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Attorneys for Federal Defendants

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

THE LOS ALAMOS STUDY GROUP,)	
)	Case No. 1:10-CV-0760-JH-ACT
Plaintiff,)	
)	FEDERAL DEFENDANTS' REPLY TO
v.)	PLAINTIFF'S DECEMBER 8, 2010
)	RESPONSE TO FEDERAL
UNITED STATES DEPARTMENT OF)	DEFENDANTS' DECEMBER 3, 2010
ENERGY, et al.)	MOTION FOR TWO-WEEK EXTENSION
)	OF TIME [DKT. NO. 19]
Federal Defendants.)	
_____)	

Plaintiff's December 8, 2010 Response, Dkt. No. 21, asserts that undersigned counsel of record for the United States misled this Court in seeking a modest two-week extension of time to respond to Plaintiff's motion for preliminary injunction. Plaintiff asserts that the reasons that U.S. Department of Justice trial counsel stated as the need for the extension were "pretextual," and that

the real reason for the requested extension was some sort of scheme by the Federal Government to moot Plaintiffs' preliminary injunction motion by getting Congress to take action that would make future construction of the Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") a "*fait accompli*." Plaintiff's assertions have no grounding in reality.¹

All of the reasons for Federal Defendants' requested extension were set forth in Federal Defendants' Motion. There were no other, or different, reasons. The request for the extension originated solely with undersigned trial counsels' assessment of where Federal Defendants stood in preparing their response to Plaintiff's motion for preliminary injunction, what needed to be done, and how much time would be needed to complete the task, taking into consideration the obstacles identified in the Motion. No other factors entered the calculus. No one from the Department of Energy ("DOE") or anywhere else in the Federal Government asked undersigned counsel to seek an extension, and there was no intent to gain an advantage with an extension. The decision to seek the extension was made entirely by undersigned counsel.

Plaintiff's Response does not have any basis in fact. Federal Defendants submit the attached declaration from undersigned counsel John P. Tustin, Trial Attorney for the U.S. Department of Justice, see Exhibit A, so that the Court may be fully informed of the events that actually transpired. The key points from Mr. Tustin's declaration and the facts in the Court record are as follows:

1. Plaintiff did not file a motion for preliminary injunction until November 12, 2010, almost three months after filing this action and more than six years after construction of CMRR-NF was approved in a 2004 Record of Decision ("ROD"). Federal

¹ Plaintiff also makes a variety of misleading and erroneous statements in Exhibit A to its Response. Federal Defendants strongly disagree with such statements and intend to address them in their response to Plaintiff's preliminary injunction motion.

Defendants' original response date to Plaintiff's motion for preliminary injunction was November 26, the Monday after Thanksgiving. On November 15, Plaintiff agreed to a one-week extension to December 6 to accommodate prior professional and personal obligations. See Dkt. No. 14.

2. On December 2, 2010, undersigned counsel contacted counsel for Plaintiff in the anticipation that exhibits in support of Federal Defendants' response would exceed the 50-page limitation under the Local Rules. Although estimated to total approximately 30 pages, undersigned counsel made no representation that the declarations were complete or almost complete. Undersigned counsel also inquired about Plaintiff's preliminary injunction exhibits, which neither he nor co-counsel had received, notwithstanding that Plaintiff's motion had been filed almost three weeks earlier.
3. Later that day, agency counsel advised undersigned counsel that one of Federal Defendants' two declarants had left New Mexico during the week of Thanksgiving for an urgent family medical emergency and was not expected to return until December 6. Undersigned counsel's assessment at that time was that neither of Federal Defendants' declarations—on which drafting of Federal Defendants' preliminary injunction opposition depends—nor the opposition itself would be ready for filing by December 6, in part because of the declarant's absence and uncertain status, as well as because of undersigned counsel's and co-counsel's other workload and leave, undersigned counsel's short illness, and Plaintiff's failure to produce the more than 100 exhibits in support of its motion.

4. On the morning of December 3, undersigned counsel left a voice message for counsel for Plaintiff stating that Federal Defendants were planning to request a two-week extension and inquiring as to Plaintiff's position on such a request. Counsel for Plaintiff called undersigned counsel approximately one-and-a-half hours later, stating that Plaintiff would condition its consent on Federal Defendants' immediate cessation of ongoing design activities for the duration of the extension. As a professional courtesy, undersigned counsel stated that he would confer with DOE concerning the request.
5. Shortly after conferring with DOE, undersigned counsel spoke with counsel for Plaintiff and stated that a self-injunction was an unacceptable condition for a reasonable two-week extension, particularly when there was no ongoing construction, and hence no environmental impacts and no colorable claim of imminent injury. Counsel for Plaintiff stated that he thought the request for an extension on that day was a "risky" move as he "knew" the presiding judge. When undersigned counsel then stated that he would be filing the motion shortly, *Plaintiff's counsel confirmed that Plaintiff would oppose the motion.*

Federal Defendants do not understand D.N.M.LR-Civ. 7.1(a) (determining whether a motion is opposed) to have required Federal Defendants to attempt to characterize the Parties' intermediate negotiating positions, to attempt to characterize why Plaintiff ultimately decided to oppose Federal Defendants' request, or to explain why Federal Defendants were not seeking alternative relief suggested by Plaintiff (i.e., an extension conditioned on a self-injunction). Plaintiff had an opportunity to state its positions in a response, and provides no explanation for failing to have done

so prior to the Court's December 7 ruling on Federal Defendants' December 3 Motion.

It is unreasonable for Plaintiff to assert that Federal Defendants should have retrieved Plaintiff's 108 preliminary injunction exhibits from Plaintiff's website in lieu of normal service requirements. For obvious reasons, such a position is untenable.

Finally, Plaintiff's request for what amounts to a temporary restraining order ("TRO") as a condition of its consent to Federal Defendants' requested extension is unreasonable. Interim injunctions such as TROs are "extraordinary" remedies, and Plaintiff bears the burden of establishing *all* four requirements for such extraordinary relief with "clear and unequivocal" evidence. SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991); see also Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) ("[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.") (citation omitted; emphasis in original). Plaintiff cannot show irreparable injury because no construction of CMRR-NF is ongoing, and thus there are no environmental impacts that could form the source of a claim of immediate irreparable injury. Nor has there been any violation under the National Environmental Policy Act ("NEPA"). The National Nuclear Security Administration ("NNSA") approved construction and operation of CMRR-NF in the 2004 ROD based on a detailed 2003 Environmental Impact Statement ("EIS"). Preparation of a supplemental EIS ("SEIS") is currently underway in furtherance of NEPA to address changes to the design. Nothing in the preparation of an SEIS requires NNSA to pretend that it never approved the CMRR-NF in the 2004 ROD, to disclaim the critical importance of CMRR-NF to the national security interests and international policy concerns of the United States, or to halt planning and design which will have no effect on the environment and, if anything, will aid the environmental

analyses and decision-making process. Plaintiff provides no support for the notion that this Court can enjoin the United States Senate from ratifying the New START treaty or can enjoin Congress from appropriating funding for CMRR-NF. Moreover, the Court lacks subject matter jurisdiction to consider Plaintiff's claims, as set forth in Federal Defendants' pending Motion to Dismiss, Dkt. No. 12.

In short, there is no basis for Plaintiff's gambit to extract a TRO in exchange for a short extension of time for Federal Defendants to prepare a response to Plaintiff's preliminary injunction motion. Federal Defendants requested a reasonable extension based on legitimate concerns, with no prejudice to Plaintiff, and the Court properly granted the request.

Respectfully submitted on this 10th day of December, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2010, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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Attorneys for Plaintiff

Dated: December 10, 2010.

/s/ John P. Tustin

JOHN P. TUSTIN

Attorney for Defendants

I contacted counsel for Plaintiff via email, not telephone, in the anticipation that exhibits in support of the response would exceed the 50-page limitation under the Local Rules. I estimated that the two anticipated declarations would total approximately 30 pages and that the exhibits in support might consist of several hundred pages of documents.¹ I made no representation that the declarations were complete, or even nearly complete. I also inquired as to the status of the Plaintiff's exhibits to Plaintiff's previously-filed preliminary injunction motion, which neither I nor co-counsel had yet received.

4. In the afternoon of December 2, 2010, agency counsel advised me that one of our two declarants experienced a severe family emergency the week of Thanksgiving and was not expected to return to the office until December 6. I sought clarification of the nature of the emergency. My and my co-counsel's assessment at that time was that neither of Federal Defendants' declarations—on which drafting of Federal Defendants' preliminary injunction opposition depends—nor the opposition itself would be ready for filing by December 6, in part as a result of the declarant's absence, but also because of my and co-counsel's other workload and leave time and Plaintiff's failure to produce the more than 100 exhibits in support of its motion.

5. On December 3, 2010, I left a voice message for counsel for Plaintiff stating that Federal Defendants were planning to request a two-week extension and seeking Plaintiff's position on the request. Counsel for Plaintiff returned my call approximately one or two hours later. I explained to counsel for Plaintiff that the primary reasons for the request for an extension were (1) that one of Federal Defendants' declarants had experienced a severe family emergency, that we would not be able to complete his declaration in time for the response

¹The number of pages that will be submitted in support has been reduced substantially but will still exceed the 50-page limit.

deadline, and that the declaration was necessary for the response; and (2) that Federal Defendants had not had an opportunity to review the materials submitted in support of the motion for preliminary injunction because Plaintiff waited 19 days to send them (see Dkt. 18), via regular mail. I stated that my co-counsel had received the materials the afternoon of the December 2 and that I had not yet received the materials, thus preventing any meaningful review of materials that should have been served with the motion for preliminary injunction.² I also proffered, as secondary reasons, that I was ill over the weekend after Thanksgiving and that both I and my co-counsel had pressing court deadlines for dispositive motions in other cases.

6. When counsel for Plaintiff stated that the request for preliminary injunction was time-sensitive, I reiterated that no construction was underway on the CMRR-NF and asked why Plaintiff waited approximately three months to file a request for emergency relief, when all of the allegations set forth in the preliminary injunction were known at the time Plaintiff filed its Complaint. Counsel for Plaintiff did not proffer a reason for delay. After further discussion, counsel for Plaintiff then stated that Plaintiff would condition its consent to an extension on Federal Defendants' immediate cessation of ongoing design activities for the duration of the extension. I stated that I would confer with my clients.

7. Still on December 3, and shortly after conferring with agency counsel and my co-counsel, I called counsel for Plaintiff and stated that the self-injunction request was an unacceptable condition for our two-week extension for a response brief, particularly when Federal Defendants had good cause for the extension and when there was no ongoing construction that could form the basis for a colorable claim of imminent injury. Counsel for Plaintiff

² I received Plaintiff's exhibits on December 6.

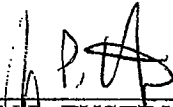
stated that he thought the request for an extension on that day was a “risky” move as he “knew” the presiding judge. I stated that I would be filing a motion for an extension shortly, and asked counsel for Plaintiff to confirm Plaintiff’s opposition. Counsel for Plaintiff stated that Plaintiff opposed the motion.

8. After this telephone conversation ended, counsel for Plaintiff emailed me and stated that all of the materials that Plaintiff submitted in support of its motion for preliminary injunction were available online. I responded in an email that this was the first time I had been made aware of the online availability of Plaintiff’s exhibits and that, in any case, Federal Defendants’ counsel should not be expected to visit Plaintiff’s website to obtain materials that should have been provided directly when the motion for preliminary injunction was filed. Counsel for Plaintiff accused me creating a pretext for the motion for extension. On December 3, 2010, I then filed the motion for an extension that accurately included, as noted above, a statement that Plaintiff opposed the motion.

9. Counsel for Plaintiff suggests that the request for an extension was a pretext to allow for more time for the United States Senate to ratify the New START treaty. The Department of Energy did not ask or suggest that the Department of Justice seek an extension of time. Rather, the request was based solely on an internal assessment by me and my co-counsel of the status of materials that were being prepared, what remained to be done, and the prospects of mounting an adequate defense to the motion for preliminary injunction given one declarant’s absence, the failure to receive Plaintiff’s exhibits in support of its motion in a timely manner, and my and my co-counsel’s other professional and personal obligations. There was no other reason for seeking an extension.

I declare that the foregoing is true and correct.

Executed on this 10th day of December, 2010.



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