

IN THE COURT OF APPEALS  
OF THE STATE OF NEW MEXICO

REGENTS OF THE UNIVERSITY OF )  
CALIFORNIA, )

Appellant, )

v. )

NO. 12190

THE ENVIRONMENTAL IMPROVEMENT )  
DIVISION OF THE NEW MEXICO )  
HEALTH AND ENVIRONMENT )  
DEPARTMENT; RICHARD )  
MITZELFELT, Director, )  
Environmental Improvement )  
Division, and THE )  
ENVIRONMENTAL IMPROVEMENT )  
BOARD, )

Appellees. )

COURT OF APPEALS  
STATE OF NEW MEXICO  
P.O. MANZANARES, CLIFK

'90 MAY 22 P1:44

FILED

REPLY TO APPELLEES' OPPOSITION  
TO THE UNIVERSITY'S MOTION TO STAY PROCEEDINGS

I.

INTRODUCTION

Appellant, The Regents of the University of California ("the University"), has moved the Court to exercise its discretionary power to stay the University's appeal pending resolution of United States v. New Mexico, No. Civ. 90-0276-SC ("the Federal Lawsuit").

The Environmental Improvement Division of the New Mexico Health and Environment Department ("EID") filed a response in opposition to the motion to stay ("Response")

on the "general grounds" that the University's appeal raises issues of state and not federal law. For the reasons set forth below in reply to EID's Response, the University requests this Court to stay this proceeding pending resolution of the Federal Lawsuit.

## II.

### EID'S RESPONSE ATTEMPTS TO CREATE ISSUES OF STATE LAW

EID argues that the issues raised in the University's appeal are questions of state law. In doing so, EID attempts to create an issue of whether New Mexico Hazardous Waste Management Regulations ("HWMR-5") are more stringent than the federal regulations adopted pursuant to RCRA. The University has not raised this issue, nor does it dispute New Mexico's authority to enact legislation which would allow the promulgation and enforcement of state regulations which are more stringent than federal regulations.

The University's appeal concerns specific provisions of RCRA, the New Mexico Hazardous Waste Act ("HWA") and federal and state regulations. As enacted, the HWA clearly states that state regulations for the management of hazardous waste can be no more stringent than federal regulations adopted by the Environmental Protection Agency ("EPA") pursuant to RCRA. NMSA 1978 § 74-4-4.A (1989 Repl.). As promulgated, the provisions

of HWMR-5 involved in this appeal and the Federal Lawsuit are identical to the federal regulations adopted by the EPA. HWMR-5 Part II Section 201. EID's Response at 14 concedes this point:

[T]he State regulations are, in fact, largely identical because the State recently began adopting the federal regulations by reference.

The University's appeal and the Federal Lawsuit focus on specific federal statutory and regulatory language which New Mexico adopted, not on the policy issue of what the New Mexico legislature could enact or the regulations that could be promulgated.<sup>1</sup> Thus, the question of whether the state regulations are more stringent than federal regulations is simply not an issue.

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<sup>1</sup>EID's Response digresses on the issue of whether New Mexico can, independent from RCRA, enact a Hazardous Waste Act. This is not an issue before the Court and EID apparently misunderstands or misconstrues the University's position. The State has the authority to enact its own Hazardous Waste Act. The New Mexico Legislature could also authorize the Environmental Improvement Board (the "Board") to promulgate and EID to enforce more stringent regulations. However, the legislature chose not to authorize more stringent regulations and chose to include the same exclusion for radioactivity found in RCRA. The Board adopted the RCRA regulations at issue by reference. The Board has not promulgated additional regulations which even purport to empower EID with the authority to impose conditions concerning radioactivity in a HWA permit. EID's Response also ignores that the Permit was issued to a federal facility and 42 U.S.C. § 6961 specifically limits the State's authority with respect to federal facilities.

EID concedes that the Court should refer to federal courts' interpretations of RCRA:

"Certainly, this Court will refer to the federal courts' interpretations of RCRA in construing the Hazardous Waste Act." Response at 8.

EID acknowledges that such reference to federal courts' interpretations is proper, but ignores longstanding New Mexico case law holding that when the New Mexico legislature adopts language from a federal statute, the interpretation of the adopted federal statute by the federal courts is presumed to have been adopted and given the same force as though the statute had been adopted from a sister state. Featherstone v. Bureau of Revenue, 58 N.M. 557, 561, 273 P.2d 752, 756 (1954); Garcia v. American Furniture Co., 101 N.M. 785, 788, 689 P.2d 934 (Ct.App. 1984), cert. denied, 102 N.M. 7, 690 P.2d 450 (1984).

Further, EID's attempt to create an issue concerning New Mexico's authority to regulate radioactive emissions under the federal Clean Air Act ("CAA") and the State Air Quality Control Act ("AQCA") is simply not an issue before this Court. The University's appeal is limited to conditions imposed in a RCRA/HWA permit, not to EID's authority under the CAA or AQCA.

III.

EID'S CHARACTERIZATION OF THE THRESHOLD  
ISSUE REQUIRES THIS COURT TO DECIDE THE  
PRECISE ISSUES CONTAINED IN THE FEDERAL  
LAWSUIT.

EID contends that the "real" questions before the Court are "definitional" and states the issue as whether "the permit in fact regulates radioactive waste." Response at 9. In contrast, the University and the United States frame the threshold issue in the University's appeal and the Federal Lawsuit as an "authority" or "jurisdictional" question. Regardless of the precise manner in which the issues are framed, this Court and the federal court will review the Permit conditions involving radioactivity and determine if EID has authority to impose these conditions. This necessarily requires statutory interpretation of RCRA, RCRA provisions adopted by the HWA, federal regulations adopted by the State and analysis of federal case law interpreting RCRA.

EID concedes that the Federal Lawsuit includes "some" of the issues in the University's appeal and correctly points out that the University's appeal contains additional issues. Response at 7. However, EID ignores the fact that the resolution of the Federal Lawsuit will provide the Court with a federal courts' interpretation of

the specific RCRA provisions adopted by the HWA and will simplify any remaining issues. See, Featherstone at 560-561.

IV.

THE UNIVERSITY HAS MET ITS BURDEN TO ALLOW THE COURT TO EXERCISE ITS INHERENT POWER AND DISCRETION TO GRANT THE STAY.

EID correctly cites 1 Am.Jur.2d Actions Sections 92, 96, 97 and 98 and cases cited therein for the Court's authority and standards in consideration of granting a stay. However, Landis v. North American, 299 U.S. 248 (1936) more accurately states the burden of the party seeking a stay than the cited Am Jur text:

[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. [citations omitted] True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. (Emphasis added.)

Id. at 254-255. The court places the burden on the movant to establish the need for a stay, but the level of hardship is to be weighed against the damage to the movant.

EID does not claim that it would be damaged by first litigating the Federal Lawsuit suit, only that the New Mexico appellate forum is more convenient. EID's Response at 8 (Point B.4). EID's claim of inconvenience does not raise a forum non conveniens issue because both the Federal Lawsuit and the University's appeal will be decided in Santa Fe, New Mexico. Furthermore, EID's contentions concerning the appellate record is incorrect because the appellate record has yet to be designated by the parties. (See Exhibit A)

The Landis court held that a stay is appropriate in the absence of identical parties and identical issues, even though disposition of the cause wouldn't settle every question of fact and law involved in other suits. The court reasoned that despite the fact that all issues would not be resolved, the disposition of the case would likely encourage settlement of other suits and simplify issues.

As in Landis, the disposition of the issues in the Federal Lawsuit will simplify any remaining issues and encourage settlement between the parties. Disposition of the Federal Lawsuit will also enable this Court to examine and defer to the federal courts interpretation of RCRA, thus protecting against inconsistent rulings on identical statutory provisions and regulations and enabling this Court to focus on any remaining issues of state law.

Under Landis and Wood v. Millers National Insurance Co., 96 N.M. 525, 632 P.2d 1163 (1981), the Court has great discretion not only in granting the stay, but also in fashioning the stay to ensure no damage to EID.

V.

EID'S CONTENTIONS OF BAD FAITH AND  
EID'S ASSESSMENT OF THE FEDERAL LAWSUIT  
ARE MISPLACED.

EID suggests "bad faith" on the part of the University concerning the filing of the Federal Lawsuit. In addition, EID suggests some inappropriateness on the part of the University for failing to propose consolidation of the two state appeals and for failing to join as a party to the Federal Lawsuit.

The decision to file the Federal Lawsuit was made by the United States Department of Energy and the United States Department of Justice. The University is not opposed to the consolidation of cause numbers 12233 and 12190, however, the University is not prepared to intervene in the Federal Lawsuit as long as the United States adequately protects the interests of the University.

EID also suggests that resolution of issues in the Federal Lawsuit will have no affect on the issues in the University's appeal. This is not true. EID ignores

the doctrine of collateral estoppel under Silva v. State,  
106 N.M. 472, 745 P.2d 380 (1987). See also Reeves v.  
Wimberly, 107 N.M. 231, 755 P2d 75 (Ct. App. 1988);  
Parklane Hosiery Company Inc. v. Shore, 439 U.S. 322  
(1979).

CONCLUSION

For the reasons set forth above and in its  
Memorandum in Support of Motion to Stay Appellate  
Proceedings, the University requests that the Court  
exercise its inherent power and discretion and stay this  
appeal pending resolution of the Federal Lawsuit.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of appellant's Memorandum in Support of Motion to Stay Proceeding was hand delivered this 22 day of May 1990, on the following counsel of record:

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April 26, 1990

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STATE OF NEW MEXICO  
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FILED

The University of California  
("University") v. EID; N.M.  
Ct. App. 12190

Dear Ms. Nelson:

This letter will confirm that we have twice tried to meet with you and Mr. Van Vleck to discuss the transcript needed for our appeal. Your schedule did not permit you to attend either our April 11, 1990, or our April 26, 1990, meetings. We are considering your April 23, 1990, request that before we try to schedule another meeting, we put in writing a list of those portions of the transcript which the University feels it needs.

In the meantime, we all need to be sensitive to the fact that the record proper, which is normally the responsibility of the district court clerk, needs to be filed. A calendar assignment cannot be made until the record proper is filed. May I assume that you will consent to any motions which may be necessary to extend the time to file and pay for the record proper?

Ms. Gini Nelson  
April 26, 1990  
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After the appeal is placed on a calendar, we will have ten days to arrange for the Transcript of the Proceedings. We also need to discuss which portions of the transcribed hearing each party will need.

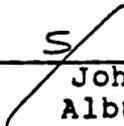
The University wants to stress that it considers the tapes (or a certified transcription) of the Board's February 9, 1990, meeting to be part of the Transcript of Proceedings.

As soon as Ms. Cummings and I have had an opportunity to meet to discuss what the appellants need, I will get back in touch.

Very truly yours,

SUTIN, THAYER & BROWNE  
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