APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAUK-SUIATTLE INDIAN TRIBE, *Plaintiff-Appellant*, v. CITY OF SEATTLE; SEATTLE CITY LIGHT, a subdivision of the City of Seattle, *Defendants-Appellees*.	No. 22-35000 D.C. No. 2:21-cv-01014-BJR OPINION

Appeal from the United States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding

Argued and Submitted October 7, 2022
Seattle, Washington

Filed December 30, 2022

Before: Mary H. Murguia, Chief Judge, and William A. Fletcher and Mark J. Bennett, Circuit Judges.

Per Curiam Opinion;
Concurrence by Judge W. Fletcher;
Concurrence by Judge Bennett

COUNSEL

Jack Warren Fiander (argued), Towtnuk Law Offices LTD., Yakima, Washington, for Plaintiff-Appellant.

Kari L. Vander Stoep (argued), Elizabeth Thomas, and Christina A. Elles, K&L Gates LLP, Seattle, Washington, for Defendants-Appellees.

OPINION

PER CURIAM:

The City of Seattle/Seattle City Light[1] ("Seattle") owns and operates the Gorge Dam, which is part of the Skagit River Hydroelectric Project ("Project"). Seattle operates the Project pursuant to a thirty-year license that was issued by the Federal Energy Regulatory Commission ("FERC") in 1995. The Sauk-Suiattle Indian Tribe ("Tribe") sued Seattle in Washington state court, alleging that Seattle's operation of the Gorge Dam without fish passage facilities ("fishways") violates certain federal and state laws. Seattle removed the case to federal court. The district court denied the Tribe's motion to remand, finding that it had jurisdiction because the Tribe's complaint raised substantial federal questions. The district court then granted Seattle's motion to dismiss for lack of subject matter jurisdiction under the Federal Power Act ("FPA") and dismissed the complaint. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

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[1] Seattle City Light is not a separate entity from the City of Seattle.

I

A

The Gorge Dam, located in Newhalem, Washington, is one of three dams that make up the Project. In 1927, FERC's predecessor licensed the Project for fifty years.[2] *See* Order Accepting Settlement Agreement, Issuing New License, and Terminating Proceeding ("FERC Order"), 71 FERC 61159, 61527 n.1 (1995).

Seattle applied for a new license in 1977, *id.*, and FERC allowed the Tribe, among others, to intervene in the proceedings, *id.* at 61528–29. The Tribe and other entities also engaged in settlement negotiations with Seattle regarding the Project. *Id.* at 61527 n.1, 61529. The negotiations resulted in several settlement agreements (collectively, "Settlement Agreement") that "purport[ed] to resolve all issues related to project operation, fisheries, wildlife, recreation and aesthetics, erosion control, archaeological and historic resources, and traditional cultural properties." *Id.* at 61527.

As relevant here, the Settlement Agreement included the "Fisheries Settlement Agreement," which the Tribe joined. *Id.* at 61529. "The Fisheries Settlement Agreement incorporate[d] the Anadromous Fish Flow Plan and the Anadromous and Resident Fish Non-Flow Plan and establishe[d] Seattle's obligations relating to fishery resources affected by the project, including numerous provisions to protect resident and

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[2] For simplicity, we refer to both FERC and its predecessor, the Federal Power Commission, as "FERC" or "Commission."

migratory fish species." *Id.* at 61530. The Settlement Agreement also asked FERC to dismiss a separate proceeding that FERC had opened to "examine the effects of the project's flow regime on the Skagit River's fisheries resource." *Id.* at 61527.

In 1995, almost twenty years after Seattle submitted its application for a renewed license, FERC issued an order granting Seattle a new thirty-year license to operate the Project ("FERC Order").[3] *Id.* at 61527, 61538. The FERC Order incorporated into the new license all parts of the Settlement Agreement "over which [FERC had] jurisdiction" and as requested in the Settlement Agreement, terminated FERC's separate proceeding to examine the Project's effects on fishery resources. *Id.* at 61527–28.

The FERC Order also contained a section on "Fish Passage." *Id.* at 61535. In it, FERC explained that neither the Secretary of Commerce nor the Secretary of the Interior had prescribed a fishway under 16 U.S.C. § 811.[4] It also explained that both the Department of Commerce and the Department of the Interior were parties to the Settlement Agreement in which they had

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[3] After the license expired in 1977, FERC issued annual licenses authorizing Seattle to continue Project operations pending disposition of its application. *See* FERC Order, 71 FERC ¶ 61159, at 61527 n.1.

[4] That section provides in relevant part: "The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of . . . such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate." 16 U.S.C. § 811.

agreed "that all issues concerning environmental impacts from relicensing of the Project, as currently constructed, are satisfactorily resolved by [the Settlement Agreement]."[5] *Id.* at 61535 (internal quotation marks omitted). Thus, the FERC Order contained no fishway requirement. FERC did however "reserve[] [its] authority to require fish passage in the future, should circumstances warrant." *Id.*

The Tribe did not seek rehearing or appeal the FERC Order.

B

In July 2021, the Tribe filed the operative amended complaint against Seattle in Washington state court, seeking only declaratory and injunctive relief under Washington's Declaratory Judgments Act. The complaint alleged that the Gorge Dam "blocks the passage of migrating fish" and thus its "presence and operation" without fishways violates several laws: the 1848 Act establishing the Oregon Territory and the 1853 Act establishing the Washington Territory ("Congressional Acts");[6] the Supremacy Clause of the United

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[5] As noted, the Tribe was also a party to the Settlement Agreement. FERC Order, 71 FERC ¶ 61159, at 61528–29.

[6] Section 12 of the Oregon Territory Act provided: "That the rivers and streams of water in said Territory of Oregon in which salmon are found . . . shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams." According to the Tribe, Section 12 was later incorporated into the

States Constitution; the Washington State Constitution, which purportedly incorporates the Congressional Acts; and Washington nuisance and common law. The complaint alleged that all these provisions prohibit dams, like the Gorge Dam, that block fish passage.

The complaint sought (1) a declaration that the Gorge Dam violates the Washington State Constitution, common law, and the Supremacy Clause because Seattle is subject to the Congressional Acts; (2) an injunction that either prohibits Seattle from maintaining the Gorge Dam in its present condition or requires Seattle to provide a fishway; and (3) other "just and equitable" relief.

C

Seattle timely removed to federal court, and the district court denied the Tribe's remand motion. The district court determined that it had jurisdiction under 28 U.S.C. §§ 1441(a) and 1331 because the complaint raised substantial federal questions: whether Seattle's actions violate the Congressional Acts and the Supremacy Clause. The district court also determined that because all the Tribe's claims "center on a single, discrete issue: whether [Seattle] may continue to operate the Gorge Dam in the absence of a passageway for fish," it had supplemental jurisdiction over the remaining state-law claims under 28 U.S.C. § 1367(a).

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laws of the Territory of Washington via Section 12 of the Washington Territory Act.

The district court then granted Seattle's motion to dismiss for lack of subject matter jurisdiction. It found that the complaint was a collateral attack on the FERC Order because it challenged an issue decided by FERC: whether Seattle was required to construct Gorge Dam fishways. And because only a federal court of appeals can review such challenges under section 313(b) of the FPA, 16 U.S.C. § 825*l*(b), the district court found that it lacked subject matter jurisdiction and dismissed the complaint.

The Tribe appeals from the district court's orders denying remand and granting the motion to dismiss. Pursuant to this court's order, the parties have also filed supplemental briefs on whether it was proper for the district court to dismiss the action considering 28 U.S.C. § 1447(c), which provides, in part: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded [to state court]."

II

We review "issues of subject matter jurisdiction and denials of motions to remand removed cases de novo." *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1315 (9th Cir. 1998). We also review "de novo . . . whether the district court had supplemental jurisdiction." *Trustees of Constr. Indus. & Laborers Health & Welfare Tr. v. Desert Valley Landscape & Maint., Inc.*, 333 F.3d 923, 925 (9th Cir. 2003).

III

A[7]

The federal removal statute provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction . . . may be removed by the defendant . . . to the district court of the United States." 28 U.S.C. § 1441(a). District courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Where, as here, state law creates the cause of action,[8] the action arises under federal law when "a well-pleaded complaint establishes . . . that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 27–28 (1983). A substantial federal question exists when the question is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state

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[7] Whether the district court correctly determined that removal was proper and denied the Tribe's motion to remand is squarely before us, as the Tribe raises the issue and the parties have fully briefed it. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.").

[8] As discussed above, the Tribe's claims are brought under Washington's Declaratory Judgments Act. We have treated such claims as state-law claims. *See Hornish v. King Cnty.*, 899 F.3d 680, 687–91 (9th Cir. 2018) (treating a claim for declaratory relief under Washington's Declaratory Judgments Act as a state-law claim, even when such claim implicated a federal statute).

balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). All four requirements are met here.

As to the first two requirements, the Tribe's complaint necessarily raises federal issues because it expressly invokes federal laws, and it is uncontested that the federal issues are disputed. The complaint alleges that the Gorge Dam's "presence and operation" violates "the governing Congressional Acts" and "violates [the Supremacy Clause] . . . in that the [Congressional Acts] imposed a prior restriction against such dams." The complaint also asks for corresponding declarations that the Gorge Dam's presence and operation violate the Congressional Acts and Supremacy Clause. Indeed, at oral argument before the district court, the Tribe's counsel conceded that the suit involved federal questions: "But clearly [there's] a federal question, because the Supremacy Clause, the laws enacting this provision going back to 1848, were enacted by Congress as a matter of the supreme law of the nation."

Turning to the third requirement, "[t]he substantiality inquiry . . . [looks] to the importance of the issue to the federal system as a whole." *Gunn*, 568 U.S. at 260. As evidenced by the FPA, the federal government has a strong interest "in maintaining control over [the] engineering, economic and financial soundness" of FERC-licensed projects, like the Gorge Dam. *First Iowa Hydro-Elec. Co-op. v. Fed. Power Comm'n*, 328 U.S. 152, 172 (1946). Indeed, the FPA was an effort to "secure enactment of a complete scheme of national regulation which would promote the comprehensive

development of the water resources of the Nation." *Id.* at 180. Whether the Supremacy Clause and Congressional Acts govern Seattle's operation of the FERC-licensed Project implicates the federal government's strong interest in national regulation, and thus the issue is a substantial one.

The final requirement considers whether exercising jurisdiction will "disturb[] any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). That Congress intended the *federal government* to have comprehensive control over FERC-licensed projects supports that exercising jurisdiction will not disrupt "the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. And it does not appear that Washington State has any special responsibility in determining whether a FERC-licensed operator like Seattle has violated the Congressional Acts or the Supremacy Clause. *Cf. id.* at 264 (explaining that exercising jurisdiction over malpractice claims would disrupt the balance between federal and state courts, as states have a special responsibility in regulating lawyers' conduct). Thus, this action can be resolved "in federal court without disrupting the federal-state balance approved by Congress." *Id.* at 258.

The circumstances here are analogous to those in *Hornish v. King County*, 899 F.3d 680 (9th Cir. 2018), in which we held that the complaint raised a substantial federal question. *Id.* at 691. In *Hornish*, plaintiffs sued in federal court seeking a declaration under

Washington's Declaratory Judgments Act that Washington's King County had acquired certain limited property rights under the Trails Act.[9] *Id.* at 689. We analyzed the four substantial-federal-question requirements and found that they had been met. Plaintiffs' claim necessarily raised a federal issue because the court would have to interpret the Trails Act in determining the scope of King County's rights. *Id.* at 689–90. The County's rights under the Trails Act were in dispute. *Id.* at 690. The federal issue was substantial and would not disrupt the federal-state balance because, as evidenced by the Trails Act, "the Government has a strong interest in both facilitating trail development and preserving established railroad rights-of-way for future reactivation of rail service," and thus "the scope of the Trails Act is 'an important issue of federal law that sensibly belongs in a federal court.'" *Id.* at 691 (quoting *Grable*, 545 U.S. at 315). We therefore concluded that federal jurisdiction was proper. *Id.*

As in *Hornish*, the Tribe necessarily raises a federal issue because a court would have to interpret the Congressional Acts and apply the Supremacy Clause in determining whether Seattle is violating the Congressional Acts by operating the Gorge Dam without fishways. The parties dispute Seattle's obligations under the Congressional Acts and the applicability of the

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[9] The Trails Act "is the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails." *Preseault v. I.C.C.*, 494 U.S. 1, 5 (1990).

Supremacy Clause.[10] And finally, the United States's strong interest in national regulation of FERC-licensed projects, as evidenced by the FPA, supports that the issue of Seattle's obligations under the Congressional Acts is an important federal-law issue that properly belongs in federal court. Thus, the district court correctly determined that removal was proper based on a substantial federal question.

The district court also properly exercised supplemental jurisdiction over the remaining state-law claims because they "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). "Nonfederal claims are part of the same 'case' as federal claims when they derive from a common nucleus of operative fact and are such that a plaintiff would ordinarily be expected to try them in one judicial proceeding." *Trustees of Constr. Indus.*, 333 F.3d at 925 (internal quotation marks and citation omitted). As the district court correctly pointed out, all the claims "center on a single, discrete issue: whether [Seattle] may continue to operate the Gorge Dam in the absence of a passageway for fish." Because all the claims rest on the same underlying facts, the district court properly exercised supplemental jurisdiction.

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[10] As noted, the Tribe claims that the applicable "Supreme Law[s] of the nation" are the Congressional Acts. And Seattle argues, among other things, that the Congressional Acts are not applicable through the Supremacy Clause because they were repealed by Congress.

Based on the above, we affirm the district court's order denying remand.

B

We also affirm the district court's dismissal for lack of subject matter jurisdiction because the Tribe's complaint is subject to section 313(b) of the FPA, which vests exclusive jurisdiction in the federal courts of appeals over all objections to FERC orders by a party to a FERC proceeding, even objections based on state law.[11]

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[11] It is undisputed that the Tribe was a party to the Gorge Dam relicensing proceedings, as FERC granted the Tribe's motion to intervene in the proceedings. *See* FERC Order, 71 FERC ¶ 61159, at 61528–29; *see also* 18 C.F.R. § 385.102(c) ("Party means, with respect to a proceeding: . . . Any person whose intervention in a proceeding is effective under Rule 214[, 18 C.F.R. § 385.214]," which governs what persons may intervene and thereby become parties in FERC proceedings.). Regardless, we have held that, under *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), section 313(b) bars non-parties from challenging a FERC order *in any court*:

> Section 313 of the [FPA] provides that only "parties" to Commission proceedings may seek administrative or judicial review of the Commission's final orders. Because section 313 enumerates "the specific, complete and exclusive mode for judicial review of the Commission's orders," *City of Tacoma*, 357 U.S. at 336, a non-party to the Commission's proceedings may not challenge the Commission's final determination in any court.

Cal. Trout v. FERC, 572 F.3d 1003, 1013 (9th Cir. 2009) (citations and parallel citation omitted).

Section 313(b) provides:

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding *may obtain a review of such order in the United States court of appeals* for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . *Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.*

16 U.S.C. § 825*l*(b) (emphasis added).

In *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), the Supreme Court interpreted section 313(b) as vesting exclusive jurisdiction in the courts of appeals over *all* objections to FERC orders:

> Congress in [Section] 313(b) prescribed the specific, *complete and exclusive* mode for judicial review of the Commission's orders. . . . It thereby necessarily precluded de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review. Hence, upon judicial review of the Commission's order, *all objections to the*

> *order*, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, *must be made in the Court of Appeals or not at all.*

Id. at 336 (emphasis added) (footnote omitted). The Court did not distinguish between challenges to a FERC order based on federal law and challenges to a FERC order based on state law, and the broad language the Court used admits of none. Moreover, the Court held that section 313(b) barred the State of Washington from relitigating state-law claims. *Id.* at 330, 341 (noting that the state's cross-complaint included a claim that the project would interfere with navigation in violation of a Washington statute and then holding that the claims in the cross-complaint were barred under section 313(b)).[12]

California Save Our Streams Council, Inc. v. Yeutter, 887 F.2d 908 (9th Cir. 1989), is also on point. There, we reasoned that "[b]y its express language, the [FPA]

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[12] The Tribe argues that Justice Harlan's *concurrence* in *City of Tacoma* supports that section 313(b) does not apply to state-law claims. 357 U.S. at 341–42 (Harlan, J., concurring). This argument fails. First, of course, the argument is based on the separate opinion of one justice, and not the opinion of the Court. *See Pub. Watchdogs v. S. Cal. Edison Co.*, 984 F.3d 744, 757 n.7 (9th Cir. 2020) ("[C]oncurring opinions have no binding precedential value. . . ."). It also ignores the Court's broad language which draws no distinction between challenges based on federal law, as opposed to state law. And finally, Justice Harlan's suggestion that the FPA does not bar relitigation of state-law issues conflicts with the Court's holding that section 313(b) barred Washington from relitigating state-law claims. *See City of Tacoma*, 357 U.S. at 341–42 (Harlan, J. concurring).

provides *exclusive* jurisdiction for the Courts of Appeals to review and make substantive modifications to FERC licensing orders" and "[g]iven Congress's careful choice of words, there can be little room for argument over whether the statutory scheme vests sole jurisdiction over questions arising under the FERC licenses in the Courts of Appeals." *Id.* at 911. Because section 313(b) "confers exclusive jurisdiction in the courts of appeals and bars suit in district court," *id.* at 909, we held that the district court lacked subject matter jurisdiction over plaintiffs' claims, *id.* at 912.

In so holding, we rejected plaintiffs' argument that they were not attacking the FERC license because their claims arose under other federal laws, not the FPA. *Id.* Rather than accept plaintiffs' characterization of their challenges, we determined that we had to look at the essence of plaintiffs' claims in deciding whether they challenged the FERC license. *Id.* We held that the action challenged the FERC license because "the practical effect of the action in district court [was] an assault on an important ingredient of the FERC license." *Id.*

In sum, *City of Tacoma* and *California Save Our Streams* establish that the federal courts of appeals have exclusive jurisdiction under section 313(b) to review all objections to FERC orders issued under the FPA—including objections based on state law. *See City of Tacoma*, 357 U.S. at 336; *Cal. Save Our Streams*, 887 F.2d at 911. Further, a plaintiff cannot avoid section 313(b) through artful pleading; courts must review the substance of an action in deciding whether it

challenges a FERC order. *See Cal. Save Our Streams*, 887 F.2d at 911–12.

So we turn back to the substance of the Tribe's complaint. The complaint does not *expressly* challenge the FERC Order, but the gravamen of the complaint—that the Gorge Dam must have fishways—is a direct attack on FERC's decision that no fishways were required. *See* FERC Order, 71 FERC ¶ 61159, at 61535. The Project's impact on fishery resources was a focal point of the relicensing process. *See*, *e.g.*, *id.* at 61530, 61535. FERC specifically considered whether fishways were required. *Id.* at 61535. And it determined that no fishways were required because neither the Secretary of Commerce nor the Secretary of the Interior had prescribed a fishway under 16 U.S.C. § 811, and because the Settlement Agreement, the terms of which were incorporated into the FERC Order, stated "that all issues concerning environmental impacts from relicensing of the Project, as currently constructed, are satisfactorily resolved by these Agreements." FERC Order, 71 FERC ¶ 61159, at 61535. Because the Tribe's action attacks "an important ingredient of the FERC license," *Cal. Save Our Streams*, 887 F.2d at 912, it is subject to section 313(b) and can be brought only in the court of appeals.[13] Thus, the district court correctly determined that it lacked subject matter jurisdiction.

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[13] Section 313(b) would also bar the Tribe from seeking review of the FERC Order in this court. To seek review in this court, the Tribe had to (1) apply for rehearing with FERC within thirty days after May 16, 1995 (the issuance date of the FERC Order), and (2) file a petition with this court within sixty days after

C

We next consider whether the district court properly dismissed the action given 28 U.S.C. § 1447(c), which, as noted, provides: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded [to state court]."[14]

Section 1447(c) states that a district court *shall* remand a removed case when it concludes that it lacks subject matter jurisdiction. But our precedent recognizes a futility exception to that requirement. "A narrow 'futility' exception to this general [remand] rule permits the district court to dismiss an action rather than remand it if there is 'absolute certainty' that the state court would dismiss the action following remand." *Glob. Rescue Jets, LLC v. Kaiser Found. Health Plan, Inc.*, 30 F.4th 905, 920 n.6 (9th Cir. 2022) (quoting

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FERC's order on the application for rehearing. *See* 16 U.S.C. § 825*l*(a)–(b).

[14] Seattle argues that § 1447(c) is inapplicable because Federal Rule of Civil Procedure 12(h)(3) controls when, as here, a case is validly removed, and the court later determines that it lacks subject matter jurisdiction on a basis different from the one that supported removal. Rule 12(h)(3) provides: "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). We need not and do not address Seattle's argument regarding the apparent conflict between § 1447(c) and Rule 12(h)(3), because as explained below, we agree with Seattle's alternative argument that even if § 1447(c) applies, dismissal was appropriate. Thus, for purposes of our opinion, we assume that § 1447(c) applies.

Polo v. Innoventions Int'l, LLC, 833 F.3d 1193, 1197–98 (9th Cir. 2016)).[15]

We have also observed that whether the futility exception remains good law is an open question given *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), in which the Supreme Court did not reject the exception outright but noted "the literal words of § 1447(c), which, on their face, give no discretion to dismiss rather than remand an action." *Polo*, 833 F.3d at 1197–98 (quoting *Int'l Primate*, 500 U.S. at 89). But in *Polo*, we declined to find that the exception had been overruled. *Id.* And just this year in *Global Rescue Jets*, we applied the exception and held that the district court had properly dismissed the action based on futility. 30 F.4th at 920 & n.6. Our precedent thus continues to recognize the futility exception.

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[15] We first recognized the futility exception in *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991):

> Where the remand to state court would be futile, however, the desire to have state courts resolve state law issues is lacking. We do not believe Congress intended to ignore the interest of efficient use of judicial resources.
>
> Because we are certain that a remand to state court would be futile, no comity concerns are involved. District court resolution of the entire case prevents any further waste of valuable judicial time and resources. The district court correctly denied the motion to remand and dismissed the state claims.

Id. at 1424–25. In *Polo*, we referred to the futility exception as the "*Bell* rule." 833 F.3d at 1197.

As a three-judge panel we are compelled to apply the futility exception unless it is "clearly irreconcilable with the reasoning or theory of intervening higher authority." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). But the Tribe has not argued that the futility exception has been overruled, and we decline to consider the issue sua sponte.[16] *See Polo*, 833 F.3d at 1198 (declining to consider sua sponte whether the futility exception had been overruled because plaintiff failed to make the argument). We are therefore bound by our precedent and must decide whether remand would be futile.

Remand here would be futile. A state court would lack jurisdiction for the same reason the district court lacked jurisdiction: section 313(b) of the FPA vests the federal courts of appeals with *exclusive* jurisdiction over the Tribe's action. Thus, "there is 'absolute certainty' that the state court would dismiss the action following remand," *Global Rescue Jets*, 30 F.4th at 920 n.6 (quoting *Polo*, 833 F.3d at 1198).

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[16] The Tribe has also failed to argue, and thus we do not consider, whether our case law on the futility exception is conflicting. *See Albingia Versicherungs A.G. v. Schenker Int'l Inc.*, 344 F.3d 931, 938 (9th Cir. 2003) ("[S]ection 1447(c) means that if it is discovered at any time in the litigation that there is no federal jurisdiction, a removed case must be remanded to the state court rather than dismissed."), *opinion amended and superseded on other grounds on denial of reh'g*, 350 F.3d 916 (9th Cir. 2003); *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257–58 (9th Cir. 1997) (stating that "[s]ection 1447(c) is mandatory, not discretionary" and citing with approval a Seventh Circuit case rejecting a futility exception).

IV

The district court correctly declined to remand because the complaint raises substantial federal questions. It also properly determined that it lacked subject matter jurisdiction under section 313(b) of the FPA, which vests exclusive jurisdiction in the federal courts of appeals. Finally, it was proper for the district court to dismiss the case under the futility exception to § 1447(c)'s remand requirement.

AFFIRMED.

W. FLETCHER, Circuit Judge, concurring in the result:

I concur in the result but do not concur fully in the reasoning of the majority's per curiam opinion.

The opinion accurately recounts that the Tribe brought suit in state court, contending that Seattle's operation of the Gorge Dam without a fishway violated federal and state law. Defendant Seattle removed the case to district court under 28 U.S.C. § 1441. The district court initially denied a motion to remand, concluding that a federal question had been sufficiently alleged in the complaint to support original federal question jurisdiction in that court. The district court later dismissed the suit for lack of subject matter jurisdiction, concluding that the suit challenged a licensing decision by the Federal Energy Regulatory Commission ("FERC"). The district court correctly held

that federal court subject matter jurisdiction over such a challenge lies exclusively in the courts of appeals. *See* 16 U.S.C. § 825*l*(b).

The question before us is not whether the district court was correct in its initial denial of the Tribe's motion to remand. If that were the question, the per curiam opinion's discussion at pp. 10–14 would be relevant. However, that is not the question. The question, rather, is whether the district court was correct in its ultimate dismissal for lack of subject matter jurisdiction.

Once it became clear to the district court that the Tribe's suit is a challenge to a FERC order, over which courts of appeals have exclusive subject matter jurisdiction, the district court correctly concluded that it did not have original subject matter jurisdiction. Absent the so-called "futility exception" (about which more in a moment), the required course would have been for the district court to remand the suit to the state court as improperly removed. This is true even though the district court's lack of subject matter jurisdiction had not been immediately apparent. *See* 28 U.S.C. § 1447(c) (second sentence) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

The basic removal statute is clear that removal to the district court is proper only for cases over which the district court has original jurisdiction. *See id.* § 1441(a) ("[A]ny civil action brought in a State court *of which the district courts of the United States have*

original jurisdiction[] may be removed . . . to the district court of the United States for the district . . . embracing the place where such action is pending." (emphasis added)). Because the district court did not have original subject matter jurisdiction over the suit, removal was improper and remand was required.

Arguing against remand in its briefing to our court, Seattle omitted the language italicized above when it paraphrased § 1441(a), thereby suggesting, incorrectly, that removal to district court is proper if *any* federal court would have subject matter jurisdiction. *See* Red Brief at 10–11 (" 'Removal presents a question of subject matter jurisdiction, which is reviewed de novo.' This Court may affirm a court's decision to deny a motion to remand 'on any basis supported by the record.' A defendant may remove a case filed in state court to *federal court over which a federal court would have jurisdiction.* 28 U.S.C. § 1441(c)." (emphasis added) (citations omitted)).

The only thing that saves this case from remand is our court's "futility exception," which allows a district court to dismiss rather than remand when it is obvious that the state court will have to dismiss the suit once it is remanded. I agree with my colleague Judge Bennett both that dismissal in this case was proper under our futility exception, and that the exception is based on a misinterpretation of the relevant statute.

BENNETT, Circuit Judge, joined by MURGUIA, Chief Judge, and FLETCHER, Circuit Judge, concurring:

Our precedent requires us to apply the futility exception to 28 U.S.C. § 1447(c)'s remand requirement, so I concur in our per curiam opinion. I write separately because the futility exception does not comport with § 1447(c)'s plain text. I believe that in the appropriate case, our court should reconsider the futility exception en banc and abandon it.

"[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *In re Stevens*, 15 F.4th 1214, 1217 (9th Cir. 2021) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion)). Section 1447 is entitled, "Procedure after removal generally," and subsection (c) provides, in relevant part: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." The statute is plain and unambiguous. Indeed, it could be neither simpler nor more straightforward. It covers all periods from removal to final judgment. And it requires a district court to remand a case to the state court from which the case was removed upon finding that it lacks subject matter jurisdiction.

The plain text admits of no exceptions, futility or otherwise. *See Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991) ("[T]he literal words of § 1447(c), which, on their face, give no discretion to dismiss rather than remand an action." (ellipsis omitted) (quoting *Maine Ass'n of*

Interdependent Neighborhoods v. Comm'r, Maine Dep't of Hum. Servs., 876 F.2d 1051, 1054 (1st Cir. 1989)).[17] The plain text ends our inquiry; there is no such thing as a futility exception to the statutory remand requirement.

Our cases recognizing the futility exception have never even attempted to reconcile the exception with the statutory text. We adopted the exception in *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991). In *Bell*, we created the exception because "[w]e d[id] not believe Congress intended to ignore the interest of efficient use of judicial resources." *Id.* at 1424–25. But we cited no authority that permitted us to amend the statute to match our belief. And there is none. We did rely on a First Circuit case, *Maine Association*, which we interpreted as "impl[ying] that [the First Circuit] *would* be willing to recognize" a futility exception. *Id.* at 1425 (emphasis added) (citing *Maine Ass'n*, 876 F.2d at 1054). But the First Circuit declined to adopt a futility exception, noting that "the literal words of § 1447(c), . . . on their face, give [the district court] no discretion to dismiss rather than remand an action." *Maine Ass'n*, 876 F.2d at 1054; *see also id.* ("And, we are unwilling to read such discretion into the statute, here, because we cannot say with absolute certainty that remand would prove futile."). And indeed, a few months after we decided *Bell*, the Supreme Court decided *International Primate*, in which it relied on

[17] Despite its discussion of the plain text of § 1447(c), the Court did not decide whether § 1447(c) allowed for a futility exception. *Int'l Primate*, 500 U.S. at 89.

Maine Association to suggest that there are no exceptions to § 1447(c)'s remand requirement. *Int'l Primate*, 500 U.S. at 88.

In *International Primate*, the Court did not decide whether there is a futility exception to § 1447(c)'s remand rule because it determined that uncertainties "preclude[d] a finding that a remand would be futile." *Id.* at 89. But as noted above, the Court suggested that no exceptions exist based on the plain statutory text: "We also take note, as did the First Circuit [in *Maine Association*], of 'the literal words of § 1447(c), which, on their face, give no discretion to dismiss rather than remand an action.' The statute declares that, where subject matter jurisdiction is lacking, the removed case '*shall* be remanded.'" *Id.* (ellipsis and citations omitted).[18] Thus, *International Primate* also supports the proposition that there is no futility exception under § 1447(c).

Indeed, several circuits have expressly rejected a futility exception based on *International Primate* and the plain language of the statute. *See Bromwell v. Mich. Mut. Ins. Co.*, 115 F.3d 208, 214 (3d Cir. 1997) ("In light of the express language of § 1447(c) and the Supreme Court's reasoning in *International Primate*, we hold that when a federal court has no jurisdiction of a case removed from a state court, it must remand and not dismiss on the ground of futility."); *Roach v. W. Va.*

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[18] Though dicta, we must give the Supreme Court's statement "due deference." *United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996).

Reg'l Jail & Corr. Facility Auth., 74 F.3d 46, 49 (4th Cir. 1996) ("[T]he futility of a remand to West Virginia state court does not provide an exception to the plain meaning of § 1447(c)." (citing *Int'l Primate*, 500 U.S. at 87–89)); *Smith v. Wis. Dep't of Agric., Trade & Consumer Prot.*, 23 F.3d 1134, 1139 (7th Cir. 1994) ("[T]he Supreme Court has squarely rejected the argument that there is an implicit 'futility exception' hidden behind the plain meaning of § 1447(c)." (citing *Int'l Primate*, 500 U.S. 72)); *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999) ("This provision [§ 1447(c)] is mandatory and may not be disregarded based on speculation about the proceeding's futility in state court." (citing *Int'l Primate*, 500 U.S. at 87–89)); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 496 (6th Cir. 1999) ("[T]he futility of a remand to state court does not provide an exception to the plain and unambiguous language of § 1447(c)."); *but see Perna v. Health One Credit Union*, 983 F.3d 258, 273 (6th Cir. 2020) (noting that the Sixth Circuit has dismissed a removed case "when [its] holding conclusively establishes not just that [it] lack[s] jurisdiction but also that the state court lacks jurisdiction as well").

The Fifth Circuit has joined us in expressly adopting a futility exception to § 1447(c). *See Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990). But the Fifth Circuit's case law is as unpersuasive as ours. In *Asarco*, the Fifth Circuit declined to remand because it would be "a futile gesture, wasteful of scarce judicial resources." *Id.* But the court did not even

mention § 1447(c). *Id.* And *Asarco* was decided before *International Primate.*[19]

In sum, § 1447(c) is clear: a district court must remand a removed case when it lacks subject matter jurisdiction. While there may be valid policy reasons for the futility exception, "it is not our role to choose what we think is the best policy outcome and to override the plain meaning of a statute, apparent anomalies or not." *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168, 1175 (9th Cir. 2017), *aff'd*, 139 S. Ct. 22 (2018). I therefore encourage our court to reconsider and abandon the futility exception in an appropriate case.

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[19] In a more recent unpublished disposition, the Fifth Circuit confirmed that it recognizes a futility exception. *See Boaz Legacy, L.P. v. Roberts*, 628 F. App'x 318, 320 & n.10 (5th Cir. 2016). But *Boaz*, like *Asarco*, did not discuss how concerns about wasting judicial resources trump the clear text of § 1447(c).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SAUK-SUIATTLE INDIAN TRIBE, Plaintiff, v. CITY OF SEATTLE and SEATTLE CITY LIGHT, a subdivision of the City of Seattle, Defendants.	NO. 2:21-cv-1014 **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS** (Filed Dec. 2, 2021)

I. INTRODUCTION

This matter comes before the Court on a Motion to Dismiss filed by Defendants City of Seattle and Seattle City Light.[1] Plaintiff, the Sauk-Suiattle Indian Tribe, filed a complaint seeking a declaration that the "presence and operation" of the Gorge Dam, a hydroelectric dam owned and operated by Defendants, violate the constitutions of Washington and the United States, in addition to state and federal law, by blocking the passage of fish. For the following reasons, the Court concludes that it lacks jurisdiction over Plaintiff's claims and that Defendants' Motion to Dismiss must therefore be granted.

[1] Seattle City Light is not a distinct legal entity. Nevertheless, the Court will refer to City Light and the City of Seattle, collectively, as "Defendants."

II. BACKGROUND

A. The Gorge Dam and Plaintiff's Claims for Relief

The Gorge Dam in Newhalem, Washington is one of three dams constituting the Skagit River Hydroelectric Project (the "Project"), which is owned and operated by Defendants. Am. Comp., ¶ 4.A, Dkt. No. 1, Ex. A. That Project, which provides electricity to residents of the City of Seattle, is located within the Ross Lake Recreational Area in North-Central Washington, and is bounded by the North Cascades National Park, and the Mount Baker-Snoqualmie, Okanogan, and Wenatchee National Forests. *See* Order Accepting Settlement Agreement, Issuing New License, and Terminating Proceeding ("Relicensing Order"), 71 FERC ¶ 61159, 61528 (May 16, 1995). The Gorge Dam is the furthest downriver of the three dams, and as constructed, "blocks fish passage within the Skagit River from the area below to the area above such dam." Am. Compl., ¶¶ 4.B, 4.C.

B. The Skagit River Hydroelectric Project and FERC's 1995 Relicensing Order

Construction of the Skagit River Project was completed in the early 1920s, and in 1927, the Federal Power Commission ("FPC") issued Defendants a 50-year license to operate the Project. *See* Relicensing Order, 71 FERC at 61,552.[2] In 1977, Defendants applied

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[2] Subsequent to expiration of that license in 1977 until issuance of the new license in 1995, FERC issued annual licenses

to the Federal Energy Regulatory Commission ("FERC" or the "Commission"), the FPC's successor agency, for a new license. *Id.* at 61,548, n. 1. The following year, FERC instituted a proceeding to study the impact of the Project's "flow regime" on the Skagit River fisheries resource. *Id.* at 61,527. Nearly two decades later, in 1995, FERC issued the "Order Accepting Settlement Agreement, Issuing New License, and Terminating Proceeding." *Id.* That Relicensing Order, as its title indicates, terminated the fisheries study proceeding and accepted the settlement agreements between Defendants and multiple intervenors in the proceeding, including Plaintiff.[3] The Relicensing Order incorporated provisions of those agreements into issuance of a new license, which authorized operation of the Project for another 30 years As outlined in the Relicensing Order, those settlement agreements—ten in all—concerned myriad aspects of the Project, and "purport[ed] to resolve all issues related to project operation, fisheries, wildlife, recreation and aesthetics, erosion control,

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under the terms and conditions of the original license. Relicensing Order, 71 FERC at 61,159, n. 1.

[3] Intervenors in the proceeding, in addition to Plaintiff, included the Swinomish Indian Tribal Community and the Upper Skagit Tribe; the National Marine Fisheries Service; the Washington State Department of Game; the North Cascades Conservation Council; the Washington State Department of Fisheries; the Secretary of the Interior, National Park Service and Fish and Wildlife Service; the Department of Ecology, Washington State; and the U.S. Department of Agriculture, Forest Service. Relicensing Order, 71 FERC at 61,528-29.

archaeological and historic resources, and traditional cultural properties." *Id.* at 61,527.

Particularly relevant to this lawsuit, the Relicensing Order approved a "Fisheries Settlement Agreement" joined by Defendants and several of the intervenors, including Plaintiff, which agreement "establishe[d] Seattle's obligations relating to fishery resources affected by the project, including numerous provisions to protect resident and migratory fish species." *Id.* at 61,530. To that end, the settlement incorporated an "Anadromous Fish Flow Plan," which was "intended to mitigate the impacts of daily and seasonal downstream fluctuations." *Id.* The flow plan prescribed "a filling schedule for Ross Lake reservoir, flows downstream of Gorge powerhouse, flow releases and limits to protect salmon and steelhead spawning and development, requirements for dry water years, advance scheduling of hourly generation," and other measures. *Id.*

The settlement agreement acknowledged, however, that:

> even with the complete implementation of the Anadromous Fish Flow Plan, some level of these impacts would continue to occur. Fish will still be exposed to daily and seasonal flow fluctuations, which will result in the continuation of chronic fry stranding at a reduced, unknown level. In addition, the configuration and operation of the project has rendered some formerly productive fish habitat inaccessible.

Id. In addition to the flow plan, therefore, the fisheries settlement also incorporated an "Anadromous and Resident Non-flow Plan," which was "specifically intended to address these residual impacts and habitat losses." *Id.* That plan provided that "[a]dditional non-flow measures will be implemented for enhanced steelhead production, chinook salmon research, fish habitat development, sediment reduction, and trout protection and production." *Id.* at 61532. It was anticipated that "Seattle's expenditures to accomplish the nonflow plan [would] total $6,320,000 over the term of the license." *Id.* Conditions of both the flow plan and the non-flow plan were incorporated, through the Fisheries Settlement Agreement, into the 1995 license.

Neither the Department of the Interior nor the Department of Commerce, as authorized under 16 U.S.C. §811, prescribed as a condition of relicensing the construction of a fishway at Gorge Dam (or any of the other two dams in the Project) to enable the passage of migrating fish. Therefore, while the Relicensing Order conceded that "[a] short reach of the river below Gorge dam will continue to be dewatered, and the slight detriment to resident and anadromous fish will persist," the license was issued without any requirement for fish passageway.[4] Relicensing Order, 71 FERC at 61,535. Plaintiff, which was a party to the Fisheries Settlement Agreement, did not seek review of the

[4] FERC did "reserve [its] authority to require fish passage in the future, should circumstances warrant." Relicensing Order, 71 FERC at 61,535.

Relicensing Order or otherwise appeal the terms of the license.

Defendants' 30-year license is scheduled to expire in 2025, and the reauthorization process has already begun, again involving numerous state and federal agencies and other stakeholders, including Plaintiff. *See* Study Plan Determination for the Skagit River Hydroelectric Project dated July 16, 2021, Request for Jud. Not., Dkt No. 12, Ex. 6. There is no dispute that the impact of the Gorge Dam and the entire Project on the habitat of salmon and other resident and anadromous fish in the Skagit River will be an issue central to the debate over conditions and issuance of a new license.

C. Plaintiff's Complaint and Procedural History

Plaintiff asserts that the "presence and operation" of Defendants' dam, and in particular Defendants' failure to provide a fishway, violate the 1848 Act Establishing the Territorial Government of Oregon (the "1848 Establishing Act"), which provided, in part relevant here, that "the rivers and streams of water in said Territory of Oregon [including an area that would later become Washington State] in which salmon are found, or to which they resort, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams." ch. 177, 9 Stat. 323. Plaintiff also argues that the dam constitutes a

nuisance, and violates the common law of Washington State. *Id.*, ¶¶ 5.C., 5D. Plaintiff seeks equitable relief, including a declaration that Defendants are in violation of the law, and an injunction requiring Defendants to provide a means for migratory fish species to bypass the dam, or prohibiting Defendants "from maintaining such dam in its present condition." *Id.*, ¶¶ 6.A.-6.D.

Plaintiff filed the operative Amended Complaint in the Skagit County Superior Court on July 26, 2021. Defendants removed the complaint to this Court. Plaintiff moved for remand, which Defendants opposed. On November 9, 2021, this Court ruled that Plaintiff's Supremacy Clause claim, asserted at ¶¶ 5.B. and 6.B. of its Amended Complaint, constituted a federal question over which this Court had jurisdiction; and that in addition, several of Plaintiff's claims raised a "disputed, substantial federal issue" requiring interpretation of the 1848 Establishing Act. The Court also asserted supplemental jurisdiction over Plaintiff's remaining state-law claims, concluding they "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." *See* Order Denying Plaintiff's Motion for Remand, Dkt. No. 19.

D. Defendants' Motion to Dismiss

Defendants' Motion to Dismiss challenges Plaintiff's claims on multiple fronts, starting with a threshold challenge to this Court's jurisdiction to hear those claims. Defendants characterize the claims as a grossly

untimely appeal of FERC's 1995 Relicensing Order, which by statute must be made directly to the U.S. Court of Appeals "or not at all." Mot. to Dismiss at 11 (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958)). Invoking the prudential doctrine of "primary jurisdiction," Defendants also ask the Court to defer any ruling on these issues to FERC, which they argue have primary jurisdiction over the question of fish passage at the dams. *Id.* at 12-13.

On the merits, Defendants argue that the 1848 Establishing Act is no longer good law, as it was never incorporated into Washington, either when Washington became a territory distinct from Oregon, or upon its statehood. Defendants alternatively argue that even if that law was continued in force in Washington, it was repealed, on any of several possible occasions, both by the State of Washington and by the U.S. Congress. Regarding Plaintiff's state-law claims, including those brought under Washington nuisance and common law, Defendants argue they are both conflict- and field-preempted by the Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, ("FPA"). Mot. to Dismiss at 12-15. On November 17, 2021, the Court heard oral argument on the Motion to Dismiss.

III. DISCUSSION

A. Standard on Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1) For Lack of Jurisdiction

Federal Rule 12(b)(1) authorizes a party to move for dismissal for lack of subject matter jurisdiction. Under this rule, dismissal is appropriate "if the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *In re Dynamic Random Access Memory Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008). Once a defendant has invoked Fed. R. Civ. P. 12(b)(1) in a challenge to a court's competence to hear a claim, the plaintiff "bears the burden of establishing subject matter jurisdiction." *Id.*, 546 F.3d at 984; *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. . . . It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.") (citations omitted).

B. This Court Lacks Jurisdiction to Review Plaintiff's Challenge to the 1995 FERC License and Relicensing Order

Defendants' threshold challenge to this Court's jurisdiction relies on Section 313, the "exclusive jurisdiction" provision of the FPA, which provides, in relevant part:

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.

16 U.S.C. § 8251(b). Over 60 years ago, the Supreme Court interpreted Section 313 to mean that appeal to the appropriate federal circuit court is the "the specific, complete and exclusive mode for judicial review of the Commission's orders." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). The provision "necessarily preclude[s] *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review," and requires that "all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all." *Id.* at 336. Written in the broadest terms, *City of Tacoma* made clear that the exclusive

jurisdiction provision deprives other forums of jurisdiction even for issues that were not raised but "could and should have been." *Id.* at 339 ("[E]ven if it might be thought that this issue was not raised in the Court of Appeals, it cannot be doubted that it could and should have been, for that was the court to which Congress had given 'exclusive jurisdiction to affirm, modify, or set aside' the Commission's order.").

Plaintiff does not dispute that Section 313 of the FPA would deprive this Court of jurisdiction over a direct challenge to a FERC order based on federal claims. Resp. Br. at 7 ("It is clear that in the Ninth Circuit, attempts to bring claims under other federal laws . . . must give way to the FPA where 'the practical effect of the action in district court is an assault on an important ingredient of the FERC license.'") (citing *Cal. Save Our Streams Council, Inc. v. Yuetter*, 887 F.2d 908, 912 (9th Cir. 1989)). Plaintiff argues, however, that this jurisdictional prescription does not apply to the claims in this case, because (1) the Ninth Circuit has not applied this provision to claims, like those in this case, that may be based on state law; and (2) Plaintiff's claims, it argues, are "wholly collateral" to the FERC order, not "an assault on an important ingredient of the FERC license." Resp. Br. at 7 (citing *Yeutter*, 887 F.2d at 912). Plaintiff's argument fails on both points.

As to its first contention, Plaintiff apparently overlooks that the claims dismissed for lack of jurisdiction in the seminal case of *City of Tacoma* were brought under state law. *See* 357 U.S. at 331. Furthermore, the

Ninth Circuit and other courts have unfailingly interpreted the FPA's exclusive jurisdiction clause, and functionally identical clauses in other federal statutes, as remarkably strict and broad, refusing to draw distinctions based on the substance or form of the claims asserted. *See*, *e.g.*, *Yeutter*, 887 F.2d at 912; *see also Pub. Watchdogs v. S. California Edison Co., Inc.*, 984 F.3d 744, 766 (9th Cir. 2020) ("Like the plaintiffs in [*Yeutter*, plaintiffs here] cannot avoid the Hobbs Act's exclusive avenue of judicial review by artfully pleading its challenge to the 2015 License Amendments . . . [as a] public nuisance, or strict products liability claim."); *Otwell v. Alabama Power Co.*, 47 F.3d 1275, 1281 (11th Cir. 2014) ("Appellants cannot escape [16 U.S.C.] § 8251(b)'s strict judicial review provision by arguing that they are pursuing different claims and different relief than the parties before the FERC."), *aff'ing Otwell v. Alabama Power Co.*, 944 F. Supp. 2d 1134, 1154 (N.D. Ala. 2013) (acknowledging that while "there is an interplay between federal regulation of hydroelectric projects and state law property rights," "once an activity is exclusively regulated and sanctioned by a FERC license, an aggrieved party may not use state law tort as a vehicle to interfere with that sanctioned activity"); *Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989) ("[W]e see nothing in the substantive character of [plaintiff's] challenges to the FERC order that would exempt those arguments from the statutory appellate scheme."); *City of Rochester v. Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979) ("The choice of forum is, as we have said, for Congress and we cannot imagine that Congress intended the exclusivity *vel non*

of statutory review to depend on the substantive infirmity alleged."). The reasoning contained in these cases necessarily supports the conclusion that a challenge to a FERC action based on state law claims—that is, "*any claim* inhering in the controversy"—must be brought in the Court of Appeals, "or not at all." *City of Tacoma*, 357 U.S. at 336 (emphasis added). Plaintiff has not identified any precedent that would support drawing a distinction here between state and federal law claims.[5]

As to Plaintiff's second contention, it is immaterial for purposes of this Court's jurisdiction that Plaintiff's claims are not an explicit or direct challenge to FERC's authority or to the Relicensing Order itself. Cases since *City of Tacoma* have repeatedly invoked the exclusive jurisdiction provision as applying with notable breadth to "any issue inhering in the controversy." As one court put it, "[we] would be hard pressed to formulate a doctrine with a more expansive scope." *Williams Nat. Gas Co.*, 890 F.2d at 262. As noted above, in assessing whether the exclusive jurisdiction provision should apply, a court is to look not to the nature of the claims asserted, but to whether "the practical effect of the action in district court is an assault on an important ingredient of the FERC license." *Yeutter*, 887 F.2d at 912 (Courts of Appeals have exclusive jurisdiction over "questions arising under the FERC

[5] In light of the clear and resolute pronouncements in these cases, Justice Harlan's observation that he did "not understand the Court to suggest that the Federal Power Act endowed the Commission and the Court of Appeals with authority to decide any issues of state law," in *dicta* in a concurring opinion, is simply not controlling.

licenses."); *Kovac v. Wray*, 363 F. Supp. 3d 721, 741 (N.D. Tex. 2019) ("exclusive jurisdiction provisions [like Section 313] bar litigants from "requesting the District Court to enjoin action that is the outcome of the agency's order.") (citing *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984)). Section 313 even applies, as the Supreme Court originally held, to challenges "to the legal competence of the licensee to execute" the terms of the FERC license—precisely how the Court would characterize the claims in this case. *City of Tacoma*, 357 U.S. at 336; *see* Am. Compl., ¶¶ 5.A.-D. (asserting that "[t]he presence and operation of such dam by respondent . . . violate[ ]" state and federal statutory and constitutional law).

It is true that Section 313 might not bar a district court's review of issues that are "wholly collateral to a statute's review provisions and outside the agency's expertise." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994) (citation omitted). However, the question that Plaintiff has raised here—whether Defendants should be required to construct a fishway—is not merely tangentially or coincidentally related to the operation of the dam; it is one that Congress explicitly directed FERC to consider in the licensing of hydroelectric projects and furthermore, was *actually considered and explicitly rejected* in proceedings leading up to issuance of *this* Relicensing Order.[6] *See* 16 U.S.C.

[6] In fact, while it does not appear that Plaintiff (or any other intervenor) availed itself of the procedure, the statute entitles "any party to the proceeding . . . to a determination on the record," and an "agency trial-type hearing of no more than 90 days, on any

§ 811 (FERC "shall require the construction, maintenance, and operation by a licensee at its own expense of . . . such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate."). As laid out in a separate, enumerated section of the Relicensing Order, titled "Fish Passage," FERC observed that the FPA

> states that the Commission shall require construction, maintenance, and operation by a licensee of such fishways as may be prescribed by the Secretary of Commerce or of the Interior. As parties to the Settlement Agreement, both Interior (FWS) and Commerce (NMFS) agreed (along with other parties to the Settlement Agreement) "that all issues concerning environmental impacts from relicensing of the Project, as currently constructed, are satisfactorily resolved by these Agreements." Neither agency prescribed a fishway or requested a reservation of fishway prescription authority.

Relicensing Order, 71 FERC at 61,535. Plaintiff's analogy—arguing that an attempt to enforce a hypothetical state law that the dam be painted red would not be an attack on a FERC license—is compelling but inapt. *See* Resp. Br. at 6. It could hardly be argued in such a case that Section 313 would apply. Neither Congress nor FERC has prescribed what color the Gorge Dam should be painted; unlike an injunction requiring construction of a fishway, enforcement of a state law

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disputed issues of material fact with respect to such fishways." 16 U.S.C. § 811.

requiring the dam be painted red would therefore be "wholly collateral" to FERC's expertise. The analogy only serves to highlight by contrast how intertwined Plaintiff's claims are with the license in this case.

Finally, the Court notes that in this case, the appropriately strict application of the FPA's exclusive jurisdiction provision is not unjust to the Plaintiff. The relicensing process, judging from the lengthy duration of the proceedings, the number of parties involved, and the complexity of the settlement agreements, as outlined in the Relicensing Order, was thorough and exhaustive, resulting in a "very complex and delicate settlement." Relicensing Order, 71 FERC at 61,532 ("The Settlement Agreement filed by the parties contains the resolution of a wide range of complex and conflicting areas of interest to the various parties, and is the product of several years of negotiations among these parties."). Plaintiff was a named intervenor and a party to negotiations over the relicensing of the Skagit River Project, and ultimately to the settlement agreement "purport[ing] to resolve all issues related to project operation, fisheries, wildlife" and other issues related to the Project." *Id.* at 61,527. It had actual knowledge of the contents of that agreement, and every opportunity to challenge them, if it had chosen, through the proper channels.

Furthermore, Plaintiff has an imminent opportunity once again to advance its position before FERC, as the end of the 30-year license term approaches, and proceedings related to relicensing the Project are underway. FERC and other interested parties will revisit

whether fishways or other ameliorative measures should be included in the relicensing of the Project.[7] In the event Plaintiff's claims are not resolved to its satisfaction in the next licensing order, Plaintiff may attempt to advance claims asserted in this lawsuit in an appeal in the proper appellate forum. Conversely, requiring Defendants (not to mention FERC and the myriad other agencies and stakeholders party to the Relicensing Order) to revisit the terms set out in the 1995 license would impose on all parties a burden that Congress deliberately sought to relieve. *See Yeutter*, 887 F.2d at 912 ("After the license applicant had

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[7] The Relicensing Order does not give a substantive explanation for why fishways were not prescribed in the 1995 license for the Skagit River Project, other than by a reference in FERC's Environmental Assessment, attached to the Relicensing Order, which opines that "[h]istorically, the upper reach of the Skagit River was not important for anadromous fishes. . . . Historical information indicates that, under pre-project conditions, the narrow canyon, high falls and extremely turbulent rapids in the Gorge reach of the river above Newhalem prevented anadromous fish from migrating much above the current locations of Gorge and Diablo dams." Relicensing Order, 71 FERC at 61,569. The science and public opinion concerning the preservation of salmon habitat may have advanced since these observations were made. *See* Study Plan Determination for the Skagit River Hydroelectric Project, Dkt. No. 12, Ex. 6 at App. B-28 (in responding to proposal regarding study of fish passage feasibility, "Skagit County states that City Light should not be the lead investigator in the fish passage study because it has spent many years and considerable resources undermining the idea that anadromous fish utilized the river upstream of the project's dams. Therefore, Skagit County asserts that `it defies reason to suggest that Seattle should now lead and control what is supposed to be an objective analysis of that very question.' Accordingly, Skagit County requests that the Commission require the federal agencies and tribes to co-lead the study.").

initially fought his way through the administrative proceedings, he would then have to grind through the district court and, almost certainly, through the appeal as of right to the circuit court. . . . Appellants' theory would resurrect the very problems that Congress sought to eliminate.").

Ultimately, granting the injunction Plaintiff seeks would prohibit the Gorge Dam from operating as the FERC license currently in place plainly allows and requires; the Court would be saying that Defendants cannot do that which a FERC order explicitly says they can. It is difficult to imagine a challenge more "inescapably intertwined" with FERC's authority than that. Such questions must be answered in the U.S. Court of Appeals, "or not at all." *City of Tacoma*, 357 U.S. at 336.

IV. CONCLUSION

Because the Court concludes that it lacks jurisdiction to hear any of Plaintiff's claims, all of which "inhere in the controversy" concerning an explicit provision of the 1995 FERC Relicensing Order, the Court need not—indeed, lacks jurisdiction to—determine whether any of Plaintiff's claims would succeed on the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). For the foregoing reasons, the Court hereby GRANTS Defendants' Motion to Dismiss.

DATED this 2nd day of December, 2021.

/s/ Barbara J. Rothstein
Barbara Jacobs Rothstein
U.S. District Court Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAUK-SUIATTLE INDIAN TRIBE, Plaintiff-Appellant, v. CITY OF SEATTLE; SEATTLE CITY LIGHT, a subdivision of the City of Seattle, Defendants-Appellees.	No. 22-35000 D.C. No. 2:21-cv-01014-BJR Western District of Washington, Seattle ORDER (Filed Jan. 26, 2023)

Before: MURGUIA, Chief Judge, and W. FLETCHER and BENNETT, Circuit Judges.

Plaintiff Appellant Sauk-Suiattle Indian Tribe filed a petition for rehearing en banc. Dkt. No. 46. Chief Judge Murguia and Judge Bennett have voted to deny the petition for rehearing en banc, and Judge Fletcher so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

28 U.S. Code § 1441 - Removal of civil actions

(a) GENERALLY.—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

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28 U.S. Code § 1447 – Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed

by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

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16 U.S. Code § 8251 - Review of orders

(b) JUDICIAL REVIEW

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the

Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No 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 unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the

Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

SEC. 17. SAVINGS PROVISIONS.

(a) IN GENERAL.—Nothing in this Act shall be construed as authorizing the appropriation of water by any Federal, State, or local agency, Indian tribe, or any other entity or individual. Nor shall any provision of this Act—

(1) affect the rights or jurisdiction of the United States, the States, Indian tribes, or other entities over waters of any river or stream or over any ground water resource;

(2) alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by the States;

(3) alter or establish the respective rights of States, the United States, Indian tribes, or any person with respect to any water or water-related right;

(4) affect, expand, or create rights to use transmission facilities owned by the Federal Government;

(5) alter, amend, repeal, interpret, modify, or be in conflict with, the Treaty rights or other rights of any Indian tribe;

(6) permit the filing of any competing application in any relicensing proceeding where the time for filing a competing application expired before the enactment of this Act; or

(7) modify, supersede, or affect the Pacific Northwest Electric Power Planning and Conservation Act.