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FROM: Steve Hoffman
DATE: 7/25/7
RE: Baca NWR: NEPA Compliance

Attached please find my first cut at a conceptual outline for the environmental assessment – it will need some tweaking to cover the new Baca Well No. 7 that was mentioned by Dave Bailey in his July 20 memo to me.

cc: John Kunz

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Conceptual EA Outline[1]
Draft dated 7/25/07

Brief Discussion of the Proposal: The U.S. Fish and Wildlife Service ("Service") is proposing standards for ensuring that the planned exploration of the mineral estate underlying the Baca National Wildlife Refuge (the "Refuge") by Lexam Explorations (U.S.A.) Inc.("Lexam") does not unreasonably degrade or impact the Refuge's surface estate and associated resources. The Service is also proposing specific environmentally-protective measures to implement these standards: certain of these measures have already been implemented with respect to seismic surveying that has been conducted by Lexam; other measures have been adopted by the Colorado Oil and Gas Conservation Commission and incorporated into permits for the planned drilling; and other measures will be adopted by Lexam through agreement with the Service. Taken together, these standards and measures will ensure that the manner, location, and timing of Lexam's activities constitute a reasonable use of the Refuge's surface estate.[2]

Specifically, the Service proposes the following standards and measures:

[The EA would then summarize the standards and measures listed at pages of 15-23 of the Draft Negotiated Operating Plan, as well as other standards and measures that are developed during the

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[1] This outline only addresses the minimum contents for an EA as set forth in the Departmental Manual. 516 DM 3.4(A), "National Environmental Policy Act Revised Implementing Procedures," 69 FR 10866 (Mar. 8, 2004). The EA can and should include other standard sections such as "Background" and "Affected Environment" sections.

[2] This formulation of the proposed action is based on the courts' discussion of NEPA compliance in *Friends of South Montezuma Valley v. Joyner,* 2004 U.S. Dist. LEXIS 11820, *17 (D. Colo. 2004) ("[the agency's] obligation under NEPA to conduct an Environmental Assessment is limited to that which was necessary to carry out the function of determining the degree of surface degradation and filing objections to the permit application at the CDNR") and *Sierra Club v. DOE*, 255 F.Supp.2d 1177, 1186 (D. Colo. 2002) ("as a surface owner, [the 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 agency] must comply with NEPA concerning the development of the mining operation."). Because the Service and Lexam have cooperatively resolved the Service's concerns about the surface impacts of Lexam's mineral exploration activities, and because those activities have either already been conducted (i.e., the seismic survey) or have been permitted by the Oil and Gas Conservation Commission, the Environmental Assessment will be directed at the formulation of protective standards and measures rather than the formulation of objections to be lodged with the Commission.

EA process or in response to public comments. For example, one standard would be "Minimize the Introduction of Noxious Weeds to the Refuge" and the implementing measure would be "all seismic survey vehicles and equipment were decontaminated (per Service procedures) prior to entering the refuge, to prevent the introduction of noxious weeds to the Refuge." Standards and measures to minimize the impact of Lexam's water use should be included. As is the case with the existing draft Negotiated Operating Plan, Lexam's seismic surveying and drilling activities should be described; however, these activities should *not* be included in the description of the proposed action – they should be either discussed in an introductory "background" section of the EA or included in the description of the "No Action Alternative."]

The Need for the Proposal: The United States owns the surface estate of the Refuge, and it is administered by the Service as a National Wildlife Refuge pursuant to the Great Sand Dunes National Park and Preserve Act of 2000, 16 U.S.C. § 410hhh, the National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd, and other applicable laws and regulations. Pursuant to those laws, the Service has a responsibility to protect the surface estate of the Refuge and its associated resources. Pursuant to Colorado law and a Surface Use Agreement that was entered into between the Service's and Lexam's predecessors-in-interest, the Service has some discretion to determine how, where, and when mining can occur and ensure that the use of the surface estate is reasonable and does not cause undue surface disturbance.[3] Thus, the Service has both the responsibility and the authority to formulate standards and measures for ensuring that the surface estate of the Refuge and its associated resources are not unreasonably impacted by Lexam's planned activities.

Alternatives: In addition to the proposed action (i.e., the adoption of the standards and measures discussed above), the Service has considered the following alternatives:

The No-Action Alternative: In this scenario, the Service would not have objected to the time, place, or manner of Lexam's proposed activities and would not have negotiated any environmentally protective standards or measures. The Oil and Gas Conservation Commission would not have included any special conditions in Lexam's drilling permits, and a Negotiated Operating Plan containing additional standards and measures would not have been drafted. Mineral exploration activities would have proceeded subject only to the standard conditions imposed by the Oil and Gas Conservation Commission.

The No Drilling Alternative: This alternative was considered but eliminated from detailed study by the Service. The United States acquired Refuge lands subject to outstanding mineral rights that are currently owned by Lexam, and nothing in the Great Sand Dunes National Park and

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[3] This description of the Service's authorities is taken directly from the court's discussion in *Sierra Club v. DOE*, 255 F.Supp.2d 1177, 1186 (D. Colo. 2002), and the Surface Use Agreement.

Preserve Act of 2000, 16 U.S.C. § 410hhh, the National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd, the Service's regulations and policies, or Colorado law authorizes the Service to prevent the reasonable exploration and development of Lexam's mineral estate.

[Discuss other alternatives that are discussed in the draft Negotiated Operating Plan; for example, on page 18 there is discussion of using existing 2-dimensional surveys in lieu of Lexam's 3-dimensional seismic survey. Also discuss any other alternatives developed through the EA process.]

The Environmental Impacts of the Proposed Action and Alternatives: [This will include a detailed discussion of the proposed action and alternatives; note that the environmental impacts of the proposed action (seismic surveys and drilling conducted pursuant to the proposed environmentally-protective standards and measures) will be beneficial in comparison to the no-action alternative (seismic surveys and drilling subject only to the standard conditions imposed by the Oil and Gas Conservation Commission).]

Listing of Agencies and Persons Consulted: Self-explanatory