

United States v. Manning

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History of U.S. v. Manning

Spring, Summer, Fall 2004: DOE attorneys attempt to interpret Initiative 297, theorize about its impact on Hanford and DOE operations, undertake legal research, and begin working with DOJ.

November 2004: Voters of Washington approve I-297, the Cleanup Priority Act, by 70% -- allegedly the largest margin by which an initiative has ever been approved in this state.

December 2004: U.S. files a temporary restraining order in Federal District Court; it is granted; the court then enjoins the initiative -- except re. its prohibition on the importation of waste to Hanford.

Early 2005: U.S. files a motion for summary judgment; the State seeks certification of five issues to the Washington State Supreme Court; the Federal District Court agrees to certification, but then enjoins I-297 in its entirety.

July 2005: The State Supreme Court issues its decision in support of the U.S. position on most issues, and on all key issues.

2005-06: U.S. files another motion for summary judgment; Federal district court grants U.S. summary judgment on all grounds sought, including preemption, sovereign immunity, and the Commerce Clause and grants a plaintiff intervenor, TRIDEC, partial summary judgment on its Contracts Clause claims; the State appeals.

May 2008: Ninth Circuit affirms on preemption grounds and upholds the district court's decision (not vacating the other constitutional grounds upon which the lower court ruled).

August 2008: The State opts not to file a petition for *certiorari*.

Summary of the Cleanup Priority Act

The Ninth Circuit Court of Appeals opinion provides a nice synopsis of the key provisions of the Cleanup Priority Act, aka Initiative 297 or I-297, which was intended to be codified at RCW 70.105E. Judge McKeown wrote the following:

“The ballot description of I-297 declared that ‘[t]his measure would add new provisions concerning 'mixed' radioactive and nonradioactive hazardous waste, requiring cleanup of contamination before additional waste is added, prioritizing cleanup, [and] providing for public participation and enforcement through citizen lawsuits.’ Thus, the CPA ‘became part of a complex state and federal system for regulating materials that are variously described as hazardous, dangerous, radioactive, or having some combination of these attributes.’ *Hoffman*, 116 P.3d at 1001. Counsel explained at oral argument that the CPA, passed by Washington voters in November 2004, was meant to eliminate Ecology's discretion in issuing permits under the RCRA and the HWMA and in taking action regarding investigation and cleanup.

“Toward those ends, § 4 of I-297 provides that a final facility permit cannot issue until all units of a facility are in compliance with federal and state cleanup laws. Significantly, a facility cannot import mixed waste until it obtains a final facility permit. Section 5 requires that Ecology take remedial and corrective action against releases of radionuclides into the environment. Section 6 contains mandates to Ecology regarding the investigation and cleanup of hazardous substances that have been disposed of in unlined trenches, and the closure of mixed waste tank systems. Section 7 requires Ecology to obtain from mixed waste facility owners the projected costs of remedial and corrective actions. Section 8 grants exemptions from the CPA's requirements for certain naval waste, in accordance with the State's obligations under the Northwest Interstate Compact. Section 9 requires facilities where there has been a release of mixed waste to provide for and fund a broadly representative advisory board, and directs Ecology to make available public participation grants that will be funded by a mixed waste surcharge assessed against permit applicants and permit holders. Finally, under § 10, the CPA is enforceable through citizen suits.

“The United States sought and obtained a temporary restraining order in federal district court against the enforcement of the CPA the day before its effective date, December 2, 2004. Various sponsors of I-297 intervened as defendants ("Sponsors"). The United States argued that the CPA was invalid in its entirety because it violated the Supremacy Clause and the Commerce Clause of the United States Constitution, and the sovereign immunity of the United States. Fluor Hanford ("Fluor"), a private contractor operating at Hanford, intervened as a plaintiff. The Tri-City Industrial Development Council ("TRIDEC"), a not-for-profit corporation that represents local businesses and public entities in the area around Hanford, also intervened as a plaintiff and asserted that the CPA violated the Contract Clause.”

Washington State Supreme Court Decision

U.S. v. Hoffman, 154 Wn.2d 730, 116 P.3d 999 (Wash. 2005)

The five questions for which the State sought interpretation by the Supreme Court are below, with most answers taken verbatim from the Justice Owens' opinion.

1. What materials are encompassed within the definition of 'mixed waste' set forth in RCW 70.105E.030(9)?

a. Specifically, does the definition of 'mixed waste' encompass materials that consist solely of radioactive source, special nuclear, or byproduct materials and, if so, under what circumstances does the CPA apply to such materials?

The parties agree the answer is no. "For a material to qualify as 'mixed waste' under the CPA definition, it must have both a nonradioactive component and a radioactive component."

b. Specifically, does the definition of 'mixed waste' encompass materials that are mixtures of radioactive source, special nuclear, or byproduct materials and other hazardous substances that do not designate as 'dangerous waste' under state laws? If so, under what circumstances does the CPA apply to such materials?

"We are left with a choice between two alternatives. On the one hand, the United States suggests a plain language interpretation based on the statutory definitions of 'mixed waste' and 'hazardous substance.' ... There is no dispute that, if these definitions are operative, the CPA includes some materials that do not 'designate' as dangerous waste. ... On the other hand, Ecology asks us to artificially eliminate much of the substance of these definitions in a way that narrows the scope of 'hazardous substance' to materials that have been released or pose a threat of release. Such an artificial limitation would require us to ignore long-held rules of statutory interpretation. Accordingly, the answer to question 1(b) is, yes, to the extent that a 'hazardous substance,' as defined in RCW 70.105.010(14), might fail to designate as dangerous waste because the concentration of dangerous material is insufficient."

c. Specifically, does the definition of 'mixed waste' encompass materials that are not 'solid wastes' under the RCRA and, if so, under what circumstances does the CPA apply to such materials?

"Yes, to the extent that a 'hazardous substance,' as defined in RCW 70.105D.020(7)(b)-(d), fails to qualify as a 'solid waste' for lack of being 'discarded' or otherwise abandoned, recycled, or inherently wastelike under 42 U.S.C. sec. 6903(27) and 40 C.F.R. sec. 261.2."

d. In light of the court's answers to subparts (a)-(c) above, does the definition of 'mixed waste' expand the scope of materials regulated as mixed waste under the HWMA and the RCRA?

"Under the foregoing analysis of subparts (a)-(c), the answer to this subpart of question 1 is, yes. Under subpart (a), the CPA definition of mixed waste does not apply to purely radioactive Atomic Energy Act of 1954...materials. However, the CPA encompasses materials that do not 'designate' as dangerous waste through the cross- reference to RCW

70.105.010(14) and encompasses materials that are not 'solid waste' through the cross-reference to RCW 70.105D.020(7)(b)-(d). Thus, the CPA does expand the scope of materials currently subject to regulation as mixed waste beyond the HWMA and the RCRA.”

2. Does the operation of the CPA prevent the intrasite transfer of waste among various units at a site or facility?

There is no dispute that the answer to this question is, no.

3. How does the exemption in RCW 70.105E.080 affect the application of the CPA to United States naval facilities?

“The naval exemption in RCW 70.105E.080 is limited to those materials specifically listed, including 'sealed nuclear reactor vessels and compartments,' but does not extend to other materials that qualify as hazardous substances under the CPA's definition of 'mixed waste' as described in question 1.”

4. Does RCW 70.105E.060(1)(a)(ii), which requires development of an inventory of hazardous substances potentially disposed to unlined trenches based on 'actual characterization' of such substances, require the physical inspection of each and every material disposed?

“Whether 'actual characterization' requires, as an epistemological matter, physical inspection of every material or allows for the use of prior record keeping is simply not clear. In this case, Ecology is ultimately responsible for developing administrative rules for compliance with the CPA. ... We are tasked only with determining whether, as a matter of law, 'actual characterization' necessarily requires physical inspection of 'each and every material disposed.' Because a reasonable alternative construction is available, and that construction is proposed by the agency responsible for enforcing the CPA, the answer to this question is, no.”

5. If the federal court finds that certain provisions of the CPA are unconstitutional, are the remaining provisions of the statute severable?

“The parties agree that any present attempt to determine whether the constitutional portions of the CPA are severable if other portions are deemed unconstitutional would be both hypothetical and speculative, particularly given the myriad possible outcomes in the federal courts. ... This court has declined to answer certified questions where the record before us was insufficient and any attempt to answer would be improvident. We do the same in this case. However, there is a dispute over the purely legal question of whether the absence of a severability clause precludes severability in all circumstances. We believe the answer to the parties' query is apparent from our case law (and)... we refer the district court to our recent statement [citation omitted] that 'the presence of an applicable severability clause is evidence that the legislature would have enacted the constitutional portions of a statute without the unconstitutional portions, but a severability clause is not necessary in order to meet the severability test.”

Decision of the U.S. Federal District Court for the Eastern District of Washington

United States v. Manning, 434 F. Supp. 2d 998 (E.D. Wash. 2006)

The following pages are *direct quotes* from Judge McDonald's 62-page opinion. I've selected them for easy reference to a key principle of law and/or because they're helpful in understanding the Court's decision making.

Supremacy Clause

- The Supremacy Clause mandates that "the laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, Cl. 2.
- [S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 78 L. Ed. 2d 443 (1984).
- Plaintiffs contend the CPA is an attempt to regulate radioactive materials for safety purposes and therefore, falls within the field of regulation preempted by the Atomic Energy Act (AEA) of 1954, 42 U.S.C. §§ 2011-2297g-4. Furthermore, they contend the CPA stands as an obstacle to maintaining exclusive federal control over the management and disposal of radioactive materials.
- The AEA regulates nuclear material, regardless of whether it is considered waste. *Legal Environmental Assistance Foundation, Inc. v. Hodel*, 586 F.Supp. 1163, 1167 (1984).
- The concern of Section 5(1) with "uncontrolled" environmental releases of AEA materials constitutes a "nuclear safety concern" and it has a direct and substantial effect on the decisions of those who operate nuclear facilities, such as the United States Department of Energy (DOE) at Hanford, concerning radiological safety levels.
- Considering RCRA and the preemption case law discussed above, this court is not persuaded that the AEA does not also preempt state regulation of "uncontrolled" AEA radionuclides released to the environment.
- "While the RCRA governs the disposal of hazardous waste, and the AEA governs the disposal of radioactive waste, no statute specifically delegates authority to regulate a mixture of the two types of waste." *United States v. Kentucky*, 252 F.3d 816, 822 (6th Cir. 2001).
- So long as the State of Washington limits itself to regulating the hazardous waste component of mixed waste, as those terms are defined in RCRA, it acts within its authority. The State cannot, however, regulate the AEA radioactive component of mixed waste.
- Therefore, the CPA's use of "hazardous substances" in its definition of "mixed waste" allows (1) use of non-radioactive hazardous substances, though not solid waste and existing in only trace amounts in the mixture, as a means of regulating the AEA radionuclide component of the mixture, and (2) regulation of pure AEA radionuclides that are not part of any mixture because those radionuclides qualify as "hazardous substances" in themselves.
- The State says it is appropriate to focus on mixed waste because the presence of AEA radionuclides in mixed waste has the effect of frustrating the State's exercise of hazardous waste authority under the RCRA and the HWMA. Be that as it may, the State cannot seek to

remedy that frustration by overstepping its RCRA and HWMA hazardous waste authority by means of the CPA so as to frustrate the federal government's power over the radioactive component as provided by the AEA.

- Even if there were a non-safety rationale for the CPA, the CPA is field preempted because it has a "direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." The CPA will: (1) require DOE and the Navy to meet cleanup levels established by the State for AEA radionuclides (Section 5(1)); (2) prevent Hanford from importing "mixed waste," including classified nuclear components generated by the Navy that qualify as "mixed waste" under the CPA, until Hanford attains State-established cleanup levels for AEA materials (Section 4(6)); (3) bar the import of "mixed waste" to Hanford for a significant period of time, thereby trumping DOE's decision under the AEA that Hanford is an appropriate site for the disposal of such "mixed waste," forcing DOE to find alternative pathways for such disposal, and disrupting DOE's nationwide cleanup program for AEA materials (Section 4(2)); (4) prohibit the Navy from sending certain classified nuclear components to Hanford for disposal, thus trumping the determination of the United States that Hanford is the appropriate site for the disposal of these AEA materials (Section 4(2))³²; (5) prevent the Pacific Northwest National Laboratory (PNNL) from importing AEA materials that are essential to important nuclear research activities (Section 4(2)); (6) require DOE to provide the Department of Ecology with "an inventory based on actual characterization of AEA materials "potentially disposed" in unlined trenches (Section 6(1)(a)(ii)); (7) prevent DOE from expanding any land disposal unit where AEA materials have been released (Section 6(2)(b)); and (8) bar DOE from using methods it has deemed appropriate for the disposal of AEA waste and the closure of tanks containing AEA waste (Section 6).
- On its face, and as confirmed by the state supreme court's interpretation of the CPA's definition of "mixed waste," it is clear the purpose of the CPA is to regulate AEA radionuclides, either non-mixed "pure" AEA radionuclides, or the AEA radionuclide component of "mixed waste," for radiological safety purposes. In turn, the CPA directly and substantially effects the decisions made by those who build or operate nuclear facilities concerning radiological safety levels. As such, the regulation of "mixed waste" sought by the CPA is field preempted by the AEA. Conflict preemption is not an issue because, as discussed above, the CPA does not simply represent another instance of the State exercising authority within the confines of the "hazardous waste" authority granted to it by the RCRA. The CPA goes beyond that authority, and it is precluded from doing so by virtue of the AEA.
- Because the CPA regulates AEA materials for radiological safety purposes and cannot do so, it is, by definition, invalid in every set of circumstances. It is facially invalid under the Supremacy Clause and there are no circumstances under which it can be applied constitutionally.

Sovereign Immunity

- Because the Supremacy Clause immunizes the activities of the Federal government from State interference, direct state regulation of federal facilities is allowed only to the extent that Congress has clearly authorized such regulation. *Goodyear*, 486 U.S. at 180, n. 1, citing *Mayo v. United States*, 319 U.S. 441, 445, 63 S.Ct. 1137, 87 L. Ed. 1504 (1943). Congress has not authorized the states to regulate AEA radionuclides for radiological safety purposes at federal facilities or anywhere else.
- The CPA is field preempted and facially invalid as a whole. Therefore, it is unnecessary to determine whether individual sections of the CPA suffer from constitutional deficiencies apart from preemption and sovereign immunity, and whether the Contract Clause is violated.

Nevertheless, the court will identify those other deficiencies and will address the Contract Clause in an effort to lessen the likelihood of piecemeal review by the Ninth Circuit Court of Appeals.

Commerce Clause

- In addition to granting Congress the power to regulate interstate commerce, the Commerce Clause has a "dormant" or "negative" aspect to it which restrains the ability of the states to discriminate against or impose substantial burdens on interstate commerce. *Oregon Waste Sys. v. Department of Env'tl. Quality*, 511 U.S. 93, 98, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994). Discrimination is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* at 99. "Waste" is an article of commerce and state law restrictions on its flow invokes the "dormant" Commerce Clause.
- If a state law restricting the flow of interstate commerce is facially discriminatory, or discriminatory in its purpose or effect, it is subject to a strict scrutiny test. Under this test, discrimination against interstate commerce "is *per se* invalid, save in a narrow class of cases in which the [state] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392, 114 S.Ct. 1677, 128 L. Ed. 2d 399 (1994). Once a plaintiff demonstrates that a regulatory scheme discriminates against interstate commerce, the burden shifts to the defendant to demonstrate that it has no other non-discriminatory means to advance a legitimate local interest. *Granholm v. Heald*, 544 U.S. 460, 125 S.Ct. 1885, 1905, 161 L. Ed. 2d 796 (2005). If a state law does not discriminate against interstate commerce, but regulates evenhandedly to effectuate a legitimate local interest, a more deferential standard applies. Under the *Pike* balancing test, the state law will be upheld unless the burden placed on interstate commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L. Ed. 2d 174 (1970).
- While the CPA does not overtly block the flow of interstate commerce at Washington's borders, nor facially discriminate against interstate commerce on the basis of origin, it serves that purpose and has that effect. Like I-383, the CPA effectively closes Washington's border to low-level radioactive waste, albeit in a more subtle manner and by a different mechanism, that being purported RCRA/HWMA authority regarding mixed waste.
- The plain, unambiguous language of the CPA, considered in conjunction with the historical background recited above, establishes the CPA has a discriminatory purpose. Because Section 4(2) is discriminatory in purpose, it follows that it is discriminatory in effect, the effect being that Washington, by not accepting out-of-state waste at Hanford until the cleanup of existing contamination there is complete, benefits itself while burdening "unrepresented" out-of-state interests. The burden falls disproportionately on out-of-state entities because nearly all of the mixed waste DOE plans to send to Hanford under its national program is generated from these out-of-state entities. *South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 92, 104 S.Ct. 2237, 81 L. Ed. 2d 71 (1984) (dormant Commerce Clause restrictions apply where state laws impose a burden "principally upon those without the state"). And while the CPA allows Washington to refuse this waste, Washington, at least hypothetically, still gets to ship its HLW and TRU out-of-state.
- The State asserts the CPA is not discriminatory in effect because Section 4 is modeled on CERCLA's prohibition of shipment of CERCLA wastes to non-compliant TSD facilities. 42 U.S.C. § 9621(d)(3). CERCLA, however, is a federal law and the Congress has power to regulate interstate commerce.
- Because the plaintiffs have met their burden of establishing discrimination, the burden shifts to defendants to demonstrate under "rigorous scrutiny" that there are no other non-

discriminatory means to advance a legitimate local interest. While the defendants identify what they believe is the "legitimate local interest," that being the public health and welfare of the citizens of the State of Washington, they make no attempt to prove there are no means, other than Section 4(2), to advance that interest. Section 4(2) fails the "strict scrutiny" test and is therefore invalid under the Commerce Clause.

- Because Section 4(2) fails the "strict scrutiny" test, there is no need to engage in the *Pike* balancing test. Assuming, however, that Section 4(2) regulates interstate and intrastate commerce evenhandedly, this court would find that it fails the balancing test.
- Assuming there is a non-illusory legitimate local interest and benefit advanced by it, Section 4(2) has more than just an incidental effect on interstate commerce, and it burdens said commerce excessively in comparison to the putative local benefit. Because of its expanded definition of "mixed waste" to incorporate "hazardous substances" which are not "waste," Section 4(2) has the effect of preventing the importation of useful products from out-of-state sources for research and national security projects.
- Cost and convenience undoubtedly factor into DOE's national program, but it must also be kept in mind that the stated goal of the program is to clean up nuclear waste nationwide and that in doing so, the individual states are assigned respective benefits and burdens.
- Decisions which need to be made at a national level addressing national concerns cannot be trumped by protectionist regulations enacted by individual states. Indeed, it may well be that at some point, the Commerce Clause will benefit Washington in that other states will be told they cannot prevent out-of-state HLW and/or TRU from being sent to those states for disposal because it would frustrate DOE's nationwide cleanup program.

Additional Fees

- If the surcharge qualified as a proper "regulatory" charge within the scope of RCRA's waiver of immunity, it would still have to: (1) not discriminate against federal functions; (2) be based on a fair approximation of use of the system; and (3) be structured to produce revenues that will not exceed the total cost to the state government of the benefits to be supplied. *Massachusetts v. United States*, 435 U.S. 444, 466-67, 98 S.Ct. 1153, 55 L. Ed. 2d 403 (1978).
- If the surcharge qualified as a proper "regulatory" charge within the scope of RCRA's waiver of immunity, this court would still strike down Section 9(5) as being unjustifiably discriminatory against federal functions.

Budget Disclosures

- The United States contends that Section 7 would require DOE to disclose preliminary budget requests forwarded from field offices to DOE Headquarters, or from DOE to the President, in violation of executive branch privileges, including the deliberative process privilege.
- "To fall within the deliberative process privilege, a document must be both predecisional and deliberative." *Carter v. United States Dep 't of Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002).
- The State contends that field requests submitted to agency headquarters are not protected by the privilege because they are budget appropriation requests, not budget deliberations, encompassing objective economic information that compares cost estimates for cleanup projects to requested funds.
- Section 7, however, infringes upon the federal government's deliberative privilege. The United States has met its burden of demonstrating deliberative privilege with respect to the agency field requests to DOE Headquarters, and from DOE Headquarters to the President.

Contract Clause

- Article I, Section 10 of the United States Constitution provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Intervenor-plaintiff TRIDEC asserts that the CPA substantially impairs: (1) the TPA; (2) Battelle contracts with DOE (known as the 1830 and 1831 contracts); and (3) Framatome's contracts with private customers. TRIDEC moves for "partial" summary judgment on the basis that these particular contracts are substantially impaired by the CPA.
- Whether a state law operates as an unconstitutional impairment of a contractual relationship is answered by a three step inquiry: (1) whether there is a contractual relationship; (2) whether a change in the law impairs the relationship; and (3) whether the impairment is substantial. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186, 112 S.Ct. 1105, 117 L. Ed. 2d 328 (1992).
- The State challenges standing of TRIDEC and its members to claim impairment of the TPA. TRIDEC and its members are not parties to the TPA, and the State asserts they are also not intended third party beneficiaries. The State contends there is nothing in the TPA evidencing intent by the contracting parties to assume a direct obligation to TRIDEC or any of its members at the time the TPA was entered. *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1320 (9th Cir. 1996).
- The State acknowledges the TPA, also known as the Hanford Federal Facility Agreement and Consent Order (HFFACO)), has a contractual element, citing *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 226 n. 10, 95 S.Ct. 926, 43 L. Ed. 2d 148 (1975) ("consent decrees are treated as contracts for some purposes but not others"), and that intended third-party beneficiaries have standing to enforce consent orders and decrees as contracts. Whether a contractual third-party beneficiary is created is based on "objective intent" and "the court should construe the contract as a whole, in light of the circumstances under which it was made." *Hairston*, 101 F.3d at 1320.
- The Contract Clause claims asserted by TRIDEC are not only ripe, the undisputed material facts of record establish as a matter of law that the TPA, and Battelle's and Framatome's contracts, are presently "substantially impaired." The CPA has "in fact, operated as a substantial impairment of a contractual relationship." *Rui One Corp. v. Berkeley*, 371 F.3d 1137, 1147 (9th Cir. 2004), *cert. denied*, 543 U.S. 1081, 125 S. Ct. 895, 160 L. Ed. 2d 825 (2005). In addition, defendants have not made any effort to establish that impairment by the CPA is both reasonable and necessary to fulfill an important public purpose. Defendants have failed to establish the absence of an evident and more moderate course of action that would serve the public purpose equally well.

Conclusion

Defendants cannot divorce the "operative" provisions of the CPA (Sections 4, 5, 6, 7, 8, 9 and 10) from the "Purpose," "Policy" and "Definitions" sections (Sections 1, 2 and 3). The "Purpose," "Policy" and "Definitions" sections manifestly reveal that the CPA seeks to regulate "mixed waste" as a whole for safety purposes, including the AEA radioactive component of such waste, in contravention of the AEA, and in contravention of the RCRA which limits the State's authority to the hazardous waste component. Confirmation of this is found in the "operative" provisions (i.e., Section 5(1)'s "direct" regulation of "pure" AEA radionuclides, and references in Sections 4 and 6 to "hazardous substances" and the obtaining of a "mixed waste" permit under the CPA in addition to a "hazardous waste" permit under the HWMA). The defendants can say the CPA does not provide the State with any more authority than the HWMA, but that is contrary to the plain

language of the CPA, as confirmed by the state supreme court's answers to the certified questions. The CPA is facially invalid as a whole because regulation of AEA radionuclides for radiological safety purposes is preempted by the AEA, and RCRA does not allow such regulation either.

The court does not intend in the slightest to diminish the concerns of Washington voters regarding the present and future management of nuclear waste at Hanford. These are very legitimate concerns in light of the volume of waste already at Hanford and the existing contamination problems. Congress has said, however, that it is the federal government which must address the issue of nuclear safety with regard to AEA materials, including as it relates to the AEA radioactive component of mixed waste. Congress has limited the State's authority to the hazardous waste component of mixed waste. Because those components are inextricably intertwined, tension is created. Congress has recognized this tension and addressed it in the RCRA, making clear that although the State cannot regulate the radioactive component, the federal government is obliged to include the State in the formulation of a plan to address mixed waste at federal facilities. At Hanford, this plan is embodied in the TPA.

Whether the State can exercise any additional authority under the RCRA/HWMA over the hazardous waste component of mixed waste is not clear, but what is clear is that the CPA exceeds the boundaries of that authority. At present, the State and its citizens must content themselves with exercising hazardous waste authority under the HWMA, enforcing the duties and obligations of the United States under the TPA, and enforcing any other duties and obligations of the United States under CERCLA and any other applicable federal law.

The motion of the United States for summary judgment (Ct. Rec. 136), joined in by intervenor-plaintiffs Fluor and TRIDEC, is GRANTED. The CPA is hereby declared invalid in its entirety as being in violation of the Supremacy Clause. In addition, Section 4(2) is declared invalid as being in violation of the dormant Commerce Clause; Section 7 is declared invalid as being in violation of the deliberative process privilege; and Section 9(5) is declared invalid as discriminating against the United States in violation of the RCRA waiver of immunity.

TRIDEC's motion for partial summary judgment (Ct. Rec. 140) is GRANTED. It is hereby declared that the CPA substantially impairs the TPA, Battelle Memorial Institute's 1830 and 1831 contracts with DOE, and Framatome's private contracts, in violation of the Contract Clause.

Decision of the Ninth Circuit Court of Appeals *U.S. v. Manning*, 527 F.3d 828 (9th Cir. 2008)

The following pages are *direct quotes* – the highlights -- from Judge McKeown's opinion.

Introduction

The present appeal arises out of an effort by Washington voters "to prevent the addition of new radioactive and hazardous waste to the Hanford nuclear reservation until the cleanup of existing contamination is complete." *United States v. Hoffman*, 154 Wn.2d 730, 116 P.3d 999, 1001 (Wash. 2005). Although the desire to take action against further environmental contamination and to protect the health and welfare of the community is understandable, we conclude that the statute enacted through the passage of Initiative 297 ("I-297"), the Cleanup Priority Act ("CPA"), is preempted by federal law. This result is dictated by a plain reading of the Washington statute, as interpreted by the Washington Supreme Court, as well as longstanding principles of federal preemption.

Radioactive waste that is subject to regulation under the AEA frequently may be mixed with non-radioactive waste that is regulated by the RCRA. No separate federal statute regulates this "mixed waste." *See Kentucky*, 252 F.3d at 822. However, the DOE and the EPA have issued rules stating that mixed waste will be subject to dual regulation: the AEA will govern the radioactive component and the RCRA or comparable state legislation will govern the non-radioactive component. *See, e.g.*, 51 Fed. Reg. 24,504 (July 7, 1986); 52 Fed. Reg. 15,937 (May 1, 1987); 53 Fed. Reg. 37,045 (Sept. 23, 1988). This dual regulatory structure is the source of the conflict engendered by the CPA.

The question we address here is whether the regulation of the radioactive component of mixed waste is preempted by the AEA.

Field Preemption

- As the Supreme Court observed, state law can be preempted in either of two general ways: if "Congress evidences an intent to occupy a given field," or, if the field has not been occupied entirely, "to the extent it actually conflicts with federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood*, 464 U.S. at 248. In a landmark case involving nuclear regulation, the Court declared that "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983). To determine whether the CPA is preempted by the AEA, "the test . . . is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" *Id.* at 213 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)). The AEA preempts the CPA if (1) the purpose of the CPA is to regulate against radiation hazards, or (2) if the CPA directly affects decisions concerning radiological safety. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 84, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). We hold that the CPA is preempted on both grounds.
- The Sixth Circuit's decision in *United States v. Kentucky* is particularly instructive. 252 F.3d at 816. There, the court addressed whether the AEA preempted state permit conditions on the disposal of radioactive waste in a landfill. The conditions prohibited the DOE from placing solid waste with more than a de minimis amount of radioactivity in a landfill and further

prohibited the DOE from disposing of solid waste that contained radionuclides in a landfill without approval from Kentucky's Division of Waste Management. *Id.* at 820. The court noted that these permit conditions "specifically limit the amount of 'radioactivity' and 'radionuclides.'" *Id.* at 823. It explained that the state "seeks to impose these conditions to protect human health and the environment. The permit conditions therefore represent an opportunity by the [state] to regulate materials covered by the AEA based on the [state's] safety and health concerns, and are thus preempted." *Id.* As in *Kentucky*, the State here seeks to impose conditions on the disposal of AEA materials out of concern for the health and environmental risks that increased contamination will cause. This type of regulation falls squarely within the field preempted by the AEA.

- The State attempts to sidestep the preemption issue by shifting the applicable definitions, contending that it is reasonable to read "mixed waste" within the operative provisions of the CPA as limited to the materials that may be regulated under the RCRA and the HWMA. This construction is neither reasonable nor legally permissible.
- The State's argument fails at the outset because we are bound by the Washington Supreme Court's opinion that "mixed waste" includes more than the materials regulated under the RCRA and the HWMA. *See Reinkemeyer v. Safeco Ins. Co. of Am.*, 166 F.3d 982, 984 (9th Cir. 1999) (explaining that "[w]e are bound by the answers of state supreme courts to certified questions just as we are bound by state supreme court interpretations in other contexts."). The Supreme Court has explained that "state courts are the ultimate expositor of state law [and] we are bound by their constructions except in extreme circumstances[.]" *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). In other words, the State cannot re-litigate its argument that "mixed waste" should be read narrowly without invoking one of the "few established grounds for disregarding a state court interpretation of state law." *Reinkemeyer*, 166 F.3d at 984. The State does not point to any "obvious subterfuge to evade consideration of a federal issue" or a "violation of federal law" that could undercut the Washington Supreme Court's analysis. *See Mullaney*, 421 U.S. at 691 n.11; *Reinkemeyer*, 166 F.3d at 984.
- The State's position is somewhat curious because it was at the State's urging that the district court certified to the state supreme court questions that would determine whether "mixed waste" included substances that were not regulated under the RCRA or the HWMA. *See Hoffman*, 116 P.3d at 1001-02. The court answered in the affirmative. *Id.* at 1006.
- The [State Supreme] court pointedly noted that it was "left with a choice between two alternatives": "a plain language interpretation based on the statutory definitions of 'mixed waste' and 'hazardous substance,'" as espoused by the United States, or Ecology's position which would "artificially eliminate much of the substance of these definitions." *Id.* at 1005.
- The State now argues that, under *Salerno*, we cannot invalidate a statute as unconstitutional if there is a reasonable, constitutional construction. It is equally true, though, that we cannot rewrite the statute to impose an artificial, unreasonable definition, *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988); *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002) (en banc), nor can we hold that the CPA is co-extensive with the RCRA and the HWMA when the state supreme court has expressly ruled otherwise.
- The CPA is also preempted because it directly and substantially impacts the DOE's decisions on the nationwide management of nuclear waste. *See English*, 496 U.S. at 85.

Savings Clause

- The CPA contains a savings clause that authorizes Ecology to "regulate mixed wastes to the fullest extent it is not preempted by federal law[.]" RCW 70.105E.040(1). Regulation of the

radioactive component of mixed waste is preempted by federal law. The CPA regulates mixed waste as a whole and certain provisions contain specific mandates concerning the radioactive component.

- Although it might be possible to excise those provisions that deal solely with radioactive materials, to construe the remaining sections of the CPA as limited to the nonradioactive component would require us to examine and rewrite most of the statute in a vacuum as to how the various provisions were intended to intersect and in a way that would be at odds with the purpose of the statute.

The End

- The CPA is preempted by the AEA because its purpose is to regulate AEA materials for safety purposes and because the CPA has a direct and substantial effect on the DOE's ability to make decisions regarding the disposal of radioactive hazardous waste. The district court's grant of summary judgment to the United States, Fluor, and TRIDEC is affirmed.
- AFFIRMED.

Seattle Times, Editorial, Wed., Aug. 27, 2008

I-297: What a waste

Washington state lawyers wisely decided not to appeal a federal appeals court ruling that affirmed the so-called Hanford cleanup initiative was unconstitutional.

Approved by well-intentioned voters in 2004, Initiative 297 had the appealing goal of preventing the federal government from putting additional nuclear waste at the Hanford nuclear reservation in south-central Washington until what was there was cleaned up.

It was a false promise. What was apparent to anyone who took a deeper look was the folly of this initiative — how federal judges would take a dim view of a state overriding federal authority to regulate radioactive waste.

Of statewide elected officials, only Sen. Patty Murray spoke against the initiative. The Seattle Times editorial board advised readers not to vote for the measure. State officials, including then-Gov. Gary Locke and anyone with a law degree should — and must — have known better.

Former state Attorney General Chris Gregoire was running for governor at the time but declined to give her constituents legal advice, ostensibly because it might have undermined the state's case later. But as a longtime advocate for Hanford cleanup who was leaving the AG's post, she should have weighed in. Her gubernatorial opponent, Dino Rossi, also declined to address this important issue.

Too bad. Without the benefit of their advice, the voters approved this utterly flawed measure and have had to pay almost \$400,000 in legal fees to defend it. That's on top of about \$1 million Heart of America Northwest plunged into the campaign.

What a waste.

The state Attorney General's Office is not appealing to the U.S. Supreme Court because it doubts the high court would take the case.

Good decision. Better not to throw more good money away.

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