

2011 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 Department 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. A Deputy General Counsel and six Associate General Counsels, each of whom is responsible for a portion of the legal work of USDA, assist the General Counsel. In 1982, USDA Law Library transferred from the National Agricultural Library to OGC.

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 that 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. OGC represent USDA 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 that 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, 2009, the office had 308 permanent full-time employees. There were 159 permanent full-time employees located in Washington, D.C., and 149 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
2009 Actual and Estimated 2010 and 2011

Item	Actual 2009		Estimated 2010		Estimated 2011	
	Amount	Staff Years	Amount	Staff Years	Amount	Staff Years
Salaries and Expenses	\$41,530,346	277	\$43,551,000	290	\$45,654,000	292
<u>Obligations under other</u>						
<u>USDA appropriations:</u>						
Hazardous Materials						
Management Program	1,523,733	9	1,700,000	11	1,700,000	11
FS Non-Litigating Sprt.....	73,631	--	110,000	--	110,000	--
Details						
AMS	22,913	--	-	--	--	--
APHIS	21,295	--	-	--	--	--
CCC	250,000	2	100,000	1	--	--
CSREES.....	33,544	--	-	--	--	--
FNS	19,966	--	-	--	--	--
FSA	79,475	1	-	--	--	--
FSIS	46,806	--	75,000	1	--	--
NRCS	4,112	--	-	--	--	--
Civil Rights Reimbursable...	805,525	7	956,000	7	978,000	7
AMS User Fees	585,939	4	643,000	5	658,000	5
APHIS User Fees	470,500	2	522,000	3	534,000	3
GIPSA User Fees.....	4,490	--	4,000	--	4,000	--
FSA User Fee	4,750	--	15,000	--	16,000	--
FSIS User Fees	27,300	--	21,000	--	21,000	--
Total, Other USDA						
Appropriations	3,973,979	25	4,146,000	28	4,021,000	26
Total, Office of the						
General Counsel	45,504,325	302	47,697,000	318	49,675,000	318

OFFICE OF THE GENERAL COUNSEL

Permanent Positions by Grade and Staff-Year Summary
2009 Actual and Estimated 2010 and 2011

Grade	<u>2009</u>			<u>2010</u>			<u>2011</u>		
	Wash DC	Field	Total	Wash DC	Field	Total	Wash DC	Field	Total
Executive Level	1	--	1	1	--	1	1	--	1
Senior Executive Service	16	4	20	16	4	20	16	4	20
GS-15	36	28	64	32	25	57	32	25	57
GS-14	66	62	128	71	56	127	79	56	135
GS-13	3	3	6	8	8	16	7	8	15
GS-12	5	2	7	10	8	18	3	8	11
GS-11	15	14	29	4	9	13	4	9	13
GS-10	2	--	2	2	--	2	2	--	2
GS- 9	7	10	17	8	10	18	8	10	18
GS- 8	12	17	29	10	21	31	10	21	31
GS- 7	7	14	21	6	9	15	6	9	15
GS- 6	2	--	2	--	--	--	--	--	--
Total Permanent Positions	172	154	326	168	150	318	168	150	318
Unfilled Positions End-of-year.....	13	5	18	--	--	--	--	--	--
Total Permanent Full-time Employment, End-of-year.....	159	149	308	168	150	318	168	150	318
Staff-Year Estimate.....	157	145	302	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, [\$43,551,000] \$45,654,000.

SALARIES AND EXPENSES

Appropriations Act, 2010	\$43,551,000
Budget Estimate, 2011	<u>45,654,000</u>
Increase in Appropriation	<u>+ 2,103,000</u>

SUMMARY OF INCREASES AND DECREASES

(On basis of appropriation)

<u>Item of Change</u>	<u>2010 Estimated</u>	<u>Pay Costs</u>	<u>Program Changes</u>	<u>2011 Estimated</u>
Legal Services	\$43,551,000	+\$553,000	+\$1,550,000	\$45,654,000

OFFICE OF THE GENERAL COUNSEL

Project Statement
(On basis of appropriation)

	<u>2009 Actual</u>		<u>2010 Estimated</u>		<u>Increase or Decrease</u>	<u>2011 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.....	\$41,530,346	277	\$43,551,000	290	+ \$2,103,000	\$45,654,000	292
Unobligated Balance...	89,654	--	--	--	--	--	--
Total Appropriation....	<u>41,620,000</u>	<u>277</u>	<u>43,551,000</u>	<u>290</u>	<u>2,103,000</u>	<u>45,654,000</u>	<u>292</u>

Justification of Increases and Decreases

(1) An increase of \$2,103,000 for the office of the General Counsel consisting of:

(a) An increase of \$553,000 for pay costs.

Unlike large program agencies that have more flexibility concerning budget implementation, OGC would absorb this increase by reducing staff and by continuing the practice of not filling vacant positions. Such action would result in backlogs and unavoidable delays in providing legal advice within requested periods and in reviewing and clearing agency rulemakings and correspondence, and in providing legal advice within requested periods.

(b) An increase of \$1,550,000 to maintain and improve effectiveness of current staff.

This increase will enable OGC to meet its goal of providing effective legal services in a responsive manner to support USDA activities, consistent with the priorities established by the Secretary of Agriculture. It is crucial that OGC be able to support and maintain current staffing levels in order to ensure that agencies of the Department receive necessary noteworthy legal advice and critical legal services. Placing OGC attorneys in the decision making process helps ensure that Departmental decisions comply with applicable legal requirements, that litigation is avoided wherever possible, and that the government's chances of successfully defending litigation filed against the Department are improved. Insuring that adequate staff is available to provide legal advice garners significant savings attributable to costly litigation expenses.

(c) A transition of staff years distributed in OGC to ensure all task and current activities are accomplished. Two staff years transferred from appropriated to reimbursable to support CCC and FSIS activities.

OFFICE OF THE GENERAL COUNSEL

Geographic Breakdown of Obligations and Staff Years
2009 Actual and Estimated 2010 and 2011

	2009		2010		2011	
	Amount	Staff Years	Amount	Staff Years	Amount	Staff Years
Alabama	\$555,351	5	\$582,000	5	\$594,000	5
Alaska	479,475	4	503,000	4	514,000	4
Arkansas	989,981	7	1,038,000	8	1,059,000	8
California	2,133,834	14	2,238,000	14	2,283,000	14
Colorado	1,971,983	13	1,972,000	13	2,011,000	13
District of Columbia ...	23,309,978	139	24,540,000	147	26,263,000	149
Georgia	2,110,026	16	2,213,000	16	2,257,000	16
Illinois	865,100	6	907,000	6	925,000	6
Minnesota	781,418	6	819,000	7	835,000	7
Missouri	1,224,904	9	1,285,000	9	1,311,000	9
Montana	885,889	7	929,000	7	948,000	7
New Mexico	592,096	5	621,000	6	633,000	6
Ohio	445,232	7	467,000	7	476,000	7
Oregon	1,489,179	11	1,562,000	11	1,593,000	11
Pennsylvania	1,156,382	10	1,213,000	11	1,237,000	11
Texas	895,767	7	939,000	8	958,000	8
Utah	586,598	4	615,000	4	627,000	4
Wisconsin	1,057,153	7	1,108,000	7	1,130,000	7
Subtotal, Available or Estimate.....	41,530,507	277	43,551,000	290	45,654,000	292
Unobligated balance ...	89,654	--	--	--	--	--
Total, Available or Estimate.....	<u>41, 620,000</u>	<u>277</u>	<u>43,551,000</u>	<u>290</u>	<u>45,654,000</u>	<u>292</u>

OFFICE OF THE GENERAL COUNSEL

Classification by Objects
2009 Actual and Estimated 2010 and 2011

	<u>2009</u>	<u>2010</u>	<u>2011</u>
Personnel Compensation:			
Washington, DC.....	\$15,408,257	\$16,693,000	\$17,753,000
Field.....	<u>15,149,518</u>	<u>16,038,000</u>	<u>16,387,000</u>
11 Total personnel compensation	30,557,775	32,731,000	34,140,000
12 Personnel benefits	7,086,492	8,408,000	8,790,000
13 Benefits for former personnel	<u>6,057</u>	<u>6,000</u>	<u>6,000</u>
Total pers. comp. & benefits	37,650,324	41,145,000	42,936,000
Other Objects:			
21 Travel and Transportation of persons	210,500	218,000	268,000
22 Transportation of things	9,881	27,000	27,000
23.3 Communications, utilities and misc. charges	694,666	685,000	695,000
24 Printing and reproduction	59,052	78,000	78,000
25.2 Other services	1,214,848	1,042,000	1,067,000
26 Supplies and materials	1,362,375	298,000	423,000
31 Equipment	<u>328,700</u>	<u>58,000</u>	<u>160,000</u>
Total other objects	<u>3,880,022</u>	<u>2,406,000</u>	<u>2,718,000</u>
Total direct obligations	<u>41,530,346</u>	<u>43,551,000</u>	<u>45,654,000</u>

Position Data:

Average Salary, ES positions	\$167,630	\$169,614	\$171,611
Average Salary, GS positions	\$105,375	\$106,614	\$112,603
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) 2009 operations are described below:

ADMINISTRATION AND RESOURCES MANAGEMENT

OGC continues to focus on the development of shared resources for the electronic exchange of data nationwide. In 2009, OGC developed a SharePoint portal that will allow attorneys to manage their work items and track all cases within OGC. Each office will have a workplace for document sharing and the capability to record work assignments. 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.

Animal Welfare and Horse Protection Acts: OGC expended substantial resources in connection with the Animal Welfare and Horse Protection Act programs. OGC attorneys serve as agency counsel in administrative enforcement actions brought under these two statutes and in FY 2009, OGC initiated 22 enforcement cases and 43 decisions were issued in ongoing cases. In addition, OGC reviewed and provided drafting assistance to the Animal and Plant Health Inspection Service (APHIS) in connection with a number of rulemaking actions.

National Organic Program: OGC provided legal assistance to Agriculture Marketing Service (AMS) in connection with its ongoing rulemaking to define access to pasture requirements for livestock, reviewed agency decisions on appeals from proposed revocation or suspension of certification by accredited certifying agents and represented AMS in administrative enforcement actions brought by the agency.

Perishable Agricultural Commodities Act (PACA): In FY 2009, OGC's Trade Practices Division devoted significant resources to the provision of legal services in support of the Perishable Agricultural Commodities Branch of AMS. OGC received 18 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. Violations of the PACA may result in a civil penalty, or suspension or revocation of license, and individuals found to be responsibly connected to a violating entity are subject to employment sanctions. In FY 2009, attorneys in the division assisted the PACA Branch in investigating whether a responsibly connected individual was affiliating with several PACA licensees in violation of his employment sanctions. When sufficient evidence to prove affiliation was gathered, OGC filed an administrative complaint against the individual and the licensees. Attorneys closed 7 PACA enforcement actions after resolution of the case, and PACA collected \$100,000 in civil penalties from one company as a result of a negotiated settlement of the disciplinary action. In FY 2009, attorneys acting as presiding officers issued 46 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 84 reparation cases in which decisions were written either after a hearing or as a result of written procedure as provided in the PACA rules of practice. A total of \$7,540,589 was at issue in those decisions. In addition, OGC reviewed 2 rulemaking dockets for amendment of existing PACA regulations.

Packers and Stockyards Act: In FY 2009, OGC also dedicated 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 the joint investigation of two livestock packers in cooperation with the Commodities Futures Trading Commission. OGC attorneys assisted in the investigations by conducting a series of investigative depositions and sought additional information relevant to the question of whether the packers violated the Act through their livestock procurement and sales activities. In this fiscal year, P&S referred 76 administrative cases to OGC. These referrals seek the issuance of an administrative complaint for the enforcement of the requirements of PSA, legal review of agency action, or help with an investigation. The Trade Practices Division filed 40 new administrative enforcement complaints under PSA in FY 2009, with 20 administrative cases concluded with orders and civil penalties which total \$364,700. 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 order to prepare a legal analysis of the violation; then refer the case to the appropriate U.S. Attorney's office for action. In FY 2009, the Trade Practices Division referred 18 cases to U.S. Attorneys' offices around the country. Twenty-six DOJ referrals were resolved for penalties totaling \$58,580. Additionally in support of the P&S Program, OGC reviewed and assisted in drafting several rulemaking dockets, most notably, GIPSA's proposed rule to implement amendments to the P&S Act made by the 2008 Farm Bill.

Animal and Plant Health Laws and Wildlife Services: During FY 2009, OGC reviewed, assisted in drafting and approved for legal sufficiency over 200 proposed rules, final rules, emergency orders, environmental assessments and notices for publication in the Federal Register. OGC assisted 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 assistance to APHIS with its proposed revision of nursery stock import regulations which would prohibit or restrict importation of specified plants from specified regions of the world based on evidence of the potential for harm to U.S. agriculture or the environment. OGC also worked with APHIS staff to develop and implement regulatory programs for preventing the spread of emerald ash borer, citrus canker and citrus greening, imposing more rigorous import restrictions to protect against highly pathogenic avian influenza (HPAI), specifying quarantine requirements for light brown apple moth, establishing importation and interstate movement restrictions for viral hemorrhagic septicemia, proposing interstate restrictions and a voluntary herd certification option for chronic wasting disease, and revising interstate movement rules, flock certification standards, and indemnity provisions for the scrapie program. OGC supported APHIS animal health

programs assisting with the agency's regulatory program for bovine spongiform encephalopathy (BSE). OGC provided assistance to APHIS in the development of a comprehensive BSE rule that would govern the importation of ruminants and ruminant products into the United States from all trading partners. OGC also assisted with new regulatory approaches for the bovine tuberculosis and brucellosis programs that would modernize the regulatory systems to allow APHIS to address disease risks more quickly and reduce or eliminate unnecessary burdens on states and producers.

Meat, Poultry, and Egg Products Inspection Acts: OGC assisted Food Safety and Inspection Services (FSIS) in the development of proposed rules, final rules, notices, and directives to improve FSIS' food safety programs. OGC assisted FSIS in connection with the implementation of the Farm Bill provisions that would allow interstate shipment of state-inspected products; authorize and require FSIS inspection of catfish production. OGC also worked with FSIS in the preparation of rules to improve recall procedures by making available to the public lists of retail consignees involved in recalls, adopting new procedures governing the filing and content of petitions for rulemaking or other action, and requiring a ban on the slaughter of non-ambulatory cattle. During the fiscal year, OGC worked on a substantial number of criminal, civil, and administrative enforcement 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:

- OGC assisted in the implementation of the commodity program provisions of the 2008 Farm Bill, including overseeing rulemaking for various complex and novel programs. These programs include Supplemental Revenue Assistance Program (SURE) and Biomass Crop Assistance Program (BCAP). OGC provided critical input on BCAP and other vital programs this year, including livestock programs, emergency programs for bee-keepers and others, new dairy support efforts, and a special grant program for aquaculture covering all states willing and able to participate. This input required thorough legal research, skilled writing and editing, and policy recommendations to ensure full agency compliance with the panoply of statutory and regulatory requirements.
- OGC provided significant assistance with respect to the procurement of large quantities of commodities, and associated ocean freight, for international feeding and developmental programs. OGC also provided similar advice with respect to the procurement of commodities for use in domestic feeding programs. This year, OGC worked with procurement officials on major efforts to address sustainable agriculture goals, streamline and improve procurement operations, and assure enforcement of contractual provisions directed at nutrition, food safety, and animal welfare.

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 assistance to FAS and the Office of the United States Trade Representative (USTR) in a number of World Trade Organization (WTO) disputes. First, in the Brazil-Cotton matter, OGC attorneys participated significantly in proceedings in Geneva, Switzerland before the WTO. In particular, OGC drafted and argued all submissions related to the CCC export credit guarantee program before the WTO arbitral panel adjudicating the authorized level and nature of countermeasures that Brazil could levy against the United States. Second, OGC attorneys participated extensively in consultations with China and in the drafting of submissions of the United States in the

case brought by China against the United States challenging the "DeLauro Amendment," a provision of appropriations law prohibiting the FSIS from implementing a regulation allowing imports from China of processed, cooked chicken. Third, OGC attorneys participated extensively in WTO consultations requested by Canada and Mexico over the United States' new retail "country of origin" labeling laws for meat and fresh and frozen fruits and vegetables (COOL) and the AMS implementing regulations. OGC attorneys also drafted voluminous responses to questions submitted to the United States in connection with these disputes.

- OGC attorneys contributed significantly in the accomplishment of major international food assistance initiatives. For the Local and Regional Food Aid Procurement Pilot Project (PPP), OGC provided critical assistance for new program guidelines. OGC was instrumental in the drafting of the umbrella agreement between the CCC and the World Food Program (WFP) that would govern the donation of funds to WFP under the PPP. Likewise, OGC participated heavily in FAS's final rule substantially revising the regulations governing the McGovern-Dole International Food for Education and Child Nutrition Program and Food for Progress Program, as well as amendments to USDA regulations governing acquisitions of commodities for such programs. This effort by OGC and the agency involved major programmatic revisions.

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

- OGC provided substantial advice and assistance in the implementation of the Nutrition Title of the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill), and the nutrition related provisions of the American Recovery and Reinvestment Act of 2009 (ARRA). First, OGC provided skillful analysis of provisions of ARRA which suspended the ineligibility of able bodied adults who do not obtain employment under the Supplemental Nutrition Assistance Program (SNAP). OGC also evaluated the interrelationship between the ARRA provisions and other statutory requirements affecting the eligibility of unemployed SNAP applicants. Second, OGC helped develop regulatory provisions implementing permanent debarment authority provided by the 2008 Farm Bill. Third, OGC supported the Department's civil rights objectives by advising the Food and Nutrition Service (FNS) in its efforts to award a grant to the Cuban American National Council to improve SNAP program access for Spanish speaking applicants. Fourth, OGC continued to work closely with Department officials engaged in evaluating and sanctioning States administering SNAP under the quality control system, including defending appeals filed by State agencies that are liable for excessive error rates.
- OGC reviewed applicable authorities in conjunction with FNS's assessment of the agency's preparedness for a potential H1N1 pandemic. In this effort, OGC drafted legislation to authorize the Secretary to provide SNAP benefits to school children unable to obtain meals under the National School Lunch Program (NSLP) because schools closed due to a public health emergency.
- OGC secured several significant litigation victories in FY 2009. In Re: Anitra Hayse, Petitioner, OGC obtained a precedent-setting dismissal for lack of jurisdiction by successfully arguing that the petitioner, against whom FNS holds a claim subject to tax offset under the Treasury Offset Program, had no further administrative remedies. OGC also provided valuable assistance to DOJ by reviewing and revising pleadings in Deron Schools of New Jersey v. USDA. The case challenged longstanding FNS policy requiring that meals be served by participating public or private non-profit schools in order to be eligible for reimbursement under NSLP. Similarly, in Manuel A. Llavona-Santos v. Commonwealth of Puerto Rico, OGC worked closely with DOJ defending against challenges to the Commonwealth's implementation of WIC vendor cost-containment and food package requirements mandated under the Child Nutrition and WIC Reauthorization Act of 2004.

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 was substantially involved in the defense and resolution of civil rights litigation and Departmental complaints involving Farm Loan Programs. The division also assisted FSA in its implementation of the Secretary's temporary moratorium on all farm foreclosures. CDD continued to provide legal advice and review of the 2008 Farm Bill's new and revised Farm Loan Programs, many affecting socially disadvantaged farmers and of high priority to the new Administration.
- **Rural Development (RD):** CDD assisted RD in the implementation of Farm Bill energy programs (9003, 9004, 9005, 9007, and 9009) and the Rural Microentrepreneur Assistance Program. The division provided assistance in RD's phase out of the Alternative Agricultural Research and Commercialization Corporation (AARCC) Program and its implementation of new funding authorities and limitations in the ARRA. CDD continued to be heavily involved in the consolidation of RD loan guarantee and grant regulations and subsequent field training. The division completed its global settlement of approximately 300 pending prepayment Federal court cases challenging statutorily mandated retroactive prepayment restrictions in the Multi-Family Housing Program. The division further assisted RHS in reviewing and expanding its foreclosure mitigation procedures during the 2009 housing crisis.
- **RMA and the Federal Crop Insurance Corporation (FCIC):** CDD provided assistance in implementing 2008 Farm Bill provisions regarding crop insurance and in preparing for the renegotiation of the Standard Reinsurance Agreement. CDD continued to provide program expertise to OGC field offices, the Office of Inspector General, and the DOJ regarding various crop insurance issues and litigation matters. CDD also assisted the FCIC Board of Directors in considering many new and unusual products as a result of the 2008 Farm Bill provisions.

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

- **Major 2009 Issues:** During FY 2009, RUD provided legal advice and assistance to the Rural Utilities Service (RUS) in implementing ARRA. RUS was responsible for implementing, \$8.6 billion in new broadband loan and grant authority and \$3.3 billion in additional water and waste loan and grant authority. RUS required a broad range of legal services to carry out these infrastructure initiatives. RUD attorneys assisted in program design, interpretation of ARRA and Office of Management and Budget guidance, public hearings, outreach, training, application review, notices of funding availability and implementing documentation necessary to deliver the new Broadband Initiatives Program (BIP). In addition to legal services required to deliver the standard RUS water and waste programs, ARRA-funded loans and grants for these RUS programs imposed Davis Bacon Act requirements and Buy American requirements for the first time. RUD attorneys provided substantial legal assistance to RUS in developing standards and procedures for assuring compliance with ARRA's requirements.
- **Green Energy Initiatives:** Historically, the RUS loan guarantee program has been used primarily for conventional fossil fueled electric generation projects. Recently, the challenges to such projects have been mounting. In response, RUS has demonstrated increasing interest in financing "greener" technologies, such as biomass, carbon-sequestration, integrated gasification combined cycle and wind. RUD has provided substantial legal assistance in evaluating the scope of RUS's legal authorities for financing these diverse technologies, some of which are cutting edge and many of which involve borrowers who are not established electric co-operatives--RUS's traditional constituency.
- **Climate Change:** RUD attorneys increasingly provide legal counsel to RUS in defensive litigation and National Environmental Policy Act compliance. Lately, RUS has shown increasing interest in developing programs to implement its relatively new statutory authority to make loans for energy efficiency and conservation. RUD attorneys provide legal advice regarding the authorized uses of this authority, interpret statutes and regulations to fit this new context, and adapt legal documents to support those transactions that have novel aspects for 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.

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 the Forest Service in developing a new planning rule.
- **Administrative appeals.** OGC continues to advise the Forest Service regarding the application of the agency's administrative appeal regulations.
- **Litigation.** As of September 30, 2009, approximately 154 cases involving NEPA, NFMA and/or ESA issues were pending, including cases concerning the Roadless Area management, Sierra Nevada forest plan amendments, travel management, minerals, and energy corridors.

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 provided a three-day contract law course; and representation in numerous suspension, debarment proceedings, and bid protest.
- OGC provided advice regarding implementation of stewardship contract projects to achieve needed project activities.
- OGC provided legal assistance on several Forest Service regulations aimed at providing relief to the timber industry in light of severely declining timber market conditions.
- OGC provided substantial legal advice on Forest Service rule governing the disposal of forest products to the general public and to Indian tribes.
- OGC provided advice and assistance to the Forest Service concerning implementation of 2008 Farm Bill provisions on tribal access to forest products for traditional and cultural purposes.
- OGC provided legal advice on reauthorizing the Secure Rural Schools and community Self-Determination Act of 2000 and extensive legal assistance in implementing the reauthorized Act.

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

- Drafting proposed directives on groundwater resources on NFS lands; revisions to the Forest Service's national recreation fee pass policy; the Continental Divide National Scenic Trail; communications sites and authority in the Farm Bill for closures for tribal traditional and cultural practices.
- Updating a memorandum of understanding with the Boy Scouts of America (BSA) for BSA uses of NFS lands and successful negotiation of a long-term permit and for the military training facilities at Camp Shelby in Mississippi.
- Successful negotiation with federal power marketing agencies regarding electric transmission lines operated on NFS lands.

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, including the Forest Service, Natural Resources Conservation Service, and Agricultural Research Service. 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. In climate change matters, OGC continues to expand its legal services in this area by providing legal advice related to federal cap and trade proposals, ecosystems services, and carbon offsets to both the newly created Office of Ecosystem Services and Markets and the reorganized Climate Change Program Office.

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, the Environmental Quality Incentives Program, the Farm and Ranch Lands Protection Program, the Grassland Reserve Program, Wetland Reserve Program, Wildlife Habitat Incentives Program, and the Healthy Forest Reserve Program, including:

- Providing legal analysis and drafting services in the development of the Department's final regulations and requests for proposals under the 2008 Farm Bill conservation authorities.
- Advising on the implementation of ARRA funds under the Emergency Watershed Protection Program.
- Advising on and drafting filings for administrative appeals which raise novel issues, including Equal Access to Justice Act issues.
- Negotiating resolutions to conservation easement violations under the Wetland Reserve Program.

Pollution Control: The OGC Pollution Control Team (PCT) provided legal services for all USDA agency matters related to the Resource Conservation and Recovery Act and CERCLA. The PCT obtained substantial contributions to cleanup costs of more than \$187.3 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. Examples included:

- Holden Mine cleanup, estimated to cost approximately \$80 million, OGC has dedicated significant resources to negotiating cleanup of the site by the responsible party and anticipates issuing a cleanup Plan for public comment during FY2010.
- Legal support to the Forest Service as the lead agency for the cleanup of 9 phosphate mine sites contaminated with selenium in southeastern Idaho. The contamination costs are projected to run from \$25 to \$80 million per site.
- Committed significant resources in the American Smelting and Refining Company (ASARCO) LLC bankruptcy matter recovering response costs or damages over \$172 million.

LEGISLATION, LITIGATION, AND GENERAL LAW

Legislation: During FY 2009, OGC reviewed 170 legislative reports on bills introduced in Congress or proposed by the Administration, and cleared for legal sufficiency written testimony of 695 witnesses testifying on behalf of the Administration before Congressional committees. The 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. The 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, most significantly the FY 2010 Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act.

Litigation: The Litigation Division, in coordination with attorneys from the DOJ and other divisions in OGC, is responsible for presenting USDA's legal position in cases on appeal. During FY 2009, the

Litigation Division handled approximately 300 such appellate matters, including 97 new matters opened during this period.

The Litigation Division's responsibilities include reviewing briefs and advising DOJ in cases affecting USDA programs before the United States Supreme Court and circuit courts. In FY 2009, USDA obtained a favorable decision from the Supreme Court in Summers v. Earth Island Institute, a case involving the Forest Service Decision-making and Appeals Reform Act and the NEPA. In addition, DOJ and USDA successfully opposed certiorari in several Supreme Court cases, including: a) Navajo Nation v. United States Forest Service, a case involving the application of the Religious Freedom Restoration Act in the context of public land management; and b) In re: Peanut Crop Insurance Litigation, Marvin Taylor Barnhill, et al. v. Ann Veneman, Risk Management Agency, a class action brought by peanut farmers challenging the FCIC's indemnification rate for losses sustained under the terms of a Multiple Peril Crop Insurance Policy. Based on Litigation Division recommendations, USDA also filed an amicus brief in Wheeler v. Pilgrim's Pride Corp., an *en banc* proceeding before the Fifth Circuit involving a circuit split on the question of whether an entity can be sanctioned for violating certain provisions of PSA in the absence of evidence that such violation had an adverse impact on competition.

The Litigation Division also defends all USDA Judicial Officer decisions enforcing the Packers & Stockyards Act, the PACA, the Animal Welfare Act, and the Horse Protection Act. Litigation Division attorneys personally brief and argue these cases before the U.S. Courts of Appeals. During FY 2009, the Litigation Division handled 10 such cases, obtaining favorable results in 5, an adverse result in 1, and settling 1. The other 3 cases are still pending.

The cases handled by the Litigation Division in FY 2009 included Brock v. USDA, an Animal Welfare Act case in the Fifth Circuit. The Litigation Division filed USDA's brief in November 2008 and argued the appeal in June 2009. The Secretary had determined that the petitioners, who described themselves as volunteers for a non-profit zoo, acted unlawfully as "dealers" under the Animal Welfare Act when they helped arrange the transfer of zoo animals to a third party who subsequently killed some of the animals. On June 24, 2009, the Court of Appeals upheld the Secretary's determination. The Litigation Division also defended USDA in Todd Syverson, d/b/a Syverson Livestock Brokers v. USDA, PSA case before the Eighth Circuit. The Litigation Division filed a brief in January 2009, defending the Secretary's determination that the petitioner, acting as a livestock market agency and dealer, violated the P&S Act by committing unfair and deceptive practices when he engaged in a practice of undisclosed self-dealing designed to inflate the selling price of cattle he sold on consignment. The case was argued in November 2009, and a decision from the Court of Appeals is pending.

The Litigation Division also is responsible for preparing USDA's official recommendations to DOJ on whether to appeal adverse decisions of various lower courts, or to participate as amicus in Supreme Court or other appellate cases. In FY 2009, the Litigation Division's attorneys prepared 42 such recommendations.

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.

In addition to performing significant legal services dealing with issues and litigation support under FOIA, the Privacy Act, and the FTCA, attorneys in GLD addressed a much larger number of issues than in the recent past in the areas of FACA, ethics and conflicts, employment law, and the Fair Labor Standards Act.

Moreover, during FY 2009, GLD also spent a great deal of time working on implementing various components of the 2008 Farm Bill. Foremost was the creation and establishment of the National Institute

of Food and Agriculture, which replaced the Cooperative State Research, Education, and Extension Service. GLD helped NIFA draft and publish one set of administrative requirements that span all competitive and non-competitive non-formula Federal assistance programs, as well as drafting and publishing program specific regulations for the Specialty Crop Research Initiative, Agriculture and Food Research Initiative, Organic Agriculture Research and Extension Initiative, and Section 406 National Competitive Grants Program.

Aside from its work with NIFA, GLD assisted with the reorganization of Departmental Administration and the drafting of various documents for the Continuity of Operations Plan. GLD also detailed how activities of the Pocatello Supply Depot can be coordinated within existing authorities, and it provided positive advice on implementing projects of the Office of the Secretary, such as The People's Garden Initiative.

Finally, on the litigation front, GLD successfully assisted in e-discovery on a case requiring the collection of electronic information from some 1,500 employees across the country. This was the first major effort in this area and more such e-discovery efforts are expected in the future. GLD also has been actively involved in two ongoing patent cases involving ARS licensees under the Bayh-Dole Act that have precedent-setting implications for the entire government.

CIVIL RIGHTS

OGC's Civil Rights area is organized into two separate and distinct divisions, each led 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 pursuant to 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 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 2009, CRPCCD provided extensive EEO and civil rights training for most of USDA's nineteen sub-agencies. 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 2009, CRLD addressed employment class certification in Gary Smith, et al. v. Vilsack; and worked on pending employment class actions such as Clifford Herron, et al., v. Vilsack, Jody Smith, et al., v. Vilsack, Darrell Harley, et al., v. Vilsack, and Joe Sedillo, et al., v. Vilsack.

CRLD also defends USDA in Section 741 cases, administrative program discrimination cases, before Administrative Law Judges. During FY 2009, CRLD started to litigate Richard Pearson v. Vilsack and Charles McDonald v. Vilsack, two program discrimination cases pending before USDA Administrative Law Judges. CRLD continues to coordinate the defense of USDA with Department of Justice (DOJ) in a myriad of program individual cases with numerous plaintiffs and class action cases brought by plaintiffs who allege discrimination in the delivery of USDA direct loan and other programs:

- Chiang, et al., v. Vilsack – Dismissal of class complaint appealed to the 3rd Circuit and waiting on decision;
- Garcia, et al., v. Vilsack - Case alleging discrimination by FSA against Hispanic farmers and ranchers; the D.C. Circuit Court of Appeals affirmed the District Court decision that failure to investigate claims of discrimination is not actionable under the Administrative Procedure Act (APA) after affirming the denial of class certification;
- Keepseagle, et al., v. Vilsack - Class action alleging discrimination by FSA against Native American farmers and ranchers; class certified by U.S. District Court; discovery has concluded and briefing class certification for economic damages;
- Wise, et al., v. Vilsack – Case 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 is not actionable under APA and the class cannot be certified, the case was transferred to the Eastern District of North Carolina; and
- Love, et al., v. Vilsack - Case alleging discrimination by FSA against female farmers and ranchers; the D.C. Circuit Court of Appeals has affirmed the District Court decision that failure to investigate claims of discrimination is not actionable under the APA 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 benefits programs, continues to require significant effort by CRLD. As of December 8, 2009, 69 percent of the 22,721 eligible Track A claims filed to date were decided in favor of the claimant. The government has paid over \$999 million to prevailing Track A claimants and provided approximately \$38 million in debt relief.

Seventeen lawsuits (In Re Black Farmers Litigation) with 29, 938 claims 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. Parties have been negotiating a settlement of this case since October 2008, and President Obama has placed in his 2010 budget \$1.15 billion for monetary relief in this case only if it is settled.

Pursuant to Secretary Vilsack's vision to improve USDA's record on civil rights and move USDA into a new era as a model employer and premier service provider, CRLD is working closely with DOJ to evaluate USDA's major Federal court cases for settlement including several of the ones identified above.

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

Rural Development. Eastern Region attorneys continued to provide significant legal resources to assist RD. 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 servicing and 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. The majority of the multi-family housing related legal work done by the Eastern Region offices is reviewing loan proposals and preparing closing instructions to guide the agency through the legal completion of these transactions.

RUS and RBS. Eastern Region OGC offices assisted with rural infrastructure development and job creation for the American economy by reviewing grant and loan proposals and preparing closing instructions to guide the agency through the legal completion of these transactions.

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.

Forest Service Litigation. Eastern Region attorneys serve as USDA legal counsel on numerous litigation matters. Many of these cases deal with challenges to the Forest Service's plan implementations pursuant to the NEPA, NFMA and ESA.

Oil and Gas and Energy Issues. In FY 2009, Eastern Region attorneys continued to advise and assist the Forest Service with significant decisions involving the ownership of oil, gas and mineral estates. In Pennsylvania Oil and Gas Asso et al. v. Forest Service, PAPCO v. US Forest Service, Minard Run v. Forest Service, Duhring Resource Co. v. US Forest Service and FSEEE v. Forest Service, OGC attorneys are assisting in 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.

Other Forest Service Issues. As urban areas continue to expand towards and interface with National Forests, the Eastern Region continues to see an increase in boundary line disputes, trespasses, title claims and access disputes. Eastern Region also continues to see an increase in the number of applications for special use permits, including permits to locate electrical transmission lines on National Forest System lands.

NRCS. Eastern Region attorneys continue to handle a significant amount of work associated with NRCS acquisition of easements under the Grassland Reserve, 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.

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.

RMA. Eastern Region attorneys have seen an increase in requests by this agency to assist in its defense in numerous RMA crop loss claim cases. Skymont Farms et al. v. FCIC and related cases, Cain Field Nursery, et al. v. FCIC and Scruggs Nursery et al. v. FCIC, are RMA catastrophic insurance cases involving crop damage of \$2.4 million. An Eastern Region attorney in the Montgomery, Alabama office is assisting in defending the agency's decision to deny these claims.

FNS. Eastern Region attorneys have also seen an increase in debarment cases brought against store owners violating the SNAP regulations by illegally trafficking program benefits. Each office in the Eastern Region had several of these cases pending in FY 2009. Philomena Affum v. United States is a SNAP trafficking case that has been taken all the way to the D.C. Circuit Court of Appeals in which Harrisburg, Pennsylvania attorneys are assisting in defending the agency's assessment of permanent disqualification as the appropriate penalty for trafficking violations.

Central Region

FSA Collection cases. Central Region attorneys handled a significant number of debt collection cases arising out of farm loan liquidations, several of which developed into conversion and false claims cases. In the *Dustin Ray Sherwood* criminal case involving false claims made to obtain loans from USDA, the northern Missouri farmer was sentenced to 9 months in custody and ordered to repay more than \$500,000 in fraudulently obtained loans.

RMA Litigation. Central Region attorneys represented the agency in 2 lengthy administrative appeal proceedings, *B & G Potato Company* and *Belzer Brothers Potato Company*, both of which involved amounts at issue of over \$500,000 regarding prevented planting and actual production history issues. In another administrative appeal, *Barnett*, Central Region OGC attorneys reached a settlement in a case which will impact several other pending administrative appeals involving non-irrigated practices for corn grown in the Texas high plains. The pro-rata settlement reached with multiple insurers reduced RMA's original \$13 million exposure to \$4 million. Central Region attorneys also defended the agency in litigation involving a claim for \$16 million based upon the agency's efforts to wind down the crop insurance affairs of a failed insurance company, which is being liquidated by a State court proceeding in Nebraska. *Granite Reinsurance company Ltd. v. State of Nebraska et al.* involves complex issues of State and Federal jurisdiction, multi-district litigation procedure, and many competing insurance claims in the multi-million dollar range.

Rural Development:

Multi-family Housing Litigation. In *Steinbeisser v. USDA, et al.*, several tenant advocacy organizations sued USDA, seeking injunctive relief to halt RHS actions which found the owners of 7 multi-family housing projects in default. Central Region attorneys are coordinating the RHS response to this litigation with OGC attorneys in the Community Development Division.

Single-family Housing Foreclosures. Foreclosures of direct SFH loans declined overall, but litigation increased due to a greater number of prior lien bank foreclosures, requiring defense of the RHS second liens taken when participation loans were made.

Community Facility Loans. A large number of loan closings have been handled by Central Region attorneys due to continuing efforts to assist communities recovering from Hurricane Katrina and the Greensburg, Kansas tornado. Loans and grants from ARRA stimulus money are creating an increase of legal work and advice required by the end of calendar year 2009.

Kansas City Commodity Office. Complex litigation continued to be handled by Central Region attorneys in the multi-million dollar bankruptcy of an AbilityOne contractor. In *Michael E. Collins, Chapter 11 Trustee, v. Committee for Purchase from People who are Blind or Severely Disabled, et al.*, several issues impacting litigation during 2009 developed as a result of whistleblower reports which suggested procurement fraud and possible food safety violations. These reports are being investigated while settlement discussions and mediation continues.

Another Commodity Office case handled by Central Region attorneys is under consideration for civil fraud by the Department of Justice. USDA's potential fraud claims against *R & J Feed Company* arose in connection with the non-fat dry milk drought relief programs intended to aid western livestock producers. OIG and OGC are assisting DOJ in determining how to collect and resolve these claims.

NRCS issues. In addition to providing increased legal advice regarding easement servicing in the Wetlands programs, Central Region attorneys provided assistance in 2 major construction contract suits requiring extensive OGC time and resources. The first matter involved a dispute arising out of the construction of a dam for the Bayou Bourbeaux in Louisiana. After lengthy mediation proceedings before the BCCA, this matter was settled with OGC assistance for 40 percent of the amount claimed. The second contract dispute case, *J.H. Parker Construction Co., Inc. v. The United States* was a U.S. Court of Claims case for damages

in the amount of \$3,040,960. The plaintiff alleged defective specifications, differing site conditions and other contract breaches arising out of a \$6.9 million NRCS contract for construction of a recreational lake in the Homochitto National Forest in Mississippi. While the government conceded the merits of the defective specifications claim, the amount of damages was contested, and ultimately the Court determined damages amounted to approximately 10 percent of the claimed amount.

Forest Service matters. After 7 years of OGC legal work, and in coordination with several different Federal agencies, the first 20-year Special Use Permit was developed with assistance from Central Region attorneys. This Special Use Permit will enable troops from the Joint Forces Training Center near Hattiesburg, Mississippi to practice combat skills on 117,000 acres of the De Soto National Forest.

Mountain Region

Roadless Rule Issues. In FY 2009, Mountain Region attorneys continued to assist with the development and negotiation of the Colorado Roadless Rule. Mountain Region attorneys have spent significant time advising the Rocky Mountain region of the Forest Service on handling the oil and gas leases in inventoried roadless areas as well as in submitting request for Secretarial approval for activities in inventoried roadless areas. Mountain region attorneys have been directly involved in developing litigation positions in Wyoming and California to clarify the applicability of the 2001 roadless rule in the Rocky Mountain States.

Service Company of Colorado. These expedited trial type hearings must be conducted within 90 days from the time the trial is requested. The Tacoma Hearing challenged the factual basis for preliminary terms and conditions filed by the Forest Service during the Federal Energy Regulatory Commission (FERC) relicensing proceeding for the Tacoma facility. Ultimately the Hearing Officer upheld the Forest Service on all contested factual matters, establishing strong precedent for the Forest Service in future proceedings. During the course of these proceedings the energy company chose not to pursue a trial type hearing in another Colorado project. Several months later, Mountain Region attorneys again successfully resolved another dispute involving terms and conditions on a FERC project in Spearfish, South Dakota based upon their experience in the Tacoma proceeding.

Travel Management. Mountain Region attorneys has provided assistance to the Forest Service in transitioning to the new motor vehicle travel management regulations. Mountain Region attorneys are currently defending 7 lawsuits and are spending considerable time advising the Forest Service on travel management decisions and analyses and responding to administrative appeals. The Forest Service has a deadline for transitioning to the new rule, and this is generating considerable work for both them and OGC. NEPA and NFMA claims challenging travel management and travel planning include Wildlands CPR v. Tidwell, (Snowmobile grooming – Pioneers Wilderness Study Area – Beaverhead-Deerlodge NF); Russell County v. USFS, (Travel Management Plan Little Belts – Lewis and Clark NF); and Citizens for Balanced Use v. Heath, (Travel Management Plan – Gallatin NF).

Land Exchanges. Mountain Region attorneys have been extensively involved in advising the Forest Service in several legislated land exchanges. These include the Sandia Pueblo Land Exchange settlement with the pueblo over title to approximately 10,000 acres of land on the west side of the Sandia Mountain and the Yavapai Ranch Land Exchange legislation was passed in 2003 and has still not been accomplished. During the past year Mountain Region attorneys have advised the Forest Service on the issue of control over the appraisal process.

NEPA. Mountain Region attorneys continued to handle a wide range of legal issues arising under NEPA. Examples include challenges to Forest Service travel management plans, e.g., Wildlands CPR v. Tidwell; timber sale projects involving extensive NEPA and NFMA challenges, e.g., Alliance for the Wild Rockies v. Cottrell; and wildlife management, e.g., Alliance for the Wild Rockies v. USFS.

Water Rights. Mountain Region attorneys continued to represent the Forest Service in water rights issues.

For example, Mountain Region attorneys successfully defeated a proposal to build a reservoir in a wilderness area in southwest Colorado. Pine River Irrigation District v. U.S. Mountain Region attorneys also continue to work collaboratively with the State of Arizona and the Salt River Project in a precedent setting case defending the Arizona in stream flow laws.

Land, Property, and Alaska National Interest Lands Conservation Act. Mountain Region attorneys assisted the Forest Service and NRCS with land exchanges, title and easement reviews, and actions under the Quiet Title Act. This includes successful resolution of a Quiet Title Act case which effectively prevented the construction of first reservoir in a wilderness area since passage of the Wilderness Act. Pine River Irrigation District v. US.

Oil and Gas and Energy Issues. In FY 2009, Mountain Region attorneys handled significant litigation involving challenges to oil and gas operations on NFS lands. For example, Mountain Region has continued to actively participate in 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 pending in the Federal district for Colorado.

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. Mountain Region attorneys also provided significant advice regarding misconduct investigations; major disciplinary issues; associated potential criminal activities, and mixed-case processing considerations. Moreover, a regimen of Regional employment law conference calls was established to provide common procedures, understanding and best practice standards concerning common issues in this arena.

Pollution Control. Mountain Region attorneys continued to handle a wide variety of matters involving CERCLA. In FY 2009, Mountain Region attorneys assisted in 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.

Pacific Region

Affirmative Fire Trespass Claims. The Pacific Region actively pursued cost-recovery actions against parties that were responsible for starting fires on NFS lands. In the Copper Fire litigation, Pacific Region attorneys helped the United States obtain a jury verdict of \$36.5 million. The jury verdict included \$28.8 million as compensation for intangible environmental damages. As the result of the Pacific Region's successful affirmative fire program, the United States has recovered more than \$150 million in damages in the Eastern District of California alone. A substantial portion of the money recovered in the Pacific Region's affirmative fire cases has been returned to the Forest Service to repair some of the damage caused by the fires.

Alaska Subsistence Program. The Pacific Region continued to advise the Federal Subsistence Board on controversial issues regarding subsistence resources for rural residents of Alaska. This work included helping to draft the first Civil Rights Impact Analysis for new regulations implementing the Federal Subsistence Program, as well as reviewing the Forest Service's compliance with executive orders on tribal consultation. The Pacific Region also continued to provide support in litigation affecting the Federal Subsistence Program, resulting in a favorable district court decision in Peratrovich v. United States.

Civil Rights and Employment Law. The Pacific Region successfully defended USDA agencies in employment-related litigation before the EEOC, 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 and resolve appropriate cases without litigation. Pacific Region attorneys helped defend the Department before the EEOC in the class action litigation entitled Sedillo v. Vilsack.

Farm Loan Programs. The Pacific Region provided legal advice to the FSA regarding projects and loans funded by the ARRA. It helped FSA make millions of dollars in loans to family farmers and small farming operations, and it helped the agency with farm loan programs in the former Pacific Island Trust Territories. Pacific Region attorneys helped the FSA recover millions of dollars in debt in bankruptcy and other litigation matters, and provided advice to the agency regarding its conservation programs and foreclosure actions.

Grazing. The Pacific Region devoted additional resources to grazing matters because environmental groups are filing more lawsuits challenging the Forest Service's grazing program. The Portland office alone worked on eight district court cases involving grazing. 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.

Hydropower Issues. The Pacific Region provided legal advice to the Forest Service in the complex negotiations that led to the Klamath Restoration Agreement, and 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.

Mining. Pacific Region attorneys worked with the Forest Service to address unauthorized mining activities and unauthorized occupancies by helping the DOJ file civil and criminal enforcement actions. The successful prosecution and civil action in United States v. Tracy resulted in favorable comments from the Governor's Office in Oregon, environmental groups, and the Northwest Mining Association supporting the Department's efforts to address the environmental damages caused by unauthorized mining activities and occupancies.

Natural Resources Litigation. The Pacific Region provided significant assistance to the DOJ in natural resources litigation, including lawsuits involving the 2004 Sierra Nevada Framework; the Herger-Feinstein Quincy Library Group Act; the Survey and Management Plan Amendment to the Northwest Forest Plan; the Columbia Gorge National Scenic Act; the disposal of tailings from the Kensington Mine in a lake on the Tongass National Forest, which the Supreme Court resolved favorably in 2009.

Pre-Decisional Environmental and Natural Resources Advice. The Pacific Region provided pre-decisional advice to the Forest Service on many significant environmental and natural resources matters to reduce the vulnerability of agency decisions in litigation. This included advice on administrative appeals of timber sales in roadless areas in view of Secretary Vilsack's 2009 directive on roadless areas; regulation of outfitting and guiding activities in Alaska that may threaten resources of the national forests; revisions to land and resource management plans; salvage and green timber sales; fuels and hazard reduction projects; and grazing allotments.

Rural Development. Pacific Region attorneys provided legal advice to RD regarding projects and loans funded by the ARRA. The Pacific Region helped the RUS obtain adequate security for its loans, and issued loan closing instructions for important water and sewer projects, including a large loan for Native Hawaiians. 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. They worked with the DOJ to defend lawsuits challenging the RHS § 515 Rural Rental Housing Program.

OFFICE OF THE GENERAL COUNSEL

Summary of Budget and Performance
Statement of Department Goals and Objectives

The Office of the General Counsel (OGC) was established in 1910, (70 Stat. 742) as the law office of the Department of Agriculture. 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.

OGC has one strategic goal and five strategic objectives that contribute to all the Department's strategic goals.

Agency Strategic Goal	Agency Strategic Goal	Agency Objectives	Programs that Contribute	Key Outcome
OGC supports all USDA strategic goals	<u>Agency Goal 1:</u> 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.	<u>Objective 1.1:</u> Review of all draft regulations submitted by USDA agencies, and provisions of advice to USDA officials as to their sufficiency. <u>Objective 1.2:</u> Preparation and review for legal sufficiency of all legal documents, memoranda, and correspondence. <u>Objective 1.3:</u> Conduct of 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. <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. <u>Objective 1.5 :</u> Provision of advice and counsel to USDA officials concerning legal issues arising out of USDA programs and activities.	Legal Services Program	Provide effective legal services in a responsive manner to support USDA activities, consistent with the priorities established by the Secretary of Agriculture.

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Selected Accomplishments Expected at the FY 2011 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

Strategic 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 Measure: All OGC's Performance Measures are key measures.

OFFICE OF THE GENERAL COUNSEL

Key Performance Targets:

Performance Measure	FY 2006 Actual	FY 2007 Actual	FY 2008 Actual	FY 2009 Actual	FY 2010 Target	FY 2011 Target
Performance Measure #1 Percentage of USDA regulations reviewed and cleared within statutory and assigned OGC timeframes.	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	95% of USDA regulation reviewed and cleared timely	95% of USDA regulation reviewed and cleared timely
Performance Measure #2 Percentage of formal legal memoranda and other legal documents prepared within assigned 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	87% of legal documents prepared within timeframes
Performance Measure #3 Items of controlled correspondence reviewed for legal sufficiency within assigned 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	95% of correspondence reviewed within timeframes	95% 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	82% of pleadings and filings made timely	82% of pleadings and filings made timely	84% of pleadings and filings made timely	86 % of pleadings and filings made timely	86% 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	Draft legislation provided timely	Draft legislation provided timely	Draft legislation provided timely	Draft legislation provided timely	Draft legislation provided timely
Performance Measure #7 Legislative reports and testimony reviewed within assigned timeframes.	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	95% of legislative reports and testimony reviewed timely	95% 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	Legal advice provided timely	Legal advice provided timely	Legal advice provided timely	Legal advice provided timely	Legal advice provided timely
Total Costs	\$ 38,876,922	\$ 39,168,094	\$ 38,883,791	\$41,530,346	\$ 43,551,000	\$ 45,654,000

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Summary of Budget and Performance
Full Cost by Strategic Goal

Strategic 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.

<u>PROGRAM</u>	<u>PROGRAM ITEMS</u>	2009 AMOUNT (\$000)	2010 AMOUNT (\$000)	2011 AMOUNT (\$000)
Legal Services Performance measures apply	Direct Costs	\$37,650	\$41,145	\$42,936
	Administrative Cost	3,880	2,406	2,718
	Total Costs	\$41,530	\$43,551	\$45,654
	FTE's	277	290	292