OVERVIEW OF THIS REPORT

In fiscal year 2011, the Division continued to achieve significant victories for the American people across its many practice areas. The chapters of this report briefly describe the organization of the Division, highlight its progress toward the goal of achieving environmental justice in protecting all communities from environmental harm, and describe the Division's key accomplishments. The chapters, which reflect the components of the Division's mission, are: protecting our nation's air, land, and water; ensuring cleanup of oil and Superfund waste; promoting responsible stewardship of America's wildlife and natural resources; enforcing the nation's pollution and wildlife criminal 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 staff. As explained in last year's report, *ENRD Accomplishments Report Fiscal Year 2010*, environmental justice is one of the priorities of the Division, and there is much progress to report. Action on other priorities--supporting the federal government's efforts to protect the environment and natural resources; Indian Country; working with U.S. Attorneys, states, tribes, and local government; national security; and addressing domestic impacts of global pollution and environmental violations--is reflected throughout this report.

INTRODUCING THE ENVIRONMENT AND NATURAL RESOURCES DIVISION

The Division has a main office in Washington, D.C., and field offices in: Denver, Colorado; Sacramento, California; San Francisco, California; Seattle, Washington; Boston, Massachusetts; and Anchorage, Alaska. ENRD has a staff of almost 700, more than 400 of whom are attorneys. The Division 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 more than 150 statutes and represents virtually every federal agency in courts all over the United States and its territories and possessions. Our litigation docket contains almost 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), and the Safe Drinking Water Act. The main federal agencies that the Division represents in these areas are the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps or USACOE). 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, national forests, and other public lands; and actions to recover royalties and revenues from development of natural resources. The Division 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 handles 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; the Marine Mammal Protection Act (MMPA), which protects animals such as whales, seals, and dolphins; and the Magnuson-Stevens Fishery Conservation and Management Act, which regulates increasingly depleted fishery resources. 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).

Division 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. Both takings and NEPA cases can affect vital federal programs such as those governing the nation's defense capabilities (including military preparedness exercises, weapons programs, and military research), renewable energy development, and food supply. 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 handle 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. The 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. The 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.

The 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. Finally, the Law and Policy Section advises and assists the Assistant Attorney General on environmental legal and policy questions, particularly those that affect multiple sections in the Division. It handles the Division's response to legislative proposals and congressional requests, ENRD's comments on federal agency rulemakings, amicus participation in cases of importance to the United States, as well as other special projects on behalf of Division leadership. Other Law and Policy Section duties include serving as the Division's ethics and professional responsibility officer and counselor, alternative dispute resolution counselor, and liaison with state and local governments. Attorneys in the Law and Policy Section also coordinate the Division's involvement in international legal matters, as well as the Division's Freedom of Information Act and Privacy Act work.

Box Text

ENRD LITIGATING SECTIONS

--Appellate

--Environmental Crimes

--Environmental Defense

--Environmental Enforcement

--Indian Resources

--Land Acquisition

--Law and Policy

--Natural Resources

--Wildlife and Marine Resources

WHAT WE DO

The Environment and Natural Resources Division has primary responsibilities for litigation as well as policy work on behalf of United States regarding:

--Prevention and Clean Up of Pollution

--Environmental Challenges to Federal Programs and Activities

--Stewardship of Public Lands and Natural Resources

--Property Acquisition for Federal Needs

--Wildlife Protection

--Indian Rights and Claims

With offices across the United States, the Division is the nation's environmental lawyer, and has the largest environmental law practice in the country.

ENRD CLIENT AGENCIES

To learn more about the client agencies referenced in this report, visit their websites:

United States Department of Agriculture www.usda.gov

United States Forest Service www.fs.fed.us

Animal and Plant Health Inspection Service www.aphis.usda.gov

United States Department of Commerce

National Marine Fisheries Service www.nmfs.noaa.gov

National Oceanic and Atmospheric Administration www.noaa.gov

United States Department of Defense

United States Air Force www.af.mil

United States Army www.army.mil

United States Army Corps of Engineers www.usace.army.mil

United States Marine Corps www.marines.mil

United States Navy www.navy.mil

United States Department of Energy www.energy.gov

Environmental Protection Agency www.epa.gov

General Services Administration www.gsa.gov

United States Department of Homeland Security www.dhs.gov

- United States Customs and Border Protection www.cbp.gov
- Federal Emergency Management Agency www.fema.gov

United States Coast Guard www.uscg.mil

United States Department of the Interior www.doi.gov

- Bureau of Indian Affairs www.bia.gov
- Bureau of Land Management www.blm.gov
- Bureau of Ocean Energy Management www.boemre.gov
- Bureau of Reclamation www.usbr.gov
- Bureau of Safety and Environmental Enforcement www.bsee.gov
- National Park Service www.nps.gov
- Office of Surface Mining, Reclamation and Enforcement www.osmre.gov
- United States Fish and Wildlife Service www.fws.gov
- United States Geological Survey www.usgs.gov

United States Department of Transportation www.dot.gov

- Federal Aviation Administration www.faa.gov
- Federal Highway Administration www.fhwa.dot.gov
- Federal Transit Administration www.fta.dot.gov
- Pipeline Safety and Hazardous Materials Administration www.phmsa.dot.gov
- United States Maritime Administration www.marad.dot.gov

United States Department of Veterans Affairs www.va.gov

REPORTING OUR PROGRESS TOWARD ACHIEVING THE GOAL OF ENVIRONMENTAL JUSTICE

Environmental justice, first identified as an important public policy goal for the federal government in the Clinton Administration, when Executive Order 12898 was issued, is a top priority for this Administration. As Attorney General Holder has stated: "[a]t every level of the Department and across all 94 United States Attorneys' Offices [environmental justice] work is a top priority." In fiscal year 2011, ENRD has achieved meaningful environmental justice results and has built a strong foundation to ensure achievement of greater results in the years to come.

Low-income, minority, and Native Americans are often disproportionately burdened with pollution, resulting in more significant health problems, greater obstacles to economic growth, and a lower quality of life for them. Such communities are frequently located in or near sources of pollution, and they have often expressed a concern that they do not have sufficient say in the decisions that affect their health and livelihood. Low-income, minority, and Native Americans, like all Americans, should breathe clean air, drink clean water, and be free from exposure to hazardous waste and toxic substances. Indeed, the essence of environmental justice is not special treatment, but equal treatment and full protection under the nation's environmental, civil rights, and health laws.

This chapter is divided into two sections. First, we describe the Division's progress in achieving environmental justice through collaboration with other federal agencies and Department of Justice components. Working primarily through the Interagency Working Group on Environmental Justice (IWG), the Division has played a leadership role in ensuring that we are working with other agencies to promote a coordinated federal response to environmental justice issues. Second, we highlight the Division's internal actions to further environmental justice through its own work and litigation docket.

Collaborative Work with Other Federal Agencies and Department Components in Fiscal Year 2011

Actively Participating in the IWG

One of the cornerstone achievements of Executive Order 12898 was the creation of the IWG. Moribund for nearly a decade, the IWG has been reinvigorated during this Administration. The IWG is chaired by EPA and is charged with providing guidance to federal agencies on environmental justice issues; coordinating the development of agency environmental justice strategies; coordinating research, data collection, and analysis; holding public meetings; and developing interagency model projects on environmental justice. The creation of the IWG underscores the importance of working collaboratively within the federal government to address environmental justice issues.

Representatives from ENRD and the Department's Civil Rights Division regularly attend IWG senior staff level meetings and identify how the Department can support and further the IWG's work. One example of the Division's extensive involvement in the IWG this year was the development and execution of a foundational interagency document on environmental justice, which is discussed below.

Signing and Implementing an Interagency Memorandum on Environmental Justice

In August 2011, the Department of Justice, along with 16 other federal agencies, signed the *Memorandum of Understanding on Environmental Justice and Executive Order 12898* (MOU). The MOU builds on the foundation laid by Executive Order 12898 and embodies the government's renewed commitment to environmental justice. The MOU promotes interagency collaboration and public access to information about agency work on environmental justice, and specifically requires each agency to publish an environmental justice strategy, to ensure that there exists an opportunity for public input on those strategies, and to produce annual implementation progress reports. The MOU also adopts a charter for the IWG and incorporates several new agencies into the IWG that had not previously been active participants. The Division played an important leadership role in the conception and development of the MOU, which will provide a strong and lasting foundation for continued coordinated federal efforts to address environmental justice issues.

The Department has taken steps to fulfill its own obligations under the MOU.

--In 1995, the Department produced the *Department of Justice Environmental Justice Strategy* and *Environmental Justice Guidance Concerning Environmental Justice*. These documents were initially prepared to implement the Department's commitments following the issuance of Executive Order 12898. The Department carefully re-evaluated the Strategy and Guidance in light of the MOU, and believes that both documents continue to fully reflect the goals and commitments of the Department of Justice. On September 30, 2011, we solicited comments on the Strategy and Guidance through the Department's environmental justice public website (www.justice.gov/ej), as well as through EPA's IWG website and IWG conference calls with environmental justice advocates and community leaders. Public input on these documents is always welcome.

--In February 2012, the Department released the *Department of Justice 2011 Implementation Progress Report on Environmental Justice*, its first annual report on the work and achievements of the Department in this area. ENRD contributed significantly to the accomplishments reported in that document. The report is available on the Department's environmental justice website.

Launching the Department's Environmental Justice Public Website

In September 2011, the Division helped develop and launch the Department's environmental justice public website, www.justice.gov/ej. This site provides information about Department environmental justice policies, case resolutions that incorporate environmental justice considerations, and contact information for the public. The site also provides the public access to view and comment on the Department's Strategy and Guidance.

Increasing Communication and Awareness Across Federal Agencies

The Division also has been working directly with other federal agency partners to further the dialogue on and awareness of environmental justice issues. In fiscal year 2011, ENRD, along with EPA's Office of General Counsel, organized a group of career attorneys from agencies across the federal government to discuss legal issues that arise with respect to environmental justice. The open dialogue and informal counseling fostered by this effort improves each agency's ability to understand not only how to implement environmental justice initiatives, but also how to respond to environmental justice concerns within the parameters of existing law.

Division attorneys also have assisted in training staff of other federal agencies regarding environmental justice issues. This past year, we participated in training sessions for personnel from the Department of Energy and the Department of the Interior (DOI or Interior), for example.

Working Within the Department to Heighten Awareness and Increase Dialogue

The Department has renewed its efforts to consider environmental justice across its work. The Department's internal Environmental Justice Workgroup, chaired by the Associate Attorney General's Office, has been reconstituted, and the Division is an active participant in this group. This workgroup reviewed and reaffirmed the Department's Strategy and Guidance.

All affected components of the Department are working to increase awareness of environmental justice and environmental enforcement issues among their staff. For example, in December 2010, ENRD and the Civil Rights Division jointly hosted a Town Hall discussion of environmental justice. This session, which was well-attended by attorneys and staff, provided an overview of environmental justice principles and gave attorneys an opportunity to discuss how those principles apply to the varied work of the Department.

Through the work of the Environmental Issues Subcommittee (chaired by U.S. Attorney Mike Cotter) of the Attorney General's Advisory Committee, the Department also is actively working to increase awareness in U.S. Attorneys' Offices around the country regarding environmental justice issues. The Division has actively participated in this subcommittee.

Participating in Community and Other Outreach

The IWG has organized numerous listening sessions in communities around the United States. These sessions provide community members; federal, state, tribal, and local governments; businesses; academics; and other interested parties the opportunity to hear about federal initiatives and speak directly to federal agency representatives about environmental issues that affect them. These meetings are often held in conjunction with other environmental and public health-related meetings to maximize the opportunities for reaching a broad spectrum of stakeholders.

The Division has been an active participant in many of these IWG sessions. Division representatives participated in sessions in New Orleans, Louisiana; Brooklyn, New York; Richmond, California; and

Washington, D.C. These sessions allow us to hear first-hand from community members about how our work is affecting them and what we might do better. We gain valuable feedback from these sessions, and look forward to continuing our participation in more of them.

In addition, the Department worked directly with federal agency partners, as well as state and local officials and community representatives, to organize direct outreach to many communities. The Division attended many such sessions. For example:

--In July 2011, Assistant Attorney General Moreno, ENRD and Civil Rights Division senior staff, U.S. Attorney Paul Fishman, EPA Assistant Administrator Cynthia Giles, and other EPA officials toured sites in Newark, New Jersey, and met with environmental and community organizations to discuss joint efforts to address environmental challenges and enforce environmental laws, and in particular, efforts to achieve environmental justice.

--Also in July 2011, Assistant Attorney General Moreno joined U.S. Attorney Joyce Vance, FBI Special Agent in Charge Patrick Maley, and EPA Regional Administrator Gwen Keyes Fleming in Birmingham, Alabama, to listen to concerns from residents and community groups about the Black Warrior River basin and environmental justice issues. The listening session was held in Ensley, a Birmingham neighborhood that borders Village Creek, a tributary of the Black Warrior River. The Black Warrior River provides drinking water for much of northern Alabama and was recently listed as one of America's Most Endangered Rivers.

--In December 2010, Assistant Attorney General Moreno and Assistant Attorney General for Civil Rights Perez, U.S. Attorney Sally Quillian Yates, and EPA officials participated in a listening session with communities in the Atlanta, Georgia, area.

--Division senior staff traveled to Alaska, Arizona, Montana, New Mexico, Oklahoma, South Dakota, and Washington State to speak directly with tribal leaders and tribal communities.

--Assistant Attorney General Moreno and other ENRD senior staff spoke about environmental justice at several major events such as the Environmental Justice in America Conference, the White House Environmental Justice Forum, the Federal Bar Association conference, and D.C. Bar events.

ENRD also conducted outreach to the corporate community regarding environmental justice. Together with Cynthia Giles, EPA's Assistant Administrator for Enforcement and Compliance Assurance, Assistant Attorney General Moreno also met with representatives from the Business Network for Environmental Justice in October 2011 to discuss opportunities for corporate engagement with communities. ENRD is currently working with EPA to plan additional meetings in order to foster a dialogue with the corporate community on these important matters.

Division-Specific Fiscal Year 2011 Environmental Justice Achievements

Through its work, ENRD strives to ensure that all communities are protected from environmental harms, including the low-income, minority, and Native American communities that too frequently live in areas

contaminated clothing back to their homes and families. Gordon-Smith and GSCI made false statements to an Occupational Safety and Health Administration inspector who had received complaints from GSCI workers. Gordon-Smith and GSCI were also convicted of six counts of failing to provide the required notice to EPA prior to commencing asbestos abatement projects at six different sites in Rochester, New York, including several schools. Gordon-Smith was sentenced to six years of incarceration, followed by a three-year term of supervised release. GSCI is now defunct.

--Despite knowing of the presence of asbestos, Charles Yi and co-conspirators John Bostick and Joseph Yoon hired a company that was not licensed to conduct asbestos abatement to scrape asbestos-containing ceilings during the renovation of a 200-plus-unit apartment building. Defendants hired untrained Hispanic day laborers and failed to tell them about the asbestos or provide them with adequate protective gear. Yi was convicted by a jury of conspiracy to violate the CAA and five substantive CAA violations for his role in the illegal removal of asbestos. The co-defendants, Joseph Yoon and John Bostick, pled guilty to conspiracy. Yi was sentenced to 48 months of incarceration, followed by a 2-year term of supervised release, and ordered to pay $5,400 in restitution. Bostick was sentenced to 6 months of home confinement and a 3-year term of probation, and ordered to complete 150 hours of community service. Yoon was sentenced to complete a two-year term of probation and held jointly and severally liable for the $5,400 in restitution with defendants Yi and Bostick. The asbestos was cleaned up properly at a cost of $1.2 million. The restitution was used to cover the cost of medical monitoring for the three workers involved in the illegal asbestos removal.

--Robert Joe Knapp, owner of the Equitable Building in Des Moines, Iowa, illegally removed asbestos from steam pipes and floor tile prior to converting the building into luxury condominiums. None of the workers on the project were trained to perform asbestos abatement work, and asbestos was illegally disposed of in an uncovered dumpster. Knapp pled guilty to conspiracy and failure to remove all asbestos. He was sentenced to 41 months of incarceration, and was ordered to pay a fine of $2,500 and to perform 300 hours of community service. Co-defendant William Coco was sentenced to complete a 3-year term of probation and perform 200 hours of community service after pleading guilty to conspiracy and failure to remove all asbestos.

--Guy Gannaway and co-defendant Stephen Spencer were involved in the purchase and renovation of apartment complexes for conversion to condominiums. During the renovations, defendants disturbed large quantities of the popcorn ceiling mixture that contained significant amounts of asbestos without notifying regulators or following the work practice standards for asbestos removal. Gannaway was convicted by a jury of conspiracy, false statements, and other CAA charges related to the mishandling of asbestos. He was sentenced to 90 days of incarceration, followed by 6 months of house arrest, a 3-year term of supervised release, and 30 hours of community service. Spencer was ordered to pay a fine of $10,000, complete a 5-year term of probation, and perform 30 hours of community service addressing contractor/architecture-related groups about the proper handling of asbestos.

--Certified Environmental Services (CES), an asbestos air monitoring company, managers Nicole Copeland and Elisa Dunn, and employee Sandy Allen were convicted by a jury of conspiracy and mail

fraud for their roles in a decade-long scheme between abatement contractors and CES in which asbestos was illegally removed from numerous homes and buildings in Syracuse, New York. CES and Dunn were also convicted of making false statements. CES provided abatement contractors with false air results to convince the building owners that the asbestos had been properly removed. An additional defendant, Frank Onoff, pled guilty to conspiracy, violations of the Toxic Substances Control Act, and mail fraud.

CES was sentenced to pay a $20,000 fine and $117,000 in restitution, and to complete a five-year term of probation. Nicole Copeland was sentenced to serve 12 consecutive weekends in jail, pay $23,000 in restitution, complete a 5-year term of probation, and perform 200 hours of community service. Elisa Dunn, Sandy Allen and Frank Onoff were each sentenced to time served, a 3-year term of supervised release, $5,000 in restitution, and 200 hours of community service. All defendants were prohibited from engaging in any asbestos-related air monitoring activities.

Prosecuting Crimes Against U.S. Fisheries and the Seafood Consumer

When fisherman and fish wholesalers do not comply with the law, they imperil the entire fishery, adversely impact the livelihoods of those who abide by the law, and commit a fraud on the U.S. consumer. Illegal commercial fishing encompasses such crimes as illegal fish harvesting, purchase of illegally harvested fish, and false labeling of fish under the Lacey Act as well as related general criminal violations. The Division has made it a priority to investigate and prosecute this type of crime. Two cases from fiscal year 2011 are representative:

--Karen Blyth, David H.M. Phelps, and John Popa owned and managed Consolidated Seafood Enterprises Inc. (Consolidated) and Reel Fish and Seafood, Inc. (Reel Fish). They conspired to falsely buy and label 283,500 pounds of farm-raised Vietnamese catfish (known as sutchi), which was then falsely declared as wild-caught sole and imported without paying $145,625 in anti-dumping duties. Blyth, Phelps and Consolidated received 81,000 pounds of sutchi, sold it to Popa and Reel Fish, and Popa and Reel Fish then changed the label to grouper and sold it to customers in Alabama, Florida, and Mississippi at a higher cost. Some of the fish seized tested positive for malachite green and Enrofloxin, both of which are prohibited from use in U.S. food. Additionally, Blyth and Phelps bought more than 25,000 pounds of Lake Victoria perch from Africa and then mislabeled and sold it as grouper to customers in Alabama and Florida at a higher cost and in greater quantities than if it had been accurately labeled. Further, defendants repackaged farm-raised foreign shrimp as U.S. wild-caught shrimp.

Defendants pled guilty to conspiracy, Lacey Act, misbranding, and smuggling violations for their roles in this mislabeling of seafood. Blyth and Phelps were sentenced to 33 and 24 months of incarceration, respectively, followed by a 3-year term of supervised release, and were ordered to pay a fine of $5,000 and barred for 3 years from working in the seafood industry. Popa was sentenced to 13 months of incarceration followed by a 3-year term of supervised release.

--Stephen Delaney, Jr., was convicted by a jury of violating the Lacey Act and the Federal Food, Drug and Cosmetic Act. The violations involved the false labeling of $8,000 worth of frozen fillets of pollock from China as cod loins from Canada and the misbranding of $203,000 worth of frozen fish fillets

that were falsely labeled as products of Holland, Namibia, and the United States, when they were actually products of Canada. The price of cod was $1 per pound higher than that for Alaskan pollock. Delaney was sentenced to three months of home detention, as part of a one-year term of probation, and was ordered to pay a fine of $5,000 into the Magnuson-Stevens Fund.

Stopping Illegal Wildlife Trafficking

Federal criminal enforcement of wildlife statutes plays a key deterrent role and augments state, tribal, and foreign wildlife management efforts. A wildlife case can include prosecution of both individual and organizational perpetrators; disgorgement of proceeds from illegal conduct such as smuggling; punishment that includes community service to help mitigate harm caused by the offense; and forfeiture of wildlife and instrumentalities used to commit the offense. One key statute for prosecution of wildlife crimes is the Lacey Act. The Division resolved a number of these cases in fiscal year 2011:

--James Bobby Butler, Jr., was involved in the illegal hunting and killing of white-tailed and mule deer. Butler and his brother, Marlin Jackson Butler, operated a guiding service hunting camp to out-of-state hunters, who killed deer in excess of annual bag limits, hunted deer without permits, and killed deer using illegal equipment and hunting methods such as spotlighting. The enterprise brought in $77,500 in guiding fees, which included arranging for the transport of the antlers and capes to Kansas, Texas, and Louisiana. James Bobby Butler pled guilty to conspiracy to violate the Lacey Act, a Lacey Act trafficking charge, and obstruction of justice. He was sentenced to 41 months of incarceration, followed by a 3-year term of supervised release, a fine of $25,000 to the Lacey Act Reward Fund, and an additional $25,000 in restitution to the Kansas Department of Wildlife and Parks, and was banned from all hunting and guiding activities for 3 years. Marlin Jackson Butler pled guilty to conspiracy and Lacey Act violations, and was sentenced to 27 months of incarceration, followed by a 3-year term of supervised release, a $10,000 fine, and an additional $10,000 in restitution.

--David Place illegally bought and imported sperm whale teeth and narwhal tusks into the United States. From 2001 to 2006, Place and two Ukrainian co-defendants, Andrei Mikhalyov and Charles Manghis, conspired to import the whale teeth for resale in the United States through the Manor House Antiques Cooperative in Nantucket, Massachusetts, that Place owned. The market value of the teeth and tusks illegally imported by Place was determined to be between $200,000 and $400,000. Place was convicted by a jury of 7 felony counts including conspiracy, Lacey Act, and smuggling violations, and was sentenced to 33 months of incarceration followed by a 3-year term of supervised release. Mikhalyov pled guilty to conspiracy, and was sentenced to nine months of incarceration and deported to the Ukraine. Manghis was sentenced to 30 days of intermittent incarceration as part of a 2-year term of probation, and was ordered to pay a $50,000 fine and forfeit a number of ivory carvings.

--Jeffrey M. Bodnar and his wife Veronica Anderson-Bodnar engaged in the illegal trapping and interstate sale of bobcats. They sold the bobcat pelts to fur buyers in Montana and Kansas. Additionally, the two conspired to submit false records to the Colorado Division of Wildlife in order to obtain tags for the pelts. Jeffrey Bodnar pled guilty to conspiracy to violate the Lacey Act and possession

of a firearm by a felon, and was sentenced to serve 27 months of incarceration, followed by a 3-year term of supervised release during which he is prohibited from hunting, trapping, or fishing. Veronica Anderson-Bodnar was sentenced to a five-year term of probation, during which time she will not be allowed to possess firearms and also will be prohibited from hunting, trapping, or fishing.

--Between 2003 and 2007, Jeffrey Foiles and his hunting club, Fallin' Skies Strait Meat Duck Club, sold and guided waterfowl hunts for the purpose of illegally hunting ducks and geese in excess of hunters' individual bag limits. Foiles pled guilty to violating the Lacey Act and the Migratory Bird Treaty Act. He was sentenced to 13 months of incarceration and a 1-year term of supervised release, and was ordered to pay a fine of $100,000. Additionally, he will be prohibited from hunting or being a guide for two years. Fallin' Skies Strait Meat Duck Club was sentenced to complete a two-year term of probation and will serve as guarantor of the $100,000 fine assessed to Foiles.

Working Together on Criminal Environmental Enforcement

In fiscal year 2011, the Division continued its vigorous efforts to ensure that U.S. Attorneys across the nation make pollution and wildlife prosecutions part of their everyday practice. In addition to hosting, along with the Attorney General's Advisory Committee, the first-ever United States Attorneys' Environmental Crimes and Enforcement Conference for all United States Attorneys on November 18 and 19, 2011, the Division developed and participated in major training events and task forces with various United States Attorneys' Offices:

--Three major training events centered around growing concerns with new techniques in energy extraction. The first of these was the Marcellus Shale Law Enforcement Conference in State College, Pennsylvania, in May 2011. Approximately 250 people attended this conference, which was sponsored by ENRD, each of the 3 U.S. Attorneys' Offices in Pennsylvania, EPA's Criminal Investigations Division, FWS, the FBI, the Internal Revenue Service, and the Pennsylvania Office of the Attorney General, among others. The purpose of the conference was to strengthen coordination and communication among federal, state, and local law enforcement in this area. Other energy extraction conferences included the Environmental Enforcement Training Conference in Bismarck, North Dakota, in September 2011; and the Environmental Law Conference in Great Falls, Montana, in October 2011.

--United States Attorneys' Offices in Alabama, Colorado, Louisiana, Missouri, and Ohio joined in the Division's Worker Endangerment Initiative, conducting joint training and docket reviews with the Occupational Safety and Health Administration and Department of Labor.

--The Division provided pollution and wildlife crimes training at events held by the United States Attorneys' Offices in the District of Montana in February 2011, the District of Idaho in April 2011, and the Eastern District of Pennsylvania in June 2011.

--Division attorneys worked closely with United States Attorneys' personnel on environmental task forces in the Southern District of Alabama, District of Idaho, Southern District of Ohio, District of

Maryland, Western District of New York, Eastern District of North Carolina, Western District of Pennsylvania, and District of South Carolina.

--In January 2011, representatives of the U.S. Attorney's Office for the Eastern District of Virginia, the ENRD Environmental Crimes Section, the Coast Guard, and EPA met in Norfolk, Virginia, to discuss environmental crimes in the Tidewater area. The topics of the meeting included Coast Guard investigative authorities, substantive environmental laws, title 18 crimes, and investigative strategies. The Coast Guard thereafter conducted numerous facility and vessel visits, and generated a number of leads for further investigation.

--And, as it does each year, the Division co-hosted the biannual meetings of the Environmental Crimes Policy Committee, comprised of Division prosecutors and Assistant United States Attorneys; and provided basic and advanced environmental crimes training to dozens of Assistant United States Attorneys and agency counsel in the week-long Environmental Crimes Seminar.

Box Text

From January 2009 through September 2011, the Division concluded criminal cases against 186 individuals and 59 corporate defendants, obtaining over 113 years of confinement and over $214 million in criminal fines, restitution, and other monetary relief.

"Together with our partners at the Coast Guard, Environmental Protection Agency, and United States Attorney's Office, we are sending the message that we will vigorously prosecute deliberate violations of environmental and safety laws. As a consequence of their violations of the law, Stanships' vessels and related corporations will pay a substantial fine and be barred from doing business in the United States for the next five years."

--Ignacia S. Moreno
United States v. Stanships Plea Agreement Press Release

Facts about Asbestos

--Because of its fiber strength and heat resistant properties, asbestos has been used for a wide range of manufactured goods, mostly in building materials, friction products, heat-resistant fabrics, packaging, gaskets, and coatings.

--When asbestos-containing materials are damaged or disturbed by repair, remodeling, or demolition activities, microscopic fibers become airborne and can be inhaled into the lungs, where they can cause significant health problems.

--EPA regulates asbestos primarily under the authority of:

> --The Clean Air Act (Asbestos National Emission Standards for Hazardous Air Pollutants regulations).

--The Toxic Substances Control Act (Asbestos Ban and Phaseout regulations).

--The Comprehensive Environmental Response, Compensation, and Liability Act.

--EPA Fact Sheet

"Knapp's illegal conduct put at risk the health of workers who lacked basic training and protective equipment. The Clean Air Act work practice standards are designed to protect people's health from real dangers, and we will hold violators fully responsible for their actions."

--Ignacia S. Moreno
United States v. Knapp Sentencing Press Release

"These defendants have admitted to flouting federal laws in a misguided scheme to defraud the American consumer. . . . This type of scam floods the market with falsely labeled fish, thereby misleading consumers, artificially deflating the cost of wild-caught fish, and depriving law-abiding fishermen of the full measure of their labor."

--Ignacia S. Moreno
Blyth and Phelps Plea Agreements Press Release

DEFENDING VITAL FEDERAL PROGRAMS AND INTERESTS

Defending the U.S. Response to the Deepwater Horizon Oil Spill and Management of Oil and Gas Resources

In fiscal year 2011, the Division continued to defend a number of cases arising from the Deepwater Horizon oil spill. These cases challenge aspects of the federal government's response to contain the oil spill following the explosion, regulatory actions to prevent future recurrence of oil spills, and approval of exploration and production plans and lease sales in the Gulf of Mexico and Alaskan waters. Examples of cases resolved in fiscal year 2011 include the following cases:

--In *Hornbeck Offshore Services, L.L.C. v. Salazar* and *Ensco Offshore Services v. Salazar*, the Division successfully defeated claims alleging that Interior lacks authority to impose planning and permitting requirements on oil and gas development activities on the Outer Continental Shelf. We also obtained dismissal of district court challenges to the Secretary's suspension in 2010 of certain deepwater drilling activities, and successfully negotiated a resolution to claims alleging unreasonable delay in the review of applications for permits to drill.

--In *Center for Biological Diversity v. Salazar*, the U.S. District Court for the District of Columbia dismissed nearly all of plaintiff's claims in response to the United States' motion to dismiss. Plaintiff had challenged DOI's policy of using categorical exclusion reviews under NEPA when approving exploration plans, development and production plans, and drilling permits, but the court agreed that the statute of limitations on any such challenge had run because the categorical exclusion policy was first adopted in 1986. The court also dismissed claims related to several planned lease sales as constitutionally and prudentially unripe for decision. The court also ruled that the plaintiff had failed to provide the notice required before bringing challenges to certain permits under the ESA. In fiscal year 2012, the parties continued to litigate plaintiff's remaining challenges to Lease Sale 213.

--In *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt., Regulation & Enforcement*, plaintiff also challenged oil and gas lease sales for deepwater wells in the Gulf of Mexico, alleging violations of NEPA, ESA, and the Administrative Procedure Act (APA) arising from DOI's alleged failure to modify offshore oil and gas leasing operations, policies, and practices following the Deepwater Horizon oil rig explosion and oil spill. The U.S. district court in Alabama also granted the United States' motion to dismiss all claims other than those relating to Lease Sale 213.

--In *Alaska v. Salazar*, the State of Alaska primarily sought to compel Interior to vacate a purported moratorium on Outer Continental Shelf exploration and development in the Alaska region and to provide plaintiff with notice and an opportunity to participate before imposing any future moratorium. The district court in Alaska granted the United States' motion for summary judgment in the case, agreeing that no moratorium on permitting of oil and gas exploration and development in the Alaska region existed.

--We filed responsive briefs in the Fifth Circuit in *Center for Biological Diversity v. Salazar* in November 2010 and in *Gulf Restoration Network, Inc. v. Salazar* in December 2010. Both of these cases consist of consolidated petitions for review of DOI's approval, shortly after the Deepwater Horizon oil rig explosion and resulting oil spill, of exploration plans that provide for the drilling of exploratory wells in the Gulf of Mexico. Petitioners primarily challenge Interior's reliance on categorical exclusions from NEPA review requirements when approving the plans. Petitioners also argue that Interior violated the APA and other federal statutes by allegedly failing to consider the implications of the Deepwater Horizon oil spill. In April 2011, the Fifth Circuit heard argument in both cases.

Upholding Administrative Actions Related to Climate Change

EPA's efforts to regulate greenhouse gases that contribute to global climate change reached a critical point in fiscal year 2011. Specifically, on January 2, 2011, EPA's regulations governing motor vehicle emissions of greenhouse gases took effect, triggering not only mobile source regulation, but also regulation of the largest stationary sources in accordance with EPA's greenhouse gas tailoring rule. Scores of lawsuits have been filed challenging these actions as well as EPA's finding that greenhouse gas emissions endanger public health and welfare and EPA's various regulations implementing the greenhouse gas regulations in the states.

--In a suite of cases known generally as *Coalition for Responsible Regulation v. EPA*, four motions were filed in the D.C. Circuit by opponents of EPA's principal greenhouse gas regulations seeking to stay their effectiveness pending judicial review, and additional motions were filed in the Fifth and D.C. Circuits seeking to stay EPA's implementation rules in the states. After extensive briefing, both courts entered orders denying the motions for stay in December 2010 and January 2011, thus ensuring that EPA's efforts to regulate greenhouse gas emissions began as scheduled.

--In March 2011, the D.C. Circuit issued briefing orders in the suite of cases challenging EPA's principal greenhouse gas regulations, largely adopting our briefing format proposal and establishing a briefing schedule extending through December 2011. From August to September 2011, the United States filed substantial briefs on the merits defending EPA's principal greenhouse gas regulations. In February 2012, the court heard two back-to-back days of oral argument.

In a related matter, *Chamber of Commerce of the United States v. EPA*, the D.C. Circuit dismissed challenges to EPA's 2009 decision to grant California a waiver of preemption under the CAA so that the state could implement its own motor vehicle greenhouse gas emission regulations. The court found that petitioners lacked standing to challenge EPA's action.

Additionally, in *Amigos Bravos v. U.S. Bureau of Land Mgmt.* and *WildEarth Guardians v. Bureau of Land Mgmt.*, the Division successfully defended three BLM quarterly oil and gas lease sales in New Mexico as well as a Forest Service decision to open an area of the Carson National Forest in New Mexico to oil and gas leasing. Plaintiffs alleged that the decisions, involving dozens of lease tracts around the state, violate the Federal Land Policy and Management Act, the Mineral Leasing Act, NEPA, and NFMA. In *Amigos Bravos*, the court dismissed plaintiffs' claims for lack of standing, finding that plaintiffs' could not

satisfy Article III injury requirements by alleging harm stemming from impacts caused by global climate change. In *WildEarth*, the court found in favor of BLM and the Forest Service on the merits on all claims. These cases are significant because of the court's holdings on air quality impacts and standing in the climate change context.

Defending Against a Public Nuisance Tort Lawsuit Related to Climate Change

The Division also assisted the Solicitor General's Office in handling a case before the Supreme Court on behalf of the Tennessee Valley Authority on the issue of climate change. Eight states, a city, and several private land trusts sued five major electric power companies, including the Tennessee Valley Authority, in an attempt to address climate change issues. They alleged that power plant emissions violated common law nuisance principles and sought an injunction to limit those emissions. The district court dismissed the lawsuit, but the Second Circuit reinstated it. In June 2011, in *American Electric Power v. Connecticut*, the Supreme Court issued a favorable decision reversing the Second Circuit. An equally divided Court of eight Justices held that plaintiffs had standing to bring their complaint (the four dissenting justices would have held that plaintiffs lacked constitutional standing). On the merits, however, the Court found that the CAA and actions taken by EPA under the act displaced any federal common law right that plaintiffs may once have had. In reaching this conclusion, the Court noted EPA's authority to regulate existing stationary sources under the act, and the multiple avenues for enforcement provided by the act, including the ability of parties to petition for rules. The Court further explained that Congress' decision to entrust EPA with regulation of greenhouse gases made sense based upon the agency's scientific, economic, and technological resources.

Upholding the Administration's Decisions Regarding Handling of Nuclear Waste

In July 2011, the D.C. Circuit issued a favorable decision in *In re Aiken*. The court dismissed for lack of jurisdiction four consolidated petitions for review that sought to challenge the Department of Energy's (DOE's) decisions to file a motion to withdraw its license application for a permanent geologic repository for high-level nuclear waste at Yucca Mountain and to terminate the Yucca Mountain program. The court agreed that petitioners' claim challenging DOE's attempt to withdraw the license application was not ripe because the Nuclear Regulatory Commission's Licensing Board had denied DOE's motion to withdraw and the Nuclear Regulatory Commission itself had not yet decided whether it would review the Board's denial. The court explained that if the Commission declined to review the Board's decision or upheld it, DOE will have failed in its attempt to withdraw the license application and petitioners' claim will be moot. The appellate court also held that petitioners' claim challenging a determination allegedly made in January 2010 by the President and DOE Secretary to unilaterally and irrevocably terminate the Yucca Mountain repository process is not justiciable because petitioners failed to identify any reviewable final agency action.

Supporting Investment in Transportation Infrastructure

In fiscal year 2011, the Division continued its effort to support the Department of Transportation's investment in state and city efforts to improve transportation options in urban areas. In *St. Paul Branch*

of the NAACP v. Federal Transit Admin., we worked with the United States Attorney's Office in Minnesota to defend the Federal Transit Administration's environmental impact disclosures for the Central Corridor Light Rail Transit Project connecting downtown St. Paul with downtown Minneapolis. The court ruled in favor of the agency on all claims but one, and declined to halt the project while the agency remedied its environmental disclosures. The court agreed with our argument that the public interest in the transit project, including the construction jobs it is bringing to the Twin Cities, outweighed the potential harm to plaintiffs. In *Friends of Congaree Swamp v. Federal Highway Admin.*, ENRD also succeeded in defending a $37 million project to rebuild a series of four structurally deficient bridges and expand connecting causeways along U.S. Highway 601 within the Congaree National Park in South Carolina. Plaintiffs were successful in a prior challenge, and brought new claims challenging the revised environmental analysis. The South Carolina Department of Transportation also was a defendant in this suit and the Division worked very closely with it. As a result of the favorable decision, this important public safety work continues. Construction is expected to be completed in June 2013.

Defending the Operation of Floodways During Mississippi River Flooding

The State of Missouri sought emergency relief in *Missouri v. U.S. Army Corps of Eng'rs* to enjoin the Corps from operating the Birds Point-New Madrid Floodway in response to record high flooding. Operation of the floodway was necessary to protect thousands of people and millions of dollars' worth of property from the potential of a catastrophic flooding event that could result from the failure of a levee near Cairo, Illinois. Missouri alleged that the Corps' plans to operate the floodway violated the Missouri CWA and the APA. In less than a week, the Division successfully opposed a request in the district court for a temporary restraining order, and motions for emergency stay in the Eighth Circuit and the Supreme Court. The Corps detonated the levee several days later. Missouri then voluntarily dismissed its suit. This victory required close cooperation among the local U.S. Attorney's Office, three sections of the Division, and the Solicitor General's Office.

Upholding Efforts to Deepen the Delaware River for Navigation

We successfully opposed multiple challenges to the long-planned deepening of the Delaware River's 102-mile main channel from 40 to 45 feet. In *Delaware Dep't of Natural Resources v. U.S. Army Corps of Eng'rs*, ENRD successfully defended the deepening of one stretch of the river against a motion for preliminary injunction from the State of Delaware, which argued that the Corps could not proceed with the project until it received certain state permits and made supplemental findings under the Coastal Zone Management Act. In November 2010, the district court in Delaware granted summary judgment in favor of the Corps, allowing the full project to proceed. In January 2011, the district court in New Jersey similarly granted summary judgment in favor of the Corps in *New Jersey v. U.S. Army Corps of Eng'rs* on claims brought by the State of New Jersey and several environmental groups under the CWA, CAA, and NEPA.

Defending Permitting of Dredge-or-Fill Activities

The Division successfully defended multiple decisions by the Corps to issue CWA permits authorizing the discharge of dredged or fill materials into various waters of the United States, including in: *Jordan River Restoration Network v. Army Corps of Eng'rs* (April 2011 order denying preliminary injunction against a permit authorizing the discharge of dredged or fill materials into wetlands adjacent to the Jordan River in Salt Lake County, Utah, in connection with the construction of the Salt Lake Regional Athletic Sports Complex); *ARC Ridge, L.L.C. v. Army Corps of Eng'rs* (February 2011 judgment dismissing challenge to the Corps' decision to allow the construction of an electric transmission line in Texas to proceed pursuant to a nationwide permit); *Hillsdale Environmental Loss Prevention, Inc. v. Army Corps of Eng'rs* (orders denying a preliminary injunction and subsequently affirming the decision of the Corps in issuing a permit allowing BNSF Railway Co. to fill wetlands in conjunction with development of an intermodal transportation facility near Gardner and Edgerton, Kansas).

Litigating Water Quality in the Everglades

Plaintiffs in *Miccosukee Tribe v. EPA* originally challenged a determination by EPA that certain statutory and regulatory actions by the State of Florida concerning discharges into the Everglades did not amount to changes to the state's water quality standards. After a largely unfavorable ruling in 2008, the district court issued a harshly worded order in April 2010, in response to contempt motions filed by plaintiffs. That order directed EPA to issue an amended determination in the matter by September 3, 2010, and to take other specific actions related to its implementation of the CWA. While EPA issued a comprehensive amended determination that complied with nearly all of the court's injunctive instructions, the Division filed a motion for reconsideration of aspects of the April 2010 order. The Division also successfully petitioned for a writ of mandamus from the Eleventh Circuit setting aside the district court's order requiring EPA Administrator Lisa Jackson to personally appear and be subject to examination by the court. In December 2010, following months of briefing, the court held a hearing on, among other things, EPA's compliance with the April 2010 order and the pending reconsideration motion. In April 2011, the court granted EPA's reconsideration motion in full and resoundingly endorsed EPA's views as to the appropriate administrative approach to protecting the Everglades under the CWA.

Last year, the Division also successfully litigated petitions for review in the Eleventh Circuit challenging EPA's September 2010 amended determination. In July 2011, in *South Florida Water Mgmt. Dist. v. EPA*, the court of appeals granted ENRD's motion to dismiss because the amended determination was neither final for purposes of review nor the type of EPA action reviewable under the provisions of the CWA.

Protecting Everglades Restoration Efforts from Constitutional Challenges

In *Mildenberger v. United States*, landowners along the St. Lucie River in Florida alleged a taking of their property in violation of the Fifth Amendment resulting from the U.S. Army Corps of Engineers' operational plan for Lake Okeechobee. Plaintiffs alleged that releases of pollutants and fresh water into the St. Lucie River and Estuary over time have destroyed the estuarine environment and riparian rights of plaintiffs. In 2010, the court rejected plaintiffs' claims that their riparian rights had been taken,

holding that the claims were time-barred; the various riparian rights claimed (fishing, swimming, and boating) are shared by the public at large under the state's public trust doctrine and are therefore non-compensable; and even if plaintiff could assert a compensable property interest under state law, the claims would be barred by the federal navigational servitude. In subsequent proceedings, the court dismissed all remaining claims, including those relating to alleged noxious odors, mangrove tree mortality, flooding, and pollution of an irrigation well. In September 2011, the Federal Circuit affirmed the Court of Federal Claims' dismissal of all claims.

Representing Federal Interests in Asian Carp Litigation

Invasive species are one of the largest threats to the Great Lakes ecosystem. Asian carp, which can grow to 5 feet and weigh more than 100 pounds, have come to dominate sections of the Mississippi River and its tributaries. If the carp were to become established in the Great Lakes, it is feared the species could create an ecological disaster by consuming the bottom of the food chain and negatively impacting the Great Lakes' $7 billion fishery industry.

In fiscal year 2011, the Division continued to successfully represent the interests of the United States in litigation involving the migration of Asian carp into the Great Lakes through the Chicago Area Waterway System. In *State of Michigan v. U.S. Army Corps of Eng'rs*, the States of Michigan, Wisconsin, Illinois, Pennsylvania, and Ohio filed suit against the Corps, alleging that the Corps had created a public nuisance by operating structures around Chicago in such a way as to allow Asian carp to enter Lake Michigan. They moved for a preliminary injunction, which the district court in Illinois denied. In August 2011, in the case of *Michigan v. Corps of Eng'rs*, the Seventh Circuit affirmed the denial of a preliminary injunction. The appellate court held that the injunctive relief sought would only marginally decrease the likelihood of harm during the pendency of the litigation while imposing great costs on the government and the public. It concluded that any effort by the courts to intervene in the ongoing extensive interagency effort to stop the invasion of carp was unnecessary and might do more harm than good given the relative competency of the branches.

Protecting U.S. Waters Against Invasive Species Carried in Vessels' Ballast Water

Marine vessels traveling in commerce in the United States can pose a threat to the waters in which they travel when they discharge ballast water laden with foreign organisms. EPA has promulgated a general permit under the CWA specifying procedures designed to reduce the threats posed by such ballast water discharges. In July 2011, in the case of *Lake Carriers Ass'n v. EPA*, the D.C. Circuit upheld EPA's regulations against challenges brought by representatives of the shipping industry who contended that the permit was too burdensome because it required compliance with all states' water quality certification conditions. The court rejected these arguments, holding that petitioners had failed to establish that EPA may alter or reject state certification conditions.

Defending EPA's Regulation of Hazardous Air Pollutants Emitted by Medical Waste Incinerators

In *Medical Waste Inst. v. EPA*, a trade group representing the hospital waste industry challenged EPA's CAA standards governing the emissions of hazardous pollutants that result from the incineration of hospital, medical, and infectious wastes. In June 2011, the D.C. Circuit upheld EPA's determination to consider up-to-date data in revising these standards following a prior remand and rejected as untimely petitioners' challenges to EPA's approach of setting hazardous air pollutant standards on a pollutant-by-pollutant basis.

Ensuring Timely Implementation of Air Quality Standards for Sulfur Dioxide

In *National Environmental Dev. Council's Clean Air Project v. EPA*, petitioners sought to stay implementation of EPA's more stringent air quality standards for SO2 pending judicial review. We opposed, and in April 2011 the D.C. Circuit entered an order denying the stay motion, thus ensuring that the protections afforded by the new standards would be implemented as scheduled.

Defending the Animal and Plant Health Inspection Service's Biotechnology Program

The Animal and Plant Health Inspection Service (APHIS) of the Department of Agriculture regulates the nation's use and introduction of genetically engineered crops. In fiscal year 2011, the Division continued its defense of APHIS's biotechnology regulatory program with respect to several genetically engineered crops.

Sugar beets comprise about one-half of the current domestic refined sugar supply, and genetically modified sugar beets make up 95% of all sugar beets planted. Several of ENRD's cases involved "Roundup Ready" sugar beets (RRSB):

--In February 2011, in the case of *Center for Food Safety v. Vilsack*, the Ninth Circuit reversed a district court's preliminary injunction entered against APHIS. In 2005, APHIS deregulated genetically engineered RRSB under the Plant Protection Act. Its decision was accompanied by an Environmental Assessment (EA). After plaintiffs filed suit challenging the EA, the district court vacated the deregulation decision and remanded for preparation of an Environmental Impact Statement (EIS). Pending its issuance of the EIS, APHIS issued four permits allowing seed companies to grow RRSB "stecklings" (seedlings), which could be used to grow the seed crop if APHIS granted additional regulatory approvals that were the subject of the EIS review. Plaintiffs, a public interest group and organic farmers, sued to enjoin the interim authorizations. The district court granted a preliminary injunction requiring destruction of the stecklings. In reversing, the Ninth Circuit held that growth of the stecklings posed a negligible risk of genetic contamination, as the juvenile plants are biologically incapable of flowering or cross-pollinating before the permits expired. The court found the district court improperly relied on alleged past incidents of contamination by genetically engineered plants to find present harm. The court noted that APHIS's permits "follow the . . . blueprint" the Supreme Court set forth in *Monsanto v. Geertson Seed Farms* for a limited authorization of a genetically engineered crop pending completion of an EIS. Once the permits expired, ENRD subsequently obtained a dismissal on mootness grounds from

the district court. The favorable outcome allowed the planting of up to 526 acres of RRSB seed crop in the fall of 2011.

--In *Grant v. Vilsack* and *Center for Food Safety v. Vilsack*, ENRD defended APHIS from litigation brought by industry groups and environmental groups against its interim decision to partially deregulate RRSB root crop production and to permit planting of RRSB seed crop subject to mandatory conditions while it prepares the EIS regarding full deregulation of RRSB. A decision from the court is expected in the second or third quarter of fiscal year 2012.

Additionally, in *Center for Biological Diversity v. Animal and Plant Health Inspection Service*, the Division successfully managed a challenge to APHIS's approval of permits that authorize the planting and flowering of a genetically modified hybrid of eucalyptus tree in seven states in the southeastern United States. The permits authorized field trials of a variety of eucalyptus that is designed to reduce fertility, enhance the ability to occasionally withstand cold temperatures, and increase efficiency for producing pulp and paper. Plaintiffs brought claims under NEPA, ESA, and the Food, Conservation, and Energy Act of 2008. The Division obtained a dismissal of certain claims on jurisdictional grounds and succeeded on the merits of the remaining NEPA claims.

Clarifying the Jurisdiction of the Court of Federal Claims

In *United States v. Tohono O'odham Nation*, the Supreme Court held that long-established statutory law precludes the Court of Federal Claims from hearing "any claim for or in respect to which the plaintiff . . . has pending in any other court." Following the issuance of that decision, we concluded that the Court of Federal Claims lacks jurisdiction to hear claims in several pending Fifth Amendment takings cases. As a result of motions filed by ENRD, the United States was able to gain dismissals of takings claims in three significant cases: *Central Pines Land Co. v. United States*, seeking more than $150 million for the alleged taking of oil and gas rights on federal lands in Louisiana; *Brandt v. United States*, involving the alleged taking of an interest in an abandoned railroad right-of-way in Wyoming; and *Stockton East Water Dist. v. United States*, seeking $500 million for an alleged taking based on the alleged failure by Reclamation to deliver water to several California water districts. Motions to dismiss several other significant cases remain pending.

Ensuring the Continued Vitality of the Rails-to-Trails Program

The Division continues to defend thousands of Fifth Amendment takings claims brought by landowners who allege that the National Trails System Act deprives them of reversionary rights in abandoned railroad rights-of-way. While the defense of these cases presents numerous legal challenges and requires significant resources, we have been able to narrow the claims in many of the cases, resulting in a savings of millions of dollars to the public fisc. These cases include: *Thompson v. United States* (granting partial summary judgment to the United States for Michigan properties); *Gregory v. United States* (granting partial summary judgment to the United States for Mississippi properties); *Farmers Co-op Co. v. United States* (limiting temporal scope of federal liability for Kansas properties); *Whispell Foreign Cars, Inc. v. United States* (granting partial summary judgment to the United States for Florida

properties); *Macy Elevator, Inc. v. United States* (granting partial summary judgment to the United States for Indiana properties); and *Rasmuson v. United States* (denying plaintiffs' motion to certify a class of Iowa property owners).

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. Examples of this type of action in fiscal year 2011 include the following cases:

--Last year saw a successful conclusion to the protracted eminent domain action, *United States v. 753.95 Acres in Washoe County, Nevada, and Incline Lake Corp*. This action was filed at the request of the Forest Service under authority of the Southern Nevada Public Land Management Act, which makes funds generated by disposal of public lands in the Las Vegas Valley available for purchase of environmentally sensitive land. In May 2008, the Forest Service and landowner Incline Lake Corporation (ILC) agreed to federal acquisition of these 753.95 acres, with the purchase price to be set by a federal court. Estimated just compensation of $46,000,000 was deposited in the district court in Nevada by the United States at the outset of litigation. ILC sought a valuation of at least $74,450,000. After lengthy discovery and pre-trial motions, the parties arrived at a settlement amount of $43,500,000. The settlement resulted in repayment by ILC to the United States of the $2,500,000 difference between the initial deposit and the settlement amount.

--In the case of *United States v. 1.604 Acres of Land Situate in the City of Norfolk, Commonwealth of Virginia, and 515 Granby, L.L.C.*, the Division sought to acquire land on behalf of the General Services Administration for construction of an annex to the Walter E. Hoffman U.S. Courthouse in Norfolk, Virginia. The site had been slated to house a $180,000,000 condominium project; however, construction halted in 2007 as a result of financial difficulties. The landowner was seeking more than $36,000,000 in just compensation for the property but, following a series of successful pre-trial motions and an effective trial presentation, the jury ultimately awarded just compensation in the amount of $13,401,741. *United States v. 15,478 Square Feet of Land Situate in the City of Norfolk, Commonwealth of Virginia, and Balaji Sai, L.L.C.*, is a companion case for the same project. The parties engaged in court-ordered mediation in June 2011, and reached a favorable $1,667,000 settlement.

--*United States v. 275.81 Acres of Land in Stonycreek Township, Somerset County, Pennsylvania and Svonavec, Inc.*, is a condemnation action on behalf of the National Park Service for construction of the Flight 93 National Memorial. The memorial site includes approximately 275 acres containing a museum, observation area, and memorial. The United States' designated trial appraiser values the property at $600,000. Defendant's appraiser originally estimated just compensation at $30,895,000 ($23,300,000 for land value and $7,595,000 for oil and gas rights), but in the course of discovery

defendant agreed to stipulate to a reduced oil and gas value of $105,000. This matter will likely be scheduled for trial in 2012.

--The condemnation action *United States of America v. 7.85 Acres of Land, More or Less, Located in Prince William County, Commonwealth of Virginia*, was filed on behalf of the National Park Service in January 2011. We sought to acquire one of the last remaining private landholdings within the boundaries of Prince William Forest Park on behalf of the National Park Service. The Service had attempted to negotiate acquisition of this property for nearly a decade, but was unsuccessful because ownership was divided among dozens of descendants and heirs of the last record owner, who died nearly 50 years ago. Taking this action allowed the transfer of title from and payment of just compensation to the many landowners. Prince William Forest Park, established in the 1940s, protects the largest piedmont forest in the national park system and the largest green space in the Washington, D.C., metropolitan region. The district court in Virginia awarded just compensation of $190,000, the amount for which the Division presented evidentiary support at trial.

In fiscal year 2011, ENRD also conducted title reviews for client agencies able to negotiate property purchases without the need for the Division to file condemnation actions. Examples include the acquisition by the General Services Administration of a warehouse in Sterling, Virginia, for use by the Department of State for a consideration of $9,700,000; by the Indian Health Service of 18.77 acres of land located in Sage, Riverside County, California, for construction of a residential rehabilitation treatment center serving 96 American Indian/Alaska Native youth annually for a consideration of $850,000; and by the U.S. Department of Veterans Affairs of 12 city blocks in New Orleans, Louisiana, as the site of the new $1 billion VA Medical Center to replace the facility damaged by Hurricane Katrina.

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. One example of this work from last year is the Division’s continuing support for the development of legislation to clarify the Oil Pollution Act, the Outer Continental Shelf Lands Act, and other federal statutes to prevent future oil spills from deepwater petroleum exploration and production, ensure that responsible parties are held accountable for spills, assure that adequate plans and resources are in place to mitigate the adverse environmental impacts from such events, and improve the administration of federal mineral and energy resources.

Enforcing Environmental Law Through International Capacity Building

The Division implements an active and varied program of international activities, often in collaboration with partners from other federal agencies, to support important Administration and Department objectives.

--We successfully prosecute transnational environmental and natural resource crimes that involve foreign evidence or foreign assistance, or that rely on the violation of underlying foreign statutes.

--We provide critical training for law enforcement partners in other countries to ensure that they may work effectively with us in investigating and prosecuting transnational environmental crimes.

--We participate in the development and implementation of trade and investment agreements, treaties, international environmental agreements, and domestic implementing legislation in order to ensure that they protect and promote effective environmental enforcement.

--We also help to develop and facilitate international partnerships and networks that promote effective prosecution of transnational environmental crimes.

To carry out these objectives, in fiscal year 2011 ENRD spoke at conferences and workshops, provided training, and met with law enforcement counterparts in Brazil, Chile, China, Mexico, New Zealand, Peru, and Russia, as well as in the United States.

The Division continued to speak at conferences and workshops internationally and domestically in order to disseminate information about the 2008 amendments to the Lacey Act, which added enforcement tools to combat international trafficking in illegally harvested timber and wood products made from such timber. For example, ENRD worked with the Department's Overseas Prosecutorial Development, Assistance, and Training Program to organize a workshop on the Lacey Act and prosecution of illegal logging crimes at the Russian Ministry of Justice Legal Academy in Khabarovsk, Russia. The workshop was attended by representatives of the Russian Ministry of Justice, regional and local prosecutors, regional police, and the Russian Federal Forestry Agency. The Division also spoke about the Lacey Act at four workshops in China funded by the U.S. Agency for International Development for government officials and representatives of the wood products industry. We also have been provided funding by the State Department and U.S. Agency for International Development to implement multi-year programs in Brazil, Russia, Peru, and Honduras to provide training on the Lacey Act and combating illegal logging.

We participated in negotiations led by the Office of the U.S. Trade Representative of the environment chapter of the Trans-Pacific Partnership Trade Agreement with eight Asian and South American countries. The Division attended and supported the U.S. delegation at meetings of the United Nations Framework Convention on Climate Change. And ENRD, with colleagues from EPA, began a program to provide training to judges in Chile on adjudicating environmental enforcement cases.

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

At times, ENRD participates as amicus curiae in cases in which the United States is not a party in order to protect the interests of the United States and its component agencies. We filed briefs in a number of such proceedings in fiscal year 2011. An example is the case of *Morrison Enterprises, L.L.C. v. Dravo Corp.* In that case, the Eighth Circuit issued a decision interpreting a key provision of CERCLA as

advocated by the United States. In *United States v. Atlantic Research*, the Supreme Court held that a potentially liable private party who has voluntarily cleaned up hazardous substances at a site can seek to recover the costs of response from other potentially liable parties through an action under section 107 of CERCLA. The Supreme Court decision did not address whether a potentially liable party that was compelled to clean up a site under an administrative settlement or consent decree, and thus may seek contribution under the plain language of CERCLA section 113, also may seek to recover costs under section 107.

Following the Supreme Court's decision, the Division filed numerous amicus briefs on behalf of EPA in district courts and courts of appeals arguing that such parties cannot seek to recover costs under section 107. The underlying concern is avoiding an interpretation of CERCLA that would undermine the contribution protection that CERCLA provides to parties that reach settlements with the federal government to resolve their liability for cleaning up hazardous waste sites. In *Morrison*, the Eighth Circuit held, consistent with its prior decision in *Atlantic Research* (before the case reached the Supreme Court) and arguments made by ENRD in its amicus brief, that CERCLA section 113 provides the exclusive remedy for a party who incurs response costs under an administrative settlement or consent decree. The Second and Third Circuits, and many district courts, have now interpreted this CERCLA provision as the United States construes it.

Other important cases in which the Division filed amicus briefs include *PPL Montana, L.L.C. v. State of Montana* (a U.S. Supreme Court case addressing the question of whether the Montana Supreme Court erred in concluding that riverbeds occupied by hydroelectric facilities are the property of the State of Montana because they were navigable for title purposes at the time Montana became a state) and *Northwest Environmental Defense Center v. Brown* (a Ninth Circuit case involving EPA regulations addressing what silvicultural activities are subject to CWA National Pollutant Discharge Elimination System permitting requirements).

The Division also conducts the Department's review of citizen-suit complaints and consent judgments under the CAA and CWA. Those statutes contain provisions allowing citizens to file suit for violations of those statutes, and require that citizen-suit complaints and consent judgments be served on the Department and EPA. When served with complaints, we offer our assistance to counsel for the parties, and we review all consent judgments to ensure that they comply with the requirements of the relevant statute and are consistent with the statute's purposes. The case of *State of New York v. ExxonMobil* is illustrative. In concert with the U.S. Attorney's Office for the Eastern District of New York, we reviewed and negotiated amendments to a proposed consent decree in a suit filed by the State of New York under state and federal law (including the citizen-suit provisions of RCRA and the CWA) for civil penalties and natural resource damages arising out of an oil spill at Exxon's oil refining and storage facilities in Greenpoint, Brooklyn. Under the terms of the consent decree, Exxon agreed to pay over $6 million to the State of New York for damages and penalties, as well as $19.5 million to fund environmental benefit projects. After identifying several aspects of the proposed consent decree that were cause for concern for EPA and the federal natural resource trustees, we worked with the parties to develop amendments

that would address those areas of concern. Plaintiffs ultimately lodged a revised proposed consent decree, and after the United States filed its comments, the court entered the decree in March 2011.

Box Text

There are three species of Asian carp that are considered invasive and a threat to the Great Lakes, the bighead, silver and black carp. Silver and bighead carp are filter-feeding fish and consume plant and animal plankton at an alarming rate. Bighead carp can grow over 5 feet in length and can weigh 100 pounds or more. Black carp differ in that they consume primarily mollusks, and threaten native mussel and sturgeon populations. They can grow to 7 feet in length and 150 pounds.

--Asian Carp Regional Coordinating Committee

Genetically Engineered Eucalyptus

--Eucalyptus species are among the fastest growing woody plants in the world and represent about 8% of all planted forests. While there are over 700 eucalyptus species identified, only a limited number are grown commercially.

--Eucalyptus is a preferred fiber source for the global pulp and paper industry.

--It is hoped that genetically engineered (GE) cold tolerant eucalyptus will allow production of this hardwood species for pulping and for biofuel applications in managed plantation forests in the southeastern United States.

--APHIS Fact Sheet

Lacey Act Plant Protection Provisions Added by the Food, Conservation, and Energy Act of 2008

--The Lacey Act now makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant, with some limited exceptions, taken in violation of the laws of a U.S. state, or any foreign law that protects plants.

--The Lacey Act also makes it unlawful to make or submit any false record, account or label for, or any false identification of, any plant.

--The definition of the term “plant” includes “any wild member of the plant kingdom, including roots, seeds, parts, and products thereof, and including trees from either natural or planted forest stands." The definition contains certain exceptions, including for common cultivars and common food crops.

--The Lacey Act also requires an import declaration for plants and plant products, except for plant-based packaging materials used exclusively to import other products. Importers must file a declaration upon importation that contains the scientific name of the plant, the value of the importation, the quantity of the plant, and the name of the country from which the plant was taken. Enforcement of the declaration requirement is currently being phased in.

-- Anyone who imports into the United States, or exports out of the United States, illegally harvested plants or products made from illegally harvested plants, including timber, as well as anyone who exports, transports, sells, receives, acquires or purchases such products in the United States, may be prosecuted.

--USDA Fact Sheet

PROMOTING NATIONAL SECURITY AND MILITARY PREPAREDNESS

The Environment and Natural Resources Division makes a unique and important contribution to national security while ensuring robust compliance with the country's environmental and natural resources laws. Increasingly, the Division is responsible for defending agency actions that support the security of the United States, including actions to expand the domestic energy portfolio to a broad range of energy sources and reduce the nation's dependence on fossil fuel.

Facilitating Military Modernization Plans

Two years ago, the Division facilitated interagency discussions under the direction of an Interagency Policy Committee chaired by the White House Council on Environmental Quality and the National Security Council to address legal, policy, and environmental concerns associated with three critical military redevelopment projects that will affect Guam and the Commonwealth of the Northern Mariana Islands. Covered actions include the relocation of U.S. Marines Corps troops and facilities presently stationed on Okinawa, Japan; construction of a deep-draft wharf with shoreside facilities for berthing a U.S. Navy transient nuclear-powered aircraft carrier; and establishment of a U.S. Army Air and Missile Defense Task Force. In September 2010, the Department of Defense signed a Record of Decision concerning the three projects, thus marking the successful conclusion of the federal interagency problem-solving process. As part of the decision-making process, EPA ultimately concluded that the final Environmental Impact Statement prepared by the Defense Department, with our assistance, contains an adequate discussion of the environmental impacts of the projects and proposes a mitigation plan that, if successfully implemented, will avoid unsatisfactory public health and environmental impacts. This will allow the Defense Department to move forward with the projects in a way that will promote the United States' long-term strategic interests and benefit the community at large.

Subsequently, in fiscal year 2011, the Division successfully defended a lawsuit, *Guam Preservation Trust v. Gregory*, brought by a coalition of historic preservation groups and local community organizations asserting claims against the Navy under the National Historic Preservation Act, the Coastal Zone Management Act, and NEPA. Plaintiffs challenged the Navy's selection of the Pagat Point area, which has cultural significance to the indigenous Chamorro people, for Marine Corps training and firing ranges as part of the Department of Defense's relocation of troops to Guam from Okinawa. The district court agreed with the Navy's argument that the litigation should be dismissed as moot based on the Navy's decision to prepare additional NEPA documentation before making a site-specific selection for the training ranges.

Defending the Department of Energy's Programs, Research, and Prerogatives

Los Alamos Study Group v. U.S. Dep't of Energy was a case brought by an anti-nuclear advocacy group that alleged the Department of Energy and the National Nuclear Security Administration (NNSA) violated NEPA by failing to prepare a "new" Environmental Impact Statement (EIS) for changes in design for construction of the multi-billion dollar Chemistry and Metallurgy Research Replacement Nuclear Facility

(CMRR-NF) at the Los Alamos National Laboratory in New Mexico. The CMRR-NF is a key component of the nation's security infrastructure and efforts to ensure a safe, secure, and effective nuclear arsenal in the 21st century. As we had argued, the district court dismissed the case under the doctrine of prudential mootness due to NNSA's initiation of a supplemental EIS process. In the alternative, the court found that ripeness was an equally valid ground for dismissal because the NEPA process is not yet complete.

Furthering the Administration's Renewable Energy Agenda

One component of the Administration's efforts to reduce the country's dependence on foreign oil is expansion of cleaner domestic sources of energy in the form of wind and solar power and renewable fuels. The Division is actively defending challenges to permits and rights of way issued by BLM to promote the development of renewable energy projects on western public lands. We successfully defeated motions for temporary restraining orders and/or preliminary injunctions for the Ivanpah Solar Project, Blythe Solar Project, and Sunrise Powerlink transmission project in California. The Division also successfully opposed efforts in *Western Watersheds Project v. BLM* to preliminarily enjoin the Spring Valley Wind Project located in Nevada. This represented the first decision on a wind energy project sited on federal land. The court concluded that the public has a strong interest in this project because "Congress and the President have clearly articulated that clean energy is a necessary part of America's future and it is important to Nevada's economic and clean energy goals." Finally, we are working closely with BLM to defend the permit issued for the Cape Wind Project, America's first offshore wind project.

In *National Petrochemical & Refiners Ass'n v. EPA*, industry petitioners challenged EPA's efforts to ensure that the full volume of renewable fuels specified by Congress in the Energy Independence and Security Act for use in 2009 and 2010 were produced and used, notwithstanding the fact that EPA had been unable to promulgate regulations in time for calendar year 2009. In December 2010, the D.C. Circuit found not only that EPA acted reasonably in combining the 2009 and 2010 quantities in the 2010 regulation, but also that the regulation was not impermissibly retroactive. In November 2011, the Supreme Court declined to grant a petition for writ of certiorari in the case.

Defending Dredging Projects Necessary for National Defense and Economic Vitality

In *Phippsburg Shellfish Conservation Comm'n v. Army Corps of Eng'rs*, the Division successfully defended against a challenge to a U.S. Army Corps of Engineers dredging project that was critical to the delivery of the *U.S.S. Spruance*, a billion-dollar guided missile destroyer, from the Bath Iron Works in Kennebec, Maine, to the possession of the United States Navy. Delay in the delivery of the destroyer would have had a ripple effect on training and assignments for multiple ships implicating military training readiness. In July 2011, the district court issued an order denying plaintiffs' motion for a preliminary injunction. In ruling in favor of the Corps, the court gave particular attention to balancing the potential for environmental harm with the public's strong interest in national defense and in the continued economic vitality of the Bath Iron Works. Plaintiffs subsequently dismissed their case voluntarily after the dredging occurred.

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

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 local U.S. Attorneys' Offices, the Department of Homeland Security, and the Corps to facilitate land acquisitions necessary for the construction of 225 miles of fencing (the Strategic Border Initiative). This has required acquisition by eminent domain of nearly 400 land parcels in Texas, New Mexico, Arizona, and California and extensive work to obtain timely possession for construction purposes and to address widespread title and survey issues. The Division has helped resolve 160 cases (most from fiscal year 2009 forward), and has trials scheduled next year on four of the most precedent-setting cases with valuation disputes of more than $100 million. In fiscal year 2011, for example, we brought to a successful conclusion *United States v. 6.09 Acres of Land Situated in Cameron County, Texas, and Rollins M. Koppel, Trustee*, a condemnation action filed in Texas on behalf of the Department of Homeland Security. The landowner's appraisers opined a value of over $13,500,000; the parties reached an agreed settlement of $4,995,000.

The Division also filed over a dozen cases, on behalf of the Department of Homeland Security and the General Services Administration, on an expedited basis, for the modernization and expansion of various land ports of entry in Maine, New York, Texas, and Washington. Virtually all of these cases have been resolved, and on terms favorable to the United States.

Acquiring Additional Property to Improve Military Preparedness and National Security

We also acquire lands or review title to lands needed to fulfill other critical military and homeland security functions. The following cases illustrate this work in fiscal year 2011:

--In *United States v. 2,560 Acres of Land in Imperial County, California, and Donald Crawford*, the Division filed a condemnation on behalf of the U.S. Navy to acquire privately owned land located within El Centro Naval Air Facility. The Navy had previously leased this property, which contains portions of a strafing range and the main target for air-to-ground bombing practice at the facility. The United States condemned fee title in September 2011, depositing estimated just compensation of $1,280,000. Trial is expected in late 2012 or early 2013.

--In February 2011, the United States deposited estimated just compensation of $4,363,000 in the case of *United States v. 1,136.526 Acres of Land, in Goliad County, Texas*. This is a condemnation action on behalf of the Department of Defense for acquisition of an airstrip to be used in Navy training.

--The Division issued a preliminary title opinion for the Department of Homeland Security acquisition by donation from the State of Kansas of 45.84 acres and 6 appurtenant easements located in Manhattan, Kansas. This will be the site of a new $450,000,000 National Bio and Agro-Defense Facility.

--We also issued a preliminary opinion of title for a joint U.S. Air Force/Trust for Public Land acquisition of a conservation easement adjacent to Beale Air Force base in Yuba County, California, for

consideration of $1,593,681. The acquisition is occurring under a federal program that protects military operations from encroaching development.

--Finally, ENRD issued another preliminary title opinion for 16.840 acres located in Glynn County, Georgia. This land is to be acquired for development of an addition to the Department of Homeland Security's Federal Law Enforcement Training Center.

Box Text

"New facilities, such as the Chemistry and Metallurgy Research Replacement building . . ., along with materials consolidation, means that the nation's special nuclear materials inventory can be protected to meet the security challenges of the 21st century."

--Los Alamos National Laboratory

"Reducing our dependence on oil is going to strengthen our national security. It will make our environment cleaner for our kids. It will make energy cheaper for our businesses and for our families. And doubling down on a clean energy industry will create lots of jobs in the process."

--President Barack Obama, February 2012

"By helping stand up responsible large-scale renewable energy projects on America's public lands and oceans, the Department of the Interior is playing a leading role in fulfilling President Obama's vision for a new energy future. As America's principal public lands management agency with stewardship responsibility over 20 percent of the nation's land mass and 1.75 billion acres of the Outer Continental Shelf, Interior manages areas with extensive renewable energy potential."

--Interior Secretary Ken Salazar, January 2011

Camp Beale opened in October 1942, as a training site for the 13th Armored and the 81st and 96th Infantry Divisions. The base has been under several commands, including Air Training Command, Continental Air Command, Aviation Engineer Force, the Strategic Air Command, and since June 1, 1992, Air Combat Command. In 2001, the 12th Reconnaissance Squadron activated at Beale as the parent organization for the GLOBAL HAWK, the Air Force's newest high-altitude reconnaissance platform. Today, Beale AFB is the home for the U-2 reconnaissance aircraft, the T-38 jet trainer, and the KC-135 tanker.

--U.S. Air Force Fact Sheet

PROTECTING INDIAN RESOURCES AND RESOLVING INDIAN ISSUES

This Administration has made clear its commitment to Indian Country. In connection with the third Tribal Nations Conference sponsored by the White House in 2011, President Obama stated: "I believe we are seeing a turning point in the relationship between our nations, and I promise to do everything I can to fight for a brighter future for First Americans and all Americans." Attorney General Holder has reaffirmed the Department of Justice's commitment to "building and sustaining healthy and safe native communities; renewing our nation's enduring promise to American Indians and Alaska Natives; and respecting the sovereignty and self-determination of tribal governments." Vigilant protection of tribal sovereignty, tribal lands and resources, and tribal treaty rights is at the heart of ENRD's core mission and is a top priority for us.

ENRD's work related to Indian tribes and their members is multi-faceted:

--Today, the United States holds almost 60 million acres of land in trust for federally recognized tribes and individual tribal members. The Department of the Interior and ENRD, working with federally recognized tribes, seek to protect these lands and associated resources from trespass, impairment, and encumbrance.

--The Division brings suits on behalf of the United States to protect tribal rights and resources. The rights and resources at issue in our cases are tribal water rights, the ability to acquire reservation land, and treaty-protected hunting and fishing rights, among others.

--The Division also defends against challenges to statutes and federal agency actions designed to protect tribal interests.

--We bring cases to address environmental contamination affecting Indian tribes. Many tribal communities may be disproportionately affected by pollution of the air, water, and land, including the effects of climate change. This also raises environmental justice issues.

--In addition, the Department of Justice defends claims asserted by Indian tribes against the United States on grounds that the United States has not properly managed the tribes' monetary and natural resources held in trust by the United States. Indian tribes also may be parties to cases challenging the actions of federal resource management agencies.

In fiscal year 2011, we continued our efforts to ensure that this work is conducted in the most effective manner, and with careful consideration of the government-to-government relationship between the United States and federally recognized tribes. We have achieved significant successes. In particular:

--ENRD has increased outreach to tribal leaders and communities to better understand their concerns, and we are working more closely with them in carrying out our important tribal responsibilities.

--The Division is actively engaged with the Department of the Interior and tribes in identifying, developing, and prosecuting affirmative cases (including through amicus participation) in multiple areas, including tribal water rights, reservation boundaries, and tribal jurisdiction and sovereignty. We also are taking steps to address uncertainty regarding Interior's trust acquisition authority created by recent Supreme Court case law.

--With other responsible federal agencies, ENRD is exploring ways to improve environmental compliance in and around Indian Country.

--With the Departments of the Interior and the Treasury, we are exploring opportunities for resolution of tribal trust cases in an expedited, fair, and just manner, and have successfully resolved cases. The Division has developed and is implementing expedited settlement processes in tribal trust litigation.

The remainder of this chapter describes specific ENRD activities in each of these areas.

Working Closely with Tribal Leaders and Communities

In the past year, ENRD senior management traveled around the country--from Arizona to Alaska, and from Montana to South Dakota--to meet with tribal leaders, visit tribal lands, and hear about and see first-hand their unique environmental and natural resources challenges, including the effects of climate change on tribal lands and fishing grounds, and increased pressures for development on sacred sites. For example:

--In September 2011, Assistant Attorney General Moreno and U.S. Attorney Michael Cotter attended the North Dakota United States Attorney's Office's Environmental Enforcement Training Conference in Bismarck, North Dakota. At this conference, Assistant Attorney General Moreno and U.S. Attorney Timothy Purdon, along with representatives from EPA, provided training on environmental enforcement actions to federal, state, local and tribal law enforcement officers, and environmental investigators.

--In July 2011, the Department held the Joint Native American Issues Subcommittee and Attorney General's Advisory Committee meeting in South Dakota, and tribes from that state discussed their public safety, environmental, and other concerns with the Department's senior leadership.

--In April 2011, Assistant Attorney General Moreno, ENRD senior staff, and U.S. Attorney Dennis Burke met with Navajo Nation officials to discuss environmental and natural resource issues of concern to that tribe.

--In February 2011, Assistant Attorney General Moreno and ENRD staff joined U.S. Attorney Michael Cotter and Montana Attorney General Steve Bullock in Helena, Montana, to attend the Joint Environmental Enforcement Training. Representatives from EPA, the Montana Department of Environmental Quality, ENRD's Environmental Crimes Section, and the Montana U.S. Attorney's Office

provided training on environmental enforcement actions to state, local, and tribal law enforcement officers, and environmental inspectors and regulators.

--In December 2011, Assistant Attorney General Moreno and senior ENRD staff participated in the third White House Tribal Nations Conference. Representatives from every federally recognized tribe were invited to attend the meeting. Assistant Attorney General Moreno was part of a panel that discussed tribal land, cultural resources and awareness, natural resources, and numerous other issues.

Supporting Tribal Recognition and Sovereignty

The Division has continued its longstanding efforts to support tribal jurisdiction and sovereignty. For example, in *Water Wheel Camp Recreation Area, Inc. v. LaRance*, ENRD filed an amicus brief in the Ninth Circuit supporting tribal court jurisdiction. The underlying dispute arose over a lease secured by Water Wheel Camp Recreation Area, Inc., for the development of tribal land on a reservation of the Colorado River Indian Tribes (CRIT). After CRIT obtained an eviction order and monetary judgment in tribal court against the company and its principal owner, both filed an action in federal district court arguing that the tribal court lacked jurisdiction. While the district court found that the tribal court had jurisdiction to adjudicate the tribe's claims only as to the company, the Ninth Circuit held that the tribal court had jurisdiction as to the claims against both the company and its owner. Consistent with the argument made by the Division, the Ninth Circuit concluded that the tribe's authority to regulate non-member use of tribal land is an inherent part of its power to exclude and that the tribe's adjudicatory authority was coextensive with its regulatory authority over the land.

Preserving the Culture and Religion of Federally Recognized Indian Tribes

While bald and golden eagles are protected under federal law, such birds also are important to the religious and cultural life of many Indian tribes. The United States has a strong interest both in protecting eagles and in ensuring that members of federally recognized tribes can practice their religion to the greatest extent possible. The Division works closely with FWS to balance these competing interests by defending the rights of federally recognized tribes and their members to have exclusive access to feathers for religious purposes and by prosecuting anyone (Indians and non-Indians alike) who illegally kills or trades in eagles or eagle parts.

An important example of this defensive work is *United States v. Wilgus*, a case in which ENRD secured a favorable outcome after over ten years of litigation in trial and appellate courts. The United States charged Wilgus, a practitioner of the Native American religion who is not a member of a federally recognized tribe, with unlawful possession of 141 eagle feathers in violation of the Bald and Golden Eagle Protection Act (the Eagle Act). The district court dismissed the charges, holding that the Eagle Act's prohibition against possessing eagle feathers violates the Religious Freedom Restoration Act (RFRA). The RFRA prohibits the federal government from substantially burdening the religious freedom of individuals unless it does so to support a compelling government interest through the least restrictive means. In March 2011, the Tenth Circuit reversed, joining the Ninth and Eleventh Circuits in upholding against RFRA claims the Eagle Act and its implementing regulations, which permit only members of

federally recognized tribes to possess and use eagle feathers for religious purposes. The Tenth Circuit's decision clarified the contours of the government's compelling interest in preserving Native American culture and religion, holding that such interest relates specifically to federally recognized Indian tribes. The court held that the current regulatory scheme both furthers the government's compelling interest in protecting eagles and furthers its compelling interest in preserving tribal religion, by "do[ing] its best to guarantee that those tribes, which share a unique and constitutionally-protected relationship with the federal government, will receive as much of a very scarce resource (eagle feathers and parts) as possible." The Tenth Circuit found the current regulatory scheme to be the least restrictive means by which the government could promote these compelling but somewhat competing interests.

Defending Tribal and Federal Interests in Water Adjudications

The Division continues to assert water rights claims for the benefit of federally recognized Indian tribes and their members in 29 complex water rights adjudications in nearly every western state in the United States. Increasing population pressures in the arid West make water rights issues particularly contentious. Settlements are often preferred as the best way to resolve these complex matters, and over the past several years, the Division has worked diligently both to settle these difficult cases and to implement settlement agreements that have been approved by Congress but still need court approval. For example, Division attorneys are actively involved in implementing five landmark Indian water rights settlements approved by Congress in 2009 and 2010 that, when fully implemented, will resolve complex and contentious Indian water rights issues in three western states. These settlements include the Taos Pueblo Indian Water Rights Settlement, the Aamodt Litigation Settlement Act, and the Navajo-San Juan River Basin Settlement in New Mexico; the Crow Tribe Water Rights Settlement in Montana; and the White Mountain Apache Tribal Settlement in Arizona. Each settlement is uniquely adapted to the needs of the tribes and non-Indians involved in the particular river basins, but they all share the common features of providing welcome resolutions of complex water rights controversies that have existed for decades and of ensuring that the tribes have access to water on their reservations. These settlements also provide certainty as to the nature and extent of tribal water rights, and thereby promote economic development both on-reservation and in the adjacent, often rural, communities.

Settlements are not possible in every case due to the exigencies of particular cases. In those situations, resolution of these complex water issues falls to the adjudicating court or agency. The Division continues to have considerable success in achieving a just resolution of tribal water rights claims through adjudication. In the *Klamath Basin Adjudication* in Oregon, for example, the Division prevailed before a state administrative law judge on its claims for the benefit of the Klamath Tribes. After eight years of litigation, including extensive discovery and lengthy evidentiary proceedings, the judge ruled in favor of the United States on all issues in six water rights cases, affirming sufficient water rights to support productive habitat for fish, wildlife, and edible plants on the Klamath Reservation in southern Oregon.

Upholding Authority to Acquire Land in Trust for Tribes

The Division continued to have considerable success in defending the Department of the Interior's authority to take land into trust for tribes. The following cases are examples of this important work:

--The Division obtained dismissals, in whole or in part, of three suits challenging the acquisition in trust of land for the Sisseton and Yankton Sioux Tribes, including claims that the Bureau of Indian Affairs has a structural bias and challenges to the constitutional authority of the Secretary of the Interior to take land into trust.

--In a case involving the Karuk Indian Tribe, the court dismissed an action challenging DOI's decision to accept land into trust for the benefit of the tribe. The district court in California granted the Division's motion for summary judgment, interpreting an important aspect of the agency's trust land acquisition policy deferentially.

--The Division also successfully defended the timing and substance of a decision to take land into trust in Glendale, Arizona, for the Tohono O'odham Nation in four lawsuits filed in the District of Columbia and Arizona.

Addressing the Supreme Court's *Carcieri* Decision

In 2009, in *Carcieri v. Salazar*, the Supreme Court limited Interior's trust land acquisition authority to those tribes that were "under federal jurisdiction" when the Indian Reorganization Act was enacted in 1934. The decision created uncertainty regarding Interior's trust acquisition authority, resulting in a backlog of trust applications. The Division has worked closely with Interior to develop a new framework for decision in trust land acquisition cases. The agency is now actively addressing its backlog.

Litigating the Status of Tribal Land Holdings

In fiscal year 2011, we continued to defend reservation boundaries and the status of tribal land holdings in various cases. For example:

--The Yankton Sioux Tribe filed an action seeking a declaration that its reservation had not been diminished beyond the extent delineated in a 1998 Supreme Court case. The Eighth Circuit held that the reservation had not been disestablished in its entirety, but that it was diminished to the extent that fee or trust lands passed out of Indian ownership. The State of South Dakota and various other parties filed petitions asking the Supreme Court to review the disestablishment ruling, and the Yankton Sioux Tribe filed a conditional cross-petition seeking review of the partial diminishment ruling. In May 2011, the United States filed a brief opposing a petition for a writ of certiorari. Critically, the Supreme Court's denial of certiorari preserves the existence of a reservation for the tribe.

--In a case of first impression, the Division secured dismissal of a case that raised the issue of the applicability of local stormwater management fees to Indian trust lands. The Wisconsin Oneida Tribe sued the Village of Hobart, Wisconsin, in district court seeking to prevent the village from assessing a

stormwater fee on tribal trust land. The village filed a third-party complaint against the United States, alleging that the United States is liable for the fee. The court granted ENRD's motion to dismiss, finding that the village had failed to state a claim under the APA because it had not specifically sought payment from the United States. The lawsuit resumed once the Department of the Interior took final agency action in October 2011 by declining a request for payment.

Addressing Environmental Issues Affecting Tribes

The Division is working with EPA, DOI, the Department of Agriculture, and the Indian Health Service to develop a coordinated approach to environmental issues affecting tribes. The Division also has brought these important issues to the attention of a newly developed interagency working group on Indian law, and anticipates continuing to work with this group to address tribal environmental problems that require interagency coordination.

In addition, through the Department of Justice's National Indian Country Training Initiative, ENRD is developing a training program for tribal and federal law enforcement officials and prosecutors on enforcing environmental and wildlife laws that affect tribal lands. The goals of the training are to develop tribal capacity to protect its own lands and resources, strengthen tribal self-government and autonomy, and promote federal-tribal communication and partnership in pollution and wildlife enforcement. We are working closely with other federal agencies and with tribal partners to develop practical training that will help tribal officials work with their federal counterparts to protect tribal lands from the effects of pollution on or off those lands. One of the themes will be the need to strike a careful balance between strong enforcement and the preservation of Native American cultural and religious practices.

In fiscal year 2011, we continued to bring and resolve environmental enforcement actions on and adjacent to Indian reservations. The following case resolutions are illustrative:

--The health of tribal residents of the Spokane Indian Reservation will be protected by the settlement reached in *United States v. Newmont USA, Ltd*. The mining companies in this case agreed to the cleanup of the Midnite Mine Superfund Site, located on the Spokane Indian Reservation in northeastern Washington. This cleanup will help control radioactive mine waste and protect nearby waters from acid mine drainage. Although the tribe is not a party to the settlement, it will support EPA in overseeing the work.

--In September 2011, the court entered a consent decree in *United States v. Hecla, Ltd.*, under which Hecla paid more than $260 million for CERCLA cost recovery and natural resources damages to the United States, the Coeur d'Alene Tribe, and the State of Idaho to resolve its liability in connection with the immense Coeur d'Alene Basin Superfund Site (also known as the Bunker Hill Mining and Metallurgical Complex Superfund Site) in Idaho. The Coeur d'Alene Tribe and the State of Idaho were co-plaintiffs. Sixty-million dollars of the relief goes toward natural resource damages for joint federal, state, and tribal resources; $4 million goes toward the tribe's past costs; and $2 million goes toward a

state and tribal management plan for Lake Coeur d'Alene. The consent decree concludes litigation that was filed more than 15 years ago.

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

The Division also is charged with representing the United States in civil litigation brought by tribes and their members against the United States, including claims that the United States has breached its trust responsibility. We strive to defend the United States in ways that are fair to all parties and respectful of tribal sovereignty and government-to-government relations.

The Division is defending the United States and its two primarily affected agencies, the Departments of the Interior and Treasury, in 72 cases pending in federal district courts in the District of Columbia and Oklahoma and in the U.S. Court of Federal Claims (CFC) as of the end of fiscal year 2011. In these cases, 110 tribes allege that the federal government has breached its trust duties and responsibilities to them by failing to provide the tribes with historical trust accountings and by mismanaging the tribes' trust funds and non-monetary trust assets. The tribes seek court orders requiring Interior and Treasury to furnish trust accountings and pay damages exceeding $1.4 billion for the government's alleged mismanagement of tribal trust funds, lands, and other natural resources.

The Division is pursuing a strategy of constructive engagement in the tribal trust cases. It is litigating certain cases to final judgment, wherever necessary or appropriate, while also working cooperatively with tribes and Interior and Treasury to resolve other cases through formal alternative dispute resolution or informal settlement processes, to the extent possible. Working with DOI, ENRD has taken the lead in developing expedited settlement methodologies in support of a large-scale effort to settle tribal trust cases with over 90 tribes.

In 2011, the Division negotiated or helped negotiate settlements in cases brought by the Osage Nation, the Ponca Tribe of Oklahoma, and the Sokaogon Chippewa Indian Community. The settlement with the Osage Nation included a payment of $380 million to compensate the tribe for its claims of historical losses to its trust funds and interest income, as well as agreement to implement measures that will lead to strengthened management of the tribe's trust assets and improved communications between Interior and the tribe.

Lawyers for most of the tribes that had brought trust accounting and trust mismanagement cases against the United States wrote letters to the President in September 2009, after the public announcement of the settlement of the *Cobell v. Salazar* litigation, seeking to engage the United States in expedited settlement discussions regarding the tribes' trust claims. Since September 2009, several of the tribes have dropped out of the informal coalition, while the remaining tribes--called the "SPOA group" ("Settlement Proposal to Obama Administration")--have proceeded with numerous informal settlement discussions with the United States (which, among other things, have included limited and focused data productions). Those informal settlement discussions continue in fiscal year 2012.

In *Wolfchild v. United States*, the Division secured a denial of a petition for a writ of certiorari to the Supreme Court. The U.S. Court of Appeals for the Federal Circuit had reversed a U.S. Court of Federal Claims' holding that the Bureau of Indian Affairs had breached a trust with 20,000 alleged descendants of Indians by transferring land to three tribes in Minnesota. The claims for money damages were in the hundreds of millions of dollars, premised in part on damages from the Indian gaming revenue that the plaintiffs claimed they should have received. On remand, we secured a partially favorable decision further limiting the possible liability exposure.

Limiting Duplicative Breach-of-Trust Claims Against the United States

Many Indian tribes have sued the United States for mismanagement of tribal trust property and funds by filing claims in both federal district court and the U.S. Court of Federal Claims. A statute enacted by Congress in the 1860s, now codified at 28 U.S.C. § 1500, was designed to prohibit multiple lawsuits against the federal government by providing that the Court of Federal Claims lacked jurisdiction to adjudicate a lawsuit in that court if another lawsuit was pending in federal district court based on the same operative facts. The Federal Circuit Court of Appeals, which oversees the Court of Federal Claims, had given a narrow construction to section 1500, holding that the Tohono O'odham Nation could maintain suits in both courts simultaneously where different relief was sought in each court. In a 7-1 decision issued in June 2011, *United States v. Tohono O'odham Nation*, the Supreme Court reversed. The Court held that section 1500 precludes Court of Federal Claims' jurisdiction if the Court of Federal Claims suit and the suit in the other court "are based on substantially the same operative facts, regardless of the relief sought in each suit." Following the Supreme Court's decision, the Division filed motions to dismiss in 25 Court of Federal Claims' cases for lack of subject-matter jurisdiction under section 1500, and it prevailed in 14 cases. Ten cases are still awaiting rulings.

Defining the U.S. Role as Trustee for Indian Tribes in the Context of Tribal Trust Litigation

In another lawsuit for alleged mismanagement of tribal trust resources and funds, the Jicarilla Apache Nation sought discovery of documents that the United States said were protected from disclosure based upon the attorney client privilege because the documents provided advice from Interior or Justice Department attorneys regarding the management of tribal assets. The U.S. Court of Federal Claims held that the United States' assertion of privilege was subject to an exception, known as the fiduciary exception, because the United States was acting in a fiduciary capacity on behalf of the Indian tribes in the management of tribal resources. The Federal Circuit agreed with the lower court, holding that the fiduciary exception was applicable. In another 7-1 decision issued in June 2011, *United States v. Jicarilla Apache Nation*, the Supreme Court reversed. The Court assumed that a fiduciary exception to the attorney client privilege exists at common law, but held that it did not apply to the United States as trustee for Indian tribes. The Court reasoned that the United States is not akin to a private trustee in its dealings with Indian tribes. Rather, the nature of the relationship between the United States and tribes is defined by statute and regulation. The Court concluded that the tribe was not the "real client" of the United States as the United States had its own independent interests in executing federal law. It also concluded that the United States does not have the same disclosure obligations as a private trustee.

Defending Against Miscellaneous Other Tribal Claims

The Division also prevailed against tribal claims in several cases that set important precedents for determining when it is appropriate to hold the United States liable. Several cases involved multi-million dollar claims against the public fisc. In *Samish v. United States*, the tribe secured federal recognition as an Indian tribe in 1996, but contended it should have been recognized since 1969. Plaintiffs brought claims for federal program monies the tribe did not receive when it was not recognized. We prevailed both at the Court of Federal Claims and at the Federal Circuit, with the courts holding that that statutory language authorizing the money was not mandating. We secured dismissal in *San Carlos Apache Tribe v. United States*, a case seeking a $10 million claim for inadequate representation by the Bureau of Indian Affairs and the Department of Justice of the tribe's water rights claim. We prevailed on a defense based on the statute of limitations, creating strong precedent on "first accrual" not being delayed pending final resolution of a state water rights adjudication. We also secured a very favorable opinion in *Klamath Claims Committee v. United States*, concerning a taking and damages claim for the destruction of the Chiloquin Dam and treaty fishing rights.

Litigating the Question of Where Tribal-Court Judgments May Be Enforced

In June 2011, the Supreme Court also denied a petition for a writ of certiorari in *Miccosukee Tribe of Indians v. Kraus-Anderson Constr. Co*. While state courts are often called upon to recognize and enforce tribal-court judgments, this case involved a scenario in which the Miccosukee Tribe asked a federal district court to enforce a favorable tribal-court judgment entered against a non-Indian opponent. The district court held that it had subject matter jurisdiction over the Miccosukee Tribe's action to enforce a tribal-court judgment entered in its favor against Kraus-Anderson. It declined, however, to recognize the judgment because it concluded that Kraus-Anderson had been denied due process when the Tribal Business Committee had disallowed a discretionary appeal to the Tribal Court of Appeals. On appeal, the Eleventh Circuit concluded that subject matter jurisdiction was lacking. In its petition, the Miccosukee Tribe argued that there was federal question jurisdiction over the action, a position that Kraus-Anderson also took in its brief in support of this petition. Our amicus brief, which was filed in May 2011 at the invitation of the Supreme Court, argued that the Eleventh Circuit's holding was correct as in most instances, including here, the action to enforce the tribal-court judgment does not raise a federal question.

Defending Bureau of Indian Affairs Program Decisions and Congressional Direction as to the Distribution of Tribal Judgment Funds

The Division successfully defended actions taken by the Bureau of Indian Affairs regarding two large tribal judgment funds held in the U.S. Treasury. In *Different Horse v. Salazar*, individual Indians sought disgorgement of the Black Hills Judgment Fund and other Sioux Nation Judgment Funds totaling over $1 billion being held in trust for the various Sioux tribes. The tribes have been opposed to using or distributing the funds. The district court granted our motion to dismiss the case because the tribes were indispensable parties and the individuals lacked standing. At issue in *Timbisha Shoshone Tribe v. Salazar*

was the proper distribution of a fund set aside for the benefit of the nations and tribes constituting the Western Shoshone Identifiable Group, of which the Timbisha Shoshone Tribe is a member. In August 1977, the Indian Claims Commission determined that the United States should pay the Western Shoshone Identifiable Group approximately $26 million in compensation for the taking of a large area of the Western Shoshone aboriginal homeland in Nevada and California. The money remained in the custody of the Treasury Department and grew to a size of $185 million. Individual Indians and some of the tribes that comprise the Identifiable Group sought distribution of the fund, while other tribes and many of their members, including the Timbisha, opposed any distribution. Congress, with the support of the Bureau of Indian Affairs, directed in the Western Shoshone Claims Distribution Act that all of the funds be distributed per capita to all individual Indians who are members of Western Shoshone tribes, with none of the proceeds going directly to the tribes. We secured dismissal of the constitutional challenge to the act. The district court rejected claims brought by the Timbisha Shoshone Tribe that this distribution violated the Fifth Amendment and Equal Protection Clause, concluding that Congress had a rational basis for this distribution scheme.

Box Text

Colorado River Indian Tribes

--The Colorado River Indian Tribes (CRIT) include four tribes: the Mohave, Chemehuevi, Hopi, and Navajo.

--The CRIT Reservation was created in 1865 by the federal government for “Indians of the Colorado River and its tributaries,” originally for the Mohave and Chemehuevi, who had inhabited the area for centuries. People of the Hopi and Navajo Tribes were relocated to the reservation in later years.

--The reservation stretches along the Colorado River on both the Arizona and California sides. It includes almost 300,000 acres of land.

--CRIT Fact Sheet

“This Administration's support for four water rights settlements in a single Congress is unprecedented. The agreements reflect the commitment of a wide range of stakeholders, including states, tribes and local communities, to work together constructively with the Administration rather than stay locked in an endless cycle of litigation. Step by step we are making steady progress in empowering Indian Country."

--Department of the Interior Assistant Secretary of Indian Affairs Larry Echo Hawk on the Passage of the Taos Pueblo, Aamodt, Crow, and White Mountain Apache Water Rights Agreements

Five Landmark Indian Water Rights Settlements Approved by Congress in 2009-2010

--Taos Pueblo Indian Water Rights Settlement (New Mexico)

--Aamodt Litigation Settlement Act (New Mexico)

-- Navajo-San Juan River Basin Settlement (New Mexico)

-- Crow Tribe Water Rights Settlement (Montana)

--White Mountain Apache Tribal Settlement (Arizona)

"Under today's agreement, the mining companies will perform the cleanup of the Midnite Mine. The cleanup will bring important environmental protections to residents of the Spokane Indian Reservation, including the control of radioactive mine waste and the protection of nearby waters from acid mine drainage. This settlement . . . gives the Spokane Tribe a role in working with EPA to ensure that the cleanup protects human health and the environment on the Reservation."

--Ignacia S. Moreno
United States v. Newmont USA, Inc. Press Release

Coeur d'Alene Basin

The Coeur d'Alene Basin is one of the largest areas of historic mining in the world. Since the late 1880s, mining activities in the Upper Coeur d'Alene Basin contributed an estimated 100 million tons of mine waste to the river system. Many of the Basin communities were built on mine wastes. Until as late as 1968, tailings were deposited directly into the river. Over time, these wastes have been distributed throughout more than 160 miles of the Coeur d'Alene and Spokane Rivers, lakes, and floodplains.

--EPA Fact Sheet

SUPPORTING THE DIVISION'S STAFF

Promoting Staff Quality of Life and Career Growth

For the third year in a row, ENRD was named the "Best Place to Work in the Federal Government" out of 240 agency subcomponents surveyed. The rankings are calculated by the Partnership for Public Service and are based on data from the Office of Personnel Management's annual Federal Employee Viewpoint Survey. Division management is committed to ensuring the continued best quality of work life for its staff and to expanding employee opportunities for professional growth. During fiscal year 2011, the Division took various steps to advance these goals:

--The number of approved telework agreements within the Division nearly septupled. Telework is an alternative work arrangement for employees that allows the conduct of some of their work at an alternative worksite away from the Division's typically used office. (The federal government is a leader in the use of innovative workplace flexibilities, including telework. Congress passed the Telework Enhancement Act of 2010 to encourage its use.)

--On July 15, 2011, ENRD issued the *Environment and Natural Resources Division Diversity Management Plan*. On April 30, 2010, the Attorney General issued the *Department-wide Diversity Management Plan* to improve the effectiveness of the Department's efforts to recruit, hire, retain, and develop employees. The Division prepared and submitted its plan in accordance with the Department's plan. The ENRD plan includes an assessment of ENRD's current diversity efforts as well as statements of goals and strategies to continue efforts to reflect the American public by drawing the ENRD workforce from all segments of society.

--During the past year, to accommodate Department-wide hiring restrictions while continuing to provide the best possible support for ENRD's litigation mission, the Office of the Assistant Attorney General authorized filling 18 support staff vacancies from within the Division's ranks. This allowed high-performing ENRD staff to compete for and be rewarded with opportunities that offered higher promotion potentials than their existing jobs.

--In October 2011, Assistant Attorney General Moreno issued Directive No. 2011-04, entitled "Procedures for Appointing Senior Counsel and Senior Attorneys in the Environment and Natural Resources Division." The goal of the directive is to make the selection of these roles transparent, consistent, and fair throughout the Division. ("Senior Counsel" and "Senior Attorney" positions apply at the GS-15 level and are titles indicating that an attorney's experience warrants special recognition that may or may not carry supervisory responsibilities. These positions should not be confused with "Senior Level Attorneys," the allocation of which is approved by the Office of Personnel Management.)

--Last year, the Assistant Attorney General approved several other delegations empowering lower levels of Division management to consent to use of a U.S. magistrate judge or designation of a U.S. magistrate judge as a special master (Directive No. 2011-06); to approve certain de minimis amendments to state court water rights decrees for federally recognized Indian tribes (Directive No.

2011-07); to approve briefs for filing in certain petition-for-review actions under the Hobbs Act (Directive No. 2011-03); and to make unanimous no-certiorari recommendations to the Solicitor General (Directive No. 2011-02).

--Early this year, the Assistant Attorney General appointed the Division's Attorney Skills Development Coordinator. The *Department-wide Diversity Management Plan* directs each Department component to appoint an Attorney Skills Development Coordinator, who will work with management to establish a skills-based program aimed at developing the competencies and talents of attorneys in the components.

Conserving Financial Resources While Supporting the Department's Key Litigation

Careful stewardship of resources enabled the Division to provide vital support for key case work, particularly the massive and time-sensitive Deepwater Horizon litigation. For this case alone, the Division's Office of Litigation Support processed over 40 million documents--comprising 30+ terabytes of data--and organized over 14,000 deposition and trial exhibits. Simultaneously, we continued to manage the contractor and in-house document and data processing services for the large and complex initiatives that continued alongside the Deepwater Horizon litigation, discussed throughout this document. Our litigation support staff provided varying levels of support to over 300 cases and matters during the year. We estimate that the Division avoided costs of over $5 million by processing documents on-site, in the litigation support computer lab, when we had the ability to do so.

In this era of declining federal budgets, Assistant Attorney General Moreno also appointed a cross-section of staff to serve on a "$AVE Committee." The $AVE Committee identified several-million dollars in cost-saving options that the Division is now implementing.

Greening the Division

In 2011, we achieved a substantial 15% reduction in energy use as compared to previous years in the Patrick Henry Building (PHB). The Division is the primary tenant of PHB. This marked decrease was largely attributable to two initiatives led by the Division's Greening the Government (GtG) Committee. From December 2010 to April 2011, more than 1,800 motion-activated light sensors were installed in PHB offices and public areas at the Division's request. The fiscal year also saw the continuation of the GtG Committee initiative to remove the middle bulbs in hallway ceiling fixtures throughout PHB. These changes, along with other improvements such as reducing by half the number of the Division's fax machines and installing water-saving aerators that reduced the building's water usage by over 20%, have qualified PHB for certification as an Energy Star building. ENRD is also working with building management to achieve Leadership in Energy and Environmental Design (LEED) certification for PHB due to these energy savings.

In January 2011, ENRD implemented environmentally friendly changes to its printing practices, including defaulting to double-sided printing and copying for the new convenience copiers, and switching to a new recycled toner cartridge program that saved ENRD over $16,000 between June and October 2011.

In coordination with these improvements, the GtG Recycling Subcommittee developed and distributed updated best management practices for paper use and recycling. This guidance was publicized on the ENRD intranet, which also features best practices for energy use and computer power management.

The Division also held its 8th annual Earth Day service celebration at Marvin Gaye Park in April 2011, helping the park to plant trees, remove trash, garden, and landscape.

Improving the Security and Usability of the Division's Information Technology Systems

Information technology (IT) security continues to be at the forefront of government and public concern. ENRD has made this critical issue a priority, even in an era of declining resources. Our technology staff maintained a "green" report card throughout the year, keeping up with ever-increasing requirements to strengthen IT infrastructure and software. ENRD also became one of the first divisions to upload contractor security data onto the Department's system last year, facilitating the sharing of resources between components and ensuring that personnel security regulations and standards are being uniformly applied within the Department.

The Division also expanded the use and capability of some of our older information technology systems and designed or moved others to web-based platforms, making them easier for Division staff to navigate. For example, we upgraded ENRD's Wiki, enhancing the ability of ENRD personnel to create and edit any number of interlinked web pages to collaborate and share information on Division-relevant projects. We also made critical operational upgrades to ENRD's Case Management System and Human Resources Information System.