

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY PIGFORD, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 97-1978 (PLF)
)	
DAN GLICKMAN, Secretary,)	
United States Department of Agriculture,)	
)	
Defendant.)	

CECIL BREWINGTON, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 98-1693 (PLF)
)	
DAN GLICKMAN, Secretary,)	
United States Department of Agriculture,)	
)	
Defendant.)	

ORDER OF REFERENCE

The Consent Decree entered in this case on April 14, 1999, provided for the appointment of an Independent Monitor to carry out certain enumerated duties. Those duties are listed in paragraph 12 of the Consent Decree. The Consent Decree, negotiated by the parties, provides a limited, clearly-defined role for the Monitor. On January 4, 2000, this Court issued an Order appointing Randi Ilyse Roth as the Independent Monitor in this case.

In accordance with the terms of the Consent Decree and its remedial purposes, this Court's Opinion of April 14, 1999, Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999), and the Court's Order of January 4, 2000, and pursuant to the Court's inherent power, it is hereby

ORDERED that the Monitor, as an agent and officer of the Court, shall have the responsibilities, powers, and protections as set forth in the Consent Decree and in this Order of Reference; it is

FURTHER ORDERED that the Monitor shall have the full cooperation of the parties, their counsel, and the Facilitator, Adjudicator and Arbitrator, who shall promptly provide any and all documentation and information requested by the Monitor, whether requested orally or in writing, and in whatever form requested, provided that the Monitor is authorized to request only non-privileged materials that are not otherwise prohibited from disclosure and that are necessary to enable her to perform her duties; and it is

FURTHER ORDERED that:

1. The Monitor shall have ex parte access to this Court without prior notice to or consultation with the parties.
2. The Monitor shall have the right to confer and conduct confidential working sessions informally and on an ex parte basis with the parties and with the Facilitator, Adjudicator and Arbitrator on matters affecting the discharge of the Monitor's duties and the implementation of the Consent Decree.

3. The Monitor shall have authority to make informal suggestions to the parties in whatever form the Monitor deems appropriate in order to facilitate and aid implementation of the Consent Decree and compliance with Orders of the Court and shall have the authority to make recommendations to the Court.

4. As an agent and officer of the Court, the Monitor shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal judicial adjuncts performing similar functions.

5. In addition to the power and authority granted elsewhere in this Order, the Monitor shall have all the responsibilities and powers enumerated in the Consent Decree. Specifically, as set forth in paragraph 12 of the Consent Decree, the Monitor shall:

- (a) Make periodic written reports (not less than every six months) to the Court, the Secretary of Agriculture, Class Counsel, and Government Counsel on the good faith implementation of the Consent Decree;
- (b) Attempt to resolve any problems that any class member may have with respect to any aspect of the Consent Decree;
- (c) Direct the Facilitator, Adjudicator, or Arbitrator 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; and

(d) Be available to class members and the public through a toll-free telephone number in order to facilitate the lodging of any Consent Decree complaints and to expedite their resolution.

If the Monitor is unable within thirty (30) days to resolve a problem brought to her attention pursuant to subparagraph (b), above, she may file a report with the parties' counsel, any of whom may, in turn, seek enforcement of the Consent Decree pursuant to paragraph 13 of the Decree.

6. In carrying out her duties under paragraph 12(b)(i) of the Consent Decree (issuance of written reports), the Monitor shall make such reports available to the public upon request. The Monitor shall not include in her reports any information that is prohibited from disclosure by the Privacy Act.

7. In carrying out her duties under paragraph 12(b)(ii) of the Consent Decree (resolving class members' problems), the Monitor has broad authority to work with claimants and USDA officials through correspondence, by telephone, and, if necessary, in person to attempt to resolve class members' problems, including problems involving injunctive relief (defined in paragraph 11 of the Consent Decree) and problems involving USDA collection actions. To fully carry out her duties pursuant to paragraph 12(b)(ii), the Monitor is encouraged to establish a mechanism through which her office can meet with claimants personally when necessary. The Monitor has informed the Court that she intends to open an office in Memphis, Tennessee, and that she plans to meet with groups of class members in other locations as needed and as her schedule allows.

8. In carrying out her duties under paragraph 12(b)(iii) of the Consent Decree (directing reexamination of claims), upon the filing of a Petition for Monitor Review, the Monitor shall

review relevant materials and decide whether to order reexamination in accordance with the following procedures:

(a) Standard of Review. Pursuant to paragraph 12(b)(iii) of the Consent Decree, the Monitor may direct reexamination only when 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.

(b) Reexamination Only. When the Monitor finds that the standard noted above has been met, the Monitor may direct the Facilitator, Adjudicator, or Arbitrator to reexamine the claim. The Monitor does not have the power to reverse any decision.

(c) Filing of Petitions. Claimants or the government may file Petitions for Monitor Review by sending the Monitor a letter that explains why the Petitioner believes that the decision of the Facilitator, Adjudicator, or Arbitrator is in error. With respect to Track A claims only, claimants or the government may include with the Petition for Monitor Review any documents that help the Petitioner to explain or establish that an error occurred. Petitions for Monitor Review should be sent to the following address:

Office of the Monitor
P.O. Box 64511
St. Paul, MN 55164-0511

Claimants are encouraged to seek the assistance of counsel in preparing their Petitions for Monitor Review, but they are not required to have the assistance of counsel.

Claimants may obtain such assistance at no charge from Class Counsel. Claimants may contact Class Counsel by writing or telephoning:

Alexander J. Pires, Jr.
Conlon, Frantz, Phelan & Pires, LLP
Suite 700
1818 N Street NW
Washington, DC 20036
Phone: 202-331-7050

Petitions must be filed in writing, and the Monitor's review of the Petition will be a paper-only review, that is, it will not be supplemented by a personal or telephone interview.

(d) Filing of Responses to Petitions. The non-petitioning party may file a response to any Petition for Monitor Review and, with respect to petitions regarding Track A claims, the non-petitioning party may include documents as described in paragraph 8(e)(i), below. The Monitor shall establish a system for notifying the non-petitioning party of the pendency of the Petition and for forwarding to the non-petitioning party copies of the Petition and any additional materials submitted by the Petitioner. The non-petitioning party shall have thirty (30) days to file a response, after which the right to file a response shall be waived.

(e) Materials Constituting Basis of Monitor Review. Generally, the Monitor's review will be based only on the Petition for Monitor Review, any response thereto, the record that was before the Facilitator, Adjudicator or Arbitrator, and the decision that is the subject of the Petition for Monitor Review.

(i) Review of Track A Claims. 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. The decision to consider additional materials regarding this flaw or mistake and to permit those materials to be made part of the record for review upon reexamination by the Facilitator or Adjudicator is within the discretion of the Monitor.

(ii) Review of Track B Claims. The Consent Decree provides for the development of a more comprehensive record in Track B than is possible Track A. Therefore, in Track B claims, the Monitor will not be permitted to consider additional materials on review or to supplement the record for review upon reexamination.

(f) Communication Regarding Reexamination. When the Monitor directs the Facilitator, Adjudicator, or Arbitrator to reexamine a claim, the Monitor shall send to the Facilitator, Adjudicator or Arbitrator a brief written explanation of the basis of her decision to direct reexamination (reexamination letters), which shall be attached to the Petition for Monitor Review. The explanation will clearly specify the error(s) identified by the Monitor. The Monitor will promptly forward to the claimant (and his or her counsel, if any) and to USDA copies of all reexamination letters with the attached

Petitions for Monitor Review and any additional materials admitted into the record by the Monitor pursuant to paragraph 8(e)(i). These materials will become part of the record for purposes of the Facilitator's, Adjudicator's or Arbitrator's reexamination.

9. Contacting the Monitor. In carrying out her duties under paragraph 12(b)(iv) of the Consent Decree, the Monitor will be available to class members and to the public through the following toll-free telephone number: 1-877-924-7483.

10. Where to Direct Communications. Inquiries, petitions and pleadings in this case should be directed as follows:

- (a) Inquiries regarding the status of Track A adjudication claims and regarding the timing of payments of approved claims should be directed to the Claims Facilitator at 1-800-646-2873.
- (b) Motions seeking review of non-final rulings by an arbitration panelist, including issues relating to discovery and scheduling, should be directed to Arbitrator Michael Lewis at ADR Associates, 1666 Connecticut Avenue, N.W., Washington, DC 20009.
- (c) Petitions for Monitor Review of final decisions in both Track A and Track B claims should be directed to the Monitor's office as explained in paragraph 8(c) above.
- (d) Inquiries regarding problems with injunctive relief or with other aspects of the Consent Decree should be directed to the Monitor's office as explained in paragraph 9 above.
- (e) Pleadings regarding attorneys' fees should be directed to the Court.

None of the matters described in subparagraphs (a) - (d), above, shall be filed with, or otherwise presented to, the Court.

11. Monitor Staff. The Monitor shall have the authority to employ and/or contract with all necessary attorney, paralegal, administrative, and clerical staff within a budget cap approved by the Court. The staff and contractors of the Office of the Monitor shall have whatever access to records and documents the Monitor believes is necessary to fulfill the staff or contracting role; however, the staff and contractors shall be given access only to non-privileged materials that are not otherwise prohibited from disclosure and that are necessary to enable the Monitor to perform her duties under the Consent Decree.

12. Fees and Expenses. Pursuant to paragraph 12(a) of the Consent Decree, the United States Department of Agriculture (“USDA”) shall pay the fees and expenses of the Monitor and the salaries of her staff.

13. Approval of Budgets. The Monitor shall submit budgets to the Court for approval. Each budget shall cover a period of at least three (3) months but not more than twelve (12) months. Copies of each budget shall be made available to USDA and class counsel, who will have a period of ten (10) working days from their receipt of the budget within which they may file with the Court, with copies to the Monitor and the opposing party, written objections to the budget. Any party that does not object to a budget within these ten (10) days shall be deemed to have waived any objection permanently. At the end of the ten (10) days, the Court will enter an order approving a total budget amount for the relevant time period.

14. Timing of Budget Submissions. The Monitor generally will submit proposed budgets to the Court one (1) month in advance of the beginning of the budget period. The Monitor advises the Court that she has entered into a tentative agreement with USDA regarding payment of fees and expenses for the period of January 4, 2000, through March 31, 2000. The first budget period to be approved by the Court, therefore, begins on April 1, 2000. The Monitor is directed to submit the budget for the period beginning April 1, 2000, by April 13, 2000.

15. Invoicing. The Monitor shall submit a statement to the Court approximately monthly for approval of her fees and expenses with copies to counsel for both parties. Objections to the statement shall be filed with the Court, with copies to the Monitor and to the opposing party, within ten (10) days of the submission of the statement. Any party that does not object to a fee statement within ten (10) days of its submission shall be deemed to have waived any objection permanently. At the conclusion of the 10-day period, the Court will enter an order directing payment of any sums approved. Any sum approved by the Court shall be paid within fifteen (15) days unless otherwise ordered or agreed upon.

16. Records. The Monitor shall keep a complete record of all of her fees and expenses, which shall be made available at the Court's or the parties' request for their inspection.

17. Payment into Court Registry. Within fifteen (15) days after the Court's approval of the first budget, USDA shall deposit with the Clerk of Court, United States District Court for the District of Columbia, the pro-rata portion of the approved budget for the month of April, 2000. Within the first fifteen (15) days of May, 2000, and within the first fifteen (15) days of each month thereafter during the Monitor's tenure, USDA shall deposit with the Clerk of Court a sum equal to a pro-rata

month's portion of the approved budget. All deposits made by USDA shall be placed by the Clerk of Court in an interest-bearing account. Any monies on deposit with the Clerk of Court that are unspent in a given month shall be carried over and applied to payment of future fees and expenses of the Monitor.

18. Refund of Surplus. At such point as the Monitor's duties are completed, surplus funds on deposit with the Clerk's Office will be refunded to USDA. If the Court determines at any time that the Monitor will require supplemental funds, the Court may so order USDA to make additional deposits.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: