Statement to the

New Mexico Radioactive Waste Consultation

Task Force

concerning

Litigation about the

Waste Isolation Pilot Plant

Office of

New Mexico Attorney General

October 6, 1992

The State's litigation concerning WIPP is primarily based on the Federal Land Policy and Management Act ("FLPMA"). This Act was adopted in 1976 after a thorough review of public land laws by the Public Land Law Review Commission, a special commission. The statutory provision concerning public land withdrawals is in 43 USC §1714.

FLPMA defines a land withdrawal as: "Withholding an area of Federal land from settlement, sale, location or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land ... from one department, bureau or agency to another department, bureau or agency."

An administrative land withdrawal is based on an application by the agency desiring to use the land, which is DOE here, review by BLM, and action by the Interior Secretary. FLPMA §1714 says that the Interior Department may not make a land withdrawal for a permanent or indefinite land use. Rather, an administrative withdrawal may only be made for a specific term, no more than 20 years. Further, when DOI makes an initial withdrawal it must provide Congress with a full report, including a description of the proposed use of the land and the expected time needed for the land use and the environmental effects of the proposed withdrawal.

Under FLPMA Congress may then within 90 days pass a concurrent resolution disapproving and nullifying the withdrawal.

There is a separate FLPMA provision for withdrawal extensions. Section 1714(e) provides that any extension must comply with the limitations on original withdrawals -- for example, it may not be permanent -- but there are noteworthy differences. There is no report to Congress, and there is no opportunity for legislative disapproval. To justify this abbreviation there is an important restriction: The withdrawal may be extended or further extended only if the Interior Secretary finds that the extension is necessary for the purpose for which the withdrawal was first made.

In 1980 DOE filed its application for land withdrawal for an 8-year period. The stated purpose was design review only. The withdrawal was made on March 23, 1982. In its report to Congress DOI stated that the withdrawal is not for WIPP or for storage of nuclear waste in any form.

In early 1983 DOE requested a second 8-year withdrawal, this time for the purpose of construction of WIPP. DOE did not request an extension of the previous withdrawal but a new withdrawal, since a new purpose was contemplated. The 1983 application again said that introduction of radioactive waste would be prohibited. DOI granted the withdrawal, stating that the purpose was construction and protection of the site, and added:

"This order does not authorize the use or occupancy of the lands hereby withdrawn for the transportation, storage or burial of any radioactive materials."

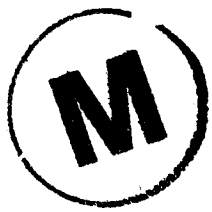
In early 1989 DOE applied to DOI to modify the 1983 withdrawal in four respects:

A. To change the purpose to provide for a test program using radioactive waste.

B. To delete the prohibition on radioactive waste at the site.

C. To increase DOE's exclusive use area.

D. To extend the term through June 29, 1997 to provide sufficient time for tests and retrieval "if necessary."



The BLM processed this application, and on January 22, 1991, the Interior Department granted the withdrawal extension and modification that DOE had requested.

DOI's action did not conclude with the January withdrawal. FLPMA §1714 enables the House Interior Committee to determine that an emergency situation exists and to notify the DOI Secretary, at which point the Secretary is required to made an emergency withdrawal "immediately" for a period of up to three years.

On March 6, 1991, the House Interior Committee passed an emergency resolution, directing Secretary Lujan to withdraw the WIPP site from receipt of radioactive waste and reciting that Congress must determine the terms and conditions under which WIPP may receive radioactive waste.

Secretary Lujan announced that he would withhold introduction of radioactive waste for 90 days to allow Congress to act. DOI gave public notice that it would consider modifying the WIPP public land order and suspending the receipt of radioactive waste for 90 days. Ironically, the FLPMA regulations require a 90 day comment period for such a modification. DOI on October 3, 1991, issued a decision not to modify the public land order.

Throughout late 1991 there was considerable speculation whether DOE would use the January 1991 administrative withdrawal extension order by the Interior Department to introduce waste to the WIPP site. The issue was postponed by the House Interior Committee's resolution on March 6, 1991, directing rescission of that withdrawal order, and postponed again while DOE Secretary Watkins negotiated with the Senate and the House of Representatives concerning withdrawal legislation.

By August our office foresaw the distinct possibility of DOE's use of the administrative withdrawal, and we began preparation to obtain a temporary restraining order.

We considered the choice of forum. The dispute under the Federal Land Policy and Management Act concerning the lawfulness of the administrative withdrawal order was really a dispute between Congress and the Executive, in which the State was threatened. Our office wanted to litigate in a court where congressmen and national environmental organizations would be encouraged to intervene, and which would appreciate the nature of the intragovernmental conflict, would not defer to a federal agency's decision, and would wish to prevent the conflict from being resolved unilaterally by DOE moving waste to the site. These factors led us to Washington.

There were other major tactical questions. To obtain an injunction one must normally show irreparable injury. Our objective was to prevent WIPP from being opened by the introduction of radioactive waste. We feared that if any waste came to WIPP, it would be nonreturnable, and Congress would find that the initiative had been taken from it, and it might have to legislate as DOE dictated. We felt we could carry the point about irreparable injury by demonstrating that the State's land would be impregnated with radioactive waste which probably could not be removed for two specific reasons.

First, there is the physical risk of instability of the WIPP test room. WIPP rooms had begun to collapse, starting in 1990. Obviously, if a room collapses, or threatens to collapse, one cannot extract test waste from that room. To make this point we

obtained affidavits from four mining engineers, including one member of DOE's own expert panel, Jack Parker.

Second, there is the difficulty of finding another place to put the waste. If the court decided, six months or a year after allowing waste to be introduced, that the waste must be removed, the court would need a place for DOE to put the waste. DOE had said in a permit application under the state Hazardous Waste Act that it would take eight years simply to identify another storage site.

The other main issue on a preliminary injunction application is injury to the defendant. We prepared evidence that the tests did not need to be conducted at WIPP. We also expected DOE to argue that WIPP was ready to go, and no other test location was ready. Thus, we also assembled evidence that the bin tests would not assist the assessment of WIPP's performance under the EPA disposal standard. We obtained affidavits from scientists familiar with WIPP, stating that the gas generation data expected from the bin tests would not be important to the result of the performance assessment and that various safety constraints on the bin tests precluded reliable gas data in any case.

We got notice on October 3 that shipments would commence sometime after October 10. We filed suit on October 9. We charged violations of FLPMA, by making an indefinite withdrawal of public

land, which is in excess of the Interior Department's powers; by extending an existing withdrawal for a new and different purpose, contrary to the FLPMA terms which permit an extension only if the purpose for which the withdrawal was first made requires the extension; and by failing to make a report to Congress, as FLPMA also requires. NEPA violations were also alleged.

When we filed suit DOE said it would withhold shipment until Judge John Garrett Penn, who was assigned to the case, decided the preliminary injunction motion.

As we hoped, three congressmen -- Bill Richardson, Peter Kostmayer, and Wayne Owens, and four environmental organizations moved to intervene, as did the State of Texas.

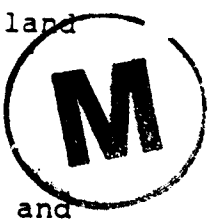
The Judge set November 15 for argument of the preliminary injunction. The Attorney General made the argument himself and focused on two main points: First, that DOE's use of administrative withdrawal bypassed Congress when Congress was actively considering legislation. Second, the problem of irretrievability of waste. The Judge's questions involved issues such as the expected life of the test rooms, the new roof support system, warning of any collapse, where waste would go after it is retrieved, whether it was necessary to run tests in WIPP, and why DOE would not wait for Congress.

The district court issued its preliminary injunction on November 26, 1991. Judge Penn found that the State was likely to succeed on two FLPMA grounds:

First, the withdrawal extension had a purpose different from the original withdrawal.

Second, there was a great likelihood that the waste will not be retrievable after the test phase, making the withdrawal permanent.

The court found irreparable injury based upon the inability to retrieve waste, reasoning that Congress could not deal with the public land under the same circumstances as under the previous land withdrawal, which barred waste.



On November 26 our co-plaintiffs, the congressional and environmental intervenors, had moved for partial summary judgement on FLPMA grounds, based on the unlawful extension of an existing land withdrawal for a new purpose. The State joined in the motion. On February 3 the district judge ruled on both motions, granting a permanent injunction. The injunction was also based on the Resource Conservation and Recovery Act ("RCRA").

The FLPMA ruling was based on the statutory limitation, restricting extensions to the purpose of the initial withdrawal.

The defendants had relied upon the power to modify a withdrawal, and the court held that the modification power may be employed only in accordance with the purpose limitation.

The Court of Appeals expedited the appeal. The appellate panel was Chief Judge Mikva, Judge Ruth Bader Ginsburg, and Judge Henderson. Argument was on May 15. The Attorney General again presented the State's case, sharing time with the intervenors. The court affirmed in an opinion issued on July 10.

DOE had argued, first, that tests with radioactive waste come within the overall purpose of the 1983 land withdrawal.

The Court of Appeals said that this argument is "refuted by the record." Thus, the "purpose" of a withdrawal is determined from the initial withdrawal application and the statement of purpose and other restrictions contained in the public land order. It is not determined by reference to the supposed overall purpose of the project.

DOE had also argued that it could modify the 1983 withdrawal to change the purpose and then extend the withdrawal. The court rejected this argument, explaining that, even if DOI lawfully modified the purpose of the 1983 withdrawal to include tests, it could not extend the withdrawal for that new purpose, because an

extension is tied to the purpose for which the withdrawal was first made.

The court observed that on an initial withdrawal the purpose and the environmental risks are reported in detail to Congress, which may then pass a resolution disapproving the withdrawal, but an extension carries no reporting requirement and must be based upon the original report. Here, the new purpose of testing with radioactive waste was neither described in the report when the withdrawal was first made nor disclosed in any later report. The statutory report, the court explained, is a critical part of the scheme for congressional control over public land withdrawals by the disapproval mechanism.

Concerning injunctive relief, the court did not find it necessary to review and affirm findings of irretrievability. It said that the injunction against introduction of waste simply held DOE and DOI to the limits of their authority and their pledge to Congress --to receive no waste under the 1983 withdrawal. The court suggested that environmental injury was also a factor, when it said that money damages would not be "responsive to the environmental and separation of powers concerns that complainants raise."

At present, the defendants can still petition for certiorari in the Supreme Court. Their time expires on October 8, 1992.

A future administrative land withdrawal is not impossible. But it is now recognized that DOI must make an adequate report on the proposed land use, its environmental effects, and the time required for testing and retrieval.

There is also the possibility that Congress may resolve the dispute by legislation, which is currently under consideration.