NOTE

TRANSMISSION AGENCY of NORTHERN CALIFORNIA v. SIERRA PAC. POWER CO.

I. SUMMARY

Private power providers may now be forced to file suit in federal district court concurrent with initiation of an administrative action challenging federal power-marketing agency decisions in order to preserve any affected contract rights against "final agency actions." In *Transmission Agency of Northern California v. Sierra Pacific Power Co.*, the Ninth Circuit Court of Appeals held that the Northwest Power Planning Act gave it exclusive original jurisdiction over contract rights and imposed a ninety-day limitation on making a contract claim. The court also held that filing an administrative action to challenge decisions by the Bonneville Power Administration (Bonneville), even where those decisions may impair a plaintiff's contract rights, does not preserve one's ability to sue for breach of contract. Instead, the district court is supposed to look beneath specific claims to see if a federal agency is being attacked and whether the basis of that attack is a "final action" made pursuant to statutory authority. Where agency breaches cannot be predicted within ninety days of the action becoming "final," private power providers may be unable to preserve their contractual causes of action.

In 1996, Bonneville approved interconnection of the Northwest AC and Alturas Interties. The Transmission Agency of Northern California (TANC) asserted the interconnection reduced its access to transmission capacity from the Northwest AC Intertie in breach of prior agreements between itself and Bonneville. TANC filed breach of contract and inverse condemnation actions against Bonneville. TANC also alleged that Sierra Pacific Power Company (Sierra Pacific), Portland General Electric (Portland) and PacificCorp (utility company defendants) violated state tort, property, fraud, and contract law during the approval, construction and operation phases of the new transmission line. The Ninth Circuit affirmed the district court's dismissal of TANC's claims for lack of subject matter jurisdiction and failure to state a claim.[1]

II. FACTUAL BACKGROUND

During the 1970's and 80's California obtained surplus electricity from the Pacific Northwest in two steps: first, the Northwest AC Intertie delivered the electricity to the California-Oregon Border;[2] from the border, the Pacific AC

1. Transmission Agency of Northen California v. Sierra Pac. Power Co., 295 F.3d 918 (9th Cir. 2002) *cert. denied*, 123 S. Ct. 2272, 156 L. Ed. 2d 129 (2003). *See generally Power Sales: Calif. Transmission Agency Asks High Court to Hear Dispute*, 14 No. 6 Andrews Util. Indus. Litig. Rep. 13 (Nov. 2002).

2. The Northwest AC Intertie consists of four 500 kV lines in Oregon which terminate at the California-Oregon Border near Malin. Bonneville operates the intertie. Another Bonneville administered direct current line, the Northwest DC Interite, is not involved in the present litigation. *Sierra Pac. Power Co.*

Intertie distributed the energy to consumers throughout the state.[3] This transmission system permitted a maximum 3200 megawatt (MW) injection of electric power into California to supplement its own generation, and helped satisfy the nation's most rapacious energy market. In the early 1980's Bonneville expressed concern that limited transmission capacity across the California-Oregon Border created a bottleneck, and inhibited its ability to market energy in California.[4] To address these concerns, Congress authorized the Secretary of Energy to cooperate with non-federal entities for the construction and operation of additional facilities to "allow mutually beneficial power sales between the Pacific Northwest and California, and to accept funds contributed by non-Federal entities for that purpose."[5]

Pursuant to this Act, Bonneville,[6] Portland,[7] PacifiCorp,[8] and TANC[9] agreed to construct, and jointly operate, facilities to increase the transmission capacity across the California-Oregon Border from 3200 MW to 4800 MW.[10] In 1991, the parties entered into an Interim Interconnection Agreement governing the construction of these facilities and the operation of two electricity interties.[11] Under the agreement, TANC promised to construct a 1600 MW transmission line, the California-Oregon Transmission Project, and to connect it with the Pacific AC Intertie.[12] California utilities dubbed the resulting distribution system, capable of transmitting 4800 MW throughout the state, the California-Oregon Intertie.[13] Bonneville, Portland and PacifiCorp agreed to construct upgrades necessary to increase the Northwest AC Intertie's rating.[14] Finally, all parties agreed to connect the California-Oregon and Northwest AC Interties,

94 F.E.R.C. ¶ 63,019, 65,055 (2001).

3. The Pacific AC Intertie consists of two 1600 MW capacity lines that extend from California-Oregon Border to Los Angeles. *Id.* at 65,056.

4. 94 F.E.R.C. ¶ 63,019, at 65,100-01.

5. 16 U.S.C. § 837g-1 (2003). In 1984, Congress amended 16 U.S.C. § 837g (1983), which prohibited interconnections with utilities outside the Pacific Northwest, to allow for interconnections between the Pacific Northwest and California. This amendment is codified at 16 U.S.C. § 837g-1.

6. Bonneville is a federal power marketing agency organized under the Bonneville Project Act, 16 U.S.C. § 832 (2002), and the Department of Energy Organization Act, 42 U.S.C. §§ 7152(a)(1)(C), 7152 (a)(2) (2002). Bonneville administrative procedures are codified in the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839g (2002). Bonneville serves customers in the Pacific Northwest with energy generated in the Federal Columbia River power system. 94 F.E.R.C. ¶ 63,019, at 65,055.

7. Portland is an investor owned utility serving portions of California, Idaho, Oregon, Utah, Washington, and Wyoming. 94 F.E.R.C. ¶ 63,019, at 65,055.

8. PacifiCorp is an investor owned utility serving Oregon. *Id.*

9. TANC is a joint power agency composed of ten northern California municipalities, two irrigation districts, the Sacramento Municipal Utility District (SMUD), and an associate electric cooperative. 94 F.E.R.C. ¶ 63,019, at 65,055.

10. *Transmission Agency*, 295 F.3d at 923.

11. The California-Oregon and Northwest AC Interties. 94 F.E.R.C. ¶ 63,019, at 65,065. The parties signed the Interim Interconnection Agreement on February 23, 1991. The FERC found that the Interim Interconnection Agreement continues to govern the relationship between the parties because a long term Interconnection Agreement was never completed.

12. The California-Oregon Transmission Project connects with the Pacific AC Intertie at the Tesla Substation in California. *Id.* at 65,056.

13. *Transmission Agency,* 295 F.3d at 923.

14. *Id.*

creating a 4800 MW transfer capability across the California-Oregon Border.[15] The parties performed and the California-Oregon Transmission Project began commercial operation in March 1993.[16] The Federal Energy Regulatory Commission (FERC) allocated one-third of this transfer capability to TANC via the California-Oregon Transmission Project.[17]

Throughout the early 1990's Sierra Pacific[18] lobbied Bonneville for a connection between the Pacific Northwest and the Pacific Southwest via its proposed Alturas Intertie. In seeking various regulatory approvals for Alturas, Sierra Pacific consistently stated that the transmission line's primary purpose was to provide southwestern utilities with emergency support.[19] In February 1996, Bonneville published its final decision to interconnect the Northwest AC Intertie with Sierra Pacific's 300 MW[20] Alturas Transmission Line Project.[21] Sierra Pacific completed the Alturas Intertie in late 1998.[22] Bonneville and Sierra Pacific signed an Operating and Scheduling Agreement in December, and the Alturas Intertie began commercial operations on December 21, 1998.[23]

Initially Bonneville declined to enter into negotiations with Sierra Pacific, ostensibly because the Northwest Power Planning Act prohibited it from constructing interconnections with the Pacific Southwest.[24] But in 1994, it reconciled its concerns and agreed to interconnect the Alturas and Northwest AC Interties. In 1998, Bonneville entered into negotiations with Sierra Pacific regarding the new intertie's operating schedule but refused to allow TANC representatives to participate in the discussions.[25] Although Sierra Pacific originally proposed to curtail deliveries over Alturas when those deliveries could reduce the California-Oregon Intertie's transfer capability, it changed its mind in 1998 and decided to regularly compete for surplus Northwestern power at the California-Oregon Border.

The dispute arose when TANC discovered that the Alturas Intertie would

15. *Transmission Agency,* 295 F.3d at 923.

16. 94 F.E.R.C. ¶ 63,019, at 65,067.

17. The other two-thirds remained allocated to the Pacific AC Intertie owners. *Id.* at 65,053. The Pacific AC Intertie terminates near the Oregon border and was connected to the Northwest AC Intertie before the California-Oregon Transmission Project was built. The Pacific AC Intertie owners are not involved in the present litigation. *Transmission Agency*, 295 F.3d at 923 n. 2.

18. Sierra Pacific is an investor-owned utility primarily serving Nevada. 94 F.E.R.C. ¶ 63,019, at 65,054-55.

19. *See generally* 94 F.E.R.C. ¶ 63,019

20. The Western Systems Coordinating Council gave the Alturas Intertie a 300 MW bi-directional Accepted Rating in July 1995. 94 F.E.R.C. ¶ 63,019, at 65,061.

21. Final rule, Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 38, 7095 (1996) (to be codified at 40 C.F.R. pts. 19, 27). Sierra Pacific financed construction related to the Alturas Intertie Project including facilities constructed or installed by Bonneville and PacificCorp as part of the Alturas project. 94 F.E.R.C. ¶ 63,019, at 65,055.

22. The Intertie runs from Nevada to Oregon, through northern California. *Transmission Agency*, 295 F.3d at 923.

23. *Sierra Pac. Power Co.*, 86 F.E.R.C. 61,198 (1999).

24. *Id.* at 65,072.

25. 94 F.E.R.C. ¶ 63,019, at 65,090-05.

cause a megawatt for megawatt[26] reduction in Bonneville's ability to deliver power to the California-Oregon Intertie.[27] In other words, the Alturas Intertie allowed Nevada to compete for up to 300 MW of the 4800 MW carried over the Northwest AC Intertie to the California-Oregon Border; this was electricity Bonneville would otherwise have transferred to California under its agreements with TANC. And although Sierra Pacific initially demanded the interconnection only to satisfy its emergency needs, it now planned to purchase power on a regular basis. California interests, of course, were displeased about the potential loss of access to surplus energy generated in the Northwest.[28]

This reduction further limited the scarce electricity supplies available to the California energy market. TANC and other California energy concerns expressed their dissatisfaction with Bonneville's diversion of Northwestern energy surpluses to Southwestern markets by filing protests with the FERC, Bonneville, the California Public Utilities Commission and the Western States Coordinating Council.[29]

III. PROCEDURAL AND REGULATORY HISTORY

A. Approval of the Alturas Intertie

Sierra Pacific filed for FERC approval of the Alturas Intertie Project, and its Scheduling Agreement with Bonneville and PacifiCorp, on October 2, 1998. TANC, and other California utilities, protested the filing because, "once the Alturas Intertie becomes operational, the Northwest AC Intertie cannot accommodate simultaneous deliveries to both the California-Oregon Intertie and the Alturas Intertie at the latter two facilities' full ratings (4800 MW and 300 MW)."[30] TANC requested that the FERC reject the Alturas approval and agreements until either: (1) Congress expressly approves them; (2) Bonneville expands the Northwest AC Intertie's transfer capacity to 5100 MW;[31] or (3) Bonneville develops operating procedures capable of protecting consumers on the California-Oregon Intertie. The FERC approved the agreements over TANC's protests,[32] effective December 1, 1998.[33] Although the FERC accepted

26. A one-for-one nomogram relationship exists with respect to Operational Transfer Capability (OTC). Thus, if combined schedules on the California-Oregon Intertie and the Alturas Intertie are within 300 MW of the combined OTC of the two facilities, there will always be a one-for-one reduction in the amount of power that can be scheduled to flow north to south on the California-Oregon Intertie for each MW scheduled on the Alturas Intertie.

94 F.E.R.C. ¶ 63,019, at 65,089. OTC represents the ability of a transmission system to transfer electricity under normal operating conditions. Factors included in OTC include loads, outages, weather and ambient temperature. *Id.* at 65,058.

27. *Transmission Agency*, 295 F.3d at 923.

28. *Sierra Pac. Power Co.*, 94 F.E.R.C. ¶ 63,019, 65,053-54.

29. *Id.*

30. *Sierra Pac. Power Co.*, 86 F.E.R.C. ¶ 61,198, 61,689.

31. An expansion to 5100 MW would allow Bonneville to satisfy the full capacity of Sierra Pacific and TANC. *See generally* 94 F.E.R.C. ¶ 63,019.

32. The FERC granted Alturas Intertie Rate Schedule Number 45. *Sierra Pac. Power Co.*, 85 F.E.R.C. ¶ 61,314 (1998).

33. TANC argued that Bonneville's agreements with Sierra Pacific violated the Northwest Power

Alturas' filing, it ordered the parties to negotiate mutually acceptable operating procedures.[34]

Two months later, the FERC reversed itself and initiated hearings to consider the justness and reasonableness of the Alturas interconnection and scheduling agreements.[35] The FERC ordered hearings to determine whether the Alturas agreements affected the Northwest AC or California-Oregon Interties' reliable operation, and whether the agreements violated California utilities' right to surplus power from the Pacific Northwest.[36] The purpose of the hearings was to address allegations that the Agreement would result in a megawatt for megawatt reduction in the California-Oregon Intertie's transmission capacity, and to consider conflicts between Alturas' operating schedule and California's scheduling needs.[37] However, instead of opening the hearings right away, the FERC directed settlement proceedings and held the investigations in abeyance pending the outcome of these proceedings.[38]

In December 1999, TANC became displeased with the settlement proceedings and brought suit in California Superior Court against Bonneville, Sierra Pacific, Portland, and PacifiCorp. TANC alleged the Alturas Intertie reduced transmission capacity from the Northwest AC Intertie to the California-Oregon Transmission Project and breached its prior agreements with Bonneville.[39]

Defendants filed a notice of removal with the Superior Court,[40] and the action was removed to the U.S. District Court for the Eastern District of California. Bonneville, a federal agency, exercised its power to remove civil actions.[41] The utility company defendants removed TANC's claims against them by asserting federal question jurisdiction.[42]

B. District Court Decision

After removal, defendants immediately moved to dismiss for lack of subject

Planning Act because, TANC asserted, the Act barred Bonneville from constructing lines, or interconnecting with lines, to transmit electricity from the Pacific Northwest to the Pacific Southwest. The FERC found it had no jurisdiction over questions of whether Bonneville exceeded its statutory authority and found no basis for rejecting the agreement to interconnect. *Id.*

34. 85 F.E.R.C. ¶ 61,314.

35. 86 F.E.R.C. ¶ 61,198.

36. *Id.* at 61,699.

37. *Transmission Agency*, 295 F.3d at 924.

38. 86 F.E.R.C. ¶ 61,198, at 61,698. TANC unsuccessfully argued that the establishment of "mutually acceptable" operating procedures must be a condition to FERC approval of the Interconnection Agreement.

39. *Transmission Agency*, 295 F.3d at 924. TANC requested legal and equitable relief for trespass, private nuisance, conversion, breach of contract, interference with contractual relations, interference with prospective economic advantage, and inverse condemnation. *Federal Power Act: Transmission Agency Seeks Damages Against Utilities for Failure to Maintain Capacity*, 13 No. 2 Andrews Util. Indus. Litig. Rep. 3 (2001). The complaint also alleged that Sierra Pacific received approval for the Alturas Transmission Line Project through misrepresentation. *Sierra Pac. Power Co.*, 94 F.E.R.C. ¶ 63,019, 65,054-120 (2002) (describes the factual basis for TANC's misrepresentation claim).

40. Pursuant to FED. R. CIV. P. 11 (2002), and 28 U.S.C. § 1446 (2003).

41. 28 U.S.C. § 1442(1) (2003).

42. 28 U.S.C. §§ 1331-1332 (2003).

matter jurisdiction and failure to state a claim.[43] TANC voluntarily withdrew its prayer for equitable relief and its property claims against Bonneville. The court dismissed contract related claims against Bonneville for lack of subject matter jurisdiction[44] because the Northwest Power Planning Act grants exclusive jurisdiction over final agency action to the United States Court of Appeals for the Ninth Circuit.[45]

The court denied TANC's request for transfer to cure want of jurisdiction because the complaint was untimely when filed. It also dismissed TANC's inverse condemnation claim against Bonneville without comment, and concluded that the Federal Power Act[46] preempted claims against the utility company defendants.[47] TANC appealed.

C. FERC Proceedings

TANC's lawsuit demonstrated that the Administrative Law Judge's (ALJ) directed settlement proceedings had failed to bring resolution. Therefore, in July 2000, the ALJ opened the FERC hearings previously held in abeyance. The ALJ issued an initial decision in March 2001, after the federal district court had dismissed the action. The ALJ approved the Alturas interconnection, operation, and scheduling agreements and denied TANC's requests.[48] However, because he found that an increase in Alturas Intertie capacity could result in unjust and unreasonable pricing throughout the Western Interconnection marketplace, the ALJ limited Alturas to a 300 MW operational rating unless and until any upgrades were approved as part of a region-wide generation/transmission program.[49]

The parties stipulated four issues for the ALJ to consider: (1) whether the Alturas Intertie agreements adversely affected reliable operation of the Northwest AC or California-Oregon Interties; (2) whether these agreements adversely affected California utilities' rights of access to the Northwest AC or California-Oregon Interties; (3) whether the operating procedures governing the Alturas Intertie were sufficient and/or appropriate; and (4) if the agreements imposed an undue burden, or if the operating procedures were insufficient or inappropriate, to what relief were the California utilities entitled?[50]

Rather than discuss these issues seriatim, the ALJ addressed only the underlying issue: whether, if the FERC approved the Alturas Intertie agreements, the California utilities would continue to have access to 4800 MW of power from the Northwest AC Intertie. The answer was yes, under most conditions.[51]

43. Fed. R. Civ. P. 12(b)(1), 12(b)(6) (2002).

44. Fed. R. Civ. P. 12(b)(1) (2002).

45. 16 U.S.C. § 839(f)(e)(5) (2003).

46. 16 U.S.C. §§ 792-825 (2003).

47. *Federal Power Act: Transmission Agency Seeks Damages Against Utilities for Failure to Maintain Capacity*, 13 No. 2 Andrews Util. Indus. Litig. Rep. 3 (Sept. 2001).

48. 94 F.E.R.C. ¶ 63,019. Other California utilities were involved in the FERC proceedings against Bonneville.

49. *Id.* at 65,148.

50. 94 F.E.R.C. ¶ 63,019, at 65,056.

51. *Id.* at 65,142-143.

Bonneville invested $30 million in Northwest AC Intertie upgrades during the late 1990's.[52] Its studies concluded that these upgrades and recent modifications due to come online by June 2001, would support a 5100 MW rating and allow for simultaneous delivery of 300 MW to the Alturas Intertie and 4800 MW to the California-Oregon Intertie. Unfortunately, this 5100 MW rating would only be valid during normal springtime conditions, and additional upgrades costing at least $50 million would be required to achieve a comparable rating during peak summertime conditions.[53]

Although the Northwest AC Intertie could not simultaneously satisfy the demands of California and Alturas during peak conditions, neither could the California-Oregon Intertie accept 4800 MW during such conditions. During peak demand, experts testified, the California-Oregon Intertie maximum transfer capability at the California-Oregon Border was 4500 MW.[54] Thus, even where Bonneville transferred 300 MW to Alturas, it could simultaneously satisfy California's entire importation capacity, whether that capacity were 4500 MW during peak demand or 4800 MW during non-peak conditions. Because operation of the Alturas Intertie would typically not injure California utilities,[55] the ALJ approved the Alturas agreements. The decision also acknowledged that if the Northwest AC Intertie failed to achieve its projected 5100 MW rating, the Alturas agreements might impact the California-Oregon Intertie and California consumers. Even though injuries to California interests were *theoretically* possible, the ALJ noted, few problems actually occurred during the first three years of the transmission line's commercial operations. Indeed, the California parties identified only one occasion where unavailable transmission capacity at the California-Oregon Border caused a California operator to curtail a load.[56]

TANC feared and alleged that Sierra Pacific would exacerbate looming power shortages by upgrading the Alturas Intertie's capacity from 300 to 600 MW. That Sierra Pacific allegedly used fraudulent means to obtain approval for the Alturas Transmission Line Project lent weight to this concern. The ALJ found that Sierra Pacific had studied the feasibility of a 300 MW expansion, and agreed such an upgrade could result in unjust pricing throughout the western marketplace.[57] Therefore, the ALJ limited the Alturas transmission line to a 300 MW rating.[58]

52. The following discussion of relevant facts is based on the Findings of Fact and Discussion sections at *Sierra Pac. Power Co.*, 94 F.E.R.C. ¶ 63,019, 65,054-149 (2002).

53. Substantial upgrades to the California-Oregon Intertie would also be required. *See generally* 94 F.E.R.C. ¶ 63,019.

54. *Id.* at 65,081-86.

55. If operated pursuant to the Alturas Interconnection and Scheduling Agreements.

56. *Id.* at 65,081-83, 65,106.

57. The ALJ worried about further wholesale electricity price increases in price at the California-Oregon Border because of the severe price fluctuations between August 1999 and August 2001. 94 F.E.R.C. ¶ 63,019, at 65,113-20. *See also* ENERGY INFORMATION ADMINISTRATION, PUB. NO. SR/SMG/2002-01, DERIVATIVES AND RISK MANAGEMENT IN THE PETROLEUM, NATURAL GAS, AND ELECTRICITY INDUSTRIES, Ch. 2 (2002).

58. 94 F.E.R.C. ¶ 63,019, at 65,115, 65,148-49.

IV. NINTH CIRCUIT DECISION

The United States Court of Appeals for the Ninth Circuit heard TANC's appeal on lack of subject matter jurisdiction and failure to state a claim.[59] The court recognized the existence of the initial FERC decision as a relevant adjudicative fact.[60]

TANC argued that the district court's decision to dismiss should be overturned and that it was entitled to damages for the "millions of dollars [it] wasted on designing, building and operating facilities in California so as to achieve a 4800 MW transfer capability at the California-Oregon border," and for defendants' interference with its use of these facilities.[61] Bonneville maintained TANC's claims were untimely under the Northwest Power Planning Act, and that the district court's dismissal should be upheld. The utility company defendants argued that the Federal Power Act and filed rate doctrine preempted TANC's claims. The standard of review from dismissal for lack of subject matter jurisdiction, from dismissal for failure to state a claim and from decisions regarding preemption is de novo.[62]

A. Motion to Dismiss Claims Against Bonneville

The district court determined that Bonneville's decision to interconnect the Northwest AC and Alturas Interties constituted final agency action, over which the Ninth Circuit enjoys exclusive jurisdiction. Nevertheless, TANC maintained that the district court's dismissal was in error because: 1) the Alturas agreements were outside the scope of Bonneville's mandate under the Northwest Power Planning Act; 2) the agreements with TANC were outside the statutory scope; 3) the agreements lacked an administrative record; and 4) the Act specifically precluded interconnection between the Pacific Northwest and the Southwest regions. Section 9(e)(5) of the Northwest Power Planning Act grants the Ninth Circuit jurisdiction over challenges to Bonneville decisions:

> Suits to challenge . . . *final actions and decisions taken pursuant to this Act* by the Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this Act, [or] the Bonneville Project Act . . . *shall be filed with 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 Act to be published in the Federal Register, within ninety days from such notice, or be barred . . . . Such court shall have jurisdiction to hear and determine any suit brought as provided in this section . . . . *Suits challenging any other actions under this act shall be filed in the appropriate court.*[63]

This statutory division of jurisdiction has been interpreted to grant the Ninth Circuit exclusive original jurisdiction over attacks on final agency action in

59. 28 U.S.C. § 1291 (2000).

60. *Transmission Agency*, 295 F.3d at 924.

61. *Federal Power Act: Transmission Agency Seeks Damages Against Utilities for Failure to Maintain Capacity*, 13 No. 2 Andrews Util. Indus. Litig. Rep. 3 (Sept. 2001).

62. *See generally* Wilson v. A.H. Belo Corp. 87 F.3d 393, 396 (9th Cir. 1996); Nathan Kimmel, Inc. v. DowElanco, 275 F.3d 1199, 1203 (9th Cir. 2002); Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000) *cert. denied,* 531 U.S. 929 (2000).

63. 16 U.S.C. § 839f(e)(5) (2000) (emphasis added).

accordance with the general rule that where Congress designates a forum for judicial review, the forum is implicitly exclusive.[64]

But the precise jurisdictional regime created by section 9(e)(5) remains unclear. Interpretational difficulties arose when the Tucker Act[65] granted jurisdiction over breach of contract claims against federal agencies to the United States Court of Federal Claims. In addition, section 9(e)(5) expressly grants jurisdiction to the 'appropriate court' for other actions taken under the act, but does not delineate a jurisdictional regime for agency actions not taken pursuant to the Act.

In *Pacific Power and Light v. Bonneville Power Administration*, plaintiff utilities sought declaratory relief because Bonneville initiated changes to its cost methodology one year after final FERC approval of the methodology.[66] The federal district court had dismissed the claims for lack of subject matter jurisdiction because it found that, "although [the utilities] seek to characterize their . . . claim as a pure contract issue unentangled with the merits or procedure of Bonneville's ratemaking proceeding, my exercise of jurisdiction would necessarily impact the course of the [pending] rate case."[67] The *Pacific Power and Light* court found that district courts have *no jurisdiction* over attacks on Bonneville actions taken pursuant to the act.[68] It did not matter that Pacific Power & Light's claim was based on contractual dealings with Bonneville because the effect of the actions would be to challenge Bonneville's ratemaking powers and statutory obligation to oversee rates in a manner consistent with its contractual commitments.[69] The jurisdiction test established in this case focuses on, "the agency being attacked and whether the factual basis for that attack is an action authorized by the Act."[70] If the factual basis for the attack is a Bonneville

64. Central Lincoln Peoples' Util. Dist. v. Johnson, 735 F.2d 1101, 1109 (9th Cir. 1984) (citing Nader v. Volpe, 466 F.2d 261, 266 (D.C. Cir. 1972)). It is worth noting that the rule as applied in *Nader v. Volpe* allowed administrative review to continue free from judicial interference to protect the public policy of "administrative autonomy." *Id.* at 266-268. Conversely, application of this standard in the present case circumscribes the FERC's ability to review agency decisions, because it requires plaintiffs such as TANC to bring every potential attack in the Ninth Circuit within ninety days, rather than pursue administrative remedies.

65. 28 U.S.C. § 1491 (2000).

66. Pacific Power & Light v. Bonneville Power Admin., 795 F.2d 810 (9th Cir. 1986).

67. Pacific Power & Light Co. v. Bonneville Power Admin., 589 F. Supp. 539, 545 (D. Or. 1984).

68. The court stated:

> It is clear, therefore that the district court has exclusive jurisdiction over nonconstituional suits challenging action taken pursuant to the Act by agencies other than Bonneville . . . . Moreover, because the first sentence *comprehensively lists* those actions of Bonneville . . . which are subject to judicial review, *the district court has no jurisdiction over challenges to Bonneville . . . actions under the Act.*

Pacific Power & Light, 795 F.2d at 814 (emphasis added). This language raises the question of where plaintiffs may bring attacks on ultra vires agency actions. In the present case, TANC attempted to demonstrate that it challenged agency action for which Bonneville had no authority, but the court did not discuss this argument and it is unclear whether the Northwest Power Planning Act, or another governing statute, explicitly authorized the Alturas agreements. TANC contended that the Act explicitly forbade Bonneville from interconnecting with Southwestern distribution systems. *See generally* 94 F.E.R.C. ¶ 63,019.

69. *Id.* at 815-16 (emphasis added).

70. *Compare*, FCC v. ITT World Communications, Inc., 466 US 463, 468-69 (1984) (litigants may not evade a congressionally enacted jurisdictional regime by attacking the results of authorized actions instead of

action authorized by the Northwest Power Planning Act, then the Ninth Circuit retains exclusive original jurisdiction.[71] Thus, in the present case, TANC faced the problem that dismissal for lack of subject matter jurisdiction was proper, unless it challenged final agency action, or the effect of such action, *not* taken pursuant to statutory authority.[72]

Actions like contracts with consultants presumably lie outside the scope of statutory authority and allow injured consultants to bring suit for breach of contract in the district court.[73] The Ninth Circuit treated TANC's situation differently because it did not sign an ordinary contract with Bonnneville, but had an agreement regarding a specific allocation of Northwestern interstate electricity. Agreements of this sort implicate the agency's statutory authority to distribute energy under the Northwest Power Planning Act. Therefore, the court looked behind TANC's breach of contract claims and found what was really being attacked was not Bonneville's failure to provide the agreed amount of power, but Bonneville's decision to interconnect the Northwest AC and Alturas Interties.

TANC also argued that it did not attack a statutory function, only a failure to maintain a 4800 MW transfer capability between the Northwest AC and California-Oregon Interties. In other words, Bonneville's decision to interconnect was irrelevant to TANC's claims because Bonneville could have expanded capacity to satisfy its prior agreements.[74] TANC hoped the final sentence of section 9(e)(5) ("[s]uits challenging any other actions under this act shall be filed in the appropriate court") would entitle the Court of Federal Claims to hear its case, based on its Tucker Act jurisdiction. Essentially this amounted to a public policy argument that agency breaches of prior contractual commitments (and inverse condemnations)[75] should not be shielded by a broad reading of section 9(e)(5)'s grant of original jurisdiction to the Ninth Circuit. A finding that an agency's inability to honor prior agreements falls outside the scope of the agency's statutory authority would have permitted common law claims (like TANC's) to be brought in the district court or the Court of Federal Claims, and would be consistent with the text of section 9(e)(5).[76] Furthermore,

attacking the agency action directly) *with, Pacific Power & Light,* 795 F.2d at 816.

71. Nota bene, section 9(e)(5) bars attacks on final Bonneville actions not brought within ninety days of publication in the Federal Register.

72. This situation leaves plaintiffs with a Hobson's choice: bring suit in the Ninth Circuit within ninety days, or forfeit all judicial claims.

73. An injured consultant would bring claims in the Court of Federal Claims if the amount in controversy were over $10,000. 28 U.S.C. § 1491 (2003).

74. *Transmission Agency*, 295 F.3d at 926.

75. Inverse condemnation actions are based on the California Constitution, art. 1 § 19. Section 19 requires payment of just compensation when private property is taken or damaged for public use. No taking is needed; just an invasion of property that directly, substantially, and peculiarly burdens a plaintiff to his detriment. In the present case, the court assumed, without deciding, that a deprivation of transmission capacity could support a state law inverse condemnation claim. *See also* Harding v. California *ex rel.* Dept. of Transp., 159 Cal. App. 3d 359, 364 - 67, 205 Cal. Rptr. 561 (Cal. Ct. App. 1984) (a deprivation of light supports an inverse condemnation claim), and Selby Realty Co. v. City of San Buenaventura, 514 P.2d 111, 116-17 (Cal. 1973) (deprivation of a scenic view supports an inverse condemnation claim).

76. *Transmission Agency*, 295 F.3d at 925-26.

prior decisions by both the Ninth Circuit and the Federal Circuit indicated that the Ninth Circuit could have found Bonneville's alleged breach of contract outside the scope of Bonneville's statutory authority. Such a finding would render subsequent agreements between Bonneville and Sierra Pacific irrelevant to TANC's claims regardless of whether such agreements implicated Bonneville's Northwest Power Planning Act powers.

The relevant prior case law begins with *Central Montana Electric Power Cooperative, Inc. v. Administrator.*[77] In *Central Montana* the Cooperative challenged Bonneville's decision to deny an electricity allocation request. Part of the Cooperative's claim rested on Bonneville actions taken outside the scope of its Northwest Power Planning Act authority. Yet, since an award of damages to the Cooperative would impact Bonneville's power marketing decisions, decisions governed by the Act, the court of appeals held that it retained exclusive jurisdiction.[78] The *Central Montana* court explained that Congress intended section 9(e)(5) to expedite litigation challenging Bonneville actions taken pursuant to the Act.[79] Claimants who sought satisfaction in other courts, based upon law or facts partially outside the scope of the Act, frustrated Congressional intent. The court reasoned that to allow such jurisdiction would be irrational in light of the statutory emphasis upon prompt resolution of litigation. Allowing the district court to hear claims would add an unnecessary level of adjudication to the process and increase the time necessary for resolution of disputes with federal agencies.[80]

Although the Congressional goal of expediting agency related litigation weighed strongly in favor of the *Central Montana* decision, a competing policy supplanted this goal in subsequent cases. The general policy that appellate courts should not normally act as fact-finding bodies led the Ninth Circuit to hold a detailed administrative record necessary for it to possess section 9(e)(5) original jurisdiction.

The Ninth Circuit reached this conclusion in *Public Utility District Number 1 v. Johnson*,[81] in which Bonneville allegedly breached an oral contract made outside the scope of an administrative record.[82] First, the court recognized the conflict inherent in Congress' jurisdictional regime. Section 9(e)(5) conferred exclusive jurisdiction to the Ninth Circuit for attacks against final agency action taken pursuant to statutory authority, but the Tucker Act granted breach of contract jurisdiction to the Court of Federal Claims.[83]

> [T]here is nothing in the language or legislative history of either the [Northwest Power Planning] Act or the Tucker Act indicating that Congress intended to provide for concurrent jurisdiction in this court and the claims court over claims

77. Central Mont. Elec. Power Coop., Inc. v. Adm'r., 840 F.2d 1472 (9th Cir. 1988)

78. *Id.* at 1475-76.

79. *See also Pacific Power & Light*, 795 F.2d at 815; Forelaws on Bd. v. Johnson, 709 F.2d 1310, 1312 (9th Cir. 1983).

80. *Forelaws on Bd.*, 709 F.2d at 1313.

81. Public Util. Dist. No. 1 v. Johnson, 855 F.2d 647 (9th Cir. 1988).

82. *Id.*

83. 28 U.S.C. § 1491 (2003). Federal district courts have concurrent jurisdiction for contract claims seeking less than $10,000. 28 U.S.C. § 1346(a)(2) (2003).

> where the agency's action involves contractual dealings.... *Claims involving alleged contractual breaches by the agency and based on allegations of facts outside an administrative record must be heard in the claims court.*[84]

The absence of an administrative record became important as the court determined that Congress could not have intended for an appellate court to review fact-specific cases without the benefit of such a record. On the other hand, direct review of claims against agency decisions recorded in an administrative record would expedite litigation and thus satisfy Congress' desire for speedy resolution of litigation against federal agencies. Without an administrative record Bonneville's acts could not constitute final action pursuant to statutory authority. Based on these factors, the *Public Utility District Number 1* court determined that the Tucker Act grants the Court of Federal Claims *exclusive jurisdiction* for breach of contract actions based on allegations of fact outside the scope of an administrative record.[85]

The Federal Circuit reached the same conclusion in *City of Burbank v. United States*,[86] a factually similar case. Burbank and Bonneville executed a contract for the sale and exchange of 18 MW of electric energy per year. The contract was later amended to increase the amount of energy exchanged to 40 MW per year. The Court of Federal Claims held that section 9(e)(5) granted the Ninth Circuit exclusive jurisdiction over breach of contract claims against Bonneville,[87] and dismissed Burbank's suit for lack of subject matter jurisdiction.[88] On appeal, the Federal Circuit reversed and remanded. It found that Bonneville's alleged breaches of contract were not final agency action or decisions taken pursuant to the Northwest Power Planning Act, because the agreements lacked an administrative record, and because the contract was outside the scope of Bonneville's statutory authority.[89] Thus, the Court of Federal Claims enjoyed jurisdiction under the Tucker Act.[90]

The present Ninth Circuit decision that the adequacy of an administrative record has no bearing on its jurisdiction, seems contrary to its decision in *Public Utilities District Number 1* where it found that agency commitments created

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84. *Public Util. Dist. No. 1*, 855 F.2d at 650 (emphasis added).

85. *Id.* In *City of Burbank v. United States*, 273 F.3d 1370 (Fed. Cir. 2001), the Federal Circuit said of *Public Utility District Number 1*:

> The Ninth Circuit [noted] that conferring jurisdiction in the Ninth Circuit over fact-specific contract actions would fail to advance the Congressional goal of achieving uniformity in the interpretation of the Northwest Power Act, and would frustrate the grant of jurisdiction to the Court of Federal Claims, a trial court equipped to undertake de novo factual inquiry. Thus, the Ninth Circuit concluded that although "Congress did not explain what it meant when it provided for exclusive jurisdiction in this court for some suits and for jurisdiction in 'an appropriate court' for other suits," Congress failed to grant the Ninth Circuit jurisdiction over alleged contractual breaches based on facts not reflected in an administrative record.

Id. at 1380.

86. City of Burbank v. United States, 273 F.3d 1370 (Fed. Cir. 2001).

87. The first alleged that Bonneville violated its implied duty of good faith and fair dealing when it failed to comply with certain notice clauses. The second alleged Bonneville materially breached the rates payable clause by overcharging Burbank. *City of Burbank*, 273 F.3d 1370.

88. *Id.* at 1374-75.

89. *City of Burbank*, 273 F.3d at 1381-82.

90. 28 U.S.C. 1491(a)(1) (2003).

outside the scope of an administrative record should not constitute final agency action. Although the court previously held that an original section 9(e)(5) challenge must be based on a formal administrative record,[91] it now views the existence or adequacy of an administrative record as irrelevant, at least where the plaintiff caused the inadequacy of the record. (The court noted that TANC caused the asserted inadequacy by failing to challenge the complained of agency decisions.)[92] The Ninth Circuit stated that TANC could have challenged Bonneville's decision to interconnect within ninety days, and that TANC's failure to do so resulted in the lack of an adequate administrative record.

It is difficult to understand why the lack of an administrative record should be attributed to TANC where it pursued administrative remedies with both Bonneville and the FERC. Whether plaintiffs in TANC's position in the Ninth Circuit pursue administrative remedies to protect their interests or to ensure the creation of a sufficient administrative record, they now risk losing all adjudicative remedies if they fail to file original actions within ninety days of related final agency action. This outcome appears to contradict traditional policies of judicial economy and administrative autonomy.[93] Diligent potential plaintiffs must now immediately bring every claim against agencies like Bonneville directly to the court of appeals regardless of whether a factual administrative record exists. This state of affairs places the Ninth Circuit in the position of fact-finder, and makes aggrieved plaintiffs less likely to seek administrative remedies. In short, the Ninth Circuit's decision creates a Hobson's choice for plaintiffs asserting breach of contract claims against federal agencies governed by jurisdictional regimes like section 9(e)(5): seek relief in the court of appeals within ninety days or don't bother seeking relief at all.

Another possibility is that the comprehensive administrative record established during numerous FERC and Bonneville hearings subtly vitiated TANC's breach of contract claim. This may be so because the FERC's findings clearly associate Bonneville's decision to interconnect with the Alturas Intertie and TANC's loss of transmission capacity. These findings undercut TANC's argument that it challenged only Bonneville's failure to meet its oral contract commitments made outside the scope of an administrative record and not pursuant to statutory authority, rather than the agency decision to interconnect.

Unlike the claims in *City of Burbank* or *Public Utility District Number 1*, TANC's breach of contract and inverse condemnation claims were found intimately related to Bonneville's decision to interconnect the Northwest AC and Alturas Interties.[94] Because that decision amounted to a final agency action taken pursuant to statutory authority, the court held it possessed exclusive original jurisdiction. TANC forfeited its common law claims when it failed to challenge Bonneville's interconnection decision during the statutory ninety-day

91. *See generally* Central Mont. Elec. Power Coop., Inc. v. Adm'r, 840 F.2d 1472, 1475-76 (9th Cir 1988); Puget Sound Energy, Inc. v. United States, 47 Fed. Cl. 506 (Fed. Cl. 2000). "We do not find any support for the proposition that a Ninth Circuit challenge must be premised on a formal administrative record." *Id.* at 512.

92. *Transmission Agency*, 295 F.3d at 927.

93. *See generally* Nader v. Volpe, 466 F.2d 261, 266-268 (D.C. Cir. 1972).

94. *Id.*

window.[95]

B. Motion to Dismiss Claims Against Utility Company Defendants

TANC appealed district court dismissal of its claims against the utility company defendants, Sierra Pacific, Portland, and PacifiCorp, for failure to state a claim.[96] The district court found TANC's claims preempted by the Federal Power Act.[97] TANC argued its claims should not be preempted because it sought money damages rather than a specific allocation of transmission capacity,[98] and because it had not "challenged any ruling, regulation or order of the FERC . . . [and because it had not challenged or even sought examination of] rates, priority of service, conditions of service, or any other aspect of the transmission of electrical power."[99]

The Supremacy Clause provides the basis for federal preemption of state law.[100] Preemption may be implied or express, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[101] TANC asserted three types of state law violations by the utility company defendants, each preempted by the Federal Power Act in a different manner.[102]

1. Tort And Property Claims

The court spurned TANC's reliance on a series of airport cases finding homeowner nuisance claims not preempted by extensive federal regulation of airlines or federal approval of airline flight plans. Homeowner nuisance suits against airlines for the operation of commercial passenger service lines are not preempted, and TANC drew an analogy between its position and the homeowner's position.[103] The court pointed out that TANC is not a homeowner,

95. 16 U.S.C. § 839f(e)(5) (2003). Bonneville filed its decision to interconnect in the February 26, 1996 Federal Register. Notice of Availability of Record of Decision, Decision to Interconnect with Sierra Pacific Power Company's Alturas Transmission Line Project, 61 Fed. Reg. 7095 (1996). Transfer to cure want of jurisdiction was not appropriate because the action would have been untimely if filed in the appropriate court. *See* Abbott v. United States, 144 F.3d 1, 6 (1st Cir. 1998).

96. FED. R. CIV. P. RULE 12(b)(6) (2002).

97. 16 U.S.C. §§ 791-828c (2003).

98. *Power Sales: Calif. Transmission Agency's Damages Claim Preempted, Utility Tells 9th Cir.*, 13 No. 3 Andrews Util. Indus. Litig. Rep. 5 (2001).

99. *Power Sales: Calif. Transmission Agency Files Reply in Intertie Dispute*, 13 No. 8 Andrews Util. Indus. Litig. Rep. 3 (2002); *Power Sales: 9th Cir. Finds Calif. Transmission Agency State Law Claims Preempted*, 13 No. 11 Andrews Util. Indus. Litig. Rep. 17 (2002).

100. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of Land; and the Judges in every State shall be bound thereby, any Thing the Constitution or Laws of any State to the Contrary notwithstanding." US Const. art. VI, cl. 2.

101. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (*quoted in* Branco v. UFCW-Northern Cal. Employers Joint Pension Plan, 279 F.3d 1154, 1157 (9th Cir. 2002)).

102. The three categories of claims were: 1) Tort and property claims for conversion, nuisance, inverse condemnation, and trespass; 2) contract related claims for intentional interference with a contractual relationship, intentional interference with a prospective economic advantage, and breach of contract; and 3) an intentional misrepresentation claim against Sierra Pacific. *Transmission Agency*, 295 F.3d at 928-33.

103. *Id.* at 928.

but a regulated operator of the interstate electricity distribution system - an interconnected, federally regulated, system.[104] The court then offered an analogy of its own, stating that, "allowing TANC to sue under state law for damage allegedly caused to its transmission system by an interconnected interstate system approved by the FERC would be akin to allowing an airline to sue under state law for economic damages caused by another airline's FAA-approved flight plans."[105]

The court's logic here seems incontrovertible, but at least one commentator has raised questions:

> The court could not have been saying that, by the very fact of federal approval of a flight plan, airlines are somehow immune from all state law claims, including negligence; instead, what the court seems to be suggesting is that federal approval of a flight plan supersedes any previous private contractual agreement between airlines that conflict with the plan. The court did not, however, explain why this result is required, particularly since the effect of such a rule is to encourage regulate[d] firms to lobby regulators to indirectly invalidate contracts – a particularly disturbing practice in a deregulatory environment.[106]

Nevertheless, the court concluded that the Federal Power Act preempts TANC's nuisance, conversion, inverse condemnation and trespass claims against utility company defendants.[107]

2. Contract Related Claims

A successful contract claim against the utility company defendants would require a finding that the signatories to the Interim Interconnection Agreement (PacifiCorp and Portland) breached the agreement, or that the utility company defendants intentionally interfered with TANC's prospective economic advantage or contractual relationship. According to the court, it would have to presume that but for the misdeeds of the utility company defendants, the FERC would have continued to allocate 4800 MW to the California-Oregon Intertie. It held that such a speculative assumption would violate the filed rate doctrine and was therefore preempted by the Federal Power Act.[108]

Unlike traditional filed rate cases, the present case arose after the FERC switched from traditional cost-of-service tariffs, to market-based or open-access tariffs designed for deregulated markets.[109] In *Town of Norwood v. New*

104. New York v. FERC, 535 U.S. 1, 122 S. Ct. 1012, 1017 (2002) (describes the interconnected nature of the nations' electricity transmission systems).

105. *Transmission Agency*, 295 F.3d at 929.

106. JIM ROSSI, LOWERING THE FILED TARIFF SHIELD: JUDICIAL ENFORCEMENT IN THE DEREGULATORY ERA, 54 (Univ. N.C. Pub. Law & Legal Theory Research Paper No. 02-15, Aug. 2002) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=326701#PaperDownload (last visited Oct. 4, 2003).

107. *Transmission Agency*, 295 F.3d at 929.

108. *Id.* at 929-32.

109. The Interstate Commerce Commission (ICC) was the first deregulated agency to repudiate the filed rate doctrine, in 1986. It saw the doctrine as unnecessary in the industry's competitive atmosphere. However, the Supreme Court overruled the ICC's repudiation in *Maislin Industries Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). The Federal Communications Commission (FCC) has attempted to circumvent the filed rate doctrine in the international interexchange marketplace by canceling all filed tariffs, and refusing to accept any new tariffs, in a process termed 'detariffing.' *In re* 2000 Biennial Regulatory Review; Policy and Rules

England Power Co., the First Circuit explained why the filed rate doctrine should continue to apply under FERC deregulated markets and open access tariffing regimes:

> Of course, if... rates were truly left to the market, with no filing requirement or FERC supervision at all, the filed rate doctrine would by its terms no longer operate.... But unlike some other regulatory agencies... FERC is still responsible for ensuring 'just and reasonable' rates and, to that end, *wholesale power rates* continue to be filed and subject to agency review.[110]

The Federal Power Act gave the FERC exclusive jurisdiction over interstate wholesale electricity rates.[111] The Act, through the filed rate doctrine, therefore preempts state law claims where an assumption of filed rates, terms or conditions other than those set out in the FERC approved tariff would be necessary to calculate damages. However, a few cases indicate that the filed rate doctrine might not preempt claims based on allocations of interstate electricity transmission.[112]

In the present case, the court decided that, in light of FERC Order No. 888 (Order 888), the filed rate doctrine should apply even to common law claims based on allocations of interstate electricity transmission, because Order 888 functionally combined the FERC's regulation of rates and regulation of transmission capacity.[113] Order 888 brought allocations of interstate transmission capacity within the arena of exclusive FERC rate regulation. The new regulatory regime initiated by the Order altered traditional notions of the filed tariff. The FERC now regulates rates, not by setting them directly, but by approving open access non-discriminatory transmission tariffs.[114] In other words, the FERC now regulates interstate electricity sales by regulating *access* to transmission lines. Therefore, the FERC enjoys exclusive jurisdiction over allocations of interstate transmission capacity.[115] This jurisdiction preempts "any claims of entitlement to a specific allocation of interstate transmission capacity, whether that claim asks a court to enforce such an alleged entitlement or merely to hypothetically assume it."[116]

To award TANC state law damages one must assume that the California-

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Concerning the Int'l Interexchange Marketplace, Report and Order, No. 00-202, F.C.C. 01-93 (Mar. 20, 2001) (*International Detariffing Order*).

110. Town of Norwood v. New England Power Co., 202 F.3d 408, 418 (1st Cir. 2000) (emphasis added).

111. 16 U.S.C. §§ 824 - 824e (2000).

112. Gulf States Util. Co. v. Ala. Power Co., 824 F.2d 1465, 1469-70 (5th Cir. 1987); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986); County of Stanislaus v. Pac. Gas & Elec. Co., 114 F.3d 858, 864 (9th Cir. 1997).

113. Final Rule, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services & Pub. Utils.; Recovery of Stranded Costs by Public Utils. and Transmitting Utils., 61 Fed. Reg. 21,540 (1996) (to be codified at 18 C.F.R. § 35.28) (implements the new open access non-discriminatory transmission tariff policy).

114. *Id.* at 21,541.

115. This filed rate doctrine does not extend its protection to intrastate electricity transmissions because the FERC possesses no corresponding intrastate ratemaking powers. Intrastate transmission decisions therefore, cannot be related to the FERC's exclusive ratemaking authority. New York v. FERC, 535 U.S. 1, 5-7 (2002).

116. *Transmission Agency*, 295 F.3d at 931.

Oregon Intertie was entitled to a 4800 MW allocation from the Pacific Northwest. Yet, because Order 888 placed entitlements to interstate transmission capacity in the ambit of exclusive federal rate regulation, the filed rate doctrine applied and the Federal Power Act preempted TANC's claims. "[S]tate law can no more assume how FERC would allocate access to interstate transmission capacity that it can assume how FERC would set rates."[117]

3. Fraud Claim Against Sierra Pacific

TANC alleged that Sierra Pacific intentionally misrepresented its plans for the Alturas Transmission Line Project to gain approval for its proposed interconnection with the Northwest AC Intertie.[118] According to TANC, Sierra Pacific:

> [O]btained governmental permits and authorizations to construct and operate the Alturas Intertie Project by representing to governmental agencies and interested parties including plaintiff, that the purpose of the Alturas Intertie Project was to provide emergency support to Sierra Pacific and to enable Sierra Pacific to make occasional economy purchases and sales, but not to purchase power to increase capacity.[119]

The Supreme Court has not yet decided whether the filed rate doctrine preempts claims that an approved rate was procured by fraud,[120] but two circuit courts have held that the doctrine bars such claims.[121] Similarly, the Ninth Circuit decided that the filed rate doctrine shields Sierra Pacific from TANC's fraud claim because damages could not be calculated without assuming a 4800 MW allocation to the California-Oregon Intertie. Such an assumption would be hypothetical and would violate the filed rate doctrine for reasons delineated above. The court recognized that this decision would not control in other factual situations. For instance, where wholesale rates are not implicated and the alleged fraud occurred before a state agency, the filed rate doctrine would not preempt claims that a utility used fraudulent misrepresentation to procure an allocation.[122]

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117. *Id.*

118. The court construed the claims to allege that the fraud occurred before the California Public Utilities Commission. *Transmission Agency*, 295 F.3d at 932. If the fraud had allegedly occurred before the FERC, the court indicated it would be preempted by *Buckman v. Plaintiffs' Legal Comm'n*, 531 U.S. 341, 343-44 (2001) (Congress impliedly preempted claims that state law fraud was committed before the Food and Drug Administration, by giving it powers to deter and punish fraud), and *Nathan Kimmel Inc. v. DowElanco*, 275 F.3d 1199, 1204-07 (9th Cir. 2002) (similar facts to *Buckman*, except this case dealt with fraud before the Environmental Protection Agency).

119. *Transmission Agency*, 295 F.3d at 932.

120. *Id.* at 933.

121. H.J. Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 489 (8th Cir. 1992) (filed rate doctrine bars claims that require damages be calculated by comparing rates actually approved with those that should have been approved absent fraud); Taffet v. Southern Co., 967 F.2d 1483, 1494-95 (11th Cir. 1992) (claims that defendant procured a filed rate through fraud are barred by the filed rate doctrine). At least one state court created an exception to the state filed rate doctrine for fraudulent misrepresentation claims. Satellite System Inc. v. Birch Telecom of Okla., 51 P.3d 585 (Okla. 2002). It is also interesting to note that California does not recognize a state corollary of the filed rate doctrine. Cellular Plus, Inc., v. Super. Ct., 14 Cal. App. 4th 1224, 18 Cal. Rptr. 2d 308 (Cal. Ct. App. 1993).

122. *Transmission Agency*, 295 F.3d at 933.

V. CONCLUSION

The Ninth Circuit adopted a jurisdictional test focused on the agency being attacked and whether the factual basis for that attack is a statutorily authorized final action. If the agency decision is final action pursuant to the statute, then all attacks must be brought directly before the court of appeals, which possesses exclusive original jurisdiction. TANC appealed the district court's dismissal of its claims against Bonneville for lack of subject matter jurisdiction and alleged that Bonneville violated transmission capacity agreements with TANC. TANC alleged these actions not only breached its contract but also constituted an inverse condemnation of its transfer capacity between the Northwest AC and California-Oregon Interties.[123] The Ninth Circuit failed to reach the substantive claims because it found that: (1) Bonneville's approval constituted final agency action; (2) the court of appeals has exclusive original jurisdiction over claims challenging final agency action; and (3) transfer to cure want of jurisdiction was inappropriate because the claims were untimely when filed. The court's analysis offers plaintiffs like TANC a Hobson's choice by requiring them to immediately challenge potentially harmful agency actions in the appropriate Circuit Court of Appeals, or to forfeit all judicial remedies.

Klint A. Cowan

123. *Id.* at 925.