

The Importance of Independence: The Ninth Circuit Provides Helpful Clarification on Connected Actions in the Energy Project Development Context

The Ninth Circuit Court of Appeals has held that a right-of-way for an access road over Bureau of Land Management (BLM) land to connect a wind project to a state highway did not trigger formal consultation under the Endangered Species Act because the proposed access road would not have significant impacts to the environment. *Sierra Club v. Bureau of Land Management*, 786 F.3d 1219 (9th Cir. 2015). North Sky River Energy developed a wind project on 12,000 acres of private land in the Tehachapi area. North Sky applied to the BLM for a right-of-way across federal lands for an access road to connect the wind farm with a state highway. North Sky could have accessed the highway through a private road, but preferred the access road over BLM land because the private road required substantial grading and would have greater environmental impacts. If the BLM had denied North Sky's application, North Sky could have pursued the private road option. After reviewing North Sky's application and evaluating the potential environmental impacts, the BLM issued an Environmental Assessment concluding that the proposed road project would not have significant environmental impacts. Therefore, the BLM concluded that it need not prepare an Environmental Impact Statement or formally consult with the Fish and Wildlife Service under the Endangered Species Act. The BLM's determination depended in large part on its finding that the private-road option was a viable alternative to the BLM access road project and thus the wind project had independent utility from the BLM access road project. The BLM issued a permit for the BLM access road project. Project opponents -- the Sierra Club, the Center for Biological Diversity, and the Defenders of Wildlife -- alleged that the BLM right-of-way violated the Endangered Species Act and the National Environmental Policy Act (NEPA). The primary basis for the project opponents' arguments was the theory that the environmental impacts of the BLM access road project should have been considered together with those of the wind project. They argued that when the impacts of the wind project and the access road were considered together, there would be significant impacts requiring the preparation of an Environmental Impact Statement and formal consultation under the Endangered Species Act. The Ninth Circuit upheld the BLM's grant of the right-of-way for the BLM access road project. Under the Endangered Species Act, a federal agency must consider the direct and indirect effects of a proposed federal action on a listed species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action. The Ninth Circuit found that the BLM correctly concluded that the BLM access road's project's direct effects did not trigger formal consultation with the Service, and that the wind project's direct effects should not be included in the analysis because of its independent utility from the BLM access road project. Similarly, the court concluded that the wind project was not an indirect effect of the BLM access road project, because the BLM access road did not cause the development of the wind project. Finally, the Ninth Circuit determined that the wind project and BLM access road project were not "interrelated or interdependent" because North Sky could have developed the wind project without the BLM's approval of the access road. The Ninth Circuit came to the same conclusion under NEPA. NEPA requires federal action agencies to evaluate not only the actions under federal control, but also "connected" and "cumulative" actions. As a preliminary matter, the Ninth Circuit confirmed that the wind project itself did not qualify as a federal action, as it was entirely on private land and outside of the jurisdiction of the BLM. Thus, the BLM access road would only trigger review of the wind farm if the two projects were considered "connected actions." The court confirmed that the Ninth Circuit follows the "independent utility" test, and that the "crux of the test is whether *each of two projects* would have taken place *with or without the other* and thus had independent utility." Because North Sky could have developed the wind project without the BLM

access road project, the court held that the wind project had independent utility from the BLM access road project. The BLM appropriately analyzed the wind project as a cumulative project. The Ninth Circuit's decision will enable developers of projects on private lands to consider less environmentally harmful routes for access roads and other related infrastructure that may cross federal lands without triggering onerous federal permitting requirements when the private project maintains utility in the event that the federal approval is denied. This is particularly important in areas of the Western United States, in which the BLM has ownership of "checkerboard" lands interspersed in between parcels of private land (as indicated on the map below). It is critical, however, that a project proponent and the federal agency include evidence in the record demonstrating that the non-federal project would proceed even without the federal approval.

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