

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF VIRGINIA
3 LYNCHBURG DIVISION

3 RICHARD A. PRESSL and
4 THERESA M. PRESSL,

4 Plaintiffs,

5 vs.

No. 7:15-cv-343
Lynchburg, Virginia
September 18, 2015

6 APPALACHIAN POWER COMPANY,

7 Defendant.

8 TRANSCRIPT OF MOTION HEARING
9 BEFORE THE HONORABLE NORMAN K. MOON
10 UNITED STATES DISTRICT JUDGE.

11 APPEARANCES:

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25 Proceedings recorded by mechanical stenography; computer-
assisted transcription.

1 (Call to Order of the Court at 2:25 p.m.)

2 THE COURT: Good afternoon.

3 MR. WANDREI: Good afternoon, Your Honor.

4 MR. PRITTS: Good afternoon, Your Honor.

5 THE COURT: Call the case, please.

6 THE CLERK: *Richard A. Pressl and Theresa M. Pressl*
7 *versus Appalachian Power Company*, Civil Action No. 7:15-cv-343.

8 THE COURT: Is the plaintiff ready?

9 MR. WANDREI: We are, Your Honor.

10 THE COURT: Are the defendants ready?

11 MR. PRITTS: Yes, Your Honor.

12 THE COURT: All right. We are -- you have the
13 defendant's motion to dismiss.

14 MR. PRITTS: Yes, Your Honor.

15 May it please the Court, Your Honor. My name is Matthew
16 Pritts. I'm with Woods Rogers in Roanoke. And I represent
17 Appalachian Power Company.

18 This case, Your Honor, is similar to a current case
19 pending in front of you. A little bit of background on this case,
20 if I may. This land is on Smith Mountain Lake. It was owned by a
21 gentleman by the name of Richard Frie. And he had a desire to
22 construct a boat dock. Started to construct a boat dock. Cut down
23 all of the trees along the shoreline. And this was a part of the
24 shoreline that was deemed to be conservation environmental. It was
25 protected shoreline because it was in the back of one of the coves

1 on the lake near wetlands.

2 And when he cut down all of the trees, Appalachian found
3 out about it, told him to stop it. A plan was put in place to
4 replace the trees. It was approved by the Virginia Department of
5 Game and Inland Fisheries. It was a landscape re-vegetation plan.
6 And after a long period of time, and stops and starts where he
7 wasn't complying with the plan, finally Appalachian decided he had
8 done enough. And Appalachian went to FERC, who has the license
9 -- that issued the license to Appalachian to run the project, and
10 gave -- Appalachian asked them for permission, "Could we allow
11 Mr. Frie to put a dock at this location?" FERC said no. And those
12 are the orders that we have submitted, that have been attached to
13 our pleadings in a couple of different places.

14 FERC said the way he cut down the trees, the way he
15 didn't follow the plan, he wanted to dredge in an area where there
16 were wetlands, he wanted to -- the area where he wanted to build
17 the dock was so shallow, there were problems, FERC said,
18 "Appalachian, you can't do this. You can't allow him to build a
19 dock. You can't give him a dock permit." That was Mr. Frie.

20 Now, fast-forward about two years. Mr. Pressl buys the
21 same property, the same pilings of the same unfinished dock are
22 sitting there. The shoreline is still the shoreline. Mr. Pressl
23 starts meeting with Appalachian to see what he would need to do in
24 order to meet FERC's requirements.

25 And if I may approach, Your Honor?

1 Attached to -- attached to one of our pleadings as
2 Exhibit C were some emails that were exchanged between Mr. Pressl
3 and Appalachian Power Company where they were explaining to him --

4 MR. WANDREI: Excuse me, Your Honor, if I may. I believe
5 that these emails were an attempt to negotiate between the parties,
6 and as such would be inadmissible pursuant to Rule 408.

7 MR. PRITTS: Your Honor -- I disagree with that, Your
8 Honor. And no objection was filed to these when we attached them
9 to our pleadings.

10 But, Your Honor, what I'm trying to show with these is
11 that there were communications between the parties where Mr. Pressl
12 was trying to meet Appalachian's requirements put upon it by FERC
13 to remediate the situation at the shoreline. And he had sent
14 documents to them. They were talking about a shoreline -- a
15 shoreline revegetation plan. All of that was going on over the
16 course of several years. You see these emails: 2012, 2013, 2014.
17 And the court -- what happened, all of a sudden Mr. Pressl
18 decided -- he got some advice that he didn't need to get a permit
19 from Appalachian. He decided no more communication with
20 Appalachian; he's going to file a lawsuit. And in this lawsuit, as
21 you can see, Your Honor, they are alleging the same type of
22 arguments that are in the other case -- one of the other cases I
23 have pending before you, which is the *Nissen* case, where they say,
24 "Yeah, there's a flowage easement, but, Appalachian, you don't have
25 any ability to restrict our rights to build docks. You don't have

1 any ability to stop us. We have a right to cross the land, that
2 gives us the right to build." But you have already said, Your
3 Honor, about five months ago, standing right here, your follow-up
4 order in the *Nissen* case, you said that's an implausible argument
5 that they made. They are making the same arguments here.

6 So it is our position, Your Honor, with that background,
7 that this case ought to be dismissed for several reasons, one of
8 which, Your Honor, with these prior -- the prior orders that have
9 been issued in this case by FERC, what you have got is a collateral
10 attack here in this case upon the issues -- the orders that were
11 issued by FERC. And as I showed in my reply brief, if you compare
12 the drawings that Mr. Pressl has for his proposed dock with the
13 drawings that Mr. Frie had for his proposed dock, you can see it is
14 the same dock. It is the same pilings. The dock is going to be
15 constructed in the same place on the same pilings. There are a few
16 of them that were going to be removed by Mr. Frie; the same ones
17 are going to be removed by Mr. Pressl. He's trying to build in the
18 same place. The same thing that FERC has already said, "You can't
19 do this like this is to be done. You have got to take care and
20 remediate these environmental concerns that exist because of where
21 this is located in the back of the cove near the wetlands."

22 And so, Your Honor, there's case law that we relied upon,
23 specifically, I think the *Otwell versus Alabama Power Company* case
24 is one of those cases where the court has said, you know, you can't
25 go before FERC, not get what you want, and then turn around and

1 then file a lawsuit in state court and say, "Well, we're asserting
2 state rights. This is different. These are state law rights," and
3 try to get what you couldn't get when you were in front of FERC.
4 If you are going to appeal, you have got to do it through FERC.
5 And what they would ask for here is a ruling that would undermine
6 what FERC has set forth.

7 Now, you don't have to be the same parties that were in
8 the prior proceeding with FERC in order to be barred from bringing
9 a collateral attack. The court said, you know, you can't have a
10 corporate champion advance the claim when they weren't a party to
11 the other case and come and do it here with a collateral attack.
12 It doesn't matter. The court looks at are you trying to get the
13 same thing that you were trying to get in the other case. And
14 that's what they are trying to get here, is this ability to build
15 this dock in this location, which we would submit is a collateral
16 attack.

17 Now, they argue in their brief, Your Honor, "No, no, no.
18 Our case is about property rights. We're just talking about
19 property rights." Well, that's the same thing they did in *Otwell*,
20 the *Otwell versus Alabama Power* case. They said, "Well, we're
21 suing for our repairing property rights in state court under state
22 law." The court said, "No, that doesn't matter. It is still a
23 collateral attack. You are trying to get the" -- "what you
24 couldn't get before FERC, you are trying to get here." And so it
25 was deemed to be a collateral attack.

1 They say -- the *Halifax County versus Lever* case, which I
2 think arose from a Judge Kiser decision, they say, well, that case
3 is distinguishable because it didn't involve -- the county wasn't
4 trying to sue under state law. But they were trying to sue under
5 state law. And so we would submit that that is distinguishable.

6 They say the *Frie* case is distinguishable because, in
7 *Frie*, Mr. Frie had filed an application for a permit. They say
8 they haven't filed an application for a permit. Your Honor, I
9 would submit that doesn't make a difference. Here, as you can see
10 from those documents, they are in communications with Appalachian
11 over the course of years. "What do we need to do to get a dock?"
12 They break off the communications and then they go and run to court
13 and say, "We want the court to rule you can't stop us from building
14 the dock." So I don't think the fact that an application had been
15 filed in *Frie* really makes any distinction of difference between
16 this case, Your Honor.

17 The second reason, Your Honor, we would submit that this
18 case should be dismissed is there's this similar principle that you
19 have got to exhaust your administrative remedies before you can be
20 heard in court on one of these types of cases. And the -- Your
21 Honor, you and I addressed this very issue in the *J.W. Holdings*
22 case in 2005. That was a case where this Court's order --
23 memorandum opinion, I'm sorry, said you look to the Federal Power
24 Act to see whether exhaustion of remedies is required. "The
25 Federal Power Act is a comprehensive statutory scheme endowing FERC

1 with full regulatory authority over federal hydroelectric projects
2 and its authority is to be broadly construed. Judicial review of
3 Federal Power Act action is strictly circumscribed." That was from
4 the *J.W. Holdings* case.

5 In *J.W. Holdings*, again, Smith Mountain Lake, again,
6 flowage easements, just like the one at issue here, were at issue
7 in that case. J.W. Holdings files an application with Appalachian
8 saying, "We want a bunch of boat slips." I don't remember how many
9 it was. It was 10 years ago. I remember there were a bunch of
10 them. It was more than was allowed under the shore management
11 plan. Appalachian said, "I'm sorry. We can't give you that many
12 boat slips. We can give you what is allowed in the shoreland
13 management plan, but you can't build a marina there."

14 They didn't like that answer, so they ran off to state
15 court. I removed the case to this Court. And the issue was, then,
16 did they exhaust their administrative remedies or can they sue.
17 And this Court looked at the issue and said, "Well, they are trying
18 to get the same thing. They are trying to get a ruling that you
19 can't stop them from building boat docks. And that's the same
20 thing they were trying to get below. That's the same thing." In
21 fact, in that case they also had intervened in the shoreline
22 management plan proceedings before FERC. And this Court said, "You
23 have got to exhaust your administrative remedies."

24 Here, they have had these dealings with FERC -- or with
25 Appalachian, the Pressls have. If they are not happy with the way

1 Appalachian has treated them, what they have told them to do, they
2 can file a complaint with FERC. And, as an example, right now
3 someone has filed a complaint with FERC, complaining about how
4 Appalachian administers the shoreline management plan. And FERC is
5 reviewing it. And that is the one that was filed by CURB that we
6 talk about in our pleadings.

7 The statutes say if you file before FERC a complaint,
8 FERC investigates it, they issue a final ruling. If you are not
9 happy with that, you appeal. But that appeal doesn't come here,
10 Your Honor. It goes to the Court of Appeals, either for the
11 Federal Circuit or here it would be the Fourth Circuit. There is a
12 procedure for that. They haven't followed that procedure. But
13 they have run to state court, trying to bring this lawsuit. And,
14 Your Honor, we would say that's improper.

15 Then, now, if you get to the merits of what they are
16 asking, Your Honor, in the *Nissen* case you ruled that certain
17 arguments that were made and certain claims that were made, like
18 Appalachian's flowage easement, give them no rights to interfere
19 with *Nissen's* ability to build a dock, you ruled that was
20 implausible on its face. They are raising the same argument here
21 with the same flowage easement. Not the exact same document, but
22 the same form of flowage easement, with the same operative
23 language.

24 And, Your Honor, we would say, when you look at what they
25 are arguing, like in paragraph F, "Appalachian can't regulate the

1 size and type of dock we want to build," that's implausible on its
2 face, Your Honor. I would say you can dismiss that claim. They
3 say, "Appalachian can't regulate any" -- "that Appalachian has no
4 regulatory authority on the land below the 800 foot contour," which
5 is in the project boundary, but beyond the vested rights that the
6 landowner has to build its own structures. Your Honor, you ruled
7 in the *Nissen* case, "You don't have a right to build a dock,"
8 because Appalachian has that language in the flowage easement that
9 they can enter the property at any time -- time to time, at their
10 discretion, to remove any structures below the 800 foot contour.
11 So there's no vested right to build a dock. It is not vested
12 right. That has been negotiated away in the flowage easement.

13 You ruled, Your Honor, about the fill in the *Nissen* case.
14 You know, they are saying essentially the same thing here. You
15 can't -- they say, "Appalachian can't regulate our ability to
16 dredge, our ability" -- "how we stabilize the shoreline,
17 Appalachian has no control over that." Your Honor, as you
18 indicated in the *Nissen* case, there's language in the flowage
19 easement that Appalachian was granted -- or negotiated and acquired
20 language in the flowage easement that says the property owner can't
21 place any refuse or waste or debris or anything below the 800 foot
22 contour, no contaminating matter. So how can they say, "You have
23 got no right to stop us from dredging"? What is dredging? Digging
24 up below the 800 foot contour and pulling up mud, pulling up
25 things, stabilizing the shoreline. That's below the 800 foot

1 contour.

2 We would submit that these things, Your Honor -- these
3 claims are implausible on their face. And you have the ability, as
4 you did in the *Nissen* case, to dismiss that.

5 Paragraphs C and D, Your Honor, they essentially are
6 saying in their request for relief, "Appalachian is requiring us to
7 enter into a permit to get a boat dock. And we don't like the
8 terms of the permit, so they don't have a right to make us forced
9 to get that permit." Well, Appalachian has the right to remove any
10 structures below the 800 foot contour at their discretion at any
11 time. A boat dock is a structure.

12 If Appalachian says to them, "We'll let you have a boat
13 dock, but you have got to sign this permit under these conditions,
14 they certainly have a right to do that under the flowage easement.
15 If they have a right to remove a dock, they have a right to
16 condition what you have to sign in order to put the dock in,
17 because they have the right to remove it. And they say, "You can
18 have it, but you have got to sign this document." Certainly they
19 have the right to do that. And their license, which I'll talk
20 about a little bit later, their license provides they have the
21 right to impose permits on people.

22 So, Your Honor, we would submit that this is a collateral
23 attack that you could dismiss under the *Alabama -- Otwell versus*
24 *Alabama Power* case because of the prior *Frie* orders or you could
25 rule that they should exhaust their administrative remedies. They

1 have been in negotiations with APCO and they just walk away from
2 them. Appalachian is telling them in here, you know, "Thank you
3 for your application. Here is the information. You need to
4 revegetate the shoreline. This is what FERC was requiring." It is
5 all in there. They walk away from it.

6 I would submit, Your Honor, that you could dismiss the
7 case for lack of exhaustion of administrative remedies or, looking
8 at the merits of what they're claiming, they are implausible, based
9 on your analysis in the *Nissen* case.

10 Thank you, Your Honor.

11 THE COURT: All right.

12 MR. WANDREI: Good afternoon, Your Honor. Steve Wandrei,
13 with Radford & Wandrei, on behalf of Rick and Theresa Pressl.

14 Your Honor, in response to Mr. Pritts, he mentioned the
15 email correspondence. As I mentioned earlier, I certainly think
16 that it is in the course of negotiations, trying to avoid this very
17 situation in which we find ourselves. And based upon that, I ask
18 the Court to consider making a ruling as to those documents
19 pursuant to the Federal Rules of Evidence Rule 408.

20 That being said, Your Honor, if the Court looks at these
21 documents in their entirety, you can see that the -- it is just a
22 proposal. And it is a discussion of perhaps what might work if
23 they were to actually proceed and actually enter into and file an
24 actual application, although this --

25 THE COURT: Well, it does show what the controversy was

1 about, don't they?

2 MR. WANDREI: Excuse me?

3 THE COURT: The emails, I haven't read them, but I assume
4 they show what the controversy was about?

5 MR. WANDREI: They have, you know, some reference to some
6 of the issues related to this lawsuit. But, again, they are in the
7 form of a proposal, an attempt to try to avoid litigation, Your
8 Honor. And we would submit --

9 THE COURT: Well, but, you know, you're not talking about
10 an automobile accident. You are talking about what is contained in
11 the -- you know, about this dock; right?

12 MR. WANDREI: That's correct.

13 THE COURT: So, I mean, it just shows what the --

14 MR. WANDREI: It does have some bearing on the dispute.
15 But we would -- we would -- you know, we feel, Your Honor, that if
16 you look -- and a simple, plain reading of the rule, it relates --

17 THE COURT: Well, what is the prejudice to you? I mean,
18 it just shows that you were talking about this with Appalachian.

19 MR. WANDREI: Well, to the extent, Your Honor, that the
20 defendant is trying to characterize these as somehow consenting to
21 the jurisdiction of FERC or acknowledging that there's some need to
22 abide by the terms of the permit or the shoreline management plan.
23 Your Honor, this is a case where we're requesting, very simply, the
24 interpretation of an easement. And that easement makes no
25 reference to --

1 THE COURT: Well, do you think FERC has nothing to do
2 with it?

3 MR. WANDREI: Yes, Your Honor. FERC doesn't have
4 anything to do with this. There's no reference in the easement as
5 to any authority or any restrictions which might be imposed on the
6 Pressls' property. If taken to their logical extent, the way that
7 the defendant is interpreting those, it deprives the Pressls of the
8 advantages associated with fee simple ownership. In this case --

9 THE COURT: You say take you as a surprise? They didn't
10 know about FERC and its --

11 MR. WANDREI: Your Honor, I don't think it is a surprise,
12 but, certainly, I think, if the case were to go forward, we would
13 show that there's nothing in the land records, you know, with
14 respect to any kind of permit or anything that Mr. Frie engaged in.
15 And based on a simple reading of the flowage easement, it gives
16 them the -- you know, only -- the purpose is the right to overflow.
17 And with that specific purpose stated, they are limited in what
18 they can do.

19 And certainly, you know, with the right to overflow and
20 the right to have a power station and dam downstream, they are
21 -- there's nothing with regards to a dock or removing vegetation
22 that has any applicability to APCO's license.

23 In response to the argument with respect to the *Otwell*
24 case as somehow being controlling in this matter, Your Honor, the
25 plaintiffs in that case, different than the plaintiffs here, are

1 specifically asking, where they had alleged -- you know, they had
2 alleged in FERC proceedings, they are specifically asking the court
3 in those proceedings to regulate the amount of water in the lake,
4 to regulate flow, and, basically, to allow a certain amount of
5 water to remain in the lake while they are generating properties.
6 They also had -- or they wanted certain restrictions as to some of
7 the other -- the power plants that were involved in the facility.

8 We're not necessarily objecting to the fact that APCO has
9 the right to generate power, to maintain a dam. What we are
10 objecting to, Your Honor, is the fact that the flowage easement
11 clearly states that they have the right to access the waters for
12 recreational purposes. I think, as you think about that, as a
13 logical extension of that, that includes, you know, the right to
14 build a dock. You know, recreational purposes, fishing --

15 THE COURT: Appalachian, of course, says they have the
16 right to remove any structure.

17 MR. WANDREI: Your Honor, I disagree with that, because a
18 dock is a structure related to the access to the water. There's
19 nothing that prohibits the construction of wharfs or piers or docks
20 to access the water for recreational purposes.

21 THE COURT: You say they have no right to remove a
22 structure?

23 MR. WANDREI: They have the right to remove structures,
24 with the limitations to those structures which are used to access
25 the lake for recreational purposes, such as a dock or pier.

1 THE COURT: Does it say that?

2 MR. WANDREI: It does not say that, Your Honor --

3 THE COURT: What does it say about removing structures?

4 MR. WANDREI: It says they are allowed to remove
5 structures, Your Honor. But I think that, when you consider the
6 state law of easements here in the Commonwealth of Virginia, that
7 implies, you know, what is reasonably necessary to enjoy that.

8 THE COURT: That's, you know, interesting, but where do
9 you get that authority if it says they can remove structures? I
10 mean, what structure -- what would be at that, other than a dock?

11 MR. WANDREI: Well, Your Honor, I think that when you
12 consider the terms of the original license that was granted to
13 Appalachian, part of the understanding was the removal of
14 structures and trees and debris so that they could clear the lake
15 before filling it up. It wasn't to allow them to have this
16 secondary role of having any control over what somebody does with
17 their property.

18 THE COURT: Is that in the agreement? Is that in the
19 lease? You say that, and maybe it makes a lot of sense. But you
20 are bound by the plain language of an easement -- of the agreement,
21 aren't you?

22 MR. WANDREI: Well, Your Honor, I think if the Court
23 considers the state law claims in this case, I think the Court can
24 see that, based upon the law of easements as it applies to this
25 case and as interpreted by the Supreme Court of Virginia, while

1 this particular issue has not been addressed with respect to it,
2 but certainly the Supreme Court of Virginia has found in the case
3 of *Smith Mountain Yacht Club versus Ramaker*, which is cited in our
4 brief, that there is some value in fee simple ownership; that there
5 is, you know, some -- there are some rights subject to the flowage
6 easement. And there has been no delineation of those by the
7 Supreme Court of Virginia.

8 Your Honor, we believe and we would feel that the law
9 allows for, you know, those things that are reasonably necessary
10 to, you know, use and enjoy the easement. There's no limitations
11 as to how the Pressls or anyone else that is subject to this
12 flowage easement can access the property. It doesn't limit them
13 to, you know, just simply wading in there --

14 THE COURT: They can go -- they can build an easement if
15 they get permission from Appalachian. They can build -- they can
16 build a dock; right?

17 MR. WANDREI: Well, Your Honor, the permission that they
18 are having to require and what they are asking for basically takes
19 away the value of having an easement where, as the owner of a
20 servient estate, you have the right to --

21 THE COURT: No. If you -- if your neighbor has a right
22 to tell them what you build, but says, "If you build" -- "I'll give
23 you permission to build something," and they -- what you can build
24 will accomplish a purpose, why wouldn't that -- why does that
25 destroy all of your property rights?

1 MR. WANDREI: Well, Your Honor, if we have to enter into
2 a permit that basically requires us to relinquish the value of an
3 easement, to enter into a revocable license which can be revoked at
4 any time, one, you know, by doing so, it doesn't transfer with
5 respect to when the property is transferred to run with the land.

6 And so, based on that, Your Honor, we feel that the
7 -- that the -- that the language regarding the removal of buildings
8 and structures is limited, especially considering the purpose of
9 that language at the time of the grant. And that's what the Court
10 would have to look to in construing this easement, which is all
11 that we're asking the Court to do.

12 And with respect, Your Honor, to the --

13 THE COURT: But then you could -- you could do something
14 that is in violation of what FERC is requiring of Appalachian.

15 MR. WANDREI: Well, there's nothing that requires a third
16 party to be compliant with the terms of Appalachian's license.
17 They could have very easily -- these flowage easements were
18 prepared by Appalachian as sort of a take-it-or-leave-it thing.
19 The only consideration that was given was the understanding at the
20 time --

21 THE COURT: Well, nobody had to buy the land, did they?
22 I mean, they weren't under any duress -- I mean, I remember when
23 that lake was built. And I don't recall anybody being required to
24 buy the land.

25 MR. WANDREI: Well, certainly, Your Honor, there were

1 some situations where Appalachian acquired the rights and fee, or,
2 you know, as in this case, there's a flowage easement. But, Your
3 Honor, we would simply state that the sole consideration, if you
4 look at the terms of the easement, was basically the rights that
5 were granted to my clients and their predecessors in title, which
6 is the right to use the -- you know, go beyond the 800 foot contour
7 to access the waters for recreational purposes. I don't think it
8 was intended simply that you could just wade out there or have a
9 boat. This is a very large body of water which we are talking
10 about. And if you were to do that, you would certainly limit the
11 full use and enjoyment of someone being able to enjoy the entire
12 lake.

13 THE COURT: Well, would Appalachian be in violation of
14 its obligations to -- under FERC to -- if they allowed your dock to
15 stand the way you want to build it?

16 MR. WANDREI: Your Honor, the -- FERC, you know, can't do
17 anything with respect to property rights --

18 THE COURT: No. But can you answer my question? Would
19 Appalachian be in violation of its duties to FERC if it allowed
20 your dock to stand?

21 MR. WANDREI: Well, Your Honor, if Appalachian is in
22 violation of its rights or its license with FERC, then it doesn't
23 have the necessary property rights to enforce that license. And,
24 Your Honor, if they don't have the necessary rights to enforce that
25 license, which we feel that the easement does not grant them, then,

1 you know, it is their responsibility.

2 FERC has said, in the exhibits that we have attached to
3 both our memorandum of law in response to the motion to dismiss and
4 in our other motions or other briefs with respect to the motion to
5 remand, that we have -- we have said that -- and FERC has said,
6 rather, excuse me, that FERC doesn't get involved in determining or
7 making any kind of determination as to property rights. Those are
8 the responsibility of the licensee, in this case Appalachian, to
9 obtain those rights. And if the license -- requirements of the
10 license change, then FERC is -- oh, rather, excuse me, Appalachian
11 is required to obtain the additional rights that are necessary to
12 enforce that license.

13 And, Your Honor, without -- you know, basically what they
14 are trying to do through the occupancy and use permit is basically
15 to rewrite the terms of an easement which is plain and clear on its
16 face.

17 The -- Appalachian is saying that --

18 THE COURT: You say -- the easement, you say it is clear
19 and plain on its face, but then you -- when I asked you if
20 Appalachian didn't have the right to remove the structures, you
21 said you had to sort of infer that from --

22 MR. WANDREI: Well, Your Honor, with respect -- maybe
23 -- you know, let me maybe back up a bit.

24 I think that it is implied that you have the right to
25 -- you know, to access the impounded waters, and that includes the

1 construction of a dock, a boat, or a wharf -- excuse me, a dock, a
2 pier, or a wharf. Not only are you allowed those express terms
3 which are allowed under the grant, but also those things which can
4 reasonably be inferred to accomplish the grant's purpose.

5 That's outlined in the state law cases that we have
6 cited, you know, in our response to the motion to dismiss,
7 particularly the *Anderson versus Delore* case, which says where the
8 scope of the easement is clearly stated, which it is in this case,
9 then you can't go beyond that scope to try to enforce other things.
10 The purpose of the easement is to overflow and flood solely for the
11 purpose of operating a dam downstream. Certainly we know that
12 having a dock does not interfere with those sorts -- those rights.
13 Appalachian can clearly generate power without -- you know, without
14 any problems by having boat docks or other similar structures
15 constructed on the lake.

16 THE COURT: Well, is FERC requiring of Appalachian
17 something it has no right to require of Appalachian?

18 MR. WANDREI: It has the right to require it of
19 Appalachian, Your Honor. But it is Appalachian's responsibility to
20 obtain the necessary rights in which to do so. And, Your Honor,
21 our position is that the --

22 THE COURT: I understand that. But I'm just asking: Is
23 FERC going beyond its authority when it requires Appalachian
24 -- tells Appalachian that they can -- should not allow you to do
25 what they are doing -- what you want to do?

1 MR. WANDREI: FERC doesn't have the ability to convey
2 property rights, Your Honor.

3 THE COURT: Well, I know that. But are they asking
4 Appalachian to do something they have no right of Appalachian?

5 MR. WANDREI: They had the right to require, you know,
6 reasonable -- you know, to regulate what Appalachian does. But,
7 Your Honor, the requirement is that Appalachian has the necessary
8 property right to do so.

9 THE COURT: Well, okay, I'm with you on that.
10 Appalachian has to have acquired from your clients the right to do
11 what it is doing. But I'm just asking you: Is FERC now asking
12 Appalachian to do something that is unreasonable, has nothing to do
13 with power generation and that sort of thing? Are they trying to
14 impose on Appalachian something that is not necessary?

15 MR. WANDREI: Well, Your Honor, to the extent that -- you
16 know, to the extent that it doesn't have anything to do with, you
17 know, the generation of power, you know, the transmission of power
18 or anything like that, you know, certainly I think that the
19 argument could be made that it is an unreasonable request to
20 request of them. But that's not really the issue in this case.
21 The issue is --

22 THE COURT: I think I know what the issues are. I have
23 seen enough of these cases. I know they have to -- they have to
24 -- Appalachian has to acquire from your clients the rights to do
25 what it is insisting on doing with the property.

1 MR. WANDREI: Correct.

2 THE COURT: And the question is do -- does Appalachian
3 have that power under the --

4 MR. WANDREI: If FERC is making such a request of
5 Appalachian, it is the responsibility of Appalachian to get the
6 necessary rights.

7 THE COURT: Okay. When Mr. Frie applied for a permit,
8 your predecessor in title, went to FERC and tried to get what he
9 wanted there, and did not, is that in any way binding on your
10 client?

11 MR. WANDREI: No, sir, because -- no, Your Honor, because
12 Mr. Frie agreed to enter into a license with Appalachian, as shown
13 in the attachments both to the reply in regards to their motion to
14 remand and in the brief in opposition to the motion to dismiss.
15 Basically, he agreed to a revocable license. And when -- as the
16 plaintiff has stated today before the Court, he didn't comply with
17 those terms of the license. And thus, based on the terms of the
18 license he failed to comply with, that was revoked. And being a
19 license, it is not binding, you know, upon my clients, who weren't
20 a party to that license.

21 And, furthermore, Your Honor, there's nothing in the land
22 records which shows -- typically these documents are recorded. But
23 in this case they weren't recorded in the land records in Franklin
24 County. So there's no notice to anyone who goes and does a title
25 examination of Mr. and Mrs. Pressl's property that a permit was

1 issued to Frie or any of the other predecessors in title.

2 THE COURT: Okay.

3 MR. WANDREI: The plaintiffs also assert that there is
4 not a justiciable -- going to the basis for relief, that there's
5 not a justiciable controversy. Certainly, as the Court can see by
6 virtue of the -- and Appalachian acknowledges this in its
7 memorandum of law in opposition to the motion to dismiss, that
8 there is an actual controversy between the parties, which is
9 definite. That's on pages 11 and 12 of their memorandum of law.

10 Certainly, they can't have it both ways when arguing with
11 respect to the motion to remand and then saying again in the motion
12 to dismiss, well, there's no justiciable controversy. They
13 acknowledge that in their pleadings. And, certainly, we think that
14 the -- there's -- you know, that that clearly indicates that
15 there's -- you know, certainly the requests for relief are valid
16 between adverse parties who have, you know, adverse positions. And
17 a determination by a court of the property rights between these
18 parties, the obligations of the owner of the dominant estate to the
19 servient estate and what the owner of the servient estate can do
20 with respect to those activities which are not inconsistent with
21 the easement that is granted to Appalachian, you know, can
22 -- certainly there's some need for interpretation there, Your
23 Honor. Of course, we feel that that interpretation is best left to
24 a state court, as the issues surrounding these claims are related
25 to state law claims of easement. There's no federal issues which

1 are raised.

2 It is clear that the occupancy and use permit, you know,
3 from its terms, requires the Pressls, or any other party, rather,
4 to surrender a valuable property right, in this case a fee simple
5 ownership and those benefits which attach thereto of owning a half
6 an acre below the 800 foot contour.

7 And there's -- it is certainly the fallacy of FERC in
8 some of its determinations, while not necessary -- and while not
9 necessarily relating to or surrounding these claims, you know,
10 FERC, you know, assumes -- I mean, its orders, which have been
11 submitted to the Court, that Appalachian, in fact, even owns the
12 property, which is contrary to doing so. So FERC, even if they
13 were able to confer property rights, certainly they don't have a
14 good track record of determining who has what.

15 And there's certainly nothing -- and as Mr. Pritts
16 mentioned here, one of the reasons for the denial of Mr. Frie's
17 request was that he had cut, you know, vegetation along the 800
18 foot contour. Well, that's a right that he would have as well.
19 There's nothing that says, in the easement, that that is exclusive
20 to Appalachian. Just because the grantors -- my clients'
21 predecessors in title granted that right to Appalachian, it didn't
22 mean that they didn't relinquish that right themselves.

23 And certainly, Your Honor, there is nothing in the
24 flowage easement which gives any notice of any kind of regulatory
25 scheme or controls that APCO may make over my client's property.

1 There's nothing in the flowage easement which relates to
2 specifically prohibiting dredging and those activities which don't
3 interfere with the operation of a dam and power plant. And the
4 purpose of the easement is clearly stated.

5 And, Your Honor, I don't know if I --

6 THE COURT: You say it doesn't interfere. I don't know
7 that. But how do you know it doesn't? In the state, if everybody
8 can do certain things, why doesn't it --

9 MR. WANDREI: Well, you know, if everybody -- if
10 everybody is able to build a dock, it certainly doesn't interfere
11 with their right to have a dam.

12 THE COURT: Well, it depends. If everybody built certain
13 docks -- I mean, if you had -- you could have all sorts of things
14 out there, if they didn't meet a certain standard, like if --

15 MR. WANDREI: I mean, certainly, Your Honor, there are
16 -- and APCO acknowledges that there are certainly building codes
17 which would apply to some of these things. But the fact that APCO
18 has the -- or alleges that it has the authority to make these
19 controls pursuant to the flowage easement is just not what was
20 intended by the parties at the time of the grant. There's nothing
21 to give, you know, my clients --

22 THE COURT: It bothers me that you say it wasn't intended
23 by the parties, because the language is what is important. And,
24 you know, you get into what was intended; the question is what does
25 the plain language say.

1 MR. WANDREI: Well, the plain language allows my clients
2 to access the lake for recreational purposes.

3 THE COURT: Uh-huh.

4 MR. WANDREI: And -- and our understanding of that and
5 our belief would be that that includes the right to build a dock
6 and to do those things which don't interfere with Appalachian's --

7 THE COURT: Okay. But the plain language says you have
8 the right to access, but it doesn't say -- but it gives Appalachian
9 the right to remove structures; right?

10 MR. WANDREI: You know, again, Your Honor, it does allow
11 Appalachian to remove those structures. But to the extent that
12 those structures are used to access the lake for recreational
13 purposes, I would say that that's --

14 THE COURT: But that's the problem here. You are
15 -- Appalachian wants it its way and you want it your way.

16 MR. WANDREI: And that's why there's a controversy here,
17 Your Honor.

18 THE COURT: And it may not be explicit either way.

19 MR. WANDREI: Well, I think that certainly the inference
20 -- there's a reasonable inference that a dock is -- would be a
21 permissible recreational use, so that one could dock a boat for,
22 you know, for fishing, to have swimming, and those sorts of things.
23 So that would be the purpose of -- and the understanding with
24 having a dock or a wharf, to allow those reasonable and certainly
25 reasonably anticipated rights for recreational use.

1 Those are all of my arguments, unless the Court has any
2 other questions with respect to our response to the motion to
3 dismiss.

4 THE COURT: Okay.

5 MR. PRITTS: Your Honor, briefly, let me touch on a
6 couple of the points raised.

7 About the documents, this attempt to try to say these
8 documents, you shouldn't consider them -- these are the emails that
9 I handed up to the Court -- I direct the Court to paragraph 19 of
10 their complaint. Here is where they raised the issue in paragraph
11 19 of the complaint. The "plaintiffs have attempted unsuccessfully
12 for almost three years to use the property for beneficial"
13 properties (*sic*). They talk in here about communication, "APCO has
14 made arbitrary demands upon the Pressls." They raised the issue,
15 Your Honor. They brought it up. It is in their complaint. It is
16 right there, paragraphs 19 and 20.

17 There you can see the documents that go over a three-year
18 period. You know, they are not settlement negotiations. There is
19 no discussion in there about settlement. What they are, are "Thank
20 you for meeting with me. What do I need to do to get a dock, to
21 deal with the issues FERC had raised with Frie?" "Well, here is
22 what you have to do. You need to renovate the property. You need
23 to do these things. These were FERC's concerns. Let's get
24 everything in order before we go back to FERC so we can get it done
25 right this time."

1 So, Your Honor, I would submit that they raised the
2 issue. It is not a settlement negotiation anyway. So that issue,
3 I think, is a nonissue.

4 Number two, you asked the question, didn't they know what
5 they were buying. And I would say, Your Honor, they did know what
6 they were buying. If you look at the FERC order, the pilings that
7 were sitting there on the unfinished dock were there. The same
8 pilings that sit there now were the ones that were put in in 2005.
9 So you buy a piece of property, it has got unfinished pilings on
10 there, you go, like, "Well, what is going on here? Can I build a
11 dock? Can I not build a dock? Why is this dock unfinished?"

12 You know, they say, well, the permit that was issued to
13 Mr. Frie wasn't recorded. Well, Mr. Frie's permit wasn't approved
14 because Appalachian didn't approve it. If it would have been
15 approved, it would have been recorded.

16 But what was recorded, more importantly, Your Honor, was
17 the flowage easement. And there's no dispute in this case the
18 flowage easement is recorded. It is in their chain of title. If
19 they read it, they can see what it says. And it clearly says they
20 can't do this.

21 Your Honor, what happens is Smith Mountain Lake is not a
22 straight line. It has got lots of backs and coves and twists and
23 turns. And I have been doing these cases for years. And when my
24 phone rings, when Appalachian calls me, one of the first things I
25 say is, "Well, where is this property?" Well, the ones that they

1 call me about are the ones that get in dispute, they are in the
2 back of these coves, Your Honor. People buy these properties in
3 the back of these coves. There's -- it is hard to fit the docks in
4 there. You don't have much shoreline depth. The docks get too
5 close together with the neighbor's docks and all of that. I never
6 get called on the ones out on the points or anything like that.
7 It is the ones in the back, in the cove. You pay less money for
8 them than the ones that are out front. And you get less, because
9 of where it is located, than the ones that are out on the point.
10 And this is another one of those cases in the back of the cove.

11 Your Honor, several times they have said they have a
12 right under the flowage easement to access the property for
13 recreational purposes. Let me just quote, Your Honor, from your
14 ruling in the *Nissen* case, your order -- memorandum opinion, sorry,
15 dated April 24th. You said -- you said, "One, the right to cross
16 the land to reach impounded waters for recreational purposes," you
17 know, that language does not affect Appalachian's right to remove
18 structures below the 800 foot contour. "Giving these words their
19 natural and ordinary meaning, the right to cross the land to access
20 the lake for recreational purposes" -- that is what they are
21 talking about, the right to cross for recreational purposes --
22 "does not carry with it a right to build structures on the land
23 even if those structures are in furtherance of recreational use of
24 the waters." That's what this case is about.

25 It is implausible, the type of arguments they are making

1 here. The argument, well, a dock is not going to interfere with
2 the operation of the dam, so they should be allowed to have it,
3 Your Honor, let me read from your same memorandum opinion:
4 "There's no language in the instrument limiting APCO's ability to
5 exercise this right to situations where the structures to be
6 removed are interfering with the impounding of waters or with the
7 operation of Smith Mountain Lake Hydroelectric Dam. Thus I reject
8 defendants' contention that APCO may only exercise the rights
9 granted to it by the flowage easement when necessary to ensure that
10 waters may be impounded or that the operation of the dam is not
11 interfered with."

12 THE COURT: Well, does Appalachian have any limitation of
13 reasonableness?

14 MR. PRITTS: On what it allows and it doesn't allow?

15 THE COURT: On removing a dock?

16 MR. PRITTS: Well, Your Honor, I think the way
17 Appalachian applies it is within the parameters of the shoreline
18 management plan.

19 Your Honor, if you look at the fourth document that I
20 handed up to you. The first three were emails. The fourth page is
21 excerpts from Appalachian's license. Now, this was an attachment
22 we had to pleading number 15 in this case. And these are pages 59,
23 60, and 61 of the license. And I have highlighted some language in
24 there.

25 And it tells Appalachian, if you look on the second page,

1 article 15 (*sic*) -- this is Appalachian's license -- "In accordance
2 with the provisions of this article, the licensee shall have the
3 authority to grant permission for certain types of use and
4 occupancy of project lands and waters and to convey certain
5 interests in project lands and water for certain types of use and
6 occupancy without FERC approval." They have -- may exercise this
7 authority "only if the proposed use is consistent with the purposes
8 of protecting and enhancing the scenic, recreational, and other
9 environmental values of the project."

10 They go on, on the next page, Your Honor, and they say,
11 paragraph (b), "The types of use and occupancy of project lands and
12 waters for which the licensee" -- that's APCO -- "may grant
13 permission without prior FERC approval are: Landscape plantings,
14 piers, landings, boat docks" -- like this -- "or similar structures
15 and facilities, as determined under the commission-approved
16 shoreline management plan."

17 So what they are saying is "You don't need to come and
18 bug us in Washington D.C. You can grant permission under your
19 license as long as it is under the approved shoreline management
20 plan." And so the shoreline management plan -- and as you can see
21 on the first page, this shoreline management plan was drafted and
22 then it was reviewed with consultation from all kinds of people.
23 Appalachian didn't just write it themselves.

24 It was done with consultation with the department of
25 -- Virginia Department of Conservation and Recreation, Virginia

1 Department of Environmental Quality, Virginia Department of Game
2 and Inland Fisheries, Virginia Department of Historic Resources,
3 the Department of Health, the Smith Mountain Lake Association, the
4 Leesville Lake Association, their Tri-County Licensing Committee,
5 Bedford County, Franklin County, Pittsylvania County, Campbell
6 County, Turner's Building. There were all of these different
7 parties that they consulted with to come up with the shoreline
8 management plan.

9 And the shoreline management plan sets forth how
10 Appalachian enforces the standards that they enforce under the
11 flowage easement, because this is what FERC says they can do. It
12 limits, in the back of a cove, if you are trying to dredge
13 wetlands. If you are trying to build on wetlands, they are a
14 sensitive area. It limits where you -- if your dock sticks too far
15 out into the cove, more than a third of the cove, and then it
16 becomes a navigational hazard. So you get a third, the guy on the
17 other side gets a third, you leave a third in the middle. Without
18 that, people build docks that are too long; people run their boats
19 into the docks; it is a problem.

20 It limits your docks getting too close to your neighbor's
21 dock. I shouldn't be allowed to build a dock that runs in front of
22 this person's property next to me. There should be a setback. It
23 set all of these requirements. It limits the heights of the dock
24 so my dock isn't blocking their view in this direction. It does
25 the best it can to try to balance all of those factors.

1 And it has been done, approved by FERC, after drafting
2 and submitted with all of these different comments from all of
3 these different people. Does everybody like every portion of it?
4 No. Some people want it to say something else. But it is the best
5 plan that is out there. And it is what Appalachian has to follow
6 when they -- it is part of their license. This is part of the
7 license for them to operate this project.

8 So, Your Honor, I would submit that there are standards
9 that Appalachian applies here. And they are not arbitrarily and
10 capriciously saying they can't ever --

11 THE COURT: Well, you are saying they are not arbitrary
12 and to comply with the shoreline management plan to make those
13 demands might be evidence of reasonableness. But as I understand
14 the plaintiffs' position is Appalachian did not acquire --

15 MR. PRITTS: Did not acquire --

16 THE COURT: -- the easement or property rights such as to
17 make that decision.

18 MR. PRITTS: Right. And, Your Honor, I would submit that
19 the claims they are making, as I was talking about a little
20 earlier, are not plausible on their face and should be dismissed.
21 For example, the claim that a right to cross the property to access
22 the water they say is a right to build a dock, that is not
23 plausible. The right to say that we can't require them to have a
24 permit -- to have a permit -- enter into a permit, that's not
25 plausible. The right to say that they can -- we can't regulate how

1 they stabilize the shoreline -- stabilizing the shoreline, that's
2 putting things below the 800 foot contour -- that is not plausible.
3 It is our position that those argument are not plausible.

4 This case is similar to the *Nissen* case. This case is
5 similar to other cases that have come before the Court. And the
6 Court has always ruled in Appalachian's flowage easements have been
7 sufficient. There were -- a long-in-effort case, Judge Turk,
8 several years ago, he ruled -- people were trying to put campers
9 right on the shoreline, below the 800 foot contour. He ruled they
10 had to remove them. And other cases, the *Arthur's* case, where
11 Judge Urbanski ruled things had to be removed. So there's numerous
12 cases where this has been upheld, Your Honor.

13 I would say, again, though, what they are trying to do is
14 say -- this is a property rights argument. But what they are
15 trying to do is get underneath and undermine the FERC orders in the
16 *Frie* case. And it should be dismissed.

17 Appalachian would be in violation of its duties to FERC
18 to allow this dock where it is under the circumstances right now,
19 based on *Frie*. But that doesn't mean it is not something that they
20 can't work out a solution at some point. I mean, if FERC would say
21 that Mr. Pressl could have a dock, Appalachian would be fine with
22 that. If it would be okay with FERC, it would be okay with
23 Appalachian's shoreline management plan. But that's not the
24 position we are in right now.

25 THE COURT: Does Appalachian have any rights over the

1 property that are not connected with producing electricity?

2 MR. PRITTS: Well, Your Honor, the rights --

3 THE COURT: Any duties to the landowners themselves?

4 MR. PRITTS: To the landowners?

5 THE COURT: Well, I mean, Appalachian -- my recollection
6 is not too great, But I thought when Appalachian either acquired
7 all of the land or the easements around --

8 MR. PRITTS: That's correct, Your Honor. For Smith
9 Mountain Lake, they either own the land -- this is the land below
10 the 800 foot contour. And that's the project down there. They
11 either own the land in fee or they have a flowage easement that
12 regulates what can be done below the 800 foot contour.

13 This case, and there's no dispute in this case, it is a
14 flowage easement case. There is a flowage easement. And it
15 regulates what can be removed, and what Appalachian can remove is
16 any structures, improvements, etc., below the 800 foot contour,
17 limits them what they can't -- what refuse and things like that --

18 THE COURT: Does Appalachian have any duty to see that
19 there is any type of same sort of development and --

20 MR. PRITTS: I'm -- I don't know if I understood --

21 THE COURT: That it is good development of the properties
22 around the lake? I mean, meets some sort of zoning or --

23 MR. PRITTS: Yeah. The shoreline classifications set up
24 around were done essentially to follow the upland classifications.
25 So, for example, Hales Ford Bridge, where the bridge goes across

1 the lake, there's all the commercial properties there, that part of
2 the shoreline was zoned commercial. So commercial docks can be put
3 there, bigger things, marinas. There were parts of it that were
4 zoned -- if it was single family residential, that part of the
5 shoreline would be classified as single family residential, so the
6 types of docks there would comply with the type of upland uses that
7 are there.

8 I mean, Appalachian does have obligations under its
9 license to FERC, you know, that if they are going to allow people
10 to have occupancy of the project lands, which is the land below the
11 800, they have got to make sure that that is within -- consistent
12 with the purposes of protecting and enhancing the scenic,
13 recreational, and other environmental values --

14 THE COURT: That comes under FERC.

15 MR. PRITTS: Pardon me?

16 THE COURT: That's under FERC.

17 MR. PRITTS: Correct.

18 THE COURT: All right. Are there any other duties other
19 than the duties it owes to FERC?

20 MR. PRITTS: Well, it -- the duties --

21 THE COURT: Well, I mean, you know, like if you didn't
22 have FERC, but Appalachian and the control it has under the terms
23 of the deeds and leases and easements, could FERC -- would
24 Appalachian have any problem if the dock on one side of the cove
25 extended until it got so close to the dock on the other side that

1 boats couldn't pass up and down the cove?

2 MR. PRITTS: Well, I guess if the question --

3 THE COURT: Would that be any problem to Appalachian?

4 MR. PRITTS: Well, I think -- you know, that's a
5 question, Your Honor, that has not come up before. I would say,
6 doing my best to answer that question, without the underlying
7 obligations to FERC, does that -- would Appalachian put a limit on
8 docks on this lake? I think they would, Your Honor. They would
9 try -- they wouldn't want things that would interfere with their
10 operation of the project, their ability to flood where they need to
11 flood.

12 There's times -- I mean, it is -- there are times when
13 the water gets up, and water has got to be held. You can't let all
14 of the water out and flood downstream in Altavista or whatever.
15 You have got to keep water in. And you have got to make sure you
16 have got room to do that. There are issues that are involved
17 there.

18 You want to make sure things aren't washing into -- you
19 know, things aren't stored on the shoreline on properties and wash
20 into the project, you know, and cause a problem and a navigational
21 hazard. There's all kinds of duties.

22 You know, I don't know. Appalachian has never had to sit
23 down, I think, to my knowledge, and come up with a list of
24 requirements they would do without what FERC has told them to do.

25 But for purposes of this case, Your Honor, I would submit

1 that, you know, the FERC license sets the standard of what
2 Appalachian can allow and not allow in terms of construction on the
3 shoreline. And Appalachian has sufficient land rights to control
4 that.

5 Your Honor, I think the -- you focused on the plain
6 language of the easement. And I think that that is controlling
7 here.

8 Let me just say about -- there's one last argument. The
9 argument is that the terms and conditions of the permit -- they are
10 complaining about the permit. They say the permit we're asking
11 them to sign would interfere with their flowage easement. And they
12 have the permit attached to their complaint, Your Honor. It is
13 Exhibit G, the last exhibit to the complaint. And the last page of
14 Exhibit G are the terms and conditions for the permit. And it
15 says, paragraph 23, "Where applicable, the terms of the flowage
16 right and easement deed that apply to the permitted facility are
17 incorporated here by reference. The terms and provisions of the
18 easement" -- that's the flowage easement -- "shall control wherever
19 they are in conflict with this permit."

20 So this language says if there's a flowage easement --
21 you sign this permit, if there's a flowage easement, if there's a
22 conflict between the two, the flowage easement controls. So I
23 don't understand that argument exactly that they are raising.

24 Your Honor, we would ask the Court to dismiss the
25 complaint. Thank you.

1 THE COURT: All right. Just a minute. Now, you were
2 reading that from where?

3 MR. PRITTS: Your Honor, that was in the complaint,
4 Exhibit G, on page -- Exhibit G, as they said, was the sample
5 permit. Okay?

6 There are four -- the complaint is part of the notice of
7 removal, I guess. It is kind of buried in there because of how
8 this case ended here. But there's four pages for the permit. And
9 then there's Exhibit B, the terms and conditions of the permit.
10 And there's four pages of that. And the last page of that, the
11 last paragraph, it is paragraph 23. And that's where I got that
12 language from.

13 Thank you, Your Honor.

14 THE COURT: All right.

15 All right. Mr. Wandrei, you filed a motion to remand --

16 MR. WANDREI: Yes, sir. And Mr. Walsh is going to argue
17 that.

18 THE COURT: Okay.

19 MR. WALSH: Good afternoon, Your Honor.

20 THE COURT: Good afternoon.

21 MR. WALSH: May it please the Court. My name is Ryan
22 Walsh. And I represent the Pressls in this motion to remand.

23 This case is about one thing. It is about interpreting
24 this document, the flowage easement. It is not about interpreting
25 a FERC license; it is not about interpreting an SMP; and it is not

1 about interpreting --

2 THE COURT: Well, if the FERC license is necessary to the
3 resolution of the case --

4 MR. WALSH: We would say that it is not, Your Honor.

5 THE COURT: I know you say it is not. But what if it is?
6 Then it should not be remanded; right?

7 MR. WALSH: In --

8 THE COURT: You would agree that the Court couldn't
9 remand -- should not remand the case if the FERC is -- considering
10 the FERC as necessary to resolve the case?

11 MR. WALSH: I'm not entirely sure if I understand what
12 you mean, Your Honor. I -- there's nothing in here indicating that
13 FERC would be required to -- the FERC license would be required --

14 THE COURT: You heard the argument --

15 MR. WALSH: Yes, Your Honor.

16 THE COURT: -- that was going on. Now, if Appalachian is
17 right, it can't be sent back to state court, can it?

18 MR. WALSH: If FERC has the necessary property rights to
19 enforce it --

20 THE COURT: No. If Appalachian's position in this
21 case -- FERC doesn't claim any property rights, I don't believe.

22 MR. WALSH: Appalachian Power is claiming that it has the
23 certain property rights to enforce its FERC license, but that's for
24 Appalachian Power to be able to --

25 THE COURT: Okay. But if Appalachian is right on the

1 first issue, the case can't go back to the state court, can it?

2 MR. WALSH: I would say that we're looking at it upside
3 down, Your Honor. I think first we need to see if there's subject
4 matter jurisdiction over this case, because if there's not, then we
5 can't rule on the motion to dismiss in the first place. So rather
6 than me -- we have to look first to see if this Court has subject
7 matter jurisdiction. If it does, then by all means we can go ahead
8 and rule on this motion to dismiss. But looking to the motion to
9 dismiss to determine whether we have subject matter jurisdiction,
10 that kind of turns this on its head.

11 So, Your Honor, the -- I want to discuss a few things
12 before I jump into my argument, basically establish regulations and
13 rules pertaining to FERC orders, FERC licenses, and property
14 rights.

15 Here APCO's interest in plaintiffs' property arises
16 solely from the flowage easement, does not arise from a FERC
17 license or SMP, as APCO would want you to believe, because the FERC
18 license cannot prevent, alter, or modify property rights. The
19 reason this is important is because APCO cannot enforce its FERC
20 license over lands that it does not hold the requisite property
21 rights. But such rights aren't granted in the flowage easement.
22 There's nothing in the flowage easement stating this is subject to
23 the Federal Power Act, this is subject to Appalachian Power's FERC
24 license, this is subject to SMP. There's nothing in there stating
25 that.

1 This Court, in the *Nissen* case, went so far to recognize
2 that by indicating that property rights -- the ability -- APCO's
3 ability to regulate lands is limited to its rights under the
4 flowage easement and not under the FERC license. That was in the
5 April 24th, 2015, decision.

6 FERC itself has noted in several of its orders and
7 licenses that when there are disputes over property rights that may
8 affect the FERC licensee's ability to -- obligation to enforce its
9 license that those property rights need to be taken up in state
10 court.

11 The state court makes a determination regarding property
12 rights that adversely affect FERC's licensee's obligation to
13 enforce its license. It does not prevent the FERC licensee from
14 asserts its rights. And it doesn't nullify or alter or modify the
15 rights. Rather, as the statute, 16 U.S.C. section 814, states that
16 if it is determined that APCO does not have the necessary property
17 rights to accomplish all of the goals of its FERC license or the
18 SMP, it needs to undertake eminent domain. Therefore, contrary to
19 APCO's argument, if it is found by a court that they don't contain
20 these requisite property rights, this by no means undermines FERC.
21 In fact, this would be an APCO undermining FERC's order.

22 And that wouldn't even be for this Court to decide, or
23 anyone else, for this matter, because it is our position that we
24 don't know if they are violating the FERC license. Maybe they are;
25 maybe they are not. But that's not for us to decide. That's for

1 FERC to decide.

2 Now, with those principles established, I want to jump
3 into the arguments -- our arguments in this case.

4 For federal jurisdiction to exist over a case, it needs
5 to be -- the federal question needs to be presented on the face of
6 the pleadings. This was established in *Caterpillar v. Williams*, a
7 Supreme Court case in 1987.

8 A defendant cannot merely attempt to inject a federal
9 question into a state law claim to transform it into one --

10 THE COURT: Well, they are coming under the exception.
11 That's what -- they are claiming the exception. Appalachian -- the
12 exception is stated in *Columbia Gas Transmission Corp.*

13 And that's what I was getting to in my first question to
14 you.

15 MR. WALSH: If you can indulge me, Your Honor, I do know
16 where that is located --

17 THE COURT: Well, it says whether -- the complaint
18 alleges a claim arising under federal law, that the declaratory
19 judgment -- that the defendant could affirmatively bring against
20 the declaratory judgment plaintiff. And that's an exception to
21 what you were just reading.

22 MR. WALSH: Well, Your Honor, they wouldn't be able to do
23 that in this case.

24 THE COURT: Well, that's what they are doing -- that's
25 what they are trying to do.

1 MR. WALSH: The Pressls?

2 THE COURT: That's why if he is right in the first
3 instance, then you can't prevail -- you can't send the case back --

4 MR. WALSH: The Pressls are absolutely not doing that, in
5 our opinion, Your Honor. They are not attempting to bring a
6 federal case against APCO. And they are alleging under that theory
7 that subject matter jurisdiction would lie under section 825p.

8 First of all, section 825p doesn't provide a cause of
9 action for establishing jurisdiction. It just states where
10 jurisdiction would be if there was a cause of action. And, second,
11 as noted in the *Jeffrey Lake* division case as well as is mentioned
12 in the Seventh Circuit's decision in *Singh*, as cited in our brief,
13 a simple reading of 825p indicates that it can only be invoked if
14 the United States is a party to the case, which it isn't here, a
15 plaintiff is not seeking -- a plaintiff is seeking judgment based
16 on a FERC license itself, which they are not doing here, and a
17 plaintiff is asserting a right to judgment for a defendant's
18 alleged violation of specific provisions within the FPA license or
19 management plan, which they are not doing here.

20 All of those things -- those are the only -- those are
21 the only means -- of course, again, if this is -- if 825p can even
22 grant a cause of action, those are the only cause of actions that
23 it can grant under here.

24 APCO -- or the Pressls can't claim any of these things.
25 They don't have a license. They can't seek to enforce a license,

1 nor are they attempting to. There's really no way for subject
2 matter jurisdiction to be established in the Pressls' case here
3 because they wouldn't be able to enforce any of these things or to
4 ask for any of these reliefs.

5 Moreover, Your Honor, the Pressls -- getting back to my
6 original argument as far as the Pressls having a well-pleaded
7 complaint, looking over the complaint, there is nothing in there
8 that invokes the Federal Power Act, FERC license, or an SMP. All
9 the request is for an interpretation of a flowage easement.

10 APCO argues that this is a federal issue that -- present
11 on the face of the complaint, simply because there is an exhibit
12 attached to the complaint and it makes reference to an SMP. But
13 this is disingenuous as far as a reason for establishing federal
14 jurisdiction.

15 Following their line of thinking here, a defendant in a
16 real estate dispute could remove a case to a federal court if the
17 closing documents were attached in there as an exhibit to the
18 complaint and include references to, like, a HUD regulation. This
19 goes much too far and is not what the courts intend. And, to wit,
20 courts confronting this issue have determined that reference to
21 federal law or matters of an attachment to the complaint are not
22 presented on the face of the complaint and, thus, cannot trigger
23 federal jurisdiction, as is discussed in our brief.

24 APCO makes much about how these cases that were cited to
25 are outside of the Fourth Circuit. But the problem is APCO is

1 unable to cite to any case law to the contrary. Whether or not
2 -- whether it be in the Fourth Circuit or be outside of the Fourth
3 Circuit, they are unable to find any.

4 So, for this reason, the plaintiffs' complaint -- there's
5 no federal issue presented on the face of the plaintiffs' complaint
6 and there's no federal jurisdiction over this case.

7 Second, contrary to APCO's arguments, a FERC license does
8 not automatically transform this case into one giving rise to
9 federal jurisdiction. Again, APCO would like you to believe that
10 its property rights flow from its FERC license that were issued
11 pursuant to the Federal Power Act. But this doesn't turn on
12 -- just because they have this license doesn't turn on a federal
13 question.

14 APCO's argument, again, apparently assumes that the FERC
15 license is what creates the property rights here. But, as this
16 Court knows, that's not true. APCO, like the power company in the
17 case *Tri-Dam versus Schediwy*, quote, "misstates its duty to comply
18 with and enforce the FERC license with a grant of the property
19 rights necessary to enforce the license against property owners
20 within the project boundary." And, here, APCO's authority to
21 enforce its federal license over properties which it holds the
22 requisite property rights is not sufficient basis to invoke federal
23 question and subject matter jurisdiction.

24 Moreover, the fact that APCO --

25 THE COURT: Well, let me ask you this.

1 MR. WALSH: Yes, Your Honor.

2 THE COURT: Appalachian, under the terms of the lease,
3 has the right to remove any structure. And the dock would be a
4 structure.

5 MR. WALSH: That's for the Court to decide, Your Honor.

6 THE COURT: Excuse me?

7 MR. WALSH: It is our position that they would not be
8 able to remove a dock.

9 THE COURT: Excuse me?

10 MR. WALSH: It is our position that they -- that APCO
11 would not be able to remove --

12 THE COURT: I know. I picked that up earlier. That's
13 not my question.

14 But if Appalachian, having the right to remove a
15 structure, is required by federal authority not to allow the type
16 of structure you have there, and it removes it, and their excuse is
17 "We're required by federal law to do it," now, that's their
18 defense, now, why doesn't that raise a federal question?

19 MR. WALSH: Because in order to --

20 THE COURT: You -- I mean, why doesn't that raise a
21 federal question?

22 MR. WALSH: Because in order to enforce its FERC license
23 it needs to have the property rights that FERC requires to enforce
24 those --

25 THE COURT: Well, they have the -- you agree they have

1 the right to remove a structure; right?

2 MR. WALSH: But they need more rights than that in order
3 to enforce a FERC license.

4 THE COURT: What do you mean? Remove a structure, they
5 have a right to do it --

6 MR. WALSH: Your Honor, if you look at the FERC
7 guidelines and the FERC license that APCO has -- and I don't want
8 to spend too much time talking about interpretation of FERC
9 license. The FERC license requires APCO to have rights equivalent
10 to fee simple. So that does not include just removing docks. It
11 includes being able to use and possess. If you --

12 THE COURT: Who gets to determine? The state judge gets
13 to determine what FERC requires?

14 MR. WALSH: No. The state court wouldn't be doing so in
15 this case, Your Honor. They would only be interpreting what the
16 -- what APCO -- what rights the Pressls have under this flowage
17 easement.

18 THE COURT: Well, what right does APCO have under the
19 easement; right?

20 MR. WALSH: They would be interpreting what rights the
21 Pressls have under the easement.

22 THE COURT: Right. Okay.

23 But -- and APCO says, "We have the right to remove a
24 structure," which you agree to?

25 MR. WALSH: Yes, it does say that, Your Honor, in the

1 plain language.

2 THE COURT: Okay. And I take it you are saying they have
3 to be reasonable about it.

4 MR. WALSH: Your Honor, we're saying that there is no
5 federal jurisdiction over this claim --

6 THE COURT: I know it -- well, if you are not going to
7 answer my questions and just keep on saying what we have been -- I
8 have been here an hour and ten minutes now, and you think I didn't
9 hear what went on before. So we're like ships passing in the
10 night. We don't -- so if --

11 MR. WALSH: Well --

12 THE COURT: Whatever you are going to say, go ahead,
13 because --

14 MR. WALSH: Well, if you can ask me one more time, Your
15 Honor, I will hit it this time.

16 THE COURT: Okay. Well, it seems to me the question is
17 does -- is it reasonable for Appalachian to require a permit or
18 does Appalachian have the right to tear down a dock on this
19 property?

20 MR. WALSH: No, they do not, Your Honor. They don't have
21 -- they don't have the property rights that require them to enter
22 into a permit here.

23 THE COURT: Okay. I said -- well, what about remove a
24 dock?

25 MR. WALSH: No, we do not believe that they have the

1 authority to remove a dock, Your Honor.

2 THE COURT: Well, what, is a dock not a structure?

3 MR. WALSH: Well, there's no -- well, Your Honor, first
4 of all, there's no dock on this property. There's not -- that's
5 what -- again, I don't want to get too much into the motion to
6 dismiss, but that's what separates this case from the *Nissen's*.
7 There's really no -- there's no dock here on this property.

8 THE COURT: Well, isn't it about a dock, so that you can
9 build a dock?

10 MR. WALSH: Excuse me?

11 THE COURT: You want it so you can build a dock; right?

12 MR. WALSH: The property -- the property rights? To
13 build a dock? Yes, Your Honor. They do wish to build a dock. And
14 they are seeking declaratory judgment to determine whether or not
15 they are able to do that.

16 THE COURT: Okay. Appalachian has a right -- they can
17 build it and Appalachian has a right to tear it down.

18 MR. WALSH: That's -- we would say that that is not true,
19 Your Honor, but that's obviously for the Court to decide. But,
20 obviously --

21 THE COURT: No, no. Under what circumstances may
22 Appalachian tear a dock down?

23 MR. WALSH: Your Honor, this is going a little bit more
24 into the motion to dismiss aspect of this, but there are -- I mean,
25 there's several situations. And I guess it would be a case-to-case

1 basis.

2 THE COURT: Well, could one of them be that they are
3 required by federal law to remove it?

4 MR. WALSH: That APCO is required by federal law or the
5 Pressls are required by federal law to remove it? The Pressls
6 aren't subject to any --

7 THE COURT: Well, APCO -- APCO could be required -- would
8 say it could be required by federal law to remove any structure on
9 the property.

10 MR. WALSH: But APCO can't exercise its rights under the
11 FERC license unless it has the requisite property rights to do so.
12 And, again --

13 THE COURT: I know that. I know that. But Appalachian
14 says that is what it has got, that's what it is trying to do. They
15 have the right to tear it down. So if they have the right to take
16 it down before you put it up, when you put it up they can ask you
17 -- get -- ask you to get permission so they don't have to take it
18 down.

19 MR. WALSH: Well, Your Honor, we're looking well beyond
20 just dock rights here in this case.

21 THE COURT: Okay. You argue your case and -- go ahead.

22 MR. WALSH: We're looking --

23 THE COURT: You go ahead.

24 MR. WALSH: Okay.

25 THE COURT: I won't bother you anymore.

1 MR. WALSH: It is okay, Your Honor. I love this back and
2 forth.

3 Second, contrary to APCO's arguments -- I apologize.

4 Moreover, the fact that APCO has a FERC license does not
5 mean that there is a significant federal issue implicated in this
6 case. Under the *Gunn* guidelines for whether or not a significant
7 federal issue is triggered, for APCO to meet its burden it must
8 demonstrate that the plaintiffs' state law claim -- federal
9 jurisdiction lies with the plaintiffs' state law claim because the
10 federal issue is, one, necessarily raised; two, actually disputed;
11 three, substantial; four, capable of resolution in federal court
12 without disrupting the federal-state court balance. Now, if any of
13 these are not met, then federal jurisdiction does not lie.

14 And several cases that discuss issues such as this have
15 determined that just because there's a federal license involved or
16 that a utility company has a federal license does not mean that
17 this is enough to trigger federal jurisdiction over cases.

18 Furthermore, the parties' disagreement over the meaning of a
19 flowage easement does not create a substantial government interest
20 simply because APCO is in possession of a FERC license obligating
21 it to regulate certain activities, particularly when the terms of
22 the license or the regulations are not disputed. The courts in
23 *Singh*, *Jeffrey Lake*, and *Nissen* all discuss this.

24 Now, APCO argues that -- despite case law to the
25 contrary, that this case does raise -- does raise one that triggers

1 a federal issue. However, it does not. First they allege that
2 interpreting the effect of the Pressls' use of their property on
3 the operation and maintenance of the dam requires the
4 interpretation of APCO's FERC license and the FPA. But, again,
5 this argument appears to assert a preemption claim and assumes that
6 its rights rise out of the FERC license rather than the flowage
7 easement. However, courts have overwhelmingly determined that
8 there is no preemption under the Federal Power Act over state law
9 claims, looking to *Nebraska Rural Electric Membership Corporation*
10 *versus Wabash Valley Power Association*, as well as *Singh*, which
11 interprets the natural gas -- which is interpreted identical to the
12 Federal Power Act.

13 Moreover, the language of the complaint, all it requests
14 is an interpretation of the flowage easement itself. Again,
15 there's nothing in there requesting an interpretation of APCO's
16 FERC license. Simply because APCO is subject to a license
17 regulating its operation of the dam does not trigger federal
18 jurisdiction in this case, particularly because, as previously
19 noted, the heart of the plaintiffs' claim here stems from state
20 law. And this, again, is recognized in *Singh* and *Jeffrey Lake* ,
21 where it discusses the heart of the case, looking to what is really
22 -- what they are really trying to interpret there is a state law
23 issue. It does not trigger federal jurisdiction.

24 And this Court recognized as much in *Virginia Timberline*,
25 where it basically stated that for federal jurisdiction to exist in

1 cases such as this, the document that is being interpreted by the
2 Court must both incorporate the terms of a FERC license or the FPA
3 and the complaint must require an interpretation of those
4 incorporated terms.

5 So, for example, in that case, that had to do with an
6 interpretation of a deed. That deed fully incorporated in its
7 language the Federal Power Act and the FERC license. And the
8 dispute was over an issue that was addressed in the FERC license
9 itself. So federal jurisdiction lied in that case. But that is
10 not the case here. There is nothing in the Federal Power Act
11 -- there is nothing incorporated in the Federal Power Act's terms
12 or the FERC license's terms into this flowage agreement.

13 Again, quoting to *Singh*, they specifically determined
14 that there must be something directly connecting an easement to a
15 substantial federal issue -- or a federal law or regulation or --
16 for federal subject matter jurisdiction to lie. But that does not
17 exist here, Your Honor.

18 Furthermore, APCO further argues that to interpret the
19 occupancy and use permit attached as an exhibit to this complaint,
20 APCO's FERC license and the FPA must be interpreted. First and
21 foremost, the defense argument fails because the Pressls are not
22 seeking an interpretation of this permit. That is not an issue
23 that they are seeking here.

24 And, again, because it is attached as a complaint -- it
25 attaches it in the complaint and it mentions the Federal Power Act

1 and the FERC license is not enough to give this Court federal
2 jurisdiction over this case. APCO -- Mr. Pritts just discussed
3 that. APCO recognizes that its ability to enforce this -- the
4 permit arises from the property rights and the flowage easement.
5 And so this would not require interpretation of FERC. This would
6 require an interpretation of the flowage easement, because that is
7 what the permit is limited by.

8 Third, the Court -- or APCO mischaracterizes the phrase
9 "regulatory authority" in the complaint. And, again, they try to
10 attempt to frame this case through the lens of a FERC license by
11 saying the regulatory authority clearly means that they are talking
12 about -- they are talking about the FERC license. But, obviously,
13 that is not what they are doing here. This language refers to
14 APCO's authority under the easement, not the FERC license. And
15 this is clear from the complaint, because there is no mention of
16 the FERC license in the complaint and it does not invoke the FERC
17 license. Therefore, this complaint does not raise a federal issue.

18 With regard to the second element of the *Gunn* test, APCO
19 argues that there is a disputed federal issue that exists. But,
20 again, this is not true. APCO's justification for this is claiming
21 that the Pressls are basically challenging APCO's FERC license,
22 but, again, they are not doing that. They are not saying that
23 certain provisions of the FERC license are valid or invalid or
24 whether or not FERC correctly or incorrectly issued a permit. If
25 they have a permit, they have a permit. That's fine. That's not

1 an issue we are disputing here. We are simply disputing rights
2 under the flowage easement.

3 And with regard to the third element of the *Gunn* test,
4 even if there was a federal issue existing, it wouldn't be
5 substantial. Again, APCO argues that if a state court makes a
6 decision regarding property rights under the flowage easement, that
7 it would, quote, essentially nullify or alter FERC orders and
8 ignore the requirements set forth in APCO's federal license and
9 undermine FERC. But this is absolutely ridiculous, because, as we
10 previously discussed, FERC orders and FERC licenses cannot alter or
11 modify property rights. And, furthermore, if it is determined that
12 APCO does not have the necessary property rights to enforce its
13 FERC license, then they can zero -- they are authorized by FERC to
14 go ahead and -- with an eminent domain claim or to try to contract
15 for those rights.

16 Additionally, the prior FERC hearings do not raise a
17 substantial federal issue. And I'm talking about the FERC orders
18 in 2010, 2011. Here they are not seeking to review those issues
19 previously discussed. Instead, what they are seeking is what the
20 Pressls' rights are under the flowage easement.

21 The orders, if you look at them, they speak only to
22 APCO's rights and responsibilities under the FERC license and does
23 not talk about the property rights. To wit, I mean, the first
24 sentence in the 2010 license, it says that APCO is seeking a
25 variance of its license in the SMP. It is not a determination of

1 property rights, nor could it have been, because FERC does not have
2 the power to make determinations regarding property rights.

3 Moreover, those FERC orders do not bind the Pressls. If
4 they binded anyone, it was Frie. But they are no longer binding on
5 him. They are still binding on APCO, however.

6 To fully understand, we need to kind of discuss the facts
7 of that case. At the time that those FERC orders were issued, the
8 owner of the property was an individual by the name of Richard
9 Frie, who we have discussed here a little bit. The difference
10 between him and the Pressls is that, again, as we discussed, Frie
11 executed a permit with Appalachian Power which incorporated the
12 shoreline management plan and the FERC license. And this permit
13 contractually obligated Frie to abide by APCO's FERC license.
14 Also, this permit was nontransferable and revocable by APCO. And,
15 in fact, as mentioned in the FERC orders, it was terminated several
16 years ago.

17 Here, the Pressls have never applied for nor received a
18 permit from APCO. And the only thing binding the Pressls to APCO
19 is a flowage easement, which, again, requires an interpretation
20 under state law because it does not invoke the FERC or FPA or the
21 shoreline management plan.

22 In brief, the Fries were bound by the commission's
23 decisions because they were personally obligated to abide by the
24 FERC license per its permit. But that is not present here.

25 Thus, contrary to defendant's arguments, allowing a state

1 court to make a determination regarding the rights of parties under
2 a flowage easement neither contradicts nor invalidates a previously
3 entered FERC order, nor does it hinder FERC's ability to oversee
4 and regulate its licensees.

5 In fact, FERC has regularly articulated that state courts
6 have jurisdiction over property disputes, determining what rights
7 the utility company or FERC licensee had over the property that is
8 in dispute.

9 Furthermore, as noted in *Singh*, federal jurisdiction over
10 nondiverse disputes related to easements disrupts the federal-state
11 balance approved by Congress, which is element number four under
12 the *Gunn* test. And, again, if any of these -- if these four
13 requirements under the *Gunn* test are not met, there is no
14 significant issue that would trigger federal jurisdiction.

15 APCO also argues that it has jurisdiction over the case
16 pursuant to section 825p. We have discussed this a little bit
17 already, but just to hit on it a little bit more. Any cause of --
18 if 825p allows for a cause of action, which, again, we argue that
19 it does not, it would -- there is only limited cases where it could
20 be brought. But looking at these causes of action, the Pressls
21 could not bring any of these. They don't have the ability to bring
22 anything here. Again, that would be the United States is not a
23 party to the case, plaintiff is not seeking a judgment based on a
24 FERC license itself, plaintiff is not asserting a right to judgment
25 of alleged violations with specific provisions within the license

1 or the management plan.

2 And, finally, even if this Court does determine that
3 somehow federal jurisdiction is triggered in this case, looking at
4 section 28 U.S.C. 1441(c)(2), it requires that this Court sever and
5 remand the claims over which the Court lacks jurisdiction, such as
6 the ones where we're asking an interpretation of the flowage
7 easement under state law.

8 So even if this Court does determine that federal
9 jurisdiction exists here, it will still have to remand nearly all
10 of these claims that have to do with interpretation of the flowage
11 easement. And -- and -- excuse me, Your Honor. It would have to
12 -- it would have to remand all of these claims.

13 And, finally, attorney's fees. We're requesting
14 attorney's fees in this case pursuant to 28 U.S.C. 1447(c). The
15 reason being a lot of the case law discussed -- in discussing this
16 case, APCO has been well aware of for several years. We're also
17 looking to the cases reached in the decision in *Nissen* and in the
18 decision in *Jeffrey Lake*, which the Court made a decision on back
19 in April. And in that case this Court specifically determined what
20 circumstances in which a claim under section 825p can be brought.
21 And it determined that -- it distinguished it from *Jeffrey Lake*
22 because in *Nissen* APCO actually brought a claim seeking to enforce
23 its FERC license. But, again, that is not present here.

24 Furthermore, there is no -- again, if you look at the
25 face of the complaint, there's nothing in there that triggers

1 federal subject matter jurisdiction or calls upon a question of
2 federal law.

3 Therefore, Your Honor, we are asking that this case be
4 remanded pursuant to 28 U.S.C. 1447 because this Court lacks
5 subject matter jurisdiction over this matter, the defendant's FERC
6 license doesn't transform this case when arising under federal law,
7 and all the plaintiffs are seeking is an interpretation of its
8 state rights under its flowage easement.

9 Thank you, Your Honor.

10 THE COURT: Thank you.

11 MR. PRITTS: Your Honor, may it please the Court. Matt
12 Pritts again for Appalachian.

13 Let's get the attorney's fees issue out of the way. I
14 don't even think it is worth much of a discussion to say that this
15 is a case where it is not an objectively reasonable argument. He
16 just argued for 35 minutes, didn't answer your questions and get
17 right to the heart of the issue. It -- there is excellent reasons
18 and grounds to remove this case. It is just like the *Virginia*
19 *Timberline* case, which was removed; just like the *J.W. Holdings*
20 case, which was removed. So I don't think we need to dwell on that
21 much.

22 Your Honor, I think your questions got to the heart of
23 the case. How are we going to decide this case without going into
24 what Appalachian is required to do under this license? They say,
25 well, this is just about the flowage easement and -- you know, but

1 they are distancing themselves from what they plead in their own
2 complaint. They plead in their complaint, they talk about the
3 project. They talk about Appalachian having no regulatory
4 authority over the property below the 800 foot contour. They talk
5 about -- they want a declaration from you that they can use the
6 property in any manner that is not inconsistent with the operation,
7 maintenance -- operation and maintenance of the dam and the
8 hydroelectric power station. It is the project.

9 They want you to say they can use the property any way
10 that is not inconsistent with what Appalachian is required to do to
11 run the property. Well, what is Appalachian required to do to run
12 the project? Well, what is in the license? That is what it is
13 required to do. I have given you the provisions earlier of the
14 license that deal with this issue, the issue being occupancy,
15 nonproject uses of -- and occupancy in land -- of project lands.
16 It is a nonproject use because it is an outsider using project
17 lands. And the -- there's -- the standards are in there. What
18 Appalachian has to follow is in its license. It has to follow the
19 shoreline management plan. It has to make sure that any uses of
20 the property are consistent with protecting the scenic,
21 recreational, and environmental values.

22 THE COURT: Show me where the shoreline management plan
23 fits into this. Tell me --

24 MR. PRITTS: Well, Your Honor, it fits into the flowage
25 easement and the complaint, both, Your Honor. It fits in -- for

1 example, the complaint -- or the flowage easement says Appalachian
2 has the rights -- was granted the rights -- it is the bottom of the
3 first page -- granted the rights to affect the property in any
4 manner from time to time as a result of a construction existence,
5 operation, and maintenance of the dam and the power station. And
6 at the top of the page it talks about Smith Mountain Combination
7 Hydroelectric Project. This is the project.

8 The project -- as you can see from the license that was
9 attached to our complaint, the project is not just the dam and the
10 power station. The project is the reservoirs. It is the
11 shorelines. It is all of that, everything within the project
12 boundary. The project boundary sets the boundary of what is in the
13 project and what is outside the project.

14 So this -- consistent with the operation and maintenance
15 of the dam and the power station and the project, what is
16 Appalachian required to do? If Appalachian just let anybody build
17 any dock they wanted to build, obviously FERC is going to say,
18 "Wait a minute, Appalachian. You are not complying with your
19 license. You have got to go out there and take that steps there to
20 make sure that that is consistent with what your obligations are on
21 your license."

22 So that is one way it comes in, Your Honor, is from the
23 language in the flowage easement about the maintenance and
24 operation of the project. Also from the allegations in the
25 complaint. The allegations in the complaint that -- they say that

1 they want you to declare that they can use the property in any way
2 that is not inconsistent with the operation and maintenance of the
3 dam and hydroelectric power project. Again, that requires us to
4 look at the license. What is Appalachian required to do in terms
5 for docks, in terms of the shoreline, in terms of those things?

6 They say Appalachian has no -- the third way, Appalachian
7 has no power or authority to require them to enter into that
8 permit. Well, if you enter into the permit, the permit says it is
9 subject to the terms and conditions of the shoreline management
10 plan. So that's the third way that the shoreline management plan,
11 which is part of the license, comes into the analysis here.

12 So as Judge Turk decided in the *Virginia Timberline* case,
13 Judge Turk said that this is a case where -- *Virginia Timberline*
14 case, from 2006, the motion to remand denied. Judge Turk said the
15 interpretation of a federal license is -- a FERC license like
16 -- that was APCO's license at that time, from the 2000 -- that was
17 a license that was issued in 1960, was still in effect in 2006.
18 Now we have a license that was issued in 2009, same -- very similar
19 license.

20 And Judge Turk said the interpretation of a federal
21 license is a federal question. And that's what brings in -- it may
22 be a state law claim, but it is a state law claim that implicates a
23 federal claim and a federal issue because it is interpreting this
24 federal license.

25 He went on and said, "This is a clear example of a state

1 law claim and necessarily raises a stated federal issue, actually
2 disputed and substantial, which a federal forum may entertain
3 without disturbing any congressionally approved balance of federal
4 and state judicial responsibilities." I would submit the same
5 thing here.

6 Now, they will try to distinguish *Virginia Timberline*.
7 They say that the *Virginia Timberline* case stands for the
8 proposition that the -- and the easement has to interpret
9 -- incorporate the terms of the license. If you read this opinion,
10 it doesn't say that. I'm not sure where they are getting that.
11 They said it in the brief. It is not right. It doesn't say that.

12 This -- I will say, and I worked on this case, it -- that
13 particular easement did talk about it being subject to the terms
14 and conditions in the license. But that wasn't the reason that
15 Judge Turk said what he said. And I would submit if that case was
16 a slam dunk, this case is an uncontested layup. It is just as
17 easy. And it should not be remanded to state court because here
18 you are going to have to interpret what does the license mean, what
19 obligations are on Appalachian here, what is required for the
20 maintenance and operation of the project.

21 So I would submit for those reasons the case shouldn't be
22 remanded. Also, as you pointed out earlier, there's the theory of
23 law that says if Appalachian could bring the suit -- the
24 countersuit, if Appalachian could sue them, which it could do under
25 the *Nissen*-type case, that analysis where Appalachian could sue to

1 enforce the shoreline management plan, then that is a case that the
2 defendant could sue; then, the plaintiff, having sued, is one that
3 has jurisdiction in federal court. That's when you have got these
4 declaratory judgments. So I would say, Your Honor, for that reason
5 also, that case could stay in federal court.

6 The *Jeffrey Lake* case is a strange case by a magistrate
7 judge in Nebraska. I don't think it applies here. It is
8 distinguishable. And that case -- you will notice in that case, as
9 you pointed out when you referenced it earlier in the *Nissen* case,
10 they said in that case *Virginia Timberline* didn't address
11 jurisdiction at all. And *Virginia Timberline* did address
12 jurisdiction. And they found that there is jurisdiction for
13 removal. So I would submit that that case doesn't carry the weight
14 here.

15 I don't know the distinction they are trying to make
16 between this case and the *Nissen* case. They say in the *Nissen* case
17 there was a dock; there's not a dock here. What you have got are
18 pilings and pilings. The *Nissen* case, they started to drive
19 pilings, we brought suit. They stopped. There's pilings there.
20 There's pictures of it in the *Nissen* complaint. In this case
21 there's pilings. The pilings are there. The dock is unfinished,
22 just as in the *Nissen* case. I don't think there's any distinction
23 between the two of them. I'm not sure where that argument was
24 going.

25 So, Your Honor, we don't say anywhere in our pleading

1 that just because there's a federal license that that creates all
2 of the property rights. We never take that position. We say we
3 have sufficient property rights. We say to interpret those rights,
4 the way it is pled, the way the easement reads, you are going to
5 have to interpret the license. And, thus, this case belongs in
6 federal court.

7 Thank you, Your Honor.

8 THE COURT: Okay.

9 MR. WALSH: Your Honor, I would like to address some of
10 the arguments that were raised by APCO here. First of all, they
11 talk about *J.W. Holdings* and *Timberline*. Those cases are clearly
12 distinguishable from this case here.

13 Again, as mentioned in *Timberline*, that had to do with
14 -- that had to do with an easement that specifically inside the
15 terms of the easement said that it incorporated the Federal Power
16 Act and the FERC license. And because of that, the court had to
17 specifically interpret those provisions in order to reach its
18 decision in that case. That's why federal subject matter
19 jurisdiction was triggered here. Here, this flowage easement does
20 not contain any of that language.

21 Furthermore, in *J.W. Holdings*, that's another situation
22 where the landowners in that case provided extra authority and
23 extra power to the -- to APCO and basically allowed them to enforce
24 their FERC license because they had a permit involved. Again, we
25 don't have a permit involved in this case.

1 They also argue -- APCO also argues that you must
2 interpret -- that in order to interpret its rights under the
3 flowage easement, you are required to interpret what they must do
4 under the license and how they must operate the dam. Well, the
5 problem with that argument is, even if that was true, interpreting
6 it under this 2009 license would be contrary to established
7 Virginia law.

8 THE COURT: Do I have to consider what the project is?

9 MR. WALSH: Does the --

10 THE COURT: Under the easement? Do I have to consider
11 what the --

12 MR. WALSH: No, you do not, Your Honor. And this is
13 why -- sorry. I lost myself here.

14 The -- and this is why, Your Honor, is because it is
15 established Virginia law that in order to -- in order to determine
16 what is and isn't allowed under an easement such as this, as far as
17 interpretation of contracts, you are supposed to interpret the
18 contract based on the circumstances as they existed at the time
19 when the contract was entered into.

20 Here, the flowage easement was executed in 1960. This
21 flowage easement was executed on April 18th, 1960. APCO did not
22 receive its FERC license until a week afterwards. They did not
23 receive a FERC license until April 25th --

24 THE COURT: They built the -- they built the dam to run a
25 hydroelectric --

1 MR. WALSH: But the dam wasn't built yet, Your Honor.
2 And, again, if we're going to interpret what -- again, we -- this
3 -- this is not enough to trigger federal jurisdiction. I'll get to
4 that in a moment.

5 THE COURT: I know you are going to say that. But -- but
6 go on and say what --

7 MR. WALSH: Okay. Even if you were required to interpret
8 anything at that time, it would just be what APCO was required to
9 do back in 1960 before there was any federal license. There was no
10 federal license at the time this was created. So if we're going to
11 interpret the flowage easement based on what APCO is required to do
12 under --

13 THE COURT: You say it makes no difference -- I mean,
14 what APCO's intentions were when they built the dam or when they
15 got this easement, it makes no difference what it was they were
16 getting the easement for?

17 MR. WALSH: Well, it really doesn't matter what their
18 intent was with regard to the full picture. What matters is what
19 the parties' intent was when they contracted.

20 THE COURT: Well, didn't the easement call for them to
21 -- that Appalachian was getting --

22 MR. WALSH: No, there's nothing in the easement that
23 discusses them obtaining a federal license and we have --

24 THE COURT: No, not a federal license, but to have a
25 hydroelectric dam and a project that generated electricity.

1 MR. WALSH: Inside the flowage easement was there
2 something saying that? No, Your Honor. But, again, that was --

3 THE COURT: What is the flowage easement?

4 MR. WALSH: Under the flowage easement, there's nothing
5 in there dictating how you interpret the operation and maintenance
6 of a dam.

7 THE COURT: Well, you know, it doesn't mention -- it
8 doesn't mention anything about a project?

9 MR. WALSH: It does mention a project.

10 THE COURT: Well, what is the project? That is what I'm
11 asking.

12 MR. WALSH: I would say the project --

13 THE COURT: Well, tell me what the lease says -- the
14 easement says about it.

15 MR. WALSH: About the project?

16 (Pause.)

17 MR. WALSH: All it says is it is for the construction of
18 a dam and power station. That's all it says, Your Honor. There's
19 nothing in there, other than that, discussing a FERC license or --

20 THE COURT: What -- what is the sentence? What does the
21 sentence say?

22 I mean, opposing counsel just read something and he said
23 hydroelectric and dam in the project. And he said the project
24 included not only the dam but -- where did that come from? That's
25 what I'm asking.

1 MR. WALSH: I'm not entirely sure, Your Honor.

2 THE COURT: Counsel, if you -- where were you getting
3 that language?

4 MR. PRITTS: Your Honor, I was reading from -- I was
5 reading from the bottom of the first page, the granting language in
6 the flowage easement, that said -- the paragraph before that says,
7 "Appalachian proposes to impound the waters of said river by
8 constructing a dam across the river downstream from," and proposed
9 "to construct and operate a dam and a hydro electric power station
10 including provisions for pumping," etc. And then, later, in the
11 granting language, Appalachian is granted "the right to overflow"
12 the property, to affect the property in any way as it may be
13 affected --

14 MR. WALSH: Overflow and affect, Your Honor.

15 MR. PRITTS: -- for the maintenance of the dam and the
16 power station, and impounding the waters, and varying the level.
17 And, of course, at the top of the page it mentions the project as
18 well. It says, "Smith Mountain Combination Hydro Electric."

19 THE COURT: Were the landowners a party to that
20 agreement?

21 MR. PRITTS: Pardon me?

22 THE COURT: Were the landowners at the time a party to
23 that agreement?

24 MR. PRITTS: The landowners at the time executed the
25 easement, yes, sir.

1 THE COURT: Okay. Why is your client charged with that
2 knowledge?

3 MR. WALSH: Why was he not charged with the knowledge --

4 THE COURT: Of what is in the easement.

5 MR. WALSH: That a project existed?

6 THE COURT: Just the language in the easement.

7 MR. WALSH: I believe that our clients probably were
8 aware that APCO can flood up to the 800 foot contour of their
9 property. Yes, Your Honor, I'm sure they were aware of that.

10 THE COURT: Not just for that. I mean, it's for a
11 reason. I mean, that doesn't --

12 MR. WALSH: To be honest, Your Honor, I'm not entirely
13 sure what you are getting at.

14 THE COURT: Why would Appalachian want to build this
15 project? What was the purpose?

16 MR. WALSH: To create a dam, Your Honor; to create power;
17 to be able to, you know, expand their business.

18 THE COURT: Right. And a necessity to have to do those
19 things, the law required to do that; right?

20 MR. WALSH: They are required to obtain a flowage
21 easement?

22 THE COURT: Yes.

23 MR. WALSH: Yes, Your Honor. They can't -- they can't
24 just flood individuals' properties without --

25 THE COURT: Right. Well, they couldn't operate the

1 project without getting these easements; right?

2 MR. WALSH: Yeah. You are right.

3 THE COURT: And so the purpose of the easement was to
4 operate this particular project. And they are required by law to
5 have these permits to operate this part of the operation of the
6 project, isn't it?

7 MR. WALSH: If APCO is required to do that, then that's
8 what they are required to do. But we're not challenging that here.

9 And so the point being, Your Honor, is that if we really
10 are going to interpret what APCO can and can't do --

11 THE COURT: Well, there's no question Appalachian
12 couldn't just have a three-foot easement out there and say, "Well,
13 that gives us a right to do all sorts of things." The question is,
14 under that easement, can they order you to remove a structure -- or
15 not order you to remove. May they remove a structure?

16 MR. WALSH: I think another question is whether this
17 Court has subject matter jurisdiction to even determine that, Your
18 Honor.

19 THE COURT: The reason I keep looking -- I can read what
20 you are saying. Sometimes I don't understand. And I -- that's why
21 I keep looking.

22 MR. WALSH: I apologize, Your Honor.

23 THE COURT: No, I'm not -- it is not your fault.
24 Sometimes I don't hear well.

25 MR. WALSH: That's okay.

1 THE COURT: But I can read. That's why -- I want you to
2 know, it is not that I'm not paying attention.

3 MR. WALSH: It is okay, Your Honor. No offense taken.

4 THE COURT: Go ahead.

5 MR. WALSH: Okay. I'm sorry, Your Honor.

6 But, again, even if this Court needs to -- needs to look
7 at how the dam needs to be operated and maintained in this case in
8 determining the flowage easement -- the rights under the flowage
9 easement, that still would not trigger federal subject matter
10 jurisdiction.

11 If you look at the *Singh* case, *Columbia Gas Transmission*
12 *LLC versus Singh*, they dealt with almost the exact same issue as
13 this right here, but it was discussing the Natural Gas Act . But,
14 again, that's -- the Supreme Court has determined that that is
15 interpreted in the exact same way as is the Federal Power Act.

16 And the defendant in that case was a utility company.
17 And it had to do with a pipeline easement. And they noted that,
18 you know, interpreting whether or not they could move the pipeline
19 or do certain things in the area where there was an easement, that
20 would require an interpretation of -- possibly it would require an
21 interpretation of rights under the Natural Gas Act.

22 The Sixth Circuit in that case specifically stated that
23 that was not enough to trigger subject matter jurisdiction because,
24 again, there was nothing linking the easement to the federal
25 license or federal act. And that is what is required in order to

1 trigger federal jurisdiction. And that is not what was in
2 existence here.

3 Furthermore, looking at -- as to what -- what the Pressls
4 can and can't do, it is worth mentioning that up until 1998 APCO
5 wasn't requiring individuals to get permits. For a period of more
6 than 40 years they were allowing anybody to build -- to build docks
7 on this area, and docks as large as they wanted. Some of them were
8 even entire homes within the 800 foot contour. And almost all of
9 them are subject to the exact same flowage easement here.

10 So, again, we would argue that because of history and
11 usage here that there is clearly -- that the Pressls clearly have
12 the ability to build a dock and that it would not be contrary to
13 the FERC license or the --

14 THE COURT: You said earlier there was no dock there now.
15 But are there pilings there?

16 MR. WALSH: There is no dock built, Your Honor. There's
17 pilings there, but -- I also wanted to hit on that as well. Those
18 were not -- those were not built by the Pressls.

19 THE COURT: Well, but they are there. And so may
20 Appalachian remove them?

21 MR. WALSH: May Appalachian remove those pilings?

22 THE COURT: Yeah.

23 MR. WALSH: I -- I suppose that they could. The Pressls
24 have no particular -- particular interest in them, I -- as far as
25 what I understand. But, you know, APCO alleges that the Pressls

1 are trying to use these pilings to go ahead and build another dock.
2 Well, that's just -- that's not the case. The reason the Pressls
3 haven't removed it is because of the problems that they have had
4 with APCO and APCO telling them what they can and cannot do below
5 the 800 foot contour level. It would create an issue, they
6 believe, if they went ahead and they removed it.

7 Those have been there for several years, and if -- you
8 know, been weathered and they are not entirely built. So I would
9 say the fact that there's pilings there, it is fairly irrelevant to
10 this case, because, again, they didn't build them; they are not
11 trying to use them.

12 I also wanted to -- wanted to note, APCO -- and the
13 rebuttal basically stated that interpreting this flowage easement
14 requires an interpretation of the SMP. But, again, if you look at
15 the flowage easement, there's nothing in there incorporating the
16 SMP. Now, APCO may be required to abide by an SMP, but that
17 doesn't -- that doesn't mean that the Pressls are required to as
18 well. They are still able to exercise the property rights that
19 they have over the area under the 800 foot contour level. It
20 doesn't bind them.

21 Furthermore, APCO brought up *Timberline* as an
22 interpretation issue. And *Timberline* somewhat falls into the same
23 issue discussed in *Singh*, in the Sixth Circuit, where it is
24 basically how you could distinguish that. Again, it does matter in
25 *Virginia Timberline* that the easement was specifically subject to

1 the terms of the FERC license. And in order -- again, in order to
2 interpret it, they had to interpret a FERC license. That is not
3 present here. Again, *Singh* mentions that, you know, when there's
4 nothing connecting the flowage easement or an easement in itself to
5 a federal issue, interpreting the easement does not require an
6 interpretation of the federal rights.

7 And, again, APCO's interpretation of the course of action
8 principles is invalid. They don't apply it correctly. Here is an
9 example of how it was meant to be applied. It is *Franchise Tax*
10 *Board versus Construction Laborers Vacation Trust*. In that case
11 the Supreme Court determined that there was federal jurisdiction
12 over a case brought by an employer for declaratory judgment against
13 an employee under an ERISA claim when the employee could have
14 brought a similar suit versus the employer. And they sought a
15 declaration, asking the court to determine -- to determine that
16 they did not violate ERISA.

17 Here, the course of action principle would be applicable
18 if the -- if the Pressls were seeking this Court to determine that
19 they did not violate the Federal Power Act. But they are not.
20 They are seeking an interpretation of the flowage easement under
21 state law. So APCO's -- APCO's application of this, in an attempt
22 to trigger section 825p, which, again, doesn't grant subject matter
23 jurisdiction here, is turned upside down and is misunderstood.

24 Finally, they mention that *Jeffrey Lake* is
25 distinguishable in this case and it is somewhat of a weird case. I

1 know that you have looked at *Jeffrey Lake* in the past and in other
2 cases. But in this particular situation it is absolutely on point.

3 It had to deal with a dispute over property rights, that
4 the property rights that are disputed do not incorporate any
5 federal issue or any -- the Federal Power Act or the license or
6 anything like that. And the utility company in that case sought to
7 remove it. And the court subsequently determined that there was no
8 federal subject matter jurisdiction over that case.

9 The reason -- there were several reasons why they reached
10 that decision. And I would argue that that case even goes beyond
11 this as far as asking the court to interpret federal issues,
12 because in that case the complaint actually requested that the
13 court interpret other related and applicable rules, regulations,
14 and policies that may be federal in nature. But, again, they
15 stated that, because there is nothing connecting the easement,
16 there is nothing triggering federal jurisdiction there. And,
17 again, this complaint does not go that far. It doesn't get close
18 to going that far.

19 The court also noted that even if the relevant rules,
20 regulations, and policies implicate the federal law at all, it
21 would best be characterized as addressing an anticipated defense
22 and it would not support removal from state court. Again, that is
23 what it is here. If APCO wants to argue that it has their federal
24 license and that this -- you know, they can't or can do certain
25 things because it is limiting this federal license and it is

1 required to do this or required to do that and the federal license
2 says so, that is a defense to this case. That is not sufficient to
3 trigger subject matter jurisdiction, as the Supreme Court has noted
4 several times over.

5 Also, in *Jeffrey Lake* the court found that even though
6 the defendant was in possession of a FERC license, the utility
7 company was in possession of a FERC license, that it allowed it to
8 -- that it allowed it to adopt permitting procedures over the lease
9 portion of the land and bestowed upon it the responsibility of
10 ensuring the uses of land consistent with federal law; that this
11 indirect regulatory authority and policing power did not transform
12 a dispute over interpretation of a lease into a federal question;
13 and, thus, did not provide it with sufficient basis for subject
14 matter jurisdiction.

15 And, moreover, the court stated that although the
16 defendant had a FERC license that placed conditions on use of the
17 property, again, disagreement over the terms there would not
18 substantially trigger subject matter jurisdiction.

19 And then, finally, that case spoke about subject matter
20 jurisdiction under section 825p, which it determined did not exist.
21 And it is not the only case that has determined that -- has reached
22 that same determination.

23 And, again, this case is exactly on point, if you look at
24 the facts here. APCO attempts to distinguish this case from this
25 particular situation because they invoke *Timberline*. But, again,

1 *Timberline* is different because that case incorporated a FERC
2 license into the deed that needed to be looked at by the court.

3 And then finally, again, they talk about how *Jeffrey Lake*
4 is a weird case. Yet, it has been cited by at least two circuit
5 court cases with overwhelming approval. Therefore, it would be our
6 position that this is -- that it is a valid and -- a valid case
7 here that the Court should absolutely follow in making this
8 determination.

9 The cases that cite to it with authority are *Northeastern*
10 *Rural Electric Membership Corporation versus Wabash Valley Power*
11 *Association*, a Seventh Circuit, and, again, *Columbia Gas* -- I'm
12 sorry, not *Columbia Gas*. And -- it is cited in my -- in the brief.
13 It is *Iowa Power* out of the -- out of the Fifth Circuit, I believe.

14 And so, again, Your Honor, our position is that there is
15 no subject matter jurisdiction here. There is nothing in the
16 complaint that even brings up federal subject matter jurisdiction.
17 And that, therefore, this case needs to be remanded to the state
18 court. And even if there is federal subject matter jurisdiction,
19 interpretation of what the Pressls are allowed to do under the
20 easement with regard to building a dock, vegetation, having to get
21 a permit, those must be remanded to the state court to decide.

22 Thank you, Your Honor.

23 THE COURT: All right. Thank you.

24 Is that all?

25 MR. PRITTS: Yes, Your Honor.

