

APR 19 1990

*Robert M. Mach*  
CLERK

COPY

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,  
Plaintiff,

v.

No. CIV 90-0276SC

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

*our motion to dismiss*

Defendants.

DEFENDANTS' MOTION TO DISMISS

The State of New Mexico and the New Mexico Health and Environment Department, Environmental Improvement Division ("EID") (jointly referred to as "the State") hereby move for dismissal of the Complaint filed in this matter, pursuant to Rules 12(b)(1), (6) and (7) of the Federal Rules of Civil Procedure, and as grounds for this motion, Defendants state:

1. In its Complaint, the United States ("the U.S." or "Plaintiff") appears to ask this Court to declare that three conditions contained in the permit issued to Los Alamos National Laboratory<sup>1</sup> by EID are void and unenforceable on the grounds that: (a) Section 6001 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6961, has not waived sovereign immunity for the State to impose permit conditions regulating the radioactive

---

<sup>1</sup>Los Alamos National Laboratory is owned by the U.S. and operated by the Regents of the University of California ("the University").

component of waste; and (b) RCRA has not waived sovereign immunity for the State to impose the particular permit conditions since the HWA imposes no "requirements" concerning regulation of radioactive waste.

2. The State maintains that RCRA Section 6001 is an expansive waiver of Plaintiff's sovereign immunity and contains no limitations on the scope of Plaintiff's amenability to state substantive or procedural hazardous waste regulations.

3. Dismissal of the Complaint is mandatory for the following reasons:

a. The claims asserted by Plaintiff arise under state law, not federal law; therefore, this Court must dismiss the Complaint for lack of subject matter jurisdiction.

b. Plaintiff is not entitled to the equitable declaratory relief it seeks because it has alternative adequate remedies at law and faces no irreparable harm if the requested relief is not granted, given these alternative remedies.

c. Even if the Complaint states a claim, this Court cannot grant the relief requested; thus, Rule 12(b)(6) mandates dismissal.

4. Dismissal is discretionary, but appropriate under the circumstances, because:

a. Resolution of unsettled state law issues may obviate the need for this Court to reach federal questions, if any.

b. The State has a superior interest in interpreting its own regulatory system.

c. Earlier proceedings of substance in state court compel dismissal on the bases of comity and federalism.

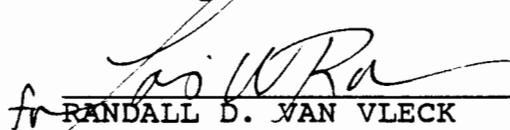
d. Principles of judicial economy compel dismissal of this Complaint.

5. Alternatively, if the Court does not dismiss this action, then Rule 19 mandates compulsory joinder of the University because the presence of the University as a party is necessary to a complete adjudication of the permit conditions. However, if such joinder not feasible, then the factors set forth in Rule 19(b) warrant dismissal given Plaintiff's alternative forum, i.e., state court, in which to address its concerns.

Respectfully submitted,

  
\_\_\_\_\_  
GINI NELSON  
Special Assistant Attorney General  
Assistant General Counsel  
Health and Environment Department  
1190 St. Francis Drive  
Santa Fe, New Mexico 87503  
(505) 827-2990

Attorney for Defendant EID

  
\_\_\_\_\_  
RANDALL D. VAN VLECK  
Assistant Attorney General  
Office of the Attorney General  
P.O. Drawer 1508  
Santa Fe, NM 87504  
(505) 827-6000

Attorney for Defendant State of  
New Mexico

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of the State's Motion to Dismiss was mailed on this 19th day of April, 1990 to the following:

Karen L. Egbert, Esquire  
U.S. Department of Justice  
Land and Natural Resources  
Division  
Environmental Defense Section  
P. O. Box 23986  
Washington, D.C. 20026-3986  
(202)786-4786

Jan Mitchell, Esquire  
Assistant United States  
Attorney  
U.S. Courthouse, Room 12002  
Albuquerque, NM 87103  
(505)766-3341

  
\_\_\_\_\_  
LOUIS ROSE