IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY C. PIGFORD, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	97-1978 (PLF)
ANNE VENEMAN, SECRETARY,	)	
THE UNITED STATES DEPARTMENT	)	
OF AGRICULTURE,	)	
	)	
Defendant.	)	
	)	
CECIL BREWINGTON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	98-1693 (PLF)
ANNE VENEMAN,	)	
	)	
Defendant.	)	

ARBITRATOR'S SEVENTH REPORT ON THE LATE-CLAIM PETITION PROCESS

The Court has held that "all putative class members seeking permission to late file under Section 5(g) of the Consent Decree are directed to review the terms of that provision, as interpreted by the Court and the Arbitrator. If, having reviewed the requirements for eligibility under Section 5(g), petitioners believe that they are entitled to late file, petitioners must seek permission directly from the Arbitrator, Michael K. Lewis." *Pigford v. Veneman*, 201 F. Supp. 2d 139 (D.D.C. May 10, 2002); see also, *Pigford v. Veneman*, No. 97-1978 (D.D.C. Dec. 20, 1999); *Pigford v. Veneman,* No. 97-1978 (D.D.C. Jul. 14, 2000). This is

the Arbitrator's sixth semi-annual report on the status of the review of late claims pursuant to Paragraph 5(g) of the Consent Decree.

Background

Since December 20, 1999, the Arbitrator has had the responsibility to determine whether a putative claimant who missed the October 12, 1999 deadline may file a late claim. A putative claimant may file late if he "demonstrates that his failure to submit a timely claim was due to extraordinary circumstances beyond his control." Consent Decree, ¶5(g). In the Memorandum Opinion and Order of November 26, 2001, the Court found that the Arbitrator's "late-claim petition processes are more than sufficient to ensure that Section 5(g) of the Consent Decree is properly and justly applied and to assure that fair process is afforded." *Pigford v. Veneman*, 173 F. Supp. 2d 38, 40 (D.D.C. 2001). As a result, the Court has declared that "it has retained no authority to review the Arbitrator's rulings on petitions to late file… Nor has it retained authority to control or review the procedures that the Arbitrator employs to reach his decisions." *Pigford v. Veneman*, 2003 U.S. Dist. LEXIS 9210, *4 (D.D.C. Jun. 4, 2003). Most recently, the Court ruled that it "will not consider any such petition, either at the first instance or following denial and/or reconsideration by the Arbitrator." *Pigford v. Veneman*, No. 97-1798 (D. D.C., filed Sept. 13, 2004).

Processes and Procedures

Forms & Filing

Since the issuance of the First Report, there have been no changes to the procedures relating to the filing of a petition to file a late claim. Approximately 66,000 petitions were filed by the September 15, 2000 deadline, and an additional 7,800 putative claimants filed petitions after that deadline. Only a few putative late claimants have been able to convince the Arbitrator that the Facilitator or the Arbitrator misread the postmark on

their late claim petition. All other late claims postmarked after September 15, 2000 have been rejected as outside the scope of the July 14, 2000 order.

Categorization & Research

Since the issuance of the first report, there have been no changes in the categorization and research methods described therein. The Arbitrator continues to use the same criteria in the review process. Currently, one researcher investigates late claim petitions where further research is necessary to make an informed decision.

As of March 31, 2004, the Arbitrator had completed all initial decisions on the petitions and notified the petitioners. The Arbitrator is aware, however, that the Facilitator is making a thorough audit of all late claim petitions to ensure that none have been overlooked. Any additional timely petitions discovered after this point have been and will continue to be reviewed on a priority basis. Of the 65,956 timely petitions, 63,824 were denied and 2,132 were approved.

Reconsideration

As described in prior reports, putative claimants whose late claim petitions are denied may make a written request for reconsideration. The reconsideration process remains as described in those reports.

Putative claimants have a 60-day window in which to submit a request for reconsideration. Approximately 24,100 requests for reconsideration have been filed, 21,017 of which were sent within the 60-day window. As the numbers indicate, slightly under one-third of all denied petitioners have made timely requests for reconsideration.

The Facilitator began forwarding the requests for reconsideration to the Arbitrator in August 2002. As of the date of this report, the period for filing timely requests for reconsideration has largely expired; those that emerge as a result of the Facilitator's audit are given the full 60 day window. As timely requests for reconsideration are filed, they are recorded by the Facilitator and forwarded to the Arbitrator.

Requests for reconsideration are distributed to researchers for investigation. The researchers review the underlying petition, the information from any interviews with the petitioner, any previously submitted documentation, and the information submitted with the request for reconsideration. Researchers also may contact the putative claimant for further clarification. Upon completing his or her investigation, each researcher is responsible for drafting an individually tailored response to the request for reconsideration for the Arbitrator's review. All requests for reconsideration forward by the Facilitator to date have been investigated by researchers and have been returned to the Arbitrator's office for further review.

As of the filing of the Sixth Report on June 4, 2004, decisions had been made in 731 reconsideration requests, with 99 requests resulting in approved petitions. As of November 30, 2004, decisions had been made in 3,015 reconsideration requests, with 138 requests resulting in approved petitions. The Arbitrator's decision on a reconsidered petition is final.

Congressional Inquiry

As the Court may be aware, on September 24, 2004, Hon. F. James Sensenbrenner, Jr., Chairman of the Committee on the Judiciary of the U.S. House of Representatives invited the Arbitrator to testify at an oversight hearing before the Subcommittee on the Constitution on the "Status of the Implementation of the *Pigford v. Glickman* Settlement." This hearing took place on September 28, 2004. The Arbitrator is aware of several pleadings before the Court which partially quote, paraphrase or otherwise reference his testimony. In order to ensure that his words are not misconstrued due to editing or otherwise mischaracterized, attached as Appendix A is a copy of his transcribed oral statement (pp.195-197), prepared written statement (pp. 198-199), questions presented and answers provided (pp. 203-205, 209-210, 213 & 218), and supplemental written statement (pp. 1594-1598)[1] in *Status of the Implementation of the Pigford v. Glickman Settlement: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong., Serial No. 108 (2004).

[1] The Arbitrator is not including the second appendix to the supplemental written statement (pp. 1599-1655) as it consists solely of copies of the six prior reports on the late-claim petition process, on file with the Court.

Results to Date

Presented in tabular form, the status of the late claim process follows below. As noted in the Fourth Report, as of May 27, 2003, the Claims Facilitator began including Late Claim Petition information in its weekly status report. The Facilitator reports the number of affidavits and requests for reconsideration filed. The Arbitrator is using the Claims Facilitator's methodology, which inflates all petition numbers due to the fact that individual petitioners have filed multiple petitions to file claims and requests for reconsideration.

Approximate number of Petitions to File Late Claims:	73,800
Approximate number filed before Sept. 15, 2000:	66,000
Number of petitions approved:	2,132
Number of petitions denied:	63,824
Approximate number of Requests for Reconsideration:	24,100
Approximate number filed within 60 days:	21,000
Number of reconsideration requests decided:	3,015
Number of reconsideration requests resulting in approval of petition:	138

Conclusion

The Arbitrator's review of late claim petitions is proceeding consistent with the Arbitrator's previous reports, with the most notable change during the reporting period being that of completing the initial review of all petitions. As noted in the Sixth Report on the Late-Claim Petition Process, he has notified nearly all those who will have prevailed on their request for reconsideration of his decision. The Arbitrator is conducting a thorough review of the remainder to ensure that no petitioner who should prevail upon

reconsideration is overlooked. As things stand now, all those who do not prevail on their request for reconsideration will receive detailed letters explaining the Arbitrator's decision by the end of the first quarter of 2005.

Date: December 1, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this electronically filed document was transmitted via first-class mail and facsimile on December 1, 2004, to the following:

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APPENDIX A

STATUS OF THE IMPLEMENTATION OF THE PIGFORD V. GLICKMAN SETTLEMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

SEPTEMBER 28, 2004

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SEPTEMBER 28, 2004

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MATERIAL SUBMITTED FOR THE HEARING RECORD

STATUS OF THE IMPLEMENTATION OF THE *PIGFORD* V. *GLICKMAN* SETTLEMENT

TUESDAY, SEPTEMBER 28, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 4:05 p.m., in Room 2141, Rayburn House Office Building, Hon. Steve Chabot (Chair of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order. This is the Judiciary Subcommittee on the Constitution. I'm Steve Chabot, the Chairman of the Committee. I welcome everyone here this afternoon and I'd like to thank everyone for being here today for this very important hearing.

However, I feel that it's necessary to qualify that statement by saying that it's unfortunate that we even have to be here because time after time it appears that the wrong choices have been made by those in positions of authority. I trust that today's hearing will enable this Subcommittee to examine those issues that are of utmost importance and will enable us to make a substantive and series of substantive recommendations to remedy the injustices that have occurred.

I would like to take this opportunity to recognize a few people: Arianne Callender of the Environmental Working Group; Mr. John Boyd, with the National Black Farmers Association; Mr. Thomas Burrell, with the National Black Farmers and Agriculturists Association; and Shirley Sherrod, with the Federation of Southern Cooperatives, for taking the time to provide this Committee with information. Through these individuals and others, it has come to this Subcommittee's attention that a second hearing is necessary in order to take additional testimony from additional witnesses, and some of the people that I just mentioned may very well be witnesses at the next hearing. I've directed my staff to investigate the scheduling of a second hearing and we will work with folks to make sure that that's at as convenient a time as possible.

When slavery was ended in the United States, our Government made a promise, a restitution of sorts, to the former slaves that they would be given 40 acres and a mule. While we can debate whether this allotment was intended to compensate the freed slaves for their involuntary service, what is clear is that this promise was intended to help freed slaves be independent economically and psychologically as holders of private property.

case, will be sent to the Facilitator, Adjudicator, or Arbitrator, and copies of the letter will be sent to you and to the government. If I decide not to direct reexamination, I will send you a letter explaining my reasoning.

16. Can USDA ask the Monitor to review cases too?

Yes. When USDA files Petitions for Monitor Review, USDA will be held to the same standards as those described above for claimants.

17. Can I appeal the Monitor's decision?

No. The Monitor's decision is final. If the Monitor decides not to grant reexamination in your case, there are no more opportunities for appeal under the Consent Decree in the *Pigford* lawsuit. If you think there was an important clerical or administrative error in your decision, you may ask the Monitor to review the decision and consider issuing an amended decision.

Mr. CHABOT. Thank you for your testimony this afternoon, Ms. Roth.

Mr. Lewis, you're recognized for 5 minutes.

STATEMENT OF MICHAEL K. LEWIS, ADJUDICATOR, *PIGFORD* V. *GLICKMAN*

Mr. LEWIS. Thank you, Mr. Chairman Members of the Committee. My name is Michael Lewis. I am the *Pigford* arbitrator. It is a pleasure to be here today. I appreciate the opportunity to testify.

I have had various roles in the progress of the *Pigford* v. *Veneman* case from its inception to its current implementation

stage. I wanted to identify those to the Committee. And based on the opening comments by, I think, all of the Committee Members, I would focus my attention and my remarks on the late claim process, although I have provided written testimony to cover some aspects of my other roles.

I have served as the parties' mediator from late December or early January 1988—1998, I'm sorry, through the entry of the Consent Decree in April 1999, and continued to help them resolve implementation issues as they arose before the appointment of Ms. Roth as the monitor in 2000. In the Consent Decree itself I am identified as the arbitrator responsible for managing the Track B arbitration process that Ms. Roth spoke about. Subsequent to the entry of the Consent Decree, Judge Friedman delegated to me the responsibility for deciding late claim petitions, what is known as paragraph 5(g) of the Consent Decree, and I will focus on those. And my final role is as an aide, as a court appointed referee to help resolve fee disputes between the Government and counsel.

Let me focus on my role in the late claim petition process. And I am going to read to the Committee what paragraph 5(g) of the Consent Decree—how it reads: A claimant who satisfies the definition of the class in paragraph 2(a), above, but who fails to submit a completed claim package within 180 days of entry of this Consent Decree may petition the court to permit him to nonetheless participate in the claims resolution procedures provided in paragraphs 9 and 10 below. The court shall grant such a petition only where the claimant demonstrates that his failure to submit a timely claim was due to extraordinary circumstances beyond his control.

On December 20, 1999, Judge Friedman delegated to me the responsibility for reviewing petitions filed pursuant to paragraph 5(g); that is, those who sought to file a claim after the October 12, 1999 deadline. On July 14, 2000, the court issued an order providing among other things that no late claim petition would be accepted for consideration if filed after September 15, 2000. As the monitor's Chart 2 illustrates, 65,950 late claim petitions were filed by the September 15, 2000 deadline. An additional 7,742 were filed after the September 15 deadline. Each of the petitioners in the latter category were sent a letter by me informing them that he or she had missed the court imposed deadline. Those, and there were a few, who subsequently showed that there was a misreading of the postmark became part of the 65,950 petitions considered.

I have completed my initial review of all 65,000 petitions. Of that number, I have found 2,268 petitions to have met the "extraordinary circumstances beyond his control" standard contained in paragraph 5(g). All of those whose petitions were approved showed that it was more likely than not that extraordinary circumstances beyond the petitioner's control caused the petitioner to miss the October 12, 1999 deadline. Hurricane Floyd, which resulted among other things in 60 counties in North Carolina being declared disaster areas by FEMA after it struck in mid-September 1999 and medical conditions that rendered an individual or his or her caretaker unable to attend to daily matters, provided the predominant reasons upon which petitions were approved. Any petitioner approved was sent a claim form, with a 60-day filing window. In

other words, they started the claims process at that point, once they were declared to be eligible members of the class.

The overwhelming reason provided by those whose petitions were denied was some form of lack of knowledge: unawareness of the existence of a settlement, disbelief in the settlement's legitimacy, unawareness of deadlines and filing procedures, or disbelief in the petitioner's eligibility under the settlement. This, despite the notice provided under the settlement approved by the court as sufficient under rule 23.

The 5(g) process requires that a farmer provide a written statement, signed under penalty of perjury, indicating why the farmer missed the original filing deadline and the extraordinary circumstances leading to the missed deadline. Because the population of people for whom the late claim process applied might be at a disadvantage by a reliance solely on writing, I employed a cadre of law students and recently minted lawyers, totaling 38 at the high point, as researchers to contact petitioners, to question them about their petitions and to obtain additional information and documentation. Approximately 75 percent of the petitions could be decided on the basis of the petitions themselves. There was some ambiguity in the other approximately 25 percent of the petitions filed. Those petitions were referred to one of the researchers for investigation. Each researcher used as a guide a questionnaire based upon the reason articulated by the farmer provided in each individual petition. Researchers were instructed, however, to deviate from the questionnaire if new information came to light during the interview so that I would have the fullest understanding about why the farmer had missed the October 1999 filing deadline. If the petitioner could not be reached by telephone, a written questionnaire was mailed to him or her.

Although not provided for in the Consent Decree, I created a process permitting late claim petitioners to request reconsideration of my decision to deny their participation in the settlement. The reconsideration process provided petitioners with a 60-day window in which to request reconsideration of the initial decision to deny their late claim petitions. I specifically encouraged petitioners to provide additional information and documentation if available. Approximately 21,000 farmers, constituting about 33 percent of the total number of denied petitions, have timely requested that I reconsider my initial denial of their late claim petition. If upon reconsideration it became clear that my initial decision was incorrect, or that relevant information was not considered, those petitions have been approved. Any request that cast doubt on my initial decision has been referred to a researcher for investigation. All petitions denied upon reconsideration are being sent letters describing in detail how a petitioner has failed to demonstrate, despite all efforts, that his or her situation meets the 5(g) standard.

Greater detail on the late claim process can be found in the six reports I have filed with the court regarding the process since November 2001, copies of which have been provided to the Committee. The reports also are posted on the monitor's website for review by anyone with Internet access.

I think I will stop there, and I am happy to answer any questions the Committee might have.

[The prepared statement of Mr. Lewis follows:]

PREPARED STATEMENT OF MICHAEL K. LEWIS

I have had various roles in the progress of the *Pigford* v. *Veneman* case from its inception to its current implementation stage and would like to describe briefly those roles to you. I have served as the parties' mediator, the Consent Decree Arbitrator, both for the Track B arbitration process and for the ¶5(g) late claim process, and as a court-appointed referee for fee disputes.

A) *Mediator:* My first contact with the parties in the *Pigford* case came in late December 1997 when the parties contacted me regarding my willingness to serve as a mediator in an effort to help them resolve the lawsuit. Beginning in January 1998 through the entry of the Consent Decree in April 1999, I served as the parties' mediator. After the entry of the Decree, especially before the appointment of the Monitor, on a few occasions I attempted to help the parties resolve issues arising in the implementation of the decree.

B) *Arbitrator:* The parties chose me as the arbitrator identified in the consent decree to resolve all claims in which farmers chose Track B—the process that provides for an 8 hour in-person hearing to resolve their claims. Statistics for that process are provided in Randi Roth's Chart 1. There is one additional piece of information I wanted to alert you to in the Track B process, that is that the total number of Track B claims filed totals 237, rather than the 174 identified in Chart 1. The difference between the 174 number mentioned in Chart 1 and the 237 I have just mentioned is that because, even though the consent decree's language in Paragraph 5(d) states that a choice of tracks is irrevocable, USDA generally has been willing to permit farmers to switch from Track B to Track A. Sixty farmers have chosen to switch tracks. In such instances, the Facilitator sends to that farmer a claim form for use in the Track A process, and that claim is processed under the decree's terms for Track A claims. The remainder of the difference is attributable to farmers who withdrew their claims.

C) *Paragraph 5(g), Late Claim Petitions:* Paragraph 5(g) of the consent decree provides that:

> A claimant who satisfies the definition of the class in ¶2(a), above, but who fails to submit a completed claim package within 180 days of entry of this Consent Decree may petition the Court to permit him to nonetheless participate in the claims resolution procedures provided in ¶¶9 & 10, below. The Court shall grant such a petition only where the claimant *demonstrates that his failure to submit a timely claim was due to extraordinary circumstances beyond his control.*

On December 20, 1999, Judge Friedman delegated to me the responsibility for reviewing petitions filed pursuant to ¶5(g), that is, those who sought to file a claim after the October 12, 1999 deadline. On July 14, 2000, the Court issued an order providing, among other things, that no late claim petition would be accepted for consideration if filed after September 15, 2000. As the Monitor's Chart 2 illustrates, 65,950 late claim petitions were filed by the September 15, 2000 deadline. An additional, 7,742 were filed after the September 15, 2000 deadline. Each of the petitioners in the latter category was sent a letter by me informing them that he or she had missed the court imposed deadline; those who subsequently showed that there was a misreading of the postmark became part of the 65,950 petitions considered.

I have completed my initial review of all 65,950 petitions. Of the 65,950, I have found 2,268 petitions to have met the "extraordinary circumstances beyond his control" standard contained in ¶5(g). All of those whose petitions were approved showed that it was more likely than not that extraordinary circumstances beyond the petitioner's control caused the petitioner to miss the October 12, 1999 deadline. Hurricane Floyd, which resulted, among other things, in 60 counties in North Carolina being declared disaster areas by FEMA after it struck in mid-September 1999, and medical conditions that rendered an individual or his/her caretaker unable to attend to daily matters, provided the predominant reasons upon which petitions were approved. Any petitioner approved was sent a Claim Form, with a sixty-day filing window.

The overwhelming reason provided by those whose petitions were denied was some form of lack of knowledge: unawareness of the existence of the settlement, disbelief in the settlement's legitimacy, unawareness of deadlines and filing procedures, or disbelief in the petitioner's eligibility under the settlement. This, despite the notice provided under the settlement, approved by the Court as "sufficient under Rule 23."

The ¶5(g) process requires that a farmer provide a written statement, signed under the penalty of perjury, indicating why the farmer missed the original filing deadline of October 12, 1999 and the "extraordinary circumstances" leading to the missed deadline. Because the population of people for whom the late claim process applied might be disadvantaged by a reliance solely on writings, I employed a cadre of law students and recently-minted lawyers (totaling 38 at the high point) as researchers to contact petitioners to question them about their petitions, and to obtain additional information and documentation. Approximately 75% of the petitions could be decided on the basis of the petitions themselves. There was ambiguity in the other approximately 25% of the petitions filed. Those petitions were referred to one of the researchers for investigation. Each researcher used as a guide a questionnaire based upon the reason provided in each individual petition. Researchers were instructed, however, to deviate from the questionnaire if new information came to light during the interview so that I would have the fullest understanding about why the farmer had missed the October 1999 filing deadline. If the petitioner could not be reached by telephone, a written questionnaire was mailed to him or her.

Although not provided for in the consent decree, I created a process permitting late claim petitioners to request reconsideration of my decision to deny their participation in the *Pigford* settlement. The reconsideration process provided petitioners with a 60 day window in which to request reconsideration of the initial decision to deny their late claim petitions. I specifically encouraged petitioners to provided additional information and documentation, if available. Approximately 21,011 farmers, constituting approximately 33% of the total number of denied petitions, have timely requested that I reconsider my initial denial of their late claim petition. If upon reconsideration, it became clear that my initial decision was incorrect, or that relevant information was not considered, those petitions have been approved. Any request that casts doubt on my initial decision has been referred to a researcher for investigation. All petitions denied upon reconsideration are being sent letters describing in detail how a petitioner has failed to demonstrate, despite all efforts, that his or her situation meets the 5(g) standard.

Greater detail on the late claim process can be found in the six reports I have filed with the Court regarding the process since November 2001, copies of which have been provided to the Committee. The reports also are posted on the Monitor's website for review by anyone with internet access. On more than one occasion, late claim petitioners have attempted to address the fact of their denial to the Court. On each such occasion of which I am aware, and most recently on September 13, 2004, the Court has upheld the late claim petition process I have described.

D) *Fee Disputes:* On December 30, 2002, the Court referred to me fee disputes arising between class counsel and the government. Under the terms of the Court's order, quarterly fee petitions are to be filed by class counsel, the government responds to those petitions in writing, and my task is then to engage the parties in discussions designed to resolve any outstanding issues. If the parties are successful in resolving their dispute, they so indicate to the Court by filing a stipulation. If the parties are unsuccessful in their efforts, I am required to submit findings and recommendations to the Court on the fees in dispute.

I am happy to answer any questions members of the Committee might have.

Mr. CHABOT. Okay. Thank you very much. And our last witness this afternoon will be Mr. Pires. You're recognized for 5 minutes.

STATEMENT OF ALEXANDER PIRES, CLASS COUNSEL, *PIGFORD* V. *GLICKMAN*

Mr. PIRES. Thank you. Can you hear me?

Mr. CHABOT. Yes.

Mr. PIRES. My name is Alexander Pires. I'm the lead attorney and co-lead counsel in the *Pigford* case. I want to thank you all for inviting me.

Other than 8 years at the Department of Justice I have spent my entire career representing farmers and that's what I do. I sue the Government and I sue companies on behalf of farmers and that's all I do. Discrimination cases are very, very difficult, and *Pigford* was a difficult case.

consideration? And, do you direct the adjudicator or arbitrator to consider such additional information?

Ms. ROTH. Thank you, Mr. Chairman. Whether I let information in in the petition process is governed by a court order. The order of reference issued April 4th, 2000, states that I am allowed to let information in if the person—if the party submitting it can show that there was a flaw or mistake in the claims process, and that the failure to let the information in would result in a fundamental miscarriage of justice.

So I apply those two tests to each piece of additional information that is submitted. Typically the kinds of information that are submitted and do get in when the test is met are the names of additional similarly situated white farmers, and just all different kinds of documents about the case.

Mr. CHABOT. Thank you very much.

Mr. Lewis, let me turn to you, if I can now. I have only got about another minute, so I am going to have to be quick, and I would ask if you could be as well.

Mr. LEWIS. I will try.

Mr. CHABOT. Thank you. Based on your experience in handling the late-filed claims, what reasons do you think caused nearly 65,000 potential claimants to file their claims after the filing deadline, and do you believe these farmers knew of the settlement but failed to timely file?

Mr. LEWIS. I know that roughly 50 percent of them did know of the settlement. I mean, because of the reasons that they put forward in their petition. About 50 percent said that they did not know of the settlement.

It is—continues to be a mystery to me as to why there were so many late filers, because the notice that accompanied or that followed Judge Friedman's July 14th, 2000 order which set the deadline of September 15th, 2000, was distributed less broadly than the notice announcing the lawsuit.

And the only thing I have concluded is that the fact that there were real live people who had received real live checks helped to spread knowledge about the lawsuit in a way that simply someone reading a notice announcing the settlement did not. But, that is, Mr. Chairman, just a guess.

Mr. CHABOT. Okay. Thank you. My time has expired. The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you. Mr. Lewis, if someone put on their form in the extended—and those that missed the deadline, the original deadline, if they put in their form that they didn't hear about it, would that be—would that disqualify them right off the bat?

Mr. LEWIS. That would disqualify them right off the bat. If—they also were told that they could ask for reconsideration if they wanted to.

Mr. SCOTT. If they put they didn't know, so if, in fact, they didn't know, if they had competent counsel, they wouldn't put that down, would they?

Mr. LEWIS. Probably not, Congressman Scott. But, very few of the petitions, the late-claim petitions—there appeared to be not very much lawyer involvement in the late claim petition process, let me put it that way.

Mr. SCOTT. Well, of all of the people that filed, 75 percent approximately filed late. Is that right?

Mr. LEWIS. I think that is right. Yes.

Mr. SCOTT. 76.

Mr. LEWIS. Somewhere on that order.

Mr. SCOTT. Doesn't that just tell you that there is something wrong with the process?

Mr. LEWIS. Well, there were also 7,700 people who missed the second deadline. So I don't know what the answer is.

Mr. SCOTT. Now, how many of those people have bona fide claims, if you would ever get to the merits?

Mr. LEWIS. I have no idea. The late claim—what was submitted was a late claim petition, that was a two-sided form. It was one page, two sides. So I——

Mr. SCOTT. Is it fair to say that certainly some have valid claims, and, in fact, some don't?

Mr. LEWIS. Oh, that certainly is true. We know that from both—from the folks who have been admitted into the process.

Mr. SCOTT. And, I mean, when all is said and done, wouldn't the fair thing to do to get to—would be to get to the merits, one way or the other. Now, your hands may be tied because of what your orders were from the consent decree; is that right?

Mr. LEWIS. Yes.

Mr. SCOTT. Would you object if we opened it up so that people could actually have their cases heard?

Mr. LEWIS. That is not my decision. Congress can do whatever it wants to do here. But——

Mr. SCOTT. You certainly wouldn't object?

Mr. LEWIS. Certainly not.

Mr. SCOTT. Mr. Pires, did—was there any motion made to open—when the—when people filed late, did you file any motions to have them—to help them get in, or keep them out?

Mr. PIRES. Well, prior to—the first time we found there were people late we had 1,100 of them. And we spent a lot of time trying to get them in. And we actually did get the first 1,100 in, as part of our settlement, as part of a process for which I took—we took quite a beating. We did get the first 1,100 in, for which I was chastised. It is complicated what happened. After that——

Mr. SCOTT. Do you have any conflict of interest? I mean, if others come in, that doesn't hurt the ones that are already in; is that right?

Mr. PIRES. Well, I would like as many as possible. I mean, if you are asking me his question, I would love you to pass a piece of legislation to let everybody in over the next 2 years. That would be——

Mr. SCOTT. Does anybody object to having cases heard on the merits, getting through all of this procedural deadlines, you have got 65,000 people who filed, plus the 20,000. Does anybody object to having cases heard on the merits?

Mr. PIRES. No, sir, not at all. Not that I know of.

Mr. SCOTT. Anybody doubt that that would be a good thing?

Mr. PIRES. It would be a great thing.

Mr. SCOTT. What do we need to do to bring that about?

Mr. PIRES. Can I answer that?

Mr. SCOTT. Sure.

Mr. PIRES. I believe it requires legislation from the House and the Senate, not much more complicated than the original legislation you passed in 1999. A sentence or two that would allow them in. Yes, sir. I think that would be fantastic.

Mr. SCOTT. That would fix it, Mr. Lewis?

Mr. LEWIS. It would—I think it would fix it. I don't know—I don't know what the legal problems would be given that there is—has been or would be—would have been a determination on whether they were eligible——

Mr. SCOTT. We are talking about claims—we are not talking about claims of one individual against another. We are talking about claims against the Government. So we have a little bit more flexibility then we would if we were trying to balance individual against individual.

Mr. LEWIS. My answer was just—I don't know what legal problems there might be in trying to change a consent decree in this manner after the fact. I am not saying it is a bad idea, I just—I don't know the answer to your question, Mr. Scott.

Mr. PIRES. It would have to be very carefully drafted, because both the statute of limitations and the res judicata defenses would be there, and the Justice Department would fight that. You would have to be very careful. But you have got great counsel. You have got legislative counsel. You have the best there is.

So I am sure you can get around that in some way.

Mr. SCOTT. Ms. Roth, if I can ask one additional question.

Mr. CHABOT. The gentleman's time has expired, but the gentleman is, by unanimous consent, granted another minute?

Mr. SCOTT. Thank you.

Ms. Roth, when people appeal to you, having lost the original, what kinds of things do you find that you can have the original decision of denial reversed? What have you done for people? I understand that you have a fairly substantial rate of overturning the original denials so that people actually get money.

What have you done for them that wasn't done originally?

Ms. ROTH. Yes, Congressman Scott. For the most part—I don't have the exact statistics, but I would say in most of the cases, where a farmer prevails at the monitor level, it is because some additional pieces of evidence that were allowed in through our process.

Mr. SCOTT. Is that the similarly situated white farmer issue?

Ms. ROTH. Of those cases, in very many of the cases, yes it is the similarly situated—if I had to say one piece of evidence that most often turns it around in the petition process, it is probably the similarly situated white farmer.

Mr. SCOTT. Have you developed a data bank so that each farmer wouldn't have to reinvent the wheel every time they want to have a case heard, that you have people in each county that might be similarly situated that people look to?

Because, it has been pointed out that some farmers just don't have access to that information.

Ms. ROTH. I understand the question, Congressman Scott. But, I am not allowed to do that, the way my reference order is set up. I am restricted to very particular things from my record, and I

Mr. CHABOT. Thank you very much. I know you want to answer a question, Mr. Haynie, or comment. Let me ask you in addition to that, could you comment on the notice? That is obviously a very big issue here, and whether or not that you think the notice was adequate? Not what you think, but I would like you to express——

Mr. HAYNIE. The notice was not adequate. I would like to comment on that. I was there at that hearing. And all of the farmers objected to consent decree. And even the farmers that Mr. Pires were representing, they were not allowed to go into this negotiation. So it was mind boggling how everybody there was objecting to the settlement, yet the attorney that was representing everybody moved forward with the settlement.

This settlement, what it does, it takes farmers out of the class and puts them on an individual fight with the Government in trying to prove their discrimination, when the attorney that has represented you has waived discovery in denying you to all of the access, which are the tools you use to defend yourself.

So it is mind boggling how the attorney, who is supposed to be representing black farmers, does not listen to the objections, and moves forward with the settlement when everybody is not in agreement with it. And he didn't have the staff to serve the notice to the number of people, and as a result, everybody was filling out forms for farmers and they came up short.

Mr. CHABOT. Thank you. Let me—my time is almost up here, so let me go back to you, if I can, Mr. Pires. Why was 180 days chosen as the filing deadline?

Mr. PIRES. Which filing deadline, Mr. Chairman? I am sorry.

Mr. CHABOT. The initial——

Mr. PIRES. I believe that was directly in the consent decree, I believe. Yes. I believe it was negotiated in the original consent decree, the 180 days, I believe.

Mr. CHABOT. Do you know why that was, though? I mean, Mr. Lewis, or could you shed any light on that?

Mr. LEWIS. Unfortunately, Mr. Chairman, I cannot. It has been 5 years.

Mr. CHABOT. The witnesses are always able to supplement their testimony. And so, if any of these things, any of the witnesses would like to supplement, you will have the opportunity to do that. And my time has expired. So I will now yield to the gentlemen for Virginia for 5 additional minutes to question.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Pires, did you file a motion last month in court opposing farmers' request to open up the deadline?

Mr. PIRES. There were various motions filed by various people. I mean, there has been hundreds of motions filed. But, there were motions filed by people who were not representing the class that we opposed, yes.

Mr. SCOTT. The answer is yes, you did?

Mr. PIRES. I oppose anything that is not in the interests of the class. That is what I do for a living. So, yes, there were motions, and I did oppose them.

Mr. SCOTT. Ms. Roth, on Track A, when people—when—Mr. Lewis, first. What portion of the Track A claimants actually got some money?

Mr. LEWIS. I am sorry, Mr. Scott. I don't have anything to do with Track A and can't answer that question.

Mr. SCOTT. Okay.

Ms Roth.

Ms. ROTH. Congressman Scott, about 61 percent of the people who went through Track A won on their first time through. Of the 8,000 or so people who lost, about 4,900 or so petitioned for monitor review. The remaining petitions were Government petitions. Of the farmers who have gone through the petition process, about 50 percent are prevailing in that process.

But, I don't have the authority, in the petitions process, to say they won or lost. I only have the authority to remand to the adjudicator in Track A. But the adjudicator in Track A is following my recommendations about 90 percent of the time. So about 13,500 claimants have won.

Mr. SCOTT. Now, to win, you have to find the similarly situated white farmer; is that right?

Ms. ROTH. That is correct.

Mr. SCOTT. How, without the discovery that Mr. Haynie has pointed out, where do they get this information?

Ms. ROTH. Congressman Scott, of course, I don't really know where they get the information. I just know what shows up in the file. But the one thing I can tell you from reading files, is that some people get it by going to the county courthouse and looking for whose names are on, you know, documents that show that a loan happened, a mortgage, or a chattel, a chattel security agreement, and then they submit those names.

Mr. SCOTT. Has that been a problem in people getting compensated, because they cannot get the information—do they have subpoena power to get that information?

Ms. ROTH. Not that I know of. No. You mean, if someone is in the Track A claim process, can they subpoena—in the Track A process? No.

Mr. SCOTT. So that would be a barrier to getting, for a person with a bona fide claim, getting—actually getting paid?

Ms. ROTH. Many of the cases in which people lose, it is because they did not have—they were not able to specifically identify a similarly situated white farmer. That is correct.

Mr. SCOTT. Does that need to be corrected?

Ms. ROTH. That is not something I can comment on.

Mr. SCOTT. Okay. Are you involved in Track B claims?

Ms. ROTH. I review petitions in the Track B process as well.

Mr. SCOTT. Mr. Haynie suggested some problems with the calculations for damages under Track B. Have you seen the same kinds of problems?

Ms. ROTH. I really couldn't say whether I have seen the exact kinds of problems Mr. Haynie described. But, we do carefully review the evidence on both sides of damages questions in Track B and make our decisions. That is really all I can say about that.

Mr. SCOTT. As I understand the consent decree, there was no technical admission of discrimination. Is there any question in anybody's mind that there was, in fact, discrimination in just about every—each and every one of these cases?

can't do that without the Government's consent. And they will not consent.

I have been working with them for 8 years, and I can tell you they won't. So what do I do? We seek to help them. That is why we are here. You have to help them. We are not going to be able to get them through the *Pigford* case. Judge Friedman is not going to reopen it, because the Government would never consent to it.

Could you get us legislation that would reopen a similar case like this? Yes. But, the Government is never, ever going to consent to reopening *Pigford*. I know that. So I don't want to abuse the system by trying to spend a lot of my energy on something that I know from 31 years will not work. What I do want to do is take care of the people who are in the——

Mr. WATT. The question I am asking is, is there somebody out there who is doing that? I am not suggesting that it should appropriately be you. I am just asking: Is there somebody out there who is representing a large number of those people?

Mr. CHABOT. The gentleman's time has expired. But you may answer.

Mr. PIRES. Those people who have filed, Congressman Watt, they are before Michael Lewis. In other words, they are in the system. I don't——

Mr. WATT. Maybe I should be asking Mr. Lewis that question then. Who represents the most of those people who—the dispossessed class members, I will characterize them in that way, although, I don't mean it.

Mr. LEWIS. Congressman Watt, I am not aware that anyone is representing them in the late claim process.

Mr. WATT. All right.

Mr. CHABOT. The gentleman's time has expired. The gentleman from Alabama is back from the hearing on the floor and is recognized for 5 minutes for questions.

Mr. BACHUS. Thank you. Mr. Pires, you are aware of a lot of wild rumors that have been going around that the attorneys have made more money off this case than the farmers?

Mr. PIRES. Yes.

Mr. BACHUS. Let's address that a minute.

Mr. PIRES. Please.

Mr. BACHUS. You know, clarifying the fee would put an end to those rumors.

Mr. PIRES. Please.

Mr. BACHUS. And I don't know. I am not—are your fees based on a set amount, or upon the number of claimants you represent?

Mr. PIRES. No, sir. It is very simple. It has all been public. We came forward and agreed to represent the class with an agreement that said, we will take none of your money. We were the only ones. Every other firm in the country had an agreement, with the exception of myself and Mr. Fraas, that wanted a percentage.

So when it started, the rule I established was, if you want to help the Black farmers, you can't take any of their money. You can't base it on anything other than the judge will eventually——

Mr. BACHUS. What are they based on?

Mr. PIRES. I said to file a motion before Judge Friedman, without the Government's consent is just paper, and it is not going anywhere.

Mr. CONYERS. Well, I am glad you know this. Maybe——

Mr. PIRES. Because I have been doing it for 7 years. I think I have a pretty good idea of how to make the litigation move in a way that provides meaningful relief.

Mr. CONYERS. Well, look, I don't want to tell you what you should be saying before the Committee. I presume you know what to say in front of the court. But, if I leave this hearing, and they ask me how does Pires and Lewis feel about the 65,000 black farmers, I am going to be strapped to explain this based on the answers and the comments that you have given me.

I would like to yield to Mr. Lewis to see what he—what his feelings are on this subject.

Mr. LEWIS. I don't disagree with Mr. Pires, that if there were some way, outside of the context of the consent decree to provide relief to—we have been talking about 65,000, why not include the other 7,700 who missed the final deadline? So we are talking about 72-73,000 people.

All I would say to you, Congressman Conyers, is that there is—what I have before me now is not the 65,000, but are the 21,000 petitions for whom reconsideration requests have been filed.

And I will, you know, I am marching through those as quickly as I can. Because one of the issues here is those folks are starting the claims process once I find that they are eligible to participate.

So we are talking about, you know, a year or two of processing to—before they get some money.

Mr. LEWIS. But what I have for you now——

Mr. CONYERS. You would like to see the decree modified to allow them to come in.

Mr. LEWIS. Frankly I agree with Mr. Pires.

Mr. CONYERS. No, I'm asking you. Forget about the class action lawyer. I can question him. What does Mr. Michael Lewis think?

Mr. LEWIS. I think it would be wonderful if 72,000 people got a shot, as Congressman Scott said, to have their cases heard on the merits. I don't believe that can happen within the context of the *Pigford* consent decree. That's all I'm saying.

Mr. CHABOT. The gentleman's time has expired. All Members shall have 5 legislative days to provide any additional materials for the record.

Mr. BACHUS. Could I have one additional question?

Mr. CHABOT. Make it after this gentleman then. I was going to ask unanimous consent to allow Mr. Scott to ask a question relative to taxes, and then I'll follow up here. But then we're going to wrap it up.

Mr. SCOTT. Thank you. And first, Mr. Chairman, I want to thank you again for calling the hearing.

We've heard uncontested evidence that about 75 percent of the people who've had potential cases are not able to have their cases heard on the merits. And we—certainly I think the fair thing to do is to try to ascertain what can be done so that they can hear their cases on the merits.

SUPPLEMENTAL STATEMENT FROM WITNESS MICHAEL K. LEWIS

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House Committee on the Judiciary

Subcommittee on the Constitution

Supplemental Testimony of Michael K. Lewis, Arbitrator, *Pigford v. Veneman*

September 28, 2004

I would like to thank the Committee for having granted me the opportunity to testify before you. During the hearing a number of questions were posed to me and I hope that the answers I provided then, as supplemented below, help to provide a greater understanding of the *Pigford* settlement for members of the Committee. If there are additional areas in which the Committee believes that I could contribute to further understanding, I would be pleased to respond to those inquiries.

In his initial questioning, the Chairman asked why it was that so many individuals filed after the October 12, 1999 deadline. In my response, I indicated that about half affirmatively stated that the cause was lack of knowledge. With the assistance of the Facilitator, I compiled a list of reasons that petitioners gave in their petitions to file late claims, and 64,006 of the petitions (out of 65,950) were coded using that list of reasons. As the table attached as Appendix 1 indicates, 28,854 late claimants cited lack of knowledge as the primary reason for missing the deadline.

Congressman Scott asked if someone stating that he or she did not know about the settlement would automatically result in a denial of his or her petition. I responded to that question in the affirmative. However, where it was also evident that the lack of knowledge stemmed from some cause that met the 5(g) standard, such as mental or neurological illness or overseas deployment, such petitions were

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approved. Congressman Scott also asked me what I thought was wrong with the process, to which I responded that I did not know. It was not until after the July 14, 2000 Order that it became apparent that anything was even remotely wrong. Those who filed late-claim petitions by the January 30, 2000 deadline were approved at approximately a 50% rate. No one anticipated the flood of petitions in the Summer of 2000, especially as the notice provided in the 2000 was less broad than that used to notify claimants of the settlement. Neither could I explain, in response to Congressman Watt, why the vast majority of the Summer 2000 petitioners were unrepresented—whether they did not seek counsel or whether they were turned away. However, because of the investigations I undertook to afford petitioners greater process (both represented and unrepresented), I do not draw the same conclusion as Congressman Scott that representation would have been outcome determinative.

Several questions were posed regarding modifications to the Consent Decree and steps that could be taken moving forward. The Chairman asked why 180 days was chosen as the filing period (April 14, 1999 – October 12, 1999). The actual filing period was longer, since filing could begin once notice was provided in January 1999, providing approximately 10 months in which claimants could file timely claims.. As Judge Friedman noted on page 39 of his opinion approving the Consent Decree, the only place sufficiency of notice might have been called into question was in the U.S. Virgin Islands. Congressman Scott asked whether I had any objections to modifications that would permit late filers to have their claims heard on the merits. As a neutral, I have no objection—the process belongs to the parties, *i.e.* the farmers and the United States; if they want to make changes, it is entirely up to them. Like the other neutrals, my role is to act within the framework of the Consent Decree.

Finally, in my testimony I referenced the six semi-annual reports to the Court on the late-claim petition process. For the record, I am attaching them herein as Appendix 2. Again, I would like to thank you for the opportunity to address the Committee.

Appendix 1: Categorization Table

Appendix 2: Arbitrator's Reports to the Court

A) November 14, 2001
B) May 3, 2002
C) November 4, 2002
D) June 2, 2003
E) December 9, 2003
F) June 4, 2004

Appendix 1

Categorization Chart

Reason	Count of Reason1
Case Not Legitimate	444
Claim Sent PD did not receive	270
Defective Not Cured	294
Difficulty Obtaining Info/Signature	946
Estate/Deceased	1182
Family Member Health/Death	7004
Hurricane Floyd in NC	1310
Hurricane Floyd outside NC	32
Incarcerated	224
Lawyer did not send Claim	148
Lawyer Unavailable	646
Lost Claim/Forgot about Deadline	420
Misinformed About Qualifications	2941
Never Received Claim	1154
No Reason Provided	2521
Not Eligible	179
Personal Health	11999
Postal: Moved/Stolen	542
Slave Reparations	82
Tax Forms - Back tax Lawsuit	31
Unable to attend Meeting	1725
Unaware of Lawsuit/Deadline	28854
Unaware of need to request claim	647
Unsure on How to Fill Out Claim	411
Total	**64006**