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FILED
UNITED STATES DISTRICT COURT
SANTA FE, NEW MEXICO

APR 19 1990

Robert M. March
CLERK

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,

Defendants.

MEMORANDUM IN SUPPORT OF
THE STATE'S MOTION TO DISMISS

A. FACTUAL BACKGROUND

On or about November 20, 1989, the Director of the Environmental Improvement Division of the New Mexico Health and Environment Department ("the State") issued Hazardous Waste Facility Permit No. 0890010515-1 ("permit") to the Los Alamos National Laboratory ("LANL") pursuant to the New Mexico Hazardous Waste Act, §§ 74-1-1 through 74-1-13 NMSA 1978 ("the HWA"). LANL is owned by the United States of America ("U.S." or "Plaintiff") and operated by the Regents of the University of California ("the University").

The permit allows LANL to operate various hazardous waste management units, including an incinerator which will be used to dispose of three categories of waste: **hazardous**, as defined by the HWA; **radioactive**; and **mixed**, i.e., waste with both hazardous and radioactive components. The permit does **not** regulate the treatment of radioactive and mixed wastes; it only regulates hazardous waste.

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However, because the U.S. has chosen to incinerate hazardous waste in an incinerator that will also be used to burn radioactive and mixed wastes, the State placed three conditions in the permit that apply **only when** the U.S. burns hazardous waste. First, the U.S. must test the waste batch before incineration to assure the State that the batch is not radioactive; i.e., that it actually consists only of hazardous waste. Second, the U.S. must continuously monitor emissions during a hazardous waste burn to assure that residual radioactivity from previous burns of radioactive waste is not emitted. Finally, if the burning of the hazardous waste **does** cause the release of radioactivity, the U.S. must stop that hazardous waste burn.

B. PROCEDURAL HISTORY

On December 20, 1989, the U.S. **and** the University filed an administrative appeal with the New Mexico Environmental Improvement Board ("the Board") contesting the three permit conditions described above. The Board subsequently dismissed the appeal for lack of jurisdiction because the HWA directs permit appeals to the New Mexico Court of Appeals.

On March 12, 1990, the University filed an appeal of the three permit conditions in the New Mexico Court of Appeals. A copy of its Docketing Statement is attached as Exhibit "A".

On March 19, 1990, the U.S. filed the Complaint before this Court, seeking declaratory relief concerning the validity of the same three permit conditions. The next day, on March 20, 1990, the U.S. filed an appeal in the state Court of Appeals, addressing the

same three permit conditions. A copy of the U.S.' Docketing Statement is attached as Exhibit "B". On April 5, 1990, the U.S. filed a Motion To Stay its appeal in the state Court of Appeals, based upon the March 19, 1990 filing of the Complaint before this Court. On April 18, 1990, the State filed its Response in Opposition to Appellant's [the U.S.] Motion to Stay Proceeding. A copy of the State's Response is attached as Exhibit "C".

C. RELIEF REQUESTED, AND ISSUES RAISED IN THE COMPLAINT

In its Complaint, the U.S. appears to ask this Court to declare that the three permit conditions governing the incineration of hazardous waste are void and unenforceable on the grounds that: (1) 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 component of waste; and (2) 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.

ARGUMENTS AND AUTHORITIES

A. ANY SOVEREIGN IMMUNITY THE U.S. MAY HAVE HISTORICALLY ENJOYED HAS BEEN EXPRESSLY WAIVED.

The U.S. cites RCRA Section 6001, 42 U.S.C. §6961, for the proposition that Plaintiff has not waived sovereign immunity regarding the permit conditions. Complaint ¶ 16 at p. 6. Section 6001, however, is an expansive waiver of sovereign immunity and contains no limitations on the scope of the U.S.' amenability to

state substantive or procedural hazardous waste requirements. Assuming arguendo that Plaintiff's argument is correct; i.e., that the permit requirements amount to regulation of radioactive emissions beyond the scope of the RCRA waiver of immunity, federal law expressly permits New Mexico to regulate radioactive emissions as well: 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. 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, any immunity the U.S. might have historically enjoyed under federal law has been waived by federal law. When the U.S. consents to be sued, the scope of that consent is properly determinable in a court of law. Raydist Nav. Corp. v. U.S., 144 F. Supp. 503 (D.C. Va. (1956). In the present instance, the appropriate court to determine the scope of Plaintiff's consent is state court.

B. PLAINTIFF'S COMPLAINT MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION, FAILURE TO SHOW ENTITLEMENT TO EQUITABLE DECLARATORY RELIEF, AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

1. THE CLAIMS ASSERTED BY PLAINTIFF ARISE UNDER STATE LAW AND NOT FEDERAL LAW; THEREFORE, THIS COURT SHOULD DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION.

Plaintiff alleges that this Court has federal question

jurisdiction to declare the rights of the parties concerning the permit. (Complaint, ¶ 3). 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, Plaintiff seeks judgment on the grounds that the LANL permit requirements exceed the permissible scope of **state** law and regulation. (Complaint, ¶ 33 & Prayer for Relief). Plaintiff concedes that permits governing hazardous waste management and disposal in New Mexico are issued under New Mexico law, and that New Mexico has also promulgated hazardous waste regulations pursuant to RCRA requirements. (Complaint at ¶'s 18, 20) The U.S. further concedes that the LANL permit was issued by the State pursuant to the permitting procedures and requirements of the HWA. (Complaint ¶ 21) [1].

Although resolution of this case will likely require interpretation and construction of federal law, this alone does not raise a federal question. The Complaint 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 plaintiff may not assert a federal question in his complaint if, but for the declaratory judgment procedure, that question would **arise only as a federal**

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[1] Plaintiff asserts that the permit is issued pursuant to both RCRA and the HWA. (Plaintiff's Complaint, ¶ 21). While this may technically be true, because the RCRA requirements are incorporated into the HWA, the permit itself states expressly that it is based on the New Mexico Hazardous Waste Management Regulations. See copy of permit certificate, attached as Exhibit "D".

> **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. at 16-19, 103 S. Ct. at 2849-51; see also, Eureka Federal Sav. & Loan Ass'n of San Francisco v. Flynn, 534 F.Supp. 479 (D.C. Cal. 1982). 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 the U.S. and the University followed the provisions and requirements of the HWA. That Act provides in part that a party aggrieved by a permit decision of the Environmental Improvement Division may appeal the decision to the Court of Appeals. §74-4-4.2.G. NMSA 1978. Section 74-4-4.2.G. is a procedural provision governing appeals from permit decisions. RCRA requires the U.S. 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** ... .

Section 6001 of RCRA, §42 U.S.C. §6961. Therefore, the scope of

the hazardous waste permit conditions must be interpreted in light of **state**, not federal, law. This Court may refuse to entertain the action where declaratory judgment is being used for "procedural fencing". Franklin Life Ins. Co. v. Johnson, 157 F.2d 653, 656 (10th Cir. 1946). Absent a true "federal question", this Court must dismiss Plaintiff's Complaint for Declaratory Relief.

2. 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 RELIEF IS NOT GRANTED GIVEN THESE ALTERNATIVE LEGAL REMEDIES.

Although statutory in form, a declaratory judgment remedy is "essentially an equitable cause of action" requiring courts to decide whether to grant or withhold relief on traditional equitable principles. Samuels v. Mackell, 401 U.S. 66, 70 (1971); *quoting* Great Lakes Co. v. Huffman, 319 U.S. 293, 300 (1943). The U.S. neither alleged, nor can it establish, any immediate, irreparable injury threatening it. To the contrary, upon information and belief, the U.S. is not using the incinerator and will not be using it for the foreseeable future; is in state court appealing the permit, as is LANL's operator; and may lawfully petition the state court to issue any stay of the operation of the permit conditions arguably necessary to protect Plaintiff's interest during the appeal. Absent a requirement that mandates an immediate and significant change in the plaintiff's conduct, with serious penalties for noncompliance, declaratory judgment is not appropriate. See, e.g., Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed. 2d 681 (1967).

Further, the U.S. neither alleged, nor can it establish, that it does not have an adequate remedy at law for any alleged defect with the HWA and the state permit appeal process. To the contrary, the U.S. clearly has an adequate remedy at law. Section 74-4-4.2.G authorizes and directs appeals of the state agency's permit decision to the Court of Appeals of New Mexico, and Plaintiff and the University have, in fact, timely appealed the permit in that Court.

> 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., 341 U.S. 341, 349 (1951).

Lastly, the remedies of declaratory judgment and possibly of mandamus are available under New Mexico as well as federal law. See §44-6-1 through 15 NMSA 1978 and §44-2-1 through 14 NMSA 1978, respectively. An expedited determination of state law, if merited, would be better brought under these provisions in state district court or the Court of Appeals.

3. EVEN IF PLAINTIFF'S COMPLAINT STATES A CLAIM, THIS COURT CANNOT GRANT THE RELIEF REQUESTED; THUS, RULE 12(b)(6) MANDATES DISMISSAL.

Rule 12(b)(6) empowers this Court to dismiss the Complaint for "failure to state a claim upon which relief can be granted." This Court cannot provide the relief requested by Plaintiff because: (1) the Court lacks subject matter jurisdiction; and (2) the U.S. is not entitled to equitable declaratory relief absent a showing

of irreparable harm and inadequate alternative remedies. Hence, Rule 12(b)(6) provides a third ground of mandatory dismissal of the Complaint.

C. ALTERNATIVELY, THIS COURT SHOULD ABSTAIN AND EXERCISE ITS DISCRETIONARY POWERS TO DISMISS THE COMPLAINT BECAUSE SUBSTANTIAL QUESTIONS OF STATE LAW CONTROL ANY POTENTIAL FEDERAL QUESTIONS; THE STATE HAS A SUPERIOR INTEREST IN INTERPRETING ITS OWN REGULATORY SCHEME; AND PRINCIPLES OF COMITY, FEDERALISM, AND JUDICIAL ECONOMY FAVOR DISMISSAL IN THIS CASE; AND JUDICIAL ECONOMY IS BETTER SERVED BY DISMISSAL

Other principles compel abstention by the federal court when parallel state proceedings are pending:

> The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11, n.9, 197 S.Ct. 1519, 1526, n.9, 95 L.Ed.2d 1, 16, n.9 (1987). Such principles as avoidance of constitutional questions and impermissible interference with transcendent local concerns; of federal-state comity; and of judicial economy may require abstention, either by dismissal or by stay. Where there is substantive litigation in both state and federal courts, decisions whether to defer to the state courts are largely committed to the discretion of the district court, even when matters of federal law are involved. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 663-664, 98 S.Ct. 2552, 2557-58, 57 L.Ed.2d 504 (1978). Application of these principles to the instant case compels the conclusion that this case must be heard in the state court and not in federal court.

1. RESOLUTION OF UNSETTLED STATE LAW ISSUES MAY OBVIATE THE NEED FOR THIS COURT TO REACH FEDERAL, POSSIBLY CONSTITUTIONAL, QUESTIONS.

In the event this Court determines that the Complaint states a potential federal question, issues of state law predominate, should be determined by a state court, and may obviate any need for this Court to become involved. To the extent that Plaintiff's federal preemption argument, i.e., that RCRA has not waived the U.S.' sovereign immunity, implicates the Supremacy Clause, there may be constitutional issues raised together with unsettled questions of state law. Resolution of the state law questions, however, may be dispositive and render moot any need for this Court to reach purported federal questions, and this Court should abstain under the standards announced in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

This entire matter arises out of the New Mexico HWA, and regulations promulgated pursuant to it, and not under federal law. The U.S. claims that certain permit conditions are unlawful even though the U.S. "shall be subject to and comply with, all Federal, State, inter-state, and local requirements" (see supra p.7); and hazardous waste permits may be issued "subject to any conditions necessary to protect public health and the environment". Although resolution of all issues raised in this matter may require interpretation and construction of federal law, this case arises under state law and involves issues of first impression in the state courts. This Court should allow the state courts to resolve such issues of New Mexico law.

Section 6001 of RCRA itself renders the U.S. responsible under state and even local laws for the management of hazardous waste.[2] The conditions in the permit are State permit requirements, specifically tailored to control LANL's hazardous waste, and the U.S. is subject to those requirements. Plaintiff neither alleged, nor can it establish, that the Court of Appeals is incapable of interpreting ancillary provisions of federal law to resolution of the issue, should the need arise. Given this, and as RCRA itself requires Plaintiff to comply with state procedural requirements regarding permits, Plaintiff's best procedural remedy here is by way of appeal to the state court. Therefore, this Court should abstain from proceeding further.

2. THE STATE'S INTEREST IN REVIEWING AND INTERPRETING ITS COMPREHENSIVE REGULATORY SYSTEM TRANSCENDS ANY FEDERAL QUESTION RAISED IN THIS CASE.

To the extent that the issues raised in this case involve a specialized aspect of a complicated regulatory system of local law which should be left to the adequate, local administrative bodies and courts, and where the limited federal questions under review are not of transcendent importance and federal review would impermissibly disrupt state policy, this Court must abstain under the standards set forth in Burford v. Sun Oil Co., 319 U.S. 315 (1943); Alabama Public Service Comm. v. Southern R. Co., 341 U.S. 341 (1951); and their progeny.

RCRA sets forth a comprehensive scheme for the regulation and

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[2] See supra, p. 7 (text of Section 6001 of RCRA).

management of hazardous waste which the State is authorized to enforce through its own, state regulatory scheme because it meets federal authorization standards. Pursuant to the RCRA mandate, New Mexico implemented the HWA, has promulgated regulations in accordance with the HWA, and otherwise has its own comprehensive scheme for the regulation and management of hazardous waste.

States are not limited to the four corners of RCRA when they develop their local hazardous waste management regulatory schemes. RCRA only prohibits states from enacting laws or imposing regulations which are **less** stringent than RCRA requirements; and they may be **more** stringent. Specifically:

> ... 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**).

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.

3. EARLIER PROCEEDINGS OF SUBSTANCE IN THE STATE COURTS COMPEL DISMISSAL ON THE BASES OF COMITY AND FEDERALISM.

The standards set forth in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny, applicable to declaratory judgment actions for the reasons stated in Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed. 2d 688 (1971)(see Younger, 401 U.S. at 41, n.2, 27 L.E.2d at 674, n.2), require a federal court to abstain whenever state court proceedings are initiated before any proceedings of substance on the merits have taken place in the federal court. See, e.g., Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 237-38, 104 S.Ct. 2321, 2327-78, 81 L.Ed.2d 186 (1984). The federal plaintiff must exhaust state appellate review before coming to the federal court, including state appellate review of a civil agency's quasi-judicial proceeding. Cf. New Orleans Public Serv., Inc. v. Council of City of New Orleans, ___ U.S. ___, 109 S.Ct. 2506, 2517-20 (1989)(proceedings before state rate-making authority were not judicial in nature and not entitled to Younger treatment).

The Younger doctrine is based on equity, as well as comity and federalism, i.e., "a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." New Orleans Public Serv., Inc. v. Council of City of New Orleans, ___ U.S. at ___, 109 S.Ct. at 2516, quoting Younger, supra, 401 U.S. at 44, 91 S.Ct. at 750.

Pursuant to state law and procedure, Plaintiff applied for and received a hazardous waste permit to satisfy requirements imposed by the New Mexico HWA. While the permit also satisfies requirements imposed by the federal act, RCRA, the permit is first and foremost a **state** permit issued pursuant to a quasi-judicial procedure that included a full public hearing before a hearing officer. The U.S. and the University had thus initiated state review procedures of the permit. Plaintiff filed this Complaint **one day before filing its state appeal**, and then moved the state court to stay its proceeding because of this allegedly "earlier-filed" Complaint. The University filed its state appeal **before Plaintiff filed its federal complaint**, but is not named in this Complaint, and has filed no separate federal action. Nonjoinder of the University is the basis of the State's Rule 12(b)(7) dismissal motion, infra.

Thus, because Plaintiff and the University previously initiated state review of the permit before the U.S. filed its Complaint; or, alternatively, because the University and Plaintiff are both necessary parties to resolution of the permit dispute, and the University filed its appeal in the state court before the U.S. filed this Complaint; the state proceedings have progressed further in substance than the federal proceeding.

4. PRINCIPLES OF JUDICIAL ECONOMY COMPEL DISMISSAL OF THIS COMPLAINT.

Considerations of judicial economy also weigh heavily in favor of denying Plaintiff's request and permitting the matter to proceed

under state law in the Court of Appeals. The University's appeal of the permit is already pending in the Court of Appeals. The University would be a necessary party to this action, but has not been joined.

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, 316 U.S. 491, 495, 62 S.Ct. 1173, 1175, 86 L.Ed 1620, (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)). Judicial administration principles must be considered and balanced as discussed in Colorado River Water Conser.Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

Where declaratory judgment will probably not result in a more expeditious and economical determination of the entire controversy, the request for such relief may be denied. See, e.g., Guardian Life Ins. Co. of America v. Kortz, 151 F.2d 582, 586 (10th Cir. 1945); see also Manley, Bennett, McDonald & Co. v. St. Paul Fire and Marine Insurance Co., 791 F.2d 460, 462 (6th Cir. 1986)(citing Grand Trunk Western R.R. v. Consolidated Rail Corp., 746 F.2d 323,

326 (6th Cir. 1984)(describing relevant factors in deciding when declaratory judgment appropriate procedural device).

Here, where a declaratory judgment would not settle the real controversies at issue and the utility of the clarification of federal law is questionable, because the issues are primarily state law in nature and of first impression; where Plaintiff appears to be using the declaratory remedy merely for procedural fencing; where the issuance of a declaration **would** increase friction between the state and federal courts; and where the alternative remedy currently pending in the state court is better, more effective, and already in process, this Court should dismiss the Complaint.

D. IF THE COURT DOES NOT DISMISS THIS ACTION, THEN RULE 19 MANDATES THE COMPULSORY JOINDER OF THE UNIVERSITY BECAUSE THE PRESENCE OF THE UNIVERSITY AS A PARTY IS NECESSARY TO A COMPLETE ADJUDICATION OF THE PERMIT CONDITIONS.

Since there is no common law substantive right governing the compulsory joinder of a person or entity to a lawsuit, the indispensable party doctrine is procedural and joinder practice in federal courts is governed by federal law. See e.g., Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). The rule is designed to ensure that, whenever feasible, all entities materially interested in the subject of an action should be joined as parties so that they may be heard and the court may dispose of the entire case. See e.g., Campbell v. Triangle Corp., 16 Fed. Rules Serv.2d 649 (E.D.Pa. 1972). Thus, Rule 19 should be construed to encourage liberal joinder of parties within the constraints of fairness to the parties. United Mine Workers of

America v. Gibbs, 383 U.S. 715, ___ (1966).

1. THE UNIVERSITY SATISFIES BOTH THE JURISDICTIONAL AND FACT-SPECIFIC REQUIREMENTS OF RULE 19(b); HENCE, JOINDER IS MANDATORY.

Specifically, Rule 19 defines the persons or entities who must be joined as parties to an action, if such joinder is feasible, i.e., Rule 19(a), and the options open to a court if joinder of such parties is not feasible, i.e., Rule 19(b):

> **(a) Persons to Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party...

Thus, the first group of prerequisites that must be satisfied for compulsory joinder may be described as "jurisdictional" in that the court must be able to exercise both personal jurisdiction over the absentee and subject matter jurisdiction over all the parties once the absentee has been joined. Second, a person or entity who satisfies the jurisdictional requirements shall be joined as a party action if at least one of three additional factual situations enumerated in Rule 19(a)(2)(i) - (iii) are true. In other words, joinder is mandatory if the conditions of Rule 19(a) are met.

The University operates LANL pursuant to a long-standing contract with the U.S. Department of Energy; hence, the University

routinely conducts business in this State. Furthermore, the University has voluntarily invoked the jurisdiction of the State of New Mexico Court of Appeals by filing an appeal of the permit conditions imposed by the State. Therefore, given the daily presence of the University, through its employees, in the State of New Mexico, the University is clearly subject to the service of process and personal jurisdiction of this Court.

Furthermore, joinder of the University will not deprive this Court of jurisdiction over the disputed subject matter. Because the U.S. alleges that the Court's jurisdiction in the present suit is based upon federal question jurisdiction, pursuant to 28 U.S.C. §1331,[3] and not based upon diversity jurisdiction, joinder alone of the University will not deprive this Court of subject matter jurisdiction over the disputed issues.[4]

Rule 19(a)(1) requires that a person be joined as a party in an action if in its absence complete relief cannot be accorded among those already parties. The obvious goal of this rule is to protect the interest of existing parties in securing complete relief and the interest of the public in avoiding repeated lawsuits. While the court has some discretion in shaping a decree and adjudicating the rights of the parties before it without affecting the rights of absent persons, if this is not possible,

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[3] See Plaintiff's Complaint, ¶ 3 at p. 2 (wherein the U.S. alleges federal question jurisdiction).

[4] However, the State contends that the Court lacks federal question jurisdiction in this action because the dispute arises under State law, not federal law.

and any relief which a court can grant in the absence of the missing person can only be characterized as "hollow" or a "paper decree", that person must be joined to the action. See e.g., Schutten v. Shell Oil Co., 421 F.2d 869 (5th Cir. 1970). The particular permit in question was issued jointly to Plaintiff (as owner of LANL) and the University (as operator of LANL). Neither the U.S. nor the State can achieve complete resolution of legal questions raised by the present case without the presence of the University because both the U.S. and the University are governed by the same permit; hence, any judgment concerning this permit would amount to a "hollow" or "paper decree" unless the University and the U.S. are bound by identical permit conditions.

Rule 19(a)(2)(i) requires the University to have an interest in the subject matter of the action so that its absence may as a practical matter impair or impedes its ability to protect its interest. See, Brown v. Chaffe, 612 F.2d 497, 503 (10th Cir. 1979); Haas, 442 F.2d at 398. Technically, because the University is not presently before this Court, it cannot be bound by the judgment rendered and the judgment is not res judicata as to the University so long as it is not a party. Haas, 442 F.2d at 399, n. 6, citing, Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). However, as a practical matter, a judgment in the present action unfavorable to Plaintiff will impair or impede the University's ability to operate the incinerator free from the conditions imposed by the State. The University would have to expend substantial time, effort, and expense in pursuing

its own separate appeal of the permit conditions in order to eliminate the "impediment" of a judgment rendered against the U.S., before the University could continue to operate the LANL incinerator.

Rule 19(a)(2)(ii) requires joinder if an existing party would be left subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the nonjoinder. Brown, 612 F.2d at 503. Conceivably, the State could be subject to the inconsistent obligations of requiring the University, as operator of LANL, to abide by the permit conditions while simultaneously being prohibited by a judgment in this action from enforcing those same conditions against the U.S. Such a conflict places the State in the confounding position of not being able to enforce the very same permit depending upon the technical distinction of whether or not the University or the U.S. violated the permit conditions. The only realistic solution to this vexing catch-22 is to include the University in the same proceeding so that a single resolution of the validity of the permit conditions can be achieved. Piecemeal interpretation of the laws and regulations applicable to a single permit poses severe risks to the State of facing multiple and inconsistent obligations to the U.S. and to the University. Similarly, the U.S. faces potentially inconsistent obligations to the State if the University is allowed to operate the LANL incinerator under different conditions but pursuant to the same permit.

2. WHEN IT IS NOT FEASIBLE TO JOIN AN INDISPENSABLE PARTY, THE COURT MUST CONSIDER FOUR FACTORS ENUMERATED IN RULE 19(b) IN ASSESSING WHETHER TO PROCEED WITH THE ACTION WITH THE EXISTING PARTIES OR TO DISMISS THE SUIT.

Rule 19(b) describes the factors a court considers when joinder of a conditionally necessary party is not feasible:

> **(b) Determination by Court Whenever Joinder not Feasible.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Rule 19(b) does not state what weight is to be given each factor; thus, the court must determine the importance of each factor on the facts of the particular case and in light of equitable considerations. Glenny v. American Metal Climax, Inc., 494 F.2d 651, 653 (10th Cir. 1974).

The first test to be considered is the extent to which a "judgment rendered in the person's absence might be prejudicial to him or those already parties." Glenny, 494 F.2d at 654. This test considers the need to protect the absentee from litigation adversely affecting its interests and the need to protect those who are parties from the threat of multiple actions, in light of

the practical, not theoretical, likelihood of prejudice and subsequent litigation. Id. In reality, a judgment rendered in this case without the University's participation would directly, and potentially adversely, affect the University's interest in operating the LANL incinerator because the bases of this action is the Plaintiff's pursuit of a declaration of the validity of the permit conditions. The University may not be bound such a declaration under the guise of res judicata; realistically, the U.S. will surely seek to control the University's operation of the incinerator in accordance with the adjudicated permit conditions. Furthermore, given the present multiplicity of lawsuits filed by the U.S. and/or the University, the track-record of the LANL owner and operator speaks for itself toward the threat of additional litigation involving the State over the permit. The State's need to protect itself from a subsequent lawsuit on the same issues filed by the University is undeniably real.

The second factor enumerated in Rule 19(b) is "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided." Glenny, 494 F.2d at 654. This factor requires the court to seek an alternative to dismissing the action if to do so will minimize the prejudicial effect. Id. In the present case, Plaintiff seeks a declaration of the conditions of the very same permit under which the University operates; thus, any available relief will directly affect the University's permit conditions. There is no practical way to interpret the same permit in a

different manner for the U.S. and for the University. Consequently, there is no satisfactory manner in which to minimize the prejudice to the University in its absence from this proceeding.

The third factor in Rule 19(b) is "whether a judgment rendered in the person's absence will be adequate." Glenny, 494 F.2d at 654. This factor meshes with other factors, particularly the "shaping of relief" concerning the second factor [discussed in the preceding subsection]. Id. Again, the relationship of the University and the U.S. concerning the LANL incinerator is so intertwined that a judgment in the absence of the University will not afford adequate relief for either the U.S. or the State. A judicial interpretation of the permit conditions must include a realistic mechanism by which both the U.S. and the University can comply with the permit as well as a means for the State to enforce the permit consistently against both entities. Such a mechanism is impossible without joinder of the University in this action.

The final factor listed in Rule 19(b) is "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Glenny, 494 F.2d at 654. In the present case, as in Glenny, the U.S. unquestionably has a satisfactory forum available in state court as evidenced by the fact that both the U.S. and the University have already filed an appeal in the New Mexico Court of Appeals which addresses the same issues before this Court. Hence, in the event this Court determines that joinder of the University is not feasible, then this action should be

dismissed for nonjoinder given the satisfactory alternative forum available to Plaintiff.

CONCLUSION

For the reasons stated above, the Complaint against the State must be dismissed for lack of subject matter jurisdiction, for Plaintiff's failure to meet its burden of proof entitling it to equitable relief, and for failure to state a claim upon which relief can be granted by this Court. Alternatively, this Court should exercise discretionary authority to dismiss the Complaint because substantial questions of state law control any potential federal questions; the State has a superior interest in interpreting its own regulatory scheme; and principles of comity, federalism, and judicial economy favor dismissal in this instance.

If the Court declines to dismiss this action, then compulsory joinder of the University is necessary to adjudicate the enforceability of the permit conditions; or, if such joinder is 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,

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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:

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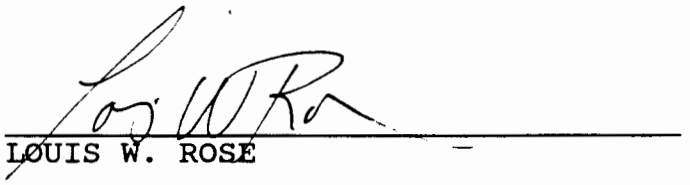

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