



United States Government Accountability Office
Washington, DC 20548

April 12, 2012

Congressional Requesters

Subject: *Limited Data Available on USDA and Interior Attorney Fee Claims and Payments*

In the United States, parties involved in federal litigation generally pay their own attorney fees. There are many exceptions to this general rule where statutes authorize the award of attorney fees to a successful, or prevailing, party. Some of these provisions also apply to the federal government when it loses a case. In 1980, Congress passed the Equal Access to Justice Act (EAJA)¹ to allow parties that prevail in cases against federal agencies to seek reimbursement from the federal government for attorney fees, where doing so was not previously authorized. The premise of EAJA was to help ensure that decisions to contest administrative actions are based on the merits and not the cost of litigation, thereby encouraging agencies to base such actions on informed deliberation. Although all federal agencies are generally subject to, and make payments under, attorney fee provisions, some in Congress have expressed concerns about the use of taxpayer funds to make attorney fee payments with agencies' limited funding, such as concerns that environmental organizations are using taxpayer dollars to fund lawsuits against the government, particularly against the Department of Agriculture (USDA), the Department of the Interior (Interior), and the Environmental Protection Agency (EPA).²

In the context of judicial cases—those brought in a court, including those that are settled—the law generally provides for three ways that prevailing parties can be eligible for the payment of attorney fees by the federal government.³ First, many statutes contain provisions authorizing award of attorney fees from a losing party to a prevailing party. Many of these apply to the federal government;⁴ for example, most claims under the Endangered Species Act and those under Title VII of the Civil Rights Act of 1964 apply to the federal government independent of EAJA. Second, where there is a “fee-shifting statute” that allows for the payment of attorney fees by a losing party to a prevailing party but is not independently applicable to the federal government, EAJA provides that the government is liable for reasonable attorney fees to the same extent as a private party (i.e., claims paid under EAJA

¹ Pub. L. No. 96-481, tit. II, 94 Stat. 2321, 2325 (1980) (codified as amended at 5 U.S.C. § 504; 28 U.S.C. § 2412).

² See for example, GAO, *Private Attorneys: Selected Attorneys' Fee Awards Against Nine Federal Agencies in 1993 and 1994*, [GAO/GGD-96-18](#) (Washington, D.C.: Oct. 31, 1995), and *Equal Access to Justice Act: Its Use in Selected Agencies*, [GAO/HEHS-98-58R](#) (Washington, D.C.: Jan. 14, 1998).

³ Under 28 U.S.C. § 2414, except as otherwise provided by law, compromise settlements of claims referred to the Department of Justice (DOJ) for defense of imminent litigation or suits against the United States or its agencies, shall be settled and paid in a manner similar to judgments. Thus, when DOJ settles cases on behalf of a federal agency, out-of-court and court-approved settlements may provide for payment of attorney fees and costs, depending on the underlying claims.

⁴ Some such provisions, however, cannot be used independently of EAJA to award fees against the federal government because the particular provisions do not effect a waiver of the federal government's sovereign immunity.

subsection (b)).⁵ Under these first two ways that a party may obtain attorney fees from the federal government, when a party prevails in litigation against the government and is awarded attorney fees under court order or settlement,⁶ the amounts generally are paid from the Department of the Treasury's (Treasury) Judgment Fund (a permanent, indefinite appropriation that pays judgments against federal agencies that are not otherwise provided for by other appropriations).⁷ Third, EAJA provides that in any civil action where there is no fee-shifting statute, prevailing parties generally shall be awarded attorney fees when the government cannot prove that its action was substantially justified (i.e., claims paid under EAJA subsection (d)).⁸ These awards or settlements are paid from the losing agency's appropriation. Where a federal agency is engaged in judicial litigation, as a plaintiff or a defendant, the Department of Justice (DOJ) generally provides legal representation for the government. However, DOJ officials reported that there are many exceptions, because several federal agencies—such as the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal Election Commission, the National Labor Relations Board, and the Consumer Financial Protection Bureau—have considerable independent litigation authority.

In adversary administrative adjudications—generally, proceedings that are brought in a special agency forum, rather than in a court, and in which the government position is represented—a separate provision of EAJA applies. Specifically, EAJA provides that in adversary adjudications the government is liable to a prevailing party for reasonable attorney fees when the government cannot prove that its action was substantially justified.⁹ Other statutes, such as Title VII of the Civil Rights Act of 1964, also authorize the payment of attorney fees in administrative proceedings. When such fees are awarded or agreed to in a settlement, they are generally paid from the agency's appropriated funds.¹⁰ According to DOJ officials, this adversarial subset of administrative proceedings for which the government may be liable for attorney fees represents a relatively small proportion of governmentwide administrative proceedings.

In this report, we refer to attorney fees any time such fees were paid, regardless of the source of law authorizing the payment—independently applicable statutory fee-shifting provisions, EAJA subsections (b) or (d), or EAJA's adversarial adjudication provisions—and whether awarded by a court or administrative forum or provided in a settlement.

⁵ This provision provides that the United States is liable for such fees and expenses to the same extent that any other party would be liable under the common law or the terms of any statute that specifically provides for such an award. 28 U.S.C. § 2412(b).

⁶ For purposes of this report, we use "awarded" to reflect attorney fees that are awarded by administrative or court decision as well as those provided in settlements.

⁷ 31 U.S.C. § 1304. Regarding payments of attorney fees under the statutory fee-shifting provisions independently applicable to the federal government, these are generally paid from the Judgment Fund unless the statute at issue provides otherwise. Regarding EAJA subsection (b) payments, an exception is that where a court finds an agency acted in bad faith, the payment cannot be made from the Judgment Fund.

⁸ In these cases, EAJA limits the prevailing plaintiff's eligibility to receive payment by defining (at the time the lawsuit is filed) an eligible party as either an individual with a net worth of \$2 million or below or a business owner or any partnership, corporation, association, local government, or organization with a net worth of \$7 million or below and 500 or fewer employees. However, tax-exempt nonprofit organizations and certain agriculture cooperative associations are considered eligible parties regardless of net worth.

⁹ 5 U.S.C. § 504(a), (b)(1)(C) (defining adversary adjudications as (i) an Administrative Procedure Act adjudication in which the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 before an agency board of contract appeals, (iii) any hearing conducted under certain false claims procedures under 31 U.S.C. chapter 38, and (iv) the Religious Freedom Restoration Act of 1993).

¹⁰ Certain statutes, such as the Small Claims Act and Federal Tort Claims Act, authorize the payment of administrative claims from the Judgment Fund. We did not identify any attorney fee payments in the scope of our review that were paid under these statutes.

From 1981 through 1995, EAJA provided for governmentwide reporting on claims paid under EAJA in the form of two annual reports to Congress. One report described administratively awarded payments and was the responsibility of the Chairman of the Administrative Conference of the United States (ACUS), while the other report described court-awarded payments and was issued initially by the Director of the Administrative Office of the U.S. Courts and later by the Attorney General.¹¹ For fiscal year 1994—the last year for which data were available—USDA did not report any awards and Interior reported one administrative award and no court awards. In 1995, Congress defunded ACUS¹² and EAJA reporting requirements were repealed,¹³ thereby eliminating the statutory mechanism to oversee these expenditures.¹⁴ There has been no official accounting of EAJA payments since then. ACUS was re-established in 2010, but requirements to report on attorney fee payments have not been re-enacted as of April 10, 2012.¹⁵

In August 2011, we reported on the costs, including attorney fee payments, associated with environmental litigation cases against EPA.¹⁶ For this report, you asked us to determine the extent to which data are available on attorney fee payments made under EAJA and other fee-shifting statutes at USDA and Interior for fiscal years 2000 through 2010. This report addresses the extent to which USDA and Interior had information available on attorney fee claims and payments made under EAJA and other fee-shifting statutes for fiscal years 2000 through 2010, including who made claims for payment, which claims were paid, the amount paid for each approved claim, and the statutes under which the cases were brought.

To conduct our work, we contacted 33 USDA and 42 Interior agencies;¹⁷ Treasury; and DOJ's Civil Division, Environment and Natural Resources Division, and the Executive Office of United States Attorneys. We asked each agency if it maintained information on cases where attorney fees were sought, and for those that maintained this information, we asked them to provide the case name, party name, claim amount, date of the award or payment, payment amount, and statutes under which the cases were brought for fiscal years 2000 through 2010. Our scope included attorney fees involving USDA and Interior, namely those associated with administrative adjudications of claims as well as cases filed with the courts. Our scope included attorney fee payments regardless of the source of law authorizing the payment— independently applicable statutory fee-shifting provisions, EAJA subsection (b) or (d), or EAJA's adversarial adjudication provisions—and regardless of whether the fees were paid from Treasury's Judgment Fund or from an agency's appropriations. Payments of other costs without a corresponding payment of attorney fees were outside of our scope.¹⁸ In addition, we interviewed USDA, Interior, Treasury, and DOJ officials to gain an understanding of the processes used by each agency to make and document attorney fee

¹¹ EAJA originally required the Director of the Administrative Office of the U.S. Courts to report annually to Congress on EAJA court activity, including the number, nature, and amounts of awards; claims involved; and any other relevant information deemed necessary to aid Congress in evaluating the scope and effect of awards under the act. The responsibility for this reporting was transferred to the Attorney General in 1992.

¹² See Treasury, Postal Service, and General Governmental Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468, 480 (1995).

¹³ Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104-66, §§ 1091, 3003, 109 Stat. 707, 722, 734.

¹⁴ ACUS lost its funding in 1995. Following congressional reauthorization in 2004 and 2008, funding was restored in 2009, and the conference was officially reestablished in March 2010.

¹⁵ Legislation that would establish certain EAJA reporting requirements, among other things, has been introduced—see, e.g., H.R. 1996, 112th Cong. (2011)—but as of April 10, 2012 has not been enacted.

¹⁶ GAO, *Environmental Litigation: Cases against EPA and Associated Costs over Time*, GAO-11-650 (Washington, D.C.: Aug. 1, 2011). Treasury paid a total of about \$14.2 million for attorney fees and costs for EPA environmental litigation cases from fiscal years 2003 through 2010, and EPA paid a total of \$1.4 million for attorney fees and costs from fiscal years 2006 through 2010.

¹⁷ USDA and Interior agencies, offices, and bureaus are referred to as agencies for purposes of this report.

¹⁸ Other costs include court costs, such as filing fees and reporting fees, and attorney expenses, such as the cost for expert witnesses, telephone, postage, travel, copying, and computer research.

payments. We also asked officials to identify any benefits and challenges of tracking attorney fee payments under EAJA and other fee-shifting statutes. The results of our work should not be generalized beyond USDA and Interior to draw conclusions about government-wide attorney fees.

We analyzed the available data gathered from each data source (i.e., USDA, Interior, and Treasury) to determine the extent to which complete and consistent information was available. Specifically, we determined the time frame in which data were available as well as whether the data source included information about claims that were denied, the party(s) and payee(s), the award or settlement amount, the payment amount, and the statutes under which the cases were brought. As part of this analysis and to the extent data were available for each agency, we determined the total amount of identified attorney fees awarded or paid and the number of cases filed as well as the statutes under which the cases were brought. When other costs were separated from attorney fees, we reported the total amount of attorney fees and other costs. When attorney fees were not separated from other costs in decisions and settlement agreements, we also reported a total amount for attorney fees and other costs. Therefore, the amounts reported may overstate attorney fees paid or awarded; however, other costs are generally minimal in comparison to attorney fees. In addition, we did not include payments with damages if damages could not be isolated from attorney fees and other costs. To the extent possible, we identified any trends in the data, such as a larger number of payments made in a particular fiscal year(s) or under a particular statute(s).

To assess the reliability of data provided by USDA and Interior agencies as well as Treasury, we reviewed data systems manuals and interviewed knowledgeable officials to ensure that the systems' design included controls for maintaining the integrity of the data. Further, to the extent possible, we reviewed selected publicly available data and case files where necessary to confirm the data we obtained from USDA and Interior agencies. Based on these actions, we determined that the data were sufficiently reliable for the purposes of illustrating the nature and limitations of the data collected and maintained in the various agency systems. Limitations in the data that we identified are noted later in this report.

In addition, we reviewed the statutory text and legislative history of EAJA and other fee-shifting statutes. We also reviewed the available ACUS annual EAJA reports issued from fiscal years 1982 through 1994 and interviewed ACUS officials to determine how ACUS collected information on attorney fees paid prior to 1995. In addition, we interviewed USDA, Interior, Treasury, and DOJ officials to gain an understanding of the processes used to make attorney fee payments. We also identified and interviewed stakeholders—such as officials from eight environmental groups, two industry associations, and a law office. We identified these stakeholders in part through a review of our prior work as well as through an iterative process, often referred to as “snowball sampling,” and selected for interviews those who would provide us with a broad range of perspectives on attorney fee payments. While the information from the interviews is not generalizable to all stakeholders, the interviews provided us with a broad range of perspectives on attorney fee payments. For our full scope and methodology, see enclosure I.

We conducted our work from May 2011 to April 2012 in accordance with all sections of GAO's Quality Assurance Framework that are relevant to our objectives. The framework requires that we plan and perform the engagement to obtain sufficient and appropriate evidence to meet our stated objectives and to discuss any limitations in our work. We believe that the information and data obtained, and the analysis conducted, provide a reasonable basis for any findings and conclusions in this product.

Results in Brief

Most USDA and Interior agencies did not have readily available information on attorney fee claims and payments made under EAJA and other fee-shifting statutes for fiscal years 2000 through 2010. As a result, there was no way to readily determine who made claims, the total amount each department paid or awarded in attorney fees, who received the payments, or the statutes under which the cases were brought for the claims over the 11-year period. Both USDA and Interior officials stated that given the decentralized nature of their departments and the absence of an external requirement to track or report on attorney fee information, decisions such as whether to track attorney fee data and the manner in which to do so are best handled at the agency level. Specifically, officials from 65 of the 75 USDA and Interior agencies we contacted told us that they did not track or could not readily provide us with this information. The remaining 10 USDA and Interior agencies either had mechanisms to track information on attorney fees or were able to compile this information manually using hard copy files or directed us to publicly available information sources where we could obtain the information. However, the extent to which these agencies had attorney fee information available for the 11-year period varied. Given this difference among these 10 agencies as well as various limitations—such as 5 USDA and Interior agencies not maintaining data about claims for attorney fees that were filed but denied—it is difficult to comprehensively determine the total number of claims filed for attorney fees, who received payments, in what amounts, and under what statutes.

Background

USDA and Interior Have Broad Missions and Multiple Component Agencies

USDA has a broad and far-reaching mission—to enhance agricultural trade, improve farm economies and quality of life in rural America, protect the nation's food supply, improve the nation's nutrition, and protect and enhance the nation's natural resource base and environment. USDA is comprised of 17 agencies and 16 offices that work to accomplish its mission. For fiscal year 2012, USDA estimates that it will have outlays of \$145 billion. About 81 percent of the department's outlays (estimated at \$117 billion) are associated with mandatory programs, including the majority of the nutrition assistance programs, farm commodity programs, export promotion programs, and conservation programs. The remaining 19 percent of outlays (estimated at \$28 billion) are associated with discretionary programs, including rural development loans and grants, research and education, and management of national forests and other Forest Service activities.

Interior's mission is to protect and provide access to the nation's natural and cultural heritage and honor trust responsibilities to American Indians and Alaska Natives and responsibilities to island communities. Interior is comprised of 9 bureaus and over 30 offices,¹⁹ which work to achieve its mission. The department's 9 bureaus are responsible for 500 million acres of America's public land, or about one-fifth of the land in the United States, and approximately 1.76 billion acres of the Outer Continental Shelf. The department's fiscal year 2012 budget was about \$10.2 billion and the department estimates that it will raise over \$14 billion in revenues in fiscal year 2012 collected from, among other things, energy and mineral rights, grazing, and timber sales.²⁰

¹⁹ On October 1, 2011, the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), formerly the Minerals Management Service, was replaced by the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement as part of a major reorganization. Because we collected information from BOEMRE, we include Interior information from 8 bureaus.

²⁰ Interior disburses revenues among federal, state, and tribal governments, while funding reclamation, conservation, and preservation accounts.

Litigation Involving USDA and Interior

Generally, the federal government has immunity from lawsuits, but federal laws authorize certain types of lawsuits against USDA and Interior, and the departments may also bring lawsuits of their own. In addition, some statutes and agency regulations provide for administrative appeals, which involve challenges to agency actions that are resolved within the agency.

The types of actions that involve USDA and Interior are varied. For example, lawsuits may involve challenges to certain agency actions—such as under provisions of the Endangered Species Act, which permits parties to file challenges to government actions affecting threatened and endangered species, or under the National Environmental Policy Act, which requires federal agencies to prepare a statement identifying the environmental effects of major actions they are proposing or ones for which third parties seek federal approval or funding and that significantly affect the environment. Cases may involve other statutes that apply governmentwide, such as Title VII of the Civil Rights Act, which prohibits discrimination in employment, or the Freedom of Information Act (FOIA), as amended, which requires agencies to make certain information available to the public pursuant to a request. Additionally, the Administrative Procedure Act authorizes challenges to certain agency actions that are considered final actions, such as rulemakings and decisions on permit applications. In addition to lawsuits that may be filed against an agency, the agencies may also file suit against other parties. For example, USDA and Interior may file suit seeking to acquire land through condemnation actions or, like other federal agencies, may seek to recover funds from contractors that have failed to fulfill the contracts.

USDA and Interior attorneys are involved in both administrative appeals and court cases, and their role is determined by the type of case involved. For example, USDA officials stated that USDA's Office of the General Counsel represents the department in all Office of Administrative Law Judges (OALJ)²¹ cases and National Appeals Division (NAD) EAJA proceedings, but its involvement in other NAD proceedings depends on the circumstances of each case.²² When USDA or Interior is party to a lawsuit filed in court, DOJ is generally responsible for providing the department's legal representation, while the departments provide technical and subject matter expertise and assist with the case, such as by drafting documents for DOJ to file and conducting research.²³ Generally, litigation decisions—such as whether to settle or litigate a claim, including claims for attorney fees—rest with DOJ. DOJ officials stated that three divisions litigate on behalf of USDA and Interior:

- the Environment and Natural Resources Division handles most of the work on environmental litigation cases;
- the Civil Division handles a broad range of litigation, including commercial, personnel, torts, and consumer protection litigation; and
- the Executive Office for United States Attorneys, which liaises with DOJ and the 94 U.S. Attorneys Offices that represent the United States in civil and criminal matters across the nation and its territories. The cases the Attorneys' Offices handle overlap in some areas of law with those of the other two divisions.

²¹ OALJ conducts rule-making and adjudicatory hearings throughout the United States in proceedings subject to the Administrative Procedure Act. In addition, OALJ is responsible for the publication of *Agriculture Decisions*, the official compilation of quasi-judicial and judicial decisions issued concerning regulatory laws administered by USDA.

²² NAD is responsible for adjudicating administrative appeals arising from program activities assigned to certain USDA agencies as well as other administrative appeals arising from decisions of USDA agencies designated by the Secretary of Agriculture. NAD proceedings are subject to the Administrative Procedure Act.

²³ The default rule is that DOJ is responsible for all litigation on behalf of the United States and its administrative agencies. 28 U.S.C. §§ 516, 519; 5 U.S.C. § 3106.

The Equal Access to Justice Act and Other Statutes Authorize the Payment of Attorney Fees

Generally, in the United States, parties involved in litigation pay their own attorney fees. However, there are many statutory exceptions, commonly known as “fee-shifting statutes,” that allow for the payment of attorney fees by a losing party to a prevailing party.²⁴ Awards of attorney fees may be designed to help to equalize contests between private individual plaintiffs and corporate or governmental defendants. Attorney fees provisions may be found in civil rights, environmental protection, and consumer protection statutes, among others.²⁵ Many of these fee-shifting provisions are applicable against the federal government. In such cases, the attorney fee awards are made under the terms of the relevant statute and are generally made from the Treasury Judgment Fund.

Where these fee-shifting provisions do not apply to the federal government, as well as where the underlying statute does not have a fee-shifting provision, EAJA may act to authorize such fees. Specifically, EAJA authorizes the award of attorney fees and costs to parties that prevail in certain civil actions brought by or against federal agencies, and in certain adversary adjudications conducted by federal agencies.²⁶ As the 1980 conference committee report for EAJA explains, the act’s premise is that individuals, corporations, partnerships, labor, and other organizations choose not to seek review of or defend against unreasonable government actions because of the expense involved as well as a disparity in expertise and resources between the government and the individual or organization involved.²⁷ For those cases brought under statutes that do not make the federal government subject to pay fees and costs, EAJA allows payment of the attorney fees and other costs if the organizations sought review of a government action and prevailed.²⁸

Except as otherwise specifically provided by law, EAJA authorizes the award of the following costs to be paid from Treasury’s Judgment Fund or an agency’s appropriations, as indicated:

- Reasonable attorney fees and expenses of a prevailing party to the same extent as any other party where a statutory or common-law exception provides for award of fees to a prevailing party.²⁹ Accordingly, EAJA makes agencies subject to fee awards under all of the statute’s provisions authorizing courts to award attorney fees and

²⁴ According to the Congressional Research Service, there are roughly 200 statutory exceptions. Congressional Research Service, *Awards of Attorneys’ Fees by Federal Courts and Federal Agencies* (2009).

²⁵ For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16; Endangered Species Act citizen suit provision, 16 U.S.C. § 1540(g)(4); and Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d).

²⁶ In general, until EAJA was enacted, under the principle of sovereign immunity, the federal government was not subject to some of these exceptions allowing for the shifting of attorney fees and therefore was not authorized to make payments to prevailing parties. However, the relevant provisions of some statutes—for example, environmental statutes such as the Clean Air Act and Clean Water Act—were already applicable to the federal government thus making the government subject to court awards to prevailing parties independent of EAJA.

²⁷ H.R. Conf. Rep. 96-1434, at 20-27 (1980) (Conference committee report on Pub. L. No. 96-481, The Small Business Export Expansion Act of 1980, of which Title II is the Equal Access to Justice Act).

²⁸ Another common way that prevailing parties may arrange for payment of attorney fees is through a contingency fee agreement, where a lawyer’s fee is typically paid from the client’s recovery in a successful suit. Because this type of fee payment is not pursuant to a fee-shifting statute, it is not included in the scope of this report.

²⁹ The data we collected included payments made under fee-shifting statutes, but the data did not identify any attorney fees payments made under a common-law exception, such as the bad faith doctrine.

expenses.³⁰ Payment of awards made under this section generally is made from Treasury's Judgment Fund.

- Attorney fees and expenses of a prevailing party in most other cases—that is, when the relevant statute does not authorize courts to award attorney fees and expenses, and no common-law exception applies—unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.³¹ As a result, in cases involving USDA or Interior under these statutes and provisions, courts award payment of fees under EAJA section 2412(d).³² Payment of awards made under this section is generally made from agency appropriations.
- Reasonable attorney fees and expenses of a prevailing party in adversarial adjudications, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. Payment of awards made under this section is generally made from agency appropriations.

EAJA also authorizes the award of court costs of prevailing parties against the United States in any civil action. These costs may include fees for the clerk and marshal, reporter, printing, witnesses, copies, docket fees, and interpreters and court-appointed experts and may include an amount equal to the filing fees. Payment of costs made under this section generally is paid by Treasury's Judgment Fund.

In addition, to settle a case, the government may agree to pay a plaintiff's court costs and attorney fees and expenses. Payments made in connection with settlements are paid in the same manner as those to fulfill a court award for the case.

Certain statutes authorizing the federal government to pay damages and attorney fees specify that the payments are to come from agency appropriations. For example, under the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002³³ and the Contract Disputes Act,³⁴ agencies are required to reimburse the Judgment Fund for judgments against the agency, and in 2007, FOIA was amended to provide that fees and costs must be paid from agency appropriations, not the Judgment Fund.³⁵ With respect to these types of provisions, we and Congress have noted that requiring awards to be paid from agency appropriations can promote accountability.³⁶ Attorney fee payments made under EAJA section 2412(d) are also made from agency appropriations.

The payment process differs based on the statute involved and whether the award was made at the administrative level or through the courts, as shown in figure 1.

³⁰ This provision does not limit the eligibility of prevailing plaintiffs, and the statute requires that the fees be "reasonable" rather than impose a specific cap on the hourly rate of attorney fees for payment purposes. In addition, any fees awarded under this section are subject to any limitations that would apply to analogous awards against private parties, which may be provided by an underlying statute.

³¹ EAJA authorizes the award of these fees against the federal government in civil court actions, excluding tort cases, such as personal injury suits.

³² This section limits the prevailing plaintiff's eligibility to receive payment by defining an eligible party as, at the time the lawsuit is filed, either an individual with a net worth of \$2 million or below or a business owner or any partnership, corporation, association, local government, or organization with a net worth of \$7 million or below and 500 or fewer employees. However, tax-exempt nonprofit organizations and certain agricultural marketing cooperatives are considered eligible parties regardless of net worth.

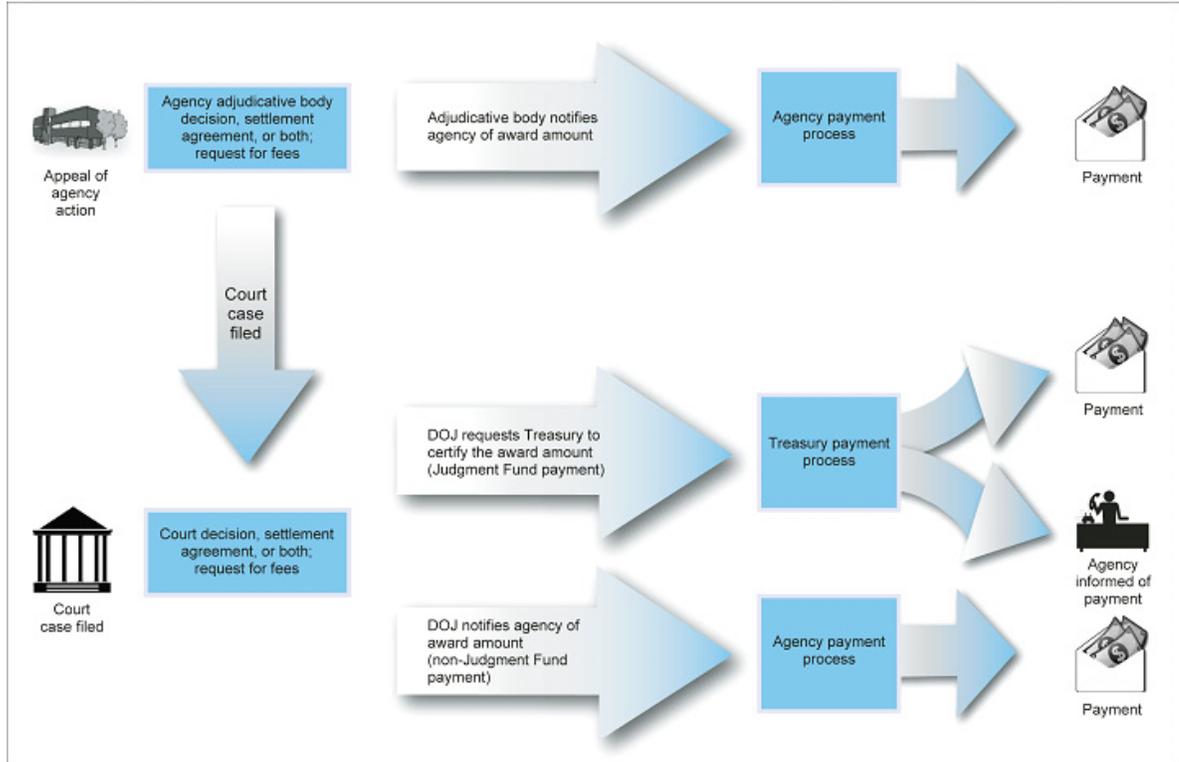
³³ Pub. L. No. 107-174, § 201(b), 116 Stat. 568 (2002), see 5 U.S.C. § 2301 note.

³⁴ Pub. L. No. 111-350, § 3, 124 Stat. 3825 (2011), codified at 41 U.S.C. § 7108(c).

³⁵ OPEN Government Act of 2007, Pub. L. No. 110-175, § 4(b) (5 U.S.C. § 552 note).

³⁶ See Pub. L. No. 107-174, § 101(8), and GAO, *The Federal Workforce: Observations on Protections From Discrimination and Reprisal for Whistleblowing*, GAO-01-715T (Washington, D.C.: May 9, 2001). Some of these statutes have established specific reporting requirements.

Figure 1: Typical Process for Administrative and Judicial Cases Resulting in Attorney Fee Payments



Source: GAO analysis of DOJ, Treasury, USDA, and Interior information.

Note: According to USDA, in some instances fees are paid initially out of the Judgment Fund but ultimately out of agency appropriations through a reimbursement to the Judgment Fund.

Most USDA and Interior Agencies Did Not Have Readily Available Attorney Fee Information, Generally Citing Few and Minimal Payments

Most USDA and Interior agencies did not have readily available information on attorney fee claims and payments made under EAJA and other fee-shifting statutes for fiscal years 2000 through 2010. As a result, it is difficult to readily determine who made claims, the total amount each department paid or awarded in attorney fees, who received the payments, or the statutes under which the cases were brought over the 11-year period. Both USDA and Interior officials stated that given the decentralized nature of their departments and the absence of an external requirement to track or report on attorney fee information, the information is not centrally tracked and decisions about whether to track attorney fee data and the manner in which to do so are best handled at the agency level.³⁷ Accordingly, we contacted 75 agencies within USDA and Interior to obtain their available attorney fee information. In response, officials from 65 of the 75 USDA and Interior agencies told us that they did not track or could not readily provide us with this information. These officials generally stated that they did not track attorney fee information because their agencies deal with few or no attorney fee cases, the payment amounts are minimal, another agency within the department tracked this information (e.g., USDA’s Office of the Assistant Secretary for Civil Rights (OASCR) tracks attorney fees arising from employee discrimination complaints), or the information was not needed for internal management purposes. For example, an Acting Director in the USDA Farm Service Agency stated that because so few cases are filed against the agency, there is little value in tracking the data. Additionally, the Finance

³⁷ The financial management system for each department includes information on litigation costs. However, the information in the systems does not isolate attorney fees and costs from damages (i.e., payments awarded to prevailing parties as a result of the case, which are not related to attorney fees or costs).

Officer for Interior's Office of the Secretary—an office that represents 28 agencies—stated that the attorney fee payment amounts are so small that information on these payments is not needed for internal management purposes. However, one of the agencies that did not track attorney fee information for the 11-year period—USDA's Natural Resources Conservation Service (NRCS)³⁸—plans to pilot a litigation case management database system in March 2012 that would track this information, and have the database fully operational by the summer of 2012. The database is to be used to track and monitor appeals, mediation cases, litigation (including attorney fees), and improper payments for NRCS nationwide. According to the NRCS Director of Compliance, tracking this information in a database will allow managers to gather case information more quickly and produce reports, and will help hold managers accountable.

The remaining 10 USDA and Interior agencies we contacted either had mechanisms to track information on attorney fees or were able to compile this information manually using hard copy files or directed us to publicly available information sources where we could obtain the information. Specifically, 3 USDA agencies—a program agency (Forest Service), an agency that conducts hearings of administrative appeals of adverse actions by certain USDA agencies (NAD), and an agency that adjudicates employee discrimination complaints (OASCR)—track attorney fee and cost information.^{39,40} Additionally, 2 Interior agencies—a program agency (U.S. Fish and Wildlife Service (USFWS)) and an agency that adjudicates administrative hearings and appeals (Office of Hearings and Appeals (OHA))—tracked this information.⁴¹ Officials from 4 of these agencies stated that tracking attorney fee information provided for increased transparency and better decision making. For example, Forest Service officials stated that attorney fee information could be used to help gauge whether attorney fees requested in pending litigation are reasonable, address congressional concerns about transparency and accountability, and reduce the need for data calls to the regional offices for this information. To this end, according to officials, in March 2009, the Forest Service implemented a code in its financial management system that enables the agency to track EAJA payments.⁴² Additionally, the USFWS Chief of the Office of Program Support for the Endangered Species Program said that tracking attorney fee data allows the Washington office to better understand where it spends its funds—providing a more accurate budget picture. Further, Interior's Director of OHA stated that Congress and the public, among others, should know the cost of Interior's programmatic decisions, including attorney fee payments.

Additionally, 4 Interior agencies—the Bureau of Land Management (BLM), the Office of the Special Trustee for American Indians (OST), the Office of the Inspector General (OIG), and the Office of the Solicitor—manually compiled attorney fee information, and officials from 3

³⁸ NRCS provides landowners with technical assistance for multiple programs to plan and implement conservation measures that protect soil, water, and wildlife.

³⁹ The Forest Service is responsible for managing its lands for various purposes—including recreation, grazing, and timber harvesting—while ensuring that such activities do not impair the lands' long-term productivity. OASCR provides overall leadership, coordination, and direction for USDA's civil rights programs, including matters related to program delivery, compliance, and equal employment opportunity.

⁴⁰ In general, USDA and Interior agencies that adjudicate administrative hearings and appeals do not maintain attorney fee information on cases filed in court.

⁴¹ USFWS's mission is to work with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people. OHA exercises the delegated authority of the Secretary of the Interior to conduct hearings and decide appeals based on decisions of the bureaus and offices of the department.

⁴² Prior to implementing the code, the Forest Service tracked some attorney fee payment information in a spreadsheet. According to Forest Service officials, the new code will capture EAJA payments made from agency appropriations—primarily those under EAJA section 2412(d).

of these agencies identified challenges to doing so.⁴³ For example, the Interior Solicitor's Office requested that attorneys in its headquarters and regional offices manually review litigation files as well as rely on their memories to identify EAJA cases—a method officials stated was labor intensive and difficult to implement for data spanning multiple years. In addition, officials in the Solicitor's Office said that turnover among attorneys who had knowledge of cases that resulted in attorney fee payments affected their ability to manually compile case information. Finally, USDA's OALJ directed us to publicly available sources on cases. We found that when compiling information from these sources, it took days to search through public records to identify such cases and collect attorney fee data.

Treasury and DOJ also maintain certain data on some USDA and Interior cases involving attorney fee payments, but DOJ's data are not readily retrievable or complete. Specifically, Treasury maintains information on attorney fees paid from the Judgment Fund on behalf of USDA and Interior in its Judgment Fund Internet Claims System (JFICS), which is designed to track all Judgment Fund payments (including damages and other categories of payments, as well as attorney fees). DOJ maintains certain case management data on individual court cases in three internal agency databases, but officials stated that these databases do not reliably capture attorney fees and costs.⁴⁴ DOJ officials said that their databases were designed for internal management purposes and not for agencywide statistical tracking. Over time, some EAJA data have been entered into the databases; however, the agency does not have a mechanism for determining what percentage of total EAJA awards is in the database or if the data were entered consistently. Furthermore, even though funds are spent to maintain the databases, the databases are old and adding data fields or otherwise making changes may be technologically infeasible or too costly. As a result, DOJ attorney fee data must be obtained by manual review of individual case files. Given that DOJ handled tens of thousands of cases over the 11-year period on behalf of USDA and Interior, we could not readily or systematically review all of the case files to determine the attorney fee awards.

Table 1 identifies the extent to which attorney fee information varied at the 10 USDA and Interior agencies that had attorney fee information available and Treasury for the 11-year period.

⁴³ BLM is responsible for managing about 250 million acres of federal land for multiple uses, including recreation; range; timber; minerals; watershed; wildlife and fish; and natural, scenic, scientific, and historical values, as well as for the sustained yield of renewable resources. OST was created to improve the accountability and management of Indian funds held in trust by the federal government. The Interior OIG provides independent oversight of the department's programs, operations, and management. The Office of the Solicitor performs legal work for Interior, manages Interior's Ethics Office, and resolves FOIA appeals.

⁴⁴ DOJ officials said that they are not in the best position to collect and report information on attorney fees and costs because they are often not aware of administrative cases.

Table 1: Number of Attorney Fee Cases and Selected Characteristics of Data Available at USDA and Interior Agencies and Treasury

	Number of cases/ payments recorded in data source ^a	Method of tracking	Time frame for which data are available (fiscal years)	Claims for attorney fees filed, but denied	Name of party	Name of payee	Amount paid	Amount awarded/ settled	Statute(s) under which the cases were brought
USDA: Data available from 4 of 33 agencies									
	241 ^b	Spreadsheet	2000-2010 ^c		X	X ^d		X	
Forest Service	32 ^b	Financial database	2009-2010 ^c			X	X		
OASCR	419	iComplaint database	2005-2010		X	X	X	X	X
NAD ^e	23	NADTrack database	2005-2010	X	X			X	n/a ^f
		We manually compiled the information using publicly-available databases and discussions with agency officials							
OALJ	7		2000-2010	X	X	X		X	X
Interior: Data available from 6 of 42 agencies									
USFWS	26 ^b	Spreadsheet	2004-2010 ^c		X ^d	X	X		X ^d
BLM	9 ^b	BLM officials manually compiled the information from payment files	2009-2010 ^c		X	X	X	X	X ^d
OST	1	Officials manually compiled the information by surveying office components	2007 ^c				X		
OHA	75 ^b	Docket Management System database	2000-2010	X	X	X		X	X
Inspector General	1	Officials manually compiled the information from legal files	2007-2010	X	X	X	X		X
Solicitor's Office	18 ^b	Officials manually compiled the information by surveying headquarters and regional offices	2010	X	X ^d	X ^d		X	X ^d
Treasury: Data available for USDA and Interior									
	525	JFICS	2001-2010 ^c		X	X	X		X

Source: GAO analysis of USDA, Interior and Treasury data and interviews with agency officials.

Note: The number of cases identified in this table should not be considered comprehensive or precise. This table represents the number of cases and amount of information we were able to identify from USDA and Interior where information was available.

^aSome sources provided case information while other sources provided payment information. Multiple payments might be associated with one case.

^bAt least one case overlapped with case information provided by another source. For example, the Solicitor's Office data overlapped with data provided by USFWS and BLM. In addition, 29 of 32 payments in the Forest Service financial database were also included with the 241 cases in the spreadsheet.

^cData are incomplete over the identified timeframe, that is, agency officials were not sure that they had provided the complete universe of cases. For example, Forest Service spreadsheet data include only environmental cases and do not include other types of cases, such as those brought under FOIA. Treasury data are available beginning in March 2001.

^dThese data sources contain the information for some, but not all, cases. For example, for USFWS some cases include the name of the party, while other cases do not.

^eAccording to USDA officials, NAD does not track payee information because all NAD cases are paid under EAJA's administrative provision, 5 U.S.C. § 504, which stipulates that any attorney fees and costs awarded are payable to the prevailing party, not to the attorney. As such, the prevailing parties are responsible for distributing any award to their legal representatives.

^fAll NAD cases arise from the same statute, 7 U.S.C. § 6996, providing a right of hearing for adverse decisions; thus, according to USDA officials, it is not necessary for NAD to track the statute relevant to each case.

Given the differences in attorney fee information available across the 10 agencies that provided information and Treasury and the limitations identified below, it is difficult to comprehensively determine the total number of claims filed for attorney fees, who received payments, in what amounts, and under which statutes.⁴⁵

- **The total number of claims filed for attorney fees cannot be determined.** Five USDA and Interior agencies that provided information on attorney fee data did not maintain data about claims for attorney fees that were filed but denied. As a result, the number of claims filed may be understated for these agencies.
- **Information on who received the payment is not always recorded.** Payment of attorney fees may be made to one or more parties or directly to the attorney. Agencies that had information on attorney fees sometimes identified a particular party in the case, as opposed to who received payments. For example, all 241 of the cases provided in the Forest Service spreadsheet identified the first named party, but 46 cases did not identify the payee. Given that attorney fees may be paid to the first named party, to other parties in the case, or to attorneys, the first named party may not reliably identify who actually received the attorney fee payment.⁴⁶
- **Data on actual attorney fee payments made are not consistently available.** Four agencies provided information on award or settlement amounts rather than payment amounts.⁴⁷ Amounts awarded reflect the attorney fee award included in a decision or settlement, and amounts paid reflect the actual amount paid by the agency. According to DOJ officials, award or settlement amounts may differ from payment amounts because award amounts may increase due to added interest expense before payment is disbursed. Moreover, DOJ and agency officials stated that award or settlement amounts may increase or decrease as a result of subsequent legal proceedings (e.g., a prevailing party could appeal the award amount, which could change the amount ultimately paid by the agency). In addition, decisions and settlement agreements may not separate attorney fees and costs from damages, which prevents agencies and Treasury from knowing exactly how much was allocated for each purpose. In these instances, the attorney fee amounts cannot be determined.

⁴⁵ Notwithstanding the limitations identified, using the various sources of information, we were able to identify some information about USDA and Interior agencies' attorney fee payments or awards. This information is included in enc. II.

⁴⁶ For example, we reviewed the 32 attorney fee and cost payments within the Forest Service's financial database. For 22 of the 32 payments, the payee did not match the first named party identified in the Forest Service spreadsheet. We could not make a determination for 2 payments because the data did not include sufficient information. Another payment was excluded from the analysis because it pertained to an administrative case. In the remaining 7 payments, the payee and party matched.

⁴⁷ In addition, the Forest Service spreadsheet data included award, not payment, amounts.

- **Statutes under which the case was brought are not always recorded.** Two agencies did not track information on the statutes underlying the award or payment. For example, the Forest Service financial database does not have a statute field, and according to the official who collected the spreadsheet data, he did not research statute information because of time constraints. However, the Forest Service has a general idea of statutes giving rise to attorney fee payments.⁴⁸

Some in Congress have identified a need for public reporting of attorney fee payment information, such as who made claims for payment, which claims were approved, and the amount paid for each approved claim, to provide better transparency and accountability.⁴⁹ For example, the House report accompanying the Department of the Interior, the Environmental Protection Agency, and Related Agencies appropriations bill for fiscal year 2012 noted that appropriators need information on how attorney fees are affecting agency budgets to prepare an accurate and responsible budget.⁵⁰ While the law itself did not impose a requirement, the report directed USDA's Forest Service, Interior bureaus, and EPA to provide to the House and Senate Committees on Appropriations and the public specific information related to attorney fee payments made under EAJA.⁵¹ A Forest Service Assistant Deputy Area Budget Coordinator stated that the agency plans to (1) report fiscal year 2011 EAJA payments—including information on the case name, award recipient, amount of program funds used, and date paid—to the committees by May 1, 2012; (2) include EAJA payment information for subsequent fiscal years in its annual budget justification; and (3) report EAJA payments on its website. This official said that the Forest Service does not track all of the data the House report directs it to provide, such as data on payments made for litigation related to the Endangered Species Act and the disposition of applications for EAJA attorney fees, but that the agency plans to determine by May 1, 2012 whether it will collect these data for future reports.⁵² Interior officials said that in February 2012 they provided the committees with the fiscal year 2010 EAJA data that the department had available. The department plans to provide the committees with available fiscal years 2011 and 2012 EAJA information, but has not yet determined when it will be able to do so. Beginning with the fiscal year 2014 budget submission, Interior plans to include summary EAJA information for the prior fiscal year. Interior is working to determine how to track this information departmentwide.

⁴⁸ This official estimated that between two-thirds and three-quarters of the Forest Service natural resource cases involve challenges under the National Environmental Policy Act, National Forest Management Act, Endangered Species Act, or a combination of these acts.

⁴⁹ See, e.g., Government Litigation Savings Act, H.R. 1996 and S.1061, 112th Cong. (2011); Jobs Through Growth Act, S. 1720, 112th Cong. (2011); Casting Light on EAJA Agency Records for Oversight Act of 2011, S. 549, 112th Cong. (2011); Judgment Fund Transparency Act of 2011, H.R. 1446, 112th Cong. (2011); and S. 2042, 112th Cong. (2012).

⁵⁰ H.R. Rep. No. 112-151, at 8-9 (2011). See also H.R. Rep. 112-331, at 1046 (2011) (Conf. Rep.).

⁵¹ The report directed Interior bureaus, the Forest Service, and EPA to make publicly available, no later than 60 days after the enactment of this act, and with each agency's annual budget submission thereafter, certain information on attorney fee payments awarded as a result of litigation against any of the three agencies or their respective bureaus. For example, the report calls for the agencies to provide detailed reports on the amount of program funds used; the names of the fee recipients; and the disposition of the applications for attorney fees, including any appeals of actions taken on the applications. To provide context, we asked the relevant agencies that are the focus of this report—Interior and Forest Service—how they are responding to the committee report direction.

⁵² The Forest Service does collect data on litigation payments that include attorney fees and costs and damages, awarded under non-EAJA statutes, some of which may result from cases arising under the Endangered Species Act as well as other statutes. However, the mechanism for collecting these data (through use of a budget object code) does not differentiate among these statutes, so it cannot be used to identify only those payments made in connection with the Endangered Species Act. As noted in enc. II, in the past the Forest Service manually compiled some information on attorney fee payments that included cases filed under the Endangered Species Act, but this information has other limitations.

Agency Comments

We requested comments on a draft of this report from USDA, Interior, Treasury, and DOJ. The departments did not provide official written comments to include in our report. However, in e-mails received on March 20, 2012, and March 21, 2012, the USDA, Interior, and DOJ liaisons provided technical comments that we incorporated as appropriate. Also, the Treasury liaison stated that the department had no comments on our report in an e-mail received on March 20, 2012.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the appropriate congressional committees; the Secretaries of Agriculture, the Interior, and the Treasury; the Attorney General; and other interested parties. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff members have any questions about this report, please contact me at (202) 512-8777 or jenkinswo@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in enclosure III.



William O. Jenkins, Jr.
Director, Homeland Security and Justice

Enclosures – 3

List of Requesters

The Honorable Lisa Murkowski
Ranking Member
Subcommittee on Interior, Environment, and Related Agencies
Committee on Appropriations
United States Senate

The Honorable John Barrasso, M.D.
United States Senate

The Honorable Michael B. Enzi
United States Senate

The Honorable John McCain
United States Senate

The Honorable David Vitter
United States Senate

The Honorable Frank D. Lucas
Chairman
Committee on Agriculture
House of Representatives

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
House of Representatives

The Honorable Michael K. Simpson
Chairman
Subcommittee on Interior, Environment, and Related Agencies
Committee on Appropriations
House of Representatives

The Honorable Rob Bishop
House of Representatives

The Honorable Cynthia M. Lummis
House of Representatives

Enclosure I: Scope and Methodology

This report addresses the extent to which the Department of Agriculture (USDA) and the Department of the Interior (Interior) had information available on attorney fee claims and payments made under the Equal Access to Justice Act (EAJA) and other fee-shifting statutes for fiscal years 2000 through 2010, including who made claims for payment, which claims were paid, the amount paid for each approved claim, and the statutes under which the case was brought.⁵³

To inform our analysis and to understand the statutory basis under which attorney fee payments are made, we reviewed the statutory text of EAJA and selected other fee-shifting statutes. We also reviewed relevant background information, such as EAJA-specific research and congressional testimonies, to understand the history of attorney fee payments. Additionally, we reviewed available Administrative Conference of the United States (ACUS) annual reports on administratively awarded EAJA payments issued from fiscal years 1982 through 1994 and interviewed ACUS officials to determine how ACUS collected information on attorney fees paid prior to 1995.⁵⁴ In addition, we interviewed USDA, Interior, Department of the Treasury (Treasury), and Department of Justice (DOJ) officials to gain an understanding of the processes used by each to make attorney fee payments. In these interviews, we also asked officials to discuss any benefits and challenges of tracking attorney fee payments under EAJA and other fee-shifting statutes.

To determine the extent to which USDA and Interior tracked data on attorney fees, we contacted 33 USDA and 42 Interior agencies;⁵⁵ Treasury; and DOJ's Civil Division, Environment and Natural Resources Division, and the Executive Office of U.S. Attorneys. We asked each agency if it maintained information on cases where attorney fees were sought, and for those that maintained this information, we asked them to provide the case name, party name, claim amount, date of the award or payment, payment amount, and statutes under which the cases were brought for fiscal years 2000 through 2010. Our scope included attorney fees involving USDA and Interior, namely those associated with administrative adjudications of claims as well as cases filed with the courts. Our scope included attorney fee payments regardless of the source of law authorizing the payment— independently applicable statutory fee-shifting provisions, EAJA subsection (b) or (d), or EAJA's adversarial adjudication provisions—and regardless of whether the fees were paid from Treasury's Judgment Fund or from an agency's appropriations. Payments of all other costs without a corresponding payment of attorney fees were outside of our scope.⁵⁶ The results of our work should not be generalized beyond these two departments to draw conclusions about governmentwide attorney fees.

⁵³ Pub. L. No. 96-481, tit. II, 94 Stat. 2321, 2325 (1980) (codified as amended at 5 U.S.C. § 504; 28 U.S.C. § 2412).

⁵⁴ EAJA originally required the Director of the Administrative Office of the U.S. Courts to report annually to Congress on EAJA court activity, including the number, nature, and amounts of awards; claims involved; and any other relevant information deemed necessary to aid Congress in evaluating the scope and effect of award under the act. The responsibility for this reporting was transferred to the Attorney General in 1992.

⁵⁵ USDA and Interior agencies, offices, and bureaus are referred to as agencies for purposes of this report.

⁵⁶ Other costs include court costs, such as filing fees and reporting fees, and attorney expenses, such as the cost for expert witnesses, telephone, postage, travel, copying, and computer research.

The USDA and Interior agencies described in table 2 provided information on attorney fees.

Table 2: USDA and Interior Data Sources Identified	
Department/agency	Data source
USDA	
Forest Service	Federal Financial Information System and payment log spreadsheet
Office of the Assistant Secretary for Civil Rights	iComplaint database
National Appeals Division	NADTrack database
Office of Administrative Law Judges	<i>Agriculture Decisions</i> ^a
Interior	
U.S. Fish and Wildlife Service	Endangered Species Act tracking spreadsheet
Office of Hearings and Appeals	Docket Management System
Bureau of Land Management	Case file information ^a
Office of the Inspector General	Case file information ^a
Office of the Solicitor	Case file information ^a
Office of the Special Trustee for American Indians	Payment documentation ^a

Source: GAO analysis of USDA and Interior data.

^aInformation obtained from these sources was manually compiled.

We analyzed the data gathered from each USDA and Interior data source identified in table 2 to determine the extent to which complete and consistent information was available across all sources. Specifically, we determined the time frame in which data were available as well as whether the data source included information about the party and payee, claims that were denied, the statutes under which the cases were brought, and the award and payment amount. As part of this analysis and to the extent data were available for each agency, we determined the total amount of attorney fees awarded or paid and the number of cases filed as well as the statutes under which the cases were brought. When other costs were separated from attorney fees, we reported the total amount of attorney fees and other costs. When attorney fees were not separated from other costs in decisions and settlement agreements, we also reported a total amount for attorney fees and costs. Therefore, the amounts reported may overstate attorney fees paid or awarded; however, other costs are generally minimal in comparison to attorney fees. In addition, we did not include payments with damages if damages could not be isolated from attorney fees and costs. Also, to the extent sufficient data were available (i.e., a sufficient number of cases and fiscal years), we analyzed the data to identify any trends, such as a larger number of payments made in a particular fiscal year(s). In addition, we analyzed the data on statutes authorizing attorney fees as identified by agencies to determine which such statutes were most frequently identified in cases in which parties were awarded attorney fees where such data were available and complete.

As part of our USDA and Interior data analysis, we took appropriate steps to assess the reliability of each data source. We reviewed relevant documents and interviewed managers of the various data systems about the sources of these data and the controls the agencies had to maintain the integrity of these data. In addition, we interviewed individuals responsible for compiling information on attorney fees payments to obtain information on the processes and procedures the agencies followed to help ensure the reliability of the data. To the extent necessary, we used other publicly available sources (e.g., Public Access to Court Electronic Records) or information available on agency web sites) to verify the accuracy and completeness of the information. When using publicly available information to corroborate manually compiled data, we discussed our results with agency officials to help ensure accuracy and completeness. When publicly available information was not available, we worked with agency officials to ensure the reliability of the manual information provided,

which, in some cases, included reviewing source documentation. Based on these steps, we determined that the data were sufficiently reliable for the purposes of illustrating the nature and limitations of the data collected and maintained in the various agency systems. Limitations in the data that we identified for each of the data sources are noted in the report as needed.

In addition, we obtained information for court-filed cases for which payments were made from Treasury's Judgment Fund from the Judgment Fund Internet Claims System (JFICS) beginning March 2001—the first date in which data are available—through fiscal year 2010. This information included case name, payee name, date of the payment, payment amount, and statute under which the case is brought. We analyzed the JFICS data to determine the total amount and number of payments Treasury made on behalf of USDA and Interior as well as the statutes most frequently giving rise to cases in which USDA and Interior paid attorney fees. When we identified errors or inconsistencies, we followed up with Treasury officials to resolve them. Also, we analyzed the data to identify any trends, such as a larger number of claims filed in a particular fiscal year(s). As part of our analysis of the JFICS data, we assessed the reliability of the data to ensure that they were sufficiently reliable for the purposes of this report. We reviewed relevant documents and interviewed JFICS managers about the controls Treasury had to maintain the integrity of these data and the processes and procedures Treasury followed to help ensure the reliability of the data. We determined that the JFICS data were sufficiently reliable for the purposes of this report.

We attempted to obtain information from DOJ agencies, but DOJ officials stated that the department's case management systems may not contain complete and accurate information related to attorney fees and costs. These officials stated that the department's case management systems were designed for internal management purposes (e.g., to manage individual cases) and not for agencywide statistical tracking. As a result, we determined that DOJ data were not sufficiently reliable for purposes of this report. Additional information about this limitation is discussed earlier in this report.

Finally, to gain additional perspective on USDA and Interior attorney fee payments under EAJA and other fee-shifting statutes, we interviewed stakeholders, such as representatives of eight environmental groups, two trade associations, and a law office. We identified these individuals in part through a review of our prior work as well as through an iterative process, often referred to as "snowball sampling," and selected for interviews those who would provide us with a broad range of perspectives on attorney fee payments. We selected a nonprobability sample of stakeholders to interview and, therefore, the information gathered from key stakeholders is not generalizable beyond the individuals we interviewed. However, these interviews helped enhance our analysis of attorney fee payments and awards during the period of our review.

We conducted our work from May 2011 to April 2012 in accordance with all sections of GAO's Quality Assurance Framework that are relevant to our objectives. The framework requires that we plan and perform the engagement to obtain sufficient and appropriate evidence to meet our stated objectives and to discuss any limitations in our work. We believe that the information and data obtained, and the analysis conducted, provide a reasonable basis for any findings and conclusions in this product.

Enclosure II: Information on Attorney Fees Awarded or Paid at Selected USDA and Interior Agencies and Treasury

In the United States, parties involved in federal litigation generally pay their own attorney fees. There are many exceptions to this general rule where statutes authorize the award of attorney fees to a successful, or prevailing, party. Some of these provisions also apply to the federal government when it loses a case. In 1980, Congress passed the Equal Access to Justice Act (EAJA)⁵⁷ to allow parties that prevail in cases against federal agencies to seek reimbursement from the federal government for attorney fees, where doing so was not previously authorized. The premise of EAJA was to help ensure that decisions to contest administrative actions are based on the merits and not the cost of litigation, thereby encouraging agencies to base such actions on informed deliberation. Although all federal agencies are generally subject to, and make payments under, attorney fee provisions, some in Congress have expressed concerns about the use of taxpayer funds to make attorney fee payments with agencies' limited funding, such as concerns that environmental organizations are using taxpayer dollars to fund lawsuits against the government, particularly against the Department of Agriculture (USDA), the Department of the Interior (Interior), and the Environmental Protection Agency.⁵⁸

In the context of judicial cases—those brought in a court, including those that are settled—the law generally provides for three ways that prevailing parties can be eligible for the payment of attorney fees by the federal government. First, many statutes contain provisions authorizing award of attorney fees from a losing party to a prevailing party. Many of these apply to the federal government;⁵⁹ for example, most claims under the Endangered Species Act and those under Title VII of the Civil Rights Act of 1964 apply to the federal government independent of EAJA. Second, where there is a “fee-shifting statute” that allows for the payment of attorney fees by a losing party to a prevailing party but that is not independently applicable to the federal government, EAJA provides that the government is liable for reasonable attorney fees to the same extent as a private party (i.e., claims paid under EAJA subsection (b)).⁶⁰ Under these first two ways that a party may obtain attorney fees from the federal government, when a party prevails in litigation against the government and is awarded attorney fees under court order or settlement,⁶¹ the amounts generally are paid from the Department of the Treasury's (Treasury) Judgment Fund (a permanent, indefinite appropriation that pays judgments against federal agencies that are not otherwise provided for by other appropriations).⁶² Third, EAJA provides that in any civil action where there is no fee-shifting statute, prevailing parties generally shall be awarded attorney fees when the government cannot prove that its action was substantially justified (i.e., claims paid under

⁵⁷ Pub. L. No. 96-481, tit. II, 94 Stat. 2321, 2325 (1980) (codified as amended at 5 U.S.C. § 504; 28 U.S.C. § 2412).

⁵⁸ See, for example, GAO, *Private Attorneys: Selected Attorneys' Fee Awards Against Nine Federal Agencies in 1993 and 1994*, [GAO/GGD-96-18](#) (Washington, D.C.: Oct. 31, 1995), and *Equal Access to Justice Act: Its Use in Selected Agencies*, [GAO/HEHS-98-58R](#) (Washington, D.C.: Jan. 14, 1998).

⁵⁹ Some such provisions, however, cannot be used independently of EAJA to award fees against the federal government because the particular provisions do not effect a waiver of the federal government's sovereign immunity.

⁶⁰ This provision provides that the United States is liable for such fees and expenses to the same extent that any other party would be liable under the common law or the terms of any statute that specifically provides for such an award. 28 U.S.C. § 2412(b).

⁶¹ For purposes of this report, we use "awarded" to reflect attorney fees that are awarded by administrative or court decisions as well as those provided in settlements.

⁶² 31 U.S.C. § 1304. Regarding payments of attorney fees under the statutory fee-shifting provisions independently applicable to the federal government, these are generally paid from the Judgment Fund unless the statute at issue provides otherwise. Regarding EAJA subsection (b) payments, an exception is that where a court finds an agency acted in bad faith, the payment cannot be made from the Judgment Fund.

EAJA subsection (d)).⁶³ These awards or settlements are paid from the losing agency's appropriation. Where a federal agency is engaged in judicial litigation, as a plaintiff or a defendant, the Department of Justice (DOJ) generally provides legal representation for the government.

In adversary administrative adjudications—generally, appeals that are brought in a special agency forum, rather than in a court, and in which the government position is represented—a separate provision of EAJA applies. Specifically, EAJA provides that in adversary adjudications the government is liable to a prevailing party for reasonable attorney fees when the government cannot prove that its action was substantially justified.⁶⁴ Other statutes, such as Title VII of the Civil Rights Act of 1964, also authorize the payment of attorney fees in administrative proceedings. When such fees are awarded or agreed to in a settlement, they are generally paid from the agency's appropriated funds.⁶⁵ According to DOJ officials, this adversarial subset of administrative proceedings for which the government may be liable for attorney fees represents a relatively small proportion of governmentwide administrative proceedings.

We refer to attorney fees any time such fees were paid, regardless of the source of law authorizing the payment—independently applicable statutory fee-shifting provisions, EAJA subsection (b) or (d), or EAJA's adversarial adjudication provisions—and whether awarded by a court or administrative forum or provided in a settlement.

USDA's Forest Service

The Forest Service manages over 190 million acres of forest and grassland. The agency is responsible for managing its lands for various purposes—including recreation, grazing, and timber harvesting—while ensuring that such activities do not impair the lands' long-term productivity. This work is carried out at more than 150 national forests, grasslands, and research sites located across the country.

The Forest Service gathered information on attorney fees and cost awards associated with cases from three sources—Forest Service regional officials, a Forest Service-commissioned university study, and publicly available court documents—and maintained this information in a spreadsheet. Specifically, the spreadsheet tracked the amounts of attorney fees and costs awarded or settled, among other items, for environmental litigation, including cases filed under the National Environmental Policy Act, National Forest Management Act, and Endangered Species Act. Forest Service officials told us that they undertook the effort to compile information on cases resulting in attorney fee and cost awards to provide internal guidance to Forest Service management. For example, the information on attorney fee and cost awards helped the agency make informed decisions on whether proposed fees in ongoing cases were reasonable in light of recent cases involving similar challenges. The

⁶³ In these cases, EAJA limits the prevailing plaintiff's eligibility to receive payment by defining (at the time the lawsuit is filed) an eligible party as either an individual with a net worth of \$2 million or below or a business owner or any partnership, corporation, association, local government, or organization with a net worth of \$7 million or below and 500 or fewer employees. However, tax-exempt nonprofit organizations and certain agriculture cooperative associations are considered eligible parties regardless of net worth.

⁶⁴ 5 U.S.C. § 504(a), (b)(1)(C) (defining adversary adjudications as (i) an Administrative Procedure Act adjudication in which the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 before an agency board of contract appeals, (iii) any hearing conducted under certain false claims procedures under 31 U.S.C. chapter 38, and (iv) the Religious Freedom Restoration Act of 1993).

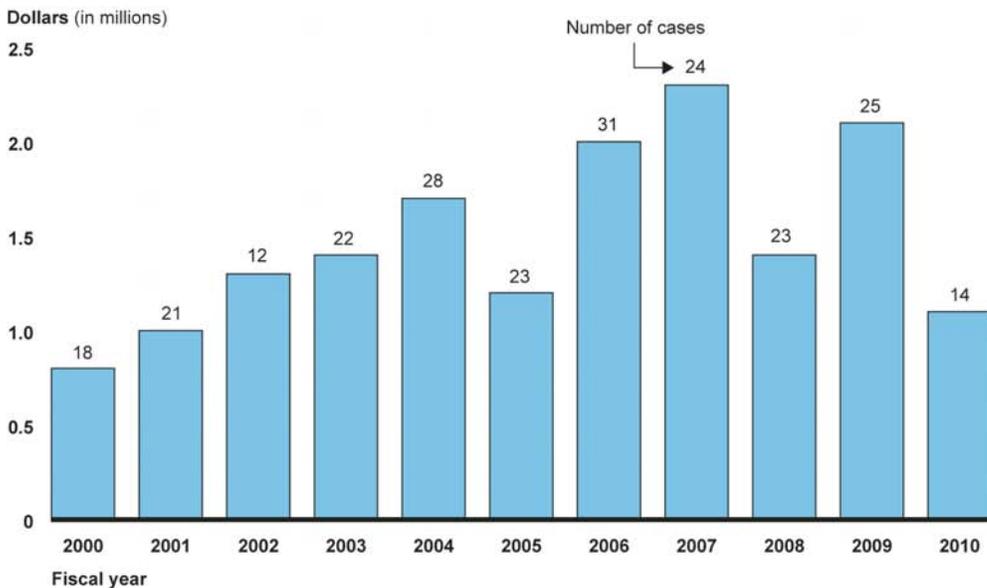
⁶⁵ Certain statutes, such as the Small Claims Act and Federal Tort Claims Act, authorize the payment of administrative claims from the Judgment Fund. We did not identify any attorney fee payments in the scope of our review that were paid under these statutes.

official who developed the spreadsheet identified several limitations of the data. Specifically, the list of cases was not intended to be a definitive list of all attorney fee and cost payments and the payments should be considered in totality rather than case-by-case.

- The data include only environmental cases. As such, non-environmental cases, such as those brought under the Freedom of Information Act (FOIA), Equal Employment Opportunity Act, and other civil rights statutes, are not included.
- Not all of the attorney fees and costs included in the spreadsheet were paid from Forest Service appropriations, as Treasury may have paid some of the attorney fees and costs from its Judgment Fund.⁶⁶
- In some instances, award or settlement amounts may be overstated. Specifically, court documents Forest Service officials reviewed to compile the data do not always break out award amounts to be paid by separate defendants. For example, if a party sued the Forest Service and Interior’s U.S. Fish and Wildlife Service (USFWS) and prevailed, both agencies might need to pay attorney fees and costs if they lost, but the court might not specify the amount each agency is to pay. In these instances, the data assumed the Forest Service paid the total amount.

Forest Service spreadsheet data show that about \$16.3 million in attorney fees and costs in 241 environmental cases from fiscal years 2000 through 2010 was awarded against or settled by the Forest Service.⁶⁷ Figure 2 shows the amounts of attorney fees awarded and number of cases at Forest Service by fiscal year.

Figure 2: Attorney Fees and Costs Awarded against the Forest Service in Environmental Cases and Number of Cases, Fiscal Year 2000



Source: GAO analysis of Forest Service data.

Note: Forest Service data may include attorney fees authorized by underlying statutes, EAJA subsection (b), and EAJA subsection (d).

Figure 2 shows that the greatest number of cases was concluded in fiscal year 2006 (31 cases) and the awards against the Forest Service were greatest in 2007 (\$2.3 million). Additionally, the awards ranged from \$350 to about \$500,000. Larger awards may skew the

⁶⁶ Although the Judgment Fund database generally identifies portions of a payment attributed to attorney fees, costs, and other categories, we could not match the Forest Service spreadsheet data with the Judgment Fund in order to isolate attorney fees because the data sets did not have a common identifier.

⁶⁷ Unless otherwise noted, all figures reported in this enclosure are in constant 2010 dollars.

data for the year in which the Forest Service made those awards or settlements. For example, in 2010, one payment accounted for over \$400,000 of the \$1.1 million in total awards.

In March 2009, the Forest Service began tracking EAJA payments under a separate accounting code in the USDA financial database in addition to the Excel spreadsheet. While the USDA financial system database included an accounting code for litigation fees and awards prior to 2009, this code captured information on all litigation payments, including attorney fees and costs and damages,⁶⁸ and did not contain a description officials could use to determine the type of claim. This code also does not differentiate such payments based on the statutes underlying the case and payment.⁶⁹ The Forest Service financial data collected since that time show that the Forest Service paid about \$2.3 million in 32 cases from March 2009 through September 2010. Twenty-nine of the 32 cases were duplicates of those provided in the spreadsheet, and one other case overlapped with information provided by Interior's Office of Hearings and Appeals (OHA).⁷⁰

USDA's Office of the Assistant Secretary for Civil Rights

The Office of the Assistant Secretary for Civil Rights (OASCR) provides overall leadership, coordination, and direction for USDA's civil rights programs, including matters related to program delivery, compliance, and equal employment opportunity. OASCR is responsible for ensuring compliance with applicable federal civil rights laws and adjudicates equal employment opportunity cases for USDA. OASCR uses the iComplaint database to track and maintain information on these cases, including attorney fees and costs paid. iComplaint data show that USDA paid \$7 million in attorney fees and costs as a result of 419 equal employment opportunity cases from fiscal years 2005 through 2010. Of this total, 318 cases were adjudicated by OASCR, and 101 cases were decided in federal court or by another adjudicative body outside of USDA, such as the U.S. Equal Employment Opportunity Commission.⁷¹ OASCR officials said that all of these cases involve discrimination claims made by USDA employees.⁷² USDA first entered data using iComplaint in 2005. According to OASCR officials, the OASCR tracked cases adjudicated prior to 2005 in different systems. USDA did not migrate all of the data from the legacy system to iComplaint. Therefore, information on cases involving attorney fees and costs prior to 2005 was not available. Figure 3 shows the number of cases and amounts paid by fiscal year.

⁶⁸ Damages are payments awarded to prevailing parties, generally as compensation for loss or injury. Damages are a distinct type of monetary award from attorney fees or costs. Some cases are resolved by settlements or decisions that provide for damages and attorney fees and costs as one lump sum.

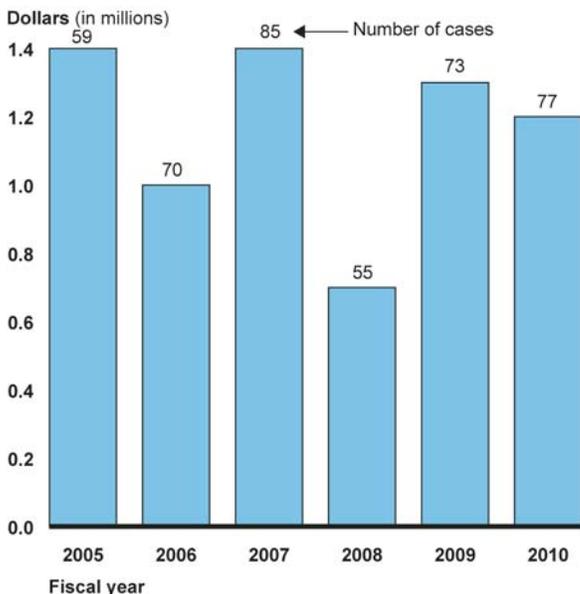
⁶⁹ Thus, the code could be used to identify all litigation payments, but not to identify only those payments made in connection with the Endangered Species Act, for example.

⁷⁰ The particular case involved both the Forest Service and the Bureau of Land Management (BLM).

⁷¹ Cases with awards approved by entities outside of USDA may also be included in Treasury's Judgment Fund data.

⁷² OASCR also hears cases filed by USDA customers. However, OASCR officials said that they were unaware of any attorney fee awards from customer cases, and the system used to track these cases does not include attorney fees.

Figure 3: USDA's Office of the Assistant Secretary for Civil Rights Equal Employment Opportunity Attorney Fees and Costs Paid and Number of Cases, Fiscal Years 2005 through 2010



Source: GAO analysis of USDA data.

As shown in figure 3, the greatest number of cases was adjudicated in fiscal year 2007 (85 cases) and the greatest amount of attorney fees and costs was paid in 2007 (\$1.4 million). The payments range from \$1 to about \$357,000. Larger payments may skew the data for the year in which those payments were made. For example, in fiscal year 2007, 1 of the 85 payments accounted for over one quarter of the \$1.4 million in total payments.

USDA's National Appeals Division

The National Appeals Division (NAD) is responsible for adjudicating administrative appeals arising from program activities assigned to certain USDA agencies as well as other administrative appeals arising from decisions of USDA agencies designated by the Secretary of Agriculture. NAD appeals involve program decisions of the Farm Service Agency, Risk Management Agency, and Natural Resources Conservation Service, among others.

NAD uses the NADTrack database to track information on cases filed and attorney fees and costs awarded through the division's administrative hearing process. NADTrack data show that the division heard 23 administrative cases where parties made claims totaling about \$588,000 and were awarded about \$97,000 from fiscal years 2005—the first year in which the division systematically tracked the data—through 2010.⁷³ Data prior to 2005 are not available because, according to an official, NADTrack data prior to that time were not maintained in a consistent manner. According to this official, these inconsistencies stemmed from the division not having many claims for attorney fees because it was USDA's policy that EAJA and the Administrative Procedure Act provisions applicable to formal administrative proceedings did not apply to NAD proceedings, except where required by judicial ruling.⁷⁴ NADTrack did not consistently differentiate between those requests for attorney fees that were not accepted because of this reason or were denied for other

⁷³ Because the number of cases is small, we are unable to report trend data for NAD cases.

⁷⁴ See 74 Fed. Reg. 57,401 (Nov. 6, 2009).

reasons. In 2009, NAD changed its position because two Circuit Courts of Appeals and one district court had joined the Eighth Circuit Court of Appeals in holding that EAJA was applicable to NAD proceedings.⁷⁵ Accordingly, NAD treats EAJA and the Administrative Procedure Act as applicable to NAD adjudications, and more claims have been filed seeking attorney fees and costs since that time.

USDA's Office of Administrative Law Judges

The Office of Administrative Law Judges (OALJ) conducts rulemaking and adjudicatory hearings throughout the United States in proceedings subject to the Administrative Procedure Act. In addition, OALJ is responsible for the publication of *Agriculture Decisions*, the official compilation of quasi-judicial and judicial decisions issued concerning regulatory laws administered by USDA. We manually reviewed *Agriculture Decisions*, searched a publicly available database, and met with the chief OALJ judge to obtain information on attorney fees.

We determined that the administrative law judges heard seven cases from fiscal years 2000 through 2010 for which the information on attorney fees and costs awarded or settled was available. In two of the seven cases, the administrative law judges awarded or the parties settled for about \$177,000 in attorney fees and costs. In the other five cases, the administrative law judges did not award any attorney fees and costs. USDA officials identified at least one other case in which they believe an award was made, but the information was not available because the court documents were sealed by the administrative law judges presiding over the case.

Interior's U.S. Fish and Wildlife Service

USFWS's mission is to work with others to conserve, protect, and enhance fish, wildlife and plants and their habitats for the continuing benefit of the American people. USFWS is responsible for administering the Endangered Species Act for freshwater and land species. Under the act, USFWS works to implement its requirements, such as consulting with federal agencies to determine if actions may affect listed species or habitats identified as critical to the species' survival, and acting on applications for permits required when non-federal activities will result in take of threatened or endangered species.

Similar to the Forest Service, USFWS did not utilize a data system to track attorney fees and costs paid, but tracked information on attorney fees and costs paid by the Endangered Species Program in the Washington office using a spreadsheet. USFWS officials gathered information on those cases paid by the Washington office and supplemented the information with four endangered species cases identified by the regional offices. However, not all regions track attorney fee payments, so the data may not be complete over the identified timeframe. That is, USFWS officials were not sure that they had provided the complete universe of cases. USFWS data show that USFWS paid about \$1.5 million in 26 cases from fiscal years 2004 through 2010, all of which pertained to the Endangered Species Act.⁷⁶ Two USFWS cases with payments (totaling about \$109,000) overlapped with information provided by the Solicitor's Office.

Interior's Bureau of Land Management

BLM is responsible for managing about 250 million acres of federal land for multiple uses, including recreation; range; timber; minerals; watershed; wildlife and fish; and natural,

⁷⁵ Id.

⁷⁶ Because the number of cases is small, we are unable to report trend data for USFWS cases.

scenic, scientific, and historical values; as well as the sustained yield of renewable resources. In addition, BLM is responsible for managing approximately 700 million sub-surface mineral onshore acres, which include the acreage leased for oil and gas development.

BLM officials were able to provide data from physical case files that show that BLM paid \$511,385 in attorney fees and costs on nine cases from fiscal years 2009 through 2010. BLM officials stated that they manually compiled the data prior to our review to gain a better understanding of attorney fee and cost payments as BLM has not consistently used its financial system to track attorney fee and cost payments in the past. The four cases from fiscal year 2010 overlapped with data provided by the Solicitor's Office (totaling about \$162,000). BLM officials stated that the data may not include all of BLM's cases. Further, one BLM case (totaling about \$52,000) overlapped with data provided by OHA.

Interior's Office of the Special Trustee for American Indians

Established by the American Indian Trust Fund Management Reform Act of 1994, the Office of the Special Trustee for American Indians (OST) was created to improve the accountability and management of Indian funds held in trust by the federal government.⁷⁷ As trustee, Interior has the primary fiduciary responsibility to manage tribal trust funds and Individual Indian Money accounts as well as resources that generate income for those accounts. The official responsible for coordinating the responses across OST programs stated that none of the programs in OST maintain attorney fee information. OST identified one payment in fiscal year 2007 of about \$104,000 in attorney fees.

Interior's Office of Hearings and Appeals

OHA exercises the delegated authority of the Secretary of the Interior to conduct hearings and decide appeals from decisions of the bureaus and offices of the department. OHA, which issues administrative decisions, first decides the underlying case, and then issues a separate decision on attorney fees and costs. OHA uses the Docket Management System (DMS) database to track and maintain information, including attorney fees and cost awards, on those cases it adjudicates. DMS data show that the office heard 75 cases in which parties requested a total of about \$3.8 million in attorney fees and costs and were awarded or settled for about \$1.5 million from fiscal years 2000 through 2010.^{78,79} The data show that of these 75 cases, 47 attorney fee claims were filed under EAJA, 22 were filed under the Surface Mining and Reclamation Act,⁸⁰ and 6 were filed under the Back Pay Act.⁸¹ The claims were most frequently made in connection with litigation brought under the Taylor Grazing Act, Surface Mining Control and Reclamation Act, and the General Mining Law, as shown in table 3.

⁷⁷ Pub. L. No. 103-412, tit. III, 108 Stat 4239 (1994) (codified as amended at 25 U.S.C. §§ 4041-46).

⁷⁸ Information on OHA attorney fees requested was not available for 16 cases and attorney fees awarded information was not available for 7 cases where the party reached a settlement agreement.

⁷⁹ Because the number of cases is small, we are unable to report trend data for OHA cases.

⁸⁰ 31 U.S.C. § 1270(d).

⁸¹ 5 U.S.C. § 5596(b).

Table 3: Law or Procedure under Which Case Was Brought, Amount Awarded, and Number of Awarded Made by OHA, Fiscal Year 2000 through Fiscal Year 2010

Law or procedure under which case was brought ^a	Attorney fees and costs	Number of cases
Surface Mining Control and Reclamation Act, 30 U.S.C. § 1275	\$695,364 ^b	24
Taylor Grazing Act, 43 U.S.C. § 315h	442,953 ^c	26
General Mining Law of 1872, 30 U.S.C. §§ 21-54	271,767 ^d	10
Agency employee grievance procedures, under authority of civil service laws	36,769	6
Indian Self-Determination Act, 25 U.S.C. §§ 450f-450n	5,618	1
Indian trust allotment law, as amended, 25 U.S.C. §§ 372, 373	0	1
Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 ^e	0	4
Desert Land Act, 43 U.S.C. §§ 321-339	0	1
Mining Claims Rights Restoration Act, 30 U.S.C. §§ 621-625	0	1
Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, 106 Stat. 4740	0	1
Total	\$1,452,471	75

Source: GAO analysis of OHA data.

^aStatutes or procedures are as provided by OHA.

^bInformation on attorney fees and costs awarded was not available for three cases.

^cInformation on attorney fees and costs awarded was not available for two cases.

^dInformation on attorney fees and costs awarded was not available for two cases.

^eThese provisions were repealed in 1971 but remain in effect for then-pending applications.

OHA began using the DMS in 2009 and imported legacy cases from the Boards of Indian and Land Appeals into the new system, but did not import cases from other offices. To provide us with complete data, OHA manually compiled cases closed before 2009 by pulling data from legacy systems and polling regional offices, and combined the legacy and regional office information with the DMS information.

Interior's Office of the Inspector General

The Office of Inspector General (OIG) provides independent oversight of the department's programs, operations, and management. Officials provided attorney fee information by manually reviewing case files. Interior OIG data show that the OIG paid \$1,789 for a 2010 FOIA case where \$2,235 in attorney fees and costs was requested.

Interior's Office of the Solicitor

The Office of the Solicitor performs legal work for Interior, manages Interior's Ethics Office, and resolves FOIA appeals. Officials from the Office of the Solicitor provided information on 18 cases in which about \$1.6 million was awarded or settled in fiscal year 2010. The Office of the Solicitor compiled case information from the Bureau of Indian Affairs,⁸² BLM, the Office of Surface Mining Reclamation and Enforcement,⁸³ and USFWS. Officials manually compiled these data by contacting Solicitor headquarters and regional offices to request information about fiscal year 2010 cases where EAJA attorney fees and costs were awarded

⁸² The Bureau of Indian Affairs provides services (directly or through contracts, grants, or compacts) to approximately 1.9 million American Indians and Alaska Natives.

⁸³ The Office of Surface Mining Reclamation and Enforcement is responsible for establishing a nationwide program to address the adverse effects of surface coal mining operations, while balancing the nation's need for continued domestic coal production with protection of the environment.

or settled. Six of these cases overlapped with cases provided by BLM and USFWS, as discussed above.

Treasury

Treasury uses the Judgment Fund Internet Claims System (JFICS) to process attorney fee and cost payments.⁸⁴ In judicial cases where payments from the Judgment Fund are authorized, DOJ officials submit the payment information to Treasury using standardized forms, and Treasury processes the payment and typically informs relevant agencies when it releases the payment to the payee. The Judgment Fund is generally not used for attorney fee payments awarded in an administrative adjudication.

From March 2001—the first date for which Treasury’s Judgment Fund data are available—through September 2010, Treasury made 525 attorney fee and cost payments (187 for USDA and 338 for Interior) totaling about \$44.4 million. Approximately half of these payments (254 of 525) were made as a result of Endangered Species Act litigation. Another 88 payments were made as a result of a class action lawsuit on behalf of black farmers alleging discrimination.⁸⁵

USDA. Treasury made 187 payments totaling \$16.9 million on behalf of USDA from March 2001 through September 30, 2010. The payments made on behalf of USDA were most frequently made in connection with litigation brought under the Equal Credit Opportunity Act, Title VII of the Civil Rights Act of 1964, FOIA, or the Endangered Species Act, as shown in table 4.

Table 4: Statute under Which Case Was Brought, Amount Paid, and Number of Payments Paid by Treasury from the Judgment Fund on Behalf of USDA, March 2001 through September 2010

Statute under which case was brought ^a	Attorney fees and costs	Number of payments
Equal Credit Opportunity Act, 15 U.S.C. § 1691e	\$9,190,168	92
Civil Rights Act Title VII, 42 U.S.C. § 2000e-16	4,444,604	39
Endangered Species Act, 16 U.S.C. § 1540	1,628,215	16
Freedom of Information Act, 5 U.S.C. § 552	449,614	21
Clean Water Act, 33 U.S.C. § 1365	366,992	5
Tucker Act (inverse condemnation & other claims), 28 U.S.C. § 1491	343,687	1
Fair Labor Standards Act, 29 U.S.C. § 216	282,093	1
Payments for which statute could not be determined	93,909	6
Rehabilitation Act (disability discrimination), 29 U.S.C. §§ 791, 794a	51,934	2
Bandelier National Monument Administrative Improvement and Watershed Protection Act of 1998, 16 U.S.C. § 698v-2, 40 U.S.C. § 3114	50,000	1
Tucker Act, 28 U.S.C. § 1346	12,154	1
Back Pay Act, 5 U.S.C. § 5596	6,429	1
Privacy Act, 5 U.S.C. § 552a	6,170	1
Total	\$16,925,969	187

Source: GAO analysis of Treasury data.

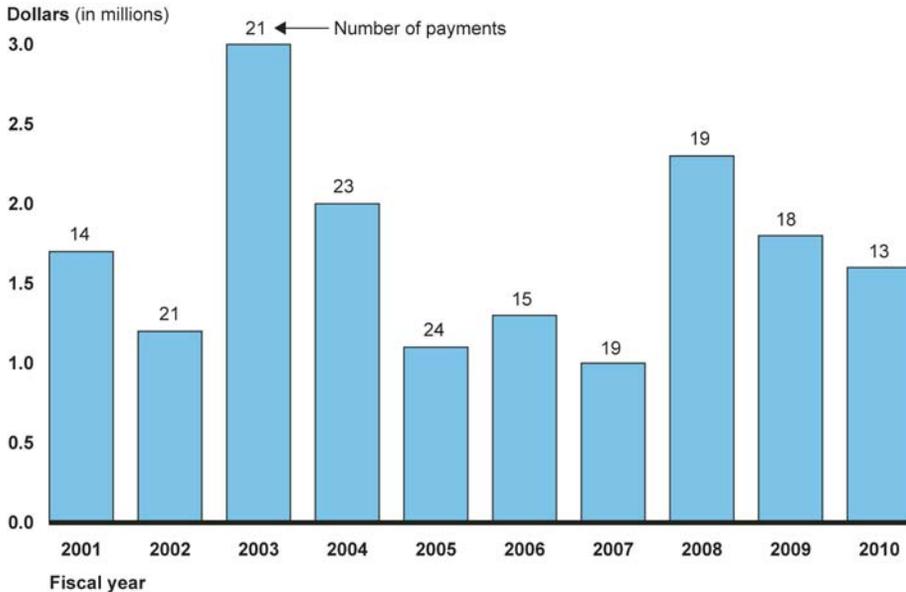
^aStatutes are as reported in Treasury’s JFICS. For payments associated with inverse condemnation claims, statutes are as identified in publicly accessible court records.

⁸⁴ Treasury’s JFICS tracks the progress of plaintiffs’ claims for Judgment Fund payments from the time they are sent to Treasury until they are paid.

⁸⁵ See *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), aff’d 206 F.3d 1212 (D.C. Cir. 2000); see also, *Congressional Research Service, The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers* (2011).

Figure 4 shows the amount and number of payments made by Treasury on behalf of USDA by fiscal year.

Figure 4: USDA Attorney Fees Paid and Number of Payments from Treasury’s Judgment Fund, Fiscal Years 2001 through 2010



Source: GAO analysis of Treasury data.

Figure 4 shows that Treasury made the greatest number of payments on behalf of USDA in fiscal year 2005 (24 payments) and Treasury paid the highest amount of attorney fees and costs on behalf of USDA in 2003 (\$3 million). The payments range from about \$175 to about \$1.1 million. Larger payments may skew the data for the year in which Treasury made those payments. For example, in 2008, one payment totaling about \$1.1 million accounted for about half of the \$2.3 million in total payments. Further, 11 of the 13 fiscal year 2010 cases were payments stemming from a class action lawsuit filed by black farmers and made up about \$1.5 million of the \$1.6 million in payments for that year.⁸⁶

Interior. Treasury made 338 payments totaling \$27.5 million on behalf of Interior from March 2001 through September 30, 2010. These payments were most frequently made under the Endangered Species Act, Title VII of the Civil Rights Act of 1964, and FOIA, as shown in table 5.

⁸⁶ *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

Table 5: Statute under Which Case Was Brought, Amount Paid, and Number of Payments Paid by Treasury from the Judgment Fund on Behalf of Interior, March 2001 through September 2010

Statute under which case was brought^a	Attorney fees and costs	Number of payments
Endangered Species Act, 16 U.S.C. § 1540	\$21,298,971 ^b	238
Civil Rights Act Title VII, 42 U.S.C. § 2000e-16	1,243,194	38
Tucker Act (inverse condemnation & other claims), 28 U.S.C. § 1491	1,086,185	2
Privacy Act, 5 U.S.C. § 552a	953,180	1
Freedom of Information Act, 5 U.S.C. § 552	658,561	26
Age Discrimination In Employment Act, 29 U.S.C. § 633a	565,029	2
Outer Continental Shelf Lands Act, 43 U.S.C. § 1349	390,000	1
Clean Water Act, 33 U.S.C. § 1365	252,947	6
Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270	240,825	4
Fair Labor Standards Act, 29 U.S.C. § 216	228,413	5
American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4011, 162a	149,014	1
Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3117	134,544	3
National Historic Preservation Act, 16 U.S.C. § 470w-4	110,661	4
Resource Conservation and Recovery Act, 42 U.S.C. § 6972	60,952	1
Payments for which statute could not be determined	52,087	4
Rehabilitation Act (disability discrimination), 29 U.S.C. §§ 791, 794a	25,523	1
Tucker Act (tort claim), 28 U.S.C. § 1346	7,774	1
Total	\$27,457,860	338

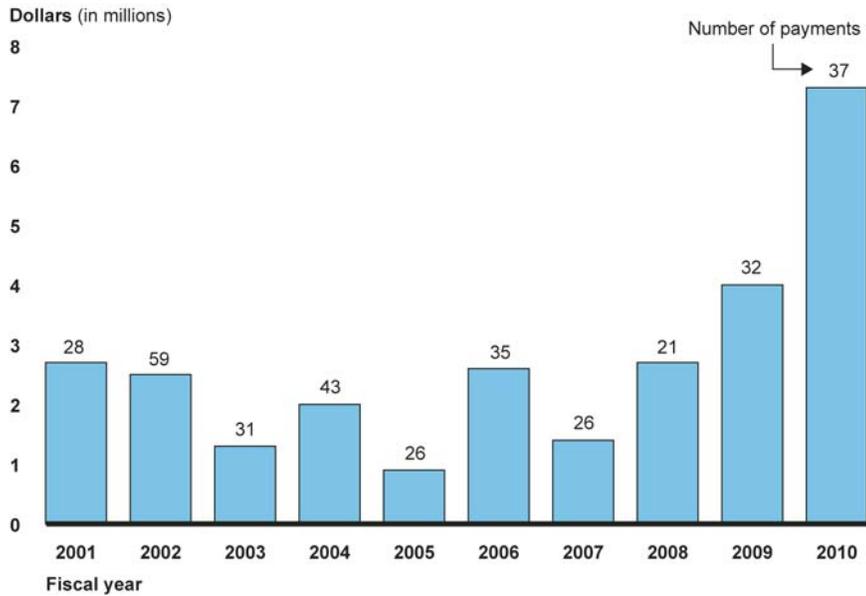
Source: GAO analysis of Treasury data.

^aStatutes are as reported in Treasury's JFICS. For payments associated with inverse condemnation claims, statutes are as identified in publicly accessible court records.

^bThe median payment under the Endangered Species Act on behalf of Interior was \$24,671.

Figure 5 shows the amount and number of payments made by Treasury on behalf of Interior by fiscal year.

Figure 5: Interior Attorney Fees Paid and Number of Payments from Treasury's Judgment Fund, Fiscal Years 2001 through 2010



Source: GAO analysis of Treasury data.

Figure 5 shows that the greatest number of payments was made in fiscal year 2002 (59 payments) and Treasury paid the highest amounts of attorney fees and costs on behalf of Interior in 2010 (\$7.3 million). The payments range from about \$140 to \$5.6 million. Larger payments may skew the data for the year in which Treasury made those payments. For example, in 2010, one payment under the Endangered Species Act accounted for over \$5.6 million (or about 77 percent) of the \$7.3 million in total payments.

Enclosure III: GAO Contact and Staff Acknowledgments

GAO Contact William O. Jenkins, Jr. (202) 512-8777 or jenkinswo@gao.gov

Staff Acknowledgments In addition to the contact named above, Maria Strudwick, Assistant Director; Ellen Wolfe, Analyst-in-Charge; Elizabeth Beardsley; Cynthia Grant; Paul Hobart; Julian King; Ron La Due Lake; Lara Miklozek; and Janet Temko made significant contributions to this report. Other contributors to this report included Lisa Brownson, Francis Dymond, Anne Johnson, John Reilly Jr, and Susan Ragland.

(440979)

This is a work of the U.S. government and is not subject to copyright protection in the United States. The published product may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.

GAO's Mission

The Government Accountability Office, the audit, evaluation, and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

Obtaining Copies of GAO Reports and Testimony

The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's website (www.gao.gov). Each weekday afternoon, GAO posts on its website newly released reports, testimony, and correspondence. To have GAO e-mail you a list of newly posted products, go to www.gao.gov and select "E-mail Updates."

Order by Phone

The price of each GAO publication reflects GAO's actual cost of production and distribution and depends on the number of pages in the publication and whether the publication is printed in color or black and white. Pricing and ordering information is posted on GAO's website, <http://www.gao.gov/ordering.htm>.

Place orders by calling (202) 512-6000, toll free (866) 801-7077, or TDD (202) 512-2537.

Orders may be paid for using American Express, Discover Card, MasterCard, Visa, check, or money order. Call for additional information.

Connect with GAO

Connect with GAO on [Facebook](#), [Flickr](#), [Twitter](#), and [YouTube](#). Subscribe to our [RSS Feeds](#) or [E-mail Updates](#). Listen to our [Podcasts](#). Visit GAO on the web at www.gao.gov.

To Report Fraud, Waste, and Abuse in Federal Programs

Contact:

Website: www.gao.gov/fraudnet/fraudnet.htm

E-mail: fraudnet@gao.gov

Automated answering system: (800) 424-5454 or (202) 512-7470

Congressional Relations

Katherine Siggerud, Managing Director, siggerudk@gao.gov, (202) 512-4400, U.S. Government Accountability Office, 441 G Street NW, Room 7125, Washington, DC 20548

Public Affairs

Chuck Young, Managing Director, youngc1@gao.gov, (202) 512-4800 U.S. Government Accountability Office, 441 G Street NW, Room 7149 Washington, DC 20548

