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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

LUIS SANCHO, et al.,)	CV 08-00136 HG-KSC
)	
Plaintiffs,)	Honolulu, Hawaii
vs.)	September 2, 2008
)	10:00 A.M.
U.S. DEPARTMENT OF ENERGY, et al.,)	
)	Federal Defendants' Combined
)	Motion to Dismiss and Motion
Defendants.)	for Summary Judgment
_____)		

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HELEN GILLMOR
CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

Plaintiff Pro Se:	LUIS SANCHO P. O. Box 411 Honolulu, HI 96728
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Official Court Reporter:	Debra Kekuna Chun, RPR, CRR United States District Court 300 Ala Moana Blvd. Ste. C285 Honolulu, HI 96850 (808) 534-0667

Proceedings recorded by machine shorthand, transcript produced with computer-aided transcription (CAT).

1 TUESDAY, SEPTEMBER 2, 2008 10:05 O'CLOCK A.M.

2 THE CLERK: Civil 08-00136 HG, Luis Sancho, et al.,
3 versus U.S. Department of Energy, et al. This case is called
4 for Federal Defendants' Combined Motion To Dismiss And Motion
5 For Summary Judgment.

6 Appearances, please, Counsel, for the record.

7 MR. WAGNER: Yes, Your Honor. Walter Wagner.

8 THE COURT: Good morning.

9 MR. SANCHO: Luis Sancho.

10 THE COURT: Good morning.

11 MR. WATSON: Good morning, Your Honor. Derrick
12 Watson from the U.S. Attorney's Office. I have with me this
13 morning Andrew Smith to my left. Andrew is with the -- he's a
14 trial attorney with the U.S. Department of Justice, Environment
15 and Natural Resources Division, out of Albuquerque, New Mexico.

16 And with us, Your Honor, Dr. Bruce Strauss.
17 Dr. Strauss is from Germantown, Maryland. He is program
18 manager with the Office of High Energy Physics, U.S. Department
19 of Energy.

20 THE COURT: Good morning.

21 MR. SMITH: Good morning.

22 THE COURT: Please all be seated.

23 There are a number of matters that I want to address,
24 the first being the amicus curiae. It has been moved, and
25 opposition has been filed.

1 I understand your position, Mr. Wagner. With respect
2 to the government does the government have a position?

3 MR. SMITH: No position, Your Honor.

4 THE COURT: Okay. I'm going to take the matter under
5 advisement.

6 At this point in time I ask counsel has anyone
7 seen -- have I missed in these filings an affidavit or anything
8 indicating that Mr. Kaufman has the authority of the people
9 whose names he uses?

10 MR. WAGNER: I have seen nothing, Your Honor. I
11 raise that as an issue.

12 THE COURT: Have you seen anything, Mr. Smith?

13 MR. SMITH: No, Your Honor.

14 THE COURT: Okay. So as of right now, it just
15 appears that Mr. Kaufman has filed a pleading which includes
16 thoughts which may or may not be other folks' thoughts.

17 Okay. Thank you.

18 Now, the second matter that has been raised with
19 respect to the CERN issue, and that is scheduled for late
20 September before the magistrate for a finding and
21 recommendation with respect to the jurisdictional issue --
22 which would have to be addressed prior to any ruling on the
23 default -- at this point I'm not going to move it. The
24 government has asked to move it, but I want, you know, I will
25 move it, if I think that it becomes appropriate to have it

1 done, at a later time.

2 MR. SMITH: Your Honor --

3 THE COURT: Yes.

4 MR. SMITH: -- our opposition to that motion for
5 default judgment is due Friday this week, but because of all
6 the preparation in looking at the late papers that were filed
7 on summary judgment I don't believe I can get that done by this
8 Friday; so I would respectfully ask for at least a week
9 extension to file a response brief on the motion for default.

10 THE COURT: You know, the the lateness of the various
11 filings here and the problems that both sides have had with
12 attempting to meet the rules, we'll get back to that because I
13 think it is a much bigger issue. As of right now, it stands,
14 I'm not going to change anything, because I think that both
15 sides need to buy themselves a personal copy of the local rules
16 and highlight it perhaps so that -- I don't think it's funny,
17 Mr. Wagner.

18 MR. WAGNER: Well, I agree, Your Honor. I think that
19 the rules need to be followed.

20 THE COURT: Well, sir, we will talk about that at --
21 a little bit later. You may think they need to be followed,
22 but, sir, I have a list of the manners in which you have not.

23 Okay. So I am going to put off whether or not I will
24 delay the CERN. Your dates stand, Mr. Smith.

25 Now, I am going to make one ruling that I don't

1 believe I need any further information to hear from the parties
2 about, and that has to do with any jurisdiction the court would
3 have that would be based on something out of the European union
4 or the European Commission. Neither the precautionary
5 principles nor the Science and Society Action Plan are
6 doctrines that appear to have any connection with the United
7 States that would require the court to order the government to
8 follow them. I don't believe that there is any jurisdiction
9 for the government to be governed by those two doctrines, and I
10 don't believe this court has any jurisdiction to impose that
11 requirement on the government; so we're not going to spend any
12 more time on that. That's going to be in the minute order, and
13 we're done with that.

14 Now, I want to get to the -- the problem in terms of
15 what has been filed here. The filings are over a foot tall,
16 and a number of them are late from both sides, and they are
17 hard to follow because of various things that have not been
18 taken into account, and each side has chosen different things
19 to ignore.

20 The courtesy copies that come to the court -- and
21 when something is over a foot tall, it is not possible to read
22 it on a computer screen. The government has ignored up until
23 their last filing putting any tabs, as are required, so that we
24 can go through the exhibits. Their last filing with
25 Dr. Stauss's declaration is not in the right font size; it is

1 in a smaller font size. Those are small things, but it makes
2 it much more difficult for the court to go through these
3 papers.

4 Now, filing an ex-parte motion to continue -- and
5 that's, basically, what the government's filing last week: the
6 Federal Defendants Ex-Parte Application To Strike Plaintiffs'
7 Untimely Response To Federal Defendants' Motion To Dismiss Or,
8 In The Alternative, For An Opportunity To Reply. But,
9 basically, you wanted a continuance.

10 That is not an appropriate filing. It is -- filing
11 it ex parte makes no sense. The idea that I would strike the
12 documents, that I would continue the matter without consulting
13 the other parties doesn't make any sense. So ex parte is
14 something that is used sparingly, and I don't want to see
15 anymore of that, unless it is such an emergency that it truly
16 needs action. But it is an inappropriate use of ex parte.

17 Now, I have a question. It appears that you have
18 filed -- the government has filed a notice that Brian Toth is
19 no longer in this case. And that was filed in 6/13/08, but I
20 do seem to still get filings by Mr. Toth.

21 MR. SMITH: Your Honor, Mr. Toth was -- did -- he
22 went to a different section in the Department of Justice. He
23 is no longer the attorney of record on this case. I am the
24 attorney -- the lead counsel of record on this case, along with
25 Mr. Watson.

1 THE COURT: So I won't be getting any more filings
2 from Mr. Toth.

3 MR. SMITH: The filing that was made on Friday, I
4 believe, from Mr. Toth was just a declaration responding to the
5 claim that Mr. Wagner had not been served with our statement of
6 facts -- our concise statement of facts, and that was filed by
7 Mr. Watson, not by Mr. Toth.

8 THE COURT: Okay. Thank you.

9 Now, Mr. Wagner and Mr. Sancho, I have, you know,
10 your timeliness has been absent, you have not followed the
11 rules in terms of filing your papers in a timely fashion, and
12 there is no observing of the rules with respect to the fact
13 that, as a pro se litigant, Mr. Wagner, you cannot file for
14 Mr. Sancho. Mr. Sancho has to sign the documents and make them
15 his. You appear -- actually, I'm surprised Mr. Sancho is here
16 because it does appear that in almost all the filings it is you
17 who are the moving party. Are you admitted to the bar
18 anywhere, Mr. Wagner?

19 MR. WAGNER: No, Your Honor. I believe Dr. Sancho
20 has signed most of the pleadings. It is my understanding --

21 THE COURT: You see, but that's it. Most isn't good
22 enough, Mr. Wagner. You can't represent him.

23 MR. WAGNER: I'm aware of that, Your Honor. The ones
24 where he doesn't have his signature there he was prepared to
25 acknowledge as being his pleadings as well.

1 THE COURT: Not good enough, Mr. Wagner. It doesn't
2 work that way. There seems to be this idea that we can clean
3 this up later. This is a court that has rules.

4 Now, I am emphasizing these things not because I am
5 not willing to look at the heart of the matter, but the number,
6 you know, this has been so sloppily done and with such -- I'm
7 trying to think of the appropriate word -- with such intensity;
8 so I have this huge pile of papers, but there probably aren't
9 10 pages in there that deals with an issue that I can actually
10 deal with. And I have to go through all of these procedural
11 hurdles to see how these things are supposed to meet.

12 You also have not honored any of the local rules with
13 respect to the type of filings and, you know, your exhibits, et
14 cetera. These aren't things that are going to be ignored,
15 Mr. Wagner. I will strike these going forward, you know, if --
16 you know, if Mr. Sancho hasn't signed it, if it isn't from him,
17 it's not going to be treated as coming from Mr. Sancho.

18 MR. WAGNER: May I ask for a clarification, Your
19 Honor. Is it possible for him to sign the signature page and
20 mail that in? He is living in Spain. It makes it difficult
21 for me to send a document that we both prepared together to
22 Spain, have him sign it and then send it back to me to meet the
23 time requirements. That's what we've done. If the court wants
24 us to do that in the future, we will, but it makes it
25 difficult.

1 THE COURT: Well, Mr. Wagner, what you are doing,
2 basically, is you are attempting to be an attorney without
3 being admitted to the bar; you're attempting to represent a
4 side in this controversy with more than yourself. As far as
5 I'm concerned, anything that is signed by you and not signed by
6 Mr. Sancho is just your position; it's not Mr. Sancho's
7 position.

8 MR. WAGNER: I'll make certain that all documents in
9 the future have both our signatures when they're filed, Your
10 Honor. Thank you.

11 THE COURT: Now, you have missed any number of
12 deadlines, and I have a pile of papers here that are -- this
13 one is, you know, a little over an inch thick, and that's
14 what's been filed in the last, you know, three or four days.
15 Nobody asked for permission to late filings, et cetera.

16 And what I find really interesting about it is we
17 have all these procedural objections from each side to the
18 other, and the only real issue that I can deal with is
19 jurisdiction: Do I have jurisdiction to do this? And neither
20 side really wants to seem to talk about that.

21 Mr. Wagner, you have huge amounts of commentary on
22 the science involved, and as does the government, but aside
23 from saying that, you know, you don't really speak to
24 jurisdiction, Mr. Wagner. You just say, you know, mankind, you
25 know, do the right thing, basically. But I am not authorized

1 to supervise the federal government just because I think it
2 might be a good idea.

3 However, on the other hand, the government does not
4 actually deal directly with jurisdiction as far as I'm
5 concerned because the question, I would imagine, is NEPA and
6 whether or not the government was -- the first question would
7 be were these expenditures something that should have involved
8 an environmental impact statement, or an EIS? That question
9 isn't really addressed by the government. And the going to the
10 second question of saying, oh, the statute of limitations has
11 run, in my mind doesn't really deal with the question I should
12 be addressing: Did the government have some responsibility
13 here that it has not met? Mr. Wagner has pointed out that
14 there are still funds, he believes, are still flowing.

15 So the question of jurisdiction is paramount. Do I
16 have the power to even look at this question? I am not going
17 to attempt as a federal judge to understand the science and
18 then go backwards to whether I have jurisdiction. But, if I
19 look at these piles and piles and piles of paper, I think
20 that's what everybody expects me to do, you know, to decide
21 what I think about the substance and then decide if I have
22 jurisdiction. But that's not what the constitution expects me
23 to do. I am supposed to adjudicate a case or controversy, and
24 there has to be a case or controversy based on a cause of
25 action. And I would really like to know whether there is one

1 here, and I have gotten no help from the plaintiffs in that
2 regard and precious little from the government.

3 So anybody want to say anything?

4 Yes, Mr. Wagner. If you're going to speak, I would
5 ask you to go to the lectern. It will make it easier for the
6 court reporter to pick it up.

7 MR. WAGNER: Certainly. I apologize, Your Honor, for
8 the lengthy refutations of the affidavits and arguments
9 presented by the government. I just didn't want to leave it
10 uncontested on the record. I am aware it makes it very thick
11 and voluminous. I believed I had addressed the NEPA issue, and
12 I believe that the court does have jurisdiction because the
13 government did not follow the NEPA requirements. If the court
14 wishes additional --

15 THE COURT: Okay. But where, Mr. Wagner -- other
16 than saying just exactly what you just said, where is the law?
17 Where is the place in your legal papers that points out exactly
18 where they were required to file it and how they in their
19 particular posture did not do so? It's very well and good to
20 be a pro se, but all you're doing is leaving it to the court to
21 go and do your legal research for you.

22 MR. WAGNER: Well, you know, Your Honor, if the court
23 wishes to take this matter under submission and request
24 additional briefing on that issue, I'm certainly willing to do
25 so.

1 I believe it was addressed in the complaint, and
2 perhaps the court was looking for seeing that in the body of
3 the pleadings with respect to the motion, and I may have been
4 deficient in that regard because I was relying on the complaint
5 as well. So if the court wishes additional legal argument on
6 that, I'd be happy to comply with that.

7 THE COURT: Thank you, Mr. Wagner.

8 Is it Mr. Smith or Mr. Watson that's going to speak?

9 MR. SMITH: It's me, Your Honor.

10 THE COURT: If you'd use the lectern, please.

11 MR. SMITH: Thank you, Your Honor.

12 Your Honor, we believe that we have provided the
13 court with arguments on jurisdiction, on standing and mootness
14 and the non-jurisdictional issue of statute of limitations.
15 The reason we haven't gotten into NEPA compliance at this point
16 is because that would be an argument on the merits, and under
17 the Supreme Court case in Steele --

18 THE COURT: Well, in order to follow your argument
19 that the statute of limitations applies are you conceding that
20 they should have done an environmental impact statement?

21 MR. SMITH: No, Your Honor.

22 THE COURT: So why would I care about the statute of
23 limitations?

24 MR. SMITH: Because, Your Honor, the question is,
25 even assuming NEPA attached in some way, that there was a NEPA

1 obligation at some point, that NEPA obligation would have
2 attached, if at all -- and we dispute that it did -- but, if it
3 did, it would have attached when the agency committed to this
4 project back in 1988, 1997, when the two agencies did. So it
5 doesn't matter. The question's not, you know, whether or how
6 they needed to comply with NEPA. The question is when would
7 that cause of action have arisen.

8 THE COURT: So that additional money, if there is
9 additional money, being appropriated each year, that does not
10 require NEPA?

11 MR. SMITH: It -- well, again that's not a claim
12 that's in Mr. Wagner's complaint. His claim is that the
13 defendants, including CERN, who's not even a federal agency,
14 but that aside --

15 THE COURT: We're not dealing with CERN today.

16 MR. SMITH: Right. That the defendants, National
17 Science Foundation and the United States Department of Justice,
18 failed to comply with NEPA by not doing an EIS, an
19 environmental impact statement, or an environmental assessment
20 for the LHC project, the Large Hadron Collider project. The
21 only time that the agency would have had such an obligation is
22 when it became involved in the project: again 1997, 1998.

23 THE COURT: Okay. That's a bald statement that you
24 are making without any real legal basis, I believe.

25 MR. SMITH: No, I'm not making --

1 THE COURT: I mean putting forward -- putting it
2 forward.

3 MR. SMITH: And we'll be happy to do that in our
4 reply brief, if Your Honor allows us to file a reply brief.
5 That was an argument that Mr. Wagner made in his opposition
6 paper that we received literally a couple hours before our
7 reply brief was due; so we didn't have a chance to reply to
8 that argument. But I will make a proffer that, for instance,
9 the Wind River case in the Ninth Circuit that is cited in our
10 opening brief says that the statute of limitation applies --
11 the statute itself of limitation applies when the cause of
12 action first accrues, not when there's subsequent accruals.
13 And so in Wind River the Ninth Circuit looked at the passing of
14 a rule by the federal agency and said that's, you know, that's
15 the agency action that the statute of limitations is triggered
16 by. It's not triggered by later, you know, subsequent acts by
17 the government.

18 So in this case -- in any NEPA case -- not any NEPA
19 case but the vast majority of NEPA cases where the federal
20 agency has taken an action to build a dam, to build a highway,
21 whatever it is, there's going to be that initial decision, and
22 NEPA says that the agency has to comply with NEPA before it
23 makes an irreversible commitment of resources to that project.
24 So as soon as the agency makes that first --

25 THE COURT: So is it your position, Mr. Smith, that

1 they were required to do that?

2 MR. SMITH: In this case?

3 THE COURT: Yes.

4 MR. SMITH: No.

5 THE COURT: At that time.

6 MR. SMITH: No, they were not because the issue --
7 the other issue -- you know, NEPA applies to major federal
8 actions significantly affecting the human environment; so the
9 courts have looked at that, including the Ninth Circuit, What
10 is a federal action -- when does an action become federal? So
11 the question is Mr. Wagner alleges that our clients, the
12 federal agencies, were required to do NEPA on the LHC project;
13 so the question that would be before the court on the merits:
14 Is the LHC project a federal action or not?

15 So there's the case the Rattlesnake Coalition case
16 cited in our brief. Mr. Wagner cites it in his case. In that
17 case the federal government was involved in helping to finance
18 a water treatment facility up in Montana, and the Ninth Circuit
19 said, you know, that the federal government participated by
20 involving itself with about 10 percent of the funding for that
21 project, didn't retain any control over the project, you know,
22 after they disbursed their funds or anything like that. It was
23 not a federal project. The Ninth Circuit said 10 percent of
24 the funding is not enough to make -- even a project within the
25 United States done by lower levels of government to make that a

1 federal action triggering a NEPA requirement.

2 So here you have about the same amount of monetary
3 involvement by the United States government, as we show in our
4 declarations. It's less than 10 percent of the entire cost of
5 the LHC. The LHC is a \$5 billion project, and the United
6 States' participation in that -- in the construction of that
7 was about \$500,000. But even more so in that case --

8 THE COURT: Five hundred million.

9 MR. SMITH: \$500,000 -- I'm sorry. \$500 million.

10 THE COURT: Yes, there's a difference, yeah.

11 MR. SMITH: Yes. Excuse me. The United States'
12 participation was about 10 percent; so it was right at the
13 Rattlesnake Coalition level. But even more so the Rattlesnake
14 Coalition case found no federal agency action even for a
15 project within the United States that was regulated by the EPA,
16 you know, federal agency, that had much more nexus with the
17 federal government than anything going on in a different
18 country completed -- a project completed by intergovernmental
19 agencies, European agencies.

20 THE COURT: Who's the major funder?

21 MR. SMITH: Excuse me?

22 THE COURT: Who gave the biggest chunk of money?

23 MR. SMITH: From the federal government or overall?

24 THE COURT: No, overall for the project, the actual
25 building of the project.

1 MR. SMITH: Which country?

2 THE COURT: Yeah.

3 MR. SMITH: I don't know the answer to that, Your
4 Honor. But CERN is an intergovernmental agency representing --
5 that's the governing board. They have all the control over
6 this facility. The United States doesn't have control over
7 this facility. They can't say when it turns on, when it turns
8 off. The magnets that were constructed by the United States,
9 title is now in CERN; so we have no authority to take those
10 back or anything like that. We have two detectors that are
11 part of the project, but those are passive detectors. And we
12 don't control when the LHC is operated. We have no say. We
13 don't even have a vote in the governing board of CERN. So
14 there's no federal control; so it's not a federal action at
15 all.

16 So that on the merits would be our position, but
17 because we were just moving to dismiss at this point and not
18 seeking summary judgment on the merits we focused on
19 irreparable injury and the standing elements, which don't
20 depend on whether Mr. Wagner and Mr. Sancho's claims have merit
21 or not. We were, you know, for purposes of our arguments, you
22 know, you can assume they have merits, but that doesn't mean
23 they have standing or that this court has jurisdiction or that
24 the statute of limitations wasn't triggered.

25 THE COURT: Okay. Thank you.

1 Did you wish to say anything else, Mr. Wagner?

2 MR. WAGNER: Yes, Your Honor. Thank you.

3 I think this case is quite a bit different than the
4 Rattlesnake case. There they were all parties within the U.S.,
5 and the U.S. government was a contributor of a portion of it.
6 Here this is -- and it was a much smaller dollar amount. Here
7 the dollar amount is far larger than the total Rattlesnake.
8 And the U.S. government is in partnership with these other
9 parties, a direct contractual agreement partnership, and so I
10 think that makes a very much of a distinction between that and
11 the Rattlesnake case.

12 And the NEPA requirements, they -- basically, every
13 year that funding is applied NEPA needs to be examined. It's a
14 continuing requirement. And I think there's going to be some
15 good case law on that, if the court wants us to brief it
16 further on that.

17 And as to in terms of federal control, the
18 contractual agreement between CERN and the U.S. government is
19 that CERN sits -- sorry. The U.S. sits as an observer with the
20 CERN Council with full right to participate in all major
21 decisions, and participation, basically, gives it that kind of
22 authority to tell them let's not do this until we have the
23 safety that's required and until we've complied with our NEPA
24 requirements. So it does give federal control and federal
25 jurisdiction over that.

1 And I believe that, if we do have those kinds of
2 hearings, we're going to find a lot more information coming
3 out. This has all been done very much in the quiet, in the
4 background so that nobody really knows about it, and that's the
5 exact contrary of what the NEPA requirements are: that you
6 have public hearings and so forth. Thank you.

7 THE COURT: Okay. Mr. Wagner -- Mr. Wagner, you have
8 asked for a temporary restraining order in your moving papers,
9 and a TRO is only good for 10 days. You asked for it for a
10 much longer period of time. It does not -- the law does not
11 allow that. You've asked for a preliminary injunction and a
12 permanent injunction. You've sort of mixed all these three up
13 together, and they do not work that way. I refer you to the
14 rule to -- it's very clear in the Federal Rules of Civil
15 Procedure exactly what can be done with those.

16 You've also -- so right now your posture is not one
17 that is really discernible.

18 The second thing is you've asked for attorneys' fees.
19 You don't have an attorney representing you. We don't grant
20 attorneys' fees to pro ses.

21 MR. WAGNER: I'm aware of that, Your Honor. That was
22 the expectation that we might retain counsel in the future.

23 THE COURT: Well, I think that retaining counsel
24 might make this work a lot better because of your inability to
25 file in a timely fashion and to follow, you know, numerous

1 rules. That certainly, if you're taking it seriously, then the
2 filings I would expect to be done in a more serious manner. It
3 just -- working through these quasi-legal documents makes it
4 difficult for the court to get to the heart of the matter.

5 Okay. Thank you.

6 MR. WAGNER: Thank you.

7 THE COURT: Okay. One moment.

8 Okay. Mr. Smith, when is the machine, the LHC,
9 expected to go on line? I have conflicting information. I've
10 had conflicting information since this case was filed in
11 March.

12 MR. SMITH: My understanding is that they are going
13 to start tests on September 10th and that it will take several
14 months before any actual collisions were to occur.

15 THE COURT: Okay. My second question is is there a
16 period of time with respect to the June 20th report on the
17 safety issues and some method of response?

18 MR. SMITH: You mean a public sort of notice and
19 comment period?

20 THE COURT: Yeah, is there, you know, I mean this
21 latest document which you just filed, which includes -- and
22 it's your -- it's exhibit 10, Review of the Safety of LHC
23 Collisions Addendum on Strangelets -- am I pronouncing that
24 correctly?

25 MR. SMITH: I think so.

1 THE COURT: -- June 20th, 2008, Safety Assessment
2 Group, this seems to be what Mr. Wagner was, when he filed in
3 March, waiting for and was talking about the idea of an
4 opportunity to respond to it. I'm just wondering if there's
5 anything formal in place that allows for comment on it.

6 MR. SMITH: Not that I know of, Your Honor. I'm not,
7 you know, I'm not an expert on international law. It's not a
8 safety report produced by the federal government. It's a
9 safety report produced by CERN; so I don't know what their
10 procedures or law are with respect to that.

11 I do know, however, that there have been lawsuits
12 filed in various European countries regarding this issue, which
13 is where it would be appropriately be heard. In fact, my
14 understanding is that there was one filed a couple days ago,
15 the court denied an injunction, and that's where we are. I can
16 get the court information on that, if you would like it.

17 THE COURT: Okay. I just wanted to know if there was
18 something in place that, you know, existed that I don't know
19 about.

20 MR. SMITH: Not that I know, Your Honor.

21 THE COURT: Okay. Thank you.

22 Okay. One moment.

23 Now, as for the motion to strike, I believe that the
24 government is correct with respect to what you filed,
25 Mr. Wagner. I don't think that there is any way that you could

1 interpret Rule 56 or the federal, you know, or the local rule
2 not to require you to file your response to the summary
3 judgment motion in a timely fashion. Your interpretation is
4 not one that the court finds persuasive.

5 However, while I do believe the government is right
6 about your being untimely throughout your responses to the
7 government's motion, I'm not going to strike it because -- I'm
8 not going to strike your filings because, while it is difficult
9 to make our way through all of these documents that are quasi
10 appropriate, the nature of the issue raised is too important
11 for the court to strike them just as a matter of course.
12 However, it is time to get your very own copy of the local
13 rules and read it, both sides, with, you know, interest and
14 intention of following it.

15 So I am going to take this matter under advisement.
16 I do not want to drag this out in terms of the issues before
17 the court. As far as I'm concerned, the first question that I
18 have to answer is whether or not I have jurisdiction to do
19 anything -- to hear anything about this, and it turns on -- and
20 the only place I can see any possibility of jurisdiction is
21 under NEPA, and I don't feel that I have information sufficient
22 from the parties.

23 The question of -- that Mr. Smith has raised, it
24 certainly is an argument that can be made, but there are many
25 arguments that can be made to the contrary with respect to

1 whether or not in this particular case NEPA is appropriate, and
2 that is what I do need to examine and figure out.

3 The question, you know, just saying that, okay, the
4 government is only a part of this, Mr. Wagner seems to believe
5 that the government has more say in what is happening with
6 this. I don't know if that's true or not. But I'm not -- I
7 don't really think -- to be totally honest I don't think that I
8 will gain a lot more from having more filings. It's just
9 something that the court will have to research and look into on
10 its own because it will just make this a further lengthy
11 process.

12 Before anybody files anything else, either side, you
13 have to ask for permission from the court because it has been
14 so scattered and without recognition of the various rules that
15 I am not going to take anything without a motion that the court
16 consider it. I think that's the only thing to do here in order
17 to stop the flow because I get papers every day, and they are,
18 you know, one will be about something that was filed, you know,
19 two weeks ago, and another will be about something that, you
20 know, somebody just popped into somebody's mind. So I'm not --
21 you have to make a motion, and I will either -- and, when you
22 make your motion, you attach what you want to file, and I will
23 either, you know, accept it or deny it. But that's what's
24 going -- you have to make a motion. I am not automatically
25 taking things because I haven't seen an ability to follow the

1 rules with respect to any kind of regularity.

2 Okay. Anybody have anything else they want to say?

3 MR. SMITH: Your Honor, does that include our
4 response to plaintiffs' motion for default judgment that's due
5 Friday?

6 THE COURT: No. File that one.

7 MR. SMITH: I mean the declaration we filed on Friday
8 for Mr. Stauss was, you know, in preparation for that response.
9 That's the only document I'm aware of that we may have filed
10 out of some sort of sequence.

11 THE COURT: I'm still, you know, considering your
12 ex-parte motion to continue.

13 MR. SMITH: Can I explain that, Your Honor. I
14 just --

15 THE COURT: You can try, but that's what it is.

16 MR. SMITH: We didn't understand ex parte to mean
17 that we were asking the court to decide it without --

18 THE COURT: That's what ex parte means. It means
19 without the other party.

20 MR. SMITH: Well, we understood that to mean that, if
21 it wasn't -- there wasn't enough time to give a notice for it,
22 you know, the 28-day rule in this district, that we needed to
23 file it ex parte.

24 THE COURT: No. Actually, you file something with a
25 notice to shorten time to hear something without --

1 MR. SMITH: So the motion to strike should have been
2 accompanied with a motion to shorten time? Okay, Your Honor.
3 Thank you.

4 THE COURT: That would have been -- as opposed to to
5 an ex parte because that's what ex parte means: don't tell
6 them, but we're going to do this.

7 MR. SMITH: Can I address this one legal issue that
8 you raised about the role of NEPA in determining standing just
9 briefly.

10 THE COURT: Yes.

11 MR. SMITH: Your Honor, the issue in plaintiffs'
12 response paper that we don't rebut that, you know, we don't
13 claim that we complied with NEPA or whatever, that is not a
14 relevant issue, and here's the reason is that under Ashley
15 Creek case, which is cited in our briefs -- it's not a new case
16 I'm presenting here for the first time -- the Ninth Circuit
17 said a free floating assertion -- and that's a NEPA case -- a
18 free floating assertion of a procedural violation without a
19 concrete link to the interest protected by the procedural rules
20 does not constitute an injury in fact.

21 And the court also said -- that's on page 938 of
22 Ashley Creek, which is 420 F.3d. The court went on to say a
23 concrete interest that is threatened by a failure to comply --
24 a concrete interest is that that is threatened by a failure to
25 comply with a procedural requirement.

1 To have a NEPA claim, okay, let's assume that there
2 was a NEPA obligation, and maybe there's a NEPA document out
3 there, maybe there's not, but we don't even need to get there.
4 Plaintiffs' complaint says they have to be injured by this
5 project. Their only claim of injury --

6 THE COURT: Is that the world might blow up, and so
7 we shouldn't get concerned about that. You're right. Why was
8 I even considering it?

9 Mr. Smith, I mean I really find that, you know, I
10 don't know if there's anything to this case, but that's just
11 not a great direction to be going.

12 MR. SMITH: I'm not following you. I mean, if their
13 only claim of injury is that the world's --

14 THE COURT: That they might die.

15 MR. SMITH: Right.

16 THE COURT: Yes.

17 MR. SMITH: So they have to show that that's a
18 credible injury. Is it actually going to happen? I can't just
19 go into federal court and say, you know, "The United States is
20 participating with Israel to launch a nuclear missile,
21 satellite that has nuclear material in it, and that nuclear
22 material might land on my house in Albuquerque. They didn't do
23 NEPA. I have standing." That's what this case is about.

24 THE COURT: I understand what you just said, that
25 hypothetical, but that's not his hypothetical. His

1 hypothetical -- I mean, and, you know, his hypothetical is that
2 the world would be made into a, you know, hard iron rock, which
3 is different than I might be an unintended casualty of
4 something that's happening half around the world -- way around
5 the world, but the person next door wouldn't be.

6 MR. SMITH: Right, but -- and, you know, his issue
7 has to be personal to him; so again for him to assert that his
8 standing is based on the world being destroyed, he has to have
9 a credible basis to say that for there to be -- for this court
10 to find that it has jurisdiction that there's an injury in
11 fact.

12 THE COURT: But you're going to standing before you
13 find out whether I have jurisdiction.

14 MR. SMITH: But standing is jurisdiction.

15 THE COURT: It is, but I have to, you know, standing
16 is jurisdictional. He has an argument for standing, but it
17 is -- the first question has got to be jurisdiction: what law,
18 what principle is involved? Not the fact that he could be
19 injured. I mean it has to be within my jurisdiction. You
20 know, if -- he might have standing in an Israeli court if, you
21 know, because of something the Israeli government is going to
22 do with respect to some harm that may come to him, but he
23 wouldn't necessarily have standing here because I have no
24 jurisdiction over what the Israeli government is doing.

25 MR. SMITH: Right.

1 THE COURT: So first I have to figure out where do I
2 get my jurisdiction to tell the government what to do. Then is
3 he the right one to raise it.

4 MR. SMITH: Right.

5 THE COURT: The standing comes after we figure out
6 whether or not it should even be in this particular courtroom.
7 Then I figure out whether or not he is the person who ought to
8 raise the question. That's when I get to standing.

9 Right now I don't know if it should even be in this
10 courtroom. That's where the NEPA thing comes in. And, if
11 there's no -- if there's no basis for me to be making a
12 decision about this, I'm not in charge of supervising what the
13 federal government does. I am only in charge of enforcing
14 whatever laws give me the power to judge in a particular case
15 or controversy about something. I mean it's basic.

16 So he may not have standing. I don't know. I'm not
17 reaching a standing. I want to know if I have any jurisdiction
18 before I go to see whether he has standing to raise the
19 particular cause of action. Does he have a cause of action?

20 MR. SMITH: A cause of action is -- jurisdiction is
21 under the federal jurisdiction statute, and there also has to
22 be a waiver of sovereign immunity --

23 THE COURT: Yes, yes.

24 MR. SMITH: -- which is under the -- for NEPA claims
25 it's well-settled it's under the Administrative Procedure Act.

1 So we don't have an argument that he hasn't raised a federal
2 question jurisdiction case or that there's no waiver of
3 sovereign immunity as to the federal agencies. We're not
4 making that argument; so our argument is on standing as the
5 issue of subject matter jurisdiction, standing, mootness, and
6 statute of limitations.

7 THE COURT: Okay. Thank you.

8 Okay. I'm going to take this matter under
9 submission. Anything that has already been scheduled to be
10 filed with respect to CERN, anything either side is supposed to
11 file with respect to anything that's already in place, that's
12 fine. Any other new documents that are to be filed will -- or
13 any new motions will be with a leave of court in order to file
14 it. And we will turn that around quickly, but I don't want any
15 more of these raining declarations that I am receiving in these
16 various filings.

17 Yes, Mr. Wagner.

18 MR. WAGNER: Yes. The next pleading we had planned
19 to file was a motion for the preliminary injunction. Did you
20 want us to do a leave of court to file --

21 THE COURT: You've already filed a motion in some
22 form. Are you now --

23 MR. WAGNER: That was the complaint. We wanted to
24 schedule a hearing on a motion. Do you want us to request
25 leave first in order to schedule that because that was already

1 in the works, too. We're going to give the full 28-day notice
2 and so forth; so it wouldn't be for at least about six weeks
3 from now, four weeks at the minimum.

4 THE COURT: Well, the court will decide when it's
5 scheduled. It is not an automatic thing that it gets scheduled
6 within 28 days. That is the minimum amount of time.

7 You can go ahead and file that, but any document that
8 is required to be filed with your preliminary injunction has to
9 be filed at the same time as the preliminary injunction, and
10 any response, you know, that the government does in terms of
11 opposition to it, everything gets filed at the same time. Do
12 not wait and do this seriatim kind of filing that has been
13 going on.

14 MR. WAGNER: I apologize, Your Honor. Thank you.

15 THE COURT: Thank you. You may file that if that is,
16 you know, something you had intended to do. I just don't want
17 any more of this scattered filing. You know, every day I come
18 in, and there's some new thing that doesn't, you know, meet any
19 rules but is, you know, somewhere has to be put into the web of
20 the information.

21 Okay. Anything further, Counsel?

22 MR. SMITH: Nothing further, Your Honor. Thank you.

23 THE COURT: Thank you. We stand in recess.

24 (Court recessed at 10:52 A.M.)

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COURT REPORTER'S CERTIFICATE

I, Debra Kekuna Chun, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATED at Honolulu, Hawaii, September 3, 2008.

/s/ Debra Chun
DEBRA KEKUNA CHUN
RPR, CRR