IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-03258-CMA

SAVE THE COLORADO, THE
ENVIRONMENTAL GROUP,
WILDEARTH GUARDIANS,
LIVING RIVERS,
WATERKEEPERS ALLIANCE, INC.,
SIERRA CLUB,

Petitioners,

v.

LT GENERAL TODD T. SEMONITE,
in his official capacity as the Chief of the U.S. Army Corps of Engineers,
DAVID L. BERNHARDT, in his official capacity as Secretary of the Interior, and
AURELIA SKIPWORTH, in her official capacity as Director of the U.S. Fish
and Wildlife Service,

Federal Respondents,

CITY AND COUNTY OF DENVER,
ACTING BY AND THROUGH ITS
BOARD OF WATER COMMISSIONERS,

Respondent-Intervenor.

FEDERAL RESPONDENTS' REPLY IN SUPPORT OF FEDERAL RESPONDENTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

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The Federal Power Act's (FPA) exclusive jurisdiction provision, 16 U.S.C. § 825*l*(b), vests the courts of appeals with jurisdiction to review all claims raising issues inhering in the controversy over an order issued by the Federal Energy Regulatory Commission (FERC). This doctrine has an expansive scope and it cannot be evaded by carefully crafting a petition to avoid directly implicating FERC. Here, Petitioners are challenging agency decisions that are intertwined with or are integral elements of the licensing order issued by FERC authorizing Respondent-Intervenor Denver Water to enlarge Gross Reservoir and increase Gross Dam's height.

Petitioners cannot carry their burden of establishing that subject matter jurisdiction is proper in this Court. The FPA's exclusive jurisdiction provision encompasses not only claims directly challenging a FERC order, but also any claim raising an issue that "inheres in the controversy" over such an order. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). Although Petitioners seek to characterize the U.S. Army Corps of Engineers' (Corps) and U.S. Fish and Wildlife Service's (FWS) actions as "separate" and "distinct," the reality is that FERC considered and relied upon the challenged Final Environmental Impact Statement (FEIS), Endangered Species Act (ESA) consultations between the Corps and FWS, and the Corps' Record of Decision (ROD) in approving the FERC license amendment. Petitioners' pleadings studiously avoid acknowledging FERC's central role in the Moffat Project, but it is plain on the face of their petition that they seek to collaterally thwart FERC's licensing decision. Supplemental Pet. ¶ 1, ECF No. 45-1 (challenging the "Moffat Project," which "would constitute the tallest dam in the history of Colorado"); *see*

California Save Our Streams v. Yeutter, 887 F.2d 908, 911 (9th Cir. 1989) (rejecting plaintiffs' attempt "through careful pleading, to avoid the strict jurisdictional limits imposed by Congress" in the FPA). Because Petitioners challenge agency actions that inhere in the controversy over the FERC order providing for the expansion of Gross Reservoir and Dam, the FPA's exclusive jurisdiction provision applies to this suit. Dismissal of the Supplemental Petition is in keeping with precedent that recognizes that any attempt to challenge an important aspect of a FERC order—no matter how it is drafted—falls under the FPA. And Petitioners offer no valid policy reasons for overriding Congress' decision to vest the courts of appeals with exclusive jurisdiction over all issues closely connected to a FERC licensing proceeding. Accordingly, the Court should dismiss the Supplemental Petition for lack of subject matter jurisdiction.[1]

Argument

I. The Supreme Court has held that the plain language of the FPA's exclusive jurisdiction provision applies beyond just orders issued by FERC.

The judicial review provision in the FPA applies to "an order issued by the Commission," 16 U.S.C. § 825*l*(b). Despite acknowledging some exceptions (like

[1] Throughout their response, Petitioners allege that Respondents waited too long to file their motions to dismiss. Pet'rs Opp. to Federal Resp't Mot. to Dismiss (Opp.) at 11-12, n.16, ECF No. 53. Petitioners are mistaken. As set forth in the Joint Case Management Plan, ECF No. 43, Respondents promptly raised the jurisdictional issues following receipt of the FERC order. Even if that were not the case, the timing of the motion is not relevant to whether Petitioners have established jurisdiction, as a "party does not waive the requirement by failing to challenge jurisdiction early in the proceedings." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). To the contrary, a court lacking jurisdiction "must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

challenges to ESA biological opinions), Petitioners argue this Court has jurisdiction because the statutory text shows that Congress restricted the FPA's exclusive jurisdiction provision only to FERC orders. Opp. at 16. But Petitioners ignore the fact that the Supreme Court has long held that the FPA's exclusive jurisdiction provision sweeps more broadly than just FERC orders. *City of Tacoma*, 357 U.S. at 336; *see also Me. Council of the Atl. Salmon Fed. v. NMFS*, 858 F.3d 690, 693 (1st Cir. 2017) (discussing *City of Tacoma*).

In *City of Tacoma*, the plaintiffs pursued claims in state court alleging that, under state law, the City of Tacoma lacked the legal authority to construct a dam that the Federal Power Commission (now FERC) had licensed under the FPA. 357 U.S. at 329-33. The plaintiffs did not directly challenge the Commission's licensing order, did not sue the Commission directly, and did not allege any violations of federal law. Nonetheless, the Supreme Court held that the plaintiffs were obliged to pursue their state law objections against the licensee according to the FPA's exclusive jurisdiction provision, which applies to "all issues inhering in the controversy" and necessarily precludes "all other modes of judicial review." *Id.* at 336. In doing so, the Supreme Court invoked § 825*l*(b)'s plain language, emphasizing that the provision's scope extends beyond just direct challenges to the specific terms of a Commission order. *Id.* at 335–36 ("This statute is written in simple words of plain meaning and leaves no room for doubt the congressional purpose and intent."). Petitioners' interpretation of § 825*l*(b) does not adhere to the Supreme Court's holding in *City of Tacoma*.

To support their narrow interpretation of the FPA, Petitioners point to differences between the text of the FPA and the Natural Gas Act (NGA). Opp. at 16-17. In 2005, in the Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 980 (Aug. 8, 2005) (EPAct), Congress expanded the NGA's exclusive jurisdiction provision to apply to "the review of an order or action of a Federal agency (other than the Commission) or State administrative agency." 15 U.S.C. § 717r(d)(1). But Congress' failure to amend the FPA in the same way as the NGA does not show that it intended to curtail the FPA's exclusive jurisdiction, as interpreted by federal courts for decades. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.") (internal quotation marks and citation omitted); *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993) ("As a general matter, we are reluctant to draw inferences from Congress' failure to act.").

Petitioners offer no legislative history of the EPAct to support their theory. The Supreme Court's ruling in *City of Tacoma* defines the scope of the FPA's exclusive jurisdiction provision, and Congress did nothing to overrule that case in EPAct. Thus, *City of Tacoma* controls. Consistent with *City of Tacoma*, multiple courts have concluded that the FPA's exclusive scheme provides the only means of challenging agency decisions even when FERC's orders are not challenged directly. *See*, *e.g.*, *Otwell v. Ala. Power Co.*, 747 F.3d 1275, 1281-82 (11th Cir. 2014) (litigants "cannot

escape [the FPA's] strict judicial review provision by arguing that they are pursuing different claims and different relief than the parties before the FERC.").

II. Petitioners challenge agency actions that inhere in the controversy over the FERC order.

As Federal Respondents previously explained, Petitioners are challenging agency actions that inhere in the controversy over the FERC license for this water development project. Federal Resp't Mem. (Mot.) at 16-23, ECF. No. 49-1. Petitioners allege that Federal Respondents have distorted the factual record and that the Corps and FWS's actions are not integral elements of FERC's licensing order, Opp. at 13, 18, but this argument does not withstand scrutiny. Petitioners attach importance to the fact that the Corps served as the lead agency for the project's FEIS. *Id.* at 18-19. Petitioners also draw attention to FERC's supplemental National Environmental Policy Act (NEPA) work focusing on the effects of amending the FERC license to the extent that they were not addressed in the FEIS. *Id.* at 19. But throughout the NEPA process, FERC cooperated with the Corps, and FERC relied upon the jointly prepared FEIS in issuing its licensing order. Supplemental Pet. ¶ 69; Corps' ROD at 2, AR000017; *City and County of Denver, Colorado*, 172 FERC ¶ 61063, at P 18 (2020). Indeed, FERC confirmed that the FEIS was part of the "complete record of analysis" for Denver Water's proposal to amend its FERC license. FERC Final Supp. EA at vi, 6; *City and County of Denver, Colorado*, 172 FERC ¶ 61063, at P 19. FERC similarly stated that the Corps' Record of Decision (ROD) was part of the "complete record." FERC Final Supp. EA at vi, 6.

As with NEPA, FERC has its own ESA obligations when taking any action. 16 U.S.C. § 1536(a)(2) (each federal agency shall ensure that any action it authorizes, funds, or carries out is not likely to jeopardize listed species or destroy or adversely modify critical habitat). FERC here relied on FWS's actions and consultations between the Corps and FWS when reaching its decision and to satisfy its own ESA obligations. *City and County of Denver, Colorado*, 172 FERC ¶ 61063, at P 27-32.

Petitioners also contend that the FPA should not apply because they challenge the Corps' Clean Water Act (CWA) analyses, which have "a critical, independent function" apart from the FERC license, Opp. at 19-20, but their argument is misplaced. Although a CWA Section 404 authorization is an independent requirement from the FERC licensing requirements, *see* Mot. at 5, this is not determinative of whether the FPA's exclusive jurisdiction provision applies to Petitioners' challenge to this specific Section 404 Permit. Courts regularly reject the argument that the scope of exclusive jurisdiction can be divided cleanly based on the substantive nature of the claims. *See, e.g.*, *Williams Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255, 262 (10th Cir. 1989) (finding no basis "for the bifurcation of judicial review along substantive lines," "given that such a procedure would negate most of the benefits attending the 'exclusive' scheme of review").[2] As the Ninth Circuit correctly observed in *Ruud v. U.S. Dep't of Labor*, when "an agency decision has more than one basis of authority, one of which

[2] *See also Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989); *Rochester v. Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979) (Congress did not intend the "exclusivity" of a special jurisdictional provision "to depend on the substantive infirmity alleged").

provides for review in the court of appeals, considerations of judicial economy and consistency justify review of the entire proceeding by the court of appeals." 347 F.3d 1086, 1088 (9th Cir. 2003).

As the Supreme Court noted decades ago, the key determination is whether Petitioners are raising claims that inhere in the controversy over the FERC order. *City of Tacoma*, 357 U.S. at 336. Although Petitioners claim that they do not "challenge any aspect of FERC's order," Opp. at 26, they do not dispute that, if this lawsuit is allowed to proceed, it would affect the legal and factual basis for FERC's licensing order. If the Court finds that the NEPA and ESA work completed for this project are inadequate, then FERC's order is rendered invalid, as it relies on the same NEPA and ESA work. And if the Court invalidates the Corps' ROD or Section 404 Permit, then Denver Water likely will not be able to carry out the project authorized by FERC. Because the Supplemental Petition raises issues that are integral to a FERC order, the FPA's exclusive jurisdiction provision applies regardless whether Petitioners are pursuing NEPA, ESA, or CWA claims against the Corps and the FWS. *See Save Our Streams*, 887 F.2d at 912; *cf. Am. Bird Conservancy v. F.C.C.*, 545 F.3d 1190, 1193 (9th Cir. 2008) (plaintiffs may not "elude" the Act's exclusive review provision by "disguising" a challenge to tower registrations as ESA claims).

III. Petitioners rely on cases that did not consider the FPA's exclusive jurisdiction provision.

Petitioners argue that Respondents failed to address adverse rulings, but Petitioners' heavy reliance on such cases such as *North Carolina v. Hudson*, 665 F. Supp. 428 (E.D.N.C. 1987), is misplaced. Although *Hudson* involved a pipeline that

was eventually the subject of a FERC proceeding, petitioners overlook the critical fact that the *Hudson* plaintiffs mounted their attack in district court ***before*** FERC's licensing proceedings had even begun. *See North Carolina v. Virginia Beach*, 951 F.2d 596, 599 (4th Cir. 1991) (related case) (noting that the power company "declined to initiate the application to FERC until the permit from the Corps was affirmed in the district court"). Unsurprisingly, the *Hudson* court did not address whether the FPA's exclusive jurisdiction provision applied. As the Supreme Court emphasized in *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 144 (2011), "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." Here, by sharp contrast, Petitioners' challenge in district court comes ***after*** the start of FERC's proceedings. In fact, Petitioners themselves attempted to intervene in the FERC proceedings to challenge the FEIS for the project, failed to timely do so, and then immediately filed this suit challenging the FEIS and other agency actions that inhere in the controversy over the FERC order.

A better comparison is *Save Our Streams*. In that case, ***after*** FERC denied the plaintiffs' attempt at late intervention in FERC's administrative proceedings, the plaintiffs filed NEPA and American Indian Religious Freedom Act claims against the Forest Service in the district court. 887 F.2d at 910. The Ninth Circuit rejected the plaintiffs' argument that they were "not attacking the licensing decision made by FERC." *Id.* at 912. The court reached this conclusion notwithstanding the fact that the plaintiffs had neither filed suit against FERC nor asserted any claims under the FPA. Petitioners

argue that the Forest Service decision did not serve any independent functions outside of the FERC order. Opp. at 25. As the Ninth Circuit emphasized, however, this is beside the point. Petitioners' action is still "an assault on an important ingredient of the FERC license." 887 F.2d at 912; *supra* pp. 5-7. *See also Southwest Ctr. for Biological Diversity v. FERC*, 967 F. Supp. 1166 (D. Ariz. 1997) ("The law is clear that any attempt to challenge a license issued by FERC, however artfully, pleaded will fall under the exclusive jurisdiction" of the FPA.).

Petitioners also cite FERC's order denying Petitioners' untimely intervention in the FERC proceedings, arguing that it is evidence of FERC's view that the FPA's exclusive jurisdiction provision does not apply to Petitioners' claims. Opp. at 27-29 (citing *City and County of Denver, Colorado*, 165 FERC ¶ 61120, at n.26). As previously explained, however, FERC's intervention denial does not address the exclusive jurisdiction provision of the FPA, Mot. at n.4, nor does it opine on the claims in the Supplemental Petition. Further, in this order, FERC confirmed its "decision to rely on" the FEIS and noted the close relationship between the Corps' analysis and its own. *City and County of Denver, Colorado*, 165 FERC ¶ 61120, at n.24 (stating that the FEIS "studied numerous aspects of the proposed expansion of Gross Reservoir"); *see also id.* at n.17 ("it might be said that the EIS is part and parcel of [FERC's] EA, which relied on the EIS"). Thus, FERC's denial of intervention does little to show that Petitioners' claims in this case do not inhere in the controversy over FERC's order.

IV. Policy considerations do not override exclusive jurisdiction.

Finally, Petitioners argue that Respondents' policy concerns are "overblown." Opp. at 29. On the contrary, Petitioners' proposal for concurrent district court jurisdiction would allow litigants to circumvent Congress' detailed scheme for administrative and judicial review, resurrecting the very problems that the FPA's exclusive review provision was designed to eliminate. *See Save Our Streams*, 887 F.2d at 912. Petitioners complain that FERC's order has not been appealed, Opp. at 29, but they ignore the fact that they had the opportunity to intervene in FERC's proceedings and slept on their rights. *See Southwest Ctr. for Biological Diversity*, 967 F. Supp. at 1174 (the lack of a challengeable FERC order was "due to Plaintiff's choice not to petition the Commission directly for action"). "Congress, acting within its constitutional powers, may freely choose the court in which judicial review may occur." *Rochester*, 603 F.2d at 931. And even "where it is unclear whether review jurisdiction is in the district court or the court of appeals the ambiguity is resolved in favor of the latter." *Gen. Electric Uranium Mgmt. Corp. v. Dep't of Energy*, 764 F.2d 896, 903 (D.C. Cir. 1985). Here, Congress chose the courts of appeals as the exclusive forum in which *all* issues intimately bound up in a FERC licensing proceeding must be litigated. 16 U.S.C. § 825*l*(b); *City of Tacoma*, 357 U.S. at 334-41. No policy considerations justify overriding Congress' choice. Because the FPA, as interpreted by the courts, directs that any claim raising an issue that inheres in the controversy over a FERC licensing order must be brought exclusively in the courts of appeals, the Supplemental Petition should be dismissed for lack of jurisdiction.

Respectfully submitted on this 23rd day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2020, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

s/ Sara E. Costello
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