

April 22, 2010

**UNITED STATES DEPARTMENT OF JUSTICE**

**ENVIRONMENT AND NATURAL RESOURCES DIVISION**

**SUMMARY OF LITIGATION ACCOMPLISHMENTS FISCAL YEAR 2009**

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## FOREWORD

On the fortieth anniversary of Earth Day, I am pleased to present this summary of the litigation accomplishments of the Environment and Natural Resources Division (ENRD or the Division) for fiscal year 2009. Last year, ENRD continued its tradition of excellence in service to the United States. The Division brought actions to protect the nation's air, water, land, wildlife, and natural resources; upheld its trust responsibilities to Native Americans; acquired land for public purposes; and defended important federal programs.

I am proud to report that in fiscal year 2009, the Division secured nearly \$69 million in civil and stipulated penalties and \$2.6 billion in corrective measures through court orders and settlements. In addition, the Division concluded 41 criminal cases against 85 defendants, obtaining over 42 years of jail time and nearly \$73 million in fines.

The Division advanced key civil and criminal enforcement initiatives to reduce pollution from sewer systems, oil refineries, power plants, and vessels. ENRD concluded eight cases last year to ensure the integrity of municipal sewage collection systems. With the addition of these cases, ENRD has settled 88 such cases from 1995 to 2009, requiring the installation of control measures estimated to cost more than \$27 billion that are designed to reduce the discharge of untreated sewage by at least 74 billion gallons annually. In 2009, the Division concluded two new cases under the civil petroleum refinery initiative and finalized a significant modification to an existing decree that secured additional relief. This means that from 2001 through 2009, the civil petroleum refinery enforcement initiative produced settlements or other court orders that have addressed more than 88% of the nation's refining capacity, and are expected to reduce air pollutants nationally by more than 337,000 tons annually. In 2009, the Division concluded its eighteenth case under the Clean Air Act against operators of coal-fired electric power generating plants. Collectively, settlements in such cases between 1999 and 2009 will result in reductions of over 2 million tons of sulfur dioxide and nitrogen oxide each year once the approximately \$12 billion in required pollution controls are fully functioning. ENRD prosecuted 10 vessel pollution cases last year in which criminal penalties of \$9.7 million were obtained and corporate officers and managers were sentenced to more than 7 months of incarceration, 13 months in a half-way house, and 5 months of home confinement. This brings the total criminal penalties in such cases between 1998 and 2009 to over \$216 million and total time of incarceration to more than 20 years. These initiatives have made our water, air, and land cleaner and safer.

In fiscal year 2009, ENRD defended environment and natural resources programs across the federal government. The Division's efforts to promote national security and military preparedness are particularly noteworthy. A highlight of this work was *Winter v. NRDC*, in which the U.S. Supreme Court reversed the Ninth Circuit's judgment and vacated the district court's preliminary injunction imposing conditions on the Navy's use of sonar in training exercises in California. To honor their service in this important litigation, the Navy bestowed its award for Superior Public Service on four ENRD attorneys and its award for Distinguished Public Service on four others. The entire ENRD sonar litigation team received the 2009 Attorney General's Award for Distinguished Service.

The Division defended federal natural resources agencies charged with such diverse responsibilities as determining whether the polar bear should be listed as threatened under the Endangered Species Act, managing fisheries resources under the Magnuson Stevens Act, and overseeing activities on federal lands that range from recreation to wildfire control to timber harvesting to grazing and energy development. ENRD worked to secure critical water rights and supplies across the country. For example, the Colorado Water Court approved a settlement resolving 30 years of effort to establish water rights for the Black Canyon of the Gunnison National Park in Colorado. The Division also brought actions to protect tribal water, hunting, fishing, and gathering rights and defended against claims asserted by Indian tribes that the United States has violated its trust responsibilities.

ENRD has significant expertise in handling environmental claims on behalf of the United States in bankruptcy proceedings. I would like to highlight the extraordinary outcome obtained last year by the Division's enforcement attorneys in one such case, *In re Asarco, L.L.C.* The American Smelting and Refining Co. (Asarco), which has been in business for more than a hundred years, is a leading producer of copper and one of the largest producers of nonferrous metal in the United States. The company is responsible for numerous sites around the country that are contaminated with hazardous waste. The successful conclusion of the Asarco bankruptcy reorganization in 2009 resulted in the largest recovery of money for hazardous waste cleanup ever: \$1.79 billion to be used to pay for past and future response costs incurred by federal and state agencies and environmental restoration at more than 80 sites contaminated by mining operations in 19 states. All claims by the United States were paid in full with interest.

I am pleased to report an award bestowed on the Division last year. In the 2009 *Best Places to Work in Federal Government Rankings* (sponsored by the Partnership for Public Service), ENRD was ranked the best place to work from among more than 200 agency component offices, reflecting a high degree of satisfaction among its employees. I am committed to ensuring that the Division continues to meet the needs of its staff, who perform some of the most important work in the nation.

2009 was a very special year in the life of the Division. On November 16, 2009, more than 750 current employees, alumni, and friends gathered to commemorate the one hundredth anniversary of the Division's founding. This event was the culmination of celebratory activities held throughout the year to which a special section of this report is devoted. I am also proud to say that it was my first day back in the Division.

I look forward to this opportunity to lead the Division as it begins its second century of service to the United States. Be assured that I could not be more committed to fulfilling ENRD's core mission: strong enforcement of civil and criminal environmental laws to ensure clean air, clean water and clean land for all Americans; vigorous defense of environmental, wildlife, and natural resources laws and agency actions; effective stewardship of our public lands and natural resources; and careful and respectful management of the United States' trust obligations to Native Americans. To meet this challenge, we must be creative and resourceful.

We will work closely with our client agencies to ensure that we focus our enforcement resources on the most significant and egregious pollution problems. We will look for innovative ways to settle conflicts that have defied resolution, despite costly and fruitless litigation.

We will consult with client agencies to ensure that they, too, comply with the law as they undertake important programs and actions. We will review their actions to ensure that, consistent with the President's directive, federal decision-making is based on sound science.

We will strive to ensure that low-income and minority communities fully share in the protection afforded by our environmental laws, integrating environmental justice in all that we do. We will engage our counterparts abroad to tackle the difficult global environmental challenges that we face together, recognizing that reducing pollution internationally will lead to a clean environment at home.

Important opportunities lie ahead, and this Division is full of energetic, talented, and dedicated career staff who are ready to meet them. My thanks to all of them for their continued and outstanding service to the American people. I am honored to be their colleague.

In closing, I would like to recognize those individuals who were in leadership positions during fiscal year 2009 and who provided significant support to the Division: Ronald J. Tenpas, who served the remainder of his term as Assistant Attorney General; John C. Cruden, Deputy Assistant Attorney General, who served as Acting Assistant Attorney General during the transition; James Kilbourne, Chief of the Appellate Section, who served as Acting Deputy Assistant Attorney General; Eileen Sobeck, then Deputy Assistant Attorney General; and Cynthia Ferguson and James Gette, attorneys in the Environmental Enforcement and Natural Resources Sections, who served as Special Counsels to the Acting Assistant Attorney General. Thanks as well to each of them for their many contributions to an outstanding year.

Ignacia S. Moreno  
Assistant Attorney General  
Environment and Natural Resources Division  
April 22, 2010

## **AN INTRODUCTION TO THE ENVIRONMENT AND NATURAL RESOURCES DIVISION**

The Division has a main office in Washington, D.C., and field offices in Anchorage, Boston, Denver, Sacramento, San Francisco, and Seattle. It has a staff of nearly 700, about 450 of whom are attorneys. It is organized into nine litigating sections plus the Office of the Assistant Attorney General and the Executive Office:

- Appellate;
- Environmental Crimes;
- Environmental Defense;
- Environmental Enforcement;
- Indian Resources;
- Land Acquisition;
- Law and Policy;
- Natural Resources; and
- Wildlife and Marine Resources.

The Division has responsibility for cases involving nearly 150 statutes and represents virtually every federal agency in courts all over the United States and its territories and possessions. Its litigation docket contains more than 7,000 active cases and matters.

About one-half of ENRD's lawyers bring cases against those who violate the nation's civil and criminal pollution-control laws. Others defend environmental challenges to government programs and activities, and represent the United States in matters concerning the stewardship of the nation's natural resources and public lands. The Division is responsible for the acquisition of real property by eminent domain for the federal government and for cases arising under the wildlife protection laws. In addition, ENRD litigates cases concerning Indian rights and claims.

One of the Division's primary responsibilities is to enforce federal civil and criminal environmental laws such as the Clean Air Act (CAA), the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), the Safe Drinking Water Act, and the Lead Hazard Reduction Act. The main federal agencies that the Division represents in this area are the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps). The ENRD sections that carry out this work are the Environmental Crimes Section, the Environmental Enforcement Section, and the Environmental Defense Section.

A substantial portion of the Division's work includes litigation under a plethora of statutes related to the management of public lands and associated natural and cultural resources. All varieties of public lands are affected by ENRD's litigation docket, ranging from entire ecosystems, such as the nation's most significant sub-tropical wetlands (the Everglades) and the nation's largest rain forest (the Tongass), to individual rangelands or wildlife refuges. Examples of ENRD's land and natural resources litigation include original actions before the U.S. Supreme Court to address interstate boundary and water allocation issues; suits over management decisions affecting economic, recreational, and religious uses of the national parks and national forests; and actions to recover royalties and revenues from exploitation of natural resources. ENRD represents all the land management agencies of the United States including, for instance, the Forest Service, the National Park Service, the Bureau of Land Management (BLM), the Corps, the Fish and Wildlife Service (FWS), the Department of Transportation, and the Department of Defense. The Natural Resources Section is primarily responsible for these cases.

The Division's Wildlife and Marine Resources Section is responsible for civil cases arising under the fish and wildlife conservation laws, including suits defending agency actions under the Endangered Species Act (ESA), which protects endangered and threatened animals and plants, and the Marine Mammal Protection Act (MMPA), which protects animals such as whales, seals, and dolphins. The Environmental Crimes Section also brings criminal prosecutions under these laws against, for example, people who are found smuggling wildlife and plants into the United States. The main federal agencies that ENRD represents in this area are FWS and the National Marine Fisheries Service (NMFS).

ENRD cases frequently involve allegations that a federal program or action violates constitutional provisions or environmental statutes. Examples include regulatory takings cases, in which the plaintiff claims he or she has been deprived of property without just compensation by a federal program or activity, or suits alleging that a federal agency has failed to comply with the National Environmental Policy Act (NEPA) by, for instance, failing to issue an environmental impact statement (EIS). Both takings and NEPA cases can affect vital federal programs such as the nation's defense capabilities (including military preparedness exercises, weapons programs, and military research), National Aeronautics and Space Administration programs, recombinant DNA research, and beneficial recreational opportunities such as the rails-to-trails program. These cases also involve challenges to regulations promulgated to implement the nation's anti-pollution statutes, such as the CAA and the CWA, or activities at federal facilities that are claimed to violate such statutes. The Division's main clients in this area include the Department of Defense and EPA. The Natural Resources Section and the Environmental Defense Section share responsibility for handling these cases.

Another portion of the Division's caseload consists of non-discretionary eminent domain litigation. This important work, undertaken with congressional direction or authority, involves the acquisition of land for projects such as national parks or the construction of federal buildings including courthouses, and for national security-related purposes. ENRD's Land Acquisition Section is responsible for this litigation.

The Division's Indian Resources Section litigates on behalf of federal agencies to protect the rights and resources of federally recognized Indian tribes and their members. This includes defending against challenges to statutes and agency action designed to protect tribal interests, and bringing suits on behalf of federal agencies to protect tribal rights and natural resources. The rights and resources at issue include water rights, the ability to acquire reservation land, and hunting and fishing rights, among others. ENRD's Natural Resources Section also defends claims asserted by Indian tribes against the United States on grounds that the United States has failed to live up to its obligations to the tribes. The main federal agency that the Division represents in connection with this work is the Bureau of Indian Affairs in the Department of the Interior.

ENRD's Appellate Section handles the initial appeals of all cases litigated by Division attorneys in the trial courts, and works closely with the Department of Justice's Office of the Solicitor General on ENRD cases that reach the U.S. Supreme Court. In addition, the Division supports the work of the Assistant Attorney General in the development of policy concerning the enforcement of the nation's environmental laws, reviewing and commenting on legislation that would affect the work of the Division, reviewing litigation filed under the various citizen suit provisions in the environmental laws, and evaluating and responding to requests that the United States participate as an amicus in various matters. Most of this work is handled by the Law and Policy Section.

## **FISCAL YEAR 2009 ACCOMPLISHMENTS**

Last year, the Division achieved significant victories for the American people in the many practice areas for which it has responsibility. This report summarizes key accomplishments thematically: protecting our nation's air, land, and water; ensuring cleanup of oil and hazardous waste; promoting responsible stewardship of America's wildlife and natural resources; criminally enforcing our nation's pollution and wildlife laws; defending vital federal programs and interests; promoting national security and military preparedness; protecting Indian resources and resolving Indian issues; and supporting the Division's litigators.

## COMMEMORATING THE CENTENNIAL OF THE ENVIRONMENT AND NATURAL RESOURCES DIVISION

The Division reached an important milestone in 2009: the one hundredth anniversary of its founding. In 1789, Congress created the position of Attorney General and established independently operating U.S. Attorneys. In 1870, Congress established the Department of Justice to assist the Attorney General and directed the U.S. Attorneys to report to the Attorney General. From 1870 to 1909, a few assistant attorneys general and solicitors assigned to federal agencies that functioned largely independent of the Department handled the U.S. government's legal business related to public lands and Indian affairs. That fact, along with the increasing volume of this work, led Attorney General George Wickersham to create the "Public Lands Division" in an order dated November 16, 1909. Over time, the Division grew from a staff of six attorneys to its present size.

The history of the Division mirrors the country's evolving relationship with public lands, natural resources, and the environment. While retaining its core responsibilities to represent the United States with respect to Indian tribes, public lands and resources, and the acquisition of land for the public good, the Division incrementally assumed new responsibilities to support the expansion of the federal government's role in society during the New Deal era, to assist civilian and military efforts during World War II, and to preserve and protect our environmental and natural resources beginning in the 1960s. Through the work of thousands of attorneys and other staff, the Division has litigated numerous significant matters. The Division has been involved in nearly all of the important cases influencing and developing public lands, Indian, natural resources, and environmental law.

During 2009, ENRD embraced multiple opportunities to celebrate its rich history, vital mission, and dedicated employees.

**ENRD's 100th Anniversary website** (<http://www.justice.gov/enrd/Anniversary/index.html>) highlights the Division's history as well as centennial celebration events throughout 2009. The website describes the evolution of each of the Division's nine litigating sections, along with noteworthy cases emerging from its docket to shape and define the areas of law in which the Division practices. The site also discusses the history of Division resources and management, and features an area in which users may share their favorite Division memories.

ENRD researched and compiled a history of the Division entitled ***Public Lands and National Treasures: The First 100 Years of the Environment & Natural Resources Division***. This booklet, which is posted on the anniversary website, describes the transition of the Public Lands Division to the Lands Division in 1933; to the Land and Natural Resources Division in 1965; and to the Environment and Natural Resources Division in 1990.

**100th Anniversary events** were held throughout the year. The **100th Anniversary Speaker Series** brought to the Department leading voices on topics of importance to environmental and natural resources work. **ENRD Earth Day 2009** combined the Division's annual Earth Day service project at Martin Gaye Park in Washington, D.C., with centennial functions, including the dedication of a park

memorial to Martin Luther King, Jr., by Attorney General Eric Holder and Senator Durbin. Over six years, ENRD has spent more than 2,800 hours at the park and planted more than 800 trees.

The **Centennial Celebration**, which was held on November 16, 2009, capped off the year's events, bringing together nearly 750 Division employees, alumni, and friends, who enjoyed a special program at the Atrium Ballroom of the Ronald Reagan Building in Washington, D.C. Twelve current and former Assistant Attorneys General attended the event: Ramsey Clark, Kent Frizzell, Wallace Johnson, Peter Taft, James W. Moorman, Carol Dinkins, F. Henry Habicht, II, Richard B. Stewart, Lois Jane Schiffer, Thomas L. Sansonetti, Ronald J. Tenpas, and Ignacia S. Moreno. Collectively, they led the Division for nearly 50 years and their presence made the day even more memorable.

"On this day, it is especially appropriate to acknowledge the Division's career employees, who are the heart and soul of the Division. Each of you plays an important role in accomplishing the Division's vital work."

- Ignacia S. Moreno  
Assistant Attorney General  
On the Occasion of ENRD's Centennial Celebration

"It has been a great privilege to work with the Environment and Natural Resources Division over the years. I've witnessed your talents, your hard work, and your dedication to making the nation a better place in which to live."

- Edwin Kneedler  
Deputy Solicitor General  
2009 Recipient, ENRD Muskie-Chafee Award  
On the Occasion of ENRD's Centennial Celebration

"Through the exceptional work of the Division's staff, the history of the United States has been altered. Lands have been preserved, species have been saved from extinction, the land air and water have been made cleaner, and the interests and prosperity of the United States have been advanced."

- John C. Cruden  
Deputy Assistant Attorney General  
*"Foreword"* to **Public Lands and National Treasures: The First 100 Years of the Environment & Natural Resources Division**

## PROTECTING OUR NATION'S AIR, LAND, AND WATER

### Reducing Air Pollution from Power Plants

ENRD continued to litigate civil claims under the CAA against operators of coal-fired electric power generating plants. Violations in these cases arise from companies engaging in major life-extension projects on aging facilities without installing required state-of-the-art pollution controls, resulting in excess air pollution that has degraded forests, damaged waterways, contaminated reservoirs, and adversely affected the health of the elderly, the young, and asthma sufferers. As of last year, 18 of these matters have settled on terms that will result in reductions of over 2 million tons of sulfur dioxide (SO<sub>2</sub>) and nitrogen oxide (NO<sub>x</sub>) each year once the nearly \$12 billion in required pollution controls are fully functioning.

In fiscal year 2009, the Division obtained two more settlements under this initiative in *United States v. Salt River Project (SRP)* and *United States v. Kentucky Utilities Co. (KU)*. Under the SRP consent decree, the project will install and operate \$426 million worth of air pollution controls at its plant in St. Johns, Arizona. Under the KU consent decree, the company will install and operate \$135 million worth of air pollution controls on the largest generating unit at its plant in Mercer County, Kentucky. When fully implemented, these air pollution controls and other measures will collectively reduce air pollution by more than 52,000 tons every year compared with pre-settlement emissions. SRP and KU also paid civil penalties of \$950,000 and \$1.4 million, respectively, and will spend \$4 million and \$3 million on projects to mitigate the adverse effects of past excess emissions.

### Addressing Air Pollution from Oil Refineries

The Division also made progress last year in its national civil enforcement initiative to combat CAA violations in the petroleum refining industry in the case of *United States v. Frontier Refining Co.* With this settlement, the petroleum refinery enforcement initiative has produced settlements or other court orders that have addressed more than 88% of the nation's refining capacity, and will reduce air pollutants by more than 337,000 tons annually. The *Frontier* settlement secures the installation of more than \$127 million in pollution controls that will result in the reduction of more than 6,000 tons per year of harmful air pollutants, when fully implemented. The defendants also agreed to pay a civil penalty of \$1.23 million and spend \$1.3 million on projects to mitigate the harmful effects of past unlawful emissions.

The provisions of two previous consent decrees entered under this initiative were successfully enforced this year. Such actions are critically important because they ensure that the nation's air quality continues to improve and deter further noncompliance. In September 2009, a district court in Indiana entered an important amendment to the original consent decree in *United States v. BP Products North America, Inc.*, resolving claims associated with BP's Texas City, Texas refinery. Under the settlement, BP will spend more than \$161 million to take measures to prevent noncompliance and mitigate excess emissions resulting from past violations. BP will pay a civil penalty of \$12 million and spend \$6 million on an additional mitigation project. Pursuant to a stipulation and agreement filed with the court in

December 2008 in *United States v. ExxonMobil Corp.*, ExxonMobil paid \$6.1 million in stipulated penalties for violating the terms of a 2005 consent decree. The violations concerned unauthorized combustion of sulfur-containing fuel gas streams at its Baytown, Texas refinery.

#### Reducing Air Pollution from the Cement Industry

The Division has begun taking civil enforcement actions against cement manufacturers whose operation of cement kilns result in unauthorized emissions of harmful air pollutants. The largest settlement yet in the cement kiln enforcement initiative was achieved in *United States v. Cemex California Cement, L.L.C.* Pursuant to the consent decree, Cemex will undertake injunctive relief to meet stringent new emission limits for NO<sub>x</sub>, which will reduce these emissions by nearly 40% per year, as well as new limits for SO<sub>2</sub> and carbon monoxide at its Victorville, California cement plant. The cost of the injunctive relief is more than \$7 million, and Cemex paid a \$2 million civil penalty.

At the beginning of the fiscal year, a district court in Illinois entered a consent decree in *United States v. St. Mary's Cement, Inc.*, resolving the Division's CAA claims concerning unauthorized emissions of NO<sub>x</sub> from St. Mary's Dixon, Illinois cement plant. Under the decree, St. Mary's Cement will take measures to reduce emissions on three of its kilns, shut down a fourth kiln, and pay a civil penalty of \$800,000.

#### Ensuring the Integrity of Municipal Wastewater Treatment Systems

Through its aggressive national civil enforcement program under the CWA to ensure the integrity of municipal wastewater treatment systems, ENRD has continued to protect the nation's waterways. Since January 2006, courts have entered almost a dozen settlements in these cases, requiring long-term control measures estimated to cost approximately \$5 billion.

In 2009, the Division achieved a significant settlement resolving CWA violations in the Nashville, Tennessee metropolitan area in the case of *United States v. Metropolitan Nashville & Davidson County*. Under the terms of the decree, Nashville will spend approximately \$400 million to upgrade its aging sewer system and bring it into compliance with the CWA, thereby reducing the discharge of untreated sewage to local waterways by hundreds of millions of gallons per year. In April 2009, a district court in Kentucky entered an amendment to a 2005 consent decree in *United States v. Louisville & Jefferson County Metropolitan Sewage Dist.* to address unauthorized discharges from its sanitary sewer system occurring after entry of the decree. Pursuant to the terms of the amendment, Louisville will spend an additional \$400 million to take measures to avoid future noncompliance with the CWA.

Consent decrees entered in *United States v. City of Portsmouth* and *United States v. City of Independence* require those cities to spend \$75 million and \$35 million, respectively, to make improvements to their wastewater collection systems to eliminate unauthorized discharges of sewage into local waterways. The consent decree in *United States v. City of Ironton* requires Ironton to separate its storm and sanitary sewers over an 18-year period at an estimated cost of \$18 million. In August 2009, the district court in New Hampshire entered a consent decree in *United States v. City of Lebanon*

that requires Lebanon to spend more than \$30 million to eliminate unauthorized wet weather discharges from its combined sanitary and stormwater collection system.

#### Protecting the Nation's Waters and Wetlands

In fiscal year 2009, the Division obtained a number of favorable settlements in civil enforcement actions brought under the CWA to protect the nation's waters and wetlands. In *United States v. Johnson*, ENRD sued an Arizona land developer and a contractor for CWA violations in bulldozing, filling, and diverting approximately five miles of the lower Santa Cruz River and a major tributary, the Los Robles Wash, without a permit from the Corps. In December 2008, the district court in Arizona entered a consent decree which enjoins the defendants from discharging pollutants in violation of the CWA and required them to pay a combined \$1.25 million civil penalty, one of the largest penalties in the history of the wetlands program.

On September 24, 2009, the district court in Nevada entered a consent decree in *United States v. Union Pacific R.R. Co.*, a CWA civil enforcement action involving unauthorized discharges of dredged and fill material and stormwater stemming from Union Pacific's extensive track repair, flood control, and stream rechannelization activities. The consent decree requires Union Pacific to pay a civil penalty of \$800,000; remove unauthorized dredge-and-fill materials; restore stream channels and revegetate wetlands; and eradicate tamarisk, an invasive, non-native plant.

In *United States v. Savoy Senior Housing Corp.*, ENRD negotiated a consent decree to resolve claims that defendants discharged sediment into waters of the United States without a permit at the Liberty Village site in Campbell County, Virginia. In March 2009, the district court entered a consent decree under which the defendants will pay \$300,000 in civil penalties and \$1,070,000 to fund restoration work on the Liberty Village site and purchase stream and wetland restoration in the region.

*United States v. Rapanos* was a CWA civil enforcement action for unauthorized discharge of fill material into waters of the United States at several locations in Michigan. In 2006, the U.S. Supreme Court vacated a judgment in favor of the government and remanded the case for reconsideration of whether defendants' property falls within the scope of federally protected waters. On remand, the Division negotiated a consent decree, under which the defendants will perform mitigation and pay a \$150,000 civil penalty. Among other things, defendants are required to record conservation easements on 135 acres of land (including 53 acres of wetland) at two of the three violation sites.

In March 2009, ENRD and a lumber company owning over 25,000 acres of land in Louisiana's Atchafalaya Basin negotiated a settlement of two eminent domain cases the Division brought at the request of the Corps to acquire environmental protection easements over the land. The easements are a component of the Atchafalaya Basin Floodway System and preclude new construction as well as harvesting of certain trees.

#### Reducing Air and Water Pollution at Other Diverse Facilities

In fiscal year 2009, the Division improved the nation's air and water quality by concluding civil enforcement actions against other facilities in diverse industries. In total, recoveries valued at more than \$2.3 billion in injunctive relief, more than \$68 million in civil penalties, and \$20.3 million in supplemental environmental projects were obtained. (A supplemental environmental project is an environmentally beneficial project that a defendant agrees to undertake in settlement of a civil penalty action that has a sufficient nexus to the alleged violation, but that the defendant is not otherwise legally required to perform.) The industries agreeing to settle their noncompliance with the CAA and CWA included the third largest coal producer in the eastern United States, four natural gas producers, two sulfuric acid manufacturers, a food processor, a New England bus operator, and a hard rock mining company, among others.

Injunctive relief was obtained from three pipeline owners and/or operators for civil violations of the CWA resulting from unauthorized spills into waters of the United States. District courts in North Carolina, Texas, and Kansas entered consent decrees in *United States v. Plantation Pipeline Co.*, *United States v. Explorer Pipeline Co.*, and *United States v. Magellan Ammonia Pipeline*, respectively. *Plantation* resolved claims in connection with four separate fuel pipeline spills in Virginia, North Carolina, and Georgia. *Explorer* resolved claims regarding the spill of jet fuel into a tributary of the Trinity River near Livingston, Texas. *Magellan* resolved claims concerning two spills of anhydrous ammonia from a pipeline, one occurring in Nebraska and the other in Kansas. Each defendant took corrective measures to address its respective spills and/or is undertaking measures needed to prevent future spills. Collectively, the companies will pay civil penalties totaling \$7.675 million.

#### Working with Companies that Self-Report Environmental Violations

ENRD obtained the largest settlement ever under EPA's Audit Policy in the case of *United States v. Invista, S.A.R.L.* EPA's Audit Policy, which was launched in 1995, provides incentives to companies that voluntarily discover, promptly disclose, and expeditiously correct environmental violations, according to its terms. Under the consent decree, Invista will pay a \$1.7 million civil penalty and spend an estimated \$500 million to correct the self-reported violations discovered at facilities in seven states. The company, a multinational manufacturer of a wide range of polymer-based fibers, disclosed more than 680 violations of water, emergency planning and preparedness, hazardous waste, and pesticide regulations to EPA after auditing 12 facilities that it acquired from DuPont. Consistent with the Audit Policy, the United States waived a portion of the potential penalty in this case.

## ENSURING CLEANUP OF OIL AND HAZARDOUS WASTE

### Conserving the Superfund by Securing Cleanups and Recovering Superfund Monies

The Division brings actions under CERCLA to require direct cleanup by responsible parties or to recover EPA's cleanup costs. ENRD also recovers Natural Resource Damages (NRD) on behalf of federal trustee agencies. In fiscal year 2009, the Division secured the commitment of responsible parties to clean up hazardous waste sites at costs estimated in excess of \$272 million; and recovered approximately \$178 million for the Superfund to finance future cleanups and more than \$13 million in NRD. Examples of major Superfund cases include: *United States v. Beckman-Coulter* (under the terms of a consent decree entered in June 2009, approximately 300 defendants will pay the United States and New Jersey \$69 million in cleanup costs, pay more than \$3 million in NRD, and purchase a \$27 million annuity for future cleanup work and costs at the Combe Fill South Superfund Site in Morris County, New Jersey); *United States v. American Hoechst Corp.* and *United States v. A.R. Sandri, Inc.* (pursuant to two consent decrees entered in March 2009, 49 parties to the *Hoechst* decree will perform a \$46 million cleanup, which 208 parties to the *Sandri* decree will contribute to, and parties to both decrees will reimburse the United States almost 90% of \$13 million in past cleanup costs and pay almost 90% of the estimated \$3.325 million in NRD at the Solvents Recovery Service of New England Superfund Site in Southington, Connecticut); and *United States v. Handy & Harman* (under the terms of a consent decree entered in January 2009, 13 parties will spend \$29 million to complete the cleanup of chemical wastes and other contaminants at the Shpack Landfill Superfund Site in Norton and Attleboro, Massachusetts, and pay up to an additional \$2.9 million to EPA for its costs in overseeing the work).

### Litigating the Constitutionality of the Superfund Law

*Goodrich Corp. v. EPA* involved EPA's issuance of a CERCLA removal order that required Goodrich to investigate groundwater contamination in Rialto, California. Goodrich asserted that EPA's "pattern and practice" of using such orders violates the Due Process Clause, and that a CERCLA judicial review provision does not prevent courts from hearing such programmatic claims. The district court rejected Goodrich's challenge, finding that it lacked jurisdiction to hear the claim. The Ninth Circuit affirmed.

### Protecting the Public Fisc Against Excessive Claims

The Division also defends lawsuits aimed at interfering with cleanup actions by EPA and other federal agencies. Federal agencies are frequently sued for their activities at contaminated sites that are being remediated. The Division seeks to settle those cases where a fair apportionment of cleanup costs can be reached.

ENRD obtained favorable settlements that ensure the United States will pay an appropriate share of cleanup costs in CERCLA contribution cases in which the United States is a liable party. In fiscal year 2009, these include such multi-million dollar settlements as *Steadfast Insurance Co. v. United States* (response costs incurred at the Whittaker-Bermite facility in Santa Clarita, California); *GTE Operations*

*Support, Inc.* (remediation of a former electronic warfare development and testing site in Mountain View, California); *Carolina Power & Light Co. and Consolidation Coal Co.* (claims for removal work at the Ward Transformer Superfund Site in North Carolina); *Maxxam Group, Inc. v. United States* (cleanup costs at the Unexcelled Manufacturing Co. Site in Cranbury, New Jersey); *United States v. City of Attleboro* (response costs relating to chemical contamination at the Shpack Dump Superfund Site in Norton and Attleboro, Massachusetts); and *United States v. Ashland, Inc.* (response actions at the Chemical Commodities Superfund Site in Olathe, Kansas).

The Division also negotiated a consent decree in *Atlantic Research Corp. v. United States*, an action for response costs associated with cleanup of pollutants allegedly released during the plaintiff's manufacture of rocket motors for the U.S. Army at the former Highland Industrial Park facility in Camden, Arkansas.

#### Protecting the Government from Unwarranted NRD Claims

*State of Ohio v. Department of Energy* concerned claims for NRD under CERCLA in connection with the release of hazardous and radioactive material at the Department of Energy's (DOE) Feed Material Production Center, a former uranium processing facility in Fernald, Ohio. The Division negotiated a consent decree requiring DOE to pay \$13.75 million in damages and assessment costs, record an environmental covenant restricting most types of future development at the site, and implement a natural resource restoration plan committing DOE to maintain a series of natural resource restoration projects at the site.

The Division resolved two long-running claims for NRD in *Colorado v. United States* and *United States v. Shell Oil Co.*, arising out of alleged contamination at the Rocky Mountain Arsenal near Denver, Colorado. In February 2009, the district court entered a settlement agreement and consent decree under which the United States will pay Colorado \$7.4 million, following Shell's agreement to pay the state \$10 million for NRD, and undertake certain other monetary and property donations.

#### Enforcing Cleanup Obligations in Bankruptcy Cases

The Division's bankruptcy practice has continued to grow, and this year we achieved notable success in several proceedings. In these cases, ENRD files claims to protect environmental obligations owed to the United States when a responsible party goes into bankruptcy.

In the largest recovery of money for hazardous waste cleanup ever, debtor American Smelting and Refining Company, L.L.C. (Asarco) paid \$1.79 billion pursuant to its confirmed bankruptcy reorganization in *In re ASARCO, L.L.C.* The Division, in coordination and collaboration with 19 states, completed a four-year odyssey through the courts when the final plan of reorganization was confirmed by the bankruptcy court in the Southern District of Texas in November 2009 and consummated in December 2009. The plan incorporated all of the environmental settlements previously approved by the bankruptcy court. Pursuant to the reorganization plan, the United States received \$776 million, which will be used to fund cleanups at more than 35 different sites; the Coeur d'Alene Work Trust was paid

\$436 million to fund cleanup and restoration work in Idaho's Coeur d'Alene Basin; 3 custodial trusts were paid a total of approximately \$261 million to fund cleanup and restoration work at 24 sites in 13 states; and payments totaling in excess of \$321 million were paid to 14 states to fund environmental settlement obligations at over 36 individual sites.

In *In re G-1 Holdings, Inc.*, the bankruptcy court in New Jersey entered a consent decree and settlement agreement with the debtor (formerly known as the GAF Corporation) in September 2009, which resolved the United States' proofs of claim with respect to 13 sites, including the Vermont Asbestos Group Mine Site (VAG site), and the largest chrysotile asbestos mine and mill in the country. The VAG site, the most significant of the contaminated sites covered by the decree, is a 1,673-acre abandoned mine site in Vermont with two towering piles of asbestos-containing mine and mill tailings, which attract hikers, rock collectors, and ATV enthusiasts, activities which may cause exposure to airborne asbestos. Under the terms of the decree, the debtor agreed to take immediate steps to construct barriers preventing public access, provide on-site monitoring, and secure the mill buildings, and will perform future work. G-1 will also reimburse the United States and the State of Vermont up to \$25.8 million for future cleanup costs at the VAG site and pay \$850,000 for damages to local wetlands and waterways contaminated by the VAG site.

In April 2009, more than five years after the date of the debtor's petition for bankruptcy in *In re Jorge Ortiz Romany*, the bankruptcy court in Puerto Rico approved a proposed distribution to the United States of nearly \$5 million, which represents the judgment entered by the court against the debtor in *United States v. JG-24, Inc.* During the intervening five years, the debtor attempted multiple times to procedurally thwart the United States' collection of the judgment, and unlawfully transferred assets during the course of the proceedings. The United States, however, was able to discover sufficient assets to pay all creditors in full, plus interest.

## PROMOTING RESPONSIBLE STEWARDSHIP OF AMERICA'S WILDLIFE AND NATURAL RESOURCES

### Defending the Columbia River Power System's Protection of Endangered Salmon

The Federal Columbia River Power System (FCRPS) is managed by the Corps and the Bureau of Reclamation of the Department of the Interior. It operates 31 dams in the Columbia River Basin that, through the Bonneville Power Administration, provide the Pacific Northwest with over 50% of its electrical power. Two cases, *National Wildlife Fed'n v. NMFS* and *American Rivers v. NOAA*, challenge the 2008 biological opinion issued by NMFS under the ESA, specifying operating parameters for the FCRPS to protect the Columbia River Basin's 13 species of anadromous fish, including endangered wild salmon.

The 2008 biological opinion was issued following a court-ordered remand of NMFS's 2004 biological opinion in this matter. The 2008 biological opinion is the subject of the current litigation in which summary judgment briefing and argument extended through 2008 and into early 2009. In 2009, the district court in Oregon solicited the new Administration's view on the adequacy of the 2008 biological opinion. Over the next six months, ENRD attorneys coordinated a comprehensive review by the defendant federal agencies. National Oceanic and Atmospheric Administration Administrator Dr. Jane Lubchenco personally participated in the review. In September 2009, ENRD advised the court of the Administration's position supporting the 2008 biological opinion.

### Litigating the Polar Bear Listing Decision

In May 2008, FWS listed the polar bear as a threatened species under the ESA, based on the loss of sea ice habitat due to Arctic warming caused by man-made climate change. The listing included a "4(d)" rule clarifying that the "takings" prohibitions of the ESA did not apply to the polar bear outside its immediate range. By fall 2008, 10 suits challenging the listing had been filed by environmental groups, oil and gas industry representatives, and the State of Alaska. ENRD successfully supported the Multi-District Panel's consolidation of the cases in the district court in D.C. In *In re Polar Bear Endangered Species Litigation*, the Division will defend competing and multiple claims against the listing, the 4(d) rule, and the FWS decision banning the importation of polar bear trophies taken but not imported prior to the listing. At their heart, the claims will test national and international scientific findings related to climate change on which the polar bear listing is based.

### Litigating Other Decisions under the ESA

Every year, plaintiffs claim that agencies have failed to adequately consider their obligations for species protection. In fiscal year 2009, the Division successfully defended a number of these cases.

The Ninth Circuit, for example, upheld two NMFS decisions:

--In *Trout Unlimited v. Lohn*, the Ninth Circuit reversed a district court judgment holding invalid NMFS's 2005 Hatchery Listing Policy and decision to downlist the Upper Columbia River steelhead ESU from endangered to threatened status. (An "evolutionary significant unit" or "ESU" is a distinct group of

Pacific salmon or steelhead which NMFS considers a “species” under the ESA.) The court concluded that the Hatchery Listing Policy is entitled to *Chevron* deference and reflected a permissible interpretation of the statute. The Ninth Circuit also repeatedly deferred to NMFS’s scientific judgment on several issues. The court rejected the claim that NMFS should have split the natural and hatchery fish into separate ESUs, explaining that the initial decision regarding the ESU composition is analytically distinct from the ESU listing decision. The court also held that NMFS properly based the listing decision on the status of the entire ESU, including hatchery fish, and that the policy is consistent with the ESA goal of preserving natural populations because it mandates a complex evaluation process that considers both positive and negative effects of hatchery fish on the viability of natural populations.

--The court affirmed a district court judgment which upheld NMFS’s listing of 16 distinct population segments (DPS) of West Coast salmon in *Alesea Valley Alliance v. Lautenbacher*. The court rejected challenges that NMFS had improperly distinguished between hatchery and naturally spawned fish in the listings and in protective regulations for threatened DPSs. The Ninth Circuit also rejected the plaintiffs’ assertion that NMFS cannot designate a DPS unless the members thereof interbreed with reasonable regularity. The court found that NMFS’s construction of the ESA, which focused on reproductive isolation rather than frequency of interbreeding, was a permissible construction entitled to *Chevron* deference.

The Division obtained successful results in district courts in response to many such challenges. These included *Palouse Prairie Found. v. Salazar* (FWS’s decision not to list the giant Palouse earthworm was affirmed, with the court deferring to its evaluation of mostly circumstantial evidence); *Fisher v. Salazar* (FWS could designate as critical habitat for the Perdido Key Beach Mouse land currently unoccupied by the mouse that nevertheless provides habitat connectivity); *Northwest Envntl. Defense Ctr. v. USACOE* (NMFS’s biological opinion for the Corps’ permit for a boat dock on Portland’s Willamette River reasonably utilized science-based proxy to calculate impacts on salmon); *Heartwood v. Agpaoa* (the Forest Service adequately determined that it was not required to reinitiate consultation on a timber salvage project and its potential White Noise Syndrome impacts on the Indiana Bat); *Wild Fish Conservancy v. Salazar* (FWS’s biological opinion rationally concluded that operation of a fish hatchery was not likely to harm resident bull trout); and *Butte Environmental Council v. USACOE* (FWS’s biological opinion on the Corps’ permit for a business park development appropriately considered the effects of impacts to small acreage of critical habitat on critical habitat as a whole).

#### Ensuring that the Limitations of Federal Jurisdiction in Wildlife Cases Are Enforced

The Administrative Procedure Act (APA) and other special review provisions circumscribe federal jurisdiction, as do the requirements of standing and other jurisdictional prerequisites. In 2009, the Division successfully asserted these threshold defenses in numerous wildlife cases, including *Fisher v. Salazar* (private landowners lacked standing to challenge a critical habitat designation where they alleged no injury specific to themselves); *Dow Agroscience, L.L.C. v. National Marine Fisheries Service* (Dow’s challenge to a NMFS biological opinion on the effects of pesticide registrations on salmon was dismissed on jurisdictional grounds); *Fisheries Survival Fund v. Locke* (fishermen association’s challenge

to a NMFS biological opinion was moot after NMFS amended the opinion to address its concern); *La Jolla Friends of the Seals v. NOAA* (a NMFS decision not to enforce the MMPA against San Diego's seal dispersal program at the city's historic children's pool was committed to agency discretion); *Center for Biological Diversity v. Chertoff* (claims that the Coast Guard must consult with NMFS under the ESA on shipping traffic management actions were dismissed as time-barred and not ripe for review); *Center for Biological Diversity v. BLM* (challenge to Army plans to translocate endangered tortoises was dismissed as not ripe for review); *Moden v. FWS* (FWS's five-year status reviews required by the ESA were not subject to judicial review under the APA or the citizen-suit mandatory duty provision); *WildEarth Guardians v. Kempthorne* (FWS's determination not to "emergency" list species was committed to agency discretion and not reviewable); and *Appalachian Voices v. Bodman* (plaintiffs lacked standing to assert claim that Internal Revenue Service/DOE tax credits for clean coal projects were subject to ESA consultation where there was no causal link between the tax credits and any actual project).

#### Defending NMFS's Ocean Harvest Management

The Magnuson Stevens Fishery Conservation and Management Act charges NMFS with the difficult task of managing ocean commercial fishing to provide for conservation and sustainable fishing while, at the same time, optimizing yield. In 2009, ENRD successfully defended NMFS's balancing of these often-competing objectives. In *Commonwealth of Massachusetts v. Gutierrez*, for example, the district court in Massachusetts upheld NMFS's management measures for a mixed-stock fishery. In *Blue Ocean Inst. v. Gutierrez*, NMFS's decision not to implement tuna fishing closures due to increased bycatch resulting from a redistribution of regional fishing efforts was upheld. Finally, in *Fishermen's Finest v. Gutierrez*, the district court in Washington upheld NMFS's allocation of catch among various types of fishing vessels for the Bering Sea/Aleutian Islands fisheries.

#### Securing Critical Water Rights and Water Supplies

The Colorado Water Court approved a settlement in fiscal year 2009 that consummated 30 years of effort to establish water rights for the Black Canyon of the Gunnison National Park. The Black Canyon sits astride the Gunnison River in west-central Colorado. With spectacular gorges carved by the river's flows over millions of years, the canyon is noted for its narrowness, depth, ruggedness, and great expanse of sheer walls. The settlement will enable the National Park Service to ensure that the water resources of the Black Canyon are protected for future generations while also promoting the interests of other federal agencies on the Gunnison, including the Bureau of Reclamation, which operates the Aspinall Unit, a federal reclamation project located upstream of the park; the Western Area Power Administration, which administers the hydropower generated by the Aspinall Unit; BLM, which administers recreational rafting in the Gunnison Gorge National Recreation Area downstream of the park; and FWS, which seeks flows for protection of the downstream habitat of several endangered species of fish.

#### Restoring Critical Natural Resources and Ecosystems

In 2009, the Division secured dismissal of *Miccosukee Tribe of Indians v. U.S. Army Corps of Eng'rs* and *Miccosukee Tribe of Indians v. Peters*, which were challenges under NEPA, the Everglades National Park Protection and Expansion Act of 1989, and the Water Resources Development Act of 2000, to the relocation of the Tamiami Trail along the northern boundary of Everglades National Park by the Department of Transportation and the Corps as part of the long-planned "Modified Water Deliveries" Everglades restoration project. With this dismissal, the project can go forward, including construction of a one-mile bridge and other roadway modifications that will allow increased water flows to the 1.3 million-acre Everglades National Park, the largest and most important subtropical wilderness in North America. The Division also continued to contribute to the restoration and protection of the Everglades ecosystem by acquiring lands within Everglades National Park and the Big Cypress National Preserve.

Acting on behalf of the U.S. Forest Service, ENRD exercised the United States' power of eminent domain to acquire mineral interests beneath over 99,000 acres of the Valles Caldera National Preserve in New Mexico. Owners of the mineral interests sought compensation of roughly \$30,300,000. In December 2009, in the case of *United States v. 99,223.7238 Acres of Land in Sandoval and Rio Arriba Counties and J.B. Harrell*, the district court determined that the fair market value of the property was \$3,800,000.

#### Litigating Federal Land Management Programs and Policies

The federal government manages vast swaths of land for a variety of purposes, including timber management in national forests, recreation in national parks, and resource development and grazing on public lands. Land management programs and policies often are the focus of competing interests for the use of public lands and become the subject of litigation.

The Sierra Nevada region of California poses one of the most vexing land management problems in the nation. On the one hand, a legacy of aggressive fire suppression has left over 8 of the 11 million federal acres in the area in a state of unnatural forest density. Without thinning of the forests, these areas and nearby communities face risk of catastrophic wildfire. On the other hand, many of the same areas in need of thinning provide habitat to the California spotted owl and other rare old-forest species. Moreover, the area is home to numerous communities with a long history of dependence on the timber industry. In 2004, the Forest Service issued a Region-wide Forest Plan Amendment (known as the 2004 Framework) intended to allow needed fuel reduction while still protecting the habitat of old-forest dependant species. The Division has been largely successful in defending the 2004 Framework in a series of lawsuits brought by the State of California, the timber industry, and environmental groups. Most recently, a district court in California allowed the Forest Service to continue implementing thinning projects pursuant to the 2004 Framework while remedying limited errors in the EIS for the 2004 Framework. This victory has saved the agency millions of dollars in planning costs and, more importantly, allowed the agency to continue moving forward with much needed fire reduction projects. In a related matter, *Sierra Forest Legacy v. Forest Service*, a district court in California upheld the Forest Service's Region-wide Forest Plan Amendment to modify the list of species that the agency monitors under the 2004 Framework to ensure forest health.

The Division's successful efforts in defending Forest Service decisions are highlighted in two cases related to the Chequamegon-Nicolet National Forest (CNNF) in Wisconsin, *Habitat Educ. Ctr. v. U.S. Forest Service* ((I) and (II)). In these two cases, the plaintiffs alleged that the Forest Service violated NEPA and the National Forest Management Act (NFMA) in approving the Twentymile Project and the Fishbone Project. Both projects involved implementation of the CNNF Forest Plan, which provides a framework for a holistic approach to forest management and includes an emphasis on restoration of forest health and age and species diversity. A district court in Wisconsin upheld the Forest Service's approach in both cases. As to both projects, the court found that the agency had considered a reasonable range of alternatives based on the purposes and needs for the projects; responded adequately to responsible, opposing scientific views; and relied properly on the forest's habitat modeling, which satisfied NFMA's requirement to provide for diversity. The Twentymile and Fishbone Projects were the first under the CNNF's new plan so the decisions pave the way for the forest to meet the desired conditions.

ENRD concluded litigation in two cases regarding National Park Service management of the Yosemite National Park. In *Friends of Yosemite Valley v. Salazar* and *Friends of Yosemite Valley v. Jarvis*, the parties executed a settlement agreement in September 2009 that resolved this decade-long dispute over the National Park Service's compliance with the Wild and Scenic Rivers Act and NEPA in developing the Merced Wild and Scenic River Plan for Yosemite National Park. The settlement will allow the park to proceed with critical repair and rehabilitation of park facilities while it prepares a new comprehensive management plan for the Merced River.

#### Protecting Public Lands from Grazing Violations

In *United States v. Hage*, the Division filed trespass claims in federal district court against several individuals and corporations who had longstanding histories of grazing cattle without authorization on BLM and Forest Service lands in Nevada. The defendants in this litigation have been parties to several lawsuits challenging the government's sovereignty over the public lands and seek compensation for the alleged Fifth Amendment takings resulting from the management of the public land. ENRD achieved a settlement with two of the defendants in which they agreed to cease all illegal grazing activities, acknowledge federal authority over those lands, remove structures that were impermissibly placed on the property, and pay fines for past violations. This significant agreement has provided the impetus for other defendants in this case to explore possible settlement, as well as helped to discourage others from undertaking similar illegal grazing activities.

Livestock grazing on federal lands in the southwest is a particularly contentious issue. In a case arising out of the Gila National Forest in New Mexico, the Forest Service's handling of its management responsibilities relating to livestock grazing has been validated. In *McKeen v. U.S. Forest Service*, a district court upheld the Forest Service's decision to sanction a term permit holder with a permanent 25% reduction in his permitted livestock numbers for repeated violations of his permit requirements. The court rejected the permit holder's claims that he had not been given sufficient notice of the

violations and opportunities to cure, despite numerous attempts by the agency to get him to take the steps necessary to protect resources on the grazing allotment.

#### Defending Livestock Grazing Decisions to Renew Permits

In *WildEarth Guardians v. U.S. Forest Service*, a district court upheld the agency's analysis and application of factors for invoking a categorical exclusion from NEPA in renewing term permits for 26 grazing allotments. In addition, the court held that the Forest Service had properly considered and addressed the potential effects of livestock grazing on species listed under the ESA.

#### Defending Subsistence Determinations in Alaska

District court decisions in two related cases have upheld the designation of certain navigable waters in Alaska as public lands for purposes of the statutory subsistence-use priority. In 1999, the Secretaries of Agriculture and the Interior identified certain navigable waters in Alaska as public lands for purposes of implementing the subsistence use priority under the Alaska National Interest Lands Conservation Act. The Secretaries made the designations pursuant to an earlier Ninth Circuit ruling that public lands for purposes of the subsistence use priority include navigable waters in which the United States holds reserved water rights as determined by the Secretaries. In *Katie John v. United States*, subsistence users sought to expand the Secretaries' designations by claiming that they should have included waters which are adjacent to national parks, forests, wildlife refuges, and other federal reservations, and on or adjacent to Alaska native allotments. In *State of Alaska v. Salazar*, on the other hand, the state sought to restrict the determinations, contending that the Secretaries improperly found that the United States reserved water rights in tidally influenced waters on privately owned lands within federal reservations, lands adjacent to federal reservations, and lands selected by, but not yet conveyed to, the state or Alaska Native Corporations. The district court rejected the plaintiffs' contentions in both cases, and appeals are pending.

#### Defending Regulation of Fisheries Against Aboriginal Claims

In *Native Village of Eyak v. Gutierrez*, Alaska natives challenged the Secretary of Commerce's halibut and sablefish fishing regulations, asserting unextinguished, nonexclusive, aboriginal fishing and hunting rights to portions of the Gulf of Alaska and Lower Cook Inlet. Following a two-week trial, the court ruled in favor of the Department of Commerce. The plaintiffs have appealed.

#### Defending Coalbed Methane Development Under Federal Leases

The Division prevailed in four cases challenging coalbed methane development. Two of the cases challenge development in south central Wyoming. In *Natural Resources Defense Council v. Salazar*, the plaintiffs alleged inadequate environmental assessments of two plans of development providing for 90 wells and adoption of development plans that are inconsistent with the applicable land use plan. In *Theodore Roosevelt Conservation P'ship v. BLM*, the plaintiffs challenged the adequacy of a programmatic EIS for a plan to drill 2,000 wells and alleged that the plan is inconsistent with the land

use plan and fails to apply multiple-use principles. The court granted the United States' motion for summary judgment in both cases, and the plaintiffs have appealed. The plaintiffs in two other cases, *American Lands Alliance v. BLM* and *Western Organization of Resource Councils v. BLM*, challenged coalbed methane development in Wyoming's Powder River Basin, which includes almost eight million acres of federal, state, and private lands. The plaintiffs alleged numerous deficiencies in BLM's programmatic EIS, prepared in cooperation with the Forest Service and the State of Wyoming. The court upheld the analysis, finding that BLM had taken a hard look at the impacts in compliance with NEPA.

## CRIMINALLY ENFORCING OUR NATION'S POLLUTION AND WILDLIFE LAWS

### Reducing Pollution from Ocean-Going Vessels

*THE PROBLEM OF VESSEL POLLUTION: Every year...the intentional, illegal discharge of oil from vessels is equal to 8 times the amount of oil spilled by the Exxon Valdez (11 million gallons)*

- *2002 Report of the Maritime Transport Committee of the Organisation for Economic Co-operation and Development*

Over the past 10 years, the criminal penalties imposed in vessel pollution cases prosecuted by ENRD have totaled more than \$216 million, and responsible shipboard officers and shore-side officials have been sentenced to more than 20 years of incarceration. This year, the Division continued its success in prosecuting deliberate violations, as the representative cases below illustrate.

In January 2009, the Second Circuit affirmed the conviction in *United States v. Ionia Mgmt., S.A.*, of a shipping company for failure to maintain an accurate oil record book relating to discharges of pollution from a vessel it managed. The Act to Prevent Pollution from Ships (the act or APPS), which implements an international protocol on oil pollution, and its regulations prohibit vessels from discharging oil above certain limits. The act and regulations also require all vessels, both foreign and domestic, to maintain an accurate oil record book showing discharges of oil from the vessel. The *M/T Kriton*, a foreign-flag vessel managed by Ionia Management, S.A., discharged oil in excess of allowable amounts. The vessel's crew then made false entries in the oil record book to hide the impermissible discharges. When the vessel entered U.S. port, it was investigated and charged with failure to maintain an accurate oil record book. On appeal, the defendant company argued that the requirement to maintain an accurate record book only applied to discharges occurring in U.S. waters. The court of appeals disagreed, holding that the record book must be accurate when the vessel is in U.S. waters and must reflect discharges occurring inside and outside U.S. waters. Among other things, the court of appeals also held that the defendant corporation could be held liable under a respondeat superior theory of liability. The Second Circuit's APPS ruling upholds keystones of the government's initiative to prosecute owners and operators of vessels that pollute at sea in violation of international and domestic standards.

The defendant, a Greek shipping operator, pleaded guilty to and was sentenced for numerous violations in *United States v. Polembros Shipping, Ltd.* The charges included two counts of APPS, one count for failing to maintain an accurate oil record book for the cargo ship *M/V Theotokos* and the other for the carrying of fuel oil in a tank forward of the collision barrier; violations of the Nonindigenous Aquatic Nuisance Prevention and Control Act (NANPCA) by failing to maintain accurate ballast water records; violations of the Ports of Waterways Safety Act (PWSA) by failing to report the hazardous condition of the crack on the rudder stem of the ship; and making false statements by concealing the fact that fuel oil was leaking into the forepeak ballast tank. The company was sentenced to pay a \$2.7 million fine and \$100,000 to fund research of marine invasive species, and to complete a three-year term of probation. Additionally, the ship's master was sentenced to serve 10 months' incarceration, and

two other crew members were ordered to serve probation for crimes including APPS, PWSA, and NANPCA violations, obstruction, and false statement violations.

A jury convicted the defendant corporation and two engineers of APPS and false statement violations for their actions surrounding the overboard discharge of bilge waste using a bypass valve in *United States v. General Maritime Mgmt.* The corporation was sentenced to pay a \$1 million fine, serve a five-year term of probation, and implement an environmental compliance plan (ECP). The engineers were sentenced to a total of 9 months' incarceration, followed by five years' probation, and to pay \$1,000 in fines.

In *United States v. Fleet Mgmt., Ltd.*, the defendant, a Hong Kong ship management company, pleaded guilty to CWA violations, obstruction, and false statements surrounding the release of more than 50,000 gallons of heavy fuel oil from the *M/V Cosco Busan*, which crashed into the San Francisco Bay Bridge in 2007. The ship's captain pleaded guilty to a negligent violation of the Oil Pollution Act (OPA) and to a violation of the Migratory Bird Treaty Act (MBTA) for causing the deaths of more than 2,000 protected migratory birds, and was sentenced to serve 10 months' incarceration followed by a 1-year term of probation.

Guilty pleas were also entered in five additional cases involving vessel operators and crew members in *United States v. Consultores De Navegacion*; *United States v. STX Pan Co.*; *United States v. Dalnave Navigation, Inc.*; *United States v. Hiong Guan Navegacion Japan Co.*; and *United States v. Holy House Shipping*. These companies and individuals were sentenced to pay a total of \$7.43 million in fines, \$1.35 million in community service, and 6 months' incarceration, with each serving a term of probation for crimes including conspiracy, APPS, false statements, obstruction, and oil record book violations.

#### Prosecuting Hazardous Waste Violations

In *United States v. Southern Union Co.*, stored gas regulators that contained mercury were removed from customer's homes and improperly stored by the corporate defendant. Vandals broke into the facility in Pawtucket, on the edge of the Seekonk River, and damaged some of the containers, resulting in mercury being spilled around the facility and in a nearby apartment complex. Southern Union was convicted by a jury of one RCRA storage violation. The company was sentenced to pay a \$6 million fine and \$12 million in community service payments, and to complete a two-year term of probation.

Defendant Robert Webb, owner of Alliance Environmental, Inc., failed to properly store waste accumulated from his methamphetamine laboratory cleanup business and pleaded guilty to two RCRA storage violations in *United States v. Webb*. He was sentenced to serve a year of incarceration, followed by a three-year term of probation, pay \$71,000 in restitution, and perform community service.

#### Prosecuting CWA Violations

In *United States v. ExxonMobil Corp.*, ExxonMobil Pipeline, a subsidiary of ExxonMobil Corp., failed to replace a known defective valve and coupling on a pipeline at its oil terminal, which resulted in a spill of 2,500 gallons of kerosene and 12,700 gallons of diesel fuel. ExxonMobil pleaded guilty to a CWA violation; and was sentenced to pay a \$6.1 million fine, complete a three-year term of probation, and implement an ECP. Of the \$6.1 million fine, \$4.6 million was designated to restore wetlands and improve water quality in Massachusetts.

The corporate defendant accepted millions of gallons of liquid industrial waste that it could not adequately store or treat and discharged directly to the Detroit sanitary sewer system in *United States v. Comprehensive Environmental Solution, Inc.* The company pleaded guilty to CWA and false statement violations and was sentenced to pay a \$750,000 fine, complete a five-year term of probation, and implement an ECP. Of the \$750,000 fine, \$150,000 will help restore the environment and wildlife habitat along the Detroit River. A jury convicted three company officials and a fourth official pleaded guilty to crimes including CWA, conspiracy, and false statement violations. They were sentenced to a total of 42 months' incarceration followed by probation.

Guilty pleas were also entered in *United States v. Johnson Matthey, Inc.*; *United States v. Corn*; *United States v. California Shellfish Co.*; *United States v. Cypress Bayou Industrial Painting, Inc.*; and *United States v. Gauntt*. These companies and individuals were sentenced to serve a total of one year of imprisonment and nine months' home confinement, pay \$3,143,200 in fines, and each serve a term of probation for CWA and false statement violations.

#### Protecting the Environment, Public Health, and Worker Safety

In *United States v. BP Products North America (BPPNA)*, the corporate defendant pleaded guilty to a felony CAA violation that triggered an explosion at BP's Texas City refinery killing 15 people and causing serious injury to at least 170 employees. BPPNA was sentenced to pay a \$50 million fine and complete a three-year term of probation.

Evidence adduced at trial in *United States v. Atlantic States Cast Iron Pipe Co.* established management practices that led to an extraordinary history of environmental violations, workplace injuries and fatalities, and obstruction of justice. The corporate defendant and four managers were convicted at trial of conspiracy, obstruction, and substantive CWA and CAA violations. Atlantic States was sentenced to pay an \$8 million fine and complete a four-year term of probation with a court-ordered monitor, while the four managers were sentenced to a total of more than 12 years' incarceration with each serving a term of probation.

In *United States v. Wood*, defendant John Wood, owner of J&W Construction, pleaded guilty to conspiracy, mail fraud, and contempt related to illegal asbestos removal. Wood was sentenced to serve 48 months' incarceration and pay \$800,000 in restitution. Co-defendant Curt Collins pleaded guilty to conspiracy and mail fraud, and was sentenced to serve 24 months' incarceration and to pay \$100,000 in restitution. A second co-defendant, Mark Desnoyers, was convicted by a jury of conspiracy, aiding and abetting CAA violations, mail fraud, and two false statement violations.

## Keeping Nuclear Power Safe

Defendant Andrew Siemaszko, a systems engineer with FirstEnergy Nuclear Operating Co., was convicted by a jury in *United States v. Siemaszko* of three false statement violations for his role in a scheme to keep information from the Nuclear Regulatory Commission. Siemaszko was sentenced to pay a fine and complete a three-year term of probation. Previously, co-defendant David Geisen was convicted by a jury of concealment and false statement violations, and sentenced to serve four months' home detention.

## Prosecuting Illegal Hunting and Fishing

In *United States v. Nelson*, the Division successfully prosecuted 14 individuals and 3 corporations involved in illegally harvesting from the Chesapeake Bay and selling millions of dollars worth of striped bass. The investigation, known as the "Interstate Watershed Task Force," was a long-term undercover operation that conducted purchases and sales of the fish. To date, the defendants have pleaded guilty to charges including Lacey Act, conspiracy, and false labeling violations, and have been sentenced to serve more than 43 months' incarceration, pay \$208,000 in fines and \$461,000 in restitution, and each serve a term of probation.

Twelve individuals and companies, thus far, have been convicted in *United States v. Virginia Star* of conspiracy and false labeling violations in a scheme to avoid paying an anti-dumping duty or tariff by falsely labeling basa, or Vietnamese catfish, as sole for import, and then selling it in the United States at below market prices. The defendants have been sentenced to serve more than 18 years' incarceration, pay \$381,000 in fines and more than \$12 million in forfeited assets, and serve probation.

In *United States v. Hooton*, defendant Harry Hooton, a big-game operator, and his two sons pleaded guilty to conspiracy to violate the Lacey Act for illegally guiding clients on brown bear hunts on federal property. Hooton was sentenced to pay a \$41,000 fine and \$30,000 in restitution. His sons were previously sentenced to serve a total of three months' home confinement, followed by a term of probation, and to pay a \$50,000 fine.

## Prosecuting Illegal Wildlife Trafficking

In *United States v. Soliz*, defendant Rene Soliz, a U.S. Border Patrol agent, pleaded guilty to a Lacey Act violation for attempting to receive 15 Tanzanian leopard tortoises that were transported to the United States in violation of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES). Soliz was sentenced to pay a fine, complete a three-year term of probation, and resign his position.

Defendant Jerry Mason pleaded guilty in *United States v. Mason* to an ESA violation for attempting to smuggle the hides and a skull from two leopards into the United States using false CITES permits. Mason was sentenced to pay a \$10,000 fine, make a \$10,000 community service payment, and complete a four-year term of probation. Co-defendant Jan Swart previously pleaded guilty to smuggling

violations and was sentenced to 18 months' incarceration. A second co-defendant, Steve Popovich, pleaded guilty to a Lacey Act violation and was sentenced to pay a fine and complete an 18-month term of probation.

In *United States v. Salabye*, defendant Cedrick Salabye pleaded guilty to violating the Bald and Golden Eagle Protection Act for selling bald eagle parts and feathers and was sentenced to serve 6 months' home confinement, followed by a 5-year term of probation, and complete 150 hours of community service.

#### Prosecuting Smugglers of Internationally Protected Wood

The corporate defendant in *United States v. Style Craft Furniture* pleaded guilty to smuggling internationally protected ramin wood, and was sentenced to pay a \$40,000 fine and complete a three-year term of probation. Ramin wood is found in the tropical forests in Southeast Asia, and is critical to the habitat of endangered orangutans.

#### Prosecuting the Killing of Migratory Birds

In *United States v. ExxonMobil Corp.*, the corporate defendant pleaded guilty to 5 misdemeanor violations of the MBTA in connection with the deaths of approximately 85 protected birds, including waterfowl, hawks, and owls. The company was sentenced to pay a \$400,000 fine and a \$200,000 community service payment, and to implement an ECP.

## DEFENDING VITAL FEDERAL PROGRAMS AND INTERESTS

### Litigating the Limitations of Federal Jurisdiction

To bring cases in federal court, litigants must demonstrate, among other things, that they have standing. In *Summers v. Earth Island Inst.*, the Department prevailed in its view that the plaintiff environmental groups lacked standing to challenge Forest Service procedural regulations, absent a live dispute over a concrete application of those regulations to a specific project. The Ninth Circuit had held that the plaintiffs could not bring a facial challenge to the validity of regulations that had not been applied to a site-specific project that injured them, but could contest two of the regulations that had been applied to a project even though that project was subsequently withdrawn. The U.S. Supreme Court reversed, stating: “We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests.”

### Giving Proper Deference to Agency Interpretations

In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, the U.S. Supreme Court reversed the Ninth Circuit, which had held that Coeur Alaska must obtain a CWA National Pollutant Discharge Elimination System (NPDES) section 402 permit for the operation of the Kensington Gold Mine in southeast Alaska where Coeur had applied for and received a CWA section 404 dredge-and-fill permit from the Corps for the discharge of fill material into waters of the United States. Coeur proposed to use a froth-flotation milling method in its mining operation in which water and chemicals are mixed with excavated rock causing gold-bearing ore to float to the top where it can be skimmed off. The Court agreed with the agency’s position that, because the discharge was fill under the agencies’ fill rule, section 404 was the proper permitting scheme. The Court agreed that the Corps has exclusive authority over discharges of “dredged or fill material,” and EPA may not regulate any discharges that meet this definition. The Court found the CWA and the agencies’ regulations ambiguous as to whether standards governing NPDES permits must be applied to discharges of fill material; and deferred to a subsequent interpretation issued by EPA and the Corps in an unpublished memorandum, which the Court found to be consistent with the statute and the agencies’ regulations.

### Defending EPA’s Discretion to Decide Whether to Employ Cost-Benefit Analyses in Formulating Regulations

The U.S. Supreme Court in *Entergy Corp. v. Riverkeeper* upheld EPA’s construction of CWA section 316(b) – which requires that cooling water intake structures employ the “best technology available for minimizing adverse environmental impact” – to allow, though not necessarily to require, the use of a cost-benefit analysis in determining the technology that must be employed. The case affirms the considerable discretion EPA has in choosing how to proceed to regulate, and whether to employ a cost-benefit analysis in the development of such regulations, in the face of an ambiguous statute.

## Litigating EPA's Air Quality Designations and Classifications for the Fine Particulate Matter Air Quality Standard

In *Catawba County v. EPA*, the D.C. Circuit upheld virtually every aspect of EPA's extensive CAA rulemaking designating and classifying areas of the nation as either meeting or not meeting the National Ambient Air Quality Standards for fine particulate matter. In its ruling, the court noted the particular deference that is due to an agency's technical and scientific judgments and specifically acknowledged the thoroughness of EPA's analysis in making the designations and classifications.

## Defending EPA's Implementation of the Eight-Hour Air Quality Standard for Ozone

After years of litigation over the eight-hour ozone air quality standard established by EPA under the CAA in 1997, the D.C. Circuit paved the way in *Natural Resources Defense Council v. EPA* for more complete implementation of that standard by upholding nearly every aspect of EPA's phase II rule for implementing the standard. Among other things, the court upheld EPA's interpretation of how reasonably available control technology requirements are to apply in certain areas of the country and EPA's determination that areas with a moderate or higher nonattainment designation that had not met the statutory requirement for a 15% reduction of volatile organic compounds emissions for the 1-hour standard would have to meet that requirement for the 8-hour standard.

## Litigating EPA's Treatment of Exceptional Events in Reviewing Air Quality Monitoring Data

In *Natural Resources Defense Council v. EPA*, the D.C. Circuit upheld EPA's CAA rule that governs when exceptional events such as high levels of pollution resulting from wind storms may be excluded from air quality monitoring data in determining whether an area satisfies federal air quality standards.

## Defending EPA's Regulation of Agricultural Emissions in the San Joaquin Valley

In a series of cases styled *Latino Issues Forum v. EPA*, the Ninth Circuit upheld EPA's approach to dealing with the complex issue of how to bring one of the nation's largest agricultural areas into compliance with federal air quality standards for coarse particulate matter without unduly hampering this vital and varied industry.

## Defending Constitutional and Other Challenges to the Rails-to-Trails Program

In the past year, the Division experienced a dramatic increase in cases seeking compensation for the alleged taking of private property abutting former railroad rights-of-way to be used for trails under the National Trails System Act (the act). ENRD is currently defending more than 10,000 such claims by successors-in-interest to parties who conveyed rights-of-way to the railroads in the 19th and early 20th centuries. The act allows a railroad to discontinue service on a line and negotiate with a third-party trail operator (typically a local government or non-profit organization) to transfer its property interest. Although these cases present significant legal and resource challenges, three recent victories will help to limit the bringing of future claims and protect the United States from millions of dollars in liability. In *Fauvergue v. United States*, ENRD successfully advocated before the Court of Federal Claims (CFC) for a

new legal standard in applying the statute of limitations to class actions in which class members must opt in. In *Ladd v. United States*, involving an issue of first impression, the CFC applied a more stringent regulatory takings standard for cases where no agreement to operate a recreational trail is reached.

In *Ellamae Phillips Co. v. United States*, the Federal Circuit reversed a CFC decision holding the United States liable for an uncompensated taking as a result of railbanking and trail use of a federally granted railroad right-of-way pursuant to the rails-to-trails program. The CFC had held that it was bound by the Federal Circuit's prior decision in *Hash v. United States* to hold the government liable, based on one sentence in *Hash*, even though the issue of liability was not presented, briefed, or argued in *Hash*. Because two other courts had reached the same conclusion, and we faced the prospect of being held liable per se for a taking on hundreds or thousands of such claims, we brought an interlocutory appeal, arguing that: (1) *Hash* did not decide liability; and (2) *Hash* should be limited to its facts. The Federal Circuit accepted our second argument, concluding that the liability ruling in *Hash* was limited to the essentially unknown facts in that case and thus did not hold the United States liable for a taking per se.

#### Litigating Air Traffic and Air Commerce Decisions

In *City of Las Vegas v. United States Dep't of Transp.*, the Ninth Circuit dismissed a petition for review that challenged a Federal Aviation Administration (FAA) decision to reinstitute a previously used procedure on one of the runways at the Las Vegas McCarran International Airport (LAS). The court upheld the FAA action. The Ninth Circuit also concluded that air traffic control activities that are designed to reduce delay are categorically exempt from the requirement to perform a conformity analysis.

In *County of Rockland v. United States Dep't of Transp.*, the D.C. Circuit upheld Department of Transportation (DOT) action in 12 consolidated petitions for review challenging the FAA's redesign of the extremely complicated airspace of the New York/New Jersey/Philadelphia area. This airspace redesign is a multi-year project to increase efficiency and allow for the use of newer technologies to better move air commerce through this congested area. The petitioners raised numerous claims under NEPA, section 4(f) of the Transportation Act, and the CAA. The court of appeals dismissed some claims on procedural grounds and ruled for DOT on the remaining claims.

#### Defending Critical Border Patrol Activities from Fifth Amendment Takings Challenges

In *Otay Mesa Property, L.P. v. United States*, ENRD successfully defended a suit brought by a group of landowners along the border with Mexico, who contended that interdiction operations on their properties by U.S. Customs and Border Protection entitled them to be compensated by the United States. The properties are used by illegal immigrants, requiring an around-the-clock presence by Border Patrol agents. With the exception of the placement of a limited number of small seismic sensors on the properties for which the United States agreed to pay compensation, the court dismissed all claims. Had ENRD not successfully defeated these claims, it is likely that the United States would have faced similar suits by property owners along the entire Mexican border.

## Defending the Presidential Permit Authorizing International Border Crossing for Oil Pipeline

The Division successfully opposed two challenges to the State Department's issuance of a presidential permit for the border crossing of the Keystone Pipeline, which will transport crude oil from Canada to refineries in the United States. In *Natural Resources Defense Council v. Department of State*, the plaintiffs claimed in the district court in D.C. that the EIS developed under NEPA for the project failed to adequately examine impacts from operation of the pipeline, including impacts of supplying refineries in the United States with transported oil and impacts on climate change. In *The Sisseton – Wahpeton Oyate v. Department of State*, five Indian tribes in South Dakota claimed violation of various treaties and statutes, as well as of NEPA. Both courts granted the United States' motions to dismiss because issuance of the presidential permit was not an action subject to judicial review under the APA.

## Defending the Corps' Initiatives in Response to Disasters

Various plaintiffs challenged the environmental review conducted by the Corps under emergency alternative arrangements as part of the effort to rebuild the levee system in New Orleans. ENRD successfully defended against a request for emergency injunctive relief in *Abadie v. Army Corps of Eng'rs*. The district court allowed the excavation of nine areas to supply necessary fill for levee and floodwall projects for the newly designed Hurricane Protection System in New Orleans. In another case, *Turkey Creek Community Initiatives v. U.S. Army Corps of Eng'rs*, the Division secured a dismissal of a challenge to a regional development permit for post-Katrina redevelopment in southern Mississippi. The regional permit allowed expedited action to fill wetlands necessary to construct residences to address the post-Hurricane Katrina need for affordable housing in six severely impacted counties.

## Acquiring Property for Public Purposes

The Division exercises the federal government's power of eminent domain to enable agencies to acquire land for public purposes ranging from establishing national parks to building federal courthouses to protecting the nation's borders. These actions secure the Fifth Amendment guarantee of just compensation in amounts that are fair to property owners and to taxpayers.

On behalf of the National Park Service, ENRD acquired land underlying the crash site of United Airlines Flight 93 in Somerset County, Pennsylvania, for inclusion in the Flight 93 National Memorial. The case, *United States v. 275.81 Acres of Land in Stonycreek Township and Svonavec, Inc.*, was filed on September 1, 2009, with estimated just compensation of \$611,000. Groundbreaking for the memorial occurred in November 2009; the National Park Service plans to dedicate the initial phase of the memorial on the tenth anniversary of the September 11, 2001 terrorist attacks.

In fiscal year 2009, the Division facilitated the expansion of the Moss Federal Courthouse in Salt Lake City, Utah, by the General Services Administration (GSA), through the acquisition of three buildings and associated parking valued at \$7,500,000 in *United States v. 29,122.5 Square Feet of Land in Salt Lake City and Shubrick Building, L.L.C.*

The Division also exercises the Attorney General's responsibility for review of title to real property before it is purchased by federal agencies, thereby ensuring that lands needed for federal government use are acquired free of liens and defects. In 2009, the Division reviewed title to a variety of federal acquisitions, including 12 acres of land in Cleveland, Ohio, acquired by the National Aeronautics and Space Administration for its John H. Glenn Research Center; and over 66,000 square feet of land in Boston, Massachusetts, acquired by the National Archives and Records Administration for the John F. Kennedy Library.

#### Working with the United States Congress on Environmental and Natural Resources Legislation and Related Matters

Through the Department's Office of Legislative Affairs, the Division responds to relevant legislative proposals and congressional requests, prepares for appearances of Division witnesses before congressional committees, and drafts legislative proposals, including proposals implementing settlements of Division litigation. An example of this work from last year is the San Joaquin River Restoration Settlement Act. After eighteen years of contentious litigation, the Division negotiated a settlement that delineates a monumental intergovernmental project by the State of California and the Bureau of Reclamation to restore flows in 153 miles of the San Joaquin River, California's second-longest river, below the Friant Dam east of Fresno. The Division, along with the Department of the Interior, assisted in crafting legislation to implement the settlement agreement, which was enacted into law in March 2009 as part of the Omnibus Public Land Management Act of 2009.

#### Enforcing Environmental Law Through International Capacity Building

Attorneys from the Division speak at conferences in foreign countries and provide training on a variety of subjects pertaining to civil and criminal environmental enforcement. This year, ENRD engaged in capacity building with Costa Rica, El Salvador, Mexico, Canada, China, Indonesia, Malaysia, Vietnam, Thailand, South Africa, Austria, Italy, Switzerland, Belgium, and Great Britain.

The State Department has provided ENRD with funding under the Central America-Dominican Republic-United States Environmental Cooperation Agreement to implement a training program for judges in Central America on handling environmental enforcement cases. In fiscal year 2009, attorneys from the Division, in consultation with judges from EPA's Environmental Appeals Board, provided training for judges in El Salvador and Costa Rica. Division attorneys also provided training to judges in Thailand on handling claims for natural resource damages and to judges and law enforcement officials in Vietnam on prosecution of wildlife trafficking cases. Managing attorneys from the Environmental Crimes and Environmental Enforcement Sections spoke on environmental enforcement issues at conferences in Rome, Italy, and Johannesburg, South Africa, and met with counterparts from prosecutors' offices and environmental ministries during their travels.

The Division also continued to disseminate information to government officials and representatives from industry and non-governmental organizations regarding the 2008 amendments to the Lacey Act, which added enforcement tools to combat trafficking in illegally harvested timber and

wood products made from such timber. Division attorneys spoke on this topic at conferences and meetings in Indonesia, Malaysia, China, Great Britain, Austria, and Belgium as well as at numerous gatherings in the United States.

#### Protecting the Interests of the United States in Litigation Involving Third Parties

The Division at times participates as amicus curiae in cases in which the United States is not a party to protect the interests of the United States and its component agencies. The Division filed briefs in a number of such proceedings in the past year. One example is *IBGA, L.L.C. v. Ulster County*. The Western Mohegan Tribe and Nation of New York, which is not a federally recognized Indian tribe, sought a declaration that it was exempt from paying taxes due to its status as a “sovereign Indian Nation.” As amicus, the United States argued in favor of dismissal of the case, in part because the acknowledgment of Indian tribes should be conducted through Interior’s formal acknowledgment process. Adopting many of the arguments made by the United States, the district court dismissed the complaint, finding that there was no case or controversy and that it would not exercise jurisdiction under the Declaratory Judgment Act given the potentially broad impacts of a decision recognizing the group as an Indian tribe.

## PROMOTING NATIONAL SECURITY AND MILITARY PREPAREDNESS

### Protecting the U.S. Navy's Ability to Use Sonar in Training Exercises

In fiscal year 2009, ENRD successfully resolved three cases challenging the U.S. Navy's use of mid-frequency sonar in the world's oceans. As in years past, no significant Navy training opportunities were precluded by this litigation. *NRDC v. Winter* challenged the Navy's non-combat use of mid-frequency sonar worldwide. *NRDC v. Department of the Navy* and *Ocean Mammal Institute v. Gates* challenged Navy sonar use in exercises off the coasts of southern California and Hawaii, respectively. The litigation culminated in U.S. Supreme Court review of a Ninth Circuit preliminary injunction in *NRDC v. Winter* halting Navy sonar exercises off the coast of southern California. The Division worked closely with the Solicitor General's Office to prepare the case before the Supreme Court.

In *NRDC v. Winter*, a district court initially issued a broad preliminary injunction prohibiting the Navy from using sonar during submarine warfare training exercises in the Southern California Operating Area. The Division obtained a stay pending appeal from the Ninth Circuit that allowed the Navy to continue training. Thereafter, the Ninth Circuit ruled that the district court in issuing the injunction had not conducted a proper balancing of the interests involved and remanded the case. When the district court on remand issued a modified preliminary injunction that still significantly impaired training, the Division filed a second appeal. The Ninth Circuit affirmed the modified injunction, but also entered another stay allowing the United States to seek U.S. Supreme Court review. In November 2008, the Supreme Court reversed and vacated the district court's modified preliminary injunction. In an opinion written by Chief Justice Roberts, the Court concluded that the Ninth Circuit employed an incorrect standard for assessing the irreparable harm prong of the preliminary injunction standard, finding that a party seeking a preliminary injunction cannot simply show a "possibility of irreparable harm" but must show that "irreparable harm is likely." The Court further found that the district court erred in its balancing of the harms to plaintiffs and the harm to the Navy. The Court concluded that a proper consideration of these factors on the record before the district court required the denial of injunctive relief, which allowed the Navy training exercises to continue. The *Winter* decision was a significant ruling not only for the Navy's military readiness, but also with regard to the Court's interpretation of the appropriate standard for issuance of an injunction. The Court rejected the standard utilized by the Ninth Circuit in this case, which had been very problematic for defense of other ENRD cases.

Following the Supreme Court's decision, the parties negotiated a settlement of the litigation. In exchange for dismissal of the worldwide sonar challenge, the Navy agreed to spend \$14.75 million over the course of three years to fund marine mammal research and affirmed its intention to adhere to its ongoing range-wide environmental compliance schedule for completing NEPA, MMPA, and ESA review on all major training ranges.

### Defending Army Modernization Plans

After nearly two years of negotiations, the district court approved the parties' settlement agreement in *Office of Hawaiian Affairs v. Gates*, concluding litigation over the Department of the

Army's compliance with the National Historic Preservation Act and Native American Graves Protection and Repatriation Act for its "Stryker conversion" activity at its facilities in Hawaii, a key component of the Army's 30-year modernization plan. The agreement removed obstacles to the Army's efforts to provide training and weapons systems needed by the troops of the 2d Brigade, 25th Infantry Division deployed to Iraq and Afghanistan.

#### Defending the Modernization of the Nation's Nuclear Weapons Complex

As the nation consolidates and modernizes its nuclear weapons capability, the Division is handling litigation challenging the planning and construction of smaller, more efficient manufacturing facilities. For example, in *Natural Resources Defense Council v. Chu*, ENRD successfully defended the proposed relocation of a National Nuclear Security Administration (NNSA) facility for the manufacture of non-nuclear components of nuclear weapons. The current facility is an aging World War II-era facility that was much larger than needed for a modern nuclear complex. The NNSA partnered with the GSA to procure a much smaller, more efficient, and more flexible facility that was in line with NNSA's goals for a modern, streamlined manufacturing complex. The plaintiff claimed that NNSA failed to adequately analyze the potential environmental impacts of the new facility, including the cleanup and final closure of the old facility. The Division obtained judgment in favor of NNSA and GSA on all claims, paving the way for the project to move forward. When the project is completed, it is expected that it will save the government nearly \$100 million annually as a result of the decreased maintenance costs and greater efficiency of the new, smaller facility.

#### Defending Safe Disposal of Obsolete Chemical Weapons

In August 2009, after six years of litigation, the district court granted judgment in favor of the United States in *Chemical Weapons Working Group v. Defense*, rejecting a challenge to the U.S. Army's compliance with NEPA for chemical weapons incineration at Anniston Army Depot in Alabama and three other locations. The dismissal removes an obstacle to the Army's efforts to fulfill the United States' obligations under an international treaty providing for the safe disposal of chemical weapon stockpiles.

In *Colorado Department of Public Health and Environment v. United States*, the State of Colorado attempted to enforce a provision of the state's hazardous waste storage regulations against the Army's Pueblo Chemical Depot. The state sought an injunction requiring the Army to destroy the portion of the nation's stockpile of chemical weapons located at Pueblo Chemical Depot on a schedule mandated by the state. The district court ruled in favor of the Army, finding that the state's claims were preempted by the federal laws addressing management and destruction of stockpiled chemical weapons.

#### Supporting the Strategic Border Initiative and Securing the Nation's Border

In 2007, Congress mandated construction of fencing and related infrastructure at multiple points along the United States-Mexico border in order to enhance domestic security by curtailing smuggling, drug trafficking, and illegal immigration. The Division is working closely with the Department

of Homeland Security and the Corps to facilitate land acquisitions necessary for the construction. This effort has required acquisition by eminent domain of over 300 parcels of land located in Texas, New Mexico, Arizona, and California.

As additional border security measures, the Division also brought eminent domain cases at the request of GSA to enable expansion and renovation of the Nogales/Mariposa Port of Entry in Arizona and the San Ysidro Port of Entry near San Diego, California.

#### Acquiring Additional Property to Improve Military Preparedness and National Security

The Division exercised the federal government's power of eminent domain this year to acquire land for such diverse military installations as the U.S. Southern Command Headquarters in Florida, El Centro Naval Air Facility in California, Marine Corps Air Station Cherry Point in North Carolina, Eielson Air Force Base in Alaska, the Vancouver Army Reserve Center in Washington, Helemano Military Reservation in Hawaii, and Gowen Field Training Area in Idaho.

ENRD also supported the critical mission of providing for armed forces veterans by reviewing and approving title for multiple medical facilities and national cemeteries at the request of the U.S. Department of Veterans Affairs during 2009.

## PROTECTING INDIAN RESOURCES AND RESOLVING INDIAN ISSUES

### Navigating the Tribal Acknowledgment Process

The Department of the Interior decides whether a group should be federally recognized as a tribe. Such a determination means the group becomes sovereign over its members and internal disputes. A federally recognized tribe receives certain federal benefits and may no longer be subject to state civil regulatory laws on its lands. Federal recognition allows a tribe to establish Indian gaming activities consistent with federal law.

ENRD handled several cases this past year upholding the Department of the Interior's decisions. In *The Shinnecock Indian Nation v. Salazar*, a state-recognized tribe filed suit seeking to be placed on the list of federally recognized tribes. The district court dismissed three of the four claims for lack of jurisdiction. ENRD reached a settlement with the plaintiff to stay the case, allowing Interior to decide the petition for recognition on an expedited schedule. In *Schaghticoke Tribal Nation v. Kempthorne*, the Second Circuit, in a per curiam decision, affirmed a district court ruling on the reasonableness of the Secretary of the Interior's decision that the Schaghticoke Tribal Nation was not entitled to acknowledgment as an Indian tribe. The court rejected the Schaghticoke's claim that the decision resulted from a massive, public effort by the state to influence the Secretary's decision. In *McCrary v. Ivanof Bay Village*, a district court dismissed a challenge to the authority of the Department of the Interior to recognize Ivanof Bay, an Alaska native village, as a federally recognized tribe.

### Defending Tribal and Federal Interests in Water Adjudications

The Division continued to successfully represent the interests of Indian tribes in complex water rights settlements and adjudications. The Division worked with the Shoshone-Paiute Tribes, which straddle the border of Idaho and Nevada, and third parties to resolve the tribes' water rights claims in Nevada. Congress approved this agreement through enactment in 2009 of the "Shoshone-Paiute Tribes of Duck Valley Water Rights Settlement Act." The settlement protects tribal water rights and authorizes approximately \$60 million to rehabilitate and maintain the Duck Valley Irrigation Project and to enhance fish and wildlife habitat.

### Protecting Tribal Hunting, Fishing, and Gathering Rights

The Division litigates to preserve treaty-protected tribal hunting, fishing, and gathering rights. In *United States v. Washington*, the United States joined tribal plaintiffs in claiming that culverts owned and maintained by the State of Washington block salmon and other anadromous fish from accessing habitat and violate the tribes' treaty fishing rights. In 2007, the district court ruled in favor of the tribes and United States, holding that the treaties impose "a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest." The Division and the tribes went to trial last year seeking to establish the number of culverts in violation of the tribal fishing right and the standard to which the culverts must be maintained. The court has not yet ruled on these issues.

## Upholding Authority to Acquire Land in Trust for Tribes

ENRD continues to defend successfully the Department of the Interior's authority to acquire land in trust for tribes. For example, in *State of New York v. Salazar*, a district court rejected numerous constitutional and statutory challenges raised by opponents to a proposed trust land acquisition for the Oneida Indian Nation of New York. Courts also upheld agency decisions related to the acquisition of trust lands for tribes in *Butte County v. Hogen*; *Stop the Casino 101 Coalition v. Salazar*; and *Patchak v. Salazar*.

## Defending Agency Land Holdings

The Division had favorable outcomes last year in three disputes challenging the validity of land transactions and holdings by federal agencies related to Indian disputes going back as far as a century. ENRD secured a dismissal in *Cheyenne-Arapaho v. United States*, protecting the major grazing research facility of the Department of Agriculture and the El Reno Federal Penitentiary of the Bureau of Prisons. The tribes had sued under the Quiet Title Act (QTA) seeking a declaratory judgment that they had a reversionary beneficial interest in the 9,493-acre Fort Reno Military Reserve west of Oklahoma City that had been part of the tribes' 1869 Executive Order Reservation. The tribes were held to have been on notice that the United States claimed title to Fort Reno when Congress transferred jurisdiction over 1,000 acres of Fort Reno to the Bureau of Prisons in 1937 and transferred the balance to the Department of Agriculture in 1948 for use in civilian agricultural research.

In *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States Army Corps of Eng'rs*, the tribe brought suit against the Corps seeking a declaration that the 1889 Act of Congress dissolving their prior reservation never took effect and an order compelling the Corps to evaluate federally owned properties within the former reservation for inclusion in the National Register of Historic Places. The D.C. Circuit affirmed the district court's decision, holding that the Indian Claims Commission Act's statute of limitations barred the tribe's claims and that the Corps did not have a duty under the National Historic Preservation Act to evaluate federally owned properties for inclusion on the National Register of Historic Places.

In *Mesa Grande Band v. Salazar*, the tribe sought to compel the Secretary of the Interior under the APA to invalidate land patents issued to a neighboring tribe in 1893 and have the patents reissued in the tribe's name. The court held that the QTA preserves the United States' immunity from challenges to lands held in trust for Indians, but also that the claims accrued well outside the QTA's 12-year statute of limitations.

## Defending Against Tribal and Individual Indian Breach-of-Trust Claims

The Division represents the United States in nearly 100 cases brought by Indian tribes demanding accountings and damages based on claims of breach of trust and mismanagement relating to funds and nonmonetary assets (such as timber rights, oil and gas rights, grazing, mining, and other interests) on some 45 million acres of land held in trust for the benefit of the tribes. Many of these

cases are in settlement negotiations or formal alternative dispute resolution (ADR) processes while others are in litigation. The cases are factually and legally complex and cover many decades of economic activity and resource management on tribal trust lands. The Division has balanced its duties to defend client programs with its obligation to make whole any tribes wronged by asset management practices.

In *United States v. Navajo Nation*, the U.S. Supreme Court unanimously reversed the Federal Circuit's judgment that the United States was liable for up to \$600 million for an alleged breach of the Secretary of the Interior's trust duties in approving amendments to a Navajo coal lease. The tribe claimed damages for the Secretary's decision not to impose a royalty rate increase on a Navajo coal lease as requested by the tribe, but instead to order the parties to the lease to attempt a negotiated amendment to a broad range of coal lease terms, and later to approve the negotiated lease amendments. In a 2003 decision, the Supreme Court held that the Indian Mineral Leasing Act, which governed the lease, did not create trust duties that could have given rise to the tribe's claim for compensation. The Federal Circuit held on remand that a claim could still proceed because the complaint alleged violations of other statutes -- the Navajo-Hopi Rehabilitation Act, Surface Mining Control and Reclamation Act, and Federal Oil and Gas Royalty Management Act -- that created trust duties. Finding violations of specific provisions of the three statutes, and of common law duties arising from "comprehensive control" over Indian coal leasing, the Federal Circuit held that the United States was liable to the tribe in damages. The Supreme Court again reversed, holding that the statutes relied on by the Federal Circuit did not apply to the conduct challenged. It held that in the absence of a "specific, applicable, trust-creating statute or regulation that the Government violated . . . neither the Government's 'control' over coal nor common-law trust principles matter."

In another case, plaintiffs sought, in damages from the United States, millions of dollars generated from the use of tribal land, mostly through casino gaming, by three federally recognized tribes -- the Shakopee Mdewakanton Sioux (Dakota) Community, the Prairie Island Indian Community, and the Lower Sioux Indian Community. Twenty thousand putative, individual descendants of the Mdewakanton Sioux in Minnesota claimed damages from alleged breaches of fiduciary duty and contract by the United States through mismanagement of the assignment system on lands purchased for support of certain Mdewakanton Sioux individuals in 1890s. The Federal Circuit decided two questions that the Court of Federal Claims had certified for review following interim rulings that were adverse to the United States. First, the Federal Circuit determined that 1888, 1889, and 1890 appropriation acts created neither rights of inheritance in properties purchased for Mdewakanton families nor any trust relationship with the families. The court ruled that the expenditure of funds pursuant to the acts was within the scope of the Secretary's discretion to spend appropriated funds. Second, the Federal Circuit ruled that a 1980 act converted United States' interests in lands into a trust for three Mdewakanton communities whereby the United States would hold legal title and the communities would hold equitable title to the relevant lands. The court decided that any interest held by the Mdewakantons was, in any event, terminated by the 1980 act. This ruling both preserved the

public fisc and prevented the undermining of the viability and membership determinations of the three tribes.

#### Litigating Cases Under the Indian Gaming Laws

ENRD continues to be involved in litigation defending the Secretary of the Interior's actions related to Indian gaming. The Division secured the dismissal of *Alabama v. Salazar*, which challenged the constitutionality of regulations implementing federal Indian gaming laws. In another notable success, the Ninth Circuit determined in *North County Community Alliance v. Salazar* that enforcement of the Indian lands requirement of the Indian Gaming Regulatory Act may be undertaken only by the National Indian Gaming Commission (NIGC) and states – not private citizens like the North County Community Alliance. This opinion prevented a private party from usurping the enforcement discretion vested in the NIGC or the state.

#### Interpreting the Apology to Native Hawaiians

In *Hawaii v. Office of Hawaiian Affairs*, the U.S. Supreme Court in a unanimous opinion agreed with the position of the United States that a 1993 federal enactment known as the "Apology Resolution," in which Congress apologized for the role that the United States played in overthrowing the Hawaiian monarchy in the late 19th century, did not strip Hawaii of its authority to alienate its sovereign territory, which authority was granted to Hawaii in the 1959 federal act that admitted Hawaii into the Union as a state. The Supreme Court of Hawaii had relied on the Apology Resolution to issue an injunction prohibiting Hawaii from alienating that land pending resolution of native Hawaiians' land claims that the court described as "unrelinquished."

*Purpose of the Apology Resolution: To acknowledge the 100<sup>th</sup> Anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii*

— Pub. L. 103-150 (November 23, 1993)

## SUPPORTING THE DIVISION'S LITIGATORS

### Improving Document Handling

The Division is continually working to improve its ability to collect, produce, and preserve needed documents. It has established cooperative working relationships with client agency staff to develop standard procedures for document collection and production efforts supporting litigation. This collaborative approach has streamlined the exchange of information with agencies and fostered more efficient and timely document processing. In fiscal year 2009, ENRD also developed training for agency staff on the new provisions of the Federal Rules of Civil Procedure affecting document collection, retention, and preservation. The Division also rolled out new software designed to assist attorneys with electronic privilege reviews by identifying duplicate and near-duplicate documents, and quickly highlighting the differences. The software will save time and, by grouping similar documents together, help to ensure consistency in document treatment.

### Managing Its Financial Resources

The Division received top marks last year on its fiscal responsibility and performance management scorecard in every rating category for which it is monitored. Additionally, as part of the Department's Offices, Boards and Divisions (OBDs) community, ENRD earned a clean audit opinion for the fiscal year 2009 Consolidated Financial Statements. During the course of the annual audit of the Department's financial statements, the auditors noted that ENRD and the other OBDs had no significant deficiencies in financial information system internal controls. The Division adroitly managed a very active Expert Witness Program. In fiscal year 2009, ENRD's Office of the Comptroller issued 385 new expert witness contracts, obligating more than \$36 million.

### Expanding and Upgrading Technology Services and Resources

In 2009, ENRD installed new desktop personal computers (PC) on every employee's desk, completing the third and final phase of the JCON4 implementation. The PC employs a new operating system and includes a fast dual core CPU, increased memory, and a large flat screen monitor. It is one of the highest performing and most energy-efficient PCs in the Department, meeting the standards for Energy Star, EPEAT Gold (Environmental Product Environmental Assessment Tool), and the EU Restrictions on Hazardous Substances. At the time the PCs were installed in their offices this year, Division attorneys were eligible to receive new government laptops. These lightweight laptops meet all IT security requirements, and provide attorneys with wireless remote access while away from the office.

### Greening the Division

Over the past year, the Greening the Government (GtG) Committee has continued to work actively on environmental and sustainability issues in ENRD. In January 2009, the Division became a partner in the ABA-EPA Law Office Climate Challenge, having adopted and instituted ENRD-wide, best paper management practices. These practices include purchasing office paper with at least 30%

recycled content, recycling discarded office paper, and using double-sided copying and printing for most documents. In April 2009, the GtG Committee unveiled an internal website featuring GtG best practices and providing information about its current activities. Last June, the GtG Committee established a prototype "Reuse Center" to encourage employees to reuse supplies for projects. These centers have now been set up in many of the common areas throughout ENRD, including copy and mailrooms. The GtG Committee has also established best practices for reuse of supplies. Last September, the GtG Committee launched a bicycle subsidy commuter program. A change in Internal Revenue Service provisions effective in January 2009 made it possible for employers to offer a bicycle subsidy to employees. ENRD received Department authorization to develop a pilot program that would provide such benefits to its bicycle commuters. Under the program, bicycle commuters can receive up to \$20 each month of non-taxed income for the purchase, improvement, repair, and storage of bicycles used regularly to commute to work. Commuters can elect to receive either a bicycle subsidy or Metro benefits for any given month. Also in September, the GtG Committee worked with the Executive Office to assure adequate recycling opportunities for employees during the Division's Annual Office Cleanup Day. The Committee used the Cleanup Day to advertise and fill the coffers of the Reuse Centers.