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7/23/12

United States Department of Agriculture

Animal and Plant Health Inspection Service

Marketing & Regulatory Programs Business Services

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William D. Spencer, Clerk (via Fax)
of the Board, Merit Systems Protection
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This letter is the United States Department of Agriculture, (USDA) Animal & Plant Health Inspection Service (APHIS), Hearings & Appeals Branch (HAB) comments on the Proposed Rules published by the Merit Systems Protection Board (MSPB) in the Federal Register on June 7, 2012. The main concern is that the new proposed rules, in pertinent parts, will require agencies to pay more for travel and transcript costs when the current administration and agency budget reductions dictate we spend less.

Specifically, APHIS is concerned about the broad wording of the proposed rule change for 5 C.F.R. § 1201.33. The current regulation states: "Every Federal agency or corporation must make its employees or personnel available to furnish sworn statements or to appear as witnesses at the hearing when ordered by the judge to do so. When providing those statements or appearing at the hearing, Federal employee witnesses will be in official duty status (i.e., entitled to pay and benefits including travel and per diem, where appropriate)."

The new proposed regulation states: "Every Federal agency or corporation, including nonparties, must make its employees or personnel available to furnish sworn statements or to appear at a deposition or hearing when ordered by the judge to do so. When providing those statements or appearing at the hearing, Federal employee witnesses will be in official duty status (i.e., entitled to pay and benefits including travel and per diem, where appropriate)." Although the word "depositions" does not appear in the second sentence, the agency is concerned about the summary of the changes which states: "The proposed language has been added to clarify that an agency's responsibility under this regulation includes producing witnesses at depositions as well as at hearings."

On May 11, 2012, Jeffrey D. Zients, Acting Director of the Office of Management and Budget (OMB) issued M-12-12 to all Heads of Executive Departments and Agencies titled "Promoting Efficient Spending to Support Agency Operations." In that memo, in Section 1, it was specifically stated that, "In FY 2013, each agency shall spend at least 30 percent less on travel expenses covered by this memorandum than in FY 2010. Agencies must maintain this reduced level of spending each year through FY 2016." Excluded expenses were defined as: critical government functions as national security, international diplomacy, health and safety inspections, law enforcement, or site visits required for oversight or investigatory purposes."

Even before OMB issued its orders to significantly reduce travel expenses, on March 9, 2011, the Deputy Chief Financial Officer of USDA issued written guidance on the

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Department-wide initiative to reduce travel expenditures by 20 percent based on the FY 2010 guidelines.

Specifically in APHIS, the impact is as follows:

- FY 2011: For FY 2011, USDA issued the above cited written guidance on the Department-wide initiative to reduce travel expenditures by 20 percent. The Department used 2010 travel costs reported in the FY 2012 Budget Request as the basis for this reduction. APHIS reported $30.3 million in travel obligations in 2010 in the FY 2012 Budget Request. Based on this spending level, the Department set APHIS' 2011 travel target at $24.2 million – a $6.1 million reduction.

- FY 2012: The goal for FY 2012 for APHIS was to spend at the FY 2011 level.

- FY 2013-2016: OMB Memorandum 12-12 states that agencies will spend 30% less in travel in FYs 2013 through 2016.

It would appear that the situation at APHIS is similar to most Federal agencies. Additionally, contrary to the MSPB's statement in the proposed regulations, funding for hearings and related litigation expenses such as depositions come out of miscellaneous expenses, and there is *no separate line item in the budget* for travel associated with MSPB hearings.

In cases in which an appellant prevails, appellants are potentially entitled to attorneys' fees. See *Hart v. Department of Transportation*, 110 MSPR 10 (2010). Under current precedent set by the Federal Circuit, fees incurred for travel for an appellant's attorney is potentially recoverable. See *Bennett v. Department of the Navy*, 699 F.2d 1140 (1983). Therefore, appellants who prevail before the Board currently have a remedy, even without the proposed revisions in the event that their attorney travels to the location of the agency employee. Therefore, if the appellant prevails, the appellant can potentially receive the costs associated with the attorney's travel.

APHIS believes the Board's proposed rule is overly broad and will lead to unnecessary and unfinanced expenditures by agencies. The Board currently recognizes that it is entirely proper for hearings to be held via video. See *Koehler v. Department of the Air Force*, 99 M.S.P.R. 82 (2005). Although nonprecedential, the Federal Circuit has recognized that even in cases where appellants object to video hearings, it is still acceptable for the Board to hold a hearing via video absent a showing of specific unfairness in a particular case. See *Bowen v. Department of the Navy*, 112 M.S.P.R. 707 (2009), aff'd 402 F. App'x 521 (Fed. Cir. 2010).

While APHIS believes that it is important to provide federal employees with official time to testify at deposition, the proposed rule goes too far in that it requires the agencies to pay for unnecessary travel expenses; as written, this could include airfare, and per diem for travel beyond an employee's commuting area or even beyond an area where the facts of a case arise. APHIS believes that the intent of the rule change could be accomplished by

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requiring agencies to provide federal employees with official time for depositions without forcing the agencies to pay for travel to locations that potentially have no bearing on a case other than the fact that an attorney or an appellant simply happens to be located there or they desire to increase costs to the Federal Government hoping this will result in settlements based on mere costs.

A hypothetical example illustrating the nature of the concern is a case where an attorney resides in California and the client resides in Washington, D.C. with a Washington Regional MSPB hearing location. Under the proposed rules, the attorney could request the deposition of 10 agency witnesses who are located in Washington, D.C. to travel to the attorney's office in California. Under the proposed regulations, the Agency would potentially be required to pay for the travel of those ten witnesses to California. This could result potentially in thousands of dollars of expenses per case that the Federal Government is not currently required to incur.

1201.33 should be revised to exclude requiring agencies to pay for travel for depositions and that depositions should be taken in the local commuting area where the witness resides if possible or where there is videoconference capabilities. The proposed rule change will require unnecessary expenses in the current environment of austerity. This new proposed rule will require agencies to pay more for travel when the current administration and agency budget reductions dictate we spend less. Simply put, there are alternatives to the proposed language that could accomplish the same goal without the potential dramatic increase in cost.

Regarding 1201.53 Record of Proceedings, APHIS is concerned about the requirement for Agencies to pay for copies of transcripts for both the Appellant and the Administrative Judge. The agency is mindful of the fact that the Board is not currently required to provide a verbatim copy of the transcript to either the agency or the appellant. The proposed rule however expands the appellant's rights beyond that which Congress initially stated. Although the Board correctly points out that the Board's proposed regulation is more narrowly tailored than the EEOC's regulation at 29 C.F.R. § 1614.109(h), 5 U.S.C. 7701(a) specifically states: "An appellant shall have the right to a hearing for which a transcript will be kept." Thus, according to statute, an agency is not required to pay for a verbatim transcript either. The new policy as written will potentially require thousands of dollars of additional expenses to agencies that have not been borne on agencies before this proposed rule change.

While an appellant is granted the right to a hearing with a transcript, nowhere in the statute does it confer a right to a free transcript. From our viewpoint, he Board has operated well with using tape recorded hearings and with consideration given to the decreasing budgets of most federal agencies; there is no reason to change this practice. The cost for agencies to pay for transcripts can run in the thousands of dollars for each transcript. The current procedures are effective in that an appellant can ask for a copy of the recording of the hearing and then take it to a transcribing service if they so desire. Again, if the appellant prevails, they can ask for costs.

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In summation, the additional costs being shifted to Federal agencies is still being borne by the taxpayer; any savings are illusionary.

Sincerely,

Bradly Siskind

Bradly Siskind, Esquire,
Hearings and Appeals Branch

Cc:

Martin Gold
Sarah Tuck

Enclosures: 1) M-12-12; 2) USDA Reduction in Travel Expenditures

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 11, 2012

M-12-12

MEMORANDUM TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: JEFFREY D. ZIENTS
ACTING DIRECTOR

SUBJECT: Promoting Efficient Spending to Support Agency Operations

The Federal Government has a responsibility to act as a careful steward of taxpayer dollars, ensuring that Federal funds are used for purposes that are appropriate, cost effective, and important to the core mission of executive departments and agencies (agencies). From the beginning of this Administration, the President has been clear that wasteful spending is unacceptable, and that the Federal Government must strive to be more efficient and effective. That is why the President and the Vice President launched the Campaign to Cut Waste and charged agencies with going line-by-line through their budgets to identify areas of unnecessary spending or opportunities for greater efficiency or cost savings.

As part of this effort, on November 9, 2011, the President signed Executive Order 13589 "Promoting Efficient Spending." In that Executive Order, the President directed each agency to reduce its combined costs in a variety of administrative categories by not less than 20 percent in Fiscal Year (FY) 2013 from FY 2010 levels. Agencies have since developed plans for achieving these cuts, and the President's FY 2013 Budget identifies $8 billion in reduced costs as a result of Executive Order 13589.

To achieve these savings, many agencies have identified and implemented creative and innovative practices to reduce costs and improve efficiencies in such areas as travel, conference expenditures, real estate, and fleet management. There are also other practical steps agencies can take to improve operations, increase efficiency, and cut unnecessary spending. Accordingly, this memorandum describes a series of policies and practices related to activities and expenses in these areas, building on measures already in place at various agencies.

Section 1 – Travel

Travel is often necessary for Federal employees to discharge their duties effectively and the travel industry plays an important role in creating jobs and supporting local economies; however, as good stewards of Federal funds, agencies must do all they can to manage their travel budgets efficiently. Accordingly, in FY 2013, each agency shall spend at least 30 percent less on travel

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expenses covered by this memorandum than in FY 2010.[1] Agencies must maintain this reduced level of spending each year through FY 2016. For the purposes of this section only, the term "agency" means any agency described in 31 U.S.C. 901(b).

In consultation with the Office of Management and Budget (OMB), agencies shall direct all immediate savings achieved through this reduction towards investments that improve the transparency of and accountability for Federal spending and therefore serve taxpayers by further reducing wasteful spending over the long-term. Investments should include activities necessary to provide more robust tracking and public reporting of Federal spending, as well as internal audits and investigations to root out fraud and error in Federal programs and activities.

No later than 90 days from the date of this memorandum, agencies shall report to OMB on the proposed reduction in travel expenses as a result of this requirement. Information provided to OMB should include the amount of the proposed reduction in travel expenses, the amount of FY 2010 travel expenses obligations subject to this section that provides a baseline for measuring the required reductions, and the amount of FY 2010 obligations for travel expenses that are excluded from this baseline. The agency may exclude certain travel expenses from reduction only if the agency head determines that inclusion of such expenses as part of the 30 percent reduction target would undermine such critical government functions as national security, international diplomacy, health and safety inspections, law enforcement, or site visits required for oversight or investigatory purposes.[2] Excluded travel expenses will not be part of the baseline that agencies use in calculating the 30 percent reduction target or subject to reduction themselves. In determining how to reduce travel expenses, agencies should consult and collaborate with their Inspectors General (IG) on the appropriate ways to reduce travel for oversight and investigatory purposes, while maintaining the independence and capacity of IGs.

In addition, agencies shall include in their FY 2014 budget submission to OMB a description of how they will make these travel reductions sustainable, including the specific process changes and technology investments necessary to reduce their reliance on travel.

In addition, to assist agencies in achieving these reductions in travel expenses, no later than 180 days from the date of this memorandum, the Department of Defense and the General Services Administration (GSA), in consultation with OMB, shall review the Joint Federal Travel Regulations and the Federal Travel Regulation (FTR) to ensure that the policies reduce travel costs without impairing the effective accomplishment of agency missions. This review shall, at a minimum, establish or clarify policies that:

(a) increase Federal employee sharing of rental automobiles and taxis when appropriate;

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[1] "Travel expenses" are defined as obligations categorized under budget object class 21.0 (travel and transportation of persons), which is described in OMB Circular A-11 (section 83.6). In some cases, travel expenses may also include travel funded outside of this object class. OMB will provide additional guidance to affected agencies on areas outside of this object class that should be included in the reductions required by this memorandum.

[2] For example, the Attorney General may determine that some portion of the travel by Federal Bureau of Investigation agents is necessary to investigate specific criminal activity and should be excluded from the baseline of travel expenses from which the 30 percent reduction would be taken. Similarly, the Secretary of Health and Human Services may determine that a portion of the travel by Food and Drug Administration inspectors is necessary to ensure the health of the public and should be excluded from the baseline subject to the 30 percent reduction.

(b) ensure that Federal employees receive a per diem reimbursement only to the extent costs were incurred and not reimbursed by another party;

(c) promote the identification and use of non-contract air carriers that, if used, will result in a lower total trip cost to the Government;

(d) expand and leverage the Government's purchasing power to reduce travel costs associated with hotels and rental cars;

(e) ensure that, whenever practicable, Federal employees arrange airfare in a manner that results in the lowest price available when traveling on domestic flights, including appropriately timing the purchase of airfare; and

(f) ensure that agencies have controls in place to collect refunds for unused or partially used airline tickets for Federal employees who have purchased airfare, consistent with existing requirements in the FTR and Federal Management Regulation (FMR).[3]

Section 2 – Conferences

As part of the effort to safeguard Federal funds, agencies should focus on expenses related to conference sponsorship, conference hosting, or attendance of Federal employees at conferences sponsored or hosted by non-Federal entities.[4] Federal agencies and employees must exercise discretion and judgment in ensuring that conference expenses[5] are appropriate, necessary, and managed in a manner that minimizes expense to taxpayers.

On September 21, 2011, OMB issued Memorandum 11-35, "Eliminating Excess Conference Spending and Promoting Efficiency in Government." That memorandum instructed all agencies "to conduct a thorough review of the policies and controls associated with conference-related activities and expenses." In accordance with that memorandum, Deputy Secretaries (or their equivalents) thoroughly reviewed the policies and controls associated with conference-related activities and expenses to mitigate the risk of inappropriate spending.

To expand upon these efforts, this memorandum outlines a series of new policies and practices for conference sponsorship, hosting, and attendance to ensure that Federal funds are used

[3] See FTR 301-72.100, 301-72.101, 301-72.300; also see FMR 102-118.

[4] "Conference" is defined in this memorandum as it is in the FTR, as "[a] meeting, retreat, seminar, symposium or event that involves attendee travel. The term 'conference' also applies to training activities that are considered to be conferences under 5 CFR 410.404." See 41 CFR 300-3.1.

[5] "Conference expenses" are defined as all direct and indirect conference costs paid by the Government, whether paid directly by agencies or reimbursed by agencies to travelers or others associated with the conference, but do not include funds paid under Federal grants to grantees. Conference expenses include any associated authorized travel and per diem expenses, hire of rooms for official business, audiovisual use, light refreshments, registration fees, ground transportation, and other expenses as defined by the FTR. All outlays for conference preparation and planning should be included, but the Federal employee time for conference preparation should not be included. The FTR provides some examples of direct and indirect conference costs included within conference expenses. See 41 CFR 301-74.2. Conference expenses should be net of any fees or revenue received by the agency through the conference and should not include costs to ensure the safety of attending governmental officials.

appropriately on these activities, and that agencies continue to reduce spending on conferences where practicable:

- **Initiate senior level review of all planned conferences** – Expanding upon the requirements of OMB Memorandum 11-35, agency Deputy Secretaries (or their equivalents) shall initiate review of planned spending for every upcoming conference that is to be sponsored or hosted by the agency (or by other Federal or non-Federal entities) where net conference expenses by the agency will exceed $100,000. Agencies must ensure that the conference expenses and activities comply with the FTR directives and executive branch policies on conferences as well as the Federal Acquisition Regulation (FAR) requirements on contracting goods and services. Until these reviews are completed, agencies shall suspend incurring obligations for conferences to which the agency has not yet committed.

- **Initiate senior level approval of all future conference expenses in excess of $100,000** – Following the review of planned conferences, Deputy Secretaries (or their equivalents) shall continue to approve the spending for all proposed new conferences to be sponsored or hosted by the agency (or by other Federal or non-Federal entities) where the net conference expenses by the agency will be in excess of $100,000. Agencies must ensure that no Federal funds are used for unnecessary or inappropriate purposes and that all conference expenses and activities comply with both the FTR and the FAR requirements on lodging, food and beverages, per diem reimbursement, and contracting of goods and services. In addition, agencies should ensure that conference attendance and expenses are limited to only the levels required to carry out the mission of the conference.

- **Prohibit expenses in excess of $500,000 on a single conference** – An agency shall not incur net expenses greater than $500,000 from its own funds on a single conference, including conferences that are sponsored or hosted by the agency (or by other Federal or non-Federal entities). The agency head may provide a waiver from this policy if he or she determines that exceptional circumstances exist whereby spending in excess of $500,000 on a single conference is the most cost-effective option to achieve a compelling purpose. The grounds for any such waiver must be documented in writing by the agency head.

- **Report publicly on all conference expenses in excess of $100,000** – Agencies shall report on conference expenses on a dedicated place on their official website. By January 31 of each year (beginning on January 31, 2013), the agency head shall provide a description of all agency-sponsored conferences from the previous fiscal year where the net expenses for the agency associated with the conference were in excess of $100,000. This description shall include:

  - the total conference expenses incurred by the agency for the conference;
  - the location of the conference;
  - the date of the conference;
  - a brief explanation how the conference advanced the mission of the agency; and
  - the total number of individuals whose travel expenses or other conference expenses were paid by the agency.

In addition, for any instances where the net expenses for an agency-sponsored conference exceeded $500,000, the website shall include the agency head's waiver that identified the exceptional circumstances that necessitated exceeding this threshold. Finally, the website shall include information about the net conference expenses for the fiscal year incurred by that agency as well as a general report about conference activities throughout the year.

In reporting these data, agencies shall exclude any information that is considered to be sensitive, is prohibited from public disclosure by statute or regulation, or may jeopardize national security or the health, safety or security of conference attendees, organizers, or other individuals.

Section 3 – Real Property

Agencies must also move aggressively to dispose of excess properties held by the Federal Government and make more efficient use of the Government's real estate assets. Agencies are already streamlining operations and using existing properties to meet the directive in the June 10, 2010 Presidential Memorandum (Disposing of Unneeded Federal Real Estate—Increasing Sales Proceeds, Cutting Operating Costs, and Improving Energy Efficiency) to produce no less than $3 billion in civilian real property cost savings by the end of FY 2012.

As of the date of this memorandum, agencies shall not increase the size of their civilian real estate inventory, subject to exceptions as described below. Acquisition of new Federal building space (where approval of such acquisition occurs following the date of this memorandum) that increases an agency's total square footage of civilian property must be offset through consolidation, co-location, or disposal of space from the inventory of that agency. In identifying consolidations, co-locations, or disposals of property to offset acquisition of new Federal building space, an agency may include civilian buildings from its own inventory that were, in accordance with the June 10, 2010 Presidential Memorandum, reported as excess to the GSA or otherwise disposed of.

Additional guidance will be provided for carrying out this section, including defining those properties to which this section applies and when a property may be identified as an offset, as well as establishing a process to identify exceptions to this section's requirements where appropriate, such as to comply with legal requirements, to reduce costs, to protect national security, or to allow for the effective accomplishment of agency missions.

Section 4 – Fleet Management

In furtherance of the May 24, 2011 Presidential Memorandum (Federal Fleet Performance), and to optimize the management of Government-owned vehicles, agencies shall use existing GSA fleet services, or initiate a replacement and renewal schedule that is consistent with the requirements of the FMR[6], whereby standard sedans operate on a replacement schedule of at least three years or until the vehicle has been driven in excess of 60,000 miles (whichever comes first), unless material defects prevent the vehicle from operating in a safe manner or if replacement would save the agency money over the life of the vehicle. GSA shall periodically review such policies for opportunities to further improve efficiency.

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[6] See FMR 102-34.270.

Within 90 days of the date of issuance of this memorandum, OMB, in consultation with GSA, will provide agencies with additional guidance on carrying out the provisions in Sections 3 and 4 of this memorandum.

Questions regarding the policies and practices outlined in this memorandum should be directed to the Office of Federal Financial Management at OMB (202-395-3993).

USDA

United States Department of Agriculture

Office of the Chief Financial Officer

1400 Independence Avenue, SW

Washington, DC 20250

MAR - 9 2011

TO: Agency Heads

FROM: Jon M. Holladay
Deputy Chief Financial Officer

Jon M. Holladay

SUBJECT: Reduction in Travel Expenditures

On February 14, 2011, Secretary Vilsack released the United States Department of Agriculture's (USDA) proposed fiscal year (FY) 2012 budget which included a $2 billion cut in discretionary spending. Secretary Vilsack is encouraging all USDA program managers and employees to cut waste, reduce administrative costs, make better use of taxpayer dollars, and to deliver services as efficiently as possible. To this end, the Secretary has set a 20 percent reduction goal in USDA travel spending for FY 2011.

We are using the FY 2010 travel cost data (i.e., Object Class 2100) reported in the FY 2012 Budget Request, to establish the 20 percent reduction required for FY 2011. USDA reported spending over $301 million on travel last year; therefore a $60 million reduction in spending is necessary to reach the Secretary's goal. The attached listing provides agency travel costs for FY 2010 and the targets for FY 2011. It is important that all travel expenditures be carefully planned and opportunities taken to achieve these savings.

Cost saving suggestions while traveling:

- Combine trips when possible; encourage travelers to cover multiple purposes in one trip rather than multiple quick trips.
- Make travel plans well in advance, taking advantage of reduced government fares (capacity controlled city pair airfares) and restricted airfares.
- Compare airfares for all nearby airports.
- Travelers on long-term temporary assignments should use extended stay accommodations, where available.
- Travelers are encouraged to use government owned vehicles (GOV), when available, rather than renting a car.
- Conference and training coordinators should work with procurement officials and hotel staff to obtain group rates for hotel rooms and meeting facilities.

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Alternatives to traveling:

- The use of video conferencing is encouraged; many USDA offices now have these capabilities.
- Use webinars and on-line meeting services to share information.
- Use USDA's broadcast media capabilities to perform outreach and program education functions rather than constant travel.

These are some suggestions to assist you in reducing travel spending.

If you have any questions, please feel free to contact me or have your staff contact Teresa Maguire at (202) 690-0290.

Attachment

cc: Deputy Administrators for Management
Agency Chief Financial Officers
Travel Policy User Group Representatives

Agency	FY 2010 Travel Costs (Actuals)	FY 2011 Travel Costs (Target)
Office of the Secretary	$1,045,805	$836,644
Office of the Chief Economist	226,481	181,185
National Appeals Division	394,092	315,274
Office of Budget and Program Analysis	3,169	2,535
Office of Homeland Security and Emergency Coordination	192,672	154,138
Office of the Chief Information Officer	4,032,834	3,226,267
Office of the Chief Financial Officer	2,104,899	1,683,919
Office of the Assistant Secretary for Civil Rights	773,437	618,750
Departmental Administration	672,711	538,169
Office of Communications	234,206	187,365
Office of the Inspector General	5,353,703	4,282,962
Office of the General Counsel	327,415	261,932
Economic Research Service	768,516	614,813
National Agriculture Statistics Service	3,060,536	2,448,429
Agricultural Research Service	18,403,323	14,722,658
National Institute of Food and Agriculture	2,260,000	1,808,000
Animal and Plant Health Inspection Service	30,266,584	24,213,267
Agricultural Marketing Service	1,934,854	1,547,883
Grain Inspection, Packers and Stockyards Administration	1,634,069	1,307,255
Food Safety and Inspection Service	38,425,655	30,740,524
Farm Servicing Agency	12,651,000	10,120,800
Risk Management Agency	2,040,718	1,632,574
Natural Resources and Conservation Service	24,554,108	19,643,286
Rural Development	15,232,769	12,186,215
Food and Nutrition Service	6,666,000	5,332,800
Foreign Agricultural Service	9,091,641	7,273,313
Forest Service	119,000,000	95,200,000
USDA	$301,351,197	$241,080,958