No. _____

In The
Supreme Court of the United States

JEFF SIMMONS, et al.,

Petitioners,

v.

SABINE RIVER AUTHORITY,
STATE OF LOUISIANA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 10(c) of the Federal Power Act ("FPA"), 16 U.S.C. § 803(a), provides:

> 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." *Id*.

In addition, Section 27 of the FPA is a savings clause which provides:

> 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.

16 U.S.C. § 821.

In this case, the Fifth Circuit has issued a decision in conflict with decisions of the Second, Fourth, Ninth and D.C. Circuits in ruling that Petitioners' property damage claims under state law and takings claims under the Louisiana and United States constitutions are preempted by the Federal Power Act. The question presented is:

QUESTION PRESENTED – Continued

Whether the Federal Power Act preempts Petitioners' property damage tort and takings claims caused by the operation of the licensee of a FERC-licensed dam project, where the provisions of the FPA have explicitly saved and reserved such claims to the property owners.

PARTIES TO THE PROCEEDING BELOW

Pursuant to Rule 14.1(b), the parties to the proceeding below include Petitioners here, and plaintiffs-appellants below, Jeff Simmons, Alice Simmons, Jeanne Simmons, Gerald Edward McBride, Edward Bryant Bonner, Frank A. Bonner, Joy N. Carlson, Von D. Fee, Katie M. Copeland, Connie L. Cryer, Athen M. Jarrell, Rodney Jarrell, Monroe McFarland, Delia McFarland, Thomas L. McMahon, Paul Mitcham, Debra L. Nash, Kelly Nash, Kim Nash, Paula Nash, Randal C. Smith, Sylvia Smith, Peggy J. Weir, David T. Cole, Ernest Howell, Larry Simmons, and Billie Simmons.

Sabine River Authority of Louisiana, Entergy Services, Inc., Entergy Louisiana, LLC, Entergy Gulf States Louisiana, LLC and Entergy Corporation are the Respondents here, and were the defendant-appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jeff Simmons, *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals reported at 732 F.3d 469, is reprinted in the Appendix (App.) at Pet. App. 1-19. The district court's opinion is unpublished and is reprinted at App. 22-32.

JURISDICTION

The court of appeals entered judgment on October 9, 2013. Pet. App. 1-21. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND PROVISIONS OF THE FEDERAL POWER COMMISSION LICENSE

The Fifth Amendment of the United States Constitution provides, in pertinent part: "nor shall private property be taken for public use, without just compensation."

Section 10(c) of the Federal Power Act, known as the "savings clause" and codified at 16 U.S.C. § 803(c) (2009), provides in relevant part that:

> [e]ach 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 thereof.

Article 38 of the Federal Power Commission License[1] ("FERC license") issued to the Sabine River Authority of Louisiana ("SRA") for the Toledo Bend Dam Project provides:

> *Article 38*. The Licensees shall be responsible for and shall minimize soil erosion and siltation on lands adjacent to the stream resulting from construction and operation of the project.

STATEMENT OF THE CASE

When the Petitioners' properties were inundated with torrential flooding caused by the operational release of water from the Toledo Bend Dam structure, Petitioners filed suit in Louisiana state court alleging

[1] The Federal Power Commission is now currently reorganized as the Federal Energy Regulatory Commission ("FERC").

claims of negligence, nuisance, trespass, unconstitutional takings without just compensation and due process violations under the Louisiana and United States constitutions for the damage caused to their land and personal property.

The United States Fifth Circuit Court of Appeals held that Petitioners' claims against the operators of a hydroelectric dam and state waterway authority were preempted by the Federal Power Act. The court acknowledged "that this was a question of first impression in the circuit." Nevertheless, the Fifth Circuit's decision contravenes and causes conflict with decisions of the United States Court of Appeals for the Second, Fourth, Ninth and D.C. Circuits on the issue of whether the Federal Power Act preempts property owners' state-law and constitutional takings claims when damage is caused by a state actor acting under the FPA.

I. Statutory Framework And The FERC License

A. Section 10(c) of the Federal Power Act

Section 10(c) of the Federal Power Act, 16 U.S.C. § 803(c), the "savings clause," explicitly provides compensation for damages caused by FERC licensees for the damages alleged in the present action, and provides, *inter alia*:

> *Each licensee hereunder shall be liable for all damages occasioned to the property of others by 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 thereof.

16 U.S.C. § 803(c). (Emphasis added).

B. Article 38 of the FERC License

Article 38 of the FERC license issued to Respondent, The Sabine River Authority of Louisiana ("SRA") for the Toledo Bend Dam Project provides:

> *Article 38*. The ***Licensees shall be responsible for and shall minimize soil erosion*** and siltation on lands adjacent to the stream resulting from construction and ***operation of the project***. (Emphasis added).

Title 16 U.S.C. § 803(c) and Article 38 of the FERC license at issue expressly and unequivocally hold Respondents SRA, Entergy Gulf States Louisiana, LLC, Entergy Corporation, Entergy Services, Inc. and Entergy Louisiana, LLC (the "Entergy Defendants") accountable for damage to Petitioners' properties. Consequently, a finding that federal preemption bars Petitioners' state-law claims of negligence, nuisance, trespass, inverse condemnation and constitutional takings claims is wholly unsupported and is in direct conflict with other circuit courts which have considered this matter.

II. Factual Background

The Petitioners in this action are 28 individuals who reside, own and/or lease property south of the Toledo Bend Dam in an area referred to as the lower Sabine River Basin in western Louisiana. This area is very rural and used primarily for residential purposes, farming operations, small businesses, timber operations, hunting and fishing, and oil and gas production.

Petitioners' properties were subjected to substantial flooding which caused severe erosion of the land, among other damages, when the FERC Licensees and operators of the dam – SRA and the Entergy Defendants – negligently opened the spillway gates of the Toledo Bend Dam and caused flooding south of the Dam during the period approximating October 30, 2009 through November 2009. These floodwaters caused catastrophic damage to Petitioners' land and personal property. All of the Petitioners, who live along the bank of the Sabine River south of the structure, have sustained significant damage to their land and everything covering it, including homes, camps, other buildings and personal property. In the most stark examples, Petitioners allege the loss of entire tracts of land to the erosion caused by Respondents' mismanagement of the Dam.

In addition to constitutional takings claims, Petitioners asserted causes of action in tort, including claims of negligence, nuisance, trespass and inverse condemnation, alleging, *inter alia*, that Respondents' negligently operated the Toledo Bend Dam through

unreasonable releases of water through selectively operated spillway gates due largely to Respondents' negligent failures to appreciate the significance of rainfall events north of the Toledo Bend Dam, and specifically, where rain is falling and at what rate, all in violation of the applicable FERC license and the FPA. These failures, combined with substantially diminished outflow capacity of the Sabine River south of the Toledo Bend Dam, also due to Respondents' negligence, created an intersection of negligence and rainfall events making the profound flooding and erosion of Petitioners' properties foreseeable. In addition, the inundation of Petitioners' properties constitutes trespass.

Petitioners assert that SRA's and the Entergy Defendants' failures to timely release floodwaters from the Toledo Bend Dam – holding too much water for too long behind the Dam – foreseeably created a situation whereby the SRA and the Entergy Defendants were forced to open multiple spillway gates to excessive degrees, and not in accordance with the FERC licenses at issue, resulting in torrential "gushes" of water into the lower Sabine River Valley, foreseeably flooding and destroying Petitioners' properties by erosion that would not otherwise be destroyed during a normal flow situation.

The Toledo Bend Dam ("the Dam") is situated on the Sabine River in Sabine Parish, Louisiana. The Dam is operated by Sabine River Authority of Louisiana. There are two ways water from the Toledo Bend Lake, which is situated north of the Dam, can enter

the Sabine River below the Dam: (1) through the hydroelectric turbines, which produces electricity and revenue for SRA; and (2) through the spillway gates operated by SRA and the Entergy Defendants. The spillway gates are located in Louisiana. Toledo Bend lake is formed north of the Dam, with the Texas-Louisiana state line meandering through the lake.

The SRA was created by statute by the Louisiana legislature in 1950 as an arm of the state and received a FERC license to operate the Dam. *La. R.S. 38:2321*. Pursuant to statute, the legislature charged SRA with the following duties, *inter alia*: to conserve, store*, control*, preserve, utilize, and distribute *the waters of the rivers and streams of the Sabine watershed . . . with the view of controlling floods* and . . . to *control and employ such waters of the Sabine River and its tributaries in the state of Louisiana, including the storm and flood waters thereof*, as are hereinafter set forth. *La. R.S. 38:2325(10)* (emphasis added).

Significantly, SRA entered into a Power Sales Agreement with the Entergy Defendant's predecessors concerning the Dam. Pursuant to that contract, the Entergy Defendants obtained the right to oversee the generation of power and purchase generated power.

The Entergy Defendants, one or all of whom purchase power from SRA and who actually conduct operations at the Dam, exercise significant influence and control over the operation of the Dam with SRA, including the release of floodwaters through the flood gates of the Dam and the release of floodwaters

through the hydroelectric generation facility located at the Dam. SRA and the Entergy Defendants, in contravention of the FERC license, have caused extensive damage to Petitioners' property by long periods of inundation and through extensive erosion of the riverbank that stood for time immemorial prior to the operational mismanagement of the dam.

Importantly, the SRA's and the Entergy Defendants' operation of the Dam has caused the unconstitutional taking of Petitioners' property without just compensation. Notably, prior to the construction of the Dam, SRA condemned many thousands of acres north of the Dam – where the Toledo Bend lake is now – even to the high water mark where land most often remains dry, yet the lower basin property owners were not compensated similarly, and to this day no apparent monetary consideration is provided for those located south of the Dam. It is irrefutable that Petitioners should be compensated for Respondents' unilateral taking and complete destruction, in many instances, of Petitioners' property.

III. Procedural History

1. Petitioners filed suit in state court against Respondents for property damages alleging claims of unconstitutional takings under the Louisiana and United States constitutions, negligence, nuisance, trespass and constitutional due process violations.

SRA removed this action to federal court. SRA and the Entergy Defendants filed a motion to dismiss the suit under Federal Rules of Civil Procedure

12(b)(6) and 12(b)(7) arguing that Petitioners' property damage and takings claims were preempted by the Federal Power Act, although the Federal Power Act explicitly saves and reserves such claims to the Petitioners. Nevertheless, Respondents insisted that the FPA and the FERC license at issue preempted all of Petitioners' claims.

The district court agreed. It noted that section 10(c) of the FPA could not reasonably be interpreted to preserve Petitioners' claims for damages arising out of conduct which FERC has expressly declined to prohibit. Pet. App. 22-23. Further, the district court opined, that because operators typically avoid acting in a manner that will expose them to liability, Petitioners' claims arising out the operation of a FERC-licensed dam have the potential to change the manner in which the dam is operated and induce operational changes that FERC declined to mandate, "they interfere with FERC's exclusive licensing authority and are preempted by the FPA." Pet. App. 32.

2. The Fifth Circuit affirmed. Like the district court, the court of appeals acknowledged "that this is a question of first impression in this circuit" but failed to rely on the decisions from other sister courts of appeals in reaching its decision. Pet. App. 8. Despite clear jurisprudence to the contrary, the Fifth Circuit held that Petitioners' state-law property damage and takings claims were preempted by the Federal Power Act. The court concluded that the FPA preempted Petitioners' property damage claims based in state tort law where the alleged damage is the

result of "negligently" operating in compliance with a FERC-issued license.

The Fifth Circuit acknowledged that Sections 10(c) and 27 of the FPA acted as savings clauses, however, found that these provisions could not permit state tort law to supplant FERC's exclusive control of dam operators and, therefore, the Fifth Circuit held that all of Petitioners' claims were preempted, including the constitutional takings claims – an undeniable error.

REASONS FOR GRANTING THE WRIT

As the Fifth Circuit acknowledged, the case raised a question of first impression in the circuit. Following the Fifth Circuit's erroneous opinion, the courts of appeals are now deeply divided over whether the Federal Power Act preempts state-law property damage and takings claims under state and United States constitutions. The circuit conflict is entrenched and incapable of resolution except by this Court. The present division and uncertainty created by the Fifth Circuit's decision upsets one of the most fundamental rights provided by the United States Constitution – the premise that private property may not be taken for public use without just compensation – and is intolerable. The Court's intervention, therefore, is required.

I. Certiorari Is Warranted To Resolve An Entrenched Circuit Conflict Over Whether The FPA Preempts Petitioners' Takings And State-Law Tort Claims And To Correct The Decision Of The Fifth Circuit Which Decided An Important Federal Question In A Way That Conflicts With A Binding Decision Of This Court.

The circuits are intractably divided over whether FPA preempts state tort law claims for damages and constitutional takings claims for flooding caused by a FERC licensed dam or project, based upon a law governing one of the most important principles of our Constitution – the right of all Americans to receive compensation when private property is taken for public use. Indeed, the lower court's opinion itself raises serious questions of internal consistency and creates far-reaching consequences which call for reversal. The time has come for this Court to intervene, moreover, as the opinion below contributes to an emerging conflict among the courts of appeals and has the danger to seriously strip away essential fundamental rights provided by the United States Constitution.

A. The Second, Fourth, Ninth and D.C. Circuits and the Supreme Court of Montana Have Held That the FPA Savings Clause Expressly Preserves State-Law and Takings Claims Caused by FERC Licensed Projects, Which Contradicts the Fifth Circuit's Decision in the Case at Bar.

In *Skokomish Indian Tribe v. United States*, 332 F.3d 551, 559 (9th Cir. 2003), the Ninth Circuit recognized that a plaintiff aggrieved by a licensee's failure to comply with the terms of a FERC license had a claim for damages. *Id*. The *Skokomish* court distinguished between a common claim for damages resulting from a licensee's nonconforming conduct and an improper collateral attack on the license itself. *Skokomish* recognized that a plaintiff could not sue for damages resulting from conduct conforming to requirements of the FERC license. Therefore, in *Skokomish*, the Court denied plaintiffs' state-based claims because the alleged wrongful conduct was admittedly in conformity with FERC license and therefore constituted an attack on the license itself.

The case at bar is easily distinguishable. First, the negligent actions of the Respondents which caused the damage at issue were in violation or outside of the FERC licensed guidelines and procedures. Second, and most importantly, a legal and physical taking still results even where the damage was caused by Respondents acting in compliance with the FERC license.

However, the redeeming value of the *Skokomish* decision for this discussion was found in the decision of the Ninth Circuit in interpreting section 10(c) of the Federal Power Act (Section 803(c)), otherwise known as the "savings clause." The Ninth Circuit held that the FPA provision requiring licensees to maintain project works in condition so as not to impair property rights of others, the savings clause, does not create a federal private right of action, but instead preserves existing state-law claims against licensees. *Id.*

In *Skokomish*, the Tribe brought suit against the United States, the City of Tacoma and the Tacoma Public Utilities ("TPU"), alleging that a system of dams, reservoirs, powerhouses and diversion works caused extensive flooding to the Tribe's reservation, including failure of septic systems, contamination of water wells, damage to the Tribe's orchards and pastures and silting over of many of the Tribe's fisheries. The Tribe brought a series of state-law claims against the City and TPU based on property damage resulting from the aggradation of the Skokomish River. *Id.* Just like the case at bar, the claims included, among others, inverse condemnation, trespass, negligence and private and public nuisance claims.

As in the instant case, the Ninth Circuit recognized that the "[T]ribe is not attempting to collaterally attack the 1924 licensing decision; rather, it is suing for damages based on impacts that are covered by the license." *Id*. at 512. Consequently, the *Skokomish* court found that the FPA did not preempt

the Tribe's claims. In reaching this decision, the Ninth Circuit followed decisions from the Second and D.C. Circuits in *DiLaura v. Power Authority of State of N.Y.*, 982 F.2d 73 (2d Cir. 1992), and *South Carolina Public Service Authority v. FERC*, 850 F.2d 788 (D.C. Cir. 1988). The Ninth Circuit in *Skokomish* clearly recognized that parties injured by a licensee's conduct extrinsic to that authorized by FERC license are entitled to sue on common-law claims for damages.

DiLaura and *South Carolina Public Service Authority* held that section 803(c), the savings clause, does not create a federal private right of action, but instead preserves existing state-law claims against licensees. *DiLaura*, 982 F.2d at 77-79; *S.C. Pub. Serv. Auth.*, 850 F.2d at 793-95. Their holdings were based on a plain reading of the statute as well as the legislative history of Section 803(c).

The legislative history revealed that all discussions during the floor debates centered on the premise that "damages caused by licensees should be determined in accordance with state law." *Id.* at 795. As the D.C. Circuit explained, the legislative history of section 803(c) indicates that, in creating section 803(c), "Congress simply wanted to preserve the right of injured property owners to bring actions for damages against licensees in state court under traditional state tort law, and to shield the United States against liability. *DiLaura v. Power Authority*, 786 F. Supp. 241, 249 (W.D.N.Y. 1991).

The *DiLaura* court noted further that "[t]he floor debate on the FPA also indicated that property damage caused by licensees was to be determined by reference to state law." *DiLaura*, 982 F.2d at 78 (citing 56 Cong. Rec. 9913-14 (daily ed. Sept. 3, 1918)). *Id*. The *Skokomish* court relied on this interpretation of Section 803(c) and believed that it was "the correct one and thus see no cause from parting with our sister circuits." *Id*.

In *DiLaura*, the court held that under 16 U.S.C. § 803(c), Congress did not preempt property-based state common-law claims against FERC licensees. In other words, while the FPA grants FERC the ultimate authority to license a hydro-electric project in accordance with federal law, it explicitly permits the operation of state law with regard to "proprietary rights" which may be affected by a FERC-licensed facility. *See First Iowa Hydro-Electric Co-op v. Federal Power Comm.*, 328 U.S. 152, 175-176 (1946).

In *DiLaura*, plaintiffs were riparian landowners who alleged that their property was damaged by ice control procedures undertaken by an electric utility company and brought suit against the utility company under the FPA and state negligence law. The Second Circuit held that the FPA did not provide for a private right of action for damages under section 803 imposing liability on a FERC licensee. Importantly, the Court held that Congress explicitly preserved the right of injured property owners to bring actions for damages against licensees in state court under traditional state tort law.

In *South Carolina Public Service Authority v. FERC*, 850 F.2d 788, the South Carolina Public Service Authority ("Authority") appealed one of the conditions imposed by FERC for renewal of its FPA license on the Santee North Dam. The challenged condition was that the Authority provide compensation for all foreseeable property damage caused by seismically induced dam failures. *Id*. at 789. In that proceeding, the Authority contended that FERC did not have jurisdiction to impose liability for property damages. On appeal, the D.C. Circuit Court of Appeals held that while 16 U.S.C. § 803(c) specifically addressed the issue of property damages, that section merely preserved any existing cause of action under state law. *Id.* at 794. As discussed therein, Congress has made it clear by the enactment of 16 U.S.C. § 803(c) that it did not intend to preempt state common-law property rights.

In resolving the dispute, the court turned to the language and the history of the FPA. In interpreting both the plain language of the Act and its legislative history, the Court held that "*the Federal Power Act reveals that Congress did not intend to authorize the Commission to displace state tort laws applicable to its licensees* . . . Indeed, to the extent that the history sheds any light on the question before us. *It suggests that Congress intended that state law govern damage claims against licensees*." *Id*. at 793 (emphasis added).

In *South Carolina Public Services Authority,* the D.C. Circuit Court of Appeals also stated:

> We note, however, *that most courts to have considered the meaning of section 10(c) have concluded that Congress intended simply to preserve any existing cause of action under state law*.[2]

The D.C. Circuit concluded that the liability for those licensees for damages caused by their projects is a matter left by Congress to state law. *Id*. at 795. The Commission therefore exceeded its authority under the FPA when it attempted to replace the tort law of South Carolina with its own principle of compensation, which it considered to be more "fair and equitable." *Id*.

Furthermore, in *Jordan v. Randolph Mills, Inc*., 716 F.2d 1053 (4th Cir. 1983), the Fourth Circuit recognized that a FERC license "neither transfers nor diminishes any right of possession or enjoyment

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[2] Compare *Pike Rapids Power Co. v. Minneapolis, St.P. & S.S.M.R. Co.*, 99 F.2d, 911-912 (8th Cir. 1938); *Beaunit Corp. v. Alabama Power Co.*, 370 F. Supp. 1044, 1050-51 (N.D. Ala. 1973); *Key Sales Co. v. South Carolina Electric & Gas Co.*, 290 F. Supp. 8, 23 (D.S.C. 1968), affirmed, 422 F.2d 389 (4th Cir. 1970) (per curiam); *Rice Hope Plantation v. South Carolina Public Service Authority*, 216 S.C. 500, 59 S.E.2d 132, 140-141 (1950); and *Alabama Power Co. v. Smith*, 229 Ala. 105, 155 So. 601, 604 (1934) with *Seaboard Air Line R.R. Co. v. County of Crisp*, 280 F.2d 873, 875-76 (5th Cir. 1960); and *DiLaura v. Power Authority of State of New York*, 654 F. Supp. 641, 644 (W.D.N.Y. 1987). *Id.* at 794 (emphasis added).

possessed by" a landowner, and that use of another's property by a FERC-licensee requires either acquisition of the owner's rights or the use of the power of eminent domain. *Id*. at 1055.

Similarly, the Ninth Circuit in *United States v. Pend Oreille Public Utility Distr. No. 1*, 28 F.3d 1544, 1549-51 (9th Cir. 1994), held that an Indian tribe was allowed to maintain a state-based cause of action for trespass where a FERC licensee's utility plant flooded surrounding lands.

In *PPL Montana, LLC v. State of Montana*, 210 MT 64, 355 Mont. 402, 229 P.3d 421 (2012), the Supreme Court of Montana was tasked with determining whether the FPA preempted a state-law based counterclaim for damages brought by the State of Montana against a FERC licensed electric utility company which operated and controlled several hydroelectric dam projects. In relying on *First Iowa Hydro-Electric Co-op v. Federal Power Comm*., 328 U.S. 152, 66 S.Ct. 906 (1946), the court noted that the FPA establishes a "dual system" of control between the states and the federal government. *Id*., citing *First Iowa*, 328 U.S. at 167-68. Furthermore, the Montana Supreme Court stated:

> Further, federal courts have concluded that the FPA itself *specifically allows* property owners to bring state law tort actions against a licensee for damages caused by a hydroelectric facility pursuant to 16 U.S.C. section 803(c). *See Nez Perce Tribe v. Idaho Power Co*., 847 F. Supp. 791, 812 (D.Idaho 1994) (emphasis added) (stating that under 16

> U.S.C. section 803(c) Congress did not preempt property based state common law claims against FERC licensees); *DiLaura v. Power Auth. of the State of N.Y.*, 982 F. 2d 73, 78 (2d Cir. 1992). In other words, while the FPA grants FERC the ultimate authority to license a hydroelectric project in accordance with federal law, it explicitly permits the operation of state law with regard to "proprietary rights" which may be affected by a FERC-licensed facility. *Id.,* 229 P.3d 421 at 410-411 (emphasis added).
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> * * *
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> However, the Court cannot accept this position. It would make no sense to reserve property rights under the Federal Power Act and then hold that any process to vindicate those rights is preempted.

Id. at 430.

Ultimately, the court in *PPL Montana LLC* held that the FPA did not preempt the State's claims for compensation against a FERC-licensed dam operator, but rather, the FPA requires licensees to compensate landowners for the use of their property. *Id*. at 412.

The Fifth Circuit's decision in the case at bar noticeably conflicts with these decisions and should be reversed.

B. The Fifth Circuit's Decision Contravenes Decisions of This Court Which Have Recognized That Temporary Government Action Which Causes Flooding Can Give Rise to a Taking.

In *Arkansas Game and Fish Commission v. United States*, 133 S.Ct. 511 (2012), this Court held that temporary government action which causes flooding may give rise to a takings claim. In *Arkansas Game*, the Arkansas Game and Fish Commission (Commission) sued the United States, alleging that temporary deviations by the U.S. Army Corps of Engineers from its Water Control Manual, which controlled the rate at which water would be released from the Dam, caused extended flooding and destruction of the Commission's timber and substantial change to the terrain and erosion, necessitating costly reclamation measures.

The question presented to the court was whether a taking may occur, within the meaning of the Takings Clause, when government-induced flood invasions, although repetitive, are only temporary as in the present case.

In reaching a decision, this Court found that the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Arkansas Game and Fish Comm'n*, at 518. Quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *See also First English*

Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318-319 (1987); *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 123-125 (1978). And "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Id.*

Flooding cases, like other takings cases, should be assessed with reference to the "particular circumstances of each case," and not by resorting to blanket exclusionary rules. *Id.* at 9, quoting *United States v. Central Eureka Mining Co*., 357 U.S. 155, 168 (1958). Ultimately, the court found that "because government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable." *Id*. at 9. Likewise, Petitioners' claims herein are compensable.

C. The Obvious Circuit Conflict Is Considered Entrenched and Capable of Resolution by This Court.

The time has come for this Court to intervene. The open disagreement among the circuits will grow only deeper and more intractable with the passage of time only to cause injustice to others such as the Petitioners herein. With these circumstances, further percolation would be pointless. The question presented

has been thoroughly expressed and is now ripe for this Court's Review.

This Court should grant the petition and reverse the court below.

II. The Decision Below Is Wrong.

Certiorari is also warranted because the decision below is wrong, conflicting with the text and purpose of the Federal Power Act, as well as the clear intent of Congress in enacting the pertinent provisions of the Act and the clear terms of FERC license at issue.

As will be set forth in more detail herein, there is not a single case which supports the Fifth Circuit's ruling in the extant case that Congress intended to preempt Petitioners' state-law inverse condemnation and takings claims caused by FERC licensees and/or projects.

Significantly, upon determining whether the FPA preempted Petitioners' damage claims, the Fifth Circuit failed to recognize that section 10(c) of the FPA provides a "savings clause," which specifically provides for, and permits claims such as those brought by Petitioners herein. This "savings clause" expressly and unambiguously preserves all claims for property damage caused by or as a result of the operation of the Dam by the Respondents.

By completely ignoring the "savings clause," the Fifth Circuit abused its discretion in ruling that Petitioners' state-law property damage, takings and

inverse condemnation claims were barred on federal preemption grounds; especially in light of the FPA's "savings clause" which specifically reserves these rights to the Petitioners.

A. The Lower Court Erred in Adopting the Harshest Possible Interpretation in Finding That FERC and/or the FPA Preempt Petitioners' Claims.

The Fifth Circuit committed reversible error in ruling that FERC and the FPA confer exclusive jurisdiction over the operations of the Dam such that Petitioners' inverse condemnation, U.S. Constitutional takings claims, tort, trespass, nuisance and property damage claims were preempted by federal law. At the very least and without serious thought, the lower court should have allowed Petitioners' constitutional takings claims to remain. It erred in not doing so.

The Fifth Circuit's decision is unfounded and totally unsupported by law, particularly in light of the appreciable lack of support brought forth by Respondents and the Fifth Circuit in support of its ruling. Notably, the Fifth Circuit based its decision entirely on two cases, *First Iowa Hydro-Electric Co-op v. Federal Power Comm*., 328 U.S. 152, 66 S.Ct. 906 (1946) and *California v. Federal Energy Regulatory Commission*, 495 U.S. 498, 110 S.Ct. 2024 (1990), which are clearly inapplicable to the case at bar.

It is true that the FPA has given FERC limited authority and operational control over federally-licensed hydroelectric power projects such as the Toledo Bend Dam Project. However, the jurisprudence cited herein establishes that FERC and the FPA clearly and expressly by way of the "savings clause," reserves to the states and its residents the right to bring state-law claims caused by the negligent operation and maintenance of FERC-licensed Dam operators, such as in the case at bar – and especially takings claims under the constitutions of states and the United States. The absence of any other authority relied on by the Fifth Circuit and cited in Respondents' papers in support thereof, other than the wholly irrelevant decisions of *First Iowa* and *California v. FERC,* is revealing as to the weakness of Respondents' position and the lower court's ruling. Candidly, the Fifth Circuit's decision is wholly unsupported by law as will be shown in greater detail herein.

At the outset, the Fifth Circuit's decision woefully mischaracterizes the redress Petitioners seek as the lower court's ruling completely ignores Petitioners' inverse condemnation and takings claims under the Louisiana and United States constitutions.

The flawed rationale of the lower court is evident in its analysis of the theoretical effects that Petitioners' state-law property damage and constitutional takings claims might have on the operational control of the dam. To that end, the Fifth Circuit states:

> Because the state law property damage claims at issue here infringe on FERC's operational control, we hold that they are conflict preempted. Plaintiffs allege that Defendants were negligent because they failed to act in a manner FERC had expressly declined to require. But FERC, not state tort law, must set the appropriate duty of care for dam operators. *See* 16 U.S.C. § 803(c). [Pet. App. 14.]
>
> * * *
>
> Applying state tort law to set the duty of care of the operation of FERC-licensed projects would "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objections" of the FPA. *See Arizona*, 132 S.Ct. at 2501. We therefore hold that the district court properly concluded that the FPA preempts Plaintiffs' claim." [Pet. App. 16.]

Petitioners' Complaint does not implicate FERC's remedial authority in any way; Petitioners do not seek to interpret or enforce a FERC remedial order or to modify any FERC-regulated mandates in connection with the operation of the Dam.

Federal preemption may exist where state-law claims conflict with a federally reserved power – not in situations such as this hypothetical conflict conjured up by the Fifth Circuit, and certainly not when constitutional takings claims are at issue. Such a position is wholly improper and would produce an absolutely chilling effect on any potential liability

against any actor who acts pursuant to or by way of a federally regulated license.

As it relates to Petitioners' negligence claim, under the Fifth Circuit's absurd rationale, for example, an interstate tractor-trailer driver, who inflicts personal injury on a plaintiff by way of a motor vehicle accident, could argue that a state-law personal injury lawsuit "carries the potential to change the manner" in which the tractor-trailer is operated under the federal regulation, and thus, would be able to successfully avail itself of federal preemption as a defense.

Truly concerning is that the Fifth Circuit's decision violates one of the cornerstones of Petitioners' rights as property owners which prevents state actors such as the Sabine River Authority from taking private property for public use without just compensation. This decision is clearly at odds with decisions of this Court and will have a far-reaching and harmful effect on the rights of property owners across the country.

B. The Federal Power Act Contains a Savings Clause Provision, 16 U.S.C. Section 803(c), Which Expressly and Unambiguously Authorizes State-Law Property Damage and Takings Claims Against Operators of FERC Licensed Dams.

Despite the Fifth Circuit's decision to the contrary, the text, history and case law concerning the FPA

make clear, that to the extent that the statute preempts state law, it preempts only those laws which conflict with the federal regulation of hydroelectric projects. In the case at bar, the Respondents opened spillway gates excessively and not in accordance with FERC licenses and regulations, which created torrential flooding and complete erosion and destruction of Petitioners' properties. Clearly, these allegations do not conflict with federal initiatives as concluded by the lower court. Even if Petitioners' negligence claims are preempted, and they are not, Respondents as state actors are still required to compensate Petitioners for the takings caused by the excessive flooding and erosion of large sections of land. Such a decision by the lower court is not what Congress had in mind by implementing the savings clause.

Nevertheless, 16 U.S.C. § 803(c), the "savings clause," specifically addresses the issue of compensation for damages caused by FERC licensees. This same provision applies to hold SRA and the Entergy Defendants, as licensees, legally responsible for the damages caused to Petitioners by the negligent operation and maintenance of the Toledo Bend Dam, as well as the constitutional takings claims which arise regardless of whether Respondents were negligent in operating the Dam pursuant to the FERC license.

Furthermore, Article 38 of the FERC license issued to SRA for the Toledo Bend Dam Project, provides:

> *Article 38*. The ***Licensees shall be responsible for and shall minimize soil erosion*** and siltation on lands adjacent to the stream resulting from construction and ***operation of the project***. (Emphasis added).

Section 16 U.S.C. § 803(c) and Article 38 of the FERC license at issue expressly and unequivocally hold Respondents accountable for damage to and the taking of Petitioners' property. Consequently, a finding that federal preemption bars Petitioners' claims is wholly unsupported by law.

Notably, the Fifth Circuit briefly mentions the savings clause of Section 10(c) and without any logical explanation states that the clause "cannot be interpreted so broadly as to allow state tort law to supplant FERC's exclusive control of dam operations." *Id*. at 476. This is plainly incorrect as Petitioners' state-law tort and takings claims simply seek compensation for damages caused by a FERC project, and in no way seek to "supplant FERC's exclusive control of dam operations." In addition, the Fifth Circuit's ruling fails to mention Article 38 of the FERC license which governs the Toledo Bend Dam Project, which unambiguously casts liability on Respondents for Petitioners' damages.

C. The Only Cases Relied on by Respondents and the Fifth Circuit, *First Iowa* and *California v. FERC*, Are Misplaced and Do Not Apply to the Case at Bar.

The Fifth Circuit's ruling is based solely and entirely on the United States Supreme Court's extremely narrow rulings in *First Iowa Hydro-Electric Co-op* and *California v. FERC*.

Notably, the *First Iowa* and *California v. FERC* opinions completely fail to address the issues presented herein. Neither of these cases even remotely supports the Fifth Circuit's ruling that Petitioners' state-law property damage and constitutional takings claims – because they peripherally involve a FERC regulated project and/or licenses – are preempted by federal law. Rather, *First Iowa* and *California v. FERC* involve situations in which states intervened in the federal licensing process in an attempt to impose more stringent state requirements or prohibit the operation of the hydropower projects already licensed by FERC. *See Wisconsin Valley Improvement Company v. Meyer*, 910 F. Supp. 1375 (W.D. Wis. 1996).

Contrary to Respondents' positions and the Fifth Circuit's decision, nothing in *First Iowa* even remotely supports the conclusion that the FPA has been found to occupy the field, or supports the federal preemption argument advanced by Respondents herein and adopted by the Fifth Circuit. *First Iowa* says nothing of the sort.

The very first line of the opinion reads: "This case illustrates the integration of federal and state jurisdictions in licensing water power projects under the Federal Power Act." *First Iowa,* 328 U.S. at 156, 66 S.Ct. 906. (Emphasis added). Indeed, the case concerns the interaction between state and federal permitting requirements for a hydropower project and how compliance with state hydropower-project licensing requirements may "conflict with federal requirements." Likewise, the Fifth Circuit mischaracterizes the holding of *California v. FERC*, which it cites for the same proposition as *First Iowa*.

Clearly, the state action taken in *First Iowa* and *California v. FERC* would be an apparent abuse of power and authority by the States, and should be preempted by federal law. Such is not at issue in the case at bar and, thus, these narrow holdings cannot possibly support the Fifth Circuit's ruling that Petitioners' state-law and constitutional takings claims are preempted. It is absurd to suggest that Congress intended to preempt all claims for damages and constitutional takings claims which "potentially" involve the Toledo Bend Dam by simply authorizing FERC to issue a license to the operators of the Dam.

1. *First Iowa* and its Progeny

In *First Iowa*, the petitioner applied to the Federal Power Commission for a license under the FPA to construct a power plant on navigable waters in Iowa. The state intervened, claiming that the petitioner's

application should be denied because of its failure to comply with state regulations, which required a state permit to construct a dam on state waters. The U.S. Supreme Court held that although 9(b), 16 U.S.C. § 802(a)(2) of the act required submission to the federal licensing agency of evidence of compliance with certain state laws, it did not require licenses prior to obtaining a state permit or to demonstrate compliance with state-law prerequisites prior to obtaining a permit. Instead, the court interpreted 9(b) as authorizing FERC to demand evidence only of applicants' compliance with the requirements of the federal permit. The court in *First Iowa* held that absent a clear mandate from Congress, 9(b) did not call for compliance with state laws that conflicted with federal requirements or were preempted by them. *Wisconsin Valley Improvement Company v. Meyer*, 910 F. Supp. 1375 (W.D. Wis. 1996) (*citing First Iowa*, 328 U.S. at 166-67, 66 S.Ct. at 912-913).

Thus, the Court held that a licensee could not be required to obtain a state license as a prerequisite for operating a project licensed by FERC.

The dispute in *First Iowa* dealt solely with the issues of *permitting and licensing*, and specifically, whether the State of Iowa could mandate FERC-licensees to obtain a state permit and comply with state-law prerequisites before obtaining a FERC license. To the contrary, the Fifth Circuit in the case at bar, was tasked with determining whether FERC and the FPA preempt Petitioners' inverse condemnation, constitutional takings, tort, nuisance and trespass

state-law claims for damages. Absent from the U.S. Supreme Court's *First Iowa* decision is any precedence or even discussion of whether the FPA or FERC preempt state-law causes of action and especially constitutional takings claims under the Louisiana and United States constitutions. *First Iowa* simply does not stand for this proposition.

In *California v. Federal Energy Regulatory Commission*, this Court revisited the *First Iowa* opinion and the federal preemption issue as it relates to conflicts between specific state regulations, FERC licensing requirements and the FPA. In that case, this Court considered whether a hydroelectric power project, licensed by the commission, was required to follow federal or state requirements for water flow into a stream. This Court held that the California Water Resources Board could not impose minimum stream flow requirements under state law that conflicted with minimum stream flow requirements contained in a FERC license. *Id*. The Court explained that California's higher minimum stream flow requirements conflicted directly with section 10(a) of the FPA, which provides that the Federal Energy Regulatory Commission shall set conditions of the license, including minimum stream flows. Significantly, this Court in *California v. FERC* also made clear that the FPA leaves intact countless state powers, not just the hydropower-related ones specifically "saved by section 27." *See id*. at 496-96, 110 S.Ct. 2024.

Importantly, the *California v. FERC* decision is not at all instructive on the issues in the case at bar.

Moreover, the Court in *California*, as it had done in *First Iowa*, was faced with resolving a purely regulatory dispute concerning whether state regulations interfered with FERC and the FPA mandates. Importantly, Petitioners' claims do not call upon the Court to resolve any discrepancies between state and federal regulations, as none exist, nor does the resolution of Petitioners' claims require departure from, or in any way interfere with FERC license requirements, regulations, or other federal requirements as endorsed by the Fifth Circuit.

First Iowa and *California v. FERC* simply do not support the Fifth Circuit's ruling and position that Petitioners' state-law property damage and constitutional takings claims are preempted by FERC or the FPA. Notably, *First Iowa* and *California v. FERC* were the only cases relied on by the Fifth Circuit in affirming the District Court's erroneous dismissal of Petitioners' claims on preemption grounds.

D. The Louisiana Third Circuit Court of Appeal's Decision in *Simmons v. Sabine River Authority of Louisiana, et al.* – August 15, 2012.

Recently, in *Simmons v. Sabine River, Authority of Louisiana, et al*., 2012 WL 3324138 (La. App. 3 Cir. Aug. 16, 2012), the SRA filed a motion for summary judgment arguing that plaintiffs' state-law personal injury claims were preempted by the FPA. This case concerned a personal injury action filed by the family

members of individuals who were killed during a very similar downstream flood event on the Sabine River as the one in the instant case. Furthermore, plaintiffs in that case alleged that the SRA was negligent in its decision to release water from the floodgates of the Toledo Bend Dam during the March 2001 flood event.

Significantly, in denying the motion for summary judgment, the Louisiana Third Circuit Court of Appeals rejected the same preemption arguments the SRA advanced and the lower court adopted in the present case, holding that they were unconvinced that "any conflict exists between state tort laws and the FPA or that state law hinders any congressional objectives." *Id*. at *3.

Notably, Associated, the excess insurer of the SRA in the Louisiana Third Circuit case, specifically recognized the obvious – that the FPA contains an express "savings clause," 16 U.S.C. § 803(c), which specifically permits "property damage claims arising out of the operation of a federally licensed hydroelectric project." *Id*. at *3.

E. Case Law Clearly Rejects the Fifth Circuit's Decision That the FPA Preempts Petitioners' State-Law Tort, Trespass, Inverse Condemnation and Constitutional Claims.

As shown above, Respondents and the Fifth Circuit relied solely on two misplaced cases, *First Iowa* and *California v. FERC*, to support their positions

that Petitioners' state-law damage, inverse condemnation and takings claims are preempted by FERC and/or the FPA. The Fifth Circuit's decision is flawed especially in light of the abundance of cases discussed below which have soundly rejected the Fifth Circuit's position on preemption. In fact, there is not a single case which supports the Fifth Circuit's ruling that Congress intended to preempt state-law claims caused by the negligence of FERC licensees or especially constitutional takings claims, as in the instant matter. To the contrary, Congress specifically reserved these rights to the states and individuals such as Petitioners.

1. United States District Courts around the country, including the United States Courts of Appeals for the Second, Fourth, Ninth and D.C. Circuits, and the United States Supreme Court, have expressly and decisively rejected the same preemption decision by the Fifth Circuit in the case at bar.

The preemption arguments adopted by the Fifth Circuit are not of first impression. In fact, courts across the country, which have examined the preemption issue presented herein, have unanimously rejected the positions taken by the Fifth Circuit herein.

In *Souders v. South Carolina Public Service Authority,* 497 F.3d 1303 (D.C. 2007) and C.A. No. 2:93-cv-03077 (S.C. 2009), the United States District

Court for the District of South Carolina awarded eight property owners nearly $200 million in damages stemming from South Carolina's state-owned electric company's operation of the Santee Cooper Dam; which caused flooding and resulting property damage.[3]

Analogous to the case at bar, plaintiffs filed suit against SCPSA alleging that SCPSA's operation of the dams and related facilities in the area caused their lands along the Santee River to be flooded. Specifically, plaintiffs alleged that the facility released extra water into the Santee River and severely flooded homes, businesses and properties in the water's path. After a series of bad floods, landowners filed suit. The complaint made claims of negligence, trespass, and inverse condemnation/governmental taking under the South Carolina Constitution.

The case went to a bifurcated trial on liability in 1993 and the jury returned a verdict against SCPSA on the trespass and takings claims. After numerous appeals, in September of 2009, damages were tried to a federal district judge who awarded the eight plaintiffs $55 million in compensatory damages plus interest (nearly $150 million). *Id*.

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[3] The defendant in *Souders*, South Carolina Public Service Authority ("SCPSA"), is a public utility company in South Carolina which has operated a series of hydroelectric plants on the Santee River pursuant to a FERC license.

The facts and the claims advanced by plaintiffs in *Souders* are enormously similar to the claims presented by Petitioners herein. Most importantly, on appeal to the United States Court of Appeals for the D.C. Circuit, the court acknowledged that plaintiffs' claims were state-law takings, negligence and trespass claims against SCPSA, even though SCPSA acted under a FERC license. *Id*., *Souders,* 497 F.3d 1303.

In the present case, Respondents also attempted to use the FERC license issued to SRA as a shield of immunity. If anything, the provisions of Article 38 of the FERC license for this particular Dam, which states that "licensees shall be responsible for and shall minimize soil erosion," strongly discredits the lower courts affirmation of the District Court's dismissal of Petitioners' claims.

In *City of Alexandria v. Cleco Corp*., 2010 WL 290506 (W.D. La. Jan. 22, 2010), the court was tasked with determining whether FERC action preempted plaintiffs' state tort-law claims in a dispute between Cleco and the City of Alexandria concerning a contract that was filed with and approved by FERC. Cleco filed a motion for summary judgment seeking dismissal of plaintiffs' state-law claims on federal preemption grounds.

In rejecting the preemption based arguments, the *City of Alexandria* court astutely recognized that the claims involved issues involving FERC's exclusive jurisdiction to regulate the sale and transmission of

energy. Notably, the court recognized that judicial precedent left substantial room for the City to seek relief under state law.

Likewise, because Petitioners' Complaint herein does not implicate FERC's remedial authority in any way, and because Petitioners do not seek to challenge or enforce a FERC remedial order or to modify any FERC-regulated mandates in connection with the operation of the Dam, federal preemption obviously does not bar Petitioners' state-law property damage and constitutional takings claims.

In *Nez Perce Tribe v. Idaho Power Company*, 847 F. Supp. 791 (D. Idaho 1994), an Indian tribe brought an action for monetary damages against the Idaho Power Company for the negative effects the power company's construction and maintenance of three FERC-licensed dams on the Snake River had on their fishing industry. Defendant filed a motion for summary judgment on the grounds that the FPA was intended by Congress to preempt any common-law claim for damages asserted by the tribe. The court concluded that because FERC does not have jurisdiction to award monetary damages, FERC could not have considered the Tribe's present damage claims and, therefore, the FERC Order did not preclude the Tribe from bringing a state court action for damages. *Id*. at 795.

Relying on *South Carolina Public Services Authority v. FERC*, the *Nez Perce Tribe* court took its inquiry a step further and analyzed the legislative

history of the FPA. It concluded that the legislative history of section 803(c) itself is a representative of Congress' determination to avoid impinging on a state's jurisdiction and shows that the legislature's intentions for damages (whether ascertained before or after construction) to be determined in accordance with state law. *Id*. at 799. "By the current language of the act and the legislative history, nothing indicates any intention to abandon the principle that property damage caused by licensees should be determined in accordance with state law." *Id., quoting South Carolina Public Services Authority v. FERC*, 850 F.2d 788, 794-95 (D.C. Cir. 1988).

In *United States v. Southern California Edison Company*, 300 F. Supp. 2d 964 (E.D. Cal. 2004), the United States brought suit against a FERC licensee and operator of a hydroelectric project for the licensee's breaches of the conditions of the license. The court found that FERC licensees were already required to conduct themselves, not only in accordance with the FERC license terms, but also in conformity with the laws of the state in which they operated. Likewise, the court rejected defendant's argument that only FERC had exclusive jurisdiction over any action having to do with a FERC license, as Respondents have argued in the case at bar. The court, relying on *Skokomish Indian Tribe*, stated:

> However, FERC's sole jurisdiction is with regard to *issuance* of licenses. *Id*. FERC has no jurisdiction to determine when and under what circumstances a breach of its license

> has occurred or to adjudicate and award damages. FERC cannot award damages.

Southern California Edison Company at 981.

The court held that both *Skokomish* and *Pend Oreille* recognize that parties injured by a licensee's conduct extrinsic to that authorized by the FERC license are entitled to sue on common-law claims for damages. *Id*. at *4. (Emphasis added).

It is blatantly obvious that Congress never intended for the federal government to entirely occupy the field with the FPA, thereby completely preempting state-law claims. *Hendricks v. Dynegy Power Marketing*, 160 F. Supp. 2d 1155 (S.D. Cal. 2001) (court found that consumers' state-law claims against FERC-regulated utility company were not preempted by the FPA, thus, the case was remanded to state court.); *New York State Electric and Gas Corp., v. New York Independent System Operator*, 2001 WL 34084006 (N.D.N.Y. 2001) (court found that FERC's jurisdiction over interstate transmission of power as described in the FPA was not intended to preempt state-law claims brought by plaintiffs); *Abramson v. Florida Gas Transmission Company*, 909 F. Supp. 410 (E.D. La. 1995) (discarding defendants' preemption arguments that the Natural Gas Act [based on the FPA] preempted plaintiffs' Louisiana state-law contract, tort and property claims.

In *Monforte Exploration L.L.C. v. ANR Pipeline Company*, 2010 WL 143712 (S.D. Tex. Jan. 7, 2010), the court in rejecting defendants' preemption argument

recognized that even though the breach of contract claim would likely require an analysis of the validity and enforceability of issues under the FERC tariff, did not mean, however, that plaintiff's claim arose under federal law. *Id*. at *4. Furthermore, the court stated that while federal law may well be relevant in resolving the state-law claim in that action, a Texas state court is competent to apply federal law.

Lastly, the Court of Appeals of North Carolina in *Zagaroli v. Pollock*, 94 N.C. App. 46, 379 S.E.2d 653 (1989), was faced with the issue of whether Duke Power Company had the authority under the FPA to grant a marina the exclusive right to use the surface of a portion of a lake which covered the plaintiff's property. In holding that it did not, the court stated:

> [T]he Federal Power Act did not abolish private proprietary rights. . . . Under the Federal Power Act, Duke Power may place limitations on the landowner's use of his property in accordance with federal law. However, the Federal Power Act does not give Duke Power the authority to grant defendants the right to use plaintiff's property without the assent of the plaintiff. *To hold otherwise would in effect authorize the taking of property without just compensation*. *Id*. at 379 S.E.2d at 657-58 (emphasis added).

The holding in *Zagaroli* strikes at the core of the issue before this Court which is whether Respondents have the power to destroy and take the property of the Petitioners by way of their negligent operations

without providing just compensation. The answer is a resounding no. In attempt to cloud the real issues that are before this Court, Respondents relied on the narrow holdings that were presented in *First Iowa* and *California v. FERC*, which share no relevance to the case at bar, however, they were accepted by the Fifth Circuit. Respondents offered, of course, no basis for this immense leap in logic, which, on its face, strains credibility. Unlike the dozens of cases cited by Petitioners herein, the Respondents nor the Fifth Circuit have brought forth even a single case which supports the premise that the FPA and/or the FERC licenses at issue in the present case preempts state-law property damage and constitutional takings claims.

Consequently, the Fifth Circuit committed error by affirming the dismissal of Petitioners' claims, and therefore, this ruling should be reversed.

The questions presented here are of the greatest importance. Considering the concise factual pattern, and the expansive scope of the lower court's over-reach, the case also presents an especially effective vehicle to bring needed clarity and guidance to this area of the law. Rather than leave lower courts adrift, this Court should grant certiorari in this case to provide much needed guidance on this important and recurring question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 12-30494

JEFF SIMMONS; ALICE SIMMONS; JEANNE SIMMONS; GERALD EDWARD MCBRIDE; EDWARD BRYANT BONNER; ET AL,

Plaintiffs-Appellants,

v.

SABINE RIVER AUTHORITY STATE OF LOUISIANA; LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT; LINDA CURTIS SPARKS; ENTERGY GULF STATES LOUISIANA L.L.C.; ENTERGY CORPORATION; ENTERGY SERVICES INCORPORATED; ENTERGY LOUISIANA, L.L.C.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana

(Filed Oct. 9, 2013)

Before STEWART, Chief Judge, and SMITH and WIENER, Circuit Judges. CARL E. STEWART, Chief Judge:

This case asks us to resolve whether the Federal Power Act preempts property damage claims under

state law where the claim alleges negligence for failing to act in a manner FERC expressly declined to mandate while operating a FERC-licensed project. We hold that it does, and so we AFFIRM the district court's dismissal of Plaintiffs' case with prejudice.

I. BACKGROUND

A. Facts

The Sabine River meanders between Texas and Louisiana. Two state agencies jointly regulate the Sabine River's waterways: the Sabine River Authority of Louisiana and the Sabine River Authority of Texas (collectively, "Authorities"). Upon application by the Authorities, the Federal Power Commission[1] granted a fifty-year license (the "License"), commencing October 1, 1963, to the Authorities for the "construction, operation and maintenance" of Project Number 2305 (the "Project"). The Project included the construction of a dam (the "Toledo Bend Dam" or the "Dam"), a large reservoir, a spillway, and a hydroelectric plant. The Dam spans the Texas/Louisiana state line and is located in the southern part of the reservoir.

Under a Power Sales Agreement (the "Agreement"), the Authorities granted Defendant-Appellant

[1] In 1977, the Federal Power Commission was reorganized and renamed the Federal Energy Regulatory Commission ("FERC"). References to FERC herein encompass both the Federal Power Commission and FERC.

Entergy[2] the right to oversee the generation of power and to purchase the generated power. Under the terms of the Agreement, Entergy is subject to the terms and conditions of the License. The License requires the Authorities to maintain a normal maximum reservoir elevation of 172 feet mean sea level ("msl"). To generate power, a minimum reservoir elevation of 162.2 feet msl is required. To maintain the required reservoir levels, water is released through the spillway gates, the power turbines, or both. Entergy and the Authorities operate the spillway gates, which are located in Louisiana.

Between 2000 and 2003, pursuant to Article 43 of the License, FERC considered several requests to modify the Project's operations.[3] FERC conducted an analysis of historical floods and found that the Dam had not had "any significant effect" on flooding. FERC ultimately denied most of the requests, including a request to raise the Project's minimum reservoir elevation, and issued a report explaining its reasoning. In declining to order changes to project operations during floods, FERC observed that the Project

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[2] The Agreement was entered into with Entergy's predecessors, but we refer simply to "Entergy" for ease of understanding. For purposes of this appeal, Entergy includes all of the named Entergy defendants.

[3] Article 43 states, "The Licensees shall install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so, after notice and opportunity for hearing."

"cannot provide any significant flood control benefits." However, FERC did require improvements to the Project's Emergency Action Plan.

B. Procedural History

Plaintiffs-Appellants ("Plaintiffs") are 28 individuals who allege that their properties were flooded and eroded after the Authorities and Entergy opened the spillway gates from October 30, 2009 through November 2009.[4]

In October 2010, Plaintiffs filed suit in Louisiana state court, alleging negligence, nuisance, trespass, unconstitutional taking, damage of property without just compensation, and due process violations under the Louisiana and United States constitutions. Plaintiffs sought, *inter alia,* damages and a permanent injunction "enjoining [Defendants] from opening the flood gates of the Toledo Bend Dam in such a manner as will cause the inundation of the downstream properties of the Plaintiffs."

Defendants thereafter removed the action under 16 U.S.C. § 825p, which provides federal courts with jurisdiction over duties and liabilities created by the Federal Power Act ("FPA"), and under 28 U.S.C. § 1331. Plaintiffs subsequently filed a motion to remand, arguing, *inter alia,* that their complaint did

[4] Plaintiffs have not specified the precise date in November 2009 on which the gates were closed.

not present a federal question. While Plaintiffs' motion to remand was pending, Defendants filed a motion to dismiss the suit under Federal Rules of Civil Procedure 12(b)(6) and 12(b)(7). Plaintiffs then filed an opposed motion for leave to amend their complaint; the motion sought to delete references to the United States Constitution. Plaintiffs' amendments, if granted, would have left only state causes of action, but would have left undisturbed their request for a permanent injunction. Six months later, without any action having been taken on any of the pending motions, Plaintiffs filed an opposed motion for leave to amend their complaint a second time. This amendment sought to remove Plaintiffs' requests for injunctive relief.

Subsequently, without ruling on any of Plaintiffs' pending motions, the district court held a hearing on the pending motion to dismiss. The district court then granted Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), finding that Plaintiffs' state law-based property damage claims were preempted by the FPA and the License, and entered judgment dismissing Plaintiffs' case with prejudice. This appeal followed.[5]

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[5] Plaintiffs have abandoned any challenge to the district court's holding that the FPA preempts their injunctive relief claim by failing to brief any argument and by continuing to press their attempt to amend their complaint to excise this claim. *See Soadjede v. Ashcroft,* 324 F.3d 830, 833 (5th Cir. 2003) (citation omitted)

II. STATE TORT CLAIMS

Plaintiffs argue that the district court improperly dismissed Plaintiffs' claims based on preemption.

A. Standard of Review

We review the district court's grant of a motion to dismiss de novo. *Bass v. Stryker Corp.,* 669 F.3d 501, 506 (5th Cir. 2012) (citation omitted). Well-pleaded facts are viewed in the light most favorable to the plaintiff. *Castro v. Collecto, Inc.,* 634 F.3d 779, 783 (5th Cir. 2011) (citation and internal quotation marks omitted).

B. Preemption

"Federal preemption is an affirmative defense that a defendant must plead and prove." *Fisher v. Halliburton,* 667 F.3d 602, 609 (5th Cir. 2012) (citations omitted). Defendants did so plead. If the complaint establishes the applicability of a federal preemption defense, it can properly be the subject of a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. *Id.* (citation omitted).

As is well known, federal preemption is based on the Supremacy Clause, which provides that federal law "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. There are three types of

preemption: (1) express preemption,[6] (2) field preemption, and (3) conflict preemption. *Kurns v. R.R. Friction Prods. Corp.,* 132 S. Ct. 1261, 1265-66 (2012). Field preemption occurs when

> [t]he intent to displace state law altogether can be inferred from a framework of regulation so pervasive . . . that Congress left no room for the States to supplement it or where there is a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (citation and internal quotation marks omitted). Conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility, and those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citations and internal quotation marks omitted).

The district court was not explicit as to which type of preemption it found applicable. However, we may affirm the district court's judgment for any reason supported by the record. *United States v. Gonzalez,* 592 F.3d 675, 681 (5th Cir. 2009) (citation omitted).

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[6] Express preemption is not implicated here, so we do not discuss it further.

C. Federal Power Act

In order to understand whether the FPA preempts state property damage claims, we look to the text of the Act, its history, and the way in which the Supreme Court, our circuit, and our sister circuits have interpreted it. We note that this is a question of first impression in this circuit. Our analysis leads us to conclude that the FPA preempts property damage claims based in state tort law where the alleged damage is the result of "negligently" operating in compliance with a FERC-issued license.

The Federal Power Act of 1935 indicates congressional intent for "a broad federal role in the development and licensing of hydroelectric power." *California v. FERC,* 495 U.S. 490, 496 (1990), There are several FPA sections relevant to the claims at issue here. First, Section 4(e) of the Act authorizes FERC to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction." 16 U.S.C. § 797(e). Second, Section 10(a)(1) of the Act requires FERC to issue licenses that the Commission determines are "best adapted" for power development and other public uses of the waters, including flood control. 16 U.S.C. § 803(a).

Third, Section 10(c) of the Act is central to Plaintiffs' arguments and our analysis. First, it requires the licensee to maintain the project and conform to Commission rules. 16 U.S.C. § 803(c). Importantly, it

also states that "[e]ach 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." *Id.*

Finally, Section 27 of the Act is a savings clause:

> 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.

16 U.S.C. § 821.

The Act "careful[ly] preserv[ed] separate interests of the states throughout the Act, without setting up a divided authority over any one subject." *First Iowa v. Hydro-Elec. Coop. v. Fed. Power Comm'n,* 328 U.S. 152, 174 (1946) (footnote omitted). As several cases recount, members of Congress who were involved in formulating the FPA emphasized that the state retained some water rights. For example, Representative William L. LaFollette of Washington stated, "The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to[.]" *Id.* (citing 56 Cong. Rec. 9810) (other citation omitted); *see also Skokomish Indian Tribe v. United*

States, 410 F.3d 506, 519 (9th Cir. 2005) (citations omitted) (holding that the FPA "does not create a federal private right of action, but instead preserves only existing state-law claims against licensees"); *DiLaura v. Power Auth. of N.Y.*, 982 F.2d 73, 78 (2d Cir. 1992) (citation omitted) (concluding that "[t]he floor debate on the FPA . . . indicates that property damage caused by licensees was to be determined by reference to state law").

D. Supreme Court Precedent and Other Persuasive Authority

The district court relied on *First Iowa* and *California v. FERC* for its preemption determination. Both cases concern state water permitting schemes rather than state tort law, as is at issue here; thus while neither is directly on point, we find them both informative, as is *Federal Power Commission v. Niagara Mohawk Power Corp.,* 347 U.S. 239 (1954).

In *First Iowa,* the Supreme Court considered whether a proposed federal hydroelectric project was required to obtain a state permit, as mandated by Iowa law, in addition to its federal license. 328 U.S. at 161. The Court held that such a state permit was not required because it would allow the state agency a "veto power over the federal project" and thereby subvert the comprehensive control of the project granted to the federal government. *Id.* at 164. The Court also held that the savings clause, 16 U.S.C. § 821, was "limited to laws as to the control,

appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature" and therefore focused on state property rights. *Id.* at 175-76. Accordingly, the Court held that the state regulation was not among the category of rights reserved to the states in the FPA's savings clause and that the FPA preempted the state permit requirement at issue. *Id.* at 175-76, 182.

In *Niagara Mohawk,* the Supreme Court held that the Federal Water Power Act of 1920[7] did not eliminate preexisting water rights, grounded in state law, on navigable streams. 347 U.S. at 248. In so holding, the Court recognized the United States's "dominant servitude . . . , under which private persons hold physical properties obstructing navigable waters of the United States and all rights to use the waters of those streams," but it also recognized "that the exercise of that servitude, without making allowances for preexisting rights under state law, requires clear authorization." *Id.* at 249 (internal footnote omitted). Moreover, the Court concluded that while the Act reserves the ability to "exercise . . . the federal servitude and . . . federal rights of purchase or condemnation, there is no purpose expressed to seize, abolish or eliminate water rights without compensation merely by force of the Act itself." *Id.* at 251-52 (footnote omitted). Importantly for the issue here, the

[7] The Federal Water Power Act, as amended, is now part of the Federal Power Act. *See Niagara Mohawk,* 347 U.S. at 241 n.1 (citations omitted).

Court noted that the Act "merely imposes" on the owners of state-based property rights "the additional obligation of using them in compliance" with the Act. *Id.* at 252. The Court expressed disbelief that the Act abolished "preexisting water rights on a nationwide scale," stating that such action would require "a convincing explanation of that purpose," which the Court did not find. *Id.* at 252-53.

If that were the end of our inquiry, the issue before us would present a closer question. However, *California v. FERC,* decided over four decades after *First Iowa,* indicated that the FPA has occupied the field of "power development and other public uses of the waters," with the exception of a narrow carve-out for water use rights. *California v. FERC,* 495 U.S. at 494, 506 (citing 16 U.S.C. § 803(a)). In *California v. FERC,* the Supreme Court considered whether FERC had the exclusive authority to set minimum stream flow rates, thereby preempting California's regulation of the same. *Id.* at 493. Relying on *First Iowa,* the Court concluded that California's regulations were preempted because Section 27 of the FPA, 16 U.S.C. § 821, was a limited savings clause, exempting only requirements that "reflect [or] establish 'proprietary rights' or 'rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.'" 495 U.S. at 498 (quoting *First Iowa,* 328 U.S. at 176) (other citations omitted).

The language in *California v. FERC* indicates that the Supreme Court has interpreted the FPA as occupying the field of public water use and power

generation except for water use rights. Thus, we agree with the Ninth Circuit's statement that *First Iowa* and its progeny have "read the broadest possible negative pregnant into [the FPA's] savings clause," exempting only "a state property law regime [that] enables users of streams and wells to obtain proprietary rights in a continuing quantity of water." *Sayles Hydro Assocs. v. Maughan,* 985 F.2d 451, 454-55 (9th Cir. 1993) (also discussing *California v. FERC*'s interpretation of *First Iowa*).

The importance of a single federal agency controlling public water use and dam operations is underscored by the factual scenario presented by the instant case. The Dam spans the Texas and Louisiana state lines, and the FERC license was granted to an entity comprised of both state agencies. Yet, Plaintiffs assert claims only under *Louisiana* law and only against *Louisiana* state agencies, in addition to the private defendants. That each state may have different causes of action and different standards of conduct that it could impose on the FERC licensee is problematic when states are jointly involved in such a project.

E. Property Damage Claims Under FPA § 10(c)

California v. FERC's interpretation of Section 27's general savings clause is instructive for our interpretation of Section 10(c)'s limited savings clause. The latter cannot be interpreted so broadly as

to allow state tort law to supplant FERC's exclusive control of dam operations.[8]

Because the state law property damage claims at issue here infringe on FERC's operational control, we hold that they are conflict preempted. Essentially, Plaintiffs allege that Defendants were negligent because they failed to act in a manner FERC had expressly declined to require. But FERC, not state tort law, must set the appropriate duty of care for dam operators. *See* 16 U.S.C. § 803(c) ("[T]he licensee . . . shall conform to such rules and regulations as the Commission may from time to time prescribe.").

The Supreme Court has recognized that damages claims can serve the same effect as regulations. *See Kurns,* 132 S. Ct. at 1269 ("[S]tate regulation can be . . . effectively exerted through an award of damages,

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[8] Although neither party cites it, this circuit previously considered whether licensees were exempt from property damage claims when operating projects pursuant to a FERC-issued license. *Seaboard Air Line R.R. v. Cnty. of Crisp, Ga.,* 280 F.2d 873 (5th Cir. 1960). There, we held that a railroad was able to seek damages from the operator of a FERC-licensed dam, noting that in the FPA, "Congress contemplated damage inflicted after as well as at the time of construction." *Id.* at 876-77, *Seaboard* presented a minority view that the FPA itself creates a cause of action for damages. As the case before us concerns claims for damages under state law, and Plaintiffs have not argued an FPA-created cause of action, *Seaboard* does not bear on the question before us. Furthermore, *Seaboard* is doubtful authority as it predated the Court's four-factor test for "determining whether a private remedy is implicit in a statute not expressly providing one," *Cort v. Ash,* 422 U.S. 66, 78 (1975).

and [t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." (second alteration in original) (citation and internal quotation marks omitted)). Plaintiffs attempted, through the proper administrative procedure channels, to impose changes on Dam operations. FERC considered these requests and issued a report denying most of the requested changes. Plaintiffs have not asserted that this administrative decision was improper. Nonetheless, failing to achieve their objective, Plaintiffs now seek to use state law to accomplish the same aims, alleging that Defendants were negligent for not changing their operations. Permitting such state property damage claims in an attempt to force changes to a FERC-issued license would "constitute a veto of the project that was approved and licensed by FERC." *California v. FERC,* 495 U.S. at 507 (citations and internal quotation marks omitted); *see also City of Lowell v. ENEL N. Am., Inc.,* 796 F. Supp. 2d 225, 231 (D. Mass. 2011) (citation omitted) (holding that a "negligence claim is preempted by the FERC license because [the plaintiff] cannot use state tort law to prevent [the FERC licensee] from doing something that FERC has sanctioned" and describing the negligence claim as a "collateral attack on the FERC license").[9]

[9] We do not hold that all state property damage claims are preempted by the FPA. For example, a claim alleging negligence for failure to conform to FERC's guidelines would not conflict

(Continued on following page)

Applying state tort law to set the duty of care for the operation of FERC-licensed projects would "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FPA. *See Arizona,* 132 S. Ct. at 2501 (citations and internal quotation marks omitted). We therefore hold that the district court properly concluded that the FPA preempts Plaintiffs' claim for negligence.[10]

III. MOTIONS TO AMEND AND REMAND

After Defendants filed their motion to dismiss, Plaintiffs filed two motions to amend their complaint. The first motion to amend sought to delete references to the United States Constitution, which Plaintiffs characterized as "mistaken" additions to their complaint. The second motion to amend sought, without explanation, to remove the complaint's claim for injunctive relief. The district court did not explicitly

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with FERC's operational control. Nor does our holding conflict with the cases cited by Plaintiffs. The D.C. Circuit, for example, held that "Congress intended for § 10(c) merely to preserve existing state laws governing the damage liability of licensees," so FERC could not impose strict liability on dam operators. *S.C. Pub. Serv. Auth. v. FERC,* 850 F.2d 788, 795 (D.C. Cir. 1988). That does not imply that Congress intended for § 10(c) to enable state tort law to replace FERC's determination of the appropriate duty of care.

[10] As we are able to affirm the district court's judgment on preemption grounds, we need not address Defendants' argument that the doctrine of primary jurisdiction further supports the district court's ruling.

rule on these motions before granting Defendants' motion to dismiss. Plaintiffs argue the district court abused its discretion in failing to permit them to amend their complaint. Plaintiffs also argue that the district court erred when it implicitly denied their motion to remand.

A. Standard of Review

A district court's denial of leave to amend is reviewed for an abuse of discretion. *Ballard v. Devon Energy Prod. Co.,* 678 F.3d 360, 364 (5th Cir. 2012) (citation omitted). Similarly, a district court's failure to remand state law claims to the state court from which the case was removed is reviewed for abuse of discretion. *Enochs v. Lampasas Cnty.,* 641 F.3d 155, 158 (5th Cir. 2011) (citation omitted).

B. Motions to Amend

Although the district court did not explicitly deny Plaintiffs' motions to amend, it implicitly did so when it entered its ruling in favor of Defendants' motion to dismiss and dismissed the case with prejudice. *See Norman v. Apache Corp,,* 19 F.3d 1017, 1021 (5th Cir. 1994) (citation omitted).

"[A] party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). "Whether to grant leave to amend a complaint is entrusted to the sound

discretion of the district court[.]" *Ballard,* 678 F.3d at 364 (citation and internal quotation marks omitted).

"Denial of leave to amend may be warranted for undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, undue prejudice to the opposing party, or futility of a proposed amendment." *Id.* (citation and internal quotation marks omitted). Where, as here, the district court has not "engage[d] in a formal recitation of reasons[, the] reason for denial must be clear . . . either from the findings of the district court or elsewhere in the record." *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.,* 238 F.3d 363, 367 (5th Cir. 2001) (citations omitted).

Defendants argue that Plaintiffs' proposed amendments were futile in light of the district court's holding that the FPA preempted their state law claims. We agree. "Clearly, if a complaint as amended is subject to dismissal, leave to amend need not be given." *Pan-Islamic Trade Corp. v. Exxon Corp.,* 632 F.2d 539, 546 (5th Cir. 1980), *abrogated on other grounds by Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,* 459 U.S. 519, 536 n.33 (1983) (citation omitted). Here, the complaint as amended would have left only state law claims for property damage. As we have determined that the district court correctly dismissed these claims, Plaintiffs' motions to amend were futile, Accordingly, the district court did not abuse its discretion in implicitly denying Plaintiffs' motions to amend.

C. Motion to Remand

Because we have concluded that the district court properly granted Defendants' motion to dismiss, we need not consider whether the district court abused its discretion in denying Plaintiffs' motion to remand.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 12-30494

D.C. Docket No. 2:10-CV-1846

JEFF SIMMONS; ALICE SIMMONS; JEANNE SIMMONS; GERALD EDWARD MCBRIDE; EDWARD BRYANT BONNER; ET AL,

Plaintiffs-Appellants,

v.

SABINE RIVER AUTHORITY STATE OF LOUISIANA; LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT; LINDA CURTIS SPARKS; ENTERGY GULF STATES LOUISIANA L.L.C.; ENTERGY CORPORATION; ENTERGY SERVICES INCORPORATED; ENTERGY LOUISIANA, L.L.C.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana, Lake Charles

Before STEWART, Chief Judge, and SMITH and WIENER, Circuit Judges.

JUDGMENT

(Filed Oct. 9, 2013)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: OCT 31 2013

A True Copy
Attest

Clerk, U.S. Court of Appeals,
Fifth Circuit

By: /s/ Shawn Henderson
Deputy

New Orleans, Louisiana
OCT 31 2013

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

JEFF SIMMONS, ET AL.	:	**DOCKET NO. 2:10 CV 1846**
VS.	:	**JUDGE MINALDI**
SABINE RIVER AUTHORITY OF LOUISIANA, ET AL.	:	**MAGISTRATE JUDGE KAY**

MEMORANDUM RULING

Before the Court is a Motion to Dismiss Pursuant to Rules 12(b)(6) and 12(b)(7) of the Federal Rules of Civil Procedure [Doc. 13], filed by the defendants, the Sabine River Authority of Louisiana ("SRA-L") and Entergy Services, Inc., Entergy Louisiana, LLC, Entergy Gulf States Louisiana, LLC, and Entergy Corporations (collectively "Entergy"). The plaintiffs, Jeff Simmons, *et al.* filed an Opposition [Doc. 34], and the defendants filed a Reply [Doc. 35] and a Sur-Reply [Doc. 44]. The court heard oral argument on the motion on April 11, 2012. Thereafter, the court took the matter under advisement.

BACKGROUND

The Toledo Bend Dam is located on the Sabine River in Sabine Parish, Louisiana. The dam creates the Toledo Bend Lake, which stretches across the Texas-Louisiana Border. The Sabine River Compact Authority of Texas ("SRA-T") and the Sabine River

Authority of Louisiana ("SRA-L") jointly operate the dam pursuant to a license issued to them by the Federal Energy Regulatory Commission ("FERC") under the authority of the Federal Power Act ("FPA").[1] The Project includes a reservoir, a dam, a hydroelectric plant, and several other facilities used for power generation.[2] The FERC license regulates most aspects of the planning, construction, and maintenance of the dam.[3] It also specifies minimum and maximum reservoir levels.[4]

As license-holders, SRA-L and SRA-T entered into a Power Sales Agreement with Entergy's predecessors.[5] The plaintiffs allege that the contract grants Entergy the right to oversee the generation of power on the river.[6]

In October of 2010, the plaintiffs filed this lawsuit against SRA-L, former SRA-L Director Linda Curtis Sparks, the Louisiana Department of Transportation and Development, and various Entergy defendants for damage to their property located in

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[1] Notice of Removal Ex. A, State Court Petition ¶ 5 [Doc. 1-4]; Mot. to Dismiss Ex. B, Final Analysis of Request to Raise the Project's Minimum Reservoir Elevation 1 [Doc. 13-2].

[2] *See* Mot. to Dismiss Ex. A, Federal Power Commission License 4 [Doc. 13-2].

[3] *See id.* at 4-11.

[4] *Id;* Mot. to Dismiss Ex. B, FERC Report on Request to Raise the Project's Minimum Reservoir Elevation [Doc. 13-2].

[5] *See* State Court Petition ¶ 5.

[6] *Id.*

the lower Sabine River Basin. The crux of the complaint is that flood waters released from the dam on October 29 and 30, 2009 damaged the plaintiffs' property.[7] There are two ways to release water from the reservoir: (1) through the energy-producing hydroelectric turbines or (2) through the spillway gates.[8] The plaintiffs allege that the defendants negligently operated the spillway gates during the heavy rainfall in October of 2009 by failing to open them soon enough and then releasing water from the reservoir too quickly, causing the water to flood their property.[9] They assert various theories of liability, including trespass, negligence, and unconstitutional taking, and their prayer for relief includes claims for damages and injunctive relief.[10]

The defendants contend that the plaintiffs' "allegations clearly ignore the operational control wielded by FERC [and] FERC's exclusive jurisdiction" over hydroelectric projects on navigable waterways.[11] Thus, they argue that the plaintiffs' claims are preempted by the FPA. They further contend that the court should dismiss the case under Federal Rule of Civil Procedure 12(b)(7) because the plaintiffs failed

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[7] *See* State Court Petition ¶¶ 8, 14.

[8] *See* Mot. to Dismiss Ex. B, FERC Report on Analysis of Flood Notification and Reservoir Operation 43 [Doc. 13-2].

[9] *See* State Court Pet. ¶ 14; Pls.' Mem. in Opp. to Defs. Mot. to Dismiss 5 [Doc. 32].

[10] State Court Petition ¶¶ 14-22.

[11] Mem. in Supp. of Defs.' Mot. to Dismiss 8.

to join FERC, SRA-T, and the Sabine River Compact Administration ("SRCA")[12] as defendants, all of whom, they argue, are necessary parties to this action. Finally, the defendants assert that the plaintiffs' claims are prescribed and that their conspiracy claims and their claim for punitive damages should be dismissed for failure to state a claim upon which relief may be granted. Because the court agrees that the plaintiffs' claims are preempted by the FPA, it will not address the defendants' other arguments.

FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6) STANDARD

A motion filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure challenges the sufficiency of a plaintiffs allegations. Fed. R. Civ. P. 12(b)(6). When ruling on a 12(b)(6) motion, the court accepts the plaintiff's factual allegations as true, and construes all reasonable inferences in a light most favorable to the plaintiff or nonmoving party. *Gogreve v. Downtown Develop. Dist.,* 426 F. Supp.2d 383, 388 (E.D. La. 2006).

To avoid dismissal under a Rule 12(b)(6) motion, a plaintiff must plead enough facts to "state a claim

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[12] The Sabine River Compact Administration is an interstate agency created by the Sabine River Compact between Texas and Louisiana in 1952. The Compact grants SRCA authority to regulate the waterways of the Sabine River. *See* Tex. Water Code § 44.010.

to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965. Accordingly, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.*

LAW AND ANALYSIS

Section 4(e) of the FPA authorizes FERC to issue licenses for the development of power "across, along, from, or in any of the streams . . . over which Congress has jurisdiction." 16 U.S.C. § 797(e). Section 10(a) of the Act further authorizes FERC to impose on licensees any condition it deems necessary to promote power development and to protect other public uses of the water. 16 U.S.C. § 803(a). These conditions preempt state law to the extent that it is impossible to comply with both or "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *California v. FERC,* 495 U.S. 490, 506 (1990).

Section 27 of the FPA contains a savings clause providing that:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States 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. 16 U.S.C. § 821.

In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 328 U.S. 152, 175-76 (1946), the Supreme Court held that section 27 preserves only those state laws relating to proprietary rights to the use of water for irrigation, municipal, or other similar purposes. It does not preserve state law relating to the control or use of water for power generation. Thus, the Court held that a licensee could not be required to obtain a state license as a prerequisite for operating a project licensed by FERC. Any such requirement, the court held, would give the states a "veto power" over federal projects that would undermine the comprehensive planning power that Congress intended to confer on FERC.

In *California v. FERC,* the Court reaffirmed the *First Iowa* Court's construction of section 27. 495 U.S. at 498-502. The case involved competing stream flow requirements in a creek from which a FERC-licensed hydroelectric plant drew water. *Id.* at 493. After FERC set a minimum flow rate requirement, the California Water Resources Control Board attempted to impose a higher minimum flow rate in order to protect the creek's fish. *Id.* at 494-95. The Court concluded unanimously that the state law requirement could not be given effect. *Id.* at 498. It reasoned that in setting the minimum stream flow requirement for the project, FERC balanced the project's potential

effect on wildlife with its economic feasibility. *Id.* at 506. Allowing California to supplement FERC's stream flow requirement, the Court held, would disturb the balance struck by the federal requirement and thereby undermine Congress's choice to vest comprehensive planning and licensing authority over the project in FERC. *Id.* Taken together, *First Iowa* and *California v. FERC* stand for the proposition that the FPA preempts any state law requirement that interferes with FERC's comprehensive planning and licensing authority over hydroelectric projects in navigable waterways, except to the extent that those laws relate to proprietary water rights.

The plaintiffs' claims for injunctive relief present precisely the sort of challenge to FERC's planning authority as did the state law minimum flow requirement at issue in *California v. FERC.* The FERC license for the Toledo Bend Project specifies minimum and maximum reservoir levels.[13] In 1999, a group of

[13] *See* FERC License; Mot. to Dismiss Ex. B, FERC Report on Request to Raise the Project's Minimum Reservoir Elevation [Doc. 13-2]. The plaintiffs argue that the court should not consider the contents of the FERC license or FERC's Collaborative Reports in ruling on the Motion to Dismiss. Generally, in considering a motion to dismiss, the court must limit itself to the contents of the pleadings and the attachments thereto. *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496 498 (5th Cir. 2000). The defendants correctly note, however, that a court reviewing a Motion to Dismiss may also consider matters of which a court may take judicial notice, including matters of public record. *Telltabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322 (2007). Both the FERC license and FERC's collaborative reports

(Continued on following page)

Sabine River Basin property owners requested that FERC modify the license to incorporate additional operational requirements related to flood control.[14] Specifically, the residents requested that FERC require SRA to draw down the reservoir earlier than it normally does when potential flooding is anticipated.[15] FERC denied the request.[16] It found that the dam could not be used for flood control of large storms because it would be impossible for SRA to safely reduce the reservoir level by an amount necessary to prevent flooding. Moreover, FERC found that permanently lowering the reservoir level would prevent power production and adversely affect recreational opportunities.[17] Accordingly, FERC declined to mandate any operational changes in the spillway for purposes of flood control.[18]

The plaintiffs' claims for injunctive relief effectively amount to attempts to use state tort law to have this court mandate the changes FERC denied. The plaintiffs characterize their complaint as addressing

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are matters of public record, and the court may therefore properly consider it in passing on this motion. *See Funk v. Stryker Corp.,* 631 F.3d 777, 783 (5th Cir. 2011) (holding that a district court did not err in taking judicial notice of publicly available documents and transcripts produced by the FDA).

[14] *See* Report on Analysis of Flood Notification and Reservoir Operation.

[15] *Id.* at 40.

[16] *Id.* at 35.

[17] *Id.* at 49, 52.

[18] *Id.* at 35.

when and to what extent the spillway gates should be opened in anticipation of rainfall.[19] In particular, they allege that the defendants failed to adopt appropriate policies and procedures for the operation of flood gates that would effectively avoid catastrophic flooding and failed to maintain adequate storage capacity in the reservoir and seek an injunction directing SRA-L to "establish a protocol to open the flood gates at a time when the increased water flow will not flood the downstream properties of the plaintiffs."[20] This is precisely what FERC declined to do in 2003. Thus, any such mandate from this court arising out of state law would usurp FERC's "broad and paramount" regulatory authority over the project. *See California v. FERC,* 495 U.S. at 499. The plaintiffs' claims for injunctive relief are therefore preempted by the FPA under *First Iowa* and *California v. FERC.*

The plaintiffs argue that even if their claims for injunctive relief are preempted, Section 10(c) of the FPA expressly preserves their claims for monetary damages. Section 10(c) provides that "[e]ach 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." 16 U.S.C. § 803(c) (2009).

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[19] Pls.' Mem. in Opp. to Mot. to Dismiss 5.

[20] State Court Petition ¶¶ 14, 30.

The court, however, finds that section 10(c) of the FPA cannot reasonably be interpreted to preserve state law claims for damages arising out of conduct which FERC has expressly declined to prohibit. Because operators typically avoid acting in a manner that will expose them to liability, state law claims for damages arising out of the operation of a FERC-licensed dam have just as much potential to change the manner in which a dam is operated as do claims for injunctive relief. As such, they present just as much of an obstacle to FERC's comprehensive planning authority as do the kinds of absolute prohibitions addressed in *First Iowa* and *California v. FERC*.

Interpreting section 10(c) to preserve the plaintiffs' claims in this case would effectively permit the plaintiffs to use state law to induce operational changes that FERC found to be contrary to the best interests of the project. Any such interpretation would stand in direct conflict with FERC's exclusive authority under section 10(a) to adopt a "comprehensive plan for improving or developing [the] waterway," "[W]hen interpreting a statute, it is a cardinal rule that a statute is to be read as a whole, in order not to render portions of it inconsistent." *Burnett c.* [sic] *Stewart Title, Inc.,* 635 F.3d 169, 172 (5th Cir. 2011) (internal citations omitted). Accordingly, the court finds that section 10(c) cannot be read to preserve state law claims for damages that interfere with FERC's authority to regulate and control the operation of its projects. Because the plaintiffs' claims for damages carry the potential to induce operational

changes that FERC declined to mandate, they interfere with FERC's exclusive licensing authority and are preempted by the FPA.

CONCLUSION

For the reasons state [sic] herein, the defendants' Motion to Dismiss will be granted, and the plaintiffs' claims will be dismissed with prejudice.

Lake Charles, Louisiana, this 25 day of April 2012.

/s/ Patricia Minaldi
PATRICIA MINALDI
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

JEFF SIMMONS, ET AL.	:	**DOCKET NO. 2:10 CV 1846**
VS.	:	**JUDGE MINALDI**
SABINE RIVER AUTHORITY OF LOUISIANA, ET AL.	:	**MAGISTRATE JUDGE KAY**

JUDGMENT

For the reasons set forth in the accompanying Memorandum Ruling, it is

ORDERED that the defendants' Motion to Dismiss is GRANTED.

IT IS FURTHER ORDERED that the plaintiffs' case is DISMISSED WITH PREJUDICE.

Lake Charles, Louisiana, this 25 day of April 2012.

/s/ Patricia Minaldi
PATRICIA MINALDI
UNITED STATES
DISTRICT JUDGE

41 Stat. 1077; 16 U.S.C. § 821

Sec. 27 [State laws not affected.] – 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.

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Section 10; 16 U.S.C. § 803

(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.