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BEFORE THE INTERIOR BOARD OF LAND APPEALS

Appeal of Shasta Coalition for the Preservation of Public Land	)	2200 (CA930)P CACA 43098 FD/PT, Salmon Creek Resources Land Exchange
	)	
	)	NOTICE OF APPEAL AND REQUEST FOR STAY
	)	

Pursuant to 43 CFR §4.411, Shasta Coalition for the Preservation of Public Land hereby appeals from the dismissal of its protest of the Redding Field Manager's Decision Record and Finding of No Significant Impact dated April 26, 2006. The dismissal of the protest was dated October 6, 2006.

Appellant submits that the factors set forth in 43 CFR §4.21 (b) are met in this case

**I. THE RELATIVE HARM TO THE PARTIES IF  
THE STAY IS GRANTED OR DENIED**

The relative harm to the parties if the stay is granted clearly tips in favor of Appellant. The Applicant will suffer no damage if the patent is not issued while the IBLA decides the appeal. He can proceed with firming up his plans to develop the federal parcel during the interim, so that he will be ready to present them in close to final form to the Supervisors, should the appeal be denied. With respect to the private parcel, the Applicant has not indicated any intention of logging there, and could not do so without the preparation of a timber harvest plan and lengthy proceedings before the California Department of Forestry.

The Appellant, on the other hand, could suffer significant harm if a patent is issued and the Applicant is allowed to proceed to do preliminary grading. As shown in Section III, this could result in loss of highly-regarded trails, damage to a significant fishery, and a viewshed.

**II. THE LIKELIHOOD OF THE APPELLANT'S SUCCESS ON THE MERITS**

Appellants are likely to succeed on the merits because BLM's actions to do not comply with the National Environmental Policy Act ("NEPA") and its appraisal methods to do not comply with appraisal standards required by FLPMA, 43 CFR §2201.3 and the BLM "Land Exchange Handbook" (BLM Manual Handbook H-2200-1)

## A. NEPA VIOLATIONS

BLM's Environmental Assessment ("EA") and its Finding of No Significant Impact ("FONSI") do not meet the requirements of NEPA for the following reasons:

1. Bias. The most striking feature of the BLM's "analysis" is its spectacular evidence of bias. In every case, the documents make assumptions that favor the exchange. Double standards are the rule. Slanted language appears everywhere. This falls woefully short of the "hard look" mandated under NEPA.

The basic premise of the EA is that loss of Area 51 is justified because of the supposed benefits of acquiring the Grass Valley parcel. But under the governing regulation:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial. 40 CFR §1508.27(b)(1).

2. Conclusory language. A second major issue is the use of conclusory language – the documents make assertions without supplying any supporting evidence or documentation to back them up. There is a long list of cases that conclusory language invalidates a decision under NEPA. See, e.g., *Neighbors of Cuddy Mountain v. U.S. Forest Service* (9th Cir. 1998) 137 F.3d 1372, 1380 ("General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided."); *Sierra Club v. Eubanks* (E.D. Cal. 2004) 335 F.Supp.2d 1070, 1079 ("Even though agency decisions are entitled to deference, NEPA does not allow Defendants to rely on its own opinions and conclusions without providing hard data and analysis for both the public and the court to review."). This is true, as well, with respect to predictions that are plucked out of the air, without any stated factual basis to support them. Listed below are numerous examples of conclusory language.

The BLM appraisal report exhibits this same problem. See *Desert Citizens Against Pollution v. Bisson* (9th Cir. 2000) 231 F.3d 1172, 1182: "The conclusory nature of the report's treatment of highest and best use fails to provide the level of detail required by the UAS, which states: The appraiser's determination of highest and best use is one of the most important elements of the entire appraisal process. Therefore, the appraiser must apply his or her skill with great care and clearly justify the highest and best use conclusion in the appraisal report." To the extent that it is not backed up by facts, this constitutes an independent problem, apart from lack of NEPA compliance.

C. Lack of public participation. Although the NEPA regulations do not require that a draft EA be circulated for public comment, a judge from the Eastern District of California (which would ultimately hear the case if we went to court) has held that the environmental information that will form the basis of an EA must be released to the public before it is issued. It is not enough merely to inform the public that a given project is contemplated. See *Sierra Nevada Forest Protection Campaign v. Weingardt* (E.D. Cal. 2005) 376 F.Supp.2d 984, 992, in which the court held: ". . . [T]he agency must offer significant pre-decisional opportunities for informed public involvement in the environmental review process by releasing sufficient environmental information about the various topics that the agency must address in the EA, such as cumulative impacts, before the EA is finalized."

3. An EIS, rather than an EA should have been prepared. BLM should have prepared an *Environmental Impact Statement* ("EIS") rather than an EA. In the Ninth Circuit, the threshold for preparation of an EIS, rather than an EA is quite liberal:

An EIS must be prepared if substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor. [Citation.] Thus, . . . a plaintiff need not show that significant effects will in fact occur. [Citation.] It is enough for the plaintiff to raise substantial questions whether a project may have a significant effect" on the environment. . . *Blue Mountains Biodiversity Project v. Blackwood* (9th Cir. 1998) 161 F.3d 1208, 1212.

If . . . the agency makes a finding of no significant impact and does not prepare an EIS, it must supply a convincing statement of reasons to explain why a project's impacts are insignificant. *Id.* at 1212.

"A plaintiff seeking to show that an agency should have prepared an EIS instead of a FONSI need not demonstrate that significant effects will occur, but rather must show only that there are substantial questions whether a project may have a significant effect of the environment." *Western Land Exchange Project v. U.S. Bureau of Land Management* (D. Nev. 2004) 315 F.Supp.2d 1068, 1087. Appellant has certainly met this liberal standard here.

### FONSI

<u>Page</u>	<u>Comment</u>
1-2	Development plans are not "speculative"; they are the motivating force behind the exchange. Elsewhere in the document, it is conceded that Rice is unwilling to accept any other parcel in exchange for Grass Valley Creek, because he is interested in development.
2	Interest in the exchange is supposed to be "localized." Try to show this is a wider issue; in any event, the two parcels are "localized"; that doesn't mean they are not important. You should also show that the exchange is certainly "controversial," with all kinds of State, county, and City officials involved, as well as Sen. Feinstein's office.
3	Cumulative impacts are, indeed, significant. See discussion in relation to the EA.
5	Selling off parcels in the Redding area does not constitute "consolidation," but, rather <u>reduction</u> of BLM lands. It would only be consolidation if other lands were acquired to take the place of Area 51 and would provide equivalent recreational and scenic opportunities.
6	The alternative of giving an easement to local agencies under R&PP was dismissed, purportedly because it would not comply with BLM Manual 2740. Yet the portion of the RMP quotes on the same page indicates that local or private agencies should be given "administrative responsibility of any portion of 6,000 acres of public land to meet local community services needs." That is precisely what an R&PP easement transfer would accomplish.
7	It is stated that the sale alternative would not accomplish any of the benefits of the proposed exchange and not achieve the proposal's purpose and need. But it WOULD achieve the purported objective of getting rid of scattered parcels and eliminating the responsibility for managing Area 51. Also, it is stated that disposal to a communities

facilities district was unworthy of consideration because “there is no assurance that the CFD’s bid would prevail.” But no one else is bidding on Area 51 and if there were multiple bids, the revenue to BLM would increase, thus providing more funds to acquire useful parcels.

8 It is claimed that retaining Area 51 is not in the public interest. But preserving recreational opportunities in a rapidly-urbanizing area, eliminating sedimentation to Salt Creek, and preserving a fishery are, in fact, public interest objectives.

8 It is asserted that acquisition of the Grass Valley Creek area would permit rehabilitation of sensitive watersheds and restoration of fish and wildlife values. But nowhere is it explained how this supposed restoration work would be funded.

9 BLM acquired 16,636 acres to reduce sediment loads in the Grass Valley Creek area, using Bureau of Reclamation funds. Why couldn’t BLM use this same mechanism to acquire the 566 acres in the Grass Valley Creek area?

10 Average figures for fuels management are provided, but there is no data on how much BLM has actually been spending on Area 51. I’d bet the number is much smaller.

11 It is stated that Salt Creek is not a good fishery. I assume you can refute these claims.

12 It is stated that local people or agencies could acquire Area 51 from Rice if the transfer goes through. This is highly disingenuous – he is obtaining the parcels for development. As soon as he gets his permits, the value shoots right up. By the same token, BLM could acquire the Grass Valley Creek parcel from him, and the price would not be inflated by development potential.

12 It is claimed that Grass Valley Creek parcel would increase in scenic value if it is acquired by BLM. The same assertion is made with respect to the Trinity River on the following page. This is nonsense – it will look the same, no matter who owns it. Also note that at p. 19 it is said that a scenic assessment has not been done.

13 It is asserted that the harvestable timber on the Grass Valley Creek parcel is worth \$310,00. But the source of this estimate is not provided. Furthermore, this is a very low amount at today’s prices, meaning that very little harvesting would actually take place.

13 It is asserted that Rice can and will make the cash equalization payment; yet the ability of community groups to pay for a purchase is disputed.

#### ENVIRONMENTAL ASSESSMENT

1 “Seamless management” is supposedly required for the Grass Valley Creek area. But no explanation is given as to why this is so. Same question as to the assertion on p. 5.

2 It is conceded that purchase, as well as exchange, is now an available tool for “tenure adjustment” under the Federal Land Transaction and Facilitation Act and BLM and other federal agencies can retain a portion of the proceeds. Yet this alternative is not

considered further.

- 3 Transfer under the R&PP was contemplated under the RMP, but an arbitrary two-year deadline was imposed. When the deadline ran out, that alternative was considered dead. But there is no reason given as to why that deadline was imposed or why it must be observed.
- 6 Note that the so-called “expenses” contained with retention of Area 51 would be in response to “critical public needs.” We’re given no estimate on what these costs have been, but it seems to me they would be very low, especially if volunteers would help with respect to trash dumping and fire hazards. I can’t imagine that law enforcement would cost anything, since the sheriff’s department would respond.
- 6 Mining claims are a red herring. There are no indications that there are any minerals present.
- 7 The sale need not be through competitive bidding. See 43 C.F.R. §43 U.S.C. §1713. (f); 43 CFR §2711.3-3.
- 8 It is asserted that if trail easements were retained, the value of the parcel may be reduced and thus the exchange may not be feasible. But no attempt is made to determine how the supposed change in value would be. It should also be noted that elsewhere in the document (p. 35), it is suggested that Rice might leave the trails intact, thus diminishing the loss of recreational value. The same argument is made with respect to the option of giving easements to state and local entities and the same objection applies. Furthermore, it may be that individual developed parcels might increase in value if they are adjacent to a well-developed trail system.
- 9 Disposal under R&PP is dismissed largely because no one stepped forward during the arbitrary 2-year window. But there is no explanation as to why that time period was selected. Furthermore, if disposal pursuant to the R&PP was considered viable under the 1993 RMP, why is it no longer possible?
- 11 The possibility of exchanging other Redding area tracts is given short shrift. It is speculated that the other tracts would not meet value equalization requirements. But without an appraisal, how can one tell for sure?
- 14 Typical spinmeister jargon implies that Indian tribes favor the exchange because they are interested in Trinity River protection. But there is no indication that Indians have weighed in on this issue, at all.
- 15 The EA states that there is salmon habitat below Buckhorn Dam. But what about on the parcel, itself?
- 16 It is stated that management expenses in urban areas are often high, but no data concerning expenses on Area 51 is provided. Similarly, there is no estimate on how much management of the Grass Valley Creek parcel would cost. Since management opportunities for that parcel are one of the prime justifications for the exchange, there should be a discussion of how much that management would cost.
- 18 Trail use on Area 51 is disparaged and minimized. It will be very useful to show the importance that local government, hiking clubs, etc place on use of the parcel.













