Office of the Monitor
Pigford v. Veneman (D.D.C.)
Brewington v. Veneman (D.D.C.)

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[redacted]

CONFIDENTIAL: Protected by Privacy Act Protective Order[1]

Mr. Michael Lewis, Esq.
Chief Arbitrator
ADR Associates
1666 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20009

Re: Petition of [redacted]
Claim No. [redacted]
Arbitration No. [redacted]

Dear Chief Arbitrator:

The Monitor has completed review of the Petition. For the following reasons, the Monitor will not direct reexamination of the Arbitrator's Decision.

I. PROCEDURAL POSTURE

This is a Track B matter involving several credit claims:

- joint application, debt assumption, excessive collateral requirements and late funding of a 1986 Emergency Loan;
- late funding of a 1987 Guaranteed Operating Loan;
- late funding and delayed processing of a 1990 Operating Loan and debt reamortization;[2] and
- delayed consideration and processing of a 1992 loan servicing request.

The Arbitrator's Decision denied relief. The Claimant has petitioned the Monitor for review.

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1 Pigford v. Glickman, Second Amended Supplemental Privacy Act Protective Order (D.D.C. July 14, 2000).

2 The Claimant did not petition for review of the Arbitrator's Decision regarding this claim.

The following issues are before the Monitor for review:

1. Whether the claim should be reexamined because the Arbitrator concluded that the Claimant failed to prove by a preponderance of the evidence that USDA discriminated against the Claimant with respect to the terms and the timeliness of his 1986 Emergency Loan.

   The Arbitrator concluded that the Claimant failed to prove by a preponderance of the evidence that USDA's joint application, debt assumption, and collateral requirements were discriminatory. The Arbitrator also rejected the Claimant's allegation that his Emergency Loan was delayed due to discrimination, finding legitimate reasons for the delay and insufficient evidence that white farmers were treated more favorably than the Claimant.

2. Whether the claim should be reexamined because the Arbitrator concluded that the Claimant failed to prove by a preponderance of the evidence that the delay in the processing of the Claimant's 1987 Guaranteed Operating Loan was due to discrimination.

   The Arbitrator found that, although this guaranteed loan transaction was characterized by clear and acknowledged delay, there was no evidence that would indicate the delay was caused or motivated by race discrimination.

3. Whether the claim should be reexamined because the Arbitrator found the Claimant failed to prove by a preponderance of the evidence that the delays in the consideration and processing of the Claimant's 1992 loan servicing request were due to discrimination.

   The Arbitrator identified reasons for some of the delay in the Claimant's loan servicing request and noted there were other, unexplained lapses in time. The Arbitrator stated that lacking evidence of a nexus between the "bungling" of the Claimant's application and race, evidence of animus, or a showing of disparate treatment, the Claimant had failed to establish by a preponderance of the evidence that he was a victim of race discrimination.

II. THE RECORD FOR MONITOR REVIEW

The record upon petitioning for Monitor review consists of:

1. The Arbitrator's Decision, dated February 27, 2001;

2. The record before the Arbitrator;

3. The Petition for Monitor Review, captioned "Claimant's Petition for Monitor Review" ("Petition"); and

4. The Non-Petitioning Party's Response, captioned "Defendant's Response to Claimant's Petition for Monitor's Review" ("Petition Response").

III. SUBSTANTIVE STANDARD OF REVIEW

Under the Consent Decree, it is the duty of the Monitor to:

> [d]irect the [F]acilitator, [A]djudicator or [A]rbitrator to reexamine a claim where the Monitor determines that a clear or manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice.[3]

The Monitor will find clear and manifest error where the Monitor, in reviewing the entire record, is left with a definite and firm conviction that a mistake has been made. If the error has resulted, or is likely to result, in a fundamental miscarriage of justice, the Monitor will direct reexamination.

IV. ANALYSIS OF CLAIM

A. Factual Background

[redacted] ("Claimant") comes from a family that had farmed in [redacted] since 1892.[4] After graduating from college in [redacted] with a major in agriculture, the Claimant spent the next eight years working on his father's farm on the weekends and working weekdays [redacted].[5] In 1964, the Claimant began farming full-time on 160 acres with the assistance of a $5,000 loan. His farming operation raised cattle and grew wheat, rye, hay, and mung beans.[6] According to the Claimant, by 1987, he was "the largest Black farmer in [redacted],[7] operating on 3,479 acres, 1,737 of which he owned. By this time, the Claimant's operation included 1,300 head of cattle, 125 brood cows, and five bulls. The Claimant and his sons each farmed the same land, using the same equipment, and sharing to some extent the income of the farm.[8] The Claimant received numerous awards and honors for his work as a farmer and for his work in the field of agriculture generally.[9] The Claimant also served on various local, state, and national agricultural committees, including the [redacted]

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3 *Pigford v. Glickman*, Consent Decree, ¶ 12(b)(iii) (D.D.C. April 14, 1999).

4 Unless otherwise specified, the factual background is taken from the Arbitrator's Decision, dated February 27, 2001.

5 Direct Testimony of [redacted], at 2.

6 Direct Testimony of [redacted], at 2.

7 Direct Testimony of [redacted], at 2.

8 Transcript, at 32 (cross-examination of [redacted]), 55-56 (cross-examination of [redacted]). *See* Transcript, at 124-130 (examination of [redacted]).

9 Direct Testimony of [redacted], at 3.

Agricultural Stabilization and Conservation Service (ASCS) Committee from 1980 to 1988, where he was the chairman for four and half years.[10]

The Claimant first applied for farm loan services from the United States Department of Agriculture (USDA) in late 1986,[11] after a severe flood hit his farming operation. The flood damaged the Claimant's fences and destroyed approximately half of his rye, wheat, and alfalfa crops, as well as all of his hay. To obtain funds to cover those losses, the Claimant applied for an Emergency Loan on December 15, 1986.[12]

Because USDA determined that the Claimant and his sons had a "joint farming operation," the County Supervisor required the Claimant to file a joint application for the Emergency Loan, signed by the Claimant and his three sons, [redacted], [redacted], and [redacted].[13] On the application, the Claimant and his sons listed prior USDA loans the Claimant's sons had received as the [redacted].[14] As part of the Emergency Loan transaction, USDA rescheduled the sons' outstanding loans at a lower interest rate and required the Claimant to assume his sons' combined USDA debts.[15] To secure the Emergency Loan and the rescheduled loans from USDA totaling $313,650,[16] USDA placed a lien on the Claimant's farmland. USDA calculated the equity value of the farmland at $337,177.[17] After the completion of a Farm and Home Plan and various closing documents, the Emergency Loan closed on June 23, 1987.[18] Based on the [redacted] Grantee/Grantor Index for USDA loans in 1987 and on mortgage records relating to certain white farmers, the Claimant testified that he was the last farmer in 1987 to receive a loan with a 4.5 percent interest rate

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10 Direct Testimony of [redacted]., at 3-4.

11 The Claimant's Petition refers to Farmers Home Administration (FmHA) as the agency within USDA that processed his loan applications. The Monitor notes that Congress reorganized USDA in 1994, eliminating FmHA and replacing it with the Farm Services Agency (FSA). *See* P.L. No. 103-354, 108 Stat. 3178 (1994)(Federal Crop Insurance Reform and Reorganization Act of 1994).

12 Direct Testimony of [redacted], at 6; USDA Ex. 5.

13 Direct Testimony of [redacted] at 5; USDA Ex. 5.

14 USDA Ex. 5; Direct Testimony of [redacted], at 5. The sons' loans had an unpaid balance of $137,000 and annual installments of $17,000.

15 Direct Testimony of [redacted], at 5; 7-8; Direct Testimony of [redacted]., at 8. *See* USDA Ex. 6, 19, 32; Transcript, at 96-100 (cross-examination of [redacted]).

16 The Emergency Loan was for $163,930; the remaining $149,720 was for the rescheduled loans of the Claimant's sons. A portion of the $163,930 Emergency Loan was designated to pay off a debt owed to the First National Bank. In exchange for the payment of $131,390, USDA would receive the Bank's first lien on the property that had secured the Claimant's bank loan. Transcript, at 71-72 (cross-examination of [redacted]), 116-117 (re-direct examination of [redacted]).

17 Because the term of the Emergency Loan exceeded seven years, USDA required that real estate be used as security, instead of equipment or other chattel property. According to the County Supervisor, USDA released its equipment liens on the sons' loans, which made it possible for this property to be used as collateral for Operating Loans for the joint farming operation of [redacted]. Direct Testimony of [redacted], at 8-9; USDA Ex. 127.

18 Direct Testimony of [redacted], at 8-9; USDA Ex. 28-29.

secured by land.[19] According to the Claimant, this meant he was the last farmer in [redacted] County to receive an Emergency Loan relating to losses caused by the 1986 flood.[20]

The Emergency Loan funds gave the Claimant only $32,450 to repair his fences and repair and replace his equipment.[21] At the same time USDA was processing the Emergency Loan request, the Claimant also sought a Guaranteed Operating Loan. On April 28, 1987, the First National Bank of Okeene submitted a request on behalf of the Claimant's joint farming operation, [redacted], for a Guaranteed Operating Loan from USDA.[22] On May 21, 1987, the County Committee found [redacted] eligible for the Guaranteed Operating Loan.[23]

On May 22, 1987, USDA notified the Bank about the eligibility decision. The County Office was required to submit the Bank's application to the District Office because the amount requested was not within the County Supervisor's approval authority.[24] On July 7, 1987, the loan application was returned by the District Office for additional information. The District Office required the Claimant to execute a Joint Operating Agreement for the Guaranteed Loan.[25]

Throughout the summer and early fall of 1987, the Claimant made several inquiries regarding the status of his Guaranteed Operating Loan.[26] The Claimant stopped into the office and also spoke on the phone with USDA personnel, who provided the Claimant with updates.[27] During this time, USDA also conveyed to the Claimant additional requests from the Office of General Counsel relating to conditions for the Joint Operating Agreement.[28] On November 3, 1987, the County Office wrote to the Bank with a request for yet more information, as requested by the District Office.[29] This letter included an apology for the

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19 Direct Testimony of [redacted], at 12-14; Claimant's Ex. 70A, 70B.

20 Direct Testimony of [redacted]., at 12-14. According to a USDA County Supervisor, the identified white farmers did not receive Emergency Loans. They all received Operating Loans with an interest rate of 4.5 percent. Some of the loans had been rescheduled, like the [redacted] loans. According to USDA, all applications were received prior to the submission of the [redacted] application. Direct Testimony of [redacted], at 12-13, Transcript, at 107-108 (cross-examination of [redacted]).

21 Direct Testimony of [redacted], at 10.

22 Direct Testimony of [redacted]at 10; USDA Ex. 23. In prior years, the Claimant had received loans from the First National Bank of [redacted]. In 1985, he borrowed $720,000 from the Bank. In 1986, he borrowed a little over $690,000. Transcript, at 31 (cross-examination of [redacted]).

23 Direct Testimony of [redacted], at 11; USDA Ex. 26.

24 Direct Testimony of [redacted] at 11.

25 Transcript, at 103 (cross-examination of [redacted]) The Joint Operating Agreement requirement contributed to the delay in closing the loan. Transcript, at 104 (cross-examination of [redacted]).

26 USDA Ex. 37 contains running records from the Claimant's file which show numerous contacts and exchanges of information over the summer and through the fall.

27 USDA Ex. 37.

28 USDA Ex. 37 (requests made on August 24, 1987, and September 9, 1987).

29 USDA Ex. 35.

length of time the process had taken and cited the complications that a joint farming operation encompassed, as well as the other levels of USDA that needed to be consulted regarding the loan.[30] In January 1988, the Bank expressed dissatisfaction with the amount of the guarantee then proposed by USDA (50 percent) and the security required, as well as with other aspects of the transaction.[31] These problems were eventually worked out, and a Guaranteed Operating Loan in the amount of $180,760 (with a 75 percent guarantee from USDA) closed on April 28, 1988.[32]

In 1992, the Claimant's financial problems led him to apply for loan servicing from USDA.[33] The Debt and Loan Restructuring System (DALR$) program – USDA's computer program for evaluating loan servicing options – indicated that, even without including the USDA debt, the Claimant's cash flow was inadequate to assure repayment of debts owed to other creditors.[34] In September 1992, USDA offered the Claimant mediation,[35] but the mediation closed without success on May 4, 1993.[36]

On May 20, 1993, USDA looked into the possibility of a net recovery buyout. A net recovery buyout plan was accordingly submitted on June 4, 1993 and approved two days later. The Claimant, however, rejected the net recovery buyout.[37]

By August 1993, therefore, the focus shifted to a discussion of a leaseback/buyback [redacted]. Shortly thereafter, USDA requested additional information from the Claimant,[38] and the Claimant filed a formal application on February 14, 1994.[39] The County Committee certified the Claimant's eligibility, and the buyback application was complete on April 14, 1994.[40]

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30 USDA Ex. 35.

31 USDA Ex. 38.

32 Direct Testimony of [redacted], at 11-12; USDA Ex. 42.

33 USDA Ex. 64. The Arbitrator found that the Claimant's financial difficulties were caused by a combination of poor farm productivity and poor health. [Details omitted]. Transcript, at 33 (cross-examination of [redacted]).

34 Direct Testimony of [redacted], at 3; USDA Ex. 69.

35 Direct Testimony of [redacted], at 3; USDA Ex. 69.

36 Direct Testimony of [redacted], at 4.

37 Direct Testimony of [redacted], at 18; USDA Ex. 77. Through a net recovery buyout, a borrower pays USDA's recovery value on the collateral in satisfaction of the borrower's outstanding indebtedness. *See* 7 C.F.R. §§ 1951.902(a)(3), 1951.909(f)-(h)(1993). The borrower must, however, obtain funds from a source other than the government to be eligible for a net recovery buyout. Transcript, at 34 (cross-examination of [redacted]).

38 Direct Testimony of [redacted], at 5; USDA Ex. 80.

39 Direct Testimony of [redacted], at 5; USDA Ex. 81.

40 Direct Testimony of [redacted], at 6; USDA Ex. 82.

The County Supervisor approved the Claimant's completed buyback application, and on July 18, 1994, sent the request for obligation of funds, Form 1940-1, to the District Office.[41] The transmittal letter for that request specifically stated that it was for a "Credit Sale."[42] On July 25, 1994, the acting District Director approved the credit sale.[43] On August 1, 1994, the approval and the Form 1940-1 were faxed to the State Office.[44] However, the State Office failed to process the documents as a request to encumber specific funds designated for credit sales and instead viewed the request as seeking funds generally available for the Farm Ownership Loan program.[45] Because the Farm Ownership loan program funds were exhausted, the Claimant's credit sale request did not move forward. Instead, the Claimant's name was placed on a list of people waiting until funds were available. This error was not realized until some time after October 1, 1994, the date after which Congress had eliminated funding for credit sales.[46]

Despite efforts by both the County Office and the State Office, no substitute funding was found for the Claimant until September 1995.[47] After funding was obtained, meetings were held with the Claimant, who was still deciding how he wanted to proceed, and with the First National Bank, which was reluctant to lend the Claimant an additional $94,000 to secure the buyback of his farm.[48] In March 1996, the First National Bank decided to submit a loss claim on its Guaranteed Loan and a request for a write down.[49] Once the loss claim and write down were approved, the Bank was willing to lend the Claimant the additional funds [redacted]. The Bank's loss claim and write down requests were sent by the State Office to USDA officials in Washington D.C. on March 25, 1996.[50] The next month, Washington sent the package back, asking for revisions.[51] On May 23, 1996, the Bank resubmitted the package, which then was resubmitted by the District Office to the State Office.[52] The State

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41 Direct Testimony of [redacted], at 7; USDA Ex. 71.

42 Direct Testimony of [redacted], at 7; USDA Ex. 91, 93-94. The County Supervisor at the time, [redacted], testified that there is no difference between a buyback and a credit sale. Direct Testimony of [redacted], at 7. In a credit sale, the borrower uses a loan from USDA to accomplish the buyback. For a description of how credit sales worked within the process of USDA loan servicing, see 7 C.F.R. § 1951.911 (1994). Under the terms of the buyback in this case, USDA approved a loan of $200,000 to the Claimant to buy back his farmland, on the condition that the First National Bank make a participation loan of $94,976. USDA Ex. 93.

43 Direct Testimony of [redacted], at 7; USDA Ex. 93.

44 Direct Testimony of [redacted], at 8.

45 Direct Testimony of [redacted], at 8; USDA Ex. 100; Transcript, at 145 (cross-examination of [redacted]).

46 Direct Testimony of [redacted], at 8-9; Transcript, at 146 (cross-examination of [redacted]).

47 Direct Testimony of [redacted], at 8-9; USDA Ex. 97, 102. Funds eventually came from the direct Farm Ownership loan pool of funds. Transcript, at 152 (cross-examination of [redacted]).

48 Direct Testimony of [redacted], at 10.

49 Direct Testimony of [redacted], at 11.

50 Direct Testimony of [redacted], at 11; USDA Ex. 108.

51 Direct Testimony of [redacted], at 11.

52 Direct Testimony of [redacted], at 11; USDA Ex. 109.

Office approved the loss claim and write down on July 1, 1996.[53] The Claimant's $200,000 buyback loan closed on September 3, 1996, when the Claimant received application priority.[54] The loan provided the Claimant with $200,000 for the buyback. USDA also provided the Claimant with a write-off for the interest that had accrued on his outstanding indebtedness during the time his loan servicing request was being processed.[55]

The Claimant submitted evidence that a white farmer applied for primary loan servicing in 1989, was offered mediation in 1991, and successfully concluded the mediation with a loan restructuring in 1992.[56] This same farmer subsequently accepted a net recovery buyout, which was closed in September, 1994.[57] In addition to this evidence, the record contains an investigative report by USDA's Office of Civil Rights, which identifies a white farmer whose request for loan servicing took longer than the Claimant's to process.[58] This report also suggests that two white farmers participated in the credit sale program prior to October 1, 1994, during the year the Claimant's application was approved.[59]

B. The Arbitrator's Decision

Following a Track B hearing on November 20, 2000, the Arbitrator issued a Decision on February 27, 2001, finding that the Claimant had failed to meet his burden of proving race discrimination.[60] With respect to the 1986 Emergency Loan, the Arbitrator concluded that USDA's requirement that the Claimant and his sons apply jointly for the loan was not the result of race discrimination, citing evidence that the Claimant and his sons operated a single farming operation.[61] The Arbitrator acknowledged that the assumption of the Claimant's sons' loans and the additional collateral required by USDA reduced the Claimant's ability to obtain future loans, but the Arbitrator did not find that either the debt

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53 Direct Testimony of [redacted], at 11; USDA Ex. 110.

54 According to the County Supervisor, the Claimant's loan was given priority for funding over another Farm Ownership Loan application, which ordinarily would have received funding before the Claimant because the application had been completed prior to the Claimant's application. Direct Testimony of [redacted], at 9.

55 Direct Testimony of [redacted], at 11. This write-off amounted to approximately $169,000 in interest, which the County Supervisor testified was taken as part of a debt settlement. Transcript, at 160 (cross-examination of [redacted]).

56 Claimant Ex. 71, 73-74. Petition, at 27. *See* Petition Response, at 23.

57 Claimant Ex. 75.

58 The report states that a white farmer applied for loan servicing on June 23, 1992, and the process was concluded on July 2, 1997. USDA Ex. 124. The Claimant's loan servicing application was submitted on August 5, 1992 and his buyback loan closed on September 3, 1996.

59 USDA Ex. 124. This report was prepared in response to a discrimination complaint filed by the Claimant with USDA. No other information about the white farmers is provided.

60 Arbitrator's Decision, at 7.

61 Arbitrator's Decision, at 4.

assumption or the collateral requirements were discriminatory.[62] The Arbitrator rejected the Claimant's allegations that his Emergency Loan was delayed due to race discrimination, finding legitimate reasons for the delay and insufficient evidence of disparate treatment.[63] The Arbitrator reached the same conclusion with respect to delays in the processing of the Claimant's 1987 Guaranteed Operating Loan and the 1992 loan servicing request.[64] Lacking evidence of a nexus between the acknowledged delay in the Claimant's applications and his race, evidence of animus, or a showing of disparate treatment, the Arbitrator found the Claimant had failed to establish by a preponderance of the evidence that he was a victim of race discrimination.[65]

C. Analysis of Issues

The Claimant has petitioned the Monitor for review. The Monitor has analyzed whether the claim should be reexamined under the tests for "clear and manifest error" and for "fundamental miscarriage of justice."[66]

1. Issue One — Whether the claim should be reexamined because the Arbitrator concluded that the Claimant failed to prove by a preponderance of the evidence that USDA discriminated against the Claimant with respect to the terms and timeliness of his 1986 Emergency Loan

In his Petition, the Claimant challenges the Arbitrator's analysis of his 1986 Emergency Loan claim on multiple grounds. The Claimant asserts that under a proper application of USDA regulations, the Claimant and his sons operated a "family farm," not a "joint farming operation."[67] The Claimant argues that the debt assumption and collateral required by

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62 Arbitrator's Decision, at 3-4.

63 Arbitrator's Decision, at 4-5.

64 Arbitrator's Decision, at 5-7.

65 Arbitrator's Decision, at 7.

66 In addition to alleging errors in the Arbitrator's analysis of specific claims, the Claimant contends generally that reexamination is warranted because the Arbitrator did not make express findings concerning application of the *McDonnell Douglas* framework for proving discrimination. Petition, at 8. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 793 (1973), the United States Supreme Court established a three-part framework governing the order and allocation of proof in cases alleging discrimination under Title VII. The Arbitrator's Decision notes that the *McDonnell Douglas* framework may be used to establish discrimination under the Equal Credit Opportunity Act (ECOA). Arbitrator's Decision, at 2. However, the Consent Decree does not require the Arbitrator's Decision to address each step in the analytical framework. The Consent Decree states only that the Arbitrator is to determine whether the Claimant "has demonstrated by a preponderance of the evidence that he was the victim of racial discrimination and suffered damages therefrom." Consent Decree, ¶ 10(g). Although express findings concerning the application of the *McDonnell Douglas* test would be helpful, the Monitor does not find a clear and manifest error based upon the lack of specific findings concerning the application of *McDonnell Douglas.*

67 Petition, at 10-13.

USDA as part of the Emergency Loan were contrary to USDA regulations.[68] The Claimant maintains that there were "[g]aping lapses in progress" in the processing of his Emergency Loan, and evidence that white farmers received their loans before the Claimant.[69]

In its Petition Response, USDA argues that the Arbitrator carefully considered all relevant facts and appropriately ruled that the Claimant did not prove racial discrimination by a preponderance of the evidence.[70] USDA asserts that the Claimant and his sons constituted a "joint farming operation" because the evidence showed that the Claimant and his sons shared land, labor, equipment, expenses, and income.[71] USDA submits that it was reasonable to require the Claimant's joint operation to assume the prior debt of his sons, since the security for the sons' loans was equipment and machinery owned by the joint operation.[72] USDA argues that the real estate lien required by USDA as collateral was consistent with USDA regulations and not discriminatory.[73] Finally, regarding the late funding issue, USDA asserts that the allegedly similarly situated white farmers cited by the Claimant applied for Operating Loans, not Emergency Loans, and there was no evidence in the record concerning the time it took to process their applications.[74] USDA further argues that there were legitimate, nondiscriminatory reasons regarding the length of time for the Claimant's loan processing.[75]

a. Clear and Manifest Error

The Arbitrator ruled that the Claimant failed to show that USDA discriminated against him in connection with the terms and the timeliness of his 1986 Emergency Loan.[76] The Claimant challenges several aspects of the 1986 Emergency Loan transaction.

1. Joint Application Requirement

The Arbitrator rejected the Claimant's contention that USDA's determination that he and his sons were a "joint operation" constituted discriminatory treatment.[77] The Claimant maintains that the Arbitrator misunderstood the nature of a family farming operation when he concluded the joint operation requirement was nondiscriminatory. According to the

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68 Petition, at 13-16.
69 Petition, at 17-19.
70 Petition Response, at 5.
71 Petition Response, at 7-8.
72 Petition Response, at 14-17. USDA also notes that the sons' loans were rescheduled to receive substantially reduced interest rates. Petition Response, at 17.
73 Petition Response, at 17-18.
74 Petition Response, at 19.
75 Petition Response, at 19-20.
76 Arbitrator's Decision, at 3-5.
77 Arbitrator's Decision, at 3-4.

Claimant, the sharing of equipment, labor, and land is common in a family farming situation, but family members can still apply for loan funds as separate individuals.[78]

Under USDA Emergency Loan regulations, a "joint operation" is defined as:

> A farming entity in which two or more farmers work together sharing equally or unequally land, labor, equipment, expenses, and/or income. The joint ownership of land and/or equipment or the exchange of labor and equipment in separate farming operations does not constitute a joint operation. They are two separate individual operations.[79]

This regulation makes it clear that the defining characteristic of a joint operation is not simply the sharing of land, labor, and equipment, which separate farming operations can often engage in, but also the sharing of expenses and/or income. There is ample evidence in the record that shows that the Claimant and his sons shared not just their land, labor, and equipment, but also their expenses and income. The Claimant testified in his direct testimony that he and his three sons "all worked on the farm, and we had an informal arrangement to share the profits we earned from farming."[80] In response to a question about whether an agreement to share expenses and profits existed, [redacted], one of the Claimant's sons, testified that "[e]xpenses within the farming were taken care of and then we would talk about what would be there."[81] The Claimant confirmed during the Arbitration hearing that he and his sons shared income from the same land:

Q. You and your three sons each farmed on your land?

A. Yes.

Q. On the same land?

A. Yes.

Q. And you all used all the same equipment?

A. Yes.

Q. And you all, to some extent, shared the income from the farm?

A. Yes.[82]

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78 Petition, at 10-11.

79 7 C.F.R. §1945.154(a)(18) (1987).

80 Direct Testimony of [redacted], at 4.

81 Direct Testimony of [redacted], at 4.

82 Transcript, at 32 (cross-examination of [redacted]).

The Claimant reinforced the conclusion that he and his sons farmed a joint operation when he indicated that he "brought my sons into the operation."[83] Moreover, as the Arbitrator noted, the Claimant had co-signed a loan for his son [redacted] "using the same cattle, machinery and equipment as collateral as was used by [redacted]," and several mortgages were in the name of [redacted].[84]

The Claimant's citation to the determination by the Agricultural Stabilization and Conservation Service (ASCS) that he was a separate "person" from his sons for the payment of ASCS benefits does not detract from the Arbitrator's finding.[85] The Claimant has not explained how a determination by ASCS, a separate agency, was binding on Farmers Home Administration (FmHA), which was responsible for farm loan programs. Moreover, the Monitor notes that under ASCS regulations, each individual who shares in the proceeds derived from farming by a joint operation "shall be considered a separate person."[86] Thus, a "separate person" determination under ASCS regulations does not in any way conflict with a finding under farm loan eligibility regulations that a farmer was involved in a "joint operation."[87] Finally, the record contains no evidence that a white farmer who was similarly situated was treated more favorably by USDA. Instead, the only evidence relating to a potentially similarly situated white farmer comes from the County Supervisor, who testified that she knew of a family farm run by a white farmer and his son-in-law, who were required to submit a joint application for a loan because they constituted a joint operation.[88]

The Arbitrator did not specify whether the Claimant had established a *prima facie* case of discrimination under the *McDonnell Douglas*[89] framework. Assuming the Claimant had established a *prima facie* case concerning the joint application requirement for his 1986 Emergency Loan, USDA articulated a legitimate nondiscriminatory reason for the joint application requirement, namely, that the Claimant's farm was a joint operation within the meaning of the Emergency Loan regulations. In finding the Claimant failed to prove the requirement was discriminatory, the Arbitrator implicitly concluded that the Claimant had failed to show that USDA's stated reason was pretextual. Because the record contains sufficient evidence to support this conclusion, the Monitor finds no clear and manifest error.

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83 Direct Testimony of [redacted] at 4.

84 Arbitrator's Decision, at 4.

85 Petition, at 10-11.

86 7 C.F.R. § 795.7 (1987). The evidence cited by the Claimant, Claimant Ex. 72, actually supports the determination of a joint operation, as the Claimant and his sons state the percentage of effort they each contribute to "this farming operation," which is described as including the Claimant and his three sons. Claimant Ex. 72.

87 *See* 7 C.F.R. § 795.3 (1987). The regulations concerning separate persons apply only to farm program payments, and do not affect FmHA farm loans. *Compare* 7 C.F.R. pt. 795 (1987) *with* 7 C.F.R. pt. 1945 (1987).

88 Direct Testimony of [redacted], at 6.

89 411 U.S. 793 (1973).

2. Debt Assumption and Collateral Requirements

In addition to challenging the joint application requirement, the Claimant also argues the Arbitrator clearly erred in failing to find that USDA's debt assumption and collateral requirements for the Emergency Loan transaction were discriminatory.[90] The Arbitrator recognized that requiring the Claimant to assume the debts of his sons harmed the Claimant's ability to obtain future financing.[91] The Arbitrator also noted, however, that the debt assumption was of some benefit to the joint operation, because it reduced the overall interest rate on the rescheduled debt.[92] The Claimant argues it was "excessive" to require a security interest in the Claimant's real estate, the value of which, according to the Claimant, was greater than the Emergency Loan funds he received.[93] However, the County Supervisor testified at some length concerning the security requirements, the reason why real estate was necessary as security, and the value of the equity position held by USDA.[94] The Claimant has cited no evidence of white farmers whose collateral requirements were more favorable than the Claimant's, nor presented other reasons why the USDA's explanation of the collateral requirements should be deemed pretextual.

The Arbitrator did not specify whether the Claimant had established a *prima facie* case of discrimination under the *McDonnell Douglas* framework. Assuming that the Claimant had established a *prima facie* case concerning the debt assumption and collateral requirements for his 1986 Emergency Loan, USDA articulated legitimate nondiscriminatory reasons for these conditions on the Claimant's loan. The Arbitrator implicitly concluded that the Claimant had failed to show USDA's stated reasons were pretextual, and the record contains sufficient evidence to support this conclusion. The Monitor finds no clear and manifest error in the Arbitrator's Decision.

3. Delay

Finally, the Claimant maintains that the six-month delay in processing his Emergency Loan request is evidence of discrimination by USDA. The Arbitrator found legitimate reasons why it took USDA six months to process the Claimant's loan application, and no basis for concluding that white farmers received their loans in a more timely manner.[95] According to

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90 Petition, at 13.

91 Arbitrator's Decision, at 3.

92 Arbitrator's Decision, at 3.

93 Petition, at 14-16. In his Petition, the Claimant states the value of his real estate was $621,026 and the amount of his Emergency Loan was $163,930.

94 The County Supervisor explained that a security interest in real estate was required because the Claimant's Emergency Loan had a term of longer than 7 years. *See* 7 C.F.R. § 1945.118(b)(1)(i) (1987). The County Supervisor also testified that the equity value of the land was $337,177. Direct Testimony of [redacted], at 8-9; USDA Ex. 127. USDA obtained a lien on this land to secure $313,650 in loan funds: an Emergency Loan of $163,930 and rescheduled loans of $149,720. Transcript, at 116-117 (redirect examination of [redacted]).

95 Arbitrator's Decision, at 4-5.

the Claimant, of the white farmers listed on the Grantor-Grantee Index for [redacted] County who received loans in 1986 and 1987 at a 4.5 percent interest rate, he was "dead last" in receiving his loan on June 23, 1987.[96] According to the County Supervisor, however, the loans which the Claimant cited were all Operating Loans, not Emergency Loans, and there is no evidence in the record concerning when these farmers applied for their loans.[97]

The Arbitrator recognized the lack of evidence that white farmers' Emergency Loans were processed more quickly.[98] The Arbitrator also noted that the County Supervisor offered legitimate reasons for the delay in the Claimant's loan processing, which included verification of the debts of the Claimant and his sons and evaluating the value of the collateral, which was encumbered by a number of different liens.[99] Thus, assuming the Claimant had established a *prima facie* case of discrimination regarding the six-month delay in his Emergency Loan processing, USDA has articulated legitimate, nondiscriminatory reasons for the delay. The Arbitrator implicitly concluded, considering the evidence as a whole, that the Claimant failed to show that USDA's reasons were pretextual. The record contains sufficient evidence to support the Arbitrator's conclusion. The Monitor finds no clear and manifest error in the Arbitrator's judgment that the Claimant failed to prove, by a preponderance of the evidence, that the delay he experienced was due to discrimination.

The Monitor has carefully reviewed the evidence and the Arbitrator's Decision. The Monitor does not have a firm and definite conviction that the Arbitrator made a mistake in evaluating the evidence concerning the Claimant's Emergency Loan claim. Therefore, the Monitor does not find clear and manifest error.

b. Fundamental Miscarriage of Justice

An analysis of fundamental miscarriage of justice is not necessary where the Monitor makes no finding of clear and manifest error.

2. Issue Two - Whether the claim should be reexamined because the Arbitrator concluded that the Claimant failed to prove by a preponderance of the evidence that the delay in the processing of the Claimant's 1987 Guaranteed Operating Loan was due to discrimination

In his Petition, the Claimant challenges the Arbitrator's conclusion that there was "no evidence" before the Arbitrator that would indicate the year-long delay in the processing of

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96 Petition, at 18.

97 Petition Response, at 19; Direct Testimony of [redacted], at 12-13; Transcript, at 108 (cross-examination of [redacted]). Neither the Grantor-Grantee index nor the mortgage records state the type of loan or the date of application. *See* Claimant Ex. 70A, 70B.

98 Arbitrator's Decision, at 4-5.

99 Direct Testimony of [redacted], at 6-9; Arbitrator's Decision, at 4-5.

his Guaranteed Operating Loan was caused or motivated by race discrimination.[100] The Claimant asserts that USDA "threw numerous obstacles" in the Claimant's path, preventing him from obtaining a timely Guaranteed Loan.[101] The Claimant argues that the reasons offered by USDA for the delay in processing the Bank's Guaranteed Loan application amount to "flimsy excuses," which do not constitute legitimate, nondiscriminatory reasons under *McDonnell Douglas*.[102]

In its Petition Response, USDA argues that the Claimant did not meet the threshold showing required to establish a *prima facie* case for the Guaranteed Loan claim, but even assuming the Claimant did so, USDA met its burden of articulating non-discriminatory reasons for the delay.[103] USDA states that the delayed processing of the Guaranteed Operating Loan was a result of the lateness of the Claimant's application and the complicated nature of the transaction, which involved a joint farming operation, the need for District Office approval, and the consent of the Bank on the percentage of USDA's guarantee.[104] USDA asserts that because the Claimant did not prove by a preponderance of the evidence that the reasons asserted by USDA were pretextual, the Arbitrator was correct in finding insufficient evidence of discrimination.[105]

a. Clear and Manifest Error

The Arbitrator reviewed the evidence in the record concerning the processing of the Claimant's 1987 Guaranteed Loan.[106] The record shows the First National Bank submitted a Guaranteed Loan application on April 28, 1987, and the loan did not close until April 28, 1988, a processing time of one year.[107] The Arbitrator concluded that while the loan transaction was "characterized by clear and acknowledged delay," there was "no evidence before the Arbitrator that would indicate that any of the delay was either caused or motivated by race discrimination."[108]

The Claimant's Petition contends there *is* evidence of discrimination in the "numerous obstacles" thrown in the Claimant's path by USDA.[109] The Claimant cites evidence that the County Supervisor did not want to begin working on the Guaranteed Loan application until the Emergency Loan papers were completed.[110] The Claimant cites the numerous inquiries

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100 Petition, at 22-23.
101 Petition, at 20.
102 Petition, at 23.
103 Petition Response. at 21.
104 Petition Response, at 21-22.
105 Petition Response, at 23.
106 Arbitrator's Decision, at 5.
107 USDA Ex. 23, 42.
108 Arbitrator's Decision, at 5.
109 Petition, at 20.
110 Petition, at 20; USDA Ex. 36 (running record note dated 5/12/87).

he made regarding the status of the loan, disparaging the "[v]arious excuses" raised for the delay, including the additional information needed for the Joint Operating Agreement and the security appraisal information needed from the Bank.[111]

The Claimant notes that First National Bank was also unhappy with USDA's positions during the loan processing and complained that the initial proposal to provide only a 50 percent guarantee "was just like saying [the Claimant's] operation was a loss."[112] USDA records report that the Bank president asserted that he knew of other instances where borrowers in a poorer position than the Claimant were nonetheless getting a greater percentage guarantee from USDA.[113] At a meeting between USDA, the Bank, and the Claimant in January 1988, USDA records report the Bank president and the Claimant complained about the delay in the loan processing, and "felt insulted by the percent of guarantee and felt [USDA] had singled them out."[114] After this meeting, the County Supervisor was able to convince the District Director to increase the amount of the guarantee to 75 percent, a fact noted by the Arbitrator in the Decision.[115]

The Claimant's allegations of discrimination in the Guaranteed Loan processing focus not on the amount of the guarantee (which the Bank surely wanted to maximize and which the Bank collected payment on in July 1996), but rather on the one-year delay in the loan processing. On the issue of delay, the Arbitrator concluded the Claimant had failed to prove by a preponderance of the evidence that the one-year processing delay was discriminatory.[116] The record contains evidence that supports the Arbitrator's Decision.

The Arbitrator did not make a specific finding about whether the Claimant had established a *prima facie* case of discrimination under the *McDonnell Douglas* framework. However, assuming the Claimant established a *prima facie* case,[117] USDA offered legitimate nondiscriminatory reasons for the loan processing delays. USDA officials explained that the County Office was extremely busy during this time period, and the Claimant's

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111 Petition, at 21.

112 Petition, at 21. According to USDA records, the Bank President was "most displeased" with the terms of the Emergency Loan (regarding the amount of security USDA required) and with USDA's proposal to guarantee only 50 percent of the Guaranteed Loan. USDA Ex. 38-39.

113 USDA Ex. 38. No specific information about these farmers is provided, however.

114 USDA Ex. 39.

115 Arbitrator's Decision, at 5.

116 Arbitrator's Decision, at 5.

117 The Monitor notes the Claimant is a member of a protected class; an application was filed by the Bank on his behalf; he was eligible for a Guaranteed Loan; USDA took one year to process the loan application; the Bank and the Claimant complained about the delay and conditions of the loan during the time the loan was being considered; the Bank president told USDA he knew of other farmers who had received more favorable treatment; the Bank president and the Claimant felt USDA had "singled them out" in the way the loan was being handled; and the County Office closed over thirty loans for white farmers during the time the Claimant was waiting for his loan to close. *See* Petition, at 20-23.

Guaranteed Loan request was "a very complex loan."[118] The record supports the Arbitrator's finding that the loan was complicated by the Claimant's joint farming operation and the negotiations with the Claimant's Bank over the terms, including questions involving security for the loan, as well as the percentage of the loan to be guaranteed.[119] USDA suggests the Claimant's evidence of loans to white farmers does not provide a sufficient basis for concluding any white farmer received a Guaranteed Loan in a more timely manner than the Claimant.[120] The Monitor finds no clear and manifest error in the Arbitrator's implicit conclusion that the Claimant failed to prove, by a preponderance of the evidence, that USDA's reasons for the delay were pretextual.

The Monitor has carefully reviewed the evidence and the Arbitrator's Decision. The Monitor does not have a firm and definite conviction that the Arbitrator made a mistake in evaluating the evidence concerning the Claimant's late funding Guaranteed Loan claim. Therefore, the Monitor does not find clear and manifest error.

b. Fundamental Miscarriage of Justice

An analysis of fundamental miscarriage of justice is not necessary where the Monitor makes no finding of clear and manifest error.

3. Issue Three - Whether the claim should be reexamined because the Arbitrator found the Claimant failed to prove by a preponderance of the evidence that the delays in the consideration and processing of the Claimant's 1992 loan servicing request were due to discrimination

Finally, the Claimant challenges the Arbitrator's analysis of his 1992 request for loan servicing. The Claimant argues that his finances had been "choked" by USDA and USDA had "tied up the collateral he needed to secure adequate operating loans to run his farm productively," so that he was in need of loan servicing.[121] The Claimant maintains that the

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[118] The prior County Supervisor had been convicted of embezzling, so the County Supervisor who took over in 1985 spent a fair amount of time sorting out the problems created by this situation. In addition, [redacted] County had the largest number of delinquent loans in the state and, after the flood in 1986, had numerous requests for emergency assistance as well. The County Supervisor described the staff as "rushed, overworked and harried." Direct Testimony of [redacted], at 2.

[119] *See* Direct Testimony of [redacted], at 12-13.

[120] USDA's counsel argued before the Arbitrator, "there are no similarly situated white farmers. In fact, we haven't seen examples of anyone applying for a guaranteed loan. So once again, we don't know how long is too long." Transcript, at 241 (closing argument). The Monitor notes the Claimant provided no specific evidence of white farmers who had received Guaranteed Loans in a more timely manner. The Claimant's evidence of over thirty loan closings secured by real estate does not indicate the type of loans or when applications were filed. *See* Claimant Ex. 70A. An Emergency Loan application could have been submitted up to eight months after the disaster declaration. 7 C.F.R. § 1945.161(a)(1)(1987).

[121] Petition, at 23-24.

four-year delay, from the time of his initial application to the time his loan closed to complete a buyback of his farm, constitutes discrimination by USDA.[122]

USDA contends there is insufficient evidence that white farmers received more timely loan servicing than the Claimant.[123] USDA further argues that the Arbitrator correctly determined that USDA presented legitimate, nondiscriminatory reasons for the delay in processing his loan servicing request, which the Claimant has not shown to be pretextual.[124]

a. Clear and Manifest Error

USDA regulations provide numerous loan servicing options for borrowers who become delinquent on their loans, including debt restructuring, reamortization, lower interest rates, loan deferrals, and write-down of debt.[125] USDA regulations direct the Agency to make "every effort" to keep farmers in business, using mediation if necessary and available in an attempt to persuade other creditors to restructure their debt if that is what is needed to develop a feasible plan.[126] If these options are not successful, USDA must offer the borrower the opportunity to buy out the USDA debt at net recovery value.[127] If the borrower does not buy out at net recovery value, a leaseback/buyback can be considered, which gives the borrower the first opportunity to lease or purchase their property back from USDA.[128]

All of these options were considered for the Claimant after he requested loan servicing. In August 1992, USDA determined that the Claimant's cash flow was insufficient to meet his obligations to other creditors, so the primary loan servicing options, such as rescheduling or deferral, would not work.[129] In October 1992, the Claimant was offered mediation, which closed in May 1993 without success.[130] In June 1993, USDA offered the Claimant a net recovery buyout.[131] When the Claimant decided he was not interested in a net recovery buyout, USDA shifted to consideration of a leaseback/buyback. The County Committee certified the Claimant's eligibility in February 1994, and the Claimant's buyback application was completed on April 14, 1994.[132]

The County Supervisor approved the application and sent a request for obligation of funds to the District Office in July 1994. Due to various errors, the obligation of funds request

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122 Petition, at 24.
123 Petition Response, at 23-25.
124 Petition Response, at 25-29.
125 7 C.F.R. § 1951.902(a)(2) (1992).
126 7 C.F.R. § 1951.902(a)(2) (1992).
127 7 C.F.R. § 1951.902(a)(2) (1992).
128 7 C.F.R. § 1951.911(a) (1992).
129 Direct Testimony of [redacted], at 3; USDA Ex. 69.
130 Direct Testimony of [redacted], at 3; USDA Ex. 71.
131 Direct Testimony of [redacted], at 4.
132 Direct Testimony of [redacted], at 5-7; USDA Ex. 83.

was not processed to secure funds for a buyback (otherwise referred to as a "credit sale").[133] This error was not realized until after October 1, 1994, when funding for credit sales was no longer available.[134] Substitute funding for the Claimant's buyback loan was not secured until almost a year later, in September 1995.[135]

Once funds were secured, the transaction was complicated by First National Bank's decision to collect on USDA's guarantee for the Claimant's 1987 Guaranteed Loan, before it was willing to lend the Claimant additional funds.[136] The State Office did not approve the loss claim and write down until July 1996.[137] USDA employees explained how these circumstances helped to account for the four-year delay from the time of the Claimant's initial loan servicing application in August 1992, to the $200,000 buyback loan closing on September 3, 1996.[138]

The Claimant argues that the Arbitrator failed to consider the context of the County Office delays in the face of numerous inquiries by the Claimant about the status of his buyback loan.[139] The Claimant also takes issue with language in the Arbitrator's Decision, which the Claimant reads to require more than the *McDonnell Douglas* test to prevail.[140] The Claimant argues that he established a *prima facie* case of discrimination, that USDA failed to articulate legitimate nondiscriminatory reasons for the way the Claimant was treated, and that, even assuming USDA met its burden, the Claimant proved USDA's asserted reasons were pretextual.[141] USDA submits that the Claimant failed to establish even a *prima facie* case, because, according to USDA, the Claimant failed to show that white farmers received more timely loan servicing.[142] USDA further argues that even assuming the Claimant has established a *prima facie* case, the Claimant failed to show that USDA's legitimate nondiscriminatory reasons for the delay - including the failure of the mediation, the

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133 Direct Testimony of [redacted], at 7-9; Transcript, at 145-146 (cross-examination of [redacted]).

134 Direct Testimony of [redacted], at 8-9; Transcript, at 146 (cross-examination of [redacted]).

135 Direct Testimony of [redacted], at 8-9; Transcript, at 152 (cross-examination of [redacted]).

136 Direct Testimony of [redacted], at 10.

137 Direct Testimony of [redacted], at 11.

138 Direct Testimony of [redacted], at 7-10.

139 Petition, at 26. The Claimant testified that he kept asking the County Supervisor when his loan would close, and the County Supervisor kept on telling him it would be ready in a few days. Direct Testimony of [redacted], at 19. According to the Claimant, the County Supervisor "knew how serious things were for me." Direct Testimony of [redacted], at 19.

140 The Claimant challenges the statement by the Arbitrator that his claim fails because it "lacks a nexus between the behavior complained of and race." Petition, at 30. The Monitor does not read the Arbitrator's Decision to require more than *McDonnell Douglas* to prevail. Instead, the Monitor views the Arbitrator's language as simply recognizing that there are a number of ways to prevail in a discrimination case, and the Claimant failed to present sufficient evidence for the Arbitrator to find in his favor under any permissible test.

141 Petition, at 30.

142 Petition Response, at 23-25. *See* Transcript, at 223-224 (closing argument).

Claimant's rejection of the net recovery buyout, the complications caused by the Bank's Guaranteed Loan loss claim and write down request, and the difficulty in securing funding after the designated funds for credit sales were eliminated - were pretextual.

Although the Arbitrator made no specific *McDonnell Douglas* findings, the record supports the Arbitrator's implicit finding that the Claimant had established a *prima facie* case of discrimination. The Arbitrator found that the Claimant experienced "more than his share of delays in the processing of loans" with USDA.[143] The Arbitrator also found unexplained lapses of time, often a month or more, in the County Office's processing of the Claimant's loan servicing request.[144] The Arbitrator characterized USDA's handling of the Claimant's loan servicing as "bungling," "sloppy," and "suspect."[145]

However, the Arbitrator also implicitly found that USDA had met its burden of articulating legitimate, nondiscriminatory reasons for the delay, and the Claimant had failed to prove by a preponderance of the evidence that USDA's asserted reasons were pretextual. The record contains sufficient evidence to support the Arbitrator's conclusions. USDA presented numerous explanations for the delay. These include the unsuccessful efforts at mediation, the Claimant's rejection of a net recovery buyout, the complications of the requirement that First National Bank also loan the Claimant funds, which required processing of the Bank's loss claim and write down on the prior Guaranteed Loan, the multiple levels of USDA involved in the approval process, the admitted mistake that was made when the request for obligation of funds was not properly processed by the District Office, the inexperience of the County Office, which had not ever processed a credit sale request, and the County Office's efforts to obtain hardship or other alternative funding. In addition to these reasons, the Arbitrator found the County Office was "extremely busy" and noted there was "scant

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143 Arbitrator's Decision, at 7.

144 Arbitrator's Decision, at 7.

145 Arbitrator's Decision, at 7. The Monitor notes this finding is consistent with statements in the unsigned discrimination investigation report prepared by USDA's Office of Civil Rights (OCR). USDA Ex. 124. The OCR began an investigation into the Claimant's loan servicing in response to a complaint he filed. The OCR report states a *prima facie* case of discrimination is established if: (1) the complainant identifies a protected basis; (2) the complainant applied to a program that is conducted by USDA; (3) the complainant is qualified to participate in the program; (4) the complainant's participation was harmed by an action or failure to act by the agency; and (5) there is some inference that discrimination may have played a part in the decision made. According to OCR, this inference can be based on a comparison with similarly-situated program participants; statistical disparities in program decisions on the basis alleged; remarks or comments indicative of stereotypes, or generally considered demeaning to the basis group alleged; or some other evidence raising an inference of prohibited discrimination. The report states that the Claimant established a *prima facie* case with regard to the denial of loan servicing in 1994, but then describes the legitimate, nondiscriminatory reasons presented by USDA for the challenged actions. The report concludes by noting that the Claimant declined to present rebuttal. USDA Ex. 124. The Claimant testified that he had no confidence his complaint would be fairly and completely investigated, and so he decided to address his complaint through assertion of a Track B claim, rather than through the OCR process. Direct Testimony of [redacted], at 26.

evidence" that white farmers with similar circumstances were treated more favorably.[146] Although the Claimant and USDA have differing views regarding the evidence of white farmers who received loan servicing,[147] the Arbitrator resolved this conflict in favor of USDA.[148] Viewing the evidence in the record as a whole, the Monitor finds no clear and manifest error in the Arbitrator's finding that the Claimant failed to prove, by a preponderance of the evidence, that USDA discriminated against him in the processing of his loan servicing request.[149]

The Monitor has carefully reviewed the evidence in the record and the Arbitrator's Decision. The Arbitrator's findings were informed by the testimony of the Claimant and the USDA officials who were cross-examined at the hearing. The Arbitrator concluded the evidence was insufficient to prove discrimination by a preponderance of the evidence. The Monitor finds no clear and manifest error in the Arbitrator's Decision.

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146 Arbitrator's Decision, at 7.

147 The Claimant argues the evidence shows white farmers received more timely loan servicing. Petition, at 27-28. USDA argues the one white farmer for whom the Claimant submitted USDA records was not similarly situated to the Claimant, because his mediation was successful (unlike the Claimant's) and he accepted a net recovery buyout, which the Claimant rejected. Petition Response, at 23-25.

148 Arbitrator's Decision, at 7. The Claimant also cites two white farmers who received credit sales in 1994, the year his application was approved and forwarded for obligation of credit sale funds. These farmers are identified in the OCR investigation report, which says nothing about when they applied for the credit sales or whether the processing of their applications was completed more quickly than the Claimant's. The report also cites yet another white farmer, whose loan servicing actually took longer than the Claimant's. *See* USDA Ex. 124.

149 The Claimant's citation to decisions from other Track B Arbitrations does not change this result. *See* Petition, at 32-34. The framework of the Consent Decree mandates a fact-specific inquiry in each arbitration, subject to review by the Monitor. The Monitor has reviewed the Arbitrator's Decision in this case, and has considered the application of the *McDonnell Douglas* framework to the facts. The result obtained in other arbitrations under a *McDonnell Douglas* analysis is not determinative of the outcome here.

b. Fundamental Miscarriage of Justice

An analysis of fundamental miscarriage of justice is not necessary where the Monitor makes no finding of clear and manifest error.

VI. CONCLUSION

The Monitor makes no finding of clear and manifest error resulting or likely to result in a fundamental miscarriage of justice.

Request for Reexamination for Claim No. [redacted] is hereby DENIED.

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Monitor