

APR 18 1990

IN THE COURT OF APPEALS
STATE OF NEW MEXICO

UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF NEW MEXICO; and
HEALTH AND ENVIRONMENT
DEPARTMENT, Environmental
Improvement Division,

Appellee.

No. 12190

12,233

*our response to their
motion to stay*

**APPELEE'S RESPONSE IN OPPOSITION TO
APPELLANT'S MOTION TO STAY PROCEEDING**

The State of New Mexico, Health and Environment Department, Environmental Improvement Division ("State of New Mexico" or "the State"), opposes the United States' ("appellant" or "U.S."), Motion to Stay Proceedings on the general grounds that this matter raises issues of state and not federal law which this Court should decide. More specifically, the State responds as follows:

I. INTRODUCTION AND PROCEDURAL BACKGROUND:

On or about November 20, 1989, the State of New Mexico, pursuant to the New Mexico Hazardous Waste Act, §§ 74-1-1 through 74-1-11 NMSA 1978 (Repl. Pamp. 1989) ("the HWA"), issued Hazardous Waste Facility Permit No. 0890010515-1 ("permit") to the Los Alamos National Laboratory ("LANL").¹ LANL is owned by the U.S. and

¹ In its motion, appellant emphasizes that the permit is issued pursuant to both the federal Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6961 ("RCRA"), and the HWA. While this is technically true because the RCRA requirements are incorporated into the HWA Act, the permit itself states expressly that it is based on the New Mexico Hazardous Waste Management Regulations.



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operated by the Regents of the University of California ("the Regents").

The U.S. and the Regents took exception to three conditions imposed by the State in that permit, and in accordance with the New Mexico Hazardous Waste Management regulations ("the HWMR's), they filed an administrative appeal of the contested permit conditions with the New Mexico Environmental Improvement Board ("the Board"). The Board dismissed that appeal for lack of jurisdiction because the HWA directs permit appeals to the Court of Appeals. §74-4-4.2.G. NMSA 1978 (Rep. Pamp. 1989).

The Regents then filed an appeal of the permit in the Court of Appeals on March 12, 1990, and filed their Docketing Statement on April 11, 1990. The U.S. filed its appeal on March 20, 1990. The U.S. also filed a Complaint for Declaratory Judgment on March 19, 1990, in United States District Court for the District of New Mexico ("district court" or "federal court"), alleging that the State had imposed unlawful conditions in the LANL permit. The U.S. then filed a Motion To Stay Proceeding with this Court, alleging in substance that the resolution of its federal law defense by declaratory judgment in federal court could render the state court proceedings unnecessary.

For the following reasons, the State asserts just the opposite; i.e., that this entire matter arises out of state and not federal law, and that any action in federal court should be stayed until this court can rule on the underlying state law issues. The State will shortly file a responsive pleading to appellant's

federal court complaint seeking, inter alia, dismissal of appellant's purported federal claims.

II. ISSUES OF STATE LAW PREDOMINATE IN THIS APPEAL, AND IF A STAY IS TO BE ENTERED ANYWHERE IT SHOULD BE IN THE FEDERAL COURT TO ALLOW THIS COURT TO RESOLVE ISSUES OF NEW MEXICO LAW.

A. **The State's permit requirements are tailored to control LANL's hazardous waste, and appellant is subject to those requirements.**

Contrary to appellant's assertion, the permit restrictions at issue here do not attempt to regulate LANL's radioactive wastes. The permit restrictions challenged by appellant simply require LANL to provide objectively verifiable evidence on an ongoing basis that the hazardous waste it routinely incinerates does not contain radioactive components above a certain threshold level.

One obvious component of hazardous waste management is its identification. The State can hardly regulate the disposal of hazardous waste if it may not require disposers to identify such waste. At a facility which also generates radioactive waste, it is reasonable to require assurance that what is being incinerated as hazardous waste is not in fact radioactive. Such assurance does not amount to "an attempt to regulate appellant's radioactive waste", unless what LANL is incinerating under the label "hazardous waste" is in fact radioactive. Instead, this amounts to a reasonable, substantive requirement regarding control of hazardous waste, a function for which appellant has waived any immunity which may apply under the federal Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901 et seq. ("RCRA"). Appellant's argument to the contrary should be dismissed by this Court as nothing more

than an attempt to confuse the issue by injecting illusory claims of federal preemption.

B. Appellant's claim of sovereign immunity is not supported either in applicable state or federal law.

Nothing in 42 U.S.C. §6961, including the quoted portion of that section in appellant's own motion (@ p.5), supports appellant's contention that it enjoys sovereign immunity from state hazardous waste permit requirements. Section 6001 of RCRA, 42 U.S.C. §6961, simply sets forth a broad range of hazardous waste management and control alternatives which states and even local governments may implement, and require appellant to comply with. Indeed, RCRA prohibits states from enacting laws or imposing regulations which are less stringent than RCRA requirements:

... no State or political subdivision may impose any requirements **less stringent** than those authorized under this subtitle Nothing in this title shall be construed to prohibit any state or political subdivision thereof from imposing any requirements ... which are more stringent than those imposed by [these regulations].

42 U.S.C. § 6929 (**emphasis added**).

RCRA thus does not support the appellant's contention that it is immune from the reasonable permit requirements imposed here. The U.S. appears to tacitly agree with this because it cites the HWA as authority for the proposition that the State may impose regulations for hazardous waste management "no more stringent than those adopted by EPA pursuant to RCRA." Appellant's Memorandum in Support of Motion to Stay Proceeding @ p.5 (citing §74-4-4A. NMSA 1978 (Rep. Pamp. 1989)).

Finally, assuming arguendo that the U.S.' argument is correct;

i.e., that the State's LANL permit requirements amount to regulation of radioactive emissions, federal law expressly permits New Mexico to regulate radioactive emissions as well.² Therefore, even viewed in the light most favorable to the U.S., appellant's argument amounts to nothing more than a question of whether the State will regulate LANL's toxic emissions under one state law or under another state law. Under either construction, whatever immunity the U.S. might have historically enjoyed under federal law has been waived by federal law.

That the State of New Mexico has apparently elected for the moment not to exercise its option under RCRA to impose more stringent conditions than federal law requires (which appellee's do not concede applies to permit conditions), does not translate into a claim of sovereign immunity under federal law. The best argument appellant's can make is that New Mexico's HWA immunizes it from the permit requirements at issue here. That disputed contention of state law is a question for this Court to determine.

C. The State's interest in reviewing and interpreting its comprehensive regulatory system transcends any federal question raised in this case.

The issues raised in this case predominantly involve a specialized aspect of a complicated regulatory system of State law.

² The federal Clean Air Act, 42 U.S.C. §7401 et seq. permits states to regulate air pollution which is defined as including radioactive emissions. See 42 U.S.C. §§7415 through 7418. Like RCRA, the Clean Air Act allows states to impose stricter air pollution measures than are federally mandated. 42 U.S.C. §7416.

The limited question under review; whether New Mexico may, under its own laws, impose reasonable, requirements upon hazardous waste permittees, is not an issue of transcendent federal importance, as appellant's would characterize it.

Accordingly, the State argues that the federal court, and not this Court, must abstain under the straightforward standard first set forth in Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), and reiterated in its progeny:

As adequate state court review of an administrative order based upon predominantly local factors is available to [plaintiff], intervention of a federal court is not necessary for the protection of federal rights.

Alabama Public Service Comm. v. Southern R. Co., 381 U.S. 341, 349, 95 L.Ed. 1002, 71 S.Ct. 762, 768 (1951).

States are authorized to enforce RCRA through their own state regulatory scheme if they meet federal authorization standards, and New Mexico does. As appellant's motion itself points out (@ p. 5), states are not limited to the four corners of RCRA when they develop their local hazardous waste management regulatory schemes. Instead, RCRA gives states flexibility in developing their authorized programs, and directs the U.S. to comply with such regulations as would "any other person". See Appellant's Memorandum in Support of Motion to Stay Proceeding @ p.5 (citing RCRA § 6001, 42 U.S.C. §6961).

The State's interest in the interpretation of the scope of its own hazardous waste management regulatory scheme and laws transcends the U.S' desire that all states implement and interpret

RCRA identically. The premise that RCRA itself mandates national uniformity in the scope of regulation by the states is problematic in light of the wide latitude that Act affords each state in the development of implementing laws and regulations. This Court should deny appellant's motion on the grounds that state law applies, and that federal interest, if any, in the outcome of one state's interpretation of its own, unique laws and regulations, is minimal.

III. THE CLAIMS ASSERTED BY THE UNITED STATES ARISE
UNDER STATE AND NOT FEDERAL LAW; HENCE THE FEDERAL
COURT LACKS SUBJECT MATTER JURISDICTION.

This argument furnishes better support for the State's anticipated motion to dismiss in the Federal Court, but it also bears on this Court's decision regarding the Motion to Stay filed by appellant here. Federal question jurisdiction must be established on the face of a well-pleaded complaint. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 15-16, 103 S.Ct. 2841, 2849-50, 77 L. Ed.2d 420 (1983). Here, appellant seeks judgment on the grounds that the LANL permit requirements exceed the permissible scope of **state** law and regulation. Appellant's Complaint for Declaratory Judgment @ ¶'s 33 & Prayer for Relief. Appellant concedes that the LANL permit was issued by the state pursuant to the permitting procedures and requirements of the HWA. Appellant's Complaint @ ¶ 21.

Although the resolution of this case will likely require interpretation and construction of federal law, this alone does

not raise a federal question. Appellant's Complaint for Declaratory Judgment filed with the district court does nothing more than raise a federal law defense to a cause of action arising under state law, which is insufficient to raise a federal question:

A declaratory judgment appellant may not assert a federal question in his complaint if, but for the declaratory judgment procedure, that question would **arise only as a federal defense to a state law claim brought by the declaratory judgment defendant in state court.**

Janakes v. United States Postal Service, 768 F.2d 1091 (9th Cir. 1985) (**emphasis added**); *citing* Franchise Tax Board, *supra*, 463 U.S. @ 16-19, 103 S. Ct. @ 2849-51. Nor does the Declaratory Judgment Act furnish an independent source of federal jurisdiction. Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1315 (9th Cir. 1986). *See also*, Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671, 70 S.Ct. 876, 878, 94 L.Ed. 2d 1194 (1950).

In applying for and obtaining the permit at issue, both appellant and LANL followed the provisions and requirements of New Mexico's HWA Act and regulations. That Act provides in part that a party aggrieved by a permit decision of the administrative agency may appeal the decision to the Court of Appeals. §74-4-4.2.G. NMSA 1978 (Rep. Pamp. 1989). RCRA requires appellant to comply with state procedural requirements regarding permits:

Each department ...of the Federal Government ... engaged in any activity resulting, or which may result, in the disposal or management of ... hazardous waste **shall be subject to and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits...), respecting control and abatement of ... hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements...** .

RCRA, §42 U.S.C. § 6961 (**emphasis added**). RCRA thus requires the appellant to comply with §74-4-4.2.G., and to seek its relief from this Court. This Court should deny the appellant's motion for stay on the independent grounds that federal jurisdiction will likely not be established, and a stay would result in unnecessary delay.

Even if the federal court had subject matter jurisdiction, the action filed by the Regents was already pending in this Court at the time appellant filed its federal court complaint. Where a state action is already pending in which all issues can be effectively determined, a federal court may refuse to entertain a declaratory judgment action, so as to avoid duplicative, piece-meal litigation:

Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.

Brillhart v. Excess Ins. Co. of America, 516 U.S. 491, 495, 86 L.Ed. 1620, 62 S.Ct. 1173, 1175 (1942), quoted in Will v. Calvert Fire Ins. Co., 437 U.S. 655, 663-64, 98 S.Ct. 2552, 2558, 57 L.Ed.2d 504 (1978). A court may also refuse to entertain a declaratory judgment action which is perceived as a device for "procedural fencing". Franklin Life Ins. Co. v. Johnson, 157 F.2d 653, 656 (10 Cir. 1946); or where the declaratory judgment action will not likely result in a just and more expeditious and economical determination of the entire controversy. Guardian Life Ins. Co. of America v. Kortz, 151 F.2d 582, 586 (10 Cir. 1945).

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that this Court deny appellant's Motion to Stay Proceedings, and assign this matter to the appropriate Calendar for determination on the merits.

Respectfully submitted,



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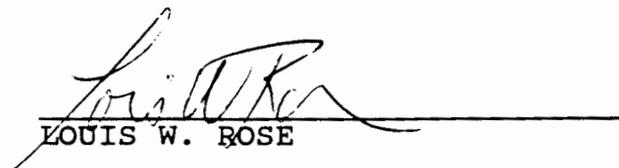
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed on this 18th day of April, 1990, to the following:

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