Justice has not updated the guidelines that it issued in 1988 pursuant to the executive order, but has issued supplemental guidelines for three of the four agencies. The executive order provides that Justice should update the guidelines, as necessary, to reflect fundamental changes in takings case law resulting from Supreme Court decisions. While Justice and some other agency officials said that the changes in the case law since 1988 have not been significant enough to warrant a revision, other agency officials and some legal experts said that fundamental changes have occurred and that the guidelines should be updated. Justice issued supplemental guidelines for three agencies, but not for Agriculture because of unresolved issues such as how to assess the takings implications of denying or limiting permits that allow ranchers to graze livestock on federal lands managed by Agriculture.

Although the executive order’s requirements have not been amended or revoked since 1988, the four agencies’ implementation of some of these requirements has changed over time as a result of subsequent guidance provided by the Office of Management and Budget (OMB). For example, the agencies no longer prepare annual compilations of just compensation awards or account for these awards in their budget documents because OMB issued guidance in 1994 advising agencies that this information was no longer required. According to OMB, this information is not needed because the number and amount of these awards are small and the awards are paid from the Department of the Treasury’s Judgment Fund, rather than from the agencies’ appropriations. Regarding other requirements, agency officials said that they fully consider the potential takings implications of their regulatory actions, but provided us with limited documentary evidence to support this claim. For example, the agencies provided us with a few examples of takings implications assessments because, agency officials said, these assessments are not always documented in writing or retained on file. In addition, our review of the agencies’ rulemakings for selected years that made reference to the executive order revealed that relatively few specified that a takings implication assessment was done and few anticipated significant takings implications.

According to Justice, 44 regulatory takings lawsuits brought against the four agencies by property owners were concluded during fiscal years 2000 through 2002, and of these, 14 cases resulted in just compensation awards or settlement payments totaling about $36.5 million. The executive order’s requirement for assessing the takings implications of planned actions applied to only three of these cases. The actions associated with the other 11 cases either predated the order’s issuance or were otherwise excluded from the order’s provisions. The relevant agency assessed the takings potential of its action in only one of the three cases subject to the order’s requirements. According to Justice, as of the end of fiscal year 2002, 54 additional regulatory takings lawsuits involving the four agencies were pending resolution.