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

UNITED STATES OF AMERICA, Plaintiff, v. NEW MEXICO ENVIRONMENT DEPARTMENT, and JAMES KENNEY, Secretary (in his official capacity) Defendants.	)	No. 2:19-cv-46- RB-SMV

THE UNITED STATES' OPPOSITION TO THE DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

In this action, the United States challenges a hazardous waste disposal permit ("Permit") issued to Cannon Air Force Base by Defendants New Mexico Environment Department and James Kenney, Secretary (jointly referred to as "NMED"). The United States invokes this Court's jurisdiction over "civil actions, suits or proceedings commenced by the United States." 28 U.S.C. § 1345. NMED does not deny the Court has jurisdiction; however, it requests that the Court decline to exercise that jurisdiction based on the *Younger*, *Pullman*, and *Colorado River* abstention doctrines. None are applicable to the United States' challenge to the Permit.[1] NMED also moves this Court to dismiss the complaint for failing to state a claim upon which relief can be granted, and alternatively for a more definite statement. The United States included sufficient factual detail to allege a cause of action challenging the definition of hazardous waste in the final

[1] Both this Court and the Tenth Circuit have exercised jurisdiction over actions by the United States seeking review of permits issued by NMED to federal facilities. *United States v. New Mexico*, 32 F.3d 494 (10th Cir. 1994); *United States v. New Mexico*, slip op., Case 1:99-cv-01280-ELM-RLP (D.N.M) (July 24, 2000) (attached).

permit, and the complaint is sufficiently detailed to allow the defendants to respond. For all of these reasons, NMED's motion to dismiss should be denied.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6921-39g, provides requirements for the cradle to grave management of hazardous waste. The Environmental Protection Agency ("EPA") administers the RCRA hazardous waste program and issues implementing regulations. *See* 40 C.F.R. § 260.1 *et seq.* RCRA, however, employs cooperative federalism and allows states to become authorized to implement a state hazardous waste program that operates in lieu of the RCRA Subtitle C hazardous waste program. 42 U.S.C. § 6926(b). To become authorized, the state hazardous waste program must be at least as stringent as the federal program. *Id.* RCRA waives federal sovereign immunity as to "Federal, State, interstate, and local requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal and management." 42 U.S.C. § 6961(a).

New Mexico operates an EPA-authorized state hazardous waste management program under the New Mexico Hazardous Waste Management Act of 1978 ("HWA"), N.M. Stat. Ann. §§ 74-4-1 *et seq*. The state program was authorized pursuant to the terms at 40 C.F.R. § 272.1601. New Mexico generally does not allow rules for the management of hazardous waste that are more stringent than federal regulations under RCRA. N.M. Stat. Ann. § 74-4-4(A). As part of the program, New Mexico issues operating permits to permittees to conduct certain hazardous waste operations. N.M. Stat. Ann. § 74-4-4.2. In order to receive a permit, an entity must submit an application to NMED. *Id.* NMED processes the application according to requirements under the HWA Section 74-4-4.2 and New Mexico Hazardous Waste Management

Regulations, NMAC § 20.4.1.901. NMED issues a draft permit and receives comments prior to issuing the final permit. NMAC § 20.4.1.901. The HWA authorizes "any person who is or may be affected by any final administrative action" by NMED to appeal that action to the New Mexico Court of Appeals within 30 days. N.M. Stat. Ann. § 74-4-14(A).

II. ADMINISTRATIVE AND LITIGATION BACKGROUND

On December 19, 2018, NMED issued the Permit to Cannon Air Force Base under the HWA, replacing a prior hazardous waste permit. Complaint ¶ 1, Exhibit A. On January 17, 2019, the United States filed this action for declaratory and injunctive relief alleging that certain terms of the Permit exceed NMED's authority. That same day the United States also filed a protective notice of appeal challenging the permit in the New Mexico Court of Appeals. The United States intends to seek a stay of the state proceedings pending resolution of this federal case.[2]

ARGUMENT

I. THIS COURT HAS JURISDICTION TO HEAR THIS CASE AND SHOULD NOT ABSTAIN FROM EXERCISING JURISDICTION.

NMED does not contest this Court's jurisdiction over this case under 28 U.S.C. §§ 1331 (granting jurisdiction over federal questions) and 1345 (granting jurisdiction over actions commenced by the United States). And where jurisdiction exists, the obligation for federal courts "to hear and decide a case is 'virtually unflagging.'" *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (*citing Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). Federal courts have "'no more right to decline the exercise of

[2] NMED has filed a motion to dismiss the state case alleging that the United States did not timely file a required docketing statement. The United States' response to that motion is due March 22.

jurisdiction which is given, than to usurp that which is not given.'" *Sprint*, 571 U.S. at 77 *(quoting Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)). The mere existence of parallel federal and state proceedings does not relax federal courts' obligation to exercise jurisdiction where provided. 571 U.S. at 77.

NMED argues that although the Court has jurisdiction it should abstain from hearing this case under *Younger v. Harris*, 401 U.S. 37 (1971). Abstention, however, "'is the exception, not the rule,' and hence should be 'rarely . . . invoked.'" *Brown ex rel. Brown v. Day*, 555 F.3d 882, 888 (10th Cir. 2009) (*quoting Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992)). *See also Sprint*, 571 U.S. at 81-82 (*Younger* abstention applies only in exceptional cases). *Younger* abstention originally applied only to state court criminal prosecutions, a "far-from-novel" exception to a federal court's obligation to exercise jurisdiction. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 364 (1989) ("*NOPSI*"). *Younger* was based primarily on comity, "a proper respect for state functions," and was subsequently extended to certain "civil enforcement proceedings" and "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 368.

In *Sprint*, the Court held that *Younger* applies only to ongoing state criminal proceedings; certain civil enforcement proceedings that are akin to criminal prosecutions; and civil proceedings implicating a state court's ability to perform its judicial functions. 571 U.S. at 78. The present case does not fall into any of these categories. First, it is neither an ongoing state criminal proceeding nor a civil enforcement proceeding. The case was initiated by the United States, not New Mexico, and as NMED itself notes in its motion is simply a challenge to a

"renewal and revision [to a permit] previously issued in 2003."[3] Def. Mot. to Dismiss at 3; *see* Complaint ¶ 2. Second, it does not implicate a New Mexico state court's ability to perform its judicial functions; the United States does not ask this Court to enjoin or otherwise address an ongoing state proceeding. Under governing Supreme Court precedent, *Younger* abstention is thus inappropriate here.

According to NMED, a federal court must abstain from hearing a case under *Younger* any time (1) there is an on-going state judicial proceeding, (2) the state forum is sufficient to provide an adequate opportunity to address the question contained in the complaint, and (3) the state proceedings involve important state interests. Def. Mot. to Dismiss at 5. In so arguing, NMED simply ignores the limits on *Younger* as defined in *Sprint.* and recognized by the Tenth Circuit. *See Sprint*, 571 U.S. at 81-82 (three-part test cited by NMED is inadequate because it "would extend *Younger* to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest"); *Planned Parenthood of Kansas v. Anderson*, 882 F.3d 1205, 1221 (10th Cir. 2018) ("To decide [whether to abstain], we ask 'whether there is an ongoing proceeding,' and then we 'decide whether that proceeding is the type of state proceeding that is due the deference accorded by *Younger* abstention.'").

NMED's failure to address *Sprint* is particularly odd given that one of the cases that NMED cites explicitly recognizes the threshold requirements established in *Sprint*, explaining that "[b]efore examining the three-factor test, *the Court must first address whether this case is one that allows for Younger abstention at all*." *Gerhardt v. Mares*, 179 F. Supp. 3d 1006, 1056

[3] In *NOPSI*, the Supreme Court stated that "it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action." 491 U.S. at 368.

(D.N.M. 2016) (emphasis added); Def. Mot. to Dismiss at 4 (citing *Gerhardt*).[4] NMED makes no effort whatsoever to show that this case falls within the three categories of cases identified in *Sprint* as subject to the *Younger* abstention doctrine. Nor, indeed, could NMED do so – as discussed above, this case does not present any of the "exceptional circumstances" in which *Younger* applies.

In cases that do fall into one of the three categories identified in *Sprint*, a federal court considers the factors NMED relies on as "*additional* factors . . .before invoking *Younger*" (emphasis in original). *Sprint*, 571 U.S. at 81. Even if this were the type of case for which *Younger* abstention were available, however, NMED has failed to demonstrate that the state proceeding in this case involves sufficiently important state interests to warrant abstention.[5] As to the state's undisputed interest in environmental protection, that interest is shared by the federal government. New Mexico has authority from the EPA to administer and enforce a hazardous waste program in lieu of the federal RCRA program. 40 C.F.R. § 272.1601. And although states may adopt regulations that are more stringent than the EPA's federal program, New Mexico instead explicitly prohibited regulation of hazardous waste more stringently than federal standards. N.M. Stat. Ann. § 74-4-4(A). This Court should not decline jurisdiction based on the mere existence of state environmental laws that are authorized under federal authority to operate

[4] Other cases that NMED relies on, *see* Def. Mot. to Dismiss at 4-5, involved proceedings falling within one of the three "exceptional" categories recognized in Sprint Communications. *See Hunter v. Hirsig*, 660 Fed. Appx. 711, 716 (10th Cir. 2016) (*Younger* abstention available for state civil enforcement proceeding); *Goings v. Sumner County Dist. Attorney's Office*, 571 Fed. Appx. 634 (10th Cir. 2014) (*Younger* abstention available for state criminal prosecution). *Crown Point I LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211 (10th Cir. 2003) predates *Sprint Communications*, and in any event found *Younger* abstention not warranted.

[5] The United States does not dispute that, if the three-factor test did apply, the first two factors would be satisfied: there is an ongoing state judicial proceeding, and that forum would provide an adequate opportunity to address questions contained in the complaint.

in lieu of a federal program. Nor has NMED demonstrated that its interest in requiring exhaustion of state administrative remedies is sufficient to justify this Court from declining to exercise jurisdiction. The question of whether the United States was required to, but did not, exhaust state administrative remedies before seeking judicial review is one that is well within the competency of this Court.

In addition to arguing for abstention under *Younger*, NMED raises the *Pullman* and *Colorado River* abstention doctrines in a single sentence, without elaborating on how these doctrines are applicable to this case. Def. Mot. to Dismiss at 8-9. And in fact, neither doctrine applies. *Pullman* abstention seeks to avoid unnecessary federal court review of the constitutionality of state law. *See Growe v. Emison*, 507 U.S. 25, 32 (1993) (*citing Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941)); *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1118-19 (10th Cir. 2008). There is no constitutional challenge to a state law in this case, so *Pullman* abstention clearly does not apply. The *Colorado River* abstention doctrine is based on "reasons of wise judicial administration" and is "considerably more limited than other abstention doctrines." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976). The Supreme Court has articulated many non-exclusive factors relevant to *Colorado River* abstention, and noted that application is not mechanical and will vary from case to case. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15-16 (1983). At root, however, *Colorado River* abstention seeks to conserve judicial resources and avoid piecemeal litigation. *Id.*; *see also D.A. Osguthorpe Family Partnership v. ASC Utah, Inc.*, 705 F.3d 1223, 1233-34 (10th Cir. 2013) (abstaining from federal jurisdiction where federal complaint followed over four years of "aggressive" litigation in a "sprawling case" with thousands of entries in a two-hundred page record). In this case, the state permit appeal and

federal complaint were filed simultaneously, both actions are in the initial stages of litigation, and the United States will seek a stay of the state litigation. This case thus does not implicate the issues of judicial economy relevant to *Colorado River* abstention.

II. THE COMPLAINT STATES A CLAIM AND PROVIDES SUFFICIENT DETAIL FOR NMED TO RESPOND

The Tenth Circuit has established that "[b]ecause of § 1345, the United States as party plaintiff is not subject to the well-pleaded complaint rule." *Federal Home Loan Bank Bd., Washington, D.C. v. Empie*, 778 F.2d 1447, 1450 (10th Cir. 1985). Even if that rule did apply, the United States has met its requirements. In order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The United States' complaint meets this standard.

The HWA provides a cause of action for "any person who is or may be affected by any final administrative action." N.M. Stat. Ann. § 74-4-14. The United States' complaint alleges that NMED issued a permit to Cannon AFB under the HWA. Complaint ¶¶ 1, 2, 18. The complaint also alleges that the Permit contains a definition of hazardous waste. *Id.* ¶ 2. This is all that is required to state a claim challenging the Permit's definition of hazardous waste. Whether the definition of hazardous waste contained in the Permit is inconsistent with the HWA and its implementing regulations and exceeds the scope of RCRA's sovereign immunity waiver is a pure question of law. Under NMED's pleading theory, the United States would need to make legal arguments appropriate for a motion for summary judgment in order to survive a motion to dismiss.

Nor is NMED entitled to a more definite statement of the United States' claim. The complaint clearly articulates that the United States is challenging the definition of hazardous

waste in the Permit. NMED was able to identify in its motion that the United States alleges that the definition of hazardous waste in the issued Permit and is inconsistent with the HWA and its implementing regulations and so exceeds the scope of RCRA's sovereign immunity waiver. *See* Def. Mot. to Dismiss at 9-11. The specific arguments regarding how the definition of hazardous waste in the Permit is unlawful and exceed RCRA's sovereign immunity waiver are legal arguments, and NMED will have an opportunity to respond to those arguments later in this litigation. For the complaint, it suffices that the United States has included sufficient factual detail to identify the permit issued and the specific permit term that the United States is challenging.

CONCLUSION

For the foregoing reasons, NMED's motion to dismiss or for a more definite statement should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on all counsel of record by the Court's electronic filing system on March 14, 2019.

s/ *Eileen T. McDonough*

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. CIV 99-1280M

STATE OF NEW MEXICO, NEW MEXICO ENVIRONMENT DEPARTMENT, and PETER MAGGIORE, in his official capacity as Secretary of the New Mexico Environment Department,

Defendants.

MEMORANDUM OPINION AND ORDER

This controversy focuses on the United States Department of Energy's Waste Isolation Pilot Plant (WIPP) near Carlsbad, New Mexico, the first deep geologic repository for the permanent disposal of extremely dangerous radioactive waste, and on certain provisions of the hazardous waste disposal permit issued for WIPP by the New Mexico Environment Department. The United States relies on 28 U.S.C. sec.1331 and 1345 as jurisdictional authority and files suit to challenge provisions of the Final Permit. The State of New Mexico contends that the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. sec. 6901 *et seq.*, precludes attacking the state permit collaterally in a federal district court and that the case is better decided by a New Mexico court.

The case comes up at this time on Defendants' Motion to Dismiss. Defendants argue absence of subject matter jurisdiction, and in the alternative, move for dismissal on the ground

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that "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar" require an abstention from the exercise of federal jurisdiction. I conclude, however, jurisdiction in a federal district court is fully authorized by both 28 U.S. C. sections 1331 and 1345, and abstention is not justified. The questions of federal law presented by the case are at least as imperative as the State's need to establish a coherent public policy and no reason to abstain from jurisdiction properly applies.

Undisputed Facts

The WIPP facility is owned by the United States Department of Energy (DOE) and operated jointly by DOE and the Westinghouse Waste Isolation Division, a private corporation. An underground geologic repository located in the southeast corner of the State of New Mexico, the facility consists of a four-square-mile area (sixteen sections) transferred to the United States Bureau of Land Management and removed from the public domain in perpetuity. This basic area is surrounded by management facilities and 35 acres which are set off as a protection area. It all rests twelve miles west and 500 feet above the Pecos River (and 400 feet above the 100-year flood plain), approximately eighteen miles east of Loving, New Mexico, the closest town.

WIPP was constructed for the purpose of storing and disposing of transuranic nuclear waste (TRU) and mixed hazardous wastes which contain TRU. It was designed after work in the 1950's by the National Academy of Sciences which studied various methods for disposing of radioactive waste, the feasibility of mined geological repositories and salt formations which could handle long-term waste isolation. A later study selected the eventual site, a 2000-foot thick salt formation known as the Salado Formation. The Salado Formation, which underlies approximately 36,000 square miles in New Mexico, Texas, Kansas and Oklahoma, was formed 220 to

250 million years ago when an ancient sea evaporated and left dissolved salts in massive layers. The Salado Formation was selected for the WIPP facility because it is regionally extensive (an indication of its stability) and also because it is isolated from other formations by impermeable beds above and below. is essentially dry, and is virtually impenetrable by water.

In June 1999, storage of TRU waste at WIPP was authorized by a Final Permit, issued by New Mexico's Environment Department (NMED) pursuant to the New Mexico Hazardous Waste Act, N.M.S.A. sec. 74-4-1 *et seq.*, and the RCRA. The RCRA allows states to establish a hazardous waste program in lieu of, but equivalent to, the federal program. 42 U.S.C. sec. 6926. Accordingly, the EPA has expressly granted New Mexico its authorization and approval; 50 Fed. Reg.1515 (Jan. 11, 1985.); and the Final Permit at issue has the same force and effect as a permit issued by the Administrator of the United States Environmental Protection Agency. 42 U.S.C. sec. 6926(d).

Nature of the Controversy

The United States sues for injunctive and declaratory relief to set aside provisions of the WIPP Final Permit and for a remand to the Secretary of the NMED with directions to reissue the permit without the contested provisions. The Final Permit is a multiple volume document which addresses operation of the WIPP site and governs storage, disposal and management of TRU and "mixed waste" (containing both hazardous constituents and radionuclides).

The United States contends that portions of New Mexico's Final Permit (a) are contrary to the Atomic Energy Act (AEA), 42 U.S.C. sec. 2011 *et seq.*; (b) disregard the Supremacy Clause of the United States Constitution, art.VI, cl.2; (c) exceed the United States' waiver of sovereign immunity contained in the RCRA because some permit provisions attempt to regulate

activities outside the federal statutory definition of solid waste; and (d) constitute arbitrary and capricious administrative actions not supported by substantial evidence, an abuse of discretion and decisions not in accordance with law.

The permit provisions with which the United States takes issue concern, first, very specific requirements for disposal of "non-mixed transuranic waste." According to the United States, these New Mexico requirements (i) regulate source, special nuclear and byproduct materials which are excluded from the definition of solid waste as defined in the RCRA at 42 U.S.C. sec. 6903(27), (ii) exceed federal environmental regulations, (iii) are not necessary to the proper disposal of non-mixed waste, and (iv) unreasonably restrict disposal of mixed waste.

Secondly, the United States contests the Final Permit's financial assurance requirements for WIPP closure and monitoring. These demand that Westinghouse obtain insurance for certain types of third party liabilities. The United States contends the insurance would cost Westinghouse an estimated twenty million dollars annually over the next five years and is unnecessary because federal law holds the United States responsible for closure and monitoring functions. The United States also argues that New Mexico's financial assurance requirements are proscribed by the Solid Waste Disposal Act, 42 U.S.C. sec. 6901 *et seq.*, and are inconsistent with federal environmental regulations, incorporated by reference into New Mexico law.

The United States also contests technical provisions of the Final Permit which it argues add millions of dollars in unnecessary cost, increase the risk of radiation exposure to Department of Energy personnel, exceed federal environmental regulations and violate the AEA and the RCRA. The provisions the United States opposes include a requirement that the contents of a substantial number of sealed waste containers be examined visually, as opposed to methods

which use radiography and limit visual examinations to quality assurance. According to the United States, visual examination is accomplished by individual workers emptying the contents of a waste container into a containment area and manipulating the contents so that every item can be viewed. The United States contends this process not only adds cost and poses unnecessary risks of radiation exposure to workers, but also increases the amount of radioactive waste requiring disposal because it contaminates the additional materials used in the visual examination.

The United States prefers to examine most of the sealed waste containers by radiography (an x-ray technique) and to examine visually only a specified and limited number of waste containers, as determined and varied by statistical calculations which purportedly measure the accuracy of the radiography examinations. Inaccuracy in a radiography examination is termed a "miscertification." The higher the miscertification rate, the greater the number of sealed containers visually examined. The United States utilizes an initial miscertification rate of two percent, which requires workers to visually examine 26 containers in a waste stream of 300. The New Mexico requirement, however, sets an eleven percent initial miscertification rate which requires examination of 202 containers in the stream of 300; and in addition, the New Mexico requirement applies the rate to each generator site separately, which again increases the number of containers that must be examined visually.

Anther provision challenged by the United States imposes specific requirements for the sampling of homogeneous mixed and non-mixed wastes for volatile organic compounds. The Final Permit requires the DOE to take and analyze three sub-samples from the core of homogenous waste containers arriving at WIPP after the effective date of the Final Permit. The

DOE maintains, however, that some waste containers yet to be shipped have already been sampled in a manner consistent with methods approved by the United States Environmental Protection Agency (EPA), and these samplings provide an equivalent level of protection to the Final Permit's three sub-sample approach and make the additional sampling unnecessary. Additional sampling after arrival, according to the United States, would needlessly and arbitrarily require millions of dollars, create delay in shipments and increase the risk of radiation exposure to workers.

Finally, the United States objects to the Final Permit's provisions for groundwater monitoring which require DOE to monitor groundwater for gross alpha and beta radiation, even though, according to the United States, the area's naturally occurring radionuclides and large amounts of salt and other dissolved solids makes monitoring for gross alpha and beta radiation unreliable. The United States contends that the groundwater monitoring required by the permit is not necessary to ensure proper management of hazardous waste and duplicates DOE monitoring currently undertaken pursuant to the AEA and the Waste Isolation Pilot Plant Land Withdrawal Act (WIPP Act), 106 Stat. 4777 (1992). The United States also alleges violations of the AEA and the Supremacy Clause because the Final Permit's groundwater monitoring requirements regulate source, special nuclear and byproduct materials which are excluded from the RCRA definition of solid waste, and thus go beyond the waiver of sovereign immunity which allows the imposition of state requirements.

For all of these reasons, the United States wants the several challenged provisions of the Final Permit declared arbitrary and capricious, an abuse of discretion, not supported by substantial evidence in the record, and otherwise not in accordance with the law. Further, the

United States pleads for preliminary and permanent injunctions to preclude enforcement of the Final Permit and to remand the permit to the Secretary of NMED with instructions to reissue it without the challenged conditions.

Defendants' Position

New Mexico wants the issues decided in its Court of Appeals. It argues not only that the RCRA precludes jurisdiction in a federal district court, it contends (a) the issues present "difficult questions of state law bearing on policy problems of substantial public import," (b) federal adjudication would disrupt state efforts to establish a coherent public policy, and (c) "principles of wise judicial administration" advise against the exercise of federal jurisdiction, apparently because the same or related issues are presently pending in the New Mexico Court of Appeals.

Several lawsuits prior to this one have dealt with the WIPP project and TRU waste disposal in New Mexico, continuing controversies which have produced significant conflict and negotiation between the United States, principally DOE, and the State of New Mexico. In these cases New Mexico has also attempted to restrict the issues to state courts. See, e.g.: United States v. New Mexico, 32 F.3d 494 (10th Cir.1994). In this instance, the United States filed the additional state court action challenging the WIPP Final Permit (pursuant to Sec.74-4-14 NMSA 1978, for review of "any final administrative action of the board or the secretary" of NMED). In November 1999, however, the United States moved to stay this proceeding in the New Mexico Court of Appeals and submitted a request to the NMED Secretary to delay the effective date of the Final Permit. Exactly how the State court issues are framed is not clear and precisely what issues are subject to decision in the State case remains unspecified.

The Final Permit at issue is the result of a lengthy and formal administrative process

which included an extensive application, a draft permit, public comment, a revised draft and a public hearing, eventually culminating in a 104-page report by a Hearing Officer setting out specific recommendations on numerous factual and policy determinations. In issuing the Final Permit, effective November 26, 1999, the NMED Secretary, according to Defendants, largely adopted the findings and conclusions of the Hearing Officer.

In its Motion to Dismiss, the State of New Mexico insists that the present case constitutes a collateral attack on the Final Permit and the administrative decision-making process. Citing Chemical Weapons Working Group, Inc. v. U.S. Department of the Army, 111 F.3d 1485 (10th Cir. 1997), New Mexico argues that collateral attacks on EPA and state equivalent permits are expressly barred by the RCRA. In the alternative, the State contends that settled principles of abstention require declining jurisdiction in order that New Mexico may develop its own safety and health related policy.

Jurisdiction

Jurisdiction properly exists pursuant to 28 U.S. C. sec.1345, as pled in the First Amended Complaint. This grant of jurisdiction in Section1345 is without regard to the subject matter of the litigation. United States v. New Mexico, supra. In addition, the Tenth Circuit has held that Section1345 does not subject the United States as party plaintiff to the "well-pleaded complaint rule." Federal Home Loan Bank Board v. Empie, 778 F.2d 1447, 1450 (10th Cir.1985). Because Section1345 provides original jurisdiction over all issues raised by the United States' First Amended Complaint, the State's reliance on Chemical Weapons Working Group, Inc. v. Department of the Army is misplaced. The Chemical Weapons case speaks only to "citizen suits" and "persons." Id. at 1490. The basis of jurisdiction expressly invoked, in fact, is "the citizen

suit" provision of the RCRA. 42 U.S.C. sec. 6972. This provision does not apply when the United States is plaintiff. Id.; 28 U.S.C. sec.1345.

In addition, I find the First Amended Complaint raises claims which clearly arise under and require determination of federal law. Central to the questions presented are (a) the scope of the RCRA's waiver of sovereign immunity to allow state regulation at a federal facility, (b) DOE's rights and the force of federal law in the face of delegations of authority to the State of New Mexico, and (c) the extent of the State's power to impose its own standards regarding storage and management of TRU and mixed waste, as well as related waste the RCRA calls "source, special nuclear and byproduct material." These federal questions establish jurisdiction properly based in 28 U.S.C. sec.1331.

"The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." Colorado River Water Conservancy District v. United States, 424 U.S. 800, 813 (1976), quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-189 (1950); City of Moore v. Atchison, Topeka & Santa Fe Railway Co., 699 F.2d 507, 510 (10th Cir.1983). Never has it been held that a federal court should exercise its discretion to dismiss a case merely because a State court could entertain it. Colorado River Water Conservancy District v. United States, supra at 813-814. The "rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction. . . .'" Id. at 817, quoting McClellan v. Carland, 217 U.S. 268, 282 (1910). Even where state issues of grave importance may be involved, "the mere potential for conflict in the results of adjudications, does not without more, warrant staying

exercise of federal jurisdiction." Colorado River Water Conservancy District, supra at 816.

In this context, I find none of the State's arguments for abstention persuasive or controlling. Apart from the State's unquestionably valid interest and the extent of its efforts to this point, which demonstrate a well-developed and aggressive approach, federal questions regarding regulation and storage of TRU and mixed waste and source, special nuclear and byproduct material, all generated by the United States, deposited in a federal facility and subject to federal law, control over the State's desire to formulate an independent policy.

The "area subject to state regulation" referred to as reason for abstention can be only that delegated by the RCRA, approved by the EPA, and found to be equivalent to RCRA policies and provisions. 42 U.S.C. sec. 6926. Thus, despite the fact that WIPP poses gravely important environmental policy issues to the State of New Mexico which the State is fully capable of determining, the extent of the federal government's intrusion to this point upon New Mexico's ability to control storage and management of TRU and mixed waste already acts as a severe constraint on the scope of state decisions. Any "uniformity" New Mexico may achieve in its environmental policy and attempts to regulate hazardous waste within the State is strictly limited to that which is consistent with the federal scheme. This markedly changes the nature of "state" issues. The "area subject to state regulation" can neither be the subject of true "domestic policy" of the State of New Mexico nor precipitate the necessity of what is referred to as Burford abstention. See: Burford v. Sun Oil Co., 319 U.S. 315 (1943). Burford abstention is not appropriate where the issues presented require application of federal law. ANR Pipeline Co. v. Corporation Commission of Oklahoma, 860 F.2d 1571, 1579 (10th Cir. 1988).

Therefore, with federal statutory authority granting original jurisdiction clear and proper and not having any substantial reason to abstain from the exercise of jurisdiction, I find and conclude that the Defendants' Motion to Dismiss is without merit.

NOW, THEREFORE, IT IS ORDERED that Defendants' Motion to Dismiss is denied.

SENIOR UNITED STATES JUDGE