

# CENTRAL INTERSTATE LLRW COMMISSION

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## ACTIONS WHICH POTENTIALLY AFFECT THE PROJECT, BUT IN WHICH THE COMMISSION IS NOT A PARTY

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**Diane Aurelia Burton and Heartland Operation to Protect the Environment, Inc. v. United States Nuclear Regulatory Commission and Ivan Selin as Chairman of the United States Nuclear Regulatory Commission** (United States District Court for the District of Nebraska, Case No. 4:CV92-3217).

In 1992, the plaintiff sued the Nuclear Regulatory Commission of the United States in federal court; that case was **dismissed** on both jurisdictional and standing grounds by Judge Urbom. The plaintiffs did not appeal.

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**The State of New York; The County of Allegany; and the County of Cortland v. The United States of America, et al.** (Supreme Court of the United States, Cases No. 91-543, 91-558, and 91-563).

An additional lawsuit of note was the suit by New York State, a "go-it-alone" state, against the United States, challenging various provisions of the federal low-level radioactive waste laws. The United States Supreme Court held unconstitutional as an unwarranted extension of federal power the federal statutory provision requiring a state such as New York (go it alone, non-compact), upon failing to meet the federal statutory guidelines, to take title to the low-level radioactive waste.

However, the **decision in general validated the federal statutory scheme**. It is quite questionable whether even the decision as to the "take-title" provision is applicable to states which have joined a compact, such as Nebraska. That issue has not been decided. In general, the system of compacts and the federal system for a national solution to the problem of low-level radioactive waste disposal passed muster in the New York case. The State of Nebraska joined New York as a limited "amicus" or friend of the court, but nothing in the decision expressly indicates that states which are members of a compact are protected by the decision.

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**Concerned Citizens of Nemaha County, a nonprofit corporation v. Dennis Grams and the Department of Environmental Control** (District Court of Lancaster County, Docket 449, Page 7).

This action sought an injunction against DEC from taking any action to terminate the existence of the Nemaha County Local Monitoring Committee or depriving such committee of any funding until a license was granted. The plaintiff was successful in obtaining a temporary injunction against DEC. Subsequently, the local monitoring committees became parties, and Boyd County Local Monitoring Committee sought to obtain a dissolution of the injunction, at first without success.

Boyd County Local Monitoring Committee then filed a **second lawsuit** in the District Court of Lancaster County against Dennis Grams, DEC, and US Ecology in the District Court of Lancaster County (Docket 454, Page 219) seeking a declaration that Boyd County was entitled to the use of the local monitoring committee cash fund since the preferred site had been selected in Boyd County, a mandatory injunction to require DEC to collect payment from US Ecology for funding the local monitoring committee cash fund, and to enjoin DEC from taking any action to review US Ecology's license until the funds were paid to the Boyd County local monitoring committee.

The **second lawsuit** was disposed of on a motion for summary judgment and the Court found that US Ecology had selected a site and had filed an application for a license on the site and therefore the other two local monitoring committees ceased to exist and were dissolved.

In the first lawsuit, the injunction was ultimately lifted and the case dismissed. An incidental effect of this litigation was to delay the funding of the Boyd County Local Monitoring Committee for over a year.

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**County of Boyd v. US Ecology** (United States District Court for the District of Nebraska, Case No. 4:CV93-3435).

In December, 1993, shortly after Judge Kopf dismissed the second "community consent" lawsuit filed by Nebraska, Boyd County and the Local Monitoring Committee sued US Ecology for fraud. The complaint alleged that US Ecology made false statements regarding the community consent process, and sought unspecified damages (a member of the Local Monitoring Committee was quoted in newspapers as saying that the damages amounted to hundreds of millions of dollars).

Judge Kopf **dismissed** the suit in July, 1994, finding that the complaint was really just another attempt to relitigate claims already decided in the previous "community consent" cases, and was thus barred by res judicata. Plaintiffs appealed to the Eighth Circuit. The Eighth Circuit affirmed Judge Kopf's decision on February 11, 1995. 48 F.3d 359. Boyd County petitioned the United States Supreme Court for certiorari; the Court denied the request on October 2, 1995. 64 U.S.L.W. 3240.

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**"Contested Case" Licensing Proceeding** (District Court of Lancaster County, Docket 505, Page 298).

Following **dismissal** of the "contested case" licensing proceeding by DEC in October 1993, on mootness grounds (reflecting amendment of US Ecology's license application to eliminate wetlands), the Boyd County Local Monitoring Committee appealed to the District Court of Lancaster County. The appeal sought a determination that the Monitoring Committee is entitled to a hearing on the merits of US Ecology's application now, notwithstanding the fact that no final licensing decision has been made. US Ecology filed a motion to dismiss arguing that the court lacked jurisdiction over the appeal. Judge Merritt **dismissed** the case on jurisdictional grounds in the spring of 1994, and no appeal from that decision was taken.

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**US Ecology, Inc. v. State of Nebraska et al.** (Nebraska Supreme Court S-98-0412).

In April of 1997, US Ecology sued the State of Nebraska, the Department of Environmental Quality and Health and certain employees of both departments in the District Court of Lancaster County for declaratory and injunctive relief regarding the defendants' authority to prevent US Ecology from filing and mitigating a small wetland (less than one acre) on the disposal facility site in accordance with a 404 Permit issued by the US Army Corps of Engineers. The defendants contended that the filing and mitigating of the wetland constitutes commencement of construction which was not authorized pursuant to Nebraska law until after a license for the construction of the facility had been issued. US Ecology also raised the question of whether the Department of Health had jurisdiction over the question of whether US Ecology's proposed actions constituted commencement of construction.

The District Court **ruled in favor of US Ecology**, finding that US Ecology's proposed action in filing and mitigating the wetland did not constitute of construction, and enjoined the defendants from interfering with the fill and mitigation project. The District Court also found that the Department of Health had no jurisdiction over the licensing of the facility and enjoined it from participating in any licensing decision. The defendants requested that the District Court stay its order pending appeal. The District Court denied the request. The defendants appealed to the Nebraska Court of Appeals and the Court of Appeals granted the defendants' motion to stay the District Court's order pending the outcome of the appeal. The Nebraska Supreme Court has exercised its discretion and will hear the appeal, instead of the Court of Appeals. Briefing was completed by the first part of September of 1998. Oral arguments were heard in December of 1998, and a decision is expected soon.

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**US Ecology Inc. v. Boyd County Board of Equalization** (Nebraska Court of Appeals A-97-802).

US Ecology contested Boyd County's 1996 increase in the assessment of the value of US Ecology's Butte property including the land upon which the disposal facility is proposed to be constructed from \$113,000.00 to \$320,000.00 by appealing the increase to the Tax Equalization and Review Commission (TERC). TERC found that the increase was warranted. US Ecology appealed to the Nebraska Court of Appeals, which found that Boyd County's assessment was arbitrary and unreasonable. Boyd County filed a petition for further review with the Nebraska Supreme Court, which was granted. The Supreme Court heard oral arguments in November 1998 and **affirmed the Court of Appeals' decision** in February 1999.

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**US Ecology, Inc. v. Boyd County Board of Equalization** (District Court of Boyd County No., 4645).

US Ecology is contesting Boyd County's 1997 increase in the assessment of the value of US Ecology's Butte property. Boyd County persists in increasing the assessed value of the land based on the facts which the Nebraska Court of Appeal found to be arbitrary and unreasonable in the case described above. This case was **settled** based on the outcome of the case described above.

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**Hayden v. Peterson, et al.** (District Court of Lancaster County, Docket 568, Page 262).

In April, 1998, Greg Hayden, Nebraska's Commissioner, sued Alan Peterson and the Cline, Williams law firm, the attorneys acting as outside counsel to the Commission since late 1989. Hayden's suit contends that the Commission's attorneys have violated various duties they owe to him because they have not given him without a requirement of confidentiality, or a Commission authorization, confidential financial information disclosed by American Ecology pursuant to a confidentiality agreement.

At its annual meeting on June 17, 1998, the Commission passed a resolution which found that Peterson and Cline Williams have not violated any Commission directives or instructions, and that Commissioner Hayden's suit was filed without the authority or concurrence of the Commission. The resolution requested that Hayden immediately dismiss his suit against the Commission's legal counsel and his law firm. Peterson and Cline Williams have filed a motion for summary judgment, which was heard on December 14, 1998, and summary judgment was granted, dismissing the case on February 19, 1999. Thereafter, Peterson and Cline, Williams filed a motion for attorney fees and costs against Mr. Hayden and his counsel, contending the lawsuit was meritless to the point of being frivolous,

and that it amounted to harassment. That motion was denied by Judge McGinn..