

UNITED STATES DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION

SUMMARY OF LITIGATION ACCOMPLISHMENTS
FISCAL YEAR 2005



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FOREWORD

It is my pleasure to present the Environment and Natural Resources Division's Accomplishments Report for Fiscal Year 2005. The Division achieved significant victories for the American people in each of the many areas for which it has responsibility. These responsibilities include protecting the Nation's air, water, land, wildlife and natural resources, upholding our trust responsibilities to Native Americans, and furthering important federal programs, including the government's mission to ensure national security.

The Division is dedicated to the vigorous, reasonable and fair enforcement of our Nation's environmental laws, in both the civil and criminal arenas. Such enforcement is a critical component of environmental protection and helps ensure that our citizens breathe clean air, drink clean water, and will be able to enjoy the country's public lands, wildlife and other natural resources for generations to come. It also helps ensure that law-abiding businesses have a level economic playing field on which to compete.

The Division's vigorous enforcement of our environmental laws has again generated record-breaking returns. Thanks to these efforts, polluters across the country will spend more than \$9.5 billion in corrective measures to protect the Nation's environment and our people's health and welfare. Last year's record-breaking recovery of corrective measures was valued at \$4.4 billion. The actions required include compliance measures and cleanup and pollution controls that will significantly benefit the health and welfare of the Nation.

In the criminal arena, the Division handled a record number of trials, with a conviction rate of nearly 90 percent. The Division prosecuted major corporations and individuals under all the environmental statutes, securing criminal penalties in excess of \$60 million and more than 25 years of jail time. In addition, the Division launched a new national enforcement effort targeting worker endangerment, highlighted by guilty pleas in Delaware by a major refinery and a \$10 million criminal fine.

Although the public is generally familiar with the Division's role as enforcer of the environmental laws, much of our attorneys' time is actually spent defending a wide range of federal programs and interests. The Division has defended almost every federal agency, handling cases that challenge such diverse and critical matters as military training programs, government cleanup actions, resource management programs, and environmental regulations. The Division's eminent domain and takings cases also facilitate important federal programs by enabling agencies to acquire needed property or other rights in a fiscally responsible manner while respecting the property interests of citizens.

The Division currently has a docket of approximately 9,500 active cases and matters. These cases involve more than 70 different environmental and natural resources statutes, including the Comprehensive Environmental Response, Compensation and Liability Act, the Clean Water Act, the Clean Air Act, the National Forest Management Act, the Federal Land Policy and Management Act, the National Environmental Policy Act, and the Endangered

Species Act. The Division has cases in every judicial district in the Nation.

The Division's exemplary record in protecting the environment, Indian rights, and the Nation's natural resources, wildlife, and public lands is due to the hard work of the Division's attorneys and staff in partnership with our client agencies, the United States Attorney's Offices, and state and local officials around the country. The Division's many accomplishments this year reflect the professionalism and dedication with which all these people work together to carry out the Division's mission.

This is my first month with the Division. I am both privileged and proud to serve with the outstanding group of people who carry out the Division's mission. As I look forward to the challenges ahead, I want to acknowledge and applaud the hard work and tremendous leadership of Thomas L. Sansonetti, the previous Assistant Attorney General for the Division, and Kelly A. Johnson, the Acting Assistant Attorney General for the Division since April, 2005, under whose stewardship the Division enjoyed such impressive successes. I look forward to continuing their efforts on behalf of the American people.

Sue Ellen Wooldridge
Assistant Attorney General
Environment and Natural Resources Division
December 2005

CRIMINAL ENFORCEMENT OF OUR NATION'S ENVIRONMENTAL AND WILDLIFE LAWS

Vessel Pollution Prosecutions. The Vessel Pollution Initiative is an ongoing, concentrated effort to prevent ships from illegally discharging pollutants into the oceans, coastal waters and inland waterways. The Division continues to have great success prosecuting such activity. Recent whistleblower awards to crew members should further increase the likelihood of detection and serve as a significant deterrent.

In *United States v. Evergreen International, S.A.*, the defendant pled guilty to twenty-four felonies and one misdemeanor spanning five federal districts and paid \$25 million in criminal fines and community service. This is the largest sentence ever imposed against a shipping company in an oil-water separator case. Evergreen admitted that crew members aboard many of its vessels repeatedly discharged oily waste water, bypassing required pollution control equipment. Crew members presented false record books to inspectors, disposed of equipment, and directed others to lie to conceal the illegal discharges.

In *United States v. Jong Chul Lee et al.*, a ship owner paid a criminal fine of over \$1.5 million after pleading guilty to making false statements in its oil record book. Two officers aboard the ship were convicted and sentenced to prison terms. In *United States v. Fujitrans Corp.*, a ship operator pled guilty to similar charges and paid over \$1.3 million in criminal fines in two federal districts. Two of the ship's officers served time in prison and were then deported.

In *United States v. Rick Stickle et al.*, Stickle was found guilty, after a jury trial, of conspiring to illegally dump four hundred forty tons of oil-contaminated grain on the high seas and of obstructing a Coast Guard and Department of Agriculture investigation. He was sentenced to serve thirty-three months in prison and to pay a \$60,000 fine. The transportation company that he chaired had previously pled guilty to related crimes and paid a \$2 million dollar fine.

Prosecuting Environmental Offenses and Worker Endangerment. The Division pursued both criminal and civil claims against Motiva Enterprises, LLC for violations of the Clean Water and Clean Air Acts stemming from an explosion at an oil refinery. The 2001 explosion of a 415,000 gallon tank for sulphuric acid killed one worker, injured eight others, and spilled 99,000 gallons of acid into the Delaware River. Company officials knew that the tank leaked and should not have been used. Motiva was sentenced to pay a \$10 million dollar criminal fine and serve three years of probation. It will also pay a \$12 million civil penalty and spend at least \$3.96 million on environmental projects. The new owner of the refinery agreed to implement a series of enhanced safety procedures that will cost an estimated \$7.5 million.

The Division has successfully prosecuted several companies owned by McWane, Inc., a company that has been cited by the U.S. Occupational Health and Safety Administration (OSHA) hundreds of times since the mid-1990s and has paid more than \$1 million in civil penalties. In *United States v. Tyler Pipe Company*, a division of McWane located in Tyler, Texas, was sentenced to pay a criminal fine of \$4.5

million, serve a five-year term of probation, and replace and upgrade structures at its iron foundry facility at a cost of approximately \$20 million. Tyler Pipe pled guilty to a felony false statement count concerning a permit application and to a knowing violation of the Clean Air Act for illegally operating its facility without notifying authorities of a major modification. After the company replaced a large furnace, known as a “cupola,” it falsely claimed that the cupola was not new, in an attempt to avoid equipping it with updated, “best available control technology,” as required by the Clean Air Act. The Tyler Pipe division of McWane has a history of environmental and safety violations. In 2000, the company pled guilty to a willful violation of OSHA regulations that resulted in the death of an employee.

In *United States v. McWane, Inc.*, three high-ranking company officials and the corporation (acting through McWane Cast Iron Pipe Company, its Birmingham-based division) were convicted by a jury of crimes related to six years of violations of its National Pollution Discharge Elimination System permits. A fourth defendant pled guilty to conspiracy before trial. The defendants conspired to violate the Clean Water Act, committed substantive Clean Water Act crimes by illegally discharging process wastewater through storm drains, and made false statements that helped conceal their discharges to the Environmental Protection Agency (EPA).

In *United States v. Union Foundry*, a McWane iron foundry division located in Anniston, Alabama, pled guilty to a willful violation of an OSHA regulation that led to the death of an employee and to violations of the Resource Conservation and Recovery

Act. Because the company operated equipment at its foundry without required safety guards, an employee was caught in a conveyer belt pulley and crushed to death. The plant also illegally treated baghouse dust contaminated with lead, a hazardous waste, and exposed workers to this waste. The company was ordered to pay a \$3.5 million criminal fine, perform community service valued at \$750,000 (including local lead and asbestos abatement), and serve a three-year term of probation. In addition, trial has begun in *United States v. Atlantic States Cast Iron Pipe Company*, in which another McWane subsidiary and several of its employees have been charged with conspiracy, Clean Water Act and Clean Air Act violations, as well as false statements and obstruction of justice.

Enforcing the Asbestos Provisions of the Clean Air Act. In *United States v. Cleve-Allan George*, a jury returned guilty verdicts against both defendants for knowingly violating regulations controlling asbestos removal during demolition of housing in a low-income neighborhood. The defendants knowingly allowed friable asbestos to be removed improperly and filed false air monitoring documents.

In *United States v. ACS*, a company and two individuals pled guilty to conspiring to obstruct OSHA, EPA, and Small Business Administration regulations. The defendants fraudulently obtained approximately \$37 million in Small Business Administration set-aside contracts at federal facilities, including contracts for jobs involving asbestos, lead abatement, and hazardous waste operations. They also purchased approximately 250 false training certificates for their unqualified employees and directed them to conduct work involving asbestos,

lead, and hazardous waste at federal facilities under those contracts. At sentencing, a \$3 million criminal fine and significant prison sentences for the individuals are expected.

In *United States v. W.R. Grace*, a Montana grand jury returned a 10-count indictment charging W.R. Grace and seven corporate officials with conspiracy to violate the Clean Air Act, conspiracy to defraud government agencies, knowing endangerment, wire fraud, and obstruction of justice. The indictment alleges that Grace mined, manufactured, and sold products from a vermiculite mine that it knew was contaminated with a particularly toxic form of tremolite asbestos, endangering the mine workers' families, residents of the community and others. The company then sold mine properties to local buyers without informing them of the contamination and later misled and obstructed the government by failing to disclose the nature and extent of the asbestos contamination to an emergency response team conducting a cleanup pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Protecting Homeowners and Enforcing the Clean Water Act. In *United States v. Robert Lucas*, all three individual defendants and two companies were convicted by a jury of illegally developing a large wetlands tract on Mississippi's Gulf Coast and defrauding those who bought home sites there. Despite warnings from Mississippi health officials and the United States Army Corps of Engineers that the wetlands property was unsuitable for homes, the defendants built and sold mobile home sites, most with illegal in-ground septic systems. By building these systems, the

defendants criminally violated the Clean Water Act in that they knowingly caused illegal discharges to waters of the United States. The systems discharged directly into wetlands and frequently failed, causing sewage to back-up into homes and seep into nearby yards.

Prosecuting Resource Conservation and Recovery Act Crimes. In *United States v. Donald Roeser*, the defendants, who operated a hazardous and non-hazardous waste treatment and disposal facility, directed their employees to discharge hundreds of thousands of gallons of untreated hazardous and non-hazardous liquid wastes through the sanitary sewer system on a daily basis. They also caused thousands of tons of hazardous solid waste to be illegally shipped to a non-hazardous waste landfill on a daily or weekly basis. The company previously pled guilty to Resource Conservation and Recovery Act (RCRA) crimes. This year, the two individual defendants pled guilty to similar crimes, and to conspiracy and substantive Clean Water Act violations. Both defendants were sentenced to periods of incarceration, one for 27 months and one for 12 months. Each must pay a \$60,000 fine.

In *United States v. Gary Wasserson*, the Third Circuit reversed a district court ruling that had set aside a criminal conviction under RCRA for the knowing disposal of hazardous waste at an unpermitted facility. Wasserson arranged for disposal of hazardous chemicals through an ordinary rubbish hauler. The chemicals were ultimately discharged into a municipal landfill, prompting closure of the landfill and a removal action. The Third Circuit held that "generators" may be liable for "causing" unlawful disposal of hazardous

waste even if they do not operate a disposal facility or commit disposal activities. The case is significant because it confirms that a person who knows that hazardous waste will be disposed of in violation of RCRA requirements may be subject to criminal liability even though he does not personally dispose of the hazardous waste.

Enforcing the Laws Protecting Wildlife.

In *United States v. Kenneth G. Kraft*, a husband and wife were convicted of conspiracy and false labeling for the illegal interstate sale of endangered and threatened animals – including tigers, leopards, and grizzly bears – from a wildlife park. Nancy Kraft was sentenced to 15 months in prison and two years supervised release. Kenneth Kraft pled guilty to conspiracy, false labeling and false statements. He was sentenced to 18 months in prison and three years supervised release. Indictments were also issued against others.

In *United States v. Optimus, Inc.*, a gourmet food company pled guilty last year to wildlife and smuggling charges and was sentenced to pay a \$1 million criminal fine. The money will be deposited into the Lacey Act Reward Account, a fund used by the Fish & Wildlife Service to provide financial incentives for information leading to convictions of wildlife law violators. One of the largest importers of sturgeon caviar in the United States, Optimus admitted that it bought nearly 6 tons of smuggled caviar from five separate smuggling rings. Since 1998, all sturgeon species have been listed as protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Smuggling in violation of this convention threatens the survival of the listed species, including sturgeon.

In *United States v. Antonio Pego*, a federal grand jury indicted a resident of Spain and a Uruguayan company for crimes stemming from the illegal import and attempted sale of toothfish, marketed as Chilean sea bass. The case directly involves the import of approximately 53,000 pounds of toothfish into Miami from Singapore. Related deliveries occurring in the same time frame included over 160,000 pounds of toothfish brought into Los Angeles and over 300,000 pounds brought into New York. All of the fish, valued at over \$3 million, have been seized and are the subject of civil forfeiture complaints. In all cases, the United States alleges that the defendants knew the fish were transported in violation of the Antarctic Marine Living Resources Act and other provisions of U.S. law. This species is the target of both legal and “pirate” commercial fishing operations that are believed to be substantially depleting existing stocks.

United States v. Stock Development, LLC, the defendant company pled guilty to a Class A misdemeanor for allowing an employee to cut down a tree and destroy an active bald eagle nest that had been discovered in an area slated for residential development. The company was sentenced to pay a \$175,000 fine and to pay \$181,000 in restitution to organizations that support and promote conservation of eagles and other birds of prey. This is the largest combination of a fine and restitution ever paid for the destruction of an eagle nest tree.

Punishing CFC Smugglers. In *United States v. Dov Shellef*, a jury convicted two defendants of conspiring to defeat the excise taxes on ozone-depleting chemicals, to launder money and to commit wire fraud. The defendants dodged approximately \$1.9

million in taxes due on domestic sales of trichlorotrifluoroethane, an ozone-depleting chemical commonly referred to as CFC-113, by representing to manufacturers that they were purchasing it for export but then selling it in the domestic market. Once widely used as an industrial solvent and as a refrigerant in centrifugal chillers for large buildings, CFC-113 now has a limited domestic market and is used in relatively small quantities for laboratory and analytical purposes.

PROTECTING OUR NATION'S AIR, LAND AND WATER

Reducing Air Pollution from Coal-Fired Power Plants. The Division continues to litigate Clean Air Act claims against operators of coal-fired electric power generating plants. This past year, the Division also reached settlements that, when fully implemented, will remove over 940,000 tons of pollutants from the air each year. These pollutants can cause severe respiratory problems and contribute to childhood asthma, and are also significant contributors to acid rain, smog and haze, which degrade forests, damage waterways and contaminate reservoirs.

The Division reached a settlement in *U.S. v. Illinois Power Co. and Dynegy Midwest Generation* in which Dynegy agreed to install approximately \$500 million worth of new pollution control equipment, pay a \$9 million civil penalty, and spend \$15 million on projects to mitigate the harm caused by unlawful emissions. The settlement will reduce emissions of harmful sulfur dioxide and nitrogen oxides from five plants by 54,000 tons each year. In *U.S. v. Ohio Edison Power Co.*, after the Division

proved Ohio Edison's liability at trial, the company agreed to install pollution controls, estimated to cost \$1.1 billion, which will eliminate over 200,000 tons of sulfur dioxide and nitrogen oxide pollution per year. The settlement also requires payment of \$8.5 million in civil penalties and \$25 million in mitigation projects. The Division also completed the liability trial in *U.S. v. American Electric Power*, the largest case in the Power Plants Initiative.

Reducing Air Pollution from Oil Refineries. The Division continues to make significant progress in its national enforcement initiative to address Clean Air Act violations within the petroleum refining industry. To date, the Division has reached settlements that address 76 petroleum refineries comprising 65% of the nation's refining capacity, and will reduce air pollutants by more than 315,000 tons a year.

The Division secured settlements with ConocoPhillips Co., Valero Energy Corp., Sunoco Refinery, Inc., Citgo Petroleum Corp., and Chevron U.S.A. Inc. The *ConocoPhillips* settlement covers nine refineries in seven states, representing more than 10% of total domestic refining capacity. ConocoPhillips will install \$525 million in pollution control technology that is expected to reduce emissions by more than 47,100 tons per year, pay a civil penalty of more than \$4.5 million, and spend \$10.1 million on supplemental environmental projects. Valero will implement approximately \$700 million in pollution control technologies that will reduce emissions by more than 20,400 tons per year, pay a civil penalty of \$5.5 million, and spend \$5.5 million on supplemental environmental projects. Sunoco will install

\$285 million in pollution control technologies, pay a \$3 million civil penalty, and perform \$3.9 million in supplemental projects. The *Citgo* and *Chevron* settlements require the companies to spend \$575 million on pollution control technologies that are expected to reduce annual emissions of pollutants by more than 39,600 tons. The two companies will also pay civil penalties of \$7.1 million and spend \$9.5 million on supplemental environmental projects that will further reduce nitrogen oxide emissions.

Reducing Air Pollution at Other Diverse Industrial Facilities. The Division also made significant gains in improving the nation's air quality by concluding enforcement actions against numerous facilities in many diverse industries, including ethanol production (*U.S. v. Cargill, Inc., U.S. v. Energy Partners, U.S. v. AGP Corn Processing, Inc., U.S. v. Golden Triangle*), grocery store refrigeration leaks (*U.S. v. Jewel Food Stores*), oil field production (*U.S. v. Mobile Exploration and Production*), glass manufacturing (*U.S. v. Saint-Gobain*), chemical manufacturing (*U.S. v. E.I. du Pont de Nemours*), sterilization facilities (*U.S. v. Cosmed Group*), hazardous waste disposal facilities (*U.S. v. Clean Harbors Environmental Services*), pulp and paper mills (*U.S. v. Stone Container Corp.*), and plastics manufacturing (*U.S. v. Chevron Phillips Chemical Co.*).

Through those efforts, the Division secured commitments for facility improvements worth \$145.4 million, supplemental environmental projects to benefit local communities valued at \$8.2 million, and payments of more than \$6.8 million in civil penalties.

Controlling Storm Water Run-off at Construction Sites. Runoff from construction sites is a significant contributor to the impairment of water quality in the nation. To assure compliance with the Clean Water Act's provisions governing the discharge of storm water from large construction sites, the Division obtained a consent decree with Wal-Mart Stores, Inc. – the nation's largest retailer and one of its largest commercial developers – that resolved claims covering 24 locations in 9 states. The United States was joined in the settlement by the States of Tennessee and Utah. Wal-Mart will pay a civil penalty of \$3.1 million, undertake a supplemental environmental project to protect sensitive wetlands or waterways, and implement a \$62 million compliance program that includes requirements for construction planning, training, inspections, and record keeping. This settlement is serving as a model in ongoing negotiations with other large commercial and residential developers who regularly engage in substantial construction activities.

The Division also reached a settlement in *U.S. v. Department of Transportation, State of Hawaii (HDOT)*, resolving violations of the Clean Water Act resulting from stormwater discharges along roadways, construction sites, and at three airports. HDOT will spend over \$50 million to achieve and maintain compliance with the Act, pay a \$1 million civil penalty and perform \$1 million in environmental projects in the affected communities.

Ensuring the Integrity of Municipal Wastewater Treatment Systems. The Division continued its aggressive national enforcement program to protect the nation's

waterways by ensuring the integrity of municipal wastewater treatment systems.

The Division achieved a number of important settlements this year. In *U.S. v. City of Los Angeles*, the United States and its co-plaintiffs reached a \$2 billion settlement with Los Angeles resolving violations due to years of sewage spills. Los Angeles operates the nation's largest sewage collection system. The settlement, a groundbreaking effort to address all causes of sewage spills in the city, requires the city not only to repair and replace its aging infrastructure but also to take a proactive approach to prevent future problems. The city must also perform \$7.7 million in environmental projects and pay civil penalties of \$1.6 million. In *U.S. v. Orange County Sanitation District*, the defendant agreed to come into compliance with its National Pollutant Discharge Elimination System permit and the Clean Water Act and to undertake a project to upgrade its wastewater treatment system to secondary treatment levels. The work required by this consent decree is expected to cost approximately \$640 million. In *United States v. District of Columbia Water and Sewer Authority (WASA)*, the Division reached a settlement requiring WASA to implement a Long-Term Control Plan to eliminate persistent overflows from the District's combined sanitary and storm water collection system. These measures are expected to reduce the volume of raw sewage discharges by 96 percent. The projects, which WASA estimates will cost more than \$1.265 billion, will be implemented over a 20-year period. In *U.S. v. City of San Diego*, the Division reached a partial settlement of our Clean Water Act action against the City of San Diego relating to unlawful discharges of sewage. The City

will undertake an extensive operations and maintenance program valued in excess of \$187 million. In *U.S. v. Baltimore Co.*, the County agreed to spend approximately \$800 million on improvements to control overflows of sanitary sewage, pay a \$750,000 penalty, and perform \$4.5 million in environmental projects. The Division reached a settlement in *U.S. v. Washington Suburban Sanitary Commission* requiring the sewage authority to spend an estimated \$200 million on improvements to control overflow of sanitary sewage, pay a \$1.1 million penalty, and perform \$4.4 million in environmental projects.

The Division also made significant gains in ensuring the integrity of municipal wastewater treatment systems by concluding enforcement actions against a number of smaller municipalities. Those actions resulted in commitments for \$2.54 billion in municipal wastewater system improvements, supplemental environmental projects valued at \$5.36 million in local communities, and more than \$1.8 million in civil penalties.

ENSURING CLEANUP OF OIL AND HAZARDOUS WASTE

Cleanup of Contaminated River Systems. The Division continues to secure river cleanups of unprecedented size and scope. General Electric Company (GE) agreed to begin dredging sediment contaminated with polychlorinated biphenyls (PCBs) at the Hudson River PCB Superfund site in upstate New York. GE will perform the first phase of dredging, expected to cost between \$100 and \$150 million, and pay EPA up to \$78 million for the Agency's past and future costs. This project addresses discharges from two GE capacitor manufacturing plants

that for years discharged hazardous PCBs directly into the upper Hudson River. The goal is to restore one of the country's most important cultural and ecological resources, using approaches designed to minimize impacts on local communities throughout the life of the project.

The Division reached a settlement resolving claims against Atlantic Richfield and NorthWestern Corporation in connection with the Milltown Reservoir Operable Unit, one of many Superfund Sites within the Clark Fork River Basin in Montana. The defendants will remove the Milltown Dam and millions of cubic yards of contaminated sediment accumulated behind it, at an estimated cost of \$106 million. The Division also settled claims for civil penalties and natural resource damages against Sunoco, Inc. and Sun Pipe Line Company resulting from a discharge of approximately 4,571 barrels of crude oil from Sunoco's pipeline into a 145-acre wetland impoundment within the John Heinz National Wildlife Refuge in Philadelphia. The spill lasted for 3 days before it was detected. Sunoco will pay a civil penalty of \$2,742,600 and damages of \$865,000. During negotiations, Sunoco performed all necessary remedial and preventative measures, funded assessment of natural resource damages and performed restoration measures at the Refuge to restore and replace the damaged resources.

Conserving Superfund Resources. The Division secured the commitment of responsible parties to clean up hazardous waste sites at costs estimated in excess of \$646 million, and recovered more than \$265 million for the Superfund to help finance future cleanups. Among the major Superfund cases resolved this year are: *U.S.*

v. Occidental Petroleum (defendants to perform cleanup estimated at \$36.5 million for Commencement Bay Site in Washington); *U.S. v. Atlantic Richfield Co. (Clark Fork-Anaconda Smelter)* (defendant to pay \$50 million for past response costs incurred at sites in the Clark Fork River Basin in Montana); *U.S. v. Industrial Excess Landfill, Inc.* (partial settlement requires defendants to pay over \$18 million in past costs, perform site remedy at estimated cost of \$7.1 million, and pay future oversight costs up to \$700,000); *In the matter of: Kerr-McGee Chemical LLC (West Chicago Site)* (defendant to perform remedial action and natural resource restoration work valued at \$74 million, pay \$6 million for past costs, and reimburse all future costs for non-oversight activities, plus \$1.685 million for oversight activities); *U.S. v. City and County of Denver (Lowry Landfill)* (defendants to pay \$13.9 million in past response costs, and perform remedial cleanup work valued at \$43 million).

In *Cooper v. Aviall*, the Department of Justice filed an amicus brief in the Supreme Court arguing that a potentially responsible party who voluntarily cleaned up a contaminated hazardous waste site could not seek contribution from other such parties under Section 113 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) unless its liability was being, or had been, adjudicated in a CERCLA Section 107 action. The Supreme Court, in a 7-2 decision, agreed, reversing a Fifth Circuit en banc decision.

Enforcing Cleanup Responsibilities In Bankruptcy Cases. The Division's bankruptcy practice has continued to grow significantly in recent years. This year, the

Division represented the United States in numerous bankruptcy proceedings in which debtors had significant environmental responsibilities, including *Federal-Mogul*, *Met-Coil*, *Metrachem Products*, *Polaroid*, *Formica*, *Sherman Wire*, *Outboard Marine*, *Stoody Company*, *Weirton Steel Corporation*, and *Kaiser Aluminum*. The Division obtained more than \$14 million in allowed general unsecured bankruptcy claims, to be paid in part under debtors' reorganization plans. The Division also lodged proposed settlements in various bankruptcy proceedings, including *Outboard Marine*, *Armstrong* and *Huffy*. The Division anticipates bankruptcy court approvals of more than \$11 million of allowed general unsecured bankruptcy claims to fund environmental cleanups.

In these and other cases, the Division has fostered settlements that harmonize bankruptcy and environmental law. These settlements enable large companies to avoid liquidation and significant job loss by facilitating reorganization or sale of ongoing operations. The settlements also prevent debtors from abandoning contaminated properties without providing cleanup funds.

Recovering Natural Resource Damages.

The Division obtained significant results in its efforts to recover for natural resource damage claims, securing settlements worth over \$87 million. The Division's recovery efforts include *U.S. v. Holyoke Water Supply Company*, *U.S. v. France Shipmanagement S.A.*, *U.S. v. Olympic Pipeline*, *U.S. v. ALCOA*, *U.S. v. Chevron U.S.A. Inc.*, *U.S. v. County of Santa Clara*, and *U.S. v. Marathon Oil*.

PROMOTING RESPONSIBLE

STEWARDSHIP OF AMERICA'S NATURAL RESOURCES AND WILDLIFE

Implementing the President's Healthy Forest Initiative. The Division continued its string of victories in defending against challenges to projects designed to restore public forest lands, improve wildlife habitat, and recover the value of damaged timber on federal forest lands – projects which implement President Bush's Healthy Forest Initiative. These include notable victories in the various cases challenging the *Biscuit Fire Recovery Project* in the Siskiyou National Forest, the largest such recovery project in the nation. That project alone spawned six lawsuits and nearly a dozen motions for preliminary injunction. The Division defeated all of the preliminary injunction motions against the Project. The Ninth Circuit affirmed the district court's denial of preliminary relief in two cases, and a third remains pending on appeal.

In a series of other cases in numerous courts, the Division successfully defeated, in both district and appellate courts, challenges to the Forest Service's ability to move forward under new categorical exclusions for small timber sales in order to quickly salvage trees killed by fire, wind or insects.

Protecting Pyramid Lake and its Fishery. In *United States v. Board of Directors, Truckee-Carson Irrigation District*, the United States sought 'recoupment' of water unlawfully diverted from the Truckee River to the Newlands Project by the Truckee-Carson Irrigation District between 1974 and 1979. The district court entered judgment in favor of the United States and the Pyramid Lake Paiute Tribe of Indians, holding that

the District must repay 197,152 acre feet of water. This will promote federal efforts to stem the decline of Pyramid Lake and its fishery, a resource of great importance to the Pyramid Lake Paiute Tribe.

Securing Needed Water Rights for the United States. This past year the Division entered into numerous settlements, or secured favorable judgments, that will protect the water supplies and flows necessary to maintain the vitality of natural resources and uses of the public lands, national forests, national parks, wildlife refuges, wild and scenic rivers, military bases, and federal reclamation projects throughout the West. For example, in *In Re Snake River Basin Adjudication*, we secured court approval of a historic settlement of claims on behalf of the U.S. Forest Service for federal reserved water rights for six rivers designated pursuant to the Wild and Scenic Rivers Act and for water sources protected by the Hells Canyon National Recreation Area Act. The settlement secures the water needed to protect the remarkable fisheries and recreation values on over 400 miles of Congressionally protected rivers and 18 lakes, including the ability of fish to migrate into and out of the lakes from their outflow streams.

The Division also had great success in the *Klamath Basin Adjudication*, the major general stream adjudication in the State of Oregon. For example, in five cases where the United States objected to inflated claims to water that threatened the water supply available for other purposes, the water court reduced the claimed acreage by over 60%. Meanwhile, in *State of Washington Department of Ecology v. Acquavella*, a general stream adjudication of water rights in Washington's Yakima

River Basin, the court issued an extensive ruling generally recognizing and upholding the Bureau of Reclamation's claims for water rights to manage the Yakima Project's six storage reservoirs for purposes including flood control, irrigation, domestic, municipal and power generation.

Protecting Clean Water. The Division successfully defended the EPA's test procedures for analyzing whole effluent toxicity under the Clean Water Act in *Edison Electric Institute v. EPA*. The court held that the EPA reasonably concluded that the test methods were accurate (i.e., sufficiently precise), that certain criteria applicable to determining the validity of chemical test methods (such as "bias") could not be applied to biological test methods such as whole effluent toxicity, and that the test methods did not produce an unacceptable number of false positives. The court also found that the test methods do not create an unconstitutional irrebuttable presumption that a person who fails a whole effluent toxicity test has violated the Clean Water Act. The court held that the EPA reasonably concluded that the test methods are available and applicable in a wide variety of circumstances and that their results are representative of real world conditions.

The Division continued its vigorous enforcement of the wetlands protection provisions of the Clean Water Act, and obtained a number of favorable resolutions in enforcement cases this year. For example, in *United States v. Adam Bros. Farming, Inc.*, the defendant farming corporation had discharged dredged and fill material, without a permit or other Clean Water Act authorization, into Orcutt Creek, its tributaries and adjacent wetlands in Santa

Barbara, California. The Division prevailed in a first trial phase addressing federal regulatory jurisdiction, and thereafter negotiated a favorable settlement requiring defendants to pay \$200,000 in civil penalties and \$915,000 for off-site mitigation, and to preserve approximately 23 acres of waters of the United States and riparian areas on-site. In *United States v. Chuchua*, the Division favorably settled a Clean Water Act enforcement action involving unauthorized discharges to wetlands. The defendant will pay a civil penalty of \$78,400 and purchase mitigation credits worth \$21,000 from a wetland mitigation bank in San Diego.

The Division also obtained a favorable result in *United States v. George and Seth Cundiff*, involving the destruction of wetlands. The court issued summary judgment for the United States as to liability, and then held a trial to determine the appropriate remedy. The court enjoined defendants from any future violations of the Clean Water Act, ordered them to implement the restoration plan that we had presented during the trial, and imposed a civil penalty of \$225,000 (with \$200,000 to be suspended if defendants adequately implement the restoration plan). Finally, in *United States v. Johnson*, defendant had discharged fill material in violation of the Clean Water Act in connection with the construction of cranberry bogs in adjacent wetlands at three sites. The court granted summary judgment for the United States, first on liability and then on remedy. The court enjoined future discharges, ordered implementation of the restoration plan proffered by our expert witnesses (providing for restoration and mitigation of approximately 25 acres of wetlands and streams), and imposed a civil penalty of

\$75,000.

Restoring the Everglades. The Division continues to contribute to protection of the Everglades ecosystem by acquiring lands within Everglades National Park and Big Cypress National Preserve through exercise of the power of eminent domain, as authorized by Congress and requested by the National Park Service. Related acquisitions on behalf of the U.S. Army Corps of Engineers took place to improve water deliveries to the Everglades. The largest case to date is *United States v. 480 Acres of Land in Miami-Dade County, Florida*. This is the lead case in a consolidated trial group involving seven tracts totaling 1,000 acres in the Everglades National Park expansion project; there are an additional 13 trial groups of similar size and complexity. The trier of fact valued the land taken at \$472,000, after a trial in which the United States testified that the value was \$362,000, and the landowner testified it was worth \$1,020,000.

Defending Legislation Revising Wildlife Statutes. *UFO Chuting v. Young*. After a court found that a Hawaii statute protecting humpback whales was preempted by the Marine Mammal Protection Act, Congress enacted a provision making clear that Hawaii could enforce laws that are more protective of humpback whales “notwithstanding any other federal law.” Plaintiffs challenged the constitutionality of this provision, and the court invited the United States to intervene to defend it. The court agreed with the United States and the State of Hawaii that the provision did not violate the separation of powers doctrine or equal protection principles.

The Fund for Animals v. Norton.

After a D.C. Circuit Court opinion held that a non-native species of swan, the mute swan, was covered by the Migratory Bird Treaty Act, Congress enacted the Migratory Bird Treaty Reform Act, which clarified that non-native/ exotic species are not protected under the Act. When the Fish and Wildlife Service (FWS) issued a list of non-native species, as required by the Reform Act, that included mute swans, plaintiffs challenged its interpretation of the Reform Act, claiming mute swans were still protected, and sued to enjoin a mute swan control program planned by Maryland. The Division successfully defended FWS's interpretation, and the case was dismissed.

Protecting Wildlife and Fishery

Resources. In *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. U.S. Fish and Wildlife Service*, plaintiffs challenged FWS's Mexican gray wolf reintroduction program, arguing that the agency was not meeting the conservation goals required by the Endangered Species Act. The court ruled for FWS, holding that the day-to-day operations of the Mexican wolf reintroduction program were not subject to judicial review. The Court also held that FWS had reasonably assessed the level of livestock depredation and occurrence, that its assessment of hybridization issues was not arbitrary, and that plaintiffs' claims about problems with the program were exaggerated.

In *Stillufsen v. Evans*, the Division successfully defended a National Oceanic & Atmospheric Administration (NOAA) decision cancelling a seafood dealer's permit and imposing an administrative penalty for refusal to comply with reporting requirements. The district court found that the administrative law judge's decision was

based on substantial evidence in the record, and held that the penalty was not excessive or arbitrary, and that plaintiff had no due process property right in his fishing permit.

PROMOTING NATIONAL SECURITY AND MILITARY PREPAREDNESS

Property Acquisitions to Improve National Security and Military Readiness.

The Division exercised the federal government's power of eminent domain to initiate litigation to acquire land needed for national security and military uses. Through these efforts, the United States acquired land that will protect our national security interests in a variety of ways, including: expanding the National Defense University and Fort McNair; acquiring a port facility in Florida for the Navy to use in shipping weapons around the globe; providing a security buffer for the U.S. Southern Command headquarters; expanding the safety zone next to the Marine Corps Air Station in Yuma, Arizona; allowing construction of a second fence and patrol zone along the San Diego-Tijuana border; facilitating the Army's transformation of a light infantry division to a Stryker Brigade Combat Team; providing encroachment protection for training and operations at Harvey Point Defense Testing; improving security at the Puget Sound Naval Shipyard in Washington; and expanding a Nellis Air Force Base flight zone.

The Division also continued work to facilitate the Navy's plan to build a practice landing strip in rural North Carolina that would provide a more realistic training environment to simulate aircraft carrier landings. In *Nat'l Audubon Soc'y v. Dep't of the Navy*, the district court found the

Navy violated the National Environmental Policy Act (NEPA) by inadequately considering impacts on migratory waterfowl and cumulative impacts in its Environmental Impact Statement. It entered a permanent injunction preventing the Navy from further planning, development, or construction of the landing strip until it complies with NEPA. The Fourth Circuit, while affirming the NEPA violation, substantially narrowed the injunction, allowing the Navy to pursue various preparatory activities.

Defending Destruction of Obsolete Weapons and Army Modernization. The Division obtained another in a series of victories defending the Army's program to destroy stockpiles of obsolete chemical weapons pursuant to international treaty obligations. In *Families Concerned About Nerve Gas Incineration v. Army*, plaintiffs brought a Resource Conservation and Recovery Act (RCRA) citizen suit challenging the operation of the Army's Anniston, Alabama, chemical weapons demilitarization facility. Although the Division had successfully defended the state-issued permit before the State Supreme Court in a prior proceeding, plaintiffs filed this action in federal court asserting that the facility posed an imminent and substantial endangerment, violated the State's Resource Conservation and Recovery Act regulations, and violated their equal protection rights. The court had previously dismissed some claims for lack of subject matter jurisdiction. This year, the court granted summary judgment for the Army on all remaining claims, holding that (1) the "permit shield" provision of the Alabama RCRA regulations limited the plaintiffs to claims that the facility had violated its permit; (2) the plaintiffs had presented no evidence that the facility was in violation of its permit; (3) the

complaint sought impermissible collateral review of the facility's state-issued permit; and (4) plaintiffs' claims were barred by collateral estoppel because they had been previously litigated in state administrative and judicial proceedings.

In addition, the Division successfully defended a challenge to a critical link in the Army's 30-year, Army-wide modernization plan to meet the national security needs of the future in *Ilioulaokalani Coalition v. Rumsfeld*. The plaintiffs in this action challenged the Army's compliance with NEPA concerning its decision to transform a light infantry division into a Stryker Brigade Combat Team at an Army training facility in Hawaii. The district court granted summary judgment in favor of the Army, ruling that the plaintiffs' claims were barred on procedural grounds and lacked merit.

DEFENDING VITAL FEDERAL PROGRAMS AND INTERESTS

Defending Governmental Cleanup Actions. In 2004, voters in Washington passed a referendum to bar shipments of nuclear waste to the Department of Energy's (DOE) Hanford Nuclear Facility pending cleanup of waste already there, and expand the state's permitting jurisdiction over radioactive and hazardous wastes. This would significantly interfere with DOE's ability to deal with waste both at Hanford and from out-of-state nuclear facilities and require the immediate cessation of certain program activities at Hanford. The Division secured an injunction in federal court enjoining the state law pending the court's ultimate resolution of this suit. In addition, the Washington Supreme Court issued a largely favorable decision adopting the

United States' interpretation of several of the state law's key terms. As a result of these rulings, cleanup actions at Hanford may for now continue unimpeded by the state law, and Hanford can continue its critical role of receiving nuclear waste from DOE and the U.S. Navy.

The Division also obtained a favorable ruling on partial summary judgment in *General Electric Co. v. Johnson*, a challenge to the constitutionality of the administrative order provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The district court originally dismissed this matter for lack of subject matter jurisdiction, but the D.C. Circuit reversed. On remand, the court ruled in favor of the EPA as to the facial challenge to the statute, holding that the challenged provision is constitutional on its face. An additional claim alleging a "pattern and practice" challenge to EPA's administration of CERCLA remains to be resolved following discovery.

The Division obtained a favorable ruling on challenges to the Maritime Administration's efforts to dispose of obsolete naval vessels in *Basel Action Network v. Maritime Administration and EPA*. The case involved a suit by environmental groups asserting claims under NEPA, RCRA, the Administrative Procedure Act, and the Toxic Substances Control Act seeking to enjoin the export of obsolete naval vessels containing PCBs, which were destined for dismantling and recycling at a facility in the United Kingdom. The court granted our motion for summary judgment on all claims.

Defending Federal Programs Challenged under the Endangered Species Act. The

Division successfully defended a number of important federal programs from challenges asserting violations of the Endangered Species Act (ESA).

In *Northwest Environmental Advocates v. NMFS*, plaintiffs challenged the Army Corps of Engineers' compliance with the ESA with respect to a project to deepen and maintain the channel in the Columbia River, pursuant to specific Congressional directive. The court upheld the biological opinion from plaintiffs' charge that it failed to evaluate the effects of dredging activities on salmon and steelhead and their critical habitat and permitted the Corps' activities to proceed.

In *National Wilderness Institute v. USACOE*, plaintiffs challenged the Army Corps of Engineers' operation of the Washington Aqueduct and the Federal Highways' Wilson Bridge re-construction project, arguing that the agencies had not adequately considered impacts to shortnose sturgeon (with regard to the Aqueduct) and to the bald eagle (with regard to Wilson Bridge). The Court held for the federal agencies on all claims, upholding the biological opinion's determination that discharges in the Washington Aqueduct during non-spawning season would not jeopardize the sturgeon and concluding that the Wilson Bridge project disturbance was permissible because the area was not a concentrated nesting area for the bald eagles and the eagles could relocate.

In *Florida Keys Citizens Coalition v. U.S. Army Corps of Engineers*, plaintiffs challenged an Army Corps of Engineers decision to permit discharge of dredge and fill material into waters of the United States in connection with planned road widening

and other improvements to U.S. 1 in Florida. The court rejected plaintiffs' claim that the project would jeopardize the endangered Florida manatee and the smalltooth sawfish in violation of ESA requirements.

In *Bear Creek Council v. Heath*, plaintiffs challenged timber sales in the Gallatin National Forest, arguing that the Forest Service and Fish and Wildlife Service failed to use the best available scientific information in determining that the timber sale and associated road construction could go forward in grizzly bear habitat. The court held that the agencies had adequately ensured that the project complied with well-settled motorized access density standards for grizzly bears and was otherwise in compliance with the ESA's conservation requirements. The court of appeals affirmed the district court's grant of summary judgment for the government agencies.

In *Buckeye Forest Council v. USFS and USFWS*, the Division successfully defended the Forest Service's ability to use a region-wide approach with respect to timber sales in the range of the Indiana bat. Although the Service consulted with the Fish and Wildlife Service to ensure that the region-wide guidance complied with the ESA, plaintiffs alleged that specific timber sales violated the ESA because the Service could not rely on the earlier biological opinion in examining the impact of specific projects. The Court rejected this claim and upheld the agencies' "tiered" approach to biological opinions for the timber program and timber sales' impacts on the Indiana bat.

In *Forest Guardians v. Veneman*, plaintiffs argued that the Canada lynx – which is listed under the ESA as a distinct population segment in Colorado but not

New Mexico – is protected under the ESA even in New Mexico because animals found in that state could have traveled there from Colorado. They argued that the Forest Service was therefore required to comply with the ESA for land management projects on New Mexico forest lands. The Division argued that plaintiffs were attempting to collaterally attack the listing determination, and the court agreed. The court held that the ESA applied only to species as listed, and that, because the Canada lynx listing expressly excluded New Mexico, the lynx was not protected there.

Defending Ocean Management Programs.

The Division also successfully defended against challenges to various ocean management programs established by the National Oceanic & Atmospheric Administration (NOAA).

In *Oceana v. Evans*, environmental and industry groups challenged NOAA's Northeast Multispecies (groundfish) Fishery Management Plan under the Magnuson Act. The environmental organizations argued NOAA had not adequately limited overfishing, while the industry groups claimed NOAA had gone too far. A number of states and fishing groups intervened and participated as amici. The court ruled for NOAA on most claims, agreeing that the Magnuson Act allowed NOAA to "phase in" fishing mortality rates over time as long as the rates will achieve the rebuilding targets in the future and end overfishing. Plaintiffs also challenged NOAA's Scallop Fishery Management Plan in *Oceana v. Evans*, arguing that it did not adequately consider the scallop fishery's incidental adverse effects on listed sea turtles and that NOAA's designation of essential fish habitat was inadequate. The court held for NOAA on

most claims, finding that NOAA had used the best available information in the ESA consultation process even though it could not numerically quantify the impact on sea turtles incidental to the fishery. The court also rejected the challenge to the essential fish habitat claim. It concluded that NOAA's "framework" process for making fishery management changes in the scallop fishery without notice and comment was permissible.

In *Oregon Trollers Ass'n v. Gutierrez*, commercial ocean salmon trolling interests challenged a management objective for Klamath River fall chinook that provided for a certain escapement goal and an escapement floor of 35,000 "naturally-spawning" Klamath River fall chinook. The Division argued that the claim was time-barred since the objective had been set by a 1989 fishery management plan amendment. Plaintiffs argued that their "as-applied" challenge was permissible since recent cases established that NOAA could no longer differentiate between hatchery and natural fish. The court held for NOAA on both the statute of limitations grounds and on the merits. The court rejected plaintiffs' argument that the National Marine Fisheries Service could not promulgate regulations to protect the ability of a stock to reproduce naturally in the wild.

Defending the Fish and Wildlife Service's Endangered Species Act Programs. In *National Wildlife Federation v. Norton*, the court upheld the City of Sacramento's Natomas Basin Habitat Conservation Plan and associated incidental take permit for giant garter snake, Swainson's hawk, and other species against an ESA challenge. The court concluded that the scheme for participating government entities was

rational, and that ESA consultation on the plan was reasonable and considered issues relevant for the species, in particular habitat connectivity throughout the very fragmented and developed area. The court also upheld the mitigation plan for development under the Conservation Plan, concluding that the agency had ensured adequate funding for mitigation land acquisition, as required by the ESA.

In addition, the Division successfully defended the Fish and Wildlife Service's (FWS) determination that it was required to apply the Marine Mammal Protection Act with respect to projects subject to Army Corps of Engineers permitting based on possible injury to endangered manatees. In *Florida Marine Contractors v. Williams*, plaintiffs challenged FWS's authority to regulate the incidental taking of manatees in Florida's inland waterways. The court ruled for FWS, holding that its construction and application of the Act was true to "the unambiguously expressed intent of Congress. . . ." The court reasoned that the Act established a general moratorium on the taking of marine mammals that is not subject to geographic or other limitations.

Defending Pollution Control Regulations. The Division continued to have success defending the EPA's regulatory program under pollution control statutes such as the Clean Air Act. For example, in *State of New York v. EPA*, states, environmental groups, and industry groups challenged the EPA's 2002 amendments to the Clean Air Act "New Source Review" regulations, which revised the applicability test for such review in order to reduce disincentives for projects that might make industrial plants more efficient. The court upheld the rule in most major respects (vacating only two discrete

portions of the rule). Among other things, the court rejected all industry challenges to the revised rule, and upheld the rule's provisions as to the baseline to be used in calculating an emissions increase and those regarding plantwide applicability limitations.

In *State of Nevada v. DOE*, Nevada filed a petition for review under the Nuclear Waste Policy Act claiming that the Department of Energy (DOE) violated an alleged mandatory duty to provide funding for Nevada's participation in activities related to the Yucca Mountain repository. DOE provided Nevada with \$1 million that Congress had specifically appropriated for particular activities, but denied the state's request for additional funding, noting that it could not use the general appropriation out of the Nuclear Waste Fund to augment the specific appropriation. The Court of Appeals held that, even assuming the court owed no deference to the agency decision, DOE had acted consistently with federal appropriations law.

Protecting the Submerged Lands and Inland Waters of the United States. In an original action in the Supreme Court, *Alaska v. United States*, the State of Alaska sought to quiet title to certain marine submerged lands in Southeast Alaska, an area approximately the size of Tennessee consisting of a thin mainland strip and the Alexander Archipelago. In a ruling that adopted every significant legal position of the United States, the Supreme Court confirmed the United States' disclaimer of the marine submerged lands in the Tongass National Forest and granted judgment in favor of the United States on the three remaining counts. Specifically, the decision upholds federal ownership of the

scientifically important submerged lands in the Glacier Bay National Monument and Preserve. The Court's rejection of Alaska's historic inland waters and juridical bay claims, involving the waters of the Alexander Archipelago, resulted in a preservation of the current division of state and federal waters in Southeast Alaska.

Clarifying the Territorial Limits of National Environmental Policy Act Analysis. In *Basel Action Network v. U.S. Maritime Administration (MARAD)*, the court upheld MARAD's analysis of impacts to U.S. territorial waters related to the export of obsolete shipping vessels to a dismantling and recycling facility in the United Kingdom. The court's decision contained important language agreeing with the United States' view that the National Environmental Policy Act (NEPA) did not require analysis of the extraterritorial impacts of an agency's actions.

Defending Mississippi Delta Project. In *Arkansas Wildlife Federation v. Army Corps of Engineers*, plaintiffs brought a challenge to the Corps of Engineers' decision to permit construction of a pumping station on the White River in Arkansas. The pumping station is part of the Grand Prairie Area Demonstration Irrigation Project and would pump water from the River to help irrigate agriculture in the Mississippi Delta and protect aquifers in that region. The court granted judgment in favor of the Corps, finding that laches barred plaintiffs' NEPA claims and that the Corps had complied with the Act.

Defending the Army Corps of Engineers' Clean Water Act Program. In numerous cases, the Division has successfully defended the Army Corps of Engineers'

issuance of permits under the Clean Water Act. For example, in *Preserve Calavera v. Army Corps of Engineers*, plaintiffs challenged the Corps' decision to issue a permit for a proposed industrial park and related municipal infrastructure work. The court adopted the Division's arguments when it denied Plaintiffs' motion for emergency relief and later ruled that the Corps' issuance of the permit was in full compliance with all applicable statutes. Likewise, in *Nauyokas v. Army Corps of Engineers*, plaintiffs challenged the Corps' issuance of a dredge and fill permit to a riverboat casino. After both the district and appellate courts denied plaintiffs' request for preliminary injunctive relief, plaintiffs chose not to pursue their claims.

The Division also defended the Army Corps of Engineers' management of federal water storage projects against challenges arising out of a long-running dispute among Florida, Alabama, Georgia and others, over the allocation of water in the Apalachicola-Chattahoochee-Flint River Basin (ACF Basin), including Lake Lanier and the Buford dam. Multiple suits have been filed in different districts, challenging the Corps' management. *Alabama v. U.S. Army Corps of Engineers* is a NEPA challenge to the Corps' proposals to reallocate water storage to municipal and industrial water supply in two river basins shared by Alabama, Florida, and Georgia. An Alabama district court previously entered a preliminary injunction which, among other things, prevented the Army Corps of Engineers from implementing an agreement settling a case in the District of Columbia. The Division persuaded the Eleventh Circuit to vacate the preliminary injunction. The court ruled that any alleged harms had already occurred in this case,

making injunctive relief inappropriate. The court also concluded that there was no imminent harm because the settlement agreement made a thorough NEPA review a condition precedent to implementation of water storage contracts. Finally, the court held that the district court had abused its discretion in finding that the states were likely to succeed on the merits.

The Division also secured rulings in favor of the Army Corps of Engineers in challenges to its operation of dams and reservoirs on the Missouri River in *In re Operation of Missouri River System Litigation (Proceedings Relating to Dams and Reservoirs on the Missouri River)*. The Eighth Circuit rejected a challenge by Missouri, Nebraska, and other downstream interests to the Corps' discretion to manage flows from dams and reservoirs on the Missouri River. The court also rejected an ESA challenge alleging the Corps was not doing enough to protect endangered and threatened species. The court further held that North Dakota was barred by sovereign immunity from bringing a Clean Water Act action alleging the Corps' discharge of waters for barge navigation violated state water quality standards.

Preserving the Bureau of Reclamation's Authority to Operate Critical Facilities.

In *Rio Grande Silvery Minnow v. McDonald*, the plaintiffs challenged the Bureau of Reclamation's operation of the Middle Rio Grande Project. Plaintiffs argued, among other things, that the United States did not own the Project works. After trial, the court rejected this claim and recognized that the United States holds title. The decision upholds the authority of the Bureau of Reclamation to operate the Project as Congress has directed.

Maintaining the Nation's Infrastructure.

The Division exercised the federal government's power of eminent domain to acquire property to improve air and rail transportation and to build new courthouse facilities, as well as to facilitate environmental remedial actions and flood control projects. In addition, the Division provided advice and training to various federal agencies to enable them to acquire property in a fiscally responsible manner while still protecting the interests of citizens.

Capacity Building for Environmental Enforcement Throughout the World.

Because pollution and other environmental harms do not respect national borders, the Division has increased its efforts to help countries around the world improve their capacities to enforce environmental and natural resource laws. These efforts are generally sponsored or supported by other agencies and conducted under the auspices of international agreements, such as those dealing with protected species, hazardous materials and vessel pollution. This year, the Division developed and conducted courses and workshops on civil and criminal enforcement of environmental laws for prosecutors and other government officials in China, Western and Eastern Europe, Thailand, Brazil and South Africa. For example, at the request of the Government of South Africa, we provided comprehensive training in environmental crimes prosecution to over 50 South African prosecutors. We also hosted a number of delegations from around the world to discuss and share experiences on environmental enforcement and defense.

Protecting the Taxpayers Against Unwarranted Claims. As part of our

responsibility to protect the public fisc against unwarranted claims, the Division prevailed against claimants who sought to recover for the conversion of railroad rights-of-way to multipurpose trails on an untimely basis. The Federal Circuit adopted the Division's argument on when the statute of limitations begins to run in such cases in *Caldwell v. United States*. Following that precedent, the Division succeeded in having three such cases dismissed this past year.

The Division also succeeded in clarifying the compensation rights of landowners served by the Bureau of Reclamation. In *Klamath Irrigation District v. United States*, the Klamath Irrigation District and numerous other irrigation and improvement districts, businesses and individuals sought approximately \$100 million based on the Bureau of Reclamation's operation of the Klamath Project during a serious drought in 2001. The court granted summary judgment in favor of the United States as to plaintiffs' takings claims, finding that their interest in project water was not a compensable property interest protected by the Fifth Amendment. The court recognized that the plaintiffs instead have contractual rights that govern their water deliveries.

In *Orff v. United States*, the Supreme Court ruled unanimously that a group of irrigators who receive water through the Westlands Water District from the Bureau of Reclamation's Central Valley Project could not directly sue the United States under 43 U.S.C. § 390uu for breach of the United States' reclamation contract with Westlands. Section 390uu grants consent "to join the United States as a necessary party defendant in any suit to adjudicate" certain rights under a federal reclamation contract. The

Supreme Court held that, in light of the principle that a waiver of sovereign immunity must be strictly construed in favor of the sovereign, Section 390uu is best interpreted to grant consent to join the United States in an action between other parties when the action requires construction of a reclamation contract and joinder of the United States is necessary. It does not permit a plaintiff to sue the United States alone.

PROTECTING INDIAN RESOURCES AND RESOLVING INDIAN ISSUES

Defending Tribal and Federal Interests in Water Adjudications. During the past year, the Division settled three major water rights adjudications in which the United States had asserted significant water rights claims for the benefit of tribes. Water adjudications are complex, primarily defensive cases, typically involving the rights of thousands of parties. In the *Snake River Basin Adjudication (Idaho)*, the Division worked with the Interior Department, the State of Idaho, and the Nez Perce Tribe to craft an historic settlement of a water rights claim. Congress ratified this settlement in the Snake River Water Rights Act. The Division also worked with the Department of the Interior, the State of Arizona, the Gila River Indian Community, and private water users to settle the Gila Community's water claims in *In Re Gila River System and Source (Ariz.)*, which Congress ratified in the Arizona Water Settlements Act. A third major settlement was reached in *Arizona v. California*, concluding a 35-year-long original Supreme Court jurisdiction case involving rights to water from the Colorado River. The settlement – which was approved by the

Special Master – resolved the water rights claims of the Quechan Indian Tribe and resolved any disagreement about the location of the Tribe's Reservation boundaries in Arizona.

Protecting Tribal Lands. The Division also defends and brings suits relating to over 50 million acres of land that the United States holds in trust for tribes. To this end, the Division settled *Seneca Nation v. New York (Cuba Lake)*, an action asserting an unlawful trespass on tribal lands. The United States, New York, and the Seneca Nation reached a settlement resolving a 150-year-old dispute. This was the first New York land claim to be resolved through settlement.

Protecting Indian Reservation Environments. In *United States v. Cam-West and Amoco Oil Company*, the Division reached a settlement agreement that ensures that pollution related to oil wells on the Wind River Indian Reservation will be cleaned up. The settlement also provides that the companies will undertake a variety of supplemental environmental projects to benefit the water treatment and delivery systems for the Shoshone and Arapahoe Tribes residing on the Reservation, bring oil fields into compliance, perform tasks aimed at improving the environmental quality on the reservation, and pay civil penalties for past violations of the Safe Drinking Water Act and the Clean Water Act.

Upholding Agencies' Authority to Implement Indian Policies. The Division had a number of successes in the past year defending federal agencies' authority to implement policy for the benefit of tribes. In four cases, the Division successfully defended the Secretary of the Interior's trust

acquisition authority against constitutional and administrative law challenges.

Defending the Criminal Jurisdiction of Indian Tribes. The Division also helped secure rulings that strengthen the authority of Native American tribes to enforce criminal laws within their territories. In 1990, Congress amended the Indian Civil Rights Act to affirm the power of Indian tribes to exercise criminal jurisdiction over “all Indians,” including members of other tribes. In *Means v. Navajo Nation* and *Morris v. Tanner*, defendants – members of tribes other than those prosecuting them – argued that the Act was unconstitutional. The Division intervened to defend the law’s constitutionality, and the Ninth Circuit agreed with the Division’s arguments.

Promoting Negotiated Resolutions of Indian Disputes. The Division ended over fifty years of litigation this past year when it resolved the last of the Indian Claims Commission Act (ICCA) cases, *Pueblo of San Ildefonso v. United States*. The innovative and comprehensive settlement among the plaintiff Tribe, the United States, the County of Los Alamos, New Mexico, and the Pueblo of Santo Domingo allows the Tribe to acquire 7,700 acres of former aboriginal lands located in the Jemez National Forest. The settlement resolves the last of over 600 claims filed by tribes under the ICCA.

A number of other important tribal issues were also resolved through negotiation. For example, in *White Mountain Apache v. United States*, the Division negotiated a resolution to the damages claims sought by the tribe from the United States. The tribe sought damages for alleged breach of trust responsibilities with

regard to historic buildings located at the Fort Apache site. The Division reached a settlement with the tribe under which the United States will pay a sum of money to be used to rehabilitate certain historic buildings.

Defending Indian Gaming Laws. The Division was successful in defending the constitutionality of provisions of the Indian Gaming Regulatory Act. In *Lac Du Flambeau v. Norton*, we successfully defended the Secretary of the Interior’s ability to allow a compact with a tribe to take effect without formal action on the part of the agency. This decision preserves the discretion of the Secretary to take no action in the limited 45 days the Secretary has to approve Tribal-State compacts. In *Texas v. Norton*, we secured dismissal of a challenge to a regulation that provides procedures in lieu of a Tribal-State compact. The regulation allows tribes to engage in certain gaming activities even when a state refuses to waive sovereign immunity for an action by the tribe to determine the proper scope of gaming in that state.

SUPPORTING THE DIVISION’S LITIGATORS

Environment and Natural Resources Division Rated 18th Best Place To Work in Government. In a ranking published by the Institute for the Study of Public Policy Implementation and the Partnership for Public Service, the Division ranked as the 18th best place to work in government. The rankings compare levels of employee satisfaction at federal agencies in an effort to promote excellence and improve performance, and are based on a government-wide survey mandated by

Congress and conducted by the Office of Personnel Management.

OMB Gives Division Highest Rating.

Using the award-winning Program Assessment Rating Tool (PART), developed as part of the President’s Management Agenda to rate agency programs, the Office of Management and Budget gave the Division the highest rating, “Effective.” The Division’s response was consolidated with the other Litigating Divisions, who scored an 85 of 100 possible points.

New Desktop Computer System In 2005, the Division upgraded its Justice Consolidated Office Network (JCON) suite of computer software to include the latest operating system and office application software upgrades for e-mail, word processing and other business functions. We also added significant new functionality, including streaming video of Justice Television Network training and education events, and press conferences, as well as C-SPAN and CNN, expanded capability for preparation of Tables of Authority and citation checking, and new software for real-time court reporting and transcripts

Automated Litigation Support. The Office of Litigation Support provided outstanding support to some of the Division’s most intense and complex cases, making the best use of new technology, contract staff, and in-house expertise. This year, we upgraded our network- and web-based software for managing electronic documents and case data to improve productivity, and we expanded our litigation support software offerings to include cutting-edge electronic trial presentation software. With the help of contractors, we assembled mobile trial networks in remote

“war rooms” to manage electronic document collections and exhibits for several trials. This combination of comprehensive electronic trial presentation technology and on-site contractor support were used effectively in several trials. Finally, we doubled our in-house support capacity by moving the document scanning lab into a larger work area and adding new processing capability. These upgrades and expansions enable the Division to handle the increasingly technological needs of litigation with a consistently high level of service.

Performance Awards Policy. In June 2005, the Division implemented a new performance awards policy to strengthen the relationship between its missions, goals and accomplishments and the annual awards for employee performance. This year more than 450 employees, client agency and contract staff were recognized for exceptional contributions to the achievement of Division goals.

Office Space Enhancements. The Division completed its multi-year plan to consolidate its Washington, D.C. staff into two buildings – the Robert F. Kennedy Main Justice Building, and the Patrick Henry Building – from six area locations five years ago. The final phase involved relocating nearly 300 staff into new space that was designed and built to Division specifications. This consolidation will yield many operational benefits for years to come, including increased productivity through the co-location of all of our legal practices, cost savings through shared resources and infrastructure, and better working conditions for all Division employees.

Telework Policy. The Division implemented a new “telework” initiative for attorneys this year. Also known as telecommuting or flexiplace, telework provides a practical solution to environmental, worklife and quality of life issues for enrolled attorneys. The success of this innovative business solution reflects the Division’s commitment to progressive IT systems.