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Jon,

*Emil Pena asked me to send you the
enclosed federal court lawsuit.*

I gave a copy to Daniel McCombe last week.

*I'd be happy to brief you on it, if
that would be helpful*

Richard

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

FILED
at Santa Fe NM

TRANSWESTERN PIPELINE COMPANY,
a Delaware corporation,

SEP 02 1996

Plaintiff,

v.

Civil No.

ROBERT M. WEIDLER
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

NEW MEXICO ENVIRONMENT DEPARTMENT,
an agency of the State of New Mexico,
and MARK E. WEIDLER, Secretary,

CIV 96-01203 MV

Defendants.

LORENZO F. GARCIA

COMPLAINT FOR DECLARATORY JUDGMENT AND
PETITION FOR INJUNCTION

JURISDICTIONAL ALLEGATIONS

1. Plaintiff, Transwestern Pipeline Company ("Transwestern"), is a corporation duly incorporated under the laws of the State of Delaware with its headquarters and principal place of business in Houston, Texas.
2. Transwestern owns and operates an interstate natural gas pipeline transmission system in the states of California, Arizona, New Mexico, Colorado, Texas and Oklahoma. Transwestern is subject to the federal Natural Gas Act (15 USC §717 et seq.), the federal Natural Gas Pipeline Safety Act of 1968 (49 USCA §1071 et seq.), the New Mexico Oil and Gas Act (§70-2-1 et seq. NMSA 1978), and the New Mexico Water Quality Act (§74-6-1 et seq. NMSA 1978). As part of its operations, Transwestern owns and operates a compressor station located approximately nine miles north of Roswell in Chaves County, New Mexico (the "Roswell

Compressor Station").

3. Defendant New Mexico Environment Department ("NMED") is the agency of the State of New Mexico primarily responsible for administering the federal Resource Conservation and Recovery Act, (42 U.S.C. § 6901 et seq.) ("RCRA"), the New Mexico Hazardous Waste Act ("New Mexico Act"), §74-4-1 et seq., NMSA 1978 and the regulations adopted pursuant to those acts.

4. Defendant Mark E. Weidler is sued in his individual capacity as the person who currently serves as the Secretary of NMED. Upon information and belief, Secretary Weidler resides in Santa Fe County, New Mexico.

5. An actual controversy exists among the parties concerning the applicability of RCRA, as applied through the New Mexico Act and the regulations adopted under those acts, to the remediation of contaminated soil and groundwater related to past operations of the Roswell Compressor Station.

6. The amount in controversy exceeds, exclusive of interest and costs, the sum of \$50,000.

7. Under 42 U.S.C. §6926, the United States Environmental Protection Agency ("EPA") may delegate its authority to administer and enforce RCRA to the NMED pursuant to the New Mexico Act and the regulations adopted thereunder.

8. NMED administers and enforces RCRA pursuant to a hazardous waste program authorized by the EPA on January 25, 1985. (50 Fed. Reg. 1515).

9. Effective January 2, 1996, the authority of NMED was expanded to include administration and enforcement of the Hazardous and Solid Waste Amendments of 1984 to RCRA, which includes authority to administer and enforce a RCRA corrective action program. (61 Fed. Reg. 2450).

10. Pursuant to its authority to administer and enforce its hazardous waste program, New Mexico has adopted by reference regulations of the EPA providing for the administration and enforcement of RCRA set forth in 40 CFR Parts 260, et seq. (the "RCRA Regulations"). (20 NMAC 4.1 §§ 101, 500, 600).

11. Transwestern's claims arise under federal law in that the actions of NMED and the Secretary exceed the authority delegated to them by USEPA under RCRA.

12. This Court has jurisdiction of the parties and of the controversy which is the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1332 and 1367, and has power to enter declaratory judgment relief pursuant to 28 USC §2201.

GENERAL ALLEGATIONS

13. Prior to November 1983, maintenance activities at the Roswell Compressor Station involved the use and disposal at two surface impoundments of solutions containing mixtures of certain halogenated solvents used to clean equipment at the Roswell Compressor Station.

14. Prior to January 30, 1986, the waste halogenated solvents at issue were "listed" as hazardous under RCRA only if they were spent in 100%, commercial grade concentrations.

15. Effective January 30, 1996, the EPA promulgated new regulations, including the "solvent mixture rule" codified at 40 CFR §261.31(a) ("Mixture Rule") which classified as hazardous, for purposes of RCRA, mixtures or wastes containing solvents in 10 percent or greater concentration.

16. Except in limited circumstances not present in this case, the New Mexico Act authorizes NMED to implement RCRA by identifying and listing wastes as hazardous only if designated hazardous in the RCRA Regulations of EPA. § 74-4-4A(1), NMSA 1978.

17. One of the surface impoundments receiving small quantities of mixed solvents was backfilled before February, 1977, prior to adoption of regulations under RCRA concerning solvents; the second was closed in 1983, prior to the adoption of the Mixture Rule, and was backfilled in June, 1986.

18. Since Transwestern ceased using the surface impoundments, it has stored wastes generated from operations in above-ground storage tanks, and removed the stored wastes from the site.

19. The Roswell Compressor Station wastes that give rise to the dispute in this matter are those wastes deposited in the surface impoundments prior to adoption of the Mixture Rule.

20. RCRA applies to owners and operators of facilities that engage in the treatment, storage and disposal ("TSD") of hazardous waste identified or listed under RCRA. 42 U.S.C. § 6924.

21. NMED asserts that certain remediation activities related to two former surface impoundments at the Roswell Compressor Station must be undertaken pursuant to RCRA, because the past use of certain cleaning solutions containing halogenated solvents constitutes a release or "disposal" of "hazardous waste" under RCRA.

22. As the result of a voluntary investigation by Transwestern concluded in 1991, Transwestern apprised the NMED the fact that mixed solvents had been released into the surface impoundments at the Roswell Compressor Station.

23. Under the mistaken assumption that the solvent mixtures and other compounds constituted hazardous wastes, Transwestern submitted a RCRA Part A permit application at the request of NMED in January, 1993.

24. In February, 1993, NMED requested that Transwestern submit a closure plan in accordance with 40 CFR §265.112(a) of the RCRA Regulations and requested that a new or amended Part A application under RCRA be submitted. Transwestern submitted an amended Part A application in April, 1993.

25. In July, 1993, Transwestern delivered a closure plan to NMED as requested by NMED; that closure plan was rejected by NMED.

26. Beginning in May, 1994, Transwestern raised questions with NMED concerning the regulatory status of the surface impoundments at the Roswell Station. Transwestern subsequently met with NMED on a number of occasions in an attempt to negotiate with NMED on the remediation of soil and groundwater contamination at the Roswell Compressor Station, including, but not limited to, submitting two revised closure plans, the second of which was submitted on January 16, 1995, and was deemed incomplete by NMED in a letter from NMED to Transwestern dated April 28, 1995.

27. Additional investigation by Transwestern subsequent to filing the Part A Application and submittal of its closure plans led it to the conclusion that the Roswell Compressor Station is not a TSD facility because Transwestern could find no evidence it ever treated, stored or disposed of waste which was classified as hazardous under RCRA at the time of disposal.

28. Transwestern's additional investigation revealed that there was no evidence that 100 percent concentrations of the RCRA-listed solvents were discharged into the Roswell Compressor Station surface impoundments.

29. The additional investigation also revealed that the other contaminants identified in Transwestern's RCRA Part A application were neither listed nor properly classified as hazardous waste during the period the surface impoundments were in use. (40 CFR § 261.24).

30. On October 11, 1995, Transwestern submitted a letter to NMED presenting the results of Transwestern's additional investigation regarding the regulatory status of the facility, including Transwestern's belief that RCRA closure and post-closure requirements do not apply to the Roswell Compressor Station and documentation supporting Transwestern's position. A copy of the October 11, 1995 letter is attached to this complaint as Exhibit 1.

31. NMED, in a letter dated December 21, 1995, responded to Transwestern's October 11, 1995 letter by stating that the position of NMED is that closure is required pursuant to RCRA as implemented by the New Mexico Act. A copy of the December 21, 1995 letter is attached to this complaint as Exhibit 2.

32. On January 19, 1996, Transwestern withdrew its RCRA Part A application and all previously submitted closure plans. A copy of the January 19, 1996 letter of Transwestern withdrawing the application and closure plans is attached to this complaint as Exhibit 3.

33. Further written and oral negotiations between NMED and Transwestern followed, and on June 28, 1996, Transwestern submitted a proposed settlement agreement and alternative closure plan to NMED proposing a closure process and reiterating Transwestern's position that NMED had no jurisdiction under RCRA to demand a RCRA compliant closure plan.

34. On July 22, 1996, Mr. Larry Campbell, a Division Environmental Specialist employed by Transwestern, received a telephone call from Mr. Edward Kelly, Director of the NMED Water and Waste Management Division, informing Mr. Campbell that NMED planned to issue a compliance order against Transwestern which would include penalties of up to \$10,000 per day for alleged violations and that NMED would possibly seek criminal penalties against Transwestern personnel.

35. On August 9, 1996, Secretary Weidler sent a letter (the "August 9 Letter") to Transwestern rejecting the June 28, 1996 proposed alternative closure plan, describing it as, "completely unacceptable" and demanding resubmission of the RCRA Closure Plan that Transwestern had withdrawn on January 19, 1996 by September 3, 1996 and notifying Transwestern that NMED believes Transwestern may be subject to potential liability for civil penalties. A copy of the August 9, 1996 letter is attached to this complaint as Exhibit 4.

36. Laboratory analysis of tests conducted as part of Transwestern's investigation indicate that over 99.9% of the volume of the contaminants present at the Roswell Compressor Station surface impoundments are petroleum hydrocarbons, the remediation of which is under the jurisdiction of the New Mexico Oil Conservation Division ("OCD") pursuant to the New Mexico Oil and Gas Act, the New Mexico Water Quality Act, and the OCD Guidelines for Remediation of Leaks, Spills and Releases adopted under to §70-2-12(B)22 NMSA 1978 ("OCD Remediation Guidelines").

37. Transwestern has submitted Phase I and Phase II remediation assessment plans to the OCD pursuant to the authority of OCD under the New Mexico Oil & Gas Act, and the New Mexico Water Quality Act, and the OCD Remediation Guidelines.

38. Transwestern is implementing a phased investigative plan and pilot remediation plan under the authority of the OCD pursuant to the New Mexico Oil and Gas Act, the New Mexico Water Quality Act and the OCD Remediation Guidelines to remediate soil and groundwater contamination at the Roswell Compressor Station.

39. The OCD has authority to approve the remediation of all of the wastes at issue in this matter, and closure under the authority of OCD as proposed by Transwestern will result in remediation of all such wastes, including halogenated solvent wastes.

COUNT I

FOR DECLARATORY JUDGMENT

40. An actual controversy arising under federal law exists between the parties as to whether NMED has authority to require Transwestern to comply with the closure and remediation requirements of RCRA, as implemented by the New Mexico Act, and the RCRA Regulations.

41. NMED does not have legal authority to require Transwestern to comply with RCRA closure requirements, as implemented by the New Mexico Act, or the RCRA Regulations,

because the Roswell Compressor Station is not a TSD facility.

42. Defendant Weidler has acted in excess of his authority as Secretary of NMED under federal and state law by attempting to require Transwestern to comply with RCRA closure requirements, as implemented by the New Mexico Act, and the RCRA Regulations.

43. RCRA, the New Mexico Act and RCRA Regulations do not apply retroactively to the mixed wastes that were released at the Roswell Compressor Station.

44. NMED's attempt to apply the Mixture Rule retroactively to the mixed wastes released at the Roswell Compressor Station prior to the effective date of the Mixture Rule creates a controversy arising under federal law in that application of the Mixture Rule to Transwestern violates RCRA, the New Mexico Act, and the RCRA Regulations.

COUNT II

FOR PRELIMINARY INJUNCTION

45. The allegations of paragraphs 1 through 44 are incorporated by reference and realleged as though fully set forth.

46. NMED and Secretary Weidler are acting beyond their authority under RCRA and the New Mexico Act and contrary to law in attempting to apply RCRA closure and remediation requirements to Transwestern.

47. The actions of NMED and Secretary Weidler threaten Transwestern with irreparable harm by: (1) threatening to impose criminal and civil penalties on Transwestern should Transwestern refuse to comply with their demands by September 3, 1996; and (2) threatening to impose regulatory requirements that may conflict with the ongoing assessment and remediation activities under authority of the OCD and may make compliance with both sets of requirements impossible.

48. There is a substantial likelihood that Transwestern will succeed on the merits of the claims alleged herein.

49. NMED, Secretary Weidler, and the public interest will not suffer any prejudice by the issuance of an injunction because the OCD remediation is ongoing and will include remediation of wastes at issue here and all contaminants of concern at the Roswell Compressor Station.

WHEREFORE, Transwestern requests that the Court:

1. Declare that RCRA, the New Mexico Act, and the regulations adopted pursuant to those Acts do not apply to the soil and groundwater remediation at the Roswell Compressor Station;

2. Issue a permanent injunction enjoining NMED and Secretary Weidler from taking any enforcement action against Transwestern under RCRA, the New Mexico Act, or the RCRA Regulations; and

3. Award Transwestern such other and further relief as the Court deems proper.

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By  _____

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