IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:23-cv-01696

GUNNISON ENERGY LLC,

Plaintiffs,

v.

DEB HAALAND, in her official capacity as United States Secretary of the Interior, NADA CULVER, in her official capacity as Bureau of Land Management Deputy Director, Policy & Programs, LARRY SANDOVAL, in his official capacity as Field Manager of the Bureau of Land Management's Colorado River Valley Field Office, and UNITED STATES BUREAU OF LAND MANAGEMENT,

Defendants.

GUNNISON ENERGY LLC'S MOTION FOR IMMEDIATE MANDAMUS RELIEF

Gunnison Energy LLC ("Gunnison") submits respectfully this motion seeking immediate mandamus relief under 28 U.S.C. § 1361 and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). Gunnison is an oil and gas producer with federal oil and gas leasehold interests in Gunnison and Delta Counties, Colorado. In March and April 2022, Gunnison submitted two Applications for Permit to Drill ("APDs") for wells on lands under the jurisdiction of the Bureau of Land Management ("BLM") Colorado River Valley Field Office ("CRVFO"). The Mineral Leasing Act, 30 U.S.C. §§ 181-287, establishes obligatory procedures that BLM field offices must employ when processing APDs on federal lands and imposes mandatory deadlines applicable to

those required procedures. The CRVFO failed to process either of Gunnison's APDs consistent with those non-discretionary obligations.

BLM represents that it has deferred processing Gunnison's APDs until BLM completes a supplemental environmental analysis for the North Fork Mancos Master Development Plan (the "MDP"). But BLM has also repeatedly acknowledged – both in writing and in verbal communications with Gunnison – that approval of a master development plan is not a prerequisite for the processing of an APD. BLM has not, by contrast, identified any *requirements* that remains to be satisfied before Gunnison's APDs may be processed.

BLM has disregarded its statutory obligations and the deadlines applicable to those obligations. BLM's unjustified and indefinite deferral of Gunnison's permit applications will needlessly foreclose Gunnison from drilling in 2023, undermining Gunnison's contractual rights and causing irreparable harm to the economic viability of Gunnison's development project. This Court should require BLM to discharge the mandatory duties that Congress intended BLM to perform and order BLM to immediately process Gunnison's APDs in a manner consistent with controlling statutory law.

I. BACKGROUND.

BLM's Colorado State Office administers the development of oil and gas on federal lands within the State of Colorado. The CRVFO is a subcomponent of the Colorado State Office, responsible for managing lands in, among other places, Gunnison and Delta Counties.

A. THE MASTER DEVELOPMENT PLAN.

The Colorado State Office conducts competitive oil and gas lease sales for nominated parcels within Colorado. Once parcels are leased, operators are required to submit exploration or development proposals in the form of APDs to BLM for an environmental analysis and application of measures to mitigate impacts before any drilling for oil and gas can occur.

BLM is responsible for approving APDs, including both the surface use plan and subsurface drilling program, and applying appropriate mitigation measures for affected resources on BLM-administered lands or minerals. Before approving an APD, BLM must comply with the National Environmental Policy Act ("NEPA") and consider the proposed action's environmental impacts. The environmental review includes an onsite inspection of the proposed well, access road, and pipeline locations, as well as other areas of proposed surface use. Review and approval of submitted APDs is conducted at the field office level.

To streamline the environmental review required on each individual APD, proponents of oil and gas development have the option of submitting a Master Development Plan. A Master Development Plan provides information common to multiple planned wells, including drilling plans, surface use plans of operations, and plans for future production. Master Development Plans also include information on associated facilities (e.g., roads, pipelines, utility corridors, and compressor stations). BLM's internal guidance documents encourage the use of master development plans to more effectively manage federal lease development. *See* Bureau of Land Mgmt., Instruction Mem. ("I.M.") No. 2005-247 (Sept. 30, 2005) ("An EA or EIS prepared for development of two or more oil, gas, or geothermal wells provides substantial time savings over writing individual EAs or EISs for each well approval and generally results in improved impact analysis.").

1. <u>The North Fork Mancos Master Development Plan</u>.

In Spring 2016, BLM and Gunnison initiated discussions concerning the possibility of preparing a master development plan. In January 2017, at BLM's request, Gunnison submitted its proposal for the MDP. Under the original proposal, Gunnison would drill, complete, and operate up to thirty-five horizontal wells and would construct access roads and gathering pipelines in

Gunnison and Delta Counties. The MDP project area includes fourteen project-related federal oil and gas leases grouped into four federal oil and gas units: Trail Gulch Unit in the north, Sheep Park II Unit in the center, Iron Point Unit in the southwest, and Deadman Gulch Unit in the southeast.

On August 15, 2019, after multiple rounds of NEPA review and at least three periods of public comment, BLM released a final Environmental Assessment (the "2019 EA") in support of the MDP. On the same day: (i) BLM issued a Decision Record, approving portions of the MDP not involving National Forest System Lands; and (ii) the United States Forest Service issued a Draft Decision Notice indicating the Forest Service's intent to approve the Surface Use Plan of Operations ("SUPO") for the MDP and initiated a 45-day period in which persons or groups that had previously filed comments on the MDP could file an objection to that approval.

On January 10, 2020, the Forest Service issued a Final Decision Notice, approving surface disturbance and surface use associated with portions of the MDP proposed to occur on National Forest System lands. On January 27, 2020, BLM issued a second Decision Record consistent with the Forest Service's Final Decision. The January 28, 2020 Decision Record approved portions of the MDP that involve the use of National Forest System lands.

2. <u>The Voluntary Remand</u>.

On May 10, 2021, a coalition of special interest groups filed a challenge to BLM's approval of the MDP in the United States District Court for the District of Colorado, contesting the adequacy of BLM's consideration of the climate change impacts from greenhouse gas emissions associated with Gunnison's anticipated development under the MDP. *See Citizens for a Healthy Cmty. v. U.S. Dep't of the Interior*, No. 21-cv-01268-MSK (D. Colo.). Gunnison intervened in that lawsuit on BLM's behalf.

For eight months, BLM actively litigated against the special interest groups' suit. On February 18, 2022, however, BLM suddenly reversed course. On that day, BLM filed a motion indicating that BLM would not defend BLM's NEPA review on the merits and requesting that the district court remand the MDP to BLM so that BLM could undertake supplemental environmental analysis.[1] BLM requested, notably, that the remand be *without vacatur* of the agency's underlying approval of the MDP. *See* Fed. Defs.' Mot. for Voluntary Remand Without Vacatur at 2, *Citizens for a Healthy Cmty. v. U.S. Dep't of the Interior*, No. 21-cv-01268-MSK (D. Colo. Feb. 18, 2022), ECF No. 21.

On May 20, 2022, the federal district court granted BLM's motion in part, remanding the MDP to BLM for further consideration, but also vacating BLM's approval of the MDP during that reconsideration period. *See Citizens for a Healthy Cmty. v. U.S. Dep't of the Interior*, No. 21-cv-01268-MSK, 2022 WL 1597864 (D. Colo. May 19, 2022). The district court did not rule on any merits issue presented in the special interest groups' petition or require BLM to re-evaluate any aspect of the 2019 EA– the district court merely remanded "the matter back to [BLM] for further consideration." *Id.* at *7. The district court's opinion remanding the MDP acknowledged that approval of the MDP was not required before approval for drilling permits might be granted and recognized that, notwithstanding the district court's decision to vacate BLM's approval of the MDP, Gunnison "might be able to request, and the Agencies might approve, request for permission to dill nevertheless." *Id.* at *5 n.7.

[1] At 11:40 pm on February 17, 2022 – twenty minutes before the deadline for BLM and Gunnison to submit their respective merits briefs in the special interest groups' suit – BLM's counsel transmitted an e-mail to counsel for the special interest groups and Gunnison alerting the parties that BLM would be "seeking voluntary remand without vacatur for the [MDP] to undertake supplemental NEPA analysis" and advising that BLM "plan[ned] to move for remand in lieu of filing its motion for summary judgment." Attach. A, Email from Leilani Doktor to Mark S. Barron et al. (Feb. 17, 2022). BLM's e-mail did not offer any reasoning for its decision to seek remand or identify any aspect of BLM's NEPA review on which the proposed remand might focus. *See id.*

B. GUNNISON'S PERMIT APPLICATIONS.

On March 16, 2022, Gunnison submitted an APD for the Iron Point Unit 1291 #13-24 H3 well (the "H3 APD") to the CRVFO; on April 26, 2022, Gunnison submitted an APD for the Iron Point Unit 1291 #13-24 H4 well (the "H4 APD") to CRVFO. Upon receipt of these APDs, CRVFO officials communicated to Gunnison that the CRVFO was either unwilling or unauthorized to process any APDs until BLM's supplemental review for the MDP remand was complete. *See* Attach. B, Letter from Mark S. Barron to Suzanne Copping & Larry Sandoval at 2 (Aug. 5, 2022).

On August 5, 2022, Gunnison's counsel sent a letter to BLM seeking additional information concerning BLM's intentions related to the remand of the MDP. *See id.* Gunnison's letter noted that, although six months had passed since BLM submitted its request to have the MDP remanded to the agency, BLM had not responded to Gunnison's numerous inquiries seeking information about the analytical parameters of the analyses BLM intended to conduct on remand nor offered Gunnison any timeframe for when BLM's supplemental review would be completed. *See id.* Gunnison's August 5, 2022 letter also explained that any delay in processing authorizations for the individual operations Gunnison proposed – including the H3 APD and H4 APD – pending completion of the MDP remand could not be reconciled with the fact that the existence of an MDP is entirely optional in the first instance. *See id.* at 3. Gunnison requested that BLM confirm that BLM would: (i) timely process all APDs and other operational authorizations that Gunnison has submitted or might submit under the timeframes contemplated in the Mineral Leasing Act and other applicable law; and (ii) not delay processing of any APD or operational authorization that Gunnison has submitted or might submit pending the completion of any supplemental analysis of the MDP on remand. *See id.* at 4.

On December 15, 2022, Larry Sandoval, the CRVFO's Field Manager, responded to Gunnison's August 5, 2022 letter. *See* Attach. C, Letter from Larry W. Sandoval, Jr. to Mark S. Barron (Dec. 15, 2022). Sandoval represented that BLM was currently preparing a supplemental environmental analysis for the MDP that would "likely consider updated information related to emissions of methane and other greenhouse gases" and stated that the CRVFO was targeting completion of this supplemental analysis "for the first quarter of calendar year 2023."[2] *Id.* at 1.

Sandoval's letter acknowledged that, in 2022, Gunnison had focused on preparing infrastructure to support future development, including drilling the H3 and H4 wells between May 1, 2023 and October 14, 2023. *See id.* Sandoval also "agreed that an approved MDP is not required before the BLM can consider individuals [APDs]." *Id.* at 2. Sandoval advised that BLM was nevertheless "prioritizing the supplemental analysis for the MDP." *Id.*

On March 21, 2023, Crockett sent an e-mail to Gunnison confirming that the H3 APD and H4 APD were complete but advising that decisions on those APDs were being deferred until September 3, 2023. *See* Attach. E*,* Email Correspondence btw Allen Crockett and Tyson Johnston at 3 (Mar. 21-22, 2023). The next day, March 22, 2023, Crockett sent another e-mail stating that BLM was deferring a decision on these APDs "because [the CRVFO] do[es] not have guidance on when the supplemental EA [for the MDP] will be released for public review," offering that the CRVFO "must await that guidance, at which time we will make any needed revisions to the document and prepare it for release as a preliminary EA." *Id.* at 1.

[2] Four days later, on December 19, 2022, Allen Crockett, Supervisory Natural Resource Specialist for the CRVFO advised Gunnison that all technical information BLM needed from Gunnison to complete the supplemental review described in Sandoval's December 15, 2022 letter had been "received timely" and affirmed that "meeting the Q1 timeline is still our intent." Attach. D, Email from Allen Crockett to Tyson Johnston (Dec. 19, 2022). Crockett stated that BLM "anticipate[d] the potential for some communication with [Gunnison's environmental] contractor to clarify certain points, but those requests and responses would be to ensure the completeness and accuracy of the supplemental EA and would not be expected to affect its completion date." *Id.*

On March 27, 2023, Gunnison's counsel sent a letter to Sandoval and Greg Larson, District Manager for BLM's Upper Colorado River District Office, requesting expressly that BLM process the H3 APD and H4 APD immediately. *See* Attach. F, Letter from Mark S. Barron to Greg Larson & Larry Sandoval at 1 (Mar. 27, 2023). The March 27, 2023 letter explained that, because BLM may not lawfully delay APD approvals to perform supplemental analysis that is not required for permit processing, deferring APD processing pending the completion of the remand on the MDP is arbitrary and capricious. *See id.* at 3-4.

On April 20, 2023, Sandoval responded to Gunnison's March 27, 2023 letter. *See* Attach. G, Letter from Larry W. Sandoval, Jr. to Mark S. Barron (Apr. 20, 2023). Sandoval's April 20, 2023 letter disregarded Gunnison's request to have the H3 APD and H4 APD processed independently from the MDP remand, stating instead that preparation of the supplemental analysis for the MDP "has required additional time" and representing that BLM was "working diligently to complete the final review of the [supplemental EA] document and will post it for public comment as soon as possible." *Id.* at 1.

On May 1, 2023, Gunnison's President, Salar Nabavian, Gunnison's Vice President, Tyson Johnston, and Gunnison's outside counsel conducted a telephone conference with Nada Culver, BLM Deputy Director, Policy & Programs, concerning the deferred APDs. During the conference, Gunnison stated expressly that Gunnison remains committed to assisting BLM complete the MDP. *See* Attach. H, Letter from Mark S. Barron to Nada Wolff Culver at 2 (June 22, 2023). But Gunnison also re-emphasized its position that the APDs must be detached from the MDP and processed immediately. *See id.*

At the conclusion of the May 1 conference, Culver represented that a Draft Supplemental Environment Assessment for the MDP (the "Draft SEA") would soon be released for public

comment and asked Gunnison to refrain from taking any legal action to enforce BLM's permitting obligations before the Draft EA was issued. *See id.* Culver also acknowledged Gunnison's request that the H3 APD and H4 APD be processed immediately, separate from the MDP. *See id.* Culver told Gunnison's representatives that she would speak to officials at the Colorado State Office to facilitate that request. *See id.*

On May 10, 2023, BLM released the Draft SEA. *See id.* On June 10, 2023, Gunnison submitted technical comments supporting BLM's analyses in the Draft SEA. *See id.* Gunnison has refrained from taking any public or private action – legal or otherwise – that could disrupt or delay final approval of the MDP. *See id.* BLM has not, however, processed the H3 APD or H4 APD independently from the MDP project. To the contrary, as recently as June 29, 2023, BLM personnel advised Gunnison officials that BLM does not intend to process Gunnison's APDs until the MDP is finalized. *See* Attach. I, Decl. of Salar Nabavian ¶ 28 (July 3, 2023) ("Nabavian Decl.").

BLM has not provided Gunnison *any* information about when BLM expects to complete work on the MDP or issue a decision on Gunnison's APDs. *See id.* ¶ 27. BLM has not provided Gunnison any reason other than BLM's desire to prioritize work on the MDP for why BLM has not processed the H3 APD or H4 APD.

II. STANDARD FOR COMPELLING AGENCY ACTION.

The APA affords judicial review to persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 702. The APA provides relief not only from agency action taken, but also for "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The APA "empowers a court to compel an agency only to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing how it shall act." *Norton v. S. Utah Wilderness*

Alliance, 542 U.S. 55, 64 (2004) (citation and quotation marks omitted). "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.

The United States Court of Appeals for the Tenth Circuit has described mandamus relief as "an appropriate remedy to compel an administrative agency to act where it has failed to perform a nondiscretionary, ministerial duty," recognizing that "[a]dministrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform." *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991). Mandamus may issue when: (i) the plaintiff has a clear right to relief; (ii) the defendant has a clear duty to act; and (iii) no other adequate remedy exists. *See Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 767 (5th Cir. 2011); *Johnson v. Reilly*, 349 F.3d 1149, 1154 (9th Cir. 2003).

III. MANDAMUS RELIEF IS A NECESSARY REMEDY.

The Mineral Leasing Act imposes discrete, non-discretionary obligations upon BLM when reviewing APDs. BLM must take certain discrete actions and must perform those actions within certain deadlines. Because BLM has failed to discharge mandatory duties that Congress intended the agency perform, this Court should award Gunnison mandamus relief and direct BLM to immediately process the H3 APD and the H4 APD in accordance with the provisions of 30 U.S.C. § 226(p).

A. GUNNISON HAS A CLEAR RIGHT TO RELIEF.

Not later than thirty days after an applicant submits a complete APD, a set of mandatory procedural obligations is implicated. After thirty days, BLM "shall . . . issue the permit, if the requirements under the National Environmental Policy Act of 1969 and other applicable law have been completed within such timeframe." 30 U.S.C. § 226(p)(2)(A). Based on the date that Crockett

confirmed that Gunnison's H3 APD and H4 APD were complete, March 21, 2023, the deadline for BLM to act under this statutory provision for Gunnison's two APDs was April 20, 2023.[3] Once that date passed without BLM identifying any requirement under NEPA or other applicable law that was not or could not be satisfied for the APDs, Gunnison had a statutory right to have its APDs issued under 30 U.S.C. § 226(p)(2)(A).

And even if BLM had identified additional work that remained incomplete on April 20, 2023, Gunnison still had a right to receive notice from BLM: (i) specifying any steps that Gunnison could take for the H3 APD and H4 APD to be issued; and (ii) identifying the actions that BLM needed to complete and describing the timelines and deadlines for BLM completing those actions. *See* 30 U.S.C. § 226(p)(2)(B)(i)-(ii). While Gunnison may not be able to dictate whether BLM issue Gunnison's permits under subsection 226(p)(2)(A) or provide a detailed deferral notice under subsection 226(p)(2)(B), the plain language of the statute clearly grants Gunnison a right to have BLM elect one subsection or the other and act in some regard. *See Marathon Oil*, 937 F.2d at 501 (explaining that while the district court cannot dictate how an agency's discretion is to be exercised, "the district court can compel the [agency] to exercise [its] discretion"); *Gunnison v. Jewell*, No. 2:16-cv-01256-DN, 2016 WL 7496116, at *2 (D. Utah Dec. 30, 2016) (holding that

[3] The actual deadlines for BLM to act on the H3 APD and H4 APD was well before April 20, 2023. The Mineral Leasing Act requires that, no later than ten days after the date on which BLM receives an APD, BLM *shall*: (i) notify the applicant that the application is complete; or (ii) notify the applicant that information is missing and specify any information that is required to be submitted for the application to be complete. *See* 30 U.S.C. § 226(p)(1)(A)-(B). BLM did not provide any notice to Gunnison satisfying the requirements of 30 U.S.C. § 226(p)(1)(A)-(B). The H3 APD was submitted on March 16, 2022 and the H4 APD was submitted on April 26, 2022. BLM never advised Gunnison that any information was missing for either application or provided Gunnison with any notice specifying additional information Gunnison needed to submit before either application could be considered complete. Because both permits were complete upon submission, BLM had a statutory obligation to process each permit in early *2022*, not April 2023.

both 30 U.S.C. § 226(p) and the APA, 5 U.S.C. §§ 702 & 706(1) granted an oil and gas operator whose APD application had been pending for more than thirty days "a clear right to relief").

In *EnerVest*, the United States District Court for the District of Utah granted an oil and gas operator mandamus relief under precisely the same circumstances this case presents. The operator in *EnerVest* had submitted ten complete APDs that BLM's Price Field Office declined to process more than thirty days after the APDs were submitted because an unidentified employee in BLM's Washington, DC office directed that no APDs could be approved without new greenhouse gas analyses. The operator argued that BLM was statutorily required to issue the permits immediately because impacts from greenhouse gases had already been studied in an approved Environmental Impact Statement that was prepared as part of BLM's consideration of a master development plan covering the area in which the operator planned to drill and therefore there were no applicable requirements that had not yet been satisfied. *See* Mot. for Immediate Mandamus Relief at 16, *EnerVest, Ltd. v. Jewell*, No. 16-cv-1256-DBP (D. Utah Dec. 14, 2016), ECF No. 7.

The district court in *Gunnison* granted in part and denied in part the operator's motion. The district court explained that because BLM has discretion whether to grant a permit under 226(p)(2)(A) or issue a deferral notice under subsection 226(p)(2)(B), the district court could not order BLM to approve the operator's permits; but because BLM was statutorily obligated to act under one provision or the other once thirty days had passed, the district court *could* compel BLM to take some action immediately. *See EnerVest*, 2016 WL 7496116, at *4. Equally important, the district court also cautioned that BLM's discretion to choose between the two subsections was circumscribed, emphasizing that "BLM has the discretion to decide how to act so long as the action is not arbitrary and is supported by substantial evidence."[4] *Id.* Based on these holdings, the district

[4] While the district court determined that it could not direct BLM to approve the permits, it also observed that, based on the factual allegations in *EnerVest*, "it appears that air quality issues have

court granted BLM four days to "either issue the remaining permits or provide non-arbitrary reasons, supported by substantial evidence, as to why it needs more time to process the permits." *Id.* Within four days of the district court's ruling, BLM issued all the APDs at issue in the *EnerVest* suit. *See* Notice of Issuance of Permits, *EnerVest, Ltd. v. Jewell*, No. 16-cv-1256-DBP (D. Utah Jan. 3, 2017), ECF No. 21.

This case calls for the same result. It is undisputed that the statutory deadlines for BLM to take some action on Gunnison's APDs has passed. As a result, BLM now has two, and only two options. BLM must issue: (i) the H3 APD and H4 APD; or (ii) offer a non-arbitrary reason supported by substantial evidence for why BLM is not approving the APDs. To choose the latter, BLM must be able to identify a prerequisite for permit issuance that is not satisfied. Having no *requirements* to justify deferring the APDs, BLM here relies instead on an MDP process that is the opposite of required – master development plans, as BLM acknowledges repeatedly, are entirely *optional*.

BLM has never provided any reason why any additional environmental review pertinent to the H3 APD and H4 APD was not done when those APDs were submitted more than a year ago. And now that the Draft SEA has been released, there is no question that BLM has in fact conducted an analysis of environmental impacts associated with production from the H3 APD and H4 APD. The only reason, therefore, that BLM has not issued the APDs is because BLM has a subjective preference to complete the MDP remand before turning to individual permit applications. That is not BLM's choice to make. BLM procedural preferences are immaterial when Congress has mandated how the agency should act.

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been addressed," so "[t]here appear[ed] to be no reason to 'defer the decision on the permit and provide to the applicant a notice' regarding additional steps to be taken." *EnerVest,* 2016 WL 7496116, at *3 (quoting 30 U.S.C. § 226(p)(2)(B)).

BLM has deprived Gunnison of Gunnison's procedural right to have the APDs that Gunnison submits processed in accordance with the mandatory procedures, and within the obligatory deadlines, that the Mineral Leasing Act establishes. *See Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016) (explaining that "the violation of a procedural right granted by statute" can constitute the injury in fact required for a plaintiff to establish standing). BLM was statutorily required to issue the APDs Gunnison submitted or, at the very least, to provide specific notice outlining the non-arbitrary reasons the agency was deferring the issuance of those APDs. Because BLM failed to satisfy these non-discretionary obligations, Gunnison has a clear right to relief.

B. BLM HAS A CLEAR DUTY TO ACT.

The Energy Policy Act of 2005 requires BLM "[t]o ensure timely action on oil and gas leases and applications for permits to drill" and "to effect policy that . . . ensures[s] expeditious compliance" with NEPA and "any other applicable environmental and cultural resources laws." Energy Policy Act of 2005, 42 U.S.C. § 15921(a)(1)(A). The mandatory provisions of 30 U.S.C. § 226(p) – enacted as part of the Energy Policy Act – facilitate the realization of these objectives.

Congress considered "compliance with the 'non-discretionary' duty to act on an APD within 30 days of receipt of a complete APD . . . critical to ensuring a 'greater degree of predictability' in APD processing." *Brigham Oil & Gas, LP*, 181 IBLA 282, 287 (2011). Providing this predictability affords an oil and gas operator the ability to "appropriately plan its drilling activity, thereby, *inter alia*, satisfying contractual commitments to rig operators and others, preventing drainage from adjacent lands, and ensuring the viability of affected private and Federal leases." *Id.* Both the plain language of 30 U.S.C. § 226(p) – assigning duties with the use of the word "shall" – and case law confirm BLM's obligation to process APDs in accordance with the framework the statute establishes.

In *Marathon Oil*, the Tenth Circuit upheld a writ of mandamus ordering BLM to "expeditiously complete administrative action" on an application for six oil shale mining patents within thirty days, relying on much less explicit statutory language. The plaintiff in *Marathon Oil* had filed all necessary papers required to process its application for the patents under 30 U.S.C. § 29, and the BLM had prepared a mineral report "unequivocally stat[ing] that Marathon's minerals claims were valid and that the patents should issue." 937 F.2d at 499-500. BLM nevertheless refused to issue the patent, representing that the agency was waiting for the Department of the Interior to pass "an amendment to the regulations establishing standards for determining whether the potential yield of an oil shale mining claim is of sufficient value to justify the awarding of a patent." *Id.* at 501. The Tenth Circuit rejected BLM's approach, observing summarily that "Congress intended [BLM] to process mining patent applications." *Id.* at 500.

Like the Interior Department in *Marathon Oil*, BLM in this case has indicated that it is declining to process the H3 APD and H4 APD because BLM prefers to first complete a separate project – the MDP remand. But as the Tenth Circuit explained in *Marathon Oil*, BLM's workflow preferences are irrelevant when Congress has instructed BLM how to act. *See id.* at 501 (holding that "the [Interior] Department's desire to promulgate regulations that clarify the [controlling] standard," for review of oil shale mining patent applications "cannot justify the substantial delay in processing Marathon's application nor can it justify the continued delay [BLM] sought"). Delay is even less acceptable in this case where the controlling statute not only outlines an administrative process for issuing APDs but imposes specific timelines for the implementation of that process.[5]

[5] BLM's decision to disregard the Mineral Leasing Act's deadlines for APD processing so that the agency can complete the MDP remand – a project of undefined scope subject to no deadline – is particularly misplaced given BLM's repeated admission that approval of the MDP is not required before an APD can be processed. *See* Attach G at 1 (conceding that "approval of the MDP is not required for BLM to process individual well permits"); Attach C at 2 ("We agree that an approved MDP is not required before the BLM can consider individual applications for permits to drill

"There is no question that [30 U.S.C. § 226(p)] imposes mandatory duties on BLM, and that BLM failed to satisfy those duties in this case." *Brigham Oil*, 181 IBLA at 286 (determining that the ten- and thirty-day notification provisions in 30 U.S.C. § 226(p) impose non-discretionary, mandatory obligations on BLM field offices). Because BLM has failed to discharge its clear duty to act, a mandamus order requiring BLM to immediately complete its required administrative action and approve Gunnison's APDs is necessary and appropriate. *See Marathon Oil*, 937 F.2d at 500; *EnerVest*, 2016 WL 7496116, at *3 (holding that BLM had a duty to act within thirty days of receiving a complete APD).

C. NO OTHER ADEQUATE REMEDY EXISTS.

Both the Interior Board of Land Appeals and federal district courts in this circuit have recognized that, in cases such as this one, no other adequate remedy exists for Gunnison to vindicate its procedural rights. In *Brigham Oil*, the IBLA upheld penalties against an operator who proceeded to drill a well without an APD, rejecting the operator's argument that BLM's failure to perform the mandatory duties 30 U.S.C. § 226(p) imposes was tantamount to an implied approval of the APD. The IBLA observed that the operator's remedy for agency's failure was to institute a "'court action' to require BLM to fulfill its statutory obligation, either through a mandamus action or through provisions of the [APA] authorizing actions to compel a federal official to perform a non-discretionary duty." *Brigham Oil*, 181 IBLA at 288 (observing that "clearly a court could order BLM to perform its nondiscretionary duties"). *See also EnerVest*, 2016 WL 7496116, at *4 (recognizing that because an operator "must obtain a decision from BLM before it may move

(APDs)."). The MDP remand is entirely independent from Gunnison's right to drill under Gunnison's leases and unit agreements. BLM has a legal obligation to timely process Gunnison's individual APDs whether the MDP is ultimately approved, rejected, or modified.

forward with operations . . . [t]he only remedy available to [the operator] is to ask this court to compel BLM to take action").

Gunnison finds itself in the same predicament here. BLM's illegal administration of its APD processing has injured and will continue to injure Gunnison. Gunnison's 2023 drilling program would have consisted of two wells drilled off an existing well pad. Initial work to prepare the well sites should have already begun with drilling conducted during Summer 2023.[6] *See* Attach C at 1 (noting that BLM anticipated Gunnison drilling the H3 or H4 wells "during the window between May 1, 2023 and October 14, 2023").

Gunnison's project timetable was premised on, among other factors: (i) the assumption that BLM would fulfill its statutory obligations under 30 U.S.C. § 226(p) and other applicable law when processing Gunnison's APDs, *see* Attach. I ¶ 9; (ii) Gunnison's knowledge that virtually all of the work necessary to complete environmental review for the APDs had already been conducted as part of the 2019 EA, *see id.*; (iii) the federal district court's recognition that, notwithstanding vacatur of the MDP, Gunnison might still submit and BLM might still approve individual APDs, *see Citizens for a Healthy Cmty.*, 2022 WL 1597864, at *5 n.7; (iv) BLM's repeated acknowledgement – made both in verbal conversations and in writing to Gunnison – that approval of the MDP is not a prerequisite for the approval of APDs, *see supra* n. 5; (v) BLM's October 2021 issuance of, and regular reliance on, an instruction memorandum adopting a nationally applicable plan for enhanced NEPA review – including enhanced review of climate change impacts – in association with APDs submitted on leases where the underlying NEPA work for the lease is subject to remand, *see* Bureau of Land Mgmt., Permanent Instruction Mem. 2022-001 (Oct. 14, 2021); (vi) BLM's regular practice of approving APDs on federal leases not covered by

[6] Gunnison's drilling season is limited both by weather and by seasonal timelines imposed to protect wildlife and other environmental values. *See* Attach. I ¶ 9.

an MDP, *see* Attach. B at 4 n. 7; (vii) Gunnison's knowledge that supplemental analysis for the MDP was complete no later than February 1, 2023, *see* Attach. I ¶ 20; (viii) BLM's representations that the supplemental analysis of the MDP would be finalized by the first quarter of 2023, *see* Attach. C at 1 ("The BLM is targeting completion of the supplemental analysis for the first quarter of calendar year 2023."); Attach D at 1 (emphasizing that "meeting the Q1 timeline is still our intent"); and (ix) BLM's awareness of the drilling obligations Gunnison must satisfy to maintain the Iron Point Unit. BLM's delay threatens to cost Gunnison the opportunity to drill any of its anticipated 2023 wells – a loss of $8 million in anticipated 2023 revenue per well. *See* Attach. I ¶ 29.

And drilling individual wells is only the latest stage in Gunnison's project. As BLM knows, Gunnison has already invested more than $100 million in gathering, compression, and treatment facilities intended to serve the wells contemplated in the MDP area. *See id.* ¶ 30; *see also* Attach. C at 1 (acknowledging that, in 2022, Gunnison was "focused on preparing infrastructure in anticipation of future development"). Those facilities – designed to serve the full build out of development contemplated under Gunnison's leases – have fixed operating costs. *See* Attach. I ¶ 30. BLM's continued deferral of Gunnison's APDs denies Gunnison the ability to bring additional production volumes into the facilities, artificially (and exponentially) increasing Gunnison's operating expenses on a per energy unit basis. *See id.* Running these facilities below capacity negates Gunnison's objectives to be a low-cost producer and keeps Gunnison from achieving an internal rate of return on Gunnison's investment in these facilities. *See id.*

If Gunnison is prevented from drilling in 2023, Gunnison will be unable to meet contractual commitments to transport hydraulic fracturing sand by rail, threatening Gunnison's ability to guaranty rail transportation for future operations and potentially eliminating the significant

environmental benefits that arrangement would have afforded Gunnison's operations. *See id.* ¶ 31. Transport by rail significantly reduces the greenhouse gas emissions associated with Gunnison's operations, eliminates the surface impacts to both roads and natural areas associated that would otherwise result from thousands of additional truck trips, and improves roadway safety and convenience for local community members. *See* Bureau of Land Mgmt., Suppl. Envtl. Assessment for the North Fork Mancos Master Dev. Plan at 4, DOI-BLM-CO-G020-2023-0003-EA (May 9, 2023) (recognizing that the use of rail transportation was arranged to offset environmental impacts from Gunnison's operations); Attach. I ¶ 31.

Gunnison's relationship with its rail partners is not unique. Gunnison's inability to guaranty and meet commitments to all categories of service providers and vendors has compromised Gunnison's ability to optimize relationships with those third parties, increasing the costs Gunnison pays for services and supplies and limiting the pool of preferred service providers and vendors that are willing to work with Gunnison. *See* Attach. I ¶¶ 32-33. Efficient oil and gas development involves coordination with a wide range of contractors and service providers on a schedule that commits money and resources often many years in advance of the date when operations are to commence. *See id.* ¶ 32. BLM's failure to process the H3 APD or H4 APD has resulted in Gunnison having to terminate, postpone, or modify numerous contractual arrangements, often paying contractual penalties or losing deposits. *See id.* As a result of Gunnison being unable to make advance commitments, Gunnison is frequently forced to wait to purchase goods and services at the last minute, resulting in higher prices and lower availability for those goods and services.[7]

[7] Gunnison's contractual challenges have environmental, as well as economic, impacts. If Gunnison is unable to meet existing contractual commitments to services providers and vendors within the timelines Gunnison's existing contracts contemplate, Gunnison may not be able to secure all the equipment and services necessary to execute each of the environmental mitigation measures the MDP contemplates. Attach. I ¶ 34.

See id. ¶ 33. Equally important, several of Gunnison's preferred vendors have declined to work with Gunnison as a result of Gunnison's inability to guaranty the timing and scope of the work Gunnison will need. *See id.* The uncertainty attributable to BLM's failure to timely process permits has already elevated Gunnison's costs for both current operations and Gunnison's proposed wells.[8] *See id.*

Given the volatile commodity markets, unnecessary and illegal delay in processing APDs injures Gunnison's economic interest. The delay in processing the permits obviously delays Gunnison's ability to obtain revenue from production, but also restricts Gunnison's ability to market its project to third parties that might have been interested in funding development or acquiring Gunnison's assets. The market for oil and gas production is extraordinarily dynamic; diverse factors like the COVID-19 pandemic, geopolitical developments, and technological innovation all influence the availability and cost of financing oil and gas projects. Delays also allow time for competitors to research the prospect and potentially enter the market. BLM's illegal administration of APD processing has reduced the specific value of the potential wells, threaten Gunnison's ability to satisfy contractual commitments, and jeopardizes the entire field economics in a manner that will compel Gunnison to reduce costs, revise its development plan, and cut jobs in the area. Should Gunnison not ever be able to drill the wells necessary to fulfill Gunnison's obligations under its federal leases and unit agreements, Gunnison would lose the entirety of its net investment in the area – more than $460 million. *See id.* ¶ 36

[8] Beyond direct financial losses, the delays attributable to BLM's illegal delay impose meaningful opportunity costs. Over the better part of a decade, innumerable Gunnison employees, contractors, and vendors spent significant time on the MDP project area that could have been redirected to identify and develop opportunities in other basins. *See* Attach. I ¶ 37.

Every day that BLM delays processing Gunnison's APDs inflicts new harm on Gunnison – both procedural and financial. And yet Gunnison cannot proceed to the development stage of its project – or even make an informed decision to re-allocate its resources elsewhere (at significant loss to Gunnison) – until BLM processes the H3 APD and H4 APD. Because no remedy other than mandamus is available to Gunnison, the Court should grant this motion.

IV. CONCLUSION.

The Mineral Leasing Act imposes discrete, non-discretionary obligations upon BLM when reviewing APDs. BLM must take certain ministerial actions and must perform those actions within certain deadlines. Because Gunnison has a clear right to relief and BLM has a clear obligation to act under 30 U.S.C. § 226(p), and because Gunnison has no other remedy for BLM's statutory violation other than appealing this Court for mandamus, this Court should grant Gunnison's motion and direct BLM to immediately process Gunnison's APDs in accordance with the provisions of 30 U.S.C. § 226(p).

Submitted respectfully this 3rd day of July, 2023,

By: */s/ Mark S. Barron*

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 3, 2023, a copy of the foregoing **Gunnison Energy LLC's Motion for Immediate Mandamus Relief** was electronically filed with the Clerk of the Court using the CM/ECF system, and was served on the following parties by UPS overnight mail:

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