

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

3-22-91  
UNITED STATES OF AMERICA,

Plaintiff,

vs.

CIV. NO. 90-276 SC

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

Defendants.

ENTERED ON DOCKET  
3-22-91

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendants' Motion to Dismiss. The Court, having read the memoranda submitted by the parties, having examined the exhibits attached thereto, and being apprised of the applicable law, finds that the motion is not well taken and should be denied. The Court's reasoning is set forth below.

This is an action for declaratory judgment brought by the United States Government. 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 Department, Environmental Improvement Division (EID) to the Los Alamos National Laboratory (LANL). Plaintiff argues that the permit, issued pursuant to the Resource Conservation and Recovery Act (RCRA) and the New Mexico Hazardous Waste Act (HWA), imposes three conditions which attempt to regulate the radioactive component of waste burned in an on-site incinerator. In its Complaint, Plaintiff asks the Court to declare



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that these three permit conditions are void and unenforceable on the grounds that: (1) RCRA has not waived sovereign immunity for the State to impose permit conditions in the LANL Hazardous Waste Facility Permit which attempt to regulate the radioactive component of the waste; and (2) RCRA has not waived sovereign immunity for the State to impose these permit conditions since the HWA imposes no "requirements" with respect to the regulation of radioactive waste. Defendants assert that the permit conditions do not attempt to regulate the radioactive component of waste in an on-site incinerator.

The events relevant to this motion are as follows. On or about November 20, 1989, EID issued a hazardous waste facility permit to the LANL<sup>1</sup> pursuant to RCRA and the HWA. The permit imposes three conditions requiring DOE to: (1) survey each batch of waste treated in the Los Alamos incinerator under the permit to determine its radionuclide content; (2) continuously monitor radioactivity from the incinerator exhaust stack during any hazardous waste burn; and (3) assure that the 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. On December 20, 1989, the United States and the University appealed the three permit conditions to the Environmental Improvement Board (Board). In response, the EID filed a motion to dismiss. On February 19, 1990, the Board issued

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<sup>1</sup> LANL is owned by the United States and operated by the Regents of the University of California (the University).

an order dismissing all pending petitions for review because the HWA provides that permit decisions by the EID should be appealed directly to the state court of appeals. On March 12, 1990, the University filed an appeal of the three permit conditions in the New Mexico Court of Appeals. On March 19, 1990, the United States, on behalf of DOE, filed the present Complaint. On March 20, 1990, the U.S. filed a notice appealing the Board's February 19, 1990 Order to the extent it upholds the decision of the EID Director to issue to DOE a hazardous waste facility permit which contains the three conditions regulating the radioactive component of waste. On April 6, 1990, the United States moved to stay its state court appeal pending resolution of this federal action. On April 18, 1990, Defendants filed their response opposing the motion to stay. On September 17, 1990, the New Mexico State Court of Appeals granted the United States' motion and stayed the appeal until further order of the court.

Defendants' have moved to dismiss the Complaint on three grounds. First, they argue that this Court lacks subject matter jurisdiction. Second, they argue that if this court has jurisdiction, it should nevertheless, abstain from exercising its jurisdiction. Finally, they argue that the University is a necessary party to this action pursuant to Federal Rule of Civil Procedure 19(a) and if joinder is not feasible, then the action should be dismissed. The Court will address each of these arguments separately.

## I. SUBJECT MATTER JURISDICTION

Defendants argue that federal question jurisdiction must be established on the face of a well-pleaded complaint and Plaintiff's Complaint does not present a "true" federal question. Defendants also argue that 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. The Court finds that these arguments are without merit.

First, this Court has jurisdiction over the Plaintiff's Complaint under 28 U.S.C. §1345, which was properly pleaded in the Complaint. The grant of jurisdiction under this section to district courts in civil actions commenced by the U.S. is without regard to the subject matter of the litigation. *U.S. v. Puerto Rico*, 551 F.Supp. 864 (D.Puerto Rico 1982), *aff'd* 721 F.2d 832 (1st Cir. 1983). Furthermore, the Tenth Circuit has held that "because of §1345, the United States as party plaintiff is not subject to the well-pleaded complaint rule." *Federal Home Loan Bank Bd. v. Empie*, 778 F.2d 1447, 1450 (10th Cir. 1985). Thus, 28 U.S.C. §1345 provides this Court with original jurisdiction over the United States' Complaint.

In addition, the Court finds that the claims raised in this Complaint present a federal question. The claims arise under federal law, specifically, the RCRA. The scope of RCRA's waiver of sovereign immunity is the central issue presented in the Complaint. By its Complaint, the U.S. seeks resolution of the rights of DOE under RCRA vis-a-vis the State's alleged attempt to

regulate the radioactive component of waste at a federal facility in a hazardous waste permit. Thus, even under the "well-pleaded complaint" rule, this Court has subject matter jurisdiction of this action under 28 U.S.C. §1331.<sup>2</sup>

## II. ABSTENTION

Next, Defendants argue that the Court should abstain from exercising its jurisdiction, claiming that issues of state law predominate, that the State has a superior interest in interpreting its own regulatory scheme, and that principles of comity and judicial economy favor dismissal. Specifically, Defendants argue the Court should abstain under the **Pullman** abstention doctrine, the **Burford** abstention doctrine, the **Younger** abstention doctrine and general principles of judicial economy as discussed in **Colorado River Water Conservation District v. U.S.**, 424 U.S. 800 (1976).

The doctrine of abstention, under which a district court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. **Colorado River** at 813; **City of Moore v. Atchison, Topeka & Santa Fe Railway Co.**, 699 F.2d 507, 510 (10th Cir. 1983). Only in exceptional

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<sup>2</sup> The Court also finds Defendants' arguments regarding the unavailability of declaratory relief in this situation to be without merit. Defendants argue Plaintiff is not entitled to declaratory relief absent a showing of irreparable harm. However, such a showing is not necessary for issuance of a declaratory judgment. **Steffel v. Thompson**, 415 U.S. 452, 471-72 (1974). Also, Defendants argue Plaintiff is not entitled to declaratory relief because it has alternative adequate remedies at law. However, declaratory relief is not unavailable because an alternative remedy may exist. Fed.R.Civ.P. 57.

circumstances should a federal plaintiff be ordered to repair to the state court. **Colorado River** at 813. Thus, abstention should not be invoked lightly. **ANR Pipeline v. Corporation Com'n of State of Oklahoma**, 860 F.2d 1571, 1579 (10th Cir. 1988), cert. denied 490 U.S. 1051 (1989). In **Colorado River**, the circumstances that are appropriate for abstention were grouped into three categories. **Colorado River** at 814-816. Since the Defendants claim that abstention is proper under all of these categories the Court will examine each one separately.

First, Defendants argue the Court should abstain under the standards announced in **Railroad Com. of Texas v. Pullman Co.**, 312 U.S. 496 (1941). The **Pullman** abstention doctrine applies to cases presenting a federal constitutional issue that might be mooted or presented in a different posture by state court determination of pertinent state law. **ANR Pipeline** at 1579-80. Defendants argue that 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. However,

The claim that a federal statute controls is essentially an exercise in construing the federal statute. Once its meaning has been determined, application of the Supremacy Clause poses no novel constitutional problem. The policy against unnecessary decision of constitutional questions does not reach unnecessary construction of statutes. Thus while one of the other abstention doctrines might justify abstaining in a Supremacy Clause case, abstention should not be ordered on **Pullman** grounds (emphasis added).

17A C. Wright, A. Miller & E. Cooper, **Federal Practice and Procedure** §4242 (1988) citing **Federal Home Loan Bank Bd. v. Empie**,

378 F.2d 1447, 1451 n. 4 (10th Cir. 1985). Therefore, the **Pullman** doctrine has no application in this situation.

Second, Defendants argue the Court should abstain under the standards set forth in **Burford v. Sun Oil Co.**, 319 U.S. 215 (1943). Under the **Burford** doctrine a federal district court may abstain when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar, or where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. **New Orleans Public Service, Inc. v. City Council of New Orleans**, 491 U.S. 350, 361 (1989). These circumstances are not present in this case. Here, no difficult questions of state law are raised. The threshold issue presented in the Complaint concerns the United States' sovereign immunity under RCRA section 6001, 42 U.S.C. §6961, and whether Congress has waived that immunity with respect to the permit conditions at issue. The United States contends that EID's attempt to impose conditions regulating radionuclides is not within the limited waiver of sovereign immunity because the radioactive component of waste is not "solid waste" as defined by RCRA. Defendants argue that the scope of the hazardous waste permit conditions must be interpreted in light of state, not federal law. However, the Court agrees with Plaintiff, that the issue is not the scope of the conditions imposed by the State, but the scope of RCRA's waiver of sovereign immunity for imposition of

those conditions at a federal facility.

Also, the exercise of federal jurisdiction will not disrupt any complicated regulatory system of local law. This case challenges three conditions imposed in a single hazardous waste permit issued to a federal facility, not the framework of the State hazardous waste management law or regulations. Thus, **Burford** abstention is not justified in these circumstances.

Next, Defendants argue the Court should abstain under the standards set forth in **Younger v. Harris**, 401 U.S. 37 (1971). The **Younger** Court held that absent extraordinary circumstances federal courts should not enjoin pending state criminal prosecutions. The Supreme Court has subsequently expanded the protection of **Younger** beyond state criminal prosecutions, to civil enforcement proceedings and even to civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions. **New Orleans** at 367-68. However, the Supreme Court also stated,

it has never been suggested that **Younger** requires abstention in deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States.

*Id.* at 368. Here, the only state court proceeding in which the United States is a party is the United States' own appeal of the action of EID. Therefore, the state proceeding is a "state judicial proceeding reviewing legislative or executive action" which is not the sort of proceeding entitled to **Younger** treatment.

Finally, Defendants argue judicial administration principles must be considered and balanced as discussed in **Colorado River Water Conservation District v. U.S.**, 424 U.S. 300 (1976). The teaching of this case was that only "exceptional" circumstances will permit a federal court to refrain from exercising its jurisdiction for reasons of wise judicial administration due to the presence of a concurrent state proceeding. 17A C. Wright, A. Miller & E. Cooper, **Federal Practice and Procedure** §4247 (1988). Here, Defendants have not convinced this Court that any exceptional circumstances exist.

The decision to abstain is largely committed to the discretion of the district court. **Will v. Calvert Fire Ins. Co.**, 437 U.S. 655, 664 (1978). For all of the reasons discussed above, this Court finds that it would be inappropriate for the Court to abstain from exercising its jurisdiction in this case.<sup>3</sup>

### III. JOINDER OF THE UNIVERSITY OF CALIFORNIA

Defendants also argue that the University of California (University) is a necessary party to this action pursuant to Federal Rule of Civil Procedure 19(a) and if joinder is not feasible, then the action should be dismissed. Plaintiff does not oppose Defendants request to join the University as a party in this case. However, Plaintiff states that joinder is neither

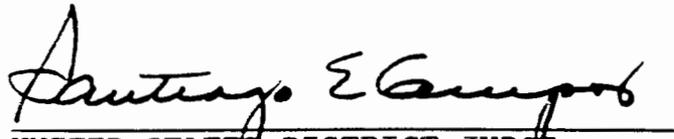
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<sup>3</sup> The Court notes that there is no ongoing state proceeding at this time. Plaintiff moved to stay its state court appeal pending resolution of this case arguing that: 1) the appeal raises threshold federal issues--sovereign immunity, under RCRA; and 2) comity considerations favor federal adjudication. On September 17, 1990, the New Mexico State Court of Appeals granted the motion to stay the appeal.

necessary nor required under Rule 19(a). Since there is no opposition to joinder of the University and joinder is feasible, the Court will order that the University be joined as a plaintiff in this action. Therefore,

**IT IS THE ORDER OF THE COURT** that Defendants' Motion to Dismiss should be, and hereby is, DENIED.

**IT IS FURTHER ORDERED** that the University of California be joined as a plaintiff in this action.

  
UNITED STATES DISTRICT JUDGE