The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In Re: SAUK-SUIATTLE INDIAN TRIBE, Plaintiff, v. CITY OF SEATTLE and SEATTLE CITY LIGHT, a subdivision of the City of Seattle, Respondents.	Case No. 2:21-cv-01014 (BJR) **MOTION FOR DISMISSAL UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6)**

THIS MATTER involves a dispute between Plaintiff Sauk-Suiattle Indian Tribe ("Sauk-Suiattle") and Respondents City of Seattle and Seattle City Light ("City Light") over "the presence and operation" of Gorge Dam, one of three dams comprising the Skagit River Hydroelectric Project ("Project"). City Light owns and operates the Project under a license administered by the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act ("FPA"), 16 U.S.C. § 791 *et seq*. Sauk-Suiattle seeks declaratory relief and an injunction to require fish passage or to prohibit maintenance of the Gorge Dam.

The Court should dismiss Sauk-Suiattle's decades-belated claims because the congressional acts that were applicable to the Territories of Oregon and Washington

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("Establishing Acts"), upon which Sauk-Suiattle relies,[1] were repealed by Congress and the Washington legislature, and therefore present no cognizable legal theory for relief. Fed. R. Civ. P. 12(b)(6). Sauk-Suiattle's remaining grounds for relief—Washington common law and tort law[2]—represent a collateral attack upon City Light's existing FERC license, which Sauk-Suiattle supported and did not appeal when it was issued in 1995. Furthermore, Sauk-Suiattle's common law and tort law grounds for requiring fish passage at the Gorge Dam in the future run afoul of the primary jurisdiction doctrine, as City Light and Sauk-Suiattle are currently engaged in relicensing proceedings at FERC. FERC will determine as part of the pending relicensing proceedings whether to order fish passage at Gorge Dam. For these additional reasons, the Court should dismiss Sauk-Suiattle's action because it does not have jurisdiction to consider attacks on City Light's existing license (Fed. R. Civ. P. 12(b)(1)), and FERC has primary jurisdiction over City Light's active relicensing proceedings. Finally, the Court also should dismiss Sauk-Suiattle's state law grounds for declaratory and injunctive relief based on preemption, and for this reason, Sauk-Suiattle also fails to state a cognizable legal theory for relief. Fed. R. Civ. P. 12(b)(6).

I. BACKGROUND

The FPA establishes a "broad federal role in the development and licensing of hydroelectric power" projects utilizing the navigable waters and located on certain lands of the United States. *California v. F.E.R.C.*, 495 U.S. 490, 496 (1990). A FERC license imposes conditions on the operator of a hydroelectric project to ensure "the adequate protection, mitigation, and enhancement of fish." *See* 16 U.S.C. § 803(a)(1). Section 18 requires FERC to

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[1] Dkt. No. 5 (hereinafter "Am. Compl." ¶¶ 5.A., 5.B., 6.A., 6.B.); Dkt. No. 7 (hereinafter "Remand Mot." pp. 10–11).

[2] Am. Compl. ¶¶ 5.C., 5.D., 6.C., 6.D.; Remand Mot. pp. 3, 10.

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order a licensee to construct, maintain, and operate fishways if prescribed by either the federal Secretary of Commerce or the Interior. *See id.* § 811.

The Project has operated since the early 1920s. *See* Order Accepting Settlement Agreement, Issuing New License, and Terminating Proceeding, 71 FERC 61,159, 61,552 (May 16, 1995), 1995 WL 301337 ("1995 Relicensing Order").[3] In 1927, FERC's predecessor agency, the Federal Power Commission ("FPC"), licensed the Project for 50 years.[4] *See also* 1995 Relicensing Order at 61,527. Sauk-Suiattle has availed itself of FERC's pervasive jurisdiction over the Project since at least 1978, entering into a 1981 settlement agreement with City Light that established a flow regime and required flow-related fishery studies.[5] Sauk-Suiattle expressly accepted the conditions that FERC imposed on its approval of the settlement.[6]

Approximately ten years later, in the proceeding on City Light's application for a new license to replace the expired 1927 license, City Light, Sauk-Suiattle, and others reached multiple settlement agreements, resolving "all issues related to [P]roject operation[s], fisheries, wildlife, recreation and aesthetics, erosion control, archaeological and historic resources, and traditional cultural properties." 1995 Relicensing Order at 61,527, 61,529. Sauk-Suiattle signed onto the over-arching Offer of Settlement and the Fisheries Settlement Agreement. *Id.* at 61,529. The fisheries settlement established City Light's "obligations relating to fishery resources affected by the project, including numerous provisions to protect resident and migratory fish species." *Id.* at 61,530. FERC adopted the settlement agreements through the 1995 Relicensing Order, which authorized maintenance and operation of the

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[3] *See* City Light's Request for Judicial Notice ("Jud. Not. Req."), Ex. 4, filed concurrently herewith.

[4] *See* Federal Power Commission, License on Government Lands, Project No. 553, Washington, City of Seattle (Oct. 28, 1927) ("1927 License"), Jud. Not. Req., Ex. 1.

[5] Order Conditionally Approving Interim Offer of Settlement, 15 FERC 61,144 at 61,329 (May 12, 1981), 1981 WL 35104; *see also* 1995 Relicensing Order at 61,527. *See* Jud. Not. Req., Ex. 2.

[6] Order Declaring Interim Settlement Effective and Partially Releasing a Condition, 16 FERC 61,044 at 61,078 (July 24, 1981), 1981 WL 33308. *See* Jud. Not. Req., Ex. 3.

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Project for another 30 years. *See id.* at 61,532. For the duration of the license, the Fisheries Settlement Agreement "establishes [City Light's] obligations relating to fishery resources affected by the [P]roject." *Id*. at 61,530, 61,532.

Although the Secretaries of Commerce and the Interior could have required that the 1995 license include construction, maintenance, and operation of fishways, those agencies chose not to require fishways. Instead they, "along with" the other settling parties, including Sauk-Suiattle, concurred "all issues concerning environmental impacts from relicensing of the Project, as currently constructed, are satisfactorily resolved[.]" *Id*. at 61,535. FERC, therefore, did not require City Light to construct and operate fishways at Gorge Dam, though FERC reserved its "authority to require fish passage in the future, should circumstances warrant" and "after notice and opportunity for hearing." *Id*. at 61,535, n.28.[7]

The 1995 Relicensing Order provided a 30-year license that will expire in 2025. Since early 2020, City Light has been engaged in a multi-year FERC process to obtain a new license. Numerous federal and state resource agencies, affected Tribes (including Sauk-Suiattle), and interested parties are actively involved and again, fisheries issues are an important part of the process. *See* Study Plan Determination for the Skagit River Hydroelectric Project dated July 16, 2021 ("Study Plan Determination").[8] Sauk-Suiattle commented on several aspects of the proposed study plan (*id.* at 1, 2, B-3, B-5, B-30), and the plan includes a study of the feasibility of fish passage at Gorge Dam. *Id.* at A-1–A-4.

II. ARGUMENT

A. Standard of Review.

1. Dismissal Under Federal Rule of Civil Procedure 12(b)(6).

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[7] In 2011, Sauk-Suiattle, City Light and other parties to the Fisheries Settlement Agreement revised it, but again did not require fishways. *See* Revised Fisheries Settlement Agreement, Skagit River Hydroelectric Project, FERC No. 553, at 2 (Jan. 2011). Jud. Not. Req., Ex. 5.

[8] *See* Jud. Not. Req., Ex. 6.

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Dismissal under Rule 12(b)(6) may be based on plaintiff's failure to assert a cognizable legal theory. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (as amended). The Court may consider the "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The Court must accept as true the complaint's well-pled facts; however, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper 12(b)(6) motion to dismiss. *See Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

2. Dismissal Under Federal Rule of Civil Procedure 12(b)(1).

Federal courts are courts of limited jurisdiction, and, as such, they possess only the power authorized to them by the Constitution or statute. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). If a court determines it lacks subject matter jurisdiction, it must dismiss the action. *See* Fed. R. Civ. P. 12(b)(1), 12(h)(3). A defendant may move to dismiss a claim under Rule 12(b)(1) by mounting a facial or factual attack. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A facial attack "asserts the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A factual attack challenges the truth of the allegations asserted. *See id.* The Court may rely on evidence extrinsic to the pleadings to resolve factual disputes concerning jurisdiction without a motion to dismiss converting to one for summary judgment. *See McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *see also Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983).

B. The Establishing Acts' Prohibition on Dams Without Fishways Have Been Repealed.

The Court should dismiss pursuant Rule 12(b)(6) because the Establishing Acts that serve as the primary grounds for Sauk-Suiattle's prayer for relief were repealed by Congress

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and the Washington legislature. Therefore, Sauk-Suiattle fails to state a cognizable legal theory to support its case. Section 12 of the 1848 congressional act establishing the Territory of Oregon prohibited dams from impeding fish passage. *See* An Act to Establish the Territorial Government of Oregon, ch. 177, 9 Stat. 323 (the "1848 Establishing Act") (Attachment A).[9] Sauk-Suiattle alleges Section 12 of the 1848 Establishing Act has not been repealed, and is therefore supreme federal law that was also adopted into Washington's Constitution. *See* Am. Compl. ¶¶ 5.A., 5.B., 6.A., 6.B. Sauk-Suiattle is mistaken, and the Court need not accept these conclusory allegations of law as true. *See Vasquez*, 487 F.3d at 1249; *see also Sprewell*, 266 F.3d at 988. Congress repealed the prior prohibition in the early 1900s and Washington repealed the prohibition in 1890, so there is no lingering conflict of federal law between the 1848 Establishing Act and the FPA.

On August 14, 1848, Congress established the Territory of Oregon. *See* 1848 Establishing Act. Section 12 of the 1848 Establishing Act prohibited dams without fishways. *Id*. In 1853, Congress established the Territory of Washington. *See* An Act to Establish the Territorial Government of Washington, ch. 90, 10 Stat. 172 (1853) (the "1853 Establishing Act") (Attachment B). Section 12 of the 1853 Establishing Act provided that "the laws now in force in said Territory of Washington, by virtue of the legislation of Congress in reference to the Territory of Oregon, which have been enacted and passed subsequent to the first day of September, eighteen hundred and forty-eight … are hereby, continued in force in said Territory of Washington until they shall be repealed or amended by future legislation." *Id*. § 12. Thus, when Congress formed the Territory of Washington in 1853, it directed the laws from the Territory of Oregon, that were already in force and enacted after September 1, 1848,

[9] As a courtesy to the Court, Attachments A through J contain federal and Washington statutes and bill reports that are not easily accessible through free electronic sources.

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to become law in the Territory of Washington.[10]

In 1873, Congress published the Revised Statutes to correct errors and consolidate the laws of the United States in force as of December 1, 1873, and as a result, completely revised the 1853 Establishing Act. *See* 23 Rev. Stat. §§ 1839–1976 (1875) (Attachment C); *see also* 74 Rev. Stat. §§ 5595–5596 (1875) (Attachment D). When it created the Revised Statutes, Congress repealed "[a]ll acts of Congress passed prior to [December 1, 1873]" that were related to statutes included in the revision, and consolidated the revised laws in the seventy-three titles of the Revised Statutes. 74 Rev. Stat. § 5596 (1875); *see also Dwight v. Merritt*, 140 U.S. 213, 217 (1891) (noting that all statutes prior to December 1, 1873, related to those included in the Revised Statutes "were abrogated by section 5596"). Laws in force as of December 1, 1873, but not included in the Revised Statutes, remained intact.

As a result, the 1853 Establishing Act was repealed and reorganized under Title 23 of the Revised Statutes. *See* 23 Rev. Stat. §§ 1839–1976. Section 12 of the 1853 Establishing Act, which imposed the laws of the Territory of Oregon on the Territory of Washington, was recodified and slightly revised to reflect the fact that Oregon became a state in 1859. 23 Rev. Stat. § 1952.

The 1848 Establishing Act was not revised or consolidated in the Revised Statutes. But the prohibition on dams without fishways contained in Section 12 of the 1848 Establishing Act was arguably still law of the Territory of Washington because 23 Rev. Stat. § 1952 provided that the laws of Oregon, "when that State was a Territory, which were enacted and passed subsequent to the first day of September, eighteen hundred and forty-eight,

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[10] It is possible that Congress did not intend to incorporate the 1848 Establishing Act's prohibition on dams without fishways into the laws of the Territory of Washington via Section 12 of the 1853 Establishing Act, as Sauk-Suiattle alleges. *See* Am. Compl. ¶1.J. Section 12 of the 1853 Establishing Act incorporated laws that were already applicable in the Territory of Washington if enacted and passed subsequent to September 1, 1848. *See* 1853 Establishing Act, § 12. The 1848 Establishing Act was not enacted "subsequent to" September 1, 1848; it was enacted on August 14, 1848. Thus, Section 12 of the 1853 Establishing Act did not explicitly incorporate the 1848 Establishing Act into the laws of the Territory of Washington.

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applicable to the Territory of Washington … are continued in force in [the Territory of Washington] until repealed or amended by future legislation[.]" *See* 23 Rev. Stat. § 1952.

The laws of the Territory of Washington became the law of the state of Washington upon statehood. *See* Act of Feb. 22, 1889, ch. 180, 25 Stat. 676, 684 (§ 24) (1889) (Attachment E) ("all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively"). Moreover, Article XXVII, Section 2 of the Washington State Constitution provided that all laws in force in the Territory of Washington, "which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature." Wash. Const. Art. XXVII, § 2. Shortly after becoming a state, however, the Washington Legislature passed an act during its first legislative session "to protect salmon and other food fishes" in the state, and repealed all "acts and parts of acts heretofore passed by the legislative assembly of the Territory of Washington in relation to the subject matter of this act[.]" *See* Fish; Protection Of, § 16, 1889–90 Wash. Sess. Laws 106, 109 (Attachment F). The Legislature, at the time, also established that the construction or maintenance of "any dam or other obstruction across any stream in this state [that] food fish are wont to ascend, without providing a suitable fishway," are guilty of a misdemeanor and may be found to be a nuisance. *See id.* § 8. The Legislature has substantially revised these laws over the years, and current state law is codified, as revised, at RCW 77.57.030.[11]

Congress also nullified the applicability of the prohibition on dams without fishways in the 1848 Establishing Act, arguably applicable to Washington, when it once again reorganized its federal laws in 1933—this time into the United States Code. Congress repealed obsolete sections of the Revised Statutes omitted from the United States Code,

[11] As explained in Section II.D., *infra*, this state statute is preempted by the Federal Power Act.

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including 23 Rev. Stat. § 1952. *See* To Repeal Obsolete Sections of the Revised Statutes Omitted from the United States Code, Pub. L. 72-418, 47 Stat. 1428, 1429 (1933) (Attachment G). The Department of the Interior recommended the repeal of 23 Rev. Stat. §§ 1896–1953 because the provisions related to territories "which have long since been admitted as States[,] … are obsolete and may be specifically repealed." H.R. Rep. No. 72-887, at 132 (1932) (Attachment H). Thus, Section 12 of the 1853 Establishing Act, which arguably incorporated the 1848 Establishing Act's prohibition on dams without fishways, ceased to be federal law in 1933.

Accordingly, the prohibition on dams without fishways contained in the Establishing Acts relied upon by Sauk-Suiattle are no longer valid federal or state law, and Sauk-Suiattle therefore has failed to present a cognizable legal theory, and its claims under the Establishing Acts, Supremacy Clause of the U.S. Constitution, and the Washington Constitution (Am. Compl. ¶¶ 5.A., 5.B. 6.A. 6.B.), must be dismissed under Rule 12(b)(6).

To the extent that the Act of March 3, 1933, failed to effectively repeal Section 12 of the 1848 Establishing Act and Section 12 of the 1953 Establishing Act, these provisions were nonetheless repealed in 1920 by Section 29 of the FPA. Section 29 of the FPA states that "all Acts or parts of Acts inconsistent with this chapter are repealed[.]" *See* Federal Power Act, Pub. L. No. 66-280, § 29, 41 Stat. 1063, 1077 (1920) (the "1920 FPA") (Attachment I); *see also* To Provide for Control and Regulation of Public-Utility Holding Companies, and For Other Purposes, Pub. L. 74-333, § 212, 49 Stat. 803, 847 (1935) (the "1935 FPA") (renumbering § 29 to Part I of the FPA) (Attachment J); currently codified at 16 U.S.C. § 823. The requirements for fish passage at dams included in the 1848 Establishing Act, and arguably carried through to the territory of Washington in the 1953 Establishing Act, are inconsistent with Section 18 in the FPA, which provides FERC and the Secretaries of Commerce and Interior the authority to determine whether fishways are required for a dam licensed by FERC. *See* 1920 FPA, § 18, 41 Stat. at 1073; *see also* 1935 FPA, § 209, 49 Stat.

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at 845 (amending § 18); *see also* 16 U.S.C. § 811. Courts have confirmed "with no hesitation" that Section 29 repealed those Congressional Acts inconsistent with the FPA. *See Scenic Hudson Pres. Conference v. Callaway*, 370 F. Supp. 162, 167–68 (S.D.N.Y. 1973), aff'd, 499 F.2d 127 (2d Cir. 1974) (holding that Section 29 of the FPA repealed authority of the U.S. Army Corps to require permits for hydropower projects under Section 10 of the Rivers and Harbors Act of 1899).

C. Jurisdiction Over Sauk-Suiattle's Challenges to City Light's Existing FERC License Lies Exclusively in the U.S. Courts of Appeals, and FERC Has Primary Jurisdiction over City Light's Ongoing Relicensing Proceeding.

Sauk-Suiattle's Amended Complaint avoids the federal regulatory history and status of the Project that establish this Court does not have jurisdiction to consider Sauk-Suiattle's challenge to City Light's current FERC license, as such jurisdiction resides exclusively in the U.S. Courts of Appeals. Sauk-Suiattle did not appeal City Light's FERC license in 1995 to the U.S. Courts of Appeals, and the deadlines for such appeals have expired. The Court should dismiss this case pursuant to Rule 12(b)(1). To the extent Sauk-Suiattle is seeking an order that requires fish passage at the Gorge Dam in the future, FERC has primary jurisdiction over the terms and conditions that will results from City Light's ongoing relicensing proceeding, and the Court should dismiss based on the doctrine of primary jurisdiction.

1. The U.S. Courts of Appeals Had Exclusive Jurisdiction over Challenges to City Light's Existing FERC License.

The Court may look to extrinsic evidence to resolve factual disputes regarding jurisdiction without converting this Motion to Dismiss to a motion for summary judgment. *See McCarthy*, 850 F.2d at 560. Here, Section 313 of the FPA establishes the procedure a party must follow to seek redress when it is aggrieved by an order issued by FERC. *See* 16 U.S.C. § 825l. An aggrieved party has 30 days after FERC issues its order licensing a hydroelectric project to request rehearing. *See id*. § 825l(a). The aggrieved party then has 60 days to petition for review to "the United States court of appeals for any circuit wherein the

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licensee or public utility to which the order relates is located or has its principal place of business … [or] the United States Court of Appeals for the District of Columbia[.]" *See id.* § 825l(b). The United States Courts of Appeals have "exclusive" jurisdiction "to affirm, modify, or set aside" FERC's orders. *Id.*; *see City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 336 (1958) ("[A]ll objections to [a FERC] 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.").

By suing City Light over Gorge Dam's lack of a fishway, Sauk-Suiattle challenges the Dam's license, City Light's obligations thereunder, and FERC's authority. In 1995, Sauk-Suiattle, the U.S. Departments of Commerce and the Interior, and others confirmed to FERC that "all issues" resulting from the Project were "satisfactorily resolved[.]" 1995 Relicensing Order, 71 FERC at 61,535. FERC, therefore, did not require a fishway, and City Light's operating without one complies with the terms of its license. Nonetheless, Sauk-Suiattle asks the Court to enjoin City Light from maintaining Gorge Dam "in its present condition or [to] provid[e] a means for migratory fish species to bypass such dam." Am. Compl. ¶ 6.D. Had Sauk-Suiattle desired, it could have challenged City Light's current license by requesting rehearing at FERC and petitioning the Court of Appeals in 1995. Sauk-Suiattle's very belated backdoor attempt to challenge and collaterally attack the terms of the Project's license cannot be heard by this Court under Section 313.

Sauk-Suiattle will likely argue its claims as pled arise under the constitutions of the United States and Washington and state law, not the FPA. The Ninth Circuit has instructed district courts to look past a plaintiff's claimed causes of action and artful attempts to avoid the FPA's "strict jurisdictional limits" by evaluating whether the allegations implicate or would substantially disrupt the FPA's licensing or review processes. *Cal. Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911-12 (9th Cir. 1989) (remanding for an entry of dismissal where district court lacked jurisdiction over a challenge to a FERC license brought

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under the National Environmental Policy Act and the American Indian Religious Freedom Act)*; see also Southwest Ctr. for Biological Diversity v. FERC*, 967 F. Supp. 1166, 1175–76 (D. Ariz. 1997).

The Court should dismiss Sauk-Suiattle's claims. By challenging Gorge Dam's "presence and operation" for a lack of a fishway, Sauk-Suiattle necessarily challenges FERC's decision not to require one in the 1995 license. Only a U.S. appellate court would have jurisdiction over this action implicating the Project's license. *See* 16 U.S.C. § 825l(b); *see also City of Tacoma*, 357 U.S. at 335–36. Sauk-Suiattle's claims thus must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1).

2. FERC Has Primary Jurisdiction to Determine the Future Presence and Operation of Gorge Dam in City Light's Ongoing Relicensing Proceedings.

The Court should dismiss this case because FERC has primary jurisdiction over Sauk-Suiattle's claims for future changes to Gorge Dam. The doctrine of primary jurisdiction affords discretion to the court to refer back to an administrative agency matters that are within that agency's special expertise. *See Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1087 (9th Cir. 2006) ("Where an issue falls within an agency's primary jurisdiction, the district court enables 'referral' of the issue to the agency"; "a court either stays proceedings, or dismisses the case without prejudice, so that the parties may pursue their administrative remedies.").

Courts have found that dismissal of a complaint was appropriate where FERC retained primary jurisdiction and the lawsuit was merely a collateral attack on a Commission order. *See Interstate Nat. Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 384-85 (9th Cir. 1953) (finding that appellant's complaint that defendant was required to operate as a common carrier was a collateral attack on certificate of public convenience and necessity issued by the FPC and dismissing the complaint because primary jurisdiction remained with the FPC); *see also Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs., Inc.*, 181 F. Supp. 2d 1111, 1122 (E.D.

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Cal. 2001) (holding FERC had primary jurisdiction where a "critical issue in [the] case… is pending before the FERC"); *New York State Elec. & Gas Corp. v. New York Indep. Sys. Operator, Inc.*, 168 F. Supp. 2d 23, 30 (N.D.N.Y. 2001) (finding that FERC had primary jurisdiction in matter where defendant had pending request for rehearing before FERC on the same issues raised in the lawsuit).

Here, FERC has primary jurisdiction over the "critical issue" of whether the Gorge Dam impairs fish passage because that issue is at the forefront of the current relicensing proceedings before FERC. Whether or not fish passage should be required is an issue that FERC will necessarily have to resolve prior to relicensing City Light's project. Specifically, under FPA Section 18, FERC must accept any fishway prescriptions required by the Secretary of Commerce or Interior, or it must deny relicensing. As such, the issue of whether to require fish passage at the Gorge Dam must be addressed in the first instance within the relicensing proceedings currently before FERC, in which Sauk-Suiattle is an active participant.

D. The Federal Power Act Preempts Sauk-Suiattle's State Law Claims.

As to any conflict between the FPA and Sauk-Suiattle's common law and nuisance claims,[12] the FPA preempts state law. For these reasons too, Sauk-Suiattle has failed to state a claim under Rule 12(b)(6). It is of no moment that state law may require dams (such as those used for irrigation) to have fishways because, for Gorge Dam and other power-generating dams, the FPA preempts state law. This Court may dismiss Sauk-Suiattle's state law grounds for declaratory and injunctive relief based on preemption, relying on either its federal question jurisdiction to consider state law claims that involve a substantial issue of federal law or its supplemental jurisdiction. *See Carrington v. City of Tacoma*, 276 F. Supp. 3d 1035, 1041–42 (W.D. Wash. 2017); *see also* 28 U.S.C. § 1367.

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[12] Although Sauk-Suiattle does not rely upon RCW 77.57.030 (discussed in Section II.B. above), this preemption analysis also applies to this Washington statute. Further, while City Light contends the Establishing Acts are repealed, to the extent Sauk-Suiattle contends it still has state law claims under those acts and the Washington Constitution, such claims also are preempted.

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A federal law can preempt state law through conflict preemption or field preemption. *See Ventress v. Japan Airlines*, 747 F.3d 716, 720 (9th Cir. 2014). Under conflict preemption, "state law is preempted to the extent that compliance with both laws is physically impossible, or state law would be an obstacle to the accomplishment of the full purposes and objectives of Congress." *Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451, 455 (9th Cir. 1993). Field preemption occurs when "the federal role is so pervasive that no room is left for the states to supplement it." *Id*.

The "FPA establishes a broad and paramount federal regulatory role," and the U.S. Supreme Court has explained that state laws imposing stricter requirements on a licensee than those imposed by FERC are preempted. *See California*, 495 U.S. at 499; *see also First Iowa Hydro-Electric Coop. v. Fed. Power Cmm'n.*, 328 U.S. 152, 180–82 (1946). Following *California* and *First Iowa*, this Court held that the FPA both field and conflict preempted claims brought under state law that Tacoma Public Utility's flow releases in accordance with its FERC license caused flooding and property damage. *See Carrington*, 276 F. Supp. 3d at 1044–45. For the same reasons, any requirements in Washington common law or tort law are preempted by the FPA's provisions that provide FERC exclusive jurisdiction over licensing of the Project, including the authority to order fishways and ensure adequate protection, mitigation, and enhancement of fish. 16 U.S.C. §§ 803(a)(1), 811.

Sauk-Suiattle's Motion to Remand argues that Section 27 of the FPA (16 U.S.C. § 821) preserves Sauk-Suiattle's state common law and tort law grounds for declaratory and injunctive relief. Remand Mot. p. 5. Sauk-Suiattle, however, partially quoted 16 U.S.C. § 821 in a misleading way. *Id.* The full text of the provision states:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

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The U.S. Supreme Court has interpreted this provision to limit state authority to allocating proprietary rights in water. *First Iowa*, 328 U.S. at 175–76; *see also Carrington*, 276 F. Supp. 3d at 1044 ("[T]he only authority states get over federal power projects relates to allocating proprietary rights in water." (citing *Sayles Hydro*, 985 F.2d at 455)). The common law and tort law cited by Sauk-Suiattle do not involve Washington's authority to govern proprietary rights in water.

Decades of precedent demonstrate the FPA preempts Sauk-Suiattle's claims that City Light's operation of Gorge Dam violates state common law and constitutes a nuisance that must be enjoined. Applying Washington law to enjoin City Light from operating the dam until City Light installs fish passage would constitute a state veto of the Project impermissible under *California* and *First Iowa*. Sauk-Suiattle has failed to articulate a state common law or tort claim upon which the Court can grant relief, and those claims must be dismissed.

III. CONCLUSION

Counsel for City Light conferred with counsel for Sauk-Suiattle on Monday, August 2, 2021, to determine if the filing of this Motion to Dismiss could be avoided. Counsel for Sauk-Suiattle declined to file an amended complaint to address City Light's grounds for its Motion to Dismiss. The Court should dismiss Sauk-Suiattle's suit with prejudice.

DATED this 5th day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 2021, the foregoing and its attachments was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send notification of such filing to the following:

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