

2009 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, 2007, the office had 324 employees of which 313 were permanent full-time employees and 11 were other than permanent full-time employees. There were 159 permanent full-time employees and 8 other than full-time employees located in Washington, D.C., and 154 permanent full-time employees and 3 other than full-time employees in the field.

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

OFFICE OF THE GENERAL COUNSEL

Available Funds and Staff Years
2007 Actual and Estimated 2008 and 2009

| Item | 2007 | | 2008 | | 2009 | |
|--------------------------------|--------------|-------|--------------|-------|--------------|-------|
| | Actual | Staff | Estimated | Staff | Estimated | Staff |
| | Amount | Years | Amount | Years | Amount | Years |
| Salaries and Expenses | \$39,227,490 | 297 | \$39,227,000 | 294 | \$42,852,000 | 304 |
| Rescission | -- | -- | -275,000 | -- | -- | -- |
| Total, Agriculture | | | | | | |
| Appropriations..... | \$39,227,490 | 297 | \$38,952,000 | 294 | \$42,852,000 | 304 |
| <u>Obligations under other</u> | | | | | | |
| <u>USDA appropriations:</u> | | | | | | |
| Hazardous Materials | | | | | | |
| Management Program | 1,468,804 | 11 | 1,700,000 | 11 | 1,700,000 | 11 |
| FS Non-Litigating Sprt | 91,786 | 0 | 150,000 | 0 | 150,000 | 0 |
| Detail (FS) | 16,278 | -- | -- | -- | -- | -- |
| Civil Rights Reimbursables.... | 458,753 | 4 | 892,000 | 7 | 946,000 | 7 |
| AMS User Fees | 782,780 | 5 | 891,000 | 5 | 914,000 | 5 |
| APHIS User Fees | 419,000 | 2 | 556,000 | 3 | 571,000 | 3 |
| GIPSA User Fees | 6,800 | 0 | 6,000 | 0 | 7,000 | 0 |
| FSA User Fees | 11,800 | 0 | 3,000 | 0 | 3,000 | 0 |
| FSIS User Fees | 41,200 | 0 | 24,000 | 0 | 24,000 | 0 |
| Total, Other USDA | | | | | | |
| Appropriations | 3,297,201 | 11 | 4,222,000 | 15 | 4,315,000 | 15 |
| Total, Office of the | | | | | | |
| General Counsel | 42,524,691 | 319 | 43,174,000 | 320 | 47,167,000 | 330 |

OFFICE OF THE GENERAL COUNSEL

Permanent Positions by Grade and Staff-Year Summary
2007 Actual and Estimated 2008 and 2009

| Grade | 2007 | | | 2008 | | | 2009 | | |
|---|---------|-------|-------|---------|-------|-------|---------|-------|-------|
| | 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 | 35 | 24 | 59 | 33 | 24 | 57 | 35 | 25 | 60 |
| GS-14 | 57 | 59 | 116 | 60 | 62 | 122 | 67 | 63 | 130 |
| GS-13 | 15 | 6 | 21 | 14 | 8 | 22 | 10 | 7 | 17 |
| GS-12 | 8 | 7 | 15 | 5 | 8 | 13 | 7 | 10 | 17 |
| GS-11 | 6 | 15 | 21 | 4 | 9 | 13 | 6 | 7 | 13 |
| GS-10 | 3 | -- | 3 | 2 | -- | 2 | 2 | -- | 2 |
| GS-9 | 8 | 10 | 18 | 8 | 10 | 18 | 8 | 10 | 18 |
| GS-8 | 10 | 19 | 29 | 10 | 19 | 29 | 10 | 19 | 29 |
| GS-7 | 8 | 14 | 22 | 8 | 14 | 22 | 8 | 14 | 22 |
| GS-6 | 1 | -- | 1 | 1 | -- | 1 | 1 | -- | 1 |
| Total Permanent Positions | 168 | 158 | 326 | 162 | 158 | 320 | 171 | 159 | 330 |
| Unfilled Positions end-of-year..... | 8 | 5 | 13 | -- | -- | -- | -- | -- | -- |
| Total Permanent Full-time Employment, end-of-year..... | 160 | 153 | 313 | 162 | 158 | 320 | 171 | 159 | 330 |
| Staff-Year Estimate..... | 163 | 156 | 319 | 162 | 158 | 320 | 171 | 159 | 330 |

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, [\$39,227,000] \$42,852,000.

SALARIES AND EXPENSES

| | |
|---------------------------------|--------------------|
| Appropriations Act, 2008..... | \$39,227,000 |
| Budget Estimate, 2009 | <u>42,852,000</u> |
| Increase in Appropriation | <u>+ 3,625,000</u> |

Adjustments in 2008:

| | |
|---|-----------------|
| Appropriations Act, 2008 | \$39,227,000 |
| Rescission under P.L. 110-161 <u>a/</u> | <u>-275,000</u> |

| | |
|-----------------------------------|-------------------|
| Adjusted Base for 2008..... | 38,952,000 |
| Budget Estimate, 2009 | <u>42,852,000</u> |
| Increase over adjusted 2008 | <u>+3,900,000</u> |

a/ The amount is rescinded pursuant to Division A, Title VII, Section 752 of P.L. 110-161.

SUMMARY OF INCREASES AND DECREASES

(On basis of adjusted appropriation)

| <u>Item of Change</u> | 2008 <u>Estimated</u> | Pay Costs | Program <u>Changes</u> | 2009 <u>Estimated</u> |
|-----------------------|--------------------------|---------------|---------------------------|--------------------------|
| Legal Services | \$38,952,000 | +\$ 1,131,000 | +2,769,000 | \$42,852,000 |

OFFICE OF THE GENERAL COUNSEL

Project Statement
(On basis of adjusted appropriation)

| | <u>2007 Actual</u> | | <u>2008 Estimated</u> | | Increase or Decrease | <u>2009 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..... | \$39,168,094 | 297 | \$38,952,000 | 294 | + \$3,900,000 | \$42,852,000 | 304 |
| Unobligated Balance.. | 59,396 | -- | -- | -- | -- | -- | -- |
| Total Available or Estimate..... | 39,227,490 | 297 | 38,952,000 | 294 | + 3,900,000 | 42,852,000 | 304 |
| Rescission..... | -- | -- | +275,000 | -- | | | |
| Total, Appropriation | <u>39,227,490</u> | <u>297</u> | <u>39,227,000</u> | <u>294</u> | | | |

Justification of Increases and Decreases

(1) An increase of \$3,900,000 for the Office of the General Counsel consisting of:

(a) An increase of \$1,131,000 to fund increased pay costs.

Approximately 94 percent of OGC's budget is in support of personnel salaries and benefits, which leaves no flexibility for absorbing increased cost for pay, or any other salary adjustments. OGC can only absorb these increases by reducing staff or reassessing its operating requirements for travel, maintenance of equipment, law library purchases and supplies. As these items comprise only 6 percent of the overall budget, OGC's flexibility is limited, and the only other option is to consider staff reductions. A staff reduction would result in backlogs and delays in reviewing and clearing agency rulemakings and correspondence, and in providing legal advice within requested time frames.

(b) An increase of \$1,537,000 to maintain and improve service delivery.

This critical increase is requested in order to maintain and improve service delivery. In order to insure that agencies of the Department receive adequate legal advice, it is critical that OGC attorneys be involved in decision-making before decisions have been reached. By doing so, legal issues can be identified and addressed at an early stage of decision-making. Placing OGC attorneys in the decision-making process helps insure that Departmental decisions comply with applicable legal requirements, litigation is avoided and improves the government's chance of successfully defending litigation filed against the Department.

Continued absorption of these costs has affected the critical parts of the base program of OGC, such as travel, training, supplies, printing, communication services, law library purchases and computerized legal research. Law library purchases include items such as legal periodicals, legal encyclopedias, State codes, State court decisions, as well as the Federal code, regulations, and court decisions, which enable OGC attorneys to stay abreast of new developments in their areas of the law and to have access to the correct and current versions of the law. Computerized legal research provides OGC attorneys electronic access to legal materials that are not affordable to

purchase or maintain in hard copy. Since budget constraints has limited the purchase of many law library books, OGC attorneys have to rely on computerized legal research for much of their legal research needs. OGC cannot continue to absorb these costs without adversely affecting on board staff and its ability to continue delivery of high legal services.

(c) An increase of \$1,232,000 and 10 staff years for additional legal services.

This increase will enable OGC to meet its objective of providing effective legal services in a responsive manner to support USDA activities, consistent with the priorities established by the Secretary of Agriculture. Without these additional staff years, OGC will not be able to provide the agencies of the Department with adequate predecisional legal advice, training, appeal and litigation legal services that is required. Staffing will consist of 10 attorney positions. The resources are needed in the following areas:

Litigation Division (1): OGC's Litigation Division, includes 3 attorneys and one secretary. The Division handles all USDA appellate matters in Federal and State courts, briefing and arguing cases in the U.S. Courts of Appeals and preparing all USDA recommendations to the Department of Justice regarding appeals of cases lost at the trial level. The Division's appellate litigation workload in all USDA programs areas, but especially in the natural resources area, has burgeoned in the last several years. We are proposing to create an SES position and increase the Division's overall attorney staff to four.

International Affairs and Commodity Programs Division (4): OGC's International Affairs and Commodity Programs Division (IACP), provides legal services in support of the commodity support, disaster payment, and other programs of the Farm Service Agency (FSA) and the international programs and trade-related activities of the Foreign Agricultural Service (FAS). The Division's trade-related workload has increased substantially within the past 3-4 years. Specifically, IACP attorneys have been called upon to assist in the negotiation of international trade agreements, and in the prosecution and defense of trade-related claims before international bodies. In addition, the Division's already heavy commodity programs work is anticipated to expand further as a result of enactment of a new Farm Bill. The Under Secretary for Farm and Foreign Agricultural Services and the Administrators of FAS and FSA have made repeated requests for additional OGC assistance in both of these areas.

Regulatory Division (2): OGC's Regulatory Division provides legal advice and services principally to the Animal and Plant Health Inspection Service and the Food Safety and Inspection Service. As a result of recent findings of Bovine Spongiform Encephalopathy in the United States, the threat still posed by Highly Pathogenic Avian Influenza, and litigation arising from animal and plant health problems in numerous areas, the Division's attorneys have faced huge challenges in the areas of rulemaking and defense of lawsuits challenging USDA's activities. Additional substantial challenges have been posed by citrus canker, emerald ash borer, and other serious and potentially devastating diseases of animals and plants, as well as substantial changes in USDA meat and poultry inspection programs.

Natural Resources Division (1): OGC's Natural Resources Division attorneys are faced with huge demands in the form of environmental challenges to timber sales and other activities on the National Forests. Further, the Division has faced, and will continue to face into FY 2009, substantially increased demands for assistance in connection with land management, mining, and permitting activities. The demands for services in these areas, presented by the Forest Service and other USDA agencies, have risen exponentially in recent past years.

General Law Division (1): OGC's attorneys in the General Law Division are faced with huge challenges in the areas of contracts and procurements and in defense of USDA's competitive sourcing activities. In addition, the demands on the Division's staff have increased greatly in the

areas of USDA's BioPreferred Program (formerly the Federal Biobased Product Preferred Procurement Program) and respecting confidentiality issues arising from USDA's animal identification program activities. Further, the Division has faced, and will continue to face into FY 2009, increased demands for assistance in connection with personnel law matters, tort claims, Freedom of Information, Privacy, and Federal Advisory Committee Act matters, and in the areas of patents, copyrights, and intellectual property. The demands for services in these areas, presented by all agencies and offices of USDA, have risen substantially from FY 2004 through FY 2008.

Kansas City (1): OGC's Kansas City, Missouri, Regional Office is receiving increasing numbers of requests for legal assistance from USDA client agencies, in areas including USDA farm and loan programs, bankruptcy, risk management, and government contract law. These requests are coming from FSA Kansas City Commodity Office, Risk Management Agency officials in Kansas City, and State offices of both FSA and Rural Development serviced by OGC's Central Region. With a current attorney staff of only 7, the Kansas City office is staffed with three fewer attorneys than was the case in the early 1990's.

Geographic Breakdown of Obligations and Staff Years
2007 Actual and Estimated 2008 and 2009

| | 2007 | | 2008 | | 2009 | |
|---|------------|-------------|------------|-------------|------------|-------------|
| | Amount | Staff Years | Amount | Staff Years | Amount | Staff Years |
| Alabama | \$505,273 | 5 | \$518,000 | 5 | \$534,000 | 5 |
| Alaska | 440,667 | 4 | 494,000 | 4 | 518,000 | 4 |
| Arkansas | 1,080,603 | 10 | 1,134,000 | 10 | 1,165,000 | 10 |
| California | 1,944,913 | 16 | 2,008,000 | 16 | 2,100,000 | 16 |
| Colorado | 1,871,037 | 13 | 2,015,000 | 13 | 2,075,000 | 13 |
| District of Columbia | 21,798,929 | 148 | 20,525,000 | 144 | 23,820,000 | 153 |
| Georgia | 2,096,141 | 17 | 2,158,000 | 18 | 2,200,000 | 18 |
| Illinois | 756,471 | 6 | 818,000 | 6 | 843,000 | 6 |
| Minnesota | 781,408 | 7 | 821,000 | 7 | 849,000 | 7 |
| Missouri | 1,187,506 | 11 | 1,249,000 | 11 | 1,287,000 | 12 |
| Montana | 821,977 | 8 | 869,000 | 8 | 897,000 | 8 |
| New Mexico | 625,636 | 6 | 713,000 | 6 | 743,000 | 6 |
| Ohio | 405,363 | 4 | 453,000 | 4 | 472,000 | 4 |
| Oregon | 1,379,729 | 10 | 1,467,000 | 10 | 1,517,000 | 10 |
| Pennsylvania | 1,133,216 | 12 | 1,180,000 | 12 | 1,214,000 | 12 |
| Texas | 890,265 | 8 | 1,006,000 | 8 | 1,039,000 | 8 |
| Utah | 497,294 | 4 | 533,000 | 4 | 564,000 | 4 |
| Wisconsin | 951,666 | 8 | 991,000 | 8 | 1,015,000 | 8 |
| Subtotal, Available or Estimate..... | 39,168,094 | 297 | 38,952,000 | 294 | 42,852,000 | 304 |
| Unobligated balance | 59,396 | -- | -- | -- | -- | -- |
| Total, Available or Estimate..... | 39,227,490 | 297 | 38,952,000 | 294 | 42,852,000 | 304 |

OFFICE OF THE GENERAL COUNSEL

Classification by Objects
2007 Actual and Estimated 2008 and 2009

| | <u>2007</u> | <u>2008</u> | <u>2009</u> |
|---|-------------------|-------------------|-------------------|
| Personnel Compensation: | | | |
| Washington, DC..... | \$15,774,677 | \$15,394,000 | \$17,681,000 |
| Field..... | <u>13,672,236</u> | <u>13,652,000</u> | <u>13,892,000</u> |
| 11 Total personnel compensation | 29,446,913 | 29,046,000 | 31,573,000 |
| 12 Personnel benefits | 6,892,144 | 7,413,000 | 8,242,000 |
| 13 Benefits for former personnel | <u>1,095</u> | <u>1,000</u> | <u>1,000</u> |
| Total pers. comp. & benefits | 36,340,152 | 36,460,000 | 39,816,000 |
| Other Objects: | | | |
| 21 Travel and Transportation of persons | 157,756 | 165,000 | 226,000 |
| 22 Transportation of things | 24,642 | 15,000 | 16,000 |
| 23.3 Communications, utilities and misc. charges | 837,097 | 833,000 | 882,000 |
| 24 Printing and reproduction | 92,499 | 108,000 | 110,000 |
| 25.2 Other services | 880,154 | 826,000 | 911,000 |
| 26 Supplies and materials | 763,045 | 496,000 | 784,000 |
| 31 Equipment | <u>72,749</u> | <u>49,000</u> | <u>107,000</u> |
| Total other objects | <u>2,827,942</u> | <u>2,492,000</u> | <u>3,036,000</u> |
| Total direct obligations | <u>39,168,094</u> | <u>38,952,000</u> | <u>42,852,000</u> |
| <u>Position Data:</u> | | | |
| Average Salary, ES positions | \$160,120 | \$166,622 | \$174,311 |
| Average Salary, GS positions | \$ 89,712 | \$ 95,950 | \$ 96,529 |
| Average Grade, GS positions | 13.51 | 13.79 | 13.82 |

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.

Highlights of OGC's fiscal year (FY) 2007 operations are described below:

Selected Examples of Recent Progress:

MARKETING, REGULATORY AND FOOD SAFETY PROGRAMS

Marketing Agreements and Orders: OGC attorneys reviewed over 120 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 in connection with formal rulemaking proceedings that proposed changes to milk marketing orders in connection with Class I and II price formulas, Class III and IV make allowances, and Class II and IV product price formulas. For fruit and vegetable programs, OGC provided assistance in connection with a new program for the handling of leafy greens and with formal rulemaking proceedings involving changes to the marketing orders for California walnuts, California almonds, South Florida avocados, and South Texas onions.

OGC attorneys assisted DOJ in connection with several actions pending in the district courts to obtain payments from milk handlers into the producer-settlement fund, and filed a number of administrative actions to enforce marketing order provisions.

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 these two statutes, and, in the last fiscal year, OGC initiated 59 enforcement cases, and 35 decisions were issued in ongoing cases.

Perishable Agricultural Commodities Act (PACA): OGC devoted substantial resources to provide legal services in connection with PACA in FY 2007. OGC received 18 new enforcement referrals, and attorneys filed 17 new administrative enforcement cases under the provisions of PACA, alleging \$11,807,971 in unpaid produce debt. One of those companies paid the sellers, alleged to be unpaid debt, over \$265,000 in produce debt as a result. Attorneys closed 11 administrative enforcement cases, and collected \$100,000 in civil penalties levied in one enforcement action under the authority of PACA. OGC also continued its work in litigation on behalf of the PACA Branch of the Agricultural Marketing Service (AMS) in cases alleging violations by Hunts Point Terminal Market (the Bronx, N.Y.) produce companies whose employees were convicted of paying bribes to Federal inspectors. In each case, AMS has sought revocation of the company's PACA license. In two of the cases, Cooseman's and G&T Tray Wrap, the Supreme Court denied the companies' petition for certiorari; in another of the Hunts Point cases, Kleiman and Hochberg, the Circuit Court of Appeals for the D.C. Circuit upheld the Secretary's order revoking the company's license, and denied a subsequent request for rehearing en banc. Finally, in the Hunts Point case, B.T. Produce, the Judicial Officer ordered the company's PACA license revoked, and BT has filed a petition of appeal in the D.C. Circuit. In FY 2007, attorneys acting as presiding officers, issued 37 orders in disputes between private party litigants under PACA's reparations provisions, and reviewed another 110 orders prepared by specialists in the PACA Branch and issued after OGC review for legal sufficiency. The total amount of awards in reparation proceedings in FY 2007 was just over \$5.5 million.

Packers and Stockyards Act (P&SA): During FY 2007, OGC received 75 referrals from the Grain Inspection, Packers and Stockyards Administration (GIPSA), Packers and Stockyards Programs (P&SP) for administrative action or for civil actions in the Federal courts. These referrals seek the issuance of a complaint for the enforcement of the requirements of P&SA, legal review of agency action, or referral of a matter to DOJ. In FY 2007, 49 new administrative enforcement actions were filed by OGC for P&SP, 34 enforcement actions were closed, and 23 cases were referred to DOJ. OGC collected approximately \$437,000 in civil penalties arising from enforcement actions under P&SA. OGC also provided legal resources in the investigation of three cases alleging anti-competitive practices or trade practices violations, working with investigators from P&SP. To obtain greater compliance when registered and subject businesses refuse to file the required annual report showing the volume of their purchases of livestock, OGC devoted resources to the referral of these cases to U.S. Attorneys' offices. In order to move a large volume of the cases forward as quickly as possible, OGC standardized the materials needed for referral and the pleadings required by the U.S. Attorneys' offices and referred eleven of those annual report cases in this first year of the compliance effort. During the past fiscal year, OGC has provided assistance to P&SP at all stages of the rulemaking process. The agency has assisted P&SP to prepare eight regulatory workplans for submission to the Office of Management and Budget (OMB), five notices, two proposed rules and two final rules for publication in the Federal Register.

Also this fiscal year, OGC devoted resources to assisting P&SP and the Under Secretary with review of the livestock provisions of the House and Senate Farm Bill - answering questions regarding the effect of various legislative changes to P&SA, responding to constituent concerns and questions from Congressional staff, and, when requested, providing legislative drafting for the program. OGC Trade Practices Division also continued to act as the liaison for the Department with the Antitrust Division of DOJ, responding to over 30 requests for expertise or information from the Antitrust Division as it carried out Hart Scott Rodino review of agricultural mergers or acquisitions and coordinating the Department's responses to those requests.

Animal and Plant Health Laws and Wildlife Services: During FY 2007, OGC reviewed, assisted in drafting and approved for legal sufficiency over 200 proposed rules, final rules or notices for publication in the Federal Register. OGC assisted the Animal and Plant Health Inspection Service (APHIS) in the development, drafting and issuance of regulations allowing the importation of live animals and meat products from minimal risk regions for bovine spongiform encephalopathy (BSE). OGC also assisted APHIS with the preparation of a final rule revising Quarantine 56 fruit and vegetable regulations to minimize regulatory delay, a final citrus canker regulation to permit the interstate shipment of Florida citrus, a programmatic environmental impact statement for the biotechnology regulatory program, and a rule to substantially expand and improve the veterinary accreditation program. In addition, numerous administrative, criminal, civil, and claims collection cases involving APHIS matters were handled during the fiscal year.

Meat, Poultry, and Egg Products Inspection Acts: OGC assisted the Food Safety and Inspection Service (FSIS) in the preparation and issuance of the final rule affirming critical BSE requirements, including the removal of specified risk materials and the prohibition on the slaughter of non-ambulatory cattle. OGC also assisted with the preparation of Federal Register documents in connection with an FSIS initiative to develop a risk-based inspection system and notices on emerging labeling issues, including use of the term "natural". OGC attorneys advised senior food safety officials in dealing with issues associated with the importation of vegetable protein products contaminated with melamine and provided legal support to the FSIS Federal-State Inspection staff in designation of Federal inspection for the State of New Mexico. 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

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

- During this past fiscal year, OGC provided 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. These efforts concerned the provision of legal advice with respect to the participation of individual producers in the major commodity programs and producer-oriented conservation programs administered by FSA. Several billion dollars are expended annually under these programs involving the participation of several million producers. OGC assisted FSA and senior Departmental officials in the development of disaster programs for crop, dairy and livestock producers for all or parts of the years 2005-2007.
- OGC provided significant assistance with respect to the procurement of over one billion dollars of commodities, and associated freight costs, to be made available for domestic nutrition programs, and for international feeding and developmental programs.
- OGC continues to provide important assistance with the successful defense of major Federal programs in matters of litigation. During the past fiscal year, those successes have included the defense of the peanut program with respect to the establishment of marketing loan repayment rates. OGC provided a successful defense of the manner in which previous disaster programs were administered with respect to the handling of claims from parties that use special cultivation

practices and who claimed additional assistance due to these practices. In addition, OGC provided assistance in various challenges to the Tobacco Transition Payment Program, including one class action case in which some producers have challenged the method by which CCC determined to allocate payments among producers.

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 legal advice on behalf of USDA with respect to activities of the National Security Council, the Departments of State, Commerce, Treasury and the Central Intelligence Agency regarding agricultural trade to Cuba, Iran, North Korea and other sanctioned countries.
- OGC attorneys participated directly in negotiations in agriculture in the World Trade Organization (WTO) Doha Development Agenda in conjunction with FAS and the Office of the United States Trade Representative (USTR). OGC attorneys provided direct assistance in the areas of export credits, food aid, tariff quota administration, domestic support, and monitoring and surveillance.
- OGC attorneys provided extensive assistance to FAS and USTR on a variety of issues and disputes that arose concerning the obligations of the United States under WTO agreements and other bilateral agreements, including the drafting and review of briefs filed by the United States in cases brought in the WTO by Brazil regarding U.S. cotton and export credit programs and in the WTO case brought by the United States regarding the European Union's approval process for genetically-engineered products. In addition, OGC attorneys provided extensive advice to FAS and USTR in anticipation of WTO disputes brought by Canada and Brazil asserting that the United States has exceeded its allowable domestic support commitments in agriculture. OGC attorneys provided further assistance to FAS in the preparation of notifications to the WTO concerning domestic support over the past four years.

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 analysis of the Nutrition Titles of both House and Senate versions of the 2007 Farm Bill legislation and in the development of the Administration's response to the proposals. OGC played a significant role in the analysis of the Secretary's authority to approve the proposal of Indiana State Food Stamp Program officials to implement the Indiana Eligibility Modernization Project, including the limitations on functions performed by personnel other than State merit pay employees. OGC continues to work closely with Department officials engaged in evaluating and sanctioning States for their performance in administering the Food Stamp Program (FSP) under the quality control system, including defending appeals filed by State agencies that are liable for excessive FSP error rates.
- With regard to litigation, OGC achieved an important precedent when the USDA Judicial Officer dismissed the FSP quality control appeal of the State of Idaho—the first such action taken on an appeal of this nature. Of equal importance was the successful defense of the statutory and Constitutional bases for the Department's Special Supplemental Nutrition Program for Women, Infants and Children (WIC)-cost containment regulations in Grocery Services, et al. v. USDA Food and Nutrition Service in which the United States District Court granted a favorable summary judgment for the Department on all counts.
- OGC provided insightful review of numerous proposed and final Federal Register publications to implement new requirements under the Child Nutrition and WIC Reauthorization Act of 2004, including proposed revisions of the regulations affecting household applications and electronic signatures for the National School Lunch Program.

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 environmental issues.

- Farm Loan Programs of FSA: CDD assisted the OGC Civil Rights Division on program issues in discrimination actions involving FSA borrowers. CDD also assisted FSA in streamlining its direct farm loan regulations and corresponding handbooks and forms as well as coordinated the defense of litigation actions involving guaranteed farm loans.
- Rural Development (RD): CDD assisted RHS on its Multifamily Revitalization Demonstration Program and its Multifamily Voucher Demonstration Program. CDD worked with RHS on drafting the legal documents that are necessary for demonstration restructuring of the borrowers' loans. CDD has also provided assistance to RBS in its expanding energy programs. CDD is extensively involved with a global settlement of approximately 300 pending prepayment Federal court cases challenging statutorily mandated retroactive prepayment restrictions. CDD worked with the Rural Development Mission Area's agencies to unify and streamline their regulations.
- RMA and the Federal Crop Insurance Corporation (FCIC): CDD was heavily involved in assisting RMA in implementing its policy changes and conversion of pilot programs through the rulemaking process, drafting guidance on various insurance and reinsurance issues, and reviewing binding final agency determinations. CDD provided technical drafting assistance for Farm Bill issues regarding crop insurance and has assisted FCIC in pursuing non-procurement suspensions, debarments, and disqualifications.

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

- Major 2007 Issues: During FY 2007, RUD provided legal advice and assistance to the Rural Utilities Service (RUS) in advancing the President's Broadband Initiative by making major revisions to the RUS Broadband Program regulations. RUD closed over \$1 billion in transactions under new authorities under the Rural Electrification Act of 1936 to significantly extend the maturities of existing obligations of borrowers to the government under certain circumstances.
- Environmental Challenges for the Future: 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. The announced intention of some RUS borrowers to participate in the revival of the U.S. nuclear power industry is expected to result in increased RUS demands for RUD's services.
- Streamlining Regulations: RUD is participating in the Rural Development Mission Area's efforts to streamline program regulations by the Mission Area's Delivery Enhancement Taskforce.

NATURAL RESOURCES

Forest Service Programs: OGC provided advice regarding compliance with Federal environmental and administrative laws governing public lands their use.

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 the 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. Twenty-three new cases with NEPA, NFMA and/or ESA issues were filed in FY 2007. As of September 30, 2007, approximately 72 cases involving these issues were pending, while 46 cases were closed.
- Fire. OGC has continued to work on litigation on fire retardant use.

In legislative matters, OGC provided extensive legal assistance to the Forest Service, including:

- Reauthorization of the Secure Rural Schools Act.
- Authorization of reimbursement for professional liability insurance for firefighters.
- Authority to enter into partnership agreements with cooperators and contracts for wildland fire risk reduction and restoration projects.

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:

- Successfully prosecuting the first cases involving enforcement of the recreation fees under the new Federal Lands Recreation Enhancement Act, securing a revenue source of approximately \$10 million annually.
- Drafting direction on preliminary assessments and site inspections and response actions at formerly used defense sites on National Forest System lands.
- Drafting a proposed policy governing wind energy.

- Developing a standard form and permit for electric transmission line easements for commercial energy companies and Federal entities.

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 include primarily the Forest Service, Natural Resources Conservation Service (NRCS), and Agricultural Research Service (ARS). OGC provided legal services for the Forest Service landownership adjustment (acquisition, exchange, and sales), boundary, status and title claims programs for which approximately \$90 million was appropriated. In addition, another \$27 million in proceeds was collected in land and administrative site sales which required OGC review. OGC activities are reflected in National Forest land transactions including 12,402 acres conveyed through land sales and exchange; 39,268 acres acquired through purchase, donation or exchange; 99,000 acres of mineral rights acquired through condemnation; 351 title claims resolved; and 152 road and trail rights-of-way acquired. OGC also 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 (EPA) on wetland protection following decisions by the United States Supreme Court.
- Negotiating and reviewing of cooperative agreements, conservation easements, and restoration agreements and/or providing title review across the five easement programs. In two of those programs, the Farm and Ranch Lands Protection Program and the Wetland Reserve Program, OGC assisted NRCS in completing 925 contracts to enroll 149,216 acres through \$257,696,142 in program funding.
- Providing legal analysis and services in the development of the Department's 2007 Farm Bill proposals.

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 the Comprehensive Environmental Response, Compensation, and Liability Act. 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 \$18 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:

- 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 total response costs to address the contamination are projected to run as high as \$225 to \$450 million.
- OGC has committed significant resources in establishing the Forest Service's proof of claim and building its case for possible estimation hearings in the largest environmental bankruptcy claim the United States has ever filed - the ASARCO bankruptcy matter.

The enactment of the Underground Storage Tank Compliance Act, which was part of the 2005 Energy Policy Act, is projected to result in a greater need for environmental defense advice and services as the new authority is implemented by States and EPA and they exercise their respective regulatory compliance duties over USDA facilities.

LEGISLATION, LITIGATION, AND GENERAL LAW

Legislation: During FY 2007, OGC reviewed approximately 200 legislative reports on bills introduced in Congress or proposed by the Administration, and cleared for legal sufficiency written testimony of approximately 410 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. 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 2007 Farm Bill by the Administration, the House of Representatives, and the Senate;
- The proposed Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act for FY 2008, and three Continuing Resolutions for FY 2008; and
- The President's budget proposal.

Litigation: OGC develops and communicates the Department's position in cases on appeal. During FY 2007, Litigation Division attorneys were assigned full responsibility for 21 appellate cases, obtained favorable results in ten, and settled one. One case was dismissed. Nine cases are pending.

The Litigation Division briefs and argues all cases before the appellate courts arising under P&SA, PACA, AWA, and HPA. During FY 2007, in Bennett v. USDA, the United States Court of Appeals for the Sixth Circuit upheld the Secretary's determination that Bennett's belief that the USDA veterinarian was not inspecting his horse in a reasonable manner was not relevant to a finding that Bennett violated HPA. The Litigation Division also defended the Secretary's determinations in several PACA cases before several courts of appeals. In Coosemans v. USDA, and in Kleiman & Hochberg, Inc. v. USDA, the United States Court of Appeals for the District of Columbia Circuit 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 Circuit also upheld the Secretary's determination that corporate officers and stockholders were responsibly connected to those corporations at the time of PACA violations. The Litigation Division filed two briefs defending the Secretary's responsibly connected determinations regarding an officer and director of two produce

companies that violated PACA by failing to pay their suppliers in litigation pending before the Ninth Circuit.

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 2007, the Litigation Division recommended petitioning the Supreme Court for certiorari in two cases involving the Forest Service, Summers v. Earth Island Institute and Ecology Center, Inc. v. Austin, et al. Based upon Litigation Division recommendations, an appeal was taken to the Court of Appeals for the Ninth Circuit in People of the State of California ex rel. Bill Lockyer v. USDA, challenging the district court's invalidation of the Forest Service State Petitions Rule. The Division also assisted DOJ in an appeal pending before the District of Columbia Circuit defending the Secretary's ability to regulate the screening of cattle for BSE, Creekstone Farms Premium Beef, L.L.C., v. USDA, and assisted in an appeal pending before the Ninth Circuit defending the Secretary's ability to deregulate the sale of genetically altered seed, Geertson Seed Farms, Inc. v. Mike Johanns.

In addition to handling 21 appellate cases, the Litigation Division's attorneys prepared 55 recommendations to DOJ on whether to appeal adverse decisions of various trial courts, or to participate as amicus in appellate or Supreme Court cases.

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 2007. GLD expended substantial effort in educating all the attorneys in OGC, and clients, on how to prevent sanctions for spoliation of electronically stored information (ESI) in litigation in light of the promulgation of new Federal Rules of Civil Procedure related to ESI in December 1 and emerging ESI caselaw. Several GLD attorneys have conducted in depth research, provided extensive written legal advice, prepared and presented training, and answered numerous requests for informal advice on the obligation to preserve ESI and other forms of evidence.

In particular, GLD has been aggressive in providing advice to the Office of the Chief Information Officer (OCIO), agency information technology staff, and agency records management officers, and holding meetings on an ongoing basis regarding ESI standards to which the Department must adhere with respect to its preservation obligation, and what available technological solutions may assist in meeting these standards. Additionally, GLD has been engaged with the OCIO in the preparation of Departmental Directives to further ensure adherence to preservation obligations.

In the FOIA arena, GLD remains actively engaged on a daily basis with administrators, program managers, and FOIA specialists in ensuring adherence to the disclosure requirements of the FOIA. Within USDA, no component is allowed to withhold any document, or portion of a document, on a FOIA appeal without the concurrence of the Assistant General Counsel for General Law. In the process of sifting through the hundreds of FOIA appeals from throughout the Department that require review in GLD, attorneys continuously provide training and other insight to clients, and ensure the integrity of the disclosure mandate of the FOIA.

Inadvertent agency disclosures of personally identifiable information (PII) generated numerous questions and policy reviews related to the protection of customer PII and elimination of the use of social security numbers in the Department's programs. GLD also spent substantial time addressing questions related to confidentiality issues regarding the National Animal Identification System.

GLD also provided advice during the emergency termination for default of the security guard services contract for USDA facilities and transition to a new contractor over a weekend. GLD provided technical assistance on the Farm Bill to the House and Senate Agriculture committees and assisted various agencies in reviewing and drafting Farm Bill legislation. GLD also provided guidance to the Office of the Chief Economist and to the Assistant Secretary for Administration regarding the BioPreferred Program, especially in implementing the Voluntary Labeling Program, and reviewed rules designating biobased products for preferred treatment.

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 cases 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 courts and individual program cases filed administratively or in court. In FY 2007, CRLD has gone to hearings several times in EEOC cases.

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 2007, CRPCCD provided extensive EEO training for a variety of agencies including ARS, Rural Development, the National Finance Center, and the Food Nutrition Service (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.

FY 2007 was a challenging year for CRLD. CRLD filed a brief opposing class certification in Pamela Jackson, et al., v. Conner, worked on pending class actions such as Joe Sedillo, et al., v. Conner and Allen Spencer, et al., v. Conner, and provided substantial assistance in defeating class certification in the Federal class action Laura Conroy, et al., v. Conner.

CRLD also defends USDA in Section 741 cases, administrative program discrimination cases, before Administrative Law Judge. CRLD was successful in the dismissal of Richard Banks v. Conner, a program discrimination case where the allegations spanned twenty years, after a four-day hearing and appeal to the Assistant Secretary of Civil Rights. CRLD continues to coordinate the defense of USDA 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. Conner - Class action alleging discrimination by RHS in the Virgin Islands; class certified by U.S. District Court and upheld by the Third Circuit; parties are awaiting a ruling on the Motion for Summary Judgment;
- Garcia, et al., v. Conner - Class action alleging discrimination by FSA against Hispanic farmers and ranchers; class certification denied by U.S. District Court; upheld by the D.C. Circuit; parties are awaiting ruling on an issue briefed pursuant to a remand by the Circuit;

- Keepseagle, et al., v. Conner - 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. Conner – Class action alleging discrimination by FSA against female, African-American (*Pigford* op-outs) and older farmers and ranchers; the putative class was waiting for the D.C. Circuit court's ruling in Love and Garcia class actions in determining whether class action certification should be pursued, and subsequently parties have briefed the class certification issue; and
- Love, et al., v. Conner - Class action alleging discrimination by FSA against female farmers and ranchers; class certification denied by U.S. District Court; upheld by the D.C. Circuit; parties are awaiting ruling on an issue briefed pursuant to a remand by the Circuit.

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 November 26, 2007, 68 percent of the 22,501 eligible Track A claims filed to date were decided in favor of the claimant. The government has paid over \$950 million to prevailing Track A claimants and provided approximately \$28 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.

REGIONAL OFFICES

OGC currently has four regional and thirteen branch offices which provide legal services to numerous USDA agencies with field organizations.

The OGC field offices provide legal advice and services on a wide range of legal matters. Generally, attorneys in the field locations advise USDA officials who have been charged with program implementation duties at the regional, State and local level. Field attorneys also provide a wide range of assistance to the United States Attorney concerning the conduct of litigation in which USDA agencies are involved. OGC field offices provide essential services in nationally significant litigation in coordination with the Washington OGC office and with DOJ. Civil Rights issues, debt collection matters, natural resource litigation, Food Stamp Program violations and FSA program matters form the core workload of the field attorneys. Field attorneys provide legal services in connection with, and legal representation on, cases before administrative law judges of the Agriculture Board of Contract Appeals, the Interior Board of Land Appeals, the Federal Energy Regulatory Commission, EEOC, MSPB, and the National Appeals Division (NAD). The types of cases include contract appeals, mining and patent contests, hydro-electric licensing procedures, Title VII employee complaints, appeals of adverse personnel actions, and appeals of farmers aggrieved by adverse decisions on certain farm programs.

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 dealt with challenges to the Forest Service's plan implementations pursuant to the NEPA and the NFMA. For example, Eastern Region attorneys provided significant assistance in Betty Varnum v. U.S. Forest Service #06-CV-0577-MJR (SD IL). A NFMA, Wilderness Act (WA) and APA based challenge to equestrian trail designation, use and management on the Shawnee National Forest, Illinois. In its Order filed October 19, 2007 the Court granted the Government's Summary Judgment motion.

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

NRCS. This year, pursuant to the amendments made to the Farm and Ranch Land Protection Program (FRPP) regulations, each FRPP deed must be reviewed for legal sufficiency of title by OGC field offices, resulting in a marked increase in workload. The majority of easements to be acquired nationally for this program are in the Eastern Region.

NRCS Litigation. Eastern Region attorneys continued to assist DOJ in defending suits brought against NRCS. For example, Eastern Region attorneys assisted DOJ in defending a \$1 million lawsuit challenging the nature and means by which NRCS carried out its cooperative agreements with landowners under the Watershed Protection and Flood Prevention Act.

Single Family Housing. 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 were 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, only three intermediaries were selected to receive funding under the 515 Multi-Family Housing Preservation Revolving Loan Fund pilot program, all three in the Eastern Region. In July 2007, attorneys in the Eastern Region worked with National OGC, Indiana Housing officials, and State Rural Development officials to assist with closing such a loan for \$2,125,000.

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 that are guaranteed by USDA.

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 has seen an increase in 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

The Central Region provides legal advice to the Rural Development, FSA, Kansas City Commodity Office, and NRCS. Throughout the Central Region critical advice was provided to assist all agencies process loans, contracts, procurements and grants on an expedited emergency basis due to many unusually severe hurricane, drought and tornado occurrences.

Mountain Region

Oil and Gas and Energy Issues. In FY 2007, Mountain 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, Mountain Region attorneys assisted with a significant

administrative appeal of a joint Bureau Land Management-Forest Service proposal to allow extensive new drilling for coal bed methane on the San Juan National Forest.

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.

NFMA. Mountain Region attorneys again played a central role defending the Forest Service against allegations that it violated NFMA. For example, Mountain Region attorneys provided assistance to DOJ lawyers in all phases of a significant Ninth Circuit case entitled Lands Council v. McNair.

NEPA. Mountain Region attorneys continued to handle a wide range of legal issues arising under NEPA. Examples include successful decisions in Forest Guardians v. USFS (10th Cir) and Alliance for the Rockies v. Kimbell (D. Mont.).

Contract Disputes. Mountain Region attorneys assisted several USDA agencies in large contract disputes. A very significant win was achieved in Precision Pine v. U.S. when the Court of Federal Claims ruled that Precision Pine had not provided adequate legal support to prove that it was a “lost volume seller.”

Water Rights. Mountain Region attorneys continued to represent the Forest Service in water rights issues. For example, Mountain Region attorneys achieved a noteworthy settlement with numerous parties in connection with the Montana Water Compact Commission.

Civil Rights and MSPB Cases. Mountain Region attorneys continued to handle administrative and judicial cases filed under Title VII of the 1964 Civil Rights Act and various personnel laws. In FY 2007, one such case went to trial in U.S. District Court in Colorado: Vialpando v. Johanns.

Fuels Reduction and the Healthy Forests Restoration Act. Mountain Region attorneys continued to advise the Forest Service on implementing a wide range of activities related to hazardous fuels reduction under the various new authorities for addressing fire dangers. For example, Mountain Region attorneys succeeded in the U.S. District Court and the Ninth Circuit Court of Appeals in Wildwest v. Bull (9th Cir.).

Pollution Control. Mountain Region attorneys continued to handle a wide variety of matters involving the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). In FY 2007, Mountain Region attorneys negotiated several significant cleanup settlements under CERCLA, including a landmark cleanup at the Upper Blackfoot site.

Land, Property, and Alaska National Interest Lands Conservation Act (ANILCA) Litigation issues. Mountain Region attorneys continued to assist the Forest Service and NRCS with land exchanges, title and easement reviews, and actions under the Quiet Title Act. Mountain Region attorneys also handled matters arising under ANILCA, including a high profile lawsuit known as Colorado Wild v. United States Forest Service, which involves the Wolf Creek ski area.

Travel Management Issues. In FY 2007, Mountain Region attorneys assisted the Forest Service with a range of travel management issues, including a legal challenge to the travel management plan issued by the Gallatin National Forest in Citizens for Balanced Use v. Heath and Montana Wilderness Association v. McAllister.

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.

Pacific Region

Civil Rights. Pacific Region attorneys played a pivotal role in defending the Department in the Hispanic class action lawsuit entitled Brionez v. USDA. The district court denied plaintiffs' motion to extend the settlement agreement, thereby allowing the settlement agreement to expire on February 14, 2007.

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. These actions resulted in the recovery of several million dollars. Resources devoted to this area are expanding, commensurate with the greater severity of wildfires and the increasing damage caused by those fires.

Lands/Land Acquisition/Title Review. Pacific Region attorneys provided important legal support for the Forest Service acquisition of conservation easements on Native Hawaiian forested lands; the Forest Service sale of administrative sites, which netted the Forest Service several million dollars; the legislated transfer of the Mill Creek tract of recreation residences on the San Bernardino National Forest to the homeowners' association; and NRCS' extensive easement acquisition program.

Law Enforcement Assistance. Pacific Region attorneys provided the Forest Service with assistance on a wide variety of important law enforcement matters, including review of forest orders that were issued in the wake of the devastating wildfires in Southern California.

Pre-Decisional Natural Resource Advice. Pacific Region attorneys 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 revision; an amendment to the Sierra Nevada forest plans regarding the monitoring of species; and an amendment to the Survey and Management Guidelines of the Northwest Forest Plan. These projects and others will continue to demand significant investments of time as we endeavor to assist USDA agencies in making legally sound and defensible decisions in the face of escalating environmental litigation.

Natural Resource Litigation. Pacific Region attorneys provided significant assistance to DOJ and the United States Attorney's Offices in natural resource litigation, including defense of the Biscuit Fire Recovery Project, the 2004 Sierra Nevada Framework, the Herger-Feinstein Quincy Library Group Act, decisions of the Federal Subsistence Board affecting hunting and fishing in Alaska, and a Forest Service decision determining which lands will be available for oil and gas leasing within the Los Padres National Forest.

Grazing. Pacific Region attorneys will spend more time on grazing matters in the next few years because the Forest Service has received several formal notices that environmental groups intend to challenge grazing allotments under the Endangered Species Act.

Hydroelectric Relicensing. Pacific Region attorneys helped the Forest Service and the Interior Department conclude complex settlement agreements with Pacific Gas & Electric Company, the Sacramento Municipal Utility District, a number of state agencies, and non-governmental groups on conditions for the relicensing of the Upper American River and Chili-Bar projects before the Federal Energy Regulatory Commission. A settlement agreement also was reached with Idaho Power Company on conditions for the relicensing of the Hells Canyon Complex. These large projects will continue to operate while the utility companies institute environmental and recreational enhancements.

Recreation. Pacific Region provided assistance to the Forest Service on the agency's new travel management rule, specifying where off-highway vehicles can be used on national forest roads and trails. The workload in this area is increasing dramatically as the National Forests implement the new rule.

Cultural Resources. Pacific Region attorneys successfully defended the Forest Service decision to protect Cave Rock (a spiritual and cultural place of importance to Native Americans), located within the Lake

Tahoe Basin. We helped the Forest Service implement new legislation requiring agencies to consult with Alaska Native corporations on the same basis as Indian tribes. Pacific Region attorneys assisted with the repatriation of cultural resources discovered on the Tongass National Forest, including 10,000-year old human skeletal remains.

Farm and Rural Development Work. Pacific Region attorneys helped the farm agencies recover millions of dollars in debt. The backlog of delinquent single-family housing loans in the Pacific Region was completely eliminated. The §515 Rural Rental Housing Program and impacts from the Emergency Low Income Housing Preservation Act continue to be the subject of litigation.

Contract Litigation. Pacific Region attorneys defended USDA contracting officers in cases before the Civilian Board of Contract Appeals, including a number of cases challenging the Forest Service decision to suspend timber sale contracts because of environmental litigation. The amount of money at issue in these contract cases exceeds \$20 million.

Alaska Subsistence Program. The Pacific Region advised the Federal Subsistence Board on several controversial issues, including drafting a formal policy on closures of Federal lands to hunting and fishing, drafting new subsistence fishing regulations, and determining the legality of changing a Native community's status to non-rural, or non-subsistence. Litigation continues over the reach of the Federal program into navigable waters (on the basis of reserved water rights), as well as over the inclusion of sport and commercial representatives on subsistence advisory committees.

OFFICE OF THE GENERAL COUNSEL

Summary of Budget and Performance
Statement of Goals and Objectives

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

| USDA Strategic Goal/Objective | Agency Strategic Goal | Agency Objectives | Programs that Contribute | Key Outcome |
|-------------------------------|--|--|--------------------------|---|
| All USDA Goals | 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><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> | 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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Strategic Objective and Funding Matrix

STRATEGIC OBJECTIVE 1.1: Review all draft regulations submitted by USDA agencies, and provisions of advice to USDA officials as to their sufficiency.

STRATEGIC OBJECTIVE 1.2: Preparation and review for legal sufficiency of all legal documents, memoranda, and correspondence.

STRATEGIC OBJECTIVE 1.3: 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.

STRATEGIC OBJECTIVE 1.4: 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.

STRATEGIC OBJECTIVE 1.5: Provision of advice and counsel to USDA officials concerning legal issues arising out of USDA programs and activities.

Strategic Objective and Funding Matrix

(On basis of adjusted appropriation)

| | <u>2007 Actual</u> | | <u>2008 Estimated</u> | | Increase or Decrease | <u>2009 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 | \$39,227,490 | 297 | \$38,952,000 | 294 | +\$3,900,000 | \$42,852,000 | 304 |

Selected Accomplishments Expected at the FY 2009 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 2004 Actual | FY 2005 Actual | FY 2006 Actual | FY 2007 Actual | FY 2008 Target | FY 2009 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 | 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 | 95% 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 | 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 | 85% 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 | 90% of correspondence reviewed within timeframes | 92% of correspondence reviewed within timeframes | 92% of correspondence reviewed within timeframes | 92% 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 | 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 | 85% 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. | 90% of legislative reports and testimony reviewed timely | 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 | 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 | \$ 34,420,053 | \$ 35,531,154 | \$ 38,957,490 | \$ 39,227,490 | \$ 38,952,000 | \$ 42,852,000 |

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Summary of Budget and Performance
Full Cost by Strategic Goal

| <u>PROGRAM</u> | <u>PROGRAM ITEMS</u> | 2007 AMOUNT <u>(\$000)</u> | 2008 AMOUNT <u>(\$000)</u> | 2009 AMOUNT <u>(\$000)</u> |
|---|----------------------|----------------------------------|----------------------------------|----------------------------------|
| Legal Services All performance measures apply | Direct Costs | \$36,340 | \$36,460 | \$40,212 |
| | Other Direct Costs | 2,828 | 2,492 | 2,640 |
| | Total Costs | \$39,168 | \$38,952 | \$42,852 |
| | FTE's | 297 | 294 | 304 |