



# Native American Resources Committee Newsletter

Vol. 2, No. 1

September 2002

## MESSAGE FROM THE CHAIR

**Tim Vollmann**  
*Albuquerque, New Mexico*  
**Chair, Native American  
Resources Committee**

This issue, our third Newsletter of the past year, is the last edited by outgoing Committee Vice-Chair Scott K. Miller, whose efforts have been key to making this Committee active again. Scott is an Interior Department attorney in Washington, D.C., who has been able to observe and document the many recent changes we have seen in Indian affairs policy and jurisprudence. He will be succeeded by Eric Shepard, who is in the Office of the Attorney General of the Colorado River Indian Tribes in Parker, Arizona. Welcome, Eric. The other new Committee vice-chair is Sharon Blackwell, who recently retired from her position as deputy commissioner of Indian Affairs. Sharon has practiced Indian law since 1975, and is well known to many Section members. She formerly served as the Interior Department's Tulsa field solicitor. Sharon will be the vice-chair for Public Service in 2002-2003, a great addition to the Committee.

The prominence of the Committee's place in the ABA was recently demonstrated when the House of Delegates passed a Resolution at the ABA Annual Meeting in Washington on Aug. 12, 2002, recommending federal support for Indian water right settlements. This ABA Resolution, which originated in the Water Resources Committee in early 2001, addressed a major policy concern in the field of Native American

resources. As the Annual Meeting opened, we were able to gain the support for the Resolution from the Section on Individual Rights and Responsibilities through the efforts of the co-chair of the Committee on Environmental Justice, Nicholas Targ. The Section on Dispute Resolution also supported passage of the Resolution. The Resolution is consistent with similar resolutions passed last year by the National Congress of American Indians, the Western Governors Association, and other important groups in the Western water mix.

This issue of the Newsletter features an authoritative article by Professor Robert T. Anderson, director of the Native American Law Center at the University of Washington, on the two tribal breach-of-trust cases against the United States now pending in the U.S. Supreme Court. This is the first time in nearly 20 years that the Court has agreed to address the monetary liability of the federal government for its actions with regard to lands held in trust for Indians. It remains to be seen whether the Court's decision next spring will prove to be a landmark in American Indian law, or merely a clarification of issues pertinent to federal trust liability. The Newsletter also contains a section on recent activity in the field of federal Indian reserved water rights, an update from our last newsletter on the continuing efforts to reorganize the Bureau of Indian Affairs' trust asset management functions, and an article by Patti Miller of the U.S. Department of Justice that practitioners working on acquiring land into trust

**Native American Resources  
Committee Newsletter  
Vol. 2, No. 1, September 2002  
Scott Miller, editor**

**In this issue:**

Message from the Chair . . . . . 1

Supreme Court to Review Breach of  
Trust Decisions . . . . . 2

Indian Trust Reform Update:  
Reorganizing Trust Asset Management  
Through Consultation and Cooperation  
with Indian Country . . . . . 8

Gambling on Taking Land into Trust: The  
Restored Lands Exception of the Indian  
Gaming Management Act . . . . . 8

*United States v. Hardman*  
297 F.3d 1116 (10th Cir. 2002) . . . . . 11

Federal Indian Reserved Water Rights:  
in the News . . . . . 12

*United States v. Adair (Adair III)*  
187 F. Supp. 2d 1273 (D. Or. 2002),  
*appeal filed* . . . . . 12

*Big Horn VI*  
48 P.3d 1040 (Wyo. 2002) . . . . . 14

© 2002. American Bar Association. All rights reserved.  
The views expressed herein have not been approved  
by the ABA House of Delegates or the Board of  
Governors and, accordingly should not be construed as  
representing the policy of the ABA.

This newsletter is a publication of the  
ABA Section of Environment, Energy, and Resources,  
and reports on the activities of the committee. All  
persons interested in joining the Section or one of its  
committees should contact the Section of Environment,  
Energy, and Resources, American Bar Association, 750  
N. Lake Shore Drive, Chicago, IL 60611.



for tribes restored to federal recognition will find helpful.

I commend to Committee members the 10th Section Fall Meeting in Portland, Oregon, in October. Among the cutting-edge topics to be addressed, there is an informative panel on Friday, October 11, on energy development in Indian Country in the wake of recent legislative developments, including Congress' pending consideration of the energy bill.

**SUPREME COURT TO REVIEW BREACH  
OF TRUST DECISIONS**

**Robert T. Anderson**

The U.S. Supreme Court will review two Federal Circuit Court of Appeals decisions imposing monetary liability on the United States for breaches of its trust responsibility: *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (2001), *cert. granted*, 122 S.Ct. 1604 (2002), and *Navajo Nation v. United States*, 263 F.3d 1325 (2002), *cert. granted*, 122 S.Ct. 2326 (2002). At issue in the first case are damages claims for harm allegedly done to property held in trust by the United States for the White Mountain Apache Tribe, but used by the United States for school and other administrative purposes. The *Navajo* case involves the Department of the Interior's approval of royalty rate adjustments in coal lease agreements between the Navajo Nation and Peabody Coal Company. During negotiations, Secretary of the Interior Donald Hodel engaged in *ex parte* communications with the Peabody Coal Company and suppressed an administrative decision that was favorable to the Nation. The Navajo Nation alleges that approval of the amendments by the Secretary under these circumstances was a breach of his trust obligations.

It is widely anticipated that the Supreme Court's rulings in these cases will have a significant impact on the ability of tribes to seek recourse

for breaches of the federal government's trust responsibility. The Court has not reviewed a breach of trust case involving damages since the early 1980s when it issued two opinions in cases captioned *United States v. Mitchell*. The cases involved mismanagement of timber resources on allotments held in trust by the United States for individual Indians on the Quinault Indian Reservation. In *Mitchell I*, the Court rejected damages claims based on the General Allotment Act of 1887, *United States v. Mitchell*, 445 U.S. 535, 542 (1980). When the case returned for a second time, the Court found the United States liable under federal timber management statutes that provided the government with effective control over tribal timber. See *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*).

The United States asked the Supreme Court to review the *White Mountain Apache* and *Navajo* cases in order to address "the proper application of the Mitchell decisions in a comprehensive manner." United States' Petition for Certiorari at 28, *United States v. Navajo Nation* (No. 01-1375). The fact that tribes have not fared well in recent years before the Supreme Court causes tribes and their advocates to watch these cases with trepidation. At minimum, the Court's rulings will have a profound effect on how breach of trust actions are litigated in the Court of Federal Claims and could have a broader impact on the federal-tribal trust relationship.

### **The Trust Responsibility: Differences Between Damages Actions and Claims for Equitable Relief**

The existence of a trust responsibility on the part of the United States to Indian tribes is without dispute. As described by the Supreme Court in *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942), "under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the United States] has charged itself with moral obligations of the highest responsibility and trust." Most recently, in

*Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 121 S.Ct. 1060, 1067 (2001), the Supreme Court noted that:

The existence of a trust obligation is not, of course, in question, see *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987); *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942). The fiduciary relationship has been described as "one of the primary cornerstones of Indian law," F. Cohen, *Handbook of Federal Indian Law* 221 (1982), and has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus.

This responsibility has been interpreted as requiring the United States and its officers to meet exacting fiduciary standards in carrying out responsibilities affecting Indian tribes and treaty rights. The United States' sovereign immunity has been waived by the Administrative Procedure Act (APA) in cases for prospective enforcement of certain federal obligations and the trust responsibility. See 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

Thus, in cases involving the management of Bureau of Reclamation water projects, the United States must exercise any discretion for the benefit of Indian tribes. See *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973). The United States also has been held to have an obligation to ensure that tribal oil and gas lessees obtain the best possible return on their leases. See *Cheyenne Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583 (10th Cir. 1992), *cert. denied, sub. nom., Woods Petroleum v. United States*,

507 U.S. 1003 (1993); see also, *Winnebago Tribe of Nebraska v. Babbitt*, 915 F. Supp. 957 (D.S.D. 1996) (requiring BIA to consult with tribe before making reductions in force). The much-publicized litigation over the management of individual Indian trust accounts is a high-profile example of a case seeking prospective equitable relief. See *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). *Cobell* is a class action seeking an accounting of the funds held in trust for individual Indian money account holders and a declaration of the United States' responsibilities as trustee. The United States has extensive responsibilities recognized and detailed in the Indian Trust Fund Management Act of 1994. See 25 U.S.C. § 162a, *et seq.* The action to vindicate those rights and common law trust duties was found proper under the APA. See *Cobell*, 240 F.3d at 1094-95. The APA's waiver, however, does not extend to claims for money damages. See 5 U.S.C. § 702; see also *Bowen v. Massachusetts*, 487 U.S. 879 (1988) (allowing claim for restitution since it is not technically a "damages" claim); *Rosebud Sioux Tribe v. United States*, 714 F. Supp. 1546 (D.S.D. 1989) (declining to exercise jurisdiction over damages action and transferring case to Claims Court).

Prior to 1855, sovereign immunity generally barred private parties from seeking money damages in the courts against the United States. Besieged by private bills for relief, Congress adopted a series of statutes to provide access to the courts for wrongs committed by the federal government. See Act of February 24, 1855, ch. 122, 10 Stat. 612; Act of March 3, 1863, ch. 92, 12 Stat. 765. However, Congress expressly provided that its 1863 statute did not encompass claims by Indian tribes. See Act of March 3, 1863, ch. 92, § 9, 12 Stat. 767. The enactment of the Tucker Act in 1887 provided a comprehensive scheme for assertion of damages actions against the Government of the United States. Act of March 3, 1887, ch. 359, 24 Stat. 505. Claims may be "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United

States . . . ." 28 U.S.C. § 1491; see also 28 U.S.C. § 1346(a)(2) (the "Little Tucker Act") (providing concurrent jurisdiction in the district courts over claims not exceeding \$10,000). The Tucker Act, however, continued to except Indian claims from its purview. Tribes thus sought repeated waivers of the United States' immunity by numerous special jurisdictional acts over the next eighty years. See F. Cohen, *Handbook of Federal Indian Law* 160-62 (1982 ed.). Finally, the Indian Tucker Act was passed in 1946 to waive the United States' immunity for claims arising after the date of its passage on the same terms as claims brought under the Tucker Act. See 28 U.S.C. § 1505.

### **United States Liability Under *Mitchell I* and *II***

In *Mitchell I* and *II*, the Court set out the governing law as to the United States' liability for damages in breach of trust actions under the Indian Tucker Act. In *Mitchell I*, the Court considered a damages claim brought by individual Indian allottees for timber mismanagement based on the government's alleged failure to: obtain fair market value for timber sold, manage timber on a sustained yield basis, obtain payment for some timber, properly manage roads and pay interest in a proper fashion. The Court of Claims held the fact that the United States held the timber-lands in trust for individuals pursuant to the General Allotment Act sufficient to provide a cause of action for damages against the United States. See *Mitchell v. United States*, 591 F.2d 1300 (1979). The Supreme Court reversed, explaining that United States ownership of land in trust under the General Allotment Act constitutes a "bare trust" "that does not impose any duty upon the government to manage timber resources." *Mitchell I*, 445 U.S. at 542-43. The Court held that the United States' sovereign immunity bars damages actions under such a "bare trust," but remanded for consideration of whether other statutes might authorize an award of damages based on the same conduct.

When the *Mitchell* case came before the Court for the second time, the Court clarified that the

Tucker Act itself constitutes a waiver of sovereign immunity, stating that: “a court need not find a separate waiver of sovereign immunity in the substantive provision [allowing for damages], just as a court need not find consent to suit in ‘any express or implied contract with the United States.’ The Tucker Act itself provides the necessary consent.” *Mitchell II*, 463 U.S. at 212 (citation omitted). The Court proceeded to review the statutes governing timber management to determine if a damages award was authorized by Congress. The Court found that:

In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government *full responsibility to manage Indian resources and land for the benefit of the Indians*. They thereby establish a fiduciary relationship and define the contours of the United States’ fiduciary responsibilities.

*Id.* at 224 (emphasis added). This daily supervision over the harvesting and management of tribal timber implied congressional consent to damages. See *id.* at 228. The Court also cited to the common law of trusts to buttress its holding, stating that “it is well established that a trustee is accountable for the breach of its fiduciary duties.” *Id.* at 226. The dissent, which included then-Justice Rehnquist and Justice O’Connor, would have required a more explicit statement of congressional intent to provide a damages remedy and rejected the notion that the rules governing private trustees should have any application to the inquiry. See *id.* at 229-30 (Powell, J., dissenting).

In the years since *Mitchell II* was decided, the United States has been held liable for damages when it “takes on or has control or supervision over the tribal monies or properties.” *Brown v. United States*, 86 F.3d 1554, 1560 (Fed. Cir. 1996) (damages based on federal approval of allottee’s lease); see also *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (damages based

on federal approval of allottee’s oil and gas leases); *Shoshone Indian Tribe v. United States*, 52 Fed. Cl. 614 (2002) (finding potential liability for alleged mismanagement of sand and gravel). It is this “ownership or control” test and reliance on the common law of trusts that is at the core of the United States’ attack in the cases before the Court.

## The Federal Circuit Decisions

The Fort Apache Military Reservation was established by Executive Order in 1877 to further the United States’ efforts in the Indian wars. The 7,500-acre military reservation was located within the exterior boundaries of what became the White Mountain Apache Tribe’s reservation. See 30 Stat. 62, 64. In 1923, the military reservation was designated an Indian Boarding School to be held by the Secretary of the Interior as long as required for Indian school purposes. See 25 U.S.C. § 277. In 1960, Congress provided that the United States’ interests in Fort Apache be “held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.” Pub. L. No. 86-392, 74 Stat. 8 (1960).

The boarding school now has few students and the Secretary proposed to transfer the land and some thirty-five buildings to the Tribe. Many of the buildings were dilapidated. The Tribe declined to accept a transfer of some land and associated buildings unless the United States first repaired them. When the United States refused, the Tribe brought an action in the Court of Federal Claims seeking a declaration of the United States’ trust responsibility and damages for failing to maintain the property. See *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1369-70 (Fed. Cir. 2001).

In a 2-1 decision, the Federal Circuit held that the federal government has some responsibility to maintain and restore the buildings. The court first concluded that the 1960 statute created a

trust relationship between the Tribe and the United States, since the buildings were held by the United States for future use by the Tribe. See *id.* at 1373. It then evaluated whether the trust also embodied sufficient fiduciary responsibilities to imply a remedy for damages under *Mitchell II*. See *id.* at 1374.

The federal government argued that the trust was a “bare trust” of the *Mitchell I* type that could not support an award of damages. See *id.* at 1375. The court rejected the argument that liability may only be imposed when there are explicit and pervasive management obligations imposed on the United States by statute or regulation. The court interpreted *Mitchell II* as making it “quite clear that control alone is sufficient to create a fiduciary relationship.” *Id.* In a prior decision imposing liability on the United States, the Federal Circuit held that in *Mitchell II*, “[t]he Supreme Court did not qualify ‘control or supervision’ with modifiers such as ‘significant,’ ‘comprehensive,’ ‘pervasive,’ or ‘elaborate.’ Nor did the Court anywhere suggest that the assumption of either control or supervision alone was insufficient to give rise to an enforceable fiduciary duty.” *Brown v. United States*, 86 F.3d 1554, 1561 (Fed. Cir. 1991).

In reliance on *Brown*, the Federal Circuit held that the federal government’s exclusive occupation of the buildings held in trust for future use by the White Mountain Apache Tribe made it “reasonable to infer that the government’s use of any part of the property requires the government to act in accordance with the duties of a common law trustee.” 249 F.3d at 1377 (quoting *Restatement (Second) of Trusts* § 176 cmt. b (1959): “It is the duty of the trustee to use reasonable care to protect the trust property from loss or damage.”). The court remanded for a determination of the merits of the tribal damages claim, ripeness issues and a statute of limitations defense. See *id.* at 1383.

The United States has asked the Supreme Court to reverse, arguing that the “1960 Act does not establish *any* explicit management duties, much less specific duties of a fiduciary nature that

could be interpreted as mandating money damages if breached.” Petitioner’s Merits Brief at 11, *United States v. White Mountain Apache Tribe* (No. 01-1067). The federal government also argues that the Court should reject the notion that the common law of trusts may serve as basis for imposing liability on the United States. *Id.* at 35-36. While not expressly criticizing the results in *Brown v. United States* and *Pawnee v. United States*, the federal government in essence asks the Court to reject the Federal Circuit’s reasoning in those decisions.

The second case, *United States v. Navajo Nation* (No. 01-1375), involves a damages claim based on the government’s approval of coal royalty lease amendments between the Navajo Nation and the Peabody Coal Company. Secretarial approval is required by 25 U.S.C. § 396a, which is one provision of the Indian Mineral Leasing Act (IMLA). An agreement signed by the Nation and Peabody’s predecessor in 1964 set a royalty rate of 37.5 cents per ton of coal and authorized the Secretary of the Interior or his delegate to adjust the royalty rate to a “reasonable” level on the twentieth anniversary of the lease. By the early 1980s the original rate was equal to only about 2% of gross proceeds, which was well below prevailing royalty rates. See Petitioner’s Merits Brief at 5, *United States v. Navajo Nation* (No. 01-1375).

When negotiations between the Nation and Peabody for a new agreement broke down, the Navajo Area Office of the Bureau of Indian Affairs exercised the authority provided in the original agreement and set the royalty rate at 20%. On appeal to the Assistant Secretary for Indian Affairs, a decision was apparently made to affirm the decision of the Area Office. Before the decision was formalized, however, Secretary of the Interior Don Hodel met with a representative for Peabody who urged that the imminent decision from the Assistant Secretary be postponed. See *id.* at 7-8. Secretary Hodel then sent a memorandum to the Assistant Secretary suggesting that he withhold release of

any decision affirming the administrative decision pending further negotiations between the Nation and Peabody. See *id.* The Nation and Peabody then agreed to a 12.5% royalty, which was approved by the Secretary of the Interior as required by 25 U.S.C. § 396a. Upon learning of the Secretary's conduct and the withheld decision to set the royalty at 20%, the Nation brought a damages action.

The Court of Federal Claims denied relief despite finding that the government's actions "violated the most fundamental fiduciary duties of care, loyalty and candor." *Navajo Nation v. United States*, 46 Fed. Cl. 217, 227 (2000). The Federal Circuit reversed, holding that the United States had full fiduciary responsibilities based on the IMLA and its implementing regulations. See 263 F.3d at 1330-31. In addition to the requirement that the Secretary approve any tribal lease, the court characterized the statutory scheme as leaving no "significant authority in the hands of the Indian tribes." *Id.* at 1331. The Court of Appeals stated that "[i]t cannot be reasonably disputed that the Secretary's actions were in Peabody's interest and contrary to the Navajo's interest." *Id.* at 1328. Accordingly, the court found the United States liable for violation of the basic common law fiduciary duties and remanded for determination of the damages. In a partial concurrence and dissent, one judge concluded that the Secretary had only breached the duty to perform an economic analysis prior to approving the lease agreement and would have remanded for a determination of damages based on that breach. See *id.* at 1340-41 (Schall, J. concurring in part and dissenting in part).

As in the White Mountain Apache case, the United States argues that it is liable for money damages only when a statute can be interpreted as mandating compensation due to the exercise of extensive "fiduciary management duties" by the United States. Petitioner's Brief on the Merits at 47-48, *United States v. Navajo Nation* (No. 01-1375). The federal government contrasts its role under the IMLA with the control it exercises over timber harvest and

management that gave rise to liability in *Mitchell II*. It argues that only in the latter case does the United States have "full fiduciary responsibilities" that may give rise to a damages claim, and likens the IMLA to the "bare trust" established by the General Allotment Act and rejected as a basis for liability in *Mitchell I*. In other words, the United States argues, the federal government can only be held liable for damages based on violation of specific duties imposed by statutes or regulations. According to the United States, the Secretary's *ex parte* contacts with Peabody and the directive to the Assistant Secretary were merely the exercise of administrative oversight of subordinates and not a breach of any specific statutory or regulatory duty. See *id.* at 49-51.

An additional theme of the federal government's argument is that the IMLA was designed to further *tribal* control over mineral leasing activities and that the Secretary of the Interior is merely "furnishing a general backstop protection" to assure that minimum standards are met. *Id.* at 52. The United States accepts the state of the law as set out in *Mitchell II*, but seems to reject any extension beyond statutory schemes that mirror the timber statutes. As in the White Mountain case, the federal government argues that reliance on the common law of trusts to impose liability was an improper extension of *Mitchell II*.

The Supreme Court is expected to rule by June 2003.

*Robert Anderson is an assistant professor at the University of Washington School of Law and director of its Native American Law Center.*

The Native American Resources  
Committee Newsletter can be found  
online at

**[www.abanet.org/environ/committees/  
nativeamerican/newsletter/home.html](http://www.abanet.org/environ/committees/nativeamerican/newsletter/home.html)**

**INDIAN TRUST REFORM UPDATE:  
REORGANIZING TRUST ASSET  
MANAGEMENT THROUGH CONSULTATION  
AND COOPERATION WITH  
INDIAN COUNTRY**

---

**Philip N. Hogen**

In November 2001, Interior Secretary Gale Norton proposed a reorganization of the Department's trust management functions into the proposed Bureau of Indian Trust Asset Management (BITAM). Tribal leaders broadly opposed the plan across Indian Country, which promoted a new dialogue between the Department and tribes.

Since that time, Secretary Norton and her key leadership team have engaged in an unprecedented, ongoing consultation effort with tribal government leaders. This effort began in December 2001 when a series of eight listening sessions were conducted across Indian Country.

The product of these sessions was the development of the Department of the Interior/Tribal Leader Task Force on Trust Reform, comprised of Interior's Deputy Secretary Steven Griles, Assistant Secretary of Indian Affairs Neal McCaleb, seven senior Interior staff members and 36 tribal leaders. The Task Force issued an initial report on its activities and progress on June 4, 2002, and held additional consultation sessions in each of the Bureau of Indian Affairs' twelve regions to discuss its progress and answer questions.

As a result of this progress, Secretary Norton removed the BITAM proposal from consideration and the Task Force continues its work to reorganize the federal government's trust management functions.

*Philip Hogen is the associate solicitor for Indian Affairs in the U.S. Department of the Interior.*

**GAMBLING ON TAKING LAND INTO TRUST:  
THE RESTORED LANDS EXCEPTION OF  
THE INDIAN GAMING MANAGEMENT ACT**

**Patti Miller**

For almost 30 years, the Secretary of the Interior has been taking land into trust for tribes that have been restored to federal recognition. As Indian gaming becomes more prevalent, however, restoring lands to these tribes faces increasing scrutiny. States, local communities and neighboring tribes are often worried that new trust land means a new local Las Vegas. Although the Secretary's authority for acquiring land is separate from her authority to determine whether the land is eligible for gaming, the two have become legally and politically entwined. As a result, practitioners should be cognizant of the fact that trust acquisitions are likely to be the subject of more challenges than ever before. Unfortunately, much of the law is mired in confusion.

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, generally prohibits gaming on lands acquired in trust after Oct. 17, 1988 – the date President Ronald Reagan signed IGRA into law. In other words, IGRA generally limits gaming to reservations that existed on Oct. 17, 1988. However, there are several exceptions to this general prohibition, and one is if the “lands are taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition.” *Id.* § 2719(b)(1)(B)(iii).

The statute does not define “restoration” or “restored,” and there is no legislative history on point. However, the enumerated exceptions to the general prohibition reveal that Congress wanted all tribes to have an equal opportunity to generate tribal government revenues through gaming activities on “Indian lands.” See 26 U.S.C. § 2702. In addition to allowing gaming on reservations that existed on Oct. 17, 1988, Congress allowed gaming on the “initial reservation” of a tribe acknowledged through the Federal acknowledgment process, on lands

acquired pursuant to a land settlement claim, and, as mentioned earlier, on lands that are part of the restoration of lands of a tribe restored to federal recognition. See *id.* § 2719(b). Congress also enacted a special provision for lands contiguous to a reservation that existed on Oct. 17, 1988, *id.* § 2719(a)(1), and for lands in Oklahoma, *id.* § 2719(a)(2).

Since IGRA's enactment, several tribes have asked the Secretary of the Interior to determine whether particular parcels of land fell within the "restored lands" exception. Some of these requests were in the context of asking the Secretary to acquire land into trust under the tribe's restoration act or under the Indian Reorganization Act (IRA), 25 U.S.C. § 461 *et seq.*, which provides general authority for the Secretary to acquire land into trust for tribes. See *id.* § 465. Other requests were in the context of lands that had already been taken into trust, though after IGRA's Oct. 17, 1988, cut-off date.

The Secretary ultimately determined that there is a two-pronged analysis to the restored lands exception, and the courts have agreed. First, the tribe must be "restored." Second, the land must be "restored." See *Grand Traverse Band of the Ottawa and Chippewa Indians v. United States Attorney*, 46 F. Supp. 2d 698 (W.D. Mich. 1999) (denying preliminary injunction and granting stay pending determination by agency); *id.*, 198 F. Supp. 2d 920 (W.D. Mich. 2002) (decision on merits of agency determination); *TOMAC v. Norton*, 193 F. Supp. 2d 182 (D.D.C. 2002); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155 (D.D.C. 2000).

To determine whether a tribe has been "restored," the Secretary and the courts generally look to see whether Congress has restored the government-to-government relationship with the tribe by enacting a "restoration act." Congressional intent to "restore" a tribe can be gleaned from the title of the act, whether privileges and rights were restored under the acts, and any other language

in the act. It is clear, however, that the word "restore" need not appear in the body of the acts. Congress often uses words such as "affirm," "reaffirm," and "recognize" to restore a tribe to federal recognition. See, e.g., *Grand Traverse*, 198 F. Supp. 2d at 930; *Coos*, 116 F. Supp. 2d at 163. Neither the Department nor the courts have opined as to whether a tribe can be restored by judicial decree or stipulation, as opposed to congressional action.

For the second prong, the Department's position was that "restored lands" are:

[O]nly those lands that are available to a restored tribe as part of its restoration to federal recognition. The statute that restores the tribe's federal recognition status must also provide for the restoration of land, and the particular parcel in question must fall within the terms of the land restoration provision.

Memorandum from Solicitor to Assistant Secretary-Indian Affairs (Oct. 19, 1999) (M-36995) (visited Sept. 1, 2002) <http://www.doi.gov/sol/solopin.html>. In other words, "restored lands" are only those lands that are mentioned in and acquired under the authority of the tribe's restoration act.

The Department was challenged on its position in *Coos*. At issue was whether "restored lands" could include lands of historical and cultural significance – such as lands previously occupied by the tribe – that are not specifically recognized in a restoration act. Considering the extent of aboriginal territory in the United States, the Department was concerned that a broader interpretation could open up vast amounts of land to gaming. See *Coos*, 116 F. Supp. 2d at 164. A broader interpretation also would appear to put restored tribes in a better position than other tribes. See *id.* Tribes that were recently restored could continue to acquire lands of historical and cultural importance in perpetuity, while others would be effectively limited by IGRA's general prohibition of gaming on lands acquired after its enactment.

Two district courts have held that the Department's interpretation was too narrow. See *Coos*, 116 F. Supp. 2d 155; *Grand Traverse*, 198 F. Supp. 2d 920. The courts, guided by the dictionary definition of "restored" and the canon of construction construing statutory ambiguities liberally in favor of the Indians, held that "restored lands" could include parcels that fell outside of the tribes' restoration acts. They could be lands with historical, cultural, and economic significance, such as lands previously ceded to the United States or previously reserved for the tribe. In sum, the lands need not be identified in or acquired pursuant to the authority in the tribe's restoration act; they can also be acquired pursuant to the IRA.

In addressing the Department's concerns about this broader interpretation, the courts expressly held that the Department could limit the "restored lands" provision by factual circumstances, geographic connection to the tribe, and temporal nexus to the tribe's restoration process. See *Coos*, 116 F. Supp. 2d at 164; *Grande Traverse*, 46 F. Supp. 2d at 700. Therefore, the Secretary has some discretionary means of narrowing the scope of the "restored lands" exception.

While interpreting the "restored lands" provision, the courts have blurred the distinctions between the restored lands exception and other enumerated exceptions. It has been held that a tribe can be "restored to federal recognition" even though it went through the Department's acknowledgment process under 25 C.F.R. Part 83, thereby potentially overlapping the "initial reservation" of an acknowledged tribe exception with the restored lands exception. See *Grand Traverse*, 198 F. Supp. 2d at 928-33; *accord TOMAC*, 193 F. Supp. 2d at 194 n.8; *Coos*, 116 F. Supp. 2d at 163-64 (dicta).

Although the court in *Grand Traverse* recognized that the enumerated exceptions must be distinguished in some fashion, it held that there was no evidence of congressional intent to create "mutually exclusive" categories. See 198

F. Supp. 2d at 931-33; see also *Coos*, 116 F. Supp. 2d at 163-64. But does this mean that restored tribes can conduct gaming on land acquired pursuant to a land settlement claim? Can restored tribes that had a reservation before IGRA's enactment conduct gaming on land of historical significance acquired after Oct. 17, 1988?

The U.S. District Court for the District of Columbia recently ruled that land acquired pursuant to the tribe's restoration act qualifies as "restored land" under IGRA even though the land was not occupied historically by the tribe. See *City of Roseville v. Norton*, Case No. 1:02CV00628 (ruling from the bench, Sept. 9, 2002). The case is almost the mirror opposite of *Coos*. Thus, historical occupancy and cultural significance appear to be factors only if the land in question is acquired under the IRA.

Compounding the confusion over the distinction between the exceptions, is the confusion over whether the Secretary's interpretation of "restored lands" deserves deference, and if so, what kind. The Department, citing *United States v. Mead*, 533 U.S. 218 (2001), recently opined that its "restored lands" determination did not deserve deference under *Chevron v. NRDC*, 467 U.S. 837 (1984), because its interpretation was not in the context of formal adjudication or rulemaking. The Department argued that it still deserved deference, however, under *Skidmore v. Swift & Co.*, 323 U.S. 139 (1944), because the Department used its expertise to develop a persuasive, thorough, and well-reasoned analysis. See Memorandum from Associate Solicitor, Division of Indian Affairs, to Assistant Secretary-Indian Affairs (Dec. 5, 2001).

One court found that the term "restored" was not ambiguous, but it nevertheless afforded the agency deference under *Skidmore*. See *Grand Traverse*, 198 F. Supp. 2d at 927-28, 933 n.2. Another court found that the term was ambiguous and applied the Indian canon of construction to disfavor the agency's interpretation. See *Coos*, 116 F. Supp. 2d at 162-63. It did not, however, expressly rule that

the Indian canon of construction trumped deference under *Chevron*. And the Tenth Circuit ruled that the National Indian Gaming Commission – not the Department of the Interior – was the proper agency to determine what constituted a “reservation” under IGRA, so no deference was given to the Secretary’s determination. See *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001). But Congress promptly clarified that the Department in fact has authority under IGRA to determine what constitutes “reservation” lands. See Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. 107-63, § 134 (2001). Now, the Department is facing a challenge as to whether IGRA delegates any authority to the Secretary to determine whether lands qualify as “restored lands.” See *Oregon v. Norton*, Civ. No. 02-6104 (D. Or.).

In light of all this uncertainty, one thing is for sure; there will be many more challenges to trust acquisitions for tribes now that Indian gaming is figuratively and literally all over the map.

*Patti Miller is a trial attorney in the Indian Resources Section, Environment and Natural Resources Division of the U. S. Department of Justice in Washington, DC. The views expressed in this article are the views of the author and do not necessarily represent those of the Department of Justice or the United States.*

---

**UNITED STATES v. HARDMAN**  
**297 F.3d 1116 (10th Cir. 2002)**

---

U.S. Fish and Wildlife Service (Service) regulations for obtaining permits to possess eagle feathers may not exclude an Indian practitioner of a Native American religion who is not a member of federally-recognized tribes, according to a recent *en banc* decision of the U.S. Court of Appeals for the Tenth Circuit. The Court held that the Service had failed to demonstrate that its regulatory distinction in

favor of members of Indian tribes (50 C.F.R. § 22.22) is the least restrictive means of furthering a compelling governmental interest, and thus violated the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1(b). This is a consolidated case involving a civil forfeiture in New Mexico and two prosecutions in Utah. See *United States v. Hardman*, 297 F.3d 1116 (10th Cir. 2002).

The decision affirmed a judgment of the U.S. District Court of New Mexico, allowing a non-member Chiricahua Apache man to retrieve feathers seized by the Service for failure to possess a permit. *In re Saenz*, No. 99-21-M (D.N.M. 2000). The Circuit also reversed two Utah convictions of non-Indians for possessing eagle feathers without a permit and remanded the cases to the District Court for findings on whether the Service could justify, under RFRA, excluding non-Indian practitioners of religions which involve use of eagle feathers from the permitting process. As a result, the Service could still prove that its regulation meets the least restrictive means test under RFRA.

The Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. §§ 668-668d, provides for exemptions for Indian religious uses, among scientific and other uses, which are addressed by Service regulations implementing both the BGEPA and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703-711. This decision not only impacts the permitting process for possession of eagle feathers for religious purposes to many persons who are not members of Indian tribes but possess some quantum of Indian blood, it also portends the opening of that process to non-Indians. Appellant Hardman had raised equal protection claims, but the Court found it unnecessary to address them.

## **FEDERAL INDIAN RESERVED WATER RIGHTS: IN THE NEWS**

---

As described in the Message from the Chair, on Aug. 12, 2002, the ABA House of Delegates passed a Resolution regarding Indian water rights settlements. For further information see [www.abanet.org/adminlaw/annual02/110.doc](http://www.abanet.org/adminlaw/annual02/110.doc). Also, the Nov./Dec. 2002 issue of the Section's newsletter *Trends* will include an article on the historical background of the Indian water rights issue. The text of the ABA Resolution follows.

### **AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES 2002 Annual Meeting Aug. 12-13, 2002 Washington, D.C.**

#### **SUBMITTED BY THE SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES AND COSPONSORED BY THE SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES**

#### **Report No. 110**

Supports adequate federal efforts to assist in the settlement of longstanding Indian water right claims, predominately in the western states.

Approved as Revised

#### **The recommendation was revised to read as follows:**

RESOLVED, That the American Bar Association endorses the use of negotiation and settlement processes to resolve Indian reserved water right claims provided the concerned Indian Tribes elect to pursue such processes, as well as the availability of adequate technical resources as an important precondition for achieving successful settlements, and specifically urges Congress and the Administration to support these settlement processes by:

1. Continuing to make the negotiation of Indian water right settlements a high priority of the U.S.

Department of the Interior and the U.S. Department of Justice;

2. Appointing and funding federal negotiating teams in every river system or basin where settlement prospects are favorable and requiring federal negotiating teams to regularly elicit and incorporate, consistent with the federal trust responsibility, the views of the Tribes involved when formulating federal negotiating positions and to bear a fair share of mediation costs and technical and legal work directly supporting settlement discussions;

3. Providing timely and adequate funds so that Indian Tribes have the legal and technical expertise necessary to participate effectively in settlement processes and ensuring, in conjunction with state governments, that other water users also have necessary legal and technical resources;

4. Appropriating adequate funds for the settlements themselves and for federal teams to assist in implementing the settlements; and 5. Ensuring that the resources necessary for negotiating settlements and for settlements themselves do not compete with other Department of the Interior funding priorities.

FURTHER RESOLVED, That when evaluating proposed settlements, the federal government should consider not just avoided federal litigation costs, but other factors as well including (a) the opportunity to address historic injustices, with the goal of fulfilling the continuing federal trust obligation to support viable tribal communities; and (b) the settlement's potential benefit to local, State, and national economies.

#### ***UNITED STATES v. ADAIR (ADAIR III)* 187 F. Supp. 2d 1273 (D. Or. 2002), *appeal filed***

---

#### **Scott Bergstrom**

The federal district court in Oregon recently issued the third installment in this on-going controversy involving the water rights of the Klamath Tribes (Tribes), an important case addressing the existence and scope of federal

Indian reserved water rights for non-agricultural purposes. In the late 1970s and early 1980s, federal courts recognized reserved water rights for the hunting, fishing, and gathering rights reserved in the Tribes' 1864 Treaty with the United States. See *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979) (*Adair I*), *aff'd*, 723 F.2d 1394 (9th Cir. 1984) (*Adair II*). Although Congress terminated federal recognition of the Tribes in the 1950s (subsequently restored in 1986) and divested them of their remaining reservation lands, the Tribes' rights in the former reservation area's resources recognized by the 1864 Treaty remained intact. See 25 U.S.C. § 564 *et seq.*; see, e.g., *Kimball v. Callahan*, 590 F.2d 768 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979) (*Kimball II*). Accordingly, the *Adair I* and *II* courts held that the Tribes continued to enjoy water rights sufficient to support their treaty-reserved rights, with a "time immemorial" priority date. See 478 F. Supp. at 350; 723 F.2d at 1414-15.

Although the *Adair* decisions also generally defined how to quantify the Tribes' instream rights, the federal courts deferred the actual quantification of those rights to the state of Oregon's pending water adjudication process. The present controversy arose as part of that process. The involved state agencies and upper basin irrigators challenged the non-consumptive claims filed by the United States and the Tribes in the adjudication, interpreting language from the prior *Adair* rulings as precluding water rights for gathering (plants) purposes and as limiting the Tribes' non-consumptive rights to the amount of water available instream as of the date of the prior *Adair* decisions (either 1979 or 1984). In 2001, the United States requested the federal district court to exercise its retained jurisdiction in the *Adair* proceeding to resolve two issues: "(1) whether the Klamath Tribes have a water right to support reserved gathering rights; and (2) whether and to what extent the 'moderate living' standard applies in quantifying the Tribes' water rights." 187 F.Supp. 2d at 1275.

Ruling for the federal district court, Judge Owen Panner first confirmed that water rights exist to

support the Tribes' gathering rights, concluding that the Ninth Circuit's short-hand reference to water rights to support "hunting and fishing" purposes could not eliminate the Tribes' water rights for gathering purposes. See *id.* at 1275. The court then turned to clarifying the appropriate quantification standard for the Tribes' non-consumptive rights as established in the prior *Adair* rulings:

In order to provide the Tribe an opportunity to continue hunting and fishing on the reservation lands, it is axiomatic that there be sufficient water to support productive habitat so there may be game to hunt, fish to fish, as well as edible plants to gather. . . . Quantifying the reserved water right so that productive habitat can be supported is the only meaningful way to measure the water requirements to meet the goal of fulfilling the purpose of the reservation.

*Id.* at 1276.

With respect to the assertion that the "moderate living" standard in *Adair II* (adopted from the U.S. Supreme Court's decision in *Fishing Vessel*) established a limitation on the water right, the court concluded:

Reducing the water level below a level which would support productive habitat would have the result of abrogating the reserved rights. Because only Congress can abrogate treaty rights, and it has not done so here, the moderate living standard cannot be applied to have the effect of reducing water levels below a level that would support productive habitat.

*Id.* at 1277. Thus, the court held that the burden fell on those opposing the Tribes' rights to provide persuasive evidence that the "full resource amount" was not necessary to

accomplish the reservation purposes. See *id.* at 1278.

Finally, the court rejected assertions that language from *Adair II* – indicating that the Tribes’ water rights were to support their hunting and fishing rights “as currently exercised” – was meant to transform the Tribes’ priority from “time immemorial” to one contemporaneous with the earlier *Adair* decisions. The court found that the assertions could not be reconciled with the 1864 Treaty, the prior *Adair* decisions, or the precedents relied upon in those decisions. See *id.* at 1278-79.

The state and private contestants have appealed the decision to the Ninth Circuit, and briefs are due by the end of the year.

*Scott Bergstrom is an attorney-advisor, United States Department of the Interior, Office of the Solicitor. The views expressed in this article do not necessarily represent those of the Office of the Solicitor, the Department of the Interior, or the United States.*

### ***BIG HORN VI*** **48 P.3d 1040 (Wyo. 2002)**

---

On June 14, 2002, the Wyoming Supreme Court issued its sixth decision in the general adjudication of water rights in the Big Horn River System. See *In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, 48 P.3d 1040 (2002) (*Big Horn VI*). *Big Horn VI* addressed two questions of interest to practitioners in the field of federal Indian reserved water rights. Both questions have to do with so-called “*Walton*” water rights, which are named after a series of Ninth Circuit cases establishing that non-Indian purchasers of allotments receive a right to share ratably in federal Indian reserved water rights to the extent applied to beneficial use either by the allottee prior to the conveyance or by the non-Indian “with reasonable diligence after the passage of the title.” *Colville*

*Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981) (*Walton II*); see also *id.*, 460 F.Supp 1320 (E.D. Wash. 1978) (*Walton I*); 752 F.2d 397 (9th Cir. 1985) (*Walton III*).

Generally speaking, the court accepted the propositions that “*Walton* rights must be narrowly construed” and that the claimant shoulders the burden of proof. *Id.* at 1046, 1056-57. It also accepted the trial court’s general rule that “proof of irrigation within five years of acquisition raises a presumption of reasonable [diligence],” but that if “water is not applied to a beneficial use within five years,” then the court must look to “factors such as intent, distance and/or obstacles to the water source and diligence” in determining whether water was put to use with reasonable diligence. *Id.* at 1055.

The first specific question addressed in *Big Horn VI* was whether non-Indian purchasers of allotments within the federal Wind River Irrigation Project could “rely on the United States’ diligence in developing the . . . Project” to prove “reasonable diligence” in applying water to beneficial use after the conveyance from the allottee. See *Big Horn VI*, 48 P.3d at 1045. The court’s answer was heavily dependent on the specific facts presented.

The irrigation project was initiated under state law in 1905 and its development continued with state approval through the 1960s. *Id.* at 1044, 1046. “The . . . claimants’ properties passed out of allotment status during the period of 1900-1920 . . . . The federal project did not begin delivering water for use until the 1930s and 1940s.” *Id.* at 1044.

Historical evidence established that the project’s purpose was “to protect and provide water to the Indian lands” and – as development proceeded – “to permit the non-Indian purchasers to maintain the water rights they acquired from the Indian allottees by allowing beneficial use when the water was finally available through development of the project.” *Id.* at 1050. The court found that “absent the United States’

assistance in constructing the Wind River Irrigation Project, irrigation would not have been possible on any of the *Walton* claimants' lands." *Id.*

The court held that "the federal law of reserved rights relies upon the reasonable diligence standard established in state prior appropriation law to determine the validity of *Walton* right claims, and reliance upon the irrigation project met that standard" under Wyoming's relation-back doctrine (i.e. "priority is determined from the date of the manifestation of intent, not the date of actual application of the water to beneficial use."). *Id.* at 1045-46, 1049 (quoting A. Dan Tarlock, *Law of Water Rights and Resources* § 5:62 at 5-104 (2001)). Thus, emphasizing "the unique factual circumstances this dispute presents," *id.* at 1054, the court held that:

under the circumstances of this case and presuming irrigation was not possible absent the project in order to establish beneficial use of the reserved water within a reasonable time to retain the federal reserved right, the . . . claimants must demonstrate their efforts to put the lands under irrigation within a reasonable time and with due diligence, as defined by state law, *after the federal project facilities became available to the properties.*

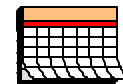
*Id.* at 1055. At the same time, the court made clear that "[i]f there had been a reasonable means to irrigate any of these properties without the project, the *Walton* standard and state law would require the irrigation be accomplished through the due diligence of the individual successor to the allottee." *Id.*

The court had little difficulty answering the second question, which was whether "the computation of the 'reasonable time' element of a *Walton* claim begins to run when the allotted property first passes out of allotment status or, in

the circumstance of land later repurchased by an Indian owner, from the date title transfers from the most recent Indian owner to a non-Indian?" *Id.* at 1045. The court found previous decisions on the issue clear and held that "the calculation of 'reasonable time' begins with the immediate grantee of the original allottee." *Id.* at 1056. The court also noted that if it were to hold otherwise "[t]here would be no certainty of priority dates because mere repurchase by an Indian successor anywhere in the chain of title would restart the 'reasonable time'" and that "such a holding could, and perhaps invariably would, lead to collusive transactions by those willing to find a 'straw man' for the precise purpose of thwarting established priority dates." *Id.* (footnote omitted).

AMERICAN BAR ASSOCIATION  
SECTION OF ENVIRONMENT, ENERGY,  
AND RESOURCES

*Calendar of Section Events*



**10th Section Fall Meeting**

October 3-7, 2002  
Portland, Oregon

**Clean Water Act: Law and Regulation**

October 23-25 2002  
Washington, DC  
Co-sponsored with ALI-ABA

**Environmental Sciences**

November 7-8, 2002  
Philadelphia, Pennsylvania

**21st Water Law Conference**

Feb. 20-12, 2003  
San Diego, California

*For more information, see the Section website at <http://www.abanet.org/environ> or contact the Section at 312/988-5724.*



# New from ABA Publishing and The Section of Environment, Energy, and Resources

## ***Endangered Species Act: Law, Policy, and Perspectives***

***Donald C. Baur and Wm. Robert Irvin***



This new book from the Section and ABA Publishing describes Endangered Species Act legal controversies and emerging case law, proposed agency reforms, and the competing perspectives of interest groups.

Chapters include:

A Premature Evaluation of American Endangered Species Law \* Historical Background to the ESA \* Section 4 of the ESA: The Keystone of Species Protection Law \* ESA: Critical Habitat \* Recovery Planning \* Protecting Species Through Interagency Cooperation \* Reinitiating of ESA Section 7 Consultations Over Existing Projects \* The Exemption Process and the “God Squad” \* Choosing Harmony: Indian Rights and the ESA \* The Cost of Continued Existence: Assessing the Impacts of Section 7 on Federal Agencies, Private Actors, and Endangered Species \* Take Prohibitions and Section 9 \* When Do Land Use Activities “Take” Listed Wildlife Under ESA Section 9 and the “Harm” Regulation? \* Judicial Interpretation of Section 9 of the ESA Before and After *Sweet Home*: More of the Same \* An Overview of Section 10 \* ESA Compliance Options: Section 10 and Other Tools \* HCA’s – Important Tools for Conserving Habitat and Species \* Tipping the Balance \* Experimenting with Experimental Populations \* Experimental Populations: Reintroducing the Missing Parts \* Plants \* Citizen Suits \* The ESA Takings of Private Property \* Trust Compensations the Endangered Species Act \* International Aspects of the Endangered Species Act \* The State of State Endangered Species Acts \* The ESA: Anatomy of an Environmental Scapegoat \* ESA Reform: Facing Hard Truths

2002 606 pages paper

Product Code: 5350089

Price: \$99.95 Section of Environment, Energy, and Resources members; \$119.95 Regular

**To order, call 1-800-285-2221 or visit the ABA Publishing website at  
[www.ababooks.org/envirolaw.html/](http://www.ababooks.org/envirolaw.html/).**

**Questions? E-mail: [service@abanet.org](mailto:service@abanet.org)**