

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. 2:21-cv-1014

SAUK-SUIATTLE INDIAN TRIBE,
Plaintiff,

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS**

v.

CITY OF SEATTLE and SEATTLE CITY
LIGHT, a subdivision of the
City of Seattle,
Defendants.

I. INTRODUCTION

This matter comes before the Court on a Motion to Dismiss filed by Defendants City of Seattle and Seattle City Light.¹ Plaintiff, the Sauk-Suiattle Indian Tribe, filed a complaint seeking a declaration that the “presence and operation” of the Gorge Dam, a hydroelectric dam owned and operated by Defendants, violate the constitutions of Washington and the United States, in addition to state and federal law, by blocking the passage of fish. For the following reasons, the Court concludes that it lacks jurisdiction over Plaintiff’s claims and that Defendants’ Motion to Dismiss must therefore be granted.

¹ Seattle City Light is not a distinct legal entity. Nevertheless, the Court will refer to City Light and the City of Seattle, collectively, as “Defendants.”

ORDER GRANTING MOTION
TO DISMISS

1 **II. BACKGROUND**

2 **A. The Gorge Dam and Plaintiff’s Claims for Relief**

3 The Gorge Dam in Newhalem, Washington is one of three dams constituting the Skagit
4 River Hydroelectric Project (the “Project”), which is owned and operated by Defendants. Am.
5 Comp., ¶ 4.A, Dkt. No. 1, Ex. A. That Project, which provides electricity to residents of the City
6 of Seattle, is located within the Ross Lake Recreational Area in North-Central Washington, and is
7 bounded by the North Cascades National Park, and the Mount Baker-Snoqualmie, Okanogan, and
8 Wenatchee National Forests. *See* Order Accepting Settlement Agreement, Issuing New License,
9 and Terminating Proceeding (“Relicensing Order”), 71 FERC ¶ 61159, 61528 (May 16, 1995).
10 The Gorge Dam is the furthest downriver of the three dams, and as constructed, “blocks fish
11 passage within the Skagit River from the area below to the area above such dam.” Am. Compl., ¶¶
12 4.B, 4.C.

13 **B. The Skagit River Hydroelectric Project and FERC’s 1995 Relicensing Order**

14 Construction of the Skagit River Project was completed in the early 1920s, and in 1927,
15 the Federal Power Commission (“FPC”) issued Defendants a 50-year license to operate the
16 Project. *See* Relicensing Order, 71 FERC at 61,552.² In 1977, Defendants applied to the Federal
17 Energy Regulatory Commission (“FERC” or the “Commission”), the FPC’s successor agency, for
18 a new license. *Id.* at 61,548, n. 1. The following year, FERC instituted a proceeding to study the
19 impact of the Project’s “flow regime” on the Skagit River fisheries resource. *Id.* at 61,527. Nearly
20 two decades later, in 1995, FERC issued the “Order Accepting Settlement Agreement, Issuing
21 New License, and Terminating Proceeding.” *Id.* That Relicensing Order, as its title indicates,

22 _____
23 ² Subsequent to expiration of that license in 1977 until issuance of the new license in 1995, FERC issued annual
licenses under the terms and conditions of the original license. Relicensing Order, 71 FERC at 61,159, n. 1.

1 terminated the fisheries study proceeding and accepted the settlement agreements between
2 Defendants and multiple intervenors in the proceeding, including Plaintiff.³ The Relicensing
3 Order incorporated provisions of those agreements into issuance of a new license, which
4 authorized operation of the Project for another 30 years. As outlined in the Relicensing Order,
5 those settlement agreements—ten in all—concerned myriad aspects of the Project, and
6 “purport[ed] to resolve all issues related to project operation, fisheries, wildlife, recreation and
7 aesthetics, erosion control, archaeological and historic resources, and traditional cultural
8 properties.” *Id.* at 61,527.

9 Particularly relevant to this lawsuit, the Relicensing Order approved a “Fisheries
10 Settlement Agreement” joined by Defendants and several of the intervenors, including Plaintiff,
11 which agreement “establishe[d] Seattle’s obligations relating to fishery resources affected by the
12 project, including numerous provisions to protect resident and migratory fish species.” *Id.* at
13 61,530. To that end, the settlement incorporated an “Anadromous Fish Flow Plan,” which was
14 “intended to mitigate the impacts of daily and seasonal downstream fluctuations.” *Id.* The flow
15 plan prescribed “a filling schedule for Ross Lake reservoir, flows downstream of Gorge
16 powerhouse, flow releases and limits to protect salmon and steelhead spawning and development,
17 requirements for dry water years, advance scheduling of hourly generation,” and other measures.
18 *Id.*

19 The settlement agreement acknowledged, however, that:

20 even with the complete implementation of the Anadromous Fish Flow Plan, some

21 ³ Intervenors in the proceeding, in addition to Plaintiff, included the Swinomish Indian Tribal Community and the
22 Upper Skagit Tribe; the National Marine Fisheries Service; the Washington State Department of Game; the North
23 Cascades Conservation Council; the Washington State Department of Fisheries; the Secretary of the Interior,
National Park Service and Fish and Wildlife Service; the Department of Ecology, Washington State; and the U.S.
Department of Agriculture, Forest Service. Relicensing Order, 71 FERC at 61,528–29.

24 ORDER GRANTING MOTION
25 TO DISMISS

1 level of these impacts would continue to occur. Fish will still be exposed to daily
2 and seasonal flow fluctuations, which will result in the continuation of chronic fry
3 stranding at a reduced, unknown level. In addition, the configuration and operation
4 of the project has rendered some formerly productive fish habitat inaccessible.

5 *Id.* In addition to the flow plan, therefore, the fisheries settlement also incorporated an
6 “Anadromous and Resident Non-flow Plan,” which was “specifically intended to address these
7 residual impacts and habitat losses.” *Id.* That plan provided that “[a]dditional nonflow measures
8 will be implemented for enhanced steelhead production, chinook salmon research, fish habitat
9 development, sediment reduction, and trout protection and production.” *Id.* at 61532. It was
10 anticipated that “Seattle’s expenditures to accomplish the nonflow plan [would] total \$6,320,000
11 over the term of the license.” *Id.* Conditions of both the flow plan and the non-flow plan were
12 incorporated, through the Fisheries Settlement Agreement, into the 1995 license.

13 Neither the Department of the Interior nor the Department of Commerce, as authorized
14 under 16 U.S.C. §811, prescribed as a condition of relicensing the construction of a fishway at
15 Gorge Dam (or any of the other two dams in the Project) to enable the passage of migrating fish.
16 Therefore, while the Relicensing Order conceded that “[a] short reach of the river below Gorge
17 dam will continue to be dewatered, and the slight detriment to resident and anadromous fish will
18 persist,” the license was issued without any requirement for fish passageway.⁴ Relicensing Order,
19 71 FERC at 61,535. Plaintiff, which was a party to the Fisheries Settlement Agreement, did not
20 seek review of the Relicensing Order or otherwise appeal the terms of the license.

21 Defendants’ 30-year license is scheduled to expire in 2025, and the reauthorization
22 process has already begun, again involving numerous state and federal agencies and other

23 ⁴ FERC did “reserve[its] authority to require fish passage in the future, should circumstances warrant.” Relicensing
24 Order, 71 FERC at 61,535.

1 stakeholders, including Plaintiff. *See* Study Plan Determination for the Skagit River
2 Hydroelectric Project dated July 16, 2021, Request for Jud. Not., Dkt No. 12, Ex. 6. There is no
3 dispute that the impact of the Gorge Dam and the entire Project on the habitat of salmon and other
4 resident and anadromous fish in the Skagit River will be an issue central to the debate over
5 conditions and issuance of a new license.

6 **C. Plaintiff’s Complaint and Procedural History**

7 Plaintiff asserts that the “presence and operation” of Defendants’ dam, and in particular
8 Defendants’ failure to provide a fishway, violate the 1848 Act Establishing the Territorial
9 Government of Oregon (the “1848 Establishing Act”), which provided, in part relevant here, that
10 “the rivers and streams of water in said Territory of Oregon [including an area that would later
11 become Washington State] in which salmon are found, or to which they resort, shall not be
12 obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow
13 salmon to pass freely up and down such rivers and streams.” ch. 177, 9 Stat. 323. Plaintiff also
14 argues that the dam constitutes a nuisance, and violates the common law of Washington State. *Id.*,
15 ¶¶ 5.C., 5D. Plaintiff seeks equitable relief, including a declaration that Defendants are in
16 violation of the law, and an injunction requiring Defendants to provide a means for migratory fish
17 species to bypass the dam, or prohibiting Defendants “from maintaining such dam in its present
18 condition.” *Id.*, ¶¶ 6.A.-6.D.

19 Plaintiff filed the operative Amended Complaint in the Skagit County Superior Court on
20 July 26, 2021. Defendants removed the complaint to this Court. Plaintiff moved for remand,
21 which Defendants opposed. On November 9, 2021, this Court ruled that Plaintiff’s Supremacy
22 Clause claim, asserted at ¶¶ 5.B. and 6.B. of its Amended Complaint, constituted a federal
23

24 ORDER GRANTING MOTION
25 TO DISMISS

1 question over which this Court had jurisdiction; and that in addition, several of Plaintiff’s claims
2 raised a “disputed, substantial federal issue” requiring interpretation of the 1848 Establishing Act.
3 The Court also asserted supplemental jurisdiction over Plaintiff’s remaining state-law claims,
4 concluding they “are so related to claims in the action within such original jurisdiction that they
5 form part of the same case or controversy.” *See* Order Denying Plaintiff’s Motion for Remand,
6 Dkt. No. 19.

7 **D. Defendants’ Motion to Dismiss**

8 Defendants’ Motion to Dismiss challenges Plaintiff’s claims on multiple fronts, starting
9 with a threshold challenge to this Court’s jurisdiction to hear those claims. Defendants
10 characterize the claims as a grossly untimely appeal of FERC’s 1995 Relicensing Order, which by
11 statute must be made directly to the U.S. Court of Appeals “or not at all.” Mot. to Dismiss at 11
12 (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958)). Invoking the
13 prudential doctrine of “primary jurisdiction,” Defendants also ask the Court to defer any ruling on
14 these issues to FERC, which they argue have primary jurisdiction over the question of fish
15 passage at the dams. *Id.* at 12-13.

16 On the merits, Defendants argue that the 1848 Establishing Act is no longer good law, as
17 it was never incorporated into Washington, either when Washington became a territory distinct
18 from Oregon, or upon its statehood. Defendants alternatively argue that even if that law was
19 continued in force in Washington, it was repealed, on any of several possible occasions, both by
20 the State of Washington and by the U.S. Congress. Regarding Plaintiff’s state-law claims,
21 including those brought under Washington nuisance and common law, Defendants argue they are
22 both conflict- and field-preempted by the Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, (“FPA”).

23
24 ORDER GRANTING MOTION
TO DISMISS

1 Mot. to Dismiss at 12-15. On November 17, 2021, the Court heard oral argument on the Motion
2 to Dismiss.

3 **III. DISCUSSION**

4 **A. Standard on Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1) For Lack of
5 Jurisdiction**

6 Federal Rule 12(b)(1) authorizes a party to move for dismissal for lack of subject matter
7 jurisdiction. Under this rule, dismissal is appropriate “if the complaint, considered in its entirety,
8 on its face fails to allege facts sufficient to establish subject matter jurisdiction.” *In re Dynamic*
9 *Random Access Memory Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008). Once a defendant
10 has invoked Fed. R. Civ. P. 12(b)(1) in a challenge to a court’s competence to hear a claim, the
11 plaintiff “bears the burden of establishing subject matter jurisdiction.” *Id.*, 546 F.3d at 984;
12 *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (“Federal courts are courts of
13 limited jurisdiction.... It is to be presumed that a cause lies outside this limited jurisdiction, and
14 the burden of establishing the contrary rests upon the party asserting jurisdiction.”) (citations
15 omitted).

16 **B. This Court Lacks Jurisdiction to Review Plaintiff’s Challenge to the 1995 FERC
17 License and Relicensing Order**

18 Defendants’ threshold challenge to this Court’s jurisdiction relies on Section 313, the
19 “exclusive jurisdiction” provision of the FPA, which provides, in relevant part:

20 Any party to a proceeding under this chapter aggrieved by an order issued by the
21 Commission in such proceeding may obtain a review of such order in the United
22 States Court of Appeals for any circuit wherein the licensee or public utility to
23 which the order relates is located or has its principal place of business, or in the
24 United States Court of Appeals for the District of Columbia, by filing in such court,
25 within sixty days after the order of the Commission upon the application for
rehearing, a written petition praying that the order of the Commission be modified
or set aside in whole or in part.... Upon the filing of such petition such court shall

24 ORDER GRANTING MOTION
25 TO DISMISS

1 have jurisdiction, which upon the filing of the record with it shall be exclusive, to
2 affirm, modify, or set aside such order in whole or in part.

3 16 U.S.C. § 8251 (b). Over 60 years ago, the Supreme Court interpreted Section 313 to mean that
4 appeal to the appropriate federal circuit court is the “the specific, complete and exclusive mode
5 for judicial review of the Commission’s orders.” *City of Tacoma v. Taxpayers of Tacoma*, 357
6 U.S. 320, 336 (1958). The provision “necessarily preclude[s] *de novo* litigation between the
7 parties of all issues inhering in the controversy, and all other modes of judicial review,” and
8 requires that “all objections to the order, to the license it directs to be issued, and to the legal
9 competence of the licensee to execute its terms, must be made in the Court of Appeals or not at
10 all.” *Id.* at 336. Written in the broadest terms, *City of Tacoma* made clear that the exclusive
11 jurisdiction provision deprives other forums of jurisdiction even for issues that were not raised but
12 “could and should have been.” *Id.* at 339 (“[E]ven if it might be thought that this issue was not
13 raised in the Court of Appeals, it cannot be doubted that it could and should have been, for that
14 was the court to which Congress had given ‘exclusive jurisdiction to affirm, modify, or set aside’
15 the Commission’s order.”).

16 Plaintiff does not dispute that Section 313 of the FPA would deprive this Court of
17 jurisdiction over a direct challenge to a FERC order based on federal claims. Resp. Br. at 7 (“It is
18 clear that in the Ninth Circuit, attempts to bring claims under other federal laws . . . must give
19 way to the FPA where ‘the practical effect of the action in district court is an assault on an
20 important ingredient of the FERC license.’”) (citing *Cal. Save Our Streams Council, Inc. v.*
21 *Yuetter*, 887 F.2d 908, 912 (9th Cir. 1989)). Plaintiff argues, however, that this jurisdictional
22 prescription does not apply to the claims in this case, because (1) the Ninth Circuit has not applied
23 this provision to claims, like those in this case, that may be based on state law; and (2) Plaintiff’s

24 ORDER GRANTING MOTION
25 TO DISMISS

1 claims, it argues, are “wholly collateral” to the FERC order, not “an assault on an important
2 ingredient of the FERC license.” Resp. Br. at 7 (citing *Yeutter*, 887 F.2d at 912). Plaintiff’s
3 argument fails on both points.

4 As to its first contention, Plaintiff apparently overlooks that the claims dismissed for lack
5 of jurisdiction in the seminal case of *City of Tacoma* were brought under state law. *See* 357 U.S.
6 at 331. Furthermore, the Ninth Circuit and other courts have unfailingly interpreted the FPA’s
7 exclusive jurisdiction clause, and functionally identical clauses in other federal statutes, as
8 remarkably strict and broad, refusing to draw distinctions based on the substance or form of the
9 claims asserted. *See, e.g., Yeutter*, 887 F.2d at 912; *see also Pub. Watchdogs v. S. California*
10 *Edison Co., Inc.*, 984 F.3d 744, 766 (9th Cir. 2020) (“Like the plaintiffs in [*Yeutter*, plaintiffs
11 here] cannot avoid the Hobbs Act’s exclusive avenue of judicial review by artfully pleading its
12 challenge to the 2015 License Amendments . . . [as a] public nuisance, or strict products liability
13 claim.”); *Otwell v. Alabama Power Co.*, 47 F.3d 1275, 1281 (11th Cir. 2014) (“Appellants cannot
14 escape [16 U.S.C.] § 8251 (b)’s strict judicial review provision by arguing that they are pursuing
15 different claims and different relief than the parties before the FERC.”), *aff’ing Otwell v. Alabama*
16 *Power Co.*, 944 F. Supp. 2d 1134, 1154 (N.D. Ala. 2013) (acknowledging that while “there is an
17 interplay between federal regulation of hydroelectric projects and state law property rights,”
18 “once an activity is exclusively regulated and sanctioned by a FERC license, an aggrieved party
19 may not use state law tort as a vehicle to interfere with that sanctioned activity”); *Williams Nat.*
20 *Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989) (“[W]e see nothing in the
21 substantive character of [plaintiff’s] challenges to the FERC order that would exempt those
22 arguments from the statutory appellate scheme.”); *City of Rochester v. Bond*, 603 F.2d 927, 936
23

24 ORDER GRANTING MOTION
25 TO DISMISS

1 (D.C. Cir. 1979) (“The choice of forum is, as we have said, for Congress and we cannot imagine
2 that Congress intended the exclusivity *vel non* of statutory review to depend on the substantive
3 infirmity alleged.”). The reasoning contained in these cases necessarily supports the conclusion
4 that a challenge to a FERC action based on state law claims—that is, “*any claim* inhering in the
5 controversy”—must be brought in the Court of Appeals, “or not at all.” *City of Tacoma*, 357 U.S.
6 at 336 (emphasis added). Plaintiff has not identified any precedent that would support drawing a
7 distinction here between state and federal law claims.⁵

8 As to Plaintiff’s second contention, it is immaterial for purposes of this Court’s
9 jurisdiction that Plaintiff’s claims are not an explicit or direct challenge to FERC’s authority or to
10 the Relicensing Order itself. Cases since *City of Tacoma* have repeatedly invoked the exclusive
11 jurisdiction provision as applying with notable breadth to “any issue inhering in the controversy.”

12 As one court put it, “[we] would be hard pressed to formulate a doctrine with a more expansive
13 scope.” *Williams Nat. Gas Co.*, 890 F.2d at 262. As noted above, in assessing whether the
14 exclusive jurisdiction provision should apply, a court is to look not to the nature of the claims
15 asserted, but to whether “the practical effect of the action in district court is an assault on an
16 important ingredient of the FERC license.” *Yeutter*, 887 F.2d at 912 (Courts of Appeals have
17 exclusive jurisdiction over “questions arising under the FERC licenses.”); *Kovac v. Wray*, 363 F.
18 Supp. 3d 721, 741 (N.D. Tex. 2019) (“exclusive jurisdiction provisions [like Section 313] bar
19 litigants from “requesting the District Court to enjoin action that is the outcome of the agency’s
20 order.”) (citing *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984)). Section 313
21

22 ⁵ In light of the clear and resolute pronouncements in these cases, Justice Harlan’s observation that he did “not
23 understand the Court to suggest that the Federal Power Act endowed the Commission and the Court of Appeals with
authority to decide any issues of state law,” in *dicta* in a concurring opinion, is simply not controlling.

24 ORDER GRANTING MOTION
TO DISMISS

1 even applies, as the Supreme Court originally held, to challenges “to the legal competence of the
2 licensee to execute” the terms of the FERC license—precisely how the Court would characterize
3 the claims in this case. *City of Tacoma*, 357 U.S. at 336; *see* Am. Compl., ¶¶ 5.A.-D. (asserting
4 that “[t]he presence and operation of such dam by respondent . . . violate[]” state and federal
5 statutory and constitutional law).

6 It is true that Section 313 might not bar a district court’s review of issues that are “wholly
7 collateral to a statute’s review provisions and outside the agency’s expertise.” *Thunder Basin*
8 *Coal Co. v. Reich*, 510 U.S. 200, 212 (1994) (citation omitted). However, the question that
9 Plaintiff has raised here—whether Defendants should be required to construct a fishway—is not
10 merely tangentially or coincidentally related to the operation of the dam; it is one that Congress
11 explicitly directed FERC to consider in the licensing of hydroelectric projects and furthermore,
12 *was actually considered and explicitly rejected* in proceedings leading up to issuance of *this*
13 Relicensing Order.⁶ *See* 16 U.S.C. § 811 (FERC “shall require the construction, maintenance, and
14 operation by a licensee at its own expense of . . . such fishways as may be prescribed by the
15 Secretary of the Interior or the Secretary of Commerce, as appropriate.”). As laid out in a
16 separate, enumerated section of the Relicensing Order, titled “Fish Passage,” FERC observed that
17 the FPA

18 states that the Commission shall require construction, maintenance, and operation
19 by a licensee of such fishways as may be prescribed by the Secretary of Commerce
20 or of the Interior. As parties to the Settlement Agreement, both Interior (FWS) and
21 Commerce (NMFS) agreed (along with other parties to the Settlement Agreement)
“that all issues concerning environmental impacts from relicensing of the Project,
as currently constructed, are satisfactorily resolved by these Agreements.” Neither
agency prescribed a fishway or requested a reservation of fishway prescription

22 ⁶ In fact, while it does not appear that Plaintiff (or any other intervenor) availed itself of the procedure, the statute
23 entitles “any party to the proceeding . . . to a determination on the record,” and an “agency trial-type hearing of no
more than 90 days, on any disputed issues of material fact with respect to such fishways.” 16 U.S.C. § 811.

24 ORDER GRANTING MOTION
TO DISMISS

1 authority.

2 Relicensing Order, 71 FERC at 61,535. Plaintiff’s analogy—arguing that an attempt to enforce a
3 hypothetical state law that the dam be painted red would not be an attack on a FERC license—is
4 compelling but inapt. *See* Resp. Br. at 6. It could hardly be argued in such a case that Section 313
5 would apply. Neither Congress nor FERC has prescribed what color the Gorge Dam should be
6 painted; unlike an injunction requiring construction of a fishway, enforcement of a state law
7 requiring the dam be painted red would therefore be “wholly collateral” to FERC’s expertise. The
8 analogy only serves to highlight by contrast how intertwined Plaintiff’s claims are with the
9 license in this case.

10 Finally, the Court notes that in this case, the appropriately strict application of the FPA’s
11 exclusive jurisdiction provision is not unjust to the Plaintiff. The relicensing process, judging
12 from the lengthy duration of the proceedings, the number of parties involved, and the complexity
13 of the settlement agreements, as outlined in the Relicensing Order, was thorough and exhaustive,
14 resulting in a “very complex and delicate settlement.” Relicensing Order, 71 FERC at 61,532
15 (“The Settlement Agreement filed by the parties contains the resolution of a wide range of
16 complex and conflicting areas of interest to the various parties, and is the product of several years
17 of negotiations among these parties.”). Plaintiff was a named intervenor and a party to
18 negotiations over the relicensing of the Skagit River Project, and ultimately to the settlement
19 agreement “purport[ing] to resolve all issues related to project operation, fisheries, wildlife” and
20 other issues related to the Project.” *Id.* at 61,527. It had actual knowledge of the contents of that
21 agreement, and every opportunity to challenge them, if it had chosen, through the proper
22 channels.

23
24 ORDER GRANTING MOTION
TO DISMISS

1 Furthermore, Plaintiff has an imminent opportunity once again to advance its position
2 before FERC, as the end of the 30-year license term approaches, and proceedings related to
3 relicensing the Project are underway. FERC and other interested parties will revisit whether
4 fishways or other ameliorative measures should be included in the relicensing of the Project.⁷ In
5 the event Plaintiff's claims are not resolved to its satisfaction in the next licensing order, Plaintiff
6 may attempt to advance claims asserted in this lawsuit in an appeal in the proper appellate forum.
7 Conversely, requiring Defendants (not to mention FERC and the myriad other agencies and
8 stakeholders party to the Relicensing Order) to revisit the terms set out in the 1995 license would
9 impose on all parties a burden that Congress deliberately sought to relieve. *See Yeutter*, 887 F.2d
10 at 912 ("After the license applicant had initially fought his way through the administrative
11 proceedings, he would then have to grind through the district court and, almost certainly, through
12 the appeal as of right to the circuit court. . . . Appellants' theory would resurrect the very
13 problems that Congress sought to eliminate.").

14 Ultimately, granting the injunction Plaintiff seeks would prohibit the Gorge Dam from
15 operating as the FERC license currently in place plainly allows and requires; the Court would be
16

17 ⁷ The Relicensing Order does not give a substantive explanation for why fishways were not prescribed in the 1995
18 license for the Skagit River Project, other than by a reference in FERC's Environmental Assessment, attached to the
19 Relicensing Order, which opines that "[h]istorically, the upper reach of the Skagit River was not important for
20 anadromous fishes. . . . Historical information indicates that, under pre-project conditions, the narrow canyon, high
21 falls and extremely turbulent rapids in the Gorge reach of the river above Newhalem prevented anadromous fish
22 from migrating much above the current locations of Gorge and Diablo dams." Relicensing Order, 71 FERC at
23 61,569. The science and public opinion concerning the preservation of salmon habitat may have advanced since
24 these observations were made. *See* Study Plan Determination for the Skagit River Hydroelectric Project, Dkt. No.
25 12, Ex. 6 at App. B-28 (in responding to proposal regarding study of fish passage feasibility, "Skagit County states
that City Light should not be the lead investigator in the fish passage study because it has spent many years and
considerable resources undermining the idea that anadromous fish utilized the river upstream of the project's dams.
Therefore, Skagit County asserts that 'it defies reason to suggest that Seattle should now lead and control what is
supposed to be an objective analysis of that very question.' Accordingly, Skagit County requests that the
Commission require the federal agencies and tribes to co-lead the study.").

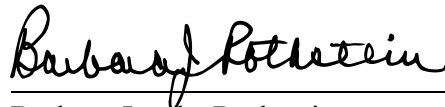
24 ORDER GRANTING MOTION
25 TO DISMISS

1 saying that Defendants cannot do that which a FERC order explicitly says they can. It is difficult
2 to imagine a challenge more “inescapably intertwined” with FERC’s authority than that. Such
3 questions must be answered in the U.S. Court of Appeals, “or not at all.” *City of Tacoma*, 357
4 U.S. at 336.

5
6 **IV. CONCLUSION**

7 Because the Court concludes that it lacks jurisdiction to hear any of Plaintiff’s claims, all
8 of which “inhere in the controversy” concerning an explicit provision of the 1995 FERC
9 Relicensing Order, the Court need not—indeed, lacks jurisdiction to—determine whether any of
10 Plaintiff’s claims would succeed on the merits. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S.
11 83, 94 (1998). For the foregoing reasons, the Court hereby GRANTS Defendants’ Motion to
Dismiss.

12 DATED this 2nd day of December, 2021.

13
14 

15 Barbara Jacobs Rothstein
16 U.S. District Court Judge

17
18
19
20
21
22
23
24 ORDER GRANTING MOTION
TO DISMISS