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1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

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4 THE LOS ALAMOS STUDY GROUP,

5 Plaintiff,

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

7 UNITED STATES DEPARTMENT
OF ENERGY, et al.,

8

Defendants.

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12 TRANSCRIPT OF PROCEEDINGS

13 OBJECTIONS AND PRELIMINARY INJUNCTION HEARING

14 April 27, 2011

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17 BEFORE: HONORABLE JUDGE JUDITH HERRERA
UNITED STATES DISTRICT JUDGE

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PAUL BACA, OFFICIAL COURT REPORTER

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1 THE COURT: Please be seated.

2 Good morning. We are on the record in the
3 Los Alamos Study Group versus the Department of
4 Energy, et al. And that's Civil No. 10-760.

5 Could I have appearances, please.

6 MR. HNASKO: Good morning, Your Honor. On
7 behalf of the plaintiff, Los Alamos Study Group, I'm
8 Tom Hnasko. Co-counsel with me to my right is
9 Mr. Lindsay Lovejoy, and Dulcinea Hanuschak, also of
10 my firm. And with us, to Ms. Hanuschak's right, is
11 Mr. Gregory Mello, the executive director of the
12 study group, and Frank von Hippel, who has joined us
13 from Princeton University this morning.

14 THE COURT: All right. Good morning.

15 MR. SMITH: Good morning, Your Honor.

16 Andrew Smith on behalf of the United States.

17 With me at counsel's table is Jan Mitchell
18 from the United States Attorney's Office here in
19 Albuquerque with me, and Mr. Roger Snyder. He is the
20 deputy site manager for the National Nuclear Security
21 Administration at Los Alamos. And also is Ashley
22 Morris. She's a law student doing an extern in our
23 office here at the US Attorney's Office here in
24 Albuquerque.

25 THE COURT: All right. Well, good morning,

1 and welcome.

2 We're here today to take up a couple of
3 issues. One is the objections to the magistrate's
4 proposed findings and recommended disposition, and
5 also plaintiff's preliminary injunction, so we're
6 going to take those two matters up.

7 As you all know, I have set aside three
8 hours for this hearing this morning, so I would urge
9 you all to be as efficient as possible.

10 I will say that I've reviewed all of the
11 materials that you all have submitted to the Court.
12 I have reviewed the exhibits. I have reviewed the
13 affidavits that have been submitted in this case, so
14 I am well acquainted with the issues and many of the
15 facts. And so I trust that you all will use your
16 time as efficiently as possible. All right?

17 I'm sure you all have a game plan as to how
18 you want to approach these two issues this morning.
19 As far as I'm concerned, it seems to me that there is
20 sufficient overlap that it doesn't probably make
21 sense to separate them. So you all are free to
22 proceed as you wish, but I don't require you to do
23 them in separate pieces.

24 MR. HNASKO: Thank you, Your Honor.

25 THE COURT: All right. Are we ready to

1 begin?

2 MR. HNASKO: Thank you, Your Honor.

3 May it please the Court.

4 THE COURT: Counsel.

5 OPENING STATEMENT

6 BY MR. HNASKO:

7 Your Honor, thank you for hearing the
8 motions this morning, and we -- we appreciate the
9 opportunity to be here. And in the interest of
10 expediency, we do agree with the Court that it is
11 appropriate to combine the matters of the preliminary
12 injunction with the magistrate judge's proposed
13 disposition.

14 As a matter of fact, in the interest of
15 expediency, we are going to focus primarily on the
16 merits of the motion for the preliminary injunction
17 to halt this project pending NEPA compliance because
18 we believe the resolution of the injunction issues
19 necessarily disposes of the recommended disposition
20 on the grounds of prudential mootness.

21 Your Honor, today what we would like to do
22 is, I would like to present the hybrid opening
23 statement and legal argument on the preliminary
24 injunction and on the magistrate judge's proposed
25 disposition.

1 My intention is to present a legal argument
2 and then to have two witnesses follow that argument:
3 Mr. Gregory Mello, who will be examined by
4 Mr. Lovejoy. And Mr. Mello will speak to the various
5 aspects of the injunctive relief including the
6 substantial changes and the present iteration of this
7 proposed CMRRNF project.

8 And for simplicity, Your Honor, we'll often
9 refer to the CMRRNF project as the 2011 nuclear
10 facility.

11 After Mr. Mello has concluded we'll present
12 Dr. Frank von Hippel, from Princeton University.
13 Dr. von Hippel is intimately familiar with the
14 nuclear weapons complex in the United States and has
15 been tasked by various administrations to render
16 advice in that regard. And he is going to advise the
17 Court concerning the lack of need, from a national
18 security perspective, for this present facility.

19 THE COURT: And I will just note that I have
20 reviewed the affidavits of both of the witnesses.

21 MR. HNASKO: Thank you, Your Honor. I
22 appreciate that.

23 Your Honor, everyone trained in the law in
24 this courtroom knows that a major federal action must
25 be preceded by an EIS prior to the federal government

1 committing itself to that particular project. Timing
2 is everything under NEPA. That's what it's all
3 about.

4 The 10th Circuit stated, in Davis versus
5 Mineta, that if any part of a project proceeds before
6 the NEPA analysis is completed there is a serious
7 risk that the NEPA analysis will be skewed in favor
8 of the completion of that particular project.

9 Your Honor, defendants are now implementing
10 a 5- to \$6 billion nuclear facility. The only NEPA
11 document even related remotely to this project has
12 been rejected by these defendants.

13 The 2003 EIS and the 2004 ROD chose an
14 alternative that the defendants presently reject and
15 will not build and cannot build and have been advised
16 they cannot build it by the safety board.

17 The \$6 billion project presently being
18 implemented by defendants has never been analyzed and
19 it has never been compared to any alternatives in any
20 NEPA analysis. And it certainly was not analyzed,
21 Your Honor, or even considered or even mentioned as
22 an alternative in the 2003 EIS.

23 All the alternatives in the 2003 EIS,
24 including the chosen alternative, which was the much
25 smaller project by the same name, the CMRRNF in 2003,

1 have been abandoned. Nonetheless, the defendants
2 have continued with the 2011 nuclear facility, and
3 they're presently letting contracts for it. They're
4 committed to it with detailed design, in violation of
5 their own internal policies. And they, in fact, have
6 started construction on it and on other interrelated
7 activities.

8 They have made irretrievable commitments to
9 this project without any NEPA compliance. NEPA has
10 been relegated to the dust bin in this particular
11 project.

12 So let us be very clear in this courtroom
13 today. There are headwinds facing us in this case,
14 and I understand that. But everyone knows what's
15 happening in this case. These defendants are going
16 to continue implementing the 2011 nuclear facility at
17 a price tag which is unknown, but currently estimated
18 between 4- and \$6 billion, and they are going to
19 prepare a supplemental environmental impact statement
20 to justify it after the fact.

21 However, Your Honor, it's axiomatic. It's
22 fundamental to the greatest environmental law this
23 nation has, that no EIS or no supplemental EIS
24 conducted while a project is being implemented can
25 ever be valid. And that is really all this Court has

1 to determine today. You cannot commit to a project
2 while NEPA analysis is not yet complete. And Courts
3 have routinely enjoined defendants, routinely
4 enjoined defendants, where the agency gets deeper and
5 deeper and farther down the road into one
6 predetermined project without NEPA compliance.

7 And I know Your Honor has read Judge
8 Meachum's decision.

9 THE COURT: I have.

10 MR. HNASKO: And Judge Meachum really said
11 it best in a number of ways. And I know Your Honor
12 is familiar with the Davis versus Mineta case, where
13 the 10th Circuit cautioned that you can't
14 predetermine or commit to a project pending NEPA
15 compliance without NEPA compliance because the NEPA
16 analysis will be skewed in favor of that project;
17 whereas, NEPA is supposed to drive the
18 decision-making not be dictated by the
19 decision-making.

20 Today, Your Honor, I'd like to address four
21 areas in our presentation. And these are going to be
22 amplified, as I mentioned, by Mr. Mello's testimony
23 and by Dr. von Hippel's testimony. And
24 Dr. von Hippel, as I mentioned, is a professor at the
25 Woodrow Wilson School at Princeton.

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1 The four subjects are -- number one, I want
2 to briefly summarize. The Court has been over this
3 in the record -- the defendant's execution and
4 delivery today of a new project that was not
5 authorized in the 2004 ROD or even mentioned in the
6 2003 EIS as an alternative that should be considered.

7 I want to talk secondly about the current
8 NEPA status of this project so there's no dispute as
9 to what it is, or the lack of status.

10 Thirdly, Your Honor, I would like to discuss
11 the summary of the evidence demonstrating that the
12 defendants are far down the road in making
13 irretrievable commitments for this unauthorized
14 project under NEPA.

15 And finally, Your Honor, I'd like to
16 conclude with some brief comments on the magistrate
17 judge's recommended disposition in this matter which
18 unintentionally, in my opinion -- unintentionally --
19 advocates a free pass for these defendants to
20 continue committing themselves to one and only one
21 alternative before the NEPA process is completed.

22 So there have been changes. The magistrate
23 judge is correct in that regard. There have been
24 changes in this project, but they are not changes
25 that foreclose meaningful relief in terms of an

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1 injunction, as stated by the magistrate, but they are
2 fundamental changes in the project itself heretofore
3 unanalyzed under NEPA, which requires an injunction
4 to pause this project so NEPA compliance can be
5 assured.

6 Number one, Your Honor, the execution of
7 new -- and delivery of this new project in 2011.
8 What is it, and what has and has not been authorized
9 in the 2004 ROD.

10 I put up on the -- as an illustrative
11 exhibit -- and I think that's on the Elmo now -- from
12 the Mello Exhibit Number 1 -- or Affidavit Number 1,
13 paragraph 26, a demonstrative exhibit.

14 Number one, we know primarily the biggest
15 change that we all can get our arms around is a
16 change from a \$300 million project to a \$6 billion
17 project. The impacts implicit in the cost increase
18 alone are self-evident.

19 The purpose of the project has changed
20 because now it incorporates the so-called hotel
21 concept. The defendants use that concept to describe
22 a purpose for unknown and unstated future missions
23 required significant redesign of the facility, large
24 interior spans, and so forth. So they don't know
25 what the purpose will be because it's necessarily

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1 unstated. That has changed.

2 Significantly, from a public health
3 standpoint, the seismic conditions at this project
4 have drastically required a new facility than the one
5 authorized in the 2004 ROD. The seismic conditions
6 were not mentioned in the 2004 ROD. As a matter of
7 fact, the 2004 ROD said that the project, as
8 approved, would have minimal environmental impacts.
9 That has changed significantly.

10 Defendants now propose, without NEPA
11 compliance, to excavate approximately 125 feet into
12 the earth and remove an unstable layer of volcanic
13 ash and to fill that hole with concrete -- concrete
14 in a volume exceeding the Big I interchange; concrete
15 exceeding the volume of the Elephant Butte Dam -- and
16 to support that concrete with steel with a volume
17 greater than the Eiffel tower.

18 There is no NEPA document even considering
19 that particular issue. That's changed dramatically.

20 The steel requirements have gone from 55 --
21 558 US tons to 18,500 US tons.

22 Concrete and soil grout 6,255 yards, a
23 fairly modest amount in the 2003 EIS and 2004 ROD, to
24 the new iteration of this project of 371,000 cubic
25 yards.

1 Locations to be impacted. It was TA55 or
2 perhaps TA6. Now it's TA55, 48, 63, 66, 44, 50, 54,
3 and 36, and possibly more.

4 The employment, 300, now 1,844.

5 The construction period, which was once
6 fewer than three years, is now up to 144 months.
7 That's 12 years -- 12 years -- of real impacts before
8 they even start moving in.

9 CO2 emissions from all this concrete have
10 never been analyzed. We know it's over 100,000
11 metric tons. Other sources, we don't know.

12 Truck traffic, unanalyzed. We know there
13 are going to be up to 26,000 truck trips going up the
14 hill and on 599.

15 Traffic impacts, not analyzed. The 2004 ROD
16 said no impacts, no significant impacts. Today we
17 know there are significant impacts.

18 Air quality, road wear, aggregate mining
19 impacts, excavation spoils -- one of my favorite
20 subjects, because it hasn't been mentioned.

21 In the 2004 ROD for the project existing and
22 approved in 2003, or analyzed in 2003, they weren't
23 going to excavate that much, so it's assumed you
24 wouldn't have to do anything with the spoils. They
25 would retain them at the construction site.

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1 Now 489,000 to 614,000 cubic yards,
2 impossible to retain at the construction site and
3 must be put somewhere.

4 So, Your Honor, I know you've been through
5 it, you've seen the comparison. But that is the
6 project that, today, is being delivered. It is today
7 being implemented. And any NEPA work, paperwork that
8 these defendants are performing, is an after-the-fact
9 justification of what we already know they're going
10 to implement because they're committed to it.

11 So what is the NEPA status? I would like to
12 move to that, if I may. What is the NEPA status?

13 We know that the sole NEPA authority for
14 this project is the 2003 EIS and the 2004 ROD.
15 That's all there is. It's fundamental under NEPA and
16 under the CEQ regulations that you have to have a ROD
17 selecting an alternative analyzed in an EIS in order
18 to commit the government to it. That's the only ROD
19 we have, is 2004. It has nothing to do with the
20 project presently being implemented.

21 Nonetheless, Your Honor, these defendants
22 have not only rejected the NEPA process as a matter
23 of degree, they have rejected it categorically. It's
24 as if it does not exist, it's now a nuisance
25 paperwork.

1 The ROD, nonetheless, in 2004, which has no
2 application to what they are doing now, has been the
3 sole basis for seven years of appropriations from
4 Congress. There's no other basis on which they could
5 receive appropriations other than the record of
6 decision in 2004. But that's not what they are
7 building.

8 Your Honor, I'd like to turn and show you
9 the absolute unequivocal pronouncement of the NEPA
10 process by these defendants through the notice of
11 intent filed by the defendants on October 1, 2010.

12 In that notice of intent the defendant said,
13 We're going to cure our NEPA problems while
14 continuing with the 2011 CMRRNF, and here's what
15 we're going to do in the notice of intent.

16 The defendants listed some alternatives to
17 the 2011 nuclear facility so they could study them
18 after the fact. The alternatives were, Well, let's
19 take the existing CMRR building at Los Alamos. It's
20 going to need major upgrades, major, major upgrades.
21 And we'll analyze that and compare it to what we are
22 already deep down the road into, which is the 2011
23 nuclear facility. Well, that's alternative one.

24 Alternative two: Let's do what we call a no
25 action alternative. That means we're not going to do

1 anything. But in this case, instead of not doing
2 anything, the no action alternative identified by the
3 defendants would be to implement the project approved
4 in the 2004 ROD and analyzed in the 2003 EIS, the
5 project on the left-hand column of our first exhibit,
6 the very small much less impactful project.

7 So they said, We're not going to do
8 anything. Let's analyze that. Maybe we'll take that
9 alternative.

10 However, that was a cover. Because when
11 they did this they knew they couldn't build it
12 because the seismic conditions wouldn't allow it to
13 be built.

14 The Defense Facilities Nuclear Safety Board
15 told them they couldn't build it because it wouldn't
16 be safe and couldn't be built. So they set up a no
17 action alternative, knowing at the time they
18 submitted the notice of intent in the federal
19 register, that it wasn't even reasonable to consider
20 a no action alternative, which is a requirement in
21 the CEQ regulations that all alternatives identified
22 in an EIS must be reasonable.

23 Straw man, set up for rejection. The very
24 ROD on which these defendants have been proceeding in
25 this project is now, by their own admission, a

1 nullity because they can't do it.

2 And then finally, Your Honor, they set up as
3 the third alternative the present iteration of the
4 2011 nuclear facility, the \$6 billion behemoth and
5 everything that entails.

6 So what happened? We know the 2004 and the
7 2003 RODs are not -- the ROD is now a nullity. And
8 the sole NEPA foundation, for whatever they are
9 doing, has evaporated. There is no NEPA foundation.
10 It is gone.

11 So before this hearing, the defendants
12 publish a draft supplemental environmental impact
13 statement. On Good Friday we pull it off the Web,
14 and I'm shocked. I'm shocked, because I expected
15 something more. I expected an effort to at least
16 cover their tracks. This is a punt. It has no
17 bearing on anything and is woefully inadequate. It
18 unveiled the true intent of the defendants.

19 Let me suggest here's what happened. In the
20 supplemental environmental impact statement summary
21 on page 8 the defendants state, as we knew, you can't
22 build the no action alternative, so we're going to
23 reject it. It's gone.

24 But it gets better. They said, Oh, by the
25 way -- by the way, remember that alternative we said

1 we would study in our notice of intent, making major
2 upgrades to the CMR facility? We're not doing that
3 either. We decided we're not going to do it. We
4 will look at the CMR facility with only minor
5 repairs, and we'll reject that.

6 But further, You know those alternatives we
7 mentioned? They don't mean anything because we're
8 not going to revisit the decision to build the 2011
9 CMRRNF. It is not going to be revisited.

10 So now we're in a Lewis Peril situation. I
11 don't know what any of this means, because the words
12 mean what they say they mean and no more and no less.

13 But we do know there's no NEPA foundation
14 for any of this activity. There's no NEPA foundation
15 for this particular project, and there is certainly
16 no EIS analyzing it.

17 So, Your Honor, the defendants have created,
18 and unfortunately the magistrate judge has condoned,
19 unintentionally, a perfect recipe to avoid NEPA
20 altogether. And that is that you approve the
21 project, change it so substantially that it bears no
22 resemblance to the prior project only in name -- and
23 some of the purposes are the same. Pit manufacturing
24 and storage, I'll give them that. That's the same,
25 and the location. We'll call it the name, but we

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1 will change it dramatically. We'll commit ourselves
2 to it through contracts, irreversible commitments of
3 resources, planning, and construction.

4 And then we'll say, Well, we're just going
5 to issue a SEIS to justify it. And we'll pick up the
6 SEIS, even though we are implementing it exactly
7 backwards of NEPA.

8 This reminds me of a construct where a
9 federal agency wants to build, say, the Cochiti Dam.
10 They study alternatives to the Cochiti Dam, water
11 retention, flood prevention, whatever the case may
12 be. They issue the EIS. The ROD selects the Cochiti
13 Dam to be built, they get the ROD, they start
14 building it.

15 But then they decide, Whoa. I want to build
16 the Hoover Dam, not the Cochiti Dam, the Hoover Dam.

17 The purpose is the same, it's going to store
18 water, and we're going to go forward and implement
19 the Hoover Dam under the auspices of the Cochiti Dam,
20 but we're going to reject the very authority which
21 allowed us to build the Cochiti Dam in the first
22 place.

23 And then when someone questions us we're
24 just going to issue a SEIS saying, We can't build the
25 Cochiti Dam anymore, so we reject that authority to

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1 do so, and now we're building the Hoover Dam.

2 So it's backwards and forwards. We have --

3 the defendants rely on the 2004 ROD and the 2003 EIS

4 when it serves their purpose. They disavow it when

5 it becomes advantageous to do so.

6 I would like to put up on the Elmo just some

7 of the aspects of what the defendants have told us

8 thus far.

9 They have told us they are not going to rely

10 on the 2003 or 2004 ROD in reaching their decision on

11 what to build. But that's all there is for NEPA

12 authority in this case. There is nothing else.

13 Then they switch horses and they tell us

14 that -- don't pay attention to O'Leary, because here

15 we haven't taken any action that was not analyzed and

16 approved in a 2003 and 2004 ROD.

17 Really? All actions taken by these

18 defendants, all actions in implementing this project,

19 have not been analyzed or approved under the 2003 EIS

20 or 2004 ROD. I believe that's self-evident.

21 So it goes on and on. But defendants have

22 told us repeatedly that they were committed to this

23 project and that the draft supplemental analysis

24 concluded that they didn't even need to do the SEIS

25 to address the behemoth project or any alternatives

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1 to it.

2 So, Your Honor, there are no alternatives on
3 the table besides the present project.

4 The Defense Nuclear Facilities Safety Board
5 has never been informed of any alternative that these
6 defendants have considered, and Mr. Mello will
7 address that, other than the current iteration of the
8 2011 nuclear facility.

9 So the purported supplemental environmental
10 impact statement can't be valid, because it's
11 performed after the fact and concurrently with the
12 implementation of the very project which these
13 defendants want the SEIS to bless.

14 And this, Your Honor, is not only contrary
15 to NEPA, it's contrary to the defendants' own
16 internal policy saying how they should implement
17 NEPA.

18 Which incidentally, I need to compliment the
19 defendants on this policy, because it is absolutely
20 consistent with the law on NEPA, that you do the NEPA
21 analysis first, and from that analysis will emerge
22 the alternative that ought to be implemented.

23 The DOE NEPA guidance says as follows. It
24 says that proceeding with the detailed design under
25 order 413.3 -- and this project is governed by order

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1 413.3, Your Honor. Before the NEPA review process is
2 completed it is normally not appropriate, because the
3 choice of alternatives might be limited by premature
4 commitment of resources to the proposed project and
5 by the resulting schedule advantage relative to
6 reasonable alternatives.

7 Now, we're so far down the road at this
8 point that any alternatives to the 2011 CMRRNF are
9 suffering from a severe scheduling disadvantage
10 because the defendants have committed themselves to
11 it.

12 We've raised this in our briefing and they
13 have not responded to it. They have not even
14 mentioned it in any of their response briefs at all.

15 The alternatives in 2003 that were
16 considered and rejected, some of those could be
17 viable now, based on the cost alone of the present
18 project. But nonetheless, contrary to their own
19 policy, they're deep into this project and they have
20 committed to it.

21 I would like to briefly summarize the
22 evidence in the record of that commitment. It's very
23 important, because that is the crux of the injunctive
24 relief request, the commitment.

25 We know that the administration's committed

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1 to it. They said so. Vice President Biden has
2 assured members of the senate that the administration
3 is committed to the 2011 version of this project in
4 exchange for their vote to ratify the START Treaty.
5 The START Treaty has now been ratified, so that's
6 done.

7 We know that the detailed design has
8 proceeded. Contrary to DOE NEPA guidance on this
9 project, and this project alone, there is no other
10 project for which the design could be applicable
11 other than this alternative.

12 Crucial to NEPA? Yes, you can design under
13 NEPA, but that design cannot prejudice the choice of
14 alternatives. No one said they're designing any
15 project other than the 2011 nuclear facility at this
16 site at this location with those parameters. That's
17 what's being designed. Years of scheduling
18 advantage.

19 Your Honor, there's a -- the laboratory is
20 run by this group called Los Alamos National
21 Security, another acronym LANS, L-A-N-S, LLC. They
22 have a contract to run the lab, and implementation of
23 the 2011 nuclear facility is an integral and
24 essential part of that contract.

25 As a matter of fact, they are compensated

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1 and rewarded for timely and expeditious
2 implementation of this project regardless of NEPA
3 issues, and they get \$300,000 of bonuses for doing
4 so.

5 Employment contracts, we just found out on
6 the Web site, they have been let. They're out to
7 bid, not for alternative projects or a study of
8 alternatives for the 2011 CMRRNF.

9 283 staff are presently employed.

10 Mr. Bretzky gave a presentation. We quoted that in
11 our reply brief at page 15. The infrastructure
12 contract package is essentially done for a project
13 for which there is no NEPA support.

14 Now, this is a little bit bureaucratic on my
15 first reading, but I thought it was pretty
16 interesting and perhaps very important. DOE does an
17 interesting thing when they do projects. They are
18 what are called critical decisions, CD, another
19 acronym. CD1 is when they choose the alternative.
20 Well, we know what CD1 is. They choose this
21 alternative.

22 But their own policies state, when you go to
23 CD2 and CD3, which is design and construct,
24 respectively, you cannot combine the two absent very
25 unusual circumstances. Those circumstances are

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1 defined as where the project -- project is very
2 simple, very simple. No reason to separate design
3 from construction.

4 Here, the defendants have combined CD2 and
5 CD3, so what they get to do is design and construct.
6 So the construction dictates the design, the design
7 dictates the construction, or whatever you want to
8 do. You don't do one then the other in --
9 consecutively. They're done concurrently.

10 Now, this is a signal to subcontractors that
11 we're good to go on this project. Gear up.

12 The other projects, Your Honor, we have
13 raised this issue, and I think it's extremely,
14 extremely important in this process.

15 Now the radiological laboratory -- as the
16 Court is aware, the so-called RLUOB. It's R-L-U-O-B.
17 Now, that was approved in the 2004 ROD as part of the
18 CMRRNF complex. That's done.

19 The defendants say, Don't worry about that.
20 It's a separate utility.

21 It does have some separate utility. There
22 is no question about that. However, it's also
23 integral to the completion of the CMRRNF, and the
24 completion of the CMRRNF is integral to the use of
25 the RLUOB because it houses all the utilities for the

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1 CMRRNF -- the offices, the fuel tanks, and the water
2 cooling tanks in the event of an accident.

3 They're already installed. They're already
4 in the CMRRNF.

5 And by the way, if you are going to work in
6 the CMRRNF, you've got to go through the RLUOB and go
7 through the tunnel, which is halfway constructed.

8 So to suggest they're not committed to this
9 project is folly.

10 They have also, as the Court knows based on
11 the record, excavated 90,000 cubic yards readying
12 themselves for more excavation necessary for this
13 project.

14 They have committed themselves to major,
15 major projects that are interconnected and have not
16 analyzed the cumulative impacts. So the CMRRNF does
17 not stand alone.

18 If I may, we have another demonstrative
19 exhibit. I believe this is from Mr. Snyder's
20 affidavit, and this shows the so-called Pajarito
21 corridor project planning 2010 to 2020 draft all of
22 which, by the way, is wholly dependent on the
23 building of the CMRRNF.

24 Road modifications, major road closures of
25 the roads up there in the Pajarito corridor for two

1 years.

2 Three batch plants, we're told. Now, they
3 have indicated one batch plant. We don't know where
4 the other is -- the other two are. But they have
5 indicated on their -- their own facility, that the
6 CMRR nuclear facility batch plant will be constructed
7 in TA55 and TA48. So two batch plants they have
8 identified. We don't know the third. Supposedly it
9 exists.

10 The RLUOB, of course, is depicted. The
11 NMSSUP, the so-called N-M-S-S-U-P, that's a security
12 fence, Your Honor. And fences don't sound like a big
13 thing, moving a fence here and there.

14 Well, I understand this thing is \$5,000 a
15 linear inch for this fence. And this is highly
16 dependent on the -- finishing the construction of the
17 CMRRNF.

18 They admit a previously undisclosed office
19 complex. We don't know anything about that part of
20 this interconnected activity.

21 The cold hardened shop at TA55, we don't
22 know about that as well.

23 And of course, the waste treatment facility
24 will be designed to handle the new nuclear facility.

25 So, Your Honor, we have the -- we have

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1 significant commitments to this project already. We
2 don't know exactly what it means. We do know that
3 the electrical usage alone, based on this proposed
4 project, will consume 27 percent of Los Alamos
5 County's current electrical usage, likely requiring
6 an additional transmission line to service the
7 project planning in the Pajarito corridor, a new
8 transmission line.

9 Six times the water usage during
10 construction than the county presently uses. We
11 don't know where water rights have been secured. We
12 don't know anything about that.

13 It's major, major modifications, real
14 impacts, for ten years of construction.

15 And obviously, during that ten years while
16 they're constructing, national security is not going
17 to be advanced because it's going to -- if anything,
18 the community and the laboratory is going to be
19 somewhat in a state of disarray during that period.

20 So there's no question that they are deeper
21 and deeper into this. And -- and under NEPA, you
22 know, Senator Jackson said when this was being
23 introduced on the floor of the senate, NEPA requires
24 examination of alternatives before they get off the
25 planning board, not after.

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1 And you know, Judge Meachum -- and we all --
2 we all remember him fondly. But he said, in
3 Los Alamos Study Group versus O'Leary, something that
4 resonated with me, and I would just like to quote,
5 because he's talking about harm under NEPA and the
6 importance of procedural compliance within NEPA so
7 that NEPA drives our decisions and we do not have our
8 decisions papered over with after-the-fact NEPA work.

9 And Judge Meachum said, quote, When a
10 decision to which NEPA obligations attach is made
11 without the informed environmental consideration that
12 NEPA requires, the very harm that NEPA intends to
13 prevent has been suffered.

14 So we know that there's a commitment. We
15 know that agency commitment starts in this case,
16 where the detailed design is way down the road and it
17 binds itself to a contract when construction occurs.
18 All of those are present in the instant case. Timing
19 is critical in this instance.

20 And the Court -- we're going to ask,
21 Your Honor, at the conclusion of our presentation,
22 that the Court enjoin this matter which Courts
23 typically do when an agency commits itself to a
24 project where the NEPA analysis has not yet been
25 completed. So the design work the defendants are

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1 doing here is a design work on one alternative and
2 one alternative only, and that can't -- they put the
3 cart before the horse.

4 I think Senator Jackson and Judge Meachum
5 would be dismayed at what has occurred in this
6 situation.

7 Your Honor, I'm not going to -- we are not
8 going to spend much time on NEPA violations. I think
9 they are self-evident through our presentation and in
10 our briefs. Suffice it to say you have got to have a
11 ROD under NEPA to -- to show the alternatives that
12 were considered and the alternative that's been
13 chosen. And 40 CFR 15.5.2, here, we are nowhere near
14 that.

15 And I might add, Your Honor, that the -- the
16 injunction is not just appropriate here, but it's
17 absolutely necessary. And it doesn't just serve us,
18 it serves everyone.

19 As a matter of fact, it will serve these
20 defendants. Everyone benefits by NEPA compliance
21 first and by pausing this particular project.

22 We have shown a likelihood of success on the
23 merits, we've shown -- irreparable harm, I think, is
24 self-evident and manifest from the gravity of the --
25 the present iteration of the project.

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1 Clearly, public interest is -- it supports
2 NEPA compliance. And as Judge Meachum found in
3 O'Leary, the national defense interest, you know, you
4 need to have a predictive judgment on something that
5 is going to be affected imminently.

6 And clearly, on a ten-year project, a pause
7 to comply with NEPA and analyze alternatives would do
8 everyone good and certainly would not harm the
9 national interest. And Dr. von Hippel is going to
10 address that as well.

11 Your Honor, I would say this, that he is
12 also going to mention -- and I don't know if the
13 Court is aware of it -- but Dr. von Hippel will
14 mention Dr. Everett Beckner, 40 years of DOE NNSA.
15 He was head of the nuclear facilities in this country
16 and the UK, and he has recently been quoted in
17 articles of -- the Nuclear Monitor and the Science
18 Monitor and in the papers as saying, you know, in
19 light of Fukushima, maybe it's time to pause this
20 project.

21 And so I think that's where we are. We
22 think a pause would do everyone good.

23 Now the magistrate's recommendation, I want
24 to just briefly touch upon that because the world
25 really has come a long way, I think. I think when we

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1 look at paragraph 25 of the magistrate judge's
2 proposed disposition, the report basically states
3 that this SEIS -- this document here is going to tell
4 the defendants how best to proceed with the CMRRNF.

5 That's crucial language to me -- crucial
6 language to me, because that's not NEPA. It might be
7 something else, but that's not NEPA. Because that's
8 absolutely contrary to Davis versus Mineta, where the
9 Court said you can't do anything which skews the
10 choice of alternatives.

11 So the magistrate judge's report says, quite
12 oppositely, that you can do a report to show you how
13 to best design the alternative you've chosen.

14 That's an incorrect application of NEPA,
15 Your Honor. And, Your Honor, we have cited the
16 cases, I think that are -- the prudential mootness
17 applies. I was taken by the doctrine of prudential
18 mootness because the crux of the doctrine is that,
19 well, you know, it's used where injunctions are
20 sought against the federal government.

21 Well, that's the remedy NEPA provides.

22 So does the doctrine of prudential mootness
23 trump NEPA? I think not. And in the three cases
24 that are discussed, it is very clear the only case
25 that has provided prudential mootness to prevent an

1 injunction is the Sierra Club versus US
2 Corps of Engineers, where the plaintiffs were
3 alleging that the defendants had not obtained a 404
4 permit for dredging the fill. And, obviously,
5 95 percent of it had been filled.

6 The judge said, I can't help you; too far
7 down the road. It's prudentially moot on the ground.

8 The other cases, of course the Crutchfield
9 case and the Sierra Club case, of course even where
10 the highway project was substantially completed, the
11 judge said, Well, you know, you have more to
12 complete. I'm going to enjoin you as to that.

13 So here, I'll -- we'll concede that these
14 defendants are far down the road in their commitment,
15 but it's not too late. It's perfectly timely,
16 because they have already spent what was authorized
17 under the 2004 -- by virtue of the 2004 ROD,
18 \$300 million. That's only 4 percent of what they
19 intend to spend. There's 96 percent more to go.
20 It's a perfect time for an injunction, it's a perfect
21 time to have these defendants pause to consider
22 alternatives under NEPA.

23 And as I am reminded from time to time, when
24 an agency goes into the NEPA process with a preferred
25 alternative -- and that's okay, you can prefer it

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1 while you go in -- oftentimes what emerges from the
2 process is that their preferred alternative they went
3 in with is not their preferred alternative they come
4 out with. And that's why it's important. That's why
5 they benefit and we benefit.

6 Your Honor, so we will in our rebuttal, time
7 permitting, we'll respectfully ask that the Court
8 enter the injunctive relief.

9 And at this time, I would like to turn the
10 podium to my co-counsel, Mr. Lindsay Lovejoy, who is
11 going to present Mr. Mello for direct examination.

12 Thank you, Your Honor.

13 THE COURT: Let me ask first if the
14 defendants care to make any kind of an opening
15 statement.

16 MR. SMITH: Well, Your Honor, our main
17 concern is that we have enough time to present our
18 arguments. I'm not sure I need to make it now.

19 THE COURT: That's fine.

20 MR. SMITH: We do object to the calling of
21 live witnesses. They have given us no notice that
22 they were going to call live witnesses. So you know,
23 we didn't have a chance to take their depositions or
24 anything like that. They have had two months' notice
25 of this hearing and didn't provide us any notice that

1 they intended to call live witnesses. So it's not
2 the ordinary preliminary injunction setting, where
3 everyone is rushed to get into court, you know,
4 notice is not that big a deal. But here, we have no
5 notice, having been noticed that they had intended to
6 call live witnesses.

7 THE COURT: Any comment?

8 MR. HNASKO: Thank you, Your Honor. Yes.

9 Mr. Smith, I -- I feel for him because we
10 tried to get together and meet and confer with these
11 defendants. They won't do it. As a matter of fact,
12 there has been an order entered that we're not
13 meeting and conferring. No discovery is to be had in
14 this case presently.

15 THE COURT: Well, I'm going to allow live
16 testimony. The notice of hearing initially went out
17 in February. I don't see that I limited the hearing
18 to oral argument only. And so from my perspective,
19 either or both sides are -- were certainly free to
20 put on evidence if that was their choice. So I will
21 allow the witnesses to testify.

22 MR. SMITH: And then, Your Honor, I'd like
23 to make a specific objection to Mr. Mello's
24 testimony.

25 Mr. Mello has no direct information for this

1 Court. All of his information, as you saw on his
2 declaration, is based on documents that the Court can
3 certainly look at.

4 So it doesn't seem like an efficient use of
5 our time to let Mr. Mello get on the stand and make
6 what are essentially arguments about their case from
7 the documents. The documents speak for themselves,
8 and Your Honor can look at those documents as well as
9 anyone else.

10 THE COURT: Any comment?

11 MR. HNASKO: One further comment,
12 Your Honor. I think as Mr. Smith knows, we're not
13 bound by the Rules of Evidence in this particular
14 proceeding. I think that Your Honor is more than
15 capable of determining -- separating the wheat from
16 the chaff, if there is any chaff.

17 THE COURT: Well, again, I will allow the
18 testimony. But I will point out that I have reviewed
19 a lot of the material. I have reviewed each of the
20 affidavits that Mr. Mello has submitted or that you
21 all have attached to various pleadings.

22 I have reviewed exhibits, and so I'm not
23 going to preclude you from putting on the testimony
24 that you want to put on. But please bear in mind
25 that I have reviewed much of this already.

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1 So you don't care to make any kind of an
2 opening statement at this point, then? You want to
3 wait and reserve your argument for later. Is that
4 right?

5 MR. SMITH: That's correct, Your Honor. But
6 again, I would like to make sure that I get my hour
7 and a half of time in my half of this hearing. So
8 I'm a bit concerned that if they put on long
9 testimony from Mr. Mello, similar to his long
10 declarations, that that's going to cut into our
11 opportunity to present our case.

12 THE COURT: Well, we will just -- we'll see
13 where we go. I will make sure you have sufficient
14 time.

15 MR. SMITH: Thank you.

16 THE COURT: All right.

17 You may call your first witness.

18 MR. LOVEJOY: Thank you, Your Honor. I call
19 Gregory Mello.

20 (Witness duly sworn.)

21 MR. LOVEJOY: Your Honor, there's a volume
22 of exhibits with tabs that correspond, essentially,
23 to Mr. Mello's. In the course of his testimony he's
24 essentially going to be giving Your Honor an outline
25 of the facts and putting it into context.

1 THE COURT: Well, I see several books with
2 tabs.

3 MR. LOVEJOY: It should be -- it says
4 "Gregory Mello Testimony Exhibits."

5 THE COURT: Got it.

6 MR. LOVEJOY: It has his affidavits in the
7 beginning of the volume, and then the items are
8 tabbed.

9 And I'll point out that the index shows
10 where each of the items appears, as in the record
11 already. There's a few items with an asterisk that
12 are not yet in the record. They are, for the most
13 part -- well, like everything else here --
14 defendants' documents and government documents. I
15 don't really think there's an admissibility question.

16 I did see a couple of items from one of the
17 trade publications, but I don't think the facts
18 related are contested.

19 And in light of the Court's remarks, we will
20 attempt to be brisk.

21 MR. SMITH: We also object to the
22 presentation of exhibits that have not yet been put
23 in the record. Again, we have no -- you know, they
24 were never given to us, they were not provided to us
25 for preparation for this hearing.

1 Plainly, they knew they had these exhibits
2 long before this hearing. They put them together,
3 they have prepped their witness, and they haven't
4 provided them to us in advance, so I haven't had time
5 to go through these exhibits with my clients and
6 review them. And I believe that is, you know,
7 unfair.

8 MR. LOVEJOY: Well --

9 THE COURT: You haven't made these available
10 to opposing counsel?

11 MR. LOVEJOY: We have given them copies.
12 Your Honor, they are items like a congressional
13 budget request. I'm sure there's some deep
14 credibility issues that could be probed with respect
15 to that, but right now they don't occur to me.

16 MR. SMITH: It's not a credibility issue,
17 Your Honor, it's a notice issue. It's -- you know,
18 how do I know? Am I supposed go through every
19 government document and try to speculate what they
20 might show up at a hearing with? They should have
21 provided me that evidence so I could have conversed
22 about it with my clients to determine its relevance
23 for this hearing in the matter.

24 MR. LOVEJOY: Well, Your Honor, I don't
25 quite have the same sympathy for the defense here

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1 that I might ordinarily, having received their own
2 draft supplemental EIS on Good Friday and having had
3 to bone up on that. I think we're more than on even
4 terms here.

5 THE COURT: Well, my plan is to proceed, but
6 I am not a real fan of nondisclosure. I mean I think
7 that whenever we have any kind of a court proceeding
8 my preference is to just get the work done and
9 proceed with the hearing in a manner that's fair to
10 everybody.

11 And so generally speaking -- now, I know
12 this is a little unusual posture because we're not in
13 a situation where there has been discovery and so
14 forth. But generally speaking, my preference is to
15 come to a hearing where everybody has got fair notice
16 of what's going to be addressed.

17 My option is to not allow the exhibits that
18 the other side has no notice of, or continue the
19 hearing so that everybody has an adequate opportunity
20 to review the material in advance of the hearing.

21 Neither of those options are particularly
22 attractive to the Court at this point. My preference
23 is to proceed. However, we'll -- again, we'll see
24 where we end up. If the government feels that they
25 need some additional time then, you know, chances are

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1 we will take somewhat of a break and come back
2 another time.

3 But again, let's just proceed and see where
4 we go. I'd rather we just address the issues and get
5 this hearing done.

6 MR. SMITH: Thank you, Your Honor.

7 MR. LOVEJOY: Thank you, Your Honor.

8 THE COURT: But again you know, please,
9 let's just proceed with the hearing. I'm not
10 particularly persuaded by soapbox or comments about
11 the other side this or this side that. I'm not
12 interested in that. I just want to deal with the
13 issues and the facts of the case. Okay?

14 MR. LOVEJOY: Thank you, Your Honor.

15 THE COURT: All right.

16 GREGORY MELLO, PLAINTIFF'S WITNESS, SWORN

17 DIRECT EXAMINATION

18 BY MR. LOVEJOY:

19 Q. Please identify yourself.

20 A. Gregory Mello.

21 Q. And you're the executive director of the
22 Los Alamos Study Group?

23 A. Yes, I am.

24 Q. And how long have you been in that position?

25 A. For the last 19 years.

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1 Q. Could you just summarize your educational
2 background?

3 A. I have a bachelor's degree in engineering from
4 Harvard College with honors; a master's degree from
5 Harvard University Graduate School of Design.

6 I've worked on natural hazards and other
7 planning -- site planning issues.

8 Q. And what's your professional background?

9 A. After college I worked for the EPA, which was
10 brand-new. I worked on research and monitoring
11 policy, traveled the country extensively. I
12 worked -- interviewed prominent environments,
13 environmental managers in government.

14 I -- after the EPA I administered an
15 external studies program in environmental policy.

16 I worked for the Central Clearinghouse in
17 Santa Fe, which was a consortium of environmental
18 organizations.

19 I have been a successful businessman.

20 I have been a transportation planner.

21 I taught high school science and math after
22 returning to New Mexico.

23 I then began work at the environment
24 department, where I initiated the external regulation
25 of Los Alamos National Laboratory under the Hazardous

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1 Waste Act. It was the first external regulation at
2 all at that time.

3 Then I became a supervising hyper geologist
4 at the environment department, where I worked on
5 enforcement and cleanup of several dozen sites and
6 cases around the state.

7 I worked, after the environment department,
8 for two hydrology firms in New Mexico.

9 I consulted in California on the cleanup of
10 Lawrence Livermore National Laboratory, which I was
11 the first professional involved in an outside
12 environment department with the weapons complex.

13 Then I began working for the Los Alamos
14 Study Group, after that.

15 Q. And during the time you've worked for the study
16 group, have you worked at the Woodrow Wilson school?

17 A. Yes. In 2002, I was a visiting research fellow
18 at the Princeton Woodrow Wilson school working on the
19 physical chemical biological effects of underground
20 nuclear explosions as well as on plutonium pit
21 production issues and infrastructure.

22 Q. And you've published articles on nuclear
23 weapons policy?

24 A. As time has allowed, I have published in the
25 Bulletin of Atomic Scientists, Washington Post,

1 National Academy Publications, other places.

2 I've also spoken several times at the

3 United Nations, European Parliament, the Council on

4 Foreign Relations, college classes, elsewhere.

5 Q. And have you advised officials of the

6 Department of Energy?

7 A. Yes, on many, many occasions. The Department

8 of Energy has flown me to Washington at their expense

9 to advise them on NEPA compliance, and I meet

10 relatively frequently with senior officials.

11 Q. And have you advised officials of the Defense

12 Nuclear Facilities Safety Board?

13 A. Yes, on many occasions. I usually meet

14 personally with the entire Nuclear Facilities Safety

15 Board about three times a year, as well as their

16 senior staff in attendance.

17 Q. And have you advised the Department of Energy

18 specifically on nuclear stockpile strategy?

19 A. Yes. I have taken part in closed-door meetings

20 with senior Department of Energy officials, members

21 of the JASON Advisory Group, assistant

22 secretary-level -- Assistant Secretary Reese, senior

23 lab people, discussing the future of the stockpile

24 stewardship program.

25 I was an invited guest. I did that twice.

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1 I was an invited guest at the Galvin panel on the
2 future of US nuclear weapons laboratories. That came
3 out of work that I had done in the early 1990s
4 consulting with laboratory officials and publishing a
5 paper on the possible new missions for Los Alamos
6 National Laboratory after the cold war.

7 Q. And let me jump forward a little bit and just
8 ask you: You, on behalf of Los Alamos Study Group,
9 are here seeking a preliminary injunction of any
10 further expenditures on the proposed CMRR nuclear
11 facility, correct?

12 A. Yes, that's correct. I think it's important to
13 say for the Court, Your Honor, that we're not seeking
14 an injunction against work that would analyze
15 alternatives to the facility, so we're not interested
16 in stopping all work. We are certainly not
17 interested in enjoining any programs at Los Alamos
18 National Laboratory.

19 I think one of the themes that should come
20 out of today's presentation is that environmental
21 impacts that we're discussing here are, first and
22 foremost, impacts on Los Alamos National Laboratory
23 and its people and its programs.

24 We -- I would like to emphasize that this
25 facility will incur great costs on Los Alamos'

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1 programs until, at a minimum 2023, when it is
2 completed. It was already incurring costs because of
3 the diversion of management attention and because of
4 the hundreds of millions of dollars. But that's only
5 just the beginning, as you can see here from this
6 chart.

7 Q. You have followed the evolution of this
8 project, correct?

9 A. Yes, I have.

10 Q. We can call it the nuclear facility, right?

11 A. Yes.

12 Q. When did this begin?

13 A. In 1999, Senator Bingaman announced he was
14 going to seek \$5 million for a planning study. This
15 was going to be a smaller, cheaper facility. He said
16 this was not going to be Taj Mahal. You can see that
17 at Tab 1.

18 Q. Okay. What kind of facility was it?

19 A. This is a very important point. The initial
20 design for this facility was not a facility that
21 would contain essentially unlimited but very large
22 amounts of plutonium.

23 In the beginning, this facility was to be
24 what's called a hazard category 3 facility. That was
25 a facility that would contain no more than

1 nine-tenths of a kilogram of plutonium.

2 That facility would be tremendously easier
3 to build than the one they're building now. And it
4 was con- -- it was -- at the time, it was enough to
5 satisfy all of their needs, as their document here at
6 Tab 2 shows.

7 Q. Okay. Now under DOE order 413.3, there is one
8 stage of the process that's called critical decision
9 zero. Is that right, CD zero?

10 A. Yes. That occurred on July 16, 2002. And then
11 that was immediately followed by the notice of intent
12 to prepare an environmental impact statement for this
13 facility as it was thought of then.

14 Q. Okay. And what was the cost estimate DOE was
15 using at that time?

16 A. DOE was using a cost estimate of 350 to
17 \$500 million plus administrative costs.

18 But, Your Honor, that was for two buildings.
19 So the cost of this one building is less than -- it's
20 probably on the order of two-thirds of that range.

21 Q. And NNSA existed then, didn't it?

22 A. Yes, they did.

23 Q. And did they adopt an accelerated construction
24 approach for this project?

25 A. They did. Right from the beginning they

1 adopted the design-build process. That had the
2 effect of pushing forward government commitment to
3 the earlier years. And as Mr. Hnasko said, it's
4 usually nearly always used for very simple projects.

5 There's real pitfalls that come from
6 eliminating the review stage when you get toward
7 construction, because a lot of the problems in a
8 complex project can occur in the final design stages
9 as you approach the construction process. This is
10 something the DOE has learned through the years.

11 But in this particular case they have
12 adopted the design-build process right from the
13 beginning.

14 Q. And say around 2003, what was their cost and
15 time estimate for this project?

16 A. That's at Tab 6. They chose the upper end at
17 that point, of their previous cost -- or their
18 previous price range. And they added \$100 million
19 for administration.

20 Q. And when was it going to be done?

21 A. It was going to be done in the first quarter of
22 2011, which would have been just a few months ago.

23 Q. Okay. And when was there an EIS issued?

24 A. EIS was issued in November of '03.

25 Q. And what alternatives did that consider?

1 A. The alternatives on that is Tab 7.

2 Basically, there was many alternatives, but
3 they were all very similar. They all had the same
4 capabilities and they were just different in their
5 construction style and in their location, whether
6 they were north of Pajarito Road or south of Pajarito
7 Road.

8 The two main distinctions were buildings
9 that were built no deeper than 50 feet or buildings
10 built no deeper than 75 feet. They're basically the
11 same.

12 Q. And what was the construction schedule of the
13 EIS?

14 A. That's at Tab 8. The construction schedule was
15 to complete the project in -- by 2009.

16 Q. And what was the size of this facility as of
17 '04 -- '03/'04?

18 A. It was 200,000 gross square feet. And that was
19 going to contain 60,000 square feet of hazard
20 category 2 space, that's the heavy laboratory space;
21 and 60,000 square feet of the lighter laboratory
22 space, the hazard category 3 space.

23 Q. And when was there a record of decision --

24 MR. SMITH: Your Honor, I'm sorry to
25 interject. I don't believe it's appropriate for

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1 Mr. Mello to testify about all of this information
2 without actually referring the Court to the exact
3 documents that he's getting the information from.

4 It shouldn't properly be part of the record
5 if he's just saying stuff, and we're supposed to
6 accept that as fact. He has no firsthand knowledge.

7 THE COURT: Well, he has been referring to
8 tabs. But maybe in addition, you should identify the
9 document so that everybody knows what you're
10 referring to.

11 MR. LOVEJOY: Yes.

12 THE COURT: And then counsel can address
13 exhibits as necessary.

14 MR. LOVEJOY: Yes. Thank you, Your Honor.

15 MR. SMITH: Thank you, Your Honor.

16 BY MR. LOVEJOY:

17 Q. Mr. Mello, what is Tab 9?

18 A. Tab 9 is the record of decision for the CMREIS
19 from 2004.

20 Q. And what does it say about impacts of
21 construction?

22 A. On --

23 Q. I turn your attention to page 6969.

24 A. Yes. That would be the third page of the tab,
25 over on the right-hand column.

1 That summarizes the construction impacts
2 that are -- in SEIS words.

3 And if I may summarize that it just says,
4 basically, that there are no serious impacts. But
5 you can -- you know, we can read that all at our
6 leisure.

7 Q. Okay. And when did DOE make the next critical
8 decision, CD1, looking at Tab 10?

9 A. Tab 10, there? It's highlighted. CD1 was
10 approved in May of 2005.

11 Now, I should say what that is. CD1 is when
12 you -- when design down-selects an alternative. And
13 that's the point where the project leaves the
14 planning stage and goes into the implementation
15 stage, according to the Department of Energy.

16 At that point it's difficult for the
17 Department of Energy to choose a different
18 alternative. The reason for the critical decision
19 process is so that all the actors in government and
20 in the private contractors can be singing from the
21 same song sheet. They can coordinate their
22 activities, they're working from the same program
23 direction.

24 So that's why the critical decision process
25 is important, because there are a number of actors

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1 that are -- all have to work together. And those
2 critical decisions are used to prepare budget
3 requests to Congress. And they're used by Congress
4 to track the progress of the projects that they're
5 funding and give them some oversight of what's going
6 on.

7 Q. Okay. Covering several years at once, since
8 then, since 2004, has the plan for the proposed
9 nuclear facility changed?

10 A. Yes. We have -- it has changed quite a lot.

11 Q. When did this happen?

12 A. It -- we are not exactly sure what happened
13 when. But we know that as the detailed design
14 progressed, serious problems began to develop in the
15 2008/2009 time frame.

16 By February of 2009, the budget had
17 increased to over \$2 billion for this one facility,
18 indicating a significant change already, the
19 character of which was not available to us at the
20 time.

21 Tab 12 is the certification review from the
22 Defense Nuclear Facilities Safety Board from
23 September of 2009. This was the clear window, even
24 though a small window, into the design changes which
25 the defendant and the safety board had been

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1 discussing for some time.

2 There, they discussed how increased seismic
3 hazard at the site was affecting the design. And I
4 believe this document also discusses how the -- no,
5 it doesn't. That would be another document. I'll
6 leave that for later.

7 Q. Well, the safety board does not normally
8 perform certification pursuant to statute, does it?

9 A. This is the sole and unique time that the
10 safety board has ever been asked by Congress to
11 perform this role. This role is normally advisory.
12 But Congress had become very alarmed by -- by the
13 lack of safety in the design of this project.

14 MR. SMITH: I am going to object to that
15 answer. He has no foundation for saying this is the
16 only time that the board has made this sort of
17 decision.

18 THE COURT: What's the foundation,
19 Mr. Lovejoy?

20 THE WITNESS: May I answer?

21 MR. LOVEJOY: We -- we are all -- well, I
22 could ask the witness, but I believe we're all aware
23 of the statutory provision over which the
24 certification was provided. That is the only one
25 known that he is --

1 THE COURT: What's the witness' foundation
2 for answering the question?

3 THE WITNESS: The safety board was just --

4 THE COURT: Let me just hear from counsel
5 first.

6 MR. LOVEJOY: Well, he has knowledge of the
7 statutory provisions. He has engaged repeatedly with
8 the safety board concerning its application of the
9 statutory authority he knows all the folks involved,
10 Your Honor.

11 THE COURT: Well, that -- that's -- that may
12 be true, but we need to hear the proper foundation.

13 THE WITNESS: Yes. Thank you.

14 MR. LOVEJOY: All right.

15 BY MR. LOVEJOY:

16 Q. Mr. Mello, are you aware of the legislation
17 under which the certification was provided?

18 A. Yes, I am. This was the 2009 Duncan Hunter
19 Defense Authorization Act, which contained a special
20 provision that gave the safety board additional
21 powers beyond what they had originally been granted
22 by Congress, just in the case of this specific
23 project.

24 Ordinarily, they are an advisory body and
25 they report to Congress. They're -- and -- but they

1 advise the Department of Energy.

2 In this particular case, the 2009
3 Authorization Act fenced about \$50 million in
4 authorized funds for this project until the safety
5 board would certify that the design was proceeding
6 along safe lines, because there had been -- the
7 safety board had raised some deep problems with the
8 design of the project.

9 MR. LOVEJOY: Shall I proceed, Your Honor?

10 THE COURT: Go ahead.

11 MR. LOVEJOY: Thank you.

12 BY MR. LOVEJOY:

13 Q. And what was the nature of the new design that
14 emerged in late 2009 or 2010?

15 A. Our information is -- well, we don't know
16 everything. But the -- all of the walls and the
17 floor were thickened, and the defen- -- the NNSA
18 realized that they needed either to grout the
19 unconsolidated ash beneath the facility or to replace
20 it entirely, as stated here in this report.

21 And then we didn't -- we didn't know which
22 of those alternatives they were choosing or what the
23 effect would be on the design until the following
24 March, on March 3, to be precise, of 2010, which is
25 at Tab 13.

1 And on March 3rd of last year, we learned
2 that the decision had been made to replace the
3 consolidated volcanic ash to a depth of 50 or 60 feet
4 beneath the building; thus, incurring really
5 tremendous environmental impacts.

6 Q. And how deep was the excavation going to be,
7 according to the plan you learned about then?

8 A. As you see here at this tab, the depth of the
9 excavation was now going to be 125 feet.

10 Your Honor, this is significant, because
11 this facility is to be sited -- as you see, they are
12 on a very narrow mesa. And it's immediately abutting
13 the active plutonium facility, and it's a very
14 crowded site. It is a difficult site in which to do
15 such a deep excavation, which subsequent events have
16 shown.

17 Q. Now in Tab 13, which bears the number
18 LAUR10-02173, there seems to be a transcript. And
19 some of the statements are attributed to Richard A.
20 Holmes. Who is Richard A. Holmes?

21 A. He is a senior LANS executive in charge of this
22 project and was delivering these remarks about the
23 project.

24 Q. And LANS is Los Alamos National Security?

25 A. Yes.

1 Q. Thank you.

2 Was there any reference in the 2003 EIS to
3 an excavation to 125 feet or to filling 50 to 60 feet
4 of that hole with concrete?

5 A. No, none of that.

6 Q. Okay. Did this change -- alter the amount of
7 concrete required for the building?

8 A. Yes, it did. And that is discussed on Tab 14.

9 In Mr. Hnasko's presentation, he discussed
10 this. The amount of concrete that he mentioned was
11 actually for both buildings, and I made this mistake
12 myself in my first affidavit. Actually, the original
13 concrete requirement was 3,194 cubic yards. So the
14 amount of concrete that is envisioned for this
15 building is increased by a factor of 116.

16 Q. And did this require additional batch plants of
17 concrete?

18 A. Yes, it did. As of last year, there were to be
19 two batch plants. As of a few days ago, we learned
20 there might now be three concrete batch plants.

21 Q. Did the environmental impact statement of 2003
22 mention two or three batch plants?

23 A. No.

24 Q. Do concrete batch plants cause certain
25 environmental impacts?

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1 A. Oh, yes.

2 MR. SMITH: Objection, Your Honor. He has
3 not been qualified to analyze potential environmental
4 impacts of a batch plant. He is not qualified for
5 that.

6 THE COURT: Do you have any response?

7 BY MR. LOVEJOY:

8 Q. Mr. Mello, you have a degree in engineering,
9 don't you?

10 A. Yes. And I have been an official of the
11 environment department in charge of enforcement, and
12 I have -- I have 30 years of experience in the
13 environmental field.

14 MR. LOVEJOY: Your Honor, we submit,
15 although of course the Rules of Evidence don't apply
16 strictly in this proceeding, but in any case, this
17 witness would be acceptable as an expert on this
18 issue.

19 THE COURT: Well, are you offering him as an
20 expert?

21 MR. LOVEJOY: Yes, I am.

22 MR. SMITH: Objection, Your Honor. There's
23 no foundation for that.

24 THE COURT: Yeah. I am going to have to
25 sustain that objection. That's not the conventional

1 method for offering experts.

2 We're going to take just a short break. I'm
3 showing 10:16 on my official clock, so we're going to
4 take about a 10-minute break.

5 (A recess was taken from 10:06 a.m. to 10:35
6 a.m.)

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

9 You may continue, Mr. Lovejoy.

10 MR. LOVEJOY: Thank you, Your Honor.

11 I'm going to be seeking leave of the Court
12 to lead the witness a bit in order to get us through
13 the material.

14 THE COURT: Is there an objection?

15 MR. SMITH: No objection.

16 THE COURT: All right.

17 BY MR. LOVEJOY:

18 Q. Mr. Mello, the -- in the current program, is it
19 true that the amount of steel called for has
20 increased from 267 tons to more than 18,000 tons? Is
21 that right?

22 A. Yes.

23 Q. And the size of the building has approximately
24 doubled in terms of square footage, right?

25 A. Gross square feet, yes.

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1 Q. Okay. And the acreage covered by the project
2 has gone from 27 acres to somewhere in the area of
3 100 acres plus. Is that true?

4 A. That's true.

5 Q. And the volume to be excavated has gone from
6 about an additional 100,000 cubic yards to between 4-
7 and 500,000 additional cubic yards?

8 MR. SMITH: Your Honor --

9 THE WITNESS: It's a little more than that.

10 THE COURT: Yes.

11 MR. SMITH: Although I don't object to the
12 leading questions, again, I think for the record they
13 need to say where they're coming up with these facts
14 instead of, "This is in fact, yes."

15 Where is it in the record? I mean this is
16 about the record, not Mr. Mello's testimony.

17 MR. LOVEJOY: This is in the book with the
18 tabs, Your Honor, Tab 14, Tab 17, Tab 18, Tab 19.

19 THE COURT: All right. Well, I know time is
20 an issue, but if you know where they are, if you can,
21 in your question, incorporate at least some reference
22 to the exhibit, that would be helpful.

23 BY MR. LOVEJOY:

24 Q. In Tab 25, is there reference to the
25 excavation, amount to be excavated?

1 A. Yes, there is. I believe this figure has now
2 been exceeded again and is in excess of 500,000 cubic
3 yards.

4 Q. Okay.

5 A. That's in the draft SEIS given to us a few days
6 ago.

7 Q. And Tab 14 refers to a peak construction
8 workforce of 300, according to the old plan. Is that
9 right?

10 A. Yes. And the new construction workforce is --
11 which tab is that?

12 Q. I think it's shown in Tab 26.

13 A. Tab 26?

14 Q. 844 for construction?

15 A. Yes.

16 Q. And there are additional administrative people
17 shown in Tab 27?

18 A. Several hundred, I believe.

19 Q. And what's the estimated completion date now?

20 A. Physical completion in 2020, and operation in
21 2023. This is in Tab 28.

22 Q. Okay. And what is meant at Los Alamos by the
23 term "Pajarito construction corridor"?

24 A. That is the sum total of these projects that
25 you see here, and possibly others that we have just

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1 heard about, such as the new -- possible new
2 transmission line.

3 The term is significant because there's an
4 enormous amount of construction crammed into a very
5 small space. About 4,400 people at the laboratory
6 work in this area.

7 Q. Now in terms of the nuclear facility, what
8 caused the design changes?

9 A. We don't know all the reasons. Safety has a
10 lot to do with it. The increased seismic hazard that
11 was formalized in 2007, that is --

12 Q. Is that Tab 31?

13 A. Tab 31 -- increased both the magnitude and the
14 frequency of large earthquakes.

15 This affec- -- the unconsolidated layer of
16 ash beneath the site that was certainly known to
17 defendants before then, but it didn't achieve the
18 significance it has now, when the accelerations were
19 smaller. Then it became quite important.

20 That seismic risk ramifies through all of
21 the safety systems that have to be provided for the
22 building if they have to survive the earthquake.

23 And in addition, there was the emphasis by
24 the NNSA in the Tab 32, if -- what they call the
25 hotel concept, which made the design of the facility

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1 particularly difficult, as the safety board explains
2 it, at Tab 32.

3 Q. Okay. And since 2003, what actions, if any,
4 have been taken by NNSA that bear on the mission of
5 the nuclear facility?

6 A. The -- a great deal of time has passed in
7 nuclear policy since 2003. The original pit
8 production mission, which was the main driver --

9 MR. SMITH: Your Honor, I object to this.

10 This is pure speculation. What's the foundation for
11 him saying what was motivating the mission for NNSA?

12 BY MR. LOVEJOY:

13 Q. What's the basis for your saying that the
14 motivation for the facility was pit production?

15 A. That is in my earlier affidavits. Those are
16 reports from Congress as well as from the White
17 House.

18 Q. And at some point, did Congress cease to fund
19 large-scale pit production?

20 I will ask you to look at Tab 34.

21 A. Well, there isn't any large-scale pit
22 production. This year, Los Alamos is to produce six
23 pits, and that program is terminating in September.

24 Q. Has there been a study --

25 A. That's in -- by the way, that's at Tab 35.

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1 Q. Yes. Has there been a study of the useful life
2 of existing plutonium pits?

3 A. The last -- yes. At -- that is at Tab 37. The
4 two nuclear physics laboratories at Los Alamos and at
5 Lawrence Livermore have conducted such studies over a
6 period of decades. Those were summarized in the
7 report, which itself is summarized at Tab 37, from
8 the JASON defense advisory group. They found that
9 pits would last -- most pits would last for
10 approximately a century, possibly longer, and there
11 were mitigation pathways.

12 Q. And do current documents concerning pit
13 production capacity show -- I'll ask you to look at
14 Tab Number 38 -- that there is existing pit
15 production capacity at Los Alamos?

16 A. Yes. This is -- Tab 38 is the integrated
17 policy document from the NNSA which governs the
18 operation of all its facilities.

19 Table D2 shows that Los Alamos National
20 Laboratory is to have a 60-pit-per-year production
21 capacity before the CMRRNF is operational.

22 Q. Has the Obama administration's nuclear posture
23 review stated a policy on pit manufacturing?

24 A. Yes. That is at Tab 40. That is the nuclear
25 posture review. That's based on some -- on the

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1 studies we have cited and other studies we don't have
2 time to get into.

3 But the policy is to manage the stockpile
4 without pit production. Pit production requires
5 special approvals from the President and from
6 Congress which don't apply to the ordinary stockpile
7 management.

8 Q. Okay. Getting back to the current nuclear
9 facility, are there contractual arrangements in
10 effect concerning construction of that project?

11 A. Yes, there are. The main contract is with the
12 LANS operating contractor, the management and
13 operating contractor of Los Alamos National
14 Laboratory, which has been directed specifically to
15 develop, produce, and deliver the nuclear facility.

16 Q. And is there construction that's taking place
17 that reflects a commitment to the nuclear facility?

18 A. Yes, there is. The construction of the RLUOB
19 is the most conspicuous. The RLUOB is a support
20 facility for the nuclear facility. And one of these
21 tabs discusses some of the features of the RLUOB
22 which are built into it to support the nuclear
23 facility.

24 The RLUOB has some -- has independent
25 utility, but there are portions of it which support

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1 the nuclear facility. They were analyzed under NEPA
2 as one project, and they are functionally
3 interrelated. These functions were broken out of the
4 other facility because it was cheaper to build them
5 into a facility that didn't have to be a category 2
6 facility.

7 I don't know which tab are those functions,
8 if we need to list them, but they're extensive. I
9 can -- from memory --

10 Q. That's Tab 7.

11 A. The -- the common utility building, the backup
12 generator, the tanks for the -- the fuel tanks for
13 the backup generator, the entrance facility we've
14 heard about, the tunnel we've heard about, incident
15 response facility for both facilities, a command
16 center for both facilities, a training center for
17 both facilities, offices for both facilities. These
18 are really essentially one project, as they were
19 analyzed under NEPA.

20 Q. Now -- and it's true that detailed design is
21 now going forward?

22 A. Yes, it is, since 2008, which is here in one of
23 the -- at Tab 41.

24 Q. Okay. And --

25 MR. SMITH: Objection, Your Honor. That's a

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1 conclusion and there is actually no evidence of that.

2 THE COURT: He says Tab 41.

3 THE WITNESS: I've got the wrong tab.

4 BY MR. LOVEJOY:

5 Q. You might look at Tab 50, you might look at Tab
6 51, which is an abstract from the affidavit in this
7 case.

8 A. Yeah, Tab 50 is the one I was looking for.

9 That -- Tab 50 is defendant's submission to Congress.
10 As you can see there at Tab 50, the preliminary
11 design -- well, that PED -- that stands for -- that's
12 project engineering design and preliminary
13 engineering and design. That's the meaning of it, in
14 any case.

15 That preliminary design line item ended in
16 fiscal year '07. You can see there's zeros in that
17 first column above the red box.

18 Then final design began in fiscal year '08.

19 Final design will continue --

20 THE COURT: I'm not quite sure where you
21 are.

22 MR. SMITH: Objection, Your Honor. He is --
23 I mean he is extrapolating from appropriations to say
24 that design is actually final design or detailed
25 design is actually occurring, when appropriations

1 don't even provide that evidence. It doesn't say
2 that the appropriations were used.

3 THE COURT: Well, I don't see anything that
4 says detailed design is going forward, but...

5 THE WITNESS: Final design. I'm sorry.

6 MR. LOVEJOY: In any event, Your Honor --

7 THE COURT: Where are you? Tab 50?

8 MR. LOVEJOY: Well, I'm also looking at Tab
9 51, which is extracts from Mr. Cook's affidavit.

10 THE COURT: Well, he talked about zeros
11 above the red, and I don't know where he is.

12 THE WITNESS: Okay.

13 THE COURT: But you're at 51, in any event,
14 so let's go to 51.

15 THE WITNESS: If you would like me to
16 summarize the evidence for detailed design I would do
17 that.

18 BY MR. LOVEJOY:

19 Q. Why don't you do it very quickly?

20 A. In addition to -- Your Honor, these are the
21 project data sheets by which Congress understands the
22 project.

23 THE COURT: Where are you at?

24 THE WITNESS: Tab 50, for example.

25 THE COURT: Okay.

1 MR. SMITH: Your Honor, I object. He's
2 speculating now about what Congress understands.

3 THE COURT: Okay. I understand your
4 objection.

5 Go ahead.

6 BY MR. LOVEJOY:

7 Q. Please finish.

8 A. With -- yes. I have met dozens of times with
9 Congress discussing these sheets.

10 The -- in addition there are, as we'll see,
11 employment contracts.

12 THE COURT: Hold on one second.

13 THE WITNESS: Yes.

14 THE COURT: Could you ask the witness a
15 question so we can get back on track?

16 BY MR. LOVEJOY:

17 Q. Mr. Mello, what's the basis for your statement
18 that final design or detailed design is now going
19 forward?

20 A. We have the representations made by defendants
21 to Congress annually through their formal submittals.

22 We have --

23 MR. SMITH: Objection, Your Honor. Where is
24 this? I would like to see that, because I happen to
25 know that there is no such document.

1 BY MR. LOVEJOY:

2 Q. Mr. Mello, can you explain what you're
3 referring to?

4 A. We will move on to the next, because we have a
5 different understanding of...

6 THE COURT: Well, let's just -- just tell us
7 where your understanding comes from and then we can
8 move on.

9 THE WITNESS: Yes.

10 Each year defendants go before congressional
11 committees and they present a paper to the committees
12 and testimony as well.

13 Defendants in recent years have repeatedly
14 emphasized their commitment to this project. And in
15 their formal budget requests they emphasize, or
16 they -- excuse me. They -- they give -- they put
17 their funding requests under the category of final
18 design.

19 Final design is the last category before
20 construction. And they -- you can see that for the
21 current fiscal year, and just below the red box in
22 fiscal year 50, there's a zero in the -- in the
23 construction component of this project.

24 However, in fiscal year 12, there's
25 \$186 million for construction. That means that in

1 fiscal year 11 the final detailed design must be
2 ready and completed to support the construction of
3 \$186 million of work, just in a few months from now.

4 And I -- I don't really have any explanation
5 for that. If it's not final design it's very, very
6 close. It's a huge project. And to let the
7 contracts, which I would like to discuss next, you
8 have to have the project -- you have to have the
9 details done for that \$186 million in expenses.

10 MR. SMITH: Objection again, Your Honor.

11 There's no evidence that any contracts for anything
12 other than the design, initial conceptual design,
13 have been let. He's just --

14 THE WITNESS: Yeah, there is.

15 MR. SMITH: He's just testifying about stuff
16 without, you know, providing a basis.

17 THE COURT: Well, we will see what the basis
18 is.

19 BY MR. LOVEJOY:

20 Q. Does NNSA -- may I ask: Does NNSA have
21 subcontracts for detailed design?

22 A. Yes. NNSA does have subcontracts for detailed
23 design.

24 Q. How do you know that?

25 A. Because at the Web sites of some of the

1 subcontractors -- you can read this -- the Marek
2 Corporation, the Sargent & Lundy Corporation, the --
3 I think it's Simpson Gumpertz & Heger are doing
4 seismic analysis. But Marek is doing long lead
5 procurement detailed interior fixtures for both the
6 RLUOB and the nuclear facility. Some of the work
7 isn't common for both, because the fixtures aren't
8 similar that's under the design-build component of
9 the project. And I hate to use the specialized
10 language, but it's called special facility equipment.

11 MR. SMITH: Your Honor, again, there is no
12 evidence that there's long lead design contracts
13 having been let. He's testifying that there has.
14 It's not true. There's no evidence in the record to
15 support that.

16 I mean it's hard to work this in because --
17 I mean I understand why you're letting him say -- you
18 know, letting him have the stand. But he's saying
19 stuff I'm afraid that's going to be in the record
20 and, you know, it's not even supported. And it's
21 just -- this is a document case. You know, from his
22 perspective he has no firsthand knowledge. He's just
23 telling you what documents are, but he is not citing
24 any documents for support.

25 THE COURT: Again, I understand. And I --

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1 at this point this is not a jury trial, and I will be
2 cognizant of what his testimony is versus what the
3 documents show. So I'm aware of that.

4 MR. LOVEJOY: Your Honor, I won't belabor
5 the record with testimony. But there is -- there's
6 an affidavit by Mr. Don Cook already in the record on
7 the progress of design specifying the number of
8 employees currently working on that.

9 BY MR. LOVEJOY:

10 Q. Now where -- Mr. Mello, where does NNSA stand
11 on construction subcontracts?

12 A. On --

13 Q. Based on statements from NNSA.

14 A. Certainly. In -- let's see. An example would
15 be Tab 56, a presentation of June 16 of last year.
16 You can see -- this is, perhaps, hard to read. But
17 the salmon-colored blocks there begin -- there's a
18 little diamond at the bottom that says CD2/3. That
19 is the initiation of design built construction.

20 And you can read the date there. Well,
21 excuse me. I'm sorry. After the salmon block we
22 have the green infrastructure package construction.
23 Sorry. That's in the middle of fiscal year 11, CD23
24 for infrastructure package construction.

25 That's -- that was as of last year. The

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1 project may be slightly delayed, but those are the
2 representations made to us.

3 Q. Who is Steve Fong?

4 A. Steve Fong is the project manager for NNSA for
5 the CMRR project at Los Alamos.

6 Q. Did he make a statement to you, or in a
7 presentation, about the preparedness of the
8 infrastructure package for contracting?

9 MR. SMITH: Objection, Your Honor. He's
10 calling for hearsay from someone he talked to. I
11 mean...

12 MR. LOVEJOY: This is one of the
13 construction managers for the defendant, Your Honor.

14 MR. SMITH: It doesn't matter, Your Honor.

15 THE WITNESS: Well, I --

16 THE COURT: Hold on a second.

17 Go ahead.

18 MR. SMITH: He's going to testify about what
19 somebody told him in a conversation.

20 THE WITNESS: No, I'm not.

21 THE COURT: Well, you know, hearsay is
22 admissible in a preliminary injunction hearing. It's
23 not going to get us anywhere if we get to a permanent
24 injunction, but it's something that the Court can
25 consider at least at this stage. So I will give it

1 the weight I think it deserves.

2 BY MR. LOVEJOY:

3 Q. Would you answer?

4 A. Certainly. Actually, I was only going refer to
5 defendant's presentation slide at Tab Number 53,
6 which was presented in a formal manner by the
7 defendant. And it shows, again, infrastructure
8 package construction expected to begin in the current
9 fiscal year.

10 Q. Okay.

11 A. And then it tells you what the infrastructure
12 package is going to include.

13 Q. Now moving on, have there been public
14 statements by the administration indicating its
15 commitment to this project?

16 You might look at Tab 58.

17 A. Yes. There have been numerous statements by
18 the administration expressing their full commitment
19 to this project. Tab 58 is one.

20 This is a letter from Vice President Biden
21 to the Senate Armed Services Committee Chair, John
22 Kerry, and other members of the committee. In that
23 letter he assures the -- that committee and the
24 senate of the administration, toward the end of the
25 letter, an unequivocal commitment to recapitalizing

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1 and modernizing the enterprise. And he specifically
2 mentions the CMRR project in the paragraph above
3 there.

4 And he is writing to assure the committee,
5 as the first paragraph says, of the administration's
6 support for this program. This letter was written in
7 connection and in an attempt to secure ratification
8 votes for the New START Treaty.

9 MR. SMITH: Objection, Your Honor. He has
10 no knowledge about why Vice President Biden drafted a
11 letter.

12 THE WITNESS: May I read the first sentence?

13 THE COURT: Well, I have the first sentence
14 here, so I've read it.

15 THE WITNESS: Yes. Well, that's what it
16 says.

17 BY MR. LOVEJOY:

18 Q. Mr. Mello, Los Alamos Study Group was lead
19 plaintiff in the case involving the DART facility
20 several years ago, correct?

21 A. Yes.

22 Q. What happened in that case?

23 MR. SMITH: Objection, Your Honor.

24 THE COURT: And again, I have read Judge
25 Meachum's opinion in that case.

1 MR. LOVEJOY: All right. Let me just ask
2 one question.

3 BY MR. LOVEJOY:

4 Q. Mr. Mello, what was the result of the
5 injunction that was entered in that case?

6 A. The result was that the defendant was able to
7 redesign the DART facility. The power and number of
8 photographs that the --

9 MR. SMITH: Your Honor, I object. Where is
10 the document that says that that's what happened?
11 Where is the foundation for this answer?

12 THE COURT: Well, if the witness has
13 personal knowledge I will allow him to answer the
14 question.

15 THE WITNESS: I do, indeed. The defendants
16 were able to redesign the DART facility during the
17 pause and improved its power and the number of
18 pictures that could be taken at a given shot on the
19 second axis.

20 From the plaintiff's side, we got
21 significant environmental mitigation actions, and I
22 believe that all parties were happy with the result.
23 In fact, although it is not in the record, the
24 Los Alamos National Laboratory official nuclear
25 weapons newsletter said that they were very pleased

1 with the NEPA process and realized that it could be
2 used to vet their projects.

3 Initially they had resisted it, but in the
4 John Emily route, that in the end the result was good
5 for them.

6 MR. LOVEJOY: Thank you, Mr. Mello.

7 THE COURT: The defense has an opportunity,
8 if they want to, to cross-examine you.

9 Is there any cross-examination?

10 MR. SMITH: Yes, Your Honor.

11 THE COURT: All right.

12 MR. SMITH: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. SMITH:

15 Q. Mr. Mello, when did you last have a security
16 clearance with the Department of Energy?

17 A. I have never had a security clearance.

18 Q. So are you privy to classified information from
19 the Department of Energy?

20 A. No, I am not.

21 Q. Are you privy to classified information
22 regarding this project?

23 A. No, I am not.

24 Q. Are you privy to classified information
25 regarding the need to produce pits?

1 A. The Department of Energy -- this is a subject
2 which has been --

3 Q. I asked a very specific question. Are you
4 privy --

5 A. I would like to give you a very substantive and
6 brief, succinct answer, but not one that's led.

7 THE COURT: He's allowed to ask you leading
8 questions.

9 THE WITNESS: Yes.

10 BY MR. SMITH:

11 Q. Please answer my question. Are you privy --
12 let me restate.

13 Are you privy to classified information
14 concerning the need to produce pits at this facility
15 or any other facility at LANL?

16 A. No, I am not.

17 MR. SMITH: No further questions,
18 Your Honor.

19 THE COURT: All right.

20 Anything further?

21 MR. LOVEJOY: No, Your Honor.

22 THE COURT: All right. You may return to
23 your seat, Mr. Mello.

24 MR. SMITH: Your Honor, at this time I'd
25 like to, for the record, renew my objection to all of

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1 Mr. Mello's testimony, move to strike it, because
2 there are statements in there that were not based on
3 any documented evidence. I know that Your Honor can
4 go through that. I just want to preserve that
5 objection and move to strike for the record.

6 THE COURT: All right.

7 MR. SMITH: Secondly, I'm done with
8 Mr. Mello.

9 THE WITNESS: You can go back to your seat.

10 MR. SMITH: At this point, I would also like
11 to object that plaintiffs have now used two hours of
12 time, cutting into our time, even if you went and
13 gave us that extra 45 minutes after lunch that you
14 said you might be able to.

15 THE COURT: Let's see where we are at noon,
16 and then we'll see where we go.

17 MR. SMITH: Again, I'm just objecting to the
18 process, that they have chosen to take all this time
19 and have cut into our time.

20 THE COURT: Well, I'm aware of your concern.
21 And you know, I will say that the -- again, that I
22 did allocate half a day. And when I allocated half a
23 day for the hearing, I didn't mean that it was all
24 for one side, I meant for the whole hearing.

25 So if we have hearings in the future and you

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1 all get a notice from me that tells you how much time
2 I'm allocating, if you think that that's not
3 sufficient time, please let my chambers know that if
4 we need to find more time we're able to do that,
5 because I think it's important that everybody be
6 heard in this process.

7 MR. HNASKO: Thank you, Your Honor. And I
8 do apologize for that. We -- I understood it was two
9 hours per side, and that's my mistake. So...

10 THE COURT: Well, we are at two hours now.

11 MR. HNASKO: We are. And absent the
12 objections, I will be done with my next witness
13 within five minutes, Your Honor.

14 THE COURT: All right.

15 MR. HNASKO: Your Honor, the plaintiffs call
16 Frank von Hippel.

17 (Witness duly sworn.)

18 FRANK VON HIPPEL, PLAINTIFF'S WITNESS, SWORN

19 DIRECT EXAMINATION

20 BY MR. HNASKO:

21 Q. Would you state your name for the record,
22 please?

23 A. Yes. I'm Frank von Hippel.

24 Q. And what is your job and where are you
25 employed, sir?

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1 A. I am a professor of public and international
2 affairs at Princeton University, and I'm trained as a
3 nuclear physicist.

4 Q. And, Dr. von Hippel, could you give us some of
5 your educational background, briefly?

6 A. Yes. I got a bachelor's degree in physics from
7 MIT, and a Ph.D. from Oxford University, where I was
8 a Rhodes scholar.

9 Q. Now, Dr. von Hippel, in your -- the binder of
10 testimony exhibits we have submitted to opposing
11 counsel and to the Court, prior to Exhibit 1 there is
12 your curriculum vitae, correct?

13 A. Yes.

14 Q. That's a very lengthy document. Could you
15 please point out to the judge, given our time
16 constraints, some of the matters in your resume which
17 would bear upon the particular issues associated with
18 the CMRRNF as proposed in 2011 and its purpose?

19 A. Yes. During 1993 and in 1994 I was the
20 technical expert in the White House as -- on -- for
21 these types of issues, nuclear issues.

22 I am the -- have written on reactor safety
23 and on plutonium dispersal accidents.

24 And I was also invited by the Secretary of
25 Energy into a meeting in 1993, where the -- with the

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1 lab directors, where the stockpile stewardship
2 program was launched.

3 Q. All right. Dr. von Hippel, based on your
4 knowledge, education, and experience are you -- do
5 you have familiarity with the need for pit production
6 in this country as a matter of national defense?

7 A. Yes.

8 Q. And before you talk about your familiarity, how
9 did you obtain your familiarity?

10 A. Well, I was involved as a member of the panel
11 on public affairs of the American physical society --
12 Professional Society of American Physicists in a
13 review of the DOE proposal for a so-called modern pit
14 facility. We -- the -- it's at tab -- the report
15 that we produced, I was one of the principal authors.
16 It's at Tab 1. And the conclusion of the report is
17 sort of telegraphed in the undergraduate -- I'm
18 sorry, in the subtitle, "No urgency for a modern pit
19 facility, address key technical issues before
20 proceeding."

21 Q. What were the issues addressed by this report
22 which caused you to arrive at the conclusion that
23 there was no urgent need for a pit facility at this
24 time?

25 A. Well, at that time, the --

1 MR. SMITH: Objection, Your Honor, no
2 foundation.

3 THE COURT: I'll allow the question.

4 Go ahead.

5 A. At that time, the Department of Energy was
6 proposing a pit production capability of 125 to 450
7 pits a year in this environmental impact statement.

8 That's at Tab 4.

9 BY MR. HNASKO:

10 Q. Yes, sir.

11 A. And we -- we thought that was grossly in excess
12 of what was required. That was before we learned
13 that US pits have a longevity of 100 years. And --
14 but even at that point, we thought that was excess.

15 The -- and -- and our -- our advice was --
16 was followed. They -- the Department of Energy
17 withdrew the proposal for a modern pit facility and
18 decided to move that cap- -- that function of pit
19 production to Los Alamos.

20 Q. All right. I am just curious. You say there
21 was grossly in excess of that which was required.

22 What's the basis for that statement?

23 A. Well, based on the longevity at that time, it
24 was -- I would have to remind myself, but it was on
25 the order of 40 to 50 years -- we emphasized that we

1 stockpile.

2 Q. Were there subsequent studies determining even
3 longer life spans for these pits?

4 A. Yes.

5 Q. Explain to the Court what those studies were.

6 A. Yes. Los Alamos and Livermore did a -- pit
7 aging studies using an accelerated aging test, and
8 came to the conclusion that, as summarized by this
9 JASON review, which was submitted to Congress by the
10 head of NNSA, Linton Brooks at the time, that the
11 pits would have an expected longevity of 100 years or
12 so.

13 Q. All right. Now just for the Court's and all of
14 our edification, who are the JASONs?

15 A. The JASONs are a group of defense consultants
16 that deal with these studies for the Department of
17 Defense and the Department of Energy during summers.
18 They're mostly academics. They are long -- long-term
19 advisers, very high-level advisers to the government
20 on nuclear issues. A number of them have been
21 members of the President's advisory committee and so
22 on.

23 Q. Now, you were in the courtroom when the
24 Assistant US Attorney asked Mr. Mello whether he had
25 security clearance.

1 Do you remember that?

2 A. Right.

3 Q. He said no, he did not.

4 Do the JASONs have security clearance?

5 A. Oh, yes.

6 Q. And what kind of security clearance do they
7 have?

8 A. Well, you know, everything they need for -- for
9 the purpose of the study, the --

10 MR. SMITH: Objection, Your Honor. No
11 foundation for how he knows what security clearances
12 the members of JASONs have.

13 MR. HNASKO: Well, let me make some
14 foundation. I will be happy to make some foundation.

15 THE COURT: Okay.

16 BY MR. HNASKO:

17 Q. How do you know that they have security
18 clearance, and if so, how do you know what security
19 clearance they have?

20 A. Well, I know members of the JASON committee,
21 and they all do have these high-level restricted data
22 security clearances that are required for the -- to
23 work on nuclear design issues for the Department of
24 Energy.

25 Q. All right. I take it the JASON report

1 concluding that pits have an excess of a 100-year
2 lifespan is not barred by some sort of national
3 secret, is it?

4 A. No. No, they -- they published that in an
5 unclassified summary of the classified report. And
6 that is in Tab 5, under Tab 5, behind the submittal
7 letter by the administrator of the NNSA to Congress.

8 Q. Okay. Dr. von Hippel, are you familiar with
9 the Los Alamos mission and the associated pit
10 production and other aspects of their mission?

11 A. Well, I -- I have served for five years as a
12 member of an external review committee for the
13 nonproliferation and armed control program at
14 Los Alamos.

15 Q. All right. And when did you do so, sir?

16 A. 2000 to 2005.

17 Q. And are you familiar with the various
18 facilities at Los Alamos that could be alternatives
19 to the present iteration of the CMRRNF in 2011?

20 A. Yes. I'm familiar with the plutonium facility.
21 I have visited it, and I think that it could be --
22 the essential functions of the CMRR nuclear facility
23 would be imported into that facility.

24 Q. Now, as I understand, though, the plutonium
25 facility, that would require major upgrades, wouldn't

1 it?

2 A. Yes. Both -- I mean that would require major
3 upgrades because of the new seismic assessment. And
4 I just don't see any reason to have such huge
5 quantities of plutonium in two facilities if one
6 facility can do the job.

7 Q. And why don't you see any reason for that? Why
8 not have two facilities when one could do the job?

9 A. Well, it's -- it's -- first, it's a question of
10 cost. And secondly, there is really no purpose for
11 the -- for the CMRR to have such huge quantities of
12 plutonium as it's being designed for.

13 Q. And, Dr. von Hippel, I know we're under time
14 constraints, and we're going to abbreviate your
15 testimony somewhat as a result.

16 But are you familiar with plutonium
17 dispersion issues that could be encountered
18 potentially at this facility?

19 A. Yes. I have published an analysis in
20 connection with the issue of the -- of nuclear
21 warhead safety. There's an accidental concern in
22 which the chemical explosive goes off and disperses
23 plutonium. We --

24 Q. Well, let me back up a second --

25 A. Yeah.

1 Q. -- if I may and just -- what factors did you
2 input into that study?

3 A. Well, it's -- the toxicity of the plutonium is
4 key. And we -- we actually -- this was for a
5 hypothetical accident at the submarine base across
6 Puget Sound from -- from Seattle, and what was within
7 the consequences for Seattle if it were --
8 10 kilograms of plutonium were dispersed, and in --
9 in an accident while loading the warheads on the
10 submarine, the missiles for the submarines.

11 We found that it would be 20 to 2,000,
12 depending on the exact meteorological conditions in
13 the assumptions that you made.

14 Q. And how does that transfer to the proposed
15 CMRRNF in 2011?

16 A. Well, here, we have 6,000 kilograms of
17 plutonium. The -- the risk assessment, which is at,
18 I think, 11B -- no, it's at Tab 12 -- states that the
19 facility would have -- estimated in consequences of
20 an accident, you know, and the concern here is
21 potential plutonium fire, and especially if --
22 following an earthquake such as the Fukushima
23 earthquakes now that are expected under the 2,500
24 year occurrence period. 6,000 tons -- I mean 6,000
25 kilograms could -- could go up in smoke. And the

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1 question is how much of that smoke would get out and
2 how much damage -- whether the facility could contain
3 that smoke.

4 Q. Are there any other former -- or any former
5 NNSA officials or anyone that used to be in
6 government that you are aware of who has expressed
7 similar concerns about potential dispersion resulting
8 from a plutonium fire in that vault?

9 A. Yes. Recently --

10 Q. Who has?

11 A. Recently --

12 MR. SMITH: Objection, Your Honor. This
13 calls for double hearsay. I don't know how far
14 you're going to let hearsay go.

15 THE WITNESS: This is --

16 MR. SMITH: He has no foundation.

17 THE COURT: Your response?

18 MR. HNASKO: My response is it's -- number
19 one, it's publicly-available information on
20 statements.

21 Number two, it's an admission against
22 interest by a consultant associated with NNSA.

23 THE COURT: Well, I'd like to hear what he
24 has to say. So...

25 THE WITNESS: Well, it's a published

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1 statement in -- and I forget the newspaper. It's the
2 New Mexican, isn't it? By Everett Beckner, basically
3 calling for a pause in the process to consider the
4 implications of the Fukushima earthquake for the
5 design of the CMRR.

6 BY MR. HNASKO:

7 Q. And did that statement also appear in a trade
8 journal, The Nuclear Weapons Monitor?

9 A. That's right.

10 Q. Now, who is Everett Beckner, for the Court's --

11 A. Well, Everett Beckner, I knew him as a
12 colleague in the Clinton administration. And then
13 he -- he was, I think at that time, a senior adviser
14 for the -- in the defense programs, in DOE. And then
15 later on during the Bush administration he became the
16 director of the -- of the weapons program in DOE, the
17 office of defense programs.

18 Q. So he was essentially in charge of the weapons
19 program within the United States and the United
20 Kingdom. Is that correct?

21 A. That's right. He also was -- he also was hired
22 to be -- to be the head of Aldermaston, which is the
23 British equivalent of Los Alamos.

24 Q. Dr. von Hippel, one final series, if we may.

25 Are you advocating to the Court that this

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1 project be paused so that alternatives to it can be
2 examined?

3 A. Yes. Yes, I am. I don't think this -- I think
4 alternatives -- much simpler alternatives,
5 specifically the one that I think should be explored
6 is taking the essential functions of the nuclear
7 facility into the plutonium facility, which is --
8 where there's a lot of extra space available, will be
9 made available, as activities in that facility are
10 moved elsewhere, especially related to the plutonium
11 fuel production. And also, I -- in the --

12 THE COURT: Hold on. Let me...

13 What is your objection?

14 MR. SMITH: I object to this answer.

15 It's -- there's no foundation for his statement that
16 he knows that there is plenty of space in this
17 plutonium facility.

18 THE WITNESS: Yes.

19 MR. HNASKO: I think, Your Honor, the
20 witness testified that he spent five years on the
21 commission that oversaw the Los Alamos facilities.

22 THE WITNESS: Well, I've also, Your Honor --

23 THE COURT: Hold on one second, please.

24 THE WITNESS: Okay.

25 THE COURT: Yes?

1 MR. SMITH: And when was he on that
2 committee? Many years ago. So he doesn't know what
3 the current, you know, facility capabilities and uses
4 are.

5 THE COURT: All right. Well, I will take
6 those gaps in information into consideration.

7 BY MR. HNASKO:

8 Q. Let's fill the gaps, if we may.

9 Dr. von Hippel, are you aware of the
10 current configuration of the facilities --

11 A. Yes. There's two --

12 Q. -- in Los Alamos?

13 A. There are two documents behind that statement
14 in the folder under Tab 14.

15 Q. Yes, sir.

16 A. On the -- this is a 2008 government
17 accountability office. It's a congressional
18 investigative office.

19 On the -- on the third page there, there's a
20 pie diagram which shows the current use of this space
21 at the plutonium facility.

22 And then under Tab 15 there's a -- a report
23 of the -- of the secretary of energy's advisory
24 board, and pages from a report, and talking about the
25 inefficiency. It says, "The available productive

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1 capacity of this plant is being wasted by inefficient
2 utilization of plant equipment and personnel."

3 And they -- those are the two documents that
4 I -- I would reference for the -- my belief that it's
5 worth looking into whether these essential functions
6 of this -- of the nuclear facility could be brought
7 into the plutonium facility, so that we would have
8 only one facility with this huge amount of plutonium.

9 MR. HNASKO: Thank you very much,
10 Dr. von Hippel.

11 Pass the witness, Your Honor.

12 THE COURT: Cross-examination?

13 MR. SMITH: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. SMITH:

16 Q. When is the last time you had a security
17 clearance?

18 A. I think it was three years ago.

19 Q. Three years ago? In 2008 you had a security
20 clearance?

21 A. I'd have to check whether -- but approximately
22 that time. I was -- I was involved in -- I was asked
23 to review a -- a national academy of science -- a
24 classified national academy of sciences review of the
25 safety of fuel pools.

1 Before that, Los Alamos held my clearance
2 until 2005.

3 Q. When is the -- you testified, right, that --
4 you testified about this JASONs report, correct?

5 A. Right.

6 Q. Where, in the record, does it show that the
7 Department of Defense or the Department of Energy has
8 accepted the conclusions of the JASONs report?

9 A. Well, it was -- it's in -- on Tab 5. You will
10 see the submittal letter by Linton Brooks on the --
11 on the -- of the unclassified -- well, EIG submitted
12 the whole classified report, but this is the only
13 thing we have here, is the unclassified summary.

14 Q. But my question was: Where did DOD, Department
15 of Defense, or Department of Energy accept the
16 findings? Not receive the findings, but accept them
17 as the correct findings, correct information?

18 A. He basically summarized the conclusions in his
19 cover letter. This was the administrator of the
20 national nuclear facility administration.

21 MR. SMITH: One minute, Your Honor.

22 BY MR. SMITH:

23 Q. And what classified knowledge do you have about
24 the current mission needs for -- and again, I'm
25 speaking about classified information -- about the

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1 current mission needs and needs for a national
2 security relationship between the CMRRNF and, you
3 know, national security and its missions?

4 A. I don't -- I don't have a clearance, as you
5 have pointed out. However, I don't think there is
6 any -- it's my belief that there is no classified
7 statement for need for this. It's something that
8 goes beyond the unclassified statements that have
9 been made.

10 Q. What's the basis for that belief?

11 A. That's the way the government works. I mean
12 they basically -- you know, when they have -- when
13 they tell Congress that there is additional
14 information that may be contrary to the -- to the
15 unclassified statements that are -- they are making
16 on the record, then they would -- you know, they
17 would inform Congress that there is such information.

18 Q. And you know that that hasn't occurred?

19 A. Well, they -- they make statements to the --
20 well, I haven't read all the -- all the hearing
21 testimony on that, so I -- but it's my -- it's my
22 belief that that's the case.

23 MR. SMITH: No further questions,

24 Your Honor.

25 THE COURT: Is there anything further?

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1 MR. HNASKO: No, thank you, Your Honor. We
2 rest at this point.

3 THE COURT: All right. You may return to
4 your seat.

5 Now, the plaintiff has rested.

6 We're going to take just a couple -- I
7 understand you need a short break?

8 MR. SMITH: Thank you, Your Honor.

9 THE COURT: All right. We'll take a short
10 break, about five minutes, ten minutes?

11 MR. SMITH: Yes, Your Honor.

12 THE COURT: Five minutes?

13 MR. SMITH: Five is fine.

14 (A recess was taken from 11:22 a.m. to 11:29
15 a.m.)

16 THE COURT: All right. The plaintiff has
17 rested. It's -- we -- we have some serious timing
18 issues here, so I am going to throw something out.

19 It's 11:29 on my watch. I -- my schedule
20 today is such that I have to conclude today at 12:00.
21 I can't go any later. Most days I have flexibility
22 and I can go into the noon hour. Today, it just so
23 happens that I can't.

24 So -- I have an afternoon docket. So we
25 can -- we can proceed now and I can give you, at

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1 most, 45 minutes this afternoon starting at about
2 1:45, or we can come back tomorrow morning and I can
3 give you -- I can give you most of the morning. So
4 that would be starting at 9:00.

5 How do you want to proceed, Mr. Smith?

6 MR. SMITH: Your Honor, I guess I'll just
7 proceed, and if we can see where we are at noon, as
8 far as...

9 THE COURT: All right.

10 Now, my understanding is you have no
11 testimony; you're making argument.

12 MR. SMITH: That's correct, Your Honor. Our
13 testimony is in our declarations.

14 THE COURT: All right.

15 STATEMENT

16 BY MR. SMITH:

17 Your Honor, this is actually a quite simple
18 NEPA case, despite the complexity of the underlying
19 matter. The NEPA is clear, and it's clear that DOE
20 has fully complied with NEPA all along, and it
21 continues to be in compliance with NEPA.

22 And besides that, on the issue of the
23 dismissal and the judge's recommendation, it's also
24 very clear that all this testimony and exhibits and
25 argument about what's going on in the NEPA process

1 and the draft supplemental environmental impact
2 statement and all of that is not properly before the
3 Court until that process is complete.

4 One thing I just wanted to address quickly,
5 Your Honor, is in Dr. von Hippel's testimony, he said
6 that this letter demonstrates that DOE has accepted
7 the findings of the JASONs with regards to the
8 lifetime for pits and the need for pit production.

9 In fact, this letter simply recognizes the
10 JASON review in the first paragraph, that it provided
11 an independent evaluation, but it reserves the
12 finding about what the weapon lifetimes are to the
13 federal agency.

14 It also discuss other issues that were not
15 addressed by JASONs with regards to the need for pit
16 productions. I believe this was Dr. von Hippel's
17 Exhibit Number 5 -- Tab 5, sorry.

18 THE COURT: Thank you.

19 MR. SMITH: So at this point, despite the
20 testimony, DOE and DOD have not accepted the JASONs
21 report expressly in any document. They have also
22 limited it to -- you know, as with regards to the
23 mission needs for these facilities, that there are
24 other concerns besides the issues that were addressed
25 in the JASONs report. So I just wanted to make that

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1 point first. And the letter is very clear on all of
2 those issues.

3 I guess I will start with our motion to
4 dismiss and discuss that, why that's appropriately
5 granted, why the magistrate's decision is
6 appropriate, or in the alternative, the other reasons
7 for our motion to dismiss to be granted are also
8 appropriate. That seems, logically, to go
9 properly.

10 First, to understand the basis for our
11 motion to dismiss, I need to clear up a few issues
12 about the NEPA process, how it works, and how it has
13 worked here.

14 And the evidence in the record clearly shows
15 that DOE is in compliance with NEPA, always has been.
16 And that at this point, there's no role for the Court
17 to jump into the administrative process and provide
18 an advisory opinion on whether the draft supplemental
19 impact statement is adequate or not. It's a draft.
20 The purpose of a draft, it's out for public comment,
21 is to look at it, explore it with the public, and
22 come out with a final and eventually a new decision
23 for the implementation of this project or some
24 various alternative.

25 Now throughout his argument, plaintiff's

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1 counsel's argument, as well as Mr. Mello's testimony
2 and argument, they continually said that there's a
3 2001 CMRRNF, as if there's a decision made and
4 there's a particular, you know, variation or set
5 project design for this. And that is just completely
6 against what the record shows.

7 What the record shows is that in 2003, DOE
8 and NNSA completed a NEPA analysis.

9 In 2004 they issued a ROD, made a record of
10 decision for the 2004 design. After that decision
11 was made in 2006 the area was cleared -- I have a
12 picture, Your Honor, if you would like to see.

13 When plaintiffs argue that construction has
14 occurred, this is the area where the proposed CMRR
15 nuclear facility will be built.

16 This building in the background is RLUOB,
17 and this building in the foreground is just a
18 temporary building to -- structure to help facilitate
19 what's going on in RLUOB. They pronounce it
20 something else, but DOE pronounces it RLUOB, the --
21 one of the two buildings that was approved through
22 the 2004 ROD.

23 So as you can see, what they did was there
24 is a slope here. And over to the right of this
25 picture is where Pajarito Road is. And Pajarito Road

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1 is level with this area here. So all they did was
2 cut down into the slope and remove this material.

3 Now again, this was in 2006. At that point
4 none of the new information that plaintiffs argue is
5 the basis for preparing a supplemental environmental
6 impact statement, or a new environmental impact
7 statement, was available.

8 In fact, part of the information that was --
9 is the basis for their argument and -- as well as the
10 basis for DOE going forward with the supplemental
11 impact statement, supplemental environmental impact
12 statement, was that was derived from this effort.

13 What they did was they cleared the site so
14 they could test it for seismic activity, both -- you
15 know, how it might behave, and that's when they
16 developed the information, part of the information,
17 for going forward with proposed design changes. So
18 this occurred in compliance and pursuant to the 2004
19 ROD.

20 So at that time, there was not any new
21 information that would lead DOE to have prepared a
22 supplemental environmental impact statement. So that
23 was done in compliance with NEPA, and that is all
24 that's been done in the physical world with regards
25 to this project. So that was in 2006.

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1 The 2003 record of decision approving this
2 project was never challenged until now. Although
3 plaintiffs disclaim that they're challenging the 2004
4 record of decision, if you read their complaint, some
5 of their claims are -- in their claims for relief --
6 are directed directly at the 2004 ROD and the 2003
7 EIS saying that the -- that ROD and EIS failed to
8 adequately address mitigation measures, or failed to
9 adequately address connective actions.

10 Well, those claims are barred by the statute
11 of limitations that ran six years after the date of
12 the ROD. That's all in our brief. I'm not going to
13 go into great detail to that, because I think that's
14 a pretty obvious conclusion of law, that those claims
15 are barred.

16 So as a result of new information and new
17 safety provisions within the Department of Energy on
18 how to build structures so that -- you know, special
19 nuclear structures so that they will withstand
20 earthquakes and potential tremors like that, DOE, of
21 course, began to develop the design for this project
22 and to look at the new information and began to
23 develop that design.

24 In plaintiff's own letter of July of 2010,
25 before this lawsuit, they themselves said, you know,

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1 last year, there was not enough information to go
2 forward with a supplemental environmental impact
3 statement or a new environmental impact statement or
4 whatever their basis is for doing additional NEPA
5 analysis. And that's in the record, so they said
6 that.

7 They sent that letter saying -- expressing
8 their concerns saying, you know, this design is
9 changing, and you need to do a new NEPA.

10 DOE informed plaintiff that they were in the
11 process of preparing what's called a supplement
12 analysis under the Department of Energy regs. The
13 supplement analysis, the purpose of that, is to
14 determine whether additional NEPA and additional EIS
15 need to be done, supplemental or otherwise. So
16 that's where we were at the end of July.

17 Nonetheless, plaintiffs filed this lawsuit.

18 After that lawsuit was filed DOE published a
19 notice of intent to prepare a supplemental
20 environmental impact statement to look at the
21 proposed design changes.

22 So there's no NEPA violation here, to the
23 extent that is relevant. They -- that's -- you know,
24 there's -- as plaintiff's counsel said, NEPA is all
25 about timing. There's no time at which DOE was

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1 required to complete a supplemental environmental
2 impact statement or record of decision, because that
3 time is all dependent on what actions DOE is taking
4 with regards to the project.

5 One of the things that distinguishes this
6 case from all of the cases that plaintiffs rely on,
7 Judge Meachum's opinion, the Davis versus Mineta
8 decision from the 10th Circuit, is that here we have
9 a valid ROD, record of decision, for the project that
10 has not been challenged, cannot be challenged, is
11 unassailable, that legally allowed DOE to move
12 forward with this project.

13 THE COURT: What about the plaintiff's
14 contention that the project has changed so
15 dramatically that it no longer resembles the 2004
16 ROD?

17 MR. SMITH: Right. The project has -- the
18 proposal for the project has changed. Throughout
19 their testimony and argument they pointed to, well,
20 it used to be two batch plants, now it might be
21 three. It used to be they're going to move this
22 road, now they're not.

23 What that shows is that there is no final
24 design, there's no detailed design.

25 Plaintiffs like to point out this

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1 memorandum, this guidance from DOE. And they say,

2 Oh, well, we've never addressed it.

3 Well, this guidance -- first of all, it's

4 not binding or enforceable. It's not a regulation.

5 It's -- so it's not binding on the agency.

6 Second of all, the agency is in compliance,

7 or acting consistently. The underlying word in this

8 very provision says detailed design, providing

9 with -- seeking with detailed design normally is not

10 appropriate.

11 Here, there -- there has been no detailed

12 design. Detailed design is when you really get down

13 into the nuts and bolts of what you're designing so

14 that you can, one, create a baseline estimate of

15 costs for Congress. And the baseline estimate of --

16 for Congress is a very precise amount that DOE is

17 very much bound by when they ask for that particular

18 appropriation.

19 And that design has not occurred and is not

20 occurring. And that is in the declarations of

21 Dr. Cook, the deputy administrator for NNSA, and it's

22 also in the declaration of Mr. Snyder, who is the

23 deputy chief up at LANL.

24 So detailed design has not occurred, so this

25 provision -- we are being consistent with this

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1 provision. DOE is being consistent with that
2 provision.

3 In addition, this provision doesn't discuss
4 the circumstances when you already have a valid
5 record of decision and new information being
6 developed during design comes out that leads you to
7 need to go into a supplemental environmental impact
8 statement.

9 So plaintiffs are taking the position that
10 once you've got a valid record of decision for the
11 project based on new information, you're developing
12 new proposals, new design proposals for it, you
13 haven't settled on anything yet, but somehow you have
14 to immediately stop at some arbitrary point in your
15 design development based on the new information, stop
16 everything and do an SEIS so that you can't further
17 develop those plants, as it's going on here, and
18 change them and modify them and figure out what you
19 need to figure out so that you can do a proper NEPA
20 analysis that reveals all of the potential changes as
21 they're developing. It's a very fluid situation, and
22 it's right in the middle of that process.

23 Plaintiffs referred to the defense board
24 statements about the project and things like that.
25 The defense board is a unique entity within the

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1 federal government created by statute to sort of act
2 as a second voice to look at what DOE is doing.
3 They're created by statute. So it's a federal
4 entity.

5 It's their job to look at what DOE is doing,
6 and they're providing DOE feedback, as this process
7 goes along, on the various alternative proposal
8 designs that are being made so that DOE can continue
9 with this process and ultimately come to a conclusion
10 of the NEPA process as well, and issue a record of
11 decision on a new design.

12 Now what NEPA doesn't require is that once
13 the agency had made a decision to build this facility
14 at this location, to suddenly wipe its mind clear
15 that it had already made that valid decision about
16 doing this project.

17 The issue now is not about whether to go
18 forward with this project, it's about whether to go
19 forward with a design change to this project based on
20 the new information. That's what the supplemental
21 NEPA process is about.

22 We have got new information that's leading
23 to design changes, and we need to now look at those
24 proposed design changes and let them evolve to
25 determine what we can do to meet these new earthquake

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1 regulations and rules about earthquake safety for
2 this kind of facility. That is what's going on here.

3 It doesn't matter at this point what those
4 changes might be. At this point they are proposed
5 changes.

6 When plaintiffs point to comments, letters
7 by Vice President Biden -- and there's also
8 statements by President Obama about the importance of
9 going forward with this project.

10 First of all, the Vice President and the
11 President are not themselves subject to NEPA. NEPA
12 applies only to federal agencies. Federal agencies
13 shall prepare detailed statements about the
14 environmental impacts of major federal actions.

15 So -- so they're not subject to NEPA, first of all.

16 Second of all, all of those statements are
17 very broad about the need for this project. They
18 don't say, We want this project built as it was -- as
19 the design stood on, you know, April 25, 2011.
20 There's no statements like that.

21 THE COURT: Policy aside for a moment, let
22 me ask you what the -- just to take an example that
23 the plaintiff gave us this morning.

24 So construction was initially identified as
25 something along -- on the order of 18 months or

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1 thereabouts, and now we're looking at 10 years,
2 basically. And so the plaintiff's example is the
3 type of environmental disruption that would occur
4 during a long-term building project versus one that
5 was initially much shorter.

6 Just to take that one example for a moment,
7 at what point in the process are -- is consideration
8 given to the environmental impact of, again, just
9 this one example of a much longer building period?

10 MR. SMITH: Right, Your Honor. If I may, I
11 brought extra copies of both the draft supplemental
12 environmental impact statement -- it has a summary as
13 well -- as well as the original environmental impact
14 statement and its summary. I'd like to give you
15 copies, if there is no objection.

16 THE COURT: I'll take them.

17 MR. HNASKO: No objection.

18 THE COURT: And, frankly, the supplemental
19 that was submitted this morning, I've not had a
20 chance to look at that.

21 MR. SMITH: Understood. And I think it's
22 completely irrelevant to most everything here today.
23 It -- we're not asking you to review whether the
24 supplemental environmental impact statement satisfies
25 NEPA, because it's not ripe for decision. It's a

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1 draft.

2 THE COURT: No, but -- and so my question
3 is: At what point are some of those issues
4 addressed?

5 MR. SMITH: This is that point. It's in --

6 THE COURT: It's in the supplemental
7 process?

8 MR. SMITH: That's what the supplemental
9 environmental impact statement does.

10 THE COURT: And then the follow-up comment?

11 MR. SMITH: Yeah. Right now the
12 supplemental environmental impact statement is a
13 draft. It's out for public review and comment for 45
14 days -- a little bit more than 45 days, actually. I
15 think it goes until June 13th.

16 There will be public meetings on this
17 process. Plaintiffs can raise all their issues that
18 they want about what alternative should be looked at,
19 and DOE has an obligation to consider and address
20 those comments. That's the process.

21 They'll do that. They will publish a final
22 supplemental environmental impact statement. And
23 then after that, they'll issue a new record of
24 decision about how to go forward with this project.

25 But right now the question is about a change

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1 in the project, not the initial approval of the
2 project, which occurred in 2004 and was, you know,
3 not challenged at all. Plaintiffs didn't challenge
4 that.

5 THE COURT: Okay. I interrupted you.

6 MR. SMITH: No, that's okay. I think that's
7 where -- where this is.

8 So right now -- I mean this is a very
9 ordinary NEPA process. It's a very extraordinary
10 project, but it's a very ordinary NEPA process. The
11 agency gets new information, you know, after a ROD,
12 after a decision on the project, and it --

13 You know, like a common example might be,
14 say, you were -- the agency was going to build a
15 bridge across a canyon. And when it started clearing
16 the ends for the bridge it found some archeological
17 material or an endangered species, so it now has to
18 modify the project in some way.

19 That's the kind of thing that supplemental
20 environmental impact statements are all about, and
21 that's what's going on here.

22 There was new information about earthquakes
23 and safety, and that's what's going on here, that the
24 regs talk about substantial changes to the project
25 that has -- that will have different environmental

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1 impacts that weren't considered in the original EIS.

2 So that's all that's going on here. That's what the
3 agency is doing.

4 And again, the issue of timing is that in
5 all the case law we presented, the issue of timing is
6 about when construction is going to occur, or for the
7 DOE guidance, is. When are you so locked into a
8 particular design that that's the one you're going
9 carry out? You shouldn't go that far down the road
10 before you complete your supplemental environmental
11 analysis.

12 And so there is no offense to that provision
13 here, because as plaintiffs even said, this new
14 document contains some variations to the design that
15 they had never seen before.

16 In fact one of the variations plaintiffs
17 talk about, the -- you know, the depth, the issue
18 that's driving this case, is plaintiffs talk about
19 this additional depth of material where it's going to
20 be excavated and filled in with concrete below in
21 order to account for the potential seismic movement.

22 Well, in the draft -- and this is the one
23 place where the draft supplemental environmental
24 impact statement is relevant to your decision -- and
25 shows that plain- -- that the DOE is not locked into

1 any particular design.

2 In the draft there is now another
3 alternative called the shallow alternative, taking
4 into account all of the new information about
5 seismicity. They have now got in the books a new
6 design, a second design they're looking at that is
7 much shallower than the deep design, that uses much
8 less concrete and much less steel than the other
9 design.

10 And also, as a ramification of that, it will
11 be far less expensive than the other proposal and
12 have far less other affects about, you know, other
13 batch plants for creating the concrete and whatever,
14 because there will be less concrete needed.

15 So now there's -- that proposal is presented
16 in this draft SEIS as well, and DOE is examining
17 that. So the process shows, contrary to plaintiff's
18 argument, that DOE all along has kept a very open
19 mind about this project. They're not locked into any
20 particular avenue. They are looking at all available
21 avenues for developing this project in accordance
22 with the 2004 ROD and moving on based on new designs,
23 and will lead to a new ROD.

24 So this goes to Magistrate Judge Torgerson's
25 decision on prudential mootness. He basically said

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1 there's no construction going on here. There is no
2 construction going on here.

3 Plaintiff's statements that there is are
4 just false. The only construction, per se, was that
5 clearing of the area in 2006 that led to the new
6 information on which this -- these new design
7 possibilities had been made.

8 So there's no construction. The deputy
9 administrator of NNSA has said there will be no
10 construction until the new ROD is issued. And at
11 that point we'll look at it and we'll see where we
12 are.

13 So the detailed design is not occurring, it
14 has not occurred. That's the DOE guidance on when
15 NEPA should be completed.

16 THE COURT: Well, you may be -- I'm thinking
17 you are about at the end of your comments about the
18 magistrate's decision. Is that right, or no?

19 MR. SMITH: Well, yes. I mean I think
20 that's what prudential mootness is all about.
21 Plaintiffs have argued that, well, it only applies if
22 the project has been constructed and is 99 percent
23 complete.

24 THE COURT: Right.

25 MR. SMITH: Well, that's not true. That's a

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1 case where it was applied or where it wasn't applied.

2 THE COURT: The reason I was asking if you
3 were done with that segment is because it's noon,
4 and --

5 MR. SMITH: All right.

6 THE COURT: -- I thought maybe this was a
7 good place to break.

8 MR. SMITH: Yes. If I -- maybe if I could
9 just wrap up this thought.

10 THE COURT: Yes, please.

11 MR. SMITH: Please.

12 But the case law on prudential mootness,
13 this is what makes it different from regular
14 constitutional mootness, is that the -- the event
15 does not have to have been completed.

16 For instance, in the United States Supreme
17 Court case of United States versus W.T. Grant
18 Company, 345 US 629 at page 633, it says, "Courts
19 routinely decline declaratory or injunctive relief
20 where it appears that a defendant, usually the
21 government, has already changed or is in the process
22 of changing policies, or where it appears that any
23 repeat of the actions in question is otherwise highly
24 unlikely."

25 And there's another cite that says about the

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1 same thing from the 10th Circuit. It's Building and
2 Construction Department versus Rockwell, 7 F.3d.,
3 1487 at 1492, basically the same quote.

4 And there's another quote that also talks
5 about undergoing significant modification. That's
6 the agency's action that's been challenged here. And
7 here, their action that's been challenged is the lack
8 of a supplemental environmental impact statement.

9 That process is undergoing. The DOE is not
10 going to go back to the 2004 ROD. That's clear.
11 They are going to issue a new ROD before construction
12 occurs, and that's in our declarations.

13 THE COURT: All right.

14 MR. SMITH: And with that, I'll break. But
15 I do want to touch on other matters. So...

16 THE COURT: Well, you know, I want to hear
17 from you on other matters. I want to hear from the
18 plaintiff again. I have a number of questions of my
19 own. And so the more I think about it, the more I
20 listen to all of you, the more I have to believe that
21 the 45 minutes that I have available after lunch will
22 not be sufficient. So I think what we're going to do
23 is reconvene tomorrow morning at 9:00.

24 Yes?

25 MR. HNASKO: Your Honor, may I --

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1 unfortunately, I am on an airplane tomorrow morning
2 for the East Coast. So...

3 THE COURT: Okay. Tomorrow morning is not
4 an option.

5 MR. HNASKO: Not for me, anyway. I'm sorry
6 to report that.

7 THE COURT: Well, unfortunately, I don't
8 have my calendar with me. What does next week look
9 like for you all?

10 MR. SMITH: Your Honor, I have a status
11 conference before a magistrate on the 3rd, but other
12 than that, my calendar is open.

13 MR. HNASKO: Your Honor, I am open Monday
14 morning. And I -- like Mr. Smith, I'm tied up
15 Tuesday, the 3rd.

16 THE COURT: Monday looks doable. Monday?

17 MR. SMITH: Monday is fine with me,
18 Your Honor.

19 THE COURT: Now, I have already confessed
20 that I'm not the greatest at accessing my calendar.
21 If for some reason I'm incorrect about Monday I will
22 be sure to let you know promptly. But it looks to me
23 like Monday, May 3, 9:00 -- I'm sorry, May 2nd.

24 Monday, May 2nd. The 3rd is when you all
25 have conflicts. But Monday, May 2nd, we'll

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1 reconvene.

2 MR. SMITH: And, Your Honor, do you know
3 about the estimate of time? And can you just tell us
4 how much time we each have, and maybe we can stick to
5 that plan?

6 THE COURT: You've used up 30 minutes so far
7 today. The plaintiffs have used a little over two
8 hours. I can get more precise if necessary.

9 My plan is to give you the same amount of
10 time the plaintiff has already taken. I know the
11 plaintiff is going have some argument after that. At
12 this point it looks like I have all of Monday morning
13 available, so that should be plenty of time. All
14 right?

15 MR. SMITH: Okay, Your Honor.

16 THE COURT: Do you agree with that?

17 MR. HNASKO: Yes, Your Honor.

18 THE COURT: Monday morning, 9:00 to 12:00
19 should work?

20 MR. SMITH: Yes.

21 THE COURT: We'll reconvene, then, Monday
22 morning at 9:00.

23 (Proceedings adjourned.)

24

25

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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: April 28, 2011

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