

2010 Explanatory Notes
Office of the General Counsel

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OFFICE OF THE GENERAL COUNSEL

Purpose Statement

The Office of the General Counsel (OGC) was established in 1910, (70 Stat. 742) as the law office of USDA. The mission of OGC is to provide legal services necessary to support activities of the USDA. OGC provides legal services primarily to the Secretary of Agriculture and officials at all levels of USDA as well as members of Congress concerning the programs and activities carried out by USDA.

Description of Programs:

OGC determines legal policy and directs the performance of all legal work conducted by USDA. All legal services are centralized within OGC and the General Counsel reports directly to the Secretary.

The office provides all necessary legal advice and services for the Department's ongoing programs. The headquarters legal staff is divided into six sections: (1) Marketing, Regulatory and Food Safety Programs; (2) International Affairs, Commodity Programs and Food Assistance Programs; (3) Rural Development; (4) Natural Resources; (5) Legislation, Litigation, and General Law; and (6) Civil Rights.

The General Counsel is the chief law officer of USDA and is responsible for providing legal services for all programs, operations, and activities of USDA. The General Counsel is assisted by a Deputy General Counsel and six Associate General Counsels, each of whom is responsible for a portion of the legal work of USDA. The USDA Law Library was transferred from the National Agricultural Library to OGC in 1982.

Legal Advice. OGC provides legal advice, both written and oral, to all agency officials of USDA. That advice takes the form of oral advice, written opinions, review of administrative rules and regulations for legal sufficiency, review of agency agreements and contracts and review and advice concerning any other agency activities which involve legal issues.

Legislation and Document Preparation. The office also prepares legislation, patent applications arising out of inventions by USDA employees, contracts, agreements, mortgages, leases, deeds and any other legal documents required by USDA agencies.

Administrative Proceedings. USDA is represented by OGC in administrative proceedings for the promulgation of rules having the force and effect of law and in quasi-judicial hearings held in connection with the administration of various USDA programs.

Federal and State Court Litigation. OGC works with the Department of Justice (DOJ) in all Departmental civil litigation. The bulk of this litigation is defensive litigation. The office serves as liaison with DOJ and assists in the preparation of all aspects of the government's case. OGC makes referrals of matters which indicate criminal violations of law have occurred and assists DOJ in preparation and prosecution of criminal cases. In some instances, OGC attorneys represent USDA as Special Assistant United States Attorneys, both in civil and criminal matters.

By delegation, the Associate General Counsel for Legislation, Litigation, and General Law represents the Department in certain classes of cases before the United States Courts of Appeals.

Geographic Location. The work of this office is carried out in Washington, D.C., and four regions which include 17 offices as follows:

Eastern Region:

Atlanta, Georgia
Columbus, Ohio
Harrisburg, Pennsylvania
Milwaukee, Wisconsin
Montgomery, Alabama

Central Region:

Kansas City, Missouri
Chicago, Illinois
Little Rock, Arkansas
St. Paul, Minnesota
Temple, Texas

Mountain Region:

Denver, Colorado
Albuquerque, New Mexico
Missoula, Montana
Ogden, Utah

Pacific Region:

San Francisco, California
Juneau, Alaska
Portland, Oregon

As of September 30, 2008, the office had 304 permanent full-time employees. There were 152 permanent full-time employees located in Washington, D.C., and 152 permanent full-time employees in the field.

OGC did not have any Office of Inspector General or Government Accountability Office evaluation reports during the past year.

OFFICE OF THE GENERAL COUNSEL

Available Funds and Staff Years
2008 Actual and Estimated 2009 and 2010

Item	Actual 2008		Estimated 2009		Estimated 2010	
	Amount	Staff Years	Amount	Staff Years	Amount	Staff Years
Salaries and Expenses	\$39,227,000	293	\$41,620,000	290	\$44,651,000	292
Rescission	-274,589	--		--	--	--
Total, Agriculture Appropriations	\$38,952,411	293	\$41,620,000	290	\$44,651,000	292
<u>Obligations under other</u>						
<u>USDA appropriations:</u>						
Hazardous Materials						
Management Program	1,260,201	8	1,700,000	11	1,700,000	11
FS Non-Litigating Sprt.....	83,797	--	110,000	--	110,000	--
Details						
AMS	10,502	--	23,000	--	--	--
APHIS	88,372	--	21,000	--	--	--
CCC	250,000	2	--	--	--	--
CSREES.....	39,369	--	34,000	--	--	--
FNS	43,087	--	20,000	--	--	--
FS	7,205	--	--	--	--	--
FSA	53,763	--	79,000	1	--	--
FSIS	20,000	--	75,000	1	--	--
NRCS	1,124	--	4,000	--	--	--
RUS	52,245	--	--	--	--	--
Civil Rights Reimbursables...	617,554	5	820,000	7	850,000	7
AMS User Fees	692,816	4	722,000	5	785,000	5
APHIS User Fees	557,000	2	471,000	3	500,000	3
GIPSA User Fees.....	6,450	--	4,000	--	5,000	--
FSA User Fee	3,000	--	5,000	--	5,000	--
FSIS User Fees	23,500	--	27,000	--	30,000	--
Total, Other USDA Appropriations	3,809,985	21	4,115,000	28	3,985,000	26
Total, Office of the General Counsel	42,762,396	314	45,735,000	318	48,636,000	318

OFFICE OF THE GENERAL COUNSEL

Permanent Positions by Grade and Staff-Year Summary
2008 Actual and Estimated 2009 and 2010

Grade	<u>2008</u>			<u>2009</u>			<u>2010</u>		
	Wash DC	Field	Total	Wash DC	Field	Total	Wash DC	Field	Total
Executive Level	1	--	1	1	--	1	1	--	1
Senior Executive Service	17	4	21	17	4	21	17	4	21
GS-15	35	25	60	35	25	60	37	28	65
GS-14	61	59	120	67	69	136	69	68	137
GS-13	10	12	22	6	4	10	5	3	8
GS-12	9	5	14	7	2	9	8	5	13
GS-11	12	11	23	6	8	14	2	9	11
GS-10	1	--	1	2	--	2	2	--	2
GS-9	7	11	18	7	12	19	7	10	17
GS-8	12	17	29	12	16	28	12	15	27
GS-7	6	14	20	5	12	17	5	10	15
GS-6	1	--	1	1	--	1	1	--	1
Total Permanent Positions	172	158	330	166	152	318	166	152	318
Unfilled Positions end-of-year.....	20	6	26	--	--	--	--	--	--
Total Permanent Full-time Employment, end-of-year.....	152	152	304	166	152	318	166	152	318
Staff-Year Estimate.....	163	151	314	166	152	318	166	152	318

OFFICE OF THE GENERAL COUNSEL

Appropriation Language

The estimates include appropriation language for this item as follows (new language underscored; deleted matter enclosed in brackets)

For necessary expenses of the Office of the General Counsel, [~~\$41,620,000~~] \$44,651,000.

SALARIES AND EXPENSES

Appropriations Act, 2009	\$41,620,000
Budget Estimate, 2010	<u>44,651,000</u>
Increase in Appropriation	<u>+ 3,031,000</u>

SUMMARY OF INCREASES AND DECREASES

(On basis of appropriation)

<u>Item of Change</u>	<u>2009 Estimated</u>	<u>Pay Costs</u>	<u>Program Changes</u>	<u>2009 Estimated</u>
Legal Services	\$41,620,000	+\$ 931,000	+2,100,000	\$44,651,000

OFFICE OF THE GENERAL COUNSEL

Project Statement
(On basis of appropriation)

	<u>2008 Actual</u>		<u>2009 Estimated</u>		Increase or Decrease	<u>2010 Estimated</u>	
	<u>Amount</u>	<u>Staff Years</u>	<u>Amount</u>	<u>Staff Years</u>		<u>Amount</u>	<u>Staff Years</u>
Legal Services.....	\$38,883,791	293	\$41,620,000	290	+ \$3,031,000	\$44,651,000	292
Unobligated Balance..	<u>68,620</u>	--	<u>--</u>	<u>--</u>	--	<u>--</u>	<u>--</u>
Total Available or Estimate.....	38,952,411	293	41,620,000	290	+ 3,031,000	44,651,000	292
Rescission.....	<u>274,589</u>	--	<u>--</u>	<u>--</u>			
Total, Appropriation...	<u>39,227,000</u>	<u>293</u>	<u>41,620,000</u>	<u>290</u>			

Justification of Increases and Decreases

(1) An increase of \$3,031,000 for the Office of the General Counsel consisting of:

(a) An increase of \$931,000 to fund increased pay costs.

Approximately 92 percent of OGC's budget is expended in support of personnel salaries and benefits, which leaves no flexibility for absorbing increased costs for pay or any other salary adjustments. OGC can absorb any such increases only by reducing staff or reassessing its operating requirements for travel, maintenance of equipment, law library purchases, and supplies. As these items comprise only 7 percent of the overall budget, OGC's flexibility is extremely limited and, when increased pay costs are not fully funded, the only available option is to consider staff reductions. A staff reduction would result in backlogs and delays in the defense of critical litigation, in reviewing and clearing agency rulemakings and correspondence, and in providing legal advice and services within requested time frames.

(b) An increase of \$2,100,000 to maintain and improve effectiveness of current staff.

During the last several years, OGC has been unable to fill key positions as they became vacant which has strained agency staff. OGC has been able to engage in modest hiring in FY 2009 to accommodate the legal areas of highest priority to the Department and to backfill positions that have been vacant for the longest periods of time. It is absolutely critical that OGC be able to support and maintain current staffing levels in order to ensure that agencies of the Department receive necessary predecisional legal advice and critical services in connection with USDA litigation and rulemaking activities.

In order to remain within its budget, OGC has put a number of cost-saving measures into place. One of the cost savings measures included temporary reimbursable details of attorney staff to other USDA agencies. These efforts greatly assisted OGC from a fiscal standpoint, and also enhanced the experience, skill, and knowledge of the attorneys in a manner that benefited both the professional growth of the attorney and the operations of the office. OGC is requesting that funding for these staff years be provided in OGC's appropriated funds.

This request would also permit OGC to increase funding for travel, training, law library purchases, and information technology. While inadequate travel funding has been a problem that has plagued OGC for many years, the current dilemma and projected travel requirements placed on OGC by client agencies over the last few years have escalated and are expected to increase. Travel in support of litigation in Federal courts and before administrative bodies is critical to the continued effective operation of OGC in its provision of services to the Department and to client USDA agencies. Training funds for OGC have also been reduced during each of the last several years. OGC recognizes the value of a well-trained workforce and plans to provide a well-planned and well-conducted training program to improve job performance and career development for OGC staff to support retention activities. OGC will use the most cost effective methods.

OGC Law Library purchases include items such as legal periodicals, legal encyclopedias, State codes, State court decisions, the United States Code, Federal regulations, court decisions, and highly important online legal research services, all of which enable OGC attorneys to stay abreast of new developments in their areas of the law and to have access to correct and current versions of the law. OGC cannot continue to absorb increased costs in all of these areas without further adverse effects on its ability to continue delivery of high quality legal services.

Additional funding is also required to support OGC's current information technology infrastructure. This funding will be used to ensure the security of all applications, systems and data, to replace computer workstations that are at the end of their life cycles, and to purchase a modest number of additional laptops and printers.

OFFICE OF THE GENERAL COUNSEL

Geographic Breakdown of Obligations and Staff Years
2008 Actual and Estimated 2009 and 2010

	2008		2009		2010	
	Amount	Staff Years	Amount	Staff Years	Amount	Staff Years
Alabama	\$524,283	5	\$532,000	5	\$540,000	5
Alaska	429,213	4	434,000	4	441,000	4
Arkansas	1,048,090	9	1,145,000	10	1,174,000	10
California	2,158,813	15	2,300,000	15	2,428,000	15
Colorado	1,970,892	13	2,070,000	13	2,175,000	13
District of Columbia ...	21,018,228	148	22,907,000	144	25,287,000	146
Georgia	2,120,459	17	2,236,000	17	2,355,000	17
Illinois	777,970	6	794,000	6	810,000	6
Minnesota	800,353	7	817,000	6	834,000	6
Missouri	1,236,024	11	1,275,000	10	1,316,000	10
Montana	838,026	7	856,000	7	875,000	7
New Mexico	569,597	5	578,000	5	587,000	5
Ohio	416,117	4	421,000	4	429,000	4
Oregon	1,370,389	11	1,494,000	12	1,547,000	12
Pennsylvania	1,182,136	11	1,213,000	10	1,249,000	10
Texas	862,459	8	947,000	9	968,000	9
Utah	551,563	4	565,000	5	573,000	5
Wisconsin	1,009,179	8	1,036,000	8	1,063,000	8
Subtotal, Available or Estimate.....	38,883,791	293	41,620,000	290	44,651,000	292
Unobligated balance ..	68,620	--	--	--	--	--
Total, Available or Estimate.....	<u>38,952,411</u>	<u>293</u>	<u>41,620,000</u>	<u>290</u>	<u>44,651,000</u>	<u>292</u>

OFFICE OF THE GENERAL COUNSEL

Classification by Objects
2008 Actual and Estimated 2009 and 2010

	<u>2008</u>	<u>2009</u>	<u>2010</u>
Personnel Compensation:			
Washington, DC.....	\$15,521,533	\$16,143,000	\$17,173,000
Field.....	<u>13,764,378</u>	<u>14,315,000</u>	<u>15,228,000</u>
11 Total personnel compensation	29,285,911	30,458,000	32,401,000
12 Personnel benefits	6,977,005	8,005,000	8,665,000
13 Benefits for former personnel	<u>9,100</u>	<u>6,000</u>	<u>6,000</u>
Total pers. comp. & benefits	36,272,016	38,469,000	41,072,000
Other Objects:			
21 Travel and Transportation of persons	91,082	98,000	238,000
22 Transportation of things	23,084	27,000	27,000
23.3 Communications, utilities and misc. charges	689,818	696,000	714,000
24 Printing and reproduction	93,202	95,000	100,000
25.2 Other services	836,642	1,255,000	1,092,000
26 Supplies and materials	856,642	741,000	894,000
31 Equipment	<u>21,686</u>	<u>239,000</u>	<u>514,000</u>
Total other objects	<u>2,611,775</u>	<u>3,151,000</u>	<u>3,579,000</u>
Total direct obligations	<u>38,883,791</u>	<u>41,620,000</u>	<u>44,651,000</u>
Position Data:			
Average Salary, ES positions	\$163,780	\$168,149	\$171,611
Average Salary, GS positions	\$ 97,356	\$100,407	\$106,071
Average Grade, GS positions	13.64	13.91	14.17

OFFICE OF THE GENERAL COUNSEL

STATUS OF PROGRAM

Current Activities:

The Office of the General Counsel (OGC) serves as the legal advisor and counsel for the Secretary and provides legal services for all agencies of the Department. These services include, but are not limited to, the following:

- rendering opinions on legal questions;
- preparing or reviewing rules and regulations;
- preparing or interpreting contracts, mortgages, leases, deeds, and other documents;
- preparing briefs and representing the Department in judicial proceedings and litigation;
- representing Departmental agencies in non-litigation debt collection programs;
- processing applications for patents for inventions by the Department's employees;
- representing Departmental agencies in State water rights adjudications;
- considering and determining claims by and against the United States arising out of the Department's activities;
- representing the Department in formal administrative proceedings;
- assisting the Department of Justice (DOJ) in the preparation and trial of cases involving the Department; and
- representing the Secretary of Agriculture and the Commodity Credit Corporation before the Federal Maritime Commission and the International Trade Commission.

Selected Examples of Recent Progress:

Highlights of OGC's fiscal year (FY) 2008 operations are described below:

ADMINISTRATION AND RESOURCE MANAGEMENT

OGC continues to focus on development of shared resources for the electronic exchange of data nationwide. In FY 2008 OGC, began development of an OGC SharePoint portal that will allow individual attorneys to manage their work items and allow the General Counsel to track all cases within OGC. Each office will have a workplace for their own document sharing and the capability to record and track work assignments. In addition, there will be an OGC-wide brief bank that will provide search capability of electronic data which will include briefs, opinions and other critical documents.

MARKETING, REGULATORY AND FOOD SAFETY PROGRAMS

Marketing Agreements and Orders: OGC attorneys reviewed approximately 100 rulemaking actions, as well as many other documents relating to marketing orders, and provided daily legal advice to client agencies in connection with a wide variety of matters. These activities included assistance in connection with formal and informal rulemaking actions, and with the enforcement and defense of the programs.

OGC provided assistance with informal rulemaking to implement 2008 Farm Bill changes to the marketing order programs, including the creation of supplemental rules of practice for amending Federal milk marketing and fruit, vegetable and nut marketing orders. The rules of practice establish certain time frames for formal rulemaking proceedings and provides authority for the use of informal rulemaking to amend marketing orders.

OGC also provided assistance in connection with a number of formal rulemaking proceedings for both marketing order programs. These proceedings included proposed temporary changes to certain Class I differentials in the Mideast milk marketing order and changes to the marketing orders for Florida citrus and pistachios grown in California.

OGC attorneys have also assisted DOJ in connection with several actions pending in the district court and the court of appeals involving issues such as make-allowance increases for Class III and IV milk, the Secretary's authority to mandate pasteurization of almonds regulated under the marketing order, and the definition of "handler" under the raisin marketing order.

Animal Welfare Act (AWA) and Horse Protection Act (HPA): OGC expended substantial resources in connection with the AWA and HPA programs. OGC attorneys serve as agency counsel in administrative enforcement actions brought under those two statutes. OGC initiated 77 AWA cases and ten HPA cases during the fiscal year, and decisions were issued in 41 AWA cases and five HPA cases.

Perishable Agricultural Commodities Act (PACA): In FY 2008, OGC's Trade Practices Division devoted significant resources to the provision of legal services in support of the Perishable Agricultural Commodities Branch of the Agricultural Marketing Service. OGC received 24 new referrals that were ready for administrative action from the PACA Branch, and filed 12 new administrative complaints alleging violations of the fair trade requirements of the PACA, many for the violation of failure to pay timely for produce in interstate or foreign commerce. One of the companies which allegedly had failed to pay, paid sellers \$207,000 for shipments of produce as a result of the enforcement action. Attorneys closed 17 PACA enforcement actions after resolution of the case, and PACA collected \$250,000 in civil penalties from one company as a result of a negotiated settlement of the disciplinary action. In FY 2008, attorneys acting as presiding officers issued 37 decisions on the merits or on motions of the parties, with regard to PACA reparation cases in which private parties seek damages as a result of violations by a PACA licensee. In total, OGC reviewed 118 reparation cases in which decisions were written either after hearing or as a result of written procedure as provided in the PACA rules of practice. A total of \$8,338,571 was at issue in those decisions. In addition, OGC reviewed 3 rulemaking dockets for amendment of existing PACA regulations, and provided legal research and counsel to the Branch on the affect of a Food and Drug Administration (FDA) warning about tomatoes on the merchantability of tomatoes in the regions of the warning.

Packers and Stockyards Act: In FY 2008, OGC also provided considerable resources to the Grain Inspection, Packers and Stockyards Administration (GIPSA) in the enforcement of the provisions of the Packers and Stockyards Act. In particular, OGC worked with Packers and Stockyards (P&S) on a joint investigation of a livestock packer in cooperation with the Commodities Futures Trading Commission. OGC attorneys assisted in the investigation and, in a series of investigative depositions, interviewed witnesses and sought additional information relevant to the question of whether the packer violated the Act through reporting procurement prices to the Agricultural Market News section under the Mandatory Livestock Reporting Act. In this year, P&S referred 67 administrative cases to OGC. These referrals seek

the issuance of an administrative complaint for the enforcement of the requirements of the Packers and Stockyards Act, legal review of agency action, or help with an investigation. The Trade Practices Division filed 59 new enforcement administrative complaints under the Packers and Stockyards Act in FY 2008, with 37 administrative cases concluded with orders and civil penalties which total \$657,770. The P&S Program also sent OGC 39 requests for referral to DOJ of violations of a Secretary's order or failures to file annual reports. For these cases OGC attorneys draft a complaint and draft order and prepare a legal analysis of the violation, and then refer the case to the appropriate U.S. Attorney's office for action. In FY 2008, the Trade Practices Division referred 29 cases to U.S. Attorneys' offices around the country. Six DOJ referrals were resolved for penalties totaling \$51,240. Additionally in support of the P&S Program, OGC reviewed and assisted in drafting 15 rulemaking dockets, often reviewing multiple drafts of proposed or final rules, and provided considerable information and feedback to the Office of Inspector General in their review of the work of the P&S Program and of the provision of legal services to the program's competition cases.

OGC also continued to act as liaison for the Department with the Antitrust Division of the Department of Justice. This fiscal year, OGC coordinated responses and assistance to DOJ from GIPSA, the Agricultural Marketing Service, the Food Safety and Inspection Service (FSIS), and other USDA agencies who worked closely with DOJ attorneys and staff in supplying expertise and information that was helpful and necessary in the Hart Scott Rodino review of the proposed JBS, S.A. proposed acquisition of National Beef Company, Inc.

Animal and Plant Health Laws and Wildlife Services: During FY 2008, OGC reviewed, assisted in drafting and approved for legal sufficiency over 215 proposed rules, final rules, assessments and notices for publication in the Federal Register. OGC assisted the Animal and Plant Health Inspection Service (APHIS) in the development, drafting and issuance of rules and supporting risk analyses and environmental assessments authorizing and regulating the importation and interstate movement of animal products, aquaculture products, plants and plant products, and nursery stock. OGC provided substantial assistance to APHIS with the development of a proposed rule revising the regulations governing the products of biotechnology, as well as with regulatory actions improving the Chronic Wasting Disease, Scrapie, Viral Hemorrhagic Septicemia and High Pathogenic Avian Influenza animal health programs.

Meat, Poultry, and Egg Products Inspection Acts: OGC assisted FSIS in the development of proposed rules, final rules, notices, and agency directives relating to the agency's Salmonella Verification Sampling Program, the prohibition on the slaughter of non-ambulatory cattle, and several labeling issues involving use of the claims "natural" and "raised without antibiotics." OGC also provided legal support to the agency in connection with the development and implementation of new recall procedures that would allow for the publication of retail consignees that had received recalled meat or poultry products. OGC attorneys advised food safety officials in connection with the Hallmark/Westland facility involving violations of the agency's humane handling requirements and the recall of products produced at that facility. During the fiscal year, OGC worked on a substantial number of criminal, civil, and administrative cases. OGC provided assistance to DOJ in prosecuting criminal and civil cases involving violations of the Federal Meat Inspection Act (FMIA), the Poultry Products Inspection Act (PPIA), and the Egg Products Inspection Act. OGC attorneys prosecuted numerous administrative cases on behalf of FSIS to withdraw or deny Federal meat and poultry inspection or custom exempt services under the FMIA and PPIA based on criminal convictions or violations of FSIS regulations.

INTERNATIONAL AFFAIRS, COMMODITY PROGRAMS
AND FOOD ASSISTANCE PROGRAMS/NATURAL RESOURCES

Commodity Credit Corporation (CCC), Farm Service Agency (FSA), and Domestic Commodity-Related Program Activities:

- During this past fiscal year, OGC has continued to provide substantial assistance with respect to commodity loan, conservation, and producer income programs authorized under various statutes, including the Farm Security and Rural Investment Act of 2002 and the Food Security Act of 1985, and the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill). These efforts concerned the provision of legal advice with respect to the participation of individual producers in the major commodity programs and conservation programs administered by FSA. Several billion dollars are expended annually under these programs involving the participation of several million producers.
- OGC expended significant efforts with respect to deliberation of the commodity program provisions of the 2008 Farm Bill. These actions included the drafting and review of numerous program proposals; provision of advice to Congressional counsel and other staff assistants; and provision of advice and counsel to Department of Agriculture officials. Upon enactment of the 2008 Act, major assistance was devoted to the development of regulations and contracts needed to implement Title I of the 2008 Farm Bill.
- OGC provided significant assistance with respect to the procurement of large quantities of commodities, and associated ocean freight, for international feeding and developmental programs and provided similar advice with respect to the procurement of commodities for use in domestic feeding programs.
- OGC continues to provide important assistance with the defense of major commodity and conservation programs in matters of litigation. Those efforts included: the defense of a challenge brought by a national environmental organization against the effort of the Department to allow acreage enrolled in the Conservation Reserve Program to be available for feed uses as a method of combating high grain prices early in calendar year 2008; assistance in the handling of matters arising out of the \$10 billion Tobacco Transition Payment Program (TTTP), including the defense of a major challenge by a member of the cigar industry against the basic allocation of costs of the program among segments of the tobacco products industry which was recently resolved in favor of the United States by the United States Court of Appeals for the Fourth Circuit; and in the initiation of actions in various United States District Courts to collect in excess of \$10 million due from the tobacco industry to finance the TTTP.

Foreign Agricultural Service (FAS) and CCC International Activities: During this past fiscal year, OGC supported the work of the Department in the implementation of a number of major international trade and foreign assistance initiatives:

- OGC attorneys provided extensive advice to both senior Department officials as well as to Congressional staff on the drafting and implementation of Title I of the 2008 Farm Bill affecting major programs of the Department involving food aid, export credits, and the Bill Emerson Humanitarian Trust.
- OGC attorneys provided extensive assistance to FAS and the Office of the United States Trade Representative (USTR) in the continuing World Trade Organization (WTO) dispute with Brazil over export credit guarantees and domestic support for cotton. Such assistance included drafting and presenting to dispute panels and the WTO Appellate Body of all arguments pertaining to export credit guarantees. OGC attorneys also designed and drafted the entire response of the United States to

Brazil's economic methodology regarding export credit guarantees, which is used in support of Brazil's effort to impose annual countermeasures against the United States totaling approximately \$1.3 billion.

- OGC attorneys provided valuable assistance to FAS in the substantial revision of the regulations for the two major international humanitarian feeding programs of the Department: the Food for Progress Program and the McGovern-Dole International Food for Education and Child Nutrition Program.
- OGC attorneys were substantially responsible for successfully litigating a challenge to the FAS debarment of a major foreign grain exporter that had contravened applicable rules of the United Nations Oil-for-Food Program in Iraq.
- OGC attorneys provided extensive advice to senior officials of the Department in respect of numerous economically significant Departmental initiatives, including the sale of wheat from the Bill Emerson Humanitarian Trust, which generated tens of millions of dollars in proceeds at the height of the market, which proceeds were then readily available to provide international food aid when market conditions indicate. OGC attorneys have also provided extensive advice to senior officials and USTR, in light of the 2008 Farm Bill and highly anomalous market conditions for raw and refined sugar, on appropriate measures to ensure an adequate supply of raw and refined sugar in the domestic market in a manner consistent with the international trade obligations of the United States.

Nutrition Assistance Programs: During the past year, OGC frequently assisted in furthering the program, policy, and integrity objectives of the nutrition assistance programs.

- OGC provided assistance and advice in the analysis of both House and Senate versions of the 2008 Farm Bill legislation that became the Food, Conservation, and Energy Act of 2008 (FCEA), and the development of the Administration's response to the proposals. OGC provided review of the legal basis for the Food and Nutrition Service (FNS) to operate a disaster Supplemental Nutrition Assistance Program (SNAP) or a commodity distribution program under the circumstances of a pandemic. This effort resulted in advice that the agency could provide emergency food distribution and benefits in response to a pandemic pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act. OGC also supported the civil rights objectives of the Department by providing advice to FNS in its efforts to assist a North Dakota Indian Tribal Organization in developing a comprehensive plan to act as a State agency in the administration of the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) Program. OGC continues to work closely with Department officials engaged in evaluating and sanctioning States for their performance in administering SNAP under the quality control system, including defending appeals filed by State agencies that are liable for excessive error rates.
- With regard to litigation, OGC provided substantial assistance to DOJ in connection with State of Colorado v. United States of America, USDA, State Food Stamp Appeals Board. As a result of this effort, the State has offered to settle the case by paying \$9,464,400 with interest to the Department. OGC also achieved an important precedent by successfully opposing a motion for preliminary injunction in Asafo Market v. United States in which the Court sustained USDA's position that the plaintiff retail food store was ineligible for a civil money penalty in lieu of disqualification for trafficking in food stamps. Finally, OGC assisted DOJ in obtaining dismissal of a challenge in Texas to the interim rule implementing the WIC Program vendor cost containment provisions of the Child and Nutrition and WIC Reauthorization Act of 2004 and dismissal of a similar case brought in Arizona.
- OGC provided review of a substantial number of proposed and final Federal Register publications, including proposed rules regulating household applications and electronic signatures for the National

School Lunch Program, and a final rule to revise regulations governing WIC Program food packages. This amendment reflects the latest scientific information regarding the nutritional needs of WIC Program recipients and represents the first major revision in this regard in almost 30 years.

RURAL DEVELOPMENT

Community Development Division (CDD): CDD provides legal advice to the Rural Housing Service (RHS), the Risk Management Agency (RMA), the Rural Business-Cooperative Service (RBS), and the farm lending arm of the FSA. CDD works with these agencies on debt collection, credit questions under direct and guaranteed loan programs, grants/cooperative agreements, and environmental issues.

- Farm Loan Programs of FSA: CDD assisted in the implementation of the 2008 Farm Bill's new and revised Farm Loan Programs; provided advice particularly on the information gathering requirements of section 1619, and foreclosure under section 14002, and determination on merits of Pigford claims under section 14012.
- Rural Development (RD): CDD assisted RHS on its Multifamily Revitalization Demonstration Program and its Multifamily Voucher Demonstration Program. CDD is extensively involved with a global settlement of approximately 300 pending prepayment Federal court cases challenging statutorily mandated retroactive prepayment restrictions. CDD has been, and continues to be, heavily involved in the writing and clearing of consolidated loan guarantee and grant regulations (including all related forms and handbooks) which will serve as "core" regulations for future programs. CDD is working with RBS in setting up five new or modified energy programs added by the 2008 Farm Bill. CDD has also provided assistance to RBS in its expanding energy programs.
- RMA and the Federal Crop Insurance Corporation (FCIC): CDD provided assistance in implementing the 2008 Farm Bill provisions regarding crop insurance and has assisted DOJ in several major civil and criminal cases. CDD also is providing guidance to the Board as a result of provisions that would allow advance payment of research and development costs to private submitters, which is likely to significantly increase the number of new crop insurance products that must be considered by the Board and reviewed by CDD.

Rural Utilities Division (RUD): RUD provides most legal services required for the administration of Rural Development's Electric, Telecommunications, Broadband and Water & Waste Disposal Programs.

- Major 2008 Issues: During FY 2008, RUD provided legal advice and assistance to the Rural Utilities Service (RUS) in advancing the President's Broadband Initiative by overhauling the RUS Broadband Program regulations in order to implement major changes to the program enacted by the 2008 Farm Bill. The 2008 Farm Bill also expanded the authority of RUS under the Rural Electrification Act of 1936 to guaranty loans made to non-profit lending institutions in order to finance the loans they make to finance electric and telephone projects (other than generation) that would be eligible to receive financing directly from RUS. RUD closed a \$500 million transaction under this new authority and is presently working on a second \$500 million transaction. Increasing public concern about global warming coupled with the Supreme Court's recent decision in Massachusetts v. EPA, produced a dramatic increase in environmental litigation related to RUS involvement in coal-fired generating plants. This trend is expected to continue.
- Nuclear Power Revival: The announced intention of some RUS borrowers to participate in the revival of the U.S. nuclear power industry is increasing RUS demands for RUD legal services. One borrower has already filed a loan application for a new nuclear project with RUS. It has also filed a successful application with the Department of Energy (DOE) to obtain additional funding for the same project by participating in DOE's new nuclear power loan guarantee program. RUD is currently working with DOE representatives to reconcile conflicting Federal lien priorities and other legal issues.

- Economic Crisis Poses Future Challenges: The current widespread economic crisis is producing secondary impacts that will challenge RUS and RUD during FY 2009. Electric cooperatives are now experiencing severe shortages of reasonably priced financing outside of the RUS program. As a consequence, demands for RUS funding are trending sharply upward. In addition, the complex capital structures of electric cooperatives typically involve an interdependent mix of investment banks, money center banks, insurance companies, rating agencies, suppliers and other stakeholders, including RUS. Consequently, the collapse of any one major player, such as Goldman Sachs or Ambac, can result in wide-ranging legal consequences involving the interests of the other stakeholders, including RUS.

NATURAL RESOURCES

Forest Service Programs: OGC provided advice regarding compliance with Federal environmental and administrative laws governing the management of 193 million acre National Forest System.

In the area of land management planning and projects, OGC counsels the Forest Service regarding compliance with environmental laws, such as the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), and the Endangered Species Act (ESA), and assists in the defense of regulations, policies, plans and projects. OGC has provided assistance in:

- Planning. OGC has been assisting Forest Service in developing a new proposed planning rule. (72 Fed. Reg. 48514).
- Programs and projects. OGC continues to provide legal advice to the Forest Service regarding compliance with relevant laws, including the laws noted above and other laws, such as the Administrative Procedure Act (APA), the Freedom of Information Act (FOIA), and the Federal Advisory Committee Act (FACA).
- Administrative appeals. OGC continues to advise the Forest Service regarding the application of the agency's administrative appeal regulations, after recent decisions expanding the scope of appealable activities.
- Litigation. As of September 30, 2008, approximately 126 cases involving NEPA, NFMA and/or ESA issues were pending. Notable cases during the year included Summers v. Earth Island Institute, a case involving the propriety of facial review of administrative appeal rules which was recently argued and submitted to the Supreme Court, and Lands Council v. McNair, a case where the Ninth Circuit, en banc, recently clarified the proper standard of judicial review in a manner favorable to the agency.

OGC has continued to provide substantial legal services in the forest management program area:

- OGC provided legal assistance on the defense of approximately 25 lawsuits seeking tens of millions of dollars based on challenges related to timber sales.
- OGC continues to provide legal advice in forest management areas, including a three-day contract law course; and representation in numerous suspension and debarment proceedings, and Government Accountability Office bid protest proceedings.
- OGC provided legal advice and assistance to the Forest Service regarding implementation of stewardship contract projects to allow timber harvest activities which also achieve needed project activities.

In support of the Forest Service Lands and Recreation Programs, OGC performed several significant tasks:

- Drafting final directives governing motor vehicle use on National Forest System (NFS) roads and NFS trails and in areas on NFS lands; outfitting and guiding on NFS lands; wind energy development on NFS lands; and design, construction, and maintenance of all types of NFS trails.
- Drafting interagency memoranda of understanding with the Western States Tourism Policy Council regarding tourism and the National Geographic Society regarding geotourism on Federal lands.
- Drafting and negotiating an interagency agreement between the Forest Service and the National Park Service providing for transfer of management and oversight of three Job Corps Centers from the National Park Service to the Forest Service and revising the Job Corps interagency agreement between USDA and the U.S. Department of Labor to accommodate the transfer.

In real property matters, OGC works closely with USDA agencies that manage real property assets, on a variety of legal issues relating to landownership transactions and stewardship responsibilities. These agencies include primarily the Forest Service, Natural Resources Conservation Service (NRCS), and Agricultural Research Service (ARS). Also in real property matters, OGC provides legal services regarding access and rights of way to public lands, title claims and disputes, treaty rights, land appraisal and survey, and other issues incident to the ownership and management of real property assets of the government.

In the minerals area, OGC has assisted in drafting proposed rules governing mining on the Forest Service lands and provided extensive advice on oil and gas leasing.

OGC continues to provide substantial legal assistance and litigation support regarding Federal laws such as those concerning American Indian treaty rights and religious freedom, and historic and archaeological resource protection.

OGC provided assistance to the Forest Service regarding hydroelectric licensing projects on National Forest System lands, and is working with an interagency group to draft final regulations for trial type hearings and alternative licensing conditions.

NRCS Programs: OGC provided legal advice and services to the NRCS in support of programs for natural resource conservation on private or non-Federal lands, including programs authorized by the Food Security Act of 1985. OGC assisted the agency in the administration of, among other programs, the Environmental Quality Incentives Program, the Farm and Ranch Lands Protection Program, the Grassland Reserve Program, and the Healthy Forest Reserve Program. Examples include:

- Developing Departmental comments on policies and guidance by the Environmental Protection Agency on Clean Air Act and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) compliance and standards with regard to protection of agricultural production.
- Providing legal analysis and drafting services in the development of the Department's regulations to implement the 2008 Farm Bill conservation authorities.

Pollution Control: The OGC Pollution Control Team (PCT) provided legal services and advice for all USDA agency matters related to the Resource Conservation and Recovery Act and CERCLA. During the most recent fiscal year, the PCT negotiated with responsible parties to obtain substantial contributions to cleanup costs or cleanup work performed by responsible parties of more than \$8 million. OGC also provided advice on compliance with pollution control standards concerning USDA programs and facilities, and provided advice on hazardous materials liability in real property transactions. Specific PCT efforts on behalf of USDA on pollution control matters include the following:

- As the lead-agency for the Holden Mine cleanup, estimated to cost approximately \$80 million, OGC has dedicated significant resources to negotiating cleanup of the site by the responsible party.
- OGC is continuing to provide legal support to the Forest Service as the lead agency for the cleanup of 9 phosphate mine sites contaminated with selenium in southeastern Idaho where response costs to address the contamination are projected to run from \$25 to \$80 million per site.
- OGC has committed significant resources in the American Smelting and Refining Company (ASARCO) LLC bankruptcy matter.

LEGISLATION, LITIGATION, AND GENERAL LAW

Litigation: OGC develops and communicates the Department's position in cases on appeal. During FY 2008, Litigation Division attorneys were assigned full responsibility for 9 appellate cases, obtained favorable results in 6, and received one adverse decision. Two cases are pending.

The Litigation Division briefs and argues all cases before the appellate courts arising under the Packers and Stockyard Act, PACA, AWA, and HPA. During FY 2008, in Jewel Bond v. USDA, the U.S. Court of Appeals for the Eighth Circuit upheld the Secretary's determination that Ms. Bond had violated the Animal Welfare Act by failing to maintain safe and clean facilities for the dogs and puppies she sold in interstate commerce. The Litigation Division received two favorable decisions in the Sixth Circuit regarding violations of the HPA. In Derickson v. USDA, the Litigation Division defended the Secretary's decision applying an appropriately broad definition of the terms "entering" and "transporting" with respect to the treatment of sore horses under the HPA. The Sixth Circuit upheld the Secretary's decision and affirmed the Secretary's authority to sanction HPA violators who have also been sanctioned by private horse industry groups. The Sixth Circuit also upheld the Secretary's determination in Perry Lacy v. USDA, holding that substantial evidence supported the Secretary's conclusion that Mr. Lacy had violated the HPA by entering a horse in a show while the horse was sore. In Ramos v. USDA, the Division filed a brief in the U.S. Court of Appeals for the Eleventh Circuit defending the Secretary's enforcement of USDA's procedural default rules in an AWA administrative proceeding.

The Litigation Division also defended the Secretary's determinations in several PACA cases before several courts of appeals. In KOAM v. USDA, and in B.T. Produce, Inc. v. USDA, the U.S. Courts of Appeals for the Second Circuit and for the District of Columbia Circuit, respectively, upheld the Secretary's determinations that the corporations violated PACA when officers of the corporations paid illegal bribes to USDA produce inspectors at the Hunts Point Terminal Market in the Bronx, New York. The courts of appeals also upheld the Secretary's determination that corporate officers and stockholders were responsibly connected to those corporations at the time of PACA violations. In addition, in Donald R. Beucke v. USDA, the Ninth Circuit Court of Appeals upheld the Secretary's responsibly connected determination regarding an officer and director of a produce company that violated PACA by failing to pay its suppliers.

Litigation Division attorneys also assisted DOJ in preparing the government's positions in lawsuits, including reviewing and advising on Supreme Court briefs affecting USDA programs. In FY 2008, the Supreme Court granted certiorari in Summers v. Earth Island Institute, a Forest Service case that presents complex questions as to the suitability and scope of facial review of agency procedural regulations. The Division assisted DOJ in its briefing and oral argument preparation in the case, which was argued in October 2008. Based upon Litigation Division recommendations, an en banc appeal was taken to the Court of Appeals for the Ninth Circuit in Lands Council v. McNair. The en banc court issued a favorable ruling clarifying the Circuit's environmental jurisprudence with respect to review of Forest Service actions. The Litigation Division also assisted in the preparation of an en banc petition to the Ninth Circuit in Sierra Forest Legacy v. Rey. The petition is pending. The Division assisted DOJ in Navajo Nation v. USFS, a Ninth Circuit case that presented the question of the reach of the Religious Freedom Restoration Act as to

the Federal Government's management of lands that it owns. The case resulted in a favorable en banc decision.

In addition to handling 9 appellate cases, the Litigation Division's attorneys prepared 43 recommendations to DOJ on whether to appeal adverse decisions of various lower courts, or to participate as amicus in appellate or Supreme Court cases.

Legislation: During FY 2008, OGC reviewed 204 legislative reports on bills introduced in Congress or proposed by the Administration, and cleared for legal sufficiency written testimony of 373 witnesses testifying on behalf of the Administration before Congressional committees. The Legislation Division provided extensive assistance to USDA policy officials in drafting and analyzing legislative proposals and amendments, and reviewed and coordinated the legal review for USDA in the clearance of legislation and ancillary legislative materials. Participated in the writing of the USDA memorandum "The Effects of Failure to Enact a New Farm Bill: Permanent Law Support For Commodities and Lapse of Other USDA Programs." The Legislation Division drafted or provided technical assistance in the preparation of bills and amendments for the Secretary, members of Congress, Congressional committees, Senate and House Offices of Legislative Counsel, and agencies within USDA, including:

- Legislative proposals for the 2008 Farm Bill by the Administration, the House of Representatives, and the Senate;
- The Conference Report for the 2008 Farm Bill;
- The fiscal year continuing resolution, the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009; and
- The President's budget proposal.

General Law Division (GLD): GLD is responsible for handling on behalf of all of the agencies and offices of the Department the legal work and litigation that arise under the many statutes and regulations that apply generally to all agencies of the Federal Government. These include, but are not limited to, the following: the Federal Tort Claims Act (FTCA), FOIA, the Privacy Act, FACA, the personnel laws and regulations, the Federal Service Labor-Management Relations Statute, Federal procurement statutes and regulations, and Federal intellectual property statutes.

Information issues occupied a great deal of GLD time in FY 2008. On December 31, 2007, the OPEN Government Act was signed into law and made significant procedural changes to FOIA, 5 U.S.C. 552. Among other changes the OPEN Government Act increased penalties on Federal agencies that are not timely in responding to FOIA requests and appeals, signaling the increased focus of Congress on FOIA timeliness. In the wake of these changes GLD expended a significant amount of legal resources training agency personnel regarding the changes, fielding questions from agency personnel regarding the changes, and reviewing and significantly reducing the backlog of agency FOIA appeals that were pending in OGC for review.

In addition, section 1619 of the 2008 Farm Bill, a new (b)(3) statute under FOIA was enacted which required significant attention by GLD attorneys. Section 1619 prohibits employees of the Department and others from sharing, except in limited circumstances, geospatial information, and information about agricultural operations, farming or conservation practices, or the land itself which was provided by producers in order to participate in USDA programs. GLD expended substantial effort in interpreting the statute, educating all the attorneys in OGC, preparing and presenting training for client agencies, and answering numerous questions by agencies regarding the application of the statute to agency information. Additionally, GLD drafted a memorandum from the General Counsel to the Subcabinet Officials establishing a uniform interpretation of the scope and application of key elements of Section 1619.

With regard to the Privacy Act, significant resources were expended in assisting an initiative by the Office of the Chief Information Officer to update the Privacy Act systems of Records Notices the Department. Consequently, GLD attorneys reviewed and rewrote numerous notices which were subsequently published. In addition, GLD developed a 2.5 hour Privacy Act training session to all Privacy Act Officers in the Department.

GLD assisted DOJ in a suit involving an alleged failure to comply with the National Environmental Policy Act and the Endangered Species Act, and is assisting in the implementation of the resulting settlement agreement. GLD also assisted in several judicial proceedings involving the applicability of the Equal Access to Justice Act to USDA National Appeals Division proceedings, including two District Court proceedings in the Fifth and Sixth Circuits, as well as settlement proceedings involving a Ninth Circuit case.

CIVIL RIGHTS

OGC's Civil Rights area is organized into two separate and distinct divisions, each lead by an Assistant General Counsel, under the umbrella of the Associate General Counsel for Civil Rights.

The Civil Rights Litigation Division (CRLD) defends USDA in individual cases and class actions filed under the equal employment opportunity laws, the Equal Credit Opportunity Act, and other Federal statutory and regulatory authorities before the Equal Employment Opportunity Commission (EEOC), Merit Systems Protection Board (MSPB) or Federal district court.

The Civil Rights Policy, Compliance & Counsel Division (CRPCCD) is responsible for providing advice and counsel prior to the request for a hearing in employment matters before EEOC. CRPCCD also prepares formal legal opinions on a wide variety of civil rights and Equal Employment Opportunity (EEO) matters and has the primary responsibility for working with the Office of Adjudication and Compliance to ensure compliance with Title VI of the Civil Rights Act and related statutes covering Federally assisted programs. CRPCCD also functions as a proactive civil rights office suggesting changes to agency practices in order to reduce discrimination complaint activity, developing action plans in response to compliance reviews, and anticipating areas in which civil rights issues may arise.

During FY 2008, CRPCCD provided extensive EEO training for a variety of agencies including ARS, Rural Development, the National Finance Center, and FNS. CRPCCD also provided program civil rights training to RMA and FNS. Other accomplishments include the successful resolution of several informal EEO complaints, comprehensive reviews of pending legislation, legal sufficiency reviews of agency policy documents on harassment, and the review of the Department's nondiscrimination statement.

In FY 2008, CRLD successfully defeated class certification in Esther Salinas, et al. v. Schafer; filed a motion to dismiss a class complaint in Jody Smith, et al. v. Schafer; and worked on pending class actions such as Joe Sedillo, et al., v. Schafer.

CRLD also defends USDA in Section 741 cases, administrative program discrimination cases, before Administrative Law Judges. CRLD worked on and obtained the dismissal of Wilbur Wilkinson v. Schafer, a program discrimination case where the allegations spanned twenty years, after an appeal to the Assistant Secretary of Civil Rights. CRLD continues to coordinate the defense of USDA with DOJ in a myriad of program class action cases brought by plaintiffs who allege discrimination in the delivery of USDA direct loan and other programs:

- Chiang, et al., v. Schafer - Class complaint dismissed due to summary judgment granted in favor of the government in FY 2008;
- Garcia, et al., v. Schafer - Class action alleging discrimination by FSA against Hispanic farmers and ranchers; the D.C. Circuit Court of Appeals has scheduled oral arguments on whether failure to

investigate claims of discrimination are actionable under the APA after affirming the denial of class certification;

- Keepseagle, et al., v. Schafer - Class action alleging discrimination by FSA against Native American farmers and ranchers; class certified by U.S. District Court; discovery is proceeding;
- Wise, et al., v. Schafer – Class action alleging discrimination by FSA against female, African-American (*Pigford* op-outs) and older farmers and ranchers; District Court decided that failure to investigate civil rights complaints are not actionable under APA and the class cannot be certified; and
- Love, et al., v. Schafer - Class action alleging discrimination by FSA against female farmers and ranchers; the D.C. Circuit Court of Appeals has scheduled oral arguments on whether failure to investigate claims of discrimination are actionable under the APA class after affirming the denial of class certification.

Implementation of the April 14, 1999, consent decree in Pigford/Brewington, the class action filed on behalf of African American farmers alleging race discrimination in farm loan and benefit programs, continues to require significant effort by CRLD. As of December 8, 2008, 69 percent of the 22,547 eligible Track A claims filed to date were decided in favor of the claimant. The government has paid over \$990 million to prevailing Track A claimants and provided approximately \$37 million in debt relief. CRLD continues to provide assistance in responding to claims and petitions for review by the Monitor, as well as a variety of other activities relating to implementation of the Consent Decree.

Ten lawsuits (In Re Black Farmers Litigation) have been filed in the D.C. District Court in response to the 2008 Farm Bill, Public Law No. 110-246, § 14012(j)(1), 122 Stat. 1651, 2212 (2008). The Pigford section provides that individuals, who were not allowed to file claims under the Pigford Consent Decree because of untimeliness and have not had decisions on the merits, to seek relief in Federal court. To be covered, you must have submitted a late-filing petition under section 5(g) of the Consent Decree prior to 6/18/2008, and have not previously obtained a determination on the merits of a Pigford claim.

REGIONAL OFFICES

OGC currently has four regional and thirteen branch offices which provide legal services to numerous USDA agencies with field organizations. Attorneys in the field locations advise USDA officials who have been charged with program implementation duties at the regional, State and local level. Examples of types of litigation and other matters handled by the field include the following:

Eastern Region

Forest Service Litigation. Eastern Region attorneys served as USDA legal counsel on numerous litigation matters. Many of these cases deal with challenges to the Forest Service's planned implementations pursuant to the NEPA, NFMA and ESA. In Heartwood v. Kempthorne, OGC attorneys assisted in winning a significant challenge to 15 Biological Opinions regarding the impact to the Indiana bat by seven projects on six different National Forests. The Sixth Circuit affirmed the District Court judgment in favor of the United States Fish and Wildlife Service and the Forest Service.

Oil and Gas and Energy Issues. In FY 2008, Eastern Region attorneys advised and assisted the Forest Service with significant decisions involving the ownership of oil, gas and mineral estates. In Petro-Hunt, a quiet title action, an Eastern Region attorney assisted in successfully defending the Forest Service's ownership of 90 out of 96 contested servitudes on 180,000 acres on the Kisachie National Forest. In addition, Eastern Region attorneys advised and assisted the Forest Service with significant decisions involving the granting or denying of requested permits to drill for oil and gas on National Forest System Lands. For example, in Duhring et al. v. USFS OGC attorneys are defending a challenge to the Forest Service authority to regulate oil and gas activities on national forest lands in Pennsylvania which has the

potential to result in a landmark ruling in the area of Federal Supremacy and agency authority under the Property Clause of the Constitution.

NRCS. Eastern Region attorneys continue to handle a significant amount of work associated with NRCS acquisition of easements under the Wetlands Reserve and the Farm and Ranch Land Protection Programs. This year Eastern Region attorneys received numerous proposed or completed acquisitions of easements from private landowners, for review, negotiation of partial releases, subordination of existing title impediments, resolving title and right-of-way problems and preparing preliminary and final title opinions.

Single Family Housing. Eastern Region attorneys continued to provide significant legal resources to assist Rural Development. A majority of RHS's single-family housing loan portfolios are in States served by the Eastern Region. Considerable OGC Eastern Region resources are spent on liquidating these loans.

Multi-Family Housing. Eastern Region attorneys also dealt with a significant number of Rural Development's Multi-Family Housing Loan Program issues. For example, the Winer bankruptcy matter, coordinated by two Eastern Region offices, involved the transfer of 17 Multi-Family Housing projects from the bankrupt owner to new owners.

Farm Program Legal Advice and Litigation. Eastern Region attorneys again provided daily assistance to FSA by processing foreclosure referrals, and reviewing program eligibility criteria and drafting detailed closing instructions for loans administered or guaranteed by those agencies. Attorneys also assisted in defending suits involving farm programs, such as In re Peanut Crop Insurance Litigation. In this long running peanut insurance case the Fourth Circuit Court of Appeals concluded that because no quota allocations were made in 2002, the government did not have to insure at the quota rate. The Circuit court vacated and remanded a district court judgment that had awarded the Plaintiffs \$30 million.

NAD Proceedings. Eastern Region attorneys continued to devote significant time representing Rural Development, FSA, and NRCS in appeals to the NAD. For example, Eastern Region attorneys continued to be in the forefront in defending RBS's decision to construe strictly the loan servicing requirements of private lenders who have made business loans guaranteed by USDA. In Enterprise National Bank v. U.S.D.A. RD Georgia terminated a Loan Note Guarantee on a \$5 million Business and Industry Guaranteed Loan due to lender negligence. A Remand Appeal Determination affirmed two of the reductions, the lender filed suit in federal court. Judge granted the USDA's (and denied the Bank's) Motion for Declaratory Judgment. Another example, is Ficus Farm, Inc. v. FCIC. The plaintiff filed an indemnity claim for roughly \$1.1 million. The claim was denied by RMA on the basis of misrepresentation of condition of the nursery stock and failure to mitigate damages. The RMA decision was upheld by the NAD Hearing Officer (after a two day hearing) and by the Director. Upon appeal, the district court granted summary judgment to RMA.

Board of Contract Appeals and Court of Federal Claims. Attorneys in the Eastern Region represented agencies before the Agriculture Board of Contract Appeals and the U.S. Court of Federal Claims. The Eastern Region continues to assist the agencies in resolving post-Katrina contract cases.

Civil Rights. Eastern Region attorneys continued to provide significant assistance to all USDA agencies in the Eastern United States in the defense of personnel actions pending before the EEOC and cases filed under Title VII in various Federal district courts. Employment discrimination and programmatic discrimination claims constituted a large and growing segment of the cases handled by the Eastern Region attorneys.

Central Region

FSA Collections, Fraud, and NAD Appeals. The Kansas City office assisted OIG and DOJ in detecting and pursuing bankruptcy fraud by planning strategy and tactics, recommending language for subpoenas and

pleadings, and by taking depositions and other discovery. The Kansas City office assisted the FSA and NRCS in several NAD appeals, allowing the agency's determinations to be upheld in regard to collections and program enforcement actions.

RMA. The Kansas City office provided program analysis and support for the successful Nebraska prosecution of a crop insurance agent who manipulated producers' loss records for the purpose of obtaining larger loss payments for the producers, and personal enrichment for the agent.

RUS Loans. The Temple, Texas office assisted in completing briefing in a significant 1926(b), case, Rural Water District No. 1, Logan County, Oklahoma v. City of Guthrie.

Rural Development Loans. The Central Region provided support for making a large number of Community Facility loans and grants to replace services and structures lost and damaged by the hurricanes, tornadoes and floods of 2008. Multi-family housing loan servicing work increased as a result of the rehabilitation financing available under the pilot demonstration program, and our offices provided extensive documents review and drafting in support of that program.

Kansas City Commodity Office (KCCO). The Kansas City office provided extensive advice and counsel to KCCO in the administration of its contract and procurement procedures. The Kansas City office also provided extensive advice and assistance on emergency matters related to the hurricane and flood disasters of 2008. In addition, the Kansas City office represented CCC before the AGBCA, prevailing in a procurement case involving a contractor's allegations of excusable delay.

NRCS. The Kansas City office defended several lawsuits involving the conversion of wetland areas. A favorable decision upholding the agency's determination that wetlands were converted in violation of the Swampbuster provisions of the Food Security Act of 1985 from the Eighth Circuit was received in Dorothy L. Clark v. USDA); while an adverse decision involving the same statutes was rendered by Judge Bennett of the U.S. District Court for the Northern District of Iowa in B & D Land and Livestock Co. v. Schafer.

EEO cases. Attorneys in the Central Region handled several program and employment discrimination cases over the past year. The Kansas City office, through mediation, settled an age and sex discrimination case for NRCS. The Chicago office settled a significant employment case for ARS prior to trial of the matter in the U.S. District Court for the Central District of Illinois, thus saving the government substantial money and resources. The Little Rock office prevailed in a sexual discrimination and harassment case, Sandra L. O'Brien and Donna Peterson v. USDA.

Mountain Region

Roadless Rule Issues. In FY 2008, Mountain Region attorneys assisted with the development and negotiation of a landmark Colorado Roadless Rule. Mountain Region attorneys also successfully defended the Bull Mountain Pipeline project in a case entitled Wilderness Workshop v. U.S. BLM, U.S. Forest Service, and S.G. Interests. The lawsuit alleged that the Forest Service's approval of an underground natural gas pipeline violated roadless rule proscriptions. Mountain Region attorneys helped defeat this argument in U.S. District Court and in the Tenth Circuit Court of Appeals.

NFMA. Mountain Region attorneys again played a central role defending the Forest Service against allegations that it violated NFMA. For example, Mountain Region attorneys played a significant role in winning a landmark case in the Ninth Circuit case entitled Lands Council v. McNair.

Oil and Gas and Energy Issues. In FY 2008, Mountain Region attorneys handled significant litigation involving challenges to oil and gas operations on National Forest System lands. For example, a case known as San Juan Citizens Alliance v. Stiles challenges a joint BLM-Forest Service proposal to allow extensive new drilling for coal bed methane on the San Juan National Forest.

Pollution Control. Mountain Region attorneys continued to handle a wide variety of matters involving CERCLA. In FY 2008, Mountain Region attorneys negotiated complex cleanup agreements, including several settlements intertwined with the ASARCO Bankruptcy proceeding. Mountain Region attorneys also handled negotiations involving cleanups of phosphate mines in Idaho.

Farm Program/Rural Development Legal Advice and Litigation. Mountain Region attorneys again provided daily assistance to FSA and Rural Development by processing foreclosure referrals, and reviewing program eligibility criteria and drafting detailed closing instructions for loans administered or guaranteed by those agencies throughout the States of Colorado, Wyoming, Arizona, New Mexico, Montana, and Utah.

National Environmental Policy Act (NEPA). Mountain Region attorneys continued to handle a wide range of legal issues arising under NEPA. Examples include Wilderness Workshop v. U.S. BLM, U.S. Forest Service, and S.G. Interests.

Contract Disputes. Mountain Region attorneys assisted several USDA agencies in large contract disputes. A very significant dispute before the Civilian Board of Contract Appeal involving a timber contract that was adversely affected by a court injunction was settled on favorable terms in a case known as Mountain Valley Lumber.

Water Rights. Mountain Region attorneys continued to represent the Forest Service in water rights issues. For example, Mountain Region attorneys assisted the Forest Service with the environmental analysis required to support a decision to issue a permit with conditions at the Long Draw Reservoir in Colorado. Mountain Region attorneys also assisted with numerous water right applications and helped the Forest Service file objections in the States of Colorado, Wyoming, Montana, Utah, and Idaho.

Civil Rights and MSPB Cases. Mountain Region attorneys continued to handle a large volume of administrative and judicial cases filed under Title VII of the 1964 Civil Rights Act and various personnel laws.

Travel Management, Land, Property, and ANILCA issues. Mountain Region attorneys assisted the Forest Service and NRCS with land exchanges, title and easement reviews, and actions under the Quiet Title Act. Mountain Region attorneys also handled challenges to proposed travel management plans, and lawsuits arising under ANILCA, including a high profile lawsuit known as Colorado Wild v. United States Forest Service, which involves the Wolf Creek ski area.

Affirmative Litigation. Mountain Region attorneys assisted the Forest Service and DOJ with various types of affirmative litigation, including trespass and fire suppression cost recovery cases. Several significant settlements yielded millions of dollars in cost recovery for fire suppression efforts expended by the Forest Service.

Pacific Region

Affirmative Fire Trespass Claims. The Pacific Region actively pursued cost-recovery actions against parties that were responsible for starting fires on National Forest System lands. In the Storrie Fire case, Pacific Region attorneys helped negotiate a settlement agreement in which the defendant paid the United States \$102 million. Of this amount, about \$80 million was returned to the Forest Service to repair some of the damage caused by the fire. The United States Attorney for the Eastern District of California called the Storrie fire case “the most significant civil case in the history of the Eastern District.” As a result of the Pacific Region’s successful fire cost recovery program, DOJ established fire cost recovery teams at the U.S. Attorneys’ Offices for the Eastern District of California, the Central District of California, and the District of Utah. The Forest Service has several hundred million dollars in potential affirmative fire claims within the Pacific Region.

Alaska Subsistence Program. The Pacific Region continued to advise the Federal Subsistence Board on controversial issues regarding subsistence resources for rural Alaska residents. This work included advising against the regulation of a commercial herring fishery in Sitka Sound and in favor of increasing fishing opportunities elsewhere on the Tongass and Chugach National Forests. Pacific Region attorneys helped obtain a favorable Ninth Circuit decision in a case in which the State of Alaska sought to narrow the authority of the Subsistence Board to determine customary and traditional uses for subsistence.

Civil Rights. The Pacific Region successfully defended USDA agencies in employment-related litigation before the EEOC, the MSPB, and the United States District Courts. Pacific Region attorneys provided USDA agencies with legal advice, case assessments, and settlement recommendations to minimize the risk of liability in employment-related matters, increase the likelihood of prevailing in litigation, control litigation costs, and resolve appropriate cases without litigation. Pacific Region attorneys helped defend the Department before the EEOC in the Hispanic class action litigation entitled Sedillo v. Ed Schafer.

Contract Litigation. The Pacific Region defended USDA contracting officers in litigation before the Civilian Board of Contract Appeals, including cases challenging Forest Service decisions to suspend or terminate timber sale contracts because of environmental litigation, and it worked closely with DOJ in contract litigation before the United States Court of Federal Claims. The appellants and plaintiffs in these cases seek more than \$20 million in damages.

Crop Insurance. Pacific Region attorneys successfully represented RMA in appeals before the Civilian Board of Contract Appeals that involve indemnity overpayments by crop insurance companies. The amount of money at issue in these cases is often substantial and averages about \$200,000 per appeal.

Cultural Resources. Pacific Region attorneys provided advice to the Forest Service before its acknowledgment that it had historically removed Alaska Native fish camps and other improvements on the Tongass National Forest, with deleterious effects on the Native cultures.

Energy Development and Climate Change. The Pacific Region provided legal advice to the Forest Service, and represented the agency in meetings with the California Public Utilities Commission, regarding several transmission lines on National Forest System lands. These transmission lines are an essential component of California's renewable energy mandate. The Pacific Region expects to see a significant increase in its workload involving climate change, carbon sequestration, and related issues.

Farm Loan Programs. The Pacific Region helped FSA make millions of dollars in loans to family farmers and small farming operations, and it helped the agency with new farm loan programs in the former Pacific Island Trust Territories. Pacific Region attorneys helped the FSA recover millions of dollars in debt in complex bankruptcy and other litigation matters, helped the agency develop guidance and forms to comply with the 2008 Farm Bill, and provided advice to the agency regarding its conservation programs and foreclosure actions. While serving as Special Assistant U.S. Attorneys, Pacific Region attorneys represented the FSA in bankruptcy court.

Grazing. The Pacific Region devoted additional resources to grazing matters because environmental groups filed an increasing number of challenges to the Forest Service's grazing program. For example, Pacific Region attorneys helped defend the Forest Service against a lawsuit (Western Watersheds Project v. United States Forest Service) challenging more than 130 Forest Service decisions, covering 386 grazing allotments that are located on 25 National Forests in 8 States and 9 judicial districts. The Pacific Region expects to see a further increase in its grazing law workload.

Hydropower Issues. The Pacific Region provided assistance to the Forest Service in the complex negotiations that led to the Klamath Restoration Agreement, and then the Hydropower Settlement with PacifiCorp. If this settlement is approved by the Secretary of the Interior, it will lead to the removal of four major dams from the Klamath River, and would be the largest dam removal undertaking in United States history.

Lands and Real Property. The Pacific Region provided important legal support for the United States's friendly condemnation of the environmentally sensitive Incline Lakes tract in the Lake Tahoe Basin, resulting in a 770-acre addition to the Lake Tahoe Basin Management Unit; the legislated exchange that resulted in a new Forest Service Supervisor's office on the San Bernardino National Forest; the Forest Legacy Program's acquisition of conservation easements on Native Hawaiian forested lands; the Forest Service's opposition to the State of Alaska's application for a recordable disclaimer of Federal ownership of the bed of the Stikine River in the Tongass National Forest; and NRCS's extensive easement acquisition program.

Law Enforcement. The Pacific Region provided the Forest Service with assistance on a wide variety of law enforcement matters, including review of forest orders that were issued to protect natural resources and provide for public safety.

Natural Resource Litigation. The Pacific Region provided significant assistance to DOJ and the United States Attorneys' Offices in natural resource litigation, including litigation involving the 2004 Sierra Nevada Framework; the Herger-Feinstein Quincy Library Group Act; the land and resource management plans for the National Forests in southern California; the Northwest Forest Plan; the Columbia Gorge National Scenic Act; and a case before the United States Supreme Court concerning the disposal of tailings from the Kensington Mine in a lake on the Tongass National Forest.

Pollution Control and Hazardous Waste. The Pacific Region continued to assert claims for more than \$15 million in the ASARCO bankruptcy case involving three mines in the State of Washington. Pacific Region attorneys continued to work on the selenium contamination associated with phosphate mines in southeast Idaho, and provided advice to the Forest Service about naturally occurring asbestos on National Forest System lands.

Pre-Decisional Natural Resource Advice. The Pacific Region provided pre-decisional advice on many significant natural resource matters to reduce the vulnerability of agency decisions to litigation. This included advice on the Tongass forest plan, which was completed in FY 2008 after a multi-year effort; proposed changes to the disposal facility for tailings from the Kensington Mine, in view of an adverse decision from the Ninth Circuit; salvage and green timber sales; fuel and hazard reduction projects; grazing allotments; the Bureau of Land Management's Western Oregon Plan Revision; and an amendment to the Sierra Nevada forest plans regarding the monitoring of species.

Recreation and Travel Management. The Pacific Region provided assistance to the Forest Service regarding the agency's new travel management rule. The workload in this area will continue to grow as the Pacific Region helps the Forest Service defend the travel management plans developed by the National Forests. Pacific Region attorneys successfully defended the Forest Service against a challenge to the expansion of the White Pass Ski Area on the Okanogan and Wenatchee National Forests.

Rural Development. The Pacific Region helped RUS obtain adequate security for its loans, and issued loan closing instructions for important water and sewer projects. Pacific Region attorneys helped RBS serve and collect millions of dollars in loans, and helped the RHS reduce the delinquency rate in its loan portfolio. Pacific Region attorneys helped the Multi-Family Housing Division with the transfer and assumption of multi-family housing properties, and the issuance of multi-family loan closing instructions. The Pacific Region worked with DOJ to defend lawsuits challenging the RHS's § 515 Rural Rental Housing Program. While serving as Special Assistant U.S. Attorneys, Pacific Region attorneys represented the Rural Development mission area in bankruptcy court.

OFFICE OF THE GENERAL COUNSEL

Summary of Budget and Performance
Statement of Goals and Objectives

Agency Strategic Goal	Agency Objectives	Programs that Contribute	Key Outcome
<p>Agency Goal 1: To provide effective legal services in support of all programs and activities of USDA, consistent with the strategic goals of USDA and the priorities of the Secretary of Agriculture.</p>	<p><u>Objective 1.1:</u> Review all draft regulations submitted by USDA agencies, and provisions of advice to USDA officials as to their sufficiency.</p> <p><u>Objective 1.2:</u> Preparation and review for legal sufficiency of all legal documents, memoranda, and correspondence.</p> <p><u>Objective 1.3:</u> Conduct litigation before courts and administrative forums, and provision of litigation support services to the Department of Justice, in connection with litigation arising out of all USDA programs and activities.</p> <p><u>Objective 1.4:</u> Drafting of legislation, and review for legal sufficiency of legislation reports and testimony, in connection with proposals to establish or amend USDA programs and activities.</p> <p><u>Objective 1.5 :</u> Provision of advice and counsel to USDA officials concerning legal issues arising out of USDA programs and activities.</p>	<p>Legal Services Program</p>	<p>Provide effective legal services in a responsive manner to support USDA activities, consistent with the priorities established by the Secretary of Agriculture.</p>

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Selected Accomplishments Expected at the FY 2010 Proposed Resource Level: OGC will provide effective legal services in a responsive manner in order to ensure that agency officials can implement their programs.

Summary of Budget and Performance
Key Performance Outcomes and Measures

Goal 1: To provide effective legal services in support of all programs and activities of USDA, consistent with the strategic goals of USDA and the priorities of the Secretary of Agriculture.

Key Outcome: Provide effective legal services in a responsive manner to support USDA activities, consistent with the priorities established by the Secretary of Agriculture.

Key Performance Measures: All OGC's Performance Measures are key measures.

Key Performance Targets:

Performance Measure	FY 2005 Actual	FY 2006 Actual	FY 2007 Actual	FY 2008 Actual	FY 2009 Target	FY 2010 Target
Performance Measure #1 Percentage of USDA regulations reviewed and cleared within statutory and assigned OGC timeframes.	90% of USDA regulation reviewed and cleared timely	92% of USDA regulation reviewed and cleared timely	92% of USDA regulation reviewed and cleared timely	92% of USDA regulation reviewed and cleared timely	94% of USDA regulation reviewed and cleared timely	96% of USDA regulation reviewed and cleared timely
Performance Measure #2 Percentage of formal legal memoranda and other legal documents prepared within assigned timeframes.	80% of legal documents prepared within timeframes	82% of legal documents prepared within timeframes	82% of legal documents prepared within timeframes	82% of legal documents prepared within timeframes	84% of legal documents prepared within timeframes	87% of legal documents prepared within timeframes
Performance Measure #3 Items of controlled correspondence reviewed for legal sufficiency within assigned timeframes.	90% of correspondence reviewed within timeframes	92% of correspondence reviewed within timeframes	92% of correspondence reviewed within timeframes	92% of correspondence reviewed within timeframes	94% of correspondence reviewed within timeframes	96% of correspondence reviewed within timeframes
Performance Measure #4 Litigation before administrative forums, including Equal Employment Opportunity Commission, Merit Systems Protection Board, USDA's Administrative Law Judge's and Judicial Officer, and other administrative bodies, conducted in effective and timely manner.	80% of pleadings and filings made timely	80% of pleadings and filings made timely	82% of pleadings and filings made timely	82% of pleadings and filings made timely	84% of pleadings and filings made timely	87% of pleadings and filings made timely
Performance Measure #5 Provision of assistance to Department of Justice and U.S. Attorneys in connection with litigation in Federal courts as assigned accomplished in effective and timely manner.	Litigation assistance provided effectively and briefs filed timely	Litigation assistance provided effectively and briefs filed timely	Litigation assistance provided effectively and briefs filed timely	Litigation assistance provided effectively and briefs filed timely	Litigation assistance provided effectively and briefs filed timely	Litigation assistance provided effectively and briefs filed timely
Performance Measure #6 Drafts of legislation in support of USDA goals and priorities, and provision of drafting services when requested by Committees and Members of Congress, provided timely and effectively.	Draft legislation provided timely					
Performance Measure #7 Legislative reports and testimony reviewed within assigned timeframes.	90% of legislative reports and testimony reviewed timely	92% of legislative reports and testimony reviewed timely	92% of legislative reports and testimony reviewed timely	92% of legislative reports and testimony reviewed timely	94% of legislative reports and testimony reviewed timely	96% of legislative reports and testimony reviewed timely
Performance Measure #8 Legal advice and counsel to USDA officials and agencies provided timely and effectively.	Legal advice provided timely					
Total Costs	\$ 35,531,154	\$ 38,876,922	\$ 39,168,094	\$38,883,791	\$ 41,620,000	\$ 44,651,000

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Summary of Budget and Performance
Full Cost by Strategic Goal

<u>PROGRAM</u>	<u>PROGRAM ITEMS</u>	2008 AMOUNT <u>(\$000)</u>	2009 AMOUNT <u>(\$000)</u>	2010 AMOUNT <u>(\$000)</u>
Legal Services	Direct Costs	\$36,272	\$38,469	\$41,072
All performance measures apply	Other Direct Costs	2,612	3,151	3,579
	Total Costs	\$38,884	\$41,620	\$44,651
	FTE's	293	290	292