SOLANO GARBAGE CO. v. CHENEY

779 F. Supp. 477 (1991) | Cited 0 times | E.D. California | July 30, 1991

FINDINGS AND RECOMMENDATIONS

This matter is before the court on plaintiffs' motion for reconsideration and on cross-motions for summary judgment. [1"] Plaintiffs seek reconsideration of the district court's order of February 14, 1989, granting in part and denying in part the government's motion for summary judgment.

BACKGROUND

This action arises out of two bid solicitations issued by the United States Department of the Air Force, Base Contracting Division, at Travis Air Force Base in Fairfield, California for refuse removal from Travis. Plaintiff Solano Garbage Company has an exclusive franchise with the city of Fairfield to provide garbage collection services in the city. Travis Air Force Base is located within Fairfield. For several years, Travis has contracted with three independent contractors, not including Solano, to provide garbage collection services on the base.

Prior to 1987, plaintiff submitted an unsuccessful bid for one of the collection contracts at Travis. Plaintiff subsequently filed a bid protest with the General Accounting Office ("GAO"). On February 5, 1987, the GAO issued a decision denying the protest. As part of the grounds for denial, the GAO found that Travis was a "major federal facility" within the meaning of 40 C.F.R. § 255.33 and therefore entitled to treatment as a separate municipality for purposes of the Resource Conservation and Recovery Act, 42 U.S.C. § 6961.

In 1988, one of the contractors notified Travis that it would be unable to continue to perform its contractual obligations. On October 5, 1988, Travis issued a solicitation for bids for refuse removal. A contract was awarded pursuant to this solicitation on November 1, 1988. On November 21, 1988, Travis issued a second solicitation for bids for refuse removal services for an initial period of six months with four twelve-month optional extensions through September 30, 1993. That contract has also been awarded to a contractor other than plaintiff.

Plaintiff filed the instant action on October 11, 1988, together with a request for a temporary restraining order. In its original complaint, plaintiff sought declaratory relief in the form of a declaration that an award of the refuse collection contracts to any party other than plaintiff or the City of Fairfield [2"] would violate 42 U.S.C. § 6961 ("RCRA"). Plaintiff also sought an injunction barring the defendants from violating RCRA and from awarding contracts illegally in violation of that statute. [3"]

By written order filed November 29, 1988, the district court denied plaintiff's application for a temporary restraining order. [4]" The court found that any possible irreparable financial injury was "self-inflicted" because plaintiff had failed to assert its legal claim in a timely fashion.

Subsequently, plaintiff filed a motion for a preliminary injunction and defendants filed a motion for summary judgment. By order filed February 14, 1989, the district court granted partial summary judgment for defendants and denied plaintiff's motion for a preliminary injunction. The district court held that 40 C.F.R. § 255.33 "represents an appropriate exercise by EPA of its statutory mandate to promulgate guidelines" and that those guidelines were part of the mandated California state plan discussed infra. The court held, however, that factual issues remained as to whether Travis was a "major federal facility" within the meaning of the regulation. The instant motions for reconsideration and for summary judgment followed.

JURISDICTION

In the February 14, 1989 order the district court held that 28 U.S.C. § 1491 did not vest exclusive jurisdiction over plaintiffs' claim for pre-award injunctive relief in the United States Claims Court. 28 U.S.C. § 1491(a)(3) provides: "To afford complete relief on any contract claim brought before the contract is awarded, the [Claims Court] shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief." Thereafter, in J.P. Francis & Associates v. United States of America, 902 F.2d 740 (9th Cir. 1990), the Ninth Circuit held that § 1491(a)(3) divests district courts of subject matter jurisdiction over pre-award government contract claims. 902 F.2d at 742. By order filed June 25, 1990, this court directed the parties to submit supplemental briefing on the jurisdictional question in light of J.P. Francis.

It appears that the contract at issue in this case was awarded on April 1, 1989. See Declaration of Gary R. Gaudreau, Exhibit D to Plaintiff's Statement of Undisputed Material Facts, filed August 14, 1989. Accordingly, assuming that the claims in this case are contract claims, they are now post-award claims and § 1491(a)(3) does not divest the district court of subject matter jurisdiction.

Defendants also argue that the government has not waived sovereign immunity over plaintiff's claims. The government contends that plaintiff's claims are, in effect, claims for specific performance, and then contends that the United States has not waived sovereign immunity over claims for specific performance. Price v. U.S. General Services Administration, 894 F.2d 323, 324 (9th Cir. 1990).

Plaintiff seeks declaratory and injunctive relief barring Travis Air Force Base from performing under a contract entered into in violation of RCRA. In Parola v. Weinberger, 848 F.2d 956 (9th Cir. 1988), the Ninth Circuit affirmed a district court decision granting summary judgment to plaintiffs in that case and "enjoining the defendants from awarding the garbage collection contract to any party other

than Parola." Id. at 958. The court noted that "'there is no question that a district court may "enjoin the performance of a [government] contract if the award was the result of procedures not comporting with the law."'" Id. at 959 (citations omitted). Parola is controlling here. The district court has jurisdiction over this action insofar as plaintiff seeks to enjoin the government from performing under an illegal contract. See also Waste Management of North America v. Weinberger, 862 F.2d 1393, 1397 (9th Cir. 1988).

The government also contends that it has not waived sovereign immunity for suits against "major federal facilities" and that if the court determines that Travis is a major federal facility, this case should be dismissed for lack of subject matter jurisdiction. The government contends that neither RCRA nor the APA waive sovereign immunity for this claim. The government's argument in this regard is inextricably intertwined with the merits of both the request for reconsideration and the cross-motions for summary judgment and need not be separately resolved.

REQUEST FOR RECONSIDERATION

Plaintiff seeks reconsideration of that portion of the district court's February 14, 1989 order which held that 40 C.F.R. § 255.33 "represents an appropriate exercise by EPA of its statutory mandate to promulgate guidelines, and that those guidelines are applicable to the California plan." Order of February 14, 1989, at 5. Plaintiff asks the court to reconsider the previous interpretation of 40 C.F.R. § 255.33 or, in the alternative, to find that the regulation as interpreted in the earlier order is in excess of the statutory authority of the EPA under RCRA. [5]"

The present controversy arose out of the February 5, 1987 decision by the General Accounting Office ("GAO") interpreting this regulation to provide an exemption from local regulation for major federal facilities and finding that Travis Air Force Base was a major federal facility within the meaning of the regulation Defendants have continued to follow that interpretation in their decisions concerning procurement of refuse collection services. Resolution of the issue presented requires interpretation of both 42 U.S.C. § 6961 and 40 C.F.R. § 255.33.

In construing a statute, the court looks first to the statutory language, then to the legislative history, and "as an aid in interpreting Congress' intent, the interpretation given to it by its administering agency." Brock v. Writers Guild of America, West, Inc., 762 F.2d 1349, 1353 (9th Cir. 1985). [6]" If the statutory language is clear, the court looks to the legislative history "to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses. INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987).

42 U.S.C. § 6961 provides in relevant part:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of

the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) 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. . . . The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The president shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption.

By its terms, the statute only authorizes the President to grant exemptions from compliance with federal, interstate, state, and local requirements under the terms and limitations described in the statute. No other exemptions are mentioned. The plain language of the statute supports plaintiff's position.

The maxim of expressio unius est exclusio alterius is an intrinsic aid to statutory construction closely related to the plain meaning rule in that it "emphasizes the language of the statute and inferences to be drawn from the way it is written." 2A Singer, Sutherland Statutory Construction, § 47.25 at 209 (1984). Under that maxim, "where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions." 2A Singer, Sutherland Statutory Construction, § 47.23 at 194 (1984).

As with the plain meaning rule, this principle can be "overcome by a strong indication of a contrary legislative intent or policy." Id. In the instant case, there is no strong indication that Congress intended the EPA administrator to be able to create exemptions from compliance with local requirements by regulation. To the contrary, the legislative history shows that Congress was aware of a history of controversy over the extent of federal compliance with local requirements mandated by § 118 of the Clean Air Act, 42 U.S.C. § 7418, and § 313 of the Federal Water Pollution Control Act, 33 U.S.C. § 1323. See Parola v. Weinberger, 848 F.2d at 961 (discussing the legislative history of § 6961). As the Parola court found, the legislative reaction to this history of controversy "was to subject federal installations to state environmental control." Id. Against this history, the court must conclude that Congress did not intend any exemption to local requirements beyond those specifically

described in the statute.

The government argues, however, that the regulation does not create an exemption, it merely defines what level of local requirement a major federal facility will be subject to. However, neither the plain language of the regulation nor the legislative history of RCRA support this argument. [7]"

Regulations are interpreted in accordance with traditional principles of statutory construction. Diaz v. I.N.S., 648 F.Supp. 638, 644 (E.D.Cal. 1986).

In determining the meaning of the regulation, the court is to examine the language of the regulation, the legislative history, and the practical consequences of any suggested interpretation. [Citation omitted.] The words used in the regulation are to be given their plain and ordinary meaning, [citation omitted], and if possible all ambiguities are to be resolved in favor of an interpretation consistent with the statutory and regulatory scheme.

Id.

Section 255.33 of Title 40 C.F.R. is found in Part 255 of title 40 of the Code of Federal Regulations. It provides:

Major Federal facilities and native American Reservations should be treated for the purposes of these guidelines as though they are incorporated municipalities, and the facility director or administrator should be considered the same as a locally elected official.

Section 255.1(a) of Part 255 defines the scope and purpose of Part 255. It provides:

These guidelines are applicable to policies, procedures, and criteria for the identification of those areas which have common solid waste management problems and which are appropriate units for planning regional solid waste management services pursuant to section 4002(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (the Act). The guidelines also define and guide the identification of which functions will be carried out by which agencies pursuant to section 4006 of the Act.

40 C.F.R. § 255.1(a).

Section 4002(a) of the Act, codified at 42 U.S.C. § 6942(a), requires the Administrator of the EPA to publish by regulation "guidelines for the identification of those areas which have common solid waste management problems and are appropriate units for planning regional solid waste management services." 42 U.S.C. § 6942(a).

Section 4006, codified at 42 U.S.C. § 6946, requires the Governor of each state to promulgate

regulations based on the guidelines promulgated by the EPA Administrator pursuant to section 4002(a) "identifying the boundaries of each area within the State which . . . is appropriate for carrying out regional solid waste management." 42 U.S.C. § 6946(a). The regulations are to be promulgated "after consultation with local elected officials." Id. Thereafter, the State "together with the appropriate elected officials of general purpose units of local government" is required to "(A) identify an agency to develop the State plan [8]" and identify one or more agencies to implement such plan, and (B) identify which solid waste management activities will, under such State plan, be planned for and carried out by the State and which management activities will, under such state plan, be planned for and carried out by a regional or local authority or a combination of regional or local and State authorities." 42 U.S.C. § 6946(b).

By its plain language, 40 C.F.R. § 255.33 requires "major federal facilities" to be treated as local municipalities for purposes of the guidelines, i.e., for purposes of the regulations in Part 255, which were intended to guide the states in developing state plans pursuant to § 4006. The regulation does not require the states to treat major federal facilities as separate municipalities for all purposes.

The Ninth Circuit has found "in the legislative history of RCRA a pervasive congressional concern that state and local authorities attempt to establish comprehensive systems for solid waste disposal and collection." Parola, at 961. The Parola court quoted from the legislative history:

Multiple jurisdictions within metropolitan areas often are unable to coordinate or unify their various solid waste collection or disposal systems because of obstacles which include: legal barriers, inconsistent disposal systems, inability to agree as to a single comprehensive system. . .and inability to provide a long-term commitment of minimum volume of municipal refuse.

1976 U.S.Code Cong. & Admin. News at 6315, quoted in Parola, at 961-62.

California's state plan was approved by EPA in 1981. Parola, at 962. The original enabling legislation was repealed in 1989, when California passed new legislation respecting solid waste management. Stats 1989 ch 1095 sec. 22. That legislation, codified beginning at § 40000 of the California Public Resources Code, requires local agencies, "as subdivisions of the state, to make adequate provision for solid waste handling, both within their respective jurisdictions and in response to regional needs. . . ." Public Resources Code § 40002. The statute delegates relevant aspects of solid waste handling to "each county, city, district or other local governmental agency." Public Resources Code § 40059.

In 1966, the annexation of Travis by Fairfield was authorized and accomplished. By reason of that annexation, Travis was included within the limits of the city of Fairfield. Congress has mandated that federal agencies be subject to "local regulation." In the absence of evidence to the contrary, this court must assume that Congress intended the phrase "local regulation" to have its ordinary meaning. Ordinarily, a local governmental unit has the authority to regulate activity within its geographical limits. It is proper to assume that Congress intended the phrase "local regulation" to have this

ordinary meaning.

Interpreting the regulation as the government suggests in this case would have the practical effect of exempting Travis from Fairfield's regulations respecting solid waste collection, even though Travis is entirely within Fairfield's boundaries. [9]" As discussed above, no exemptions beyond those described in the statute are permitted. The government's interpretation also would have the effect of multiplying rather than unifying the number of jurisdictions with separate waste collection systems and would conflict with the Congressional concern for unification of such systems. [10]" The exemption of Travis Air Force Base from a local regulation to which it would otherwise be subject under the statute is beyond the authority of the EPA Administrator under RCRA. Accordingly, plaintiff's motion for reconsideration should be granted.

For the same reasons, plaintiff's motion for summary judgment should be granted. Since 40 C.F.R. § 255.33 cannot apply to exempt Travis from Fairfield's regulations, 42 U.S.C. § 6961 requires Travis' compliance with those regulations and plaintiff is entitled to summary judgment.

For the foregoing reasons, IT IS HEREBY RECOMMENDED THAT:

1. Plaintiff's motion for reconsideration be GRANTED;

2. Plaintiff's motion for summary judgment be GRANTED; and

3. The district court enter an order (a) declaring the October 1988 solicitation illegal under RCRA; (b) permanently enjoining the defendants, their successors and all of their employees, officers, attorneys and agents from further performance under the contract awarded pursuant to the November 1988 solicitation; and (c) permanently enjoining the defendants from failing to comply with 42 U.S.C. § 6961 and with the local requirements for refuse collection promulgated by the city of Fairfield. [11]"

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within ten (10) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Greenhow v. Secretary of Health and Human Services, 863 F.2d 633 (9th Cir. 1988).

DATED: July 30, 1991.

JOHN F. MOULDS, UNITED STATES MAGISTRATE JUDGE

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1. The motions were referred to the undersigned for findings and recommendations by order of the district court pursuant to 28 U.S.C. § 636(b).

2. Fairfield was realigned as a party plaintiff by stipulation and order filed September 11, 1989. when used in the singular in this order, the term "plaintiff" refers to Solano Garbage Company.

3. In the supplemental complaint filed pursuant to the court's order of February 14, 1989 and now pending before the court, plaintiff seeks essentially the same declaratory and injunctive relief, except that plaintiff also seeks an injunction prohibiting the defendants from authorizing performance under any new contract and a court order terminating any contract awarded pursuant to the November, 1988 solicitation.

4. The application was orally denied at a hearing on October 13, 1988.

5. The matter was referred to the undersigned following oral argument in the district court on the pending motions.

6. In the instant case, the administrative interpretation before the court is that of the GAO, not the EPA. The GAO's interpretation of the statute and regulation at issue in this litigation is not entitled to deference. Parola v. Weinberger, 848 F.2d 956, 959-960 (9th Cir. 1988).

7. It is also true that the government took an entirely different, and opposing, position with respect to the interpretation of the regulation in the Parola litigation. It is the EPA's interpretation of the regulation that is entitled to deference, and the EPA was not a party in the Parola litigation. If the government's litigation positions did reflect an EPA interpretation of the regulation, that interpretation would be entitled to little deference given the substantial conflict in the positions over a relatively short period of time. See Santa Fe Pacific R. Co. v. Secretary of Interior, 830 F.2d 1168, 1180 n.91 (D.C.Cir. 1987).

8. The state plan is a state solid waste management plan. 42 U.S.C. § 6942.

9. The government argues that the statute does not address the question of what level of local regulation a federal facility is subject to if the federal facility lies in two or more municipalities or is otherwise potentially subject to regulation by two locales. That conflict is not presented by this case, since Travis is entirely within the city of Fairfield.

10. The government argues that exclusive franchise agreements also create problems for comprehensive solid waste management, and directs the court's attention to Solano County's Draft Solid Waste Management Plan Revision of March 1988. That may be the case, but the Ninth Circuit has already held that exclusive franchise agreements are "local requirements" within the meaning of RCRA and that issue cannot be relitigated in this proceeding.

11. This court cannot recommend that the district court require defendants to enter into a contract with plaintiff for refuse collection, as such an order would apparently constitute an order for specific performance. See Price v. U.S. General Services Administration, 894 F.2d 323, 325 n.5 (9th Cir. 1990); but cf. 5 U.S.C. § 706(1) (district court "shall compel agency action unlawfully withheld").