PETITION No. 15-72788

DECIDED: March 27, 2018

BEFORE: Fisher, N.R. Smith, and Hurwitz, Circuit Judges

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRIENDS OF THE COLUMBIA GORGE
and **SAVE OUR SCENIC AREA,**

Petitioners

v.

BONNEVILLE POWER ADMINISTRATION,

Respondent

PETIONERS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Petitioners Friends of the Columbia Gorge and Save Our Scenic Area state that they have no parent corporations and do not issue shares of stock, and accordingly no publicly held corporation owns 10% or more of their stock.

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GLOSSARY OF ACRONYMS

BLM	Bureau of Land Management
BPA	Bonneville Power Administration
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
MW	Megawatt
NEPA	National Environmental Policy Act
ROD	Record of Decision
SEPA	Washington State Environmental Policy Act

RULE 35 STATEMENT

The panel held that the Bonneville Power Administration ("BPA") was not required under the National Environmental Policy Act ("NEPA") to evaluate the environmental effects of the wind turbine portion of the Whistling Ridge Energy Project. The panel's decision was based on misapprehensions of fact and law, and conflicts with this Court's precedent. Panel rehearing or rehearing en banc is necessary to correct the errors and to secure and maintain uniformity with the Court's decisions. Fed. R. App. P. 35(b)(1)(A), 40(a)(2).

Petitioners Friends of the Columbia Gorge and Save Our Scenic Area (collectively "Friends") present three issues for rehearing. First, the panel apparently misunderstood the nature of BPA's decision. Contrary to the panel's characterization, BPA did *not* determine that the proposed wind turbines (referred to by the panel as the "Wind Project"[1]) were not a major federal action requiring review under NEPA. Instead, BPA repeatedly conceded—both in the record and on appeal—that it was required under NEPA to review the Wind Project's effects, and purported to do exactly that in its Final Environmental Impact Statement ("FEIS").

[1] This Petition uses the panel's term "Wind Project" to refer solely to the proposed wind turbines. However, BPA defined the "Whistling Ridge Energy Project" to include several integrated project components, including the wind turbines, the federal substation, and the federal interconnection. *See infra* p. 4.

By holding that the Wind Project is not "federal," the panel erroneously based its decision on an agency "determination" that never occurred. The panel, in reviewing that alleged determination, held that NEPA review of the Wind Project was not even required—an issue that was not presented by any party. The *adequacy* of BPA's actual analysis of the Wind Project in the FEIS was at issue, not whether BPA was required to review the Wind Project's effects at all. The panel's decision conflicts with controlling precedent that a court must review the actual decision made by the agency.

Second, the panel erred by ignoring NEPA regulations that dictate the scope of actions that an EIS must consider and by not applying this Court's "independent utility" test for whether connected actions must be evaluated in an EIS. BPA was required to evaluate the Wind Project in the FEIS because it is a connected action that cannot proceed without the federal interconnection and substation. The undisputed facts in the record demonstrate that the Wind Project has no independent utility without the federal interconnection, and that, without the interconnection, the Wind Project would not be built. Accordingly, the Wind Project and the federal components are "connected actions" under NEPA.

The panel also should have applied this Court's "independent utility" test, under which an EIS must fully evaluate the effects of non-federal actions that lack independent utility without the connected federal action. Proper application of that

test here required BPA to evaluate the effects of the Wind Project—which lacks independent utility—in the FEIS. But rather than applying the independent utility test, the panel relied on other inapplicable precedent involving the "federalization" of isolated non-federal actions that *have* independent utility—a different factual scenario than presented here.

This Court has never before held that an EIS prepared under NEPA need not evaluate the environmental impacts of a connected private action that lacks independent utility, yet the panel so held in this case. The panel's ruling that an EIS can ignore connected private actions that lack independent utility and which only cause environmental effects because they are tied to a federal action is fundamentally at odds with this Court's precedent.

Finally, the panel erred in presuming that Friends could have challenged the adequacy of the environmental review of the Wind Project in state court. In a prior case, the Washington Court of Appeals foreclosed that avenue of review in the circumstances presented here. The panel's decision leaves Friends with no forum available to challenge the FEIS, despite its inadequate evaluation of the Wind Project's environmental effects.

BACKGROUND

This case involves BPA's decision to approve an interconnection of the proposed Wind Project to BPA's energy transmission grid. The Whistling Ridge

Energy Project would install 25 to 50 wind turbines (each varying in capacity from 1.2 to 2.5 MW, for a total capacity of up to 75 MW), related infrastructure, and a federal collector substation and interconnection to the Federal Columbia River Transmission System. The Wind Project would be built on private land adjacent to the Columbia River Gorge National Scenic Area.

In its FEIS, BPA defined the single Proposed Action as including the state's approval of the proposed wind turbines *and* BPA's concurrent grant of the interconnection. ER 210. The Proposed Action was further defined as including six components: the wind turbines, the electrical connector system, the federal collector substation and interconnection to BPA's power grid, an operations and maintenance facility, a water supply, and site access for construction and operation. ER 210–13. Thus, BPA considered the Wind Project and the federal interconnection to each be integral components of a single project, no component of which has utility independent of the others.

The FEIS's definition of the no-action alternative further confirms that the Wind Project could not exist on its own. Under the no-action alternative, Washington state officials "would deny the Applicant's application for a Site Certificate for the [Wind Project], *and/or* BPA would not grant interconnection of the Project to the [Federal Columbia River Transmission System]." ER 213 (emphasis added). The "or" means there would be no action if either the state

denied siting certification *or* if BPA denied the interconnection. "As a result, the [Wind Project] would not be constructed or operated." *Id*. As thus defined, the Wind Project would not be built if BPA denied the interconnection.

Although BPA speculated in the Record of Decision ("ROD") that alternative transmission was "conceivably" available through a local utility, ER 19 n.13, this speculation is disproven by a BPA statement in an early draft of the EIS that the only local power utility, Skamania County Public Utility District #1, "is not capable of providing transmission interconnection and capacity to the [Wind Project]." FER 29. Accordingly, BPA conceded in its ROD that it "continues to presume that the Wind Project would not be constructed and operated under the No Action Alternative." ER 19 n.13.

ARGUMENT

I. THE PANEL ERRONEOUSLY BASED ITS DECISION ON AN AGENCY "DETERMINATION" THAT BPA NEVER ACTUALLY MADE.

The panel based its entire decision on an alleged determination by BPA that never actually occurred. The panel's opinion states that "BPA determined that the Wind Project—as opposed to the interconnection itself—is not a major federal action under [NEPA]." March 27, 2018 Opinion ("Op.") at 2 (attached as Appendix). The opinion reiterates that it was reviewing "BPA's determination that

the Wind Project was not a federal action," *id.* at 3, and concludes by supposedly upholding "BPA's no-federal-action determination," *id.* at 4.

The problem with the panel's characterization of the agency decision is that *BPA never made such a determination*—not in the ROD, not in the FEIS, nor anywhere else. In fact, BPA reached the opposite conclusion, expressly defining the Proposed Action to include *both* the Wind Project and the BPA interconnection and substation. ER 210–13. The panel in effect created a straw-man "determination" that BPA itself never made, and then knocked it down to conclude that BPA need not have done what it purported to do: analyze the effects of the Wind Project in the FEIS.

BPA did not even argue on appeal that it was not required to evaluate the environmental effects of the Wind Project. Rather, it conceded in its Answering Brief that "such effects could be considered cumulative, or perhaps indirect, effects of Bonneville's portion of the Proposed Action." Answ. at 33. BPA continued, "[n]one of this is to suggest to the Court that [BPA] did not consider the effects of both its own Interconnection Decision and the Wind Project, which it clearly did by choosing to prepare the Joint EIS in concert with the [Washington State] Siting Council." *Id*. Having conceded that it *did* purport to evaluate the effects of the Wind Project in the FEIS, BPA argued that its lack of jurisdictional authority over individual wind turbine siting "should, however, influence the way in which the

Court evaluates whether [BPA] can be held to have been arbitrary and capricious." *Id*. The panel, however, inexplicably transformed BPA's argument into a "no-federal-action determination" that never occurred. Op. at 4.

By basing its opinion on a mischaracterization of BPA's decision, the panel violated the fundamental principle that the focus of judicial review of federal agency action must be the decision the agency actually made. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007) ("[O]ur review of an administrative agency's decision begins and ends with the reasoning that the agency relied upon in making that decision."). Rehearing is necessary to ensure that the Court discharges its obligation to review the adequacy of the actual decision BPA made.

II. THE PANEL OVERLOOKED THE NEPA REGULATIONS ON "CONNECTED ACTIONS" THAT REQUIRED BPA TO EVALUATE THE WIND PROJECT'S EFFECTS AND FAILED TO APPLY THIS COURT'S "INDEPENDENT UTILITY" TEST.

NEPA requires federal agencies to disclose the environmental consequences of their actions. This requirement ensures that agencies carefully contemplate the environmental effects that will occur if they take action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

NEPA also requires agencies to evaluate the effects of "connected actions"—including non-federal actions—that cannot proceed unless another action is taken simultaneously. 40 C.F.R. § 1508.25(a)(1)(ii). The panel's opinion overlooks these regulations and fails to apply this Court's "independent utility" test under NEPA, which required evaluation of the Wind Project because it cannot exist independently of the federal interconnection. All of the cases on which the panel relied involved private or state actions that had independent utility, unlike the Wind Project in this case.

A. The Panel's Decision Conflicts With NEPA Regulations That Required BPA to Evaluate the Effects of the Wind Project Within the EIS.

The panel's decision conflicts with NEPA regulations governing the scope of federal EISs. An agency "shall make sure the proposal which is the subject of an [EIS] is properly defined." 40 C.F.R. § 1502.4. "Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." *Id*. Agencies are further directed to study "connected actions" together in "the same impact statement." *Id.* § 1508.25(a)(1). Actions, including private actions, are "connected if they . . . [a]utomatically trigger other actions which may require environmental impact statements [or c]annot or will not proceed unless other actions are taken previously or simultaneously." *Id*. § 1508.25(a)(1)(i)–(ii).

BPA's FEIS confirms that the proposed wind turbines and the BPA interconnection, together, constitute a single connected action. *See* ER 210–13. The FEIS defines the Proposed Action to include "[u]p to 50 wind turbines" plus the "interconnection with BPA's existing . . . transmission line," which together require the "construction of a new BPA substation and related electrical equipment." ER 202, 239. Further, the no-action alternative acknowledges that if BPA were to deny the interconnection, "the [Project] would not be constructed or operated," ER 213, which also makes the turbines and interconnection connected actions under NEPA. *See, e.g.*, *Oregon Natural Desert Ass'n v. Jewell*, 840 F.3d 562, 565 (9th Cir. 2016) (noting that a proposed federal right-of-way and private wind turbine site were connected actions under 40 C.F.R. § 1508.25(a)(1)).

The panel acknowledged that "interconnection with BPA is the only feasible means of transmitting power generated from the Wind Project." Op. at 3. Yet the panel overlooked the regulation under which the Wind Project and interconnection are "connected actions" if they "[c]annot or will not proceed" without each other. 40 C.F.R. § 1508.25(a)(1)(ii). Rehearing is required to correct this error.

B. Under this Court's "Independent Utility" Test, the Wind Project Has No Independent Utility and its Environmental Effects Must be Fully Evaluated in the EIS.

The panel's decision conflicts with this Court's principle that an agency may only "limit the scope of its NEPA review to the activities specifically authorized by

the federal action where the private and federal portions of the project could exist independently of each other." *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1116 (9th Cir. 2000), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). As explained above, the Wind Project cannot exist independently of the federal interconnection. Therefore, as a threshold issue, the independent utility test required BPA to review the environmental effects of the Wind Project in the FEIS (as BPA actually purported to do).

The independent utility test originated in *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394 (9th Cir. 1989). The Court in *Sylvester* reviewed an agency's grant of a permit to fill eleven acres of wetlands to construct part of a golf course which, itself, was part of a larger resort complex. *Id*. at 396. After reviewing its precedents, this Court upheld the agency's decision to limit its NEPA review to the federal jurisdictional wetlands. *Id.* at 396–97. In a subsequent case, the Court identified that the crucial fact in *Sylvester* was that "although the golf course and the entire resort complex 'would benefit from the other's presence' they were not sufficiently interrelated to constitute a single 'federal action' for NEPA purposes." *Wetlands*, 222 F.3d at 1116 (quoting *Sylvester*, 884 F.2d at 400–01).

This Court has reiterated that "[w]e apply an 'independent utility' test to determine whether multiple actions are so connected as to mandate consideration

in a single EIS. The crux of the test is whether 'each of the two projects would have taken place with or without the other and therefore had independent utility.'" *Cal. ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 795 (9th Cir. 2014) (citations omitted). When "one of the projects might reasonably have been completed without the existence of the other, the two projects have independent utility and are not 'connected' for NEPA's purposes." *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006).

Applying this test, for example, this Court held that a federal agency was not required under NEPA to evaluate the effects of a wind project on private lands when the agency analyzed a federal road project to provide access to the wind project site. *Sierra Club v. BLM*, 786 F.3d 1219, 1225 (9th Cir. 2015). In that case, the agency "would not have been required to consider the effects of the Wind Project under NEPA because the Road and Wind Projects are not connected." *Id*. The Court found that the two projects had independent utility because the "Road Project was independently useful for providing dust and stormwater control and limiting access to the Pacific Crest Trail," and the wind project would have been developed even without the road on federal land because there was a private road option available. *Id.* Although the Court noted that the wind project in that case was not a major federal action (because it was on private land), it also applied the independent utility test to determine whether the road project and wind project

were sufficiently connected to warrant consideration of the wind project's effects in the environmental analysis for the road project. *Id.*

Here, the fact that the Wind Project has no independent utility distinguishes *Sierra Club* and requires the opposite result: namely, that BPA must evaluate the effects of the Wind Project together with the effects of the connected federal actions (the federal interconnection and substation) in a single FEIS. Which is, of course, what BPA purported to do in its FEIS.

BPA's evaluation here of all project components together in the same EIS was not only required by law and by this court's controlling precedent, it was also the same evaluation that the Bureau of Land Management ("BLM") undertook in *Jewell*. In that case, the agency evaluated the effects of a proposed wind project on private land together with the effects of a proposed federal right-of-way for a transmission line. 840 F.3d at 565–66 & n.2. In *Jewell*, the BLM had even less involvement than BPA had here, because the federal action there was limited to the issuance of a right-of-way across federal land, unlike the physical collector substation and interconnection provided by BPA here. But in *Jewell*, as in this case, the wind turbines could not have been constructed without the federal action, and thus their effects were required to be analyzed together. *See id*.

The *Jewell* Court observed that "[b]ecause the right-of-way for the transmission line crosses public lands administered by the BLM, and the

construction of the turbines is a 'connected action,' 40 C.F.R. § 1508.25(a)(1), the entire Project is subject to environmental review under [NEPA]." 840 F.3d at 565. The Court then invalidated BLM's decision because it did not adequately evaluate environmental effects *on the private land turbine site*. *Id*. at 568–71.

The panel's decision here marks the first time this Court has held that the environmental effects of a private action that has no independent utility without a connected federal action need not be evaluated in the NEPA analysis for that federal action. Because it overlooks the regulatory requirements for connected actions and the independent utility test, the panel's decision misapprehends the relevant law and conflicts with this court's precedent. Rehearing is necessary to correct these errors.

C. All of the Cases on Which the Panel Relied Involved Non-Federal Actions That Had Independent Utility, Unlike the Wind Project in This Case.

Rather than apply the "independent utility" test, the panel relegated the threshold issue—that the Wind Project lacked independent utility and therefore had to be evaluated in the FEIS—to an afterthought among the four factors evaluated in its Opinion. *See* Op. at 3. But the four factors the panel addressed here have previously only been applied in cases where a proposed private action *has* independent utility, to determine whether the private project nevertheless is sufficiently "federalized" for purposes of a federal EIS.

For example, the panel relied on *Wetlands*, in which the holding turned on the fact that the non-federal action "certainly *could* proceed without the [federal action] and . . . is currently proceeding without the [federal action]." 222 F.3d at 1117. This Court later summarized the facts in *Wetlands* as showing "that the filling of the wetlands was not sufficiently related to the rest of the development," that "'the wetland portion of the development was a separate and independent phase of the master project, [and] that the wetland portion of the project did not have to be completed for the master plans to continue or to exist.'" *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1040 (9th Cir. 2009) (citing *Wetlands*, 222 F.3d at 1110–11, 1117, and quoting *Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1124 (9th Cir. 2005)). Thus, the non-federal and federal portions had independent utility, and none of the other factors that might "federalize" the non-federal portion—such as federal financing or federal control over the design—were present. *See Wetlands*, 222 F.3d at 1117.

Although the district court in *Wetlands* determined that the federal and non-federal parts of the project were interconnected, this Court explained that "[t]he linkage that the district court found between the permitted activity and the specific project planned is the type of 'interdependence' that is found in any situation where a developer seeks to fill a wetland as part of a large development project," which did not foreclose a finding that the different parts had independent utility. *Id.*

at 1116–17. The sort of "linkage" in *Wetlands*—involving a private project that could be developed even without a federal wetlands permit—is very different from this case, where the Wind Project *cannot be developed* without the federal interconnection and substation.

Another case relied on by the panel, *Enos v. Marsh*, also involved a non-federal project that had independent utility apart from the separate federal project. 769 F.2d 1363, 1366, 1371–72 (9th Cir. 1985). In *Enos*, a federal harbor project involved the construction of an entrance channel and inner harbor, while separate state-planned shoreside facilities included berthing areas, terminals, roadways, and utility improvements. *Id*. at 1366, 1371. After distinguishing cases that held that highway projects with both state and federal sections required NEPA review as a single federal action, the Court held that "the state and federal [shoreline and harbor development] projects serve complementary, but distinct functions; they are not as interrelated as were the parts of the same highway construction." *Id*. at 1371.

In this case, the Whistling Ridge Energy Project more closely resembles the highway projects discussed in *Enos*. Not only are the private Wind Project, the BPA interconnection, and the BPA substation all components of the single Proposed Action in the FEIS, ER 210–13, the record shows that the Wind Project is inextricably interrelated with the federal components because it cannot be built without them. *See supra* pp. 4–5.

Moreover, *Enos* predated this Court's adoption of the independent utility test. Thus, the interpretive framework used in *Enos* for determining whether the proposed state facilities were "federal" has since been superseded by the threshold independent utility test.

In addition, the panel's statement that the Wind Project and the interconnection "'serve complementary, but distinct functions,'" Op. at 3 (quoting *Enos*, 769 F.2d at 1371), is inconsistent with the facts here. If industrial-scale wind turbines could not transmit energy, they would never be constructed. Here, because the Wind Project has no utility independent of the BPA interconnection, there is no "distinct function" that a non-existent Wind Project—unable to transmit energy—could serve.

Finally, the panel's attempt to distinguish *Port of Astoria v. Hodel* on the grounds that the federal involvement in that case was greater than here misses the point: in both cases, the private facility *could not exist* but for the federal action. 595 F.2d 467 (9th Cir. 1979) (BPA was required to evaluate the environmental effects of a private aluminum plant where it could not exist without BPA's transmission line and supplied power).

In summary, in deciding whether the environmental effects of the Wind Project must be evaluated in the FEIS, the panel misapprehended the fundamental legal issue. The question is not whether the Wind Project, in isolation, is "federal"

(there is no question it is not), but rather whether it lacks independent utility apart from the federal interconnection, and thus needed to be evaluated in the FEIS in accordance with this Court's precedent. The undisputed facts of the case show that the Wind Project cannot exist independently of the federal interconnection, and thus BPA was required to evaluate its effects and disclose these effects to the public in accordance with NEPA—which BPA purported to do.

III. The Panel Apparently Presumed that Judicial Review of the Adequacy of the FEIS Would Have Been Available in State Court, but the Washington Court Of Appeals has Foreclosed Such Review in These Circumstances.

In discussing whether BPA was obligated to review the environmental effects of the Wind Project in the FEIS (and whether Friends was permitted to challenge the adequacy of the FEIS in federal court), the panel relied on the fact that "BPA engaged in a joint NEPA analysis with Washington's regulatory agency." Op. at 3. In relying on this fact, the panel was apparently presuming that judicial review of the adequacy of the FEIS under Washington's State Environmental Policy Act ("SEPA") would have been available in state court.

This presumption is incorrect. When an EIS is jointly prepared by federal and state agencies under NEPA and SEPA, and issued before final project approval by the state agency, SEPA precludes judicial review of the joint EIS in state court "to reduce duplicative and wasteful practices." *Boss v. Wash. State Dep't of*

Transp., 54 P.3d 207, 211 (Wash. App. 2002). Thus Friends could not challenge the adequacy of the joint FEIS in state court.

The panel's holding now also precludes Friends from challenging the FEIS in federal court. The resulting Catch-22 is a fundamentally unfair result—particularly given that the FEIS actually purports to analyze the environmental effects of the Wind Project, yet Friends has no venue to challenge that analysis.

This result is also particularly unfair given the panel's discussion at oral argument about the FEIS's substantive deficiencies. As Judge Hurwitz noted, "if we really are in NEPA-land on the entire project, I don't see how this EIS complies."[2] As the panel discussed, these problems include BPA's deficient analysis of project alternatives, mitigation, and impacts to birds and bats.[3]

Because the panel overlooked the NEPA regulations on connected actions and misapplied the independent utility test, no court will be able to address the deficiencies in the FEIS. This Court should grant rehearing in order to ensure that the serious environmental impacts of the Proposed Action will be properly disclosed and evaluated, as NEPA requires.

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[2] Oral Argument Video, *available at* https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000013218, at Time Index 28:45.

[3] *Id*. at Time Index 28:30 to 39:08.

CONCLUSION

For the reasons set forth above, the Court should grant rehearing by the panel or rehearing en banc.

Dated this 8th day of May 2018.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Petitioners Friends of the Columbia Gorge and Save Our Scenic Area are aware of no related cases pending before this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 and 40(b), and Ninth Circuit Rule 40-1(a), I certify that this Petition for Panel Rehearing is proportionately spaced, has a typeface of 14 points or more, and contains 4,199 words, excluding the parts that do not count towards the limitation as provided in Fed. R. App. P. 32(a)(7)(B)(iii).

s/ David H. Becker
David H. Becker
Law Office of David H. Becker, LLC

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2018, I electronically filed the foregoing Petition for Panel Rehearing and Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. There are no unregistered users participating in this case.

s/ David H. Becker
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APPENDIX

FILED

MAR 27 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRIENDS OF THE COLUMBIA GORGE and SAVE OUR SCENIC AREA, Petitioners, v. BONNEVILLE POWER ADMINISTRATION, Respondent.	No. 15-72788 MEMORANDUM*

On Petition for Review of an Order of the
Bonneville Power Administration

Argued and Submitted March 8, 2018
Portland, Oregon

Before: FISHER, N.R. SMITH, and HURWITZ, Circuit Judges.

Friends of the Columbia Gorge and Save Our Scenic Area (collectively, "Friends") petition for review of a Bonneville Power Administration (BPA) record of decision granting the Whistling Ridge Energy Project (the Wind Project) an interconnection to BPA's transmission system. We deny the petition.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

BPA determined the Wind Project—as opposed to the interconnection itself—was not a major federal action under the National Environmental Policy Act (NEPA). *See Sierra Club v. Bureau of Land Mgmt.*, 786 F.3d 1219, 1225 (9th Cir. 2015).

We review BPA's determination with deference under the Administrative Procedure Act, determining only whether it was arbitrary, capricious, or contrary to law. *See Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1118 (9th Cir. 2000), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

Determining whether an action is federal for purposes of NEPA "requires 'careful analysis of all facts and circumstances surrounding the relationship'" between the federal agency and the allegedly nonfederal action. *Enos v. Marsh*, 769 F.2d 1363, 1371 (9th Cir. 1985) (quoting *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 329 (9th Cir. 1975), *abrogated on other grounds by Cottonwood Envtl. Law Center v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015)). We evaluate (1) whether the project received "federal funding," *Enos*, 769 F.2d at 1372; (2) whether the "federal government exercised . . . control over the planning and development of" the project, *id.*; (3) whether "[t]he environmental effects of the state action were . . . ignored" or whether "the state project was taken

into account as one of the secondary effects of the federal action," *id.* at 1372 n.11; *see also Wetlands*, 222 F.3d at 1117 (weighing "extensive state environmental review" as a factor indicating an action was not within federal jurisdiction); and (4) whether two projects "are so functionally interdependent that the projects constitute a single federal action" or whether they "serve complementary, but distinct functions," *Enos*, 769 F.2d at 1371.

These factors support BPA's determination that the Wind Project was not a federal action. First, the Project will receive no federal money. Second, the federal government exercised no control over the planning and development of the Wind Project. Third, BPA engaged in a joint NEPA analysis with Washington's regulatory agency. Lastly, even if interconnection with BPA is the only feasible means of transmitting power generated from the Wind Project, the interconnection and the Wind Project "serve complementary, but distinct functions." *Id.* In contrast to the situation in *Port of Astoria v. Hodel*, 595 F.2d 467 (9th Cir. 1979), BPA would merely *transmit* power generated by the private Wind Project to other private consumers along its existing transmission system. *Cf. id.* at 471 (identifying federal action in a contract to supply federally generated power to an aluminum plant).

Accordingly, we cannot conclude that BPA's no-federal-action determination was arbitrary, capricious, or contrary to law. *See Wetlands*, 222 F.3d at 1118.

Petition **DENIED.**