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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE LOS ALAMOS STUDY GROUP,
Plaintiff,

vs. No. 1:10-CV-00760-JCH-ACT

UNITED STATES DEPARTMENT
OF ENERGY, et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS
OBJECTIONS AND PRELIMINARY INJUNCTION HEARING
MAY 2, 2011

BEFORE: HONORABLE JUDGE JUDITH HERRERA
UNITED STATES DISTRICT JUDGE

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16 THE COURT: Please be seated. Good
17 morning.

18 All right. We're back on the record in
19 Los Alamos Study Group versus Department of Energy,
20 et al. Are we all ready to continue?

21 MR. SMITH: Yes, Your Honor.

22 MR. HNASKO: Yes, Your Honor.

23 THE COURT: All right. I think when we
24 broke last week, Mr. Smith, you were in the middle
25 of your argument.

1 MR. SMITH: Thank you, Your Honor.

2 THE COURT: Probably, for the record, I
3 should just ask you all to state your appearances,
4 just so the record is clear.

5 MR. HNASKO: Good morning, Your Honor. On
6 behalf of the plaintiff, Tom Hnasko and Lindsay
7 Lovejoy. And to Mr. Lovejoy's right is Gregory
8 Mello, the executive director for the plaintiff.
9 And also Dulcinea Hanuschak to the right of
10 Mr. Mello.

11 THE COURT: Thank you.

12 MR. SMITH: Good morning, Your Honor.
13 Andrew Smith on behalf of the United States and the
14 federal defendants. With me at counsel table is Jan
15 Mitchell from the US Attorney's Office; Roger
16 Snyder, the deputy manager for Los Alamos site; Lisa
17 Cummings, who is the site counsel for NNSA at
18 Los Alamos; and Ashley Morris, who is a law student
19 ex-terning in our office here in Albuquerque.

20 THE COURT: Thank you.

21 You may proceed, Mr. Smith.

22 MR. SMITH: Thank you, Your Honor.

23 Just to quickly recap, Your Honor, what
24 this case is about is that -- and again in 2003, the
25 Department of Energy and NNSA completed an EIS for

1 this facility. They issued a ROD in 2004, a
2 decision of record -- a record of decision. Sorry
3 about all the acronyms. That's the nature of these
4 cases.

5 THE COURT: That's quite fine.

6 MR. SMITH: And in that ROD they selected
7 an alternative to build this CMRR in that building
8 at a particular location. The design, at that
9 point, had not progressed overly far.

10 They proceeded, after the record of
11 decision which was not challenged in any court --
12 and cannot be challenged in any court, since the
13 statute of limitations has exhausted. And so that
14 record of decision is valid and cannot be
15 challenged.

16 And contrary to plaintiff's argument, the
17 Department of Energy/NNSA has not rejected that ROD.
18 They are working from that ROD, that record of
19 decision, going forward.

20 So for instance, the ROD, the record of
21 decision from 2004, supports the construction of the
22 RLUOB building, the building next door to the
23 building that's in question in this litigation.

24 But what DOE has, and NNSA have committed
25 to, is that their -- the project final design,

1 detailed design, and -- and I shouldn't say
2 "project," because RLUOB is part of the overall
3 project. But the building that's in question, the
4 nuclear facility building that's in question, will
5 not continue into final design and will not continue
6 into construction until a new ROD is issued on the
7 supplemental environmental impact statement process
8 that is being completed as we speak.

9 So -- so it's not accurate to say that the
10 earlier ROD has been rejected. It's also not
11 accurate to say that after an agency issues a ROD
12 and then determines that it should do a supplemental
13 environmental impact study that that ROD somehow
14 becomes invalidated under NEPA. There's no case law
15 to support that. There's nothing in the regs. The
16 old ROD doesn't become invalidated; it's a question
17 of whether to go forward in a different direction or
18 not. And that's the question that's before the
19 agency in the current ongoing NEPA process, is
20 whether and how to go forward with the project that
21 was selected in the ROD, based on the new
22 information that came out.

23 Now, Your Honor, a lot of the presentation
24 and materials that have been presented, they're a
25 bit hard to follow I have to admit. There's --

1 plaintiffs have submitted much material. I think,
2 though, that the focus for this Court, for its
3 determinations that it needs to make, there's
4 actually only a few key items that -- that tell the
5 actual story about what's going on.

6 Now we've submitted three declarations in
7 this case from high-ranking officials in the
8 Department of Energy/NNSA, including the affidavit
9 of Dr. Cook, who is the deputy administrator, a
10 deputy administrator for the NNSA. We submitted
11 that with our motion to dismiss. And he's charged
12 with execution of the weapons program.

13 And then we also submitted the declaration
14 of Roger Snyder, who's with us here today at counsel
15 table. And he is the Los Alamos site manager,
16 deputy manager. And so he's charged with overseeing
17 LANL. And in that capacity, he's charged with, of
18 course, knowing what the priorities are for what
19 construction projects should be going forward, which
20 ones are priority, which ones have national security
21 concerns, international policy considerations. So
22 that's his job, to understand that and to move
23 forward with the projects in accordance with policy,
24 national security interests, as well as ensuring
25 compliance with NEPA.

1 And then we also submitted the declaration
2 of Herman Le-Doux, who is in charge of the actual
3 implementation of this particular project.

4 And those declarations, sworn
5 declarations, all confirm that there's no
6 construction going on on this facility or of the
7 infrastructure that's needed to support the
8 facility, including the batch plants for concrete
9 and things like that.

10 Now the associated building, the RLUOB, of
11 course, has been completed. The building is there.
12 It exists. The only thing that remains left to be
13 done with that building is for it to be outfitted
14 internally with, you know, materials and stuff for
15 the laboratories that are in that building.

16 One thing that I thought was interesting
17 is that in the record of decision, the 2004 record
18 of decision, DOE made a decision to build two
19 buildings instead of just one, which was one of the
20 contemplations in the original EIS. And part of the
21 reason they did that was to lower expenses by
22 separating out some of the aspects, the tasks that
23 would be carried out in the two buildings. So RLUOB
24 is actually a lower level, called a hazard category
25 3 building -- is that correct -- a radiological

1 facility.

2 RLUOB, Your Honor, can only handle
3 essentially a dime's worth of special radioactive
4 material, just a dime. That's how much material
5 would be handled in that facility. So it's not the
6 same as the nuclear facility at all that's at issue
7 today which, you know, has a storage vault for six
8 kilo- -- metric tons -- I always get this mixed
9 up -- which has a capacity to hold and store much
10 more material.

11 And the experiments, each of the
12 experiments that will go on in this facility,
13 involve much greater sources of nuclear material.

14 Now right now, what happens up at the
15 laboratory is you have the old building, the CMR,
16 which is now approximately 60 years old, so it
17 wasn't built with the rigors that, certainly, these
18 buildings are going to be built to. But it was --
19 it's 50 years old, and seismic testing indicated
20 that there's a fault under it.

21 So what that means is that what DOE/NNSA
22 has had to do up at LANL is to severely restrict the
23 amount of activities that go on in that building.
24 They have made upgrades to make it safer. But at
25 the same time, they've had to severely restrict the

1 amount of material, the amount of testing that can
2 go on in that particular facility.

3 So right now, today, there's a hardship on
4 DOE and NNSA, that they're relying on a building
5 that doesn't meet the capacity of the needs for
6 LANL's mission statement with regards to testing and
7 experimenting with plutonium.

8 So there is an urgency to this project. I
9 think that's reflected throughout the materials,
10 particularly the materials that we presented,
11 including -- and I think the most important
12 document, and I'll get to this later -- is the
13 nuclear posture review, which found the urgent need
14 for CMRRNF.

15 Now plaintiffs, of course, make this
16 argument that -- all these statements about how
17 important CMRR is and how -- you know, how the
18 President has said that he's going to make sure that
19 this project is funded and committed to that, and a
20 letter from Vice President Biden to Congress as
21 well, reflecting that.

22 Those all reflect the importance of this
23 project, for sure, the importance of this project
24 for nuclear security -- national security, excuse
25 me.

1 But one thing that's missing from all of
2 those statements is that none of those statements
3 say we're behind this particular configuration of
4 the building, in light of the new evidence. Nobody
5 yet has come to any conclusion or gotten very far
6 along the road of determining what is the exact best
7 way to build this building. And that's what's going
8 on in the supplemental environmental impact
9 statement analysis. They are exploring alternatives
10 to -- alternative ways of how to build this building
11 to meet the new information.

12 Even in plaintiff's testimony they say,
13 Well, at one time it was two batch plants, now it
14 looks like it might be three. They're going to move
15 the road, they're not going to move the road. All
16 of these things are in a state of flux, as they
17 should be. They are being examined. The DOE/NNSA
18 has not come to any conclusion or predetermination
19 about which alternative to choose.

20 And this is amply demonstrated in this
21 draft supplemental environmental impact statement
22 that we provided you on Friday, where the agency is
23 now looking at two options for construction, the
24 main -- you know the main bulk of construction, the
25 one deep construction that led to this, you know,

1 very large increase in the amount of concrete and
2 steel that's involved with the proposal as it
3 stands.

4 But they're also now looking at a shallow
5 construction opportunity that would avoid and reduce
6 the impact tremendously over the deep option,
7 because it actually would result in only going down
8 a certain level, and not all the way to the area
9 that -- where the "loose welded cuff," they call it,
10 you know, that they were going to replace with
11 concrete. The shallow option that they are now
12 looking at would sit above that.

13 It hasn't been fully examined yet. That's
14 one of the reasons why it's important that an
15 injunction not issue. The plaintiffs want to stop
16 design and planning. If you stop design and
17 planning, you know, they're not going to get this
18 information until the injunction is over, at which
19 time they're going to come up with new information
20 that will lend itself to doing another SEIS, and
21 we'll be constantly chasing our tail around and
22 around. And that's really not how the NEPA process
23 should work.

24 If, for instance, plaintiffs had come in
25 with this motion six months ago and you granted it,

1 you said, "No more planning, no more design, do your
2 NEPA," well, they probably wouldn't have come up
3 with this shallow design option, because that design
4 process that found that -- that potential
5 alternative less impactful to the environment
6 alternative, you know, came out of the ongoing
7 design process. So I think it's important to
8 recognize that.

9 So all that's going on here, Your Honor,
10 is a -- a very ordinary, as I said last time -- a
11 very ordinary process of NEPA. They got new
12 information, they decided to go forward with a
13 supplemental environmental impact statement.

14 Now plaintiffs talked about, Well, DOE is
15 incentivizing the contractor to come out with
16 these -- you know, construction and start
17 construction and meet it on time by 2011.

18 And for support for that, Your Honor, they
19 cite a document -- a document from before. And this
20 is Tab 45 of Mello -- Mr. Mello's testimony
21 exhibits. And this -- this document is dated
22 August 24th, 2010. It was before the agency
23 determined that it should do a supplemental
24 environmental impact statement.

25 And in there it talks about the

1 deliverables from the contractor as to, you know,
2 what they would get bonuses for. I think
3 plaintiff's counsel said it was a \$300,000 bonus if
4 they got to certain points on time. And it does
5 talk about actions necessary to issue and execute
6 construction contracts in fiscal year 2011.

7 Well, that was before the decision to do
8 the supplemental environmental impact statement.

9 After -- and this is Tab 46 of Mr. Mello's
10 testimony exhibits. And this is the same document,
11 now updated as of December 2010. Those incentives,
12 those deliverables, were changed to actions
13 necessary to support SEIS alternatives to explore,
14 help -- help NNSA/DOE locate, identify alternatives.
15 We want to find as many alternative ways to do what
16 we're proposing to do.

17 That's what the NEPA process is all about.
18 That's what they are currently incentivized about,
19 not the older stuff that plaintiff's counsel relies
20 on. There's no incentive right now for them to
21 produce any construction contracts, because that's
22 not the focus of what's going on now. The focus of
23 what's going on now is the NEPA process in coming up
24 with designs and development for forwarding that
25 process.

1 So in each of these declarations,
2 Your Honor, that we've submitted, the officers of
3 NNSA have testified that there is no construction of
4 the facility or its infrastructure going on, that
5 design is still progressing. It's -- at the time of
6 Dr. Cook's declaration it was below 45 percent. He
7 testified that through June of this year it will
8 probably progress maybe 15 percent more, so maybe up
9 to around 60 percent.

10 But that's not getting to the stage of
11 detailed design for the facility itself. And
12 detailed design is where they really pin down
13 exactly precisely where switches are going to be
14 and, you know, all of that kind of infrastructure
15 detail so that they can give a precise estimate of
16 cost to Congress for budget approval.

17 As plaintiff's counsel repeatedly pointed
18 out last week, currently there's these wide ranges
19 of estimates as to how much that facility is going
20 to cost to construct. Why -- you know, 3 billion to
21 5 billion. Why is there a wide range? Because the
22 design hasn't progressed far enough into that
23 detailed design level where DOE and NNSA can pin it
24 down to that precise amount so that Congress can
25 lock in -- that's called that performance baseline.

1 Another exhibit that I thought might be
2 helpful for the Court was also presented by
3 Mr. Mello. It's his Exhibit 18 from his testimony
4 book. And what this is, it's a December 2010 slide
5 show created by the Los Alamos site office. And
6 it's -- was presented to the city of Santa Fe,
7 which -- was it the city or the county? I'm not
8 quite sure, one of the -- either the city or the
9 county.

10 And what it does is it shows -- it's just
11 basically an overview of this new project that's at
12 issue before the Court, before Your Honor.

13 And this picture right here (indicating),
14 this is the completed RLUOB building that's
15 constructed. So in the slide show the first
16 question is: What is CMR? And I thought it might
17 be helpful for a -- in, you know, layperson terms --
18 I certainly need the layperson terms.

19 It says, CMRR is essentially a chemistry
20 laboratory where scientists will analyze the origin
21 and purity of materials and understand the chemical
22 and mechanical properties of special nuclear
23 materials, in this case, plutonium. This capability
24 is key to perform the national security mission
25 assigned to LANL.

1 So again reflecting the importance of this
2 project to national security, but also explaining
3 what it does.

4 Plaintiffs often, in their papers and in
5 their argument, allege that this is a pit production
6 facility. It's not a pit production facility. It
7 does support the production of pits by testing the
8 pits after they are manufactured. But it also
9 serves numerous other purposes besides just that.
10 This facility, it actually -- the main mission for
11 Los Alamos laboratories is anything having to do
12 with plutonium and testing of plutonium.

13 This slide talks about that CMRR replaces
14 the 60-year-old facility. This is a picture of the
15 old facility, and it notes that no other facility or
16 site in the US can fulfill its mission. And the
17 external safety oversight board has reported to
18 Congress the critical need to replace.

19 And here is a list of some of the
20 essential national security capabilities of the
21 proposed CMRRNF building:

22 It provides monitoring and assurance of
23 the stockpile. That's the nuclear stockpile.

24 It supports nonproliferation and
25 counterterrorism needs of the country.

1 It provides science for treaty
2 verification.

3 It helps maintain credible deterrent
4 without testing.

5 One thing that's important to know,
6 Your Honor, is that the United States no longer
7 explodes nuclear materials for testing. So what
8 they have to do is they have to rely -- that stopped
9 in 1992 -- in 1992.

10 So what -- what the agency now -- the
11 United States has to rely on is information about
12 how those past pits worked in those tests, because
13 we no longer test new configurations of pits. So we
14 have to make sure that the new pits that are being
15 produced have the exact same characteristics of the
16 ones we tested, so that we know how they are going
17 to behave. Because you know, you can only truly
18 know how they are going to behave right when you
19 actually use it.

20 So here, since they're no longer exploding
21 pits to test them -- I don't know if they exploded
22 pits to test them -- but they're no longer doing the
23 explosions.

24 And I'm sorry, Your Honor. This is really
25 complicated material.

1 Since they no longer explode them they
2 have to make sure that the new ones they're making
3 are precisely the same as the old ones that were
4 tested, so that they know how things are going to
5 respond.

6 Let's see. Improves ability to respond to
7 urgent threats through modernized technical
8 capabilities.

9 Provides power sources for space flight.

10 And has other diverse applications
11 including energy, environment, and homeland
12 security.

13 So it's actually not just support of pit
14 production, Your Honor, that this facility is
15 designed to undertake. It's actually a whole suite
16 of operations. And I present this slide because it
17 presents it in more lay terms. It's something that
18 I can certainly grasp a lot better than trying to
19 read some of the reports that are in the record.

20 And then, finally, there are some other
21 pages that I don't think are particularly relevant,
22 but it has this one slide here. Here's that RLUOB
23 building again that I showed you in the earlier
24 picture that's already constructed.

25 And this is the proposed CMRRNF.

1 Another facility that you have heard
2 about, the plutonium facility, that's where actually
3 the pits are being produced, is right here just off
4 the side of the screen. You can barely see part of
5 it.

6 So -- so the idea is that all of these
7 buildings will support each other. And if -- if all
8 goes as to plan, the RLUOB will be connected to the
9 CMRRNF through a tunnel underground. And then
10 CMRRNF will also be connected to the plutonium
11 facility through a tunnel underground.

12 And the importance of that, Your Honor, is
13 that presently CMRR -- I mean CMR, the existing old
14 building, is located away from these buildings. So
15 right now any time they want to move nuclear
16 materials between the CMR, the old building, and the
17 new -- and the plutonium facility or eventually
18 RLUOB, they have to basically shut down roads -- the
19 roads in Los Alamos inside the laboratories
20 themselves. So it really gums up everything that's
21 going on while they transport this material safely
22 and securely through the lab.

23 So that's another hardship that's on the
24 laboratory right now, in trying to operate a CMR at
25 this other location, as opposed to once they have

1 tunnels adjoining these buildings they will be able
2 to just move them through the tunnels without
3 exposing them to, you know, national security
4 threats that are very serious matters.

5 In fact, I took a tour of RLUOB. And down
6 where the tunnel would be between the two buildings
7 there is this really heavy-duty security place where
8 they told me there's going to be 24-hour armed
9 guards sitting there. I mean that's how serious --
10 this is a serious matter.

11 So -- so I just thought that would help
12 give the Court a little bit more of an overview
13 about what this project is all about.

14 And then again just specifically what --
15 what is the status of CMRRNF, we have the Dr. Cook
16 declaration. We have Paragraph 11. He says, quote,
17 No CMRRNF construction is underway nor will any
18 occur as long as the SEIS is being prepared.

19 The plaintiffs do point out, as we talked
20 about last week, that there is this partial
21 excavation of the site that -- that Los Alamos did
22 to do some of the testing of the site that led to
23 the information for the SEIS process decision. But
24 again that was done, you know, based on the 2004 ROD
25 and is not -- is no longer active. It was done to

1 test the site before the new information came out.

2 Mr. Snyder's declaration at Paragraph 12,
3 quote, CMRRNF construction will not be authorized or
4 executed during the SEIS period. No contracts or
5 contract options for physical construction of CMRRNF
6 will be awarded pending outcome of the SEIS.

7 Those are pretty definitive statements.
8 Plaintiffs point to older materials in the record
9 that suggests certain things were going to happen in
10 2011, you know, progressing into construction,
11 progressing into detailed design. All of that is
12 off. All of that has been put off so that the
13 agency can finish the SEIS process and issue a ROD
14 and make a determination on -- based on the ROD, in
15 accordance with NEPA, on how to proceed with the
16 project.

17 And then as to design contracts,
18 Mr. Snyder at Paragraph 14, quote, Final design
19 contracts of CMRRNF have been deferred.

20 And then in paragraph 15 he says "The
21 CMRRNF has not established a performance baseline."

22 Again, that's the estimate for Congress,
23 the very precise detailed estimate of costs for
24 Congress.

25 The CMRRNF has not established a

1 performance baseline. As design uncertainties
2 continue to be addressed, the timeline for critical
3 decision 2, approve performance baseline, has not
4 yet been finalized. The performance baseline will
5 provide Congress with the definitive costs and
6 schedule for the CMRRNF project. In light of the
7 SEIS a definitive path forward will not be
8 established until issuance of a ROD by NNSA.
9 Critical decision 2 is required prior to critical
10 decision 3. And critical decision 3 says -- is
11 approved start of construction.

12 So what he's saying is we're not going to
13 move into critical decision stage 2 until after we
14 complete this ROD. Dependent on the outcome of the
15 ROD they will decide how to go, depending on the
16 outcome of the SEIS and the information that is
17 contained in that document.

18 The significance of the critical design
19 stage, Your Honor -- this is docket number 30-17.
20 This is -- we went over this a bit last week. It
21 talks about that this is the DOE guidance on
22 implementing NEPA with regards to projects. And
23 again it says proceeding -- proceeding with detailed
24 design -- "detailed" underlined -- is normally not
25 appropriate before the NEPA review process is

1 completed.

2 Again it's important to remember here,
3 this is an SEIS case after a record of decision, not
4 before. Like all of the cases, or almost all of the
5 cases that plaintiffs cite, here we have a valid
6 decision. Now, changes are being made to that
7 decision based on new information.

8 So the agency had progressed to a certain
9 point. It's in decision space CD1 at the moment,
10 which is still exploring alternatives.

11 If you will notice this footnote down here
12 it says, Note 2, that DOE order 413.3 similarly
13 provides for NEPA documentation to be completed
14 before critical decision 2. Detailed design --
15 conceptual design and detailed design are defined
16 under this DOE order.

17 So, Your Honor, to the extent this
18 guidance even applies here, they haven't entered
19 into CD2 space for the nuclear facility, as
20 Mr. Snyder's declaration indicates. So -- so
21 they're still being consistent with their own
22 guidance. The guidance, of course, as I noted last
23 week, is not enforceable. I think that what you
24 would have to do eventually, to look at the -- if
25 you wanted to get beyond that -- you can look at the

1 facts of this specific case as opposed to
2 necessarily what DOE -- how they interpret
3 implementation of their regulations and orders.

4 Last week plaintiff's counsel talked a lot
5 about how massive this project has become. It
6 certainly is a bigger project with regards to the
7 amount of concrete and the amount of steel necessary
8 for the project. The bulk of that concrete, under
9 the deep design, would go underground, essentially a
10 big block underground for the building to sit on, a
11 massive block of concrete.

12 And then the other major change is the
13 width of the walls has been increased substantially
14 and reinforced with the steel that is added to the
15 project.

16 But one thing that hasn't changed very
17 substantially is the footprint of the building.
18 It's still going to fit in that same space. It's
19 not -- you know, between -- that picture that I
20 showed you between RLUOB and the plutonium facility,
21 it still fits in that same space. The footprint
22 projected in the 2004 ROD for the building was 300
23 by 275 feet. So 300 by 275.

24 The analysis -- the proposed alternatives
25 in the draft EIS, the footprint has increased to 342

1 by 304 feet, which is a bit bigger but not overly
2 bigger. That's to account for the additional wall
3 space and they -- some proposals to move some
4 support facilities inside of the building as opposed
5 to having them outside of the building.

6 And I would note that this isn't a
7 remarkable unusual building. Like you wouldn't
8 drive up to it and go, "Oh, my gosh, it's the Hoover
9 Dam," as plaintiff's counsel said.

10 If you look at it, Your Honor, I'm sure
11 you've been by the Pit, the bask- -- you know,
12 coincidentally, the Pit, the basketball facility.
13 The roof of the Pit is 338 by 300 feet, almost
14 identical to the projected size of this building.
15 And it's not going to be much higher aboveground
16 than the Pit either. It's -- you know it's got a
17 couple of stories aboveground and some belowground.
18 And then most of that cement is underground just to
19 ride on.

20 And again, if the shallow option works out
21 with this less environmentally impactful option as
22 far as, you know, producing concrete and truck
23 travel and things like that, it will be a lot less
24 as far as those impacts go.

25 So then, Your Honor, returning to the

1 arguments about the motion to dismiss, I started off
2 by going over why it seemed like Judge -- Magistrate
3 Judge Torgerson's recommendation actually made a lot
4 of sense, prudential mootness, how it fits, how it's
5 geared towards deference towards the federal agency
6 when the federal agency is making changes to its
7 policy, which it plainly has here. Although again,
8 I think this is the ord- -- an ordinary change that
9 they were going through anyway, to go through the
10 NEPA process.

11 But one thing that plaintiff's counsel
12 repeated at least twice was that somehow Magistrate
13 Judge Torgerson inadvertently gave DOE a pass here,
14 gave them a NEPA pass. They get to do whatever they
15 want. You know, they're just going to violate NEPA
16 and they're not going to be held accountable.

17 That's not true at all, Your Honor, even
18 accepting the notion that somehow maybe DOE should
19 have done the SEIS sooner than they had, which --
20 which I think is wrong, is incorrect. It's an
21 incorrect interpretation.

22 But even accepting that, I don't think
23 Magistrate Judge Torgerson intended to give DOE any
24 kind of pass inadvertently or otherwise.

25 As he pointed out, when the new ROD, the

1 new record of decision comes out, plaintiffs can
2 challenge that new record of decision, and that's
3 what makes sense here. Because at that point we'll
4 have the entire analysis done and the SEIS and the
5 ROD. If plaintiffs want to make their argument
6 about, Well, they should have done a different kind
7 of EIS, a new EIS, as plaintiffs call it, they
8 should have examined other alternatives, they should
9 have looked at environmental impacts in a certain
10 way, they should have provided this to the public in
11 a different way, they should have looked at
12 mitigation measures in a different way, all of that
13 will be ripe for judicial review once that ROD is
14 issued and before any construction will have begun.

15 So as far as the -- and I'll get into this
16 during the PI argument as well. But as far as the
17 injuries go, there's no injuries here because the
18 injuries have to occur during the course before the
19 Court can reach the merits.

20 Well, assuming that the Court's going to
21 the merits, if the -- if the Court even keeps this
22 alive -- there's still a point down the road in the
23 future where things are going to change. Based on
24 the record of decision, there is going to be -- even
25 if -- even if you wouldn't consider it for

1 constitutional mootness purposes, the beginning of
2 the NEPA process as a change. Certainly when the
3 ROD comes out in a few months that will be a
4 significant change that will, even by plaintiff's
5 own account, would moot the case.

6 And then you would be looking at a new
7 decision, not the old ROD for the CMRRNF, but a new
8 ROD, which will at that time replace the old ROD as
9 to this particular building.

10 At that time you will have an
11 administrative record for that whole process to
12 review, and it won't usurp the agency's ability
13 right now to go through this process, make its own
14 corrections in the course, if it sees that they need
15 to be made based on public comments.

16 Again, the draft SEIS that we presented
17 you on Friday -- I mean on Wednesday -- it is out
18 for public review. DOE/NNSA will look at all the
19 public comments that come in. They will consider
20 them all. They might not agree with them all, but
21 they'll explain why, if they don't agree with them
22 all. If plaintiffs say --

23 THE COURT: Tell me how that process
24 squares with the plaintiff's argument that the
25 supplemental is -- and maybe I'm putting words in

1 their mouths -- but basically is a sham process,
2 that the options that are currently on the table
3 include some which are perhaps not -- not
4 legitimate --

5 MR. SMITH: Right.

6 THE COURT: -- or -- or the notion that
7 the preferred design has somehow been preordained so
8 that --

9 MR. SMITH: Right.

10 THE COURT: -- the true review of the
11 environmental impacts have been, maybe, guided to a
12 particular result.

13 MR. SMITH: Well, Your Honor, I think it's
14 pretty obvious. One, just looking at the course
15 that things have gone, that there is no particular
16 result here. Things are -- have very much changed.

17 Based on DOE's development of its own
18 information, its own design code was a big change.
19 You know, it didn't bury its head and say, you know,
20 no, you know, this seis- -- new seismic information
21 we got, we can still get by with this old design.
22 They have constantly changed this design.

23 There's oversight by another federal
24 entity, the Nuclear Defense Board that plaintiffs
25 mentioned several times, and that's -- there's some

1 of their documents in the paper.

2 This independent board, which was created
3 by statute, oversees NNSA's operations and buildings
4 and plans, so they're constantly providing DOE with
5 feedback in questioning them.

6 You know every month or every few months
7 the defense board sends DOE a letter saying, Hey,
8 we're concerned about this particular design, or,
9 We're concerned about how you're analyzing responses
10 to seismic activity.

11 So that's the ongoing process that shows
12 that nobody has locked into any particular design.
13 And the idea -- you know, again, since the SEIS
14 process began with the notice of scoping, you know,
15 back last year, they have come up with yet this
16 other option, this shallow design. So it shows
17 right there that DOE is looking at -- you know, at
18 this. This is an evolving process. They're not
19 locked into any particular alternative. That's
20 pretty much the opposite of a sham.

21 Dr. Cook testified that he would -- you
22 know, he's at the level that makes the decision.
23 The decision is going to be made, the ROD, the
24 record of decision, the new one, is designed by the
25 administrator. Dr. Cook's the deputy administrator,

1 so he is from that office back in Washington DC for
2 all of NNSA.

3 He says, you know, any separation, he will
4 look at this with an open mind, look at the
5 environmental impacts. They're looking for
6 different ways to minimize the environmental
7 impacts.

8 Plaintiffs complain that the no action
9 alternative in the SEIS -- I mean again, this seems
10 like a premature argument to me, because we're
11 trying to judge the validity of a document that I
12 don't think is ripe for judicial review until the
13 ROD is issued.

14 But anyway, plaintiffs complain that the
15 no action alternative is the 2004 configuration.
16 Well, that's -- that's fine, and DOE has recognized
17 that that configuration can no longer go forward
18 because of the design changes that must be
19 implemented because of the new earthquake
20 information.

21 But -- but the purpose of a no action
22 alternative is to compare the incremental impacts of
23 the action that's being proposed, as well as other
24 alternatives to what the existing situation was.

25 And the way -- the way DOE has viewed

1 their task here is that their -- the proposal on the
2 table is whether and how to modify the design for
3 this building, so they're looking at various
4 alternatives. So -- so they're comparing the
5 impacts of the new designs, new proposed design, and
6 the various alternatives to that old design.

7 But it really doesn't make much of a
8 difference, because what they are presenting in the
9 end is the absolute numbers, you know, the absolute
10 amount of concrete, the absolute amount of steel,
11 the absolute amount of these kinds of emissions or
12 those kinds of emissions, all of those impacts which
13 go towards the no action alternative.

14 But even if -- even if, say, that was not
15 the right no action alternative to include, the
16 other no action alternative, of course, is to not
17 build the building at all. And that is included as
18 the other alternative that's in the supplemental
19 environmental impact statement. And that's run the
20 old building to the ground as long as we can, doing
21 what -- you know, doing upgrades as we can, as makes
22 sense.

23 So they are -- you know regardless of
24 labels, they are looking at and comparing the
25 proposed construction alternatives with the other

1 alternatives so that you -- the public can compare
2 and see how the differences are for environmental
3 impacts.

4 NEPA is governed, Your Honor, by -- the
5 Supreme Court and the 10th Circuit have said this a
6 lot -- by rule of reason. And what that means is
7 that there's not necessarily one particular way as
8 to how to do things under NEPA.

9 I mean there is certain rules under NEPA,
10 like you have to have a 45-day public comment period
11 on a draft EIS, right? But other than that, how the
12 agency analyzes impacts and looks at them is
13 governed by a rule of reason.

14 Now, there may be multiple reasonable ways
15 to do things. And Your Honor might conclude that it
16 would have been more reasonable to do things one
17 way, but that doesn't make the agency's way of doing
18 it unreasonable. It's just another reasonable way.

19 And when you are reviewing a NEPA case on
20 the merits, if the agency's way is one of those
21 multiple reasonable ways of doing things, then the
22 agency's decision has to be upheld.

23 So there -- you know, granted, there's
24 lots of ways to look at this, but it's not a sham.
25 The agencies often look at no action alternatives

1 meaning, you know, no construction of the building
2 or no timber harvesting or whatever, that don't meet
3 the purpose and need for the project in the first
4 place.

5 So I mean there's always a purpose and
6 need for a project that's part of the NEPA process.
7 That's what generates it. That's how we get there
8 in the first place.

9 So most times the no action alternative,
10 whatever it is, is not going to meet the purpose and
11 need. But that's not necessarily what it's there
12 for. It's there for -- to provide comparisons
13 between the different alternatives so that the
14 public can see and then the ultimate decision-maker
15 at DOE can see what the potential environmental
16 impacts have.

17 And then one of the things I think that
18 shows DOE's good faith here as well is that
19 ordinarily they don't have to allow for a public
20 scoping period, a period before they even drafted
21 the SEIS. They don't have to allow that for a
22 supplemental environmental impact statement. That
23 obligation only arises for environmental impact
24 statements, original ones.

25 Nonetheless, they did that here. We talk

1 about that in our various briefs. They went above
2 and beyond what was required for a supplemental
3 environmental impact statement, took it out, held
4 public scoping meetings, accepted comments on the
5 initial proposal that was in the Federal Register
6 notice, and they accepted those comments. They
7 looked at them. Again, they considered them. They
8 didn't have to accept them, but they certainly
9 incorporated that into their decision-making
10 process.

11 So I mean again, it's hard when someone
12 accuses the government of bad faith to say, well --
13 or a sham, to say it's not. I mean that's why the
14 10th Circuit in the Forest Guardians case -- and
15 I'll get into that in a minute -- really emphasized
16 several times in that decision -- that's a
17 predetermination case that's -- what a stringent
18 standard it is to actually prove that the government
19 is acting in bad faith. I mean there -- there they
20 had -- that case involved the -- a rule by the Fish
21 and Wildlife Service to potentially introduce a
22 population of falcons into southern New Mexico. And
23 so that was the proposed action, right? And the no
24 action would be to, you know, let the wild
25 populations do what they could.

1 And there were statements in the record
2 from biologists of the Fish and Wildlife Service
3 saying, you know, We're going to do this. We're
4 going to introduce this experimental population.

5 There was a statement from an organization
6 that -- called the Peregrine Fund that was raising
7 these birds in captivity that stood to have great
8 benefit from that decision. You know, they were the
9 ones that were going to provide the birds to be
10 reintroduced into New Mexico.

11 There's a statement in there from one of
12 their biologists saying that Fish and Wildlife
13 Service told them that this experimental population
14 rule was a done deal.

15 The 10th Circuit said, you know, that's --
16 that's not enough. And I'll get more into that in a
17 minute.

18 But -- so -- so here, what plaintiffs are
19 pointing to is -- is commitments by the President of
20 the United States and the Vice President of the
21 United States saying how they were going to ensure
22 that this project received its adequate funding.

23 Now the President of the United States and
24 the Vice President of the United States are not
25 subject to NEPA. NEPA applies to federal agencies.

1 There is case law on that if you are even interested
2 in it, but it's pretty obvious that NEPA applies to
3 federal agency actions. And the courts have held
4 that the President is not a federal agency.

5 So again, though, those statements talk
6 about how important this project is to national
7 security. What they don't do, Your Honor, none of
8 the statements do, is say, We're locked in to this
9 design, we're locked in to this design, we're going
10 to do it this way, NEPA be damned.

11 The agency is keeping an open mind here in
12 going through this process. That draft SEIS is an
13 extensive document with detailed analyses. You know
14 they are spending hundreds of thousands, if not
15 millions of dollars, on this process. It's a
16 serious process. They take their NEPA obligation
17 seriously. And you know it's hard to say -- you
18 know it's hard to defend the negative in that kind
19 of situation.

20 But again, I think the end is that
21 Magistrate Judge Torgerson didn't inadvertently give
22 any pass here. This is all going to be subject to
23 judicial review once the ROD comes out. But the
24 Court should defer either through prudential
25 mootness or through the ripeness doctrine and let

1 that process complete itself. There will be a new
2 ROD.

3 If plaintiffs are still dissatisfied --
4 I'm sure they probably will be -- you know we can
5 come back to court, but we will have a final
6 decision that is ripe for judicial review and we can
7 go from there.

8 And just briefly to finish up on the
9 prudential mootness issue, Your Honor, the
10 plaintiffs cite some cases where a Court either
11 applied or couldn't apply prudential mootness in the
12 context where the construction or the project was
13 almost done.

14 In one case the project -- you know the
15 filling of wetlands was, you know, almost complete
16 and the Court said, I'm going to apply prudential
17 mootness here because the project is almost -- there
18 is not really much -- I'm not going to enjoin this
19 last little bit of filling this wetland. It doesn't
20 make sense.

21 And then there's some other cases where
22 the project was more or less complete, where the
23 project -- where the Court said, We are not going to
24 apply prudential mootness.

25 Well, those aren't the cases that are

1 relevant here, because the construction is not
2 ongoing here, so there's no -- it's not looking at
3 the construction and saying, Well, this case is
4 essentially over anyway.

5 The case that this is most similar to is
6 this Willow Creek Ecology case out of the District
7 of Colorado, in which the agency had withdrawn the
8 decision. It's called a decision notice in that
9 case, but the equivalent of a ROD, for a particular
10 timber project that had been partially implemented.
11 But the agency withdrew that decision notice and
12 told the Court, We're not going to go forward with
13 that decision notice.

14 And the Court in that case said, Yes, I'm
15 going to stay my hand. They're not going to go
16 forward under that decision notice. If they go
17 through a new administrative process and come up
18 with a new decision to go forward with this project
19 or something, you know, related to it, then we can
20 review that at this time.

21 And that's kind of where we are here. We
22 have the old ROD, the old record of decision. DOE
23 has indicated that they are not going to go forward
24 with that decision with regards to building the
25 CMRRNF, so the Court should stay its hand. There is

1 nothing to adjudicate here. There's nothing for the
2 Court to stay, and it gives the deference to the
3 agency to complete its administrative process.
4 Let's see where it comes out. Let's see what we
5 have. Let's focus the issues on what's left.

6 You know, maybe -- you know, certainly,
7 plaintiffs aren't going to be satisfied with some
8 things, but maybe they'll be satisfied with the
9 mitigation measures that ultimately come out of the
10 process or whatever. So -- so maybe it will
11 eliminate some of the issues.

12 Maybe it will eliminate all of them.
13 Maybe they will figure -- I don't know. You know,
14 they will probably get up here and say, We're going
15 to sue hell or high water so, Judge, you need to
16 rule now. You know, that's just not -- not the law,
17 though.

18 So -- so again on prudential mootness,
19 Your Honor, I think Magistrate Judge Torgerson's
20 decision was actually quite wise. It wasn't the way
21 that I had originally envisioned the problems. I
22 mean I saw lots of jurisdictional problems here, but
23 it kind of encompasses the whole package here that,
24 you know, there's deference to the agency, there's
25 this change in circumstances where the agency is

1 committed to doing this NEPA process.

2 I'm not sure if you enjoin something here,
3 or took this up as a matter of not being moot or not
4 being not ripe, what -- what would happen? I mean
5 how, if the agency is committed to this outcome as
6 plaintiffs allege, how would anything change if an
7 injunction were -- I mean that doesn't -- I don't
8 see how that changes in the end.

9 I mean it -- but again, I -- again, I
10 think the evidence is real sparse that there is any
11 commitment to any particular way of going or any
12 particular outcome of this project.

13 I -- you know, Your Honor, we also believe
14 this case is constitutionally moot. I'm not going
15 to spend a lot of time on that issue. But the idea
16 that the agency has to complete the NEPA process
17 first for it to be constitutionally moot I don't
18 think is necessarily supported by the case law,
19 where the agency has actually published its notice
20 of intent.

21 It's not just saying, you know, Oh, yeah,
22 Your Honor, it's moot because, you know, we're going
23 to do NEPA in the future sometime and everything
24 will be hunky-dory. The agency isn't saying that
25 here.

1 They have actually, you know, published in
2 the Federal Register, committed to doing the
3 supplemental environmental impact statement. And
4 now they have actually, even more so, released the
5 draft environmental impact statement. It's a real,
6 substantial document.

7 You know, plaintiffs are going to have
8 their beefs with it. I have my own beefs with it,
9 but that's not what's important now.

10 But they are going through the process,
11 and it's not until the end of that process -- that's
12 where you get from mootness into ripeness. It's not
13 until the end of that process that the Court should
14 get involved and look at how the agency is complying
15 with NEPA.

16 And then just getting into the ripeness
17 issue, which I think is more substantial here, but I
18 think it is related to Magistrate Judge Torgerson's
19 considerations and prudential mootness, I don't
20 think that necessarily one has to replace the other
21 or they're complementary here. I think they could
22 both support each other.

23 The purpose of the ripeness doctrine is to
24 prevent the courts, through avoidance -- and I'm
25 quoting -- this is the National Park Hospitality

1 case. It's cited in our briefs. It's 538 US 803.

2 I'm quoting from pages 807 through 808.

3 That -- the Supreme Court in that case
4 said, "The purpose of the ripeness doctrine is to
5 prevent courts, through avoidance of premature
6 adjudication, from entangling themselves in abstract
7 disagreements over administrative policies, and also
8 to protect the agencies from judicial interference
9 until an administrative decision has been formalized
10 and its effects felt in a concrete way by the
11 challenging parties."

12 So that's a lot in that statement, but I
13 think it fairly well encapsulates what's going on
14 here.

15 The agency is in the middle of a NEPA
16 process. There's no construction going on, so
17 plaintiffs aren't feeling any effects in a concrete
18 way, as in other cases, like they cite a lot Judge
19 Mechum's unpublished decision in that DART case. In
20 that DART case, construction was going on, so there
21 was something for the Court to enjoin and sink its
22 teeth in.

23 And also in the DART case, you know, that
24 was a question about the adequacy of the NEPA that
25 had already been done. The agency wasn't in the

1 middle of its NEPA process like it is here, to
2 reopen the NEPA process. I'll get to that in a
3 minute. But the agency hadn't done an EIS for that
4 project. And so that case was about not doing any
5 EIS at all.

6 Here, we've already done one EIS and now
7 we are supplementing it, and we're in the middle of
8 that process. So the agency, again under the
9 ripeness doctrine, should be allowed to go forward
10 with that process.

11 One of the main elements of ripeness in
12 the context of federal agency action is -- is
13 whether there's a final agency action.

14 Now by statute, under the Administrative
15 Procedure Act, you know, individuals and entities
16 can't just sue the United States because of
17 sovereign immunity. That sovereign immunity is
18 waived against the United States in cases against
19 final agency actions for which there is no other
20 remedy in law. And that's the Administrative
21 Procedure Act at 5 USC 704.

22 And 702 allows -- you know, combined, they
23 allow entities to sue the United States for final
24 agency action. So it has to be -- one, it has to be
25 an agency action, so you can't use the APA, again,

1 against President Obama. You can use it against
2 federal agencies. DOE/NNSA, they're a federal
3 agency. But the action challenging has to be final.

4 So what does it mean to be final? The
5 Supreme Court in the seminal case of *Bennet v.*
6 *Spear* -- again, I think all of these cases I have
7 mentioned today will be in my brief, but I'll give
8 you the cites again. They're at 520 US 154 at
9 177-178, says -- the Supreme Court said that an
10 action is final under the APA if the -- the action
11 must mark the consummation of the agency's
12 decision-making process. It must not be a merely
13 tentative or interlocutory nature. That's one of
14 the requirements. It's got to be -- the process has
15 to be complete. That's what a record of decision
16 is.

17 There's no record of decision for this
18 SEIS, so it doesn't make sense to start arguing
19 about whether they're adequately looking at
20 mitigation in the draft SEIS or what alternatives
21 and things like that. There's no consummation.
22 That process is ongoing.

23 And, two, the action must be one by which
24 rights or obligations have been determined and from
25 which legal consequences flow.

1 So right now, the agency has not
2 determined how it's going to go forward with this
3 project. In fact, there's even a possibility that
4 it might not go forward with this project, you know,
5 after it reviews the NEPA material.

6 So those are the two tests. There's lots
7 and lots of case law saying that the final agency
8 action in NEPA is when the EIS and the ROD are
9 complete.

10 Judge Black, in a case -- another one of
11 my cases, New Mexico ex. rel. Richardson versus
12 Bureau of Land Management, which involved Otero
13 Mesa, he said if there's a real possibility that the
14 agency will conduct further environmental analysis
15 the NEPA claim is not yet ripe. That's at 459 F
16 Supp 2d on pages 1116 to 1117.

17 His decision was vacated on part -- on
18 another part of the case, but that particular part
19 of the case is actually affirmed.

20 So here, it's not a possibility that
21 there's going to be new NEPA, it's not even a real
22 possibility; it's an actuality. There is new NEPA.
23 It's going on. The agency, at its highest levels,
24 has committed to doing this new NEPA before there is
25 any final decision on how to proceed with the

1 CMRRNF.

2 The cases -- some of the cases,
3 Your Honor, on this issue, for instance, in a case
4 called Coliseum Square out of the Eastern District
5 of Louisiana, it's a non-published case, but it's on
6 Westlaw at 2003, Westlaw 715758. At page 6, the
7 Court held that judicial review is NEPA -- of NEPA
8 claims is inappropriate in light of the reopened
9 NEPA reviews.

10 That's kind of what we have here. That's
11 why I cite that specific case.

12 There's lots of other cases that talk
13 about the more normal situation where parties are
14 challenging an EIS and a ROD.

15 In Sierra Club versus Slater, a
16 6th Circuit case, 120 F 3d 623 at page 631, the
17 Court said, "It appears well established that a
18 final EIS or the ROD issued thereon constitute the
19 final agency action for purposes of the APA."

20 A case called Goodrich versus United
21 States, 434 F 3d at page 1335, out of the federal
22 circuit, collecting -- "collected case law from our
23 sister circuits holding that for purposes of the APA
24 a ROD is a final agency action."

25 So I'm not going to bore Your Honor with

1 all of these cases. There's one more worth pointing
2 out, I guess, Center for Marine Conservation, 917 F
3 Supp at page 1150, out of the Southern District of
4 Texas. Quote, Of course any challenge to the
5 supplemental EIS itself is not ripe for review
6 because there is no final agency action to review
7 until the EIS is actually issued, end quote.

8 So I think the case law is well settled
9 that the process has to be complete.

10 Plaintiffs have cited a 10th Circuit case
11 called Friends of Marolz, and then -- which is based
12 on a Supreme Court case that says a violation of
13 NEPA can be challenged at any time because it can
14 never get riper.

15 But the plaintiffs misread that case. And
16 I'm not aware of any case that's used that language
17 to say you can jump into the middle of the process.
18 The violation of NEPA occurs when the ROD is issued,
19 not when a draft EIS comes out that looks like it
20 might not have an appropriate alternative or
21 something like that.

22 So that's -- those are the main issues of
23 ripeness, again. But the important point is to let
24 the agency finish its process and then, you know,
25 judicial review can occur.

1 I wanted to get into -- and this kind of
2 goes to both their motion for preliminary injunction
3 as well as the issue of -- of what's going on here,
4 and that is the issue of predetermination.

5 And this kind of goes back to your
6 question, Your Honor, about the sham that plaintiffs
7 allege is going on here.

8 And -- and the -- and I think the -- you
9 know sort of the important case that sort of
10 summarizes the law in the 10th Circuit is the Forest
11 Guardians versus Fish and Wildlife Services, that
12 Aplomado falcon case I mentioned earlier. And
13 that's found at 611 F 3d 692. It's a 2010 case, so
14 it's fairly new. It kind of looks at some of the
15 other cases that are out there on this issue in
16 various ways.

17 In that case, one of the important
18 things -- I already mentioned one of the important
19 things was that predetermination requires a very
20 clear showing. That's reflected in the Court's
21 statements of -- for instance at page 714, quote, A
22 petitioner must meet a high standard to prove
23 predetermination.

24 And then another statement at page 17 --
25 excuse me -- 717, quote, The evidence must meet

1 rigorous -- the rigorous standard of establishing
2 that the agency has made an irreversible and
3 irretrievable commitment, end quote, to the
4 particular project, particular alternative.

5 But it -- so it -- one, it's a very high
6 standard.

7 Two -- and I think this is an important
8 point that the Court made -- is that a finding of
9 predetermination doesn't necessarily lead to a
10 finding of a NEPA violation.

11 What the Court said on page 713, in
12 footnote 17, it said, What Davis, which is an
13 earlier 10th Circuit case on predetermination -- I
14 will get to that in a minute, but it's one that
15 plaintiffs rely heavily on in this case -- in Forest
16 Guardians the 10th Circuit said, What Davis meant
17 was that if an agency predetermines the result of
18 its NEPA analysis, this Court is more likely to
19 conclude that the agency failed to take a hard look
20 at the environmental consequences of its actions
21 and, therefore, acted arbitrarily and capriciously.

22 So it only makes the Court more likely to
23 find that the ultimate analysis was not
24 sufficient -- more likely. It doesn't establish
25 that that NEPA analysis, that process, must be

1 thrown out. It just makes it more likely.

2 In other words, the Court -- provided a
3 predetermination is shown, it makes the Court more
4 skeptical of the resulting environmental analysis.
5 It doesn't necessarily mean that that environmental
6 analysis is thrown out. There may be other evidence
7 that comes in that shows it's still a valid
8 environmental analysis.

9 So predetermination alone, according to
10 the 10th Circuit, is not in and of itself grounds to
11 find an ultimate NEPA violation to throw out an
12 agency's decision. And again, that's footnote 17 on
13 page 713.

14 Other important points in this Forest
15 Guardians case are that the Court emphasized that
16 the agency does not have to remain subjectively
17 impartial to the various alternatives that it's
18 considering in the NEPA process.

19 In fact, NEPA requires just the opposite.
20 It requires the agency to identify its preferred
21 alternative. It requires the agency to identify the
22 purpose and need for its proposal in the first
23 place.

24 And that's what the agency has done here
25 in the statements that plaintiffs point to about

1 commitment. Yes, this facility is critical to
2 national security. The agency has found that. DOD,
3 the Department of Defense, has found that. The
4 President of the United States has found that.
5 Congress has found that.

6 So to say that there's an urgent need for
7 this project, we want to get it moving as fast as we
8 can, is not the same as predetermination. They're
9 not predetermining the outcome of how they are going
10 to meet this need, but that's what NEPA is all
11 about. There's -- you first identify the need for
12 the project. That need is identified. It's very
13 serious.

14 Then you go through the NEPA process to
15 determine, are there environmental impacts from this
16 proposal or its alternatives, or are there
17 alternative ways to do it that have less impacts, or
18 do the environmental impacts outweigh the importance
19 of this project altogether?

20 But it -- NEPA does not preclude the
21 agency from saying this project is critical to
22 national security, or this project is critical to
23 what we need to protect, this national forest or
24 whatever the project may be. That's not how NEPA
25 works.

1 NEPA requires the agency to identify that
2 purpose and need and then look at alternatives, look
3 at the environmental impacts, put that out there for
4 the public.

5 And even after all of that process is
6 completed, Your Honor, NEPA does not dictate the
7 result. It does not tell the agency, You have to do
8 the most environmentally friendly alternative or you
9 can't do this project, if there's a certain amount
10 of environmental impacts.

11 That's not how NEPA works. NEPA is purely
12 procedural. It only requires the agency to take a
13 hard look at the environmental impacts, to put those
14 environmental impacts out before the public, get
15 public input, incorporate that into the
16 decision-making process.

17 Oftentimes, during that NEPA process, it
18 works amazingly well. It's actually surprising.
19 NEPA is a very simple statute. It's not a long --
20 one of these long environmental statutes. It's
21 actually pretty short. And all it says is the
22 agency puts this information out there. It's purely
23 procedural.

24 It doesn't dictate the substance of the
25 decision. It doesn't say the agency's decision has

1 to be wise, it has to be perfect, it has to be the
2 best decision ever, or it has to be environmentally
3 friendly. That's not what NEPA does at all. The
4 Supreme Court has said that several times. It only
5 requires the process.

6 But it works amazingly well, Your Honor,
7 because of interest groups and individuals bringing
8 their -- the public interest to bear on the agency.

9 So oftentimes, and even in this instance
10 as well, the agency gets shaped to look hard for
11 environment -- ways to reduce environmental impact.
12 And that's exactly what the agency is already doing
13 here is by -- you know, they have the deep
14 alternative proposal, you know, when this lawsuit
15 started. And now they are looking at the shallow
16 alternative. They don't know yet for sure if it's
17 going to be viable as far as, you know, earthquake
18 safety.

19 But they're examining it, and that's why
20 it's important for this process to go on, is for
21 them to continue design, to make sure -- and
22 hopefully that will work and there will be less need
23 to put this big huge pad of concrete under the
24 building and we'll have a much more
25 environmentally -- a much less environmentally

1 inpactful project. So that's now NEPA works.

2 And then so -- so again, as the 10th
3 Circuit said, it doesn't require subjective
4 impartiality, it only requires good faith
5 objectivity in reviewing the environmental impacts.
6 And there is no evidence that the agency is not
7 moving forward looking at these impacts as
8 objectively as they can. They are outlined. I mean
9 they're kind of doing overkill on -- on outlining
10 all of the potential impacts, all the acres that
11 might be impacted.

12 You know, the plaintiffs put up their
13 slide -- it's still over there -- about, you know,
14 now -- the original project was going to affect
15 26.75 acres, and the new proposals are going to
16 affect somewhere, you know -- and again, it's
17 changing all the time as they develop these. But
18 you know, greater than 79 on their board. I think
19 it's actually up from that, in their proposal, to
20 around 100 for the shallow and 120 or so for the
21 deep.

22 So -- but -- but those impacts, 130 acres,
23 I mean the building itself is still on almost an
24 identical amount of acreage which is, like,
25 4-point -- it was 4.75, I think in the 2004 ROD, and

1 now it's 4.80. So it's gone up by .05 of an acre.

2 But what those other impacts are are
3 temporary laydown areas, places to put the batch
4 plants to mix the concrete, things like that.

5 And to put that number in perspective
6 plaintiffs are like, Oh, my gosh, they're doing the
7 Hoover Dam now. They were going to do Cochiti, now
8 they're doing Hoover Dam. This is ridiculous.

9 To put 150 acres of temporary impacts into
10 perspective, Your Honor, the Forest Service has
11 what's called a categorical exclusion from NEPA. A
12 categorical exclusion is part of the NEPA process
13 where an agency identifies categories of actions
14 that they -- they find will never have a significant
15 environmental impact. Okay? So they have
16 categorical exclusion.

17 That was upheld by the 10th Circuit in a
18 case called Colorado Wild. I don't have the cite
19 offhand. But in that case, the categorical
20 exclusion at issue was the removal of salvage timber
21 from 250 acres. And we're talking there a national
22 forest. We're not talking about a national
23 laboratory, where most of these areas are already
24 disturbed and it's not prime hiking ground or
25 hunting ground.

1 For the plaintiffs, regardless of what
2 their declarations say, if you're hunting in
3 Los Alamos, you better keep your head down yourself.

4 But this is not prime -- you know, the
5 areas that they're using are already mostly, for the
6 most part, disturbed. So we are talking about 125,
7 where the Forest Service has a categorical exclusion
8 that is upheld for harvest of 250 acres and building
9 of a half mile of temporary road.

10 So by comparison -- and that's a
11 categorical exclusion where they are never going to
12 have significant environmental impacts. So you
13 know, aside from the concrete issue and the steel
14 issue, the acreage issue is sort of a red herring
15 because it's not actually that much acreage.

16 And again, I'm not -- certainly not trying
17 to prejudge the process and say it's not going to
18 come out that there is significant impact related to
19 that. I'm just trying to put it in perspective.

20 And then finally, Your Honor, with regards
21 to the Forest Guardians decision, the other
22 principle is to find predetermination and
23 irreversible commitments of resources.

24 The Courts looked to whether the agency
25 has bound itself -- has bound itself to a certain

1 path. So for instance, the 10th Circuit said on
2 page 717, "The agency will not be found to have
3 conducted a biased NEPA analysis unless those
4 communications fairly could be said to have the
5 effect of binding the agency as a whole to an
6 irreversible and irretrievable commitment to a
7 course of conduct based on a particular
8 environmental outcome, thereby rendering any
9 subsequent environmental analysis biased and
10 flawed."

11 So there's nothing here that binds the
12 agency to come out with an environmental impact
13 statement that says this or that. I mean often,
14 that issue comes up in the other -- you know,
15 there's three NEPA analyses, right? I talked about
16 categorical exclusion. We have already been talking
17 about the environmental impact statement.

18 Where this kind of thing usually comes up
19 is in the middle, when the agency prepares what's
20 called an environmental assessment. And that --
21 what the environmental assessment is is where, if
22 the impacts -- potential impacts or the significance
23 of them is unclear, the environmental assessment is
24 used to determine whether a full-blown environmental
25 impact statement is necessary.

1 So an environmental assessment, an EA, is
2 a -- usually a briefer, shorter, concise document
3 briefly looking at the potential impacts to
4 determine whether they are of potential significance
5 such that an EIS must be prepared.

6 Under NEPA, the NEPA language itself --
7 again, it's real short -- just says federal agency
8 actions shall prepare an impact statement for
9 projects that may -- and I'm just paraphrasing --
10 that may have a significant impact on the
11 environment.

12 So the EA is used to determine whether
13 that threshold is met. And at the end of that EA,
14 the decision is either to prepare an EIS or it comes
15 out with a FONSI, which is a finding of no
16 significant impact.

17 So usually where this comes up in a lot of
18 the cases that plaintiffs cite, including the Davis
19 versus Mineta case, is where the agency has
20 predetermined -- prejudged the environmental impacts
21 to say they're not going to be significant before
22 it's even gone through the process, before it's
23 completed the process and gone out to the public
24 with the EA, that it's prejudged the significance
25 level as to whether to go into an EIS or not.

1 Here that is irrelevant, because it
2 doesn't matter -- it doesn't matter at all whether
3 the agency here characterizes their -- the potential
4 impacts as significant or not. They're doing an
5 EIS. So all that matters is putting the impacts out
6 there to the public, you know, the numbers and how
7 this relates to standards and things like that.
8 Whether they, you know, call it significant or not
9 is irrelevant.

10 So -- so these cases like Davis versus
11 Mineta aren't really on point. And Davis versus
12 Mineta, which is 302 F 3d 1104, the 10th Circuit did
13 find predetermination.

14 Why? Because the -- the contractor who
15 was working on the NEPA process had a contract
16 requiring it to produce a FONSI well before the NEPA
17 process had even begun.

18 So, well, of course that's
19 predetermination if the agent -- if the contractor
20 is contracted to produce a FONSI to produce a
21 certain result in the NEPA process.

22 Here there is no result-oriented decision
23 at all. The NEPA process is open, the contractor is
24 aiding in looking for alternatives to explore to
25 increase the importance and the viability of the

1 NEPA process. There's no contract for the
2 contractor to produce a certain outcome to say,
3 look, let's -- you know, by contract, let's say
4 these impacts are insignificant.

5 That -- that was the problem in Davis
6 versus Mineta.

7 Again another case where a
8 predetermination was found that's cited by a lot of
9 Courts is Metcalf versus Daley, which is a
10 9th Circuit case, 214 F 3d 1135. In that case the
11 agency was looking at whether to allow an Indian
12 tribe, the Makah tribe, to harvest a certain number
13 of gray whales.

14 And during the NEPA process -- prior to
15 the completion of the NEPA process, the agency
16 entered into an agreement with the tribe saying it
17 would support that decision that it -- you know. So
18 again, the 9th Circuit in that case found that there
19 was predetermination because the agency had an
20 agreement with the tribe to support the tribe's
21 proposal that it be allowed to hunt a certain number
22 of gray whales.

23 But the 9th Circuit in that case
24 clarified. It says, quote, We want to make clear,
25 however, that this case does not stand for the

1 general proposition that an agency cannot begin
2 preliminary consideration of an action without first
3 preparing an EA or that the agency must always
4 prepare an EA before it can lend support to any
5 proposal. Again, making clear that it's not wrong
6 for an agency to support it.

7 But where the agency crossed the line in
8 the Metcalf case was they actually committed to the
9 tribe that it would go forward with its decision to
10 allow the hunt.

11 And then another interesting case out of
12 the 9th Circuit on this issue is Conner versus
13 Burford, 848 F 2d 1441. In that case, the
14 9th Circuit found the dichotomy of situations. It
15 said -- the case had to do with oil and gas leases.
16 When does the agency make an irreversible and
17 irretrievable commitment of resources in the context
18 of issuing oil and gas leases?

19 The Court said if the agency sells an oil
20 and gas lease that allows development on the lease
21 parcel before it completes the NEPA process, that's
22 an irreversible commitment of resources. So if it
23 actually issues the lease that allows development on
24 that parcel, that's irreversible because it
25 allows -- it gives the lessee some right to develop

1 that parcel.

2 On the other hand, in that same case, the
3 Court found that non- -- what are called non-surface
4 occupancy leases, leases that don't allow the lessee
5 to actually use the parcel itself but allows for a
6 directional development from outside to drill under
7 that parcel, those are not irreversible commitments
8 of resources. They're not irreversible commitments
9 of resources because the agency didn't commit the
10 parcel to any environmental disturbance.

11 And then a case -- a District Court case
12 that plaintiffs site -- I mean again, right now I'm
13 going through the cases where predetermination was
14 found -- the International Snowmobile case, 340 F
15 Supp 2d at 1249, District of Wyoming. In that case
16 the Court found predetermination.

17 Why? Because the director -- or I'm
18 sorry, the assistant secretary of interior -- the
19 issue in that case was whether to allow or continue
20 to allow snowmobiling in national parks -- I believe
21 it was Yellowstone and maybe Grand Teton. That was
22 the -- the proposals were various ways to manage
23 snowmobiling.

24 The assistant secretary of the interior
25 directed the National Park Service, you know, a

1 subordinate who was going to make the decision
2 about -- you know, after the NEPA process -- to
3 close the areas to snowmobiles.

4 And the District Court in that case found
5 that that direction that you're -- you know,
6 basically, you are going to close this area before
7 the NEPA process was done, that that subverted the
8 NEPA process, because there was direction for a
9 particular outcome in the NEPA process.

10 There's no direction here. Again, the
11 statements even from the President, even though
12 those could be accorded in the predetermination
13 stage, talk about the importance of the project in
14 his commitment to funding it, but it doesn't say
15 this is the exact path that we're going to go down
16 to.

17 So the agency can still keep an open mind
18 and the NEPA process is still meaningful as the
19 agency looks at various alternatives.

20 THE COURT: Mr. Smith, you have been going
21 for just about an hour and a half, so I think I'd
22 like to take about a 15-minute break.

23 MR. SMITH: Okay. Thank you, Your Honor.

24 THE COURT: We'll be in recess for 15
25 minutes.

1 (A recess was taken from 10:26 a.m. to
2 10:46 a.m.)

3 THE COURT: Please be seated. We're back
4 on the record.

5 You may continue, Mr. Smith.

6 MR. SMITH: Thank you, Your Honor.

7 And just to wrap up the issues with
8 regards to predetermination, citing some of the
9 cases that -- in the circumstances that were not
10 predetermination or an irreversible commitment of
11 resources.

12 In the Silverton Snowmobile case, the 10th
13 Circuit, the Court found that there was no
14 predetermination because the agencies had not
15 entered into an agreement for a certain outcome.

16 And also, it showed in the final NEPA
17 process that the agency had actually modified its
18 proposal somewhat by the time that the process got
19 done.

20 And again, that's kind of what's going on
21 here. There is now this shallow option alternative.

22 I wanted to direct your attention very
23 quickly to the draft EIS that we provided last week.
24 This is page 2-17. This is sort of a schematic, a
25 side view, of what the deep alternative looks like.

1 Do you understand the way they number
2 these things? They have sections, so it's 2-17.
3 It's Chapter 2, page 17.

4 THE COURT: Okay. All right.

5 MR. SMITH: So -- so in this schematic on
6 page 2-17, it basically shows -- this would be the
7 bottom depth (indicating), this will be where they
8 fill in the concrete in the part of the
9 underground -- underground earth that's not as
10 stable as they would like it to be.

11 This line right here (indicating) is
12 important because that's how far down it's excavated
13 already, prior to all the new information coming in.
14 So the additional excavation for the deep
15 alternative, you know, goes down this much further
16 than from the top of the little hill.

17 And then on the next page, on 2-18, it
18 shows the shallow. So as you can see, where the
19 deep filled all the way in here (indicating), the
20 concrete, the shallow only goes about twice as far
21 as the existing excavation. So it's actually quite
22 a substantial difference that they're looking at.

23 So the shallow would ride above these
24 dotted lines, dashed lines, sort of to indicate the
25 area where the earth has that looser quality that

1 they are not too excited about, to say the least.

2 In the lead 10th Circuit case, 354 F 3d
3 1229, in that case it had to do with whether the Air
4 Force was going to allow some German airplanes to
5 bed down at Holloman Air Force Base. And the agency
6 actually entered into agreements with Germany prior
7 to completing the NEPA process. But the 10th
8 Circuit said that's not predetermination.

9 Why? Because the 19- -- this is a
10 quote -- The 1998 amended agreement explicitly
11 stated that it would not go into effect unless the
12 US Air Force approved the action following
13 completion of all NEPA requirements. There is,
14 thus, no indication here that the US Air Force
15 prejudged the NEPA issues.

16 So there, they actually had an agreement
17 in place to do the action that they were going to
18 do, but it was contingent on NEPA, and that was
19 enough for the 10th Circuit to say no prejudgment.

20 In the Wild West/Bull case, Wild West
21 versus Bull case from the 9th Circuit we cited in
22 our brief. In that case the Forest Service had
23 spent \$280,000 on actually marking the trees that
24 would be cut in the project; actually physically
25 going out and changing the environment, marking

1 trees.

2 And the 9th Circuit said that's not
3 enough. That's a substantial investment of money.
4 I mean a project like that is, you know, going to be
5 worth a lot less than the proportions that are at
6 issue in this case.

7 Yet even going so far as to marking the
8 trees that were going to be cut was not
9 predetermination, even though that was being done
10 before the close of the NEPA process.

11 And then in the Hawaii Green Party case
12 out of the District of Hawaii, the District Court
13 found that \$350 million expending on developing a
14 certain weapons program was not an irreversible
15 commitment of resources.

16 And finally, Your Honor, on this issue,
17 Friends of Southeast's Future, another 9th Circuit
18 case, 153 F 3d 1059, the Forest Service had
19 developed a tentative operating schedule for a
20 project very similar to kind of how the agency here
21 has some projections about where things might go.
22 But everything, as the agency has said, is
23 contingent on a NEPA process, both here and in this
24 other case where the 9th Circuit found no
25 predetermination.

1 So -- so in sum, on the motion to dismiss,
2 Your Honor -- oh, one thing I wanted to point out on
3 the motion to dismiss, that motion is subject to the
4 Rules of Evidence. So I just -- you know I think
5 you have to look at the evidence that you are
6 relying on to rule on that motion to make sure it
7 meets, you know, the rules.

8 But just in sum, Your Honor, we believe
9 that the Magistrate Judge Torgerson's recommendation
10 on prudential mootness is correct, and that that
11 should be adopted by the Court, or in the
12 alternative, that some combination of these
13 principles apply.

14 It's just not time for the Court to get
15 involved in this matter. The Court should wait
16 until the agency completes its NEPA process.

17 With regards to the motion for preliminary
18 injunction, Your Honor, I think that again, just on
19 the evidentiary issue, the rules don't strictly
20 apply. But certainly the Court has -- the issues go
21 to weight. When the plaintiffs are quoting a
22 statement out of a newspaper article, that's double
23 hearsay. That's the person talking to the reporter,
24 the reporter puts it in a newspaper. You know, how
25 much can that kind of material actually be trusted?

1 I think that the main case that the Court
2 should look at in determining the preliminary
3 injunction motion is the Supreme Court's case in
4 Winter versus Natural Resources Defense Council.
5 It's very similar in many respects to this case,
6 and -- because it also involved national security
7 issues. It also involved the preliminary
8 injunction. It also involved NEPA.

9 So when plaintiffs say certain things
10 about preliminary injunctions in the NEPA context
11 are different, the Supreme Court doesn't say that.
12 It says, Here is our preliminary injunction
13 standard. It applies here.

14 When the plaintiffs say you can presume
15 irreparable injury, or it's obvious there is going
16 to be irreparable injury, the Supreme Court says no.
17 They have to prove a substantial likelihood of
18 irreparable injury. It's a NEPA case.

19 So the 10th Circuit, in Davis versus
20 Mineta, talked about presuming environmental injury
21 in NEPA cases. But the 10th Circuit doesn't control
22 when the Supreme Court has said otherwise, that
23 there has to be a showing of likely environmental
24 injury.

25 I am going to keep going back to Winter,

1 because I think it's an important case relative to
2 this case. In fact, the -- there's ways to
3 distinguish Winter that actually turn it more in
4 favor of the United States in this particular
5 instance.

6 With regards to the merits of plaintiff's
7 claims, it's hard to even argue the merits of
8 plaintiff's claims because they don't make a lot of
9 sense right now because the process is ongoing.

10 Did the agency look at potential
11 mitigation well enough for what plaintiffs call
12 their chosen -- the agency's chosen alternative?

13 Well, they are going through the NEPA
14 process right now. They haven't chosen a particular
15 alternative, so we don't know how that's going to
16 turn out.

17 Did the agency violate public comment
18 requirement? Well, you know, they are going through
19 public comment. How can you -- how can you judge
20 that? There's nothing there to judge.

21 And then they make this one argument, I'm
22 not sure how it fits into their whole puzzle, but
23 this connected action argument, where they say, Oh,
24 there's all of this other stuff going on. This all
25 has to be considered in the same environmental

1 impact statement, and it wasn't.

2 Well, they point to things. Under NEPA,
3 connected actions do have to be considered, but NEPA
4 has a very specific definition of connected actions,
5 these other projects that are going on in the area.
6 And that -- the 10th Circuit has said that if those
7 projects, other projects have independent utility,
8 then they are not connected actions for NEPA
9 purposes.

10 In the draft SEIS at page 1-15, the
11 Department of Energy addresses this issue. And it
12 notes that all of these other projects with the
13 exception of RLUOB, which of course was analyzed in
14 the 2003 EIS for this project. But all of these
15 other projects that plaintiffs point to were
16 analyzed in the Los Alamos site-wide EIS.

17 In other words, Los Alamos did an EIS to
18 look at how to manage the whole laboratory, what --
19 you know, what activities needed to go on as a
20 whole.

21 And all of those activities that the
22 plaintiffs point to were analyzed in that site-wide
23 EIS. So again, that's at the draft SEIS at
24 page 1-15.

25 But just -- I would like to get into just

1 some specific examples. They talk about the radio
2 liquid -- radioactive liquid waste treatment
3 facility.

4 The reason that facility is being upgraded
5 is not just to serve -- or for the CMRRNF project,
6 it's because it's old and antiquated. They're --
7 they need to upgrade it to service LANL as a whole,
8 all of its operations that relate to -- that
9 generate radioactive liquid waste. Its capacity is
10 actually being reduced, you know, based on modern
11 technology. So it's -- it's plainly not a connected
12 action because it has independent utility. It's
13 going to service the other facilities, existing
14 facilities like CMR, existing facilities like the
15 plutonium facility. So it doesn't --

16 THE COURT: When was that site-wide EIS?

17 MR. SMITH: 2008, Your Honor.

18 THE COURT: Okay.

19 MR. SMITH: And the same goes for the
20 other actions.

21 And then the one they make the most --
22 they talk about the most is this NMSSUP, this
23 nuclear material safety security upgrades. What
24 that basically is -- and I'm sure I'm hacking it to
25 pieces here. But it's essentially a very high-tech

1 security perimeter fence, security towers, stuff
2 around these high-level nuclear facilities.

3 And what they are building right now is a
4 fence around the existing plutonium facility. So
5 it's needed, because the existing fence for the
6 plutonium facility is slumping into a canyon on the
7 backside. So they need to replace that. They need
8 to upgrade these areas to make them modern anyway.

9 So that fence is being built right now
10 around the plutonium facility, that neighboring
11 facility that's already there.

12 And then when -- if CMRRNF is built there,
13 then they'll move -- they'll enclose that as well.
14 So it's actually -- what they are building now is
15 consistent and independent of CMRR, and they're
16 avoiding that area.

17 So again on -- plaintiffs are not likely
18 to prevail here, mostly because their claims don't
19 make a lot of sense jurisdictionally for the Court.
20 They -- it's just hard -- it's like someone telling
21 me I, you know, violated the tax code because, as
22 they saw on my draft income return, I had some
23 mistakes on it or whatever, but I haven't filed my
24 tax return. So I haven't really violated it.
25 Thanks for telling me, I'll fix it, kind of thing.

1 On irreparable injury, I think there's two
2 key points. One is, in the Supreme Court -- and
3 Winter emphasized this, the 10th Circuit's
4 emphasized this, that the injury -- the irreparable
5 injury has to occur or be likely to occur prior to
6 the Court being able to get to the merits.

7 So here, plaintiff's alleged injuries are
8 about dust from construction, light, traffic
9 problems, hunting effects, you know, stuff like
10 that, that's going to occur from construction.

11 Here, let's even assume we -- this case
12 doesn't get dismissed and we go to the merits and
13 it's not dismissed after the ROD gets issued. But
14 at some point -- say it takes a year to get to the
15 merits -- construction will not have begun by that
16 point.

17 So their alleged irreparable injuries from
18 dust and whatnot are not going to occur prior to
19 this Court ruling on the merits. And at which point
20 if we ended up losing that case, the Court could
21 look at injunctive relief at that time and prevent
22 the injury from occurring. So it's not irreparable
23 during the period of a preliminary injunction.

24 There is no -- unlike the DART case, for
25 instance, the Judge Mechum case, there's no

1 construction going on here. There is nothing to
2 enjoin. There's planning and development, but that
3 doesn't have environmental impacts.

4 Nor -- I mean plaintiffs will argue
5 otherwise, but it's not -- it's leading to different
6 alternatives that may reduce those impacts. It's
7 not leading to any specific design at this point.
8 So that's the first point.

9 The second point is that plaintiff's
10 claimed injuries, irreparable injuries of their
11 members are not germane to the Los Alamos Study
12 Group's -- of plaintiff's organizational interests.
13 Their organization is not their -- you know an
14 organization can't just have standing based on the
15 injuries to their members unless those members'
16 injuries are germane to the organization's
17 interests.

18 Here, these complaints about dust and
19 traffic and things like that at Los Alamos, that's
20 not what the study group is all about. The study
21 group is about, you know, looking at the -- the --
22 what the agency is doing from a nuclear standpoint,
23 not a construction standpoint.

24 So for instance, if the agency was
25 building something nonnuclear, they wouldn't have

1 standing for that either.

2 But they certainly don't have standing to
3 complain about dust injuries and light injuries and
4 things that aren't related directly to impacts from
5 nuclear issues.

6 And then finally, Your Honor, their -- the
7 injuries have to be substantial. Claims about, oh,
8 I'm -- you know, one of their declarants is actually
9 an employee up at the labs. And she complains,
10 well, this is going to interfere with -- you know,
11 there's going to be some traffic delays or trucks.

12 And I mean those aren't -- aren't the
13 substantial kind of injuries, you know, that -- that
14 should sustain a motion for preliminary injunction.

15 And then finally, Your Honor, on the issue
16 of the balance of harms and the public interests --
17 I think they kind of go together.

18 One of the arguments, just to touch on
19 first, is that plaintiff's argument that, Well, this
20 is a NEPA case. The public interest is in
21 compliance with NEPA in protecting the environment
22 or whatever.

23 But again, the Supreme Court in Winter
24 didn't mention that at all when it was doing its
25 balance of harms and public interest analysis. It

1 didn't say -- one of the things we considered is
2 that this is NEPA and the public has an interest in
3 complying with NEPA.

4 The -- in Winter, the Supreme Court
5 assumed a NEPA violation. And yet, in its balance
6 of harm and public interest analysis, they didn't
7 say anything about the importance of making sure the
8 agency complies with NEPA. It didn't say that's a
9 factor we're going to consider here.

10 On the balance of harms issue, however,
11 again, I think Winter is instructive because Winter
12 also had national security interests at stake. In
13 that case it was testing of sonar for the naval
14 fleet off of Southern California.

15 There was evidence that that sonar was
16 having adverse effects on marine mammals, some of
17 which are protected by marine mammal protection
18 acts, you know, specifically. You know, so a very
19 high level of potential irreparable environmental
20 injury to marine mammals.

21 But the Court said, you know, this isn't
22 even a close call. The national security interests
23 in the Navy being able to carry out these exercises,
24 you know, and the readiness of our naval forces is
25 so much more important here that the balance of harm

1 easily tips in favor against the injunction.

2 So -- and in its analysis of that issue of
3 looking at the national security issue, the Supreme
4 Court said in Winter at page 337, quote, We give
5 great deference to the professional judgment of
6 military authorities concerning the relative
7 importance of a particular military interest, end
8 quote.

9 And then on that same page, "Neither the
10 members of this Court nor most federal judges begin
11 their day with briefings that may describe new and
12 serious threats to our nation and its people." And
13 that's, again, on page 337.

14 And it goes on. There's more statements
15 to that effect, that when there's national security
16 issues at stake, as there plainly are here -- I mean
17 the agency is the National Nuclear Security
18 Administration. I mean this is -- you know, our
19 nuclear deterrent is some of the most important
20 national security issues there could be. It's hard
21 to imagine anything much greater than that to ensure
22 that this project goes forward.

23 In the meantime, all the NEPA process is
24 being complete to -- as soon as possible -- to
25 replace the CMRR facility that is functioning below

1 the levels that the agency needs.

2 The statements in the record -- we've
3 attached to Mr. Snyder's declaration to the
4 Department of Defense Nuclear Posture Review report.
5 Again, the Department of Defense is not the
6 defendant here, although the United States is -- I
7 represent the United States as a whole. But the
8 Department of Defense, in that Posture Review, you
9 know, it's just loaded with explanations and
10 statements about how important this project is to
11 national security.

12 You know we provided the summary part of
13 it plus a couple of pages of the detailed part. But
14 I know Your Honor is pressed for time and, you know,
15 there's -- you can just read that. And it shows how
16 important this project is, plus the statements that
17 plaintiffs have cited from President Obama and from
18 Vice President Biden about how important -- they all
19 say this -- this project is essential to national
20 security.

21 And it's not for plaintiffs and it is not
22 for this Court to second-guess decisions about
23 what's important for national security. That's the
24 message from Winter.

25 The plaintiffs spent time, you know, with

1 Dr. von Hippel talking about the need -- the
2 lifetime of these pits and that they're 100 years.

3 But -- but the problems with Dr. von
4 Hippel's testimony, besides the fact that he is
5 actually a member of the plaintiff group, is that --
6 and I'm not saying he's bad for being a member of
7 their group, but I think it goes a little bit to
8 credibility.

9 The problems with his testimony are, one,
10 he doesn't have access to classified information.
11 So as the Supreme Court noted, you know, he doesn't
12 get the briefings, the classified briefings, about
13 what's important for this nation's security like DOD
14 does and DOE does and the President does and the
15 Vice President does. So, you know, he doesn't get
16 those briefings, so he has limited -- he has to base
17 his information on the JASON report that talked
18 about the information that suggests that these pits
19 may last 100 years.

20 But aging of pits alone -- you know, this
21 is the other bigger problem with his testimony. The
22 aging of pits alone is not the sole criteria for why
23 this project is needed. Aging of pits alone is not
24 the sole function, as I showed you in that slide,
25 that this project has multiple national security

1 functions.

2 But aging of pits alone is not the only
3 reason why new pits might need to be developed.
4 It's not just because they're out-aged, but there
5 are certain qualities or certain aspects of the pits
6 that -- that the agency may need to change in the
7 nuclear warheads that's not determined by age, but
8 by other features.

9 So other than that -- I don't want to go
10 into more great detail than that, other than to say
11 there's other issues.

12 I pointed out last week that the
13 Department of Energy had not adopted the JASON
14 report's conclusions in that letter, that they
15 reserve the -- to leave it to their own scientists
16 to figure out the importance of those conclusions
17 and how that might affect the mission. But the fact
18 is the mission exists. DOD says this project is
19 critical to national security.

20 We have cited some other papers in there
21 as well that say the same thing.

22 So I think that's -- you know the balance
23 of plaintiff's harm from dust -- you know, again,
24 speculative harm out in the future about harm that
25 wouldn't even happen versus the national security

1 concerns at stake here is tremendous.

2 So the balance of harms and the public
3 interest clearly weigh against any preliminary
4 injunction.

5 And that, Your Honor, is all that I have.

6 THE COURT: Let me ask you just a question
7 here.

8 You talked earlier about the public
9 scoping process.

10 MR. SMITH: Yes.

11 THE COURT: And you said that it wasn't
12 required, but it was done, nonetheless. And I'm
13 just curious as to what the public scoping
14 process -- or what impact it had on the alternatives
15 that were identified in the supplemental EIS.

16 MR. SMITH: I -- I couldn't be specific.
17 I --

18 THE COURT: If you know.

19 MR. SMITH: What I do know is that there's
20 a section in the draft SEIS that says what the main
21 public scoping comments were, and it addresses them.
22 You know a lot of the public scoping comments were
23 from plaintiff, as you might expect, you know,
24 saying, Oh, you have to look at this alternative or
25 that and --

1 THE COURT: You said were for the
2 plaintiff?

3 MR. SMITH: Yeah, from the plaintiff.

4 THE COURT: I wasn't sure if you said were
5 or were not.

6 MR. SMITH: Were. Excuse me.

7 So you know, the agency considered those
8 alternatives. I mean not those alternatives, they
9 have considered the comments. They addressed the
10 comments expressly in a section of their draft EIS.
11 I can point that out to you. I mean of course the
12 agency might have disagreed.

13 But -- but again, I think the more
14 important point about the whole process is they're
15 open to it, they're considering it. They are
16 pushing to find other alternatives that will have
17 less impacts, as demonstrated, again, by the
18 inclusion of that shallow option.

19 THE COURT: All right. Thank you.

20 MR. SMITH: Thank you, Your Honor.

21 THE COURT: Mr. Hnasko?

22 MR. HNASKO: Thank you, Your Honor.

23 May it please the Court.

24 THE COURT: Counsel.

25 MR. HNASKO: Thank you, Your Honor.

1 I will be relatively brief, because I
2 think we're at a crossroads in NEPA and how it
3 applies to this case and how it certainly does not
4 apply to this case.

5 Number one, I think we can all agree on,
6 there is some sort of NEPA process going on
7 presently. Whatever that may be is not necessarily
8 before the Court. I think that's correct. I agree
9 with Mr. Smith on that.

10 But one cannot implement a federal project
11 while a NEPA process is going on, and that is simply
12 the preliminary injunctive relief that is ripe for
13 review today. That until that process is completed,
14 the federal agency cannot commit resources to and
15 implement a federal project, their alternative.

16 Now, let me tell you the way they get
17 around it. Mr. Smith talks about alternatives.
18 He's not talking about alternatives, he's talking
19 about variations in design for one alternative, and
20 only one alternative, and that's the CMRRNF that
21 they are proceeding forward with.

22 Today he told you their alternatives they
23 are considering: Dig a hole or dig a deeper hole.
24 Those are the alternatives, Your Honor.

25 Those are not alternatives, those are

1 variations in design for one alternative that is
2 being implemented today in violation of NEPA.

3 NEPA does not state, take -- let's take a
4 hard look at the alternative or the environmental
5 consequences of the alternative we have chosen to
6 implement. It says, Let's take a hard look at the
7 alternatives, to the alternative we might prefer,
8 and look at the environmental consequences of all
9 alternatives and choose one.

10 Does it have to be the least impactful
11 alternative? Not necessarily. Not necessarily.
12 But that has to be given due consideration under
13 NEPA.

14 Now we know, because Mr. Smith has told us
15 today that, quote, the alternative chosen in the
16 2004 ROD cannot be built. I think I got that
17 accurately, could not be built.

18 So we have no NEPA foundation, no NEPA
19 authority whatsoever for what they are doing, and he
20 doesn't understand my claim.

21 Our claim is to pause while the NEPA
22 process is going on. And guess what? If building a
23 125-foot-in-depth structure, filling it with
24 concrete on the side of a volcano on the fault zone
25 of a 7.3 Richter potential emerges as the best

1 alternative, so be it. So be it.

2 I'm not to say. I'm not a scientist or a
3 geologist. I am an attorney who knows, under NEPA,
4 you've got to look at all alternatives, alternatives
5 other than that project, not design variations
6 within that project.

7 So we don't, as a magistrate judge, say go
8 through the SEIS process so it tells us how we can
9 adjust the design from an engineering standpoint of
10 an alternative that is, indeed, a fete de complete.
11 The 2011 version of the CMRRNF, it's fete de
12 complete.

13 I don't believe I used the word "sham" in
14 the 2003 EIS, but I adopt it wholeheartedly --
15 excuse me, the 2011 EIS, supplemental EIS draft. I
16 adopt that characterization because it is a sham.

17 All alternatives have been rejected and
18 the alternatives themselves were highly
19 unreasonable. The no action alternative is the one
20 that was chosen to be built. That was the one that
21 was imported into, without discussion, the site-wide
22 EIS performed in 2008.

23 But the legs have fallen out from under
24 that 2008 site-wide EIS because the 2003 EIS, by the
25 defendants' own admission, is no longer valid.

1 But by the same time their quote -- and
2 again, this -- it's not my words. Counsel for the
3 United States Government's word -- are they
4 committed? Yes, to CMRRNF. They're committed. He
5 said it today.

6 The injunction should be issued based on
7 that statement alone, and we'll come back and
8 revisit the case after the NEPA process is
9 completed. But right now they have got to pause.

10 And I want to go back to last Wednesday,
11 because I got on the plane and I thought -- when I
12 left the following day -- and I thought, you know,
13 Counsel used the example I was going to use.
14 Remember the example? He said, Well, we built a
15 bridge -- it was similar to the one I was going to
16 use.

17 We built a bridge. We had an EIS, we had
18 a ROD authorized. We analyzed all our alternatives,
19 and this was the best. We took a hard look at not
20 building a bridge, going down below and coming up
21 and having the road go that way, and by gosh, this
22 bridge was the best.

23 What we ran into, while we were building
24 it, an archeological site. And according to
25 Mr. Smith, they just keep going and analyze the

1 impacts of the -- the environmental impacts of the
2 archeological site, much as though they are
3 analyzing the impacts of the geological formations
4 here, but they're keep- -- they're going.

5 You can't do that. You have to stop the
6 project there and then under NEPA. It has to halt.
7 And you go back and you say, What is the effect of
8 this archeological site not only on what I'm doing
9 now, but on other alternatives that may now be
10 viable by virtue of discovering this archeological
11 site?

12 But I don't keep planning, designing, and
13 building my chosen alternative. I've got to stop.
14 And the law is very clear on it, very clear on that.

15 Portland Audobon Society versus Babbitt, a
16 9th Circuit decision, 1993: A forthcoming EIS or
17 SEIS has no basis to refuse injunctive relief
18 because the idea of NEPA is to pause and analyze all
19 the alternatives, not design variations to your
20 chosen alternative.

21 Mr. Smith told us the SEIS is going to
22 tell us -- he goes back to the draft SEIS, which he
23 says is irrelevant. I agree it's irrelevant. It's
24 a terrible document, but it's irrelevant for the
25 preliminary injunction proceedings.

1 He says, This is going to tell us the
2 rigors under which these buildings are going to be
3 built. That's an open mind to a different
4 alternative other than CMRRNF in 2011? I think not.

5 He says the SEIS is going to tell us what
6 is the exact best way to build these buildings, as
7 though the SEIS process is some sort of engineering
8 refinement document where you study environmental
9 consequences of your chosen alternative,
10 stay-with-it alternative, and see what the
11 consequences are to the design modifications. Not
12 so. Not so.

13 There is no discussion anywhere from the
14 government of comparing this facility today with its
15 \$6 billion price tag versus the \$300 million price
16 tag it used to have.

17 And by the way, the \$600 million old price
18 tag included the RLUOB building. So it's 300 for
19 the original 2003 EIS nuclear facility.

20 There's no discussion of, because we have
21 these environmental issues of extracting 125 feet of
22 soil and volcanic ash beneath this facility, what --
23 now how are these other alternatives -- how do
24 they -- how do they stand up? How did renovating
25 the CMR stand up?

1 I don't know. I have no idea, because
2 they won't look at it.

3 How does looking at PF4 stand up?

4 How does looking at moving the facility to
5 Lea County stand up? Because you have got national
6 security, they say you need it. God forbid we don't
7 want to get in the way of what they say is national
8 security. They might be right.

9 If they need it, they need to produce six
10 metric tons of plutonium and store it, then the best
11 alternative to do so will emerge. We are not
12 getting in the way of that.

13 But they need to have a fresh look. And
14 it's not -- it's not a fresh look, Your Honor. It's
15 not a fresh look at the environmental consequences
16 of their chosen alternative.

17 It's a fresh look at the alternatives, not
18 design modifications that might lessen the impacts
19 or -- or either -- environmentally, or be necessary
20 from a geologic standpoint.

21 So now is the time. There is no NEPA
22 foundation for this project whatsoever. They have
23 told us there isn't, but they're committed to it,
24 nonetheless.

25 So NEPA means nothing here. If we

1 don't -- if we do not get the injunction NEPA is
2 extracted from this federal project. And there has
3 only been one case where that as occurred, and
4 that's Yucca Mountain. But Yucca Mountain received
5 a congressional exemption by legislation to remove
6 it from this process so that alternatives to Yucca
7 Mountain would not have to be examined.

8 If the exemption were not removed or did
9 not apply, Yucca Mountain wouldn't simply be looking
10 at engineering modifications to Yucca Mountain, they
11 would be looking at options to the facility itself.

12 There is no such congressional exemption
13 in this case. This project is fully within the
14 guise of NEPA, and compliance has to be assured, and
15 that requires a fresh look at alternatives.

16 To date we have no NEPA ROD authorizing
17 this project. We might get one. Then we'll look at
18 that ROD. But until we get that ROD we have got to
19 stop. You can't keep going forward.

20 And they are going forward. They tell you
21 they're committed on the one hand, say we have an
22 open mind on the other.

23 Mr. McKinney made a presentation in
24 September and in June. These are Mello exhibits,
25 Tab 27. Design deliverables include everything

1 necessary to construct.

2 Now they say, Well, we're not going to
3 construct, we're going to design.

4 Well, you might as well go out and turn
5 the wrenches.

6 THE COURT: But isn't that a critical
7 distinction?

8 MR. HNASKO: No, it's not, Your Honor.

9 THE COURT: Why not?

10 MR. HNASKO: Because it's a demarcation of
11 some instances where irretrievable -- irretrievable
12 commitments of resources toward the project have not
13 been made.

14 In this instance, they have been made.
15 They're not going back. So I --

16 THE COURT: But could they go back?

17 MR. HNASKO: Absolutely they could go
18 back. But we're asking this Court's assistance in
19 requiring they go back. Because if a preliminary
20 injunction is granted, here is what will happen.

21 If a preliminary injunction is granted,
22 that will stop implementing this particular project.
23 They will have to analyze alternatives to this
24 project.

25 And what's the result of that analysis? I

1 don't know. I cannot tell you, Your Honor.

2 THE COURT: But short of -- short of the
3 Court's involvement, are there contracts or
4 something in place that truly is irretrievable?

5 MR. HNASKO: Oh, yes, Your Honor. They
6 cannot go back without the Court's intervention.

7 They have -- presently, on the Web site,
8 they have issued proposals for particular employee
9 contracts for this job, for the CMRRNF. They have
10 land signed up for contracts where they have to
11 deliver this project. This is going forward, and
12 going forward without any question.

13 You can call it detailed design, you can
14 call it final design, you can call it whatever you
15 wish.

16 I will say this, however, that I think --
17 I think unintentionally -- I think
18 unintentionally -- that when they tell you that they
19 are not going to know about the final design cost,
20 they're not going to know until 2015. Because
21 remember last Wednesday we had the discussion of CD2
22 and CD3 being combined, the critical decisions?
23 They're going to design while they build and build
24 while they design. Congress is not going to get a
25 baseline for another four years while they're

1 already into it.

2 So now is the time to stop them, not then.
3 Now is the time to take a fresh look at these
4 alternatives. Because they are far down the road,
5 but they are not too far down the road.

6 I think, as we mentioned last Wednesday,
7 they've spent about 4 percent of the entire
8 project's budget. I think the burn rate is some
9 huge amount per day presently, just on contracts,
10 detailed design work, and so on. I think -- and I
11 don't want to say a figure, but I think -- I think
12 it's roughly half a million dollars a day, the
13 present burn rate. So that's where they are. So
14 now it's important that they are stopped.

15 And by the way, they shouldn't fear NEPA.
16 Why do they fear NEPA? I don't get it. I don't get
17 why they don't consent to a preliminary injunction
18 if they are so open minded. Why don't they just
19 say, Yeah, we'll do it. We'll consent to the
20 preliminary injunction and come back to court when
21 the ROD is issued, and we will look at alternatives.

22 But they're not even looking at
23 alternatives at all, particularly not the ones they
24 said they would look at in the NOI. I think we
25 mentioned last Wednesday, Your Honor, they were

1 looking at -- said they would look at major upgrades
2 to the CMR building.

3 In the draft cites they say, No, no, no,
4 we're only making minor upgrades to the CMR building
5 which, by the way, we reject. Everything is set up
6 to be rejected, and that's for another day. I agree
7 with that.

8 I agree with Mr. Smith when he said last
9 Wednesday, This SEIS I'm handing you, Your Honor, is
10 irrelevant, absolutely irrelevant, because the NEPA
11 process has not been completed, and they're moving
12 forward. And you can't move forward while the NEPA
13 process is pending. End of story.

14 Now in their look -- their analysis of
15 alternatives, are they free to look at this project?
16 Of course they are. As a matter of fact, they can
17 prefer it, and I'm sure they probably will.

18 But you know what? They might come up
19 with an alternative that says, you know, for
20 \$2 billion we might do a lot better than 6 billion.
21 We might have fewer environmental impacts, or our
22 needs may not be as counsel said they were.

23 Now we tried. Dr. von Hippel, as close as
24 we can get, we don't have one document in this case
25 that we haven't gotten by ourselves. Not one.

1 I have never raised a claim of bad faith
2 in this case. The only claim I have raised is
3 they're not complying with NEPA. But we have gotten
4 not one document with them. They don't meet with
5 us. This is, We're going forward with this project
6 and we're going to paper it up with NEPA documents
7 after the fact.

8 So today we're talking about a preliminary
9 injunction, a preliminary injunction, until the NEPA
10 process is completed. It's certainly not a severe
11 remedy, one they ought to adopt.

12 And -- and as Mr. Smith says, quote,
13 There's nothing for the Court to stay, well, then,
14 why worry? What's the worry?

15 Let's enjoin that nothing so nothing
16 happens, and when we are done with the ROD, we'll
17 come back and move on to the merits of the case.

18 And in the interim, they might decide to
19 do better with the SEIS than they have done thus far
20 with the draft.

21 Your Honor, clearly, under the Portland
22 Audobon Society case, under Judge Mechum's
23 reasoning, under the NEPA implementing regulations
24 from the council on environmental quality which, by
25 the way, although NEPA may be a small statute, short,

1 the regs are not. The regs are the meat. 40 CFR
2 1502.2, "An agency shall not commit resources
3 prejudicing the selection of other alternatives."

4 We only have one alternative, so it's --
5 it would be hard to argue differently.

6 Section 1506, "Until the ROD is issued no
7 action shall be taken that limits the choice of
8 reasonable alternatives."

9 I'm not talking about design variations to
10 their chosen alternative, the one that's going
11 forward. I'm not talking about excavating 120 feet
12 versus 125 feet. I am talking about alternatives to
13 this project.

14 They are now substantially prejudiced, but
15 not too far yet. Now is the time. Now is the time.
16 By the time the ROD is issued it's going to be too
17 late.

18 Now is the time. They're not going to get
19 hurt by pausing this project; they're going to be
20 helped. They are going to look at alternatives and
21 take the necessary pause, make the decisions
22 necessary to be made when you're talking about the
23 storage of six metric tons of plutonium, which
24 the -- the magnitude of that, by the way, I believe
25 that is 6,000 times greater than the volume

1 suggested in the 2003 EIS, the original project.

2 Of course for this project we have no NEPA
3 foundation whatsoever. So, Your Honor, we
4 respectfully request the Court issue the preliminary
5 injunction halting all work on this project and
6 requiring DOE and NNSA to pause and give a hard look
7 to alternatives, given the information that has been
8 found and given the proposal to construct a \$6
9 billion facility 12 and a half stories underground,
10 using more concrete than the Elephant Butte Dam, and
11 more steel than the Eiffel Tower.

12 Your Honor, we respectfully request that
13 the injunction be issued.

14 Thank you so much for your time.

15 THE COURT: Is there anything further?

16 MR. SMITH: Your Honor, I would just point
17 out that I think he hit the nail on the head. NEPA
18 does not require stopping of everything related to a
19 proposal while the NEPA process is going on.

20 And plaintiffs don't cite a single case
21 where the Court enjoined design and development
22 short of construction, when there's no construction
23 in this case.

24 In fact, we cited this case, National
25 Audobon Society, out of the 4th Circuit, 422 F 3d

1 174, in which a Court rejected as overly broad a
2 District Court injunction following the finding of a
3 NEPA violation that enjoined planning and
4 development in addition to construction of a Navy
5 aircraft landing/training facility pending
6 preparation of an SEIS.

7 So in other words, the Court in that case
8 erred. It enjoined construction, but here there is
9 no construction to enjoin. It erred by enjoining
10 planning and development.

11 So that's what -- NEPA doesn't require the
12 agency to just stop and pretend that there's not all
13 of these employees up there that have valuable
14 information that can actually further the NEPA
15 process by continuing to look at potential design
16 elements.

17 Thank you.

18 THE COURT: All right. Thank you,
19 Mr. Smith.

20 MR. HNASKO: Your Honor, one final comment
21 on that.

22 If Mr. Smith is suggesting that these
23 employees can continue with the design work on this
24 project to which they contributed irretrievable
25 commitment of resources, that's incorrect. The

1 design process has to be a consideration of all
2 alternatives that are identified to this project,
3 and that's the essence of our position.

4 THE COURT: All right.

5 Thank you, Counsel, for your
6 presentations. I have a number of things to review
7 before I give you my decision, so I will take the
8 matter under advisement.

9 Is there anything further?

10 MR. SMITH: No, Your Honor.

11 MR. HNASKO: No, Your Honor.

12 THE COURT: All right.

13 Court will be in recess.

14 (Proceedings concluded.)

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CERTIFICATION

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date: May 5, 2011



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