Pace Environmental Law Review

Volume 8
Issue 2 *Spring 1991*

Article 10

April 1991

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PACE ENVIRONMENTAL LAW REVIEW

Volume 8 Spring 1991 Number 2

# CASENOTE

# RCRA versus CERCLA: The Clash of the Titans in *Colorado v. United States Dep't of the Army*

**James M. Lenihan**

## I. Introduction

The State of Colorado and the United States Department of the Army have struck the initial blows in what may prove to be a long and significant environmental battle. The focus of the controversy is a toxic waste disposal site in the United States Department of the Army's Rocky Mountain Arsenal (Arsenal). The State of Colorado (Colorado) and the United States Department of the Army (the Army) in *Colorado v. United States Dep't of the Army*, both plaintiff and defendant respectively, have claimed jurisdiction and control over the cleanup of a toxic waste holding basin.[1]

Although the area in dispute is only a small part of the Army's entire Arsenal cleanup effort, the controversy stems from Colorado's claim of jurisdiction over the cleanup under the Resource Conservation and Recovery Act of 1976[2] (RCRA). The Department of the Army, however, claims sov-

1. 707 F. Supp. 1562 (D. Colo. 1989).
2. 42 U.S.C. § 6961 (1988).

ereign immunity from the enforcement actions brought by Colorado. The Army claims that, because it was required to clean up the Arsenal under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[3] (CERCLA), Colorado should not be permitted to interfere with its cleanup actions, which were already being directed by the Environmental Protection Agency (EPA). The United States District Court of Colorado disagreed with the Army. The court held that a federal reservation designated for cleanup by the EPA under CERCLA was not immune from a subsequent state enforcement action brought under RCRA.[4]

The District Court ruling has pushed the issues of sovereign immunity and jurisdiction over federal facilities in environmental litigation to a precipice. As the remainder of this note will demonstrate, the court's decision in this case has left the participants dangling precariously. Part II of this note will discuss the historical background of the Rocky Mountain Arsenal, which is the subject of this litigation. Part III will address the procedural history and legal issues of the controversy between the State of Colorado and the Army. The opinion of the court will be presented in Part IV, with an analysis of the decision following in Part V. Part VI will conclude with an examination of the possible ramifications of this decision and an identification of some troubling issues for future consideration.

## II. Historical Background

Since 1942 the defendant, the United States Department of the Army, has owned and operated a chemical munitions facility outside Denver, Colorado. The facility, known as the Rocky Mountain Arsenal, encompasses about 27 square miles in Adams County, north of Denver.[5] The Arsenal was constructed in 1942 to support the Department of Defense[6] re-

3. 42 U.S.C. §§ 9601-75 (1988).

4. *Army*, 707 F. Supp. at 1571.

5. *Id.* at 1563; United States v. Shell Oil Co., 605 F. Supp. 1064, 1067 (D. Colo. 1985).

6. The U.S. Army is the Department of Defense's sole proponent for production

quirements for life cycle management[7] of chemical agents and munitions.[8] Its current mission includes the demilitarization[9] and disposal of toxic materials.[10]

In 1947, the Army began leasing portions of the Arsenal to private corporations who used the facility to develop, test, manufacture, and package pesticides, herbicides, and other chemicals.[11] The Army built a common sanitary sewer system and a common waste disposal system to handle wastes generated by day-to-day Army operations as well as those of its other lessees.[12] In 1956, the Army constructed and commenced operation of toxic waste holding basins to store and dispose of chemical manufacturing and processing by-products.[13] One of these basins, Basin F, is the subject of this litigation.

The Arsenal waste disposal systems' ultimate failure resulted in a toxic release comprised of commingled wastes generated by the Army and the Arsenal's tenants.[14] This system's failure created what may be one of the worst hazardous and toxic waste sites in America.[15] The released chemicals have taken their toll on the wildlife, contaminating the air, land, ground water, and surface waters within the Arsenal, and by

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and management of conventional ammunition and munitions. United States Army Material Command Mission Statement. Department of Defense Directive 5160.65 (November 1981), *Single Manager Assignment for Conventional Ammunition.*

7. Cradle to grave management of weapon systems or programs. *See* Department of Defense Directive 5000.1 (February 1981); *Defense Aquisition* Department of Defense Instruction 5000.2 (February 1991); *Defense Aquisition Management Policies and Procedures*; Army Regulation 70-1, *Systems Aqusition Policy and Procedures*, ch. 3 (Nov. 12, 1986).

8. The Arsenal was used to manufacture, test, assemble, demilitarize, detoxify, and dispose of chemical warfare agents and products, as well as incendiary munitions. *Army*, 707 F. Supp. at 1563; *Shell Oil Co.*, 605 F. Supp. at 1067.

9. The process of rendering a product useless for military purposes. Webster's 3rd International Dictionary 599 (3rd ed. 1981).

10. *Shell Oil Co.*, 605 F. Supp. at 1067. "The United States Department of the Army has used various portions of the Arsenal for the manufacture, testing, demilitarization, disposal and other handling of various chemical agents and munitions." *Id.*

11. *Id.*

12. *Id.*

13. *Army*, 707 F. Supp. at 1563.

14. *Shell Oil Co.*, 605 F. Supp. at 1067.

15. *Army*, 707 F. Supp. at 1570.

contaminating or threatening to contaminate the surrounding area.[16] As a result of this incident, several legal actions were initiated. Many of the actions remain unresolved, replete with claims, counter-claims and cross claims creating a complex web of pre-trial motions.

## III. Procedural History and Legal Issues

### A. *Procedural History*

In 1975, Colorado issued several administrative orders requiring the Army and Shell Oil Company (Shell) to clean up all sources of designated chemicals, to undertake a groundwater monitoring program, and to cease certain chemical discharges.[17] The Army responded by initiating an investigation and subsequent testing "to determine the existence, extent and sources of contamination at the Arsenal."[18] It also chose to undertake response actions designed to prevent or control the spread of chemicals off the Arsenal property and to prevent public exposure to the chemicals.[19] In 1982, a Memorandum of Agreement was signed by the EPA, Colorado, the Army, and Shell regarding removal, remedial and other response actions taken or planned by the Army.[20]

By December 1983, the Army was completing its response plan for the Arsenal cleanup and had incurred expenses of approximately $48,000,000 as a result of its response to actual or threatened releases at the Arsenal.[21] During this same time, Colorado commenced a civil action by filing suit against the Army and Shell on December 9, 1983.[22] One month later, in

16. *Shell Oil Co.*, 605 F. Supp. at 1067.

17. *Id.* It is important to note that both the accident and ensuing actions taken by Colorado pre-dated both RCRA and CERCLA. The response taken by the Army was in compliance with its own Installation Restoration Program, a self-imposed environmental program adopted throughout the Department of Defense in 1975. For a brief description of the Installation Restoration Program, *see* U.S. Army Corps of Engineers, Commanders Guide to Environmental Compliance, 64-67 (1989).

18. *Id.*

19. *Id.*

20. *Id.* at 1068.

21. *Id.*

22. Colorado v. United States Dep't of the Army, No. 83-C-2386 (D. Colo. filed

January 1984, the Army submitted its Draft Decontamination Assessment for Land and Facilities at Rocky Mountain Arsenal with four alternative proposals for the cleanup.[23] The Army recommended adoption of the first alternative at a cost of $360,000,000.[24] Yet, by October 1984, Colorado still had not accepted the plan.[25]

In October 1984, the Army commenced a CERCLA Remedial Investigation and Feasibility Study at the Arsenal.[26] The Army consequently filed suit against Shell[27] seeking damages of $1.8 billion in potential cleanup costs.[28] The district court consolidated these two cases in *United States v. Shell Oil Co.*, where it denied Shell's pre-trial dismissal motions[29] and ruled that the Army's claim for $1.86 billion was a permissible figure.[30] In June 1986, the interim remedial action

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Dec. 9, 1983).

23. United States v. Shell Oil Co., 605 F. Supp. 1064, 1068 (D. Colo. 1985). "[T]he Rocky Mountain Arsenal Contamination Control Program Management Team outlined four alternative cleanup programs, with costs ranging from $210,000,000 to $1,860,000,000." *Id.*

24. *Id.*

25. *Id.* (citing October 23, 1984 letter from F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, Department of Justice).

26. Colorado v. United States Dep't of the Army, 707 F. Supp. 1562, 1568 (D. Colo. 1989).

27. *Shell Oil Co.*, 605 F. Supp. at 1086.

28. *Id.*

29. *Id.*

> [I] find and conclude, that more efficient management of the action and of No. 83-C-2386 can be accomplished if the two cases are consolidated, at least for all pre-trial matters. Accordingly, IT IS ORDERED that Shell's motion for partial dismissal of the first claim for relief is denied [because CERCLA's statutory scheme authorized recovery of pre-enactment response costs] . . . that Shell's motion to join the Army as defendant is denied [because the Army as defendant would result in the Army suing itself since it is a trustee of federal land] . . . that Shell's motion to join the State of Colorado as a plaintiff is denied [because there was no "substantial risk" that Shell would be subject to multiple or inconsistent obligations] . . . that Shell's renewed motion to strike is denied [because claimed damages were not redundant or scandalous].

*Id.*

30. *Id.* at 1085.

> The $1.8 billion allegation in the complaint corresponds to the "worst case" scenario, the most expensive cleanup option.
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> . . . .

plan for Basin F was proposed by the Army.[31] Thereafter, Colorado filed for an injunction in the state court to halt the Army's alleged present and future violations of pertinent environmental regulations[32] by the continued operation of the 93-acre hazardous waste surface impoundment area known as Basin F.[33] In addition, Colorado specifically asserted numerous violations of Colorado's State Ground Water Monitoring Regulations.[34]

The Army removed the case from the state court to the United States District Court of Colorado in January 1987, where it sought dismissal of the action or, in the alternative, for summary judgment as to Colorado's claims.[35] The Army's position was that Congress had not waived federal sovereign immunity, therefore it was not required to comply with Colorado's hazardous waste management provisions. Moreover, the Army argued that federally-supervised CERCLA cleanup ac-

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The proposal made by the Army is at present tentative and conceptual in nature. Further studies and planning must be conducted before a final decision is made and the plan implemented. Apparently, the Army is seeking a solution in cooperation with the State of Colorado. Colorado has not yet commented on or approved the proposal. Moreover, comments on the plan have not been received from Shell or the public. The Army will review these comments before making a final decision.

*Id.*

31. *Army*, 707 F. Supp. 1562, 1568.

32. *Id.* at 1563; 6 COLO. CODE REGS. § 1007-3 (1982).

33. *Can a Jurisdictional Showdown Under Superfund Be Avoided?*, 19 Envtl. L. Rep. (Envtl. L. Inst.) 10,327-28 (Aug. 1989)[hereinafter *Showdown*].

34. *Id.*

Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities, [6 COLO. CODE REGS. § 1007-3 (1982)] issued pursuant to the Colorado Hazardous Waste Management Act [COLO. REV. STAT. §§ 25-15-301-13 (1982)]. These claims include: (1) failure to provide and monitor complying upgradient monitoring wells, in violation of [section] 265.91(a)(1) (First Claim); (2) failure to submit a specific ground water monitoring program, inviolation of [section] 265.93(d)(2) (Second Claim); (3) failure to determine impact of Basin F on ground water quality assessment, in violation of [6 COLO. CODE REGS. § 1007-3 (1982)] [section] 265.93(d)(2) (Third Claim); and failure adequately [sic] to monitor and report groundwater quality assessment, in violation of sections 265.93(d)(5) and (7).

*Army*, 707 F. Supp. at 1563-64.

35. *Id.* at 1564.

tivities preempted any state initiated RCRA compliance requirements.[36]

In December 1987, Colorado filed an amended complaint against the Army based on a state plan[37] to close Basin F.[38] The Basin F Closure Plan (Plan) which became effective on October 2, 1986 required the Army to close Basin F within one year.[39] Because the Army did not seek review or appeal of this plan, Colorado assumed that it was acceptable to the Army and alleged so in its amended complaint which was the equivalent of an entirely new claim.[40]

During 1988 and 1989, the Army commenced negotiations with Shell to initiate a consent decree, in an attempt to avoid litigation.[41] When a compromise had been reached, the decree was submitted to Colorado where it was flatly rejected. The Army and Shell then attempted to submit the consent decree to the court for its approval, and met with refusal there as well.[42] In January 1989, the Army withdrew the proposed consent decree and initiated a Federal Facility Agreement which it signed with Shell.[43] In response to these maneuvers, the

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36. *Showdown*, *supra* note 25, at 10,328.

37. *Army*, 707 F. Supp. at 1564. "[S]ubsequent to E.P.A.'s authorization to the State of Colorado to operate the State's hazardous waste management program, the Colorado Department of Health ("CDH") issued a final plan to close Basin F, pursuant to State Closure Regulations [6 COLO. CODE REGS. § 1007-3 (1982)]." It appears from the case that the state did not advise the Army that it was developing its own plan, nor did it indicate that the Army's plan, proposed in June 1986, was insufficient. *Id.*; *see supra* note 30 and accompanying text.

38. *Army*, 707 F. Supp. at 1564.

> [T]he plaintiff asserts claims against the Army for: (1) failure to close Basin F in compliance with the Basin F Closure Plan (First Claim); (2) failure to comply with Colorado's Ground Water Monitoring Regulations, a claim with three subclaims, and essentially a reassertion of three of the claims set forth in the plaintiffs' initial complaint (Second Claim); and (3) failure to pay annual operating and waste volume fees, in violation of [sections] 100.31(a) and (b) of State Fee Regulations, [6 COLO. CODE REGS. § 1007-3 (1982)].

*Id.*

39. *Id.*

40. *Id.* Telephone interview with Michael R. Hope, Deputy Attorney General of the CERCLA Litigation Section in Denver, Colorado (Nov. 11, 1989)[hereinafter Interview].

41. *Id.*

42. *Id.*

43. *Id.* The Federal Facilities Agreement is a settlement agreement, the

court denied the Army's motion to dismiss this action and ordered Colorado to amend and update its motions in the action.[44] The court also ordered Colorado to apply for an expedited hearing on any issues not yet decided.[45]

## B. *Legal Issues*

The Army assailed Colorado's enforcement and injunction action under RCRA, claiming that Congress did not waive sovereign immunity for federal facilities designated as CERCLA cleanup sites.[46] It argued that RCRA was unenforceable on two grounds: (1) the enforcement of RCRA was precluded when ongoing CERCLA cleanups are taking place[47] (statutory immunity); and (2) the statutes which Colorado sought to enforce were ill-suited for federal application[48] (statutory deficiency).

Colorado countered that Congress waived sovereign immunity in civil actions against federal agencies where those agencies failed to comply with state hazardous waste management and disposal regulations.[49] It also maintained that the Colorado regulations it sought to apply were identical to those promulgated by the EPA, and applicable to all federal agencies.[50]

### 1. *Statutory Immunity*

The main issue presented by the Army in its motion for summary judgment was that "sovereign immunity is not waived [in situations] where there is an ongoing CERCLA cleanup action at [a] site that addresses hazardous waste re-

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equivalent of a consent decree, except for the requirement of a judicial signature. *Id.*

44. *Id.*

45. Colorado v. United States Dep't of the Army, 707 F. Supp. 1562, 1572 (D. Colo. 1989). The court found that CERCLA did not preclude a RCRA enforcement action and that the state regulations were sufficiently specific to allow enforcement. *Id.*

46. *Id.* at 1564.

47. *Id.* at 1565.

48. *Id.* at 1570.

49. *Id.* at 1564.

50. *Id.* at 1572.

quirements that are the same in substance as those sought to be enforced by [Colorado] under RCRA."[51] The Army also contended that the regulations sought to be enforced by Colorado were neither precise nor objective, and therefore lacked the means by which federal compliance could be fairly gauged.[52] Supplemental briefs submitted by both parties addressed several new aspects of the dispute:

> [W]hether the State is precluded from pursuing this action because the Army has commenced interim cleanup measures at Basin F; whether and to what extent the State will have a role in the Arsenal cleanup if the instant action is dismissed; and whether the State is proceeding under RCRA [section] 7002, [42 U.S.C. § 6972] in this case . . . .[53]

The court heard oral arguments on these questions from both parties.

Colorado argued that the EPA authorized the state to operate its own hazardous waste management program pursuant to section 3006(b) of RCRA.[54] In addition, the state also demonstrated that the Colorado Department of Health (CDH) had developed and issued a final plan to close Basin F.[55] The final plan was issued pursuant to state regulations and became effective October 2, 1986 as a final order of the CDH.[56] Colorado also contended that the Army's failure to appeal or to request review of the plan, which required Basin F's closure by October 2, 1987, constituted an implied acceptance.[57]

The Army responded by reasserting that the entire Arsenal was an ongoing CERCLA cleanup site and therefore, the EPA retained sole enforcement authority.[58] It emphasized

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51. *Id.* at 1565.
52. *Id.* at 1570-71.
53. *Id.* at 1565.
54. *Id.* at 1564, 1567; 42 U.S.C. § 6926(b) (1988).
55. *Army*, 707 F. Supp. 1562, 1564.
56. *Id.*; 6 COLO. CODE REGS. § 1007-3 (1982).
57. *Army*, 707 F. Supp. at 1564.
58. *Id.* at 1567.

that two pending actions, one brought by Colorado and one brought by the Army, had already been filed under CERCLA and were directed at the Arsenal cleanup as a whole.[59] Colorado still maintained that Congress had waived sovereign immunity, allowing states to initiate civil enforcement actions against federal entities regarding hazardous waste management and disposal.[60] Colorado cited the Solid Waste Disposal Act[61] and its amendments under RCRA as the proper authority.[62] The Army disagreed with this interpretation, arguing that CERCLA's enforcement and response provisions preempted and precluded Colorado from enforcing RCRA-based cleanup actions.[63] It also contended that the State's theory was inconsistent with the maxim that RCRA and CERCLA were designed to avoid conflicts and to eliminate cleanup duplication.[64] Although the RCRA regulations which called for

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59. *Id.* at 1564.

60. *Id.*

61. Solid Waste Disposal Act § 6001, *as amended by* the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6961 (1988) which provides in pertinent part:

> Each department, agency, and instrumentality of the executive, legislative and judicial branches of the Federal Government . . . engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirements for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief . . . .

*Id.*

62. *Army*, 707 F. Supp. at 1564.

63. *Id.* at 1565.

64. *Id.* The Army relied on §§ 1006(a) and (b) of RCRA, 42 U.S.C. §§ 6905(a), (b) to support the argument that the Congressional intent behind RCRA and CERCLA was that they be integrated. That section provides in pertinent part:

> Nothing in [RCRA] shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act . . . , the Safe Drinking Water Act . . . , the Marine Protection, Research and Sanctuaries Act of 1972 . . . , or the Atomic Energy Act of 1954 . . . , except to the extent

avoiding duplication did not specifically mention CERCLA, the Army argued that this was only because RCRA predated CERCLA and could not therefore, include it. The Army conceded that Colorado had a role to play in the cleanup, but one governed by the CERCLA provisions.[65]

After presentations by both sides were concluded, the court determined that an accurate restatement of the issue was:

> [W]hether the provisions of RCRA and CERCLA can be harmoniously construed so as to permit the State to pursue a RCRA suit against the Army seeking hazardous waste cleanup and abatement laws at Basin F at the same time as other pending actions instituted under CERCLA are address entire Arsenal cleanup.[66]

The court used this construction of the issue in its determination of the case.

### 2. *Statutory Deficiency*

In its second argument, the Army contended that sovereign immunity was not waived when the State standards or statutes were deficient. It argued that the regulatory standards Colorado sought to apply "[were] not precise or objec-

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that such application (or regulation) is not inconsistent with the requirements of such Acts . . . .

The [EPA] shall integrate all provisions of [RCRA] for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act . . . , the Federal Water Pollution Control Act . . . , the Federal Insecticide, Fungicide, and Rodenticide Act . . . , the Safe Drinking Water Act . . . , the Marine Protection, Research and Sanctuaries Act of 1972 . . . and such other Acts of Congress as grant regulatory authority to the Administrator. Such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in [RCRA] . . . and in the other acts referred to in this subsection.

*Id.*

65. *Army*, 707 F. Supp. at 1566, 1568; CERCLA, §§ 120(f), 121(d), (e), (f), 42 U.S.C. §§ 9620(f), 9621(d), (e), (f) (1988).

66. *Army*, 707 F. Supp. at 1566-67.

tive, and [were] ill-suited for uniform application."[67] Relying on *Florida Department of Environmental Regulation v. Silvex Corp.*[68] and *Kelly v. United States*,[69] the Army claimed that Colorado "failed to promulgate objective and ascertainable regulations by which federal compliance can be fairly gauged."[70] In response, Colorado stated that its environmental statutes and regulations were verbatim recitations of federal regulations promulgated by the EPA.[71] The court held that the statutes and regulations were sufficiently specific and precise to satisfy the term "requirements" as set forth in equivalent federal regulations.[72]

## IV. Opinion of the Court

The district court found the Army's statutory immunity argument unimpressive, holding that a pending CERCLA suit did not preclude a state enforcement action under RCRA.[73] It also determined that the Army's statutory deficiency argument was without merit, finding that Colorado's own pollution regulations "tracked almost verbatim, federal regulations promulgated by E.P.A."[74] It held that the State standards were precise enough to satisfy the term "requirements" as used in RCRA.[75]

### A. *Statutory Immunity*

The district court recognized that the United States cannot be sued without its consent; any legal action must be dis-

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67. *Id.* at 1570.

68. 606 F. Supp. 159 (M.D. Fla. 1985).

69. 618 F. Supp. 1103 (W.D. Mich. 1985).

70. *Army*, 707 F. Supp. at 1570-71.

71. *Id.* at 1572.

72. *Id.* The State compared the language of 6 COLO. CODE REGS. § 1007-3 (1982) with the language of RCRA § 6001, 42 U.S.C. § 6961 (1988). *Id.*

73. Colorado v. United States Dep't of the Army, 707 F. Supp. 1562, 1570 (D. Colo. 1989). "[I] cannot read a conflict into statutes enacted on the same subject matter where none exists. Nor can I supply an amendment to a statute that Congress has chosen not to amend for over eight years." *Id.*

74. *Id.* at 1572.

75. *Id.*

missed for lack of jurisdiction, absent an express statutory waiver.[76] However, the court also concluded that a waiver of immunity must be strictly construed and confined to the terms and conditions specified in the waiver.[77] In order to determine if Congress had given an express statutory waiver of immunity in this case, the court carefully scrutinized the wording of several RCRA and CERCLA sections.[78] The court determined that no statutory reference to avoid conflicting and duplicative cleanup actions between RCRA and CERCLA was apparent.[79]

The district court referred to the well-settled rule of statutory interpretation in *Mardan Corp. v. C.G.C. Music, Ltd.*[80] to support its conclusion that CERCLA was independent of, and in addition to, RCRA.[81] In light of this interpretation, the court gave great weight to CERCLA, section 120(a)(4)[82] which "preserves state enforcement actions at federal facilities that are not listed on the National Priorities List [NPL]."[83] The court also underscored that CERCLA requires the federal government to comply with the Solid Waste Disposal Act and RCRA, regardless of whether the facility is listed on the NPL.[84]

The Army's assertion that RCRA did not specifically discuss or require integration with CERCLA, because CERCLA post-dated RCRA,[85] met with equal difficulty. The court rea-

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76. *Id.* at 1565. *See generally* United States v. Shaw, 309 U.S. 495 (1940); United States v. Testan, 424 U.S. 392 (1976).

77. *Army*, 707 F. Supp. at 1565 (citing Stubbs v. United States, 620 F.2d 775 (10th Cir. 1980) and Reynolds v. United States, 643 F.2d 707 (10th Cir.), *cert. denied*, 454 U.S. 817 (1981)).

78. *Army*, 707 F. Supp. at 1565-69. In deciding that Colorado was not precluded from enforcement actions, the court relied on several statutes: RCRA §§ 1006, 6001, 7002, 42 U.S.C. §§ 6905, 6961, 6972 (1988); CERCLA §§ 114(a), 302(d), 42 U.S.C. §§ 9614(a), 9652(d) (1988); Superfund Amendments and Reauthorization Act, § 120(a)(4), 42 U.S.C. § 9620(a)(4) (1988).

79. *Army*, 707 F. Supp. at 1566.

80. 600 F. Supp. 1049 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986).

81. *Army*, 707 F. Supp. at 1569.

82. 42 U.S.C. § 9620(a)(4) (1988).

83. *Army*, 707 F. Supp. at 1569.

84. *Id.* at 1569-70; CERCLA § 120(i), 42 U.S.C. § 9620(i) (1988).

85. *Army*, 707 F. Supp. at 1566.

soned that if Congress had intended such measures, an amendment to RCRA surely would have materialized in the eight years since its passage. Since Congress failed to include CERCLA as one of those amended provisions, it must not have intended such integration.[86]

The court addressed several of the Army's policy arguments supporting its position. The court rejected the contention that CERCLA enforcement and remediation should be given exclusive jurisdiction.[87] It found no merit to the Army's arguments that CERCLA should be given precedence because it is the most recent statutory scheme, that RCRA would disrupt the ongoing cleanup and serve to duplicate the CERCLA cleanup, or that state RCRA enforcement would undermine the goals and policies of CERCLA.[88] The court also addressed the Army's contention that Colorado's requirements were more burdensome than CERCLA's. The Army argued that the Colorado closure plan and monitoring requirements necessitated obtaining permits, a time-consuming process compared to CERCLA provisions which do not require permits.[89] Referring to its frequent cajoling of both parties for their constant litigation delays, the court reminded the Army that the initial CERCLA action was commenced in 1983, minimizing the effect of any delays possibly attributed to the RCRA actions.[90]

In framing its decision, it appears that the court focused primarily on the safeguards necessary for protecting Colorado's interests. The court rejected the Army's contentions that Colorado's interests were adequately protected by CERCLA.[91] The court agreed with Colorado's allegations that the Army and the EPA were bypassing the state in decision-mak-

86. *Id.* at 1570.

87. *Id.* at 1569. "It appears that CERCLA was intended to operate independently of and in addition to RCRA." *Id.*

88. *Id.* at 1568-72. "Nothing in the cited statutes indicates that a CERCLA action should take precedence over a RCRA enforcement action." *Id.*

89. *Id.* at 1568. "[T]he Army contends, the delays incurred in obtaining permits for RCRA enforcement would frustrate Congress's intent in enacting CERCLA as an effort to 'speed up' the cleanup process." *Id.*

90. *Id.*

91. *Id.* at 1568-69.

ing processes.[92] The court also accused the Army and Shell of bad faith with regards to the cleanup effort and their negotiations toward a consent decree.[93] It assailed the Department of Justice (DOJ) for the apparent conflict of interest,[94] and alleged that the agency could not effectively serve as a vigorous advocate for the public.[95] Finally, the court concluded that in RCRA, Congress has plainly provided Colorado with a meaningful voice in the Arsenal cleanup. The court found that the people of Colorado were best represented by the state in a RCRA enforcement action.[96]

### B. *Statutory Deficiency*

The court addressed the Army's allegation that the "state has failed to promulgate objective and ascertainable regulations by which federal compliance can be fairly gauged."[97] It addressed the Army's reliance on *Florida Department of Environmental Regulation v. Silvex Corp.*[98] and *Kelly v. United States*,[99] distinguishing them on their facts. The court emphasized that the state statutes in those cases failed to provide "objective, quantifiable standards subject to uniform applica-

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92. *Id.* at 1569-72; CERCLA §§ 120(f), 121(d), (e)(2), (f), 42 U.S.C. §§ 9620(f), 9621(d), (e)(2), (f) (1988).

93. Colorado v. United States Dep't of the Army, 707 F. Supp. 1562, 1570 (D. Colo. 1989).

94. *Id.* "Since it is the E.P.A.'s job to achieve a cleanup as quickly and thoroughly as possible, and since the Army's obvious financial interest is to spend as little money and effort as possible on the cleanup, I cannot imagine how one attorney can vigorously and wholeheartedly advocate both positions." *Id.*

95. *Id.*

> I conclude that the E.P.A.'s potential monitoring of the Army's Basin F cleanup operation under CERCLA does not serve as an appropriate or effective check on the Army's efforts. As long as both of these federal agencies are represented in the arsenal CERCLA action by the same Justice Department lawyers who have professed that they have no conflict of interest, even though one of their clients is a plaintiff and another a defendant in the same consolidated action, there is no vigorous independent advocate for the public interest.

*Id.*

96. *Id.*

97. *Army*, 707 F. Supp. at 1570-71.

98. 606 F. Supp. 159 (M.D. Fla. 1985).

99. 618 F. Supp. 1103 (W.D. Mich. 1985).

tion."[100] The District Court of Colorado relied heavily on the language of the Middle District Court of Florida's opinion in *Silvex Corp.*[101] In *Silvex Corp.*, the state sued the Navy for an alleged negligent release of hazardous waste materials in violation of state statutes.[102] As in the present case, the Navy moved for dismissal on the ground that the state statutes were not requirements as envisioned by Congress.[103] The district court in *Silvex Corp.* concluded that both the legislative history of RCRA and other analogous statutes addressing the waiver of immunity, strictly defined requirements as synonymous with state objective regulations.[104] Because the statutes in *Silvex Corp.* failed to set forth specific, precise standards for the disposal of hazardous waste material, the Navy's motion to dismiss was upheld.[105]

The court determined that the facts in *Kelly* were similar to those in *Silvex Corp.*[106] In *Kelly*, the waiver provision contained in the Federal Water Pollution Control Act was interpreted against a state claim brought under Michigan's environmental laws, and asserted against a federal agency.[107] Unlike *Silvex Corp.* and *Kelly*, the court ruled in the present case that the Colorado statutes tracked the federal statutes almost verbatim and were therefore sufficient to satisfy the term "requirements" as used in the regulations.[108]

## V. Analysis

This case presents unusual challenges to traditional anal-

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100. *Army*, 707 F. Supp. at 1572 (quoting Kelly v. United States, 618 F. Supp. 1103, 1108 (W.D. Mich. 1985)).

101. *Id.* at 1571.

102. *See generally* Florida Dep't of Envtl. Regulation v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985).

103. *Id.*; *Army*, 707 F. Supp. at 1571.

104. *See generally Silvex Corp.*, 606 F. Supp. 159 (M.D. Fla. 1988). The Florida statutes in question permitted the State to take emergency action when the spillage of hazardous waste material posed an imminent threat to public health, safety and welfare. *Id.*

105. *Id.*

106. *Army*, 707 F. Supp. at 1571.

107. *See generally Kelly*, 618 F. Supp. 1103.

108. *Army*, 707 F. Supp. at 1571.

ysis for several reasons. First, there is ample support for both the Army's and Colorado's assertions in the statutory provisions of RCRA and CERCLA. To analyze this case and decide that one party in the action was right and another wrong requires one to accept specific provisions of the statutes virtually to the exclusion of others. Second, this case is unique in that two previous actions before the same bench have been consolidated into one action for judicial economy. This has resulted in several inconsistencies between the present case and the findings and reasonings of the same bench in *United States v. Shell Oil Co.*[109]

### A. *Statutory Immunity*

United States agencies cannot be sued without the federal government's consent[110] which is usually embodied in a statutory waiver of immunity. This waiver must be strictly construed and must be confined to the terms and conditions specified therein.[111] The Federal Government can only be sued in those instances where it has given its permission. The courts should limit the exposure of the government by strictly and narrowly interpreting statutes which grant permission to sue. In the present case, the Army conceded that section 6001 of RCRA, read in conjunction with section 7002, contained a waiver of federal sovereign immunity.[112] The Army's sovereign immunity claim, however, detailed a specific instance where the immunity waiver was inapplicable.[113] This was apparently an assault on the requirement that the waiver must be confined to the terms and conditions specified. The gravamen of the Army's claim was that sovereign immunity is not waived when CERCLA cleanup actions are already taking place and a subsequent state enforcement action, addressing substantially

109. 605 F. Supp. 1064 (D. Colo. 1985).

110. *See, e.g.*, United States v. Shaw, 309 U.S. 495 (1940); United States v. Testan, 424 U.S. 392 (1976).

111. *See, e.g.*, Stubbs v. United States, 620 F.2d 775 (10th Cir. 1980); Reynolds v. United States, 643 F.2d 707 (10th Cir.), *cert. denied*, 454 U.S. 817 (1981).

112. Colorado v. United States Dep't of the Army, 707 F. Supp. 1562, 1564-65 (D. Colo. 1989).

113. *Id.* at 1565.

the same hazardous waste requirements, ensues.[114] The Army argued "CERCLA's enforcement and response provisions preempt and preclude a state RCRA-enforcement action with respect to the cleanup of hazardous wastes at the Arsenal."[115] The Army's position is not devoid of statutory support.

RCRA specifically limits the ability of a party to commence a legal action against the government[116] once the Administrator has initiated an action,[117] is engaged in a removal action,[118] has incurred costs to initiate a Remedial Investigation and Feasibility Study,[119] or has obtained a court order and is proceeding with a remedial action.[120]

Comparing the circumstance in this case to the RCRA provisions above, it appears that the cleanup actions taken by the Army support its contention that Colorado's legal actions are prohibited. The Army demonstrated that its Remedial Investigation and Feasibility Study under CERCLA was initiated in October 1984.[121] The interim remedial action plan was proposed in June 1986, well before the commencement of this action by Colorado. The plan was subsequently delivered to the state in December 1987.[122] Therefore, pursuant to section 7002(b)(2)(B) of RCRA, Colorado would be without authority to initiate an action because the Army had already com-

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114. *Id.*

115. *Id.*

116. RCRA § 7002(b)(2)(B), 42 U.S.C. § 6972(b)(2)(B) (1988). ("No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions . . . .").

117. *Id.* § 7002(b)(2)(B)(i), 42 U.S.C. § 6972(b)(2)(B)(i) ("has commenced and is diligently prosecuting an action under . . . section 106 of [CERCLA].").

118. *Id.* § 7002(b)(2)(B)(ii), 42 U.S.C. § 6972(b)(2)(B)(ii) ("is actually engaging in a removal action under section 104 of [CERCLA]").

119. *Id.* § 7002(b)(2)(B)(iii), 42 U.S.C. § 6972(b)(2)(B)(iii) ("[h]as incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of [CERCLA] and is diligently proceeding with a remedial action under that Act . . . .").

120. *Id.* § 7002(b)(2)(B)(iv), 42 U.S.C. § 6972(b)(2)(B)(iv) ("has obtained a court order (including a consent decree) or issued an administrative order under section 106 of [CERCLA] . . . pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.").

121. Colorado v. Dep't of the Army, 707 F. Supp. 1562, 1568 (D. Colo. 1989); *cf. supra* note 26.

122. *Army*, 707 F. Supp. at 1568.

menced removal actions under section 104 of CERCLA and had incurred costs to initiate a Remedial Investigation and Feasibility Study.

The court recognized that the CERCLA Remedial Investigation and Feasibility Study was in progress and that "interim response" cleanup measures by the Army were in fact underway.[123] However, it apparently gave those factors little weight. Ironically, this same district court in *United States v. Shell Oil Co.*,[124] recognized that the Army had been directing cleanup activities at the Arsenal since 1975.[125] These activities amounted to a cost of nearly $48,000,000 as late as December 1983.[126] The court found that Shell Oil Company could be pecuniarily liable under section 107 of CERCLA for actions taken by the Army pursuant to sections 104 and 106.[127] This was possible notwithstanding that some of these costs were incurred prior to CERCLA's enactment.[128] The court also recognized that "Army personnel are currently working to develop a comprehensive cleanup plan, a plan which may require implementation over many years and cost hundreds of millions of dollars."[129]

Although the CERCLA and RCRA provisions mentioned above present strong support for the Army's contentions of statutory preclusion, the court failed to use those provisions in making its decision. Instead, the court gave great weight to the broad provisions of section 6001 of RCRA,[130] and the express waiver of immunity contained therein. In construing the waiver verbatim, the court gave section 6001 of RCRA a strict interpretation. It did not, however, give the provision a nar-

123. *Army*, 707 F. Supp. at 1567.

124. 605 F. Supp. 1064 (D. Colo. 1985).

125. *Id.* at 1084.

126. *Id.* at 1068.

127. *Id.* at 1072-77.

128. *Id.* at 1073. "I conclude that the unavoidably retroactive nature of CERCLA, and Congress' decision in CERCLA to impose the cost of cleaning up of hazardous waste sites on the responsible parties rather than on taxpayers, strongly indicate Congressional intent to hold responsible parties liable for pre-enactment government response costs." *Id.*

129. *Id.* at 1084.

130. *See supra* note 61.

row interpretation as required.

A narrow interpretation of this statute, taken in conjunction with these facts, would require a court to recognize that RCRA, at least inferentially, addressed the integration of enforcement actions.[131] As stated above, the rule that a waiver of immunity must be strictly construed and must be confined to the terms and conditions specified[132] mandates a narrow construction of immunity statutes. In the present case, the integration provisions of RCRA served as a parameter for the district court to determine the extent of the express waiver of statutory immunity. The Army argued that the extent of the waiver of immunity was not governed solely by the express waiver in section 6001 of RCRA, but by that provision taken *in pari materia*. Specifically, the Army contended that section 1006(b)(1) of RCRA would assist in the analysis.[133]

The Army vehemently argued "that Congress intended that RCRA and CERCLA be integrated to avoid conflicts and to eliminate duplication."[134] It found support for this proposition in section 1006(b)(1) which essentially provides that the EPA shall integrate all the provisions of RCRA for enforcement and administration purposes and avoid duplication, wherever possible, with all other environmental regulations and "other such Acts of Congress as grant regulatory authority to the Administrator."[135] Clearly, CERCLA is an act which confers authority on the EPA and as such, should be integrated with RCRA. The court responded by stating that if Congress intended CERCLA to apply as the Army suggested, it would have enacted legislation to that effect.[136] This response by the court can hardly be considered as a strict and narrow construction of a statutory waiver of immunity.

Section 1006(b)(1) of RCRA expressly delineates the desire to avoid duplication of effort and mandates the integration with a litany of other environmental statutes. RCRA also

131. Colorado v. Dep't of the Army, 707 F. Supp. 1562, 1566 (D. Colo. 1989).
132. *Id.* at 1565; *see also supra* note 75.
133. *Id.* at 1566.
134. *Id.*
135. *Id.*; RCRA § 1006, 42 U.S.C. § 6905 (1988). *See supra* note 64.
136. *Army*, 707 F. Supp. at 1566.

includes within its parameters "such other Acts of Congress as grant authority to the [EPA]."[137] CERCLA falls within the category of congressional acts which grant authority to the EPA. Even a narrow construction of section 1006(b)(1) would, therefore, have to include CERCLA as an act which requires integration with RCRA. This was the position suggested by the Army. The court, however, chose a different analysis. It ruled that CERCLA was not specifically mentioned in the statute and thus was not included among those express exceptions.[138] The Army protested that the only reason CERCLA was not mentioned in the RCRA statute was because RCRA pre-dated CERCLA.[139] The court dismissed this point, rationalizing that Congress had eight years subsequent to CERCLA's passage, in which to amend RCRA, but did not do so.[140] Based on these facts, it is difficult to conform the court's rationale with the well settled requirements of strict statutory construction.

The strength of the court's decision stems from section 120(a)(4) of CERCLA[141] which governs state laws concerning enforcement. This provision requires federal facilities to comply with state laws when such facilities are not included on the National Priorities List (NPL). The difficulty with applying this statute to the present facts is that while the entire Arsenal was listed on the NPL, Basin F, a subfacility, was not listed. With the entire Arsenal listed as a federal Superfund site, it is difficult to imagine that every subfacility of the Arsenal would also be required to be listed on the NPL. This diffi-

137. *Id. quoting* RCRA § 1006, 42 U.S.C. § 6905 (1988). "Since it is the E.P.A.'s job to achieve a cleanup as quickly and thoroughly as possible, and since the Army's obvious financial interest is to spend as little money and effort as possible on the cleanup, I cannot imagine how one attorney can vigorously and wholeheartedly advocate both positions." *Id.* at 1570.

138. *Army*, 707 F. Supp. at 1566-70.

139. *Id.* at 1566.

140. *Id.*

141. 42 U.S.C. § 9620(a)(4) (1988). "State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List." *Id.*

culty could be avoided by a strict, narrow interpretation of the waiver of immunity provision. If the district court had followed the recognized requirements for waiver of immunity as delineated by the United State Supreme Court, than Colorado's enforcement action would be precluded as incompatible with section 120(a)(4) of CERCLA. By recognizing that the entire facility was listed on the NPL and therefore remediated under CERCLA provisions, Colorado would not have been allowed to " 'carve out' Basin F and proceed under RCRA, separate and apart from the Army's CERCLA cleanup anticipated for the Arsenal as a whole . . . ."[142]

### B. *Statutory Deficiency*

The Army claimed that Colorado's enforcement action was barred because the state regulations were neither precise nor objective, and ill-suited for uniform application.[143] The court found that there was little merit to these allegations. It based this decision on a word-for-word comparison of the state regulations[144] with the federal RCRA regulations. These regulations were already directly applicable to federal facilities and agencies and track almost verbatim the state provisions.[145] The decision of the court dismissing this claim under a statutory deficiency theory was merited. This was not, however, the principle rationale in the decision of the court. A close reading of the case reveals a deep sense of judicial distrust for all of the parties involved.[146] It appears that this distrust was the foundation for the court's decision.

### C. *Public Policy Considerations*

In denying the Army's motion to dismiss, the court went to great lengths to examine the role that Colorado would play in the event the motion were to succeed. The court found in-

142. *Army*, 707 F. Supp. at 1567.

143. *Id.* at 1570.

144. *Id.* at 1572. A full recitation of the Colorado statutes is provided in an annex to the decision at pages 1572-1577.

145. *Id.* at 1572.

146. *See supra* notes 90, 93-95 and accompanying text.

sufficient the following public protections afforded by CERCLA:[147] 1) the opportunity of the public to participate in the planning and selection of remedial action;[148] 2) the state's right to participate in the cleanup remedy selection process and to seek review of the remedy selected;[149] 3) the state's ability to seek compliance with its own standards;[150] 4) procedures for judicial challenge of the United States remedial action plan prior to implementation;[151] and 5) public participation in the cleanup process by means of written and oral comments in a public meeting near the facility.[152] The court gave several reasons for this determination. First, the Army's cleanup efforts would go unchecked by any party with adverse interests, if the action was dismissed in accordance with the Army's arguments. Second, the court concluded, that the EPA's monitoring of the cleanup under CERCLA did not serve as an adequate check on the Army. Finally, the court feared that if the CERCLA action failed, the people of Colorado would be left to pay for the cleanup.[153]

The court showed several manifestations of distrust of the parties in this case. It determined that there was a conflict of interest within the Department of Justice which precluded them from adequately representing the interest of the general public.[154] It also determined that "the Army's obvious financial interest is to spend as little money and effort as possible on the cleanup . . . ."[155] Furthermore, the court suggested that once the Army was satisfied that it had met its obligations, Colorado would be responsible to its citizens if the process had not been thorough.[156]

In deciding *United States v. Shell Oil Co.*, the court considered these same propositions with somewhat different re-

147. *Army*, 707 F. Supp. at 1568-69.
148. CERCLA § 120(f), 42 U.S.C. § 9620(f) (1988).
149. *Id.* § 121(f), 42 U.S.C. § 9621(f).
150. *Id.* §§ 121(d), (e), 42 U.S.C. §§ 9621(d), (e).
151. *Id.* § 121(f)(3)(B), 42 U.S.C. § 9621(f)(3)(B).
152. *Id.* §§ 113(k), 117, 42 U.S.C. §§ 9613(k), 9617.
153. *Army*, 707 F.Supp. 1562, 1570.
154. *Id.* at 1570.
155. *Id.*; *cf. supra* note 28.
156. *Army*, 707 F. Supp. at 1570.

sults. In *United States v. Shell Oil Co.*, the court determined that Colorado and the Army were co-trustees for the natural resources of the Arsenal with the authority to act on behalf of the public.[157] The court expressly supported the obligations and responsibilities undertaken by the Army.[158] The court determined that as a trustee, the Army had an obligation that went beyond its own interests.[159]

The court's findings in this action raise several questions when compared with the findings in *Shell Oil Co.* The inconsistencies between the decisions in *Army* and *Shell Oil Co.* are significant ones. While the court's concern for the public as voiced here is admirable, it provides little support for its decision in the face of such strong statutory evidence. The statutes do generally show a facial waiver of sovereign immunity in deference to state enforcement actions. Yet, that waiver is extinguished where the EPA has undertaken an action under CERCLA.

## VI. Conclusion

Colorado has a bona fide interest in subjecting federal agencies or facilities within its borders to enforcement actions under the Resource Conservation and Recovery Act of 1976. While the federal government has issued a broad waiver of immunity under these statutes, it is clear that there are specific instances where that immunity is not waived. RCRA specifically provides the EPA to undertake an integration of

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157. *Shell Oil Co.*, 605 F. Supp. at 1080; CERCLA §§ 107(f), 115, 42 U.S.C. §§ 9607(f), 9615 (1988).

158. *Id.* at 1082. "It is the Army that continues to plan, in consultation with the Environmental Protection Agency, a comprehensive solution to the Arsenal contamination problem. It is the Army that is the designated trustee for natural resources at the Arsenal." *Id.*

159. *Id.* at 1083.

> The Army stands before this court not just as a proponent for its own interests, but also as a trustee for the natural resources at the Arsenal. As such, it has a fiduciary obligation to the citizens of this country to ensure that the Arsenal cleanup is complete. As trustee, the Army is bound to accept responsibility for its share of the costs of cleanup and damages for injury to the natural resources.

*Id.*

cleanup actions. The actions taken by the Army were clearly initiated under the penumbra of CERCLA. This court determined that issue in the previous *Shell Oil Co.* decision. As a result, Colorado must defer to the federal government and its agencies (the EPA and the Army) for resolution of this problem.

Nonetheless, Colorado is not without recourse. CERCLA's provisions for state participation in the cleanup have proven extremely effective. Under CERCLA, a state can participate in the planning and selecting of remedial actions. It can seek review of the selected process if it desires, and can even seek compliance with the state's own standards. The only constraint is that the cleanup operation falls under the jurisdiction of the federal government.

Although Colorado made bold allegations of bad faith on the part of the Army, it must be remembered that the Army was developing four response plans, all of which were rejected by Colorado. It is also noteworthy that while the Army was drafting these plans, Colorado was preparing for civil action rather than actively participating in the plans' developments.

Perhaps the strongest support for the Army's contention emanates from the status of this case to date. As of this writing, there has been no activity on any of the consolidated cases concerning the Arsenal. Colorado complied with the judicial direction to amend and update Colorado's motion for preliminary injunction and motion for partial summary judgment within eleven days. The court also directed that the parties submit a subsequent request for an expedited hearing to address remaining issues.[160] That order also was complied with, but that is where it has ended. The court has failed to enforce its decision in this case. Instead the required documents, long since filed, sit awaiting disposition. It is highly probable that any decision on the merits of this case will be appealed.

There is hope that the Army and Colorado can come to terms and settle this matter through an alternative method.

160. Telephone interview with Michael R. Hope, Deputy Attorney General of the CERCLA Litigation Section in Denver, Colorado (Nov. 11, 1989).

Perhaps the parties should enter into a Memorandum of Agreement similar to the one they engaged in earlier. Any further delays will only exacerbate the problem at everyone's expense. The cost of the cleanup increases incrementally with time; the resentment of the public towards both the federal and state governments festers. Moreover, the image of environmental legislation fades into one of uselessness. A judicial direction to adopt an agreement in conformity with both RCRA and CERCLA regulations, where the federal government maintains its status as lead agency enforcing the standards of the Colorado statutes, may also serve to benefit the parties.