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THE USDA DISCRIMINATION CASES: *PIGFORD, IN RE BLACK FARMERS, KEEPSEAGLE, GARCIA, AND LOVE*

*Stephen Carpenter**

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I. INTRODUCTION

Over the past several years, the practical terms of the contemporary intersection of race, gender, and agriculture generated several lawsuits. In this litigation, African Americans, Hispanics, Native Americans, and women allege that the USDA discriminated against them when they sought to participate in USDA programs as farmers.¹ The cases involve tens of thousands of class members and billions of dollars in remedies while tens of thousands more claimants

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¹ These are the terms used to describe plaintiffs in the various cases. While both Hispanic and Latino and Native American and Indian respectively might be used interchangeably, and considerable discussion addresses the merits of each identifying term, this article generally follows the terminology used in the litigation in question. See *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009); *Love v. Connor*, 525 F. Supp. 2d 155 (D.C. Dist. 2007); *Keepseagle v. Johanns*, 236 F.R.D. 1 (D.C. Dist. 2006); *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999).

may yet recover.² This article summarizes the development and status of those cases.³

II. BACKGROUND

Today, there are roughly two million farms in the United States.⁴ A typically implicit assumption in discussion of American agriculture is that those operating the farms are uniformly white men.⁵ The cases discussed here have, as plaintiffs, some of those who contradict this assumption. They demonstrate hidden layers of struggle within the ongoing crisis of family farming.⁶ White male farmers, to be sure, can experience a form of invisibility in the sense that farm country and rural life can generally seem distant to many.⁷ The assumption,

2. See generally *Garcia*, 563 F.3d 519; *Love*, 525 F. Supp. 2d 155; *Keepseagle*, 236 F.R.D. 1; *Pigford*, 185 F.R.D. 82.

3. A number of important topics could be considered when evaluating these cases. Examples that are not included are: the existence and extent of discrimination at the USDA in the past or present, the present cases as examples of class action reform litigation, the extent to which the cases provide a fair remedy to aggrieved class members, triggered reform in the USDA, or were the subject of fraud.

4. WILLARD W. COCHRANE, *THE DEVELOPMENT OF AMERICAN AGRICULTURE* (1979) (giving an historical account); USDA, NAT'L AGRIC. STATISTICS SERV., 2007 CENSUS OF AGRICULTURE: AC-07-A-51 Farms Numbers, 16 tbl.8 (2007), available at http://www.agcensus.usda.gov/Publications/2007/Full_Report/usv1.pdf.

5. USDA, 2007 CENSUS OF AGRICULTURE, *supra* note 4 at 53, tbl.49, 58–61, tbl.54. Beginning in 1978—the first year for which the Agricultural Census tracked farm operators by gender—through the present, women farmers are more likely to be nonwhite when compared to male farmers. Penni Korb, *Women Farmers in Transition*, in USDA ECON. RESEARCH SERV., AGRIC. INFO. BULLETIN NO. 797, STRUCTURAL AND FINANCIAL CHARACTERISTICS OF U.S. FARMS: 2004 FAMILY FARM REPORT 63–75, tbl.6-5 (David E. Banker & James M. MacDonald eds., 2005), available at <http://www.ers.usda.gov/publications/aib797/aib797.pdf>. But see Minnie Miller Brown, *Black Women in American Agriculture*, 50 AGRIC. HIST. 202, 202–12 (1976) (explaining the over-breadth of this general rule).

6. African American, Native American, and Hispanic farmers are concentrated in relatively separate rural regions of the nation and this has important implications for farming. See Daniel D. Arreola, *Settlement Geographies of Mexican Americans*, in CONTEMPORARY ETHNIC GEOGRAPHIES IN AMERICA 93–122 (Ines M. Miyares & Christopher A. Airriess eds., 2007) (discussing the importance of geographic location); Kate A. Berry et al., *Native Americans*, in CONTEMPORARY ETHNIC GEOGRAPHIES IN AMERICA 51–70 (Ines M. Miyares & Christopher A. Airriess eds., 2007); Glenn V. Fugutt, *Population Change in Nonmetropolitan American*, in THE CHANGING AMERICAN COUNTRYSIDE: RURAL PEOPLE AND PLACES 77–100 (Emery N. Castle ed., 1995) (discussing conditions and perceptions of rural America); Bobby M. Wilson, *The Historical Spaces of African Americans*, in CONTEMPORARY ETHNIC GEOGRAPHIES IN AMERICA 71–92 (Ines M. Miyares & Christopher A. Airriess eds., 2007) (discussing the importance of geographic location).

7. See Emery N. Castle, *The Forgotten Hinterlands*, in THE CHANGING AMERICAN COUNTRYSIDE: RURAL PEOPLE AND PLACES, *supra* note 6, at 3–9.

however, that African Americans live almost entirely in urban areas, that Hispanics are involved in agriculture—but only as laborers—and that Native Americans who are not in cities live on reservations, where little agriculture takes place, has limited application and obscures reality. Women, for their part, have always been the country's invisible farmers.⁸

After lengthy litigation, the cases on behalf of Hispanics, African Americans, Native Americans, and women are in various stages.⁹ As a legal matter these causes of action bear similarities, if only that the main legal arguments concern discrimination against a protected class by the USDA, and in each case a class action was pursued.¹⁰

Viewed broadly, however, each case is an ongoing portion of a set of overlapping stories central to the country's history.¹¹ At the time of European contact, indigenous North Americans were a collection of largely agricultural peoples.¹² Despite four centuries of population decline, many Native Americans remained engaged in agriculture.¹³ Well into the 1980s, thousands of Native Americans continued to farm and ranch.¹⁴

Millions of African Americans were forcibly brought to the western hemisphere, largely in order to work on agricultural plantations. After slavery—and the failure of the once promising efforts during Reconstruction—a significant number of African Americans gained a toe-hold on the land and farmed.¹⁵ By

8. CAROLYN SACHS, *INVISIBLE FARMERS: WOMEN IN AGRICULTURAL PRODUCTION* xi (1983).

9. See *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009); see also *Pigford v. Vilsack*, 613 F. Supp. 2d 78 (D.C. Dist. 2009); *Love v. Connor*, 525 F. Supp. 2d 155 (D.C. Dist. 2007); *Keepseagle v. Johanns*, 236 F.R.D. 1 (D.C. Dist. 2006).

10. See *Garcia*, 563 F.3d 519; see also *Pigford*, 613 F. Supp. 2d 78; *Love*, 525 F. Supp. 2d 155; *Keepseagle*, 236 F.R.D. 1.

11. See *Garcia*, 563 F.3d 519; see also *Pigford*, 613 F. Supp. 2d 78; *Love*, 525 F. Supp. 2d 155; *Keepseagle*, 236 F.R.D. 1.

12. THEDA PERDUE & MICHAEL D. GREEN, *NORTH AMERICAN INDIANS: A VERY SHORT INTRODUCTION* 10 (2010) (discussing that at the time Europeans began to arrive, "it [North America] was primarily an agricultural world." While some groups did not farm—notably along the Pacific coast, or those that hunted on the plains, the Great Basin, or in the far north—"everywhere else, in the desert Southwest, in the Missouri River system, and east of the Mississippi River from the Great Lakes to the Gulf of Mexico, the cultivation of corn, beans, and squash . . . produced the bulk of food for Indian people."). For a standard account of Native American agricultural history, see R. DOUGLAS HURT, *INDIAN AGRICULTURE IN AMERICA: PREHISTORY TO THE PRESENT* (1997).

13. See Korb, *supra* note 5, at 71 tbl.6-5.

14. See *id.*

15. See Adam Rothman, *Slavery, the Civil War, and Reconstruction*, in *AMERICAN HISTORY NOW* 75–95 (Eric Foner & Lisa McGirr eds., 2011) (providing a contemporary summary); see also JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* (Peter Labella & Bob Greiner, eds., 7th ed. 1994); see also W.E.

1978 these numbers had dwindled from nearly one million in 1920 to a few tens of thousands.¹⁶

Hispanics, a result of the colonial mixture of populations—mainly indigenous peoples of the Western Hemisphere and Spanish immigrants—were partially incorporated into the United States by one means or another, or were immigrants to the United States.¹⁷ By 2007, over 80,000 Hispanic farmers had gained a grip on the land and were farming.¹⁸

Women have been farmers—though often with limited autonomy—for as long as there has been agriculture. For decades, women in the United States performed a large portion of farm work.¹⁹ In the early 1980s, wives on farms were commonly performing a range of farming tasks and actively participating in the making of farm decisions.²⁰ In addition, thousands of American women were farming independently or as the head of a farming operation.²¹

The cases discussed here do not consider the experiences of others that may have experienced discrimination by the USDA. Most notable may be the

Burghardt Dubois, *The Negro Farmer*, in *NEGROES IN THE UNITED STATES* 69–99 (Dept. of Comm. & Labor, Bureau of the Census 1904).

16. VERA J. BANKS, USDA ECON. RESEARCH SERV., *BLACK FARMERS AND THEIR FARMS* 2–3 (1986) (noting in 1950 there were about 560,000 African American farmers, and as late as 1964 there were dozens of counties in which the majority of farmers were African American).

17. A large settlement of Mexican-Americans exists in the borderlands region that stretches from California to Texas. Daniel D. Arreola, *Settlement Geographies of Mexican Americans*, in *CONTEMPORARY ETHNIC GEOGRAPHIES IN AMERICA* *supra* note 6, at 93–122 (summarizing both the incorporation of these settlements into the United States and migration patterns into the United States); *see also* Refugio I. Rochin, *Rural Latinos: Evolving Conditions and Issues*, in *THE CHANGING AMERICAN COUNTRYSIDE: RURAL PEOPLE AND PLACES* *supra* note 6, at 286–302.

18. USDA, NAT'L AGRIC. STATISTICS SERV., 2007 CENSUS OF AGRIC. FACT SHEETS DEMOGRAPHICS HISPANIC FARMERS, *available at* http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Demographics/hispanic.pdf.

19. John Mack Faragher, *History from the Inside-Out: Writing the History of Women in Rural America*, 33 AM. Q. 537, 540 (1981). From colonial times through the nineteenth century, Euro-American women engaged in “one-third to more than one-half of all the food production on family farms.” *Id.*

20. RACHEL ANN ROSENFELD, *FARM WOMEN: WORK, FARM, AND FAMILY IN THE UNITED STATES* 52–53 (1985). In 1980, for example, a sociologist calculated that farm women were putting in a forty-one hour work week on farm tasks, and an additional fifty-eight hour work-week for domestic tasks. *Id.*; *see also* Thomas A. Lyson, *Husband and Wife Work Roles and the Organization and Operation of Family Farms*, 47 MARRIAGE & FAMILY 759, 763–64 (1985) (using data from South Carolina family farms to describe work done by women on family farms, including both production activities and organizational activities).

21. USDA NAT'L AGRIC. STATISTICS SERV., 2007 CENSUS OF AGRIC., *FARMS WITH WOMEN PRINCIPAL OPERATORS COMPARED WITH ALL FARMS* (2007), http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Race_Ethnicity_and_Gender_Profiles/reg99000.pdf.

absence of various groups of Asian Americans who have contributed greatly to American agriculture.²² Hmong farmers offer a significant contemporary example of this conspicuous absence.²³

III. DISCRIMINATION GENERALLY

At an individual level, people differ in their understanding of what constitutes discrimination. Where one may identify discrimination, another may not.²⁴ Therefore, a personal story describing discrimination can be powerful to some, but leaves others skeptical. The personal understanding of those involved in discrimination—as with individual stories in general—earn an uneven reception in the law and in scholarship.²⁵

Broader social scientific efforts to measure discrimination are complicated and often in dispute, due in significant part to the immense scale of the question and the difficulty in taking into account various factors that also account for differences in individual treatment. It is worth noting, however, that in the last two decades, social scientists have refined techniques to assess the existence and extent of discrimination.²⁶ One strain of empirical research focuses on discrete markets that can be analyzed carefully.²⁷ Sophisticated empirical studies appear to confirm continued gender and race discrimination.²⁸ Some studies ana-

22. For an account of the tendency of scholars to neglect Asian American life in rural areas, see Gary Y. Okihiro, *Fallow Field: The Rural Dimension of Asian American Studies*, in *FRONTIERS OF ASIAN AMERICAN STUDIES* 6–13 (Gail M. Nomura et al. eds., 1989). For one account of Asian Americans in farming, see Theodore Saloutos, *The Immigrant in Pacific Coast Agriculture, 1880–1940*, 49 *AGRIC. HISTORY* 182 (1975).

23. See Jess Anna Speier, *Hmong Farmers: In the Market and on the Move*, FARMERS' LEGAL ACTION GROUP (2001), http://www.flaginc.org/topics/pubs/arts/CLE_JAS.pdf.

24. See Russell K. Robinson, *Perceptual Segregation*, 108 *COLUM. L. REV.* 1093, 1097 (2008) (discussing differing perceptions of allegations of discrimination).

25. See generally Gerald P. Lopez, *Lay Lawyering*, 32 *UCLA L. REV.* 1 (1984) (discussing the way the law values some stories, but not others).

26. See generally Kerwin Kofi Charles & Jonathan Guryan, *Studying Discrimination: Fundamental Challenges and Recent Progress*, 3 *ANNUAL REVIEW OF ECONOMICS* 479, 479–511 (2011) (providing analysis of discrimination from an economic viewpoint, including labor market outcomes); National Research Council of the National Academies, *MEASURING RACIAL DISCRIMINATION* (Rebecca M. Black et al. eds. 2004).

27. See, e.g., IAN AYERS, *PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* 21, 167, 234 (William M. Landes & J. Mark Ramseyer eds., 2001) (using empirical research to examine disparate treatment based on race and gender in retail car negotiations, racial disparities in access to kidney transplants, and discrimination in the bail bond market).

28. Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 *ANN. REV. SOC.* 181, 200 (2008); John Yinger, *Evidence of Discrimination in Consumer Markets*, 12 *J. ECON. PERSP.* 23, 38

lyze discrimination in lending in particular.²⁹ As psychological literature adds insight to this discussion, an increasingly strong argument can be made that discrimination continues at a non-conscious level.³⁰

Two studies within the last twelve years are worth noting explicitly—one concerns gender and the other race. The gender study found that concealing the identity of musicians auditioning for a spot in symphony orchestras significantly increased the chances of women succeeding in the audition.³¹ Women historically have been underrepresented in orchestras, but it has been hard to prove that part of the cause was gender bias.³² The study found that blind auditions increased the chances that a woman would advance from preliminary rounds by fifty percent.³³ It is quite difficult to claim that this result is from anything other than ongoing gender discrimination.

In a study of hiring practices, authors mailed thousands of résumés in response to help-wanted advertisements in Boston and Chicago.³⁴ They assigned either an African American or a white sounding name for each résumé.³⁵ White names received fifty percent more callbacks for interviews.³⁶ The study concluded that these disparities were significant and generally consistent across various occupations and industries.³⁷ Names generally associated with African Americans seem to harm labor market prospects.³⁸

(1998); see also HANDBOOK ON THE ECONOMICS OF DISCRIMINATION (William M. Rodgers, III ed., 2006).

29. See REN S. ESSENE & WILLIAM APGAR, JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., UNDERSTANDING MORTGAGE MARKET BEHAVIOR: CREATING GOOD MORTGAGE OPTIONS FOR ALL AMERICANS (2007) (summarizing studies regarding discrimination in lending); see also Michael S. Barr, *Credit Where it Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. Rev. 513, 544–54 (2005) (discussing credit discrimination, or redlining, which is refusing to lend to low-income or minority communities).

30. John A. Bargh & Erin L. Williams, *The Automaticity of Social Life*, 15 CURRENT DIRECTION PSYCH. SCI. 1 (2006) (discussing nonconscious mental processes triggered by social environments); John A. Bargh, *The Cognitive Monster: The Case Against the Controllability of Automatic Stereotype Effects*, in DUAL-PROCESS THEORIES IN SOC. PSYCHOL. 361 (Shelly Chaiker & Yaacov Trope eds., 1999) (exploring the dual process model of stereotyping and stereotype control ability).

31. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 726 (2000).

32. *Id.* at 715–16.

33. *Id.* at 738.

34. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and George More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004).

35. *Id.*

36. *Id.*

37. *Id.* at 1006.

38. *Id.* at 992.

IV. USDA HISTORY AND DISCRIMINATION

The USDA was established in the 1860s during the Lincoln Administration.³⁹ No one can deny discrimination in the Department occurred during the first century of its existence. A more specific question raised in the cases discussed in this Article is the extent to which USDA moved beyond discrimination by the early 1980s.⁴⁰ A series of scholars and journalists analyzed USDA practices and found significant discrimination in recent decades—especially regarding race.⁴¹ More recent literature using econometric models has begun to look at discrimination as well.⁴² The most expansive discussion of discrimination problems within the Department, however, comes from a series of United States Commission on Civil Rights reports, Government Accountability Office (formerly the General Accounting Office) reports, and congressional investigations.⁴³

Two aspects of these reports are of note. First, they suggest that discrimination has been an ongoing problem at USDA that extended into the class period of the relevant cases.⁴⁴ A second and somewhat separate issue is the ex-

39. 12 Stat. 387 (1862) (codified as amended at 7 U.S.C. § 2201).

40. See generally *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006) (relating to discrimination by the USDA against female farmers); *Keepseagle v. Veneman*, No. 99-03119, 2001 U.S. Dist. LEXIS 25220 (D.C. Dist. 2001) (relating to discrimination by the USDA against Native Americans farmers); *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999) (relating to discrimination by the USDA against African-American farmers).

41. See, e.g., Pete Daniel, *African American Farmers and Civil Rights*, 1 J. S. HIST. 3 (2007) (presenting a detailed historical account of USDA discrimination, focusing on the 1960s); see also DAVID EUGENE CONRAD, *THE FORGOTTEN FARMERS: THE STORY OF SHARECROPPERS IN THE NEW DEAL* (1965) (discussing New Deal policies that were the forerunner of current USDA programs and explaining the role of race in the way programs were implemented); DONALD H. GRUBBS, *CRY FROM THE COTTON: THE SOUTHERN TENANT FARMERS' UNION AND THE NEW DEAL* (1971) (discussing New Deal policies that were the forerunner of current USDA programs and explaining the role of race in the way programs were implemented).

42. See Ya Wu et al., *A Decomposition Approach to Analyzing Racial and Gender Biases* (2009) (paper presented at the Agricultural & Applied Economics Association 2009 AAEA Annual Meeting); Cesar L. Escalante et al., *Credit Risk Assessment and Racial Minority Lending at the Farm Service Agency*, 38 J. AGRIC. & APPLIED ECON. 61 (2006).

43. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, *THE DECLINE OF BLACK FARMING IN AMERICA* (1982); U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-99-38, *PROBLEMS CONTINUE TO HINDER THE TIMELY PROCESSING OF DISCRIMINATION COMPLAINTS* (1999) [hereinafter U.S. GEN. ACCOUNTING OFFICE, *PROBLEMS CONTINUE*]; H.B. REP. NO. 101-984 (1990).

44. See U.S. GEN. ACCOUNTING OFFICE, GAO-02-942, *IMPROVEMENTS IN THE OPERATIONS OF THE CIVIL RIGHTS PROGRAM WOULD BENEFIT HISPANIC AND OTHER MINORITY FARMERS* 14 (2002) [hereinafter U.S. GEN. ACCOUNTING OFFICE, *IMPROVEMENTS*]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-755T, *MANAGEMENT OF CIVIL RIGHTS EFFORTS CONTINUES TO BE DEFICIENT DESPITE YEARS OF ATTENTION* 1-3 (2008) [hereinafter U.S. GOV'T ACCOUNTABILITY OFFICE, *MANAGEMENT*]; U.S. GEN. ACCOUNTING OFFICE, *PROBLEMS CONTINUE*, *supra* note 43, at 3.

tent to which various internal USDA entities tasked with investigating and remediating civil rights violations have been effective.⁴⁵ A central question in all of these USDA discrimination cases is the effectiveness of the USDA's efforts to investigate and resolve discrimination complaints.⁴⁶

The United States Commission on Civil Rights has issued a number of reports over the years regarding civil rights at the USDA.⁴⁷ Most notable, perhaps, is a detailed 1982 effort that provides perhaps the single most detailed discussion of USDA credit discrimination.⁴⁸ The Commission found that longstanding discrimination in USDA programs and a lack of effective procedures for ensuring civil rights enforcement contributed to a decline in farms operated by African-American farmers.⁴⁹ The prevailing practice at the USDA, according to the 1982 report, was to follow local patterns of racial segregation and discrimination when providing assistance.⁵⁰ The Commission observed that the director of USDA's Farm and Home Administration Equal Opportunity staff did not disagree with the Commission's analysis and concluded that the Equal Opportunity office was "in no position to enforce compliance with civil rights laws."⁵¹ Previous Commission studies found similar problems.⁵²

In 1990, Congress engaged in an extensive hearing on civil rights issues at the USDA and produced a lengthy report.⁵³ Several of those testifying criticized the delivery of program benefits to minority farmers and USDA's civil

45. U.S. GEN. ACCOUNTING OFFICE, IMPROVEMENTS, *supra* note 44, at 14; U.S. GOV'T ACCOUNTABILITY OFFICE, MANAGEMENT, *supra* note 44, at 8; U.S. GEN. ACCOUNTING OFFICE, PROBLEMS CONTINUE, *supra* note 43, at 15.

46. See, e.g., *Keepseagle v. Glickman*, 194 F.R.D. 1 (D.C. Dist. 2000) ("Plaintiffs, a number of Native American farmers, allege that defendant discriminated against them on the basis of their race in the review of their applications for credit or benefit programs and that defendant failed to review their administrative complaints of discrimination properly."); *Pigford v. Glickman*, 185 F.R.D. 82, 86 (D.C. Dist. 1999) ("The plaintiffs in this case allege . . . that when plaintiffs filed complaints of discrimination with the USDA, the USDA failed properly to investigate and resolve those complaints.").

47. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, THE DECLINE OF BLACK FARMING IN AMERICA 8-11 (1982) [hereinafter U.S. COMM'N ON CIVIL RIGHTS, DECLINE] (examining discrimination in federal farm credit programs and describing previous reports on discrimination at the USDA).

48. *Id.*

49. *Id.* at 176-77.

50. *Id.* at 177.

51. *Id.* at 151 n.53.

52. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN FARM PROGRAMS: AN APPRAISAL OF SERVICES RENDERED BY AGENCIES OF THE UNITED STATES DEPARTMENT OF AGRICULTURE 105-06 (1965).

53. H.R. REP. NO. 101-984 (1990).

rights efforts.⁵⁴ The report concluded that the USDA had “been a catalyst in the decline of minority farming.”⁵⁵

In 1997, the Secretary of Agriculture’s Civil Rights Action Team (CRAT), composed of senior officials, held listening sessions around the country and wrote a report on civil rights at the USDA.⁵⁶ The report concluded that discrimination continued and that civil rights had not been a high priority at the USDA.⁵⁷ According to the CRAT report, “[d]espite the fact that discrimination in program delivery and employment has been documented and discussed, it continues to exist to a large degree unabated.”⁵⁸ Further, in recent years “every Secretary of Agriculture has said that improving civil rights is a priority at USDA.”⁵⁹ The findings of the report, however, suggest “that with few exceptions, senior managers at the Department have not invested the time, effort, energy, and resources needed to produce any fundamental change.”⁶⁰ The CRAT report also observed that civil rights programs at the USDA “ha[d] been in a persistent state of chaos because of numerous reorganizations since the 1980s.”⁶¹ In addition, the report asserted that the process of resolving complaints about the delivery of program benefits had “failed.”⁶²

A series of reports by the Government Accountability Office (GAO) discuss the civil rights record of the USDA and comment repeatedly on what is described as a lack of progress in addressing civil rights complaints.⁶³ GAO testimony to Congress in 2008 found USDA still unable to effectively address discrimination complaints or to provide accurate data to Congress on its efforts to

54. *Id.* at 11.

55. *Id.* at 41.

56. CIVIL RIGHTS ACTION TEAM, USDA, CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE (1997).

57. *Id.* at 6, 12.

58. *Id.* at 2.

59. *Id.* at 12.

60. *Id.*

61. *Id.* at 47.

62. *Id.* at 31.

63. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-97-41, FARM PROGRAMS: EFFORTS TO ACHIEVE EQUITABLE TREATMENT OF MINORITY FARMERS (1997); U.S. GEN. ACCOUNTING OFFICE, IMPROVEMENTS, *supra* note 44; U.S. GEN. ACCOUNTING OFFICE, GAO-03-96, USDA: MAJOR MANAGEMENT CHALLENGES AND PROGRAM RISKS (2003); U.S. GOV’T ACCOUNTABILITY OFFICE, MANAGEMENT, *supra* note 44; U.S. GEN. ACCOUNTING OFFICE, PROBLEMS CONTINUE, *supra* note 43; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-650T, USDA: RECOMMENDATIONS AND OPTIONS AVAILABLE TO THE NEW ADMINISTRATION AND CONGRESS TO ADDRESS LONG-STANDING CIVIL RIGHTS ISSUES (2009); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-62, USDA: RECOMMENDATIONS AND OPTIONS TO ADDRESS MANAGEMENT DEFICIENCIES IN THE OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS (2008).

resolve discrimination complaints.⁶⁴ Unresolved discrimination complaints dating back over a decade remained unresolved, and claims and inquiries were lost or disregarded.⁶⁵ GAO suggested that the longstanding management deficiency in these efforts calls into question “USDA’s commitment to efficiently and effectively address discrimination complaints”⁶⁶

A series of USDA Office of Inspector General (OIG) reports tell a similar story.⁶⁷ In 2000, the OIG explained that it was making its seventh attempt to provide USDA’s Office of Civil Rights with constructive ways to overcome its case processing inefficiencies.⁶⁸ Without significant changes, the OIG observed, it was doubtful whether complaints would receive due care.⁶⁹ By 2007, the OIG designated civil rights as a major management challenge for the USDA and commented that because of the conditions the OIG had found, public confidence in the USDA’s ability to uphold civil rights might be lost.⁷⁰

Based on these studies, there seems to be a nearly unanimous view that civil rights have been a problem at USDA in recent years. The Judge in the *Pigford* case concluded, based on the CRAT report and Office of Inspector General reports, that there was a “persuasive indictment of the civil rights records of the USDA.”⁷¹ Furthermore, USDA’s 1998 National Commission on Small Farmers found conclusive evidence of discrimination at the USDA.⁷² A remedy for such

64. U.S. GOV’T ACCOUNTABILITY OFFICE, MANAGEMENT, *supra* note 44, at 24.

65. *Id.* at 16–17.

66. *Id.* at 24.

67. See OFFICE OF INSPECTOR GENERAL, USDA, No. 60801-2-HQ, EVALUATION OF THE OFFICE OF CIVIL RIGHTS’ EFFORTS TO IMPLEMENT CIVIL RIGHTS SETTLEMENTS (1999); OFFICE OF INSPECTOR GENERAL, USDA, No. 60801-1-HQ, EVALUATION OF THE OFFICE OF CIVIL RIGHTS’ EFFORTS TO REDUCE THE BACKLOG OF PROGRAM COMPLAINTS (1998); OFFICE OF INSPECTOR GENERAL, USDA, No. 50801-5-HQ, EVALUATION REPORT: IMPLEMENTATION OF OIG’S RECOMMENDATIONS-DEPARTMENT’S CIVIL RIGHTS COMPLAINT SYSTEM AND THE DIRECT FARM LOAN PROGRAM (1998); OFFICE OF INSPECTOR GENERAL, USDA, No. 50801-3-HQ, MINORITY PARTICIPATION IN FARM SERVICE AGENCY’S FARM LOAN PROGRAMS-PHASE II (1997); OFFICE OF INSPECTOR GENERAL, USDA No. 50801-4-HQ, NATIONWIDE DATA ON MINORITY PARTICIPATION IN FARM SERVICE AGENCY’S FARM LOAN PROGRAMS-PHASE III (1997); OFFICE OF INSPECTOR GENERAL, USDA, No. 60801-4-HQ, OFFICE OF CIVIL RIGHTS STATUS OF THE IMPLEMENTATION OF RECOMMENDATIONS MADE IN PRIOR EVALUATIONS OF PROGRAM COMPLAINTS (2000) [hereinafter OFFICE OF INSPECTOR GENERAL, STATUS]; OFFICE OF INSPECTOR GENERAL, USDA, No. 50801-2-HQ, REPORT FOR THE SECRETARY ON CIVIL RIGHTS ISSUES-PHASE I (1997).

68. OFFICE OF INSPECTOR GENERAL, STATUS, *supra* note 67, at 1.

69. *Id.* at 2.

70. OFFICE OF INSPECTOR GENERAL, USDA, MANAGEMENT CHALLENGES 21 (2007).

71. *Pigford v. Glickman*, 185 F.R.D. 82, 103–04 (D.C. Dist. 1999).

72. USDA, NAT’L COMM’N ON SMALL FARMS, A TIME TO ACT: A REPORT OF THE USDA NATIONAL COMMISSION ON SMALL FARMS 25–27 (1998).

discrimination requires a cause of action. In the cases discussed here the main cause of action is found in the Equal Credit Opportunity Act (ECOA).

V. AGRICULTURAL CREDIT AND THE EQUAL CREDIT OPPORTUNITY ACT (ECOA)

The bulk of the claims in these cases are related to agricultural credit, and therefore to USDA lending programs. These loans are currently made by the Farm Service Agency (FSA). Previously it was the Farmers Home Administration (FmHA).

In ways that may not be obvious to those unfamiliar with agriculture, credit is the lifeblood of farming and ranching. Successful farms and ranches must have access to timely credit, in adequate amounts, at fair terms.⁷³ Most crucially, virtually every producer uses short-term operating credit to purchase production inputs.⁷⁴ Seed and fertilizer, for example, are often bought in the spring on credit, and the debt is repaid after harvest in the fall. Credit is also used to purchase machinery, equipment, livestock, and livestock feed. Without credit, real estate purchases are not possible. In summary, without ongoing access to credit, farmers and ranchers simply cannot operate.

Credit in rural areas tended to be in short supply during the class period, and credit was especially difficult to obtain for family-sized operations.⁷⁵ By statute, USDA farm loan programs were almost always required to exclusively lend to family farmers who could not get credit elsewhere.⁷⁶ These USDA farm loan programs tended to function as the lender of last resort and as the only credit alternative for many producers.⁷⁷ They were especially important for the plaintiffs in the litigation discussed here.⁷⁸

73. See FARM AID ET AL., DON'T BANK ON IT: FARMERS FACE SIGNIFICANT BARRIERS TO CREDIT ACCESS DURING ECONOMIC DOWNTURN 3 (2011), available at <http://documents.foodandwaterwatch.org/doc/farm-credit-survey.pdf> (discussing barriers to credit access and consequences for farmers).

74. See USDA, FISCAL YEAR 2013 BUDGET SUMMARY AND ANNUAL PERFORMANCE PLAN 18 (2012) (discussing the current demand for credit).

75. Janet Perry, *Small Farms in the U.S.*, AGRIC. OUTLOOK, May 1998, at 24.

76. 7 U.S.C. § 1941(a) (2006).

77. Charles Dodson & Steve Koenig, *The Major Farm Lenders: A Look at their Clientele*, AGRIC. OUTLOOK, Dec. 1994, at 24; Perry, *supra* note 75, at 24–25.

78. See Steve Koenig & Charles Dodson, *FSA Credit Programs Target Minority Farmers*, AGRIC. OUTLOOK, Nov. 1999, at 14 (stating racial and ethnic minorities generally rely on FSA loan programs); see also, e.g., *Pigford v. Glickman*, 185 F.R.D. 82, 86 (1999) (claiming many minority farmers depend on credit and benefits from the USDA).

To a somewhat unrecognized extent, the settlements have followed the patterns of proof provided by ECOA.⁷⁹ ECOA requires that creditors not discriminate on the basis of race, color, national origin, or sex against an applicant in any aspect of a credit transaction.⁸⁰ Further, ECOA sets out specific actions that do not constitute discrimination.⁸¹ Transactions in which credit is extended by the government are subject to ECOA.⁸² ECOA remedies include actual damages, punitive damages for nongovernmental entities, equitable relief, and attorney's fees.⁸³ The statute, not widely used until the 1990s, offers a powerful method for addressing discrimination.⁸⁴

The settlements also track the standard ECOA case law that incorporated a version of the burden-shifting analysis used by the United States Supreme Court in *McDonnell Douglas Corporation v. Green*.⁸⁵ A brief summary of that standard helps to explain aspects of the discrimination cases and their resolution.

In general, if the plaintiff does not have direct evidence of disparate treatment, it may be established through circumstantial evidence by way of establishing a prima facie case for discrimination.⁸⁶ A prima facie case is established by showing:

- (1) The plaintiff is a member of a protected class;
- (2) the plaintiff applied for credit for which the plaintiff was qualified;

79. Compare Settlement Agreement at 21, *Keepseagle v. Vilsack*, No. 1:99CV03119 (2010), and Settlement Agreement at 15, *In re Black Farmers Discrimination Litigation* (No. 08-MC-0511) (2011), with Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2006).

80. 15 U.S.C. § 1691(a). Other protected classes are religion, marital status, age, the receipt of public assistance income, and the exercise of rights under the Consumer Credit Protection Act. *Id.*

81. *Id.* at § 1691(b)–(c).

82. *Id.* at § 1691(e) (defining “creditor” to encompass “any person who regularly extends, renews, or continues credit . . .”).

83. *Id.* at § 1691e(b)–(d); 12 C.F.R. § 202.16(b) (2012); see also 12 C.F.R. § 202.16 (supp. I 2012). See generally THOMAS P. VARTANIAN, ET AL., *THE FAIR LENDING GUIDE* (1997) (detailing ECOA from a creditor point of view).

84. ALYS COHEN ET AL., NAT'L CONSUMER LAW CTR., *CREDIT DISCRIMINATION* 2–3 (5th ed. 2009). This National Consumer Law Center publication is frequently updated and provides the best account of the workings of credit discrimination law. See *id.*

85. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

86. *Id.*

- (3) the plaintiff was rejected despite being qualified; and
- (4) the position remained open and the employer sought applicants

who were similarly qualified when compared to the plaintiff.⁸⁷

Applicants are also protected under ECOA. The statute defines applicant as a person “who applies to a creditor directly for an extension, renewal, or continuation credit”⁸⁸ According to Regulation B, an applicant includes “any person who requests . . . an extension of credit from a creditor” and includes any person who “is or may become contractually liable regarding an extension of credit.”⁸⁹ Simply put, an applicant, is a person who tries to get credit.⁹⁰

This last requirement tends not to be taken literally by courts.⁹¹ An exact match tends not to be needed.⁹² Some courts have omitted the requirement entirely.⁹³ If a prima facie case is established, the burden of proof shifts to the creditor to articulate a legitimate, nondiscriminatory basis for the adverse action.⁹⁴ If the defendant does so, the plaintiff must then demonstrate that the reason offered as legitimate was actually a pretext for discrimination.⁹⁵

VI. THE DISCRIMINATION CASES

There are five main discrimination cases. *Pigford v. Glickman* was certified as a class of African Americans, and settlement was approved in 1999.⁹⁶ Implementation of *Pigford* is nearly complete, and it is too late to make a claim

87. *Id.*; see also *Cooley v. Sterling Bank*, 280 F. Supp. 2d 1331, 1339 (2003).

88. 15 U.S.C. § 1691a(b).

89. 12 C.F.R. § 202.2(e) (2012).

90. *Id.* Regulation B, for that matter defines an application as “an oral or written request for an extension of credit that is made in accordance with procedures used by a creditor for the type of credit request.” *Id.* at §202.2(f). See COHEN ET AL., *supra* note 84, at 24 (explaining an applicant need not submit a full application to a creditor).

91. See, e.g., *McDonnell Douglas Corp.*, 411 U.S. at 802 n.13 (“The facts necessarily will vary in Title VII cases, and the specification above the prima facie proof required from the respondent is not necessarily applicable in every respect to differing factual situations.”).

92. *Id.*

93. See, e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94–101 (2003) (holding that heightened showing was not necessary to prove discrimination, circumstantial evidence was sufficient).

94. *McDonnell Douglas Corp.*, 411 U.S. at 802–3.

95. *Id.* at 803.

96. *Pigford v. Glickman*, 185 F.R.D. 82, 86 (D.C. Dist. 1999).

in the case.⁹⁷ As of February 16, 2012, about \$1 billion has been paid to the African American class of about 23,000 people.⁹⁸

Keepseagle v. Veneman was certified as a class action of Native Americans and settlement was approved on April 28, 2011.⁹⁹ The claim filing period ended on December 27, 2011.¹⁰⁰ A federal allocation of \$760 million has been established for the settlement.¹⁰¹

In re Black Farmers Discrimination Litigation was conditionally certified as a class of African Americans and the settlement received final approval in October 2011.¹⁰² The class could potentially include over 60,000 people.¹⁰³ The time period for submitting claims ended May 11, 2012.¹⁰⁴ A federal appropriation of more than \$1 billion was allocated for the settlement.¹⁰⁵

In *Garcia v. Johanns*, Hispanics were denied class certification, and litigation is ongoing.¹⁰⁶ The USDA, however, “announced that it would create an administrative process for resolving claims by Hispanics.”¹⁰⁷

In *Love v. Johanns*, women sought and were denied class status.¹⁰⁸ Litigation is ongoing. Simultaneously, similar to the result in *Garcia v. Johanns*, the

97. *Id.*; see also TADLOCK COWAN & JODY FEDER, CONG. RESEARCH SERV., RS 20430, THE PIGFORD CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 4 (2011).

98. OFFICE OF THE MONITOR, NATIONAL STATISTICS REGARDING PIGFORD V. VILSACK TRACK A IMPLEMENTATION AS OF FEBRUARY 16, 2012 (2012), available at <http://www.dcd.uscourts.gov/pigfordmonitor/stats/> [hereinafter OFFICE OF THE MONITOR NAT'L STATISTICS].

99. *Keepseagle v. Veneman*, No. 99-03119, 2001 U.S. Dist. LEXIS 25220, at *47 (D.C. Dist. 2001); Order Granting Final Approval of Settlement Agreement, No. 99-03119, 2001 U.S. Dist. LEXIS 25220 (D.C. Dist. 2011).

100. *Important Dates*, KEEPSEAGLE V. VILSACK SETTLEMENT, <https://www.indianfarmclass.com/dates.aspx> (last visited June 4, 2012).

101. Settlement Agreement at 12, 26 *Keepseagle v. Vilsack* No. 1:99CV03119 (D.C. Dist. 2010) (Providing for \$680 million in the Total Compensation Fund and \$80 million in Debt Relief Award).

102. Order and Judgment at 7, *In re Black Farmers Discrimination Litig.* No. 08-mc-0511 (D.C. Dist. 2011).

103. Settlement Agreement at 2, *In re Black Farmers Discrimination Litig.* No. 08-mc-0511 (D.C. Dist. 2011).

104. Order and Judgment at 10, *In re Black Farmers Discrimination Litig.* No. 08-mc-0511 (D.C. Dist. 2011).

105. Settlement Agreement at 2, *In re Black Farmers Discrimination Litig.* No. 08-mc-0511 (D.C. Dist. 2011).

106. *Garcia v. Johanns*, 444 F. 3d. 625, 636 (D.C. Cir. 2006); *USDA Discrimination Cases*, FARMERS' LEGAL ACTION GROUP, <http://www.flaginc.org/topics/discrimination/index.php> (last visited June 4, 2012).

107. *USDA Discrimination Cases*, *supra* note 106.

USDA has announced that it will create an administrative process for resolving claims by women.¹⁰⁹

A. *Pigford*

Pigford v. Vilsack, the first among the above referenced cases to be filed, involves nearly 23,000 African American class members.¹¹⁰ *Pigford* was certified as a class in 1998¹¹¹ and settlement was approved in 1999.¹¹² Implementation of *Pigford* is nearly complete and it is too late to make a claim in the case.¹¹³ At the time of the final monitor's report, \$1.06 billion had been paid to more than 15,000 class members.¹¹⁴

Two important developments paved the way for *Pigford* to be settled in 1999. First, congressional action altered the statute of limitations for this and other discrimination cases against the USDA.¹¹⁵ At the time *Pigford* was filed,

108. *Love v. Veneman*, 224 F.R.D. 240 (2004) *aff'd in part sub nom*; *Love v. Johanns*, 439 F.3d 723 (2006) (remanded on other grounds); *USDA Discrimination Cases*, FARMERS' LEGAL ACTION GROUP, <http://www.flaginc.org/topics/discrimination/index.php> (last visited June 4, 2012).

109. Press Release, USDA, Agriculture Secretary Vilsack and Assistant Attorney General Tony West Announce Process to Resolve Discrimination Claims of Hispanic and Women Farmers (Feb. 25, 2011), *available at* <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2011/02/0085.xml>; *see also* Press Release, USDA, Agriculture Secretary Vilsack Announces Updated and Improved Process to Resolve Discrimination Claims of Hispanic and Women Farmers (Jan. 25, 2012), *available at* <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2012/01/0024.xml> (declaring updates to the initial administrative process).

110. *See* Monitor's Final Report on Good Faith Implementation of the Consent Decree and Recommendation for Status Conference, *Pigford v. Vilsack*, No. 97-1978 tbl.4 (D.C. Dist. 2012) (final report on implementation and recommendation to have regular conference calls until fully implemented); *see also* *Pigford v. Glickman*, 185 F.R.D. 82, 94 (D.C. Dist. 1999).

111. *Pigford v. Glickman*, 182 F.R.D. 341, 351-52 (D.C. Dist. 1998).

112. *Pigford v. Glickman*, 185 F.R.D. at 113; *see* Monitor's Final Report on Good Faith Implementation of the Consent Decree and Recommendation for Status Conference, *Pigford v. Vilsack*, No. 97-1978 (D.C. Dist. 2012); *see also* COWAN AND FEDER, *supra* note 97; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-469R, PIGFORD SETTLEMENT: THE ROLE OF THE COURT-APPOINTED MONITOR (2006); Kristol Bradley Ginapp, *Jim "USDA" Crow: Systematic Discrimination in Agriculture*, 8 DRAKE J. AGRIC. L. 237 (2003); Stephen Carpenter, *Discrimination in Agricultural Lending*, 33 CLEARINGHOUSE REV. 166 (1999); ENVTL. WORKING GROUP, OBSTRUCTION OF JUSTICE: USDA UNDERMINES HISTORIC CIVIL RIGHTS SETTLEMENT WITH BLACK FARMERS (2004), *available at* <http://www.ewg.org/book/export/html/8476> (providing analysis of *Pigford*).

113. *See* Monitor's Final Report on Good Faith Implementation of the Consent Decree and Recommendation for Status Conference at 19-20, *Pigford v. Vilsack* No. 97-1978 (D.C. Dist. 2012) (process for filing late claims complete).

114. *See id.* at 1.

115. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 741, 112 Stat. 2681, 2681-30 (1998).

EOCA statute of limitations for actions of this type was two years from the date of the occurrence of the violation.¹¹⁶ The two-year statute of limitations provided significant problems for plaintiffs as the effects of problems with programs, especially loan programs, can take considerable time to unfold.¹¹⁷ Second, in a decision issued in 1998 the District Court of the District of Columbia certified the *Pigford* plaintiffs as a class.¹¹⁸

The subsequent settlement established criteria for class membership.¹¹⁹ First, a class member must be African American.¹²⁰ Second, the class member must have “farmed, or attempted to farm, between January 1, 1981 and December 31, 1996.”¹²¹ Notably, a putative class member could meet this requirement by attempting to farm.¹²² Third, the class member must have “filed a discrimination complaint on or before July 1, 1997, regarding USDA’s treatment of such farm treatment or benefit application.”¹²³ The USDA had a myriad of farm programs—as well as nonfarm programs—during the class period.¹²⁴ Notable, therefore, this definition excluded discrimination in the USDA rural housing credit programs.¹²⁵ Fourth, a class member must believe that he or she was discriminated against on the basis of race in the USDA’s response to that application.¹²⁶ Finally, a class member must have filed a discrimination complaint on or before July 1, 1997, regarding the USDA’s treatment of the application.¹²⁷

The Consent Decree established a notice procedure.¹²⁸ A claim deadline of October 12, 1999 was set.¹²⁹ Individual class members were permitted to file a late claim if it was determined that the failure to submit a claim on time was “[d]ue to extraordinary circumstances beyond his control.”¹³⁰ A subsequent order

116. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 2085 (2010) (codified at 15 U.S.C. § 1691e(f) (Supp. IV 2010) (extending the statute of limitations to five years).

117. See *Pigford v. Glickman*, 185 F.R.D. 82, 88 (D.C. Dist. 1999).

118. *Pigford v. Glickman*, 182 F.R.D. 341, 351–52 (D.C. Dist. 1998).

119. *Pigford v. Glickman*, 185 F.R.D. at 92.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 92–93.

124. See generally *id.* at 86–87 (discussing farm benefit programs offered by the USDA).

125. See *id.* at 92 (noting that the class explicitly includes only applicants for participation in a “federal farm credit or benefit program”).

126. *Id.*

127. *Id.*

128. Consent Decree at 7, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999) (No. 97-1978).

129. See *id.* at 10.

130. *Id.* at 11; see also OFFICE OF THE MONITOR, MONITOR UPDATE: LATE CLAIM DEADLINE, (2003), available at <http://www.dcd.uscourts.gov/pigfordmonitor/updates/update01.pdf>;

delegated this authority to the arbitrator.¹³¹ Tens of thousands of people sought to get into the case in this manner. Many were denied permission to enter the case.¹³² It is this group of people that are the class members for *In re Black Farmers Discrimination Litigation*.¹³³

The settlement also provided a method whereby each class member received an individual determination of his or her claim.¹³⁴ As a result, each class member's factual allegations are evaluated separately.¹³⁵ In order to prevail under a Track A credit claim, the claimant needed to establish several things.¹³⁶ First, the claimant must have owned, leased, or attempted to own or lease, farm land.¹³⁷ It is important to emphasize that the claimant could meet this standard by *attempting* to own or lease farm land.¹³⁸ Second, the claimant must have applied for a specific credit transaction at a USDA county office.¹³⁹ Notably, this could mean either a loan or a form of servicing of an already existing loan.¹⁴⁰ Third, when USDA considered the loan, 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."¹⁴¹

OFFICE OF THE MONITOR, MONITOR UPDATE: UNDERSTANDING WHO IS PART OF THE PIGFORD CASE (2002), available at <http://www.dcd.uscourts.gov/pigfordmonitor/updates/update11.pdf>.

131. Order at 2, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. Dec. 20, 1999) (No. 97-1978).

132. See *Status of the Implementation of the Pigford v. Glickman Settlement: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 108th Cong. 42, 43 (2004) (statement of Michael K. Lewis, Adjudicator, *Pigford v. Glickman*).

133. *In re Black Farmers Discrimination Litig.* Misc. No. 08-0511, slip op. at 9–10 (D.C. Dist. 2011).

134. Consent Decree at 13, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999) (No. 97-1978).

135. *Id.*

136. *Id.* at 14; see Stipulation and Order at 1–3, *Pigford v. Glickman*, 185 F.D.R. 82 (D.C. Dist. 1999) (No. 97-1978); see also OFFICE OF THE MONITOR, MONITOR UPDATE: NONCREDIT CLAIMS—\$3,000 FOR EACH PREVAILING CLASS MEMBER (2003), available at <http://www.dcd.uscourts.gov/pigfordmonitor/updates/update09.pdf> (explaining that a noncredit claim meant essentially any USDA farm program that did not involve the farm loan programs).

137. Consent Decree at 14, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999) (No. 97-1978).

138. *Id.*

139. *Id.*

140. See OFFICE OF THE MONITOR, MONITOR UPDATE: ELIGIBILITY AND MONITOR REVIEW (2002) available at <http://www.dcd.uscourts.gov/pigfordmonitor/updates/update05.pdf> (explaining that eligibility includes participation in credit or benefit program).

141. Consent Decree at 14, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999) (No. 97-1978).

Broken into its component parts, this dense sentence permits an applicant to prevail under a number of scenarios.¹⁴² If the loan was made but provided late, the claimant could prevail.¹⁴³ Lateness of an agricultural loan can be quite damaging given the precise time and seasonal requirements in agriculture. For example, a crop planted a month late could be effectively worthless. The claimant could also prevail if the paid loan was encumbered by restrictive conditions.¹⁴⁴ For example, even though a loan may have been made, the collateral requirements could be exceedingly high or the terms of the loan agreement may call for the borrower to receive permission each time loan funds were used. In addition, the claimant could prevail if the USDA made the loan but failed to service the loan appropriately.¹⁴⁵ USDA loan rules permitted several counter-intuitive loan servicing measures to be taken to protect a borrower that was in financial trouble.¹⁴⁶ The white farmer needed to be specifically identified and similarly situated.¹⁴⁷ Finally, USDA's treatment of the loan application led to economic damage to the claimant; solely emotional damages do not meet this requirement.¹⁴⁸ No minimum amount for the level of economic damage was indicated.¹⁴⁹

The claims were decided by an independent adjudicator who made the decision based on a paper record provided by the claimant, generally a claim sheet, supporting documents, and a claim response by USDA.¹⁵⁰ In order to prevail on a claim the burden of proof of race discrimination was substantial evidence.¹⁵¹ Substantial evidence was defined in the Consent Decree as "such relevant evidence as appears in the record before the adjudicator 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."¹⁵²

If either party, the claimant or the government, disagreed with the adjudicator's decision, the aggrieved party could petition the independent court-appointed monitor.¹⁵³ The opposing party could also submit a petition response

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. See FARMERS' LEGAL ACTION GROUP, INC., FARMERS' GUIDE TO FMHA 10.1-90 (4th ed. 1990).

147. Consent Decree at 14, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999) (No. 97-1978).

148. *Id.*

149. *Id.*

150. See *id.* at 8 (identifying the claim documents required to be eligible for relief); see also *id.* at 13 (allowing the USDA to respond to any Track A claim).

151. *Id.* at 14.

152. *Id.* at 5.

153. *Id.* at 22.

to the monitor.¹⁵⁴ If the monitor found a “clear and manifest error” in the screening for eligibility or in the adjudication of the claim, and the error had “resulted” or was “likely to result in a fundamental miscarriage of justice,” the monitor could direct the adjudicator to re-examine the claim.¹⁵⁵ A monitor petition and response could include certain kinds of additional information into the record. Several thousand petitions resulted in the monitor directing reexamination.¹⁵⁶ In most instances in which the monitor directed reexamination, the adjudicator changed the decision.¹⁵⁷ Ultimately, in approximately ten percent of total Track A cases adjudicator reexamination resulted in a changed decision.¹⁵⁸

Claimants prevailing in Track A received a standard set of payments and other relief.¹⁵⁹ In practice, therefore, the relief varied among prevailing claimants.¹⁶⁰ First, each prevailing Track A claimant received a \$50,000 cash payment.¹⁶¹ Second, a payment of twenty-five percent of the \$50,000 (\$12,500) was placed in the claimant’s IRS account as partial payment of any taxes owed on the \$50,000.¹⁶² IRS Forms 1099 were also sent to claimants to reflect these activities.¹⁶³ Third, Track A claimants with a credit claim were eligible for debt relief.¹⁶⁴ The relief constituted forgiveness of outstanding USDA debt—not other debt—that, according to the Consent Decree, “was incurred under, or affected by, the program(s) that was/were the subject of ECOA claim(s) resolved in the class member’s favor by the Adjudicator.”¹⁶⁵ Determining the precise nature of this relief for an individual claimant turned out to be challenging.¹⁶⁶ Fourth, prevailing Track A claimants with credit claims received what is called “injunctive re-

154. *Id.*

155. *Id.*

156. OFFICE OF THE MONITOR, NAT’L STATISTICS, *supra* note 98.

157. Monitor’s Final Report on Good Faith Implementation of the Consent Decree and Recommendation for Status Conference, *Pigford v. Vilsack*, No. 97-1978 tbl.6 (D.C. Dist. 2012).

158. *Id.* (showing fifty-nine percent of the adjudications were originally approved, but after re-examination, sixty-nine percent in total were approved).

159. *Id.* (other relief included non-credit rewards, IRS payments, and debt relief).

160. *Id.*

161. Consent Decree at 15, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999) (No. 97-1978).

162. *Id.*

163. OFFICE OF THE MONITOR, MONITOR UPDATE: FEDERAL INCOME TAX AND DEBT RELIEF (2009), available at <http://www.dcd.uscourts.gov/pigfordmonitor/updates/update16.pdf>.

164. *Id.*

165. *Id.*

166. See OFFICE OF THE MONITOR, MONITOR UPDATE: DEBT RELIEF FOR PREVAILING CLASS MEMBERS (2008), available at <http://www.dcd.uscourts.gov/pigfordmonitor/updates/update10.pdf> (describing various scenarios for debt relief).

lief" in the Consent Decree.¹⁶⁷ Injunctive relief provided individuals with specific rights in terms of their future dealing with USDA as they sought to get farm loans.¹⁶⁸ This included technical assistance from USDA, the right to have applications viewed in a "light most favorable" to the claimant, and priority consideration for some loans.¹⁶⁹ Finally, prevailing Track A claimants with credit claims received forbearance from certain possible foreclosures by USDA.¹⁷⁰

Track B, in contrast, was an arbitration process in which the standard of proof is preponderance of evidence.¹⁷¹ Fewer than 200 claimants elected Track B.¹⁷² In the arbitration, the claimant's burden was to show by a preponderance of evidence that he or she was a victim of discrimination, and that the claimant suffered damages from that discrimination.¹⁷³ Prevailing Track B claimants received discharge of debt in a similar fashion to Track A claimants.¹⁷⁴ Several claimants in track B received considerable awards of several hundred thousand dollars, and some awards exceeded one million dollars.¹⁷⁵ Many, however, received no award.¹⁷⁶

Two other aspects of the *Pigford* settlement are notable. First, all of the money paid to claimants came from the Judgment Fund.¹⁷⁷ Second, there was no set maximum amount to be awarded to the class.¹⁷⁸ Further, fees for class counsel were determined on the basis of fee shifting statutes used in litigation against the government.¹⁷⁹ Class counsel, in other words, did not take a percentage of payment that was made to the class.

167. Consent Decree at 15, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999) (No. 97-1978).

168. *Id.* at 20-1.

169. *Id.* at 21-2.

170. *Id.* at 15.

171. *Id.* at 19.

172. OFFICE OF THE MONITOR, NAT'L STATISTICS, *supra* note 98.

173. Consent Decree at 19, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999) (No. 97-1978).

174. *Compare id.* at 14-16, with *id.* at 19-20.

175. Monitor's Final Report on Good Faith Implementation of the Consent Decree and Recommendation for Status Conference, *Pigford v. Vilsack*, No. 97-1978 app. 29 (D.C. Dist. 2012).

176. *Id.* app. 26.

177. Consent Decree at 19, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999) (No. 97-1978).

178. *See generally id.* at 19-20 (indicating no maximum amount for awards).

179. *Id.* at 24.

B. *Keepseagle*

Keepseagle was filed in 2000, subsequent to the *Pigford* settlement.¹⁸⁰ It alleged discrimination by the USDA against Native Americans.¹⁸¹ A class was eventually certified,¹⁸² and a settlement was approved by the court on April 28, 2011.¹⁸³ The claim filing period ended on December 27, 2011.¹⁸⁴

A maximum monetary value of \$760 million was included in the settlement.¹⁸⁵ A fund of \$680 million may be used to compensate class members.¹⁸⁶ Another \$80 million may be used for debt relief.¹⁸⁷ As was the case with *Pigford*, congressional action to alter the statute of limitations made *Keepseagle* possible.¹⁸⁸

180. *Keepseagle v. Glickman*, 194 F.R.D. 1 (D.C. Dist. 2000). For background on Indian farming and ranching during the class period, see HENRY W. KIPP, U.S. DEP'T OF INTERIOR BUREAU OF INDIAN AFFAIRS, *INDIANS IN AGRICULTURE: A HISTORICAL SKETCH* (1988); R. Douglas Hurt, *Agriculture*, in *ENCYCLOPEDIA OF N. AM. INDIANS* 7 (Frederick E. Hoxie ed., 1996); Peter Iverson, *Herd and Ranching*, in *ENCYCLOPEDIA OF N. AM. INDIANS* 241 (Frederick E. Hoxie ed., 1996); Terry L. Anderson & Dean Lueck, *Land Tenure and Agricultural Productivity on Indian Reservations*, 35 J. L. & ECON. 427 (1992); Raymond Cross, *Keeping the American Indian Rancher on the Land: A Socio-Legal Analysis of the Rise and the Demise of American Indian Ranching on the Northern Great Plains*, 49 WASHBURN L.J. 745 (2010); Theodore E. Downing, *The Crisis in American Indian and Non-Indian Farming*, *AGRIC. & HUMAN VALUES*, Summer 1985, at 18; JESSICA SHOEMAKER, *FARM AND RANCH ISSUES IN INDIAN COUNTRY* (2006), available at http://www.flaginc.org/topics/pubs/arts/CLE_JS.pdf.

181. *Keepseagle v. Glickman*, 194 F.R.D. 1.

182. Settlement Agreement at 9, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010) (explaining that a class was judicially established on September 28, 2001).

183. *USDA to Pay \$760 Million in Keepseagle Settlement*, *NATIVE AMERICAN TIMES*, Apr. 28, 2011, <http://www.nativetimes.com/news/federal/5302-usda-to-pay-760-million-in-keepseagle-settlement>.

184. *Important Dates*, *KEEPSEAGLE V. VILSACK SETTLEMENT*, <https://www.indianfarmclass.com/dates.aspx> (last visited June 4, 2012).

185. Settlement Agreement at 42, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010).

186. *Id.* at 12.

187. *Id.* at 3.

188. *Compare* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, Pub. L. No. 105-277, § 741, 112 Stat. 2681, 2681-30 (1999) (codified at 7 U.S.C. § 2297) (waiving the statute of limitations for civil rights actions dealing with alleged discrimination, thus allowing *Pigford* to proceed), *with* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1085, 124 Stat. B76 (2010) (codified at 15 U.S.C. § 1691e(f)) (extending ECOA statute of limitations from two to five years, thus allowing *Keepseagle* to proceed); *see also* ALYS COHEN ET AL., *CREDIT DISCRIMINATION* 31 (5th ed. 2009) (describing Congressional action to waive the statute of limitations for the *Pigford* case); Cohen et al., *supra* note 84, at 56.

Prior to the *Keepseagle* settlement, class certification was extensively litigated.¹⁸⁹ The subsequent settlement established several criteria for class membership.¹⁹⁰ First, a class member must be a Native American.¹⁹¹ A precise definition of Native American is included in the settlement.¹⁹² It includes the possibility of self-identification if a person is not an enrolled member of a tribe.¹⁹³ Second, the class member must have farmed, ranched, or attempted to farm or ranch between January 1, 1981 and November 24, 1999.¹⁹⁴ It is worth emphasizing a putative class member could meet this requirement by *attempting* to farm or ranch.¹⁹⁵ Third, the class member must have applied to USDA in that time period for participation in a farm program.¹⁹⁶ In *Keepseagle*, there is no provision for noncredit USDA programs.¹⁹⁷ As in *Pigford*, relief is limited to farm loan programs and does not cover other USDA loan programs.¹⁹⁸ Finally, a class member must have filed a discrimination complaint with USDA either individually or through a representative.¹⁹⁹ The filing of a discrimination complaint may be oral in some cases.²⁰⁰

As with *Pigford*, the settlement provides a method whereby each class member receives an individual determination of their claim.²⁰¹ Each class member's factual allegations are therefore evaluated separately.²⁰² In order to prevail in Track A, the claimant needs to establish several things.²⁰³ First, the claimant must have farmed, ranched, or attempted to farm or ranch between January 1, 1981 and November 24, 1999.²⁰⁴ Second, the claimant must have owned, leased, or attempted to purchase or lease farm or ranch land, or had grazing rights on

189. See, e.g., *In re Veneman* 309 F.3d 789 (D.C. Cir. 2002); *Keepseagle v. Johanns*, 236 F.R.D. 1 (D.C. Dist. 2006).

190. See Settlement Agreement at 1–2, 15 *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010) (stating those who already filed claims in *Pigford* cannot make a claim in *Keepseagle*).

191. *Id.* at 1–2.

192. *Id.* at 4.

193. *Id.* at 5.

194. *Id.* at 1.

195. *Id.* at 1–2.

196. *Id.*

197. See *id.* at 1 (omitting noncredit USDA programs).

198. See *id.*

199. See *id.* at 1–2.

200. See *id.* at 2.

201. Compare *id.* at 15–26 (describing the claims process), with Consent Decree at 7, *Pigford v. Glickman* 185 F.R.D. 82 (D.C. Dist. 1999) (No. 97-1978).

202. Settlement Agreement at 14–32, 15, *Keepseagle v. Vilsack*, No. 1:99CVO3119 (D.C. Dist. 2010).

203. See *id.* at 21–23.

204. See *id.* at 21.

farm or ranch land.²⁰⁵ Importantly, the *attempt* to gain access to land for farming and ranching meets the requirement.²⁰⁶ Legal access is not limited to ownership or a traditional lease.²⁰⁷ Third, the claimant must have applied, or attempted to apply, for a specific farm loan from a USDA office between January 1, 1981, and November 24, 1999.²⁰⁸ This could include either a loan or a form of servicing of an already existing loan.²⁰⁹ It could also mean that a person who is attempting to farm for the first time could apply and potentially prevail. Fourth, when the USDA considered the loan, the loan was: “denied, provided late, approved for a lesser amount than requested, encumbered by restrictive condition(s), or USDA failed to provide appropriate loan service(s).”²¹⁰

The bulk of these provisions align with *Pigford*.²¹¹ If the loan was made, but provided late, the claimant could prevail.²¹² Similarly, the claimant could also prevail if the loan was made if the loan was encumbered by restrictive conditions.²¹³ In addition, the claimant could prevail if USDA made the loan but failed to service the loan appropriately.²¹⁴ A crucial distinction from *Pigford*, however, is that *Pigford* required that a claimant name a similarly situated white farmer who was treated more favorably than the claimant.²¹⁵ This requirement does not appear in the *Keepseagle* settlement.²¹⁶ Fifth, the claimant must demonstrate the USDA’s treatment of the loan application led to economic damage to the claimant.²¹⁷ Emotional damages, therefore, do not meet this requirement. There is no minimum amount, however, for the level of economic damage. Finally, the claimant needed to file a discrimination complaint with USDA.²¹⁸ The complaint

205. *See id.*

206. *See id.*

207. *See id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Compare* Consent Decree at 44–45, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999) (No. 97-1978), *with* Settlement Agreement at 21, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010).

212. Settlement Agreement at 21, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010).

213. *Id.*

214. *Id.* at 24.

215. *Pigford v. Glickman*, 185 F.R.D. at 97 (D.C. Dist. 1999) (citing Consent Decree at 16–17, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999) (No. 97-1978)).

216. *See generally* Settlement Agreement, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010).

217. *Id.* at 24.

218. *Id.* at 21, 24.

must have been filed either between January 1, 1981 and June 30, 1997, or between November 24, 1997 and November 24, 1999.²¹⁹

The claims are decided by a Track A neutral.²²⁰ A substantial evidence standard is used to evaluate the claims.²²¹ Substantial evidence is defined in the settlement as: "such relevant evidence 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."²²²

In *Keepseagle*, the Track A neutral must conclude the claimant either actually applied for credit or made a bona fide effort to apply for credit.²²³ The settlement provides the specific means by which a claimant can establish such a bona fide effort.²²⁴ The claimant must provide the following: (1) the year of the application or attempt to apply, and the general period within the year; (2) the type and the amount of the loan or loan servicing sought; (3) how the claimant planned to use the loan funds; (4) how the claimant's plans for farming were consistent with other operations in the area; and (5) the location where the claimant made efforts to seek credit assistance.²²⁵ It appears that the agreement is intended to require the above information for both applications and attempts to apply.²²⁶ The *Pigford* Consent Decree did not include this requirement.²²⁷ An additional *Keepseagle* claimant requirement applies if the claimant attempted to apply for a loan.²²⁸ In such a case, the claimant must show that the USDA actively discouraged the application.²²⁹

The *Keepseagle* Track A neutral will review a paper-only record.²³⁰ That record will include only the material submitted by the claimant and information provided by USDA that is designed to guide debt relief.²³¹

Concerning Track A decisions, *Keepseagle* differs from *Pigford* in at least two central ways. First, in *Keepseagle*, unlike *Pigford*, the USDA will not provide records or arguments in response to the claim in order to dispute the

219. *Id.* at 21–22.

220. *Id.* at 21.

221. *Id.*

222. *Id.* at 6.

223. *Id.* at 22.

224. *Id.*

225. *Id.*

226. *Id.*

227. See Consent Decree, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999) (No. 97-1978).

228. Settlement Agreement at 22, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010).

229. *Id.*

230. *Id.* at 23.

231. *Id.*

claim itself.²³² Second, unlike *Pigford*, there is no appeal system for a *Keepseagle* Track A claim.²³³ A claim determination is binding.²³⁴

Claimants prevailing in Track A receive a standard set of payments and other relief.²³⁵ The Track A payments may be reduced depending on the extent to which claimants prevail.²³⁶ First, each prevailing Track A claimant will receive a \$50,000 cash payment.²³⁷ Second, an additional payment of twenty-five percent of this amount is made to the IRS as partial payment of any taxes owed on the debt relief.²³⁸ Third, Track A claimants with USDA debt are eligible for debt relief, which is limited to \$80 million.²³⁹ Finally, prevailing Track A claimants with credit claims receive forbearance from certain possible creditor actions by USDA.²⁴⁰

Keepseagle includes a Track B arbitration process.²⁴¹ Awards, however, are capped at \$250,000 and total Track B payments are capped at \$50 million.²⁴² The standard of proof is preponderance of the evidence.²⁴³ As is the case in Track A there are no appeals of Track B decisions.²⁴⁴ Prevailing Track B claimants receive discharge of debt in a similar fashion to Track A claimants.²⁴⁵

The settlement provides for what is called programmatic relief that will last for five years.²⁴⁶ There was no such provision in *Pigford*.²⁴⁷ There are several provisions along these lines. First, the settlement creates a Federal Advisory Committee that will be known as the Council for Native American Farming and

232. Compare *id.* at 18 (providing that “[t]he Secretary and/or the United States shall have no obligation to provide any information, documents, or discovery to the Class, Class Members, or Class Counsel.”), with Consent Decree at 13, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999) (No. 97-1978) (expressing that USDA may “provide to the adjudicator assigned to the claim, and to class counsel, and information or materials that are relevant to the issues of liability and/or damages.”).

233. See Settlement Agreement at 21–3, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010).

234. Compare *id.* at 18, with Consent Decree at 17, *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999).

235. See Settlement Agreement at 26–32, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010).

236. *Id.* at 7.

237. *Id.*

238. *Id.*

239. *Id.* at 3.

240. *Id.* at 14.

241. *Id.* at 23.

242. *Id.* at 7–8.

243. *Id.* at 23.

244. *Id.* at 43.

245. *Id.* at 26.

246. *Id.* at 38.

247. Consent Decree, *Pigford v. Glickman*, No. 97-1978 (D.C. Dist. 1999).

Ranching.²⁴⁸ The aim of the Council will be to provide a forum whereby farm loan programs will become more available to Native American farmers and ranchers.²⁴⁹ Second, the USDA will establish sub-offices on Indian Reservations.²⁵⁰ They will provide technical assistance and outreach.²⁵¹ This provision is subject to funding.²⁵² Third, the USDA will review its rules for loan making, in consultation with Class Counsel, and make changes to ensure the rules are responsive to Native American culture.²⁵³ Fourth, the USDA must collect data regarding loans sought by Native Americans in order to identify disparities.²⁵⁴ Fifth, the settlement calls for an Ombudsperson to address concerns of all socially disadvantaged farmers.²⁵⁵ The ombudsperson will report the concerns of minority farmers to the Council.²⁵⁶ Finally, the USDA will not allow prior debt settlements for debts that would have been forgiven under the settlement to adversely affect the debtor ability to receive credit from the USDA in the future (a similar agreement was reached in *Pigford*).²⁵⁷

A few other aspects of the *Keepseagle* settlement are notable. First, the court and the government have a relatively limited role in the implementation of the agreement.²⁵⁸ The government, for example, does not appear to have a direct role in choosing the neutrals.²⁵⁹ Second, attorney fees and costs, and other implementation costs, come from a common \$760 million fund that is also the source of claimant payments.²⁶⁰ This is in stark contrast to *Pigford*.²⁶¹ Class counsel has asked the Court for more than \$60 million in fees.²⁶²

248. Settlement Agreement at 33, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010).

249. *Id.*

250. *Id.* at 36–37.

251. *Id.* at 37.

252. *Id.* at 36.

253. *See id.* at 37–38 (requiring Class Counsel to engage in ongoing review for revisions with the Council for Native American Farming and Ranching).

254. *Id.* at 35.

255. *Id.* at 35; *see also* 7 U.S.C. § 2279 (e)(1)–(2) (2006) (providing the statutory definition of “Socially Disadvantaged Farmer or Rancher” used by the USDA).

256. Settlement Agreement at 35, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010).

257. *Id.* at 37; Consent Decree at 15, *Pigford v. Glickman*, No. 97-1978 (D.C. Dist. 1999).

258. *See* Settlement Agreement at 38–39, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010).

259. *See id.* at 6, 8.

260. *See id.* at 42.

261. *Compare id.* (indicating that Class Counsel would seek attorneys’ fees in the amount of 4–8% of the \$760 million class common fund), *with* Consent Decree at 24, *Pigford v. Glickman*,

C. In re Black Farmers Discrimination Litigation

In re Black Farmers Discrimination Litigation was certified as a class of African Americans and a settlement approved on October 27, 2011.²⁶³ The class may include more than 60,000 people.²⁶⁴ The claim period began November 14, 2011 and ended May 11, 2012.²⁶⁵ A maximum monetary value was set at \$1.25 billion.²⁶⁶

More than 60,000 people sought to enter *Pigford* but filed too late and were not permitted into the case.²⁶⁷ Two statutory provisions made *In re Black Farmers* possible. First, in 2008 Congress permitted claimants in *Pigford* who did not receive a determination on the merits to bring a new civil action.²⁶⁸ This provision, which was part of the 2008 Farm Bill, also provided \$100 million of funding for these claims.²⁶⁹ In 2010, Congress provided an additional \$1.15 billion to fund an agreement reached between the plaintiffs and the government earlier that year.²⁷⁰

The settlement established two criteria for class membership.²⁷¹ First, a class member must have submitted late-filing requests in *Pigford*.²⁷² To qualify, the request must have been submitted on or after October 13, 1999, and on or before June 18, 2008.²⁷³ A late-filing request is a written request to the Court, or a *Pigford* neutral, to participate in the *Pigford* claims process.²⁷⁴ Records pre-

No. 97-1978 (D.C. Dist. 1999) (outlining counsel's entitlement to reasonable attorneys' fees and a one-time payment of \$1 million to be credited against the class award).

262. Memorandum of Law in Support of Plaintiff's Motion for an Award of Attorney's Fees and Expenses at 1-2, *Keepseagle v. Vilsack* No. 1:99CV03119 (D.C. Dist. 2010).

263. Order and Judgment at 13, *In re Black Farmers Discrimination Litig.* No. 08-0511 (D.C. Dist. 2011); Settlement Agreement at 1, *In re Black Farmers Discrimination Litig.* No. 08-MC-0511 (D.C.C. 2011).

264. Settlement Agreement at 2, *In re Black Farmers Discrimination Litig.* No. 08-MC-0511 (D.C.C. 2011).

265. Order and Judgment at 10, *In re Black Farmers Discrimination Litig.* No. 08-MC-0511 (D.C.C. 2011).

266. Settlement Agreement at 39, *In re Black Farmers Discrimination Litig.* No. 08-MC-0511 (D.C.C. 2011).

267. *Id.* at 2.

268. Food, Conservation, and Energy Act of 2008, H.R. 2419, 110th Cong. § 14012(b) (2008).

269. H.R. 2419, § 14012(c).

270. Claims Resolution Act of 2010, H.R. 4783, 111th Cong. § 201(b) (2010).

271. Settlement Agreement at 2, *In re Black Farmers Black Farmers Discrimination Litig.* No. 08-MC-0511 (D.C.C. 2011).

272. *Id.* at 9.

273. *Id.* at 9, 20.

274. *Id.* at 6.

sumably exist for the vast majority of all *Pigford* late filing requests. An *In re Black Farmers* claimant does have the opportunity, however, to show that this list is incomplete.²⁷⁵

Second, the person must not have obtained a determination on the merits of that claim.²⁷⁶ Therefore, all *Pigford* claimants that filed their original claim on time, but lost their claim on the substantive merits of that claim, are not a part of the *In re Black Farmers* class.²⁷⁷

As with *Pigford* and *Keepseagle*, the *In re Black Farmers* settlement also provides a method whereby each class member receives an individual determination of his or her claim.²⁷⁸ Each class member's factual allegations are therefore evaluated separately.²⁷⁹ As was the case in *Keepseagle*, there is no means for a claimant who files late to get into the case.²⁸⁰

In order to prevail under a Track A claim, the claimant needs to establish several things.²⁸¹ First, the claimant must be an African American who farmed, or attempted to farm, between January 1, 1981 and December 31, 1996.²⁸² Second, the claimant must have owned, leased, or attempted to own or lease farm land.²⁸³ Notably, the *attempt* to gain access to land for farming meets the requirement.²⁸⁴ Third, the claimant must have applied, or constructively applied, for a specific credit transaction or a specific noncredit benefit at a USDA office.²⁸⁵ This action must have taken place between January 1, 1981 and December 31, 1996.²⁸⁶ This could include either a loan or servicing of an already existing loan.²⁸⁷ It could also mean that a person who is attempting to farm for the first time could attempt to apply and prevail. The distinction between an applica-

275. See *id.* at 20 (describing the process for using independent documentary evidence to prove that a late-filing request was submitted).

276. *Id.* at 9.

277. See *id.* at 20–21.

278. Compare *id.* at 19–22, with Consent Decree at 13–20, *Pigford v. Glickman*, No. 97-1978 (D.C. Dist. 1999), and Settlement Agreement at 19–32, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010) (all stating the determinations in each settlement are done on a claimant-by-claimant analysis of their claims).

279. Settlement Agreement at 19–20, *In re Black Farmers Discrimination Litig.* No. 08-MC-0511 (D.C.C. 2011).

280. Compare *id.* at 20, with Settlement Agreement, *Keepseagle v. Vilsack* No. 1:99CV03119 (D.C. Dist. 2010).

281. Settlement Agreement at 22–25, *In re Black Farmers Discrimination Litig.* No. 08-MC-0511 (D.C.C. 2011).

282. *Id.* at 22.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* at 23.

tion and a constructive application is one that affects the claimant's burden in the case.²⁸⁸ An applicant that applied for a specific farm transaction or noncredit benefit must show that he or she was "denied, provided late, approved for a lesser amount than requested, encumbered by restrictive condition(s), or USDA failed to provide appropriate loan service(s)."²⁸⁹

If the class member claims that he or she constructively applied for a loan or noncredit benefit the claimant must also establish by substantial evidence that he or she made a bona fide effort to apply for the loan or noncredit benefit.²⁹⁰ In order to establish that a bona fide effort was made, the claimant must provide the year and time period within the year in which he or she sought the loan, the type and amount of the loan or noncredit benefit, how the claimant planned to use the funds, and how the claimant's operation were consistent with farming operations in that area.²⁹¹ In order to show that a bona fide effort was made, the claimant must also show that the USDA actively discouraged the applications.²⁹² Active discouragement occurred if the USDA official told the class member that there were no loan funds available and that no application would be provided, that there were no application forms available, or that the USDA was not accepting applications at that time.²⁹³ Fourth, the USDA's treatment of the loan or the noncredit benefit or constructive application must have led to economic damage to the claimant.²⁹⁴ Solely emotional damages, therefore, do not meet this requirement. There is no minimum amount, however, for the level of economic damage.²⁹⁵ Finally, the claimant must have complained to an official of the United States Government on or before July 1, 1997 regarding USDA's treatment.²⁹⁶

For the most part, these provisions follow the provisions in *Pigford* and *Keepseagle*.²⁹⁷ If the loan was made, but provided late, the claimant could prevail.²⁹⁸ Similarly, the claimant could also prevail if the loan was made but was

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 23–24.

292. *Id.* at 24.

293. *Id.*

294. *Id.* at 23.

295. *See id.* at 22–25 (noting the absence of a minimum level).

296. *Id.* at 23.

297. *Compare id.* at 23, with Consent Decree at 8–9, *Pigford v. Glickman*, No. 97-1978 (D.C. Dist. 1999), and Settlement Agreement at 1–2, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010) (noting terms of the settlements are similar in language and effect).

298. Settlement Agreement at 23, *In re Black Farmers Discrimination Litig.* No. 08-MC-0511 (D.C.C. 2011).

encumbered by restrictive conditions.²⁹⁹ In addition, the claimant could prevail if USDA made the loan but failed to service the loan appropriately.³⁰⁰ For Track A in *In re Black Farmers* like in the *Keepseagle* case, there is no requirement to name a similarly situated white farmer.³⁰¹

Track A claims are decided by a Track A neutral.³⁰² A substantial evidence standard is used to evaluate the claims.³⁰³ Substantial evidence is defined in the settlement as “such evidence 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.”³⁰⁴ An *In re Black Farmer* Track A neutral will review a paper-only record.³⁰⁵ That record will include only the material submitted by the claimant and information provided by the USDA that is designed to guide debt relief.³⁰⁶ The Track A neutral, may, however, ask the claimant to provide additional information.³⁰⁷

In re Black Farmers claimants prevailing in Track A receive a standard set of payments and other relief.³⁰⁸ The Track A payments may be reduced depending on the number of claimants who prevail.³⁰⁹ First, each prevailing Track A claimant with a credit claim will receive a \$50,000 cash payment.³¹⁰ Each claimant with a noncredit claim will receive a \$3000 payment.³¹¹ Noncredit claimants must be in Track A.³¹² Second, a payment of twenty-five percent of the cash credit claim payment is made to the IRS as partial payment of any taxes owed on the debt relief.³¹³ Third, Track A claimants with a USDA debt are eligible for debt relief.³¹⁴ Debt relief is limited to \$80 million.³¹⁵ Finally, prevailing

299. *Id.*

300. *Id.*

301. Compare *id.* at 22–25, with Settlement Agreement at 21–23, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. 2010).

302. Settlement Agreement at 23, *In re Black Farmers Discrimination Litig.* No. 08-MC-0511 (D.C.C. 2011).

303. *Id.* at 22.

304. *Id.* at 23.

305. See *id.* at 24.

306. *Id.*

307. *Id.*

308. See *id.* at 7 (A “Track A Award” includes a defined Track A “Liquidated Award,” “Tax Award,” and “Loan Award”).

309. See *id.* at 8 (indicating Track A Awards may be reduced subject to number of meritorious claims).

310. *Id.* at 7.

311. *Id.*

312. *Id.* at 18.

313. *Id.* at 8.

314. *Id.*

315. *Id.* at 3, 26.

Track A claimants with credit claims receive forbearance from certain possible creditor actions by the USDA.³¹⁶

In re Black Farmers includes a Track B neutral arbitration process.³¹⁷ The total aggregate amount available for Track B is capped at \$100 million.³¹⁸ Individual Track B claims are capped at \$250,000.³¹⁹ These payments can be reduced based on the available funds and number of prevailing claims.³²⁰ The standard of proof is preponderance of the evidence.³²¹ As with the other cases, Track B preponderance is defined as proof that something is more likely true than not.³²² Like under Track A, there are no appeals of Track B decisions.³²³ Prevailing Track B claimants received discharge of debt in a similar fashion to Track A claimants.³²⁴

A few other aspects of the settlement are notable. First, as in *Keepseagle*, there are no appeals of decisions for *In re Black Farmer* claimants.³²⁵ Second, the judge for *In re Black Farmers* can appoint an ombudsman, and has done so.³²⁶ The ombudsman authority is limited to issues concerning the implementation of the settlement.³²⁷ USDA, meanwhile, plays little role in implementation.³²⁸ Third, attorney fees and costs, and other implementation costs, come from a common fund that is also the source of claimant payments.³²⁹ This is in contrast to *Pigford*.³³⁰ Class counsel has asked the Court for more than \$90 million in

316. *Id.* 32–33.

317. *Id.* at 9.

318. *Id.*

319. *Id.* at 8.

320. *Id.*

321. *Id.* at 25.

322. *Id.*

323. *Id.* at 18.

324. *Id.*

325. *Id.*

326. *Id.* at 32; Order of Reference, *In re Black Farmers Discrimination Litig.* No. 08-MC_0511 (D.C.C. 2012).

327. *Id.*

328. *See id.*

329. *Id.* at 38–39.

330. *Compare id.*, with Consent Decree, *Pigford v. Glickman*, No. 97-1978 (D.C. Dist. Apr. 14, 1999).

fees.³³¹ Finally, unlike *Keepseagle*, but like *Pigford*, there is no institutional reform aspect to the settlement.³³²

D. *Garcia, Love, and a USDA Administrative Process*

In *Garcia*, Hispanics plaintiffs sought and were denied class status.³³³ Women plaintiffs in *Love* were also denied class status.³³⁴ Both failed on grounds of commonality of the class.³³⁵ Litigation is ongoing in both cases.³³⁶ Simultaneously the USDA announced that it will create an administrative process for resolving claims by Hispanics and women.³³⁷

331. Settlement Agreement at 38, *In re Black Farmers Discrimination Litig.*, No. 08-MC-0511 (D.C. Dist. May 13, 2011) (\$90 million is not specifically asked for, but Class Counsel asks for 7.4% of the fee base, and the fee base is \$1 hundred million plus \$1.25 billion minus \$22.5 million).

332. Compare *id.*, with Consent Decree, *Pigford v. Glickman*, No. 97-1978 (D.C. Dist. Apr. 14, 1999). But contra Settlement Agreement, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. Nov. 1, 2010) (detailing new procedures to be implemented per the settlement agreement).

333. *Garcia v. Johanns*, 444 F.3d 625, 633, 637 (D.C. Cir. 2006). The case is discussed in JODY FEDER & TADLOCK COWAN, CONG. RESEARCH SERV., *GARCIA V. VILSACK: A POLICY AND LEGAL ANALYSIS OF A USDA DISCRIMINATION CASE* (2010). See generally Refugio Rochin, *The Conversion of Chicano Farm Workers into Owner-Operators of Cooperative Farms, 1970–1985*, 51(1) RURAL SOCIOLOGY 97 (1986) (discussing Hispanic farming during the 1970s and 1980s).

334. *Love v. Johanns*, 439 F.3d 723, 730–32 (D.C. Cir. 2006); *Love v. Veneman* 224 F.R.D. 240, 246 (D.C. Dist. 2004). For discussion of women in farming during the class period, see C. Milton Coughenour & Louis Swanson, *Work Status and Occupations of Men and Women in Farm Families and the Structure of Farms*, 48 RURAL SOCIOLOGY 23 (1983); CALVIN JONES ET AL., NAT'L OP. RESEARCH CTR., NORC REP. NO. 130, AMERICAN FARM WOMEN: FINDINGS FROM A NATIONAL SURVEY (1981); Frances Hill, *Farm Women: Challenge to Scholarship*, 6 RURAL SOCIOLOGIST 379 (1981); Jane E. Meiners & Geraldine I. Olson, Household, Paid and Unpaid Work Time of Farm Women, 36(4) FAMILY RELATIONS 407 (October 1987); MARK FRIEDERBER, FARM FAMILIES AND CHANGE IN TWENTIETH-CENTURY AMERICA (1988); RACHEL ANN ROSENFELD, FARM WOMEN: WORK, FARM, AND FAMILY IN THE UNITED STATES (1985); Rachel A. Rosenfeld, *U.S. Farm Women: Their Part in Farm Work and Decision Making*, 13(2) WORK AND OCCUPATIONS 179 (1986); SONYA SALAMON, PRAIRIE PATRIMONY: FAMILY, FARMING AND COMMUNITY IN THE MIDWEST (1992). For a more contemporary discussion, see Cesar L. Escalante et al., *Gender Bias in Farm Service Agency's Lending Decisions*, 34(2) J. OF AGRIC. & RES. ECON. 332 (2009).

335. *Garcia v. Johanns*, 444 F. 3d 625, 633 (D.C. App. 2006); *Love v. Johanns*, 439 F.3d 723, 733 (D.C. App. 2006); *Garcia v. Veneman*, 224 F.R.D. 8, 14–15 (D.C. Dist. 2004); *Love v. Veneman*, 224 F.R.D. 240 (D.C. Dist. 2004); *Garcia v. Veneman*, 211 F.R.D. 15, 19 (D.C. Dist. 2002).

336. *Garcia v. Johanns*, 444 F.3d 625, 148; *Love v. Johanns*, 439 F.3d 723, 727; *Love v. Veneman*, 284 F.R.D. 8, 9 (D.C. Dist. 2004); *Garcia v. Veneman*, 224 F.R.D. 8, 14–15; *Garcia v. Veneman*, 211 F.R.D. 15, 19.

337. Agriculture Secretary Vilsack and Assistant Attorney General Tony West Announce Process to Resolve Discrimination Claims of Hispanic and Women Farmers, *supra* note 109.

In May of 2010 the USDA announced that it was offering to settle the two cases and was going forward with an administrative process that would resemble the settlements discussed here.³³⁸ A revised version of the process was announced on January 25, 2012.³³⁹

Only a skeletal description of the program is available.³⁴⁰ The government says that it will make at least \$1.33 billion available to women and Hispanic farmers who alleged discrimination by USDA based in the making or servicing farm loans during certain periods between 1981 and 2000.³⁴¹ A qualifying claimant could receive up to \$250,000 in cash.³⁴² In addition, USDA says it will provide up to \$160 million in debt relief to claimants who owe USDA for eligible farm loans.³⁴³ Further, an award for tax obligations would equal twenty-five percent of the cash award and principal from debt relief.³⁴⁴

Based on a USDA website description of the program, the following criteria will apply. First, the claimant must have been the owner operator or tenant operator of a family farm, or attempted to own or lease farm land.³⁴⁵ For Hispanics, the dates for this requirement are between January 1, 1981 and December 31, 1996 or between October 13, 1998 and October 13, 2000.³⁴⁶ For women, the dates are between January 1, 1981 and December 31, 1996 or between October 19, 1998 and October 19, 2000.³⁴⁷ Second, the claimant must have sought a farm loan or farm-loan servicing from the USDA.³⁴⁸ The loan must have been denied, approved late, or approved for a lesser amount than requested, approved with restrictive conditions, or the USDA failed to provide an appropriate loan service.³⁴⁹ Third, the claimant must believe the actions occurred because the claimant is Hispanic or female.³⁵⁰ Fourth, the USDA's treatment of loan or loan applica-

338. *1.3 Billion Offered in Case of USDA Bias*, WASH. POST, May 26, 2010, at A4.

339. Agriculture Secretary Vilsack Announces Updated & Improved Process to Resolve Discrimination Claims of Hispanic & Women Farmers, *supra* note 109.

340. *Home*, WOMAN AND HISPANIC CLAIMS PROGRAM, <http://hispanicfarmerclaims.gov/> (last visited June 4, 2012).

341. *Id.*

342. Agriculture Secretary Vilsack Announces Updated & Improved Process to Resolve Discrimination Claims of Hispanic & Women Farmers, *supra* note 109.

343. Agriculture Secretary Vilsack & Assistant Attorney General Tony West Announce Process to Resolve Discrimination Claims of Hispanic & Women Farmers, *supra* note 109.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. USDA, FARM SERV. AGENCY, SUMMARY OF CLAIMS PROCESS – FEMALE OR HISPANIC FARMERS, http://www.fsa.usda.gov/Internet/FSA_File/hispanic_women_factsheet.pdf (last visited June 4, 2012).

350. *Id.*

tion led to economic damage.³⁵¹ Fifth, the claimant must have filed a discrimination complaint with the USDA as an individual or through a representative, and alleged that the USDA discriminated on the basis that the claimant was Hispanic or female.³⁵²

The USDA says it will divide successful claimants into Tier one and Tier two; Tier two claimants, who prevail, will receive a full payment of \$50,000.³⁵³ They must submit copies of loan applications or other documents, and a copy of a written discrimination complaint.³⁵⁴ Tier one claimants, who may receive less than \$50,000 if they prevail, do not need to produce as much documentation as a Tier two claimant.³⁵⁵ In order to prevail with an “attempt to apply” claim, however, the claimant must produce a statement from someone who witnessed the discrimination, and a copy of a written discrimination complaint.³⁵⁶ The effect of these provisions will make it harder to prevail as an “attempt to apply” claimant than was the case in *Pigford*, and will likely be the case in *Keepseagle* and *In re Black Farmers*.³⁵⁷

The claims will be decided by an adjudicator “with independent decision-making authority.”³⁵⁸ Decisions will not be appealable.³⁵⁹ The USDA will reserve the right to submit evidence to the Claims Adjudicator regarding a claim.³⁶⁰ It is not clear how the program will affect the status of the ongoing litigation.

VII. CONCLUSION

Americans have a soft spot for family farmers. In popular thought, however, there tends to be an assumption that all farmers are white men. Powerful and varied images in the public mind see African Americans, Hispanics, Native Americans, and women of all races in a variety of contexts, but those images rarely include independent farming. In what could only be considered an ironic

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Compare id.* (supporting the inference that more than just oral claims will qualify a claimant’s proposal), *with* Consent Decree at 8–9, *Pigford v. Glickman*, No. 97-1978 (D.C. Dist. Apr. 14, 1999), *and* Settlement Agreement at 22, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.C. Dist. Nov. 1, 2010), *and* Settlement Agreement at 22–25, *In re Black Farmers Discrimination Litig.*, No. 08-MC-0511 (D.C. Dist. May 13, 2011).

358. *Id.*

359. *Id.*

360. *Id.*

and surprising turn, the most successful civil rights litigation in recent decades—at least in terms of dollar value and the number of people involved—centers on agriculture and the struggle of tens of thousands of individuals to farm. *Pigford* is essentially completed, but for African Americans, a separate settlement, *In re Black Farmers*, is still underway.³⁶¹ *Keepseagle* is settled and a sign-up complete, but little is yet known about the on-the-ground remedy for Native Americans.³⁶² Hispanics and women are plaintiffs in cases that have not settled, although an administrative remedy may be available to them.³⁶³ Therefore, the final result of these cases remains unknown in many important respects. It will soon be possible, however, to evaluate and learn from the USDA discrimination cases, and to think about the intersection of race, gender, and agriculture in ways that have thus far proved difficult.

361. *Pigford v. Glickman*, 185 F.R.D. 82, 113 (D.C. Dist. 1999); Order and Judgement at 1, *In re Black Farmers Discrimination Litig.*, No. 08-0511 (D.C. Dist. Oct. 27, 2011).

362. *See generally* Settlement Agreement, *Keepseagle v. Vilsack*, No. 1:99cv03119 (D.C. Dist. 2010) (a settlement has been reached, but not fully implemented).

363. *Garcia v. Vilsack*, 563 F.3d 519, 527 (D.C.C. Cir. 2009); USDA, FARM SERV. AGENCY, *Summary of Claims Process – Female or Hispanic Farmers*, USDA, http://www.fsa.usda.gov/Internet/FSA.FILE/hispanic_women_factsheet.pdf (last visited June 4, 2012).

