

UNITED STATES DEPARTMENT OF JUSTICE

ENVIRONMENT AND NATURAL RESOURCES DIVISION  
FISCAL YEAR 2004  
SUMMARY OF LITIGATION ACCOMPLISHMENTS

**CONTENTS**

FOREWORD

CRIMINAL ENFORCEMENT OF OUR NATION'S  
ENVIRONMENTAL LAWS

PROTECTING THE AIR, LAND AND WATER

ENSURING CLEANUP OF HAZARDOUS WASTE

PROMOTING RESPONSIBLE STEWARDSHIP OF AMERICA'S  
NATURAL RESOURCES

PROMOTING NATIONAL SECURITY AND MILITARY  
PREPAREDNESS

DEFENDING VITAL FEDERAL PROGRAMS AND INTERESTS

PROTECTING INDIAN RESOURCES AND RESOLVING INDIAN  
ISSUES

SUPPORTING THE DIVISION'S LITIGATORS

## **FOREWORD**

I am pleased to present the Environment and Natural Resources Division's ("ENRD") Accomplishments Report for Fiscal Year 2004. The Division continues to work tirelessly to enforce and defend America's environmental laws, ensuring the air we breathe is clean, the water we drink pure, and the majestic American landscape preserved for generations to come. This year produced even more record-breaking accomplishments of which all Americans can be proud. The Division again secured cleanup costs, civil penalties and criminal fines for the United States Treasury that far exceeded ENRD's budget and provided incalculable benefits for human health and the environment.

Thanks to vigorous enforcement of existing laws, polluters across the nation agreed to spend in excess of \$4 billion in the last fiscal year – topping the previous record of just over \$3 billion in fiscal year 2002 – to take corrective measures protecting the nation's health, welfare and environment. The last two fiscal years were also record-breaking periods for assessment of civil penalties. In fiscal year 2004, courts imposed more than \$181 million in fines for violations in environmental cases, second only to fiscal year 2003's recovery of \$203 million, which was itself almost \$80 million more than any previous year in ENRD's enforcement history. The Division also obtained the largest civil penalty settlement ever in a wetlands enforcement case brought on behalf of the Environmental Protection Agency.

The Division's accomplishments in the environmental area cannot be summed up simply in numerical terms: ENRD also achieved immediate, on-the-ground benefits for the American people. For example, in Massachusetts a local power plant agreed to a settlement that will improve air quality significantly for Boston school children and North Shore commuters, as well as restore a salt marsh in Chelsea and construct a new commuter bike path. Among the projects to which plant owner Exelon Mystic LLC committed is retrofitting 500 Boston school buses with pollution control equipment, to be supplied by the company with ultra low-polluting diesel fuel. This project alone will benefit more than 28,000 school children who ride the buses every day, reduce tailpipe emissions by

more than 90 percent, and make Boston the first major American city to have retrofitted its entire school bus fleet.

Nor can the Division's accomplishments be summed up solely by reference to its criminal and civil enforcement actions. Much of ENRD's workload continued to be non-discretionary cases, whether in the form of defending EPA regulations or other federal agency decisions, or bringing eminent domain actions pursuant to Congressional direction. These cases, along with our litigation regarding Indian issues, repeatedly put our lawyers on the cutting edge of the law. As evidence of this, eight of the eighty-one cases accepted by the Supreme Court for argument in the last term were Division cases. And, as evidence of the quality of the Division's work, the position advanced by ENRD on behalf of the United States prevailed in all but one of those cases decided by the Court.

I have had the privilege of serving as Assistant Attorney General for the Environment and Natural Resources Division for almost three years now, and I can readily say it has been one of the most challenging yet rewarding positions I have held in my legal career. Hardly a week goes by without one or more Division cases featuring prominently in the media or without meetings in which difficult decisions must be made. What makes the challenge a pleasure is the opportunity to work with such a wonderful group of people. The Division's lawyers and support staff bring intelligence and dedication to their cases, making my job immeasurably easier. They have served the American people well and I am proud to serve with them.

Thomas L. Sansonetti  
Assistant Attorney General  
Environment and Natural Resources Division  
December 2004

---

**CRIMINAL ENFORCEMENT OF OUR NATION'S  
ENVIRONMENTAL LAWS**

**Transportation of Hazardous Materials.** The Departments of Justice and Transportation completed the first full year of this joint effort to combat illegal shipment of hazardous materials by air, highway, rail and water. The "hazmat" initiative is addressing critical homeland security issues as well as the significant public health and environmental consequences of crimes involving transportation of hazardous materials. In *United States v. Emery Worldwide Airlines*, the defendant pled guilty to a twelve-count information charging felony violations of the Hazardous Materials Transportation Act and was sentenced to pay a \$6 million fine, complete a three-year term probation, and initiate an environmental compliance program. Emery specializes in shipping heavy cargo by air and land, including hazardous materials. DOT regulations require the operator of an aircraft transporting an item classified as hazmat to give the pilot written notification. Audits conducted by Emery revealed the company was not following proper procedures, but did not take constructive steps to correct the problem for well over a year.

In *United States v. Solar International and Shipping*, the defendant company, and Hung Tao Chou and Chin Wang, two of its employees, were indicted and charged with conspiracy to make false statements and with use of a false emergency response telephone number on paperwork that accompanied numerous containers of hazardous materials shipped in 1998 and 1999 in violation of the Hazardous Materials Transportation Safety Act ("HMTSA"). All three defendants were further charged with substantive HMTSA violations, and Solar and Chin Wang were also charged with false statement violations.

**Vessel Pollution Enforcement.** The Vessel Pollution Initiative is an ongoing, concentrated effort to prevent vessels from illegally discharging pollutants into the oceans, coastal waters and inland waterways. Since 1990, over 135 environmental prosecutions have resulted from such illegal activity. The Vessel Pollution Initiative contributed to a number of important new prosecutions again this year. In *United States v. OMI Corporation*, the company pled guilty to falsifying documents in an effort to cover up illegal dumping of thousands of gallons of waste oil at sea in violation of the Act to Prevent Pollution from Ships ("APPS"). The

company was sentenced to pay a \$4.2 million dollar fine, half of which went to a crew member whistleblower, and will also serve three years' probation. Connecticut-based OMI operated the *M.T. Guadalupe*, a tanker that carried various types of petroleum products, including jet and diesel fuel. The captain and chief engineer of the *M.T. Guadalupe* previously pled guilty to falsifying the ship's oil record book, to asking crew members to lie to the U.S. Coast Guard, and to asking engineers to conceal illegal oil discharge bypass pipes used during a five-month period in 2001.

Similarly, in *United States v. Sabine Transportation Co.*, Iowa-based Sabine pled guilty to eight APPS violations, including the illegal dumping of 440 tons of diesel-contaminated grain, oil-contaminated bilge waste, and contaminated diesel fuel and plastic waste, as well as a failure to notify and two false oil record violations. The company was sentenced to pay a \$2 million fine with \$1 million to be paid to three employee whistleblowers. Sabine operated a fleet of eight U.S.-flagged ships engaged in similar discharge violations on the high seas.

**Combating Worker Endangerment.** In *United States v. Atlantic States Cast Iron Pipe Company, a Division of McWane, Inc., et al.*, the company and five current or former managers and supervisors were charged in a 35-count indictment with conspiracy to violate the Clean Water Act ("CWA") and the Clean Air Act ("CAA"), to making false statements and to obstructing the Environmental Protection Agency ("EPA") and the Occupational Safety and Health Administration ("OSHA") and to defeating the lawful purpose of OSHA and EPA. Atlantic States manufactured ductile cast iron pipes for the water and sewer industry at its Phillipsburg, New Jersey facility. The superseding indictment charges the defendants with routinely violating their CWA permits by discharging petroleum-contaminated water and paint into storm drains leading to the Delaware River; repeatedly violating their CAA permits by, among other things, burning tires and excessive amounts of hazardous waste paint; systematically altering accident scenes and plant conditions in preparation for OSHA inspections; and routinely misleading federal, state, and local officials investigating environmental and worker safety violations.

ENRD's Environmental Crimes Section convicted 19 individuals and corporations for fraudulently obtaining training certificates required to conduct asbestos and lead paint remediation and for using the certificates to win lucrative abatement contracts at federal facilities, schools, hospitals and other public buildings. In *United States v. Ethel Holmes*, the jury convicted the defendant on 12 counts of conspiracy, mail fraud and false claims following a week-long trial. Holmes was president of Holmes Environmental, Inc., an asbestos and lead abatement contractor that obtained false training certificates to enable its employees to perform abatement work at the Pentagon and other facilities. The company from which the certificates were purchased had previously been sentenced to a \$30,000 fine and two years' probation. That company's owner was sentenced to 15 months imprisonment followed by three years' supervised release.

Other asbestos certificate prosecutions yielded guilty pleas to false statement charges. Those cases include *United States v. Marcor Remediation*, (company and general manager); *United States v. Macsons, Inc.*, (company and contract representative); *United States v. Potomac Abatement, Inc.*, (company and operations manager); and *United States v. ETMS*, (company, president and vice-president). Fines imposed in the four cases totaled \$292,000; \$100,000 in restitution was also ordered to be paid.

**Prosecuting Hazardous Waste and Clean Air Act Violations.** In *United States v. Rhodia Inc.*, the defendant company pled guilty to two Resource Conservation and Recovery Act ("RCRA") storage violations and was sentenced to pay a \$16.2 million fine, \$1.8 million in restitution, and to perform 1,000 hours of community service. Rhodia operated the Silver Bow Plant in Montana, which manufactured elemental phosphorus, the waste from which spontaneously ignites when exposed to air. From January 1999 until August 2000, Rhodia illegally stored carbon brick and precipitator dust contaminated with elemental phosphorus. The company also illegally stored elemental phosphorus sludge. Rhodia was ordered to clean up the now defunct plant and was placed on a five-year term of probation.

*United States v. Hormoz Pourat*, another hazardous waste prosecution, resulted in a guilty plea to RCRA and conspiracy violations. Mr. Pourat was a vice-president of AAD Distribution and Dry Cleaning Services, one of the largest handlers of dry cleaning waste in California before it was shut down in January 2001. Between January 1999 and July 2000, Mr. Pourat admitted to storing drums of tetrachloroethylene (PERC) waste at AAD after the facility had exceeded its storage permit limit. Mr. Pourat pled guilty to a similar scheme at Right Choice, Inc., where he served as manager. He was sentenced to serve 37 months' incarceration, pay \$1.29 million in cleanup costs, and complete a three-year term probation.

In *United States v. John Littlehale*, Mr. Littlehale, a vice-president of Multi-Color Corporation, falsely represented that a new press in Scottsburg, Indiana was not in operation, and when it was working, claimed proper air pollution control devices had been installed when he knew this was not true. Mr. Littlehale pled guilty to making a false statement in violation of the Clean Air Act and was sentenced to serve 18 months' incarceration, pay a \$4,000 fine, and perform 50 hours of community service. A co-defendant pled guilty to misprison of a felony, the knowing concealment of and failure to report a felony committed by another, and was sentenced to serve six months of home detention as part of a five-year term probation and ordered to perform 500 hours of community service.

**Prosecuting Environmental Fraud.** In *United States v. William Murphy*, defendant Murphy pled guilty to 28 counts of counterfeiting and misbranding pesticides and was sentenced to serve 41 months incarceration, three years' supervised release, and pay \$45,305 in restitution to the Alabama Department of Agriculture. Mr. Murphy, operating under the company name Sierra Chemical, sold these pesticides to municipalities in Alabama and Florida for mosquito eradication in connection with West Nile Virus.

In *United States v. Thomas Michael Hayes*, the defendant was convicted of conspiracy to violate the Clean Air Act, making false statements to the EPA, mail fraud and obstruction of justice. He was sentenced to 57 months' incarceration and three years supervised release, and required to

pay a \$1,000 fine. Mr. Hayes was a vice-president of Saybolt Inc., which performed sampling and analysis of petroleum products. Mr. Hayes ordered the destruction of laboratory data falsified by company executives. He was convicted of carrying out the conspiracy at Saybolt's New Jersey and Massachusetts facilities.

### **Enforcing Wildlife Protection Laws.**

In *United States v. Marousz Chomicz*, the defendant pled guilty to a four-count information charging him with smuggling and Lacey Act violations. Mr. Chomicz, president of a caviar company located in Poland, was part of a conspiracy in which couriers were paid to smuggle black market caviar from Europe to Miami without import documents required under the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). Mr. Chomicz was directly responsible for the smuggling of 619 kilograms of caviar worth as much as \$1.8 million. He was sentenced to 30 months' incarceration.

Another such prosecution was *United States v. Leong Tian Kum*, in which the defendant pled guilty to smuggling protected reptiles into the United States and laundering money from his smuggling activities. Mr. Kum used overnight delivery services to ship to the United States wildlife declared as handicrafts, art or stuffed animals. Federal agents intercepted over 170 tortoises, turtles, tree monitors, water dragons and other protected animals valued as high as \$200,000. These animals are protected by CITES and may only be traded when accompanied by proper permits. Mr. Kum's co-defendant, Reid Turkowski, also was convicted and sentenced to 10 months imprisonment. Turkowski was the owner of Captive Bred Specialities, which purchased reptiles from Mr. Kum for resale at reptile shows in the Midwest. A second confederate of Mr. Kum, Singapore-resident Lawrence Wee Soon Chye, was sentenced to 37 months imprisonment for illegally shipping animals from Singapore and Bangkok to customers in the United States identified through the Internet.

In *United States v. Mississippi Potash, Inc.*, the defendant company pled guilty to "taking" (i.e., killing) migratory birds in violation of the Migratory Bird Treaty Act ("MBTA") and was ordered to pay a \$15,000

fine. The company had illegally discharged waste products from its mining operations in Carlsbad, New Mexico, into Laguna Toston, a natural playa lake. The waste products included significant amounts of sodium salts which can be fatal to migratory birds. The company was also required to fund a remediation plan by placing \$237,500 in escrow.

The defendant in *United States v. Phelps Dodge Morenci, Inc.*, also pled guilty to violating the MBTA by taking migratory birds illegally, and was sentenced to pay a \$15,000 fine and undertake a corrective action plan to prevent bird deaths. In addition, the company agreed to donate \$10,000 to one or more federally-licensed bird rehabilitators to care for sick and/or injured birds and to fund a study of projects to create or enhance migratory bird habitat within the Gila/Salt/Verde River Ecosystem. Some of the impounded waters discharged during the mining process at the Morenci Mine site contained acid and other chemical solutions harmful and at times fatal to migratory birds. Dead birds were found near these impoundments.

## **PROTECTING THE AIR, LAND AND WATER**

**Reducing Air Pollution from Coal-Fired Power Plants.** The Division continues to litigate vigorously Clean Air Act cases against operators of coal-fired electric power generating plants. Violations arise when companies engage in major life extending projects on aging facilities without first installing state of the art pollution controls, as the law requires. These violations result in tens of millions of tons of excess air pollution which adversely affect the health of the elderly, the young and asthma sufferers and lead to forest degradation, waterway damage and reservoir contamination. The settlements achieved to date by the Division with operators of coal-fired power plants will remove 688,000 tons of pollutants from the air annually.

In January 2004, the Division expanded its enforcement initiative by suing East Kentucky Power Cooperative, which emits over 85,000 tons of sulfur dioxide and nitrogen oxides each year. In June 2004, the Division sued the South Carolina Public Service Authority and simultaneously lodged a settlement under which that utility will spend over \$400 million to reduce its pollutant emissions by more than 69,000 tons per year, pay a \$2 million

civil penalty, and perform \$4.5 million in environmental mitigation projects.

In September 2004, the Division sued Mirant Mid-Atlantic Corp. and lodged a settlement under which that company will spend over \$130 million to reduce emissions of nitrogen oxides by over 28,000 tons a year, pay a \$500,000 civil penalty and perform \$1 million in mitigation projects. The Division also entered into an alternative dispute resolution process in the largest of the power plant cases filed to date, *United States v. American Electric Power Co.*, and reactivated litigation in *United States v. Alabama Power Co.*, which had been administratively stayed by the court.

**Addressing Air Pollution from Oil Refineries.** The Division also made significant progress this year in its national initiative to combat Clean Air Act violations within the petroleum refining industry. Among other accomplishments, the Division secured comprehensive settlements with Chevron U.S.A., Inc. and CITGO Petroleum Corp. The Chevron settlement covers operations at five petroleum refineries in four states. Mississippi, Utah, Hawaii and the Bay Area Air Quality Management District in California participated as plaintiff-intervenors in the settlement. Under the settlement, Chevron will undertake specified measures to reduce pollution, including implementation of innovative technologies to reduce emissions of nitrogen oxides and sulfur dioxide from refinery processes by approximately 9,600 tons per year at an estimated cost in excess of \$275 million. Chevron will also pay a civil penalty of \$3.5 million and spend at least \$4.55 million to perform supplemental environmental projects ("SEPs").

A proposed consent decree settlement with CITGO Petroleum Corporation requires CITGO to spend an estimated \$320 million to install and operate innovative technologies to reduce pollutants at refineries in Illinois, Louisiana, Texas, New Jersey and Georgia. These controls are expected to reduce emissions of nitrogen oxides by more than 7,000 tons and emissions of sulfur dioxides by more than 23,000 tons a year. The decree also requires CITGO to pay a \$3.6 million civil penalty and spend at least \$5 million on a SEP to further reduce nitrogen oxide emissions. With these additional settlements, the Division's initiative will have addressed more

than 40% of the nation's refining capacity and will reduce air pollutants by more than 166,000 tons per year.

**Reducing Air Pollution at Other Diverse Industrial Facilities.** The Division made additional significant gains in improving the nation's air quality by concluding enforcement actions against facilities operating in diverse industries including wood cabinet manufacturing (*United States v. Capital Cabinet Corp.*), molybdenum and copper mining (*United States v. Phelps Dodge Sierrita*), refrigeration manufacturing (*United States v. True Manufacturing*), silica sand processing (*United States v. J.R. Simplot Company*) and steel mills (*United States v. CF&I Steel, L.P., d/b/a Rocky Mountain Steel Mills*). Those efforts addressing Clean Air Act violations resulted in the United States securing commitments by defendants to perform \$2.57 million in facility improvements, to undertake SEPs in local communities valued at \$400,000, and to pay more than \$6.6 million in civil penalties.

**Innovative Pollution Controls to Reduce Air Pollution at Commercial Egg Production Facilities.** In an unprecedented Clean Air Act settlement, Buckeye Egg Farm, L.P., Ohio's largest commercial chicken egg producer (responsible for 4% of the nation's total production in 2002), agreed to install and test innovative pollution controls at its three giant Ohio facilities to dramatically cut air emissions of particulate matter and ammonia. Particulate matter has been linked to aggravated asthma,

breathing difficulties, and chronic bronchitis, among other ailments. Ammonia is a serious lung irritant. The combined particulate matter and ammonia controls are also expected to reduce fly infestations, the subject of repeated state and private litigation. The settlement ensures that families residing near the massive farms will see continuing improvement in the air they breathe. Buckeye will also pay a civil penalty of approximately \$880,600.

**Upholding EPA's Clean Air Act Regulatory Program.** The Division had numerous successes in defending EPA's regulatory program under the Clean Air Act. Most notably, in *Alaska Department of Environmental Conservation v. EPA*, the Division obtained a favorable appellate ruling

upholding EPA's authority to issue findings of noncompliance and a stop construction order with respect to a prevention of significant deterioration ("PSD") permit issued by Alaska for a new diesel generator at a major zinc mine. The decision was affirmed by the Supreme Court, which sustained EPA's interpretation of the Clean Air Act as granting the agency authority to block construction of a major new pollutant-emitting facility permitted under a state implementation plan-approved program where EPA found the state's determination of "best available control technology" unreasonable.

**Upholding EPA Actions on State Implementation Plans.** The Division also obtained multiple rulings upholding EPA decisions involving implementation of air quality standards in various parts of the country through the state implementation plan ("SIP") process. In *Environmental Defense v. EPA*, the Court of Appeals for the Second Circuit upheld EPA's full approval of the New York portion of the New York City area SIP and attainment demonstration for the one-hour ozone standard. Rejecting numerous claims that EPA had not properly interpreted or applied statutory requirements, the court upheld EPA's interpretation and application of the statute.

Similarly, in *BCCA Appeal Group v. EPA*, the Fifth Circuit rejected multiple petitions for review of related EPA actions regarding the ozone attainment SIP for Houston. The court found EPA's reliance on the state's photochemical grid modeling was neither arbitrary nor capricious because the model provided a reasonable indication, supported by the record, that the measures and procedures in the SIP would lead to attainment of the ozone standard.

In *Sierra Club v. EPA*, the Seventh Circuit Court of Appeals rejected petitions for review of a final rule determining that the St. Louis ozone nonattainment area had attained one-hour ozone National Ambient Air Quality Standards ("NAAQS") and approving the implementation plan for the area. And in *Greenbaum v. EPA*, the Sixth Circuit upheld EPA's decision to redesignate Cuyahoga and Jefferson Counties, Ohio, to attainment status for particulate matter.

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

At ENRD's request, the District Court for the Southern District of Ohio entered two consent decrees that will require the Metropolitan Sewer District of Greater Cincinnati to spend more than one billion dollars to bring its aging sewer system into compliance with the Clean Water Act. For years, Cincinnati and Hamilton County illegally discharged untreated sewage through overflow pipes from sanitary sewers and outfalls ("sanitary sewer overflows," or "SSOs") when it rained. Additionally, inadequate capacity in those portions of the sewer collection system that also accept storm water ("combined sewer overflows," or "CSOs") caused the discharge of an estimated six billion gallons of untreated sewage each year, much of which found its way into residents' yards and basements. The two decrees will bring about CSO and SSO compliance and require defendants to implement a comprehensive program to prevent, clean up, and compensate homeowners for sewage entering their basements. The decrees also require the defendants to pay \$1.2 million in civil penalties and undertake SEPs valued at \$5.3 million. The State of Ohio joined in the settlement.

Also, in one of the largest sewage cases in our nation's history, the United States and a coalition of co-plaintiffs reached a \$2 billion settlement with the City of Los Angeles resolving years of sewage spills. Los Angeles operates the largest sewage collection system in the country with approximately 6,500 miles of lines. The consent decree, a groundbreaking effort to address all causes of sewage spills and odors in the City, requires Los Angeles to repair and replace its aging infrastructure and to work proactively to prevent future problems. In addition to the injunctive relief, the proposed decree requires the city to perform \$8.5 million in SEPs and pay civil penalties of \$1.6 million.

Courts also entered consent decrees settling Clean Water Act violations arising from operation of wastewater collection and treatment systems with five smaller municipalities during the past year: Lebanon, Missouri; Branford, Connecticut; South Haven, Indiana; and Williamstown and North Adams, Massachusetts. The consent decrees provide for the governments to spend approximately \$22 million in injunctive relief to

bring their sewage treatment systems into compliance with the CWA, to pay civil penalties totaling \$722,000 and to perform SEPs worth \$364,000.

**Conserving the Nation's Wetlands.** Working in concert with various U.S. Attorney's Offices, the Division has continued to take successful enforcement action where unlawful discharge of dredged or fill material has damaged or destroyed wetlands and waterways. Most notably, in August 2004, ENRD lodged a proposed consent decree resolving an enforcement action for the unauthorized discharge of fill material in wetlands and other waters of the United States at a private ski and golf resort near Yellowstone National Park. The defendants' violations had adversely affected several tributary streams of the Gallatin River, a world-renowned fishery. The settlement calls for the Yellowstone Mountain Club to pay a \$1.8 million civil penalty, the largest ever in an EPA wetlands enforcement case. Defendants will also restore damaged wetlands and create new ones as mitigation. Overall, the Division's wetlands enforcement efforts yielded assessments of civil penalties exceeding \$2.9 million.

**Controlling Storm Water Run-off at Construction Sites.** In a strong start to a new national initiative designed to assure compliance with Clean Water Act provisions governing discharge of storm water from large construction sites, the Division lodged a consent decree with the nation's largest retailer and one of the country's largest commercial developers, Wal-Mart Stores, Inc. The decree resolved claims that Wal-Mart violated the CWA's provisions at 24 locations in nine states. Wal-Mart builds more than 200 stores each year across the United States. Runoff from construction sites is a primary contributor to the impairment of water quality in our nation. The United States was joined in the settlement by the States of Tennessee and Utah. Under the proposed decree, Wal-Mart will pay a civil penalty of \$3.1 million, undertake a SEP to protect sensitive wetlands or waterways, and implement a substantial compliance program that includes requirements for construction planning, training, inspections and record keeping. The settlement with Wal-Mart will serve as a model in ongoing negotiations with other large commercial and residential developers who engage regularly in substantial construction activities.

**Continuing Progress to Clean up Contaminated River Systems.** The Division made significant progress in efforts to secure four river cleanups that are unprecedented in scope.

Two consent decrees were entered as part of the Division's effort to require seven paper companies to clean up a 39-mile stretch of the Fox River flowing into Green Bay, Wisconsin, which became contaminated with PCBs as a result of paper manufacturing, and to pay associated natural resource damages ("NRD"). One decree requires two companies to dredge the uppermost section of the Fox River at an estimated cost of \$66 million; a second decree recovers \$10.8 million for specified NRD projects and \$1.6 million for the United States from a third company located down river. Additionally, ENRD assisted EPA in negotiating an administrative order on consent ("AOC") with two paper companies that have agreed to perform the design work, estimated to cost \$20 million, for remediating the balance of the river. The eventual cleanup and NRD restoration costs are expected to exceed one billion dollars.

Additional progress was made in the United States' effort to secure cleanup of the Hudson River, which is contaminated with polychlorinated biphenyls ("PCBs") discharged by the General Electric Co. ("GE"). This year, the Division assisted EPA in negotiating a second complex AOC, which provides for GE to develop a multi-million dollar remedial design for dredging the river, an additional payment of \$15 million to the Superfund, and \$13 million to offset government costs of overseeing the design process. This AOC and one negotiated in 2002 collectively recover \$20 million in past costs for the Superfund, more than \$15 million in government oversight costs, and, because GE will perform millions of dollars of work under the two orders, spare the Superfund that expenditure.

The Division also assisted EPA in negotiating AOCs with more than 30 parties responsible for contamination of the Passaic River in New Jersey. Collectively, the AOCs will provide more than \$10 million toward a remedial investigation/feasibility study ("RI/FS") along a 17-mile stretch of the river and the performance of a multi-million dollar RI/FS of the Newark Bay, thus also saving Superfund resources for other cleanups.

Another consent decree involving river contamination was reached with Tecumseh Products Company, and will require that company to implement an upper river cleanup effort - estimated to cost \$28 million - on the Sheboygan River in Wisconsin and reserve all claims with respect to future work in downstream portions of the river. The remedial work will be allowed to go forward while the parties evaluate and negotiate their next steps. The decree also provides for Tecumseh to reimburse the United States at least \$2.1 million in past response costs.

**Restoration of River Habitat.** ENRD reached a settlement in August 2004 with eight companies which will pay nearly \$60 million to restore natural resources in the Grand Calumet River and Indiana Harbor Canal. Although located in one of the most heavily industrialized areas of the country, the river and canal support a variety of fish and wildlife. Interspersed among the area's factories, housing developments and refineries are remnants of important natural features including globally rare dune and swale habitat, prairie wetlands, savannas, marshes and swamps, as well as the Indiana Dunes National Lakeshore. Federal and state agencies worked cooperatively to determine the extent of damage from a century of industrial releases of oil and other hazardous substances into the waterway. The proposed settlement provides more than \$53 million to clean up, restore and protect the waterways and surrounding areas, protect permanently 233 acres of land that contain important fish and wildlife habitat, and pay \$2.7 million to state and federal agencies to reimburse them for damage assessment costs.

**Defending EPA Standard-Setting.** The Division obtained an important ruling upholding EPA's emission standards for engines used in the largest ocean-going vessels - including oil tankers - in *Bluewater Network v. EPA*. The U.S. Court of Appeals for the District of Columbia Circuit found that EPA reasonably limited the rule to codifying emission standards currently used by engine manufacturers pursuant to the International Convention for the Prevention of Pollution from Ships ("MARPOL") treaty, and permissibly deferred consideration of more restrictive standards until a second rulemaking to be completed in 2007 to enable the agency to develop additional information on new technology.

## **ENSURING CLEANUP OF HAZARDOUS WASTE**

**Conserving Superfund Resources.** Through numerous judgments and settlements, the Division obtained commitments from responsible parties to clean up hazardous waste sites at costs estimated in excess of \$285 million and recovered more than \$92 million for the Superfund to help finance cleanups under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Superfund sites that will benefit include the San Gabriel Valley site in California, Commencement Bay site in Washington, Palmerton Zinc site in Pennsylvania, Plymouth Wood Treating Plant site in North Carolina, Liberty Industrial Finishing site in New York and the National Southwire Aluminum site in Kentucky. The Division also recovered more than \$700,000 to restore or replace damaged natural resources.

Five enforcement actions that could not be settled proceeded to trial: *United States v. JG-24, Inc.*; *United States v. E.I. DuPont de Nemours and Company*; *United States v. Pharmacia (f/k/a Monsanto)*; *United States v. Rayonier Inc.*; and *United States v. 175 Inwood Associates*. The United States prevailed on all or a portion of the issues tried in each case. The Division also prevailed on all issues in a suit tried the previous year, *United States v. Domenic Lombardi Realty, Inc.* These favorable rulings will provide strong precedential support for future enforcement actions.

**Pursuing Corporate Assets to Fund Cleanup Responsibilities.** The Division filed a civil complaint against three corporate defendants for CERCLA cost recovery and declaratory relief with respect to the Waste Disposal, Inc. Superfund site in Santa Fe Springs, California, and asserted a fraudulent conveyance claim against two of them, Powerine Oil Company, a defunct and insolvent refinery company that sent hazardous waste to the site, and Energy Merchant Corporation ("EMC"), Powerine's corporate parent and the recipient of a \$12.5 million "dividend" from Powerine that left Powerine insolvent. The Division seeks to void the purported \$12.5 million dividend under the Federal Debt Collection Procedures Act to ensure the funds will be available for site cleanup.

**Enforcing Cleanup Responsibilities In Bankruptcy Cases.** The Division's bankruptcy practice continued to grow. This year, ENRD represented the United States in numerous proceedings including the *Kaiser Aluminum*, *Union Financial*, *Philip Services*, *Fansteel*, *Horizon*, *Northwestern*, *Farmland*, *Washington Group*, *Plainwell*, *Special Metals*, *GenTek*, and *Black Pine* bankruptcies, where debtors had significant environmental cleanup responsibilities. The Division obtained agreements to provide more than \$175 million of funding or financial assurance for cleanup, reclamation, or natural resource restoration work. The Division also obtained allowed general unsecured bankruptcy claims of more than \$83 million to be paid in part by debtors under their plans of reorganization in the *Washington Group*, *Kaiser Aluminum*, *Philip Services*, *GC Quality*, *Pittsfield-Canfield*, *Farmland*, *Bethlehem*, *Keysor* and *Burlington* bankruptcies.

Of particular note this year, the Division successfully defended against several attempts by debtors to misuse bankruptcy law to evade legal obligations for public health and safety protection (e.g., *Philips Services*, *Horizon* and *Union Financial*) and used innovative trust instruments to provide for cleanup of contaminated properties. In the *Philips Services* bankruptcy, the United States successfully thwarted the debtor's plan to abandon Superfund sites it owned without providing for cleanup. In lieu of abandonment, the debtor transferred the sites to custodial trusts and agreed that governmental parties will receive the benefit of more than \$6 million of cleanup work. Similarly, in the *Union Financial* bankruptcy, the Division prevented the debtor from transferring property it owned without funding cleanup. After expedited hearings, the debtor agreed to provide over \$14 million. In the *Kaiser Aluminum* bankruptcy, the debtor agreed to transfer one of its contaminated properties to a custodial trust that will undertake cleanup work and provide funding to perform the work.

In these and others cases, ENRD was able to foster settlements that harmonized bankruptcy and environmental law. The

settlements enabled large companies to avoid liquidation and significant job loss by facilitating either reorganization or sale of ongoing operations. A number of our settlements also avoided abandonment of contaminated properties by debtors without provision of funding for cleanup.

**Cleaning Up Federal Facilities.** The Division successfully resolved litigation regarding cleanup of contaminated federal facilities on appropriate terms. In *United States Department of Energy v. Curry*, DOE contested unilateral administrative orders issued by the New Mexico Environmental Department for cleanup of the Los Alamos and Sandia National Laboratories. Following approximately two years of negotiations, the Division resolved the litigation through agreements that will govern cleanup of these laboratories. Similarly, in *United States v. Fitzsimmons*, ENRD negotiated a settlement between DOE and the State of Washington that resolved two related lawsuits regarding DOE's Hanford Reservation. This settlement established a new 10-year schedule for cleaning up certain radioactive wastes at Hanford while eliminating outdated and ineffective cleanup requirements DOE was alleged to have violated.

## **PROMOTING RESPONSIBLE STEWARDSHIP OF AMERICA'S NATURAL RESOURCES**

**Everglades Restoration.** The Division continues to work toward protection of the endangered Everglades ecosystem by acquiring land for addition to Everglades National Park and Big Cypress National Preserve through exercise of the power of eminent domain, as authorized by Congress and requested by the National Park Service. Related acquisitions on behalf of the U.S. Army Corps of Engineers took place to improve water deliveries to the Everglades.

**Defending Responsible Natural Resource Management.** The Division successfully defended multiple emergency challenges to a succession of salvage timber sales designed to recover burned-over timberlands in the Pacific Northwest. The sales were in furtherance of President Bush's Healthy Forests Initiative to reduce the risk of

catastrophic wildfire and improve the overall health and productivity of the nation's forests. The Division's victories will permit federal agencies to pursue goals of creating jobs and boosting local economies through salvage of millions of board feet of usable timber. These agencies can now take steps to prevent future catastrophic fires and restore habitats and ecosystems destroyed by the fires.

Environmental groups also challenged the revised Tongass Land Management Plan and seven major timber sale projects constituting the bulk of the timber available on the Tongass, alleging the plan and projects were arbitrary and capricious and relied on incorrect market demand projections. The Division succeeded in having that challenge dismissed on the merits.

The Division also won a notable victory in persuading a district court not to enjoin grazing on 1.3 million acres in Nevada. The court was persuaded by the actions the Bureau of Land Management ("BLM") had taken to improve conditions and reduce the amount of grazing.

In June the Supreme Court issued a unanimous decision in favor of the government in a dispute over the BLM's administration of public lands in Utah. Plaintiffs in *Norton v. Southern Utah Wilderness Alliance* alleged BLM was acting unlawfully by not curtailing or eliminating off-road vehicle use in Wilderness Study Areas, areas identified by the agency as eligible for consideration as wilderness but not yet so designated by Congress. The Supreme Court held these claims inactionable.

**Defending the U.S. Army Corps of Engineers' Missouri River Operations.** The United States Army Corps of Engineers operates the Missouri River Main Stem System, a network of dams and reservoirs on the Missouri River. A series of lawsuits filed during 2002 and 2003 by states, environmental groups and commercial interests allege the Corps' operation of the Missouri River system violates both the Flood Control Act of 1944 and the Endangered

Species Act ("ESA"). The Division obtained summary judgment favorable to the federal government on all counts in all cases.

**Water Rights Victories.** The Division secured numerous settlements protecting the water supplies and flows necessary to maintain vital natural resources and uses of the public lands, including national forests, parks, wildlife refuges, wild and scenic rivers, military bases and federal reclamation projects in areas such as the Snake River Basin in Idaho, Klamath River Basin in Oregon, and Yakima River Basin in Washington.

## **PROMOTING NATIONAL SECURITY AND MILITARY PREPAREDNESS**

**Promoting National Security.** The Division has been active in safeguarding administration initiatives to support the war on terror, including the successful defense of the construction and operation of a biological safety laboratory against environmental challenges. The laboratory will permit the Department of Homeland Security and other federal agencies to safely research infectious biological agents that pose risks to human health.

The Division also successfully defended the Navy in a case raising National Environmental Policy Act ("NEPA") and ESA challenges to the upgrade of the Trident missile system at Submarine Base Bangor in Washington. The Ninth Circuit Court of Appeals agreed the decision to site Trident missiles at Bangor was a presidential decision not reviewable under NEPA. The court also concluded the Navy did not violate the ESA because, given the remote possibility of an accidental explosion, the project was unlikely to jeopardize the continued existence of any listed species.

**Defending Military Readiness:** In *Malaga Makua v. Rumsfeld*, a case litigated to settlement in the course of two weeks, the Division defended the Department of Defense's live-fire mortar and rocket training exercises at Makua Military Reservation on the island of Oahu. Plaintiffs claimed these exercises posed a risk of destructive

fire to listed species and designated critical habitat under the ESA. On March 19, the court temporarily enjoined mission-essential training that would become impossible after mid-April. The Division negotiated a settlement that allowed the Marines to train during the window of opportunity, with certain additional safety precautions and other mitigation. An ENRD trial attorney was present during the exercise to assist military counsel in ensuring the agreement's terms were satisfied.

**Property Acquisitions to Improve Military Readiness and National Security.** As directed by federal agencies acting under authority of Congress, ENRD exercised the federal government's power of eminent domain to complete several land acquisitions for military purposes. These actions included:

*United States v. 1,098.221 Acres in Duval County, Florida, and Gate Maritime Properties* acquired a port facility on Blount Island near Jacksonville, Florida, for use by the Department of the Navy for weapons shipping around the globe. Estimated just compensation of \$101,000,000 was made immediately available to the landowner.

*United States v. 8.51 Acres in Washington, D.C. and Riverside Associates Limited Partnership* obtained land for expansion of the National Defense University and Ft. McNair. Estimated just compensation of \$18,500,000 was made immediately available to the landowner.

*United States v. 1,402 Acres of Land Honolulu, Hawaii and the Estate of James Campbell* acquired land needed for the U.S. Army's transformation of its 2<sup>nd</sup> Brigade, 25<sup>th</sup> Infantry Division (Light) to a Stryker Brigade Combat Team. Estimated just compensation of \$15,900,000 was made immediately available to the landowner.

**Successful Defense of the Army's Chemical Weapons Demilitarization Program.** The Division continued to successfully defend the Army's \$24 billion Chemical Weapons Demilitarization Program. Pursuant to U.S. treaty obligations, Congress has charged

the Army with destroying certain weapons stockpiles at current locations. The Division defended litigation related to the destruction of chemical weapons in Alabama, Arkansas, Oregon and Utah. Of particular note is ENRD's success in *GASP v. Environmental Quality Commission of the State of Oregon*, a challenge to a state-issued hazardous waste permit to incinerate chemical weapons at the Umatilla demilitarization facility. After a lengthy trial (over 70 trial days), the court ruled for the State and Army on almost all claims, thus allowing the Army to proceed with its incineration schedule.

**No Liability for Destruction of Sudanese Industrial Plant.** El-Shifa Pharmaceutical Industries sought \$50 million in compensation for destruction of an industrial plant in Sudan by cruise missiles launched on orders of President Clinton in response to bombing of U.S. embassies in Tanzania and Kenya by terrorists affiliated with Al-Qaeda. The Court of Federal Claims dismissed the claim, reasoning that federal courts have no role in setting standards by which the president or military commanders are to measure the veracity of intelligence gathered to determine what assets located abroad constitute enemy property.

## **DEFENDING VITAL FEDERAL PROGRAMS AND INTERESTS**

**The Corp of Engineers' Wetlands Protection Program.** The Division successfully defended numerous cases challenging the U.S. Army Corps of Engineers' wetlands protection and permitting program under the Clean Water Act. *National Association of Home Builders v. U.S. Army Corps of Engineers* and *National Stone, Sand and Gravel Ass'n v. United States Army Corps of Engineers* challenged an EPA and Corps-promulgated rule modifying the definition of "discharge of dredged material" under the CWA. The rule clarifies the distinction between regulable redeposits of dredged material (which may result from a variety of mechanized earth-moving activities) and "incidental fallback," which cannot be regulated under the CWA. The Division obtained an order dismissing those challenges to the rule. Similarly, *National Association of Home Builders et al. v. Army Corps of Engineers*

presented challenges to the Corps' March 9, 2000 replacement nationwide permits ("NWP"). A court dismissed all the plaintiffs' complaints for lack of jurisdiction on the ground that the NWPs are not final agency action subject to review.

The Division also continued a history of successfully defending Fifth Amendment takings claims involving permit applications necessary to dredge and fill wetlands pursuant to Section 404 of the CWA. Noteworthy victories this year included *Palm Beach Isles Associates v. United States* and *Bay-Houston Towing Co. v. United States*. In *Palm Beach Isles*, the court held the government had demonstrated a bona fide navigational purpose in denying a permit to fill 49 submerged acres of Lake Worth in Palm Beach, Florida, and thus there was no taking. In *Bay-Houston*, the court held a property owner's failure to wait for a final decision on his permit application rendered his claim unripe for review, rejecting the argument that further pursuit of the permit would constitute an exercise in futility.

In *Greater Yellowstone Coalition v. Flowers*, an appellate court upheld the Corps of Engineers' issuance of a CWA Section 404 permit. Plaintiffs had argued the Corps violated the CWA and NEPA when it issued the permit in connection with the construction of Canyon Club, a residential development and golf course along the Snake River near Jackson, Wyoming.

In *Protect Our Water and San Joaquin Raptor/Wildlife Rescue Center v. Flowers*, a court upheld the Corps' issuance of a CWA Section 404 permit in connection with Phase One of the "Diablo Grande" development project, a resort and residential community in Stanislaus County, California. Plaintiffs had alleged the project would result in an unpermitted taking of the endangered San Joaquin kit fox and California red-legged frog. Similarly, in *Hayward Area Planning Association v. Norton*, the court rejected claims the Corps' permit for a residential subdivision and golf course would jeopardize the continued existence of the Alameda whipsnake and California red-legged frog, concluding the administrative record of

the Corps and U.S. Fish and Wildlife Service supported the "no jeopardy" determination that allowed issuance of the permit.

**Enforcing Magnuson Act limitations on judicial review of fishery regulations.** The Magnuson Stevens Fishery Conservation and Management Act provides for special judicial review procedures calculated to address the rapidity with which fishery regulation changes from year to year and fisheries open and close. Cases must be brought immediately and heard on expedited review, but plaintiffs are expressly prohibited from seeking preliminary injunction of fishing regulations. In two cases brought this year plaintiffs sought to circumvent this prohibition by asking for injunctive relief under the ESA and NEPA. The Division argued such claims could not be heard since a ruling for plaintiffs would effectively halt fishing. Both courts presented with the issue agreed with the Division's position.

**Defending the Fish and Wildlife Service's Habitat Conservation Program.** The U.S. Fish and Wildlife Service has developed an ESA habitat conservation permit ("HCP") program encouraging private landowners to contribute to species conservation while providing certainty against prosecution to those landowners desirous of developing their property. Plaintiffs in *California Native Plant Society v. Norton* challenged the permit for a Carroll Canyon development issued pursuant to a complicated, regional multispecies HCP in the San Diego area. The court held the agency had wide latitude to decide the best scientific and commercial data available and in general deferred to FWS judgment. In *National Wildlife Federation v. Norton* plaintiffs challenged an HCP and associated incidental take permit issued for the Metro Air Park project near Sacramento. The court again deferred to the Service's judgment regarding the level of mitigation and funding in the HCP and further held the Service's interpretation of the requirement to minimize and mitigate to the "maximum extent practicable" under ESA was entitled to deference.

**Maintaining the Nation's Infrastructure.** The Division opposed efforts to halt upgrade of several of the nation's airports and operation of major dams. In *City of Olmsted Falls v. EPA*, for example, ENRD defeated an action against the Corps of Engineers and EPA challenging a permit issued under Section 404 of the Clean Water Act in connection with runway improvement at Cleveland Hopkins International Airport in Ohio. The court issued a final opinion and order upholding the permit.

ENRD exercised the government's power of eminent domain to acquire transmission line easements in the western United States on behalf of DOE's Western Area and Bonneville Power Administrations. New transmission lines will bolster system reliability by creating redundancy and allowing transmission of new capacity to population centers.

The Division defended successfully a NEPA challenge to the Longhorn pipeline project, which will use a pre-existing pipeline to transport gasoline and other petroleum products across the state of Texas.

The Division also exercised the federal government's power of eminent domain to assemble properties in Richmond, Virginia for construction of a new federal courthouse; \$3,029,600 in estimated just compensation was made available to the landowners.

**Protecting the Public Fisc.** A significant portion of the Division's practice includes resolving liability of federal agencies in connection with cleanup of contaminated facilities under CERCLA. This year ENRD successfully defended numerous claims of federal Superfund liability, saving the government hundreds of millions of dollars.

Of particular note is the Division's victory in *Miami-Dade County, Florida v. United States*. In 2001, Miami-Dade County brought a lawsuit against the United States arising from environmental contamination in and around Miami International Airport. The county sought to hold the United States responsible for approximately \$500

million in past and estimated future cleanup costs and penalties under a variety of theories based on federal, state and local laws. After extensive discovery the court conducted a trial during December 2003 and January 2004. In September 2004, the court issued a lengthy order rejecting on factual and legal grounds every claim made by the county.

In *DuPont v. United States*, the Division defeated CERCLA contribution claims for costs to clean up fifteen DuPont-owned plants based on activities during the First and Second World Wars and the Korean War. Through orders issued in December 2003 and March 2004, the court granted judgment in favor of the United States on grounds that DuPont had not satisfied statutory prerequisites for maintaining a contribution action under CERCLA. These rulings disposed of a case in which DuPont sought to have the United States pay a significant portion of the estimated \$1.5 billion cost of cleaning up the DuPont plants.

Where the government bore liability for cleanup costs at contaminated sites, the Division negotiated appropriate settlements providing for payment of a fair share. For example, in *General Motors Corp. v. United States*, a CERCLA contribution action alleging the United States was liable as an owner, operator and arranger for contamination based on wartime contamination in Michigan, Indiana and New Jersey, the Division resolved the government's liability at nine of the sixteen sites through a settlement agreement requiring the United States to pay \$890,000 of the cleanup costs (approximately 3%).

ENRD defeated an attempt to extend CERCLA obligations to military facilities overseas. In *ARC Ecology v. Air Force and Navy*, a court dismissed a complaint seeking to compel the Air Force and Navy to perform preliminary environmental assessments at the former Clark and Subic bases in the Philippines. The court concluded that CERCLA does not have extraterritorial application in this context.

The Division also defended a Clean Air Act enforcement action brought against the United States in *City of Jacksonville v. Department of the Navy*. The Eleventh Circuit Court of Appeals held the CAA federal facilities section does not waive the government's sovereign immunity from payment of punitive fines to state and local governments, following the Supreme Court's ruling in *Department of Energy v. Ohio*.

**Protecting the Public Fisc Against Invalid Fifth Amendment Takings Claims.** Several important victories by the Division helped clarify Fifth Amendment takings law while ensuring that those who assert valid claims are justly compensated. A notable victory was achieved through litigation in *Henderson County Drainage District v. United States*, in which the United States proved the property owner had been aware for decades of erosion of its property along the Mississippi River. As a result, the court dismissed plaintiffs' \$200 million claim as barred by the statute of limitations.

Considerable savings to the public fisc also have been achieved through successful use of settlement and alternative dispute resolution in these cases. The Division achieved an important negotiated resolution of *Quinault Indian Nation v. United States*, where the plaintiff alleged taking and trust claims as a result of Fish and Wildlife Service restrictions on timber harvest pursuant to the ESA. The Quinault Nation sought in excess of \$92 million but ultimately settled for a congressionally-appropriated payment of \$30 million plus a separate contribution from a non-governmental party.

**Resolving Claims Involving the National Trails System.** The Division continued to defend numerous lawsuits brought by thousands of individuals throughout the United States as a result of conversion of former railroad rights-of-way into recreational trails in "rails-to-trails" programs. These suits allege the conversions caused a taking of private property without just compensation in violation of the Fifth Amendment. The Division successfully resolved all or part of many of these suits this fiscal year, saving the United States

millions of dollars by ensuring that only plaintiffs who state valid claims are compensated.

**Protecting Federal Title to Lands.** In a long-running original action before the Supreme Court, the Division achieved a significant victory before a special master who recommended that title to submerged lands in Glacier Bay National Park and around the Alexander Archipelago be deemed to belong to the United States rather than the State of Alaska.

In another Alaska matter, ENRD defended federal interests against the claimed right of the "Pilgrim Family" to construct a 15-mile road across Wrangell-St. Elias National Park.

**Advice and Training for Federal Agencies.** The Division provides advice and training to other federal agencies when appropriate. This year, the Land Acquisition Section held three training conferences for attorneys holding delegated authority to review titles for federal land acquisitions. Approximately 250 federal employees from 11 agencies participated. Instructors were also provided for land acquisition training sessions held by the Departments of the Interior, Navy and Veterans Affairs.

**Capacity Building for Environmental Enforcement.** ENRD has participated in a number of programs to improve enforcement capacity around the world. These programs have been generally sponsored or supported by other agencies and/or conducted under the auspices of Administration initiatives such as the US Free Trade Agreements with Chile and Morocco. They have included courses on general civil and criminal enforcement, as well as on specific issues such as wildlife enforcement, vessel pollution and recovery of natural resource damages. In 2004, ENRD conducted such programs in Belgium, Canada, Chile, China, Central and Eastern Europe, Mexico, Morocco and Thailand.

## **PROTECTING INDIAN RESOURCES AND RESOLVING INDIAN ISSUES**

### **Defending Tribal and Federal Interests in Water Adjudications.**

The Division devoted significant resources to settling water adjudications in which the United States asserted claims on behalf of Indian tribes and their members. These water adjudications are complex cases involving the water rights of thousands of parties. This year the Division worked with the Department of the Interior, the State of Idaho and the Nez Perce Tribe to craft an historic settlement of the *Snake River Basin Adjudication*. The settlement followed eight years of contentious litigation and difficult negotiations. The Division also worked with Interior, the State of Arizona, the Gila River Indian Community and private water users to settle Gila Community water claims in *In Re Gila River System and Source*. Finally, our efforts in the *Klamath Basin Adjudication* and the *Bitterroot Basin Adjudication* convinced the parties to settle or withdraw sixteen claims.

Not all water adjudications are susceptible to settlement, however. The Division won a notable litigation victory in *Matter of Applications to Change Use of Waters Within the Pyramid Lake Valley*, where we successfully defended the Pyramid Lake Paiute Tribe's right to use its water to protect fish habitat in Pyramid Lake rather than for irrigation.

**Defending Tribal Lands.** The Division defends over 150 million acres of land held by the United States in trust for tribes. This fiscal year the Division prevailed in *United States v. City of Tacoma*, a trespass action brought against the City for unlawfully condemning Indian lands. The trial court granted our motion for summary judgment and the Ninth Circuit Court of Appeals affirmed. In *Proschold v. United States*, the Division successfully defended the use and existence of an easement for the benefit of a tribe in both the district and appellate courts.

**Defending the United States' Authority to Implement Indian Policies.** ENRD realized a number of successes this year in defending federal agencies and programs intended to further federal Indian policies. The Division obtained dismissal in *Arakaki v.*

*Cayetano* of a challenge to the constitutionality of programs serving Native Hawaiians, including a 1920s program to set aside lands for Native Hawaiian people. In *Morris v. Tanner*, the Division prevailed in a constitutional challenge to the Indian Civil Rights Act, establishing that Indian tribes have criminal jurisdiction over crimes committed in Indian country by members of other tribes.

**Promoting Negotiated Resolutions of Indian Disputes.** ENRD continues to promote the use of settlements for resolving complex litigation with Indian Tribes. In *Quapaw v. Norton*, the Division reached a novel agreement that funded a tribal enterprise's project for collecting and analyzing historic documents related to the tribe's trust funds and trust assets, thereby avoiding costly litigation and saving the Department of the Interior from incurring the expense of preparing an accounting that, in the tribe's view, would not have met the tribe's needs. In *Warm Springs v. Norton*, the Division entered into a comprehensive settlement of three major asset mismanagement cases, saving the government from protracted litigation and setting the stage for further negotiated settlements.

**Defending Indian Gaming Laws.** The Division had considerable success in defending the constitutionality of provisions of the Indian Gaming Regulatory Act ("IGRA"). In *Lac Courte Oreilles Band of Lake Superior Chippewa v. Norton*, ENRD prevailed in a tribe's challenge to the constitutionality of an IGRA provision permitting the Secretary of the Interior to take newly acquired lands into trust for Indian gaming purposes only if the Secretary determines gaming would be in the best interest of the tribe and not detrimental to the surrounding community, and the governor of the relevant state concurs. In *Artichoke Joe's California Grand Casino v. Norton*, the Division prevailed in a challenge by non-Indian gambling interests, under the Equal Protection Clause, to state compacts that authorize Indian tribes to engage in casino gaming despite prohibition of others from engaging in such gambling.

## **SUPPORTING THE DIVISION'S LITIGATORS**

**Support for Large Trials.** For ENRD's largest cases, the Executive Office has provided on-site trial support to the traveling trial teams. The Office has provided a full complement of support for the Ohio Edison and Illinois Power (Power Plants) trials, as well as the Shoshone-Arapaho and Gros Ventre (Tribal Trust) trials. Support has included technology resources, exhibit/document processing and management services, witness preparation, contractor support and logistical services. Our Executive Office also helped with establishing "war rooms" and "mini-networks" connected to the ENRD JCON 2A computer system for key Division trials across the country.

**Continuity of Operations.** ENRD is dedicated to meeting the Attorney General's commitment to maintain business operations in the event of a national emergency. To that end, the Division further strengthened our precedent-setting computer network security protocols and initiated a continuity of operations plan. Simultaneously, ENRD became the first litigating division with a DOJ-certified remote computer access system. Connectivity to the Division's computer system was enabled for key ENRD trials across the country.