

2013 Explanatory Notes

Office of the General Counsel

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## OFFICE OF THE GENERAL COUNSEL

Purpose Statement

By General Order of June 17, 1905, the Secretary of Agriculture established the position of Solicitor, thereby consolidating the legal activities of the Department. In 1956, Congress established the position of General Counsel of the Department of Agriculture as a Presidential appointee confirmed by the Senate (70 Stat. 742) (7 U.S.C. 2214). The mission of the Office of the General Counsel (OGC) is to provide legal services necessary to support all activities of the United States Department of Agriculture (USDA). OGC serves as the law office of USDA and provides legal services to the Secretary of Agriculture, 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. As of February 2012, the headquarters legal staff was reorganized into five divisions: (1) Marketing, Regulatory, and Food Safety Programs; (2) International Affairs, Food Assistance, and Farm and Rural Programs; (3) Natural Resources and Environment; (4) General Law and Research; and (5) Civil Rights, Labor and Employment Law.

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. Two Deputy General Counsels, five Associate General Counsels, each of whom is responsible for a portion of the legal work of USDA, and four Regional Attorneys assist the General Counsel in managing the work of the office.

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 represents 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 refers 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 General Law and Research represents USDA in certain classes of cases before the United States Courts of Appeals.

Law Library. OGC maintains the USDA Law Library which, prior to 1982, was housed at the National Agricultural Library.

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, 2011, the office had 282 permanent full-time employees. There were 138 permanent full-time employees located in Washington, D.C., and 144 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  
(Dollars in thousands)

Item	2010 Actual		2011 Actual		2012 Estimate		2013 Estimate	
	Amount	Staff Years	Amount	Staff Years	Amount	Staff Years	Amount	Staff Years
<b>Salaries and Expenses:</b>								
Discretionary Appropriations.....	\$43,551	284	\$41,499	267	\$39,345	256	\$45,074	288
Rescission.....	-	-	-83	-	-	-	-	-
Total Available.....	43,551	-	41,416	-	39,945	-	45,074	-
Lapsing Balances.....	-158	-	-29	-	-	-	-	-
Obligations.....	43,393	284	41,387	267	39,945	256	45,074	288
<b><u>Obligations under other USDA appropriations:</u></b>								
<b>Hazardous Materials Management</b>								
Program.....	1,515	10	1,398	10	1,398	10	1,398	10
FS Non-Litigation Travel.....	137	-	45	-	70	-	70	-
CCC.....	250	2	350	2	450	2	450	2
Civil Rights Reimbursable.....	846	7	847	7	1,027	7	1,027	7
AMS User Fees.....	643	4	687	5	742	6	742	6
APHIS User Fees.....	572	2	535	2	291	1	291	1
GIPSA User Fees.....	4	-	7	-	7	-	7	-
FSA User Fees.....	15	-	15	-	15	-	15	-
FSIS User Fees.....	21	-	21	-	21	-	21	-
Total, Agriculture Appropriations.....	4,003	25	3,905	26	4,021	26	4,021	26
Total, OGC.....	47,396	309	45,292	293	43,966	282	49,095	314

OFFICE OF THE GENERAL COUNSEL  
Permanent Positions by Grade and Staff Year Summary

Item	2010 Actual			2011 Actual			2012 Estimate			2013 Estimate		
	Wash. D.C.	Field	Total									
ES.....	1	-	1	1	-	1	1	-	1	1	-	1
SES.....	16	4	20	16	4	20	13	4	17	14	4	18
GS-15.....	39	29	68	43	29	72	39	26	65	39	26	65
GS-14.....	60	64	124	60	61	121	64	58	122	64	58	122
GS-13.....	8	2	10	6	3	9	5	3	8	9	4	13
GS-12.....	5	4	9	4	2	6	1	2	3	11	5	16
GS-11.....	13	12	25	19	17	36	4	11	15	6	18	24
GS-10.....	2	-	2	2	-	2	2	-	2	2	-	2
GS-9.....	6	10	16	5	11	16	4	9	13	8	9	17
GS-8.....	13	20	33	12	17	29	8	16	24	8	16	24
GS-7.....	4	14	18	1	15	16	1	10	11	1	10	11
GS-6.....	2	-	2	1	-	1	1	-	1	1	-	1
Total Perm. Positions.....	169	159	328	170	159	329	143	139	282	164	150	314
Unfilled, EOY....	14	8	22	32	15	47	-	-	-	-	-	-
Total, Perm. Full-Time Employment, EOY.....	155	151	306	138	144	282	143	139	282	164	150	314
Staff Year Est.....	158	151	309	148	145	293	143	139	282	164	150	314

OFFICE OF THE GENERAL COUNSEL

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

Salaries and Expenses:

For necessary expenses of the Office of the General Counsel, [~~\$39,345,000~~] \$45,074,000.

Lead-Off Tabular Statement

Appropriations Act, 2012.....	\$39,345,000
Budget Estimate, 2013.....	<u>45,074,000</u>
Change from 2012 Appropriation.....	+ 5,729,000

Summary of Increases and Decreases

(Dollars in thousands)

<u>Item of Change</u>	<u>2010 Actual</u>	<u>2011 Change</u>	<u>2012 Change</u>	<u>2013 Change</u>	<u>2013 Estimate</u>
Office of the General Counsel.....	\$43,551	-\$2,135	-\$2,071	+5,729	\$45,074

## OFFICE OF THE GENERAL COUNSEL

Project Statement  
(On basis of appropriations)  
(Dollars in thousands)

Program	2010 Actual		2011 Actual		2012 Estimate		Change		2013 Estimate		
	Amount	Staff Years	Amount	Staff Years	Amount	Staff Years	Amount	Staff Years	Amount	Staff Years	
Discretionary Appropriations:											
Legal Services.....	\$43,551	284	\$41,416	267	\$39,345	256	+\$5,729	(1)	+32	\$45,074	288
Rescission and Transfer (Net).....	-	-	83	-	-	-	-	-	-	-	-
Total Appropriation.....	43,551	284	41,499	267	39,345	256	+5,729		+32	45,074	288
Rescission.....	-	-	-83	-	-	-	-	-	-	-	-
Total Available.....	43,551	284	41,416	267	39,345	256	+5,729		+32	45,074	288
Lapsing Balances.....	-158	-	-29	-	-	-	-	-	-	-	-
Total Obligations.....	43,393	284	41,387	267	39,345	256	+5,729		+32	45,074	288

Project Statement  
(On basis of obligations)  
(Dollars in thousands)

Program	2010 Actual		2011 Actual		2012 Estimate		Change		2013 Estimate		
	Amount	Staff Years	Amount	Staff Years	Amount	Staff Years	Amount	Staff Years	Amount	Staff Years	
Discretionary Obligations:											
Legal Services.....	\$43,393	284	\$41,387	267	\$39,345	256	+\$5,729		+32	\$45,074	288
Total Obligations.....	43,393	284	41,387	267	39,345	256	+5,729		+32	45,074	288
Recoveries, Other (Net).....	-	-	-	-	-	-	-	-	-	-	-
Lapsing Balances.....	158	-	29	-	-	-	-	-	-	-	-
Total Available.....	43,551	284	41,416	267	39,345	256	+5,729		+32	45,074	288
Rescission.....	-	-	83	-	-	-	-	-	-	-	-
Total Appropriation.....	43,551	284	41,499	267	39,345	256	+5,729		+32	45,074	288

## OFFICE OF THE GENERAL COUNSEL

Justification of Increases and Decreases

Base funds will allow the Office of the General Counsel to continue to provide legal oversight, counsel, and support to all activities of the Department.

(1) An increase of \$5,729,000 and 32 staff years (base funds: \$39,345,000 and 256 staff years available in 2012) for the Office of the General Counsel consisting of:

(a) An increase of \$139,000 to fund increased pay costs.

Approximately 94 percent of OGC's budget is expended in support of personnel salaries and benefits, which leaves no flexibility for absorbing increased costs for pay. OGC can absorb any such increases only by reducing staff or reassessing its operating requirements for travel, maintenance of equipment, law library purchases, and supplies.

(b) An increase of \$3,143,000 and 32 staff years for increased legal services.

The 2013 budget request includes sufficient resources to cover salary and benefit costs to add 25 attorneys, 5 paralegals, and 2 information technology (IT) specialists in the following areas:

Immediate Office of the General Counsel (1 staff year): The Immediate Office requests funding to fill a vacancy for a second Executive Assistant to assist the General Counsel, the Deputy General Counsels and the Senior Counselor in managing day-to-day operations. This would bring the total staff years for the Immediate Office to 6.

Administration and Resource Management (2 staff years): OGC's Office of Administration and Resource Management requests funding to fill two information technology positions. The positions are needed to assist with the development and implementation of a new case management system and OGC's document management system. This would bring the total staff years for the Administrative Office to 11.

Marketing, Regulatory, and Food Safety Division (3 staff years): OGC seeks to add three attorneys to this Division, which has experienced significant workload increases in several program areas. APHIS has dramatically increased the number of cases referred to OGC for administrative prosecution under the Animal Welfare Act and the Horse Protection Act and regulatory decisions of the Biotechnology Regulatory Services (BRS) have generated increased federal court litigation brought by opponents of BRS actions under this program. AMS has added new programs, particularly in the area of research and promotion orders, and is increasing enforcement in various labeling areas, including the National Organic Program. AMS is also involved in new initiatives, including the leafy greens marketing agreement, which are drawing heavily on OGC legal resources. FSIS will generate new demands for legal support as it enhances enforcement and moves into new areas of regulation to better address significant public health issues. This would bring the total staff years for the Marketing, Regulatory, and Food Safety Division to 40.

Civil Rights, Labor and Employment Law Division (4 staff years): OGC seeks to add two attorneys and a paralegal to the Litigation section and an additional attorney for the Policy, Compliance, and Counsel section. The additional staff for the Litigation section is needed to handle the increasing number of high-profile and complex civil rights, equal access to programs and Equal Employment Opportunity (EEO) cases facing USDA. The demand for seasoned civil rights litigators to handle EEO and program discrimination cases with Department-wide impact is at an all-time high. This Division needs an attorney with significant experience in non-EEO Merit Systems Protection Board cases such as prohibited personnel practice and whistleblower cases, and to handle labor matters. The paralegal will assist attorneys with legal research, cite-checking, preparation of documents, and coordination and follow-up of litigation hold (document retention) memoranda. The additional attorney for the Policy, Compliance, and Counsel section is needed to respond to increased demand

for preventive services such as training and best practice development, and to assist the Department in settlement negotiations, to review EEO settlements, and to review Final Agency Decisions for legal sufficiency. In addition, the Assistant Secretary for Civil Rights has instituted a resolution initiative for EEO matters that has significantly increased the demand for representation during mediations and for drafting and reviewing settlement agreements. The Secretary's accountability policy has also placed a greater emphasis on disciplinary action for civil rights matters and OGC is being asked to review many more of these actions than in the past. This would bring the total staff years for the Civil Rights, Labor and Employment Law Division to 17.

International Affairs, Food Assistance, and Farm and Rural Programs Division (6 staff years): Four attorneys and two paralegals are needed in this division to address international programs, food assistance programs, farm programs and crop insurance, and rural utilities programs. Specific programs include: export credit guarantee program; international grants and cooperative agreements; Supplemental Nutrition Assistance Program (SNAP); the Special Supplemental Nutrition Program for Women, Infants and Children (WIC); the School Lunch Program; grants related to disaster assistance; tobacco buyout litigation; disaster assistance programs; crop insurance; Rural Business Cooperative Service programs; and Rural Utilities Service electric program and the expansion of the broadband and water program loan portfolios. All of these programs involve complicated legal issues with significant fiscal implications for the Department and taxpayers. This would bring the total staff years for the International Affairs, Food Assistance, and Farm and Rural Programs Division to 35.

Natural Resources and Environment Division (3 staff years): Two attorneys and one paralegal are needed in this Division to provide legal services to the Forest Service and the Natural Resources Conservation Service (NRCS). Due to recent retirements, OGC is currently unable to provide sufficient legal support for FS programs. In addition, given the anticipated passage of a new Farm Bill in 2012, the NRCS workload is expected to increase dramatically as the client demands advice on a host of complex, legal policy issues and a series of new regulations that must be reviewed and approved under tight time constraints in order to meet statutory deadlines. This would bring the total staff years for the Natural Resources and Environment Division to 21.

General Law and Research Division (2 staff years): One attorney and one paralegal position are needed in this Division. The attorney will assist in responding to increased demands in suspension and debarment matters, contractor compliance requirements, FOIA and e-discovery matters, and procurement litigation before GAO and the Federal courts. The paralegal will assist attorneys by copying and assembling filings, maintaining files, and engaging in similar other tasks that can be handled more efficiently and at less cost by appropriate support staff. This would bring the total staff years for the General Law and Research Division to 24.

San Francisco Office (1 staff year): The San Francisco office provides legal services in support of the Pacific Region's fire cost recovery program. This program has recovered more than \$180 million since October 2008, including more than \$20 million in 2011. OGC seeks to add one attorney to support this program and USDA's lending programs in California, Nevada, Hawaii, and the Western Pacific Islands. This would bring the total staff years for the San Francisco office to 17.

Portland Office (1 staff year): The Portland office handles legal issues for all USDA agencies in Oregon and Washington and for all agencies except the Forest Service in Idaho. Among other responsibilities, the additional attorney will help the Portland office respond to increased demands for legal services related to agricultural programs and natural resource management. This would bring the total staff years for the Portland office to 13.

Denver Office (1 staff year): The Denver office handles virtually all of the legal work for the Forest Service in Colorado, Wyoming, Kansas, Nebraska, North Dakota, and South Dakota, and the majority of the legal work for Rural Development, the Farm Service Agency, the Natural Resources Conservation Service, and other USDA agencies in Colorado, Wyoming, Utah, New Mexico, and Arizona. During the past two years, OGC has been unable to fill several vacancies due to budgetary constraints, and backlogs have inevitably begun to

develop in several areas. An additional attorney will be able to provide critical legal support for client agencies in a cost-effective manner. This would bring the total staff years for the Denver office to 10.

Missoula Office (1 staff year): The Missoula office handles legal work for USDA agencies in Montana and parts of Idaho, including a heavy litigation docket for the Forest Service's Region 1. Its workload includes hundreds of water law cases arising from the State of Montana's on-going adjudication of water rights in large areas of the State. The office expects its water law docket to increase over the next several years, as Montana continues to adjudicate additional water basins. This would bring the total staff years for the Missoula office to 8.

Kansas City (1 staff year): The Kansas City office represents USDA agencies in four of the Nation's largest farm States: Iowa, Nebraska, Kansas and Missouri. There has been an increase in the demand for legal services related to loan servicing, bankruptcy and foreclosure to protect the government's property interests. Natural disasters and economic and political turmoil around the world have increased the need for international food aid and the legal support for food aid programs provided by the Kansas City office. Adding one attorney will enable the office to better serve the clients' needs in a timely manner and to better protect the financial interests of the government. This would bring the total staff years for the Kansas City office to 9.

St Paul (1 staff year): The St Paul office provides legal services to client agencies in Minnesota, North Dakota and South Dakota. There has been an increase in demand for legal services, particularly in the areas of crop insurance litigation, disaster assistance programs, Equal Access to Justice Act (EAJA) litigation, foreclosures, FNS retailer and wholesaler litigation, and conservation easement enforcement actions. This would bring the total staff years for the St. Paul office to 7.

Temple (1 staff year): The Temple office serves USDA agencies in Texas and Oklahoma and seeks funding to add an additional attorney. The attorney would provide legal support for USDA's disaster relief programs, loan servicing activities, bankruptcy actions, and foreclosures; areas which have experienced increased demand in legal services. This would bring the total staff years for the Temple office to 9.

Little Rock (1 staff year): OGC's Little Rock office provides legal services to USDA client agencies (including the Forest Service) in Arkansas, Louisiana, and Mississippi. OGC requests funding to add an attorney to help the office handle its heavy litigation and document-intensive real estate acquisition practice. This would bring the total staff years for the Little Rock office to 8.

Atlanta (1 staff year): The Atlanta office provides legal services to client agencies in Georgia, Florida, Kentucky, North Carolina, South Carolina, Virginia and Puerto Rico. An attorney position is requested to handle civil rights litigation and Farm Service Agency and Rural Development transactions. The client agencies have increased requests for assistance in these areas since 2009, and adding an attorney would allow us to provide required services in a more timely fashion. This would bring the total staff years for the Atlanta office to 18.

Harrisburg (1 staff year): The Harrisburg office handles legal matters for all USDA mission areas and agencies operating in Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, West Virginia, the District of Columbia, and the Virgin Islands. The work is heavily weighted in commercial transactions and the office averages over 2,000 new matters each year. Adding an additional attorney to handle loan servicing activities, Farm Service Agency and Rural Development transactional matters would ensure the efficient delivery of legal services. This would bring the total staff years for the Harrisburg office to 11.

Milwaukee (1 staff year): The Milwaukee office provides legal services to the Forest Service Eastern Region and all NRCS matters in Illinois, Michigan and Wisconsin. The work of this office is very heavily weighted in environmental litigation, which has increased significantly in recent years due to an increase in oil and gas mineral development in that part of the country. However, due to retirements, the size of the office staff is the

lowest it has ever been. An additional attorney would assist in assuring the timely delivery of legal services in that region. This would bring the total staff years for the Milwaukee office to 8.

(c) An increase of \$1,544,000 to maintain and improve effectiveness of current staff.

This increase will enable OGC to increase funding for litigation travel, law library purchases, computerized legal research and maintain current staff positions which are critical to achieving the agency's objective of providing effective legal services in a timely manner. OGC attorneys are faced with litigation in Federal courts and before administrative bodies. Travel to take depositions and interview witnesses is often critical in order for OGC to provide effective legal service. OGC Law library must invest in legal periodicals, legal encyclopedias, State codes, State court decisions, the United States Code, Federal regulations, court decisions and computerized legal research services. These services allow OGC attorneys to stay abreast of new developments in their respective areas of law and to access current laws and regulations. Computerized legal research has provided OGC attorneys electronic access to legal materials that are not affordable to purchase or maintain in hard copy.

(d) An increase of \$903,000 for information technology and telecommunications technology improvements.

OGC's existing case management system is over fifteen years old, ineffective and not centralized and accessible to all components of our agency. OGC has no electronic records management system or litigation hold and related e-discovery technology. OGC requests funding to develop these tools by leveraging the Microsoft SharePoint 2010 software that is currently licensed for OGC's use and enhancing its features to create an integrated case and records management system that will be available to all OGC employees. The SharePoint platform will also be developed as a knowledge management tool to enable collaboration among OGC employees throughout the country, and as a document repository to permit the legal staff to access key legal opinions and research memoranda created by OGC, thus helping the agency avoid having to recreate work that has already been performed. These technological improvements will increase OGC's efficiency and responsiveness to its clients, help the Department keep pace with the requirements of electronic discovery, and increase transparency through generating accurate aggregate reports on legal matters. This increase is intended to cover the estimated one-time costs of migrating data from the current case management system, and the annual costs of maintaining OGC's basic information technology infrastructure. OGC would also acquire video-conference technology for select field offices.

## OFFICE OF THE GENERAL COUNSEL

Geographic Breakdown of Obligations and Staff Years

(Dollars in thousands)

State/Territory	2010 Actual		2011 Actual		2012 Estimate		2013 Estimate	
	Amount	Staff Years	Amount	Staff Years	Amount	Staff Years	Amount	Staff Years
Alabama.....	\$586	5	\$549	5	\$466	4	\$474	4
Alaska.....	506	4	511	4	511	4	520	4
Arkansas.....	1,049	7	1,059	7	1,059	7	1,158	8
California.....	2,340	14	2,415	15	2,415	15	2,565	16
Colorado.....	1,933	13	1,863	9	1,863	9	2,012	10
Georgia.....	2,171	16	2,192	16	2,192	16	2,326	17
Illinois.....	877	6	885	6	885	6	900	6
Minnesota.....	800	7	777	7	709	6	804	7
Missouri.....	1,307	11	1,232	11	1,076	8	1,187	9
Montana.....	923	7	933	7	933	7	1,027	8
New Mexico.....	650	6	657	6	657	6	668	6
Ohio.....	457	7	439	4	439	4	446	4
Oregon.....	1,637	12	1,654	12	1,654	12	1,764	13
Pennsylvania.....	1,248	11	1,173	10	1,173	10	1,271	11
Texas.....	955	9	912	8	912	8	1,006	9
Utah.....	536	4	541	4	541	4	550	4
Wisconsin.....	1,115	8	1,070	8	953	7	1,050	8
District of Columbia.....	24,269	136	22,460	127	20,842	122	25,280	143
Puerto Rico.....	34	1	65	1	65	1	66	1
Obligations.....	43,393	284	41,387	267	39,345	256	45,074	288
Lapsing Balances.....	158	-	29	-	-	-	-	-
Total, Available.....	43,551	284	41,416	267	39,345	256	45,074	288

## OFFICE OF GENERAL COUNSEL

	2010 Actual	2011 Actual	2012 Estimate	2013 Estimate
<b>Personnel Compensation:</b>				
Washington D.C.....	\$16,438	\$15,528	\$15,061	\$17,127
Field.....	15,793	14,957	14,471	15,744
11 Total personnel compensation.....	32,231	30,485	29,532	32,871
12 Personnel benefits.....	8,051	7,988	7,491	8,434
13.0 Benefits for former personnel.....	6	12	12	12
Total, personnel comp. and benefits.....	40,288	38,485	37,035	41,317
<b>Other Objects:</b>				
21.0 Travel and transportation of persons.....	328	115	100	158
22.0 Transportation of things.....	4	6	6	6
23.3 Communications, utilities, and misc. charges.....	807	709	660	696
24.0 Printing and reproduction.....	63	32	32	32
25.2 Other services .....	1,085	1,248	1,162	1,766
26.0 Supplies and materials.....	566	635	329	777
31.0 Equipment.....	252	157	21	322
Total, Other Objects.....	3,105	2,902	2,310	3,757
99.9 Total, new obligations.....	43,393	41,387	39,345	45,074
<b>Position Data:</b>				
Average Salary (dollars), ES Position.....	\$167,630	\$169,650	\$169,650	\$169,650
Average Salary (dollars), GS Position.....	\$105,375	\$100,918	\$103,860	\$108,115
Average Grade, GS Position.....	13.6	13.5	13.6	14.2

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 components of the Department. These services include, but are not limited to, the following:

- Responding to legal inquiries and preparing formal legal opinions on a broad range of issues relating to the Department's authorizing statutes, as well as laws of general applicability such as the Freedom of Information Act, the Federal Advisory Committee Act, the Equal Credit Opportunity Act, the Economy Act, the Defense Procurement Act, and constitutional and fiscal law matters;
- Preparing or reviewing rules and regulations;
- Preparing or interpreting contracts, mortgages, leases, deeds, and other legal documents;
- Preparing briefs and representing the Department in judicial proceedings and litigation;
- Representing the Department in formal administrative proceedings before the Equal Employment Opportunity Commission, the USDA Office of Administrative Law Judges, the Merit System Protection Board, the Civilian Board of Contract Appeals, the National Appeals Division, the Interior Board of Land Appeals, and other Federal agencies;
- Collaborating with the Department of Justice (DOJ) in trial and appellate litigation involving the Department;
- Providing briefings and technical assistance to Committees and members of both chambers of the U.S. Congress;
- Representing Departmental agencies in non-litigation debt collection programs;
- Preparing or reviewing patent applications and other documents required to protect the Department's intellectual property rights;
- Representing Departmental agencies in State water rights adjudications; and
- Evaluating, defending and prosecuting claims by and against the United States arising out of the Department's activities.

Selected Examples of Recent Progress:

Highlights of OGC's 2011 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 2011, OGC began to enhance the SharePoint portal to enable greater collaboration among its personnel and offices and increase efficiency. For example, we are creating an OGC-wide electronic document repository to enable employees throughout OGC's 17 offices to access briefs, opinions and other critical documents. In addition, during 2011, OGC purchased computer workstations, laptops and printers to replace obsolete equipment nationwide. Also, at the end of 2011, OGC purchased video conferencing equipment for its Washington, DC headquarters and four of its 16 field offices to be installed during 2012.

**MARKETING, REGULATORY AND FOOD SAFETY PROGRAMS**

Marketing Agreements and Orders: OGC attorneys reviewed approximately 85 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, informal, and negotiated rulemaking actions, and with the enforcement and defense of the programs.

Animal Welfare and Horse Protection Acts: OGC attorneys serve as agency counsel in administrative enforcement actions brought under the Animal Welfare Act (AWA) and the Horse Protection Act (HPA) programs administered by the Animal and Plant Health Inspection Services (APHIS). In 2011, OGC attorneys helped APHIS secure \$494,662 in

civil penalties under those statutes; filed 61 new enforcement cases; and 42 decisions in ongoing enforcement cases. Final decisions were issued in four license denial and license termination cases. Also during 2011, OGC attorneys assisted APHIS on three confiscation actions, and reviewed and provided drafting assistance in connection with a number of rulemaking actions. OGC attorneys also assisted the Department of Justice and United States Attorneys in district court actions under both the AWA and HPA.

Perishable Agricultural Commodities Act (PACA): The PACA is administered by the Agricultural Marketing Service (AMS), and violations of the statute may result in the assessment of civil penalties or suspension or revocation of license, and individuals found to be responsibly connected to a violating entity are subject to employment sanctions. The PACA provides an administrative forum for the resolution of disputes among private parties relating to produce transactions. OGC supports AMS in its administration of the PACA. In 2011, OGC:

- Received 27 new PACA referrals and filed 17 new administrative complaints alleging violations of the fair trade requirements of the PACA;
- Negotiated settlements in three related cases involving allegations of misbranding that resulted in the suspension of one company's license and the assessment of civil penalties totaling \$70,000 against the other two companies;
- Helped AMS investigate whether several responsibly connected individuals were affiliating with PACA licensees in violation of their employment sanctions and, when the evidence warranted it, filed administrative complaints against the individuals and the licensees;
- Closed 22 PACA enforcement actions after resolution of the case;
- Issued 19 decisions in PACA reparation cases in which OGC attorneys acted as presiding officers. These cases result in orders issued by the Judicial Officer of the Department; and
- Retired a longstanding backlog of reparation orders drafted by AMS that had been awaiting OGC review. In total, OGC reviewed 203 reparation cases in which written decisions were issued. The reparation awards issued totaled over \$11 million.

Food Safety: In 2011, OGC reviewed over 40 proposed rules, final rules and notices for publication in the Federal Register. OGC assisted the Food Safety and Inspection Service (FSIS) with the preparation of a proposed rule to modernize poultry slaughter inspection and a notice declaring six additional strains of E. coli as adulterants in certain raw beef products. Other significant actions included two final rules to implement provisions of the 2008 Farm Bill relating to the interstate shipment of state inspected meat and poultry products and a rule requiring federally inspected meat and poultry establishments to notify FSIS if adulterated or misbranded products are shipped and to develop and maintain recall plans. During the year, OGC attorneys initiated 10 administrative cases to withdraw inspection services from establishments based on criminal convictions or violations of FSIS regulations and prepared 20 cases for referral to the Department of Justice for the initiation of criminal or civil action. OGC also provided substantial assistance to the Department of Justice in connection with a case filed under the False Claims Act against a federally inspected beef slaughter and processing company.

Packers and Stockyards Act (P&S Act): In 2011, the Packers and Stockyard Program referred 62 administrative cases to OGC. These referrals seek the filing of an administrative complaint for the enforcement of the requirements of the P&S Act, legal review of agency action, or help with an investigation. During 2011, OGC filed 38 administrative complaints under P&S Act, closed 34 cases, and secured assessments of over \$650,000 in civil penalties. OGC also referred cases to the Department of Justice (DOJ) for violations of a Secretary's order or failure to file annual reports. Referrals to DOJ resulted in the assessment of over \$70,000 in penalties.

Animal and Plant Health Laws and Wildlife Services: During 2011, OGC reviewed, assisted in drafting, and approved for legal sufficiency approximately 250 proposed rules, final rules or notices for publication in the Federal Register and federal quarantine orders. OGC assisted APHIS in the development, drafting, and issuance of regulations regarding the establishment of a system for animal traceability, the interstate movement of regulated nursery stock, herd certification, and interstate movement requirements to control chronic wasting disease and amendments to update and strengthen APHIS' bioterrorism regulations. OGC also provided considerable assistance to the Department of Justice in connection with three cases challenging APHIS' biotechnology regulatory activities. One case was successfully resolved during the fiscal year and briefing is completed on the remaining two cases. OGC,

in partnership with the Department of Justice and the Department of Homeland Security, successfully resolved several important cases against international express and air cargo companies for alleged violations of APHIS' agricultural hold requirements. Criminal and civil penalties totaling \$2 million were assessed against these companies.

### **INTERNATIONAL AFFAIRS, COMMODITY PROGRAMS AND FOOD ASSISTANCE PROGRAMS**

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

- **Tobacco Buyout Program and Assessments.** OGC continues to provide critical assistance to FSA on this 10-year, \$10 billion program. OGC has provided wide-ranging legal support, including underpinning the defense in major lawsuits and prosecuting dozens of affirmative actions that have resulted in successful recovery of hundreds of millions of dollars from tobacco manufacturers and importers that contravened various provisions of the program. The litigation involved an attempt by a major cigar maker to shift assessments to another segment and a defense against an action by a major cigarette manufacturer to shift \$140 million of assessments annually from cigarette makers to cigar makers;
- **Biomass Crop Assistance Program (BCAP):** During 2011, OGC continued to provide critical assistance to FSA in connection with both parts of the new BCAP program. Those parts involve (1) payment to producers to collect and transport biomass to energy markets and (2) funding privately developed projects to increase biomass. With respect to the former, OGC played a seminal role in achieving a settlement of major claims concerning tree deliveries and the use of so-called "black liquor", concerning the latter, OGC's assistance facilitated major projects to increase biomass production, notwithstanding close to \$100 million in funding reductions to the program;
- **Disaster Assistance:** During 2011, U.S. agriculture suffered exceptional losses from an extraordinary number of natural disasters, most notably flooding in the upper plains states, along the Mississippi flood plain, and in the Northeast, as well as devastating fires and drought throughout the Southwest. As a result, OGC had to provide nearly continuous support and advice to FSA on the entire suite of disaster programs available for crop loss, livestock loss, and forage loss. In particular, OGC provided analysis on numerous critical and complicated eligibility issues arising from losses related to damage caused by the breaching of levees to alleviate or prevent greater flood damage. During the year, USDA paid out \$1.7 billion under the various disaster programs;
- **Conservation Reserve Program (CRP).** OGC continues to provide essential advice on funding issues for CRP, involving hundreds of thousands of contracts and approximately \$2 billion in annual expense. In 2011, OGC's help was especially important with respect to the Conservation Reserve Enhancement Program, under which FSA and individual states both expend resources to target new enrollment to address critical local environmental issues.

**Foreign Agricultural Service (FAS) and CCC International Activities:** During 2011, OGC supported the work of the Department in the implementation of several major international trade and foreign assistance initiatives:

- **Trans-Pacific Partnership (TPP):** OGC attorneys played a significant role in collaboration with the Office of the United States Trade Representative (USTR) and the National Security Council (NSC) in reviewing and revising proposals for legal text in the TPP negotiations, particularly with relation to the Regulatory Coherence and Competition (state-owned enterprises) chapters and the implications of such provisions for the activities of CCC;
- **Korea-U.S. Free Trade Agreement:** OGC attorneys played a significant role, again in collaboration with USTR and the NSC, in developing certain applications of the Market Access Program for cooperators involved in meat exports to Asia, in an ultimately successful coordinated effort to build congressional support for legislation to implement the Korea-U.S. Free Trade Agreement;
- **Civil Fraud Claim against BNP Paribas (BNP):** OGC attorneys successfully engaged and supported the Department of Justice in filing a \$79 million civil fraud claim against the major European bank BNP Paribas in connection with the now moribund CCC Supplier Credit Guarantee Program, after having provided support to the U.S. Attorney's office in the indictment and conviction of several individuals, including a former BNP bank officer, in a related criminal matter;
- **CCC Export Credit Guarantee Program (GSM-102) and WTO dispute with Brazil.** OGC attorneys played an integral role in developing and implementing modifications to the GSM-102 program to comply with applicable

provisions of a Framework Agreement with the Government of Brazil that the United States has entered into while seeking a permanent resolution to a long-standing WTO dispute. Absent said Framework, Brazil could impose hundreds of millions of dollars of trade retaliation against goods and services of the United States.

Food and Nutrition Service (FNS) Activities: During 2011, OGC assisted in furthering the program and policy objectives of the nutrition assistance programs.

- Litigation: In The Deron School of New Jersey, Inc., et al. v. The United States Department of Agriculture, et al., FND attorneys led USDA's efforts during the discovery phase of the litigation. FND coordinated document custodian identification across the Department, concluding that over 200 individual custodians had potentially relevant documents. In addition, FND advised FNS in the retention of an e-discovery contractor and the institution of defensible mechanisms and methods for recovering and retaining all documents from all FNS custodians in Headquarters and all seven of its Regional Offices, as well as documents in the custody of officials elsewhere in the Department. Following collection, FND worked with the U.S. Department of Justice and the e-discovery contractor to establish search terms and privilege considerations designed to result in an appropriate production in response to plaintiffs' discovery requests. Finally, FND attorneys coordinated a team of six OGC attorneys in reviewing more than 2 million electronic documents identified as potentially relevant during the discovery process - producing all relevant documents, and meeting the discovery production deadlines imposed by the Court. FND also assisted FNS in Humane Society of America, ex rel. Humane Society of the United States v. Westland/Hallmark Meat Company, et al. The Humane Society brought action against Westland/Hallmark Meat Company for fraud in multiple contracts with the government due to use of "downer" cows in its production of beef. FND assisted in the response to interrogatories and the gathering and review of over 200,000 documents.

### **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 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 resolution of Departmental civil rights litigation and implementation of settlement agreements involving Farm Loan Programs, including In re Black Farmers Discrimination Litigation, Garcia v. Vilsack, and Love v. Vilsack. CDD continued to provide legal advice in the settlement of individual program discrimination complaints against FSA.

Rural Development (RD): CDD continued to assist RD in the implementation of complex Farm Bill energy programs and negotiation of conditional commitments and bond terms for significant section 9003 guaranteed loans. CDD assisted in the defense of RD in 38 new prepayment lawsuits involving the multi-family housing loan program, helped RHS streamline its guaranteed single family housing regulations, and helped defend several lawsuits challenging RHS servicing and appeal procedures.

RMA and the Federal Crop Insurance Corporation (FCIC): CDD provided substantial assistance in addressing questions concerning the new Standard Reinsurance Agreement. CDD assisted the agency in developing several new concept proposals into policies or endorsements and provided significant drafting assistance for a 2012 Farm Bill. CDD continued to assist 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 by the Rural Utilities Service (RUS) of Rural Development's Electric, Telecommunications, Broadband, and Water and Waste Disposal Programs.

Major Telecommunications and Broadband Issues: During 2011, RUD continued to provide legal advice and assistance to RUS in administering the portfolio of loans and grants resulting from the American Recovery and Reinvestment Act of 2009 (ARRA). RUS also required ongoing legal assistance in administering its broadband portfolio created under

the Rural Electrification Act and other authorities. RUD attorneys provided substantial legal advice and assistance in enforcing collection of delinquent loans and recovery of misspent grant funds. RUD attorneys are working with RUS in developing an initial set of standardized procedures for enforcing collection on obligations arising under the RUS telecommunications program.

Endangered Species Act: The Keystone XL Pipeline, if built, would require electric service from several RUS Electric Program borrowers whose service territories include portions of the proposed route. Consequently, environmental groups named the Administrator of RUS as a co-defendant in their lawsuit against the Department of State and other federal defendants in their efforts to block the pipeline by attacking the legal sufficiency of the Endangered Species Act process RUS and the other federal defendants used. Shortly after this action was filed, the RUS Water Program received formal notice of the intention of another environmental group to challenge the route of a proposed water line extension in Oregon using a similar legal theory.

Energy Efficiency: RUS is launching a new energy efficiency lending program as part of the Vice President's Recovery through Retrofit initiative. RUD is providing legal advice and drafting for the initial regulations and legal instruments needed to implement the program and will be responsible for providing all legal assistance necessary to administer the program in the future.

Transmission: In 2011, the Administration announced a major Smart Grid Initiative. The only funding announced for this multiagency initiative was a \$250,000,000 commitment from RUS. In addition, multiple policy initiatives intended to improve the national grid are generating a demand for legal services from RUD in order to assess their impacts on the \$43 billion RUS loan portfolio and to make corresponding changes in established RUS policies, regulations, legal instruments and procedures. Issues include transmission siting authority, rights of way use, cost allocation, reliability, security, interconnection and access. Because abundant renewable energy resources tend to be located in rural areas, the construction of the high voltage transmission lines to deliver this energy to the population centers which need it also generates legal controversies even for popular "green" sources of energy.

Regulatory Streamlining: In response to the President's Executive Order on improving regulations and regulatory reviews, RUS has begun the process of comprehensively reviewing its Electric Program regulations to expedite approvals and reduce unnecessary burdens on energy projects. RUD attorneys are directly and substantially involved in this effort. Stakeholders have already filed a comprehensive set of reforms with the Under Secretary for Rural Development that they are asking RUS to make as part of this initiative.

## NATURAL RESOURCES

Forest Service Programs: OGC advised the Forest Service on compliance with Federal environmental and administrative laws governing management of the 193 million acre National Forest System (NFS). OGC counsels the Forest Service on legal issues arising under laws such as the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), the 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 assisted 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; and
- Litigation. As of September 30, 2011, approximately 132 cases involving APA, NEPA, NFMA, ESA, and other issues were pending, including cases concerning timber salvage, fuels reduction projects, Roadless Area management, range 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 including:

- Legal assistance on the defense of lawsuits seeking tens of millions of dollars based on challenges related to timber sales;
- Representation in suspension and debarment proceedings, and bid protests;
- Advice regarding implementation of stewardship contract projects;
- Legal assistance to the Forest Service regarding its efforts aimed at providing relief to the timber industry in light of severely declining timber market conditions;
- Legal advice to the Forest Service with respect to a rule governing the disposal of forest products to the public and to Indian tribes; and
- Legal advice on implementing the Secure Rural Schools and Community Self-Determination Act of 2000.

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

- Drafted revisions to water rights clauses in ski area permits to ensure that ski area operators will continue to have the water they need to operate;
  - Provided assistance with litigation involving designation of routes and areas for motor vehicle use on NFS lands and litigation involving recreation fees charged for high-impact recreation areas on NFS lands;
  - Drafted a proposed rule, published for public notice and comment, which would clarify and streamline the administrative appeal process for decisions relating to special use authorizations, grazing permits, and plans of operations for mining activities;
  - Developed directives implementing the interdepartmental and interagency memorandum of understanding governing siting of large-scale electric transmission lines on federal land; and
- § Assisted the Forest Service in negotiating an enhanced working relationship between the Forest Service and Tennessee Valley Authority, Bonneville Power Administration, Southwestern Power Administration, and Western Area Power Administration regarding authorization and administration of electric transmission lines 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 (NRCS), and Agricultural Research Service (ARS). 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 provided extensive advice regarding the rights conveyed by the United States mining laws, the Forest Service's authority to regulate locatable mineral operations, and oil and gas leasing issues.

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 in drafting legislation, and in reviewing a significant amount of pending legislation. OGC also reviewed and assisted in drafting legislative reports, and reviewed testimony for congressional hearings.

OGC provided assistance to the Forest Service regarding hydroelectric licensing projects on NFS land and worked with an interagency group to draft final regulations for trial type hearings and alternative licensing conditions.

NRCS Programs: OGC provides legal advice and services to 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 Conservation Stewardship Program, 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.

Pollution Control: The OGC Pollution Control Team (PCT), in support of the Hazardous Materials Management Program, provided legal services for all USDA agency matters related to the Resource Conservation and Recovery Act and Comprehensive Environment Response, Compensation, and Liability Act (CERCLA). In 2011, the PCT recovered money or equivalent work for cleanup costs of more than \$82 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 as agencies divest themselves of surplus properties. Since the inception of the Pollution Control Team in 1991, the PCT has received funding from the Hazardous Materials Management appropriation. Examples of the PCT's accomplishments in 2011 include:

- Concluding a Consent Decree with Hecla Mining Company to resolve almost 20 years of litigation and recover \$265 million, of which \$65 million was paid for Natural Resource Damage Restoration;
- Completing the Record of Decision for the Holden Mine site cleanup, estimated to cost the responsible party \$107 million to remediate this site in Washington State;
- Concluding a Consent Decree with the Stearns Company wherein USDA received a confession of judgment for \$31.8 million and acquired the company's mineral rights on nearly 40,000 acres of land in Kentucky to settle the company's CERCLA liability and also end takings litigation that has lasted more than 15 years; and
- Committing significant resources in the Nu-West v. United States litigation to defend the Forest Service from CERCLA liability as an owner, operator, and arranger for hazardous substance releases caused by phosphate mining under the Mineral Leasing Act, where the Forest Service and Bureau of Land Management approved mining plans. The potential CERCLA liability at the sites in litigation ranges from \$200 million to \$450 million.

### **LEGISLATION, LITIGATION AND GENERAL LAW**

Legislation: During 2011, OGC reviewed 250 legislative reports on bills introduced in Congress or proposed by the Administration, and cleared for legal sufficiency written testimony of 688 witnesses testifying on behalf of the Administration before Congressional committees. The Division provided 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, including the FY 2012 Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, and a draft of the 2012 Farm Bill intended to be attached to legislation by the Joint Select Committee on Deficit Reduction.

Litigation: The Litigation Division, in coordination with attorneys from the Department of Justice (DOJ) and other divisions in OGC, is responsible for presenting USDA's legal position in cases on appeal. During 2011, the Litigation Division handled approximately 300 such appellate matters, including 67 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, federal circuit courts, and state appellate courts. In 2011, DOJ and USDA obtained a favorable decision from the Ninth Circuit in Center for Food Safety v. Vilsack, in which the court of appeals reversed a preliminary injunction that would have required the destruction of Roundup Ready sugar beets planted pursuant to permits issued by APHIS. DOJ and USDA also obtained a favorable ruling from the Tenth Circuit in State of Wyoming v. USDA, in which the court of appeals upheld USDA's Roadless Rule, finding that Wyoming had failed to demonstrate that the Forest Service's promulgation of the Roadless Rule violated the Wilderness Act, NEPA, the Multiple Use Sustained Yield Act, or NFMA, and also finding that the district court abused its discretion in permanently enjoining the Rule on a nationwide basis. Another favorable result was obtained in Russell Country Sportsmen v. USFS, in which the Ninth Circuit held that "nothing in the [Montana Wilderness] Study Act, which requires the Service to manage a wilderness study area so as to 'maintain' its wilderness character as it existed in 1977, prohibits the Service from exercising its discretion to enhance the wilderness character of a study area." Montana Wilderness Association v. Weldon, a second case presenting related issues concerning the interpretation of the Act, is currently pending before the Ninth Circuit.

In addition, DOJ and USDA successfully opposed certiorari in a number of Supreme Court cases, including Benoit v. USDA, in which the D.C. Circuit had upheld and applied statutory exhaustion requirements pertaining to certain discrimination complaints.

The Litigation Division also assisted DOJ in preparing the United States' briefs at the certiorari and merits stages, and preparing for oral argument before the United States Supreme Court, in National Meat Association v. Harris, in which the National Meat Association challenged a California statute requiring the immediate euthanasia of non-ambulatory pigs presented for slaughter, including pigs presented for slaughter at federally inspected slaughterhouses. The United States argued in its amicus brief that the California statute imposed requirements at slaughterhouses that were in addition to and different than the requirements imposed by the Federal Meat Inspection Act, and therefore, the state statute was expressly preempted by the federal statute. The Litigation Division also assisted DOJ in preparing amicus briefs at the certiorari and merits phases in PPL Montana, LLC v. Montana, in which the Supreme Court elected to review a decision of the Montana Supreme Court that pertains to the legal standards by which a state may show ownership of beds of rivers and streams within the state's boundaries. Argument in the case was held on December 7, 2011, and a decision is expected by June 2012.

The Litigation Division assisted DOJ in preparing for oral argument before the Third Circuit in Minard Run Oil Co. v. USFS. The issue on appeal is whether the Forest Service, in order to protect surface resources in the NFS, has the authority to delay approval of drilling proposals submitted by owners of subsurface mineral rights until after the Service has conducted environmental analysis under the NEPA. Holders of private oil, gas, and mineral rights on the Allegheny National Forest persuaded a district court judge in Pennsylvania to enter a preliminary injunction requiring the Service, without preparing any environmental analysis, to issue Notices to Proceed. On September 20, 2011, the Third Circuit issued an adverse decision affirming the injunction. The Division has worked with OGC and DOJ attorneys in deliberating about how to respond to the Third Circuit's decision. The Litigation Division also assisted DOJ in preparing an amicus brief that the United States filed in The Wilderness Society v. USFS, in which the Ninth Circuit revisited and abandoned its so-called "federal defendant" rule, which had categorically prohibited private parties and state and local governments from intervening as a matter of right on the merits of claims brought under NEPA.

The Litigation Division also defends all USDA Judicial Officer decisions, of which review is sought in the federal courts of appeals that enforce P&S Act, PACA, AWA, and HPA. Litigation Division attorneys personally brief and argue these cases before the U.S. Courts of Appeals. During 2011, the Litigation Division handled 5 such cases, obtaining favorable results in 2, and a partially favorable result in a third. Two cases remain pending.

The cases handled by the Litigation Division in 2011 include briefing and presenting oral argument in Todd Syverson, d/b/a Syverson Livestock Brokers v. USDA, a P&S Act case in which the Eighth Circuit issued a published decision upholding 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. However, the Eighth Circuit remanded the case to the Judicial Officer to reconsider the length of the sanction. The Litigation Division defended the Judicial Officer's revised sanction in petitioner's second appeal to the Circuit. The Litigation Division also defended USDA in a case arising out of PACA. In Perfectly Fresh Farms, Inc., et al. v. USDA, the Litigation Division presented oral argument before the Ninth Circuit defending the Secretary's determination that the corporations violated the prompt payment provisions of the PACA, and that the corporations' officers and directors were responsibly connected to the corporations at the time of the violations. Additionally, the Litigation Division successfully defended United States Department of Agriculture in Back v. USDA, a HPA case arising in the Sixth Circuit. On September 14, 2011, the court of appeals issued a decision upholding APHIS's use of digital palpation as a method of determining whether a horse is sore within the meaning of the Act. The Litigation Division successfully defended USDA in Lorenzo Pearson v. USDA, an AWA case in which the Sixth Circuit upheld the Judicial Officer's determination that Mr. Pearson had committed numerous violations of the Act.

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 2011, the Litigation Division's attorneys prepared 27 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), Freedom of Information Act (FOIA), the Privacy Act, Federal Advisory Committee Act (FACA), the

personnel laws and regulations, the Federal Service Labor-Management Relations Statute, federal procurement statutes and regulations, and federal intellectual property statutes.

Following the trend of last year, attorneys in GLD spent significant time advising agency employees on issues related to the Privacy Act and FOIA. Attorneys in the division spent significant time reviewing and advising agency personnel tasked with updating, amending, and establishing USDA agency systems of records. In 2011, GLD defended an unprecedented number of FOIA and reverse FOIA suits. Not only was the number of FOIA lawsuits unusual, but many involved requests involving several agencies in the Department in which the assigned attorney had to coordinate the release of tens of thousands of pages of documents in order to defend the cases, such as Schiff Hardin v. USDA, Save the Scenic Santa Ritas, et al. v. FS, Richard Wallick v. AMS and others. GLD also successfully defended the USDA in Central Platte Natural Resources District v USDA (8<sup>th</sup> Cir.) which is one of several cases that have been filed against the Department challenging the denial of FOIA requests involving information covered by section 1619 of the Food, Conservation, and Energy Act of 2008.

As anticipated, issues associated with e-discovery grew significantly in 2011. GLD assisted the Office of the Chief Information Officer with the acquisition of the Harvester software tool to enable transfer of forensically sound copies of electronically stored information (ESI) to central locations. GLD assisted with the collection and review of ESI in a number of cases, including the Westland-Hallmark False Claims Act action in which an attorney from GLD coordinated OGC staff from many divisions of OGC and the field offices in the collection, processing, and privilege review of ESI for some 350 custodians.

Significant attorney resources have been expended on the review of the circumstances of the flash flood that occurred at the Albert Pike Recreation Area in Arkansas and resulting tort claims that have been filed against the Forest Service. OGC has also advised Forest Service officials prospectively on policies regarding flooding on the lands it manages.

GLD counseled the Department on many significant issues ranging from environmental issues to fiscal law to Homeland Security and emergency preparedness. For example, GLD led and coordinated the Department's review and comment effort in response to the Office of Legal Counsel's review of amendments to the Clean Water Act and the differing positions of the Government Accountability Office (GAO) and the Environmental Protection Agency (EPA) as to how the amendments affect obligations of federal agencies to pay storm water impact assessments. GLD also analyzed the complicated issue of potential Anti-Deficiency Act violations in the Trade Adjustment Assistance for Farmers program. GLD assisted the Office of the Chief Financial Officer in understanding the Improper Payments Elimination and Recovery Act of 2010. Finally, GLD represents OGC on the permanent Natural Disaster Multi-Agency Coordination Group, and participated in the 2011 National Level Exercise and Eagle Horizon Exercise. In addition, GLD assisted in the development and review of the Agriculture Priorities and Allocations System regulation implementation, which are USDA responsibilities under the Defense Production Act and Executive Order 12919.

In 2011, GLD continued to support the Administration's and the Department's commitment to the use of prizes and challenges for promoting open government, innovation, and other national priorities. GLD provided advice and expedited legal review of high-priority projects such as the People's Garden Grant Program, FNS's MyPlate Fruit and Veggies Video Challenge, the Summer Food Service Program contest, and the End Childhood Hunger Video contest.

GLD defended or assisted in numerous proceedings before the Court of Appeals for the Federal Circuit, the Court of Federal Claims, district courts, and GAO. GLD reviewed the Department's contract for an IT services blanket purchase agreement for provision of help desk, network maintenance, and other vital technology services for the Washington, DC, metropolitan area network, which eventually resulted in a successful defense at GAO.

GLD also is assisting DOJ in defending a lawsuit against the government for breach of contract and Lanham Act violation for misuse of trademark.

GLD provided trademark and copyright advice in regard to Administration and Department initiatives, including Biopreferred, USDA Foods, and the change of the MyPyramid nutrition program to ChooseMyPlate.

GLD, together with the Litigation Division, continued assisting DOJ in regard to the Federal Government's involvement in Delano Farms Company v. The California Table Grape Comm'n. (E.D. Ca.), a case concerning intellectual property rights in the Agricultural Research Service. program for the development and introduction of certain new table grape varieties among California growers.

### **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. The CRLD litigates actions before the Equal Employment Opportunity Commission (EEOC), Merit Systems Protection Board (MSPB), USDA Administrative Law Judges 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 provides legal sufficiency reviews of all Final Agency Decisions (FAD) issued by the Assistant Secretary for Civil Rights in program civil rights complaints, including all decisions rendered in the farm and housing loan programs under the Equal Credit Opportunity Act (ECOA). 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 (OA) 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 providing training on a variety of civil rights and employment issues, 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 2011, CRPCCD provided extensive EEO training for a variety of agencies including APHIS, Rural Development, FSIS, and FAS. CRPCCD also provided program civil rights training to OA and RMA. Other accomplishments include the successful resolution of several informal EEO complaints, resulting in savings of hundreds of thousands of dollars in litigation costs and judgments against USDA. In FY 2012, CRPCCD will take on a variety of new responsibilities including all OGC legal functions related to human resources, labor relations, and employee relations, in addition to the ongoing EEO and civil rights responsibilities of the division.

In 2011, CRLD worked on pending employment class actions such Joe Sedillo, et al., v. Vilsack and a newly filed putative class complaint Elaine Vercruyse, et al., v. Vilsack. The implementation of the settlement agreement in Clifford Herron, et al., v. Vilsack, was completed, and Darrell Harley, et al., v. Vilsack, was dismissed.

CRLD continues to coordinate the defense of USDA with 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:

- Garcia, et al., v. Vilsack, and Love, et al. v. Vilsack - Cases alleging discrimination by FSA against Hispanic and Women farmers and ranchers in loan making and loan servicing, respectively; the U.S. Supreme Court denied the petitions for writ of certiorari challenging the D.C. Circuit Court of Appeals and the District Court decisions regarding the denial of class certification. USDA established a voluntary non-judicial adjudicative claims process similar to the model used in the Pigford I, to address the decades old allegations of discrimination against women and Hispanics as an alternative for individual plaintiffs to litigate their cases in federal court. USDA is conducting outreach to notify female and Hispanic primary operators about the claims process, and is in the process of selecting a Claims Administrator to operate the claims process;
- Keepseagle et al. v. Vilsack - In November 1999, Native American farmers and ranchers filed a class action against the Department alleging discriminatory treatment in USDA loan programs and a systematic failure to investigate civil rights complaints. In Keepseagle, the United States District Court certified the case as a class action for injunctive relief purposes. After many years of litigation, plaintiffs and the United States achieved a comprehensive and historic settlement of this action which was approved by the court on April 28, 2011, and USDA is currently implementing the settlement agreement. The claims period for the non-judicial adjudication process similar to the model used in the Pigford II agreement, ended on December 24, 2011;
- After more than twelve years, implementation of the April 14, 1999, consent decree in Pigford/Brewington et al.,

the class action filed on behalf of African American farmers alleging race discrimination in farm loan and benefits programs, is coming to a close and the parties are negotiating the wind down of the agreement. As of November 10, 2011, no additional prevailing decisions were implemented in favor of Track A claimants. To date, the government has paid \$1,016,328,416 to prevailing Track A claimants, which includes \$44,598,941 in debt relief and related expenses. In addition, a total of \$34,739,783 has been paid to the 162 persons who elected to file Track B claims which were either adjudicated or settled.

The settlement agreement in Re Black Farmers Litigation (Pigford II), a consolidation of lawsuits with approximately 35,000 plaintiffs, was recently approved by the court on October 27, 2011. The lawsuits were in response to the 2008 Farm Bill, Public Law No. 110-246, § 14012(j)(1), 122 Stat. 1651, 2212 (2008), which authorizes 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. The claims period began November 14, 2011, and ends on May 11, 2012.

### **REGIONAL OFFICES**

OGC 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.

#### **Eastern Region**

NRCS. Eastern Region attorneys defended NRCS in contract disputes. For example, in Gulf Group, Inc. v. The United States, a contractor filed a complaint in Federal Claims Court requesting damages in the amount of \$904,087 based upon alleged defective specifications, directed changes, differing site conditions, and cost overruns.

RMA. Eastern Region attorneys have continued to see an increase in requests by this agency to assist in its defense in numerous RMA large claim crop loss cases. For example, attorneys defended successfully, Skymont Farms et al. v. FCIC, Cain Field Nursery et al. v. FCIC, Scruggs Farm Nursery v. FCIC, and Barnhill v. Veneman, with claims exceeding \$20 million.

Single-Family Housing. Considerable OGC Eastern Region resources were spent on servicing and liquidating RHS's single-family housing loans. In addition, new cases were brought challenging the servicing of guaranteed loans. For example, in Christopher Tone v. Tom Vilsack, OGC is defending allegations of Administrative Procedure Act and Due Process Clause violations in servicing the single-family guaranteed loan program.

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 -- almost one-half of all SNAP violation cases are pending in the Eastern Region. Vermex Deli and Grocery v. US, and Abdi Hajifarah dba The African Store v. United States of America, are just two examples of such matters in which OGC successfully defended the agency's permanent debarment of violating retailers.

Forest Service. Eastern Region attorneys served as USDA legal counsel on litigation matters brought under NEPA, NFMA, and ESA challenging numerous Forest Service plans and projects. In 2011, Eastern Region attorneys successfully settled or won multiple challenges to projects such as Heartwood, Inc. v. Elizabeth Agpaoa, which challenged the Forest Service's decision to harvest trees damaged in an ice storm would harm the Indiana Bat.

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. An OGC attorney defended the Forest Service in an action brought by a landowner, Edward Charles Furlong III v. Garland, wherein plaintiff claims access to his property through White Mountain National Forest and an adjacent town, as opposed to using the designated snow-mobile trail system. The Eastern Region has seen an increase in the number of applications for special use permits, including permits to locate electrical transmission lines on National Forest System lands.

Civil Rights, Employment Law, and Contract Law. The Eastern Region successfully defended USDA agencies in employment-related litigation before the EEOC, MSPB, and the United States District Courts. For example, Eastern Region attorneys helped defend the Department in Abramsen et al v. Vilsack, a case involving 32 plaintiffs alleging discrimination by the Cooperative State, Research, Education & Extension Service (now known as National Institute of Food and Agriculture).

### **Central Region**

Contracting. The Central Region provides legal services to FSA in its procurement of commodities for international food aid and for domestic food acquisition for the FNS nutrition assistance programs. The legal advice relates to the implementation of Federal Acquisition Regulation compliant contracting. During 2011, the Central Region worked extensively on a contract claim for \$5 million related to a food safety issue on an international procurement, where the contracting officer issued a final decision requiring OGC defense. In another procurement, the Central Region worked extensively on a matter involving an AbilityOne contractor who is alleged to have altered and falsified invoices to show compliance with contract specifications. This matter is on-going but involves a potential civil false claim of over \$31 million and contract disputes over payment calculations that total over \$4.5 million. There has also been an increase in requests for legal advice related to contract leasing issues on office space that USDA agencies are renewing, terminating or otherwise modifying.

NRCS Easement Acquisitions and Claims. OGC's Central Region continues to see a substantial increase in legal work related to easement acquisition for the Natural Resources Conservation Service. This legal work ensures that the environmental and financial interests of the United States are protected through adequate legal review and documentation. Many of these acquisitions involve parcels where the value exceeds \$1 million; the Barrs & Lawson acquisition involved 7,295 acres in Louisiana for over \$10 million. OGC also successfully defended NRCS in litigation involving an environmental tort claim for \$6 million arising out of an EQIP contract. In the Coastal Restoration activity along the Louisiana coast there has been an increase in complex Civilian Board of Contract Appeals litigation involving contractor claims of mistake, wrongful termination and claim for payment. Several of these claims are in excess of \$4.5 million.

Crop Insurance. OGC's Central Region provides legal advice to the Federal Crop Insurance Corporation. In the American Growers litigation, OGC's Central Region is working on collecting a \$40 million claim in the Rehabilitation and Liquidation action following the failure of this crop insurance corporation.

Supplemental Nutrition Assistance Program (SNAP). Increased surveillance using computer assisted technology has increased FNS's ability to detect SNAP fraud and abuse. In OGC's Central Region, this increase in surveillance and detection resulted in an increased amount of litigation and legal work (discovery, motions, cross motions, etc.) to defend the agency. Several of these cases resulted in permanent disqualification of store owners and in assessment of large civil monetary penalties.

### **Mountain Region**

Travel Management. Mountain Region attorneys have spent considerable time advising the Forest Service on travel management decisions 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 the Forest Service and OGC. Implementation of the 2005 travel management rule has been controversial in this Region, and there are currently seven lawsuits pending in Utah and Idaho filed by both motorized vehicle user groups and environmental groups, and one similar lawsuit in Colorado. In addition, there are administrative challenges to travel management plans in Colorado. The Missoula office is representing the Forest Service in multiple lawsuits involving challenges to travel management plans on the Gallatin, Beaverhead-Deerlodge, and Lewis and Clark National Forests. We received a favorable published travel management decision from the 9th Circuit regarding a Lewis and Clark N.F. travel plan in Russell County Sportsmen v. USFS (No. 10-35784, October 12, 2011). The Missoula office is also representing the Forest Service in a lawsuit involving an R.S. 2477 assertion by Shoshone County, Idaho. This lawsuit was filed by mining companies who want an old road restored to accommodate mining traffic. The Forest Service has constructed an alternative route to the site as the contested road is in an environmentally sensitive area. The State of Utah has asserted claims under the Quiet Title Act to rights of way

for up to 2,000 roads on federal land in Utah; the Ogden office is defending against the State's claims to rights of way for roads on NFS land. The Denver office is defending a claim by the South Dakota Attorney General that public highways exist along all section lines in the State, including within NFS lands, and that those "public highways" cannot be closed to motorized use.

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, Hapner v. Tidwell, and Alliance for the Wild Rockies v. Bradford; and wildlife management, e.g., Alliance for the Wild Rockies v. USFS. The Region recently won a victory in Ark Initiative v. USFS, a case involving numerous NEPA challenges to an environmental assessment for a proposed ski resort project as well as the acceptance by the Forest Service of a Master Development Plan completed without NEPA analysis.

Water Rights. Mountain Region attorneys continued to provide legal counsel and represent the Forest Service in water rights issues at the regional and national levels. Water rights and water resource developments are contentious issues in this Region, especially with the number of fish species listed as threatened or endangered under the ESA. The Region has a number of pending civil and administrative water rights cases, and several pending lawsuits concerning regulation of water facilities on NFS lands. For example, in Water Supply and Storage Company v. USDA and USDOJ, the operator of a private dam on NFS land challenges Forest Service regulation of the dam, while at the same time, environmental groups challenge the Forest Service's decision to authorize the dam. In Friends of the Clearwater v. U.S. Dept. of Agriculture (D. Idaho), the Missoula office is currently defending the Forest Service in two cases that allege Clean Water Act violations arising from the operation of wastewater treatment plants at ranger stations. The Region is also handling numerous claims for water rights filed by the Forest Service in state courts under the McCarran Act, is working closely with the OGC Washington Office and the Forest Service on ski area water rights issues, and has several outstanding disputes regarding relicensing of hydropower projects and implementation of appropriate license terms to protect NFS lands.

Energy Development. Mountain Region attorneys advise the Forest Service regarding controversial proposed oil and gas development in Colorado, Utah and Wyoming, and coal development in Colorado and Utah. Several of these minerals projects are in litigation. In WildEarth Guardians v. USFS, the region recently won a case challenging a coal lease modification based on claims centering on the alleged failure of the Forest Service to quantify the incremental effect on global warming caused by the venting of methane gas, and to look at alternatives to venting the methane gas.

Mining. Mountain Region attorneys in Albuquerque are currently advising the Forest Service regarding two proposed large copper mines in Arizona (one will be the subject of a legislated land exchange) and the reinitiation of uranium mining in the vicinity of the Grand Canyon in Arizona and traditional cultural properties in New Mexico. The Ogden office is currently advising the Forest Service regarding two controversial large mines in Idaho (one phosphate mine and one cobalt mine) in the vicinity of large remediation efforts directed at releases from previous mines. The Ogden office is also assisting the Forest Service in seeking remediation, cleanup, and compliance with federal regulations at several other large mines. The Denver office provided significant advice to the Forest Service regarding a planned molybdenum mine near Crested Butte, Colorado. The Missoula office is currently advising the Forest Service regarding two silver mines proposed underneath the Cabinet Mountain Wilderness Area on the Kootenai National Forest.

Grazing. Livestock grazing is a significant and controversial program in the Forest Service regions served by OGC's Mountain Region. Mountain Region attorneys are helping to defend several pending lawsuits that challenge Forest Service authorization of livestock grazing, alleging violation of NEPA, NFMA and the ESA. The region's attorneys also advise on many challenges from grazing permit holders disputing Forest Service actions to administer their permits, or other actions that reduce opportunities for livestock grazing. The Payette National Forest has recently issued a decision to substantially curtail domestic sheep grazing to avoid risk of disease transmission to bighorn sheep, and National Forests in several states are expected to follow suit. By contrast, the Bighorn National Forest reauthorized many cattle and sheep allotments and those decisions are now under appeal on grounds of wildlife viability (e.g., disease transmission from domestic to bighorn sheep) and NEPA. Lawsuits by industry and environmental groups are pending. The Forest Service's Southwestern Region has experienced a series of years with lower than normal

precipitation, and has had a large number of challenges to the reauthorization of grazing permits. That region is also currently in litigation in both Arizona and New Mexico over how it is managing grazing in relation to the critically endangered Mexican wolf. Similarly, the proposed listing of sage grouse under the Endangered Species Act has prompted consideration of a large scale amendment of forest plans for the national forests within the Mountain Region, including as the plans relate to grazing. Development of strategies to avoid listing, and consideration of plan amendments, will require OGC involvement. Attorneys in the Mountain Region also provide substantial assistance to the Washington office of OGC and the Forest Service on water right issues relative to grazing permits.

Fire. The four Forest Service regions served by the Mountain Region of OGC have active wildland fire programs, which lead to a large number of claims for collection of suppression costs and damages. There are numerous pending suits for collection and several more ongoing investigations. Several million dollars have been recovered in recent years. In Region 4 alone, there are three pending suits for collection and eight pending referrals to DOJ.

Title Disputes and Easement Issues. During the past year, the Mountain Region has assisted DOJ in defending the Forest Service in over 20 federal court cases involving quiet title claims against the Forest Service. These quiet title claims involved hundreds of acres of land claimed by the Forest Service and numerous easement claims either by or against the Forest Service. OGC attorneys helped to achieve successful settlement in 15 of these cases, which included, among other things, donation of five valued wilderness inholdings to the Forest Service. We prevailed on the merits in United States District Court in three other cases, two of which are currently on appeal to the 10th Circuit Court of Appeals.

Rural Development Programs. The Mountain Region provided legal advice and litigation support to all Rural Development agencies in Colorado, Wyoming, Utah, Arizona, New Mexico, and Montana, including RHS, RUS, and RBS. The region's services included assisting with loans worth hundreds of millions of dollars (including making, servicing, restructuring, and collecting loans, and, where necessary, foreclosing on collateral), grants, and tribal issues. Attorneys in the region drafted national templates for loan closing instructions for the Rural Microentrepreneur Assistance loan program and for the Preservation Revolving Loan Fund loan program, and served as a national resource for issues arising from the multi-family housing guaranteed loan program.

RMA. Mountain Region attorneys provided litigation support to the Topeka Regional Office of RMA on Colorado and Wyoming cases. The region successfully defended the RMA in proceedings before the National Appeals Division in a case involving approximately \$7 million. The region is currently assisting DOJ in defending RMA in two lawsuits involving over \$10 million.

Law Enforcement Issues. The region assisted Forest Service law enforcement with hundreds of closure orders, provided criminal law advice, and is currently assisting in the defense of two civil rights cases against law enforcement officers arising from their law enforcement work during a recent Rainbow Family gathering in New Mexico.

FNS. The region assisted the Department of Justice in litigating five debarment and suspension cases against grocery retailers, arising from the retailers' violation of SNAP program rules.

FSA. Mountain Region attorneys provided legal advice to FSA with loan issues and bankruptcies in more than 100 matters during the past year. The Mountain Region helped FSA make millions of dollars in loans to family farmers and small farming operations in five states, including Colorado, Wyoming, Montana, New Mexico, and Arizona.

## **Pacific Region**

Affirmative Fire Claims. The Pacific Region actively pursued cost-recovery actions against parties responsible for starting fires on NFS lands. It has represented USDA in affirmative fire cases that have resulted in the recovery of more than \$200 million, including more than \$18 million in 2011. (These figures do not include a \$35.6 million jury verdict that is on appeal to the Ninth Circuit Court of Appeals.) Of the amount recovered by the Pacific Region, the Forest Service has received more than \$140 million to help restore the affected NFS lands, make the lands more resilient to climate change, and enhance water resources.

Alaska Subsistence Program. The Pacific Region advised the Federal Subsistence Board on controversial issues regarding subsistence resources for rural residents of Alaska. This work included helping the Board conclude ten years of public debate and finalize a determination of the customary and traditional uses of all fish species on the Kenai River in the Chugach National Forest. The Pacific Region continued to provide assistance to the Justice Department in litigation affecting the Federal Subsistence Program, including defending against an appeal of a favorable district court decision in Katie Johns v. United States, a long-standing case in which the State of Alaska seeks to narrow the jurisdiction over navigable waters within federal reserves.

Hydropower. The Pacific Region reviewed the proposed legislation to implement the Klamath Basin Restoration Agreement. The legislation was introduced in November 2011. Pacific Region attorneys are helping the Forest Service respond to an increased number of proposals for projects involving alternative sources of energy. In Alaska, for example, there were more than 30 proposed hydroelectric projects on NFS lands in 2011, most of which are in roadless areas and pose potential conflicts with USDA roadless policies.

Legislation and Congressional Relations. The Pacific Region provided legal services to the Forest Service and the Department on Alaska-specific legislation and congressional relations. This work included the transfer of 70,000 acres of NFS lands within the Tongass National Forest to the Sealaska Corporation, an Alaska Native Corporation, to finalize Sealaska's entitlement under the Alaska Native Claims Settlement Act.

Natural Resources Litigation. The Pacific Region provided significant assistance to DOJ in natural resources litigation, including the lawsuits challenging the 2004 Sierra Nevada Framework, an amendment to the Land and Resource Management Plans (LRMP) for 11 National Forests in California; the lawsuits challenging the LRMPs for the four National Forests in Southern California; the lawsuits challenging various travel management plans in the Pacific Region; the lawsuits challenging the newly proposed Revised Management Plan for the Columbia River Gorge National Scenic Area; the lawsuits challenging the Tongass National Forest LRMP's protection of roadless areas and old-growth reserves; the lawsuit challenging the exemption of the Tongass from the 2001 Roadless Rule, which resulted in a judgment that allowed critical economic activities to continue; and the lawsuits challenging timber sales in roaded areas of the Tongass. Pacific Region attorneys also helped settle Conservation Congress v. Rey, the long-standing and contentious litigation involving the challenge to the revisions to the Northwest Forest Plan by Forest Service and the Bureau of Land Management.

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 in support of a strategy to help communities shift from relying on old-growth timber resources of the Tongass National Forest to a more diversified economy. Pacific Region attorneys also provided advice on a new rule for developing land and resource management plans, as well as on individual plans, salvage and green timber sales, fuels and hazard reduction projects, and grazing allotments.

Rural Development. The Pacific Region reviewed and prepared legal documents for grants and loans helping RD agencies obligate several hundred million dollars in 2011. The Pacific Region helped RUS obtain adequate security for its loans, and issued loan closing instructions for important water and sewer projects. Pacific Region attorneys helped RHS with the transfer and assumption of multi-family housing properties, and the issuance of multi-family loan closing instructions.

Western Pacific Programs. The Pacific Region saw an increase in work from the Western Pacific Islands as Pacific Region attorneys used their expertise to help USDA agencies address the unique issues posed in these islands. Pacific Region attorneys worked closely with the RD State office in Hawaii regarding various projects, loans, and grants in the Western Pacific Islands. They also provided legal advice to the Forest Service with respect to proposed conservation easements in American Samoa and the Federated States of Micronesia.

OFFICE OF THE GENERAL COUNSEL

Summary of Budget and Performance  
Statement of Agency Goals and Objectives

By General Order of June 17, 1905, the Secretary of Agriculture established the position of Solicitor, thereby consolidating the legal activities of the Department. In 1956, Congress established the position of General Counsel of the Department of Agriculture as a Presidential appointee confirmed by the Senate (70 Stat. 742) (7 U.S.C. 2214). The mission of the Office of the General Counsel (OGC) is to provide legal services necessary to support all activities of USDA. OGC serves as the law office of the Department of Agriculture (USDA) and provides legal services to the Secretary of Agriculture, 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.

<b>USDA Strategic Goal</b>	<b>Agency Strategic Goals</b>	<b>Agency Objectives</b>	<b>Programs that Contribute</b>	<b>Key Outcome</b>
OGC supports all USDA strategic goals	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>Conduct litigation before courts and administrative forums; and provide litigation support services to the Department of Justice; in connection with litigation arising out of USDA programs and activities.</p> <p>Provide advice and counsel to USDA officials concerning legal issues arising out of USDA programs and activities.</p> <p>Review all draft regulations submitted by USDA agencies; and provide advice to USDA officials as to the legal-sufficiency of the draft regulations.</p> <p>Prepare and review for legal sufficiency legal documents, memoranda, and correspondence.</p> <p>Draft legislation, and review proposed legislation, reports, and testimony for legal sufficiency in connection with proposal to establish or amend USDA programs and activities.</p>	Legal Services Program	Provide effective legal services in a timely and responsive manner to support USDA activities, consistent with the priorities established by 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.

Selected Past Accomplishments toward Achievement of the Key Outcome:

- Negotiated settlement of three related cases involving allegations of misbranding under the Perishable Agricultural Commodities Act. The settlement resulted in the suspension of one company’s license and the assessment of civil penalties totaling \$70,000 against the other two companies.
- Obtained civil penalties of over \$650,000 in administrative cases brought to enforce the Packers and Stockyards Act.
- In the discovery phase of litigation challenging the School Lunch Program, a team of six OGC attorneys reviewed more than two million electronic documents identified as potentially relevant. All relevant documents were produced within the discovery deadlines imposed by the Court.
- Concluded a Consent Decree with Hecla Mining Company to resolve almost 20 years of litigation and recover \$265 million, of which \$65 million were paid for Natural Resource Damage Restoration.
- Successfully defended the Risk Management Agency in large-claim crop loss cases, including: Skymont Farms et al. v. FCIC; Cain Field Nursery et al. v. FCIC; Scruggs Farm Nursery v. FCIC; and Barnhill v. Veneman, with total claims exceeding \$20 million.
- Successfully defended the Department’s permanent debarment of retailers who violated the Supplemental Nutrition Assistance Program regulations by illegally trafficking program benefits
- Pursued cost-recovery actions against parties responsible for starting fires on NFS lands resulting in recovery of more than \$18 million in 2011.
- Successfully engaged and supported the Department of Justice in filing a \$79 million civil fraud claim against the major European bank BNP Paribas in connection with the now moribund CCC Supplier Credit Guarantee Program, after having provided support to the U.S. Attorney’s office in the indictment and conviction of several individuals, including a former BNP bank officer, in a related criminal matter.
- Played an integral role in developing and implementing modifications to the GSM-102 program to comply with applicable provisions of a Framework Agreement with the Government of Brazil that the United States has entered into while seeking a permanent resolution to a long-standing WTO dispute. Absent said Framework, Brazil could impose hundreds of millions of dollars of trade retaliation against goods and services of the United States.
- Successfully defended USDA in Central Platte Natural Resources District v USDA (8<sup>th</sup> Cir.) which is one of several cases that has been filed against the Department challenging the denial of FIOA requests involving information covered by section 1619 of the Food, Conservation, and Energy Act of 2008.

Selected Accomplishments Expected at the 2013 Proposed Resource Level: OGC will provide effective legal services in a responsive manner in order to ensure that agency officials can implement their programs.

Strategic Goal Funding Matrix  
(Dollars in thousands)

Program / Program Items	2010	2011	2012	2013	
	Actual	Actual	Estimate	Change	Estimate
<b>Agency Strategic Goal: 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.</b>					
Legal Services.....	\$43,393	\$41,416	\$39,345	\$5,729	\$45,074
Staff Years.....	284	267	256	+32	288

## OFFICE OF THE GENERAL COUNSEL

Summary of Budget and Performance  
Key Performance Outcomes and Measures

**Agency Strategic Goal:** 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:**

- Measure #1: Litigation before administrative forums, included Equal Employment Opportunity Commission, Merit Systems Protection Board, USDA's Administrative Law Judges and Judicial Officer, and other administrative bodies, conducted in an effective and timely manner.
- Measure #2: Provision of assistance to Department of Justice and U.S. Attorneys in connection with litigation in Federal courts as assigned accomplished in an effective and timely manner.
- Measure#3: Legal advice and counsel to USDA officials and agencies provided in a timely and effective manner.

**Key Performance Targets:**

Performance Measure	2007 Actual	2008 Actual	2009 Actual	2010 Actual	2011 Actual	2012 Target	2013 Target
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 an effective and timely manner.	Pleadings and filings made in an effective and timely manner	Pleadings and filings made in an effective and timely manner	Pleadings and filings made in an effective and timely manner	Pleadings and filings made in an effective and timely manner	Pleadings and filings made in an effective and timely manner	Pleadings and filings made in an effective and timely manner	Pleadings and filings made in an effective and timely manner
Provision of assistance to Department of Justice and U.S. Attorneys in connection with litigation in Federal courts as assigned accomplished in an effective and timely manner.	Litigation assistance provided effectively and briefs filed in a timely manner	Litigation assistance provided effectively and briefs filed in a timely manner	Litigation assistance provided effectively and briefs filed in a timely manner	Litigation assistance provided effectively and briefs filed in a timely manner	Litigation assistance provided effectively and briefs filed in a timely manner	Litigation assistance provided effectively and briefs filed in a timely manner	Litigation assistance provided effectively and briefs filed in a timely manner
Legal advice and counsel to USDA officials and agencies provided timely and in an effective manner.	Legal advice provided in a timely and effective manner	Legal advice provided in a timely and effective manner	Legal advice provided in a timely and effective manner	Legal advice provided in a timely and effective manner	Legal advice provided in a timely and effective manner	Legal advice provided in a timely and effective manner	Legal advice provided in a timely and effective manner
Dollars (in thousands)	\$39,168	\$38,884	\$41,530	\$43,393	\$41,387	\$39,345	\$45,074

OFFICE OF THE GENERAL COUNSEL

OFFICE OF THE GENERAL COUNSEL

Full Cost by Agency Strategic Goal  
(Dollars in thousands)

Agency Strategic Goal: 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.

Program / Program Items	2010 Actual	2011 Actual	2012 Estimate	2013 Estimate
Administrative costs (direct).....	\$40,288	\$38,485	\$37,035	\$41,317
Indirect costs.....	3,105	2,902	2,310	3,757
Total Costs.....	43,393	41,387	39,345	45,074
FTEs.....	284	267	256	288