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92*

JUDITH M. ESPINOSA
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TRANSMITTAL MEMORANDUM

TO: Barbara Hoditschek, Program Manager
H&RM Bureau

DATE: November 17, 1992

RE: Regents of the University of California v. The Environmental Improvement Division of the NMED et al., No. 12190 & United States of America v. State of NM; and HED, Environmental Improvement Division, No. 12233

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

PLEASE:

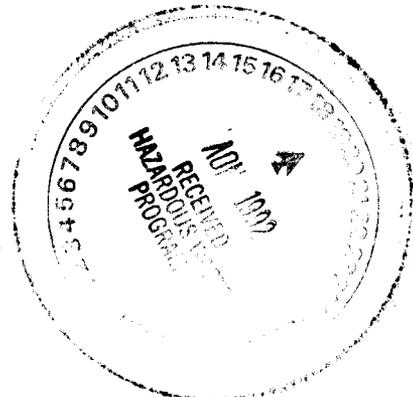
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| <input type="checkbox"/> File | <input type="checkbox"/> Check for \$ _____ enclosed for proper fee |
| <input type="checkbox"/> Record | |
| <input type="checkbox"/> Serve, complete Return of Service and return to us | <input type="checkbox"/> Self-addressed, 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 and sign | |
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Thank you very much,

Linda M. Romero
GINI NELSON
Assistant General Counsel

lmr

Enclosure



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IN THE COURT OF APPEALS^{SET OF APPEALS OF NEW MEXICO}
OF THE STATE OF NEW MEXICO

OCT 30 1992

Patricia C. Magallon

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Appellant,

v.

No. 12190

THE ENVIRONMENTAL IMPROVEMENT
DIVISION OF THE NEW MEXICO
HEALTH AND ENVIRONMENT DEPT.
et al.,

UNITED STATES OF AMERICA,

Appellant,

v.

No. 12233

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

Appellees.

JOINT STATUS REPORT

Appellants, United States of America and the Regents of the University of California, in accordance with the Court's Order, dated September 17, 1990, hereby file the following status report:

1. On September 17, 1990, this Court stayed the appeals in No. 12233 and No. 12190, pending resolution of the United States' complaint against the State of New Mexico and Health and Environment Department, Environmental Improvement

Division, in the United States District Court for the District of New Mexico, United States v. New Mexico, CIV 90-0276 SC. This Court further directed appellants to file monthly reports on the status of the federal district court proceeding.

2. The United States filed its federal district court complaint against the state defendants on March 19, 1990. A motion by the State of New Mexico to dismiss the complaint was denied by the United States District Court by Order dated March 22, 1991. By that same Order, the Court joined the Regents of the University of California ("University") as a plaintiff in the federal action.

3. On October 4, 1990, the United States filed a motion for summary judgment on its complaint in the federal district court. On April 26, 1991, New Mexico filed its opposition and cross-motion for summary judgment. The United States and the University opposed New Mexico's cross-motion for summary judgment.

4. A joint initial pre-trial report was filed by the parties on July 10, 1991 and trial was scheduled for April 6, 1992 by Order of Court dated July 18, 1991.

5. On October 4, 1991, the parties filed a Stipulated Motion to Amend the Pre-Trial Report and Vacate Trial Setting. By Order dated February 11, 1992, the district court amended the pre-trial report providing a moratorium on all deadlines until 90 days after a ruling on the pending motions for summary judgment and vacating the April 6, 1992 trial setting.

6. On December 6, 1991, the University filed an involuntary complaint in the federal district court proceeding raising issues of federal and state law. The parties stipulated that the state defendants may have an extension of time until after the pending motions for summary judgment have been decided to answer or otherwise respond to the state law issues alleged in the involuntary complaint. The stipulation and joint motion to extend the time in which the state defendants may have to answer the state law claims were filed on December 26, 1991 and an Order granting the joint motion was entered on January 2, 1992.

7. The state defendants filed an answer to the federal law issue raised in the involuntary complaint on December 26, 1991.

8. By Order dated August 13, 1992, the Court denied the United States' motion for summary judgment and granted the state defendants' cross motion for summary judgment.

9. A Declaratory Judgment constituting a final judgment as to all issues raised in the Complaint for Declaratory Relief filed by the United States and as to the First Cause of Action contained in the Involuntary Complaint for Declaratory Relief filed by the University was entered in the federal district court proceeding on October 14, 1992. The Declaratory Judgment is attached hereto as Exhibit A.

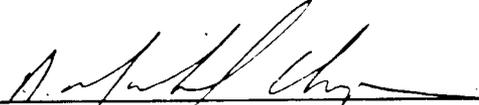
10. The United States and the University are considering an appeal.

Dated: October 30, 1992.

Respectfully submitted,

SUTIN, THAYER & BROWNE
A Professional Corporation

By


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CERTIFICATE OF SERVICE

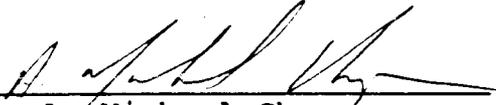
I hereby certify that one copy of the foregoing Joint Status Report was served this 30th day of October 1992, by first class mail, postage pre-paid, on the following:

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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.

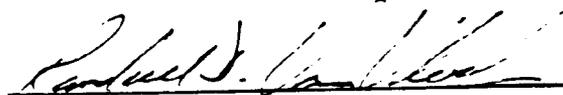
9. The permit does not apply to the incineration of "radioactive" waste, nor to the incineration of "mixed waste," i.e. waste which contains both "hazardous" and "radioactive" waste.

UNITED STATES DISTRICT JUDGE

APPROVED:



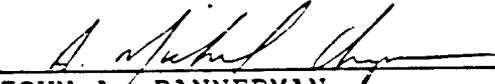
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APPROVED AS TO FORM:

Telephonically Approved 10/9/92
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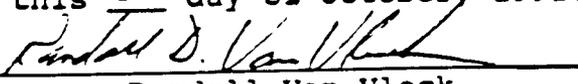
We hereby certify that we have mailed
a copy of the foregoing Order to:

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on this 13th day of October, 1992.

By 

Randall Van Vleck

681AMC