

I. FEDERAL, NOT STATE, ISSUES PREDOMINATE THIS APPEAL

A. This Appeal Raises A Significant Federal Issue And Federal Law Will Provide The Rule of Decision.

The issue raised in this appeal, as reflected in the United States' Docketing Statement, concerns the Department of Energy's ("DOE's") sovereign immunity under RCRA section 6001, 42 U.S.C. § 6961,¹ and whether Congress has waived that immunity with respect to New Mexico's attempt to regulate the radioactive component of waste in the Los Alamos National Laboratory Hazardous Waste Facility Permit.

Under RCRA's waiver of sovereign immunity, 42 U.S.C. § 6961, federal facilities which, among other things, engage in any activity resulting in the disposal or management of "solid waste" or hazardous waste, are subject to, and shall comply with, all federal, state, interstate and local "requirements" respecting control and abatement of solid waste or hazardous waste disposal in the same manner as any other person. The United States contends that EID's attempt to impose conditions regulating

¹ That section provides, in part, that

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or 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 or reporting . . .), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements" [Emphasis added].

radionuclides is not within this limited waiver of sovereign immunity in two respects: 1) the radioactive component of waste is not "solid waste" as defined by RCRA, see 42 U.S.C. § 6903(27), and 2) the State of New Mexico has no "requirements" governing the treatment, storage or disposal of radioactive waste to which the Los Alamos National Laboratory ("LANL") could be subject.

Under any assessment, therefore, the United States' appeal raises substantial questions of federal law. Indeed, appellees devote three pages of their 10 page response in opposition arguing the merits of whether RCRA has waived sovereign immunity for the state's effort to regulate the radioactive component of waste in the LANL hazardous waste permit.² This very argument refutes appellees' contention that state law issues predominate and supports appellant's view that the scope of RCRA's waiver of sovereign immunity, as applied to New Mexico's efforts to regulate the radioactive component of waste at the LANL federal facility, is the central issue presented herein. Thus, the scope of this waiver must be determined under RCRA and the case law developed thereunder, and not under any state law. Indeed, the

² This argument addresses the merits of the United States' appeal and is not properly before the Court in resolving the motion to stay. Nevertheless, appellees' argument is as wrong as it is irrelevant. The state argues that "federal law expressly permits New Mexico to regulate radioactive emissions . . ." and then cites the federal Clean Air Act as authority for this proposition. App. Res. at 5 and n.2. However, the challenged conditions are not set forth in an air permit, but included in a hazardous waste permit issued pursuant to the State's authority under RCRA.

State agrees and has admitted that "resolution of this case will likely require interpretation and construction of federal law" App. Res. at 7.

B. Resolution of The Issues Presented Herein Will Not Disrupt Any Comprehensive Scheme Of State Regulation.

The State also contends that a stay is inappropriate since the issues here "involve a specialized aspect of a complicated regulatory system of State law." App. Res. at 5. However, the United States' appeal challenges the conditions of a single permit issued to a federal facility engaged in work with radioactive materials -- not the framework of the State's hazardous waste management regulations. More significantly, this appeal concerns the State's attempted regulation of the radioactive component of waste at a federal facility. Whatever the result of the United States' challenge, it will not affect the State's ability to regulate the numerous hazardous waste facilities within New Mexico which are not federal and which are not engaged in activities which require the management of radioactive waste.³

Finally, New Mexico claims that its interest in "interpreting its comprehensive regulatory system" transcends any federal question raised. App. Res. at 5. In fact, the State's Hazardous Waste Act defines "solid waste" exactly as it is

³ The United States is not challenging the Environmental Improvement Board's February 19, 1990, conclusion that the state regulatory appeal provision, HWMR 902.G, is ultra vires, but only the imposition of three permit conditions regulating the radioactive component of waste.

defined in RCRA and specifically excludes source, special nuclear and byproduct material, as defined by the Atomic Energy Act, from the definition of "solid waste." § 74-4-3(M) NMSA 1978 (1989 Repl.). In addition, the State's Hazardous Waste Management Regulations adopt and incorporate EPA regulations, with some variations that are irrelevant here. See United States' Memorandum In Support of Motion to Stay at 6 n.4. As a result, New Mexico's claim that the State has a right to interpret its own "unique laws and regulations," App. Res. at 7, is undermined.⁴

Accordingly, resolution of the sovereign immunity issues raised here will not disrupt the state's administration or implementation of its Hazardous Waste Management Regulations or its ability to regulate the storage or disposal of hazardous waste at all the non-federal, private facilities within its borders.

II. THE FEDERAL DISTRICT COURT HAS JURISDICTION OVER THE UNITED STATES FEDERAL COMPLAINT.

Finally, the state devotes three pages of its 10 page response in opposition to the argument that this Court should refuse to stay this proceeding because the federal district court lacks jurisdiction over the United States' complaint in United

⁴ To the best of the United States' knowledge, there is no body of state law to be applied to these issues. In addition, as set forth in its Docketing Statement, the United States intends to rely solely on federal law interpreting RCRA to support its claims herein.

States v. New Mexico, CIV 90-0276 SC.⁵ App. Res. at 7-9. This is a matter which will be resolved by the federal district court and is not a matter which this Court has authority to address. Moreover, it underscores the need for this Court, at a minimum to stay this proceeding until the federal district court decides New Mexico's motion.

Nevertheless, the State's argument that the federal district court lacks jurisdiction is wrong legally and factually. The United States' federal complaint asserted a proper basis for jurisdiction under the federal question statute, 28 U.S.C. § 1331, and 28 U.S.C. § 1345, which gives federal district courts original jurisdiction over any suit brought by the United States regardless of its subject matter.

Indeed, in 28 U.S.C. § 1345, Congress gave the United States the right to apply to the federal courts whenever it seeks to protect its sovereign interest.⁶ See Colorado v. United States,

⁵ On April 19, 1990, the State filed, in lieu of an answer to the United States' complaint, a motion to dismiss in the federal district court for lack of jurisdiction. The United States' opposition is due on May 8.

⁶ The statute states in full:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

New Mexico has not alleged that any other Act of Congress prevents the federal district court from exercising its jurisdiction pursuant to 28 U.S.C. § 1345. Nor are there any other statutes which would prevent the federal district court from exercising that jurisdiction.

219 F.2d 474, 476-77 (10th Cir. 1954). This right is provided only to the United States and without regard to the subject matter of the litigation.⁷ United States v. Puerto Rico, 551 F. Supp. 864, 865 (D.P.R. 1982), aff'd, 721 F.2d 832 (1st Cir. 1983). Thus, the federal district court properly has jurisdiction to adjudicate the issues raised by the United States in its complaint -- whatever their origin or subject matter.⁸ See United States v. Mississippi Tax Commission, 421 U.S. 599 (1975); Department of Employment v. United States, 385 U.S. 355 (1966). Accordingly, the United States properly asserted jurisdiction in its complaint and, therefore, the federal district court lacks a basis to grant New Mexico's motion to dismiss.

⁷ That the United States has a special entitlement to a federal forum also is shown by the fact that the Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits federal courts from ordering injunctions against state judicial proceedings, does not apply to the United States. NLRB v. Nash-Finch Co., 404 U.S. 138, 146 (1971); Leiter Minerals, Inc. v. United States, 352 U.S. 220, 225-26 (1957). Moreover, this statutory right of the United States to proceed in federal court cannot be displaced except by unequivocal expression of congressional intent. District of Columbia v. Transamerica Ins. Co., 797 F.2d 1041, 1047 (D.C. Cir. 1986).

⁸ Even if the United States' claims were based on state law, which they are not, 28 U.S.C. § 1345 empowers the federal district courts to hear and determine claims for relief by the United States, including those based on rights and duties established by state law. See United States v. California, 328 F.2d 729, 734 (9th Cir.), cert. denied, 379 U.S. 817 (1964) ("The relevant court decisions support the view, evidently entertained by Congress, that congressional power to confer jurisdiction upon lower courts based upon the character of the parties is not limited by the subject matter of the controversy.").

CONCLUSION

For the reasons set forth above and in its Memorandum in Support of Motion to Stay, the United States respectfully requests that this matter be stayed pending resolution of the United States' complaint in CIV 90-0276 SC (D.N.M.).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "REPLY TO APPELLEES' OPPOSITION TO UNITED STATES' MOTION TO STAY PROCEEDING" was served this 30th day of April 1990, by first class mail, postage pre-paid, on the following counsel of record:

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