WHITE PAPER

THE *PIGFORD* SETTLEMENT: GRADING ITS SUCCESS AND MEASURING ITS IMPACT

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"Forty acres and a mule." That was the promise made by the federal government to former slaves after the Civil War—a promise that they would be provided what they needed to start farming afresh as free men and women. And it is with those five words that Judge Paul L. Friedman started out his historic 1999 opinion approving the settlement in *Pigford v. Glickman*, 185 F.R.D. 82 (DDC 1999) pointing out that over the decades that followed the Civil War, in many different ways, the government broke its promises to Black farmers.

The broken promise Judge Friedman focused on in his opinion was the actions of U.S. Department of Agriculture agencies that excluded Black farmers from its programs. Judge Friedman described how the *Pigford* settlement, which addressed USDA discriminatory treatment of Back farmers during the period 1981 through 1996, would be "a significant first step forward" to address USDA's broken promise to Black farmers.

Has the *Pigford* settlement effectively made that first step forward, has it accomplished what the parties who drew it up intended? Yes, it has. Thousands of Black farmers, many elderly and who had given of any hope of ever seeing justice done in their lifetimes, finally have been able to tell their bitter stories of unfair treatment and receive some compensation for their losses. And, a follow-up claims process—to allow other injured Black farmers who didn't get their claims in on time in the *Pigford* settlement a chance to have their complaints heard too—is itself nearing completion. Society as a whole has benefitted because USDA has been made to pay for wrongs it committed against Black farmers in the 1980s and 1990s.

Looking to the future, all evidence indicates that USDA is putting an increased emphasis on moving beyond its many past mistakes and welcoming Black and other minority farmers as its clients and partners. Whether or not this progress can be directly tied to the *Pigford* settlement can be debated, but, as Judge Friedman said, the settlement was just the important <u>first</u> step. And, USDA is charting a course first set by the *Pigford* settlement.

This fruitful and productive *Pigford* settlement is close to wrapping up. Work under the consent decree essentially is completed. So, a motion recently was filed with Judge Friedman jointly by the lawyers for the government and Class Counsel for the Black farmers to "wind down" the consent decree that, since April 14, 1999, has governed the implementation of the settlement. On the occasion of this "wind down, it is timely to review how the settlement came about and what it has accomplished.

<u>Background</u>

The 1980's were a period of crisis for Black farmers. The decade began with a worsening outlook for agriculture that ended up being in the most severe economic downturn in the Nation's farm economy since the Great Depression of the 1930's. This put great financial stress on tens of thousands of vulnerable, financially at-risk farmers, white and Black alike; but the misery was

compounded for Black farmers, for they also had to deal with entrenched racial bias at the hands of many of the local USDA offices, primarily in the South.

That racial bias (which some argue continues even today in pockets of the rural South), and the harm stemming from that bias, have been well-documented. [i] Beyond the problems Black farmers faced at the hands of the local loan officers, they also were dealing with a national USDA that, for all the reports and studies describing the problems, refused to acknowledge the gravity of the situation. In a May 25, 1997, *Richmond Times Dispatch* article and interview of Lloyd Wright, Director of USDA's Office of Civil Rights, Mr. Wright stated that no systematic probes or investigations into farmer allegations of discrimination in the administration of USDA loan programs had been conducted since 1983, when the Civil Rights investigative staff was disbanded. Mr. Wright's conclusions were buttressed by a report of USDA's Office of the Inspector General issued on February 27, 1997, critical of USDA's management of civil rights issues.

As long as USDA chose to ignore the FSA discrimination problems, they would never get resolved.

The *Pigford* Case and Settlement

Tim Pigford, a farmer from North Carolina and two other Black farmers who had suffered discriminatory treatment at the hands of the Farmers Home Administration, or FmHA, (renamed the Farm Service Agency, or FSA, in 1994) filed a law suit in the U.S. District Court for the District of Columbia on August 28, 1997. They filed the case both on their own behalf and on behalf of all Black farmers similarly situated, to address the two wrongs the group had suffered in the 1980s and 1990s at the hands of USDA: (1) unfair treatment in the award of farm loans and other benefits provided by USDA, and (2) USDA's failure to respond to their complaints about their treatment.

After a long, intense, and exhaustive process of litigating the case and then negotiating a compromise, a process that went on over a year-and-a-half, the *Pigford* class and the government reached a settlement that Judge Friedman approved on April 14, 1999, when he issued his opinion approving the terms of the consent decree containing the specifics of the settlement.

Before that, Congress and the President had intervened in October of 1998 to facilitate the settlement by enacting special legislation to waive the two-year statute of limitations on federal discrimination claims so the farmers could get relief for complaints filed and ignored as far back as 1981.

The *Pigford* settlement, unlike most mass tort settlements, did not directly award one cent to the aggrieved Black farmers. Rather, it simply gave the farmers the right to have their long-ignored complaints of discriminatory treatment at the hands of USDA's local farm loan and benefit program officers heard through a two-track claims process. Only if they prevailed in their claims would they be eligible for damage awards for the discrimination they suffered.

In every claim, the farmer had to prove through detailed testimony (and, in some claims, documentation) that he or she—

(a) farmed or attempted to farm, and applied for a USDA farm loan or other farm program benefit;

(b) did not receive the loan or benefit sought, believed the denial to be the result of discrimination, and made a complaint about the discrimination; and

(c) suffered economic harm as a result of the discrimination, and

that a similarly-situated white farmer received the loan or benefit denied him or her.

The settlement made two complaint resolution processes available that claimants could choose from.

The first track, "Track A," provided the farmer the right to have his or her claim adjudicated based on the farmer's detailed declaration made on uniform claim form that told the farmer's story and named the white farmers who were treated differently.

However, once a farmer filed a claim under Track A, USDA had the right, which it exercised for every claim, to review the claim, the Black farmer's USDA files, and the files of white farmers cited by the claimant as being similarly-situated to the Black farmer, and file opposition papers to the claim if it so chose. USDA spent many thousands of hours vetting all the Track A claims, and submitted reports on many claims to the Adjudicators for their consideration in evaluating the claims.

The Track A adjudicators, all of whom were trained adjudication specialists (many of them retired judges) provided by JAMS, one of the country's most prestigious alternative dispute resolution (ADR) companies, reviewed the claimant's story along with any rebuttal by USDA to decide the claim.

The Black farmers who filed Track A claims did get an important concession in that their claims were evaluated under the "substantial evidence" burden of proof, which is easier to overcome than the standard "preponderance of evidence" burden of proof typically used in court cases. Reliance on this lower burden of proof was necessitated by the fact that the settlement intended to provide relief for claims based on events that, in a number of cases, occurred many years before, as far back as 19 years previously. For the bulk of these very old claims, the documentary evidence needed to prevail under the preponderance of evidence standard had long since been lost or destroyed. So, under the Track A rules, all the farmer needed to do to prove his or her case was his or her own testimony, which, if persuasive after USDA comments were considered, would be sufficient to prevail under the substantial evidence standard.

To balance the advantage of having the lower burden of proof, the damages that a farmer could receive were fixed at $50,000, and $12,500 paid to the IRS for taxes. This Track A fixed award would apply even if a farmer's losses were much more than $50,000, as happened in some of the claims when the farmer lost his entire farm and was driven into insolvency by USDA's discrimination. In addition, any farm program loan tainted by the discrimination and loans to that farmer in the same program made thereafter during the claim period were cancelled, and an amount equal to 25% of cancelled principal was paid to the IRS for taxes.

The other claims resolution process, "Track B," provided farmers who had large losses and sufficient documentation to support their claims with the opportunity to have an expedited arbitration of their claim under which they could recover all of their losses if they prevailed, even if those losses were much greater than $50,000. The Track B arbitrations were expedited by utilizing a short litigation time schedule, limited discovery, and presentation of direct evidence in writing, with the trial limited to cross-examination in an 8-hour hearing. The Track B Arbitrators, again, were experienced and well-respected ADR specialists from JAMS, led by Michael Lewis, who is recognized nationally as an ADR expert.

Because of the stringent documentation requirements for Track B, only about 1 percent of all *Pigford* claims used that process. Having said that, it also is fair to say that each one of these relatively few arbitrations under the *Pigford* settlement was intensely litigated before they were decided by the Arbitrator or settled.

For both Track A and Track B claims, both the claimant and the government had the right to an appeal of decisions against them, under a high standard set out in section 12(b)(iii) of the consent decree: that is, if "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." The appeals, referred under the settlement as Petitions for Monitor Review (PMR's), were conducted by the consent decree Monitor, Randi Roth, and her staff.

Making the Settlement Work

The two parties, early in the claims process, reached agreement to include within the class covered by the settlement persons who constructively applied for farm loans and benefits. This was important because one of the common forms of discrimination was when USDA officials discouraged Black farm operators from actually filing applications for loans. And, this form of discrimination was especially invidious because it left few "fingerprints" in the way of loan application papers that could be used to document the discrimination. As described in the testimony of a witness at the 1990 House Committee on Governmental Affairs hearing, "An example is the minority applicant who enters into the local FmHA office for the purpose of applying for an FmHA loan. Instead of providing the minority farmer an application, the local FmHA officer advises the minority farmer he/she does not qualify for FmHA services and that this farmer should not bother to apply. FmHA rules require FmHA employees to give an application to any farmer who requests one. However, because this farmer was a member of a minority group, the FmHA employee refused to give an application to the farmer and talked the farmer out of applying for FmHA services."[ii]

What the parties did was agree to interpret the word "applied" to include certain *bona fide* attempts to apply for loans. The agreement, contained in the "Constructive Application Principles," set out specific fact-based criteria under which attempts to apply would qualify for relief under the settlement. The Principles were consistent with USDA regulations, which require FSA officials to encourage farmers to file farm loan applications. While an important protection for farmers, the attempt-to-apply claims were not a large portion of the overall number of claims approved.

Class Counsel provided the farmer free assistance in filling out the Track A claim form (and in fact had to sign the claim him or herself, testifying to his or her belief in the reliability of the farmer's claims) and in prosecuting Track B claims. It should be noted in passing that Class Counsel did not receive windfall fees from this case, or any fees at all from the farmers. They took none of the farmer's damage award if the farmer won; instead, they petitioned to the government for compensation for work done on an hourly basis, and were subject to strict guidelines limiting them to payment for the minimum reasonable amounts of time spent in prosecuting the case and handling winning claims. The government did not pay them for their work on losing claims—and 30% of the Track A claims, and many of the Track B claims, were not successful.

The implementation of the settlement and consent decree was overseen by the Monitor, who did everything the consent decree required of her, and much more. She and her staff worked incredibly long hours and with fierce dedication to the tasks not only of handling thousands of PMR's but, just as importantly, monitoring the claims process on the ground, reaching out to members of the claimant class to ensure that their voices were being heard and their needs being met, and assisting the parties resolve the innumerable disputes that arise in a settlement this large. In addition, the Monitor developed numerous resource materials to assist famers understand and make the most effective use of their rights under the claims process.

Implementing the Settlement Took a Long Time Because So Many Farmers Sought Relief

It has taken 14 years to fully implement the terms of the settlement and consent decree; and this period might be broken down into two phases, the first relatively short, the following phase much longer. The first phase consisted of the claims submission period, which ran from April 14, 1999, to October 12, 1999, and the roughly two years that followed during which most Track A claims were adjudicated, Track B claims arbitrated, and PMR's were filed. The second phase, which took place over the following 11 years were spent by all of the consent decree neutrals processing claims made by the more than 2,000 "late filers" granted special permission to file claims after the claims period expired; by the Monitor completing work a huge docket of PMRs; and by the Monitor and the two parties working through issues that sprang up after implementation of the consent decree began, such as the difficulty in determining the extent of debt relief and the need to correct mechanical errors in the claims process.

The overall long duration of the process speaks to a reality that was just coming to the surface at the time the settlement was approved in early 1999—the great number of Black farmers participating in the settlement claims processes that was not anticipated when the *Pigford* case filed in 1997.

In retrospect, this huge groundswell of interest shouldn't be surprising. After all, as noted above, the pervasiveness and persistence of the discrimination against Black farm operators in the conduct of the USDA farm loan and assistance program, and USDA's neglect in dealing with the problem, were well-documented. Further, the pool of potential claimants was large: An economist has estimated that there were about 120,000 Black farm operators who might have qualified to participate in the claims process.[iii]

What is for sure, however, is that by the time Judge Friedman issued his Opinion on the *Pigford* settlement, the number of expected claimants was being pegged in the 15,000 to 20,000 range (*see* Opinion at 24), which is close to the number of claims actually processed during the six-month claim period.

As Class Counsel, working on the ground with farmers to implement the consent decree, we knew as soon as we started that effort that the class was going to bigger than anyone had expected. We held 252 meetings with farmers throughout the county during the six-month claim period to assist farmers fill out their claim forms. Our first meetings were packed to overflowing, with two to three times as many showing up as expected. And, throughout the claim period, even with all those meetings, attendance did not abate appreciably.

In addition, as has been documented by Congress and addressed in the *Pigford II* "late filer" settlement, after the claim period ended on October 12, 1999, the claims administrator was flooded by petitions from thousands of other farmers who fit the *Pigford* class definition asking to participate in the claims process, along with petitions from thousands of others who weren't sure whether they fit the class definition but wanted to find out more about the process. This post-claims-period demand is what led Congress to pass section 14012 of the Food, Conservation, and Energy Act of 2008 (the 2008 "farm bill") and the Claims Resolution Act of 2010 to provide these "late filers" the opportunity to pursue *Pigford* claims, and the Administration to settle the cases filed by these "late filers."

Grading the *Pigford* Settlement's Success and Measuring Its Impact: What It Accomplished

The Monitor filed her final report on April 1, 2012 ("Monitor's Final Report on Good Faith Implementation of the Consent Decree and Recommendation for Status Conference") and in it summarized what the consent decree had achieved. The numbers, effective as of December 31, 2001—and they haven't changed by more than a handful since then—are impressive.

- 22,721 claimants were found eligible to participate in the Track A and B claims processes.
- 22,522 claimants chose Track A, of which 15,645 (or 69%) prevailed. Conversely, 6,907 claimants (or 31%) did not prevail.
- 169 claimants chose Track B, of which 104 (or 62%) prevailed or settled their claims. The other 65 Track B claimants did not prevail.
- 5,848 petitions for Monitor review were filed, of which 2,941 or (50%) were successful. Claimants filed 4,981 PMR's, of which 2,809 were successful; and the government filed 867 PMR's, of which 132 were successful.
- 2,585 farmers were allowed to file late claims because they could establish that they were prevented from filing on time due to extraordinary circumstances beyond their control, such as illness or natural disasters. However, tens of thousands of other late-filing petitions were denied.
- The government provided a total of approximately $1.06 billion in cash relief, estimated tax payments, and debt relief to successful Track A and Track B claimants.
- 425 farmers received debt relief totaling $51 million.

The process worked efficiently and effectively: Even though the number of claimants was large and the demands of the *Pigford* settlement process daunting for all involved—the parties' counsel

and the consent decree neutrals alike—the claims and PMR processes were conducted with very few glitches. Class Counsel reached out and recruited dozens of extremely competent lawyers with civil rights and litigation experience to serve as "of counsel" to assist in handling the huge influx of claims and staff the 252 claims meetings conducted during the six-month claim period. There were no complaints that any farmer who showed up at a claims meeting was turned away or was not allowed to complete his or her claim form. In 2001, when the PMR process threatened to overwhelm Class Counsel, Judge Friedman took timely steps to make sure that the process stayed on track. In the end, all PMR's were fully briefed and thoroughly reviewed.

The integrity of the process was preserved at all times, even though the opportunity for gaming the claims process rises when it is overburdened, as it was here. There were three key elements to maintaining program integrity: First, Class Counsel and of counsel reviewed and signed each claim form, and did so only after receiving sufficient assurance of the reliability of the claimant's complaints. Class Counsel turned away hundreds, if not thousands, of claims that didn't make the grade. Second, USDA was given the opportunity to vet every claim filed, and it exercised that right, spending thousands of man hours reviewing the loan and benefit files of claimants and the similar-situated white farmers and filing reports to the Track A adjudicators and to the government lawyers fighting the Track B claims in the arbitration process. Finally, the 6,907 Track A claims that did not succeed included many where the denial was based on the adjudicator's determination that the claim lacked sufficient credibility to merit the substantial fixed Track A award.

As evidenced by the number of PMR's filed, both sides frequently, and with some success, made use of the PMR process to protect their interests. The Monitor gave full consideration to every PMR, which has extended the length of time it has taken to wrap up the settlement but has resulted in the pervasive sense among all involved that the issues were fairly and justly resolved.

Thousands of farmers got justice: The bottom line for a settlement like this is to ask: To what extent have the victims of discrimination been helped? The figures cited above speak for themselves. Tens of thousands of Black farmers who have lived with the pain of discrimination for decades finally got justice. Even those who didn't prevail got the opportunity to be heard, to have their complaints recognized. These results, as important as they are on their own, also send a powerful message at a higher level—that the people of this Nation will recognize their government's mistakes and try to heal those who were harmed by those mistakes.

USDA is moving toward fairer treatment of minority farmers: After the settlement, FSA quickly established the Office of Minority and Socially Disadvantaged Farmers Assistance. More recently, USDA expanded its work in this area by creating the Office of Advocacy and Outreach, which covers all USDA agencies, to improve access to USDA programs and enhance the viability and profitability of socially disadvantaged farmers, other small farmers, and beginning farmers.

In addition, a new element has been added to USDA's mission: the Socially Disadvantaged Farmer and Rancher program area that coordinates with agencies within USDA, such as FSA, to enhance access to USDA programs by minority farmers, ranchers and forest landowners. This program area administers the Outreach and Technical Assistance for

Socially Disadvantaged Farmers and Ranchers Competitive Grants Program. The primary purpose of the grants program is to enhance the coordination of outreach, technical assistance, and education efforts, to reach socially disadvantaged farmers, ranchers and forest landowners and to improve their participation in the full range of USDA programs.

Further, in April 2009, Secretary of Agriculture Tom Vilsack initiated an independent assessment of USDA's program delivery to minorities, and released the results of the assessment in May 2011. The assessment provided recommendations that will help USDA improve field-based service delivery to minority and socially disadvantaged farmers, which the USDA is implementing under the leadership of a working group chaired by the Secretary and consisting of key USDA leadership and senior career employees.

Perhaps most telling, and most apt in evaluating the success of the *Pigford* settlement, on September 28, 2011, FSA Administrator Bruce Nelson announced that FSA had significantly reduced the number of civil rights complaints in fiscal year 2010 to the lowest level in the agency's history.

Conclusion

The very size and breadth of the *Pigford* settlement—covering, as it has, 16 years of discriminatory conduct in hundreds of FSA county offices involving a myriad of programs, fact situations, and types of discrimination—makes it an historic civil rights settlement. It is doubted that many would have undertaken to implement such a comprehensive settlement covering such widespread discrimination over such a long period of time. However, given the demonstrated need for action and the opportunity that presented itself because of the tools that Congress had provided, the parties and the court could do no less than to take on that challenge. And, it can be reported now that the parties' implementation of this settlement with the vigilant oversight of the court has met that challenge. That important first step to mend USDA's broken promise to Black farmers has successfully been taken.

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[i] The documentation of USDA's persistent problems with racial discrimination in its local county offices include the following well-known reports and hearings:

- 1965 U.S. Civil Rights Commission report, entitled "Equal Opportunity in Farm Programs."
- 1982 U.S. Civil Rights Commission report, entitled "Decline of Black farming in America."
- 1990 Hearing on "The Decline of Minority Farming in the United States" held by the House Committee on Government Operations.
- The 1996 D. J. Miller Disparity Study, focusing on minority and female participation in Farm Service Agency (FSA) programs.
- The 1996 Listening Sessions conducted by Secretary of Agriculture Dan Glickman.
- February 1997 USDA Civil Rights Action Team report, entitled "Civil Rights at the U.S. Department of Agriculture."

[ii] *Decline of Minority Farming in the United States Before the Subcomm. on Govt. Information, Justice, and Agriculture of the House Comm. on Govt. Operations*, 101st Cong., 2nd Sess, 29. (statement of David H. Harris, Jr., Exec. Dir., Land Loss Prevention Project).

[iii] There has been some debate about the size of the universe of potential claimants, based on the figures in the 1982 and 1997 agricultural censuses pegging the number of Black farm operators at between

33,250 and 18,816. However, the agricultural census historically has undercounted minority farmers, a fact admitted by USDA's National Agricultural Statistics Service (NASS), which has adjusted the census numbers upward since 1992 to correct for the undercounting. In addition, the census figures are only snapshots taken once every five years, and do not count the number of farmers that enter and exit farming in the interim. In the case of the *Pigford* class period, there it is estimated that there were tens of thousands of farmers who entered and exited the business between 1981 and 1997. Finally, the census numbers, even after adjusted for undercounting, didn't count start-up farm operators and misclassified a large number of minority farmers as white. It is believed that the 120,000 estimate more accurately reflects the size of the *Pigford* pool.