offsets taken by USDA that had been applied to loans subject to *Pigford* debt relief.<sup>6</sup> In other cases, USDA has forgiven additional loans and/or “switched” the discharge of loans to the correct loan program.<sup>7</sup> The accuracy of USDA’s debt relief implementation for all but one of the prevailing claimants who received amended Adjudicator decisions has been verified by the Monitor and Class Counsel.<sup>8</sup> For the amended decisions group of claimants, USDA has fully completed the tasks identified and agreed upon by the parties for proper debt relief implementation.<sup>9</sup>

### C. Amended Decisions Reporting Is Complete

The Monitor has worked with the parties to determine the appropriate cash relief and debt relief for each of the claimants who received an amended Adjudicator decision in the

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<sup>6</sup> In some cases, USDA used a procedure called “offset” to take payments owed to claimants by the government, such as farm program payments or income tax refunds, and applied those funds to the claimant’s outstanding farm loan debts. See footnote 21 for further discussion of offsets.

<sup>7</sup> As discussed in more detail below, the parties have referred to a category of cases as “switch” cases. For example, in a case in which the Adjudicator’s or Arbitrator’s finding refers to an Operating Loan and USDA finds that the actual loan at issue was an Emergency Loan for operating purposes, USDA will make the “switch” and will discharge the Emergency Loan and all outstanding Emergency Loans incurred from the time of the finding of discrimination through the end of the class period.

<sup>8</sup> As noted in footnote 3 above, in one debt relief case the parties’ agreement has not yet been implemented. The parties have agreed upon the appropriate debt relief and are cooperating to correctly implement that relief for a claimant who is currently incapacitated. Class counsel is working with the claimant’s representative to obtain the proper authority to implement a “switch” in the claimant’s debt relief. The Monitor anticipates that this claimant’s debt relief will be fully implemented shortly. If any problems arise regarding this matter, the Monitor will report to the Court.

<sup>9</sup> In the Monitor’s Report and Recommendations on Amended Decisions filed on July 9, 2007, the Monitor noted that there are aspects of debt relief implementation about which the parties may disagree. To the extent that the parties may have disagreements in individual cases about the implementation of discretionary policies explained in USDA’s Information Memo for the Monitor, Memo #4, those disagreements are not addressed in this report. Memo # 4 is attached to the Monitor’s July 9, 2007, report as Exhibit 2. See Monitor’s Report and Recommendations on Amended Decisions, page 15, footnote 20, and Exhibit 2 (Jul. 9, 2007).

Track A claims process. With the one exception noted above, USDA has fully implemented the cash relief and debt relief that the parties have agreed is appropriate for each of the claimants who received an amended Adjudicator decision.<sup>10</sup> The Monitor's investigation and reporting process for the amended decisions group of claimants is now complete.<sup>11</sup>

### III. DEBT RELIEF FOR PREVAILING CREDIT CLAIMS

All claimants who prevail on one or more credit claims under Track A or Track B are eligible for debt relief. Under the terms of the Consent Decree and a February 7, 2001, Debt Relief Stipulation and Order, this debt relief includes the forgiveness of certain USDA farm loans. It also includes the assurance that *Pigford* debt relief will not adversely affect the future eligibility of persons who had been liable on the loans to participate in any USDA loan or loan servicing program.<sup>12</sup>

The implementation of debt relief in individual cases is often quite complicated. During the Monitor's investigation of the amended decisions group of prevailing claimants, the Monitor and the parties became aware of issues in USDA's debt relief implementation process that potentially affect the accuracy of all claimants' debt relief awards (not just the awards of the amended decisions group). The Monitor has been actively engaged with USDA and Class Counsel to reach agreement regarding the policies and procedures necessary for ensuring that the correct debt relief has been provided for all prevailing claimants who are entitled to debt relief. As part of this effort, USDA has issued a revised Farm Loan Program Notice, FLP-510,

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<sup>10</sup> See footnote 8 above.

<sup>11</sup> To the extent that further action is required to manage the tax consequences of amended decisions debt relief, that action will be reported as part of a larger report on the tax consequences for the entire universe of claimants who are entitled to debt relief.

<sup>12</sup> See Consent Decree, paragraphs 9(a)(iii)(A) (Track A debt relief) and 10(g)(ii) (Track B debt relief).

Guidance on Applications Submitted by *Pigford* Claimants, which is attached to this report as Exhibit 1. In addition, the parties have agreed to a set of debt relief implementation rules. Those rules are reflected in a revised Monitor Update Number 10, Debt Relief for Prevailing Class Members, which is attached to this report as Exhibit 2. Both the revised Farm Loan Program Notice, FLP-510, and the revised Monitor Update Number 10 describe the agreements the parties have reached regarding how USDA will implement debt relief for each claimant who is entitled to *Pigford* debt relief.<sup>13</sup>

A. Determining the Loan(s) That Should Receive *Pigford* Debt Relief

The parties have worked together to clarify the rules that apply in determining the specific loan type for debt relief. In general, a prevailing class member is entitled to debt relief for (1) all debts identified in the text of an Adjudicator or Arbitrator decision as having been affected by discrimination; and (2) all debts incurred in the same loan program(s) as the affected loan(s) from the date of the first event upon which a finding of discrimination is based, through the end of the class period (December 31, 1996). In some cases, however, application of these seemingly simple rules can be complicated. The rules negotiated by the parties regarding some of the complications are described below.

1. *Misidentified Loan Types*

There is an exception to these general rules as they relate to the loan program(s) qualifying for debt relief. In some cases, when USDA examines a prevailing claimant's loan file, USDA determines that the claimant actually received a different type of loan than the loan type identified in the Adjudicator's or Arbitrator's decision as having been affected by

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<sup>13</sup> See Consent Decree, paragraphs 9(a)(iii)(A) (Track A debt relief) and 10(g)(ii) (Track B debt relief); Stipulation and Order, paragraph 2 (D.D.C. Feb. 7, 2001).

discrimination. The parties have agreed that when the Adjudicator or Arbitrator makes a finding with regard to a specific loan type and USDA determines that the actual loan at issue was clearly a different loan type that was misidentified in the Adjudicator’s or Arbitrator’s decision, USDA will “switch” debt relief to the correct loan type and implement debt relief based on the actual loan type at issue.<sup>14</sup>

## 2. Correcting Mistakes in Debt Relief

In some cases, USDA discovers that it provided the incorrect debt relief in an individual case. When this happens, USDA will notify Class Counsel and the Monitor and provide to Class Counsel and the Monitor loan records for the claimant. USDA then affords Class Counsel the opportunity to choose whether the debt relief should remain as is, or whether instead the incorrectly granted debt relief should be undone, and the correct debt relief should be implemented. USDA has agreed that it will not reverse debt forgiveness and reinstate previously forgiven debt unless the claimant’s lawyer informs USDA that the claimant agrees to the change.

## 3. USDA Forgives All Liability for Qualifying Debts

Some loans that are subject to *Pigford* debt relief were resolved before the claimant prevailed in a *Pigford* claim. In some cases, these loans were resolved using mechanisms that resulted in some types of continuing financial liability. For example, the resolution of a claimant’s loan might have resulted in a “shared appreciation agreement”<sup>15</sup> or might not have

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<sup>14</sup> See footnote 7.

<sup>15</sup> If USDA writes down a debt that is secured by real estate, the borrower may be required to sign a shared appreciation agreement. The shared appreciation agreement provides that if the land that is collateral for the loan increases in value during a certain time period, USDA can recapture a portion of the appreciation in the value. *See* 7 C.F.R. § 1951.909, 7 C.F.R. Part 1951, subpt. S, Ex. D (1996); 7 C.F.R. Part 766, subpt. E (2008).



included a full release of personal liability.<sup>16</sup> In such cases, USDA will forgive all remaining liability for loans that qualify for *Pigford* debt relief.<sup>17</sup>

#### 4. Agreements of the Parties

Monitor Update No. 10, attached to this report as Exhibit 2, provides a detailed description of the parties' agreements as to the detailed rules needed to implement the Court's debt relief orders. USDA and Class Counsel have agreed that the information in Monitor Update No. 10 accurately describes the debt relief prevailing claimants are entitled to under the *Pigford* Consent Decree and the Court's February 7, 2001, Debt Relief Stipulation and Order.

Monitor Update No. 10 notes that the parties are not in agreement with respect to the appropriate debt relief for prevailing claims in which the finding of discrimination is based on USDA's failure to provide appropriate loan servicing.<sup>18</sup> In addition, the parties are attempting to reach an agreement on the appropriate approach to debt relief for prevailing claimants whose loan are, or were at some time, the subject of bankruptcy proceedings.<sup>19</sup>

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<sup>16</sup> For example, if a borrower received a "chargeoff" through USDA's debt settlement program, USDA would temporarily stop collection activities but the borrower would still be personally liable for the debt. *See* 7 C.F.R. § 1956.54 (1996, 2008)

<sup>17</sup> The Court recently issued an Opinion and Order that addressed one claimant in this posture. Opinion and Order (D.D.C. Feb. 21, 2008). The Court held that USDA was "precluded from enforcing the shared appreciation agreement with respect to any" loans that would have qualified for forgiveness under *Pigford*. Opinion, at 18 (D.D.C. Feb. 21, 2008).

<sup>18</sup> When the Adjudicator or Arbitrator specifically orders such discharge, USDA has agreed to discharge all loans that were open at the time of the "affected by" attempt to obtain loan servicing. The parties are not in agreement on the appropriate debt relief for loan servicing claims when the Adjudicator or Arbitrator does not specifically identify the loans to be discharged. USDA has agreed that it will evaluate requests for debt relief in loan servicing cases on a case-by-case basis. In any case that cannot be resolved between the parties, Class Counsel may take appropriate action as permitted under the Consent Decree. Claimants in this situation are encouraged to contact Class Counsel or the Monitor's office for assistance.

<sup>19</sup> Monitor Update No. 10 is silent about bankruptcy issues.

## B. Procedures for Refunds of Payments

There is sometimes a lengthy delay between the time a claimant receives an initial prevailing decision and the implementation of debt relief. In the period between the issuance of the decision and the implementation of debt relief, some claimants have made payments on outstanding loans that are subject to discharge.

USDA has agreed to refund to claimants those payments made on a loan subject to *Pigford* debt relief if the payments were received by the agency after the date of the initial prevailing decision that gave the claimant the right to debt relief on the loan.<sup>20</sup> Monitor Update No. 10 explains the parties' agreement as to what constituted "the date of the initial prevailing decision" in different procedural postures.

## C. Procedures for Offsets

In some cases, USDA has obtained funds to repay a prevailing claimant's outstanding loans through administrative or Treasury offset.<sup>21</sup> The parties have agreed to guidelines and procedures for refunds of offsets taken by USDA and applied to loans that qualify for *Pigford* debt relief. USDA will refund any administrative offsets (such as those taken from farm program payments), or Treasury offsets (such as those taken from Social Security benefits and

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<sup>20</sup> There are circumstances, however, in which a claimant will not receive a cash refund of voluntary payments made on *Pigford* debt. If a claimant still has other delinquent debt after all *Pigford* debts have been discharged, USDA may apply the voluntary payments to the delinquent debt rather than refund the payments directly to the claimant. Monitor Update No. 10, attached to this report as Exhibit 2, provides additional details about the refund of voluntary payments.

<sup>21</sup> USDA is required to pursue offset against delinquent borrowers according to 31 U.S.C. § 3716(c)(6). Federal payments that would otherwise be paid to a delinquent USDA borrower may be "offset" and paid directly to USDA and credited on the delinquent borrower's account. See 26 U.S.C. § 6402(d) (Treasury offsets) and 31 U.S.C. § 3720 (administrative offsets). For an explanation of USDA's *Pigford* offset policy, see USDA Notice FLP-197, Collecting Farm Loan Program (FLP) Debt by Administrative Offset for *Pigford v. Glickman* Claimants (Apr. 6, 2001) (expired Aug. 1, 2001), available on the Monitor's website at <http://www.pigfordmonitor.org/flp/>.

income tax refunds), that were taken on or after January 1, 1999, and applied to any loans that were ultimately found to be subject to *Pigford* debt relief.<sup>22</sup>

#### D. “No Adverse Action” Process

Ordinarily, if USDA forgives or writes off debt and the forgiveness causes a loss to the government, that forgiveness can have an adverse affect on the farmer’s ability to qualify for new loans or loan servicing.<sup>23</sup> The Consent Decree provides that *Pigford* debt forgiveness “shall not adversely affect the claimant’s eligibility for future participation in any USDA loan or loan servicing program.”<sup>24</sup> The Consent Decree provides that successful claimants have a right to the forgiveness of certain outstanding debt. The Consent Decree is silent, though, about debt that was forgiven by the agency before the claims decision, but that would have been forgiven had it still been outstanding. USDA issued a “no adverse action” policy to ensure that the resolution of debt that would have qualified for forgiveness under *Pigford* had it still been outstanding at the time of the Adjudicator or Arbitrator decision will not be used as a reason to deny loans or loan servicing to prevailing claimants.<sup>25</sup>

Initial decisions on eligibility for loans and loan servicing occur at the USDA county office. It is important, therefore, that county offices have access to accurate information about

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<sup>22</sup> As is the case with the refund of voluntary payments, USDA may apply the offset amount to delinquent debts rather than provide a cash refund directly to the claimant.

<sup>23</sup> For examples of the effect of previous debt forgiveness on loan making, see 7 C.F.R. §§ 1941.12(a)(8), 1943.12(a)(10) (2007) and 7 C.F.R. § 764.101(d)(2), 764.152(b), 764.252(b)-(c) (2008). For an example of the effect of previous debt forgiveness on future loan servicing eligibility, see 1951.909(e)(4)(ii) (2007) and 7 C.F.R. § 766.111(a)(3) (2008).

<sup>24</sup> See Consent Decree, paragraphs 9(a)(iii)(A) (Track A debt relief) and 10(g)(ii) (Track B debt relief).

<sup>25</sup> This policy also extends to individuals who were liable for those loans that qualified for *Pigford* debt relief even if they were not a named claimant in the prevailing claim. Examples of this situation include the surviving spouse of a prevailing claimant or the partner/co-borrower of a prevailing claimant even if the spouse or partner was not identified as the claimant in the prevailing claim.

debts qualifying for discharge through the *Pigford* claims process. USDA's revised Notice, FLP-510, Guidance on Applications Submitted by *Pigford* Claimants, provides additional guidance for USDA county offices processing loan and loan servicing requests involving loans subject to *Pigford* debt relief. The revised USDA Notice, FLP-510, is attached as Exhibit 1 to this report.

USDA has agreed that county offices will follow special procedures before denying an application on the basis of prior debt forgiveness where the application has been made by a prevailing *Pigford* claimant, a co-borrower of a prevailing *Pigford* claimant, or another person who the county office has any reason to believe was otherwise legally liable for loans that qualified for *Pigford* debt relief. USDA county offices will consult with the State Office, which in turn will consult with the Farm Service Agency (FSA) National Office for guidance. Designated officials in the National Office will confirm the status of the prevailing claimant and will notify officials of the debt(s) that qualified for discharge under *Pigford* to ensure that USDA's "no adverse action" policy is implemented properly.<sup>26</sup>

Prevailing claimants who are entitled to *Pigford* debt relief may contact Class Counsel or the Monitor's office if they have questions about USDA's "no adverse action" policy or if they encounter problems with their eligibility for future loans or loan servicing due to debts that qualified to be discharged under *Pigford*.

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<sup>26</sup> The Monitor's July 2007, Report to the Court discussed USDA's "ADPS Civil Rights Screenshot" as a key document USDA used in implementing its no adverse action policy. ("ADPS" stands for Automated Data Processing System.) The parties have recognized that reliance on USDA's ADPS Civil Rights Screenshot may not be as appropriate as other methods to track *Pigford* debt relief forgiveness. The new process outlined in FLP-510, attached hereto as Exhibit 1, no longer relies on the accuracy of information about specific debts reflected in ADPS in making a final "no adverse action" determination.

## E. Research, Correction, and Verification of Debt Relief

The parties have agreed that three steps are necessary to ensure that appropriate debt relief is implemented for all prevailing claimants who are eligible for debt relief. These three steps are research, correction, and verification. The parties and the Monitor have developed this approach after frequent, ongoing phone conferences over the past several months, including the discussion of individual cases and system-wide implementation issues.

### I. Research

USDA has agreed that additional efforts are required to identify the universe of claimants who prevailed on credit claims under Track A and Track B of the claims process and who had outstanding farm loan program debt during the class period (from January 1, 1981, through December 31, 1996). In October 2007, USDA identified 817 prevailing Track A borrowers who had outstanding farm loan debt as of 1999.<sup>27</sup> The Monitor identified an additional 472 prevailing Track A borrowers whose claims were reviewed by the Monitor as part of the petition process and whose loan records showed the claimants had open farm loan debt during the class period. USDA has agreed that the loan files of these 1,289 borrowers should be reviewed first to ensure appropriate debt relief implementation. USDA has also agreed that additional steps are needed to identify the entire universe of prevailing borrowers under Track A and Track B who had open farm loan debt during the class period. The parties will continue to work together to identify all claimants who prevailed on a credit claim under Track A or Track B and who had any open farm loan debt during the class period.

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<sup>27</sup> USDA's initial search focused on prevailing *Pigford* claimants who had open debt as of 1999 because these claimants are likely to have had debt during the class period and, because the debt was still open in 1999, are likely to have had problems relating to loan payments being made after the issuance of *Pigford* claims decisions.

For each identified claimant, USDA will examine its loan records to identify debts that may qualify for *Pigford* debt relief.

### 2. Correction

As USDA reviews the files of prevailing claimants who had open debt during the class period, USDA will review whether each claimant has received all of the debt relief to which he or she is entitled. In cases in which the agency's initial grant of debt relief was incorrect, the grant will be corrected.<sup>28</sup> As part of the correction process, USDA will apply non-cash credits to equity recapture accounts in the appropriate amounts and confirm that prevailing claimants are relieved of any remaining liability for resolved loans that qualify for *Pigford* debt relief. USDA will also provide the appropriate refunds of voluntary payments and offsets on discharged loans.

### 3. Verification

USDA will submit loan documents to the Monitor and Class Counsel to verify that the correct loan(s) have been discharged, that certain voluntary payments or offsets have been refunded, and that the appropriate non-cash credits have been applied to equity recapture accounts. A process has been developed for the Monitor or Class Counsel to request additional records as necessary and to continue discussing the appropriate debt relief in individual cases.

USDA has begun the agency's research and correction process for the 1,289 currently-identified prevailing claimants. On March 1, 2008, USDA began forwarding loan file documents for these prevailing claimants to the Monitor and to Class Counsel for review and verification. As of this filing, the Monitor's Office has received USDA loan records for 150

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<sup>28</sup> As discussed above, USDA will notify Class Counsel if it discovers that debt relief was incorrectly implemented in individual cases. After reviewing loan documents and consulting with the claimant, Class Counsel may request that USDA reinstate the incorrectly forgiven debt and implement the correct debt relief.

prevailing claimants. The Monitor and the parties have agreed to an ongoing schedule for the research, correction, and verification process for the identified prevailing claimants.

USDA anticipates that it will complete its review of debt relief for all prevailing credit claimants by July 1, 2009. This time projection covers USDA's research phase of the work; however, this time projection does not include the full implementation of any additional debt relief, the correction of prior debt relief, or the verification of records regarding the final verification transmissions.

#### F. Communications With Prevailing Claimants

As discussed above, the Monitor has issued a revised Monitor Update No. 10 explaining the recent developments in debt relief. The Monitor will send this update to each claimant who prevailed on a credit claim. The Update will be accompanied by a letter from the Monitor explaining the debt relief review process.

Class Counsel and the Monitor will continue to assist any claimant who has experienced problems with the implementation of their debt relief and will continue to review loan records provided by USDA for individual prevailing claimants to verify that each prevailing claimant receives the appropriate debt relief. After each case has been reviewed and the appropriate debt relief has been verified, individualized letters will be sent to each prevailing claimant who had open farm loan debt during the class period explaining the appropriate debt relief in his or her case.

#### IV. CONCLUSION

The Monitor's investigation and reporting on cash relief and debt relief implementation for claimants who received amended Adjudicator decisions is complete. The Monitor does not anticipate any additional investigation or reporting on the amended decisions group of claims.

The Monitor and the parties continue their work to achieve full debt relief implementation for all prevailing claimants who are entitled to debt relief. Although not all implementation tasks will be completed in this calendar year, the Monitor recommends that the Court order the Monitor to report to the Court on or before December 15, 2008, on the progress of debt relief implementation for all prevailing claimants who are entitled to debt relief, including the system for managing the potential federal income tax consequences or debt relief.

Dated: July 11, 2008.

Respectfully submitted,

s/Randi Ilyse Roth  
Randi Ilyse Roth  
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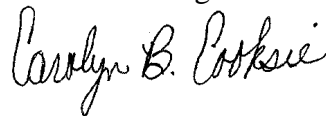


## **Exhibit 1**

For: State and County Offices

**Guidance on Applications Submitted by *Pigford* Claimants**

Approved by: Deputy Administrator, Farm Loan Programs



**1 Overview**

**A Background**

The Consent Decree entered into between the Government and plaintiffs in the class action suit *Pigford vs. Schafer* and approved by the U.S. District Court specifies injunctive relief in the form of special considerations in loan processing and inventory property purchases. These provisions apply to all prevailing claimants who were determined by an adjudicator or arbitrator to have a valid claim under the Consent Decree. Any claimant who prevailed on a claim under the civil action *Pigford vs. Schafer* shall be accorded the rights given them by the Consent Decree.

**Note:** Consent Decree Stipulation and Order dated April 21, 2005, extended the deadline to seek injunctive relief in loan processing, purchasing of inventory property, and seeking technical assistance on an application. See subparagraph 2 A for clarification.

**B Purpose**

This notice:

- provides guidance on processing requests for priority consideration
- provides guidance on consideration of debts forgiven for borrowers, co-borrowers, and those otherwise legally liable on a past loan
- provides State and County Offices with procedures to follow when processing loan and inventory property purchase applications from prevailing credit claimants
- provides answers to frequently asked questions about processing requests received from prevailing claimants (Exhibit 1)
- provides a prevailing claimant priority consideration letter (Exhibit 2)
- obsoletes Notice FLP-504.

<b>Disposal Date</b>	<b>Distribution</b>
April 1, 2009	State Offices; State Offices relay to County Offices

## Notice FLP-510

### 1 Overview (Continued)

#### C Contacts

If there are questions about this notice:

- County Offices shall contact the State Office
- State Offices shall contact either of the following:
  - James Radintz, Director, LMD at 202-720-1632
  - Mike Hinton, Direct Loans/Funds Management Branch Chief, LMD at 202-720-1472.

### 2 Special Consideration Provisions of the Consent Decree

#### A Credit Claim Prevailing Claimants

In most cases, claimants who prevail on a credit claim under the Consent Decree are entitled to the following:

- priority consideration on a one-time basis for:
  - purchase or lease of inventory property to the extent permitted by law
  - one direct FO loan and one OL

**Note:** This right **must** be exercised no later than April 14, 2005, or 2 years **after** the date the prevailing claimant is complete in the Consent Decree claims process, whichever is later. The request for priority consideration **must** be submitted with the actual loan application or an applicant may request priority consideration on a pending loan application. The prevailing claimant **must** notify FSA in writing that this right is being exercised. See Exhibit 2.

- any application for OL, FO loan, or purchasing an inventory property will be viewed in a “light most favorable” to the applicant and the amount and terms of the loan will be the most favorable permitted by law and regulations

**Note:** This consideration applies to any loan request submitted by a prevailing claimant until April 14, 2005, or 2 years **after** the date the prevailing claimant is complete in the Consent Decree claims process, whichever is later, and is **not** limited to loans for which priority consideration is requested.

## Notice FLP-510

### 2 Special Consideration Provisions of the Consent Decree (Continued)

#### A Credit Claim Prevailing Claimants (Continued)

- FSA will provide technical assistance in connection with any application upon request
- technical assistance includes assistance from FLP employees who are acceptable to the applicant.

**Note:** This consideration applies to any new loan request or pending loan application submitted by a prevailing claimant until April 14, 2006, or 2 years **after** the date the prevailing claimant is complete in the Consent Decree claims process, whichever is later, and is **not** limited to loans for which priority consideration is requested.

Claimants who were awarded priority consideration under the Consent Decree are identified in the Automated Discrepancy Processing System (ADPS) "Approved Civil Rights Claim Priority Activity" database. Agency officials will use the database to determine whether an applicant is entitled to priority consideration for farm loan assistance. The date a prevailing claimant's right to priority consideration and "light most favorable consideration" expires is listed in ADPS. See the ADPS manual, Chapter 22 for instructions on accessing the database. Prevailing claimants **must** meet all regulatory requirements for loans. Debt forgiven under the Consent Decree shall **not** have any adverse impact on future loan requests.

The Consent Decree requires that priority consideration be requested in writing. Copies of Exhibit 2 shall be provided to applicants upon request.

**Note:** Applicants exercising priority consideration are **not** required to use Exhibit 2. Any written request is acceptable as long as it states what is being requested.

#### B Farm Programs Benefits and Prevailing Claimants

Prevailing claimants whose claim involved only farm programs benefits, for example disaster and emergency conservation program and no loan programs, are entitled to "light most favorable" and technical assistance according to subparagraph A. Noncredit claimants are **not** entitled to priority consideration.

## Notice FLP-510

### 3 Implementing the Consent Decree Provisions

#### A Notifying Prevailing Claimants

All claimants will be notified by the adjudicator or arbitrator about the outcome of their claim. Prevailing credit claimants will be notified about how to proceed when exercising priority consideration. **No action by State or County Offices is necessary.**

#### B Notifying Prevailing Farm Program Benefits Claimants

Claimants who prevailed but whose claim only involved farm program benefits are **not** entitled to priority consideration. These claimants will be notified by the adjudicator or arbitrator about the outcome of their claim.

#### C Monitor Petitions and Injunctive Relief

A prevailing claimant may **not** obtain injunctive relief within 120 calendar days of the date of their initial adjudicator or arbitrator decision. This court-ordered delay in implementing injunctive relief will enable FSA or a prevailing claimant to request a monitor review of the initial decision, if necessary. Requests for injunctive relief will be accepted, but not processed during the 120-calendar-day period **after** the adjudicator or arbitrator decision. Any applications submitted during the 120-calendar-day period will be handled according to normal processing procedures.

#### D Priority Consideration in Loan Processing

Applications in which priority consideration is exercised shall be handled according to the following.

- Regardless of other incomplete applications on file in the County Office, the authorized agency official will immediately take action to process the priority consideration application.
- To the extent practicable, an office appointment or farm visit will be scheduled to occur within 5 workdays of receiving Exhibit 2 to provide technical assistance to the applicant.
- If at any time in the processing of a priority consideration application an appointment is needed to complete documents, or any other action necessary to complete the application arises, this shall take precedence over any other incomplete application on file in the County Office.

## Notice FLP-510

### 3 Implementing the Consent Decree Provisions (Continued)

#### D Priority Consideration in Loan Processing (Continued)

- All communication with applicants exercising priority consideration will be by telephone unless the applicant indicates a preference for written communication exclusively.

**Note:** All conversations about application information will be confirmed in writing within 3 workdays. Every effort will be made to avoid processing delays because of mailing.

- If at any time while a priority consideration application is incomplete 5 workdays pass while awaiting information from the applicant, on the sixth workday the authorized agency official responsible for the application will:
  - contact the applicant by telephone to advise that the necessary information has **not** been received
  - offer assistance in obtaining the information to complete the application.

**Note:** The results of this contact will be documented and a letter confirming the conversation sent to the applicant within 3 workdays.

- When an appraisal, environmental assessment, or other service **must** be obtained from non-FSA sources, the authorized agency official responsible for the application, to the extent practical, will require that if the outside source has multiple requests pending from FSA, the outside source performs the next service on matters related to the application on which priority has been requested.
- When a priority application is determined to be complete according to 3-FLP, paragraphs 42 and 43, a final decision **must** be made within 3 workdays and the applicant notified according to 3-FLP, Part 10. No nonpriority completed applications shall have a final decision until a decision has been made on completed priority applications. If 2 complete priority applications are pending at the same time, they shall be acted upon in the order received.
- Prevailing claimants, who submit a written request for priority consideration without an application, should be cautioned that submitting the written request without an application will **not** preserve their rights to priority consideration beyond the injunctive relief expiration date. Under the *Pigford* Consent Decree, prevailing claimants receive priority consideration on a specific loan request. The priority consideration request should **not** be accepted unless it is accompanied by a signed application or the prevailing claimant has a loan request pending.

## Notice FLP-510

### 3 Implementing the Consent Decree Provisions (Continued)

#### D Priority Consideration in Loan Processing (Continued)

- If a prevailing claimant wants to submit an application for a loan to be used months or years in the future:
  - **remember** that FSA **cannot** refuse to accept the application
  - the authorized agency official should explain to the applicant:
    - the requirements for a complete application
    - that FSA procedures specify application timeframes that **must** be met
    - that unless they are able to complete the application within the specified timeframes, the application will be withdrawn
    - the availability of technical assistance.

#### E Priority Consideration for Loan Funding

Prevailing claimants shall receive priority for funding when a loan on which priority consideration was requested is approved. By definition, prevailing claimants are SDA's and shall receive SDA-targeted funds to the extent these funds are available. If a State Office's remaining SDA allocation is insufficient to immediately fund a priority consideration loan, SED shall immediately forward the claimant's name, amount, type of loan request, and date of initial application to LMD by FAX at 202-690-1117. Once additional funding is available, the subject applicant will be the first to receive funding, regardless of how many other applications have earlier initial application dates. In the event there are multiple priority consideration applications awaiting funds, the applications will be funded according to the earliest initial application date.

#### F Priority Consideration for Inventory Property

By law, qualified beginning farmers and SDA's have first priority to purchase FSA inventory property. SDA's were added to the priority list effective May 22, 2008, enacted by §5302 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-246). A prevailing claimant **must** be a qualified beginning farmer or SDA to receive priority consideration. If a claimant does **not** qualify as a beginning farmer or SDA, the claimant will **not** receive priority over other beginning farmers and SDA's. However, according to the definition of priority consideration provided in the *Pigford* Consent Decree, Section 1 (k), if the property is not sold to a beginning farmer or SDA, a prevailing claimant will have priority and may purchase the property at the appraised value **before** it is put up for public bid.

## Notice FLP-510

### 3 Implementing the Consent Decree Provisions (Continued)

#### F Priority Consideration for Inventory Property (Continued)

FLC's shall follow 5-FLP, subparagraph 776 J to obtain current data on inventory properties. This information will be provided to prevailing claimants upon request. Alternatively, FLC's may develop a procedure to ensure that any prevailing claimant who requests a list of inventory properties in the State receives the list on a timely basis. FSA will also provide public notice of inventory property for sale as required by law. FSA employees will offer and, if requested, provide assistance to prevailing claimants in completing the necessary documents to submit a bid on FSA inventory property.

#### G Viewing Applications in a "Light Most Favorable"

When processing a loan application, authorized agency officials may exercise judgment in applying applicable regulations. When considering eligibility and credit criteria in a loan application submitted by a prevailing claimant, authorized agency officials shall view the criteria in a way that would be most beneficial to the applicant. Where there is a legitimate issue as to an item in the application, the prevailing claimant shall receive the benefit of the doubt within FSA procedures and regulations.

When there is an issue that would affect if a loan can be made:

- borderline or marginal decisions shall be made in favor of the applicant
- authorized agency officials will be prudent when reconsidering their assumptions
- the rationale for all conclusions about factors, such as yields, prices, expenses, debt repayment history, and similar components of the credit decision, **must** be thoroughly documented in the loan file.

**Note:** Viewing loan criteria in a "light most favorable" does **not** mean using any assumptions necessary, no matter how unrealistic or unreasonable, to justify determining an applicant's eligible for a loan.

**Examples:** Farmer Smith has had corn yields over the last 3 years of 110, 115, and 120 bushels per acre for a 3-year average of 115 bushels per acre. The county average is 120 bushels per acre. Farmer Smith needs a corn yield of 125 bushels to generate a positive cash flow. Under "light most favorable", the 125 bushels per acre could be used even though it is higher than Farmer Smith's 3-year average or the county average. The yield has gone up 5 bushels per acre for each of the last 3 years, so a yield of 125 bushels could be made this year.

Using the same information, assume 135 bushels an acre is needed for a positive cash flow. In this case, the yield of 135 bushels per acre could **not** be used because the yield is higher than any indicators of what Farmer Smith could reasonably expect to receive.



### 3 Implementing the Consent Decree Provisions (Continued)

#### H Claimants With Past Debt Forgiveness

The following are exceptions to debt forgiveness limitations.

- Loans written off at the direction of the adjudicator, arbitrator, or under the Consent Decree Stipulation and Order dated February 7, 2001, are **not** considered debt forgiveness. The County Office shall consult the Approved Civil Rights Claim Priority Activity database in ADPS to determine whether an applicant is a prevailing claimant and to check for a list of the claimant's loans previously subject to discharge under the Consent Decree. However, it should be noted that because of policy changes during the claims process, the Approved Civil Rights Claim Priority Activity database does **not** have a complete list of all loans subject to discharge under the Consent Decree for every claimant.

**Note:** This exception includes loans previously written off or debt settled by FSA or FmHA under agency servicing procedures, but if they still existed, would have been written off at the direction of the adjudicator, arbitrator, or under the Consent Decree Stipulation and Order dated February 7, 2001.

**Example:** The applicant had a 1982 FO and 1983 and 1985 OL's, all of which were written off in 1990. The adjudicator finds in favor of the claimant on a claim that discrimination occurred in relation to the 1983 OL. However, the claimant does not prevail on the 1982 FO. Under the Consent Decree Stipulation and Order dated February 7, 2001, any OL between 1983 and 1996 would be discharged. Since the 1983 and 1985 OL's were already written off, neither of these write offs will be held against the claimant. However, write off of the 1982 FO on which the claimant did not prevail will be counted against the claimant and thus may make the claimant ineligible for certain future loans.

- Such prior Consent Decree debt forgiveness also **will not** adversely affect an applicant who was a co-borrower or who was otherwise legally liable on the previously forgiven loan. The applicant's *Pigford* status is **not** relevant for this purpose.

**Example 1:** The applicant is the spouse of a deceased prevailing claimant who the adjudicator found in favor of with regard to a 1983 OL. The applicant was a co-borrower with the claimant on the 1983 OL, but did **not** file a Consent Decree claim in his or her own name. In 1990, the 1983 OL was debt settled. This debt settlement will **not** be held against the applicant.

## Notice FLP-510

### 3 Implementing the Consent Decree Provisions (Continued)

#### H Claimants With Past Debt Forgiveness (Continued)

**Example 2:** The applicant was the partner of a prevailing claimant who the adjudicator found in favor of with regard to a 1982 EM. The applicant was personally liable for the 1982 EM made to the partnership, but did **not** prevail on an individual claim. In 1992, the 1982 EM was debt settled. This debt settlement will **not** be held against the applicant.

**Example 3:** The applicant is the father of a prevailing claimant who the adjudicator found in favor of with regard to a 1983 OL. The applicant was **not** the primary borrower but co-signed the 1983 OL for his son, the prevailing claimant. In 1990, the 1983 OL was debt settled. This debt settlement will **not** be held against the applicant.

Any loan application received that falls under the exceptions to debt forgiveness limitations should be sent to LMD for guidance and concurrence on whether the applicant is eligible. State Offices shall forward those applications by Express Mail to the following.

**USDA FSA DAFLP LMD  
1280 Maryland Avenue, SW, Suite 240  
Washington DC 20024**

- Any debt forgiven under the Consent Decree, or previously written off debt that would have been discharged had it still existed, will **not** be considered in evaluating creditworthiness on future loan applications.

County Office will contact the State Office for guidance **before** making an adverse eligibility decision on any application from a prevailing claimant, when prior debt forgiveness is the basis for the adverse decision.

If the County Office has any reason to believe that an applicant was a co-borrower with a prevailing Consent Decree claimant or was otherwise legally liable for a loan that qualified for *Pigford* debt relief, the County Office will contact the State Office for guidance **before** making an adverse decision on such an applicant.

State Offices will contact Ann Smith, LMD, at [ann.smith@wdc.usda.gov](mailto:ann.smith@wdc.usda.gov) for guidance. Requests shall include the applicant's name, claim number, and a brief explanation of the applicant's situation.

## Notice FLP-510

### 3 Implementing the Consent Decree Provisions (Continued)

#### I Loan Term Limits for Prevailing Claimants

Loans received by prevailing claimants will count towards their term limits. This includes loans that were written off for those years in which discrimination was found to have occurred.

#### J Technical Assistance From a USDA Employee Acceptable to the Applicant

3-FLP, subparagraph 41 D requires that authorized agency officials provide assistance as necessary to all applicants in completing an application. In addition, authorized agency officials **must** offer assistance to a prevailing claimant when a loan application has been submitted. This assistance will cover the full range from helping fill out the application to developing a farm plan, and locating specialists for advice on new or improved enterprises, and all other aspects of the loan application process. The authorized agency officials providing the technical assistance **must** be acceptable to the applicant. Prevailing claimants may request that SED's assign a different employee to assist them if the staff in the State or County Office is **not** acceptable.

#### K Denial of Requests by Prevailing Claimants

Denial of a request for priority consideration for which the applicant does **not** qualify, for example, a second request for priority consideration for OL, does **not** require appeal rights, but is subject to a review by NAD for a determination if the decision is otherwise appealable.

Claimants may also ask the court-appointed monitor for assistance about FSA's determination.

Notification of denial of assistance based upon regulatory requirements, for example, delinquency on a Federal debt, inadequate security, or lack of repayment ability, will be completed according to 3-FLP, Part 10, subject to communication requirements in this notice.

Frequently Asked Questions and Answers

<b>Questions and Answers</b>	
<b>Q1. How can I verify that someone is a prevailing claimant?</b>	<b>A1.</b> Claimants can be verified through the ADPS Civil Rights database. See the ADPS Manual, Chapter 22.
<b>Q2. Is a handwritten request for priority consideration acceptable?</b>	<b>A2.</b> Yes, as long as the request is in writing and states what is being requested, such as priority for OL, FO, or inventory property, it is acceptable.
<b>Q3. A prevailing claimant applied for OL and EM assistance and requested priority consideration. How should the EM application be processed since priority does not apply to EM applications?</b>	<b>A3.</b> Although EM does not get priority, both applications should move forward at the same time according to the OL processing priority.
<b>Q4. A claimant’s daughter has applied for an FO loan and submitted a written document assigning her father’s priority consideration to her together with a written request for priority consideration. Does she receive priority consideration?</b>	<b>A4.</b> No. Rights under the Consent Decree cannot be transferred or assigned. Process the application in the normal manner according to regulations.
<b>Q5. Can the heirs of a deceased prevailing claimant receive priority consideration?</b>	<b>A5.</b> No. If a claimant is deceased, the entitlement to the special considerations in the Consent Decree ceases.
<b>Q6. Should the \$50,000 or other settlement amount and elimination of FSA debt be considered in determining a prevailing claimant’s eligibility?</b>	<b>A6.</b> Prevailing claimants must be eligible for the loan requested. Therefore, the test for credit applies. The settlement payment and forgiveness of FSA debt might enhance a prevailing claimant’s financial condition to the point that commercial credit may be available, with or without an FSA guarantee. Remember that while the forgiven FSA debt may have a positive effect on the applicant’s financial condition, the forgiveness will not be considered in evaluating creditworthiness and is not counted in eligibility.

## Frequently Asked Questions and Answers (Continued)

<b>Questions and Answers</b>	
<b>Q7. If an application under priority consideration is rejected or withdrawn, has the applicant used their 1 time priority for that type of loan?</b>	<b>A7.</b> If an application under priority consideration is rejected, the claimant has used their priority consideration for that type of loan. In the case of withdrawal, if the applicant requests the application be withdrawn, it is to be assumed the request for priority consideration is withdrawn as well. The claimant can request priority consideration again. However, if FSA withdraws the application, for example, as the result of a failure to respond to a letter requesting additional information, the priority consideration for that type of loan has been exercised and cannot be used again. If there are questions in a specific case, obtain guidance from the contacts listed in subparagraph 1 C.
<b>Q8. Can an entity applicant exercise priority consideration on behalf of 1 of its members?</b>	<b>A8.</b> Possibly. OGC has advised that because each entity is different, an OGC determination will be necessary on a case-by-case basis. If there are questions in a specific case, obtain guidance from the contacts listed in subparagraph 1 C.
<b>Q9. Can an applicant withdraw a request for priority consideration, and if so, at what point in the process is the priority consideration considered irrevocable?</b>	<b>A9.</b> An applicant may withdraw a request for priority consideration at any time until the loan application, on which priority consideration was requested, is determined to be complete. When an application is determined to be complete, the applicant has received priority consideration in loan processing and cannot withdraw the request.

Prevailing Claimant Priority Consideration Letter

Notification of Exercise of Priority Consideration under Consent Decree

To: Farm Service Agency

\_\_\_\_\_ (Fill in the address where the loan application was or will be submitted.)
\_\_\_\_\_

This memorandum constitutes written notification that I am exercising priority consideration granted to me in accordance with paragraph 11 of the Class Action Consent Decree. I am using my priority consideration for: (Please see instructions below and mark 1 box below; a separate form must be used for each item in which priority is sought)

- [ ] An operating loan.
[ ] An ownership loan.
[ ] Purchase or lease of farm property in FSA inventory.

I am entitled to this consideration by virtue of my claim approved as follows:

Name: \_\_\_\_\_ Claim Number: \_\_\_\_\_

Address: \_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_

Phone: \_\_\_\_\_

I hereby exercise my priority as set forth above.

\_\_\_\_\_
Claimant/Applicant Signature Date

Instructions

The Consent Decree under which your claim has been approved entitles you to priority consideration for the purchase or lease of one inventory property from FSA, one direct farm ownership loan, and one direct operating loan. YOU MUST EXERCISE YOUR RIGHT TO PRIORITY CONSIDERATION ON ANY OF THESE BY THE LATER OF APRIL 14, 2005, OR TWO YEARS AFTER THE DATE ON WHICH YOU ARE COMPLETE IN THE CONSENT DECREE CLAIMS PROCESS, WHICHEVER IS LATER. YOUR LOAN APPLICATION MUST BE SUBMITTED ALONG WITH YOUR PRIORITY CONSIDERATION REQUEST. YOU MAY ALSO REQUEST PRIORITY CONSIDERATION ON A PENDING LOAN APPLICATION. The agreement requires that you request this priority in writing. Your use of this form is not required but it is designed to make it easy for you to request your priority consideration. If you do not use this form you must give FSA other written notice of your intent to exercise your priority. If FSA does not receive written notice of your exercise of priority, your application will be processed in the normal manner. You should note that priority consideration does not guarantee you will receive a loan. You must be otherwise eligible and qualified to receive the loan.

Marking the boxes- If you are applying for a loan to buy equipment or livestock, pay production expenses like seed, feed, fertilizer, and chemicals, OR pay general farm expenses and family living expenses, please mark the box for "An operating loan." If you are applying for a loan to buy a farm or farm land and/or build buildings on a farm please mark the box for "An ownership loan." If you wish to buy or lease a specific farm property owned by FSA, please mark the box for "Purchase or lease of farm property in FSA inventory."

Additional Help- If you need help filling out this form letter, a loan application, or any other forms needed to apply for a loan, please ask FSA staff- they are required to help you. If you have questions about your rights under the Class Action Consent Decree you should consult an attorney, FSA staff cannot give legal advice.

## **Exhibit 2**

# Monitor Update: Debt Relief for Prevailing Class Members

Originally Issued: March 19, 2001

**Date Revised: July 11, 2008**

Update 010

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*Brewington v. Schafer (D.D.C.)*  
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**This is not a USDA publication.**

## Debt Relief for Prevailing Class Members

### 1. Introduction

The Consent Decree in *Pigford* provided debt relief for prevailing credit claimants. This Monitor Update describes recent developments regarding debt relief and describes the debt relief claimants will receive.

### 2. Debt Relief Available Only for Successful Credit Claims

In *Pigford*, debt relief can be granted only as a result of a successful Track A or Track B credit claim. In general, a credit claim is a claim based on the claimant's effort to get a farm loan from USDA. For example, if a claimant claimed that USDA discriminated against him or her in the making of a Farm Operating Loan or a Farm Ownership Loan, the claimant made a credit claim.

A noncredit claim, on the other hand, is a claim that is not based on an effort to get a farm loan—but instead is based on the claimant's effort to obtain some other benefit from USDA. For example, if a claimant claimed that USDA discriminated against him or her in providing a USDA disaster payment, or in implementing a USDA conservation cost-share program, the claimant made a noncredit claim.

### 3. Legal Authority for Debt Relief

Debt relief for claimants who prevail on a credit claim is based on several legally binding documents.

#### a. Consent Decree

The Consent Decree provides that a claimant who prevails on a credit claim receives a discharge of certain outstanding USDA debts. The discharge applies to those debts that were incurred under, or affected by, the USDA program or programs that were the subject of a prevailing credit claim.

#### b. February 7, 2001 Stipulation and Order

On February 7, 2001, Judge Paul L. Friedman signed a Stipulation and Order that discusses the details regarding the debt discharge that claimants will receive in credit cases. The Stipulation and Order is based on an agreement that was reached by the government and Class Counsel. According to the Stipulation and Order, the government



and Class Counsel had certain debts in mind when they wrote the part of the Consent Decree that provides for debt relief. These debts are more clearly defined in the Stipulation and Order.

**c. February 22, 2008 Opinion and Order**

On February 22, 2008, Judge Paul L. Friedman signed an Opinion and Order that interprets certain Consent Decree provisions regarding debt relief.

**d. USDA Agreement**

USDA has agreed that the principles outlined in this Monitor Update are consistent with how USDA implements debt relief to prevailing claimants.

**4. Debts to Be Discharged**

Certain USDA debts will be discharged as a result of the *Pigford* settlement. The question of which loans will be forgiven can be complicated. The following sections explain debt forgiveness in some detail.

**a. Debts Affected by Discrimination**

In general, if the Adjudicator or Arbitrator specifically identified a certain debt as being affected by discrimination, this debt will be discharged. For example, if the Adjudicator found discrimination in the late funding of the claimant's 1984 Operating Loan, the 1984 Operating Loan that was affected by discrimination qualifies for *Pigford* debt relief.

Two important points flow from this finding of discrimination.

First, the date of the discrimination matters for the purposes of debt discharge. For example, if the Adjudicator found that there was discrimination in a loan denial that took place on April 15, 1990, that date creates an important starting point for debt discharge purposes.

Second, the type of loan that was found to be the subject of discrimination matters for the purpose of debt discharge. In general, a loan is of the same type if it was incurred under the same loan program. The Operating (OL) Loan Program is one USDA program, the Farm Ownership (FO) Loan Program is a separate program, the Emergency Loan program (EM) is a separate program, and so forth.

**b. Some Debts Incurred After the Discrimination Occurs**

The Adjudicator or Arbitrator will have found discrimination based on a certain event—for example, the denial of a loan or of loan servicing. If, after the date of discrimination, the claimant incurred additional debt that was of the same type as the debt that was subject to discrimination, the additional debt will be discharged.

For example, if the Adjudicator found that USDA discriminated against the claimant in denying a Farm Operating Loan in 1994, and USDA then made a Farm Operating Loan to the claimant in 1995, the 1995 Operating Loan will be discharged. This is true even though the Adjudicator did not find discrimination in the 1995 Operating Loan.

**c. Loans Made After December 31, 1996—No Debt Discharge**

In general, loans made after the end of the period covered by the Consent Decree—December 31, 1996—are not subject to discharge as a result of the Consent Decree.

For example, if a claimant received a Farm Operating Loan in 2000, this loan cannot be discharged as a result of the Consent Decree.

If, however, a loan application was filed before the end of the class period, and the loan resulting from that application closed after the end of the class period, the loan may be discharged.

For example, a claimant might have submitted a loan application in November 1996 for a Farm Ownership Loan, and, based on that application, received a Farm Ownership Loan in May 1997. If the Adjudicator found discrimination in the making of the May 1997 Farm Ownership Loan, that loan would be forgiven even though the loan was made after the end of the class period.

**d. Rescheduling, Reamortization, and Defining When a Debt Is Incurred**

As is noted above, the date on which a loan was incurred is important for figuring the right to debt relief in *Pigford*. For *Pigford* debt relief purposes, a loan is considered “incurred” at the time the loan was originally made, not at the time a loan was rescheduled or reamortized.

For example, if the only discrimination found by the Adjudicator was in the making of an Emergency Loan in 1992, the 1992 Emergency Loan would normally be discharged, as would Emergency Loans made from 1992 through the end of the class period. If USDA rescheduled the 1992 Emergency Loan in 1998, for the purposes of *Pigford* debt relief, the loan was still incurred in 1992, and would be forgiven. If the Emergency Loan had been originally incurred by the claimant in 1998, it would not normally be forgiven.

It is also possible for a loan to have been incurred before the class period, and later rescheduled during the class period.

For example, if the only discrimination found by the Adjudicator was in the making of an Operating Loan in 1984, the 1984 Operating Loan would normally be discharged, as would Operating Loans made from 1984 through the end of the class period. If the claimant had also received an Operating Loan in 1979 that was rescheduled in 1986, for the purposes of *Pigford* debt relief, the loan was incurred in 1979 and would not be forgiven because it was incurred before the discrimination occurred.

**e. Some Debts Incurred at the Same Time as the Discrimination**

If the claimant incurred additional debt of the same type as the debt that was subject to discrimination, and incurred the additional debt at the same time as the discriminatory act, the additional debt will be discharged.

For example, if the Adjudicator found that discrimination occurred in the late funding of a claimant’s one-year 1990 Operating Loan for annual production purposes, that loan would normally be forgiven under *Pigford*. If, on the same day that the claimant received

the one-year Operating Loan, he or she also received a seven-year Operating Loan for the purchase of equipment or livestock, the seven-year Operating Loan incurred at the same time as the one-year Operating Loan would be forgiven even if the Adjudicator did not specifically discuss that loan.

**f. Exception to Loan Program Rules—Switch Cases**

As is noted above, debt forgiveness in *Pigford* largely follows the loan programs that are available from USDA.

For example, in general, if an Adjudicator found discrimination in the making of an Operating Loan in 1990, the claimant will receive debt relief for Operating Loans received from 1990 through 1996. If the claimant also received a Farm Ownership Loan in 1990, but the Adjudicator did not find discrimination in the making of a Farm Ownership Loan, the Farm Ownership Loan would generally not be eligible for debt relief.

An exception to this general rule occurs in what might be called “switch cases.” In some cases, the Adjudicator or Arbitrator made an explicit finding of discrimination with respect to a specific loan, and USDA determines that the actual loan at issue was clearly from a different loan program and was simply misidentified by the Adjudicator or Arbitrator. In these cases, USDA will “switch” the finding to the correct loan program and implement debt relief based on the actual loan program in which the Adjudicator or Arbitrator found discrimination. In other words, if the Adjudicator or Arbitrator found discrimination in the making of a loan, but made a mistake in identifying the type of loan program in question, the loan will be forgiven even if the loan program was incorrectly identified. In these cases, the claimant will generally not receive debt forgiveness for the loan type that was mistakenly identified by the Adjudicator or Arbitrator.

For example, an Adjudicator may have found discrimination in the making of an Operating Loan in 1991, but it turns out that the only loan made to the claimant in 1991 was an Emergency Loan. If the facts establish that the loan referred to by the Adjudicator was actually an Emergency Loan, the remedy will be “switched” to the Emergency Loan and the Emergency Loan will be forgiven.

Similarly, an Adjudicator may have found discrimination in the making of a 1981 Farm Ownership Loan but in fact the loan at issue was a 1981 Emergency Loan for real estate purposes. If the 1981 Emergency Loan is the loan referred to by the Adjudicator, the debt relief would be “switched” to the Emergency Loan program.

As another example, if the Adjudicator found discrimination in the making of Emergency Loans from 1981 through 1984, but the claimant received Emergency Loans from 1981 through 1983 and received an Operating Loan in 1984, the remedy for 1984 will be “switched” to the Operating Loan program. In this case, the claimant’s 1981, 1982, and 1983 Emergency Loans and 1984 Operating Loan were the subject of the finding that they were “affected by” discrimination and qualify for debt relief.

There are rare cases in which the Adjudicator found discrimination in the making of a loan in one loan program and USDA's records indicate that the claimant received two loans at the same time that were affected by the same act of discrimination.

For example, an Adjudicator may have found discrimination in the late funding of an Operating Loan in 1991. If the facts establish that the claimant's 1991 loan application resulted in both an Operating Loan and an Emergency Loan being made to the claimant, the remedy will be "switched" to include both the Operating Loan and the Emergency Loan and both loans will be forgiven.

In addition, once the remedy of loan forgiveness has been switched to a different loan program, the switch applies to debt forgiveness for loans in the same program that were made for the rest of the class period. Some USDA farm loan programs authorize the use of funds for a variety of purposes. Once the loan program is identified, however, the use of loan funds for particular purposes does not affect the eligibility of subsequent loans in the same loan program for *Pigford* debt relief.

For example, if debt relief is "switched" from the 1981 Operating Loan program to the 1981 Emergency Loan program, the claimant's Emergency Loans received between 1981 and 1996 qualify for debt relief regardless of whether the Emergency Loans were used for operating or real estate purposes.

#### **g. USDA Forgives All Liability for Claimant**

In some cases the claimant will already have had the debt forgiven through USDA's loan servicing or debt settlement regulations. When this happens, the claimant is sometimes still possibly liable to repay part of the debt. This can occur, for example, with a shared appreciation agreement that is signed after a debt write-down. If the original debt is forgiven under *Pigford*, the debt forgiveness applies to all claimant liability for that debt, including shared appreciation and other similar obligations.

### **5. Debt Forgiveness and Loan Servicing**

In cases concerning a prevailing claim based upon loan servicing, USDA will discharge loans that were in effect at the time of the loan servicing application or were the subject of the loan servicing request, when the Adjudicator or Arbitrator specifically provided for such discharge. "Loan servicing" as used here means various types of loan restructuring available to eligible farm loan borrowers. These include, but are not limited to: primary loan servicing options previously found in Code of Federal Regulations, Title 7, Part 1951, subpart S, such as rescheduling, reamortization, consolidation, limited resource interest rates, deferrals, write-downs, and net recovery buyouts; preservation loan servicing opportunities, such as homestead protection, credit sales, and leaseback/buyback; debt settlement options previously found in Code of Federal Regulations, Title 7, Part 1956, such as adjustment, compromise, cancellation, and charge off; and other options, including, disaster set aside, subordinations, and the release of valueless liens.

The parties are not in agreement with respect to the appropriate debt relief in cases concerning a prevailing claim based upon loan servicing when the Adjudicator or Arbitrator

did not specifically identify the loans to be discharged. In this latter situation, a claimant should contact class counsel or the Monitor's office for assistance.

## **6. Debts Not to Be Forgiven—Older Lawsuits**

An important exception applies to all of the above debt discharge discussion. No debt discharge will apply to any debts that were the subject of litigation separate from this lawsuit if there was what is known as a final judgment in that separate lawsuit, and if all of the appeals for that separate lawsuit have been forgone or completed.

For example, if a claimant was involved in a lawsuit with USDA that was begun and completed in 1990, and the result of the 1990 lawsuit was that USDA got a judgment against the claimant, and all appeals have been exhausted, debt discharge in the *Pigford* settlement will not change the result of the 1990 lawsuit.

## **7. Refunds of Voluntary Payments**

Claimants sometimes make voluntary payments on loans that are subject to discharge under the Consent Decree. In most cases, voluntary payments that a *Pigford* claimant paid on a debt that was later forgiven under *Pigford* will not be refunded. However, USDA will refund voluntary payments made after the date of the initial prevailing decision that gave the claimant the right to debt relief on the loan on which voluntary payments were made.

### **a. Most Common Cases—No Refund**

In most cases, the claimant will not receive a refund of payments he or she made.

For example, if a claimant received an Operating Loan in 1993 and made payments on that loan in 1994 and 1995, those payments will not be refunded even if under *Pigford* the 1993 Operating Loan became eligible for forgiveness.

### **b. Refunds for Payments After Adjudicator or Arbitrator Decision**

Payments made by the claimant after the claimant won the right to debt relief in an Adjudicator or Arbitrator decision will generally be refunded. However, such refunds might be applied to other delinquent debt that is outstanding at the time of the refund but that is not subject to discharge under the Consent Decree.

### **c. Defining When an Adjudicator or Arbitrator Decision Takes Effect**

As noted above, the date the claimant won the right to debt relief in an Adjudicator or Arbitrator decision is important for deciding whether the claimant will get a refund of a payment made on a debt. Because many Adjudicator and Arbitrator decisions were the subject of a petition to the Monitor, and in some cases were amended by the Adjudicator without a petition, defining when a claimant prevailed on certain debt relief can be complicated.

***(1) Claimant Prevails, No Petitions***

If a claimant prevailed on a claim in his or her Adjudicator decision and neither side petitioned the decision to the Monitor, the claimant qualified for debt relief on the date of that Adjudicator decision.

For example, if an October 1, 1999 Adjudicator decision found discrimination with respect to USDA's 1995 Operating Loan program and neither party petitioned the Monitor on the decision, USDA will refund payments the claimant made on the 1995 Operating Loan on or after October 1, 1999, the date of the original Adjudicator decision.

***(2) Claimant Prevails, USDA Petition Denied by Monitor***

If a claimant prevailed on a claim in his or her Adjudicator decision and a USDA petition was denied by the Monitor, for debt relief purposes, the claimant prevailed on the date of the original Adjudicator decision.

For example, if an October 1, 1999 Adjudicator decision found discrimination with respect to USDA's 1995 Operating Loan program, USDA petitioned the Monitor, but the petition was denied, USDA will refund payments the claimant made on the 1995 Operating Loan on or after October 1, 1999, the date of the original Adjudicator decision.

***(3) Claimant Prevails, USDA Petitions, Monitor Directs Reexamination, but Adjudicator Reaffirms Claimant Win***

If a claimant prevailed on a claim in his or her Adjudicator decision, and a USDA petition to the Monitor resulted in the Monitor sending the decision to the Adjudicator for reexamination, but the Adjudicator reaffirmed the original decision, the claimant qualified for debt relief on the date of the original Adjudicator decision.

For example, if an October 1, 1999 Adjudicator decision found discrimination in USDA's 1995 Operating Loan program, USDA petitioned the Monitor, the Monitor sent the decision back to the Adjudicator, and the Adjudicator issued a reexamination decision in 2005 that reaffirmed the Adjudicator's original decision, including a finding of discrimination with respect to the claimant's 1995 Operating Loan, USDA will refund payments the claimant made on the 1995 Operating Loan on or after October 1, 1999, the date of the original Adjudicator decision.

***(4) Claimant Loses, Claimant Petitions, Monitor Directs Reexamination, and the Adjudicator Finds Discrimination in the Reexamination Decision***

If a claimant originally lost a claim in his or her Adjudicator decision, but petitioned to the Monitor, and the Monitor sent the decision back to the Adjudicator for reexamination, the claimant may not have prevailed in an Adjudicator reexamination decision until a long time after the original adjudication. In this case, the claimant's loans did not qualify for debt relief until the later Adjudicator reexamination decision in which the claimant won.

For example, if an October 1, 1999 Adjudicator decision denied the claimant any relief, the claimant petitioned the Monitor, the Monitor sent the decision back to the Adjudicator, and the Adjudicator issued a reexamination decision in 2005 that resulted in forgiveness of a 1995 Operating Loan, USDA will refund payments by the claimant on the 1995 Operating Loan on or after the date of the Adjudicator reexamination decision in 2005. Payments made before the 2005 reexamination decision will not be refunded.

***(5) Reexamination Decisions That Do Not Affect Relief of a Particular Debt***

If a claimant originally prevailed in an Adjudicator decision that was later the subject of a petition, it will sometimes be the case that the petition and the later decisions based on the petition did not address the original finding that resulted in relief for a particular debt. In such a case, the loans identified in the original decision qualified for debt relief on the date of that initial prevailing Adjudicator decision.

For example, if an October 1, 1999 Adjudicator decision found discrimination in the making of a 1995 Operating Loan, the claimant might have petitioned the Monitor to seek a reexamination of the Adjudicator's refusal to find discrimination in the making of a 1982 Farm Ownership Loan. If the Claimant won the 1982 Farm Ownership Loan claim on reexamination and the 1995 Operating Loan claim was not disturbed by the petition process, the relevant Operating Loans qualified for debt relief on October 1, 1999, the date of the original prevailing Adjudicator decision. In this case, the relevant Farm Ownership Loans qualified for debt relief on the date of the Adjudicator's reexamination decision. USDA will refund payments made on the respective loans on or after the dates that the loans qualified for debt relief.

***(6) Claimant Prevails and Petitions on Debt Relief, Monitor Directs Reexamination to Correct Debt Relief***

If a claimant originally prevailed in an Adjudicator decision that, under the general debt relief rules of *Pigford*, would have provided debt relief, it will sometimes be the case that the claimant petitioned regarding the debt relief in question. If the Monitor sent the decision back to the Adjudicator for reexamination of debt relief, the Adjudicator's reexamination decision clarifying debt relief did not change the date that the claimant's loans qualified for debt relief. The claimant's loans qualified for debt relief on the date of the original prevailing Adjudicator decision.

For example, if an October 1, 1999 Adjudicator decision found discrimination in the making of a 1990 Operating Loan but did not award debt relief, the claimant might have petitioned the Monitor for debt relief on his outstanding 1990 Operating Loan. Although the Adjudicator specifically awarded Operating Loan debt relief for the first time in the reexamination decision, the claimant's 1990 Operating Loan qualified for debt relief on October 1, 1999, when the Adjudicator found discrimination in USDA's 1990 Operating Loan program. In this case, USDA will refund payments made by the claimant on or after October 1, 1999.

## **8. Refund of Offsets**

Many claimants have had “offsets” of payments that would usually have been paid to them by the federal government. Offsets can be taken for USDA farm program payments, as well as other federal payments, such as Social Security benefits and income tax refunds. Offset funds are applied to a borrower’s debt to the government instead of being paid to the borrower.

Offsets are important for *Pigford* because some of the money offset by the federal government was applied to loans that were forgiven as a part of the lawsuit. USDA will refund offsets taken after January 1, 1999, as payment on any loans subject to discharge under the Consent Decree. Offsets taken before January 1, 1999, will not be refunded. However, such refunds might be applied to other delinquent debt that is outstanding at the time of the refund but is not subject to discharge under the Consent Decree.

## **9. Correcting Mistakes in Debt Relief**

USDA has agreed that if they mistakenly provided debt relief that was not due to a claimant, and also failed to provide the debt relief that was due to that claimant, USDA will notify class counsel about the mistake. USDA will also provide the claimant’s loan records to class counsel and give class counsel the choice of whether USDA should implement the correct debt relief or allow debt relief to stand as implemented. In other words, once USDA has forgiven a debt through *Pigford*, USDA will not reverse the debt forgiveness and reinstate the debt unless the claimant’s lawyer informs USDA that the claimant agrees to the change.

## **10. Debt Forgiveness and Future Participation in USDA Programs**

USDA agrees that debt forgiveness under *Pigford* will not affect the claimant’s ability to participate in USDA farm loan programs—either in receiving or servicing a loan. This means, for example, that *Pigford* debt forgiveness will not affect the claimant’s creditworthiness if the claimant seeks another loan with USDA.

## **11. More Information**

For more information about the February 7, 2001 Order, the February 22, 2008 Order, or for a copy of the Consent Decree or the Orders, please call the Monitor’s office at the phone number listed below.

Anyone who has any question regarding debt relief should call the Monitor’s office toll free at 1-877-924-7483.