



BRUCE KING
GOVERNOR

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

*file LANC
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JUDITH M. ESPINOSA
SECRETARY

RON CURRY
DEPUTY SECRETARY

TRANSMITTAL MEMORANDUM

TO: Barbara Hoditschek, Program Manager, Hazardous &
Radioactive Material Bureau

DATE: October 23, 1992

RE: United States of America and the Regents of the
University of California v. State of New Mexico; and
Health and Environment Department, No. 90-276 SC

The following documents are enclosed: **Copy of Declaratory Judgment
in the above-referenced case.**

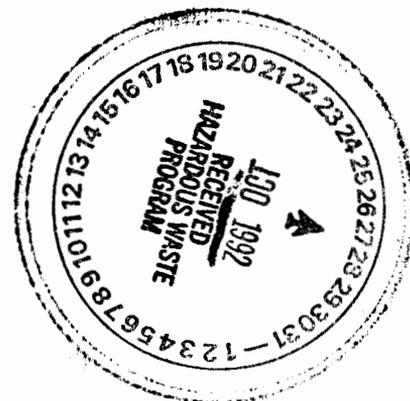
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enclosed for proper fee |
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Service and return to us | <input type="checkbox"/> Self-addressed, stamped
envelope(s) enclosed |
| <input type="checkbox"/> Per your request | <input type="checkbox"/> Other: |
| <input checked="" type="checkbox"/> For your information | |
| <input type="checkbox"/> Approve and sign | |
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Thank you very much,

GINI NELSON
GINI NELSON
Assistant General Counsel

lmr

Enclosure



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FILED
at Santa Fe, NM

OCT 14 1992

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

ROBERT M. MARCH, Clerk
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA)
and THE REGENTS OF THE)
UNIVERSITY OF CALIFORNIA,)
)
Plaintiff,)
)
v.)
)
STATE OF NEW MEXICO; and)
HEALTH AND ENVIRONMENT)
DEPARTMENT,)
)
Defendant.)
_____)

No. CIV No. 90-276 SC

DECLARATORY JUDGMENT

THIS MATTER came before the court, Honorable Santiago Campos, District Judge, presiding, on Plaintiff United States of America's motion and Defendants' cross-motion for summary judgment. The Court, having reviewed the pleadings, and briefs of counsel, having issued its Memorandum Opinion and Order on August 13, 1992, a copy of which is attached hereto and incorporated herein by reference and being otherwise fully advised in the matter finds that there are no controverted issues of material fact and that the defendants, State of New Mexico and New Mexico Environment Department are entitled to summary judgment and a declaration of Defendants' rights concerning the conditions contained in the Hazardous Waste Facility Permit issued to Plaintiffs.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure this Declaratory Judgment constitutes a final judgment as to all issues raised in the Complaint for Declaratory Relief filed by the United States of America and as to the First Cause of Action contained in the Involuntary Complaint for Declaratory Relief filed by the Regents of the University of California.

There being no just reason for delay of appeals, IT IS THEREFORE ORDERED and adjudged that:

1. In November of 1989, the Environmental Improvement Division ("EID") of the New Mexico Health and Environment Department, predecessor agency to the New Mexico Environment Department ("NMED"), issued to the United States Department of Energy ("DOE") and the Regents of the University of California ("University") jointly, Hazardous Waste Facility Permit NM 0890010515-1 for the Los Alamos National Laboratory ("LANL") pursuant to both the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq., and the State Hazardous Waste Act ("HWA"), NMSA 1978 §§ 74-4-1 to 74-4-13.

2. The permit, among other things, contains three conditions with respect to an on-site incinerator:

a. Permit condition V.C.3 requires the permittee to survey each batch of waste to determine its radionuclide content;

b. Permit condition V.E.10 requires the permittee to monitor radioactivity from the incinerator's exhaust stack during any hazardous waste burn; and

c. Permit condition V.F.9 requires the permittee to assure that exhaust gas radioactivity measured during operation under the permit does not exceed certain background levels.

3. The DOE and the University challenged these conditions, arguing that the permit conditions impermissibly "regulate" radionuclides and that sovereign immunity prohibits the state from such regulation.

4. The permit conditions do not in any way "regulate" radioactive waste or the radioactive component of hazardous waste. The permit conditions regulate "hazardous waste", for which regulation sovereign immunity has been waived by RCRA § 6001.

5. Even if the permit conditions are seen as regulating hazardous waste that is also radioactive, the permit conditions would be permissible under RCRA unless the permit conditions are in conflict with some regulation under the federal Atomic Energy Act, 42 U.S.C. §§ 2011 to 2296.

6. The permit conditions are state "requirements" under the HWA for which requirements sovereign immunity has been waived by RCRA § 6001.

7. Alternatively, the permit conditions, albeit issued under RCRA authority, can be upheld under the state's authority under the federal Clean Air Act, 42 U.S.C. §§ 7401 et seq.

8. Permit conditions V.E.10 and V.F.9 only apply with regard to batches of waste which the permittee determines to be "hazardous" waste.

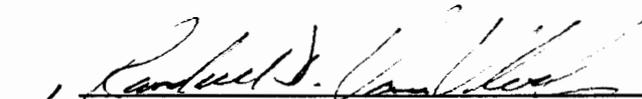
9. The permit does not apply to the incineration of "radioactive" waste, nor to the incineration of "mixed waste," i.e. waste which contains both "hazardous" and "radioactive" waste.

UNITED STATES DISTRICT JUDGE

APPROVED:



RANDALL VAN VLECK
Attorneys for State of N.M.
P. O. Drawer 1508
Santa Fe, New Mexico 87504
(505) 827-6070



GINI NELSON
Attorneys for NMED
1190 St. Francis Drive
Santa Fe, New Mexico 87503
(505) 827-2990

APPROVED AS TO FORM:

Telephonically Approved 10/9/92

KAREN EGBERT
Attorneys for the U.S.A.
P. O. Box 23986
Washington, D.C. 20026
(202) 514-0996



JOHN A. BANNERMAN
A. MICHAEL CHAPMAN
Attorneys for The Regents of
the University of Calif.
P. O. Box 1945
Albuquerque, New Mexico 87103
(505) 883-2500

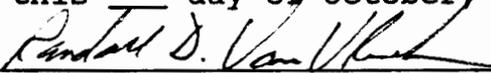
We hereby certify that we have mailed
a copy of the foregoing Order to:

John A. Bannerman, Esq.
P. O. Box 1945
Albuquerque, New Mexico 87103

Gini Nelson, Esq.
Special Assistant Attorney General
Health and Environment Department
1190 St. Francis Drive
Santa Fe, New Mexico 87503

Karen L. Egbert, Esq.
Environmental Defense Section
P. O. Box 23986
Washington, D.C. 20026-3986

on this 13th day of October, 1992.

By 

Randall Van Vleck

681AMC