

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA



STATE OF NEW MEXICO, ex. rel.  
TOM UDALL, Attorney General,

Plaintiffs.

v.

JAMES D. WATKINS, Secretary of  
the Department of Energy, MANUEL  
LUJAN, JR., Secretary of the  
Department of the Interior,  
DAVE O'NEAL, Assistant Secretary of  
the Department of the Interior,  
CY JAMISON, Director of the Bureau  
of Land Management, UNITED STATES  
DEPARTMENT OF ENERGY, and UNITED  
STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Civil Action No. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

COMES NOW the Plaintiff State of New Mexico, by its Attorney  
General Tom Udall, and for its Complaint herein alleges as follows:

**JURISDICTION AND VENUE**

1. This is a civil action arising under the provisions of  
the Federal Land Policy and Management Act, 43 U.S.C. §§1701 et  
seq. ("FLPMA"), the National Environmental Policy Act, 42 U.S.C.  
§§4321 et seq. ("NEPA"), and the Administrative Procedure Act, 5  
U.S.C. §§551 et seq. ("APA"). The relief sought is authorized by  
28 U.S.C. §2201 and §2202.

2. This Court has jurisdiction of the subject matter of this  
action under 28 U.S.C. §1331, which confers upon the Court original



jurisdictions of civil actions arising under the laws of the United States. Venue is proper in this Court under 28 U.S.C. §1391.

#### NATURE OF CLAIMS

3. In 1979, Congress authorized the construction of the Waste Isolation Pilot Plant ("WIPP") on federal land in Eddy County, New Mexico, for the purpose of providing a facility for the disposal of radioactive waste resulting from certain federal defense programs. Pub. Law 96-164. However, Congress has never authorized the shipment of such waste to the WIPP, nor has it "withdrawn" the public land for the WIPP to allow its use for the storage of radioactive waste. Congress has the exclusive power to do so. Defendant Department of Energy ("DOE"), however, desires to concentrate disposal of transuranic waste (i.e., containing radioactive elements heavier than uranium) now stored in ten different states at the WIPP. Congress has been deliberating the matter, and several bills addressing serious scientific, environmental and health concerns have been introduced. Frustrated by Congress not resolving the issue, DOE has sought to bypass Congress and to ship transuranic wastes to the WIPP. To this end, it has procured an administrative land withdrawal from the defendant, Department of the Interior ("DOI"), for this purpose, which is contrary to law, and it has given notice that as early as October 10, 1991, it will begin shipping radioactive waste into New Mexico without Congressional authorization, as more fully described below.

4. This is a civil action seeking relief pursuant to the APA with respect to agency action taken pursuant to §204 of the FLPMA, 43 U.S.C. §1714, the NEPA and Public Law 96-164. Such agency action includes (a) action by the DOE in directing the conduct of a Test Phase which includes the emplacement of radioactive waste at the WIPP in Eddy County, New Mexico, and (b) action by the Department of the Interior ("DOI") in making and reaffirming an administrative land withdrawal (the "1991 Withdrawal") of in excess of 5,000 acres of public lands for the purpose of such Test Phase and subsequently authorizing it to go forward.

5. The aforesaid DOE and DOI actions are unlawful for the following reasons:

- (a) Congress is constitutionally vested with control over federal land and has not authorized any executive department to "withdraw" permanently federal land for any use. Here, DOI, which has been given statutory authority to withdraw land only for limited term uses (i.e., "not more than twenty years," id.), has, ultra vires, authorized the 1991 Withdrawal for DOE to establish the WIPP as a de facto permanent nuclear waste depository;
- (b) DOE and DOI have improperly bypassed pending Congressional consideration of a permanent "withdrawal" of the land that would be accompanied by environmental, oversight, health and other

safeguards The attempt of DOI and DOE to bypass Congress is manifestly invalid. The so-called "test" for which entry of radioactive waste is required need not in fact be conducted at WIPP, and if conducted there, it will not yield usable results, and the radioactive waste will not be retrievable, so that the DOE-DOI effort is in fact one to introduce such waste for permanent storage in violation of law;

- (c) DOI further violated FLPMA by "withdrawing" the WIPP site for the introduction of radioactive waste without, as required, "notify[ing] both Houses of Congress" (43 U.S.C. § 1714(c)(1));
- (d) The DOI and DOE also failed to consider Congressionally-authorized withdrawal as a reasonable alternative plan, as required by the NEPA, 42 U.S.C. § 4321 et seq., and the regulations of the DOI, 40 C.F.R. § 1503.14(a);
- (e) The DOI 1991 Withdrawal order directly conflicts with its earlier withdrawal orders relating to WIPP, which provided that "no radioactive waste will be stored or disposed of under the terms of this withdrawal" (48 Fed. Reg. 3878), and there was no reasoned basis provided for this departure, as required by law;

- (f) The DOI further violated FLPMA by purporting to extend its earlier withdrawal orders in the 1991 Withdrawal; however, an extension is permitted only where "the purpose for which the withdrawal was first made requires the extension" (43 U.S.C. § 1714(f)), whereas, in contrast, here the purpose of the "extension" plainly conflicts with the prior purpose because it permits the introduction of radioactive waste;
- (g) The DOI further violated FLPMA in that the use for which the 1991 Withdrawal is intended, *i.e.*, the DOE's proposed "tests," cannot be completed by the end of the term of the withdrawal order (only six years, 1997); the prescribed "tests" will take at least eight to ten years to complete;
- (h) The DOI has made the 1991 Withdrawal without considering relevant factors, such as whether the radioactive waste would be retrievable within the time period of the withdrawal, because it does not have the capability to evaluate such factors, contrary to the FLPMA and the NEPA.

#### PARTIES

6. The Plaintiff is the State of New Mexico (the "State"), represented herein by its Attorney General, Tom Udall. The Attorney General is acting pursuant to §8-5-2(B) NMSA 1978, which statute charges him with the duty of prosecuting any action in

which the State may be a party or interested when, in his judgment, the interest of the State requires such action.

7. Defendant James D. Watkins is the Secretary of the DOE and is charged by law and regulations with the responsibility for constructing the WIPP pursuant to Public Law 96-164, §213, and complying with the provisions of the NEPA and the APA. He is sued in his official capacity.

8. Defendant United States Department of Energy is a department and agency of the United States. The DOE is charged with responsibility to construct and plan for the operation of the WIPP.

9. Defendant Manual Lujan, Jr. is the Secretary of the DOI and is charged by law and regulations with the responsibility for administering and enforcing the FLPMA and complying with the provisions of the NEPA and the APA. He is sued in his official capacity.

10. Defendant Dave O'Neal is the Assistant Secretary of the DOI and is charged by law and regulations with the responsibility for administering and enforcing the FLPMA and complying with the provisions of the NEPA and the APA. He is sued in his official capacity.

11. Defendant Cy Jamison is the Director of the Bureau of Land Management ("BLM") and is charged by law and regulations with the responsibility for managing the public lands in compliance with the FLPMA, the NEPA, and the APA. He is sued in his official capacity.

12. Defendant United States Department of the Interior is a department and agency of the United States and incorporates the BLM.

**THE LAW**

**(a) FLPMA**

13. The Congress of the United States has plenary power to control the disposition of the public lands pursuant to Article IV, §3 of the Constitution.

14. In enacting the FLPMA Congress declared that it is the policy of the United States that Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action. (43 U.S.C. §1701(a)(4)). Congress sought to institute the policy that limited or single use withdrawals of land for specified uses of indefinite term may be made only by Act of Congress. Thus, the FLPMA provides:

a. That a withdrawal aggregating 5,000 acres or more may be made only for a period of not more than 20 years by the Secretary of the DOI (43 U.S.C. §1714(c)(1));

b. That upon the making or extension of a withdrawal aggregating 5,000 acres or more the Secretary of the DOI shall report to Congress the proposed use of the land involved, the expected length of time needed for the withdrawal, and other factors (43 U.S.C. §1714(c)(2)) and (f); and

c. That a withdrawal having a specific period may be extended only if the Secretary of the DOI determines that the purpose for which the withdrawal was first made requires the extension. (43 U.S.C. §1714(f)).

15. Congress has specifically directed in the FLPMA that the "Secretary [of the Interior] shall not make a withdrawal which can be made only by Act of Congress." (43 U.S.C. §1714(j)).

16. In enacting the FLPMA Congress also directed that, when the Executive makes a withdrawal of public lands, it must consider certain specified factors, find specified facts, and report such facts, so that the public and the State whose land is involved may learn the purpose and effect of the withdrawal and so that Congress may consider taking action in response to the withdrawal. Thus, the Secretary of the DOI is required to advise Congress of each administrative land withdrawal or extension thereof no later than its effective date and make a statement disclosing, among other things:

a. a clear explanation of the proposed use of the land involved; and

b. the expected length of time needed for the withdrawal. (43 U.S.C. §1714(c)(2)).

17. Pursuant to the FLPMA, the DOI has adopted regulations which govern the making of any administrative land withdrawal, which are set forth at 43 C.F.R. Part 2300. These regulations provide, among other things, as follows:

a. The applicant for an administrative land withdrawal is required to set forth in its application, among other things, a statement of the "public purpose or statutory program for which the lands would be withdrawn" and the "duration of the withdrawal, with a statement in justification thereof." (43 C.F.R. §2310.1-2(c)(7),(11)).

b. The applicant for a withdrawal shall submit an environmental impact statement; the BLM shall act as cooperating agency with respect to such statement; the authorized officer of the BLM shall participate in the development of such statement; and the BLM shall, at a minimum, independently evaluate and review the final product (43 C.F.R. §2310.3-2(b)(3));

c. The authorized officer of the BLM shall prepare findings of fact keyed specifically to the relevant portions of the case file supporting the recommendation of the BLM, which is submitted to the Secretary of the DOI (43 C.F.R. §2310.3-2(f)).

**(b) NEPA**

18. The NEPA requires all federal agencies, including the DOE and the DOI, to "[i]nclude in every recommendation or report on... major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on... the environmental impact of the proposed action,... alternatives to the proposed action... [and] any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." (42 U.S.C. §4332(c)).

19. Regulations of the Council on Environmental Quality adopted pursuant to the NEPA require as follows:

a. An environmental impact statement must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." (40 C.F.R. §1502.14(a)).

b. An agency is required to "adopt procedures (§1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act" (40 C.F.R. §1505.1), including procedures "[r]equiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement." (Id.).

c. When a federal agency takes action in a case requiring preparation of an environmental impact statement, it is required to make a public Record of Decision, which document must "[i]dentify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable." (40 C.F.R. §1505.2 and Id. (b)).

d. A "cooperating agency," such as the BLM, is permitted to adopt the environmental impact statement of a lead agency, in this case the DOE, "when, after an independent review of the statement, the cooperating agency concludes that its

comments and suggestions have been satisfied." (40 C.F.R. §1506.3(c)).

e. All federal agencies are required to "be capable (in terms of personnel and other resources) of complying with" their obligations under §102(2)(a) of the National Environmental Policy Act, including "sufficient capability to evaluate what others do for it" (40 C.F.R. §1507.2).

20. The BLM's participation as a cooperating agency in the development of the Final Supplement to Environmental Impact Statement ("FSEIS") is governed by applicable regulations of the Council on Environmental Quality (40 C.F.R. §1501.6), of the DOI (DOI Manual, Part 516), and of the BLM (BLM Manual 1790, 1790-1), which require a cooperating agency to possess or to obtain the technical capabilities and resources required to carry out its responsibilities.

#### STANDING

21. This action concerns, inter alia, the legality of the Record of Decision of the DOE, dated June 13, 1990, which authorizes the conduct of a Test Phase at the WIPP, and was published on June 22, 1990 (55 Fed. Reg. 25689), of Public Land Order No. 6826, which was signed by Defendant O'Neal on January 22, 1991 (56 Fed. Reg. 3038) (Jan. 28, 1991), and of a Notice to Proceed dated October 3, 1991, authorizing the DOE to transport to or emplace radioactive waste at the WIPP site, also signed by Defendant O'Neal. Public Land Order No. 6826 was maintained in effect, and a proposal to modify it was rejected, by a notice

signed by Defendant O'Neal on October 3, 1991. Public Land Order No. 6826 withdraws until June 29, 1997, certain described public lands containing 10,240 acres in Eddy County, New Mexico, for purposes of the underground emplacement of radioactive waste.

22. By reason of DOE and DOI actions challenged herein, the State has been and will be injured economically, and will be compelled to incur substantial future costs, to protect the health and safety of its citizens and visitors to the State. The DOE on October 3, 1991, announced plans to begin such shipments as early as October 10, 1991. Such shipments are dependent upon the validity of the Test Phase Record of Decision and the 1991 Withdrawal. To provide for the safety of such shipments and to deal with foreseeable accidents in shipment the State will be required to improve public roads along the planned routes of shipment, to post additional police and emergency forces, to train and equip emergency response personnel, and to prepare medical staffs to treat injuries from radioactive and hazardous waste. The present value of such costs is in the hundreds of millions of dollars.

23. By reason of the DOE and DOI actions challenged herein, the withdrawn land has been and will be substantially diminished in value, to the injury of the State. The withdrawn land contains significant reserves of natural gas, oil, potash, and other minerals. Pursuant to federal statutes (30 U.S.C. §191), which were enacted as §317(a) of Public Law 94-579, which also enacted the FLPMA, the State is entitled to receive 50% of any royalties

paid to the Federal government for extraction of such minerals. The State is also entitled to benefit from a Reclamation Fund, pursuant to 43 U.S.C. §391, generated with such federal royalty payments and to receive severance and other tax payments from mineral lessees. By reason of the 1991 Withdrawal the State will not receive any such payments during the term of the withdrawal. Moreover, because the 1991 Withdrawal involves a permanent use of the land withdrawn, the State will not receive any such payments at any future time. The present value of such revenues, which have been lost to the State, is approximately \$50 million.

24. The operation of the WIPP authorized by the Test Phase Record of Decision and the 1991 Withdrawal may result in the escape of non-natural radiation to the air, land and water of the State; reductions in property values of lands within the State; reductions in tax revenues to the State; reasonable fear and apprehension on the part of citizens and visitors as to the effects of increased radioactivity in air, land and water upon such persons and their descendants; and reasonable fear and apprehension on the part of citizens and visitors of an accident resulting in uncontrolled release of radioactive or hazardous materials within the State.

25. The 1991 Withdrawal was carried out without compliance by the DOI and the DOE with the requirements of the NEPA with regard to preparation of an Environmental Impact Statement ("EIS") and by the DOI with the reporting requirements of the FLPMA, 43 U.S.C. §1714(c)(2). The State, in the exercise of its governmental functions, monitors the use of land in the vicinity of the proposed

WIPP to identify the impacts of the project upon its citizens, resource uses, land use planning, economy, and governmental interests and to inform the agencies of the State, the congressional representatives of the State, and the public about such impacts. The State has been frustrated in its efforts to identify such facts and to provide such information by the refusal of the DOI and the DOE to comply with their reporting obligations under the FLPMA and the obligations of the DOI and the DOE to prepare an EIS fully exploring the reasonable alternatives. The State has had to devote significant resources to determine the facts which were required to be reported by the DOI and to report them accurately.

26. Interests of the State are within the zone of interests protected by the statutes involved here. The Congressional purposes in enacting the FLPMA, among other things, were to limit the extent to which the Executive may withdraw public lands without legislative action to the injury of the state in which such public lands are located; to institute comprehensive rules and regulations for the exercise of Executive discretion based upon public participation; to ensure that the use of public lands is projected through a planning process coordinated with state planning efforts; to manage public lands to protect environmental values; to compensate state governments for the immunity of federal lands from taxation; to enable state governments to plan and regulate the uses of non-federal lands in proximity of public lands; to provide for meaningful public involvement of state government officials in land

use decisions for public lands; and to provide adequate compensation to states for the impacts associated with mineral extraction. The Congressional purposes in enacting the NEPA, among other things, were to foster the cooperation of federal and state governments to create and maintain a harmonious environment. The State has standing to bring this action.

27. The actions complained of herein constitute final agency action for which there is no other adequate remedy in a court. Such agency action is reviewable in this Court pursuant to 5 U.S.C. §704. The State has suffered legal wrong and is adversely affected and aggrieved by the action complained of herein.

**ALLEGATIONS AS TO EVENTS AT ISSUE**

**(a) FLPMA Violations Relating to Indefinite Period of Use of Land**

28. The 1991 administrative land withdrawal violates the provisions of the FLPMA, 43 U.S.C. §1714, in that it authorizes a use which exceeds the time period fixed in the public land order, which use is in fact permanent; and in that it extends a previous administrative land withdrawal which was made for the limited purpose of construction and changes the stated purpose of such withdrawal, contrary to the FLPMA.

29. In 1979 and 1980, the DOI and the BLM had concluded that they could not assume responsibility for public lands wherein radioactive waste had been stored, when the withdrawal of such lands terminated. They decided that, although they would assist the DOE to investigate the WIPP site and to preserve it, they would

not allow radioactive waste to be placed within the WIPP site during an administrative land withdrawal.

30. The BLM Director advised the New Mexico State Director in 1980 that certain DOE activities could be carried out as "site characterization," but directed that "[u]nder no circumstances is the storage of waste materials, regardless of types of storage methods, kind of waste, or source (i.e., defense or commercial), considered to fall within the definition of site characterization activities." (Memorandum, Director to State Director, July 14, 1980.)

31. Accordingly, by application dated November 7, 1980, the DOE made application to the BLM for the withdrawal of 8960 acres of public lands in Eddy County. This application sought withdrawal only for the specific and limited "purposes of protecting the geological integrity of the site for the research and development of a WIPP Project and performing a Site and Preliminary Design Validation Program." (45 Fed. Reg. 75768) (Nov. 17, 1980.)

32. By Public Land Order No. 6232 the Secretary of the DOI made a withdrawal of the designated public lands specifically "for the purpose of performing a Site and Preliminary Design Validation Program (SPDV) in connection with a WIPP Project of the DOE and to protect the lands pending a legislative withdrawal if appropriate." (47 Fed. Reg. 13340) (March 30, 1982).

33. On March 23, 1982, the DOI forwarded to both Houses of Congress a report pursuant to 43 U.S.C. §1714(c). (Letter, G. Carruthers to J. McClure, Mar. 23, 1982).

34. Public Land Order No. 6232 was dated March 23, 1982, and was made for a period of eight years. Public Land Order No. 6232 expired on March 23, 1990.

35. By application dated January 17, 1983, the DOE made another application to the BLM for the withdrawal of the same public lands that were the subject of Public Land Order No. 6232, and two sections owned by the State that were planned for acquisition by the Federal government. This application sought such withdrawal specifically "for the purpose of constructing a research and development facility (the Waste Isolation Pilot Plant - WIPP)" (48 Fed. Reg. 3879) (Jan. 27, 1983). The stated purpose of the 1983 application specifically excluded the storage or disposal of radioactive waste. "[N]o radioactive waste will be stored or disposed of under the terms of this withdrawal." (Id.) Notice of such application was published (48 Fed. Reg. 3878) (Jan. 27, 1983).

36. By Public Land Order No. 6403 the Secretary of the DOI made a withdrawal of the designated public lands specifically "for the purpose of the construction of full facilities for the Waste Isolation Pilot Plant Project of the DOE and to protect the lands pending a legislative withdrawal if appropriate." (48 Fed. Reg. 31038) (July 6, 1983).

37. The stated purpose of the 1983 withdrawal specifically excludes the transportation, storage or burial of radioactive waste. Public Land Order No. 6403 expressly "does not authorize the use or occupancy of the lands hereby withdrawn for the

transportation, storage, or burial of any radioactive materials, except as to radiological instruments normally used for nondestructive testing and geophysical logging." (Id. 31038-39).

38. On June 29, 1983, the DOI forwarded to both Houses of Congress a report pursuant to 43 U.S.C. §1714(c). (Letter, D. Houston to J. McClure, June. 29, 1983).

39. Public Land Order No. 6403 was dated June 29, 1983, and was made for a period of eight years. Public Land Order No. 6403 expired on June 29, 1991.

40. On April 7, 1989, the DOE filed with the BLM another application concerning the same public lands which had been the subject of the previous withdrawal applications, asking to modify Public Land Order No. 6403 and to extend its term. The 1989 application sought to change the stated purpose of the withdrawal to permit the introduction of radioactive waste. The DOI stated that the DOE requested such modification "to change the purpose of the land withdrawal stated in paragraph 1 of Public Land Order No. 6403 to provide that the land is withdrawn for the purpose of the construction of full facilities for the WIPP Project of the DOE; the conducting of a test program by the DOE using retrievable radioactive waste at the site; and to protect the land pending a legislative withdrawal; to delete paragraph 5 of Public Land Order No. 6403, which prohibits the use of the withdrawn land for the transportation, storage or burial of radioactive material; to increase the DOE exclusive control area from 640 acres to 1453.9 acres to conform that area to security requirements; and to extend

the term of the withdrawal through June 29, 1997, to provide sufficient time to conduct an operations and experimental program, and for retrieval of the waste, if necessary." (54 Fed. Reg. 15815) (April 19, 1989).

41. The DOE's 1989 withdrawal application states that the purpose of the withdrawal is "to operate the WIPP facility for the purpose of using radioactive waste during the testing phase" and that the "time period anticipated for completing the radioactive tests and for retrieval, decontamination, and decommissioning, if necessary, is eight years." Thus, the use of the public lands involved will require at least eight years.

42. The time period of the 1991 Withdrawal extends only to June 29, 1997, which is less than eight years from the date of the 1991 Withdrawal. Thus, the DOE's withdrawal application demonstrates that the purpose for which the withdrawal was requested cannot be accomplished within the time allowed.

43. The BLM in 1989 and thereafter explicitly took the view that whether to grant the requested administrative withdrawal would depend upon the BLM's determination that the radioactive waste would be retrievable within the time period of the withdrawal.

44. By mid-1990 the DOE and the DOI both recognized that the time requested by the DOE withdrawal application was inadequate for retrieval of radioactive waste. DOE personnel stated, "Since the earliest arrival of waste will be in January 1991 and the Test Phase will take from three to seven years, the need exists to amend this application for an additional period of time. Considering the

possibility that waste retrieval will take place, while probably having to overpack the drums from the alcoves, a period of time several years longer will be needed to assure that waste retrieval could occur in time." (Memorandum, E. Hunter to K. Griffith, June 28, 1990). The quoted DOE memorandum is on file at the BLM office in Santa Fe.

45. Thereafter, the BLM and DOE discussed the fact that the waste would not be retrievable within the time period requested. They ascertained that, if the requested time period were changed to allow for retrieval, they would have to give public notice and receive public comments. Such course was not acceptable to the DOE. The BLM acquiesced in the DOE's refusal to amend the withdrawal application. BLM personnel noted that, if the DOE were to request the necessary additional time, "we did need to republish and allow for public comment. If DOE requests an amendment, and we republish, we will build in another 90 day comment period. Karen [Griffith of the DOE] says that based on the delay this could create problems with her [Washington Office]. Also, we may get comments where we hadn't before. She does not feel that her [Washington Office] would decide to amend under these circumstances." (Memorandum, C. Hougland, July 6, 1990).

46. BLM and DOI personnel who acquiesced in the DOE opposition to any amendment of the withdrawal application to seek a longer time period gave consideration to factors which were irrelevant and ought not to have been considered and ignored factors which were relevant and ought to have been considered.

Had the BLM and the DOI given proper consideration to the fact that the requested time period was inadequate for the retrieval of radioactive waste, the withdrawal application would have been denied.

47. The retrievability of the radioactive waste is discussed in a Waste Retrieval Plan, which was prepared by the DOE and submitted to the BLM in support of the withdrawal application, and is material to whether to approve the withdrawal application. It is, moreover, a highly technical document and, to be understood, requires training in geology, mine engineering, radiation protection, and industrial operations, among other disciplines. The BLM personnel responsible for evaluating the DOE's withdrawal application did not possess the technical capabilities or the necessary resources to evaluate the Waste Retrieval Plan, did not seek to obtain them, and did not independently evaluate the Waste Retrieval Plan.

48. The BLM published a Record of Decision stating that the BLM would recommend "that the Secretary of the DOI approve the DOE's request for an amended administrative withdrawal for the WIPP." (55 Fed. Reg. 38586) (Sept. 19, 1990). The Record of Decision recites that the BLM "has reviewed" (Id.) the FSEIS. However, the BLM did not possess and did not obtain the technical capabilities or the resources necessary to evaluate the FSEIS and made no independent evaluation of it.

49. The BLM Record of Decision states that the requested land withdrawal would "allow the DOE to continue the phased development

of the WIPP. The next phase of the development of the WIPP is the Test Phase which will demonstrate the safe disposal of post-1970 transuranic ("TRU") waste resulting from defense activities and programs of the United States. The Test Phase involves emplacing, in a fully retrievable manner, a limited quantity of TRU waste underground at the WIPP. The Test Phase will allow the DOE to conduct tests designed to collect data to reduce uncertainties associated with performance assessment predictions that are necessary to determine whether the long-term WIPP would comply with the Environmental Protection Agency requirements." (55 Fed. Reg. 38586). These findings of fact are unsubstantiated in the record and contradict relevant facts known to personnel of the BLM. BLM personnel were aware that the time period of the requested withdrawal was insufficient to retrieve the radioactive waste. In addition, the experiments to be conducted in the Test Phase were not necessary for the regulatory determinations referred to. Moreover, the BLM lacked the technical capabilities and resources necessary to evaluate the retrievability of the waste, or the need for the Test Phase, or the preferability of the Test Phase to other suggested alternatives, and it did not obtain such capabilities and resources from outside the BLM, although it is required by regulations to do so.

50. On January 22, 1991, Assistant Secretary of the DOI Dave O'Neal signed Public Land Order No. 6826. That order modifies Public Land Order No. 6403 to "expand the stated purpose of the order to include conducting the Test Phase of the project using

retrievable, transuranic radioactive nuclear waste at the site; (2) increase the DOE's exclusive use area (the reserved area) from 640 acres to 1453.90 acres; (3) extend the term of the withdrawal through June 29, 1997, so as to provide sufficient time to conduct the experimental Test Phase of the WIPP project, unless, as a result of a review conducted before the expiration date pursuant to Section 204(f) of the FLPMA of 1976, 43 U.S.C. §1714(f), the Secretary determines that the withdrawal shall be extended; and (4) delete paragraph 5 of Public Land Order No 6403 which prohibits the use of the land for the transportation, storage or burial of radioactive materials." (56 Fed. Reg. 3038) (Jan. 28, 1991). On October 3, 1991, a Notice to Proceed was issued by the DOI pursuant to Public Land Order No. 6826, authorizing the DOE to proceed to transport to or to emplace radioactive waste at the WIPP site.

51. The purpose and effect of the 1991 Withdrawal are to carry out the withdrawal for the use of more than 5,000 acres of public lands for a permanent or indefinite term by introducing radioactive waste to the WIPP site.

52. The use permitted by the 1991 Withdrawal involves the emplacement of radioactive waste which, once emplaced, cannot practically be retrieved within the time period of the 1991 Withdrawal, or at all.

53. Public Land Order No. 6826 expressly states that the withdrawal may be extended beyond its termination date of June 29, 1997, if the Secretary determines to do so. Thus, the DOI has acknowledged the likelihood that yet another extension may be

necessary, because the time period of the 1991 Withdrawal will be inadequate to retrieve the radioactive waste.

54. Public Land Order No. 6826 extends the term of a previous administrative land withdrawal for a stated purpose which is new and materially different from the stated purpose of the previous withdrawal. The Secretary of the DOI has not determined that the purpose for which the withdrawal was first made requires the extension.

55. The BLM failed to acquire the technical capability and resources necessary to act as a cooperating agency in the preparation of the FSEIS.

56. The BLM and the DOI failed to acquire the technical capabilities and resources necessary to make an independent evaluation of the FSEIS, the Waste Retrieval Plan, or other materials submitted in connection with the withdrawal application.

57. The BLM and the DOI failed to make an independent evaluation of the FSEIS, the Waste Retrieval Plan, or other materials submitted in connection with the withdrawal application.

58. The BLM failed to find facts keyed to the pertinent portions of the record for submission to the DOI.

59. In making the BLM Record of Decision, the DOI Record of Decision, and Public Land Order No. 6826 the BLM and the DOI were required to consider the facts contained in the materials submitted to them, but failed to do so, because they were not capable of evaluating such materials.

**(b) FLPMA Violations for Failure to Make Report**

60. The report to Congress called for by 43 U.S.C. §1714(c) was not sent in connection with the 1991 Withdrawal or the Notice to Proceed. Thus, the DOI reversed without explanation its policy and practice of making such reports, which had been furnished in connection with previous administrative withdrawals of the WIPP site.

61. The 1991 Withdrawal violates 43 U.S.C. §1714(c) and 43 C.F.R. §2310.3-3(b)(2), because the DOI has failed to consider the specified factors, find the specified facts, and make a statement which provides the information specified in 43 U.S.C. §1714(c)(2). Had such information been furnished, more likely than not, it would have disclosed that:

- a. The proposed use involves the permanent or indefinite use for a single purpose of the land involved; and
- b. The expected length of time needed for the withdrawal exceeds the stated time period of the withdrawal.

62. Had the factors called for by the statute been considered, the specified facts been found, and the disclosure called for by 43 U.S.C. §1714(c)(2) been made, it would be apparent that the 1991 Withdrawal is not lawful; involves significant costs, adverse effects, and indeterminate risks; and the 1991 Withdrawal would not be acceptable to the public, the State, the Congress, or the Executive, and there is a substantial likelihood that such withdrawal would not have taken place or would have been revoked.

**(c) APA Violation For Unexplained Reversal of Agency Determinations**

63. The BLM and the DOI publicly adopted and repeatedly confirmed -- until 1990 -- the interpretation of the FLPMA which prohibits, without further legislation, the storage or placement of radioactive waste at the WIPP site. They adopted the position that such would amount to a permanent use, inconsistent with administrative withdrawal.

64. In December 1982 the DOI, by its Assistant Secretary Garrey Carruthers, formally advised the DOE that the DOI would not permit radioactive waste to be placed in the WIPP site without legislation. The DOI stated: "A legislative withdrawal is the appropriate mechanism for transferring exclusive land use authority (i.e., complete administrative jurisdiction) over all or any part of the proposed WIPP site to the DOE for a period in excess of twenty (20) years. Moreover, this Department will not authorize or allow the proposed WIPP site at Los Medanos to be used for the temporary storage or permanent burial of any defense-related nuclear waste in the absence of appropriate legislation reserving, or directing the Secretary of the DOI to reserve, the site for the storage or burial of nuclear waste." (Letter, G. Carruthers to H. Roser, Dec. 7, 1982).

65. The Secretary of the DOI, Manuel Lujan, Jr., in 1989 stated that "[b]y letter of December 7, 1982, this Department advised the DOE that the administrative withdrawal will not authorize the use of the site for temporary or permanent placement of nuclear waste." (Memorandum, M. Lujan, Jr., to Director, BLM, April 14, 1989).

66. However, on June 13, 1990, the Secretary of the DOI advised the Secretary of the DOE that, "upon receipt of a Record of Decision (ROD) that supports the continuation of the phased development of WIPP, we will initiate Interior's review of the DOE's administrative land withdrawal application." (Letter, M. Lujan, Jr., to J. Watkins, June 13, 1990). Thus, the DOI in June 1990 abandoned the position that radioactive waste could not enter the WIPP site without legislation.

67. The June 1990 decision by the DOI constituted a basic policy change.

68. There is no credible explanation for the DOI's and the BLM's abandonment of the position that legislation is required to introduce radioactive waste.

69. Neither the BLM nor the DOI has offered any explanation of the change in position concerning placement of radioactive waste within the WIPP without legislative authorization.

70. The DOI has consistently--until 1990--taken the position that all environmental permitting and EPA requirements must be satisfied before radioactive waste may enter the WIPP site. The DOI has now abandoned that position.

71. The BLM expressly represented to the New Mexico Radioactive Waste Consultation Task Force that "[b]efore the approval of an administrative withdrawal, the WIPP site must be in compliance with all environmental and public health and safety requirements. The Environmental Protection Agency's regulations, as well as state and local laws and regulations will be met before

issuance of any withdrawal." (Letter C. Hougland to A. Lockwood, Aug. 10, 1989).

72. The BLM initially decided that the requested withdrawal would not be "processed until the DOE has submitted all required State and Federal permits and has met all the EPA requirements." (55 Fed. Reg. 38586, 38587) (Sept. 19, 1990). However, based on a unilateral submission by the DOE on November 1, 1990, the BLM Director instructed the New Mexico State Director to amend the Record of Decision to allow for completion of the Public Land Order prior to receipt of all required permits. Thereafter, the BLM deleted the quoted provision and inserted the following: "No transuranic or other forms of radioactive waste will be transported to or emplaced at the WIPP until such time as the DOE has obtained all required permits and has provided copies to the DOI, BLM, or certifies that all environmental permitting requirements have been met, and the BLM issues a Notice to Proceed." (55 Fed. Reg. 47926, 47927) (Nov. 16, 1990). Such deletion and insertion constituted a material change in the proposed withdrawal. On information and belief, had the amendment not been made, the DOE would have been required to submit a permit pursuant to the State Hazardous Waste Act and that it was in compliance with EPA standards for the management and disposal of radioactive waste before the withdrawal would have been processed.

73. In sum, the BLM first stated that all environmental permits and compliance with EPA requirements would be required before an administrative land withdrawal and later rescinded its

commitment, without explanation. The DOI has made the 1991 Withdrawal despite the DOE's failure to meet the stated conditions.

**(d) Failure to Comply With NEPA**

74. The FSEIS is inadequate as a basis for agency decision, because it fails to consider and analyze the alternative of delaying the Test Phase until Congress enacts a legislative land withdrawal. Such alternative is a reasonable alternative. Such alternative would involve the determination by Congress of the timing, rate, regulatory requirements, and other terms and conditions of the introduction of radioactive waste. Consequently, the environmental impact of such alternative would be materially different from the impact of any of the alternatives discussed in the FSEIS.

75. Analysis of legislative withdrawal was highly material. The DOI specifically advised the DOE that the Draft Supplement should examine the alternative of a legislative withdrawal. DOI stated: "While DOE believes the modification to the existing administrative withdrawal may take less time than the legislative transfer, we must be assured that environmental impacts of using the administrative procedure are considerably less than the environmental impacts associated with the legislative transfer, therefore, the final SEIS needs to address the social, economic and national defense (if appropriate) impacts of the perceived time delay which would occur until Congress acts on a legislative transfer of land." (Letter, J. Gallegos to J. Minehardt, Aug. 8, 1989).

76. The FSEIS (January 1990) does not examine the alternative of postponing emplacement of radioactive waste until authorized by Congressional legislation.

77. In comments on the Preliminary FSEIS the DOI again specifically "asked DOE to address the Environmental Impacts of delaying the implementation of the Test Phase until a legislative withdrawal was obtained." (Memorandum, J. Sovcik to C. Hougland, Mar. 23, 1990).

78. The DOI then advised the DOE that the FSEIS was incomplete and that agency decision could not properly be based upon it: "The Record of Decision (ROD) for the next phase of the WIPP project needs to include a consideration of delaying the project until a legislative withdrawal is obtained. Because such a delay does not appear to be addressed in the FSEIS, DOE should explain how they plan to take this into consideration during preparation of the ROD." (Memorandum, C. Hougland to L. Stone, Mar. 23, 1990).

79. The DOI further determined that the DOI would need to evaluate the impact of delaying waste emplacement pending a legislative withdrawal for its own decision purposes: "We are concerned about this issue because although the Final Supplement may meet all technical requirements, we do not think it adequately addresses the pending administrative withdrawal. The Final Supplement addresses in great detail, waste to be stored and the radioactive content, but it does not discuss the withdrawal except to mention it in passing or in the portion on Federal requirements

in Chapter 10. Unless this information is provided to us we believe our withdrawal process may take longer since the information we requested must be evaluated in our process." (Letter, J. Deason to P. Brush, Apr. 4, 1990).

80. Based upon current legislative proposals, the environmental impacts of a legislative land withdrawal would be significantly different from the environmental effects of an administrative land withdrawal. Bills and amendments, which have been introduced in Congress provide, inter alia, for withdrawal on terms, which include:

a. Determination by the EPA, rather than the DOE, of whether the WIPP complies with environmental standards for the management and disposal of radioactive waste.

b. Conduct of experiments on site with radioactive waste only after independent scrutiny of the necessity for such tests and whether they will contribute relevant information.

c. Conduct of experiments on site with radioactive waste only after specific approval by the EPA based upon the necessity for tests.

d. Conduct of experiments on site with radioactive waste only after adoption of a retrieval plan that incorporates a specific retrieval schedule and identifies interim storage locations.

e. Construction of highway improvements to increase transportation safety.

f. Legislative limits on waste quantity.

81. The environmental impact of legislative land withdrawal on terms such as those listed above, or on any other terms, has not been evaluated in the FSEIS.

82. However, the DOE issued its Record of Decision on June 13, 1990, announcing that it would proceed with the Test Phase. (55 Fed. Reg. 25689) (June 22, 1990). The DOE Record of Decision reflects no consideration of the alternative of awaiting a Congressional land withdrawal, which is a reasonable alternative. The Secretary of the DOI on the same day wrote that "I have concluded that the WIPP FSEIS adequately assesses the environmental impacts associated with land withdrawal." (Letter M. Lujan, Jr., to J. Watkins, June 13, 1990).

83. On January 22, 1991, Assistant Secretary of the DOI O'Neal signed a DOI Record of Decision adopting the FSEIS and reciting that the DOI would approve the requested administrative land withdrawal. The DOI Record of Decision adopts the BLM Record of Decision, as amended, and adds: "Another alternative action would be to modify the existing withdrawal to extend the time period to 1997 without proceeding with the experimental Test Phase. The transuranic waste would not be shipped to or emplaced in the WIPP for the Test Phase, but would continue to be stored at various DOE sites. The WIPP would not be decommissioned until the term of the modified withdrawal expires. An amended withdrawal to change the term would be processed by the BLM."

84. The other alternative referred to in the DOI Record of Decision is a reasonable alternative but is not examined in the FSEIS.

85. Neither the BLM nor the DOI has offered any explanation of the change in position concerning the need to examine the alternative of a legislative land withdrawal before making an administrative land withdrawal.

86. The FSEIS fails to set forth public comments summarized by personnel of the BLM and the responses thereto (see FSEIS Vol. 3 at 66-67), contrary to applicable regulations. Such comments and the responses thereto would have furnished material information to the DOE and the DOI decisionmakers in determining whether to proceed with a Test Phase and whether to make an administrative land withdrawal.

87. The Test Phase and related actions described in the FSEIS and the 1991 Withdrawal constitute major federal action significantly affecting the quality of the human environment. The FSEIS fails to comply with the NEPA and the regulations of the Council on Environmental Quality for the following reasons:

a. The alternative of awaiting legislative land withdrawal before emplacing radioactive and hazardous waste in the WIPP is a reasonable alternative, but was not rigorously explored, objectively evaluated, and substantially treated. The environmental effects of such alternative might be significantly different from the effects of any alternatives discussed in the FSEIS, because the timing of withdrawal and waste emplacement would

depend on the timing and conditions established by Congress in withdrawal legislation. The effects of such timing and conditions on waste sources, waste storage sites, transportation, experiments, and disposal operations are not discussed in the FSEIS. Therefore, decisionmakers are not able to evaluate the comparative merits of such alternative.

b. The alternatives which the DOI believed should be considered were not encompassed by the range of alternatives discussed in the FSEIS and could not be considered by the decisionmaker.

c. The FSEIS is misleading and inaccurate in stating that the Test Phase would have a duration of approximately five years and failing to state that the DOE believed that the term of the requested administrative land withdrawal would be adequate to complete the Test Phase and retrieve the waste.

d. The Record of Decision made by the DOI on January 22, 1991, refers to another alternative action, whereby the existing land withdrawal would be extended to 1997 without proceeding with the Test Phase. Such alternative is not discussed in the FSEIS, and its impacts are different from the impacts of any alternative discussed therein. Therefore, the impacts of such alternative are not examined.

e. Comments received by the DOE from the DOI, from the BLM, and from the public concerning the Draft Supplement were not attached to the FSEIS. Therefore, decisions based upon the FSEIS were not based upon a consideration of the relevant factors.

f. The BLM and the DOI specified to the DOE the need to develop information concerning the alternative of a legislative land withdrawal and pointed out that such information was required for their own decision purposes, but the information was not provided.

g. The DOE failed to consider and respond to the comments received from the DOI, the BLM, and the public, particularly concerning the alternative of a legislative land withdrawal, as shown by the DOE Record of Decision dated June 13, 1990, which fails to mention such alternative.

h. The DOI adopted the FSEIS even though it demonstrably did not agree that its comments and suggestions had been satisfied.

i. The DOI failed to provide or to obtain personnel and other resources sufficient to enable it to evaluate the FSEIS pursuant to the requirements of its own regulations concerning land withdrawals (43 C.F.R. §2310.3-2(b)(3)) as well as the regulations of the Council on Environmental Quality.

88. Events occurring after the issuance of the FSEIS have demonstrated the necessity to prepare a supplemental environmental impact statement. Specifically, it has become apparent that there is a significant risk that, after emplacement, the test waste may not be retrievable, by reason of the closure, collapse, or threat of collapse of the test rooms. The DOE has empaneled two groups of experts to examine the problem of roof failure and has attempted to formulate a solution. The likelihood that the waste may not be

retrievable, and the consequences of such nonretrievability, have not been examined in the FSEIS and must be examined to furnish a sufficient analysis of the consequences of the issuance of an administrative land withdrawal authorizing emplacement of radioactive waste, the issuance of a Notice to Proceed to allow such emplacement, and the conduct of the Test Phase underground at the WIPP.

#### FIRST CAUSE OF ACTION

##### FEDERAL LAND POLICY AND MANAGEMENT ACT

89. The State realleges the contents of paragraphs 1 through 88 of this Complaint.

90. By making the 1991 Withdrawal the Secretary of the DOI has exceeded his lawful authority by failing to determine that the proposed use will be completed within the time period of the requested withdrawal. Alternatively, if he has in fact so determined, the determination is unsubstantiated and contradicted by the record, devoid of record references, and unexplained in any way enabling the Court to perform judicial review.

91. The 1991 Withdrawal contradicts the express intent of Congress in enacting 43 U.S.C. §1714(c), and it constitutes an interpretation of 43 U.S.C. §1714(c) which is unreasonable and is inconsistent with the statutory purpose.

92. The action of the DOI in making the 1991 Withdrawal contrary to 43 U.S.C. §1714(c) is unlawful and should be set aside as:

- a. arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;
- b. in excess of statutory jurisdiction, authority, and limitations;
- c. without observance of procedures required by law;
- d. unsupported by substantial evidence; and
- e. unwarranted by the facts.

**SECOND CAUSE OF ACTION**

**FEDERAL LAND POLICY AND MANAGEMENT ACT**

93. The State realleges the contents of paragraphs 1 through 88 of this Complaint.

94. The 1991 Withdrawal is governed by 43 U.S.C. §1714(f), which states that "[a]ll withdrawals and extensions thereof... having a specific period... may be extended or further extended only if the Secretary determines that the purpose for which the withdrawal was first made requires the extension..."

95. The 1991 Withdrawal constitutes an extension of a withdrawal previously made pursuant to Public Land Orders No. 6232 and 6403, which had a specific period, and the Secretary of the DOI has not made the statutorily mandated determination that the purpose for which the withdrawal was first made requires the extension. Moreover, any such determination would be contradicted by the record, because the previous withdrawals expressly prohibited the introduction of radioactive waste, and the 1991 Withdrawal was expressly requested by the DOE and made by the DOI

for the new and different purpose of the placement of radioactive waste in the site.

96. The 1991 Withdrawal contradicts the express intent of Congress in enacting 43 U.S.C. §1714(f), and it constitutes an interpretation of 43 U.S.C. §1714(f) which is unreasonable and is inconsistent with the statutory purpose.

97. The action of the DOI in making the 1991 Withdrawal contrary to 43 U.S.C. §1714(f) is unlawful and should be set aside as:

- a. arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;
- b. in excess of statutory jurisdiction, authority, and limitations;
- c. without observance of procedure required by law;
- d. unsupported by substantial evidence; and
- e. unwarranted by the facts.

### THIRD CAUSE OF ACTION

#### FEDERAL LAND POLICY AND MANAGEMENT ACT

98. The State realleges the contents of paragraphs 1 through 88 of this Complaint.

99. The applicable regulations contained in 43 C.F.R. Part 2300 were violated by the BLM and the DOI in making the 1991 Withdrawal. The BLM and the DOI did not have and failed to obtain the technical capability and the resources necessary to perform an independent evaluation of the materials, such as a plan to retrieve the test waste, submitted in connection with the withdrawal

application, and they performed no independent evaluation of such materials.

100. In making the 1991 Withdrawal the BLM and the DOI failed to examine the relevant data, and they failed to consider important aspects of the problem. The DOI and the BLM have failed to articulate a satisfactory explanation for their action and failed to demonstrate a rational connection between the facts found and the choice made. The DOI's and the BLM'S explanation of their action runs counter to the evidence before them.

101. The 1991 Withdrawal was made in violation of the FLPMA and the regulations contained in 43 C.F.R. Part 2300, is unlawful, and should be set aside as:

- a. arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;
- b. in excess of statutory jurisdiction, authority, and limitations;
- c. without observance of procedure required by law;
- d. unsupported by substantial evidence; and
- e. unwarranted by the facts.

#### FOURTH CAUSE OF ACTION

##### FEDERAL LAND POLICY AND MANAGEMENT ACT

102. The State realleges the contents of paragraphs 1 through 88 of this Complaint.

103. In making the 1991 Withdrawal without complying with 43 U.S.C. §1714(c)(2) by determining and reporting the matters called

for therein, the DOI failed to consider factors required to be considered in making the 1991 Withdrawal.

104. The 1991 Withdrawal was made in violation of 43 U.S.C. §1714(c)(2) and 43 C.F.R. §2310.3-3(b)(2), is unlawful, and should be set aside as:

- a. arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;
- b. in excess of statutory jurisdiction, authority, and limitations;
- c. without observance of procedure required by law;
- d. unsupported by substantial evidence; and
- e. unwarranted by the facts.

**FIFTH CAUSE OF ACTION**

ADMINISTRATIVE PROCEDURE ACT;  
FEDERAL LAND POLICY AND MANAGEMENT ACT;  
NATIONAL ENVIRONMENTAL POLICY ACT

105. The State realleges the contents of paragraphs 1 through 88 of this Complaint.

106. By the 1991 Withdrawal the DOI and the BLM have reversed their administrative interpretation of critical provisions of the FLPMA and the NEPA. Such reversals have no support in the administrative record. No reasoned explanation of such reversals of position has been provided.

107. The 1991 Withdrawal, made despite the declared policy positions of the DOI and the BLM in conflict with such withdrawal, violates the APA, FLPMA, and the NEPA, and should be set aside as:

- a. arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;
- b. in excess of statutory jurisdiction, authority, and limitations;
- c. without observance of procedure required by law;
- d. unsupported by substantial evidence; and
- e. unwarranted by the facts.

SIXTH CAUSE OF ACTION

FEDERAL LAND POLICY AND MANAGEMENT ACT

108. The State realleges the contents of paragraphs 1 through 88 of this Complaint.

109. In considering the application by the DOE, which led to the 1991 Withdrawal, the DOI and the BLM were told by the DOE that the time period of the requested withdrawal was inadequate to allow for the possible retrieval of radioactive waste.

110. Pressure was applied to the DOI and the BLM by the DOE to compel them to rule favorably on the DOE's withdrawal application on the basis of factors not made relevant by Congress in the FLPMA. The DOI's and the BLM's decision in making the 1991 Withdrawal was affected by those extraneous and irrelevant considerations.

111. The 1991 Withdrawal violates the FLPMA, is unlawful, and should be set aside as:

- a. arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;

- b. in excess of statutory jurisdiction, authority, and limitations;
- c. without observance of procedure required by law;
- d. unsupported by substantial evidence; and
- e. unwarranted by the facts.

**SEVENTH CAUSE OF ACTION**

**NATIONAL ENVIRONMENTAL POLICY ACT**

112. The State realleges the contents of paragraphs 1 through 88 of this Complaint.

113. The action of the DOE in deciding to proceed with the Test Phase without complying with the NEPA and regulations issued thereunder is unlawful and should be set aside as:

- a. arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;
- b. in excess of statutory jurisdiction, authority, and limitations; and
- c. without observance of procedure required by law.

114. The actions of the DOI in making the 1991 Withdrawal and issuing the Notice to Proceed without complying with the NEPA and regulations issued thereunder is unlawful and should be set aside as:

- a. arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;
- b. in excess of statutory jurisdiction, authority, and limitations; and
- c. without observance of procedure required by law.

**CLAIM FOR RELIEF**

WHEREFORE, the State respectfully requests that the Court call for production of the record of the final agency action contained in (1) the DOE Record of Decision dated June 13, 1990, and (2) the DOI Record of Decision and Public Land Order No. 6826, dated January 22, 1991, and the Notice to Proceed, dated October 3, 1991, and upon the record and after trial and determination of the factual issues presented:

a. Adjudge and declare that the DOE Record of Decision dated June 13, 1990, is unlawful and shall be set aside;

b. Adjudge and declare that the DOI Record of Decision and Public Land Order No. 6826, dated January 22, 1991, and the Notice to Proceed, dated October 3, 1991, are unlawful and shall be set aside;

c. Enjoin the Defendants from taking any action pursuant to such Records of Decision, Public Land Order and Notice to Proceed;

d. Direct the Defendants Department of the Interior, Lujan, O'Neal and Jamison, to prepare and submit to the Court a plan for the consideration by the DOI of any other or future application for a withdrawal of public land for purposes related to a nuclear waste disposal facility and for the supervision of such withdrawal, including the acquisition of sufficient resources and skilled personnel to evaluate such an application and to supervise the operation of such a withdrawal so that it remains

within the statutorily defined limits of an administrative withdrawal;

e. Grant the State its costs, disbursements and attorney's fees; and

f. Grant such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

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of New Mexico

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Dated: October 9, 1991



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW MEXICO, ex. rel.  
TOM UDALL, Attorney General,

Plaintiffs.

v.

JAMES D. WATKINS, Secretary of  
the Department of Energy, MANUEL  
LUJAN, JR., Secretary of the  
Department of the Interior,  
DAVE O'NEAL, Assistant Secretary of  
the Department of the Interior,  
CY JAMISON, Director of the Bureau  
of Land Management, UNITED STATES  
DEPARTMENT OF ENERGY, and UNITED  
STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Civil Action No. \_\_\_\_\_

**MEMORANDUM IN SUPPORT OF  
MOTION FOR TEMPORARY RESTRAINING ORDER**

**PRELIMINARY STATEMENT**

This Memorandum is submitted in support of the motion of the plaintiff State of New Mexico (the "State") for a temporary restraining order directed to the defendants, prohibiting them from taking any action to introduce radioactive waste to the site of the Waste Isolation Pilot Plant ("WIPP"), a proposed nuclear waste repository located in New Mexico and operated by the Department of Energy ("DOE").

Also submitted herewith are the affidavits or statutorily verified statements of:

- Lokesh Chaturvedi, Ph.D., Deputy Director of the Environmental Evaluation Group ("EEG"), dated September 20, 1991;
- Marion Deming, Registered Nurse, National Union Health and Safety Coordinator, dated October 7, 1991;
- Judith M. Espinosa, Cabinet Secretary of the New Mexico Environment Department ("NMED"), dated October 7, 1991;
- Gabriel Fernandez-Delgado, Research Engineer at University of Illinois, dated October 7, 1991;
- Don Hancock, Administrator of the Southwest Research and Information Center ("SRIC") and Director of SRIC's Nuclear Waste Safety Project, dated October 7, 1991;
- Linda L. Lehman, principal of L. Lehman & Associates, Inc., specializing in hydrologic and nuclear waste matters, dated October 6, 1991;
- John D. Leshy, Professor of Law at Arizona State University, dated October 7, 1991;
- Jack Parker, principal of Jack Parker and Associates, rock mechanics and mining consultants, dated October 6, 1991;
- Christopher J. Wentz, principal technical and policy analyst on WIPP, State of New Mexico, Department of Energy, Minerals and Natural Resources ("EMNRD") and Coordinator of the Radioactive Waste Consultation Task Force, dated October 7, 1991;
- Marcus A. Wiley, President, Wiley Engineering, Inc., mining and construction consultants, dated October 5, 1991;

For the Court's convenience, each affidavit is preceded by a summary sheet that states briefly its essential conclusions.

Also submitted is a binder of exhibits containing official federal government documents and correspondence. References to the binders are in the form "ex. \_\_\_."

### NATURE OF THE CASE

This action is brought on behalf of the State against the DOE, the Department of the Interior ("DOI") and certain officers of each in their official capacities.

WIPP is an underground repository, excavated in an ancient salt bed, designed to receive dangerous transuranic waste<sup>1</sup> generated in DOE defense nuclear programs. The WIPP is located near Carlsbad, New Mexico on 10,240 acres of the public lands of the United States. (Chaturvedi Aff. ¶ 9.) It is contemplated that radioactive waste generated in DOE defense facilities may be shipped to the WIPP, if Congress approves. Congress has appropriated funds to excavate and equip the WIPP, but it has declined to authorize the introduction of radioactive waste there, pending resolution of certain serious environmental, health and oversight concerns. Congress is now actively deliberating this matter. (See ex. 20, 22, 23). The DOE, acting in cooperation with the DOI, has now determined to bypass Congress and to transport radioactive waste to the WIPP in violation of applicable law. Specifically, DOE intends to proceed on its own "due to the failure of the Congress to enact legislation to withdraw the public lands

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<sup>1</sup> Transuranic wastes consist of radioactive elements heavier than uranium which remain radioactive for a quarter million years. They include radioactive isotopes of plutonium, thorium, americium, uranium, neptunium, curium, californium, cobalt, strontium, ruthenium, antimony, tin, cesium, cerium, and europium. (Chaturvedi Aff. ¶ 8).

at WIPP . . . ." (ex. 24, Letter of the Secretary of Energy to Secretary of the Interior, dated October 3, 1991, p. 1).

This is a civil action seeking relief pursuant to the Administrative Procedure Act with respect to agency actions taken in violation of § 204 of the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1714, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., and Public Law 96-164. These actions include (a) DOE's determination to emplace radioactive waste at the WIPP to conduct a so-called "Test Phase" and its taking action to do so; and (b) DOI's making and reaffirming an administrative "withdrawal" of the public lands comprising the WIPP for the purpose of allowing the waste to be shipped to New Mexico for the Test Phase (the "1991 Withdrawal") (ex. 3, Public Land Order No. 6826, Jan. 22, 1991; 56 Fed. Reg. 3030, Jan. 28, 1991) and its authorizing the DOE to proceed.

Public Land Order 6826, effecting the 1991 Withdrawal, provided that no radioactive waste could be transported to the WIPP until the DOE self-certified that all environmental impact requirements had been met, and that the DOI's Bureau of Land Management ("BLM") issued a Notice to Proceed. The DOE represented to the DOI by letter dated October 3, 1991, that "all regulatory conditions specified" had been satisfied. (ex. 24, Letter of the Secretary of Energy to Secretary of the Interior, dated Oct. 3, 1991, p. 3.) On the same day, an Assistant Secretary of the Interior issued a letter notifying DOE that it may proceed to transport radioactive waste to the WIPP effective on the date that

a copy of the letter is printed in the Federal Register. (ex. 25, Letter of Dave O'Neal to Secretary of Energy, dated Oct. 3, 1991, p. 1.) DOE has given notice that it intends to ship "the first dry bin" of radioactive waste "as early as October 10, 1991." (ex. 1, Letter of B. G. Twining to A. Lockwood, dated Oct. 3, 1991, p. 1.) As of the date of this application, no shipment has entered New Mexico, but it is apparent that shipment is imminent, and that immediate relief is necessary.

The DOE decision to introduce waste into New Mexico to conduct the Test Phase and the DOI action making the 1991 withdrawal for this purpose and authorizing DOE to proceed are improper and illegal in that:

a. Congress has exclusive authority under the Constitution of the United States (Art. IV, Sec. 3) to regulate and dispose of the public lands of the United States. Congress has reserved for itself authority to "withdraw" public lands for a specified use on a permanent basis. It has authorized only limited-term (20 year or less) withdrawals by the DOI of large acreage (5,000 or more acres), under specified terms and conditions. FLPMA, 43 U.S.C. § 1714(c)(i). Here, the DOI's 1991 Withdrawal improperly authorized a de facto permanent use of New Mexico public land as a radioactive waste depository.

b. Congress has been deliberating the issue of whether, and under what circumstances and safeguards, radioactive waste should be moved to the WIPP. Notably, the WIPP has recently experienced a number of severe structural problems (i.e., roof collapses of

thousands of tons of rock). Both DOE and DOI have sought to bypass Congress by requesting and authorizing, respectively, what is ostensibly a limited-term withdrawal of the WIPP land for the purpose of the "Test Phase." Although the very purpose of the WIPP is to provide permanent disposal, DOE invented the idea of "retrievable" nuclear waste -- so that waste could be moved to WIPP under an administrative land withdrawal while evading FLPMA's bar to any such withdrawal that is permanent in nature. However, there is no substance to the stated purpose, since (1) the single test (dry bin scale test) need not be conducted at the WIPP; (2) if conducted there, it will not yield useful results; and (3) the other tests cannot be conducted at all. More importantly, the idea that the radioactive waste emplaced in the WIPP will be "retrievable" in several years is utterly fanciful, due to the WIPP's active geological flux. The proposed withdrawal is not, in fact, for limited term use.

c. Even if not de facto permanent, the 1991 withdrawal is improper because the use specified in the withdrawal requires, for its completion, a period of at least nine to ten years based upon DOE time estimates, significantly in excess of the six year time period provided in such withdrawal, and thus the withdrawal violates FLPMA, 43 U.S.C. § 1714.

d. The 1991 withdrawal was effected as an "extension" of a previous administrative land withdrawal, not as a new withdrawal. However, in the case of an extension, FLPMA requires that the Secretary of the DOI find that the purpose stated in the previous

withdrawal requires the extension and thus that it be the same as that of the original withdrawal. Neither requirement was met here, in violation of FLPMA. 43 U.S.C. § 1714(f). In particular, the 1991 withdrawal was for the new purpose of emplacing radioactive waste at the WIPP.

e. The DOI made the 1991 withdrawal without considering critical factors, particularly the DOE's ability to retrieve the radioactive waste from the WIPP within the time period of the withdrawal. In fact, DOI does not even have the capability to evaluate such factors, and its action is contrary to FLPMA, 43 U.S.C. § 1714, and the NEPA, 42 U.S.C. § 4321 et seq.

f. The 1991 withdrawal was effected without making a report to Congress, contrary to FLPMA 43 U.S.C. § 1714(c)(2). Moreover, such a report would require a clear explanation of the proposed use of the land involved and a statement of the expected length of time needed for the withdrawal, and thus indicate violations of law.

g. The 1991 withdrawal constitutes an unexplained reversal of the DOI's previously stated positions (see 48 Fed. Reg. 3878) that any withdrawal for the emplacement of radioactive waste at the WIPP (1) required Congressional authorization; (2) should await the DOE's obtaining all State and Federal permits and complying with the EPA requirements; (3) required examination for the environmental impact of legislative land withdrawal; and (4) required a report to Congress pursuant to 43 U.S.C. § 1714(c)(2), in violation of the APA, the FLPMA and the NEPA.

h. The DOE induced DOI to grant the 1991 withdrawal in disregard of the fact that the time period of the withdrawal was inadequate to conduct the so-called Test Phase and to retrieve the radioactive waste, so that the decision was based upon improper and irrelevant factors, contrary to the APA and the FLPMA.

i. The 1991 withdrawal and the DOE's decision to conduct the Test Phase were based on inadequate consideration of important alternatives to assess the environmental impact, including a possible legislative land withdrawal and the possibility of non-retrievability of the waste, among other things, contrary to the NEPA.

#### INTRODUCTION

This proceeding was precipitated by DOE's insistence upon introducing radioactive waste into the WIPP located near Carlsbad, New Mexico, without the required Congressional action. The DOE has advised the State that on or after October 10, 1991, the DOE will ship radioactive waste to the WIPP (ex. 1, 2). The shipments are to begin a series of experiments described as "dry bin scale tests."<sup>2</sup> (Chaturvedi Aff. ¶ 15; Lehman Aff. ¶¶ 17-23.) In order to proceed, DOE obtained an administrative land withdrawal from DOI effective in "Public Land Order," No. 6826, dated January 22, 1991

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<sup>2</sup> The "dry bin scale tests" are to involve emplacement of up to 105 "bin" containers of transuranic waste underground in the WIPP. Each bin will contain the contents of from four to six 55-gallon drums of transuranic waste. Gases generated by the waste contained in the bins will be measured over a period of five years. (Chaturvedi Aff. ¶ 15.)

and subsequently a "Notice to Proceed" issued October 3, 1991. The Order extends the period of withdrawal of the WIPP site to June 29, 1987 and changes the purpose of the preceding land withdrawal by removing a prohibition against emplacement of radioactive waste at the WIPP (ex. 3), and the Notice to Proceed authorizes radioactive shipments upon its publication in the Federal Register.

#### ARGUMENT

#### I. DOI's 1991 Land Withdrawal Violates the FLPMA and Other Statutes

The WIPP is designed to isolate and dispose of radioactive waste generated in defense nuclear programs. (Chaturvedi Aff. ¶¶ 8-9). That waste includes plutonium, which remains radioactive for approximately one-quarter of a million years. The federal public land which is to act as such a repository must be set aside and reserved for the use of a disposal facility permanently. However, the DOE has so far been unable to come to terms with Congress -- which under the FLPMA and the United States Constitution may alone make permanent reservations of public land -- with respect to the serious concerns that underlie pending legislation to withdraw public land for WIPP nuclear storage.

The FLPMA was enacted in 1976 pursuant to Congress's exclusive Constitutional power to control the disposition of the public lands (Art. IV, § 3). Section 102(a)(4) declares the Act's policy that,

the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action.

43 U.S.C. § 1701(a)(4); emphasis added.

In relevant part, FLPMA delineates executive power as to land withdrawals as follows: After giving public notice, the Secretary of DOI may make a withdrawal aggregating 5,000 acres or more only for a period of not more than 20 years. Upon the making or extension of such a withdrawal, 43 U.S.C. § 1714(c)(2) and (f), the Secretary must notify Congress and file a report that addresses twelve specified subject matter areas, including "a clear statement of the proposed use of the land involved," an inventory of the current uses and values of the site, the expected length of time needed for the withdrawal, the availability of alternative sites for the use, a geological report, and other matters. 43 U.S.C. § 1714(c)(2). Further, a withdrawal may be extended only if the Secretary determines that "the purpose for which the withdrawal was first made requires the extension" and only for up to the time period of the original withdrawal. (42 U.S.C. § 1714(c)(1), (2) and (f)).

In addition, DOI regulations issued under the FLPMA provide that the applicant for a withdrawal (here, DOE) must set forth the public purpose and expected duration of the use for which the land is sought and must prepare an environmental impact statement ("EIS") in cooperation with the BLM. The EIS, in turn, is required to "[r]igorously explore and objectively evaluate all reasonable alternatives..." (40 C.F.R. § 1502.14(a)).

In 1980 DOI and DOE reached an agreement, whereby DOE agreed to limit the purpose of any administrative withdrawal for the WIPP to its protection and evaluation of the site. (ex. 5). DOI was concerned that it might otherwise become heir to a site containing radioactive waste at the termination of a withdrawal. (ex. 6). Accordingly, the DOE sought a withdrawal in 1980 specifically for the "purposes of protecting the geological integrity of the site for the research and development of a WIPP project and performing a Site and Preliminary Design Validation Program" ("SPDV"). (45 Fed. Reg. at 75768; ex. 7). This was granted, expressly for these purposes "and to protect the land pending a legislative withdrawal, if appropriate." (47 Fed. Reg. at 13340, March 30, 1982; ex. 8; emphasis added.) The statutorily required report to Congress was made. (ex. 9).

In 1983 another public land order was sought by the DOE to allow construction of the WIPP. (ex. 10). The required public notice contained a critical limitation on the purpose of the withdrawal: "[H]owever, no radioactive waste will be stored or disposed of under the terms of this withdrawal." (48 Fed. Reg. at 3878; Jan. 27, 1983). (ex. 11). Paragraph 5 of the resulting Public Land Order No. 6403 (issued for a period of eight years), stated:

The public land order itself expressly "does not authorize the use or occupancy of the lands hereby withdrawn for the transportation, storage or burial of any radioactive materials, except as to radiological instruments normally used for nondestructive testing and geophysical logging."

(48 Fed. Reg. 31038-39). (ex. 4). Again, a report to Congress was made. (ex. 12).

In 1989 the DOE initiated an effort to obtain the use of the WIPP site for the introduction of radioactive waste. It filed an application to "modify" the existing order and to change its stated purpose. (ex. 13). The application sought

"to change the purpose of the land withdrawal stated in paragraph 1 of Public Land Order No. 6403 to provide that the land is withdrawn for the purpose of... the conducting of a test program by the DOE using retrievable radioactive waste at the site; and to protect the land pending a legislative withdrawal; to delete paragraph 5 of Public Land Order No. 6403, which prohibits the use of the withdrawn land for the transportation, storage or burial of radioactive material...; and to extend the term of the withdrawal through June 29, 1997, to provide sufficient time to conduct an operations and experimental program, and for retrieval of the waste, if necessary."

(54 Fed. Reg. 15815, Apr. 19, 1989; emphasis added) (ex. 14).

Following public hearings, the application was granted on January 22, 1991, by Public Land Order No. 6826, which modifies and extends the previous order to "expand the stated purpose of the order to include conducting the Test Phase of the project using retrievable, transuranic radioactive nuclear waste at the site..."

(56 Fed. Reg. 3038). (ex. 3).

Thus, by the 1991 withdrawal the DOE and the DOI changed the "purpose" and attendant restriction which had assured that any use of the land to receive radioactive waste would be based on legislative action and provided Congress an opportunity to

introduce such safeguards and oversight as it deemed necessary. Notably, because the stated purpose of the withdrawal was changed, it was impossible for the DOI to satisfy the statutory requirement that the Secretary of the DOI find that the purpose of the original withdrawal requires the extension. (43 U.S.C. §1714(f)). No such finding was made. Further, the required report to Congress was not made.

Other FLPMA violations underlay the 1991 withdrawal. One of the requirements of FLPMA is that duration of the withdrawal period be determined by the length of time needed for the proposed use. 43 U.S.C. § 1714(c)(2)(9) and § 1714(f). As stated by the DOI Secretary, any use of public land authorized by an administrative order should be completed by the end of the withdrawal term, and the land be restored, so that DOI will be free to choose whether to allow the withdrawn land to return to the public domain. (ex. 15, pp. 52, 60).

However, the Test Phase authorized by the 1991 withdrawal will extend well beyond the duration of the withdrawal, which expires in 1997. DOE's own application states that eight years are required for the Test Phase (ex. 15, p. 3), whereas the time available is less than six years. (ex. 3). In fact, the test phase will take ten years. (Wiley Aff. ¶ 2). DOE has said elsewhere that waste retrieval alone may consume eight years (ex. 16, p. 1-2). Thus, if the DOE obtains the use of the site for waste emplacement, it will have initiated a use of the land which

the DOI is virtually powerless to stop. Such result conflicts with FLPMA's time limitation and disclosure requirements.

DOE was aware that the proposed use could not be completed within the time period specified in the withdrawal request and informed DOI prior to issuance of Order No. 6826. It decided to avoid disclosing this in an amended application in order to avoid the required public hearing process. BLM personnel negotiating with DOE noted that,

If DOE requests an amendment, and we republish, we will build in another 90 day comment period. Karen [Griffith of the DOE] says that based on the delay this could create problems with her [Washington Office]. Also, we may get comments where we hadn't before. She does not feel that her [Washington Office] would decide to amend under these circumstances." (Memorandum, C. Hougland, July 6, 1990.) (ex. 19).

Further, DOI made no report to Congress upon the administrative land withdrawal, although the law requires such a report. (43 U.S.C. § 1714(c)(2) and (f); 43 C.F.R. § 2310.3-3(b)(2)). Had such a report been made, it would have been clear both that the proposed Test Phase involves the permanent or indefinite use of the land involved, and that in any event the expected length of time needed for the withdrawal under current DOE plans exceeds the stated time period of the withdrawal. Such factors are of vital concern to the State and to Congress.<sup>3</sup>

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<sup>3</sup> The attached affidavit of John Leshy, Associate Solicitor of the DOI from 1977 to 1980, confirms the longstanding application of FLPMA such that (a) the time period of an administrative land withdrawal is required to be sufficient to complete the proposed land use; (b) an administrative withdrawal may not be extended for a

Beyond the several violations of FLPMA noted above is the fundamental problem that the issuance of the Land Order No. 6826 to authorize the storage or burial of any radioactive waste within the WIPP is entirely invalid as beyond the "delineation" of DOI authority set forth in FLPMA. Indeed, it represents an unconstitutional arrogation of power by DOI and DOE.

DOI has no lawful power to withdraw public lands for any indefinite or permanent use. The particular characteristic of the WIPP, an excavation of rooms within an ancient salt bed, is its inherent tendency toward permanence of storage. The salt structures of the WIPP are in constant flux and, indeed, are expected to collapse around, crush and embed the deposited waste. (Chaturvedi Aff. ¶ 9). It is in fact not possible to guarantee the physical security of any underground room within the WIPP, and recently the WIPP has experienced several catastrophic roof collapses, sufficiently unanticipated that expensive DOE equipment was destroyed. (Chaturvedi Aff. ¶ 13).

DOI recognized the prospectively permanent nature of nuclear waste emplacement within the WIPP, and it advised DOE that DOI would not authorize any such emplacement, deferring instead to appropriate legislative action:

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purpose which is different from the purpose of the original withdrawal; and (c) upon the making or extension of an administrative land withdrawal it is mandatory that the DOI report to Congress, stating, inter alia, a description of the proposed use and an estimate of the time required.

[T]his Department will not authorize or allow the proposed WIPP site at Los Medanos to be used for the temporary storage or permanent burial of any defense-related nuclear waste in the absence of appropriate legislation reserving, or directing the Secretary of the Interior to reserve, the site for the storage or burial of nuclear waste. Draft legislation to accomplish the foregoing will be forwarded by this Department to the Office of Management and Budget in due course.

(DOI Letter to DOE, Dec. 7, 1982 at p. 1; ex. 27).

On April 14, 1989, the Secretary of DOI issued a memorandum to the BLM restating the aforesaid advice. Continuing, however, the Secretary noted that DOE had nearly finished construction at WIPP and wanted to begin a demonstration phase and an operational phase which would "involve the receipt and storage of radioactive waste." He then noted that although appropriate legislation had been introduced in Congress, DOE intended to act without legislation:

Legislation has been introduced to permanently transfer these lands to the Department of Energy (DOE). A legislative transfer for WIPP is supported by the Department of the Interior. The DOE, however, desires to proceed with the next phase of WIPP without delay, even if Congress fails to act. Therefore until legislation passes DOE intends to pursue an administrative land withdrawal which would authorize the receipt and storage of radioactive waste.

(ex. 28, Letter from Secretary, DOI to Director, BLM, dated Apr. 14, 1989 at p. 1; emphasis added).

DOE determined to evade the statutory and Constitutional bars to its plans by confecting the idea of "fully retrievable nuclear waste." That is, it would assert that the emplacement of waste

would be tested for years, then be removable. Of course, if the proposed impregnation of the WIPP with radioactive waste were not fully retrievable after the test period, then DOI would clearly have no power to authorize a withdrawal for this purpose. The issue of retrievability, therefore, goes directly to the statutory and Constitutional power of the DOI to act. Based upon the evidence, as well as recent incontrovertible events, the idea of "full retrievability" is entirely unrealistic.

First, it must be pointed out that the introduction to WIPP of nuclear waste is entirely unnecessary. (Chaturvedi Aff. ¶¶ 14, 15). The only test that can presently be accomplished is the proposed "dry bin scale test" -- the emplacement of bins of waste within the WIPP and a periodic sampling of the gases they generate within the containers. However, there is no interaction with the WIPP environment, and the DOE has conceded that this test could be conducted anywhere. (Lehman Aff. ¶¶ 18-22). The other previously proposed tests simply cannot be conducted at this time, and there is no known time when they will be able to be conducted. (Lehman Aff. ¶¶ 24-27; Chaturvedi ¶ 15). These facts suggest that the emplacement of waste at the WIPP have political, not scientific, impetus.

Second, the waste that is scheduled to go into the WIPP will never come out. The WIPP has been excavated in salt beds 2150 feet underground. (Chaturvedi Aff. ¶ 9). The salt beds are in constant motion and have failed under the stresses created by the excavation. "Some parts of the facility ... have collapsed or are

already unsafe and closed to entry." (Chaturvedi Aff. ¶ 6). Large slabs have fallen into the underground rooms -- one roof fall of 100 tons on June 19, 1990 and another of 1,200 tons on February 4, 1991. (Parker Aff. ¶ 16; Fernandez Aff. ¶ 11). Other roof falls have occurred and are expected (Chaturvedi Aff. ¶ 13). The floors are unstable as well. (Id. ¶ 15.) Moreover, the roof and floor of test rooms converge, preventing access by equipment necessary to retrieve the waste. (Parker Aff. ¶ 44).

The DOE itself admitted these risks and in April 1991 convened an expert panel to project the expected life of the test room. The panel unanimously refused to state that the rooms would last the full nine years which the DOE said was required to conduct the tests and remove the waste. They estimated that the room could last only another two years -- approximately the time required to introduce the waste to begin the tests -- and much shorter than the time needed to test and retrieve. (ex. 32 at 5-2).

If the roof fails while test waste is present, the possible consequences to the workers and the waste bins, containing radioactive and explosive waste, are severe (Chaturvedi Aff. ¶ 13). It should be noted that access for any purpose to the room which experienced a roof fall in early 1991 is now barred for reasons of safety. (Id.) (Parker Aff. ¶ 16).

Jack Parker, an expert in rock mechanics selected by the DOE for its own expert panel, reported to the DOE that the only successful solution to the room stability problem was one which relieved the geological stresses which are the cause of the roof

falls. (ex. 32, Parker report). The DOE adopted no such solution, but pursued the expedient of trying to bolt the rocks. Mr. Parker has now submitted an affidavit opposing any shipment of waste to the WIPP that purports to be retrievable because:

1. The proposed test room (Room 1, Panel 1) exhibits similar fractures to those which led to the failure of SPDV Room 1 (§ 31).

2. Failure of the test room is highly probable (§ 31).

3. If the test room follows the pattern of a similar room which failed in early 1991, it will be inaccessible by October 1992 (§ 31).

4. The roof support remedy adopted by the DOE rests upon erroneous assumptions and will fail (§§ 33-42).

5. DOE says that 11'4" clearance is required for the tests; this is only 2" less than the clearance now available, and the leeway will be lost within a year. At that time the waste bins would not be retrievable, because equipment could not get access to them (§§ 44-45, 47).

6. The roof support system will probably impair warning of a roof failure by masking the acceleration of closure which provides a warning sign. (§§ 4-6.)

Mr. Parker concludes that the use of the DOE's support system to conduct underground tests with radioactive waste is imprudent (§ 47).

Dr. Gabriel Fernandez-Delgado, Research Engineer at the University of Illinois, independently visited and examined the WIPP on September 27, 1991. He also states that Room 1, Panel 1, cannot

be expected to remain stable for more than 18 months, and that the room may fail, or give such warning of failure that access to the room must be barred, well before 18 months. (§ 9). He notes that SPDV Room 1 where a major roof fall occurred, was barred to access after slightly more than six years of use, and that Room 1, Panel 1, the test room, is now slightly over five years old and may be closed to access within about a year (§ 9). Dr. Fernandez made a detailed assessment of the DOE's proposed roof support system for the test room, found it ineffective (§§ 17-24) and anticipated that structural failure may occur or accelerate at an unpredictable rate (§ 22). He concludes that the WIPP is unstable and that the system adopted by the DOE contains many uncertainties that may lead to the WIPP's failure at a rate that is unpredictable. (§ 24).

Based on this evidence and the report of DOE's own panel, there is a substantial probability that the waste, once emplaced in Room 1 of Panel 1, will remain there, either because the roof fails entirely, because the roof gives such warning of failure that access must be barred, or because the roof sags so much that essential clearance is lost and the waste cannot be withdrawn.<sup>4</sup>

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<sup>4</sup> Moreover, if the waste could physically be removed from the WIPP, the DOE would face major obstacles in returning it to its source at the Idaho National Engineering Laboratory. The Governor of Idaho, Cecil Andrus, has publicly advised the Secretary of Energy that "the state of Idaho will no longer accept nuclear waste shipments from any source outside of Idaho for storage at Idaho National Engineering Laboratory." (ex. 34). Governor Andrus recently repeated that "I remain firm in my commitment to keep Idaho's borders closed to the importation of radioactive waste for storage." (ex. 35).

In short, the land withdrawal authorized by Public Land Order No. 6826 is one that cannot properly be made by DOI because it entails a permanent use of public land and requires legislation.

**II. DOE's Proposed Shipment of Waste Violates the Public Land Order Purporting to Authorize It**

DOE intends to ship waste into New Mexico notwithstanding that it has not complied with, and has misrepresented its compliance with, the terms of Public Land Order No. 6826.

The withdrawal of land under Order No. 6826 for waste storage is premised on compliance by DOE with "all environmental permitting requirements." (ex. 3). Initially, DOE was to have been required to submit "all required State and Federal permits," and to have met "all the EPA requirements" before a land withdrawal would be authorized. 55 Fed. Reg. at 38587, Sept. 19, 1990. However, the BLM subsequently amended the requirement to allow the land withdrawal order to issue without evidence of such compliance, but to bar all radioactive waste shipments until DOE self-certified that all environmental permitting requirements had been met, after which the BLM was to issue a "Notice to Proceed." 55 Fed. Reg. at 47927, Nov. 16, 1990.

One of the required permitting requirements specified was DOE's compliance with the Resource Conservation and Recovery Act ("RCRA"). (Id.) Under RCRA, if a state administers a qualifying hazardous waste program, it operates in lieu of the federal RCRA program. 42 U.S.C. § 6926(b). Federal agencies must comply with such state hazardous waste programs and attendant regulations. 42

U.S.C. § 6961. New Mexico was authorized by EPA to operate its hazardous waste program pursuant to its Hazardous Waste Act ("HWA") in lieu of the federal program, 55 Fed. Reg. at 28897, July 11, 1990.

In DOE's letter to the Secretary of DOI, required to obtain the Notice to Proceed with waste shipments (ex. 24, Letter from Secretary DOE to Secretary DOI, Oct. 3, 1991), DOE represented that it had "satisfied all regulatory conditions specified in PLO 6826" for shipping waste to the WIPP. Specifically, it represented that DOE had "complied in a timely fashion with the procedural requirements necessary to obtain interim status under RCRA," *i.e.*, had complied with New Mexico's HWA requirements.

This was not the case. The DOE letter failed to reveal that the New Mexico Environment Department had "preliminarily determined that WIPP may not qualify for interim status under the New Mexico Hazardous Waste Act." (Espinosa Aff., ex. 1 at 1). As of the time DOE sent the required self-certification to DOI, that determination had not been revised. Presently DOE is not in compliance with its RCRA or HWA responsibilities. Having procured the Notice to Proceed on false grounds, DOE may not ship waste to the WIPP.

**III. The Plan to Ship Waste to the WIPP Is Based On a Violation of the NEPA**

The decision by the DOE to initiate the Test Phase and the decision by the DOI to carry out an administrative land withdrawal and permit shipping of radioactive waste each constitute major federal actions significantly affecting the quality of the human

environment and consequently require the preparation of an EIS, 42 U.S.C. § 4332(c). The applicable regulations concerning administrative land withdrawals also require the preparation of an EIS, 43 C.F.R. § 22310.3-2(b)(3). Pursuant to these requirements, the DOE prepared the final supplement to EIS ("FSEIS") in supplementation of its 1980 EIS. Applicable regulations require that an EIS contain an analysis of the impact of all reasonable alternatives. (40 C.F.R. §1502.14(a)). It does not do so.

DOI and BLM repeatedly informed the DOE that any environmental impact statement had to include an analysis of the alternative of legislative withdrawal. (Hancock aff. ¶ 8). Indeed, the Interior Department's Assistant Secretary wrote in 1989 that "we must be assured that environmental impacts of using the administrative procedure are considerably less than the environmental impacts of associated with the legislative transfer." (Id., ex. 3; emphasis added).

There is no analysis of the legislative alternative in the FSEIS. (Hancock Aff. ¶ 9). Moreover, the impacts would be substantially different, because the congressional bills proposed to regulate the WIPP include substantial use limitations, safeguards and environmental controls that are absent from an administrative withdrawal (Id. ¶ 11).

Thus, the administrative withdrawal was made by the DOI on the basis of an environmental impact statement that the DOI itself says is incomplete in a critical respect.

While it is not necessary to demonstrate the differences in impact here, it is nevertheless true that the environmental impacts of legislative withdrawal would clearly be less severe than those the impacts of administrative withdrawal. For example, the bill recently passed by the House Interior Committee (ex. 22) would only allow the initiation of a test phase subject to a limit of 1/2% of the total capacity of the WIPP, and subject to the further requirement that the EPA first find the proposed test plan to be necessary to demonstrate compliance with new waste disposal standards, which must also be issued.

A bill recently introduced in the Senate (ex. 23) would allow the initiation of a test phase only after third-party oversight - - an evaluation by the EPA, the National Academy of Sciences, the State, and the EEG under specific standards including the existence of initial performance assessment calculations and the timeliness and usefulness of the anticipated data. Such requirements of third-party review of the proposed tests would, clearly, underscore the need for further review to permit any proposed tests and impose objective scientific conditions upon their conduct. Numerous additional safeguards are contained in the House and Senate bills, such as additional highway improvements.

The legislative alternative, in other words, is predictably different from administrative withdrawal. But the FSEIS fails to discuss or analyze the impact of such an alternative.

Finally, assessment of the environmental impacts of the proposed DOE action and the DOI's issuance of a Notice to Proceed

has been premised on the DOE's emplacing waste in the WIPP "in a fully retrievable manner" (ex. 25, E.A. and Finding of No Significant Impact by BLM through Ass't Sec'y, Land and Minerals, DOI, Oct. 3, 1991 at p. 1). Because, as previously described, the notion of "full retrievability" is baseless, the environmental record of decision does not support the action proposed.

**IV. The Withdrawal and Proposed Shipment of Waste Are Based On Violations of the Administrative Procedure Act**

The decision to use an administrative land withdrawal to introduce radioactive waste constitutes the unexplained reversal of several clearly enunciated administrative interpretations of law. As noted above, DOI has repeatedly stated that the introduction of radioactive waste to the WIPP site would require legislation and, therefore, would not be permitted pursuant to an administrative land withdrawal. The 1991 administrative land withdrawal flatly violates that commitment and contains no explanation for the reversal.

The DOI also determined that no Notice to Proceed could issue until DOE was in compliance with all environmental and public health and safety requirements. (ex. 29). The initial BLM Record of Decision reflected this commitment (55 Fed. Reg. 38586, 38587) (ex. 30). Despite the fact that the DOE has not obtained the mandatory permit under the State HWA, and the State Environment Department has preliminarily determined that the facility is not authorized to operate without a permit under interim status (ex.

31; Espinosa Aff.), the DOI has authorized the DOE to introduce radioactive waste to the site.

Similarly, DOI previously held, but has now abandoned, the position that the FSEIS is required to analyze the impact of legislative land withdrawal. In addition, DOI previously took the position that an administrative withdrawal for the WIPP is required to be accompanied by a report to Congress under 42 U.S.C. § 1714(c)(2), but this position has apparently been abandoned as well.

No explanation has been offered for such reversals of position.

**V. New Mexico Has Met the Standards Governing the Issuance of a Temporary Restraining Order**

The principal purpose of a temporary restraining order is the "preservation of the status quo" until the Court can review the matter more fully at the hearing for a preliminary injunction. Electronic Data Systems Federal Corp. v. General Services Admin., 629 F. Supp. 350, 352 (D.D.C. 1986).<sup>5</sup>

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<sup>5</sup> There is, of course, a private right of action to review the exercise by the Secretary of the DOI of FLPMA authority with respect to public lands. See National Coal Assoc. v. Hodel, 825 F.2d 523 (D.C. Cir. 1987) (plaintiffs have standing to complain of Secretary's failure to consider competitive impacts.) See also Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) (private plaintiffs entitled to bring APA action to review BLM action under FLPMA with respect to use of public lands); Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982) (private plaintiffs have standing to contest FLPMA enforcement actions alleged to have affected mineral interests).

The District Court should consider "(1) the plaintiff's likelihood of prevailing on the merits, (2) the threat of irreparable injury to the plaintiff in the absence of injunctive relief, (3) the possibility of substantial harm to other interested parties from the injunctive relief, and (4) the interests of the public." Foundation of Economic Trends v. Heckler, 756 F.2d 143, 151 (D.C. Cir. 1985). See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) and Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

The district court has "broad discretion" in balancing these factors. Vikonics, Inc. v. United States, 749 F. Supp. 315, 317 (D.D.C. 1990); accord Diverco, Inc. v. Cheney, 745 F. Supp. 739, 740 (D.D.C. 1990). Further, the "necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors." Holiday Tours, 559 F.2d at 844. So long as the latter three elements are present, "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." Id. at 844. Thus,

An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Holiday Tours, 559 F.2d at 844; accord Diverco, 745 F. Supp. at 740.

Where, as here, Congressional mandates have been violated, irreparable harm exists as a matter of law, and no further showing is necessary. "[I]t is well established that acts by Government agencies in derogation of statutory rights of the public or certain individual members of the public can constitute irreparable injury." Gates v. Schlesinger, 366 F. Supp. 797, 800 (D.D.C. 1973); see United States v. City of San Francisco, 310 U.S. 16, 30-31 (1940); Lathan v. Volpe, 455 F.2d 1111, 1116-1117 (9th Cir. 1972); Izaak Walton League of Am. v. Schlesinger, 337 F. Supp. 287, 295 (D.D.C. 1971).

Moreover, where the process mandated by NEPA has not been met, "more liberal standards for granting an injunction" apply. American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 965 (9th Cir. 1983). "[I]rreparable damage may be implied from the failure of responsible authorities to evaluate thoroughly the environmental impact of a proposed federal action." Id. at 966; accord Friends of the Earth, Inc. v. Coleman, 518 F.2d 323, 330 (9th Cir. 1975).

NEPA was intended to ensure that decisions about federal actions would be made only after responsible decisionmakers had fully adverted to the environmental consequences of the actions, and had decided that the public benefits flowing from the actions outweighed their environmental costs. Thus, the harm with which courts must be concerned in NEPA cases is not, strictly speaking, harm to the environment, but rather the failure of decision-makers to take environmental factors into account in the way that NEPA mandates.

Jones v. District of Columbia Development Land Agency, 499 F.2d 502, 512 (D.C. Cir. 1974); accord Scherr v. Volpe, 466 F.2d 1027, 1034 (7th Cir. 1972).

a. Likelihood of Success on the Merits

The State has a strong case and is likely to prevail on the merits of its FLPMA claim:

1. The Secretary of DOI has granted an administrative land withdrawal for a use which will require far longer than the time period provided in the public land order, if not, indeed, a permanent use.

2. The Secretary of DOI has granted an extension of an administrative land withdrawal without making the mandatory finding that the purpose of the initial withdrawal requires the extension. (43 U.S.C. § 1714(f); 43 C.F.R. § 2310.4(a)). Indeed, he could not so find, because the extension is made for the new and different purpose of introducing radioactive waste.

3. The Secretary of the DOI has failed to make the mandatory public report to Congress, containing, inter alia, a description of the proposed use and an estimate of the time required. (43 U.S.C. § 1714(c)(2) and (f); 43 C.F.R. § 2310.3-3(b)(2)).

4. The DOI made the 1991 withdrawal without properly considering relevant factors, such as the time required for the test phase and the retrievability of the waste.

5. DOI and DOE have for at least a decade recognized that waste could not lawfully be emplaced in the WIPP without Congressional authorization and have taken an illegal action to

try to force Congress to act. The ruse of "fully retrievable radioactive waste" will not suffice in these circumstances.

Under the NEPA there can be no dispute as to the inadequacy of the FSEIS, namely:

6. The FSEIS fails to consider and analyze the reasonable alternative of a withdrawal of the land involved pursuant to act of Congress, with the time frame and conditions of any testing with radioactive waste governed by legislation.

Under the APA there are unquestionable violations of the requirement that fundamental reversals of agency interpretation must be predicated on a reasoned analysis; see Southwestern Electric Power Co. v. FERC, 810 F.2d 289 (D.C. Cir. 1987); Texas Oil & Gas Corp. v. Watt, 683 F.2d 427 (D.C. Cir. 1982):

7. The DOI reversed without explanation the determination that radioactive waste would not be introduced to the WIPP site without Congressional authorization.

8. The DOI reversed without explanation the position that emplacement of radioactive waste must be preceded by compliance with all environmental and safety requirements.

9. The DOI reversed without explanation its decision that the FSEIS was required to evaluate the alternative of a legislative land withdrawal.

10. The DOI reversed without explanation its decision that an administrative land withdrawal must be accompanied by a public report to Congress, containing, inter alia, a description of the proposed use and an estimate of the time required.

In these circumstances, the Court is required to conclude that the State is likely to succeed on the merits of its claims.

b. Irreparable Injury to the State

Several types of recognized irreparable injury face the State if injunctive relief is not granted. The NEPA is designed to require that federal agencies scrutinize the environmental impact of a federal action and all reasonable alternatives. In failing to analyze the alternative of legislative land withdrawal, such as Congress is now considering, or the consequences of nonretrievability of waste, the DOI and the DOE have ignored NEPA's requirements. This is "more than a technicality; it is an extremely important statutory requirement to serve the public and the agency before major federal actions occur." Foundation on Economic Trends v. Heckler, 756 F.2d 143, 157 (D.C. Cir. 1985). The failure to analyze the environmental impact is, in itself, irreparable injury: "If plaintiffs succeed on the merits, then the lack of an adequate environmental consideration looms as a serious, immediate and irreparable injury." (Id.)

DOI and DOE have avoided their obligations under the NEPA to analyze and consider the consequences and possible benefits of legislative land withdrawal. The State is injured, because, if the NEPA had been complied with, and the alternative of legislative withdrawal fully explored, additional safeguards might have become available. Indeed, DOI expressly told DOE that DOI would not support administrative withdrawal unless its consequences were substantially less severe than legislative withdrawal. (ex. 36).

It is plain that the legislative alternative would be substantially less disruptive and more beneficial to the State. Thus, to proceed in violation of the NEPA denies the State the opportunity to have DOI's best informed judgment on the very issue that DOI deemed relevant. Clearly, this is irreparable injury. Foundation on Economic Trends v. Heckler, supra; Friends of the Earth v. Coleman, supra.

Moreover, the implications of the recently disclosed test room instability were not analyzed in the FSEIS. The instability may well lead to the nonretrievability of the test waste. The consequences of the nonretrievability clearly have not been examined, and they need to be evaluated for the benefit of the DOI, the DOE, and those affected by their decisions, such as the State.

The injury under the FLPMA is likewise irreparable. The Congressionally imposed and Constitutional restrictions on the administrative withdrawal of public land have been ignored. The transport of dangerous radioactive waste across the highways and its introduction into a new area is a matter of great civic anxiety and concern. The evasion of the political and legislative process entrusted by the Constitution to Congress engenders disrespect for governmental processes. Further, based upon an unlawful public land order, the DOE plans immediately to bring radioactive waste to an underground location which has passed none of the standards which apply to disposal of a nuclear waste repository. The underground repository is presently geologically unstable and

cannot be predicted to remain intact. The site may give such warning of collapse that access must be barred within approximately a year. The roof and floor will converge and prevent access within less than a year. Unless the Court intervenes, the DOE will be able to introduce radioactive waste which may become unretrievable by reason of collapse of the underground facility, impending collapse, or loss of required clearance, before a final order can issue. (Parker Aff. ¶¶ 31, 44-45, 47; Fernandez Aff. ¶¶ 9, 21, 22). This is a clear case of irreparable injury.

The State has the obligation to ensure the health and safety of citizens along the highway route of radioactive waste transportation to the WIPP. Hospital facilities are simply not ready. Most hospitals at Albuquerque, Santa Fe, Artesia, Roswell, Raton, and Las Vegas, New Mexico, and Trinidad, Colorado, lack essential facilities to isolate patients contaminated with radiation; procedures to treat radiation exposure cases; detectors, and essential drugs. (Deming Aff. ¶ 3). Thus, the citizens of New Mexico will be exposed to the risk of accident without adequate medical facilities to deal with the consequences, by reason of illegal and improper shipments.

In addition, the State must expend its police, fire and other emergency resource and sustains other financial impacts by reason of shipments of waste to the WIPP. Such costs are beyond remedy by legal proceedings for money damages. (Wentz Aff. ¶¶ 12-13).

c. Lack of Injury to Other Interested Parties

It is fundamental here that DOE has no cognizable injury because Congress has the right to determine whether, when and under what circumstances radioactive waste should be implanted in federal lands in New Mexico. DOE has waited an extended period to obtain Congressional authorization, and the further delay occasioned by the proposed order is inconsequential.

Moreover, in the period in which a hearing for a preliminary injunction could be held, DOE plans to ship small amounts of waste, enough to make a powerful political point, but not enough to have any impact on the full length test results. (ex. 1).

Further, there is no substance to any asserted need to conduct the tests at the WIPP. DOE's test phase is not required by any regulatory requirement. The EPA standards for the management and disposal of radioactive waste, as promulgated in 1985, 40 C.F.R. Part 191, and in the most recent draft form for reissuance (ex. 37), impose no requirement of on-site tests with radioactive material. Thus, DOE currently has no plan to conduct on-site tests with radioactive waste at the proposed high level waste disposal site at Yucca Mountain, Nevada. (Lehman Aff. ¶ 22). Only at the WIPP are tests proposed to be conducted with radioactive waste.

Linda L. Lehman, a professional geologist and hydrologist with extensive experience in nuclear waste disposal and performance evaluations of proposed disposal sites, has reviewed the current status of the DOE's performance assessment at the WIPP and has reached three principal conclusions:

1. There is no necessity for the dry bin scale tests proposed by the DOE to be conducted underground at the WIPP. They could be conducted at a surface laboratory facility, with less risk and inconvenience. (§§ 19-21, 23).

2. Remaining elements of the DOE test plan cannot now be conducted and, thus, a prohibition on the introduction of waste would not impair the DOE's interests. (§§ 24-27).

3. Information to be obtained from the dry bin-scale tests is of unknown importance and appears to be of marginal importance to the performance assessment process. (§§ 28-49).

Lehman concludes that there is a fundamental lack of justification for the dry bin tests at WIPP, since they furnish limited data, are not pertinent to compliance with standards governing the disposal phase, when the repository is sealed. (§ 28).

Dr. Lokesh Chaturvedi, of the Environmental Evaluation Group, also stated that if the tests were done elsewhere than at the WIPP, the test data would be available sooner, and the data would be more reliable. (Chaturvedi aff. ¶ 17).

The DOE does not plan to use the bin test data to carry out a performance assessment. The current DOE schedule provides that it will complete the performance assessment of the repository by 1994 (ex. 38 p. 2). The dry bin tests are not expected until after that date. Moreover, it will take two years simply to move the waste taken to the WIPP in order to run the tests. (Chaturvedi

aff. ¶ 17). Obviously, the test data from the dry bin tests will not be available for use in the performance assessment.

**d. The Public Interest Supports an Injunction**

It is clearly in the public interest that the Nation's first nuclear waste repository should be objectively examined and found in compliance with applicable requirements, and that it not be the subject of an evasion of the Constitutional process. If the DOE succeeds in implementing its Test Phase, the danger exists that the WIPP will become a nuclear waste repository by default. Such result plainly violates the public interest.

The interests of the public lie in the compliance by federal agencies, in large projects as well as small ones, with all requirements of the law; in observance of the limitations which Congress has placed upon the use of the administrative land withdrawal power; and in an administrative procedure that is governed by principle and consistency rather than responding ad hoc to political pressures. No valid public purpose is served by ignoring these principles of law. A restraining order should issue.

**CONCLUSION**

For the reasons set forth herein the Court should enter its order in the form annexed hereto, temporarily enjoining and prohibiting the DOE and the DOI from introducing radioactive waste to the WIPP site pending further proceedings.

Respectfully submitted,

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Dated: October 9, 1991

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_)  
STATE OF NEW MEXICO, ex. rel. )  
TOM UDALL, Attorney General, )  
 )  
Plaintiffs. )  
 )  
v. )  
 )  
JAMES D. WATKINS, Secretary of ) Civil Action No. \_\_\_\_\_  
the Department of Energy, MANUEL )  
LUJAN, JR., Secretary of the )  
Department of the Interior, )  
DAVE O'NEAL, Assistant Secretary of )  
the Department of the Interior, )  
CY JAMISON, Director of the Bureau )  
of Land Management, UNITED STATES )  
DEPARTMENT OF ENERGY, and UNITED )  
STATES DEPARTMENT OF THE INTERIOR, )  
 )  
Defendants. )  
\_\_\_\_\_)

**MOTION FOR TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

Plaintiff, the State of New Mexico (the "State"), through its Attorney General, Tom Udall and the undersigned attorneys, hereby moves, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a temporary restraining order (pending the outcome of a hearing for a preliminary injunction) prohibiting defendants from taking any action to introduce radioactive waste into the Waste Isolation Pilot Plant ("WIPP") in Eddy County, New Mexico.

Submitted in support of this motion are: a Memorandum in Support of Motion for a Temporary Restraining Order; ten affidavits and verified statements; a volume of exhibits containing official federal government documents and correspondence; the required

papers relating to service and notice, and a proposed order. Plaintiff notified counsel for defendants, by telephone and by hand delivery on October 9, 1991, that it would file this motion on October 9, 1991, as verified in the attached certificate.

As grounds for the motion, plaintiff states as follows:

The WIPP, located in excavated salt beds on federal land in New Mexico nearly one-half mile underground, was initially selected by the Department of Energy ("DOE") to be used for storage of its nuclear waste. The WIPP has experienced substantial structural problems. After DOE failed to receive the necessary Congressional approval to "withdraw" permanently the federal land comprising the WIPP and to use it for radioactive waste storage, the Department of Interior ("DOI"), at the request of DOE, purported to withdraw the land for a limited period, for the purpose of allowing DOE to ship "retrievable" radioactive waste to the WIPP, ostensibly so that certain tests could be performed. However, there is no purpose in performing such tests at the WIPP site; the results will be unusable; the nuclear waste will not be retrieved; and its emplacement will become permanent.

The plan to emplace such waste violates several statutes and will inflict irreversible damage upon the State and will result in substantial costs to it that are not recoverable through legal process. On October 3, 1991, DOE notified the state that it will commence shipping such waste by October 10, 1991.

As further grounds, more fully set forth in the aforesaid memorandum, the State asserts:

- (1) the State is likely to prevail on the merits because:
  - (a) Congress is constitutionally vested with exclusive control over the use of federal land. It gave DOI authority to "withdraw" federal land only for limited-term uses (i.e., not more than twenty years"), Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1714(c)(1)). Here, DOI has, ultra vires, authorized a withdrawal for DOE to utilize the WIPP as a de facto permanent nuclear waste repository;
  - (b) DOE and DOI have improperly bypassed pending Congressional consideration of a permanent "withdrawal" of the land that would be accompanied by environmental, oversight, health and other safeguards. The attempt of DOI and DOE to bypass Congress is manifestly invalid. The so-called "tests" for which entry of radioactive waste is required need not in fact be conducted at WIPP, and if conducted there, will not yield usable results, and the radioactive waste will not be retrievable, so that the DOE-DOI effort is in fact one to introduce such waste for permanent disposal in violation of law;
  - (c) DOI further violated FLPMA by "withdrawing" the WIPP site for the introduction of radioactive waste

without, as required, "notify[ing] both Houses of Congress" (43 U.S.C. § 1714(c)(1));

(d) the DOI and DOE also failed to consider Congressionally-authorized withdrawal as a reasonable alternative plan, as required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., and the regulations of the DOI, 40 C.F.R. § 1503.14(a);

(e) The DOI withdrawal order directly conflicts with its earlier withdrawal orders relating to WIPP, which provided that "no radioactive waste will be stored or disposed of under the terms of this withdrawal" (48 Fed. Reg. 3878), and there was no reasoned basis provided for this departure, as required by law, Southwestern Elec. Power Co. v. FERC, 810 F.2d 289, 290 (D.C. Cir. 1987);

(f) The DOI further violated FLPMA by purporting to extend its earlier withdrawal order; however, an extension is permitted only where the Secretary finds that "the purpose for which the withdrawal was first made requires the extension" (43 U.S.C. § 1714(f)), whereas, in contrast, here the purpose of the "extension" plainly conflicts with the prior purpose because it permits the introduction of radioactive waste;

- (g) The DOI further violated FLPMA in that the use for which the "withdrawal" is intended, i.e., the DOE's proposed "tests," cannot be completed by the end of the term of the withdrawal order (only six years, 1997); the prescribed "tests" will take at least eight to ten years to complete;
- (2) there is irreparable injury to the State and its citizens from the substantial probability that nuclear waste, once introduced into WIPP, will become nonretrievable due to presently existing unstable conditions, including stress failures of the roofs of the underground test rooms; in fact, DOE's own panel disbelieved that the site could accommodate, on a retrievable basis, the waste for the time required for DOE's tests;
- (3) entry of the order requested would not substantially harm defendants as there is no present, much less immediate, need that the tests be performed; indeed, the "tests" have not been shown to have any probative value; and the tests can readily be conducted at a surface laboratory facility without the risk of permanent contamination;
- (4) the public interest favors entering the requested restraining order here, where (a) federal statutes require that Congress, not the DOI, authorize a permanent "withdrawal" of the land for such purposes; and (b) pending Congressional

consideration was bypassed; (c) the decisionmaking process for the introduction of nuclear waste into a permanent repository was fatally flawed in violation of federal statutes governing the use of federal land and the requirement to consider other reasonable alternatives; and (d) the State, its citizens and the environment are threatened needlessly with nuclear waste tests that have no meaningful purpose.

- (5) a balancing of factors (2) - (4) weighs heavily in favor of granting relief to the State, and thus lessens the necessity for a detailed assessment, at this early stage, of the merits, which requires familiarity with a complex statutory and regulatory scheme, see Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977).

WHEREFORE, for all the reasons stated herein, the motion should be granted; the DOI "withdrawal" order and "notice to proceed" should be enjoined from their operation to the extent that the DOE should be enjoined from introducing transuranic waste into WIPP; the DOE shall be enjoined from introducing transuranic waste into the WIPP; and the DOI shall be enjoined from allowing a withdrawal of public land for such purpose, all pending the outcome of a hearing on the State's motion, here made, for a preliminary injunction.

Respectfully submitted,

