

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF WASHINGTON
4

5 WASHINGTON STATE BUILDING &)
6 CONSTRUCTION TRADES COUNCIL ()
7 AFL-CIO, a Washington corporation)
8 and labor organization; WASHINGTON ()
9 VOICE OF ENERGY, a nonprofit)
10 Washington corporation; U.S. ()
11 ECOLOGY, INC., a California)
12 corporation; TRI-CITY NUCLEAR ()
13 INDUSTRIAL COUNCIL, a nonprofit)
14 Washington corporation; TRI-STATE ()
15 MOTOR TRANSIT CO., a Delaware)
16 corporation; PRECISION CASTPARTS ()
17 CORPORATION; an Oregon corporation;)
18 NORTHERN STATES POWER COMPANY, a)
19 Minnesota corporation; and)
20 CHEM-NUCLEAR SYSTEMS, INC.,)
21 a Washington corporation,)

22 Plaintiffs,)

23 -vs-)

24 THE HONORABLE JOHN C. SPELLMAN,)
25 Governor of the State of)
26 Washington; THE HONORABLE KENNETH)
27 EIKENBERRY, Attorney General of)
28 State of Washington; and ALAN J.)
29 GIBBS, Secretary of the State of)
30 Washington, Department of Social)
31 and Health Services,)

32 Defendants.)

33 -----)
34 UNITED STATES OF AMERICA,)

35 Plaintiff,)

36 -vs-)

37 STATE OF WASHINGTON, JOHN C.)
38 SPELLMAN, Governor of the State)
39 of Washington, and KENNETH O.)
40 EIKENBERRY, Attorney General of)
41 the State of Washington,)

42 Defendants.)

No. C-81-154 RJM

FILED IN THE
U. S. DISTRICT COURT,
Eastern District of Washington

JUN 26 1981

J. R. FALLQUIST, Clerk
Deputy

No. C-81-190 RJM

MEMORANDUM DECISION

31 The plaintiffs in these cases challenge the constitution-
32 ality of Washington's Radioactive Waste Storage and Transportation

1 Act of 1980, adopted by the voters as Initiative Measure No. 383
2 (Initiative). Since the plaintiffs' motions for summary judgment
3 rest on substantially similar grounds, their motions were joined
4 for purposes of argument.

5 One of the plaintiffs, U.S. Ecology, Inc. operates one
6 of the three active commercial nuclear waste disposal sites in
7 the United States. It provides disposal services to the United
8 States, various state governments and numerous commercial users
9 throughout the country. The United States, in addition to being
10 a substantial user of the commercial facility, also maintains its
11 own disposal sites in Washington.

12 The defendant (State) by the Initiative, seeks to
13 effectively ban the storage of all non-medical radioactive waste
14 (waste) generated outside the State of Washington. The Initiative
15 also bans the transportation of such waste to any storage site in
16 Washington. The stated purpose of the Initiative was to protect
17 the health and safety of the citizens of Washington. Although
18 the State contends that the provision in the Initiative for an
19 interstate compact might remove any impermissible ban on interstate
20 commerce, the Initiative Compact Section does not provide a
21 timely or effective exception to the ban.

22 The Initiative does not ban the transportation for
23 storage or the storage of waste generated in Washington. Nor does
24 it ban the transportation of radioactive material through Washing-
25 ton for use or storage elsewhere. Consequently, the Initiative
26 suggests that the perceived harms caused by the waste occur after
27 its disposal in the storage sites.

28 The plaintiffs jointly contend that the Initiative
29 violates the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3 and
30 that under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, it
31 has been preempted by federal law. (Atomic Energy Act, 42 U.S.C.
32 §§ 2011 et seq.; Low-Level Radioactive Waste Policy Act, Pub. L.

1 No. 96-573 (Dec. 23, 1980); Hazardous Materials Transportation Act,
2 49 U.S.C. §§ 1801 et seq.). In addition, the United States contends
3 that the Initiative violates the War Powers and Property Clauses
4 of the United States Constitution. With respect to the Commerce
5 Clause, the State contends that the Initiative is valid as an
6 action of a market participant or as a proper exercise of the
7 State's police powers. With respect to the Supremacy Clause, the
8 State contends that the Initiative has not been preempted by
9 federal law. I hold that the Initiative is unconstitutional and
10 thus not enforceable.

11 FACTS

12 This controversy centers on the transportation to and
13 storage of nuclear waste on the Hanford Reservation. This federal
14 reservation consists of 562 square miles of land and facilities
15 in and around Benton County, Washington. Since 1943, the reserva-
16 tion has been used for federal nuclear programs.

17 There are three storage areas on the reservation. The
18 first two areas are owned and operated by the federal government.
19 The first area provides storage for waste generated from federal
20 energy programs and national defense activities. The second area
21 contains a near-surface test facility which is designed to test
22 the feasibility of storing spent fuel and high-level waste in
23 underground basalt formations. The third area arose out of a lease
24 of approximately 1000 acres by the United States to the State of
25 Washington. The State of Washington subleased approximately 100
26 of those acres to U.S. Ecology, Inc. for the operation of a low-
27 level radioactive waste storage facility. Although there are two
28 other active commercial facilities in the United States, the U.S.
29 Ecology, Inc. site is the only existing commercial facility which
30 can store absorbed low-level radioactive liquids.

31 The commercial site is licensed for its current activity
32 by the State of Washington. The site is regulated under State

1 and Federal regulations pertaining to atomic energy and health and
2 environmental protection. The United States Department of Trans-
3 portation regulates the transportation of the radioactive waste.

4 The low-level radioactive waste problem is of national
5 concern. S. Rep. No. 548, 96th Cong. (1980), reprinted in U.S.
6 Code Cong. & Ad. News 11230. The latest Department of Energy
7 statistics indicate commercial facilities generated over three
8 million cubic feet of low-level waste in 1980. Low-Level Radio-
9 active Waste Management Report (Draft Report, April 21, 1981).
10 By 1985, the figure is expected to increase to over five and a
11 half million cubic per year. Id.

12 The commercial storage facility on the Hanford Reserva-
13 tion is a key facility in the nation's waste disposal program.
14 Specifically, it is the only commercial storage site which can
15 store "absorbed low-level radioactive liquids." Moreover, it
16 accepted approximately twenty-seven percent (27%) of the total
17 waste in 1980. While a site in Barnwell, South Carolina has been
18 accepting more than fifty percent (50%) of the generated waste, a
19 South Carolina "volume limitation program" will cut that site's
20 capacity to less than twenty-five percent (25%) of the waste
21 generated in 1985.

22 The facts of this case present a classic supply and
23 demand problem. It is clear that there is a serious national
24 problem with the increasing volume of waste, which must be stored
25 somewhere, and a nearly simultaneous reduction of the already
26 limited storage capacity. Congress has recognized this problem
27 and taken steps to solve it to the end that a few states will
28 not continue to bear the waste of many. If the Initiative were
29 permitted to stand it would aggravate an already critical situation.

30 DISCUSSION

31 The Initiative is invalid for two reasons: it violates
32 the Supremacy Clause and the Commerce Clause of the United States

1 Constitution.

2 The Initiative violates the Supremacy Clause because it
3 seeks to regulate legitimate federal activity, and because it has
4 has been preempted by federal law.

5 If the Initiative seeks to regulate the transportation
6 for storage and storage of all federal waste generated outside
7 the State of Washington and the operation of the federal storage
8 facilities, the Initiative violates the Supremacy Clause. U.S.
9 Const., Art. VI, cl. 2. Since defendants' counsel are unable to
10 represent that the Initiative did not apply against the federal
11 government, I must, in light of the Initiative's clear language,
12 assume that it does purport to apply to the federal government.
13 Therefore, I am compelled to find that, to the extent that it is
14 applicable to the United States government, the Initiative, in
15 the absence of an express Congressional waiver of sovereignty, is
16 unconstitutional. Hancock v. Train, 426 U.S. 167 (1976); Mayo v.
17 United States, 319 U.S. 441 (1943).

18 The doctrine of federal preemption has its roots in the
19 Supremacy Clause. The issue is whether the federal government
20 has preempted the state regulation of high-level and low-level
21 radioactive wastes.

22 Since preemption may be demonstrated in either of two
23 ways, my function is to determine: (1) Whether there is evidence
24 (pervasive federal scheme or dominant federal interest) that
25 Congress intended to supersede the police powers of the State,
26 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) or (2)
27 Whether the Initiative "stands as an obstacle to the accomplishment
28 and execution of the full purposes and objectives of Congress."
29 Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

30 By reviewing the pervasive federal statutory schemes
31 for the regulation of radioactive waste, the Atomic Energy Act,
32 the Low-Level Radioactive Waste Policy Act and the Hazardous

1 Materials Transportation Act, and applying established judicial
2 reasoning, I am convinced that Congress intended that the trans-
3 portation and storage of all materials which pose radiation
4 hazards would be regulated by the federal government except where
5 jurisdiction was expressly ceded to the states. Northern States
6 Power Company v. State of Minnesota, 447 F.2d 1143 (CA8 1971),
7 aff'd, 405 U.S. 1035 (1972) (nuclear waste releases); Consolidated
8 Rail Corporation v. City of Dover, 450 F. Supp. 966 (D. Del. 1978)
9 (hazardous freight and toxic materials).

10 The State concedes, and the most recent legislative
11 history confirms the fact that Congress has not expressly ceded
12 management of high-level radioactive waste. S. Rep. No. 548,
13 96th Cong., (1980), reprinted in U.S. Code Cong. & Ad. News
14 11231. Since it is clear that federal law preempts any state ban
15 on high-level waste, the only remaining issue is whether Congress
16 has expressly ceded regulation of low-level wastes.

17 In this case, there are two federal expressions which
18 might be interpreted as a grant of such authority: (1) the
19 Agreement between the United States Atomic Energy Commission and
20 the State of Washington pursuant to Section 274 of the Atomic
21 Energy Act (42 U.S.C. § 2021), and (2) the Low-Level Radioactive
22 Waste Policy Act, Pub. L. No. 96-573 (Dec. 23, 1980).

23 Although the Section 274 Agreement expressly ceded
24 qualified regulatory responsibility over byproduct materials,
25 source materials and special nuclear materials, it did not cede
26 control over all low-level wastes. Also, the Agreement, by its
27 terms, contemplates "that State and Commission programs for
28 protection against hazards of radiation will be coordinated and
29 compatible." Agreement at p. 2. Moreover, the Agreement recog-
30 nizes the desirability of reciprocal recognition of licenses.
31 Agreement at p. 5. Furthermore, Congress granted the authority
32 to regulate certain nuclear material. It did not grant the

1 authority to effectively ban the receipt and disposal of such
2 material. Finally, the Initiative was expressly based upon the
3 State's police power to protect the health, safety and welfare of
4 the citizens of Washington State. It was not premised on the
5 Section 274 Agreement.

6 Thus, neither the Agreement nor the statute which
7 authorized it represent an express grant of the authority to the
8 State to effectively ban the storage or transport of low-level
9 radioactive waste.

10 The Low-Level Waste Policy Act, (Low-Level Act), does
11 constitute a valid but limited grant of authority to effectively
12 ban the storage of certain waste. The Low-Level Act is important
13 for several reasons. First, it clearly excludes federal waste or
14 facilities from any action taken under a regional compact.

15 Second, the Low-Level Act recognizes the particularly
16 acute national problem of a high demand for storage and a dwindling
17 supply of storage capacity. At the same time, the Act recognizes
18 that those states (Nevada, South Carolina and Washington) which
19 provide the nation's entire commercial disposal system cannot be
20 expected to continue to bear the burden of the other states'
21 waste problems.

22 Thirdly, the Low-Level Act presents a rational and
23 equitable approach for resolving the waste disposal problem.
24 Each state is now responsible "for providing for the availability
25 of capacity either within or outside the State" for low-level
26 radioactive waste disposal. Section 4(a)(1)(A). The Low-Level
27 Act recognizes that a regional approach affords the safest and
28 most efficient management. Section (4)(a)(1)(B). Congress has
29 authorized the states to join interstate compacts to provide for
30 regional disposal sites. Section 4(a)(2)(A). These compacts are
31 subject to approval by Congress. After January 1, 1986, any
32 such regional compact may preclude disposal of extra-regional

1 waste in the compact's regional sites. Section 4(a)(2)(B).

2 The State's argument that Congress, by this statute,
3 ceded complete authority to regulate is not persuasive because
4 the statute merely makes each state "responsible for providing
5 for the availability of capacity."

6 The State contends that the Federal Low-Level Waste Act
7 does not preclude the State from presently banning the importation
8 of waste. Such an interpretation of the statute is strained.
9 Congress has authorized the State to enter into interstate
10 compacts. After such compacts are approved by Congress, the
11 regions established thereby may exclude waste from without the
12 region after January 1, 1986 or at such other times as Congress
13 may authorize.

14 A close reading of the statute and the legislative
15 history reveals a Congressional plan to place future responsibility
16 on the individual states to dispose of their waste. To encourage
17 individual state action, Congress made it clear to all states
18 that if they did not make provision for their own waste by January
19 1, 1986, they could be denied access to other regions' disposal
20 sites. At the same time, Congress recognized that the organization
21 of regional compacts and construction of disposal sites would
22 take time. Consequently, Congress expressly delayed any authorized
23 ban on radioactive waste until January 1, 1986. If I were to
24 adopt the contentions that Washington may ban waste today, the
25 State of Washington would obstruct the efforts of Congress toward
26 an orderly resolution of a significant national problem.

27 For the aforementioned reasons, the Initiative cannot
28 withstand scrutiny under the Supremacy Clause.

29 COMMERCE CLAUSE

30 The plaintiffs contend that the Initiative violates the
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32 ///

1 Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, because it
2 discriminates against and interferes with interstate commerce.
3 The State contends that the Initiative does not violate the
4 Commerce Clause because: (1) the interstate movement of radioactive
5 waste, unlike other substances, is not "commerce" within the
6 meaning of the Commerce Clause, (2) the State is acting as a
7 market participant; and (3) the Initiative is based upon a
8 permissible exercise of the state's police powers.

9 Both a common sense view of the facts and the principle
10 that "[a]ll objects of interstate trade merit Commerce Clause
11 protection; none [are] excluded by definition at the outset[.]"
12 Philadelphia v. New Jersey, 437 U.S. 617, 622 (1978), (solid or
13 liquid waste), support a determination that the movement of
14 radioactive waste in interstate commerce fits within the definition
15 of "commerce" for constitutional purposes.

16 The State's contention that the Initiative merely
17 reflects the action of a "market participant" and that as such
18 the Initiative is beyond the reach of the Commerce Clause is not
19 persuasive. The Initiative is not a proprietary measure. The
20 clear language of the Initiative establishes that it is a regula-
21 tory measure. It purports to effectively ban the transport for
22 storage and the storage of certain material. It establishes
23 civil and criminal penalties for violations. Moreover, the
24 Initiative is based on a perceived need to protect the health and
25 safety of the citizens of Washington. It is not based on economics
26 or other factors traditionally associated with proprietary measures.
27 Finally, the State, as a lessor, is engaged in the rental business.
28 The real proprietors are the United States government as an
29 operator of two federal sites and U.S. Ecology, Inc., as the
30 operator of the commercial site. Having determined that the move-
31 ment of radioactive waste is "commerce" and that the State is not
32 a "market participant", I must now determine whether the Initiative

1 is permissible as an exercise of Washington's police powers. I
2 hold that the State of Washington, through the Initiative, has
3 exceeded its police powers.

4 Unlike the situation in South Carolina State Highway
5 Department v. Barnwell Brothers, Inc., 303 U.S. 177 (1938),
6 Congress has established a pervasive statutory scheme, in this case
7 to regulate nuclear activity. Although Congress has ceded some
8 of this authority to the states, it has not granted the states
9 the power to effectively ban the transportation for storage or
10 the storage of radioactive waste generated outside Washington.
11 In the presence of such pervasive federal legislation, the
12 Initiative must be invalidated. Campbell v. Hussey, 368 U.S. 297
13 (1961) (supplemental state tobacco regulation).

14 Even in the absence of federal legislation, "the Commerce
15 Clause prevents the States from erecting barriers to the free flow
16 of interstate commerce." Raymond Motor Transportation, Inc. v.
17 Rice, 434 U.S. 429, 440 (1978). However, a state statute which
18 affects commerce does not violate the Commerce Clause if it is
19 designed to serve a legitimate state interest and if it is applied
20 in a nondiscriminatory manner. Id. The court in such instances
21 must make a "delicate adjustment of the conflicting state and
22 federal claims." Great Atlantic & Pacific Tea Co., Inc. v.
23 Cottrell, 424 U.S. 366, 371 (1976), quoting from H.P. Hood & Sons,
24 Inc. v. Du Mond, 336 U.S. 525, 553 (Black, J. dissenting). The
25 traditional criteria for this "delicate adjustment" are set forth
26 in Pike v. Bruce Church, Inc., 397 U.S. 137, 142.

27 The Pike test centers on three key issues: (1) As
28 a threshold issue, does the state law regulate evenhandedly;
29 (2) Does the state law effectuate a legitimate local public
30 purpose; and (3) Does it have only an incidental effect on
31 interstate commerce. Assuming these questions are answered
32 in the affirmative, "the Initiative will be upheld unless the

1 burden imposed on such commerce is clearly excessive in relation
2 to the putative local benefits. . . ." Id. This balancing effort
3 involves "a sensitive consideration of the weight and nature of
4 the state regulatory concern in light of the extent of the burden
5 imposed on the course of interstate commerce." Raymond Motor
6 Transportation, Inc. v. Rice, supra at 441.

7 The threshold issue must be answered in the negative.
8 Where, as here, a state "overtly blocks the flow of interstate
9 commerce at [the] State's borders," Philadelphia v. New Jersey,
10 437 U.S. 617, 624 (1978), the state statute on its face discrimin-
11 ates against interstate commerce on the basis of origin. Such
12 facial discrimination, regardless of the State's purpose, may
13 by itself provide a sufficient basis to invalidate the statute. Id.
14 Moreover, in light of the Initiative's implied exemptions and the
15 recent decision in Kassel v. Consolidated Freightways Corporation
16 of Delaware, _____ U.S. _____, 49 U.S.L.W. 4328 (March 24, 1981), it
17 is also clear that an application of the Initiative to the movement
18 of radioactive waste in interstate commerce would discriminate
19 against commerce. The exemptions in the Initiative, particularly
20 the implied exemption of all radioactive waste generated in
21 Washington, offers the benefits of available radioactive waste
22 storage to Washington's nuclear industry and effectively denies
23 such benefits to the bulk of this country's nuclear industry.
24 Moreover, since the Initiative impliedly exempts the shipment of
25 radioactive waste through the State and, by its terms, is directed
26 at the origin of the waste, it would appear that the State has
27 decided that the principal harm from radioactive waste arises
28 after its disposal in a storage site. Thus, there is no basis to
29 distinguish waste generated in Washington from waste generated in
30 other states. In short, the Initiative on its face and in its
31 plain effect is unconstitutional because it does not regulate
32 evenhandedly. See Kassel v. Consolidated Freightways, supra;

1 Philadelphia v. New Jersey, supra.

2 Even if such facial and substantive discrimination is not
3 a per se fatal defect, "such facial discrimination invokes the
4 strictest scrutiny of any purported legitimate local purpose and
5 of the absence of nondiscriminatory alternatives." Hughes v.
6 Oklahoma, 441 U.S. 322, 337 (1979). The Initiative cannot with-
7 stand such scrutiny.

8 While it has been held that "if safety justifications
9 are not illusory, the Court will not second-guess legislative
10 judgment," Raymond Motor Transportation, Inc. v. Rice, supra at
11 449, (Blackmun, J. concurring), the mere incantation of "a purpose
12 to promote the public health or safety does not insulate a state
13 law from Commerce Clause attack." Kassel v. Consolidated
14 Freightways, _____ U.S. _____, 49 U.S.L.W. 4328, 4330 (March 24,
15 1981). This should be particularly true where, as here, the
16 state law is a product of the Initiative process and not a
17 product of the more detailed and deliberate approach normally
18 associated with the state legislature.

19 Moreover, when discrimination against commerce is
20 demonstrated, the State has the burden of demonstrating the local
21 benefits flowing from the state statute and the unavailability of
22 adequate nondiscriminatory alternatives. Hunt v. Washington Apple
23 Advertising Comm'n., 432 U.S. 333, 353, (1977). Here the defen-
24 dants have failed to present evidence that non-medical radio-
25 active waste, transported and stored in compliance with Federal
26 regulations, is dangerous to the health and safety of the citizens
27 of the State of Washington. Indeed, a recent study by the
28 Department of Social and Health Services of the State of Washing-
29 ton suggests that nuclear waste, if properly regulated, can be
30 safely transported and also suggests that there are less discrimi-
31 natory means to protect the public. See Stipulation of Authenticity
32 of Documents, Exhibit 10. The closing sentence of the report's

1 Abstract is particularly instructive:

2 None of our studies detected serious personnel
3 exposure problems, but further reductions can
4 be obtained through the institution of better
5 storage procedures, quicker handling techniques
6 and maintaining greater distances from radiation
7 sources.

8 Finally, the Initiative will clearly have more than
9 an incidental effect on interstate commerce. As noted earlier,
10 Congress and the Department of Energy have noted the rapid growth
11 of radioactive waste and the reduction in storage capacity. The
12 Initiative will aggravate this national problem by substantially
13 reducing all low-level radioactive waste storage and by precluding
14 any commercial storage of absorbed low-level radioactive liquids.

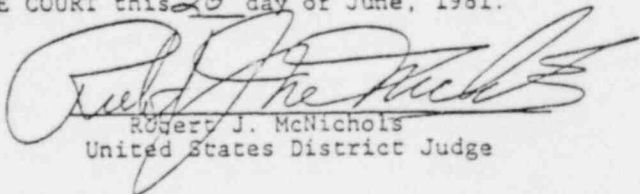
15 Even if I were to consider the weight and nature of the
16 state regulatory concern in light of the extent of the burden on
17 interstate commerce, I would still hold that the Initiative
18 violates the Commerce Clause. Since the State's safety interest,
19 assuming proper compliance with adequate regulations, is at
20 least arguably illusory and since the Initiative significantly
21 impairs the federal interest in encouraging the peaceful use of
22 radioactive material and in solving the radioactive waste problem,
23 the Initiative cannot be harmonized with the Commerce Clause.

24 CONCLUSION

25 For the aforementioned reasons, I hold that the
26 Initiative is unconstitutional and thus unenforceable. Therefore,
27 plaintiffs' Motions for Summary Judgment are GRANTED. The Clerk
28 shall enter judgment accordingly.

29 IT IS SO ORDERED.

30 DONE BY THE COURT this ^{26th} day of June, 1981.

31 
32 Roger J. McNichols
United States District Judge