

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

MONITOR'S SECOND PROGRESS REPORT
ON AMENDED ADJUDICATOR DECISIONS

I. BACKGROUND

The Court directed the Monitor to investigate and report to the Court regarding certain Track A decisions that were amended outside of the Consent Decree's Monitor review process.¹ In response to the Court's orders, the Monitor filed several reports.² On January 31, 2007, the

¹ The Court issued orders regarding amended decisions on February 23, 2006; August 7, 2006; and December 15, 2006.

² The reports were filed on April 7, 2006, December 14, 2006, and January 16, 2007.

Court issued a Minute Order directing the Monitor to file a further progress report on amended Adjudicator decisions on or before March 29, 2007. This report is being filed to comply with that Order.

II. EIGHTY-FOUR AMENDMENTS THAT AFFECTED OR MAY HAVE AFFECTED RELIEF

This report focuses on a total of eighty-four amended decisions issued to claimants in Track A claims. These eighty-four amendments occurred in a universe of seventy-eight claims. (There are more amended decisions than claims because some of the claims had multiple amendments.) These eighty-four amended decisions include twenty-three amendments classified by the Facilitator as “substantive” and sixty-one amendments classified by the Facilitator as “technical.” The Court’s Memorandum Opinion and Order of August 7, 2006, directed the Monitor to obtain information regarding these eighty-four amendments and to attempt to resolve with the parties any problems related to the amendments.³

The Monitor’s Interim Follow-up Report on December 14, 2006, described the Monitor’s data collection progress and stated that the Monitor had begun analysis of the eighty-four amended decisions. The Monitor’s January 16, 2007, Progress Report provided information from the Facilitator explaining the circumstances that led to the amendment of decisions and described the steps the Monitor and the parties had taken to review the claims in which amended decisions had been issued.

³ On June 30, 2006, the Court approved a Stipulation and Order relating to amended decisions issued for a group of forty-three “Conservation Loan” claims. The group of eighty-four amendments that are the subject of the Monitor’s current investigation are separate from the amendments addressed in the June 30, 2006, “Conservation Loan” Stipulation and Order. However, some claims had one or more amendments in both the “Conservation Loan” group and in this group of eighty-four amendments.

This report describes the further steps the Monitor has taken to investigate and review the relief provided to the seventy-eight claimants who received one or more of the eighty-four amended decisions referenced in the Court’s August 7, 2006, Memorandum Opinion and Order.

III. PARAMETERS AND STATUS OF INVESTIGATION

Previous reports described the information that the Monitor initially requested from the United States Department of Agriculture (USDA) and the Facilitator.⁴ The Monitor has since made requests for additional information. Both USDA and the Facilitator continued to cooperate fully with the information requests. One set of information requests is pending with USDA

Based on the data that has been provided to date, the Monitor has reviewed both the cash relief and the debt relief provided to each affected claimant.

A. Amendments Affecting Cash Relief

The Monitor’s review of amendments affecting cash relief focused on whether the claimant had alleged discrimination in a farm credit program (a “credit” claim) or a noncredit farm benefit program (a “noncredit” claim) or both.⁵ In reviewing these eighty-four amended decisions, the Monitor paid particular attention to cases in which an original decision (or early amended decision in a case with multiple amendments) awarded credit relief, and a later

⁴ The Monitor previously reported that the parties and the Monitor were reviewing the original Adjudicator decision, the amended Adjudicator decision(s), any petition documents that were “closed” by the Facilitator as a result of the amendment(s), records from USDA regarding each claimant’s USDA loan history, records from USDA regarding what debt relief USDA implemented for each claimant, and payment status information for each claimant’s cash relief. *See* Monitor’s Progress Report on Amended Adjudicator Decisions, at 2 (Jan. 17, 2007).

⁵ When a claimant prevails on one or more Track A credit claims, the cash component of the claimant’s relief is \$50,000. Consent Decree, ¶ 9(a)(iii)(B). When a claimant prevails on one or more Track A noncredit claims, the cash component of the claimant’s relief is \$3,000. Stipulation and Order, at 3 (D.D.C. Feb. 7, 2001). If a claimant prevails on one or more credit claims and on one or more noncredit claims, the cash component of the claimant’s relief is \$53,000. Other differences between credit and noncredit relief may be found in the Consent Decree. Consent Decree, ¶¶ 9, 11.

amended decision changed the relief to noncredit. In such cases, the Monitor reviewed: (1) the Adjudicator's original decision and any amended decision(s); (2) the class member's claim file, including the class member's Claim Sheet and Election Form; and (3) any Monitor petition documents. As of this date, the Monitor and the parties have identified no problems requiring further attention by the Court or resolution by the parties in the group of eighty-four amendments where amended decisions were issued that affected or may have affected cash relief.

Cash relief for prevailing credit claims is paid by the Judgment Fund, and cash relief for prevailing noncredit claims is paid by USDA. The Monitor is in the process of confirming that the appropriate amounts of cash relief have been paid to each of the seventy-eight claimants who received one or more of the eighty-four amended decisions.

B. Amendments Affecting Debt Relief

The Monitor has identified the subset of the eighty-four amendments that affected, or may have affected, prevailing claimants' debt relief.⁶ Debt relief can be affected by an amendment to the narrative portion of a Track A decision (typically, page two of the decision), or by an amendment to the "ordering" page of a Track A decision (typically, page three of the decision).

1. Claims With No History of Loan Activity

Some amendments that could conceivably affect a claimant's debt relief occurred in claims for which USDA records appear to show no history of loan activity during the class period. If the claimant had no USDA farm program loans, the language of the debt relief portion

⁶ Paragraph 9(a)(iii)(A) of the Consent Decree provides for debt relief for claimants who prevail on credit claims. A February 7, 2001, Stipulation and Order defines the parameters of debt relief. Monitor Update No. 10, available at <http://www.pigfordmonitor.org/updates/update10.pdf>, describes debt relief in detail.

of the Track A decision is of no consequence to the claimant. For these claims, the Monitor has asked USDA to certify that the claimant has no farm loan history during the class period (or, alternatively, to provide relevant records if USDA discovers that the claimant has a loan history). USDA has provided some of these certifications already; the Monitor expects that USDA will provide the remaining certifications within the next few weeks.⁷

2. Claims With History of Loan Activity

Other amendments that could affect debt relief occurred in claims in which documents show that the claimant had a farm loan history with USDA during the class period. For these claims, the Monitor reviewed: (1) the Adjudicator's original decision and any amended decision(s); (2) any petitions for Monitor review, and any resulting Monitor decisions and Adjudicator reexamination decisions; and (3) USDA loan records, including records of when loans originated, when payments were made, when government payments to the claimant were offset, whether USDA refunded payments or offsets, and when loans were forgiven.⁸

3. "No Adverse Effect" Policy

For each of the claims in which amendments affected or may have affected debt relief, the Monitor reviewed USDA's implementation of its "no adverse effect" policy.⁹ This policy addresses the interaction between the *Pigford* Consent Decree and federal laws that govern the

⁷ USDA must search archived microfiche records to determine whether the claimant had a loan history.

⁸ These loan records include the Online Borrower History, the Current/Past Debts Inquiry, and copies of microfiche archived records.

⁹ See USDA's FLP-388, at 8 (May 23, 2005) (available at http://www.pigfordmonitor.org/flp/FLP_388.pdf). This policy is explained in detail in Monitor Update No. 14, which is available at <http://www.pigfordmonitor.org/updates/update14.pdf>.

ability of borrowers who have received debt forgiveness from USDA to obtain future USDA loans and loan servicing.

In general, borrowers who have received debt forgiveness on a USDA loan cannot obtain certain types of future loans or loan servicing.¹⁰ The Consent Decree clearly states that the discharge of outstanding debt for claimants who prevail on credit claims “shall not adversely affect the claimant’s eligibility for future participation in any USDA loan or loan servicing program.”¹¹ However, some of the debt that would have been forgiven based on *Pigford* claims outcomes had been forgiven before the date of the claimant’s prevailing decision and would ordinarily trigger the loan making and servicing restrictions described above.

USDA articulated a “no adverse effect” policy to address this type of previously written-down debt. The policy is articulated in an FSA policy notice that says:

Loans written off at the direction of the adjudicator, arbitrator, or under the Consent Decree Stipulation and Order dated February 7, 2001, are not considered debt forgiveness [for the purpose of determining whether the borrower caused a loss to the government that could make the borrower ineligible for future loans or loan servicing]. . . . This includes loans previously written off or debt settled by FSA or FmHA, but that, if they still existed, would have been written off at the direction of the adjudicator, arbitrator, or under the Consent Decree Stipulation and Order dated February 7, 2001, These loans are identified in a prevailing claimant’s record in the ADPS database.¹²

¹⁰ For the statutory basis of these restrictions, *see* 7 U.S.C. § 2008h(b), (c). For regulatory details regarding the restrictions and the limited exceptions that sometimes apply to them, *see* 7 C.F.R. §§ 1910.5(c), 1941.12(a)(8), (b)(11), 1943.12(a)(8), (b)(11), 1951.909 (2006).

¹¹ Consent Decree, ¶ 9(a)(iii)(A).

¹² USDA’s FLP-388, at 8 (May 23, 2005) (available at http://www.pigfordmonitor.org/flp/FLP_388.pdf).

The Monitor has requested the relevant Automated Data Processing System (ADPS) database screen prints to verify the implementation of the “no adverse effect” policy in these amended decision cases.

4. Debt Relief Summary

For many of the seventy-eight claims, the Monitor has requested additional information from USDA to confirm the scope of debt relief provided. Based on the Monitor’s preliminary analysis of issues related to debt relief, the Monitor has made recommendations to the parties regarding possible corrective actions by USDA in some affected claims. These recommendations include additional debt relief, refunds of voluntary payments made after the issuance of a decision that required debt relief, and refunds of offsets taken after January 1, 1999,¹³ as well as certain corrections to the ADPS database screen prints to reflect the proper scope of debt relief. The parties are considering the Monitor’s recommendations.

IV. STATUS OF INVESTIGATION AND RECOMMENDATION FOR FURTHER REPORT

The Monitor has communicated frequently with Class Counsel and with USDA regarding the results of the Monitor’s investigation, the Monitor’s preliminary analysis of the eighty-four amendments that affected or may have affected claimants’ relief, and the potential corrective actions suggested for some of the affected claims. The Monitor is awaiting additional information regarding cash relief and debt relief for some claims. In addition, some claimants have not yet received a final decision in their claims. The Adjudicator and the Monitor are

¹³ See USDA’s FLP-145 (available at http://www.pigfordmonitor.org/flp/flp_145.pdf) and FLP-197 (available at http://www.pigfordmonitor.org/flp/flp_197.pdf). These notices provide that certain offsets taken after January 1, 1999, will be refunded.

expediting their issuance of decisions in this group of claims in response to requests from the parties.

The Monitor remains hopeful that once all necessary information is available, the parties can reach agreement and USDA can implement any necessary corrective action in this matter. Based on the progress and results of the Monitor's investigation to date, the Monitor recommends that the Court order the Monitor to report back to the Court on or before June 21, 2007, regarding the Monitor's investigation and recommendations for the eighty-four amended Adjudicator decisions.

Dated: March 29, 2007

Respectfully submitted,

s/Randi Ilyse Roth
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