Sauk-Suiattle Indian Tribe v. City of Seattle, 56 F.4th 1179, 2022 WL 17999429 (9th Cir. Dec. 30, 2022); cert. denied, — S. Ct. —, 2023 WL 6377806 (Oct. 2, 2023).

- **Holding:** Tribe's suit alleging that 1995 FERC-licensed dam violated federal and state law by impeding fish migration was dismissed because the district court lacked jurisdiction to review the license and relicensing order.
- **Summary:** This decision is in an appeal from the judgment in *Sauk-Suiattle Indian Tribe v. City of Seattle*, 2021 WL 5712163 (W.D. Wash. Dec. 2, 2021), summarized at https://docs.google.com/document/d/1RqMv1sk5OLfXRnEOZrwPFLTIwYAS42JZ/edit. The dispute centered on the Gorge Dam that was subject to 50-year license issued in 1927 by the Federal Power Commission, now the Federal Energy Regulatory Commission. During relicensing proceedings in the 1970's, the Sauk-Suiattle Indian Tribe and others entered into a Settlement Agreement with licensee City of Seattle that dealt with anadromous fish flow-related issues. FERC's 1995 renewed 25-year license incorporated the Agreement that, importantly, contained no fishway requirement but did reserve the agency's "'authority to require fish passage in the future, should circumstances warrant.'" Twenty-six years later, the Tribe sued the City in state court seeking declaratory relief, asserting that the Dam "'blocks the passage of migrating fish' and thus its 'presence and operation' without fishways violates several laws: the 1848 Act establishing the Oregon Territory and the 1853 Act establishing the Washington Territory ...; the Supremacy Clause of the United States Constitution; the Washington State Constitution, which purportedly incorporates the Congressional Acts; and Washington nuisance and common law." The City removed the case to federal court under 28 U.S.C. § 1441(a) on federal question grounds and then moved to dismiss for lack of subject-matter jurisdiction because the Federal Power Act section 313(b) commits review of challenges to FERC orders to the federal courts of appeals. 16 U.S.C. § 825(b). The district court denied the Tribe's remand motion and, agreeing with the City's position, dismissed the amended complaint for lack of jurisdiction.

  The Ninth Circuit panel affirmed the dismissal in a per curiam opinion, accompanied by two concurring opinions. The panel agreed that the state court complaint set forth a substantial federal question because its claims "'(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.'" Having determined that the district court properly denied the motion to remand, the panel turned to whether § 825(b) deprived that court of subject-matter jurisdiction. It again agreed with the lower court on this score, reasoning in part:

  > The complaint does not expressly challenge the FERC Order, but the gravamen of the complaint—that the Gorge Dam must have fishways—is a direct attack on FERC's decision that no fishways were required. ... The Project's impact on fishery resources was a focal point of the relicensing process. ... FERC specifically considered whether fishways were required. ... And it determined that no fishways were required because neither the Secretary of Commerce nor the Secretary of the Interior had prescribed a fishway under 16 U.S.C. § 811, and because the Settlement Agreement, the terms of which were incorporated into the FERC Order, stated "that all issues concerning environmental impacts from relicensing of the Project, as currently constructed, are satisfactorily resolved by these Agreements." ... Because the Tribe's action attacks "an important ingredient of the FERC

license," ... it is subject to section 313(b) and can be brought only in the court of appeals.

On the final issue—whether the district court properly dismissed the action "given 28 U.S.C. § 1447(c), which ... provides: 'If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded [to state court][,]'" the panel followed the "futility" exception to that requirement adopted in *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991). Recognizing that "[a]s a three-judge panel we are compelled to apply the futility exception unless it is 'clearly irreconcilable with the reasoning or theory of intervening higher authority[,]'" the panel held that "[r]emand here would be futile. A state court would lack jurisdiction for the same reason the district court lacked jurisdiction: section 313(b) of the FPA vests the federal courts of appeals with exclusive jurisdiction over the Tribe's action."

The two concurring opinions expressed the view that, but for the futility exception, the case would have been remanded to state court once the district concluded that it lacked subject-matter jurisdiction. All panel members joined in the observation that "[w]hile there may be valid policy reasons for the futility exception, 'it is not our role to choose what we think is the best policy outcome and to override the plain meaning of a statute, apparent anomalies or not'" and therefore "encourage[d]" the full court "to reconsider and abandon the futility exception in an appropriate case."

- **Relevant (2022) Deskbook Section:** None