

July 16, 1990

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

_____)
UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.	NO. CIV90 - 0276SC)
)
STATE OF NEW MEXICO; and)
HEALTH AND ENVIRONMENT)
DEPARTMENT, Environmental)
Improvement Division,)
)
Defendants.)
_____)

INITIAL PRETRIAL REPORT

Counsel have conferred and submit herewith the parties' consolidated Initial Pretrial Report.

APPEARANCES

Counsel are:

Karen L. Egbert, U.S. Department of Justice, and Jan Mitchell, Office of the United States Attorney, for plaintiff United States.

Hal Stratton, Attorney General, Randall Van Vleck, Assistant Attorney General, and Gini Nelson, Special Assistant Attorney General, Health and Environment Department, for defendants State of New Mexico and Health and Environment Department.

NATURE OF THE CASE

The United States, on behalf of the Department of Energy ("DOE"), challenges three conditions imposed in a Hazardous Waste Facility Permit issued by the New Mexico Health and Environment

15080

72

Department, Environmental Improvement Division ("EID"), to the Los Alamos National Laboratory. In part, the permit, issued pursuant to the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6992k, and the New Mexico Hazardous Waste Act ("HWA"), N.M. Stat. Ann. 1978, ch. 74, art. 4, §§ 74-4-1 to 74-4-13, imposes three conditions which attempt to regulate the radioactive component of waste burned in an on-site incinerator.

The State of New Mexico and the Health and Environment Department assert that the permit conditions do not attempt to regulate the radioactive component of waste in an on-site incinerator.

AMENDMENTS TO THE PLEADINGS

Plaintiff, at this time, does not intend to amend its complaint.

Defendant cannot at this time enumerate any anticipated amendments to the pleadings. The defendants have yet to file an Answer in this matter, but have contested this Court's jurisdiction. Should the Court deny the motion to dismiss, defendants will file an Answer; further amendments to the pleadings simply cannot be anticipated at this time.

STIPULATIONS

A. Jurisdiction

The parties disagree whether this Court has jurisdiction over this matter. Plaintiff asserts this Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1345. Defendants assert that

this Court lacks jurisdiction over the complaint and have filed a motion to dismiss for lack of jurisdiction.

B. Venue

The parties hereto stipulate and agree that, if this Court has jurisdiction, venue is properly laid in this District.

C. Facts

The parties are willing to stipulate to the following facts:

1. The Los Alamos National Laboratory is owned by DOE and operated and managed by the Regents of the University of California pursuant to a contract with DOE.

2. In November 1989, the New Mexico EID issued permit number 0890010515-1 for the Los Alamos National Laboratory, pursuant both to RCRA and the New Mexico HWA.

3. The permit allows operation of various units, including an incinerator, for the treatment, storage and disposal of hazardous waste at the Los Alamos facility.

4. Among other things, the permit requires DOE to: (1) survey each batch of waste treated under the permit to determine its radionuclide content; (2) continuously monitor radioactivity from the exhaust stack during any hazardous waste burn; and (3) assure that exhaust gas radioactivity measured during operation under the permit does not exceed the background level by fifty percent at any time or by ten percent for more than one minute.

5. DOE and the University of California appealed the permit to the Environmental Improvement Board, challenging the EID Director's purported attempt to regulate the radioactive

ponent of the waste stream through the permit. In response, filed a motion to dismiss DOE's petition, alleging that New Mexico's HWA requires that permit decisions should be appealed directly to the New Mexico Court of Appeals and, therefore, the Board had no jurisdiction to hear DOE's Petition for Review.

6. The Board, on February 9, 1990, ruled that the relevant provision of the Hazardous Waste Management Regulations was ultra vires because the HWA provides that permit decisions by the EID should be appealed directly to the state court of appeals.

7. On February 19, 1990, the Board issued an order suspending all pending petitions for review before the Board, including DOE's.

D. Governing Law

The parties disagree as to the governing law and do not make any stipulations on this point.

PLAINTIFF'S CONTENTIONS

Plaintiff United States opposes defendants' motion to dismiss and contends that jurisdiction in this Court is proper pursuant to 28 U.S.C. §§ 1331 and 1345. On the merits, Plaintiff contends that the permit conditions imposed by EID are within RCRA's limited waiver of sovereign immunity for federal facilities, 42 U.S.C. § 6961, for two reasons, either of which is sufficient to void the permit conditions. First, New Mexico has attempted to regulate the radioactive component of waste, which is not within either RCRA's or HWA's definition of

"solid waste," 42 U.S.C. § 6903(27); NMSA 1978 § 74-4-3(M).
Second, the New Mexico HWA imposes no "requirements" regulating the treatment, storage or disposal of the radioactive component of waste to which the Los Alamos facility is subject. Accordingly, the permit conditions are void and unenforceable.

DEFENDANTS' CONTENTIONS

Defendants contend that this Court lacks subject matter jurisdiction over this case for several reasons. First, defendants assert that the claims raised by plaintiff arise under state law and not federal law, consequently no federal question is involved. Secondly, defendants contend that the plaintiff is not entitled to the equitable remedies it seeks because it has adequate remedies at law which have yet to be pursued. Defendants also suggest that this Court abstain and exercise its discretionary powers to dismiss the complaint because substantial questions of state law control any federal questions; the state has a superior interest in interpreting its own regulatory scheme and the principles of comity, federalism and judicial economy favor dismissal. Finally, defendants assert that complete relief cannot be accorded the parties under FRCP Rule 19 and the case should therefore be dismissed. Due to the pending Motion to Dismiss, a discussion of defendants' substantive contentions is premature.

DISCOVERY

Plaintiff does not intend to obtain any discovery in this matter since the issues presented are purely legal. Therefore, there are no applicable discovery deadlines.

Defendants cannot agree that this case is purely legal in nature. Defendants have not yet answered the suit pending their motion to dismiss, and are faced with the prospect of defending a motion for summary judgment as soon as an answer is filed. Consequently, it is premature for the defendants to anticipate what discovery, if any, will be required. The defendants will have a better understanding of the issues involved after their motion to dismiss is ruled upon. It is simply premature for the defendants to speculate on the nature and extent of discovery at this early date.

OTHER PRE-TRIAL MOTIONS

Defendants have filed a motion to dismiss the United States' complaint and have suggested that the University of California be joined as a party. The United States has opposed the motion to dismiss but does not oppose the joinder of the University. Assuming defendants' motion to dismiss is denied, plaintiff intends to file a motion for summary judgment on its complaint.

It is premature for defendants to speculate concerning any other pre-trial motions defendants may file. Defendants contend that their motion to dismiss will be dispositive of this case.

Pretrial motions shall be filed on or before the expiration of 60 days following the entry of the Court's order on

defendants' motion to dismiss. Any pretrial motions filed after that time shall be considered untimely in the discretion of the Court.

PRE-TRIAL ORDER

Counsel for plaintiff does not believe this case is appropriate for trial because the issues presented are purely legal. Accordingly, no pre-trial order is necessary.

Counsel for defendants state that they cannot agree at this time that this case is inappropriate for trial. Defendants suggest that if this Court accepts jurisdiction and denies their motion to dismiss, a pretrial conference would be helpful in order to focus the issues.

ESTIMATED TRIAL TIME

Plaintiff does not provide an estimate of trial time since it believes the issues presented herein are purely legal and that the case, accordingly, can be resolved on motion for summary judgment.

Defendants are unable to anticipate the length of time required for trial until the issues are delineated.

OTHER MATTERS

None.

APPROVED WITHOUT EXCEPTIONS

Karen L. Egbert
For Plaintiff United States

Karen L. Egbert for Randall Van Uleck
For Defendant State of New Mexico

Karen L. Egbert for Gini Nelson
For Defendant Health and
Environment Department

APPROVED AND ADOPTED AS THE ORDER
OF THIS COURT:

United States District Judge

* Per telephone conversation
7/16/90.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "INITIAL PRETRIAL REPORT" was served this 16th day of July 1990, by first class mail, postage pre-paid, on the following:

HAL STRATTON
Attorney General
RANDALL VAN VLECK
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87504

GINI NELSON
Special Assistant Attorney General
Health and Environment Department
1190 St. Frances Drive
Santa Fe, New Mexico 87503

JOHN BANNERMAN
A. MICHAEL CHAPMAN
Sutin, Thayer & Browne
300 First Interstate Plaza
P.O. Box 2187
Santa Fe, New Mexico 87504

Karen L. Egbert
KAREN L. EGBERT