

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SKOKOMISH INDIAN TRIBE, a
federally recognized Indian tribe
in its own capacity as a class
representative and as parens
patriae; DENNY S. HURTADO;
GORDON A. JAMES; JOSEPH PAVEL;
ANNE PAVEL; MAURES P. TINAZA;
CELESTE F. VIGIL; ROSLYNNE L.
REED; GARY W. PETERSON; RITA C.
ANDREWS; TOM G. STRONG; MARIE
E. GOULEY; VICTORIA J. PAVEL;
DENNIS W. ALLEN; JOSEPH
ANDREWS, SR.; ZETHA CUSH; ELSIE
M. ALLEN; ALEX L. GOULEY, JR.;
LAWRENCE L. KENYON; DORIS
MILLER; GERALD B. MILLER; HELEN
M. RUDY; RONALD D. TWIDDY, SR.;
NICK G. WILBUR, SR.,

Petitioners-Appellants,

v.

UNITED STATES OF AMERICA;
TACOMA PUBLIC UTILITY, a
Washington municipal corporation;

No. 01-35028

D.C. No.

CV-99-05606-FDB

CITY OF TACOMA, a Washington municipal corporation; WILLIAM BARKER, Tacoma Public Utilities Board Member in his official capacity; TOM HILYARD, Tacoma Public Utilities Board Member in his official capacity; ROBERT LANE; TIM STREGE; G. E. VAUGHN,
Defendants-Appellees.

SKOKOMISH INDIAN TRIBE, a federally recognized Indian tribe in its own capacity as a class representative and as *parens patriae*; DENNY S. HURTADO; GORDON A. JAMES; JOSEPH PAVEL; ANNE PAVEL; MAURES P. TINAZA; CELESTE F. VIGIL; ROSLYNNE L. REED; GARY W. PETERSON; RITA C. ANDREWS; TOM G. STRONG; MARIE E. GOULEY; VICTORIA J. PAVEL; DENNIS W. ALLEN; JOSEPH ANDREWS, SR.; ZETHA CUSH; ELSIE M. ALLEN; ALEX L GOULEY, JR.; LAWRENCE L. KENYON; DORIS MILLER; GERALD B. MILLER; HELEN M. RUDY; RONALD D. TWIDDY, SR.; NICK G. WILBUR, SR., Skokomish Indian Tribal members for themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

No. 01-35845

D.C. No.

CV-99-05606-FDB

OPINION

TACOMA PUBLIC UTILITY, a
Washington municipal corporation;
CITY OF TACOMA, a Washington
municipal corporation; WILLIAM
BARKER, Tacoma Public Utilities
Board Member in his official
capacity; TOM HILYARD, Tacoma
Public Utilities Board Member in
his official capacity; ROBERT LANE;
TIM STREGE; G. E. VAUGHN;
UNITED STATES INTERNAL REVENUE
SERVICE,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted
January 6, 2003—Seattle, Washington

Filed June 3, 2003

Before: J. Clifford Wallace, Stephen S. Trott, and
A. Wallace Tashima, Circuit Judges.

Opinion by Judge Trott;
Parial Concurrence and Partial Dissent by Judge Tashima

COUNSEL

Mason D. Morisset, Morisset, Schlosser, Ayer & Jozwiak, Seattle, Washington, for the petitioners-appellants.

Phillip H. Lynch, Assistant United States Attorney, Tacoma, Washington, for the defendants-appellees.

J. Richard Creatura, Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, P.L.L.C. (Tacoma Public Utility), Tacoma, Washington, for the defendants-appellees.

Timothy L. Ashcraft, Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, P.L.L.C. (Tacoma Public Utility), Tacoma, Washington, for the defendants-appellees.

OPINION

TROTT, Circuit Judge:

The Skokomish Indian Tribe (“Skokomish Tribe”) and individual tribe members (collectively “Tribe”) brought this action against the City of Tacoma (“City”), Tacoma Public Utilities (“TPU”), and individual board members of TPU (“Board”), (collectively “Tacoma”), and the United States alleging they were harmed by the Cushman Hydroelectric Project (“Project”) owned by the City.¹ The Project includes two dams, two reservoirs, diversion works, two power houses, transmission lines, and it floods over thirty acres of federal land within a total project area of 4,700 acres. In Case No. 01-35028, the Tribe appeals the district court’s denial of its motion to certify a class of tribe members who allege they were harmed by the Project. In Case No. 01-35845, the Tribe appeals the district court’s orders (1) denying the Tribe’s

¹The Tribe is seeking almost \$6 billion in monetary damages.

recusal motion, (2) dismissing the United States as a defendant, (3) granting summary judgment in favor of Tacoma on the Tribe's claims asserted against Tacoma; and (4) dismissing the Tribe's 16 U.S.C. § 803(c) cause of action for failure to state a claim upon which relief can be granted.

We have jurisdiction under 28 U.S.C. § 1291 over the Tribe's timely appeal in 01-35845, and we affirm, in part, and vacate and remand with instructions to the district court to dismiss in part. Because of our holding with respect to the Tribe's appeal in 01-35845, we need not address the Tribe's appeal in 01-35028.

BACKGROUND

A.

On January 26, 1855, Governor Isaac I. Stevens ("Stevens"), Governor of the Washington Territory, negotiated the Treaty of Point-No-Point ("Treaty") with the Tribe. The Treaty ceded territory belonging to the Tribe to the United States and reserved a tract of land for the Tribe. In Article 4, the Treaty provides: "[t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; . . . together with the privilege of hunting and gathering roots and berries on open and unclaimed lands." The Treaty was one of several negotiated by Stevens on behalf of the United States with various Pacific Northwest Indian Tribes between 1854 and 1855. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661-62 (1979). The treaties extinguished tribal claims to portions of what is now Washington State in exchange for monetary payments. *Id.*

B.

In 1923, the City filed an application to license the Project with the Federal Power Commission, a predecessor to the Federal Energy Regulatory Commission ("FERC").² The application described the Project virtually as it remains today. In 1924, FERC issued a 50-year "minor part" license to the City pursuant to the Federal Water Act of 1920 ("FWA"), now codified as Part I of the Federal Power Act ("FPA"), 16 U.S.C. § 791a *et seq.* The license authorized the flooding of 8.8 acres of federal land in connection with the City's construction of the Project, which was only a part of the entire Project. As required by § 4(d) of the FWA, FERC stated in its license that the Project "will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired."³

The original license was limited to a minor part of the Project because the then-current legal view was that FERC only had authority to issue licenses for the occupancy and use of federal lands. *Pacific Gas & Elec. Co.*, 29 F.P.C. 1265, 1266 (1963); *City of Tacoma*, 67 F.E.R.C. 61,152 (1994). In 1963, FERC reconsidered this view, concluding that its authority "runs to the 'project works'; i.e., the dams, reservoirs, powerhouses, etc., themselves, and not to the mere occupancy and use of the government lands involved, as was the expressed purpose of these licenses." *Pacific Gas*, 29 F.P.C. at 1266.

² FERC is used throughout this opinion to refer to FERC and the Federal Power Commission.

³ Section 4(d) is now codified as 16 U.S.C. § 797(e), and the statutory language has remained the same:

That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

In light of FERC's decision that it had authority to license entire projects where only a minor part occupies federal land, in 1974 the City filed an application for a new license in the form of an application for a major project license encompassing the entire Project.⁴ *City of Tacoma*, 67 F.E.R.C. 61,152 (1994). The Tribe was granted the right to intervene in the relicensing proceedings, and twenty-four years of litigation followed.

In 1992, the Tribe filed a petition with FERC for a declaratory order that the City's relicensing application was an original license proceeding because the 1924 license was only for a minor part of the Project. *Id.* FERC held that although it issued only a minor-part license in 1924, the issuance was consistent with FERC's interpretation of its jurisdiction at that time and the proceeding for a license of the entire Project was "appropriately characterized as a relicensing proceeding." *Id.* FERC also noted that "the Commission's initial failure to issue a license for the complete project was founded upon a mistaken view of the law and the facts." *Id.* Accordingly, in 1998, FERC issued a subsequent license for the entire Project, which included the required finding that the Project "will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired." *City of Tacoma*, 84 F.E.R.C. 61,107 (1998). In the administrative proceeding, FERC addressed within context of the FPA the same contentions raised by the Tribe that they raise in this case. *Id.*

The parties eventually petitioned for review of FERC's licensing order to the United States Court of Appeals for the District of Columbia, which remanded to FERC for further development of the record. *City of Tacoma v. FERC*, 2000 WL 1683468 (D.C. Cir. 2000). That case is still pending.

⁴ FERC subsequently confirmed that holders of minor-part licenses for hydroelectric projects would be required to file license applications covering all project works. *Pacific Gas & Elec. Co.*, 56 F.P.C. 994, 1008 (1976).

DISCUSSION**A.****Orders Denying the Tribe's Recusal Motion**

We review the district court's denial of the Tribe's recusal motion for an abuse of discretion. *Kulas v. Flores*, 255 F.3d 780, 783 (9th Cir. 2001). An abuse of discretion is "a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Wing v. Asarco, Inc.*, 114 F.3d 986, 988 (9th Cir. 1997).

Sixteen months after filing its complaint, and after numerous issues had been resolved by the district court, the Tribe wrote a letter to Judge Burgess informing him of an opinion following the federal judiciary's Code of Conduct. The Tribe quoted the following part of the opinion in its letter:

A judge's status as a utility customer does not indicate recusal in cases involving the utility, unless the outcome of the case could substantially affect the judge's utility bill. A ten dollar per month increase is one which might reasonably be considered substantial and accordingly recusal was suggested.

Judge Burgess denied recusal on the ground that the motion was untimely. The Tribe moved to reconsider, and Judge Burgess again denied recusal but acknowledged he was a TPU ratepayer. Judge Burgess then referred the Tribe's recusal motion to Chief District Judge Coughenour, who denied the request also holding that it was untimely. Judge Coughenour stated that Judge Burgess had already ruled on at least fifteen different motions in the case and trial was scheduled four and one half months away.

The Tribe appeals all three denials of its recusal motion. According to the Tribe, the fact that Judge Burgess is a TPU

ratepayer requires recusal. We disagree because the Tribe's motion was untimely, and we hold that neither Judge Burgess nor Judge Coughenour abused their discretion in denying the Tribe's recusal motion.

A motion for recusal must be made with "reasonable promptness" after the movant learns of the ground for making the motion. *United States v. Preston*, 923 F.2d 731, 733 (9th Cir. 1991); *see also E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1294-96 (9th Cir. 1992) (holding that a motion for recusal made after entry of an adverse judgment, although the movant had discovered the grounds for recusal before entry of judgment, was untimely because the "unexplained delay suggests that the recusal statute is being misused for strategic purposes"). The Tribe knew they were litigating a case against TPU in a Tacoma federal court with a Tacoma area judge, and therefore they should have known when they filed their complaint that they might want to seek recusal of the Tacoma area judge assigned to the matter. In addition, the Tribe made its recusal request sixteen months after filing its complaint, and six months after learning of the ratepayer opinion. This was untimely. Judge Burgess had ruled on several motions including a ruling against the Tribe on whether to certify the class, and trial was less than four and one half months away.

B.

Order Dismissing the United States as a Defendant

We review de novo a district court's dismissal for lack of subject matter jurisdiction. *La Reunion Francaise SA v. Barnes*, 247 F.3d 1022, 1024 (9th Cir. 2001). We review for clear error the district court's factual findings relevant to its determination of subject matter jurisdiction. *United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 836 (9th Cir. 2002).

16 U.S.C. § 803(c) (“§ 803(c)”) provides:

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.*

(Emphasis added.) This language is patently clear: the United States cannot be held liable for damages caused by hydroelectric projects federally licensed under the FPA. Because we conclude that Tacoma had a valid federal license to build and operate the Project, the FPA bars the Tribe’s claims against the United States relating to the Project.

The Tribe attempts to distinguish its tort claims against the United States from § 803(c), claiming that § 803(c) does not grant the United States “immunity from its failure to take action to properly license and condition projects and to take care of its Indian wards.” This attempt is unconvincing. In *Pacific Power and Light Co. v. Bonneville Power Admin.*, 795 F.2d 810, 816 (9th Cir. 1996), we stated:

Congress has decided that jurisdiction under the Act should be a function of the agency whose actions are being challenged rather than a function of the cause

of action which petitioner asserts Unless constitutional issues are raised, jurisdiction under the [Pacific Northwest Electric Power Planning and Conservation Act] does not turn on the legal theory underlying a suit. For jurisdiction purposes, therefore, it matters not whether the utilities' suit is grounded in contract, administrative law or some other legal theory. Instead, jurisdiction arises because the actions of a particular agency are being challenged and because of the nature of the agency action at issue. The proper inquiry focuses on the agency being attacked and whether the factual basis for the attack is an agency action authorized by the Act.

The Tribe made claims against the United States Department of Energy and FERC, the United States Department of Interior and Bureau of Indian Affairs, and the United States Department of Commerce. All these claims arise from the Tribe's objection to FERC's licensing of the Project. Therefore, the Tribe challenges the "construction, maintenance, or operation" of the Project and the United States is immune from that challenge. Thus, we affirm the district court's order dismissing the United States as a defendant.

C.

Orders Granting Summary Judgment in Favor of Tacoma and Dismissing the Tribe's § 803 Claim For Failure to State a Claim Upon Which Relief Can be Granted.

We review the district court's grant of summary judgment de novo. *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002). We must determine, after viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* After apply-