

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

DOCKETING STATEMENT

Case Name: The Los Alamos Study Group v. U.S. Dep't of Energy, et al.

Appeal No. (if available): 11-2141

Court/Agency Appeal From: U.S.D.C. District of New Mexico

Court/Agency Docket No.: 10-CV-760 District Judge: Herrera

Party or Parties filing Notice of Appeal/Petition: The Los Alamos Study Group

I. TIMELINESS OF APPEAL OR PETITION FOR REVIEW

A. APPEAL FROM DISTRICT COURT

1. Date notice of appeal filed: July 1, 2011

a. Was a motion filed for an extension of time to file the notice of appeal? If so, give the filing date of the motion, the date of any order disposing of the motion, and the deadline for filing notice of appeal:
No.

b. Is the United States or an officer or an agency of the United States a party to this appeal? Yes.

2. Authority fixing time limit for filing notice of appeal:

Fed. R. App. 4 (a)(1)(A) Fed. R. App. 4(a)(6)
Fed. R. App. 4 (a)(1)(B) X Fed. R. App. 4(b)(1)
Fed. R. App. 4 (a)(2) Fed. R. App. 4(b)(3)
Fed. R. App. 4 (a)(3) Fed. R. App. 4(b)(4)
Fed. R. App. 4 (a)(4) Fed. R. App. 4(c)
Fed. R. App. 4 (a)(5)
Other:

3. Date final judgment or order to be reviewed was filed and **entered** on the district court docket: May 23, 2011

4. Does the judgment or order to be reviewed dispose of **all** claims by and against **all** parties? *See* Fed. R. Civ. P. 54(b).
Yes.

(If the order being appealed is not final, please answer the following questions in this section.)

a. If not, did district court direct entry of judgment in accordance with Fed. R. Civ. P. 54(b)? When was this done?

b. If the judgment or order is not a final disposition, is it appealable under 28 U.S.C. § 1292(a)? _____

c. If none of the above applies, what is the **specific** statutory basis for determining that the judgment or order is appealable? _____

5. Tolling Motions. *See* Fed. R. App. P. 4(a)(4)(A); 4(b)(3)(A).

a. Give the filing date of any motion under Fed. R. Civ. P. 50(b), 52(b), 59, 60, including any motion for reconsideration, and in a criminal appeal any motion for judgment of acquittal, for arrest of judgment or for new trial, filed in the district court:

b. Has an order been entered by the district court disposing of that motion, and, if so, when? _____

6. Bankruptcy Appeals. (To be completed only in appeals from a judgment, order or decree of a district court in a bankruptcy case or from an order of the Bankruptcy Appellate Panel.)

Are there assets of the debtor subject to administration by a district or

bankruptcy court? _____

Please state the approximate amount of such assets, if known.

B. REVIEW OF AGENCY ORDER (To be completed only in connection with petitions for review or applications for enforcement filed directly with the Court of Appeals.)

1. Date petition for review was filed: _____

2. Date of the order to be reviewed: _____

3. Specify the statute or other authority granting the court of appeals jurisdiction to review the order: _____

4. Specify the time limit for filing the petition (cite specific statutory section or other authority): _____

C. APPEAL OF TAX COURT DECISION

1. Date notice of appeal was filed: _____
(If notice was filed by mail, attach proof of postmark.)

2. Time limit for filing notice of appeal: _____

3. Date of entry of decision appealed: _____

4. Was a timely motion to vacate or revise a decision made under the Tax Court's Rules of Practice, and if so, when? *See* Fed. R. App. P. 13(a) _____

II. LIST ALL RELATED OR PRIOR RELATED APPEALS IN THIS COURT WITH APPROPRIATE CITATION(S). If none, please so state.

None.

III. GIVE A BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW.

In dismissing plaintiff's complaint for declaratory judgment and injunctive relief under the National Environmental Policy Act ("NEPA"), the district court resolved factual disputes in favor of defendants and granted their motion to dismiss under Fed.R.Civ.P 12(b)(1), based on doctrines of prudential mootness and ripeness. The district court imported almost verbatim the Magistrate Judge's written recommendation that the doctrine of prudential mootness applied because defendants had promised some additional NEPA analysis for the Nuclear Facility ("NF") component of the Chemical and Metallurgy Research Replacement ("CMRR") project in Los Alamos, New Mexico. In so doing, the district court disregarded plaintiff's evidence that defendants had been implementing and continue to implement a new and substantially-changed version of the NF, without any analysis of viable alternatives as required under NEPA, and without a record of decision ("ROD") authorizing the massive federal project.

In 2003, defendants completed an environmental impact statement ("EIS"), generally analyzing a CMRR project at Los Alamos, and subsequently issued a ROD in 2004 that selected and authorized certain aspects of the CMRR project, including the Radiological Laboratory, Utility, and Office Building ("RLUOB") and a far less impactful nuclear facility which defendants thereafter abandoned and which bears little resemblance to the Nuclear Facility defendants are presently implementing. Since the issuance of the 2004 ROD, the present Nuclear Facility component of the CMRR changed dramatically in complexity and character, and now includes excavation and construction more than 120 feet below the ground surface, within a geologic area of significant – and previously underestimated – seismic risks. The present iteration of the CMRR-NF is not the original project analyzed in the 2003 EIS, and is not mentioned, discussed, or authorized in the 2004 ROD. It short, it has never been analyzed in any EIS or approved in any ROD whatsoever.

Defendants acknowledged to the district court that the original nuclear facility, as analyzed in the 2003 EIS and authorized in the 2004 ROD, cannot be built. In their draft supplemental EIS submitted at the hearing in this matter, defendants reiterated their continuing commitment to the present iteration of the Nuclear Facility and identified the 2003 CMRR-NF as a distinct project, labeled it as a "no action" alternative, and acknowledged that it could neither be selected nor approved under any current NEPA process. Thus, the District Court was presented with substantial and unrefuted evidence that there is no NEPA foundation or analysis for the current iteration of the CMRR-NF that defendants continue to implement.

Nonetheless, because defendants had promised some future NEPA analysis to justify and legitimize their implementation of the present iteration of the CMRR-NF project, the district court held that defendant's irreversible commitments and execution of the substantially-changed project would be excused under the doctrine of prudential mootness, despite the absence of any NEPA analysis examining viable alternatives to the project, or any ROD authorizing it. Finally, after the importing the Magistrate Judge's dismissal recommendations on prudential mootness, the district court alternatively held that the complaint would not be ripe until defendants had completed their promised NEPA analysis, despite the inconsistent fact that defendants continue to implement the current CMRR-NF without first conducting the NEPA analysis forming the basis for the district court's "ripeness" determination.

IV. ISSUES RAISED ON APPEAL.

1. Did the district court abuse its discretion and act contrary to law by resolving disputed material, factual allegations in favor of defendants and against plaintiff, as the non-moving party, and dismissing this NEPA case despite substantial evidence of defendants' irretrievable commitments and continued implementation of the current version of the CMRR-NF project without first completing the required NEPA analysis of viable alternatives and without any ROD authorizing defendants' actions.

2. Did the district court abuse its discretion and act contrary to law by dismissing this NEPA case based on defendants' assertions that they have not entered into final design contracts for the current version of the CMRR-NF, nor begun construction activities, where the evidence demonstrated that defendants had entered into binding contracts for final design activities and had begun constructing interrelated components of the CMRR and the Nuclear Facility itself, in contravention of NEPA and defendants' internal NEPA guidance advising against such irreversible commitments prior to the issuance of a ROD.

3. Did the district court abuse its discretion and act contrary to law by dismissing the complaint on prudential mootness grounds, by reasoning that defendants had "changed their policy" by promising more NEPA analyses of the current CMRR-NF in the future, notwithstanding the uncontroverted showing that an injunction would provide meaningful relief by halting defendants' irretrievable commitments pending NEPA compliance.

4. Did the district court abuse its discretion and act contrary to law by dismissing the complaint based on ripeness grounds, yet inconsistently allowing defendants to continue implementing the current version of the CMRR-NF without first

completing the required NEPA analysis and obtaining a ROD authorizing the new Nuclear Facility.

V. ADDITIONAL INFORMATION IN CRIMINAL APPEALS.

- A. Does this appeal involve review under 18. U.S.C. § 3742(a) or (b) of the sentence imposed? _____
- B. If the answer to question in A is yes, does the defendant also challenge the judgment of conviction? _____
- C. Describe the sentence imposed. _____

- D. Was the sentence imposed after a plea of guilty? _____
- E. If the answer to question D is yes, did the plea agreement include a waiver of appeal and/or collateral challenges? _____
- F. Is defendant on probation or at liberty pending appeal? _____
- G. If the defendant is incarcerated, what is the anticipated release date if the judgment of conviction is fully executed? _____

NOTE: In the event expedited review is requested, the defendant shall consider whether a transcript of any portion of the trial court proceedings is necessary for the appeal. Necessary transcripts must be ordered at the time of appeal by completing and delivering the transcript order form to the clerk of the district court when a notice of appeal is filed. Defendant/appellant must refrain from ordering any unnecessary transcript as this will delay the appeal. If the court orders this appeal expedited, it will set a schedule for preparation of necessary transcripts, for designation and preparation of the record on appeal, and for filing briefs. If issues other

than sentencing are raised by this appeal, the court will decide whether bifurcation is desirable.

VI. INDICATE WHETHER ORAL ARGUMENT IS DESIRED IN THIS APPEAL. If so, please state why.

Yes. Oral argument will assist the court in analyzing defendants' ongoing implementation of the CMRR-NF project without meeting the requirements of NEPA, requirements which prohibit such implementation in the absence of a valid ROD authorizing the present iteration of the Federal project.

VII. ATTORNEY FILING DOCKETING STATEMENT:

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Firm: Hinkle, Hensley, Shanor & Martin LLP

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Address: Box 2068, Santa Fe, NM 87504

PLEASE IDENTIFY ON WHOSE BEHALF THE DOCKETING STATEMENT IS FILED:

- A. Appellant
- Petitioner
- Cross-Appellant

B. PLEASE IDENTIFY WHETHER THE FILING COUNSEL IS

- Retained Attorney
- Court-Appointed
- Employed by a government entity
(please specify _____)
- Employed by the Office of the Federal Public Defender.

Signature _____ Date _____

Attorney at Law

NOTE: A copy of the court or agency docket sheet, the final judgment or order appealed from, any pertinent findings and conclusions, opinions, or orders, any motion filed under Fed. R. Civ. P.

50(b), 52(b), 59, or 60, including any motion for reconsideration, for judgment of acquittal, for arrest of judgment, or for new trial, and the dispositive order(s), any motion for extension of time to file notice of appeal and the dispositive order, and the notice of appeal or petition for review **must be submitted with the Docketing Statement**, except as otherwise provided in Section I of the instructions.

The Docketing Statement must be filed with the Clerk via the court's Electronic Case Filing System (ECF). Instructions and information regarding ECF may be found on the court's website, www.ca10.uscourts.gov.

This Docketing Statement must be accompanied by proof of service.

The following Certificate of Service may be used

CERTIFICATE OF SERVICE

I, Thomas M. Hnasko hereby certify that on
[appellant/petitioner or attorney therefor]

July 21, 2011 I served a copy of the foregoing **Docketing Statement**,
[date]

to:

John Tustin, Esq., at
[counsel for/or appellee/respondent]

USDOJ, Natural Resources Division. P.O. Box 663, Washington, D.C. 20044 -
0663, (505) 305-3022, john.tustin@usdoj.gov

_____, the last known
address/email address, by CM/ECF
[state method of service]

and

to:

Andrew A. Smith, Esq., at
[counsel for/or appellee/respondent]

US Department of Justice c/o US Attorneys Office, P.O. Box 607,
Albuquerque, NM 87103, (505) 224-1468, andrew.smith@usdoj.gov

_____, the last known
address/email address, by CM/ECF
[state method of service]

Signature:

s/Thomas M. Hnasko
s/Dulcinea Z. Hanuschak

Date: July 21, 2011

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[Full name and address of attorney]