

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

LOS ALAMOS STUDY GROUP, )

Plaintiff, )

v. )

UNITED STATES DEPARTMENT OF )  
ENERGY, et al. )

Federal Defendants. )

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

\_\_\_\_\_  
THE LOS ALAMOS STUDY GROUP, )

Plaintiff, )

v. )

UNITED STATES DEPARTMENT OF )  
ENERGY, et al. )

Federal Defendants. )

Case No. 1:11-CV-0946-RHS-WDS

**FEDERAL DEFENDANTS' UNOPPOSED MOTION TO TRANSFER RELATED CASE**

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Federal Defendants hereby move the Court to transfer *Los Alamos Study Group v. U.S. Dep't of Energy*, Case 1:11-CV-0946-RHS-WDS (“*LASG II*”) to the Court of the Honorable Judith C. Herrera, United States District Judge for the District of New Mexico, who considered Plaintiff’s earlier related action, *Los Alamos Study Group v. U.S. Dep't of Energy*, Case 1:10-CV-0760-JH-ACT (“*LASG I*”). Federal Defendants are filing this Motion in both *LASG I* and *LASG II* because Federal Defendants are uncertain in which case the Motion should be decided and defer to the Court on that issue. Plaintiff in both cases, through counsel of record, has been consulted and does not oppose this Motion. As grounds for this Motion, Federal Defendants state as follows:

#### **INTRODUCTION**

Plaintiff has correctly identified *LASG I* and *LASG II* as related cases. *See LASG II*, ECF No. 1-1 (Civil Cover Sheet). In these two cases, Plaintiff Los Alamos Study Group challenges the adequacy of the Department of Energy/National Nuclear Security Administration’s (“DOE/NNSA” or “NNSA”) analysis of potential environmental impacts pursuant to the National Environmental Policy Act (“NEPA”) from the construction and operation of the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility (“CMRR-NF”) at the Los Alamos National Laboratory (“LANL”) in Los Alamos, New Mexico. In *LASG I*, Plaintiff sought--and continues to seek--judicial review of DOE’s decision-making process while DOE was in the midst of preparing a Supplemental Environmental Impact Statement (“SEIS”) for CMRR-NF. Although Judge Herrera dismissed *LASG I* on prudential mootness and (in the alternative) ripeness grounds, Plaintiff appealed that decision and continues to actively seek to have the Tenth Circuit Court of Appeals remand that case to Judge Herrera for a decision on the merits. Plaintiff is opposing Federal

Defendants' November 1, 2011 motion to dismiss the *LASG I* appeal as *constitutionally* moot, which Federal Defendants filed because NNSA completed the SEIS on September 2, 2011, and issued an Amended Record of Decision ("ROD") for CMRR-NF on October 18, 2011. *See LASG I*, ECF No. 71; Federal Defendants-Appellees' Motion for Summary Disposition Because of Mootness, *Los Alamos Study Group v. U.S. Dep't of Energy*, No. 11-2141 (10th Cir. Nov. 1, 2011).

In *LASG II*, filed on October 21, 2011, Plaintiff filed a new Complaint that includes the same NEPA claims that Judge Herrera dismissed in *LASG I*. Namely, in both cases Plaintiff asserts that NNSA failed to examine reasonable alternatives, predetermined the outcome of the NEPA process, failed to consider cumulative impacts and connected actions, failed to provide mitigation measures, and denied opportunities for review and comment. In addition, as in *LASG I*, Plaintiff's Complaint in *LASG II* raises the prospect of a motion for preliminary injunction against construction *and* further design work on CMRR-NF. In *LASG I*, Judge Herrera held a two-day hearing on Plaintiff's motion for a preliminary injunction, in conjunction with Federal Defendants' motion to dismiss, and any motion for preliminary injunction in *LASG II* would need to demonstrate the same elements for injunctive relief (likelihood of success on the merits, irreparable injury, balance of harms, public interest) with regard to Plaintiff's NEPA claims and CMRR-NF that were presented to Judge Herrera in *LASG I*.

In short, the claims in the two cases raise common and related questions of law and fact, and seek the same relief. If the Tenth Circuit remands *LASG I* for a decision on the merits, as Plaintiff is requesting, both *LASG I* and *LASG II* will be resolved based on judicial review of a voluminous, largely (if not completely) overlapping Administrative Record that would include the documents

relevant to NNSA's NEPA decision-making process for CMRR-NF. Because Judge Herrera has already invested substantial judicial resources in *LASG I*, addressing many of the claims and issues that are presented again in *LASG II*, transfer of *LASG II* to Judge Herrera will serve the interests of justice, promote judicial economy and efficiency, and facilitate this litigation in a manner beneficial to the Court, the Parties, and the public. Therefore, Federal Defendants respectfully request that the Court transfer *LASG II*, Case 1:11-CV-0946-RHS-WDS, to the Honorable Judith C. Herrera, who was presented with and/or considered many of the same claims and issues in *LASG I*, Case 1:10-CV-0760-JH-ACT, a case which is still pending before the Tenth Circuit.

### **BACKGROUND**

#### **A. Proceedings in the District Court**

Plaintiff filed its Complaint in *LASG I* on August 16, 2010. The *LASG I* Complaint challenged the adequacy of DOE/NNSA's analysis of potential environmental impacts from the construction and operation of the proposed CMRR-NF. Specifically, Plaintiff alleged that NNSA: failed to prepare an applicable EIS and failed to implement an alternative chosen in any ROD (Count I); failed to develop an EIS addressing connected actions and cumulative environmental impacts (Count II); failed to provide mitigation measures (Count III); failed to integrate NEPA analysis into the decision making process (Count IV); and denied opportunities for review and comment (Count V). *LASG I*, ECF No. 1 at 19-32. Plaintiff sought a declaratory judgment and mandatory injunction requiring Federal Defendants to prepare a new Environment Impact Statement ("EIS") regarding the CMRR-NF and also sought to prohibit all further investments in the CMRR-NF project, including any funds for detailed design or construction, until a new EIS is completed. *Id.* at 32-33.

The Court's October 28, 2011 Memorandum Opinion and Order succinctly summarizes the relevant background information and procedural history for *LASG I*:

Following the filing of [*LASG I*], NNSA's Deputy Administrator announced that the NNSA would complete a Supplemental EIS ("SEIS") to analyze the potential environmental impacts associated with the construction of the proposed CMRR-NF project. On April 22, 2011, the NNSA released a draft of the SEIS to the public. This release began a public comment period, which was to culminate in the release of the final SEIS.

On January 6, 2011, pursuant to a referral from the Court, the Magistrate Judge filed his Proposed Findings and Recommended Disposition. The Magistrate Judge recommended that Plaintiff's [*LASG I*] Complaint be dismissed in its entirety based on the doctrine of prudential mootness. Plaintiff timely filed objections to this recommended disposition. Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court reviewed *de novo* the findings and recommendations to which Plaintiff objected. In addition to reviewing all of the materials submitted by the parties, the Court also heard two days of testimony and argument on the matter prior to issuing its ruling.

*LASG I*, ECF No. 72 at 2. The materials reviewed by the Court included voluminous binders of material submitted by Plaintiff as well as the draft SEIS submitted by Federal Defendants. *LASG I*, Mem. Op. and Order, ECF No. 55 at 2 n.2; *also available at Los Alamos Study Group v. U.S. Dep't of Energy*, – F. Supp. 2d –, 2011 WL 258035, at \*1 n.2 (D.N.M. 2011).

On May 23, 2011, the Court in *LASG I* held that the Magistrate Judge properly applied the doctrine of prudential mootness to dismiss the case. *LASG I*, ECF No. 55 at 1. In the alternative, the Court in *LASG I* held that the case must be dismissed because it was not ripe. *Id.* at 5. The Court entered judgment and dismissed with prejudice the claims raised in *LASG I*. *LASG I*, ECF No. 56. Plaintiff appealed and moved in the District Court for an injunction pending appeal. *LASG I*, ECF No. 59, 64.

Federal Defendants notified the District Court that on September 2, 2011, the Environmental Protection Agency published a Notice of Availability of the Final CMRR-NF SEIS prepared by NNSA. *Id.*, ECF No. 71 (citing 76 Fed. Reg. 54,768). The notice also informed the District Court that NNSA published the Amended ROD for the CMRR-NF on October 18, 2011. *Id.* (citing 76 Fed. Reg. 64,344).

Three days after NNSA published the Amended ROD, Plaintiff filed a new Complaint in *LASG II*. The new Complaint raises many of the same claims and arguments raised in *LASG I*. Specifically, the *LASG II* Complaint alleges that NNSA: failed to analyze alternatives in an EIS and failed to implement an alternative chosen in any ROD (Counts I and VI); predetermined the outcome of the NEPA process (Count IV); failed to integrate NEPA analysis into the decision making process (Count VII); denied opportunities for review and comment (Count IX); and failed to address connected actions and cumulative environmental impacts (Count X).<sup>1/</sup> Plaintiff's new Complaint seeks declaratory judgment and mandatory injunction requiring Federal Defendants to prepare a new EIS regarding the CMRR-NF and also seeks to prohibit all further action and investments in the CMRR-NF project, including any funds for detailed design or construction, until a new EIS is completed. *LASG II*, ECF No. 1 at 48-52.

The District Court denied Plaintiff's motion for injunction pending appeal on October 28, 2011. *LASG I*, ECF No. 72. The Court found that Plaintiff "merely repeat[ed] many of the same

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<sup>1/</sup> *LASG II* also brings additional claims, including allegations that NNSA: failed to include current information about the purpose and need (Count II); failed to include a no action alternative (Count III); failed to issue a record of decision (Count V); took interim actions prejudicial to the NEPA process (Count VIII); and relied upon the 2004 analysis (Count XI).

arguments that it made in its initial round of briefing and at oral argument” and that “Plaintiff has done little to demonstrate that it is likely to prevail on the merits in its appeal.” *Id.* at 4. The Court also reasoned that

[w]hen it issued its decision dismissing this case, the Court based its determination on the fact that the SEIS process was ongoing and that the form that the final ROD would take could not be known. It noted that Plaintiff had the ability to participate in the SEIS comment process in an attempt to ensure that its perspectives are heard. *See* Doc. 55 at 15. It further stated that if, when the SEIS process was complete, Plaintiff believes that its perspectives were not adequately considered, it would have the opportunity to file a new action. That is precisely what Plaintiff has now done, filing a new lawsuit that challenges Defendants’ actions on the basis of the completed SEIS and final ROD. *See* Case No. 11cv946 RHS/WDS. This new lawsuit appears to be the proper vehicle to contest Defendants’ plans to move forward with the CMRR-NF project, as the issuance of the completed SEIS and final ROD constitute the necessary “final agency action” that was missing in this case.

*Id.* at 4-5.

**B. Proceedings in the Tenth Circuit**

Plaintiff’s appeal is pending in the Tenth Circuit. *LASG I*, Case No. 11-2141 (10th Cir. July 1, 2011). In its opening brief, Plaintiff alleges that this Court erred because NNSA: failed to issue an applicable ROD for the CMRR-NF; failed to analyze alternatives; predetermined the outcome of the NEPA process; and engaged in actions prejudicial to the NEPA process. Appellants’ Opening Brief, *LASG I*, Case No. 11-2141, at 26-45, 48-49, 55-58. (10th Cir. Aug. 31, 2011) (“App. Opening Br.”). Plaintiff’s opening brief also expressly challenges alleged deficiencies in the draft SEIS considered by this Court in its ruling on Federal Defendants’ motion to dismiss. *Id.* at 40-42; *LASG I*, ECF No. 55 at 2 n.2.

On November 1, 2011, Federal Defendants filed a motion to dismiss Plaintiff’s appeal as

moot. Federal Defendants-Appellees' Motion for Summary Disposition Because of Mootness, *LASG I*, No. 11-2141 (10th Cir. Nov. 1, 2011). The motion asserts that due to the issuance of the final SEIS and Amended ROD, the Tenth Circuit cannot grant any meaningful relief on Plaintiff's Complaint in *LASG I* and that the appeal is constitutionally moot. *Id.* at 2. Plaintiff opposes the motion to dismiss the appeal. *Id.* at 1. The Tenth Circuit ordered a briefing schedule on the motion to dismiss and tolled briefing on the merits. Order, *LASG I*, No. 11-2141 (10th Cir. Nov. 2, 2011).

### ARGUMENT

Although there is no Federal Rule of Civil Procedure or Local Rule in this district governing the transfer of cases, “[i]n the District of New Mexico, a judge will, at times, transfer a case to another judge if the other judge has conducted a large amount of work on the case or on a related case.” *Stark-Romero v. Nat’l R.R. Passenger Co.*, 763 F. Supp. 2d 1231, 1274 (D.N.M. 2011).

The circumstances of this case warrant transfer to the Court that considered *LASG I*. The parties in both Complaints are identical. Both Complaints seek judicial review of Federal Defendants' compliance with NEPA in moving forward with CMRR-NF. Plaintiff itself identified *LASG I* and *LASG II* as related cases. *LASG II*, ECF No. 1-1. Plaintiff's new Complaint, *LASG II*, ECF No. 1, raises many of the same arguments and claims raised in *LASG I*. For example, in both cases Plaintiff alleges that NNSA: failed to prepare an applicable EIS and failed to implement an alternative chosen in any ROD (*LASG I*, Count I; *LASG II*, Counts I and VI); failed to develop an EIS addressing connected actions and cumulative environmental impacts (*LASG I*, Count II; *LASG II*, Count X); failed to provide mitigation measures (*LASG I*, Count III; *see LASG II*, ECF No. 1 at 31-32, 49); failed to integrate NEPA analysis into the decision making process (*LASG I*, Count IV;

*LASG II*, Count VII); and denied opportunities for review and comment (*LASG I*, Count V; *LASG II*, Count IX). Both Complaints seek the same relief, namely declaratory judgment and mandatory injunction requiring Federal Defendants to prepare a new EIS and to prohibit all further action on and investments in the CMRR-NF project, including any funds for detailed design or construction, until a new EIS is completed. *LASG I*, ECF No. 1 at 32-33; *LASG II*, ECF No. 1 at 48-52.

In addition to the clear overlap in the claims presented and relief sought in the two Complaints, the new claims raised in *LASG II* have already been briefed and considered at the District Court level. For example, Plaintiff's new Complaint alleges that NNSA predetermined the outcome of the NEPA process for the CMRR-NF project and took interim actions prejudicial to the NEPA process. (*LASG II*, Count IV and VIII). Plaintiff raised these arguments in its briefing on the motion to dismiss. *LASG I*, ECF No. 55 at 17 ("Plaintiff next contends that its claims are ripe because Defendants are currently engaged in making an irretrievable commitment of resources related to the CMRR-NF project); *id.* at 18 ("In a closely related vein, Plaintiff also argues that Defendants have violated NEPA by predetermining the result of its environmental analysis.").

The arguments raised in Plaintiff's opening appellate brief in *LASG I* also overlap substantially with the claims presented in its Complaint in *LASG II*. For instance, Plaintiff alleges that the District Court erred because NNSA: failed to analyze alternatives in an EIS and failed to implement an alternative chosen in any ROD (App. Opening Br. at 27-28; *LASG II*, Counts I and VI); and predetermined the outcome of the NEPA process and engaged in actions prejudicial to the NEPA process (App. Opening Br. at 34-35; *LASG II*, Counts IV and VIII). Plaintiff's appellate brief also expressly challenges the draft SEIS that was considered by the District Court in its ruling on

Federal Defendants' motion to dismiss. App. Opening Br., at 21-22, 40-42 (10th Cir. July 1, 2011); *LASG I*, ECF No. 55 at 2 n.2.

Furthermore, the Complaint in *LASG II* contains a request for a preliminary injunction. *LASG II*, ECF No. 1 at 49-50. Although the District Court did not reach the merits of Plaintiff's motion for a preliminary injunction in *LASG I*, the evidence and arguments that Plaintiff presented to the District Court in *LASG I* would be largely the same as any submitted in support of a motion for preliminary injunction that is filed in *LASG II*.

The Court in *LASG I* also conducted a substantial amount of work on Plaintiff's earlier case. Notably, in the spring of this year, the Court in *LASG I* heard two days of testimony and argument prior to issuing a detailed opinion on Plaintiff's earlier challenge. *LASG I*, ECF No. 55 at 1. In its opinion dismissing Plaintiff's *LASG I* Complaint based on the doctrine of prudential mootness, the Court stated that it considered the voluminous binders of material submitted by Plaintiff as well as the draft SEIS submitted by Federal Defendants. *Id.* at 2 n. 2. NNSA has since issued a final SEIS and Amended ROD based on the draft SEIS. *LASG I*, ECF No. 71. The Court in *LASG I* therefore already is familiar with the complex factual issues present in *LASG II*. Transfer of *LASG II* to the Court that considered *LASG I* will serve the interests of judicial economy and conserve scarce judicial resources because a second court will not need to familiarize itself with the factual issues that underlie both of Plaintiff's Complaints. Moreover, if Plaintiff succeeds in its appeal in *LASG I*, the Tenth Circuit will remand that case to this Court for resolution on the merits, and thus the Court will be faced with deciding the merits of identical claims brought by the same party against the same Federal Defendants in two different cases based on similar Administrative Record

materials.

Transfer to a related case and consolidation under Federal Rule of Civil Procedure 42(a) are procedurally distinct, but both consider the interests of justice and judicial economy. *See, e.g., ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1182-83, 1194 (10th Cir. 1998) (consolidating appeals with related issues in “the interests of justice” and “judicial economy”), *overruled on other grounds, Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007); *United States v. Green*, 115 F.3d 1479, 1480-81 (10th Cir. 1997) (“The panel has now determined that these three appeals should be consolidated for disposition in one opinion since they are interrelated and there is, understandably, considerable duplication in the respective briefs of the appellants.”); *United States v. Wiles*, 106 F.3d 1516, 1517 n.1 (10th Cir. 1997) (noting that the court had consolidated appeals “because both appeals presented overlapping factual and legal issues”). The Court should apply the same considerations for the interests of justice and judicial economy and transfer *LASG II* to the Court of Judge Herrera, the presiding judge in the related *LASG I* case.<sup>2</sup>

### CONCLUSION

In the interests of justice, for the foregoing reasons, Federal Defendants respectfully request that the Court transfer *Los Alamos Study Group v. U.S. Dep’t of Energy*, Case 1:11-CV-0946-RHS-WDS, to the Court of the Honorable Judith C. Herrera, United States District Judge for the District of New Mexico, who considered Plaintiff’s earlier related action, *Los Alamos Study Group v. U.S. Dep’t of Energy*, Case 1:10-CV-0760-JH-ACT, for all purposes.

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<sup>2</sup> At this time, Federal Defendants are not seeking to consolidate *LASG I* with *LASG II*. Consolidation would be appropriate in the future, however, if the Tenth Circuit reverses and remands *LASG I* for further proceedings, and both cases are pending at the same time.

Respectfully submitted on this 10th day of November, 2011.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 10, 2011, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing, which transmitted a Notice of Electronic Filing to the following CM/ECF registrants:

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