IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

APPALACHIAN POWER COMPANY	)	
Plaintiff,	)	**Case No: 7:14-cv-00535-MFU**
v.	)	
WILLIAM W. NISSEN, II,	)	
and	)	
LORA J. NISSEN	)	
Defendants.	)	

THE NISSENS' MEMORANDUM OF LAW IN OPPOSITION TO APPALACHIAN POWER COMPANY'S MOTION TO DISMISS COUNTERCLAIM FOR DECLARATORY JUDGMENT

COMES NOW Defendants and Counterclaim Plaintiffs William W. Nissen, II and Lora J. Nissen ("Nissens") who, by counsel, submit this Memorandum of Law in Opposition of Appalachian Power Company's ("Appalachian") Motion to Dismiss Counterclaim for Declaratory Judgment. For the foregoing reasons, the Nissens respectfully request that Appalachian's Motion to Dismiss Counterclaim for Declaratory Judgment be denied.

BACKGROUND INFORMATION

Appalachian operates the Smith Mountain hydroelectric Project (the "Project") on Smith Mountain Lake.[1] Appalachian's operation of the Project is pursuant to a License Order issued by the Federal Energy Regulatory Commission ("FERC") on December 15, 2009.[2] Appalachian developed a Shoreline Management Plan ("SMP"), which was incorporated into

[1] Compl. ¶ 7, ECF No. 1; Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 7, ECF No. 40.

the FERC License Order on January 20, 2014.[3] Article 5 of the FERC License Order requires Appalachian to "acquire title in fee or the right to use in perpetuity all lands . . . necessary or appropriate for the construction maintenance, and operation of the project [boundary]" within five years of the issuance of the License, and further requires Appalachian to retain "possession of all . . . property [within the Project boundary] covered by the license," including "right or occupancy and use."[4] The FERC License Order and SMP authorize Appalachian to, among other things, regulate some uses of lands located within the Project boundaries if Appalachian has acquired interests in such lands consistent with Article 5 of the License Order.[5] The FERC License Order defines the Project boundaries as the 800-foot contour level around Smith Mountain Lake.[6]

The Nissens acquired property on Smith Mountain Lake lying above and below the Project boundary on April 14, 2014.[7] The only interest that Appalachian maintains in the Nissens' property is a Flowage Right and Easement Deed dated September 12, 1960, by and between Appalachian and the Nissens' predecessors-in-title (the "Flowage Easement").[8] The Flowage Easement grants Appalachian the right to flood the Nissens' property up to the 800-foot contour level for the purposes of constructing and operating a hydropower dam.[9] In consideration of these purposes, the Flowage Easement also grants Appalachian the right to

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[2] Compl. ¶ 9, ECF No. 1; Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 9, ECF No. 40.

[3] Compl. ¶ 17, ECF No. 1; Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 17, ECF No. 40.

[4] *Appalachian Power Company*, 29 FERC ¶ 62,201, at 65, Project No. 2210-169, Order Issuing New License (FERC 2009) (attached as Ex. A of Compl., ECF No. 1).

[5] Defs.' Answer to Pl.'s Compl. and Countercl. ¶¶ 69-72, ECF No. 40; *Appalachian Power Company*, 29 FERC ¶ 62,201, at 65 (attached as Ex. A of Compl., ECF No. 1).

[6] Defs.' Answer to Pl.'s Compl. and Countercl. ¶¶ 68, ECF No. 40; *Appalachian Power Company*, 29 FERC ¶ 62,201, at 6 (attached as Ex. A of Compl., ECF No. 1).

[7] Compl. ¶ 21, ECF No. 1; Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 21, ECF No. 40.

[8] Compl. ¶ 22, ECF No. 1; Defs.' Answer to Pl.'s Compl. and Countercl. ¶¶ 22, 58, ECF No. 40.

"cut, burn and/or remove therefore any and all buildings, structures, improvements, trees, bushes, driftwood and other object and debris" below the 800 foot counter level to ensure the construction, existence, maintenance, and operation of the dam.[10] The Flowage Easement grants the Nissens' the right to "possess and use" the property subject to the Flowage Easement in any manner not inconsistent with the rights granted to Appalachian, including the right to access land "to reach impounded waters for recreational purposes[.]"[11] The Flowage Easement makes no mention of FERC, a FERC License Order, or an SMP.[12]

Upon acquiring their property, the Nissens constructed a dock, removed vegetation, and constructed a road on the land which Appalachian alleges is within the Project boundary. The Nissens obtained permits from Franklin County authorizing them to build the dock prior to its construction.[13]

Appalachian filed its Complaint in this action seeking declaratory judgment, alleging that the Nissens' dock, removal of vegetation, and construction of a road violated Appalachian's rights.[14] The Nissens, in response, submitted a Motion to Dismiss for lack of subject matter jurisdiction.[15] After this Court issued an order denying this motion,[16] the Nissens also filed their Answer to Appalachian's Complaint, as well as their Counterclaims

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[9] Flowage Easement, at 1 (attached as Ex. A of Mem. of Law in Supp. of Appalachian's Mot. to Dismiss, ECF No. 45).

[10] Flowage Easement, at 2 (attached as Ex. A of Mem. of Law in Supp. of Appalachian's Mot. to Dismiss, ECF No. 45).

[11] Flowage Easement, at 2 (attached as Ex. A of Mem. of Law in Supp. of Appalachian's Mot. to Dismiss, ECF No. 45).

[12] *See* Flowage Easement (attached as Ex. A of Mem. of Law in Supp. of Appalachian's Mot. to Dismiss, ECF No. 45).

[13] Defs.' Answer to Pl.'s Compl. and Countercl. ¶ 61, ECF No. 40 (a copy of the permit is attached thereto as Ex. B).

[14] Compl. ¶¶ 31-38, ECF No. 1.

[15] Mot. to Dismiss Compl., ECF No. 18.

[16] Order, ECF No. 35.

for Declaratory Judgment.[17] Appalachian subsequently filed a Motion to Dismiss the Nissens' counterclaims.[18]

STANDARDS OF REVIEW

I. THE DECLARATORY JUDGMENT ACT.

The Declaratory Judgment Act states that, "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. The Supreme Court has determined, in order to satisfy the "actual controversy" requirements of the Declaratory Judgment Act, a dispute must "be 'definite and concrete, touching the legal relations of parties having adverse legal interests'; and that it be 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (*quoting Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)) (alteration of quotation in original). "[A] declaratory judgment action is appropriate 'when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and . . . when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" *Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 256 (4th Cir. 1996) (*quoting Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937)).

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17 Defs.' Answer to Pl.'s Compl. and Countercl., ECF No. 40.

18 Appalachian's Mot. to Dismiss Countercl. For Decl. J., ECF No. 44.

II. MOTION TO DISMISS UNDER RULE 12(B)(1).

Pursuant to Fed. R. Civ. P. 12(b)(1), a party may file a motion to dismiss based on a court's lack of subject matter jurisdiction. Article III, § 2 of the United States Constitution "limits the jurisdiction of federal courts to 'cases' and 'controversies.'" *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014). Federal jurisdiction "will lie over state-claims that implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). "[This] doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Id.* (citation omitted).

Under the Declaratory Judgment Act, an actual controversy exists if a justiciable issue under Article III is raised. *MedImmune, Inc.*, 549 U.S. at 127 (citation omitted). "A justiciable controversy exists only where a plaintiff has shown that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury [is] both real and immediate, not conjectural or hypothetical." *Shenandoah Valley Network v. Capka*, 669 F.3d 194, 202 (4th Cir. 2012) (internal punctuation marks and citations omitted).

III. MOTION TO DISMISS UNDER RULE 12(B)(6).

Pursuant to Fed. R. Civ. P. 12(b)(6), a party may file a motion to dismiss "for failure to state a claim upon which relief can be granted." "To survive a motion to dismiss pursuant to Rule 12(b)(6), the '[f]actual allegations must be enough to raise a right to relief above the speculative level,' thereby 'nudg[ing] [its] claims across the line from conceivable to

plausible.'" *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 543 (4th Cir. 2013) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)).

"The plausibility standard requires a plaintiff to demonstrate more than 'a sheer possibility that a defendant has acted unlawfully.'" *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009)) "It requires the plaintiff to articulate facts, when accepted as true, that 'show' that the plaintiff has stated a claim entitling him to relief, i.e., the 'plausibility of 'entitlement to relief.'" *Id.* Generally, when ruling on a Rule 12(b)(6) motion, a judge must accept as true all of the factual allegations contained in the complaint. *Sanders v. Norfolk S. Ry.*, 400 F. App'x 726, 727-28 (4th Cir. 2010) (*citing Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007)).

ARGUMENT

This Memorandum of Law addresses Appalachian's request to dismiss the Nissens' third and fourth requests for declaratory judgment. The Nissens' abstention in addressing their remaining requests for declaratory judgment in this Memorandum of Law should not be construed as the Nissens' concession or waiver of the issues raised in those requests. This is particularly true with regard to the Nissens' first and second requests for declaratory judgment, which request that this Court determine that it does not have subject matter jurisdiction over this case. The issue of subject matter jurisdiction in this case, as well as the issue of Appalachian's standing to bring suit, are addressed in the Nissens' Motion for Reconsideration or, in the Alternative, to Certify Interlocutory Order, which was filed on March 26, 2015 (ECF No. 49). The arguments below are presented insofar as it is determined that this Court has subject matter jurisdiction over the suit brought by Appalachian, and are

not to be interpreted as the Nissens' concession to this Court's subject matter jurisdiction over this case.

I. APPALACHIAN'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE NISSENS' THIRD REQUEST FOR DECLARATORY JUDGMENT STATES A PLAUSIBLE AND LEGALLY SUFFICIENT CLAIM THAT THIS COURT HAS SUBJECT MATTER JURISDICTION OVER.

The Nissens' third request for declaratory judgment requests that this Court determine that the Flowage Easement does not provide Appalachian with sufficient property rights to regulate the Nissens' property under the FERC License and SMP. Appalachian argues that this request should be dismissed for failure to state a plausible and legally sufficient claim and lack of subject matter jurisdiction. However, both of Appalachian's arguments fail.

First, Appalachian errantly cites to *Appalachian v. Arthur*, 39 F. Supp. 3d 790, 2014 U.S. Dist. LEXIS 110274 (W.D. Va. 2014), for the proposition that the Flowage Easement provides Appalachian with sufficient property rights to regulate the Nissens' property within the Project boundary in accordance with the SMP. In *Arthur*, the court determined that the flowage easement in that case entitled Appalachian "to enforce the SMP with regard to the portion of defendants' property within the Project boundary." *Id.* at *9. However, this case is clearly distinguishable from *Arthur* because, as Appalachian conveniently fails to note, the defendants in that case, who were *pro se*, did "not contest[] that their property [was] subject to [the flowage easement at issue] and offered no argument [that Appalachian's] property rights [were] insufficient to entitle it to relief." *Id.* at *18-19. Because of this, the court did not weigh the property rights held by the defendants and merely relied on Appalachian's interpretation of the law to reach its conclusion. *Id.*

Put simply, the defendants in *Arthur* did not raise the issue of whether the flowage easement provided Appalachian with sufficient property rights to enforce the SMP on the their property within the Project Boundary. Unlike the defendants in *Arthur*, the Nissens *do* raise this issue. As such, *Arthur* has no precedential value with regard to the Nissens' third request for declaratory judgment. *See United States v. Martinez*, 584 F. App'x 630, 632 n.2 (9th Cir. 2014) (determining that a defendant's reliance on a similar case in which the critical facts at issue were conceded was misplaced); *Alspaugh v. McConnell*, 643 F.3d 162, 168-69 (6th Cir. 2011) (determining that a case with similar facts in which a party conceded an issue did not have precedential value over the case at hand when the same facts were not conceded); *United States v. Simmons*, 587 F.3d 348, 376 (6th Cir. 2009) (refusing to recognize the precedential value of a case with similar facts because pertinent issues were waived); *United States v. Gardner*, 417 F. Supp. 2d 703, 707 n.4 (D. Md. 2006) (differentiating cases with similar facts because they all waived the issue raised before the court); *France v. Apfel*, 87 F. Supp. 2d 484, 486 n.3 (D. Md. 2000) (holding that cases in which issues are waived are not binding precedent on subsequent cases with similar facts where the same issue is not waived).

Furthermore, contrary to Appalachian's arguments, the *Arthur* decision does not stand for the proposition that flowage easements, as a matter of law, always provide Appalachian with sufficient property rights to enforce the SMP over properties within the Project boundary. In fact, the court in *Arthur* indicated that the issue of the sufficiency of Appalachian's property rights, had it been raised by the defendants, was likely a justiciable issue. *See Arthur*, 39 F. Supp. 3d at __, 2014 U.S. Dist. LEXIS 110274, at *18-19 (indicating

that, had the defendants contested the sufficiency of Appalachian's property rights, such an issue would have been heard by the court). Moreover, as a result of the defendants' concession of issues in *Arthur*, the conclusions reached by the court directly conflicted with those of the Virginia Supreme Court, which has determined that flowage easements similar in language to the one at issue here do not prohibit servient landowners, such as the Nissens, from possessing and building docks over such easements. *Brown v. Haley*, 233 Va. 210, 355 S.E.2d 563, 570 (Va. 1987). As such, Appalachian's reliance on *Arthur* is misplaced because the matter at hand is clearly distinguishable from that case.

Second, Appalachian argues that the allegations contained in the Nissens' third request for declaratory judgment do not have to be accepted by the Court because they are contradicted by the terms of the Flowage Easement. However, Appalachian's argument is based on a distorted and dishonest reading of the Flowage Easement instrument. The Flowage Easement instrument conveyed to Appalachian the right to flood the property, currently owned by the Nissens, up to the 800 foot contour level for the purposes of constructing, operating, and maintaining a dam.[19] The Flowage Easement was conveyed in 1960, three years prior to the completion of the dam. The Flowage Easement also granted to the property owners "the *right to possess and use said premises* in any manner not inconsistent with the . . . rights . . . granted to Appalachian, *including . . . the right to cross said land to reach the impounded waters for recreational purposes*[.]"[20] In considering the purpose of the Flowage Easement, Appalachian was also granted the right to enter the

[19] Flowage Easement, at 1 (attached as Ex. A of Mem. of Law in Supp. of Appalachian's Mot. to Dismiss, ECF No. 45).

[20] Flowage Easement, at 2 (emphasis added) (attached as Ex. A of Mem. of Law in Supp. of Appalachian's Mot. to Dismiss, ECF No. 45).

premises "to cut, burn, and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood, and other objects and debris of any kind . . . located on . . . said premises below the [800 foot contour level]" (hereinafter referred to as Appalachian's "additional rights").[21]

"Easements are not ownership interests in the servient tract but 'the privilege to use the land of another in a particular manner and for a particular purpose.'" *Basheer/Edgemoore-Millwood, LLC v. Sizdahkhani*, 62 Va. Cir. 28, 30 (Va. Cir. Ct. 2003) (*quoting Russakoff v. Scruggs*, 241 Va. 135, 400 S.E.2d 529, 531 (Va. 1991)). When an easement "limits exclusive use . . . of the servient estate to a particular purpose, the servient landowner retains the right to use the land in ways not inconsistent with the uses granted in the easement." *Walton v. Capital Land*, 252 Va. 324, 477 S.E.2d 499, 501 (Va. 1996); *see Adamson v. Columbia Gas Transmission, LLC*, 579 F. App'x 175, 177 (4th Cir. 2014) (holding that, "if the granting language states the object or purpose of the easement, the dimensions of the easement may be inferred to be such as are reasonably sufficient for the accomplishment of that object").

A flowage easement that grants a servient landowner "the right to possess and use [the] premises in any manner not inconsistent with the estate, rights, and privileges . . . granted" to the easement owner does not deprive a servient landowner "from exercising the rights of fee simple ownership that [are] unaffected by [said] flowage easement." *Smith Mt. Lake Yacht Club v. Ramaker*, 261 Va. 240, 542 S.E.2d 392, 397 (Va. 2001). A flowage easement does not grant the easement holder "the right to grant . . . the permission to build

[21] Flowage Easement, at 2 (attached as Ex. A of Mem. of Law in Supp. of Appalachian's Mot. to Dismiss, ECF No. 45).

any docks" below the designated contour level, if there is one. *Id.* When a flowage easement grants a servient landowner the right to access waters for recreational purposes, the construction of "docks, bathhouses, and other facilities related to water sports and recreation" is not inconsistent with the easement. *Brown*, 355 S.E.2d at 570.

Here, the first part of the Flowage Easement states that its purpose is to flood the property up to the 800 foot contour "as the result of the construction, existence, operation and/or maintenance" of a dam.[22] The extent of Appalachian's additional rights under the Flowage Easement are limited to this express purpose. Despite case law to the contrary, Appalachian appears to allege that its additional rights extend so far above and beyond the purpose of the Flowage Easement that they can be used prohibit the Nissens' construction of a dock despite the Nissens' right to possess and use the property. However, the fact that the terms of Appalachian's dock permits obligate permittees to abide by the FERC License Order and SMP, coupled with the fact that Appalachian records these permits with Virginia Circuit Court Clerks' Offices, demonstrate Appalachian's knowledge that its additional rights under the Flowage Easement are limited to this purpose.[23] If Appalachian's additional rights alone sufficiently allow Appalachian to regulate and remove docks and vegetation growth, Appalachian would not require property owners to convey to it property rights it already has.

If the Flowage Easement was meant to prohibit the building of a dock, construction of a private road, or removal of vegetation, it would have expressly stated so. *Cf. McCarthy Holdings LLC v. Burgher*, 282 Va. 267, 274, 716 S.E.2d 461, 465 (2011) (determining that a

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[22] Flowage Easement, at 1 (attached as Ex. A of Mem. of Law in Supp. of Appalachian's Mot. to Dismiss, ECF No. 45).

[23] *See* Defs.' Answer to Pl.'s Compl. and Countercl. ¶¶ 83-88, ECF No. 40 (a copy of the permit is attached thereto as Ex. C).

servient landowner who conveyed an easement that did not contain a purpose or limitations could not prohibit the easement holder's uses of and on the easement area). As such, in keeping with the with express purpose of the Flowage Easement, Appalachian's additional rights are limited to preparing and clearing land for the dam's development and ensuring that its operation is not impeded. *See Brown*, 233 Va. 210, 355 S.E.2d at 569 (determining that Appalachian's additional rights in a flowage easement that mirrored the one at issue here were limited to clearing land for the "development of the [dam]").

Thus, as the Nissens pled in their third request for declaratory judgment, the Flowage Easement only limits them from materially impacting Appalachian's right to impound and flow waters, and Appalachian's additional rights under the Flowage Easement are limited to preparing and clearing the area below the 800 foot level to ensure that the dam's construction, existence, operation, and maintenance is not impeded. "Determining whether a complaint states on its face a plausible claim for relief and therefore can survive a Fed. R. Civ. P. 12(b)(6) motion" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Vitol, S.A.*, 708 F.3d at 543. Here, considering the purpose and the context of the Flowage Easement, the Nissens' allegations contained in their third request for declaratory judgment are clearly plausible. Therefore, the Nissens' third request for declaratory judgment states a valid claim upon which relief can be granted.

Finally, Appalachian argues that this Court lacks subject matter jurisdiction over the Nissens' third request for declaratory judgment. Specifically, Appalachian argues that the Nissens' third request for declaratory judgment alleges that Appalachian is not in compliance with its FERC License Order. However, Appalachian's arguments mischaracterize the

substance of the Nissens' claim. The Nissens' third request for declaratory judgment does not allege that Appalachian is noncompliant with its FERC License Order; rather, it alleges that the Flowage Easement does not provide Appalachian with sufficient property rights to regulate the Nissens' property within the Project boundary in accordance with the FERC License Order or SMP.

Article 5 of Appalachian's FERC License Order required it "acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, *necessary or appropriate for the construction maintenance, and operation of the project*."[24] Put more succinctly, lands within the Project boundary are not subject to the FERC License Order if Appalachian does not hold sufficient property rights to those lands. *See Public Utility Dist. No.1 of Pend Oreille County v. City of Seattle*, 382 F.2d 666, 670-71 (9th Cir. 1967) (determining that a FERC license does not create, supersede, or modify property rights, whether held by the licensee or a third party); *Tri-Dam v. Michael*, No. 1:11-CV-2138, 2014 U.S. Dist. LEXIS 42472, at *9-10 (E.D. Cal. Mar. 28, 2014) (holding that a "FERC license does not grant [the licensee] any property rights over any property in the Project Boundary"); *Tri-Dam v. Schediwy*, 1:11-cv-01141-AWI-MJS, 2014 U.S. Dist. LEXIS 29775, at *21 (E.D. Cal. Mar. 5, 2014) (holding that "FERC does not grant licensees the necessary property rights to regulate private property within the project boundary); *Tri-Dam v. Keller*, No. 1:11-cv-1304, 2013 U.S. Dist. LEXIS 80617, at *9-10 (E.D. Cal. June 7, 2013) (stating that a "FERC license gives [a licensee] the authority to regulate certain uses and occupancies of land in the FERC Project Boundary without prior FERC approval, [but] it does not give [the

[24] *Appalachian Power Company*, 29 FERC ¶ 62,201, at 65 (emphasis added) (attached as Ex. A of Compl., ECF No. 1).

licensee] the right to do so"); *see also Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 250, 256 (1954) (holding that neither the Federal Power Act nor a FERC license abolishes existing property rights rooted in state law); Letter from Cheryl A. LaFleur, FERC Chairman, to Robert Hurt, U.S. Representative for Virginia's 5th Congressional District (December 8, 2014) (stating that Plaintiff's "SMP applies only to those lands in the project boundary where [Plaintiff] has property rights," and noting that Plaintiff's status as a FERC licensee alone gives it "no authority to regulate construction on privately owned lands, unless the property owner has given the company those rights.").

Here, the Nissens are not disputing Appalachian's duties under the FERC License Order. Rather, they are simply arguing that Appalachian has not acquired sufficient interests in the Nissens' property to subject it to the FERC License Order. This Court, as well as others, have entertained property right disputes in claims brought under § 825p. *See VA Timberline, L.L.C. v. Appalachian Power Co.*, 343 F. App'x 915, 918 n.* (4th Cir. 2009) (indicating that the court, in an action brought under § 825p, had jurisdiction over the issue of whether a flowage easement provided Appalachian with "sufficient property rights to manage" land in accordance with the FERC License Order and SMP, but failing to reach that specific issue); *Arthur*, 39 F. Supp. 3d at __, 2014 U.S. Dist. LEXIS 110274, at *18-19 (indicating that this Court has sufficient subject matter jurisdiction over a claim contesting the extent of Appalachian's property rights under a flowage easement in an action brought pursuant to § 825p); *VA Timberline, LLC v. Appalachian Power Co.*, 2008 U.S. Dist. LEXIS 6394, at *10-12 (W.D. Va. Jan. 29, 2008) (applying Virginia state law to determine whether Appalachian's interests in a property were sufficient to subject the property to the regulations

contained in the FERC License Order and SMP); *Michael*, 2014 U.S. Dist. LEXIS 42472, at *16-21(interpreting state law in an action brought under § 825p to determine if a FERC licensee acquired the necessary property rights over disputed lands to make them subject to the FERC license); *Schediwy*, 2014 U.S. Dist. LEXIS 29775, at *26 (same); *Tri-Dam v. Keller*, No. 1:11-cv-1304, 2013 U.S. Dist. LEXIS 80617, at *10-14 (same); *Tri-Dam v. Yick*, No. 1:11-CV-01301, 2013 U.S. Dist. LEXIS 80550, at *11-17 (E.D. Cal. June 7, 2013) (same). As such, subject matter jurisdiction is proper here.

Appalachian cites *DiLaura v. Power Auth. of N.Y.*, 786 F. Supp. 241 (W.D.N.Y. 1991) and *Sw. Ctr. for Biological Diversity v. FERC*, 967 F. Supp. 1166 (D. Ariz. 1997) to support its argument that this Court does not have subject matter jurisdiction over the Nissens' third request for declaratory judgment. However, these cases are distinguishable. In *DiLaura*, the plaintiffs sought to enforce a FERC licensee's compliance with federal statutes in the Federal Power Act. 786 F. Supp. at 245-46. In *Sw. Ctr. for Biological Diversity*, the plaintiffs brought suit against FERC itself requesting judicial review of a license order. 967 F. Supp. at 1168, 1172-75. Here, the Nissens are not requesting that this Court force Appalachian to comply with its FERC License Order or seeking judicial review of the licensing order; rather, they are requesting that this Court determine that Appalachian has not acquired sufficient interests in the Nissens' property to subject it to the FERC License Order.

Appalachian also argues that this Court does not have subject matter jurisdiction over the Nissens' third request for declaratory judgment because it is a request to review the validity of Appalachian's FERC License Order. Again, Appalachian's argument is a red

herring that mischaracterizes the Nissens' claim, because the Nissens are not requesting that this Court determine the validity of the FERC License Order.

Should this Court agree with Appalachian that it does not have subject matter jurisdiction over property right disputes in cases brought under § 825p, FERC licensees will effectively be granted free reign to arbitrarily regulate land within project boundaries without any review of property rights or repercussions, even if no property interest is held in the lands being regulated. This result flatly contradicts case law on this issue. *See, e.g., VA Timberline, LLC v. Appalachian Power Co.*, 2008 U.S. Dist. LEXIS 6394, at *10-12; *VA Timberline, L.L.C. v. Appalachian Power Co.*, 343 F. App'x at 918 n.*; *Arthur*, 39 F. Supp. 3d at __, 2014 U.S. Dist. LEXIS 110274, at *18-19; *Michael*, 2014 U.S. Dist. LEXIS 42472, at *16-21; *Schediwy*, 2014 U.S. Dist. LEXIS 29775, at *26; *Tri-Dam v. Keller*, 2013 U.S. Dist. LEXIS 80617, at *10-14; *Tri-Dam v. Yick*, 2013 U.S. Dist. LEXIS 80550, *11-17.

The Supreme Court has long recognized that federal jurisdiction "will lie over state-claims that implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Here, the Nissens' third request for declaratory judgment implicates § 825p, and does not seek to enforce Appalachian's compliance with its FERC License Order or contest the validity of the FERC License Order. Thus, this Court properly has subject matter jurisdiction over the Nissens' third request for declaratory judgment and Appalachian's Motion for Dismiss should be denied.

Therefore, the Nissens' third request for declaratory judgment presents an actual controversy, and the factual allegations contained in the request state a plausible claim for which relief can be granted. Furthermore, this Court has subject matter jurisdiction over the

Nissens' third request for declaratory judgment. As such, Appalachian's Motion to Dismiss should be denied.

II. APPALACHIAN'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE NISSENS HAVING STANDING TO BRING THEIR FOURTH REQUEST FOR DECLARATORY JUDGMENT.

The Nissens' fourth request for declaratory judgment claims that, should this Court determine that Appalachian's interests in the Nissens' property is sufficient to subject it to the regulations of the FERC License Order and SMP, the Nissens' property rights held under the Flowage Easement have been extinguished or superseded by Appalachian's exercise of the federal regulatory power delegated to it under the FPA and that a taking has occurred. Appalachian argues that the Nissens do not have standing to assert a takings claim because they were not the owners of the Flowage Easement at the time the taking occurred. Appalachian's assertions are incorrect.

The taking of private property for private use is prohibited by the Fifth Amendment of the United States Constitution. *Warren v. City of Athens*, 411 F.3d 697, 705 (6th Cir. 2005); *Montgomery v. Carter Cnty.*, 226 F.3d 758, 765 (6th Cir. 2000). "Private-use takings . . . are unconstitutional regardless of whether just compensation is paid." *Montgomery*, 226 F.3d at 766 (citations omitted); *see Porter v. DiBlasio*, 93 F.3d 301, 310 (7th Cir. 1996) (holding that "[t]he Constitution forbids a taking executed for no other reason than to confer a private benefit on a particular private party, even when the taking is compensated"). "A person whose property is confiscated for a strictly private use need not settle for 'just compensation.'" *Montgomery*, 226 F.3d at 766.

Here, the taking was for private-use because Appalachian maintains that it has the power to manage, regulate, and control the Nissens' property, and the property is not being used for a public purpose. This taking is unconstitutional, even if the Nissens were provided compensation.

Appalachian is correct in its assertion that only the owner of property "at the time of [its] taking is entitled to compensation"[25] However, Appalachian's argument overlooks three critical issues. First, the Nissens are not requesting that this Court award compensation for a taking;[26] rather, they are requesting that this Court determine that the Nissens' property rights held under the Flowage Easement have been extinguished or superseded by Appalachian's enforcement of the FERC License Order and SMP and that a taking has occurred. Second, contrary to Appalachian's assertion, the taking could not have occurred when the FERC License Order was issued on December 15, 2009 or when FERC approved Appalachian's SMP on January 20, 2014 because neither modify existing property rights. *Michael*, 2014 U.S. Dist. LEXIS 42472, at *9-10; *see Public Utility Dist. No.1 of Pend Oreille County*, 382 F.2d at 670-71 (determining that a FERC license does not create, supersede, or modify property rights). Third, even if the FERC License Order or SMP could modify existing property rights, the taking did not occur until Appalachian sought to have the Nissens remove their dock and road and re-vegetate their property.

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[25] Mem. of Law in Supp. of Appalachian's Mot. to Dismiss 14, ECF No. 45 (*citing Hansen v. U.S.*, 65 Fed. Cl. 76, 127 (Fed. Cl. 2005).

[26] Nor could they, as this Court does not have jurisdiction over compensation claims arising out of a taking. *See* 28 U.S.C. § 1491(a)(1). Only "the Court of Federal Claims" has jurisdiction over "cases in which a plaintiff seeks just compensation for a taking [by the federal government] under the Fifth Amendment." *Souders v. S.C. Pub. Serv. Auth.*, 497 F.3d 1303, 1308 (Fed. Cir. 2007) (*citing* 28 U.S.C. § 1491(a)(1)). The Federal Court of Claims does not have jurisdiction over such cases when the plaintiff is not seeking compensation, such as the case here. *Doe v. United States*, 372 F.3d 1308, 1316 (Fed. Cir. 2004).

U.S. v. Dow, 357 U.S. 17 (1958), provides guidance regarding when a taking has occurred. In *Dow*, the United States acquired immediate possession of an individual's private property (via a condemnation proceeding) in 1943 for the purposes of building a pipeline, but did not file a declaration of taking until 1946. *Id.* at 18-20. The Supreme Court determined "that the 'taking' did not occur in 1946 when the Government filed its declaration of taking, but rather when the United States entered into possession of the land in 1943." *Id.* at 21.

Following the logic set forth in *Dow*, if a taking occurred here, it did not occur when the FERC License Order was issued or the SMP was approved; rather, it occurred when Appalachian instituted the restrictions and regulations under the SMP and attempted to exercise its domain over the Nissens' property after they removed vegetation and began constructing the dock and. Therefore, the Nissens have standing to assert their fourth request for declaratory judgment. As such, Appalachian's Motion to Dismiss should be denied.

CONCLUSION

For the aforementioned reasons, Defendants and Counterclaim Plaintiffs William W. Nissen, II and Lora J. Nissen respectfully request that this Court deny Plaintiff and Counterclaim Defendant Appalachian Power Company's Motion to Dismiss Counterclaim for Declaratory Judgment.

Respectfully,

WILLIAM W. NISSEN, II and LORA J. NISSEN

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following individuals:

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