

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue top and bottom. The globe in the top bulb is dark blue, and the globe in the bottom bulb is light blue. The hourglass is centered on the page.

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*The Pigford Case: USDA Settlement of a Discrimination  
Suit by Black Farmers*

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Attorney

January 13, 2009

**Abstract.** This report highlights some of the events that led up to the Pigford class action suit and outlines the structure of the settlement agreement. It also discusses the number of claims reviewed, denied, and awarded, and some of the issues raised by various parties.

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# The Pigford Case: USDA Settlement of a Discrimination Suit by Black Farmers

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## Summary

On April 14, 1999, Federal District Court Judge Paul L. Friedman approved a settlement agreement and consent decree resolving a class action discrimination suit (commonly known as the *Pigford* case) between the U.S. Department of Agriculture (USDA) and black farmers. The suit claimed that the agency had discriminated against black farmers on the basis of race and failed to investigate or properly respond to complaints from 1983-1997. The deadline for submitting a claim as a class member was September 12, 2000. Many have voiced concern over the structure of the settlement agreement, the large number of applicants who filed late, and reported deficiencies in representation by class counsel. A provision in the 2008 farm bill (P.L. 110-246) permits any claimant in the *Pigford* decision who has not previously obtained a determination on the merits of a *Pigford* claim to petition in civil court to obtain such a determination. This report highlights some of the events that led up to the *Pigford* class action suit and outlines the structure of the settlement agreement. It also discusses the number of claims reviewed, denied, and awarded, and some of the issues raised by various parties. It will be updated periodically.

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## Background

Litigation against the U.S. Department of Agriculture (USDA) for discrimination against African-American farmers began in August 1997 with two discrimination suits brought by black farmers—*Pigford v. Glickman*, No. 97-1978 (D.D.C. 1997) and *Brewington v. Glickman*, No. 98-1693 (D.D.C. 1997)—but its origins go back much further.<sup>1</sup> For many years, black farmers had complained that they were not receiving fair treatment when they applied to local county committees (which make the decisions) for farm loans or assistance. These farmers alleged that they were being denied USDA farm loans or forced to wait longer for loan approval than were non-minority farmers. Many black farmers contended that they were facing foreclosure and financial ruin because the USDA denied them timely loans and debt restructuring. Moreover, many claimed that the USDA was not responsive to discrimination complaints. A huge agency backlog of unresolved complaints began to build after the USDA's Civil Rights Office was closed in 1983.

### USDA-Commissioned Study

In 1994, the USDA commissioned D.J. Miller & Associates, a consulting firm, to analyze the treatment of minorities and women in Farm Service Agency (FSA) programs and payments. The study examined conditions from 1990 to 1995 and looked primarily at crop payments and disaster payment programs and Commodity Credit Corporation (CCC) loans. The final report found that from 1990 to 1995, minority participation in FSA programs was very low and minorities received less than their fair share of USDA money for crop payments, disaster payments, and loans.

According to the commissioned study, few appeals were made by minority complainants because of the slowness of the process, the lack of confidence in the decision makers, the lack of knowledge about the rules, and the significant bureaucracy involved in the process. Other findings showed that (a) the largest USDA loans (top 1%) went to corporations (65%) and white male farmers (25%); (b) loans to black males averaged \$4,000 (or 25%) less than those given to white males; (c) 97% of disaster payments went to white farmers, while less than 1% went to black farmers. The study

#### Demographics

The 2002 Census of Agriculture reported that 2.13 million farms operated in the United States. Of this total, 29,090, or approximately 1.4% of all farms, were operated by African Americans.

Over 74% (22,516) of African American farmers in the U.S. reside in Texas, Mississippi, North and South Carolina, Alabama, Georgia, Virginia and Louisiana.

Average annual market value and government payments for farms operated by African American farmers in 2002 were \$18,060. The national average for all U.S. farmers was \$97,320.

Overall, the number of farms operated in the United States decreased by 4.1% between 1997 and 2002. Farms operated by African Americans increased from 18,451 to 29,090, a 36.6% increase over the five-year period. (This observed increase likely reflects a change in the how the Census defined "operator" in 2002).

In 2002, 757 African American farmers received Commodity Credit Corporation loans amounting to a total of \$7.6 million. This averaged \$10,017 per African American farmer, about 28% of the national average (\$36,122).

National average government payments to African American farmers in 2002 (\$3,457) were considerably lower than the national average government farm payment (\$9,251).

Total government payments of \$6.55 billion were distributed to 707,596 farmers nationwide in 2002. Payments totaling \$18.5 million (or three-tenths of one percent of all) were made to 5,344 black farmers.

**Source:** 2002 Census of Agriculture, NASS.

<sup>1</sup> USDA Secretary Mike Johanns is now the defendant in the class action suit.

reported that the reasons for discrepancies in treatment between black and white farmers could not be easily determined due to “gross deficiencies” in USDA data collection and handling.

In December 1996, Secretary of Agriculture Dan Glickman ordered a suspension of government farm foreclosures across the country pending the outcome of an investigation into racial discrimination in the agency’s loan program and later announced the appointment of a USDA Civil Rights Task Force. On February 28, 1997, the Civil Rights Task Force recommended 92 changes to address racial bias at the USDA, as part of a USDA Civil Rights Action Plan. While the action plan acknowledged past problems and offered solutions for future improvements, it did not satisfy those seeking redress of past wrongs and compensation for losses suffered. In August 1997, a proposed class action suit was filed by Timothy Pigford (and later by Cecil Brewington) in the U.S. District Court for the District of Columbia on behalf of black farmers against the USDA. The suit alleged that the USDA had discriminated against black farmers from 1983 to 1997 when they applied for federal financial help and again by failing to investigate allegations of discrimination.

## Class Action Suit

Following the August 1997 filing for class action status, the attorneys for the black farmers requested blanket mediation to cover all of the then-estimated 2,000 farmers who may have suffered from discrimination by the USDA. In mid-November 1997, the government agreed to mediation and to explore a settlement in *Pigford*. The following month, the parties agreed to stay the case for six months while mediation was pursued and settlement discussions took place. Although the USDA had acknowledged past discrimination, the Justice Department opposed blanket mediation, arguing that each case had to be investigated separately.

When it became apparent that the USDA would not be able to resolve the significant backlog of individual complaints from minority farmers, and that the government would not yield on its objections to class relief, plaintiffs’ counsel requested that the stay be lifted and a trial date be set. On March 16, 1998, the court lifted the stay and set a trial date of February 1, 1999. On October 9, 1998, the court issued a ruling certifying as a class black farmers who filed discrimination complaints against the USDA between January 1983 and February 21, 1997.<sup>2</sup> In his ruling, Judge Friedman concluded that the class action vehicle was “the most appropriate mechanism for resolving the issue of liability” in the case.<sup>3</sup> A complicating factor throughout the period, however, was a two-year statute of limitations in the Equal Credit Opportunity Act (ECOA), the basis for the suit. Congress, accordingly, passed a measure in the FY1999 omnibus funding law that waived the statute of limitations on civil rights cases for complaints made against the USDA between 1981 and December 31, 1996.<sup>4</sup>

As the court date approached, the parties reached a settlement agreement and filed motions consolidating the *Pigford* and *Brewington* cases, redefining the certified class and requesting preliminary approval of a proposed consent decree. On April 14, 1999, the court approved the consent decree, setting forth a revised settlement agreement of all claims raised by the class

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<sup>2</sup> *Pigford v. Glickman*, 182 F.R.D. 341 (D.D.C. 1998).

<sup>3</sup> *Id.* at 342.

<sup>4</sup> P.L. 105-277, §741.

members.<sup>5</sup> Review of the claims began almost immediately, and the initial disbursement of checks to qualifying farmers began on November 9, 1999.

## Terms of the Consent Decree

Under the consent decree, an eligible recipient is an African American who: (1) farmed or attempted to farm between January 1981 and December 31, 1996, (2) applied to USDA for farm credit or program benefits and believes that he or she was discriminated against by the USDA on the basis of race, and (3) made a complaint against the USDA on or before July 1, 1997. The consent decree set up a system for notice, claims submission, consideration, and review that involved a facilitator, arbitrator, adjudicator, and monitor, all with assigned responsibilities. The funds to pay the costs of the settlement (including legal fees) come from the Judgment Fund operated by the Department of the Treasury, not from USDA accounts or appropriations.<sup>6</sup>

The *Pigford* consent decree basically establishes a two-track dispute resolution mechanism for those seeking relief. The most widely-used option—*Track A*—provides a monetary settlement of \$50,000 plus relief in the form of loan forgiveness and offsets of tax liability. Track A claimants had to present *substantial evidence* (i.e., a reasonable basis for finding that discrimination happened) that

- claimant owned or leased, or attempted to own or lease, farm land;
- claimant applied for a specific credit transaction at a USDA county office during the applicable period;
- the loan was denied, provided late, approved for a lesser amount than requested, encumbered by restrictive conditions, or USDA failed to provide appropriate loan service, and such treatment was less favorable than that accorded specifically identified, similarly situated white farmers; and
- the USDA's treatment of the loan application led to economic damage to the class member.

Alternatively, class participants could seek a larger, tailored payment by showing evidence of greater damages under a *Track B* claim. Track B claimants had to prove their claims and actual damages by a *preponderance of the evidence* (i.e., it is more likely than not that their claim is valid). The documentation to support such a claim and the amount of relief are reviewed by a third party arbitrator, who makes a binding decision. The consent decree also provided injunctive relief, primarily in the form of priority consideration for loans and purchases, and technical assistance in filling out forms.<sup>7</sup> Finally, plaintiffs were permitted to withdraw from the class and pursue their individual cases in federal court or through the USDA administrative process.<sup>8</sup>

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<sup>5</sup> *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

<sup>6</sup> 31 U.S.C. §1304.

<sup>7</sup> See also P.L. 107-171 (2002 farm bill) § 10707 (mandating that the USDA carry out an outreach and technical assistance program to assist “socially disadvantaged farmers” in owning farms and participating in USDA programs); §10708 (governing the composition of county, area, or local committees to encourage greater representation of minority and women farmers).

<sup>8</sup> USDA news release. July 11, 2002.

Under the original consent decree, claimants were to file their claim with the facilitator (Poorman-Douglas Corporation) within 180 days of the consent decree, or no later than October 12, 1999. For those determined to be eligible class members, the facilitator forwarded the claim to the adjudicator (JAMS-Endispute, Inc.), if a Track A claim, or to the arbitrator (Michael Lewis, ADR Associates), if a Track B claim. If the facilitator determined that the claimant was *not* a class member, the claimant could seek review by the monitor (Randi Roth). If the facilitator (and later by court order, the arbitrator<sup>9</sup>) ruled that the claim was filed after the initial deadline, the adversely affected party could request permission to file a late claim under a process subsequently ordered by the court.

Late filing claimants were directed to request permission to submit a late claim to the arbitrator by no later than September 15, 2000.<sup>10</sup> The arbitrator was to determine if the reason for the late filing reflected *extraordinary circumstances* (e.g., Hurricane Floyd, a person being homebound, or a failure of the postal system). Since there reportedly had been extensive and widespread notice of the settlement agreement and process—including local meetings and advertisements in radio, television, newspapers and periodicals across the nation and in heavily populated black minority farmer areas—*lack of notice* was ruled an unacceptable reason for late filing.

## Current Status

In general, there seems to be a consensus that many of the issues surrounding the implementation of *Pigford* can be attributed to the gross underestimation of the number of claims that would actually be filed.<sup>11</sup> At the same time, many in Congress and those closely associated with the settlement agreement have voiced much concern over the large percentage of denials, especially under Track A—the “virtually automatic” cash payment. Interest groups have suggested that the poor approval percentages can be attributed to the consent decree requirement that claimants show that their treatment was “less favorable than that accorded specifically identified, similarly situated white farmers,” which was exacerbated by poor access to USDA files.<sup>12</sup> **Table 1** shows statistics for Track A claims as of January 2009. As of that date, there were 172 eligible Track B claimants.<sup>13</sup>

More alarming for many, however, is the large percentage of farmers who did not have their cases heard on the merits because they filed late. Approximately 73,800 petitions (66,000 before September 15, 2000 late filing deadline) were filed under the late filing procedure, of which 2,116 were allowed to proceed.<sup>14</sup> Many claimants who were initially denied relief under the late filing procedures requested a reconsideration of their petitions. Out of the approximately 20,700 timely requests for reconsideration, 17,279 requests had been decided, but only 113 had been allowed to

<sup>9</sup> *Pigford v. Glickman*, No. 97-1978 and No. 98-1693 (D.D.C. December 20, 1999) (order delegating the authority to make decisions on late claims to the arbitrator).

<sup>10</sup> *Pigford v. Glickman*, No. 97-1978 and No. 98-1693 (D.D.C. July 14, 2000).

<sup>11</sup> See *Status of the Implementation of the Pigford v. Glickman Settlement*, hearing Before the House Committee on the Judiciary, Subcommittee on the Constitution, 108<sup>th</sup> Cong. at 1595 (2004) (letter from Michael K. Lewis, Arbitrator).

<sup>12</sup> Environmental Working Group, *Obstruction of Justice, USDA Undermines Historic Civil Rights Settlement with Black Farmers*, Part 4 (July 2004) available at <http://www.ewg.org/reports/blackfarmers/execsumm.php> [hereinafter EWG Report].

<sup>13</sup> Office of the Monitor, at <http://www.pigfordmonitor.org/stats/>.

<sup>14</sup> Arbitrator’s Ninth Report on the Late-Claim Petition Process (November 30, 2005).

proceed by the end of 2005, according to the most recent compilation of individual case data.<sup>15</sup> Many argue that the large number of late filings indicate that the notice was “ineffective or defective.”<sup>16</sup> Others counter these claims by arguing that the *Pigford* notice program was designed, in part, to promote awareness and could not *make* someone file.<sup>17</sup> Some have also suggested—including many of the claimants—that the class counsel was responsible for the inadequate notice and overall mismanagement of the settlement agreement.<sup>18</sup> Judge Friedman, for example, cautioned the farmers’ lawyers for their failure to meet deadlines and described their representation, at one point, as “border[ing] on legal malpractice.”<sup>19</sup>

**Table I. Track A Statistics as of September 2, 2008**

<b>Track A</b>	<b>Totals</b>
Track A Decisions	22,505
Adjudications Approved	13,348 (59%)
Adjudications Denied	6,909 (31%)
\$50,000 Cash Awards	\$759,800,000 <sup>a</sup>
\$3,000 Non-Credit Awards	\$1,515,000
Debt Relief	\$37,671,236
Tax Payments for Title A Claimants	\$189,950,000
IRS Payments for Debt Relief	\$6,513,986
<b>Total Track A Relief</b>	<b>\$995,450,222</b>

**Source:** Office of the Monitor [<http://www.pigfordmonitor.org/stats/>].

a. This number may reflect payments actually made thus far.

Judge Friedman also declared that he was “surprised and disappoint[ed]” that the USDA did not want to include in the consent decree a sentence that in the future the USDA would exert “best efforts to ensure compliance with all applicable statutes and regulations prohibiting discrimination.”<sup>20</sup> The Judge’s statements apparently did not go unnoticed, as the Black Farmers and Agriculturalists Association (BFAA) filed a \$20.5 billion class action lawsuit in September 2004 on behalf of roughly 25,000 farmers against the USDA for alleged racial discriminatory practices against black farmers between January 1997 and August 2004. The lawsuit, however, was dismissed in March 2005 because BFAA failed to show it had standing to bring the suit.<sup>21</sup>

The Senate amendment states that currently a USDA guidance prohibits loan foreclosures when there is a pending claim of racial discrimination against the Department. This provision amends

<sup>15</sup> Ibid.

<sup>16</sup> *Notice Hearing*, 1-4. See also EWG Report, at Part 3.

<sup>17</sup> *Notice Hearing*, at 10 (statement of Jeanne C. Finegan, consultant to Poorman-Douglas).

<sup>18</sup> Tom Burrell, President, Black Farmers and Agriculturalists Association, Inc., *Tom Burrell Lays out the Case of why Al Pires, Class Counsel, Must be Fired!*, available at [[http://www.bfaa.net/case\\_layout.pdf](http://www.bfaa.net/case_layout.pdf)]; see also EWG Report, at Part 3.

<sup>19</sup> *Pigford v. Glickman*, No. 97-1978 and No. 98-1693 (D.D.C. April 27, 2001); see also *Pigford v. Veneman*, 292 F.3d 918, 922 (D.C. Cir. 2002).

<sup>20</sup> *Pigford v. Glickman*, 185 F.R.D. 82, 112 (D.D.C. 1999).

<sup>21</sup> *Black Farmers and Agriculturalists Assoc. v. Veneman*, 2005 U.S. Dist. LEXIS 5417 (D.D.C. March 29, 2005).

Section 307 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1927) to put into law what is already in place in a guidance at USDA.

In the 110<sup>th</sup> Congress, the Pigford Claims Remedy Act of 2007 (H.R. 899; S. 515) and the African-American Farmers Benefits Relief Act of 2007 (H.R. 558) were introduced to provide relief to many of these claimants who failed to have their petitions considered on the merits. The provisions of these bills were incorporated into the 2008 farm bill (P.L. 110-246, Section 14012), providing up to \$100 million for potential settlement costs. The farm bill provision also mandates a moratorium on all loan acceleration and foreclosure proceedings where there is a pending claim of discrimination against USDA related to a loan acceleration or foreclosure. This section also waives any interest and offsets that might accrue on all loans under this title for which loan and foreclosure proceedings have been instituted for the period of the moratorium. If a farmer or rancher does not prevail on her claim of discrimination, then the farmer or rancher will be liable for any interest and offsets that accrued during the period that the loan was in abeyance. The moratorium terminates on either the date the Secretary of Agriculture resolves the discrimination claim or the date the court renders a final decision on the claim, whichever is earlier.

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