

The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

NO. 2:22-cv-142

THE CITY OF SEATTLE,  
Plaintiff,

v.

SAUK-SUIATTLE TRIBAL COURT; JOSH  
WILLIAMS, in his official capacity as Sauk-  
Suiattle Tribal Court chief judge; JACKIE  
VARGAS, in her official capacity as Sauk-  
Suiattle Tribal Court clerk; and SAUK-  
SUIATTLE INDIAN TRIBE, Defendants

**ORDER (1) DENYING DEFENDANTS’  
MOTION TO DISMISS; AND  
(2) STAYING CASE**

**I. INTRODUCTION**

This matter comes before the Court on the Motion to Dismiss filed by Defendants Sauk-Suiattle Tribal Court (the “Tribal Court”), Josh Williams in his official capacity as Tribal Court chief judge, Jackie Vargas in her official capacity as Tribal Court clerk, and the Sauk-Suiattle Indian Tribe (“Sauk-Suiattle” or the “Tribe”) (collectively, “Defendants”). Defendants seek dismissal of this preliminary injunction action, filed by Plaintiff the City of Seattle (the “City”). Having reviewed the briefs and exhibits filed in support of and opposition to the Motion to Dismiss, and the relevant authority, the Court finds and rules as follows.

ORDER (1) DENYING MOTION  
TO DISMISS AND (2) STAYING CASE

## II. BACKGROUND

On January 7, 2022, the Sauk-Suiattle Indian Tribe filed a civil complaint against the City in the Sauk-Suiattle Tribal Court. *See Sauk-Suiattle Indian Tribe v. City of Seattle*, Case No. SAU-CIV-01/22-001 (Sauk-Suiattle Tribal Ct. Jan. 18, 2022), Exhibit A to Compl., Dkt. No. 2-1. The Tribal Court complaint seeks a declaratory judgment concerning salmon “within the territory of the Sauk-Suiattle Indian Tribe.” Tribal Court Compl., ¶ a. In that lawsuit, the Tribe claims infringement of certain rights stemming from the construction and operation of three dams on the Skagit River by Seattle City Light, which is owned by the City. In particular, the Tribe alleges that the dams block upstream and downstream passage of several species of migratory fish, threatening the Tribe’s livelihood and wellbeing.

The dams are not located within the boundaries of the Sauk-Suiattle Reservation, but upstream from where the Skagit River meets a tributary, the Sauk River, which does flow through the reservation. In asserting the Tribal Court’s jurisdiction over the City, the Tribe stated in its complaint that by operation of the dams, the City’s “conduct threatens or imperils the health, welfare, safety and economic security of the Sauk-Tribal [*sic*] Indian Tribe and such impacts are felt by the Sauk-Suiattle Indian Tribe within the Sauk-Suiattle Reservation and lands and waters within the Ceded Territory of the Sauk-Suiattle Indian Tribe.” Tribal Court Compl., ¶ 3.A. The Tribe alleges violations of its usufructuary rights under the 1855 Treaty of Point Elliott, and violations of the First, Fourth, and Fourteenth Amendments to the U.S. Constitution, and the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996. On February 3, 2022 counsel for Seattle appeared in the Tribal Court and filed a motion for dismissal of the civil action for lack of subject-matter jurisdiction. At this time, the motion is presumably still pending.

ORDER (1) DENYING MOTION  
TO DISMISS AND (2) STAYING CASE

1 On February 7, 2022, the City filed this action, seeking an injunction preventing the Tribal  
2 Court from exercising jurisdiction over it. Defendants oppose that motion, and on February 14,  
3 2022, filed the instant Motion to Dismiss, arguing this Court should require the City first to  
4 exhaust its remedies in the Tribal Court.

### 5 III. DISCUSSION

#### 6 A. *National Farmers* Exhaustion Requirement

7 This Court has jurisdiction to consider whether the Sauk-Suiattle Tribal Court has  
8 jurisdiction to review the Tribe's complaint against the City. *Nat'l Farmers Union Ins.*  
9 *Companies v. Crow Tribe of Indians*, 471 U.S. 845, 851–52 (1985) (In “questions concerning the  
10 extent to which Indian tribes have retained the power to regulate the affairs of non-Indians . . . the  
11 governing rule of decision has been provided by federal law.”). As the Supreme Court stated in  
12 *National Farmers*, “a federal court may determine under [28 U.S.C.] § 1331 whether a tribal court  
13 has exceeded the lawful limits of its jurisdiction.” *Id.* at 853; *see also Boozer v. Wilder*, 381 F.3d  
14 931, 934 (9th Cir.2004) (“Non–Indians may bring a federal common law cause of action under 28  
15 U.S.C. § 1331 to challenge tribal court jurisdiction.”).

16 *National Farmers* also cautioned, however, that a federal court should “stay[] its hand  
17 until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to  
18 rectify any errors it may have made.” *Nat'l Farmers*, 471 U.S. at 857; *see also Elliott v. White*  
19 *Mountain Apache Tribal Ct.*, 566 F.3d 842, 846 (9th Cir. 2009) (“[A] plaintiff must first exhaust  
20 tribal court remedies.”) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987); *Nat'l*  
21 *Farmers*, 471 U.S. at 856–57). “Allowing tribal courts to make an initial evaluation of  
22 jurisdictional questions serves several important functions, such as assisting in the orderly  
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24 ORDER (1) DENYING MOTION  
TO DISMISS AND (2) STAYING CASE

1 administration of justice, providing federal courts with the benefit of tribal expertise, and  
2 clarifying the factual and legal issues that are under dispute and relevant for any jurisdictional  
3 evaluation.” *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013). Because  
4 “the existence and extent of a tribal court’s jurisdiction will require a careful examination of tribal  
5 sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well  
6 as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and  
7 elsewhere, and administrative or judicial decisions,” the Supreme Court has held that  
8 “examination should be conducted in the first instance in the Tribal Court itself.” *Nat’l Farmers*,  
9 471 U.S. at 855–56 (exhaustion requirement promotes “a policy of supporting tribal self-  
10 government and self-determination,” and “the orderly administration of justice in the federal  
11 court,” by “allowing a full record to be developed in the Tribal Court before either the merits or  
12 any question concerning appropriate relief is addressed.”). “Exhaustion of tribal court remedies,  
13 moreover, will encourage tribal courts to explain to the parties the precise basis for accepting  
14 jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in  
15 the event of further judicial review” *Nat’l Farmers*, 471 U.S. at 856–57.

16 ***B. Exception to Exhaustion Requirement Where Jurisdiction Is “Plainly” Lacking***

17 Against the backdrop of these practical and prudential considerations, the Supreme Court  
18 has outlined four exceptions to the exhaustion requirement: (1) when an assertion of tribal court  
19 jurisdiction is “motivated by a desire to harass or is conducted in bad faith”; (2) when the tribal  
20 court action is “patently violative of express jurisdictional prohibitions”; (3) when “exhaustion  
21 would be futile because of the lack of an adequate opportunity to challenge the [tribal] court’s  
22 jurisdiction”; and (4) when it is “plain” that tribal court jurisdiction is lacking, so that the  
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24 ORDER (1) DENYING MOTION  
25 TO DISMISS AND (2) STAYING CASE

1 exhaustion requirement “would serve no purpose other than delay.” *Elliott v. White Mountain*  
 2 *Apache Tribal Ct.*, 566 F.3d 842, 847 (9th Cir. 2009) (citing *Nevada v. Hicks*, 533 U.S. 353, 369  
 3 (2001)).

4 In this case, the City has argued only that the fourth exception to the exhaustion  
 5 requirement applies: that jurisdiction is so “plainly lacking,” requiring the City to exhaust its  
 6 remedies would serve no purpose other than to cause delay. Circuit courts, including the Ninth  
 7 Circuit, have apparently not articulated precisely “how ‘plain’ the issue of tribal court jurisdiction  
 8 needs to be before the exhaustion requirement can be waived.” *DISH Network*, 725 F.3d at 883.  
 9 The Eighth Circuit in *DISH*, however, observed that the Supreme Court has indicated “that the bar  
 10 is quite high.” *Id.* (requirement to exhaust should be waived only when the issue of tribal court  
 11 jurisdiction is invoked for “no other purpose than delay.”) (citing *Strate v. A-1 Contractors*, 520  
 12 U.S. 438, 459, n. 14 (1997)). “In other words the exhaustion requirement should be waived only if  
 13 the assertion of tribal court jurisdiction is frivolous or obviously invalid under clearly established  
 14 law. In circumstances where the law is murky or relevant factual questions remain undeveloped,  
 15 the prudential considerations outlined in *National Farmers Union* require that the exhaustion  
 16 requirement be enforced.” *DISH Network*, 725 F.3d at 883 (citing *National Farmers*, 471 U.S. at  
 17 856–57). Where the assertion of tribal court jurisdiction is “‘colorable’ or ‘plausible,’ the  
 18 exception does not apply and exhaustion of tribal court remedies is required.” *Elliott*, 566 F.3d at  
 19 848.

### 20 ***C. Whether Assertion of Jurisdiction in Sauk-Suiattle Tribal Court is “Frivolous”***

21 As federal courts have repeatedly observed, “determining the scope of tribal court  
 22 jurisdiction is not an easy task. . . There is no simple test for determining whether tribal court  
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24 ORDER (1) DENYING MOTION  
 TO DISMISS AND (2) STAYING CASE

jurisdiction exists.” *Elliott*, 566 F.3d at 849 (quoting *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir.1989)); see also *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 937 (9th Cir. 2009) (“Tribal jurisdiction cases are not easily encapsulated, nor do they lend themselves to simplified analysis. The Supreme Court itself observed that questions of jurisdiction over Indians and Indian country are a complex patchwork of federal, state, and tribal law. And we have acknowledged that there is no simple test for determining whether tribal court jurisdiction exists.”) (citations omitted).

From a series of “foundational” Supreme Court cases, however, the Ninth Circuit has “discern[ed] the ground rules governing tribal adjudicatory jurisdiction over nonmembers.” *Philip Morris*, 569 F.3d at 939 (citing, *inter alia*, *Montana v. United States*, 450 U.S. 544 (1981)). The “general proposition” is that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana*, 450 U.S. at 565. In *Montana v. United States*, the Supreme Court identified two exceptions to this rule: (1) a “tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements”; and (2) a “tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 566. In addition to deriving limited jurisdiction from the “inherent sovereignty” at issue in *Montana*, “tribes may also be granted jurisdiction via treaty or congressional statute.” *Philip Morris*, 569 F.3d at 939-40.

Defendants argue here that the Sauk-Suiattle Tribal Court has jurisdiction over the City under the second *Montana* exception, which recognizes tribal jurisdiction over “conduct [that]

ORDER (1) DENYING MOTION  
TO DISMISS AND (2) STAYING CASE

1 threatens or has some direct effect on the political integrity, the economic security, or the health  
2 or welfare of the tribe.” 450 U.S. at 566. The City claims the second exception is inapposite to the  
3 facts here, arguing that it applies only to conduct taking place entirely within a reservation, not  
4 outside its boundaries.

5 It is true that it “is at least strongly implied” that this exception is only applicable to on-  
6 reservation activity. *Dolgenercorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 176  
7 (5th Cir. 2014). Nevertheless, according to at least one appellate court, “the Supreme Court has  
8 never explicitly held that Indian tribes lack inherent authority to regulate nonmember conduct that  
9 takes place outside their reservations.” *Id.* Indeed, several courts have concluded they may not  
10 necessarily lack such authority, at least under some circumstances. *See, e.g., DISH Network*, 725  
11 F.3d at 884 (“Even if the alleged abuse of process tort occurred off tribal lands, jurisdiction would  
12 not clearly be lacking in the tribal court because the tort claim arises out of and is intimately  
13 related to [plaintiff] DISH’s contract with [tribal member defendant] and that contract relates to  
14 activities on tribal land.”). Moreover, while in some cases “the question of where activity or  
15 conduct took place may be clear,” where, as the Tribe has argued here, “a nonmember begins an  
16 activity outside the reservation, the effects of which are directed on to the reservation, it is not  
17 clear that such an activity occurred wholly outside the reservation.” *Sprint Commc’ns Co. L.P. v.*  
18 *Wynne*, 121 F. Supp. 3d 893, 900 (D.S.D. 2015). It is appropriate, therefore, that “[t]he precise  
19 location of [the] activity or conduct should be evaluated by the tribal court when it applies  
20 *Montana* in the first instance.” *Id.*

21 Jurisdictional questions are notoriously fact-intensive, and the facts of this case may be  
22 distinguishable in a number of potentially material ways from the precedent on which the City  
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24 ORDER (1) DENYING MOTION  
TO DISMISS AND (2) STAYING CASE

1 relies and could at least arguably bring the tribal lawsuit within the ambit of the claimed *Montana*  
2 exception. For example, the Tribe seeks a declaration that the salmon population “*within the*  
3 *territory of the Sauk-Suiattle Indian Tribe* is protected.” Tribal Court Compl., ¶ a. (emphasis  
4 added). While the City maintains that “there is no physical on-reservation impact” in this case, the  
5 Tribe has alleged that the upstream activities on the Skagit River do in fact have a direct impact  
6 on the health of the salmon population downstream, within the reservation. Depending on how the  
7 facts in this case develop, this argument may be unfounded or attenuated, and ultimately  
8 unpersuasive; but the Court cannot say at this point that it is frivolous. The lawsuit concerns  
9 conduct on and affecting rivers, making the jurisdictional inquiry particularly difficult to limit  
10 according to geopolitical boundaries. *See, e.g., Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d  
11 565, 578 (9th Cir. 2018) (“It is no defense that [Canadian defendant’s] wastewater outfalls were  
12 aimed only at the Columbia River, which in turn was aimed at Washington. Rivers are nature’s  
13 conveyor belts.”). In addition, the tribal lawsuit is based in part on interpretation of Sauk-Suiattle  
14 tribal law and Indian treaty rights, which would benefit from the Tribal Court’s expertise. *See*  
15 *Tidwell v. Harrah's Kansas Casino Corp.*, 322 F. Supp. 2d 1200, 1206 (D. Kan. 2004) (“If  
16 plaintiff’s case involved questions of tribal law, the benefit of tribal court expertise would be  
17 unquestionable.”). The breadth and complexity of these factual and legal issues are well-suited for  
18 review—in the first instance, at least—by the Tribal Court. *See Nat’l Farmers*, 471 U.S. at 855–  
19 56, 105 S.Ct. 2447 (“[The] policy of supporting tribal self-government and self-determination . . .  
20 favors a rule that will provide the forum whose jurisdiction is being challenged the first  
21 opportunity to evaluate the factual and legal bases for the challenge.”); *Sprint*, 121 F. Supp. 3d at  
22 901 (“The controlling principles are broad and abstract and must be carefully applied to the  
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24 ORDER (1) DENYING MOTION  
25 TO DISMISS AND (2) STAYING CASE

1 myriad of factual scenarios they govern.”) (citation omitted).

2       It is true that the City finds support in many of the “broad and abstract” principles  
3 announced in its cited authority. In the absence of controlling precedent directly on point,  
4 however, it cannot be said that the Tribe’s invocation of tribal court jurisdiction in this case is  
5 frivolous. To be clear, the Court is not ruling here that the Tribal Court has jurisdiction, and  
6 nothing the Court has said about the plausibility of jurisdictional arguments should be construed  
7 as commentary on the relative merit of those arguments. The Court holds only that the Tribe is  
8 entitled to make these arguments to the Tribal Court first.

9       Finally, the City argues that jurisdiction in the Sauk-Suiattle Tribal Court is lacking  
10 because under Section 313 of the Federal Power Act (“FPA”), the U.S. Courts of Appeals have  
11 “exclusive” jurisdiction “to affirm, modify, or set aside” FERC’s orders. *See* 16 U.S.C. § 8251.  
12 This clause “necessarily preclude[s] de novo litigation between the parties of all issues inhering in  
13 the controversy, and all other modes of judicial review.” *City of Tacoma v. Taxpayers of Tacoma*,  
14 357 U.S. 320, 336 (1958).

15       Again, the question is whether the Tribe’s assertion of tribal court jurisdiction is  
16 “frivolous.” The complaint filed in the Tribal Court seeks only declaratory relief, including a  
17 declaration of rights concerning salmon and the legal obligations of the members of the Sauk-  
18 Suiattle Tribe to protect those rights, and whether the City’s actions interfere with those rights and  
19 obligations. Tribal Court Compl., ¶¶ a-g. While the claims are certainly related to the FERC  
20 license at issue, it is not “frivolous” to argue that the lawsuit—seeking as it does only declaratory  
21 relief—is not an attempt to “affirm, modify, or set aside” that license. The Tribe has at least a  
22 colorable argument that its claims proceeding in Tribal Court are “wholly collateral to a statute’s

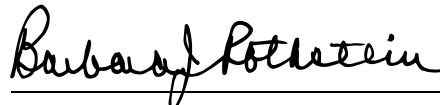
23  
24 ORDER (1) DENYING MOTION  
TO DISMISS AND (2) STAYING CASE

1 review provisions and outside the agency's expertise," and not, therefore, precluded by Section  
2 313 of the FPA. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994) (citation omitted).  
3 This question is therefore also subject to the *National Farmers* exhaustion requirement.

#### 4 IV. CONCLUSION

5 "Whether the federal action should be dismissed, or merely held in abeyance pending the  
6 development of further Tribal Court proceedings, is a question that should be addressed in the first  
7 instance by the District Court." *Nat'l Farmers*, 471 U.S. at 857. Accordingly, the Court DENIES  
8 Defendants' Motion to Dismiss, but for the foregoing reasons hereby STAYS and statistically  
9 closes this matter "until after the Tribal Court has had a full opportunity to determine its own  
10 jurisdiction." *Id.*, 471 U.S. at 857.

11 DATED this 5th day of July, 2022.

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14 Barbara Jacobs Rothstein  
15 U.S. District Court Judge  
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24 ORDER (1) DENYING MOTION  
25 TO DISMISS AND (2) STAYING CASE