

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ENTERGY ARKANSAS, INC., an
Arkansas corporation;
ENTERGY GULF STATES, INC.,
a Texas corporation;
ENTERGY LOUISIANA, INC., a
Louisiana corporation;
WOLF CREEK NUCLEAR
OPERATING CORPORATION,
a Delaware corporation;
OMAHA PUBLIC POWER
DISTRICT, a public corporation and
political subdivision of the State of
Nebraska,

4:98CV3411

Plaintiffs,

MEMORANDUM AND ORDER

CENTRAL INTERSTATE
LOW-LEVEL RADIOACTIVE
WASTE COMMISSION,

Realigned Plaintiff,

US ECOLOGY, INC., a California
corporation,

Intervening Plaintiff,

vs.

STATE OF NEBRASKA, et al.,

Defendants.

The Court of Appeals directed me to reconsider whether the Generators and USE possessed “property interests” sufficient to give them a claim for denial of procedural or substantive due process¹ under the Fourteenth Amendment. Entergy Arkansas, Inc. v. Nebraska, 241 F.3d 979, 990-92 (8th Cir. 2001), petition for cert. filed, 70 U.S.L.W. 3076 (U.S. July 16, 2001) (No. 01-87). This issue was raised in various motions to dismiss filed by the defendants both before and after the remand order of the Court of Appeals.² In addition, the

¹The Court of Appeals made clear that USE and the Generators must have a “property interest” as predicate for both their procedural and substantive due process claims. Id. at 990-91.

²After the decision by the Court of Appeals, the Commission, the Generators and

defendants have again sought to dismiss the Commission's suit. As before, I presume detailed knowledge of this very complex case.

The Commission

I will deny the motions asserted against the Commission. The arguments advanced by the defendants have been disposed of earlier either by this court or the Court of Appeals. To the extent that the defendants assert a variation of those earlier arguments, they are without merit.

On a related matter, I see no good reason to stay consideration of the motions or this case while the defendants request relief from the Supreme Court regarding the Commission's suit. In this regard, I note that the Court of Appeals did not stay the issuance of the mandate. (Filing 224 (mandate filed May 1, 2001).)

The Generators, USE and "Property Interests"

USE filed amended complaints. In the new pleadings, certain earlier claims were abandoned. That is, there are no longer state law claims nor claims for damages asserted against the defendants individually.

I will grant the motions to the extent they seek to dismiss the procedural and substantive due process claims of the Generators and USE which are asserted under the Fourteenth Amendment to the Constitution. I find and conclude that the Generators and USE have not alleged the deprivation of a “property interest” within the meaning of the Fourteenth Amendment.³

The Fourteenth Amendment protects us from the government taking our property⁴ without procedural or substantive due process of law. Compare *Stauch v. City of Columbia Heights*, 212 F.3d 425, 429 (8th Cir. 2000) (owners possessed protected property interest in the renewal of their rental license because renewal was required when three nondiscretionary conditions were satisfied) with *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716, 718 (8th Cir. 1998) (no property interest in renewal of bingo license when the city had unfettered discretion to withhold issuance of the license). See also *Littlefield v. City of Afton*, 785 F.2d 596, 601 (8th Cir. 1986) (discussing when an applicant’s interest in a license which is denied rises to a constitutionally protected property interest), overruled on other grounds, *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 n.2 (8th Cir. 1992).

The Generators and USE claim that they have a property interest in the nuclear waste disposal license itself and the money spent in an attempt to obtain the license. Broadly speaking, the issue is whether the defendants denied the Generators and USE procedural and substantive due process when, after accepting tens of millions of dollars from them to process the license application, they (taking the complaint as true) denied the license for crude political purposes.

As directed by the Court of Appeals, I have considered “the procedures and requirements listed in the N.A.C. [Nebraska Administrative Code]” regarding the issuance of nuclear waste disposal licenses, “the requirement that the licensing process costs be paid by USE (and the ultimately the Generators),” the “very large payments already made in reliance on Nebraska’s procedures,” “the administrative scheme set up by the Compact which was enacted into state law,” and “state law” more generally, *Entergy Arkansas*, 241 F.3d at 991, to determine whether the Generators and USE have a “property interest” in the license and the money spent to obtain one. At the same time, I also recognize that the Court of Appeals has

³Because this decision entirely disposes of the due process claims asserted by USE and the Generators, the other arguments raised by the defendants in defense to these claims are moot. I therefore decline to address them.

⁴It also protects our lives and liberty from similar deprivations. Neither life nor liberty interests are implicated in this case.

decided that the Compact itself does not allow the Generators or USE to sue the defendants for breach of the Compact's "good faith" obligation. Id. at 990.

Next, I realize that "[p]roperty interests are not created by the Constitution but rather stem from an independent source such as state law." Stauch, 212 F.3d at 429. Most importantly, I recognize that parties asserting a property interest must have something "more than a unilateral expectation of it." Id. That is, they "must possess a legitimate claim of entitlement to it." Id.

USE and the Generators claim that their "property interest" was created by Nebraska's "substantive standards or criteria that guide an official's discretion." Entergy Arkansas, 241 F.3d at 990-91 (citing Stauch, 212 F.3d at 429). In particular, they assert that (1) Nebraska's regulations require the issuance of a license to USE if certain criteria are satisfied; (2) Nebraska law contemplates that the Generators would finance the USE application; and (3) upon issuance of the license, Nebraska law contemplates the granting of a credit against disposal rates for all or a portion of the monies paid by the Generators to finance the acquisition of the license. Accordingly, USE (as the license applicant) and the Generators (as the financiers and users of the disposal site) had a protected property interest.

The pivotal question is whether Nebraska's discretion to issue the license to USE was substantially limited. If it was, USE, as the applicant, had a property interest in the license. If USE had a property interest in the license, the Generators also had a property interest protected by the Fourteenth Amendment because Nebraska law contemplated that the Generators would finance the entire process and recoup some of the payments when the site became operational after it was licensed.

On the other hand, if USE did not possess a property interest in the license, then the Generators cannot reasonably claim a property interest in the money spent in an attempt to obtain the license. That is, the Generators cannot logically have a "property interest" in money they spent to finance a license application when the underlying right to apply for the license creates no property interest in the party applying for it. Simply put, the Generators' interest can be no more expansive than USE's interest.

Did Nebraska impose significant limits on itself regarding the power to issue or deny a license, thus creating a property interest in the license? The answer to that question is found in N.A.C. tit. 194, Ch. 3, § 009, the regulation relied upon by USE and the Generators. It establishes twelve criteria for issuance of a license and states as follows:

009. Requirements for issuance of a license. A license for the receipt, possession, and disposal of waste shall be issued by the department upon finding that:

009.01 The application is complete;

009.02 The issuance of the license will not constitute an unreasonable risk to the public health and safety and the environment;

009.03 The applicant is qualified by reason of training and experience to carry out the disposal operations requested in a manner that protects health and minimizes danger to life, property and the environment;

009.04 The applicant's proposed disposal site, disposal design, facility operations including equipment, facilities and procedures, disposal site closure and post-closure institutional control shall be consistent with a zero-release objective and shall protect the public health and safety in that they provide reasonable assurance that the general population will be protected from releases of radioactivity as specified in Chapter 4, Section 002;

009.05 The applicant's proposed disposal site, disposal site design, facility operations including equipment, facilities and procedures, disposal site closure and post-closure institutional control will protect the public health and safety in that they will provide reasonable assurance that individual inadvertent intruders are protected in accordance with Chapter 4, Section 003;

009.06 The applicant's proposed facility operations, including equipment, facilities and procedures, will protect the public health and safety in that they will provide reasonable assurance that the Standards for Protection Against Radiation specified in Title 180 are met;

009.07 The applicant's proposed disposal site, disposal site design, facility operations, disposal site closure and post-closure institutional control will protect the public health and safety in that they will provide reasonable assurance that long-term stability of the disposed waste and the disposal site will be achieved and will eliminate to the extent practicable the need for on-going active maintenance of the disposal site following site closure;

009.08 The applicant's demonstration provides reasonable assurance that the applicable technical requirements of Chapter 5 will be met;

009.09 The applicant's proposal for institutional control provides reasonable assurance that such control will be provided for the length of time necessary to ensure the findings in 009.04 through 009.07 of this Chapter and that the institutional control meets the requirements of Chapter 5, 009;

009.10 The financial or surety and insurance arrangements of the applicant's proposal meet with the requirements of Chapter 6[;]

009.11 The information submitted and obtained in 002.01E of this Chapter has been reviewed by the department, and the department

finds that such person can adequately comply with the provisions of the application and applicable laws, rules, and regulations; 009.12 Any additional information submitted, as requested by the department, is adequate.

N.A.C. tit. 194, Ch. 3, § 009.

This regulation does not create a property interest. In particular, Nebraska reserves the right to decide whether the licensed disposal site will “constitute an unreasonable risk to the public health and safety and the environment.” Id. (second criterion). The decision about whether the public health and safety will be furthered by granting or denying a license is the quintessential example of a discretionary decision. In other words, there can be no legitimate claim of entitlement to a nuclear waste disposal license when issuance of it turns almost entirely upon such open-ended factors as the “public health and safety.”

The concern for the “public health and safety” is not an isolated part of the regulation. Virtually every criterion set forth in the regulation emphasizes this point by using such words as: the operations will be conducted “in a manner that protects health and minimizes danger to life, property and the environment,” id. (third criterion); “shall protect the public health and safety in that they provide reasonable assurance that the general population will be protected from releases of radioactivity,” id. (fourth criterion); “will provide reasonable assurance that individual inadvertent intruders are protected,” id. (fifth criterion); the “applicant’s proposed facility operations . . . will protect the public health and safety in that they will provide reasonable assurance that the Standards for Protection Against Radiation . . . are met,” id. (sixth criterion); “will protect the public health and safety in that they will provide reasonable assurance that long-term stability of the disposed waste and the disposal site will be achieved and will eliminate to the extent practicable the need for on-going maintenance,” id. (seventh criterion); “provides reasonable assurance . . . [regarding technical requirements and institutional control],” id. (eighth and ninth criteria); “such person can adequately comply with the provisions of the application and applicable laws, rules, and regulations,” id. (eleventh criterion); and “[a]ny additional information submitted, as requested by the department, is adequate.” Id. (twelfth criterion).

As a result, Nebraska retained such great discretion that the regulation, although nominally mandatory in nature, cannot be said to provide USE and the Generators with a “legitimate claim of entitlement” to a license. See, e.g., Green v. City of St. Paul, 187 F.3d 641 (table), available at 1999 WL 376099, at *1 (8th Cir. 1999) (the plaintiff did not have a protected property interest in issuance of a cabaret license because the city could deny the license based upon the determination that the “public health, safety or welfare would be otherwise adversely affected”); Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667,

679 (3rd Cir. 1991) (city ordinance conditioning issuance of license upon finding that the facility is a “safe and proper place” did not create property interest); Bayview-Lofberg’s Inc. v. City of Milwaukee, 905 F.2d 142, 145 (7th Cir. 1990) (no property interest where license could be denied based upon “other factors which reasonably relate to the public health, safety and welfare”); Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 59 (2nd Cir. 1985) (no property interest where issuance of the license turned upon such statutory criteria as the “health, safety, and general welfare” of the public). Therefore, the motions to dismiss the procedural and substantive due process claims of the USE and the Generators must be granted since those parties have no “property interest” which is protected by the Fourteenth Amendment.

The Generators, USE and the Remaining Claims

The Generators and USE have asserted a claim of equitable subrogation based upon the Commission’s suit against the defendants. They have also asserted a cross claim against the Commission. The defendants have not moved to dismiss the equitable subrogation claim.

As a consequence, the dismissal of the procedural and substantive due process claims does not result in the Generators or USE being removed from this suit. On the contrary, they are free to maintain their equitable subrogation claim and cross claim. USE and the Generators may participate with the Commission in discovery against the defendants based upon their equitable subrogation interest. The degree to which USE and the Generators may participate in a trial against the defendants must be resolved on motion of an interested party. I leave the timing of that motion to the parties, but suggest that it be submitted well before the pretrial conference.

Accordingly,

IT IS ORDERED that:

1. The defendants’ motions (filings 50 and 263) to dismiss the Commission’s complaint are denied.
2. The defendants’ motions (filings 50, 83, and 264) to dismiss the procedural and substantive due process claims of USE and the Generators are granted and those claims are dismissed with prejudice. However, judgment shall be withheld until final disposition of this case.

DATED this 29th day of August, 2001.

BY THE COURT:

/s/
Richard G. Kopf
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ENTERGY ARKANSAS, INC., an
Arkansas corporation, et al.,

4:98CV3411

Plaintiffs,

CENTRAL INTERSTATE
LOW-LEVEL RADIOACTIVE
WASTE COMMISSION,

Realigned Plaintiff,

US ECOLOGY, INC., a California
corporation, (USE)

Intervenor-Plaintiff,

**MEMORANDUM
AND ORDER**

vs.

STATE OF NEBRASKA,
et al.,

Defendants.

With respect to the suit by the Central Interstate Low-Level Radioactive Waste Commission (Commission), Magistrate Judge Piester struck the jury demand of the State of Nebraska and related Nebraska officials (Nebraska Defendants). The Nebraska Defendants appeal, and they also request in their brief that I certify the question for interlocutory appeal in the event I disagree with them. Presuming a

knowledge of this complex case¹, I affirm Judge Piester’s decision striking the jury demand. I also decide that certification is not appropriate.

I.

The Commission sued the Nebraska Defendants contending they breached obligations owed under the Central Interstate Low-Level Radioactive Waste Compact (the Compact), which Nebraska, Arkansas, Kansas, Louisiana, and Oklahoma had joined in 1986. In the Compact, the states agreed to develop disposal facilities for low-level nuclear waste generated within their borders, and in 1989 the Commission selected Nebraska as the host state for such a facility.

¹The most recent opinion of the Court of Appeals is Entergy Arkansas, Inc. v. Nebraska, 241 F.3d 979 (8th Cir.), cert. denied, 122 S. Ct. 203 (2001) (despite claim for damages, affirming decision that the Eleventh Amendment did not preclude the Commission’s suit against Nebraska; reversing decision denying qualified immunity to individual defendants; reversing decision that private corporations’ complaints stated a claim under an interstate compact; remanding for reconsideration of motions to dismiss private corporations’ due process claims). The most recent published opinion of this court is Entergy Arkansas, Inc., v. Nebraska, 161 F. Supp.2d 1001 (D. Neb. 2001) (holding that private corporations did not have due process-protected “property interest” in license or money spent to obtain it and dismissing those claims).

The Commission alleges that Nebraska has attempted to evade its obligations under the Compact since 1991, by delaying the decision on a license for the proposed facility and by then wrongfully denying a license. The Commission seeks injunctive relief, a declaratory judgment that Nebraska has violated its fiduciary and contractual obligations under the Compact, an accounting, compensatory and consequential damages², the removal of Nebraska from further supervision of the licensing process and appointment of a third party to exercise supervision, and attorney fees and costs.

²No personal liability is asserted against State officials.

Congress passed the Low-Level Radioactive Waste Policy Act of 1980 (the Act), 42 U.S.C. § 2021b et seq. (1994) (amended 1986), "to promote the development of regional low-level radioactive waste disposal facilities." Concerned Citizens of Neb. v. United States Nuclear Regulatory Comm'n, 970 F.2d 421, 422 (8th Cir. 1992). Under the authority of the Act the member states entered into the Compact, which was passed as original legislation by each of the states and by Congress. See Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub.L. 99-240, tit. II, sec. 222, 99 Stat. 1859, 1863 (1986) (reprinting the Compact hereinafter referred to by article).³

The Compact established the Commission to enforce its provisions and provided the framework for licensing a facility for the disposal of low-level radioactive waste generated in the five states. See ART.'S III and IV. Several provisions address performance of obligations imposed by the Compact. Each of the states has "the right to rely on the good faith performance of each other party state." ART. III(f). The state selected as the host for a disposal site is required "to process all applications for permits and licenses required for the development and operation of any regional facility or facilities within a reasonable period from the time that a completed application is submitted." ART. V(e)(2). By filing suit, among other methods, the Commission is explicitly commanded to "require all party states . . . to perform their duties and obligations arising under this compact[.]" ART. IV(m)(8).

The claims of the other plaintiffs against the Nebraska Defendants are not at issue in this appeal. The only question in this appeal is whether the Nebraska Defendants are entitled to a jury trial on the Commission's claims.

³The Central Interstate Low-Level Radioactive Waste Compact is also found at Appendix § BB, Neb. Rev. Stat. Vol. 2A (Reissue 1989).

II.

Judge Piester struck the Nebraska Defendants' jury demand because he believed that "while the Commission is now requesting compensatory damages⁴ for Nebraska's alleged lack of good faith and breaches of fiduciary duty in performance of the Compact, historically these issues would have been tried without a jury." (Filing 351 at 4.) I agree with Judge Piester.

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII. We look to the English common law at the time the amendment was adopted to decide "whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was." Markman v. Westview Instruments, 517 U.S. 370, 376 (1996) (citing Tull v. United States, 481 U.S. 412, 417 (1987)). If, at the time of the Founding, the action was not tried at law and it is not analogous to one that was, there is no right to trial by jury. Tull, 481 U.S. at 417 ("those actions that are analogous to 18th-century cases tried in courts of equity or admiralty do not require a jury trial").

After careful consideration, I find and conclude that suits predicated upon an interstate compact, brought by a creature created by the compact against a signatory state to enforce its terms, were not tried to a jury at the Founding. I also find and

⁴As earlier noted, the Commission also seeks a declaratory judgment that Nebraska has violated its fiduciary and contractual obligations under the Compact, an accounting, the removal of Nebraska from further supervision of the licensing process and appointment of a third party to exercise supervision of the licensing process.

conclude that there are no analogous cases that were tried to a jury at the Founding. Therefore, the Nebraska Defendants are not entitled to a jury trial.

At one level, this is a dispute between Nebraska, on the one hand, and Arkansas, Kansas, Louisiana, and Oklahoma, represented by the Commission, on the other. The Constitution established two methods for resolving these types of disputes. Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 279 n.5 (1959). The first method is the original jurisdiction conferred upon the Supreme Court by the Constitution. Id. (citing U.S. CONST. art. III., § 2). "The other is the compact" Id. (citation omitted).

As for the first method, we know that when the Supreme Court exercises its original jurisdiction there is no jury trial even if money is awarded against a state. Texas v. New Mexico, 482 U.S. 124, 130 (1987) (holding that monetary relief could be awarded against New Mexico because it acted in bad faith by failing to deliver water called for by a compact).

The second method of resolving disputes between states is found in the Compact Clause. U.S. CONST. art. I, § 10, cl. 3.⁵ As I have previously indicated in a related context⁶, the primary historical authority on the Compact Clause is found in the work of Felix Frankfurter & James M. Landis, The Compact Clause of the Constitution--A Study in Interstate Adjustments, 34 Yale L.J. 685, 691-92 (1925) ("The Compact Clause of the Constitution").⁷

⁵"No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power"

⁶Entergy Arkansas, Inc., v. State of Nebraska, 68 F.Supp.2d 1093, 1097-98 (D. Neb. 1999) (Commission's suit was not barred by the Eleventh Amendment), aff'd, 241 F.3d 979, 987-88 (8th Cir. 2001).

⁷The early history of the Compact Clause is also described in Virginia v. West Virginia, 246 U.S. 565, 597-602 (1918) (holding that the Court had the power to

enforce a \$12 million judgment, recommended by a special master and adopted by the Court, in favor of Virginia and against West Virginia). See also United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460-72 (1978) (describing early and more recent history).

According to Frankfurter and Landis, the Compact Clause finds its historical roots in the method used by the Crown to resolve disputes between colonies. The Compact Clause of the Constitution, at 694. The "framers were familiar with the modes of settlement [between colonies] prior to the Revolution" Id. If the colonies had a dispute that they could not resolve by agreement (which agreement required approval of the Crown), then the only method for resolving the dispute "was an appeal to the Crown, followed normally by a reference of the controversy to a Royal Commission." Id. at 693. If the Royal Commission's decision was not acceptable, then "an appeal lay to the Privy Council" because the Crown was normally too busy to hear those disputes directly. Id. Thus, the colonial method of settlement of disputes was not even judicial, let alone one tried at law. Also, there is no evidence that the Royal Commission, the Privy Council or the Crown itself were served by, or functioned as, a jury when there was dispute between the colonies.

From this review of the alternative methods of resolving disputes between the states set forth in the Constitution at the time of the Founding, two things are clear. First, even when awarding money against a state, the Supreme Court resolves disputes between states without a jury. Second, there is no historical evidence that the method of resolving colonial disputes, which method was transformed into the Compact Clause of the Constitution, involved law actions or juries.

As a result, there is no historical basis for contending that compact disputes such as this one were tried to juries at the Founding. In fact, whether from the Founding or otherwise, the Nebraska Defendants have not directed me to a single case in which a jury was selected to hear a dispute regarding the terms of an interstate compact when the litigants were parties to, or creatures created by, a compact.

Realizing that they cannot establish that this type of dispute was, at the time of the Founding, tried at law, the Nebraska Defendants argue by analogy that cases such as this are covered by the Seventh Amendment. Specifically, the Nebraska

Defendants assert that this case is most like a breach of contract action where money is sought. They assert that contract actions were tried to juries at common law.⁸ Therefore, they claim a right to a jury in this case.

I reject the analogy that this case is like a breach of contract case for purposes of the Seventh Amendment. While it is true that a Compact is a contract between States, it is also true that a Compact is much more. As the Supreme Court has made clear, the “requirement of congressional consent is at the heart of the Compact Clause.” Cuyler v. Adams, 449 U.S. 433, 439 (1980). “By vesting in Congress the power to grant or withhold consent, or to condition consent on the States’ compliance with specific conditions, the Framers sought to ensure that Congress would maintain

⁸Even when money was involved, it is not true that all, or even most, contract actions were tried to juries at the time of the Founding. See Burlington Northern Railroad Company v. Nebraska Public Power District, 931 F. Supp 1470, 1481, 1484-85 (D. Neb. 1996) (noting that it is difficult and sometimes impossible to determine whether a particular contract action would have been tried to a jury at the time of the Founding; listing broad categories of contract actions that were or were not tried to juries at the Founding; denying jury trial even though public power district sought money under a contract). For present purposes, I need not debate this point because even if I assume that each and every contract action was tried to a jury at the Founding, I do not believe that the contract analogy put forth by the Nebraska Defendants is proper.

ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority.” Id. at 339-40 (citing The Compact Clause of the Constitution, at 694-95) (emphasis added).

What is at stake, then, is not a mere contractual promise but rather Congressional control over Nebraska’s behavior regarding the disposition of low-level nuclear waste. Congress required that Nebraska exercise “good faith” when deciding whether to issue a license. ART III(f). Congress also required that the Commission enforce that obligation if Nebraska failed. ART. IV(m)(8). I reject the implausible notion that a jury comprised of Nebraska citizens was intended by the Framers to decide whether Nebraska satisfied the obligations imposed by Congress under the exclusive power that the Framers gave to Congress under the Compact Clause. Congressional conditions and the national interest related thereto, not contractual promises, are the focal point of this litigation.

In summary, actions like this one were not tried at law when the Constitution was signed. There is also no appropriate historical analogy to law cases upon which one might fairly compare this case. Accordingly, the Seventh Amendment does not entitle the Nebraska Defendants to a jury trial even though money damages, among other modes of relief, are sought by the Commission for the alleged violation of Nebraska’s congressionally imposed obligations under the Compact.

III.

Anticipating that I might disagree with them, the Nebraska Defendants request that I certify this question for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). I decline to do so. Respectfully, there is no controlling question of law upon which there is a substantial ground for difference of opinion.

Accordingly,

IT IS ORDERED that:

1. The Nebraska Defendants' appeal from the order striking their jury demand (filing 367) is denied; and
2. The request for certification set forth in the Nebraska Defendants' brief is denied.

February 22, 2002.

BY THE COURT:

s/
Richard G. Kopf
United States District Judge