

**COLORADO GENERAL ASSEMBLY
JOINT BUDGET COMMITTEE**



SUPPLEMENTAL REQUESTS FOR FY 2010-11

DEPARTMENT OF LAW

**JBC Working Document - Subject to Change
Staff Recommendation Does Not Represent Committee Decision**

**Prepared By:
Stephen Allen, JBC Staff
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For Further Information Contact:

Joint Budget Committee Staff
200 E. 14th Avenue, 3rd Floor
Denver, Colorado 80203
Telephone: (303) 866-2061
TDD: (303) 866-3472

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Prioritized Supplementals

**Supplemental Request, Department Priority #1
 Arkansas River Litigation Database and U.S. Supreme Court Amicus Brief**

	Request	Recommendation
Total	\$38,886	\$25,000
Cash Funds	38,886	25,000

Does JBC staff believe the request meets the Joint Budget Committee's supplemental criteria? [An emergency or act of God; a technical error in calculating the original appropriation; data that was not available when the original appropriation was made; or an unforeseen contingency.]	YES
JBC staff and the Department agree that both parts of this request are the result of <i>data that was not available when the original appropriation was made.</i>	

Department Request: This is a two part request. Both parts of the request would increase the FY 2010-11 cash funds appropriation for Consultant Expenses in the Department's Water and Natural Resources Division. The current \$50,000 FY 2010-11 appropriation for this line item comes entirely from the Attorney Fees and Costs Account; the requested extra spending authority would come from grants that the Colorado Water Conservation Board has made from its Litigation Fund. The two parts of the request are separate; one could be accepted while the other is rejected.

1. *Litigation Database:* The Department requests that the Consultant Expenses appropriation be increased by \$8,866 cash funds. The increase comes from a grant from the Colorado Water Conservation Board's Litigation Fund. The extra spending authority would be used to pay a portion of development costs for a \$50,000 Arkansas River litigation database that will aid the Department's Arkansas-River-Compact work.
2. *Amicus Brief:* The Department requests that the Consultant Expenses appropriation be increased by an additional \$30,000 to pay an outside attorney and consultants who were engaged to prepare an amicus brief that was filed with the U.S. Supreme Court in October 2010 in a Florida water case. The case has important implications for Colorado water resources.

Staff Recommendation: Staff recommends that the Committee adjust FY 2010-11 appropriations for the Consultant Expenses line item as follows:

1. *Litigation Database:* appropriate \$8,866 from the Colorado Water Conservation Board's

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Litigation Fund but reduce the appropriation from the Attorney Fees and Costs Account by \$8,866, an exactly offsetting amount. This will refinance a portion of the development cost for the litigation database but the Department will have sufficient spending authority to complete the project.

2. *Amicus Brief*: appropriate \$25,000 from the Colorado Water Conservation Board's Litigation Fund. The work on the Amicus Brief is complete and this is the actual cost of the work.

If the Committee adopts both of these recommendations, the appropriation for Consultant expenses would rise by \$25,000 cash funds to \$75,000 and the composition of the appropriation would change from entirely Attorney Fees and Costs to \$41,134 Attorney Fees and Costs and \$33,866 Colorado Water Conservation Board's Litigation Fund.

Background on the Colorado Water Conservation Board's Litigation Fund. The Colorado Water Conservation Board, established in Section 37-60-102, C.R.S., was established to aid in the protection and development of state waters for the benefit of Colorado's present and future citizens. The board's budget is located in the Department of Natural Resources. The Colorado Water Conservation Board's Litigation Fund, which is established in Section 37-60-121 (2.5) (a) (III), C.R.S., was created to support the State in water-related litigation involving the federal government or other states. The fund's balance, which currently equals approximately \$3.4 million, derives from periodic appropriations and transfers that the General Assembly makes into the Fund. The most recent transfer into the fund occurred when S.B. 09-125 (Water Conservation Board Construction Fund), transferred \$1.9 million from the Colorado Water Conservation Board Construction Fund to the Litigation Fund. Moneys in the Litigation Fund are continuously appropriated to the Board and all expenditures from the fund must be approved by the Board. By statute, the Attorney General may request moneys from the Litigation Fund to defend and protect Colorado's allocations of water in interstate streams and rivers with respect to specifically identified lawsuits.

Appropriations to the Department of Law from the Litigation Fund require two steps. The first step occurs when the Colorado Water Conservation Board, following a request from the Attorney General, uses its continuous spending authority to allocate funds to the Department of Law. Often these allocations cover the entire life of a project with no specification as to fiscal year. The second step occurs when the General Assembly gives the Department the authority to expend the moneys allocated by the Colorado Water Conservation Board.

Background on Arkansas River Litigation: In 1985 Kansas filed a complaint with the U.S. Supreme Court, which had original jurisdiction, asserting that Colorado was violating the 1948 Arkansas River Compact by consuming too much river water. In 1994 a Supreme Court appointed Special Master concluded that Colorado had violated the Compact by pumping too

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much water from wells near the river. The Supreme Court agreed with the Special Master's findings, and in 2005 Colorado paid Kansas \$34 million in damages for violations dating back to the 1950's. In 2006 Colorado paid another \$1.1 million for Kansas' legal costs, an amount that the Supreme Court upheld in 2009 following a Kansas challenge. In the wake of Supreme Court's 1994 ruling, Kansas and Colorado worked jointly with the Special Master to develop a decree, finalized in 2009, that implemented the Supreme Court's decision. The decree includes a complex water model and water accounting procedures that will, in future years, determine whether Colorado has complied with the compact. In 2010 a Colorado water judge approved rules issued by the Colorado State Engineer that are designed to ensure compact compliance. The resulting compliance and enforcement work requires the Department of Law to remain involved in Arkansas River matters for the foreseeable future. Should Colorado fail to comply with the Compact, the likely result will be arbitration and possibly litigation.

Background on the Consultant Expenses Line Item: Arkansas River litigation has, until recently, been largely handled by an outside law firm. This line item has been used to make payments to this private counsel and to other consultants who have been involved in the dispute. The FY 2010-11 appropriation equals \$50,000 cash funds with the entire appropriation coming from the Attorney Fees and Costs Account.

Staff Analysis of the Litigation Database Request: Since the beginning of the Arkansas River dispute, Colorado has relied on outside counsel for legal work. The most difficult parts of the case have been resolved and the Department is in the process of shifting the work in house, though outside council would probably still be required if a disagreement with Kansas goes to arbitration. To aid this transition, the Department is using the \$50,000 Consultant Expense appropriation to hire a consultant who will scan and index the thousands of Arkansas River pleadings, exhibits, briefs and other documents that have accumulated over the years. These documents are currently in boxes in a warehouse, which makes it difficult for the attorneys at the Department of Law, who have much less experience with the case than the outside counsel that handled it for years, to utilize them to familiarize themselves with issues as they arise. Staff believes that an Arkansas River litigation database will prove very helpful as the Department of Law carries out its compliance and enforcement work and that it will also be valuable when disputes arise with Kansas. The Department also expects to heavily use the database during the current dispute with Kansas and Nebraska over the Republican River. Litigation databases of this sort are becoming increasingly common in cases involving a large volume of documents.

The Department has \$8,866 of funding left over from a Colorado Water Conservation Board Litigation Fund grant for Arkansas River rule making. It would like to use this left over money to pay a portion of the cost of developing the litigation database, since database development is consistent with the purpose of the grant. Staff believes that this is a reasonable use of the grant money. However, the cost of developing the litigation database has not increased, thus staff

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recommends that the grant *substitute* for existing funding, rather than augment existing appropriations.

Staff Analysis of the Amicus Brief Request: In 2009 an Atlanta-based federal appeals court, overturning a federal District Court ruling, upheld an Environmental Protection Agency (EPA) regulation which states that the federal Clean Water Act does not require discharge permits for water transfers from one body of water to another. Such transfers include routing water through tunnels, channels, and natural waterways for municipal water supplies, irrigation, power generation, and flood control. If the EPA rule had been overturned, it would have required western water users to obtain thousands of permits that are not currently required, at considerable cost. Adverse permitting decisions could have threatened municipal water supplies. An environmental group appealed the Atlanta court's ruling to the U.S. Supreme Court. In September 2010, the Attorney General, believing this case offered an excellent opportunity for the U.S. Supreme Court to uphold the EPA rule, which has been the object of litigation for years, asked the Colorado Water Conservation Board to make a \$30,000 grant from its Litigation Fund to pay private counsel and supporting water experts to write an amicus brief encouraging the Supreme Court to accept the case and rule in favor of the EPA. Normally the Attorney General's staff would have written this brief, but the press of other work prevented them from doing so. The Board approved the request and private counsel submitted the brief before the October 22, 2010 deadline, however, the Court declined to take the case.

The Department has already paid for the Amicus Brief, using the existing General Fund appropriation to the Federal and Interstate Water Unit, a use that is consistent with that appropriation's intent. The Department could not spend from the \$30,000 Colorado Water Conservation Board grant because it lacked the spending authority. If the Committee approves this request, the Department will transfer the cost to the Consultant Expenses line item and use the grant. Staff believes that the importance of the issue justified the expenditure, even though the Supreme Court did not accept the case, and recommends that the Committee approve a \$25,000 appropriation, which equals the actual cost of the brief.

**Supplemental Request, Department Priority #2
 Fund Source for Building Security Appropriation (Technical Correction)**

	Request	Recommendation
Total - RF	<u>\$0</u>	<u>\$0</u>

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Does JBC staff believe the request meets the Joint Budget Committee's supplemental criteria? [An emergency or act of God; a technical error in calculating the original appropriation; data that was not available when the original appropriation was made; or an unforeseen contingency.]	YES
JBC staff and the Department agree that this request is the result of <i>a technical error</i> .	

Department Request: The Department requests that the source of the reappropriated funds that partially fund security at the Department for Law be changed from "Indirect Cost Recoveries" to "Various Sources of Reappropriated" Funds.

Staff Recommendation: Staff recommends that the Committee approve this request, thus correcting a technical error in the Long Bill.

Staff Analysis: The Department of Law pays for security services provided by the State Patrol via a central appropriation titled *Security for State Services Building*. As with other central appropriations (or "pots"), the General Assembly makes a single appropriation to the Department for this item and the Department then allocates the total among its divisions according to their needs. Divisions pay for their allocations using their various sources of cash and reappropriated funds. When the FY 2010-11 Long Bill was drafted last year, staff mistakenly attached a letter note to the \$71,164 reappropriated funds portion of this line item which stated that the reappropriated funds came from indirect cost recoveries; the letter note should have said that the appropriation was from various sources of reappropriated funds. Staff recommends that the Committee correct the error.

**Supplemental Request, Department Priority #3
 Substitute for Statewide One Percent Across the Board General Fund Personal Services
 Reduction**

	Request	Recommendation
Total	(\$55,000)	(\$55,000)
General Fund	(55,000)	(55,000)

Does JBC staff believe the request meets the Joint Budget Committee's supplemental criteria? [An emergency or act of God; a technical error in calculating the original appropriation; data that was not available when the original appropriation was made; or an unforeseen contingency.]	YES
JBC staff and the Department agree that this request is the result of <i>data that was not available when the original appropriation was made</i> .	

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Department Request: The Department requests that the General Fund portion of its Health, Life and Dental appropriation be decreased by \$55,000, which equals 1.06 percent of the Department's General Fund appropriation for Personal Services. The Department requests this reduction as an alternative to the one percent General Fund personal services reduction that the Governor requested of all executive-branch agencies.

Staff Recommendation: **Staff recommends that the Committee approve this request.**

Staff Analysis: Because the Attorney General is an elected official, his department is not required to comply with budget directives issued by the Governor, such as the one percent across-the-board General Fund personal services reduction announced in August 2010. Had the Department requested a reduction that conformed to the Governor's directive, it would have reduced General Fund personal services appropriations by \$52,000, taken proportionately from six line items in the Department.

The requested reduction of the Health, Life and Dental appropriation does not mean that the Department will do without \$55,000 of Health, Life and Dental coverage for its employees. Instead, the reduction will force the Department to pay \$55,000 of Health, Life, and Dental expenses from its various General Fund personal services appropriations, rather than using the money to pay for salaries, temporary employees, and contract services. The reduction will give the Department the flexibility to choose where to find savings and the flexibility to respond to unanticipated savings opportunities as they arise. If a given personal services line item can accommodate a 3 percent reduction while another can't be reduced, the Department can take the savings from the line item that can more easily handle it. Since salaries in the Administration Division are paid from indirect cost recoveries but Health, Life and Dental expenses in the division are paid from the General Fund, the Department's request also allows it to take advantage of personal services savings opportunities in the Administration Division, should they arise.

Staff recommends that the Committee approve this request because the Department's request produces \$3000 more General Fund savings than the Governor's directive while giving the Department more flexibility as it achieves the savings.

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**Supplemental Request, Department Priority #4
 Legal Services for State Agencies**

	Request	Recommendation
Total - RF	\$1,685,091	\$1,685,091
FTE	6.2	6.2

Does JBC staff believe the request meets the Joint Budget Committee's supplemental criteria? [An emergency or act of God; a technical error in calculating the original appropriation; data that was not available when the original appropriation was made; or an unforeseen contingency.]	YES
JBC staff and the Department agree that this request is the result of <i>data that was not available when the original appropriation was made.</i>	

Department Request: The Department of Law requests an additional appropriation of \$1,685,091 reappropriated funds and 6.2 FTE to supply legal services to other agencies, which equals the sum of the supplemental legal services requests of those agencies. Of this amount, \$774,593 would be appropriated on the "Lobato Litigation Expenses" line in the Department of Law's Special Purpose Division, while \$806,828 and \$103,670 would be appointed on the Personal Services line and the Operating and Litigation line, respectively, in the Department of Law's Legal Services to Stage Agencies Division. Litigation Expenses for the Lobato case are appropriated separately because they are expected to be large; the Department estimates that it will, during the remainder of the fiscal year, expend \$450,000 on Lobato experts, \$213,000 on depositions, and \$198,000 on discovery. A five week trial is scheduled for August 1, 2011.

The following table details the components of this request.

<i>Department:</i> Supplemental Description	Total	Personal Services	Operating & Litigation	Legal Hours	Equiv. FTE	JBC Status
<i>Governor:</i> Lobato Lawsuit	\$1,252,275	\$477,682	\$774,593	6,511	3.6	Pending
<i>Labor and Employment:</i> Legal Services	47,690	42,921	4,769	650	0.4	Approved
<i>Public Health and Environment:</i> Legal Services for Environmental Divisions	132,066	118,859	13,207	1,800	1.0	Pending
<i>Revenue:</i> Direct Marketing Association Lawsuit Over H.B. 10-1193	253,060	167,366	85,694	2,281	1.3	Pending
Total Request	\$1,685,091	\$806,828	\$878,263	11,242	6.2	

All amounts in this table are reappropriated funds.

Staff recommends that the appropriation to the Legal Services to State Agencies Division

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be adjusted to correspond with Committee-approved legal-services supplementals for other state agencies. Staff asks permission to adjust this appropriation so it accords with the legal services appropriations that the Committee approves for other Departments when it considers their supplemental requests.

Background: The Attorney General's office operates under the "Oregon" plan. State agencies purchase legal services from the Department much as they would purchase legal services from a private sector law firm. A cash funded program in a state agency would receive a cash funds appropriation to pay its legal bills while a General Fund program would receive a General Fund appropriation. The Department of Law collects these payments when it provides legal services, but it cannot spend the money unless it too has an appropriation. Without an appropriation the Department of Law cannot pay the salaries of the attorneys who provided the legal services or pay associated expenses. Thus, whenever the General Assembly makes an appropriation to a state agency for legal services, an equal appropriation must be made to the Department of Law so it can spend the money it receives. The appropriation to the Department of Law is typically classified as reappropriated funds.

Non-Prioritized Supplementals

Interim Supplemental Update

Compensation for the Seventh Judicial District's Interim District Attorney

The Committee tabled this interim supplemental request for a \$52,000 General Fund appropriation to pay the salary of an acting District Attorney for the Seventh Judicial District when it was considered on December 20, 2010.

Incumbent District Attorney Myrl Serra of the Seventh Judicial District has resigned, effective Jan 11, 2011 and the District's Chief Judge has issued an order cancelling the appointment of an acting District Attorney. Since the office of District Attorney is now vacant, Section 1-12-204, C.R.S., authorizes the Governor to appoint a successor who will serve until the next election in 2012. Before leaving office, Governor Ritter issued an order requiring the Attorney General to continue administering the District Attorney's office until Governor Hickenlooper appoints a new D.A.

As a consequence of Mr. Serra's resignation, the Seventh Judicial District will not have to pay simultaneously the salaries of two District Attorneys and there is no need for this supplemental.

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**JBC Staff Initiated Supplemental
 Reduced Appropriation for District Attorney Salaries (Technical Correction)**

	Request	Recommendation
Total	\$0	(\$50,600)
General Fund	0	(50,600)

Does JBC staff believe the request meets the Joint Budget Committee's supplemental criteria? [An emergency or act of God; a technical error in calculating the original appropriation; data that was not available when the original appropriation was made; or an unforeseen contingency.]	YES
This supplemental is the result of a <i>technical error in calculating the original appropriation.</i>	

Department Request: The Department has not requested this supplemental but indicates that it would have requested this supplement if the District Attorney controversy in the Seventh Judicial District had not arisen. That situation led the Department to request that the potential savings from this supplemental be used to pay the salary of a temporary District Attorney.

Staff Recommendation: Staff recommends that the Committee decrease the appropriation for District Attorney Salaries by \$50,600 General Fund in order to correct a technical error in calculating the appropriation.

Background and Analysis: Section 20-1-306, C.R.S., requires the state to pay 80 percent of the base salary of District Attorneys as established in Section 20-1-301, C.R.S. If a judicial district sets the salary higher than the base, the counties in the district must pay all of the extra cost. The state only subsidizes the salary of the district attorney; it does not contribute to deputy or assistant district attorney salaries. The state also pays 80 percent of the PERA, AED and SAED (but not the Medicare) on each district attorney's base salary. When calculating the FY 2010-11 appropriation for this line item, staff failed to take into account S.B. 10-146 which lowered the state PERA contributions from 10.15% to 7.65% for FY 2010-11 and increased the employee contribution by an offsetting amount. This supplemental corrects this technical error.

Statewide One Percent Across the Board General Fund Personal Services Reduction

The Department submitted Supplemental #3 as a substitute for this common policy supplemental.

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Statewide Common Policy Supplemental Requests

These requests are not prioritized and are not analyzed in this packet. The JBC will act on these items later when it makes decisions regarding common policies.

Department's Portion of Statewide Supplemental Request	Total	General Fund	Cash Funds	Reapprop. Funds	Federal Funds	FTE
Annual Fleet Vehicle Replacement	\$1,517	\$970	\$417	\$0	\$130	0.0
Printing of Statewide Warrants and Mainframe Documents	1,507	260	167	1,033	47	0.0
Department's Total Statewide Supplemental Requests	3,024	1,230	584	1,033	177	0.0

Staff Recommendation: The staff recommendation for these requests is pending Committee approval of common policy supplementals. **Staff asks permission to include the corresponding appropriations in the Department's supplemental bill when the Committee approves this common policy supplemental.** If staff believes there is reason to deviate from the common policy, staff will appear before the Committee later to present the relevant analysis.

	FY 2009-10	FY 2010-11	Fiscal Year 2010-11 Supplemental		
	Actual	Appropriation	Requested Change	Recommended Change	New Total with Recommendation
DEPARTMENT OF LAW					
Attorney General - John Suthers					
Supplemental #1 - Arkansas River Litigation Database and Amicus Supreme Court Brief					
<i>(4) Water and Natural Resources</i>					
Consultant Expenses - CF	82,678	50,000	38,886	25,000	75,000
Supplemental #2 - Building Security Letter Note (Technical Correction)					
<i>(1) Administration</i>					
Security for State Services Building	<u>196,693</u>	<u>120,919</u>	<u>0</u>	<u>0</u>	<u>120,919</u>
General Fund	73,989	34,587	0	0	34,587
Cash Funds	15,512	11,976	0	0	11,976
Reappropriated Funds	101,938	71,164	0	0	71,164
Federal Funds	5,254	3,192	0	0	3,192
Supplemental #3 - Substitute for Statewide One Percent Across the Board General Fund Personal Services Reduction					
<i>(1) Administration</i>					
Health, Life and Dental	<u>1,940,668</u>	<u>2,022,131</u>	<u>(55,000)</u>	<u>(55,000)</u>	<u>1,967,131</u>
General Fund	534,414	529,390	(55,000)	(55,000)	474,390
Cash Funds	152,611	216,077	0	0	216,077
Reappropriated Funds	1,194,594	1,226,397	0	0	1,226,397
Federal Funds	59,049	50,267	0	0	50,267

	FY 2009-10	FY 2010-11	Fiscal Year 2010-11 Supplemental		
	Actual	Appropriation	Requested Change	Recommended Change	New Total with Recommendation
Supplemental #4 - Legal Services for State Agencies					
(see narrative for more detail)					
<i>(1) Administration</i>					
Personal Services	18,075,032	19,586,780	806,828	806,828	20,393,608
FTE	<u>212.7</u>	<u>231.3</u>	<u>6.2</u>	<u>6.2</u>	<u>237.5</u>
Cash Funds	1,659,140	1,582,388	0	0	1,582,388
Reappropriated Funds	16,415,892	18,004,392	806,828	806,828	18,811,220
Operating and Litigation - RF	849,567	1,545,006	103,670	103,670	1,648,676
<i>(6) Special Purpose</i>					
Lobato Litigation Expenses - RF	0	432,500	774,593	774,593	1,207,093
Total for Supplemental #4	18,924,599	21,564,286	1,685,091	1,685,091	23,249,377
FTE	<u>212.7</u>	<u>231.3</u>	<u>6.2</u>	<u>6.2</u>	<u>237.5</u>
Cash Funds	1,659,140	1,582,388	0	0	1,582,388
Reappropriated Funds	17,265,459	19,981,898	1,685,091	1,685,091	21,666,989
Reduced Appropriation for District Attorney Salaries (Technical Correction)					
<i>(6) Special Purpose</i>					
District Attorneys' Salaries - GF	2,096,027	2,313,828	0	(50,600)	2,263,228

	FY 2009-10	FY 2010-11	Fiscal Year 2010-11 Supplemental		
	Actual	Appropriation	Requested Change	Recommended Change	New Total with Recommendation
Totals Excluding Pending Items					
DEPARTMENT OF LAW					
Totals for ALL Departmental line items	46,415,605	52,073,927	1,668,977	1,604,491	53,678,418
FTE	<u>379.1</u>	<u>414.5</u>	<u>6.2</u>	<u>6.2</u>	<u>420.7</u>
General Fund	9,184,084	9,615,003	(55,000)	(105,600)	9,509,403
Cash Funds	7,720,141	9,900,454	38,886	25,000	9,925,454
Reappropriated Funds	28,309,230	31,089,374	1,685,091	1,685,091	32,774,465
Federal Funds	1,202,150	1,469,096	0	0	1,469,096
Statewide Common Policy Supplementals					
(see narrative for more detail)	<u>N.A.</u>	<u>N.A.</u>	<u>3,024</u>	<u>Pending</u>	<u>N.A.</u>
General Fund			1,230		
Cash Funds			584		
Reappropriated Funds			1,033		
Federal Funds			177		
Totals Including Pending Items					
DEPARTMENT OF LAW					
Totals for ALL Departmental line items	46,415,605	52,073,927	1,672,001	1,604,491	53,678,418
FTE	<u>379.1</u>	<u>414.5</u>	<u>6.2</u>	<u>6.2</u>	<u>420.7</u>
General Fund	9,184,084	9,615,003	(53,770)	(105,600)	9,509,403
Cash Funds	7,720,141	9,900,454	39,470	25,000	9,925,454
Reappropriated Funds	28,309,230	31,089,374	1,686,124	1,685,091	32,774,465
Federal Funds	1,202,150	1,469,096	177	0	1,469,096

Key: N.A. = Not Applicable or Not Available