

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: )  
 )  
 Sandra Bennett, ) Docket No. 21-J-0022  
 )  
 Petitioner. )

**DETERMINATION**

Appearances:

**(b) (6)**, non-attorney representative of the Petitioner, Sandra Bennett<sup>1</sup>

*Juan Carlos Alarcon, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, DC 20250, for the Respondent, the Deputy Assistant Secretary for Civil Rights*

**Preliminary Statement**

This is an administrative proceeding under section 741(b) of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999 (7 U.S.C. § 2279 note) (“Section 741”)<sup>2</sup> and the regulations governing adjudications thereunder (7 C.F.R. Part 15f) (“Regulations”). Before me is a Section 741 Complaint that was filed with the USDA Office of Civil Rights in 1997. The petitioner, Sandra Bennett, has opted for a determination without hearing based on the written record.

**Case Background**

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<sup>1</sup> On March 26, 2021, **(b) (6)** filed a Notice of Appearance and “Authorization of Representation” on Petitioner’s behalf.

<sup>2</sup> Enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (codified at 7 U.S.C. § 2279 note).

This case arises out of a complaint filed on June 4, 1997 by ██████ Bennett<sup>3</sup> with the United States Department of Agriculture (“USDA,” “Government,” or “Department”) alleging “illegal actions”<sup>4</sup> taken against him and his wife by the Office of Inspector General and Farmers Home Administration,<sup>5</sup> now known as the Farm Service Agency (“FSA”).<sup>6</sup> On August 5, 1997, the USDA Office of Civil Rights (“OCR”) informed Mr. Bennett that it was unable to determine whether the complaint was within OCR’s jurisdiction as OCR could “only consider allegations of discrimination on the bases of race, color, national origin, sex, religion, age, disability, marital status, familial status, political beliefs, receipt of public assistance, or reprisal for equal opportunity activities.”<sup>7</sup>

On August 21, 1997, Mr. Bennett submitted another letter to OCR specifying that his wife, Petitioner Sandra Bennett, had been subjected to discrimination based upon her sex. Petitioner signed the August 21, 1997 amended complaint.

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<sup>3</sup> Mr. Bennett is not a petitioner in the present case and has not filed any request to join Sandra Bennett’s request for a hearing.

<sup>4</sup> OCR file at 101.

<sup>5</sup> See OCR file at 101 (“The illegal actions (fully documented) taken against us by FmHA and the OIG were committed knowingly, willfully and totally in violation of our rights.”). USDA has been unable to locate a copy of the complaint but have provided a copy of the cover letter enclosing the complaint. OCR file at 101. The cover letter is signed only by Mr. Bennett; however, the letter states the complaint is by both Bennetts. See OCR file at 101 (“The enclosed document is the Complaint we wish to Register with your office.”). See *id.* Petitioner signed the August 21, 1997 amended complaint. See OCR file at 105.

<sup>6</sup> The Farmers Home Administration (“FmHA”) ceased to exist in 1994, and the farm-loan programs it administered are now administered by FSA. See Dep’t of Agric. Reorganization Act of 1994, Pub. L. 10-354 (Oct. 10, 1994). For the purposes of this Determination, I will refer to FmHA as “FSA.”

<sup>7</sup> OCR file at 102.

By letter dated January 15, 1999,<sup>8</sup> OCR informed Mr. Bennett of USDA's final determination that no discrimination had occurred.<sup>9</sup> Twenty-two years later, on February 12, 2021, Petitioner requested a hearing before an administrative law judge under Section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277 ("Section 741").

██████████ and Sandra Bennett's grievances about FSA are numerous; they cover a span of years from 1981 through 1988 and involve at least one lawsuit in federal district court.<sup>10</sup> Between 1981 and 1984 the Bennetts received a total of \$211,000<sup>11</sup> in loans from FSA to establish a rabbit-ranching operation. On or about January 1, 1986, the Bennetts failed to make an annual payment,<sup>12</sup> and in February 1986, the FSA sent the Bennetts a Notice of Intent to Take Adverse Action.<sup>13</sup> The Bennetts subsequently requested a rescheduling of their loans, which was

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<sup>8</sup> Although the letter is dated January 15, 1998, after review of the entire file, I have determined that the date of 1998 is a typographical error and the correct date should be January 15, 1999. I reached this conclusion based upon a letter dated May 29, 1998 stating the Bennetts' case as being opened (OCR file at 75); letter dated December 4, 1998, listing the Bennetts' civil rights case as open (OCR file at 74); letter dated March 24, 1999, stating "we have just received verification that the Bennett's civil rights complaint has been closed" (OCR file at 69); a copy of the same letter with the 1998 date hand-corrected to "1999" (OCR file at 3); and a screenshot of a computer database lists the closed date of the Bennetts' complaint as 1/15/1999. *See* OCR file at 94.

<sup>9</sup> OCR file at 107.

<sup>10</sup> In both the Motion to Dismiss and the Agency Report, USDA alleges that Petitioner was a named Plaintiff in *Love v. Veneman*, a class action suit initially filed in the U.S. District Court for the District of Columbia on October 19, 2000. Petitioner denies being a plaintiff. While it appears that Petitioner was at some point a plaintiff in the class-action suit, whether Petitioner was a named plaintiff in *Love v. Veneman* has no significance in the present case.

<sup>11</sup> This the amount alleged in the complaint the Bennetts filed in District Court.

<sup>12</sup> *See* SB Exhibit 12.

<sup>13</sup> *See* SB Exhibit 15.

denied.<sup>14</sup> The Bennetts appealed the denial of their rescheduling application, and on August 29, 1986 the Bennetts were informed that their appeal was denied.<sup>15</sup> In that letter USDA acknowledged that the Notice to Take Adverse Action had been sent in error.<sup>16</sup> By final decision letter dated October 8, 1986, the FSA acting State Director refused to reconsider the denial of the rescheduling application.<sup>17</sup>

The Bennetts submitted a tort claim to FSA on September 26, 1988.<sup>18</sup> FSA's lack of response operated as a denial,<sup>19</sup> and the Bennetts filed suit in the U.S. District Court for the Central District of California.<sup>20</sup> In that suit the Bennetts alleged four claims of tortious conduct by FSA: breach of fiduciary duty, negligence, duress and undue influence, and breach of implied duty of good faith and fair dealing. On September 26, 1990, the District Court dismissed the complaint for lack of subject-matter jurisdiction and failure to state a claim. The Bennetts appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit denied the Bennetts' appeal.<sup>21</sup>

On May 5, 1997, ██████ Bennett spoke to an employee of USDA. Handwritten notes written by the employee indicate that Mr. Bennett was informed of the civil rights complaint process.<sup>22</sup>

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<sup>14</sup> See Pre-Hearing Brief at ¶¶ 33-34.

<sup>15</sup> See SB Exhibit 15.

<sup>16</sup> SB Exhibit 17.

<sup>17</sup> SB Exhibit 17.

<sup>18</sup> *Bennett v. United States*, 974 F.2d 1341, 1992 WL 214545 at \*1 (9th Cir. 1992).

<sup>19</sup> *Bennett v. United States*, 974 F.2d 1341, 1992 WL 214545 at \*1 (9th Cir. 1992).

<sup>20</sup> Case No. CV-89-5660-HLH.

<sup>21</sup> See *Bennett v. United States*, 974 F.2d 1341, 1992 WL 214545 (9th Cir. 1992).

<sup>22</sup> OCR file at 87.

On June 4, 1997, Mr. Bennett filed a complaint with the Chief of Program Complaints, Adjudication Division at USDA. As detailed in footnote 5, USDA has not been able to locate the original complaint; however, the cover letter that was attached to the complaint alleges “illegal actions [fully documented] taken against [the Bennetts] by FmHA,” and, more specifically, that the Bennetts “were deprived of equitable treatment under the Lending Laws”<sup>23</sup> According to Mr. Bennett, “[t]he complaint depicts how personnel at the ‘People’s Department’ operated with a systematic illegal plan to destroy [the Bennetts’] operation.”<sup>24</sup> The complaint was not signed by Petitioner, Sandra Bennett.

In response to the Bennetts’ complaint, Jeremy Wu, Deputy Director, Office of Civil Rights, wrote Mr. Bennett on August 5, 1997 informing him that OCR could only consider allegations of discrimination on the basis of race, color, national origin, sex, religion, age, and disability.<sup>25</sup>

By letter dated August 21, 1997, the Bennetts responded to Mr. Wu’s letter alleging that Sandra Bennett had experienced sexual discrimination.<sup>26</sup> Both ██████ Bennett and Petitioner, Sandra Bennett, signed the August 21, 1997 letter.

On May 29, 1998, ██████ Smythe, State Executive Director, California State FSA Office, provided a list of open Civil Rights complaints to the California County Executive Directors. The Bennetts were listed as having an open case.<sup>27</sup>

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<sup>23</sup> OCR file at 101.

<sup>24</sup> OCR file at 101.

<sup>25</sup> OCR file at 102.

<sup>26</sup> OCR file at 104.

<sup>27</sup> OCR file at 75.

On December 4, 1998, ██████ Zerger, California State FSA Officer, wrote to Farm Loan Manager, FSA, Monterey County, stating that the ██████ Bennett had an open and unresolved civil rights complaint.<sup>28</sup>

By letter dated January 15, 1999,<sup>29</sup> Rosalind Gray, Director, Office of Civil Rights, informed Mr. Bennett that the Office of Civil Rights had determined that no discrimination had occurred. The letter also informed Mr. Bennett that no further action would be taken by USDA.

Apparently, Mr. Bennett never received a copy of the January 15, 1999 letter, and he called the FSA on March 7, 2000. As a result of that telephone call, ██████ Maragoni sent Mr. Bennett a letter wherein he referred to the telephone call and enclosed copies of Rosalind Gray's January 15, 1999 letter and a March 10, 1999 letter from the Office of Civil Rights informing the California State Executive Director that Mr. Bennett's case had been closed.<sup>30</sup>

On March 24, 1999, ██████. Zerger, Farm Loan Chief, USDA, wrote to an FSA Farm Loan Officer stating that OCR had closed Mr. Bennett's discrimination complaint.<sup>31</sup>

On May 24, 2000, ██████ Isler, USDA, sent an e-mail to ██████ Cole, USDA, which stated that ██████ and Sandra Bennett had "been determined to be eligible for consideration under the SOL process" and requested that "all pending foreclosure proceedings be postponed until such time as a final determination [was] made on the complaint."<sup>32</sup>

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<sup>28</sup> OCR file at 74.

<sup>29</sup> *See supra* note 8.

<sup>30</sup> OCR file at 68.

<sup>31</sup> OCR file at 69.

<sup>32</sup> OCR file at 21.

On May 31, 2000, [REDACTED] Christensen, USDA, wrote to [REDACTED] Hall, FSA, USDA, via email that efforts to locate the missing case files for [REDACTED] and Sandra were unsuccessful. The email also requested “the status of the Administrative Law Judge review.”<sup>33</sup>

On June 1, 2000, [REDACTED] Zerger, Farm Loan Chief, wrote to a Farm Loan Officer at FSA’s Santa Barbara office that the “National Office ha[d] recently advised . . . that the borrower has requested an administrative Law Review and the request was accepted by the USDA Office of Civil Rights (OCR).”<sup>34</sup> Mr. Zerger added: “[W]e must hold our efforts to liquidate the account in abeyance until we are authorized to proceed by the OCR.”<sup>35</sup>

On September 22, 2000, [REDACTED] Christensen, USDA informed [REDACTED] Adams, FSA, USDA, that the case files for [REDACTED] and Sandra Bennett that were sent to OCR in November 1997 had not been returned and were now missing. The email also stated that “[t]hrough the allegation of discrimination was closed without a finding, the claimant ha[d] requested an Administrative Law Judge Review.”<sup>36</sup>

On February 8, 2001, [REDACTED] Dolcini, California State FSA Office, wrote the Director of FSA requesting a status of open complaints under Authority of Administrative Law Judges, providing names and dockets numbers. The Bennetts were not listed under complaints with docket numbers. Ms. Dolcini also requested the status of the Administrative Law Judge review for [REDACTED] and Sandra Bennett, noting that FSA was notified of acceptance for review in March 24, 2000 but never apprised of the docket number.<sup>37</sup>

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<sup>33</sup> OCR file at 65.

<sup>34</sup> OCR file at 64.

<sup>35</sup> OCR file at 64.

<sup>36</sup> OCR file at 57.

<sup>37</sup> OCR file at 52.

By email dated 17 December 2002, [REDACTED] Christensen, USDA, wrote to [REDACTED] Romero, USDA, requesting assistance in attempting to locate the missing Bennett case files.<sup>38</sup>

On March 31, 2005, [REDACTED] Pletcher, USDA, wrote email to [REDACTED] Christensen, USDA, advising that FSA could proceed with foreclosure on the Bennetts' property. Mr. Pletcher provided the following background on the case:

OCR informed FSA by memorandum dated March 10, 1999 that th[e] case was closed. On May [23], 2000, [REDACTED] Isler, OCR, informed [Mr. Christensen] that the Bennet's were eligible for SOL (anyone who received a denial of their C/R complaint were deemed eligible until the case was reviewed). In 2003, all SOL eligible cases were reviewed and everyone should have been contacted if their case was accepted. . . .

I submitted a request to OCR's Intake Unit and was informed that SOL Docket No. 55 was never appealed by the Bennets [sic] and no record of appeal was in the Assistant Secretary for Civil Rights office. . . .

Given the fact[] that the Bennets [sic] do not have an open C/R complaint, you may continue foreclosure on this case.

OCR file at 47.

On May 10, 2005, Petitioner wrote to the Director OCR stating that she "had recently received a reconveyance notice indicating that [her] ranch [would] be foreclosed [the] next month."<sup>39</sup> Petitioner stated that she had been waiting on two separate USDA determinations concerning civil rights abuse by FSA and that she had previously been informed that no foreclosure action could be taken until a final determination had been made.<sup>40</sup>

On May 16, 2005, Sandra and [REDACTED] Bennett wrote to FSA requesting an extension of time on the date of reconveyance and sale of their property.<sup>41</sup>

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<sup>38</sup> OCR file at 51.

<sup>39</sup> OCR file at 46.

<sup>40</sup> OCR file at 46, 17.

<sup>41</sup> OCR file at 7.



On May 16 and 17, 2005, [REDACTED] Gibson, USDA, and [REDACTED] Zimmerman, FSA, exchanged emails regarding the status of the Bennett case. On May 16, 2005, Mr. Gibson stated that there was no open case on the Bennetts. He wrote: “[I]t looks like they were informed they had to request a Section 741 Hearing in writing by the closing date, and never requested one.”<sup>42</sup> However on May 17, 2005, Mr. Gibson reported: “[O]n review of file we have determined the Bennett’s do in fact have an open Section 741 case.”<sup>43</sup>

On May 19, 2005, [REDACTED] Zerger, Farm Loan Chief wrote to the Bennetts and informed them that no additional foreclosure action would be taken until the concerns raised in their May 10, 2005 letter were reviewed and addressed.<sup>44</sup>

On July 15, 2005, Constance Bails, Deputy Director, OCR, responded to Petitioner’s May 10, 2005 letter. Ms. Bails’s July 15, 2005 letter referred to docket number 960604-55 (the correct docket number was 970604-55) and summarized the earlier letter by stating: “ You are seeking assistance with postponing foreclosure in the event your civil rights complaint is not resolved in your favor.”<sup>45</sup> The letter informed the Bennetts: “[T]he Office of Civil Rights authority to delay foreclosure ends at the time a final decision is issued and your administrative complaint is closed. At that point, the foreclosure may proceed in accordance with applicable laws and regulations.”<sup>46</sup>

On May 7, 2009, [REDACTED] Schadd, Acting State Executive Director, California State FSA Office, wrote to USDA FSA stating his office was advised in December 2005 that the permission

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<sup>42</sup> OCR file at 10.

<sup>43</sup> OCR file at 10.

<sup>44</sup> OCR file at 6.

<sup>45</sup> OCR file at 22.

<sup>46</sup> SB Exhibit 6.

OCR previously granted OCR to initiate foreclosure was provided in error and the ability to proceed with foreclosure was withdrawn. The letter stated: “There appears the reason for this reversal was related to the pending Administrative Law Judge review that was apparently not previously acted on.”<sup>47</sup> On August 20, 2009, [REDACTED] Cooksie, Deputy Administrator for Farm Loan Programs, wrote to [REDACTED] Schadd, Acting State Executive Director, California State Farm Service Agency Office, confirming that [REDACTED] Bennett had an outstanding civil rights complaint and that the office was not authorized to proceed with foreclosure of this account.<sup>48</sup>

On March 1, 2013, [REDACTED] Keller, FSA, Merced, CA, wrote an email to [REDACTED] Oosterman, FSA, Davis, CA, to request a status on the Bennett’s case.<sup>49</sup>

There does not appear to be any additional correspondence regarding the Bennetts’ case from either the Bennetts or USDA until 2019. It is unclear from the record what, exactly, prompted Petitioner to contact USDA in 2019. Whether it was because foreclosure proceedings were reinitiated, the Bennetts were trying to sell their land, or the Bennetts were just trying to get an update on their case, it is unclear. Whatever the reason, it appears Petitioner contacted then-Senator Kamala Harris’s office at some point in 2019. Senator Harris’s office wrote to OCR on September 20, 2019 requesting the status of Petitioner’s case. By letter dated December 3, 2019, [REDACTED] McElwain, Chief of Staff, OCR, informed Senator Harris that the final agency decision was issued with no finding of discrimination and the complaint was closed on January 15, 1999.<sup>50</sup>

### **OALJ Procedural History**

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<sup>47</sup> OASCR file at 22.

<sup>48</sup> OCR file at 31.

<sup>49</sup> OCR file at 30.

<sup>50</sup> SB Exhibit No. 3; OCR file at 99.

On March 8, 2021,<sup>51</sup> Sandra Bennett (“Petitioner”) filed with the Hearing Clerk’s Office a request for hearing citing the Code of Federal Regulations, Title 7, Part 15f. Included with Petitioner’s was request was a pre-hearing brief asserting she filed a non-employment discrimination complaint with the USDA Office of Civil Rights (“OCR”)<sup>52</sup> in 1996 and has been waiting over twenty-five years for a determination on her claim.<sup>53</sup>

I was assigned the case on March 18, 2021. On March 26, 2021, I conducted a telephone conference with the party representatives and informed them I was proceeding with the case under Section 741. Pursuant to section 15f.14 of the Section 741 Regulations (7 C.F.R. § 15f.14), I scheduled a virtual hearing for June 21 through June 23, 2021. I also advised that no hearing would be held if I determined the Petitioner did not file an eligible complaint. Lastly, I directed OCR to file a report and turn over its file within thirty-five days pursuant to 7 C.F.R. § 15f15.

On April 27, 2021, OCR filed a motion to dismiss on the grounds that: (1) I lack jurisdiction to decide the case; (2) the action is barred by the doctrine of *res judicata*; and (3) Petitioner’s claim is barred based upon the doctrine of laches.<sup>54</sup>

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<sup>51</sup> Sandra Bennett filed a request for hearing before an ALJ on February 12, 2021; however, the Hearing Clerk’s Office did not process the request at that time because it had been over ten years since the Section 741 process was used and it was originally thought that Ms. Bennett had not filed a complaint prior to July 1, 1997. However, based upon a civil -rights complaint number provided by Ms. Bennett (960604-55) and her claim that she filed a complaint in 1996, Ms. Bennett’s request for a hearing was filed and processed under Section 741.

<sup>52</sup> USDA established the Office of the Assistant Secretary for Civil Rights (“OASCR”) in 2003, supplanting the prior civil rights office. See U.S. Gov’t Accountability Off., GAO-12-976R, *U.S. Department of Agriculture: Progress toward Implementing GAO’s Civil Rights Recommendations* (2012), available at <https://www.gao.gov/assets/gao-12-976r.pdf> (last visited July 20, 2021). For the purposes of this Determination, however, I will continue to refer to the organization as the Office of Civil Rights (“OCR”).

<sup>53</sup> Pre-Hearing Brief ¶¶ 1, 7. Petitioner attached twenty-five exhibits to her Pre-Hearing Brief.

<sup>54</sup> See Agency Motion to Dismiss at 2-4, 4-8, 9-15.

On April 28, 2021, I denied the Motion to Dismiss<sup>55</sup> and directed OCR to file a report and turn over its file on Petitioner's complaint by May 28, 2021.

On May 28, 2021, OCR filed a report ("Agency Report") and turned over its file. In its Report, OCR argued that: (1) the request for hearing should be dismissed for failing to raise an actionable claim prior to July 1, 1997 or, in the alternative, Petitioner should be limited to actionable claims of discrimination raised in the August 1997 complaint;<sup>56</sup> (2) Petitioner's claims are barred by the doctrine of *res judicata*; and (3) Petitioner's request for a hearing should be dismissed based on the doctrine of laches.<sup>57</sup>

On May 28, 2021, I granted Petitioner ten days to file a response to OCR's Report.

On June 2, 2021, Petitioner filed a "Response to Agency Report" and additional exhibits.

In that Response, Petitioner argued the following:

- (1) OCR should be sanctioned for spoliation of evidence;
- (2) Petitioner should be awarded a default judgment sanction with compensatory (intangible) damages against OCR for spoliation of evidence;
- (3) Petitioner's Section 741 Complaint filed in 1996 is an eligible complaint;
- (4) OCR did not forward her husband's amended complaint to an ALJ;
- (5) OCR did not articulate a non-discriminatory reason for its actions;
- (6) Petitioner's request for a hearing should not be dismissed on the doctrine of laches;
- (7) Petitioner's request for a hearing is not barred by the doctrine of *res judicata*;

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<sup>55</sup> See Order Denying Respondent's Motion to Dismiss at This Time and Directing Respondent to Submit a Report as Required by 7 C.F.R. § 15f.15 at 2.

<sup>56</sup> Since I have determined that the complaint is not an eligible complaint and that the complaint is barred by the doctrine of laches, I will not address OCR's other arguments.

<sup>57</sup> See Agency Report at 5-7, 11-16, 16-22.

(8) Petitioner's was not part of the *Love* class action suit; and

(9) Petitioner is entitled to damages.<sup>58</sup>

Petitioner also requested a decision on the written record.<sup>59</sup> Accordingly, I issued an order canceling the virtual hearing on June 7, 2021.

Pursuant to 7 C.F.R. § 15f.16(a), OCR was given thirty-five days to file any additional information, arguments, or evidence for me to consider.<sup>60</sup> On July 21, 2021,<sup>61</sup> OCR filed a brief<sup>62</sup> with exhibits<sup>63</sup> and 363 pages of documents.<sup>64</sup> OCR's brief essentially rehashes the same arguments already raised in the Agency Report.<sup>65</sup> The documents submitted therewith, although lengthy, make no reference to allegations of sex discrimination and have no bearing on the eligibility of Petitioner's 1997 complaint.

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<sup>58</sup> Since I have determined that Petitioner did not file an eligible complaint and that Petitioner's complaint is barred by laches, I have not addressed Petitioner's remaining arguments.

<sup>59</sup> Response to Agency Record at 6 ¶¶ 18-19; Request for Decision on Record at 1 ("I am now accepting a decision on the record, based upon written submissions, without an oral hearing.").

<sup>60</sup> See Order Canceling Virtual Hearing at 2.

<sup>61</sup> See Order Granting Agency Request for Two Week Extension at 1; Order Denying Respondent's Request for Further Extension at 3.

<sup>62</sup> The brief is titled "Agency's Additional Information, Arguments, and Evidence."

<sup>63</sup> The exhibits consist of loan-related documents from the 1980s; a law-review article (Guy R. Montag, *FmHA Loan Servicing: Alternatives to Foreclosure*), 35 DRAKE L. REV. 561 (1986)); and two decisions involving Section 741 claims against FSA (*Visconti v. Veneman*, Civil Action No. 01-5409 (JBS) (D.N.J. Feb. 3, 2003) and *Wilkinson*, 67 Agric. Dec. 1126 (U.S.D.A. 2008) (Final Determination)).

<sup>64</sup> These documents date back to 1993 and earlier and include a 1988 Investigation Report by the USDA Office of Inspector General (██████████ & Sandra P. Bennett, d/b/a Sandy's Rabbits, File No. SF-499-48).

<sup>65</sup> Although I will not specifically address the arguments raised in OCR's brief, I note that OCR's assertion that the "[u]nderlying discrimination complaint was not filed within 180 days of the date Petitioner knew or should have known of alleged discrimination" ignores the history and purpose behind the Section 741 process, which is the procedure that allows for claims alleging discrimination between 1981 and 1986 to be filed by July 1, 1997. Agency's Additional Information, Arguments, and Evidence at 13.

## Discussion

The Federal Register provides a comprehensive summary of Section 741's background and purpose.

During much of the 1980's and 1990's, the USDA administrative process for review of program civil rights complaints filed against USDA agencies by program participants did not function effectively. As a result, while administrative complaints were pending, the statutes of limitation for certain discrimination statutes under which complainants potentially could obtain relief continued to run and the time periods available for obtaining relief expired, thus foreclosing the possibility for relief for those who had filed discrimination complaints administratively with the Department. Accordingly, the Secretary of Agriculture sought the enactment of legislation to waive the applicable statutes of limitation for those individuals who had filed nonemployment related discrimination complaints with USDA alleging discrimination during that period . . .

Congress enacted legislation to so waive the applicable statutes of limitation in section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105 – 227, for a period of two years after the enactment of that Act. The section 741 provisions are available to any person who filed a nonemployment related discrimination complaint with USDA before July 1, 1997, that alleged discrimination by USDA occurring at any time between January 1, 1981 and December 31, 1996 . . . in violation of the Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*) with respect to the administration of farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account . . . .

Section 741(b) of the statute also preserves to an eligible complainant the right, in lieu of court proceedings, to first seek an administrative determination by USDA on the merits of his or her complaint. . . . [O]nce OCR docketed a complainant's Section 741 Complaint Request, a complainant may request a hearing before an administrative law judge (ALJ) at any time during consideration of his or her complaint under these rules. . . . If the complainant chooses to have an ALJ consider the complaint, he or she may either request that the ALJ render a proposed determination on the written record . . . or proceed with a full hearing.

Administrative Civil Rights Adjudications Under Section 741, 63 Fed. Reg. 67392, 67392-93 (Dec. 4, 1998).

Section 15f.12 of the USDA regulations (7 C.F.R. Part 15f) governing Administrative Civil Rights Adjudications under Section 741 provides that a claimant is *not* entitled to a hearing if the ALJ determines that: (1) that his or her complaint is not an eligible complaint under Section 741; or (2) that there are no material issues of fact in dispute between the petitioner(s) and USDA and the only dispute involves a question of law.<sup>66</sup> In such cases the ALJ will make a final determination under 15f.16.<sup>67</sup> Under section 15f.16, the ALJ may recommend dismissal of the complaint on the basis of a finding that the complaint is not an eligible complaint; recommend denial of an eligible complaint on the merits; or make a proposed finding of discrimination on an eligible complaint.<sup>68</sup> The ALJ's determination will be made on the complaint based upon the original complaint, the Section 741 Complaint Request, the OCR report, and any other evidence or written documents filed by the parties.<sup>69</sup>

Having reviewed the evidence and the parties' submissions in the case, I conclude that the discrimination complaint must be dismissed for the reasons that: (1) the complaint was not an "eligible" complaint within the meaning of Section 741, and, (2) that even assuming that Petitioner filed an eligible complaint, the complaint should be dismissed based on laches.

**I. There is no evidence that Petitioner filed a complaint in 1996.**

In her response to the Agency Report, Petitioner argues that she has two outstanding complaints. Petitioner alleges she filed a complaint with USDA in 1996. Petitioner also states that her husband filed a separate complaint on June 4, 1997 and admits she did not join her husband's amended complaint until August 21, 1997.

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<sup>66</sup> 7 C.F.R. § 15f.12.

<sup>67</sup> 7 C.F.R. § 15f.12.

<sup>68</sup> 7 C.F.R. § 15f.16(a).

<sup>69</sup> 7 C.F.R. § 15f.16(a).

There is no evidence that Petitioner filed a separate complaint in 1996. In fact, the evidence shows that the only complaint filed in this case was a complaint filed by ██████ Bennett on June 4, 1997, alleging illegal conduct against him and his wife, Petitioner, by USDA employees. The complaint was amended and co-signed by Petitioner on August 21, 1997 to allege sex discrimination against Petitioner.

There is no copy of a 1996 complaint ██████ or reference to a 1996 complaint in any of the files provided by OCR or Petitioner. In support of her contention that she filed a complaint in 1996, Petitioner alleges that she asked for an update on the status of her complaint in 1997 and was provided a copy of a letter from ██████ Smythe, FSA California State Executive Director, to Llyod Wright, Director of Civil Rights.<sup>70</sup> The subject line of the letter is “Pending Allegation Of Discrimination,” and it lists “██████ Bennett” as one of the pending cases.<sup>71</sup> However, that letter, dated November 12, 1997, is not evidence of Petitioner having filed a complaint in 1996; rather, it is evidence that the June 4, 1997 complaint filed by Mr. Bennett and amended on August 21, 1997 was still open.

Petitioner also claims to have requested an update on the status of her complaint in 1998 and cites to a May 29, 1998 letter<sup>72</sup> listing ██████ and Sandra Bennett as having an open civil rights case. Again, this letter is not evidence that Petitioner filed a separate complaint in 1996. As explained in footnote 8, it is evidence that Mr. Bennett’s June 4, 1997 complaint (amended and signed by Petitioner on August 21, 1997) was still open.

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<sup>70</sup> OCR file at 77.

<sup>71</sup> OCR file at 77.

<sup>72</sup> OCR file at 75.



Next in support of her claim that she filed a complaint in 1996, Petitioner cites to a letter she wrote on March 10, 2005 stating she had “been waiting for two separate USDA determinations concerning civil rights abuse.”<sup>73</sup> Petitioner now claims she was referring to Petitioner’s 1996 complaint and the 1997 amended complaint submitted jointly by Petitioner and her husband;<sup>74</sup> however, Petitioner’s May 10, 2005 letter also states: “Our outstanding case and docket number are referenced above.”<sup>75</sup> The subject line of the letter references a “Case #9706045-55 and Docket # 1208;”<sup>76</sup> there is no reference to a 1996 complaint. Petitioner also quotes<sup>77</sup> a March 10, 2013 FSA email that states “The civil rights allegations emanated from Ms. Bennett who alleged gender bias.”<sup>78</sup> This is not evidence that Petitioner filed a claim in 1996; rather, it is a reference to the August 21, 1997 letter alleging sex discrimination that is co-signed by Petitioner.

Finally, Petitioner admits that she signed Mr. Bennett’s August 21, 1997 amended complaint, detailing her claim of sex discrimination.<sup>79</sup> Nowhere in that amended complaint do the Bennetts reference an earlier complaint of sex discrimination or ask for a status update on Petitioner’s allegedly filed 1996 complaint. The first time any allegation of sex discrimination appears in the case is in the August 21, 1997 amended complaint. Thus, there is no evidence that Petitioner ever filed a complaint in 1996.

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<sup>73</sup> OCR file at 17.

<sup>74</sup> Response to Agency Report at 2 ¶ 3.

<sup>75</sup> OCR file at 17.

<sup>76</sup> Case # 9706045-55 and Docket 1208 refer to the same complaint. Docket # 1208 is the “SOL Docket #” for civil-rights complaint number 9706045-55. *See* OCR file at 94.

<sup>77</sup> OCR file at 2 ¶ 3.

<sup>78</sup> OCR file at 30.

<sup>79</sup> *See* Response to Agency Report at 1 ¶ 1.

**II. Even if I were to accept Petitioner’s claim that she filed a separate complaint in 1996, her complaint would not be an eligible complaint because she failed to follow the procedures specified in section 15f.5.**

Section 15f.5 (7 C.F.R. § 15f.5) sets forth the procedures and requirements for individuals who filed discrimination complaints prior to July 1, 1997. The Regulation provides, in pertinent part:

- (a) *Do I have to file a “Section 741 Complaint Request” if USDA is already working on my complaint? Do I have to file again?* If USDA OCR already received or is working on your complaint you will receive a notice by March 1, 1999 indicating that your complaint automatically has been docketed as a Section 741 Complaint Request for consideration under these procedures. . . .
- (b) *What if USDA is not working on my complaint? If I think USDA has reviewed or is working on my complaint, but do not receive a letter by March 1, 1999, what should I do?* If USDA is not already working on your complaint, or you do not receive a letter from USDA by March 1, 1999, or within 30 days thereafter, you should file a Section 741 Complaint Request with the Docketing Clerk at USDA OCR.
- (c) *How long do I have to file my Section 741 Complaint Request?* You have until October 21, 2000 to file your Section 741 Complaint Request. If you did not receive a notice from USDA by October 21, 2000, that your Section 741 Complaint Request had been docketed automatically under paragraph (a) of this section, and you did not file a Section 741 Complaint Request prior to October 21, 2000, under this paragraph (b) of this section, then any Section 741 Complaint Request received by USDA after October 21, 2000, will not be accepted.

7 C.F.R. § 15f.5. These procedures would apply to Petitioner if she had filed a complaint in 1996.

According to her Pre-Hearing Brief and Response to Agency Report, Petitioner filed a complaint sometime in 1996.<sup>80</sup> Petitioner also alleges that she asked about the status of her complaint in 1997 and in 1998; however, she has again failed to provide any evidence of such requests. Petitioner does not allege having received a letter regarding the status of her complaint

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<sup>80</sup> Pre-Hearing Brief at 3; Response to Agency Report at 1 ¶ 1, 8 ¶ 25, and 22 ¶ 78.

from OCR by March 1, 1999. In fact, she alleges just the opposite: that she has never heard from USDA regarding her complaint.<sup>81</sup> Because Petitioner did not receive a letter from USDA prior to March 1, 1999 regarding the complaint she allegedly filed in 1996, under subsection (a), this meant that OCR had either not received or was not working on her complaint. Thus, under subsection (b), Petitioner was required to file a Section 741 Complaint Request with the Docketing Clerk at OCR. Under subsection (c), Petitioner had until October 21, 2000 to file the Section 741 Complaint Request.<sup>82</sup> Petitioner does not allege any such filing.

In support of her claim that she filed a complaint in 1996, Petitioner cites a 1997 report by the USDA Inspector General finding that the discrimination-complaint process at FSA lacked “integrity, direction and accountability” and that “the staff also processe[d] discrimination complaints without a reliable tracking system to determine the status of the complaints.”<sup>83</sup> However, this is the exact reason for section 15f.5. USDA was aware of and acknowledged a problem with the processing of complaints filed prior to July 1, 1997. It required that anyone who had filed a complaint prior to 1997 and had not heard from USDA regarding that complaint file a Section 741 Complaint Request. Petitioner’s Pre-Hearing Brief and Response to the Agency Report allege that she filed a complaint in 1996. Petitioner states that USDA never acknowledged receipt of the complaint. Instead, she waited nine years before she finally writing a letter regarding her alleged outstanding complaint. Even assuming that Petitioner filed a

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<sup>81</sup> See Response to Agency Report at 17-18 ¶ 58 and 27 ¶ 102; Pre-Hearing Brief ¶ 7.

<sup>82</sup> Although OCR states in footnote 6 of its Agency Report that based upon email correspondence from May 2005, “the Bennetts likely filed a timely Section 741 complaint request,” the concession appears to refer to Mr. Bennett’s June 4, 1997 complaint that was later amended by letter dated August 21, 1997. Agency Report at 7 n.6.

<sup>83</sup> SB Exhibit 28 at 5.

complaint in 1996, she failed to follow the procedure required by section 15f.5; therefore, her complaint is not an eligible complaint and must be dismissed.

**III. The June 4, 1997 complaint is not an eligible complaint.**

Only complaints that fall within the jurisdiction conferred by Section 741 may be eligible for adjudication by this tribunal. Subsection (e) of Section 741 provides that:

As used in this section, the term “eligible complaint” means a nonemployment related complaint that was filed with the Department of Agriculture before July 1, 1997, and alleges discrimination at any time during the period beginning on January 1, 1981, and ending December 31, 1986—

- (1) in violation of the Equal Credit Opportunity Act (15 U.S.C. § 1691 et seq.) in administering:
  - (A) a farm ownership loan, farm operating loan or emergency loan funded from the Agricultural Credit Insurance Program Account;  
or
  - (B) a housing program established under Title V of the Housing Act of 1949; or
- (2) discrimination in the administration of a commodity program or disaster assistance program.

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, Title VII § 741(e), 112 Stat. 2681–31 (codified at 7 U.S.C. § 2279 note).

Based on the above provision, for the Bennetts’ June 4, 1997 complaint to be an “eligible complaint” it must have satisfied each of three requirements: (1) the complaint must have been filed by July 1, 1997; (2) the complaint must have alleged a type of discrimination listed in section 1691(a) of the Equal Credit Opportunity Act (“ECOA”);<sup>84</sup> and (3) the discrimination

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<sup>84</sup> The ECOA is Title VII of the Consumer Credit Protection Act (15 U.S.C. §§ 1601 et seq.).

alleged must have occurred during the period beginning on January 1, 1981, and ending December 31, 1996.<sup>85</sup>

Section 1691(a) of the ECOA identifies the types of discrimination prohibited by the Act as follows:

(a) Activities constituting discrimination

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

- (1) on the basis of race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract);
- (2) because all or part of the applicant's income derives from any public assistance program; or
- (3) because the applicant has in good faith exercised any right under this chapter.

15 U.S.C. § 1691(a). The undersigned has reviewed all the evidence and written documents in the case and has concluded that the complaint filed by Mr. Bennett on June 4, 1997 is not an eligible complaint under Section 741 because it did not allege a basis of discrimination covered under Section 741 and therefore any allegation of sex discrimination are time-barred.

Petitioner disavows connection to ██████ Bennett's<sup>86</sup> June 4, 1997 complaint, alleging that she had already filed a complaint in 1996. She claims her husband filed his complaint on June 4, 1997 and acknowledges that she did not sign her husband's complaint until August 21, 1997. Since Petitioner did not join her husband's complaint until August 21, 1997, she missed the July 1, 1997 deadline; therefore, the complaint is not an eligible complaint.

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<sup>85</sup> Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (codified at 7 U.S.C. § 2279 note).

<sup>86</sup> Mr. Bennett is not a petitioner in the present case and has not filed any request to joint Sandra Bennett's request for a hearing.

However, even if Petitioner was considered to have joined ██████ Bennett's June 4, 1997 complaint (which she expressly denies in her response to the Agency Report), it is not an eligible complaint since it did not allege any discrimination listed in section 1691(a).

Although neither Petitioner nor USDA has provided a copy of the actual complaint, Mr. Bennett's cover letter is sufficient evidence to establish there was no allegation of sex discrimination in the June 4, 1997 complaint. First, Mr. Bennett's cover letter describes the complaint as "fully documenting" the "illegal actions" taken against both him and his wife, Petitioner.<sup>87</sup> It also claims that FSA and OIG "deprived" the two of them "equitable treatment under the Lending Laws."<sup>88</sup> The letter does not, however, assert that those "relentless criminal actions" had anything to do with Petitioner's sex.<sup>89</sup> Mr. Bennett describes:

The complaint depicts how personnel at the "People's Department" operated with a systematic illegal plan to destroy our operation, with the aid of the OIG and their deceptive investigation techniques. They utilized a plan with an unwritten policy of cover-up to hide FmHA wrongdoing to save the Agency and members of FmHA, who because of their actions are a total embarrassment and liability to the Government. In the process OIG makes it all but impossible to hold FmHA accountable.

OCR file at 101. Nowhere in the June 4, 1997 cover letter does Mr. Bennett mention any sex discrimination against Sandra Bennett.

Further proof that the complaint did not contain any allegations of sex discrimination is an August 5, 1997 letter from the Deputy Director, Office of Civil Rights, to Mr. Bennett. In that letter, the Deputy Director informs Mr. Bennett that the Office of Civil Rights is in receipt of his complaint alleging "discrimination about the illegal foreclosure and hearing based upon false

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<sup>87</sup> OCR file at 101.

<sup>88</sup> OCR file at 101.

<sup>89</sup> OCR file at 101.

information contrived by loan officer.”<sup>90</sup> Mr. Wu informs Mr. Bennett that OCR may only consider allegations of discrimination on the bases of race, color, national origin, sex, religion, age, disability, marital status, familiar status, political belief, etc.”<sup>91</sup> Mr. Wu informs Mr. Bennett that “We are unable to determine from you letter whether your complaint is within our jurisdiction.”<sup>92</sup> Thereafter, on August 21, 1997, Mr. Bennett alleges for the first time that his wife experienced sex discrimination. As stated earlier, the August 21, 1997 letter is signed by Petitioner.

The requirements under Section 741 must be interpreted strictly in favor of the Government because Section 741 is a waiver of sovereign immunity. The United States, as sovereign, is immune from suit and can be sued only with its consent.<sup>93</sup> Any waiver of sovereign immunity must be “construed strictly in favor of the sovereign” and must not be enlarged beyond what the language of the waiver requires.<sup>94</sup>

Accordingly, allegations of “illegal actions,” “relentless criminal actions,” and “systematic illegal plan to destroy our operation” do not satisfy the statutory requirements of Section 741.<sup>95</sup> Petitioner’s assertion that the filing of a complaint of illegal actions on June 4, 1997 was sufficient to satisfy the requirements of section 1691(a), if accepted, would render meaningless the requirement that the complaint of discrimination be filed by July 1, 1997. By

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<sup>90</sup> OCR file at 102.

<sup>91</sup> OCR file at 102.

<sup>92</sup> OCR file at 102.

<sup>93</sup> See, e.g., *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *United States v. Shaw*, 309 U.S. 495, 500-01 (1940); *Minnesota v. United States*, 305 U.S. 382, 287 (1939).

<sup>94</sup> *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951)); see also *United States v. Idaho*, 508 U.S. 1, 7 (1993); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983).

<sup>95</sup> OCR file at 101.

Petitioner’s reasoning, the filing of a general complaint of illegal actions would preserve, indefinitely, a complainant’s right to a hearing on any basis prohibited by Section 741(e)(1).

There can be no doubt but that the allegation of sex discrimination made on August 21, 1997 was made after the July 1, 1997 cutoff date for filing the discrimination complaint.<sup>96</sup>

I find that the Section 741 requirement that a complaint of discrimination alleging a basis prohibited by the ECOA be filed by July 1, 1997 has not been met. Thus, the complaint is not an eligible complaint, and I lack jurisdiction under Section 741 to decide the issues in the case.

**IV. Even assuming an eligible complaint was filed in 1997, Petitioner’s request for hearing is denied based upon the doctrine of laches.**

Assuming *arguendo* that Petitioner did file an eligible Section 741 Complaint in 1997, Petitioner’s 2021 request for hearing is nonetheless barred by the equitable doctrine of laches.

The legislative history of Section 741 makes clear that the statute incorporates equitable principles;<sup>97</sup> its purpose “is to revive certain pre-existing complaints which would otherwise be time-barred.”<sup>98</sup> Section 741 is, in essence, an equitable tolling of the Equal Creditor Opportunity

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<sup>96</sup> See *Ordille*, 216 F. App’x 160, 169 (3d Cir. 2007) (“The purpose of Section 741 is to revive certain pre-existing complaints which would otherwise be time-barred. The regulations which implement the adjudication process for discrimination complaints filed administratively within the USDA pursuant to Section 741 do not provide for the amendment or relation back of amendments to those complaints. See 7 C.F.R. Part 15f. To the contrary, the implementing regulations contemplate consideration only of the pre-existing complaint.”); see, e.g., *Manning*, USDA Docket No. 170, HUDALJ No. 99-45-NA (Feb. 29, 2000) (allegation of race discrimination on November 4, 1997 was untimely); *Polasky*, USDA Docket No. 214, HUDALJ No. 99-43-NA (U.S.D.A. May 20, 2000) (allegation of race discrimination raised for first time on December 6, 1999 was untimely); *Lockwood*, USDA Docket No. 1083, HUDALJ No. 99-38-NA (U.S.D.A. May 24, 2000) (allegations of reprisal raised for first time on April 20, 1998 and of age discrimination for first time on May 27, 1998 was untimely).

<sup>97</sup> See *Ordille v. United States*, 216 F. App’x 160, 165-66 (3d Cir. 2007).

<sup>98</sup> *Ordille v. United States*, 216 F. App’x 160, 170 (3d Cir. 2007).



Act's statute of limitations for certain eligible cases filed administratively with USDA during the 1980s and 1990s.<sup>99</sup> It was implemented to redress OCR's mishandling of these cases.<sup>100</sup>

[I]n 1998, Congress enacted Section 741, a retroactive limited waiver of the ECOA's statute of limitations. *See Garcia*, 444 F.3d at 629 n.4. Section 741 was "a response to a fundamental breakdown in the USDA's system for processing discrimination complaints." *Benoit v. United States Dep't of Agric.*, 577 F. Supp. 2d 12, 17 (D.D. C. 2008). The civil rights office of the USDA was essentially "dismantled" in the early 1980s and, as a result, many administrative complaints of discrimination filed with the USDA between 1981 and 1996 "were never processed, investigated or forwarded to the appropriate agencies for conciliation." *Pigford v. Glickman*, 185 F.R.D. 82, 88 (D.D.C.1999). The agency's failure to properly process these complaints effectively denied a large number of complainants the right to seek relief under applicable anti-discrimination statutes – such as the ECOA – because the limitations periods for those statutes expired while complainants waited for a response from the USDA. *See Administrative Civil Rights Adjudications Under Section 741*, 63 Fed. Reg. 67293, 67392 (Dec. 4, 1998) (explaining the genesis of Section 741).

*Allen v. Schafer*, No. 4:08CV120-SA-DAS, 2009 WL 2245220, at \*1 (N.D. Miss. July 27, 2009).

But "just as various tolling doctrines can be used to lengthen the period for suit specified in a statute of limitations, so laches can be used to contract it."<sup>101</sup>

"The doctrine of laches is premised upon the same principles that underlie statutes of limitation: the desire to avoid unfairness that can result from the prosecution of stale claims."<sup>102</sup>

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<sup>99</sup> *See Administrative Civil Rights Adjudications Under Section 741*, 63 Fed. Reg. 67392, 67392 (Dec. 4, 1998); *see also Pigford v. Glickman*, 206 F.3d 1212, 1215 n.3 (D.C. Cir. 2000); *Morales v. Vilsack*, No. 1:16-CV-0282-AWI-BAM, 2016 WL 7404756, at \*4 (E.D. Cal. 2016).

<sup>100</sup> *See Administrative Civil Rights Adjudications Under Section 741*, 63 Fed. Reg. 67392, 67392 (Dec. 4, 1998); *see also Ordille v. United States*, 216 F. App'x 160, 167 (3d Cir. 2007) ("Section 741 is a unique statute that only waives the statute of limitations for a limited class of complaints that were initially brought administratively against the USDA during a limited time period and that, because of administrative problems within the USDA during that time period, were otherwise lost because the statute of limitations expired on those claims before the USDA had made an administrative determination."); *Love v. Johanns*, 439 F.3d 723, 725 n.1 (D.C. Cir. 2006).

<sup>101</sup> *Teamsters & Employers Welfare Trust of Illinois v. Gorman Bros. Ready Mix*, 283 F.3d 877, 881 (7th Cir. 2002).

<sup>102</sup> *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 805 (8th Cir. 1979).

Laches is “a defense developed by courts of equity”<sup>103</sup> to protect defendants against “unreasonable, prejudicial delay in commencing suit.”<sup>104</sup> The Supreme Court defines laches as “neglect to assert a right or claim which, taken together with the lapse of time and other circumstances causing prejudice to the adverse party, operates as a bar in court of equity.”<sup>105</sup>

In order for laches to apply, there must be “proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.”<sup>106</sup>

“[T]he longer the delay,” however, “the less need there is to show or search for specific prejudice.”<sup>107</sup>

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<sup>103</sup> *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 678 (2014).

<sup>104</sup> *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2014).

<sup>105</sup> *Kansas v. Colorado*, 514 U.S. 673, 687 (1995) (quoting BLACK’S LAW DICTIONARY 875 (6th ed. 1990) (internal quotation marks omitted); see also *Teamsters & Employers Welfare Trust of Illinois v. Gorman Bros. Ready Mix*, 283 F.3d 877, 881 (7th Cir. 2002) (“Indeed, laches can be argued regardless of whether the suit is at law or in equity because as with many equitable defenses, the defense of laches is equally available in suits at law.”) (quoting *Teamsters & Employers Welfare Trust of Illinois v. Gorman Bros. Ready Mix*, 283 F.3d 877, 881 (7th Cir. 2002))).

<sup>106</sup> *Costello v. United States*, 365 U.S. 265, 282 (1961); see *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 699 (2014) (Breyer, J., dissenting) (“The gravamen of laches is the plaintiff’s unreasonable delay, and the consequent prejudice to the defendant.”); *Bevelheimer v. United States*, 4 Cl. Ct. 558, 563 (1984) (“Laches requires evidence by the party asserting it, in this case the United States, that (1) the plaintiffs lacked diligence in asserting their claim and (2) that the defendant was prejudiced by this delay.”). See also *Gardner v. Panama R. Co.*, 342 U.S. 29, 30-31 (1951) (“[T]he existence of laches is a question primarily addressed to the discretion of the trial court . . . The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief.”).

<sup>107</sup> *Conner v. United States*, 10 Cl. Ct. 110, 114 (1986). See also *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 843 (D.C. Cir. 1982) (“If only a short period of time elapses between accrual of the claim and suit, the magnitude of prejudice required before suit would be barred is great; if the delay is lengthy, a lesser showing of prejudice is required.”); *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 807 (8th Cir. 1979) (“If only a short period of time has elapsed since the accrual of the claim, the magnitude of prejudice require[d] before the suit should be barred is great, whereas if the delay is lengthy, prejudice is more likely to have occurred and less proof of prejudice will be required.”).

**a. Petitioner’s Lack of Diligence**

I find that Petitioner’s decades-long delay in requesting a hearing was “unreasonable and inexcusable.”<sup>108</sup>

Although Petitioner claims having waited twenty-five years “for USDA OCR to review, investigate and resolve [her] civil rights complaint,”<sup>109</sup> there is no evidence that she requested a hearing until 2021. Neither Petitioner’s own Pre-Hearing Brief nor her Response to the Agency Report alleges she requested a hearing before an ALJ until 2021.

While the OCR file contains various correspondences between USDA agencies referring to a request for hearing before an ALJ or requesting the status of an ALJ review,<sup>110</sup> there is no evidence that Petitioner filed a written request for hearing before an ALJ until 2021.<sup>111</sup> What is apparent from the file is confusion among OCR and FSA employees regarding the SOL process, Section 741 Complaints, and requests for hearing. For example, a May 24, 2000 email from a USDA employee in Washington, DC states that the Bennetts’ complaint was determined to be eligible for consideration under the SOL process.<sup>112</sup> However, by June 1, 2000, the California

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<sup>108</sup> *Smith v. Caterpillar, Inc.*, 338 F.3d 730, 733 (7th Cir. 2003).

<sup>109</sup> Pre-Hearing Brief at ¶ 7.

<sup>110</sup> *See, e.g.*, OCR file at 22 (referring to a “pending Administrative Law Judge Review that was apparently not previously acted upon”); OCR file at 52 (“We would also appreciate knowing the present status of the Administrative Law Judge review for ██████████ and Sandy Bennett.”); OCR file at 19 (“Can you find out if there is an SOL complaint pending (or an ALJ) and give us any information as to status?”); OCR file at 9 (“Is there anything open on these individuals with OCR or with SOL/ALJ??”).

<sup>111</sup> *See* OCR file at 10 (May 16, 2005 email from ██████████ Gibson) (“From our records, it looks like they were informed they had to request a Section 741 hearing in writing by the closing date, and never requested one.”).

<sup>112</sup> *See* OCR file at 18 (email from ██████████ Pletcher to ██████████ Christensen) (“On May 32 [sic], 2000, ██████████ Isler, OCR informed you that the Bennet’s were eligible for SOL (anyone who received a denial of their C/R complaint were deemed eligible until the case was reviewed.”).

State FSA Office states: “The National Office has recently advised us that [REDACTED] Bennett] has requested an Administrative Law Judge review, and the request was accepted by the USDA Office Of Civil Rights (OCR).”<sup>113</sup> On February 8, 2001, the California FSA Office requested status reports on six complainants who were identified on a “listing of open complaints under the Authority of the Administrative Law Judges” and listed six complainants.<sup>114</sup> The Bennetts are not listed, which is further proof that as of February 2001 the Bennetts had never requested a hearing before an ALJ.<sup>115</sup>

That Petitioner was initially determined to be “eligible for consideration under the SOL process” and that, as OCR concedes, Petitioner filed a timely Section 741 Complaint<sup>116</sup> does not mean Petitioner requested a formal hearing before an ALJ. The existence of an open “Section 741 case” or “SOL complaint” does not mean a hearing request is pending.<sup>117</sup> As one FSA employee explained, “*anyone* who received a denial of their [civil rights] complaint [was] deemed eligible until the case was reviewed.”<sup>118</sup> This is why OCR Director Frederick Isler

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<sup>113</sup> OCR file at 64 (June 1, 2020 letter from [REDACTED] Zerger, Farm Loan Chief, to Farm loan Officer, FSA Santa Barbara). *See also* OCR file at 57 (September 22, 2000 email from [REDACTED] Christensen, California Civil Rights Coordinator, to FSA’s [REDACTED] Adams) (“Though the allegation of discrimination was closed without a finding, the claimant has requested an Administrative Law Judge Review.”).

<sup>114</sup> OCR file at 52.

<sup>115</sup> *See also* OCR file at 11 (May 16, 2005 email from [REDACTED] Zimmerman of FSA to [REDACTED] Gibson of OCR) (“The Bennetts do not show up on the listing of open ALJ cases last seen by this office.”).

<sup>116</sup> *See supra* note 82.

<sup>117</sup> *See* OCR file at 19 (May 10, 2005 email from [REDACTED] Pletcher to [REDACTED] Patterson) (distinguishing between an “SOL complaint [that is] pending” and “an ALJ” one).

<sup>118</sup> OCR file at 47 (March 31, 2005 email from [REDACTED] Pletcher to [REDACTED] Christensen) (emphasis added).

advised that “[REDACTED] and Sandra Bennett [were] determined to be eligible for consideration under the SOL process” in May 2000.<sup>119</sup>

If a claimant’s case was not accepted by OCR, he or she could have requested for a formal hearing before an ALJ.<sup>120</sup> The Bennetts’ case was reviewed in 2003.<sup>121</sup> Although the Bennetts’ case and “was not accepted for further consideration/action,”<sup>122</sup> the case was never appealed by the Bennetts” and “no record of appeal was in the Assistant Secretary for Civil Rights Office for further review.”<sup>123</sup>

Moreover, Petitioner could have requested a hearing at *any time* during this process.<sup>124</sup>

The Regulations specifically provide:

**§ 15f.10           What if I donot want the Director to review my Section 741  
Complaint Request and I want to proceed directly to a  
hearing?**

If you do not want the Director to review your Section 741 Complaint Request, you may request a hearing following the procedures below in subpart D. *You may request a hearing at any time during informal review or negotiations with the Director, or at any time during USDA consideration of your Section 741 Complaint Request.*

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<sup>119</sup> OCR file at 21.

<sup>120</sup> See 7 C.F.R. §§ 15f.9 through 15f.11.

<sup>121</sup> See OCR file at 40 (“In 2003, all SOL cases were reviewed and everyone should have been contacted if their case was accepted or denied. Apparently this case was not accepted for further consideration/action[.]”).

<sup>122</sup> OCR file at 11.

<sup>123</sup> OCR file at 11. See *id.* (“The Bennetts do not show up on the listing of open ALJ cases last seen by this office.”).

<sup>124</sup> See *Benoit v. U.S. Dep’t of Agric.*, 577 F. Supp. 2d 12, 18 n.9 (D.D.C. 2008), *aff’d*, 608 F.3d 17 (D.C. Cir. 2010) (“A complainant may also choose to interrupt or forego altogether the Director’s informal review and proceed directly to formal ALJ review. See 7 C.F.R. § 15f.10.”); Administrative Civil Rights Adjudications Under Section 741, 63 Fed. Reg. 67392, 67393 (Dec. 4, 1998) (“[T]he complainant may request a hearing on the record before an ALJ at any time after his Section 741 Complaint Request is docketed.”).

7 C.F.R. § 15f.10 (emphasis added). Petitioner could have elected to forego the Director’s review altogether.<sup>125</sup> This certainly would have been reasonable at the time Mr. Bennett filed the June 4, 1997 complaint or the August 21, 1997 amended complaint – even more so after waiting 180 days with no determination.<sup>126</sup> Instead, Petitioner waited five years before writing the Director of Civil Rights.<sup>127</sup> Even then, Petitioner did not request a status update or explanation for the Department’s delay; rather, Petitioner requested the Director’s assistance in postponing foreclosure in the event her complaint was not resolved in her favor.<sup>128</sup> Petitioner then waited another fourteen years to write USDA – again, only after receiving notice of foreclosure proceedings.<sup>129</sup> “One cannot sit back, wait years for someone else to act as his stalking horse, and then ride the coattails of a favorable judicial decision irrespective of the delay involved.”<sup>130</sup>

Petitioner’s claim of waiting twenty-five years for USDA to review and resolve her complaint appears disingenuous when she could have requested a hearing at any point over the past two decades. In her Response to the Agency Report, Petitioner cites a September 2000 email from FSA’s █████ Christensen that states: “Though the allegation of discrimination was closed without a finding, the claimant has requested an Administrative Law Judge Review.”<sup>131</sup> Petitioner proceeds to argue that “FSA should have immediately forwarded [her] husband’s

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<sup>125</sup> *See id.*

<sup>126</sup> *See* 7 C.F.R. § 15f.16(b) (“To the maximum extent practicable, a final determination will be made within 180 days of your filing of the Section 741 Complaint Request.”).

<sup>127</sup> *See* OCR file at 17 (May 10, 2005 letter from Petitioner to OCR Director).

<sup>128</sup> *See* OCR file at 17 (May 10, 2005 letter from Petitioner to OCR Director) (“We have recently received a reconveyance notice indicating our ranch will be foreclosed upon next month.”).

<sup>129</sup> *See* OCR file at 98 (July 30, 2019 letter from Petitioner to Farm Service Agency) (“I recently received notification of foreclosure on our farm property in █████, CA.”).

<sup>130</sup> *Awtry v. United States*, 684 F.2d 896, 898 (Cl. Ct. 1982).

<sup>131</sup> Response to Agency Report at 10 ¶ 32 (emphasis omitted) (citing OCR file at 62).

amended complaint to an ALJ for review.”<sup>132</sup> Even if Mr. Bennett had requested an ALJ review in 2000 (which is speculative from the record),<sup>133</sup> it would not excuse Petitioner’s waiting another nineteen years to file a hearing request. A reasonable person would have followed up after 180 days.<sup>134</sup>

Although USDA’s “clumsy and careless” handling of Petitioner’s complaint contributed to much of the delay, that does not excuse Petitioner’s failure to take action to ensure her case moved forward.<sup>135</sup> Had Petitioner continued pressing her claim, OCR might have revisited the case, preserved relevant records, or at least informed Petitioner that the deadline to request a formal proceeding before an ALJ had expired.<sup>136</sup> Petitioner has not “diligently sought redress in

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<sup>132</sup> Response to Agency Report at 10 ¶ 32. This would not have been the correct the procedure for filing a hearing request. Section 15f.11 clearly provides: “If you desire a hearing, *you must file a request for a hearing with the Docketing Clerk*, citing the docket number assigned to your Section 741 Complaint Request. When the Docketing Clerk receives your request for a hearing, your Section 741 Complaint Request will be assigned to an ALJ.” 7 C.F.R. § 15f.11 (emphasis added). FSA has no role in the process. It was Petitioner’s responsibility to file with the Docketing Clerk, who could then have forwarded the Amended Complaint to the Office of Administrative Law Judges. *See id.*

<sup>133</sup> *See, e.g.*, OCR file at 22 (mentioning “the pending administrative Law Judge Review that was apparently not previously acted on”). Correspondence in the OASCR file suggests that if any such request was made, it was never filed in writing. *See* OASCR file at 39 (May 16, 2005 email from ██████ Gibson) (““From our records, it looks like th[e Bennetts] were informed they had to request a Section 741 hearing in writing by the closing date, and never requested one.”).

<sup>134</sup> *See* 7 C.F.R. § 15f.16(b) (“To the maximum extent possible, a final determination will be made within 180 days of your filing the Section 741 Complaint Request.”); *see supra* note 126 and accompanying text.

<sup>135</sup> *Ordille v. United States*, No. CIV 01-3503 (JBS), 2005 WL 2372963, at \*12 (D.N.J. Sept. 26, 2005), *aff’d*, 218 F. App’x 160 (3d Cir. 2007).

<sup>136</sup> *See* Administrative Civil Rights Adjudications Under Section 741, 68 Fed. Reg. 7411, 7411 (Feb. 14, 2003) (“The USDA amends the adjudication process for certain civil rights discrimination complaints filed administratively with USDA in order to establish deadlines for complaints to request a formal proceeding before an administrative law judge (ALJ) and to clarify that complaints may no longer be filed.”).

this case.”<sup>137</sup> Her failure to aggressively demand action and instead wait more than twenty years to request a hearing was unreasonable.

#### **b. Prejudice to OCR**

I find that OCR has been prejudiced by Petitioner’s unreasonable delay in pursuing resolution of her civil rights complaint and requesting a hearing.

“[T]here are two kinds of prejudice that will support a defense of laches: (1) the loss of evidence which would support defendant’s position, or (2) a change in position by defendant that would not have occurred, except for plaintiff’s delay.”<sup>138</sup> Here OCR has been prejudiced by the former kind—“defense prejudice”—which includes “loss of records, destruction of evidence, fading memories, or unavailability of witnesses.”<sup>139</sup>

As OCR correctly notes, the facts underlying Petitioner’s discrimination complaint occurred in 1986—*thirty-five years ago*.<sup>140</sup> Furthermore, Petitioner herself admits having “waited approximately 25 years for USDA, OCR, to review, investigate, and resolve [her] civil

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<sup>137</sup> *Gardner v. Panama R. Co.*, 342 U.S. 29, 31 (1951).

<sup>138</sup> *Conner v. United States*, 10 Cl. Ct. 110, 114 (1986) (citing *Bevelheimer v. United States*, 4 Cl. Ct. 558 (1984)); see *Brown v. Buena Vista Cnty.*, 95 U.S. 157, 161 (1877) (“The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof.”).

<sup>139</sup> *Cornetta v. United States*, 851 F.2d 1372, 1378 (Fed. Cir. 1988). See *Powell v. Zuckert*, 366 F.2d 634, 638 (D.C. Cir. 1966) (“The prejudice normally contemplated in applying laches . . . stems from such factors as loss of evidence and unavailability of witnesses, which diminish a defendant’s chance of success.”); see also *Bevelheimer v. United States*, 4 Cl. Ct. 558, 563 n.1 (1984); *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 955 (9th Cir. 2001) (“Evidentiary prejudice includes such things as lost, stale, or degraded evidence, or witnesses whose memories have faded or who have died.”).

<sup>140</sup> See Agency Report at 19; Pre-Hearing Brief ¶ 2 (“Farmers Home Administration . . . and its successor agency Farm Service Agency . . . discriminated against me based on sex (‘Female’) in administering my farm operating loans during the years 1986 through 1991, in violation of the Equal Credit Opportunity Act[.]”).



rights complaint pursuant to 7 C.F.R. §§ 15f.8 – 15f.9.”<sup>141</sup> As the Supreme Court has cautioned, “equity aids the vigilant and not those who slumber on their rights.”<sup>142</sup>

Given the significant lapse of time between the accrual of Petitioner’s civil rights claim and her request for ALJ review, “a lesser showing of prejudice is required.”<sup>143</sup> OCR has sufficiently shown it “suffered prejudice in its ability to prepare for litigation.”<sup>144</sup> In the three-and-half decades since the alleged discrimination took place, files have been lost,<sup>145</sup> documents have been destroyed,<sup>146</sup> and memories have most certainly faded. While I disagree with OCR’s assertion that because certain employees named in Petitioner’s Brief are no longer employed by USDA “they are no longer available to testify,”<sup>147</sup> I believe the reliability of any such testimony

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<sup>141</sup> Pre-Hearing Brief ¶ 7.

<sup>142</sup> *Kansas v. Colorado*, 514 U.S. 673, 687 (1995) (quoting BLACK’S LAW DICTIONARY 875 (6th ed. 1990) (internal quotation marks omitted)); see also *Conner v. United States*, 10 Cl. Ct. 110, 112 (1986) (“The doctrine of laches is based upon considerations of public policy which require the discouragement of stale claims. It recognizes the need for speedy . . . enforcement of rights, so that courts may arrive at safe conclusions as to the truth.”) (internal citation omitted)).

<sup>143</sup> *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 843 (D.C. Cir. 1982). See also *Conner v. United States*, 10 Cl. Ct. 110, 114 (1986) (“[T]he longer the delay, the less need there is to show or search for specific prejudice.”); *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 807 (8th Cir. 1979) (“If only a short period of time has elapsed since the accrual of the claim, the magnitude of prejudice require[d] before the suit should be barred is great, whereas if the delay is lengthy, prejudice is more likely to have occurred and less proof of prejudice will be required.”).

<sup>144</sup> Agency Report at 20.

<sup>145</sup> See OCR file at 57 (“[W]e wish to apprise you that California has two (2) missing borrower casefiles for ██████ and Sandra Bennett (Sandy’s Rabbits.”); OASCR file at 65 (“Our efforts to find the missing casefiles for ██████ and Sandy Bennett 04-40-049, 28,6770 were unsuccessful.”).

<sup>146</sup> See Declaration of ██████ King at 2-3 (stating that records pertaining to discrimination complaints and paper files were destroyed pursuant to Departmental Regulation 3080-001; data from OASCR’s prior data systems “may not have been fully transferred” in fiscal years 2008 and 2009; and “in 2010 or 2011, OASCR experienced a flood in its’ office building which destroyed many hard copy paper files”).

<sup>147</sup> Agency Report at 20.

would be impaired by the natural passage of time. I agree that “Petitioner’s own memories of the case are likely diminished given the extensive length of time that has passed since the events in question.”<sup>148</sup> All of these factors have hardened OCR’s ability to defend the action.

I sympathize with the frustration Petitioner has endured trying to obtain documents from USDA, especially given the admission by OCR’s Executive Director that key documents—including a copy of Petitioner’s Section 741 Complaint Request—are “missing from the Civil Rights file.”<sup>149</sup> And Petitioner has “every right to be confounded by [the] correspondence [between] the Office of Civil Rights”<sup>150</sup> and FSA provided in the OCR file, where employees went back and forth for years requesting status updates and emphasizing the age of this case with no apparent response. As previously noted, OCR’s own staff appears to have misunderstood Section 741 procedures and confused the difference between a Section 741 Complaint, SOL review, and hearing request. “The picture portrayed in the [OCR file] and in the numerous supporting documents supplied by Plaintiff does not reflect well on the FSA” or OCR.<sup>151</sup> However, the record reflects that Petitioner took full advantage of the bureaucracy’s clumsiness by avoiding foreclosure on her property for more than twenty years.

As the D.C. Circuit has held, “Plaintiffs are encouraged to file suits when courts are in the best position to resolve disputes.”<sup>152</sup> The undersigned is hardly in such a position at present, more than three decades after the alleged discrimination occurred.

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<sup>148</sup> Agency Report at 21.

<sup>149</sup> Declaration of █████ King at 1-2.

<sup>150</sup> *Ordille v. United States*, No. CIV 01-3503 (JBS), 2005 WL 2372963, at \*11-12 (D.N.J. Sept. 26, 2005), *aff’d*, 216 F. App’x 160 (3d Cir. 2007).

<sup>151</sup> *Ansell v. United States*, No. 2:05-CV-505, 2007 WL 2593777, at \*6 (W.D. Pa. Sept. 4, 2007),

<sup>152</sup> *NAACP v. NAACP Legal Defense & Education Fund, Inc.*, 753 F.2d 131, 137 (D.C. Cir. 1985).

**ORDER**

The Complaint of Discrimination and the request for hearing in the above-entitled matter, are hereby ordered Dismissed.

This Determination shall become final thirty-five (35) days after issuance unless Petitioner requests review of the Determination by the Assistant Secretary for Civil Rights within that time or the Assistant Secretary for Civil Rights reviews the Determination on its own initiative. *See* 7 C.F.R. § 15f.24.

Copies of this Determination shall be served upon the parties and counsel by the Hearing Clerk.

Done at Washington, D.C.,  
This 22<sup>nd</sup> day of July 2021

Tierney Carlos /S/

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Tierney Carlos  
Administrative Law Judge

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