

[REDACTED]

**CONFIDENTIAL: Protected by  
Privacy Act Protective Order<sup>1</sup>**

Lester J. Levy, Esq.  
Chief Adjudicator  
c/o Poorman-Douglas Corporation  
10300 SW Allen Boulevard  
Beaverton, OR 97005

Re: Petition of [REDACTED]  
Claim No. [REDACTED]

Dear Chief Adjudicator:

I am writing to direct reexamination of the Adjudicator's Decision issued in this matter.

**I. PROCEDURAL POSTURE**

This is a Track A matter involving a credit claim and a non-credit claim. The Adjudicator's Decision denied relief. The Claimant has petitioned the Monitor for review.

The following claims are before the Monitor for review:

1. Denial of Operating Loan in 1990; and
2. Underfunding of non-credit benefits in 1992 (Disaster Payments).

**II. THE RECORD FOR MONITOR REVIEW**

The record upon petitioning for Monitor review consists of:

1. The Claim Sheet and Election Form ("Claim Sheet");
2. The United States Department of Agriculture's Response to the Claim ("USDA's Claim Response");

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<sup>1</sup> *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Second Amended Supplemental Privacy Act Protective Order, July 14, 2000) (copy available from the Facilitator).

3. The Adjudicator's Decision ("Decision");
4. The Petition for Monitor Review ("Petition");
5. The Non-Petitioning Party's Response ("Petition Response"); and
6. The following supplemental material submitted for consideration and accepted by the Monitor into the record:<sup>2</sup>
  - a. The names of two additional allegedly similarly situated white farmers, Farmer C and Farmer D<sup>3</sup> (located in the Petition, at 2, 4);
  - b. Allegations regarding Farmer A and Farmer B (located in Petition, at 4);
  - c. Financing Statement and Continuation Statement regarding Farmer D (attached to the Petition); and
  - d. Correction of disaster benefit amounts (located in the Petition, at 4).

### **III. SUBSTANTIVE STANDARD OF REVIEW**

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

Direct the [F]acilitator, [A]djudicator, or [A]rbitrator to reexamine a claim where the Monitor determines that a clear and 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.<sup>4</sup>

The Monitor will find clear and manifest error where the Monitor, in reviewing the entire record, is left with the 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.

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<sup>2</sup> The decision to accept supplemental material into the record is within the Monitor's discretion. *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Order of Reference, § 8(f), Apr. 4, 2000) (copy available from the Facilitator and also available at <http://www.dcd.uscourts.gov/district-court-2000.html>). A description of the supplemental material submitted in this case and a brief explanation of the Monitor's decision to accept or deny the material are set forth in Appendix A, attached.

<sup>3</sup> For privacy purposes, references to the named allegedly similarly situated white farmers are coded in sequential alphabetical order.

<sup>4</sup> *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Consent Decree, ¶ 12(b)(iii), Apr. 14, 1999) (available from the Facilitator and at <http://www.dcd.uscourts.gov/district-court-1999.html>).

#### **IV. ANALYSIS OF CLAIMS**

The Monitor analyzed the claims under the tests for “clear and manifest error” and for “fundamental miscarriage of justice.”

##### **A. Claim One—Denial of Operating Loan in 1990**

In his Claim Sheet, the Claimant stated that he owned 77 acres and leased 50 acres of land southwest of [REDACTED],[REDACTED].<sup>5</sup> The Claimant stated that in 1990, he applied for and was denied an Operating Loan to purchase a tractor, combine, and sprayer.<sup>6</sup> The Claimant stated that USDA told him that he could not obtain a loan unless he had been turned down by three banks.<sup>7</sup> The Claimant stated that USDA told him that he did not qualify as a farmer because of his off-farm jobs.<sup>8</sup> The Claimant identified an allegedly similarly situated white farmer, Farmer A, who he said had off-farm jobs and received an Operating Loan.<sup>9</sup> The Claimant also identified Farmer B and alleged that Farmer B received an application upon request and “was approved.”<sup>10</sup> The Claimant stated that he was unable to upgrade his equipment as a result of USDA’s actions and this made his farming inefficient and costly.<sup>11</sup> The Claimant estimated that in addition to lost opportunity, he suffered crop losses every year after 1990,

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<sup>5</sup> Claim Sheet, at 3.

<sup>6</sup> Claim Sheet, at 3, 6

<sup>7</sup> Claim Sheet, at 3.

<sup>8</sup> Claim Sheet, at 3.

<sup>9</sup> Claim Sheet, at 5.

<sup>10</sup> Claim Sheet, at 4-5. The Claimant also alleged that USDA did not provide him appropriate loan services because they mailed him a loan application when he visited the USDA office. While these allegations contain information regarding the Claimant's experiences with USDA staff, they do not create a separate claim that “USDA failed to provide appropriate loan service” as that term is used in the Consent Decree. Rather, these are allegations regarding improper technical assistance. “Loan service,” more commonly referred to as “loan servicing,” is a USDA term of art that refers to restructuring and other programs available to borrowers having difficulty meeting their loan obligations after receiving a loan. Therefore, there can be no claim for failure to provide appropriate loan servicing unless a loan was actually made and the borrower was experiencing repayment difficulties. For a description of some of the possibilities, see 7 C.F.R. pt. 1951, subpt. S (2002).

<sup>11</sup> Claim Sheet, at 6. Specifically, the Claimant stated:

With the tractor [that I owned] I broke the land, cultivated, sprayed, and planted. I only had one tractor. It was old. I needed another one. When you cultivate you have to come right behind that and plant. If you don't you will not get a good plant “stand” (the # of plants per row or per feet). That's one of the reasons I needed another tractor, but not the only one. I had to rent a tractor every season for 2 weeks for \$1400.00. When my old one broke down I could not afford to repair at the time. I had to rent one then. Finally I had to go to a bank for a loan to repair my own – repair was \$1700. I needed a combine to harvest my crop. I was hiring a combine each year at 2500 a year. In addition, I hired a sprayer every year – that cost me 2.00 pr. acre each year. I was trying to pay ridiculous money when these were the items I requested for a loan from USDA.”

including a 50-percent crop loss in 1991.<sup>12</sup> In addition, the Claimant alleged that he was promised \$16,000 in disaster benefits around 1993, and received only \$8,000.<sup>13</sup>

USDA found no paper or computer records revealing a loan history for the Claimant.<sup>14</sup> USDA stated that the Claimant received a total of \$3,095 in disaster benefits for the years 1990, 1991, 1993, and 1994.<sup>15</sup> USDA found no paper or computer records revealing a loan history for Farmer A.<sup>16</sup> USDA provided the results of computer database searches (Name and Address - File Maintenance, Common Routine to Select ID Number, Alpha Cross Reference) indicating that Farmer A was not located in USDA's producer or borrower databases.<sup>17</sup> USDA did not submit a response regarding Farmer B.

In relevant part, the Adjudicator found that:

Claim denied. Claimant's allegations regarding receipt of \$8,000 in disaster benefits in 1993 is specifically contradicted by the USDA records showing total benefits of only about \$4,000 over a four-year period. . . . With respect to the operating loan, it is highly unlikely that the USDA would have no information for the first white farmer for a transaction as recent as 1990. Also, claimant's credibility was impeached by his allegation regarding the disaster payments. Claimant therefore did not establish by substantial evidence that he was the victim of discrimination with respect to the 1990 operating loan.

In his Petition, the Claimant states that the person completing his Claim Sheet erroneously wrote the amounts of disaster benefits.<sup>18</sup> The Claimant states that he said he should have received \$1,600, not \$16,000 as was written in the Claim Sheet, and that he received about half of that.<sup>19</sup> The Claimant argues that the error in completing the Claim Sheet caused the Adjudicator to mistakenly find that the Claimant's credibility had been impeached by USDA evidence.<sup>20</sup> The Claimant also submits the name of one additional allegedly similarly situated white farmer who is relevant to this claim, Farmer D.<sup>21</sup> The Claimant alleges that Farmer D received a 1990 Operating Loan and submits copies of a 1990

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<sup>12</sup> Claim Sheet, at 6.

<sup>13</sup> Claim Sheet, at 3.

<sup>14</sup> USDA's Claim Response, Track A Questionnaire on Class Member, response to questions 1-3, Ex. 1 (stamped Nos. [REDACTED]00001).

<sup>15</sup> USDA's Claim Response, Track A Questionnaire on Class Member, response to questions 2, 6.

<sup>16</sup> USDA's Claim Response, Track A Questionnaire on Similarly Situated White Farmer 1 of 1 (Farmer A), response to questions 1, 3, 7 and 8.

<sup>17</sup> USDA's Claim Response, Track A Questionnaire on Similarly Situated White Farmer 1 of 1 (Farmer A), Ex. 01-2 (stamped Nos. [REDACTED]00024-27).

<sup>18</sup> Petition, at 4.

<sup>19</sup> Petition, at 4.

<sup>20</sup> Petition, at 4.

<sup>21</sup> Petition, at 2, 4

Financing Statement and a 1991 Continuation Statement to support his allegation.<sup>22</sup> The Claimant also reiterates that the white farmers named in the Claim Sheet – Farmer A and Farmer B – received loans and specifically alleges that they both received Operating Loans in 1990.<sup>23</sup>

In the Petition Response, USDA argues that there has been no submission of evidence that warrants reexamination of this claim, and submits no supplemental information in response.

1. Clear and Manifest Error

The Monitor finds clear and manifest error in the adjudication of this claim because the Adjudicator made a mistaken assumption of fact by giving undue weight to the absence of USDA paper file records and computer records of a 1990 Operating Loan to Farmer A or Farmer B.

In his Claim Sheet, the Claimant alleged that Farmer A received an Operating Loan in 1990 and that Farmer B received an application and “was approved.”<sup>24</sup> In its Claim Response, USDA provided no response regarding Farmer B. Regarding Farmer A, USDA stated that no loan files were available and an Alpha Cross Reference indicated that Farmer A was not located in USDA’s borrower database.<sup>25</sup> USDA’s internal rules mandated that USDA routinely destroy paper loan files one year after the end of the fiscal year in which the loan file was closed.<sup>26</sup> Similarly, USDA periodically purged its borrower databases of most computer records of loans that were fully resolved<sup>27</sup> and retained information regarding the purged loans only in its record archives.<sup>28</sup> The last database purge occurred in 1993. Therefore, it seems likely that had Farmer A received a 1990 Operating Loan, that loan would have been resolved by 1993 and the computer records purged from USDA’s Current/Past Debts Inquiry system, leaving USDA’s record archives as the only complete record of the borrower’s loan history.<sup>29</sup> Because nothing in this file indicates that USDA

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<sup>22</sup> Petition, at 4.

<sup>23</sup> Petition, at 4.

<sup>24</sup> Claim Sheet, at 5.

<sup>25</sup> USDA’s Claim Response, Track A Questionnaire on Similarly Situated White Farmer 1 of 1 (Farmer A), response to questions 1, 3, Ex. 2 (stamped Nos. [REDACTED]00026-27).

<sup>26</sup> See, e.g., FmHA RD Instruction 2033-A, § 2033.10(b)(4) (PN 275 Apr. 9, 1997). A loan file was considered closed when it was paid in full, an approved settlement amount was paid, or the loan was “otherwise satisfied.” Instruction 2033-A, § 2033.10(a)(1).

<sup>27</sup> A loan was resolved when the loan file was closed because the loan was fully paid; debt settled by compromise, adjustment charge-off, or cancellation; satisfied through transfer and assumption; written off; or, in the later years of the class period, satisfied through net recovery value buyout.

<sup>28</sup> See USDA Letter to the Monitor explaining USDA record retention policy (June 27, 2001) (on file with the Facilitator).

<sup>29</sup> Operating Loans are generally one-year loans that are paid back at the end of the crop cycle. Some Operating Loans, such as loans for the purchase of equipment, have terms of as long as seven years.

searched its records archives, USDA's lack of records regarding Farmer A and Farmer B does not fairly detract from the Claimant's allegations that these white farmers received Operating Loans in 1990.<sup>30</sup> Therefore, the Monitor finds a clear and manifest error in the adjudication of this claim.

## 2. Fundamental Miscarriage of Justice

Having found clear and manifest error, the Monitor must decide whether the fundamental miscarriage of justice test is met. The fundamental miscarriage of justice test is met only when the Monitor believes it is likely that the Decision will change if the Adjudicator reexamines the claim.

The Adjudicator found that the Claimant's credibility had been impeached by inconsistencies between the Claim Sheet allegations and USDA's evidence regarding the amount of disaster benefits received by the Claimant. In his Petition, the Claimant explains that the figures written in the Claim Sheet were erroneous and corrects the estimates of his disaster benefits.<sup>31</sup> Although inaccuracy regarding one detail of a claim may have an impact on the credibility of other claims, in this case, the amount of disaster funds sought in later years is not an essential element of loan denial in an earlier year. Although the Adjudicator found the inaccuracy detracted from the credibility of the Claim, the Claimant responds to those concerns in his Petition. Furthermore, as discussed in Claim Two, USDA records corroborated the Claimant's allegations that "around 1993" he only received approximately half of his calculated disaster benefits. In 1992, USDA calculated the Claimant's disaster benefits at \$2,648 and the Claimant received payments totaling \$1,326.<sup>32</sup>

Based on this analysis, the Monitor finds that it is likely that upon reexamination the Adjudicator would find that the substantial evidence test is met. Therefore, the Monitor's fundamental miscarriage of justice test is met, and the Monitor directs the Adjudicator to reexamine this claim.

### **B. Claim Two—Underfunding of Non-credit Benefits in 1992 (Disaster Payments)**

In his Claim Sheet, the Claimant stated that he owned 77 acres and leased 50 acres of land southwest of [REDACTED],[REDACTED].<sup>33</sup> The Claimant stated that around 1993, USDA promised

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7 C.F.R. § 1941.18(b)(1) (1990). In the absence of a specific allegation about the type of Operating Loan, the Monitor assumes that the allegation concerns a one-year Operating Loan.

<sup>30</sup> In his Petition, the Claimant also names Farmer D and alleges that Farmer D received an Operating Loan in 1990. Petition, at 2, 4. USDA did not provide any information in response to the allegations. Therefore, nothing in the record detracts from the Claimant's allegations regarding Farmer D.

<sup>31</sup> Petition, at 4.

<sup>32</sup> USDA's Claim Response, Track A Questionnaire on Class Member, Ex. 2 (stamped Nos. [REDACTED]00010-17).

<sup>33</sup> Claim Sheet, at 3.

him \$16,000 in disaster benefits for crop loss due to drought.<sup>34</sup> The Claimant stated that he received only \$8,000.<sup>35</sup> The Claimant stated he asked about the rest and was told if there was no drought in the upcoming year, he would get the rest.<sup>36</sup> The Claimant stated that there was no drought, but he received no additional funds.<sup>37</sup> The Claimant identified Farmer A and Farmer B, but did not specifically allege that these farmers received disaster benefits.<sup>38</sup>

In the Claim Response, USDA stated that the Claimant received a total of \$3,095 in disaster benefits for the years 1990, 1991, 1993, and 1994.<sup>39</sup> USDA noted that disaster benefits are based upon losses calculated by established formulas and that actual payments depend on national funding levels.<sup>40</sup> USDA provided several of the Claimant's Applications for Disaster Benefits, Farm Entitlement Reports, and Payment Statements, which are summarized in the following table:<sup>41</sup>

| Disaster Losses                  | Calculated Payment | Payment Made to Claimant | Date of Payment  |
|----------------------------------|--------------------|--------------------------|------------------|
| 1990 losses on farm [REDACTED]96 | \$ 511             | \$ 256                   | April 17, 1992   |
| 1991 losses on farm [REDACTED]86 | \$2,137            | \$1,070                  | April 17, 1992   |
| 1993 losses on farm [REDACTED]96 | \$ 758             | \$ 758                   | January 27, 1994 |
| 1993 losses on farm [REDACTED]86 | \$ 0               | N/A                      | N/A              |
| 1994 losses on farm [REDACTED]96 | \$1,167            | \$1,167                  | March 14, 1995   |
| 1994 losses on farm [REDACTED]96 | \$ 602             | \$ 602                   | March 14, 1995   |

In relevant part, the Adjudicator found that:

Claimant's allegations regarding receipt of \$8,000 in disaster benefits in 1993 is specifically contradicted by the USDA records showing total benefits of only about \$4,000 over a four-year period. In addition, claimant did not name a white farmer

<sup>34</sup> Claim Sheet, at 3.

<sup>35</sup> Claim Sheet, at 3.

<sup>36</sup> Claim Sheet, at 3.

<sup>37</sup> Claim Sheet, at 3.

<sup>38</sup> Claim Sheet, at 5.

<sup>39</sup> USDA's Claim Response, Track A Questionnaire on Class Member, response to question 6.

<sup>40</sup> USDA's Claim Response, Track A Questionnaire on Class Member, response to question 2.

<sup>41</sup> USDA's Claim Response, Track A Questionnaire on Class Member, Ex. 2-7 (stamped Nos. [REDACTED]00003-23).

who received more favorable treatment in receipt of benefits and this is a specific threshold requirement in order to establish a viable claim regarding benefits. . . . Also, claimant's credibility was impeached by his allegation regarding the disaster payments. Claimant therefore did not establish by substantial evidence that he was the victim of discrimination with respect to the 1990 operating loan.

In his Petition, the Claimant states that the person completing his Claim Sheet erroneously wrote the amounts of disaster benefits.<sup>42</sup> The Claimant states that he told the attorney that his disaster losses were estimated at approximately \$1,600, not \$16,000, and that he received about half of that.<sup>43</sup> The Claimant argued that the error in completing the Claim Sheet caused the Adjudicator to mistakenly find that the Claimant's credibility had been impeached by USDA evidence.<sup>44</sup> The Claimant also submitted the name of one additional white farmer that is relevant to this claim, Farmer C, who allegedly received full disaster benefits when he did not.<sup>45</sup>

In the Petition Response, USDA argues that the lesser amounts included in the Petition do not change the original claim.<sup>46</sup> USDA also argues that the Claimant has not met the requirements of the Consent Decree because he has not named a similarly situated white farmer "regarding this benefit denial."<sup>47</sup> USDA submitted no supplemental information in response to this claim.

### 1. Clear and Manifest Error

The Monitor finds clear and manifest errors in the adjudication of this claim because the record before the Adjudicator was inaccurate regarding the Claimant's allegations of the benefit amounts and was incomplete regarding the naming of a similarly situated white farmer. In his Petition, the Claimant corrects the record and explains that the person completing the Claim Sheet on his behalf made an error, writing \$16,000 and \$8,000 as the amount of disaster benefits the Claimant thought he should receive and actually received when the Claimant said \$1,600 and \$800. This error caused the Adjudicator to find that the Claimant's credibility had been impeached by USDA records contradicting the Claimant's allegations. The Claimant also named a white farmer, Farmer C, who he alleged received full disaster benefits. Because the record before the Adjudicator was inaccurate and incomplete, the Monitor finds clear and manifest error in the adjudication of the Claimant's claim.

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<sup>42</sup> Petition, at 4.

<sup>43</sup> Petition, at 4.

<sup>44</sup> Petition, at 4.

<sup>45</sup> Petition, at 4.

<sup>46</sup> Petition Response, at 3.

<sup>47</sup> Petition Response, at 3.



## 2. Fundamental Miscarriage of Justice

Having found clear and manifest error, the Monitor must decide whether the fundamental miscarriage of justice test is met. The fundamental miscarriage of justice test is met only when the Monitor believes it is likely that the Decision will change if the Adjudicator reexamines the claim.

The Consent Decree provides that a claimant should prevail under the substantial evidence standard when:

[S]uch relevant evidence appears in the record . . . that a reasonable person might accept as adequate to support a conclusion after taking into account other evidence in the record that fairly detracts from that conclusion.<sup>48</sup>

The Claimant can satisfy that burden by showing that:

(A) he applied for a specific non-credit benefit program at a USDA county office during the [class] period . . . ; and (B) his application was denied or approved for a lesser amount than requested, and that such treatment was different than the treatment received by specifically identified, similarly situated white farmers who applied for the same non-credit benefit.<sup>49</sup>

The Claimant alleged that he did not receive the full amount of the disaster payments he was entitled to “around 1993.”<sup>50</sup> Disaster payments are typically based upon a detailed and quite specific method of calculation.<sup>51</sup> In his Petition, the Claimant states that he only received “approximately half” of the benefits he should have received, with a promise to receive the other half later.<sup>52</sup> The Claimant asserts that, according to USDA’s calculations of his qualifying losses, he should have received an estimated \$1,600, but only received \$758.<sup>53</sup>

In its Claim Response, USDA provided the Claimant’s 1992 Applications for Disaster Benefits, Farm Entitlement Reports, and Payment Statements for losses incurred in 1990 and 1991.<sup>54</sup> These documents indicate that USDA calculated the Claimant’s disaster

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<sup>48</sup> Consent Decree, ¶ 1(l).

<sup>49</sup> Consent Decree, ¶ 9(b)(i)(A)-(B).

<sup>50</sup> Claim Sheet, at 3.

<sup>51</sup> See, for example, 7 C.F.R. § 1477.5(b) (1993). The Monitor presumes the program at issue is the Disaster Payment Program found at 7 C.F.R. pt. 1477 (1990-1994).

<sup>52</sup> Petition, at 4.

<sup>53</sup> Petition, at 4.

<sup>54</sup> USDA's Claim Response, Track A Questionnaire on Class Member, Ex. 2 (stamped Nos. [REDACTED]00010-17).

benefits at \$2,648 and the Claimant received payments totaling \$1,326.<sup>55</sup> Thus, USDA's records support the Claimant's allegation that around 1993 he received approximately half of his calculated disaster benefits.

In his Petition, the Claimant identifies a white farmer, Farmer C, and alleges that Farmer C "received full disaster benefits for his losses."<sup>56</sup> USDA did not provide any information in response to the Claimant's allegations regarding Farmer C. Therefore, nothing in the record detracts from the Claimant's allegations that a specifically identified white farmer received different treatment regarding the receipt of disaster benefits during the time period that the Claimant alleges that his benefits were underfunded.<sup>57</sup>

The Monitor finds that once the supplemental information is taken into account and the proper basis of comparison is applied, it is likely that upon reexamination the Adjudicator would find that the substantial evidence test is met. Therefore, the Monitor's fundamental miscarriage of justice test is met, and the Monitor directs the Adjudicator to reexamine this claim.

## **V. CONCLUSION**

The Monitor finds clear and manifest error resulting or likely to result in a fundamental miscarriage of justice regarding:

1. Claim One – Denial of Operating Loan in 1990. The request for reexamination regarding this claim is GRANTED.
2. Claim Two – Underfunding of Non-credit Benefits in 1992 (Disaster Payments). The request for reexamination regarding this claim is GRANTED.

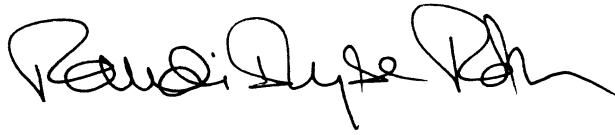
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<sup>55</sup> USDA's Claim Response, Track A Questionnaire on Class Member, Ex. 2 (stamped Nos. [REDACTED]00010-17).

<sup>56</sup> Petition, at 4.

<sup>57</sup> In the Claim Response, USDA noted generally that actual payments depend on national funding levels. USDA's Claim Response, Track A Questionnaire on Class Member, response to question 2. USDA did not assert that national funding levels effected the amount of benefit payments received by the Claimant in 1992, nor did USDA submit a factual response to the Claimant's allegation that Farmer C received full disaster benefits for his losses.

Based on the above findings, the Monitor directs the Adjudicator to reexamine Claim No. [REDACTED].

A handwritten signature in black ink, appearing to read "Randi Ilyse Roth". The signature is fluid and cursive, with a large initial "R" and "I".

Randi Ilyse Roth  
Attorney at Law  
Monitor

**Appendix A**  
**Supplemental Information**

The Order of Reference in this case provides that:

The Monitor may consider additional materials submitted by the claimant or by the government with a Petition for Monitor Review of a Track A claim or with a response to such a Petition only when such materials address a potential flaw or mistake in the claims process that in the Monitor's opinion would result in a fundamental miscarriage of justice if left unaddressed.<sup>58</sup>

The decision to accept additional material into the record is within the Monitor's discretion.<sup>59</sup>

*1. Supplemental Material Submitted for Consideration*

The Claimant requests that the record be supplemented with the names of two additional allegedly similarly situated white farmers. The Claimant also submits:

- Allegations regarding Farmer A and Farmer B;
- Correction of disaster benefit amounts; and
- Financing Statement and Continuation Statement regarding Farmer D.

USDA does not submit any supplemental information.<sup>60</sup>

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<sup>58</sup> *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Order of Reference, § 8(e)(i), Apr. 4, 2000) (copy available from the Facilitator and also available at <http://www.dcd.uscourts.gov/district-court-2000.html>).

<sup>59</sup> *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Order of Reference, § 8(e)(i), Apr. 4, 2000).

<sup>60</sup> The Monitor notes USDA's assertion in its Petition Response that it is prohibited by the Privacy Act from releasing loan information regarding farmers without their prior written permission. It is unclear if USDA refers to the Privacy Act of 1974 (5 U.S.C. § 522a(b)(11) or the Second Amended Supplemental Privacy Act Protective Order (Privacy Order), issued by the Court on July 14, 2000. USDA does not explain how responsive information to the names of white farmers identified by the Claimant would violate the Privacy Act or the Privacy Order.

## 2. Analysis of Supplemental Material

### *a. Additional similarly situated white farmers*

In his Petition, the Claimant names two additional allegedly similarly situated white farmers, Farmer C and Farmer D.<sup>61</sup> The Claimant alleges that Farmer C received full disaster benefits in 1993 and that Farmer D received an Operating Loan in 1990.<sup>62</sup> As the flaw or mistake that prevented the Claimant from submitting the names of these farmers in his original Claim Sheet, the Claimant cites various difficulties in the claims process, including the lack of discovery. However, for the issue of naming similarly situated white farmers, the Monitor does not require an individualized explanation of a potential flaw or mistake.<sup>63</sup>

If otherwise admissible supplemental information could contribute to the outcome of the Decision, it would be a fundamental miscarriage of justice not to admit the information and construct as complete a record as possible. The Adjudicator denied the claims, in part, for lack of a white farmer. The Claimant provides the names of two white farmers and links them to his claims with allegations regarding the benefits or loans they received.<sup>64</sup> Given

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<sup>61</sup> Petition, at 2, 4.

<sup>62</sup> Petition, at 4.

<sup>63</sup> The Opinion in this case stated:

Some objectors contend that it will be too difficult for some claimants to present evidence of a specific, similarly situated white farmer who received more favorable treatment, especially since there is no right to discovery under Track A. At this point, however, Class Counsel has amassed a significant amount of material regarding the treatment by the USDA of both African American farmers and white farmers, and claimants will be able to call upon that material in completing their claim packages. Class Counsel should be able to provide most claimants with the evidence they need.

*Pigford v. Glickman*, 185 F.R.D. 82, 106 (D.D.C. 1999).

In fact, however, throughout the claims process, Class Counsel was unable to provide adequate, timely information about similarly situated white farmers to claimants. In his statement to the Court, Class Counsel stated:

And, finally, similarly situated white farmers. Everybody makes mistakes and I made a mistake there. I thought it would be easier than it has been to find white folks who got preferential treatment and get their names. . . . Did I make a mistake? I should have come up with an easier way of doing it. Yes, I did. I made a mistake. . . . A lot of those folks didn't have a similarly situated white farmer, according to the adjudicator, and it's probably the single biggest mistake that I made.

*Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Hearing, at 64-66, July 31, 2000) (copy available from the Facilitator). See, also, the Court's Memorandum Opinion and Order regarding its reconsideration of the fairness of the Consent Decree. *Pigford v. Glickman*, *Brewington v. Glickman*, 127 F. Supp. 2d 35, 39 (D.D.C. 2001).

In this context, the Monitor finds that Class Counsel's inability to provide sufficient information to claimants regarding similarly situated white farmers constitutes a "class-wide" flaw or mistake in the claims process.

<sup>64</sup> Petition, at 4.

this linkage, omission of these names could result in a fundamental miscarriage of justice. Therefore, the names of Farmer C and Farmer D are admitted into the record.

*b. Allegations regarding Farmer A and Farmer B*

The Claimant states that Farmer A and Farmer B, the white farmers named in his Claim Sheet, both received Operating Loans in 1990.<sup>65</sup> In his Claim Sheet, the Claimant did not specifically allege when Farmer A and Farmer B received Operating Loans. As the flaw or mistake that prevented the Claimant from submitting this information in his original Claim Sheet, the Claimant states that he did not know the level of similarity required to satisfy the similarly situated white farmer requirement.<sup>66</sup> The Monitor finds that this simple error by the farmer constitutes an adequate flaw or mistake in the claims process.

If otherwise admissible supplemental information could contribute to the outcome of the Decision, it would be a fundamental miscarriage of justice not to admit the information and construct as complete a record as possible. The Adjudicator denied the claim, in part, for lack of a white farmer. The Claimant has provided additional information alleging that Farmer A and Farmer B link to his claim regarding denial of an Operating Loan. Excluding the information would constitute a fundamental miscarriage of justice. Therefore, the additional information regarding Farmer A and Farmer B is admitted into the record.

*c. Correction of disaster benefit amounts*

The Claimant submits information that he told his attorney that his disaster losses were estimated at approximately \$1,600 and that he received about half that amount.<sup>67</sup> The Claimant states that an apparent miscommunication with the attorney resulted in erroneous amounts stated in the Claim Sheet.<sup>68</sup> The Monitor finds that this is a sufficient statement of a flaw or mistake in the claims process.

If otherwise admissible supplemental information could contribute to the outcome of the decision upon reexamination, it would be a fundamental miscarriage of justice not to admit the information and construct as complete a record as possible. The Adjudicator denied this claim, in part, due to the Claimant's allegations regarding the amount of disaster benefits at issue. This information is relevant to the Adjudicator's reason for denial and could contribute to changing the outcome of the Decision. Its omission from the record could result in a fundamental miscarriage of justice. Therefore, the Monitor admits the information regarding the amount of disaster benefits into the record.

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<sup>65</sup> Petition, at 4.

<sup>66</sup> Petition, at 2.

<sup>67</sup> Petition, at 4.

<sup>68</sup> Petition, at 4.

*d. Financing Statement and Continuation Statement regarding Farmer D*

The Claimant submits a 1987 Financing Statement identifying USDA as the secured party, and a Continuation Statement indicating that USDA renewed its security interest in Farmer D's chattel property in 1991.<sup>69</sup> The Claimant submits these documents in support of his allegations that Farmer D received an Operating Loan in 1990.<sup>70</sup> The same flaw or mistake that applied to the name of Farmer D in section 2(a) also applies to these documents.

If otherwise admissible supplemental information could contribute to the outcome of the Decision, it would be a fundamental miscarriage of justice not to admit the information and construct as complete a record as possible. As noted above, the Adjudicator denied this claim based upon the absence of a similarly situated white farmer. These documents suggest that USDA filed a document that claimed USDA had a security interest in Farmer D's chattel property in 1987 and filed a second document in 1991 claiming a continued security interest in that chattel property. As a result, this document is relevant to the analysis of the Consent Decree's similarly situated white farmer requirement, and its omission from the record could result in a fundamental miscarriage of justice. Therefore, the Monitor admits this document into the record.

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<sup>69</sup> Petition, Attachment. The Continuation Statement references the Financing Statement that was filed on January 15, 1987.

<sup>70</sup> Petition, at 4.

**Appendix B**

**Encoding of Similarly Situated White Farmers**

Farmer A = [REDACTED]

Farmer B = [REDACTED]

Farmer C = [REDACTED]

Farmer D = [REDACTED]