IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

SAVE THE COLORADO et al.,

Petitioners,

v.

LT. GEN. TODD T. SEMONITE, et al.,

Respondents,

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

Respondent-Intervenor.

DENVER WATER'S REPLY IN SUPPORT OF MOTION TO DISMISS

Petitioners attempt to rewrite the law and the facts, proposing a restrictive test for Federal Power Act (FPA) jurisdiction and minimizing the Federal Energy Regulatory Commission's (FERC's) role in permitting the Gross Reservoir Expansion Project (Project). But for decades, courts have interpreted the FPA's jurisdictional provision to broadly bar district court challenges to all issues "inhering *in the controversy*" before FERC—not just challenges to the specific terms of FERC's order. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-336 (1958) ("*Taxpayers*") (emphasis added). As the Tenth Circuit explained, that "expansive scope" covers all issues "that could have and should have been raised before FERC." *Williams Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255, 262-64 (10th Cir. 1989). Petitioners here recognized, when they belatedly tried to intervene before FERC, that they could have and should have raised all their arguments before FERC. Opposition (Opp.) Ex. A at 2.

Petitioners have now changed their tune, but the facts and law do not support their new perspective. FERC's Supplemental Environmental Assessment (EA) was the last essential step in a coordinated set of environmental reviews in which FERC directly participated and on which it expressly relied. Petitioners fail to acknowledge, much less address, FERC's incorporation of the Army Corps of Engineers' (Corps) and Fish and Wildlife Service's (FWS) analyses into the "complete record of analysis" for FERC's amendment of the Project's hydropower license. 172 FERC ¶ 61,063, at P 19 (2020).

Denver Water does not contend it is *always* the case that, when an agency takes an action related to a FERC-licensed project, review lies in the court of appeals. But here, FERC cooperated in producing the analyses at issue in Petitioners' claims and relied upon those analyses to meet its own legal obligations before amending the Project's hydropower license. The challenged analyses therefore are as much FERC's as the Corps'. As such, they "inhere in the controversy" before FERC, *Taxpayers*, 357 U.S. at 335-36, and cannot be challenged in district court. Petitioners thus have not met the "burden of establishing subject-matter jurisdiction"—which is always "on the party asserting jurisdiction." *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002).

I. Petitioners' Claims "Inhere in the Controversy" Before FERC.

Petitioners ignore decades of case law confirming the expansive reach of the FPA's exclusive-jurisdiction provision, 16 U.S.C. § 825*l*(b). Congress did not limit that provision's scope to the specific terms of FERC's order, as Petitioners assert. On the contrary, the Supreme Court has "made it clear that the jurisdiction provided by § 825*l*(b) is 'exclusive,' not only to review the terms of the specific FERC order, but over

any issue 'inhering in the controversy.'" *Me. Council of Atl. Salmon Fed'n v. NMFS*, 858 F.3d 690, 693 (1st Cir. 2017) (Souter, J., sitting by designation) (quoting *Taxpayers* and affirming dismissal of Endangered Species Act (ESA) claim). And according to this Circuit, any issue that "could have and should have been raised before FERC" must be brought in the court of appeals, or not at all. *Williams*, 890 F.2d at 262-64.[1]

Petitioners' National Environmental Policy Act (NEPA), Clean Water Act (CWA), and ESA claims all inhere in the controversy before FERC because they challenge environmental analyses that FERC cooperated in producing, incorporated into the "complete record of analysis"[2] for its own decision, and then relied upon to meet its legal obligations before amending the hydropower license for the Project. *See Me. Council*, 858 F.3d at 693 (court of appeals had exclusive jurisdiction "on two separate and independently sufficient grounds ... FERC incorporated the [biological opinions (BiOps)] in its own orders, and the BiOps were ... 'inher[ent]' in" the FERC process).

The coordination between the agencies on this Project was no coincidence. FERC became a "cooperating agency," *see* AR000017, so that it could actively participate in the Corps' and FWS's environmental analyses and then "tier" to those analyses to support its own decision, *see* 40 C.F.R. § 1501.11 (authorizing tiering). As early as 2003, FERC and the Corps executed a cooperating agreement stating that

[1] In *Williams*, the Tenth Circuit interpreted the Natural Gas Act's (NGA's) then-parallel exclusive review provision but relied primarily on the Supreme Court's FPA discussion in *Taxpayers*. 890 F.2d at 261-62. Congress's later amendment of the NGA does not undermine prior interpretations of the FPA as equally broad. *See also infra* Part II.B.

[2] 172 FERC ¶ 61,063, at P 19; *see also* Supplemental EA at 6 ("The Final [environmental impact statement (EIS)] reviewed the effects of enlarging the Moffat Collection System and amending the license for Gross Reservoir Project.").

"FERC's involvement in the preparation of the EIS as a cooperating agency is to ensure their [sic] NEPA and other regulatory obligations are met, should an enlargement of Gross Reservoir, a currently FERC-licensed facility, emerge as an element of the proposed action…." AR176934; *see also* AR143534 (FERC noted that the EIS should "serve[] the needs of both agencies"). Petitioners note Denver Water submitted its FERC license amendment application in 2016 (about seven months before the Corps issued its Record of Decision (ROD)). Opp. 6-7. This timing ensured all analyses to which FERC would tier were complete, but the FERC application process started much earlier. In 2008, Denver Water notified stakeholders that it would seek a FERC license amendment and explained that the Corps' Draft EIS and Final EIS would be included with the application. AR166625-26. Public review and comment on the Corps' Draft EIS and the draft FERC application proceeded concurrently. *See* AR158816-17 (notifying public that Draft EIS and draft FERC application would be released on the same date).

Nowhere does Petitioners' Opposition address FERC's incorporation of the Corps' and FWS's analyses into the "complete record of analysis" for its hydropower license amendment. 172 FERC ¶ 61,063, at P 19. Instead, Petitioners quote a different passage in a footnote to FERC's order to assert that FERC did not "address, let alone endorse, the Corps' actions." Opp. 12. The quoted text does not support Petitioners' assertion. It merely explains that FERC's Supplemental EA did not re-analyze issues that were "appropriately addressed in the 2014 Corps Final EIS." 172 FERC ¶ 61,063 at P 22 n.25. But that is how tiering works. A supplemental EA builds on, rather than retreads, ground covered in a prior EIS. *See Theodore Roosevelt Conservation P'ship*

v. Salazar, 616 F.3d 497, 511 (D.C. Cir. 2010) (rejecting argument that agency was "required to reevaluate the analyses" in a previous EIS); 40 C.F.R. § 1501.11(a) ("Agencies should tier their environmental impact statements … when it would eliminate repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided or not yet ripe.…").

If FERC had not adopted the Corps' and FWS's prior analyses, as Petitioners suggest, then FERC would have had to repeat those analyses to meet its legal obligations. *See* AR143534 (FERC comment warning against "increas[ing] the additional NEPA analysis needed to support our review"). Instead, the agencies planned that FERC would rely on the EIS to address broader issues, like the Project's purpose and need and alternatives, and then address additional hydropower-specific issues in a *supplement*. *See* AR176883 (2003 scoping notes explaining the bulk of the analysis would be in the Corps EIS, then FERC would issue a supplement). This use of tiering by a cooperating agency is entirely appropriate. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1220-22 (11th Cir. 2002) (Corps complied with NEPA and the ESA by cooperating in the preparation of an EIS and a BiOp and then "incorporating the previous studies into its current analysis"); *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1526 (10th Cir. 1992) (Corps properly adopted Forest Service EIS).[3]

Petitioners also attempt to minimize FERC's participation in the process that produced those analyses. But FERC did not cordon off its NEPA review to address only

[3] *See also Davis Mountains Trans-Pecos Heritage Ass'n. v. FAA*, 116 Fed. Appx. 3, 18, 2004 WL 2295986, at *10, n.64 (5th Cir. 2004) (NEPA process continues after lead agency's decision where cooperating agency adopts and supplements prior analysis).

energy-related issues, as Petitioners suggest. Rather, FERC fully "cooperated with the Corps in the preparation of the Draft and Final EIS." Supplemental EA at 6. Beyond "substantial informal consultation and coordination on pertinent technical and procedural matters throughout" EIS development, FERC was "formally asked to provide comments and input on scoping, development of Project purpose and need, development of alternatives and impact analyses, the Preliminary Draft EIS, the Draft EIS, and the Preliminary Final EIS." AR125896; *see also* AR000018 (Corps ROD noting FERC's participation in 2003 "scoping meeting … to address agency concerns and review the [] key" Project components). FERC ultimately reviewed the entire Draft and Final EIS and commented on issues it found significant.[4]

FERC equally cooperated in the ESA consultation process; the record belies Petitioners' unsupported assertion to the contrary. Opp. 7-8, 10. The Corps informed FWS that it intended ESA consultation to cover "all federal agency decisions associated with the Moffat Project, including the Federal Energy Regulatory Commission []." USFWS_000031. As early as 2009, FERC requested FWS's concurrence that the Corps' consultation would satisfy FERC's consultation requirements for amending the hydropower license. USFWS_000054; *see also* USFWS_000032 (attaching FERC letter). And FERC joined the reinitiated Section 7 consultation for the green lineage cutthroat trout, FWS00124, on which Petitioners' ESA claims focus, ECF 45-1 ¶¶ 7 & n.2, 153-67. FWS addressed its decision for that reinitiated consultation to both the

[4] *See, e.g.*, AR166453, AR163606, AR143534, AR141446, AR141233, AR140283, AR138409, AR138092, AR137284, AR136877, AR136860, AR136842, AR136828, AR136557, AR135321.

Corps *and* FERC, FWS00129, and then FERC discussed and relied on FWS's decision in its order. 172 FERC ¶ 61,063 at P 32 & n.31. The coordination between the agencies shows that FWS's decision was integral to FERC's license amendment process. Moreover, the Corps' ROD provides that *FERC's* order triggers application of FWS's Mitigation Plan. AR000041 ("The [FWS] Mitigation Plan is a Special Condition of the [CWA] permit and includes [] multiple actions that Denver Water will implement within one year of receiving the FERC license amendment."). This further illustrates that both the Corps' and FWS's environmental analyses were intertwined with, and had no utility independent from, FERC's license amendment decision.

The Corps' CWA analysis is also interwoven with FERC's decision. It is appended to the FEIS and ROD, which FERC incorporated into the record for its decision. 172 FERC ¶ 61,063 at P 19. And the CWA alternatives analysis cannot be disentangled from the NEPA alternatives analysis. They assess the exact same set of alternatives, which were developed simultaneously for compliance with both the CWA and NEPA.[5] Notably, Petitioners' two CWA claims essentially restate the same allegations contained in *eleven* of their NEPA claims, alleging the Corps' alternatives analysis was flawed because, *inter alia*, those alternatives were evaluated against a skewed Project purpose and need. *Compare* ECF 45-1 ¶¶ 132-143 *with* ¶¶ 149-50. Given FERC's cooperation in producing and reliance upon the alternatives analysis, Petitioners' CWA arguments attack FERC's license amendment decision as much as

[5] *See* AR000023-24 ("The Corps is responsible for determining if an adequate assessment of alternatives has occurred for the purposes of NEPA and the [CWA].... [S]creening using NEPA criteria and the [CWA] Section 404(b)(1) Guidelines, led to the development of five action alternatives and a No Action Alternative....").

the Corps' decision. And unlike in the cases on which Petitioners primarily rely (Opp. 22-23), the Corps' decision here covers the exact same Project as FERC's order. AR000016-17 (Corps' ROD explaining that, to execute the "Preferred Alternative" of "expand[ing] Gross Reservoir and rais[ing] the dam, Denver Water would need to receive an amendment to the … license for the Gross Reservoir Hydroelectric Project"). Petitioners' claims thus all inhere in the controversy before FERC.

II. Petitioners' Arguments Are Legally and Factually Erroneous.

A. Petitioners' proposed jurisdictional test has no basis in the FPA or case law.

Petitioners invent a new test for FPA jurisdiction, asserting that it applies to another agency's action only if that action was "triggered by" and would not have been taken "but for a specific FERC license." Opp. 16, 25-26. None of the cases Petitioners cite contains those phrases or stands for such a restrictive principle.

California Save Our Streams v. Yeutter, 887 F.2d 908 (9th Cir. 1989) ("*Cal. S.O.S.*"), held the district court lacked jurisdiction over a NEPA claim against the Forest Service, reasoning that the "practical effect of the action in district court [was] an assault on an important ingredient of the FERC license," and the agency action at issue had "no significance outside the licensing process." 887 F.2d at 912. That is precisely the case here. The "practical effect" of this suit is an attack on "important ingredient[s]" of FERC's order because, as explained above, FERC cooperated in preparing and relied upon the challenged analyses to support its decision. And the Corps' and FWS's analyses have no effect outside FERC's licensing proceeding because any alteration to the Gross Reservoir Hydroelectric Project—which resides in a federally designated hydropower

reserve—cannot proceed without FERC's approval. If FERC withheld its approval, the expansion Project would not take place, and Petitioners' claims would be moot.[6]

Snoqualmie Valley Preservation Alliance v. U.S. Army Corps of Engineers, 683 F.3d 1155 (9th Cir. 2012), also is inapposite. There, the claims against the Corps could not "have been raised during judicial review of the FERC license" because the Corps had not acted when the "earlier lawsuit" concluded. *Id.* at 1159. Here, Petitioners could have raised their claims before FERC and then the court of appeals, but they failed to timely intervene. Moreover, in *Snoqualmie*, there was no sign that the Corps tiered to FERC's prior EIS or that any of the claims against the Corps implicated FERC's analysis at all. The only argument was that the "practical effect" of the court's judgment could have "interfered" with FERC-authorized activities. *Id.* at 1159-60. The court held that such practical interference was not—by itself—enough to constitute an "improper collateral attack on the FERC license." *Id.* Here, Petitioners' district court suit does more than threaten practical interference. Petitioners' claims attack "important ingredient[s]" of FERC's decision, *Cal. S.O.S.*, 887 F.2d at 912: namely, the environmental analyses that FERC helped produce and incorporated into its decision. This court's judgment therefore could affect "the validity of FERC's license," and Petitioners' suit constitutes an "improper collateral attack on the FERC license." *Snoqualmie*, 683 F.3d at 1160.

Finally, Petitioners cite a series of cases concerning a Virginia pipeline project

[6] Petitioners' "trigger" theory also lacks substance. The "trigger" for both agency actions here is the Project. The order of the agency actions or which agency was "lead" versus "cooperating" does not determine where jurisdiction lies. What matters is whether the challenged analysis is an "important ingredient" of FERC's decision, *id.*, and therefore "could have and should have been raised before FERC." *Williams*, 890 F.2d at 263-64.

that are distinguishable for multiple reasons. Opp. 22-23. First, as Petitioners admit (Opp. 23), those cases did not analyze the FPA's exclusive-jurisdiction provision and so "have no precedential effect." *Gad v. Kan. State Univ.*, 787 F.3d 1032, 1040 (10th Cir. 2015); *see also Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) (case has no bearing on jurisdiction "[w]hen a potential jurisdictional defect is neither noted nor discussed"). Second, in those cases, FERC and the Corps independently analyzed the projects; FERC did not tier to the Corps' analysis, like here. Third, as Petitioners admit (Opp. 23), there the Corps' action covered miles of pipeline that lay outside of FERC's jurisdiction, whereas FERC's project boundary here covers the entire raised dam and expanded reservoir. *See* 172 FERC ¶ 61,063 at PP 3, 13. Fourth, the Corps' analysis there preceded FERC's order by *over a decade*, and the courts had fully adjudicated the lawfulness of the Corps permits well before FERC acted, so combined judicial review was unavailable. *See North Carolina v. FERC*, 112 F.3d 1175, 1180-83 (D.C. Cir. 1997) (recounting case history). Here, in contrast, the only thing that prevented Petitioners from challenging all Project-related analyses in one court-of-appeals action was their own failure to timely intervene in FERC's proceeding. For all those reasons, Petitioners' cases do not support their restrictive reading of the FPA.

B. Congress's amendment of the NGA does not change the scope of § 825*l*(b).

Petitioners argue that Congress's 2005 amendment of the NGA's judicial review provision, which now explicitly encompasses claims against state and other federal agency actions, means that Congress wished to apply a narrower test under the FPA. That inference is unwarranted. Courts have held for decades, both before and after

amendment of the NGA, that the FPA's exclusive-jurisdiction provision may apply to actions of other agencies. *See, e.g., City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006); *City of Tacoma v. NMFS*, 383 F. Supp. 2d 89 (D.D.C. 2005); *Idaho Rivers United v. Foss,* 373 F. Supp. 2d 1158, 1161 (D. Idaho 2005); *Sw. Ctr. for Biological Diversity v. FERC*, 967 F. Supp. 1166, 1172-75 (D. Ariz. 1997); *Cal S.O.S.,* 887 F.2d at 912. It cannot be inferred that, by *not* amending the FPA, Congress impliedly intended to overrule those precedents or to narrow the test under the FPA. *See Cent. Bank of Denver v. First Interstate Bank of Denver,* 511 U.S. 164, 187 (1994) ("Congressional inaction cannot amend a duly enacted statute" and "lacks persuasive significance because … several equally tenable inferences may be drawn from such inaction." (quotations omitted)); *Wilson v. Burlington N. R.R. Co.*, 803 F.2d 563, 566 (10th Cir. 1986) (refusing to "depart from nearly 80 years of precedent" because "looking to congressional action or inaction in the face of subsequent developments in society and the common law is usually ambiguous assistance at best").[7] The type of "post-enactment legislative history" on which Petitioners rely "is not only oxymoronic but inherently entitled to little weight." *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005); *see also Almendarez–Torres v. United States,* 523 U.S. 224, 237 (1998) ("[L]ater enacted laws … do not declare the meaning of earlier law.").

If anything, the fact that Congress has *not* chosen to amend the FPA's exclusive review provision despite decades of case law interpreting it broadly to bar district court

[7] *Duncan v. Walker*, 533 U.S. 167, 172 (2001), is off point. It stands for the well-established—but inapplicable—principle that, where Congress includes language in one part, but not another, *of the same statute*, that choice has meaning.

claims against other agencies suggests that such precedent is correct. *See High Country Citizens All. v. Clarke*, 454 F.3d 1177, 1190 (10th Cir. 2006) (citing *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 629 n.7 (1987)). It is therefore unsurprising that, since amendment of the NGA in 2005, courts have continued to interpret the FPA broadly. *E.g., Me. Council*, 858 F.3d at 693 (holding that an ESA BiOp had to be reviewed in court of appeals because there is "no good reason to read 'limited' into the Supreme Court's understanding of 'exclusive' jurisdiction").

C. FERC's denial of Petitioners' late intervention petition does not support their claim that this Court has jurisdiction over their challenges.

Petitioners cite a footnote in FERC's denial of their untimely intervention petition to argue that it was "FERC's view that the FPA plainly does not confer original jurisdiction over Petitioners' claims in the court of appeals." Opp. 28. The footnote does not so state—it analyzed neither the text nor the case law interpreting the FPA's jurisdictional provision. And even if it had, it would not merit any deference concerning this Court's jurisdiction. *See Allegheny Def. Project v. FERC*, 964 F.3d 1, 11-12 (D.C. Cir. 2020) ("Federal agencies do not administer and have no relevant expertise in enforcing the boundaries of the courts' jurisdiction."); *Murphy Expl. & Prod. Co. v. Interior*, 252 F.3d 473, 479 (D.C. Cir. 2001) ("Because jurisdiction-conferring statutes do not delegate authority to administrative agencies, courts do not extend *Chevron* deference to an agency's construction of them.").

Nor does the cited footnote give "explicit instructions" that Petitioners should sue in district court (Opp. 28). It states that "the record does not reflect whether Save the Colorado sought judicial review of the Corps' actions … but nothing in our proceeding

prevented it from doing so." 165 FERC ¶ 61,120 at P. 20 n.26. That past-tense language does not address whether a district court would have jurisdiction *once FERC issued its order*; at most, it suggests that Petitioners might have been able to sue in district court *while FERC's proceeding was ongoing*. *See Williams*, 890 F.2d at 257, 262 (addressing "race to the courthouse" and explaining that FPA review becomes "exclusive in the court of appeals *once the FERC certificate issues*" (emphasis added)); *Me. Council*, 858 F.3d at 692-93 ("[T]ime and events have eliminated whatever claims of district court jurisdiction … [existed] when this action was filed. ... Once issued, the FERC order was unquestionably subject to … direct appellate jurisdiction....").[8]

Finally, Petitioners ignore that, when belatedly seeking to intervene before FERC, they conceded that their claims could not proceed if not brought first before FERC. Opp. Ex. A at 2 (arguing that FERC's denial of intervention would "block[] Save the Colorado's ability to challenge the environmental findings related to the project under NEPA"). FERC's footnote appropriately denied responsibility for that outcome, but it did not speak to this Court's jurisdiction now that FERC's order has issued—let alone overcome the extensive case law confirming that all issues "inhering in the controversy" before FERC must proceed in the court of appeals, or not at all.[9]

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[8] Petitioners accuse Denver Water of improperly delaying its motion to dismiss. Opp. 11. But Denver Water promptly moved once FERC issued its order, which the authority above describes as triggering the court of appeals' exclusive jurisdiction.

[9] *Carter v. Smith Food King* is inapposite. There, the Ninth Circuit concluded that "[a] good faith recipient of a right-to-sue letter may not be penalized for a procedural error made by the state agency." 765 F.2d 916, 924 (9th Cir. 1985). Aside from the vast contextual difference, Petitioners' characterization of FERC's views on the FPA's jurisdictional provision alleges a legal—not procedural—issue.

III. Any Jurisdictional Doubts Must Favor the Court of Appeals to Honor Congress's Intent for Consolidated Review of FERC-Licensed Projects.

The Tenth Circuit has explained that "if there is any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals we must resolve that ambiguity in favor of review by a court of appeals." *Nat'l Parks & Conservation Ass'n v. FAA*, 998 F.2d 1523, 1529 (10th Cir. 1993) (citing *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 192 (7th Cir. 1986)); *accord, Clark v. Commodities Futures Trading Comm'n*, 170 F.3d 110, 114 (2d Cir. 1999). Indeed, several circuits have clarified that when "an agency decision has more than one basis of authority, one of which provides for review in the court of appeals, considerations of judicial economy and consistency justify review of the entire proceeding by the court of appeals." *Ruud v. U.S. Dep't of Labor*, 347 F.3d 1086, 1088 (9th Cir. 2003) (citing 2d, 3d, 7th, and D.C. Circuit cases); *see also Ctr. for Biological Diversity v. Dep't of Energy*, 2008 WL 4602721, at *9-10 (C.D. Cal. 2008) (applying this principle to dismiss NEPA, ESA, and APA claims under § 825*l* because plaintiffs could have obtained review by seeking rehearing from FERC).

Court-of-appeals review of the "entire proceeding" effectuates Congress's goals of avoiding "duplicative" proceedings with potentially inconsistent results. *Suburban O'Hare*, 787 F.2d at 192-93; *see also Cal. S.O.S.*, 887 F.2d at 912 (rejecting argument that FPA exclusive jurisdiction did not cover district court NEPA claim because "[t]he point of creating a special review procedure … is to avoid duplication and inconsistency.... We do not believe … Congress would involuntarily create a glaring loophole that would undermine the efficacy of the expedited process it adopted.").

Similarly here, to effectuate Congress's goals, all issues inhering in the

controversy over FERC's order—including challenges to other agencies' environmental analyses intertwined with FERC's decision—must proceed in the court of appeals, or not at all. That no party to the FERC proceeding decided to challenge FERC's decision in a court of appeals here does not change that conclusion.[10] As the Tenth Circuit has explained, the court of appeals' jurisdiction is exclusive even "if a petition is never filed" because "to allow parties to circumvent the scheme of judicial review … simply by choosing not to file a petition for review with FERC or the court of appeals would be to allow precisely the type of collateral challenge that *Taxpayers* condemned." *Williams,* 890 F.2d at 262 n.8 (citing *Halifax Cty. v. Lever*, 718 F.2d 649, 652 (4th Cir. 1983)); *see also U.S. Commodity Futures Trading Comm'n v. Amaranth Advisors*, 523 F. Supp. 2d 328, 338 (S.D.N.Y. 2007) (rejecting attempted "end-run around" court of appeals' exclusive jurisdiction). Petitioners cannot use their failure to timely intervene before FERC to frustrate Congress's intent that only a court of appeals may review the lawfulness of all issues inhering in the controversy before FERC. *See United States v. McBride*, 788 F.2d 1429, 1432-33 (10th Cir. 1986) (failure to file timely challenge in court of appeals did not permit collateral attack in district court).

CONCLUSION

Petitioners' claims must be dismissed under the FPA, 16 U.S.C. § 825*l*(b).

DATED this 23rd day of October, 2020

Respectfully submitted,

Jessica R. Brody
Daniel J. Arnold

/s/ *Amanda Shafer Berman*
Amanda Shafer Berman

[10] Petitioners feign "astonish[ment]" that Denver Water did not mention this in its motion. Opp. 29. But when Denver Water filed its motion, the 30-day window to petition FERC for rehearing had not yet closed, 16 U.S.C. § 825*l*(a).

Nicholas A. DiMascio
DENVER WATER
1600 West 12th Avenue
Denver, CO 80204-3412
(303) 628-6460
Nick.dimascio@denverwater.org

David Y. Chung
Elizabeth Boucher Dawson
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2500
aberman@crowell.com

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users of the CM/ECF system.

Dated: October 23, 2020

Respectfully submitted,

/s/ Amanda Shafer Berman
Amanda Shafer Berman