

No. 22-35000

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SAUK-SUIATTLE INDIAN TRIBE,

Plaintiff-Appellant,

v.

THE CITY OF SEATTLE AND SEATTLE CITY LIGHT,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:21-01014
Hon. Barbara J. Rothstein

APPELLEE’S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

On August 4, 2022, this Court requested supplemental briefing “addressing the impact, if any, of 28 U.S.C. § 1447(c) ... on the district court’s Order Granting Defendants’ Motion to Dismiss.” Dkt. 34. Subsection (c) of 28 U.S.C. § 1447 has no impact on the district court’s order dismissing Appellant Sauk-Suiattle Indian Tribe’s (“Sauk-Suiattle’s”) claims because the district court dismissed the action pursuant to Appellee The City of Seattle and Seattle City Light’s (“City Light’s”)¹ Federal Rules of Civil Procedure (“Rule”) 12(b)(1) defense, as required by Rule 12(h)(3). This action raised federal questions and constituted a collateral attack on a license issued by the Federal Energy Regulatory Commission (“FERC”). ER-3–10. Almost a month after denying remand, the district court concluded it lacked subject matter jurisdiction because the claims were cognizable only in federal appellate courts, not in federal district courts. ER-11–24. Thus, the claims clearly did not belong in state court. The district court was not required to remand the validly removed action to state court under 28 U.S.C. § 1447(c) because Sauk-Suiattle’s claims clearly establish federal question jurisdiction. It was not until the time of a final judgment that the district court determined subject matter jurisdiction was lacking because Sauk-Suiattle failed to comply with federal laws

¹ Seattle City Light is not a separate entity from The City of Seattle. Rather, Seattle City Light is a d/b/a name for The City of Seattle’s City Light Department.

governing the presentation of such claims.

II. STATUTORY AUTHORITIES

Except for 28 U.S.C. § 1447, which appears in the Addendum to this supplemental brief (appended hereto), all other pertinent statutory and constitutional authorities are set out in the addendum to the City's Answering Brief. *See* Dkt. 20.

III. ARGUMENT

A. Legal Standard

1. Removal under 28 U.S.C. § 1441

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(a). Federal courts are courts of limited jurisdiction, and, as such, they possess only the power conferred upon them by the Constitution or statute. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Generally, federal district courts have original jurisdiction in federal question cases under 28 U.S.C. § 1331 or diversity cases pursuant to 28 U.S.C. § 1332. Diversity jurisdiction is not at issue in this case. City Light removed Sauk-Suiattle's Amended Complaint to district court because Sauk-Suiattle's claims established federal question jurisdiction under 28 U.S.C. § 1331.

A federal district court will have federal question jurisdiction under 28 U.S.C. § 1331 where "*plaintiff's* complaint establishes that the case 'arises under' federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10

(1983) (emphasis in original). “The general rule, referred to as the ‘well-pleaded complaint rule,’ is that a civil action arises under federal law for purposes of § 1331 when a federal question appears on the face of the complaint.” *City of Oakland v. BP PLC*, 969 F.3d 895, 903 (9th Cir. 2020) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). Moreover, “a case may not be removed to federal court on the basis of a federal defense.” *Franchise Tax Board*, 463 U.S. at 14. “Put simply, the existence of federal jurisdiction depends solely on the plaintiff’s claims for relief and not on anticipated defenses to those claims.” *ARCO Env’t Remediation, L.L.C. v. Dep’t of Health & Env’t Quality of Montana*, 213 F.3d 1108, 1113 (9th Cir. 2000). After a case is removed from state court to federal court, “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction,” removal pursuant to 28 U.S.C. § 1441 is no longer proper and the action must be remanded to state court. 28 U.S.C. § 1447(c).

2. Dismissal for Lack of Subject Matter Jurisdiction per Rule 12(b)(1) Defense

Under Rule 12(b)(1), a defendant may raise lack of subject matter jurisdiction as a *defense*. If the court determines at any time that it lacks subject matter jurisdiction under the Rule 12(b)(1) defense, “the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3).

B. The District Court Did Not Have to Remand to State Court for Lack of Subject Matter Jurisdiction Under 28 U.S.C. § 1447(c)

The district court correctly ruled that it had subject matter jurisdiction over Sauk-Suiattle’s claims when it denied Sauk-Suiattle’s Motion for Remand. Subsequently, the district court properly dismissed Sauk-Suiattle’s Amended Complaint for lack of jurisdiction under Rule 12(b)(1) and was not required to remand the case to state court under 28 U.S.C. § 1447(c).

1. The District Court Correctly Determined that it Had Federal Question Jurisdiction Over Sauk-Suiattle’s Claims and Denied Sauk-Suiattle’s Motion to Remand

On November 9, 2021, the district court correctly determined that Sauk-Suiattle’s Amended Complaint established federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction over Sauk-Suiattle’s state-law claims under 28 U.S.C. § 1367. ER-3–10. Accordingly, removal of Sauk-Suiattle’s Amended Complaint from state court to district court was proper under 28 U.S.C. § 1441, and the district court denied Sauk-Suiattle’s Motion to Remand. *Id.*

As City Light argued in its Answering Brief, under the “well-pleaded complaint rule,” there can be no denying the fact that, as pled, Sauk-Suiattle’s Amended Complaint presents at least two federal questions on its face: (1) does the “presence and operation” of the Gorge Dam violate Article VI, Paragraph 2 of the United States Constitution, and (2) do the Congressional Acts of August 14, 1848, ch. 177, 9 Stat. 323, and March 2, 1853, ch. 90, 10 Stat. 172, from when Oregon

and Washington were territories (“Establishing Acts”) require the construction of fish passage at a federally-licensed hydropower facility? The district court agreed that Sauk-Suiattle’s Amended Complaint, “on its face, does indeed raise a number of federal questions.” ER 7. The district court held Sauk-Suiattle’s “Supremacy Clause claim raises a substantial and disputed federal issue sufficient to establish this Court’s jurisdiction.” *Id.* Moreover, because the Amended Complaint’s claims cite, rely upon, and require interpretation of the federal Establishing Acts, Sauk-Suiattle’s “federal constitutional and statutory claims—raising not only substantial, but pivotal federal issues apparent on the face of the complaint—provide an adequate basis to assert [the district court’s] jurisdiction.” ER 9.

During oral argument in the district court on November 17, 2021, counsel for Sauk-Suiattle refused to abandon its federal law claims under the Supremacy Clause and Establishing Acts. *See* SER-12–13, 27–28. Counsel for Sauk-Suiattle admitted that “as far as the Supremacy Clause[,] ... clearly it’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 land.” SER-24; *see also* SER-28 (“But there’s still a federal question, because you’ve got to go back and interpret these other federal laws[.]”).

At no point “before final judgment” (here, the district court’s December 2, 2021 Order Granting Defendants’ Motion to Dismiss (ER-11–24)) did it appear

that Sauk-Suiattle’s Amended Complaint no longer arose under federal law such that removal under 28 U.S.C. § 1441 was improper. Quite the contrary: on November 9, 2021, the district court concluded that it had federal question jurisdiction (*see* ER-3–10) and on November 17, 2021, Sauk-Suiattle’s counsel confirmed that the claims raised federal questions. Thus, when the district court subsequently granted City Light’s motion to dismiss for lack of jurisdiction under Rule 12(b)(1), the district court was not required to remand the case back to state court under 28 U.S.C. § 1447(c). Instead, as explained in Section II.B.2, *infra*, the district court was required to dismiss the action pursuant to Rule 12(h)(3).

2. A District Court is Not Required to Remand a Validly Removed Case to State Court Under 28 U.S.C. § 1447(c) for Lack of Subject Matter Jurisdiction in Lieu of Dismissal When Dismissal is Based Upon a Rule 12(b)(1) Defense

The district court correctly dismissed Sauk-Suiattle’s Amended Complaint for lack of jurisdiction under City Light’s Rule 12(b)(1) defense and as required by Rule 12(h)(3). Thus, the district court did not have to remand the case for lack of subject matter jurisdiction under 28 U.S.C. § 1447(c). Section 313 of the Federal Power Act (the “FPA”) vests exclusive jurisdiction with federal appellate courts, not district courts or state courts, over challenges to licenses issued by the FERC. 16 U.S.C. § 825l. The district court correctly concluded that Sauk-Suiattle’s *federal* and state law claims amounted to an impermissible collateral attack on City Light’s 1995 FERC license, and dismissed the Amended Complaint. *See* ER-11–

24. This ruling did not change the fact that federal questions were presented on the face of Sauk-Suiattle's Amended Complaint and those federal questions were at the heart of the district court's order to dismiss in response to City Light's Rule 12(b)(1) motion.

A district court that grants a defendant's motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) must dismiss the action per Rule 12(h)(3). On the other hand, after removal, but before final judgment, if a district court determines that it lacks subject matter jurisdiction over plaintiff's claims—because removal was improper or because the case no longer presents a federal question or diversity has been destroyed—the case must be remanded to state court. 28 U.S.C. § 1447(c). But in a validly removed case, a district court is not automatically stripped of its original jurisdiction over plaintiff's claims when the district court dismisses an action for lack of subject matter jurisdiction per a defendant's Rule 12(b)(1) defense. Only if the district court determines that no grounds for subject matter jurisdiction over plaintiff's claims remain—such as when removal was improper or the grounds for removal no longer exist—must the case be remanded back to state court.

When the district court dismissed Sauk-Suiattle's Amended Complaint for lack of jurisdiction in response to City Light's Rule 12(b)(1) motion, it did not rescind its previous Order Denying Sauk-Suiattle's Motion for Remand. City Light

raised the exclusive jurisdiction provision in Section 313 of the FPA, 16 U.S.C. § 8251(b), as a Rule 12(b)(1) defense to Sauk-Suiattle's federal and state law claims. As explained above, a party's defense, including a Rule 12(b)(1) defense, does not confer federal question jurisdiction on a district court. *ARCO*, 213 F.3d at 1113. Thus, Section 313 of the FPA was not the source of the district court's federal question jurisdiction over the case (or lack thereof), nor could it be: "the existence of federal jurisdiction depends solely on the plaintiff's claims for relief and not on anticipated defenses to those claims." *Id.* Instead, the district court's jurisdiction over Sauk-Suiattle's Amended Complaint stems from the federal constitutional claims and Establishing Act claims, each raising an independent basis for federal question jurisdiction. *See* ER-7–8. Therefore, Sauk-Suiattle's claims could have been brought in federal court originally and removal was proper under 28 U.S.C. § 1441.

After removal, Sauk-Suiattle's federal claims, and Sauk-Suiattle's state law claims over which the district court was exercising supplemental jurisdiction, were the subject of the City Light's 12(b)(1) motion. Accordingly, the district court's order dismissing Sauk-Suiattle's federal and state law claims for lack of subject matter jurisdiction under Rule 12(b)(1) did not strip the district court of its federal question jurisdiction such that removal under § 1441 was improper or no longer valid. In other words, despite the district court's determination that it lacked

subject matter jurisdiction under Rule 12(b)(1) because of the exclusive jurisdiction provision of the FPA, federal question subject matter jurisdiction over Sauk-Suiattle’s federal constitutional claims and Establishing Act claims remained. Thus, remand under 28 U.S.C. § 1447(c) was not required and the district court properly dismissed the Amended Complaint as required by Rule 12(h)(3).

The district court’s dismissal of Sauk-Suiattle’s Amended Complaint was not only proper, it was not unusual. For example, in *Seaway Bank & Trust Co. v. J&A Series I, LLC*, the Federal Deposit Insurance Corporation (FDIC) properly removed a case to federal court under 12 U.S.C. § 1819(b)(2)(B), “which allows removal to federal court of any suit” filed against the FDIC. 962 F.3d 926, 932 (7th Cir. 2020). The district court subsequently dismissed the case for lack of subject matter jurisdiction because the parties failed to timely exhaust their Financial Institutions, Reform, Recovery, and Enforcement Act’s administrative claims, as required under 12 U.S.C. § 1821(d)(13)(D)(ii). *Id.* The Seventh Circuit affirmed, and found that the district court’s dismissal for lack of subject matter jurisdiction was appropriate and “[r]emand to the state court would have been improper” because federal law provides that, “in the absence of exhaustion of that process, no court shall have jurisdiction over a claim. That includes state courts.” *Id.* (internal quotations and citations omitted).

In *Blake v. Columbia Gas Transmission, LLC*, No. 3:19-0847, 2022 WL

866269 at *1 (S.D. W. Va. Mar. 22, 2022), plaintiffs filed an action in state court alleging that defendants' changes to their natural gas compressor station, which were approved and authorized by a certificate issued by FERC, negatively impacted plaintiffs' properties. Defendants removed the case to district court based on federal question and diversity jurisdiction. *Id.* The district court for the Southern District of West Virginia dismissed plaintiffs' claims for lack of subject matter jurisdiction under Rule 12(b)(1) because the exclusive jurisdiction provision of the Natural Gas Act, 15 U.S.C. § 717r,² meant that plaintiffs' claims amounted to a collateral attack on defendants' FERC certificate. *Id.* at *3. Just like Section 313 of the FPA, 16 U.S.C. § 825l(b), which restricts challenges to a FERC hydropower license to the federal courts of appeals, the Natural Gas Act restricts challenges to a FERC certificate to federal courts of appeals. *See* 15 U.S.C. § 717r. The court in *Blake* properly dismissed the complaint pursuant to Rule 12(h)(3), and did not remand to state court. The same result is proper here.

When removal is proper, courts may dismiss actions for lack of subject matter jurisdiction—especially if remand to state court is inappropriate. In

Stephens v. American Airlines, Inc., the district court found the case was properly

² The Ninth Circuit will often look to identical exclusive jurisdiction clauses in other federal statutes, such as the Hobbs Act or the Natural Gas Act, when interpreting Section 313 of the FPA. *See, e.g., Pub. Watchdogs v. S. Cal. Edison Co., Inc.*, 984 F.3d 744, 766 (9th Cir. 2020) (citing *Cal. Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 909–11 (9th Cir. 1989)).

removed under federal question and diversity jurisdiction and granted defendant's motion to dismiss for lack of subject matter jurisdiction. Case No. 21-cv-6934, 2022 WL 1115048, at *3–4 (N.D. Ill. March 31, 2022). The district court lacked subject matter jurisdiction because plaintiffs' claims were completely preempted by the Railway Labor Act ("RLA"), and plaintiffs failed to exhaust their administrative remedies under the RLA. *Id.* Accordingly, "[r]emand to state court is inappropriate because the RLA rules out the continuation of this case in any court[,]” including a state court. *Id.* Other courts have similarly dismissed properly removed cases for lack of subject matter jurisdiction. *See, e.g., Lewis v. Transcon. Gas Pipe Line Corp.*, 200 F. Supp. 219, 219–20 (S.D. Tex. 1961) (action removed from state court on diversity grounds; district court granted motion to dismiss for failure to exhaust administrative remedies under the Natural Gas Act).

C. Alternatively, This Court Should Affirm the District Court's Dismissal of Sauk-Suiattle's Amended Complaint Because Remand to State Court Would Be Futile

If this Court were to somehow conclude that the district court erred in dismissing Sauk-Suiattle's Amended Complaint for lack of jurisdiction under Rule 12(b)(1) and should have remanded the case back to Skagit County Superior Court under 28 U.S.C. § 1447(c), remand is not required because such remand would be futile. This Court recognizes a narrow "futility exception" to 28 U.S.C. § 1447(c) that "permits the district court to dismiss an action rather than remand if there is

‘absolute certainty’ that the state court would dismiss the action following remand.” *See Global Rescue Jets, LLC v. Kaiser Found. Health Plan, Inc.*, 30 F.4th 905, 920 n.6 (9th Cir. 2022) (citing *Polo v. Innov. Int’l, LLC*, 833 F.3d 1193, 1197–98 (9th Cir. 2016)). When “the eventual outcome of a case after remand is so clear as to be foreordained[,]” a district court may dismiss the action “to prevent any further waste of valuable judicial time and resources.” *Polo*, 833 F.3d at 1198 (internal quotations omitted).

In *Global Rescue Jets*, plaintiff filed an action in state court against the defendant to recover full payment for services, which defendant removed to federal court. *Global Rescue Jets*, 30 4th at 910. The district court dismissed plaintiff’s action for lack of subject matter jurisdiction because plaintiff failed to exhaust its administrative remedies under the Medicare Act. *Id.* at 911. This Court affirmed the district court’s dismissal because under the “narrow” futility exception to 28 U.S.C. § 1447(c), remand would be futile: “[a] state court would be compelled to dismiss this action following remand both because Jet Rescue must first exhaust its administrative remedies and because any ensuing judicial action would have to be brought in federal district court.” *Id.* at 920, n.6.

Here, there is “absolute certainty” that the state court must dismiss the action upon remand: under Section 313 of the FPA, only the Court of Appeals, not district courts and not state courts, have jurisdiction over Sauk-Suiattle’s federal and state

law claims. ER 24; *see also City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336–340 (1958) (state law claims are also subject to the impermissible collateral attack doctrine because such issues should have been raised in an appeal to the federal courts of appeals under Section 313 of the FPA). Thus, in the alternative, dismissal of Sauk-Suiattle’s Amended Complaint, instead of remand, was proper “to prevent any further waste of valuable judicial time and resources.” *Polo*, 833 F.3d at 1198.

IV. CONCLUSION

For the foregoing reasons in this supplemental brief and in the City’s prior briefing, 28 U.S.C. § 1447(c) did not require the district court to remand Sauk-Suiattle’s Amended Complaint to state court and this Court should affirm the district court’s order granting City Light’s Motion to Dismiss.

DATED this 18th day of August, 2022.

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**UNITED STATES COURT OF APPEALS
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Federal Statutes

28 U.S.C. § 1447	Addendum-1
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KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Limitation Recognized by [Flam v. Flam](#), 9th Cir.(Cal.), June 08, 2015

United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part IV. Jurisdiction and Venue (Refs & Annos)

Chapter 89. District Courts; Removal of Cases from State Courts (Refs & Annos)

28 U.S.C.A. § 1447

§ 1447. Procedure after removal generally

Effective: November 9, 2011

[Currentness](#)

(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.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 939; May 24, 1949, c. 139, § 84, 63 Stat. 102; [Pub.L. 88-352, Title IX, § 901](#), July 2, 1964, 78 Stat. 266; [Pub.L. 100-702, Title X, § 1016\(c\)](#), Nov. 19, 1988, 102 Stat. 4670; [Pub.L. 102-198, § 10\(b\)](#), Dec. 9, 1991, 105 Stat. 1626; [Pub.L. 104-219, § 1](#), Oct. 1, 1996, 110 Stat. 3022; [Pub.L. 112-51, § 2\(d\)](#), Nov. 9, 2011, 125 Stat. 546.)

[Notes of Decisions \(1680\)](#)

28 U.S.C.A. § 1447, 28 USCA § 1447

Current through P.L. 117-166. Some statute sections may be more current, see credits for details.

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