

Native American Resources Committee Newsletter

Vol. 7, No. 1

January 2010

A MESSAGE FROM THE COMMITTEE'S CHAIR

Jana L. Walker
**Chair, Native American
Resources Committee**

Please enjoy this latest issue of the Native American Resources Committee Newsletter. While the newsletter has experienced a hiatus for several months, we plan to publish on a tertiary or quarterly basis for the remainder of this ABA 2009-2010 year. We are pleased to introduce our vice chairs who have volunteered to spearhead the development and publication of the newsletter: Donald M. Clary (lead editor), Robert Gruenig, and Timothy J. Humphrey, Sr. The success of the newsletter depends on contributions of current, emerging, and interesting articles by members of the committee and Section. The newsletter is a more casual vehicle where you can publish an article or notice of interest to committee members. If you would like to write or submit a newsletter article, please contact Donald Clary at clarydonald@gmail.com.

Other publishing opportunities also are available to individual attorneys or law firms in connection with the committee's chapter in *The Year in Review*. As you may already know, *The Year in Review* is one of the most used and most useful publications within the Section. The annual edition can be prominently found in the offices of most Section members as a ready and dependable reference for the "latest" updates in case

law, regulation, and legislation in any particular area of environmental, resources, or energy law.

The ABA Section of Environment, Energy, and Resources' periodical *Natural Resources & Environment* also accepts proposals from members on various topics. The committee will post available opportunities on its Web site and use its list serve to advise members who may wish to write an article.

Formed in the late 1980s, the Native American Resources Committee has a growing membership. It is governed by a chair (or co-chairs), appointed annually by the Section chair. The chair in turn appoints vice chairs, who focus on the Section's six service areas: newsletter, membership, programs, public service, technology, and *The Year in Review*. If you are interested in serving in a future leadership role on the committee, please let us know by e-mailing the chair. This year, we have a strong and very diverse committee, which we hope will help us add further value to your membership in the committee and Section. The current committee includes:

Chair:

Jana L. Walker
Stetson Law Offices, P.C.
jlw@stetsonlaw.com

Committee Newsletter:

Donald M. Clary (Lead)
Donald M. Clary, Attorney at Law
clarydonald@gmail.com

**Native American Resources Committee
Newsletter**

Vol. 7, No. 1, January 2010

**Donald M. Clary, Robert Gruenig, and
Timothy J. Humphrey, Sr., Editors**

In this issue:

Message from the Chair <i>Jana L. Walker</i>	1
Message from the Editors	3
EPA Reaffirms Indian Policy <i>Peter J. Hack</i>	4
Update on Sacred Places Issues <i>Jana L. Walker</i>	5
Mercury, Fish, and Tribal Health <i>Professor Catherine A. O'Neill</i>	7
Tenth Circuit Panel Finds Private Lands Located in the Navajo Checkerboard to Be within a Dependent Indian Community; Rehearing <i>En Banc</i> Granted <i>Timothy J. Humphrey, Sr.</i>	9
Western States Water Council Holds Symposium	10
New CDC Tracking Network	13
<i>Natural Resources & Environment</i> Issues Planned	13
In Memoriam: Luke W. Cole—20 Year of Advocacy	14
Native American Resources Committee Awarded Certificate of Recognition	14

Copyright © 2010. American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. Send requests to Manager, Copyrights and Licensing, at the ABA, e-mail: copyright@abanet.org.

Any opinions expressed are those of the contributors and shall not be construed to represent the policies of the American Bar Association or the Section of Environment, Energy, and Resources.

Robert Gruenig
National Tribal Environmental Council
bgruenig@ntec.org

Timothy J. Humphrey, Sr.
Stetson Law Offices, P.C.
tjh@stetsonlaw.com

Membership:

Kimberly Craven (Lead)
National Renewable Energy Laboratory
kimberly.craven@nrel.gov

Dorothy FireCloud, Superintendent
*National Park Service/Devils Tower National
Monument*
Dorothy-firecloud@nps.gov

Programs:

Dean B. Suagee (Lead)
Hobbs, Straus, Dean & Walker, LLP
dsuagee@hobbstrauss.com

Robert Gruenig
National Tribal Environmental Council
bgruenig@ntec.org

Jane W. Gardner, Esq.
Senior Counsel/Strategic Advisor
*General Electric Company/Corporate
Environmental Programs*
jane.w.gardner@ge.com

Public Service:

Catherine O'Neill, Professor (Lead)
Seattle University School of Law
oneillc@seattleu.edu

Dorothy FireCloud, Superintendent
*National Park Service/Devils Tower National
Monument*
Dorothy-firecloud@nps.gov

Technology:

Ivy Anderson (Lead)
Washington State Office of the Attorney General
ivya@atg.wa.gov

Brian Nichols
Modrall Sperling
bkn@modrall.com

The Year in Review:

Klint Austin Cowan
Hobbs, Straus, Dean & Walker LLP
kcowan@hobbsstraus.com

Please visit our Web site for further information about the committee and Section, including links to the current and archived editions of the newsletter: <http://www.abanet.org/environ/committees/nativeamerican/>. We also would be particularly interested in learning what types of information members would find most helpful on the committee Web site. Should you have any questions or comments regarding the committee, please contact me or any vice chair. Thank you.

A MESSAGE FROM THE EDITORS

Welcome to the Native American Resources Committee's first newsletter of the 2009-2010 ABA year. The committee serves as the Section's primary forum for discussing Native American and tribal issues as they relate to natural resources, energy, and the environment. The newsletter is intended to provide committee members with a valuable source of new information on a wide range of issues affecting the federally-recognized tribes in Indian Country and Alaska Native Villages.

We hope that the newsletter enhances your experience not only as an attorney and committee member, but also as a member of the Section, helping you to participate and communicate more efficiently within both the committee and Section.

This year promises to be a very interesting one, full of both challenges and opportunities. The committee's 2009-2010 Action Plan outlines many of the current and emerging issues that the committee hopes to consider in detail. A summary of these areas includes: *Global Warming and Climate Change*—Section members will be considering pending legislation and

regulatory changes that could potentially impact the costs paid for energy, the development of renewable and alternative energy projects on and near Indian lands, and, as the potentially disproportionate impacts of climate change on Native communities are assessed, environmental justice.

Environmental Protection and Federal Regulatory and Permitting Programs in Indian Country—These issues include the treatment of tribes in the same manner as states under federal environmental programs, Environmental Protection Agency Indian policies and executive orders, development of tribal environmental policy acts, and potential changes in Clean Water Act and Clean Air Act regulatory requirements affecting Indian Country. These issues also include the sometimes adverse and inequitable effect of federal regulatory and permitting programs on tribal economic development and tensions with the federal trust responsibility.

Environmental Justice in Indian Country—These issues include economic paternalism arising from insufficient funding to support sustainable and environmentally safe forms of economic development by tribes, the effect of federal policies and practices promoting natural resource development on Indian lands that are significant sources of pollution in tribal communities, lack of effective environmental regulation and protection in Indian Country due to gaps in the federal environmental regulatory scheme, and the potential for special environmental harm to tribal members and their traditional lifeways resulting from their dependence on subsistence fishing, hunting, and gathering.

Native American Interests in Off-Reservation Resources and Activities—This relates to such matters as the roles of federal, tribal, and state governments with respect to off-reservation areas and joint use areas; off-reservation protection of sacred sites and cultural use areas; repatriation; and tribal consultation rights and issues.

This newsletter will be used as a vehicle to communicate with the committee's membership on these areas, as well as others. It is our hope that you will find the newsletter informative and useful in your

EPA REAFFIRMS INDIAN POLICY

Peter J. Hack

**Colorado Department of Law-
Natural Resources Section
Denver Colorado**

practice as well as interesting reading. We also hope that this will be a two-way communication, and hope that members will submit articles on areas that interest them. We can include articles of varying lengths, though most are fairly short, and this is an excellent opportunity to have your article appear in a Section publication under more casual writing guidelines. Please feel free to contact the newsletter vice chairs (who are listed below) if you are interested in contributing an article, and wish to discuss it.

We will try to present articles that will not only be informative, but also will provoke further thought and discussion on these issues. It is not be our intent to promote any particular perspective. We recognize that our committee's membership is diverse, and can represent many different points-of-view on just about any issue. Further, please understand that the articles presented will necessarily offer the perspective of the individual author to some degree, and do not represent an official position of the committee or Section. In the event that only one side of any issue is presented, please consider it to be implicitly understood that we welcome articles (and feedback) from those holding contrary views.

Again, we look forward to an exciting year, and hope that you will find this newsletter to be an important part of your interaction with the committee. Please feel free to contact the vice chairs directly if you have any comments, questions, or wish to contribute to the newsletter.

Donald M. Clary
Lead Newsletter Vice-Chair
Law Office of Donald M. Clary
(818) 952-4135
clarydonald@gmail.com

Timothy J. Humphrey, Sr.
Stetson Law Offices. P.C.
(505) 256-4911
tjh@stetsonlaw.com

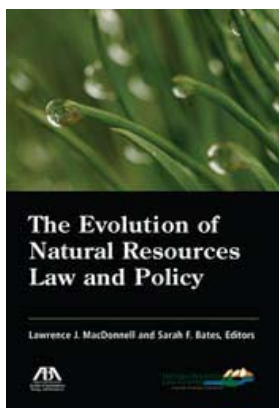
Robert Gruenig
National Tribal Environmental Council
(505) 242-2175
bgruenig@ntec.org

On July 22, 2009, the Environmental Protection Agency (EPA) formally reaffirmed its Indian Policy. In a speech to the National Tribal Operations Committee, administrator Lisa P. Jackson announced the reaffirmation. Originally, adopted in 1984, the policy has been reaffirmed by each subsequent administration. The first such policy adopted by a federal agency, it sets forth EPA's support for tribal self-government and government-to-government relations. The policy details nine principles to guide interaction between EPA and tribes on environmental decisions affecting tribal lands: (1) EPA will work directly with tribal governments; (2) Tribal governments should be the primary parties for setting environmental standards and making environmental policy decisions related to lands under their jurisdiction; (3) EPA will take steps to assist tribes in assuming regulatory control over environmental programs on tribal lands; (4) EPA will take steps to remove barriers to working directly with tribal governments; (5) EPA will consider tribal concerns and interests whenever EPA decisions may affect reservation environments; (6) EPA will encourage coordination between tribal, state, and local governments on problems of mutual concern; (7) EPA will work with other federal agencies having responsibilities in relation to tribal land to enlist support for tribal self government; (8) EPA will assure compliance with environmental statutes on tribal lands; and (9) EPA will incorporate these policies into its planning and decision making. *See* EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984), available at <http://www.epa.gov/tribalportal/pdf/indian-policy-84.pdf>. The reaffirmation noted that "significant milestones and successes in the EPA-tribal environmental partnership . . . can be directly traced to the EPA Indian policy." *See* EPA Indian Policy Memorandum (July 22, 2009) available at <http://www.epa.gov/tribalportal/pdf/reaffirmation-memo-epa-indian-policy-7-22-09.pdf>. Administrator Jackson also stated that "tribes are

essential partners” in meeting the challenges of developing a “clean energy environment.” Further information on the EPA’s Indian Policy can be found on the EPA’s Web site at <http://www.epa.gov/tribalportal/basicinfo/epa-policies.htm>.

UPDATE ON SACRED PLACES ISSUES

Jana L. Walker
Stetson Law Offices, P.C.
Albuquerque, New Mexico



The Evolution of Natural Resources Law and Policy

**Lawrence J.
MacDonnell and
Sarah F. Bates,
Editors**

Natural resources law has emerged over the last 60 years as a dynamic and challenging field of practice, with a rich and colorful history that reaches back to the beginning of the United States. The contributors to *The Evolution of Natural Resources Law and Policy* do more than review the past, however: they also look at current challenges and offer ideas about the future. The book shows how the role of the federal government continues to be a complex one, as markets and private actors become more visible participants in the current policy arena.

The first part—Reflections on Natural Resources Law and Policy—comprises foundational analyses of the law. The book’s second part—The Evolution of Resource Management—reviews thematic issues in natural resources law and policy.

2010 6 x 9 paperback 451 pages
Product Code: 5350182
Price: Section of Environment, Energy, and Resources members \$89.95; Regular \$109.95

**TO ORDER ABA BOOKS, VISIT THE
ABA PUBLISHING WEB SITE AT
WWW.ABABOOKS.ORG**

Recent events demonstrate the determination of tribes and Native people to protect off-reservation sacred places under state and federal laws and in administrative and judicial forums. Under the New Mexico Cultural Properties Act, five tribes (the Pueblos of Acoma, Laguna, and Zuni; the Hopi Tribe; and the Navajo Nation) obtained protection for Mount Taylor as a significant traditional cultural property (TCP) eligible for listing on the State Register of Cultural Properties. Within the Mount Taylor TCP, thousands of contributing cultural resources are present, and as many as thirty tribes make pilgrimage to the mountain for religious and cultural practices. In addition to its cultural and religious importance to tribes, Mount Taylor sits atop some of the richest known uranium ore reserves in the United States.

On June 5, 2009, the New Mexico Cultural Properties Review Committee (Committee) voted unanimously on the nomination, making Mount Taylor possibly the largest of any such property ever listed in a state or national register. The Committee’s final order approving the Mount Taylor TCP, issued Sept. 14, 2009, excludes privately owned property as non-contributing to the TCP. The final order requires the New Mexico Historic Preservation Department to maintain an ongoing, flexible list of these non-contributing private property owners. The state listing does not give the tribes veto authority over proposed actions on Mount Taylor; however, the designation gives cultural properties within the TCP some protections from development through, for example, permitting procedures for excavation and disposition of cultural properties. While the Mount Taylor TCP listing reflects over a year of collaboration and consultation among tribes, private landowners, and the public, the nomination process nevertheless engendered controversy. During the summer, the Navajo Nation Human Rights Commission held a public hearing and met with city and local law enforcement officials in Grants, New Mexico, regarding race relations and

violence against several Native Americans in that area, which reportedly may in some cases be related to the Mount Taylor TCP listing. *See Dirty Secrets Emerge After 'Indian Rolling,'* ALBUQUERQUE J., July 19, 2009, at A 1-2. A group of energy companies and landowners are presently challenging the Mount Taylor TCP listing, alleging among other things that the Committee violated the state's Open Meetings Act and New Mexico Constitution by endorsing tribal religion. The case, styled *Rayellen Resources, Inc. v. New Mexico Cultural Properties Review Committee*, CV-09-1085 MCA/CG, was recently remanded by the United States District Court, District of New Mexico, to the Fifth Judicial District Court of New Mexico.

In other developments, on June 8, 2009, the United States Supreme Court declined to review the Ninth Circuit *en banc* decision in *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008); *cert. denied*, 129 S. Ct. 2763 (2009). In that case, several tribes and environmental groups filed suit to enjoin further development of the San Francisco Peaks by the operator of an Arizona ski resort—the “Snowbowl”—which planned to use treated sewage effluent to make artificial snow. The tribal plaintiffs claim the Peaks to be highly sacred and culturally significant and that the use of such snow desecrates the entire mountain, substantially burdening their exercise of religion under the Religious Freedom Restoration Act (RFRA).

This particular dispute began in 2005, however, the tribes' objections to operations of Snowbowl actually began decades earlier. *See Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984). Following unsuccessful administrative appeals of the Forest Service's approval of the proposed upgrades, the plaintiffs filed suit alleging the Forest Service's authorization violated RFRA, the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), Endangered Species Act, Grand Canyon National Park Enlargement Act, and National Forest Management Act of 1976. Dismissing all claims except the plaintiffs' RFRA claim on summary judgment, the district court held at trial the proposed artificial snowmaking and other upgrades at

Snowbowl would not violate RFRA. A three-judge panel of the Ninth Circuit reversed the district court. The panel held that Snowbowl's use of the treated sewage effluent would violate RFRA and found for plaintiffs on one remaining NEPA claim. *See Navajo Nation v. U.S. Forest Service*, 479 F.3d 1024, 1029 (9th Cir. 2007). Sitting *en banc*, the Ninth Circuit overturned the panel decision holding that the Forest Service's approval of the proposal to spray treated sewage effluent on the Peaks would not violate the tribes' religious freedom rights under RFRA. *See Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008). The Ninth Circuit found that even if the tribal plaintiffs believed the artificial snowmaking desecrated the mountain, the only effect was on the tribal plaintiffs' subjective spiritual experience. The *en banc* court held that to prove a substantial burden under RFRA, the tribes would have to show that the government coerced the tribes to act against their religious beliefs or forced them to choose between tenets of their religion or receiving benefits from the government. The Ninth Circuit held that the tribes had not done so and thus concluded that the proposal did not substantially burden the tribes' exercise of religion within the meaning of RFRA. With respect to NEPA, the Ninth Circuit adopted the panel's dismissal of four of plaintiffs' NEPA claims and further held that the Navajo plaintiffs did not properly and timely raise the remaining NEPA claim that the final environmental impact statement (FEIS) failed to consider adequately risks from human ingestion of artificial snow. The United States Supreme Court denied *certiorari*, refusing to hear or comment on the *Navajo Nation* case.

On Sept. 21, 2009, court challenges to Snowbowl's operations began anew. Save the Peaks Coalition and a group of private citizens filed a complaint in federal district court alleging that the Forest Service violated NEPA on several grounds, including its failure to consider adequately in the FEIS the risks to human health, particularly the health of children, associated with ingestion of artificial snow made with treated sewage effluent. *See Complaint, Save the Peaks Coalition v. U.S. Forest Service*, No. 2:09-cv-01969 (D. Ariz. Sept. 21, 2009). Plaintiffs in this new litigation were not plaintiffs in *Navajo Nation*.

In other recent RFRA developments, plaintiffs South Fork Band Council of Western Shoshone Indians of Nevada, Timbisha Shoshone Tribe, Western Shoshone Defense Project, and Great Basin Resource Watch filed suit challenging the Bureau of Land Management's issuance of a record of decision, FEIS, and approval of a plan of operations approving construction and operation of an open-pit gold mine in Nevada, asserting adverse impacts to Mt. Tenabo, which they hold sacred. Shortly after *certiorari* was denied in *Navajo Nation*, the plaintiffs dropped their RFRA claim. See Joint Stipulation of Dismissal of Plaintiffs' Religious Freedom Restoration Act Claim With Prejudice, in *South Fork Band Council of Western Shoshone v. U.S. Dept. of Interior*, No. 3:08-cv-00616-LRH-RAM (D. Nev. June 12, 2009). Litigation in the federal district court proceeds on the plaintiffs NEPA and other claims.

A lawsuit by the Comanche Nation also proceeds against the United States and the U.S. Army under RFRA and NHPA. After a federal district court enjoined the Army's construction of a warehouse located on a site sacred to Comanches near the southern base of the Medicine Bluffs at Fort Sill, Oklahoma, the Army terminated the construction contract and announced plans to move the warehouse site. The originally proposed site is an open undeveloped area that provides the last undisturbed view of the Medicine Bluffs peaks from the south. The Army also claims that it has terminated plans for other developments near the original site, including a fire station, vehicle parking facility, and road-widening project. The Army now claims the lawsuit is moot. However, the Comanche Nation asserts that mere assurances by the Army that it will not build the warehouse or another objectionable building at the disputed site neither moots its claims nor adequately protects its interests under RFRA. Dispositive motions are expected to be filed soon in the case, styled *Comanche Nation v. United States*, No. 5:08-cv-00849-D (W.D. Okla.).

The debate over protection of Native American sacred places is of continuing and profound national importance, raising issues irrespective of political or geographical boundaries. Please check back on the

Native American Resources Committee Web site and future issues of this newsletter for further updates on ongoing litigation and other developments.

Jana L. Walker (Cherokee/Loyal Shawnee/Delaware) is a senior attorney in the Albuquerque office of Stetson Law Offices, P.C. She is chair of the Section's Native American Resources Committee.

MERCURY, FISH, AND TRIBAL HEALTH

Professor Catherine A. O'Neill Seattle University School of Law

The United States Geological Survey (USGS) recently issued a report finding widespread mercury contamination in U.S. streams. The USGS found methylmercury in every fish that it sampled—an extraordinary indictment of the health of our nation's waters. The USGS reported that the fish at 27 percent of the sites contain mercury at levels exceeding the U.S. Environmental Protection Agency (EPA) criterion for the protection of humans who consume an average amount of fish.

The report, however, fails to mention a most alarming fact—EPA's criterion grossly understates the risk to those people whose fish consumption practices differ from those of the "average American," particularly members of the various fishing tribes. While the EPA's criterion is based on the assumption that people eat 17.5 grams per day of fish—about one fish meal every two weeks, on average—people in the fishing tribes consume fish at several times this rate. The fishing peoples of the Pacific Northwest, the Great Lakes, the Northeast coast, and elsewhere have always depended on fish for their physical, economic, social, political, cultural, and spiritual health. As a result, many Native peoples in the Pacific Northwest currently eat hundreds of grams per day, as documented in recent studies by the Suquamish, the Tulalip, the Squaxin Island, and other tribes. Compare the EPA's 17.5 gram-per-day figure, which reflects the 90th percentile value for the general population, with the 90th

percentile value documented by the Suquamish tribe, which is 489 grams per day. (Note that the maximum value documented by the Suquamish tribe is 1453.6 grams per day—several orders of magnitude greater than the EPA’s assumption.) The failure of EPA’s criterion to reflect the consumption practices of certain higher-consuming and subsistence groups was highlighted by the National Environmental Justice Advisory Council’s report *FISH CONSUMPTION AND ENVIRONMENTAL JUSTICE* (2002). The USGS findings are thus all the more troubling when one considers the these higher-consuming groups—the USGS numbers mean that few of the fish sampled are fit for consumption by these people. And these figures capture only contemporary consumption rates. But such contemporary rates often reflect fish consumption practices that are *suppressed* relative to tribes’ aboriginal, historical, or “heritage” practices—practices to which tribes may have treaty-secured and other rights. That is to say, tribal members often consume less fish today than in the past, as a consequence of depletion and contamination of the fisheries; inundation of fishing places; denial of access to aboriginal lands; and years of prosecution, intimidation, and gear confiscation. Many tribes today continue to exercise their treaty rights to fish, hunt, and gather and seek to protect and/or revitalize their traditional practices in an exercise of political and cultural self-determination. However, they are faced with the fact that mercury contamination can make these practices precarious as a matter of human health.

Methylmercury is a potent neurodevelopmental toxin. Exposure to even small amounts *in utero* or during childhood can lead to irreversible neurological damage. Evidence shows that at least one in ten women of childbearing age in the U.S. has blood mercury at levels that pose a risk to a developing fetus; and this number nearly triples for the group of women that includes Native Americans and Pacific and Caribbean Islanders. Methylmercury is toxic to non-human species as well. It has been shown to be harmful to mink, loons, otters, mergansers, kingfishers, and a host of other species that also look to fish for food.

The main anthropogenic sources of mercury releases in the United States are coal-fired power plants. Near the

end of the Clinton administration, EPA found that regulating these sources was “appropriate and necessary” within the meaning of Section 112 of the Clean Air Act (CAA). This finding would have ushered in a requirement that coal-fired power plants reduce their emissions to levels achieved by the application of “maximum achievable control technology.” The Bush administration, however, attempted to rescind this regulatory finding and instead employ a cap-and-trade program for mercury from these sources. The Bush administration’s attempt was vacated by the D.C. Circuit in *New Jersey v. EPA*. More than eight years later, EPA in the Obama administration is now working to craft a mercury regulation for coal-fired power plants, which, by court-ordered deadline, are to be issued by 2011. In the meantime, some twenty-three states have stepped in to issue their own mercury standards for coal-fired power plants. Besides coal-fired power plants, there are a number of other sources of mercury contamination that have been left largely unregulated by the federal government: chlor-alkali plants and gold mines among them. Legislation to phase out mercury use at chlor-alkali plants—in an industry where alternative mercury-free processes are already widely used—was introduced in the current legislative session.

Tribes have been active in research and policy debates relevant to mercury contamination on numerous fronts. In addition to the federal administrative, legislative, and judicial venues discussed above, tribes have been involved in other aspects of mercury regulation. For example, states and tribes around the country are in the process of issuing and reviewing their water quality standards for mercury. Under the risk-based approach currently favored by EPA, the fish consumption rate is the linchpin of the resulting regulatory standards for water quality. Thus, many fishing tribes have been working on multiple fronts toward outcomes that are protective of tribal rights and tribal health. Tribes have, for example, been leaders in undertaking the research to document accurately both contemporary and historical consumption practices for use by tribal and non-tribal agencies in setting water quality standards. Several tribes have adopted or are in the process of adopting standards that employ higher fish consumption rates—rates that are moving toward

protecting consumption at contemporary and, ultimately, historical levels. And many tribes have labored to impress upon neighboring states, whose water quality standards inevitably affect tribal resources and rights, the need to account for tribal members' higher fish consumption rates and different fish consumption practices. Finally, some tribes and associated researchers are working to articulate an alternative, "health-and-well-being"-based approach to the problem of environmental contamination—an approach that would be more culturally compatible with the fishing tribes' worldviews than the current, risk-based paradigm. This approach would seek to account for the fact that when fish are contaminated, it is not just individual tribal members' physiological health that is "at risk." Rather, the harms of contamination are visited on both the individual and the group; and the harms are manifested not only in adverse physiological health "endpoints" such as neurological damage or cancer, but also in harms to social, cultural, and spiritual well-being as well as to tribal rights, including those protected by treaty.

Tribes' efforts to address the harms of mercury contamination of the fish resource have borne some fruit. There is, however, still a great deal of work to be done to reach the point where tribes and their members are able fully to exercise their rights, including treaty-protected rights, to catch and consume fish without fear of methylmercury contamination.

Professor Catherine O'Neill teaches at Seattle University School of Law, focusing on environmental and Indian law, environmental justice, and risk assessment. To listen to a recent radio interview with Professor O'Neill regarding mercury and fish consumption, visit <http://www.wnyc.org/shows/lopat/episodes/2009/07/29/segments/137586>.

TENTH CIRCUIT PANEL FINDS PRIVATE LANDS LOCATED IN THE NAVAJO CHECKERBOARD TO BE WITHIN A DEPENDENT INDIAN COMMUNITY; REHEARING EN BANC GRANTED

**Timothy J. Humphrey, Sr.
Stetson Law Offices, P.C.
Albuquerque, New Mexico**

Hydro Resources, Inc. (HRI) seeks permits to authorize uranium mining on lands in an area known as the Navajo Checkerboard. The proposed mine will be located on privately owned fee lands eleven miles northeast of Gallup, New Mexico, and six miles north of the Church Rock Chapter House (HRI lands) and subject to regulation under the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j(26) (SDWA). In 2007, following lengthy litigation among United States Environmental Protection Agency (EPA), HRI, the Navajo Nation, and the State of New Mexico, the EPA determined that the Church Rock Chapter was "Indian Country" due to its status as a dependent Indian community and therefore EPA, rather than the State of New Mexico, had primacy to regulate under the SDWA. HRI appealed and on April 17, 2009, a divided three judge panel of the United States Court of Appeals for the Tenth Circuit upheld the decision of EPA and the lower court that regulation of the facility properly lay with EPA. *Hydro Resources, Inc. v. United States EPA*, 2009 U.S. App. Lexis 8517 (10th Cir. 2009).

In finding EPA jurisdiction over SDWA activities, the court determined that the HRI lands are located within the geographic boundaries of the Church Rock Chapter. Although it noted the absence of residents on the HRI lands, citing Census Bureau and land records, the court stated that 97 percent of the Chapter's population is Navajo and that 92 percent of the land is owned by the federal government and superintended for the benefit of the Navajo Nation, its members, and individual Navajo allottees. Using the Chapter as a "Community of Reference," the court then determined that, under 25 U.S.C. § 1151(b), the Church Rock Chapter is a "dependent Indian community." Because

the regulations implementing the SDWA assert EPA jurisdiction over “Indian lands” by reference to § 1151, the court found the HRI lands to be within Indian lands subject to EPA jurisdiction rather than that of the New Mexico Environmental Department.

In arguing against the EPA’s determination and the application of the “Community of Reference” standard, HRI argued that, since the United States Supreme Court’s decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the use of the Tenth Circuit’s Community of Reference test, also known as the Watchman test, identified in *Pittsburgh & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995), was no longer appropriate. Though seemingly acknowledging the possible validity of that argument, the court pointed to several Tenth Circuit decisions since *Venetie* applying the Watchman test. The court also emphasized that the doctrine of *stare decisis* bars panels from overruling earlier decisions of a panel of the court absent *en banc* reconsideration or a superseding contrary decision by the United States Supreme Court.

In seeking respite from EPA jurisdiction and in response to the panel’s refusal to go against another panel’s precedence, on June 1, 2009, HRI filed a motion for hearing *en banc*. The court granted motions to file *amicus* briefs by United Nuclear Corporation, the former owner of the Church Rock Uranium Mill, and the State of New Mexico, both joining HRI in its challenge to EPA jurisdiction. EPA and the Navajo Nation both filed responses to the issues raised by HRI in its petition for rehearing *en banc*. On Aug. 24, 2009 the Tenth Circuit Court of Appeals granted HRI’s request and indicated that the hearing *en banc* probably will be held in January 2010.

While the Panel’s ruling expands the definition of Indian Country to include that part of the Navajo Checkerboard known as the Church Rock Chapter, it ignores legislation of the Navajo Nation banning uranium mining and the past experience of Church Rock Chapter residents with radioactivity. On the morning of July 16, 1979, an earthen tailings dam at the United Nuclear Corporation’s Church Rock

Uranium Mill failed, spilling twenty years of radioactive fluids into the Rio Puerco. The radiation released on that date was greater than that released during the Three Mile Island reactor incident, and is second only to the 1989 Chernobyl reactor melt down. A formal clean-up plan for the Northeast Church Rock Mine was not issued until this year, 27 years after its closure. This and other uranium related concerns led President Joe Shirley, Jr. to sign the Diné Natural Resources Protection Act of 2005 banning uranium mining within the Navajo Nation.

It is yet to be seen whether and what role the Navajo Nations ban on uranium mining or the history of the land and people will play in future development of uranium resources in the area.

Timothy J. Humphrey, Sr. is a senior attorney in the Albuquerque office of Stetson Law Offices, P.C. He is a vice chair on the Native American Resources Committee.

WESTERN STATES WATER COUNCIL HOLDS SYMPOSIUM

The Western States Water Council (WSWC) and the Native American Rights Fund (NARF) held the 11th biannual Symposium on the Settlement of Reserved Indian Water Rights Claims on August 24-26, in Ferndale, Washington. The Lummi Nation hosted the event, which included presentations and speeches from Administration representatives, key Congressional staff members, and state and tribal leaders. Lummi Nation Chairman, Henry Cagey, welcomed nearly 200 people in attendance and explained the importance of water. He also discussed efforts to preserve the Tribe’s resources and presented NARF Executive Director, John Echohawk, with a bandana representing a Lummi dancer, canoe, and tribal leader. Next, Mr. Echohawk explained the history of the Symposium and that its purpose is to provide a forum for water experts from around the country to exchange information and advice regarding Indian water rights settlements. He also recognized the efforts of WSWC Executive Director Craig Bell, who passed away unexpectedly in June.

Mr. Echohawk presented the WSWC with a hand-made quilt in honor of Craig. Next, WSWC Executive Director Tony Willardson thanked the Lummi Nation for its hospitality and referenced the Western Governors' Association's policy statement on settlements, which supports negotiated resolutions to Indian water rights claims and calls for appropriate federal participation and assistance.

Following these remarks, Jay Manning, Director of the Washington Department of Ecology (DOE) and a WSWC member, addressed "Washington's Water Challenge." Jay addressed a number of topics, including climate change, the loss of snowpack, increased land cover, and the proliferation of exempt wells. With respect to Indian water rights settlements, Jay said Washington is committed to resolving disputes through settlements, but added that the "real trick" is making an agreement "stick" in basins where non-Indians will be impacted. To do this, Jay said that "...it takes a lot of education for non-tribal folks to gain a tribal perspective." He also described water management partnerships and programs in the Columbia and Walla Walla and Yakima River basins.

NARF Senior Staff Attorney Steve Moore moderated the first panel discussion, entitled, "Gathering Background Information and the Role of Technicians in Negotiations." The panel consisted of Randy Chandler, Deputy Manager of the Bureau of Reclamation's Phoenix Area Office; Andrew B. Dunn, Section Manager for the Washington Department of Ecology's Water Resources Program; and Joe Ely (filling in for Robert Bear), who worked on the Duck Valley settlement and is a project coordinator for Stetson Engineers, Inc. Mr. Chandler said parties should consult with technicians early in the settlement process to ensure that the terms of an agreement are practical, while Mr. Dunn stressed the importance of sharing information and having technical staff communicate directly with each other. Mr. Ely said technical issues are a significant portion of a settlement and that technicians can mean the difference between success and failure.

A second panel discussion was entitled, "Identifying Parties and Issues and How Negotiations Bind Larger

Groups." WSWC member and Washington Assistant Attorney General Barbara Markham moderated the panel, which included: Duane Mecham, a senior attorney with the Department of Interior's Solicitor's Office; Chris Tweeten, the Chairman of the Montana Reserved Water Rights Compact Commission; and Stanley Pollack, an Assistant Attorney General for the Navajo Nation. Mr. Mecham said the settlement process helps create relationships that allow parties to work jointly on "outlier" issues and implement settlements, while Mr. Tweeten and Mr. Pollack discussed the challenges associated with crafting politically feasible settlements and obtaining funding.

Next, NARF Staff Attorney David Gover moderated a panel on "Settlements and Ground Water." Panelists included: Robert Talbot, a hydrogeologist with the Bureau of Reclamation; WSWC member Ken Slattery, Washington DOE Water Resources Program Manager; Merle Jefferson, Executive Director of the Lummi Nation Natural Resources Department; and Dr. Rosalind Bark with the University of Arizona's Department of Hydrology and Water Resources. Mr. Talbot said ground water should be included as an "integral" component of a tribe's water rights claims early in the negotiation process, while Ken provided a state perspective on whether federal reserved water rights extend to ground water. Mr. Jefferson described the "lessons" the Lummi Nation learned as a result of its settlement, and Dr. Bark discussed ground water rights within the context of the Arizona Water Settlement Act of 2004.

On the following day, Letty Belin, Counselor to Deputy Secretary of the Interior David Hayes, conducted a listening session. She said the Administration does not yet have a comprehensive settlement policy, adding that Reclamation Commissioner Mike Connor's testimony on the White Mountain Apache bill (H.R. 1065) is its only official statement. She also said the Administration "strongly supports" settlements, but recognizes that climate change, budget issues, and other challenges present obstacles. Of note, Ms. Belin said the Administration is: (1) concerned about the end costs of settlements and will look skeptically at proposals that lack significant state and non-Indian contributions; (2) open to take suggestions on funding

mechanisms and spending offsets; and (3) willing to work to address the “impression and expectation” that the federal government will always say “no.” Pam Williams, Director of the Indian Water Rights Office, and Bella Wolitz, Assistant Legislative Counsel in the Office of the Secretary of the Interior, also participated in a question and answer session following Ms. Belin’s remarks.

A response panel followed, consisting of Scott McElroy, a partner with the law firm of McElroy, Meyer, Walker & Condon; and WSWC member Susan Cottingham, Program Manager, Montana Reserved Water Rights Compact Commission. Clayton Matt, Head of the Confederated Salish and Kootenai Tribes’ Natural Resource Department, moderated the discussion. Susan commented that a fully engaged federal sovereign is critical. Settlements consistently involve funding issues and a process that involves decisions coming from Washington, D.C. to the local level and back and forth. Mr. McElroy added that more money is needed in a number of areas, including the team building process in the early stages of a settlement.

Ken Slattery moderated a panel discussion on the Lummi Settlement, which included Barbara Markham and Harry Johnsen, a partner with the law firm of Raas, Johnsen & Stuen. Mr. Johnsen represented the Lummi Nation. He provided a historical overview of the events leading up to the settlement, while Barbara discussed the prior and present litigation regarding the Tribes water rights. Following their remarks, Symposium attendees embarked on a tour of the Lummi Reservation that included stops at ground water wells, pump stations, and tribal government and cultural buildings. The tour also included a salmon barbeque, a cultural presentation, artisan fair, and a canoe race.

On Wednesday, NARF Staff Attorney Amy Bowers moderated a panel on the “Congressional Outlook for Funding for Indian Water Rights Settlements,” which included: Allison Binney, Majority Staff, Senate Indian Affairs Committee; David Mullan; Minority Staff, Senate Indian Affairs Committee; Tanya Trujillo, Majority Staff, Senate Energy and Natural Resources Committee; Ryan Smith, Legislative Counsel for

Senator Jon Kyl (R-AZ); and Camille Calimlim, Majority Staff, House Natural Resources Committee, Water and Power Subcommittee. Mr. Mullan described the process the Senate Indian Affairs Committee uses for settlement bills, while Ms. Binney said the Committee Chair, Senator Byron Dorgan (D-ND), does not like to move bills that are opposed by a Senator from an impacted state or involve interstate conflicts where the parties have not tried to resolve disputes. She also said this Congress is taking a “closer look” at state and non-Indian contributions and waiver provisions. Ms. Trujillo and Mr. Smith then discussed funding options available through a recently created settlement fund and the President’s Emergency Plan for AIDS Relief, a statute that authorized \$1B for water supply projects. Lastly, Ms. Calimlim described her subcommittee’s processes, and said the White Mountain Apache (H.R. 1065), Crow (H.R. 845), Taos (H.R. 3254), and Aamodt (H.R. 3342) settlement bills will be priorities for action.

WSWC member Candace West, the Chief Legal Counsel for Montana’s Department of Natural Resources and Conservation, moderated a response panel consisting of: Mark Sheridan, a partner with Holland & Hart, LLP; Don Wilson, the Director of Natural Resources for the Blackfoot Tribe; Bella Wolitz; and Barbara Cosens, Associate Professor of Law, University of Idaho College of Law. Mr. Sheridan spoke of his experiences representing non-Indian water users in the Aamodt Settlement, and said parties need to make Indian water rights a “sorrow” that can compete with other “sorrows” before Congress and the President. Mr. Wilson recommended frequent contact with Congressional staffers and said parties should look to other sources to secure funding in addition to the federal government. Lastly, Ms. Wolitz described the process of authorizing and appropriating settlement funds, while Ms. Cosens discussed strategy development.

Billy Frank, Jr., chairman of the Northwest Indian Fisheries Commission, provided the concluding “wrap up.” He said the current system is “broken,” but urged tribes to work with the new Administration and Congress and to play an integral role in the new team efforts to fix “the machine.”

NEW CDC TRACKING NETWORK

The Centers for Disease Control and Prevention (CDC) recently announced its National Environmental Public Health Tracking Network (Tracking Network). Developed through collaboration between the CDC, other federal partners, and state and local health departments, the Tracking Network is a Web-based tool that tracks and reports environmental hazards and potentially related health problems such as cancer and asthma. For additional information, visit CDC's YouTube video at: <http://www.youtube.com/user/CDCStreamingHealth>.

NATURAL RESOURCES & ENVIRONMENT ISSUES PLANNED

At the 17th Section Fall Meeting in Baltimore, the editorial board of *Natural Resources & Environment* selected themes for the four issues that will comprise Volume 25. When production begins on each issue, a solicitation is distributed by e-mail which includes some suggestion article topics within the theme. The theme for each issue is listed below, along with the lead editor, and the date that the solicitation of authors will commence:

Issue 1, Summer 2010: 25th Anniversary of NR&E
Issue editor: Jean Feriancek
Solicitation goes out: October 1, 2009

Issue 2, Fall 2010: Bellwether States
Issue editor: Madeline Kass
Solicitation goes out: December 8, 2009

Issue 3, Winter 2011: Ethics and Disclosure
Issue editor: Gale Lea Rubrecht
Solicitation goes out: March 11, 2011

Issue 4, Spring 2011: Energy
Issue Editor: Dean Suagee
Solicitation goes out: June 14, 2010

Please watch for these upcoming solicitations and consider becoming a contributor to one of these issues.

AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events

ABA Midyear Meeting

Feb. 3–9, 2010
Orlando

28th Annual Water Law Conference

Feb. 17–19, 2010
San Diego

39th Annual Conference on Environmental Law

March 18–21, 2010
Salt Lake City

Eastern Water Resources Conference

May 20–21, 2010
Orlando

ABA Annual Meeting

Aug. 5–10, 2010
San Francisco

18th Section Fall Meeting

Sept. 29–Oct. 2, 2010
New Orleans

**For more information, see the
Section Web site at
www.abanet.org/environ/.**

**Course materials from many prior
Section programs are available through
the ABA Web Store as well as audio
files from select Section CLE programs
and teleconferences. Details can be
found at [www.abanet.org/environ/
programs/pastcle.html](http://www.abanet.org/environ/programs/pastcle.html).**

IN MEMORIAM: LUKE W. COLE— 20 YEARS OF ADVOCACY

Luke W. Cole, the founder of the Center on Race, Poverty & the Environment (CRPE), passed away in Uganda on June 6, 2009 while on sabbatical. During the Section of Environment, Energy, and Resources' 17th Section Meeting, the Section awarded Luke Cole and CRPE the 2009 American Bar Association Award for Excellence in Environmental, Energy, and Resources Stewardship. The award recognizes leadership or achievement in areas of sustainable development or environmental, energy, or resources stewardship.

CRPE issued the following statement upon Cole's death:

Luke was a visionary leader who helped define the role of law and lawyers in the environmental justice movement. With the inspiration and support of his mentor, Ralph Abaca of California Rural Legal Assistance, he founded CRPE soon after his graduation from Harvard Law School. Luke saw that as a legal field, environmental justice could be a bridge between the traditional environmental movement and the traditional civil rights movement. Although he worked hard to bring lawyers into the environmental justice movement, he was always mindful of the secondary role they should play. Luke recognized that in the end, environmental racism is a political problem, not a legal one, and therefore that the ultimate end is to empower disempowered communities. In his view, no legal strategy was adequate unless it met the test of three questions: Will it educate? Will it build the movement? Will it address the root of the problem?

Luke came from privilege, and he often laughed about being called a "limousine liberal," but in his life and his work he walked the walk. He used his education, his race and gender privilege, his "macho law brain," his charisma, and his heart to help those who did not have a voice influence the decisions that affect their lives and health. His "from the ground up" philosophy of environmental

justice advocacy has influenced an entire field of legal practice and scholarship, as well as built lasting relationships with the communities with which we work. While we feel his loss deeply, CRPE is committed to continuing his work and ensuring that his vision of justice and equity is realized.

NATIVE AMERICAN RESOURCES COMMITTEE AWARDED CERTIFICATE OF RECOGNITION

At the 17th Section Fall Meeting in Baltimore in September 2009, the Native American Resources Committee was awarded a Certificate of Recognition for "Best Public Service of the 2008-2009 Energy and Resources Committee." This award was in recognition of the committee's role in sponsoring the public service project at the 2008 Fall Meeting, which was held in Phoenix, Arizona. That public service project was a mock public hearing held at the Salt River Pima-Maricopa Indian Community High School, on the development of a tribal climate action plan. The May 2009 issue of our committee's newsletter includes an article on the mock public hearing. The committee will make available the materials that were developed for the mock public hearing for use by any member or organization that is interested in holding its own mock public hearing.

TRENDS NOW AVAILABLE ONLINE!



Section members are able to view the newsletter *Trends* in .pdf format in the Section Members Only portion of the Section Web site at [www.abanet.org/ environ/](http://www.abanet.org/environ/). Issues dating back to September/October 2006 are archived.