No. 22-35000

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAUK-SUIATTLE INDIAN TRIBE,

Plaintiff-Appellant,

v.

CITYOF SEATTLE and SEATTLE CITY LIGHT,

Defendant – Appellee,

On Appeal from the United States District Court for the Western District of Washington

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APPELLANT'S OPENING BRIEF

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Introduction

Appellant appeals from a judgment of the district court wherein the court entered an order removing plaintiff's claims to federal court based upon finding that it had federal question jurisdiction (ER-3) and dismissing its complaint with prejudice based upon lack of jurisdiction (ER-11).

Jurisdiction

Plaintiff's appeal was timely filed and this Circuit possesses jurisdiction over such appeal pursuant to 28 U.S.C. § 1291.

Assignments of Error

1. The district court erred in removing the cause from the Superior Court of the State of Washington for Skagit County. The complaint was entirely premised upon claims arising under state law and raised no substantial federal questions which might provide the basis for removal. The only issue relating to federal law was federal preemption, which is properly to be raised as a defense in the state court rather than as a basis for removal.

2. Neither the Federal Power Act nor the 1986 amendments thereto completely preempt the application of state law.

3. The District Court erred in concluding that Appellant's participation in a 1995 Federal Energy Regulatory Commission agreement bar appellant from initiating its civil action.

4. The district court erred in concluding that the Federal Power Act so fully occupied the field as to preempt a cause of action for Nuisance.

Factual Background

As stated in appellant's complaint in the Superior Court of the State of Washington

for Skagit County:

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

See ER-25. Appellant filed the operative Complaint in the Skagit County Superior Court on June 30, 2021. Appellees removed the complaint to the United States District Court for the Western District of Washington on July 21, 2021 (ER-38). Appellant moved for remand (ER-5) 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, raised a Federal Question over which this Court had removal jurisdiction; and that in addition, several of Plaintiff's claims raised a "disputed, substantial federal issue" requiring interpretation of the 1848 Establishing Act (ER-3). 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, (ER-3-10) (ECF No. 19 below). On November 17, 2021, the district court entertained argument on appellee's motion to dismiss plaintiff's complaint (ER-63) and, on December 2, 2021 the

Court entered an order dismissing plaintiff's complaint on grounds that "this Court Lacks Jurisdiction to Review Plaintiff's Challenge to the 1995 FERC License and Relicensing Order" (ER-17), notwithstanding that nowhere in appellant's complaint did it assert claims "challeng[ing] the 1995 FERC License and Relicensing Order". This appeal followed.

Historical Basis for Plaintiff's Claims

The law of the Oregon Territory, later adopted for the Washington Territory, prohibited obstructing rivers and streams. And under the common law, owners of land adjacent to streams through which migratory fish swam could not inhibit fish passage. Congress recognized the existence of a "valuable fishery" in the Oregon Territory and took steps to ensure that the salmon there would not be "driven out" by obstructions. Cong. Globe, 30th Cong., 1st Sess. 1020 (1848). The Territory's Organic Act accordingly provided "[t]hat 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." Act of Aug. 14, 1848, § 12, 9 Stat. 328 (emphasis added). That provision was incorporated into the law of the Washington Territory. *See* Act of Mar. 2, 1853, § 12, 10 Stat. 177.

Protection against fishery-depleting obstructions also has deep roots in the Anglo-American legal tradition. British common law authorities recognized that possession of a fishery came with an implied "right" in the free passage of migratory fish. Weld v. Hornby, (1806) 103 Eng. Rep. 195 (K.B.) 199. The erection and use of stone weirs, "through which the fish could not insinuate themselves," were accordingly considered "as public nusances." Id. at 198-199. *See* J.B. Phear, *A Treatise on Rights of Water*, 29-30 (London 1859) ("[T]he owner of the land * * * cannot do anything which shall sensibly affect the natural supply of fish in the parts of the stream belonging to other proprietors."). Early American case law adopted the same view, which was understood to be "founded upon that universal principle of every just code of laws, *sic utere tuo ut alienum non lædas*," Commonwealth v. Chapin, 22 Mass. (5 Pick.) 199, 207 (1827), that is, "Use your own property such that you do not injure another's." As the Massachusetts Supreme Judicial Court explained, "[t]he value of [a] fishery depends on the shoals of fish that enter the river to pass to the ponds above to cast their spawn: and if none were allowed to pass, the fishery would be of little value." Stoughton v. Baker, 4 Mass. (1 Tyng) 522, 527 (1808). Riparian land owners were thus obligated not to take any affirmative action to substantially inhibit fish migration, an obligation that applied regardless of whether the obstruction was upstream or downstream. *See* Hart v. Hill, 1 Whart. 124,

137 (Pa. 1836) ("The owner of the land * * * must not, even out of fishery season, do any act which will injure or destroy the fishery."); Shaw v. Crawford, 10 Johns. 236, 238 (N.Y. 1813) (per curiam) ("Every owner of a mill-dam on a stream which fish from the ocean annually visit, is bound to provide a convenient passage way for the fish to ascend."); *see also* Chapin, *supra* 22 Mass. (5 Pick.) at 205.

Subsequent to removal, appellee moved to dismiss appellant's complaint and argued 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. Appellees alternatively argued 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, Appellees argued they were both conflict and field preempted by the Federal Power Act, 16 U.S.C. §§ 791a, et seq., ("FPA").

Standard of Review

Review of a decision of a district court dismissing a complaint under Fed. R. Civ. P. 12 (b) (6) is *de novo.*

Summary of Argument

The district court erred in removing the cause from the Superior Court of the

State of Washington for Skagit County. The complaint was entirely premised upon claims arising under state law and raised no federal questions which might provide the basis for removal. The only issue relating to federal law was federal preemption, which is properly to be raised as a *defense* in the state court rather than as a *basis* for removal. Neither the Federal Power Act, the 1986 amendments thereto, nor a 1995 settlement agreement preempt the application of state law. The district court erred in concluding that the Federal Power Act so fully occupied the field as to preempt a state-law based cause of action for Nuisance.

Argument

1. Plaintiff's state court complaint was not properly removable as it asserts claims purely arising under state law and does not conflict with Congress' intent embodied in the plain text of the Federal Power Act.

The district court has removal jurisdiction in any case where it has original jurisdiction. 28 U.S.C. § 1441 (a). The district court has original federal question jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. However, the fact that federal law may provide a *defense* to a state claim is insufficient to establish federal question *jurisdiction*. *See, e.g.*, Hart v. Bayer Corp., 199 F. 3d 239, 244 (5th Cir. 2000). In this Circuit, City of Oakland v. BP, No. 18-16663 (Aug. 12, 2020), is instructive. There, two cities sued five energy companies in state court asserting claims of the

common law tort of Nuisance. The cause was removed to federal court. Although removal is appropriate where the claims in a complaint are capable of being resolved in federal court without disrupting the federal-state balance approved by Congress (Amended Slip Opinion at 18), the panel concluded that the "well-pleaded complaint" rule precluded removal because plaintiffs' state court complaint failed to raise a substantial federal question. The panel buttressed its decision by also concluding that the state law claim was not completely preempted by the Clean Air Act. Id., at pp. 24-25.

In this case, appellant's claims stated in its Complaint fail to raise a substantial federal question and, considering the allegations of the Complaint as a whole rather than considering paragraphs in isolation, arise solely under Washington state law, *i.e.*, claims that the Washington State Constitution and laws prohibit construction of dams within Washington which block fish passage, and claims that Washington's "reception statute" adopting common law as the law of the State also prohibits such blockages. As such, plaintiff's complaint, which the respondent seeks to remove, purely involves only questions of *state* law. As a matter of federalism, principles of comity require that questions arising under state law should be resolved in the first instance by state courts. Even the United States Supreme Court has held that the Court is generally "bound to accept the interpretation of [the State's] law by the

highest court of the State." Hortonville Joint Sch. Dist. No. I v. Hortonville Educ. Ass'n, 426 U.S. 482, 488 (1976), *quoted* with approval in Alabama v. Shelton, 535 U.S. 654, 674 (2002).[1] By allowing removal of this action from the Skagit County Superior Court to the United States District Court, the district court essentially commandeered the case such that the state court was left without the opportunity to interpret the state's own constitution and laws.

In this Circuit, because federal removal jurisdiction "depends solely on the plaintiff's claims for relief and not on anticipated defenses to those claims," ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Mont., 213 F.3d 1108, 1113 (9th Cir. 2000), "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue," Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987). Therefore, as the "master of the claim," the plaintiff can generally "avoid federal jurisdiction by exclusive reliance on state law." Id. at 392. It is apparent from the district court's December 2, 2021 Order that federal

[1] In Ring v. Arizona, involving the state law allocation of functions between judge and jury, the Supreme Court without the slightest hesitation abandoned its prior construction of an Arizona death penalty law on the basis of a subsequent state supreme court opinion stating that the Court's initial understanding was in error: "[W]e recogniz[e] that the Arizona court's construction of the State's own law is authoritative." 536 U.S. 584, 603 (2002).

preemption was the only question truly at issue:

> [T]he 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[.]

ER 21 (Order, Dec. 2, 2021, p. 1). According to the District Court, since "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…to enable the passage of migrating fish", appellant, since it was a party to a Fisheries Settlement Agreement in the 1975-1995 FERC relicensing proceeding, was bound by it.

2. Resolution of plaintiff's state-based claims by the state court is not "exclusively" subject to federal jurisdiction, as the Federal Power Act's savings clause expressly precludes complete federal preemption.

As to whether plaintiff's complaint should have been removed from the state court because the claims asserted in it are completely federally preempted and exclusively subject to federal jurisdiction, the United States Supreme Court has identified only three federal statutes that completely preempt the application of state law: (1) Section 301 of the Labor-Management Relations Act; (2) Section 502 of the

Employee Retirement Income Security Act of 1974; and (3) the usury provisions of the National Bank Act. Beneficial Nat'l Bank v. Anderson, 531 U.S. 1 (2003). The Federal Power Act is not among them.

The Supreme Court has identified two general ways in which federal law can preempt state law. First, federal law can *expressly* preempt state law when a federal statute or regulation contains explicit preemptive language. Second, federal law can *impliedly* preempt state law when Congress's preemptive intent is implicit in the relevant federal law's structure and purpose.

Many federal statutes contain provisions that purport to restrict their preemptive effect. These "savings clauses" make clear that federal law does *not* preempt certain categories of state law, reflecting Congress's recognition of the need for states to "fill a regulatory void" or "enhance protection for affected communities" through supplementary regulation. Sandi Zellmer, *When Congress Goes Unheard: Savings Clauses' Rocky Judicial Reception*, in Preemption Choice: The Theory, Law, and Reality of Federalism's Core Question 144, 146 (William W. Buzbee, ed., 2009). Some courts and commentators have labeled these clauses "anti-preemption provisions." While the case law on anti-preemption provisions is not well-developed, some courts have addressed such provisions in the context of defendants' attempts to remove state law actions to federal court.

Specifically, certain courts have relied on anti-preemption provisions to *reject* removal arguments premised on the theory that federal law "completely" preempts state laws concerning the relevant subject. In Bernhard v. Whitney National Bank, 523 F.3d 546 (5th Cir. 2008), for example, the U.S. Court of Appeals for the Fifth Circuit relied on an anti-preemption provision in the Electronic Funds Transfer Act to reject a defendant-bank's attempt to remove state law claims involving unauthorized funds transfers to federal court. 523 F.3d 546, 548. A number of federal district courts have also adopted similar interpretations of other anti-preemption provisions. *See* Ervin v. JP Morgan Chase Bank NA, No. GLR-13-2080, 2014 WL 4052895 at *3 (D. Md. Aug. 13, 2014); Palacios v. IndyMac Bank, FSB, No. CV 09-04601, 2009 WL 3838274 at *4 (C.D. Cal. Nov. 13, 2009); Perkins v. Johnson, 551 F. Supp. 2d 1246, 1255 (D. Colo. 2008).

As to whether the Federal Power Act expressly preempts state law, it does not. Section 27 of the Act of June 10, 1920 expressly provided that:

> 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[.]

Such an exclusionary clause also appears in the 1986 amendments to the Federal Power Act:

> 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 tribes, 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 compacts 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 rights;
> (4) Alter, 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.

16 U.S.C. § 797. The Supreme Court has made clear that Congress's purpose is the "ultimate touchstone" of its statutory analysis. The Court's analysis of Congress's purpose has at times been informed by a canon of statutory construction known as the "presumption against preemption," which instructs that federal law should not be read as preempting state law "unless that was the clear and manifest purpose of Congress." Section 3 of the Congress' 1986 amendments to the Federal Power Act clearly demonstrates a Congressional purpose to protect and enhance fish and wildlife:

> Section 3. Environmental Considerations in Licensing.
> (a) Purposes of License.—Section 4(e) of the Federal Power Act is amended by adding the following at the end thereof: "In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality."

16 U.S.C. § 797. Consequently, not only does the Federal Power Act expressly *not* preempt State laws by virtue of a savings clause, the requirement that dams within Washington *not* block the passage of fish is entirely *consistent* and "compatible" with Congress purposes of *enhancing* fish and wildlife embodied in that Act. Consequently, remanding the case so that the state court can interpret the State's own constitution vis-à-vis preserving fish passage creates no irreconcilable conflict with federal law.

The United States Supreme Court has identified two subcategories of implied preemption: "field preemption" and "conflict preemption." *Field preemption* occurs when a pervasive scheme of federal regulation implicitly precludes supplementary state regulation, or where states attempt to regulate a field where there is clearly a dominant federal interest. *Conflict preemption* occurs when simultaneous compliance with both federal and state regulations is impossible ("impossibility

preemption"), or when state law poses an obstacle to the accomplishment of federal goals ("obstacle preemption"). Given that all of the over 50 hydroelectric dams in Washington licensed by the Federal Energy Regulatory Commission—except one—*already* have fish passage measures at their dams, it cannot be said that compliance with Washington's fish passage requirement makes it "impossible" to comply with FERC's federal licensing requirements nor impermissibly frustrates Congressional purposes. There is no issue of implied federal preemption in this case.[2]

The Supreme Court has repeatedly explained that in determining whether (and to what extent) federal law preempts state law, the purpose of Congress is the "ultimate touchstone" of its statutory analysis. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (*quoting* Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)). The Court has further instructed that Congress's intent is discerned "primarily" from a statute's text. Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996) (internal quotation marks and citation omitted). However, the Court has also noted the importance of statutory structure and purpose in determining how Congress intended specific federal

[2] Federal law impliedly preempts state law when it is impossible for regulated parties to comply with both sets of laws ("impossibility preemption"). Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963). Second, federal law impliedly preempts state laws that pose an obstacle to the "full purposes and objectives" of Congress ("obstacle preemption"). Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

regulatory schemes to interact with related state laws. Id. (internal quotation marks and citation omitted).

In evaluating congressional purpose, the Court has at times employed a canon of construction commonly referred to as the "presumption against preemption," which instructs that federal law should not be read to preempt state law "unless that was the clear and manifest purpose of Congress." Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947). The presumption against preemption has traditionally been justified on the grounds that it promotes respect for federalism and state sovereignty. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part). Prominent textualists have expressed suspicion about substantive canons' legitimacy. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 1 23-24 (2010) ("Substantive canons are in significant tension with textualism . . . insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute."); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 124 (2001) ("If textualists believe . . . that statutes mean what a reasonable person would conventionally understand them to mean, then applying a less natural . . . interpretation is arguably unfaithful to the legislative instructions contained in the

statute."); *and see* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 28 (1997) (arguing that "[t]o the honest textualist," substantive canons "are a lot of trouble"); id. at 28-29 (". . . whether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean more or less than what they fairly say? I doubt it."). *See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 293 (2012):

> ("[T]he [presumption against preemption] . . . ought not to be applied to the text of an explicit preemption provision . . . The reason is obvious: The presumption is based on an assumption of what Congress, in our federal system, would or should normally desire. But when Congress has explicitly set forth its desire, there is no justification for not taking Congress at its word—*i.e.*, giving its words their ordinary, fair meaning.").

In Virginia Uranium, Inc. v. Warren, 587 U.S. _ (2019), Justice Gorsuch authored an opinion joined by Justices Thomas and Kavanaugh in which he emphasized that *any evidence of Congress's preemptive purpose must be sought in a statute's text and structure*. (Gorsuch, J., lead opinion) (slip op., at 14-15).

Certainly, there may be discrete areas where the Federal Power Act must prevail over conflicting principles of State law. However, this is not a case, where a law applicable in the State court is irreconcilable with requirements of the Federal Energy Regulatory Commission. For example, if the Washington Utilities and

Transportation Commission adopted rates and regulations applicable to electricity generated by federally licensed power generating facilities that contradicted federal rates such that it became impossible for licensees to comply with both sets of laws, such state regulations might fail. However, this is not such a case.

Maryland Public Service Commission v. Talen Energy Marketing LLC (U.S. Supreme Ct. No. 14-614), April 9, 2016), is essentially on all fours and is dispositive of appellee's preemption argument made to the district court. There, the energy company successfully asserted that Maryland's power pricing program "impermissibly interfered" with FERC's exclusive authority to set interstate wholesale price rates. However, in the course of its decision the Supreme Court noted that:

> While Maryland may *retain traditional state authority to regulate the development, location, and type of power plants within its borders*…the scope of Maryland's power is necessarily limited by FERC's exclusive authority to set wholesale energy and capacity prices.

Id. (emphasis added). The Court then held as follows:

> Our holding is limited: We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector. Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or

> clean generation through measures "untethered to a generator's wholesale market participation."

In this case, there is a requirement, based upon Congressional enabling acts applicable within Washington, their incorporation by reference in Washington State's Constitution, and the state's adoption of common law, that dams within the State of Washington provide for fish passage. Since doing so is *consistent* with the purposes of Congress embodied in 1986 amendments to the Federal Power Act encouraging enhancement of fish and wildlife and the fact that there are already over 50 hydroelectric generating dams licensed by FERC within the State which have such fish passage, Washington's requirement cannot be held to be completely preempted by federal law, given the explicit savings clause which plainly appears in the text of the Federal Power Act, and the longstanding presumption against preemption.

In actuality, this is not a case involving Federal Preemption. Rather, this case involves the reconciling of two separate acts of Congress peculiarly applicable to the enabling acts of Washington and Oregon Territories, which the founders of the State of Washington expressly incorporated into the State's constitution and laws. The Act of August 14, 1848, 9 Stat. 323, establishing Oregon Territory provides *inter alia* that:

> [T]he 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.

Id. A subsequent act of Congress, the Act of March 2, 1853, 10 Stat. 1077, incorporated the above provision by reference:

> [T]he 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.

Id. Respondent contends that, somehow, these acts of the United States Congress, were repealed by enactment of the Federal Power Act or cannot be reconciled therewith. The issue in this case is not one of federal preemption. Rather, this is a case of statutory construction, the question being whether enactment of the Federal Power Act terminated the obligation embodied in the 1848 and 1853 statutes requiring that dams have fish passage.

This issue is not vastly different from the scenario presented in Menominee Tribe v. United States, 391 U.S. 404 (1968). In the absence of an unambiguous statement that Congress intended to repeal prior legislation, federal statutes must be

read *in pari materia* and construed so as to be harmonious rather than disharmonious. It is an unquestionable rule of statutory construction that statutes must be given their plain meaning. [citation]. The Congressional acts establishing Washington and Oregon Territories—incorporated by reference in the Washington State Constitution—are unambiguous in requiring fish passage at dams on rivers and streams. The later Federal Power Act and its amendments are silent on the matter, although the original act's savings clause preserved applicability of certain state laws and the act's 1986 amendments clearly stated an objective of furthering preservation of fish and wildlife. The only conclusion one can reach from an ordinary reading of these acts is that the general terms of the later acts did not supersede the narrower, more specific, statutory fish passage requirement imposed by Congress within the Pacific Northwest where salmon were known to abound and which were integral to the economy.

> 3. Although adjudication of Plaintiff's complaint may *involve* federal questions raised as a *defense*, the claims raised in the *complaint* are based upon state law and state constitutional provisions which merely incorporate by reference federal laws.

As to the first reason warranting removal, determining what claim is asserted in a complaint and whether it is plausible (or is premised upon federal or state law) is a context-specific task that requires the reviewing court to draw on

its judicial experience and common sense. Ashcroft v. Iqbal, 556 U.S. 662 (2009):

> Determining whether a complaint states a plausible claim for relief will...be a context specific task that requires the reviewing court to draw on its judicial experience and common sense.

A common sense reading of the face of plaintiff's complaint plainly discloses that the complaint is based upon questions raised arise under Washington *state* law rather than based upon the numerous defenses under federal law raised by the respondents. As stated on the face of the Complaint:

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

See ER-27 (State court Complaint, [District Court ECF 5], p. 16, ln. 1-6. The Complaint is stylized as arising under Section 7.24.010 of the Revised Code of Washington. Id., p. 1. The Complaint seeks, *inter alia*, a declaration that respondent's dam is operated contrary to the Washington State Constitution. Id., ER-32 p. 14 (ln. 1-6), p. 21, ¶ 6.A.

Certainly, the construction and determination of the applicability of certain federal statutes may be necessary for the state court to perform in order to resolve plaintiff's claims. State courts, however, are competent to review and determine the

applicability or relevance of federal law which may bear upon the cases before it. This long established principle supports appellant's assignment of error to the district court's determination that, by merely referencing the Supremacy Clause of the United States Constitution, the exercise of federal removal jurisdiction was warranted. By its very terms, the Supremacy Clause contemplates that State judges would entertain issues of federal law arising in state court cases:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; *and the judges in every state shall be bound thereby*, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. Const., Art. VI, Cl. 2 (emphasis added). Plaintiff's complaint, read as a whole, discloses that its claims do not arise directly under federal law but, rather, that certain federal laws were incorporated by reference into Washington state law prior to their repeal as federal laws. As alleged in plaintiff's complaint, those "Congressional Acts [are] binding within what is now the State of Washington" (ER-32, [ECF 5 below], p. 21, ¶ 6.B) that the Common Law adopted by the State of Washington embodied in RCW 4.04.010 "prohibits dams within fresh waters within which fish migrate and that nothing in State law is contrary to such Common Law" (ER 32, ¶ 6.C), and that respondent's dam is operated contrary to the Washington State Constitution".

ER 32, ¶ 6.A. Although matters requiring a review of federal statutes and regulations may be necessary in order for the *state court* to rule on appellant's civil complaint, the "federal questions" that the district court and appellee asserted as the basis for removal to this court appear in the most part, if not all, to have more properly described as *defenses* to be raised in the state court rather than bases for removal.

Here, it must be pointed out that the mere appearance of federal questions in a plaintiff's complaint does not warrant removal. Rather, such federal question must be substantial. As stated in Carrington v. City of Tacoma so heavily relied upon below by appellee, to constitute a substantial federal question:

> It is not enough that the federal issue be significant to the particular parties in the immediate suit" rather the inquiry must focus on "the importance of the issue to the federal system as a whole."

276 F. Supp. 3d 1035, 1042 (W.D. Wash. 2017). In Carrington, the relief sought by the plaintiffs would upset "a complete scheme of national regulation." Id. Here, the state court entertaining the issue of whether the constitution and laws peculiar to *Washington* is of significance only to the parties in the immediate suit and will not affect a scheme of national regulation—since the State of Washington, by virtue of its incorporation of a Congressional Act specific *solely* to what is now the State of Washington, is the *only* State in the United States with such a restriction requiring

fish passage at dams within its territorial jurisdiction.

Since the United States Congress saw fit in the exercise of its federal powers to impose that restriction upon Washington Territory, and Washington in the exercise of its state police powers adopted it, derogating Washington's requirement potentially disrupts the balance of federal-state powers contemplated by the constitutions of both, not to mention the principles of federalism envisioned by the framers of both.

> 4. The district court's determination that Plaintiff's common law claims and claim of Nuisance involve a question foreclosed by federal law or that it involves a federal question is without merit. That respondents' possess a license to generate hydropower does not vitiate the applicability of Washington common law.

As to any assertion that removal of appellant's civil action from the Skagit County Superior Court was warranted because plaintiff's state-based common law claims raise substantial federal questions, constitute a collateral attack on their license to operate a hydropower facility, or are preempted by approval of a federal regulatory agency, claims that common law claims for equitable relief is not proper because the federal government approved something when or after it was constructed, routinely failed at common law. Courts repeatedly rejected defenses by mill owners that they had been authorized to construct their obstruction by a royal

grant (in England) or a legislative act (in the United States). *See, e.g.*, Stoughton v.

Baker, 4 Mass. 522 (1808).

This common law prohibition on obstruction of waterways was incorporated, with only slight modifications, by federal, state and local governments throughout the United States. Indeed, it formed the basis of court decisions and legislation in the eighteenth and nineteenth centuries that conditioned the erection of mills, dams, and other artificial structures on assurance of reasonable fish passage.

No less a document than the *Magna Carta* embodied the barons' demand that "[a]ll fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast." Magna Carta ¶ 33 (1215). English law was clear that it was illegal "to obstruct the passage of fish into the upper fishery," *See, e.g.*, Humphrey W. Woolrych, *A Treatise of the Law of Waters* 170-71 (1853) ("the state or condition of a fishery low down a stream, cannot be so altered as to obstruct the passage of fish into the upper fishery, especially if it be done in such a manner as may be prejudicial to the fair exercise of the right of catching fish in the lower fishery"); *see also* Weld v. Hornby, 103 Eng. Rep. 75, 7 East 196 (K.B. 1806) (declaring stone weir a public nuisance because it blocked the passage of fish upstream); Parker v. People, 111 Ill. 581, 591-92 (1884) (noting that more than 30 acts of parliament forbade obstructions that prevented fish from swimming upstream).

The U.S. states adopted the prohibition on obstructing fish passage from the very beginning. *E.g.*, Joseph K. Angell, *Treatise on the Law of Watercourses* 82-83 (5th ed. 1854) ("The right of several fishery is clearly limited to the right of taking fish, and does not carry with it the right to hinder the passing of them above, and of preventing the suprariparian proprietors from enjoying a similar privilege"). They did so both through common law nuisance doctrines and statutory prohibitions. *E.g.*, Boatright v. Bookman, 1 Rice 447 (S.C. Ct. App. 1839) (noting that obstructions to the passage of fish may constitute a public or private nuisance, and describing an 1827 Act passed to prevent such on specific rivers). *See also*, Holyoke Co. v. Lyman, 82 U.S. 500, 509 (1872) (describing 1866 Massachusetts statute authorizing state fisheries commissioners to examine dams, determine the fishways that should be constructed, and, if the dam owner refused to agree to the remediation plan, authorize the commissioners to make physical modifications and charge the cost to the owner).

At common law, obstructions in navigable waterways were considered "purprestures," or public nuisances. This rule was originally developed, in part, because obstructions hindered navigation, and historically, rivers were the equivalent of today's highways. But obstructions were also prohibited if they impeded the passage of fish upstream. Joseph Chitty, *A Treatise on the Game Laws*

and on Fisheries (2d ed. 1826). Chitty explains the reasoning behind this rule as follows: Public fisheries, as a matter of national concern, are of great importance, since they are not only the source of considerable sustenance for the population of the country, but constitute a nursery for our seamen. "We therefore find that the common law has, in various instances, particularly protected such fisheries . . ." Chitty, *supr*a, at 239. Woolyrch agreed in particularly strong language: "[T]he erection of wears, so as to injure the fish, is a public nuisance, it is itself illegal, and against the rules of the common law; and no length of time will legitimate or sanction the continuance of such an obstruction." Woolrych, *supra*, at 217. This rule was so strong, that "[n]ot even a legal grant by the Crown can make a nuisance of this kind [obstructing a public waterway] legitimate. The right of the public is paramount." Woolrych, *supr*a, at 194.

In Williams v. Wilcox, 8 Ad. & E. 315 (1838), the plaintiff brought a trespass action against the defendant, who had torn down a weir appurtenant to the plaintiff's fishery. The plaintiff, similar to the appellee here, claimed that his weir was legal because the Crown had granted his predecessors in interest the right to erect it generations ago. The court rejected this defense, noting that such obstructions were always nuisances:

> It is difficult, therefore, to see how any such grant made in derogation of the public right previously existing, and in direct opposition to that

> duty, which the law casts on the Crown, of reforming and punishing all nuisances which obstruct the navigation of public rivers, could have been in its inception valid at common law. . . . We are, therefore, of opinion that the legality of this weir cannot be sustained on the supposition of any power existing by law in the Crown in the time of Edward I, which is now taken away.

Wilcox, 8 Ad. & E. at 333-34.

The same rules appear to have existed throughout the United Kingdom. In an early Irish case, for example, an individual who obstructed the river Bann with weirs and traps made of wood, stone, and other substances, was charged with trespass. Hamilton v. Marquis of Donegall, 3 Ridgeway's Parl Cases 267, 268 (Ire. 1795).

By 1869, Charles Stewart's *A Treatise on the Laws of Scotland Relating to Rights of Fishing* could declare confidently that all artificial structures "which form even a partial obstruction, or tend to frighten the fish, are illegal . . . and it is no defence to an action for the removal of such contrivances, that the right to use them has been expressly conveyed by grant, or that they have been in use for the prescriptive period, or for time immemorial." Id. at 167-68.

> 5. The district court erred in mischaracterizing the basis of plaintiff's claims. That certain territorial acts for Oregon and Washington were repealed in 1873 and 1933 respectively have no bearing on this case, since Washington had by then already incorporated their provisions as matters of Washington state law. Plaintiff's claims do not arise directly under now repealed federal law, rather, the claims are based upon the incorporation by reference of then-existing federal law *into state law*.

In the trial court, appellees argued that certain prohibitions against complete stream blockage requirements in Territorial acts which were incorporated by reference in the Washington State Constitution (Wash. Const. Art. XXVII, § 2) were repealed and consequently no longer in effect (*see* ER-63-72, ECF No. 11, pp. 5-10), citing to various statutes which they say rendered such requirements. In particular, portions of an 1873 Congressional Act (Attachments C and D of ER-63) (ECF 11-4, 11-5 in the district court) consolidating the general laws of the United States into the Revised Statutes which was later to be denominated the United States Code. There are two key problems with respondents' reliance upon such enactment.

First, the 1873 Act, like the later 1933 act relied on by respondents, was an effort to codify all general laws of the United States, while repealing "obsolete" provisions. As to the Act establishing Oregon Territory, of course in 1873 its provisions were obsolete and repealed as a law of the United States subject to placement in the Revised Statutes, since Oregon obtained statehood in 1859. As to any repeal of provisions of the 1853 Washington territorial act, the 1873 repeal asserted by respondents expressly *exempted* from repeal provisions of Congressional Acts made prior to 1873 which were not general to the United States but rather were "peculiarly local in nature". *See,* §5596, ECF 11-5, p. 3. The probition of stream

blockages in Section 12 of the 1853 Washington Territorial Act was "peculiarly local"—Washington being the sole jurisdiction of the United States which in 1873 had such a prohibition.

Second, Section 1952 of the 1873 Act expressly *preserved* the continuing validity of Section 12, and other sections of the Washington Territorial Act:

> Sec. 1952. The laws now in force in the Territory of Washington, by virtue of the legislation of Congress in reference to Oregon, when that State was a Territory, which were enacted and passed subsequent to the first day of September, eighteen hundred and forty-eight, applicable to the Territory of Washington, together with the legislative enactments of Oregon, while a Territory, enated and passed prior to March 2, 1853, and not inconsistent with the provisions of this Title, and appliable to the Territory of Washington, are continued in force in that Territory until repealed or amended by future legislation, unless such laws have been repealed or amended by legislation susequent to the second day of March, eighteen hundred and fifty-three.

That Act, which had by then already been incorporated by reference into the Washington State Constitution and the State's Enabling Act (Act of Feb. 22, 1889, ch. 180, 25 Stat. 676, 684 [§ 24] [1889]), was not repealed from the Revised Statutes until 1933. However, Congress was explicit when it repealed Section 1952 that the obsolescence of Section 1952 was merely because, upon Statehood, Congress lacked the authority to determine the laws of the State of Washington.

This section provided that certain laws should continue if force in the

> territory of Washington. When the territory of Washington became one of the States of the Union, Congress lost its power to determine what laws should be in force therein, other than the general body of Federal law applicable to all of the States, and this section became obsolete at that time.

Congressional repeal thus had *no effect* on the applicability of Section 12 of the Washington Territorial Act through its incorporation via state law. Quite to the contrary, Congress expressly recognized the matter as a question of purely state law. The restriction against stream blockages, having been adopted as the state law of Washington prior to its decades-later repeal, and Congress having deemed the federal statute unworthy in 1933 of placement in the United States Code since it was obsolete, subject to repeal, and no longer a law of the United States—Washington having decades earlier obtained statehood—this case is one purely of determining the applicability of a Washington *state* law. Those federal laws incorporated into Washington state law no longer even raise a Federal Question for purpose of invoking this court's 28 U.S.C. § 1331 original jurisdiction.

That Washington courts deem the provisions of the Washington Territorial Act to remain to be of continued vitality as a matter of Washington state law is demonstrated by State v. Svenson, 104 Wn. 2d 533 (1985). There, the question presented was whether the State of Washington possessed jurisdiction over an offense committed on the Oregon side of the Columbia River in light of § 1950 of

the 1853 Washington Territorial Act that provided:

> Sec. 1950. The State of Oregon and the Territory of Washington shall have concurrent jurisdiction over all offenses committed on the Columbia River, where that river forms a common boundary between the State and Territory.

Act of March 2, 1853, Ch. 90, §12. The Washington State Supreme Court did not resolve the issue based upon the territorial Act, since the issue was addressed in a Compact between Washington and Oregon. However, the state's supreme court certainly did not treat the territorial provision as though it was no longer in effect as a law of the state.

An alternative basis for dismissal argued by respondents is that Washington has, on its own, "altered or repealed" the anti-stream blockage provision it constitutionally adopted by enacting an 1889 statute imposing criminal penalties upon those who completely blocked fish-bearing streams:

> Sec. 8. Any person or persons now owning or maintaining, or who shall hereafter construct or maintain any dam or other obstruction across any stream in this state which any food fish are wont to ascend, without providing a suitable fishway or ladder for the fish to pass over such obstruction, shall be deemed guilty of a misdemeanor, and upon conviction thereof, be punished by a fine of not less than one hundred dollars nor more than two hundred fifty dollars, and said dam or obstruction may, in the discretion of the court, be abated as a nuisance.

See, ER 72 of Respondents' Motion to Dismiss in the trial court. Appellant fails to see how the Washington legislature's memorialization—or codification—of

the anti-stream blockage provision incorporated into the Washington state constitution "repealed" the prohibition such that respondents' continuing to operate in direct violation of it cannot be the basis for a declaratory judgment action in state court. Ordinarily, constructions in violation of state laws are a nuisance *per se*. That there is a good faith basis for a declaratory judgment action in state court that should not have been removed is further borne out by current provisions of Washington state law. *See*, RCW 77.15.320 (Unlawful Failure to Provide, Maintain, or Operate Fishway for Dam or Other Obstruction); *see also*, RCW 77.57.030 (Fishways Required in Dams, obstructions).[3]

6. Appellant's assertion of a common law claim does not constitute a "collateral attack on respondent's license".

Contrary to the enunciation by the district court that "the practical effect of the action in district court is an assault on an important ingredient of the FERC license," ER 73, *citing* Cal. Save Our Streams Council, Inc. v. Yuetter, 887 F.2d 908 (9th Cir. 1989), nowhere in plaintiff's complaint is it asserted that plaintiff

[3] The 1889 Washington Statehood Act does not expressly provide for the repeal of Section 12 of the Washington Territorial Act because that act was not "passed by the legislative assembly of the Territory of Washington." Rather, Section 12 was initially passed by the United States Congress, then incorporated into Washington State law not via the legislative assembly of the Territory of Washington but rather via a special constitutional convention. The legislature could have mirrored the languaged of the Washington State Constitution that referenced all laws "in force in the Territory of Washington" but chose rather to limit the repeal clause to laws passed by the legislative assembly.

questions the validity of respondents' license to operate a hydroelectric power generating facility. On the contrary, plaintiff's complaint—which for purposes of a motion to dismiss is presumed to be true—asserts that the presence and operation of respondents' dam violates the Washington State *Constitution* (ER 31, Amended Complaint ¶ 5.A), that the restriction against stream blockages in territorial acts were not repealed by the State's admission to the Union (id., ¶ 5.B) , that complete stream blockages violate Washington common law that was adopted by the Washington legislature by enactment of Section 4.04.010 of the Revised Code of Washington (Amended Complaint ¶ 5.C) ER 31, and that respondents' dam unreasonably interferes with plaintiff's enjoyment of its property thereby constituting a nuisance. Id., ¶ 5.D. The mere fact that respondent's Gorge Dam completely blocks a river does not prevent it from being *licensed* to produce electricity. But the mere fact that a license is issued by another jurisdiction does not prevent the application of state laws which provide *greater* or different restrictions than those imposed by federal law so long as the two are compatible. A State may impose greater restrictions on how the dam is built than are imposed as a matter of federal law, so long as that does not make it impossible for the facility to be licensed. Since over 50 dams in Washington already licensed which do not block streams,

asking the state court to determine that this dam should not completely block the stream according to Washington state law, in no way attacks the ability of the dam to remain licensed.

Similarly, the fact that respondent's dam is "licensed" does not preclude it nevertheless constituting a nuisance under Washington common law. According to Washington law,

> [W]hen proper authority authorizes the operation of a lawful business in a certain area, such business does not constitute a nuisance in a legal sense, but it may become such if it is conducted in such an unreasonable manner that it substantially annoys the comfort or repose of others or essentially interferes with the enjoyment of property[.]

Bruskland v. Oak Theater, 42 Wn. 2d 346 (1953).

Contrary to the district court's conclusion, the exclusive jurisdiction provisions of the FPA have not been found to apply to claims under state law. It is clear that in the Ninth Circuit, attempts to bring claims under other *federal* laws including NEPA, AIRFA, and ESA 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." *Id.* at 912. However, these cases do not provide that the exclusive jurisdiction prescription of the FPA can provide Congress with the authority to create jurisdictional prescriptions under state law claims. The Supreme Court has warned it does not find that Section 313 of the FPA:

> …suggest that the Federal Power Act endowed the Commission of the Court of Appeals with the authority to decide any issues of state law if such law were deemed controlling, or that had the Court of Appeals undertaken to do so, such a determination would have foreclosed re-examination of such a decision in other proceedings.

City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 241 (1958) (J. Harlan, concurring).

7. The 1995 Settlement Agreement the district court relied on to dismiss plaintiff's complaint does not preclude appellant's Claims

The Agreement relied upon by the district court as the basis for dismissal applies only to claims that arise "from the effects of the Project, as currently constructed, on fisheries." Here, while appellant's claims may ultimately have a fisheries effect the claims do not arise from the effects on fisheries but arise from a violation of state law. The parties to the settlement agreement explicitly reserved that "Nothing in this Agreement precludes the City…from complying with their obligations under…any other laws applicable to the Project."

Just as "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit,"[4] neither can a signatory of an official of

[4] Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917).

appellant tribal nation's government agree in an agreement to what the law does not permit. Consequently, the district court erred in dismissing appellee's complaint based upon that agreement. An officer or agent of a governmental body cannot be bound by an agreement to terms that are contrary to law—in this case the constitution and laws of the State of Washington prohibiting dams without fish passage. In Utah Power & Light Co. v. United States, 243 U.S. 389 (1917)., the United States sought injunctive relief against a power company that had, without legal authority, erected "dams, reservoirs, pipe lines, power houses, [and] transmission lines" on a federal forest reservation. Id. at 409, 402. The company claimed that its actions had been authorized by "officers or agents of the United States," on whose permission the company had relied, and that the United States was therefore "estopped to question" the company's conduct. Id. at 408. This Court rejected that defense in a single sentence, quoted above, and it upheld the injunction. Id. at 409, 411.

The district court's statement that appellant failed to object to the 1995 agreement for 20+ years is essentially an invocation of the equitable defense of laches:

> 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

ECF 22. Yet "laches is not imputable to the Government." United States v. Kirkpatrick, 22 U.S. (9 Wheat.) 720, 735 (1824) (Story, J.); *see* Utah Power & Light, 243 U.S. at 409 (rejecting defendant's laches argument that "officers and employees of the Government, with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein"); United States v. Beebe, 127 U.S. 338, 344 (1888) ("[T]he United States are not * * * barred by any laches of their officers, however gross, in a suit brought by them as a sovereign Government."); United States v. Thompson, 98 U.S. (8 Otto) 486, 488-489 (1879). The principle is just as applicable to appellee which is a sovereign tribal government. It is worth noting that, at the time the 1995 agreement was entered which the district court relied upon to dismiss appellant's complaint, that salmon within the Skagit River where appellee's dam is located were not proclaimed by the United States Fish and Wildlife Service to be Threatened or Endangered Species. 16 U.S.C. § 1531, *et*

seq. As such, the district court's application of anti-relitigation principles have no application in the present circumstances. he State—not the federal government—enacted laws and regulations to protect the fishery. *See, e.g.*, Vail v. Uranium, 120 Wash. 126, 130, 207 P. 15 (1922) (describing state fishing regulations enacted in response to the "well known fact that the salmon industry of the state is rapidly disappearing").

8. The doctrine of primary jurisdiction is inapplicable to this cause.

Primary jurisdiction is a prudential doctrine that permits courts to determine "that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch." Astiana v. Hain Celestial Group, Inc., 783 F.3d 753, 759 (9th Cir. 2015) (internal citations omitted). Appellant's claims stated in its Complaint present ordinary claims of state constitutional and statutory interpretation that do not require the expertise of FERC. In dismissing appellant's complaint, the district court essentially concluded that the Federal Energy Regulatory Commission possessed primary or exclusive jurisdiction over the issue of whether appellee's Gorge Dam was required to have fish passage." However, this Circuit has already held that, in the context of a 12(b)(6) motion to dismiss, there is no "need to resolve an issue" under primary jurisdiction because the

court must accept the plaintiff's allegations as true and thus whether the Gorge Dam impairs fish passage must be resolved in plaintiff's favor. *See* Cost Management Services v. Washington Nat. Gas, 99 F.3d 937, 949 (9th Cir. 1996)

9. The claims raised in plaintiff's complaint are not preempted by the Federal Power Act nor exclusively subject to determination by the Federal Energy Regulatory Commission.

The Supreme Court has identified two ways in which federal law can preempt state law such that invocation of federal jurisdiction is the exclusive remedy. First, federal law can *expressly* preempt state law when a federal statute or regulation contains explicit preemptive language. Second, federal law can *impliedly* preempt state law when Congress's preemptive intent is implicit in the relevant federal law's structure and purpose.

Many federal statutes contain provisions that purport to restrict their preemptive effect. These "savings clauses" make clear that federal law does not preempt certain categories of state law, reflecting Congress's recognition of the need for states to "fill a regulatory void" or "enhance protection for affected communities" through supplementary regulation. Sandi Zellmer, *When Congress Goes Unheard: Savings Clauses' Rocky Judicial Reception*, in Preemption Choice: The Theory, Law, and Reality of Federalism's Core Question 144, 146 (William W. Buzbee, ed., 2009). Some courts and commentators have labeled these clauses "anti-preemption

provisions."

Certainly, there may be discrete areas where the Federal Power Act must prevail over conflicting principles of State law. However, this is not a case, where a law applicable in the State is irreconcilable with requirements of the Federal Energy Regulatory Commission. For example, if the Washington Utilities and Transportation Commission adopted rates and regulations applicable to electricity generated by federally licensed power generating facilities that contradicted federal rates such that it became impossible for licensees to comply with both sets of laws, such state regulations might fail. However, this is not such a case.

It is the State—not the federal government—that enacted laws and regulations to protect the fishery. *See, e.g.*, Vail v. Seaborg, 120 Wash. 126, 130, 207 P. 15 (1922) (describing state fishing regulations enacted in response to the "well known fact that the salmon industry of the state is rapidly disappearing"). The State of Washington has opposed construction of certain fish-blocking dams, to have certain dams removed, and to secure protection for salmon in the federal licenses issued for others. *See, e.g.*, PUD 1 of Jefferson Cty. v. Washington Dep't of Ecology, 511 U.S. 700, 703 (1994) (describing State permit conditions on dam "to protect salmon and steelhead runs" on the Dosewallips River); City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 322-33 (1958) (describing State's 10-year effort to block dams on the

Cowlitz River because of effects on salmon); City of Tacoma v. State, 121 Wash. 448, 451, 209 P. 700 (1922) (describing state objection to dam because "the proposed dam . . . will destroy, or seriously damage, the propagation of salmon" in the Skokomish River). In this case, there is a requirement, based upon Congressional enabling acts incorporated by Washington and its adoption of common law, that dams within the State not completely block streams unless they are constructed in a manner that provides for fish passage. Doing so is consistent with the purposes of Congress embodied in 1986 amendments to the Federal Power Act. Washington's requirement cannot be held to be preempted by federal law, given the explicit savings clause which plainly appears in the text of the Federal Power Act, and the longstanding presumption against preemption.

There are only "a few areas, involving 'uniquely federal interests,… [that] are so committed by the Constitution and the laws of the United States to federal control that state law is pre-empted and replaced…" Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988). The police power of the State of Washington entitles it to prevent anadromous fish from going the way of the passenger pigeon. Puyallup Tribe v. Department of Game, 414 U.S. 44, 49 (1973).

Maryland Public Service Commission v. Talen Energy Marketing LLC (U.S. Supreme Ct. No. 14-614), April 9, 2016), is essentially on all fours and is dispositive

of respondent's argument. There, the energy company successfully asserted that Maryland's power pricing program impermissibly interfered with FERC's exclusive authority to set interstate wholesale price rates. However, in the course of its decision the Supreme Court noted that:

> While Maryland may retain *traditional state authority to regulate the development, location, and type of power plants within its borders*…the scope of Maryland's power is necessarily limited by FERC's exclusive authority to set wholesale energy and capacity prices.

Id. (emphasis added). The Court then held as follows:

> Our holding is limited: We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector. Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures "untethered to a generator's wholesale market participation."

10. Principles of Comity militate in favor of the Court abstaining from entertaining respondents' motion to dismiss, as resolution of the issues raised therein are best resolved by the State court, in determining the applicability of the State's own laws.

The claims in plaintiff's complaint do not demonstrate Federal Questions so substantial as to merit the Court exercising jurisdiction to resolve respondents'

motion to dismiss. The complaint seeks a declaratory judgement from a state court regarding the applicability of certain state laws to a public entity within the state. Federal courts do not have original jurisdiction, nor do they acquire jurisdiction on removal, when a federal question is presented by a complaint for a state declaratory judgment. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950). Our system of government is said to be one of "dual sovereignty." Murphy v. NCAA, 138 S. Ct. 1461 (2018). The founders believed that "the State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former." J. Madison, Federalist No. 4. As was stated in Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982):

> The notion of "comity" includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

In this case, the Superior Court of the State of Washington for Skagit County is an appropriate forum for determining the applicability of provisions of Washington constitutional, legislative, and common law such that, as a matter of comity, the court should abstain from entertaining respondents' motion in deference to principles of federalism, rather than commandeering the case. Just as was the case

in Gully v. First National Bank in Meridian, 299 U.S. 109 (1936),

> The most that one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.

Id., 299 U.S. at 117.

CONCLUSION

For the foregoing reasons, principles of federalism and comity, together with the presumption against preemption and longstanding precedents that the federal courts defer to courts of a state interpreting their own constitutions and laws in the first instance, militate in favor of this case being remanded back to the state court.

Doing so is consistent with the anti-preemption savings clause of the Federal Power Act and the application of state and constitutional measures for the protection of fish is entirely consistent with the purposes of Congress embodied in the 1986 amendments to the Federal Power Act favoring conservation and enhancement of fish and wildlife.

Finally, as noted by the Ninth Circuit, remand does not preclude the respondent from raising in state court the same issues it raises in its removal petition as a defense in state court.

For the foregoing reasons, the orders of the district court removing appellant's complaint from the state court in the absence of the complaint raising a substantial Federal Question basis for removal jurisdiction—other than bases which were more properly *defenses* to be raised in state court—and dismissing it based upon proceedings under the Federal Power Act being the "exclusive" remedy should be *reversed* and the cause *remanded* to the Washington State Superior Court.

Respectfully submitted,

DATED this 2nd day of March, 2022.

SAUK-SUIATTLE INDIAN TRIBE
By:

S/*Jack W. Fiander*

Counsel for Appellant

Certificate of Service

I certify that the foregoing Opening Brief of Appellant was filed with the Clerk on the above date using the Court's electronic filing system with a copy served upon all counsel of record.

S/Jack W. Fiander

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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