

# National Environmental Policy Act/ Transmission System Interconnection: Federal Appellate Court Addresses Federal Action Question



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

04/02/2018

The United States Court of Appeals for the Ninth Circuit (“Court”) in a March 27th opinion addressed whether an action involving the Whistling Ridge Energy Project (“Project”) was “federal” for the purposes of the National Environmental Policy Act (“NEPA”). See *Friends of the Columbia Gorge and Save Our Scenic Area v. Bonneville Power Administration*, 2018, WL 1476609.

Friends of the Columbia Gorge and Save Our Scenic Area (“Friends”) petitioned for review of a Bonneville Power Administration (“BPA”) Record of Decision granting the Project an interconnection to BPA’s transmission system.

NEPA requires federal agencies to include environmental values and issues in their decision making processes. This mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions. The statute requires federal agencies to prepare a detailed statement known as an Environmental Impact Statement (“EIS”) in the event of a major federal action, that will significantly affect the environment.

BPA had determined that the Project was a major federal action. However, it determined that an interconnection was not a NEPA major federal action.

The Court noted, in reviewing BPA’s decision, that:

- Deference would be provided under the Administrative Procedure Act, which is limited to as assessment as to whether the decision was arbitrary, capricious, or contrary to law
- Determining whether an action is federal requires careful analysis of all facts and circumstances surrounding the relationship between the federal agency and the allegedly nonfederal action

The Court states that the evaluation of the issue will include:

- whether the project received “federal funding”
- whether the federal government exercised control over the planning and development of the project
- whether the 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
- whether two projects are so functionally interdependent that the projects constitute a single federal action or whether they serve complementary, but distinct functions

The Court holds that the following referenced factors support BPA’s determination:

- No federal money was received
- No federal control over the planning and development
- BPA engaged in a joint NEPA analysis with the State of Washington's regulatory agency
- Even if interconnection with BPA is the only feasible means of transmitting power generated from the Project, the interconnection and the Project serve complementary, but distinct functions
- BPA would merely transmit power generated by the private Project to other private consumers along its existing transmission system

The Court concludes that BPA's determination of absence of a federal action was not arbitrary, capricious, or contrary to law.

[A copy of the decision can be downloaded here.](#)