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July 13, 2007

Deputy Chief Administrative Judge Bruce R. Harris  
Interior Board of Land Appeals  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 North Quincy Street, Suite 300  
Arlington, VA 22203

re: State Director's request for expedited review, *Shasta Coalition for the Preservation of Public Land*, IBLA 2007-21

Dear Judge Harris:

We are in receipt of State Director Mike Pool's request for "expedited hearing," in the above matter which, though dated June 28, 2007, was delivered to this office on July 11, 2007. The reasons given for Mr. Pool's request for a rush to judgment in this case are spurious – IBLA should take the time to consider the appeal carefully, rather than moving precipitously. As we pointed out in our Statement of Reasons (p. 4), Area 51 is of vital concern to many people and organizations in the Redding Area and throughout Northern California. It should not be disposed of lightly.

Mr. Pool suggests that the key legal issue – NEPA compliance -- has already been decided in the Board's denial of our application for a stay. In fact, less than 3 pages of that decision dealt with that issue; respectfully, the stay decision, which adopted the arguments of the applicant and the State Director, misstated the law. BLM and the applicant asserted that the agency's decision must be sustained if it has taken a "hard look" at the question of whether there may be significant environmental impacts.. They cited *Blue Mountains Biodiversity Project v. Blackwood* 161 F.3d 1208, 1211 (9th Cir.1998) (Applicant's Response to Statement of Reasons, p. 2) and *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson* 685 F.2d 678, 681-682 (D.C. Cir. 1982) (BLM Response to Statement of Reasons, p. 9).

In its denial of the stay application, the Board asserted that under the "hard look" standard, the burden is on the appellant to demonstrate that the agency was wrong. (p. 5.) But both the opinions cited above emphasize that, at the outset, the agency must do more than merely look carefully at the issue. In *Blue Mountains Biodiversity*, the court noted that "If an agency decides not to prepare an EIS, it must supply a "convincing statement of reasons" to explain why a project's impacts are insignificant. Furthermore, the court continued:

Thus, to prevail on a claim that the [agency] violated its statutory duty to prepare an EIS, a plaintiff need not show that significant effects will in fact occur. It is enough for the plaintiff to raise substantial questions whether a project may have a

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significant effect on the environment.

In the *Cabinet Mountains* case, the Ninth Circuit again emphasized that the agency must show why has decided not to proceed with an EIS:

This court has established four criteria for reviewing an agency's decision to forego preparation of an EIS: (1) whether the agency took a "hard look" at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and (4) if there was impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.

In its opinion denying a stay, IBLA did *not* assert that the Appellants had failed to raise substantial questions concerning those impacts; clearly they did. Nor did the decision assert that the State Director had made a "convincing case" that there would be no significant impacts. Rather, it engaged in a review of the Appellant's contentions and concluded that they had not proved that there would be significant environmental impacts from developing Area 51. As noted above, such a finding, alone, is not sufficient to forego preparation of an EIS.

The supposed "equitable" reasons for rushing to judgment are disingenuous. Every day, Area 51 becomes more valuable; thus, rather than having a "chilling" effect on the exchange proponent, his ardor is bound to increase, since he has "locked in" the land at a very low price. As for other potential exchange proponents, they would be only too glad to wait for years to obtain a one-sided bargain such as the proponent is getting in this case.

The public interest demands that you take a good and thorough look at the merits of this case and the applicable law. When you do, we are confident that your decision will favor Appellants.

Yours truly,

Joseph J. Brecher  
Attorney for Appellant Shasta Coalition for the  
Preservation of Public Land

JJB:gr

cc: Erica L.B. Neibauer  
Sandra K. Dunn  
Mike Pool