Clay R. Smith
Chief Editor, AILD
CWAG & AG Alliance
1807 W. Bannock St. **I** Boise ID 83702
208.350.6426 (Direct Dial) **I** 208.724.9780 (Cell)
Clay.Smith@cwagweb.org

Native Village of Nuiqsut v. BLM—NEPA challenge to completed project's environment assessment deemed moot where "multitude of factors" convinced Ninth Circuit that capable-of-repetition-yet-evading-review exception did not apply

The Bureau of Land Management completed an integrated action plan/environmental impact statement in 2012 for a portion of northern Alaska's Petroleum Reserve. Six years later, the agency issued an environmental assessment approving a winter drilling exploration program by ConocoPhillips Alaska, Inc. that tiered to the IA/EIS. Various entities sued the BLM in 2019 shortly before the exploration's completion, alleging violation of the National Environmental Policy Act, the Administrative Procedure Act, and the Alaska National Interest Lands Conservation Act. In January 2020, the district court granted the federal defendants' motion for summary judgment on the merits after denying their argument that the project's completion had rendered the controversy moot because, in the court's view, the dispute was capable of repetition yet would evade review. *Native Village of Nuiqsut v. Bureau of Land Mgmt.*, 432 F. Supp. 3d 1003 (D. Alaska 2020). The plaintiffs appealed the summary judgment grant, and the federal defendants renewed their mootness argument before the court of appeals.

The Ninth Circuit vacated the judgment and remanded with instructions to dismiss the action as moot. *Native Village of Nuiqsut v. Bureau of Land Mgmt.*, No. 20-35224, 2021 WL 3730748 (9th Cir. Aug. 24, 2021). The panel recognized that "'defendants in NEPA cases face a particularly heavy burden in establishing mootness' ... because 'if the completion of the action challenged under NEPA is sufficient to render the case nonjusticiable, entities could merely ignore the requirements of NEPA, build its structures before a case gets to court, and then hide behind the mootness doctrine.'" Its reference to a defendant's burden was somewhat misleading given that, while a defendant has the burden of showing that a dispute is "technically moot," settled precedent imposes on the plaintiff "'the burden of showing that there is a reasonable expectation that they will once again be subjected to the challenged activity[.]'" The plaintiffs failed to carry that burden here for several reasons.

First, although the plaintiffs satisfied the initial prong of the exception—i.e., "ConocoPhillips completed its exploration in a time period that was 'too short to allow full litigation before [the project] cease[d]'"—the panel found that "the legal landscape has changed. The [Council on Environmental Quality] issued new regulations [in 2020] implementing NEPA, which supplanted the regulations in force at the time Plaintiffs brought their suit." However, the Secretary of the Interior had subsequently ordered the Department's bureaus and offices "'not [to] apply the 2020 Rule in a manner that would change the application or level of NEPA that would have been applied to a proposed action before the 2020 Rule went into effect on September 14, 2020.'" The panel therefore reasoned that, if the new regulations did "change the application or level of NEPA," the exception did not apply because "[t]he changes to the regulations mean that the BLM would

employ a 'different method' for approving future exploration projects." Even if the former regulations applied, moreover, the BLM had issued a superseding 2020 IAP/EIS, making it "no longer 'likely that additional NEPA analyses for future exploration in the [Petroleum Reserve] will tier to and rely on the 2012 IAP/EIS.'" The panel stressed the use of "'likely'" because the federal defendants' attorneys had informed it that a review of the 2020 IAP/EIS was ongoing and that upon completion the agency "will not necessarily simply adopt the 2020 IAP/EIS or re-promulgate the 2012 IAP/EIS. The process for revising the 2020 IAP/EIS or adopting a new IAP/EIS could take months or years." All in all, it concluded, "[w]ith the 2020 IAP/EIS still technically binding the BLM, Plaintiffs have not met their burden in showing a 'reasonable expectation that [they] will be subjected' to an EA tiering to the 2012 IAP/EIS again."

Next, the panel held that the BLM's tiering of the 2018 EA to a supplemental EIS (GMT2 SEIS) prepared in 2018, and also tiered to the 2012 IAP/EIS, with respect to a ConocoPhillips request to construct a drill pad on another Preserve area known as the Greater Mooses Tooth Unit did not establish a reasonable expectation of reoccurrence. Under the old NEPA regulations, it stated, "the BLM could not tier the 2018 EA to the GMT2 SEIS" because "[t]he 2018 EA was not 'of lesser scope' than the GMT2 SEIS, 40 C.F.R. § 1508.28(a) (2019); it was of a different scope, covering a different area." Alternatively, "[i]f ... the BLM attempts to tier future analyses to the GMT2 SEIS by utilizing the new NEPA regulations, then Plaintiffs' suit is still moot because the new legal framework affects the issue of tiering, ... and courts would analyze future claims pursuant to the new regulation." The panel also rejected the BLM's argument that it could incorporate by reference the GMT2 SEIS in lieu of tiering, pointing out the old NEPA rules authorized incorporation only into EISs and that "[i]f the BLM applies the new regulations to incorporate by reference the GMT2 SEIS, those future EAs would presumably be analyzed pursuant to the other new regulations in the 2020 Rule, which ... contains myriad new and different legal obligations which would affect Plaintiffs' claims and moot this case."

Finally, the panel declined to accept ConocoPhillips's invocation of the voluntary-cessation mootness doctrine on the basis of a district court declaration stating that it did not plan to conduct additional winter exploration in the area where it carried out the 2018-19 exploratory drilling. Nevertheless, although the declaration was insufficient to satisfy the doctrine's requirements, "in evaluating the 'capable of repetition, yet evading review' exception to the mootness doctrine, we consider ConocoPhillips's declaration to be a factor that shows that 'there is [no] reasonable expectation that [Plaintiffs] will once again be subjected to the challenged activity.'"

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/24/20-35224.pdf