

No. 20-35224

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF NUIQSUT, et al.,
Plaintiffs/Appellants,

v.

BUREAU OF LAND MANAGEMENT, et al.,
Defendants/Appellees,

and

CONOCOPHILLIPS ALASKA, INC.,
Intervenor-Defendant/Appellee.

Appeal from the United States District Court for the District of Alaska
No. 3:19-cv-00056 (Hon. Sharon L. Gleason)

FEDERAL APPELLEES' SUPPLEMENTAL BRIEF

Of Counsel:

MICHAEL GIERYIC
Attorney-Advisor
Office of the Solicitor
U.S. Department of the Interior

JEAN E. WILLIAMS
Acting Assistant Attorney General
ANDREW C. MERGEN
AMELIA G. YOWELL
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-5580
amelia.yowell@usdoj.gov

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GLOSSARY

BLM	Bureau of Land Management
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
IAP	Integrated Activity Plan
NEPA	National Environmental Policy Act
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement

INTRODUCTION

This Court has asked the parties to file supplemental briefs providing an update on the status of the 2020 Integrated Activity Plan and Environmental Impact Statement (IAP/EIS) for the National Petroleum Reserve in Alaska and explaining whether that status “affects the issue of mootness.” Docket Entry 51, Order (July 6, 2021).

The short answer to the Court’s question is that the Bureau of Land Management (BLM) issued a Record of Decision (ROD) for the 2020 IAP/EIS on December 31, 2020. Since then, BLM has been applying the 2020 IAP/EIS in its environmental analysis and approval of proposed activities in the Petroleum Reserve. New officials within the U.S. Department of the Interior are currently reviewing the 2020 IAP/EIS and ROD, but as of this filing, the 2020 IAP/EIS remains in effect.

These developments underscore that this appeal is moot and does not fall within the narrow exception for cases capable of repetition yet evading review. Plaintiffs challenge BLM’s 2018 Environmental Assessment (EA) and Decision Record approving certain winter exploration activities on ConocoPhillips’ leases in the Petroleum Reserve. But ConocoPhillips completed those activities over two years ago. And Plaintiffs cannot reasonably expect to face the same or similar action in the future. As discussed in Intervenor’s Answering Brief (pp. 24–25), ConocoPhillips has no plans to conduct more winter exploration activities in the Petroleum Reserve in the near future. Even so, BLM would not issue the same or similar EA in the future. Any future exploration activities would involve different

areas and would be subject to their own project-specific environmental analysis with a different administrative record. Further, BLM's adoption and implementation of the 2020 IAP/EIS confirms that the framework for BLM's environmental analyses has changed since the 2018 EA. And given the agency's ongoing review of the 2020 IAP/EIS and ROD, this framework could once again change.

ARGUMENT

I. Status of the 2020 IAP/EIS

A. BLM has been implementing the 2020 IAP/EIS since December 31, 2020.

As discussed in BLM's Answering Brief (pp. 16, 22–23), on June 26, 2020, BLM issued a new final IAP/EIS for the Petroleum Reserve. 85 Fed. Reg. 38,388 (June 26, 2020). On December 31, 2020, BLM issued a ROD formally adopting the agency's preferred alternative identified in the 2020 IAP/EIS. *See Integrated Activity Plan Record of Decision*, https://eplanning.blm.gov/public_projects/117408/200284263/20032151/250038350/NPR-A%20IAP%20Record%20of%20Decision.pdf (ROD). Among other things, the 2020 IAP/EIS and ROD opened additional lands to leasing, adopted new lease stipulations, and adopted new required operating procedures for all oil and gas activities in the Petroleum Reserve. *Id.* at 1–2.

BLM has been implementing the regulatory standards of the 2020 IAP/EIS since it went into effect on December 31, 2020.¹ For instance, BLM has been applying the 2020 IAP/EIS's required operating procedures to on-the-ground

¹ Although the 2020 IAP/EIS opened additional lands to leasing, BLM has not held a lease sale in the Petroleum Reserve since 2019 and currently has no plans to do so.

activities in the Petroleum Reserve, including any oil and gas exploration activities. These operating procedures apply to all oil and gas activities (and some non-oil and gas activities) proposed in the Petroleum Reserve while the IAP/EIS is in effect. *See* ROD at 1–2, Appendix A at A4–5. They include specific measures to protect the environment and minimize disruption to wildlife including caribou. ROD Appendix A at A18–38. BLM will evaluate these operating procedures in its future project-specific analysis under the National Environmental Policy Act (NEPA). *See* 43 C.F.R. § 46.130.

BLM also now relies on the new 2020 IAP/EIS instead of the superseded 2012 IAP/EIS when preparing tiered NEPA analyses of proposed activities in the Petroleum Reserve. *See* BLM Answering Brief 22–24. For example, BLM recently tiered to the new 2020 IAP/EIS, not the 2012 IAP/EIS, when approving winter exploration activities in a different part of the Petroleum Reserve. Emerald House Environmental Assessment at 8, 11–16, https://eplanning.blm.gov/public_projects/2003448/200394150/20033585/250039784/Final%20EH%20EA%201.14.2021.pdf (Emerald House EA); *see id.* at 10 (map of activities).²

B. Interior is reviewing the 2020 IAP/EIS and ROD.

Interior is currently reviewing the 2020 IAP/EIS and ROD. Interior estimates that it will complete its review by September 7, 2021. Counsel for Federal Appellees

² Plaintiffs moved for judicial notice of the Accumulate Energy, Inc. (now Emerald House) project on December 9, 2020. Docket Entry 38. In response, ConocoPhillips requested judicial notice of the project’s preliminary draft EA. Docket Entry 40. BLM did not oppose either request. The final EA for the Emerald House project is available on BLM’s website at the above link.

will notify this Court of the outcome of Interior’s review. In the meantime, the 2020 IAP/EIS remains in effect.

Several environmental groups (including some Plaintiffs here) are challenging the 2020 IAP/EIS and its ROD in two pending lawsuits in the U.S. District Court for the District of Alaska. *Nat’l Audubon Soc’y v. Haaland*, No. 3:20-cv-206 (D. Alaska); *N. Alaska Env’t Ctr. v. Haaland*, No. 3:20-cv-207 (D. Alaska) (*NAEC*). Federal defendants moved to stay that litigation “to accommodate review of this matter by new officials within the United States Department of the Interior.” Motion to Stay at 2, *Nat’l Audubon Soc’y*, ECF No. 27; Motion to Stay at 1–2, *NAEC*, ECF No. 23. The court stayed the litigation on March 15, 2021 and then extended the stay on May 13, 2021. *Nat’l Audubon Soc’y*, ECF Nos. 28, 30; *NAEC*, ECF Nos. 24, 26. On July 9, 2021, federal defendants filed a joint status report seeking to extend the stay until September 7, 2021 and stating that “[d]efendants intend within that time period to determine their next steps with regard to the IAP.” Status Report at 2, *Nat’l Audubon Soc’y*, ECF No. 32; Status Report at 2, *NAEC*, ECF No. 27.

II. These developments confirm that this appeal should be dismissed as moot.

The capable of repetition yet evading review exception to the mootness doctrine applies only when the “the duration of the challenged action is too short to allow full litigation before it cease” *and* “there is a reasonable expectation that the plaintiffs will be subjected to it again.” *Feldman v. Bomar*, 518 F.3d 637, 644 (9th Cir. 2008) (internal quotation marks omitted). This is not an extraordinary case that meets both prongs. BLM Answering Brief 20–25.

In its Answering Brief (pp. 21–24), BLM gave three independent reasons why there is no reasonable expectation that Plaintiffs will face the same or similar action in the future. First, ConocoPhillips does not plan to conduct more exploration activities in the same area or elsewhere in the Petroleum Reserve for at least the next couple of years. Second, even if ConocoPhillips (or anyone else) were to apply to conduct winter exploration activities in the same area, BLM would complete a new project-specific NEPA analysis that would analyze different sites and scopes than those at issue in the 2018 EA. Third, the framework for future BLM environmental analyses has changed since the 2018 EA.³

The adoption and implementation of the 2020 IAP/EIS further confirms that BLM’s NEPA analysis framework has shifted since the 2018 EA and the district court’s decision. A year and a half ago, the court reasoned that “NEPA analyses for future exploration” will tier to BLM’s prior NEPA analyses “in the same manner as the 2018 EA.” 1 E.R. 27. But that is no longer true. BLM Answering Brief 21–23. Even if someone were to propose winter exploration activities in the same area in

³ As noted in BLM’s Answering Brief (p. 23), revised NEPA regulations took effect on September 14, 2020. The Council on Environmental Quality (CEQ) has announced its plans to change those regulations. *CEQ Unified Agenda RIN 0331-AA05*, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0331-AA05>; *CEQ Unified Agenda RIN 0331-AA07*, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0331-AA07>. In anticipation of those changes, CEQ also extended the deadline for federal agencies to revise their individual NEPA procedures. 86 Fed. Reg. 34,154 (June 29, 2021). In the meantime, BLM anticipates performing the same level of NEPA analysis contemplated by the regulations in effect prior to 2020. *See* Secretary of the Interior, Order No. 3399, § 5 (April 16, 2021), https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3399-508_0.pdf.

the future, and even if BLM were to analyze those activities in an EA, there is no evidence that Plaintiffs will face another EA that tiers to the 2012 IAP/EIS in the same manner as the EA here. *Id.* at 22. BLM tiers to the IAP/EIS in effect at the time of the environmental analyses. Because BLM has adopted the 2020 IAP/EIS, the agency will tier to it instead of the 2012 IAP/EIS when preparing a tiered NEPA analysis. Indeed, the recent Emerald House EA shows that BLM is now tiering to the 2020 IAP/EIS.⁴ *See supra* p. 3. Interior's review of the 2020 IAP/EIS and ROD and the pending litigation could also lead to a wide range of changes to the IAP/EIS in the future.

Plaintiffs argue that their case is not moot as long as *any* IAP/EIS is in place for the Petroleum Reserve. Reply Brief 9. But Plaintiffs offer no support for their expansion of the capable of repetition yet evading review exception to mootness. Besides, Plaintiffs have not challenged BLM's decision to manage the Petroleum Reserve under programmatic IAPs. Nor have they challenged BLM's tiering regulations. Rather, Plaintiffs' claims rest on alleged flaws with BLM's specific analysis in the 2018 EA. Opening Brief 23–36, 40–57; Reply Brief 12–28. Those particular shortcomings will not recur in the future for the reasons discussed in BLM's Answering Brief (pp. 18–25). Moreover, the adoption of the 2020 IAP/EIS

⁴ In its Answering Brief (p. 23), BLM indicated that it would also rely on the 2020 IAP/EIS instead of the cumulative effects analysis in the GMT2 Supplemental Environmental Impact Statement (SEIS). In the recent Emerald House EA, however, BLM relied on both the 2020 IAP/EIS and the GMT2 SEIS. Emerald House EA at 8. Moving forward, BLM may similarly rely on the GMT2 SEIS if the proposed future activities would occur at the same time and place as the GMT2 activities. *See id.* at 14. Even so, future environmental analyses would not resemble the 2018 EA for all the reasons discussed in this brief and BLM's Answering Brief.

confirms that Plaintiffs will not face the same tiered analysis. The 2020 IAP/EIS sets forth a different management plan, with revised operating procedures and updated NEPA analysis. Plaintiffs are free to challenge any future project-specific EA that tiers to the new IAP/EIS. But Plaintiffs may not convert their claims challenging the 2018 EA into ones challenging the 2020 IAP/EIS to escape mootness.

At any rate, this case is moot regardless of the status of the 2020 IAP/EIS. BLM Answering Brief 19–22. The EA here addressed specific wells that were drilled in winter 2018–2019. Any future exploratory activity would involve different sites, scopes, and issues. It would also be subject to its own project-specific NEPA analysis with its own administrative record. In short, BLM would not re-issue the same EA and thus there is no reasonable expectation that Plaintiffs will be subjected to the challenged action again. *See Or. Nat. Res. Council, Inc. v. Grossarth*, 979 F.2d 1377, 1379–80 (9th Cir. 1992); *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978), *cited in* BLM Answering Brief 21–22.

CONCLUSION

For these reasons and those in BLM’s Answering Brief, this appeal should be dismissed as moot or the judgment of the district court should be affirmed on the merits.

Respectfully submitted,

/s/ Amelia G. Yowell

JEAN E. WILLIAMS

Acting Assistant Attorney General

ANDREW C. MERGEN

AMELIA G. YOWELL

Attorneys

Environment and Natural Resources Division

U.S. Department of Justice

Of Counsel:

MICHAEL GIERYIC

Attorney-Advisor

Office of the Solicitor

U.S. Department of the Interior

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