

CENTRAL INTERSTATE LLRW COMMISSION



ACTIONS IN WHICH THE COMMISSION IS OR WAS A PARTY

Concerned Citizens of Nebraska (CCN), Ronald Schumann, Lowell Fisher, Larry Anderson, Diane Burton, David Follrichs, Roger Williams, and Edd Epley v. United States Nuclear Regulatory Commission (NRC), Dennis Grams, Director of Nebraska Department of Environmental Control (NDEC), Central Interstate Low-Level Radioactive Waste Compact Commission, and US Ecology, Inc. (USE) (United States District Court for the District of Nebraska, Case No. CV 90-L-70)

In 1990, opponents of the siting project filed suit against the Commission, US Ecology, Inc., the United States Nuclear Regulatory Commission, and Dennis Grams, the Director of the Nebraska Department of Environmental Control. This case alleged a variety of statutory and constitutional objections and asked that the siting of a regional facility be enjoined. The case was **dismissed** by Judge Warren K. Urbom as to all counts, and the United States Court of Appeals for the Eighth Circuit affirmed that dismissal in 1992.

Boyd County Local Monitoring Committee v. Central Interstate Low-Level Radioactive Waste Commission (United States District Court for the District of Nebraska, Case No. 92-L-3137).

In 1992, the Boyd County Local Monitoring Committee sued the Commission, alleging an assortment of violations of Nebraska law and constitutional claims, and sought an injunction against the Commission prohibiting it from proceeding with contractual amendments with its contractor, US Ecology. Judge Urbom **dismissed**. The plaintiff amended its complaint but then dropped its case and dismissed its lawsuit.

Diane Aurelia Burton and Dawneane Ferry Munn v. Central Interstate Low-Level Radioactive Waste Commission (United States District Court for the District of Nebraska, Case No. 4:CV92-3250).

Also in 1992, Diane Burton and Dawneane Munn sued the Commission, alleging a variety of complaints about the Commission's rules, policies, budgeting, and financing, and claiming this increased the plaintiffs' taxes unconstitutionally. On February 24, 1993, the case was **dismissed** by Judge Urbom on the ground that neither of the plaintiffs could show valid "standing" or separate or particular injury on their part so as to justify federal jurisdiction. Plaintiffs appealed to the Eighth Circuit, which affirmed Judge Urbom. Burton petitioned the U.S. Supreme Court to take the case; her petition was denied in the fall of 1994.

Central Interstate Low-Level Radioactive Waste Commission; and US Ecology, Inc., a California Corporation v. McCulley Township, Boyd County, Nebraska (United States District Court for the District of Nebraska, Case No. 4:CV92-3244).

McCulley Township, Nebraska, passed ordinances prohibiting, in effect, the siting of the regional facility near Butte, Nebraska; and the Commission and US Ecology jointly have brought a federal suit to declare those ordinances an unconstitutional local burden on a federal statutory plan, thus violating both the interstate commerce clause and the

supremacy clause of the United States Constitution. Chief United States District Judge for the District of Nebraska Lyle Strom overruled the McCulley Township's motion to dismiss and in his opinion strongly indicated that the McCulley ordinances are invalid and unenforceable. Shortly thereafter, Judge Strom granted our motion for **summary judgment** and invalidated the ordinances. McCulley Township did not appeal.

State of Nebraska ex rel. E. Benjamin Nelson, Governor, v. Central Interstate Low-Level Radioactive Waste Commission; and US Ecology, Inc., a California Corporation, 834 F.Supp. 1205 (D.Neb. 1993); 26 F.3d 77 (8th Cir. 1994).

In January 1993, the State of Nebraska, at the instance of E. Benjamin Nelson, the Governor, sued the Commission and US Ecology, seeking a permanent injunction against the regional facility and a declaration that so-called "community consent" by Boyd County was a pre-condition to siting the facility and that such consent did not exist. The suit also contended that the developer and the Commission have not satisfied the language of Nebraska state law, section 81-1579, which states:

It is the intent of the Legislature that potential host communities be actively and voluntarily involved in the siting process. To the extent possible, consistent with the highest level of protection for the health and safety of the citizens of the state and protection of the environment, the developer shall make every effort to locate the facility where community support is evident.

The Commission answered the complaint and sought dismissal of this suit on several legal grounds, including that the Commission and its developer have met every legal requirement involving community support; that the attempt by the Governor now to define "community consent" contrary to Nebraska state statute is without legal basis; and on several other grounds, including lack of jurisdiction, violation of the United States Constitution's supremacy clause, untimeliness for a party state to contest a decision of the Commission, and failure of the lawsuit to state a valid claim upon which any relief could be granted by the federal court.

On October 8, 1993, U.S. District Judge Kopf granted the Commission and US Ecology's motion for **summary judgment**, holding that the suit was untimely under the statute of limitations contained in Art.IV(1) of the compact, and that Nebraska's delay in bringing the action barred the suit under the equitable doctrines of estoppel and laches.

Nebraska appealed to the Eighth Circuit, which affirmed Judge Kopf's decision in an opinion issued on June 13, 1994. 26 F.3d 77. Nebraska then petitioned the U.S. Supreme Court to hear the case; the Supreme Court denied the petition in November, 1994. 130 L.Ed.2d 395.

State of Nebraska ex rel. E. Benjamin Nelson, Governor v. Central Interstate Low-Level Radioactive Waste Commission v. US Ecology, Inc. (United States District Court for the District of Nebraska, Case No. 4:CV93-3367).

Not satisfied with the Court's ruling in the first community consent case, the plaintiff filed a second suit three weeks later, contending that the August 27, 1993 license application amendment by US Ecology created a new "site" for purposes of the "community consent" issue. This claim was clearly barred by the doctrine of res judicata. The Commission and US Ecology moved for summary judgment on that basis one week after the suit was filed. On December 3, 1993, Judge Kopf granted our summary judgment motion and **dismissed** the case. Any appeal from this judgment would have been frivolous and the State did not appeal.

State of Nebraska ex rel. E. Benjamin Nelson, Governor v. Central Interstate Low-Level Radioactive Waste Commission (United States District Court for the District of Nebraska, Case No. 4:CV95-3053).

On February 3, 1995, Governor Nelson filed suit against the Commission, claiming that Nebraska was entitled to additional representation on the Commission by virtue of amendments to the Compact, notwithstanding that the Kansas Legislature conditioned its agreement to the Compact amendments on the issuance of a disposal facility license by Nebraska and that Congress had not yet consented to the Compact amendments. The Commission answered, denying that the Compact amendments could become effective until all states, including Kansas, legislatively agreed to them, and until they are consented to by Congress. Following a one-half day bench trial, Judge Kopf found in favor of the Commission and **dismissed** the suit on October 23, 1995. The plaintiff did not appeal.

State of Nebraska ex rel. E. Benjamin Nelson, Governor v. Central Interstate Low-Level Radioactive Waste Commission (United States District Court for the District of Nebraska, Case No. 4:CV95-3052).

Also on February 3, 1995, Governor Nelson filed a second suit against the Commission; this suit contends that Nebraska is entitled to receive all surcharge rebate funds delivered to the Commission by the Department of Energy pursuant to federal statute. The Commission answered, denying the claims and asserting that Nebraska has failed adequately to account for its use of rebate funds previously given to it. Both parties have moved for summary judgment. The court recently granted Governor Nelson's request to be allowed to conduct additional discovery and file a reply brief.

The summary judgment motions of both sides were overruled, with Judge Kopf saying in his opinion that if Nebraska did not perform its recordkeeping and reporting responsibilities in good faith, then as matter of equity it would not be entitled to the equitable relief it sought. As the case approached trial, the court struck the jury request by Nebraska. A settlement conference was held before the U.S. Magistrate Judge, and a settlementreached between the parties. In essence, the parties agreed to split evenly all unspent "rebate funds" in the possession of either, and to work out their differences as to the reporting of rebate expenditures by Nebraska. Also, a licensing cost reimbursement arrangement was included which may facilitate expediting by Nebraska of its licensing process. A **settlement agreement** was finalized and the case was dismissed with prejudice pursuant to that agreement.

State of Nebraska v. Central Interstate Low-Level Radioactive Waste Commission (United States District Court for the District of Nebraska, Case No. 4:CV963438).

The Central Interstate Low-Level Radioactive Waste Commission at a meeting on September 30, 1996, passed resolutions after receiving evidence calling for the State of Nebraska to issue its initial draft decision and documents on the license application no later than January 14, 1997, and also calling for a consolidation of the hearing process after the draft decision. The State of Nebraska sued the Commission, claiming that it was entitled to a federal declaratory judgment that the Commission lacks authority to set any schedule for the remainder of the license application review currently underway in the Departments, and that even if it had such authority, the dates set were unreasonable.

Major generators Wolf Creek and Entergy were allowed by the Court to intervene, over Nebraska's objection. Trial was held before Judge Urbom during July, 1998. The parties submitted written closing arguments and briefed some issues at Judge Urbom's request. On October 15, 1998, Judge Urbom entered **judgment in favor of Commission**. His 18-page opinion held that the Commission had the authority to pass its September 30 motion imposing a

decision deadline, and that the deadline contained in the motion was reasonable. Nebraska has appealed this decision to the Eighth Circuit Court of Appeals.

On August 16, 1999, the Eighth Circuit filed an opinion affirming the judgment entered by Judge Urbom. The Eighth Circuit determined that the Commission had authority to pass the deadline. The Court decided that the issue of the reasonableness of the deadline was moot, because the State had made a license decision after the lower court judgment was entered but before the appeal was decided. However, in a footnote the Eighth Circuit said, "Without addressing the issue directly, we believe, in any event, that the deadline established by the Commission was responsible." Nebraska has available no direct appeal from the Eighth Circuit's decision but can ask the U.S. Supreme Court to review the case on certiorari. The State has 90 days from August 16, 1999 to file a cert. petition.

State of Nebraska v. Central Interstate Low-Level Radioactive Waste Commission (United States District Court for the District of Nebraska, Case No. 4:CV973267).

In June and July, 1997, the Commission approved waste export applications made by a number of Major Generators. Nebraska's Commissioner voted "No" on each application, contending that Art.IV(m)(6) of the Compact gives the Host State veto authority over all export of waste from the region. On advice of counsel, the Commission determined that Nebraska's claimed "Veto" authority did not apply to the export applications before it, and approved the applications on a 4-1 vote.

In mid-August, 1997, Nebraska sued the Commission, seeking a declaration that the export permits issued by the Commission in June are invalid and that the affirmative vote of the Nebraska Commissioner is required before the Commission can authorize any export of waste from the region. Although the Commission took no action regarding importation of waste to the region, Nebraska's suit seeks a declaration that the affirmative vote of Nebraska's Commissioner is required before the Commission can authorize importation of any waste into the region. On September 13, 1997, Nebraska amended its complaint to include the export applications approved by the Commission in July, 1997.

The Commission asked that the case be dismissed unless the waste exporters whose applications were challenged by Nebraska's Commissioner were made parties. The Court rejected that motion, and the Commission answered the complaint. A Short trial was held on October 2, 1998.

On November 23, 1998, Judge Kopf issued a Memorandum and **Judgment in favor of the Commission**. The opinion holds that Nebraska does not have veto power over export applications, and refuses to decide issues related to future import issues. On December 8, 1998, Nebraska filed a motion for new trial, which was overruled and Nebraska has appealed to the Eighth Circuit Court of Appeals. Briefing was completed by the end of May, 1999, and the case will be set for argument at some time later this year.

U.S. Ecology, Inc., and Central Interstate Low-Level Radioactive Waste Commission, Contested Case Proceeding over License Denial (Departments of Environmental Quality and Health and Human Services of Nebraska).

After the two departments announced their denial of a license on December 18, 1998, US Ecology filed a contested case proceeding before the two departments, and the Commission intervened as an interested party, with both US Ecology and the Commission seeking a reversal of the license denial. The attorneys for the two departments, however, then filed an answer in which they said that the issues of political influence over the license decision could not be decided in this proceeding for “lack of subject matter jurisdiction.” A preliminary hearing was held before the hearing examiner, former Nebraska Chief Justice C. Thomas White, at which point the Commission announced that the major generators and the Commission would be seeking to enjoin any further proceedings in the contested case hearing because of the limitations being placed on it by the departments. Subsequently, in the lawsuit filed by the major generators and the Commission against the State of Nebraska and others, which is described in the following paragraph in this memorandum, United States District Judge Richard Kopf entered first a temporary restraining order and then a preliminary injunction against the contested case proceedings going any further. That preliminary injunction was entered on April 16, 1999. It both halted the contested case hearing and also prevented the State of Nebraska from billing the Commission, US Ecology, or the major generators in any way for the legal costs involved in the contested case proceeding or in the costs of the federal lawsuit itself. Therefore, at least until trial of the federal case, now scheduled for February of 2001, there will be no further action in the contested case proceeding. The State has appealed the preliminary injunction, but it is the Commission’s opinion that the injunction will be sustained on appeal.

Entergy Arkansas, Inc. [and all other major generators except NPPD] and Central Interstate Low-Level Radioactive Waste Commission and US Ecology v. State of Nebraska [and several individual defendants] (United States District Court for the District of Nebraska, Case No.: 4:98CV3411)

In this case, which was filed by the major generators in late December, 1998, the claim was made by those original plaintiffs against the State of Nebraska, the directors of the Departments of Health and Human Services and Environmental Quality, and against the program director for the low-level radioactive waste program, Jay Ringenberg, and others, that the licensing proceeding was politically influenced and the denial was invalid. The plaintiffs also named the Central Interstate Low-Level Radioactive Waste Commission as a defendant, subject to realignment by the court since the Commission’s position was much more likely to be aligned with the plaintiffs than the defendants. The claims by the generators were that the State of Nebraska, under color of state law, had denied the civil rights of the plaintiff generators in various respects, and also that the plaintiff generators were essentially intended beneficiaries of the compact between the states, and that bad faith on the part of the State of Nebraska had caused them tremendous damages.

Shortly thereafter, the Commission, at its January 1999 meeting, authorized its outside counsel to ask the Court to realign it as a plaintiff and essentially join in the claims originally made by the major generators. That has been done, and the Commission, in its own claim against the State of Nebraska, contended that Nebraska had operated in bad faith in violation of the compact which is both a federal law and has the characteristics of a contract between parties. A temporary injunction was obtained by the plaintiffs preventing any of the defendant parties from destroying any documents, and that has been communicated to all the State officials involved. The plaintiffs, including the Commission, then moved for a temporary restraining order and then a preliminary injunction against the State of Nebraska and the other defendants, prohibiting them from continuing with the contested case proceeding, and also prohibiting them from trying to charge the costs of any aspect of the low-level radioactive waste activities against the plaintiffs. The allegation was that more than \$75 million had been spent on the project by the original plaintiffs in this action (not counting the additional \$20 million or so spent by NPPD which has not joined in the case), and that allowing the State to continue charging everything to the plaintiffs was simply a continuation of the bad faith and illegality of Nebraska's approach to its role as the host state. The Commission joined in all those motions for injunctive relief.

On April 16, 1999, United States District Judge Richard Kopf granted the preliminary injunction, making extensive findings of probable bad faith by Nebraska in a 38-page opinion. The requirements for preliminary injunctive relief include a finding of probable ultimate liability, and the Court therefore was obliged to make that call and found very substantial and itemized evidence of various bad faith and political influence on the licensing proceeding. The State has appealed the preliminary injunction; the Commission and the State have filed their opening briefs, the State's reply brief is due on August 30, 1999, and the Court will likely schedule oral argument for late fall or winter.

Under current scheduling, the parties are all required to turn over to each other relevant evidentiary documents and lists of witnesses by June 15, 1999. Various other deadlines are set, with a planned trial date after all discovery and motions of February, 2001. Nebraska has filed a motion asking that all discovery be halted until its "sovereign immunity" arguments have been resolved.
