

**JURISDICTIONAL QUESTIONS CONCERNING
NATURAL GAS PIPELINES: *BIG BEND
CONSERVATION ALLIANCE V. FEDERAL ENERGY
REGULATORY COMMISSION***

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I. INTRODUCTION

On July 17, 2018, the Court of Appeals for the D.C. Circuit held that a 148-mile long pipeline, the Trans-Pecos Pipeline, transporting natural gas to an export facility near the border of Mexico was not subject to federal regulation in *Big Bend Conservation Alliance v. Federal Energy Regulatory Commission (Big Bend)*.¹ The court noted that the intrastate pipeline, running through Texas and transporting only natural gas produced in Texas, was not an interstate pipeline, and was thus under the jurisdiction of the Railroad Commission of Texas (RRCT) and not the Federal Energy Regulatory Commission (FERC).² Additionally, the court concluded that FERC was not required to apply the connected-actions doctrine to consider the Trans-Pecos Pipeline while conducting its review of the export facility under the National Environmental Policy Act of 1969 (NEPA).³ Finally, the court found that the Trans-Pecos Pipeline did not become “federalized” due to FERC’s involvement in authorizing the export facility.⁴

Part II provides a background on the regulation of the natural gas industry in the United States, discussing the Natural Gas Act of 1938 (NGA), NEPA, and the Natural Gas Policy Act of 1978 (NGPA), as well as the procedural and factu-

1. *Big Bend Conserv. All. v. FERC*, 896 F.3d 418 (D.C. Cir. 2018).
 2. *Id.* at 423.
 3. *Id.* at 424.
 4. *Id.* at 423.

al background of *Big Bend*. The federal government first became involved in the regulation of natural gas with the passage of the NGA, which granted the Federal Power Commission, and later FERC, the authority “to regulate natural gas prices and sales and establish a federal process . . . for the approval and siting of interstate natural gas pipelines.”⁵ The natural gas industry was further regulated through the passage of the NEPA, which requires federal agencies to “carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any major federal action.”⁶ Finally, the most recent major federal regulation of the natural gas transportation industry came with the passage of the NGPA, which gave FERC authorization to regulate natural gas production and transmission in intrastate commerce, through section 311 of the NGPA, in addition to interstate commerce, through section 7 of the NGA.⁷

Part III analyzes the D.C. Circuit’s reasoning in *Big Bend* and the uncertainty created as to when natural gas pipeline projects, though intrastate in nature, might be subject to federal jurisdiction.⁸ Additionally, it provides a discussion of the potential future implications of *Big Bend* on the natural gas industry. While the court’s decision will not give pipeline developers the opportunity to avoid federal jurisdiction by building an intrastate pipeline with the intent of exclusively engaging in section 311 transportation, it does incentivize developers in large natural gas-producing states to avoid federal jurisdiction by building intrastate pipelines that meet up with export facilities at the states border. This is significant considering the geographic locations of many of the top natural gas-producing states.⁹

II. BACKGROUND

A. *The Natural Gas Act of 1938*

On June 21, 1938, Congress passed the NGA out of concerns of monopoly power in the natural gas industry.¹⁰ The NGA granted federal authority to the Federal Power Commission (FPC) “to regulate natural gas prices and sales and establish[] a federal process—the federal certificate of public convenience and

5. Alexandra B. Klass & Jim Rossi, *Reconstituting the Federalism Battle in Energy Transportation*, 41 HARV. ENVTL. L. REV. 423, 430 (2017); see also 15 U.S.C. §§ 717c, 717f(c)-(h) (2012).

6. *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service*, 689 F.3d 1060, 1068 (9th Cir. 2012) (citing *Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1131 (9th Cir. 2011) (internal quotation marks omitted)); Although the NEPA was not directed at the natural gas industry specifically, it has major effects on the industry by requiring additional procedures for the development and construction of natural gas pipelines under federal jurisdiction.

7. Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3350 (1978).

8. *Big Bend*, 896 F.3d at 424 (D.C. Cir. 2018).

9. The top natural gas-producing states are Texas, Pennsylvania, Louisiana, Oklahoma, and Ohio. ENERGY INFORMATION ADMINISTRATION, FREQUENTLY ASKED QUESTIONS <https://www.eia.gov/tools/faqs/faq.php?id=46&t=8>.

10. 15 U.S.C. § 717; Klass & Rossi, *supra* note 5.

necessity (certificate)—for the approval and siting of natural gas pipelines.”¹¹ Congress later transferred this grant of authority to FERC.¹² The NGA regulates “the transportation of natural gas in interstate commerce,” and the “importation or exportation of natural gas in foreign commerce.”¹³ Additionally, the Act does not “apply to any other transportation or sale of natural gas . . . to the local distribution of natural gas or to the facilities used for such distribution.”¹⁴ Section 3 of the NGA prohibits the “export” or “import” of any natural gas to or from a foreign country “without first having secured an order” from FERC.¹⁵ Unless FERC finds that the proposed importation or exportation is inconsistent with the public interest, it “shall issue such order upon application.”¹⁶

Section 3 of the NGA also provides that natural gas imported or exported between the United States and “a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation and exportation shall be granted without modification or delay.”¹⁷ Additionally, the D.C. Circuit has “construed section 3 also to require prior authorization to construct export and import facilities.”¹⁸ Section 7 of the NGA prohibits any natural gas company from constructing, acquiring, or operating any facility to transport or sell natural gas within the jurisdiction of FERC, without “a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.”¹⁹

B. *The National Environmental Policy Act of 1969*

In 1969, Congress passed NEPA “to protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any

11. *Klass & Rossi*, *supra* note 5; *see also* 15 U.S.C. §§ 717c, 717f(c)-(h).

12. This authority was transferred from the Federal Power Commission to the Secretary of Energy, and the Secretary of Energy then delegated this authority to FERC to “[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for import or exit for exports.” 42 U.S.C. § 7151(b); U.S. Dep’t of Energy, Delegation Order No. 00-004.00A, § 1.21.A (May 16, 2006).

13. 15 U.S.C. § 717(b).

14. *Id.* § 717(b).

15. *Id.* § 717(a). The grant of authority was delegated in part to FERC, U.S. Dep’t of Energy, Delegation Order No. 00-004.00A, § 1.21.A (May 16, 2006); *see also* Executive Order No. 10485, 18 Fed. Reg. 5397 (Sept. 3, 1953) (requiring the agency to obtain “the favorable recommendations of the Secretary of State and the Secretary of Defense” before issuing a Presidential Permit for the construction of natural gas import or export facilities at the US border).

16. 15 U.S.C. § 717b(a).

17. *Id.* § 717b(c).

18. *Big Bend*, 896 F.3d at 420; *see also* *District Gas Corp. v. Fed. Power Comm’n*, 495 F.2d 1057, 1064 (D.C. Cir. 1974).

19. 15 U.S.C. § 717f(c)(1)(A); 42 U.S.C. § 7172(a)(1)(C)-(D) (2019).

major federal action.”²⁰ NEPA, in turn, establishes decision making procedures by the federal government regarding the environmental impacts of proposed energy projects, and requires agencies, such as FERC, to evaluate potential environmental impacts of proposed actions by preparing an environmental impact statement (EIS) for “major federal actions significantly affecting the quality of the human environment.”²¹ In conducting NEPA reviews, the Council on Environmental Quality (CEQ) regulations require federal agencies to consider “connected actions” in determining whether a proposed project will have an environmental impact.²² Connected actions are “interdependent parts of a larger action and depend on the larger action for their justification.”²³ The connected-actions doctrine, in theory, prevents the government from “segmenting” its own federal actions into distinct projects so that it avoids addressing the full environmental implications of the project as a whole.²⁴

C. *The Natural Gas Policy Act of 1978*

In 1978, Congress passed NGPA, which gave FERC authorization to regulate natural gas production and transmission in intrastate commerce, in addition to interstate commerce.²⁵ Section 311 of the NGPA permits FERC to “authorize any intrastate pipeline to transport natural gas on behalf of . . . any interstate pipeline.”²⁶ FERC’s authorization of an intrastate pipeline to transport gas on behalf of an interstate pipeline does not trigger section 7 of the NGA.²⁷ The NGPA provides that FERC jurisdiction under the NGA “shall not apply” to transportation authorized under section 311.²⁸ However, FERC jurisdiction over interstate pipelines is fact-specific and depends on whether the pipeline receives the proper authorizations and how the pipeline is being utilized.²⁹ While FERC has recognized the ability of intrastate pipelines to provide section 311 service even after being placed into service, FERC has also exercised section 7 jurisdic-

20. *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service*, 689 F.3d 1060, 1068 (9th Cir. 2012) (citing *Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1131 (9th Cir. 2011) (internal quotation marks omitted)).

21. 42 U.S.C. § 4332(2)(C) (2019); National Environmental Policy Act, 20A1 Minn. Prac., Business Law Deskbook § 23:7. Sometimes, the Council on Environmental Quality (CEQ), requires “agencies to prepare an environmental assessment – a document used to determine whether to prepare an EIS.” See 40 C.F.R. § 1508.13; see also *Big Bend*, 896 F.3d at 420. When an agency determines that no EIS is required, “it must issue a finding of no significant impact – a document explaining why the proposed action ‘will not have a significant effect on the human environment.’” *Id.*

22. 40 C.F.R. § 1508.25(a)(1) (2019).

23. *Id.* § 1508.25(a)(1)(iii).

24. *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 49-50 (D.C. Cir. 2015) (brackets omitted) (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014)).

25. See Natural Gas Policy Act, 92 Stat. 3350.

26. 15 U.S.C. § 3371(a)(2) (2019).

27. 15 U.S.C. § 3431(a)(2)(A) (2019).

28. *Id.* § 3431(a)(2)(A)(ii).

29. FED. ENERGY REG. COMM’N, BLANK CERTIFICATES, <https://www.ferc.gov/industries/gas/industry/blank-cert.asp>.

tion over facilities that were seemingly intrastate but that were constructed with the purpose of providing section 311 service.³⁰

D. *The Presidio Border Crossing Project*

On May 28, 2015, FERC received an application from Trans-Pecos Pipeline, LLC (Trans-Pecos) seeking “a Presidential Permit and authorization under section 3 of the [NGA] to site, construct, and operate a border crossing facility (the Presidio Border Crossing Project)” in Presidio County, Texas, to export natural gas across the border between the United States and Mexico.³¹ Trans-Pecos included in the plans of the Presidio Border Crossing Project a proposal to construct and operate a Texas intrastate pipeline, the Trans-Pecos Pipeline, subject to the jurisdiction of the RRCT.³² The Trans-Pecos Pipeline would transport natural gas to the proposed border crossing facility from a hub in Pecos County, Texas, and would “interconnect with other Texas intrastate pipelines, as well as processing plants,” and “may later interconnect with interstate pipelines.”³³ Trans-Pecos asserted that while the Trans-Pecos Pipeline would initially only provide intrastate service, it may, at some later point, transport natural gas through interstate services under section 311 of the NGPA.³⁴

On June 16, 2015, Trans-Pecos’s application was published in the *Federal Register*, and Big Bend Conservation Alliance (BBCA) filed a timely, unopposed motion to intervene.³⁵ On June 26, 2015, FERC “sent copies of the application and a draft Presidential Permit to the Secretaries of State and Defense for their recommendations.”³⁶ Replies, dated October 7, 2015, on behalf of the Secretary of State, and September 28, 2015, on behalf of the Secretary of Defense, “indicate[d] no objection to the issuance of the requested Presidential Permit.”³⁷

On July 23, 2015, FERC “issued a Notice of Intent to Prepare an Environmental Assessment (NOI) and mailed it to interested parties.”³⁸ One of the purposes of an environmental assessment (EA), as explained by FERC, “is to assist agencies in determining whether to prepare an EIS or a finding of no significant impact.”³⁹ Prior and in response to the NOI, 653 concerned individuals filed

30. See, e.g., *Roadrunner Gas Transmission, LLC*, 153 F.E.R.C. ¶ 61041, at P 5 (2015) (“new intrastate pipeline . . . initially . . . will provide only intrastate service,” but “may later provide service under section 311”); See, e.g., *Egan Hub Partners, L.P.*, 73 F.E.R.C. ¶ 61,334, at 61,930 (1995).

31. *Trans-Pecos Pipeline, LLC*, 155 F.E.R.C. ¶ 61,140 at P 1 (2016).

32. *Id.* at P 4.

33. *Id.* at P 5.

34. *Id.* at P 5. The Trans-Pecos Pipeline will transport natural gas volumes only in intrastate commerce unless the pipeline begins providing service under section 311 of the NGPA.

35. Notice of Application, *Trans-Pecos Pipeline, LLC*, 80 Fed. Reg. 34,402 (2015); see also 155 F.E.R.C. ¶ 61,140 at P 7.

36. 155 F.E.R.C. ¶ 61,140 at P 10.

37. *Id.*; see also 18 Fed. Reg. 5397 (requiring the agency to obtain “the favorable recommendations of the Secretary of State and the Secretary of Defense” before issuing a Presidential Permit for the construction of natural gas import or export facilities at the US border).

38. 155 F.E.R.C. ¶ 61,140 at P 19.

39. 40 C.F.R. § 1508.9 (2012); 155 F.E.R.C. ¶ 61,140 at P 29.

comments on the issue.⁴⁰ A majority of the comments concerned Tran-Pecos's planned intrastate pipeline through Texas.⁴¹

On January 4, 2016, FERC issued a sixty-one page EA of the Presidio Border Crossing Project, addressing geology, soils, groundwater, surface waters, wetlands, vegetation, wildlife and aquatic resources, special status species, land use, recreation, special interest areas and visual resources, cultural resources, air quality and noise, safety and reliability, and alternatives.⁴² Additionally, the EA addressed the cumulative impacts of the border crossing project related to the Trans-Pecos Pipeline.⁴³ The EA also examined the Trans-Pecos Pipeline's impacts on "geology and soils; water resources; vegetation and wildlife; land use; cultural resources; air quality and noise;" and safety.⁴⁴ FERC placed the EA in the public record and provided a thirty-day comment period.⁴⁵ In response, FERC received over 500 comments, with a majority of them from individuals opposing the project.⁴⁶

On May 5, 2016, FERC released an order issuing Trans-Pecos a Presidential Permit for construction of the Presidio Border Crossing Project, and authorizing the import and export of natural gas under section 3 of the NGA.⁴⁷ In its Order, FERC recognized that section 3 of the NGA applies to the proposed Presidio Border Crossing Project because the United States and Mexico are both members of the North American Free Trade Agreement (NAFTA).⁴⁸ Based on its analysis in the EA, FERC concluded that "if constructed and operated in accordance with Trans-Pecos's application and supplements, and in compliance with the environmental conditions in Appendix B to [the May 2016] order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment"⁴⁹ and therefore an EIS was not required.⁵⁰ Moreover, FERC concluded that since "Trans-Pecos's 148-mile upstream pipeline initially will only transport Texas gas production received from other Texas intrastate pipelines or processing plants and none of the gas will enter jurisdictional interstate commerce," when service begins, "it will qual-

40. 155 F.E.R.C. ¶ 61,140 at P 20.

41. *Id.* at P 21.

42. *Id.* at P 25-26.

43. *Id.* at P 25.

44. *Id.* at 42.

45. 155 F.E.R.C. ¶ 61,140 at P 26.

46. *Id.*

47. *Id.*

48. *Id.* at P 13.

49. *Id.* at P 76.

50. 155 F.E.R.C. ¶ 61,140 at P 30; *see also* 40 C.F.R. § 1508.9. Under 40 C.F.R. § 1508.18 (2015) of CEQ's regulations, a "[m]ajor federal action includes actions which effects that may be major and which are potentially subject to federal control and responsibility. Major reinforces but does not have a meaning independent of significantly." "'Significantly' requires consideration of both the context and intensity" of the project. *See* 40 C.F.R. § 1508.27 (2015); CEQ regulations state that, where an EA concludes in a finding of no significant impact, an agency may proceed without preparing an EIS. *See* 40 C.F.R. §§ 1501.4(e), 1508.13 (2015).

ify as a non-jurisdictional intrastate pipeline” that is not subject to FERC’s jurisdiction “under either section 311 of the NGPA or section 7 of the NGA.”⁵¹

BBCA, who intervened due to its interest in the environmental impacts of the Presidio Boarder Crossing Project, filed requests for rehearing of the May 2016 FERC Order, arguing that FERC “too narrowly defined its jurisdiction over the Presidio Border Crossing Project and related facilities, which resulted in a truncated environmental review that failed to comply with” NEPA.⁵² On November 1, 2016, FERC issued an Order Dismissing and Denying Rehearing.⁵³

III. ANALYSIS

Petitioner, BBCA, filed a petition for review of the two FERC orders that authorized the construction of facilities to transport gas from the United States to Mexico in the United States Court of Appeals for the District of Columbia.⁵⁴ While FERC exercised jurisdiction over the export facilities at the United States and Mexico border, BBCA argued that FERC should have also exercised jurisdiction over the intrastate pipeline.⁵⁵ Additionally, BBCA argued that “an expanded review was required” under NEPA, even if the intrastate pipeline was not within FERC’s jurisdiction under the NGA.⁵⁶ The D.C. Circuit denied the petition, holding that (1) it could not consider BBCA’s argument that the pipeline was an export facility because it lacked jurisdiction; (2) FERC’s conclusion that the pipeline was subject to the RRCT’s regulatory control was supported by substantial evidence; and (3) FERC correctly declined to include the Trans-Pecos Pipeline in its NEPA review because it was not a connected-action and did not become “federalized” due to FERC’s involvement in authorizing the Export Facility.⁵⁷

A. *The Court Lacked Jurisdiction to Hear BBCA’s First Argument*

While BBCA argued that the Trans-Pecos Pipeline was an export facility, the court lacked jurisdiction to consider the argument because BBCA did not present the argument to FERC on rehearing.⁵⁸ According to section 19(a) of the NGA, a court is unable to review a FERC order “unless the person seeking review has first ‘made application to the Commission for a rehearing thereon.’”⁵⁹ Additionally, section 19(b) of the NGA establishes that “[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing un-

51. 155 F.E.R.C. ¶ 61,140 at P 31.

52. *Trans-Pecos Pipeline, LLC*, 157 F.E.R.C. ¶ 61,081 at P 1 (2016).

53. *Id.*

54. *Big Bend*, 896 F.3d at 418.

55. *Id.* at 421.

56. *Id.* at 419.

57. *Id.* at 418.

58. *Id.* at 421.

59. *ASARCO, Inc. v. FERC*, 777 F.2d 764, 771 (D.C. Cir. 1985) (quoting 15 U.S.C. §717r(a)).

less there is reasonable ground for failure so to do.”⁶⁰ Because BBCA failed to raise its first argument on rehearing, the D.C. Circuit lack jurisdiction to consider this aspect of BBCA’s appeal.

B. The Trans-Pecos Pipeline is not Subject to FERC Jurisdiction

The NGA gives FERC the authority “to regulate natural gas prices and sales and establish a federal process . . . for the approval and citing of natural gas pipelines.”⁶¹ Section 7 of the NGA applies to pipelines that transport natural gas in interstate commerce.⁶² The facts demonstrate that the Trans-Pecos Pipeline would not be interstate and thus subject to FERC jurisdiction.⁶³ Trans-Pecos proposed that the Trans-Pecos Pipeline would transport only natural gas that has been produced in Texas, or natural gas received from intrastate pipelines or processing plants that also transport only Texas produced natural gas.⁶⁴

Upon review of these facts, FERC determined that the Trans-Pecos Pipeline was located entirely within Texas, was connected with only other intrastate pipelines, there was enough “Texas-sourced natural gas to supply the Trans-Pecos Pipeline without relying on interstate volumes,” and the pipeline would only carry gas produced in Texas.⁶⁵ FERC also found that the Trans-Pecos Pipeline was an intrastate pipeline subject to the jurisdiction of the RRCT and not subject to FERC jurisdiction under section 7.⁶⁶ Additionally, possible future transportation of interstate gas by the Trans-Pecos Pipeline does not provide a loophole for subjecting the pipeline to NGA section 7 because the FERC orders do not specifically authorize the pipeline to transport natural gas under section 311.⁶⁷ Indeed, FERC orders state that even if the pipeline does provide services under NGA section 311, it will not trigger NGA section 7.⁶⁸ Moreover, FERC precedent allows intrastate pipelines to provide section 311 services after construction without triggering FERC jurisdiction under NGA section 7.⁶⁹ FERC’s precedent is

60. 15 U.S.C. § 717r(b).

61. Klass & Rossi, *supra* note 5, at 430; 15 U.S.C. §§ 717c(e), 717f(c)-(h).

62. 15 U.S.C. § 717f(c)(1)(A); *see* 42 U.S.C. § 7172(a)(1)(C)-(D).

63. *See generally Big Bend*, 896 F.3d 418.

64. 157 F.E.R.C. ¶ 61081 at P 9.

65. *Id.* at P 11.

66. *Id.* Although section 3 of the NGA prohibits the export or import of any natural gas to or from a foreign country “without first having secured an order” from FERC, it is not applicable to the Trans-Pecos pipeline itself because it will only be transporting natural gas to the export facility. 15 U.S.C. § 717b(a); The D.C. Circuit previously interpreted section 3 of the NGA to require prior authorization to construct import and export facilities. *Distrigas Corp. v. Fed. Power Comm’n*, 495 F.2d 1057, 1064 (D.C. Cir. 1974).

67. 155 F.E.R.C. ¶ 61,140 at P 31; 157 F.E.R.C. ¶ 61,081 at PP 10-11.

68. 155 F.E.R.C. ¶ 61,140 at P 31; 157 F.E.R.C. ¶ 61,081 at PP 10-11.

69. *See, e.g., Roadrunner Gas Transmission, LLC*, 153 F.E.R.C. ¶ 61,041 at P 5 (2015) (“new intrastate pipeline . . . initially . . . will provide only intrastate service,” but “may later provide service under Section 311”); *NET Mex. Pipeline Partners, LLC*, 145 F.E.R.C. ¶ 61,112, at 61,598 (2013).

supported by NGPA, which states that FERC will not have jurisdiction over the transportation of natural gas that has been authorized under section 311.⁷⁰

C. FERC Correctly Declined to Include the Trans-Pecos Pipeline in its NEPA Review

BBCA asserted two arguments for FERC to include the Trans-Pecos Pipeline in its NEPA review: (1) “the projects at issue were impermissibly segmented;” and (2) “the pipeline should be ‘federalized’ for NEPA purposes.”⁷¹ According to CEQ regulations, federal agencies must consider “[c]onconnected actions” in conducting NEPA reviews.⁷² Neither of these arguments applied to the facts surrounding the Trans-Pecos Pipeline.

As discussed above, the connected-actions doctrine requires that the government provide a NEPA review for connected projects that could have a larger environmental impact.⁷³ Actions are considered “connected” if they are “interdependent parts of a larger action and depend on the larger action for their justification.”⁷⁴ The intent of the connected-actions doctrine is to prevent the government from “segmenting” its own “federal actions into separate projects and thereby failing to address the true scope and impact of the activities that should be under consideration.”⁷⁵ However, the D.C. Circuit found that the connected-actions doctrine did not apply here.

The circumstances in *Big Bend* are similar to those in *Sierra Club v. U.S. Army Corps of Engineers*.⁷⁶ In *Sierra Club*, the D.C. Circuit held that federal jurisdiction over segments of an oil pipeline did not subject the entire pipeline to NEPA review.⁷⁷ While the oil pipeline was “undoubtedly a single ‘physically,

70. 15 U.S.C. § 3431(a)(2)(A)(ii). In addition to the strong statutory and precedential basis for the court to find that FERC lacked jurisdiction, the facts surrounding Trans-Pecos Pipeline do not support an equitable argument for jurisdiction. FERC has asserted jurisdiction where it is clear that a pipeline operator is blatantly and in bad faith attempting to avoid federal regulatory jurisdiction. *See, e.g., Egan Hub Partners, L.P.*, 73 F.E.R.C. ¶ 61,334, at 61,930 (1995). However, this case does not represent a situation where a pipeline developer submitted that only intrastate gas would be transported in an attempt to evade federal regulations, and FERC found “no evidence” in its rehearing order that construction of the Trans-Pecos Pipeline would “frustrate the purposes” of the NGA or NGPA. *Rehearing Order*, 157 F.E.R.C. ¶ 61,081 at P 9; *see also Big Bend*, 896 F.3d at 423. Additionally, FERC has, in the past, asserted Section 7 jurisdiction in cases where it was clear that the pipeline was constructed solely to provide Section 311 service. *See, e.g., Egan Hub Partners, L.P.*, 73 F.E.R.C. ¶ 61,334, at 61,930 (1995). There was no evidence of duplicity on Trans-Pecos’ part. FERC indicated in this case that it would have taken different action, and would have asserted jurisdiction over construction of the pipeline, if it “detected an effort to evade” the NGA. *Rehearing Order*, 157 F.E.R.C. ¶ 61,081 at P 11; *see also Big Bend*, 896 F.3d at 423. However, there was no such evidence in this case.

71. *Big Bend*, 896 F.3d at 423; *see also* 155 F.E.R.C. ¶ 61,140 at PP 32-36; 157 F.E.R.C. ¶ 61,081 at PP 7-16.

72. 40 C.F.R. § 1508.25(a)(1).

73. *See* discussion *supra* Section II.B.

74. 40 C.F.R. § 1508.25(a)(1)(iii).

75. *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 49-50 (D.C. Cir. 2015) (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014)).

76. *See generally Sierra Club*, 803 F.3d 31.

77. *Sierra Club*, 803 F.3d at 49-50. *Sierra Club* concerned the jurisdiction over segments of the Flanagan South oil pipeline, a 593-mile pipeline from Illinois to Oklahoma. Constructing portions of the Flanagan

functionally, and financially connected' project," the majority of the pipeline was not subject to federal jurisdiction.⁷⁸ The D.C. Circuit in *Sierra Club* explained that "[t]he connected actions regulation . . . does not dictate that NEPA review encompass private activity outside the scope of the sum of the geographically limited federal actions."⁷⁹ Private activities are those activities which are undertaken by a private party, without the involvement of the federal government.⁸⁰ In *Sierra Club*, the court recognized that the oil pipeline at issue was a private activity because it was constructed by a private company, on predominately private land, and was not in itself subject to regulation by the federal government.⁸¹ While the export facility in *Big Bend* was subject to federal jurisdiction, the Trans-Pecos Pipeline did not require any federal action to begin construction.⁸² The Trans-Pecos Pipeline was constructed by a private company, and did not require any federal authorization for its construction.⁸³ Therefore, in *Big Bend*, there was not a connected federal action that would require the connected actions doctrine to apply.⁸⁴

BBCA also argued that FERC's involvement in authorizing construction and jurisdiction over the export facility, should "federalize" the Trans-Pecos Pipeline.⁸⁵ The federalization theory was first discussed in *Macht v. Skinner* and involved a challenge against the Secretary of Transportation and other state and federal officials for the failure to conduct a NEPA review in the construction of a railroad, despite its development requiring a federal wetlands permit.⁸⁶ The court disagreed with the plaintiff's argument that the requirement of the wetlands permit "federalized" the project, and did not adopt the federalization theory.⁸⁷ While the court expressed the soundness of the federalization theory, it did not apply it to the construction of the railroad because the Army Corps of Engineers' control of the project was over "only a negligible portion."⁸⁸

The federalization theory was questioned, however, in *Karst Environmental Education & Protection, Inc. v. EPA*.⁸⁹ In *Karst*, the D.C. Circuit explained that it "had not yet held . . . that NEPA claims must be brought pursuant to the APA" when it decided *Macht*.⁹⁰ Once the court held that NEPA claims must be

South pipeline required approvals from government agencies, and the Sierra Club claimed that this should make the entire pipeline subject NEPA environmental scrutiny.

78. *Id.* at 50 (quoting *Del. Riverkeeper*, 753 F.3d at 1308).

79. *Id.* at 49.

80. *Id.* at 50.

81. *Id.*

82. *Big Bend*, 896 F.3d at 424.

83. *Id.*

84. *Id.*

85. *Id.* at 423.

86. *See Macht v. Skinner*, 916 F.2d 13 (D.C. Cir. 1990).

87. *Id.* at 19-20.

88. *Big Bend*, 896 F.3d at 424 (quoting *Macht*, 916 F.2d at 19-20).

89. *See Karst Envntl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291 (D.C. Cir. 2007).

90. *Id.* at 1297.

brought pursuant to the APA, it revisited the federalization theory from *Macht*.⁹¹ In these later federalization cases,⁹² the D.C. Circuit found that, since APA review requires final agency action by an agency of the United States Government, “judicial review of NEPA claims must address actions by the *federal* government.”⁹³ This represented a change from the prior interpretation of the federalization theory which was decided when “then-existing case law suggested that NEPA itself created a private right of action.”⁹⁴ This interpretation of the federalization theory was cleared up from *Macht*, and strengthened in later cases.⁹⁵

In *Sierra Club*, the court found that while there was federal regulatory control over segments of an oil pipeline, this limited control did not change the jurisdiction, and thus federalize, all other segments of the pipeline project.⁹⁶ Additionally, in *Coalition for Underground Expansion v. Mineta*, the court concluded that federal funding towards portions of the rail transit system, along with the potential for federal funding in the future, was not enough to “federalize” the rail line extension project.⁹⁷ As the court in *Karst* held, “although the federalization theory may have had merit when we decided *Macht*, it lacks validity today.”⁹⁸ The same holds true in *Big Bend*.⁹⁹

The project in *Big Bend* is similar to the oil pipeline at issue in *Sierra Club*.¹⁰⁰ In *Sierra Club*, although segments of the pipeline project were subject to federal regulatory control, this federal control did not in turn “federalize” all other segments of the project.¹⁰¹ Similarly, in *Big Bend*, while the export facility is subject to federal regulatory control, it does not federalize the intrastate Trans-Pecos Pipeline.¹⁰² The reasoning in *Mineta*, that federal funding towards portions of a rail transit system does not federalize the entire project, is consistent with the reasoning in *Big Bend* that just because the export facility—only a portion of the overall project—is subject to federal regulation, does not subject the entire project, including the Trans-Pecos Pipeline, to federal regulation.¹⁰³

91. *Id.* at 1297-98.

92. *Karst*, 475 F.3d 1291; *see also* Pub. Citizen v. Office of U.S. Trade Representatives, 970 F.2d 916 (D.C. Cir. 1992); Pub. Citizen v. U.S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993).

93. *Big Bend*, 896 F.3d at 424; *see also* 5 U.S.C. § 704; 5 U.S.C. § 701(b)(1).

94. *Karst*, 475 F.3d at 1297; *see also* Public Citizen v. U.S. Trade Representative, 5 F.3d 549, 551 (D.C. Cir. 1993); Public Citizen v. Office of U.S. Trade Representatives, 970 F.2d 916, 918 (D.C. Cir. 1992) (recognizing that NEPA claims must allege “final agency action.”).

95. *See generally* *Karst*, 475 F.3d 1291 (D.C. Cir. 2007); *Sierra Club*, 803 F.3d 31; *Coal. For Underground Expansion v. Mineta*, 333 F.3d 193 (D.C. Cir. 2003).

96. *Sierra Club*, 803 F.3d at 50-51.

97. *Mineta*, 333 F.3d at 197-98.

98. *Karst*, 475 F.3d at 1297; *see also* Pub. Citizen v. Office of U.S. Trade Representatives, 970 F.2d 916 (D.C. Cir. 1992); Pub. Citizen v. U.S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993).

99. *Big Bend*, 896 F.3d at 424-25.

100. *See generally* *Sierra Club*, 803 F. 3d 31.

101. *Id.* at 50-51.

102. *Big Bend*, 896 F. 3d. at 425.

103. *Mineta*, 333 F.3d at 197-98.

In addition to finding FERC lacked jurisdiction under the federalization theory, the D.C. Circuit reviewed FERC's application of the four factor balancing test governing jurisdiction laid out in *Algonquin Gas*, finding that FERC correctly applied this test and concluded that it lacked jurisdiction.¹⁰⁴ In response, BBKA contended that FERC instead should have applied a "but-for" test to evaluate whether the Trans-Pecos Pipeline would have still been built "but for the agency's approval of the Export Facility."¹⁰⁵ However, the court held that it had already considered and rejected the use of a "but for" test for determining jurisdiction.¹⁰⁶ The D.C. Circuit noted that it rejected the "but for" test in *National Committee for the New River, Inc.*, because it would allow FERC "to extend its jurisdiction over non-jurisdictional activities simply on the basis that they were connected to a jurisdictional pipeline."¹⁰⁷ FERC previously abandoned the "but-for" test in *Algonquin Gas*, and has not used it since that time.¹⁰⁸

D. Potential Future Implications

The holding of the D.C. Circuit in *Big Bend* may have a number of future implications. As of March 13, 2020, FERC has cited *Big Bend* in six of its orders.¹⁰⁹ It is likely that FERC will continue applying this current interpretation of the connected actions doctrine and will not take non-federalized actions into consideration while conducting its NEPA review.

While FERC indicated that it would have taken different action in asserting federal jurisdiction over the Trans-Pecos Pipeline if it "detected an effort to evade"¹¹⁰ the NGA, pipeline developers might view *Big Bend* as an opportunity to evade federal jurisdiction by building an intrastate pipeline with the intent of exclusively engaging in section 311 transportation. These developers, however, would be mistaken.¹¹¹ FERC merely recognized that if, at some point in the future, the Pipeline were to qualify for section 311 transportation, the Pipeline

104. 155 F.E.R.C. ¶ 61,140 at P 32; *Algonquin Gas Transmission Co.*, 59 F.E.R.C. ¶ 61,255, at p. 61,934 (1992). The four factors laid out in *Algonquin Gas* include: "(i) Whether or not the regulated activity comprises 'merely a link' in a corridor type project (e.g., a transportation or utility transmission project). (ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity. (iii) The extent to which the entire project will be within Corps jurisdiction. (iv) The extent of cumulative federal control and responsibility." 155 F.E.R.C. ¶ 61,140 at P 32.

105. *Big Bend*, 896 F.3d at 425.

106. *Id.*

107. *National Committee for the New River, Inc. v. FERC*, 373 F.3d 1323 (D.C. Cir. 2004); *Big Bend*, 896 F.3d at 425.

108. 59 F.E.R.C. ¶ 61,255, at p. 61,934-35; *Big Bend*, 896 F.3d at 425.

109. See *Annova LNG Common Infrastructure, LLC, Annova Lng Brownsville a, LLC, Annova Lng Brownsville B, LLC, Annova Lng Brownsville C, LLC*, 169 F.E.R.C. ¶ 61,132 (2019); *Tennessee Gas Pipeline Co., LLC*, 164 F.E.R.C. ¶ 61,062 (2018); *Penneast Pipeline Co., LLC*, 164 F.E.R.C. ¶ 61,098 (2018); *Atl. Coast Pipeline, LLC, Dominion Transmission, Inc., Atl. Coast Pipeline, LLC, Piedmont Nat. Gas Co., Inc.*, 164 F.E.R.C. ¶ 61,100 (2018); *Columbia Gas Transmission, LLC*, 164 F.E.R.C. ¶ 61,036 (2018); *Millennium Pipeline Co., LLC*, 164 F.E.R.C. ¶ 61,039 (2018).

110. *Big Bend*, 896 F.3d at 423.

111. 157 F.E.R.C. ¶ 61,081 at P 11; *Big Bend*, 896 F.3d; See, e.g., *Egan Hub Partners, L.P.*, 73 F.E.R.C. ¶ 61,334, at p. 61,930 (1995).

would not be subject to section 7.¹¹² This is a reiteration of existing law and FERC precedent.¹¹³ In making its decision, FERC took all relevant factors into consideration, and found, after a complete evaluation, that there was “no evidence” of any intent to evade the NGA or NGPA.¹¹⁴ Furthermore, FERC has, in the past, asserted jurisdiction under NGA section 7 over developers who attempted to avoid federal jurisdiction in this manner.¹¹⁵

In addition to effecting future determinations by FERC, the D.C. Circuit’s holding could lead to an increased number of purely intrastate pipelines being built that connect to separate export facilities on state and national borders, thus avoiding federal regulations. While the export facility would still be subject to federal jurisdiction, large natural gas producing states could have incentives for constructing intrastate natural gas pipelines to transport natural gas produced within that particular state for transportation to export facilities. According to the U.S. Energy Information Administration (EIA), the United States’ “marketed production” of natural gas in 2018 was 32.82 trillion cubic feet (Tcf).¹¹⁶ The top ten natural gas producing states consist of (1) Texas, (2) Pennsylvania, (3) Oklahoma, (4) Louisiana, (5) Ohio, (6) Colorado, (7) West Virginia, (8) Wyoming, (9) New Mexico, and (10) North Dakota.¹¹⁷ Of these states, only four of them are landlocked so as to make the holding in *Big Bend* inapplicable to them for international transportation. The other six, however, present the possibility of international transportation by pipeline, as was the case in *Big Bend*, or by Liquefied Natural Gas (LNG) export facilities on waterways.

Last year, in Texas alone, there were 98 applications filed with the RRCT for natural gas related projects, the longest of which stretches 446 miles, and that number is only expected to increase.¹¹⁸ In addition to purely intrastate pipelines transporting natural gas to export facilities on the border of Texas and Mexico,

112. 155 F.E.R.C. ¶ 61,140 at P 31; 157 F.E.R.C. ¶ 61,081 at PP 10-11.

113. See 15 U.S.C. § 3431(a)(2)(A)(ii); *Roadrunner Gas Transmission, LLC*, 153 F.E.R.C. ¶ 61,041 at P 5 (2015); *NET Mex. Pipeline Partners, LLC*, 145 F.E.R.C. ¶ 61,112, at 61,598 (2013).

114. 157 F.E.R.C. ¶ 61,081 at P 11.

115. See *Egan Hub Partners, L.P.*, 73 F.E.R.C. ¶ 61,334, at p. 61,930 (1995).

116. U.S. ENERGY INFO. ADMIN., NATURAL GAS GROSS WITHDRAWALS AND PRODUCTION (Nov. 29, 2019), https://www.eia.gov/dnav/ng/ng_prod_sum_a_EPG0_VGM_mmc_f_a.htm. “Marketed Production” is defined by the EIA as: “Gross withdrawals less gas used for repressuring, quantities vented and flared, and nonhydrocarbon gases removed in treating or processing operations. Includes all quantities of gas used in field and processing plant operations.” U.S. ENERGY INFO. ADMIN., GLOSSARY: NATURAL GAS, <https://www.eia.gov/tools/glossary/?id=natural%20gas>.

117. U.S. ENERGY INFO. ADMIN., NATURAL GAS GROSS WITHDRAWALS AND PRODUCTION (Nov. 29, 2019), https://www.eia.gov/dnav/ng/ng_prod_sum_a_EPG0_VGM_mmc_f_a.htm. Marketed production in 2018 for the top ten producing states is as follows: (1) Texas: 7,865,591 mcf; (2) Pennsylvania: 6,207,874 mcf; (3) Oklahoma: 2,946,117 mcf; (4) Louisiana: 2,818,422 mcf; (5) Ohio: 2,385,112 mcf; (6) Colorado: 1,825,932 mcf; (7) West Virginia: 1,799,097 mcf; (8) Wyoming: 1,511,808 mcf; (9) New Mexico: 1,487,685 mcf; (10) North Dakota: 738,723 mcf. *Id.*

118. RRCT, 2018 NEW CONSTRUCTION REPORTS (Dec. 31, 2018), https://www.rrc.state.tx.us/media/49790/ncr_calendar_2018_january-11-2019.pdf. As of February 13, 2019 there have been 16 applications filed with the Rail Road Commission of Texas for the construction of natural gas related projects, https://www.rrc.state.tx.us/media/50372/ncr_calendar_2019.pdf.

high natural gas producing states such as New Mexico and North Dakota have the potential to develop similar intrastate pipelines, not subject to federal jurisdiction, that meet up with export facilities on the borders with their international neighbors.

Moreover, as the United States' involvement in LNG liquefaction and exportation continues to grow, the D.C. Circuits' holding in *Big Bend* becomes even more relevant in addressing jurisdictional questions associated with the pipelines transporting natural gas to those liquefaction and export facilities.¹¹⁹ Of course when the pipeline is transporting natural gas interstate, it is subject to NGA section 7,¹²⁰ but when an intrastate pipeline transporting natural gas produced in that state leads to a liquefaction and export terminal, the holding in *Big Bend* could apply.¹²¹ Of the ten states with the highest marketed production of natural gas in 2018, FERC has identified three existing LNG export terminals with a combined export capacity of 5.65 Bcf/d.¹²² Additionally, FERC has approved twelve projects in these states with a combined export capacity of 21.74 Bcf/d.¹²³ Furthermore, an additional eleven projects have been proposed to FERC.¹²⁴

IV. CONCLUSION

In *Big Bend*, the D.C. Circuit resolved a number of jurisdictional questions relating to interstate and intrastate natural gas pipelines and export facilities.¹²⁵ The Trans-Pecos Pipeline is not subject to FERC jurisdiction because it is a purely intrastate pipeline that “initially will only transport natural gas produced in Texas and received from other Texas intrastate pipelines or Texas processing plants.”¹²⁶ Additionally, if the pipeline provides services under section 311 of the NGPA in the future, it will not trigger section 7.¹²⁷ Furthermore, FERC appropriately excluded the Trans-Pecos Pipeline from its NEPA review. First, the pipeline and export facility were not “connected actions,” as to subject the entire pipeline to NEPA review.¹²⁸ Second, FERC's involvement in authorizing the export facility did not “federalize” the Trans-Pecos Pipeline for jurisdictional purposes because “judicial review of NEPA claims must address actions by the

119. U.S. ENERGY INFO. ADMIN., U.S. LIQUEFIED NATURAL GAS EXPORT CAPACITY TO MORE THAN DOUBLE BY END OF 2019 (Dec. 10, 2018), <https://www.eia.gov/todayinenergy/detail.php?id=37732>.

120. 15 U.S.C. § 717f(a).

121. *Big Bend*, 896 F.3d 418.

122. U.S. ENERGY INFO. ADMIN., RANKINGS: NATURAL GAS MARKETING PRODUCTION, 2018 (Jan. 31, 2020), https://www.eia.gov/dnav/ng/ng_prod_sum_a_EPG0_VGM_mmc_f_a.htm; FED. ENERGY REG. COMM'N, NORTH AMERICAN LNG EXPORT TERMINALS EXISTING (Feb. 5, 2020), <https://www.ferc.gov/industries/gas/indus-act/lng/lng-existing-export.pdf>.

123. U.S. ENERGY INFO. ADMIN., *supra* note 121.

124. FED. ENERGY REG. COMM'N, NORTH AMERICAN LNG EXPORT TERMINALS PROPOSED (Feb. 5, 2020), <https://www.ferc.gov/industries/gas/indus-act/lng/lng-proposed-export.pdf>.

125. *See generally Big Bend*, 896 F.3d 418.

126. 157 F.E.R.C. ¶ 61,081 at P 9.

127. 155 F.E.R.C. ¶ 61,140; 157 F.E.R.C. ¶ 61,081.

128. 155 F.E.R.C. ¶ 61,140; 157 F.E.R.C. ¶ 61,081; *see also Sierra Club*, 803 F.3d at 49-50.

federal government.”¹²⁹ The Trans-Pecos Pipeline, as a purely intrastate pipeline, transporting natural gas produced only within Texas, and subject to the control of the RRCT, is not subject to federal jurisdiction solely because it connects to a federally controlled export terminal. While BBCA declined to file an appeal to the Supreme Court, it can be expected that jurisdictional questions regarding natural gas pipelines will only increase as the industry continues to grow.

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129. *Big Bend*, 896 F.3d 418; *see also* 5 U.S.C. § 704; *see also* 5 U.S.C. § 701(b)(1).

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