No. 02-529

In the Supreme Court of the United States

TRANSMISSION AGENCY OF NORTHERN CALIFORNIA,
PETITIONER

v.

SIERRA PACIFIC POWER COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The brief for the federal respondent addresses the following questions presented by the petition:

1. Whether petitioner's claim that the Bonneville Power Administration breached its alleged contractual obligation to provide specified power transmission capacity by participating in the construction and operation of the Alturas Intertie Project is effectively a challenge to the administrative decision to build and operate that project, and thus within the exclusive original jurisdiction of the Ninth Circuit under 16 U.S.C. 839f(e)(5).

2. Whether petitioner's lawsuit was subject to the requirement of 16 U.S.C. 839f(e)(5) that "[s]uits to challenge * * * final actions and decisions" taken by the Bonneville Power Administration under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 *et seq.*, be filed within ninety days of when the action or decision is deemed final.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-27a) is reported at 295 F.3d 918. The opinion of the district court (Pet. App. 28a-52a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2002. An amended decision was issued on July 8, 2002, and a petition for rehearing was denied the same day (Pet. App. 27a). The petition for a writ of certiorari was filed on October 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, the Transmission Agency of Northern California, an agency formed by several California municipalities, brought suit in state court against the Bonneville Power Administration (BPA) and several regional utility companies asserting claims for money damages and equitable relief stemming from the construction and operation of an electricity intertie known as the Alturas Intertie. Respondents removed the suit to the United States District Court for the Eastern District of California, which dismissed the claims against BPA for lack of subject matter jurisdiction, concluding that those claims challenged final agency action by BPA and therefore fell within the exclusive original jurisdiction of the Ninth Circuit. See 16 U.S.C. 839f(e)(5). It also held that state-law tort and breach of contract claims against the regional utility companies were preempted under the Federal Power Act, 16 U.S.C. 791a *et seq.* The court of appeals affirmed.

1. The Bonneville Power Administration is a federal agency established within the United States Department of Energy by the Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.* BPA is responsible for marketing and transmitting electricity generated by the federal Columbia River power system in several States primarily in the Pacific Northwest.[1] BPA has extensive

[1] The "Pacific Northwest" consists of: "(A) the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River drainage basin, and; (B) any contiguous areas, not in excess of seventy-five air miles from the area referred to in subparagraph (A), which are a part of the service area of a rural electric cooperative customer served by the Administrator on

statutory obligations with respect to the power needs of its customers. Because those obligations cannot be met solely from the regional hydroelectric resources under its control, the agency is authorized to acquire generation capacity on behalf of its customers. See *Aluminum Co. of Am.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984). BPA also owns, operates and maintains approximately 15,000 miles of high-voltage transmission lines comprising the federal Columbia River Transmission System, which provides approximately 80% of the bulk transmission capacity in the Pacific Northwest. See *Association of Pub. Agency Customers, Inc.* v. *Bonneville Power Admin.*, 126 F.3d 1158, 1163 (9th Cir. 1997).

BPA's operating decisions frequently have significant consequences for energy markets, and those decisions are often challenged in litigation. In recognition of that fact, Congress included provisions designed to streamline BPA litigation in the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 *et seq.* (Northwest Power Planning Act or Act), in an effort to "expedite litigation challenging BPA actions under the Act." *Pacific Power & Light Co.* v. *Bonneville Power Admin.*, 795 F.2d 810, 815 (9th Cir. 1986). To promote uniform interpretation of its provisions, the Act provides for exclusive jurisdiction over challenges to final agency action and the implementation of such actions in the United States Court of Appeals for the Ninth Circuit, and requires expedited filing to ensure prompt resolution of litigation. *Ibid.*; *Puget Sound Energy, Inc.* v. *United States*, 47 Fed. Cl. 506, 511 (2000). The Act provides in relevant part:

December 5, 1980, which has a distribution system from which it serves both within and without such region." 16 U.S.C. 839a(14).

> Suits to challenge * * * final actions and decisions taken pursuant to this chapter by the Administrator [of BPA] or the [Northwest Power Planning] Council, or the implementation of such final actions, whether brought pursuant to this chapter, the Bonneville Project Act [16 U.S.C. § 832 et seq.], the Act of August 31, 1964 (16 U.S.C. 837-837h), or the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), shall be filed in the United States court of appeals for the region. Such suits shall be filed within ninety days of the time such action or decision is deemed final, or, if notice of the action is required by this chapter to be published in the Federal Register, within ninety days from such notice, or be barred. * * * Suits challenging any other actions under this chapter shall be filed in the appropriate court.

16 U.S.C. 839f(e)(5). See generally *Pacific Power & Light Co.*, 795 F.2d at 814.

2. a. Petitioner is an agency formed by several municipalities in Northern and Central California to provide electric transmission facilities and services for its members. Petitioner is the majority owner of a 1600 megawatt (MW) transmission line between California and Oregon known as the California-Oregon Transmission Project. Respondents BPA, Portland General Electric, and PacifiCorp operate an electric transmission interconnection known as the Northwest AC Intertie.[2] The California-Oregon Transmission Project was joined with the Pacific AC Intertie to form the California-Oregon Intertie, which has a transfer capacity of 4800 MW. Pet. App. 3a-4a. Petitioner and respondents

[2] An "intertie" is an interconnection of two or more electric utility systems that permits the passage of current.

BPA, Portland General Electric, and PacifiCorp agreed to connect the Northwest AC Intertie with the California-Oregon Intertie at the California-Oregon border. Pet. App. 4a.

b. On February 15, 1996, BPA announced its decision to join the Northwest AC Intertie with the new 300 MW Alturas Intertie, which was to be constructed by respondent Sierra Pacific Power Company. See *Decision to Interconnect With Sierra Pacific Power Company's Alturas Transmission Line Project*, 61 Fed. Reg. 7095 (1996); Pet. App. 4a. The proposed Alturas Intertie would connect the Northwest AC Intertie with Sierra Pacific facilities in Nevada. No party sought review of that decision. Gov't C.A. Br. 6-7. On October 2, 1998, Sierra Pacific submitted the Alturas Intertie Project Interconnection and Operation and Maintenance Agreement—an agreement among Sierra Pacific, BPA, and PacifiCorp—to the Federal Energy Regulatory Commission (FERC) for approval. See *Department of Energy Notices*, 63 Fed. Reg. 56,018, 56,019 (1998).

c. Before the Alturas Intertie began operating, petitioner filed an unsuccessful objection with FERC alleging that the Alturas Intertie would create a megawatt-for-megawatt reduction in the capacity of the California-Oregon Intertie. Thus, petitioner contended, if the Alturas Intertie were operating at its maximum 300 MW capacity, the California-Oregon Intertie would experience a reduction of 300 MW capacity. In that proceeding before FERC, petitioner claimed that it had a right of first priority of access to 4800 MW of transfer capacity on the California-Oregon Intertie pursuant to agreement with respondents BPA, Portland General Electric, and PacifiCorp (Pet. App. 3a, 5a), and requested that FERC protect its claimed contractual

entitlement. Alternatively, petitioner asked FERC to delay operation of the Alturas Intertie until either Congress approved the intertie, or the Northwest AC Intertie's capacity was increased to 5100 MW so the Alturas Intertie could be operated without reducing the capacity of the California-Oregon Intertie below 4800 MW. FERC denied those requests and, on November 30, 1998, it approved operation of the Alturas Intertie. Pet. App. 5a; *Sierra Pac. Power Co.*, 85 F.E.R.C. ¶ 61,314 (1998). In December 1998, the Alturas Intertie began operating. Pet. App. 30a.

3. a. In February 1999, FERC initiated hearings on the connection agreement creating Alturas Intertie. *Sierra Pac. Power Co.*, 86 F.E.R.C. ¶ 61,198 (1999). But before the FERC proceeding was resolved,[3] in December 1999, petitioner filed suit in California Superior Court against respondents BPA, Sierra Pacific, Portland General Electric, and PacifiCorp. Petitioner alleged that respondents BPA, PacifiCorp, and Portland General Electric had entered into agreements with it to "provide the facilities necessary to transfer 4800 MW at the California-Oregon border," and had "breached these agreements * * * by allowing,

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[3] After the district court filed its opinion in this case, an administrative law judge rendered a decision in the FERC proceeding. See *Sierra Pac. Power Co.*, 94 F.E.R.C. ¶ 63,019 (2001). The judge rejected petitioner's claims in relevant part and approved the interconnection agreement and the operating agreement. Among other things, the administrative law judge commented that the "meager evidence [presented by petitioner] is insufficient to demonstrate that the California Utilities's transmission systems will be impaired." *Id.* at 65,144. Petitioner's exceptions to the administrative law judge's decision are currently pending before FERC. Sierra Power Co., FERC Docket Nos. ER99-28-000, ER99-945-000 & ER99-28-000.

agreeing to and participating in the construction and operation of the Alturas Intertie Project." C.A. E.R. 7 (Compl. ¶¶ 33, 35). Petitioner asserted that the operation of the Alturas Intertie reduces the amount of power delivered via the California-Oregon Transmission Project, thus impairing its interests. C.A. E.R. 7-8 (Compl. ¶ 35). Petitioner claimed that, *inter alia*, BPA's and the other respondents' participation in the creation and operation of the Alturas Intertie constituted an inverse condemnation, trespass, private nuisance, conversion, breach of contract, interference with contractual relations, and interference with prospective economic advantage. C.A. E.R. 4-9. Petitioner also asserted that respondent Sierra Pacific had engaged in fraud by making misrepresentations before unspecified governmental agencies to obtain approval for the Alturas Intertie. *Id.* at 5-6; Pet. App. 6a.

b. Respondents removed the action to federal district court. The district court dismissed the claims against BPA for want of subject matter jurisdiction. The district court held that petitioner's claims against BPA were, essentially, challenges to the agency's administrative decision to participate in the Alturas Intertie. Pet. App. 39a-42a. Such claims, the district court held, could be brought only by seeking review directly in the United States Court of Appeals for the Ninth Circuit pursuant to 16 U.S.C. 839f(e)(5). Pet. App. 42a. The district court rejected petitioner's request for a transfer of the proceedings pursuant to 28 U.S.C. 1631, concluding that "[t]he interests of justice are better served here by dismissal." *Ibid.*

The district court also dismissed petitioner's claims against respondents Sierra Pacific, PacifiCorp, and Portland General Electric. Noting that petitioner was pursuing "the same basic issues" (Pet. App. 49a) in pro-

ceedings brought before FERC, see note 3, *supra*, the district court held that petitioner's claims were preempted by the Federal Power Act, 16 U.S.C. 824(b)(1). Pet. App. 49a.

4. The court of appeals affirmed. Pet. App. 1a-27a.

a. The court first held that it had exclusive original jurisdiction over petitioner's claims against BPA under 16 U.S.C. 839f(e)(5) and that the district court therefore had "correctly dismissed [those] claims against the BPA for lack of subject matter jurisdiction." Pet. App. 13a. The court noted that it had "consistently interpreted" Section 839f(e)(5)'s "judicial review provision 'with a broad view of this Court's jurisdiction and a narrow definition of district court jurisdiction.'" *Id.* at 9a (quoting *Central Mont. Elec. Power Coop., Inc.* v. *Administrator*, 840 F.2d 1472, 1475 (9th Cir. 1988)). The court explained that under its precedents, the focus of the jurisdictional inquiry is not on the "theory of recovery" advanced by the plaintiff, but on "whether the factual basis for the [claim] is an agency action authorized by the Act." *Ibid.* (quoting *Central Mont. Elec. Power*, 840 F.2d at 1476). The court distinguished its earlier decision in *Public Utility District No. 1* v. *Johnson*, 855 F.2d 647 (9th Cir. 1988), in which the court held that it lacked original jurisdiction over a claim for breach of an oral contract, on the grounds that the case had involved "allegations of facts outside an administrative record" and "the principal conduct of the agency on which [the] claim is based *is not final action taken pursuant to statutory authority*." Pet. App. 11a (quoting *Public Util. Dist. No. 1*, 855 F.2d at 649-650). The court noted that here, by contrast, petitioner's "claims cannot be separated out from the BPA's final administrative decision" to connect the Alturas Intertie and the Northwest AC Intertie. *Id.* at 11a-12a.

b. The court also concluded that the district court acted properly in declining to transfer the case to the court of appeals for resolution because transfer "would have been untimely" even if it had been filed there originally. Pet. App. 13a. The court noted that Section 839f(e)(5) "requires that suits challenging a final BPA action, or its implementation, be filed within ninety days of the BPA giving notice of the action in the Federal Register or of the action becoming final." *Ibid.* Because BPA announced its decision to interconnect the Northwest AC Intertie to the Alturas Intertie in February 1996, petitioner's lawsuit, filed in December 1999, was untimely. *Ibid.* The court also rejected petitioner's alternative request to transfer the matter to the Court of Federal Claims, see 28 U.S.C. 1346(a)(2), 1491, noting that jurisdiction exists in that court only where the Ninth Circuit lacks exclusive jurisdiction under 16 U.S.C. 839f(e)(5). Pet. App. 13a n.6.

c. The court of appeals also affirmed the district court's dismissal of the petitioner's claims against Sierra Pacific, PacifiCorp, and Portland General Electric, concluding they were preempted by federal law. The court held that because FERC approved the construction and operation of the Alturas Intertie, "FERC alone has the authority to modify its decision pertaining to the Alturas Intertie, or to respond to challenges to the Intertie's operation. [Petitioner] cannot obtain state law money damages allegedly resulting from the operation of an interstate electricity intertie expressly approved by FERC, where the manner of operation was necessarily contemplated at the time of approval." Pet. App. 15a. Thus, the court held, petitioner's state-law tort and property claims against the regional utility respondents are preempted. *Id.* at 15a-16a.

The court of appeals then held that petitioner's contract-related claims "run[] afoul of the filed rate doctrine" (Pet. App. 17a), which provides that state law "may not be used to invalidate a filed rate" approved by an administrative agency. *Ibid.* See generally *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (holding that plaintiff could "claim no rate as a legal right that is other than the filed rate" set or accepted by the forerunner to FERC). The court held that petitioner's contract claims against the regional utilities in this case are tantamount to "claims of entitlement to a specific allocation of interstate transmission capacity." Pet. App. 20a-21a. Noting that FERC had chosen to regulate transmission rates through a market system by setting rules requiring open access to transmission lines at uniform, openly disclosed rates—and thus "functionally combined FERC regulation of rates with FERC regulation of transmission capacity" (*id.* at 20a)—the court reasoned that any claim "to a particular allocation of interstate transmission capacity * * * would restrict FERC's ability to regulate rates through its open transmission policy." *Ibid.* Accordingly, the court held, petitioner's claims are precluded by the filed rate doctrine.

d. The court also rejected petitioner's fraud claim against respondent Sierra Pacific.[4] Because the award of any damages would necessarily assume that petitioner had a "'right' to 4800 MW" (Pet. App. 24a), and thereby "undermine FERC's ability to regulate rates through its open access transmission policy" (*id.* at 25a),

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[4] Although petitioner had not indicated before which regulatory body Sierra Pacific allegedly had engaged in fraud, the court construed the claim to allege fraud before the California Public Utilities Commission. Pet. App. 23a.

the court concluded that the fraud claim is preempted by the filed rate doctrine. The court cautioned, however, that its holding would not apply to "every case where FERC and a state utility commission have both approved a defendant's electricity intertie." *Ibid.* Rather, dismissal was required in this case only because petitioner "has failed to present a model of damages that does not impermissibly rely upon an assumption that FERC would have continued to allocate a certain amount of electricity transmission capacity to the California Oregon Intertie but for Sierra Pacific's misrepresentations." *Id.* at 26a.

ARGUMENT

The decision of the court of appeals affirming the dismissal of claims against BPA is correct and does not conflict with any decision of this Court or any court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner first contends that the court of appeals erred in holding that it had exclusive original jurisdiction under 16 U.S.C. 839f(e)(5) over petitioner's claim against BPA, which petitioner characterizes as a "pure and unadulterated * * * breach of contract claim." Pet. 14. Petitioner argues that the decision in this case conflicts with the court of appeals' prior decision in *Public Utility District No. 1* v. *Johnson*, 855 F.2d 647 (9th Cir. 1988). Even if petitioner were correct that the decision below is inconsistent with *Public Utility District No. 1*, claims of an intra-circuit conflict do not ordinarily warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, the decision below is consistent with *Public Utility District No. 1* and with the Ninth Circuit's longstanding construction of its

grant of exclusive original jurisdiction under 16 U.S.C. 839f(e)(5), and petitioner cites no decisions of any other court that cast doubt on the Ninth Circuit's ruling.

Section 839f(e)(5) grants "the United States court of appeals for the region" of the Pacific Northwest (*i.e.*, the United States Court of Appeals for the Ninth Circuit) exclusive original jurisdiction over "[s]uits to challenge * * * final actions and decisions taken pursuant to [the Northwest Power Planning Act] by the Administrator [of BPA] or the [Northwest Power Planning] Council, or the implementation of such final actions." To effectuate Congress's purposes of "expedit[ing] litigation challenging BPA actions under the Act" and promoting uniform application of the Act, *Pacific Power & Light Co.* v. *Bonneville Power Admin.*, 795 F.2d 810, 815 (1986), the Ninth Circuit "has consistently interpreted the Act with a broad view of this court's jurisdiction and a narrow definition of district court jurisdiction." *Id.* at 814; accord *Central Mont. Elec. Power Coop., Inc.* v. *Administrator*, 840 F.2d 1472, 1475 (9th Cir. 1988). In determining whether a claim is subject to its exclusive original jurisdiction, the court of appeals consistently has looked past the labels used by the litigants and instead "focuse[d] on the agency being attacked and whether the factual basis for that attack is an agency action authorized by the Act." *Pacific Power & Light*, 795 F.2d at 816. "For jurisdictional purposes, therefore, it matters not whether the * * * suit is grounded in contract, administrative law or some other legal theory. Instead, jurisdiction [in the court of appeals] arises because the actions of a particular agency are being challenged and because of the nature of the agency action at issue." *Ibid.*; accord *Public Util. Dist. No. 1*, 855 F.2d at 649; *Central Mont.*, 840 F.2d at 1476.

Petitioner's claim against BPA falls squarely within the Ninth Circuit's exclusive original jurisdiction. Although petitioner now contends that its claim did not challenge BPA's "participation in the Alturas Intertie Project" (Pet. 15) and that "no federal agency took any actions" that caused the reduction in capacity to the California-Oregon Intertie (Pet. 14), the statement of the claim in petitioner's complaint is precisely to the contrary. In the complaint, petitioner alleged that BPA "breached th[e] agreements * * * by allowing, agreeing to and participating in the construction and operation of the Alturas Intertie Project." C.A. E.R. 7 (Compl. ¶ 35). As the court of appeals correctly concluded, petitioner's "breach of contract claims cannot be separated out from the BPA's final administrative decision. In deciding to join the Northwest AC Intertie with the Alturas Intertie without also making provision to increase the capacity of the Northwest AC Intertie, the BPA plainly decided to take an action" that would affect the California-Oregon Intertie's transmission capacity and that was "inconsistent with the BPA's alleged contractual commitments to [petitioner]." Pet. App. 11a-12a. Accordingly, the Ninth Circuit properly concluded it had exclusive original jurisdiction over the claim. Cf. *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) ("Litigants may not evade these provisions [vesting the court of appeals with exclusive jurisdiction to review agency orders] by requesting the District Court to enjoin action that is the outcome of the agency's order."). The court of appeals' application of the exclusive jurisdiction provision of Section 839f(e)(5) to the particular facts of this case does not warrant further review.

Although petitioner characterizes its claim as involving only breach of contract, it is well established

that "[a] party's characterization of its claim as one for breach of contract is not dispositive of jurisdictional issues" under Section 839f(e)(5). *CP Nat'l Corp.* v. *Jura*, 876 F.2d 745, 747 (9th Cir. 1989). The Ninth Circuit repeatedly has asserted exclusive original jurisdiction in cases involving alleged breaches of contract. See, *e.g.*, *M-S-R Pub. Power Agency* v. *Bonneville Power Admin.*, 297 F.3d 833, 840 (9th Cir. 2002) (asserting exclusive original jurisdiction over claim that BPA "failed to abide by the requirements of [a] [s]ales [a]greement when forecasting excess federal power" because it "actually challenges a decision made pursuant to BPA's statutory authority"); *Kaiser Aluminum & Chem. Corp.* v. *Bonneville Power Admin.*, 261 F.3d 843, 852 (9th Cir. 2001) (asserting original jurisdiction over claim that BPA breached contractual obligation to provide surplus power at particular rate); *CP Nat'l Corp.*, 876 F.2d at 747-748 (asserting original jurisdiction over claim that BPA breached power sales contract by imposing additional fee); *Pacific Power & Light*, 795 F.2d at 815-816 (asserting exclusive original jurisdiction over action "seek[ing] a declaratory judgment to prevent a breach of contract" because "the effect of th[e] action would be to challenge BPA's ratemaking proceedings")[5]; accord *Puget Sound Energy, Inc.* v. *United States*, 47 Fed. Cl. 506, 511 (2000) ("Despite petitioner's

[5] Although petitioner attempts to distinguish *Pacific Power & Light* on the ground that "the Agreements [at issue in this case] do not restrict in any way whatsoever the manner in which BPA conducts activities which it is required or authorized by law to undertake" (Pet. 15), petitioner's claim is that BPA breached the agreements "by allowing, agreeing to, and participating in * * * the operation of the Alturas Intertie." C.A. E.R. 7. If accepted, that claim would plainly affect the ability of BPA to operate the Alturas Intertie and its ability to sell and market power in Nevada.

characterization of its claim as one for breach of contract, it is actually a claim challenging [BPA's action] and its implementation," and thus "jurisdiction over this dispute lies in the Circuit Court").

Those holdings appropriately reflect the central importance of contracts to the performance of BPA's regulatory mission. BPA frequently enters into contracts to perform its regulatory function as a power marketing agency, through, for example, the sale of federal power to industrial customers, the exchange of power with residential customers, the acquisition of resources, and the operation of transmission facilities. See generally *Aluminum Co. of Am.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 386-388 (1984) (discussing BPA's use of contracts in performing its regulatory mission). Because many of BPA's regulatory decisions are implemented through contracts, permitting a litigant to circumvent the Ninth Circuit's exclusive original jurisdiction by characterizing its claim as one for breach of contract would severely undermine Section 839f(e)(5)'s purposes of expediting litigation before a single court and promoting consistency in decisions. Cf. *Central Mont.*, 840 F.2d at 1476 ("[p]ermitting district court jurisdiction where a party challenging a BPA decision partially grounds its theory of recovery outside of the Northwest Power Planning Act would frustrate Congress's intent").

Public Utility District No. 1, on which petitioner relies (Pet. 15), is not to the contrary. In that case, the petitioner alleged in relevant part that a BPA representative had made an oral agreement to purchase power from the utility district. The court held that that claim was properly within the jurisdiction of the United States Claims Court (now the United States Court of Federal Claims), emphasizing that "the principal con-

duct of the agency on which petitioner's claim is based is not final action taken pursuant to statutory authority; it is alleged contractual commitments made outside the scope of any administrative record." 855 F.2d at 650. Here, by contrast, "[t]he root cause of the alleged * * * breach of contract" was BPA's final action in joining the Northwest AC Intertie with the Alturas Intertie. Pet. App. 12a.

2. Petitioner next contends that the Ninth Circuit erred in holding that its claims were untimely because they were not filed, as Section 839f(e)(5) requires, "within ninety days of the time such action or decision [of the agency] is deemed final." Pet. 17-19. Petitioner claims the court of appeals' interpretation is inconsistent with Section 839f(e)(5), and would require the needless filing of "'protective' or 'preemptive' lawsuit[s] potentially years before a breach occurs." Pet. 18. That contention is simply a variation of petitioner's argument, discussed above, that the Ninth Circuit does not have exclusive jurisdiction over breach of contract claims. Assuming that a suit is properly classified as one that seeks to "challenge * * * final actions and decisions taken pursuant to [the Northwest Power Planning Act] by [BPA], or the implementation of such final actions" (16 U.S.C. 839f(e)(5)), the Act unequivocally requires that "[s]uch suits *shall* be filed within ninety days of the time such action or decision is deemed final." *Ibid.* (emphasis added).

Petitioner errs in suggesting that the decision in this case will require parties to file protective lawsuits whenever the "BPA makes an administrative decision to take an action which does not constitute a breach of contract * * * but *might* under certain circumstances cause a breach to occur years later." Pet. 18. The court of appeals' decision carries no such implication. Peti-

tioner has made no showing that it was not on notice of the potential interference in February 1996, when BPA announced its final decision to construct transmission facilities and participate in the interconnection of Northwest AC Intertie to the Alturas Intertie. See Pet. App. 13a; see also 61 Fed. Reg. 7095 (1996). (Indeed, petitioner's claims before FERC reflected its awareness, even before the Alturas Intertie began operating, that operation of the Alturas Intertie would impair transmission capacity on the California-Oregon Intertie. See Pet. App. 3a, 5a.) Petitioner therefore could have made a timely claim in 1996 that BPA's participation in the Alturas Intertie violated the Administrator's duties by furnishing transmission services that would substantially interfere with BPA's "power marketing program, applicable operating limitations or existing contractual obligations." 16 U.S.C. 839f(i)(3). Even if the relevant final agency action were the date on which the Alturas Intertie began operating in December 1998[6]—at which point petitioner concedes that "[t]he breach * * * first occurred" (Pet. 17)—petitioner's claim would still be untimely, because its

[6] In the court of appeals, petitioner did not raise the question of which specific BPA action constituted "final action." See Pet. C.A. Br. 29-30; Pet. C.A. Reply Br. 38-42. The court of appeals apparently concluded that the final action was BPA's announcement in February 1996 of its decision to interconnect the Northwest AC Intertie to the Alturas Intertie. Pet. App. 13a. However, the court did not purport to hold that in all cases asserting breach of contract arising from agency action, the relevant date would be the date the agency announced its decision to undertake a course of action, rather than the date of implementation. Section 839f(e)(5) provides for jurisdiction in the Ninth Circuit over suits challenging the "implementation" of final actions and decisions of BPA, as well as the initial renderings of final actions and decisions.

complaint was not filed until a year later. Pet. App. 13a.

Thus, as the court of appeals correctly concluded, petitioner cannot raise its claims "at this late date by clothing its challenge in state law claims." Pet. App. 12a. See generally *Association of Pub. Agency Customers, Inc.* v. *Bonneville Power Admin.*, 126 F.3d 1158, 1182-1183 (9th Cir. 1997) (claim untimely under 16 U.S.C. 839f(e)(5) where filed more than 90 days after challenged business plan record of decision was executed). Further review is not warranted.[7]

[7] Petitioner's remaining contentions concern the court of appeals' dismissal of its state-law tort, property, and contract claims against the regional utility respondents on federal preemption grounds under the Federal Power Act (*i.e.*, the third and fourth questions presented by the petition). BPA did not separately brief those issues in the court of appeals, although it noted its agreement with the district court on those questions and pointed out the special statutory provisions addressing FERC's jurisdiction over governmental entities such as BPA, as distinguished from private utilities. See BPA C.A. Br. 33-36. This brief therefore does not address the general Federal Power Act preemption issues raised by petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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