



TRANSMITTAL MEMORANDUM

TO: Elizabeth Gordon  
Room N2035

DATE: June 29, 1990

RE: United States of America v. State of New Mexico and Health and Environment Department, Environmental Improvement Division; Court of Appeals No. 12233 and Regents of the University of California v. The Environmental Improvement Division of the New Mexico Health and Environment Department, et al.; Court of Appeals No. 12190

The following documents are enclosed: Copies of Appellee Environmental Improvement Division's Responses In Opposition to Appellant's Motion To Delay Filing of Record on Appeal, Motion to Delay Filing of Record on Appeal and letter dated June 29, 1990 to Timothy J. Dowling from Gini Nelson.

PLEASE:

- |   |   |
|---|---|
| <input type="checkbox"/> File   | <input type="checkbox"/> Check for \$ _____ enclosed for proper fee   |
| <input type="checkbox"/> Record   |   |
| <input type="checkbox"/> Serve, complete Return of Service and return to us | <input type="checkbox"/> Self-addressed, stamped envelope(s) enclosed |
| <input type="checkbox"/> Per your request                                   | <input type="checkbox"/> Other:                                       |
| <input checked="" type="checkbox"/> For your information                    |   |
| <input type="checkbox"/> Approve, sign and return                           |   |
| <input type="checkbox"/> Return conformed copies                            |   |

Thank you very much,

*Gini Nelson*  
GINI NELSON  
Assistant General Counsel

Enclosure(s)



15082

IN THE COURT OF APPEALS  
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 OF NEW MEXICO  
**FILED**  
JUN 29 1990

*Patricia C. Mangano*

**APPELLEE ENVIRONMENTAL IMPROVEMENT DIVISION'S RESPONSE  
IN OPPOSITION TO APPELLANT'S MOTION TO DELAY  
FILING OF RECORD ON APPEAL**

The Environmental Improvement Division of the New Mexico Health and Environment Department ("EID"), opposes the Regents' of the University of California ("appellant" or "the University"), Motion to Delay Filing of Record on Appeal. More specifically, EID responds as follows:

1. The Docketing Statement in this matter was filed on or about April 11, 1990.
2. SCRA 1986, 12-209.B. requires the district court clerk **without discretion** to prepare and submit the record proper to the appellate court upon receipt of Appellant's docketing statement.

**Upon receipt of a copy of the docketing statement**, the district court clerk shall number consecutively the pages of the record proper and send it to the appellate court. ... The appellant shall pay for the record proper within ten (10) days of the filing of the docketing statement.

(Emphasis added).

3. SCRA 1986, 12-209.B. also requires Appellant **without**

12

**discretion** to pay the district court clerk's costs of preparing and transmitting the record proper to the appellate court within ten days of Appellant's filing of the docketing statement:

Upon receipt of a copy of the docketing statement, the district court clerk shall number consecutively the pages of the record proper and send it to the appellate court. ... **The appellant shall pay for the record proper within ten (10) days of the filing of the docketing statement.**

(Emphasis added).

4. SCRA 1986, 12-601.B. substitutes EID staff for the district court clerk regarding the clerk's obligation to prepare and send the record proper to the appellate court:

Whenever in these rules a duty is to be performed by, service is to be made upon, or reference is made to the ... clerk of the district court, the ... administrative agency or official whose action is appealed from shall be substituted for the ... clerk of the district court  
... .

5. EID has a **nondiscretionary duty** to prepare and transmit the Record Proper to this Court. EID had delayed doing so because of negotiations with Appellant to limit the scope of the Record Proper, to eliminate irrelevant material for the benefit of both this Court and of Appellant (to limit the cost of preparation and transmittal). Because this is an appeal of an administrative appeal, the Record Proper is different from the normal Record Proper of a judicial proceeding, i.e., it consists both of written submittals and a transcribed public hearing upon which the Director's final permit decision was based. EID made its determination of the minimum Record Proper and determined that it can no longer delay preparing and transmitting that Record Proper to this Court. It is prepared to do so once this Court rules on

this Motion.

6. EID staff estimates that the Record Proper will cost approximately \$2000 to prepare, copy and transmit to this Court.

7. Costs of an appeal are costs that an appellant knows it must bear when it undertakes an appeal. The time and costs of going forward with an appeal do not constitute "harm" to Appellant.

8. The State does not concur in Appellant's assertion that "the Record is not necessary to the Court's determination of [Appellant's] motion to stay this appeal." It is the Appellant's duty to see that the record is properly prepared and completed for review of **any question** by the Appellate court.

9. The University argues in support of its motion for stay before this Court, the summary judgment motion the United States expects to file after the State has filed its Answer in the federal complaint, implying delay in this Court. See Memorandum in Support of Motion to Stay at 12. Appellee opposes this contention. See Response in Opposition to Motion For Stay at 8. Appellant appears to further argue that the Record Proper cannot be easily and quickly brought before this Court. See Reply to Appellees' Opposition to the University's Motion to Stay Proceedings at 7.

10. The State does not know what prejudice it may suffer or may have already suffered by not already having the Record Proper before the Court, or by additional delays in getting the Record Proper to this Court. EID does not know to what degree the absence of the Record Proper has delayed or otherwise influenced this Court's calendaring decision on the appeal, or action on the pending motion for stay. It will be difficult if not impossible

for this Court to make its calendaring decision in the absence of the Record Proper.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that this Court deny appellant's Motion to Delay Filing of Record on Appeal, and assign this matter to the appropriate Calendar for determination on the merits.

Respectfully submitted,



GINI NELSON  
Special Assistant Attorney General  
Assistant General Counsel  
Office of General Counsel  
1190 St. Francis Drive  
Santa Fe, New Mexico 87503  
(505) 827-2990

Attorney for Appellee EID

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Motion to Delay Filing of Record on Appeal was mailed on this 29 day of June, 1990, to the following:

SUTIN, THAYER & BROWNE  
John Bannerman  
A. Michael Chapman  
P.O. Box 2187  
Santa Fe, NM 87504



GINI NELSON

IN THE COURT OF APPEALS  
STATE OF NEW MEXICO

UNITED STATES OF AMERICA,

Appellant,

v.

No. 12233

COURT OF APPEALS OF NEW MEXICO  
**FILED**

JUN 29 1990

*Patricia C. Mangano*

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

Appellees.

APPELLEE ENVIRONMENTAL IMPROVEMENT DIVISION'S RESPONSE  
IN OPPOSITION TO APPELLANT'S MOTION TO DELAY  
FILING OF RECORD ON APPEAL

The Environmental Improvement Division of the New Mexico Health and Environment Department ("EID"), opposes the United States' ("appellant" or "United States"), Motion to Delay Filing of Record on Appeal. More specifically, EID responds as follows:

1. The Docketing Statement in this matter was filed on or about April 5, 1990.

2. SCRA 1986, 12-209.B. requires the district court clerk **without discretion** to prepare and submit the record proper to the appellate court upon receipt of Appellant's docketing statement.

**Upon receipt of a copy of the docketing statement**, the district court clerk shall number consecutively the pages of the record proper and send it to the appellate court. ... The appellant shall pay for the record proper within ten (10) days of the filing of the docketing statement.

(Emphasis added).

3. SCRA 1986, 12-209.B. also requires Appellant **without discretion** to pay the district court clerk's costs of preparing and transmitting the record proper to the appellate court within ten days of Appellant's filing of the docketing statement:

Upon receipt of a copy of the docketing statement, the district court clerk shall number consecutively the pages of the record proper and send it to the appellate court. ... **The appellant shall pay for the record proper within ten (10) days of the filing of the docketing statement.**

(Emphasis added).

4. SCRA 1986, 12-601.B. substitutes EID staff for the district court clerk regarding the clerk's obligation to prepare and send the record proper to the appellate court:

Whenever in these rules a duty is to be performed by, service is to be made upon, or reference is made to the ... clerk of the district court, the ... administrative agency or official whose action is appealed from shall be substituted for the ... clerk of the district court  
... .

5. EID has a **nondiscretionary duty** to prepare and transmit the Record Proper to this Court. EID had delayed doing so because of negotiations with Appellant to limit the scope of the Record Proper, to eliminate irrelevant material for the benefit of both this Court and of Appellant (to limit the cost of preparation and transmittal). Because this is an appeal of an administrative appeal, the Record Proper is different from the normal Record Proper of a judicial proceeding, i.e., it consists both of written submittals and a transcribed public hearing upon which the Director's final permit decision was based. EID made its determination of the minimum Record Proper and determined that it can no longer delay preparing and transmitting that Record Proper to this Court. It is prepared to do so once this Court rules on this Motion.

6. EID staff estimates that the Record Proper will cost

approximately \$2000 to prepare, copy and transmit to this Court.

7. Costs of an appeal are costs that an appellant knows it must bear when it undertakes an appeal. The time and costs of going forward with an appeal do not constitute "harm" to Appellant.

8. The State does not concur in Appellant's assertion that "the Record is not necessary to the Court's determination of [Appellant's] motion to stay this appeal." Further, it is the Appellant's duty to see that the record is properly prepared and completed for review of **any question** by the Appellate Court.

9. The United States argues in support of its motion for stay before this Court, the summary judgment motion it expects to file after the State has filed its Answer in the federal complaint, implying delay in this Court as cause for stay. See Motion to Stay Proceedings at 13 n. 11.

10. The State does not know what prejudice it may suffer or may have already suffered by not already having the Record Proper before the Court, or by additional delays in getting the Record Proper to this Court. EID does not know to what degree the absence of the Record Proper has delayed or otherwise influenced this Court's calendaring decision on the appeal, or action on the pending motion for stay. It will be difficult if not impossible for this Court to make its calendaring decision in the absence of the Record Proper.

#### CONCLUSION

For all of the foregoing reasons, the State respectfully requests that this Court deny appellant's Motion to Delay Filing

of Record on Appeal, and assign this matter to the appropriate Calendar for determination on the merits.

Respectfully submitted,

  
GINI NELSON  
Special Assistant Attorney General  
Assistant General Counsel  
Office of General Counsel  
1190 St. Francis Drive  
Santa Fe, New Mexico 87503  
(505) 827-2990

Attorney for Appellee EID

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Opposition to Motion to Delay Filing of Record on Appeal was mailed on this 29 day of June, 1990, to the following:

Richard B. Stewart, Esq.  
Karen L. Egbert, Esq.  
Post Office Box 23986  
Washington, D.C. 20026-3986

William P. Lutz, Esq.  
Jan Mitchell, Esq.  
U.S. Courthouse, Room 12002  
Albuquerque, New Mexico 87103

  
GINI NELSON