IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

SOUTHWEST RESEARCH AND INFORMATION CENTER and MARGARET ELIZABETH RICHARDS, Appellants, v. NEW MEXICO DEPARTMENT OF ENVIRONMENT, Appellee. IN THE MATTER OF THE APPLICATION FOR A CLASS 2 MODIFICATION FOR SHIELDED CONTAINERS FOR REMOTE-HANDLED TRANSURANIC WASTE AT THE WASTE ISOLATION PILOT PLANT	)	Case No. 32-499

UNITED STATES' UNOPPOSED MOTION TO INTERVENE

Pursuant to New Mexico Rule of Civil Procedure 1-024A, the United States submits this motion to intervene on behalf of the United States Department of Energy ("DOE"). The United States seeks to intervene for the sole purpose of supporting the decision by the New Mexico Environment Department ("NMED") to modify a permit for DOE's Waste Isolation Pilot Plant ("WIPP") in Carlsbad, New Mexico.

In this action, Southwest Research and Information Center and Margaret Elizabeth Richards (jointly referred to as "Appellants") seek judicial review of a decision of the Secretary of NMED modifying the permit for WIPP. The challenged permit modification would add a shielded container to the list of containers authorized by the WIPP permit and change certain other provisions of the permit to insert a reference to the new container where appropriate. Appellants claim (1) that the permit modification request did not comply with the applicable regulations and (2) that NMED failed to follow the required set of procedures.

The United States seeks to intervene to support NMED's decision. The approval of the modification is important to DOE's management of the WIPP facility[1] and to the DOE facilities that generated the waste, which are seeking the most efficient means to pack and transport transuranic waste to the WIPP facility for disposal. As explained below, this interest could be adversely affected if the United States is not permitted to intervene on behalf of DOE. Therefore, the United States requests that its motion for intervention be granted.

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[1] The WIPP permits are issued to both DOE and the company acting as DOE's management and operating contractor for WIPP. When the permit modification was requested, the contractor was Washington TRU Solutions LLC. The current contractor is Nuclear Waste Partnership, LLC. For the sake of simplicity, this motion will refer only to DOE, rather than to both DOE and its contractors.

BACKGROUND

A. NMED'S PERMITTING AUTHORITY AT WIPP

Under section 3006 of the Resource Conservation and Recovery Act ("RCRA"), states may request the Environmental Protection Agency ("EPA") to "authorize" a qualified state hazardous waste program. 42 U.S.C. § 6926. To receive authorization, a state regulatory program must be equivalent to and consistent with the federal program, and must provide for adequate enforcement. 42 U.S.C. § 6926(b). Once authorized, a state may carry out its program "in lieu of the Federal program under this subchapter in such state and [] issue and enforce permits for the storage, treatment or disposal of hazardous waste." *Id.*

EPA authorized New Mexico's RCRA hazardous waste permitting authority in 1985. 50 Fed. Reg. 1515 (Jan. 11, 1985). Pursuant to this authorization, New Mexico issues hazardous waste facility permits for WIPP and other DOE facilities in New Mexico under the New Mexico Hazardous Waste Act ("HWA," §§ 74-4-1-14, NMSA 1978). NMED's hazardous waste facility permits have "the same force and effect as" a federally-issued permit. 42 U.S.C. § 6926(d).

The scope of NMED's authority is limited by the scope of RCRA's definition of hazardous waste to any "solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics" may pose a

serious risk to human health or the environment if not properly managed. 42 U.S.C. § 6903(5). The RCRA definition of "solid waste" expressly excludes radioactive waste, such as transuranic waste, that is "source, special nuclear, or byproduct material as defined by the Atomic Energy Act." *Id.* § 6903(27). Such materials are instead regulated by the federal government under the Atomic Energy Act. Much of the transuranic radioactive waste being disposed of at WIPP is combined with waste regulated as "hazardous waste" under RCRA. NMED regulates the hazardous portion of any transuranic mixed waste disposed of at WIPP, while federal agencies retain regulatory authority over the radioactive portion of such waste under the Atomic Energy Act and section 8 of the WIPP Land Withdrawal Act ("WIPP Act"). Pub. L. No. 102-579, 106 Stat. 4777.

B. TRANSURANIC WASTE AT WIPP

The WIPP Act authorizes DOE to dispose of transuranic waste at WIPP. Public Law 102-579. By law, only transuranic waste generated by "atomic energy defense activities" may be disposed of at WIPP. Section 2(21). This waste, which is stored at DOE facilities throughout the country is shipped by DOE to WIPP for disposal. The WIPP Act set the capacity of the facility at 6.2 million cubic feet of transuranic waste. Section 7(a)(3).

The WIPP Act divides transuranic waste into two categories, depending on the radiation dose rate at the external surface of the waste container. If the external surface dose rate is below 200 millirem per hour, the waste is classified as contact-handled. Section 2(3). If the dose is above that level, the waste is classified as remote-handled. Section 2(12). Containers designated as contact-handled waste can be handled by workers without additional radiological controls. For containers designated as remote-handled waste, remotely operated mechanical equipment in shielded rooms must be used for operations.

C. RELEVANT NMED PERMITTING ACTIVITIES

The WIPP permit issued by NMED in 1999 authorized DOE to dispose of contact-handled waste at WIPP. In 2006, NMED approved a permit modification that also authorized the disposal of remote-handled waste. On July 5, 2012, DOE submitted to NMED a request to modify the permit that, in most relevant part, requested that NMED approve the addition of a shielded container to the list of waste containers that could be used for the management and disposal of waste at WIPP. Shielded containers are far more effective than unshielded containers at reducing the external surface dose rate. NMED approved the permit modification on November 1, 2012.

G. THE LITIGATION

The Appellants appealed NMED's decision to this Court pursuant to N.M.S.A. 1978, § 74-4-14(A). Appellants' brief was filed on April 11, 2013.

ARGUMENT

I. THE UNITED STATES IS ENTITLED TO INTERVENE AS OF RIGHT

New Mexico Rule of Civil Procedure 1-024 A(2) governs intervention as of right. Rule 1-024 A provides that upon timely application,

> [a]nyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

This Court has interpreted Rule 1-024A as requiring proposed intervenors to demonstrate that (1) their application is timely, (2) they "have a sufficient interest in [the] outcome of [the] action to warrant intervention," and (3) their "interests will be jeopardized if intervention is not allowed." *See Thriftway Mktg. Co. v. State*, 810 P.2d 349, 349 (N.M. Ct. App. 1990). As explained below, the United States meets these requirements.

There is no statute or rule that establishes a deadline for motions to intervene. *Nellis v. Mid-Century Ins. Co.*, 163 P.3d 502, 504 (N.M. Ct. App.

2007). Therefore, the courts evaluate timeliness on the basis of equitable principles. *Id.* Here intervention is timely because there will be no delay in the proceedings and no prejudice to any party. The United States is filing its brief on the same day as NMED. The lack of prejudice to Appellants is established by their decision to consent to the United States' intervention.

As the permit-holder, DOE has a clear interest in the WIPP permit modification. An adverse decision by the Court of Appeals would have a significant impact on operations at WIPP and on the DOE facilities that generate the transuranic waste and must package it for shipment to and disposal of at WIPP. Furthermore, DOE's interests will not be adequately represented by NMED. The Supreme Court, in analyzing identical language in Fed. R. Civ. P. 24(a)(2), explained:

> The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal.

Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n.10 (1972). The Tenth Circuit has explained that an administrative agency has broad public responsibilities that go beyond the interests of any one party in a particular proceeding. *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dep't of Interior*, 100 F.3d 837, 845 (10th Cir. 1996).

In this case, NMED cannot fully represent DOE's interests because NMED has broader interests with respect to the overall administration of its hazardous waste program. DOE's interests, in contrast, are focused solely on securing affirmance of the particular decision approving the modification of the WIPP permit. Therefore, DOE's substantial interest in the approved permit modification will be jeopardized unless the United States is allowed to intervene.

II. IN THE ALTERNATIVE, DOE SHOULD BE GRANTED PERMISSIVE INTERVENTION

Permissive intervention is allowed where the intervenor-applicant cannot state a direct, personal interest in the outcome of the litigation, but nonetheless does seek to raise a claim or defense in common with the main action. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002). The words "claim or defense," are not interpreted strictly. *City of Herriman v. Bell*, 590 F.3d 1176, 1184 (10th Cir. 2010) (citing *Nuesse v. Camp,* 385 F.2d 694, 704 (D.C. Cir. 1967) ("[I]ntervention has been allowed in situations where the existence of any nominate 'claim' or 'defense' is difficult to find.")). The issues that the United States would raise in support of NMED's approval of the permit modification are the same as the issued raised by Appellants. Therefore,

permissive intervention should be allowed, even if the Court should deny intervention as of right.

III. IF INTERVENTION IS DENIED, DOE SHOULD BE ALLOWED TO PARTICIPATE AS AMICUS CURIAE

If intervention is denied, the United States asks that it be allowed to participate on behalf of DOE as amicus curiae. DOE plainly has a strong interest in this proceeding. Moreover, as the permit-holder that requested the modification, DOE has extensive knowledge of the administrative proceedings at issue. A brief on behalf of DOE would be informative to the Court and useful in deciding the instant appeal.

CONCLUSION

For the reasons set forth above, the United States' motion to intervene should be granted.

Respectfully submitted,

Kenneth J. Gonzales
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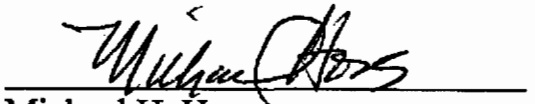
Dated: 7/1/13



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I certify that a copy of the foregoing brief was served by first class mail on July 1, 2013, upon:

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