

## **Northern Alaska Environmental Center v. U.S. Dep’t of Interior**—Ninth Circuit rejects challenge under NEPA and the Naval Petroleum Reserves Production Act to sale of an oil and gas lease in the National Petroleum Reserve-Alaska

The Bureau of Land Management administers 22.6 million acres of land in the National Petroleum Reserve-Alaska that contains recoverable resources of 8.7 billion barrels of oil and 25 trillion feet of natural gas. The Naval Petroleum Reserves Production Act, 42 U.S.C. §§ 6501 to 6507, authorizes the agency to enter into leases for extraction of those resources. BLM prepared a combined Integrated Activity Plan and programmatic environmental impact statement in 2012 with respect to managing the Reserve’s alleasing activities. The IAP/EIS “predicted that it would fully satisfy NEPA’s requirements for the first oil and gas lease sale. With respect to anticipated subsequent lease sales, it stated that BLM would prepare an administrative determination of NEPA adequacy (DNA) in connection with each proposed lease to determine whether the then-existing NEPA documentation was adequate.” In 2013, the agency issued a record of decision committing to manage the Reserve under the EIS’s preferred alternative. It thereafter offered oil and gas leases annually through 2016 with an accompanying four-page DNA “documenting its conclusion that the 2012 EIS remained adequate to meet the requirements of NEPA, so no further NEPA documentation was required to support the offering or sale of the relevant leases.”

BLM followed this practice with regard to an offer to lease Reserve resources in 2017. The associated DNA “asserted that the current proposal was part of the preferred alternative analyzed in the 2012 EIS, and that no new information or circumstances substantially changed the analysis.” ConocoPhillips Alaska, Inc. was the sole bidder, and BLM accepted its bid for seven of the available 900 tracts. The plaintiff environmental groups then sued, alleging “first, that BLM failed to prepare a NEPA analysis, and second, that BLM failed to take a ‘hard look’ at environmental impacts.” After the suit’s filing, BLM issued a revised DNA examining an updated United States Geological Survey assessment, which it deemed unusable, and several other new developments, which it deemed insignificant. The plaintiffs responded with an amended complaint containing a third cause of action “claiming that BLM had violated its own NPRPA regulations by issuing the Revised DNA ‘after it had already conducted the 2017 lease sale.’” The district court granted summary judgment to the federal defendants and intervenor ConocoPhillips. *N. Alaska Env’tl Ctr. v. U.S. Dep’t of Interior*, No. 3:18-cv-00030—SLG, 2018 WL 6424680 (D. Alaska Dec. 6, 2018).

The Ninth Circuit affirmed the district court’s judgment but on different grounds. *N. Alaska Env’tl Ctr. v. U.S. Dep’t of Interior*, No. 19-35008, 2020 WL 3866583 (9th Cir. July 9, 2020). It first addressed the federal defendants’ and ConocoPhillips’s statute of limitations claim under NPRPA § 6506a(n)(1). That section provides “[a]ny action seeking judicial review of the adequacy of any program or site-specific environmental impact statement under section 102 of [NPRPA] concerning oil and gas leasing in the [Reserve] shall be barred unless brought in the appropriate District Court within 60 days after notice of the availability of such statement is published in the Federal Register.” As to the first and third claims, the panel reasoned that

[i]f the 2012 EIS *was* the EIS for the 2017 lease sale, then BLM did not fail to prepare an EIS, and Plaintiffs’ first and third claims fail on the merits. If the 2012 EIS was not an EIS for the 2017 lease sale—in other words, if the 2017 lease sale required at least a tiered EA regardless of the adequacy of the 2012 EIS—then Plaintiffs’ first and third claims are not affected by the statute of limitations.

As to the third claim, “[i]f the 2012 EIS *was* the EIS for the 2017 lease sale, then Defendants are correct that Plaintiffs’ second claim ‘necessarily’ must challenge the adequacy of the 2012 EIS,

and is barred by the statute of limitations.” However, “[i]f the 2012 EIS was not an EIS for the 2017 lease sale, then Plaintiffs’ second claim implicates only the DNA or Revised DNA, and is not barred by the statute of limitations.”

Turning to the merits, the panel concluded that “nothing in NEPA or our caselaw prevents agencies from using a single document to undertake both a programmatic-level analysis and a site-specific analysis at the level appropriate for any irretrievable commitments of resources.” Given this possibility, “the fact that the 2012 EIS provided a programmatic-level analysis for the IAP does not preclude the legal possibility that it also served as the necessary site-specific analysis for future lease sales.” The panel recognized that competing interests—giving effect to the NPRPA limitation provision and the need for fair notice to aggrieved persons—and selected as the appropriate test “whether the initial EIS purported to be the EIS for the subsequent action.” In resolving this question, it turned to the test of the 2012 EIS and, particularly,

a section of the Introduction regarding “Requirements for Further Analysis” [that] ... states that “BLM anticipates that this IAP/EIS will fulfill the NEPA requirements for the first oil and gas lease sale.” As to future lease sales, it states that “[p]rior to conducting each additional sale, the agency would conduct a determination of the existing NEPA documentation’s adequacy. If the BLM finds its existing analysis to be adequate for a second or subsequent sale, the NEPA analysis for such sales may require only an administrative determination of NEPA adequacy.” It then contrasts future “actions,” such as a “proposed exploratory drilling plan,” which “would require further NEPA analysis” based on the specifics of the proposal. [¶] By stating that future lease sales might require only an “administrative determination of NEPA adequacy,” as opposed to “further NEPA analysis,” this section implies that future leases are within the scope of the 2012 EIS.

The panel added that “[w]e see nothing in NEPA that would in principle prevent BLM from analyzing a proposed authorization of multiple, entirely discretionary lease sales” and observed that “[h]ad Plaintiffs brought a timely challenge against the 2012 EIS, they could have argued that NEPA required consideration of a reasonable alternative authorization of multiple lease sales that employed particular criteria regarding how many and which tracts to offer when.” In sum, “[a]lthough the expressly defined scope of the 2012 EIS is somewhat ambiguous as to the question before us, we find that the language regarding future NEPA requirements provides reasonable notice that the intended scope encompassed the actual lease sales.” The panel accordingly “defer[red] to BLM’s reasonable position that the 2012 EIS was the EIS for the 2017 lease sale.”

In view of this analysis, the panel denied the first and third claims on the merits; i.e., “BLM did not violate NEPA or its own NPRPA regulations by failing to prepare a NEPA analysis for the 2017 lease sale before the 2017 lease sale took place, because BLM prepared the required NEPA analysis in 2012.” It found the second claim, “alleging that BLM failed to take a hard look at the impacts of the 2017 lease sale, is time barred in part and waived in the remainder” since “the 2012 EIS was the EIS for the 2017 lease sale.” As the panel explained with respect to this claim:

The NPRPA statute of limitations prevents us from inquiring whether the 2012 EIS took a sufficiently hard look at the impacts of the 2017 lease sale. Following the 2012 EIS, BLM’s only remaining hard look obligation with respect to the 2017 lease sale was to analyze new circumstances and new information under the supplementation rubric [in 40 C.F.R. § 1502.9(c)]. ... Because Plaintiffs have disavowed a supplementation claim, we consider this issue waived.

Decision link: <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/07/09/19-35008.pdf>