

Page 1

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

3

4     THE LOS ALAMOS STUDY GROUP,

5                   Plaintiff,

6     vs.

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

7     UNITED STATES DEPARTMENT  
8     OF ENERGY, et al.,

9                   Defendants.

10

11

12                   TRANSCRIPT OF PROCEEDINGS

13                   OBJECTIONS AND PRELIMINARY INJUNCTION HEARING

14                   MAY 2, 2011

15

16

17     BEFORE: HONORABLE JUDGE JUDITH HERRERA  
18                   UNITED STATES DISTRICT JUDGE

19

20

21

22                   Proceedings reported by stenotype.

23                   Transcript produced by computer-aided  
24     transcription.

25

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 2

1 A P P E A R A N C E S:

2 FOR THE PLAINTIFF: DULCINEA Z. HANUSCHAK  
3 THOMAS M. HNASKO  
218 Montezuma Avenue  
4 Santa Fe, New Mexico 87504  
505-982-4554

5 LINDSAY A. LOVEJOY  
6 The Lofts  
3600 Cerrillos Road, Unit 1001A  
7 Santa Fe, New Mexico 87505  
505-983-1800

8 FOR DEFENDANT CHU: ANDREW A. SMITH  
9 JAN MITCHELL  
United States Attorney's Office  
10 P.O. Box 607  
201 3rd Street, Northwest  
Albuquerque, New Mexico 87103  
11 505-224-1468

12 LISA CUMMINGS  
13 Site Counsel

14

15

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

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

21 MR. SMITH: Yes, Your Honor.

22 MR. HNASKO: Yes, Your Honor.

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 3

1 MR. SMITH: Thank you, Your Honor.

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

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

11 THE COURT: Thank you.

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

20 THE COURT: Thank you.

21 You may proceed, Mr. Smith.

22 MR. SMITH: Thank you, Your Honor.

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 4

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

5 THE COURT: That's quite fine.

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 5

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 6

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 7

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 8

1 facility.

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 9

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 10

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 11

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 12

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

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

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

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

25 And in there it talks about the

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 13

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 14

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 15

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 16

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

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 17

1               It provides science for treaty  
2 verification.

3               It helps maintain credible deterrent  
4 without testing.

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 18

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

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

9                    Provides power sources for space flight.

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

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

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

25                  And this is the proposed CMRRNF.

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 19

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 20

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 21

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

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

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

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

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

25 The CMRRNF has not established a

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 22

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 23

1 completed.

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 24

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 25

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

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

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

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

25 So then, Your Honor, returning to the

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 26

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 27

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 28

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 29

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

5                    MR. SMITH: Right.

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

9                    MR. SMITH: Right.

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 30

1 of their documents in the paper.

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 31

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

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

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

14 But anyway, plaintiffs complain that the  
15 no action alternative is the 2004 configuration.

16 Well, that's -- that's fine, and DOE has recognized  
17 that that configuration can no longer go forward  
18 because of the design changes that must be  
19 implemented because of the new earthquake  
20 information.

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

25 And the way -- the way DOE has viewed

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 32

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 33

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

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 34

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

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

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

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

25 Nonetheless, they did that here. We talk

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 35

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 36

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

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 37

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 38

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

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

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

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

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

25 Well, those aren't the cases that are

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 39

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 40

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

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

12 Maybe it will eliminate all of them.

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 41

1 committed to doing this NEPA process.

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 42

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 43

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

2 I'm quoting from pages 807 through 808.

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 44

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 45

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 46

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 47

1 CMRRNF.

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

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 48

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 49

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 50

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 51

1 thrown out. It just makes it more likely.

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 52

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 53

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 54

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 55

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

2                And then so -- so again, as the 10th

3      Circuit said, it doesn't require subjective

4      impartiality, it only requires good faith

5      objectivity in reviewing the environmental impacts.

6      And there is no evidence that the agency is not

7      moving forward looking at these impacts as

8      objectively as they can. They are outlined. I mean

9      they're kind of doing overkill on -- on outlining

10     all of the potential impacts, all the acres that

11     might be impacted.

12               You know, the plaintiffs put up their

13     slide -- it's still over there -- about, you know,

14     now -- the original project was going to affect

15     26.75 acres, and the new proposals are going to

16     affect somewhere, you know -- and again, it's

17     changing all the time as they develop these. But

18     you know, greater than 79 on their board. I think

19     it's actually up from that, in their proposal, to

20     around 100 for the shallow and 120 or so for the

21     deep.

22               So -- but -- but those impacts, 130 acres,

23     I mean the building itself is still on almost an

24     identical amount of acreage which is, like,

25     4-point -- it was 4.75, I think in the 2004 ROD, and

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 56

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

2 But what those other impacts are are

3 temporary laydown areas, places to put the batch

4 plants to mix the concrete, things like that.

5 And to put that number in perspective

6 plaintiffs are like, Oh, my gosh, they're doing the

7 Hoover Dam now. They were going to do Cochiti, now

8 they're doing Hoover Dam. This is ridiculous.

9 To put 150 acres of temporary impacts into

10 perspective, Your Honor, the Forest Service has

11 what's called a categorical exclusion from NEPA. A

12 categorical exclusion is part of the NEPA process

13 where an agency identifies categories of actions

14 that they -- they find will never have a significant

15 environmental impact. Okay? So they have

16 categorical exclusion.

17 That was upheld by the 10th Circuit in a

18 case called Colorado Wild. I don't have the cite

19 offhand. But in that case, the categorical

20 exclusion at issue was the removal of salvage timber

21 from 250 acres. And we're talking there a national

22 forest. We're not talking about a national

23 laboratory, where most of these areas are already

24 disturbed and it's not prime hiking ground or

25 hunting ground.

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 57

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

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 58

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 59

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 60

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 61

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 62

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 63

1 that parcel.

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 64

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

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

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 65

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

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

5                             You may continue, Mr. Smith.

6                             MR. SMITH: Thank you, Your Honor.

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 66

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

4                   THE COURT: Okay. All right.

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 67

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 68

1 trees.

2 And the 9th Circuit said that's not  
3 enough. That's a substantial investment of money.

4 I mean a project like that is, you know, going to be  
5 worth a lot less than the proportions that are at  
6 issue in this case.

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 69

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 70

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

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

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

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

25                  I am going to keep going back to Winter,

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 71

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

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 72

1 impact statement, and it wasn't.

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 73

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

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

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

17 MR. SMITH: 2008, Your Honor.

18 THE COURT: Okay.

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 74

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 75

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 76

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

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

8 So that's the first point.

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 77

1 standing for that either.

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

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 78

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 79

1 easily tips in favor against the injunction.

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 80

1 the levels that the agency needs.

2 The statements in the record -- we've  
3 attached to Mr. Snyder's declaration to the  
4 Department of Defense Nuclear Posture Review report.

5 Again, the Department of Defense is not the  
6 defendant here, although the United States is -- I  
7 represent the United States as a whole. But the  
8 Department of Defense, in that Posture Review, you  
9 know, it's just loaded with explanations and  
10 statements about how important this project is to  
11 national security.

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

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

25 The plaintiffs spent time, you know, with

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 81

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 82

1 functions.

2                 But aging of pits alone is not the only  
3 reason why new pits might need to be developed.

4 It's not just because they're out-aged, but there  
5 are certain qualities or certain aspects of the pits  
6 that -- that the agency may need to change in the  
7 nuclear warheads that's not determined by age, but  
8 by other features.

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 83

1 concerns at stake here is tremendous.

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

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

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

8 You talked earlier about the public  
9 scoping process.

10 MR. SMITH: Yes.

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

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

17 I --

18 THE COURT: If you know.

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 84

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

3                   MR. SMITH: Yeah, from the plaintiff.

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

6                   MR. SMITH: Were. Excuse me.

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

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

19                  THE COURT: All right. Thank you.

20                  MR. SMITH: Thank you, Your Honor.

21                  THE COURT: Mr. Hnasko?

22                  MR. HNASKO: Thank you, Your Honor.

23                  May it please the Court.

24                  THE COURT: Counsel.

25                  MR. HNASKO: Thank you, Your Honor.

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 85

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

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

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

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

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

25                  Those are not alternatives, those are

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 86

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

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 87

1 alternative, so be it. So be it.

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 88

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 89

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 90

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 91

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

3                   How does looking at PF4 stand up?

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

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

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

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

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

25                  So NEPA means nothing here. If we

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 92

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

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 93

1 necessary to construct.

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

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

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

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

9 THE COURT: Why not?

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

14 In this instance, they have been made.

15 They're not going back. So I --

16 THE COURT: But could they go back?

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 94

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

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 95

1 already into it.

2 So now is the time to stop them, not then.

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

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

15 And by the way, they shouldn't fear NEPA.

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 96

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

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 97

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

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 98

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

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

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

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 99

1 suggested in the 2003 EIS, the original project.

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

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

14 Thank you so much for your time.

15 THE COURT: Is there anything further?

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 100

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

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

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

17 Thank you.

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

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

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

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 101

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

4 THE COURT: All right.

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

9 Is there anything further?

10 MR. SMITH: No, Your Honor.

11 MR. HNASKO: No, Your Honor.

12 THE COURT: All right.

13 Court will be in recess.

14 (Proceedings concluded.)

15

16

17

18

19

20

21

22

23

24

25

**PAUL BACA, OFFICIAL COURT REPORTER**

Page 102

1 CERTIFICATION

2

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

9

10 Date: May 5, 2011

11

12

---

PAUL BACA, RPR, CCR  
Certified Court Reporter #112  
License Expires: 12-31-11

13

14

15

16

17

18

19

20

21

22

23

24

25

**PAUL BACA, OFFICIAL COURT REPORTER**

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

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

v.

Case No. 1:10-CV-0760-JH-ACT

UNITED STATES DEPARTMENT OF  
ENERGY; THE HONORABLE STEVEN  
CHU, in his capacity as SECRETARY,  
DEPARTMENT OF ENERGY;  
NATIONAL NUCLEAR SECURITY  
ADMINISTRATION; THE HONORABLE  
THOMAS PAUL D'AGOSTINO, in his  
Capacity as ADMINISTRATOR,  
NATIONAL NUCLEAR SECURITY  
ADMINISTRATION,

Defendants.

**NOTICE OF APPEAL**

Notice is hereby given that The Los Alamos Study Group, plaintiff, in the above-captioned case, hereby appeals to the United States District Court for the Tenth Circuit from the order dismissing this case in its entirety that was entered on May 23, 2011.

Date: July 1, 2011

Respectfully submitted,

HINKLE, HENSLEY, SHANOR & MARTIN, LLP

/s/ Thomas M. Hnasko

Thomas M. Hnasko  
Dulcinea Z. Hanuschak  
P.O. Box 2068  
Santa Fe, NM 87504  
[thnasko@hinklelawfirm.com](mailto:thnasko@hinklelawfirm.com)  
[dhanuschak@hinklelawfirm.com](mailto:dhanuschak@hinklelawfirm.com)  
(505) 982-4554

THE LAW OFFICE OF LINDSAY A. LOVEJOY, JR.  
Lindsay A. Lovejoy, Jr.  
3600 Cerrillos Road #1001A  
Santa Fe, NM 87507  
[lindsay@lindsaylovejoy.com](mailto:lindsay@lindsaylovejoy.com)  
(505) 983-1800

*Attorneys for plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of July, 2011 I filed the foregoing *Notice of Appeal* electronically through the CM/ECF System, which caused the following parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing:

John P. Tustin [john.tustin@usdoj.gov](mailto:john.tustin@usdoj.gov)

Andrew A. Smith [andrew.smith6@usdoj.gov](mailto:andrew.smith6@usdoj.gov)

/s/ Thomas M. Hnasko

Thomas M. Hnasko