

UNITED STATES DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
FISCAL YEAR 2003
SUMMARY OF LITIGATION ACCOMPLISHMENTS

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FOREWORD

I am pleased to present the Environment and Natural Resources Division's Accomplishments Report for Fiscal Year 2003. Once again, the Division has achieved significant victories for the American people in the many areas for which it has responsibility, including protection of this Nation's air, water, land, wildlife and natural resources, furthering of important federal programs, and upholding trust obligations to Native Americans.

Tough enforcement of the environmental laws continues to be a top priority for the Division and I am proud to announce that Fiscal Year 2003 set a record for civil penalties in our civil enforcement cases. We obtained approximately \$203 million, which is over \$80 million more than any previous year in the Division's enforcement history. Moreover, we recovered the largest civil penalty ever from a single company - \$34 million - in a lawsuit under the Oil Pollution Act.

Although penalties and fines play an important role in our environmental enforcement efforts by deterring future violations and ensuring that wrongdoers do not profit at the expense of law-abiding citizens, they are by no means the whole story. Through our refinery, power plant, and ethanol initiatives, we have obtained injunctive relief that will remove hundreds of thousands of tons of air pollutants. Through actions against pipeline operators and wastewater treatment systems, we have obtained

commitments to update and better maintain critical elements of the nation's infrastructure. And through numerous cases, we have ensured that responsible parties will either clean up or pay for the clean up of hazardous waste sites across the United States. These cases demonstrate our firm commitment to the Division's civil enforcement priorities that the Attorney General announced last spring, and we will continue to carry out that commitment.

We were also honored to have the Attorney General join us in September to announce an important new criminal initiative, the Hazardous Materials Initiative, which joins a panoply of other highly successful criminal initiatives that the Division has implemented. Criminal prosecutions are an essential element of any environmental enforcement program and the Attorney General has stated repeatedly that "all those who violate these laws are on notice: the Department of Justice will not hesitate to seek criminal sentences where appropriate." In this context, we thank the many United States Attorneys and the State and local enforcement officers around the country who help make our enforcement efforts, civil as well as criminal, such a success.

Equally central to the Division's mission is our defensive and eminent domain work. Having practiced in these areas, I have no hesitation in saying that these cases present some of the most challenging issues that we as a Division and the nation as a whole face. The Division defends a

plethora of federal agencies when they are sued under environmental and natural resource laws, and the majority of our docket is consumed by these non-discretionary cases. Such cases include suits against the military in connection with training programs, against the Forest Service and the Department of the Interior in connection with their resource management programs, and against the EPA when it promulgates rules. Water rights adjudications are also a significant source of these cases, as are various Indian-related lawsuits, such as those seeking to vindicate treaty rights and to establish tribal trust obligations. In addition, property rights and valuation issues also loom large in our takings and eminent domain caseload. In all of these cases, credit must go to the Division's attorneys and staff, who have done an outstanding job of bringing them to a successful conclusion in the face of serious constraints on the Division's resources.

This month marks the close of my second year as the Assistant Attorney General for the Environment and Natural Resources Division. It has been a time filled with challenges as well as successes, but through it all, the Division's employees have shown a skill, perseverance, and resourcefulness that is the hallmark of all top-notch legal staff. Every day, they deliver quality legal work for the American people. It is an honor for me to serve with such a dedicated group of individuals and I look forward to continuing to work with them in the months to come.

Thomas L. Sansonetti

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Environment and Natural Resources Division

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CRIMINAL ENFORCEMENT OF THE ENVIRONMENTAL AND WILDLIFE LAWS

Hazardous Materials Initiative. The Departments of Justice and Transportation announced a new initiative this year to combat the illegal shipment of hazardous materials ("hazmat.") This initiative will address critical homeland security issues as well as the significant public health and environmental consequences of crimes involving the transportation of hazmat. The initiative already has produced results: in *United States v. Emery Worldwide Airlines*, Emery, which specializes in shipping heavy cargo, pled guilty to felony violations of the Hazardous Materials Transportation Act. DOT regulations require the operator of an aircraft that transports an item classified as hazmat to give the pilot of the aircraft written notification that hazmat has been loaded on board the plane. In January 1998, Emery conducted audits that revealed they were not following proper procedure, but they did not take constructive steps to correct the problem until August 1999. Emery has agreed to pay a \$6

million criminal penalty and develop a compliance program to detect and deter future violations.

Laboratory Fraud Initiative. Laboratories are used to analyze soil, water and other media to determine their chemical composition, to assess whether such chemicals pose human health risks, and to determine whether such media are contaminated and in need of remediation. In light of this role, maintenance of the integrity of laboratory sample tests, results, and reports is critical. As a result, the Lab Fraud Task Force was established to survey the problem of fraudulent laboratory testing and to determine how best to tackle it. During the last year, Division attorneys prosecuted several nationally significant cases associated with the task force. These include *United States v. Thomas Michael Hayes*, in which Hayes, a vice-president at Saybolt Inc., was convicted of conspiracy to falsify laboratory results on various petroleum products, including reformulated gasoline on behalf of, and in conjunction with, a number of Saybolt's clients. Another such prosecution was *United States v. Jet-Pep Inc.*, in which the company pled guilty to knowingly making a false material statement in its 1998 Annual Report to EPA. From 1995 through 1998, Jet-Pep failed to perform certain tests required under regulations designed to reduce harmful emissions caused by gasoline. The company was sentenced to pay a \$200,000 fine, and serve three years probation.

Cracking Down on Caviar Trafficking. Working with the Assistant United States Attorneys Offices, Fish and Wildlife Service, Customs Service, FBI, National Oceanic and Atmospheric Administration, and Food and Drug Administration, the Division embarked on a crackdown on caviar smuggling from the Caspian Sea. This initiative has already yielded fruit - on November 6, 2002, Viktor Tsimbal, the former president and owner of Beluga Caviar, Inc., was sentenced to serve 41 months incarceration followed by two years of supervised release. Tsimbal had pled guilty to organizing a caviar smuggling conspiracy in violation of wildlife protection laws, a substantive smuggling violation, money laundering and obstruction of justice charges. During the course of the investigation, the agents seized more than \$500,000 worth of caviar along with false identification labels. In 1999 alone, Tsimbal imported more Russian-origin Beluga caviar than the entire annual Russian export quota. Tsimbal also forfeited \$36,000 in his possession at the time of his arrest at the Miami International Airport.

CFC Smuggling Prosecutions. The Division continues to pursue its highly successful effort to stem smuggling of the ozone-depleting gases known as chlorofluorocarbons (CFCs). Ten defendants pled guilty in *United States v. Himes*, a case involving a complex, multi-million dollar scheme to import and sell CFCs under false pretenses and to avoid payment of excise and income taxes from 1995-1998. Barry Himes, the

lead defendant in this conspiracy, was sentenced to serve 78 months in prison and pay \$1.8 million dollars in restitution and a fine of \$12,500. Himes previously forfeited a \$3 million dollar mansion, a BMW sedan, and a three-carat diamond ring. Co-conspirator John Mucha was sentenced to serve 48 months of incarceration, pay \$1.2 million in restitution and forfeit his BMW sedan. Accountant Richard Pelletier was sentenced to serve 33 months of incarceration and pay 1.2 million in restitution. Others have been sentenced to terms of up to 15 months imprisonment.

Vessel Pollution Enforcement. The Vessel Pollution Initiative is an ongoing, concentrated effort to prevent pollution from ships into the oceans, the coastal waters, and the inland waterways. Since 1990, over 123 environmental prosecutions have involved pollution from ships, and in the past year, the work of the Vessel Pollution Initiative has contributed to a number of important prosecutions. One recent case was *United States v. Ronald Cook* in which Cook was found guilty by a jury of conspiracy, ocean dumping, and violating the Act to Prevent Pollution from Ships. Cook directed his employees to dump hundreds of plastic bags filled with asbestos into the ocean. He was sentenced to serve 24 months imprisonment, and three years supervised probation.

Prosecuting Fraud in the Lead and Asbestos Abatement Industry. In *United States v. Ho*, the Fifth Circuit rejected a Commerce Clause challenge to the prosecution of Eric Ho, a Houston, Texas, real estate

business developer, for Clean Air Act violations related to unlawful asbestos removal from buildings he was renovating. Ho employed untrained illegal aliens to remove the asbestos for \$20,000, rather than pay as much as \$400,000 for asbestos removal by a trained contractor. The Fifth Circuit rejected Ho's argument that his prosecution was unconstitutional because the asbestos did not move in interstate commerce. In *United States v. Potomac Abatement, Inc.*, the company and its operations manager, William Gutierrez, pled guilty to two felony false statement counts for purchasing false lead and asbestos abatement certificates for approximately 60 untrained employees in order to obtain contracts to conduct abatement of numerous public buildings. The company was sentenced to pay a \$100,000 fine and \$100,000 in restitution, while Gutierrez was sentenced to six months home confinement and one year probation.

Refinery Explosion Prosecution. In *United States v. Ashland Inc.*, the company was sentenced to serve five years probation and pay \$9.1 million in fines and restitution in connection with a massive explosion at the company's refinery that injured several employees and firefighters. The company had pled guilty to negligent endangerment under the Clean Air Act because it drained hydrocarbons into a sewer that subsequently ignited causing the explosion. The court ordered the company to commit to paying millions more to upgrade the facility.

Prosecuting Pollution of Our Waterways. We continue to prosecute vigorously those who pollute our waterways. In *United States v. Tyson Foods Inc.*, the company pled guilty to 20 felony Clean Water Act violations and agreed to pay a \$5.5 million fine. Tyson also paid \$1 million in damages to the State of Missouri in connection with a separate state civil enforcement action, and \$1 million to the Missouri Natural Resources Protection Fund. The company admitted that, over a four-year period, it repeatedly discharged untreated wastewater from its Sedalia, Missouri poultry processing plant through storm drains into a tributary of the Lamine River in violation of its Clean Water Act permit. As a condition of Tyson's three-year term of probation, the company has agreed to have an environmental assessment of its facility performed by an outside auditor and to implement an enhanced environmental management program.

In *United States v. Tin Products*, the company was sentenced to a five-year term of probation, while its vice-president, James Goldman, and environmental supervisor, Melanie Purvis, were sentenced to serve 18 months imprisonment and 5 months imprisonment respectively. From March 1999 until February 2000, Tin Products discharged toxic wastewater that killed a significant number of fish and shut down a wastewater treatment plant.

Prosecuting Pollution of Our Air. The EPA has identified air pollution as a major public health concern. In *United States v. John Littlehale*, Littlehale, former Vice-President of the Scottsburg Division of the Multi-Color Corporation, which is one of the largest label manufacturers in the United States, pled guilty to making a false statement in violation of the Clean Air Act in connection with filing of a false construction application permit. This false permit led to uncontrolled emissions of over 100 tons of toxic gases including toluene and carbon tetrachloride. In a related case, *United States v. Roger Taylor*, Taylor pled guilty to misprision of a felony. Both defendants await sentencing.

Enforcement of Wildlife Laws. The Division continues to obtain convictions or pleas in matters ranging from *United States v. The Peterson Companies*, in which a multi-million dollar company pled guilty to violating the Bald and Golden Eagle Protection Act related to its destruction of an eagle nest in developing the National Harbor, to *United States v. David Joe Yocam*, in which Yocam pled guilty to being a felon in possession of firearms and violating the Lacey Act in connection with his unlawful baiting of waterfowl on his commercial hunt club property. The Eleventh Circuit also affirmed the convictions in *United States v. McNab of David Henson McNab*, the owner of a Honduran lobster fishing fleet, and three of his confederates, who engaged in an extensive operation to

smuggle spiny lobsters from Honduras to the United States. Prosecution of these defendants helped protect lobster fisheries and supported those in the lobster industry who run their businesses in compliance with the law.

PROTECTING OUR NATION'S AIR, LAND AND WATER

Reducing Air Pollution from Coal-Fired Power Plants. During the past year, the Division continued to litigate Clean Air Act enforcement actions against coal-fired electric power generating plants. The failure of these plants to install emissions control technology during major plant upgrades has resulted in tens of millions of tons of air pollution, leading to adverse health effects on asthma sufferers, the elderly and children, including premature deaths, and to forest degradation, waterway damage, reservoir contamination, and deterioration of buildings. As part of this initiative, the Division concluded the liability trial in *United States v. Ohio Edison*, after which it received a very favorable ruling, and is scheduled to begin the remedy phase in April 2004. We have also completed trial in *United States v. Illinois Power Co.*, but the court has not yet issued a decision. The Division also reached settlements with four other companies: Virginia Electric Power Co., Wisconsin Electric, Southern Indiana Gas & Electric Co. and Alcoa, Inc. Collectively, these settlements will likely reduce annual emissions of nitrogen oxide by more than 113,000 tons per year and emissions of sulphur dioxide by more than 300,000 tons per year. The settlements require the defendants to spend approximately \$2.1 billion to

install pollution control equipment and another \$38.9 million on environmental projects to mitigate the harm their alleged violations caused, as well as to pay \$10.6 million in civil penalties.

Addressing Air Pollution from Oil Refineries. The Division has moved aggressively to protect the nation's air quality by continuing its national enforcement initiative to address refinery Clean Air Act violations.

Building on previous successes, we secured comprehensive settlements with three additional petroleum companies: Cenex, Ergon and Coastal Eagle Point. These settlements will reduce toxic emissions at four refineries in four states, require the payment of \$2.9 million in civil penalties and the expenditure of an estimated \$30 million in injunctive relief. All four states joined in these settlements. Three settlements require the defendants to install state-of-the-art pollution control equipment while one defendant has agreed to surrender its operating permit. To date, this initiative has addressed approximately 40% of the nation's refining capacity and will reduce air pollutants by more than 129,000 tons a year.

Leveling the Playing Field in the Ethanol Industry. In a strong start to this new enforcement initiative, the Division and the State of Minnesota entered into 12 consent decrees resolving Clean Air Act claims against 12 Minnesota dry corn mill operators that produce ethanol. The ethanol industry has historically underestimated toxic emissions from feed dryers, cooling cyclones and fuel loading operations. To achieve compliance with

Clean Air Act New Source Review requirements, the settlements will require the defendants to install state-of-the-art control technology on all units that are significant sources of pollution and pay a civil penalty. These settlements were quickly followed by a far-reaching settlement with agribusiness giant Archer Daniel Midlands (ADM) covering 52 ethanol, corn mill, and oilseed plants in 16 states. Under the terms of the consent decree, ADM will install state-of-the-art air pollution controls on hundreds of units, shut down older, dirty units and accept restrictive emission limits on others, which will reduce harmful air emissions by 63,000 tons per year. ADM is expected to spend \$328 million on the injunctive relief and \$6.363 million on other projects to improve the environment, as well as pay a \$4.6 million civil penalty. Eleven states and three counties joined in this settlement.

Enforcement Initiative Against Industrial Bakeries. In the first enforcement action taken under this initiative, the Division reached a settlement with Earthgrains Baking Industries which resolved violations regarding the use of chlorofluorocarbons (CFCs). Earthgrains will convert all of its large refrigeration units that use ozone-depleting substances to substantially minimize the risk of leakage of substances such as CFCs from the units at a cost of more than \$5 million. Earthgrains will also pay \$5.25 million in civil penalties.

Deterring Pipeline Spills. The Division achieved several landmark settlements in connection with pipeline spills this year. Two such settlements resolved claims of gross negligence against pipeline operators Olympic Pipeline Co. and Shell Pipeline Co. in connection with a major gasoline spill into a Bellingham, Washington river, which ignited, killing three boys and destroying natural resources and habitat. Collectively, the settlements require the companies to spend an estimated \$80 million on comprehensive injunctive relief to restore and maintain 2,139 miles of pipeline running through seven states. The companies will also pay \$15 million in civil penalties. Another settlement resolves claims against Colonial Pipeline Company concerning multiple spills along a pipeline spanning nine states, including a devastating spill of 950,000 gallons of diesel fuel into the South Carolina's Reedy River that killed 35,000 fish and other animals and extensively damaged habitat. Under the settlement, Colonial will undertake comprehensive injunctive relief worth \$30 million along the full length of its pipeline and pay a \$34 million civil penalty, the largest penalty obtained against a single company under a federal environmental statute.

The Division also settled claims against Potomac Electric Power Co. (PEPCO) and ST Services relating to a 140,000 gallon oil spill from a ruptured pipeline into a tributary of Maryland's Patuxent River, which affected environmentally sensitive areas including wetlands and habitat for

fish and resident and migratory birds and prompted emergency responses from federal and state agencies. The consent decree recovers \$2.7 million for damages to natural resources and the payment of a \$2 million penalty to our co-plaintiff, the State of Maryland, in addition to a previously issued emergency order requiring PEPCO to conduct oil recovery operations at an estimated cost of \$71 million. The Division also obtained the largest ever civil environmental penalty in Iowa when it settled with Koch Pipeline Company for damages caused by a ruptured pipeline that released about 312,800 pounds of anhydrous ammonia in liquid and gas forms. As part of the settlement, Koch agreed to pay a \$1 million penalty to the United States and \$450,000 to the State of Iowa for penalties and natural resource damages.

Ensuring the Integrity of Municipal Wastewater Treatment Systems.

The Division lodged consent decrees with six governmental entities - the District of Columbia Water and Sewer District (WASA), the Government of Guam, the Puerto Rico Aqueduct and Sewer Authority (PRASA), the City of Rock Island (Illinois), the City of Waterbury (Connecticut) and the Hoosic Water Quality District (Massachusetts) - settling Clean Water Act violations in connection with their operation of wastewater collection and treatment systems. The consent decrees provide for the governments to spend a minimum of \$360 million in injunctive relief to bring their sewage treatment systems into compliance with the Clean Water Act, to pay civil

penalties totaling \$1.76 million and to perform supplemental environmental projects worth more than \$3.2 million. Collectively, the consent decrees address numerous illegal discharges of pollutants and raw sewage into waters of the United States. The Division also entered into a consent decree with a privately owned and operated wastewater treatment plant and sanitary sewer system in South Haven, Indiana, where EPA identified more than 1,000 days of violations. The operator is required to implement corrective measures costing \$7 million and will pay a \$250,000 civil penalty. Additionally, in our enforcement action against the City of Los Angeles, we lodged a stipulation establishing the City's liability for 3,800 spills of raw sewage from the City's sewage collection system, the largest collection system in the nation.

Preserving Our Nation's Wetlands. The Division obtained court orders requiring violators of federal wetland laws to restore or create more than 200 acres of wetlands and pay over \$1 million in civil penalties and. Our success in this area included four favorable appellate court decisions upholding Clean Water Act regulatory jurisdiction over adjacent wetlands and tributaries of navigable-in-fact waters in *United States v. Deaton*, *United States v. Newdunn*, *United States v. Rapanos*, and *United States v. Rueth*.

Protecting Our Drinking Water Supplies. We successfully defended the Safe Drinking Water Act ("SDWA") against constitutional challenge in

State of Nebraska v. EPA. Seeking to overturn EPA's rule lowering the maximum contaminant level for arsenic in drinking water, Nebraska argued that the SDWA both exceeds Congress' power under the Commerce Clause and violates the Tenth Amendment by compelling states to regulate. In June 2003, the court denied Nebraska's petition for review, finding the Act to be a valid exercise of Congress' Commerce Clause power, and holding that it does not compel states to pass legislation or enforce federal standards in violation of the Tenth Amendment. We also successfully defended EPA's rule setting limits on the permissible level of radionuclides in drinking water against industry challenges in City of Waukesha v. EPA. The D.C. Circuit found that EPA had relied on the best available scientific evidence in setting the standards, and had properly balanced costs against the benefits of increased protection afforded by the new rule.

Controlling Stormwater Discharges into the Nation's Waters. The Division successfully defended challenges to EPA's regulations requiring municipalities to control stormwater discharges. In Environmental Defense Center v. EPA, the Ninth Circuit held that EPA's stormwater regulations do not violate either the First or Tenth Amendments and that EPA had a sufficient factual basis to require control of discharges from construction sites as small as one acre. The Fifth Circuit in City of Abilene, Texas v. EPA similarly ruled that stormwater permits issued to two Texas

municipalities did not violate the Constitution by requiring those entities to regulate discharges to their storm sewer systems or by requiring them to design a public education program to minimize stormwater pollution.

Reducing Toxic Air Pollution from Cars. The Division repelled attacks on EPA's decision setting controls on toxic emissions from cars. In April 2003, the court in *Sierra Club v. EPA* upheld EPA's decision imposing an "antibacksliding provision" to maintain refiners' existing levels of voluntary overcompliance with current toxic requirements on their fuels, and EPA's conclusion that other recent rules limiting vehicle emissions already attain the greatest degree of toxics control achievable for cars. The court held that EPA acted within its authority and that its analysis of the adequacy of existing controls was well supported.

ENSURING CLEANUP OF HAZARDOUS WASTE

Conserving the Superfund through Securing Cleanup of Hazardous Waste Sites by Responsible Parties and Recovering Superfund Monies Expended for Cleanups. In a number of notable judgments and settlements, the Division secured the commitment of responsible parties to cleanup of hazardous waste sites or reimburse the United States for Superfund monies expended to clean up sites around the nation:

California - The Division lodged five consent decrees in connection with the Casmalia Superfund Site, a 252-acre inoperative commercial hazardous

waste facility in Santa Barbara County. Collectively, the settlements provide for the payment and release of claims against the United States in the amount of \$52 million.

Idaho - We received a favorable ruling on liability in *United States v. Asarco, Inc.*, in which we seek to recover response costs and natural resource damages associated with lead, zinc and cadmium in mining wastes deposited in the Coeur d'Alene Basin in northern Idaho, one of the largest Superfund sites in the nation. The wastes have caused elevated blood lead levels in children, and serious harm to migratory birds, fish, and vegetation over a large area.

Illinois - The court entered a consent decree resolving claims against NL Industries in connection with the NL Industries/Taracorp site, a former lead smelter. The decree requires NL Industries to reimburse the Superfund at least \$29.78 million in response costs. A separate group of generator parties recently completed implementation of the remedy at a cost of approximately \$20 million.

Montana - We obtained the largest Superfund cost recovery judgment ever obtained after trial - over \$54 million - against W.R. Grace & Co. in connection with the Libby Asbestos Site in Libby, Montana. EPA had removed large amounts of asbestos, a carcinogenic substance, from Grace's former vermiculite mining and processing facilities and remediated

asbestos-contaminated mining and process wastes that were given to Libby homeowners for use in their gardens and to local schools for use on athletic tracks.

New York - The Second Circuit affirmed Alcan Aluminum Corporation's liability for reimbursement of costs EPA and the State of New York incurred in cleaning up hazardous substances at two waste sites where Alcan disposed of more than 5 million gallons of waste oil. Alcan claimed that the harms from hazardous substances it disposed of were divisible from the harms caused by others who sent waste to the sites, but the Second Circuit held that a responsible party arguing that it is not liable for all costs based on a divisibility of harms must present proof that the total impact of all its waste is divisible from harms from other wastes at the site. The Second Circuit's decision is expected to be very helpful in ensuring that responsible parties pay cleanup costs for their wastes sent to Superfund sites.

Pennsylvania - We lodged a consent decree with Horsehead Industries providing for its implementation of the remedy at two operable units and the performance of operation and maintenance at a third operable unit at the Palmerton Zinc Pile Superfund Site, which operated as a zinc smelter for more than 80 years. The projected cost of this work is \$28 million. Horsehead also agreed to reimburse the Superfund \$13.5 million.

Texas - In connection with the West Dallas Lead Site, a former secondary lead smelter operation, RSR Corporation and its subsidiaries will pay \$13.25 million to the Superfund and perform most of the remaining cleanup work, valued at \$11.6 million.

Washington - We entered into five consent decrees in connection with the Commencement Bay Superfund Site, which, taken together, require cleanup commitments of an estimated \$66.1 million, as well \$28.4 million for the Superfund in cost recovery. We also lodged two consent decrees in connection with the Harbor Island (Seattle) Site which has been divided into seven operable units. In the first consent decree, Lockheed Martin agreed to perform the remedy for one operable unit at a cost of \$29 million. The second decree provides that Todd Pacific Shipyards will perform the remedy at a second operable unit at an estimated cost of \$30 million.

Wisconsin - The Division lodged a consent decree with respect to the Sheboygen River Superfund Site in Sheboygan, which requires Tecumseh Products Co. to perform remedial action addressing PCB contamination in river sediments in the Upper River portion of the Site, at a cost of about \$28 million and to reimburse the Superfund \$2.1 million.

Pursuing Corporate Assets to Fund Cleanup Responsibilities. In January, the Division secured a stipulation with ASARCO, Inc. to enjoy

the fraudulent transfer of ASARCO's most valuable asset - its majority ownership interest in a Peruvian copper company - to its parent corporation, Americas Mining Co. (AMC), when it lodged a settlement resolving this claim. Our settlement with ASARCO requires AMC to pay \$765 million - more than \$100 million more than previously proposed - for ASARCO's stock ownership interest in the Peruvian company. The settlement creates and funds an independent environmental trust to be used to pay for cleanup at sites where ASARCO is responsible. Initial funding of the trust is valued at \$100 million and is guaranteed by AMC.

Throughout the year, the Division also represented the United States in numerous bankruptcy proceedings where the debtor had environmental responsibilities to fund. For example, in national bankruptcies involving such corporations as LTV Steel, K-Mart Corporation, Bethlehem Steel, Kaiser Aluminum, Owens-Corning, Borden Chemical, Pittsfield-Canfield Corp., Farmland Industries, Aerovox, Inc., Laclede Steel and Western Processing, the Division secured commitments from debtors or its parent corporation to perform an estimated \$33.6 million in corrective action and cleanup work, to make cash payments of approximately \$38.5 million, to allow administrative claims of \$365,000, to allow secured claims of \$831,500, and to allow general unsecured claims of more than \$48.6 million.

Defending the Scope of Hazardous Waste Regulation Under Resource Conservation and Recovery Act ("RCRA"). In *American Chemistry Council v. EPA*, an industry group challenged EPA's statutory authority under RCRA to regulate as a "hazardous waste" any substance that is either mixed with or derived from a listed hazardous waste. In August 2003, the District of Columbia Circuit denied the challenge, holding that EPA's interpretation fulfills Congress's purpose of subjecting hazardous wastes to "cradle-to-grave" regulation in order to protect public health and the environment.

Allowing Anthrax Contamination Cleanup to Proceed. On September 15, 2003, the Second Circuit affirmed the district court's dismissal of a challenge to the Postal Service's anthrax cleanup of the Morgan Processing Center in midtown Manhattan. The Second Circuit concluded that the Postal Service was conducting an ongoing removal action that precluded judicial review during the pendency of the removal. This ruling will allow postal officials to expeditiously complete the cleanup.

Defending EPA's Ability to Direct Cleanup of Polluted Sites. In *General Electric v. EPA*, General Electric sought to have declared unconstitutional portions of CERCLA allowing EPA to issue emergency orders directing cleanup of polluted sites nationwide. In March 2003, the district court resoundingly rejected General Electric's claims, thus preserving EPA's ability to ensure that environmental dangers can be

responded to rapidly. The Division also successfully defended challenges to EPA's efforts to clean up widespread PCB contamination at a contaminated site in Bloomington, Indiana.

Apportioning Properly Cleanup Liability. One significant portion of the Division's practice involves resolving federal agency responsibility for cleanup of contaminated facilities. Of particular note in this regard is the Division's defeat of New Mexico's claims for more than \$4 billion at the South Valley Superfund site near Albuquerque. Despite the ongoing groundwater cleanup being supervised by federal and state authorities, private attorneys hired by the State filed suit in 1999 sought to recover additional money. However, we demonstrated that the cleanup operations would fully restore the groundwater to drinking water standards and that additional damages should not be awarded for contamination below those standards. In response, the State dismissed all claims against the United States. Similarly noteworthy was the court's determination that the United States was not liable on almost all contribution claims against the government in connection with the multi-million dollar cleanup of the Bunker Hill mining site in Idaho.

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

Everglades Restoration. The Division continued to contribute to protection of the endangered Everglades ecosystem by acquiring lands within Everglades National Park and Big Cypress National Preserve, as authorized by Congress and requested by the National Park Service. We also continue to defend multiple challenges to the Army Corps of Engineers' implementation of the Everglades restoration program. For example, in two cases brought by the Miccosukee Tribe we faced repeated motions in which the Tribe tried to stop the Corps from implementing water management plans for the Everglades ecosystem as part of the Corps' effort to avoid jeopardy to the endangered Cape Sable seaside sparrow. Our success in this litigation has enabled the Corps to continue implementing its plan to avoid jeopardy to the endangered sparrow while also accommodating the water-related needs of South Florida.

Expansion of Wildlife Refuges and National Parks. At the Fish and Wildlife Service's request, we acquired by eminent domain Calves Island, Connecticut, for addition to the Stewart B. McKinney National Wildlife Refuge. We also administer regulations designed to ensure that federal agencies will acquire clear title when making land purchases. Purchases facilitated by administration of these regulations included the National Park Service's acquisition of 115,788 acres in Hawaii and the Fish and Wildlife Service's purchase of property in Maine to add to the Rachel Carson National Wildlife Refuge. These regulations also helped to modify

procedures for physical inspections of land in the Bureau of Land Management's Alaska Native allotment recovery program, which will likely save millions of dollars in processing costs while greatly speeding up the program.

Establishing Federal Ownership of Coastal Submerged Lands. In a case involving 264,000 square miles of submerged lands, the Commonwealth of the Northern Mariana Islands sought a judgment that the Commonwealth owns the submerged lands underlying both a 12-mile territorial sea and a 200-mile exclusive economic zone surrounding the Islands. The Division obtained an favorable ruling affirming title to these lands in the United States and holding that Congress must enact legislation before the Commonwealth can acquire any interest in the lands seaward of the Commonwealth's low water mark.

Obtaining Water Rights Victories. We secured numerous settlements that will protect the water supplies and flows necessary to maintain the vitality of natural resources and uses of the public lands, national forests, national parks, wildlife refuges, wild and scenic rivers, military bases, and federal reclamation projects in areas such as the Snake River Basin in Idaho, the Klamath River Basin in Oregon, and the Yakima River Basin in Washington. The Division also played a key role in resolving an original action in the Supreme Court brought by Kansas, Nebraska and Colorado alleging violations of the Republican River Compact. The settlement,

approved by the Supreme Court in May, provides much needed protection for federal reclamation and water supply projects and creates a moratorium on new groundwater development, stabilizing the water supply for existing users and federal projects. It also contemplates cooperative rules of water administration during dry years, thereby reducing future litigation over the compact.

In California, working closely with officials in the Department of the Interior, we successfully resolved a lawsuit challenging the Secretary's determination to limit Colorado River water deliveries to the Imperial Irrigation District to amounts needed for reasonable and beneficial use in 2003. Comprehensive and historic agreements, reached among the Department of the Interior, four Southern California water agencies, and the State of California, together with implementing legislation by the California legislature, not only resolved this lawsuit but also created a plan for California to bring its use of Colorado River water within its annual apportionment of 4.4 million acre feet, honored a 70-year old commitment to the other Colorado River basin states, provided for unprecedented agricultural-to-urban water transfers, established water conservation measures within the Imperial Irrigation District, and protected the Salton Sea.

Advancing Responsible Timber Production From the National Forests. The Division took a key role in fulfilling President Bush's

commitment to timber production goals of the Northwest Forest Plan by a creative settlement of the last remaining challenge to the Plan with a coalition of timber industry, local county and labor union plaintiffs from the Pacific Northwest. The settlement allows for the sale of an additional 300 million board feet of timber a year in thinning sales, provides for the testing of new and experimental timber harvesting systems, and contemplates the re-examination of the legal bases for the creation of reserves on certain Bureau of Land Management lands in western Oregon.

Defending Federal Resource Management Programs. The Division had several victories this year in defending federal resource management programs. For example, we defeated challenges that sought to halt or alter timber related activities, ranging from individual timber sales in Kentucky and Washington to broad programs integrating conservation measures into harvest planning such as the Indiana bat and Northern spotted owl conservation programs. Similarly, we continued to defend federal grazing programs, defeating injunction motions on numerous grazing allotments in the West. We also fended off attempts to halt planning for oil and gas development on Forest Service and Bureau of Land Management lands and on the Padre Island National Seashore.

Endangered Species Act Commerce Clause Challenges. Recently, two courts of appeals have rejected claims that the Endangered Species Act's prohibitions on taking species would violate the Commerce Clause. In

GDF Realty v. Norton, the Fifth Circuit upheld the application of the prohibitions to the plaintiffs' commercial development activities in central Texas because the development would take members of six endangered and listed invertebrate cave species. The court of appeals ruled that the cave species takes may be aggregated with all other ESA takes in determining effects on interstate commerce because the ESA is an economic regulatory scheme and the regulation of intrastate takes of the cave species is an essential part of it." And in Rancho Viejo, LLC v. Norton the D.C. Circuit held that the take provision of the Endangered Species Act - as applied to a housing development project that would harm endangered arroyo toads - was a constitutional exercise of Congress's Commerce Clause power. The Court reasoned that the housing project involved an economic enterprise, that the relationship between the housing development and interstate commerce was substantial, and that the regulated entity and activity causing the take in this case were both commercial.

Guarding the Public Fisc Against Claims Regarding Mineral

Regulation. In several "regulatory takings" cases we recently handled, the Division has saved the United States tens of millions of dollars. For instance, the holder of a lease to drill oil and gas wells beneath the Waste Isolation Pilot Plant in New Mexico claimed that it was entitled to compensation due to the delay in the government's issuance of a drilling

permit. The United States contended that this delay was necessary to allow the Department of Energy and the EPA time to analyze the environmental impacts of drilling beneath the world's only permanent storage facility for low-grade nuclear waste. The court, in dismissing the lawsuit, determined that the length of the delay was not unreasonable considering the unique circumstances. In another "regulatory taking" matter, we successfully defended a lawsuit brought by the owner of a coal mining property in Kentucky who alleged that limitations on his ability to conduct surface mining resulted in a taking of his property even though a portion of the property had been designated as unsuitable for surface mining due to contamination concerns involving the sole source of drinking water for the City of Middlesboro, Kentucky.

PROMOTING MILITARY PREPAREDNESS AND NATIONAL SECURITY

Defending Military Training and Readiness Programs. Plaintiffs alleged in two challenges to a Navy low frequency sonar system designed to detect the new generation of quiet foreign submarines that the system would have an adverse impact on marine mammals. We obtained dismissal of one challenge seeking to enjoin wartime use of the system. In the other challenge, which only challenged peacetime use of the system, we obtained an agreement allowing the Navy to operate the system in the western Pacific Ocean with carve-outs for certain areas where plaintiffs

believe that densities of marine mammals may be higher. This agreement will enable the Navy to test and train under a wide variety of strategic, geographical, and oceanic conditions.

In other litigation against the Navy, we worked with the United States Attorney's Office to win in *Ground Zero Center for Non Violent Action v. United States Department of Navy*. Plaintiffs had claimed that the Navy violated the Endangered Species Act and other statutes by not examining the full environmental effects, including accidental detonation, of maintaining Trident D-5 missiles at Submarine Base Bangor, which was upgrading its facilities to accommodate the missiles. The court held that the appropriate scope of effects had been considered, and that the government had complied with the ESA. And, in a long-running case against several Defense agencies that use the Barry Goldwater Air Force Base, *Defenders of Wildlife v. Norton*, we have avoided any injunctions against the military and had significant success in limiting renewed challenges to the revised Endangered Species Act consultations.

Facilitating the Army's Chemical Weapons Demilitarization Program.

We enjoyed several victories in defending multiple lawsuits regarding the Army's destruction of a stockpile of thousands of tons of chemical weapons to comply with the Chemical Weapons Convention and to protect the public from significant public health and safety risks associated with continued storage of the hazardous chemical agents. In March, the Tenth

Circuit approved the Army's authority to continue incinerating chemical weapons at the Tooele Chemical Agent Disposal Facility in Utah, and in July 2003, the Division obtained dismissal of the bulk of plaintiffs' claims regarding Anniston Army Depot in Alabama, thus avoiding jeopardy to the Army's ability to meet the congressionally-mandated April 2007 deadline for destruction of all chemical weapons in the United States. The Division also significantly boosted the Department of Energy's initiative to close unusable and costly nuclear facilities by handing a resounding defeat to a local county's attempt to stop the deactivation of the Fast Flux Test Facility, a research nuclear reactor which had outlived its role in the Nation's nuclear program, and which was costing DOE millions each month to keep in "hot safe standby" status.

Property Acquisitions to Improve Military Readiness and National Security. We provided guidance in the multi-million dollar valuation and acquisition of safety zones to facilitate munitions handling at the Navy's Blount Island Command in Jacksonville, Florida. The agreement reached successfully avoided the need for condemnation of the safety zones. Similarly, our advice and assistance enabled the General Services Administration ("GSA") to increase security measures at the Defense Intelligence Agency's offices in Arlington, Virginia, without condemnation. This is one of a series of GSA acquisitions in which we are facilitating the expansion of rights under existing leases to satisfy new

security needs. We also acquired property located in Washington, D.C., to provide additional security for the abutting United States Secret Service headquarters and assisted in securing the nation's borders by coordinating preparation and filing of a series of eminent domain actions in Vermont, Minnesota, North Dakota and Montana to permit rapid construction of new border inspection facilities needed by the Department of Homeland Security.

We continued to satisfy agency requests for approval of land titles under 40 U.S.C. § 3111. Acquisitions reviewed included an exchange of property interests valued at \$7,400,000 to improve access security for the Nuclear Regulatory Commission in suburban Maryland and purchase of twenty acres in Glynn County, Georgia, for \$2,850,000 on behalf of the Department of Homeland Security's Federal Law Enforcement Training Center.

Guarding Against Claims From Military Activities. Over the past year we have successfully defended several lawsuits by individuals who allege that actions undertaken by the United States military have resulted in a taking of their property without just compensation in violation of the Fifth Amendment. In one, the owner of a factory located in the Sudan which was destroyed by the Navy sought \$50 million in compensation. The United States contends that the plant was used for the manufacture and storage of chemical weapons and that it had ties to Osama bin Laden. El-Shifa's claim

was rejected by the Court of Federal Claims, which held that the constitutional right to just compensation does not extend to claims arising out of the destruction of a purported enemy war-making instrumentality through American military action. In another matter, the Division successfully defended an attempt to certify a class action alleging that the noise from an increase in military overflights at Naval Air Station Oceana prevented the residential neighbors of the base from making use of their property. The proposed class consisted of approximately 30,000 individuals seeking \$500 million in compensation.

DEFENDING VITAL FEDERAL PROGRAMS AND INTERESTS

Defense of Federal River Structures. In 2002-2003, the government faced major challenges to federal flood control, irrigation, and hydroelectric facilities operation on river systems throughout the country. For instance, the Division's litigators once again defeated various efforts to enjoin or modify the operations of the Federal Columbia River Power System, a series of dams and reservoirs on the Columbia and Snake Rivers which provide approximately half of the power needs of the Pacific Northwest. Similarly, we defeated attempts to alter operations of the Colorado and Klamath River projects. On the Colorado, plaintiffs argued that the United States should divert water from its reservoirs to benefit species in Mexico even though that would cause flooding in impoverished areas of Mexico. On the Klamath, plaintiffs demanded that more water be

left in the river and shifted away from agricultural uses despite the fact that a National Academy of Sciences study indicated that the river species did not need the additional water. Perhaps most notable, however, were the Division's efforts regarding the Missouri River. In that case, the District of Columbia district court issued an injunction requiring that water levels on the Missouri be kept low during the summer. However, a prior conflicting ruling by the District of Nebraska required that the levels be kept high to benefit navigation. The Division guided the Corps through this dilemma by convincing the Judicial Panel on Multidistrict Litigation to transfer all of the cases to a single judge in Minnesota, resolving the conflicting injunctions, and allowing the Corps to move forward with its river operations.

Maintaining the Nation's Infrastructure. In several different pieces of litigation, the Division defeated efforts to halt the upgrading of several of the nation's airports and its operation of major dams. For example, it successfully opposed efforts to halt construction of runways at the Phoenix Sky Harbor International Airport in *City of Tempe, Arizona v. FAA* and Seattle-Tacoma Airport in *Airport Communities Coalition v. Corps of Engineers*, and forestalled continued efforts to prevent expansion of the Hopkins Cleveland International Airport in *City of Olmsted Falls v. United States*. In *National Wildlife Federation v. Corps of Engineers*, the district court upheld the Corps' plans for operating four dams along the lower

Snake River in Washington State, rejecting claims that the plan was the cause of downstream violations of water quality standards.

Promoting Alternative Energy Sources. The Division successfully defended a River and Harbors Act permit in *Alliance to Protect Nantucket Sound v. Corps*, which will allow further study of a possible wind energy facility in the ocean waters of Nantucket Sound off the coast of Massachusetts. The permit authorizes a data collection tower, and may eventually lead to the construction of a renewable energy windmill farm comprised of 170 wind turbine generators, which could provide up to one-third of the electrical needs of Cape Cod in a clean and environmentally sound manner.

Protecting Energy Policy and Infrastructure. The Division exercised the government's power of eminent domain to acquire transmission line easements over 526 acres of land in California and Washington at an estimated cost of over \$2,800,000 on behalf of the Department of Energy's Western Area Power Administration and Bonneville Power Administration.

Bolstering the Nation's Energy and Water Infrastructure. The Nation's effort to maintain secure, dependable electrical power was significantly aided by the Division's defense of Presidential Permits allowing two large Mexican power plants to transport electricity into California. The

Division's lawyers successfully persuaded the Court to allow continued operation of the power plants and transmission of the electricity to fulfill vital energy needs. Also, in Georgia, we successfully defeated attempts to block the construction of a new water supply reservoir that will supplement the local municipal water supply, which would otherwise be exhausted in 2004. Another successful effort to ensure adequate water resources came when we successfully defeated attempts in New Jersey to interfere with the Corps' operation of a large multi-use reservoir that serves a variety of important municipal and other public purposes.

Defending the Clean Water Act's Dredge and Fill Permitting

Program. On appeal to the Fourth Circuit, the Division successfully obtained a reversal of a district court ruling which held, contrary to 30-years of prior practice, that the Environmental Protection Agency, not the Army Corps of Engineers, was the appropriate agency to review permit applications for the discharge of excess surface coal mining spoil into waters of the United States. In another appeal to the Fourth Circuit, the court also upheld the Corps of Engineer's authority to review a proposed Section 404 Clean Water Act discharge of fill material under general, nationwide permit provisions, rather than under a more time-consuming individual permit process.

Land Acquisition Advice and Training for Federal Agencies.

In addition to providing representation for federal agents in lawsuits, the

Division also provides advice and training to various federal agencies when appropriate. For example, the Division's Appraisal Unit provided significant valuation guidance to federal agencies over the course of the year, including advising the Department of the Interior in an ongoing major reorganization of real estate appraisal functions within that Department. Members of the unit presented training at national and regional meetings and seminars held by federal land acquiring agencies, including the Bureau of Land Management, the Fish and Wildlife Service, and Forest Service.

Saving Taxpayers Millions in Eminent Domain Cases. The Division successfully defended the statutory interest rate provided by law for exercise of the government's power of eminent domain in 40 U.S.C. § 3116 against a constitutional challenge. The result in this single case saved the government as much as \$25,000,000 and established precedent for future litigation. Similarly, we saved the federal government approximately \$2,000,000 when we prevailed in a case stemming from the purchase of land within an irrigation district for expansion of the Yuma (Arizona) Marine Corps Air Station. We successfully argued that a formula used by the Ninth Circuit Court of Appeals to calculate just compensation in previous litigation involving other land in the same irrigation district should no longer apply. The new formula is also expected to apply to ongoing land acquisitions for Yuma Air Station.

PROTECTING INDIAN RESOURCES AND RESOLVING INDIAN ISSUES

Defending Tribal and Federal Interests in Water Adjudications. We had several notable successes in water rights adjudications. These adjudications are complex, primarily defensive cases, often involving the water rights of thousands of parties, and we devote significant resources to crafting settlements that balance and recognize the interests of all parties, as opposed to litigating these cases in a winner-takes-all manner. For example, this year the Court approved the Warm Springs Water Rights Agreement, which concluded a 15-year adjudication with a cooperative conclusion. Not all water adjudications, however, are amenable to settlement, in which case we are prepared to litigate. We had several significant victories in such litigation, including *Lummi Indian Nation v. Washington*, where the Court adopted the United States' argument that reserved Indian water rights include a right to use groundwater and that the purposes for which Tribes may exercise their water rights include the right to support necessary domestic purposes. Since the decision, we successfully have encouraged discussions between the State and the Tribe to mediate the resolution of this adjudication. In the Bitterroot River Basin adjudication in Montana, the Court adopted the United States' position that the Tribe had not abandoned its water rights.

Protecting Tribal Rights to Hunting and Fishing. In *United States v. Washington*, the Court approved the Shellfish Implementation Plan negotiated among the parties, which resolved outstanding litigation issues regarding regulation of the shellfish habitat. In the culverts sub-proceeding of *United States v. Washington*, where the United States is seeking relief to aid the passage of endangered salmon through state culverts, the Court granted the United States' motion to dismiss the State's assertion of cross-claims on the grounds the United States had not waived its sovereign immunity.

Defending the United States' Ability to Take Title to Indian Land. The Division has had seven successes in a row in defending the Secretary of the Interior's decisions to accept title to Indian land and hold such land in trust status. These cases seek to vacate not only agency action, but to declare important federal statutes and programs unconstitutional. Notable successes this year included *Calcieri v. Norton*, in which the court rejected a plethora of constitutional and regulatory challenges to the Interior Department's power to take lands into trust that the Narragansett Tribe seeks to use for elderly and low income housing, and *Santee Sioux v. Norton*, in which we defeated a preliminary injunction seeking to bar Interior from taking land to be used for economic development into trust on behalf of the Ponca Tribe.

Defending the United States' Authority to Implement Indian Policies.

The Division had several successes in the past year defending federal agencies' actions. For example, in *Connecticut v. Department of Interior*, the court dismissed Connecticut and two towns' challenge to the Secretary of the Interior's preliminary decisions on petitions for federal recognition by two groups of Indians and the regulatory procedures in place for processing recognition petitions. In *South Dakota v. Department of Transportation*, the court dismissed South Dakota challenge to a federal policy providing for the reimbursement of taxes collected by Indian tribes for transportation projects on reservations. In *Association of Property Owners v. Individual Council Members of the Suquamish Tribal Council*, we successfully defended before the Ninth Circuit a HUD program to provide low-income housing for Native Americans pursuant to the Native American Housing Assistance Act. And in *Oregon v. Norton*, we obtained dismissal of a challenge that challenged the Secretary's authority to make decisions regarding whether trust lands could be considered part of a Tribe's restored reservation after recognition. Following the grant of our motion to dismiss, the Governor announced the State would not appeal.

Promoting Negotiated Resolutions of Indian Disputes. The Division continues to promote the resolution of controversial legal disputes involving Indian land and rights through alternative dispute resolution ("ADR"). The goal is to resolve litigation efficiently and favorably, but

also to establish cooperation between tribes, states, and local governments, which will benefit all parties in their future interactions. To that end, we served as the mediator in *Nevada v. United States*, where the State of Nevada challenged a trust acquisition on behalf of the Fallon Paiute Shoshone Tribe in Fallon, Nevada. We helped negotiate a resolution that enabled the State to dismiss its appeal of this challenge, while at the same time creating an agreement between the State and the Tribe for handling similar issues in the future. We believe this is the first negotiated resolution of a trust land challenge between a tribe, a State, and the United States, and will create a precedent for resolving similar disputes in the future.

Other examples of beneficial uses of ADR in the Indian context include the Gila River Water Adjudication, in which we worked with the parties to craft a legislative settlement of that adjudication, and the Snake River Basin Adjudication, in which the parties agreed to a term sheet that will form the basis for the settlement of this complex water adjudication that has been the subject of six years of negotiations. To further our ADR initiative, Division managers addressed attendees at the Conference of Western Attorney Generals and at an American Bar Association conference on ADR to promote the use of ADR in resolving Indian disputes.

Defending and Enforcing Indian Gaming Laws. The Division, working with United States Attorneys, enjoyed significant success in defending and

enforcing Indian gaming laws. In a case of first impression, the Tenth Circuit upheld the authority of the Chairman of the National Indian Gaming Commission unilaterally to issue a temporary closure order under the Indian Gaming Regulatory Act ("IGRA") to close a gaming facility that was conducting uncompact Class III gaming, that is, casino-style gambling. Also, in the Eighth Circuit, two factions of the Sac and Fox Tribe, the elected tribal officials and a dissident group, challenged the Chairman's temporary closure order shutting down the Tribe's Meskwaki Casino after the dissident group took over control of the Casino from the elected council. The court of appeals ruled that IGRA implicitly forbids review of temporary closure orders and requires that a party first take an administrative appeal to the full Commission. These rulings affirm the Chairman's authority to act quickly to halt unlawful gaming practices.

We also had several successes in the district courts. For example, in California, the Division prevailed in a suit brought by non-Indian casino interests from Nevada, who sought to have Indian gaming in California declared unconstitutional as a violation of the Equal Protection Clause. In Wisconsin, in a suit filed by a Tribe, we successfully defeated a challenge under the Tenth Amendment and other Constitutional provisions, to the Indian Gaming Regulatory Act's prohibition against taking of land into trust for a Tribe absent the concurrence of the State where the land is located. In Iowa, the Division won a court order shutting down an illegal

Indian gaming casino that was generating more than \$3 million in illegal revenues every month.

Resolving Indian Land and Mineral Claims. In a significant victory for the Division, the Supreme Court issued a landmark decision for the government in a case in which the Navajo Nation sued the United States, seeking \$600 million for an alleged breach of trust after the Secretary of the Interior approved amendments, previously agreed to by the Nation, which increased the royalties a private coal company would pay for mining tribal coal resources. The Supreme Court ruled that the Navajo Nation could not sue the United States for money damages because the Secretary has no responsibility to manage Indian coal resources on behalf of Tribes or to ensure that a Tribe seeking approval of a lease obtains the highest possible return. In so ruling, the Court recognized that important Congressional goals of furthering Tribal self-determination would be defeated if the United States were held accountable for decisions that are the primary responsibility of Tribes.

In another matter, the Division devoted significant effort in the past several years to resolving an ongoing land dispute between three tribes, the United States, and private landowners involving the Arkansas River in Oklahoma. In 1980, the Supreme Court held that title to a 96-mile stretch of the Arkansas Riverbed belonged to the Cherokee, Choctaw, and Chickasaw tribes of Oklahoma. The river changed course and much of the riverbed

became dry land occupied by private landowners. The Tribes brought a breach of trust action against the United States in *Cherokee Nation v. United States* and sought to file quiet title actions against the private landowners as well. We played a significant role in drafting settlement legislation resolving the Tribes' claims against the United States and compensating them while at the same time affirming and ratifying title in the private landowners occupying the dry riverbed lands. Congress enacted the Cherokee, Choctaw, and Chickasaw Land Claim Settlement Act at the close of the 107th Congress.

Also, in *Mohawk Indian Nation v. New York*, the State of New York asserted counterclaims against the United States in a land claim, seeking contribution from the United States for a share of the State's liability arising out of the State's invalid purchases of Indian lands. The court granted the United States' motion to dismiss these counterclaims, and denied the State's motion for reconsideration, which will provide valuable precedent for other such claims. In *Sands v. United States*, the court granted the United States' motion to dismiss a claim seeking \$500,000 for alleged depredation in hunting and fishing rights on a new Mexico Indian reservation.

SUPPORTING THE DIVISION'S LITIGATORS

Litigation Support. The Division's Office of Litigation Support provided superb support to some of the Division's largest and most demanding cases. The unit worked diligently to manage scarce funding for the Power Plants family of cases, which have proven to be extremely resource-intensive. We were particularly pleased to break new ground in our work by electronically imaging all case documents in the recent Power Plants Ohio Edison trial from initial acquisition through the conduct of an electronic trial. The unit also provided support to 23 Tribal Trust cases, in which gathering and managing a century of relevant documents present numerous logistical and technical challenges. The Division developed document exchange protocols and technical specifications for use with the Interior Department which greatly assisted the development of those cases.

Technology Upgrades. The Division provided its litigators with the latest and best technological tools available. This year we upgraded all desktop computer systems, at all nationwide offices, on schedule, under budget, and with virtually no disruption to the staff. The upgrade provided critical new hardware, the latest releases of Corel and Microsoft software, and a new group of legal applications to improve productivity. The desktop system also includes new tools for "e-filing," a Division Intranet, and improved security. To prepare for the age of electronic litigation, we installed state-of-the-art digital copiers throughout the Division, and added

large central networked copiers, with the capability to scan documents and create electronic documents that will be needed for e-filing purposes.

Remote Access. The Division improved its remote access options for litigators who frequently travel and need alternative access to electronic communications. We enabled a secure network solution for Blackberry handheld devices and installed a remote-access system compatible with high-speed broadband access for users to gain full network access through cable or DSL lines from home or hotel.

Training. We coordinated the development of several training programs and seminars at the Office of Legal Education's National Advocacy Center, including a new management training course for legal division attorney-supervisors and managers, developed in cooperation with several other Department training coordinators.