No. 22-35000

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAUK-SUIATTLE INDIAN TRIBE,

Plaintiff-Appellant,

v.

THE CITY OF SEATTLE AND SEATTLE CITY LIGHT,

Defendant-Appellee.

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

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should affirm the district court's Order Denying Appellant Sauk-Suiattle Indian Tribe's ("Sauk-Suiattle") Motion for Remand because Appellee The City of Seattle and Seattle City Light[1] ("City Light") properly removed this case from Washington state superior court to the Western District of Washington. ER-3. This Court also should affirm the district court's Order Granting City Light's Motion to Dismiss, which disposed of Sauk-Suiattle's claims in their entirety as impermissible collateral attacks on City Light's Federal Energy Regulatory Commission ("FERC") hydroelectric license. ER-11. Sauk-Suiattle's Amended Complaint challenges the continued "presence and operation" of City Light's Gorge Dam, one of three dams comprising the Skagit River Hydroelectric Project (the "Project"), because it does not have fish passage facilities (sometimes referred to as "fishways"). Sauk-Suiattle alleges violations of (i) the federal Supremacy Clause, (ii) the Congressional Acts of August 14, 1848, ch. 177, 9 Stat. 323, and March 2, 1853, ch. 90, 10 Stat. 172, from when Oregon and Washington were territories ("Establishing Acts"), (iii) the Washington Constitution, and (iv) Washington nuisance and common law. ER-31.

The district court correctly concluded that removal of Sauk-Suiattle's

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

Amended Complaint from the Superior Court of the State of Washington for the County of Skagit ("Skagit County Superior Court") was proper because the "[A]mended [C]omplaint, on its face, does indeed raise a number of federal questions." ER 7. The district court held Sauk-Suiattle's "Supremacy Clause claim raises a substantial and disputed federal issue sufficient to establish this Court's jurisdiction." *Id.* Moreover, because the Amended Complaint's claims cite, rely upon, and require interpretation of the federal Establishing Acts, Sauk-Suiattle's "federal constitutional and statutory claims—raising not only substantial, but pivotal federal issues apparent on the face of the complaint—provide an adequate basis to assert [the district court's] jurisdiction." ER 9. Furthermore, even if this Court were to agree with Sauk-Suiattle that its Amended Complaint's reliance on the federal Supremacy Clause and federal Establishing Acts somehow does not involve substantial and disputed federal issues sufficient to confer subject matter jurisdiction on the district court, this Court can affirm the Order Denying Plaintiff's Motion for Remand on alternative grounds. Sauk-Suiattle's Washington Constitution claim requires interpretation of the federal Establishing Acts, and Sauk-Suiattle's nuisance and common law claims necessarily raise substantial and disputed federal issues under the Federal Power Act, 16 U.S.C. § 791 *et seq*. ("FPA"), and City Light's FERC hydropower license.

The district court also correctly granted City Light's Motion to Dismiss,

holding that Sauk-Suiattle's federal Supremacy Clause, federal Establishing Acts, Washington Constitution, and Washington nuisance and common law claims are impermissible collateral attacks on City Light's 1995 FERC hydropower license for the Project. ER-11. Sauk-Suiattle's exclusive avenue for challenging City Light's continued operation of the Project without fish passage was to file an appeal of the Project's FERC license in the federal courts of appeals as required by Section 313 of the FPA, which should have occurred more than 25 years ago. ER-22–23; 16 U.S.C. § 825l(b). Relying on the U.S. Supreme Court's holding in *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958), the district court held that all of Sauk-Suiattle's federal and state law claims are "inescapably intertwined" with the Project's 1995 FERC license because the injunction that Sauk-Suiattle "seeks would prohibit the Gorge Dam from operating as the FERC license currently in place plainly allows and requires[.]" ER-23–24.

Even if this Court concludes that Sauk-Suiattle's claims are not impermissible collateral attacks over which the district court (or any court) does not have jurisdiction, this Court can affirm dismissal on alternative grounds. First, the federal Establishing Acts do not apply to hydropower projects in Washington, and therefore are not applicable to the Project through either the U.S. Supremacy Clause or the Washington Constitution. Second, Sauk-Suiattle's Washington Constitution and state nuisance and common law claims are preempted by the

FPA.

II. JURISDICTIONAL STATEMENT

After Sauk-Suiattle filed suit against City Light in Skagit County Superior Court, City Light removed Sauk-Suiattle's Amended Complaint to district court on July 29, 2021. ER-38. The district court had jurisdiction over Sauk-Suiattle's federal Supremacy Clause and Establishing Acts claims under 28 U.S.C. § 1331, and supplemental jurisdiction over Sauk-Suiattle's Washington Constitution and Washington nuisance and common law claims under 28 U.S.C. § 1367(a). The district court entered final judgment on December 2, 2021. ER-11. Sauk-Suiattle filed a notice of appeal on December 31, 2021, which was timely under Fed. R. App. P. 4(a)(1)(A). ER-84. This Court has jurisdiction under 28 U.S.C. § 1291.

III. STATEMENT OF ISSUES

1. Did the district court rule correctly in denying Sauk-Suiattle's Motion to Remand the Amended Complaint back to state court because the Amended Complaint presented federal questions on its face?

2. Alternatively, should this Court affirm the district court's order denying remand because other grounds in the record support the conclusion that Sauk-Suiattle's Washington Constitution, nuisance, and common law claims necessarily raise substantial and disputed federal issues under the Establishing Acts, the FPA, and City Light's FERC hydropower license sufficient to establish

jurisdiction in the district court?

3. Next, did the district court rule correctly in dismissing Sauk-Suiattle's Amended Complaint because all of Sauk-Suiattle's claims are impermissible collateral attacks on City Light's FERC license, which should have been pursued exclusively in the federal courts of appeals over 25 years ago?

4. Alternatively, should this Court affirm the district court's dismissal because other grounds in the record support City Light's assertion that none of Sauk-Suiattle's claims present cognizable legal theories for relief based on the fact that:

a. Sauk-Suiattle's arguments regarding the Establishing Acts do not apply to hydropower projects in Washington, and therefore are not applicable to the Project through either the U.S. Supremacy Clause or the Washington Constitution?

b. Sauk-Suiattle's Washington Constitution and Washington nuisance and common law claims are preempted by the FPA?

IV. STATUTORY AND CONSTITUTIONAL AUTHORITIES

All pertinent statutory and constitutional authorities appear in the Addendum to this brief, which is appended hereto.

V. STATEMENT OF THE CASE

A. The Federal Power Act

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 (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 if prescribed by either the federal Secretary of Commerce or the Interior. *See id.* § 811.

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). Section 313 of the FPA specifically provides that the United States Courts of Appeals have "exclusive" jurisdiction "to affirm, modify, or set aside" FERC's orders. *Id.*

B. History of the Gorge Dam

The Project has operated since the early 1920s. *See* SER-101. In 1927, FERC's predecessor agency, the Federal Power Commission, licensed the Project

for 50 years. *Id*. Sauk-Suiattle has availed itself of FERC's pervasive jurisdiction over the Project since at least 1978, entering into a 1981 settlement agreement with City Light that established a flow regime and required flow-related fishery studies. SER-149–55. Sauk-Suiattle expressly accepted the conditions that FERC imposed on its approval of the settlement. SER-146–48.

Approximately ten years later, in the proceeding on City Light's application for a new license to replace the expired 1927 license, City Light, Sauk-Suiattle, and others reached multiple settlement agreements, resolving "all issues related to [P]roject operation[s], fisheries, wildlife, recreation and aesthetics, erosion control, archaeological and historic resources, and traditional cultural properties." SER-101, 103, 105. In particular, in 1991, Sauk-Suiattle signed onto the over-arching Offer of Settlement and the Fisheries Settlement Agreement. SER-103, 105. The Fisheries Settlement Agreement established City Light's "obligations relating to fishery resources affected by the [P]roject, including numerous provisions to protect resident and migratory fish species." SER-108. FERC subsequently adopted the settlement agreements, including the Fisheries Settlement Agreement, through the 1995 Relicensing Order, which authorized maintenance and operation of the Project for another 30 years. *See* SER-113–114, 126. For the duration of the license, the Fisheries Settlement Agreement "establishes [City Light's] obligations relating to fishery resources affected by the [P]roject." SER-108, 114.

Although the Secretaries of Commerce and the Interior could have required that the 1995 license include construction, maintenance, and operation of fishways, those agencies chose not to require fishways. Instead they, along with the other settling parties, including Sauk-Suiattle, concurred "all issues concerning environmental impacts from relicensing of the Project, as currently constructed, are satisfactorily resolved[.]" SER-119. FERC, therefore, did not require City Light to construct and operate fishways at Gorge Dam, though FERC reserved its "authority to require fish passage in the future, should circumstances warrant" and "after notice and opportunity for hearing." *Id.*[2]

The 1995 Relicensing Order provided a 30-year license that will expire in 2025. SER-126. Since early 2020, City Light has been engaged in a multi-year FERC process to obtain a new license. 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. *See* SER-85–95. Sauk-Suiattle commented on several aspects of the proposed study plan, and the plan includes a study of the feasibility of fish passage at Gorge Dam. SER-89–95.

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[2] In 2011, Sauk-Suiattle, City Light and other parties to the Fisheries Settlement Agreement revised it, but again did not require fishways. *See* SER-99.

C. Procedural History

On June 30, 2021, Sauk-Suiattle filed a Summons and Complaint, as amended on July 27, 2021, in Skagit County Superior Court against City Light and its operation of the Gorge Dam (the "Amended Complaint"). ER-25. Sauk-Suiattle's Amended Complaint seeks a declaratory judgment that City Light's "presence and operation" of the Gorge Dam without fish passage violates the federal Establishing Acts that allegedly prohibited the construction of dams without fishways, the Supremacy Clause of the United States Constitution, the Washington Constitution, and Washington nuisance and common law, and seeks an injunction to require fish passage or to prohibit maintenance of the Gorge Dam. ER-31–32.

On July 29, 2021, City Light filed a Notice of Removal to Federal Court to remove the Amended Complaint from Skagit County Superior Court to the United States District Court for the Western District of Washington (Seattle Division). ER-38. Sauk-Suiattle filed a Motion to Remand on July 29, 2021. ER-50.

City Light filed a Motion for Dismissal Under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on August 5, 2021 ("Motion to Dismiss"). ER-63. City Light simultaneously filed a Request for Judicial Notice in Support of its Motion to Dismiss on August 5, 2021. Dkt.12. Sauk-Suiattle filed its response to City Light's Motion to Dismiss the very next day, on August 6, 2021. SER-69–84. City Light

filed its Opposition to Sauk-Suiattle's Motion to Remand on August 19, 2021. SER-48–57. Also on August 19, 2021, City Light filed its Reply in Support of its Motion to Dismiss. SER-58–68.

On August 24, 2021, Sauk-Suiattle filed its Reply in Support of its Motion to Remand. SER-37–47. On November 9, 2021, the district court entered an order denying Sauk-Suiattle's Motion to Remand. ER-3–10.

Oral argument on City Light's Motion to Dismiss was heard on November 17, 2021. *See* ER-89; *see also* SER-4–36. On December 2, 2021, the district court granted City Light's Motion to Dismiss and held that it lacked subject matter jurisdiction over Sauk-Suiattle's claims because Section 313 of the FPA grants federal appellate courts, not district courts (nor state courts), exclusive jurisdiction over challenges to licenses issued by FERC. ER-84–85; 16 U.S.C. § 825l. Sauk-Suiattle timely filed a notice of appeal on December 31, 2021. This Court has jurisdiction under 28 U.S.C. § 1291.

VI. ARGUMENT

A. Standard of Review

"Removal presents a question of subject matter jurisdiction, which is reviewed de novo." *Schnabel v. Lui*, 302 F.3d 1023, 1029 (9th Cir. 2002). This Court may affirm a court's decision to deny a motion to remand "on any basis supported by the record." *Carter v. Evans*, Case No. 20-55952, 2022 WL 989363,

*1 (9th Cir. 2022). A defendant may remove a case filed in state court to federal court over which a federal court would have jurisdiction. 28 U.S.C. § 1441(a). Federal district courts have original jurisdiction under 28 U.S.C. § 1331 where "*plaintiff's* complaint establishes that the case 'arises under' federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10 (1983) (emphasis in original); *see also Indep. Living Ctr. of S. Cal., Inc. v. Kent*, 909 F.3d 272, 278 (9th Cir. 2018) ("[F]ederal question jurisdiction encompasses more than just federal causes of action. Federal courts have jurisdiction to hear 'cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" (quoting *Franchise Tax Board*, 463 U.S. at 27-28)).

This Court reviews *de novo* dismissal for lack of subject matter jurisdiction under Fed. R. of Civ. P. 12(b)(1), *Navajo Nation v. U.S. Dep't of the Interior*, 26 F.4th 794, 806 (9th Cir. 2022), and may affirm on any basis supported by the record. *Zuress v. Donley*, 606 F.3d 1249, 1252 (9th Cir. 2010). Federal courts are courts of limited jurisdiction, and, as such, they possess only the power authorized to them by the Constitution or statute. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). If a court determines it lacks subject matter jurisdiction, it must dismiss the action. *See* Fed. R. Civ. P. 12(b)(1), 12(h)(3). A defendant may

move to dismiss a claim under Rule 12(b)(1) by mounting a facial or factual attack. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A facial attack "asserts the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A factual attack challenges the truth of the allegations asserted. *See id.* The Court may rely on evidence extrinsic to the pleadings to resolve factual disputes concerning jurisdiction without a motion to dismiss converting to one for summary judgment. *See McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *see also Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983).

Dismissal for failure to assert a cognizable legal theory under Rule 12(b)(6) is also subject to *de novo* review. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (as amended). This Court can affirm the dismissal of a complaint under Rule 12(b)(6) "upon any basis fairly supported by the record." *Orellana v. Mayorkas*, 6 F.4th 1034, 1041 (9th Cir. 2021). The Court may consider the "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The Court must accept as true the complaint's well-pled facts; however, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper 12(b)(6) motion to dismiss. *See Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors*, 266 F.3d 979,

988 (9th Cir. 2001).

B. The District Court Correctly Determined Removal Was Proper

The district court correctly ruled that it had subject matter jurisdiction over Sauk-Suiattle's claims and denied Sauk-Suiattle's Motion for Remand.

1. Sauk-Suiattle Presents a Substantial Federal Question on the Face of its Amended Complaint

Sauk-Suiattle argues that the Amended Complaint was not removable to federal court because it asserts claims "purely arising under state law" and "fail[s] to raise a substantial federal question." Appellant's Opening Brief ("Br.") at 6–7. Such an argument belies the plain text of Sauk-Suiattle's Amended Complaint. Sauk-Suiattle's Amended Complaint seeks declaratory judgment on the substantial federal question of whether the presence and operation of the Gorge Dam "violates Article VI, ¶ 2 of the United States Constitution." ER-31. Sauk-Suiattle's Amended Complaint also seeks a declaration that the "presence and operation of [the Gorge Dam] violates the Supremacy Clause of the United States Constitution in that [City Light] is subject to the prohibitions against dams that block fish migration contained in [the Establishing Acts] binding within what is now the State of Washington…." ER-32.

This Court has original jurisdiction under 28 U.S.C. § 1331 where "*plaintiff's* complaint establishes that the case 'arises under' federal law." *Franchise Tax Bd.*, 463 U.S. at 10 (emphasis in original). "The general rule,

referred to as the 'well-pleaded complaint rule,' is that a civil action arises under federal law for purposes of § 1331 when a federal question appears on the face of the complaint." *City of Oakland v. BP PLC,* 969 F.3d 895, 903 (9th Cir. 2020) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). Under the "well-pleaded complaint rule," there can be no denying the fact that, as pled, Sauk-Suiattle's Amended Complaint presents at least two federal questions on its face: (1) does the "presence and operation" of the Gorge Dam violate Article VI, Paragraph 2 of the United States Constitution, and (2) do the Establishing Acts require the construction of fish passage at a federally-licensed hydropower facility?

A violation of the U.S. Supremacy Clause inherently involves a violation of federal, not state, law. *See* U.S. Const., Art. VI, cl. 2 ("the Laws of the United States … shall be the supreme Law of the Land[.]"). Sauk-Suiattle's Amended Complaint was properly removed because it does more than "merely referenc[e] the Supremacy Clause of the United States Constitution." Br. at 3. Despite Sauk-Suiattle's statements to the contrary, the Amended Complaint, as pled, depends on this Court's interpretation of federal law.

While Sauk-Suiattle would like to dodge the federal questions on the face of the Amended Complaint for the purposes of avoiding federal court jurisdiction, Sauk-Suiattle's Opening Brief further demonstrates that this Court has federal question jurisdiction. Sauk-Suiattle argues:

> Respondent contends that, somehow, [the Establishing Acts], were repealed by enactment of the Federal Power Act or cannot be reconciled therewith. The issue in this case is not one of federal preemption. Rather, this is a case of statutory construction, the question being whether enactment of the Federal Power Act terminated the obligation embodied in the 1848 and 1853 statutes requiring that dams have fish passage.
>
> … In the absence of an unambiguous statement that Congress intended to repeal prior legislation, federal statutes must be read *in pari materia* and construed so as to be harmonious rather than disharmonious. It is an unquestionable rule of statutory construction that statutes must be given their plain meaning.

Br. at 20.

When pressed during oral argument in the district court whether Sauk-Suiattle was abandoning its claims based on the Supremacy Clause and Establishing Acts given its arguments that the case involved only state law, counsel for Sauk-Suiattle refused to abandon the federal law arguments. *See* SER-12–13, 27–28. Moreover, during oral argument, counsel for Sauk-Suiattle admitted that "as far as the Supremacy Clause[,] … clearly it's a federal question, because the Supremacy Clause, the laws enacting this provision going back to 1848 were enacted by Congress as a matter of the supreme law of the land." SER-24; *see also* SER-28 ("But there's still a federal question, because you've got to go back and interpret these other federal laws[.]").

Federal questions appear on the face of Sauk-Suiattle's Amended Complaint and Sauk-Suiattle's Opening Brief confirms that its Amended Complaint raises

substantial issues of federal law. Therefore, Sauk-Suiattle's claims could have been brought in federal court originally and removal was appropriate under 28 U.S.C. § 1441. *See North Carolina v. Alcoa Power Generating, Inc.*, 853 F.3d 140, 146-50 (4th Cir. 2017) (citing *Franchise Tax Board* and holding that a state law claim under the North Carolina Declaratory Judgment Act was properly removed to federal court because ownership of the land at issue turned on the construction of federal law). This Court should affirm the district court's conclusion that removal was proper and that it had federal question jurisdiction over Sauk-Suiattle's federal Supremacy Clause and Establishing Acts claims and supplemental jurisdiction over Sauk-Suiattle's Washington Constitution and Washington nuisance and common law claims. ER-9; 28 U.S.C. § 1367(a).

2. Alternatively, Sauk-Suiattle's Washington Constitution, Washington Nuisance and Common Law Claims for Relief Raise Substantial Federal Questions

If this Court were to somehow conclude that Sauk-Suiattle's Amended Complaint does not present federal questions with respect to the federal Supremacy Clause and Establishing Acts, this Court can still affirm the district court's order denying Sauk-Suiattle's Motion for Remand on alternative grounds supported by the record. *Carter*, 2022 WL 989363, *1 (holding the Ninth Circuit may affirm a court's decision to deny a motion to remand "on any basis supported by the record"). Sauk-Suiattle's state law claims also necessarily raise substantial federal

questions that justify federal court jurisdiction separate from Sauk-Suiattle's federal Supremacy Clause and Establishing Acts claims.

(a) Substantial federal question jurisdiction exists

Sauk-Suiattle wrongly claims that its Washington Constitution, nuisance and common law claims do not raise a substantial federal question. Br. at 25. Federal question jurisdiction exists over an alleged state law claim where it "necessarily raises a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state power." *Hornish v. King Cty*., 899 F.3d 680, 688 (9th Cir. 2018) (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1570 (2016)).

First, Sauk-Suiattle's Amended Complaint asserts that Article XXVII of the Washington Constitution incorporated the federal Establishing Acts into the law of the new State of Washington. ER-29, 31. Inherent in this argument is determining whether the provisions regarding fish passage at dams in the federal Establishing Acts were "now in force in the Territory of Washington" at the time of the adoption of the Washington Constitution. *See* Wash. Const. Art. XXVII, § 2. Determining whether the Establishing Acts were in force in the Territory of Washington presents a question of federal statutory interpretation, and therefore, presents a substantial question of federal law justifying federal question

jurisdiction. *See infra,* Sec. VI.D.1.

Second, Sauk-Suiattle's nuisance argument necessarily requires a court to determine whether City Light's operation of the Gorge Dam violates its FERC license, the FPA, and its implementing rules and regulations. *See* RCW 7.48.160 ("Nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance."); *see also Tiegs v. Watts*, 135 Wn.2d 1, 14, 954 P.2d 877 (1998) ("[a] business operation does not at the outset constitute a nuisance when it is authorized by proper authority"); *Bruskland v. Oak Theater, Inc.*, 42 Wn.2d 346, 350–51, 254 P.2d 1035 (1953) ("when proper authority authorizes the operation of a lawful business in a certain area, such business does not constitute a nuisance in a legal sense, but it may become such if it is conducted in [] an unreasonable manner"). Thus, Sauk-Suiattle's nuisance claim necessarily raises the federal question of whether City Light's Gorge Dam is properly authorized and operated in compliance with its FERC license, and in turn, requires a court to apply and interpret the FPA and its implementing regulations.

Because it is necessary to interpret City Light's FERC license under the FPA to address Sauk-Suiattle's state law arguments, there can be no doubt that Sauk-Suiattle's claims implicate a substantial issue of federal law. For example, in *Carrington v. City of Tacoma*, a federal district court held that plaintiffs' Washington negligence claim necessarily raised substantial issues of federal law

requiring interpretation of the FPA and the defendant's FERC hydropower license, and therefore, supported removal to federal court:

> Because it is necessary to interpret [the utility's] FERC license to determine the duty of care, Plaintiffs' claims implicate a substantial issue of federal law. The FPA provides a comprehensive regulatory structure and prescribes an arduous licensing procedure to establish guidelines for dam operations. [The utility's] thirty-six year FERC relicensing process … evidences the substantiality of this regime. Plaintiffs' negligence claim necessarily requires analysis of the federal standard borne out of this process. The federal issues in this case are substantial.

276 F. Supp. 3d 1035, 1042 (W.D. Wash. 2017); *see also Indep. Living Ctr.*, 909 F.3d at 279 (holding that federal court had jurisdiction over state action for writ of mandate when plaintiffs would necessarily have to show that state law violated a federal Medicaid provision to prevail and the purported violation was the "central point of dispute") (quoting *Gunn v. Minton*, 568 U.S. 251, 259 (2013)); *Hornish*, 899 F.3d at 690–91 (finding that federal court had jurisdiction over Washington state law action regarding the validity of a quit claim deed where the claim necessarily turned on construction of the federal Trails Act).

Sauk-Suiattle cites *City of Oakland v. BP PLC*, 969 F.3d 895, 906 (9th Cir. 2020), in support of its claim that the principle articulated in *Carrington*—that state law claims that implicate substantial federal issues may be removed to federal court—does not apply in this case. Br. at 6. *Oakland*, however, is easily distinguishable from *Carrington* because it did not require the interpretation or

application of federal law. In *Oakland*, the plaintiffs alleged that defendants were responsible for the production and promotion of fossil fuels, that consumption of fossil fuels led to rising sea levels, and that rising sea levels had damaged plaintiffs, thereby giving rise to a California state law cause of action for public nuisance. 969 F.3d at 906. Defendants removed to federal court, arguing the "public-nuisance claim was governed by federal common law because the claim implicates uniquely federal interests." *Id.* at 902 (quotations omitted). The federal court found it lacked jurisdiction under 28 U.S.C. §1331 because adjudicating plaintiffs' claim "neither require[d] an interpretation of a federal statute nor challenge[d] a federal statute's constitutionality." *Id.* at 906 (citations omitted). Furthermore, the court found that "it is not clear that the claim requires an interpretation or application of federal law at all, because the Supreme Court has not yet determined that there is a federal common law of public nuisance relating to interstate pollution[.]" *Id*.

In contrast, the court in *Carrington* found the plaintiffs' negligence claims necessarily "raise[d] a federal question because [defendant]'s FERC license established the applicable duty of care." 276 F. Supp. 3d at 1041. Contrary to the plaintiffs' arguments in *Carrington*, Washington law did not provide the standard of care for their negligence claim because if it did "state tort law would supplant FERC's exclusive control of dam operations and would subject dam operators to

contradictory standards of care in different jurisdictions." *Id.* Therefore, removal was proper because the plaintiffs' complaint implicated a substantial issue of federal law that necessarily required an analysis of an applicable federal standard. *Id.* at 1042.

Sauk-Suiattle makes no effort to distinguish *Carrington* or address the precedent in this Circuit and others that establishes that state law cases may be removed to federal court where a plaintiff's claims necessarily require the application of federal law to resolve a substantial issue. *See, e.g.*, *Funderburk v. S.C. Elec. & Gas Co*., 179 F. Supp. 3d 569, 579 (D.S.C. 2016) (finding removal proper where plaintiff's state negligence claim against FERC-licensed dam necessarily required interpretation of the FERC's rules and regulations under the FPA); *Sherr v. S.C. Elec. & Gas Co*., 180 F. Supp. 3d 407, 417 (D.S.C. 2016) (same). Whether City Light's Gorge Dam violates Washington nuisance or common law requires consideration of whether the presence and operation of the Gorge Dam is properly authorized by City Light's FERC license and the interaction of that FERC license, the FPA, and the applicable federal rules and regulations with Washington's nuisance and common law.

(b) City Light does not argue that the doctrine of complete preemption applies

Contrary to Sauk-Suiattle's statements otherwise, City Light's removal of the Amended Complaint from state court to federal court had nothing to do with

the doctrine of complete preemption. Br. at 9. City Light's Notice of Removal never alleged that "complete preemption" applies to Sauk-Suiattle's claims. ER-38–49. In fact, City Light agrees that the *complete* preemption doctrine does not apply to Sauk-Suiattle's claims, which is precisely why City Light did not rely on that doctrine as a basis for removal.[3]

The doctrine of complete preemption can be a jurisdictional argument for removal to federal court, while the defenses of conflict and field preemption are defenses to the application of state law. "Complete preemption is really a jurisdictional rather than a preemption doctrine, as it confers exclusive federal jurisdiction in certain instances where Congress intended the scope of federal law to be so broad as to entirely replace any state-law claim." *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 947 (9th Cir. 2014) (quoting *Dennis v. Hart*, 724 F.3d 1249, 1254 (9th Cir. 2013)). In contrast, conflict and field preemption are normally raised as affirmative defenses that, if successful, result in the dismissal of the plaintiff's claims. *See Andera v. Precision Fuel Components,*

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[3] Sauk-Suiattle also suggests that City Light's Notice of Removal was premised on the affirmative defenses of field and conflict preemption. Br. at 8. City Light's Notice of Removal did not rely on the affirmative defenses of field and conflict preemption to justify removal. *See* ER-38–49. Instead, City Light justified removal based on the substantial federal issues on the face of Sauk-Suiattle's Amended Complaint (the U.S. Supremacy Clause and the Establishing Acts) and the substantial federal issues necessarily raised by Sauk-Suiattle's Washington Constitution, nuisance and common law claims.

LLC, C12-0274-JCC, 2012 WL 12509225, at *1 (W.D. Wash. 2012) (citing *Montalvo v. Spirit Airlines*, 508 F.3d 464, 475-76 (9th Cir. 2007)). The doctrines serve different purposes and are conceptually distinct. *See Retail Prop. Tr.*, 768 F.3d at 949 ("it is enough to say that the doctrines serve distinct purposes and should be kept clear and separate in our minds").

City Light's Notice of Removal does not argue that the FPA falls within that class of statutes Congress intended "to be so broad as to entirely replace any state-law claim." *Id.* at 947. Rather, City Light asserts the defense that the FPA conflicts with Sauk-Suiattle's Washington Constitution, nuisance, and common law grounds for relief, and therefore, those grounds are preempted. *See infra,* Sec. VI.D.2.

(c) Carrington establishes federal question jurisdiction in this case

Under *Carrington*, state law claims necessarily raising a federal question may be properly removed to federal court based on federal question jurisdiction. Once in federal court, such claims may be properly dismissed based on conflict or field preemption by federal law. As in *Carrington*, the Court here should find that removal was appropriate based on federal question jurisdiction. The court in *Carrington* found that removal was proper because the plaintiffs' state law claims implicated a substantial issue of federal law. 276 F. Supp. 3d at 1042. Nonetheless, the plaintiffs' claims, once removed, were properly dismissed because the state law claims were conflict and field preempted by the FPA. *Id.* at 1045.

Sauk-Suiattle failed to address the standards set forth in *Carrington*, instead relying upon *City of Oakland v. BP PLC* to make the unnecessary point that a defense to a state law claim cannot confer federal question jurisdiction. Br. at 6–7. Yet Sauk-Suiattle's claims raise exactly the same jurisdictional issues as those presented in *Carrington* and are similarly subject to removal and dismissal. Sauk-Suiattle's Washington Constitution and state law nuisance claims necessarily require the interpretation and application of federal law. *See supra* VI.B.2.a. Sauk-Suiattle's Washington Constitution, nuisance, and common law claims also are conflict and field preempted and should be dismissed. *See infra* Sec. VI.D.2. As in *Carrington*, this Court should find that removal was proper and dismiss Sauk-Suiattle's state law claims because they are preempted by the FPA.[4]

In summary, this Court should affirm the district court's denial of Sauk-Suiattle's Motion to Remand because Sauk-Suiattle's claims based on the federal

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[4] Sauk-Suiattle tries to distinguish the federal question jurisdiction found in *Carrington* by arguing that the state law claim that necessarily raised a substantial federal issue only justified removal because "the relief sought by the plaintiffs [in Carrington] would upset 'a complete scheme of national regulation.'" Br. at 24. The Washington negligence claim in *Carrington* that justified removal because it necessarily raised a substantial federal issue is no different than the Washington nuisance claim in this case. Both require consideration of whether a FERC licensee is operating in compliance with its license, the FPA, and related laws and regulations. Both *Carrington* and this case present issues of Washington tort law that will disrupt "a complete scheme of national regulation" if adjudicated without consideration of the substantial federal issues intertwined with these state law claims.

Supremacy Clause and federal Establishing Acts present substantial federal questions on the face of Sauk-Suiattle's Amended Complaint. This Court also should affirm the district court's assertion of supplemental jurisdiction over Sauk-Suiattle's state law claims. Alternatively, even if this Court were to conclude that the Amended Complaint did not raise substantial federal questions with respect to the federal Supremacy Clause and federal Establishing Acts (which counsel for Sauk-Suiattle even refused to concede during oral argument in district court), this Court can still affirm the district court's denial of Sauk-Suiattle's Motion to Remand because Sauk-Suiattle's Washington Constitution, nuisance, and common law claims necessarily raise substantial issues of federal law sufficient to support federal question jurisdiction.

C. After Denying Sauk-Suiattle's Motion to Remand, the District Court Correctly Dismissed Sauk-Suiattle's Amended Complaint as an Impermissible Collateral Attack on City Light's FERC License

Sauk-Suiattle alleges that the district court erred in dismissing its Amended Complaint because Section 313 of the FPA does not apply to claims under state law. Br. at 36; 16 U.S.C. § 825l. Again, Sauk-Suiattle is wrong: courts have repeatedly recognized that Section 313 of the FPA, which grants federal appellate courts exclusive jurisdiction over challenges to FERC orders, applies to federal and

state law claims alike.[5]

1. Federal Courts of Appeals Have Exclusive Jurisdiction Over Any Issue—Including Claims Under State Law—Related to City Light'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"

[5] Sauk-Suiattle leaves the impression that the District Court granted City Light's Motion to Dismiss based on a preemption defense. Br. at 6 ("Neither the Federal Power Act, the 1986 amendments thereto, nor a 1995 settlement agreement preempt the application of state law. The district court erred in concluding that the Federal Power Act so fully occupied the field as to preempt a state-law based cause of action for Nuisance."); *see also* Br. at 8–9. As will be explained in this section, the district court properly granted City Light's Motion to Dismiss because all of Sauk-Suiattle's claims are an impermissible collateral attack on City Light's 1995 FERC License in violation of Section 313 of the Federal Power Act, which requires that Sauk-Suiattle's claims should have been raised in an appeal of FERC's 1995 Relicensing Order more than 25 years ago. Sauk-Suiattle is conflating the concepts of impermissible collateral attacks and preemption defenses. The district court did not rule on City Light's field and conflict preemption arguments. As is explained in Section VI.D.2 below, however, this Court also can affirm the district court's Order Granting City Light's Motion to Dismiss based on field and conflict preemption.

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*, 357 U.S. at 336. "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. FERC*, 967 F. Supp. 1166, 1175–76 (D. Ariz. 1997).

Accordingly, 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,[6] 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 provision in 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 Ninth Circuit held that plaintiff's claim regarding the safety of nuclear waste canisters under state law, which had been certified by the NRC, was an impermissible "veiled challenge" to the NRC's licensing decisions. *Id.* at 765.

Contrary to Sauk-Suiattle's unfounded claim otherwise, courts have repeatedly applied that same logic to preclude state law claims that mount a collateral attack on a FERC license. Br. at 36–37. In *Carrington v. City of Tacoma*,

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[6] The Ninth Circuit will often look to identical exclusive jurisdiction clauses in other federal statutes, such as the Hobbs Act, when interpreting Section 313 of the FPA. *See, e.g.*, *Pub. Watchdogs v. S. California Edison Co., Inc.*, 984 F.3d 744, 766 (9th Cir. 2020) (citing *Yeutter*, 887 F.2d at 909–911).

the court held plaintiffs' 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[.]" 276 F. Supp. 3d 1035, 1044–45 (W.D. Wash 2017); *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* [*v. Taxpayers of Tacoma*, 357 U.S. 320, 336, 78 S. Ct. 1209, 2 L.Ed.2d 1345 (1958)], or federal court[.]"). "[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.").

Sauk-Suiattle's citation to Justice Harlan's concurrence in *City of Tacoma* is unpersuasive. Br. at 37. The concurrence left intact the Court's holding that the Washington courts could not consider a collateral state law attack on Tacoma's authority and obligation to comply with its FERC license. 357 U.S. at 337–40. The Court's holding in *City of Tacoma* applies directly to this case, where Sauk-Suiattle

advances state law arguments regarding fish passage to challenge City Light's authority and obligation to comply with FERC license provisions requiring it to operate Gorge Dam without fish passage. SER-118–119. Sauk-Suiattle participated in FERC's licensing proceedings in the 1990s, entered into a settlement in those proceedings, and did not appeal City Light's 1995 license pursuant to Section 313 of the FPA. SER-101, 103, 105. Sauk-Suiattle cannot now challenge City Light's authority and obligation to comply with the FERC license because "all objection to the [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*, 357 U.S. at 336.

2. The U.S. Court of Appeals Had Exclusive Jurisdiction over Challenges to City Light's Existing FERC License

Here, Sauk-Suiattle has "artfully pled" its claims to launch an impermissible attack on City Light's operation of the Gorge Dam without fish passage in compliance with its FERC license. In *Public Watchdogs*, 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, 42 U.S.C. § 825l(b). In 1995, FERC expressly licensed the Project, including the Gorge Dam, to operate without fish passage, so any challenge to this conduct

should have been challenged pursuant to the FPA's exclusive jurisdiction provision. SER-118–19. Instead, Sauk-Suiattle is now using its Amended Complaint, more than 25 years after the fact, to challenge City Light's operation of the Project consistent with its FERC license. The district court correctly found that Sauk-Suiattle's action is an impermissible attack on City Light's FERC license in violation of Section 313 of the FPA, and correctly dismissed Sauk-Suiattle's Amended Complaint due to lack of subject matter jurisdiction.

Sauk-Suiattle's Amended Complaint essentially asks 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. By challenging City Light's lawful operation of the Gorge Dam without fish passage, Sauk-Suiattle necessarily challenges FERC's decision not to require fish passage in City Light's 1995 license. Only a U.S. Court of Appeals, more than 25 years ago, would have had jurisdiction over an action implicating City Light's 1995 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, this Court should affirm the district court's decision to dismiss Sauk-Suiattle's claims for lack of subject matter jurisdiction under Rule 12(b)(1).

3. The District Court Did Not "Rely" on the Fisheries Settlement Agreement to Dismiss the Amended Complaint; the District Court Correctly Relied on Section 313 of the

FPA to Dismiss Sauk-Suiattle's Amended Complaint Challenging the 1995 Relicensing Order

Sauk-Suiattle also mischaracterizes the district court's grounds for dismissal: the district court did not rely on a "1995 Settlement Agreement" to dismiss the Amended Complaint, as Sauk-Suiattle alleges. Br. at 37–40. The Fisheries Settlement Agreement was entered into in 1991, and subsequently adopted by FERC and incorporated into the 1995 Relicensing Order. SER-113–114, 126. Accordingly, the district court relied on Section 313 of the FPA and FERC's 1995 Relicensing Order to dismiss Sauk-Suiattle's Amended Complaint, because Section 313 meant the district court "lack[ed] jurisdiction to hear any of [Sauk-Suiattle's] claims, all of which 'inhere in the controversy' concerning an explicit provision of the 1995 FERC Relicensing Order[.]" ER-24. The district court's decision had nothing to do with "the equitable defense of laches" or "the application of anti-relitigation principles" and everything to do with Section 313 of the FPA, which prohibits challenges to a FERC license except in federal appellate court and within specific time parameters.[7]

D. Other Grounds Exist for Affirming the District Court's Order Granting City Light's Motion to Dismiss Sauk-Suiattle's Amended Complaint in its Entirety

In the event that this Court does not affirm the district court's conclusion

[7] Additionally, Sauk-Suiattle's unsubstantiated point that the 1995 Relicensing Order was entered before salmon within the Skagit River were listed as threatened

that Sauk-Suiattle's entire Amended Complaint should be dismissed because it is an untimely and impermissible collateral attack on City Light's FERC license, this Court can affirm dismissal on alternative bases in the record. *Orellana*, 6 F.4th at 1041 (holding a court of appeals can affirm the dismissal of a complaint under Rule 12(b)(6) "upon any basis fairly supported by the record"). First, for several reasons, the Establishing Acts do not provide a cognizable legal theory for relief through either the U.S. Supremacy Clause or Washington Constitution. Second, Sauk-Suiattle's Washington Constitution and Washington nuisance and common law claims are preempted by the FPA.

1. The Establishing Acts Do Not Provide a Cognizable Legal Theory for Relief Through Either the U.S. Supremacy Clause or Washington Constitution

Sauk-Suiattle's U.S. Supremacy Clause and Washington Constitution claims are premised on the Establishing Acts, and the (incorrect) notions that: (i) a federal law from 1848 forming the Territory of Oregon and prohibiting dams without fishways was incorporated into the laws of the Territory of Washington in 1853, (ii) such law was then subsequently incorporated into Washington state law upon its statehood in 1889 through Article XXVII, Section 2 of the Washington

or endangered species under the Endangered Species Act ("ESA") is immaterial to this dispute. Br. at 39. Sauk-Suiattle's Amended Complaint contains no claims regarding the ESA, and this Court's analysis should remain on the claims actually alleged in the Amended Complaint.

Constitution, and (iii) the prohibition on dams without fishways has remained a valid, supreme federal law and state law for more than 133 years. ER-28–32. Sauk-Suiattle's reliance on the Establishing Acts as grounds for relief is fundamentally flawed for several reasons.

First and foremost, the prohibition on dams without fishways from the 1848 congressional act forming the Territory of Oregon (the "1848 Establishing Act") was not incorporated into the laws of the Territory of Washington, and subsequently into the laws of the state of Washington, as Sauk-Suiattle alleges. On this basis alone, Sauk-Suiattle's Establishing Acts arguments fail and the U.S. Supremacy Clause and Washington Constitution claims should be dismissed. Second, assuming arguendo that this is purely a question of state law and that the 1848 Establishing Act's prohibition on dams without fishways was incorporated into the laws of the state of Washington, the prohibition on dams without fishways ceased to have any legal effect in 1890 when the Washington Legislature altered the prohibition. Third, the U.S. Supremacy Clause can provide no grounds for relief, as Congress repealed the Establishing Acts' prohibition on dams without fishways implicitly in 1920 via Section 29 of the FPA and explicitly in 1933 through repeal of obsolete sections of the Revised Statutes.

(a) The prohibition on dams without fishways was not incorporated into the law of the Territory of Washington or Washington State

The plain text of the Establishing Acts themselves demonstrate that Sauk-Suiattle has failed to present a cognizable legal theory for relief under federal or state law, and its claims must be dismissed: the prohibition on dams without fishways found in the congressional act forming the Territory of Oregon was not incorporated into the laws of the Territory of Washington, and therefore, never incorporated into Washington state law through Article XXVII, Section 2, of the Washington Constitution.

On August 14, 1848, Congress established the Territory of Oregon (the "1848 Establishing Act"). *See* SER-188–191; *see also* Addendum-25–27. Section 12 of the 1848 Establishing Act prohibited dams without fishways. SER-191; *see also* Addendum-27. In 1853, Congress established the Territory of Washington (the "1853 Establishing Act"). *See* SER-183–187; Addendum-28–31. Section 12 of the 1853 Establishing Act provided that:

> the laws now in force in said Territory of Washington, by virtue of the legislation of Congress in reference to the Territory of Oregon, *which have been enacted and passed subsequent to the first day of September, eighteen hundred and forty-eight* … are hereby, continued in force in said Territory of Washington until they shall be repealed or amended by future legislation.

SER-186 (emphasis added); *see also* Addendum-30. Thus, Section 12 of the 1853 Establishing Act incorporated only those laws applicable in the Territory of

Oregon that were enacted *subsequent* to September 1, 1848. The 1848 Establishing Act was not enacted "subsequent to" September 1, 1848; it was enacted on August 14, 1848. Consequently, the prohibition on dams without fishways contained in Section 12 of the 1848 Establishing Act was not incorporated into the laws of the Territory of Washington via Section 12 of the 1853 Establishing Act, which means the prohibition was also not incorporated into the laws of the state of Washington upon statehood in 1889 through Article XXVII, Section 2, of the Washington Constitution.[8]

Congress knew how to reference and incorporate the 1848 Establishing Act into the 1853 Establishing Act, and did so elsewhere. *See, e.g.*, SER-187 (§ 15 states all pending lawsuits and proceedings in the Territory of Oregon, which was formed "by act of Congress, entitled, 'An act to establish the territorial government of Oregon,' approved August fourteen, one thousand eight hundred and forty-eight[,]" were to be transferred to courts within the Territory of Washington); *see also* Addendum-31. "It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words. … Congress's explicit

[8] Article XXVII, Section 2, of the Washington Constitution provides:

> All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature ….

decision to use one word over another in drafting a statute is material." *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) (internal citations omitted).

This was not simply a clerical error. In 1873, when Congress revised the 1853 Establishing Act as part of its efforts to correct errors and consolidate the laws of the United States by publishing the Revised Statutes, Section 12 of the 1853 Establishing Act still recognized that laws of the Territory of Oregon that were enacted and passed "*subsequent to*" September 1, 1848 were incorporated into the laws of the Territory of Washington. *See* SER-182 (Section 12 of the 1853 Establishing Act recodified at 23 Rev Stat. § 1952); *see also*Addendum-34.

The plain text of these congressional acts belies Sauk-Suiattle's allegations. Sauk-Suiattle's U.S. Supremacy Clause and Washington Constitution claims that rely on the Establishing Acts should be dismissed under Rule 12(b)(6) because the 1848 Establishing Act prohibition was never incorporated into the laws of the Territory of Washington or the state of Washington.

(b) The Washington State Legislature repealed the Establishing Acts' prohibition on dams without fishways in 1890, and it is no longer valid state law

Assuming, *arguendo*, that this is purely a question of state law as Sauk-Suiattle alleges (Br. at 7), and that the 1848 Establishing Act's prohibition on dams without fishways was incorporated into the laws of the state of Washington through either the congressional act giving Washington statehood, or Washington

Constitution Article XXVII, Section 2, Sauk-Suiattle's claims still fail and must be dismissed.

The laws of the Territory of Washington became the law of the state of Washington upon statehood. *See* SER-177–178 (pursuant to § 24, "all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively"); *see also* Addendum-37–38. Moreover, Article XXVII, Section 2 of the Washington State Constitution provided that all laws in force in the Territory of Washington, "which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature… ." Wash. Const. Art. XXVII, § 2; *see also* Addendum-2. Shortly after becoming a state, however, the Washington Legislature passed an act during its first legislative session "to protect salmon and other food fishes" in the state, and repealed all "acts and parts of acts heretofore passed by the legislative assembly of the Territory of Washington in relation to the subject matter of this act[.]" *See* ER-83; *see also* Addendum-56. The Legislature, at the time, also established that the construction or maintenance of "any dam or other obstruction across any stream in this state [that] food fish are wont to ascend, without providing a suitable fishway," are guilty of a misdemeanor and may be found to be a nuisance. *See* ER-81; *see also* Addendum-54. The Legislature has substantially

revised these laws over the years, and current state law is codified, as revised, at RCW 77.57.030.[9] As a result, Sauk-Suiattle's Washington Constitution claim also fails on this ground.

(c) Congress repealed the Establishing Acts in 1920 and 1933, so the U.S. Supremacy Clause provides no grounds for relief

While Sauk-Suiattle repeatedly argues in its Opening Brief that this case "purely involves only questions of *state* law[,]" Sauk-Suiattle's Amended Complaint clearly involves federal law, as it alleges that the Establishing Acts were not repealed by Congress and the presence and operation of the Gorge Dam without fishways violates the Supremacy Clause of the U.S. Constitution. Br. at 7; ER-31–32. Taking Sauk-Suiattle's Amended Complaint at face value, Sauk-Suiattle fails to state a cognizable legal theory to support its case, as the Establishing Acts were repealed by Congress: Congress implicitly repealed the prohibition on dams without fishways in 1920 via Section 29 of the FPA, and explicitly repealed it in 1933 through repeal of obsolete sections of the Revised Statutes.

(i) The Establishing Acts prohibition on dams without fishways was repealed by Section 29 of the FPA in 1920

Section 12 of the 1848 Establishing Act and Section 12 of the 1853

[9] As explained in Section VI.D.2, *infra*, this state statute is preempted by the FPA.

Establishing Act were repealed in 1920 by Section 29 of the FPA. Section 29 of the FPA states that "all Acts or parts of Acts inconsistent with this chapter are repealed[.]" *See* SER-165; *see also* Addendum-42; *see also* SER-160 (renumbering § 29 to Part I of the FPA); *see also* Addendum-49; currently codified at 16 U.S.C. § 823. The requirements for fish passage at dams included in the 1848 Establishing Act, which Sauk-Suiattle incorrectly argues was carried through to the territory of Washington in the 1853 Establishing Act, are inconsistent with Section 18 in the FPA, which provides FERC and the Secretaries of Commerce and Interior the authority to determine whether fishways are required for a dam licensed by FERC. *See* SER-164; *see also* Addendum-41; *see also* SER-159; *see also* Addendum-48; *see also* 16 U.S.C. § 811. Courts have confirmed "with no hesitation" that Section 29 repealed those Congressional Acts inconsistent with the FPA. *See Scenic Hudson Pres. Conference v. Callaway*, 370 F. Supp. 162, 167–68 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 127 (2d Cir. 1974) (holding that Section 29 of the FPA repealed authority of the U.S. Army Corps to require permits for hydropower projects under Section 10 of the Rivers and Harbors Act of 1899). Therefore, the Establishing Acts do not provide a cognizable theory for relief through the U.S. Supremacy Clause because they were repealed by Section 29 of the FPA.

(ii) Congress repealed the prohibition on dams without fishways in 1933

Congress also nullified the applicability of the prohibition on dams without

fishways in the 1848 Establishing Act, which Sauk-Suiattle incorrectly argues was carried through to the territory of Washington in the 1853 Establishing Act, when it again reorganized its federal laws in 1933—this time into the United States Code. Congress repealed obsolete sections of the Revised Statutes omitted from the United States Code, including 23 Rev. Stat. § 1952. *See* SER-170–73; *see also* Addendum-43–45. The Department of the Interior recommended the repeal of 23 Rev. Stat. §§ 1896–1953 because the provisions related to territories "which have long since been admitted as States[,] … are obsolete and may be specifically repealed." *See* SER-168–69. Thus, Section 12 of the 1853 Establishing Act, which Sauk-Suiattle argues (and City Light disputes) incorporated the 1848 Establishing Act's prohibition on dams without fishways, ceased to be federal law in 1933. Therefore, the Establishing Acts do not provide a cognizable theory for relief through the U.S. Supremacy Clause because they were repealed as obsolete by Congress.

(d) Sauk-Suiattle's U.S. Supremacy Clause and Washington Constitution claims must be dismissed

In conclusion, Sauk-Suiattle's reliance on the Establishing Acts is mistaken, and the Court cannot accept these conclusory allegations of law as true. *See Vasquez*, 487 F.3d at 1249; *see also Sprewell*, 266 F.3d at 988. As established in the foregoing analysis, the prohibitions on dams without fishways contained in the Establishing Acts relied upon by Sauk-Suiattle are no longer valid federal or state

law, and Sauk-Suiattle therefore has failed to present a cognizable legal theory, and its claims under the Establishing Acts, Supremacy Clause of the U.S. Constitution, and the Washington Constitution must be dismissed under Rule 12(b)(6). ER-31–32.

2. The FPA Preempts Sauk-Suiattle's State Law Claims

Again, even if this Court does not affirm the district court's conclusion that Sauk-Suiattle's state law claims are an impermissible collateral attack on City Light's FERC license in violation of Section 313 of the FPA, this Court can affirm dismissal of Sauk-Suiattle's state law claims on the grounds of conflict or field preemption by the FPA. For these reasons too, Sauk-Suiattle has failed to state a claim under Rule 12(b)(6). It is of no moment that Washington nuisance or common law may require dams (such as those used for irrigation) to have fishways because, for Gorge Dam and other FERC-licensed hydropower projects, the FPA preempts state law. This Court may dismiss Sauk-Suiattle's state law grounds for declaratory and injunctive relief based on preemption, relying on either its federal question jurisdiction to consider state law claims that involve a substantial issue of federal law or its supplemental jurisdiction. *See Carrington*, 276 F. Supp. at 1041–42; *see also* 28 U.S.C. § 1367.

A federal law can preempt state law through conflict preemption or field preemption. *See Ventress v. Japan Airlines*, 747 F.3d 716, 720 (9th Cir. 2014).

Under conflict preemption, "state law is preempted to the extent that compliance with both laws is physically impossible, or state law would be an obstacle to the accomplishment of the full purposes and objectives of Congress." *Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451, 455 (9th Cir. 1993). Field preemption occurs when "the federal role is so pervasive that no room is left for the states to supplement it." *Id*.

The "FPA establishes a broad and paramount federal regulatory role," and the U.S. Supreme Court has explained that state laws imposing stricter requirements on a licensee than those imposed by FERC are preempted. *See California*, 495 U.S. at 499; *see also First Iowa Hydro-Electric Coop. v. Fed. Power Cmm'n.*, 328 U.S. 152, 180–82 (1946). Following *California* and *First Iowa*, the district court for the Western District of Washington held that the FPA both field and conflict preempted claims brought under state tort law that Tacoma Public Utility's flow releases in accordance with its FERC license caused flooding and property damage. *See Carrington*, 276 F. Supp. 3d at 1044–45. For the same reasons, any requirements in the Washington Constitution or Washington common law or tort law requiring fish passage are preempted by the FPA's provisions that provide FERC exclusive jurisdiction over licensing of the Project, including the authority to order fishways and ensure adequate protection, mitigation, and enhancement of fish. 16 U.S.C. §§ 803(a)(1), 811.

Sauk-Suiattle is also wrong when it alleges that "[t]he State—not the federal government—enacted laws and regulations to protect the fishery." Br. at 40. Under the FPA, 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 requires FERC to order a licensee to construct, maintain, and operate fishways if prescribed by either the federal Secretary of Commerce or the Interior. *See id.* § 811. Thus, the state law claims alleged by Sauk-Suiattle are preempted by the FPA.

Sauk-Suiattle's unsupported allegation that "all of the over 50 hydroelectric dams" in Washington licensed by FERC have fish passage measures has no bearing on whether City Light can install fish passage as a matter of state law while also complying with its FERC license and the FPA. Br. at 15. Sauk-Suiattle's state law arguments are both field and conflicted preempted by the FPA. *See* 16 U.S.C. §§ 803(a)(1), 811.

Sauk-Suiattle argues that Section 27 of the FPA preserves Sauk-Suiattle's state law grounds for declaratory and injunctive relief. 16 U.S.C. § 821; Br. at 11. Sauk-Suiattle, however, partially quoted 16 U.S.C. § 821 in a misleading way. *Id.* The full text of the provision states:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States *relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses,*

or any vested right acquired therein. (Emphasis added.)

The U.S. Supreme Court has interpreted this provision to limit state authority to allocating proprietary rights in water. *First Iowa*, 328 U.S. at 175–76; *see also Carrington*, 276 F. Supp. 3d at 1044 ("[T]he only authority states get over federal power projects relates to allocating proprietary rights in water." (citing *Sayles Hydro*, 985 F.2d at 455)). The common law and tort law cited by Sauk-Suiattle do not involve Washington's authority to govern proprietary rights in water. Therefore, those claims are not saved by Section 27 of the FPA and are preempted.

Sauk-Suiattle also seems to argue that the Savings Provision in Section 17 of the 1986 amendments to the FPA preserves its state common law and tort law arguments from field and conflict preemption. Br. at 12; *see also* 16 U.S.C. § 797 note. Sauk-Suiattle's reliance on this provision is flawed. A plain reading reveals that none of the provisions in Section 17 preserve the rights of anyone to rely on state common law or tort law to override a FERC license and demand fish passage at a FERC-licensed dam. Instead, the provisions in Section 17 preserve (1) certain authorities over proprietary rights in water (similar to Section 27), (2) interstate compacts, (3) rights pertaining to federal transmission facilities, (4) treaty rights, (5) FERC's competing application requirements for new hydropower licenses, and (6) the Pacific Northwest Electric Power Planning and Conservation Act.

Sauk-Suiattle also wrongly asserts that *Hughes v. Talen Energy Marketing,*

LLC, 136 S.Ct. 1288 (2016), is "on all fours and is dispositive of respondent's argument." Br. at 18. The U.S. Supreme Court in *Hughes* held that Part II of the FPA, 18 U.S.C. §§ 824 *et seq*., which authorizes FERC to set rates for interstate sales of power, preempted state law. In *dicta,* the Court noted states generally may use non-price measures to promote clean energy. 136 S.Ct. at 1299. The decision never mentions hydropower or considers whether a state measure that is flatly contrary to FERC's exclusive authority over hydropower licensing under Part I of the FPA, 18 U.S.C. §§ 791–823(g), could survive preemption analysis. *California, First Iowa*, and *Carrington* and other decisions under Part I demonstrate that many state laws are indeed subject to preemption under Part I of the FPA.

Accordingly, decades of precedent demonstrate the FPA preempts Sauk-Suiattle's claims that City Light's operation of Gorge Dam violates the Washington Constitution and state common law and constitutes a nuisance that must be enjoined. Applying Washington law to enjoin City Light from operating the dam until City Light installs fish passage would constitute a state veto of the Project impermissible under *California* and *First Iowa*. Sauk-Suiattle has failed to articulate a state constitutional, common law or tort claim upon which the Court can grant relief, and those claims must be dismissed.

VII. CONCLUSION

For the foregoing reasons, the district court should be summarily affirmed.

The district court correctly concluded that it had federal question jurisdiction due to the substantial federal issues on the face of Sauk-Suiattle's Amended Complaint. The district court also properly asserted supplemental jurisdiction over Sauk-Suiattle's state law claims. Therefore, the district court's order denying Sauk-Suiattle's Motion to Remand should be affirmed. Alternatively, the record supports affirming the district court's order denying the Motion to Remand because Sauk-Suiattle's state law claims also necessarily raise substantial questions of federal law.

Further, the district court's order granting City Light's Motion to Dismiss should be affirmed because all of Sauk-Suiattle's claims are an impermissible collateral attack on City Light's FERC license that should have been brought in an appeal of the FERC license to the federal courts of appeals more than 25 years ago, or "not at all." *City of Tacoma*, 357 U.S. at 336. Therefore, the district court correctly dismissed based on lack of subject matter jurisdiction. Alternatively, the record supports affirming the district court's order granting City Light's Motion to Dismiss because Sauk-Suiattle's federal Supremacy Clause and Washington Constitution claims relying on the Establishing Acts do not provide a cognizable theory for relief, and Sauk-Suiattle's Washington Constitution, nuisance and common law claims are field and conflict preempted by the FPA.

DATED this 4th day of May, 2022.

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STATEMENT OF RELATED CASES

CASE NUMBER 22-35000

There are no known related cases pending in this Court.

Dated this 4th day of May, 2022

By: *s/ Kari L. Vander Stoep*
Kari L. Vander Stoep
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number 22-35000

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ADDENDUM

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U.S.C.A. Const. Art. VI cl. 2

Clause 2. Supreme Law of Land

Currentness

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Notes of Decisions (2226)

U.S.C.A. Const. Art. VI cl. 2, USCA CONST Art. VI cl. 2
Current through P.L. 117-102. Some statute sections may be more current, see credits for details.

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West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 27. Schedule (Refs & Annos)

West's RCWA Const. Art. 27, § 2

§ 2. Laws in Force Continued

Currentness

All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: *Provided,* That this section shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide lands to any person, company or any municipal or private corporation.

Credits
Adopted 1889.

Notes of Decisions (12)

West's RCWA Const. Art. 27, § 2, WA CONST Art. 27, § 2
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United States Code Annotated
Title 16. Conservation
Chapter 12. Federal Regulation and Development of Power (Refs & Annos)
Subchapter I. Regulation of the Development of Water Power and Resources (Refs & Annos)

16 U.S.C.A. § 797

§ 797. General powers of Commission

Effective: August 8, 2005
Currentness

The Commission is authorized and empowered--

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licensees in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project, addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished Commission

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

(d) Publication of information, etc.; reports to Congress

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To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this subchapter, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof.

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation:[1] The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.[2] *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

(f) Preliminary permits; notice of application

To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however,* That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice

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of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

(g) Investigation of occupancy for developing power; orders

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

CREDIT(S)

(June 10, 1920, c. 285, Pt. I, § 4, 41 Stat. 1065; June 23, 1930, c. 572, § 2, 46 Stat. 798; renumbered Pt. I and amended, Aug. 26, 1935, c. 687, Title II, §§ 202, 212, 49 Stat. 839, 847; July 26, 1947, c. 343, Title II, § 205(a), 61 Stat. 501; Pub.L. 97-375, Title II, § 212, Dec. 21, 1982, 96 Stat. 1826; Pub.L. 99-495, § 3(a), Oct. 16, 1986, 100 Stat. 1243; Pub.L. 109-58, Title II, § 241(a), Aug. 8, 2005, 119 Stat. 674.)

Notes of Decisions (225)

Footnotes

1 So in original. The colon should probably be a period.

2 So in original. The period should probably be a colon.

16 U.S.C.A. § 797, 16 USCA § 797

Current through P.L. 117-102. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 16. Conservation
Chapter 12. Federal Regulation and Development of Power (Refs & Annos)
Subchapter I. Regulation of the Development of Water Power and Resources (Refs & Annos)

16 U.S.C.A. § 803

§ 803. Conditions of license generally

Currentness

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title[1] if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by--

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities

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for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.

(b) Alterations in project works

That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

(d) Amortization reserves

That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 808 of this title, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e) Annual charges payable by licensees; maximum rates; application; review and report to Congress

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That,

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subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 5123 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission: *Provided however,* That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such licensee that meets each of the following requirements:

(A) The contract covers one or more projects for which a license was issued by the Commission before January 1, 1985.

(B) The contract contains provisions specifically providing each of the following:

(i) A powerplant may be built by the licensee utilizing irrigation facilities constructed by the United States.

(ii) The powerplant shall remain in the exclusive control, possession, and ownership of the licensee concerned.

(iii) All revenue from the powerplant and from the use, sale, or disposal of electric energy from the powerplant shall be, and remain, the property of such licensee.

(C) The contract is an amendatory, supplemental and replacement contract between the United States and: (i) the Quincy-Columbia Basin Irrigation District (Contract No. 14-06-100-6418); (ii) the East Columbia Basin Irrigation District (Contract No. 14-06-100-6419); or, (iii) the South Columbia Basin Irrigation District (Contract No. 14-06-100-6420).

This paragraph shall apply to any project covered by a contract referred to in this paragraph only during the term of such contract unless otherwise provided by subsequent Act of Congress. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

(2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces in any year, 1 ½ mills per kilowatt-hour for

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over 40 up to and including 80 gigawatt-hours in any year, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours in any year. Except as provided in subsection (f), such charge shall be the only charge assessed by any agency of the United States for the use of such dams or structures.

(3) The provisions of paragraph (2) shall apply with respect to--

(A) all licenses issued after October 16, 1986; and

(B) all licenses issued before October 16, 1986, which--

(i) did not fix a specific charge for the use of the Government dam or structure involved; and

(ii) did not specify that no charge would be fixed for the use of such dam or structure.

(4) Every 5 years, the Commission shall review the appropriateness of the annual charge limitations provided for in this subsection and report to Congress concerning its recommendations thereon.

(f) Reimbursement by licensee of other licensees, etc.

That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

(g) Conditions in discretion of commission

Such other conditions not inconsistent with the provisions of this chapter as the commission may require.

(h) Monopolistic combinations; prevention or minimization of anticompetitive conduct; action by Commission regarding license and operation and maintenance of project

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(1) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

(2) That conduct under the license that: (A) results in the contravention of the policies expressed in the antitrust laws; and (B) is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in subchapter II of this chapter) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance. In the event it is impossible to prevent or adequately minimize the contravention, the Commission shall refuse to issue any license to the applicant for the project and, in the case of an existing project, shall take appropriate action to provide thereafter for the operation and maintenance of the affected project and for the issuing of a new license in accordance with section 808 of this title.

(i) Waiver of conditions

In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided,* That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) shall not apply to the conditions required under this subsection.

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CREDIT(S)

(June 10, 1920, c. 285, Pt. I, § 10, 41 Stat. 1068; renumbered Pt. I and amended, Aug. 26, 1935, c. 687, Title II, §§ 206, 212, 49 Stat. 842, 847; Pub.L. 87-647, Sept. 7, 1962, 76 Stat. 447; Pub.L. 90-451, § 4, Aug. 3, 1968, 82 Stat. 617; Pub.L. 99-495, §§ 3(b), (c), 9(a), 13, Oct. 16, 1986, 100 Stat. 1244, 1252, 1257; Pub.L. 99-546, Title IV, § 401, Oct. 27, 1986, 100 Stat. 3056; Pub.L. 102-486, Title XVII, § 1701(a), Oct. 24, 1992, 106 Stat. 3008.)

Notes of Decisions (142)

Footnotes

1 So in original. Probably should be followed by "; and".

16 U.S.C.A. § 803, 16 USCA § 803

Current through P.L. 117-102. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 16. Conservation
Chapter 12. Federal Regulation and Development of Power (Refs & Annos)
Subchapter I. Regulation of the Development of Water Power and Resources (Refs & Annos)

16 U.S.C.A. § 811

§ 811. Operation of navigation facilities; rules and regulations; penalties

Effective: August 8, 2005
Currentness

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate. The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such fishways. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection[1] and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this chapter, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of the Army; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 825*o* of this title.

CREDIT(S)

(June 10, 1920, c. 285, Pt. I, § 18, 41 Stat. 1073; renumbered Pt. I and amended, Aug. 26, 1935, c. 687, Title II, §§ 209, 212, 49 Stat. 845, 847; 1939 Reorg. Plan No. II, § 4(e), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433; July 26, 1947, c. 343, Title II, § 205(a), 61 Stat. 501; June 4, 1956, c. 351, § 2, 70 Stat. 226; 1970 Reorg. Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090; Pub.L. 109-58, Title II, § 241(b), Aug. 8, 2005, 119 Stat. 674.)

Notes of Decisions (2)

Footnotes

1 So in original. Probably should be "section".

16 U.S.C.A. § 811, 16 USCA § 811
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United States Code Annotated
Title 16. Conservation
Chapter 12. Federal Regulation and Development of Power (Refs & Annos)
Subchapter I. Regulation of the Development of Water Power and Resources (Refs & Annos)

16 U.S.C.A. § 821

§ 821. State laws and water rights unaffected

Currentness

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

CREDIT(S)

(June 10, 1920, c. 285, pt. I, § 27, 41 Stat. 1077; renumbered pt. I, Aug. 26, 1935, c. 687, Title II, § 212, 49 Stat. 847.)

Notes of Decisions (57)

16 U.S.C.A. § 821, 16 USCA § 821
Current through P.L. 117-102. Some statute sections may be more current, see credits for details.

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Title 16. Conservation
Chapter 12. Federal Regulation and Development of Power (Refs & Annos)
Subchapter I. Regulation of the Development of Water Power and Resources (Refs & Annos)

16 U.S.C.A. § 823

§ 823. Repeal of inconsistent laws

Currentness

All Acts or parts of Acts inconsistent with this chapter are repealed: *Provided,* That nothing contained herein shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, granting certain rights-of-way to the city and county of San Francisco, in the State of California.

CREDIT(S)

(June 10, 1920, c. 285, pt. I, § 29, 41 Stat. 1077; renumbered pt. I, Aug. 26, 1935, c. 687, Title II, § 212, 49 Stat. 847.)

16 U.S.C.A. § 823, 16 USCA § 823
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United States Code Annotated
Title 16. Conservation
Chapter 12. Federal Regulation and Development of Power (Refs & Annos)
Subchapter III. Licensees and Public Utilities; Procedural and Administrative Provisions

16 U.S.C.A. § 825***l***

§ 825*l*. Review of orders

Effective: August 8, 2005
Currentness

(a)Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b)Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in 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 in the United States Court of Appeals for the District of Columbia, by filing in such court, 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. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or

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in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c)Stay of Commission's order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

CREDIT(S)

(June 10, 1920, c. 285, Pt. III, § 313, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 860; amended June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Pub.L. 85-791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub.L. 109-58, Title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

Notes of Decisions (454)

16 U.S.C.A. § 825***l***, 16 USCA § 825l
Current through P.L. 117-102. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 83. Courts of Appeals (Refs & Annos)

28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

Currentness

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; Pub.L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub.L. 97-164, Title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

Notes of Decisions (3536)

28 U.S.C.A. § 1291, 28 USCA § 1291
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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1331

§ 1331. Federal question

Currentness

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 930; Pub.L. 85-554, § 1, July 25, 1958, 72 Stat. 415; Pub.L. 94-574, § 2, Oct. 21, 1976, 90 Stat. 2721; Pub.L. 96-486, § 2(a), Dec. 1, 1980, 94 Stat. 2369.)

Notes of Decisions (3203)

28 U.S.C.A. § 1331, 28 USCA § 1331
Current through P.L. 117-102. Some statute sections may be more current, see credits for details.

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28 U.S.C.A. § 1367

§ 1367. Supplemental jurisdiction

Currentness

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

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CREDIT(S)

(Added Pub.L. 101-650, Title III, § 310(a), Dec. 1, 1990, 104 Stat. 5113.)

Notes of Decisions (1702)

28 U.S.C.A. § 1367, 28 USCA § 1367
Current through P.L. 117-102. Some statute sections may be more current, see credits for details.

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28 U.S.C.A. § 1441

§ 1441. Removal of civil actions

Currentness

(a) Generally.--Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Removal based on diversity of citizenship.--(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Joinder of Federal law claims and State law claims.--(1) If a civil action includes--

(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and

(B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute,

the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

(d) Actions against foreign States.--Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

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(e) Multiparty, multiforum jurisdiction.--**(1)** Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if--

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j)[1] has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) Derivative removal jurisdiction.--The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

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Notes of Decisions (3778)

Footnotes

1 So in original. Section 1407 of this title does not contain a subsec. (j).

28 U.S.C.A. § 1441, 28 USCA § 1441

Current through P.L. 117-102. Some statute sections may be more current, see credits for details.

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Sec. 2. *And be it further enacted*, That if the Fifth Auditor shall report, in any of the cases herein provided for, that preliminary surveys are necessary to determine the site of a proposed lighthouse or light-boat, or to ascertain more fully what the public exigency demands, the Secretary of the Navy shall thereupon appoint one or more officers of the navy, possessing the requisite skill and experience, to perform the required service.

If the Fifth Auditor shall report that preliminary surveys are necessary, the Secretary of the Navy shall appoint an officer to perform the service required.

Sec. 3. *And be it further enacted*, That any officer so appointed shall forthwith enter upon the discharge of the duty, and, after fully ascertaining the facts, shall report, first, whether the proposed facility to navigation is the most suitable for the exigency which exists; and, second, where it should be placed if the interests of commerce demand it; third, if the thing proposed be not the most suitable, whether it is expedient to make any other kind of improvement; fourth, whether the proposed light has any connection with other lights, and if so, whether it cannot be so located as to subserve both the general and local wants of trade and navigation; and, fifth, whether there be any, and, if any, what other facts of importance touching the subject.

Duties of officers so appointed.

Sec. 4. *And be it further enacted*, That all such reports shall, as speedily as may be, be laid before the Secretary of the Treasury, and if such as to authorize the work without further legislation, he shall forthwith proceed with it; otherwise, such report shall be laid before Congress at the next ensuing session; but in all cases where the Fifth Auditor does not report such preliminary examination as expedient, the provisions of this act shall without delay be carried into execution.

Reports of such officers to be laid before Secretary of the Treasury, &c.

Sec. 5. *And be it further enacted*, That the sum of six thousand dollars be, and the same is hereby appropriated, out of any money in the treasury not otherwise appropriated, to purchase lenses, and to fit up, under the direction of the Secretary of the Treasury, a lighthouse to make trial of Mr. Isherwood's plan of discriminating one light from another, and of determining the distance of a vessel from a light, if the said Secretary shall be of opinion that the discovery merits such a trial of its value.

Appropriation for a lighthouse to make trial of Mr. Isherwood's discovery.

Approved, August 14, 1848.

Chap. CLXXVII.—*An Act to establish the Territorial Government of Oregon.*

Aug. 14, 1848.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act, all that part of the Territory of the United States which lies west of the summit of the Rocky Mountains, north of the forty-second degree of north latitude, known as the Territory of Oregon, shall be organized into and constitute a temporary government by the name of the Territory of Oregon: *Provided*, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed: *And provided, also*, That the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said Territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong: *And provided further*, That nothing in this act contained shall be construed to inhibit the government of the United States from dividing

Temporary government for Territory of Oregon established.

Proviso as to Indians in said Territory.

Title to missionary stations confirmed.

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United States, and faithfully to discharge the duties of their respective offices; which said oaths, when so taken, shall be certified by the person by whom the same shall have been taken, and such certificates shall be received and recorded by the said secretary among the executive proceedings; and the chief justice and associate justices, and all other civil officers in said Territory, before they act as such, shall take a like oath or affirmation, before the said governor or secretary, or some judge or justice of the peace of the Territory, who may be duly commissioned and qualified; which said oath or affirmation shall be certified and transmitted by the person taking the same, to the secretary, to be by him recorded as aforesaid; and, afterwards, the like oath or affirmation shall be taken, certified, and recorded, in such manner and form as may be prescribed by law. The governor shall receive an annual salary of fifteen hundred dollars as governor, and fifteen hundred dollars as superintendent of Indian affairs. The chief justice and associate justices shall each receive an annual salary of two thousand dollars. The secretary shall receive an annual salary of fifteen hundred dollars. The said salaries shall be paid quarter-yearly, from the dates of the respective appointments, at the treasury of the United States; but no such payment shall be made until said officers shall have entered upon the duties of their respective appointments. The members of the legislative assembly shall be entitled to receive three dollars each per day during their attendance at the session thereof, and three dollars each for every twenty miles' travel in going to and returning from said sessions, estimated according to the nearest usually travelled route. And a chief clerk, one assistant clerk, a sergeant-at-arms, and door-keeper, may be chosen for each house; and the chief clerk shall receive five dollars per day, and the said other officers three dollars per day, during the session of the legislative assembly; but no other officers shall be paid by the United States: *Provided*, That there shall be but one session of the legislature annually, unless, on an extraordinary occasion, the governor shall think proper to call the legislature together. There shall be appropriated annually the sum of fifteen hundred dollars, to be expended by the governor to defray the contingent expenses of the Territory, including the salary of a clerk of the executive department; and there shall also be appropriated, annually, a sufficient sum to be expended by the Secretary of the Territory, and upon an estimate to be made by the Secretary of the Treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses; and the governor and secretary of the Territory shall, in the disbursement of all moneys intrusted to them, be governed solely by the instructions of the Secretary of the Treasury of the United States, and shall semi-annually account to the said Secretary for the manner in which the aforesaid [sum] moneys shall have been expended; and no expenditure, to be paid out of money appropriated by Congress, shall be made by said legislative assembly for objects not specially authorized by the acts of Congress making the appropriations, nor beyond the sums thus appropriated for such objects.

Salary of governor &c.

Salary of secretary.

Compensation of members of legislative assembly.

Officers of legislative assembly.

Proviso as to sessions of legislature.

Provision for contingent expenses.

Salmon leaps not to be obstructed.

SEC. 12. *And be it further enacted*, That the rivers and streams of water in said Territory of Oregon in which salmon are found, or to which they resort, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.

Appropriations for services and expenses of expresses,

And for presents to Indians.

SEC. 13. *And be it further enacted*, That the sum of ten thousand dollars be, and is hereby appropriated, to be expended under the direction of the President of the United States, in payment for the services and expenses of such persons as have been engaged by the provisional government of Oregon in conveying communications to and from the

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of said court, as follows: At Dubuque on the first Mondays of January and July; at Iowa City on the first Mondays of May and October; and at Burlington on the third Mondays of May and October.

Provisions as to process.

Sec. 2. *And be it further enacted*, That all process, bail bonds, and recognizances, returnable at the term of said court at Dubuque, Iowa City and Burlington, respectively, shall be returnable and returned to the court next to be held at the place where said process, bail bonds and recognizances are made returnable, and all continuances may be made to conform to this Act.

Repeal of inconsistent acts, 1849, ch. 124.

Sec. 3. *And be it further enacted*, That all acts and parts of acts inconsistent with the provisions of this act, be, and the same are hereby repealed.

Approved, February 26, 1853.

March 2, 1853.

1846, ch. 90.

Chap. LXXXIX.—*An Act to provide Compensation to such persons as may be designated by the Secretary of the Treasury to receive and keep the Public Money, under the fifteenth section of the Act of sixth August, eighteen hundred and forty-six, for the additional services required under that Act.*

Compensation of depositaries of public money under act of 1846, ch. 90.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the depositaries which have been or may be designated by the Secretary of the Treasury, under the fifteenth section of the act of the sixth of August, eighteen hundred and forty-six, to receive payments and give receipts or certificates of deposit for public money from miscellaneous sources, other than the transactions of the respective offices for which they are or may be commissioned, may be paid in full compensation for receiving, safely keeping, and paying out such public money, after the first day of March, eighteen hundred and forty-nine, at the rate of one half of one per centum for the first one hundred thousand dollars; one fourth of one per centum for the second one hundred thousand dollars; and one eighth of one per centum for all sums over two hundred thousand dollars; any sum which may have been allowed to such depositary for rent or any other contingent expenses in respect to the custody of such public money, being deducted from such compensation before any payment shall be made therefor:

Proviso.

Provided, That no compensation shall be allowed for the above services when the emoluments of the office of which said designated depositary is in commission, amounts to the maximum compensation fixed by law; nor shall the amount allowed to any of said designated depositaries for such services, when added to the emoluments of the office of which he is in commission be more than sufficient to make the maximum compensation fixed by law:

Proviso.

And provided further, That the whole allowance to any designated depositary for such services, shall not exceed fifteen hundred dollars per annum.

Appropriation.

Sec. 2. *And be it further enacted*, That the sum of twenty thousand dollars be, and the same is hereby appropriated to meet the allowances which may be made under the provisions of this act.

Approved, March 2, 1853.

March 2, 1853.

Chap. XC.—*An Act to establish the Territorial Government of Washington.*

Part of Oregon formed into the territory of Washington.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act, all that portion of Oregon Territory lying and being south of the forty-ninth degree of north latitude, and north of the middle of the main channel of the Columbia River, from its mouth to where the forty-sixth degree of north latitude crosses said river, near Fort Wallawalla, thence with said forty-sixth degree of latitude to the summit of the Rocky Mountains, be organized into and constitute a temporary government by

the duties of their respective offices, which said oaths, when so taken, shall be certified by the person before whom the same shall have been taken; and such certificates shall be received and recorded by the said Secretary among the executive proceedings; and the Chief Justice and Associate Justices, and all other civil officers in said Territory, before they act as such, shall take a like oath or affirmation before the said Governor or Secretary, or some judge or justice of the peace of the Territory who may be duly commissioned and qualified, which said oath or affirmation shall be certified and transmitted, by the person taking the same, to the Secretary, to be by him recorded as aforesaid; and afterwards, the like oath or affirmation shall be taken, certified and recorded in such manner and form as may be prescribed by law. The Governor shall receive an annual salary of fifteen hundred dollars as Governor, and fifteen hundred dollars as Superintendent of Indian affairs. The Chief Justice, and Associate Justices, shall each receive an annual salary of two thousand dollars. The Secretary shall receive an annual salary of fifteen hundred dollars. The said salaries shall be paid quarterly, from the dates of the respective appointments, at the Treasury of the United States; but no such payment shall be made until said officers shall have entered upon the duties of their respective appointments. The members of the legislative assembly shall be entitled to receive three dollars each per day during their attendance at the session thereof, and three dollars each for every twenty miles' travel in going to and returning from said sessions, estimated according to the nearest usually travelled route. And a chief clerk, one assistant clerk, a sergeant-at-arms, and door-keeper, may be chosen for each house; and the chief clerk shall receive five dollars per day, and the said other officers three dollars per day, during the session of the legislative assembly; but no other officers shall be paid by the United States: *Provided*, That there shall be but one session of the legislative assembly annually, unless, on an extraordinary occasion, the Governor shall deem it expedient and proper to call the legislature together. There shall be appropriated, annually, the sum of fifteen hundred dollars, to be expended by the Governor, to defray the contingent expenses of the Territory, including the salary of a clerk of the executive department; and there shall also be appropriated, annually, a sufficient sum to be expended by the Secretary of the Territory, and upon an estimate to be made by the Secretary of the Treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses; and the Governor and Secretary of the Territory shall, in the disbursement of all moneys intrusted to them, be governed solely by the instructions of the Secretary of the Treasury of the United States, and shall, semi-annually, account to the said Secretary for the manner in which the aforesaid sums of money shall have been expended; and no expenditure, to be paid out of money appropriated by Congress, shall be made by said legislative assembly for objects not specially authorized by the acts of Congress making the appropriations, nor beyond the sums thus appropriated for such objects.

Salaries.

One session annually, only.

Contingent expenses.

Instructions as to disbursement of money to be followed.

Sec. 12. *And be it further enacted*, That the laws now in force in said Territory of Washington, by virtue of the legislation of Congress in reference to the Territory of Oregon, which have been enacted and passed subsequent to the first day of September, eighteen hundred and forty-eight, applicable to the said Territory of Washington, together with the legislative enactments of the Territory of Oregon, enacted and passed prior to the passage of, and not inconsistent with, the provisions of this act, and applicable to the said Territory of Washington, be, and they are hereby, continued in force in said Territory of Washington until they shall be repealed or amended by future legislation.

Existing laws in said territory continued in force so far as applicable.

Sec. 13. *And be it further enacted*, That the legislative assembly of the Territory of Washington shall hold its first session at such time and

First session of legislative assembly.

place in said Territory as the Governor thereof shall appoint and direct; and at said first session, or as soon thereafter as they shall deem expedient, the legislative assembly shall proceed to locate and establish the seat of government for said Territory, at such place as they may deem eligible; which place, however, shall thereafter be subject to be changed by said legislative assembly. And the sum of five thousand dollars, out of any money in the Treasury not otherwise appropriated, is hereby appropriated and granted to said Territory of Washington, to be there applied by the Governor to the erection of suitable buildings at the seat of government.

Seat of government.

Public buildings.

Delegate.

SEC. 14. *And be it further enacted,* That a delegate to the House of Representatives of the United States, to serve for the term of two years, who shall be a citizen of the United States, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as have been heretofore exercised and enjoyed by the delegates from the several other Territories of the United States to the House of Representatives, but the delegate first elected shall hold his seat only during the term of the Congress to which he shall be elected. The first election shall be held at such time, and places, and be conducted in such manner, as the Governor shall appoint and direct; of which, and the time, place, and manner of holding such elections, he shall give at least sixty days' notice by proclamation; and at all subsequent elections the time, places, and manner of holding the elections shall be prescribed by law. The person having the greatest number of votes shall be declared by the Governor to be duly elected, and a certificate thereof shall be given accordingly. The delegate from said Territory shall be entitled to receive the same per diem compensation and mileage at present allowed the delegate from the Territory of Oregon.

His pay.

Removal of cases from courts of Oregon Territory.

SEC. 15. *And be it further enacted,* That all suits, plaints, process, and proceedings, civil and criminal, at law and in chancery, and all indictments and informations, which shall be pending and undetermined in the courts established within and for said Territory of Oregon, by act of Congress, entitled "An act to establish the territorial government of Oregon," approved August fourteen, one thousand eight hundred and forty-eight, wherein the venue in said cases, suits at law, or in chancery, or criminal proceedings, shall be included within the limits hereinbefore declared and established for the said Territory of Washington; then, and in that case, said actions so pending in the Supreme or Circuit Courts of the Territory of Oregon shall be, by the clerks of said courts, duly certified to the proper courts of said Territory of Washington; and thereupon said causes shall, in all things concerning the same, be proceeded on, and judgments, verdicts, decrees, and sentences rendered thereon, in the same manner as if the said Territory had not been divided. All bonds, recognizances, and obligations of every kind whatsoever, valid, under the existing laws, within the limits of said Territory of Oregon, shall be held valid under this act, and all crimes and misdemeanors against the laws now in force within the said limits of the Territory of Washington may be prosecuted, tried, and punished in the courts established by this act, and all penalties, forfeitures, actions, and causes of action, may be recovered and enforced, under this act, before the Supreme and Circuit Courts established by this act as aforesaid: *Provided,* That no right of action whatever shall accrue against any person for any act done in pursuance of any law heretofore passed by the legislative assembly of the Territory of Oregon, and which may be declared contrary to the Constitution or laws of the United States.

Certain rights of action restricted.

Certain existing officers to retain their offices, till others are appointed.

SEC. 16. *And be it further enacted,* That all justices of the peace, constables, sheriffs, and other judicial and ministerial officers, who shall be in office within the limits of said Territory of Washington when this

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in connection therewith, or for colleges, seminaries, churches, libraries, or any benevolent, charitable or scientific association.

Limitation on right of religious corporations to hold real estate.

1 July, 1862, c. 126, s. 3, v. 12, p. 501.

SEC. 1890. No corporation or association for religious or charitable purposes shall acquire or hold real estate in any Territory, during the existence of the territorial government, of a greater value than fifty thousand dollars; and all real estate acquired or held by such corporation or association contrary hereto shall be forfeited and escheat to the United States; but existing vested rights in real estate shall not be impaired by the provisions of this section.

Constitution and laws of United States made applicable to all the Territories.

SEC. 1891. The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.

N. Mex., 9 Sept., 1850, c. 49, s. 17, v. 9, p. 452. Utah, 9 Sept., 1850, c. 51, s. 17, v. 9, p. 458. Colo., 28 Feb., 1861, c. 59, s. 16, v. 12, p. 176. Dak., 2 March, 1861, c. 86, s. 16, v. 12, p. 244. Ariz., 24 Feb., 1863, c. 56, s. 2, v. 12, p. 665. Idaho, 3 March, 1863, c. 117, s. 13, v. 12, p. 813. Mont., 26 May, 1864, c. 95, s. 13, v. 13, p. 91. Wyo., 25 July, 1868, c. 235, s. 16, v. 15, p. 183.

Penitentiaries.

10 Jan., 1871, c. 15, s. 1, v. 16, p. 398.

SEC. 1892. Any penitentiary which has been, or may hereafter be, erected by the United States in an organized Territory shall, when the same is ready for the reception of convicts, be placed under the care and control of the marshal of the United States for the Territory or District in which such penitentiary is situated; except as otherwise provided in the case of the penitentiaries in Montana, Idaho, Wyoming, and Colorado.

Rules for their government.

10 Jan., 1871, c. 15, s. 2, v. 16, p. 398.

SEC. 1893. The Attorney-General of the United States shall prescribe all needful rules and regulations for the government of such penitentiary, and the marshal having charge thereof shall cause them to be duly and faithfully executed and obeyed, and the reasonable compensation of the marshal and of his deputies for their services under such regulations shall be fixed by the Attorney-General.

Payment of marshal, &c., and of expenses of subsistence, &c., of offenders.

Ibid.

SEC. 1894. The compensation, as well as the expense incident to the subsistence and employment of offenders against the laws of the United States, who have been, or may hereafter be, sentenced to imprisonment in such penitentiary, shall be chargeable on, and payable out of, the fund for defraying the expenses of suits in which the United States are concerned, and of prosecutions for offenses committed against the United States; but nothing herein shall be construed to increase the maximum compensation now allowed by law to those officers.

Imprisonment in penitentiaries.

10 Jan., 1871, c. 15, s. 3, v. 16, p. 398.

SEC. 1895. Any person convicted by a court of competent jurisdiction in a Territory, for a violation of the laws thereof, and sentenced to imprisonment, may, at the cost of such Territory, on such terms and conditions as may be prescribed by such rules and regulations, be received, subsisted, and employed in such penitentiary during the term of his imprisonment, in the same manner as if he had been convicted of an offense against the laws of the United States.

CHAPTER TWO.

OF PROVISIONS CONCERNING PARTICULAR ORGANIZED TERRITORIES.

Sec.
1896. Boundaries and establishment of New Mexico.
1897. Of Utah.
1898. Of Washington.
1899. Of Colorado.
1900. Of Dakota.
1901. Of Arizona.
1902. Of Idaho.
1903. Of Montana.
1904. Of Wyoming.

Sec.
1905. Elections in Washington and Idaho.
1906. Delegate to Congress from Washington, Idaho, and Montana, must be a citizen of the United States.
1907. The judicial power, how vested in all the Territories except Arizona.
1908. The judicial power, how vested in Arizona.
1909. Writs of error to United States Supreme Court.

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other lands, to an equal amount, in sections or fractional sections, as the case may be, within their respective counties, in lieu of the sections so occupied.

SEC. 1948. All general territorial laws of the Territory of Dakota in force in any portion of the Territory of Wyoming on the 25th July, 1868, shall continue in force throughout the Territory of Wyoming until repealed by the legislative authority of that Territory, except such laws as relate to the possession or occupation of mines or mining claims.

Certain laws of Dakota continued in force.

25 July, 1868, c. 235, s. 17, v. 15, p. 183.

SEC. 1949. The existing agencies and superintendencies of the Indians inhabiting the Territories of Idaho and Montana shall be continued with the same powers and duties now prescribed by law, except that the President may, at his discretion, change the location of the office of such agents or superintendents.

Agencies, &c., continued.

Idaho, 3 March, 1863, c. 117, s. 17, v. 12, p. 814. Mont., 26 May, 1864, c. 95, s. 17, v. 13, p. 91.

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

Concurrent jurisdiction over the Columbia River.

2 March, 1853, c. 90, s. 21, v. 10, p. 179.

SEC. 1951. All officers to be appointed by the President, by and with the advice and consent of the Senate, for the Territories of Washington, Idaho, and Montana, who, by virtue of the provisions of any law now existing, or which may be enacted by Congress, are required to give security for moneys that may be intrusted to them for disbursement, shall give such security at such time and in such manner as the Secretary of the Treasury may prescribe.

Disbursing officers in Washington, Idaho, and Montana to give security.

26 May, 1864, c. 95, s. 16, v. 13, p. 91. Wash., 2 March, 1853, c. 90, s. 19, v. 10, p. 179. Idaho, 3 March, 1863, c. 117, s. 16, v. 12, p. 814. Mont., 26 May, 1864, c. 95, s. 16, v. 13, p. 91.

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

Certain laws of Washington continued in force.

2 March, 1853, c. 90, s. 12, v. 10, p. 177.

SEC. 1953. The libraries heretofore purchased by appropriations of Congress for the Territories of Utah and Washington shall be kept at the respective seats of government of those Territories for the use of the governor, legislative assembly, judges of the supreme court, secretary, marshal, and attorney of each Territory, and such other persons and under such regulations as may be prescribed by law.

Library for Utah and Washington to be kept.

Utah, 9 Sept., 1850, c. 51, s. 14, v. 9, p. 457. Wash., 2 March, 1853, c. 90, s. 17, v. 10, p. 179.

CHAPTER THREE.

PROVISIONS RELATING TO THE UNORGANIZED TERRITORY OF ALASKA.

Sec.
1954. Customs, &c., laws extended to Alaska.
1955. Importation of fire-arms and distilled spirits may be prohibited.
1956. Killing of fur-bearing animals prohibited.
1957. What courts to have jurisdiction of offenses.
1958. Remission of fines, &c.
1959. Saint Paul and Saint George Islands declared special reservations.
1960. Killing of seal upon them prohibited except in certain months.
1961. Killing of certain seal prohibited.
1962. Limit to number of seals to be killed.
1963. Right to take seal may be leased.

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Citations:

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To provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States., Chapter 180, 50 Congress, Public Law 50-180. 25 Stat. 676 (1889).

ALWD 6th ed.
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Chicago 17th ed.
"Chapter 180, 50 Congress, Session 2, An Act: To provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States.," U.S. Statutes at Large 25, no. Main Section (1889): 676-684

McGill Guide 9th ed.
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AGLC 4th ed.
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MLA 8th ed.
To provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States., Chapter 180, 50

February 22, 1889.

CHAP. 180.—An act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States.

Admission of new States.
North Dakota, South Dakota, Montana, and Washington.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

Division of Dakota.

Conventions to meet at Bismarck and Sioux Falls.

SEC. 2. The area comprising the Territory of Dakota shall, for the purposes of this act, be divided on the line of the seventh standard parallel produced due west to the western boundary of said Territory; and the delegates elected as hereinafter provided to the constitutional convention in districts north of said parallel shall assemble in convention, at the time prescribed in this act, at the city of Bismarck; and the delegates elected in districts south of said parallel shall, at the same time, assemble in convention at the city of Sioux Falls.

Delegates to conventions to be chosen.

Qualifications.

Apportionment.

Governors to issue proclamation for election.

Number of delegates.

SEC. 3. That all persons who are qualified by the laws of said Territories to vote for representatives to the legislative assemblies thereof, are hereby authorized to vote for and choose delegates to form conventions in said proposed States; and the qualifications for delegates to such conventions shall be such as by the laws of said Territories respectively persons are required to possess to be eligible to the legislative assemblies thereof; and the aforesaid delegates to form said conventions shall be apportioned within the limits of the proposed States, in such districts as may be established as herein provided, in proportion to the population in each of said counties and districts, as near as may be, to be ascertained at the time of making said apportionments by the persons hereinafter authorized to make the same, from the best information obtainable, in each of which districts three delegates shall be elected, but no elector shall vote for more than two persons for delegates to such conventions; that said apportionments shall be made by the governor, the chief-justice, and the secretary of said Territories; and the governors of said Territories shall, by proclamation, order an election of the delegates aforesaid in each of said proposed States, to be held on the Tuesday after the second Monday in May, eighteen hundred and eighty-nine, which proclamation shall be issued on the fifteenth day of April, eighteen hundred and eighty-nine; and such election shall be conducted, the returns made, the result ascertained, and the certificates to persons elected to such convention issued in the same manner as is prescribed by the laws of the said Territories regulating elections therein for Delegates to Congress; and the number of votes cast for delegates in each precinct shall also be returned. The number of delegates to said conventions respectively shall be seventy-five; and all persons resident in said proposed States, who are qualified voters of said Territories as herein provided, shall be entitled to vote upon the election of delegates, and under such rules and regulations as said conventions may prescribe, not in conflict with this act, upon the ratification or rejection of the constitutions.

Place of meeting.

Time.

Adoption of Constitution.

Civil rights.

SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed States, respectively. The constitutions shall be republican in form, and make no distinction in civil or

which such record is or may be pending, or to the supreme court of such State, as the nature of the case may require: *Provided*, That the mandate of execution or of further proceedings shall, in cases arising in the Territory of Dakota, be directed by the Supreme Court of the United States to the circuit or district court of the district of South Dakota, or to the supreme court of the State of South Dakota, or to the circuit or district court of the district of North Dakota, or to the supreme court of the State of North Dakota, or to the supreme court of the Territory of North Dakota, as the nature of the case may require. And each of the circuit, district, and State courts, herein named, shall, respectively, be the successor of the supreme court of the Territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts respectively with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of either of the Territories mentioned in this act, in any case arising within the limits of any of the proposed States prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union.

Proviso.

Dakota causes.

Supreme Territorial courts to be succeeded by circuit, district, and State courts.

Judgments prior to admission.

SEC. 23. That in respect to all cases, proceedings, and matters now pending in the supreme or district courts of either of the Territories mentioned in this act at the time of the admission into the Union of either of the States mentioned in this act, and arising within the limits of any such State, whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said Territory; and in respect to all other cases, proceedings and matters pending in the supreme or district courts of any of the Territories mentioned in this act at the time of the admission of such Territory into the Union, arising within the limits of said proposed State, the courts established by such state shall, respectively, be the successors of said supreme and district Territorial courts; and all the files, records, indictments, and proceedings relating to any such cases, shall be transferred to such circuit, district, and State courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause or proceeding now pending, or that prior to the admission of any of the States mentioned in this act, shall be pending in any Territorial court in any of the Territories mentioned in this act, shall abate by the admission of any such State into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district or State court, as the case may be: *Provided, however*, That in all civil actions, causes, and proceedings, in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper State courts.

Transfer of pending actions.

Circuit and district courts.

State courts.

Transfer of files, records, etc.

Writs, etc., not to abate.

Proviso.
Request for trial in federal courts.

SEC. 24. That the constitutional conventions may, by ordinance, provide for the election of officers for full State governments, including members of the legislatures and Representatives in the Fifty-first Congress; but said State governments shall remain in abeyance until the States shall be admitted into the Union, respectively, as provided in this act. In case the constitution of any of said proposed States shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two Senators of the United States; and the governor and secretary of state of such proposed State shall certify the election of the Senators and Representatives in the manner required by law; and when such State is admitted

Election for full State governments.

Election of Senators.

into the Union, the Senators and Representatives shall be entitled to be admitted to seats in Congress, and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the officers of the State governments formed in pursuance of said constitutions, as provided by the constitutional conventions, shall proceed to exercise all the functions of such State officers; and all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively.

Existing laws.

Repeal provision.

SEC. 25. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said Territories or by Congress, are hereby repealed.

Approved, February 22, 1889.

February 23, 1889.

CHAP. 201.—An act granting the title of the United States in certain lands to the county of Randolph and State of Illinois, on certain conditions.

Randolph County, Ill.

Public lands granted to.

Provisos.

Survey.

Purchase.

Patents.

Private rights not affected.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all right, title, and interest of the United States in and to all lands in the Mississippi bottom, between the line of bluffs and the Mississippi River, in the county of Randolph and State of Illinois, be, and the same are hereby, granted to the said county of Randolph: *Provided,* That the legal authorities of said county, on the discovery of any such lands within said boundaries, shall have the same surveyed at the expense of said county, and file plats of said surveys with the Commissioner of the General Land Office, at Washington, District of Columbia. If, upon examination by said Commissioner, it shall appear that the title of the United States has not heretofore been alienated in any tract shown on said plat or plats, he shall so notify the authorities of said county; and upon payment by the authorities of said county into the Treasury of the United States of the sum of one dollar and twenty-five cents for every acre shown on said plat or plats, it shall be the duty of said Commissioner of the General Land Office to prepare and have executed patents for every tract so paid for, and to deliver the same on application to the legal authorities of said county: *Provided further,* That nothing in this act shall be so construed as to include any accretions formed to lands bordering on the Mississippi River and owned by private individuals.

Approved, February 23, 1889.

February 23, 1889.

CHAP. 202.—An act granting the right of way to the Yankton and Missouri Valley Railway Company through the Yankton Indian Reservation in Dakota.

Yankton and Missouri Valley Railway Company granted right of way through Yankton Indian Reservation, Dak.

Location.

Proviso.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Yankton and Missouri Valley Railway Company, a corporation duly organized under the laws of the Territory of Dakota, its successors or assigns, are hereby invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway, telegraph, and telephone line through the Yankton Indian Reservation in said Territory, beginning at any point to be selected by said railway company on the east line of said reservation between the northeast corner thereof and a point one mile south of the junction of the west fork of Choteau Creek with the east fork thereof, and running thence westerly or northwesterly through said reservation, but at no point farther than fifteen miles to the south of the northernly boundary thereof: *Provided,* That if said right of way be so located

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To create a Federal Power Commission, to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes., Public Law 66-280 / Chapter 285, 66 Congress. 41 Stat. 1063 (1920).

ALWD 6th ed.
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June 5, 1920.
[H. J. Res. 380.]
[Pub. Res. No. 52.]

CHAP. 273.—Joint Resolution Authorizing the payment of the compensation of session employees of the Senate and House of Representatives for the month of June, 1920, on the 5th day of said month.

Congressional session employees to be paid June 5, 1920, salaries for month of June.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Senate and Clerk of the House of Representatives are hereby authorized and directed to pay to the session employees of the Senate and House of Representatives borne on the session roll their respective salaries for the month of June, 1920, on the fifth day of said month.

Approved, June 5, 1920.

June 10, 1920.
[H. R. 3184.]
[Public, No. 280.]
Post, p. 1639.

CHAP. 285.—An Act To create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes.

Federal Water Power Act.
Federal Power Commission.
Creation and composition of.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Power Commission (hereinafter referred to as the commission), which shall be composed of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. Two members of the commission shall constitute a quorum for the transaction of business, and the commission shall have an official seal, which shall be judicially noticed. The President shall designate the chairman of the commission.

Executive secretary.
Detail of Army engineer officer.

SEC. 2. That the commission shall appoint an executive secretary, who shall receive a salary of $5,000 a year, and prescribe his duties, and the commission may request the President of the United States to detail an officer from the United States Engineer Corps to serve the commission as engineer officer, his duties to be prescribed by the commission.

Execution of work by Departments of War, etc.

The work of the commission shall be performed by and through the Departments of War, Interior, and Agriculture and their engineering, technical, clerical, and other personnel except as may be otherwise provided by law.

Expenses authorized.

All the expenses of the commission, including rent in the District of Columbia, all necessary expenses for transportation and subsistence, including, in the discretion of the commission, a per diem of not exceeding $4 in lieu of subsistence incurred by its employees under its orders in making any investigation, or conducting field work, or upon official business outside of the District of Columbia and away from their designated points of duty, shall be allowed and paid on the presentation of itemized vouchers therefor approved by a member or officer of the commission duly authorized for that purpose; and in order to defray the expenses made necessary by the provisions of this Act there is hereby authorized to be appropriated such sums as Congress may hereafter determine, and the sum of $100,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, available until expended, to be paid out upon warrants drawn on the Secretary of the Treasury upon order of the commission.

Appropriation.

Meaning of terms as used.

SEC. 3. That the words defined in this section shall have the following meanings for the purposes of this Act, to wit:

"Public lands."

"Public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public-land laws. It shall not include "reservations," as hereinafter defined.

"Reservations."

"Reservations" means national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the

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1902; and 37½ per centum of the charges arising from licenses hereunder for the occupancy and use of national forests, national parks, public lands, and national monuments, from development within the boundaries of any State shall be paid by the Secretary of the Treasury to such State; and 50 per centum of the charges arising from all other licenses hereunder is hereby reserved and appropriated as a special fund in the Treasury to be expended under the direction of the Secretary of War in the maintenance and operation of dams and other navigation structures owned by the United States or in the construction, maintenance, or operation of headwater or other improvements of navigable waters of the United States.

To States.

From all other licenses.

To special navigation improvement fund.

SEC. 18. That the operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this Act, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of War. Such rules and regulations may include the maintenance and operation by such licensee at its own expense of such lights and signals as may be directed by the Secretary of War, and such fishways as may be prescribed by the Secretary of Commerce; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 25 hereof.

Navigation facilities subject to regulation, etc., by Secretary of War.

Maintenance of lights, fishways, etc.

Penalty for noncompliance.

Post, p. 1076.

SEC. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

Public service licensees.
State regulations to control.

Regulation by Commission, if no State provision therefor.

Proviso.
To cease when State provision made.

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a

Reasonable, etc., rates for power used in interstate commerce.

Discriminatory, etc., unlawful.
Commission to enforce if no authority provided by State.

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Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

State irrigation, etc., laws not affected.

Sec. 28. That the right to alter, amend, or repeal this Act is hereby expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder.

Amendments, etc. Protection of licenses.

Sec. 29. That all Acts or parts of Acts inconsistent with this Act are hereby repealed: *Provided*, That nothing herein contained shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, granting certain rights of way to the city and county of San Francisco, in the State of California: *Provided further*, That section 18 of an Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, approved August 8, 1917, is hereby repealed.

Inconsistent laws repealed.
Provisos.
San Francisco water supply not affected.
Vol. 38, 242.
Waterways Commission abolished.
Vol. 40, p. 269, repealed.

Sec. 30. That the short title of this Act shall be "The Federal Water Power Act."

Title of Act.
Post, p. 1638.

Approved, June 10, 1920.

June 14, 1920.
[S. 547.]
[Public, No. 281.]

CHAP. 286.—An Act Authorizing the enlistment of non-English speaking citizens and aliens.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the Act of Congress entitled "An Act to regulate enlistments in the Army of the United States," approved August 1, 1894, as provides that "in time of peace no person (except an Indian) who can not speak, read, and write the English language" be, and the same is hereby repealed.

Army.
Enlistments.
Speaking, etc., English not required.
Vol. 28, p. 216, amended.

Approved, June 14, 1920.

June 14, 1920.
[S. 4167.]
[Public, No. 282.]

CHAP. 287.—An Act To extend the time for the completion of the municipal bridge approaches, and extensions or additions thereto, by the city of Saint Louis, within the States of Illinois and Missouri.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the time for the construction and completion of the municipal bridge approaches and also extensions or additions thereto, which said construction and completion was authorized by an Act entitled, "An Act to authorize the city of Saint Louis, a corporation organized under the laws of the State of Missouri, to construct a bridge across the Mississippi River," approved June 25, 1906, be, and the same is hereby, extended, for the period of three years from February 11, 1921.

Mississippi River.
Time extended for bridging, by Saint Louis, Mo.
Vol. 34, p. 461; Vol. 40, p. 436.

Sec. 2. That for the purpose of carrying into effect the objects of this Act, the city of Saint Louis may receive, purchase, and also acquire by lawful appropriation and condemnation in the States of Illinois and Missouri upon making proper compensation therefor, to be ascertained according to the laws of the State within which the same is located, real and personal property and rights of property, and in order to facilitate and support interstate commerce, may make any and every use of the same necessary and proper for the

Condemnation, etc., authorized.

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[CHAPTER 202.]

March 3, 1933.
[H. R. 9877.]
[Public, No. 418.]

AN ACT

To repeal obsolete sections of the Revised Statutes omitted from the United States Code.

United States Code. Designated obsolete sections of Revised Statutes, omitted from, repealed.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sections of the Revised Statutes are hereby repealed:

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R. S. 16
R. S. 17
R. S. 20
R. S. 21
R. S. 23
R. S. 42
R. S. 51
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R. S. 53
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[CHAPTER 687.]

AN ACT

To provide for control and regulation of public-utility holding companies, and for other purposes.

August 26, 1935.
[S. 2796.]
[Public, No. 333.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the " Public Utility Act of 1935 ".

Public Utility Act of 1935.

TITLE I—CONTROL OF PUBLIC-UTILITY HOLDING COMPANIES

Title I—Control of public-utility holding companies.

NECESSITY FOR CONTROL OF HOLDING COMPANIES

Necessity.

SECTION 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

Abuses; interest adversely affected by.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

Vol. 47, p. 1544.

Enumeration of.

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction,

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able cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved."

Proviso. Condemnation proceedings.

SEC. 208. Section 17 of the Federal Water Power Act, as amended, is amended to read as follows:

Vol. 41, p. 1072; U. S. C., p. 699.

"SEC. 17. (a) All proceeds from any Indian reservation shall be placed to the credit of the Indians of such reservation. All other charges arising from licenses hereunder, except charges fixed by the Commission for the purpose of reimbursing the United States for the costs of administration of this Part, shall be paid into the Treasury of the United States, subject to the following distribution: 12½ per centum thereof is hereby appropriated to be paid into the Treasury of the United States and credited to 'Miscellaneous receipts'; 50 per centum of the charges arising from licenses hereunder for the occupancy and use of public lands and national forests shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress known as the Reclamation Act, approved June 17, 1902; and 37½ per centum of the charges arising from licenses hereunder for the occupancy and use of national forests and public lands from development within the boundaries of any State shall be paid by the Secretary of the Treasury to such State; and 50 per centum of the charges arising from all other licenses hereunder is hereby reserved and appropriated as a special fund in the Treasury to be expended under the direction of the Secretary of War in the maintenance and operation of dams and other navigation structures owned by the United States or in the construction, maintenance, or operation of headwater or other improvements of navigable waters of the United States. The proceeds of charges made by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part shall be paid into the Treasury of the United States and credited to miscellaneous receipts.

Charges arising from licenses; disposition.

"(b) In case of delinquency on the part of any licensee in the payment of annual charges a penalty of 5 per centum of the total amount so delinquent may be added to the total charges which shall apply for the first month or part of month so delinquent with an additional penalty of 3 per centum for each subsequent month until the total of the charges and penalties are paid or until the license is canceled and the charges and penalties satisfied in accordance with law."

Penalty charge for delinquent payment.

SEC. 209. Section 18 of the Federal Water Power Act, as amended, is amended to read as follows:

Vol. 41, p. 1073; U. S. C., p. 699.

"SEC. 18. The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of War, and such fishways as may be prescribed by the Secretary of Commerce. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this Act, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of War; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 316 hereof."

Maintenance of lights and signals, fishways.

Navigation facilities.

Rules and regulations.

Penalty for violation. *Post*, p. 862.

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lands are located. Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this Part, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this Part, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the Commission: *Provided*, That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites, or in connection with water-power development, or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained.

Reopening for location, entry, etc.

Entry of licensee; payment for damages.

Proviso. Locations, etc., heretofore made.

SEC. 212. Sections 1 to 29, inclusive, of the Federal Water Power Act, as amended, shall constitute Part I of that Act, and sections 25 and 30 of such Act, as amended, are repealed: *Provided*, That nothing in that Act, as amended, shall be construed to repeal or amend the provisions of the amendment to the Federal Water Power Act approved March 3, 1921 (41 Stat. 1353), or the provisions of any other Act relating to national parks and national monuments.

Vol. 41, pp. 1063–1077; U. S. C., p. 693.

Proviso. Acts not affected hereby.

SEC. 213. The Federal Water Power Act, as amended, is further amended by adding thereto the following parts:

"PART II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

Regulation of electric utility companies engaged in interstate commerce.

"DECLARATION OF POLICY; APPLICATION OF PART; DEFINITIONS

"SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

Declaration of policy.

"(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such

Application of Part.

West's Revised Code of Washington Annotated
Title 7. Special Proceedings and Actions (Refs & Annos)
Chapter 7.48. Nuisances (Refs & Annos)

West's RCWA 7.48.160

7.48.160. Authorized act not a nuisance

Currentness

Nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance.

Credits
[Code 1881 § 1238; 1875 p 79 § 4; RRS § 9916.]

Notes of Decisions (18)

West's RCWA 7.48.160, WA ST 7.48.160
Current with effective legislation through chapter 187 of the 2022 Regular Session of the Washington Legislature. Some statute sections may be more current, see credits for details.

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West's Revised Code of Washington Annotated
Title 77. Fish and Wildlife (Refs & Annos)
Chapter 77.57. Fishways, Flow, and Screening

West's RCWA 77.57.030

77.57.030. Fishways required in dams, obstructions--Penalties, remedies for failure

Currentness

(1) Subject to subsection (3) of this section, a dam or other obstruction across or in a stream shall be provided with a durable and efficient fishway approved by the director. Plans and specifications shall be provided to the department prior to the director's approval. The fishway shall be maintained in an effective condition and continuously supplied with sufficient water to freely pass fish.

(2)(a) If a person fails to construct and maintain a fishway or to remove the dam or obstruction in a manner satisfactory to the director, then within thirty days after written notice to comply has been served upon the owner, his or her agent, or the person in charge, the director may construct a fishway or remove the dam or obstruction. Expenses incurred by the department constitute the value of a lien upon the dam and upon the personal property of the person owning the dam. Notice of the lien shall be filed and recorded in the office of the county auditor of the county in which the dam or obstruction is situated. The lien may be foreclosed in an action brought in the name of the state.

(b) If, within thirty days after notice to construct a fishway or remove a dam or obstruction, the owner, his or her agent, or the person in charge fails to do so, the dam or obstruction is a public nuisance and the director may take possession of the dam or obstruction and destroy it. No liability shall attach for the destruction.

(3) For the purposes of this section, "other obstruction" does not include tide gates, flood gates, and associated man-made agricultural drainage facilities that were originally installed as part of an agricultural drainage system on or before May 20, 2003, or the repair, replacement, or improvement of such tide gates or flood gates.

Credits
[2005 c 146 § 903, eff. July 24, 2005; 2003 c 391 § 1, eff. May 20, 2003; 1998 c 190 § 86; 1983 1st ex.s. c 46 § 72; 1955 c 12 § 75.20.060. Prior: 1949 c 112 § 47; Rem. Supp. 1949 § 5780-321. Formerly RCW 77.55.060, 75.20.060.]

OFFICIAL NOTES

Part headings not law--2005 c 146: See note following RCW 77.55.011.

Severability--2003 c 391: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2003 c 391 § 8.]

Effective date--2003 c 391: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 20, 2003]." [2003 c 391 § 9.]

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Notes of Decisions (6)

West's RCWA 77.57.030, WA ST 77.57.030
Current with effective legislation through chapter 187 of the 2022 Regular Session of the Washington Legislature. Some statute sections may be more current, see credits for details.

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FISH; PROTECTION OF.

AN ACT to protect salmon and other food fishes in the State of Washington, and upon all waters upon which this State has jurisdiction and concurrent jurisdiction.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. It shall not be lawful to take or fish for salmon in the Columbia river or its tributaries by any means, in any year hereafter, between the first day of March and the tenth day of April, or between the tenth day of August and the tenth day of September; and also, during the weekly close time; that is to say, between the hour of six o'clock P. M. on each and every Saturday and six o'clock in the afternoon of the following Sunday, and any person or persons fishing for or catching salmon in violation of this section by catching salmon, or purchasing salmon unlawfully caught, or having in his or their possession any such unlawfully caught salmon, shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined in a sum not less than fifty dollars nor more than two hundred and fifty dollars.

Offense defined.

Penalty.

SEC. 2. It shall be unlawful to catch, kill, or in any manner destroy any salmon on or within one mile below any rack or other obstruction erected across any river or stream for the purpose of obtaining fish for propagation, and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined in a sum of not less than fifty dollars nor more than two hundred and fifty dollars, and any and all appliances used in the violation of this act, viz.: Boats, nets, traps, wheels, seines or other appliances, shall be subject to execution for the payment of the fine herein imposed.

Fish for propagation protected.

Property subject to execution.

SEC. 3. It shall not be lawful for any person or persons to take or fish for salmon on the waters of Shoalwater bay and the rivers with their tributaries flowing into said bay, and also on the waters of Gray's Harbor and the rivers with their tributaries flowing into said Gray's Harbor,

Shoalwater Bay.

Gray's Harbor and tributaries

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from the fifteenth day of November until the fifteenth day of December during any year hereafter, and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined in a sum not less than fifty dollars nor more than two hundred and fifty dollars. Penalty.

SEC. 4. It shall not be lawful for any person or persons to take or fish for salmon during the months of March, April and May of each year, on the waters of Puget Sound. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined in a sum of not less than fifty dollars nor more than two hundred and fifty dollars. Puget Sound. Penalty.

SEC. 5. For the purpose of more clearly defining the provisions of section four of this act, all that portion of the tide waters emptying into the Straits of Fuca, and the bays, inlets, streams and estuaries thereof, shall be known and designated in this act as Puget Sound.

SEC. 6. It shall not be lawful for any pound net, set net, trap, weir, wheel or other fixed appliance for taking fish, to extend more than one-half of the way across the breadth of any stream, channel or slough of any waters mentioned in this act at the time and place of such fishing, and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined in a sum not less than fifty dollars nor more than two hundred and fifty dollars. Size of nets and traps limited. Penalty.

SEC. 7. It shall not be lawful to cast or pass, or allow to be cast or passed, into any of the rivers and streams of this state into which salmon or trout are wont to be, any lime, gas, coculus indicus, or any other substance deleterious to fish, and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined in a sum not less than fifty dollars nor more than two hundred and fifty dollars. Waters must be kept pure.

SEC. 8. Any person or persons now owning or maintaining, or who shall hereafter construct or maintain any dam or other obstruction across any stream in this state which any food fish are wont to ascend, without providing Fishways.

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a suitable fishway or ladder for the fish to pass over such obstruction, shall be deemed guilty of a misdemeanor, and upon conviction thereof, be punished by a fine of not less than one hundred dollars nor more than two hundred and fifty dollars, and said dam or obstruction may, in the discretion of the court, be abated as a nuisance.

Penalty.

Nuisance.

SEC. 9. It shall not be lawful for the proprietor of any sawmill in this state, or any employee therein, or any other person, to cast sawdust, planer shavings or other lumber waste made by any lumber manufacturing concern, or suffer or permit such sawdust, shavings or other lumber waste to be thrown or discharged in any manner into the Columbia river and its tributaries, and all other streams and lakes in this state where fish resort to spawn, and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not less than one hundred dollars nor more than two hundred and fifty dollars.

Sawdust and refuse.

Penalty.

Moneys.

SEC. 10. All the moneys collected under the provisions of this act shall be paid into a fund to be known as a fish commission fund.

"Salmon" defined.

SEC. 11. Whenever the term salmon is used in this act, it shall be construed to include chinook, steelhead, blueback, silversides and all other species of salmon.

Division of fines.

SEC. 12. One-half of all the moneys collected under the provisions of this act shall be paid to the informer, if there be one, one-quarter to the attorney prosecuting, and the remainder shall be put into a fund to be known as the fish commission fund, and it shall be the duty of the attorney prosecuting, or justice of the peace, to cause to be endorsed upon the back of the indictment or complaint, the name of any person who shall voluntarily make complaint for violation of any of the provisions of this act.

SEC. 13. Payment of any fine and cost imposed under the provisions of this act shall be enforced in the same manner as is now provided by law in other criminal actions.

Jurisdiction of courts.

SEC. 14. Justices of the peace shall have concurrent jurisdiction with the superior court of all offenses mentioned in this act.

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SEC. 15. Nothing in this act shall be construed so as to prevent the taking of fish at any time of year, and in any manner, for propagation.

SEC. 16. All acts and parts of acts heretofore passed by the legislative assembly of the Territory of Washington in relation to the subject matter of this act be and the same are hereby repealed.

Approved February 11, 1890.

PRIZE FIGHTING; TO PROHIBIT.

AN ACT to prohibit prize fighting and sparring matches.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Any person who, within this state, engages in, instigates, aids or encourages, or does any act to further a contention or fight, with or without weapons, between two or more persons, or a fight commonly called a sparring match, in which the combatants are provided with gloves, or who sends or publishes a challenge, or acceptance to a challenge, for such a contention, prize fight, sparring match, with or without gloves, or carries or delivers such a challenge or acceptance, or trains or assists any person or persons in training or preparing for such contention, prize fight or sparring match, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment in the county jail for a term of not less than thirty days nor more than one year, and by a fine of not less than fifty dollars nor more than one thousand dollars: *Provided*, That nothing in this section shall be so construed as to interfere with members of private clubs sparring or fencing for exercise among themselves.

Misdemeanor defined.

Penalty.

SEC. 2. Any person who bets, stakes or wagers money