
Scott S. Smith
COMMENT

FEDERAL PREEMPTION AND THE AEA: HOW FEDERAL PREEMPTION LAW "NUKES" STATE LAW THAT AFFECTS NUCLEAR WASTE

I. INTRODUCTION

Until 1954, the use, control and ownership of nuclear technology remained a federal monopoly.1 With the passage of the Atomic Energy Act ("AEA") of 19542, the federal government relaxed its monopoly over fissionable materials and nuclear technology by erecting a complex scheme.3 This scheme promotes the civilian development of nuclear energy, while seeking to safeguard the public and the environment from the unpredictable risks of nuclear technology.4 Under the AEA, the Atomic Energy Commission ("AEC") has exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials.5 Upon these subjects, no role was left for the states.6 By providing the federal government with the exclusive power to license these aspects of nuclear materials, the AEA established the safeguards against the unpredictable risks of nuclear technology7.

The AEA does not, however, preserve the federal government as the sole regulator of all matters nuclear. Under the AEA, the states retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other state concerns.8 To ensure that the states may carry out these responsibilities, state public utility commissions or similar bodies are empowered to make the initial decision regarding the need for nuclear power.9 Thus the historic police powers of states to regulate electrical utilities are not to be superseded by the AEA, unless that is the clear and manifest purpose of Congress.10

The interrelationship of federal and state authority in the nuclear energy field has not been simple.11 Congress has frequently amended the federal regulatory structure embodied in the AEA to optimize the nuclear partnership between the states and the federal government.12 In 1959, Congress amended the AEA in order to "clarify the respective responsibilities . . . of the [s]tates and the [Atomic Energy] Commission with respect to the regulation of byproduct, source, and special nuclear materials."13 The 1959 amendment heightened the states’ role by allowing them to enter into an agreement with the Nuclear Regulatory Commission ("NRC") to obtain regulatory authority over certain materials under limited conditions.14 The subject matter of those agreements, however, is limited by the amendment. The amendment, among other things, specifically provides the Commission with authority and responsibility to regulate (1) the construction and operation of any [nuclear] facility, and (2) the disposal of nuclear materials the Commission determines should, because of its potential hazards not be disposed of without a license from the NRC.15 This and similar limitations within the 1959 amendment underscored the distinction between the spheres of activity left respectively to the

4 Id.
5 Id. at 207.
6 Id.
7 See id.
8 Id. at 205.
9 Id. at 206.
10 Id.
11 Id. at 194.
12 Id.
13 Id. at 208-209.
14 The NRC can shift authority to the states for control over byproduct and source material, and over special nuclear material "in quantities not sufficient to form a critical mass." Id. at 209 n. 9.
15 Id.; See also 42 U.S.C. § 2021(c) (1994). Under 42 U.S.C. § 2021(b), an agreement between a state and the NRC provides for the discontinuance of the regulatory authority of the Commission with respect to source materials, and certain byproduct and special nuclear materials. Discontinuance of the regulatory authority of the Commission obviates the need for a license from the NRC to the state for the disposal of these nuclear materials.
The several amendments to the AEA following the 1959 amendment have not disturbed the dual regulation of nuclear-powered electricity generation.

While the dual regulation of the AEA has remained intact, courts continue to adjudicate the issue of whether a state's legislation regulates safety concerns of radioactive material, and is thereby preempted by the AEA. This article provides examples of how states attempt to protect their legislation from preemption by the AEA. It also provides examples of how federal courts decide whether to hear a case involving an issue of federal preemption under the AEA, and if so, how they dispose of the issue. This article is by no means exhaustive, but is merely illustrative of issues surrounding federal preemption under the AEA.

II. THE FEDERAL PREEMPTION DOCTRINE

Under the Supremacy Clause of the United States Constitution, Congress may preempt state law so long as it acts within its constitutionally delineated powers. Congress may preempt state authority by so stating in express terms within its enactments. Absent explicit expressive language, Congress' intent to supersede state law may be found from a scheme of federal regulation pervasive enough to make one reasonably infer that Congress left no room for the states to supplement it. When Congress evidences intent to supersede state law, it evidences intent to "occupy a given field," and any state law falling within that field is preempted.

If Congress has not entirely displaced state regulation over a matter in question, state law is still preempted to the extent it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility." State law also conflicts with federal law, and is therefore preempted, when the state law frustrates Congress' accomplishment of the full purposes and objectives of the federal law.

III. ABSTENTION

A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute, presents a federal question for which federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. Before the issue reaches a federal court, however, a party sometimes institutes proceedings to adjudicate the issue in a state court. When both state and federal courts have concurrent jurisdiction to hear the matter, one party may ask the federal court to decline jurisdiction over the matter in favor of allowing the state court to adjudicate the issue. If the federal court declines jurisdiction over the matter, it has abstained from hearing the case.

Interplay exists between preemption and abstention. When state and federal courts have concurrent jurisdiction to decide preemption questions, a federal court should abstain to allow the state court to consider the preemptive issues. However, if the issues present facially conclusive claims of federal preemption, a federal court will not abstain, but instead will decide the preemption question. The judicially created abstention doctrines suggest that a federal court should not abstain from a case when the issues in the case present facially conclusive claims of federal preemption.
The Pullman abstention doctrine is the oldest of the abstention doctrines. Pullman abstention is appropriate only when three concurrent criteria are satisfied: (1) the federal plaintiff’s complaint must require resolution of a sensitive question of federal constitutional law; (2) that question is susceptible to being mooted or narrowed by a definitive ruling on state issues; and (3) the possibly determinative state law must be unclear. The preemption question, however, is not a sensitive constitutional question in that it does not present any constitutional issues of substance. Although preemption has its doctrinal base in the Constitution, the question is largely one of determining the compatibility of a state and federal statutory scheme. So long as the issue presented to a federal court is the compatibility of state and federal law, Pullman abstention is not appropriate.

Burford abstention allows federal courts to decline to rule on an essentially local issue arising out of a complicated state regulatory scheme. Burford abstention requires: (1) that the state has chosen to concentrate, in a particular court, suits challenging the actions of the agency involved; (2) that federal issues could not be separated easily from complex state law issues with respect to which state courts might have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy. Notwithstanding a fulfillment of the first and third requirements of the Burford doctrine, a preemption case rarely revolves around “complex state law issues.” Rather, a preemption case revolves around whether state law conflicts with federal law, which is not an issue with respect to which state courts might have special competence. Therefore, Burford abstention is particularly inappropriate when the plaintiff’s claim is based on preemption, because abstaining under Burford would be an implicit ruling on the merits.

As opposed to the traditional abstention doctrines, courts use Colorado River abstention in cases that do not involve consideration of proper constitutional adjudication or regard for federal-state relations. A federal court may exercise Colorado River abstention in situations involving the contemporaneous exercise of concurrent jurisdiction. The Colorado River abstention doctrine is based on several considerations including wise judicial administration, conservation of judicial resources, and comprehensive disposition of the litigation. Factors relevant to a court’s decision to abstain under Colorado River include: (1) whether the state court or the federal court has assumed jurisdiction over the res or property; (2) which forum is more convenient to the parties; (3) whether abstention would avoid piecemeal litigation; (4) which court obtained jurisdiction first; and (5) whether federal law or state law provides the basis for the decision on the merits. A case provided later in this article outlines an attempt by a state to persuade a federal court to abstain from deciding a preemption issue under Colorado River abstention.

The Younger abstention doctrine allows a court to abstain from a case so as to avoid unnecessary conflict between state and federal governments. Younger abstention is appropriate in favor of a state court proceeding if (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions. At least one court has held that in cases where the United States seeks relief against a state or its agency, the state and federal governments are in direct conflict before they arrive at the federal courthouse. Since the two governments are in conflict prior to the lawsuit, any attempt to avoid a federal-state conflict is likely futile. Therefore the Younger Doctrine may not be applicable to cases where the U.S. seeks relief against a state.
or its agency because the rationale behind the application of the doctrine no longer exists. Even if a party other than the U.S. seeks to invalidate the state action, the appropriateness of abstention is still predicated solely "upon the significance of the federal interest invoked." A case involving federal preemption under the AEA of a state action that may regulate the safety of radioactive materials likely involves a sufficiently significant federal interest that regardless of the party seeking to invalidate the state action, abstention is rarely appropriate in such a case.

IV. FEDERAL PREEMPTION AND THE AEA

A. Pacific Gas v. State Energy Resources Conservation & Development Commission

Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission serves as the seminal United States Supreme Court case that involves federal preemption under the AEA. In 1974, California passed the Warren-Alquist State Energy Resources Conversation and Development Act. The Act required that a utility seeking to build any electric power generating plant in California, including a nuclear power plant, must apply for certification to the State Energy Commission before beginning construction on the plant. At issue in Pacific Gas were two sections of an amendment made in 1976 to the Warren-Alquist Act that provided additional state regulation of new nuclear power plant construction.

One of the sections at issue in Pacific Gas was Section 25524.1(b) of the 1976 amendment. Section 25524.1(b) of the amendment provided that before a nuclear power plant may be built, the State Energy Resources Conservation and Development Commission must determine on a case-by-case basis that there will be "adequate capacity" for storage of the plant's spent fuel at the time the plant requires such storage. The section also required that each utility provide continuous, on-site, "full core reserve storage capacity" in order to permit storage of the entire reactor if it must be removed to permit repairs of the reactor. In short, this section of the Act addresses the interim storage of spent fuel generated by a California nuclear reactor.

The other section at issue in Pacific Gas was section 25524.2 of the 1976 amendment. Unlike section 25524.1(b) of the amendment, section 25524.2 of the amendment dealt with long-term solutions to nuclear waste. This section imposed a moratorium on the certification of nuclear plants by the State Energy Commission until that Commission finds that an authorized federal agency has approved a demonstrated technology for the permanent disposition of high-level nuclear waste. The section further provides that such a finding must be reported to the California State Legislature, which may nullify that finding.

Pacific Gas and Electric Company and Southern California Edison Company filed an action in the United States District Court requesting a declaration that the two sections of the 1976 amendments to the Act, among other sections within the Act, were invalid under the Supremacy Clause because they were preempted by the AEA. The District Court held that the issues presented by the two sections were ripe for adjudication. The District Court further held that the AEA preempted the two sections because both sections encroached upon the field covered by and conflicted with the AEA.

The State of California appealed the District Court's decision to the Ninth Circuit Court of Appeals. Before the Ninth Circuit reached the merits of the case, it upheld the District Court's holding that section 25524.2 of the 1976

48 Id.
51 Id.
52 Id.
53 Id.
54 Id. at 197-198.
55 Id. at 198.
56 Id.
57 Id.
58 Id.
59 Id.
60 Id.
61 Id.
amendments was ripe for adjudication. However, the Ninth Circuit reversed the District Court’s holding that section 25524.1(b) was ripe for adjudication. The Ninth Circuit held that section 25524.1(b) was not ripe for adjudication because the court could not determine whether the State Energy Commission would ever find a nuclear plant’s storage capacity to be inadequate.

On the merits of the case on appeal, the State of California argued that it designed section 25524.2 within the 1976 amendment to address economic concerns of the construction of a nuclear power plant within its boarders. California argued that the nuclear waste problem could become critical without a permanent means of disposal. The waste problem could then lead to unpredictably high costs, or worse, shutdowns in reactors. California’s arguments persuaded the Ninth Circuit, which believed that “California [was] concerned not with the adequacy of the method, but rather with its existence.” Therefore, the Ninth Circuit held that the AEA did not preempt the sections of the California Code concerning the state’s requirements for the construction of a nuclear reactor within its boarders. Pacific Gas and Electric Company appealed the Ninth Circuit’s decision to the Supreme Court, which granted certiorari to hear the case.

In Pacific Gas, the Supreme Court affirmed the Ninth Circuit’s holding that Pacific Gas’ challenge to section 25524.2 was ripe for adjudication and that section 25524.1(b) was not ripe for adjudication. The rationale behind the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies. The doctrine is also designed to protect agencies from judicial interference until an administrative decision has been formalized, and its effects felt in a concrete way by the challenging parties. In Pacific Gas, the Supreme Court held that the question of preemption is predominately legal, and although an interpretation by California of what constitutes a demonstrated technology or waste under section 25524.2 would have better guided the Court’s decision, resolution of the preemption question did not need to await that interpretation. Furthermore, the Court believed that the section was ripe for review because holding otherwise would likely cause hardship on the utilities that brought the action. If the Court held that the challenge to section 25524.2 was not ripe for review, the utilities could spend millions of dollars on the project without benefit of the certainty that California would certify the project or that a court would strike down the California law. At a broader level, the Court held that delayed resolution of this issue could frustrate the goal of the AEA to promote commercial development of atomic energy. Since the utilities need not await the consummation of threatened injury to obtain preventative relief, but only need a certainty of impending injury, the Supreme Court affirmed the Ninth Circuit’s holding that the issue of preemption concerning section 25524.2 was ripe for adjudication.

The Supreme Court also affirmed the Ninth Court’s holding that section 25524.1(b) was not ripe for adjudication. Section 25524.1(b) of the amendment directs the State Energy Commission to make determinations of the adequacy of a plant’s storage capacity on a case-by-case basis. The Court adopted the Ninth Court’s holding that since it cannot know whether the State Energy Commission will ever find a nuclear plant’s storage capacity to be inadequate, judicial consideration of section 25524.1(b) should await further development. In addition, since the Court held that the

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63 Id. at 918
64 Id.
65 Id.
67 Id. at 213-214.
68 Id.
69 Pacific Legal Found., 659 F.2d at 925.
70 Id. at 926.
71 Pacific Gas and Electric Co., 457 U.S. at 1132.
73 Id.
74 Id.
75 Id. at 201.
76 Id.
77 Id.
78 Id. at 202.
79 Id. at 201-02.
80 Id. at 203
81 Id.
82 Id.
AEA did not preempt section 22524.2 of the 1976 amendment, the Court believed that industry behavior would likely not be uniquely affected by uncertainty surrounding the interim storage provisions of the section.\(^8\) Therefore, the Supreme Court affirmed the Ninth Circuit’s holding that section 22524.1(b) is not ripe for adjudication.\(^4\)

Before deciding whether the AEA preempts section 25524.2, the Supreme Court held that the AEA does not prohibit the states from deciding not to permit the construction of any further reactors.\(^5\) It further held, however, that the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states.\(^6\) When the federal government completely occupies a given field, the test for preemption is whether “the matter on which the state asserts the right to act is in any way regulated by the federal government.”\(^7\) The Court held that a state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field occupied by the federal government under the AEA.\(^8\) Thus, the Court in Pacific Gas needed to determine whether section 25524.2 of the 1976 amendment to the California Act contained a non-safety rationale.\(^9\)

After lending considerable confidence to the Ninth Circuit’s interpretation of the section of the amendment, the Supreme Court held in Pacific Gas that California passed the section for economic reasons.\(^10\) Since California passed the section for economic reasons, the Court held that the section lies outside the occupied field of nuclear safety.\(^11\) Thus, the AEA does not preempt section 25524.2 for infringing upon this occupied field.\(^12\) The Court refused to attempt to ascertain California’s true intent for passing the section of the amendment. The Court believed that a search for California’s intent in passing the section was an “unsatisfactory venture” in that the motives of one legislator for passing the section may be different from the motives of another legislator for passing the section.\(^13\) The Court also believed that a search for the motive of the legislature for passing the section was pointless, given that the states retain the authority over the need for electrical generating facilities.\(^14\) This authority, according to the Court, allows a state to condition the construction of a nuclear power plant in the way that California did through section 25524.2 of the 1976 amendment.\(^15\)

Petitioners in Pacific Gas did not allow the case to end with an adverse ruling by the Court on the issue of whether the section of the amendment infringed on a field occupied by the federal government. Petitioners further argued that the section 25524.2 of the amendment frustrated the AEA’s purpose to develop the commercial use of nuclear power.\(^16\) Since the section frustrates the purpose of the AEA, the petitioners argued that they stand as an obstacle to the accomplishment of the full purposes and objectives of Congress.\(^17\) The Supreme Court did not agree with Pacific Gas’ argument regarding the effect of the sections as an obstacle to the objectives of Congress.\(^18\) The Court stated that a primary purpose of the AEA was the promotion of nuclear power.\(^19\) The Court held, however, that the promotion by the AEA of nuclear power is not to be accomplished “at all costs.”\(^20\) Since the States retained authority under the AEA to regulate the construction of nuclear power plants for economic reasons, the Court held that Congress, rather than the Court, must reallocate the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective.\(^21\)

\(^{8}\) Id.

\(^{4}\) Id.

\(^{5}\) See id. at 211-12.

\(^{6}\) Id. at 212.

\(^{7}\) Id. at 212-13 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947)).

\(^{8}\) Id. at 213.

\(^{9}\) Id.

\(^{10}\) Id. at 216.

\(^{11}\) Id.

\(^{12}\) See id.

\(^{13}\) Id.

\(^{14}\) Id.

\(^{15}\) See id.

\(^{16}\) Id. at 220.

\(^{17}\) Id.

\(^{18}\) Id.

\(^{19}\) Id. at 221.

\(^{20}\) Id. at 222.

\(^{21}\) Id. at 223.
B. United States v. Kentucky

In United States v. Kentucky, the Sixth Circuit Court of Appeals recently applied the regulatory distinction described by the Supreme Court in Pacific Gas. In Kentucky, the State of Kentucky sought to condition the operation of a uranium enrichment facility located within its boarders and owned by the Department of Energy ("DOE"). These conditions, contained within an operating permit issued to the DOE by the State of Kentucky, related to the disposal of radioactive materials in the landfill. The DOE appealed the imposition of these permits through Kentucky's administrative process.

After the State of Kentucky dismissed the DOE's administrative appeal, the DOE filed an action in a Kentucky state court seeking review of the State's administrative decision. Ten days after filing its action in Kentucky state court, the DOE filed another action in the U.S. District Court for the Western District of Kentucky seeking declaratory and injunctive relief on several grounds, including the ground that the AEA preempts state regulations relating to the disposal of radioactive materials. In response to the action filed by the DOE in federal court, the State of Kentucky filed a motion to dismiss in that court claiming, among other things, that the district court should decline jurisdiction over the DOE's action based upon the discretion accorded it under the Declaratory Judgment Act and the Burford abstention doctrine.

The District Court declined Kentucky's motion to dismiss. The court held that it was not required to decline jurisdiction over the case because the DOE presented a facially conclusive claim of federal preemption that did not require the court to interpret state law or make factual findings. The District Court further held that federal law preempts the State of Kentucky's attempt to regulate the DOE's disposal of radioactive waste in the landfill. Kentucky appealed the district court's decision to the Sixth Circuit Court of Appeals.

The Sixth Circuit recognized that Kentucky, through the use of these conditions, sought to regulate solid waste that exhibits radioactivity above de minimis levels and solid waste that contains radionuclides. In 1976, Congress amended the Solid Waste Disposal Act by passing the Resource Conservation and Recovery Act ("RCRA"). The RCRA prohibits the treatment, storage, or disposal of hazardous waste at private or governmental facilities without a permit issued by either the United States Environmental Agency or an authorized state. By its terms, the RCRA expressly contemplates that state and local governments' facilities play a lead role in solid waste regulation. Under the RCRA, hazardous waste is defined as "solid waste." "Solid waste," however, does not include the material covered by the AEA. No federal statute specifically delegates authority to regulate a mixture of the two types of waste.

On appeal to the Sixth Circuit, the State of Kentucky argued that the challenged permit conditions do not constitute regulation of radioactive materials, but merely regulation of solid waste that may be contaminated with radioactivity. The State further argued that since the AEA does not expressly address the disposal of solid waste...
contaminated with radionuclides, the District Court erred in holding that the AEA preempts the conditions without finding actual conflicts between the state and federal requirements.\(^\text{119}\)

The Sixth Circuit was not persuaded by the State’s arguments concerning the preemption issue. To reach its holding, the Sixth Circuit applied the rule set forth in *Pacific Gas & Electric* that the federal government has occupied the entire field of nuclear safety concerns except the limited powers expressly ceded to the states.\(^\text{120}\) Accordingly, the AEA preempts any state attempt to regulate materials covered by the AEA for safety purposes.\(^\text{121}\) The Sixth Circuit held that since Kentucky’s conditions seek to protect human health and the environment, the conditions represent a state’s attempt to regulate materials covered by the AEA for safety reasons.\(^\text{122}\) When the federal government completely occupies a given field, as it has done with safety of radioactive materials, the test of preemption is whether the federal government in anyway regulates the matter on which the state acts.\(^\text{123}\) Therefore, the court held that the AEA preempted the permit conditions issued to the DOE by the State of Kentucky because the permit sought to regulate, for safety reasons, materials covered by the AEA.\(^\text{124}\)

The State also failed to convince the Sixth Circuit that the district court erred on the abstention issue. Abstention is not required in a case presenting facially conclusive claims of federal preemption, where resolution of the dispute does not require the court to interpret state law or make factual findings.\(^\text{125}\) The court held that the DOE’s action for declaratory and injunctive relief presented a facially conclusive claim of federal preemption in that a determination of the preemption question did not require a detailed analysis of state law.\(^\text{126}\) Therefore, the Sixth Circuit held that the District Court did not err by refusing to abstain from hearing the case based on the Declaratory Judgment Act.\(^\text{127}\)

After holding that the District Court did not err under the Declaratory Judgment Act, the Sixth Circuit further held that the District Court properly declined to abstain from exercising jurisdiction under the *Colorado River* and *Burford* doctrines.\(^\text{128}\) The court applied the facts of the case to the factors relevant to the *Colorado River* doctrine, finding that the federal case would resolve the entire dispute between the parties and that abstention is not required to avoid piecemeal litigation.\(^\text{129}\) The court also found that the federal case has been fully litigated whereas neither party has acted in the state case.\(^\text{130}\) Finally, federal law provides the basis for the decision on the merits.\(^\text{131}\) These findings led the court to hold that the District Court did not err under the *Colorado River* doctrine by failing to abstain from exercising jurisdiction in the case.\(^\text{132}\)

The Sixth Circuit also applied the facts of the case to the *Burford* doctrine. The *Burford* doctrine applies in one of two scenarios. First, *Burford* applies if a case presents difficult questions of state law bearing on important state policy concerns that transcend the case at issue.\(^\text{133}\) Since the case involved a question under federal law, not one of state law, the first avenue to *Burford* abstention did not apply to this case.\(^\text{134}\) Second, *Burford* applies if exercise of federal jurisdiction in the case would disrupt state efforts to establish a coherent policy of substantial public concern.\(^\text{135}\) The Sixth Circuit in *Kentucky* held that the District Court’s adjudication did not disrupt Kentucky’s effort to establish a coherent policy of solid waste management except to the extent that such policy oversteps the state’s authority to regulate radioactive materials.\(^\text{136}\) Merely overturning a state policy is not a reason to abstain from adjudicating a case involving a federal

\(^{119}\) Id.

\(^{120}\) Id.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) Id. at 825 (quoting *Pacific Gas and Electric Co.*, 461 U.S at 212).

\(^{124}\) Id. at 823.

\(^{125}\) Id. at 826 (quoting *Bunning v. Kentucky*, 42 F.3d 1008, 1111 (6th Cir. 1994).

\(^{126}\) Id.

\(^{127}\) Id. at 827.

\(^{128}\) Id.

\(^{129}\) Id.

\(^{130}\) Id.

\(^{131}\) Id.

\(^{132}\) See id.

\(^{133}\) Id.

\(^{134}\) Id.

\(^{135}\) Id.

\(^{136}\) Id. at 828.
question. Therefore, the court held that the district court did not err under the Burford doctrine by declining to abstain from exercising jurisdiction in the case.

C. Brown v. Kerr-McGee

The Sixth Circuit is not the first court to encounter a federal preemption case involving waste mixed with both radioactive and non-radioactive material. Prior to the Sixth Circuit’s decision in Kentucky, the Seventh Circuit Court of Appeals decided Brown v. Kerr-McGee Chemical Corporation, which involved waste mixed with both radioactive and non-radioactive material. Unlike the Sixth Circuit in U.S. v. Kentucky, the Seventh Circuit in Brown held that the state action concerning the waste did not fall within a field occupied by federal law. Nonetheless, the court in Brown held that federal law preempted the state action.

In Brown, the Kerr-McGee Company used a factory site in Chicago to process monazite ores containing thorium, a natural radioactive element. The process produced both solid and liquid waste. The company disposed of the solid and liquid waste in a storage area on the factory site. The company ceased the production of monazite ore in 1973, but continued to store the waste on site under a license from the NRC. In 1983, the NRC issued a Final Environmental Statement that outlined alternative proposals for the indefinite storage of the waste located on the Kerr-McGee site.

The plaintiffs in Brown lived in residential property that abutted the Kerr-McGee factory site. The plaintiffs filed the action in United States District Court for the Northern District of Illinois seeking relief on several state law tort theories. The plaintiffs alleged, among other things, that the liquid wastes deposited in ponds at the Kerr-McGee disposal site permeated the soil and polluted the water table. The relief sought by the plaintiffs included an injunction ordering Kerr-McGee to repair or destroy the existing structures on the company’s property and to remove all the hazardous waste to some other location. The District Court ruled against the plaintiffs on their request for an injunction. The District Court held that the request for an injunction ordering that the wastes be removed and stored elsewhere was preempted because the order would conflict with the NRC’s exclusive authority over the disposal of radioactive materials.

On appeal to the Seventh Circuit Court of Appeals, the plaintiffs submitted an argument similar to the one submitted to the Sixth Circuit by the State of Kentucky in U.S. v. Kentucky. The arguments of these parties in the two cases are similar in that both emphasize the nonradiation aspects of the waste in an effort to avoid the application of federal preemption to the state action. The plaintiffs in Brown argued that federal law preempts state regulation of radiation hazards but not state regulation of nonradiation hazards. Consequently, the plaintiffs argued that since Illinois law permits a court to order exhumation of hazardous wastes, the court could find that the nonradiation hazards of the Kerr-McGee wastes justify the removal of the wastes to another site.

The Brown court noted that when a state regulation concerns an activity involving radioactive materials, the preemption issue normally turns on whether the state is regulating radiation or nonradiation hazards. Since states retain
the power to determine the need for a nuclear power plant, the court held that a private plaintiff might rely on state law to obtain injunctive relief from nonradiation hazards.\(^{156}\) Congress clearly did not intend federal law to "occupy the field" of nonradioactive hazardous waste disposal.\(^{157}\) Therefore, if the nonradiation hazardous at the Kerr-McGee site were separable from the radiation hazards, plaintiffs could maintain an action to have the nonradioactive wastes removed to another site.\(^{158}\) Unfortunately for the plaintiffs, however, the radioactive and nonradioactive materials at the Kerr-McGee site were "inextricably intermixed."\(^{159}\)

Even though the waste at the Kerr-McGee site contained both radioactive and nonradioactive waste, the Seventh Circuit in *Brown* held that Congress did not intend to preempt the state laws relied upon by the plaintiffs that affected the waste.\(^ {160}\) The *Brown* court further held that the state law did not fall within a specific field occupied by the federal government.\(^ {161}\) The state laws relied upon by the plaintiffs concern pollution standards, building codes, and public nuisance.\(^ {162}\) These laws are valid in many circumstances that do not involve radioactive materials.\(^ {163}\)

Although the state laws did not encroach upon an occupied field of the federal government, the state injunction is still preempted if a conflict exists between state and federal law.\(^ {164}\) The waste at the Kerr-McGee site consisted of "byproduct material" under the AEA.\(^ {165}\) The NRC has exclusive authority to regulate the radiation hazards of the byproduct material.\(^ {166}\) The FES issued by the NRC for the Kerr-McGee site analyzed several alternatives for the disposal of the on-site waste. The *Brown* court held that an injunction ordering Kerr-McGee to remove the byproduct material from the site would substitute the judgment of the district court for that of the NRC as to the best method of storing the waste material.\(^ {167}\) The injunction would prevent the NRC from choosing the most appropriate site to send the material.\(^ {168}\) Therefore, the Seventh Circuit held that federal law preempted the state injunction because the injunction would stand as an obstacle to the accomplishment of the full purposes and objectives of federal regulation of radiation hazards.\(^ {169}\)

### D. Kerr-McGee v. City of West Chicago

Litigation concerning the planned disposal of radioactive waste at the Kerr-McGee West Chicago site did not end with the *Brown* case. After the Seventh Circuit held in *Brown* that the AEA preempted the injunction sought by the plaintiffs in that case, Kerr-McGee submitted to the NRC a plan for on-site disposal of the radioactive waste.\(^ {170}\) In April 1989, the NRC concluded that the on-site plan submitted by Kerr-McGee was the "preferred course of action" to a number of off-site alternatives.\(^ {171}\) The NRC subsequently issued a license to Kerr-McGee to begin implementation of the plan.\(^ {172}\)

On March 5, 1990, Kerr-McGee informed the City of West Chicago that it would begin work the following day on the project outlined in the Kerr-McGee plan.\(^ {173}\) The City responded by informing Kerr-McGee that it planned to hold Kerr-McGee to compliance with the Erosion and Sedimentation Regulations outlined in West Chicago Code.\(^ {174}\) The next day City officials posted a stop work notice at the site, stating that all persons ignoring the notice are liable for arrest.\(^ {175}\)

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156  Id. at 1241.
157  Id.
158  Id.
159  Id.
160  Id.
161  Id.
162  Id.
163  See id.
164  Id.
165  Id. at 1242.
166  Id.
167  Id.
168  Id.
169  Id.
170  Kerr-McGee Chemical Corp. v. City of West Chicago, 914 F.2d 820, 822 (7th Cir. 1990).
171  Id.
172  Id.
173  Id.
174  Id.
175  Id.
Without testing this threat or applying for a City permit, Kerr-McGee filed an action with the United States District Court seeking a temporary restraining order and a preliminary injunction against the City of West Chicago. 176

In Kerr-McGee v. City of West Chicago, the United States District Court denied Kerr-McGee’s request for a preliminary injunction after finding that Kerr-McGee did not make a minimal showing of some likelihood of success on the merits. 177 The District Court based its holding upon a finding that Kerr-McGee, in its license request, represented to the NRC that its disposal plans would conform strictly to the City’s Code. 178 Since Kerr-McGee represented that its plans would conform to the City’s Code, the District Court held that the City’s enforcement of its Code could not conflict with federal law. 179 Thus, the District Court ruled against Kerr-McGee.

Kerr-McGee appealed the District Court’s decision to the Seventh Circuit Court of Appeals. 180 Before reaching the merits of the case, however, the Seventh Circuit faced an issue of ripeness similar to that the Supreme Court faced in Pacific Gas. 181 The City argued that if Kerr-McGee applied for a City permit, then the City might find Kerr-McGee’s plans in complete compliance with the City’s Code. 182 Therefore, the City argued that the Kerr-McGee’s suit was premature since Kerr-McGee had not sought to comply with the City’s Code. 183

The Seventh Circuit held that the action brought by Kerr-McGee was ripe for consideration. 184 It reached this holding by comparing the obstacle presented to Kerr-McGee by the City’s Code and the obstacles presented to the Petitioners in Pacific Gas by the two sections of the 1976 amendment to the California Act. 185 The court found that since Kerr-McGee requested an injunction and declaratory judgment, the City could not apply any aspect of its Code. 186 The obstacle presented to Kerr-McGee is similar the obstacle presented to the petitioners in Pacific Gas by section 25541.2 of California’s Act. 187 The Seventh Circuit also held that since Kerr-McGee did not simply object to an application of a particular regulation, the obstacle presented to Kerr-McGee was not similar to the obstacle presented to the petitioners in Pacific Gas by section 25541.1(b) of the California Act. 188 The Supreme Court in Pacific Gas held that the request for injunction against California’s implementation of section 25541.2 was ripe for review, but also held that the request for injunction against section 25541.1(b) was not. 189 Therefore, because Kerr-McGee’s obstacle posed by the City of West Chicago is similar to that posed to the Pacific Gas petitioners by section 25541.2 and dissimilar to that posed to the petitioners by section 25541.1(b), the Kerr-McGee court held that Kerr-McGee’s requested injunction was ripe for review. 190

After the Seventh Circuit declined to abstain from exercising jurisdiction in the Kerr-McGee case, 191 and after the court decided that Kerr-McGee stated a cause of action cognizable by the federal courts, 192 it turned to the merits of the case. The Seventh Circuit restated the rule that the NRC has exclusive authority to regulate radiation hazards associated with the materials and activities covered by the AEA, but that states and local agencies retain the right to regulate non-radiation hazards. 193 Thus, the AEA does not displace local regulations that do not involve or directly interfere with federal regulation of radiation hazards. 194 Furthermore, for a state law to fall within the preempted zone, it must have

176 Id. at 822-23.
177 Id. at 823.
178 Id.
179 Id.
180 Id.
181 Id. (citing Pacific Gas & Electric Co., 461 U.S. at 190).
182 Id.
183 Id.
184 Id. at 824.
185 Id. at 823-24.
186 Id. at 823.
187 Id.
188 Id.
189 Id.
190 Id. at 824.
191 Id.
192 Id. at 825.
193 Id.
194 Id. at 826.
some direct and substantial effect on the decisions made by those that build or operate nuclear facilities concerning radiological safety levels.\textsuperscript{195}

In \textit{Kerr-McGee v. City of West Chicago}, Kerr-McGee conceded that the City’s Code on its face concerned matters unrelated to radiological hazards.\textsuperscript{196} Kerr-McGee filed the suit, however, asking for a determination by the court that some applications of the Code would in fact present an obstacle to the NRC’s regulation.\textsuperscript{197} Kerr-McGee maintained that the Code would present an obstacle because it regulated matters, such as erosion, run-off, dust, and sediment, that the NRC reserved the right to scrutinize.\textsuperscript{198} In response to this argument, the Seventh Circuit reiterated its holding in \textit{Brown} that the City is not precluded from visiting the same areas touched upon by the NRC’s comprehensive licensing scheme so long as the City does not interfere with the regulation of radiological hazards.\textsuperscript{199}

Kerr-McGee petitioned the court to unmask the true intent in requiring the company to obtain the City’s approval before Kerr-McGee began implementation of the project.\textsuperscript{200} In its effort to persuade the court to find this intention by the City, Kerr-McGee cited the City’s well-documented opposition to on-site encapsulation as proof that the City will not treat the Kerr-McGee project as just another local development.\textsuperscript{201} Just as the Supreme Court in \textit{Pacific Gas} declined to inquire into California’s intention for passing the section at issue in that preemption case, the Seventh Circuit in \textit{Kerr-McGee v. City of West Chicago} refused to inquire into the reasons why the City decided to pass its Code and apply it to Kerr-McGee.\textsuperscript{202} Since the Code is “radiation neutral,” and since the mere exercise of jurisdiction by the City does not create an irreconcilable conflict with the objectives of federal law, the Seventh Circuit held that the Supremacy Clause did not invalidate the City’s actions on the basis that those actions may violate the Clause at some later date.\textsuperscript{203}

While the court ruled in favor of the City in \textit{Kerr-McGee v. City of West Chicago}, it refused to adopt a holding sought by the City. In \textit{Kerr-McGee v. City of West Chicago}, the City asked the court to overrule its earlier holding in \textit{Brown}.\textsuperscript{204} In \textit{Brown}, the Seventh Circuit held that the NRC’s licensing of the West Chicago site is part of a regulatory scheme that preempts local control.\textsuperscript{205} The City urged the court to overrule \textit{Brown} and find that the NRC gave Kerr-McGee only “permission” to dispose of waste on the Kerr-McGee site.\textsuperscript{206} By only giving Kerr-McGee permission for on-site disposal of the waste, the City argued that the use of its Code to force Kerr-McGee to dispose of the tailings off-site would not interfere with a federal scheme.\textsuperscript{207} The Seventh Circuit refused to adopt this holding urged by the City because, in effect, that approach would give the City a veto power over the NRC’s licensing scheme in contravention of express congressional intent.\textsuperscript{208}

V. Conclusion

Since Congress passed the AEA in 1954, the federal government has retained complete control over safety matters concerning radioactive materials. This retention illustrates the federal government’s continuing belief that the safety of radioactive material is too important an issue to allow in the hands of the states. States’ power to regulate these matters is solely derived from permission by the federal government. Furthermore, states’ are often unable, in a preemption case, to persuade a federal court from abstaining in the interests of federalism or comity. Preemption issues are almost exclusively issues regarding federal law. Since federal courts rarely abstain from hearing a case that involves mostly federal law, the federal government usually decides the life of a state’s legislation that arguably concerns the safety of radioactive material.
Congress' reluctance to overturn cases such as *Pacific Gas* and *U.S. v. Kentucky* by passing legislation that provides states with the power to control the safety of radioactive material represents a rationale judgment of the federal government. If the federal government were to believe that the states could control the safety of radioactive material as effectively and uniformly as the federal government controls the safety of such material, then Congress' reluctance to concede the power to the states is unjustifiable. Since the advent of nuclear technology, however, Congress has not believed that the states can collectively ensure the safety of radioactive material as well as the federal government ensures such safety. Without proof that the states can collectively ensure the safety of radioactive material on a level commensurate with the level of safety achieved by the federal government, Congress should not concede to the states the ability to control the safety of material as dangerous as radioactive material.

Although the states cannot control the safety of radioactive material, courts facing the issue of whether to use the AEA to preempt a state law should continue to stand guard against infringing upon that state's vested rights. A law that appears on its face to regulate the safety of radioactive material may, in fact, be applied by the state to regulate a matter unrelated to such safety. Unless the language of a state law conclusively illustrates to a court that the application of the state law affects the safety of radioactive material, the court should wait until the application of the law by the state to determine whether to invalidate it using federal preemption under the AEA.

Scott S. Smith