FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF NUIQSUT; ALASKA WILDERNESS LEAGUE; FRIENDS OF THE EARTH; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB, *Plaintiffs-Appellants*, and CENTER FOR BIOLOGICAL DIVERSITY, *Plaintiff*, v. BUREAU OF LAND MANAGEMENT; DEBRA HAALAND,[*] in her official capacity as Secretary of the Interior; CHAD PADGETT, in his official capacity as Alaska State Director of the Bureau of Land Management; NICHELLE JONES, in her official capacity as District Manager of the	No. 20-35224 D.C. No. 3:19-cv-00056-SLG OPINION

[*] Debra Haaland has been substituted for her predecessor, David Bernhardt, as the Secretary of the Interior pursuant to Federal Rule of Appellate Procedure 43(c)(2).

Bureau of Land Management Arctic District Office,
Defendants-Appellees,

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

Appeal from the United States District Court
for the District of Alaska
Sharon L. Gleason, District Judge, Presiding

Argued and Submitted July 28, 2021
Pasadena, California

Filed August 24, 2021

Before: MILAN D. SMITH, JR. and JOHN B. OWENS, Circuit Judges, and EDUARDO C. ROBRENO,[**] District Judge.

Opinion by Judge Milan D. Smith, Jr.

[**] The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

SUMMARY[***]

Environmental Law / Mootness

The panel vacated as moot the district court's judgment in an action challenging the Bureau of Land Management's ("BLM") approval of a winter drilling exploration program for ConocoPhillips Alaska, Inc. in the National Petroleum Reserve-Alaska.

In November 2012, the BLM published the 2012 Integrated Action Plan/Environmental Impact Statement ("IAP/EIS"), a document that analyzed environmental impacts in much of the Petroleum Reserve. In 2014, ConocoPhillips sought permission to construct a drill pad in the Greater Mooses Tooth ("GMT") Unit located within the Petroleum Reserve. The BLM approved the request, and issued a GMT supplemental EIS that relied on the analysis in the 2012 IAP/EIS. In 2018, ConocoPhillips sought permission to construct another drill pad in the GMT Unit. The BLM approved the request and issued a second GMT supplemental EIS, which also referenced the 2012 IAP/EIS. In 2018, ConocoPhillips applied to drill in the Bear Tooth Unit, and the BLM published an environmental assessment ("EA") and did not subsequently issue an EIS. This 2018 EA purportedly incorporated the 2012 IAP/EIS and the two GMT supplemental EISs. BLM issued a finding of no new significant impact for ConocoPhillips's 2018-2019 winter exploration program. ConocoPhillips completed the program on April 28. 2019. On March 1, 2019, before

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

completion of the program, plaintiffs brought this action alleging violations of the Administrative Procedure Act, the National Environmental Policy Act ("NEPA"), and the Alaska National Interest Lands Conservation Act. The district court concluded the action was not moot, and granted defendants' motion for summary judgment on each of the substantive claims.

The panel held that the case was moot because neither the district court nor this court could give any relief to plaintiffs, where ConocoPhillips fully completed the operations of the 2018-2019 winter exploration program, the only lasting physical features of the drilling were capped wells, and there was no indication that ConocoPhillips could undo the drilling of those wells.

Plaintiffs contend that the "capable of repetition, yet evading review" exception to mootness applied. This exception has two requirements: (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.

The plaintiffs' challenge to the 2018 environmental assessment met the durational requirement where the 2018-2019 winter exploration program lasted only five months.

The panel next considered the "capable of repetition" prong of the mootness exception. The panel noted that generally a case will not be moot when the environmental report at issue will be used by the agency in approving a future project. This case, however, is more complicated. While the 2018 EA was confined solely to the 2018-2019 winter exploration program, and the BLM would not use that

particular EA in approving a future drilling exploration request, the 2018 EA relied on the 2012 IAP/EIS, and the two GMT supplemental EISs. At the time of the district court decision, the BLM's continued reliance on the 2012 IAP/EIS, and the two GMT supplemental EISs in future EAs meant that the case was "capable of repetition, yet evading review."

The panel held, however, that new circumstances have arisen subsequent to the district court's decision, and the case is now moot. First, the legal landscape has changed. The Council of Environmental Quality issued new regulations implementing NEPA ("2020 Rule"), which supplanted the regulations at the time plaintiffs brought their suit. In January 2021, the President signed Executive Order 13990 directing review of the 2020 Rule, and it is unclear whether future challenges would be adjudicated pursuant to the old or the new regulations. The panel held that the new regulations would render the case moot because there was no reasonable expectation that the plaintiffs would be subjected to the challenged action again. Second, in 2020, the BLM issued a new IAP/EIS for the Petroleum Reserve, and plaintiffs have not shown a "reasonable expectation" that they will be subjected to an EA tiering to the 2012 IAP/EIS again. Third, BLM represents that it is continuing to tier environmental reports to the second GMT supplemental EIS, which would likely allow plaintiffs to contend that their claims were "capable of repetition." The panel held, however, that BLM could not tier to either GMT supplemental EIS for a document similar to the 2018 EA because they cover entirely separate development-stage projects and do not address exploration activities. Whether BLM applies the old regulations, or the new regulations, plaintiffs' particular claims no longer fit into the "capable of repetition, yet evading review" exception to mootness.

Fourth, ConocoPhillips states that it does not plan to conduct additional winter exploration in the area for the foreseeable future. Standing alone, the declaration did not satisfy the heavy burden to show that voluntary cessation mooted the case. The panel held, however, that the declaration must be considered when combined with the other circumstances noted above.

The panel concluded that this was a unique case where mootness was not based on a single factor, but instead on a multitude of new circumstances, which, together, showed that the "capable of repetition, yet evading review" mootness exception did not apply.

Because the case is moot, the district court and the Ninth Circuit are without jurisdiction to decide the case. The panel held that it did not have jurisdiction to consider the merits of plaintiffs' claims, vacated the district court's decision, and remanded with instructions to dismiss the case as moot.

COUNSEL

Jeremy Lieb (argued) and Rebecca Noblin, Earthjustice, Anchorage, Alaska; Eric P. Jorgensen, Earthjustice, Juneau, Alaska; Garett R. Rose, Natural Resources Defense Council, Washington, D.C.; for Plaintiff-Appellant.

Amelia G. Yowell (argued) and Andrew C. Mergen, Attorneys; Eric Grant, Deputy Assistant Attorney General; Jean E. Williams, Principal Deputy Assistant Attorney General; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; Michael Gieryic, Attorney-Advisor, Office of the Solicitor,

United States Department of the Interior, Washington, D.C.; for Defendants-Appellees.

Jason T. Morgan (argued) and Ryan P. Steen, Stoel Rives LLP, Seattle, Washington, for Intervenor-Defendant-Appellee.

OPINION

M. SMITH, Circuit Judge:

In 2018, the Bureau of Land Management (BLM) approved a winter drilling exploration program for ConocoPhillips Alaska, Inc. (ConocoPhillips) in the National Petroleum Reserve-Alaska (Petroleum Reserve). In connection with its approval of ConocoPhillips's exploration program, the BLM issued an environmental assessment (EA), which relied, in part, on the 2012 Integrated Action Plan/Environmental Impact Statement (IAP/EIS), a document that analyzed environmental impacts in a larger portion of the Petroleum Reserve. The Native Village of Nuiqsut and other plaintiffs (collectively, Plaintiffs) brought suit against the BLM, claiming that the agency violated the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the Alaska National Interest Lands Conservation Act (ANILCA) when it approved the referenced winter drilling exploration program. ConocoPhillips intervened in the dispute. The district court decided that, although the dispute was no longer live, it fit into the "capable of repetition, yet evading review" mootness exception, and decided the case on the merits. *See Wildwest Inst. v. Kurth*, 855 F.3d 995, 1002–03 (9th Cir. 2017) (internal quotation marks omitted).

In most NEPA cases, the "capable of repetition" inquiry focuses on whether the agency will be relying on the same environmental report in the future, or will utilize a new report or a new method in approving future actions. This case is unique in that a multitude of factors convince us that Plaintiffs' claims are not capable of repetition. The BLM has promulgated a new IAP/EIS for the Petroleum Reserve, and the Council on Environmental Quality (CEQ) has revised the regulations implementing NEPA. The Department of the Interior is currently reviewing those actions. Notwithstanding that ongoing review, the new IAP/EIS and NEPA regulations, when combined with the BLM's improper reliance on a supplemental EIS and ConocoPhillips's declaration that it will not pursue exploratory drilling in the near future, mean that the "capable of repetition, yet evading review" exception no longer applies to Plaintiffs' claims. Therefore, discharging our ongoing duty to be certain that we have subject matter jurisdiction, we vacate the district court's decision, and remand with instructions to dismiss the case as moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Petroleum Reserve is "the largest single unit of public land in the United States and covers 23.6 million acres." *N. Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969, 973 (9th Cir. 2006). In 1980, "Congress . . . directed the Secretary [of the Interior] to carry out an expeditious program of competitive leasing of oil and gas on the Reserve." *Id.* (internal quotation marks omitted). Congress has also directed that oil and gas leasing in areas of the Petroleum Reserve "containing any significant subsistence, recreational, fish, and wildlife, or historical or scenic value[] shall be conducted in a manner which will assure the maximum protection of such surface values to the extent

consistent with the requirements of" the National Petroleum Reserve Protection Act (NPRA) "for the exploration of the reserve." 42 U.S.C. § 6504(a). One of the areas protected by the NPRA is the Teshekpuk Lake Special Area. *See id.*

In November 2012, the BLM published the 2012 IAP/EIS.[1] The 2012 IAP/EIS is a comprehensive and programmatic document that analyzes environmental impacts in much of the Petroleum Reserve and, in its chosen course of action, made "approximately 11.8 million acres . . . (nearly 52 percent of the total in the [Petroleum Reserve]) available for oil and gas leasing." Pertinent to this appeal, the 2012 IAP/EIS kept most of the Teshekpuk Lake Special Area closed for oil and gas exploration, but made "lands in the eastern-most part of the [area] available." The 2012 IAP/EIS noted that "[t]hese lands, which have valuable waterfowl and caribou habitat, also include or are close to existing leases, including those with oil discoveries in the Greater Mooses Tooth Unit."

The Greater Mooses Tooth (GMT) Unit is located within the Petroleum Reserve. In 2014, ConocoPhillips sought permission to construct a drill pad in the GMT Unit. The BLM approved the request and, in doing so, issued a supplemental EIS (GMT1 SEIS). The GMT1 SEIS "tier[ed] to" the 2012 IAP/EIS, meaning it relied on the analysis in the 2012 document. *See* 40 C.F.R § 1502.20 (2019).[2] In

[1] A number of documents we reference were published by the BLM in one year, with the formal record of decision (ROD) being issued the following year, such as the 2012 IAP/EIS, where the ROD was issued in 2013. We refer to the documents by the year that the BLM published the reports, rather than the year the ROD was issued.

[2] As discussed below, the CEQ issued new NEPA regulations that took effect on September 14, 2020. *See* Update to the Regulations

2018, ConocoPhillips sought permission to construct another drill pad in the GMT Unit. The BLM approved this request as well and issued another supplemental EIS (GMT2 SEIS). The GMT2 SEIS also tiered to the 2012 IAP/EIS. Both the GMT1 SEIS and GMT2 SEIS additionally "incorporate[d] . . . by reference" the 2012 IAP/EIS. *See* 40 C.F.R § 1502.21 (2019).

In 2018, ConocoPhillips applied to drill exploratory wells in the Bear Tooth Unit, west of Nuiqsut and the GMT Unit. The BLM published an EA and did not subsequently issue an EIS. An agency can "first prepare[] an EA to determine whether an action will have a significant impact," and, "[i]f the agency concludes there is no significant effect associated with the proposed project, it may issue a [finding of no significant impact] in lieu of preparing an EIS." *Env't Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1009 (9th Cir. 2006). Regulations also allowed the BLM to not issue an EIS if it made a "finding of no *new* significant impact," or FONNSI. 43 C.F.R. § 46.140(c) (emphasis added) (internal quotation marks omitted). The 2018 EA purportedly tiered to, or incorporated by reference, the 2012 IAP/EIS, the GMT1 SEIS, and the GMT2 SEIS. Along with the final EA, the BLM issued a FONNSI for ConocoPhillips's 2018–2019 winter exploration program and did not subsequently issue a supplemental EIS for the program. The BLM also published an ANILCA evaluation to approve the winter drilling exploration program. After receiving approval, ConocoPhillips carried out the program, which included building ice pads, an ice airstrip, ice roads,

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Implementing the Procedural Provisions of the National Environmental Policy Act (Update to NEPA Regulations), 85 Fed. Reg. 43,304 (July 16, 2020). We refer to the regulations in place at the time Plaintiffs' filed their suit as the 2019 regulations.

and six new wells. ConocoPhillips completed the 2018–2019 winter exploration on April 28, 2019.

On March 1, 2019, before the completion of the program, Plaintiffs brought suit against the BLM, alleging violations of the APA, NEPA, and ANILCA. Plaintiffs' claims centered on the 2018 EA's explanations for impacts on caribou and subsistence, and the BLM's consideration of alternatives to ConocoPhillips's proposal. The district court granted ConocoPhillips's motion to intervene. The BLM and ConocoPhillips (collectively, Defendants) and Plaintiffs filed cross-motions for summary judgment.

The district court issued its decision in January 2020. *See Native Village of Nuiqsut v. Bureau of Land Mgmt.*, 432 F. Supp. 3d 1003 (D. Alaska 2020). The district court held that the case fit into the "'capable of repetition yet evading review' exception to the mootness doctrine." *Id.* at 1021–23. The court first held that the time period for the exploration program, "a period of only five months," was "precisely the sort of short-term action that evades judicial review." *Id.* at 1021–22. Additionally, the district court wrote that Plaintiffs did not need to ask for a preliminary injunction to avoid mootness. *See id.* at 1022 n.112 (citing *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1330 (9th Cir. 1992)).

Next, the district court noted that "ConocoPhillips ha[d] since proposed winter exploration for 2019–2020 in the same area as the 2018–2019 exploration at issue in this case, and that [the] BLM ha[d] again completed an EA to review impacts of the proposed activity." *Id.* at 1022 (footnote omitted). Additionally, the court stated that "while the 2018 EA and the exploration it authorized cannot themselves be repeated," the court found "it quite likely that [the] BLM will authorize future winter exploration in the Teshekpuk Lake

Area using an EA that tiers to the 2012 IAP/EIS and the GMT1 and GMT2 SEISs to support conclusions regarding impacts to caribou and subsistence uses." *Id.* at 1023. Thus, the district court concluded that the dispute was "capable of repetition yet evading review." *Id.* (citing *Greenpeace Action*, 14 F.3d at 1330).

After concluding that the case was not moot, the district court granted Defendants' motion for summary judgment for each of the substantive claims. *See id.* at 1026–46. Plaintiffs appeal the district court's ruling on the merits, and Defendants renew their argument that the case is moot.[3]

II. STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's pronouncements on mootness de novo. *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1151 (9th Cir. 2019).

III. ANALYSIS

"The case or controversy requirement of Article III . . . deprives federal courts of jurisdiction to hear moot cases." *N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1352 (9th Cir. 1984). "A case becomes moot only when it is impossible for a court to grant any effectual relief

[3] The district court also held that most, but not all, Plaintiffs had standing. *See Nuiqsut*, 432 F. Supp. 3d at 1017–21. Defendants do not dispute the standing analysis, but Plaintiffs claim that the district court erred in deciding that Friends of the Earth did not have standing. *See id.* at 1019 n.92. Because we ultimately vacate the district court's decision and remand with instructions to dismiss the case as moot, we need not reach the issue of the Friends of the Earth's standing. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000).

whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (internal quotation marks omitted).

"[D]efendants in NEPA cases face a particularly heavy burden in establishing mootness." *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001). This is 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." *Id.* (internal quotation marks omitted).

In *Cantrell*, "destruction of the historic buildings on the Naval Station [could not] be remedied," but we nonetheless determined that, "if required to undertake additional environmental review, the defendants could consider alternatives to the current reuse plan, and develop ways to mitigate the damage to the birds' habitat." *Id.* at 678–79. "Since effective relief [was possibly] still . . . available, the demolition of the Naval Station was insufficient to render the case moot." *Id.* at 679.

In this case, as the district court noted, "ConocoPhillips fully completed the operations" of the 2018–2019 winter exploration program "on April 28, 2019." *Nuiqsut*, 432 F. Supp. 3d at 1014. ConocoPhillips informs us: "All equipment has been demobilized. The authorized ice roads and ice pads have melted. The exploration and appraisal wells have been capped. No structures remain in the Winter Program area." Plaintiffs do not dispute the accuracy of these statements.

Unlike in *Cantrell*, where the district court could still order relief, here there is no relief we can provide Plaintiffs. The only lasting physical features of the 2018–2019

exploratory drilling are the capped wells, but there is no indication that ConocoPhillips could undo the drilling of those wells. *See Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1988) ("The impacts of the Plan mines are not remediable since we cannot order that the Plans be 'unmined.'"); *cf. West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 925 (9th Cir. 2000) (holding that the case was not moot because "our remedial powers would include remanding for additional environmental review and, conceivably, ordering the interchange closed or taken down"). Because neither we nor the district court could give any relief to Plaintiffs, the case is technically moot.

Plaintiffs implicitly acknowledge that the case is moot by arguing that the issues are "capable of repetition, yet evading review," an *exception* to mootness. *Wildwest Inst.*, 855 F.3d at 1002 (internal quotation marks omitted). This exception has two requirements: "(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." *Id.* at 1002–03 (internal quotation marks omitted). Unlike the initial mootness question, where the *defendants* have the burden, *see Cantrell*, 241 F.3d at 678, "[u]nder the 'capable of repetition' prong of the exception to the mootness doctrine, the *plaintiffs* have the burden of showing that there is a reasonable expectation that they will once again be subjected to the challenged activity," *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985) (emphasis added).

A. Duration of the Challenged Action

As to the first requirement, the 2018–2019 winter exploration program lasted only five months. *See Nuiqsut*, 432 F. Supp. 3d at 1021. ConocoPhillips completed its

exploration in a time period that was "too short to allow full litigation before [the project] cease[d]." *Wildwest Inst.*, 855 F.3d at 1003 (internal quotation marks omitted); *see Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1018 (9th Cir. 2012) ("We have repeatedly held that [mining activity] lasting only one or two years evade[s] review."). Defendants argue that Plaintiffs' failure to ask for a preliminary injunction means that the case is moot. However, even if ConocoPhillips's winter exploration program "could have been enjoined" for the final month of the program, the 2018–2019 winter "season has ended and the" 2018 EA has effectively "expired." *Greenpeace Action*, 14 F.3d at 1329–30. "No injunction could have preserved this challenge to a short-term" and project-specific environmental report, like the 2018 EA. *Id.* at 1330. Therefore, Plaintiffs' challenge to the 2018 EA fulfills the first requirement of the "capable of repetition, yet evading review" exception.

B. Reasonable Expectation of Repetition

In most NEPA cases, the inquiry for the "capable of repetition" prong of the mootness exception is relatively simple. Our precedent has focused on whether the environmental report at issue is confined to the challenged action only, or whether the agency will use that same report in approving a future project. If the latter is true, then the case is not moot. *See id.* (holding that the case was not moot because the Secretary of Commerce "ha[d] relied on the same biological opinion" for both the challenged action and a subsequent action). In contrast, when the environmental report at issue "has been superseded, and the federal agencies will rely" on a new and different report "for the near future," the case is moot. *Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1071, 1075 (9th Cir.

1995). Similarly, when an agency "rel[ies] on the same biological opinion" but "us[es] a different method of calculating" the final course of action in future environmental reports, the case is moot. *Ramsey v. Kantor*, 96 F.3d 434, 446 (9th Cir. 1996).

This case is a bit more complicated. The 2018 EA is confined solely to ConocoPhillips's 2018–2019 winter exploration program. The BLM would not use that particular EA in approving a future drilling exploration request. However, the 2018 EA relied on the 2012 IAP/EIS, GMT1 SEIS, and GMT2 SEIS, purportedly either by tiering to those reports or incorporating them by reference. *See Nuiqsut*, 432 F. Supp. 3d at 1014, 1025 n.141. The ANILCA analysis also relied on the GMT1 SEIS and GMT2 SEIS. At the time the district court decided this case, the BLM's continued reliance on the 2012 IAP/EIS, GMT1 SEIS, and GMT2 SEIS in future EAs meant that the case was "capable of repetition, yet evading review." *See id.* at 1023. Because the 2018 EA borrowed so much analysis from those previous EISs, the BLM would in effect be "rel[ying] on the same biological opinion[s]" for future environmental reports. *See Greenpeace Action*, 14 F.3d at 1330.

However, our duty to examine mootness is an ongoing obligation. "[A]n 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013) (citation omitted). "A case that becomes moot at any point during the proceedings," including during an appeal, "is no longer a 'Case' or 'Controversy' for purposes of Article III, and is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (some internal quotation marks omitted).

New circumstances have arisen since the district court's disposition that convince us that the case is now moot. When viewed holistically, these new circumstances show that there is not a reasonable "probability that the challenged action will affect [Plaintiffs] in the future." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174 (9th Cir. 2002).

1. New Regulations

First, the legal landscape has changed. The CEQ issued new regulations implementing NEPA, which supplanted the regulations in force at the time Plaintiffs brought their suit. Update to NEPA Regulations, 85 Fed. Reg. 43,304 (July 16, 2020) (2020 Rule). "The effective date" for these new regulations was "September 14, 2020," *id.* at 43,304, after Plaintiffs filed suit in March 2019, and after the district court rendered its decision in January 2020. In its answering brief, the BLM stated that it "would analyze any future exploration activities under" these new regulations and not the old regulations that "it applied in the 2018 EA."

However, this past January, the President signed Executive Order 13990, which "directs Federal agencies to review Federal agency actions taken between January 20, 2017, and January 20, 2021, including the promulgation of regulations," and "specifically identifies the 2020 Rule as among the actions to be reviewed." Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures (Deadline for NEPA Proposals), 86 Fed. Reg. 34,154, 34,155 (June 29, 2021); *see also* Proclamation No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021). Subsequently, the CEQ "beg[a]n its review of the 2020 Rule," noting that it has "substantial concerns" about the new regulations. Deadline for NEPA Proposals, 86 Fed. Reg. at 34,155. The CEQ "extend[ed] the deadline by two years for Federal agencies to develop or revise proposed procedures for

implementing the procedural provisions of" NEPA. *Id.* at 34,154.

The Secretary of the Interior, in turn, issued an order mandating that the Department of the Interior's bureaus and offices, including the BLM, "not 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." Secretary of the Interior Order No. 3399, 2021 WL 1584759, at *3 (Apr. 16, 2021). The BLM informs us that it "anticipates performing the same level of NEPA analysis contemplated by the regulations in effect prior to 2020." It is unclear whether the BLM "performing the same level of NEPA analysis" amounts to use of the old regulations or the new regulations. Moreover, the Secretary of the Interior's order only forbids the BLM from using the new regulations "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." *Id.* The Secretary of the Interior's order does not necessarily require that the BLM use the old regulations. Thus, it is unclear whether future challenges would be adjudicated pursuant to the old or the new regulations.

If the BLM uses the new regulations, the 2020 Rule creates new directives that would affect Plaintiffs' claims. *See, e.g.*, 40 C.F.R. § 1501.3 (providing instructions for how an agency should decide to issue an EIS or EA); *id.* § 1501.5 (providing instructions for preparing and issuing EAs). The 2020 Rule also replaces the old regulations with new ones in ways that would directly impact Plaintiffs' suit. *Compare* 40 C.F.R. § 1501.11 (tiering), *and* 40 C.F.R. § 1501.12 (incorporation by reference), *with* 40 C.F.R. § 1502.20 (2019) (tiering), *and* 40 C.F.R. § 1502.21 (2019)

(incorporation by reference). The changes to the regulations mean that the BLM would employ a "different method" for approving future exploration projects. *Ramsey*, 96 F.3d at 446. These new regulations render the case moot because there is no "reasonable expectation that the plaintiffs will be subjected to the challenged action again," *Wildwest Inst.*, 855 F.3d at 1003 (internal quotation marks omitted), with the same "method of calculating" environmental impacts, *Ramsey*, 96 F.3d at 446.

However, with the uncertainty surrounding implementation of the new regulations, we must also examine whether the case is moot if the BLM continues to rely on the old regulations. Based on the factors discussed below, even using the old regulations, the case is still moot.[4]

2. New Integrated Activity Plan/Environmental Impact Statement

The 2018 EA relied heavily on the 2012 IAP/EIS for its analysis. For example, in analyzing the impact on caribou, the 2018 EA provided only a brief discussion. The 2012 IAP/EIS, to which the 2018 EA tiered, had substantially more analysis about the impact on caribou for hypothetical drilling programs pursuant to different courses of action. On the merits, Plaintiffs argue that the analysis from the 2012 IAP/EIS is inadequate for the 2018 EA because the 2012 IAP/EIS "is a broad-scale zoning and land management plan for the entire [Petroleum] Reserve that explicitly states that

[4] There are no corresponding new regulations implementing Section 810 of ANILCA, which is codified at 16 U.S.C. § 3120. However, the ANILCA analyses relied only on the GMT1 SEIS and GMT2 SEIS. For the reasons noted below, the ANILCA claim is moot despite the absence of new regulations.

site-specific analysis will be required when exploration activities are permitted."

We need not decide whether the 2018 EA could tier to the 2012 IAP/EIS because in 2020 the BLM issued a new IAP/EIS for the Petroleum Reserve. The BLM states that because it "has adopted the 2020 IAP/EIS, the agency will tier to it instead of the 2012 IAP/EIS when preparing" future EAs. The BLM notes that it has already tiered to the 2020 IAP/EIS in a recent EA. Because the BLM is now relying on an entirely different IAP/EIS it is no longer "likely that additional NEPA analyses for future exploration in the [Petroleum Reserve] will tier to and rely on the 2012 IAP/EIS." *Nuiqsut*, 432 F. Supp. 3d at 1023. The 2012 IAP/EIS "has been superseded" and the BLM will likely tier future EAs to the 2020 IAP/EIS. *Idaho*, 56 F.3d at 1075.

We say "likely" because, as with the 2020 Rule, the status of the 2020 IAP/EIS is in flux. The BLM issued the 2020 IAP/EIS on June 26, 2020. Notice of Availability of the National Petroleum Reserve in Alaska Integrated Activity Plan Final Environmental Impact Statement, 85 Fed. Reg. 38,388 (June 26, 2020). The BLM issued its ROD on December 31, 2020. U.S. Dep't of Interior, Bureau of Land Mgmt., National Petroleum Reserve in Alaska: Integrated Activity Plan Record of Decision (Dec. 2020), https://eplanning.blm.gov/public_projects/117408/200284263/20032151/250038350/NPR-A%20IAP%20Record%20of%20Decision.pdf. The BLM advises that the Department of the Interior "is currently reviewing the 2020 IAP/EIS and ROD" and "estimates that it will complete its review by September 7, 2021." "In the meantime," the BLM states, "the 2020 IAP/EIS remains in effect." During oral argument, the BLM's counsel further explained that even when the Department of the Interior

completes its review in September 2021, it 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.

With 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. *Wildwest Inst.*, 855 F.3d at 1003 (internal quotation marks omitted).

3. Reliance on GMT2 Supplemental Environmental Impact Statement

The 2018 EA also purportedly tiered to the GMT1 SEIS and GMT2 SEIS. The BLM represents that it is continuing to tier environmental reports to the GMT2 SEIS.[5] Continued reliance on the GMT2 SEIS would likely allow Plaintiffs to show that their claims were "capable of repetition," as the district court relied, in part, on future tiering to the GMT2 SEIS to determine that the case adhered to the mootness exception. *See Nuiqsut*, 432 F. Supp. 3d at 1023.

Plaintiffs argue that the BLM could not tier to the GMT1 SEIS or GMT2 SEIS because they "cover entirely separate development-stage projects and do not address exploration

[5] The BLM has not stated whether it will continue to tier to the GMT1 SEIS. However, future reliance on the GMT1 SEIS does not affect the issue of mootness in this case. If the BLM does attempt to tier to the GMT1 SEIS in the future, then the case is moot for the same reasons as pertain to the GMT2 SEIS. If the BLM does not attempt to tier to the GMT1 SEIS for future environmental reports, then the case is moot for the same reasons that pertain to the 2020 IAP/EIS replacing the 2012 IAP/EIS.

activities, let alone activities conducted in the [2018–2019 winter] Exploration Program area." Quoting 40 C.F.R §§ 1502.20 and 1508.28 (2019), the BLM contends that "[n]othing prohibits [the agency] from tiering to the SEISs" and that "tiering a 'lesser scope' EA to those SEISs . . . aligns with the regulation's encouragement to tier 'to eliminate repetitive discussions of the same issues.'"[6]

We agree with Plaintiffs. Pursuant to the old NEPA regulations, the BLM could not tier the 2018 EA to the GMT2 SEIS. The regulations in force at the time the BLM issued the 2018 EA provided that "[w]henever a broad environmental impact statement has been prepared . . . and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action)," the site-specific EA could tier to the programmatic EIS. 40 C.F.R. § 1502.20 (2019). Another regulation afforded the BLM the ability to tier either: (1) "[f]rom a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis"; or (2) "[f]rom an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later

[6] Defendants also argue that Plaintiffs waived the argument concerning tiering to the GMT1 SEIS and GMT2 SEIS because Plaintiffs did not raise it in the district court. The parties discuss tiering to the GMT1 SEIS and GMT2 SEIS in the merits sections of their briefs. Because we must decide the issue of tiering to the SEISs as it pertains to mootness—a jurisdictional issue—we can raise the issue *sua sponte*. *See Bernhardt v. County of L.A.*, 279 F.3d 862, 871 (9th Cir. 2002) ("[W]e must raise issues concerning our subject matter jurisdiction sua sponte. This includes mootness." (citation omitted)).

stage (such as environmental mitigation)." *Id.* § 1508.28(a)–(b) (2019).

"We have never held that the analysis of *similar* effects for a separate project excuses the failure to consider significant environmental impacts in an EIS. Though 'tiering' to a previous EIS is sometimes permissible, the previous document must actually discuss the impacts of the project at issue." *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009). While *South Fork Band Council* concerned tiering from one EIS to another EIS, we recently stated that tiering applies to "subsequent EISs *or EAs*," and involves a process "which concentrate[s] on issues specific to the current proposal" that were analyzed in "previous broader EISs that cover matters more general in nature." *N. Alaska Env't Ctr. v. U.S. Dep't of the Interior*, 983 F.3d 1077, 1090 (9th Cir. 2020) (emphasis added) (citing 40 C.F.R. § 1508.28 (2019)). In *Northern Alaska Environmental Center*, we were "not aware of anything that would prevent an agency from performing the analysis required by the tiering regulations in a document styled as a supplement to a previous NEPA analysis," *id.* at 1093 n.15, but that case concerned whether the BLM had a prepare a narrower EA under the umbrella of the broad, programmatic 2012 IAP/EIS, *see id.* at 1085.

As confirmed in *Northern Alaska Environmental Center*, the 2012 IAP/EIS was a broad document covering much of the Petroleum Reserve, including the area in which ConocoPhillips conducted the 2018–2019 winter exploration program. However, the GMT2 SEIS pertained to a specific project in another part of the Petroleum Reserve. The 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. Although the GMT2 SEIS

analyzed many of the same issues concerning impacts to the Teshekpuk Caribou Herd as were discussed in the 2018 EA, it was not "an EIS for a programmatic plan." *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1049 (9th Cir. 2013).

The GMT2 SEIS is a "site-specific EIS[] that do[es] not fall into either situation where tiering is permitted," at least pursuant to the 2019 regulation and as it relates to the 2018 EA. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1089 (9th Cir. 2011). Thus, if the BLM continues to utilize the pre-2020 Rule NEPA regulations, then it cannot tier environmental reports for new, separate projects to the GMT2 SEIS. Without such tiering, Plaintiffs' case is moot because it is *not* "likely that additional NEPA analyses for future exploration in the [Petroleum Reserve] will tier to and rely on the . . . GMT2 SEIS in the same manner as the 2018 EA." *Nuiqsut*, 432 F. Supp. 3d at 1023. In other words, Plaintiffs' claim that the 2018 EA's analysis was inadequate because it relied on the GMT2 SEIS is not capable of repetition.

If, instead, 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, as discussed above, and courts would analyze future claims pursuant to the new regulation. *See* 40 C.F.R. § 1501.11.

Alternatively, the BLM argues that it could incorporate the GMT2 SEIS by reference in lieu of tiering. However, the regulation in force in 2018 only allowed incorporation by reference "into an environmental *impact statement*," without mentioning an environmental *assessment* like the 2018 EA. 40 C.F.R § 1502.21 (2019) (emphasis added). Therefore, the plain text of the 2019 regulation forbids incorporating the GMT2 SEIS into the 2018 EA. If the BLM

continues to rely on 40 C.F.R. § 1502.21 (2019) when issuing new EAs, then it cannot incorporate by reference the GMT2 SEIS, and Plaintiffs' claims are moot.

The CEQ appears to have recognized this issue, since the 2020 Rule allows incorporation by reference "into environmental *documents*." 40 C.F.R. § 1501.12 (emphasis added); *see also* Update to NEPA Regulations, 85 Fed. Reg. at 43,327 ("CEQ proposed to . . . change 'environmental impact statements' to 'environmental documents' because this provision is applicable generally, not just to EISs."). If 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, as discussed above, contains myriad new and different legal obligations which would affect Plaintiffs' claims and moot this case.

Therefore, the BLM, applying the old regulations, cannot rely on the GMT2 SEIS for future EAs like the 2018 EA, or the BLM must utilize the new regulations to rely on the GMT2 SEIS for future EAs. Under either scenario, Plaintiffs' particular claims no longer fit into the "capable of repetition, yet evading review" exception to mootness.[7]

[7] The BLM informs us that "on August 14, 2020, the BLM issued a final EIS for the Willow Master Development Plan, which analyzes ConocoPhillips'[s] proposed development activities located within the same area as most of the 2018–2019 exploration activities." *See* Notice of Availability of the Willow Master Development Plan Final Environmental Impact Statement, Alaska, 85 Fed. Reg. 49,677 (Aug. 14, 2020). The BLM stated it "expected to . . . issue[]" the ROD for this EIS "by the end of October 2020 or shortly thereafter." The BLM has not provided an update as to whether it issued the ROD for the Willow Master Development Plan, whether the Department of the Interior is

4. Voluntary Cessation

ConocoPhillips states that while the company "applied to the [BLM] for approval to conduct exploration activities in the winter of 2019–20[,] . . . [a]t this time, ConocoPhillips does not plan to conduct additional winter exploration in the proposed Willow Master Development Plan area[8] for the foreseeable future." In holding that the case was not moot, the district court relied in part on the fact that, at that time, "[n]either [the BLM] nor ConocoPhillips dispute[d] the company's continued interested in conducting winter exploration in the area." *Nuiqsut*, 432 F. Supp. 3d at 1022. Additionally, the district court took "judicial notice of the fact that ConocoPhillips" applied for exploratory drilling for 2019–2020 and that the BLM had "again completed an EA to review impacts of" that application. *Id.*

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks omitted). "[T]he standard . . . for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.*

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currently reviewing that EIS, or whether the Willow Master Development Plan EIS is broader than the 2018 EA (like the 2012 IAP/EIS and 2020 IAP/EIS) or is for a different program (like the GMT2 SEIS). Therefore, we do not rely on issuance of the Willow Master Development Plan EIS in deciding that this case is moot.

[8] This is roughly the area where ConocoPhillips conducted the 2018–2019 winter exploratory drilling. *See supra* n.7.

(quoting *United States v. Concentrated Phosphate Export Ass'n.*, 393 U.S. 199, 203 (1968)).

Standing alone, ConocoPhillips's declaration does not satisfy the "heavy burden" to show that voluntary cessation moots the case. *Id.* (internal quotation marks omitted). As Plaintiffs note, ConocoPhillips's "intention could change at any time." Thus, the voluntary cessation exception to mootness would apply if the only new circumstance that arose since the district court decided this case were ConocoPhillips's declaration. *Cf. Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1095 (9th Cir. 2003).

However, 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." *Lee*, 766 F.2d at 1390. Again, ConocoPhillips's declaration alone is insufficient to show that the case is moot, or to show that the mootness exception should not apply, but when combined with the other circumstances noted above, the declaration must be considered.

IV. CONCLUSION

This is a unique case where mootness is not based on a single factor, but instead on a multitude of new circumstances, which, together, show that the "capable of repetition, yet evading review" exception to mootness does not apply. Based upon the issuance of the 2020 Rule, the publication of the 2020 IAP/EIS, the fact that the BLM cannot tier to or incorporate by reference the GMT2 SEIS for future EAs similar to the 2018 EA, and ConocoPhillips's declaration that it will not pursue exploratory drilling in the near future, we hold that Plaintiffs cannot show that the

exception to mootness applies to their claims. With the case being moot, our court and the district court are without jurisdiction to decide this case. Finally, because we do not have jurisdiction, we cannot consider the merits of Plaintiffs' claims.

"When a case becomes moot on appeal, the 'established practice' is to reverse or vacate the decision below with a direction to dismiss." *NASD Disp. Resol., Inc. v. Jud. Council of State of Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997)). Because actions by Defendants, not Plaintiffs, have triggered our holding that the case is moot, the "established practice" of vacatur is appropriate in this case. *See In re Burrell*, 415 F.3d 994, 999 (9th Cir. 2005). Additionally, the district court's decision implicitly endorses that future EAs can rely on the GMT2 SEIS. *See Nuiqsut*, 432 F. Supp. 3d at 1023, 1029–40. The "preclusive effect of [the district court's] judgment[], if unreviewed, may unfairly prejudice" Plaintiffs in future cases and "must be vacated." *Burrell*, 415 F.3d at 1000. Therefore, we vacate the district court's decision and remand with instructions to dismiss the case as moot.

VACATED AND REMANDED.