

No. 20-35224

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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NATIVE VILLAGE OF NUIQSUT, et al.,

Plaintiffs-Appellants,

v.

BUREAU OF LAND MANAGEMENT, et al.,

Defendants-Appellees

and

CONOCOPHILLIPS ALASKA, INC.,

Intervenor-Defendant-Appellee

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On Appeal from the District of Alaska  
Case No. 3:19-cv-00056-SLG

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**CONOCOPHILLIPS ALASKA, INC. RESPONSE TO ORDER  
REQUESTING SUPPLEMENTAL BRIEFING**

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In response to the Court’s order at docket 51 directing the parties to provide supplemental briefing updating the status of the 2020 Integrated Activity Plan Environmental Impact Statement (“2020 IAP/EIS”) and how that status affects the issue of mootness, Intervenor-Defendant-Appellee ConocoPhillips Alaska, Inc. (“ConocoPhillips”) respectfully submits the following:

The Bureau of Land Management (“BLM”) and the Department of the Interior issued a record of decision (“ROD”) approving the 2020 IAP/EIS for National Petroleum Reserve, Alaska (“Petroleum Reserve”) on December 31, 2020.<sup>1</sup> The 2020 IAP/EIS and ROD supersede and replace the prior 2012 Integrated Activity Plan Environmental Impact Statement (“2012 IAP/EIS”). The issuance of the ROD adopting the 2020 IAP/EIS confirms that there is no longer a live controversy regarding BLM’s environmental assessment (“EA”) for ConocoPhillips’ 2018-19 winter exploration program (“Winter Program”) in the Petroleum Reserve and the matter is now moot.<sup>2</sup>

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<sup>1</sup>[https://eplanning.blm.gov/public\\_projects/117408/200284263/20032151/250038350/NPR-A%20IAP%20Record%20of%20Decision.pdf](https://eplanning.blm.gov/public_projects/117408/200284263/20032151/250038350/NPR-A%20IAP%20Record%20of%20Decision.pdf).

<sup>2</sup>Plaintiffs-Appellants previously encouraged the Court to disregard the 2020 IAP/EIS because “BLM has not yet adopted a decision approving [the 2020 IAP/EIS].” Dkt. 33 at 6–7. But even Plaintiffs-Appellants acknowledge that the ROD has bearing on whether there is a live controversy. *See id.* (“Once the decision is final, it may be appropriate for the Court to take judicial notice of [the 2020 IAP/EIS], but it is at best premature to consider it at this point before the agency has made a decision.”).

Plaintiffs-Appellants’ underlying Amended Complaint solely challenges the adequacy of the site-specific EA for the 2018-19 Winter Program. The EA was tiered to and relied upon the 2012 IAP/EIS. The parties do not dispute that ConocoPhillips fully completed all activities related to the winter exploration program in April 2019. *See* Dkt. 10 at 59 (“Vacating the EA would not affect the Exploration Program because it is over.”); SER 2–3. An appeal is moot when there is no longer a “present controversy as to which effective relief can be granted.” *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008) (internal quotation marks and citation omitted). The “capable of repetition, yet evading review” exception to the mootness doctrine applies when “(1) the duration of the challenged action is too short to allow full litigation before it ceases or expires, *and* (2) there is a reasonable expectation that the plaintiffs will be subjected to the challenged action again.” *Wildwest Inst. v. Kurth*, 855 F.3d 995, 1002–03 (9th Cir. 2017) (emphasis added) (quoting *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1018 (9th Cir. 2012)).

There are two primary reasons that the issuance of the ROD for the 2020 IAP/EIS confirms that this case is moot. ***First***, the adoption of the 2020 IAP/EIS removes a key rationale by which the district court decided to apply the capable of repetition, yet evading review exception to the mootness doctrine. The district court reasoned that this exception applied because “it appears likely that additional

NEPA analyses for future exploration on the NPR-A will tier to and rely on the 2012 IAP/EIS . . . .” ER 27. In the intervening time since the district court issued its decision, the 2012 IAP/EIS has been superseded by the 2020 IAP/EIS.<sup>3</sup> As a result, future exploration programs will tier to and rely on the 2020 IAP/EIS, not the superseded 2012 IAP/EIS. This concern is no longer *likely* to recur.

***Second***, the ROD for the 2020 IAP/EIS reinforces the fact that there is no reasonable expectation that Plaintiffs-Appellants will be subjected to the challenged action again. ConocoPhillips’ opening brief explains that BLM has always conducted new site-specific EAs for each winter exploration program, and that there is no likelihood that the BLM will rely on the challenged EA in future authorizations. Dkt. 19-1 at 19 (citing ER 338–48). ConocoPhillips has completed all activities under the 2018-19 Winter Program, and any future exploration activities will necessitate a new site-specific EA (or environmental impact statement) to account for differences in location, number of wells, ice roads and associated infrastructure, and other factors. *Id.* at 19–20. Significantly, the EA challenged by Plaintiffs-Appellants is tiered to the 2012 IAP/EIS, a document that has been replaced by the recently approved 2020 IAP/EIS. This is plainly a

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<sup>3</sup>As stated in the Federal Defendants-Appellees’ supplemental brief, the 2020 IAP/EIS is currently in litigation. *See N. Alaska Env’tl. Ctr. v. Haaland*, Case No. 3:20-cv-00207-SLG (D. Alaska).

situation where the agency will not be relying on the same underlying environmental analysis in future years. *See Ramsey v. Kantor*, 96 F.3d 434, 446 (9th Cir. 1996) (holding challenge to expired fishing regulation was moot where the agency would “no longer be relying on the particular biological opinion that was being challenged, but rather upon a new opinion”); Dkt. 19-1 at 21–23.

In sum, ConocoPhillips fully completed all activities related to the challenged winter exploration program in April 2019. Because there is no longer a “present controversy as to which effective relief can be granted” with respect to the 2018-19 Winter Program, the action is moot. *Feldman*, 518 F.3d at 642 (internal quotation marks and citation omitted); *see also Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 893 F.2d 1012, 1015 (9th Cir. 1989). If at some point in the future ConocoPhillips proposes new winter exploration, BLM will review that proposal as part of a new NEPA process that tiers to a different IAP/EIS. ConocoPhillips respectfully requests the Court dismiss this case as moot or, alternatively, affirm the district court’s decision on the merits.

DATED: July 12, 2021.

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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