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July 10, 1991

HAND DELIVERED

Honorable Robert W. McCoy
United States Magistrate
Tenth Floor
500 Gold Avenue, S.W.
Albuquerque, New Mexico 87102

United States, et al. v.
State of New Mexico, et al.;
United States District Court
Cause No. CIV 90-0276SC

Dear Judge McCoy:

In accordance with your May 16, 1991 letter, the Regents of the University of California submits the enclosed consolidated Initial Pre-Trial Report.

Very truly yours,

SUTIN, THAYER & BROWNE
A Professional Corporation

By _____
John A. Bannerman
Albuquerque Office

AMC:gfb
45AMO

cc: Gini Nelson, Esq.
Randall D. Van Vleck, Esq.
Karen L. Egbert, Esq.
Jan Elizabeth Mitchell, Esq.
Marc Johnston, Esq.



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

UNITED STATES OF AMERICA)
and THE REGENTS OF THE)
UNIVERSITY OF CALIFORNIA,)
)
Plaintiffs,)
)
v.)
)
STATE OF NEW MEXICO; and)
NEW MEXICO DEPARTMENT OF)
ENVIRONMENT,)
)
Defendants.)
_____)

NO. CIV 90-0276SC

INITIAL PRE-TRIAL REPORT

Counsel have conferred and submit herewith the parties' consolidated Initial Pre-trial 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.

John A. Bannerman and A. Michael Chapman, Sutin, Thayer & Browne, A Professional Corporation, for plaintiff The Regents of the University of California.

Tom Udall, Attorney General, and Randall Van Vleck, Assistant Attorney General, for defendant State of New Mexico.

Gini Nelson, Special Assistant Attorney General, for defendant New Mexico Department of Environment.

NATURE OF THE CASE

The United States, on behalf of the Department of Energy ("DOE"), and The Regents of the University of California (the "University") challenge three conditions imposed in a Hazardous Waste Facility Permit No. 0890010515-1 ("Permit") issued by the New Mexico Department of Environment to DOE and the University for the Los Alamos National Laboratory facility. 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 controlled air incinerator.

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

Alternatively, if the conditions do "regulate" radioactive waste, the defendants assert that regulation is authorized by the federal Clean Air Act.

AMENDMENTS TO THE PLEADINGS

The United States does not intend to amend its complaint.

The University was involuntarily joined as a plaintiff on March 21, 1991 by Order of Court. The University intends, if necessary, to file a complaint asserting additional claims against defendant New Mexico Department no later than fifteen business days following a ruling by the Court on the pending motions for summary judgment.

Defendants filed their answer to the United States' complaint on April 4, 1991. Defendants do not intend to amend their answer to the United States' complaint.

STIPULATIONS

A. Jurisdiction

The United States' complaint alleged jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1345. Defendants claimed that this Court lacks jurisdiction over the complaint and filed a motion to dismiss for lack of jurisdiction. By Order dated March 21, 1991, this Court

denied defendants' motion, finding that jurisdiction properly rests in this Court and ordered the joinder of the University as a plaintiff.

B. Venue

The parties hereto stipulate and agree that 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 University pursuant to a contract with DOE.

2. In November 1989, the New Mexico Department of Environment issued the Permit to the United States and the University 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 storage and treatment of hazardous waste at the Los Alamos National Laboratory facility.

4. Among other things, the Permit requires DOE and the University 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) stop incineration of hazardous waste if the exhaust gas radioactivity measured during operation under the Permit exceeds the background level by fifty percent at any time or by ten percent for more than one minute.

5. Pursuant to regulations issued by the New Mexico Environmental Improvement Board ("Board"), DOE and the University challenged the New Mexico Environmental Improvement Division Director's purported attempt to regulate the radioactive component of the waste stream through the Permit by filing a Petition for Review with the Board. In response, the New Mexico Department of Environment filed a motion to dismiss the 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 the Petition for Review.

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

7. On February 19, 1990, the Board issued an order dismissing all pending petitions for review

before the Board, including the petition filed by DOE and the University.

D. Governing Law

The United States contends that the law governing this case is 42 U.S.C. § 6961, and cases decided thereunder.

The University contends that the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k and cases decided thereunder as well as federal and state administrative law govern this case.

Defendants do not stipulate that the governing law is limited to 42 U.S.C. §§ 6901-6992K and cases decided thereunder and federal and state administrative law.

UNITED STATES' CONTENTIONS

The United States contends that the three contested Permit conditions imposed by the New Mexico Department of Environment are not 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, defendants have 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 National Laboratory is subject. Accordingly, the Permit conditions are void and unenforceable and the United States is entitled to judgment as a matter of law.

UNIVERSITY'S CONTENTIONS

The University concurs with the United States' position and contends that RCRA does not waive sovereign immunity as to the contested Permit conditions because the conditions attempt to regulate radioactive materials which are neither "solid waste" nor "hazardous waste" under RCRA and the New Mexico HWA. Since Findings of Fact issued by the Court in response to the United States' Motion for Summary Judgment will, of necessity, address the issue of whether radioactive materials are solid or hazardous wastes subject to regulation by the Defendants, the University contends that any ruling in favor of the United States should also grant judgment in favor of the University.

The University also contends that because radioactive materials are excluded from the definition of solid and hazardous waste, the Defendants may not regulate radioactive materials through conditions placed in the

Permit. Further, neither the New Mexico HWA nor regulations issued pursuant to the Act authorize the New Mexico Department of Environment (formerly the New Mexico Health and Environment Department, Environmental Improvement Division) to impose the contested Permit conditions. Accordingly, the University contends that the Permit conditions are void and unenforceable against the University and the University is entitled to judgment as a matter of law.

If it becomes necessary, the University will file additional claims which contend that the decision of the New Mexico Department of Environment to impose the three contested permit conditions was not in accordance with law; was not supported by substantial evidence; and was arbitrary, capricious and an abuse of discretion. The University further contends that the Permit definition of "background" radiation is unclear, unworkable and has no recognized scientific basis. The University also contends that the imposition of the contested permit conditions is an inappropriate attempt to broaden the regulatory authority of the New Mexico Department of Environment under RCRA and the New Mexico HWA.

DEFENDANTS' CONTENTIONS

Defendants contend that they are entitled to judgment as a matter of law because the Permit conditions

are requirements respecting control and abatement of solid waste or hazardous waste disposal within the meaning of 42 U.S.C. § 6961; and/or the Permit conditions are requirements respecting the control and abatement of air pollution within the meaning of § 118 of the federal Clean Air Act; and, therefore, Congress has waived sovereign immunity for these conditions.

DISCOVERY

Plaintiff United States does not intend to obtain any discovery in this matter since the issues are purely legal. The University concurs that the issues presently before the Court are purely legal and discovery is not needed.

If the University is required to file a complaint, it may obtain the following discovery:

1. Interrogatories;
2. Requests for admission;
3. Request for production of documents; and
4. Depositions of Kelley C. Crossman,
A. Elizabeth Gordon, Richard Mitzelfelt, former employees of the University and others depending on the responses to interrogatories.

Defendants do not intend to obtain any discovery in this matter since the issues presented are purely

legal. However, should the University file a complaint, defendants reserve the right to determine appropriate discovery at that time.

The termination date for discovery is _____, 19__, and discovery shall not be reopened, except by an Order of the Court upon a showing of good cause. This deadline shall be construed to require that discovery be completed on or before the above date. Service of interrogatories or requests for production shall be considered timely only if the responses are due prior to the deadline. A notice to take deposition shall be considered timely only if the deposition takes place prior to the deadline. The pendency of dispositive motions shall not stay discovery.

Motions relating to discovery (including but not limited to motions to compel and motions for protective order) shall be filed no later than _____, 19__. This deadline shall be construed to extend the twenty-day time limit in Local Rule 10(c).

Plaintiffs shall identify to all parties in writing any expert witness to be used by plaintiffs at trial no later than _____, 19__. All other parties shall identify in writing any expert witness to be used by such parties at trial no later than _____, 19__.

THE UNIVERSITY'S COMPLAINT

The University's Complaint shall be filed no later than _____.

OTHER PRE-TRIAL MOTIONS

The United States and defendants have filed motions for summary judgment. All parties have responded to the motions.

If the University files a complaint, the University intends to file a motion for summary judgment in accordance with Federal Rule of Civil Procedure 56.

Pre-trial motions, other than discovery motions, shall be filed on or before _____; any pre-trial motions, other than discovery motions, filed after the above date shall be considered untimely in the discretion of the Court.

PRE-TRIAL ORDER

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

Defendants concur with the position as stated by counsel for plaintiffs.

ESTIMATED TRIAL TIME

Plaintiffs do 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 concur with the position as stated by counsel for plaintiffs.

SETTLEMENT

The possibility of settlement is not foreclosed.

OTHER MATTERS

Counsel are directed that a Pre-Trial Order will provide that no witnesses except rebuttal witnesses whose testimony cannot be anticipated, will be permitted to testify unless his or her name is furnished to the Court and opposing counsel no later than thirty (30) days prior to the time set for trial. Any exceptions thereto must be upon Order of the Court for good cause shown.

If documents are attached as exhibits to motions, affidavits or briefs, those parts of the exhibits that counsel want to bring to the attention of the Court shall be highlighted in yellow on all copies which are filed, delivered to the Court or served on other counsel.

EXCEPTIONS

The State of New Mexico and the New Mexico Environment Department object to the University of California's suggestion that it is permitted to file a complaint asserting additional claims against the

defendants no later than fifteen business days following a ruling by the Court on the pending motions for summary judgment. The University was joined as a party plaintiff by this Court on March 21, 1991. The defendants' purpose in requesting that the University be joined in this litigation was to place all matters in controversy between all parties before the Court in one proceeding. In order to fully facilitate the purpose of joining all parties and adjudicating all appropriate claims in a single lawsuit, the University should be required to file any claims it has against defendants no later than fifteen days from the date the Court enters its Pre-Trial Order. The University has indicated that it contemplates that it will file a separate motion for summary judgment in favor of any claims it decides to pursue. Judicial economy and fairness to the parties dictate that the University be compelled to now assert any motions on its claims, rather than waiting until the Court's determination of the pending motions for summary judgment and raising additional claims at a later date.

APPROVED WITH EXCEPTIONS

[Telephonically approved 7/9/91]
Karen L. Egbert, Esq.
For Plaintiff United States

John A. Bannerman, Esq.
A. Michael Chapman, Esq.
For Plaintiff the Regents of the
University of California

[Telephonically approved 7/10/91]
Randall D. Van Vleck, Esq.
For Defendant State of New Mexico

[Telephonically approved 7/10/91]
Gini Nelson, Esq.
For Defendant New Mexico
Department of Environment

APPROVED:

UNITED STATES MAGISTRATE

APPROVED AND ADOPTED AS THE
ORDER OF THE COURT:

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

We hereby certify that we mailed a copy of the foregoing consolidated initial pre-trial report to the following counsel of record this 10th day of July, 1991:

Randall D. Van Vleck, Esq.
Assistant Attorney General
P. O. Drawer 1508
Santa Fe, New Mexico 87501

Gini Nelson, Esq.
Special Assistant Attorney General
Assistant General Counsel
New Mexico Environment Department
Office of General Counsel
P. O. Box 26110
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Karen L. Egbert, Esq.
U.S. Department of Justice
Environmental and Natural
Resources Division
Environmental Defense Section
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Marc Johnston, Esq.
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United States Department of Energy
Office of General Counsel
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Assistant U.S. Attorney
P. O. Box 607
Albuquerque, New Mexico 87103

SUTIN, THAYER & BROWNE
A Professional Corporation

By _____

194AMC/26AONET



BRUCE KING
GOVERNOR

State of New Mexico
ENVIRONMENT DEPARTMENT
Harold Runnels Bulding
1190 St. Francis Drive, P.O. Box 26110
Santa Fe, New Mexico 87502
(505) 827-2850

JUDITH M. ESPINOSA
SECRETARY

RON CURRY
DEPUTY SECRETARY

TRANSMITTAL MEMORANDUM

TO: Elizabeth Gordon
Hazardous Radioactive Materials Bureau

DATE: July 22, 1991

RE: United States, et al. v. State of New Mexico, et al.
United States District Court Cause No. CIV 90-0276SC

The following documents are enclosed: Copy of letter from John A. Bannerman to Honorable Robert W. McCoy dated July 10, 1991, and copy of Initial Pre-Trial Report in the above-referenced case.

PLEASE:

- | | |
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| <input checked="" type="checkbox"/> For your information | |
| <input type="checkbox"/> Approve and sign | |
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Thank you very much,

Linda M. Romero
Linda M. Romero
Legal Assistant

Enclosure

