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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THE COURT: Please be seated. Good morning.

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

MR. SMITH: Yes, Your Honor.

MR. HNASKO: Yes, Your Honor.

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

MR. SMITH: Thank you, Your Honor.

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

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

THE COURT: Thank you.

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

THE COURT: Thank you.

You may proceed, Mr. Smith.

MR. SMITH: Thank you, Your Honor.

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

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

THE COURT: That's quite fine.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

facility.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And in there it talks about the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It supports nonproliferation and counterterrorism needs of the country.

It provides science for treaty verification.

It helps maintain credible deterrent without testing.

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

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

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

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

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

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

Provides power sources for space flight.

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

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

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

And this is the proposed CMRRNF.

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

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

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

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

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

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

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

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

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

test the site before the new information came out.

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

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

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

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

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

The CMRRNF has not established a

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

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

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

completed.

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

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

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

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

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

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

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

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

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

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

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

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

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

So then, Your Honor, returning to the

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

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

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

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

As he pointed out, when the new ROD, the

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

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

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

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

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

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

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

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

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

MR. SMITH: Right.

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

MR. SMITH: Right.

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

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

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

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

of their documents in the paper.

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

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

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

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

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

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

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

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

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

And the way -- the way DOE has viewed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Nonetheless, they did that here. We talk

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Well, those aren't the cases that are

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

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

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

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

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

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

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

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

committed to doing this NEPA process.

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

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

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

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

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

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

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

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

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

case. It's cited in our briefs. It's 538 US 803. I'm quoting from pages 807 through 808.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CMRRNF.

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

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

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

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

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

So I'm not going to bore Your Honor with

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

thrown out. It just makes it more likely.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

inpactful project. So that's now NEPA works.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

that parcel.

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

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

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

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

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

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

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

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

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

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

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

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

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

You may continue, Mr. Smith.

MR. SMITH: Thank you, Your Honor.

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

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

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

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

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

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

THE COURT: Okay. All right.

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

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

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

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

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

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

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

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

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

trees.

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

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

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

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

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

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

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

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

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

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

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

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

I am going to keep going back to Winter,

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

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

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

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

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

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

impact statement, and it wasn't.

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

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

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

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

But just -- I would like to get into just

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

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

THE COURT: When was that site-wide EIS?

MR. SMITH: 2008, Your Honor.

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

standing for that either.

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

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

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

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

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

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

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

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

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

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

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

easily tips in favor against the injunction.

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

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

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

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

the levels that the agency needs.

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

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

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

The plaintiffs spent time, you know, with

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

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

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

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

functions.

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

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

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

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

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

concerns at stake here is tremendous.

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

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

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

You talked earlier about the public scoping process.

MR. SMITH: Yes.

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

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

THE COURT: If you know.

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

THE COURT: You said were for the plaintiff?

MR. SMITH: Yeah, from the plaintiff.

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

MR. SMITH: Were. Excuse me.

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

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

THE COURT: All right. Thank you.

MR. SMITH: Thank you, Your Honor.

THE COURT: Mr. Hnasko?

MR. HNASKO: Thank you, Your Honor.

May it please the Court.

THE COURT: Counsel.

MR. HNASKO: Thank you, Your Honor.

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

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

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

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

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

Those are not alternatives, those are

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

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

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

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

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

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

alternative, so be it. So be it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

How does looking at PF4 stand up?

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

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

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

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

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

So NEPA means nothing here. If we

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

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

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

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

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

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

necessary to construct.

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

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

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

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

THE COURT: Why not?

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

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

THE COURT: But could they go back?

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

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

And what's the result of that analysis? I

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

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

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

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

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

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

already into it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

suggested in the 2003 EIS, the original project.

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

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

Thank you so much for your time.

THE COURT: Is there anything further?

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

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

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

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

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

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

Thank you.

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

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

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

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

THE COURT: All right.

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

Is there anything further?

MR. SMITH: No, Your Honor.

MR. HNASKO: No, Your Honor.

THE COURT: All right.

Court will be in recess.

(Proceedings concluded.)

CERTIFICATION

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

Paul Baca

PAUL BACA, RPR, CCR
Certified Court Reporter #112
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