



# EXHIBITS

## Docket No.

0803.GA.03

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Public Comments From San Luis Valley Ecosystem



## Energy Minerals Law Center

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March 24, 2008

by e-mail attachment (pdf) and U.S. Mail

David Neslin, Director  
Colorado Oil and Gas Conservation Commission  
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ORIGINAL

**Re: Lexam Explorations (USA) Inc - Extension of time for permits-to-drill,  
Saguache County, Colorado; Docket No. 0803-GA-03**

Mr. Neslin:

The Energy Minerals Law Center, through undersigned counsel, submits the concerns in this letter on behalf of our client, the San Luis Valley Ecosystem Council ("SLVEC"). These written public comments are provided in support of the Commission granting the relief requested in the protest filed by Saguache County regarding the Lexam Exploration, Inc. ("Lexam") requests for the State of Colorado to issue permits to drill, complete, and begin production on oil and/or gas wells in the Baca National Wildlife Refuge ("Baca NWR"). The Citizens for San Luis Valley Water Protection Coalition also joins and endorses these comments.

The main purpose of this letter is to alert the Commission to the fact that when the subject APDs were issued, the Lexam Exploration, Inc. and the Fish and Wildlife Service (USFWS) had failed to complete the mandated federal process by which many matters regarding Lexam's proposal must be documented before any Lexam proposal may be acted upon or otherwise approved by the USFWS.

As set forth by the Saguache County protest, all matters regarding the reasonableness of the Lexam proposal, the surface impacts, and the reasonable accommodation (E&P Wastes, well location, wetlands, mitigation measures, etc.) are in the process of being addressed by the mineral owners (Lexam et. al.), the manager of the Baca NWR (USFWS), and the owners of the National Wildlife Refuge (the public) subject to a pending federal court order. *See Attachment 1: San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service*, Case No. 07-CV-00945 WDM (Doc 46 - February 26, 2008 Status Report). The USFWS approvals, and the submission of the USFWS approvals to the COGCC, are the direct subject of pending federal litigation. *See Attachment 2, (Id. Doc. 1- Complaint at ¶¶ 76-79).*

The federal court proceedings are implicated by the COGCC proceedings because USFWS and Lexam denied the SLVEC's repeated request that the USFWS and Lexam complete the processes mandated under the National Environmental Policy Act ("NEPA") before committing

to a course of action regarding the Lexam proposal. *See Attachment 2, (Id. Doc. 1- Complaint)*. As a result, SLVEC filed suit last spring against the USFWS in the Federal District Court of Colorado. The lawsuit requested that the Court compel the USFWS to comply with the public disclosure and environmental review procedures of NEPA to determine, among other things, questions of reasonable accommodation. *Id.*

The SLVEC lawsuit requested that the Court require compliance with the mandatory NEPA process before USFWS issued any decisions or approvals regarding Lexam's request to use and occupy the federally owned surface estate at the Baca NWR. *See Attachment 2, (Doc. 1- Complaint at pp 12-17)*. The federal court remanded the matter to the USFWS for compliance with NEPA and explicitly directed that the USFWS "shall prohibit all ground disturbing activities related to the exploration and development of the mineral estate underlying the Baca National Wildlife Refuge during the NEPA process." *See Attachment 3: (Doc 44 – Order and Remand)*.

Thus, it is quite reasonable for the COGCC to deem the previously approved APDs as void *ab initio* since the Lexam permits incorporated USFWS decisions regarding, among other things, impacts and mitigation measures which had not received the NEPA analysis required by federal law. Again, the NEPA analysis is ongoing. *See Attachment 1 (Id. Doc 46 - Status Report)*. In light of the USFWS failure to conduct NEPA before approving the conditions which became part of the COGCC approval, the Lexam permits are properly invalid *ab initio* and the Commission should require that Lexam to wait to file new APD requests until such time as the NEPA process has been completed so that the USFWS and the public may properly exercise their rights regarding the surface estate in accordance with federal law.

The ongoing USFWS NEPA process must analyze, among other things, whether Lexam's development proposal and the proposal to use and occupy the federal surface estate is: 1) reasonable, 2) necessary, 3) adopts reasonable alternative means, and 4) includes sufficient mitigation measures. *See: Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 933-34 (Colo. 1997); *see also* C.R.S. § 34-60-127 (Reasonable accommodation amendment). It is well established that questions regarding the reasonable use of the federal surface must be addressed by the federal agency in accordance with the NEPA process. *Sierra Club v. DOE*, 255 F.Supp. 2d 1177 (D.Colo 2002) ("Armed with discretionary authority to determine reasonable use of the surface estate, which is a National Wildlife Refuge, [the Federal Agency] must comply with NEPA . . .").

Whether or not the Commission takes action to invalidate the Lexam APDs *ab initio*, the Saguache County protest properly requests the Commission to allow the APDs for the Baca NWR to lapse by their own terms. The language of the COGCC rules recognizes that the integrity of the Commission depends on respect for the rule of law in conducting official activities:

#### **Rule 516      STANDARDS OF CONDUCT**

[. . .] To achieve these standards Commissioners and Hearing Officers should:

- (1)      Discharge their responsibilities with high integrity.

- (2) Respect and comply with the law. Their conduct, at all times, should promote public confidence in the integrity and impartiality of the Commission.

The COGCC rules explicitly recognize that these matters of federal law, including the NEPA requirements, the forthcoming final environmental reports, and the federal court orders are within the Commission's scope of consideration and analysis:

**Rule 519      APPLICABILITY OF COLORADO COURT RULES AND ADMINISTRATIVE NOTICE.**

[. . .] **c. Administrative notice.** The Commission may take administrative notice of:

- (1) Constitutions and statutes of any state and of the United States;
- (2) Rules, regulations, official reports, decisions, and orders of state and federal administrative agencies;
- (3) Decisions and orders of federal and state courts;

Thus, the Commission's Rules contain decisionmaking authority which compels the Commission to recognize and respect the unique combination of federal and state laws applicable to the Baca NWR. The COGCC rules require the Commission to respect that applicable federal law prohibits the USFWS from making any decisions regarding the Lexam proposal until compliance with NEPA is achieved.

By contrast, as the pending litigation makes clear, the state permits were sought by Lexam/USFWS without regard to the mandatory requirement that NEPA compliance precede any USFWS approvals. Thus, by granting the Saguache County request, the Commission would be acting in accordance with its own rules and would allow the federal NEPA process to inform the Commission's own decisionmaking process, especially those decisions regarding location, minimization of surface impacts, and handling of E&P wastes regarding these wells.

In sum, it is not apparent that Lexam provided the COGCC with notice that Lexam no longer has lawful access to the surface estate or that the USFWS/Lexam agreements were reopened by the federal court remand to USFWS in the SLVEC litigation. However, the Saguache County request provides the COGCC with the notice and the opportunity to recognize that the underlying Lexam permits were issued contrary to the federal laws which set forth the process by which a mineral owner may obtain lawful access and approval of a proposal to develop private mineral rights underlying federal public lands in Colorado. Based on the information in the County protest and these comments, the Lexam permits should be recognized as invalid *ab initio* and the Saguache County protest be granted.

I look forward to making further oral comments at the public hearing. Should you have any questions or concerns regarding this matter, please do not hesitate to contact me.

Sincerely,  
s/Travis E. Stills

Travis E. Stills  
Managing Attorney  
Energy Minerals Law Center

cc: Tricia Beaver, COGCC Hearings Officer (tricia.beaver@state.co.us)  
Ben Gibbons, Attorney, Saguache County  
Saguache County Board of County Commissioners

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 07-cv- \_\_\_\_\_ - AP

San Luis Valley Ecosystem Council,  
a Colorado non-profit corporation,

Plaintiff,

v.

U.S. Fish and Wildlife Service,  
a federal agency,

Defendant.

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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## I. INTRODUCTION

1. The U.S. Fish and Wildlife Service (referred to as the “USFWS,” “Agency” or “Defendant”), violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§701, *et seq.*, by unlawfully approving staking/surveying activities, seismic operations, the location of well pads, access roads, connection to proposed pipelines, well servicing, and other activities on federal lands as proposed by Lexam Exploration Inc. (“Lexam”) in connection with a proposed “high risk” oil and gas exploration project in the Baca National Wildlife Refuge (“Baca NWR” or “Refuge”). The USFWS manages the federal lands in the Baca NWR that are at issue in this dispute.

2. The Baca NWR consist of approximately 92,500 acres of wetlands, sagebrush, and riparian lands located in Saguache and Alamosa Counties, Colorado. Prominent land features within the Refuge include sand dunes, forested areas, and several thousand acres of ditch-serviced and irrigated lands. The Baca NWR is located in the heart of the San Luis Valley, which extends over 100 miles from north to south and 50 miles from east to west, and is surrounded on three sides by towering mountains, including the Sangre de Cristos, the San Juans, and the Saguache Range. These surrounding mountains feed the arid valley with precious surface water and replenish an expansive underground reservoir. According to the USFWS, “All life (human and wild) hangs in the balance of this natural water cycle. Rivers fed by mountain snow and wetlands created by artesian pressure create threads and patches of life on the valley floor.” *See* <http://www.fws.gov/alamosa/BacaNWR.html>.

3. The Baca NWR was acquired by the federal government due to the unique hydrological, educational, wildlife, recreational, and other diverse resources deserving preservation for the enjoyment of future generations.

4. The FWS manages the Baca NWR under Congressional direction and authorities found in The Great Sand Dunes National Park and Preserve Act of 2000 (P.L. 106-530, codified at 16 U.S.C. § 410hhh), The National Wildlife Refuge System Administration Act of 1966, as amended in 1997, (16 U.S.C. 668dd)(the organic act applicable to the management of National Wildlife Refuges), and other federal laws of general application to federal lands, including NEPA.

5. The USFWS has not completed biologic inventories on the Baca NWR. At the Great Sand Dunes National Park, located adjacent to the Baca NWR, biologic inventories have revealed areas of global biologic significance, including at least twenty-eight rare, threatened, or endangered species, including the globally imperiled slender spider flower. Similar findings are expected on the Baca NWR where biologists have recently discovered a genetically unique population of the Rio Grande sucker that the Colorado Division of Wildlife considers to be critical to the recovery of this imperiled species of fish.

6. On information and belief, local USFWS officers with offices near the Baca NWR in Saguache County, Colorado were directed by USFWS and Department of the Interior officials in Washington, D.C., to approve various exploration plans and surface use proposals submitted by Lexam including operating plans, well pad locations, disposal requirements, road locations/standards, and other surface use permissions needed by Lexam for the development of

proposed oil and gas exploration wells known as “Lexam #5” and “Lexam #6” (collectively “Lexam Wells”).

7. Portions of the mineral rights below the Baca NWR are privately held by Lexam and others. Pursuant to USFWS approvals and with USFWS assistance, Lexam has conducted geophysical exploration over a vast area of the Baca NWR. Lexam’s exploration activities have impacted hundreds of acres. In some areas, exploration activities have left visible scars in the fragile soils.

8. On its website, ([lexamexplorations.com](http://lexamexplorations.com)) Lexam has publicly represented that its proposed activity on the Baca NWR is an example of the type of “very high risk projects” that Lexam is willing to accept. Lexam’s website indicates that few other companies are willing to accept such a high risk, high cost project. According to Lexam’s website, geologists have generally believed that the necessary geologic conditions do not exist under the Baca NWR to support successful oil or gas development. The USGS has published estimates that drilling for oil and gas in this area has a five percent chance of success.

9. Lexam anticipates that the costs associated with drilling the two wells and final completion to total approximately \$21.0 million. See [http://lexamexplorations.com/reports/Lexam\\_summary\\_report\\_june\\_2006.pdf](http://lexamexplorations.com/reports/Lexam_summary_report_june_2006.pdf). At the end of the fourth quarter of 2006, Lexam had working capital of \$3.6 million, compared with a working capital deficit of \$540,000 in 2005. (dollar figures are expressed in Canadian Dollars.) Lexam has no direct experience as an operator of oil and gas wells.

10. As part of what Lexam has characterized as a “high cost,” “high risk” oil and gas project in the Baca NWR, Lexam plans to drill two oil and gas wells to a depth of 14,000 feet. The

construction of each well is likely to take many months and perhaps as much as a year and would include such activities as road construction, well pad construction, followed by well spudding, months of drilling activities, leading up to final well completion. If the wells go into production, years (perhaps decades) of production and maintenance operations could follow.

11. The construction and operation of the wells would require private use and occupancy of the federal surface estate by two well pads. Each well pad would require its own pipelines, treatment facilities, delivery equipment, etc. The current proposal would require Lexam to upgrade and use approximately 10 miles of existing Baca NWR ranch roads to accommodate industrial use levels and would require the construction of approximately 2 miles of roads through the unique and unscarred landscape of the Baca NWR.

12. If production occurs, oil and gas from the Lexam wells would likely be trucked to market until a series of collector pipelines and a pipeline delivery system could be constructed to take the oil or gas to the relevant hubs and markets. Production operations would likely include the daily servicing and monitoring of each well and associated production and delivery equipment.

13. Depending on the level of success of Lexam's "high risk" proposal, production activities could potentially use and occupy these two well sites and other portions of the Baca NWR for the next 5-50 years. Regardless of whether or not production occurs, well plugging, abandonment and reclamation activities are a mandatory part of Lexam's proposed project.

14. Alternatively, Lexam's "high risk" drilling project could go bust, leaving behind irreparable damage to the unique and fragile "threads and patches of life on the valley floor" that exist within the Baca NWR. A reasonable range of cost estimates for the eventual plugging and

reclamation of surface impacts caused by the Lexam project has not been disclosed to the public or to the USFWS employees.

15. In order to ensure that only reasonable operations are approved by an informed federal decisionmaker acting with the benefit of public involvement, Plaintiffs SLVEC, along with other groups and local government entities, have requested that the USFWS conduct a full and open analysis of the proposal in accordance with NEPA. The USFWS has taken the position that since the agency could not impose a *per se* ban on the mineral development, NEPA analysis is not required. The USFWS position is in error.

16. The USFWS's failure to conduct NEPA for the activities related to Lexam's two proposed wells, as well as its position that it has no discretion or authority to manage federal resources and therefore need not comply with NEPA, is without merit and directly contradicts Chief Judge Babcock's holding in Sierra Club v. DOE, 255 F.Supp. 2d 1177 (D.Colo 2002).

17. In Sierra Club, the Court found:

Furthermore, under Colorado state law, where interference with surface uses is "unreasonable from the perspective of the surface owner," the [Federal] surface owner may require the [private] mineral owner to use some reasonable alternative.

Id. at 1186, *quoting* Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 933--34 (Colo. 1997).

The court goes on to hold that:

Thus, as a surface owner, [the Federal Agency] maintains some discretion to determine how, where, and when mining can occur and ensure that the surface use is reasonable. Armed with discretionary authority to determine reasonable use of the surface estate, which is a National Wildlife Refuge, [the Federal Agency] must comply with NEPA concerning the development of the mining operation.

Id.

18. A surface use agreement exists with terms that purportedly provide Lexam with limited access, occupancy, and use of the surface estate in the Baca NWR under the terms that Lexam's activities are conducted in a manner "reasonable" to the purposes of the mineral estate and provided that such access does not cause "undue surface disturbance." Among other things, the surface use agreement prohibits Lexam from conducting "unreasonable" surface use, requires advance consultation with USFWS regarding proposed operations and roads, and requires Lexam to use good faith efforts to implement USFWS's reasonable comments and alternatives.

19. Access, use and occupancy that does not conform with the terms of the surface use agreement: are not allowed; may be denied by USFWS; may be enjoined in a civil proceeding; and/or, may be prosecuted as a trespass on the federal surface estate pursuant to federal law.

20. Where the surface use agreement is silent to a particular subject matter, such as impacts to wildlife and recreational purposes of the Baca NWR, Colorado common law provisions of "reasonable and necessary access" and "reasonable alternatives" confirm that the USFWS retains authority and discretion to affect Lexam's proposed use and occupancy of the Baca NWR and to deny proposed uses that exceed the implied easement found in Colorado common law. *See Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997).

21. The USFWS retains sufficient discretionary authority over Lexam's proposed surface use of the Baca NWR to require compliance with NEPA.

22. Defendant's failure to carry out NEPA's informed decisionmaking and public participation mandates is contrary to law and causes procedural harms which can be remedied by declaratory judgment invalidating the USFWS approvals identified herein, injunction against USFWS approval of any further agency actions regarding the Lexam proposal, and a remand to

the USFWS that compels the agency to carry out the duties that Congress has imposed on the federal land management agency by ensuring the USFWS adheres to NEPA's procedural protections of the environment.

23. Unless directed by this court, the USFWS will not conduct NEPA analysis to identify, disclose, and address: 1) the impacts of Lexam's "very high risk project;" 2) available alternatives courses of action ; 3) the dollar amount required for a reasonable reclamation bond appropriate to reflect impacts, costs, and project capitalization involved in the Lexam proposal; 4) mitigation measures necessary to protect the federal surface estate; and, 5) the reasonableness of the Lexam's proposed uses of the federal surface estate.

24. If provided with the opportunity via the requested relief - remand for NEPA compliance - the SLVEC and its members intend to use the environmentally protective procedures of the NEPA process to address the complex substantive controversies that are involved in ensuring adequate protections of the unique Baca NWR and fulfilling the Refuge purposes - providing habitat and refuge for a wide range of wildlife and protecting the important remaining "threads and patches of life on the valley floor."

## **II. JURISDICTION AND VENUE**

25. This Court has jurisdiction to review agency action and to order effective relief sought in this civil action pursuant to 28 U.S.C. §§ 1331 (federal question); 1346 (United States as defendant); 1361 (mandamus); 2201 (declaratory relief); 2202 (injunctive relief); and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* There is a present and actual controversy between the parties that is ripe for judicial review.

26. Where a federal agency fails to adhere to procedural requirements of the APA or the requirements of reasoned/open/informed agency decisionmaking such as are set forth in NEPA, the APA explicitly waives sovereign immunity and provides a cause of action that provides for judicial review of the federal agency's actions and omissions. 5 U.S.C. § 701 *et seq.*

27. The project area at issue in this lawsuit is located in the San Luis Valley in Saguache County, Colorado, on federal land within the boundaries of the Baca National Wildlife Refuge. The agency's actions and approvals and violations of federal law that are addressed in this complaint transpired in Colorado. Venue in this Court is therefore proper under 28 U.S.C. § 1391(e).

### **III. PARTIES**

28. Plaintiff, SAN LUIS VALLEY ECOSYSTEM COUNCIL, ("SLVEC") is a non-profit organization whose mission is to protect and restore - through research, education, and advocacy - the biological diversity, ecosystems, and natural resources of the San Luis Valley and associated bioregion, balancing ecological values and human needs. Since 1995, SLVEC has served south-central Colorado, a vast area of some 8,100 square miles that includes two National Wildlife Refuges, the Rio Grande National Forest, the Great Sand Dunes National Park, numerous state wildlife areas, 230,000 acres of wetlands, and some of Colorado's most remote wilderness. Originally formed to offer input for the Revised Management Plan of the Rio Grande National Forest, today SLVEC is a voice for citizens in the valley concerned about threats to our public lands by increased motorized recreation, mismanaged livestock grazing, destructive timber sales, unbridled development by

the ski industry, and mineral development that could impair the ongoing agency efforts to create a sound management plan for the Baca National Wildlife Refuge. SLVEC has established a reputation for being a strong environmental advocate that finds workable solutions. SLVEC works on the Baca NWR to preserve natural resources and unfragmented wildlife habitat, and restore wildlife migration corridors. The mailing address for the SLVEC is: P.O. Box 223, Alamosa, CO 81101. SLVEC offices are located at 537 Main St. Alamosa, CO 81101.

29. SLVEC and its members have been active participants in the ongoing management of the Baca NWR. SLVEC has attended numerous private and public meetings related to management of the Baca NWR. In response to the complexities of managing the Baca NWR and to ensure informed public involvement in these matters, SLVEC has repeatedly requested that the USFWS use the NEPA process to address mineral development proposals on the Baca NWR.

30. SLVEC and its members use, enjoy, and plan to continue to use and enjoy on a regular basis, the public lands and natural resources within and adjacent to the areas of the Baca NWR slated for Lexam's roads and oil and gas facilities for many health, recreational, moral, scientific, spiritual, professional, educational, aesthetic and other purposes that would be degraded by the development and access that Defendant's approvals and assistance has and will make possible. SLVEC's members enjoy viewing wildlife in the Baca NWR and viewing resident and migratory wildlife on public and private lands in the surrounding area. SLVEC and their members benefit from the intact ecosystem of the Baca NWR as it exists today.

31. SLVEC and its members will be adversely affected by Defendant's issuance of special use authorizations and other approvals and assistance to Lexam's proposed "high risk" oil and gas development. USFWS authorizations and assistance to Lexam will harm the biological

integrity of the area which SLVEC strives to protect. The special use authorizations granting use and occupancy of the Baca NWR are causing, and continue to cause direct, immediate, and irreparable informational and procedural injury to SLVEC's interests by denying the group and its members the right to informed decision making and full disclosure under NEPA. Unless relief is granted, the unique hydrological, educational, wildlife, recreational, and other diverse resources that Congress recognized as deserving preservation for the enjoyment of future generations, will not be protected. Unless the relief prayed for herein is granted, SLVEC and its members will continue to suffer ongoing and irreparable harm and injury to their interests, including their future use and enjoyment of the wildlife and related recreational purposes of the Baca NWR.

32. Granting the requested relief can remedy the injuries to SLVEC by providing the informed decisionmaking and public participation that Congress, through NEPA, put in place to afford substantive protections for the federal public lands.

33. Defendant, UNITED STATES FISH AND WILDLIFE SERVICE ("USFWS") is the federal agency within the U.S. Department of the Interior responsible for managing the Baca National Wildlife Refuge. In carrying out its management of the Baca NWR, among other things, the USFWS must consider and disclose the impacts of its decisions to the public through the specific processes and environmental analyses that are set forth in NEPA. The USFWS is regulated by NEPA in order to ensure informed decisionmaking and public participation regarding the proposed uses that the USFWS approves or assists on the Baca NWR lands under its supervision. USFWS is also responsible for ensuring that its actions do not have adverse environmental impacts or limit the choice of reasonable alternatives for management of the Baca

NWR pending the completion of the required NEPA analysis in this case, which is an Environmental Impact Statement.

34. Plaintiff has not joined the non-federal owners or lessees of the private mineral estate in this action against a federal agency under federal law. Plaintiff does not believe there are any necessary or indispensable parties to this federal lawsuit seeking to enforce the informed decisionmaking and public participation requirements of the NEPA. Plaintiffs have brought this lawsuit in federal court to settle a dispute with a federal agency over the statutory construction of federal laws applicable to all federal agencies. Out of an abundance of caution and because Plaintiff believes time is of the essence, the apparent owner of the mineral estate - Lexam Exploration Inc. - has been provided a courtesy copy of this Complaint.

#### **IV. STATUTORY AND REGULATORY BACKGROUND**

35. Congress enacted the National Environmental Policy Act ("NEPA") to "promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4331. To fulfill this stated goal, NEPA requires federal agencies to analyze the environmental impacts of a particular action before the proposed action may proceed. *Id.* § 4332(2)(C). In addition, federal agencies must notify the public of proposed actions and allow the public to comment on the fully-disclosed environmental impacts of the proposed project.

36. NEPA requires preparation of an EA and/or EIS and adherence to the NEPA process for all "major Federal actions significantly affecting the quality of the human environment..." 42 U.S.C. § 4332(B), 40 C.F.R. § 1508.21 ("NEPA process" means "all measures necessary for compliance with the requirements of [42 U.S.C. § 4321] and [42 U.S.C. § 4331-4335] of NEPA").

37. “Major Federal Actions” include “actions with effects that may be major and which are potentially subject to Federal control and responsibility” and “include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies...” 40 C.F.R. §1508.18 (emphasis supplied).

38. The trigger for NEPA compliance and use of the NEPA process to “prevent or eliminate damage” to the environment is a “federal action.” 42 U.S.C. § 4332(2)(C).

39. Federal courts have held that the federal surface management agencies must discharge their land management activities in accordance with NEPA, even where a non-federal owner of a mineral estate proposes to develop the severed mineral estate.

As a surface owner, [the Federal Agency] maintains some discretion to determine how, where, and when mining can occur and ensure that the surface use is reasonable. Armed with discretionary authority to determine reasonable use of the surface estate, which is a National Wildlife Refuge, [the Federal Agency] must comply with NEPA concerning the development of the mining operation.

Sierra Club v. DOE, 255 F.Supp. 2d. 1177 at 1186 (D.Colo 2002)(discussing Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 933--34 (Colo. 1997)); *see also*, Friends of South Montezuma Valley v. Joyner, 2004 U.S. Dist LEXIS 11820, \*16 (D. Colo. April 14, 2004)(BLM duty to protect federal surface estate from degradation resulting from mining underlying private mineral estate was “major federal action” under NEPA); *see also* Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 933-34 (Colo. 1997)(surface and mineral estates co-equal in Colorado); *see also* Duncan Energy Co. v. United States Forest Serv., 109 F.3d 497, 498 (8th Cir. 1997) (“federal law gives the Forest Service the power to regulate Forest System lands and agreed with the Forest Service that it had the limited authority [based on state law] to determine the reasonable use of the federal surface”)(citing Duncan Energy Co. v. United States Forest Serv., 50 F.3d 584,

589--91 (8th Cir. 1995)); *see also Kleppe v. New Mexico*, 426 U.S. 529 (1976)(addressing federal Property Clause and Supremacy Clause).

40. USFWS policy and a regulatory preamble published in the Federal Register recognize the need for NEPA compliance:

NEPA compliance is required whenever we take an action. It is the action that triggers NEPA. A compatibility determination is not an action under NEPA, rather it is only one of many factors that we take into account whenever we consider taking an action, i.e., allow a refuge use. Deciding whether to allow the use is the action, not the compatibility determination. Comprehensive conservation plans, step-down management plans, and the issuance of special use permits are actions about allowing or not allowing refuge uses. These actions require NEPA compliance.

65 Fed. Reg. 62484 at 62494 (October 18, 2000)(USFWS “compatibility policy”) *accord* 65 Fed. Reg. 62458 at 62475 (October 18, 2000)(preamble to USFWS “compatibility regulations”).

41. The cornerstone of the NEPA process is the environmental impact statement (“EIS”) that federal agencies must prepare and circulate for public review and comment. An EIS is required for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4.

42. Federal agencies must conduct the NEPA process prior to the initiation of any major federal action so that the environmental impacts can be considered and disclosed to the public during the decision-making process. 40 C.F.R. §§ 1501.2, 1502.5. During the NEPA process and in the environmental document(s) prepared for public review and comment, the federal agency must, *inter alia*, use a systematic, interdisciplinary approach which identifies direct, indirect, and cumulative impacts of the proposed action, considers alternative actions (including a “no action” alternative) and their impacts, identifies all irreversible and irretrievable commitments of resources associated with the action, initiates and utilizes ecological information, and actively

involves the public and local institutions. 42 U.S.C. § 4332(2)(A-H). These requirements are commonly referred to as the agency's duty to take a "hard look" at the environmental impacts of its proposed action.

43. NEPA requires federal agencies to consider three types of actions in an EIS; connected, cumulative, and similar. 40 C.F.R. § 1508.25; *see also* Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985). Connected actions are closely related actions that the agency must discuss in the same impact statement. 40 C.F.R. § 1508.25(a)(1). Connected actions are those that:

- i. Automatically trigger other actions which may require environmental impacts statements;
- ii. Cannot or will not proceed unless other actions are taken previously or simultaneously; or
- iii. Are interdependent parts of a larger action and depend on the larger action for their justification.

Id. § 1508.25(a)(1)(i-iii); *see e.g.*, Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1035 (10th Cir. 2001)(a NEPA document must "analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts of 'past, present, and reasonable foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.'").

44. The federal agency must also adhere to the NEPA process to identify and evaluate the effectiveness and feasibility of any mitigation measures adopted to alleviate identified impacts from the proposed action. 40 C.F.R. §§ 1502.14(f), 1502.16(h).

45. A condition that must be satisfied before an agency can approve a request for surface use and occupancy of federal land is NEPA's requirement that agencies rigorously explore and objectively evaluate all reasonable alternative courses of action and take a hard look at direct,

indirect and cumulative impacts of their decisions. 42 U.S.C. § 1502.14. The development and consideration of NEPA alternatives “is at the heart” of the NEPA process, “sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” Id.

46. For a specific proposal such as approval of surface use and occupancy, NEPA regulations require maintenance of the status quo until the NEPA process is complete:

Until an agency issues a record of decision...no action concerning the proposal shall be taken which would:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

40 CFR 1506.1(a).

47. Where there is ongoing development of a management plan, and the interim management plan has not been developed in accordance with NEPA, additional interim protections apply:

While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

- (1) Is justified independently of the program;
- (2) Is itself accompanied by an adequate environmental impact statement; and
- (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

40 C.F.R. § 1506.1(c)(emphasis supplied).

48. The existence of state permit(s) regarding drilling of privately owned minerals is of no consequence to the need to comply with NEPA since federal agencies must make their own

decisions regarding the use and occupancy of federal lands. *See e.g. Kirkpatrick Oil & Gas Co. v. United States*, 675 F.2d 1122 (10<sup>th</sup> Cir.1982); *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

49. Relevant caselaw supports relief that includes declaration of the federal approvals invalid and an injunction that prevents further federal actions to allow surface use and occupancy or to otherwise assist with the Lexam proposal pending compliance with NEPA. *See e.g. Denver v. Bergland*, 659 F.2d 465 (10<sup>th</sup> Cir. 1982); *Ducan Energy Co. v. U.S. Forest Service*, 50 F.3d 584 (8<sup>th</sup> Cir. 1995).

## **V. PROCEDURAL BACKGROUND**

50. The factual record in this case will be established and the case resolved pursuant to judicial review based on provisions of the APA. The parties and the Court will undertake a searching review of the whole administrative record, with limited discovery and supplementation as allowed by relevant caselaw.

51. Plaintiff's statement of facts relies heavily on investigations, information, and review of documents that should be contained in the agency's administrative record. Plaintiff has already done significant work in compiling and reviewing agency documents that should be included in the administrative record as defined by the APA and relevant caselaw.

52. In order to ensure efficient and timely adjudication of this matter, Plaintiff will separately request by letter to Defendant that Defendant assemble and certify the administrative record on the same date as it files its Answer or other responsive pleading. This request is reasonable since Defendant's investigations into the allegations in this Complaint should require the assembly and review of the whole administrative record before Defendant can competently file an Answer or other responsive pleading.

## **VI. STATEMENT OF FACTS**

53. The present controversy concerns whether or not a “federal action” exists where Lexam has used - and proposes to continue to use and occupy - the Baca National Wildlife Refuge (“Baca NWR”) for oil and gas production activities.

54. Each of these several contested USFWS surface use and occupancy approvals constitute final administrative determinations of the agency. Lexam has relied upon USFWS approvals in conducting oil and gas exploration activities and in seeking other governmental approvals.

55. Lexam obtained permits from the Colorado Oil and Gas Conservation Commission for Lexam #5 and Lexam # 6, which are conditioned on Lexam’s acquisition of USFWS approval of Lexam’s proposed surface use and occupancy of the Baca NWR.

56. Each of the contested USFWS surface use and occupancy approvals constitute “final agency action” and are ripe for judicial review. The ongoing series of agency actions addressed in this complaint were taken by USFWS without first adhering to the procedures required by the NEPA. Failure to conduct NEPA procedures has resulted in the denial of public participation opportunities and informed decisions regarding the use and management of federal public lands.

57. The Lexam proposal to use and occupy the Baca NWR to conduct exploration activities and to drill two oil and gas wells under the federally owned surface estate are “major federal actions” subject to NEPA because the Lexam proposals “are potentially subject to Federal control and responsibility” over Lexam’s use and occupancy of the federally owned surface estate and/or because the exploration and drilling proposals “include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies...” 40 C.F.R. §1508.18.

58. USFWS has taken the position that NEPA compliance is not required because the agency is not able to impose a *per se* ban against Lexam's proposed activities. USFWS fails to recognize that the federal assistance and surface use approvals necessary for the Lexam proposal to go forward are sufficient to trigger the informed decisionmaking and public participation provisions of NEPA.

59. A twenty-seven page (excluding appendices) surface use agreement dated "3/25/92" exists with terms that purportedly provide Lexam with limited access, occupancy, and use of the surface estate in the Baca NWR under the terms that Lexam's activities are conducted in a manner "reasonable" to purposes of accessing the mineral estate, provided such access does not cause "undue surface disturbance."

60. Among other things, the 1992 surface use agreement prohibits Lexam from "unreasonable" surface use, requires advance consultation with USFWS regarding proposed operations and roads, and requires Lexam to use good faith efforts to implement USFWS's reasonable comments and alternatives.

61. Access, use and occupancy that does not conform with the terms of the surface use agreement: are not allowed; may be denied by USFWS; may be enjoined in a civil proceeding; and/or, may be prosecuted as a trespass on the federal surface estate pursuant to federal law.

62. Where the surface use agreement is silent on a particular subject matter, such as impacts to wildlife and recreation, Colorado common law provisions of "reasonable and necessary access" and "reasonable alternatives" confirm that the USFWS retains authority and discretion to affect Lexam's proposed use and occupancy of the Baca NWR and to deny uses that exceed the

implied easement found in Colorado common law. *see* Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913 (Colo. 1997)

63. USFWS has already issued several approvals related to Lexam's proposal, including Special Use Permits for well survey/staking activities in July 2006 and Lexam's operation plan to carry out seismic exploration activities in January/February 2007, without first complying with NEPA.

64. On information and belief, USFWS has (unlawfully) provided Lexam with numerous oral surface use approvals and permissions regarding the Lexam #5 and Lexam #6 wells, without first complying with NEPA.

65. USFWS has approved and assisted in creating baseline water sampling program in coordination with the Lexam drilling proposal, without first complying with NEPA.

66. USFWS and Lexam must enter into an agreement concerning the sampling frequency for three water monitoring wells and will assist in the water monitoring program, and intends to do so without first complying with NEPA.

67. USFWS has taken significant steps toward entering into a "negotiated operating plan" where USFWS would approve Lexam's proposed use of the Baca NWR, without first complying with NEPA.

68. USFWS has proposed to assist in Lexam's proposal by participating in a voluntary water augmentation plan that would include federal water rights in a plan to provide a source of water necessary for Lexam to carry out drilling operations, without first complying with NEPA. NEPA compliance would allow public review the proposed water augmentation plan and would likely reveal that USFWS cannot allow Lexam to use Refuge water rights as a source for drilling

water without violating federal law, including the Great Sand Dunes National Park and Preserve Act of 2000 (P.L. 106-530, codified at 16 U.S.C. § 410hhh).

69. In addition to surface impacts from construction and operation of the well and wellpad, the surface development of wells #5 and #6 would require road and pipeline access over federal land.

#### **Chronology of the Site-Specific Agency Actions**

70. In August 2006, USFWS hosted a meeting to discuss a Lexam proposal for drilling in the Baca NWR. The impact of the Lexam exploration on the development of nearby federally owned minerals was discussed at the meeting. Numerous local residents, including member of SLVEC protested the proposed development.

71. In September 2006, a private facilitator (the Sonoran Institute) assisted USFWS in conducting a public meeting regarding the Lexam proposal. No NEPA documentation was provided.

72. At an October 2006 meeting facilitated by the Sonoran Institute, USFWS asserted that the agency had no power to affect the Lexam use of the federal surface estate. At that meeting, it was revealed that the USFWS and Lexam had entered negotiations to establish reasonable use of the federal surface estate. USFWS used the Sonoran Institute to hold public meetings, but did not provide NEPA documentation of the Lexam proposal and did not adhere to NEPA-mandated procedural requirements.

73. In November 2006, representatives from Lexam stated publicly that Lexam had no legal obligation to consider community concerns. It was publicly revealed that Lexam and USFWS

were negotiating terms of surface use, but were not using the NEPA process or preparing NEPA documentation.

74. In November 2006, SLVEC and other members of the public, publicly requested that the Lexam proposal receive full scrutiny under NEPA.

75. In December 2006 members of the SLVEC voiced opposition to USFWS approval of any Lexam operations that did not first receive full NEPA review.

76. In August 2006, Lexam applied to the Colorado Oil and Gas Conservation Commission ("COGCC") for two state permits to drill ("APD") the Lexam #5 and Lexam #6 wells under the Colorado Oil and Gas Conservation Act. The Colorado Oil and Gas Conservation Act ("COGCA") provides the COGCC with limited state authority to regulate specific technical aspects of oil and gas production in Colorado. See Board of County Commissioners v. Bowen/Edwards Associates, Inc., 830 P.2d 1045 (Colo.1992)(addressing preemption and the limitations of the COGCA).

77. The COGCC does not have authority to grant Lexam with the right of surface use of federal lands for oil and gas development. The USFWS, not COGCC, has the legal authority to determine reasonable surface use of the Baca NWR lands for oil and gas development.

78. Both APDs were issued by the COGCC on April 3, 2007, with conditions of approval approved by the USFWS and which require additional USFWS approvals of Lexam proposals.

79. The USFWS approvals relied upon by Lexam in its COGCC applications constitute final agency action by the USFWS with regard to location and roads required for the drilling of the Lexam #5 and Lexam #6 wells. These actions were taken without compliance with NEPA.

80. On December 8, 2006, USFWS sent a letter to Lexam that asserted that NEPA process would not be used to analyze the Lexam proposals. The USFWS letter asserted that the NEPA process would be useful to assess the Lexam proposals to use the federal surface.

81. On February 15, 2007, USFWS issued a memo that asserted that the agency would not use the NEPA process in conjunction with Lexam's proposals and the USFWS involvement in the project.

82. Neither the December 8, 2007 letter nor the February 15, 2007 memo were issued by the Department of the Interior's Office of the Solicitor nor agency legal counsel.

83. USFWS continues to consider proposals from Lexam which constitute federal agency action that require compliance with NEPA.

84. On the date this complaint was filed, a series of negotiations between Lexam and USFWS are ongoing concerning a "Negotiated Operationg Plan for Conducting Hydrocarbon Exploration and Development Activities on the Baca National Wildlife Refuge" ("NOP"). USFWS has stated that it will not comply with NEPA before agreeing to and entering into the NOP.

85. The NOP is an exercise of USFWS land management authority and discretion over surface use of the Baca NWR and must be subjected to NEPA process, analysis, and documentation.

86. USFWS involvement in the NOP is part of a continuing pattern and practice of USFWS taking federal action regarding the Lexam proposals without first subjecting the proposal to the NEPA process.

87. Lexam and the USFWS have made a formal proposal to the Baca Grande Water & Sanitation District for the use and transfer of water pursuant to a water augmentation plan. The federal water and/or federal water rights involved in the plan would be used as part of a project to provide Lexam with water for industrial purposes within the Baca NWR, including the drilling of the Lexam #5 and Lexam #6 oil and gas wells.

88. The water augmentation plan is part of a continuing pattern and practice of the USFWS taking federal action regarding the Lexam proposals without first subjecting the proposals to the NEPA process.

89. On April 18, 2007, Travis Stills called Department of Interior solicitor Margot Zallen to discuss this matter. Ms. Zallen left a message that she was out of the office and in a subsequent call on May 1, 2007, Ms. Zallen referred Mr. Stills to Mr. Steve Hoffman.

90. On May 2, 2007, Mr. Stills called Mr. Hoffman, who works part-time in the DOI Solicitor's Office, to inform Mr. Hoffman of the SLVEC position that the USFWS ongoing series of approvals and authorizations were issued in violation of federal law. In particular, the discussion detailed the failure of the USFWS to use the NEPA Process to include and inform the public in its decisionmaking process. On Mr. Hoffman's request, on May 2, 2007, Mr. Stills provided a letter that summarized the SLVEC position and requested that the parties seek swift and judicially enforceable settlement of this ongoing dispute.

91. On the morning of May 8, 2007, a message was left with Mr. Hoffman and a courtesy copy of this complaint was provided by fax upon filing.

92. Christine Canaly, Director, San Luis Valley Ecosystem Council has made numerous inquiries and requests to the USFWS seeking NEPA compliance. USFWS has represented to Ms.

Canaly that there has been and will be no NEPA document prepared to support USFWS actions regarding Lexam's proposals.

93. USFWS has taken the position that it cannot veto the Lexam proposals.

94. USFWS retains adequate land management authority to reject unreasonable proposals to develop subsurface mineral estate.

95. The Lexam #5 and Lexam #6 wells are within the area of the ongoing management analysis identified in the Conceptual Management Plan for the Baca National Wildlife Refuge (May 2005). The Conceptual Management Plan was adopted without NEPA compliance and was not prepared in conjunction with an EIS.

96. Surface and subsurface impacts from the mineral development have not yet being considered in the ongoing Refuge planning process. The Conceptual Management Plan does not consider and therefore arbitrarily omits management direction for the Baca NWR related to the private mineral estate. An ongoing process, that will include the preparation of an EIS, has been initiated by the USFWS in order adopt a permanent management plan for the Baca NWR.

97. Neither program-level NEPA nor site-specific NEPA compliance exists to support USFWS actions related to the Lexam proposals.

98. This lawsuit is filed to remedy the Defendants' failure to properly use NEPA to fully and accurately inform the public and agency decisionmaker of impacts, reasonable alternatives, and mitigation measures related to Lexam's use of federal lands to pursue its "high risk" "high cost" drilling proposal.

99. Upon information and belief, road construction, well-pad preparation, and other drilling operations are planned for imminent implementation on land within the Baca NWR located in

Saguache County, Colorado. Staking has been conducted and preliminary ground disturbing activities are being planned for the Lexam #5 and Lexam #6 wells.

## VII. CLAIMS FOR RELIEF

### FIRST CLAIM FOR RELIEF

**Violation of the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.*, and the Administrative Procedures Act:** *Defendant acted arbitrarily and capriciously by taking action and failing to conduct a NEPA process and take a hard look at the direct, indirect and cumulative impacts of authorizing surface use and occupancy related to the Lexam #5 and Lexam #6 oil and gas wells.*

100. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint. The National Environmental Policy Act (“NEPA”) requires the federal agencies to conduct the NEPA process and produce an Environmental Assessment (“EA”) and/or Environmental Impact Statement (“EIS”) for all “major Federal actions significantly affecting the quality of the human environment...” 42 U.S.C. §4332(B). “Major Federal Actions” include “actions with effects that may be major and which are potentially subject to Federal control and responsibility” and “include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies...” 40 C.F.R. §1508.18.

101. In reviewing, accepting, authorizing, approving, regulating, and/or assisting with Lexam’s staking/survey activities, geophysical explorations, and other activities on the Baca NWR as set forth in this Complaint, Defendant did not comply with the NEPA process or prepare NEPA documentation.

102. Defendant violated NEPA by failing to adhere to the NEPA process, to produce an EA or EIS, to take the required hard look at the environmental impacts of its action, to

analyze adequately the direct, indirect or cumulative impacts before providing federal approvals, assistance, and authorization of Lexam's proposals to develop the mineral estate underlying the Baca NWR.

103. As a result of its failure to conduct the NEPA process before providing federal approvals, assistance, and authorization of Lexam's proposals to develop the mineral estate underlying the Baca NWR, Defendant violated NEPA and its implementing regulations, acted arbitrarily and capriciously, abused its discretion, failed to act in accordance with law and therefore has violated the APA, 5 U.S.C. § 706(2)(A).

## **SECOND CLAIM FOR RELIEF**

**Violation of the National Environmental Policy Act and the Administrative Procedures Act:** Defendants acted arbitrarily and capriciously by *authorizing an action before completing an ongoing NEPA process*.

104. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

105. Regulations implementing the National Environmental Policy Act ("NEPA") require that "Until an agency issues a record of decision...no action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives." 40 CFR 1506.1(a).

106. "While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action: (1) Is justified independently of the program; (2) Is itself accompanied by an adequate environmental impact

statement; and (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.” 40 CFR 1506.1(c).

107. Approvals and assistance of activities related to the development of the Lexam #5 and Lexam #6 wells: (1) have an adverse environmental impact; (2) limit the choice of reasonable alternatives related to the Lexam proposals.

108. Approvals and assistance of activities related to the development of the Lexam #5 and Lexam #6 wells would limit the choice of reasonable alternatives in the ongoing development of the management plan for the Baca NWR that is currently being prepared in conjunction with a programmatic EIS.

109. Defendant cannot demonstrate that federal agency actions concerning the Lexam #5 and Lexam #6 wells: (1) are justified independently of the management program for the Baca NWR; (2) are themselves accompanied by an adequate environmental impact statement; and (3) will not prejudice the ultimate decision on the program for managing the Baca NWR.

110. As a result of its action in authorizing activities related to the proposed Lexam #5 and Lexam #6 wells, Defendant violated NEPA and its implementing regulations, acted arbitrarily and capriciously, abused its discretion, failed to act in accordance with law and therefore has violated the APA, 5 U.S.C. § 706(2)(A).

#### **VIII. REQUEST FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment providing the following relief:

1. Declare that Defendant violated the National Environmental Policy Act (“NEPA”) and Administrative Procedures Act (“APA”) by failing to conduct the NEPA process, prepare NEPA documentation, and take a “hard look” at the Lexam proposal to use federal public lands to access privately held minerals.
2. Declare that Defendant violated the NEPA and APA by reviewing, accepting, regulating, assisting, and authorizing Lexam’s proposed “high risk” oil and gas development project and the associated surface use and impacts to the Baca NWR;
3. Void Defendant’s actions authorizing Lexam to conduct development activities on or to cause impacts to the Baca NWR and permanently enjoin Defendant from acting on this and any future oil and gas development proposal that does not first comply with NEPA and the APA;
4. Order Defendant to comply with the requirements of NEPA and APA and their respective implementing regulations by performing Defendant’s mandatory procedural duties when considering whether or not to authorize surface use and occupancy related to the Lexam mineral development activities;
5. Grant the Plaintiff’s costs of litigation, including reasonable attorney fees as provided by the Equal Access to Justice Act, 28 U.S.C. § 2412; and
6. Grant Plaintiff’s such additional and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED on May 8, 2007

s/ Travis E. Stills

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-00945-WDM-MEH

SAN LUIS VALLEY ECOSYSTEM COUNCIL,

Plaintiff,

v.

U.S. FISH AND WILDLIFE SERVICE,

Defendant.

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**JOINT REPORT CONCERNING STATUS OF LITIGATION**

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Pursuant to the Court's Order dated November 28, 2007, (Docket No. 44), Plaintiff San Luis Valley Ecosystem Council and Defendant U.S. Fish and Wildlife Service, submit the within Joint Report Concerning Status of Litigation, and state as follows:

1. On November 28, 2007, the Court issued an Order that granted Defendant's Motion to Remand (Docket No. 15) and that remanded this matter to Defendant "for the purpose of allowing Defendant to comply with the National Environmental Policy Act ("NEPA") ... and its implementing regulations." (Docket No. 44, Order, at 3, ¶ 1.)

2. Pursuant to the Order, Defendant is currently conducting a NEPA analysis "concerning the oil and gas exploration project proposed by Lexam Exploration, Inc. in the Baca National Wildlife Refuge." *Id.* At ¶ 2.

3. On February 15, 2008, pursuant to paragraph 2 of the Order, Defendant submitted Defendant's *Status Report Concerning Compliance with the National*

*Environmental Policy Act* ("Status Report").

4. The Status Report advised the Court that on January 18, 2008, Defendant issued the draft *Environmental Assessment of Proposed Gas and Oil Exploration, Baca National Wildlife Refuge, Saguache County, Colorado* ("Draft EA").

5. The public comment period for the Draft EA closes March 2, 2008.<sup>1</sup>

6. The Order also directed that, "Both parties shall file a status report by February 29, 2008, setting forth their respective positions whether this litigation should proceed and, if so, in what manner[.]" (Docket No. 44, Order, at 3, ¶ 3.)

7. The parties jointly and respectfully submit that because the NEPA analysis is ongoing, it is premature for the parties to formulate and submit their respective positions on the present claims and the claims, if any, which Plaintiff may wish to bring upon completion of the NEPA analysis and issuance of a final agency decision.

8. Plaintiff has submitted formal NEPA comments at the scoping stage and now intends to submit detailed, formal NEPA comments on the Draft EA.

9. Defendant intends to diligently review and analyze the comments received from the public and from local, state and federal government agencies concerning the Draft EA.

10. Thereafter, Defendant will determine, pursuant to NEPA, whether a final EA, Finding of No Significant Impact ("FONSI"), and decision document can be issued or

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<sup>1</sup> March 2, 2008 falls on a Sunday. The Service will receive comments through March 3, 2008.

whether further NEPA analysis is required before Defendant issues a decision regarding the oil and gas exploration project proposed by Lexam Exploration, Inc., in the Baca National Refuge.

11. At this time, Defendant is unable to state the date upon which a decision will be made as to whether a final EA and FONSI will be issued or whether further NEPA analysis will be required.

12. Accordingly, Plaintiff and Defendant respectfully request that the Court accept this filing as satisfying the reporting requirement set forth in its Order (Docket No. 44, at 3, ¶ 3) and that the Court direct the parties to file a joint status report on or before May 6, 2008, advising the Court of the current status of the NEPA process, and if appropriate under the circumstances, setting forth their respective positions on whether this litigation should proceed and, if so, in what manner.

WHEREFORE, Plaintiff and Defendant jointly request that the Court enter an order directing the parties to file a joint status report on or before May 6, 2008, advising the Court of the current status of the NEPA process. A proposed order is included with this joint status report and motion.

Dated: February 26, 2008.

Respectfully submitted,

ENERGY MINERALS LAW CENTER

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge Walker D. Miller

Civil Action No. 07-cv-00945-WDM-MEH

SAN LUIS VALLEY ECOSYSTEM COUNCIL,

Plaintiff(s),

v.

U.S. FISH AND WILDLIFE SERVICE,

Defendant(s).

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**ORDER**

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This matter is before me on Defendant's Motion for Remand (doc. no. 15) and the Defendant's Objections to Magistrate Judge Michael E. Hegarty's Order on Defendant's Motion to Stay which granted in part and denied in part Defendant's Motion to Stay All Proceedings (doc. no. 30).

Defendant seeks remand for its reconsideration of a proposed project on federal lands because it now concedes that it should have followed the review procedures established by the National Environmental Policy Act ("NEPA") and the regulations promulgated to implement the NEPA process. Indeed, Defendant has commenced that process and, if not already having done so, anticipates issuing a draft NEPA statement within a matter of days. Defendant U.S. Fish and Wildlife Service's Objection to Magistrate Judge's Order on Defendant's Motion to Stay dated September 21, 2007, at 7-8. Defendant has previously anticipated that the NEPA analysis and process should

be completed by January 2008. Motion for Remand at p. 3. Plaintiff agrees that there should be a remand but it should be pursuant to a final judgment in favor of Plaintiff. Plaintiff's response was premised on its mistaken belief that Defendant had failed to answer the complaint and therefore all allegations should be deemed admitted. In fact, Defendant had been granted extensions of time to answer and did do so in a timely fashion. See doc. no. 29. Plaintiff also seeks inclusion in the remand order of a requirement that no further ground disturbing actions be permitted pending the finalization of the NEPA process. Defendant states that it has voluntarily ceased all activities pending completion of the NEPA process. Doc. no. 36 at 7.

Under these circumstances, remand is appropriate. See *Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412 (6th Cir. 2004). I also agree with the Defendant that judicial efficiency is served by not granting a final judgment but rather maintaining jurisdiction pending the completion of the NEPA process.

Turning to Defendant's objections to Magistrate Judge Hegarty's order, Defendant objects to that part of the order which required Defendant to file the administrative record. Defendant argues that, given that Defendant has voluntarily undertaken the NEPA analysis, the previous administrative record which concerned Defendant's failure to perform the NEPA analysis was no longer relevant. Rather, a new administrative record is being developed which includes the NEPA process and which would presumably be filed if the litigation process continues. In any case, Defendant's original Motion to Stay (doc. no. 30) only sought a stay pending my ruling

on the Motion for Remand and Defendant persists in requesting that relief. Defendant's Reply to Plaintiff's Response to Defendant's Objection to Magistrate Judge's Order. (Doc. no. 40 at pp. 3-4). Although it may well be appropriate to stay production of the record pending completion of the NEPA process, that is not Defendant's request. Procedurally Defendant's Motion to Stay has become moot, given this order.

It is therefore ordered:

1. Defendant's Motion for Remand (doc. no. 15) is granted. This matter is remanded to the Defendant U.S. Fish and Wildlife Service for the purpose of allowing Defendant to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* and its implementing regulations;

2. By February 15, 2008, Defendant shall file a status report setting forth its compliance with NEPA and its regulations concerning the oil and gas exploration project proposed by Lexam Exploration, Inc. in the Baca National Wildlife Refuge;

3. Both parties shall file a status report by February 29, 2008, setting forth their respective positions whether this litigation should proceed and, if so, in what manner;

4. The Defendant shall prohibit all ground disturbing activities related to the exploration and development of the mineral estate underlying the Baca National Wildlife Refuge during the NEPA process;

5. Pursuant to D.C. COLO.LCivR 41.2 this matter is administratively closed subject to reopening for good cause; if no motion is made to reopen this matter by November 24, 2008, this case will be dismissed without prejudice; and

6. Defendant's Motion to Stay (doc. no. 30) is denied as moot and Defendant's objection (doc. no. 36) is overruled.

DATED at Denver, Colorado, on November 28, 2007.

BY THE COURT:

s/ Walker D. Miller  
United States District Judge