One Hundred Years of the Environment and Natural Resources Division

by Richard J. Lazarus

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On November 16, 2009, hundreds of current and former attorneys, staff members, and friends gathered in Washington, D.C., to celebrate the 100th Anniversary of the Environment and Natural Resources Division (ENRD or the Division) at the U.S. Department of Justice (DOJ). As an alumnus of ENRD, I was tremendously honored to address the group. I began working for the Division on October 9, 1979. It was my first job out of law school, and I could not have been more excited. Nor could I have been more amazed that I had, what I considered, my dream job. And so it was equally marvelous to return to ENRD and share with them the 100-year history of the Division.

The ENRD can justly boast of an enormously rich history. The history of the Division tells no less than the history of this nation and its aspirations. The Division and its lawyers were at the forefront of the two most significant transformations of the country's laws. From new laws responding to the closing of the western frontier at the turn of the 20th century, to those arising from the emergence and evolution of modern environmental law during the second half of the same century, the Division was at the center of these changes. Indeed, the changing name of the division itself hints at the story. From the Public Lands Division in 1909, to the Lands Division in 1933, then to the Land and Natural Resources Division in 1965, and finally to the ENRD in 1990, the Division's story is one of tremendous achievement.

But any profound legal change inevitably generates tremendous litigation. There are those whose expectations are dramatically upset by changes in legal rules that they long assumed static. And there are those who are unhappy because they wanted a very different kind and pace of change. During the past 100 years, ENRD lawyers served as stewards of these extraordinary legal transformations. Division lawyers stood up in thousands of cases in the nation's courts on behalf of U.S. client agencies responsible for implementing many series of new, ambitious laws. Division lawyers have defended these same laws against legal challenges. Working with their clients, they have enforced the terms of these laws. And working together, the ENRD and its clients have literally changed the nation's physical and legal landscape.

Like any good story, the ENRD's story must start at the beginning.

I. The Beginning: 1909-1929

The year is 1909, and a hit song of that year, "Take Me Out to the Ball Game," had made its debut in 1908. Of course, it was the last World Series won by the Chicago Cubs.[1] The Chief Justice of the U.S. Supreme Court was Melville Fuller.[2] The president of the United States was William Howard Taft. A large man just over six feet tall,[3] Taft weighed over 300 pounds.[4] The White House had to build a special bathtub large enough to fit him.[5] Taft was also reportedly a polite man. He once gave up his seat on the D.C. trolley, and two ladies sat down in his place.[6]

On November 16, 1909, Attorney General George Wickersham signed a two-page order creating the Public Lands Division.[7] The Division was headed by Ernest Knaebel, who was joined by five attorneys and three stenographers.[8] Knaebel's position was upgraded to Assistant Attorney General (AAG) in 1911, and the U.S. Senate con-

Editors' Note: This Comment reproduces the author's keynote address, delivered on November 16, 2009, on the occasion of the 100th anniversary celebration of the Environment and Natural Resources Division of the U.S. Department of Justice.

1. MLB.com, World Series Overview, http://mlb.mlb.com/mlb/history/postseason/mlb_ws.jsp?feature=recaps_index (last visited Sept. 29, 2011).
2. Supreme Court of the United States, Members of the Supreme Court of the United States, http://www.supremecourt.gov/about/members.aspx (last visited Sept. 29, 2011).
3. Michael Benson, William H. Taft 7 (2005).
4. Henry F. Pringle, The Life and Times of William Howard Taft, vol. I, 287 (1964).
5. Benson, *supra* note 3, at 80.
6. Francis McHale, President and Chief Justice: The Life and Public Services of William Howard Taft 178 (1931).
7. Circular No. 114, Order of the Attorney General for Division of Business, Nov. 16, 1909.
8. *Id.*

firmed him 11 days after the President nominated him.[9] That must be why they called it "the good old days."

Of course, there were some unsteady times during those early days. Attorney General Wickersham pointed out that "on two or three occasions great inconvenience has arisen due to the fact that for a period of two or three hours not a single Assistant Attorney General has been in the Department of Justice." He admonished that "this should not occur," and directed each AAG to ensure at least one of them is always on duty during business hours.[10]

The Attorney General's Annual Report in 1910 testifies to the compelling reasons why the DOJ needed the new Division. The Attorney General created the Division "for the purpose of properly attending to the enormous and increasing volumes of business relating to the public lands of the United States and of Indian affairs."[11] To be sure, the nation was undergoing a dramatic transformation at the turn of the 20th century.

During the 19th century, the federal government's general land policy was to turn over the nation's public lands to private hands as quickly as possible to promote the settling of the nation from coast to coast. Through the Homestead Act,[12] the Desert Land Act,[13] the Timber Culture Acts,[14] the Timber & Stone Act,[15] the Veterans Acts,[16] the Morrill Act,[17] the Swamp Land Act,[18] and the General Mining Law,[19] among others, the government quickly disposed of massive amounts of public lands. Moreover, the General Allotment Act of 1887[20] led to reducing the amount of land owned by Native American tribes from 138 million acres to only 48 million acres 50 years later.[21]

The federal government's policy worked. In short order, the nation settled one coast to another. The government gave away millions of acres of land for little or no money. The railroads took title to nearly 100 million acres, and states received between 35 and 40 million acres to be used by the railroads.[22] In turn, the railroads quickly sold the land to private parties. For example, the Atchison, Topeka & Santa Fe Railroad advertised land for sale with "good soil for wheat, corn and fruit."[23] Additionally, the Burlington & Missouri River Railroad Company advertised land in Iowa and Nebraska for sale on 10 years' credit and 6% interest.[24] But there was no plan to return public lands to federal ownership.

By the turn of the 20th century, however, the federal government embraced an abrupt change in its land policy. It drafted new rules to retain federal ownership for the benefit of the entire nation, and to create federal public land laws to manage the lands' natural resources and to eliminate their waste. To these ends, Yellowstone National Park became the first national park in the world in 1872.[25] It was shortly followed by Sequoia and Yosemite National Parks in 1890,[26] Mt. Rainier National Park in 1899,[27] and Mesa Verde National Park in 1906.[28] Gifford Pinchot became the first chief of the newly created U.S. Forest Service in 1905.[29] And between 1901 and 1909, President Theodore Roosevelt placed 95 million acres of land under federal protection, while declaring that forest reserves and waters were "vital concerns" to the nation.[30]

All the while, the Division's duty was to effectuate these transformations through litigation in federal courts. At the end of the Division's first fiscal year in 1910, the Division had 2,459 civil and 466 criminal cases related to the administration of public lands. In the same period, the Division brought 480 civil cases and recovered nearly 400,000 acres of land and approximately $130,000 in damages.[31]

The reasons for the Division's creation and its emerging role in the nation's history is best captured in events leading up to one of the Division's most famous early cases, *United States v. Midwest Oil Company*.[32] The legal issue in the case arose two months before the Division's creation. The U.S. Geological Service reported to the Secretary of the Interior that private companies acting under the General Mining Law were claiming petroleum deposits on public lands in California and Wyoming at a rate that would result in the federal government losing all ownership in just a few

9. U.S. DOJ, Historical Timeline of Key Organization Events, http://www.justice.gov/enrd/EO_Events.php (last visited Sept. 30, 2011).
10. Memorandum from George Wickersham, Attorney General, to Assistant Attorneys General, Apr. 1, 1912.
11. 1910 Att'y Gen. Ann. Rep. 26.
12. Ch. 75, 12 Stat. 392 (1862).
13. Ch. 107, 19 Stat. 377 (1877).
14. Ch. 277, 17 Stat. 605 (1873).
15. Ch. 151, 20 Stat. 89 (1878).
16. *See* George Cameron Coggins et al., Federal Public Land and Resources Law 115 (6th ed. 2007) (explaining the United States conveyed approximately 70 million acres of land to veterans as compensation for their service).
17. Ch. 30, 12 Stat. 503 (1862).
18. Ch. 84, 9 Stat. 519 (1850).
19. Ch. 152, 17 Stat. 91 (1872).
20. Ch. 119, 24 Stat. 388 (1887).
21. Nell Jessup Newton, ed., Cohen's Handbook of Federal Indian Law §1.04 (2005).
22. Coggins et al., *supra* note 16, at 15.
23. Norman E. Saul, *The Migration of the Russian-Germans to Kansas*, 40 Kan. Hist. Q. 38 (1974), *available at* http://www.kshs.org/p/kansas-historical-quarterly-the-migration-of-the-russian-germans-to-kansas/13242.
24. Library of Congress, An American Time Capsule: Three Centuries of Broadsides & Other Printed Ephemera, http://memory.loc.gov/cgi-bin/query/h?ammem/rbpebib:@field(NUMBER+@band(rbpe+13401300)) (last visited Oct. 1, 2011).
25. U.S. National Park Service, Yellowstone National Park, History & Culture, http://www.nps.gov/yell/historyculture/index.htm (last visited Oct. 1, 2011).
26. Richard West Sellars, *A Very Large Array: Early Federal Historic Preservation*, 47 Nat. Resources J. 267, 287 (2007).
27. *Id.* at 280.
28. *Id.* at 298.
29. Public Lands & National Treasures: The First 100 Years of the Environment & Natural Resources Division 6 (2009), *available at* http://www.justice.gov/enrd/ENRD_Assets/public_lands_and_national_treasures.pdf (last visited Oct. 1, 2011).
30. *Id.*
31. 1910 Att'y Gen. Ann. Rep. 27.
32. 236 U.S. 459 (1915).

months.[33] The U.S. Navy would have to buy, from private companies, petroleum that now sat on public lands. President Taft acted immediately; he issued an Executive Order withdrawing from public lands all those lands with petroleum deposits from entry or patent.[34]

Of course, private industry was furious. They had a point. There was no express statutory authority for the President's action. Existing federal statutes, all from the 19th century, clearly contemplated private entry and patent. So, the President acted to preserve the status quo while the U.S. Congress deliberated over new legislation. As such, the order's purpose was "in aid of proposed legislation."[35] It was now the Division's challenge to defend the President's action. And they won.

The Division's first AAG, Knaebel, argued the first of two oral arguments before the Supreme Court.[36] The second time, Knaebel was joined by Solicitor General J.W. Davis.[37] In the end, the Court endorsed the view that the President possesses inherent authority to address such an exigency.[38] The case remains today, almost 100 years later, one of the Court's most important opinions on inherent presidential power in the absence of express congressional authorization.

During the remainder of the decade, the Division was headed by three different AAGs: Francis J. Kearful (1917-1919); Frank K. Nebeker (1919-1920); and Leslie C. Garnett (1920-1921).[39] The Division's docket reflected the times. It was filled with suits against railroads for fraudulent use of mineral patents, disputes over Native American lands, and efforts to rid the Department and the Division of Communists and Anarchists.

The 1920s saw the Division headed by three AAGs: William D. Riter (1921-1924), Ira K. Wells (1924-25), and Bertice Parmenter (1925-29).[40] In 1920, the states ratified the 19th Amendment granting women the right to vote.[41] The nation was infatuated with "The Charleston,"[42] and no one could resist Lee Morse in *Yes Sir, That's My Baby*.[43] The Chief Justice in 1921 was Edward White, but not for long. Chief Justice White was appointed by President Taft. It was a controversial appointment, as Chief Justice White, in poor health and 65 years old, was a Democrat, and Taft a Republican.[44] Coincidentally, or perhaps not, Chief Justice White remained on the Court for only a few more years, and President Taft fortuitously had the opportunity to fulfill his lifelong ambition, serving as the Chief Justice of the Supreme Court.[45] If, as it might appear, President Taft appointed Chief Justice White to achieve this result, his tactic worked. Chief Justice White died in 1921, and President Taft, the man who elevated White to Chief Justice, was appointed as the 10th Chief Justice of the Supreme Court.[46]

The work of the Division during the 1920s again reflected the changing times. Congress passed the Federal Water Power Act[47] and the Mineral Lands Leasing Act[48] in 1920. Both of these laws made clear that the federal government would assert permanent and dominant authority over public lands. Meanwhile, the automobile began to sweep the nation. A partially paved Route 66 traversed the nation in 1929.[49] By the end of the decade, more than 26 million cars were on the road.[50] As a result, the Division started its work to acquire the land essential to building the nation's highways. Ultimately, the Division's efforts were integral to facilitating the construction of 41,000 miles of roads across the nation, which was authorized under the Federal-Aid Highway Act of 1956.[51]

With the federal government's assumption of authority over public lands came the temptation for abuse. The Teapot Dome Scandal rocked the nation's capital, as Secretary of the Interior Albert Fall was convicted of accepting bribes from oil companies for leases of naval petroleum reserves.[52] The Division brought a series of cases against oil companies for fraudulently obtained leases.[53] The Division itself directly engaged in investigating corruption within the executive branch. AAG Seth Richardson led investigations of the Secretary of Interior's and other officials' malfeasance.[54]

The Division's probes were not limited to the U.S. Department of the Interior (DOI). Richardson turned his attention inward, and what he found walking the hallways at the Division was startling: no one was there. He accordingly issued the following missive to Division attorneys:

> I have experienced considerable trouble at times in getting contact with various attorneys in the above divisions owing to inability to locate such attorneys at the particular moment. Each attorney is supposed to be in his particular office from 9:00 a.m. until 4:30 p.m., excepting the neces-

33. *Id.* at 466-67.
34. *Id.*
35. *Id.*
36. *Id.* at 459.
37. *Id.*
38. *See id.* at 471-72.
39. U.S. DOJ, ENRD AAGs: Then and Now, http://www.justice.gov/enrd/2987.htm (last visited Sept. 20, 2011).
40. *Id.*
41. U.S. Const. amend. XIX, passed by Congress June 4, 1919, and ratified by the states Aug. 18, 1920.
42. *On With the Charleston!,* Literary Dig., Sept. 19, 1925, *reprinted in* Jazz in Print (1856-1929): An Anthology of Selected Early Readings in Jazz History 423 (Karl Koenig ed., 2002).
43. Lee Morse, Echoes of a Songbird (Jasmine Music 2005).
44. McHale, *supra* note 6, at 249.
45. Henry F. Pringle, The Life and Times of William Howard Taft 954 (1964).
46. McHale, *supra* note 6, at 296.
47. Pub. L. No. 66-280, 41 Stat. 1063 (1920).
48. Pub. L. No. 66-146, 41 Stat. 437 (1920).
49. *See* Russell A. Olsen, The Complete Route 66: Lost and Found 7 (2008).
50. Stephen B. Goddard, *The Road to Now*, 553 Annals Am. Acad. Pol. & Soc. Sci. 30, 37 (1997).
51. Federal Aid-Highway Act of 1956, Pub. L. No. 84-627, §108(l), 70 Stat. 374 (1956).
52. Earl F. Woodward, *Hon. Albert B. Fall of New Mexico: The Frontier's Fallen Star of Teapot Dome*, 23 Mag. W. Hist. 14, 23 (1973).
53. Public Lands & National Treasures, *supra* note 29, at 17.
54. U.S. DOJ, Seth W. Richardson, http://www.justice.gov/enrd/4785.htm (last visited Sept. 26, 2011).

sary luncheon period. . . . I would appreciate if the foregoing request is carefully complied with hereafter.[55]

II. From Disposing of Public Lands to Recovering Public Lands: 1930-1949

By the 1930s, the nation was in the midst of The Great Depression. The song of the times was, not surprisingly, a strong testimony to the decade: "Brother Can You Spare a Dime?" by Jay Gorney and E.Y. Harburg.[56] More fundamental, the work of the Division equally reflected the times. In 1933, the Division had 57 employees.[57] But as President Franklin Delano Roosevelt launched his New Deal across the nation, the work of the Division exploded. By 1939, the Division housed 500 employees, 225 of which worked in the Title field offices. There were at least five women attorneys in the Title section.[58] Moreover, the Division became the largest litigation division in the DOJ at the close of the 1930s.[59]

The nation, which had spent much of the 19th century disposing of public lands, was now, assisted by the Division, in the business of buying lands back.[60] The Division accordingly changed its name from the Public Lands Division to the Lands Division in 1933.[61] By 1937, the Division was assisting the nation to acquire eight million acres of land per year, for government buildings, post offices, and veterans' hospitals. In Washington, D.C., the Division assisted in land acquisition for the DOJ main building still located today at Ninth Street and Pennsylvania Avenue, the Supreme Court, and Rock Creek Park. The Division also aided in acquiring land for new national parks, dams, and massive reclamation and irrigation projects.[62]

The Division also helped to acquire land needed to redress wasteful soil practices. The Great Dustbowl of the early 1930s literally brought to the nation's capital evidence of destruction of the nation's soil as dust reached the District itself, impairing visibility.[63] Congress responded with the Taylor Grazing Act of 1934.[64] And the Division was charged with purchasing for conservation and salvage purposes western agricultural lands to be turned back to good use for impoverished farmers.[65]

But most significant was the role the Division played in preparing the nation for war. In the immediate aftermath of Pearl Harbor, the Division oversaw the acquisition of 20 million acres of land, the size of Connecticut, Delaware, Massachusetts, Rhode Island, and most of New Jersey combined.[66] The Division acquired land for airports, naval bases, and bombing fields. It handled more than 18,000 cases, and the average time to acquire land for possession was just over four days.[67] Indeed, the Division oversaw the purchase of the Stevens Hotel, originally owned by the family of Supreme Court Justice John Paul Stevens, in Chicago, the largest hotel in the world with 3,000 rooms; the transaction was completed in just 24 hours, and the U.S. Army used the hotel for barracks and classrooms.[68] The music of the times captured the patriotic fervor: the song of 1943 was *Praise the Lord, Pass the Ammunition* by Frank Loesser.[69]

For much of this period of extraordinary activity, the AAG of the Division was Norman Littell. Littell was, by many, considered a crusader for good government. He investigated Standard Oil regarding a 1942 contract for California Elk Hills Oil Reserve. Littell condemned the sale as worse than the Teapot Dome scandal.[70] But Littell was also prone to making controversial claims of corruption. The Attorney General, Francis Biddle, requested his resignation. Littell refused to resign and responded with a "12,000-word blast" against the Attorney General.[71] Littell accused the AG of "devious ways" and "intimate connections with lobbyist Tommy Corcoran."[72] President Roosevelt ultimately fired Littell in 1944.[73]

Apparently, the enormous tension during this period spilled over to the attorneys in the Division themselves. A 1943 memo to all attorneys in the DOJ building was simply devastating. It requested that attorneys not take silverware from the cafeteria, and that the practice of taking "double desserts" be discontinued.[74]

While land acquisition was at its zenith in the 1940s, the rest of the Division was no less active. The Division's work relating to Native American tribes had always been important. It was part of the original justification for the Division's creation in 1909. At that time, over one-half of the Division's cases involved Native Americans.[75] And the Supreme Court had just decided *Winters v. United States*,[76] which established Indian reserved water rights. The rela-

55. Memorandum from Seth Richardson, Assistant Attorney General, to All Attorneys in Public Lands, Title and Condemnation Divisions (May 20, 1930) (on file with author).
56. Howard Husock, *Popular Song*, 12 Wilson Q. 50, 65 (1988).
57. Public Lands & National Treasures, *supra* note 29, at 24.
58. *Id.* at 25.
59. *Id.* at 29.
60. *See* 1939-1940 Att'y Gen. Ann. Rep. 104 (explaining a "reversal of national policy from that of settling and disposing of the public domain as rapidly as possible during the first 100 years or more of our history, to a policy of acquiring for salvage and conservation lands depleted by years of prodigal waste and soil exploitation").
61. Att'y Gen. Order No. 2507, Dec. 20, 1933.
62. *Id.* at 25.
63. Michael J. Goc, *The Wisconsin Dust Bowl*, 73 Wis. Mag. Hist. 163, 175 (1990).
64. 73 Pub. L. No. 482, 48 Stat. 1269 (1934).
65. Public Lands & National Treasures, *supra* note 29, at 25.
66. *Id.* at 27.
67. *Id.* at 28-29.
68. *Id.* at 29.
69. National Museum of American History, Sheet Music, http://americanhistory.si.edu/collections/object.cfm?key=35&objkey=81 (last visited Sept. 26, 2011).
70. Memorandum from Norman Littell, Assistant Attorney General, to U.S. Senate War Investigating Committee (Apr. 27, 1944).
71. *Judiciary: This Is Inexcusable*, Time, Dec. 11, 1944, *available at* http://www.time.com/time/magazine/article/0,9171,883864-1,00.html.
72. *Id.*
73. Public Lands & National Treasures, *supra* note 29, at 28.
74. Memorandum to All Employees in the Department of Justice Building (July 30, 1943).
75. Public Lands & National Treasures, *supra* note 29, at 14.
76. 207 U.S. 564 (1908).

tionship between the Division and the tribes had, from the outset, been complex and delicate. The Division litigates on behalf of federal agencies when protecting the rights and resources of federally recognized tribes and their members. But the Division also defends against claims brought by tribes against the United States.

During the 1930s and 1940s, however, work related to Native American tribes grew even more complex. In 1934, Congress passed the Indian Reorganization Act,[77] which marked a major shift in federal policy away from the assimilation policy dominant since the 1887 General Allotment Act. Soon, the Division was handling over 100 cases brought by tribes against the United States seeking over $3 billion in damages based on alleged federal government violations of treaty obligations.[78]

But not all of the suits were brought by tribes against the United States. Section Five of the Indian Reorganization Act authorized the Secretary of the Interior to acquire lands in trust *for* the tribes.[79] The amount of new duties related to Native American tribes prompted AAG McFarland to ask Felix Cohen in the DOI to prepare a study of Native American law. Cohen became the principal architect of the Indian Reorganization Act and Indian New Deal legislation. Cohen's work led to the publication of the first *Handbook of Federal Indian Law* in 1941, still celebrated today.[80]

In 1946, Congress passed the Indian Claims Commission Act[81] to provide a forum for consideration of Native American claims against the United States for money damages. Within two years of its creation, there were claims for a total of $5 billion pending in the Commission. Within a decade, 400 claims were filed, prompting the creation of the Indian Claims Section within the Division in 1953.[82]

During this time, the AAG was David Bazelon (1946-1947).[83] Of course, veteran environmental lawyers remember Judge Bazelon as one of the most famous environmental law judges of the 20th century. He is renowned for his opinion in *Environmental Defense Fund v. Ruckelshaus*.[84]

III. The Dawn of the Environmental Era: 1950-1969

If the 1930s and 1940s was a boom time for the Division, the Division went bust in the 1950s, at least in terms of the number of attorneys working in the Division. Under AAG Perry Morton (1953-1961), the Division underwent a major reorganization.[85] The Division began with about 500 attorneys and staff members. By 1955, only 209 people worked in the Division. And by 1959, fewer than 100 attorneys worked in the Division.[86]

During the 1950s, however, the environmental era for the Division was dawning. The economic boom of the New Deal and the aftermath of World War II brought new problems. In 1948, a thermal inversion blanketed Donora, Pennsylvania. Twenty people died, and thousands more were injured in the span of just 12 hours.[87] In that same year, Congress passed the first Federal Water Pollution Control Act (FWPCA).[88] Los Angeles became synonymous with daily smog alerts.[89] And President Dwight D. Eisenhower signed the first federal air pollution control legislation in 1955.[90] None of these new air and water pollution control laws gave Division lawyers the tools they needed to truly address rising pollution problems facing the nation.

As the Division waited for Congress to act, lawyers developed innovative theories to address rising industrial pollution activities. The Division reached back to a statute passed in 1899, the Rivers and Harbors Act.[91] In *United States v. Republic Steel Corporation*, attorneys sought to persuade the Supreme Court that a statute designed to safeguard navigability could be used to prevent modern pollution.[92] It was not an easy argument to make: there was a forceful competing claim that more specific statutory authority was needed. Yet, in a 5-4 opinion written by Justice William Douglas, the Division prevailed.

By the time the 1960s took hold, the nation had a new, young President and the Division had a new, young AAG. The new AAG was Ramsey Clark (1961-1965).[93] Clark's father was Tom Clark, the Supreme Court Justice. The younger Clark was only 33 years old when he assumed his position at the Division.[94] Of course, the Attorney General at the time, Robert Kennedy, was himself only 35 years old.[95] As AAG, Clark presided over a series of important, wide-ranging initiatives in the Division. He invigorated pollution control enforcement as the Division brought its first case under the FWPCA against St. Joseph, Missouri, for pollution of the Missouri River.[96] Clark facilitated a settlement with California tribes, awarding $24 million for 64 million acres. He also spearheaded path-breaking changes to the interstate apportionment of water in the

77. 73 Pub. L. No. 383, 48 Stat. 984 (1934).
78. Public Lands & National Treasures, *supra* note 29, at 30.
79. Indian Reorganization Act §5, Pub. L. No. 73-383, 48 Stat. 985 (1934), *codified at* 25 U.S.C. §465 (2006).
80. *Id.*
81. 79 Pub. L. No. 726, 60 Stat. 1049 (1946).
82. Public Lands & National Treasures, *supra* note 29, at 31.
83. ENRD AAGs, *supra* note 39.
84. 439 F.2d 584, 1 ELR 20059 (D.C. Cir. 1971).
85. U.S. DOJ, Perry W. Morton, http://www.justice.gov/enrd/4775.htm (last visited Sept. 20, 2011).
86. Public Lands & National Treasures, *supra* note 29, at 34.
87. Lynn Page Snyder, "The Death Dealing Smog Over Donora, Pennsylvania": *Industrial Air Pollution, Public Health Policy, and the Politics of Expertise*, 1948-1949, 18 Envtl. Hist. R. 117, 117-18 (1994).
88. Pub. L. No. 80-845, 62 Stat. 1155 (1948).
89. *See, e.g.*, *Third Smog Alert Seen for Today*, L.A. Times, Sept. 20, 1958, at 1; *Weeping L.A. Gets Second Smog Alert in 2 Days*, L.A. Times, Sept. 15, 1955, at 1; *County Gets First Triple Smog Alert*, L.A. Times, Aug. 24, 1956, at 1.
90. An Act to Provide Research and Technical Assistance Relating to Air Pollution Control, Pub. L. No. 84-159, 69 Stat. 322 (1955).
91. Ch. 425, 30 Stat. 1121 (1899).
92. United States v. Republic Steel Corp., 362 U.S. 482 (1960).
93. ENRD AAGs, *supra* note 39.
94. U.S. DOJ, Ramsey Clark, http://www.justice.gov/enrd/4774.htm (last visited Sept. 10, 2011).
95. Arthur M. Schlesinger Jr., Robert Kennedy and His Times 236 (1978).
96. Public Lands & National Treasures, *supra* note 29, at 40.

western states. Finally, under Clark's leadership, the Division played an important role in desegregating the south.[97]

In 1967, Clark became the Attorney General for the United States.[98] He is the Division's only AAG that has also served as the Attorney General. The new AAG was Edwin Weisl (1965-1967).[99] Weisl worked closely with Congress to fashion new environmental protection laws.[100] Weisl also renamed the Division from the Land Division to the Land and Natural Resources Division, a name which reflected the new responsibilities that Division lawyers began to take on.[101]

In 1967, the legendary Louis Claiborne, brother of the famous clothing designer Liz Claiborne and cousin of the celebrated chef and food critic Craig Claiborne, joined the Office of the Solicitor General, which commenced a 20-year relationship with the Division in cases before the Supreme Court.[102] Claiborne had been Judge Skelly Wright's law clerk.[103] He also clearly always felt a special responsibility for representing the interests of Native American tribes. And Division lawyers reveled in his special eloquence and wit. Claiborne wrote memoranda and briefs in styles never seen before or since. For example, in one memorandum to the Solicitor General, Claiborne recommended no certiorari in a case dealing with Native American tribes and wrote:

> They are truly brave those who would defy the wrath of the Great Spirit by pursuing the unworthy argument that we need not account for the mismanagement of funds placed in our care by Congress for the benefit of Indian children, even when specific statutory mandates are alleged to have been violated.[104]

But it was, of course, the publication of Rachel Carson's *Silent Spring* five years earlier in 1965 that forecast the tumultuous events of the 1960s and the explosive emergence of federal environmental law in the 1970s.[105] President John F. Kennedy had captured the imagination and aspirations of the nation. There was nothing the nation could not accomplish if its people committed resources and ingenuity to it, the President extolled as he promised to put a man on the moon by the end of the decade.[106] Carson, however, captured our fears: of deadly, invisible poisons; of contaminated food supplies and a polluted natural environment; and of private industry that could not be trusted.

At the turn of the 20th century, our nation's spatial frontier, once seemingly boundless, came to an abrupt end. In the 1960s, it seemed as though time itself was bounded. The atomic bomb had changed our perception of space and time. A technology seemingly capable of ending life on earth, the doomsday clock, and all types of bombs, from the population bomb to toxic time bombs, proliferated our daily discussions. At this time, the Division received a new leader: Clyde Martz (1967-1969), one of the nation's leading natural resources experts, former professor at the University of Colorado, and author of the first casebook on natural resources law.[107] The nation also received a new musical, celebrating *Hair*, but also warning of the dangers of pollution through its catchy ballad, "*Air*."[108]

By the end of the decade, ours was a nation reeling from tragedy and division. Multiple assassinations, riots, and antiwar demonstrations were brought for the first time live into people's living rooms through satellite TV. The nation watched in real time the terrors of the Santa Barbara oil spill and viewed in shock the Cuyahoga River on fire.[109] But, ironically, it was the nation's fulfillment of JFK's great promise that, as much as anything else, unsettled the nation in a wholly unanticipated way. The young President promised to put a man on the moon by the end of the decade.[110] He was no longer with us when his promise became a reality. But when the first pictures came back from the Apollo moon landing showing earth from space, the public reaction was opposite of what had been anticipated. The earth looked small and vulnerable. The trip to the moon had not demonstrated our reach so much as our limits. As captured by C.P. Snow in an essay published immediately afterward:

> [T]he distances to any other system are so gigantic that it would take the entire history of mankind paleolithic to the present day to traverse . . . . So that the frontier is closed . . . . As a result of supreme technological skill and heroism, we are faced not with the infinite but with the immovable limits.[111]

The environmentalism of the late 1960s and early 1970s was not, however, just about fear. It was also about aspiration and idealism. The nation was torn apart by war, race, and profound sadness. Environmentalism offered possible hope, a consensus for a better future, and a way to bridge the generation gap.

IV. The Division and the Birth of Modern Environmental Law: 1970-2009

This environmentalism exploded in the 1970s. The year 1970, standing alone, was no less than an environmental revolution. On January 1, 1970, President Richard M.

97. Ramsey Clark, *supra* note 94.
98. *Id.*
99. ENRD AAGs, *supra* note 39.
100. U.S. DOJ, Edwin L. Weisl Jr., http://www.justice.gov/enrd/4773.htm (last visited Sept. 26, 2011).
101. Order No. 348-65, Redesignating the Lands Division as the Land and Natural Resources Division, Oct. 8, 1965.
102. Richard J. Lazarus, *Judging Environmental Law*, 18 Tulane Envtl. L.J. 201, 202-03 (2004); Irvin Molotsky, *Louis Claiborne, 72, Deputy Solicitor General*, N.Y. Times, Oct. 12, 1999, at B13.
103. Lazarus, *supra* note 102, at 203.
104. Memorandum from Louis Fenner Claiborne, Deputy Solicitor General, to Rex E. Lee, Solicitor General, Aug. 18, 1982.
105. Rachel Carson, Silent Spring (1st ed. 1962).
106. *See* 107 Cong. Rec. 8881 (May 25, 1961) (President Kennedy promising, in a Joint Session of Congress, to put a man on the moon before the end of the decade).
107. U.S. DOJ, Clyde O. Martz, http://www.justice.gov/enrd/4772.htm (last visited Sept. 15, 2011).
108. James Rado & Gerome Ragni, Hair (1967); *Air*, *on* Hair: The Original Soundtrack (RCA Records 1999).
109. Richard J. Lazarus, The Making of Environmental Law 59 (2006).
110. *See supra* note 106.
111. C.P. Snow, *The Moon Landing*, Look Mag. (Aug. 26, 1969).

Nixon signed into law the National Environmental Protection Act (NEPA),[112] the Magna Carta of environmental law. The first Earth Day was celebrated in April of that year.[113] On December 5, 1970, the U.S. Environmental Protection Agency (EPA) came into existence.[114] And on December 31, 1970, President Nixon signed the Clean Air Act (CAA),[115] instituting a tougher pollution control law by orders of magnitude.

The Division responded to these new challenges. The AAG was Shiro Kashiwa (1969-1972).[116] Kashiwa created the Pollution Control Section on October 1, 1970.[117] In 1971, the Attorney General transferred jurisdiction over environmental crimes from the Criminal Division to the Land and Natural Resources Division.[118] And the Division brought water pollution enforcement action after water pollution enforcement action in the early 1970s.[119]

But even more dramatically, rising environmentalism triggered an avalanche of new laws. Congress passed a series of ever more ambitious pollution control laws and corresponding natural resource conservation laws.[120] Marvin Gaye's song, "*The Ecology*," captured the mood well, as it observed "things ain't what they used to be" with "oil wasted on the oceans and our seas" and "fish full of mercury."[121]

And of course, it was the Division's responsibility to represent its client agencies in implementing these new laws, from defending lawsuits brought against the United States to enforcing the statutes against those in violation. This was a massive undertaking, given the reach and aspirations of the new laws.

The Division was led by a series of talented AAGs, as career personnel worked to meet this monumental challenge. Kent Frizzell (1972-1973) took over as AAG in 1972.[122] Litigation stemming from the development of the Alaskan pipeline was the major focus of his tenure.[123] But Frizzell is best known for the historic role he played in negotiations at Wounded Knee.[124]

Wallace Johnson (1973-1975) became AAG in 1973. He was greeted with a barrage of lawsuits brought against EPA from two sides: industry; and the environmental community. But he also oversaw the first major modern pollution control enforcement action against the Reserve Mining Company.[125] The company dumped 10.7 million tons of iron pellets, or 67,000 tons per day, into Lake Superior. The trial lasted 139 days, and 100 witnesses testified, producing over 18,000 pages of trial transcripts. Triumphantly, the suit brought the end to the use of Lake Superior as a dumping ground.[126]

Peter Taft (1975-1977) succeeded Johnson as AAG in 1975. Taft was none other than the grandson of President Taft. Under his leadership, the Division continued its rise to national prominence. It was engaged in a wide range of cases; from representing tribal claims against states violating treaty rights, to the defense of EPA from industry lawsuits under the CAA, the Division continued to lead the charge. Their threatened suit against Maine, for example, led to a $54-million recovery for the Native American tribes in the state.[127] Taft personally argued an early CAA case, *Union Electric Company v. Environmental Protection Agency*.[128] According to his notes, Justice Harry Blackmun gave Taft a score of 80 for his argument, a high score from the Justice.[129] And while mulling over the case, Chief Justice Warren Burger lamented in a letter to his colleagues that the problems presented in the case were a consequence of "letting a lot of little boys on Congressional staffs write legislation in noble prose that often takes little account of realities."[130]

But no one better expressed the transformation of the Division than AAG James Moorman (1977-1981). Moorman came to the Division, not directly from the government, not directly from a private law firm, nor from academia. Moorman was one from the first generation

112. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
113. Earth Day Network, Earth Day, http://www.earthday.org/earth-day-history-movement (last visited Sept. 15, 2011).
114. Reorganization Plan No. 3 of 1970, 3 C.F.R. §198 (1970), *reprinted in* 84 Stat. 2086 (1970).
115. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
116. U.S. DOJ, Shiro Kashiwa, http://www.justice.gov/enrd/4771.htm (last visited Sept. 15, 2011).
117. Public Lands & National Treasures, *supra* note 29, at 43.
118. *Id.*
119. Kashiwa, *supra* note 116.
120. Among the environmental and natural resources laws enacted during the 1970s are the following: NEPA, the CAA; the FWPCA Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816; the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) of 1972, 7 U.S.C. §§136-136y, ELR Stat. FIFRA §§2-35; the Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234; the Coastal Zone Management Act (CZMA) of 1972, 16 U.S.C. §§1451-1466, ELR Stat. CZMA §§302-319; the Marine Mammal Protection Act (MMPA) of 1972, 16 U.S.C. §§1361-1421h, ELR Stat. MMPA §§2-410; the Endangered Species Act (ESA) of 1973, 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18; the Safe Drinking Water Act (SDWA) of 1974, 42 U.S.C. §§300f-300j-26, ELR Stat. SDWA §§1401-1465; the Forest Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476; the Federal Coal Leasing Act Amendments of 1975, Pub. L. No. 94-377, 90 Stat. 1083 (1976); the Toxic Substances Control Act (TSCA) of 1976, 15 U.S.C. §§2601-2692, ELR Stat. TSCA §§2-412; the Resources Conservation and Recovery Act (RCRA) of 1976, 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011; the National Forest Management Act (NFMA) of 1976, 16 U.S.C. §§1600-1687, ELR Stat. NFMA §§2-16; the Federal Land Policy and Management Act (FLPMA) of 1976, 42 U.S.C. §§1701-1785, ELR Stat. FLPMA §§102-603; the CAA Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685; the Clean Water Act Amendments of 1977, Pub. L. No. 95-190, 91 Stat. 1393; the Surface Mining Control and Reclamation Act (SMCRA) of 1977, 30 U.S.C. §§1201-1328, ELR Stat. SMCRA §§101-908; and the Outer Continental Shelf Lands Act of 1978, Pub. L. No. 95-372, 92 Stat. 629.
121. Marvin Gaye, *Mercy Mercy Me (The Ecology)*, *on* What's Going On (Tamla Records 1971).
122. U.S. DOJ, Kent Frizzell, http://www.justice.gov/enrd/4770.htm (last visited Sept. 17, 2011).
123. Public Lands & National Treasures, *supra* note 29, at 44.
124. Kent Frizzell, *supra* note 122.
125. U.S. DOJ, Wallace Johnson, http://www.justice.gov/enrd/4769.htm (last visited Sept. 17, 2011).
126. *See* Reserve Mining Co. v. Envtl. Prot. Agency, 514 F.2d 492, 500, 502, 5 ELR 20596 (8th Cir. 1975).
127. U.S. DOJ, Peter Taft, http://www.justice.gov/enrd/4768.htm (last visited Sept. 17, 2011).
128. 427 U.S. 246, 6 ELR 20570 (1974).
129. Harry A. Blackmun, Oral Argument Notes, Union Electric Co. v. Envtl. Prot. Agency, No. 74-1542, *in* The Blackmun Papers, Box 224, Library of Congress Manuscript Reading Room, Washington, D.C.
130. Letter from Warren E. Burger, Chief Justice, to Thurgood Marshall, Justice, May 24, 1976, *in* The Brennan Papers, Box I:389, Library of Congress Manuscript Reading Room, Washington, D.C.

of public interest environmental lawyers.[131] He sued the government in the historic NEPA litigation, *Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm'n*.[132] He lent his support to the Sierra Club against the government in the no-less-historic case of *Sierra Club v. Morton*.[133] The people's environmental lawyer became the government's chief environmental lawyer.

Just as the new environmental laws changed the legal landscape, Moorman transformed the Division. He brought in a crop of bright, young, energetic public interest lawyers, including the first woman section chief, Lois Schiffer.[134] He created the Hazardous Waste Section, Wildlife Section, the Policy, Legislation, and Special Litigation Section, the Energy Conservation Section, and the Environmental Enforcement Section.[135]

He launched hazardous waste suits around the nation based on innovative legal theories, such as the federal common law of nuisance theory and the imminent and substantial endangerment theory.[136] These suits were ultimately designed to help prompt congressional action. Moorman was successful in that regard, as Congress passed two of the most significant environmental statutes of the decade, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[137] and the Alaska National Interest Lands Conservation Act (ANILCA).[138] Moorman also took a chance on a new lawyer fresh out of law school in October 1979, for which I, of course, am always grateful.

The 1980s brought very different times to the Division with a shift from President Jimmy Carter to President Ronald Reagan. The new President campaigned on a promise to cut back the role of the federal government. He promised to eliminate unnecessary regulation, take the government off the back of business, make environmental regulation more sensitive to costs, and show a greater respect for the role of the states in pollution control and natural resources management.[139] As always, the nation's music reflected the times. Gone were the prior Administration notions of moderation in consumption, turning down thermostats and wearing cardigan sweaters. A new celebration of laissez-faire economics and material wealth swept the nation and its culture. It is no surprise, then, that Madonna's "*Material Girl*" was widely popular in the 1980s.[140]

Such significant transformations in the nation's politics always create new challenges for the Division. The Division must simultaneously remain steadfast to laws formally in place, while also recognizing the legitimacy of new political appointees who bring a change in policy within the boundaries supplied by existing statutes and established frameworks. The Division was fortunately led by two especially thoughtful leaders through this transition. The first was Carol Dinkins (1981-1983), a newly minted partner from the law firm Vinson & Elkins.[141] Dinkins made some changes. She folded the Energy Section into the General Litigation Section and integrated the Hazardous Waste Section into the Environmental Enforcement Section.[142] She also pushed hard to restore Article III standing limitations in environmental litigation. Moreover, Dinkins earned the respect and loyalty of career personnel, many of whom were brought to the Division by Moorman. She largely built upon the transformative changes instituted during Moorman's tenure. She resisted efforts to turn the Division into an arm of political change. She recognized the propriety of changing policy, but insisted that client agencies always follow the correct pathways for its accomplishment. It was, to be sure, a time of great controversy and challenging clients, from Anne Gorsuch at EPA to James Watt at the DOI.[143] Secretary Watt once famously complained to Dinkins: "One of the things I dislike about my job is that I cannot fire my lawyer." Dinkins no less famously replied: "One of the things I dislike most is that I can't fire my client."[144]

Dinkins was succeeded by her deputy Henry "Hank" Habicht (1983-1987) in 1983. He was the youngest AAG ever: he was 30 years old when he was confirmed by the Senate.[145] Habicht oversaw a dramatic expansion in the Division. By the end of the 1984 fiscal year, the Division housed 391 employees.[146] During his tenure, Habicht more than doubled the number of civil and criminal enforcement actions. He also elevated the Environmental Crimes Unit to a full-fledged Section.[147]

Under Dinkins and Habicht combined, the Division celebrated extraordinary growth and accomplishment. The Division filed more than 1,000 civil environmental enforcement suits between 1981 and 1985, and obtained court-ordered cleanups in hazardous waste

131. U.S. DOJ, James W. Moorman, http://www.justice.gov/enrd/4767.htm (last visited Sept. 17, 2011).
132. Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1 ELR 20346 (D.C. Cir. 1971); *see also* A. Dan Tarlock, *The Story of Calvert Cliffs: A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, *in* Environmental Law Stories 77, 91 (Richard J. Lazarus & Oliver A. Houck eds., 2005).
133. 405 U.S. 727, 2 ELR 20192 (1972).
134. Dick Kirschten, *The Justice Department's Land Division Flies the Environmentalists' Banner*, 11 Nat'l J. 2068, 2071 (1979).
135. Public Lands & National Treasures, *supra* note 29, at 49-51.
136. *See* Bill Richards, *U.S. to Sue on Hazardous Waste Dumping*, Wash. Post, Feb. 3, 1979, at A2 (reporting the Land & Natural Resources Division's plan to institute a number of "unprecedented lawsuits" against companies responsible for dumping hazardous wastes); *see also, e.g.*, United States v. Solvents Recovery Serv., 496 F. Supp. 1127, 10 ELR 20796 (D. Conn. 1980); United States v. Waste Indus., 556 F. Supp. 1301, 13 ELR 20286 (E.D.N.C. 1982); United States v. Hooker Chem. & Plastics Corp., 540 F. Supp. 1067, 12 ELR 20701 (W.D.N.Y. 1982); United States v. Midwest Solvent Recovery, 484 F. Supp. 138, 10 ELR 20316 (N.D. Ind. 1980).
137. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.
138. Pub. L. No. 96-487, 94 Stat. 2371 (1980).
139. Richard J. Lazarus, *supra* note 109, at 99-100.
140. Madonna, *Material Girl, on* Like A Virgin (Sire Records 1985).
141. U.S. DOJ, Carol Dinkins, http://www.justice.gov/enrd/4766.htm (last visited Sept. 20, 2011).
142. *See* Public Lands & National Treasures, *supra* note 29, at 52-53.
143. *See* Richard J. Lazarus, *supra* note 109, at 101-02 (describing Anne Gorsuch's tenure at EPA and Jim Watt's tenure at the DOI).
144. Interview by the Environment and Natural Resources Division staff with Carol Dinkins (Mar. 17, 2009).
145. U.S. DOJ, F. Henry "Hank" Habicht II, http://www.justice.gov/enrd/4765.htm (last visited Sept. 20, 2011).
146. 1984 Att'y Gen. Ann. Rep. 161.
147. F. Henry "Hank" Habicht, *supra* note 145.

cases worth nearly $400 million.[148] Moreover, the number of attorneys in the Environmental Enforcement Section increased by severalfold. At its inception in 1980, the Environmental Enforcement Section housed only 15 attorneys and 15 support staff.[149] By the end of fiscal year 1986, the Section boasted 157 employees, 86 attorneys, and 71 support staff.[150]

The second half of the 1980s was also a challenging time for environmental law, the Division, and its client agencies. A growing distrust between the executive and legislative branches on environmental policy created a whipsaw effect. Congress enacted ever more demanding laws, but failed to supply client agencies with the resources necessary for their full implementation.[151] In the 1970s, environmental laws delegated much discretion to agencies. But the laws of the 1980s substituted prescriptions and deadlines for discretion.[152] The Division's challenge was to represent its clients as they sought to comply with these mandates.

The AAG at this time was Roger Marzulla (1988-1989). Like Moorman, Marzulla came from a public interest group.[153] But his group, the Mountain States Legal Foundation, was very different than the Sierra Club Legal Defense Fund. It was founded on the principle that the federal government is sometimes doing too much, in derogation of states' rights.[154] A champion of private property rights and concerned about government overreaching, Marzulla also oversaw aggressive enforcement of existing environmental laws.

Marzulla was succeeded by Richard Stewart (1989-1991), the Division's first environmental law professor, from Harvard Law School.[155] Today, one of the nation's leading environmental law academics, Stewart made official the Division's transformation when he changed its name to the Environment and Natural Resources Division in 1990.[156] Stewart is also celebrated for his innovative thinking about environmental law and litigation. He was heavily involved in criminal and civil enforcement arising out of the *Exxon-Valdez* disaster, and under his supervision, the Division brought in record fines for the United States.[157] Moreover, Stewart played an instrumental role in crafting two significant environmental laws, the CAA Amendments of 1990[158] and the Oil Pollution Act[159] of the same year. Finally, Stewart formally brought the Division's work into the international law arena for the first time.[160]

From 1993 to Inauguration Day 2001, the AAG was Lois Schiffer, whom Moorman first brought to the Division in 1978 and who worked there until 1984. Schiffer is one of the two longest-serving AAGs.[161] Among her principal accomplishments, Schiffer reinvigorated the Environmental Crimes Section.[162] She also oversaw renewed EPA enforcement under both the CAA and the Clean Water Act (CWA) as EPA sought to ensure compliance with the CAA's New Source Review regulations and the CWA's Water Quality Standards.[163] Moreover, Schiffer led a successful defense of EPA's ecosystem approach to natural resource planning.[164]

In one of the most significant initiatives in the 1990s, Schiffer stepped up efforts to implement protections for endangered and threatened species and their critical habitats.[165] Under Secretary of the Interior Babbitt and the Department's Solicitor, John Leshy, endangered species and wilderness protection took on new urgency.[166] And so, appropriately, did it for Division lawyers, especially in the Wildlife Section.

The 1990s, however, was also a decade in which environmental lawmaking broke down in Congress. In the 1970s and '80s, Congress passed remarkable waves of laws with bipartisan support. Democrats and Republicans worked together to fashion laws with a shared vision. They worked out the details of the laws in lengthy, substantive meetings. And the laws were ultimately passed by overwhelming majorities. Even CERLCA and ANICLA have been passed in a lame duck December (1980) session of Congress between Administrations. The legislators were acting at their best, through a dynamic process. They worked with agencies and states, and learned from the courts in order to craft effective laws.[167]

148. 1986 Att'y Gen. Ann. Rep. 145.
149. Public Lands & National Treasures, *supra* note 29, at 51.
150. 1986 Att'y Gen. Ann. Rep. 146-47.
151. *See* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 L. & Contemp. Probs. 311, 329-30 (1991) (describing the decrease in congressional funding and simultaneous increase in responsibilities of agencies charged with implementing environmental laws).
152. *See id.* at 340-42 (describing Congress' efforts to pass increasingly prescriptive, demanding, specific environmental protection laws).
153. U.S. DOJ, Roger J. Marzulla, http://www.justice.gov/enrd/4764.htm (last visited Sept. 20, 2011).
154. Mountain States Legal Foundation, Mission, http://www.mountainstateslegal.org/mission.cfm (last visited Sept. 20, 2011).
155. U.S. DOJ, Richard B. Stewart, http://www.justice.gov/enrd/4763.htm (last visited Sept. 20, 2011).
156. Public Lands & National Treasures, *supra* note 29, at 71.
157. Richard B. Stewart, *supra* note 155; Public Lands & National Treasures, *supra* note 29, at 56.
158. Pub. L. No. 101-549, 104 Stat. 2399 (1990).
159. 33 U.S.C. §§2701-2761, ELR Stat. OPA §§1001-7001.
160. Public Lands & National Treasures, *supra* note 29, at 71.
161. U.S. DOJ, Lois Jane Schiffer, http://www.justice.gov/enrd/4762.htm (last visited Sept. 20, 2011).
162. Public Lands & National Treasures, *supra* note 29, at 57; *see also* e-mail from Lois Schiffer, General Counsel, National Capital Planning Commission, to author (Nov. 2, 2009) (on file with author).
163. *See* U.S. DOJ, Clean Air Act, http://www.justice.gov/enrd/4487.htm (last visited Sept. 29, 2011) (summarizing the Environmental Enforcement Section's efforts in the 1990s to enforce the New Source Review provisions); U.S. DOJ, The Clean Water Act, http://www.justice.gov/enrd/4483.htm (last visited June 29, 2011) (describing the Section's renewed emphasis on water quality standards in the 1990s).
164. E-mail from Lois Schiffer, General Counsel, National Capital Planning Commission, to author (Nov. 2, 2009) (on file with author).
165. *See* U.S. DOJ, History of the Section, http://www.justice.gov/enrd/4730.htm (last visited Sept. 29, 2011) (summarizing the history of ENRD's Wildlife Section during the 1990s and early 2000s).
166. *See generally* John D. Leshy, *The Babbitt Legacy at the Department of the Interior: A Preliminary View*, 21 Envtl. L. 199 (2001) (discussing Secretary Bruce Babbitt's tenure as head of the DOI).
167. *See* Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law,* 94 Geo. L.J. 619, 623-29 (2006) (describing Congress' environmental lawmaking and oversight efforts in the 1970s and 1980s).

But that dynamic lawmaking process ended in 1996. Ever since, environmental lawmaking has failed to be the comprehensive, dynamic, and substantive process it once was. Most lawmaking has been accomplished by ad hoc appropriation riders, championed by narrow interests. This presents a problem for client agencies, which cannot always wait for specific congressional authority. It is a problem for the Division, too, as it represents its clients who are acting without clear authority. And it was a problem for the DOI and EPA, as they sought to achieve reforms without accompanying legislation.[168]

The Division's tenth and most recent decade has been no less important. Tom Sansonetti headed the Division for the first half, from 2001 to 2005. His tenure is celebrated for increasing the Division's resources and updating its technology. During his tenure, too, the tremors of 9/11 that shook the nation extended to the Division's work. The Division became increasingly involved in national security, especially port security. Division lawyers also lent considerable assistance to the Department of Homeland Security.[169]

But, as always, litigation on behalf of client agencies was the Division's main mission. Significant policy changes between the Clinton and Bush Administrations generated much work. While these changes were no less significant than those instituted in the prior Administration, they faced the same hurdles to implementation and enforcement that challenged the Clinton Administration. As efforts to get Congress to act failed, agencies were forced to act based on existing statutory authority, which was not always clearly supportive of reform efforts.

This period was also a time marked by a federal judiciary, including the Supreme Court, seeming increasingly skeptical of the furthest reaches of environmental protection laws.[170] This skepticism helped Division lawyers prevail in some cases, but made litigation success harder in others.

Since 2005, three AAGs, Sue Ellen Woodridge (2005-2007), Ronald Tenpas (2007-2009), and Ignacia Moreno (2009-present), have led the Division.[171] Woodridge came from serving as the Solicitor for the DOI.[172] Tenpas, like Dick Stewart 20 years before, was both a Rhodes Scholar and Supreme Court clerk. Under his leadership, Tenpas secured the Division's largest-ever injunctive settlement in a suit against American Electric Power. The settlement required American Electric Power to install $4.6 billion worth of equipment to reduce emissions. He also oversaw the Division's successful litigation before the Supreme Court in support of naval training exercises.[173] Moreno was sworn in as AAG on the Division's 100th anniversary, becoming the first Hispanic American to serve as the Division's leader. Moreno previously served as a special counsel to AAG Schiffer during the Clinton Administration and more recently worked as an environmental counsel for General Electric.[174]

V. The Environment and Natural Resources Division in the New Millennium

One hundred years is a long time. Certainly, Cubs fans appreciate that. A great deal has changed in the world around us. But the Division's central mission has not, nor have the related challenges. One hundred years ago, the President sought dramatic changes in federal land policy. The Division met that challenge by defending new policies and allowing for a new sweep of federal legislation. Eighty years ago, in the face of the Great Depression and 10 years later a world war, the federal government, and in turn, the Division, embraced its new, more active and ambitious role in society. Both helped bring the nation's economy out of the Depression and ready the nation for the sacrifices of war.

For the past 30 years, the Division has been at the forefront of one the most successful legal revolutions of the 20th century: the emergence of modern environmental, natural resources and pollution control law. Today, there is reason to believe we may well be on a cusp of yet another sea change of scale not witnessed since the 1970s as the nation addresses the serious problem of global climate change. It is an enormous lawmaking challenge in the first instance.[175] But once new laws are in place, no less enormous is the task to ensure their effective implementation.[176] It may be in the form of a new statute enacted by Congress. Or, as in *Midwest Oil* in 1909, it may be in the form of executive branch actions intended to preserve the status quo of reducing greenhouse gas emissions as Congress takes the time necessary to craft effective legislation. Whatever its form, it will require skill, acumen, and innovation.

That is the ENRD's new challenge for the 2010s. Division lawyers are certainly up to the task of aiding Congress and client agencies as they craft new laws and regulations. Once in place, the Division must then defend that new generation of global climate change laws from inevitably powerful attacks.

There is no doubt these tasks are formidable. With scores of talented, energetic, bright, and committed lawyers and staff, there is equally no doubt that the Division is well-prepared and equipped to face them. It is an exciting time to be an environmental lawyer anywhere. But the ENRD remains, as always, one of the best of all possible places to be one.

168. *See id.* at 629-32 (describing Congress' inability to legislate successfully in the environmental and natural resources law arena in the 1990s).
169. U.S. DOJ, Thomas L. Sansonetti, http://www.justice.gov/enrd/4761.htm (last visited Sept. 20, 2011).
170. *See generally* Richard J. Lazarus, *The Nature of Environmental Law and the U.S. Supreme Court*, *in* Strategies for Environmental Success in an Uncertain Judicial Climate (Envtl. L. Inst. 2005).
171. ENRD AAGs, *supra* note 39.
172. U.S. DOJ, Sue Ellen Woodridge, http://www.justice.gov/enrd/4760.htm (last visited Sept. 20, 2011).
173. U.S. DOJ, Ronald J. Tenpas, http://www.justice.gov/enrd/4760.htm (last visited Sept. 20, 2011).
174. *See* U.S. DOJ, Ignacia S. Moreno, http://www.justice.gov/enrd/4752.htm (last visited Sept. 28, 2011).
175. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 Cornell L. Rev. 1153, 1184-87 (2009).
176. *Id.* at 1156-59.