

Feds paid billions in settlements last year

Analysis shows more than twice as much as in 2010, and the most in at least five years.

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Lawyers for Uncle Sam shelled out more than \$3 billion in taxpayer funds last year to resolve lawsuits against the federal government — more than twice as much as in 2010, and the most in at least five years, an analysis of government records shows.

The lion's share of expenses can be attributed to the Department of Energy, which single-handedly accounted for \$1.3 billion in payments. [\[see chart\]](#) The agency in 2011 quietly settled a series of breach-of-contract suits with utilities over the storage of spent nuclear fuel, resulting in a \$1 billion spike in legal bills compared with 2010.

Energy wasn't the only agency to rack up fat settlements. The U.S. Department of Agriculture spent \$698 million to resolve lawsuits in 2011 compared with \$39 million in 2010, an 18-fold increase. The Department of the Interior was third, spending \$403 million, compared with \$47 million the year before. Both agencies settled megacases involving Native Americans in 2011.

At the other end of the spectrum, the Department of Labor cost taxpayers a mere \$350,000 in legal judgments in 2011, and the Department of Education didn't spend a penny (though it was part of a multiagency settlement).

To arrive at the numbers, *The National Law Journal* took an in-depth look at more than 5,000 payment records in the Judgment Fund, a largely overlooked pocket of federal spending. Created by Congress in 1956, the fund pays court judgments, Justice Department compromise settlements of actual or imminent lawsuits and settlements by agencies at the administrative level without a lawsuit. The payments, which don't come out of the agencies' budgets, cover most claims against the government, though there are a few exceptions, such as judgments against the U.S. Postal Service and certain employment discrimination claims.

Administered by the Treasury Department, the fund is not subject to the appropriations process — it's more like a bottomless well that agencies can draw from at will.

Treasury on its Web site explains that the fund is a "permanent, indefinite appropriation....The Judgment Fund has no fiscal year limitations, and there is no need for Congress to appropriate funds to it annually or otherwise." The rationale for such a flexible budget is that it allows for speedy legal payments and reduces the assessment of interest against the United States. It also means the agencies don't have to beg Congress for money every time they lose in court or settle a suit.

A BIG RANGE

The range of payments from the fund in 2011 was enormous. The Department of Agriculture had the dubious distinction of requesting the year's smallest payment — 5 cents, for an unspecified matter — and the largest — \$680 million, to settle the class action *Keepseagle v. Vilsack*. The lawsuit claimed that the USDA denied thousands of Native American farmers and ranchers the same opportunities given to white farmers to get loans.

The second largest Judgment Fund payment of the year — \$380 million — went to the Osage Tribe in Oklahoma in November. The tribe sued the Department of the Interior in the U.S. Court of Federal Claims in 1999 and 2000 over mismanagement of the tribe's trust accounts, trust lands and other natural resources. The settlement included a payment of \$26.1 million in attorney fees to Akin Gump Strauss Hauer & Feld.

Another big payout went to a class of 3,000 air marshals who sued the Department of Homeland Security for unpaid overtime. In late March, DHS requested \$106 million from the Judgment Fund to settle the case.

The majority of the 5,000-plus Judgment Fund payments last year, though, were for much more modest amounts — \$2,350 to a Texas woman who accused a Transportation Security Administration screener of groping her breasts; \$21,250 to a federal prisoner who claimed he was denied medical care; \$50,000 to a diabetic who became ill when a Fish & Wildlife Service agent searched his house and wouldn't let him eat for hours.

Treasury's job is to make sure the agencies submit properly authorized requests and to wire the money to victorious plaintiffs — but it "does not review the merits of the underlying judgments or settlements." That's left up to the agencies submitting the claims.

A LACK OF TRANSPARENCY?

Critics of the Judgment Fund have focused their objections on the dearth of information about where the money goes — the fund database reveals payment dates and amounts, but little else. Connecting payments to lawsuits requires detective work and is often not possible with the information provided.

"The strange thing is the lack of transparency," said Walter Olson, a senior fellow at the Cato Institute's Center for Constitutional Studies. "Settlements deserve scrutiny.... There's no reason why as a public process there shouldn't be fine-grained disclosure."

In April, Rep. Darrell Issa (R-Calif.) introduced the Judgment Fund Transparency Act of 2011, which would require Treasury (unless barred by a court order or law) to make public the names of plaintiffs and counsel, plus a brief description of the facts that gave rise to the payments and a breakdown of principal and attorney fees. The bill has not attracted any co-sponsors and remains stalled before the House Judiciary courts, commercial and administrative law subcommittee.

"Left unchecked, agencies use the Judgment Fund like untraceable expense accounts, paying settlements without having to reimburse them or be accountable to Congress and the public for the decision-making process that leads to settlements," said Issa spokesman Jeffrey Solsby. "This situation creates the potential for abuse and shuts the public out of the settlement process."

One particular concern is that Judgment Fund payments may be used by environmental groups as part of a strategy dubbed "sue and settle." The idea is that activists sue the government — typically the Environmental Protection Agency — and the agency promptly settles the case on sweetheart terms, using the resulting court order as a form of backdoor regulation. Activists may then be awarded attorney fees from the Judgment Fund — and use the money to bring more suits.

"Let's track the money," said Karen Budd-Falen, a senior partner at Cheyenne, Wyo.-based Budd-Falen Law Offices who has done extensive research on Judgment Fund payments in environmental cases. "This isn't national security or trade secrets.... We're the taxpayers. We ought to be able to know."

Ultimately, though, the EPA only accounts for a tiny fraction of Judgment Fund payments — about \$3 million in 2011, or 0.1 percent of total expenditures.

BILLIONS FROM ENERGY

The big money — \$1.3 billion — was spent by the Department of Energy. The agency is on the hook for breaching 76 contracts signed with utilities in 1983. The contracts called for DOE to begin accepting spent nuclear fuel and high-level radioactive waste by Jan. 31, 1998. In return, the utilities for the past 29 years have made payments into the Nuclear Waste Fund — one-tenth of a cent per kilowatt hour of nuclear energy produced.

There's no question DOE breached the contracts; it hasn't taken custody of any waste. What's left to fight over is the amount of damages.

At the beginning of 2011, DOE had settled with seven utilities, according to testimony by Michael Hertz, a deputy assistant attorney general in the Justice Department's Civil Division, before the Blue Ribbon Commission on America's Nuclear Future in February

2011. By the end of the year, government lawyers with little fanfare had settled claims brought by another 13 companies. The amounts, Judgment Fund records show, ranged from \$120 million to resolve two claims by Jackson, Mich.-based Consumers Energy Co. to \$68 million for Rochester Gas and Electric Corp. to \$11 million for the Power Authority of the State of New York.

The Department of Energy declined comment on the settlements. Several of the utilities in news releases announcing their deals specified that the government approached them in 2010 to initiate talks.

Additional payments were court-ordered. In April, the U.S. Court of Appeals for the Federal Circuit upheld an award of \$48.7 million for Energy Northwest, as well as \$43 million for Dominion Nuclear Connecticut Inc. In July, the appeals court found Raleigh, N.C.-based Progress Energy Inc. was entitled to \$92 million, and in August, it upheld an award of \$142 million to Southern California Edison Co.

The pot of money in the Nuclear Waste Fund is now around \$28 billion, but all the payments to the utilities are coming from the Judgment Fund. Hertz in his testimony said this was the result of a 2002 decision by the U.S. Court of Appeals for the 11th Circuit. The court ruled that the waste fund couldn't be tapped because such expenses were not one of the uses authorized by the Nuclear Waste Policy Act.

"Although Congress provided in [the Nuclear Waste Policy Act] that utilities and their ratepayers would be responsible for paying for the storage" of spent nuclear fuel, Hertz said, "at least currently a substantial portion of those storage costs are being paid by the taxpayers, through the Judgment Fund."

Chart: [Judgment fund payments in 2011 for cabinet-level agencies](#)

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