IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-01696-NYW-NRN

GUNNISON ENERGY LLC,

Plaintiff,

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.

DEFENDANTS' RESPONSE TO MOTION FOR IMMEDIATE MANDAMUS RELIEF (ECF No. 4)

Defendants respond to Gunnison Energy LLC's ("Gunnison") Motion for Immediate Mandamus Relief (ECF No. 4, filed 7/3/23).[1]

INTRODUCTION

The Mineral Leasing Act, 30 U.S.C. § 181 *et seq.*, authorizes the Secretary of the Interior to manage and oversee mineral development on public lands in a manner that "safeguard[s] . . . the public welfare." 30 U.S.C. § 187. The Mineral Leasing Act also provides for the development of oil and gas resources. 30 U.S.C. § 226. When the holder of a federal oil-and-gas lease submits an "application for permit to drill" ("APD"), the Secretary has a choice. She

[1] Gunnison filed its motion the day that it filed the complaint. ECF Nos. 1 & 4. Gunnison did not confer with Defendants' counsel before filing the motion. *See* D.C.COLO.LCivR 7.1(a).

can issue the permit, if, among other things, all requirements of applicable law have been met, including those of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, which generally requires the government to consider the environmental impacts of proposed actions. *See* 30 U.S.C. § 226(p)(2)(A). But if the applicant must take additional steps for the permit to be issued, or if the agency still needs to comply with applicable law, such as NEPA, the Secretary must defer the final decision on the permit and notify the applicant. *See* 30 U.S.C. § 226(p)(2)(B). The deferral notice must identify the action that needs to be taken, together with timelines and deadlines for completing those tasks. *See* 30 U.S.C. § 226(p)(2)(B)(ii). Although the Secretary must choose one of these two options, the choice is left to the discretion of the agency. *See EnerVest, Ltd. v. Jewell*, No. 16-cv-1256, 2016 WL 7496116, at *3 (D. Utah Dec. 30, 2016) ("BLM therefore has a duty to take some sort of action in response to a completed APD, but it has discretion as to what action it will take.").

This case concerns two of Gunnison's APDs for wells in Delta County, Colorado. Defendant U.S. Bureau of Land Management ("BLM"), acting for the Secretary, deemed the APDs complete on March 2, 2023. Five days later, on March 7, 2023, BLM sent Gunnison two "Notice of Deferral" letters, one for each APD. Both notices listed: the action that BLM needed to take to comply with applicable law ("BLM has not completed the National Environmental Policy Act (NEPA) analysis"); a timeline ("this analysis will take the following number of days: 180"); and a deadline ("We expect your APD to be approved by September 03, 2023.").

Gunnison's motion seeks to remedy BLM's alleged inaction. The motion, however, does not mention these deferral notices.[2] Gunnison asks the Court to order BLM to "process

[2] The Amended Complaint, filed after the motion, acknowledges receipt of the notices. *See*

Gunnison's APDs in a manner consistent with controlling statutory law." ECF No. 4 at 2. But controlling statutory law merely instructs BLM to *either* issue Gunnison's permits, if no further action is required by the applicant and if all requirements of applicable law have been completed, *or* provide a notice of deferral. BLM already complied with the statute when it provided the two deferral notices on March 7.

Gunnison is not entitled to relief from this Court, because the Administrative Procedure Act and the mandamus statute only permit the Court to order an agency to take discrete, non-discretionary action that is required by law. Gunnison has not identified a clear, non-discretionary action that BLM failed to take. The determination of whether NEPA requirements have been completed is within the agency's discretion. So, too, is the choice to defer the final decisions on the permits, if BLM's environmental analysis is not complete. BLM is close to completing the supplemental environmental assessment that will enable it to process Gunnison's APDs. Because BLM complied with Section 226(p)(2), and because BLM's decisions on these matters are discretionary, the Court should deny the motion for mandamus.

BACKGROUND

Oil and gas development on federal land. Development of onshore federal oil and gas generally involves three steps. First, BLM develops an area-wide resource management plan, specifying what areas will be open to potential leasing and development, along with conditions on any development. *See* 43 U.S.C. § 1712(a); 43 C.F.R. § 1601.0-5(n) (defining "resource management plan"). Second, BLM may issue leases for the development of specific parcels. *See* 43 C.F.R. § 3120.1-1 *et seq*. Third, the lessee must submit, for BLM's consideration, an

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ECF No. 15 ¶¶ 52, 84.

APD for each well that it wishes to drill. *See* 43 C.F.R. § 3162.3-1(c). Before a lessee may "commenc[e] any 'drilling operations' or 'surface disturbance preliminary thereto,'" BLM must conduct sufficient NEPA review and approve the APD. *See Pennaco Energy Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147. 1151-52 (10th Cir. 2004) (quoting 43 C.F.R. § 3162.3-1(c)).

NEPA requirements. NEPA "requires agencies to take a hard look at environmental consequences of a proposed action." *Diné Citizens Against Ruining Our Env't v. Haaland*, 59 F.4th 1016, 1034 (10th Cir. 2023) (quotation omitted). The statute "does not command agencies to reach any particular outcome, and it does not direct agencies to give special weight to environmental concerns." *Id.* at 1025. Instead, NEPA "directs agencies to prepare an [environmental impact statement] for 'proposals for ... major Federal actions significantly affecting the quality of the human environment.'" *Id.* (quoting 42 U.S.C. § 4332(C)). But if the "agency is unsure whether an action will significantly affect the environment, the agency may prepare an [environmental assessment] to determine whether an [environmental impact statement] is necessary." *Id.* (citing 40 C.F.R. § 1501.5). If an agency completes an environmental assessment and determines that a proposed action "will not significantly impact the human environment, the agency issues a Finding of No Significant Impact ('FONSI'), and the action may proceed without an [environmental impact statement]." *Id.* at 1025-26; 40 C.F.R. §§ 1501.5(c)(1) & 1501.6(a).

To satisfy NEPA, "agencies must consider the direct, indirect, and cumulative environmental impacts of the proposed action." *Diné Citizens*, 59 F.4th at 1034. "The impact of [greenhouse gas] emissions on climate change is precisely the kind of [ ] impacts analysis that NEPA requires agencies to conduct." *Id.* at 1035. "NEPA's implementing regulations require

the information in an environmental analysis to 'be of high quality' and supported by '[a]ccurate scientific analysis.'" *Id.* at 1039 (quoting 40 C.F.R. § 1500.1(b)). "[I]f an accurate method exists to determine the effect of the proposed action, BLM must perform that analysis or explain why it has not." *Id.* at 1042. "NEPA does not give BLM the discretion to ignore the impacts to the environment when there are methods for analyzing those impacts." *Id.* at 1043. This "'hard look' analysis must utilize 'public comment and the best available scientific information.'" *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 72 F.4th 1166, 1178 (10th Cir. 2023).

Challenges to BLM's NEPA analysis. In recent years, BLM's oil and gas planning, leasing, and permitting decisions have been challenged in lawsuits alleging that BLM's environmental analysis under NEPA was insufficient. *See Diné Citizens*, 59 F.4th at 1050 (holding that "BLM violated NEPA because it failed to take a hard look at the direct, indirect, and cumulative impact of [greenhouse gas] emissions and the cumulative impact of [hazardous air pollutant] emissions of the APD approvals"); *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d 237, 249 (D.D.C. 2020) ("BLM's cumulative impact analysis falls short of what NEPA requires"); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 75 (D.D.C. 2019) (ordering BLM to "consider the cumulative impact of [greenhouse gas] emissions generated by past, present, or reasonably foreseeable BLM lease sales in the region and nation"). These cases illustrate the careful environmental analysis that BLM must conduct related to oil and gas development under NEPA.

Gunnison's project. In 2017, Gunnison submitted its proposed North Fork Mancos Master Development Plan ("MDP") for development of oil and gas resources on its federal leases. ECF No. 4, Attach. I ¶ 6. After completing an environmental analysis for the MDP,

which led to a Finding of No Significant Impact, BLM approved the MDP. **Exhibit 1**, Declaration of Larry W. Sandoval, Jr. ("Sandoval Decl.") ¶ 8.

Legal challenge to the MDP. In 2021, five organizations challenged the adequacy of the environmental analysis that BLM and the U.S. Forest Service had prepared before approving the MDP. *Citizens for a Healthy Cmty. v. U.S. Dep't of Interior*, No. 21-cv-01268-MSK (D. Colo. May 10, 2021), ECF No. 1 (Pet. For Review of Ag. Action & Inj. Relief). The litigation claimed that "Defendants failed to take a hard look at impacts of development under the MDP—particularly climate impacts—and did not sufficiently evaluate available alternatives." *Id.* ¶ 7. Upon further review, BLM identified substantial concerns with the existing NEPA analysis of the challenged MDP, including the analysis of the potential impact of new wells on emissions of greenhouse gases. Sandoval Decl. ¶ 8. The agencies requested a voluntary remand to allow them to reconsider the environmental analysis via the administrative process. *Id.* In May 2022, the district court vacated the agencies' approval of the MDP and remanded the matter back to the agencies for further consideration. *Citizens for a Healthy Cmty. v. U.S. Dep't of Interior*, No. 21-cv-01268-MSK, 2022 WL 1597864, at *7 (D. Colo. May 19, 2022).

BLM defers its decision on two of Gunnison's APDs. Gunnison submitted APDs for two wells contemplated in the MDP, known as Iron Point Unit 1291 #13-24 H3 ("H3") and Iron Point Unit 1291 1291 #13-24 H4 ("H4"). Sandoval Decl. ¶ 2. In the following months, BLM staff transmitted a series of deficiency letters to Gunnison related to the two APDs. *Id.* ¶ 3. Gunnison responded to the deficiency letters, and the H3 and H4 APDs ultimately were deemed complete on March 2, 2023. *Id.* Five days later, on March 7, 2023, BLM sent Gunnison notices of deferral related to the H3 and H4 APDs. Sandoval Decl. ¶ 4, Attach. 1 at 1-2 & Attach. 2 at 1-

2; **Exhibit 2**, Declaration of Wesley Toews ("Toews Decl.") ¶¶ 3, 5 & Attach. 1 at 1; **Exhibit 3**, Declaration of Shannon Noah ("Noah Decl.") ¶ 5, Attach. 1 at 1 & Attach. 2 at 1. The notices listed the action that BLM had yet to complete to comply with applicable law: "BLM has not completed the National Environmental Policy Act (NEPA) analysis." Sandoval Decl., Attach. 1 at 1 & Attach 2 at 1. The notices gave a timeline for completing the action: "We Anticipate that this analysis will take the following number of days: 180." *Id.* The notices gave a deadline: "We expect your APD to be approved by September 03, 2023." *Id.*, Attach. 1 at 2 & Attach. 2 at 2.

BLM is completing its supplemental environmental analysis. BLM is in the process of updating and improving its environmental analysis, including analysis of the cumulative effects of greenhouse gases, which will inform the decisions on the H3 and H4 APDs. *Id.* ¶¶ 10-12; ECF No. 4, Attach. C at 1-2 ("BLM is currently preparing a supplemental environmental analysis for the MDP" that "supports efficient consideration of the impacts of development in the project area"); *id.*, Attach. G at 1 ("When complete, the updated analysis will inform not only BLM's review of the proposed MDP, but also individual permit approval decisions."). Portions of the supplemental environmental assessment that BLM is completing, including the analysis of cumulative greenhouse gas effects, are virtually identical to what BLM would have to produce before approving the APDs, if BLM were conducting an environmental analysis only of the H3 and H4 wells. Sandoval Decl. ¶ 12.

The supplemental environmental assessment will, among other things, update the air quality and greenhouse gas analysis of the 2019 environmental assessment, using new information and methods, and makes analytic changes to address concerns identified in BLM's review of the prior analysis. Sandoval Decl. ¶ 10. The supplemental environmental assessment

takes into account five new natural gas wells constructed in the area since the prior project-specific emissions inventory was developed for the prior analysis. *Id.* BLM is updating the original air pollutant and greenhouse gas emissions inventories, and the supplemental environmental assessment also includes a new emissions "calculator" (equations and emissions factors) for midstream and downstream greenhouse gas emissions. *Id.* This updated analysis is a necessary component of BLM's NEPA analysis for the H3 and H4 APDs. *Id.* ¶¶ 11-12.

BLM's supplemental environmental assessment is nearing completion. BLM concluded the public comment period on the analysis and is now reviewing comments to evaluate whether any modification is warranted. *Id.* ¶ 13. BLM received more than 180 pages of comments and identified more than 250 individual comments from the submissions. *Id.* Once the environmental analysis is complete, BLM can determine whether a Finding of No Significant Impact is warranted for the APDs and, if so, move forward with processing them. *Id.* ¶¶ 13-14. And because approval of the MDP is not a prerequisite to approval of the APDs, BLM could approve the APDs, even if it declined to approve the MDP. *Id.* ¶ 14.

ARGUMENT

Gunnison moves for a writ of mandamus under 28 U.S.C. § 1361, which is only available if, among other things, a plaintiff "has no other adequate remedy" under the law. *Rios v. Ziglar*, 398 F.3d 1201, 1206 (10th Cir. 2005). But here plaintiff has another remedy. Agency inaction can be challenged under the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 706(1) (providing that a reviewing court may "compel agency action unlawfully withheld or unreasonably delayed"); 5 U.S.C. § 551(13) ("'agency action' includes . . . failure to act"); *see also Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997) ("The availability

of a remedy under the APA technically precludes Mt. Emmons' alternative request for a writ of mandamus, although the mandatory injunction is essentially in the nature of mandamus relief.") (citations omitted).

Regardless, under either the APA or the mandamus statute, a plaintiff is only entitled to relief if the defendant owes him "a clear nondiscretionary duty." *Marquez-Ramos v. Reno*, 69 F.3d 477, 478-79 (10th Cir. 1995) (mandamus); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004) (the APA "empowers a court only to compel an agency to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing *how* it shall act") (quotation marks omitted); *Audubon of Kan., Inc. v. U.S. Dep't of Interior*, 67 F.4th 1093, 1108 (10th Cir. 2023) ("To bring a failure-to-act claim [under the APA], a plaintiff must identify a 'failure to take an agency action' that is (1) discrete and (2) legally required."). Thus, the Court can only grant Gunnison's motion if BLM has failed to perform a discrete, ministerial or non-discretionary action that is legally required. As described below, this high threshold is not met here, and the Court should deny the motion.

I. BLM complied with the Mineral Leasing Act by providing notices of deferral.

Gunnison seeks an order directing BLM to comply with Section 226(p)(2) but cannot identify a discrete, non-discretionary action that BLM was legally required, but failed, to take. To the contrary, BLM satisfied Section 226(p)(2) when it issued statutory notices of deferral to Gunnison, stating that it would complete additional NEPA analysis within 180 days and expected to issue the permits by September 3, 2023. The Court should deny the mandamus motion.

A. The Mineral Leasing Act

The Mineral Leasing Act outlines the two actions that BLM can take on APDs:

> Not later than 30 days after the applicant for a permit has submitted a complete application, the Secretary shall—
>
> (A) issue the permit, if the requirements under the National Environmental Policy Act of 1969 and other applicable law have been completed within such timeframe; or
>
> (B) defer the decision on the permit and provide to the applicant a notice--(i) that specifies any steps that the applicant could take for the permit to be issued; and (ii) a list of actions that need to be taken by the agency to complete compliance with applicable law together with timelines and deadlines for completing such actions.

30 U.S.C. § 226(p)(2).

B. BLM's NEPA analysis for Gunnison's APDs was not complete.

BLM cannot issue permits under Section 226(p)(2)(A) until "the requirements" under NEPA "have been completed." 30 U.S.C. § 226(p)(2)(A). Here, BLM's NEPA analysis is not complete. Sandoval Decl. ¶¶ 8-13.

BLM had planned to rely on its completed 2019 environmental analysis for Gunnison's MDP when processing APDs for the project. *Id.* ¶ 9. Federal regulations recognize and approve of this approach for its efficiency. *Id.* ¶ 12; 40 C.F.R. § 1501.12 ("Agencies shall incorporate material, such as planning studies, analyses, or other relevant information, into environmental documents by reference"); 43 C.F.R. § 46.120(d) ("Responsible Officials should make the best use of existing NEPA documents by supplementing, tiering to, incorporating by reference, or adopting previous NEPA environmental analyses to avoid redundancy and unnecessary paperwork."); *see also* 43 C.F.R. § 3171.15(b) ("After the Master Development Plan is approved, subsequent APDs can reference the Master Development Plan and be approved using the NEPA analysis for the Master Development Plan, absent substantial deviation from the Master Development Plan previously analyzed or significant new information relevant to environmental effects. Therefore, an approved Master Development Plan results in timelier

processing of subsequent APDs.").

But the sufficiency of the existing NEPA analysis for the MDP was called into question, and BLM identified substantial concerns with that analysis, including the analysis of the potential impact of new wells on greenhouse gas emissions. Sandoval Decl. ¶ 8. The agency sought a voluntary remand, and the district court vacated approval of the MDP so that the agencies could conduct further environmental analysis. *Citizens for a Healthy Cmty.*, 2022 WL 1597864, at *1, 6-7; *see also* Sandoval Decl. ¶ 8. Due to its concerns with the existing environmental analysis for the MDP, BLM could not solely rely on it to approve the H3 and H4 APDs. Sandoval Decl. ¶ 9.

Until BLM has completed a NEPA analysis of greenhouse gases sufficient to inform its review of the H3 and H4 APDs, BLM cannot issue the permits. *Id.* ¶¶ 12-13; *see also* 30 U.S.C. § 226(p)(2)(A) (permits must issue "if the requirements" of NEPA are "completed").

C. BLM provided Gunnison with the statutory notice of deferral letters.

Because BLM was not positioned to approve the APDs in March 2023, BLM had only one option under Section 226(p)(2): provide deferral notices. Tracking the requirements of the statute, BLM prepared notices that listed the action the agency needed to take to complete compliance with applicable law ("BLM has not completed the [NEPA] analysis") and provided a timeline (estimated "180" days) and a deadline ("September 03, 2023"). *See* 30 U.S.C. § 226(p)(2)(A), (B)(ii) (stating that permits cannot issue until BLM complies with the requirements of NEPA and identifying the required contents of a deferral notice); Sandoval Decl. ¶ 7, Attach. 1 at 1-2 & Attach. 2 at 1-2. BLM provided the notices to Gunnison. Sandoval Decl. ¶ 4; Toews Decl. ¶¶ 3, 5 & Attach. 1 at 1 (email to Gunnison attaching the notices); Noah Decl.

¶ 5, Attach. 1 at 1 & Attach. 2 at 1 (notifications of the notices).

These facts are dispositive of this motion and should end the Court's inquiry into BLM's alleged inaction. To the extent Gunnison argues that the notices of deferral are insufficiently detailed or lacking documentation, *see* ECF No. 4 at 11 (suggesting that BLM must "provide a detailed deferral notice"); *id.* at 13 ("BLM must . . . offer a non-arbitrary reason supported by substantial evidence"), the statute does not support Gunnison's argument. The statute requires BLM to "list" the action to be taken together with a "timeline[]"and a "deadline[]" for the action. 30 U.S.C. § 226(p)(2)(B)(ii). The statute does *not* require BLM to provide a "detailed" justification for its deferral of a decision or provide the applicant with "substantial evidence" supporting the deferral. *See id.* The notices prepared here satisfy the statutory requirements, as explained above. The Court cannot order BLM to take action not required by law. *See Audubon of Kansas*, 67 F.4th at 1108 (action must be "legally required").

Moreover, whether BLM had a sufficient justification to defer its decisions is not before the Court. Even if the deferral of a decision could be deemed a final agency action, *but see* 30 U.S.C. § 226(p)(2)(B) (the agency shall "defer the *decision*") (emphasis added), challenges to an agency's justification for a final agency action must be brought under 5 U.S.C. § 706(2)(A) (a reviewing court may "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"), not Section 706(1). Gunnison's mandamus motion does not raise such a challenge. Rather, Gunnison asks the Court to order BLM to act, under Section 706(1) or 28 U.S.C. § 1361.[3] *See* ECF No. 4 at 9-10. A

[3] The motion cannot be interpreted as raising an arbitrary-or-capricious challenge to the notices under the APA. Gunnison does not recognize the existence of the deferral notices in its motion. Moreover, Gunnison seeks mandamus relief and structures its argument around that standard.

claim that an agency took action but failed to act *in a non-arbitrary or non-capricious manner* is not a failure-to-act claim. Such a claim is, in substance, a challenge to the agency's action as being arbitrary or capricious. Gunnison has not brought such a challenge.

D. The MDP and APD approval processes are distinct, but BLM needs the completed supplemental environmental assessment to process the applications.

Gunnison contends that BLM's MDP process shouldn't be connected to the APD process. ECF No. 4 at 13 ("BLM here relies instead on a MDP process that is the opposite of required – master development plans, as BLM acknowledges repeatedly, are entirely *optional*."). Defendants recognize that the MDP and APD processes are distinct and that MDPs are optional. But there is nothing improper about relying on an environmental analysis prepared to support the agency's consideration of a proposed MDP to make decisions about APDs. *See, e.g.*, 43 C.F.R. § 3171.15(b). BLM is not waiting to *approve* the MDP before reviewing the APDs. *See* Sandoval Decl. ¶ 14. Rather, BLM is completing a supplemental environment assessment that it expects to consider, together with the 2019 environment assessment, to determine whether it can reach a Finding of No Significant Impact for the two pending APDs. *Id.* ¶¶ 13-14; ECF No. 4, Attach. G at 1 ("BLM has granted appropriate lease and unit suspensions while the additional NEPA analysis is being completed."). That compliance with NEPA is a prerequisite to issuing permits. *See* 30 U.S.C. § 226(p)(2)(A).

II. The Court cannot affirmatively order BLM to issue the permits.

The Court also should deny Gunnison's request for an order directing BLM to issue the permits, because BLM is not legally required to issue permits when it has not completed its

environmental analysis.[4] 30 U.S.C. § 226(p)(2)(A). Congress gave the Secretary a choice: to issue permits *or* defer the decision to take required action. 30 U.S.C. § 226(p)(2); *see also EnerVest*, 2016 WL 7496116, at *3 ("BLM therefore has a duty to take some sort of action in response to a completed APD, but it has discretion as to what action it will take.").[5] The decision to issue oil-and-gas permits is discretionary. Indeed, "NEPA applies only where an agency action is discretionary." *Nat. Res. Def. Council v. McCarthy*, 993 F.3d 1243, 1251 (10th Cir. 2021); *see also* "*Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1262-63 (10th Cir. 2001) (agreeing that "NEPA compliance is unnecessary where the agency action at issue involves little or no discretion on the part of the agency"). Mandamus cannot issue under these circumstances. *See Audubon of Kansas*, 67 F.4th at 1108 (action must be "legally required").

The Court has no authority under Section 706(1) or 28 U.S.C. § 1361 to tell BLM *how* to act. *See, e.g.*, *Norton*, 542 U.S. at 64 (a court is empowered "to compel an agency . . . to take action upon a matter, without directing *how* it shall act") (quotation marks omitted). Here, the Court cannot determine that NEPA requirements are complete—work on the supplemental environmental assessment is ongoing, *see* Sandoval Decl. ¶ 13—or that the permits must issue. *See Norton*, 542 U.S. at 64.; *see also EnerVest*, 2016 WL 7496116, at *3 (concluding that the district court could not order BLM to issue permits, even where the court stated that air quality

[4] Gunnison appears to recognize that the Court cannot order BLM to issue the permits. *See* ECF No. 4 at 11 ("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.").

[5] The *EnerVest* court ordered BLM to act under Section 226(p)(2) but declined to order BLM to issue permits. 2016 WL 7496116, at *3. In that case, BLM conceded that it had not issued permits or provided deferral notices and that the motion should be granted. *Id.* at *1.

issues "appear[ed]" to have been "addressed" adequately). Where BLM has acted under 30 U.S.C. § 226(p)(2), the Court cannot order BLM to act *differently*.

CONCLUSION

Defendants respectfully request that the Court deny the motion.

Dated: July 28, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve all parties of record.

s/ Thomas A. Isler
Thomas A. Isler
Assistant United States Attorney