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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY

In Re:

NO. 21-2-00386-29-1

14 **SAUK-SUIATTLE INDIAN TRIBE,**
15 Plaintiff,

**AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

16 v.

RCW 7.24.010

17 **CITY OF SEATTLE and SEATTLE**
18 **CITY LIGHT,** a subdivision of the
City of Seattle,

19 Respondents.

20
21 COMES NOW the plaintiff and amends its complaint to add the name the City of
22 Seattle as a respondent as set forth in ¶ 2.B herein. All other allegations of plaintiff's original
23 complaint are incorporated by reference herein.¹

24
25
26 ¹Counsel for Respondent correctly noted the misnomer in its Notice of Appearance that the City of
Seattle as the owner of Seattle City Light is a proper respondent herein.

1 Our job is to see the deep principles articulated in
2 our founding documents and apply them to the
3 world today as we understand it.

4 --*Steven C. Gonzales*
5 Chief Justice
6 Washington State Supreme Court

7 Living constitutionalists often complain we can't
8 know the original understanding because the
9 document's too old and cryptic. Hardly. We figure
10 out the original meaning of old and difficult texts all
11 the time. Just ask any English professor who teaches
12 Shakespeare or Beowulf.

13 --*Neil Gorsuch*
14 Associate Justice
15 United States Supreme Court

16 All laws in force in the Territory of Washington,
17 which are not repugnant to this Constitution, shall
18 remain in force until they expire by their own
19 limitations, or are altered or repealed by the
20 legislature[.]

21 --Washington State Constitution
22 Article XXVII, § 2

23 Nothing contained in this chapter shall be construed
24 as affecting or intending to affect or in any way to
25 interfere with the laws of the respective States[.]

26 --Federal Power Act
of June 10, 1920
Section 27

I. INTRODUCTION

1 This is a Complaint in a Civil action seeking declaratory and prospective injunctive
 2 relief on grounds that a dam owned by respondent blocks the passage of migrating fish and
 3 therefore its presence and operation is contrary to the Washington State Constitution, the
 4 governing Congressional Acts preceding formation of the State of Washington which placed a
 5 servitude upon such dam, and binding principles of Common Law.
 6

7 HISTORICAL BACKGROUND

8 Common Law

9 1.A. On July 13, 1787, the Congress of the Confederation of the United States enacted
 10 the Northwest Ordinance, applicable to what then was called the Northwest Territory, which
 11 established a government for the territory and specified a procedure for admitting new states to
 12 the Union. That ordinance guaranteed judicial proceedings according to the common law.
 13

14 1.B. The law of the state of Washington, as set forth in what is now RCW 4.04.010, is
 15 that the common law, so far as it is not inconsistent with the Constitution and laws of the United
 16 States or of the state of Washington nor incompatible with the institutions and condition of
 17 society in this state, shall be the rule of decision in all the courts of this state.

18 1.C. Since the *Magna Carta*, proscriptions against barriers to fish passage have been
 19 firmly imbedded in Anglo-American law. See *Magna Carta*, Ch. 33 (1215) (“All kydells for
 20 the future shall be removed altogether from [the Rivers] Thames and Medway, and throughout
 21 all England, except upon the sea shore.”).
 22

23 1.D. Scholar of common law Joseph Angell, who first authored his Treatise on the Law
 24 of Watercourses in 1794, noted that according to common law:

25 Even the exclusive right of fishery in rivers not navigable, is subject to a
 26 reasonable qualification, in order to protect the rights of others, who have a

1 similar interest, but might lose all advantage from it, if their neighbors below
2 them could with impunity wholly impede the passage of fish.

3 J. K. Angell, *A Treatise on the Law of Watercourses*, Ch. III, §84 (7th ed. 1879).

4 1.E. Under the common law of Great Britain:

5 This private right of fishery, in rivers above tide-water, is, in this country,
6 considered and held to be subject to the qualification of not being used so as to
7 injure the private rights of others ; so that it does not extend to impede the
8 passage of fish up the river by means of dams or other obstructions.
9 Id., Ch. III, §85.

10 1.E.a. Angell's treatises have previously been found authoritative by the United
11 States District Court court in determining fishery issues arising in United States v.
12 Washington. See, e.g., 873 F. Supp. 1422, 1439.

13 1.F. In the English case of Weld v. Hornby², in the Court of King's Bench, the plaintiff,
14 "being possessed of a sole and several fishery in a stream of water", undertook to convert a
15 brush wear, through which some of the fish might and did escape, into a solid stone wear, which
16 was entirely impervious. This was determined to be a nuisance, because it obstructed the
17 passage of fish higher up the stream.

18 1.G. In the absence of express repeal or legislation to the contrary, the common law is
19 applicable in the courts of Washington state.

20 Congressional Acts

21 1.H. On August 14, 1848, the United States Congress enacted an act to establish Oregon
22 Territory which, at the time, included what was later to become Washington Territory. Section
23 12 of the Act states that the rivers and streams of water in said Territory of Oregon in which
24 salmon are found, or to which they resort, shall not be obstructed by dams or otherwise, unless
25

26 ² 7 East. 195.

1 such dams or obstructions are so constructed as to allow salmon to pass freely up and down
2 such rivers and streams.

3 1.H.a. Attached hereto as Exhibit A is a true copy of Section 12 of the Act of
4 August 14, 1848 establishing Oregon Territory.
5

6 1.I The record of congressional hearings preceding adoption of the Oregon Territorial
7 Act discloses that Section 12 was added at the insistence of a member of congress who had
8 witnessed the extinction of salmon in the Connecticut River due to the erection of a dam there.

9 1.I.a. Attached hereto as Exhibit B is a true copy of that portion of the August
10 1, 1848 *Congressional Globe* in which such addition of Section 12 was made by Congressional
11 amendment.
12

13 1.J. On March 2, 1853, the United States Congress carved out a portion of Oregon
14 Territory in order to establish the Territory of Washington. That Congressional Act establishing
15 Washington Territory provided that the applicable laws in Oregon Territory by virtue of the
16 legislation of Congress in reference to the Territory of Oregon are applicable to and continue
17 in force in Washington Territory.

18 1.J.a. Attached hereto as Exhibit C is a true copy of Section 12 of the
19 Congressional Act of March 2, 1853 establishing Washington Territory.
20

21 Washington State Constitution

22 1.K. Upon admission to the Union in 1889, a Constitution was adopted for the State of
23 Washington. According to Article XXVII, in order to ease the transition from a territory to a
24 state, the state constitution provided, and still provides, that the laws applicable to the Territory
25 of Washington State remained in place unless expressly repealed.
26

1 1.K.a. Attached hereto as Exhibit D is a true copy of Article XXVII, § 2 of the
2 Washington

3 State Constitution.

4 1.J. Attached hereto as Exhibit E is a true copy of RCW 4.04.010.

5
6 II. PARTIES

7 2.A. Plaintiff Sauk-Suiattle Indian Tribe is a tribal nation with an address of 5318
8 Chief Brown Lane, Darrington, WA 98241.

9 2.B. Respondent City of Seattle is a municipal corporation incorporated as a city under
10 laws of the State of Washington.

11 2.C. Seattle City Light is a subdivision of the City of Seattle which operates as an
12 electric company with a principal address of 700 Fifth Avenue #3200, Seattle, WA 98104.

13
14 III. JURISDICTION AND VENUE

15 3.A. Jurisdiction and venue are appropriate in this Court since the plaintiff is
16 composed of citizens of the State of Washington residing or domiciled in Skagit County and
17 respondent owns property situated within Skagit County and the facts giving rise to the
18 causes of action arose in Skagit Court, Washington.

19 IV. FACTUAL ALLEGATIONS

20 4.A. Respondent operates a dam on the Skagit River within the State of Washington
21 known as the Gorge Dam at Newhalem.

22 4.B. On Information and Belief, such dam extends from the right bank of such river to
23 the left bank, extending across the Skagit River in its entirety.

24 4.C. Respondent's dam blocks fish passage within the Skagit River from the area
25 below to the area above such dam.
26

V. CLAIMS FOR RELIEF

5.A. The presence and operation of the Gorge Dam by respondent within the Skagit River which blocks fish passage violates the Washington State Constitution in that the statutes governing the Territories of Oregon and Washington imposed a prior restriction against such dams which was not repealed by the Territory's admission to the Union or any other act or statute.

5.B. The presence and operation of the Gorge dam by respondent within the Skagit River which blocks fish passage violates Article VI, ¶ 2 of the United States Constitution providing that the laws of the United States are the Supreme Law of the nation which the judges of every state shall be bound thereby in that the statutes governing the Territories of Oregon and Washington imposed a prior restriction against such dams which was not repealed by the United States Congress by Washington Territory's admission to the Union.

5.C. The presence and operation of such dam by respondent within the Skagit River which blocks fish passage violates governing common law applicable to respondent's operations in that such common law prohibits dams which block fish migration and such common law is consistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, as memorialized in RCW 4.04.010.

5.D. The presence and operation of a dam by respondent within the Skagit River which blocks fish passage constitutes the tort of Nuisance in that such conduct unreasonably and substantially interferes with plaintiff's use and enjoyment of its property rights of access to natural and cultural resources.

VI. RELIEF SOUGHT

WHEREFORE, plaintiff prays that the Court:

6.A. Declare that respondent's dam is operated contrary to the Washington State Constitution;

6.B. Declare that the presence and operation of respondent's dam violates the Supremacy Clause of the United States Constitution in that respondent is subject to the prohibitions against dams that block fish migration contained in Congressional Acts binding within what is now the State of Washington, and the court is bound thereby;

6.C. Enter a Declaratory Judgment that the Common Law prohibits dams within fresh waters within which fish migrate and that nothing in State law is contrary to such Common Law;

6.D. Enjoin respondent from maintaining such dam in its present condition or in the alternative enter an order requiring respondent to abate such Nuisance by providing a means for migratory fish species to bypass such dam; and

6.E. Award such other and further relief as is just and equitable.

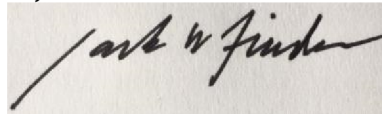
DATED this _26_ day of July, 2021.

Respectfully submitted,

SAUK-SUIATTLE INDIAN TRIBE

By:

S/Jack W. Fiander



Jack W. Fiander
Towtnuk Law Offices, Ltd.
Sacred Ground Legal Services, Inc.
Counsel for Plaintiff

Exhibit A
Act Establishing Oregon Territory

Salmon leaps
not to be ob-
structed.

SEC. 12. *And be it further enacted,* That the rivers and streams of water in said Territory of Oregon 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.

Appropriations

Exhibit B

August 1, 1848 Congressional Globe

SENATE.
Mr. GRINNELL moved a new section, to come in between the 11th and 12th sections, providing that the rivers and streams in the Territory in which salmon are found shall not be obstructed by dams or otherwise, unless so made as to allow said fish to pass freely.

He said there was now a valuable fishery in Oregon, and unless some care was taken of it, it would be lost. For the want of care, by the erection of a dam, &c., in the Connecticut river, the salmon, which formerly had been very valuable there, had been driven out. This might be avoided in this Territory, with care, without expense.

The amendment was agreed to.

Exhibit C
Act Establishing Washington Territory

SEC. 12. *And be it further enacted,* 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, applicable to the said Territory of Washington, together with the legislative enactments of the Territory of Oregon, enacted and passed prior to the passage of, and not inconsistent with, the provisions of this act, and applicable to the said Territory of Washington, be, and they are hereby, continued in force in said Territory of Washington until they shall be repealed or amended by future legislation.

Existing laws
in said territo-
ry continued in
force so far as
applicable.

Exhibit D
Washington State Constitution, Article XXVII, Section 2

SECTION 2 LAWS IN FORCE CONTINUED. All laws now 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: *Provided*, That this section shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide lands to any person, company or any municipal or private corporation.

Exhibit E
RCW 4.04.010

RCW 4.04.010

Extent to which common law prevails.

The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.