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LANDS AND NATURAL RESOURCES

OVERVIEW

This section of the annual Tenth Circuit survey encompasses the interrelated areas of property, public lands, natural resources, and the environment. The Tenth Circuit considered 12 cases dealing with land and natural resources issues, and, as in recent years, the greater number of cases concerned environmental problems. On the whole, the court clarified legal principles in several areas, reversing the district courts in one-half of the cases. Of particular concern, three of the four cases within the general area of condemnation and compensation were reversed on the merits.

I. PROPERTY, PUBLIC LANDS, AND NATURAL RESOURCES: SOME GENERAL PROPOSITIONS

A. *United States v. Reimann*, 504 F.2d 135 (10th Cir. 1974)

United States v. Reimann[1] dealt with which of two government land surveys controlled as to the boundary between defendant's property and surrounding national forest land. Reimann was the successor in title to land patented subsequent to two government surveys (the Ferron survey of 1894 and the Hanson survey of 1903) but prior to a third survey (the Miller survey of 1926) which essentially reestablished the boundaries set by the Ferron survey. The purpose of the Miller survey was to correct serious defects in the Hanson survey, while also making the necessary tract segregations to preserve vested interests in land already patented. The failure of Miller to accommodate his resurvey to vested interests resulted in the loss of approximately 56 acres to the patented land and led to the present controversy.

The Government thought and the trial court found the general rule to be that "where the lines of senior [Ferron] and junior [Hanson] surveys conflict the lines of the senior survey control."[2] In reversing, the Tenth Circuit distinguished the present controversy from one in which the patent was based on the senior survey and issued prior to the junior,[3] and where the conflict did

[1] 504 F.2d 135 (10th Cir. 1974).
[2] *Id.* at 138.
[3] *Id.*, *citing* Cragin v. Powell, 128 U.S. 691 (1888).

not center on overlapping survey lines.[4] The court specifically found the federal district court decision in *United States v. Macmillan*[5] to have been founded on authority in which the facts were clearly distinguishable: "none of which [authority] involved a conflict between two officially approved government surveys, both of which were conducted *prior to* title passing from the government."[6]

The Tenth Circuit held the controlling rule to be that when the lines of senior and junior surveys conflict "*the government is bound by the last official survey accepted prior to its divestment of title.*"[7] Although the Government retains the right to resurvey and reestablish boundaries, "[t]he government retains no power to nullify a patent, nor the survey upon which it is based, once patent has issued,"[8] even if such survey was grossly defective.

B. *McTiernan v. Franklin*, 508 F.2d 885 (10th Cir. 1975)

McTiernan filed for noncompetitive oil and gas leases, arguing that the sale of certain tracts to the United States by Roger Mills County, Oklahoma with a reservation of all mineral rights in favor of the county for 50 years was void since the county had both acquired and resold the tracts as part of a delinquent tax process, which under Oklahoma law automatically passed title in fee simple absolute to the United States.[9] The Board of Land Appeals rejected the noncompetitive oil and gas lease offer because of "uncertain title."[10] Plaintiff's suit against the Acting Secretary of Interior, Franklin, requesting reversal of the Board's decision and later that title be quieted in the United States, was dismissed by the trial court.

Although plaintiff's allegation that title resided in the United States was not without merit, the Tenth Circuit affirmed, holding that "[b]ecause the reservations *may* be valid, and the minerals therefore not subject to the Secretary's disposition, the

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[4] *Id.*, *citing* United States v. Weyerhaeuser Co., 392 F.2d 448 (9th Cir. 1967), *cert. denied*, 393 U.S. 836 (1968).

[5] 331 F. Supp. 435 (D.C. Nev. 1971).

[6] 504 F.2d at 138.

[7] *Id.* at 139 (emphasis added). The Tenth Circuit found it inequitable of the government to record a survey "with knowledge that it would be relied upon by patentees, and then grant the government the right to later correct its error, ex parte . . . ." *Id.* at 140.

[8] *Id.* at 139.

[9] McTiernan v. Franklin, 508 F.2d 885, 886 (10th Cir. 1975).

[10] *Id.*

decision refusing McTiernan's offers was proper."[11] The United States could not be forced into asserting title to the land, and since a mere offer does not confer a vested property right, McTiernan lacked standing to bring a quiet title action.

C. *United States v. Zweifel*, 508 F.2d 1150 (10th Cir. 1975)

Zweifel, through his claim-staking service, filed several thousand location certificates for claims on public lands in Wyoming which the United States argued clouded its title, alleging that no valid mining locations were made pursuant to federal and Wyoming law. Two issues were presented to the Tenth Circuit: (1) Whether the district court lacked jurisdiction since the statutory regulations provided for an exception to district court jurisdiction by "authorizing the government to initiate administrative proceedings to invalidate mining claims;"[12] and (2) whether the mining claims were of "good faith" quality.

Addressing the jurisdictional issue, the court acknowledged that when the Secretary of Interior

> initiated an administrative contest, the jurisdiction of the court is withdrawn as respects suits filed by *private* claimants either to halt the administrative proceedings or to substitute the court's determination of claim validity for that of the Interior Department.[13]

However, the court argued that the statutory regulation did not have the effect of constituting an exception to federal court jurisdiction, nor did case law "foreclose the government's entering federal court to vindicate its title to public lands."[14] To interpret either statute or case law as requiring administrative determination prior to judicial review "would needlessly prolong the period during which qualified locators would forbear from discovery work on the clouded lands."[15] The Tenth Circuit held that when the United States was initiating procedures to clear title to public lands it had the right *to elect* whether to proceed administratively or within the federal district court. Even though normally the trial court should defer to a specialized administrative body, where the agency with specialization is, as in this case, part of the

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[11] *Id.* at 887-88 (emphasis added).

[12] United States v. Zweifel, 508 F.2d 1150, 1154 (10th Cir.), *cert. denied*, 96 S. Ct. 47 (1975), *citing* 43 C.F.R. § 4.451.1 (1975).

[13] *Id.* at 1155.

[14] *Id.*

[15] *Id.*

litigation, "and the agency's position with respect to the claims [is] clear,"[16] there is no reason for the trial court to defer. Moreover, the trial court need not defer where the factual issue, here the good faith intent of the locator, is within the conventional experience of judges and of a type considered routinely by them.

Defendants did not contest whether the Government had met the requirement under which it had to establish a prima facie invalidity of the claims before the burden shifted to claimants, but requested reexamination of the prima facie standard.[17] The court held the standard, which had previously been found applicable in administrative contest proceedings before the Interior Department, to be similarly applicable in quiet title actions such as this.[18]

II. CONDEMNATION AND COMPENSATION

A. *United States v. 46,672.96 Acres of Land*, 521 F.2d 13 (10th Cir. 1975)

On appeal, the Government challenged awards made by commissioners and later adopted by the District Court of New Mexico in three condemnation actions connected with the White Sands Missile Range. In its supplemental report explaining the basis of the awards, the Commission acknowledged that it had "found the highest and best use of the land was for overflight, launching and impact of missiles and similar type uses,"[19] and that it had accepted as comparables the appraisals furnished by the landowners' expert based on co-use leases negotiated by the government with other landowners. As no one but the Government could use the land for a missile range and as the lands subject to these condemnation awards were too small for missile range use unless combined with other property acquired by the Government for this purpose, the court concluded that the Commission must have considered prior and future use in its determination that a missile range was the highest and best use of the land.[20] In reversing, the Tenth Circuit held the general rule to be that "[w]here, however, a market for a particular use is created

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[16] *Id.* at 1156.

[17] *Id.* at 1157.

[18] *Id.*

[19] United States v. 46,672.96 Acres of Land, 521 F.2d 13 (10th Cir. 1975).

[20] *Id.*

solely as a result of the project for which the land is condemned, value based on that use must be excluded."[21] The Tenth Circuit found the co-use leases noncomparable because they were for substantially larger properties with improvements and because "evidence of prices paid by the government for the purchase, through private negotiations, of lands in connection with the project for which land is being condemned cannot be received."[22] Moreover, neither payments in the nature of a compromise nor sale prices to a condemnor are evidentiary as to what constitutes fair market value. Recognizing the difficulty of establishing a price for land which has little market value, the court directed that a different method be utilized as the award under the commission's method was grossly excessive in this case.[23]

B. *United States v. City of Pawhuska*, 502 F.2d 821 (10th Cir. 1974)

This was an action for damages in the amount of over $200,000 brought by the United States as trustee for the Osage Indian Tribe of Oklahoma against the City of Pawhuska. Defendant city had brought a condemnation action against the surface owners and later made a settlement with the tribal lessees of the mineral rights for the purpose of constructing a municipal reservoir.[24] The tribe, which had retained a royalty interest of 16 2/3 percent on the mineral rights received no compensation.

The Tenth Circuit reversed and remanded for a new trial, holding that two findings of the trial court lacked sufficient evidence. First, the trial court's holding that the oil and gas underlying the reservoir was being adequately drained by other producing wells was strongly contradicted by the Government's witnesses, while testimony supporting the ruling was "only by tenuous inferences from unsatisfactory evidence."[25]

Alternatively, the trial court found "that the underlying oil

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Separate interests in surface and mineral rights had been created by the Government, the latter being reserved in trust for the tribe. United States v. City of Pawhuska, 502 F.2d 821, 823 (10th Cir. 1974).

[25] *Id.* One government witness "testified that considerable space under the reservoir could not be drained from on-shore locations." *Id.* The estimated royalty loss to the tribe was over $219,000.

could not be profitably extracted 'even if no lack were present.' "[26] The Tenth Circuit examined and rejected this finding on four grounds. First, *even if there were adequate off-shore drainage,* such a finding would be immaterial to whether or not profitable extraction existed prior to the inundation of the surface by the reservoir. Second, the court found the city's testimony on this subject inadequately developed and contradictory.[27] Third, the failure of the tribe to "demand to drill would have been futile because drilling was incompatible with City's use of the land."[28] And, finally, the court rejected the city's defense of the "prudent operator rule." The city could not base its economic infeasibility argument on any type of drilling operation *necessitated by the reservoir.*[29]

C. *Mescalero Apache Tribe v. Burgett Floral Co.,* 503 F.2d 336 (10th Cir. 1975)

The issue on appeal was whether the district court's dismissal of an action for compensatory damages brought by plaintiff tribe for the destruction of trees by defendant, who entered upon the tribe's reservation without permission, was proper. The Tenth Circuit reversed relying upon the United States Supreme Court's holding in *Oneida Indian Nation v. County of Oneida*[30] to the effect that "federal law now protects, and has continuously protected . . . possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession."[31] The court found that the possessory right in *Oneida,* ejectment, was not distinguishable from the trespass action in this case, and that the "scope of matters arising 'under the Constitution, laws, or treaties of the

[26] *Id.*

[27] It would appear that the Tenth Circuit found the settlement figures with the lessees of the tribal mineral rights irreconcilable with the unprofitable extraction argument. *Id.*

[28] *Id.* at 824. The city had raised the defense that notice was required in order to sustain an action for lease forfeiture for failure to develop. The Tenth Circuit found the Oklahoma exception applicable: Notice need not be given if it would be useless.

[29] The prudent operator rule would be applicable to the situation before the city acted, not after. The court noted that, prior to the reservoir being constructed, a tribal lessee had attempted to drill on the land but was forcibly ejected by the city.

[30] 414 U.S. 661 (1974).

[31] Mescalero Apache Tribe v. Burgett Floral Co., 503 F.2d 336, 338 (10th Cir. 1974), *quoting* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 677 (1974).

United States' should be at least as broad under § 1362 as under § 1331."[32]

D. *Ashland Oil, Inc. v. Phillips Petroleum Co.*, Nos. 73-1997 to -1999 (10th Cir., Jan. 27, 1975) (petition for rehearing outstanding):

In the *Consolidated Helium Cases*[33] the problem of reasonable compensation due to natural gas producers for helium extracted by pipeline companies was remanded to the trial court for determination. The contract entered into between Phillips Petroleum Co. and the Bureau of Mines provided that due to the inability of ascertaining the identity of the thousands of owners who would be entitled to compensation, the United States would pay Phillips the amounts "that Seller shall pay subsequent to the date of this contract . . . to parties other than itself . . . for the acquisition of helium in the natural gas . . . or for any interest therein."[34] The Tenth Circuit found it within the trial court's discretion to reject the market value evidence submitted by defendants because of the lack of a free competitive market in helium and because the transactions introduced were not comparable, and in its place to select the "value less expense" method.[35]

Urging the condemnation doctrine, the Government argued that the helium values were created by its own purchase program. The Tenth Circuit found that

> The issue here is the determination of value of a commodity which was purchased and sold by the Government and by private concerns. This cannot be equated to the cases where the condemnation or the reason for condemnation increases the value of the land taken. The helium has value by reason of its nature and usefulness. The Government may have made this helium available *but did not create its value*[36]

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[32] 503 F.2d at 338. In *Mescalero* jurisdiction had been asserted under section 1362 which gave the district courts original jurisdiction "of all civil actions, brought by *any Indian tribe* . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362 (1970) (emphasis added). In *Oneida*, jurisdiction was based on 28 U.S.C. § 1331 (1970) which deals with general federal-question jurisdiction.

[33] Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir. 1971).

[34] Ashland Oil, Inc. v. Phillips Petroleum Co., Nos. 73-1997 to -1999 (10th Cir., Jan. 27, 1975) (petition for rehearing outstanding). The contract formula provided that Phillips would pay the first $3.00 per Mcf and the United States would pay any additional amount.

[35] *Id.*

[36] *Id.* at 11 (emphasis added).

and affirmed the findings of the trial court as to the value figure.

The court also sustained the trial court's determination that federal law should be applied even though plaintiff was not directly seeking relief against the United States. The Government had entered the case asserting a substantial interest and the existence of an actual controversy between it and plaintiff. The *Clearfield* doctrine was held applicable, to wit:

> [W]hen the United States seeks to litigate or seek a remedy arising from transactions it has entered into in the ordinary commercial world to carry out its program, it has been held that federal law may be applied.[37]

The Tenth Circuit concluded that "[i]n the face of the multitude of claimants, the variations in state law, and the *Clearfield* doctrine, the trial court was correct in not applying *Erie v. Tompkins*."[38]

III. ENVIRONMENTAL LAW

A. *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974)

In *Sierra Club v. Stamm*[39] four nonprofit environmental corporations brought an action seeking declaratory judgment and injunctive relief against the Secretary of the Interior and the Bureau of Reclamation alleging failure to file a final environmental impact statement. The complaint was dismissed with prejudice on a finding by the trial court that the impact statement filed met the statutory requirements. The Tenth Circuit found the statement sufficient in its discussion of alternatives and cost-benefit ratio.[40] The primary issue addressed was the extent to which a *final* impact statement *could be filed* for what constituted only a sub-unit of a major federal project. The statement filed was intended to be final as to the Strawberry Aqueduct and Collection System, which was only one of six units of the Bonneville Unit,

[37] *Id.* at 17. *See* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). The district court had improperly based federal jurisdiction on the conclusion that there were elements of condemnation by the United States involved. This argument was rejected in the *Consolidated Helium Cases.*

[38] Nos. 73-1997 to -1999 at 19. The Tenth Circuit reversed the trial court's division of interest equally between lessors and lessees and directed that the division be in accordance with the terms of the leases. The court also reversed the award of attorney's fees by the district court, finding no statutory provision or any rule of practice to sustain the award.

[39] 507 F.2d 788 (10th Cir. 1974).

[40] *Id.* at 793-94.

itself constituting only one of six units of the Central Utah Project. The Central Utah Project is "on-going," completion not expected until sometime in the next century. The plaintiffs argued that the statement was too narrow in scope and "should include the cumulative and collective environmental impact of the entire Central Utah Project,"[41] and, collaterally and in the alternative, as a final statement it should minimally "encompass all increments of the Bonneville Unit."[42] The Tenth Circuit sustained the district court's finding that the Strawberry system qualified as an *independent* major federal action both in light of prior cases dealing with similar factual circumstances,[43] and, since this specific project "has an independent utility of its own as a collection and conveyance system of waters . . . . [s]uch system can operate and function separately from the remaining unconstructed systems of the Bonneville Unit or other units of the Central Utah Project."[44]

B. *Scenic Rivers Association v. Lynn*, 520 F.2d 240 (10th Cir. 1975)

The district court enjoined HUD and the Office of Interstate Land Sales Registration (OILSR) from approving a filing by Flint Ridge Development Company, codefendant-appellant, required under the Interstate Land Sales Act prior to the sale of lots in interstate commerce, pending the preparation of an environmental impact statement by HUD. On appeal, the defendants raised four issues: Was the filing under the Interstate Land Sales Act a major federal action; was there an irreconcilable conflict between NEPA and the Interstate Land Sales Act; did the district court have jurisdiction; and was a public hearing required on the impact statement?[45]

The Tenth Circuit sustained the finding that a major federal action was involved since the filing provided for federal approval, which, if given, would lead to substantial environmental conse-

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[41] *Id.* at 790.

[42] *Id.*

[43] See the discussion by the court of Sierra Club v. Calloway, 499 F.2d 982 (5th Cir. 1974), and Environmental Defense Fund, Inc. v. Armstrong, 352 F. Supp. 50 (N.D. Cal. 1972), *supplemental opinion*, 356 F. Supp. 131 (N.D. Cal.), *aff'd*, 487 F.2d 814 (9th Cir. 1973), dealing with similar unit-projects. *Id.* at 792.

[44] *Id.* at 791.

[45] Scenic Rivers Ass'n v. Lynn, 520 F.2d 240, 242 (10th Cir. 1975).

quences. The court noted a number of similar situations in which analogous filings requiring federal approval had been made subject to environmental impact statements.[46] The court rejected various arguments made by defendants in an attempt to establish inconsistency between NEPA and filings under OILSR, and held that the purpose of both was to provide the public with information, such information being complementary rather than incompatible.[47] Similarly, the court found that jurisdiction attached since compliance with the NEPA requirement presented a substantive federal question, and it was consistent with Congressional intent that NEPA be given broad application to all federal agencies.[48] As the *public* nature of a hearing on an environmental impact statement is within the agency's discretion, the court reversed the district court's order that there be a public hearing on HUD's environmental impact statement once prepared.[49]

C. *Vivant v. Trans-Delta Oil and Gas Co.*, Nos. 74-1115, -1116 (10th Cir., Nov. 27, 1975) (Not for Routine Publication)

Declaratory and injunctive relief were requested by plaintiffs against defendants for failure to prepare an environmental impact statement regarding road-building in portions of Capitol Reef National Park and drilling of an oil well in Glen Canyon National Recreation Area. The district court granted a preliminary injunction enjoining construction, improvement, and use of the road and the proposed drilling, finding irreparable injury to plaintiffs' aesthetic and recreational interests. Trans-Delta appealed on the grounds that an environmental impact statement was not required as there was no major federal action involved significantly affecting the environment. Although this had been argued also by the federal defendants at the hearing before the district court, the Park Service decided to prepare a full environmental impact statement, and based its appeal on mootness.

The Tenth Circuit restricted its inquiry to whether: (1) There was a reasonable probability of plaintiffs' prevailing on the merits, (2) there was a showing irreparable injury would result if relief were not granted, and (3) the interlocutory relief granted was an

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[46] See the court's discussion *id.* at 243-44.

[47] *Id.* at 245.

[48] *Id.* at 245-46.

[49] *Id.* at 247.

abuse of discretion. The court held that the district court's findings and conclusions were sufficient to support the interlocutory order; that there was substantial evidence that the enjoined activities would have a significant impact on the aesthetic and recreational value of the area; that irreparable injury could be found under the environmental statutes; that the district court possessed jurisdiction under the Administrative Procedure Act; and that plaintiffs' standing was adequately demonstrated by the possible and significant effect the enjoined actions would have on their aesthetic and recreational interests. Although upholding the preliminary injunction, the Tenth Circuit remanded to the district court for modification or dissolution on the new grounds asserted by the federal defendants.

Cile O. Pace

WATER LAW: A REPUDIATION OF ABSTENTION
United States v. Akin, 504 F.2d 115 (10th Cir. 1974)

United States v. Akin[1] presented two questions regarding federal procedure where water rights are in issue. The first is whether the federal courts have jurisdiction to adjudicate water rights claimed by the United States in its own right and as trustee for Indian tribes where the United States is the plaintiff. Second, if jurisdiction exists, should the action be dismissed on grounds of abstention and comity?

These questions stem from an action brought in November 1972 by the federal government in the United States District Court for the District of Colorado.[2] The purpose was to determine federal and Indian water rights in that part of the San Juan Basin situated in Colorado. Adjudication of water rights in the San Juan Basin had been in process in Colorado state courts for some time, but the United States was not joined in the state action until January 1973.[3] The district court assumed jurisdiction, but dismissed the action on the grounds of abstention and comity. The Tenth Circuit reversed.[4]

[1] 504 F.2d 115 (10th Cir. 1974), *cert. granted*, 421 U.S. 946 (1975).
[2] *Id.* at 116. The district court opinion was not published.
[3] *Id.* at 117.
[4] 504 F.2d 115 (10th Cir. 1974).

Although the circuit court recognized that "the primary issue is whether the trial court erred in its decision to abstain,"[5] the appellate court concentrated on the threshold jurisdictional issue. Its opinion firmly rejected appellee's contention that the McCarran Amendment[6] precludes federal jurisdiction where the adjudication of water rights to a river system is in issue. The Tenth Circuit held that state jurisdiction was not exclusive.[7]

Unfortunately, the court dwelt on the McCarran Amendment at the expense of abstention and comity. For example, the Tenth Circuit recognized the lower court's dismissal was based in part upon comity,[8] but nowhere in the appellate court's opinion is there a discussion of comity; nowhere is there any indication why comity was not an appropriate ground for the district court's dismissal. It would seem, therefore, that in regard to comity the appellate court arbitrarily substituted its discretion for that of the district court.

Almost as abruptly, the Tenth Circuit rejected certain of appellee's contentions regarding abstention and, in so doing, distinguished several key precedents without substantial explanation. Perhaps the most closely analogous case in regard to the abstention problem is *Burford v. Sun Oil Co.*[9] where the Supreme Court, in favoring abstention, noted the importance to the state

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[5] *Id.* at 117.

[6] 43 U.S.C. § 666 (1970). The McCarran Amendment gives permission to join the United States as a defendant in certain water rights adjudications. The amendment provides, in part:

> (a) Joinder of United States as defendant; costs.
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

[7] 504 F.2d 115 (10th Cir. 1974).

[8] *Id.* at 117.

[9] 319 U.S. 315 (1943).

of the natural resources involved, the complexity of the legal issues, the capabilities of the state adjudication system, the value in a unified method of determining cases, and the avoidance of a federal-state conflict. All of these factors appear to be present and substantial in *Akin*, but the Tenth Circuit distinguished *Burford* by simply saying:

> Here the federal court is not short-circuiting or interfering with efforts of a state administrative regulatory system, where the *Burford* rule could operate.[10]

This cryptic conclusion indicates a very narrow reading of *Burford*, but beyond that it teaches us little about the differences between *Burford* and *Akin*.[11]

Other key cases were distinguished without the benefit of more than a cursory explanation.[12] In stating conclusions with little or no reasoning, the appellate court has not made clear why it substituted its discretion for the district court's.[13] And, of perhaps even greater importance, the court did not define the limits of the federal jurisdiction to be exercised under its holding. It did not define the extent to which two parallel systems of water rights adjudication—federal and state—might develop; it did not attempt to limit potential federal-state conflict in this area.[14]

Stanley L. Grazis

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[10] 504 F.2d at 120.

[11] *See also* Comment, *Adjudication of Indian and Federal Water Rights in the Federal Courts*, 46 COLO. L. REV. 555 (1975), for a discussion of possible interpretations of this statement.

[12] *E.g.*, United States v. District Court, 401 U.S. 520 (1971); Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[13] Whether to abstain "involves a discretionary exercise of a court's equity powers." Baggett v. Bullitt, 377 U.S. 360, 375 (1964). *Accord, Burford*, where the U.S. Supreme Court stated that a federal court could abstain "in its sound discretion." 319 U.S. at 317.

[14] For an analysis of the potential ramifications of this broad holding, see Comment, *supra* note 11.

POWER PLAY IN THE NUCLEAR ARENA
Colorado Public Interest Group, Inc. v. Train, 507 F.2d 743 (10th Cir. 1974)

This suit[1] began as a citizen suit[2] against the Environmental Protection Agency for refusal to regulate radioactive effluents discharged into navigable waters by the Atomic Energy Commission's Rocky Flats Plant and by the Public Service Company of Colorado's Fort St. Vrain Nuclear Station.[3] On appeal from the district court's summary judgment in favor of the EPA,[4] Colorado Public Interest Group, Inc. (COPIRG) contended, pursuant to the definition of "pollutant" as set forth in the Federal Water Pollution Control Act Amendments of 1972,[5] that it is a nondiscretionary duty of the EPA to regulate the discharge of *all* radioactive wastes into navigable waters. The EPA argued that only those radioactive materials not subject to regulation under the Atomic Energy Act of 1954 were encompassed by the 1972 Amendments.

The Tenth Circuit, reversing, held that the term "radioactive materials," as found in the 1972 Amendments, meant *all* radioactive materials.[6] In so deciding, the Tenth Circuit determined the respective roles of two major federal agencies, the AEC[7] and the

[1] Colorado Public Interest Group v. Train, 373 F. Supp. 991 (D. Colo.), *rev'd*, 507 F.2d 743 (10th Cir. 1974), *cert. granted*, 95 S. Ct. 2393 (1975) [hereinafter COPIRG v. Train].

[2] Citizen suits are authorized by the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1375 (Supp. 1973) [hereinafter referred to as the 1972 Amendments].

[3] The Rocky Flats Plant, owned by the AEC, is managed by Rockwell International, Inc. The plant is a plutonium processing facility which manufactures components of atomic weapons. Radioactive discharges from the plant include plutonium, americium, tritium, and strontium. The Fort St. Vrain Nuclear Generating Station is the first commercial-sized, high-temperature, gas-cooled nuclear reactor. It will have a capacity of 330,000 kilowatts of power. Liquid wastes from the plant, which will include radioactive effluents, will eventually be released into the South Platte River.

[4] The district court granted the defendants' motion for summary judgment on the following grounds: First, legislative history supported the defendants; second, dual control by the AEC and EPA would result in duplication of effort, confusion, and possible danger to the public; third, the nuclear field is a potentially dangerous area and Congress intended the AEC to have exclusive control; fourth, the energy crisis. 373 F. Supp. 994-95.

[5] *See* 1972 Amendments § 1362(6).

[6] 507 F.2d at 747.

[7] Since the Tenth Circuit decision, the AEC has been abolished. Its regulatory functions have been transferred to the Nuclear Regulatory Commission (NRC) and the AEC's authority over the operation of the Government's nuclear facilities has been assumed by the Energy Research and Development Administration (ERDA). *See* Energy Reorgani-

EPA, in the regulation of radioactive effluent discharges into water from nuclear facilities.[8] Although the EPA has yet to set more stringent effluent standards than those of the AEC, the impact of the case on the predicted growth of nuclear energy[9] may reflect the difference between technological advancement which occurs without adequate consideration of its environmental effect,[10] and technological advancement which is influenced by a greater concern for the interaction between man's tools and the human environment in which he works.[11]

I. STATUTORY BACKGROUND

The Atomic Energy Act of 1954 delegated to the AEC broad powers to control development and growth in the nuclear field.[12] The AEC was entrusted with managing the government's military use of atomic energy[13] and with encouraging the development and use of atomic energy by private enterprise.[14] It is in respect to this latter role that the AEC's duties have seemed inconsistent[15]—promotion of the maximum development and use of at-

zation Act of 1974, 42 U.S.C.A. §§ 5801-91 (Supp. Feb. 1975). To avoid confusion, this article shall refer to the AEC.

[8] *See* text accompanying notes 70-74 *infra*.

[9] It has been predicted that nuclear reactors, now supplying approximately 7 percent of the nation's electricity, will provide over 60 percent by the year 2000. Address by AEC Commissioner Doub, Feb. 26, 1974, *reprinted in* 5 USAEC News Release, No. 11 (March 13, 1974), *as cited in* Palfrey, *Energy and the Environment: The Special Case of Nuclear Power*, 74 COLUM. L. REV. 1375 (1974); Note, *Harnessing the Atomic Juggernaut: The Need for Multi-Lateral Input in Nuclear Energy Decision-Making*, 14 NATURAL RESOURCE J. 411 (1974), *citing* LEWIS, THE NUCLEAR POWER REBELLION 20 (1972).

[10] Gofman & Tamplin, *Nuclear Power, Technology, and Environmental Law*, 2 ENVIRON. LAW 57 (1971); Moore, *The Environmentalist and Radioactive Waste*, 49 CHI.-KENT L. REV. 55 (1972); Note, *Harnessing the Atomic Juggernaut: The Need for Multi-Lateral Input in Nuclear Energy Decision-Making*, *supra* note 9; Comment, *Radioactive Waste: A Failure in Governmental Regulation*, 37 ALB. L. REV. 97 (1972).

[11] Palfrey, *supra* note 9, at 1384, *citing* NATIONAL ACADEMY OF SCIENCES REPORT ON TECHNOLOGY: PROCESSES OF ASSESSMENT AND CHOICE 54-55 (1969).

[12] Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-296 (1970) [hereinafter referred to as Atomic Energy Act].

[13] *See id.* § 2013(c).

[14] Private development and use of atomic energy is to be encouraged "to the maximum extent consistent with the common defense and security and with the health and safety of the public." *See id.* §§ 2013(a), (e).

[15] Seemingly, the inconsistency in AEC duties was alleviated with the Energy Reorganization Act of 1974, which replaced the AEC with the NRC and ERDA. *See* note 7 *supra*. NRC is now responsible for the regulation of the nuclear industry, and ERDA is responsible for the promotion and development of the Government's nuclear facilities. However, as all AEC personnel were simply transferred to NRC and ERDA, it is question-

omic energy in the private sector while also regulating such use under its licensing authority to protect the "health and safety of the public."[16]

The Presidential Reorganization Plan No. 3 of 1970,[17] creating the EPA, brought control of many of the country's environmental concerns under this one agency.[18] Thereafter, the EPA proposed comprehensive standards for radioactive effluents for the entire uranium cycle along with an accompanying Draft Statement of Considerations.[19]

The promulgation and issuance of these effluent standards led to a jurisdictional dispute between the AEC and the EPA. The Office of Management and Budget (OMB) settled this dispute by ruling that the proposed Uranium Fuel Cycle Standards were beyond EPA's authority,[20] and the EPA was deemed to have authority to establish ambient standards only. Authority over effluent standards for radioactive materials remained in the AEC. Settlement of this dispute also resulted in an inter-agency agreement on the respective EPA-AEC roles in controlling radioactive effluents under the 1972 Amendments.[21]

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able whether the split in agencies has resulted in a total split in philosophies.

[16] The various licensing provisions include the Atomic Energy Act §§ 2073, 2093, 2099, 2111, 2131, 2133, and 2139. With no further statutory guide than the protection of the public health and safety, the AEC promulgated regulations defining various permissible levels of radiation exposure for persons working in nuclear plants, minors working in restricted areas, and the average citizen. 10 C.F.R. §§ 20.103-.105 (1975). The AEC also set permissible effluent limitation standards for radioactive materials discharged into water. *Id.* § 20.106, app. B. The plans for every proposed nuclear project were required to comply with these standards in order to obtain a construction license and, later, an operation license from the AEC. *Id.* §§ 50.40(a), 50.50.

[17] Reorganization Plan No. 3 of 1970, Exec. Order No. 11,752, 35 Fed. Reg. 15623, 42 U.S.C. § 4321 (1970) [hereinafter cited as Reorganization Plan].

[18] Among the various functions that were transferred to the EPA were: (1) Those of the Federal Radiation Council; and (2) those of the AEC "to the extent that such functions of the Commission consist of establishing generally applicable environmental standards for the protection of the general environment from radioactive material." Reorganization Plan §§ 2(a)(6), (7).

[19] EPA, DRAFT STATEMENT OF CONSIDERATIONS—ENVIRONMENTAL RADIATION STANDARDS FOR THE URANIUM FUEL CYCLE (Sept. 1973) (report on file with Appellant) [hereinafter cited as Draft Statement of Considerations]. A final Statement of Considerations was issued in 1975.

[20] Memorandum from Ash, Director, Office of Management and Budget, to Administrator Train (EPA) and Chairman Ray (AEC), Dec. 7, 1973 (memorandum on file with the *Denver Law Journal*).

[21] *See* text accompanying notes 34-37 *infra*.

The 1972 Amendments provided a comprehensive scheme, to be administered by the EPA,[22] for the regulation and ultimate elimination of water pollution.[23] Under an express objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[24] the 1972 Amendments mandated the promulgation of ambient and effluent standards for all pollutants.[25] In part for these reasons the 1972 Amendments are considered landmark legislation in the area of water pollution control.[26]

The 1972 Amendment's "no right to pollute" concept[27] was effectuated by making it unlawful for any person to discharge any pollutant except in compliance with certain provisions of the Act.[28] In an attempt to avoid litigable issues,[29] the 1972 Amendments for the first time defined the term "pollutant" as

> dredged spoil, solid waste, incinerator residue, sewage, garbage,

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[22] 1972 Amendments § 1251(d).

[23] *Id.* § 1251(a)(1).

[24] *Id.* § 1251(a).

[25] For general articles on the federal water pollution control legislation, see Barry, *The Evolution of Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation, Symposium: Control of Environmental Hazards,* 68 MICH. L. REV. 1103 (1970); McThenia, *An Examination of the Federal Water Pollution Control Act Amendments of 1972,* 30 WASH. & LEE L. REV. 195 (1973); Note, *Clearing Muddy Waters: The Evolving Federalization of Water Pollution Control,* 60 GEO. L.J. 742 (1972); Note, *Water Quality Control: Federal Water Pollution Control Act Amendments of 1972,* 7 NATURAL RESOURCES LAW. 223 (1974).

[26] While all pre-1972 water pollution control legislation made use only of the ambient standard, the 1972 Amendments have made use of effluent limitation standards as well. Implicit in the earlier legislation was the theory that one had a right to pollute as long as the established water quality level for that body of water was not violated. Now, under the Amendments' added effluent limitation system, the predominant theory, as aptly expressed in the Senate Report, is that "no one has the right to pollute—that pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes." 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93d Cong., 1st Sess., at 1460 (1973) [hereinafter *Leg. Hist.*].

[27] *Id.*

[28] 1972 Amendments § 1311(a).

[29] The Senate Committee on Public Works stated in its report accompanying S. 2770:

> For the first time the Committee would add to the law a definition of the term pollutant. In order to trigger the control requirements over addition of materials to the navigable water, waters of the contiguous zone and the ocean, it is necessary to define such materials so that litigable issues are avoided over the question of whether the addition of a particular material is subject to control requirements.

2 *Leg. Hist.*, at 1494.

> sewage sludge, munitions, chemical wastes, biological materials, *radioactive materials*, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" . . . or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas . . . .[30]

In a step-by-step approach to eliminate pollutant discharges into water by point sources,[31] the EPA was required to set effluent limitations standards, targeted toward two specific dates, for all pollutants.[32] Any point source must obtain a permit from the EPA under the National Pollutant Discharge Elimination System (NPDES) in order to lawfully discharge any pollutant.[33]

As "radioactive materials" are expressly defined as a "pollutant" under the 1972 Amendments, nuclear facilities would appear to be subject to the NPDES license requirement and radioactive effluent limitations as established by the EPA.[34] Yet, as a result of the AEC-EPA agreement,[35] the EPA would establish effluent limitations for only those radioactive materials not under AEC control.[36]

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[30] 1972 Amendments § 1362(6) (emphasis added). The term "pollution" is also defined as "the man-made or man-induced alteration of the chemical, biological, and radiological integrity of water." *Id.* § 1362(19).

[31] Section 1362 provides:

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

Id. § 1362(14).

[32] By July 1, 1977, effluent limitations are to be set requiring the application of the "best practicable" control technology currently available to point sources. *Id.* § 1311(b)(1)(A). By July 1, 1983, effluent limitations are to require the "best available" technology economically achievable for such category or class of point sources. *Id.* § 1311(b)(2)(A). In determining what constitutes "best practicable" and "best available" technology, the EPA is guided by statutory criteria. *See id.* §§ 1314(b)(1)(B), (b)(2)(B).

[33] *Id.* § 1342(a). A license will be issued, after opportunity for public hearing, only upon the condition that the effluent standards established for that point source will be met. *Id.* Any unlicensed discharge of pollutants or any pollutant discharge not in compliance with the license requirements subjects the responsible party to a possible civil action. *Id.* §§ 1319, 1365.

[34] Nuclear reactors would fall within the definition of "point sources" in the 1972 Amendments. *See* note 31 *supra*.

[35] *See* text accompanying notes 18-20 *supra*.

[36] Examples of radioactive materials not under AEC control are radium and accelerator-produced isotopes. 40 C.F.R. § 125 (1975).

The EPA-AEC agreement appears to have thwarted Congressional intent.[37] The AEC, pursuant to the Atomic Energy Act, in the past has regulated the discharge of radioactive effluents from nuclear facilities; however, the 1972 Amendments, as a later expression of legislative intent, appear to mandate regulation by the EPA of all radioactive materials.

II. *COPIRG v. Train*

A. *Analysis of the Tenth Circuit Decision*

The essence of the Tenth Circuit holding, in reversing the district court, is that "radioactive materials" means *all* radioactive materials. To support its decision, the Tenth Circuit relied on various rules of statutory construction and the similarity of this case to *Scenic Hudson Preservation Conference v. Callaway.*[38]

Perhaps one of the most accepted rules of statutory construction is that a court, attempting to determine legislative intent, will look first to the plain meaning of the statute.[39] Where the purpose may be ascertained and the language is clear and unambiguous, a court will not resort to other rules of construction to determine the meaning of the statute.

In applying this rule to the facts of the case, the Tenth Circuit felt the purpose of the 1972 Amendments was to eliminate

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[37] As stated in 40 C.F.R. § 125.1(X) (1975):

> Comment—The legislative history of the Act reflects that the term "radioactive materials" as included within the definition of "pollutant" in section 502 of the Act covers only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to the latter Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term "pollutant" are radium and accelerator produced isotopes.

Id. (citations omitted). The Draft Statement of Considerations also stated:

> This decision was made at AEC's request to avoid duplication of ongoing AEC plant licensing activities, in spite of the rather clear mandate of FWPCA for [EPA regulation of all] radioactive materials. It was made based on EPA's plans to issue these standards for the uranium fuel cycle under authority separate from the FWPCA [the Reorganization Plan].

Draft Statement of Considerations, *supra* note 19, at 41. This comment was deleted from the final Statement of Considerations issued in 1975.

[38] 370 F. Supp. 162 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 127 (2d Cir. 1974).

[39] The Tenth Circuit relied on the following cases: United States v. Ray, 488 F.2d 15 (10th Cir. 1973); United States v. Western Pac. R.R., 385 F.2d 161 (10th Cir. 1967).

all pollution through a comprehensive legislative scheme. The court then considered the language of the 1972 Amendments and found the language to be clear and unambiguous in its plain meaning. "Pollution" is there defined as the "man-made or man-induced alteration of the . . . radiological integrity of water." Further, "pollutant" is defined to include "radioactive materials." Faced with a reasonable and broad purpose, as well as the plain meaning of the definitions, the court concluded that the term "radioactive materials" in fact means *all* radioactive materials.[40]

The court's analysis of the 1972 Amendments under the plain meaning rule is correct—the statute when considered as an isolated entity is clear and unambiguous on its face. Yet the plain meaning analysis appears to have been too narrow in scope—it ignores an apparent conflict between the Atomic Energy Act and the 1972 Amendments. The inconsistency lies in the fact that under the Atomic Energy Act, the AEC set effluent limitation standards for the majority of radioactive materials—source, by-product, and special nuclear material. Yet the 1972 Amendments, as interpreted by the Tenth Circuit, require the EPA to set effluent limitation standards for all radioactive materials.

The Tenth Circuit quickly dismissed EPA's contention that the court should attempt to "juxtapose" the 1972 Amendments and the Atomic Energy Act so as to make them consistent. The consistency interpretation advanced by the EPA was equated by the court with the interpretation found in the EPA regulation. The court held that an administrative interpretation could not be used to thwart the express statutory intent of the 1972 Amendments.[41] While the EPA regulation may be pertinent to the determination of the meaning of the 1972 Amendments (had the court not used the plain meaning rule), it is not pertinent to the issue of inter-statutory inconsistencies. The court then briefly concluded that the two Acts are inconsistent.

An appropriate test to be used in determining consistency or inconsistency between statutes is based on "reasonableness"[42]—

[40] 507 F.2d at 747.

[41] *Id.* at 748.

[42] *See* Stevens v. Biddle, 298 F. 209 (8th Cir. 1924); Yellen v. Hickel, 335 F. Supp. 200 (S.D. Cal. 1971); Golanda Lead Mines v. Neill, 82 Idaho 96, 350 P.2d 221 (1960).

can the two statutes be *reasonably* construed to give effect to both? In this case, according to the EPA, the only construction of the Atomic Energy Act and the 1972 Amendments which would make the two acts consistent is the view taken by the EPA in its regulation[43] that the AEC alone is responsible for setting effluent limitations on by-product, source, and special nuclear material, and that the EPA is responsible for setting effluent limitations for radium and accelerator-produced isotopes. Although this interpretation may be a reasonable construction of the Atomic Energy Act, it is a highly unreasonable construction of the 1972 Amendments: First, it would require a very narrow reading of the latter statute; and second, the 1972 Amendments would become internally inconsistent.[44]

Another perspective on the inconsistency problem was dealt with in *Scenic Hudson.* There the inconsistency existed between one statute's provision for the discretionary exercise of power by one agency and a later statute's provision for the mandatory exercise of power by a different agency over the same subject matter.[45]

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[43] *See* note 37 *supra.*

[44] The 1972 Amendments are of such a broad and comprehensive scope that to narrow the meaning of "radioactive materials" to include only radium and accelerator-produced isotopes—which elements comprise only a small percentage of all radioactive materials—would cause blatant inconsistency. Not only would this narrowing of the definition of "radioactive materials" be inconsistent with the purpose of the 1972 Amendments, it is generally inconsistent with the tendency of courts to construe broadly water pollution control legislation. *See* United States v. Standard Oil Co., 384 U.S. 224 (1966); United States v. Republic Steel Corp., 362 U.S. 482 (1960). The definition of "pollution" as "man-made or man-induced alteration of the . . . radiological integrity of water" would become meaningless, for the vast majority of man-made radioactive materials which alter the "integrity of water" would be exempted from the statute's coverage. *See* note 30 *supra.*

Another provision of the 1972 Amendments provides "[n]otwithstanding any other provision of this chapter, it shall be unlawful to discharge any . . . high-level radioactive waste into the navigable waters." 1972 Amendments § 1311(f). The term "high-level radioactive waste" refers to specific concentrations of radioactive materials and refers only to radioactive materials which are subject to AEC control under the Atomic Energy Act. Brief for Respondent at 9, Train v. COPIRG, 507 F.2d 743 (10th Cir. 1974), *cert. granted,* 95 S. Ct. 2393 (1975) (brief on file with the *Denver Law Journal*). If the basic provisions of the 1972 Amendments were not to apply to *all* radioactive wastes, including those under AEC regulation, it would be meaningless for this provision to contain the clause "notwithstanding any other provision of this chapter."

[45] *Scenic Hudson* considered a provision of the 1972 Amendments which requires that permits be obtained from the Corps of Engineers, with the approval of the EPA, to discharge dredged or fill material. Consolidated Edison, whose hydroelectric plant was in a phase of construction requiring dredging, claimed that the 1972 Amendments' provisions could not have been intended to apply to hydroelectric power plants "because of the

To the extent the statutes overlapped in the potential exercise of powers, the statute with the mandatory duties controlled.

The Atomic Energy Act and the 1972 Amendments may be deemed inconsistent by use of the *Scenic Hudson* mandatory-discretionary distinction. The AEC, under the Atomic Energy Act, has in its *discretion* set effluent limitation standards for radioactive materials. The EPA, pursuant to the 1972 Amendments, is under a *mandatory* duty to set effluent limitation standards for all "pollutants," including "radioactive materials."[46]

As a result of this inconsistency, AEC control over the setting of effluent limitation standards for radioactive materials is extinguished by the 1972 Amendments, which state "[t]his chapter shall not be construed as . . . limiting the authority or functions of any officer or agency of the United States under any other law or regulation *not inconsistent* with this chapter . . . ."[47] The EPA now possesses sole responsibility for the setting of effluent limitation standards pursuant to the 1972 Amendments.

There is much judicial authority supporting the rule of statutory construction that when a statute includes express excep-

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comprehensive regulatory power under which the Federal Power Act is to be wielded by the FPC." 370 F. Supp. at 170. The district court rejected the contention that the FPC had exclusive control over hydroelectric power plants. It held the 1972 Amendments controlled with respect to dredging and filling. The inconsistency between the Acts was simply that, under the Federal Power Act, demands for compliance with dredge and fill requirements would result from a discretionary exercise of power by the FPC. However, under the 1972 Amendments, demands for compliance with such requirements result from a mandatory exercise of power by the Corps and EPA. *Id.*

[46] The EPA, in setting effluent limitation standards, is guided by statutory criteria and must target those standards to the date deadlines set forth in the 1972 Amendments, the final goal being no discharge of pollutants by 1985. *See* 1972 Amendments §§ 1311(b)(1)(A), (2)(A), 1251(a)(1). The EPA thus is under a *mandatory* duty both to set effluent limitation standards in accordance with statutory guidelines and target dates, and to ensure that a point source will be able to meet those standards before issuance of a permit. *See id.* §§ 1342(a)(1), (2).

No provision of the Atomic Energy Act specifically requires the AEC to set effluent limitation standards for the discharge of radioactive wastes. In its discretion, the AEC has chosen to promulgate such standards under the statute's general mandate requiring the AEC to establish minimal licensing criteria to protect the "health and safety of the public." *See, e.g.,* Atomic Energy Act §§ 2073(b), 2093(b). The AEC is neither guided by statutory criteria in determining appropriate effluent standards, nor subject to the target dates found in the 1972 Amendments. Perhaps most importantly, the AEC is not subject to the 1985 "no discharge" goal. The AEC in its discretion could enforce standards to meet the 1972 Amendments' target dates and "no discharge" goal. It is, however, under no duty to do so.

[47] 1972 Amendments § 1371(a)(1) (emphasis added).

tions, the courts will refuse to imply any other exceptions.[48] The Tenth Circuit, in finding that the 1972 Amendments' definition of "pollutant" contained two express exceptions, neither of which related to radioactive material,[49] refused to imply that Congress intended to exclude radioactive materials heretofore regulated by the AEC.[50]

After determining that the 1972 Amendments were clear and unambiguous, the Tenth Circuit refused to deal extensively with the legislative history. The court relied on the rule of statutory construction that "legislative history of a statute cannot be used to change the meaning of a clear and unambiguous statute."[51] The court noted, however, that it viewed the legislative history of the 1972 Amendments as "conflicting and inconclusive."[52]

The 1972 Amendments originated as Senate Bill 2770

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[48] The Tenth Circuit relied on the following: Knapczyk v. Ribicoff, 201 F. Supp. 283 (N.D. Ill. 1962); *In re* Monks Club, Inc., 64 Wash. 2d 845, 394 P.2d 804 (1964); 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION §§ 47.07, 47.11 (4th ed. 1973). *See also* Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607 (1944); Bend v. Hoyt, 38 U.S. (13 Pet.) 263 (1839); Board of Medical Examiners v. Warren Hosp., 102 N.J. Super. 407, 246 A.2d 78 (1968).

[49] *See* text accompanying note 30 *supra*.

[50] 507 F.2d at 747-48.

[51] 507 F.2d at 747. The Tenth Circuit relied on the following cases to support this rule of statutory construction: United States v. Oregon, 366 U.S. 643 (1961); *Ex parte* Collett, 337 U.S. 55 (1949); Gemsco, Inc. v. Walling, 324 U.S. 244 (1945); United States v. Zions Sav. & Loan Ass'n, 313 F.2d 331 (10th Cir. 1963); Haskell v. United States, 241 F.2d 790 (10th Cir. 1957). *See also* United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932); Railroad Comm'n v. Chicago, B. & Q.R.R., 257 U.S. 563 (1922); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

[52] 507 F.2d at 748. There are many reasons why the Tenth Circuit, having commented on the legislative history of the 1972 Amendments, should have probed more deeply into the subject. The district court, although not discussing the legislative history, relied on it in granting summary judgment for the EPA. 373 F. Supp. at 994. Both parties dealt extensively with legislative history in their briefs. Brief for Appellants at 21-32; Brief for Appellees at 20-26; Reply Brief for Appellants at 7-10, COPIRG v. Train, 507 F.2d 743 (10th Cir. 1974) (briefs on file with the *Denver Law Journal*). There is authority for the proposition that legislative history, when available, should always be used in determining legislative intent. *See* United States v. American Trucking Ass'ns, 310 U.S. 534 (1940); Boston Sand & Gravel Co. v. United States, 278 U.S. 41 (1928); Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974); Litchfield Sec. Corp. v. United States, 325 F.2d 667 (2d Cir. 1963). The Supreme Court, even when citing the same rule relied on by the Tenth Circuit, has often looked into the legislative history (since certiorari has been granted in this case, the Supreme Court probably will look extensively at pertinent legislative history). *See, e.g.*, United States v. Oregon, 366 U.S. 643 (1961); *Ex parte* Collett, 337 U.S. 55 (1949); Gemsco, Inc. v. Walling, 324 U.S. 244 (1945).

(S.2770). The definition of "pollutant," as found in S.2770, was very similar to that finally enacted. It included "radioactive materials" as a "pollutant" and the two express exceptions found in the final conference draft of the 1972 Amendments.[53]

The definition of "pollutant" in the House version of the proposed bill, H.R. 11896, is identical to that found in S.2770,[54] except that it contains two express exceptions not found in S.2770,[55] neither of which limits the term "radioactive materials." Yet, the House Committee Report excluded radioactive materials under AEC control from the term "radioactive materials" in the definition of pollutant.[56]

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[53] Section 502(f) of S.2770 stated:

> The term "pollutant" means, but is not limited to, dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, *radioactive materials,* heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, agricultural, and other waste introduced into water: *Provided,* it does not mean (1) "sewage from vessels" within the meaning of section 312 of this Act; or (2) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by the authority of the State in which the well is located.

2 *Leg. Hist.*, at 1697-98 (emphasis added).

[54] *See id.*

[55] The two additional exceptions are found in section 502(6) of H.R. 11896, which stated:

> This term [pollutant] does not mean . . . (C) thermal discharges in accordance with regulations issued pursuant to section 316 of this Act; or (D) organic fish wastes.

1 *Leg. Hist.*, at 1068.

[56] The Report of the House Committee on Public Works accompanying H.R. 11896 contains the following statement:

> [T]he term "pollutant" as defined in the bill includes "radioactive materials." These materials are those not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that Act.

Id. at 818. Representative Frenzel was the most vocal of the House members in opposition to the interpretation given the meaning of "radioactive materials" in H.R. 11896 by the House Committee. He continually insisted that the plain meaning of the bill controlled—there were only four express exceptions; therefore, "radioactive materials" meant all radioactive material. *See, e.g., id.* at 547, 745-46.

Confusion reigned in the House as to the proper interpretation of the term "radioactive materials" in the H.R. 11896 definition of "pollutant." A prime example is found in the House debate over an amendment proposed by Representatives Wolff and Frenzel to ensure the right of the states under the bill to impose and enforce effluent standards for the discharge of radioactive and thermal wastes equal to or more stringent than those

When the final draft of the 1972 Amendments came out of the Conference Committee, a House committeeman consoled concerned representatives that the House Committee interpretation of the term "radioactive materials" had prevailed.[57] Yet, the Conference Committee Report contained no statement, like that found in the House Committee Report, which excluded radioactive material under AEC control from the bill. The Conference Committee's substitute definition of "pollutant" again included the term "radioactive materials" and two express exceptions, neither of which limited that term.[58] Meanwhile, the Senate proceeded to adopt a portion of the unofficial Conference Report,[59] which contained a discussion of the impact of clause 511(c)(2)(B)[60] to the effect that all agencies, such as AEC, must accept as dispositive EPA effluent limitation standards.[61]

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established under the Act. *See id.* at 542. Wolff appeared to have accepted the House Committee statement and sponsored the inclusion of the amendment because the bill failed to prohibit routine discharge of radioactive wastes into water. *See id.* at 544. Frenzel, however, sponsored the amendment simply to clarify the intent of the bill. *Id.* at 547. Of those who opposed the amendment, the basic attitude expressed was that it was an attempt to amend the Atomic Energy Act. They, therefore, assumed H.R. 11896 had not modified AEC control over the discharge of radioactive wastes.

[57] The discussion was between Representative Anderson and House Committeeman Harsha.

[58] *See id.* at 226. The Conference definition included the following changes: First, it omitted the House and Senate provision that the term "pollutant" means, "but is not limited to" the various materials; second, it omitted the phrase "other wastes"; and third, it dropped the last two exceptions in the House definition. *See id.* at 326-27.

[59] *Id.* at 166-184.

[60] Section 511(c)(2) states:

> Nothing in the National Environmental Policy Act of 1969 shall be deemed to . . . (B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this Act.

2 *Leg. Hist.*, at 80.

[61] *See id.* at 183. There are three possible types of pollutants which may be discharged by the nuclear plants under AEC control: High-level radioactive wastes; low-level radioactive wastes; and heat. It would be helpful to determine which of these three pollutants the Conference had in mind when making the AEC an example of an agency which must "bow" to the EPA determination of effluent standards. The Conference Committee could not have been considering high-level radioactive wastes because no effluent limitation standards will be set for them—they are absolutely prohibited from being discharged under the 1972 Amendments. *See* 1972 Amendments § 1311(f). Additionally, it is unlikely that the Conference Committee was considering thermal discharges, as the AEC has continually refused to exercise jurisdiction over thermal discharges and has never set standards for such discharges. *See* Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). The only remaining and logical possibility is that the commit-

In neither of the two original bills nor the final conference bill did a limitation on the term "radioactive materials" reach the status of "legislation."[62] If the Conference Committee intended to limit that term, it chose a completely inadequate means to do so. As aptly stated by the Supreme Court in a recent case, *Train v. New York*,[63] "[L]egislative intention, without more, is not legislation."[64] In these circumstances, the Tenth Circuit could only conclude, as it ultimately did, that the term "radioactive materials" means *all* radioactive materials.

Scenic Hudson,[65] decided in 1973, has particular relevance to *COPIRG v. Train*.[66] That case held that, despite the exclusive control the Federal Power Commission had traditionally exercised over the hydroelectric industry prior to the 1972 Amendments, that industry was not exempt from the scope of the 1972 Amendments.[67] The Tenth Circuit relied on the similarity of these cases as a basis for determining that in accordance with the 1972 Amendments, the EPA, not the AEC, is responsible for the regulation of radioactive materials discharged into water.[68]

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tee was referring to low-level radioactive wastes. The importance of the Conference Committee statement would, therefore, be that the AEC must accept as dispositive the effluent limitation standards set by the EPA for these radioactive wastes. If this is true, the term "radioactive materials" in the 1972 Amendments means *all* radioactive materials.

[62] *See* Brief for Respondent at 55-56, Train v. COPIRG, 507 F.2d 743 (10th Cir. 1974), *cert. granted*, 95 S. Ct. 2393 (1975) (brief on file with the *Denver Law Journal*).

[63] Train v. New York, 420 U.S. 35 (1975).

[64] *Id.* at 45.

[65] Scenic Hudson Preservation Conference v. Callaway, 370 F. Supp. 162 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 127 (2d Cir. 1974).

[66] *See* note 45 *supra* for the facts of *Scenic Hudson*.

[67] In *Scenic Hudson* the Federal Power Act and the 1972 Amendments were deemed inconsistent by use of the mandatory-discretionary distinction. *See* note 45 *supra*. In the alternative, Consolidated Edison argued that the 1972 Amendments were simply not intended to apply to the hydroelectric industry "because of the comprehensive regulatory power which, under the Federal Power Act, is to be wielded solely by the FPC." 370 F. Supp. at 169. In response, the New York federal district court stated:

> The argument [that FPC-regulated industry is exempt from the 1972 Amendments] is persuasive at first blush, but even more plausible is plaintiff's unmentioned contention that Congress would not design an Act which on its face is all-inclusive, but for specifically enumerated exceptions, and yet intend to establish an exception of the scale suggested here. Without any indication that Con Ed's reading of the Congressional will is accurate, the carving out of so major an exception would be improper. If this was Congress' intention and the omission is mere oversight, the remedy rests in Congress' hands . . . .

Id. at 170.

[68] *See* 507 F.2d at 748-49. Analogies between *Scenic Hudson* and this case are easily

In the 1972 Amendments, Congress passed an "all-inclusive" piece of legislation. The AEC and FPC, highly protective of their broad powers, apparently refused to believe that the 1972 Amendments meant to include them among those who had to yield to the 1972 Amendments' commands. The fact remains that, pursuant to the 1972 Amendments, the right to pollute no longer exists. The AEC and FPC have no power to insulate the nuclear and hydroelectric industries from the reaches of the 1972 Amendments, as the Tenth Circuit and federal district court in New York recognized. If Congressional intent has been misconstrued, the remedy lies with Congress.[69]

III. IMPLICATIONS

With the Tenth Circuit holding that the term "radioactive materials" means *all* radioactive materials, the control over the promulgation of effluent limitation standards for radioactive discharges into water has been taken from the AEC and placed exclusively in the EPA. The significance of this new division of agency authority cannot be fully understood without consideration of the AEC's past performance when it was responsible for the establishment of effluent limitation standards for radioactive materials.

Prior to *COPIRG v. Train,* the AEC had promulgated regulations establishing permissible radiation and effluent standards.[70] Although these standards were established to protect the public health and safety, their adequacy was under continuous attack.[71]

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drawn. The AEC has for many years exercised broad control over the nuclear industry similar to the power the FPC has maintained over hydroelectric plants. The AEC had not expressly claimed an exemption from the entire coverage of the 1972 Amendments as Consolidated Edison had claimed in *Scenic Hudson.* Rather, the AEC contended only that those radioactive materials which have been subject to its control—source, by-product, and special nuclear material—were exempt from the definition of "pollutant." Yet, the effect of such a contention is the same. By excluding these radioactive materials from the definition of "pollutant," they would be exempted from any other provision of the 1972 Amendments. Almost all radioactive wastes would thus be excepted, despite the rather clear language in the 1972 Amendments to the contrary. *Id.*; 370 F. Supp. at 170.

As the Tenth Circuit observed:

> "[B]y-product material," "source material," and "special nuclear materials" constitute virtually all of the radioactive materials that are of significant concern to water quality . . . .

507 F.2d at 749.

[69] 507 F.2d at 749; 370 F. Supp. at 170.

[70] *See* note 16 *supra.*

[71] *See* authorities cited in note 10 *supra.*

Despite new data concerning the biological effects of radiation at very low dose rates and the environmental buildup of long-lived radionuclides,[72] the AEC had not modified any of its standards since 1957.[73]

In analyzing the AEC's standards, it appears that the protection of the environment and the American public was second in priority to the AEC's promotional concerns.[74] The Tenth Circuit's decision may ultimately promote greater protection for the American public and environment, for the EPA has no such dual concerns. As the EPA establishes effluent limitation standards for radioactive material, the potentially adverse impact of the AEC priorities will be alleviated. This new division of authority between the AEC and EPA will help ensure that, as our nation works towards energy independence, it does so with a firm commitment to the protection of our environment.

Northern States Power Co. v. Minnesota[75] held that the regulation of radioactive discharges into water had been preempted by the federal government (AEC) under the Atomic Energy Act. As a result of the interpretation of the 1972 Amendments in *COPIRG*, a transfer of authority from the AEC to the EPA has occurred with respect to the establishment of radioactive effluent limitation standards.[76] Questions, therefore, arise as to the cur-

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[72] *Id.*

[73] Thus, a proposed nuclear project had to comply only with 1957 standards in order to obtain an AEC license. As a result of these inadequate and outdated standards, the AEC has been accused of permitting the nuclear industry to conduct "its research and development 'in the field,' with the American public participating as guinea pigs in a gigantic experiment." Gofman & Tamplin, *supra* note 10, at 72.

[74] *See* note 15 *supra.*

[75] 320 F. Supp. 172 (D. Minn. 1970), *aff'd*, 477 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

[76] In its opinion the Tenth Circuit considered the *Northern States* case. It did so in response to the trial court's reliance on the case in granting summary judgment for the defendants and in response to the AEC's concern over the possible impact of this case on *Northern States.* Yet, the Tenth Circuit recognized that the *Northern States* decision is not relevant to the disposition of this case. *See* 507 F.2d at 749.

In *Northern States* the State of Minnesota had attempted, as a condition to granting a permit, to impose upon the Monticello nuclear plant radioactive discharge requirements more stringent than those of the AEC. 320 F. Supp. at 173. The power company sought a declaratory judgment on the issue of whether the AEC's authority to regulate radioactive releases by nuclear power plants was exclusive, thereby preempting any *state* action. The district court held, under the Atomic Energy Act, that the *states* were precluded from concurrent regulation of radioactive discharges into water. *Northern States* is not relevant

rent applicability of *Northern States*, which considered state-federal preemption solely in the context of the Atomic Energy Act.

As a result of the 1972 Amendments, the states are no longer preempted from establishing their own effluent limitation standards for the discharge of radioactive wastes into water.[77] The 1972 Amendments provide two means by which the states may enforce more stringent standards than those set by the EPA. First, prior to the granting of any Federal permit or license under section 1341 of the 1972 Amendments, applicants who intend to construct or operate facilities which are likely to result in any discharge into navigable waters must provide the licensing agency with certification from the state in which the discharge will originate.[78] A second way the states may assert the authority granted them in the 1972 Amendments is to gain control over the NPDES permit program established in that Act.[79]

However, each state permit program is subject to the overview of the EPA.[80] The EPA may withdraw its approval of a state

to the issue of whether a *federal* agency, the EPA, may acquire by congressional mandate control over the regulation of radioactive discharges which was once exclusively held by another agency, the AEC.

[77] Section 1370 of the 1972 Amendments provides that nothing in the Act shall preclude the states from adopting and enforcing their own effluent limitation standards for the discharge of pollutants. The only limitation is that, to the extent an effluent limitation standard is in effect under the Act, the states may not adopt a standard *less* stringent than that in force. Thus the states may adopt effluent limitation standards for radioactive materials more stringent than those promulgated by the EPA. *See* 1972 Amendments § 1370.

[78] *Id.* § 1341(a)(1). A state in granting certification must set forth effluent limitations to ensure that the applicant will comply with applicable effluent limitations under the 1972 Amendments as well as "*any other appropriate requirements of State law.*" *Id.* § 1341(d) (emphasis added). The limitations set forth in such a certification then become a condition of any federal license or permit. *Id.* If a state should determine that the applicant cannot "reasonably assure" compliance with the terms of certification, that certification will be denied and a license or permit may not be issued. *Id.* § 1341(a)(1).

[79] Another provision of the 1972 Amendments allows a governor of a state to submit to the EPA the proposed state program for administering permits for discharges into navigable waters within its jurisdiction, accompanied by a statement from the appropriate state official to the effect that the state laws provide adequate authority for the described program. Each state program must conform with the guidelines promulgated by the EPA. *Id.* § 1342(b)-(c).

[80] The EPA must receive notice of each application and of every action related to the state's consideration of the permit application. *Id.* § 1342(d)(1). The EPA may veto the issuance of a permit by the state under two conditions. First, EPA may object to the issuance of the permit after notification of the "permitting" state's failure to accept

program if, after a public hearing in which it is determined that the state is not administering its program in accordance with the established guidelines and statutory requirements, the state fails to take corrective action.[81]

By transferring control over the discharge of radioactive materials into water from the AEC to the EPA, the 1972 Amendments, as interpreted in this case, do not overrule *Northern States*. The issue of whether the field of regulation of the discharge of radioactive materials is preempted by the Atomic Energy Act is moot; that "field" is now controlled by the EPA under the 1972 Amendments. Pursuant to the 1972 Amendments, states may establish and enforce their own effluent limitation standards for the discharge of radioactive materials. The 1972 Amendments stand as a later expression of Congressional intent. As such, the field of regulation over the discharge of radioactive materials is no longer preempted from concurrent state control.[82]

The Tenth Circuit decision also has important ramifications for the development of the nuclear industry: First, the EPA might promulgate more stringent effluent limitation standards for the discharge of radioactive materials than those of the AEC and require compliance with those standards as a condition to the issuance of a NPDES permit; second, the states might promulgate even stricter effluent limitation standards for the discharge of radioactive materials and require compliance with those standards as a condition of certification or a NPDES permit; and, third, the nuclear industry will stand on the same ground as all other energy sources.

As the EPA will probably set new, more stringent effluent limitation standards for radioactive materials, such standards must be met by the nuclear industry as a condition precedent to receiving an EPA license. A probable effect of these more stringent standards will be to stimulate technological advancement to enable the nuclear industry to meet them.[83]

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recommendations submitted by a state whose waters may be affected. Second, it may object to the issuance of a permit as being outside the guidelines and requirements of the Act. *Id.* § 1342(d)(2).

[81] *Id.* § 1342(c)(3).

[82] As was recognized in *Northern States*, "The United States Congress has the power to preempt a field of activity within its constitutional authority . . . . It also has the power to relinquish that authority to the states." 320 F. Supp. at 179.

[83] A member of the Senate Committee on Public Works said:

Despite the possibility that the EPA may establish effluent limitation standards more stringent than those of the AEC, it must be kept in mind that the 1972 Amendments have "created a phased approach [by] setting deadlines far in advance for achieving gradually more stringent control requirements."[84] In consideration of the time leeways set out in the Act, there should be no reason why the nuclear industry should not be able to meet the deadlines with whatever technological development is necessary. If the industry responds sufficiently to the "psychology" behind the 1972 Amendments, in light of the time granted for such a response, there should be no significant lag in the growth of the nuclear industry.

Perhaps the greatest concern of the nuclear industry, as a result of this decision, is that it may be subject to varying effluent limitation standards from state to state. Since, however, the industry is already subject to such regulation with respect to thermal and chemical releases, the Tenth Circuit's addition of radioactive materials to the list merely imposes a uniform lack of uniformity.[85]

Overall, the Tenth Circuit decision places the nuclear industry on the same grounds as all other energy sources. The nuclear industry has learned the same lesson in *COPIRG v. Train* that the hydroelectric industry learned in *Scenic Hudson:* It is not exempt from the reaches of the 1972 Amendments.

> Our legislation contains an important principle of psychology: Men seldom draw the best from themselves unless pressed by circumstances and deadlines. This bill contains deadlines and it imposes rather tough standards on industry, municipalities, and all other sources of pollution. Only under such conditions are we likely to press the technological threshold of invention into new and imaginative developments that will allow us to meet the objectives stated in our bill.

2 *Leg. Hist.*, at 1278.

[84] Brief for Respondents at 15, Train v. COPIRG, 507 F.2d 743 (10th Cir. 1974), *cert. granted,* 95 S. Ct. 2393 (1975) (brief on file with the *Denver Law Journal*). *See also* note 32 *supra.*

[85] The EPA may be able to hinder the states' enforcement of more stringent effluent limitation standards with respect to the state permit program. Pursuant to section 1314(h), the agency is to establish guidelines for minimum procedural and other elements of any state program. It is conceivable that in establishing these guidelines, the EPA would set an upper limit on the "appropriate stringency" for state standards as a requisite for an approvable program. However, the states would still retain unlimited ability to set as stringent effluent limitation standards for radioactive materials as they desire under the state certification program.

CONCLUSION

The federal district court in *COPIRG v. Train* refused to be responsible for the hindrance of nuclear growth during our nation's energy crisis.[86] The Tenth Circuit accepted that responsibility. By placing control over the establishment of effluent limitation standards for radioactive materials in the EPA, the Tenth Circuit promoted maximum protection for the American public and environment.

Congress must now determine whether the true hallmark of the maintenence of the American way of life is the quality of our environment and the health of the American people or whether it should be our ability to reach energy independence rapidly. The nuclear industry is subject to a multiplicity of standards set by the various states. The option remains open for Congress to modify state certification and state permit programs. If Congress chooses to exercise this option, it will destroy the purpose and intent of the 1972 Amendments—to restore and maintain our nation's waters through a joint federal-state effort. Hopefully, such goals are not so easily forgotten.

In light of its prior attempts to gain control over the radioactive effluent limitation standards, the EPA has finally "won" by "losing" in *COPIRG v. Train.*

Marilyn G. Alkire

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[86] 373 F. Supp. at 995.