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Director

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A Letter From the Director

As the new director of the Executive Office for United States Attorneys, I am pleased to present this edition of the United States Attorneys' Bulletin. In the six months of my service as EOUSA director, I have met and spoken with many hardworking, highly-dedicated Assistant United States Attorneys who strive every day to carry out the mission of their offices in an effective yet even-handed way. I have been tremendously impressed by the high quality and the wide variety of the litigation pursued in our 94 United States Attorneys' Offices. As EOUSA director, it is my job to insure that you have all the tools - both legal and technical - that you need to do your job in the most productive way possible. I hope that you find the Bulletin to be one of the many resources that you can use to perform your important litigation tasks more efficiently.

This edition, which examines natural resources, is the second in a two-part series focusing on environmental issues. As an Assistant United States Attorney, I appreciate the often complex and time-consuming litigation – both civil and criminal – that arises from environmental issues and real-life events. Those who work in this area should be proud of their critical roles in the protection and preservation of the environmental quality of our surroundings and are to be congratulated on their successful efforts.

I wish to thank Assistant Attorney General Lois Schiffer and all of the contributors from the Environment and Natural Resources Division who have thoughtfully committed their insights and guidance to paper, making this edition of the United States Attorneys' Bulletin a most valuable and informative resource.

Sincerely,

Mary H. Murguia

Environmental Justice: An Overview of Legal Issues	
Sylvia F. Liu	1
Guidance to Client Agencies on Compiling the Administrative Record	
Joan Goldfrank	7
Role of the Policy, Legislation, and Special Litigation Section	
Pauline Milius and Tim Dowling	12
Affirmative ESA Civil Cases Seeking Injunctive Relief	
Samuel D. Rauch, III	16
An Overview of Takings Jurisprudence	
Susan V. Cook	18
General Stream Adjudications: Overview of the Process and Issues	
David W. Harder and K. Jack Haugrud	24
RS 2477 Litigation: Statutory Background and Litigation Issues	
Claire E. Douthit and Margo D. Miller	29
Responsibilities and Activities of the Title Unit	
Lewis M. Baylor	32
Timber Sale Litigation on Public Lands	
John Watts	38
An Overview of Mineral Royalty Litigation	
Ann D. Navaro and Donna S. Fitzgerald	43
Public Interest Value	
William J. Kollins	47
Appraisal Unit - Support Services	
James D. Eaton	54

Environmental Justice: An Overview of Legal Issues

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Section

Environmental justice has gained nationwide attention in recent years. Environmental and community groups opposed the site of a proposed polyvinyl chloride (PVC) facility in St. James Parish, Louisiana. Indian tribes protested a proposed low-level radioactive waste facility in Ward Valley, California. Residents in Chester, Pennsylvania, filed a civil rights lawsuit to prevent the issuance of an environmental permit for a waste processing facility. Communities in Los Angeles argued that a state air emissions trading program results in toxic hot spots for some of its poorest residents. In these and similar situations around the country, the affected communities have argued that they, as poor or minority communities or Indian tribes, suffer disproportionately from environmental harms and from the burdens of living near unwanted, polluting facilities. People have raised environmental justice claims for more than two decades, but only recently has environmental justice reached national levels of attention.

What is Environmental Justice?

In the past twenty years, people have become increasingly concerned about “environmental justice,” which deals with the the issue of minorities and low-income people suffering disproportionate exposure to environmental harms. Although recent attention has focused on facility sites near minority or low-income populations, environmental justice encompasses many concerns. For example, low-income and minority families are more likely to live

in substandard housing and may, therefore, face greater threats of lead paint poisoning. Native American and other subsistence fishers, who consume a greater than average proportion of fish and shellfish in their diet, may be disproportionately affected by pollutants that accumulate in the food chain. Farm workers experience exposure to pesticides at a greater rate than the general population. Low-income families may be more likely to live in heavily industrial areas where multiple sources of pollution exist. Concerns about these issues have propelled the grassroots environmental justice movement, which combines civil rights and social equity issues with environmental concerns. A goal of environmental justice, or environmental equity, is equal protection from environmental harms. Environmental justice also includes the fair enforcement of environmental laws and meaningful access and participation in decisions that affect peoples’ health, environment, and quality of life.

Environmental justice first gained national prominence in 1982 when more than 500 civil rights and environmental activists were arrested while protesting the proposed location of a PCB (polychlorinated biphenyl) landfill in Warren County, North Carolina. Following these protests, several widely-cited studies found a strong correlation between racial demographics and the location of environmental hazards, notably a 1983 General Accounting Office study and a 1987 report by the Commission for Racial Justice, United Church of Christ.¹ In October 1991, approximately

¹Commission for Racial Justice, United Church of Christ, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-*

600 grassroots and national delegates met at the First National People of Color Environmental Leadership Summit in Washington, D.C., and adopted seventeen “Principles of Environmental Justice.”² In response to the growing public concern, in 1992, the EPA created the Office of Environmental Equity, which is now the Office of Environmental Justice.³

In 1994, President Clinton signed Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.”⁴ The Executive Order requires each agency “to make environmental justice a part of its mission by addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” Among other things, the Order requires each agency to develop an environmental justice strategy, and directs agencies to ensure that any programs or activities substantially affecting human health or the environment do not exclude people from benefits of those activities, or subject them to discrimination, based on race, color, or national origin. In an accompanying memorandum, the President directed agencies to ensure that all programs or activities receiving federal financial assistance that affect human health or the environment comply with Title VI of the Civil

Economic Characteristics of Communities with Hazardous Waste Sites (1987); U.S. General Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (GAO/RCED-83-168, June 1, 1983).

²Reprinted in *People of Color Environmental Groups: 1994-1995 Directory* at 4 (Robert D. Bullard, ed., Charles Stewart Mott Foundation 1994).

³The website for the Office of Environmental Justice is found at <http://es.epa.gov/oeca/oeljbut.html>.

⁴*Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 11, 1994).

Rights Act of 1964 (which prohibits discrimination based on race, color, or national origin), and to consider environmental justice impacts in environmental reviews made under the National Environmental Policy Act (NEPA).⁵ The Department of Justice issued its environmental justice strategy in April 1995.

While there is still some scholarly debate about the existence of environmental injustice — a 1995 GAO report, for instance, reviewed ten studies analyzing the correlation between race and proximity to hazardous waste facilities, and concluded that the studies were contradictory⁶— the Administration has taken the issue seriously. The Executive Order reflects the commitment of the Administration to address these complex issues and to achieve the goals of environmental justice. Many states also have created environmental justice programs to address these issues.

How Environmental Justice Issues May Arise in Department Litigation

While environmental justice encompasses a broad social movement, communities and their advocates have used litigation to further environmental justice goals, and the Department also has promoted environmental justice through its litigation. The following section provides a brief overview of some ways environmental justice issues arise in the Department’s litigation, and suggests ways in which Department attorneys can address these issues.

(1) Civil and criminal environmental enforcement The Environment and Natural Resources

⁵ Memorandum for the Heads of All Departments and Agencies, Feb. 11, 1994.

⁶ U.S. General Accounting Office, *Hazardous and Nonhazardous Waste: Demographics of People Living Near Waste Facilities* (GAO/RCED-95-84 June 13, 1995) (concluding that minorities or low-income people were not overrepresented near a majority of nonhazardous municipal landfills, and that a review of ten existing studies of the demographics near hazardous waste facilities had conflicting conclusions).

Division (ENRD) and the United States Attorney's Offices bring both civil and criminal cases to enforce the nation's environmental laws. In many of these cases, the affected communities are low-income populations, minority populations, or Indian tribes, so cleanups and other remedies that result from successful litigation benefit these communities and promote environmental justice. In civil environmental enforcement, consistent with the Department's Guidance Concerning Environmental Justice⁷ and ENRD policy, attorneys should consider the following:

- C Assess each enforcement case to determine whether it raises potential environmental justice issues. Agency referrals, draft pleadings, or other documents pertaining to a case may not explicitly identify a case as an environmental justice matter. Your office may wish to consult with the client agency to gather additional information about the demographics of the affected community.
- C Identify environmental justice issues, report them on your docket sheets, and contact your environmental justice or environmental coordinator. Each section in the ENRD has a designated environmental justice contact. The Executive Office for United States Attorneys has an environmental justice contact and most United States Attorneys' Offices also have an environmental contact person.
- Consider conducting outreach to the affected communities to promote participation in the agency decision-making process concerning remedies. In reaching settlements in these civil cases, consult with the affected community and explore possible supplemental environmental projects (SEPs). SEPs are environmentally beneficial projects that defendants agree to

undertake in the settlement of civil enforcement actions, often with direct benefits to the community. SEPs are required to have an adequate nexus, or relationship, to the alleged violations. The EPA's SEP policy encourages the use of community input for developing projects in appropriate cases, and provides that community input be a factor to consider while mitigating penalties.⁸

DOJ, in conjunction with HUD and EPA, recently launched an initiative to enforce the Residential Lead-Based Paint Hazard Reduction Act of 1992, a statute requiring disclosure and notification of lead-based paint hazards in pre-1978 housing. This statute responds to findings that low-level lead poisoning is widespread among American children, disproportionately affecting minority and low-income children. EOUSA recently forwarded to each USAO Civil Chief a packet of information on how to investigate and litigate these cases.

The Environmental Crimes Section of ENRD and the United States Attorneys' Offices also have prosecuted defendants in cases in which pollution has impacted communities covered by Executive Order 12898. These cases include successful convictions of defendants who illegally applied commercial pesticides, designed for outdoor use, in low-income homes around the country; those who exploited homeless workers by making them participate in illegal asbestos removal operations without proper safety precautions or training; and those who illegally dumped hazardous wastes in low-income and minority neighborhoods.

(2) *Civil Rights enforcement*

The Department also has provided guidance to agencies and to courts on the interaction between

⁷ The Department of Justice Guidance Concerning Environmental Justice may be found at DOJ's website, at the following address: <http://www.usdoj.gov/enrd/ejguide.html>.

⁸ See *EPA Supplemental Environmental Protects Policy*, 63 Fed. Reg. 24796 (May 5, 1998). The SEP policy as well as a national database of SEPs can be found at EPA's website at <http://es.epa.gov/oeca/sep/>.

environmental justice and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in programs and activities that receive federal financial assistance. Nearly all agencies have adopted implementing regulations that apply not only to intentional discrimination but also to policies and practices that have a discriminatory effect. *See Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) (holding that while Title VI itself requires proof of discriminatory intent, agencies may validly adopt regulations implementing Title VI that also prohibit discriminatory effects); *Alexander v. Choate*, 469 U.S. 287 (1985) (restating holding in *Guardians* that disparate impact violations could be addressed through regulations implementing Title VI). Persons who believe they have been subject to discrimination violating Title VI may file a lawsuit in district court or file an administrative complaint with the Office of Civil Rights of the federal agency which funds the program or activity that allegedly caused the discrimination.

Environmental justice advocates have filed both judicial and administrative complaints alleging that state environmental agencies (the recipients of EPA funds) have violated both Title VI and EPA's implementing regulations in issuing environmental permits or otherwise running their programs in a way that results in adverse discriminatory impacts. Department attorneys have been involved in these issues in several ways:

C *Amicus Participation*

The Department participated as *amicus curiae* in a Third Circuit case where plaintiffs challenged a proposed waste facility in the predominantly African-American city of Chester, Pennsylvania. In that case, the Third Circuit held that citizens have a private right of action to enforce EPA's disparate impact Title VI regulations. *Chester Residents for a Quality Living et al. v. Seif et al.*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 118 S. Ct. 2296, *vacated as moot*, 119 S. Ct. 22 (1998). The Supreme Court vacated on mootness grounds because the company seeking the permit at issue had withdrawn its application.

C *Advice to Client Agencies*

Attorneys in the Civil Rights Division and ENRD also have provided technical and legal assistance to client agencies concerning Title VI administration complaints. Since 1993, the EPA has received approximately 50 administrative Title VI complaints alleging a theory of disproportionate adverse impacts from environmental permitting. The EPA has accepted a number of these complaints for investigation, and it issued its first substantive decision in October 1998.⁹ In March 1998, the EPA issued an interim guidance to provide a framework for the EPA's Office of Civil Rights to process these complaints.¹⁰ Department attorneys provided legal expertise to the EPA during its development of this guidance and during the investigation of some specific cases. The Civil Rights Division also consulted with the Department of Transportation (DOT) concerning some of their Title VI administrative complaints.

(3) *Defensive posture*

⁹ The complaint alleged that the Michigan Department of Environmental Quality's (MDEQ) issuance of a Clean Air Act permit for a proposed steel recycling mini-mill in Flint, Michigan, would result in discrimination. EPA found that there would be no adverse health impacts from the proposed emissions, and therefore there would be no unjustified disparate impacts. The EPA letter explaining the decision can be found on the internet at the following address: <http://www.epa.gov/region5/steelcvt.htm>.

¹⁰ The Interim Guidance can be found at: <http://es.epa.gov/oeca/oej/titlevi.html>. The guidance has generated much controversy among state and industry groups, who have said that EPA's implementation of Title VI will discourage urban redevelopment efforts and create costly uncertainty in the environmental permitting process. EPA is addressing these concerns by obtaining recommendations for Title VI implementation from a broadly representative Federal Advisory Committee Act advisory council; by conducting outreach to interested parties; and by reviewing the public comments.

Sometimes, environmental justice issues arise when a federal agency's actions are challenged, and Department attorneys defend the agency in court. For example, plaintiffs might file a lawsuit under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, alleging that an agency did not adequately conduct an environmental review before taking a major federal action. NEPA requires federal agencies to analyze the environmental impacts of major federal actions significantly affecting the quality of the environment. Before embarking on an action, an agency may conduct an Environmental Assessment (EA) to determine whether there are significant environmental impacts. If, at the conclusion of the EA, the agency finds a significant impact, it then produces an Environmental Impact Statement (EIS), which includes an analysis of impacts on the natural and physical environment, and associated social, economic, and cultural impacts. In December 1997, the White House Council on Environmental Quality (CEQ), issued guidance on how agencies should address environmental justice issues in the NEPA process. Because NEPA is a procedural statute that does not mandate an outcome, environmental justice challenges raising substantive claims, brought under NEPA, are not always successful. *See, e.g. New River Valley Greens v. United States Department of Transportation*, 161 F.3d 3 (4th Cir. 1998). Some claims have alleged that federal agencies failed to comply with their obligations under the Executive Order. Such claims fail, however, because an Executive Order is not privately enforceable where it does not explicitly provide for private enforcement. *See, e.g., Zhang v. Slattery*, 55 F.3d 732, 748 (2d Cir. 1995) (not an environmental justice case).

In defending cases raising environmental justice concerns, the Department encourages attorneys to work with the client agency to explore whether there was adequate public participation in the decision-making process, to find whether alternatives to litigation are appropriate, and to

address the substantive legal questions that have been raised. The Community Relations Service (CRS), a Department component that provides mediation, conciliation, and technical assistance to communities experiencing tensions or conflicts arising from perceived discriminatory actions, policies, and practices,¹¹ is a resource that we can tap in some situations. The CRS has provided conciliation and mediation services in environmental justice matters, often before they are in litigation.

Department attorneys have frequently provided advice and guidance to our client agencies before there is litigation over environmental justice issues. In such circumstances, we are often able to work with the agency, to come up with innovative solutions to address the underlying concerns of the community, and to ensure that the agency addresses environmental justice concerns. The Department also encourages the use of alternative dispute resolution (ADR) to resolve environmental justice claims.

How Department Attorneys Can Promote Environmental Justice Outside of Litigation

Department attorneys can promote environmental justice outside of litigation in a variety of ways, including community building and interagency cooperation efforts. These can include:

C Incorporating Environmental Justice into Weed and Seed programs

Operation Weed and Seed, which operates out of the Office of Justice Programs, is a neighborhood-focused coordination strategy, currently implemented in more than 150 communities around the nation, to prevent and control crime and improve the quality of life. On the “seeding” side of building communities, strategies have included environmental restoration and environmental justice. For example, in

¹¹*See* 42 U.S.C. 2000g-1.

Houston, Texas, the United States Attorney's Office has incorporated Rat-on-a-rat (ROAR) program, which seeks to protect land and water resources in low-income neighborhoods through a citizen hotline, investigation, and enforcement against the illegal transport and dumping of solid and hazardous wastes. In addition, several Weed and Seed sites are engaged in brownfields restoration projects. Brownfields are abandoned, idle, or under-used industrial or commercial properties, where real or perceived environment contamination complicates redevelopment. Restoration of these sites to economically productive properties brings jobs to neighborhoods that need them, stems suburban sprawl and greenfields development, and cleans up contaminated areas.

C Holding Community Meetings

A useful way to gather information about environmental problems facing a community is to sponsor local meetings and hear directly from local community members. Including local and state enforcement officials in community meetings helps ensure that all officials with authority to respond to specific problems are present. A town hall-style meeting, where the community can address enforcement officials directly, is a very effective way to solicit community concerns. The information gathered from community meetings can serve as a basis for further investigation. This collaboration helps state and local enforcement agencies that may have additional legal tools to complement federal authorities in dealing with local environmental problems.

C Participating in Interagency Coordination

The White House Council on Environmental Quality (CEQ) has sponsored some regional interagency efforts to address environmental justice issues in a comprehensive way. In July 1998, high level agency officials (including CEQ, EPA, USDA, DOI, DOC, DOJ, and HUD) met with environmental justice advocates, local business leaders, elected officials, and community representatives to discuss major environmental

issues of concern in Los Angeles. Following the meeting, a regional interagency task force to address specific issues was developed. The CEQ held its second regional meeting in New York City in March 1999. Assistant United States Attorneys in the area are participating in the interagency activities that came out of this meeting, including the development of an environmental enforcement workshop.

Conclusion

Department attorneys can do much through both litigation and programs to promote environmental justice. Addressing environmental justice is not easy, but the principles behind it — environmental protection for people of all incomes and races, and opportunities for meaningful public participation in government — are ones that we should all try to promote. ~

Guidance to Client Agencies on Compiling the Administrative Record

Joan Goldfrank

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Many cases for which ENRD is responsible involve defending a federal agency's decision. In these cases, compiling an administrative record is necessary for the agency. It is the purpose of this article to provide guidance to the agency personnel who compile administrative records.

This article provides only internal Department of Justice guidance. It does not create any rights, substantive or procedural, which are enforceable at law by any party. No limitations are hereby placed on otherwise lawful prerogatives of the Department of Justice or any other federal agency.

Introduction

Under the Administrative Procedure Act (APA), a court reviews an agency's action to determine if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In making this determination, a court evaluates the agency's entire administrative record. The administrative record is the paper trail that documents the agency's decision-making process and the basis for the agency's decision.

The APA governs judicial review of a challenged agency decision. However, several statutes specify what documents and materials constitute an administrative record *see* 42 U.S.C. § 7607(d)(7)(A) (provision states what materials will constitute the record for judicial review of certain enumerated types of rule making issued

under the Clean Air Act); 42 U.S.C. § 9613(j), (k) (CERCLA). At the outset, make sure to determine whether a statute, (other than the APA), applies in the case. In addition, regulations may govern how to assemble a record. *See, e.g.*, 40 C.F.R. §§ 300.800 - .825 (CERCLA); 40 C.F.R. Part 24 (RCRA Corrective Action). *See also* Federal Rules of Appellate Procedure Rules 16 and 17 (record on review or enforcement and filing of the record).

The purpose of this article is to provide guidance to agencies in compiling the administrative record of agency decisions other than a formal rule making or an administrative adjudication. Optimally, an agency will compile the administrative record as documents and generation or receipt of materials occurs during the agency decision-making process. The record may be a contemporaneous record of the action. However, the agency may compile the administrative record after litigation has been initiated. An agency employee should be designated to be responsible for compiling the administrative record. That individual will be responsible for certifying the administrative record to the court. The individual should keep a record of where she or he searched for the documents and materials, and whom they consulted while compiling the administrative record.

Taking great care in compiling a complete administrative record is critical for the agency. If the agency fails to compile the whole administrative record, it may significantly impact both our ability to defend and the court's ability to review a challenged agency decision.

General Principles for Compiling the Administrative Record

The administrative record consists of all documents and materials directly or indirectly considered by the agency decision-maker in making the challenged decision. It is not limited to documents and materials relevant only to the merits of the agency's decision. It includes documents and materials relevant to the process of making the agency's decision. For example,

- Documents and materials whether or not they support the final agency decision;
- Documents and materials which were available to the decision-making office at the time the decision was made;
- Documents and materials considered by, or relied upon, by the agency;
- Documents and materials that were before the agency at the time of the challenged decision, even if the final agency decision-maker did not specifically consider them; and
- Privileged and non-privileged documents and materials.

Where To Find The Documents and Materials That Comprise The Administrative Record

The agency employee responsible for compiling the administrative record should be reliable, careful, and prepared to provide an affidavit. The person should keep a record of where he or she searched for documents and whom he or she consulted in the process. The identified person should conduct a thorough search for compiling the whole record. They should:

- Contact all agency people, including program personnel and attorneys, involved in the final agency action and ask them to search their files and agency files for documents and materials related to the final agency action and include agency people in field offices;
- Contact agency units other than program personnel, such as congressional and correspondence components;
- Where personnel involved in the final agency action are no longer employed by the agency, search the archives for documents and materials related to the final agency action. A former employee may be contacted for guidance about where to search;

- Determine whether there are agency files relating to the final agency action. If there are such files, search them;
- If more than one agency was involved in the decision-making process, the lead agency should contact the other agencies to be sure the record contains all the documents and materials considered or relied on by the lead agency;
- Search a public docket room to determine whether there are relevant documents or materials.

What Documents and Materials to Include in The Administrative Record

A. Types of materials:

- Documents to include in the administrative record should not be limited to paper but should include other means of communication or ways of storing or presenting information, including E-mail, computer tapes and discs, microfilm, and microfiche. *See* 36 C.F.R. Chapter XII, subchapter B (electronic records). Data files, graphs, charts, and handwritten notes should also be included. Do not include personal notes, meaning an individual's notes taken at a meeting or journals maintained by an individual, unless they are included in an agency file. Agency control, possession, and maintenance determine an agency file.

B. Kinds of Information:

- Include all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, even though the final decision-maker did not review or know about the documents and materials;
- Include policies, guidelines, directives, and manuals;
- Include articles and books. Be sensitive to copyright laws governing duplication;
- Include information or data;
- Include communications the agency received from other agencies and from the public, and any responses to those communications. Be

aware that documents concerning meetings between an agency and Office of Management and Budget (OMB) should be included but may qualify, either partially or fully, for the deliberative process privilege;

- Include documents and materials that contain information that supports or opposes the challenged agency decision;
- Exclude documents and materials that were not in existence at the time of the agency decision;
- As a rule, do not include internal “working” drafts of documents, whether or not they were superseded by a complete, edited version of the same document. Generally, include all draft documents that were circulated for comment either outside the agency or outside the author’s immediate office, if changes in these documents reflect significant input into the decision-making process. Drafts, excluding “working” drafts, should be flagged for advice from the Department of Justice attorney or the Assistant United States Attorney (AUSA) on whether: 1) the draft was not an internal “working” draft; and 2) the draft reflects significant input into the decision-making process;
- Include technical information, sampling results, survey information, engineering reports or studies;
- Include decision documents;
- Include minutes of meetings or transcripts thereof; and
- Include memorializations of telephone conversations and meetings, such as a memorandum or handwritten notes, unless they are personal notes.

How to Handle Privileged Documents and Materials

Generally, the administrative record includes documents and materials that are privileged and contain protected information. However, once the

record is compiled, privileged or protected documents and materials are redacted or removed from the record.

The agency should consult with the agency counsel and the Department attorney or the AUSA as to the type and the extent of the privilege(s) asserted. Be sensitive to the relevant privileges and prohibitions against disclosure including, but not limited to, attorney-client, attorney work product, Privacy Act, deliberative or mental processes, executive, and confidential business information.

If documents and materials are determined to be privileged or protected, the index of record must identify the documents and materials, reflect that they are being withheld, and state on what basis they are being withheld.

How to Organize the Administrative Record

- Organize the documents and materials in a logical and accessible way;
- Organize the documents and materials in chronological order and/or by topic;
- Separate documents and materials that do not fit into a chronological order by category, e.g., internal policies, guidelines, or manuals;
- After a Department of Justice attorney or an AUSA has had the opportunity to review the administrative record for completeness and organization, date stamp or number each item. A Department of Justice attorney or an AUSA may review the documents and materials the agency excluded from the administrative record;
- Prepare an index to the administrative record;
- Make sure the index identifies each document and material by the date stamp number or document number and includes a brief description of the document or material, for example, “memorandum dated June 5, 1997 from Mary Smith to the EPA Administrator Jones regarding June 6, 1997 meeting agenda.” If a document or material is being withheld

based on a privilege or prohibition, state the privilege or prohibition.

- Make sure the agency certifies the administrative record.¹² Certification language should reflect how the agency person who was responsible for compiling the record has personal knowledge of the assembly of the administrative record. Attached are sample certificates. Neither a Department of Justice attorney nor an AUSA should certify the record in order to avoid the possibility of being called as a witness in the case;
- Make sure the Department of Justice attorney or the AUSA consults the local rules of the court in which the matter is pending to determine how to file the administrative record with the court. If the local rules are silent on this issue, the Department of Justice attorney or the AUSA can address the issue with the parties and the court. For example, it may be appropriate to file the index with the court and to give the parties copies of the index and the opportunity to review the record, or to file the parts of the record that the parties will rely on as grounds for their motions for summary judgment. The United States Attorney's Office in the jurisdiction in which the matter is pending should be consulted.

Important for Court to Have the Whole Administrative Record

- A court reviews the agency action based on the administrative record before the agency at the time the decision was made.
- The whole administrative record allows the court to determine whether the agency's decision complied with the appropriate APA standard of review.
- All agency findings and conclusions and the basis for them must appear in the record.
- The administrative record is the agency's evidence that its decision and its decision-

making comply with relevant statutory and regulatory requirements.

- A court may remand the matter where the agency's reasoning for its decision is not contained in the administrative record.

Consequences of Incomplete Administrative Record

- If the record is incomplete, the government may be permitted to complete it, but, by doing so, you also may raise questions about the completeness of the entire record.
- If the court decides the record is not complete, it should remand the matter to the agency. It may, however, allow extra-record discovery, including depositions of agency personnel, and may allow court testimony of agency personnel.
- Generally, although it may vary from circuit to circuit, courts will allow discovery when a party has proffered sufficient evidence suggesting bad faith or improprieties that may have influenced the decision-maker, or that the agency relied on substantial materials not included in the record.
- A party must make a strong showing that one of these exceptions applies before a court will allow extra-record inquiry.

Supplementation of the record

- When the administrative record fails to explain the agency's action, effectively frustrating judicial review, the court may allow the agency to supplement the record with affidavits or testimony.
- Be aware that once the government supplements the record with affidavits or testimony, the opposing party may depose your witnesses and/or submit additional affidavits or testimony.
- Be aware that if agency counsel becomes a potential witness, it may be appropriate to screen the agency counsel from participation in the litigation. ABA Model Rule of Professional Responsibility 3.7.

Conclusion

¹²If the agency fails to certify the record, the government may not be able to file a motion for summary judgment.

When an agency must defend a final agency action before a court, it should take great care in preparing the administrative record for that decision. It is worth the effort and may avoid unnecessary and unfortunate litigation issues later. ~

Role of the Policy, Legislation, and Special Litigation Section

Pauline Milius
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Tim Dowling
Formerly, Attorney, Policy, Legislation and
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Environment and Natural Resources Division

The Policy, Legislation and Special Litigation Section (PLSL) of the Environment and Natural Resources Division (ENRD) handles two types of litigation: 1) *amicus curiae* matters and 2) “citizen suits” to enforce the Clean Water Act and Clean Air Act, in which the United States, though not a party, has a significant interest. The Division sometimes calls upon Assistant United States Attorneys to help with these cases, and welcomes input from the United States Attorneys’ offices.

A. *Amicus Curiae Matters*. — PLSL coordinates an active ENRD program to identify, consider, and participate as *amicus curiae* in cases that raise important questions affecting environmental law, natural resources and public lands, or Native Americans. For example, in the past few years, the Division has considered approximately 100 requests for *amicus* participation throughout the country and has filed *amicus* briefs in dozens of these cases. The Division most frequently submits *amicus* briefs for the Environmental Protection Agency and the Department of the Interior (Fish and Wildlife Service, Bureau of Indian Affairs), the Army (Corps of Engineers), and the Department of Commerce (National Marine Fisheries Service); however, we welcome referrals from any federal agency or the public. We have filed many of our *amicus* briefs in cases brought to our attention by Tribes, with whom the United States has a trust

relationship, or litigants in environmental “citizen suits.” We especially encourage Assistant United States Attorneys to call to our attention cases in which the United States might have an interest.

The Division’s *Amicus* Committee meets monthly to consider new or pending *amicus* matters, and to screen requests and ensure coordinated litigating positions. The Committee also considers cases in which the Division receives notice pursuant to 28 U.S.C. § 2403(a) (that the constitutionality of a federal statute has been called into question). The Committee consists of the chiefs of several ENRD Sections, or their designees, and the Deputy Assistant Attorney General acts as chair. Interested Assistant United States Attorneys, and attorneys from client agencies, are always welcome to attend these meetings in person, or to participate by telephone. A PLSL attorney, who acts as secretary to the Committee, coordinates meetings. To learn more about the Committee, or to receive an agenda for an upcoming meeting, please call PLSL at (202) 514-1442.

The Division views *amicus curiae* briefs as important and effective tools for helping the court and putting forward the views of the United States, and is very interested in hearing from AUSAs about matters in which *amicus* participation might be appropriate. Among the factors that the Division considers when screening cases are the court in which the case is pending, the significance of the affected interest, and whether the briefing schedule allows adequate time for participation. Cases in the United States Supreme Court and federal Courts of Appeals generally take priority over federal district court cases. In part because state court cases often do not raise federal questions, participation in state courts is unusual. Decisions to file *amicus* briefs are made by the Assistant Attorney General or Deputy Assistant Attorney General, in coordination with our clients and interested United States Attorneys. The

Solicitor General must also authorize appellate *amicus* briefs in federal or state court.

“Citizen suits” to enforce environmental laws against non-federal defendants may present a good opportunity for *amicus* participation because, although the United States is not a party to these actions, there are often important questions of statutory construction, citizen plaintiffs’ Article III standing, and the limits of federal authority under the Commerce Clause or the Tenth Amendment. Federal *amicus* participation can help to ensure the court hears the views of the United States. For example, ENRD recently filed an *amicus* brief to advise the Ninth Circuit of the government’s position that persons conducting Superfund cleanups, who are themselves partly responsible for the contamination, may sue other potentially responsible parties only for contribution and cannot assert claims for joint and several liability. The Ninth Circuit adopted the position of our brief.

Attorneys from PLSL, the Appellate Section, or other ENRD Sections generally write *amicus* briefs. However, where we are aware that an *amicus* matter might affect litigation being handled by a United States Attorney’s office, we encourage that office to provide ideas on whether to file or what position to take. In a recent Southern District of Texas citizen enforcement action that involved an interpretation of Environmental Protection Agency hazardous waste regulations, the Division decided not to write a new *amicus* brief because an Assistant United States Attorney in New York had recently briefed a closely-related issue in an enforcement action brought by the United States. Rather than writing a new brief, we arranged for a copy of the Assistant United States Attorney’s brief to be lodged with the court, shortly after which the court issued a favorable opinion.

B. *Citizen Suits Under Environmental Statutes*. — Although the United States, with the individual states, has primary responsibility for enforcing the nation’s environmental laws, many environmental statutes also authorize private individuals to bring enforcement actions.

Environmental citizen suits, like environmental laws themselves, are a recent development. There is more extensive precedent regarding citizen suits brought on behalf of the public to enforce other public legislation. In 1943, Jerome Frank coined the term “private attorneys general” to describe individuals who sue to enforce public legislation. *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943). In 1963, the Supreme Court explicitly recognized the legitimacy of citizen enforcement of non-economic public rights in *NAACP v. Button*, 371 U.S. 415 (1963).

Citizens sought to protect shared public resources in the late 1960s by initiating *qui tam* and public nuisance actions against polluters fouling common air and waters. These actions did not find favor in the courts, and suits to enjoin “public nuisances” faced enormous obstacles. These and other events galvanized Congress in the 1970s to include statutory citizen suit provisions in almost every major environmental statute adopted. One court noted, with respect to the Clean Air Act:

Fearing that Administrative enforcement might falter or stall, the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced.

Natural Resources Defense Council v. Train, 510 F. 2d 692, 700

(D.C. Cir. 1975). * * * Thus, the Act seeks to encourage citizen participation, rather than treat it as a curiosity or a theoretical remedy.

Friends of the Earth v. Carey, 535 F.2d 165, 172-73 (2d Cir. 1976), *cert. denied*, 434 U.S. 902 (1977). Today, there are citizens suit provisions in most of the major federal environmental statutes and several natural resource statutes. Of the major environmental statutes, only the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) lacks a means of citizen enforcement.

ENRD views citizen enforcement as an important tool. The responsible exercise of citizen enforcement proceedings provides a strong incentive for regulated entities to comply with the law. Thus, citizen suits help fill the gap between the government's limited enforcement resources and the number of violations that may warrant enforcement. In addition, citizen suits enable those most affected by pollution—those downstream, downwind, or who live, work, or recreate in an area affected by pollution—to protect the health and environment of themselves, their families, and their communities when federal, state, and local governments fail to do so.

The ENRD statutory rule in monitoring citizen suit litigation is to ensure the appropriate use of citizen suits to attain those goals. Under both the Clean Water Act and the Clean Air Act, consent judgments are proposed to ensure that they adequately address the violations at issue and meet other applicable legal requirements. Citizen suits often attract substantial public attention and United States Attorneys' Offices may, from time-to-time, receive press inquiries about citizen enforcement actions. Assistant United States Attorneys should feel free to contact PLSL at (202) 514-0424 in such situations.

1. *Citizen suit notice* — Under the citizen enforcement provisions of the major environmental statutes, citizens are required to notify the agency with enforcement authority before bringing suit. *See, e.g.*, 33 U.S.C. § 1365(b). Mandatory pre-filing notice serves several important functions. Notification to federal and state authorities alerts them to the alleged violations, enabling them to undertake enforcement action. Notice to the potential defendant enables it to investigate the factual basis for the alleged violations, and to inform the citizens if the allegations are unfounded. Notice to the potential defendant also allows the parties to discuss settlement before litigation ensues. Even if a negotiated resolution of the matter is not feasible, providing notice to the potential defendant may allow it to correct the violations, enabling the potential defendant to avoid or reduce its liability. In addition, because notice to federal and state governments is necessary to allow them to take

action, it is only fair that the alleged violator also receive notice of the alleged violations.

2. *Intervention* — Although the United States does not routinely intervene in citizen suits, it may do so if ENRD and the client agency determine that intervention is an effective enforcement strategy. Through intervention, the United States often can focus on the central issues of a case, such as the alleged violation of an environmental statute and how any such violation can be corrected, rather than peripheral issues unique to citizen suits, such as plaintiff's standing or whether the violations were ongoing at the time of the filing of the complaint. Thus, the involvement of the United States can prompt earnest settlement negotiations and save substantial administrative and litigation costs.

Since most citizen suit provisions require citizens to give at least 60 days notice to EPA (as well as the state and the potential defendant), EPA has the opportunity to take enforcement action during this interval. However, as 60 days is generally not sufficient time to develop an enforcement referral, EPA rarely requests that the Department of Justice file a judicial enforcement action after receiving a citizen suit notice. This is due to the fact that EPA does not reorder its enforcement priorities merely because a citizen files a notice of suit. In addition, EPA often views the citizen's plans to bring an enforcement action as a potential reason not to expend agency resources on the matter.

Both the Clean Water Act and the Clean Air Act contemplate that the United States will assist courts in determining whether to approve proposed settlements of citizen enforcement actions. Congress amended both Acts to require that proposed citizen suit consent judgments, to which the United States is not a party, be served on the Administrator of the EPA and the Attorney General of the United States at least 45 days prior to entry. PLSL routinely reviews all such consent judgments and provides its comments or objections to the parties and the court. In recent years, about fifty such consent decrees have been lodged each year throughout the country.

ENRD reviews proposed consent judgments under the citizen suit provision of both the Clean

Water Act and Clean Air Act to ensure that such settlements will correct the violations, meet all legal requirements, and benefit the public—not the plaintiff or his or her attorney. The standards for entry of a consent judgment are well established. Prior to entry, a court should ensure the judgment is fair, reasonable, equitable, and does not violate the law or public policy. A consent decree also must come within the general scope of the case made by the pleading, and it must further the objectives of the law upon which the complaint was based. Where ENRD or its client agencies have information based on specific factual knowledge or enforcement expertise that might help a court in evaluating a proposed consent judgment, the statutes provide a mechanism for the United States to bring that information to the court's attention. Often, PLSL will ask the local United States Attorney's office for assistance in such matters, particularly when courts request the United States to present its views at a hearing. More often, however, the parties agree to modify a proposed consent judgment after the United States advises them of its concerns.

Yet the government's role in such cases is limited. As the United States is not a party, the parties' settlements do not bind the United States. The United States does not engage in discovery, and may not always have complete, independent information on all aspects of the proposed consent. In such circumstances, the United States may advise the court that it is aware of no objection to, or has no comment on, the proposed consent judgment. If the United States subsequently determines that the relief afforded in the citizen suit has not corrected the violations, or is otherwise inappropriate, the United States remains free to bring its own enforcement action. ~

Affirmative ESA Civil Cases Seeking Injunctive Relief

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Congress enacted the Endangered Species Act (ESA) in 1973 to conserve endangered and threatened species and protect the ecosystems upon which they depend. 16 U.S.C. § 1531(b). In the famous “Snail Darter” case, the Supreme Court held that the Act’s plain meaning and legislative history show that “Congress viewed the value of endangered species as ‘incalculable.’” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187 (1978). Congress empowered the Attorney General to sue in district court to enjoin any person from violating either the Act or its implementing regulations. 16 U.S.C. § 1540(e)(6).

Two federal agencies share principal responsibility for enforcing the ESA. The Department of the Interior’s Fish and Wildlife Service (FWS) is responsible for terrestrial species and the Department of Commerce’s National Marine Fisheries Service (NMFS) is responsible for aquatic species. Affirmative civil actions to enforce the ESA have increased in recent years. This is in response to referrals from FWS and NMFS to the Department of Justice. These referrals, in particular, regard the prohibition against the unlawful “take” of listed species.

Section 9 of the ESA makes it unlawful for any person to “take” any species of fish or wildlife, listed as endangered under the ESA. The regulations expand the statutory prohibition to include most species listed as threatened, as well as endangered. 16 U.S.C. § 1533(d). Congress defined a “take” broadly, to include an act to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). FWS regulations further define “harm” as “an act which actually kills or injures wildlife,” including

significant habitat modification or degradation that significantly impairs “essential behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704-05 (1995) (upholding “harm” definition against facial challenge).

Any person who commits an unauthorized “take” faces several means of enforcement: private citizen suits filed under 16 U.S.C. § 1540(g)(1)(A); civil and criminal penalties for violations brought under 16 U.S.C. § 1540(a), (b); and injunctive actions brought by the Attorney General under 16 U.S.C. § 1540(e)(6).

Despite the broad statutory and regulatory prohibition against a “take,” a non-federal public entity may “take” a listed species if authorized by an “incidental take permit,” which is issued by FWS or NMFS, under ESA § 10(a). These permits allow an activity to continue under prescribed conditions if the take is “incidental to, and not the purpose of” the proposed activity. 16 U.S.C. § 1539(a)(1)(B).

The United States has recently stepped up enforcement actions, filing suit to enjoin both private and non-federal public entities from engaging in activities which “take” listed species. Examples include actions to enjoin an irrigation district from diverting juvenile salmon into irrigation channels and actions to prevent private landowners from clearing nesting habitats occupied by endangered bird species, such as the Florida scrubjay.

The United States also sued to enjoin logging on a parcel of private land in Oregon. *United States v. West Coast Forest Resources*, Civ. No. CV 96-1575-HO (D. Or. Aug. 4, 1997). A pair of threatened northern spotted owls used a nest site about one-and-one-half miles from the parcel. FWS presented testimony from biologists that the owls used the old-growth habitat to forage. Though the court questioned the degree to which

FWS had established that the owls used this stand of old growth trees, it enjoined timber harvesting for one year, enabling FWS to use radiotelemetry equipment to monitor the birds' movement.

In another affirmative § 9 case, the United States sued to enjoin the Town of Plymouth, Massachusetts, from authorizing off-road vehicles on the town's beach. *United States v. Town of Plymouth*, 6 F. Supp.2d 81 (D. Mass. 1998). FWS presented evidence that off-road vehicles harmed endangered piping plover chicks both directly by running over them, and indirectly, by degrading vegetation in their essential feeding habitat. The court found the town liable under ESA § 9 for harming the chicks through both its action and inaction.

The evidentiary standard for proving a "take" varies among the circuits, especially where it involves habitat modification allegedly resulting in harm. Most courts require a reasonable certainty that a listed species will be killed or injured in the future, if the ongoing or proposed action is not enjoined. The mere modification of the listed species' habitat, without proof of injury to the animal, generally cannot establish a § 9 violation.

Once a violation is proven a violation, a court can exercise broad discretion in fashioning an appropriate remedy, so long as the relief ensures that the violation will abate. The United States generally seeks to enjoin the harmful activity until the defendant applies for and receives an incidental take permit under § 10. The United States also may compel the defendant to restore a cleared habitat. The United States cannot seek monetary penalties in a civil proceeding, although FWS or NMFS may assess penalties administratively.

In referring an affirmative ESA civil case, FWS and NMFS must develop specific and credible evidence to support claims that an action will harm or otherwise "take" a member of a listed species. Given the ESA's important statutory objectives, and the potential setbacks to the ESA program from adverse rulings, both the Department of Justice and United States Attorneys

should scrutinize referral packages carefully, and exercise judgment in deciding which cases present appropriate opportunities to obtain § 9 injunctive relief. ~

An Overview of Takings Jurisprudence

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Introduction

The Takings Clause of the Fifth Amendment provides “nor shall private property be taken for public use, without just compensation.” The aim of the Clause is to prevent the Government “from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

A “taking” can occur directly through the exercise of the governmental power of Eminent Domain. *See, e.g., United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979). A taking can also occur “indirectly,” when the Government acts in a manner which causes an inverse condemnation. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 315 (1987). Inverse condemnation, in turn, can occur by direct physical invasion (referred to as a “physical taking”), *Loretto v. Teleprompter Manhattan CATB Corp.*, 458 U.S. 419, 436 (1982), or by virtue of the Government’s restriction land use (referred to as a “regulatory taking”), *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). Both physical and regulatory takings can be either temporary, *see, e.g., Bass Enters. Prod. Co. v. United States*, 133 F.3d 893 (Fed. Cir. 1997), or permanent, *see, e.g., Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994).

Jurisdiction Over A Takings Claim: Is Plaintiff in the Right Court?

Jurisdiction over claims against the United States for a taking in excess of \$10,000 is vested exclusively in the United States Court of Federal Claims under the Tucker Act,

28 U.S.C. § 1491(a)(1), while the Little Tucker Act, 28 U.S.C. § 1346(a)(2), grants concurrent jurisdiction to the United States District Courts in cases where the amount in controversy is less than \$10,000. A plaintiff seeking to bring itself within the jurisdiction of the federal district courts bears the burden of alleging that his claim does not exceed \$10,000.00. *See New Mexico v. Regan*, 745 F.2d 1318, 1322 (10th Cir. 1984). A plaintiff can continue to maintain its claim in federal district court only if it is willing to waive its right to the recovery of damages in excess of the \$10,000 jurisdictional limit. *Smith v. Secretary of the Air Force*, 855 F.2d 1544, 1553 (Fed. Cir. 1988).

The government cannot use the failure of a plaintiff to plead a particular amount in controversy in an attempt to maintain an action in district court. The Federal Rules of Civil Procedure require a complaint to contain a “short and plain statement of the grounds upon which the court’s jurisdiction depends.” Fed. R. Civ. P. Rule 8(a). “A party cannot avoid the exclusive jurisdiction of the Claims Court under the Tucker Act by merely artfully pleading injunctive, declaratory, or mandatory relief when the purpose of the suit is to obtain money from the United States more than \$10,000.” *Colorado Dept. of Highways v. U.S. Dept. of Transp.*, 840 F.2d 753, 755 (10th Cir. 1988); *see, e.g., Chula Vista City Sch. Dist. v. Bennett*, 824 F.2d 1573, 1579 (Fed. Cir. 1987).

An attempt by a plaintiff to designate an individual government official by name cannot vary this rule. If the suit is one against a federal official for acts performed within his official capacity, it is considered an action against the sovereign. *Portsmouth Redevelopment & Hous. Auth. v. Pierce*, 706 F.2d 471, 473 (4th Cir. 1983). As such, any money judgment would be paid out against the public treasury and the suit is, in fact, one against the United States. *Id.*; *see, e.g., Amoco Prod. Co. v. Hodel*,

815 F.2d 353, 359 (5th Cir. 1987) (*stating* "It is well established that failing to name the United States as a defendant cannot avoid the limitations of the Tucker Act.").

Injunctive Relief to Prevent a Taking is Not Available

Even if a taking is presently occurring, injunctive relief to prevent a taking is not appropriate, because it is well established that:

[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign after the taking.

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127-28 (1985), (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-17 (1984)). When it is claimed that the United States has taken property, a suit for compensation can be brought under the Tucker Act, 28 U.S.C. § 1491, and heard by the appropriate court after the taking. *Id.* at 1016. As the court explains, "[t]his maxim rests on the principle that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 128, (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985)).

Thus, the Fifth Amendment "does not prohibit the taking of private property, but instead, places a condition on the exercise of that power," and is designed "not to limit the governmental interference with property rights per se, but to secure compensation in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. at 314-15. Compensation need not be paid before, or even contemporaneously with, the taking. *Preseault v. ICC*, 494 U.S. 1, 11 (1990).

Accordingly, a suit for a taking must first be brought in the Court of Federal Claims, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-19 (1984). Courts normally presume that the Tucker Act remedy is available. To obtain an injunction based on a claim of an unconstitutional taking, a claimant must overcome the presumption that a Tucker Act remedy is available by presenting clear evidence that Congress has withdrawn the remedy. Under a narrow exception to this general rule, a court will not presume the availability of a Tucker Act remedy where the claimant brings a takings challenge to a statute that compels a direct transfer of funds. *Eastern Enters. v. Apfel*, 524 U.S. 498, (1998) (citing *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2nd Cir.), *cert. denied sub. nom., LTV Steel Co. v. Shalala*, 516 U.S. 913 (1995)). Monetary relief is not presumed to be available in these cases because, if the payments are deemed to be a taking, monetary relief would result in the meaningless exercise of having the government reimburse the claimant, dollar for dollar, for each payment made. *Eastern Enters. v. Apfel*, 524 U.S. 498, (1998).

Need for the Government Action in Question to Be "Authorized"

A compensable taking arises only if the government action in question is "authorized." *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998). Authorized means that the government agents were acting within "the general scope of their duties," i.e., "their actions are a 'natural consequence of congressionally approved measures,'" *Id.* at 1362 (quoting *NBH Land Co. v. United States*, 576 F.2d 317, 319 (Ct. Cl. 1978)), "or are pursuant to 'the good faith implementation of a Congressional Act.'" *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d at 1362 (quoting *Southern Cal. Fin. Corp. v. United States*, 634 F.2d 521, 525 (Ct. Cl.

1980)). Here, the federal circuit court drew a distinction between “unauthorized” conduct and authorized conduct, but nonetheless unlawful, noting that “[m]erely because a government agent’s conduct is unlawful does not mean that it is unauthorized.” *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d at 1362. For example, a district court may later determine the United States Army Corps of Engineers’ denial of a Clean Water Section 404 permit application to have been arbitrary, capricious, or an abuse of discretion. Nonetheless, the government action is “authorized,” i.e., the government congressionally empowered the corps to grant or deny Section 404 permits.

Need for a Compensable Property Interest

The government must make a threshold inquiry in any takings case whether the plaintiff possesses a compensable property interest in that which he alleges has been taken. The limitation on the exercise of property rights must be one which “inhere[s] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). Thus, “a pre-existing limitation upon the landowner’s title” does not require compensation for its exercise when that limitation does “no more than duplicate the result that could have been achieved in the courts — by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances” *Id.* Thus, though the regulatory action “may well have the effect of eliminating the land’s only economically productive use, [it is not a taking if] it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles.” *Id.* at 1029-30. In analyzing a governmental action that allegedly interferes with an owner’s land use, there can be no compensable interference if such land use was not permitted at the time the owner took title to the property. *M & J Coal Co. v. United States*, 47 F.3d 1148, 1153 (Fed. Cir. 1995).

The Special Nature of Physical Takings

When there has been a physical occupation, or direct physical intrusion of property, the general rule is that such an intrusion, despite size or nature of impact, effects a taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1028; see, e.g., *Loretto v. Teleprompter Manhattan CATB Corp.*, 458 U.S. at 436; *Preseault v. United States*, 100 F.3d 1525, 1550-51 (Fed. Cir. 1996); *Hendler v. United States*, 952 F.2d 1364, 1378 (Fed. Cir. 1991). This is true despite the public benefit or interest served. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1028.

The Question of Ripeness

Before a regulatory takings claim can be litigated, a plaintiff must establish that his claim is ripe. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Supreme Court declined to reach the merits of an as-applied regulatory taking claim, finding instead, that the claim was not ripe. There, the court held that landowners, who challenged zoning ordinances restricting the number of houses they could build on their property, needed to submit first, and have denied, a plan for development of their property. *Id.* at 260. Subsequent Supreme Court case law clearly established the need for the administrative agency to arrive at a final, definitive position regarding how the challenged regulation will apply to the particular land at issue, before an as-applied regulatory taking claim would be ripe. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 (1986); *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985).

Facial, as opposed to as-applied, challenges to governmental actions are generally ripe the moment the challenged law is placed into effect, but nonetheless face an “uphill battle.” *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 495 (1987). For example, it is always difficult to show that the mere enactment of legislation has deprived an owner of *all* economically viable use of his property. *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 297 (1981).

The Supreme Court's most recent discussion of ripeness in a regulatory takings case is *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, (1997). There, the Court found that the plaintiff had received a final agency decision regarding the application of the regulations to her property, and her claim was ripe for decision. *Id.* at 743. However, in *Heck & Assoc., Inc. v. United States*, 134 F. 3d 1468 (Fed Cir 1998), the Federal Circuit found that a Clean Water Act Section 404 permit, which was withdrawn from active status pending plaintiff's submission of a state water quality certificate, was not ripe. *Id.* at 1472.

Merely Requiring a Plaintiff to Apply for a Permit Does Not Establish a Taking

The Supreme Court has recently noted that a party challenging governmental action as an unconstitutional taking bears a substantial burden. *Eastern Enters. v. Apfel*, 524 U.S. 498, (1998) (citing *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989)). This is because government regulation often "curtails some potential for the use or economic exploitation of private property." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). Thus, "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." *Armstrong v. United States*, 364 U.S. at 48. Nonetheless, regulatory action which "goes too far" will be found a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The mere requirement that an individual apply for a permit or other permission does not establish a taking. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 127. This is because "[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted..." *Id.* at 126-27. Thus a plaintiff must apply for permission and have that permission denied to

ripen his claim, unless resorting to that procedure would prove futile. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. at 350 n.9. Application of the futility exception, however, as it has become known, is not appropriate where the property owner has not yet applied to engage in the proposed use. *Greenbrier v. United States*, 40 Fed. Cl 689, 702-03 (1998). Further, "[a] plaintiff cannot plead futility whenever faced with long odds or demanding procedural requirements." *Heck & Assoc. v. United States*, 37 Fed. Cl. 245, 252 (1997), *aff'd*, 134 F.3d 1468 (Fed. Cir. 1998).

Limited Applicability of the Agins Test

When a plaintiff challenges a governmental action as a taking by virtue of its mere enactment or placement into effect, this is considered a "facial" challenge. In such a situation, the Supreme Court has in the past looked to whether the regulation (1) fails substantially to advance a legitimate state interest, or (2) denies an owner economically viable use of his land, to decide whether there has been a taking. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (citing *Agins v. City of Tiburon*, 447 U.S. at 260). Recent Supreme Court jurisprudence suggests, however, that the court may soon reevaluate the continued viability of the first factor in assessing whether there has been a compensable taking. In any case, it must be noted that a different analysis applies to the evaluation of whether the application of a particular law or regulation on a plaintiff effects a taking, as discussed below.

Evaluation of When Governmental Action Causes a Regulatory Taking

When a plaintiff challenges a regulation *as applied*, the Supreme Court has explained that the inquiry does not lend itself to any "set formula" and thus the determination is essentially ad hoc and fact intensive. *Eastern Enters. v. Apfel*, 524 U.S. 498, (1998), (citing *Kaiser Aetna v.*

United States, 444 U.S. 164, 175 (1979)). Instead, the court has

identified several factors ... that have particular significance: the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.

Eastern Enters. v. Apfel, 524 U.S. 498, (1998), (citing *Kaiser Aetna v. United States*, 444 U.S. at 175); see also *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986).

In evaluating whether there has been a regulatory taking, a court's analysis focuses primarily on the regulation's economic impact on the plaintiff and the extent to which the regulation interferes with reasonable investment-backed expectations. To establish a taking, a plaintiff must show that the regulation denies all economically viable use of his property. *Bass Enters. Prod. Co. v. United States*, 133 F.3d at 895 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1030-31). However, "[g]overnment hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413. Thus, the mere diminution in property value, standing alone, does not establish a taking. *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 131. Likewise, denial of the highest and best use, or the most profitable use, does not constitute a taking. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 901 (Fed. Cir. 1989). Nor does the fact a property owner is not permitted to reap as great a financial return from his property, as he might have hoped, by itself, establish a taking. See, e.g., *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. at 353 n.9.

When there is a reciprocity of advantage, as frequently occurs in a zoning case, the claim that the government has taken private property is not compelling: "the claimant has in a sense been compensated by the public program adjusting the

benefits and burdens of economic life to promote the common good." *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 124); see also *Agins v. City of Tiburon*, 447 U.S. at 262-63.

In determining whether there has been a regulatory taking, courts also evaluate the extent to which the challenged governmental action has interfered with the reasonable investment-backed expectations of the property owner. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 495; *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. at 227. The court has noted, however, that an investment-backed expectation must be reasonable — it "must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1005-06 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

Thus, a successful plaintiff must be able to demonstrate that he purchased his property "in reliance on the non-existence of the challenged regulation." *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994). This is true even where the challenged regulation has effectively eliminated all viable economic use. *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999). Where a plaintiff was aware of the need to obtain regulatory approval to develop his land, he cannot claim a taking when the previously existing regulatory environment becomes more stringent. *Id.* at 1362, citing *Deltona Corp. v. United States*, 657 F.2d 1184, 1193 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982).

The Measure of Just Compensation

Once the court establishes a taking, it makes a determination of compensation. The proper measure of just compensation is that which will put the owner "in as good a position pecuniarily as he would have occupied if his property had not been taken." *Yuba Natural Resources, Inc. v. United States*, 821 F.2d 638, 640 (Fed. Cir. 1987) (quoting *United States v. Miller*, 317 U.S. 369, 373 (1943)). Just compensation for a permanent taking is generally the fair market value of the property taken. *Id.* Just compensation for a

temporary taking is determined with reference to the fair market rental value of the property interest taken. *Bass Enters. Prod. Co. v. United States*, 133 F.3d at 895. In either a temporary or permanent taking, a successful litigant is entitled to the reimbursement of those reasonable costs and expenses of litigation, including reasonable attorney, appraisal, and engineering fees, which the litigant incurred because of the litigation. Uniform Relocation Assistance and Real Property Acquisition Act, 42 U.S.C. § 4654.

General Stream Adjudications: Overview of the Process and Issues

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In virtually every state west of the 100th meridian, water is scarce, but litigation concerning it is not. Much of this litigation takes place in “general stream adjudications,” in which the right to use water from a given river system is judicially determined. While some of these adjudications are small, others are huge, complex actions involving thousands of parties and years of litigation. For example, the Snake River Basin adjudication in Idaho, beginning in 1987, involves more than 100,000 claims to water, and is expected to last at least another ten years. A synopsis of the major ongoing adjudications in the western states is attached to the end of this article.

State law generally governs the allocation and distribution of water. The arid states of the American West follow the “prior appropriation” doctrine. Under this doctrine, an individual can obtain a protected property right to use a certain quantity of water by placing the water to a “beneficial use,” such as irrigation. When there is not enough water for all users, the shortage is not shared on a pro rata basis. Water is allocated under a principle of “first in time is first in right.” In other words, “senior” water right holders (i.e., those who were the first to use the water) are entitled to use their entire amount of water before “junior” holders get any. The date used to decide one’s position in this hierarchy is called the “priority date.”

To administer water rights under the prior appropriation doctrine, knowing everyone’s rights to a given river system is essential. Without knowing the priority date and quantity of water

being used by each individual, it is impossible to know, in times of shortage, who to cut off and who to allow the use of their full water share. Unfortunately, very few comprehensive listings exist of valid water rights for western river systems. With ever increasing demands on water by growing populations, the need for comprehensive listings of water rights becomes increasingly important, and general stream adjudications are designed to provide them.

A general stream adjudication results in a judicial decree of all water rights to a given river system. Although adjudications involving the United States may occasionally be in federal court, they are usually state court proceedings. The United States is joined as a defendant in these proceedings pursuant to the McCarran Amendment, 43 U.S.C. § 666, which waives the United States’ sovereign immunity “for the adjudication of rights to the use of water of a river system or other source.”

Although each state’s process is different, typically the adjudication begins with each water user making a claim for a water right. The state’s water resource agency then examines these claims, and files recommendations with the state court on whether, and to what extent, the claimed rights should be decreed. Water right claimants can file objections to the recommendations made by the agency for their own claim or the claim of others. The agency treats each objected-to claim as a separate “sub-case,” and will resolve the issue much like any other civil litigation. Eventually, after ruling on each claim, the court issues a judicial decree listing all of the water rights. For each right, the court will decree the quantity of water usage, the purpose of use, the season of use, the place of use, the place of diversion, and the priority date.

The United States plays a crucial role in these adjudications because it files some of the largest claims on behalf of both Indian tribes and federal

agencies. Agencies with large land holdings or water resource duties in the adjudicated watershed will be major claimants, but all agencies using water must file claims. Agencies that often have significant claims include the Bureau of Land Management, the Bureau of Reclamation, the Department of Defense, the Fish and Wildlife Service, the Forest Service, and the National Park Service.

The United States' claims are particularly controversial because many of them are "reserved" water rights not based on state law. Under the federal reserved rights doctrine, when the United States reserves land from the public domain for a federal purpose, it also, by implication, reserves sufficient water to accomplish the reservation's purposes. *United States v. New Mexico*, 438 U.S. 696 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976); *Winters v. United States*, 207 U.S. 564 (1908). See also *Montana v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754 (Mont. 1985). Under this doctrine, the quantity reserved is not tied to historical beneficial use (as state law-based rights are), but to the amount of water needed to fulfill the purposes of the reservation.

Reserved rights differ from state law-based rights in a number of other important ways. For example, under state law, the priority date of a water right is essentially the date the water was first put to a beneficial use. In contrast, the priority date of a reserved right is the date of the creation of the federal reservation. For some types of Indian reserved water rights, like those to support fishing rights created by a treaty, the priority date is based on the tribe's longstanding use of the water, resulting in a "time immemorial" priority date.

Moreover, federal reserved rights are not subject to state law rules on nonuse. If a state water-right-holder does not use a water right for a period of time, five years for example, the water right is usually lost under a forfeiture statute. In contrast, a nonused federal right created by implication in a 1864 reservation may still be

valid. Finally, the federal or Indian reserved right includes water needed for present and future uses. A private water claimant can generally claim only current uses in the adjudication. For a more in-depth discussion of reserved rights, consult 4 *Waters and Water Rights, Reserved Water Rights* (Robert E. Beck, ed., 1996 replacement volume to 1991 ed.).

Although reserved water rights have been recognized since 1908 for Indian reservations, and since 1963 for other federal agencies, see *Arizona v. California*, 373 U.S. 546 (1963), many fundamental issues remain unresolved concerning the existence and scope of reserved rights. The following subsections highlight some controversial issues being litigated with respect to Indian reserved rights and those of federal agencies.

Important Indian Water Rights Issues

The Department, through the Indian Resources Section of the Environment Division, represents the Bureau of Indian Affairs (BIA) of the Department of the Interior in water adjudications throughout the western United States. The BIA is the trustee for Indian natural resources, including water rights, and makes water right claims for the benefit of tribes in adjudications. The BIA objects to the water right claims of other entities that would conflict with the claimed tribal water right. Significant Indian water rights issues include the following:

a. Practicably Irrigable Acres (PIA) — A tribe's agricultural water right is measured by the PIA standard from *Arizona v. California*, 373 U.S. 546, 600-01 (1963). The PIA test determines whether land can be irrigated for agriculture and if that enterprise would be economically feasible. In the New Mexico *Aamodt* adjudication, the Department litigated the correct basis for economic analysis of the future irrigation project for the Nambe Pueblo. The state and private entities wanted a national focus, requiring the irrigation project be feasible as a part of the national economy, while both the United States and

the Pueblo contended that the economic analysis focus only on the specific project. The Special Master made an adverse preliminary ruling under F.R.C.P.(e)(5) in mid-1999.

b. Instream Flow Claims — Water rights have been recognized to protect tribal fishing, hunting, and gathering rights. *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983). The Department, with the Klamath Tribes of Oregon and the Nez Perce Tribe of Idaho, is litigating how much water is appropriate to provide habitat for fish, game, and plants important to each tribe. These claims include the contention that relatively large flows are needed to keep the stream channel in proper shape and to maintain the riparian corridor adjacent to the stream. The United States is actively seeking to resolve these claims through negotiation in both the *Klamath* and *Snake River Basin* adjudications.

c. Groundwater — An important component of Indian reserved water rights is groundwater. The courts have not uniformly acknowledged the existence of reserved groundwater rights for either federal or Indian lands. In the *Gila River* adjudication, the Arizona Supreme Court recently heard arguments on this point. In several New Mexico adjudications, the inclusion of groundwater within the Indian reserved right is also being litigated. In many areas, groundwater, or storage of surface flows in aquifers, is often an important component to settle the tribal right, as the parties look for water to mitigate surface water shortages when tribal and federal rights are fully exercised.

d. Operation of Federal Facilities — Indian reservations are often adjacent to or significantly affected by the operation of other federal facilities. For example, dams operated by the Army Corps of Engineers or the Bureau of Reclamation (BOR) can affect tribal fisheries and the water rights associated with those fisheries. In litigation concerning tribal water rights along the Klamath River in Oregon and California, a federal court in Oregon recognized BOR's obligation to provide water for senior, but unadjudicated, tribal instream water rights, ahead of the contractual rights of BOR Project irrigators. *Klamath Water Users Assoc. v. Patterson*, 191 F.3d 1115 (9th Cir.

1999). Similarly, federal and private dams on the Snake River have adversely affected salmon relied on by the Nez Perce Tribe, and water from storage in BOR projects is necessary to help fish passage.

e. State Water Permitting and Unadjudicated Tribal Water Rights — The Flathead Tribes of Montana initiated an original action in the Montana Supreme Court in 1998. The suit challenges whether a state agency has authority to issue new water right permits when the tribes' senior water right is not yet quantified. The tribes contend that the state agency could not determine whether water is available to allocate to new users until a complete adjudication or settlement determines the tribes' water right. The matter was argued to the Montana Supreme Court in early 1999 but it has issued no ruling.

f. Settlement of Tribal Water Right Claims — Tribal water right claims are often settled. The Department plays a role in claim negotiation as a part of the Interior Department's negotiation team. The team generally settles the matters on terms that both allow the affected tribe to use its water right effectively, and maintain many existing private water uses. Since there is rarely surplus water in a watershed, the United States typically provides the bulk of the funding for water projects or environmental restoration. This smooths the transition from partial exercise to the complete use of the tribal water right. The Interior Department has renewed its commitment to settle Indian water problems, and we are actively helping all settlement efforts.

Important Non-Tribal Reserved Right Issues

The attorneys in the General Litigation Section of the Environment Division litigate the reserved water rights of federal agencies. A description of a few of the most controversial issues follows.

a. Wilderness Water Rights — Congress established the wilderness preservation system in 1964 with the enactment of the Wilderness Act, 16 U.S.C. §§ 1131-36. Congress has now designated more than 90 million acres of land as wilderness, but in virtually every case, Congress did not state what, if any, water rights exist for these areas. Recently, in the Snake River Basin adjudication in Idaho, the Idaho Supreme Court held that

wilderness water rights do exist, and that the quantity reserved is all unappropriated flow at the date of designation. The State of Idaho has requested the court to reconsider its opinion.

b. Wild and Scenic River Water

Rights — Congress enacted the Wild and Scenic Rivers Act in 1968. 16 U.S.C. § 1271 *et seq.* The statute has a negatively worded reservation of water rights: “Designation of any stream . . . shall not be construed as a reservation of the waters of such stream for purposes other than those specified in this Act, or in quantities greater than necessary to accomplish these purposes.” 16 U.S.C. § 1284(c). Until recently, no judicial decision explicitly ruled on the meaning of this provision. On July 24, 1998, a state district court in Idaho ruled that this provision is an express reservation of water, but that the United States must establish the precise quantity to ensure that it is the minimum amount necessary for each designated river segment. This ruling is presently on appeal to the Idaho Supreme Court.

c. Stock Water Reserves — In 1926, the President issued an executive order entitled “Public Water Reserve No. 107” (PWR 107). The order reserved all land within one quarter mile of “every spring or water hole located on unsurveyed public land” so that the public could use the springs to water livestock. Although the Colorado Supreme Court summarily ruled that this provision reserved water, *United States v. City & County of Denver*, 656 P.2d 1, 31 (Colo. 1982), other states have refused to recognize the validity of these reservations. Last year, the Idaho Supreme Court reversed a lower court decision and held that “PWR 107 is a valid basis for a federal reserved water right for the limited purpose of stock watering.” *United States v. Idaho*, 959 P.2d 449, 453 (Idaho 1998).

As this brief overview suggests, litigation of federal water rights is pervasive across the western United States. Given the uncertainty in the law, it is also expensive and time consuming. Negotiated resolutions are more efficient than

litigation, and routinely result in better outcomes for all parties concerned. In the past few years, we have had notable successes in achieving negotiated agreements for both Indian and Non-Indian water rights. If we can build on these successes, we can make obsolete Mark Twain’s still felicitous observation that, in the West, “Whisky is for drinking and water is for fighting.”

An Overview of Adjudications Involving the United States

Arizona:

The *Gila River Adjudication* and the *Little Colorado River Adjudication* started in the 1970s and are continuing.

California:

A few water matters are ongoing, including the *Fallbrook Adjudication*.

Colorado:

A general adjudication of all waters within the state began in the 1960s. The state is carved into seven water divisions, with a district court presiding over each division. The process is unique and is essentially a permanent, ongoing adjudication.

Idaho:

The *Snake River Basin Adjudication* began in 1987 and involves more than 80% of the state’s water resources and more than 100,000 claims.

Montana:

A statewide adjudication began in 1979 and involves more than 200,000 claims. The claims for several federal agencies and three tribes have been settled.

New Mexico:

Many general stream adjudications are ongoing in both state and federal court. In addition, federal law suits are ongoing concerning the Rio Grande Compact and the Rio Grande Project.

Nevada:

There are approximately ten ongoing state court adjudications. Additionally, there is the

ongoing federal water rights adjudication of the *Walker River* and its tributaries.

Oregon:

The *Klamath Basin Adjudication* is ongoing in state court.

Texas:

A suit has been initiated to adjudicate federal water rights on the Rio Grande.

Utah:

The *Virgin River Adjudication* was recently completed following a comprehensive water rights settlement. There are many other adjudications filed in state court.

Wyoming:

The *Big Horn River General Adjudication* has been ongoing for more than twenty years and the Indian phase is now complete. ~

RS 2477 Litigation: Statutory Background and Litigation Issues

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I. Background

In 1866, Congress enacted an innocuous-sounding provision granting rights-of-way across federal lands:

The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Codified as Section 2477 of the Revised Statutes, "RS 2477" allowed establishment of many highways across the public domain of the United States. Ironically, the real controversies created by the statute did not arise until it was repealed in 1976. *See* Pub. L. No. 94-579, 90 Stat. 2744 (1976) (repealing many right-of-way grants).

The 1976 repeal did not affect rights-of-way established before that year. By that time, thousands of roads and trails crossed federal land. Because no procedures had ever been created to determine and document RS 2477 rights-of-way, there was no way to decide which of these roads fell within the right-of-way grant of RS 2477. With ever increasing momentum after 1976, counties and other entities (especially in Utah and Alaska), began asserting rights under RS 2477 to all kinds of roads and trails crossing federal land. At present, Utah alone has more than 5,000 claims

to RS 2477 rights-of-way, and the United States recognizes only ten of these claims.

To resolve these controversies, an administrative process for making and determining claims would be immensely helpful. Unfortunately, such a process is not likely to exist any time soon.

In response to a 1996 Interior proposal to create a claims process, Congress placed a moratorium on "developing, promulgating, and thereafter implementing a rule concerning rights-of-way under section 2477 of the Revised Statutes," unless expressly authorized by an Act of Congress. FY 1996 Interior Appropriations Act, Pub. L. 104-134, § 110, 110 Stat. 1321-177 (1996). Although Congress lifted this moratorium the following year, regulations can be implemented only if "expressly authorized by an Act of Congress." FY 1997 Interior Appropriations Act, Pub. L. 104-208, § 108, 110 Stat. 3009 (1996). Because of this Congressional action, the Secretary of Interior issued an "Interim Departmental Policy on Revised Statute 2477," which is still in effect, and prevents the agency from making right-of-way determinations, absent compelling circumstances. This policy states: "Until final rules are effective, I have instructed the Bureau of Land Management to defer any processing of R.S. 2477 assertions except in cases where there is demonstrated, compelling, and immediate need to make such determinations."

With no administrative process to resolve disputes over RS 2477, the issues necessarily have become the focus of judicial actions. RS 2477 litigation commonly arises in two contexts: (1) a county or other claimant sues to quiet title; or (2) a county or other claimant asserts its rights through some action, such as bulldozing in a

national park. Under either scenario, a need for national coordination exists because RS 2477 law is still developing, with the meaning of most key words still in dispute.

II. Issues that Arise in RS 2477 Litigation

A few of the key issues that arise in RS 2477 litigation are highlighted below.

A. Does an RS 2477 Right-of-Way Exist?

The threshold issue in any law suit will be whether an RS 2477 right-of-way exists. This issue may arise in a quiet title action or as a defense to a trespass action. Whether a valid right-of-way exists is more complicated than the simple terms of the grant would suggest because the statute provides no definition of its terms. What is the definition of a "highway"? What constitutes "construction"? Which public lands are "not reserved" for public uses? What law, state or federal, should answer these questions? The law is not settled with respect to any of these questions.

Many state cases address establishment of highways pursuant to RS 2477. Most state cases involve only non-federal litigants and, therefore, are not dispositive on federal RS 2477 issues. However, the few federal cases that address existence issues, provide no clear judicial precedents, because each focuses on only one term in the statute. *See, e.g., Humboldt County v. United States*, 684 F.2d 1276 (9th Cir. 1982) (discusses only the meaning of the term "public lands," assumes a county participated in "construction," and assumes that road was a "highway"); *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir. 1973) (discusses only the meaning of the term "highway").

B. What Is the Regulatory Authority of the United States?

When a valid right-of-way exists, the issue generally will be what activities within the right-of-way can be, or have been, regulated by the United States, and what regulatory authority can be exercised over expansion or modification of the right-of-way. Can a federal agency limit the use of a right-of-way pursuant to its statutory duties to protect the federal resource? Can a federal agency

direct the holder of an RS 2477 right-of-way to exercise its rights in a particular way? Both the Ninth and Tenth Circuits have held that agencies have the authority to regulate within the scope of RS 2477 rights-of-way. *United States v. Vogler*, 859 F.2d 638, 642 (9th Cir. 1988); *Clouser v. Espy*, 42 F.3d 1522, 1538 (9th Cir. 1994); *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988); *see also City & County of Denver v. Bergland*, 695 F.2d 465, 468, 482 (10th Cir. 1982) (Interior has authority to regulate a 1905 Act easement); *United States v. Jenks (Jenks I)*, 22 F.3d 1513, 1518 (10th Cir. 1994) (holding that even if defendant has patent or common law easement rights, he must apply for a special use permit). It is unsettled, however, whether, lacking specific regulations, federal agencies can restrict activities within a right-of-way. *See Southern Utah Wilderness Alliance et. al v. Bureau of Land Management et. al (SUWA v. BLM)*, 2:96-CV-0836-S, slip op. at 17 n. 7 (D. Utah Oct. 8, 1997) (Memorandum Decision Addressing the United States' Motion for Partial Summary Judgment and Motion to Strike Kane County's Fourth Defense) (reasoning "absent defining statutes or regulations, it is not for the court to declare how the BLM is to carry out its duties, or to create regulations judicially that comport with the BLM's view of its regulatory role in the present dispute"). Fortunately, many agencies have promulgated regulations that apply to roads across the lands they manage. *See, e.g.,* 36 C.F.R. § 261.10 (prohibiting construction of roads on forest system lands without authorization); 36 C.F.R § 5.7 (prohibiting construction or roads through National Parks without written authorization). Few of these regulations, however, have been subject to RS 2477 litigation, so whether they constitute the exercise of regulatory authority within RS 2477 rights-of-way is still an unsettled question. The Congressional moratorium further complicates this issue, described above, on developing, promulgating, or implementing any rule or regulation unless expressly authorized by an Act of Congress.

C. What Is the Scope of an RS 2477 Right-of-Way?

It is also an unsettled question whether the scope of a valid RS 2477 right-of-way must be determined before a court finding that an RS 2477 right-of-way holder violated federal regulations. At least one court has suggested that the federal land management agency's authority to regulate an RS 2477 right-of-way is directly related to whether the proposed activity is within the scope of the right-of-way. See *United States v. Garfield County*, No. 2:29-CV-0450-J (D. Utah); see also *SUWA v. BLM*, No. 2:96-CV-0836-S, slip op. at (D.Utah October 7, 1997) (Federal Government has the authority to regulate the use of valid rights-of-way, but without regulations, "as long as Kane County stays within its right-of-way, . . . BLM authorization is not required" before the right-of-way is expanded or modified).

If scope becomes an issue, the initial task is to determine the law to apply. In the Tenth Circuit, state law determines the scope of an RS 2477 right-of-way. *Sierra Club v. Hodel*, 848 F.2d at 1083. Attorneys in the General Litigation Section, Environment and Natural Resources Division (ENRD) have completed much of the research concerning the state highway rights-of-way scope standards in individual states, in the Tenth Circuit. We encourage individuals to contact these attorneys before embarking on a similar effort. As with most RS 2477 issues, however, the scope standards to apply in each state are not entirely settled.

D. Additional Issues

When a county or claimant asserts its rights through some action, such as bulldozing a road in a national park or forest, the fact-intensive issues often expand to include the following: (1) What, when, where, why, and how did the specific ground-disturbing activity occur? (2) Was the specific ground disturbing activity the type that required authorization by the federal agency? (3) If so, did the owner have such authorization for that specific activity? and (4) If the activity was unauthorized, how was the resource damaged?

These cases quickly demand large expenditures of attorney time and resources.

III. Additional Resources

Attorneys in the General Litigation Section of the ENRD have handled or monitored most of the RS 2477 cases over the past twenty years. The following attorneys can provide substantial assistance: K. Jack Haugrud, Assistant Chief (202-305-0438), Bruce Landon (907-271-5452), Allison Rumsey (202-514-0750), and Margo Miller (202-305-0449). Because of the unsettled nature of the legal issues, they are also attempting to provide national coordination. In addition to these human resources, a comprehensive and useful guide to understanding the complexities of issues surrounding RS 2477 rights-of-way is *The United States Department of Interior Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands* (June 1993), submitted to the Chairman of the Subcommittee on Interior, Committee on Appropriations, House of Representatives. ~

Responsibilities and Activities of the Title Unit

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The Title Unit, Land Acquisition Section, Environment and Natural Resources Division (ENRD), has been delegated the task of fulfilling several statutory responsibilities of the Attorney General relating to land, including:

- the review and approval of the sufficiency of titles for land or interests in land to be acquired by the Federal Government (40 U.S.C. § 255),
- the approval and preparation of easements to be granted over lands administered by the Department of Justice and its components (40 U.S.C. § 319), and
- the approval of conveyances of land from the government for airport purposes (49 U.S.C. § 47125).

The Title Unit also oversees and administers the Attorney General's title regulations (cited below). It also guides the review of title by eleven federal agencies, delegated their authority by the Attorney General. The Title Unit participates directly in condemnation litigation when ownership or boundaries are in question, and it serves as a resource to assist attorneys and various federal agencies in litigation involving land, in structuring negotiated real estate transactions, and in addressing questions relating to title and estates in real property.

Statutory and Delegated Authority:

Congress placed the responsibility for the review of title in federal land acquisitions on the Attorney General by virtue of 40 U.S.C. § 255. This statute reads, in part, as follows: "Unless the Attorney General gives prior written approval of the sufficiency of the title to land for the purpose

for which the property is being acquired by the United States, public money may not be expended for the purchase of the land or any interest therein."

This wording is in a statute that dates back to 1841. Until 1970, the Attorney General, acting through the Land Acquisition Section's Title Unit, reviewed titles for essentially all federal land acquisitions. In 1970, the statute was revised to allow the Attorney General to delegate to other departments and agencies responsibility, "subject to his general supervision and in accordance with regulations promulgated by him."

Authority has been delegated to the government's principal land acquiring agencies; Department of Agriculture, Department of the Army, Department of Energy, Department of the Interior, Department of the Navy, Department of Transportation, Department of Veterans Affairs, General Services Administration, International Boundary and Water Commission, and United States Postal Service (subsequently excluded by statute).

These agencies may, without reference to the Department of Justice, review and approve titles to land or interests they are acquiring, subject to compliance with the Attorney General's title regulations (see item 3 below). All other federal agencies, unless they have been exempted from the effect of the statute, submit requests for the review of titles directly to the Department of Justice.

Within the Department of Justice, the Attorney General has delegated her authority and responsibility to review titles and promulgate related regulations to the Assistant Attorney General, Environment and Natural Resources Division (Order No. 440-70 of the Attorney General, dated October 2, 1970, and codified at 28

C.F.R. §0.65(c) and 0.66). She, in turn, has delegated her title review authority and responsibility to the chief and assistant chiefs of the Land Acquisition Section, and the chief of the Title Unit in the Land Acquisition Section (ENRD Directive No. 23-98).

Primary References:

The Department of Justice has developed four reference documents to guide and regulate attorneys who review titles under delegated authority from the Attorney General. These reference documents are:

1. *Standards for the Preparation of Title Evidence in Land Acquisitions by the United States*, 1970, as amended by a February 26, 1992 Memorandum titled Introduction to the ALTA U.S. Policy - September 28, 1991(The Standards);
2. *A Procedural Guide for the Acquisition of Real Property by Governmental Agencies*, 1972, (The Procedural Guide);
3. Regulations of the Attorney General, promulgated in accordance with the provisions of Public Law 91-393 approved September 1, 1970, 84 Stat. 835 [40 U.S.C. §255], An Act to Amend Section 355 of the Revised Statutes, as amended, Concerning Approval by the Attorney General of the Title to Lands Acquired for and on Behalf of the United States and for Other Purposes (The Attorney General's title regulations); and
4. The List of Approved Attorneys, Abstracters, and Title Companies (November 10, 1998).

Copies of these documents have been distributed to federal agencies for their use, and copies may be obtained from the Title Unit, Land Acquisition Section. Efforts are underway to place them on the Department of Justice's web page.

Title Unit Responsibilities:

Title reviews:

The Title Unit administers the Attorney General's title regulations by providing agency guidance, assisting in the preparation of requests for waivers in specific cases, and in updating the regulations. In 1991, the Title Unit worked with the American Land Title Association to develop a new form of title insurance policy for use by the government in all jurisdictions except Texas. This policy replaced one originally adopted in 1963. A new federal policy form for use in Texas has been proposed but has not yet been adopted. A revision of the Title Standards has also been drafted, and is currently being circulated within the Department of Justice for comments.

Title reviews by the government serve the same purpose as title reviews by any party who acquires land or an interest in land — to assure that the ownership of the land is as represented by the seller/grantor, and that it is sufficient for the intended purpose. Whether the land or interest in land is being acquired by purchase, exchange, donation, in settlement of litigation, or otherwise, it is vital that the title records be examined and the property inspected to be certain that valid title is being acquired. In the case of acquisition by condemnation, the title review serves a slightly different purpose, which is to be sure that all of those having an interest in the land have been identified. This way the proper parties will be paid just compensation for the land taken. The documents that should be examined in a title review include: the agreement or contract to sell (donate, etc.) the land, proposed conveyancing documents, the title evidence, any surveys or plats, the description(s), and reports of physical inspections of the property.

The scope and variety of the Title Unit's title review work is revealed by a brief overview of projects:

The greatest volume of cases, in recent years, has come from the Federal Emergency Management Agency, which has acquired hundreds of small, urban parcels located in flood plains across the nation. The Department of

Veterans Affairs has also been very active in acquiring land for cemeteries and medical centers. The unit has also been reviewing titles for prison facilities for the Bureau of Prisons, Border Patrol stations for the Immigration and Naturalization Service, and the fingerprint center in West Virginia for the Federal Bureau of Investigation. The Bureau of Indian Affairs requests title reviews for land acquisitions by the United States in trust for various Indian tribes. The Department of Labor has acquired or expanded a number of Job Corps Centers. Titles have also been reviewed for federal laboratory sites, scientific facilities, radar sites, office buildings, and courthouses for agencies such as the National Oceanic and Atmospheric Administration, Federal Aviation Administration, Environmental Protection Agency, and General Services Administration. Agencies as diverse as the State Department, the Architect of the Capital, Bureau of Reclamation, Department of the Treasury, Department of the Army, and Department of the Navy have all requested title reviews for multiple projects.

Easements:

The Title Unit assists components of the Department of Justice in granting easements over land they control. The unit reviews the proposal, and drafts the easement for signature by the Chief, Land Acquisition Section, Environment and Natural Resources Division. Most grants relate to correctional facilities of the Bureau of Prisons and to Border Patrol facilities of the Immigration and Naturalization Service. Some examples of the type of easements granted are: a telephone line in California, a street widening in Florida, and sewer and water lines in Texas.

Easements over federal land may be granted by the head of the agency having control of the land. This authority stems from 40 U.S.C. § 319. Easements are granted with or without consideration and subject to such reservations, exceptions, limitations, benefits, burdens, terms, or conditions as the head of the agency deems necessary to protect the interest of the United States. Supervision and control of federal facilities administered by all components of the Department of Justice, including those

administered by the Federal Bureau of Prisons, the Immigration and Naturalization Service, the Federal Bureau of Investigation, and the Drug Enforcement Agency, are vested in the Attorney General.

By virtue of the provisions of 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, and 28 C.F.R. § 0.69, Order No. 736-77, 42 F.R. 38177, dated July 27, 1977, the Attorney General delegated authority to make determinations and grants of easements to the Assistant Attorney General in charge of the Environment and Natural Resources Division. She has further delegated this authority to the chief of the Land Acquisition Section (ENRD Directive No. 26-95, issued pursuant to 28 C.F.R. § 0.69b on October 12, 1995). The Title Unit reviews requests for the grant of easements, and drafts the easements for signature by the chief of the Land Acquisition Section. As a condition of granting the easement, the Department of Justice requires that the grantee agree to a set of standard stipulations.

Airport conveyances:

Airport conveyances are made at the request of a local government or entity for the creation or expansion of an airport. Most requests relate to public land administered by the Bureau of Land Management, or to military land administered by the Army, Navy, or Air Force; however, requests can be made and granted as to any federal land. For example, a recent request for land next to Washington Dulles International Airport outside Washington, D.C., related to land administered by the National Oceanic and Atmospheric Administration.

Pursuant to the Airport and Airway Improvement Act of 1982, codified at 49 U.S.C. § 47125, requests can be made for land conveyances from the Federal Government for airport purposes. The Federal Aviation Administration coordinates such requests, and all such transfers require the Attorney General's approval. The Attorney General's approval authority has been delegated to the Assistant Attorney General, Environment and Natural Resources Division (28 C.F.R. § 0.69b, Order No. 1069-84, 49 F.R. 39843, dated October 11, 1984),

and delegated to the chief of the Land Acquisition Section (ENRD Directive No. 26-95, issued pursuant to 28 C.F.R. § 0.69b on October 12, 1995).

The Title Unit reviews the materials provided by the granting agency, including the deed or patent to be issued, for legal sufficiency under the authorizing statute and applicable local real estate law.

Litigation:

Condemnation is sometimes used to acquire land when the title is defective. In these circumstances, the acquiring agency may be unable to ascertain ownership, or ownership may be in dispute. This occurs most frequently with low value lands that the owners have ignored for many generations. It can, however, arise in other settings, where the parcel in question is small, but its contributory value to an adjoining or surrounding parcel is very significant. In such cases, the United States has no interest in the outcome of the determination of who owns the land, but it needs to have ownership determined so that just compensation is paid to the right party. If there is a dispute between two parties, actively asserting conflicting claims of ownership, the United States may let the claimants present their evidence. Frequently, however, the government, at the request of the court, takes on the role of *amicus curiae*, and presents evidence of ownership based on its own title research. The district court will resolve such issues in every condemnation action.

Title Unit attorneys may serve either as advisors or as counsel. Either way, their technical expertise, developed in reviewing titles for land purchases and in conducting other title and boundary hearings, compliments the litigation expertise of both Land Acquisition Section condemnation attorneys and United States Attorneys. Although the cost to the United States, in time and money, for resolving ownership disputes can be significant, there is frequently no alternative when the potential owners

are not interested in resolving the matter. To move the case forward the government must take the initiative. The true government benefit is in working to assist (often) innocent parties in equitably sorting out complicated ownership issues.

Sometimes, the Title Unit will be asked to assist in condemnation litigation when a case involves an unusual legal issue. For example, a few years ago, the State of California asserted a “tidelands trust” claim of interest as to certain Navy land in San Diego. If the interest was valid, the state could potentially block a proposed redevelopment of the site. A condemnation action was initiated to seek the court’s determination concerning the validity of the state’s claim of interest, and, if valid, to acquire the state’s interest. The court determined that the state had no interest in the Navy land and dismissed the case. (*United States of America, v. 15.320 Acres of Land, more or less, in San Diego County, State of California, et al*, United States District Court, Southern District of California, Civil No. 90-1562-E (BTM)).

In another case, the Title Unit acted as lead counsel in a condemnation action of federal land being physically occupied by a private party, claiming an interest in it. The government believed the private party’s claim was without merit. It would have initiated an ejectment action, except that it needed the land immediately, and it realized that the private party could potentially frustrate the government’s plans for the land if it repeatedly filed appeals. Since the private party was claiming it had some right to remain on the land (i.e., some ownership interest), the agency, in consultation with the Land Acquisition Section, decided to file a condemnation action and seek an immediate order of possession. This was done, and the private party soon vacated the property and dropped its claim.

Client counseling:

The Title Unit constantly receives inquiries from government agencies relating to real estate transactions. Many questions concern the Attorney General's title regulations and the review of title, but more frequently, the questions relate to broader issues, such as the scope of an agency's acquisition authority, or the determination of estate acquisition. On occasion, the questions turn into requests for help and the Title Unit attorneys become directly involved in negotiations or settlements. They become facilitators, assisting client agencies in structuring and closing complicated real estate transactions. Some examples follow:

The Federal Railway Administration acquired Union Station in Washington, D.C., several years ago to facilitate the station's renovation and development as a viable retail and transportation center. Because this agency is not normally involved in land acquisitions, and because this transaction was complex (involving for example, multiple parties, commercial leases and air rights), it asked the Title Unit to conduct the closing.

The General Services Administration has enlisted the aid of the Title Unit in many federal courthouse and office building acquisitions, most notably the Foley Square project in New York City; the federal Courthouse in Alexandria, Virginia; a proposed federal office building in San Francisco; and a Census Bureau computer facility in Maryland. Condemnation was ultimately used to acquire rights in adjoining streets in the first project, but has been unnecessary (so far) in the others.

The Air Force asked the Title Unit to join in negotiations for the acquisition of an easement to prevent the development of land on the California coast next to the Vandenberg Air Force Base. The land was very valuable and multiple interests in it had to be addressed.

The Departments of the Interior and Agriculture recently enlisted the aid of the Title Unit in a series of large land acquisitions. In Alaska, both agencies are working with the state and private parties, to acquire interests in lands affected by the *Exxon Valdez* oil spill. The Title Unit participated in multiple negotiating sessions early in the process, and suggested a structure for

the transactions, which was ultimately adopted as a model. The United States, the State of Alaska, and sometimes the seller native corporations, each have overlapping interests in the land being acquired, so that each can assure that preservation of the natural resources occurs.

In Montana, the Departments of the Interior and Agriculture were involved in the acquisition of the New World Mine. The Title Unit conducted the review of title, helped in the preparation of documents, and helped close this proposed gold mine in the historic New World Mining District near Yellowstone National Park. The mine posed an environmental threat to the park, and the agreed-upon solution was the acquisition by the United States of an interest in the site sufficient to prevent the development of the mine.

Within the Department of Justice, the Title Unit has provided advice to multiple components. The Bureau of Prisons has a very active land acquisition program for new and expanded facilities all over the country. Frequently, a community welcomes prison facilities as part of an economic revitalization; but the local community development plans must be consistent with any prison development plans. One site that was located next to an airport had restrictions on the use of the land that needed to be reconciled with the requirements of the Bureau of Prisons.

Another large land acquisition which involved the Title Unit was the Federal Bureau of Investigation's new fingerprint facility in West Virginia. This transaction involved a large assemblage of rural properties. The Title Unit reviewed the title evidence and assisted in structuring easements with the state for access, and with an adjoining landowner for buffer areas to screen a nearby landfill.

The Title Unit has worked extensively within the ENRD by helping other sections in litigation, such as inverse takings and quiet title actions handled by the General Litigation Section, or wetlands actions handled by the Environmental Defense Section. The majority of time has been spent with the Environmental Enforcement Section and the Environmental Protection Agency, developing an approach to incorporating institutional controls in CERCLA consent decrees

to restrict the use of the land, protect the public health, and cap other remedies in place. The Environmental Enforcement Section recently published a new Model Consent Decree which includes information on institutional controls and a new model Environmental Protection Easement prepared by the Title Unit.

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Timber Sale Litigation on Public Lands

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The great national forests of this country are not set aside for any one purpose, but instead are intended to be all things to all people, managed under the amorphous principle of "multiple use". The land management agencies are directed simultaneously to protect the environment, to accommodate recreation, and to provide a continuous stream of commodity outputs such as timber. This article discusses the litigation that frequently results when the agencies are unable to satisfy these competing goals. For the most part, agencies have broad substantive discretion to manage the lands under their multiple use mandate. Congress requires agencies to comply with complex environmental analysis and public participation procedures before they propose a timber sale, or take other action, with respect to the public lands. Much timber sale litigation focuses on the agencies' compliance with these procedures, not on the substance of their decisions. It should be noted that, while the Forest Service in the Department of Agriculture carries out timber sales on the public lands, the Bureau of Land Management (BLM) in the Department of the Interior administers other federal land useable for timber harvest.

I. The Forest Service's Statutory Framework

While the principal statute governing Forest Service timber sales is the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600 *et seq.*, the agency also operates under the provisions of several earlier statutes. The origins of the Forest Service's authority to manage the National Forests can be traced back nearly 100 years, before the genesis of the agency itself. In 1897, Congress enacted a statute vesting the predecessor agency to the Forest Service with

expansive authority to make rules "to regulate [the Forests'] occupancy and use and to preserve the forests therein from destruction." Act of June 4, 1897, ch. 2, 30 Stat. 35 ("Organic Act") (codified as amended at 16 U.S.C. §§ 473-82, 551). The Organic Act is still in effect in modified form. 16 U.S.C. §§ 473-82, 551.

In 1960, Congress enacted the Multiple Use and Sustained Yield Act (MUSYA), which made express the Forest Service's authority to manage the National Forests for multiple uses under the balance the agency deems will best meet the needs of the American people and make use of the forest resources. Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. §§ 528-31; *see* § 531(a). The concepts of multiple use and sustained yield of forest resources remain vital in the land management planning of the Forest Service, as MUSYA is still in effect.

The NFMA establishes the current management framework for the national forests, which "envisions a two-stage approach to forest planning." *Inland Empire Pub. Lands Council v. United States Forest Serv.*, 88 F.3d 754, 757 (9th Cir. 1996); *see Ohio Forestry Ass'n v. Sierra Club*, 118 S. Ct. 1665, 1668-69 (1998). The first level is the programmatic level at which the Forest Service develops "land and resource management plans" (LRMPs) for the individual forests. Act of August 17, 1974, 88 Stat. 476, 16 U.S.C. §§ 1601-04. The agency develops various alternative management scenarios for the entire forest and analyzes the environmental consequences, costs, and benefits of each alternative in a programmatic environmental impact statement (EIS) developed pursuant to the National Environmental Policy Act (NEPA). *Id.* § 1604(g)(1); 36 C.F.R. § 219.12. The chosen alternative becomes the final forest plan, which guides management of multiple use resources forest-wide for a ten to fifteen-year period, subject to amendment and revision.

16 U.S.C. § 1604(f)(4)-(5); 36 C.F.R. § 219.10(f)-(g).

At the forest plan level, the Forest Service, among other things: 1) designates "management areas" (MAs), which emphasize production or conservation of particular resources (e.g., timber, recreation, or wildlife) and specifies, with respect to each area, activities that are permissible and those that are not; 2) identifies management prescriptions, which direct how future actions may be carried out in each MA; 3) establishes mandatory standards and guidelines with which future activities forest-wide must comport; and, 4) projects levels of output for each resource. *See Citizens for Env'tl. Quality v. United States*, 731 F. Supp. 970, 977 (D. Colo. 1989); 16 U.S.C. § 1604; 36 C.F.R. §§ 219.10 *et seq.* In addition, the forest plan states a "desired future condition" for the forest and identifies the management activities necessary to achieve that condition. *See Krichbaum v. United States Forest Serv.*, 973 F. Supp. 585, 588 (W.D. Va. 1997), *aff'd*, 139 F.3d 890 (4th Cir. 1998). Forest plans are intended to be flexible documents and amended as conditions change. *See* 16 U.S.C. § 160(f)(4) (providing that forest plans shall "be amended in any manner whatsoever after final adoption."). The forest plan thus establishes a broad management framework to guide future projects on the forest.

Once the LRMP is approved, implementation of projects occurs at a second stage where individual site-specific projects are proposed and assessed. *Inland Empire*, 88 F.3d at 757. These site-specific projects, such as timber sales and road construction projects, must be consistent with the stage-one forest plan. 16 U.S.C. § 1604(i); *Ohio Forestry*, 118 S. Ct. at 1668. The Forest Service also evaluates individual site-specific projects for compliance with the requirements of the Endangered Species Act and other applicable laws, as discussed below.

In addition to setting forth a two-stage approach to forest administration, the NFMA establishes substantive constraints on the Forest

Service's management of its lands. One of the more important requirements is set forth in the viability regulation, which requires that fish and wildlife habitat be managed "to maintain viable populations of existing native and desired non-native vertebrate species in the planning area." 36 C.F.R. § 219.19; *see also* 16 U.S.C. § 1604(g)(3)(B) (the "diversity" provision, the statutory authority for the viability regulation). Another important provision is the statute's direction that clear-cutting be used only where "it is determined to be the optimum method," and other types of even-aged management to be used only when they are appropriate to meet the objectives of the relevant land management plan. 16 U.S.C. § 1604(g)(3)(F)(i); *see also* 16 U.S.C. § 1604(g)(3)(F)(ii); 36 C.F.R. § 219.27(a)(7) (requiring site-specific analysis before even-aged management is authorized). Among its other substantive provisions, the NFMA includes measures to prevent irreversible damage to soils, slopes, streams, and watershed conditions. *See* 16 U.S.C. § 1604(g)(3)(E)-(F). For further discussion of the substantive provisions of the NFMA, *see* Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1 (1985).

II. The BLM's Statutory Framework

The major statutes applicable to BLM timber management are the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.*, and the Oregon and California Railroad and Coos Bay Wagon Road Lands Act (O&CLA), Act of August 28, 1937, 50 Stat. 874, 43 U.S.C. §§ 1181a-j. In 1976, Congress passed FLPMA and adopted the philosophy of MUSYA, that BLM is to manage federal lands for multiple uses. Act of Oct. 21, 1976, 90 Stat. 2744, 43 U.S.C. §§ 1712(c)(1)-(2), 1732(a). FLPMA requires promulgation of land use plans to govern federal land management, but does not establish standards as detailed as those that apply to Forest Service LRMPs. BLM regulations detail the procedures

for developing Resource Management Plans (RMPs), the current version of the land use plans. 43 CFR subpart 1610. FLPMA did not require development of these RMPs in any certain time frame, and BLM is still operating under the previous land use plans in some instances. FLPMA also calls for BLM to use a systematic interdisciplinary approach to planning, and to promulgate regulations establishing a process that allows state and local governments, and the public at large, an opportunity to comment on and participate in development of RMPs. 43 U.S.C. § 1712(f). These regulations, found at 43 C.F.R. § 1610, provide that RMPs may be changed through amendment and are to be revised "as necessary". 43 C.F.R. §§ 1610.5-5 - 16.10.5-6.

The O&CLA addresses the management of some, but not all, BLM timber-producing lands, specifically the revested Oregon & California Railroad and reconveyed Coos Bay Wagon Road grant lands in western Oregon and northern California. The act provides that such lands "shall be managed . . . for permanent forest production" and "in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities." 43 U.S.C. § 1181a; see *Seattle Audubon Soc. v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd*, 80 F. 3d 1401 (9th Cir. 1996).

III. The Administrative Record Defines the Scope of Challenges to Forest Service or BLM Timber Sales

Under the statutory framework for both the Forest Service and the BLM, challenges to timber sales proceed upon the administrative record of documents before the decision-maker at the time of the challenged action. There is no private right of action under the NFMA, FLPMA, or NEPA. See *Lujan v. National Wildlife Fed.*, 497 U.S. 871, 882 (1990) (discussion of FLPMA & NEPA). Accordingly, judicial review is under the Administrative Procedure Act (APA), and "the court shall review the whole record or those parts

of it cited by a party." 5 U.S.C. § 706. This means that plaintiffs are not entitled to discovery unless they can establish that an exception to the record review principle applies. See *Animal Defense Fund v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988), *as amended*, 867 F.2d 1244 (1989). In order to preserve the record review principle, affidavits, testimony, or other extra-record evidence should be avoided, except as allowed by case law or as rebuttal if plaintiff is allowed to go beyond the record. Furthermore, the filing of motions to strike is appropriate if plaintiffs attempt to introduce extra-record documents.

Administrative record cases are ordinarily resolvable on cross motions for summary judgment, without any need for trial. See *Occidental Eng'g. Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985). The APA's standard of review for informal agency adjudications governs: whether the action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *Nevada Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713, 716-17 (9th Cir. 1993) (applying this standard to the Forest Service's actions under the NFMA); see also *Sierra Club v. Cargill*, 11 F.3d 1545, 1548 (10th Cir. 1993) (same); *Webb v. Lujan*, 960 F.2d 89, 91 (9th Cir. 1992) (applying this standard to claim under FLPMA).

As a procedural matter, file the record prior to the initial scheduling conference with the judge, if possible. This way, the government can point to the filed administrative record at the scheduling conference as a way of discouraging discovery. The administrative record can also serve as our initial disclosures.

IV. Jurisdictional Defenses

Two commonly used jurisdictional defenses, in defending Forest Service or BLM timber sales, involve the APA's requirements of exhaustion of administrative remedies and final agency action. Concerning exhaustion, the Forest Service has provided an opportunity for administrative appeal of most proposed timber sales. 36 C.F.R.

§ 215.7(b); 16 U.S.C. § 1612 n.l. Only green timber sales under 250,000 board feet, and salvage timber sales under 1 million board feet, which satisfy certain conditions, are exempted. Forest Service Handbook 1909.15 § 31.2(4) (found at National Environmental Policy Act; Revised Policy and Procedures, 57 Fed. Reg. 43180, 43209 (1992)). If plaintiffs have failed to seek an administrative appeal, the case should be dismissed for failure to exhaust administrative remedies.¹³

The Supreme Court's decision in *Darby v. Cisneros*, 509 U.S. 137 (1993), establishes the prerequisites for an exhaustion defense in all cases relying upon the APA's waiver of sovereign immunity, which includes cases brought under the NFMA and FLPMA. As the Supreme Court stated in *Darby*, "where the APA applies, an appeal to superior agency authority is a prerequisite to judicial review only when [1] expressly required by statute or when an agency rule requires appeal before review and [2] the administrative action is made inoperative pending that review." 509 U.S. at 154. See also *Glisson v. United States Forest Serv.*, 55 F.3d 1325, 1328 (7th Cir. 1995); *Clouser v. Espy*, 42 F.3d 1522, 1532-33 (9th Cir. 1994). Under the first of these conditions, Congress, in 1994, statutorily required potential plaintiffs to pursue any administrative appeal opportunities available within the Department of Agriculture. 7 U.S.C. § 6912(e). One court construed this requirement: "It is hard to imagine more direct and explicit language requiring that a plaintiff suing the Department of Agriculture, its agencies, or employees, must first turn to any administrative avenues before beginning a lawsuit and, as the Supreme Court did in *Darby*, I must abide by the statutory language."

¹³ BLM also allows for administrative appeals of timber sales by adversely affected individuals. 43 C.F.R. §§ 4.410, 4.411. Under BLM procedures, any would-be appellants must first protest the decision involved to the authorized officer. 43 C.F.R. § 5003.3.

Gleichman v. United States Dep't of Agriculture, 896 F. Supp. 42, 44 (D. Me. 1995); see also 36 C.F.R. § 215.20 (Forest Service rule also requiring exhaustion). Thus, the first condition for exhaustion is satisfied.

The second condition is met when the agency "provides that the action meanwhile is inoperative" pending the appeal. Once an appeal is filed, implementation is delayed until 15 days after the date of the appeal disposition. 36 C.F.R. § 215.10(b). Only if certain emergency circumstances occur will the action be implemented while the appeal is pending. *Id.* § 215.10(d). If both conditions of *Darby* are satisfied, and plaintiffs have failed to administratively appeal Forest Service timber sales, their claims should be dismissed.

A second jurisdictional defense is the lack of final agency action. There is no private right of action under NFMA, FLPMA, or NEPA, as discussed in section III above. Accordingly, potential plaintiffs must satisfy the requirements of the APA and challenge "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; see *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990) (FLPMA & NEPA). The standards for final agency action are set forth in two recent Supreme Court decisions. *Bennett v. Spear*, 520 U.S. 154 (1997); *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

Other jurisdictional defenses include standing, ripeness, and mootness. The Supreme Court recently dismissed, as unripe, a facial challenge to certain provisions of a Forest Service LRMP, where plaintiffs had failed to challenge any specific timber sales or other projects implementing the plan. *Ohio Forestry*, 118 S. Ct. 1665 (1998). While you should be aware of this decision, it applies only to certain plan-level decisions, and does not provide a ripeness defense to litigation over specific timber sales. Indeed, the Supreme Court ruled that certain planning decisions were unripe precisely because they were

more appropriately contested through challenges to timber sales and other projects implementing the plan. If you have any uncertainty about the use of the *Ohio Forestry* precedent, you are encouraged to contact Stephanie Parent or John Watts, two Environment and Natural Resources Division attorneys whose telephone numbers are provided at the end of this article.

V. Interaction with Other Statutes

Frequently, the defense of Forest Service or BLM timber sales involves other environmental statutes, especially the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, and the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* If you have a NEPA issue in a Forest Service case, an important authority is the Forest Service NEPA Handbook, which can be found at National Environmental Policy Act; Revised Policy and Procedures, 57 Fed. Reg. 43180 (1992). This sets forth Forest Service NEPA procedures as a supplement to the Council for Environmental Quality regulations at 40 C.F.R. §§ 1500, *et seq.* Courts have split on whether the Forest Service NEPA Handbook is binding on the agency. Compare *Rhodes v. Johnson*, 153 F.3d 785 (7th Cir. 1998) (holding that the Handbook was binding), with *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (holding that the Handbook was not binding). BLM's NEPA procedures are set forth in the agency's National Environmental Policy Handbook, H-1790-1 (1988). An excellent resource for NEPA cases is Daniel R. Mandelker, *NEPA Law and Litigation* (Clark, Boardman & Callaghan Environmental Law Series, updated with inserts annually).

If you have an ESA claim, under Department policy, you should refer it to the Wildlife and Marine Resources Section of the Environment and Natural Resources Division at the Department of Justice at (202-305-0210).

The General Litigation Section of the Environment and Natural Resources Division has a number of attorneys who regularly handle timber sale litigation. Several have offered to be resources for United States Attorneys: Andrea Berlowe (202-305-0478), Ted Boling (202-305-9609), Lisa Holden (202-305-0474), Greg Page (202-305-0446), Stephanie Parent (202-305-0428), Andrew Smith (202-305-0427), and John Watts (202-305-0495). Two excellent articles on the NFMA are: Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1 (1985); and Michael J. Gippert & Vincent L. DeWitte, *The Nature of Land & Resource Management Planning Under the NFMA*, 3 *Envtl. Law*. 149 (1996).~

VI. Resources for Further Reference

An Overview of Mineral Royalty Litigation

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I. Introduction

As the administrator and collector of revenues from more than 25,000 federal and Indian mineral leases, covering approximately 21.1 million acres, the Department of the Interior (Interior) is the defendant in many actions brought by private lessees under mineral leasing statutes, regulations, and lease terms. A substantial portion of the litigation over federal leases revolves around the lessees' obligations to pay a percentage of the value of the minerals, or a royalty, to the government. The Minerals Management Service (MMS), a bureau within the Interior, collects, verifies, and distributes mineral revenues from leases on federal and Indian lands, and manages the mineral resources of the Outer Continental Shelf. The Environment and Natural Resources Division (ENRD) defends most of these cases for the MMS.

II. The Nature of Royalty Litigation

Many disputes between the MMS and lessees concern the authority of the MMS to examine lessees' transactions involving mineral production from federal and Indian leases and, ultimately, the proper valuation of minerals produced from federal and Indian lands for royalty payments on the production. The stakes, in terms of revenue, are high. In recent years, the MMS has collected approximately four billion dollars per year, down

from a high of eleven billion dollars in 1983. In an average month, the MMS's Royalty Management Program processes approximately \$300 million in royalties, bonuses, and rents. The MMS distributes these revenues to states, Indian tribes, and specific United States Treasury accounts, including the Historic Preservation Fund, the Land and Water Conservation Fund, and the Reclamation Fund, depending upon the location of the specific lease.

The amount and nature of litigation over royalty issues reflects the significance of the royalty program. The cases are many and often involve the application of detailed regulations to complex transactions. These cases are particularly challenging because the government is in a unique position as the lessor of mineral interests, with rights and obligations that differ substantially from those of private parties. Moreover, each case has the potential to set significant precedent that will control or influence other royalty assessments or royalty program decisions by the MMS. This is due to the commonality of the issues raised in multiple cases filed in the various jurisdictions. Each case must be considered in relation to past, pending, and possible future litigation. In addition, as a group, the private lessees, ranging from small independent operators to the largest integrated oil and gas companies, use litigation to define the industry's royalty obligations from a broader programmatic perspective. The industry often acts accordingly to select a forum and particular case to advance the industry's view of its royalty obligations.

III. The Mineral Leasing Statutes

A variety of federal statutes govern federal and Indian mineral leases. This article focuses on statutes and ideas applicable to the production of coal, oil, and gas. Other mineral resources, which account for a small portion of revenues collected by the MMS, (including potash, sodium, phosphate, and garnet), will not be specifically discussed. The MMS issues coal and onshore oil and gas leases under the Mineral Leasing Act, 30 U.S.C. §§ 181-287 (for onshore public domain lands), the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-59, and Indian leasing statutes 25 U.S.C. §§ 396a - g (tribal leases) and 25 U.S.C. § 396 (allotted leases). The Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-56, governs leasing on the Outer Continental Shelf. The MMS has the responsibility to enforce the applicable statutes, regulations, and lease terms that govern the lessee's liability for royalties and other payments due under the leases.

In addition to these statutes, Congress enacted the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. §§ 1701-57, to strengthen Interior's royalty audit and enforcement authority in the oil and gas context. FOGRMA requires Interior to establish a comprehensive accounting and audit system, and to make additional collections or refunds as appropriate. Most recently, Congress passed the Federal Oil and Gas Royalty Simplification and Fairness Act (RSFA) of 1996. Pub. L. 104-185, 110 Stat. 1700 (Aug. 13, 1996). RSFA adds to and modifies both FOGRMA and OCSLA with provisions, including a seven-year statute of limitations on royalty collection, payment of interest on overpayments of royalties, and a framework for the additional delegation of royalty functions to the states. Interior is now implementing its provisions.

IV. The Nature of the Royalty Obligation

Under the leasing statutes and regulations, lessees generally must pay royalties calculated as a specified percentage of the value of production saved, removed, or sold from the lease. While this concept appears simple, its implementation is at the heart of most royalty disputes. What, exactly, is the value of the production for royalty purposes?

Current regulations maintain the important and long-established principle that the "gross proceeds" received for disposition of coal, oil, and gas production is the minimum value for royalty purposes of minerals produced and sold from federal and Indian leases. See 30 C.F.R. Part 206.

As defined in the regulations governing gas, mimicked in the oil and coal contexts, "gross proceeds" mean "the total monies and other consideration accruing to an oil and gas lessee for the disposition of unprocessed gas, residue gas, or gas plant products produced" 30 C.F.R. § 206.151. See *Hoover & Bracken Energies, Inc. v. Department of the Interior*, 723 F.2d 1488 (10th Cir. 1983); *Pennzoil Exploration & Prod. Co. v. Lujan*, 751 F. Supp. 602, 605 (E.D. La. 1990), *aff'd*, 928 F.2d 1139 (TECA 1991); *Marathon Oil Co. v. United States*, 604 F. Supp. 1375 (D. Alaska 1985), *aff'd*, 807 F.2d 759 (9th Cir. 1986); *Enron Oil & Gas Co. v. Lujan*, 778 F. Supp. 348 (S.D. Tex. 1991), *aff'd*, 978 F.2d 212 (5th Cir. 1992). In sales not conducted at arm's-length, other royalty valuation regulations may be applicable, but under no circumstances is royalty calculated on less than the "gross proceeds" accruing to the lessee. See 30 C.F.R. § 206.152 (gas).

Propriety disputes of the royalty assessment often concern payment types to a lessee that may properly be considered as part of a lessee's gross proceeds for valuation purposes or the types of properly deductible expenses. See *Mobil Exploration & Producing U.S., Inc. v. Babbitt*, 913 F. Supp. 5 (D.D.C. 1995). For example, the ENRD currently has pending litigation on the question of whether payments made to a coal producer by a coal purchaser to defer delivery of contracted for coal may be considered part of the producer's "gross proceeds" for royalty purposes. Other recent cases concern whether specific types of payments to producers of gas, common after the restructuring of the gas industry in the late 1980s, may be considered part of the "gross proceeds" received by the lessee. See *United States v. Century Offshore Management Corp.*, 111 F.3d 443 (6th Cir. 1997); *Independent Petroleum Ass'n*

of *America v. Babbitt*, 92 F.3d 1248 (D.C. Cir. 1996).

V. The Agency's Audit Process and Document Review

In the context of its audit and enforcement authorities, arriving at a value for royalty purposes may be a long process for the MMS, involving detailed review of voluminous documents generated by the lessee. To retrieve documents that a lessee does not voluntarily provide, the MMS may issue a subpoena. FOGRMA provides the MMS authority to "require by subpoena [sic] the attendance and testimony of witnesses and the production of all books, papers, production and financial records, documents, matter, and materials, as the Secretary may request. . . ." 30 U.S.C. § 1717(a)(3). If a lessee refuses to comply with an MMS subpoena, FOGRMA allows the Attorney General to seek judicial enforcement of it. 30 U.S.C. § 1717(b). Jurisdiction is proper in a federal district court where the subpoenaed party is "found, resides, or transacts business." 30 U.S.C. § 1717(b).

As of this date, very few MMS subpoenas have reached the judicial enforcement stage. However, the enforcement actions are framed similarly to actions involving enforcement of other agencies' administrative subpoenas. Issues that have arisen in enforcement proceedings include: whether pre-enforcement review of an MMS subpoena is available; whether the MMS has legal authority under FOGRMA to subpoena internal audit reports and other internal company data; and whether the MMS has authority to seek enforcement of an administrative subpoena when there is a pending criminal investigation of the subpoenaed party.

Another recent issue related to document production is the question of the MMS's right to review the records of an affiliate's arm's-length resale of oil or gas. This issue arises when the producing company sells to an affiliate. This is often practiced by large and integrated oil and gas

companies. For example, in *Shell Oil Co. v. Babbitt*, 125 F.3d 172 (3rd Cir. 1997), Shell challenged an MMS order directing Shell to produce records concerning its resale of oil produced by and purchased from its subsidiary, Shell Western E & P, Inc. The Third Circuit held that, under FOGRMA and applicable regulations, MMS could properly order the production of documents relating to the ultimate arm's-length resale by Shell of oil that it acquired from its subsidiary in a transaction that was not conducted at arm's-length. The Tenth Circuit reached the same conclusion in *Santa Fe Energy Products Co. v. McCutcheon*, 90 F.3d 409 (10th Cir. 1996).

VI. The Statute of Limitations — Does it Apply?

In addition to issues that arise in the MMS's audit obligations, the ENRD has litigated, over the past several years, the question of the applicability of the statute of limitations at 28 U.S.C. § 2415(a) to orders to pay additional royalties and to counterclaims brought to enforce those orders. Although the 1996 RSFA specifically imposes a limitations period of seven years, the issue of the applicability of Section 2415(a) arises with some frequency, since the RSFA applies only to oil and gas production after the date of its enactment. Courts in several jurisdictions have held that Section 2415(a) does not apply to government claims for additional royalties. *See Phillips Petroleum v. Johnson*, No. 93-1377, 1994 WL 484506 (5th Cir. Sept. 7, 1994); *Samedan Oil Corp. v. Deer*, No. Civ. A. 94-2123 (RCL), 1995 WL 431307 (D.D.C. 1995), *vacated*, 971 F. Supp. 19, 35-39 (D.D.C. 1997), (reversed on other grounds sub. nom.); *Independent Petroleum Ass'n of America v. Babbitt*, 92 F.3d 1248 (D.C. Cir. 1996); *Vastar Resources, Inc. v. Armstrong*, Civil No. 94-2040 (D.D.C. 1997); *Atlantic Richfield Co. v. U.S. Dept. of the Interior*, Civil No. 94-62 (D. Mont. 1995); *Marathon Oil Co. v. Babbitt*, No. Civ. A. 94-N-1429 1996 WL 640436 (D. Colo.

Aug. 29, 1996), *vacated as moot*, 133 F.3d 932 (10th Cir. 1998). These decisions have turned on the courts' findings that an MMS order is not an "action" or that government-owed royalties are not "money damages" within the meaning of Section 2415. In contrast, three decisions have held that Section 2415 does apply to government claims for additional royalties. *Oryx Energy Co. v. United States Dep't of the Interior*, Civil No. 92-C-1052 (N.D. Okla. 1994), *appeal pending*; *Amerada Hess Corp. v. United States Dep't of the Interior*, Civil No. 94-C-1051-H (N.D. Okla. 1997), *appeal pending*; *Oxy USA Inc. v. Babbitt*, Civil No. 96-C-1067-K (N.D. Okla. 1998); *Marathon Oil Co. v. Babbitt*, 938 F. Supp. 575 (D. Alaska 1996). There is disagreement between the industry and the MMS as to whether the Tenth Circuit has squarely addressed the issue. *See Phillips Petroleum Co. v. Lujan*, 4 F.3d 858 (10th Cir. 1993); *Mesa Operating Ltd. Partnership v. United States Dep't of the Interior*, 17 F.3d 1288 (10th Cir. 1994).

VII. Conclusion

ENRD litigates the entire spectrum of issues relating to the MMS's Royalty Management Program. This article presents only a short summary of a few of the topics that arise. Issues range from initial document production that enables the MMS to carry out its audit responsibilities, to defense of MMS's royalty assessment and policy decisions, to the defense of challenges to rules issued by Interior incident to its royalty collection authority and obligations. Royalty cases raise complex issues and present particular challenges to the litigator, given the government's unique obligation to collect, verify, and distribute mineral revenues from leases on federal and Indian lands. ~

Public Interest Value

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Background

Recently, we have begun to see an asserted highest and best use of "preservation," "conservation," and "natural lands" in landowner appraisals of properties that the United States is acquiring for preservation-oriented projects. These appraisals typically base their valuations on sales in which the purchaser is a governmental entity, and on sales of land quite distant from the subject property, even several states away. Usually, these appraisals purport to be "fair market value" appraisals and report values in excess of the price the properties could command in the general market for an economic use. For instance, a landowner whose unusable Mississippi swampland is being acquired may assert that the highest and best use of the land is for wetland preservation, and use an acquisition by New Jersey for a nature preserve as a "comparable sale."

The value estimated by an appraiser in this fashion has been described as a "Public Interest Value (PIV)." This is a term coined by its proponents to describe a real estate value, derived from the public's interest in preserving undeveloped land which has significant natural, scenic, or wildlife habitat features. The public has both a powerful interest in preserving natural lands and the means to do it. This value, containing the public interest value proponents, creates a special value for that use, (essentially, a hold-up value).

The PIV concept first appeared in the late 1980's and early 1990's, urged by a small but vocal group of appraisers. A dispute ensued among the members of the appraisal profession as to whether "preservation," "conservation," and "natural lands" are valid "highest and best use" in appraising the "fair market value" of a property. While that dispute was going on, the federal land acquiring agencies reached their own conclusion on

the matter, and formalized it in the "Interagency Land Acquisition Conference Position Paper: On the issue whether a noneconomic highest and best use can be a proper basis for the estimate of market value" (April 14, 1995).¹⁴ The position paper¹⁵ concluded that:

[I]t is the Conference's position that a noneconomic highest and best use is not a proper basis for the estimate of market value and, accordingly, that a highest and best use of conservation, preservation, or other use that requires the property to be withheld from economic production in perpetuity, is not a valid use upon which to estimate market value. ***

¹⁴ The Interagency Land Acquisition Conference is an organization composed of representatives of federal agencies engaged in the acquisition of real estate for public uses. The Conference was established on November 27, 1968, through invitations issued by the Attorney General. The Conference conducts its business by *ad hoc* committee called into session as land acquisition issues arise that affect the federal land acquiring agencies.

¹⁵ The position paper is accessible on the Internet at <http://www.usdoj.gov/enrd/land-ack/propostn.htm>.

In the Spring of 1996, the Appraisal Institute¹⁶ issued its position on the question:

The Appraisal Institute's Position on PIV

As a result of considerable discussion and debate, the Appraisal Institute's position on PIV and the related family of concepts is summarized as follows:

- If the purpose of an appraisal assignment is to estimate market value, then the highest and best use of the property to be appraised must be an economic use.
- Preservation and conservation are not recognized as economic alternatives to be considered in the highest and best use analysis.
- Transactions involving purchasers whose intent is to preserve/conservate privately owned natural lands should not be considered as reliable evidence in support of the market value estimate.

Until such time as the definitions of market value and highest and best use are changed, and until introduction of new systems occur to replace the current legal and market systems of our country, the above-stated policy will clearly govern the members of the Appraisal Institute. It should also serve as a guide to the profession, governments, other users of appraisal services, and the public at large. Hanson, *Public Interest Value and Noneconomic Highest and Best Use: The Appraisal Institute's Position*, Valuation Insights and Perspectives, 27, 48 (Spring 1996). (Copies of the entire position paper are available from the Land Acquisition Section.)

The Division's Litigating Position on PIV

¹⁶ The Appraisal Institute is an organization of professional real estate appraisers qualified by education and experience, members of which must adhere to its Code of Professional Ethics and Standards of Professional Appraisal Practice. A member holds the designation "MAI." The Appraisal Institute is the country's largest and most prestigious professional appraiser organization, with 14,000 members representing the merged M.A.I. and S.R.E.A.

In line with the views expressed by ILAC, AI, and ASFMRA, described above, the Environmental and Natural Resources Division (ENRD) regards PIV and similar values based on a highest and best use of conservation, preservation, natural land, as improper valuation premises where, as in a federal eminent domain action, the issue for determination is fair market value.

There is no court decision, however, that has addressed the issue of the admissibility of PIV in a condemnation proceeding. The way to deal with this issue is by applying the basic principles of the law of just compensation. The balance of this article describes these basic principles together with the strategy and legal arguments to be made.

Basics of the Law of Just Compensation Especially Pertinent to this Issue

In an effort to find some practical standard for the measurement of just compensation, the courts early adopted, and have retained, the concept of "market value." *United States v. Miller*, 317 U.S. 369, 375 (1943). The continuing validity of the fair market value standard for determining just compensation has been affirmed by the Supreme Court in its latest decision on this issue, *United States v. 50 Acres of Land*, 469 U.S. 24 (1984).

"Market value," or "fair market value," as it is often denominated, has been defined by the Supreme Court as "the sum which, considering all the circumstances, could have been obtained [for the property]; that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy." *Olson v. United States*, 292 U.S. 246, 257 (1934). The Court added that "[i]n making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining." *Id.* The measure of compensation is not the value to the owner for his particular purposes or to the condemnor for some special use, *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946), rather, the inquiry must be "what is the property worth in the market" *Boom Co. v.*

Patterson, 98 U.S. 403, 407-08 (1878). The market value standard is an objective standard. Market value does not fluctuate with the needs of the condemnor or condemnee but with general demand for the property. *Petty Motor Co.*, 327 U.S. at 377-78. Or as stated in *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 80 (1913), [t]hat the property may have to the public a greater value than its fair market value affords no criterion for estimating what the owner should receive.”

A most important consideration in ascertaining the fair market value of a property is the determination of the property’s “highest and best use,” that is, “[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.” *Olson* 292 U.S. at 255. The highest and best use is to be considered, “not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.” *Id.*

An excellent discussion of the law relating to highest and best use is found in the *Uniform Appraisal Standards for Federal Land Acquisitions*, Interagency Land Acquisition Conference (1992), Sec. A-3, reproduced below.¹⁷

A-3. Highest and best use: Determination of fair market value concerning the property’s “highest and best use” — that is, the highest and most profitable use for which the property is adaptable and current and future needs. Ordinarily, the highest and best use of property is the use to which it is being subjected at the time of taking. However, if the property is clearly adaptable to a use other than the existing use, its marketable

potential for such use should be considered in determining the property’s fair market value. However, just compensation cannot be predicated upon potential uses that are speculative and conjectural; the Supreme Court has said:

Elements affecting value that depend on events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value . . . [Footnotes omitted.]

A proposed highest and best use requires a showing of reasonable probability that the land be both physically adaptable for such use *and* that there is a need or demand for such use in the reasonable future; physical adaptability alone is insufficient. And as spelled out in more detail under the heading “Conjectural and speculative evidence; (*infra*, p. 26), remote or speculative uses should not be considered.” [Footnotes omitted.]

Highest and best use cannot be predicated on a demand created solely by the project for which the property is taken (*e.g.*, rock quarry, when the only market is the highway project for which property was taken). A proposed highest and best use cannot be the use for which the government is acquiring the property (*e.g.*, missile test range, airfield, park), unless there is a prospect and demand for that use by others than the government. [Footnotes omitted.]

Demonstration of the application of these law principles, in arguing for the exclusion of public interest value evidence, follows.

Pretrial Motions to Exclude Under *Daubert*

In light of the fact that the Appraisal Institute repudiated highest and best uses of conservation, preservation, and the like as a valid basis for determining a property’s fair market value, a motion *in limine* to exclude as unreliable the appraiser’s valuation testimony based on such a

¹⁷ This publication contains a thorough, but concise, exposition of the law of just compensation and is recommended reading for anyone handling a condemnation case. It is available in hard copy by contacting the Land Acquisition Section and can be accessed on the Internet at the following address: <http://www.usdoj.gov/enrd/land-ack>.

use might be pursued under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993),¹⁸ provided the jurisdiction has expanded the *Daubert* standard to embrace non-scientific expert testimony.

In *Daubert*, 509 U.S. at 592-96, the Supreme Court outlined a two-step standard regarding the admissibility of scientific testimony¹⁹ under Rule 702. The preliminary inquiry is whether the knowledge the expert offers is reliable. *See id.* The Supreme Court declined to set forth a “definitive checklist” of what constitutes reliability. *Id.* at 592. Some factors it deemed pertinent included, “whether the theory or technique has been subjected to peer review and publication,” and “whether the theory or technique has met with general acceptance within the particular community.” *Daubert*, 509 U.S. at 593-94.

The appraiser’s professional peers have scrutinized and soundly rejected the technique (or theory) of valuing the condemned property based on a highest and best use of conservation or preservation. The appraiser’s highest and best use theory of “preservation or conservation” is not reliable because it has been unable to withstand peer review or gain acceptance in the appraisal community. It fails the critical first prong of the *Daubert* test, and the court should exclude the testimony.

When appropriate, combining the *Daubert* argument with a motion asking the court to exclude speculative evidence as to highest and best use, and

¹⁸ For an excellent treatment of the subject of excluding expert testimony under *Daubert*, see Easton, “*Yer Outta Here!*” *A Framework For Analyzing the Potential Exclusion of Expert Testimony Under the Federal Rules of Evidence*, 32 U.Rich.L.Rev. 1, January, 1998.

¹⁹ The type of testimony to which the standard applies has been expanded beyond the field of science by some courts to all expert testimony based upon technical or other specialized knowledge, which would encompass expert appraisal testimony. However, not all courts have joined in this expansion. See Easton, *op. cit.*, at 7, esp. n. 110.

to exclude evidence of sales that are not comparable or that are not fair indicia of market value, should be made as discussed below.

Pretrial Motion to Screen And Exclude Evidence of Highest And Best Use

We can expect the appraiser valuing the property for a highest and best use of conservation/preservation to contend that there is a market for properties like the subject for preservation or conservation. Both environmental organizations and local, state, and Federal Government agencies that purchase for preservation annually spend untold millions to purchase lands for preservation and conservation. These specialized purchases do not establish a market demand for the subject property for conservation/preservation.

The government’s need for the property must be excluded in assessing market demand for the property for that use as a matter of law. The appraisers must establish that: (1) there is, or within the reasonable future will be, a demand for the subject property for the asserted highest and best use, (2) by others than the government. (See cases cited in footnotes 29 and 30 accompanying the text quoted above from Sec. A-3 of the Uniform Appraisal Standards.) Failing that, the asserted highest and best use remains a speculative use for which there is no compensation.

Through discovery and exchange of appraisals, we should learn whether the landowner’s appraiser has any factual basis for asserting a market demand for the subject property for the proposed highest and best use, and if he has, what that basis is. If he has not furnished a basis, or if the basis is weak or speculative, file a pretrial motion requesting the court to screen the appraiser’s evidence of highest and best use, and exclude it as speculative, based on the legal principles that follow.

Condemnation cases differ from other civil cases in that the role of the jury is limited by Rule 71A(h) Fed. R. Civ. P., which provides that a party “may have a trial by jury of the issue of just compensation.” The rule continues by stating, “[t]rial of all issues shall otherwise be by the court.”

By virtue of this rule, we regard the judge presiding over a condemnation trial as the gatekeeper of the evidence that may be presented to a condemnation jury. Thus, in *United States v. 320 Acres of Land in Monroe County, Florida*, 605 F.2d 762 (5th Cir. 1979), the court held that "it is the trial court's responsibility under Rule 71A(h) to screen all proffered potential use evidence and exclude from consideration by the trier of fact evidence of any potential uses upon which a just compensation award may not, as a matter of law, be based." *Id.* at 819. Any party seeking to offer evidence of value, based on another use of the land [besides the present use], has the burden of proving that it is feasible under the Supreme Court's rule in *Olson v. United States*, 292 U.S. 246, 257 (1934). Proof of that higher and better use for the land must include evidence that "the property is adaptable and needed or likely to be needed in the reasonably near future...not necessarily as a measure of value, but to the full extent that the prospect of demand for such use affects the market value...." *Id.* at 255. "Physical adaptability alone" is not enough to establish a highest and best use for land condemned, *id.* at 256, because, as cautioned by the Supreme Court, the court must not permit speculative evidence. The Court explained:
In making that estimate [of market value] it should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value a thing to be condemned in business transactions, as well as in judicial ascertainment of truth.

Id. at 257.

To meet the *Olson* criteria, the use must be physically and legally feasible ("adaptable"), and there must be market demand for the use of the property in the "reasonably near future." The standard for evaluating whether to allow the trier of fact to consider a proffered highest and best use is that it must be reasonably probable.

A pretrial hearing may be requested to screen the evidence that will be presented to the jury in the trial of the case. The law requires the court to screen the proposed uses for the property in condemnation and to exclude those that are speculative from jury consideration. *United States v. 158.24 Acres, etc.*, 696 F.2d 559 (8th Cir. 1982); *United States v. 341.45 Acres of Land in St. Louis County, Minnesota*, 633 F.2d 108, 110-112 (8th Cir. 1980); *320 Acres of Land in Monroe County* 605 F.2d at 813-20. *Accord Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 158 (1990). *See also United States v. 478.34 Acres of Land*, 578 F.2d 156, 159-60 (6th Cir. 1978).

The court in *320 Acres* discussed *Olson v. United States* and found that there must be proof of a potential use's practicality and reasonable likelihood in order to establish "market demand." *United States v. 320 Acres*, 605 U.S. at 814.

*** [A]bsent such proof the alleged potential use remains a speculative use for which, as a matter of law, the landowner cannot be compensated. Consequently, there is no reason to allow the jury ***, in deciding the issue of just compensation, to even *consider* a use that is not reasonably probable. [Emphasis in original.]

Id. This opinion is careful to point out that the trial court is not given the responsibility of determining the highest and best use of the subject property. *Id.* at 817. Rather, the court is charged

with excluding uses which are speculative, because there is not sufficient proof to establish market demand. *Id.* at 814. See also *United States v. 341.45 Acres of Land in St. Louis County, Minnesota*, 633 F.2d at 111.

Pretrial Motion to Screen And Exclude Comparable Sales Evidence

In PIV appraisals, the appraiser's selection of particular sales as "comparable" to the subject property is a key to generating exorbitant value opinions.²⁰ The appraiser selecting as comparable sales properties that are superior to the subject due to differences in highest and best use, access, availability of utilities, development potential, zoning, size, regulatory restrictions, and so forth, and not making appropriate downward adjustments to value and/or making unjustified upward adjustments is a good example. Often the "comparable" is so drastically different from the subject that the difference cannot be accounted for with any meaningful adjustment.

Where the difference between a purported "comparable sale" and the subject property is such that the sale does not provide a meaningful basis for estimating the value of the subject, file a pretrial motion asking the court to screen and exclude that sale from evidence. At least one trial court has followed this procedure, and it was approved on appeal. *United States v. 33.90 Acres of Land, etc.*, 709 F.2d 1012 (5th Cir. 1983)

It is well established that the admissibility of allegedly comparable sales in a condemnation case is within the sound discretion of the trial court and a ruling thereon is reviewable only for abuse of discretion. See *id.*; *United States v. 1,129.75 Acres, Etc.*, 473 F.2d 996, 998 (8th Cir. 1973); *United States v. Certain Land in City of Fort Worth, Texas*, 414 F.2d 1029 (5th Cir. 1969); *United States v. 55.22 Acres in Yakima*

County, Washington, 411 F.2d 432, 434 (9th Cir. 1969).

Certain kinds of sales are inadmissible to prove market value as a matter of law. Forced sales, *i.e.*, sales made under some form of legal compulsion, fall within this category. See *United States v. Certain Land in City of Fort Worth, Texas*, 414 F.2d 1029, 1031-32 (5th Cir. 1969); *District of Columbia Redev. L.A. v. 61 Parcels of Land*, 235 F.2d 864, 865-66 (D.C. Cir. 1956)

Another kind of sale generally inadmissible as a matter of law to prove market value is a sale to a condemning authority — state and local governments, utility companies, and the Federal Government. Summarization of the rule on this follows in the excerpt from the *Uniform Appraisal Standards for Federal Land Acquisitions*.

A-18. Price paid by a condemnor for similar property: These payments are a compromise to avoid the expense and uncertainty of litigation and so are not fair indications of market value. Such evidence complicates the record, confuses the issue, is misleading, and raises collateral issues as to the conditions under which such sales were made. The overwhelming view of the various federal courts is that the sum paid for similar land by an agency having condemnation authority, even if condemnation proceedings have not begun, is inadmissible. The only recognized exceptions to this rule are in cases of voluntary sale, or where the fact that the parties were condemnor and condemnee either was not known or had no influence because the sale was not in connection with, or in anticipation of, condemnation proceedings. However, there is a small minority view under which evidence of purchases by a condemnor is admitted on the theory that objection to this type of evidence goes to its weight, not its competency.

With regard to the exception, the court in *Transwestern Pipeline Co. v. O'Brien*, 418 F.2d 15 (5th Cir. 1969), stated:

²⁰ As are the value adjustments the appraiser makes (or fails to make) in comparing the sale to the subject.

The party claiming the exception bears the burden of proving that the comparable sales are voluntary; that is, he must show that the sales in question were made willingly, without coercion, compulsion, or compromise. Sales to buyers possessing the power of eminent domain should be admitted as independent evidence of market value only when it is certain that those sales truly represent the market value of the land in question. That necessarily means that the party relying on the exception to the exclusion rule must show that the sales were uninfluenced by the buyer's possession of the eminent domain power. *The burden is a heavy one.* [Emphasis added.]

Id. at 19. The court further indicated that conclusory statements by a landowner that sales were voluntary and that no threats of condemnation were made to the vendors is not sufficient to meet the landowner's burden. *Id.*

In the Final Analysis

If pretrial motions to exclude appraisers' testimony are unsuccessful, make the motions again at trial. The deficiencies in the appraiser's evidence can be brought out and exploited on cross-examination. Rebuttal evidence can be presented. Tailored instructions can be submitted. The most important element to have is solid, sensible, well-supported appraisal evidence for the case-in-chief. Jurors are sensible people, and can separate the wheat from the chaff. Trying a case in which the landowner's appraiser testifies to a public interest value is like trying any other condemnation case: the side that presents the most credible, convincing evidence is the one that will prevail. ~

Appraisal Unit - Support Services

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Environment and Natural Resources Division*

DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

February 1, 1951

Lands Division
Order No. 47

TO THE STAFF OF THE LANDS DIVISION

Effective today there is created the Appraisal Section for the Lands Division. . . . All matters relating to appraisals . . . must clear through this Section.

A. Devitt Vanech
Assistant Attorney General

Much has changed since the issuance of that order. The Lands Division is now known as the Environment and Natural Resources Division (ENRD). Conversion of the Appraisal Section to the Appraisal Unit within the Land Acquisition Section (LAS) of the Division occurred in 1982. The mission of the Appraisal Unit remains essentially the same: to provide technical support to the government's trial attorneys regarding real estate valuation issues. Because the Appraisal Unit contains the only appraisers employed directly by the Department, the services provided by the unit are as varied as the lawsuits in which the United States is involved.

The Appraisal Unit

The ENRD appraisal unit currently consists of three professional appraisers, each of whom holds an MAI (Member, Appraisal Institute) designation and is state-certified as a General Appraiser in at least one state. Their collective professional appraisal experience spans nearly 100 years, and consists of both private sector and government service. The breadth of this experience allows the unit to direct AUSA inquiries to an individual with specific knowledge and experience in the subject matter.

What does the Appraisal Unit Do?

The primary mission of the Appraisal Unit is to provide technical appraisal review services to AUSAs and Department attorneys in eminent domain litigation. The Appraisal Unit routes all government agency condemnation requests through the Land Acquisition Section. Such requests must come with a "condemnation package" that includes the agency's approved condemnation appraisal of the property, along with the agency's review of the appraisal and the negotiator's diary. After review, the unit usually sends the case-filing request to the United States Attorney's office in the appropriate jurisdiction for filing, and the agency's appraisal report is forwarded to the Appraisal Unit for review.

The reviews conducted by the Appraisal Unit are not "typical" technical appraisal reviews, in that they are prepared for the litigation. The acquiring agency has formally reviewed and approved the reports received as a part of a condemnation package. The Appraisal Unit does not normally second-guess the appraiser and the agency's field reviewer on issues of value, but it does evaluate the strengths and weaknesses of the report for purposes of litigation. While this information may result in technical corrective actions, it is done under the supervision of the assigned trial attorney.

A standard introduction used in a review of an appraisal received as a part of a condemnation package is set out below:

The purpose of this review is twofold. First, the intention is to insure technical conformance with the *Uniform Appraisal Standards for Federal Land Acquisitions* (Washington, D.C.: U.S. Government Printing Office, 1992), and the current *Uniform Standards of Professional Appraisal Practice* (The Appraisal Foundation) for a "complete" appraisal and a "self-contained" appraisal report, and confirm that the appraiser's estimates of value are reasonable, based upon the data presented. The appraiser must

correct technical deficiencies in the appraisal report. Secondly, to help the Government's legal counsel in preparing for trial (and preparing the appraiser for trial) by identifying areas within the appraisal report that, while not technically incorrect, may be weak, or insufficient to meet the special demands created within the environment of a condemnation trial. Because of its dual purpose, *this review should not be shown to the appraiser.*

This appraisal report has not been reviewed for conformance with Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. Therefore, government's legal counsel should review this report for conformance with this rule, or any applicable alternative local rule that may have been adopted relating to the content of expert witness reports.

The above introduction, the wording of which varies slightly among the reviewers in the Appraisal Unit, points out additional characteristics of our special appraisal reviews. Almost as much emphasis is placed on the potential weaknesses in the report as on the correctness of the final estimate of value. Value estimates not adequately supported by the appraiser with factual market data and logical analysis are of little use to AUSAs who are in the midst of a condemnation trial. For that reason, the reports are reviewed from the perspective of a cross-examiner on the theory that AUSAs would rather reveal the areas of weakness in the appraiser's analysis at an early stage, rather than waiting for opposing counsel to do so during depositions or, worse, during trial.

The introductory comments indicate that government appraisal reports are reviewed to insure technical conformance with the *Uniform Appraisal Standards for Federal Land Acquisitions*. These standards, often called the "Yellow Book" because of the color of its cover,

are well known in the appraisal industry and used by all federal agencies in their land acquisition appraisals. Any AUSA who is going to represent a client agency in a condemnation action must be familiar with relevant portions of this document. Not only does it describe the standards that appraisers must follow in the development of an appraisal report for federal land acquisition, but it also cites more than 200 federal condemnation cases that form the foundation of current federal condemnation law. For that reason alone, it is an invaluable resource to the AUSA preparing the condemnation case. The *Uniform Appraisal Standards for Federal Land Acquisitions* (Washington, D.C.: U.S. Government Printing Office, 1992) is available on the Department's Internet Home Page. The Internet address to access the Yellow Book directly is: <http://www.usdoj.gov/enrd/land-ack/>. The Yellow Book is in a Word Perfect 5.1 format and can be downloaded onto a PC directly from the Department home page.

Another important provision in the above introduction is the cautionary note that the review should not be shown to the appraiser. There are multiple reasons for this request. It has long been a LAS policy that the Appraisal Unit's reviewers should be free to express their opinions about appraisal reports without the concern that such opinions, which are sometimes less than complimentary to appraisers, would be made public. Also, the law protects the Appraisal Unit's reviews from discovery under the attorney work-product rule. Dissemination of the review to the appraiser could jeopardize that protection. Finally, the unit intends the appraisal review to be a tool for the trial attorneys in the preparation of their cases. The review allows the trial counsel to convey verbally to the appraiser corrective or additional work required before trial, that is compatible with the counsel's theory of the case.

The appraisal review process described above is only the first step in the Appraisal Unit's assistance in trial preparation. Experience indicates that many appraisal reports submitted with a client agency's condemnation package require additional work before use in trial. That additional work can range from merely updating

the appraisal report to the date of taking to requiring major revision and correction. There also may be times when the appraisal report and the appraiser are considered unsalvageable by the reviewer. In this case, it is recommended that trial counsel consider retaining a different appraiser for trial purposes. The Appraisal Unit is available to provide trial counsel assistance regarding appraisers who may be suitable to counsel's needs. Unit personnel can also assist trial counsel in assuring compliance with the Yellow Book by developing special appraisal instructions.

One reason the Appraisal Unit frequently finds initially submitted appraisal reports unsuitable for trial purposes is that the unit conducts its review with the advantage of hindsight. That is, it conducts the review in the context of a different date of valuation and any additional pertinent facts that have arisen since the date of the initial report. By contrast, the earlier agency review would have been concerned with value as of the date of the appraisal report. In this regard, comments under Standards Rule 3-1 of the *Uniform Standards of Professional Appraisal Practice* (USPAP) provide that:

The review should be conducted in the context of market conditions as of the effective date of the opinion in the report being reviewed. Information that could not have been available to the appraiser on the date of the report being reviewed should not be used by a review appraiser in the development review.

The Appraisal Unit does not follow the USPAP provisions because it is not concerned with determining whether the appraised value of the property was accurate as of the effective date of the appraisal, based on the information that was available at the time the appraisal was prepared. The Appraisal Unit is concerned with the value of the property as of the date of taking, which is generally well after the effective date of the appraisal submitted with the condemnation package. Therefore, the Appraisal Unit will consider information contained in the negotiator's diary, which is information that was obviously unavailable at the time of the original appraisal.

Often, appraisers are asked to appraise property before the agency has procured a title report, but the Appraisal Unit will consider all of the Department's title report information for review. Also, there are times when the condemning agency changes its taking between the time of its initial appraisal and the date that it sends its condemnation package to the LAS. The Appraisal Unit conducts its review in light of the legally described "estate to be taken" submitted with the condemnation package.

Disapproval of an appraisal report by the Appraisal Unit means only that it should not be used at trial. Rejection should not be construed as meaning that the client agency erred in its original approval of the report. As a practical matter, the Appraisal Unit's only concern is whether the report is adequate for trial purposes, based on the information known to the Appraisal Unit at the time of its review. The report could have been completely adequate when finished and approved, but still be unusable in court. Nevertheless, reviewing an original report is often prudent for the Appraisal Unit, even if it is out of date, rather than calling for the agency to bring the appraisal up to date before submitting the condemnation package. Then when the appraiser updates the appraisal report, the unit can ask the appraiser to correct errors or consider factors brought out by the Appraisal Unit's review.

The second phase of the Appraisal Unit's involvement generally comes after trial counsel has procured a revised appraisal report. The Appraisal Unit then reviews the revised report to assure that the appraiser adequately addressed any technical deficiencies in the initial report.

Once trial counsel determines that the appraisal report is satisfactory for trial purposes, they typically exchange it with opposing counsel, as a part of the discovery process, for the property owner's appraisal report. Many AUSAs and LAS attorneys also submit the owner's appraisal report to the Appraisal Unit for review. In those cases, the Appraisal Unit reviews the owner's report in

the same manner as the government's report this time, emphasizing areas in the report that appear weak and subject to attack. The reviews also may suggest areas of deposition inquiry, either to learn more about the foundation and support for the appraiser's opinion or to confirm that the witness' methodology is deficient.

AUSAs should take note of the fact that the Appraisal Unit serves a support function — not a watchdog function. We are not aware of any "rule" that requires that an AUSA must have an Appraisal Unit-approved appraisal for trial purposes. There are occasions when the Appraisal Unit is justified in "disapproving" an appraisal report and, at the same time, an AUSA is justified in using both the "disapproved" report and its author for trial purposes. AUSAs merely need to assure themselves that they can justify such action, especially if trial results in an unfavorable verdict.

The volume of support services provided AUSAs and Department trial attorneys under the above review program can be seen by the Appraisal Unit's production figures for the past three fiscal years. *See figure 1.* The review results of those reports reviewed that were subject to approval/disapproval are shown in the chart that follows. *See figure 2.*

Major Case Support Services

From the 1996-1998 data, comparison of the mean (\$4,903,277) and the median (\$50,150) value of the reports reviewed by the Appraisal Unit shows that the range of just compensation between the cases reviewed is substantial. That disparity between the mean and median clearly demonstrates that certain cases deserve more attention and greater support services than others, simply because of the dollars at stake. Although there are exceptions, such as when a small case involves a sensitive or important valuation or legal issue, generally the Appraisal Unit gives the larger cases greater attention. That greater attention often takes the form of support services beyond the

review of appraisal reports. Typical support services requested and provided include:

- Translation. Legal and appraisal terms of art may not be compatible. This often results in confusion when AUSAs, unfamiliar with the appraisal process and legal rules applicable to condemnation trials, try to talk with each another. Because members of the Appraisal Unit are professional appraisers and work daily with attorneys who specialize in condemnation trial work, they can often act as translators, for both the contract appraiser and the AUSA.
- Analysis and technical evaluation of proposed settlements;
- Calculation of interest for delayed payments on deficiencies, under the Declaration of Taking Act. 40 USC § 258(e);
- Review and analysis of deposition testimony;
- Assisting AUSA/LAS attorney in the development of special appraiser instructions; and
- Assisting AUSA/LAS attorney in the development of appraiser/witness contract specifications.

Non-condemnation Support Services

Because the three appraisers in the Appraisal Unit are the only appraisers employed directly by the Department, and because the Appraisal Unit historically provides support to all Sections within the Division, the Unit provides a broad range of support services to AUSAs, attorneys in other sections of ENRD, and attorneys in other divisions of the Department. One of the most frequent users of the Appraisal Unit's support services is ENRD's General Litigation Section, which handles the government's inverse condemnation cases, and other cases which often involve the question of real estate values. The Indian Resources, Environmental Enforcement, and Environmental Defense Sections also avail themselves of the Appraisal Unit in cases that involve the value of contaminated real estate. ENRD's Policy, Legislation, and Special Litigation Section also uses the Unit's consulting services in its analysis of

proposed legislation which may relate to real estate valuation issues.

Government agencies outside ENRD, and sometimes from outside the Department, request the Appraisal Unit's services because of its widely recognized expertise in the technical aspects of valuation. The Department's Civil Division Torts Branch has requested, and received, support assistance from the Appraisal Unit in matters relating to the valuation of contaminated properties. The Unit has also provided consulting services to the Civil Division regarding the methodologies available to estimate the market value of the Nixon Papers and the location of potential contractors with such expertise. The Appraisal Unit has also provided consulting and training services in non-condemnation matters to many of the Department's client agencies, including the Bureau of Land Management, the National Park Service, the United States Fish and Wildlife Service, and the United States Forest Service.

Why should AUSAs use Appraisal Unit support services?

Not only does Section 5-15-960 of the United States Attorney's Manual recommend using the Appraisal Unit, but using these unique professional services can aid counsel in building the strongest possible cases while reducing the time personally devoted to preparation. This can be a particularly critical advantage, especially when the subject of a case is highly technical in nature, and the financial consequences of the case are extremely important.

One of the best ways to convince government counsel to take advantage of the support services offered by the Appraisal Unit is to cite some examples in which the services of the Unit have contributed significantly to the successful outcomes of cases.

In one case, an AUSA obtained a copy of a property owner's appraisal report in the course of discovery and submitted it to the Appraisal Unit for its review before the owner's appraiser was deposed. The Appraisal Unit found the appraiser had adopted an inappropriate, uneconomic "highest and best" use for the appraised property and

estimated its value on that use. (See Kollins article on PIV in this issue) Because of its national importance to the government's acquisition program and the controversial nature of the methodology, the appraisal unit immediately notified the AUSA of the situation. The AUSA had the owner's appraiser confirm the use of the methodology during his deposition. The AUSA was then able to prepare his defense against the owner's theory of valuation. The trier of fact ultimately rejected the owner's theory of value and entered a verdict in the amount recommended in the government's testimony.

Another AUSA was dissatisfied with an appraiser retained by the client agency, and the agency was reluctant to retain another appraiser. After the Appraisal Unit reviewed the appraiser's report and submitted a copy of its review to the client agency, the agency agreed to consider retaining another appraiser. The AUSA, the client agency, and a reviewer from the Appraisal Unit participated in interviewing potential appraisers. The three parties agreed to a suitable appraiser for the complex appraisal assignment, and the AUSA obtained a settlement of the case favorable to the government.

In another case, the LAS received an initial condemnation package, containing both the government's and the property owner's appraisal. The Appraisal Unit found the government's appraisal to be technically and logically flawed, but found the owner's appraisal to be reasonable and well-documented. The AUSA quickly negotiated a settlement, thereby avoiding an unnecessary and costly trial.

A public hospital sold to a private "for-profit" organization triggered the requirement that the government be compensated for grant funds previously awarded to the hospital for building improvements, based on the value of the improvements. The Appraisal Unit was asked to review both the government's and the hospital's appraisals. The Appraisal Unit reviewer, at the request of government counsel, attended the

depositions of both the government's and the hospital's appraisers. Based on the technical reviews and the observations made at the depositions, the Unit's reviewer helped counsel in the evaluation of the government's case. As stated by the agency:

We recently agreed to a significant settlement of our claim just short of trial. . . . In short, we could not have concluded this case as favorably as we did without [the Appraisal Unit's] assistance.

Conclusion

The Appraisal Unit is unique in its function to provide support to AUSAs and Department trial attorneys in the preparation of their cases that involve real estate valuation matters. Contact a member of the Appraisal Unit as follows:

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Fiscal Year	No. of Reviews	Appraised Values	Just Compensation	Mean Just Comp.	Median Just Comp.
1996	311	\$3,120,509,010	\$2,873,329,146	\$9,064,130	\$130,300
1997	351	\$1,318,480,693	\$837,607,037	\$2,372,824	\$42,500
1998	370	\$1,557,503,778	\$1,388,934,706	\$3,753,878	\$29,463
Total	1,032	\$6,106,493,481	\$5,099,870,889	\$4,903,722	\$50,150
Mean	344	\$5,387,675	\$4,903,722		
Median	351	\$127,000	\$50,150		

Figure 1

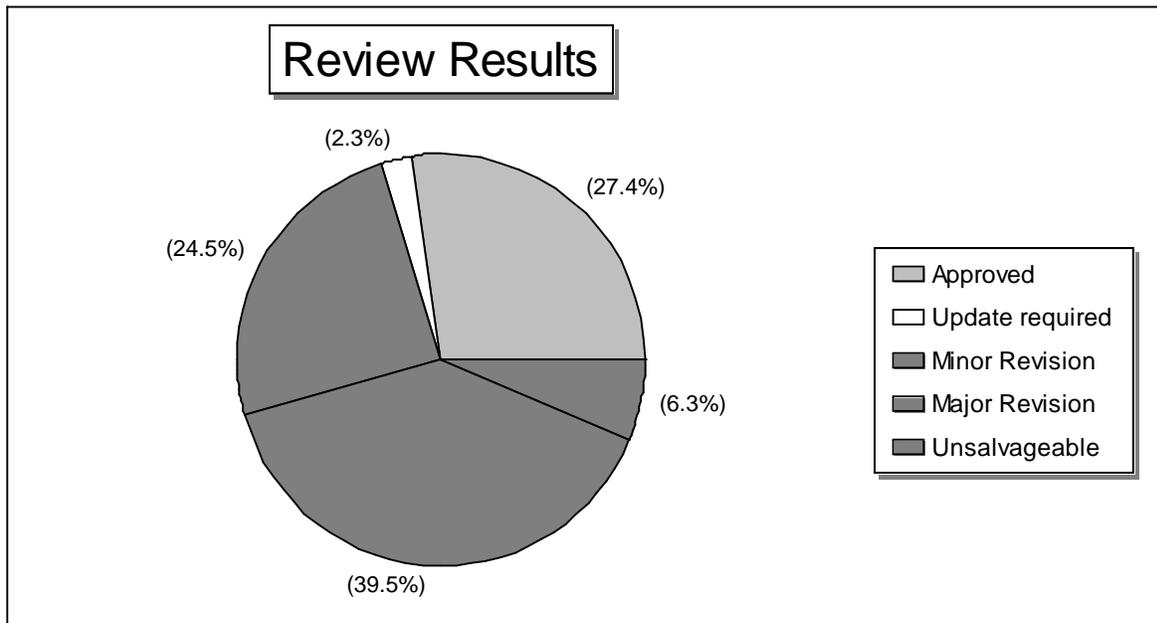


Figure 2

Based on your survey responses, we are beginning a series on trial advocacy in the next issue of the United States Attorneys' Bulletin. The first part of the series is devoted to cross-examination and impeachment. In this issue you will also get to meet Mary H. Murguia, the new director of the Executive Office for United States Attorneys. Ms. Murguia enjoyed a distinguished career as a state prosecutor in Kansas and as an Assistant United States Attorney for the District of Arizona before becoming Principal Deputy Director of EOUSA. In September, 1999, she assumed her current position as Director of EOUSA. In the featured interview she shares her view of the role of EOUSA, and highlights some of the significant issues currently facing us.