104

No. ....., Original

In The

Supreme Court of the United States

October Term, 1985

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STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEVADA,
THE NEVADA PUBLIC SERVICE COMMISSION,
and THE CITY OF LAS VEGAS, NEVADA,

Defendants.

—o—

MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT

—o—

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Defendants.

—o—

MOTION FOR LEAVE TO FILE COMPLAINT

—o—

The State of New Jersey, by its Attorney General, asks leave of the Court to file its complaint against the State of Nevada, the Nevada Public Service Commission, and the City of Las Vegas submitted herewith, for the reasons set forth in the statement in support of the motion.

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Plaintiff,

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THE NEVADA PUBLIC SERVICE COMMISSION,
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STATEMENT IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

—o—

Summary of The Case

This is an action by the State of New Jersey against the State of Nevada, its Public Service Commission, and the City of Las Vegas. The State of New Jersey, in order to protect the public health and welfare of its citizens, has undertaken to excavate soil from several residential homes in northern New Jersey which was found to be contaminated with a low level of radioactive waste, namely radium. Radium emits a gas which can be potentially harmful to the health of New Jersey citizens. New Jersey has also contracted with a private party which operates a site designed for the disposal of radioactive waste in Beatty, Nevada which is owned by the State of Nevada. New Jersey as an accommodation to Nevada also applied for and

was granted by the State of Nevada the permit required by law to transport and dispose of low level radioactive material in Nevada, and New Jersey as shipper has contracted with a common carrier, the Union Pacific Railroad, to transport the contaminated soil in interstate commerce from New Jersey to Beatty, Nevada.

After New Jersey obtained the permit required by Nevada law and took all steps required by Nevada law, and after New Jersey started the excavation work in reliance upon its having complied with all applicable law, certain Nevada officials—most notably the Governor of Nevada—objected to the transportation of the contaminated soil into Nevada. The Governor and Nevada Department of Human Resources officials then asserted that an additional "authorization to transport" is required before the contaminated soil may be transported into Nevada —even though New Jersey has already obtained the permit required by Nevada law and even though Nevada statutes require no further permits or authorizations. Moreover, Nevada has never notified the State of New Jersey that it is not in any respect in compliance with any substantive laws of Nevada, or that the extensive safety measures taken by New Jersey are inadequate or not in compliance with any applicable federal law or Nevada law.

Further steps have been taken in Nevada to prevent New Jersey from shipping the contaminated soil. Nevada's Public Service Commission ("PSC") on August 30, 1985 adopted an emergency order which imposes new requirements on common carriers transporting radioactive material into—but not through—Nevada. Under the PSC emergency order a carrier of such cargo must make an application to the PSC showing, among other things, the proposed route of travel and all safety and security pre-

cautions taken, and also all federal and state permits obtained. Under the new emergency order the PSC may now deny a permit if the carrier has not complied with all applicable state and federal laws, has not designed a rail route and interim storage facilities which "minimize" the "contact" of the material with densely populated areas or with intersections with other railways and highways at hours of heavy traffic, or has not established safe procedures for unloading and reloading as between different means of transportation, such as trains and trucks. The City of Las Vegas also joined in the last minute efforts to block the shipment of the contaminated soil. The contaminated soil will pass through Las Vegas, and on September 6, 1985 it adopted an ordinance by which it asserted jurisdiction over the transportation of New Jersey's contaminated soil which imposes new requirements on the transportation of hazardous materials in and through Las Vegas, including the necessity of securing a permit. The ordinance authorizes the City Department of Fire Services to deny a permit if the Department does not have adequate training, equipment or planning for an emergency involving radioactive materials. The ordinance also authorizes the Department to direct which routes the transportation must take and provide fines and imprisonment for violations.

New Jersey takes no issue with the need for a disposal permit, but does take issue with the requirement in the Nevada statutes and regulations that it secure a permit regarding the packaging and transportation methods. New Jersey contends that the carriage of hazardous cargo in interstate commerce, including all necessary and reasonable safety requirements to protect the public, are governed by federal statutory law and regulations, and by

state law only to the extent permitted by federal law. New Jersey contends that Nevada's permit to the extent it applies to packaging and transportation, the new requirement of an "authorization to transport" to be issued by the Nevada Department of Human Services, the new permit required by the Nevada PSC and the Las Vegas ordinance, go beyond what is permitted in federal law so as to be invalid under the Supremacy Clause in the United States Constitution, Article VI, section 2. In particular, New Jersey contends that these new requirements are unauthorized and preempted by the *Hazardous Materials Transportation Act,* 49 *U.S.C.* §1801, by an agreement in which the Nuclear Regulatory Commission in 1972 authorized Nevada to perform certain regulatory functions under 49 *U.S.C.* §2021, and by the *Low-Level Radioactive Waste Policy Act,* 42 *U.S.C.* §2012b *et seq.* New Jersey contends that the new requirements also impose an unreasonable burden on interstate commerce and are discriminatory, so as to violate the Commerce Clause in the United States Constitution, Article I, section 8.

Thus, New Jersey's claim against Nevada is a claim by one state against another state. New Jersey originally brought an action in the U.S. District Court for the District of Nevada, but the District Court dismissed it on the ground that the claims fell within the original and exclusive jurisdiction of this Court. New Jersey's claim against Las Vegas is a claim by a state against a "citizen" of another state within the meaning of 28 *U.S.C.* §1251(b)(3) so as to be within the original but not exclusive jurisdictions of this Court. New Jersey asserts claims under federal law, namely the Supremacy and Commerce Clauses of the U.S. Constitution and federal statutes, and its claims against Nevada and Las Vegas arise out of the same series

of occurrences and involve common questions of law and fact.

The State of New Jersey by a separate motion will ask the Court to determine on an expedited basis whether it should hear the case within its original jurisdiction, and in a second separate motion will ask the Court to hear on an expedited basis a motion for a preliminary injunction, on the ground that New Jersey is presently suffering immediate and irreparable harm by reason of the belated efforts of Nevada and Las Vegas to block the shipment of the contaminated soil, which efforts began after New Jersey had complied with Nevada law in all respects, and after the project to excavate and remove the soil had started operations.

This is not the first case brought in connection with Nevada's belated opposition to New Jersey's shipment of the contaminated soil to Beatty, Nevada. On July 30, 1985 Las Vegas, North Las Vegas and Clark County, Nevada brought an action in a Nevada State court against the Union Pacific Railroad, claiming without any factual support that the contaminated soil would not be transported in compliance with applicable Nevada and federal laws. They sought a temporary restraining order and a preliminary injunction blocking the shipment of the soil. The railroad removed the case to the U.S. District Court for the District of Nevada on the basis of diversity and the assertion of federal claims, and the U.S. District Court subsequently allowed New Jersey to intervene as a defendant. Then on August 9, 1985 the U.S. District Court denied a preliminary injunction. That case remains pending.

Then, after the Union Pacific Railroad took the position in August, 1985 that it would not transport the contaminated soil absent a judicial declaration as to whether the State of Nevada's recent objections were proper and lawful, New Jersey, as noted, on September 3, 1985 brought an action substantially identical to the present complaint against Nevada and two Nevada officials in the U.S. District Court for the District of Nevada. New Jersey filed an amended complaint in that action on September 9, 1985, which simply added claims against Las Vegas because on September 6, 1985 Las Vegas adopted its new ordinance. New Jersey asked for a preliminary injunction against all the defendants in that action. Nevada moved to dismiss New Jersey's claims against it and its officials on the ground they are within the original and exclusive jurisdiction of this Court. On September 10, 1985 the U.S. District Court denied New Jersey's motion for a preliminary injunction as against the State of Nevada defendants and also dismissed the complaint against them on the ground that the claims may only be asserted in the original and exclusive jurisdiction of the Supreme Court. It declined to hear New Jersey's application for a preliminary injunction as against Las Vegas in that action on the ground that the court could not grant complete relief and that New Jersey's action against Las Vegas could proceed in this Court should jurisdiction lie with the Supreme Court.

This Action Falls Within The Original And Exclusive Jurisdiction Of This Court.

Article III, Section II, paragraph 2 of the U.S. Constitution vests this Court with original jurisdiction in cases

in which a State is a party, and 28 U.S.C. §1251(a) provides that this Court shall have "original and exclusive jurisdiction of all controversies between two or more States." A case to be brought within the original jurisdiction of this Court must also present a justiciable case or controversy. This requirement was summarized by Justice White in *Maryland v. Louisiana,* 451 U.S. 725 (1981) in which the Court allowed several states to file a complaint against Louisiana challenging a tax on constitutional grounds. He said (451 U.S. at 735-36):

> In order to constitute a proper "controversy" under our original jurisdiction, "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." *Massachusetts v. Missouri,* 308 U.S. 1, 15 (1939). See *New York v. Illinois,* 274 U.S. 488, 490 (1927); *Texas v. Florida,* 306 U.S. 398 (1939).*

The Court's original jurisdiction is premised upon the nature of the parties and not the nature of the controversy. See *Cohens v. Virginia,* 6 Wheat. 264 (1821). While there are certain types of claims not considered to be justiciable even as between States in this Court's original jurisdictions, this Court has entertained complaints such as this one in which one state claims that another is causing harm to it and its citizens in violation of the U.S. Constitution.

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* As noted in a footnote accompanying the foregoing text, the Court has also said that before the Court can exercise its extraordinary power to control the conduct of one state at the suit of another, the invasion of rights must be of a serious magnitude and established by clear and convincing evidence.

See *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923), *Maryland v. Louisiana,* 451 U.S. 725 (1981). A complaint must, of course, be premised upon actions by the state against which suit is brought or by officials acting under the authority of state law. See *New York v. New Jersey,* 256 U.S. 296 (1921). The complaining state must also have proper standing. To assert a claim it must show that the claims are premised upon an invasion of a quasi-sovereign interest, a proprietary interest, or an interest on the part of its citizens of such magnitude and nature as to justify the state acting in its *parens patriae* capacity. See, for example, *New York v. New Jersey,* 256 U.S. 296 (1921); *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923); *North Dakota v. Minnesota,* 263 U.S. 365 (1923); *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439 (1945).

In this case New Jersey asserts claims against another State, Nevada, and an agency exercising authority on behalf of Nevada under Nevada law. New Jersey's complaint contends that Nevada officials including its Governor have asserted that they will utilize their authority as state officials to prevent New Jersey's contaminated soil from being transported into Nevada. The complaint is based on the further claim that Nevada is now requiring a permit to be issued by its Public Service Commission which New Jersey claims cannot validly be required under federal law.

The actions of Nevada which are the basis of the complaint are also causing serious and immediate harm to New Jersey and its citizens in that they are preventing New Jersey from shipping thousands of barrels of contaminated soil to the disposal site in Beatty, Nevada. Because temporary storage facilities in New Jersey are in-

sufficient, Nevada's actions threaten to shut down the project to remove the contaminated soil from homes in New Jersey, thus requiring residents to remain in temporary lodgings away from their homes. Such a shut down will also threaten some of the houses because of their proximity to open excavation pits, and will cause the State of New Jersey to suffer great additional expense including claims by its contractors for additional cost due to delays and disruptions.

New Jersey is also the proper party to assert the claims. The State is acting itself to remove the contaminated soil based on its responsibilities to protect the public health and welfare of its citizens. It is the most central party involved in addressing the problem of the contaminated soil. New Jersey is funding the entire clean-up and removal project with state funds appropriated by its legislature, and it has itself engaged all the necessary contractors to perform each aspect of the work needed to clean-up, transport and dispose of the contaminated soil. It as shipper contracted with the Union Pacific Railroad to transport the soil in inter-state commerce to Beatty, Nevada, it contracted with the disposal site in Beatty, Nevada to accept the soil, and it as the applicant obtained the permit needed to dispose of the soil at Beatty, Nevada.

In the circumstances, New Jersey has a substantial proprietary interest which is being harmed by Nevada. Nevada's actions are also hampering New Jersey's fulfillment of its quasi-sovereign duty to protect the public health and welfare of the people of New Jersey—most notably but not exclusively of the residents of the affected towns. Moreover, this is an appropriate case for New Jersey also to assert claims on behalf of its citizens in its

parens patriae capacity. It is submitted that it would be inappropriate to expect individual homeowners to shoulder the burden alone of instituting suit against Nevada even though they should have standing to do so, given the resources necessary to prosecute such a suit and given the fact that the proof of the claims must entail proof from the State of New Jersey as to the steps it has taken properly to ship and dispose of the soil and to comply with federal law and Nevada law. Moreover, while various private parties are sufficiently affected so that they should have standing to assert claims against Nevada, including the affected homeowners and the interstate rail carrier, it is submitted that New Jersey's central role in the resolution of the environmental threat posed by the contaminated soil together with the expense and burden of a dispute with Nevada are such that New Jersey's right to assert the claim should be recognized. Finally, to deny New Jersey the right to assert the claims despite its substantial involvement in the matter is, we submit, to deny it the respect which it is entitled to in our federal constitutional scheme.

Finally, it cannot be said that the claim is premature. Nevada officials have asserted publicly and to New Jersey that they will not allow the shipments into Nevada. New Jersey should not be required to provoke a confrontation at the Nevada border before asserting its claim, and in any event it cannot do so because the Union Pacific Railroad has refused to transport the soil absent a judicial declaration as to a lawfulness of Nevada's refusal to allow the shipments. Finally, the start of the shipment has already been delayed a month and the delay is now threatening to shut down the clean-up project in mid-excavation.

New Jersey is also asserting a claim against the City of Las Vegas, Nevada in its complaint because Las Vegas

has joined in Nevada's efforts to block the shipment, by adopting an ordinance imposing new regulatory requirements on the transportation of the shipment through Las Vegas. 28 U.S.C. §1251(b) (3) provides that this Court shall have original but not exclusive jurisdiction in actions by a state against citizens of another state. This Court has held that political subdivisions of states such as cities and local state activities should not be treated as "States" within the meaning of 28 U.S.C. §1251(a), with the result that a claim by another state against them does not fall within the original and exclusive jurisdiction of this Court. *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972). The Court in *Illinois* also noted that political subdivisions of states have been treated as "citizens" for diversity purposes, with the result that another state could assert a claim against them in a federal district court even though 28 U.S.C. §1251(a) provides that claims by one state against another must be asserted in this Court's original jurisdiction. If political subdivisions are treated as "citizens" for diversity purposes, they should also be treated as "citizens" for purposes of 28 U.S.C. §1251(b) (3) which gives this Court original but not exclusive jurisdiction over actions by a state against citizens of another state. On this basis, New Jersey's claim against Las Vegas falls with the original but non-exclusive jurisdiction of this Court, and the only remaining question is whether that jurisdiction should be exercised.

In summary, New Jersey's claims against Nevada fall within the original and exclusive jurisdiction of this Court and its claims are of a type which may be properly asserted. Moreover, New Jersey's claims against Las Vegas fall within the original but non-exclusive jurisdiction of this Court.

The Court Should Entertain This Action Within Its Original Jurisdiction If There Is No Other Adequate Forum In Which New Jersey As Plaintiffs Can Assert Its Claims.

While a court must normally entertain all cases falling within its jurisdiction, *Cohens v. Virginia,* 6 Wheat. 264 (1821), this Court simply cannot entertain all suits which might be asserted within its original jurisdiction, even those asserted by states against other states which fall within its original and exclusive jurisdiction. The Court has observed in the past that to do so would impact adversely upon its significant responsibilities as an appellate tribunal, and also that it is not presently constituted to act as a court of first instance. Over the years various cases asserted in the Court's original jurisdiction have been dismissed (or not allowed) because the jurisdictional prerequisites were absent, but, beyond that the Court has also developed principles under which it declines to exercise its original jurisdiction even where cases are properly brought and within its original jurisdiction. The Court has declined to exercise jurisdiction in cases in both the exclusive and nonexclusive branches of its original jurisdiction.

In this case New Jersey sought to resolve its claims against Nevada by asserting them in the U.S. District Court in Nevada. That effort failed because Nevada objected. New Jersey contends that its central role in the clean-up, transportation and disposal of the contaminated soil is a proper role for a state, and that where as here one state frustrates another State's efforts to fulfill its important duties to the public and in a manner which violates the U.S. Constitution, the injured State should be able to assert a claim on its own behalf to redress its grievance. In the present circumstances

New Jersey contends that it should be permitted to assert its claims in this Court.

Maryland v. Louisiana, 451 U.S. 725 (1981) sets forth the general rule as to when this Court will exercise jurisdiction in a case between states within the exclusive original jurisdiction of the Court. There Justice White said (451 U.S. at 739-40):

> With respect to Louisiana's second argument, it is true that we have construed the congressional grant of exclusive jurisdiction under §1251(a) as requiring resort to our obligatory jurisdiction only in "appropriate cases." *Illinois v. City of Milwaukee,* 406 U.S. 91, 93 (1972); *Arizona v. New Mexico,* 425 U.S. at 796-797. This view is consistent with the general observation that the Court's original jurisdiction should be exercised "sparingly." *United States v. Nevada,* 412 U.S. 534 (1973). See *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. at 501; *Massachusetts v. Missouri,* 308 U.S. at 18-20. In *City of Milwaukee,* we noted that what is "appropriate" involves not only "the seriousness and dignity of the claim," but also "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." 406 U.S. at 93.

Ten years earlier Justice Harlan stated the rule under which the Court will determine whether it should exercise its nonexclusive original jurisdiction in suits brought by States against citizens of other states, in *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971). He said (401 U.S. at 499-500):

> Thus, at this stage we go no further than to hold that, as a general matter, we may decline to entertain a complaint brought by a State against the citizens of another State or country only where we can

say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to with its other responsibilities.

II

In applying this analysis to the facts here presented, we believe that the wise course is to deny Ohio's motion for leave to file its complaint.

A

Two principles seem primarily to have underlain conferring upon this Court original jurisdiction over cases and controversies between a State and citizens of another State or country. The first was the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own. *Chisholm v. Georgia,* 2 Dall 419, 475-476, (1793); *Wisconsin v. Pelican Ins. Co.,* 127 U.S. at 289. The second was that a State, needing an alternative forum, of necessity had to resort to this Court in order to obtain a tribunal competent to exercise jurisdiction over the acts of nonresidents of the aggrieved State.

See also *Washington v. General Motors Corp.,* 406 U.S. 109 (1972). In *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439 (1945) Justice Douglas said in speaking about cases within the Court's nonexclusive original jurisdiction, "The Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice." 324 U.S. at 464.

The *Maryland v. Louisiana* and *Ohio v. Wyandotte Chemicals* tests appear similar in that they both contemplate that the Court should exercise jurisdiction over a claim brought by a state in the Court's original jurisdiction if no other adequate forum is available. It is true that an alternative forum may be less likely when a dispute is properly between two states. If there is any difference between the tests in the two cases, it would appear to be that the *Maryland v. Louisiana* test contemplates that disputes between two or more states may be of such "seriousness and dignity" that by that fact alone they should be heard by this Court rather than any lesser tribunal.

In this case it may well be that New Jersey's interest in the matter could be characterized narrowly. Insofar as Nevada's actions are concerned, New Jersey is shipping hazardous material in interstate commerce, just as any private citizen might, and it is asserting rights under the Commerce Clause and Supremacy Clause of the U.S. Constitution which are available generally to any shippers in interstate commerce. Viewed in this way New Jersey is not acting in a quasi-sovereign capacity or quasi-sovereign rights insofar as it simply seeks to ship its cargo in interstate commerce. New Jersey so argued in the District Court. As noted, the District Court rejected the argument and found that this Court was the sole federal forum available to New Jersey.

Nonetheless Nevada has caused injuries which affect New Jersey's proprietary interests, and also New Jersey's quasi-sovereign responsibilities to protect the health and welfare of its citizens. Moreover, New Jersey's central role in the clean-up effort in New Jersey makes it the most appropriate party to bring suit, both

in a legal and practical sense. In this setting, too, it is more than appropriate for New Jersey to assert claims in its *parens patriae* capacity on behalf of its citizens who are also being improperly harmed by Nevada's actions. Compare *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923); *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439 (1945); and *Maryland v. Louisiana,* 451 U.S. 725 (1981) in which States were allowed to assert suits in both branches of the Court's original jurisdiction based on both proprietary and *parens patriae* claims and based on rights asserted under federal law. See also *California v. Texas,* 457 U.S. 164 (1982); *South Carolina v. Regan,* 104 S.Ct. 1107 (1984).

It is submitted that this case is one in which the Court should exercise its original jurisdiction. New Jersey as a state is being completely frustrated in its effort to address a major problem threatening the health and welfare of its citizens, and it is being put to great additional expense and incalculable injury by Nevada. Moreover, New Jersey contends that Nevada's actions ignore and violate federal law. New Jersey contends that it is a matter of "seriousness and dignity" when one state is preventing another from addressing a major environmental problem such as the one giving rise to this suit, and violating federal constitutional and statutory law in doing so. The removal of radioactive material from private residencies in New Jersey is a project of the highest priority, to protect the public health and welfare.

Nor are there adequate alternative forums. The suit must be brought against Nevada because it is Nevada's officials exercising their authority under state law who are blocking the shipment of the contaminated soil. And

New Jersey is the most appropriate plaintiff, practically and legally speaking. New Jersey is conducting and administrating the clean-up project with State funds, New Jersey has employed the interstate carrier and is the shipper, and New Jersey is the holder of the permit issued under Nevada law for the disposal of the soil. Moreover, New Jersey will suffer financial and other losses because of Nevada's actions. Therefore, while certain private citizens in New Jersey should have standing to assert claims against Nevada, this is not a case in which a state has merely stepped in to assert rights belonging only to private citizens. Compare *Oklahoma v. Atchison, Topeka & Santa Fe Railway Co.,* 220 U.S. 277 (1911) and *Illinois v. Michigan,* 406 U.S. 36 (1972). Nor is this a case in which one state has only indirectly injured another state, such as by imposing a tax which is assessed on third parties and only indirectly passed on to other states, so that the intermediary may be a more appropriate party to file suit. See *Arizona v. New Mexico,* 425 U.S. 794 (1976) and *Pennsylvania v. New Jersey,* 426 U.S. 660 (1976). To deny New Jersey the right to sue on its own behalf in the circumstances is to afford a state less deference than it is entitled to under our federal form of government, and, indeed, less than a private citizen. To deny New Jersey the right to sue on its own behalf is to force New Jersey to depend for the vindication of its rights on the uncertain outcome of potential litigation between a private citizen and Nevada.

It is clear that this is the only appropriate forum for New Jersey to assert its claims against Nevada. Other federal courts have no jurisdiction over the claims by virtue of the exclusive jurisdiction of this Court. More-

over, as noted by Justice Harlan in *Ohio v. Wyandotte Chemicals,* one of the reasons for conferring original jurisdiction upon this Court in cases by States against citizens of other States was that no State should be compelled to resort to the tribunals of another State for redress, since parochial factors might lead to the appearance of partiality if not actual partiality. That consideration is equally applicable to disputes between states, and especially to a case such as this. In the circumstances of this case it is contended that it would be inappropriate to conclude that New Jersey should assert its claims in the Nevada courts —the only other tribunals available if New Jersey is to sue on its own behalf. To require New Jersey to assert its claims in Nevada's court would be to disregard a fundamental purpose and assumption in granting this Court original jurisdiction in cases involving states.

The case only presents issues of federal law, and it may not unduly burden the Court. New Jersey seeks a determination that Nevada's actions are invalid under the Commerce Clause and Supremacy Clause of the U.S. Constitution, and also certain federal statutes. Moreover, those federal statutes define the limits upon what Nevada may do by way of regulating the interstate transportation of hazardous materials. In view of this resolution of New Jersey's claims should simply involve determining whether Nevada's new regulatory efforts to block the shipment are improper as measured under federal statutes and regulations governing the transportation of hazardous materials. In this setting no significant factual issues should develop which would require a trial. Indeed, summary judgment seems appropriate.

For the foregoing reasons, this Court has original and exclusive jurisdiction over New Jersey's claims against

Nevada and should exercise that jurisdiction and allow New Jersey to file its complaint. The Court also has original but non-exclusive jurisdiction over New Jersey's claims against Las Vegas, and New Jersey asks the Court to entertain those claims as well. All the claims arise out of the same series of occurrences, namely the efforts of Nevadans to block New Jersey's shipments, and involve common questions of law and fact within the meaning of Federal Rule of Civil Procedure 20(a). Moreover, the relief sought must be obtained against both Nevada and Las Vegas if it is to be complete and adequate within the meaning of Federal Rule of Civil Procedure 19. Both Nevada and Las Vegas are interfering with the shipment, and eliminating the restrictions of either still leaves those of the other. Finally, time is of the essence for New Jersey, and in this circumstance it has no adequate forum against Las Vegas because the U.S. District Court in Nevada has declined to proceed with New Jersey's pending suit against Las Vegas until this Court rules on the question of whether the claims against Las Vegas should be asserted in this Court. For all these reasons New Jersey asks the Court to allow it to file its complaint as against both Nevada and Las Vegas.

DATED: September 19, 1985.

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STATE OF NEW JERSEY,

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STATE OF NEVADA,
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and THE CITY OF LAS VEGAS, NEVADA,

Defendants.

—o—

COMPLAINT

—o—

Plaintiff the State of New Jersey ("New Jersey"), by its Attorney General, brings this suit in equity against the State of Nevada ("Nevada"), the Nevada Public Service Commission ("PSC"), and the City of Las Vegas, Nevada and for its cause of action states:

Jurisdiction

I

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U.S.C. §1251(a) and (b)(3). New Jersey's claims present an actual controversy, appropriate for a declaratory judgment pursuant to 28 U.S.C. §2201, and for injunctive and other necessary relief pursuant to 28 U.S.C. §2202. New Jersey has suffered a wrong through the action of another State and a municipality of another

state which is a "citizen" within the meaning of 28 *U.S.C.* §1251(b)(3) which furnishes grounds for judicial redress, and it is asserting a right against another State and a "citizen" of another state which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence. Moreover, all its claims arise out of the same series of occurrences and involve common questions of law and fact within the meaning of Federal Rule of Civil Procedure 20(a), and the relief sought must be obtained against both Nevada and Las Vegas if it is to be complete and adequate within the meaning of Federal Rule of Civil Procedure 19.

Parties

II

The State of New Jersey is one of the states of the United States, and it has undertaken to excavate low-level radioactive waste in the form of soil contaminated with small quantities of radium from residential areas in northeast New Jersey, and to transport and dispose of it in Beatty, Nevada.* New Jersey has contracted with U.S. Ecology, Inc., the lessee of a site in Beatty, for the disposal of the contaminated soil. New Jersey as the shipper of the contaminated soil has also contracted with the Union Pacific Railroad as a common carrier to transport the soil in interstate commerce to Beatty, Nevada. New Jersey has also applied for and obtained the permit required under Nevada law to dispose of the soil at Beatty.

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* The facts alleged in this complaint are set forth in affidavits included in the attached appendix, as Exhibits 5, 9, 12 and 23 (21a, 40a, 51a, 155a).

III

Defendant the State of Nevada ("Nevada") is also one of the states of the United States. Nevada is the owner and lessor of the Beatty disposal site. Nevada also exercises certain regulatory authority over the lessee of the Beatty site, pursuant to a limited delegation of authority by the Nuclear Regulatory Commission ("NRC"), under 42 U.S.C. §2021. Nevada by its Department of Human Resources also exercises certain regulatory authority over the disposal of radioactive materials in Nevada pursuant to and in accordance with federal law.

IV

Defendant Nevada Public Service Commission ("PSC") is a regulatory agency of the State of Nevada which regulates public utilities in Nevada. It has recently asserted jurisdiction over the transportation of New Jersey's contaminated soil by the Union Pacific Railroad, by adopting an emergency order which imposes new requirements on the transportation of radioactive material in Nevada, provided they are being transported for the purpose of storage in Nevada.

V

Defendant City of Las Vegas is a municipal corporation of the State of Nevada through which the shipments will pass. It has recently asserted jurisdiction over the transportation of New Jersey's contaminated soil by adopting an ordinance which imposes new requirements on the transportation of hazardous materials in and through Las Vegas, including the necessity of securing a permit.

Summary of Claims

VI

By this action, New Jersey seeks a declaration that Nevada's requirement that New Jersey obtain a permit governing packaging and transportation requirements prior to disposal, a recent assertion by Nevada that New Jersey needs an additional "authorization to transport" to transport radioactive soil into Nevada for disposal, General Order Number 52 of the PSC, and Las Vegas Ordinance No. 3190 on their face and as applied to New Jersey are invalid and unenforceable because they are in violation of the United States Constitution and United States statutes. In addition, New Jersey seeks preliminarily and permanently to enjoin the enforcement of Nevada's permit requirement, its new transport authorization requirement, the PSC order and the Las Vegas ordinance, and any other statute, regulation, state or municipal policy or other act of the defendants or their agents which would interfere with, restrict, delay or prevent the transportation and disposal of the contaminated soil from New Jersey.

VII

New Jersey is in the process of excavating the soil from 12 residential home sites and an adjacent lot in Montclair, Glen Ridge and West Orange in northeast New Jersey. While the level of radiation in this soil is relatively low, investigations by New Jersey and the United States Environmental Protection Agency ("EPA") have revealed that radon, a gas emitted from radium found in the soil,

was migrating to the insides of these homes and accumulating there, and that it could potentially cause health problems for the residents after many years of exposure at the levels found in the homes. The Federal Centers for Disease Control ("CDC") recommended that the soil at the most contaminated of these homes be removed by the end of 1985 in order to protect the health of the residents.

VIII

Under federal law low-level radioactive wastes such as those being excavated by New Jersey may only be removed to and disposed of at one of three sites in the United States: Barnwell, South Carolina, Beatty, Nevada and Richland, Washington. Barnwell, however, is not permitted, due to physical limitations, to accept the type of waste involved in New Jersey's clean-up project. New Jersey, through its bidding process, chose to use the Beatty, Nevada site for the disposal of the contaminated soil, and entered into a contract with its operator, U.S. Ecology, Inc. for that purpose.

IX

Nevada's statutes and regulations prohibit the use of the Beatty disposal site by a shipper such as New Jersey unless the shipper first obtains a permit from the Nevada Department of Human Resources, State Board of Health. The statutes and regulations require a shipper to demonstrate to the satisfaction of the Nevada Division of Health that the hazardous material will be packaged and transported in conformity with the regulations of the State Board of Health. Pursuant to a permissive but not man-

datory section of the statute, NRS 459.221.2, the Nevada Department of Human Resources has designated a third party, Nevada Inspection Services, Inc. ("NIS"), to inspect New Jersey's project and to make reports regarding New Jersey's packaging and transportation arrangements for its shipments to Nevada. Nevada's statutes and regulations also contain various enforcement provisions.

X

New Jersey made application to Nevada for the required permit and contracted with NIS for the inspection of its packaging and transportation methods. An unconditional permit to dispose of the contaminated soil at the Beatty site was issued by the Nevada State Board of Health to New Jersey on May 1, 1985. A copy is attached as Exhibit 1 (1a). Both a licensing audit and an inspection of New Jersey's packaging and shipping operations have been performed by NIS, and NIS prepared an initial audit report dated May 13, 1985 and a periodic audit report dated July 25, 1985. Both were submitted to Nevada. Copies are attached as Exhibits 2 and 3 respectively (2a, 12a). NIS reported that New Jersey is following all applicable procedures and guidelines. Despite New Jersey's compliance with Nevada's law and despite the permit issued to it by Nevada, Nevada officials have prevented the actual shipment of the contaminated soil by a recent assertion that New Jersey has not obtained an additional approval, which they characterized as an "authorization to transport." This "authorization" is nowhere described in the statutes and regulations of Nevada. Nevada officials have publicly stated that Nevada will refuse to issue this new-

ly required authorization to New Jersey, but at the same time have not identified any provisions of Nevada or federal law which New Jersey has not complied with.

XI

On August 30, 1985, the Nevada PSC, which had previously not asserted any jurisdiction over the safety aspects of the shipment by rail of hazardous substances, convened a meeting on short notice and adopted a regulatory order on an emergency basis, General Order 52. The emergency order now requires New Jersey's rail carrier to obtain a transportation permit from the PSC not previously required under law before it may carry New Jersey's soil into Nevada. A copy of the PSC emergency order is attached as Exhibit 4 (17a). The order is effective on September 3, 1985 and expires on December 31, 1985.

XII

On September 6, 1985 the City of Las Vegas, which had not previously asserted any regulatory authority over the shipment of New Jersey's contaminated soil, adopted an ordinance which now requires New Jersey to obtain yet another permit before shipment because of the nature of the cargo. A copy of the ordinance is attached as Exhibit 22 (141a).

XIII

Nevada's enforcement of the permit requirement, the new requirements of the authorization to transport and the PSC permit and Las Vegas' enforcement of its new

ordinance violate the United States Constitution and United States statutes in several respects. Nevada's permit requirement and its two new requirements and Las Vegas' new ordinance invade a field occupied by federal regulation — the packaging, labelling and transportation of radioactive materials in commerce — in direct conflict with provisions of the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §1801 *et seq.,* and regulations adopted thereunder, and are inconsistent therewith. Further, the permit requirement and the new state requirements and ordinance are not authorized by the agreement of 1972 between Nevada and the NRC, and therefore violate 42 U.S.C. §2021. For this reason, Nevada's permit requirement and the two new requirements and Las Vegas' ordinance are unconstitutional and invalid under the Supremacy Clause, Article VI, Section 2 of the United States Constitution. Nevada's permit requirement and the two new requirements and Las Vegas' new ordinance also represent a closure of Nevada's borders to the interstate shipment of contaminated soil by New Jersey, notwithstanding New Jersey's full compliance with all applicable federable requirements. As such these requirements are in direct conflict with the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §2021b *et seq.,* and unconstitutional and invalid under the Supremacy Clause, Article VI, section 2, of the United States Constitution. Finally, the permit requirement and the new requirements which Nevada and Las Vegas are imposing on New Jersey place an unreasonable burden on New Jersey's attempt to ship low-level radioactive waste in interstate commerce and are therefore in violation of the Commerce Clause, Article I, Section 8, of the United States Constitution.

XIV

Nevada's enforcement of its permit requirement and the new requirement for an "authorization to transport" and its emergency PSC order and Las Vegas' enforcement of its new ordinance are causing immediate and irreparable injury to New Jersey and to the public interest, for which there is no adequate remedy at law. More particularly, the actions of Nevada and Las Vegas: (a) deprive New Jersey of its constitutional right to transport low-level radioactive waste from New Jersey and to dispose of it at the U.S. Ecology disposal site at Beatty, Nevada in accordance with federal regulations; (b) prevent the removal and transportation from New Jersey of low-level radioactive waste, thus causing New Jersey to contravene the Centers for Disease Control advisory and causing the affected New Jersey residents to continue to be exposed to the high radon gas levels inside their homes; (c) subject New Jersey to the risk of being charged with substantial delay charges from the excavation and transportation contractors, and substantial relocation costs for the residents affected if the excavation and shipment are delayed or forbidden; and (d) interfere with the proper discharge of New Jersey's authority to clean up and remove discharges of hazardous substances mandated by the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 *et seq.*

The Contaminated Soil

XV

Radium is a radioactive substance previously used for, among other things, the painting of watch dials to increase

their visibility at night. As it decays, it emits a gas known as radon. Radon can build up to dangerous levels if trapped in an enclosed area such as a home.

XVI

In the late 1970's and early 1980's, New Jersey in conjunction with the United States Environmental Protection Agency (the "EPA") discovered that homes in Montclair, West Orange and Glen Ridge, in northern New Jersey had been built on fill that contains radium that is decaying and thus giving off radon gas. The level of radium in the soil varies at each house, but averages 84 pCi/g (picocuries per gram) of radium-226.

XVII

The Code of Federal Regulations specifies levels of safe exposure to radium-226 and the level of cleanup needed to protect the public from exposure, in 40 C.F.R. §192.12. They are:

(a) The concentration of radium-226 in land averaged over any area of 100 square meters shall not exceed the background level by more than—

(1) 5pCi/g, averaged over the first 15 cm of soil below the surface, and

(2) 15 pCi/g, averaged over 15 cm thick layers of soil more than 15 cm below the surface.

(b) In any occupied or habitable building—

(1) The objective of remedial action shall be, and reasonable effort shall be made to achieve, an annual average (or equivalent) radon decay product concentration (including background) not to exceed 0.02 WL [working level]. In any case, the radon decay

product concentration (including background) shall not exceed 0.03 WL, and

(2) The level of gama radiation shall not exceed the background level by more than 20 microroentgens per hour.

XVIII

For purposes of United States Nuclear Regulatory Commission ("NRC") and United States Department of Transportation ("USDOT") regulations governing packaging, labelling and transportation, the soil to be shipped by New Jersey is classified as low specific activity ("LSA") material. 49 C.F.R. §173.403(n). See Affidavit of Arthur Robb, Exhibit 5 (21a).

History of New Jersey's Cleanup Efforts for the Contaminated Soil in Northeast New Jersey

XIX

In 1979 New Jersey instituted a program to assess the extent of, or potential for, radiological contamination at industrial facilities in New Jersey which processed or used radioactive material and which may have disposed of radium processing wastes off-site. The EPA at New Jersey's request funded an aerial gamma radiation survey of 12 square miles in Essex County, New Jersey. The survey identified areas in Montclair, Glen Ridge and West Orange in northern New Jersey that warranted further study based on elevated gamma radiation levels.

XX

In 1983 New Jersey conducted field investigations, including outdoor and indoor gamma radiation surveys,

subsurface coring and other tests, and indoor radon gas measurements. As a result of this investigation it was determined that a number of homes in these municipalities had levels of outdoor and indoor gamma radiation and radon gas concentrations inside certain residential homes which exceeded general background levels. In some homes radon gas concentrations were above the levels considered safe by the federal government for exposure of uranium mine workers under OSHA regulations.

XXI

New Jersey consulted with the EPA, the Federal Centers for Disease Control ("CDC") and the New Jersey State Department of Health and developed a risk assessment and management plan. CDC issued a health advisory requiring that the radon levels in certain of the homes investigated be permanently reduced before January 1, 1986. A number of homes required the immediate installation of ventilation systems to reduce indoor radon gas concentrations. The EPA provided further guidance regarding removal of contaminated soil in accordance with cleanup criteria based on federal standards, set forth in 40 C.F.R. Part 192.

XXII

In order to accomplish a permanent cleanup, the EPA and New Jersey planned a phased cleanup program to remove the contaminated soil and to restore the homes to a safe condition. Phase 1 of this program involves 12 homes and one adjacent lot, and is now in progress. The New Jersey Legislature appropriated $8 million to fund this phase of the cleanup. Phase 1 is expected to be completed

by the end of 1985. It is this phase of the cleanup project which is now underway and which is being frustrated by Nevada's recent opposition. This phase began on June 19, 1985, after Nevada issued the disposal permit and before Nevada belatedly opposed the shipment of the soil. The EPA will complete the remainder of the project under the federal "Superfund." 42 *U.S.C.* §9601 *et seq.*

XXIII

In October, 1984 New Jersey prepared a request for proposals to engage a private consultant to complete necessary field studies, engineering designs and contract bid specifications for the excavation, transportation and disposal of the radium contaminated soil, and to provide construction and engineering management services. The firm of Baker Engineers /TSA, Inc. was selected in December, 1984 for the work and was awarded the contract. In accordance with New Jersey purchasing laws, New Jersey solicited bids for the transportation of the contaminated soil to a radioactive waste disposal site, and subsequently awarded a contract to the Union Pacific Railroad.

XXIV

There are presently only three active commercial licensed disposal sites for low level radioactive wastes in the United States: Barnwell, South Carolina, Beatty, Nevada and Richland, Washington. The operation of these commercial facilities is regulated, in part, by the *Low-Level Radioactive Waste Policy Act,* 42 U.S.C. §2021b-d. License restrictions at the Barnwell facility prohibit the acceptance of radium bearing waste, leaving only two available sites, both operated by U.S. Ecology, Inc.

XXV

Prior to the award of the disposal contract to U.S. Ecology, Inc., New Jersey through its Department of Environmental Protection unsuccessfully sought to identify and locate appropriate low level radioactive waste interim storage and/or disposal sites within and outside New Jersey. These included requests for the use of United States Department of Energy ("USDOE") and United States Department of Defense ("USDOD") low level radioactive waste disposal sites. New Jersey was informed that USDOE and USDOD policies and/or federal statutes prohibit the use of USDOE and/or USDOD facilities for the disposal or storage of low level radioactive wastes not generated by those agencies.

The Nevada Statutes, Regulations and PSC Order and the Las Vegas Ordinance

XXVI

In 1981 the Nevada Legislature added Section 459.221 to Title 459 of the Nevada Revised Statutes ("NRS"). This section was amended in 1983, Chapter 504, and now reads in pertinent part:

> 459.221 License to use disposal area required; shipping violations; penalties; suspension, revocation and reinstatement of license.
>
> 1. A shipper or producer of radioactive waste, or a broker who receives such waste from another person for the purpose of disposal, shall not dispose of the waste in this state until he obtains a license from the health division to use the disposal area. The health division shall order a shipment of such waste from an unlicensed shipper or broker to be returned to him, except for a package which has leaked or spilled its

contents, unless the package has been securely repackaged for return.

2. The health division shall issue a license to use a disposal area to a shipper or broker who demonstrates to the satisfaction of the division that he will *package and label the waste he transports or causes to be transported to the disposal area in conformity with the regulations of the state board of health.* The director of the department of human resources may designate third parties to inspect and make recommendations concerning such shippers and brokers and their shipments . . . . [emphasis added]

N.R.S. 459.221 is enforced by the following sections of Title 459:

459.270 Injunctive and other relief.

1. If, in the judgment of the health division, any person is engaged in or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of NRS 459.010 to 459.290, inclusive, or any rule, regulation or order issued under NRS 459.010 to 459.290, inclusive, the division may request the attorney general to apply to the district court for an order enjoining such act or practice, or for an order directing compliance with any provision of NRS 459.010 to 459.290, inclusive, or any rule, regulation or order issued under NRS 459.010 to 459.290, inclusive.

2. Upon a showing by the health division that such person has engaged in or is about to engage in any such act or practice, a permanent or temporary injunction, restraining order or other appropriate order may be granted by the court.

459.290 Penalties. Every person is guilty of a misdemeanor who:

1. Uses, manufactures, produces, or knowingly transports, transfers, receives, acquires, owns or possesses any source of ionizing radiation which has not

been licensed or registered in accordance with the provisions of NRS 459.010 to 459.290, inclusive, and the regulations adopted under them.

2. Violates any of the provisions of NRS 459.010 to 459.290, inclusive, or any regulation or order adopted or issued under them.

XXVII

The Nevada Division of Health has promulgated regulations for radiation control, the Nevada Administrative Code ("NAC"), Section 459, NAC 459.850 through 459.950 which contain the requirements pertaining to the disposal of radioactive material. The pertinent sections read as follows:

459.850 Definitions. As used in NAC 459.850 to 459.950, inclusive, unless the context otherwise requires:

1. "Authorized inspector" means a third party designated by the department of human resources to inspect the program of an applicant or licensee *for packaging and transporting low-level radioactive waste.* [emphasis added].

459.865 Licenses required; license a revocable privilege.

1. *Any shipper* or producer of radioactive waste or any broker receiving such waste from another person for the purpose of disposal who desires to dispose of that waste at the state-owned disposal area near Beatty, Nevada, *must obtain a license from the health division of the department of human resources before shipping* the waste to the disposal area. [emphasis added].

2. The issuance of a license pursuant to NAC 459.850 to 459.950, inclusive, is merely evidence of a revocable privilege and does not expressly or impliedly create a property right or interest in the license.

459.870 Application for license. To obtain such a license, a person must do all of the following:

1. Submit a written application to the health division on a form furnished by the division, and provide the information requested on the form and any other information requested by the division.

2. Allow an audit and inspection of his program for radioactive waste to be conducted by an authorized inspector at the site where the waste is generated or a broker holds it awaiting shipment.

3. Agree to allow unannounced inspections of the site by an authorized inspector.

4. Enter into a contract with an authorized inspector for performance of *inspections of the applicant's program for packaging and transporting radioactive waste* and agree to pay the inspector's organization for those inspections.

5. Enter into an agreement with the State of Nevada to hold it and the health division harmless from *any loss or expense* which may arise from liability or consequential damage *caused by the licensee's shipment* of radioactive waste from its place or origin to the state-owned disposal area. *The health division may waive this requirement if the licensee is not allowed by state or federal law to enter into such an agreement.*

6. Agree to comply with all federal and state regulations *relating to the transportation and packaging* of radioactive waste and the conditions of the license issued to the operator of the state-owned disposal area.

7. Pay in advance the fee established for the license. [emphasis added].

459.875 Audit and inspection prerequisite to licensing.

To obtain qualification of his program for packaging radioactive waste, an applicant for a license

must submit to the authorized inspector a request to have an audit and inspection of the program. No license may be issued until an audit and inspection has been completed.

459.910 Duties of licensee.

A licensee:

1. Shall carry out his own written program for ensuring the quality of the packaging of the radioactive waste.

2. Shall package the radioactive waste in accordance with:

(a) *The regulations of the Secretary of Transportation concerning the transportation of hazardous materials, in 49 C.F.R. Parts 171 to 177, inclusive,* revised as of December 1, 1980, as amended on March 10, 1983, March 31, 1983, and July 7, 1983. The board hereby incorporates those regulations by reference. Those regulations are contained in one volume of the Code of Federal Regulations and may be obtained from the Government Printing Office, Washington, D.C. 20402, at a price of $8. [emphasis added].

(b) The regulations of the Nuclear Regulatory Commission concerning the packaging and transport of radioactive material in 10 C.F.R. Part 71 revised as of September 6, 1983. The state board of health hereby incorporates those regulations by reference. Those regulations are contained in a volume of the Code of Federal Regulations and may be obtained from the Government Printing Office, Washington, D.C. 20402, at a price of $7.50.

3. May ship only solid radioactive waste to the state-owned disposal area. Any liquid radioactive waste must, before shipment, be solidified by a method, other than by using urea formaldehyde, which will ensure that there will not be any liquid in the shipping containers upon their arrival at the disposal area.

459.920 Additional inspections.

During each year, a licensee shall allow at least four unannounced inspections of the site of his program for packaging radioactive waste, in addition to any inspections which may be required as a result of his noncompliance with NAC 459.850 to 459.950, inclusive.

XXVIII

Independent of the Nevada Division of Health, the Nevada Public Service Commission which regulates common carriers in Nevada on August 30, 1985 promulgated Emergency General Order 52. It was signed by Governor Richard Bryan and became effective on September 3, 1985. A copy of the PSC Emergency Order is attached as Exhibit 4 (17a). It requires a transporter or carrier of radioactive materials by rail which has a final destination within Nevada to obtain a permit from the PSC before such shipments may begin. The new emergency order now requires an applicant for the newly required permit to show:

1) a map of the route;

2) the estimated duration of storage of the radioactive waste in Nevada before transfer to highway transport;

3) the estimated date the material will be placed back in transport;

4) the methods of storage and security at the storage site;

5) copies of all necessary permits the shipper has from other jurisdictions.

The emergency order provides that the PSC may issue a permit if the applicant carrier demonstrates that it complies with all other federal and state laws and regulations, that it designs the rail route to minimize contact with densely or residentially populated areas, that it will minimize contact with other major rail or highway intersections during times when there is heavy traffic, and that it takes safety precautions—not specified—when radioactive materials are transferred from one form of transportation to another, such as from trains to trucks. The emergency order was framed as to apply only to shipments having a final destination within Nevada. It does not therefore apply to shipments otherwise identical to New Jersey's which would pass through or from Nevada to another state.

XXIX

On September 6, 1985 Las Vegas adopted Ordinance No. 3190 which is entitled:

> AN ORDINANCE RELATING TO THE TRANSPORTATION OF HAZARDOUS MATERIALS; AMENDING TITLE 9 OF THE MUNICIPAL CODE OF THE CITY OF LAS VEGAS, NEVADA, 1983 EDITION, BY ADDING THERETO A NEW CHAPTER, DESIGNATED AS CHAPTER 36; PRESCRIBING REGULATIONS TO GOVERN CONDITIONS RELATING TO THE TRANSPORTATION OF HAZARDOUS MATERIALS WHICH ARE HAZARDOUS TO LIFE AND SAFETY; RESTRICTING THE AREAS FOR TRANSPORTING HAZARDOUS MATERIALS WITHIN THE CITY; AUTHORIZING THE DEPARTMENT OF FIRE SERVICES TO OVERSEE ALL ACTIVITIES RELATING TO THE TRANSPORTATION OF HAZARDOUS MATERIALS AND DEFINING THE POWERS AND DUTIES THEREOF; PROVIDING FOR OTHER MATTERS PROPERLY RELATING

THERETO; PROVIDING PENALTIES FOR THE VIOLATION THEREOF; AND REPEALING ALL ORDINANCES AND PARTS OF ORDINANCES IN CONFLICT HEREWITH.

A copy of Ordinance No. 3190 is attached as Exhibit 22 (141a). The ordinance applied exclusively to the "transportation, and storage incidental to transportation, of hazardous materials into, through, within and out of the City." §9.36.010. Hazardous materials are defined by reference to provisions of the federal hazardous materials transportation regulations (§9.36.040). It adopts by reference the federal Hazardous Materials Regulations and provides that where the ordinance is "inconsistent" with the federal regulations, the provisions establishing the greater level of protection shall prevail (§9.30.030). The ordinance applies expressly to radioactive materials (§9.36.040(c)) and requires shippers to obtain a permit from the City prior to the transportation of hazardous materials (§9.36.060(A); §9.36.090). Section 9.36.060(D) requires that permit applications be submitted 60 days in advance of proposed shipments. Section 9.36.070(A) authorizes the Department of Fire Services to deny a permit if "adequate training, equipment and planning does not exist in the Department for an emergency response in the case of an accident with the specified materials." Violations are punishable by fine or imprisonment or both.

XXX

42 U.S.C. §2021(d)(2) allows the NRC to delegate certain of its duties to States if the NRC finds that,

> the State program is in accordance with the requirements of subsection (o) of this section [dealing with

> high-level waste not relevant here] *and in all other respects compatible with the Commission's program* for the regulation of such materials . . . [emphasis added].

Pursuant to 42 U.S.C. §2021 the NRC on July 1, 1972 delegated to Nevada the authority and responsibility to regulate by-product materials, source materials and special nuclear materials in quantities not sufficient to form a critical mass. A copy of the NRC's order is attached as Exhibit 6 (27a). None of the types of radioactive materials specified in the NRC's 1972 Order are involved in New Jersey's shipment, which is low-level radioactive waste.

New Jersey's Compliance With Nevada Law

XXXI

On March 1, 1985 New Jersey submitted a written application to the Nevada Division of Health on a form provided by the Division for the use of applicants seeking to dispose of radioactive substances at the Beatty site. A copy of the application is attached as Exhibit 7 (33a). New Jersey in the application modified the indemnification provision required, in order to conform to restrictions in New Jersey law. The modification was accepted by the Nevada Division of Health on March 15, 1985, pursuant to discretion expressly granted to it by NAC 459.878(5). New Jersey also advised Nevada of its intention to comply with all federal regulations governing the transportation and packaging of radioactive waste, and with the conditions of the license issued to U.S. Ecology, Inc. for the Beatty disposal site.

XXXII

By a letter to New Jersey dated March 15, 1985, John Vaden, on behalf of the Department of Human Resources, in the Nevada Division of Health, acknowledged receipt of New Jersey's application and stated "All of the papers you submitted are in good order and are accepted." Mr. Vaden informed New Jersey that it should next contact Nevada Inspection Services, Inc. ("NIS") for a pre-licensing audit of New Jersey's packaging procedures, and further stated: "Upon receipt of a satisfactory finding by NIS we will sign and return the purchase order and issue the permit to the State of New Jersey." A copy of Mr. Vaden's March 15, 1985 letter is attached as Exhibit 8 (38a).

XXXIII

Subsequent to Mr. Vaden's letter of March 15, 1985, Nevada signed and returned New Jersey's purchase order for the cost of the licensing fee. New Jersey thereafter forwarded Nevada a check in the sum of $2,219, to pay the fee for disposing of the soil at the Beatty site. On May 1, 1985, Mr. Vaden, on behalf of the Nevada State Board of Health, issued a "Permit to Use State Radioactive Waste Disposal Site." A copy of the permit is attached as Exhibit 1 (1a). It was issued to the New Jersey Department of Environmental Protection. This permit, numbered Q437, has an expiration date of May 1, 1986. It is unconditional on its face, and reads as follows:

> Pursuant to Nevada Revised Statute 439.200 and regulations adopted by the State Board of Health, and in reliance on statements and representations made by the person designated below, this permit is issued authorizing the named person to ship radioactive wastes to the State Radioactive Disposal Site.

It was understood that shipments would not begin until the requested NIS report was submitted.

XXXIV

Based on the issuance of the permit by Nevada, New Jersey proceeded to engage private contractors to excavate, pack and deliver for interstate carriage the contaminated soil. NIS performed its first audit inspection on May 13, 1985, and issued a report dated June 28, 1985. This report, which is attached as Exhibit 2 (2a), was submitted to Nevada. Excavation work at two of the home sites began on June 19, 1985. At the site the contractor excavates the soil and places it in steel drums which are then collected in groups of about 20 and placed on trucks to be brought to a transfer site in Kearny, New Jersey. The drums are loaded onto larger containers at that point, and are subsequently to be placed on railroad cars for rail transportation from Kearny through Las Vegas to Arden, Nevada. From there the containers will be moved by highway to Beatty. All excavation and packaging of the contaminated soil is being done in compliance with applicable federal regulations, in 10 C.F.R. Part 71 (1985). The interstate transportation of the contaminated soil is also being performed in compliance with HMTA regulations in 49 C.F.R. Parts 171-189 (1984).

XXXV

Approximately 175 drums are being removed from each of the two work sites each working day, or five days per week. The site in Kearny, New Jersey which is being utilized temporarily to hold the containers until they can be loaded onto the trains was designed to hold approximately 70 containers, and 70 containers is the approximate total

which can be carried on each train. The procedure established when the project began was that as soon as 70 containers were on site a train would be loaded and started on the journey to Nevada, thus freeing the Kearny site for the next group of drums to be transported. Several trains will be required to transport all the drums to Nevada, and the project was scheduled to be completed before the winter months.

XXXVI

On July 17, 1985, while the work was in progress, NIS performed the first of its periodic audits of the work site in New Jersey to verify that New Jersey is following all applicable procedures and guidelines during the performance of the work. A report of this audit was submitted to John Vaden of the Nevada Division of Health on July 25, 1985. A copy is attached as Exhibit 3 (12a). The report states in part that:

> . . . the steps taken by the above-named Participants are *in compliance with the packaging and shipping conditions as specified in the license for disposal* of radioactive wastes at the Beatty, Nevada disposal facility *and the specific requirements for packaging and shipping of radioactive wastes set forth by the DOT and NRC.* [emphasis added]

The report goes on to state:

> It is clear to me that the State of New Jersey has done a lot of planning and has spent an enormous amount of time and money to insure there will be no problem or delays in complete [sic] this project.

Except for some initial inquiries to New Jersey after the initial audit, Nevada did not request any further information from New Jersey, and gave no indication to New Jer-

sey that there were any problems with the methods being used for the packaging and shipping of the contaminated soil. Pluta affidavit, Exhibit 9 (40a). Recently, too, Nevada conceded that the NIS reports showed that New Jersey's procedures are acceptable. See Exhibit 21 (110a).

XXXVII

The excavation work in New Jersey is continuing at the present time. While the work is underway the residents of the homes that are affected have been relocated at New Jersey's expense to motels. One of these families has children of school age or younger. New Jersey is accelerating the pace of the work at the sites in order to meet the December 31, 1985 CDC deadline. During the week of August 26, 1985 the excavation contractor added a second work crew so that the pace of the work could be accelerated. The ideal conditions for excavation work at these sites exist in summer and early fall when the weather is drier and the ground is not subject to freezing. If the work is delayed beyond December 31, 1985, freezing conditions at the sites make make excavation work impossible for at least six weeks to two months, if not longer. In this setting New Jersey's inability to start the train movements in mid-August is threatening to bring the project to a halt any day with home sites partially excavated because the storage facilities in New Jersey for filled drums are inadequate.

XXXVIII

Almost four months after Nevada issued the disposal permit to New Jersey on May 1, 1985, and well after the commencement of work by New Jersey and the issuance of favorable reports by NIS, Nevada officials suddenly and

without warning asserted that New Jersey must obtain an additional "authorization to transport" before the shipments to the Beatty site could enter Nevada On August 20, 1985, Governor Richard H. Bryan of Nevada sent a letter in response to a letter from the Union Pacific Railroad, New Jersey's interstate carrier. He asserted that New Jersey needs this further authorization to transport the contaminated soil. Copies of these two letters are attached as Exhibits 10 and 11 (48a, 50a). As a result of these belated assertions by Nevada officials that this further authorization is required, a representative of the State of New Jersey on August 22, 1985 communicated directly with Jerry Griepentrog, the Director of the Nevada Department of Human Resources, in an attempt to determine if any particular aspects of New Jersey's packaging and shipping program were not in compliance with federal and state regulations. Mr. Griepentrog said that Nevada required no further engineering data from New Jersey and that the only outstanding issue concerned the terms of New Jersey's agreement to indemnify Nevada. Despite this, he reiterated that New Jersey must still secure a further authorization from Nevada before the shipments could begin. As to the indemnification issue raised by Mr. Griepentrog for the first time in the August 22 conversation, Mr. Griepentrog said that Nevada did not approve of New Jersey's substitute indemnification clause in the application form. This new concern raised by Nevada directly contradicts Nevada's March 15, 1985 letter by which it accepted New Jersey's application (Exhibit 8, (38a), and also its prior issuance of the permit. It also conflicts with N.A.C. 459.870.5 which authorizes governmental applicants to submit a modified indemnity agree-

ment as New Jersey did. See Affidavit of William E. Rosenbaum, Exhibit 12 (51a). The issue of the indemnification requirement has not been raised with New Jersey since that time, suggesting that it is no longer in issue. New Jersey has not been cited to, nor can it find, any authority under federal law or Nevada law for the imposition of the requirement for a further authorization to transport, and New Jersey has not been advised of any further steps or conditions which must be met.

XXXIX

The Union Pacific Railroad, as indicated in its August 12 letter to Governor Bryan of Nevada (Exhibit 11, 50a), is unwilling to transport the contaminated soil in interstate commerce to Nevada in accordance with its contract with New Jersey because of Nevada's imposition of the requirement of a further authorization to transport. According to newspaper reports in late July 1985, Governor Bryan of Nevada publicly stated that Nevada will not grant a permit to allow Union Pacific trains carrying New Jersey's contaminated soil to enter Nevada, and further stated that he had contacted the Nevada Attorney General to seek legal ways to stop or delay the radioactive waste shipment. The Nevada Governor further suggested that this delaying action may help get the attention of Congress to act on the ratification of the Rocky Mountain States Low-Level Radioactive Waste Compact. See newspaper stories, Exhibits 14 and 15 (55a, 58a). These statements demonstrate that it is the policy of Nevada officials to prevent New Jersey from shipping the contaminated soil to Beatty, Nevada even though New Jersey has complied with all lawful requirements of Nevada and federal law concerning the transportation and disposal of the soil.

The Las Vegas Case

XL

On July 30, 1985 the City of Las Vegas, the City of North Las Vegas and Clark County, Nevada joined in the opposition to the transportation of the contaminated soil into Nevada. They filed a complaint and sought a temporary restraining order and preliminary injunction in the Eighth Judicial District in Clark County, Nevada against the Union Pacific Railroad. The suit sought to ban the railroad and any person acting in concert with it from transporting, storing or transferring low-level radioactive waste into, through and out of the City of Las Vegas, North Las Vegas, or Clark County. They alleged that the shipments would not be in compliance with applicable federal and state requirements but submitted no evidence in support of this contention. Since the first shipment was not due to leave New Jersey until August 15, 1985, or a little over two weeks later, no restraining order was necessary at that time. The action is entitled *City of Las Vegas, et als. v. Union Pacific Railroad,* and a copy of the complaint and motion are attached as Exhibits 17 and 18 (92a, 102a). The Union Pacific Railroad as the sole defendant in the action filed a petition on August 1, 1985 to remove the action to the United States District Court for the District of Nevada, on the ground that the U.S. District Court had both federal question and diversity jurisdiction. A copy of the removal petition is attached as Exhibit 19 (105a), The State of New Jersey sought and was granted leave to intervene in the action as a defendant by the U.S. District Court on August 8, 1985. On August 8, 1985 the U.S. District Court heard the application for a preliminary injunction which had been sought

by the two municipalities and the county as plaintiffs. It denied the motion in a three page decision and order dated August 9, 1985. A copy is attached as Exhibit 13 (52a). The court stated in part as to the grounds for denying the motion:

> (a) plaintiffs' had failed to show the possibility of irreparable injury as their alleged injuries were purely speculative;
>
> (b) the balance of hardships did not tip in favor of plaintiffs in that their injuries were speculative while defendants injuries from an injunction were both "real and quantifiable;"
>
> (c) the defendants had asserted that they would comply with all applicable laws and regulations, to which plaintiffs presented no evidence to the contrary.

New Jersey's Pending Case Against Nevada and Las Vegas

XLI

After the Union Pacific Railroad took the position in August 1985 that it would not transport the contaminated soil into Nevada absent a judicial declaration as to whether Nevada's recent objections to the shipments were proper and lawful, New Jersey on September 3, 1985 filed a complaint substantially identical to the present complaint against Nevada in the U.S. District Court for the District of Nevada. The action is entitled *State of New Jersey v. State of Nevada, et als,* Docket No. CV-R-85-485 HDM (D. Nev.). New Jersey filed an amended complaint in that action on September 6, 1985, which simply added claims against Las Vegas because on September 6, 1985 Las Vegas

adopted the new ordinance regulating the transportation of hazardous materials through Las Vegas. New Jersey's amended complaint is very similar to the complaint in this action. Nevada responded in the action with a motion to dismiss New Jersey's action or to abstain, on the ground that the claims against the State of Nevada and its officials are within the original and exclusive jurisdiction of this Court. A copy of the motion to dismiss is attached as Exhibit 20 (108a). The Nevada Attorney General on behalf of Nevada and its Department of Human Resources (but not the Public Service Commission which appeared separately) responded to New Jersey's application for a preliminary injunction by a memorandum dated September 6, 1985. A copy is attached as Exhibit 21 (110a). Although the third party inspection reports by NIS showed that New Jersey met all applicable requirements, Nevada newly contended that it was entitled to review an unsolicited independent report obtained by the Union Pacific Railroad for its own purposes in late August, before Nevada would be required to authorize the shipment to go forward. That additional report is not required as a condition of shipment under Nevada law, and in any event it was furnished to Nevada on August 30, 1985 and showed that New Jersey met all applicable requirements. A copy of the report is attached as Exhibit 16 (61a). Thus it is no proper basis for Nevada's refusal to allow the shipments to go forward.

XLII

On September 10, 1985 the U.S. District Court for the District of Nevada denied New Jersey's motion for a preliminary injunction as against Nevada and its officials

and also dismissed the amended complaint as against them, on the ground that the claims may only be asserted in the original and exclusive jurisdiction of this Court. The District Court then declined to hear New Jersey's application for a preliminary injunction as against Las Vegas in the action, on the ground that New Jersey's action against Las Vegas could proceed in the Supreme Court should jurisdiction lie with this Court and that the District Court could not give New Jersey full relief in an action without Nevada. The District Court said it would not proceed with that aspect of the action until such time as New Jersey certified that the Supreme Court declined jurisdiction in the matter. The Court ruled from the bench, and as of the time this complaint was printed no transcipt, written decision or order were available.

Effect of Nevada's New Requirements and the Las Vegas Ordinance

XLIII

Nevada's enforcement of its permit requirement, its new requirement for an authorization to transport and its PSC emergency order and Las Vegas' enforcement of its new ordinance are preventing New Jersey from shipping the contaminated soil to Nevada, and are having an adverse effect upon New Jersey because they create uncertainty as to the ability of New Jersey to ship and dispose of its soil, and they are causing immediate and irreparable injury to New Jersey and the public interest in the following respects: (a) New Jersey will be out of storage space for the soil around the middle of September, 1985, and the project will have to stop at the houses, leaving New Jersey subject to delay costs to its contractor and leaving resi-

dents out of their homes for a longer period of time than originally represented to them, and additional expense and inconvenience to them and to the State of New Jersey; (b) If the excavation work is delayed or stopped, New Jersey will not be able to meet its very tight time schedule for cleanup, and New Jersey will fail to comply with the CDC health-based recommendation that the contamination at the homes be remedied by the end of 1985, a result which will be contrary to the public interest; (c) Work stoppage during ideal excavation conditions as exist in late summer and early fall in New Jersey will magnify excavation time in the winter, if winter work is possible at all, thus adding to time spent by residents away from their homes and thus adding to New Jersey's costs. As a result of the foregoing, an actual controversy of a justiciable nature exists between the parties.

First Claim for Relief

Preemption: The Hazardous Materials Transportation Act

XLIV

Article VI, Section 2 of the United States Constitution, the Supremacy Clause, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or Law of any state to the Contrary notwithstanding.

XLV

The United States Department of Transportation ("DOT") is the agency of the Federal Goverment charged

with the primary responsibility and authority for regulating the handling and transportation of "hazardous materials." The authority of the DOT to issue regulations governing the transportation of hazardous material is contained in the HMTA, 49 U.S.C. §§1801-1812. 49 U.S.C. §1804 provides:

> (a) *The Secretary* [*of Transportation*] *may issue . . . regulations for the safe transportation in commerce of hazardous materials.* Such regulations shall be applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by such person for use in the transportation in commerce of certain hazardous materials. *Such regulations may govern any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate, including, but not limited to, the packaging, repacking, handling, labeling, marking, placarding, and routing* (*other than with respect to pipelines*) *of hazardous materials,* and the manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold by such person for use in the transportation of certain hazardous materials. [emphasis added].

XLVI

The policy which Congress sought to advance by the enactment of the HMTA was the establishment of uniform national standards governing the transportation of hazardous materials, and to preclude a multiplicity of state and local regulations with the potential for varying and conflicting requirements. To implement this policy the

HMTA provides for the preemption of state and local law in this area, in 49 *U.S.C.* §1811. It states:

> (a) Except as provided in subsection (b) of this section, *any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is pre-empted.* [emphasis added]
>
> (b) Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is not preempted if upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce.

XLVII

The NRC has determined that all packaging, labelling and transportation of radioactive materials of the type being shipped by New Jersey (low specific activity materials) should be regulated pursuant to the uniform national standards established under the HMTA. To that end, the NRC and the USDOT executed a memorandum of understanding on June 8, 1979 effecting this delegation. 44 F.3R. 38690, July 2, 1979. Pursuant to the HMTA and the Memorandum of Understanding, the DOT has issued comprehensive and detailed rules and regulations governing the packaging, labelling and transportation of radioactive materials by rail and highway. These rules and regulations include those in 49 CFR Parts 171-189 (1984).

XLVIII

Upon information and belief, no "appropriate" Nevada State official or Las Vegas official has made an application to the Secretary of the DOT for a determination of non-preemption with respect to Nevada's permit requirement, its new requirement of an authorization to transport and PSC emergency order and the Las Vegas ordinance as required in 49 U.S.C. §1811(b)(2). Nor has the Secretary made any determination as required by that section. Moreover, the requirements now being imposed by Nevada and Las Vegas "unreasonably burden commerce" in direct contravention of §1811(b)(2).

XLIX

New Jersey has repeatedly informed Nevada that it intends to and is adhering to the requirements in 49 CFR Parts 171-189 and the regulations of the NRC governing the packaging, labelling and transportation of radioactive materials, 10 CFR Part 71. Moreover NIS, in two reports which were submitted to Nevada, has confirmed that New Jersey has and is doing so. See Exhibits 2 and 3 (2a, 12a). In addition, a thorough report from an independent consultant, Battelle Columbus Laboratories, dated August 28, 1985, confirms New Jersey's compliance with applicable DOT and NRC regulations. A copy of this report was provided to Nevada Governor Bryan and the Department of Human Resources by the Union Pacific Railroad under cover letter dated August 29, 1985. See Exhibit 16 (61a). This report was obtained by the Union Pacific Railroad.

L

Despite the fact that New Jersey submitted in a timely fashion a permit application to Nevada, and despite the fact that Nevada granted a "Permit to Use State Radioactive Waste Disposal Site," Nevada officials recently have asserted that New Jersey may not ship the contaminated soil until it receives an "authorization to transport" from Nevada. Nevada officials now also require that New Jersey's rail carrier obtain a newly required transportation permit from the Public Service Commission under a very recent emergency order which imposes brand new and yet other additional after-the-fact requirements. Las Vegas is also requiring that a permit be obtained before the shipments may begin. By requiring the new permits and the "authorization to transport," Nevada and Las Vegas are imposing requirements which are inconsistent with those set forth in the HMTA and the regulations of the DOT promulgated thereunder. The requirement of obtaining permits and the prerequisites for such permits are inconsistent with DOT and NRC regulations because they impose redundant, additional, and non-uniform requirements which stand as an obstacle to the achievement of the purpose of the regulations adopted under the HMTA, that is, expediting the movement of hazardous materials by having uniform national packaging, labelling and transportation requirements. Therefore, the Nevada and Las Vegas requirements are preempted by the HMTA.

LI

Nevada's permit requirement, the new PSC permit requirement and the new authorization for transportation

of radioactive waste and Las Vegas' new requirement for a permit are clearly incompatible with the NRC's program for the regulation of the packaging, labelling and transportation of such material, pursuant to its delegation of the regulation of those areas to USDOT. State regulatory programs carried out by agreement with NRC under Section 274 of the Atomic Energy Act, 42 U.S.C. §2021, must be in all respects compatible with the NRC program. 42 U.S.C. §2021(d) (2). Therefore, to the extent Nevada and Las Vegas purport to impose the above described requirements pursuant to Nevada's agreement with NRC, those requirements violate the terms of the NRC agreement and 42 U.S.C. §2021. As such, the new requirements of Nevada and Las Vegas, on their face and as applied to New Jersey, are preempted under the HMTA and are in direct conflict with the Atomic Energy Act, and are therefore unconstitutional and invalid under the Supremacy Clause, Article VI, Section 2 of the United States Constitution. Morever, the new requirements of Nevada and Las Vegas are causing New Jersey immediate and irreparable injury, and New Jersey has no adequate remedy at law.

Second Claim for Relief

Preemption: The Low-Level Radioactive Waste Policy Act

LII

In the *Low-Level Radioactive Waste Policy Act,* Pub. L. 96-573, 94 Stat. 3347, codified at 42 *U.S.C.* §2021b-d, Congress specifically delineated the extent of the States'

rights to restrict the use of a low-level radioactive waste disposal site. The Act does allow States to enter into regional disposal compacts, §2021d(a)(2)(A), but permits such compacts to be effective only after January 1, 1986, and then only if such a compact has been ratified by Congress. Only under such a compact may a state exclude non-party states from using low-level radioactive waste disposal facilities. Section 2021d(a) (2) (B).

LIII

The *Low-Level Radioactive Waste Policy Act* in 42 U.S.C. §2021b(1) defines "disposal" as:

> The isolation of low-level radioactive waste pursuant to requirements established by the Nuclear Regulatory Commission under applicable laws.

The contaminated soil being shipped by New Jersey falls within this definition of low-level radioactive waste because it is radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or by-product material. The Act further provides in 42 U.S.C. §2021d(a)(2)(B) that:

> A compact entered into under subparagraph (A) [§2021d(a)(2)(A)] shall not take effect until the Congress has by law consented to the compact . . . . *After January 1, 1986,* any such compact may restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the region. [emphasis added].

Nevada has entered into such a proposed compact but that compact has not yet been ratified by Congress so that it

can have any force and effect. Under the Low-Level Radioactive Waste Policy Act, the only authority given the states to control the shipping of low-level waste into their jurisdictions is the authority to exclude shipments from a non-party state under a compact which has been ratified by Congress, and then only after January 1, 1986.

LIV

Nevada's recent insistence that New Jersey obtain an "authorization to transport" and the PSC and Las Vegas requirements that permits be obtained to transport by rail are in reality nothing more than attempts by Nevada to implement an *ad hoc* policy of preventing any shipment of New Jersey's contaminated soil into Nevada under any circumstances. As such, the implementation of the new requirements of Nevada and Las Vegas represents an attempt by Nevada to close its borders to the shipment and disposal of New Jersey's low-level radioactive waste prior to January 1, 1986 and prior to the ratification by Congress of a compact which includes Nevada, and thus violates the Low-Level Radioactive Waste Policy Act. As such, the new requirements of Nevada and Las Vegas on their face and as applied to New Jersey are unconstitutional and invalid under the Supremacy Clause, Article VI, Section 2 of the United States Constitution. The enforcement of the new requirements is causing New Jersey irrearable and immediate injury, and New Jersey has no adequate remedy at law.

Third Claim for Relief

Unreasonable Interference with Interstate Commerce

LV

Article I, section 8 of the United States Constitution, the Commerce Clause, grants Congress the power:

> To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Congress, under the United States Constitution, is granted the exclusive authority to "regulate commerce . . . among the several States." In enacting the HMTA, Congress determined that, except the to extent the Secretary decides otherwise, "any requirement, of a State or political subdivision thereof, which is inconsistent with any requirements set forth in this chapter, or in a regulation issued under this chapter, is preempted." 49 U.S.C. §1811(a). Congress, by adopting the HMTA, delegated the authority and responsibility for regulating the transportation of radioactive waste to the DOT, and thereby determined that, because of the important national interest in this field and the significance of this field, there is a need for uniformity of regulation.

LVI

The new requirements of Nevada and Las Vegas affect and unreasonably interfere with and unduly burden the free flow of articles (low-level radioactive waste) in the stream of interstate commerce, because, on their face and as applied to New Jersey's contaminated soil, they prohibit the transportation into and through Nevada unless a permit to transport and an "authorization to transport" are given, nothwithstanding that all federal DOT and NRC regulations are being complied with and even though New

Jersey has obtained a Nevada permit to use the Beatty disposal area. By the imposition of the new requirements of the PSC and Las Vegas permits and the "authorization to transport" Nevada and Las Vegas have blocked the shipment of the contaminated soil at their borders and are attempting to divert New Jersey's shipment to other jurisdictions, and because New Jersey is in compliance with all applicable federal packaging, labelling and shipping requirements, the new requirements of Nevada and Las Vegas serve no legitimate or lawful local purpose.

LVII

The congressional determination that there is a need for uniformity in the regulation of the transportation of radioactive materials in interstate commerce, as expressed in the HMTA and AEA; the failure of Nevada's new requirements to serve any permissible local purpose; and the fact that the new requirements serve to preclude the transportation of the soil into and through Nevada together establish that the new requirements constitute an impermissible intrusion into a field preempted by federal law, an unreasonable burden on interstate commerce, and an unwarranted and invalid exercise of Nevada's police powers. As such, they are unconstitutional and invalid under the Supremacy Clause, Article VI, Section 2 of the United States Constitution and under the Commerce Clause, Article 1, Section 8 of the United States Constitution. Moreover, their enforcement is causing New Jersey immediate and irreparable injury and New Jersey has no adequate remedy at law.

WHEREFORE, plaintiff the State of New Jersey prays that:

1. That the Court declare that Nevada's permit requirement, its new requirement of an "authorization to transport," General Order 52 of the Nevada PSC, and Las Vegas Ordinance 3190 are unconstitutional, void and unenforceable on their face and as applied to New Jersey;

2. That the Court preliminarily and permanently enjoin the enforcement of Nevada's permit requirement, its new requirement of an "authorization to transport," General Order 52 of the Nevada PSC, and Las Vegas Ordinance 3190 and any other statute, regulation, state policy or ordinance or other act of Nevada or Las Vegas or their agents which would interfere with, restrict, delay or prevent the transportation of New Jersey's low-level radioactive waste from New Jersey into Nevada to the Beatty disposal area;

3. That the Court grant to New Jersey such other and further relief as the Court may deem necessary and proper, including damages, costs and attorneys fees as appropriate.

DATED: September 19, 1985

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EXHIBIT 1

NEVADA STATE BOARD OF HEALTH
PERMIT TO USE STATE RADIOACTIVE WASTE DISPOSAL SITE

Pursuant to Nevada Revised Statute 439.200 and regulations adopted by the State Board of Health, and in reliance of statements and representations made by the person designated below, this permit is issued authorizing the named person to ship radioactive waste to the State Radioactive Waste Disposal Site.

1. Name Department of Environmental Protection, State of New Jersey

2. Address CN402 Trenton, NJ 08625

3. Permit Number 0437

4. Expiration date May 1, 1986

Date May 1, 1985

For The Nevada State Board of Health

By: /s/ J. D. Vaden
Supervisor, Radiological Health

EXHIBIT 2

NEVADA INSPECTION SERVICES

AUDIT NO: 85-5-1 DATE: 5/13/85

AUDIT REPORT

ORGANIZATION: State of New Jersey

FROM: Nevada Inspection Services

AUDIT PERSONNEL: B. Warren R. Hall

PERSONNEL CONTACTED: See on last page

SCOPE: To audit by collection of objective evidence, the program and implementation of procedures to determine compliance with the packaging and shipping conditions as specified in the license for the disposal of radioactive waste at the Beatty, Nevada disposal facility, and the specific requirements for packaging and shipping of radioactive waste set forth by the DOT and the NRC.

SUMMARY OF AUDIT RESULTS: This was an audit of a planned activity involving several participants and took several week to finalize the review of the information. Overall, this is a project to remove, package, ship and bury soil contaminated with radium 226. It is anticipated that approximately 135,000 ft^3 are to be shipped from New Jersey and buried in Nevada within the next 6 months.

HISTORY: Mid-century, a company called U.S. Radium Corporation manufactured radium 226 sources for commercial/medical uses. It is suspected that effluents from the process were distributed to dumpsites which were re-

claimed and houses built on in the 1950's and 60's. Through the assistance of the USEPA, surveys of respective townships indicate excess radon 222 emanation from specific sectors. This survey was from "flyovers" using sensitive micro R meters (NaI) and follow up core borings. Results indicated excessive levels of radium 226 which contributed (through sustained equilibrium) to the excessive working level (W.L.) dose from radon 222. Also, since these houses were built on dumpsites, certain settling is taking place contributing to cracks and leaks in the houses.

FINDINGS ATTACHED: YES ( ) NO (X)

APPROVED: /s/ Bernhardt C. Warren

DATE: 28 June 85

This project is to remove the excessive radium 226 contaminated soils (primarily), roots, trash, roads, etc, which will thus reduce the background radiation contributed from the isotope and daughters then reclaim the area and structures.

PARTICIPANTS: There are several companies and organizations affiliated with this project. The overall responsibility lies with the State of New Jersey Department of Environmental Protection (NJDEP), a State agency which also regulated the possession and use of Natural Occurring Radioactive Material (NARM), which included radium 226. THE NJDEP has assumed "ownership" of the material by default since no licensee can apparently be proved liable.

1. NJDEP—Has overall responsibility of the project.

   Thomas Pluta—The project manager of the program and the official contact person for interagency involvement with the project.

Frank Cosalito—Program Manager of the Radiation Control Program and will be dedicating most of his time to this project until its termination. He will assure all organizations involved in the project perform their function adequately.

Mark Nichols—State inspector who will be on site the entire time to assure the excavation, packaging, radioactive analysis and transportation are performed according to established standards.

(There will be other State employees placed on the project as needed and as determined by the Project Manager.)

2. CONTI CONSTRUCTION CO., INC.

Nat Conti—owner and principal contractor.

Warren Schumacher—project engineer for Conti Construction.

Conti Construction Company is responsible for:

a) the actual excavation and removal of the soil and related contents from the surroundings.

b) Load contaminated soils into 55 gal. drums and metal boxes. After sampling or surveying, place the top on the barrel or box to complete the package.

c) Transport package of radioactive material from the house site to a temporary holding area then to a central marshalling area for loading onto semi-trailers for final shipment.

3. MICHAEL BAKER ENGINEERS

This is an engineering firm charged with the responsibility coordinating the entire effort. They will be working for the New Jersey DEP and will report directly to the State regarding the status of the activities.

4. PHOENIX SAFETY ASSOCIATES, IND. (PSA)
   Primary responsible directly to the Michael Baker Engineers for assuring health physics activities are implemented by all participants.
5. EBERLINE INSTRUMENT CORP.
   (not present at meeting)

   Primary responsibility for analysis of radioactivity of the radioactive waste. They will compile reports, checklists and other documentation for the backup information necessary for the shipping of the radioactive material for burial.

   Eberline has had experience in this type project with the USEPA previously.
6. TRANSPORTERS
   A. Penn Truck lines
   B. Conrail
   C. Union Pacific
   D. U.P. Motor Freight
7. DISPOSER

   U.S. Ecology

Resumes of the key personnel (referenced above) were submitted, were reviewed by NIS and appear to be adequate to be able to satisfactorily manage this project.

The attached "TASK RESPONSIBILITIES ASSIGNMENTS" further delineates the organization responsible for the task, general inspection (QC), checking inspection (QA) and the management.

EXCAVATION: Packages to be used for containing the radioactive waste will be 17H type drums or metal boxes from Containing Products Corporation (28″ x 47″ x 73″) with a boxweight capacity of 5,150 lbs. These containers will be evaluated upon receipt at site by Conti and Eber-

line to assure the packaging is adequate and meets the standards for the transport and burial of the materials.

After approval by the State of NJ and Eberline, Conti Construction will dig contaminated areas to be loaded into packages. Sifting/vibrating systems will be used to separate soil from larger objects.

A drum shroud or funneling system is to be used to channel the material into the drum. A drum could weigh up to 750 lbs.

Conti shall provide initial document of contents of drum based on grid system from each location. Contractor cannot move anything offsite without the approval of Baker Engineers or PSA.

QUALITY ASSURANCE: The overall responsibility lies with the NJDEP and Baker Engineers, PSA, Eberline all have specific QA Roles.

Determination of the specific activity of the material is the responsibility of Eberline Instrument Corporation. The Specific Activity (SA) is based on the radiation level reading taken with a NaI micro-R meter correlated with core samples to determine the actual radioactive material content and concentration. A built in two fold safety factor is placed in the calculations to assume that twice that activity is present. This is to assure the 10 nanocurie/gram limit is not exceeded because of build up factors from decay products, sporatic background levels, geometry, etc.

Areas were surveyed with a uR meter (NaI) and core samples taken by the USEPA and State of New Jersey to determine "hotspots".

The specific criteria for determining an area is subject to removal and burial is:

1. 5pCi/g above background of radium 226 in the first 15-centimeters of surface soil averaged over 100 square meters.
2. 15pCi/g above background of radium 226 in any subsequent 15-centimeter layer averaged over 100 square meters. 20uR/hr above background for gamma exposure rate.
   (See procedure "VERIFICATION OF REMEDIAL ACTION CRITERIA" for future explanation of this criteria.)

A go/no-go standard will be developed for the technician surveyors based on the external radiation levels compared to direct samplying methods. Samples will be taken at each site to assure the correlation between the radiation levels and S.A. remain accurate. The external radiation surveys will be taken on six sides of a package and averaged with samples taken from the same package.

Oversite of the Eberline sampling survey program shall be performed by the Phoenix Safety Lmd. (for Baker Eng.) and by the NJDEP. (See the enclosed Eberline Procedure for further details.)

Placing labels and/or marking on the containers will be performed by Baker Engineering at the direction of the Quality Control Experts (specifically Eberline). The backup information for determining the S.A. of the packages is prepared by Eberline.

External swipes of packages are to comply with USDOT regulations for removable contamination. This will be performed by Eberline with Q.C. by PSA.

The types of portable and laboratory instruments appear to be satisfactory. Calibration and check responses before use of the instrumentation as described in the procedures is essential for accurate measurements.

Training of all personnel involved in the project will be performed by the Contracting Engineers, NJDEP and U.S. Ecology to the level of their need for training.

Packages will be accounted for once the material is placed in the package. Their surveys will be taken, activity calculated, weighed then stored for transport. The shipping papers will include required information on the U.S. Ecology Radiation Shipping Waste Manifest.

Assuming 10nCi/g x 1/2200 g/lb x 750 lbs/dr x 60 dr/tlr x 8 tlr (at a time at Beatty) equals 1.632×10^9 nCi or 1.632 Ci of Ra 226 conceivably could be on the U.S. Ecology site at any one time.

MARSHALLING: After the packages have been filled, marked and/or labelled, paper work completed, they will be transported to a temporary holding area in the general vicinity of the excavation. After a truck is full it will be transported to the temporary transport site (Marshalling Site) to be weighed, documentation verified, loaded onto a semi-trailer which will be stored in a large holding area until ultimate transport.

Security is provided by Conrail This area is a large vacant lot in an industrial sector, underneath a main bridge going to Manhattan. The area seems adequate to transfer and hold the number of drums anticipated.

TRANSPORTATION: Trucks to ship drums from the excavation sites to the Conrail Marshalling zone will be supplied by Penn Truck.

Consolidated Rail Corp. (Conrail) will supervise the loading, blocking, bracing of all trailers and the securing on the railroad.

This is a piggyback ramp facility at Kearny, NJ. Empty trucks will be returned to the Marshalling area by Penn Truck lines.

Conrail shall transport the trailers to St. Louis, then to Las Vegas via unit train then the shipment will be split up to be shipped by U.P. Motor Freight. The waste will be shipped to Beatty to be buried by U.S. Ecology.

According to the responders, the maximum trailer cargo weight will be 45,000 lbs. and will be monitored at New Jersey. It should take approximately 5 days travel time from the time it leaves the Kearny site until it arrives at Beatty. There will be 35 railroad cars (2 truckloads per R.R. car) for 70 trailers per load. Conrail has a computer system in place to track the location of any load.

SUMMATION:

1. It appears to be a somewhat complicated operation from the point of view of many participants. However, in my many discussions with several persons it seems that the planning has been detailed sufficiently to adequately manage the operation.
2. The type of radioactive waste is relatively homogeneous and the same isotope will be involved. This will lessen some of the Q.A. problems opposed to having multiple isotopes with varying specific activities. It seems their instrumentation, Quality control mechanisms, heirarchies and technical mechanics are sufficient to adequately evaluate the contents for burial. This area will be emphasized during NIS periodic visits.
3. The participants have evidence of experience and/or training in their duties of the project to

assure that the procedures will be implemented appropriately.

4. The coordination of trucking from the sites to the marshalling area, then on to the railroad could have some potential for loss or mix up of shipping papers for the loads. This will be one item to be heavily reviewed by NIS during operation.

5. Of note during the pre-qualification was the type of marking on the containers. The discussion and subsequent documentation indicates that markings are to be as per transport and burial site requirements. However, it was emphasized that the procedure should be specific as to the type of marking required (i.e., "RADIOACTIVE-LSA," "CLASS A", "UNSTABLE"). In addition, the procedures indicated that the containers will be pre-marked as "RADIOACTIVE-LSA" by the manufacturer of the container. This was pointed out to be a procedure of "overmarking" and is a violation of 49CFR. The packages should be marked radioactive only *after* the radioactive contents have been added to the container.

6. A visit was conducted by the NIS audit team of several home sites, the temporary staging area and the central Marshalling and loading area at Kearny, NJ.

ATTACHMENTS

TASK RESPONSIBILITY ASSIGNMENTS
EBERLINE PROCEDURE
VERIFICATION OF REMEDIAL ACTION CRITERIA
LETTER FROM NJDEP, June 11, 1985 with attachments
(Description of Training Modules, Radiological Construction Monitoring)

QUALITY ASSURANCE PROJECT MANAGEMENT PLAN dated June 17, 1985

PERSONS INTERVIEWED:

1. N.J. Dept. of Environmental Protection
   Thomas Pluta
   Frank Cosalito
   Mark Nichols
2. Conti Construction
   Nat Conti
   Warren Schumacher
3. Michael Baker Engineers
   Earl H. Rothfuss
4. Phoenix Safety Assoc., Lmd.
   Terry Shannon

EXHIBIT 3

QUADREX

Memorandum

DATE July 25, 1985

TO B. Warren, President NIS

FROM K. Crosson, NIS Auditor

SUBJECT: Periodic Audit of the State of New Jersey on July 17, 1985

The purpose of this report is to verify that the State of New Jersey is in fact following all procedures and guidelines as presented to NIS during the Qualification Audit. Also to ensure that the Participants involved with the project are those Participantes outlined in the Qualification Audit Report.

Verification of Participants:

Verification of Participants involved with this project was an easy task. Before going to the work site a meeting was called to order in the conference trailer. At this meeting I was introduced to all of the key "players" from each of the contractors involved with the project. These people told me a little about their background and what their job responsibility is in this project. The Participants are, The State of New Jersey, Baker Engineers, Conti Construction, Phoenix Safety, Eberline Analysis and a subcontractor for Conti Construction called T.L.G. Radiological Services. T.L.G.'s main responsibility is to implement Conti Construction's Q.C. program. US Ecology is here at this time. They are checking to see how far along the project is and

to make sure all paper work for the shipments are in order. As you know there are many more Participants involved in the transportation aspect of this job. I can verify the steps taken by the above named Participants are in compliance with the packaging and shipping conditions as specified in the license for disposal of radioactive waste at the Beatty, Nevada disposal facility and the specific requirements for packaging and shipping of radioactive waste set forth by the DOT and NRC.

QA and QC verification:

At the excavation site each Participant involved has specific QA and QC roles. Phoenix Safety oversees all activities at the job site. Their people are in the work area making sure that each Participant is performing their job task, there are no exceptions. Any discrepancies are reported to Baker Engineers. Phoenix can "shut down" the job at any time if necessary. Conti Construction and T.L. G. along with Eberline have QC points which are followed. Before a drum is filled with soil by Conti, T.L.G. inspects the drum for any damage which might affect its seal or integrity. If a drum does not pass the inspection, it is set aside. After Conti fills a drum and puts a lid on it T.L.G. assigns a number to it. Drum numbers are assigned according to the street the excavation is on and the number of the house on that street. Example, 103 Carterret St. would appear like this C103-1 the last number being the number of drums filled at that site. The number is permanently affixed to the side and top of each drum. At this point Eberline surveys the drum for removable contamination. The drum number along with the survey results, date and the technician performing the survey are recorded in Eberlines daily log book. If the survey indicates the

drum is below 20 cpm/100cm^2 (PAC with an efficiency of 43%) the drum is marked "O.K." on the top and it is ready to be transported to the Transloading area. Conti has two trucks that are used to haul the drums to the Transloading area. T.L.G. fills out the Local Transportation Manifest (Figure 1) and the Transport Vehicle Release Checklist (Figure 2). These documents are used for the short trip to the Transloading area. An average of 150 drums per day are shipped from the excavation site to the Transloading area.

At the Transloading area the drums are unloaded from the truck and placed in a staging area. Only drums which have not been processed by Eberline are kept in this area. During my visit to the Transloading area there were approximately 40 drums in the staging area. Eberline takes the drums one at a time from the staging area to the process area. There each drum has its dose rate read on six (6) sides and is weighed. The drum number, average dose rate and the weight are recorded on a billing form. From there the drum is placed in a predetermined trailer for its ultimate shipment to Beatty. Each trailer has a ten (10) digit identification number which is recorded on a US Ecology manifest. After sixty (60) drums have been processed and placed in the trailer, the data that Eberline recorded on the billing sheet is used to complete the US Ecology manifest for that trailer. Mark Nichols, a New Jersey State inspector, is in charge of the Transloading area. He oversees all activities performed at this site. His main responsibility is to insure that all paperwork and manifests involved with the shipment of this material is correct and in order. Before the State of New Jersey signs a US Ecology manifest, Mark Nichols visually inspects each trailer with the manifest for that trailer in

hand. He verifies drum numbers and weights by comparing them to the manifest. When he is satisfied the shipment is ready to go, the manifest is signed.

When the trailer is ready to be shipped it is moved to the Marshalling area. Penn Truck Lines transports the trailers to the Marshalling area and in turn to the Con-rail piggy back loading area. The Penn truck driver picks up the shipment, a release survey is performed, the driver is given his instructions, a copy of the manifest goes to the driver and a copy is placed in the nose box of the trailer. A registered seal number along with the trailer number are recorded on a document provided by Con-rail. When the shipment is released it goes to the Marshalling area and is dropped off. As the trailer goes to the Marshalling area, another copy of the manifest is sent to Con-rail, which is on the other side of the fence from the Transloading area. This insures that when Con-rail received the trailers from Penn Truck Lines they will have at least one copy of the US Ecology manifest for each trailer.

Con-rail will ship seventy (70) trailers at a time out of New Jersey. Con-rail will prepare a Bill of Lading for 70 trailers and their contents. The US Ecology manifest will be used to document the trailers' contents. When the 70 trailers are assembled and ready to be shipped to Beatty a package containing all the paperwork for the 70 trailers will be sent to Beatty prior to the shipment's arrival. This will allow US Ecology and Beatty to know exactly what they are going to receive before it gets there. Another copy of each manifest is kept in a file for the State of New Jersey Representatives to hand deliver the originals to the Beatty site upon the first shipment's arrival They will also observe the condition of each trailer and its contents

after the haul as compared to before it left New Jersey. The first shipment's arrival to Beatty is scheduled for the end of August. After walking through the steps taken to prepare these shipments for arrival to the Beatty site, it is clear to me that the State of New Jersey has done a lot of planning and has spent an enormous amount of time and money to insure there will be no problem or delays in complete this project.

The drums used to contain the radioactive materials are recertified and have "Radioactive L.S.A., Class A, Unstable" stenciled on two sides when they arrive from the factory (this practice remains questionable). Also when talking with Eberline about their analysis of the contents of each drum, they explained to me about three procedures, the average dose rate of a drum is correlated by a graft to the amount of radioactive material in that drum. A representative soil sample is taken out of one in every thirty drums and is analyzed in a MultiChannel Analyzer which is in Eberline's lab located in Montclair. This is to insure that the dose rate for each drums correlate to the Specific Activity. Other soil samples are sent to Eberline in New Mexico to verify the tests performed in New Jersey.

If you have any questions regarding this report please contact me.

KC/kdg4-t

Attachments

(Incompleted Forms Omitted)

EXHIBIT 4

EMERGENCY GENERAL ORDER 52

Authority: 233B.0613, 704.020, 704.120, 704.210, 703.380

PREAMBLE

The State of Nevada must be assured that the rail transportation of radioactve materials in Nevada be accomplished in as safe a manner as possible, particularly when the materials will be off-loaded from the rail cars. To that end, and within the limits of federal laws and regulations, the Public Service Commission shall provide, by regulation, that a railroad company must file an application for a permit to transport radioactive materials in Nevada when permanent storage of such radioactive materials will take place in this State. The application for such a permit shall contain information concerning the proposed rail route; the dates, duration and location of any interim storage in Nevada; the security measures to be utilized for the interim storage and reloading of radioactive materials; and copies of all federal and State permits.

Section 1. Chapter 704 of NAC is hereby amended, by emergency regulation, by adding thereto the provisions set forth as Sections 2 to 6, inclusive, of this regulation.

Section 2. It shall be unlawful for any railroad to transport radioactive materials in Nevada, where the final destination is within the State of Nevada, without first obtaining a permit from the Public Service Commission.

Section 3. The application fee for such a permit shall be $50.00.

Section 4. An application to transport radioactive material by rail must include as exhibits thereto the following:

a. A map depicting the portion of the rail route proposed to be used by the railroad in transporting the radioactive material within this State;

b. A statement defining the estimated dates, duration and location of any interim storage within the State of Nevada of radioactive materials pending final disposal or transfer to motor vehicle or other mode of transport. This statement shall include the estimated dates and hours at which the radioactive materials will reenter transport status from storage;

c. A statement describing the security measures that the railroad will utilize to ensure that the handling of the radioactive materials, including the unloading and storage of the radioactive materials will be properly monitored; and

d. Copies of all necessary federal and State permits and certificates issued to the railroad as of the date of application and a list of all other permits and certificates to be obtained.

Section 5. The Public Service Commission shall issue a permit to a railroad carrier allowing him to transport and/or handle radioactive materials, including unloading and storage, if the railroad carrier:

a. States to the Pubilc Service Commission that he complies with and will continue to comply with all laws and regulations of this State and the federal government respecting the handling and transport of radioactive ma-

terials and the safety of the trains and the employees of the railroad;

b. Designs the railway route and interim storage in such a manner as to minimize the amount of contact of the radioactive materials with densely or residentially populated areas within the State;

c. Designs the railroad route in such a manner as to minimize the transport of radioactive materials through intersection with other railways and highways at hours of heavy traffic; and

d. Establishes procedures for the unloading and transfer of the radioactive materilas from rail trains to other trains or to other modes of transport to ensure that the safe and efficient transfer of the material is effected.

Section 6. Within 120 days from the effective date of this emergency regulation the Public Service Commission shall enact permanent regulations for the transport by rail, the unloading, storage and loading for transport by motor vehicles or other mode of transport of radioactive materials by a railroad company.

FOR FILING ADMINISTRATIVE REGULATIONS

Agency Public Service Commission

FOR EMERGENCY REGULATIONS ONLY

Effective date 9/3/85

Expiration date 12/31/85

/s/ Richard H. Bryan
Governor

Classification: ☐ PROPOSED ☐ ADOPTED BY AGENCY [X] EMERGENCY

Brief description of action Emergency General Order 52 relative to rail transportation of radioactive materials in Nevada

Authority citation other than 233B

Notice date 8/27/85

Hearing date 8/30/85

Date of Adoption by Agency 8/30/85

EXHIBIT 5

AFFIDAVIT OF ARTHUR E. ROBB, JR., P.E.

State of Pennsylvania:
County of Beaver: SS

ARTHUR E. ROBB, JR., P.E., being duly sworn upon oath, deposes and says that:

1. I received a Bachelor of Science (biology/chemistry joint major) degree from Allegheny College in 1973; a Master of Science in Zoology degree from State University of New York, State University College at Brockport in 1977; and a Master of Science in Civil Engineering from the University of Pittsburgh in 1983. I am a registered professional engineer in the Commonwealth of Pennsylvania. Since 1975 I have been involved in environmental resources projects with consulting engineering firms and have been employed with Michael Baker, Jr., Inc. since 1977.

2. My role in the Montclair/Glen Ridge Radiological Contamination Removal Project was to participate in the operations planning group, with the primary responsibilities of identifying transportation and disposal options and corresponding regulatory requirements for radiologically contaminated soil. Associated with these responsibilities, I was responsible for preparing the bid specifications for the transportation and disposal of the excavated material.

3. To develop the transportation and disposal options and identify applicable regulations governing these activities for radioactive materials, I utilized the following primary references during my research:

a. Jordan, J.M., 1984. Low-Level Radioactive Waste Management: An Update. A Legislator's Guide.

National Conference of State Legislatures. Denver, CO. 80 p.

b. Foster, B. and J. Jordan. 1984. A Guide to Radioactive Materials Transportation. National Conference of State Legislatures. Denver, CO. 126 p.

c. Abbott, L. *et al.,* 1984. Hazardous Materials Transportation. A Legislator's Guide. National Conference of State Legislatures. Denver, CO. 137 p.

d. Code of Federal Regulations. 1984. Title 10. Energy Parts 61 and 71. Chapter 1—Nuclear Regulatory Commission.

e. Code of Federal Regulations. 1984. Title 49. Transportation Parts 171 to 179. Research and Special Programs Administration, Material Transportation Bureau, U.S. Department of Transportation.

f. U.S. Department of Transportation, Research and Special Programs Administration. 1983. A Review of the Department of Transportation Regulations for Transportation of Radioactive Materials. U.S. Govt. Printing Office. Washington, D.C. 64 p.

4. As a result of my research, I determined that only three commercial low-level radioactive materials landfill disposal facilities were licensed by the Nuclear Regulatory Commission. These facilities included the Barnwell, South Carolina site operated by Chem-Nuclear Systems, Inc., the Beatty, Nevada site operated by U.S. Ecology and the Hanford, Washington site, which also is operated by U.S. Ecology. I contacted each site operator and obtained cop-

ies of their licensing agreements with the states within which they operate. Upon receipt and review of these agreements, I ascertained that the Barnwell, South Carolina facility's agreement specifically excludes their acceptance of radium-bearing wastes. Therefore, the only available disposal facilities for the New Jersey project were the Beatty, Nevada and Hanford, Washington sites—both operated by U.S. Ecology.

5. The U.S. Department of Transportation (DOT) has primary responsibility for issuing regulations for the transportation of radioactive materials as a result of the passage of the Hazardous Materials Transportation Act of 1974. The U.S. Nuclear Regulatory Commission (NRC) also regulates the packaging and transportation of radioactive material, but defers to DOT when criteria presented in CFR Title 10 71.10 are met. Based on the characteristics of the material, DOT regulations were considered to be applicable to this project.

6. U.S. DOT transportation requirements for movement of the contaminated soil were dictated in large part by the specific activity of the material. Preliminary data from the earlier investigations of the Monclair/Glen Ridge area indicated that the specific activity of the radium-contaminated soil would not be expected to exceed 50 nanocuries per gram (50,000 picocuries per gram) and that the lower limit would be about 15 picocuries per gram (the designated cleanup goal for subsurface soil). Dose rates from containerized excavated material would not be expected to exceed 0.5 millirems per hour.

7. Based on DOT requirements, four options were considered possible for transportation of material to be excavated. These alternatives were:

a. Transport as nonradioactive material

b. Shipment under DOT's "limited quantity" provision (49 CFR 173.421)

c. Shipment as low specific activity (LSA) material in Type A containers

d. Shipment as LSA exclusive use

The first option, shipment as nonradioactive material, requires that the material not have a specific activity greater than 0.002 microcuries (2,000 picocuries) per gram. Under this condition, the material is exempt from NRC and DOT requirements. This option was eliminated because the possibility existed that material with a higher specific activity might be encountered during excavation and because no safety precautions would be necessary, which would not be prudent, given the concern of the public and effort expended to remediate the site. The second option also was rejected due to the potential for encountering material that would exceed the criteria for limited quantities unless packaged amounts were unecomonically small. The third and fourth options, shipment as LSA material either in Type A containers or exclusive use, require that the material have radioactivity that is essentially uniformly distributed and in which the estimated average specific activity of the contents does not exceed 0.0001 millicurie per gram (100,000 picocuries per gram). LSA material must be transported in DOT Specification 7A Type A package or consigned as LSA exclusive use, in which case it is excepted from specification packaging, marking, and labeling (§ 173.425). Use of Type A containers requires more marking and labeling and the containers used must meet all Type A tests. This option was considered, but for this project, with large quantities of material, rejected because

no apparent advantage existed. The fourth option, shipment as LSA exclusive use, was chosen because the shipments would be exclusive use (i.e., no mixing of packages from other sources would occur) and less marking and labeling were required with less chance of human error occurring during shipment preparation. Furthermore, shipment by this option still required safety features such as "strong and tight" containers, driver instructions, placarding of vehicles and controlled loading and unloading requirements.

8. I contacted Mr. Wendell Carriker, U.S. Department of Transportation, Research and Special Programs Administration, Office of Hazardous Materials, by telephone on January 25, 1985. Mr. Carriker confirmed that the options identified were correct for the material to be shipped for this project. As a further confirmation, I contacted Mr. Gary Young of U.S. Ecology by telephone on January 28, 1985. Mr. Young also concurred with the identification of the options available for transporting the radium-contaminated soil from the Montclair/Glen Ridge, New Jersey project.

9. I presented my findings and recommendations in the form of a Transportation and Disposal Plan, which was included in the Final Design Report submitted to the State of New Jersey Department of Environmental Protection. Subsequently, testing of 3060 containers has shown that the specific activity of the soil has been in the range of 46 to 395 picocuries per gram, with an average of 84 picocuries per gram, which is less than the DOT and NRC definition of radioactive material. The shipping option selected—LSA exclusive use—complies with the requirements set forth in the applicable federal requirements.

Further, Affiant sayeth not.

Dated this 16th day of September, 1985.

ARTHUR E. ROBB, JR.

Subscribed and sworn to
before me this 16th day
of September, 1985.

/s/ Richard F. Engel

EXHIBIT 6

STATE OF NEVADA

Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State

Notice is hereby given that William O. Doub, Commissioner of the Atomic Energy Commission and the Honorable Mike O'Callaghan, Governor of the State of Nevada, have signed the agreement below for discontinuance by the Commission and assumption by the State of Certain Commission regulatory authority. The agreement is published in accordance with the requirements of Public Law 86-373 (section 274 of the Atomic Energy Act of 1954, as amended). The exemptions from the Commission's licensing authority have been published in the FEDERAL REGISTER and codified as Part 150 of the Commission's regulations in Title 10 of the Code of Federal Regulations.

Dated at Germantown, Md., this 5th day of June 1972.

For the Atomic Energy Commission.

W. B. McCOOL,
Secretary of the Commission.

Agreement Between the U.S. Atomic Energy Commission and the State of Nevada for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State

Whereas the U.S. Atomic Energy Commission (hereinafter referred to as the Commission) is authorized under section 274 of the Atomic Energy Act of 1954, as amended (hereinafter referred to as the Act), to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission within the State under Chapters 6, 7, and 8, and sec-

tion 161 of the Act with respect to by-product materials, source materials, and special nuclear materials in quantities not sufficient to form a critical mass; and

Whereas the Governor of the State of Nevada is authorized under Nevada Revised Statutes 459.080 to enter into this agreement with the Commission, and

Whereas the Governor of the State of Nevada certified on March 9, 1972, that the State of Nevada (hereinafter referred to as the State) has a program for the control of radiation hazards adequate to protect the public health and safety with respect to the materials within the State covered by this agreement, and that the State desires to assume regulatory responsibility for such materials; and

Whereas the Commission found on May 18, 1972, that the program of the State for the regulation of the materials covered by this agreement is compatible with the Commission's program for the regulation of such materials and is adequate to protect the public health and safety; and

Whereas the State and the Commission recognize the desirability and importance of cooperation between the Commission and the State in the formulation of standards for protection against hazards of radiation and in assuring that State and Commission programs for protection against hazards of radiation will be coordinated and compatible; and

Whereas the Commission and the State recognize the desirability of reciprocal recognition of licenses and exemptions from licensing of those materials subject to this agreement; and

Whereas this agreement is entered into pursuant to the provisions of the Atomic Energy Act of 1954, as amended; now therefore,

It is hereby agreed between the Commission and the Governor of the State, acting in behalf of the State, as follows:

ARTICLE I

Subject to the exceptions provided in Articles II, III, and IV, the Commission shall discontinue, as of the effective date of this agreement, the regulatory authority of the Commission in the State under Chapters 6, 7, and 8, and section 161 of the Act with respect to the following materials:

A. Byproduct materials;

B. Source materials; and

C. Special nuclear materials in quantities not sufficient to form a critical mass.

ARTICLE II

This agreement does not provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of:

A. The construction and operation of any production or utilization facility;

B. The export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;

C. The disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;

D. The disposal of such other byproduct, source, or special nuclear materials as the Commission from time to time determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

ARTICLE III

Notwithstanding this agreement, the Commisison may from time to time by rule, regulation, or order, require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license or an exemption from licensing issued by the Commission.

ARTICLE IV

This agreement shall not affect the authority of the Commission under subsection 1613 b or i of the Act to issue rules, regulations, or orders to protect the common defense and security, to protect restricted data or to guard against the loss or diversion of special nuclear material.

ARTICLE V

The Commission will use its best efforts to cooperate with the State and other agreement States in the formulation of standards and regulatory programs of the State and the Commission programs for protection against of radiation and to assure that State and Commission program for protection against hazards of radiation will be coordinated and compatible. The State will use its best

efforts to cooperate with the Commission and other agreement States in the formulation of standards and regulatory programs of the State and the Commission for protection against hazards of radiation and to assure that the State's program will continue to be compatible with the program of the Commission for the regulation of like materials. The State and the Commission will use their best efforts to keep each other informed of proposed changes in their respective rules and regulations and licensing, inspection and enforcement policies and criteria, and to obtain the comments and assistance of the other party thereon.

ARTICLE VI

The Commission and the State agree that it is desirable to provide for reciprocal recognition of licenses for the material listed in Article I licensed by the other party or by any agreement State. Accordingly, the Commission and the State agree to use their best efforts to develop appropriate rules, regulations, and procedures by which such reciprocity will be accorded.

ARTICLE VII

The Commission, upon its own initiative after reasonable notice and opportunity for hearing to the State, or upon request of the Governor of the State, may terminate or suspend this agreement and reassert the licensing and regulatory authority vested in it under the Act if the Commission finds that such termination or suspension is required to protect the public health and safety.

ARTICLE VIII

This agreement shall become effective on July 1, 1972, and shall remain in effect unless and until such time as it is terminated pursuant to Article VII.

Done at Las Vegas, State of Nevada, in triplicate, this 25th day of May 1972.

For the U.S. Atomic Energy Commission.

[SEAL] WILLIAM O. DOUB,
Commissioner.

For the State of Nevada.
MIKE O'CALLAGHAN,
Governor.

Attest:

JOHN KOONTZ,
Secretary of State.

[FR Doc. 72-8722 Filed 6-8-72; 8:48 am]

EXHIBIT 7

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

Robert E. Hughey, Commissioner
CN 402
Trenton, N.J. 08625
609-292-2885

March 1, 1985

Mr. John Vaden
Nevada Division of Health
Radiological Health Section
505 East King Street
Carson City, Nevada 89710

Dear Mr. Vaden:

The enclosed documents are submitted in order to obtain a user permit for disposal of radioactive wastes at the state site near Beatty, Nevada.

1. Application for user permit dated March 1, 1985
2. Letter of agreement dated March 1, 1985
3. New Jersey Invoice Form in the amount of $2219.00 for the required permit fee

Paragraph 2 of the suggested letter of agreement has been amended to conform to the liability limits under the New Jersey Constitution and State law. The resources of the State of New Jersey are sufficient to cover claims that might arise.

Please complete items D and F on the invoice and return it to me for processing. If you require any additional information, please call me at 609-292-2885 or Frank Cosolito at 609-292-5383.

Sincerely,
/s/ Thomas A. Pluta

Enclosures
cc: F. Cosolito
S. Dubin

NEVADA STATE BOARD OF HEALTH
APPLICATION FOR USER PERMIT

This application is for a permit to use the State site near Beatty, Nevada for disposal of radioactive waste. Provisions requiring all persons shipping radioactive waste to the site to obtain a permit are contained in Articles of the State Board of Health Regulations. Mail this application in duplicate to: Radiological Health Section, Nevada Division of Health, 505 East King Street, Carson City, Nevada 89710.

1. NAME AND STREET ADDRESS OF APPLICANT. (Institution, firm, hospital, person, etc.)
   State of New Jersey
   Department of Environmental Protection
   CN027
   Trenton, NJ 08625

2. STREET ADDRESS AT WHICH RADIOACTIVE WASTE IS STORED. (If different from 1).
   Various sites as per attached listing.

3. NAME, ADDRESS AND TELEPHONE NUMBER OF THE CHIEF EXECUTIVE OF THE COMPANY OR INSTITUTION.
   Robert E. Hughey, Commissioner
   Department of Environmental Protection
   CN402
   Trenton, NJ 08625 (609) 292-2885

4. NAME, ADDRESS AND TELEPHONE NUMBER OF THE PERSON RESPONSIBLE FOR RADIATION SAFETY.
   Frank J. Cosolito, Special Assistant to the Director
   Division of Environmental Quality, CN027
   Trenton, NJ 08625

5. INDICATE WHETHER TRANSPORT WILL BE BY COMMON CARRIER, CONTRACT CARRIER OR PRIVATE CARRIER AND GIVE THEIR NAME AND ADDRESS.
   Will advise after common carrier has been selected by competitive bid.

6. INDICATE WHETHER THE RADIOACTIVE WASTE SHIPMENT WILL BE SENT THROUGH A BROKER. IF SO, GIVE THEIR NAME AND ADDRESS.
   No.

CERTIFICATE

The Applicant, and any official authorized to execute this certificate on behalf of the Applicant certify to the State of Nevada that:

All radioactive waste will be packaged in accordance with: the regulations of the U.S. Department of Transportation, 49 CFR Parts 100-199; the applicable regulations of the U.S. Nuclear Regulatory Commission and the U.S. Environmental Protection Agency; and the conditions of the site operator's license which, (a) do not allow liquids to be received on site except that in scintillation vials which are packed in absorbent as specified in the site operator's license; (b) requires that solidified liquid waste be absolutely dry. They are aware that violations of any of the above provisions may result in refusal of acceptance of the shipment at the site, or the requirement of

over-packaging of the shipment and removal from the site, or suspension or revocation of the user permit.

Robert E. Hughey, Commissioner
N.J. Department of Environmental Protection

NAME OF APPLICANT
/s/ By: Robert E. Hughey

DATE: 3/1/85 TITLE: Commissioner

MONTCLAIR/GLEN RIDGE
RADIOLOGICAL CONTAMINATION REMOVAL
INSTRUCTIONS TO BIDDERS

TABLE 1

SITE LOCATIONS

Address	Block/Lot
101 Carteret St. Glen Ridge	Block 17 Lot 15.05
103 Carteret St. Glen Ridge	Block 17 Lot 15.04
43 Virginia Ave. Montclair	Block 1911 Lot 15
45 Virginia Ave. Montclair	Block 1911 Lot 16
47 Virginia Ave. Montclair	Block 1911 Lot 17
13 Amelia St. Montclair	Block 1914 Lot 2
16 Amelia St. Montclair	Block 1914 Lot 1
18 Amelia St. West Orange	Block 134.01 Lot 48.01
16 Lorraine Ave. Montclair	Block 17 Lot 19
18 Lorraine Ave. Glen Ridge	Block 17 Lot 11
15 Franklin Ave. Montclair	Block 1911 Lot 13
17 Franklin Ave. Montclair	Block 1911 Lot 12

Letter of Agreement

The New Jersey Department of Environmental Protection (DEP) hereby covenants to the State of Nevada and agrees to comply with the following conditions in consideration of the issuance of a Qualification Permit to ship radioactive waste to the Beatty, Nevada disposal site:

1. Contract with Nevada Inspection Services, Inc., to carry out the functions of the third party inspection system and to pay for such services directly to Nevada Inspection Services, Inc.;

2. The State of New Jersey shall indemnify and defend the Health Division of the Department of Human Resources and the State of Nevada from any liability arising from the negligence of the DEP or its employees occurring during the performance of their obligations under this Agreement; provided, however, neither the State nor its employees shall be liable to pay any damages for which it and/or they have no liability under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*, provided further that the payment of such damages, if any, shall be subject to the availability of funds.

Comply with all Federal and State regulations relating to the transportation of radioactive waste. The DEP understands that Nevada Inspection Services, Inc. inspection is not a guarantee of suitability of shipment and the ultimate responsibility for compliance with Federal and State Regulations and safe transportation is upon the DEP.

/s/ Robert E. Hughey,
Commissioner
New Jersey Department of
Environmental Protection

Sworn to and subscribed before
me this 1st day of March 1985
/s/ JOSEPH N. SCHMIDT, JR.
An Attorney at Law of New Jersey

EXHIBIT 8

(SEAL)

STATE OF NEVADA
DEPARTMENT OF HUMAN RESOURCES

Health Division
505 East King Street
Carson City, Nevada 89710

RICHARD H. BRYAN
Governor

JERRY GRIEPENTROG
Director

March 15, 1985

Mr. Thomas A. Pluta
Department of Environmental Protection
State of New Jersey
CN 402
Trenton, N.J. 08625

Dear Mr. Pluta:

This will acknowledge receipt of your letter dated March 1, 1985 which transmitted an application for a permit to dispose of radioactive material at the Beatty, Nevada site, a letter of agreement, and a purchase order.

There were some questions about the role of the contractor who will package the radioactive waste and I contacted Mr. Frank Cosolito about it. He conferred with state attorneys and advised that the contractor would be an agent of the state and could be considered an employee of the State of New Jersey.

Therefore, all of the papers you submitted are in good order and are accepted. The next step you should take is to contact Nevada Inspection Services, Inc. They should make a pre-licensing audit of radioactive waste packaging procedures on-site when the contractor is ready to start the packaging process. Please do not allow any radio-

active waste to be packaged before NIS performs their pre-licensing audit.

Upon receipt of a satisfactory finding by NIS we will sign and return the purchase order and issue the permit to the State of New Jersey.

I appreciate your and Mr. Cosolito's cooperation in this matter. Should you have any questions, do not hesitate to call me.

Sincerely,
/s/ J. W. Vaden

John Vaden, Supervisor
Radiological Health Section
Bureau of Regulatory Health Services

AFFIDAVIT OF THOMAS A. PLUTA

State of New Jersey:
County of Mercer: SS

THOMAS A. PLUTA, of full age, being duly sworn according to law, deposes and says:

1. I am employed by the State of New Jersey, Department of Environmental Protection (hereafter "NJDEP"), as a Special Assistant to the Commissioner of NJDEP. In that capacity I am the project manager in charge of all aspects of the excavation, transportation and disposal of radioactively contaminated soil from home sites in Montclair, Glen Ridge and West Orange, New Jersey.

2. In 1979, New Jersey began a program to assess the extent of, or potential for, radiological contamination at industrial facilities in New Jersey that processed or used radioactive material and may have disposed of radium processing wastes offsite. The United States Environmental Protection Agency ("EPA"), at New Jersey's request, funded an aerial gamma radiation survey of 12 square miles in Essex County, New Jersey. The survey identified areas in Montclair, Glen Ridge and West Orange that warranted further study based on elevated gamma radiation levels.

3. In 1983, New Jersey conducted field investigations, including outdoor and indoor gamma radiation surveys, subsurface coring and other tests, and indoor radon gas measurements. After investigation it was determined that a number of homes in these towns had levels of outdoor and indoor gamma radiation and radon gas concentrations inside the houses above background levels. In some homes radon gas concentrations were above levels considered safe by the federal government for exposure of uranium

mine workers under OSHA regulations. The level of radium in the soil averages 84 pCi/g of Radium—226.

4. Radium is a radioactive substance previously used for, among other things, painting watch dials to allow visibility at night. As it decays, it gives off a gas known as radon which can build up to dangerous levels if trapped in an enclosed area such as a home.

5. New Jersey consulted with EPA, the Federal Centers for Disease Control ("CDC") and the New Jersey State Department of Health and developed a risk assessment and management plan. CDC issued a health advisory requiring that radon levels in certain homes be permanently reduced before January 1, 1986. A number of homes required the immediate installation of ventilation systems to reduce indoor radon gas concentrations. EPA provided further guidance regarding removal of contaminated soil in accordance with cleanup criteria based on federal standards in 40 *C.F.R.* Part 192.

6. In order to accomplish a permanent cleanup, EPA and New Jersey planned a phased cleanup program to remove the contaminated soil and restore the homes to a safe condition. Phase 1 of this program involves 12 homes and one adjacent lot, and is now in progress. The New Jersey Legislature appropriated $8 million to fund this phase of the cleanup. Phase 1 is expected to be completed by the end of 1985. EPA will complete the remainder of the project under federal "Superfund."

7. In October, 1984, New Jersey prepared a request for a proposal to engage a consultant to complete necessary field studies, engineering designs and contract bid specifications for the excavation, transportation and dis-

posal of the radium contaminated soil, and to provide construction and engineering management services. Baker Engineers/TSA, Inc. was hired in December, 1984. In accordance with New Jersey purchasing laws, bid awards were made to the Union Pacific Railroad for transportation and to U.S. Ecology, Inc. for disposal at its Beatty, Nevada licensed low-level radioactive waste disposal site.

8. There are presently only three active commercial licensed disposal sites for low level radioactive wastes: Barnwell, South Carolina, Beatty, Nevada and Richland, Washington. The operation of these commercial facilities is regulated, in part, by the federal 1980 Low Level Radioactive Waste Policy Act, 42 *U.S.C.* § 2021. License restrictions at the Barnwell facility prohibit the acceptance of radium bearing wastes, leaving only two available sites, both operated by U.S. Ecology, Inc.

9. Prior to the disposal contract award to U.S. Ecology, Inc., NJDEP unsuccessfully sought to identify and locate appropriate low level radioactive waste interim storage and/or disposal sites within and outside New Jersey. These included requests for the use of the United States Department of Energy ("USDOE") and United States Department of Defense ("USDOD") low level radioactive waste disposal sites. USDOE and USDOD policies and/or federal statutes prohibit the use of USDOE and/or USDOD facilities for disposal or storage of non-DOE or non-DOD generated low level radioactive wastes.

10. In an effort to cooperate with Nevada, New Jersey made a written application on March 1, 1985 to the Nevada Division of Health on a form furnished by the Division for use of the Beatty site. See Exhibit 7. New Jersey advised Nevada of its intention to comply with all federal regulations regarding the transportation and pack-

aging of radioactive waste and the conditions of the license issued to U.S. Ecology, Inc. for the Beatty disposal site.

11. On March 15, 1985, John Vaden, on behalf of the Department of Human Resources, Division of Health, acknowledged receipt of the application and stated "All of the papers you submitted are in good order and are accepted." Mr. Vaden informed New Jersey that it should next contact Nevada Inspection Services, Inc. ("NIS") for a pre-licensing audit of New Jersey's packaging procedures, and stated: "Upon receipt of a satisfactory finding by NIS we will sign and return the purchase order and issue the permit to the State of New Jersey." See Exhibit 8.

12. Subsequent to Vaden's letter of March 15, 1985, Nevada signed and returned New Jersey's purchase order, whereupon New Jersey sent and Nevada negotiated a check for $2,219, the fee set for use of the Beatty site. On May 1, 1985, John Vaden, on behalf of the Nevada State Board of Health, issued a "Permit to Use State Radioactive Waste Disposal Site" to the Department of Environmental Protection of the State of New Jersey. This permit, numered Q437, has an expiration date of May 1, 1986. It is unconditional on its face, reading as follows:

> Pursuant to Nevada Revised Statute 439.200 and regulations adopted by the State Board of Health, and in reliance on statements and representations made by the person designated below, this permit is issued authorizing the named person to ship radioactive wastes to the State Radioactive Disposal Site.

See Exhibit 1. By agreement with Nevada officials, New Jersey understood it would not begin shipments it had submitted to the required audit from NIS.

13. Based on the representations made in the permit, New Jersey engaged the services of the contractors previously noted. NIS performed its first audit on May 13, 1985, and issued a report summarizing the audit on June 28, 1985. This report, Exhibit 2, was transmitted to Nevada.

14. Excavation work at two of the home sites began on June 19, 1985. The contractor excavates the soil and places it in steel drums, which are then collected in groups of about 20 and placed on trucks to be brought to a transfer site in Kearny, New Jersey. These drums were to be loaded onto larger containers at that point, and would eventually be placed on railroad cars for rail transportation from Kearny to Arden, Nevada. From there the trailers would be transferred to trucks for highway transport to Beatty. All excavation and packaging of the materials is being done in compliance with federal regulations found at 10 *C.F.R.* Part 71 (1985). Transportation of the material is also being performed in compliance with HMTA regulations found at 49 *C.F.R.* Parts 171-189 (1984).

15. Approximately 175 drums are being removed from each work site each working day (five days per week). The site in Kearny used to temporarily hold the containers until they can be loaded onto the train was designed to hold approximately 70 containers, which constitutes a trainload of waste. The design of the contracts was such that as soon as the 70 containers were on site a train would commence its movement to Nevada, thus freeing the Kearny site for the next group of drums to be transported.

16. On July 17, 1985, while the work was in progress, NIS performed the first of its four periodic audits of the work site in New Jersey to verify that New Jersey is following all procedures and guidelines set out in the previous audit. A report of this audit was transmitted to John Vaden in Nevada on July 25, 1985, and is attached to the Complaint as Exhibit 3. As stated in that report,

> . . . the steps taken by the above-named Participants are in compliance with the packaging and shipping conditions as specified in the license for disposal of radioactive wastes at the Beatty, Nevada disposal facility and the specific requirements for packaging and shipping of radioactive wastes set forth by the DOT and NRC.

The report goes on to state,

> It is clear to me that the State of New Jersey has done a lot of planning and has spent an enormous amount of time and money to insure there will be no problem or delays in complete [sic] this project.

17. Except for some initial inquiries to New Jersey after the initial audit, Nevada has not requested any further information from New Jersey, and has given no indication to New Jersey that there are any problems with the methods being used by New Jersey for packaging and shipping this waste. New Jersey has repeatedly assured Nevada it would comply with all applicable federal and state regulations.

18. The excavation work is continuing at the present time. While excavation is going on the residents of the homes that are affected are relocated at New Jersey's expense to motel rooms. One of these families has school age or younger children.

19. New Jersey is stepping up the pace of the work at the sites in order to meet the December 31, 1985 CDC deadline. During the week of August 26, the excavation contractor added a second work crew so that the work pace could be doubled. The ideal conditions for excavation work at these sites exist in summer and early fall, while the weather is drier and the ground is subject to freezing. If work is pushed back beyond December 31, 1985, freezing conditions at the sites may make excavation work impossible for at least six weeks to two months.

20. Nevada officials, as evidenced by the newspaper articles attached to the Complaint as Exhibits 14 and 15, have recently stated they would not grant New Jersey a permit to ship the waste and would seek legal ways to stop the train. The Governor of Nevada suggested this might help get the attention of Congress regarding ratification of the Rocky Mountain States Low-Level Radioactive Waste Compact.

21. Almost four months after the issuance of a license to New Jersey, and well after the commencement of work by New Jersey and the issuance of favorable reports by NIS, Nevada has recently asserted that New Jersey must obtain an "authorization to transport" before shipments to the Beatty site could begin. On August 20, 1985, Governor Richard H. Bryan of Nevada sent a letter in response to a letter from the Union Pacific Railroad, New Jersey's contract carrier, to officials of the Union Pacific Railroad stating that New Jersey needs such a further authorization to transport the soil. A copy of these letters are annexed to the Complaint as Exhibit 10 and Exhibit 11, respectively.

22. The Union Pacific Railroad has stated it is unwilling to ship New Jersey's soil until the issues raised in this Complaint are resolved.

23. On August 29, 1985, the Union Pacific Railroad submitted to the Governor of Nevada and the Nevada Department of Human Resources the report of an independent firm, Battelle Columbus Laboratories, hired to evaluate the health and safety aspects of New Jersey's project. This report is attached to the Complaint as Exhibit 16.

.....

THOMAS A. PLUTA

Sworn and Subscribed to
before me this 18 day
of September, 1985.

/s/ Richard F. Engel

EXHIBIT 10

(SEAL)

THE STATE OF NEVADA
EXECUTIVE CHAMBER
Carson City, Nevada 89710

RICHARD H. BRYAN
Governor

TELEPHONE
943-3670

August 20, 1985

Mr. Joe S. Gray
Union Pacific Railroad Company
555 Capital Mall, Suite 490
Sacramento, California 95814

Dear Mr. Gray: (Joe)

This office is in receipt of your August 12, 1985, communication which requests clarification on the State of New Jersey's authorization to ship radioactive materials into Nevada.

Please be advised that authorization has not yet been provided by the State of Nevada. Although a preliminary permit has been issued to New Jersey, that permit cannot be utilized until full compliance has been achieved with all applicable state laws and regulations. Several issues of noncompliance remain. For example, Nevada regulations require the Division of Health to review and approve of an independent third-party inspection of the various processes and procedures to be utilized in the packaging, handling, etc. of the contaminated materials. The findings of that inspection report have not yet been approved by Nevada.

In order to insure that Union Pacific does not inadvertently proceed illegally with the proposed shipment,

your office will be provided with written confirmation whenever New Jersey has received final authorization to proceed.

Sincerely,

/s/ Richard H. Bryan
Governor

EXHIBIT 11

JOE S. GRAY
General Solicitor

August 12, 1985

The Honorable Richard H. Bryan
Governor of the State of Nevada
Capitol Complex
Carson City, Nevada 89710

Dear Governor Bryan:

Union Pacific has been advised that New Jersey officials must have a permit from the State of Nevada before the low-level radioactive dirt from Montclair, New Jersey, may be shipped into Nevada for disposal at the Beatty site. The New Jersey Department of Environmental Protection has advised us that it has already received the necessary permit. However, a question has been raised in the press concerning the effectiveness of that permit.

As I indicated to you during our phone conversation this morning, Union Pacific will not begin transporting shipments of the soil from New Jersey into Nevada until the State of New Jersey has obtained all necessary legal authority to ship the material to the disposal site. Therefore, I would appreciate it if you or your appropriate representative could advise me as to whether the State of New Jersey has met applicable permit requirements and, if not, what specifically remains to be done in this regard. We would appreciate receiving this information as soon as possible so that we can make certain that the proposed movement is in full compliance with applicable Nevada law.

Sincerely,

/s/ Joe S. Gray

EXHIBIT 12

AFFIDAVIT OF WILLIAM E. ROSENBAUM, P.E.

State of Pennsylvania:
County of Beaver: SS

WILLIAM E. ROSENBAUM, P.E., being duly sworn upon oath, deposes and says that:

1. I am an Assistant Engineering Manager for Baker/TSA Division of Michael Baker, Jr., Inc. the engineering consultant to the New Jersey Department of Environmental Protection on the Montclair/Glen Ridge Radiological Contamination Removal Project. I am responsible for providing design engineering and project support for this cleanup project.

2. At the direction of officials from the State of New Jersey, on August 22, 1985, I spoke by telephone with Jerry Griepentrog, Director of the Nevada Division of Human Resources. The purpose of my call was to confirm, in his judgment, that New Jersey has conformed with all Nevada requirements for the shipment of radioactive soil from New Jersey on this project.

3. He responded that no further engineering data is needed by Nevada and that the only outstanding issue involved the indemnifcation clause in the letter agreement by and between New Jersey and Nevada.

Further, Affiant sayeth not.

Dated this 16 day of September, 1985.

.....

William E. Rosenbaum, P.E.

Sworn and subscribed to
before me this 16 day
of September, 1985.

.....

EXHIBIT 13

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

NO. CV-LV 85-683, LDG

CITY OF LAS VEGAS, NEVADA, a municipal corporation, CITY OF NORTH LAS VEGAS, NEVADA, a municipal corporation, and COUNTY OF CLARK, NEVADA, a political subdivision of the State of Nevada,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD, a Utah corporation,

Defendant.

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The State of New Jersey contracted the Union Pacific Railroad ("UPR") to transport certain low-level radioactive dirt from that state to a hazardous waste facility at Beatty, Nevada. UPR's intended transportation route passes through the cities of Las Vegas and North Las Vegas and Clark County, all in Nevada. The two cities and the county object to the proposed shipment and, therefore, brought an action in Nevada State District Court to have the shipment enjoined. This action was removed to federal court on diversity and federal question grounds. The State of New Jersey was subsequently permitted to intervene as a defendant under Rule 24 of the Federal Rules of Civil Procedure.

The plaintiffs have not clearly stated their objective in bringing this action, although they appear to seek assurance from this Court that the UPR has complied with all state, local, and federal laws and regulations. Until such

assurance is given, they request that the Court impose a preliminary injunction against UPR to prevent the shipment of the dirt through their cities and county and its temporary storage there.

To prevail as to their motion for a preliminary injunction, the plaintiffs must demonstrate "either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in [plaintiffs'] favor." *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 634 F.2d 750, 753 (9th Cir. 1980). Plaintiffs have failed to meet this test. For the reasons set forth below, their motion must be denied.

As to the first alternative of the test for preliminary injunction, the plaintiffs have failed to show the possibility of irreparable injury. Their potential injuries are wholly speculative. They suggest that because UPR's switching yards are so close to downtown Las Vegas, the tourism industry will be harmed. They further claim that the potential danger from accident merits the imposition of an injunction. However, their contentions are unsupported. The plaintiff's have shown the Court no reason to believe they may suffer irreparable injury if injunctive relief is not granted.

As to the second alternative of the test, the balance of hardships does not tip sharply in the plaintiffs' favor. The cities and county have not justified their fears concerning the transport of the dirt. On the other hand, the hardships of delay that an injunction would place upon the defendants are both real and quantifiable.

Finally, the plaintiffs would have the Court become a judicial regulatory agency. The defendants have asserted that they have complied with all applicable laws and regulations. This Court must accept the defendants' assertions unless the plaintiffs can present evidence to the contrary. The plaintiffs have not yet done so.

For these reasons, the motion for preliminary injunction must be denied.

IT IS SO ORDERED.

DATED this 9th day of August, 1985.

/s/ LLOYD D. GEORGE
United States District Judge

EXHIBIT 14

Reno Gazette 7-26-85

BRYAN IGNITES NUKE WASTE WAR
By Brendan Riley/AP

CARSON CITY — Gov. Richard Bryan said Wednesday he plans to temporarily withhold a state authorization needed to bring a shipment of radioactive waste from New Jersey to a low-level waste dump in southern Nevada.

Bryan also said he favors the state joining with local government officials in Las Vegas in a court battle to block the waste shipments planned by Union Pacific Railroad to the dump near Beatty.

In a related action, Clark County commissioner agreed Wednesday to join Las Vegas in filing suit to stop the loads of contaminated soil that Union Pacific planned to send to Nevada starting next week.

"Maybe this shipment can be stopped," Bryan told reporters following a brief speech to the state Hazardous Materials Committee. But he added he wanted to check with the Attorney General's Office on the state's legal options.

Chief Deputy Attorney General Bill Isaeff questioned whether the court fight would work, saying, "It doesn't appear there is much likelihood of success" in trying to stop the train.

"We are an officially designated dump state. If there is no imminent threat to the health and safety of the citizens, then we can do little to stop the train," Isaeff added.

Isaeff said the legal options are being studied now, and he hopes to get a report on Friday.

Bryan conceded the state lacks the power to flatly refuse to take any lowlevel radioactive waste. But he added he still favors the state joining the legal battle against the shipments.

Asked whether he would authorize the state Human Resources Department to issue the letter of authorization needed to bring the waste into Nevada, Bryan said, "I do not intend to at this point."

The governor suggested the delaying action may help get the attention of Congress — and Nevada's congressional delegation — which has not acted on a Rocky Mountain States regional compact on nuclear wastes.

Bryan criticized the three Republican members of the Nevada delegation for "a wait-and-see attitude" that he said would only ensure the state would continue to get waste shipments from the East Coast.

He added that the current dispute over the rail shipment is "a preview" of what could happen if a high-level waste dump is located in Nevada. He said there could be 140,000 shipments of high-level waste over a 20-year period.

The unanimous Las Vegas City Council vote on Tuesday for a court fight came despite doubts by City Attorney George Ogilvie that the city can win. But Councilman Ron Lurie said the city had to do something to stop the shipment of waste through Las Vegas because of fears it poses a health hazard.

The council vote shattered a tentative compromise reached last week after meetings between city, county and railroad officials.

Under that plan, the radioactive waste would be shipped through Las Vegas to a railroad yard in Arden, about 15 miles from the city. The waste would then be transferred into trucks and taken to the Beatty site.

City officials originally raised objections because the railroad had planned to transfer the radioactive material, which is being dug from beneath homes in a Montclair, N.J., subdivision, into trucks at its downtown Las Vegas facility.

Arden residents also protested the plan to unload the shipments in their small community. "No one in their right mind wants that stuff in their back yard," Bryan said.

The governor told the Hazardous Materials Committee the Union Pacific dispute was a good example of what state officials should avoid in such cases. He said good planning is important but "you can't ignore public concerns."

Bryan said Union Pacific failed to realize "that the public is frightened by all this." He also was critical of New Jersey officials for taking "a rather cavalier attitude: 'Well, we'll send it out to Nevada.' "

EXHIBIT 15

Las Vegas Sun 7-26-85

BRYAN WON'T ISSUE NUCLEAR WASTE PERMIT
By CY RYAN

United Press International

CARSON CITY — Gov. Richard Bryan said Wednesday he would not issue a permit to allow a Union Pacific train carrying low-level nuclear waste to enter Nevada and he criticized New Jersey for taking a "cavalier attitude" in shipping the material out west.

The governor said he wants to talk with Attorney General Brian McKay to see what legal options the state has.

In the meantime, Bryan said the permit sought by New Jersey would not be approved. Initially Union Pacific planned to haul the shipment into downtown Las Vegas.

But Bryan, Las Vegas and Clark County officials said that was unacceptable and the railroad agreed the train would be unloaded at Arden, a small community about 175 miles southwest of Las Vegas.

Bryan said the state has yet to agree whether that site is acceptable.

Bryan emphasized he did not have the power to stop all shipments of nuclear waste into Nevada but he might be able to prevent this one.

Bryan said he was frustrated by the view in New Jersey "that they just want to get rid of it . . . they're not particularly sympathetic to Nevada's problem."

"New Jersey's response is to this thing is that 'We don't see why the Nevada people are so upset because this is low-level stuff and what's there to worry about,'" Bryan said. "Our response is that if it is such low-level stuff, then you keep it there."

Bryan said this was a "preview of a nuclear nightmare," if Nevada is chosen as the site for a high-level nuclear dump by the federal government. He said there would be 140,000 shipments over a 20-year period, which breaks down to 20 to 30 a day with the "stuff everybody acknowledges to be deadly."

He criticized the three Republican members of the Nevada congressional delegation, saying their " 'wait-and-see attitude' is the best guarantee that Nevada could have that it is going to get it (the high-level radioactive waste)."

"We haven't had any help from our congressional delegation except for Congressman (Harry) Reid," Bryan said.

"What is frustrating is that Ron Lurie (a Las Vegas city councilman), the county people and myself are down there in the trenches trying to get something accomplished and it's as if they're not aware there is a problem."

The New Jersey application has been filed with the state Human Resources Department. Director Jerry Griepentrog said it won't be acted upon for at least a week.

He said that means the shipment cannot leave New Jersey until Nevada approves the license. He said his office is reviewing a report of an independent inspection of the shipment.

George Klenk, a spokesman for the New Jersey Department of Environmental Protection, said about 40 trailer loads of soil had been removed by midday Wednesday, and were being stored at the DEP's staging area in Kearny.

Klenk also said the DEP had not planned to start the shipments until sometime next month.

EXHIBIT 16

UNION PACIFIC RAILROAD COMPANY
MISSOURI PACIFIC RAILROAD COMPANY

1416 Dodge Street Omaha, Neb. 68179

JAMES V. DOLAN
Vice President-Law

August 29, 1985

The Honorable Richard H. Bryan
Office of the Governor
Capitol Building
Carson City, Nevada 89710

Dear Governor Bryan:

Enclosed is a copy of the report that we have just received from Battelle-Columbus Laboratories, the independent expert that we retained to review the safety of the proposed movement of low-level radioactive waste to Beatty, Nevada. Battelle-Columbus Laboratories is one of the most highly respected scientific firms in this area. Their investigation (which, as shown by the report, was quite thorough) indicates that the potential health hazard of the movement to residents of the State is "virtually nil."

Needless to say, the Battelle-Columbus report satisfies the concerns raised in our mind by the error in Dr. Touhill's affidavit. Battelle's report unequivocally confirms the safety of the proposed movement. If you or members of your staff have any questions regarding the report, please let us know.

Very truly yours,

/s/ Jim Dolan

CC — Mr. J. S. Gray

General Solicitor
Union Pacific Railroad
555 Capitol Mall
Suite 490 Plaza Towers
Sacramento, CA 95826

FINAL REPORT

ON

TECHNICAL CONSULTATION RELATED TO THE SAFETY OF TRANSPORTING RADIOACTIVELY CONTAMINATED SOIL FROM NEW JERSEY TO NEVADA

TO

UNION PACIFIC RAILROAD

FROM

BATELLE COLUMBUS LABORATORIES
505 King Avenue
Columbus, Ohio 43201

August 28, 1985

"LEGAL NOTICE"

This report was prepared by BCL as an account of work sponsored by Union Pacific Railroad. Neither UPRR, BCL, nor any person acting on behalf of either;

a. Makes any warranty or representation, express or implied with respect to the accuracy, completeness, or usefulness of the information contained in this report, or that the use of any information, apparatus, method, or process disclosed in this report may not infringe privately-owned rights, or

b. Assumes any liability with respect to the use of, or for damages resulting from the use of, any information, apparatus, method, or process disclosed in this report.

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FINAL REPORT

on

TECHNICAL CONSULTATION RELATED TO THE SAFETY OF TRANSPORTING RADIOACTIVELY CONTAMINATED SOIL FROM NEW JERSEY TO NEVADA

to

UNION PACIFIC RAILROAD

from

BATTELLE COLUMBUS LABORATORIES
505 King Avenue
Columbus, Ohio 43201

August 28, 1985

1. INTRODUCTION

Union Pacific Railroad has been awarded a contract from the New Jersey Department of Environmental Protection to transport soil containing Radium-226 and its daughter products from several sites near Montclair, New Jersey to a low level radioactive waste burial site near Beatty, Nevada. Battelle has performed an independent evaluation of the hazards of the soil being transported and of the incremental risk to the health of the public and to Union Pacific employees. This report presents the results of the study and addresses the following topics:

A. Verification of the specific activity measured in the soil,

B. Evaluation of the conclusions by the New Jersey Department of Environmental Protection regarding the hazardous nature of the soil,

C. Evaluation of the incremental health risk for the entire intermodal (rail and truck) transport within the State of Nevada,

D. Credentials of the Battelle participants.

The sites visited, persons contacted and documents reviewed during the course of this study are presented in Appendices A, B, and C, respectively.

2. SUMMARY

Battelle evaluated methods being used and planned for the packaging and transportation of soil contaminated with Ra-226. The soil, being excavated from residences in Montclair and Glen Ridge, New Jersey, was reported to be contaminated at a very low level of specific activity (84 pCi/g Ra-226 average). The objective of this study was

to provide to Union Pacific Railroad an independent opinion about the safety of the project.

Soil removal, packaging, and package monitoring procedures were observed. Records were reviewed to determine the appropriateness and completeness of radioactivity measurement techniques. Samples of soil were obtained and analyzed by the site field laboratory and by Battelle. These studies confirmed the accuracy of reported radiation levels and the scientific acceptability of the methods used by the remedial action team to obtain them. The packaging and transportation methods appeared to be in compliance with appropriate federal regulations.

The proposed route and several alternative routes in Nevada which could be used to transport the soil to Beatty, Nevada, were inspected. Factors such road/rail condition, passage through inhabited areas, availability of unloading sites, proximity or availability of support services at unloading sites, and safety features/security at the unloading sites were considered. From this study it was concluded that the intermodal shipment and specific route proposed by UPRR is appropriate.

Using measured and reported radiation levels from the packaged soil, estimates of the radiation levels along the transportation route were calculated conservatively. These were compared to radiation levels normally encountered by the public. These comparisons indicated that the transportation of this material presents an immeasurably low incremental radiological health risk to the public.

3. SCOPE OF WORK AND RESULTS

This section describes the work done and the results obtained. Detailed supporting data and supplementary information are presented in the Appendices.

3.1 Radioactivity of the Soil

3.1.1. Specific Activity of Soil

Reported values of the specific activity of the soil were verified by two methods: i) Review and evaluation of measurements performed by Eberline Analytical Corporation, and ii) independent sampling and measurements by Battelle.

3.1.1.1. Audit of Eberline Equipment and Procedures. Eberline Analytical Corporation has responsibility at the site for radiological surveillance of waste containers. This includes quantifying the radioactivity of the contents as well as measuring external radiation dose rates of waste containers. Laboratory counting instruments, specifically the gamma spectrometer, are used to quantify concentrations of Ra-226 in drums. Hand-held radiation survey meters are used in the field to monitor the exterior of waste containers. Records of calibrations were reviewed. The field survey meters are calibrated weekly and field response checks are performed daily prior to instrument use. Appendix D includes copies of field source check logs.

The gamma spectrometer used for quantifying Ra-226 in soil is a Canberra 4096 channel gamma spectrometer coupled to a 4 in. x 4 in. sodium iodide (NaI) detector. It is calibrated prior to use, normally on a daily basis. The calibration source is a pitchblend ore-silica mixture, uranium standard from the U.S. DOE New Brunswick Laboratory. Appendix E is a copy of the Certificate of Analysis.

3.1.1.2 Independent Sampling and Measurement. Since there were about 4600 containers already loaded at the start of this study, a statistical sampling approach was considered impractical. Verification of container contents

consisted of review of procedures regarding quantification technique as well as comparison of analytical results between Eberline site personnel and analyses by Battelle.

Five drums were randomly selected for sampling at the trans-loading facility located in Kearny. The oldest available drums (3-4 days) were selected by the personnel at the trans-loading site. Core samples representing the vertical profile of the drums were extracted and provided to Eberline site personnel for analyses. These samples were then sent to Battelle for analyses. The Battelle analyses were performed using an intrinsic Ge-Li detector coupled to a 4096 multichannel analyzer with data manipulation by an ND66 Nuclear Data computer system. Calibration/counting was performed with a NBS traceable standard Ra-226 reference source. Results of Eberline and Battelle analyses are given in Table 1.

TABLE 1. SOIL SAMPLE ANALYTICAL DATA

RA-226 CONCENTRATION, PICOCURIES PER GRAM			
Drum No.	Sample Date	Eberline	Battelle
L18-4722	8-21-85	286±24	220±12
L18-4725	8-21-85	45±10	44±3
L18-4749	8-21-85	10±4	6±3
L18-5025	8-21-85	11±5	9±1
L18-5032	8-21-85	10±5	7±1

These results are considered to be in very good agreement and confirm the accuracy of the analyses being performed at the excavation site on the material being removed.

It was determined by the Eberline personnel that the correlation between the total activity in each drum and its dose rate can conservatively be taken as 1.0 mRem/hr 1 mCi/drum. It was not possible to confirm this, however, because it was not possible, with the facilities available, to duplicate the Eberline drum monitoring and sampling procedures. From Battelle's radiation readings that were taken of the drums, the correlation developed is believed to be conservative.

3.1.2 *Radiation from Containers/Trailers*

3.1.2.1 *Containers.* The reported surface dose rates of all containers (17H drums and cubic B-12 metal boxes) were reviewed to determine the magnitude of the dose rates. The contents manifests of the 76 trailers loaded from the inception of soil removal from the sites on June 19, 1985, through the date of review on August 22, 1985, were examined. Over 4600 drums and boxes were represented. Of these only 62 had surface readings of 0.1 mRem/hr or greater, and only two had surface readings of 1.0 mRem/hr or greater, specifically 1.0 mRem/hr and 1.6 mRem/hr. Appendix F lists the containers which had surface readings of 0.1 mRem/hr or greater, and the trailer in which it was loaded. Typically, the high readings were measured at a localized area on the containers. The dose rates measured over the remaining surface of the container were usually several factors lower.* This phenomenon tends to indicate that the radioactive source is small in volume and that the soil provides significant shielding.

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*Private communication with various staff of Michael Baker, Jr., Inc., Eberline Analytical Corp., and U.S. Ecology, Inc.

In addition significant reduction in dose is obtained by increasing distance from the source. As an example, if a radioactive point source which produces a 1 mRem/hr dose at the surface is assumed to be at ½ the radius from the surface of the container (about 6-inches), then the dose rate at 1-ft from the surface would be 0.11 mRem/hr and at 3-ft the dose rate would be 0.03 mRem/hr.

Battelle was unable to verify surface dose readings of loaded containers by independent measurements because the trailers were sealed and had been moved from the transloading area to the staging area to await loading onto rail flat cars. No equipment was available at the staging area to remove individual containers to an isolated area for monitoring. However, as noted in Section 3.1.1, an audit of the procedures being used indicated that good measurement techniques and properly calibrated instruments were being used for container monitoring.

3.1.2.2 *Trailers.* The dose rates reported in the shipping manifests for each trailer were reviewed to determine the magnitude of the dose rates at contact and at 2-meters from the trailer surface. The maximum reported dose rates for each of the 76 trailers loaded from the inception of soil removal from the sites through August 22, 1985, are presented in Appendix G. Battelle visited the staging area where these trailers were stored and attempted to verify the readings recorded on the shipping manifests. The trailers were placed very close to each other in the staging area and only six of the trailers (at the ends of the rows) could be considered to be reasonably shielded on one side from radiation from adjacent trailers. Of these six, only one exhibited a surface dose rate significantly above background. The readings are compared in Table 2 with those presented in the shipping manifest.

TABLE 2. COMPARATIVE DOSE RATE MEASUREMENTS OF TRAILER NO. REAZ287306

Location	Dose Rate Readings, mRem/hr	
	Manifest: Ion Chambers Survey Meter	Battelle Survey: NaI Detectors
Contact	0.06	0.22
1-meter	—	0.04
2-meter	0.01	0.02

These readings are considered to be in good agreement. NaI detectors are more sensitive at low dose rate levels and thus would be expected to indicate higher dose rates than ion chamber devices. The variations observed are considered normal.

For completeness we calculated the dose rate expected at various distances from a train carrying many trailers. Our calculations were based on the conservative assumption that the dose rate on contact with the surface of each trailer was 0.220 mRem/hr at every point. In reality 0.22 mRem/hr was the highest contact dose rate we observed and most readings were much lower. Background readings in the area where the trailers were stored was 0.008 mRem/hr. Thus the dose rate due to the radioactive material in the trailers was 0.212 mRem/hr. Assuming that a train loaded with many trailers could be modeled as a line source that produced a dose rate of 0.212 mRem/hr at the surface of the trailer, we calculated the dose rates at various distances from the train. The results of the calculations are shown in the Table 3 below. Note that a stand-off distance of 20 m reduces the dose rate from the train to background radiation levels.

TABLE 3. CALCULATED DOSE RATE AS FUNCTION OF DISTANCE FROM SIDE OF TRAIN

Distance from train, m	Dose Rate, mRem/hr
1	0.115
2	0.078
5	0.039
10	0.020
20	0.009
30	0.006

3.2 Hazardous Nature of the Soil

Battelle evaluated the conclusions reached by the New Jersey Department of Environmental Protection on the hazardous nature of the contaminated soil. The evaluation was based on a review of documents as well as the results discussed in Section 3.1. A complete list of the documents reviewed is presented in Appendix C.

3.2.1 *Contaminated Soil*

During the planning stage of the remedial response activities for the sites having the Ra-226 contaminated soil, bore holes were dug to characterize the level of activity. The samples had specific activities ranging from 0.36 pCi/g to 2200 pCi/g of Ra-226. It was estimated that the maximum specific activity which might exist is 50,000 pCi/g. The USDOT regulations define a radioactive material as one with a specific activity greater than 2000 pCi/g. Thus, the soil with the higher activity is considered radioactive and must be handled in accordance with the applicable regulations.

During the removal of the contaminated soil from the sites it was noted that the activity of most of the soil was less than 2000 pCi/g. The soil with specific activity above 2000 pCi/g was found to be a relatively small quantity. It was concentrated in small isolated pockets and some dilution with the low activity soil occurred during the digging and drum loading process. In order to assure safe removal and disposal of the contaminated soil, all soil and loaded drums are handled as low specific activity material regardless of its specific activity.

Another conservatism was introduced when assigning a curie content to the loaded drums. The curie content was determined using the correlation between specific activity and radiation dose rate described in Section 3.1. However, as an added safety measure due to the uncertainty of the distribution of activity in the soil, the curie content was assigned based on the highest observed reading at the drum surface rather than an average or otherwise weighted value. Thus, in many instances, the average specific activity of the containers is probably much lower than the value assigned. The average specific activity of approximately 4600 containers loaded from the beginning of the program on June 19, 1985, through mid-August, 1985 was reported as 84 pCi/g. This is over 20 times less than the activity of material defined as radioactive. Of these 4600 containers, about 62 were assigned surface dose rates of 0.1 mRem/hr or more. The maximum surface dose rate measured on a container was 1.6 mRem/hr. Using the correlation in Section 3.1, this corresponds to a specific activity of 1.6 mCi/drum or approximately 4400 pCi/g.

3.2.2 *Packaging*

The Quality Assurance (QA) documents for the fabrication of the two types of containers were reviewed. The 55 gal drums were supplied by the Kearny Steel Container Corporation. These reconditioned drums were certified to meet the U.S. Department of Transportation (USDOT) specifications for 17H drums. This specification is for a higher quality container than is required by the USDOT for the transport of low specific activity material.

The metal boxes were supplied by Container Products Corporation. They have a reported capacity of about 49 cu ft. They are referred to as B-12V (or simply B-12) boxes and are specified as strong-tight boxes as required for LSA material.

Both 55-gal, 17H drums and the B-12V boxes were examined at the transloading site. The 55-gal drums are clearly labeled as meeting the 17H specifications of the USDOT. They were obviously reconditioned in that the sides had local irregularities. The sealing surfaces appeared round. Both the drums and the covers appeared freshly painted. The paint on the sides of the loaded drums were scuffed from the metal drum handling equipment. The paint was not chipped, however, on any drum examined and no base metal was exposed.

On the loaded drums, the locking rings on the drums were drawn tight with the ring bolt. A lock nut on the bolt was drawn up tight to the threaded ear on the ring clamp. The exposed bolt threads immediately adjacent to the lock nut were peened and sufficiently distorted to prevent the lock nut from loosening or being removed without destroying the bolt or the nut itself.

Loading of the drums was observed at the dig site. On occasion the covers had to be set into the drum top with the aid of a hammer. This apparently was due to slight ovality of the reconditioned drums. The clamp rings appeared to draw the covers well into place, however, when the clamp bolt was tightened. Both the bolt and the lock nut were tightened with an electric impact wrench designed to prevent overtorquing.

3.2.3 *Transportation Options*

Three option for transporting the contaminated soil were considered.

1. Limited quantity material (DOT Regulations 49 CFR 173.421)
2. Low specific activity in Type A containers
3. Low specific activity in exclusive use vehicles.

The limited quantity option was not feasible because the potential existed that material might be encountered which would exceed limited quantity restrictions. Those restrictions include a specific activity of less than 50 microcuries per gram and less than 0.5 mRem/hr dose rate at the surface of the package. Shipment as low specific activity in either Type A containers or by exclusive use vehicle was acceptable. The exclusive use vehicle option was chosen as the more preferable of the two because it required (1) less marking and labeling of the packages and vehicle and 2) less chance of human error. Yet the option provided adequate assurance of safety by including use of strong-tight containers, specific requirements for the loading and unloading procedures, placarding of the vehicles, and specific requirements for instructions to the driver.

3.2.4 *Conclusions on Hazardous Nature of Soil*

It was concluded that the procedures used to measure the specific activity of the soil follow good practice. This includes instrument calibration techniques and frequency as well as the methods of analysis. The accuracy of the instrumentation and analytical methods was verified by independent analyses of five samples using different instrumentation from that used for the routine analyses at the excavation field laboratory. Thus, the accuracy of the measured radioactivity has been verified.

The average specific activity of the soil removed up to the time of this review study was reported to be 84 pCi/g. This is about 24 times less than the quantity (2000 pCi/g) defined in the DOT Regulations (49CFR173.403(y)) as necessary for a material to be considered radioactive. Thus, the average specific activity of the soil would allow classifying it as a nonradioactive material. Higher concentrations than the definition limit exist in some containers, however. It is estimated that less than 2 percent of the containers contain soil which is radioactive by definition. Moreover, though technically radioactive, the specific activity is very low and does not constitute a hazard when the integrity of the packaging is considered.

3.3 *Incremental Risk to Public and Employees*

3.3.1 *Route Survey*

3.3.1.1 *Rail Transport*

Description of the Route. The rail transport of the radioactive material will be accomplished on the East/West UPRR rail line from Salt Lake City to Los Angeles.*

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*Unless otherwise noted, all directions given are railroad directions with west toward Los Angeles and east toward Omaha.

This entire section is automatically controlled from UPRR Centralized Traffic Control in Salt Lake City. Speed limits are designated for all portions of the track. The line is routinely used by a dozen or more freight trains and by Amtrak daily. The line consists of single track mainline with passing tracks located every 5 to 10 miles. Maximum speed on this route is 70 mph, but the exclusive use trains will be limited to 50 mph.

The track distance from the Utah border to the Arden siding is 177 miles; Arden is 11 miles south of the downtown Las Vegas UPRR yards. On entering the State of Nevada, the track ascends for 6 miles to Crestline and then descends for 111 miles Moapa. It ascends again for 30 miles to Apex, then descends for 13 miles to North Las Vegas, and then ascends again through the Las Vegas yard to Arden for the next 17 miles. The grades are one percent or less except for some sections on the long downhill section where it is about 2 percent at 20 miles west of Crestline, and about 1½ percent at 35 to 40 miles west of Crestline. The track passes over may culverts and bridges and through 15 single track tunnels; all tunnels are in the mountains and canyons between Crestline and Moapa. Rock walls were excavated and embankments were built to accommodate the right of way and provide reasonable grades. A photograph in Appendix H shows a representative portion of the rail route in the mountains.

The mainline track is welded rail from the state border to the west switch at Apex except where bolted rail is used in the curves of four degrees or greater. Bolted rail is used from there to Arden. Automatic flange lubricators are installed in the track in the approaches to curves to reduce track wear. Curves are not severe and are ade-

quate for the types of rail cars currently in service. Hot box detectors and dragging equipment detectors are installed at various locations.

The road bed appears to be in good condition and well maintained; areas where ties have been replaced are evident. Several miles of track west of Crestline were replaced in 1982 to eliminate a sharp curve. The track is inspected visually twice a week by certified track inspectors and is walked each Friday by each section gang (20 to 30 miles per section). An unpaved service road parallels the track. Thus, means are available to bring motorized equipment in to service the train or road bed, as needed. Inspections of rails and welds are conducted on a regular schedule.

Off-loading Sites. Before describing the proposed off-loading site and the alternates, a short description of the off-loading (off-ramping) process is needed. The rail cars are parked on a siding and the train is uncoupled at several places to form segments of 9 cars each; the segments are seperated by 150 to 200 feet. A pad of asphaltic concrete or rock at track level is located in the gaps between car segments to allow motorized vehicle approach to the end of the car. A portable ramp is positioned at the end of the first car and a special tractor backs up to engage and remove the first trailer. This operation is repeated over and over until all trailers are removed from the cars; deck plates between cars allow tractor movement over the full length of the 9-car segment. Standard, over-the-road tractors then haul the trailers from the unloading site. Unloading trailers by this method is a routine, daily operation.

Arden Siding. Use of this site west (magnetic south) of Las Vegas would require movement of the train through the city. However, this would be accomplished with a train speed restriction of 20 mph within the city limits. The siding is 6480 feet long and has two siding tracks located about 75 feet north of the mainline and the passing track. There is scattered housing in the area, but none within 500 feet except one house about 200 feet to the north of the siding and about 1600 feet from the west switch. The siding is shown in a photograph in Appendix H. During the off-loading operation the passing track would not be used and mainline speed would be restricted to 50 mph or less. A wye-siding is available if any cars needed to be turned around. Temporary pads for ramps and tractors would be installed in the siding road bed for the off-loading operations.

This site is not fenced. Security would be provided by 2 hired guards for the first train load, and by intermittent visits of UPRR security patrols and employees living in company houses at the Arden siding thereafter. Entry to half the trailers is blocked by their being parked end to end, two to a car, with the doors of one facing the front of the other trailer. Crews of passing trains will be instructed to be alert for trespassers on the right-of-way.

Las Vegas Yard. Permanent off-loading pads are available in the yard on two sidings spaced several hundred feet to the north of the mainline. Also, two dead ended sidings are available with concrete ramps. This latter area is 2900 feet from the Union Plaza Hotel. The size of the yard would isolate the operation from any residents of the city of Las Vegas. Most of the yard is fenced and the area is patrolled; there are employees at various locations throughout the yard at almost any hour of the day or night.

Wann Siding (Craig Road). This siding is located 5 miles east (magnetic north) of the Las Vegas yards. This is a relatively isolated site except for the road. The passing siding is located too close to the mainline for off-loading operations. However, it is planned to stop the train on this siding for the crew change that normally occurs in the Las Vegas yards; thus, the train would not have to stop in Las Vegas.

Valley Siding. This is one of several alternatives proposed by the state. Use of the siding (9 miles east of Las Vegas yards), would require shoving the train backwards into the dead-ended siding. The temporary off-ramping facilities would be installed on the siding about one mile from the mainline. There is a recycling facility nearby, and petroleum pipelines are buried under each side of the right of way. Use of Craig Road for the truck traffic to Beatty would be necessary.

Fiberboard Siding (Apex). This is another suggested alternate located 19 miles east of Las Vegas yards. It also would require shoving the train backward over a mile from the main track onto the dead-ended siding. It would also require parking the train on an incline; thus, wheel chocking would be necessary since the air brake systems would lose pressure during the off-ramping process. Interstate 15 (I15) would be employed to move truck traffic south to Craig Road.

Caliente Siding. This is another suggested off-loading location located 125 miles east of Las Vegas. The siding is located about 100 yards off the main line. However, it is located across the street from and less than 100 feet from several blocks of residences and businesses. The only grade crossing in an inhabited area between Las Vegas and the Utah border is in Caliente. The truck route to

Beatty would be much longer requiring either going around the north and west sides of the Nevada Test Site (passing through Tonopah and Beatty) or south to Las Vegas if Craig Road would be used. Either route would extend the time required for the train to be parked in Caliente for unloading to about a month. The yard at Caliente is not fenced.

Etna Siding. This siding 5 miles west of Caliente has also been suggested. However, the passing track is too close to the main track to allow safe off-loading operations. Truck-traffic would have to go north to Caliente to enter the US highway.

Ute Siding. This siding 40 miles east of Las Vegas was also suggested, but the passing track is too close to the mainline to be used safely for off-loading operations.

3.3.1.2 *Road Transport*

Description of the Proposed Route. UPRR has proposed that the motor transport of the material be made from Arden to Beatty on Nevada Route 160 and US95. Before departure from the yard area, each tractor and trailer will be weighed on site by the State of Nevada (either Department of Transportation or Highway Patrol). The trucks will enter a local road at the east end of the Arden yard and proceed about 200 feet to a stop sign at Route 160 where they will make a left turn. Visibility in each direction is good.

Route 160 is a wide, 2-lane asphalt road in good condition (no holes, no breaks, etc.) for its 76 mile length to US95. It is white lined on the right shoulder with over a foot of paving between the line and the shoulder for most of its length except for about a 14 mile section passing over the only mountain pass on the highway. On the moun-

tain there is no white line and the paving is irregular at the edge where it meets the shoulder. The mountain ridge is 3000 feet higher than Arden and the approach is 12 miles long. The curves in this section are not severe and there are many straight sections. The descent on the other side is less steep into a higher valley. Signs indicate flash flood zones and open range. The rest of the road for over 50 miles after this first descent is mostly straight with gentle curves here and there, and long, gradual ascents and descents (see Appendix H). The Clark County/Nye County line is 42 miles from Arden. One guard rail at Arroyo was noted at the top of the ridge when leaving the Pahrump Valley (66 miles from Arden).

At the stop sign at US95 the visibility in both directions is very good. A left turn on US95 is required to go west to Beatty. This road is also wide, 2 lane asphalt and in very good condition with over 3 feet of paving on the right between the white line and the shoulder. The road is mostly straight with gentle curves and undulations (see Appendix H). It is 34 miles to the entrance of the U.S. Ecology Facility at Beatty. There is room to park 2 or 3 trucks outside the fence for inspection before allowing entrance to the facility.

More traffic was observed on US95 than on Route 160. However, for the summer vacation season this traffic volume would be rated as light. It was well spaced. Tractors/trailer rigs in groups of three were observed going east bound. Tractor trailer use of Route 160 was also observed.

Only two inhabited areas are located on the route: Pahrump at about 50 miles from Arden and Lathrop Wells on US95 at about 93 miles. Some scattered housing is well off the road for 10 miles on each side of Pahrump, mostly

to the West. Pahrump consists of businesses such as motels, restaurants, gas stations, real estate offices, etc. Most of these are 100 feet or more from the road along about a one mile stretch of the highway.

Lathrop Wells is a smaller settlement with a gas station, casinos, a restaurant, and a few other buildings. A road side rest is located on the south side of the highway at the west end of town. The buildings are over 100 yards from the highway on both sides. There is plenty of parking area for the trucks to stop to make their required 100 mile vehicle inspection.

The only other habitations along this route were scattered for the first 8 miles from Arden. Mailboxes were seen at various places indicating habitation but buildings were not visible from the road.

Alternate Routes. The most convenient route for highway shipment would be I15 and US95 from downtown Las Vegas if off-loading in the UPRR yard was employed. Exit from the yard is directly onto I15 North and the entrance ramp to the US95 expressway is immediately north of that. US95 passes through commercial and residential parts of Las Vegas. Outside of Las Vegas US95 is a divided, 4-lane asphalt highway to about 1 mile beyond the entrance to the Nevada Test Site (about 64 miles from the Las Vegas yards). This point is about 6 miles east of the Route 160 entrance.

In many areas this 4-lane highway is built on top of an embankment to keep it from flooding in a rainstorm; the embankments on these banks are up to 50 feet in some places. Between Las Vegas and Route 160, US95 only passes through one other inhabited area, Indian Spring AFB. This is a reduced speed zone. The total distance from the yard to U.S. Ecology is about 104 miles.

Use of Valley Siding or Fiberboard Siding would add 4 to 14 miles, respectively to the trip by way of Craig Road (described previously). However, at this time it is not recommended that Craig Road be used, even if permitted, owing to construction to upgrade the road. Use of Ute, Caliente or Etna Sidings would require even longer truck routings over some secondary roads with no truck facilities and poor communications.

3.3.1.3 *Evaluation.*

UPRR has proceeded in a reasonable and prudent manner to evaluate alternatives for transport and handling of these shipments to meet local concerns, to follow Federal and other regulations, to protect the health and safety of employees and of the public, and to conduct routine operations efficiently. The rail route within the State of Nevada to and through the City of Las Vegas is used daily by ten or more freight trains. Many hazardous materials are hauled on this line routinely and safely using normal operations and procedures. The radium-bearing soil is to be hauled in exclusive-use trains; thus, the train will be operated under special rules of reduced speeds with minimal "bumping" and switching. Safety of rail transport is enhanced by these special measures applied to the shipment.

Attempts were made by UPRR to find an alternate location for off-loading the shipment north of the City of Las Vegas, when it was evident that use of the Las Vegas yard was opposed by public opinion. However, the use of sites with good access roads from a siding area to the public highway were eliminated for one or more of the following valid, safety reasons: the passing track was too close to the mainline; population was too close; backing up the train was required; parking on an incline was required; parking on a siding for a month was required; use

of a local road in North Las Vegas was not acceptable; 24-hour security was difficult to provide; and truck transport operations were required over difficult terrain for excessive times.

The choice of Arden for the off-loading appears to be an appropriate compromise. Even though passage of the train through the City of Las Vegas is required, conduct of this operation non-stop at low speed under increased supervision minimizes risk to the occupants of the city. The Arden location is sufficiently remote for effective isolation of population from off-loading and transport activities. It is also close enough to Las Vegas to allow almost routine and efficient service and equipment support for operations from the Las Vegas yards. The proposed truck route (Route 160 and US95) is adequate and safe for overland transport to the Beatty site with minimal involvement of local population; the roads are well maintained.

For any of the sites considered, the potential for overt threats such as vandalism or sabotage presents a problem. However, security plans are in place to deal with this. The material itself is secure having been sealed in drums which are blocked in place in a locked and sealed enclosed trailer. Additionally, protection will be supplied by guards. The prevailing public attitude at the time of the shipments should indicate the level of security actually needed at the Arden site.

3.3.2 *Incremental Health Risk*

It is noted from Section 3.1 that the procedures used to determine the specific activity of the soil follow good practice. This includes instrument calibration techniques and frequency as well as the methods of analysis. The accuracy of the instrumentation and analytical methods was

verified by independent analyses of five samples. In this section a comparison of the radiation hazard of the soil with radioactivity encountered by the public in normal living conditions is presented.

The maximum dose rate at the surface of any container was measured to be 1.6 mRem/hr. The highest measured dose rate at the surface of a trailer loaded with 60 soil-filled drums was 0.212 mRem/hr. The dose rate would be about 0.08 mRem/hr and 0.02 mRem/hr. at 2m and 10m from the trailer, respectively. The health risk resulting from this radiation can be placed in perspective by comparing it to the radiation levels encountered by the public in normal environments. Normally occurring sources of radioactivity are virtually everywhere. A partial representative list includes the following:

- Cosmic
- Tobacco
- Natural gas (cooking and unvented heating)
- Coal
- Building materials including stone and concrete
- Television receivers
- Smoke detectors
- Airport security inspection
- Medical (diagnostic and therapeutic).

Table 4 presents the dose rates of ionizing radiation from cosmic and terrestrial sources and from common medical diagostic procedures. Comparsion of these data with the radiation external to the trailers used to transport the soil can help estimate the incremental risk to the public which results from the soil shipment.

TABLE 4. RADIATION EXPOSURE TO THE PUBLIC DURING NORMAL LIVING ENVIRONMENTAL CONDITIONS*

Source	Dose
Cosmic	
Average	31 mRem/yr
Rocky Mountain States	60-80 mRem/yr
Jet Flight, Transcontinental	2.5 mRem/trip
Terrestrial	
Average External	40 mRem/yr
Average Internal	28 mRem/yr
Medical Diagnostic X-Ray	
Chest	10 mRem/exam
Upper GI	500 mRem/exam
Lower GI	900 mRem/exam
Skull	80 mRem/exam
Dental Full Mouth	9 mRem/exam
Average per capita from natural sources (excluding medical)	103 mRem/yr or 0.01 mRem/hr

*Reference: Schleien, B. S., et al, "The Health Physics and Radiological Health Handbook, Nuclear Lecture Associates, 1984.

It is not likely that the general public will be closer than 20 meters to the train or truck trailers or for more than a few seconds. Even in the unlikely event a person does remain in that proximity for a prolonged period, the residence time adjacent to the trailer with the highest sur-

face reading would have to exceed 10 days in order for the absorbed dose to equal the dose absorbed during a single transcontinental flight. From this example, it is seen that the radiological risk to the health of the public from the shipment of the contaminated soil is virtually nil.

Battelle did not have the information needed to perform an explicit evaluation of the radiological health risk to UPRR employees that might be involved in the transportation of the soil. In particular one would need to know how many employees would be in what proximity to the containers for what periods of time. The basic information provided here on dose rates allows one to calculate occupational doses and incremental radiological risk once the employee related information is known.

4. PERSONNEL PERFORMING THIS STUDY

Mr. Richard J. Burian led this project. Mr. Burian has 27 years of successful experience related to the packaging and transportation of radioactive materials. Assisting Mr. Burian were Mr. George Kirsch, a health physicist with 25 years experience; Mr. William Zielenbach, a professional nuclear engineer with over 20 years experience in nuclear safety; Mr. John Allen, a transportation engineer with over 10 years experience in transportation safety; and Dr. Michael Stenhouse, an experienced radiochemist. Dr. Raymond DiSalvo, Manager, Nuclear Systems Section, provided management oversight for the project. Appendix I provides the resumes of these personnel.

APPENDIX A.

SITES VISITED

1. Excavation Site:
   a. 101 Carteret Street, Glen Ridge, N.J.
   b. 103 Carteret Street, Glen Ridge, N. J.
   c. 18 Lorraine Avenue, Glen Ridge, N.J.
2. Waste Transloading Area, Kearny, N. J.
3. Truck Trailer Staging Area, Kearny, N. J.
4. Truck Trailer Off-Loading Area, Arden, Nevada.
5. Truck Transport Route (Nev. Rt. 160 and US95), Arden to Beatty site (U.S. Ecology), Nevada.
6. UPRR Yards, Las Vegas, Nevada.
7. UPRR Right of Way, Las Vegas, Nevada, to Utah state Line.

APPENDIX B.

PERSONS CONTACTED

1. Earl H. Rothfuss, Jr., Project Manager, Michael Baker, Jr., Inc., Beaver, Pennsylvania.
2. Frank Cosolito, Special Assistant to the Director, Division of Environmental Quality, Department of Environmental Protection, State of New Jersey, Trenton, N. J.
3. Richard D a b a l, On-Scene-Coordinator, Division of Waste Management, Department of Environmental Protection, State of New Jersey, Trenton, N. J.
4. Michael C. Davis, Quality Assurance Representative, Radiological Division, U. S. Ecology, Inc., Louisville, KY.
5. Dennis Frain, Health Physicist, Eberline Analytical Corp., Alburquerque, N. M.

6. Leo Tierney, Manager, Environmental Control, UPRR, Omaha, Nebraska (at Las Vegas, Nevada).
7. Paul E. Rhine, Manager, Train Energy Conservation, UPRR, Omaha, Nebraska, (in New Jersey).
8. A. J. Cardinale, Sales Representative, UPRR, New York City, New York, (in New Jersey).

APPENDIX C

DOCUMENTS REVIEWED

1. Affidavit of Leo Tierney, August 6, 1985.
2. Points and Authorities in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction, Attorneys for Intervenor-Defendent STATE OF NEW JERSEY, CV-LV-85 683 LDG, August 7, 1985.
3. Affidavit of Thomas A. Pluta, August 6, 1985.
4. Application for User Permit, To Radiological Health Section, Nevada Division of Health from State of New Jersey Department of Environmental Protection, August 1, 1985.
5. Letter of Agreement from New Jersey Department of Environmental Protection to the State of Nevada, March 1, 1985.
6. Audit Report from Nevada Inspection Services to State of New Jersey, Audit No. 85-5-1, May 13, 1985, (Approved June 28, 1985).
7. Affidavit of C. Joseph Touhill, August 6, 1985.
8. Affidavit of Arthur E. Robb, Jr., August 7, 1985.
9. Letter from Thomas A. Pluta, New Jersey Department of Environmental Protection, to Ben C. Warner, Nevada Inspection Services, June 11, 1985.
10. Certificate of Anlysis by RMC Environmental Services to O. H. Materials, May 15, 1985.

11. Health and Safety Plan for the Montclair/Glen Ridge Radiological Contamination Removal Project, by Phoenix Safety Associates, Ltd, January 25, 1985.
12. Letter from Conti Construction Co. (Mr. Richard Lynt) to Michael Baker, Jr., Inc. (Mr. Earl H. Rothfuss, Jr.), Subject: Container (17H drums) Quality Assurance Plan.
13. Container Products Quality Assurance Plan (for B-12V steel boxes).
14. Health Physics and Operating Procedures, Montclair Remedial Action Project, By Radiation Management Corporation, May, 1985.
15. Radiological Procedure Manual, By Eberline Analytical Corporation.
16. Quality Assurance Project Management Plan for Montclair/Glen Ridge/West Orange Radiological Contamination Removal, Final Design Report, Volume 6, By Baker/TSA, June 17, 1985.
17. Specification for the Transportation of Contaminated Materials, By Michael Baker, Jr., Inc., March 18, 1985.
18. Montclair/Glen Ridge Radiological Contamination Removal, Final Design Report, By Michael Baker, Jr., Inc.
19. Project for Performance of Remedial Activities at Uncontrolled Hazardous Substances Facilities—Zone 1; Results of the Source Characterization Program, Montclair Low Level Radiation Site, Montclair, New Jersey, R-584-5-84-8, By NUS Corporation, Superfund Division, July 12, 1984.
20. UPRR Booklet, "Instructions for Handling Hazardous Materials", October 30, 1983.
21. UPRR, condensed profile, California Division Main Line from Arden to Utah Stateline, January 1, 1985.
22. UPRR drawing, "Arden Nevada, Proposed TOFC Facility", August 14, 1985.

(Appendices D through I omitted)

EXHIBIT 17

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

CITY OF LAS VEGAS, NEVADA, a municipal corporation, CITY OF NORTH LAS VEGAS, NEVADA, a municipal corporation, and COUNTY OF CLARK, NEVADA, a political subdivision of the State of Nevada,

Plaintiff,

v.

UNION PACIFIC RAILROAD, a Utah corporation,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT, TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

1. Plaintiff, City of Las Vegas (hereinafter "City of Las Vegas"), is a municipal corporation operating under the laws of the State of Nevada.

2. Plaintiff, City of North Las Vegas (hereinafter "North Las Vegas"), is a municipal corporation operating under the laws of the State of Nevada.

3. Plaintiff, County of Clark (hereinafter "County"), is a political subdivision operating under the laws of the State of Nevada.

4. Defendant, Union Pacific Railroad (hereinafter "UPRR"), is a Utah corporation authorized to do business in the State of Nevada.

5. Defendant, UPRR, is threatening to transport "low level radioactive waste" either by train or by truck or by both train and truck—into, through or out of the corporate boundaries of the City of Las Vegas, Nevada, the corporate boundaries of the City of North Las Vegas, Nevada, or the boundaries of the County of Clark, Nevada.

6. Defendant, UPRR, is threatening to store "low level radioactive waste" for a length of time unknown to the Plaintiff, City, at a location or locations within the corporate boundaries of the City of Las Vegas, Nevada, or within the boundaries of the County of Clark, Nevada.

7. Defendant, UPRR, is threatening to transfer "low level radioactive waste" from one or more trains to one or more trucks at a location or locations within the corporate boundaries of the City of Las Vegas, Nevada, or within the boundaries of the County of Clark, Nevada.

8. Plaintiffs, have not been formally apprised of the exact nature of the "low level radioactive waste."

9. The "Hazardous Materials Transportation Act," 49 U.S.C. §§ 1801 *et seq.* regulates the transportation and handling of hazardous materials.

10. A "hazardous material" is defined in 49 U.S.C. § 1802(2) as "a substance or material in a quantity and form which may pose an unreasonable risk to health and safety or property when transported in commerce."

11. 49 C.F.R. §§ 100-177, inclusive, set forth the federal regulations that must be compiled with for the transportation and handling of hazardous material.

12. On information and belief, the "low level radioactive waste" that Defendant threatens to transport, store or transfer within the corporate boundaries of the City of Las Vegas, Nevada, the corporate boundaries of North Las Vegas, Nevada, and the boundaries of the County of Clark, Nevada, is a "hazardous material" regulated under the Hazardous Materials Transportation Act and its associated federal regulations.

13. 10 C.F.R. Part 71 sets out the regulations of the Nuclear Regulatory Commission relating to the packaging and transportation of radioactive material.

14. On information and belief, the "low level radioactive waste" that Defendant threatens to transport, store or transfer within the corporate boundaries of the City of Las Vegas, Nevada, the corporate boundaries of North Las Vegas, Nevada, and the boundaries of the County of Clark, Nevada, is the type of material that is subject to the regulations of the Nuclear Regulatory Commission set out in 10 C.F.R. Part 71.

15. NRS 444.700 to 444.778, inclusive, sets out a statutory scheme regulating Hazardous Waste Disposal.

16. Pursuant to NRS 444.712:

'Hazardous waste' means any waste or combination of wastes, including solids, semisolids, liquids or contained gases, which:

1. Because of its quantity or concentration or its physical, chemical or infectious characteristics may:

(a) Cause or significantly contribute to an increase in mortality or serious irreversible or incapacitating illness; or

(b) Pose a substantial hazard or potential hazard to human health, public safety or the environment

when it is given improper treatment, storage, transportation, disposal or other management.

2. Is identified as hazardous by the department as a result of studies undertaken for the purpose of identifying hazardous wastes.

The term includes, among other wastes, toxins, corrosives, flammable materials, irritants, strong sensitizers and materials which generate pressure by decomposition, heat or otherwise.

17. On information and belief, the "low level radioactive waste" that Defendant threatens to transport, store or transfer within the corporate boundaries of the City of Las Vegas, Nevada, the corporate boundaries of the City of North Las Vegas, Nevada, or the boundaries of the County of Clark, Nevada, is "hazardous waste" regulated pursuant to NRS 444.700 to 444.778, inclusive.

18. NRS 459.010 to 459.290, inclusive sets out a statutory scheme for the control of radiation by the Health Division of the State of Nevada Department of Human Resources.

19. NRS 459.201 *et seq.* provides for a state licensing scheme applicable to persons who receive, possess or transfer radioactive materials.

20. NAC 459.865 *et seq.* sets out regulations in furtherance of the licensing scheme provided for in NRS 459.201 *et seq.*

21. On information and belief, the "low level radioactive waste" that Defendant threatens to transport, store or transfer within the corporate boundaries of the City of Las Vegas, Nevada, the corporate boundaries of the City of North Las Vegas, Nevada, or the boundaries of the County

of Clark, Nevada, is subject to the statutory scheme set out in NRS 459.010 *et seq.* and the NAC regulations associated therewith.

22. NRS 706.441 requires a permit from the State of Nevada Public Services Commission to transport radioactive waste upon the highways of the State of Nevada.

23. On information and belief, the "low level radioactive waste" that Defendant threatens to transport by truck using the highways of the State of Nevada into, within or out of the corporate boundaries of the City of Las Vegas, Nevada, the corporate boundaries of the City of North Las Vegas, Nevada, or the boundaries of the County of Clark, Nevada, is subject to the permit requirement of NRS 706.441 and the NAC regulations associated therewith.

24. NRS 408.125(4) authorizes the Board of Directors of the State of Nevada Department of Transportation to:

> Designate by regulation alternative routes for the transport of radioactive, chemical or other hazardous materials over the highways or county roads of this state, in lieu of the preferred highways for such transport designated by the United States Department of Transportation . . . if the regulation . . . does not conflict with the standards for alternative routes establishes by the United States Department of Transportation.

25. On information and belief, the "low level radioactive waste" that Defendant threatens to transport by truck using the highways of the State of Nevada into, within or out of the corporate boundaries of the City of Las Vegas, Nevada, the corporate boundaries of the City of North Las Vegas, Nevada, or the boundaries of the County

of Clark, Nevada, is subject to the alternative highway designations authorized by NRS 408.125(4).

26. Section 4.101(39) of the Uniform Fire Code, 1982 Edition, adopted by the City of Las Vegas pursuant to LVMC 16.16.010 *et seq.*, adopted by the City of North Las Vegas and enforced by Clark County pursuant to NRS 244.3673, NAC 477.275, 477.280 and 477.281 and Clark County Code § 13.04.025 requires that a permit be obtained from the appropriate fire department "to store or handle at any installation more than 1 microcurie of radioactive material not contained in a field source or more than 1 millicurie of radioactive material in a sealed source or sources, or any amount of radioactive material for which a specific license from the Nuclear Regulatory Commission is required."

27. On information and belief, the "low level radioactive waste" that Defendant threatens to transport, store or transfer within the corporate boundaries of the City of Las Vegas, Nevada, and within the corporate boundaries of the City of North Las Vegas, Nevada, is subject to the permit requirements of the Uniform Fire Code § 4.101(39), 1982 Edition.

28. 1985 Nev. Stat., Ch. 299, Sec. 2 provides:

It is unlawful for any person to transport hazardous waste:

1. Without a manifest that complies with regulations adopted by the commission;

2. That does not conform to the description of the waste specified in the manifest;

3. In a manner that does not conform to the manner of shipment described in the manifest; or

4. To a facility that has not been issued a permit to treat, store or dispose of the hazardous waste described in the manifest.

29. On information and belief, the "low level radioactive waste" that Defendant threatens to transport, store or transfer within the corporate boundaries of the City of Las Vegas, Nevada, the corporate boundaries of the City of North Las Vegas, Nevada, or the boundaries of the County of Clark, Nevada, is "hazardous waste" subject to the provisions of 1985 Nev. Stat., Ch. 299, Sec. 2.

30. On information and belief, the manner in which Deefndant threatens to transport, store or transfer the "low level radioactive waste" may violate one or more of the regulations referred to in paragraphs 9-29, above.

31. The Las Vegas City Charter § 2.180(1) provides that the City Council may "provide for safeguarding the public health in the city."

32. The Las Vegas City Charter § 2.250(6) provides that the City Council may "require any company which owns or operates any means of transportation to provide protection against injuries to persons or property."

33. The Las Vegas City Charter § 2.260(1) provides that the City Council may "determine by ordinance what are nuisances."

34. The Las Vegas City Charter § 2.260(2) provides that the City Council may "provide for the abatement, prevention and removal of those nuisances at the expense of the person who creates, causes or commits those nuisances."

35. The Las Vegas Municipal Code § 9.04.010 defines a nuisance as "whatever is injurious to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, or is against the interest of public morals, decency, peace and order."

36. The Las Vegas Municipal Code § 9.04.020 provides that "the creation or maintenance of a nuisance is prohibited."

37. The Las Vegas Municipal Code § 10.47.010 provides in pertinent part that "every act which is unlawfully done and every omission to perform a duty, which act or omission . . . annoys, injures or endangers the safety, health, comfort or repose of any person in a public place or any place to which the public is invited . . . is a public nuisance."

38. The North Las Vegas City Charter § 2.170(1) provides that the City Council may "provide for safeguarding the public health in the city."

39. The North Las Vegas City Charter § 2.240(1) provides that the City Council may "determine by ordinance what are nuisances."

40. The North Las Vegas City Charter § 2.240(2) provides that the City Council may "provide for the abatement, prevention and removal of those nuisances at the expense of the person who creates, causes or commits those nuisances."

41. Defendant's threatened transportation, storage or transfer of "low level radioactive waste" into, through and out of the corporate boundaries of the City of Las

Vegas, Nevada, the corporate boundaries of the City of North Las Vegas, Nevada, and the boundaries of the County of Clark, Nevada, would constitute a nuisance if Defendant has not complied with all applicable federal, state and local laws and regulations.

42. Plaintiffs, as a result of the foregoing, will suffer irreparable injury for which they have no adequate remedy at law in that Defendant may be transporting, storing and transferring "low level radioactive waste" into, through and out of the corporate boundaries of the City of Las Vegas, Nevada, the corporate boundaries of the City of North Las Vegas, Nevada, and the boundaries of the County of Clark, Nevada, in violation of the laws of the United States, the State of Nevada, the County of Clark, the City of Las Vegas and the City of North Las Vegas.

43. For the reasons set forth herein, a real controversy exists between the Plaintiffs and the Defendant as to Defendant's threatened activity, and Plaintiffs bring this action pursuant to Chapter 30 of the Nevada Revised Statutes.

WHEREFORE, Plaintiffs p r a y judgment against the Defandant as follows:

1. That this Court declare that Defendant must comply with all laws and regulations of the United States, the State of Nevada, the County of Clark, the City of Las Vegas and the City of North Las Vegas relating to the transportation, storage or transfer of "low level radioactive waste."

2. That this Court enjoin the Defendant from transporting, storing or transferring "low level radioactive

waste" into, through and out of the corporate boundaries of the City of Las Vegas, Nevada, the corporate boundaries of the City of North Las Vegas, Nevada, and the boundaries of the County of Clark, Nevada.

3. For such other and further relief as this Court deems proper in the premises.

DATED this 30th day of July, 1985.

GEORGE F. OGILVIE
Las Vegas City Attorney

By /s/ John Edward
Roethel, Esq.
Chief Civil Deputy Attorney
400 East Stewart #906
Las Vegas, Nevada 89101
Attorney of City of
Las Vegas

/s/ By ROY A. WOFFTER
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City Attorney

By /s/ Roy A. Woofter for
Terrance P. Marren, Esq.
Deputy City Attorney
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ROBERT J. MILLER
Clark County
District Attorney

By /s/ Victor W. Priebe, Esq.
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225 East Bridger, 8th Fl.
Las Vegas, Nevada 89101
Attorney for Clark County

EXHIBIT 18

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

CITY OF LAS VEGAS, NEVADA,
a municipal corporation, CITY
OF NORTH LAS VEGAS, NEVADA,
a municipal corporation, and
COUNTY OF CLARK, NEVADA, a
political subdivision of the
State of Nevada,

Plaintiff,

v.

UNION PACIFIC RAILROAD, a
Utah corporation,

Defendant.

MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

The Plaintiffs, City of Las Vegas, Nevada, City of North Las Vegas, Nevada, and County of Clark, Nevada, by and through their respective attorneys, move this Court for a Temporary Restraining Order and a Preliminary Injunction in the above-entitled case, to restrain and enjoin the Defendant, Union Pacific Railroad, its agents, servants, employees, attorneys and any other persons acting in concert or participation with it from transporting, storing or transferring "low level radioactive waste" into, through and out of the corporate boundaries of the City of Las Vegas, Nevada, the corporate boundaries of the City of North Las Vegas, Nevada, or the boundaries of the County of Clark, Nevada, by either train, truck or equivalent mode of transportation.

This Motion is made and based upon all the pleadings and papers on file herein, the Complaint and Affidavits filed in support hereof and the points and authorities filed concurrently herewith.

NOTICE OF MOTION

TO: UNION PACIFIC RAILROAD, Defendant, and

TO: JAMES F. PICO, ESQ., its Attorney:

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion For Temporary Restraining Order And Preliminary Injunction on for hearing before the above-entitled Court at the Clark County Courthouse, Las Vegas, Nevada, on the 8th day of August, 1985, at the hour of 10:00 o'clock A.M. of that day, or as soon thereafter as counsel can be heard.

DATED this 30 day of July, 1985.

Respectfully submitted,

GEORGE F. OGILVIE
Las Vegas City Attorney

/s/ By JOHN EDWARD ROETHEL, ESQ.
Chief Civil Deputy Attorney
400 East Stewart #906
Las Vegas, Nevada 89101
Attorney for City of Las Vegas

ROY A. WOOFTER
North Las Vegas City Attorney

/s/ By ROY A. WOFFTER
for
TERRANCE P. MARREN, ESQ.
Deputy City Attorney
2200 Civic Center Drive
North Las Vegas, Nevada 89030
Attorney for North Las Vegas

ROBERT J. MILLER
Clark County District
Attorney

/s/ By VICTOR W.
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8th Fl.
Las Vegas, Nevada
89101
Attorney for Clark
County

EXHIBIT 19

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-LV-85 683 LDG

CITY OF LAS VEGAS, NEVADA, a municipal corporation, CITY OF NORTH LAS VEGAS, NEVADA, a municipal corporation, and COUNTY OF CLARK, NEVADA, a political subdivision of the State of Nevada,

Plaintiff,

vs.

UNION PACIFIC RAILROAD, a Utah corporation,

Defendant.

PETITION FOR REMOVAL

TO: UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA:

Petitioner, UNION PACIFIC RAILROAD COMPANY, respectfully shows:

1. Petitioner is the Defendant named in the above-entitled action.

2. The above-entitled action was commenced in The Eighth Judicial District Court for the State of Nevada, in and for the County of Clark, and is now pending in that Court. Process was served upon Petitioners on July 30, 1985. Removal is therefore timely made.

3. Plaintiffs City of Las Vegas, Nevada, a municipal corporation, City of North Las Vegas, Nevada, a municipal corporation, and County of Clark, Nevada, a political subdivision of the State of Nevada, each are citizens and residents of the State of Nevada. Petitioner UNION PA-

CIFIC RAILROAD COMPANY, is a Utah corporation with is principal place of business in Omaha, Nebraska.

4. Plaintiff seeks Declaratory and Injunctive Relief, and Petitioner anticipates a loss in excess of $10,000 exclusive of interests and costs, should Plaintiffs' claim for relief prevail.

5. This Court has jurisdiction of the subject matter of the present action by reason of diversity of citizenship and jurisdictional amount. Title 28 U.S.C. § 1332.

6. This Court has jurisdiction of the subject matter of the present action by reason of the fact that Plaintiff's Complaint is based upon a claim or right arising under the Constitution, treaties, and laws of the United States. 28 U.S.C. § 1441, to-wit:

a. Plaintiffs seek to enjoin the interstate transportation of low level radioactive waste through the corporate boundaries of the City of Las Vegas, Nevada the corporate boundaries of North Las Vegas, Nevada and the boundaries of Clark County, Nevada, thereby creating a claim arising under the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3.

b. Plaintiffs' Complaint asserts and concedes that the transportation of low level radioactive waste is subject to and regulated by the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 et. seq. and requests a Declaration of Rights pursuant to said Federal statute and associated federal regulations, thereby asserting a claim arising under the constitution, treaties and laws of the United States.

c. Further the above-cited statutes and associated regulations prescribe the Plaintiff's exclusive rights and remedies as a matter of federal law and therefore removal is appropriate. *Conrail v. City of Dover,* 450 Fed. Supp. 966 (Del. 1978).

c. Plaintiff's Complaint concedes and allege that the transportation and packaging of radioactive material is subject to and regulated by the Nuclear Regulatory Commission pursuant to those regulations enacted in 10 CFR Part 71, and requests a declaration of rights pursuant to such federal regulations, thereby asserting a claim arising under the constitution, treaties and laws of the United States.

7. This Petition is accompanied by a bond conditioned as required by law and the rules of this Court.

8. Copies of all pleadings process, and other papers served on Petitioner and on file with the Clerk of The Eighth Judicial District Court in Case No. A 241050, are filed herewith and attached hereto.

WHEREFORE, Petitioner prays that this action be removed.

DATED this 1st day of August, 1985.

DICKERSON, MILES,
PICO & MITCHELL

/s/ By James F. Pico
2000 South Eastern Avenue
Las Vegas, Nevada 89104
Attorneys for Defendant

EXHIBIT 20

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CIVIL NO. CV-R-85-484-HDM

STATE OF NEW JERSEY,

Plaintiff,

vs.

STATE OF NEVADA, NEVADA PUBLIC SERVICE COMMISSION, JERRY GRIEPENTROG, Director, Nevada Department of Human Resources, JOHN VADEN, Supervisor, Radiological Health Section, Bureau of Regulatory Health Services, Nevada Department of Human Resources,

Defendants.

MOTION TO DISMISS OR, IN
THE ALTERNATIVE, TO ABSTAIN

COME NOW, defendants STATE OF NEVADA, NEVADA PUBLIC SERVICE COMMISSION, JERRY GRIEPENTROG, Director, Nevada Department of Human Resources, JOHN VADEN, Supervisor, Radiological Health Section, Bureau of Regulatory Health Services, Nevada Department of Human Resources, by and through their attorneys, Brian McKay, Attorney General, William E. Isaeff, Chief Deputy Attorney General, Bryan Nelson, Deputy Attorney General, and William H. Kockenmeister, General Counsel to the PSC, and pursuant to Rule 12(b)(1) and (2) of the Federal Rules of Civil Procedure move this Honorable Court to enter its order dismissing the above-entitled action on the grounds that original and exclusive jurisdiction of all controversies between two or more states lies with the Supreme Court of the United States or, in the alternative, abstaining from further proceedings until

the Supreme Court of the United States has been given an opportunity to rule on the question of its jurisdiction to hear this action.

This motion is made and based upon all the pleadings on file herein and the points and authorities attached hereto.

DATED this 6th day of September, 1985.

BRIAN McKAY
Attorney General
/s/ By: William E. Isaeff
Chief Deputy
Attorney General

/s/ By: Bryan Nelson
Deputy Attorney
General
Attorneys for Defendants
STATE OF NEVADA,
JERRY GRIEPENTROG,
and JOHN VADEN

OFFICE OF GENERAL
COUNSEL, PUBLIC
SERVICE COMMISSION
OF NEVADA

/s/ By: William H.
Kockenmeister
General Counsel
Attorney for Defendant
NEVADA PUBLIC
SERVICE COMMISSION

(Points and Authorities In Support Of Motion Omitted)

EXHIBIT 21

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STATE OF NEVADA, JERRY
GRIEPENTROG, JOHN VADEN

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF NEVADA

CIVIL NO. CV-R-85-485

STATE OF NEW JERSEY,

Plaintiff,

vs.

STATE OF NEVADA, NEVADA PUBLIC SERVICE COMMISSION JERRY GRIEPENTROG, Director, Nevada Department of Human Resources, JOHN VADEN, Supervisor, Radiological Health Section, Bureau of Regulatory Health Services, Nevada Department of Human Resources,

Defendants.

———————————/

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO APPLICATION FOR PRELIMINARY INJUNCTION

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I.

INTRODUCTION

A. *Nature of the Action*

Plaintiff, STATE OF NEW JERSEY, is seeking Injunctive Relief from this Court to prevent the Defendants[1] from requiring any additional authorization prior to

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1. The term "Defendants" throughout this brief will only be in reference to Jerry Griepentrog and John Vaden and not the Public Service Commission unless otherwise noted.

the shipment and subsequent disposal of low-level radioactive waste from New Jersey other than that authorization already provided.

B. *Federal and State Statutory and Regulatory Backdrop*

The Beatty low-level waste depository was initially licensed by the Atomic Energy Commission for disposal of waste in 1962 and continued to be so licensed until 1972 pursuant to the Atomic Energy Act of 1954, as amended. In 1972, the State of Nevada executed an agreement with the U.S. Atomic Energy Commission which discontinued the regulatory authority of the Commission with respect to certain types of materials buried at the Beatty site. This agreement provided in pertinent part:

> "WHEREAS, The United States Atomic Energy Commission (hereinafter referred to as the Commission) is authorized under Section 274 of the Atomic Energy Act of 1954, as amended (hereinafter referred to as the Act), to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission within the State under Chapters 6, 7 and 8, and Section 161 of the Act with respect to *byproduct materials, source materials,* and *special nuclear materials* in quantities not sufficient to form a critical mass; and . . .
>
> "WHEREAS, The Governor of the State of Nevada certified on March 9, 1972, that the State of Nevada (hereinafter referred to as the State) has a program for the control of radiation hazards and safety with respect to the materials within the State covered by this Agreement, and that the State desires to

assume regulatory responsibility for such materials; and

"WHEREAS, The Commission found on May 18, 1972, that the program of the State for the regulation of the materials covered by this Agreement is compatible with the Commission's program for the regulation of such materials and is adequate to protect the public health and safety; and . . . .

ARTICLE 1

"Subject to the exceptions provided in Articles II, III, and IV, the Commission shall discontinue, as of the effective date of this Agreement, the regulatory authority of the Commission in the State under Chapters 6, 7 and 8, Section 161 of the Act with respect to the following materials:

"A. *By product materials;*

"B. *Source materials;* and

"C. *Special nuclear materials* in quantities not sufficient to form a critical mass."

(Emphasis Added)

The Atomic Energy Act of 1954, ("AEA") as amended, does not however, address naturally occurring radioactive substances such as radium. The AEA specifically states it regulates only source, byproduct and special nuclear material (42 U.S.C. § 2012). These materials are defined in 42 U.S.C. §2014 and do not include naturally occurring radioactivve materials such as radium.

According, the Beatty site has received radium throughout its history as a repository for low-level radioactive waste in addition to these materials covered by the AEA.

The State statutory scheme provides in pertinent part:

> "459.020 State radiation control agency. The health division is hereby designated as the state radiation control agency, and is authorized to take all action necessary or appropriate to carry out the provisions of NRS 459.010 to 459.290, inclusive . . . .
>
> "459.030 Duties of state radiation control agency. For the protection of public health and safety, the health division shall:
>
> 1. Develop and conduct programs for the evaluation of hazards associated with the use of sources of ionizing radiation.
>
> 2. Develop programs and formulate, with due regard for compatibility with federal programs, regulations for adoption by the state board of health regarding:
>
> (a) Licensing and regulation of byproduct materials, source materials, special nuclear materials and other radioactive materials, including radioactive waste.
>
> (b) Control of other sources of ionizing radiation.
>
> 3. Adopt such regulations as may be necessary to administer the provisions of NRS 459.010 to 459.290, inclusive.

4. Collect and disseminate information relating to control of sources of ionizing radiation, including:

(a) Maintenance of a file of all license applications, issuances, denials, amendments, transfers, renewals, modifications, suspensions and revocations.

(b) Maintenance of a file of registrants possessing sources of ionizing radiation which require registration under the provisions of NRS 459.010 to 459.290, inclusive, such file to include a record of any administrative or judicial action pertaining to such registrants.

(c) Maintenance of a file of all regulations, pending or promulgated, relating to the regulation of sources of ionizing radiation, and any proceedings pertaining to the regulations . . . . "

"459.221 License to use disposal area required; shipping violations; penalties, suspension, revocation and reinstatement of license.

1. A shipper or producer of radioactive waste, or a broker who receives such waste from another person for the purpose of disposal, shall not dispose of the waste in this state until he obtains a license from the health division to use the disposal area. The health division shall order a shipment of such waste from an unlicensed shipper or broker to be returned to him, except for a package which has leaked or spilled its contents, unless the package has been securely repackaged for return.

2. The health division shall issue a license to use a disposal area to a shipper or broker who demon-

strates to the satisfaction of the division that he will package and label the waste he transports or causes to be transported to the disposal area in conformity with the regulations of the board of health. The director of the department of human resources may designate third parties to inspect and make recommendations concerning such shippers and brokers and their shipments.

3. A shipper or broker violates this section if he transports or causes to be transported to a disposal area any such waste:

(a) Which is not packaged or labeled in conformity with regulations of the state board of health;

(b) Which is not accompanied by a bill of lading or other shipping document prescribed by that board; or

(c) Which leaks or spills from its package, unless, by way of affirmative defense, the shipper or broker proves that the carrier of the waste was responsible for the leak or spill, and if licensed by the health division, he may be assessed an administrative penalty by the health division of not more than $5,000, or if not licensed, he is guilty of a misdemeanor.

4. Each container of such waste which is not properly packaged or labeled, or leaks or spills its contents, constitutes a separate violation, but the total amount of the penalty or fine for any one shipment must not exceed $20,000. The health division in assessing an administrative penalty, or the court in imposing a fine for a misdeameanor, shall consider the sub-

stantiality of the violation and the injury or risk of injury to persons or property in this state.

5. The health division, or the board pursuant to NRS 459.100, may suspend or revoke a license to sue a disposal area if it finds that the licensee has violated any provision of this chapter. If a license has been revoked or suspended, it may be reinstated only if the licensee demonstrates to the health division that he will comply with the provisions of this chapter in all future shipments of waste."

The State regulatory scheme provides in pertinent part: NAC 459.865 License required; license a revocable privilege.

1. Any shipper or producer of radioactive waste or any broker receiving such waste from another person for the purpose of disposal who desires to dispose of that waste at the state-owned disposal area near Beatty, Nevada, must obtain a license from the health division of the department of human resources before shipping the waste to the disposal area.

2. The issuance of a license pursuant to NAC 459.850 to 459.950, inclusive, is merely evidence of a revocable privilege and does not expressly or impliedly create a property right or interest in the license . . . .

"459.870 Application for license.

To obtain such a license, a person must do all the following:

1. Submit a written application to the health division on a form furnished by the division, and provide the information requested on the form and any other information requested by the division.

2. Allow an audit and inspection of his program for radioactive waste to be conducted by an authorized inspector at the site where the waste is generated or a broker holds it awaiting shipment.

3. Agree to allow unannounced inspections of the site by an authorized inspector.

4. Enter into a contract with an authorized inspector for performance of inspections of the applicant's program for packaging and transporting radioactive waste and agree to pay the inspector's organization for those inspections.

5. Enter into an agreement with the State of Nevada to hold it and the health division harmless from any loss or expense which may arise from liability or consequential damage caused by the licensee's shipment of radioactive waste from its place of origin to the state-owned disposal area. The health division may waive this requirement if the licensee is not allowed by state or federal law to enter into such an agreement.

6. Agree to comply with all federal and state regulations relating to the transportation and packaging of radioactive waste and the conditions of the license issued to the operator of the state-owned disposal area . . . .

7. Pay in advance the fee established for the license.

"459.875 Audit and inspection prerequisite to licensing.

To obtain qualification of his program for packaging radioactive waste, an applicant for a license must submit to the authorized inspector a request to have an audit and inspection of the program. *No license may be issued until an audit and inspection has been completed* . . . .

"459.900 Compliance with federal, state regulations.

1. If any agency of the Federal Government is subject to a federal statute or regulation which precludes its compliance with any aspect of NAC 459.850 to 459.950, inclusive, the agency may enter into separate arrangements with the health division for disposal of radioactive waste in the state-owned disposal area if the agency gives assurances, satisfactory to the division, that its shipments of radioactive waste to the area will be in compliance with all applicable provisions of federal law and the provisions of state law concerning burial of the waste at the area.

2. Radioactive waste being shipped to the state-owned disposal area must remain packaged in compliance with applicable federal regulations and NAC 459.850 to 459.950, inclusive, until the waste is received at the disposal area for burial. The radioactive waste must be in such a physical condition and be so packaged that the operator of the disposal area is able to

dispose of the waste without violating any condition of his license to operate the area . . . .

"459.910 Duties of licensee.

A licensee:

1. Shall carry out his own written program for ensuring the quality of the packaging of the radioactive waste.

2. Shall package the radioactive waste in accordance with:

(a) The regulations of the Secretary of Transportation concerning the transportation of hazardous materials, in 49 C.F.R. Parts 171 to 177, inclusive, revised as of December 1, 1980, as amended on March 10, 1983, March 31, 1983, and July 7, 1983. The board hereby incorporates those regulations by reference. Those regulations are contained in one volume of the Code of Federal Regulations and may be obtained from the Government Printing Office, Washington, D.C. 20402, at a price of $8.

(b) The regulations of the Nuclear Regulatory Commission concerning the packaging and transport of radioactive material in 10 C.F.R. Part 71 revised as of September 6, 1983. The state board of health hereby incorporates those regulations by reference. Those regulations are contained in a volume of the Code of Federal Regulations and may be obtained from the Government Printing Office, Washington, D.C. 20402, at a price of $7.50.

3. May ship only solid radioactive waste to the state-owned disposal area. Any liquid radioactive

waste must, before shipment, be solidified by a method, other than by using urea formaldehyde, which will ensure that there will not be any liquid in the shipping containers upon their arrival at the disposal area." (Emphasis Added)

C. *Historical Background*

Prior to amendments enacted in 1981 to Nev. Rev. Stat. 459.221, Nevada required any shipper who wished to dispose of low-level radioactive waste at the Beatty repository, to obtain a license from the health division. However, just prior to the 1981 legislative session, a heightened concern for the health and well being of Nevada's citizenry manifested itself after the receipt of testimony before the state board of health on September 10 and 11, 1980, concerning numerous violations of packaging and shipping requirements by users of the Beatty repository. A summary sampling of the testimony adduced explains Nevada's concern that it was being subjected to increased health risks as a result of the shippers noncompliant track record with respect to Federal and State requirements for packaging and shipping of low-level radioactive waste. For example, Dr. Karl Morgan, who had served on numerous Nuclear Regulatory Commission ("NRC") committees, testified:

> "And the conclusion and consensus of all members of the committee was that the regulations in existence were not conformed with properly, that there was not adequate assurance that the shipper himself would package the radionuclides appropriately.
>
> "And there appeared to be some recklessness or carelessness in the preparation of some of the sources

going to hospitals, for example, as well as the sources going from the hospitals to the waste facilities.

"So we made a number of recommendations of how we hoped some of these accidents could be avoided or minimized."[2]

Dr. Morgan went on to testify that he felt the non-compliance situation with reference to truck shipments of low-level radioactive waste was worse in 1980 than in 1973 when the prior findings of the committee were made.

Dr. Melvin Carter testified concerning the importance of complying with packaging requirements to adequately protect the public health. He stated:

"Well, I think, in my opinion, the handling of radioactive materials in a careful manner is extremely important, as far as health and safety are concerned. Probably no different than being given a Petrie dish with pathogenic bacteria in it.

"You hope that the bacteria are inside the dish and not on the cover, and not somewhere else they're not supposed to be.

"It's a very similar kind of analogy, I think.

"And in this case, I think the whole—the whole heart of the matter of transporting radioactive materials, handling them at a site such as Beatty, has to be done on a very careful basis."[3]

Professor Gofman's deposition was also part of the record reviewed by the state board of health. His testi-

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2. Transcript of entire testimony attached as Exhibit A.
3. Transcript of entire testimony attached as Exhibit B.

mony, in part, addressed the increased risk to Nevadans as a result of noncompliant shippers sending their waste to the Beatty repository. In response to the question: Does there exist any potential health hazards as a result of leaks or spills from low-level radioactive waste containers or the presence of small amounts of radioactive contamination on or about trucks transporting this waste material or radiation being emitted from the truck transporting this material during the transit? He stated:

"In my opinion, there definitely is such a hazard to health . . . .

"The nature of radiations emitted by such substances are well characterized. They are either gamma rays or X-rays, alpha rays and beta particles; or the alpha rays are also called alpha particles.

"Now, these various particles or radiations are varying energies for each type of radiation: The X-rays or gamma rays, the beta rays, and for the alpha particles.

"We have definite evidence of the production of cancer and/or leukemia.

"And we have such definitive evidence from a variety of human epidemiological studies which I would list for you, if you want them.

"One of the largest ones, of course, being the studies of the Japanese; and another study, one that I did myself, on the workers at Hanford, Washington.

"But for each of these forms of radiation, we have separate proof of the leukemia and cancer harm.

"Therefore, since we have separate proof of the harm in the form of producing these diseases, since these substances emit such radiation, there simply is no question that these substance, if leaked—radiations from them getting into the body will produce harm in the form of cancer and leukemia in individuals so exposed."[4]

When asked whether Nevadan's are exposed to a greater risk than the citizenry of other states who do not have a low-level radioactive waste repository, Dr. Gofman stated:

"In my opinion, the residents of Nevada are exposed definitely to a greater risk.

"And that's based on common sense.

"For example, all the shipments from all—say, if it were forty-eight; or if we include all states, all fifty, if they come from there to Nevada, whatever vehicle they are coming in has to transit some part of Nevada's roads or rails.

"And if you think of a state like New York, it's not likely that many of the shipments from Idaho are going to go through New York .

"But every shipment has to go through Nevada.

"So the New York shipments, New Yorkers are only exposed, at most, to what comes from New York or part of New York. But the Nevadans have a chance of being exposed to shipments from many states.

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4. Transcript of entire testimony attached as Exhibit C.

> "So it has got to work out, because all these individual ones funnel and must crisscross Nevada, that Nevadans have a bigger change of exposure and the hazards of cancer and leukemia from such exposure than the residents of other states."

In response to this new evidence, Nevada enacted certain amendments to Nev. Rev. Stat. § 459.221 in 1981. One such amendment initiated a "third party inspection" program which reviewed the quality assurance programs of packagers and shippers to ensure compliance with Federal and State regulations. Prior to the issuance of a license by the health division to permit the burial of low-level radioactive waste at the Beatty repository, a shipper or broker had to demonstrate that it was in compliance with Federal and State requirements for packaging and shipping. The state requirements, adopted by the State Board of Health, were nothing more than the Federal Department of Transportation and NRC regulations addressing the packaging and transport of radioactive waste. These requirements were in fact merely incorporated by reference at NAC 459.910(2).

Therefore, pursuant to Nevada's statutory and regulatory scheme, a user of the Beatty repository must first secure a license from the health division. Such licensee must demonstrate that his quality assurance program meets or exceeds the Federal and State requirements for packaging and shipping. Upon presentation of satisfactory evidence of such compliance and the payment of a repository user fee, a license is issued. Such license is, in part, the subject of the instant dispute.

II.

ARGUMENT

Adopting Plaintiff's citation of authority defining the traditional factors which must be present in order for preliminary injunctive relief to be granted, i.e., the four-prong test, Nevada will only address the issue whether Plaintiff has demonstrated a strong likelihood of success on the merits because such discussion is dispositive with respect to whether an Injunction should issue.

A. *Plaintiff Has Not Demonstrated That A Substantial Likelihood Exists That It Will Prevail On The Merits Of Its Complaint*

Plaintiff asserts its claim under the Supremacy Clause, Art. VI, cl. 2, and the Commerce Clause, Art. 1 § 8, cl. 3 of the United States Constitution. Specifically, Plaintiff alleges that Nevada's statutory and regulatory provisions concerning users of the Beatty repository are preempted by the Hazardous Materials Transportation Act ("HMTA") and are in direct conflict with the Atomic Energy ("AEA") and are therefore unconstitutional and invalid under the Supremacy Clause. Plaintiff additionally alleges that Nevada's statutory and regulatory provisions are in conflict with the Low-Level Radioactive Waste Policy Act ("LLWPA") and are therefore unconstitutional and invalid under the Supremacy Clause. Lastly, Plaintiff alleges that Nevada's statutory and regulatory provisions affect and unreasonably interfere with and unduly burden the free flow of articles (low-level radioactive waste) in the stream of interstate commerce, and as such are unconstitutional and invalid under the Supremacy Clause and the Commerce Clause.

(1) *Supremacy Clause*

Plaintiff's Supremacy Clause argument seems to waffle between challenging Nevada's entire regulatory scheme with respect to requiring a license for users of the Beatty respository to challenging only the "additional authorization to transport" aspect of the regulatory scheme. Although it is the Defendant's belief that Plaintiff's intention is to only challenge any "additional authorizations to transport" requirements, the response herein will address the entire regulatory scheme.

The gist of Plaintiff's Supremacy Clause argument is that Defendant's action, and the underlying regulatory scheme, is preempted by a pervasive and comprehensive Federal regulatory scheme as set forth in and resulting from the Atomic Energy Act of 1954, as amended, the Low-Level Radioactive Waste Policy Act of 1980 and the Hazardous Materials Transportation Act of 1975.

When a state action is challenegd under the Supremacy Clause, the court's inquiry is directed to whether Congress intended to prohibit states from regulating in such a manner, starting with the assumption that state police powers were not to be superseded unless that was the clear and manifest purpose of Congress. *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission,* 659 F.2d 903 (9th Cir., 1981), *cert. denied,* 102 S.Ct. 2959 (1982). Justice Brennan put it another way in *Florida Lime and Avacado Growers, Inc. v. Paul,* 373 U.S. 132, 142 (1963):

> "[T]hat federal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons — either

that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

This ruling established a presumption which favored state regulatory power unless either of the persuasive reasons noted by Justice Brennan were deemed present.

Applying Justice Brennan's two part test, Plaintiff's claims must fail.

(a) *The Atomic Energy Act As Amended, Does Not Prohibit The Challeneged Regulatory Scheme*

It is abundantly clear that the AEA only addresses three types of radioactive material. Chapter 1 of the AEA at 42 U.S.C. § 2012 states as a finding in paragraphs 2(c)(d) and (e) that Congress intends by such act to regulate source material, byproduct material and special nuclear material. Plaintiff appears to concede this point by its argument at page 46 of its Brief that the NRC has authority to regulate these three types of materials. Plaintiff also concedes in its Brief that radium is not one of the three designated types of radioactive material referred to in the AEA. The AEA's definitions at 42 U.S.C. § 2014 confirms this interpretation. Plaintiff also references the Section 274 Agreement which delegates to States the authority to regulate these specified types of radioactive material. Plaintiff then mounts a quantum leap of logic by concluding that since the Section 274 agreement does not include authority for the state to regulate radium, Nevada therefore has no such authority or, alternatively, such authority is pre-empted by the AEA.

Defendants submit that there is no clear and manifest intent by Congress expressed in the AEA to regulate the field with respect to naturally occurring radioactive material such as radium. Absent an explicit prohibition, Nevada's police powers to regulate such radioactive waste cannot be deemed superseded. Therefore, it likewise cannot be argued that such regulatory scheme contravenes the Supremacy Clause.

(b) *The Low-Level Radioactive Waste Policy Act Does Not Preempt The Challenged Regulatory Scheme*

The LLWPA, 42 U.S.C. § 2021 b-d, is enabling legislation providing for and encouraging the use of compacts between and among states to accomplish regional storage capacity for low-level radioactive waste. The substantive provisions of the LLWPA are: § 2021d(a)(1)(A), setting forth the policy that each state is responsible for providing for the disposal of low-level radioactive waste generated within its borders; § 2021d(a)(2)(A), permitting compacts between states to accomplish said responsibility; and § 2021d(a)(2)(B), providing that a compact may, after January 1, 1986, restrict the use of a regional facility under a compact to the waste generated within the compact region.

Plaintiff argues that Defendants' regulatory scheme is preempted by the LLWPA because it prevents *any* shipment of New Jersey's soil into Nevada under any circumstances. Plaintiff argues that Nevada can only prevent such shipments in the manner provided by the LLWPA, and, in any case, not prior to January 1, 1986 and until congressional ratification of the compact.

The factual premise upon which Plaintiff concludes the LLWPA preempts Nevada's regulatory scheme is erroneous thus an erroneous conclusion necessarily follows.

Nevada's regulatory scheme does not on its face prevent shipments of low-level radioactive waste under any circumstances. Rather, Nevada's regulatory scheme requires a prospective user of the repository to obtain a license to bury low-level radioactive waste at Beatty. Such prospective licensee must demonstrate compliance with Federal and State packaging and shipping regulations by subjecting itself to an inspection by a third party inspector who examines the quality assurance methods to be employed. Upon payment of a burial fee and sufficient demonstration of ability to comply with Federal and State packaging and shipping regulations, a license is issued.

As noted previously, Nevada does not believe that it is this regulatory process that afronts New Jersey. Rather, New Jersey contends that it should not be required to await an "additional authorization to transport" not referenced in the state's regulatory scheme.

New Jersey's concern that an "additional authorization to transport" is required as a result of an ad hoc requirement by Nevada is unfounded. Mr. John Vaden, Nevada's supervisor of the radiological health program, was contacted by New Jersey requesting a commitment by Nevada that it would allow the subject waste to be buried at the Beatty repository. Mr. Vaden was told that such an assurance was necessary, prior to the ordinary course of pre-licensure inspection by Nevada's third-party inspector, to permit the conclusion of the contracting process between New Jersey and those parties handing the packaging and

shipping. While Nevada concedes that the license issued by Mr. Vaden does not expressly contain any conditional language, Nevada respectfully submits that such license was orally conditioned upon a subsequent inspection by the third party inspector with results acceptable to Nevada.[5] It was the absence of this third party inspector report that required Nevada to place in writing that an additional authorization to transport was required.[6] NAC 459.875 specifically states: "No license may be issued until an audit and inspection has been completed." Nevada has since received this inspection report and found it to be acceptable with respect to the quality assurance program to be utilized by New Jersey.

Nevada's failure to provide the "additional authorization to transport" after acceptance of the inspection report is based upon the concerns expressed by Union Pacific Railroad, the carrier New Jersey has contracted with to ship the radioactive waste to Nevada. As noted in Mr. Jerry Griepentrog's affidavit attached as Exhibit D, Union Pacific Railroad recently became concerned that New Jersey had misrepresented the nature of the material to be shipped by Union Pacific relative its potential health hazard and therefore stated it wished to investigate the matter more fully before shipping the waste. Union Pacific Railroad contracted with Battelle-Columbus Laboratories to review the safety of the proposed movement of

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5. Mr. Vaden's affidavit to support this factual contention will be forthcoming as he was out of town on business and such affidavit was unavailable in the time frame permitted for the filing of this memorandum.

6. See Plaintiff's Exhibit I.

the waste to Nevada. Union Pacific Railroad provided a copy of the Battelle report to Mr. Griepentrog which he received at 4:10 p.m. on August 30, 1985. The cover letter indicates that Union Pacific's concerns no longer exist. (See Exhibit 0 of Plaintiff's Exhibits)

As Mr. Griepentrog notes in his affidavit, the additional authorization to transport has been held up pending the receipt and analysis of the Battelle report.

In conclusion, Nevada has not prevented any shipment of New Jersey's waste into Nevada "under any circumstances". A reasonable explanation exists for the delay in providing the additional authorization that became necessary only as a result of New Jersey's insistence that it required a license to be issued even prior to the third party inspection.

Accordingly, Plaintiff cannot contend that the LLWPA preempts Nevada's regulatory scheme. Such scheme does not prevent waste from being shipped to the Beatty repository in contravention of the LLWPA. Therefore, Nevada's regulatory scheme does not contravene the Supremacy Clause.

(c) *The Challenged Regulatory Scheme Is Not Preempted By The Hazardous Materials Transportation Act of 1975.*

In 1975, Congress passed the HMTA "to protect the public against the risks to life and property which are inherent in the transportation of hazardous materials." 49 U.S.C. §1801 (1976). The Federal regulatory scheme stemming from said Act, in essence, sets forth criteria to be met:

> "... by any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, fabricates, makes, maintains, reconditions, repairs or tests a package or container which is represented, marked, certified, or sold by such person for use in the transportation in commerce of certain hazardous materials ...."

42 U.S.C. § 1804(a). The HMTA preempts state or local government regulation of transport to the extent it is *inconsistent* with the Act. 49 U.S.C. § 1811(a). Thus, the purpose of the HMTA is to set forth rules which, *if complied with,* will provide for the transport of inherently hazardous materials compatible with the public health and safety.

Defendants respectfully submit that Nevada's regulatory scheme is not preempted by the HMTA because (1) they are not in conflict with each other; and (2) the state regulatory scheme does not obstruct the accomplishment of the objectives of Congress. As noted in *Pacific Gas & Electric v. Energy Resources Comm'n,* 461 U.S. 190, 203 (1983), "state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, (citations omitted) or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

A review of Nevada's regulatory scheme evidences that it is not inconsistent with the federal regulatory scheme. For example, NAC 459.910 sets forth the requirements of a prospective licensee who wishes to dispose of low-level radioactive waste at the Beaty repository. Sub-

section 2 states that a licensee shall package the radioactive waste in accordance with:

> "(a) The regulations of the Secretary of Transportation concerning the transportation of hazardous materials, in 49 C.F.R. Parts 171 to 177, inclusive, revised as of December 1, 1980, as amended on March 10, 1983, March 31, 1983, and July 7, 1983. The board hereby incorporates those regulations by reference. Those regulations are contained in one volume of the Code of Federal Regulations and may be obtained from the Government Printing Office, Washington, D.C. 20402, at a price of $8.
>
> (b) The regulations of the Nuclear Regulatory Commission concerning the packaging and transport of radioactive material in 10 C.F.R. Part 71 revised as of September 6, 1983. The state board of health hereby incorporates those regulations by reference. Those regulations are contained in a volume of the Code of Federal Regulations and may be obtained from the Government Printing Office, Washington, D.C. 20402, at a price of $7.50."

No contention can be made that this state board of health regulation, which applies to prospective users of the repository, is in conflict with the Federal regulatory scheme.

NAC 459.900(2) provides that:

> "Radioactive waste being shipped to the state-owned disposal area must remain packaged in compliance with applicable federal regulations and NAC 459.850 to 459.950, inclusive, untl the waste is received at the disposal area for burial. The radioactive waste

must be in such a physical condition and be so packaged that the operator of the disposal area is able to dispose of the waste without violating any condition of his license to operate the area."

NAC 459.870(6) requires an applicant for a licensee to "agree to comply with all federal and state regulations relating to the transportation and packaging of radioactive waste."

It becomes readily apparent that the Nevada regulatory scheme does not conflict with the Federal regulatory scheme relative packaging and transportation of low-level radioactive waste. In fact, Plaintiff seems to concede this point as well in its brief at page 40 where it is stated that Nevada's requirements are aimed at insuring compliance with *federal* packaging and labelling requirements. Plaintiff also concedes at page 41 that it is legitimate for Nevada to require periodic inspections of licensees to determine compliance with federal requirements. Plaintiff however argues that Nevada cannot require a license as a pre-condition to ship across its highways.

Plaintiff's assertion is erroneous based upon the mischaracterization of the license. The license required by Nevada is not a license to ship across its highways. Thus, any citation of authority for the proposition that a license cannot be required of a state for shipments of waste is inapposite. The license issued by Nevada is a written authorization to dispose of low-level radioactive waste at the Beatty repository. Likewise, the indemnification provision is a condition to use the repository for burial, not a condition to the use of Nevada's highways.

Lastly, Plaintiff once again focuses on the "additional authorization to transport" which has been explained, supra. The requirement that a prospective licensee must obtain a permit to dispose of low-level radioactive waste is not addressed by the HMTA. The HMTA does not expressly or impliedly suggest that it is Congress' intent to regulate the *disposal* of low-level radioactive waste. Thus, Plaintiff cannot argue that the requirement of a license to use the Beatty repository is preempted by the HMTA. The requirements of packaging in compliance with Federal law certainly does not conflict with the HMTA. There has been no showing by Plaintiff that a conflict exists to the extent that compliance with both federal and state law is a physical impossibility. Nor has Plaintiff demonstated how Nevada's regulatory scheme for users of the Beatty repository stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress in enacting the HMTA.

Accordingly, Plaintiff's contention that the Nevada regulatory scheme is preempted by the HMTA is without merit. Therefore, Plaintiff's Supremacy Clause argument likewise fails.

(d) *The Challenged Regulatory Scheme Does Not Unduly Burden Or Discriminate Against Interstate Commerce*

The entire basis of Plaintiff's contention that Nevada's regulatory scheme is an undue burden on interstate commerce is premised on the conclusion that these Defendants will not allow New Jersey to ship its radioactive waste to Beatty under any circumstances, thus, Nevada has erected a barrier to the free flow of commerce in contravention of the Commerce Clause.

Defendants do not quarrel with the basic principles of law expoused by Plaintiff with respect to what laws may run afoul of the Commerce Clause. However, as noted above, these Defendants have not absolutely precluded the shipment of New Jersey's waste. Nevada simply has not had sufficient time to review the Battelle report. If the Batelle report concludes that adequate measures to protect the public health have been taken by all concerned with respect to the transport and disposal of the waste in question, counsel for Defendants have no reason to believe that Defendants will not act in accordance with applicable law relative the issuance of a license. Thus, there are no *ad hoc* additional requirements that must be met by New Jersey not founded in existing statute or regulation.

The Commerce Clause, as interpreted by the United States Supreme Court, prevents a state from erecting barriers to the free flow of interstate commerce. *Raymond Motor Transortation, Inc. v. Rice,* 134 U.S. 429, 98 S.Ct. 787, 54 L.Ed. 2d 664 (1978). The *Washington State* court, citing *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 884, 887 (1970), articulated a threeprong test for determining whether the Commerce Clause has been violated. The criteria to be applied are whether the state action (1) legislates evenhandedly, (2) accomplishes a legitimate local public purpose, and (3) has only an incidental effect on interstate commerce.

Plaintiff cites a number of decisions wherein the Court found that a state had impermissibly erected a barrier to the free flow of interstate commerce. These cases, however, are inapposite to the facts at bar.

In *Washington State Bldg. & Const. Trades v. Spellman,* 684 F.2d 627 (9th Cir. 1982), the United States Court

of Appeals for the Ninth Circuit declared unconstitutional an initiative which closed Washington's borders to all low-level radioactive waste under then Washingtons. Nevada's regulatory scheme has been applied evenhandedly to all users unlike Washington's initiative. The Ninth Circuit Court found that the initiative failed the initial *Pike* criteria—that of evenhandedness—because it discriminated between radioactive waste generated within the state and waste produced outside the state. This facial discrimination, in turn, caused the court to scrutinize the purported purpose underlying the initiative and the effects of the initiative on interstate commerce. The court found that the public safety considerations resulting in the initiative were suspect because the initiative failed to address how local waste, transported and stored within Washington, had superior safety and environmental virtues over waste produced elsewhere. The court also concluded that the initiative, by effectively barricading the states borders, represented a direct, as opposed to indirect or incidental, attempt to regulate commerce.

The cases of *Illinois v. General Electric Co.,* 683 F.2d 206 (7th Cir. 1982) and City of *Philadelphia v. New Jersey,* 437 U.S. 617, 98 S.Ct. 2531 (1978) likewise condemned laws that closed the states borders to waste other than that generated in the state. No such unevenhandedness is present with respect to Nevada's regulatory scheme.

Nevada's regulatory scheme is in furtherance of a legitimate public purpose, that of protecting the health and safety of its citizens. Recall the testimony cited at the beginning of this brief concerning the health risks associated with transportation of low-level radioactive waste not in compliance with Federal and State requirements. While a

statement of purpose to promote public health or safety does not insulate a state action from Commerce Clause attack, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 101 S.Ct. 1309, 67 L.Ed. 2d 580 (1981), any challenge to bona fide safety regulations must overcome a strong presumption of validity. *Bibb v. Navajo Freight Lines,* 359, U.S. 520, 79 S.Ct. 962, 3 L.Ed. 2d k1003 (1959).

Lastly, Nevada's regulatory scheme does not erect barriers to interstate commerce as what took place in the cases noted by Plaintiff. Rather, such scheme impacts commerce indirectly and therefore incidentally.

In conclusion, Nevada's regulatory scheme does not unduly burden the free flow of interstate commerce by erecting discriminatory barriers at its border. Therefore, this scheme is not violative of the Commerce Clause.

III.

CONCLUSION

Nevada's regulatory scheme for users of the Beatty repository is not inconsistent with the LLWPA, the HMTA, or the AEA, nor does it run afoul of the purposes and objectives of these respective Federal Acts. Therefore, such scheme cannot be deemed preempted by federal law, nor can it be found in contravention of the Supremacy Clause.

Nevada's regulatory scheme likewise cannot be found violative of the Commerce Clause because it does not erect a barrier to the free flow of interstate commerce. Rather, such scheme promotes a legitimate public purpose, that of protecting the public health and safety of Nevada's citizenry. Any perceived impact on commerce should be deemed indirect at best and therefore incidental.

Lastly, Defendants believe that the major thrust of Plaintiff's Complaint challenges the legal basis for an

"additional authorization to transport" rather than the constitutionality of the existing regulatory scheme.

As has been noted, such "additional authorization to transport" was legally justified by the regulatory scheme which required a third party inspection prior to issuance of a license. In the case at bar, the license was issued prior to such inspection thus creating at best a conditional license.

While Nevada has received an acceptable third party inspection report, Nevada has not yet had sufficient time to analyze the Battelle report with respect to any findings of health risk associated with the transport of this radioactive waste from New Jersey. Thus, it cannot be concluded that Nevada has acted contrary to its own regulations.

In conclusion, Defendants assert that in order for an injunction to issue against Defendants, this court must find the law decidedly, if not inevitably, in favor of Plaintiff. Defendants respectfully submit that Plaintiff has failed to demonstrate that it is likely to prevail on the merits of its Complaint. Accordingly, Defendants hereby request that Plaintiff's Application For Preliminary Injunction be denied.

DATED this 6th day of September, 1985.

BRIAN McKAY
Attorney General

By /s/ Bill Isaeff
Chief Deputy Attorney General

By /s/ Bryan M. Nelson
Deputy Attorney General
Attorneys for Defendants

EXHIBIT 22

SECOND AMENDMENT

BILL NO. 85-34

Ordinance No. 3190

AN ORDINANCE RELATING TO THE TRANSPORTATION OF HAZARDOUS MATERIALS; AMENDING TITLE 9 OF THE MUNICIPAL CODE OF THE CITY OF LAS VEGAS, NEVADA, 1983 EDITION, BY ADDING THERETO A NEW CHAPTER, DESIGNATED AS CHAPTER 36; PRESCRIBING REGULATIONS TO GOVERN CONDITIONS RELATING TO THE TRANSPORTATION OF HAZARDOUS MATERIALS WHICH ARE HAZARDOUS TO LIFE AND SAFETY; RESTRICTING THE AREAS FOR TRANSPORTING HAZARDOUS MATERIALS WITHIN THE CITY; AUTHORIZING THE DEPARTMENT OF FIRE SERVICES TO OVERSEE ALL ACTIVITIES RELATING TO THE TRANSPORTATION OF HAZARDOUS MATERIALS AND DEFINING THE POWERS AND DUTIES THEREOF; PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO; PROVIDING PENALTIES FOR THE VIOLATION THEREOF; AND REPEALING ALL ORDINANCES AND PARTS OF ORDINANCES IN CONFLICT HEREWITH.

Sponsored by: Councilman Ron Lurie

Summary: Regulates and restricts the transportation of hazardous materials within the City of Las Vegas

THE CITY COUNCIL OF THE CITY OF LAS VEGAS DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1: Title 9 of the Municipal Code of the City of Las Vegas, Nevada, 1983 Edition, is hereby amended by adding thereto a new chapter, designated as Chapter 36, consisting of Sections 10 to 160, inclusive, reading as follows:

9.36.010: The purpose and intent of this Chapter is to protect the public health, safety and welfare from the potential hazards of fire, explosion and exposure to toxic substances that accompany hazardous materials incidents by regulating the transportation and storage incidental to transportation, of hazardous materials into, through, within and out of the City.

9.36.020: This Chapter shall apply to all hazardous materials, as defined herein, which are transported into, through, within and out of the City and shall be in addition to all other sections of this Code regarding hazardous substances or materials or the rules or regulations of any City department, board or commission pertaining thereto. For the purpose of this Chapter a point of origin or destination, including loading docks or terminals where hazardous cargos are handled, within the area bounded by the corporate limits of the City shall be considered to be a point of origin or destination within the City.

9.36.030: Those certain documents, three copies of which are on file in the office of the City Clerk and marked and designated as follows are hereby adopted by reference and made a part of this Chapter as if they were fully set forth herein:

(A) Title 49 of the Code of Federal Regulations, Parts 171 to 179, inclusive, of the Hazardous Materials Regulations, as from time to time amended, designated as Part 1 of this Chapter;

(B) Title 10 of the Code of Federal Regulations, Part 71, of the Nuclear Regulatory

Commission, as from time to time amended, designated as Part 2 of this Chapter; and

(C) Title 49 of the Code of Federal Regulations, Parts 390 to 397, inclusive, of the Federal Motor Carrier Safety Regulations, as from time to time amended, designated as Part 3 of this Chapter.

When any provision of this Chapter is found to be inconsistent with the regulations adopted in subsections (A) to (C), inclusive, of this Section, the provision which establishes the greater level of protection for the health, safety and welfare of the public shall prevail.

9.36.040: Transportation in commerce within the City of the hazardous materials identified in subsections (A) to (C), inclusive, of this Section, in the quantities set forth in or opposite their respective descriptions, shall be subject to the regulations set forth in Sections 9.36.050 to 9.36.160, inclusive, in addition to those regulations adopted in Section 9.36.030.

(A)

Material	*Quantity*
(Numbers in parentheses refer to sections of Title 49 of the Code and Federal Regulations)	
Class A Explosives (173.53)	any quantity
Class B Explosives (173.88)	any quantity
Poisonous Gases Poison A (173.326)	any quantity

Flammable solids (173.150) which require the DANGEROUS WHEN WET label (172.423) as specified in (172.101)	2500 pounds or more
Liquified Petroleum Gas (172.101)	2500 pounds or more
Methane (Liquefied) (171.101)	2500 pounds or more
Liquefied hydrogen (173.316)	400 pounds or more

(B) *Flammable Liquids* transported in quantities of 1,000 gallons or more with flash points of 73 degrees or less as determined by tests listed in Title 49 of the Code of Federal Regulations, Section 173.115(d), with the exception of distilled spirits of 140 proof or less (173.115(a) (2)).

(C) *Radioactive materials*

(1) Plutonium isotopes in any quantity and form exceeding two grams or 20 curies, whichever is less;

(2) Uranium enriched in the isotope U-235 exceeding 25 atomic per cent of the total uranium content in quantities where the U-235 content exceeds one kilogram;

(3) Any of the actinides (i.e., elements with atomic number 89 or greater) the activity of which exceeds 20 curies;

(4) Spent reactor fuel elements or mixed fission products associated with such spent fuel elements the activity of which exceeds 20 curies; and

(5) Any quantity of radioactive material specified as a "Highway route controlled quantity" in Title 49 of the Code of Federal Regulations, Section 173.403(L).

(6) Any quantity of radioactive materials required to be placarded by Title 49 of the Code of Federal Regulations, Part 172, Subpart F—Placarding.

9:36.050: The Department of Fire Services is authorized and directed to do the following:

(A) To collect all available information with respect to the volumes, routes, locations of storage incident to transportation, risks and conditions of transport and storage of hazardous materials presenting the highest risk, by any mode of transportation, and to report annually to the City Council on the transportation of hazardous materials and the adequacy of the City's emergency response capabilities in cases of accidents.

(B) To collect information, as available, from the State on the routes and volumes of hazardous waste shipments through the City and to request that the State conduct surveys to determine the volumes, routes, compliance with Federal and State regulation accident rates and other information on truck cargos of hazardous materials.

9.36.060: (A) Except as in otherwise provided in subsection (B) of this section, a non-transferable permit for hazardous transport shall be required annually for each person who transports hazardous materials in the quantities listed in subsections (A) to (C), inclusive, of Section 9.36.040.

(B) Producers or transporters, or both, of small quantities of specified radioactive materials intended for therapeautic and biomedical research or educational purposes shall not be required to obtain a permit for hazardous transport.

(C) Permits for hazardous transport shall be granted for:

(1) Hectocurie and kilocurie cobalt—60 and cosium—137 teletherapy sources employed in therapeutic radiology and biomedical research or educational purposes and for medical devices designed for individual application, by way of illustration and not in limitation, cardiac pacemakers, containing plutonium—238, promethium —(47) or other radioactive material or wastes generated in these activities.

(2) Sealed industrial radiography sources up to 100 curies.

(D) Any person required by this Section to obtain a permit for hazardous transport shall apply to the Department of Fire Services at least 60 days prior to the intended date of movement of hazardous materials into, through, within, and out of the City. In addition to such information as the Department requires, the application for a permit for hazardous transport shall include:

(1) A description of the hazardous materials to be transported, including the volumes, quantities and forms;

(2) A written statement from the shipper of hazardous materials certifying that the material described in the ap-

plication is properly classified, described, packaged and labeled and is in proper condition for transportation according to the applicable Federal and State regulations;

(3) Origin, route and destination of the shipment and, if a series of shipments is planned, the number of proposed shipments and the period of time over which such shipments are planned;

(4) A copy of the route plan when the preparation of one is required by Title 49 of the Code of Federal Regulations, Section 397.9(b);

(5) The name, address and telephone number of the carrier, the description, identification and registration of the motor vehicle or railcars and 24-hour emergency response telephone numbers.

9.36.070: The Department of Fire Services shall deny, refuse to renew, suspend or revoke a permit for hazardous transport if:

(A) Adequate training, equipment and planning does not exist in the Department for an emergency response in the case of an accident with the specified materials.

(B) The containers to be used in the proposed shipments have been tested, in their current model, in order to determine the containers' ability to withstand the effects of puncture, impact and fire that could be encountered in severe accidents in the City and have been determined not to have such ability.

9.36.080: (A) Upon the final approval by the Department of Fire Services of an application for a permit for hazardous transport, the applicant shall pay a reasonable fee according to a schedule to be adopted by the City Council.

(B) The fee schedule shall reflect the costs of emergency response preparation and the costs of issuing the permits and may also reflect the relative hazard and potential risk to the public of the hazardous cargos to be transported within the City, based upon their volume, toxicity, combustion potential and other risk factors which the Department of Fire Services may consider appropriate.

(C) The fees collected under this Section shall be used to reimburse the costs of administration of the permit program, emergency response preparation and enforcement of the rules and regulations promulgated pursuant to this Chapter.

9.36.090: Applications for a permit for hazardous transport shall be made to the Department of Fire Services and shall be acted upon within 30 days after the submission to the Department. The Department shall approve, deny or take such other action with respect to such application as the Department considers appropriate. A single permit shall be required for each carrier for each class of hazardous materials identified in Section 9.36.040.

9.36.100: Any person aggrieved by a decision of the Department of Fire Services in denying, refusing to renew, suspending or revoking a permit may appeal that decision within thirty days to the City Council by filing written notice of appeal with the Department. The City Council shall

hear the appellant at its first regular meeting following the expiration of ten days after the City Clerk receives the notice of appeal.

9.36.110: Incidents involving hazardous materials occurring within the City are required to be reported immediately to the Department of Fire Services and the Department shall file a standing request with the Materials Transportation Bureau of the United States Department of Transportation for routine mailing to the Department of a copy of the written report required by Title 49 of the Code of Federal Regulations, Section 171.16.

9.36.120: The Department of Fire Services may temporarily suspend the operation of some or any vehicle employed in carrying hazardous materials, as defined in Section 9.36.040, without notice whenever road, weather, traffic or other hazardous circumstances warrant that action.

9.36.130: Restrictions

(A) The Department of Fire Services is hereby authorized to designate routes and to implement other restrictions for the transportation of hazardous materials into, through, within, and out of, the City.

(B) For the purpose of applying Title 49 of the Code of Federal Regulations, Section 379.9(a), the following restrictions to the transportation of hazardous materials by truck in the City are adopted:

(1) The use of City streets for the transportation of the hazardous materials specified in 9.36.040, in a situation in which there is neither a point of origin nor a point of destination within the City, is prohibited.

(2) The Department of Fire Services may require advance notification, a police escort or an inspection, or a combination thereof, of any cargo deemed to present a special risk, if an emergency response, in its judgment, may be enhanced by any such measure; provided, however, that, in all cases of radioactive shipments concerning which the U.S. Nuclear Regulatory Commission is currently required to pre-notify the Governor, the Department of Fire Services shall request that advance notification also be immediately forwarded to the City.

9.36.140: The following regulations apply to the motor vehicle transportation within the City of the materials specified in Section 9.36.040:

(A) Traffic violations of transporters of hazardous materials shall be treated as violations of these regulations and shall be subject, in addition to criminal penalties, the penalty provided in Section 9.36.160.

(B) Except when overtaking or passing in opposite directions of travel, all vehicles transporting hazardous materials shall maintain a minimum distance of at least 300 feet from other vehicles carrying hazardous materials. This requirement shall apply whether or not such vehicles are moving or parked except when at a destination or point of origin.

(C) Except as to any route which has been designated by the Department of Fire Services as being more appropriate with respect to a particular shipment, pursuant to subsection (A) of Section

9.36.130, a transporter of hazardous materials by truck shall use only State-designated routes, listed in subsection (D) of this Section, to reach its destination or to reach a point as close as possible to the destination.

(D) For the purposes of this Chapter, the following are considered State-designated routes:

(1) Interstate 15

(2) U.S. Highway 95

(3) U.S. Highway 93

9.36.150: (A) With respect to rail shipments of hazardous materials, the Department of Fire Services, in order to ascertain if a local hazard exists, shall collect information from all railroads operating in or near the City or whose lines may present useful alternative routes to lines through the City. Such information shall include:

(1) The annual volumes of specific cargos.

(2) Containers used.

(3) Routes and switchyard data on hazardous cargos handled.

(4) Accident rates and track maintenance data.

(5) Whether each railroad has utilized an acceptable methodology for determining routes and yards of lowest risk for such cargos.

(6) The adequacy of each railroad's emergency response preparation in the event of a rail accident on its main tracks or sidings or in its yards, including but not limited to the established response times, staffing and emergency phone numbers of the nearest emergency response units, listed by mileposts of rail track, and the availability of fire hydrants and other emergency resources.

(B) The Department of Fire Services, in order to remedy a local hazard related to rail shipments of hazardous cargos, may petition the Public Services Commission for remedial legislation or rulemaking.

9.36.160: In addition to criminal penalties, in the event of a hazardous materials incident, as described in Title 49 of the Code of Federal Regulations, Sections 171.15 and 171.16, requiring the response of the Department of Fire Services and others to control said incident, the transporter shall be liable to the City for the payment of all costs and expenses which the Department incurs in and about the use of its employees, apparatus and materials in the control and neutralization of said incident.

SECTION 2: Whenever in this ordinance any act is prohibited or is made or declared to be unlawful or an offense or a misdemeanor, or whenever in this ordinance the doing of any act is required or the failure to do any act is made or declared to be unlawful or an offense or a misdemeanor, the doing of any such prohibited act or the fail-

ure to do any such required act shall constitute a misdemeanor and upon conviction thereof, shall be punished by a fine of not more than $1,000.00 or by imprisonment for a term of not more than six months, or by any combination of such fine and imprisonment. Any day of any violation of this ordinance shall constitute a separate offense.

SECTION 3: If any section, subsection, subdivision, paragraph, sentence, clause or phrase in this ordinance or any part thereof, is for any reason held to be unconstiutional or invalid or ineffective by any court of competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this ordinance or any part thereof. The City Council of the City of Las Vegas, Nevada, hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases be declared uncontitutional, invalid or ineffective.

SECTION 4: All ordinances or parts of ordinances, sections, subsections, phrases, sentences, clauses or paragraphs contained in the Municipal Code of the City of Las Vegas, Nevada, 1983 Edition, in conflict herewith are hereby repealed.

PASSED, ADOPTED and APPROVED this 6th day of September, 1985.

APPROVED:

/s/ Ron Lurie
Mayor Pro Tem

ATTEST:

/s/ Carol Ann Hawley
City Clerk

The above and foregoing ordinance was first proposed and read by title to the City Council on the 7th day of August, 1985, and referred to the following committee composed of Councilmen Lurie and Bunker for recommendation; thereafter the said committee reported favorably on said ordinance on the 6th day of September, 1985, which was a recessed meeting of said City Council; that at said recessed meeting, the proposed ordinance was read by title to the City Council as amended and adopted by the following vote:

VOTING "AYE" Councilmen: Levy, Lurie and Nolen
VOTING "NAY" Councilmen: NONE
ABSENT: EXCUSED Councilman Bunker and Mayor Briare

APPROVED:

By /s/ Ron Lurie
Mayor Pro Tem

ATTEST:
/s/ Carol Ann Hawley, City Clerk

EXHIBIT 23

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

NO. ——, Original

STATE OF NEW JERSEY
Plaintiff,

v.

THE STATE OF NEVADA, et. al.,
Defendants.

STATE OF NEW JERSEY)
) ss.
COUNTY OF MERCER)

AFFIDAVIT OF RICHARD F. ENGEL

RICHARD F. ENGEL, being duly sworn according to law, upon his oath deposes and says:

1. I am a Deputy Attorney General in the New Jersey Division of Law, Department of Law and Public Safety. As such I have been involved in representing the State of New Jersey in *City of Las Vegas v. Union Pacific Railroad,* United States District Court for the District of Nevada, CV-LV-85-683, and in *State of New Jersey v. State of Nevada,* United States District Court for the District of Nevada, CV-R-85-485.

2. A number of exhibits attached to the proposed Complaint in this matter to be filed by the State of New Jersey are Court documents in those two cases. Also included as exhibits are the Nevada Public Service Commission Emergency General Order No. 52, and Las Vegas, Nevada Ordinance No. 3190. The purpose of this Affidavit is to verify that, to the best of my knowledge, those exhibits are true and correct copies of the original documents.

3. The documents are:

(a) The Order denying a Preliminary Injunction entered by Judge Lloyd George on August 9, 1985 in *City of Las Vegas v. Union Pacific Railroad;*

(b) The Complaint in the *City of Las Vegas v. Union Pacific Railroad;*

(c) The Motion for a Temporary Restraining Order and Preliminary Injunction the *City of Las Vegas v. Union Pacific Railroad;*

(d) The Petition for removal to the U.S. District Court for the District of Nevada in *City of Las Vegas v. Union Pacific Railroad;*

(e) The Motion by Nevada to Dismiss the Complaint in *State of New Jersey v. State of Nevada;*

(f) The Memorandum of Points and Authorities of the State of Nevada, *et al.* in Opposition to the Motion for Preliminary Injunction in *State of New Jersey v. State of Nevada;*

(g) General Order No. 52 of the Nevada Public Service Commission; and

(h) Ordinance No. 3190 of the City of Las Vegas, Nevada.

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Richard F. Engel

Sworn to and subscribed before
me this 18 day of September, 1985.

/s/ Eugene J. Sullivan