No: 83632-3-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SAUK-SUIATTLE INDIAN TRIBE,

Appellant,

v.

CITY OF SEATTLE,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This Court should affirm the Superior Court's Order Granting Defendant's Revised Motion to Dismiss (CP 458–61) (the "Superior Court Order"). This appeal involves a dispute between Appellant Sauk-Suiattle Indian Tribe ("Sauk-Suiattle") and Respondent The City of Seattle (the "City") over the City's statements related to three hydroelectric dams comprising the Skagit River Hydroelectric Project (the "Project") and the operation of the City's electric utility. The City, through its City Light Department, manages and operates the Project under a license issued and administered by the Federal Energy Regulatory Commission ("FERC") pursuant to the Federal Power Act ("FPA"), 16 U.S.C. § 791 *et seq*. Sauk-Suiattle claims the City's statements (1) amount to "greenwashing" in alleged violation of Washington's Consumer Protection Act, Chap. 19.86 RCW (the "CPA"), and (2) are a public and private nuisance in alleged violation of Chap. 7.48 RCW.

The Superior Court correctly dismissed Sauk-Suiattle's

CPA and nuisance claims under CR 12(b)(6) because "the law is clear that municipal corporations, like the City, are not subject to the authority and restrictions of the CPA." CP 459. The Superior Court also correctly dismissed Sauk-Suiattle's nuisance claims because (i) such claims did not fall within any of the statutorily enumerated public nuisances in RCW 7.48.140, (ii) "the City's statements are not an unlawful act amounting to a nuisance per se[,]" and (iii) "intervening third-party acts disrupt the flow of causation from the City's statements to the discrimination, harassment, and vandalism alleged by [Sauk-Suiattle]." CP 459. Moreover, this Court should affirm the Superior Court's dismissal of Sauk-Suiattle's nuisance claims under CR 12(b)(6) because Sauk-Suiattle has no Treaty-based property rights in the Skagit River.

Alternatively, the record also supports dismissal under CR 12(b)(1) because only federal appellate courts have jurisdiction to consider attacks on the City's FERC license. Under Section 313 of the FPA, federal appellate courts have

exclusive jurisdiction over challenges to FERC orders. 16 U.S.C. § 825l. Sauk-Suiattle's claims represent an impermissible attack upon the Project's license, which Sauk-Suiattle failed to appeal and even supported in 1995.

II. COUNTER-STATEMENT OF THE CASE

A. The Project

The City is a municipal corporation. CP 210; Seattle Charter, art. I, § I ("The municipal corporation, now existing and known as The City of Seattle"). The City operates an electric utility through its City Light Department. *See, e.g.*, Seattle Municipal Code ("SMC") 3.08.010 ("There shall be a City Light Department, consisting of the municipal light and power system[.]"). As admitted by Sauk-Suiattle, the City "is the sole owner of and solely responsible for the City's electric utility operations." CP 210.

The FPA establishes a "broad federal role in the development and licensing of hydroelectric power" projects utilizing the navigable waters or located on certain lands of the United States. *California v. F.E.R.C.*, 495 U.S. 490, 496, 110 S. Ct. 2024, 108 L.Ed.2d 474 (1990). A FERC license imposes conditions on the operator of a hydroelectric project to ensure "the adequate protection, mitigation and enhancement of fish."

See 16 U.S.C. § 803(a)(1). Section 18 of the FPA requires FERC to order a licensee to construct, maintain, and operate fishways[1] if prescribed by either the federal Secretary of Commerce or the Interior. *See id.* § 811.

The City constructed and operates the 711 megawatt hydroelectric Project. CP 210. In 1927, FERC's predecessor agency, the Federal Power Commission, licensed the Project for 50 years. CP 267. In 1977, the City applied to FERC for a new license and "FERC instituted a proceeding to study the impact of the Project's 'flow regime' on the Skagit River fisheries resource." *Id*. In 1995, FERC issued its "Order Accepting Settlement Agreement, Issuing New License, and Terminating Proceeding" (the "1995 Relicensing Order"), which authorized the City's operation of the Project for another 30 years. *Id*. The 1995 Relicensing Order also approved ten settlement agreements between the City and intervenors, including Sauk-

[1] "Fishways" are also referred to as fish passage.

Suiattle. *Id*. The settlement agreements, and particularly the "Fisheries Settlement Agreement" joined by the City and Sauk-Suiattle (among others), "purported to resolve all issues related to project operation, fisheries, wildlife, recreation and aesthetics, erosion control, archaeological and historic resources, and traditional cultural properties." CP 268 (internal quotations omitted). Several conditions of the Fisheries Settlement Agreement were incorporated into the 1995 license. CP 269. "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 [the Project] to enable the passage of migrating fish." *Id*. Sauk-Suiattle "did not seek review of the 1995 Relicensing Order or otherwise appeal the terms of the license." *Id*.

The 1995 license will expire in 2025 and the relicensing process is already underway at FERC. CP 269; *see also* CP 230. Numerous federal and state resource agencies, affected

Tribes (including Sauk-Suiattle), and interested parties are actively involved and again, fisheries issues are an important part of the process. CP 269–70, 278.

B. The LIHI Low Impact Certification

In 2003, the City applied for and received the Low Impact Hydropower Institute ("LIHI") Low Impact certification. CP 214–15. The Project was recertified by LIHI in 2017. CP 215.

C. Sauk-Suiattle

Sauk-Suiattle is a federally recognized Indian Tribe and filed this suit on behalf of itself individually and on behalf of its members as a putative class. CP 236. Sauk-Suiattle alleges that the City has violated the CPA by advertising itself as a "green" power source when the Project lacks fish passage. CP 233–34. Sauk-Suiattle also alleges that the City has committed a public and/or private nuisance because its advertising has caused third parties to harm Sauk-Suiattle and interfere with Sauk-Suiattle's enjoyment of its treaty-protected land and water

rights. CP 229–30, 234. Sauk-Suiattle seeks declaratory and injunctive relief, and asks this Court to: issue an order declaring the City's various alleged "greenwashing" statements are a deceptive practice; declare that the City's LIHI Low Impact certification was improperly obtained (even though Sauk-Suiattle has not named LIHI as a party); issue an injunction prohibiting the City from making assertions about its environmental stewardship of the Project; issue an injunction prohibiting the City from using the LIHI Low Impact certification for the Project; and require the City to seek leave of the Court to make statements regarding its environmental stewardship in the future. CP 239–41.

D. Procedural History

Sauk-Suiattle initiated this action on September 17, 2021. CP 1–41. The City originally filed its Motion to Dismiss ("Original Motion to Dismiss") on October 21, 2021. CP 52. Then, on November 1, 2021, Sauk-Suiattle filed a Motion for Leave to Amend Complaint. CP 145–49. On November 12,

2021, the City filed a response that it did not oppose Sauk-Suiattle's Motion for Leave to Amend Complaint, but if the Court were to grant Sauk-Suiattle's Motion, the City would file a revised Motion to Dismiss ("Revised Motion to Dismiss") pursuant to CR 15(a). CP 203–04. That same day, Sauk-Suiattle filed a brief in opposition to the City's Original Motion to Dismiss. CP 188–202. Although the Superior Court had not yet ruled on Sauk-Suiattle's Motion for Leave to Amend Complaint, Sauk-Suiattle filed and served its First Amended Complaint on November 19, 2021. CP 209–41. In response to Sauk-Suiattle's First Amended Complaint, the City filed a Revised Motion to Dismiss that expanded upon the arguments in its Original Motion to Dismiss and included arguments to address the new nuisance claims Sauk-Suiattle added in the First Amended Complaint. CP 245–93. At no point did Sauk-Suiattle file a motion to certify the Amended Complaint as a class action pursuant to CR 23(c).

Oral argument on the City's Revised Motion to Dismiss

was held on January 14, 2022. RP 1; *see also* CP 206. Ruling from the bench, the Superior Court granted the City's Revised Motion to Dismiss and dismissed Sauk-Suiattle's CPA claim and nuisance claims. RP 42, 45. On January 20, 2022, Sauk-Suiattle filed its Notice of Appeal. CP 416. On February 22, 2022, the Superior Court issued its Order Granting Defendant's Revised Motion to Dismiss. CP 458–61.

III. ARGUMENT

A. Standard of Review

Appellate courts review a superior court's ruling on a motion to dismiss under CR 12(b)(6) de novo. *Wash. Trucking Ass'n v. Employment Sec. Dep't*, 188 Wn.2d 198, 207, 393 P.3d 761 (2017). Dismissal under CR 12(b)(6) is "appropriate only when it appears beyond doubt that the plaintiff cannot prove any set of facts that would justify recovery." *Id*. (internal quotations omitted). All facts alleged in a plaintiff's complaint are presumed true. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). But the complaint's legal conclusions are not required to be accepted as correct. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987).

Courts of appeals review a CR 12(b)(1) motion to dismiss for lack of subject matter jurisdiction de novo. *Glacier Northwest, Inc. v. Int'l Brotherhood of Teamsters Local Union No. 174*, 198 Wn.2d 768, 782, 500 P.3d 119 (2021). A court

must dismiss claims when it lacks subject matter jurisdiction. *See* CR 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). "Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal." *Ricketts v. Wash. State Bd. of Accountancy*, 111 Wn. App. 113, 116, 43 P.3d 548 (2002) (quoting *Inland Foundry CO., Inc. v. Spokane Cnty. Air Pollution Control Auth.*, 98 Wn. App. 121, 123–24, 989 P.2d 102 (1999)).

While a trial court "may only consider the allegations contained in the complaint and may not go beyond the face of the pleadings[,] . . . the trial court may take judicial notice of public documents if their authenticity cannot be reasonably disputed in ruling on a motion to dismiss." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725–26, 189 P.3d. 168 (2008) (citing ER 201(b)).

B. The Superior Court Correctly Dismissed Sauk-Suiattle's CPA Claims

The Superior Court correctly dismissed Sauk-Suiattle's CPA claims because they fail as a matter of law and must be dismissed pursuant to CR 12(b)(6). In 1969, and again in 1987, the Washington Supreme Court held that municipal corporations and political subdivisions of the state are not subject to the CPA. *Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969); *see also Haberman*, 109 Wn.2d at 170–73. For more than half a century now, state courts (including this Court) and federal courts have continuously reaffirmed *Washington Natural Gas* and *Haberman*. And contrary to Sauk-Suiattle's assertion, neither RCW 19.86.170 nor RCW 19.86.920 compel this Court to ignore the plain language of the CPA and more than fifty years of case law holding that municipal corporations, such as the City, are not subject to the CPA. If Sauk-Suiattle wants a different outcome, Sauk-Suiattle should make its arguments to the Washington State Legislature, as the courts simply cannot

rewrite the plain language of the CPA.

1. The CPA does not apply to municipal corporations.

Washington courts and federal courts have repeatedly upheld *Washington Natural Gas*'s core holding since 1969: municipal corporations and political subdivisions of the state are not subject to the CPA. *Wash. Nat. Gas Co.*, 77 Wn.2d at 98; *see also Haberman*, 109 Wn.2d at 170–73.

In *Washington Natural Gas*, the Washington Supreme Court held that a public utility district, which is a municipal corporation, was not subject to the CPA because municipal corporations were "exempt from the operation but not the benefits of the [CPA]." *Wash. Nat. Gas Co.*, 77 Wn.2d at 98. In that case, the plaintiff tried to argue that, because the defendant public utility district ("PUD") was a municipal corporation and therefore able to sell electricity free from the control of any state regulatory body, it was "in law a monopoly and in the public interest ought to be subject to the CPA." *Id*. at 97. The plaintiff asserted that the PUD was subject to the CPA

"by necessary implication," because the CPA's carve-out in RCW 19.86.170, "specifically exempts from its operation actions and transactions otherwise subject to regulation by the Washington Utilities and Transportation Commission [UTC], the Federal Power Commission, or other regulatory bod[ies] of this state or the United States," and the defendant PUD was not regulated by the UTC or any other regulatory body. *Id*. at 97–98 (emphasis added). The Court unequivocally rejected this argument. *Id*. at 98.

In rejecting the argument that the PUD should be subject to the CPA because the PUD did not fall within the carve-out in RCW 19.86.170, the Washington Supreme Court noted that "[b]y its very terms" the CPA applies only to "natural persons, corporations, trusts, unincorporated associations and partnerships." *Id*. at 98 (referring to RCW 19.86.010, which defines "person" as "natural persons, corporations, trusts, unincorporated associations and partnerships"). Based on this definition of "person" under the CPA, the Washington Supreme

Court held: "[n]owhere does [the CPA's] language imply that municipal corporations or political subdivisions of the state are within the definition of persons and entities made subject to it." *Id*.

The Washington Supreme Court's reasoning in *Washington Natural Gas* rests on the plain language of RCW 19.86.010 and RCW 19.86.090: while municipal corporations are not subject to the CPA, they are allowed to benefit from the CPA. *Id*. at 98. Under RCW 19.86.090, a "person who is injured in his or her business or property by a violation" of the CPA may file suit in superior court and "enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee." For the purpose of RCW 19.86.090—and RCW 19.86.090 alone—"person" is defined to include "the counties, municipalities, and all political subdivisions of this state." RCW 19.86.090. As the Washington Supreme Court noted in *Washington Natural Gas*,

"[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim expression unius est exclusion alterius—specific inclusions exclude implication." *Id.* at 98. According to the Washington Supreme Court, the Washington legislature's omission of municipal corporations under the definition of "person" in RCW 19.86.010 (which applies throughout the CPA), but explicit inclusion of municipal corporations in RCW 19.86.090, clearly indicates that the legislature intended municipal corporations to be exempt from the operation of CPA, but not from its benefits. *Id*.

Sauk-Suiattle completely ignores *Washington Natural Gas*'s explicit holding establishing that the plain language of the CPA makes municipal corporations exempt from its operation. Instead, Sauk-Suiattle spends eight pages of its brief arguing the Supreme Court meant to limit the municipal

corporation exemption to actions that solely fall within RCW 19.86.170. Opening Br. at 6–13. This wishful reasoning by Sauk-Suiattle simply does not accurately represent the Supreme Court's holding in *Washington Natural Gas*, which was based on the conclusion that the plain language definitions in the CPA exempt municipal corporations from its operation.

a. Washington courts and federal courts have continuously reaffirmed *Washington Natural Gas* since 1969.

Sauk-Suiattle claims that the City's Revised Motion to Dismiss is based on "aged decisions of the Washington supreme court." Opening Br. at 14. But the mere passage of time does not render rulings of the Washington Supreme Court, nor any court, invalid. Case law reaffirming *Washington Natural Gas*'s key holding that municipal corporations are not subject to the CPA now spans more than half a century. In 1987, the Washington Supreme Court in *Haberman* again held that municipal corporations, such as irrigation districts and rural electric cooperatives, are exempt from the CPA. *See* 109

Wn.2d at 170–72 ("[I]rrigation districts are municipal corporations and, as such, are exempt from the CPA under *Washington Natural Gas*[.] ... [R]ural electric cooperatives are also exempt from the CPA under our reasoning in *Washington Natural Gas*[.]"). Notably, Sauk-Suiattle's brief does not cite *Haberman*, let alone acknowledge or attempt to grapple with the fact that the Washington Supreme Court's 1987 decision in *Haberman* held that both irrigation districts and rural electric cooperatives (even though there was no evidence that the rural electric cooperatives' actions fell within the CPA carve-out in RCW 19.86.170) were still not subject to the CPA based solely on their status as municipal corporations. 109 Wn.2d at 171.

Subsequent to the Washington Supreme Court's holdings in *Washington Natural Gas* and *Haberman*, Washington courts (including this Court) and federal district courts have ruled time and time again that municipal corporations and political subdivisions are not subject to the CPA. Most recently, in an unpublished opinion in 2016, this Court found that a trial court

did not err in dismissing plaintiff's CPA claims against a rural electric cooperative because "*Haberman's* holding, which is binding on this court," and "buttressed by *Haberman's* reliance on *Washington Natural Gas*" exempted the defendant rural cooperative from the CPA. *Costello v. Tanner Elec. Co-op*, 192 Wn. App. 1062, 2016 WL 885169 at *6–7 (2016) (unpublished opinion). In 2000, this Court found that the "plain language" of the CPA and controlling case law (including *Washington Natural Gas*, among others) meant that the CPA did not apply to the Silver Lake Water District, as a municipal corporation. *Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.*, 103 Wn. App. 411, 422, 12 P.3d 1022 (2000), *abrogated on other grounds by Fisk v. City of Kirkland*, 164 Wn.2d 891, 194 P.3d 984 (2008). In 1996, the Washington Court of Appeals, Division 2 came to the same conclusion. *See Ottgen v. Clover Park Technical Coll.*, 84 Wn. App. 214, 221–22, 928 P.2d 1119 (1996) (holding Clover Park Technical College ("CPTC") is exempt from the CPA as a political subdivision of

the state, and "[t]he fact that CPTC is exempt from the CPA is a complete bar to the students' claim that the CPTC violated the CPA").

Federal courts have also repeatedly ruled similarly and found that municipal corporations are not subject to the CPA. *See Witham v. Clallam Cnty. Pub. Hosp. Dist. 2*, Case No. C09-5410, 2009 WL 3346041, *6 (W.D. Wash. Oct. 15, 2009) (granting defendant hospital district's motion to dismiss CPA claims because "the Washington Supreme Court has clearly ruled that municipal corporations, including hospital districts, are exempt from the [CPA]"); *Leahy v. Edmonds School Dist.*, Case No. C07-1970, 2008 WL 11508397, *8–9 (W.D. Wash. Nov. 10, 2008) (noting that the CPA "does not apply to municipal corporations or political subdivisions . . . . As a result, it is quite obvious that Defendant [Edmonds School District]—as a school district and an entity that did not have a contractual relationship with the Leahys— cannot be held liable under the CPA.").

All of these cases following *Washington Natural Gas* and its progeny turn on whether the defendant is a municipal corporation and therefore exempt from the definition of "person" in the CPA. And most importantly, the Washington Supreme Court in *Haberman* in 1987 specifically rejected the argument that municipal corporations should only be exempt from the CPA if their actions fall within the carve-out in RCW 19.86.170. 109 Wn.2d at 171. Numerous courts, including the Washington Supreme Court, have rejected the revisionist history that Sauk-Suiattle attempts to graft onto *Washington Natural Gas*. Opening Br. at 6–13.

b. RCW 19.86.920 does not negate *Washington Natural Gas*.

Sauk-Suiattle's argument that the Washington Legislature "clarified" the application of the CPA after *Washington Natural Gas* by adopting RCW 19.86.920 is blatantly false. Opening Br. at 13–14. The pertinent language Sauk-Suiattle clings to ("It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of

the federal courts") was part of the CPA when it became law in 1961, was not amended after the Washington Supreme Court's 1969 decision in *Washington Natural Gas*, and still contains the exact same language as it did when originally enacted in 1961. *Compare* RCW 19.86.920 *with* 1961 Wash. Sess. Laws Chap. 216, Section 20, available at https://leg.wa.gov/CodeReviser/documents/sessionlaw/1961c216.pdf. Contrary to Sauk-Suiattle's arguments at pages 13 and 14 of its Opening Brief, in 1985, the only change HB 46 made to RCW 19.86.920 was an additional clause at the end of the last sentence of the entire statute. *See* Wash. Sess. Laws Chap. 401, Section 1, available at https://leg.wa.gov/CodeReviser/documents/sessionlaw/1985c401.pdf?cite=1985%20c%20401%20%C2%A7%201 (adding, "nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.").

Moreover, the federal cases cited by Sauk-Suiattle interpreting the federal Sherman and Clayton Acts do not

"compel[] a conclusion" that this Court should abandon the plain text of the CPA and more than fifty years of case law. Opening Br. at 16. Accepting Sauk-Suiattle's argument that this Court must interpret the CPA consistently with federal decisions would effectively require this Court to defy canons of statutory interpretation and rewrite the CPA. The Legislature directed courts to be "guided by" federal decisions on what conduct constitutes an unfair or deceptive trade practice. RCW19.86.920. But directing courts to be guided by federal decisions that identify what conduct qualifies as a deceptive trade practice is wholly different from directing courts to rewrite the plain language of the CPA in order to apply it to municipal corporations. *See State v. James-Buhl*, 190 Wn.2d 470, 474, 415 P.3d 234 (2018) ("When ascertaining the plain meaning of the statute, [courts] must not add words where the legislature has chosen not to include them, and [courts] must construe statutes such that all of the language is given effect."); *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006)

("Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.").

If Sauk-Suiattle is correct that RCW 19.86.920 and *City of Lafayette v. Louisiana Power and Light Company*, 435 U.S. 389 (1975), "compels a conclusion" that municipal corporations are subject to the CPA, then why did the Washington Supreme Court not rule differently in 1987 when it held again in *Haberman* that municipal corporations are not subject to the CPA? *City of Lafayette* was decided by the U.S. Supreme Court in 1978, nearly a decade before the Washington Supreme Court ruled again in *Haberman* that municipal corporations are not subject to the CPA. Clearly RCW 19.86.920 does not compel such a conclusion because the CPA's plain language, as described in *Washington Natural Gas*, establishes that the statute does not apply to municipal corporations.

2. The City, as a municipal corporation, is not subject to the CPA.

Sauk-Suiattle filed this suit against the City, which is

undisputedly a municipal corporation. *See supra* Section II.A. Even Sauk-Suiattle acknowledges that the City is a municipal corporation. CP 210. While acknowledging that the City is a municipal corporation, Sauk-Suiattle tries to avoid the established law regarding the inapplicability of the CPA to municipal corporations. It first mischaracterizes the facts and holding in *Washington Natural Gas* and then argues that because the City is not engaged in regulated actions identified in the CPA's carve-out in RCW 19.86.170, it is subject to the CPA. Opening Br. at 10. This is the exact argument rejected by the Washington Supreme Court in *Washington Natural Gas* and *Haberman*. *See supra* Section III.B.1.a. The Washington Supreme Court's reasoning was based on the plain language of the CPA. Municipal corporations—even when engaged in unregulated activity not included in RCW 19.86.170—are simply not subject to the CPA. *Wash. Nat. Gas*, 77 Wn.2d at 97–98; *Haberman*, 109 Wn.2d at 171.

Sauk-Suiattle is also wrong when it claims that the

Washington Natural Gas decision "was *expressly* based by the Washington supreme court upon the court's *prior* decision in *Williamson v. Grant County Public Hospital District*, 65 Wn.2d 245 (1961)." Opening Br. at 7 (emphasis in original). The Washington Supreme Court said it itself at the end of its lengthy analysis of the issue: its view that municipal corporations are not subject to the CPA was simply "supported by" its holding in *Williamson*. *Wash. Nat. Gas*, 77 Wn.2d at 98–99. The Washington Supreme Court's holding in *Washington Natural Gas* turned exclusively on a plain reading of the CPA, and it affirmed that exclusive reasoning in *Haberman*.

Sauk-Suiattle's attempt to classify *Washington Natural Gas* as out of touch, or dated, is also unavailing. Sauk-Suiattle claims that "[i]n 1969 it was never contemplated that a utility owned and operated by a municipality would be operated some 90+ miles outside the municipality's jurisdiction." Opening Br. at 13; *see also* Opening Br. at 18. But such a statement

blatantly ignores the long history of the Project. The very facts of this case demonstrate that a municipality did, in fact, own and operate hydropower and other utility assets outside of their own jurisdiction. Such an idea was specifically contemplated and approved in 1927, more than forty years before *Washington Natural Gas* was decided, when the Project was first licensed. *See* CP 267; *see supra* Section II.A. By the time *Washington Natural Gas* was decided, the notion that municipalities, such as the City, operated and owned utility projects outside of their jurisdiction was not a novel concept the Washington Supreme Court would have been unaware of; it was commonplace, despite Sauk-Suiattle's unsubstantiated allegation to the contrary. And if the Washington Supreme Court erred in 1969 because it was somehow unaware that municipal utilities often owned and operated electric projects outside of their jurisdictions, they certainly could have changed their mind in 1987 when it again held that municipal corporations such as irrigation districts and rural electric cooperatives are exempt

from the CPA. *See Haberman*, 109 Wn.2d at 170–72.

Accordingly, any argument from Sauk-Suiattle that the City is subject to the CPA, or that the CPA is intended to apply to municipal corporations, is categorically wrong. The plain text of the CPA, supported by more than fifty years of case law, makes clear that the City is not subject to the CPA. Sauk-Suiattle's CPA claim thus fails as a matter of law and the Superior Court correctly dismissed the claim under CR 12(b)(6).

C. The Superior Court Correctly Dismissed Sauk-Suiattle's Nuisance Claims

Sauk-Suiattle alleges that the Superior Court exceeded its scope of review for a CR 12(b)(6) motion when it dismissed the City's nuisance claims. Opening Br. at 29. Sauk-Suiattle is wrong. The Superior Court correctly dismissed Sauk-Suiattle's nuisance claims under CR 12(b)(6) for several reasons. There are three ways to establish a defendant's actions as nuisance: cite to one of the statutorily enumerated public nuisances in RCW 7.48.140, cite to a statute that creates nuisance per se, or

show that the City's conduct caused substantial and unreasonable interference with the plaintiff's property interest. *See* RCW 7.48.140 (listing the statutorily enumerated public nuisances); *Moore v. Steve's Outboard Serv.*, 182 Wn.2d 151, 156–57, 339 P.3d 169 (2014) (nuisance per se "is an act, thing, omission, or use of property which . . . [is] not permissible or excusable under any circumstance," and it can be established by citing a statute that prohibits conduct at all times and under all circumstances); *Tiegs v. Watts*, 135 Wn.2d 1, 13–14, 954 P.2d 877 (1998) (public or private nuisance can be established by showing defendant's conduct caused unreasonable and substantial interference). The Superior Court did not err in dismissing Sauk-Suiattle's "public nuisance claim by simply stating in its order that 'the City's statements are not a statutorily enumerated public nuisance.'" Opening Br. at 22 (quoting CP 459). While the Superior Court correctly determined that "it is undisputed that the City's statements" are not one of the nine statutorily enumerated public nuisances

under RCW 7.48.140, that was only one reason why the Superior Court correctly dismissed Sauk-Suiattle's nuisance claim. CP 459; *see also* RCW 7.48.140.

The Superior Court correctly concluded that Sauk-Suiattle did not plead a cognizable theory for relief under any of the three nuisance frameworks for the following reasons. First, the City's statements are not unlawful and do not constitute nuisance per se. Second, the Superior Court correctly determined that Sauk-Suiattle failed to establish that the City's statements were the cause of the alleged acts of third-parties. Third, public statements cannot be a nuisance. Lastly, Sauk-Suiattle's assertion that it has a Treaty-protected property right in the Skagit River is a legal conclusion that this Court is not required to accept on appeal, and provides this Court with additional, alternative grounds to affirm the Superior Court's dismissal. *Haberman*, 109 Wn.2d at 120. A property right is an essential element of a nuisance claim. Here, Sauk-Suiattle has no property right in the Skagit River, so Sauk-Suiattle

cannot allege any set of facts, even if presumed true, that would justify recovery. Thus, dismissal of Sauk-Suiattle's nuisance claims under CR 12(b)(6) is proper.

1. Sauk-Suiattle cannot establish nuisance per se.

First, the Superior Court correctly dismissed Sauk-Suiattle's nuisance claims and found that "the City's statements are not an unlawful act amounting to a nuisance per se" and does not violate the criminal false advertising statute, RCW 9.04.010. CP 459.[2]

A nuisance per se "is an act, thing, omission, or use of property which of itself is a nuisance, and hence is not permissible or excusable under any circumstance." *Moore v. Steve's Outboard Serv.*, 182 Wn.2d 151, 156–57, 339 P.3d 169

[2] Sauk-Suiattle claims that it has asserted "a theory of nuisance per se," Opening Br. at 20, but its First Amended Complaint does not allege or plead nuisance per se, only private and public nuisance. *See* CP 234; *see also* CP 239 ("That the Court issue an order declaring that it constitutes a deceptive practice and/or nuisance, either public or private"). Sauk-Suiattle did allege in its Opposition to the City's Revised Motion to Dismiss that the City's conduct violated RCW 9.04.010 (false advertising) and thus, was a nuisance per se. *See* CP 317–18.

(2014) (citing *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998)); *see, e.g., Motor Car Dealers' Ass'n of Seattle v. Fred S. Haines Co.*, 128 Wn. 267, 222 P. 611 (1924) (while a statute made it illegal to sell cars on Sunday, actually doing so was not a nuisance per se because it was lawful to sell cars on other days, and thus the "acts complained of are not acts which constitute a nuisance at all times and under all conditions, [and] thus [fail] one of the most important elements of a nuisance per se").

The Superior Court did not err when it correctly determined that Sauk-Suiattle cannot use RCW 9.04.010 to establish nuisance per se. CP 459. Sauk-Suiattle alleges that the City's statements "constitute[] false advertising prohibited by RCW 9.04.010, the violation of which is a misdemeanor, … [which therefore] constitute a nuisance per se." Opening Br. at 28 n.8. To constitute false advertising under RCW 9.04.010, the statute requires that the alleged violator must have the "intent to sell, or in any wise dispose of merchandise, securities,

service or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof[.]" (emphasis added). During oral argument, the Superior Court noted that the City's statements were "mere puffing" and that it is not "contemplated in nuisance law that even false speech of one company [that it] is more virtuous than another can be considered an unlawful act" and constitute nuisance per se. RP 31, 44.[3] Thus, the Superior Court correctly

[3] Furthermore, "mere puffery" does "not give rise to an actionable CPA claim." *Babb v. Regal Marine Indus., Inc.*, 179 Wn. App. 1036, 2014 WL 690154 at *4 (2014) (unpublished opinion). Federal courts, including the Ninth Circuit and Second Circuit, also recognize that "mere puffing" does not constitute false advertising and is not actionable under the Lanham Act. *See, e.g.*, *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1054 (9th Cir. 2008), *cert. denied* 557 U.S. 903 (2009); *Lipton v. Nature Co.*, 71 F.3d 464, 474 (2nd Cir. 1995). Most recently, on April 18, 2022, the U.S. District Court for the Southern District of New York granted defendant Allbirds' motion to dismiss because defendant's statements regarding environmental impact and sustainability did not amount to deceptive businesses practices or false advertising under New York state law. *See Dwyer v. Allbirds*, No. 21-cv-5238, 2022 WL 1136799 (S.D.N.Y. April 18, 2022).

dismissed Sauk-Suiattle's nuisance per se claim because "there is no allegation that the City's statements amount to advertising to sell a product or increase consumption of a product, as otherwise required by RCW 9.04.010." CP 459.

Moreover, RCW 9.04.010 is a criminal statute enforced by either the Attorney General or county prosecuting attorneys.[4] *See* RCW 9.04.060. Sauk-Suiattle did not plead an alleged violation of RCW 9.04.010 or otherwise cite to or discuss the statute in its First Amended Complaint. *See generally* CP 209–41. Nuisance per se also requires the acts complained of to be a nuisance at all times and under all conditions. *Moore*, 182 Wn.2d at 156–57. Sauk-Suiattle cannot meet this high bar by oblique reference to a criminal statute under which the City has not been charged.

[4] RCW 9.04 also arguably does not apply to municipal corporations. *Compare* RCW 19.86.010 (CPA applies to "natural persons, corporations, trusts, unincorporated associations and partnerships") *with* RCW 9.04.010 (applying to "any person, firm, corporation, or association").

Sauk-Suiattle also cannot use the CPA to establish nuisance per se. Sauk-Suiattle builds its case around the CPA, and while the CPA does prohibit certain conduct, it does not apply to municipal corporations and exempts certain regulated activities under RCW 19.86.170. Thus, the CPA does not apply at all times and under all conditions. *See Wash. Nat. Gas*, 77 Wn.2d at 98; *see also supra* Section III.B. Accordingly, Sauk-Suiattle cannot argue that the City's statements that allegedly violate the CPA are a nuisance per se. Thus, Sauk-Suiattle cannot use these statutes, or any other, to create nuisance per se liability.

Sauk-Suiattle also incorrectly alleges that "[u]nlawfulness is not an element of a nuisance *per se* claim, nor of a public, private or common law nuisance claim." Opening Br. at 28. Such a statement is puzzling, given that Sauk-Suiattle directly quotes RCW 7.48.120 in its Opening Brief, which explicitly defines nuisance as:

> *unlawfully doing an act*, or omitting to perform a

> duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, *or unlawfully interferes with*, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

RCW 7.48.120 (emphasis added). Sauk-Suiattle also quotes *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 139 (1986), which states that "[e]ngaging in any business or profession *in defiance of a law regulating or prohibiting the same*, however, is a nuisance per se." (emphasis added). Engaging in a business "in defiance of a law" is inherently the very definition of unlawful. Thus, the Superior Court correctly ruled that "the City's statements are not an unlawful act amounting to a nuisance per se." CP 459.

2. Sauk-Suiattle's alleged harm is not causally related to the City's statements.

Second, the Superior Court correctly dismissed Sauk-Suiattle's nuisance claims—both public and private—because Sauk-Suiattle cannot establish a causal connection between the

City's statements and the alleged acts of third parties. Sauk-Suiattle alleges that the Superior Court erred in dismissing its nuisance claims by ruling that proximate cause is an element of nuisance. Opening Br. at 2. Instead, Sauk-Suiattle alleges that proximate cause is "not an element of a *prima facie* nuisance claim[.]" *Id*. Sauk-Suiattle is wrong. A defendant's actions must be the legal cause of the nuisance. *See* Restatement (Second) of Torts § 824, comment (b); *see also* Restatement (Second) of Torts § 9, comment (b) (citing Restatement (Second) of Torts §§ 430 – 453 and § 870) (stating that for a defendant's action to be the legal cause of an invasion of another's interest, the act must be a substantial factor in bringing about the harm, and cannot be superseded by unforeseeable intentional or criminal acts of third parties). Courts will evaluate whether a plaintiff has "successfully alleged facts showing proximate cause" when deciding whether a nuisance claim should be dismissed. *See City of Seattle v. Monsanto Co.*, 237 F. Supp. 3d 1096, 1105–07 (W.D. Wash.

2017). Moreover, "unforeseeable intervening acts break the chain of causation." *Id*. at 1107.

Here, Sauk-Suiattle cannot show the requisite causal connection between the City's statements and the alleged interference by third parties with Sauk-Suiattle's use and enjoyment of its property. Sauk-Suiattle states that it is the harassment and vandalism by third parties that give rise to any interference in its use of its Treaty-based property rights. CP 229–30. These third parties are outside of the City's control. The City's statements do not encourage any person to harm Sauk-Suiattle; they are merely statements regarding the City's efforts to obtain electricity from sources with a lower impact on the environment than carbon-based options.

Accordingly, the actions of these third parties are unforeseeable and break the chain of causation, and the City cannot be held liable for any harm allegedly brought about by a third party's independent, intervening, and superseding actions. *See, e.g.*, Restatement (Second), Torts §§ 9, 824.

see also City of Seattle v. Monsanto Co., 237 F. Supp. at 1105–07; *Young v. Bryco Arms*, 213 Ill. 2d 433, 456 (Ill. 2004) (granting motion to dismiss nuisance claim because "the defendants' conduct is not a legal cause of the alleged nuisance because the claimed harm is the aggregate result of numerous unforeseeable intervening criminal acts by third parties not under defendants' control"). The Superior Court did not err when it ruled that "intervening third-party acts disrupt the flow of causation from the City's statements to the discrimination, harassment, and vandalism alleged by [Sauk-Suiattle]" and dismissed its nuisance claims. CP 459.

3. Public statements cannot be a nuisance.

Third, even if Sauk-Suiattle alleged injuries beyond the harassment and vandalism perpetrated by third parties, Sauk-Suiattle cannot establish private or public nuisance liability because no set of facts, consistent with the First Amended Complaint, could ever support the City's statements constituting nuisance. *See, e.g.*, *Lakey v. Puget Sound Energy,*

Inc., 176 Wn.2d 909, 922 n.9, 296 P.3d 860 (2013) (stating that, even if the court were reviewing dismissal pursuant to CR 12(b)(6), it would still affirm dismissal of the nuisance claim because plaintiff homeowners could not prove, consistent with the allegations of the complaint, that the energy company defendant acted unreasonably by operating an electrical substation).

The making and issuing of public statements is not the type of activity the Legislature meant to consider a nuisance. Indeed, the types of nuisances enumerated in the statute itself all involve physical obstructions or intrusions—something mere words cannot do. *See* RCW 7.48.140 (listing improperly disposing of an animal carcass; obstructing waterways, highways, streets, and walkways; and producing noxious or foul smells, among others, as public nuisances). No case law supports the argument that mere statements like the City's constitute a private or public nuisance. The only reported decision involving an allegation remotely close to words or

statements constituting a nuisance is in *McKinney v. Ostrovsky*, No. 53549-8-I, 2005 WL 518985 (Wash. Ct. App. 2005). In *McKinney*, a plaintiff brought a public nuisance action against her neighbors in part because their children were writing and drawing on the sidewalk with chalk. *Id*. at *11–12. The court in that case held that these chalk statements and drawings were not nuisances, but at most, "minor annoyances." *Id*. Indeed, other courts that have more directly considered whether words or statements can be a nuisance have concluded that they cannot, for allowing such a claim "would enter a field with no just or reasonable stopping point." *Henson v. Stroede*, 868 N.W.2d 198 (Wis. Ct. App. 2015) (affirming dismissal by refusing to consider defendant's derogatory and disparaging remarks as nuisances on public policy grounds).

The Superior Court agreed that public statements were not a nuisance, noting that it is not "contemplated in nuisance law that even false speech of one company [that it] is more virtuous than another can be considered an unlawful act" and

constitute nuisance per se. RP 44. Because there is no authority recognizing public statements as an actionable nuisance, Sauk-Suiattle cannot set forth any facts consistent with the First Amended Complaint that would impose liability.[5]

4. Sauk-Suiattle has no affected property interest in the Skagit River.

While the Superior Court Order dismissed Sauk-

[5] Sauk-Suiattle's nuisance claims also should be dismissed based on collateral estoppel. "Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties." *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). "The collateral estoppel doctrine promotes judicial economy and serves to prevent inconvenience or harassment of parties. Also implicated are principles of repose and concerns about the resources entailed in repetitive litigation." *Id*. at 306–07. As explained in Section III.D.2, Sauk-Suiattle filed a separate lawsuit asserting state law nuisance claims against the City, and that case was removed to federal court. *See also* CP 270 ("*Sauk-Suiattle I*"). Sauk-Suiattle contended the City's operation of the Project without fish passage is a nuisance under Washington state law. *Id*. The federal district court dismissed Sauk-Suiattle's nuisance claims on December 2, 2021, in *Sauk-Suiattle I*. Although there is an arguable distinction between the nuisance claims raised in this suit and the nuisance claims raised by Sauk-Suiattle in *Sauk-Suiattle I*, this Court should dismiss Sauk-Suiattle's nuisance claims in this case to the extent they argue that the City's operation of the Project without fish passage is a nuisance under state law.

Suiattle's nuisance claims on the other grounds discussed above, Sauk-Suiattle's nuisance claims also fail because Sauk-Suiattle lacks property rights that the complained-of conduct could affect. An essential element of a nuisance claim requires the plaintiff actually have an interest in real property that is disrupted by the defendant. *See, e.g.*, *Mustoe v. Xiaoye Ma*, 193 Wn. App. 161, 169, 371 P.3d 544 (2016) (nuisance action based on defendant's excavation and removal of tree roots failed because plaintiff had no property interest in the tree roots on defendant's property); *Collinson v. John L. Scott*, Inc., 55 Wn. App. 481, 482, 778 P.2d 534 (1989) (nuisance action failed because plaintiffs possessed no easement in light, air, or view disrupted by the defendant's building). While the City acknowledges that where a Treaty-based usufructuary fishing right exists constitutes a form of property right, here Sauk-Suiattle has no Treaty-based rights that could be affected by the conduct of which Sauk-Suiattle complains.

Sauk-Suiattle's nuisance claims broadly declare

purported fishing rights in the Skagit River generally. *See* CP 228 (¶ 2.36, alleging rights to the "Skagit ecosystem"); CP 229 (¶ 2.41, alleging a "Treaty-grounded property right in the lands and waters of the Skagit"). These sweeping claims suggest that Sauk-Suiattle's fishing rights extend throughout the Skagit basin. Yet as Sauk-Suiattle is well aware, it has **no** adjudicated Treaty-based right to fish in the Skagit River. Treaty-based fishing rights arise under federal law. *United States v. Washington*, 384 F. Supp. 312, 407 (W.D. Wash. 1974) (the "*Boldt Decree*"). Sauk-Suiattle was a party to the litigation that led to the *Boldt Decree,* which adjudicated off-reservation Treaty-based fishing rights for Sauk-Suiattle and many other tribes in Western Washington. *See id.* at 375–76. The court determined that Sauk-Suiattle's Treaty-based fishing rights are limited to specific tributaries of the Skagit River, exclude the Skagit River itself, and are downstream of the City's dams on the main stem of the Skagit River. *Id.*

Recognizing the complexity of the issues involved,

including significant review of expert reports and ethnographic data in the *Boldt Decree*, the federal court retained ongoing jurisdiction and established a system for parties to initiate subproceedings to resolve disputes. *Id.* at 419. These subproceedings provide Western Washington tribes, including Sauk-Suiattle, the exclusive forum to resolve questions regarding the extent of their fishing rights. *See id.* Recently, the Upper Skagit Indian Tribe brought a subproceeding against Sauk-Suiattle because Sauk-Suiattle was fishing in the Skagit River. *United States v. State of Washington*, Case No. C70-9213-RSM, 2021 WL 4972343 (W.D. Wash. Oct. 26, 2021) (*"Martinez Decision"*). After considering multiple arguments advanced by Sauk-Suiattle, United States District Court Judge Martinez determined Sauk-Suiattle had no Treaty-based right to fish in the Skagit River. *Id.* at *9–13 (interpreting the *Boldt Decree* to confirm that Sauk-Suiattle's Treaty-based fishing rights exclude the Skagit River because they extend only to the Sauk River, Cascade River, Suiattle River, and certain

tributaries to the Sauk and Suiattle rivers). Judge Martinez declined to enjoin Sauk-Suiattle from fishing in the Skagit River only because he expected that Sauk-Suiattle would comply with his interpretation of the injunctive relief already provided in the *Boldt Decree*. *Martinez Decision*, 2021 WL 4972343, at *14 n.27.

Sauk-Suiattle correctly recognizes that its Treaty-based property right is a right "on specifically-identifiable areas of land and water." Opening Br. at 27. Because Sauk-Suiattle has no adjudicated Treaty-based rights to fish in the Skagit River, it has no property interest, Treaty-based or otherwise, in the Skagit River. Sauk-Suiattle has not specifically identified any other affected area in its First Amended Complaint.

Given that Treaty rights arise under federal law and the federal court has already fully adjudicated the extent of Sauk-Suiattle's Treaty-based fishing rights, *Boldt Decree*, 384 F. Supp. at 407, this Court should rely on the decisions of Judge Boldt and Judge Martinez to reject claims that are premised on

the unfounded assertion that Sauk-Suiattle has rights to fish in locations other than the specified tributaries. This recent adjudication is binding on, and fatal to, Sauk-Suiattle's nuisance claims here.

The City's Project is located on the main stem of the Skagit River. CP 151. Thus, any statements made by the City regarding the Project pertain only to the Skagit River, and the City's statements cannot constitute a nuisance with respect to Sauk-Suiattle's Treaty-based fishing rights on other rivers or downstream tributaries.

Moreover, Sauk-Suiattle's assertion that it has a Treaty-protected property right in the Skagit River is a legal conclusion that this Court is not required to accept on appeal. *Haberman*, 109 Wn.2d at 120. A property right is an essential element of a nuisance claim. Because Sauk-Suiattle has no property right in the Skagit River, Sauk-Suiattle cannot provide any set of facts, even if presumed true, that would justify recovery. Thus, dismissal of Sauk-Suiattle's nuisance claims under CR 12(b)(6)

is proper.

5. Dismissal Prior to Class Certification Was Proper

Sauk-Suiattle brought its Amended Complaint on behalf of its members as a putative class. CP 236. Dismissal of the Amended Complaint prior to class certification, however, was not premature or improper, and class certification would not have changed the outcome of Sauk-Suiattle's nuisance claim. *See* Opening Br. at 23. "[C]lass certification need not always be undertaken before other pretrial motions are considered. Other matters are often disposed of before class certification." *Wash. Educ. Ass'n v. Shelton School Dist. No. 309*, 93 Wn.2d 783, 789 (1980). Granting a motion to dismiss prior to class certification is not improper when such dismissal "might preclude the action simply because there was no claim upon which relief could be granted to any conceivable class; i.e., there was no cause of action as a legal, rather than as a factual matter." *Id*. Here, the Superior Court correctly dismissed Sauk-Suiattle's nuisance claim (and its CPA claim) as a legal

matter, not a factual matter.

Moreover, Sauk-Suiattle never moved the Superior Court to certify its Amended Complaint as a Class Action, as required by CR 23(c). Certification of a class "is sought by motion[,]" it is not granted *sua sponte* by the superior court. *See* 14 Wash. Prac. § 11:79 (3d. ed.).

D. Alternatively, the Superior Court, and this Court, Lack Subject Matter Jurisdiction over Sauk-Suiattle's Claims

In the event this Court does not affirm the Superior Court's conclusion to dismiss Sauk-Suiattle's CPA and nuisance claims, this Court can affirm dismissal on alternative bases in the record. *See Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, n.114 (2010). Under Section 313 of the CPA, federal appellate courts have exclusive jurisdiction over challenges to FERC orders. *See* 16 U.S.C. § 825l. Sauk-Suiattle's claims represent an impermissible attack upon the City's license, which Sauk-Suiattle failed to appeal, and even supported, when it was issued in 1995. Whether it is

through the CPA or nuisance claims Sauk-Suiattle alleges here, or the federal or state law claims alleged in its other lawsuits filed against the City, it is clear that Sauk-Suiattle has one goal: to require fish passage at the Project.

Over the last year, Sauk-Suiattle has sued the City in various fora, including Skagit County Superior Court (which the City removed to the U.S. District Court for the Western District of Washington, now on appeal in the Ninth Circuit[6]) and Sauk-Suiattle Tribal Court[7] (which the City is currently challenging in the Western District of Washington[8]), asserting similar claims concerning and related to the City's operation of the Project without fish passage. But under the FPA, the proper venue for such a question is FERC in the pending relicensing

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[6] *See* CP 266–70; *see also* Notice of Appeal, *Sauk-Suiattle Indian Tribe v. City of Seattle*, Case No. 2:21-cv-1014, ECF 22 (W.D. Wash. Dec. 13, 2021).

[7] *See* Amended Civil Complaint for Declaratory Judgment, *Sauk-Suiattle Indian Tribe v. City of Seattle*, Case No. SAU-CIV-01/22-001 (Jan. 18, 2022).

[8] *See City of Seattle v. Sauk-Suiattle Tribal Court*, Case No. 2:22-cv-00142 (W.D. Wash. Feb. 7, 2022).

proceeding—in tandem with the Secretaries of Commerce and Interior. The Western District of Washington agrees: on December 2, 2021, the court dismissed Sauk-Suiattle's first lawsuit challenging the City's operation of the Project without fish passage because it found the court lacked jurisdiction over Sauk-Suiattle's claims due to Section 313 of the FPA. CP 266–79. This Court should find the same here.

1. Federal courts of appeals have exclusive jurisdiction over any issue related to the City's FERC license.

Section 313 of the FPA establishes the procedure a party must follow to seek redress when it is aggrieved by an order issued by FERC. *See* 16 U.S.C. § 825l. An aggrieved party has 30 days to request rehearing. *See id*. § 825l(a). After FERC has ruled on the request for rehearing, the aggrieved party has 60 days to petition for review to "the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business … [or] the United States Court of Appeals for the

District of Columbia[.]" *See id*. § 825l(b). The United States Courts of Appeals have "exclusive" jurisdiction "to affirm, modify, or set aside" FERC's orders. *Id*. In 1958, the U.S. Supreme Court recognized the broad parameters of the FPA's exclusive jurisdiction provision: "[A]ll objections to [a FERC] order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336, 78 S. Ct. 1209, 2 L.Ed.2d 1345 (1958). "It thereby necessarily precluded de novo litigation between the parties of all issues inhering in the controversy[.]" *Id*. (emphasis added). The Tenth Circuit noted, "[w]e would be hard pressed to formulate a doctrine with a more expansive scope." *Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989).

The Ninth Circuit has instructed district courts to look past a plaintiff's claimed causes of action and artful attempts to avoid the FPA's "strict jurisdictional limits" by evaluating

whether the allegations implicate or would substantially disrupt the FPA's licensing or review processes. *Cal. Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911–12 (9th Cir. 1989) (remanding for an entry of dismissal where district court lacked jurisdiction over claims under the National Environmental Policy Act and the American Indian Religious Freedom Act challenging the Forest Service's actions in relation to the issuance of a FERC license); *see also Southwest Ctr. for Biological Diversity v. F.E.R.C.*, 967 F. Supp. 1166, 1175–76 (D. Ariz. 1997). That same logic precludes state law claims that mount a collateral attack on a FERC license. *See Carrington v. City of Tacoma*, 276 F. Supp. 3d 1035, 1044–45 (W.D. Wash 2017) (plaintiff's state law negligence claims were an "impermissible collateral attack … seeking state tort damages for [the utility's] operations in compliance with its FERC license" and noting that plaintiffs "did not challenge the terms of [the utility's] FERC license at any time during the [prior] relicensing process"); *see also Williams*, 890 F.2d at 262

("[T]he prohibition on collateral attacks applies whether the collateral action is brought in state court, e.g., *City of Tacoma*, or federal court[.]"). "[I]n assessing whether the exclusive jurisdiction provision should apply, a court is to look not to the nature of the claims asserted, but to whether 'the practical effect of the action … is an assault on an important ingredient of the FERC license.'" CP 275 (quoting *Yeutter*, 887 F.2d at 912). "[O]nce an activity is exclusively regulated and sanctioned by a FERC license, an aggrieved party may not use state law tort as a vehicle to interfere with that sanctioned activity." *Otwell v. Alabama Power Co.,* 944 F.Supp.2d 1134, 1154 (N.D. Ala. 2013), *aff'd by Otwell v. Alabama Power Co.*, 747 F.3d 1275, 1281 (11th Cir. 2014) ("Appellants cannot escape §825l(b)'s strict judicial review provision by arguing that they are pursuing different claims and different relief than the parties before the FERC.").

The Ninth Circuit has repeatedly held that plaintiffs cannot avoid exclusive jurisdiction provisions through artful

pleading. *See, e.g., American Bird Conservancy v. F.C.C.*, 545 F.3d 1190, 1194 (9th Cir. 2008). For instance, to determine whether a plaintiff's claims violated the exclusive jurisdiction provision of the Hobbs Act,[9] the Ninth Circuit will look to see if the claims are "preliminary, ancillary, or incidental" to the Nuclear Regulatory Commission's (the "NRC's") licensing proceedings. *Pub. Watchdogs v. S. California Edison Co., Inc.*, 984 F.3d 744, 764 (9th Cir. 2020). In *Public Watchdogs*, the Ninth Circuit found that the plaintiff could not avoid the exclusive jurisdiction of the Hobbs Act "by artfully pleading" its challenges as a "Price-Anderson [Act, 42 U.S.C. § 2210(n)(2)], [California] public nuisance, or strict products liability claim." *Id*. at 766. There, the plaintiff's claim regarding the safety of nuclear waste canisters that had been certified by the NRC was an impermissible "veiled challenge"

[9] Courts often look to "functionally identical" exclusive jurisdiction clauses in other federal statutes, such as the Hobbs Act, when interpreting Section 313 of the FPA. *See, e.g.,* CP 274.

to the NRC's licensing decisions. *Id*. at 765.

2. Sauk-Suiattle's claims represent an impermissible attack on the City's FERC license and the Superior Court, and this Court, lack subject matter jurisdiction to hear Sauk-Suiattle's claims.

Here, Sauk-Suiattle has "artfully pled" its claims and is using the CPA and nuisance claims to launch an impermissible attack on the City's operation of the Project without fish passage. Sauk-Suiattle's Amended Complaint challenges the City's statements regarding its lawfully-licensed operation of the Project without fish passage, alleging that such statements constitutes a deceptive trade practice under the CPA and nuisance under state law. CP 233–34. But such claims amount to an impermissible "veiled challenge" to the City's license 25 years too late. *Pub. Watchdogs*, 984 F.3d at 765. Neither the Superior Court, nor this Court, is the appropriate forum for such a dispute; only FERC is.

In *Public Watchdog*s, the Ninth Circuit found that "conduct that is expressly licensed, certified, and regulated by the NRC" falls within the exclusive jurisdiction of the Hobbs

Act. 984 F.3d at 766. It follows then, that conduct that has been "expressly licensed, certified, and regulated" by FERC also falls within the exclusive jurisdiction of the FPA, specifically, Section 313, 16 U.S.C. § 825l(b). In 1995, FERC expressly licensed the Project to operate without fish passage, so any challenge to this conduct should have been challenged pursuant to the FPA's exclusive jurisdiction provision. Instead, Sauk-Suiattle is now using the CPA and its nuisance claims, 25 years after the fact, to challenge the City's operation of the Project consistent with its FERC license. *See City of Tacoma*, 357 U.S. at 336.

On December 2, 2021, the Western District of Washington granted the City's Motion to Dismiss in a similar suit brought by Sauk-Suiattle regarding fish passage at the Project. *See* CP 266–79. The court agreed with the City that Sauk-Suiattle's action was an impermissible attack on the City's FERC license in violation of Section 313 of the FPA, and dismissed Sauk-Suiattle's action because the court lacked

jurisdiction to hear any of Sauk-Suiattle's claims. CP 279. Sauk-Suiattle similarly argued that the exclusive jurisdiction provision did not apply because it was not challenging the City's FERC license. CP 273–74. But the court saw through Sauk-Suiattle's argument and found that Sauk-Suiattle's claims were "inescapably intertwined" with the City's FERC license. CP 279. As a result, the court summarily dismissed Sauk-Suiattle's complaint. *Id.*

While Sauk-Suiattle yet again claims that its action does not arise from the City's FERC license or the City's operation of the Project, "but rather arises exclusively from [the City's] deceptive trade practices[,]" Sauk-Suiattle also asserts that the City's alleged "greenwashing campaign" is "centrally implicated in [the City's] failure to provide fish passage and current obstructionist approach to the FERC process[.]" CP 233 (emphasis added). Sauk-Suiattle is essentially asking this Court to circumvent FERC (both the 1995 Relicensing Order, which did not require fish passage, and the current relicensing

proceeding) and ignore Section 313 of the FPA, and declare that the City's operation of the Project without fish passage—which was lawfully permitted by FERC and agreed to by Sauk-Suiattle in 1995—harms the environment and is a deceptive trade practice. CP 233, 235.

Sauk-Suiattle's allegations regarding "false and misleading environmental claims regarding [the Project], fish passage, and the LIHI low Impact certification[,]" CP 224, also present an incomplete and inaccurate picture of the Project's FERC licensing history and the city's ongoing FERC relicensing proceeding. First, Sauk-Suiattle does not acknowledge that it agreed to the "Fisheries Settlement Agreement," which incorporated a plan to protect anadromous fish downstream from the Project and permitted the 1995 licensing to go forward without fish passage. CP 267–69. Moreover, the Secretaries of Commerce and Interior chose not to exercise their statutory authority under the FPA (16 U.S.C. § 811) to require fish passage in the current Project license. CP

269.

Instead, Sauk-Suiattle cherry picks and truncates very recent comments made by the Agencies in 2020 and 2021 as part of the current FERC relicensing proceeding to accuse the City of falsely or deceptively stating that there were natural barriers to fish passage downstream of the Project. Opening Br. at 12; *see also* CP 217–22. Viewed in context, the Agencies' statements, however, are not determinative regarding natural barriers to fish passage. Instead, the statements comment upon the City's proposed study plan and urge the study of fish passage as part of the relicensing process because relatively recent information indicates that the extent of the natural barriers may not be as significant as previously thought.[10] In

[10] *See* https://elibrary.ferc.gov/eLibrary/search, NMFS Comments (FERC Accession No. 20201022-5094) Att. 3 p. 34 ("Within the last license period, there have been recent observations of salmonids navigating upstream past SCL's proposed limits of historical natural passage to the base of Gorge Dam (USIT 2020a, USIT 2020b)."); *see also* USFWS Comments (FERC Accession No. 20210308-5128), WDFW

response to these comments, the City agreed in April 2021 to expand the proposed fish passage study as requested by the Agencies.[11]

By challenging the City's statements regarding its lawfully-licensed conduct at the Project, Sauk-Suiattle necessarily challenges FERC's decision not to require fish passage in the City's 1995 license. Only a U.S. Court of Appeals would have jurisdiction over this action implicating the Project's license. *See* 16 U.S.C. § 825l(b); *see also City of Tacoma*, 357 U.S. at 335–36; *Pub. Watchdogs*, 984 F.3d at 766. Thus, Sauk-Suiattle's claims must be dismissed for lack of subject matter jurisdiction under CR 12(b)(1).[12]

Comments (FERC Accession No. 20201026-5133), and NPS Comments (FERC Accession No. 20201023-5057).

[11] *See* https://elibrary.ferc.gov/eLibrary/search, SCL Revised Study Plan (FERC Accession No. 20210407-5163) pp. 5-12 - 5-14.

[12] To be clear, the City is not arguing that Sauk-Suiattle's case is preempted by federal law. Instead, Sauk-Suiattle's action should be dismissed in its entirety under CR 12(b)(1) because only federal appellate courts, not the Superior Court nor this

IV. CONCLUSION

For the foregoing reasons, the Superior Court did not err in dismissing Sauk-Suiattle's First Amended Complaint, and this Court should affirm the Superior Court's Order.

Pursuant to RAP 18.17, I certify that the foregoing contains 10,212 words.

DATED this 11th day of May 2022.

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Court, have jurisdiction over challenges to the City's FERC license.

CERTIFICATE OF SERVICE

I, Sabrina Mitchell, hereby certify under penalty of perjury under the laws of the State of Washington that on the 11th day of May 2022, I caused the foregoing document to be served by the manner specified, to all parties listed below:

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DATED this 11th day of May 2022.

/s/ Sabrina Mitchell
Sabrina Mitchell
Sr. Practice Assistant

K&L GATES LLP

May 11, 2022 - 2:18 PM

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