

Stephen D. Bell, Esq.
Dorsey & Whitney LLP
Millennium Building
125 Bank Street, Suite 600
Missoula, Montana 59802-4407
Telephone: (406) 329-5590
Email: bell.steve@dorsey.com

J Jackson, Esq. (*Pro Hac Vice*)
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55402
Telephone: (612) 340-2760
Email: jackson.j@dorsey.com

Attorneys for NorthWestern Corporation

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

**PORTLAND GENERAL
ELECTRIC COMPANY; AVISTA
CORPORATION; PACIFICORP;
and PUGET SOUND ENERGY,
INC.,**

Plaintiffs,

v.

**NORTHWESTERN
CORPORATION; TALEN
MONTANA, LLC; and AUSTIN
KNUDSEN, in his official capacity as
Attorney General for the State of
Montana,**

Defendants.

Case No. 21-cv-00047-SPW-KLD

**DEFENDANT
NORTHWESTERN
CORPORATION'S RESPONSE
TO PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

	Page
ARGUMENT	7
A Plaintiffs Distort the Facts to Make Their Argument More Palatable	7
B Were This Court to Issue an Injunction, It Should Compel the Owners to Move Forward Promptly with the Arbitration Proceedings	11
1. Protracted Court Litigation Will Cause Serious Damage to NorthWestern and Its Montana Customers.....	12
2. In Balancing the Equities, NorthWestern and Its Montana Customers Will Suffer the Greatest Harm if the Arbitration Is Substantially Delayed.....	14
3. The Public Interest Is Best Protected by an Injunction that Compels the Owners to Move Forward Promptly with the Arbitration.....	15
4. Plaintiffs’ Irreparable Harm Argument Suffers from Misdiagnosis	17
5. This Court Should Issue a Mandatory Injunction Compelling the Owners to Move Forward Promptly with the Arbitration Proceedings while Protecting Plaintiffs’ Ability to Argue Their Interpretation of the O&O Agreement.....	18
CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>DISH Network Corp. v. FCC</i> , 653 F.3d 771 (9th Cir. 2011)	12
<i>Earth Island Institute v. Carlton</i> , 626 F.3d 462 (9th Cir. 2010)	14
<i>Klein v. City of San Clemente</i> , 584 F.3d 1196 (9th Cir. 2009)	12
<i>League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton</i> , 752 F.3d 755 (9th Cir. 2014)	15
<i>Munaf v. Geren</i> , 553 U.S. 674, 128 S. Ct. 2207 (2008).....	12
<i>Univ. of Haw. Prof'l Assembly v. Cayetano</i> , 183 F.3d 1096 (9th Cir. 1999)	14
<i>Winter v. NRDC, Inc.</i> , 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)	11, 12, 16
Statutes	
Federal Arbitration Act, 9 U.S.C. § 2	4
MCA § 70-1-313	7
Montana Unfair Trade Practices and Consumer Protection Act	3
ORS 757.518(1)(a).....	10, 17
ORS 757.518(2)	9, 10, 17
RCW 19.405.020(1).....	10, 17
RCW 19.405.030(1)(a)	10, 17

RCW Chapter 19-405.....9

Other Authorities

Montana Constitution.....4

Montana Senate Bill 265.....5

Montana Senate Bill 266.....5

Senate Bill 2654

Senate Bill 266*passim*

Senate Bill 266 § 2(1)(a).....3, 4

Senate Bill 266 § 2(2)(b).....3

U.S. Constitution.....4

Defendant NorthWestern Corporation (“NorthWestern”) is an investor-owned Montana public utility serving customers in Montana, South Dakota, Nebraska, and Yellowstone National Park, and is subject to the regulations and oversight of the Montana Public Service Commission. Declaration of John Tabaracci at ¶¶ 10-11 (“Tabaracci Decl.”). NorthWestern is one of six owners of Colstrip Units 3 and 4 Steam Electric Generating Project and related facilities, located in Colstrip, Montana (the “Project”), under the terms of the Colstrip Units 3 and 4 Ownership and Operation Agreement, dated May 6, 1981 (along with each of its four Amendments, the “O&O Agreement”). Tabaracci Decl. ¶¶ 3, 5 and corresponding Exhibit 1. Plaintiffs Portland General Electric Company, Avista Corporation, PacifiCorp, and Puget Sound Energy, Inc., along with Defendant Talen Montana, LLC, are the other five owners of the Project (the “Owners”).¹

The O&O Agreement sets forth the obligations and rights of the Owners. The original Owners created the O&O Agreement “to establish the terms and conditions relating to their ownership, as tenants in common, and the planning, financing, acquisition, construction, operation and maintenance of the Colstrip Units #3 and #4 Steam Electric Generating Project and related facilities.” O&O Agreement first Whereas clause.

¹ Of the Project’s six owners, only defendant Talen Montana, LLC is not a public utility.

A dispute exists among the Owners about the ongoing operation of Colstrip Units 3 and 4 beyond the year 2025. Plaintiffs have insisted on and threatened to take actions that would cause the closure of the Project by 2025 in violation of the O&O Agreement, claiming a majority of the Owners can decide to close the Project. NorthWestern, on the other hand, contends a unanimous vote of the Owners is required to close the Project. Meanwhile, Talen has not declared its position as to the specific vote required to close the Project.

NorthWestern depends upon the Project to meet the demand for electricity from its customers in Montana. Tabaracci Decl. at ¶ 16. Given the lengthy lead time for NorthWestern to plan for, locate, obtain regulatory approval for, address inevitable litigation, and construct new sources of electrical generation to replace the Project were it closed prematurely, any delay in obtaining a final decision regarding whether the O&O Agreement requires unanimity or a majority to close the Project would severely damage NorthWestern and create potential electricity shortfalls for NorthWestern's customers in Montana.² Tabaracci Decl. at ¶¶ 13-15, 22, 26-27. Time is of the essence.

Because an actual and substantial controversy exists between NorthWestern

² Plaintiffs admit, "Transitioning from sources of electricity is a complex and costly process that requires long-term planning to ensure utilities have sufficient generation for their customer load." Pls.' Br. at 26, citing Roberts Decl. ¶ 21.

and the other Owners regarding their respective rights and duties arising out of or in connection with the O&O Agreement, NorthWestern, acting pursuant to Section 18 of the O&O Agreement, commenced an arbitration proceeding. *Id.* at ¶ 23.

NorthWestern commenced arbitration, as required under Section 18, by providing 30-day notice to all Owners on February 9, 2021, and serving its demand for arbitration on March 12, 2021, which it amended and served on April 2, 2021. *Id.* at ¶ 24.

After NorthWestern served its amended demand for arbitration, on April 13, 2021, the Montana Legislature passed Senate Bills 265 and 266. Montana Governor Gianforte signed Senate Bills 265 and 266 into law on May 3, 2021.

Senate Bill 266, the focus of Plaintiffs’ Motion for a Preliminary Injunction, amends the Montana Unfair Trade Practices and Consumer Protection Act to create two new unfair or deceptive acts or practices. The first is a “failure or refusal of an owner of a jointly owned electrical generation facility in the state to fund its share of operating costs.” Senate Bill 266 § 2(1)(a). The second is “[c]onduct by one or more owners of a jointly owned electrical generation facility in the state to bring about permanent closure of a generating unit of a facility without seeking and obtaining the consent of all co-owners of a generating unit.” *Id.* § 2(1)(b). Senate Bill 266 authorizes³ the Montana Department of Justice to pursue injunctive relief

³ Under Senate Bill 266 § 2(2)(b), the operative word is “may”: “In an action

and request a civil fine of up to “\$100,000 for each violation,” with “[e]ach day of a continuing violation” counting as “a separate offense.” *Id.* § 2(2)(a)–(b).

The Owners have filed two other lawsuits besides this matter. On April 12, 2021, Plaintiffs commenced a lawsuit in the Superior Court for the State of Washington for Spokane County, bearing file no. 21201000-32. On April 27, 2021, Plaintiffs moved to compel the arbitration commenced by NorthWestern to proceed according to O&O Agreement § 18 (the arbitration clause), arguing, among others things, that Senate Bill 265 violates the contracts clauses of the U.S. Constitution and the Montana Constitution, and that the Federal Arbitration Act (“FAA”), 9 U.S.C. § 2, preempts the effort of the Montana Legislature to invalidate the arbitration clause in the O&O Agreement. Defendant Talen Montana, LLC (“Talen”) removed that lawsuit to the United States District Court for the Eastern District of Washington, Case No. 2:21-cv-00163, and it has moved to transfer that case to this Court.⁴

On May 4, 2021, Plaintiffs commenced the present lawsuit (Case No. 21-cv-00047), and later that same day, Talen commenced a lawsuit in the Montana

brought under this section, if the court finds that a person is willfully using or has willfully used a method . . . declared unlawful by this section, the department **may**, on petition to the court, recover . . . a civil fine of not more than \$100,000 for each violation. . . .” (Emphasis added.)

⁴ Plaintiffs have since moved to remand Case No. 2:21-cv-00163 to the Spokane Superior Court. Both the motion to transfer and the motion to remand are scheduled to be heard on July 14, 2021.

Thirteenth Judicial District Court, Yellowstone County, Cause No, DV 21-0511,
seeking:

1. A declaration that Sections 18 and 34(c) of the O&O Agreement are invalid insofar as they (1) require that any arbitration be conducted in Washington; (2) permit a Washington court to appoint an arbitrator; (3) require that any arbitration be governed by the Washington Uniform Arbitration Act; (4) allow for arbitration by one rather than three arbitrators; or (5) otherwise allow the laws or courts of Washington to influence where and how the arbitration proceeds.
2. An order enjoining [Plaintiffs and NorthWestern] to comply with, and conditionally compelling them to arbitrate in accordance with the O&O Agreement as modified by, Montana Code§ 27-5-323.

Plaintiffs removed Talen’s Yellowstone County lawsuit to this Court, Case No. 21-cv-00058. Plaintiffs have since moved to consolidate Case No. 21-cv-00047 with Case No. 21-cv-00058.⁵

The controversy, which began as a straightforward interpretation of the O&O Agreement about the Project’s ongoing operation has now morphed into three lawsuits in two jurisdictions addressing the number of arbitrators, the controlling law, arbitration’s situs, and the constitutionality of Montana Senate Bill 265 and, with the Plaintiff’s First Amended Complaint, the constitutionality of Montana Senate Bill 266. Without timely resolution of how this arbitration will be

⁵ Talen has now moved to remand Case No. 21-cv-0058 to the Yellowstone County District Court.

administered, NorthWestern’s need for a prompt resolution of the issue of Project closure to avoid suffering severe damage and potential electricity shortfalls, especially for its Montana customers, is in jeopardy. *Id.* at ¶¶ 26-27. NorthWestern needs resolution of these lawsuits now.

Northwestern fears protracted court litigation, including these ongoing proceedings, will materially delay arbitration proceedings—a risk Plaintiff Puget Sound Energy (“PSE”) threatened during testimony it gave in opposing Senate Bill 266. *See* Testimony of Melissa Lewis, representing PSE, given on March 24, 2021: “So practically speaking, if this bill passes, the utility will likely find itself in protracted, prolonged litigation with the State of Montana and unable to engage in discussions outside of the court.” Exhibit C to the Declaration of Jeff Hanson (“Hanson Decl.”) at 88 of 151 (Tr. at 18) submitted by Plaintiffs in support of their motion. *See also* Feb. 23, 2021 Testimony of Melissa Lewis, Exhibit A to Hanson Decl. at 29 of 151 (Tr. at 24).

NorthWestern also fears that if this Court grants Plaintiffs’ motion for a preliminary injunction and enjoins the Montana Attorney General from enforcing Senate Bill 266, Plaintiffs will immediately seek to close the Project. They likely will call a vote to close Colstrip Unit 3 at the next Committee meeting, as they had planned to do at the May 19, 2021 Committee meeting, *see* Ron Roberts’s Declaration at ¶ 42, or bring about premature closure of the Project or one of its units

by starving the capital and Operations and Maintenance budgets.

Plaintiffs, co-owners of the Project, have moved to enjoin the Montana Attorney General from enforcing Senate Bill 266. Plaintiffs claim Senate Bill 266 violates the United States Constitution's contract clause and commerce clause, also arguing Senate Bill 266's closure provision is unconstitutionally vague.

While Plaintiffs direct their motion for a preliminary injunction solely at the Montana Attorney General, many of Plaintiffs' arguments, and the requested relief itself, affects NorthWestern. For this reason, NorthWestern submits this response to Plaintiffs' motion for preliminary injunction.

ARGUMENT

A Plaintiffs Distort the Facts to Make Their Argument More Palatable

The Owners own the Project "as tenants in common." O&O Agreement first Whereas clause, quoted at page 2, *ante*. "The Project and each part thereof shall be owned by the Owners as tenants in common . . ." O&O Agreement § 2(a). As such, the Owners own an undivided interest in the Project, MCA § 70-1-313, and all owners have equal rights to possession and the benefits produced by the property subject to the terms of the O&O Agreement. Even though the Owners are private parties, and no governmental entity has an interest in the Project, five of the six Owners are regulated public utilities.

While the Project is managed by way of a five-member Project Committee,

established “to facilitate effective cooperation, interchange of information and efficient management of the Project,” O&O Agreement § 17(a), Amend. No. 1, § 2(k), Plaintiffs inaccurately enhance the role of the Committee while diminishing NorthWestern’s role. Pls.’ Br. at 3-4.

The establishment of the Project Committee does not supplant the Owners’ interests as tenants in common, thereby giving the Project Committee the power to shut down the Project absent the inability of the Project to produce electricity pursuant to Prudent Utility Practice. Tabaracci Decl. Ex. 1, O&O Agreement § 32 (“End of Project”). Nor, as Plaintiffs suggest, does NorthWestern have no role on the Project Committee,⁶ for NorthWestern and Talen have entered into an Amended and Restated Project Committee Vote Sharing Agreement (“Vote Sharing Agreement”) under which NorthWestern and Talen collectively appoint one Project Committee Member, and depending on the vote, either the NorthWestern or the Talen appointee casts the vote. *See* Tabaracci Decl. at ¶¶ 7-9 and corresponding Exhibit 2 (Vote Sharing Agreement recital F).

Ultimately, the issue of the number of votes necessary to close the Project is the subject of the arbitration commenced by NorthWestern, which began this legal journey.⁷ Through that arbitration, NorthWestern seeks an award declaring, among

⁶ Pls.’ Br. at 3-4.

⁷ Plaintiffs agree. *See* Pls.’ Br. at 12 n.6.

other things:

The Project can only be shut down upon a unanimous vote of the Owners when the Project, or any part thereof as originally constructed, reconstructed or added to, can no longer be made capable of producing electricity consistent with Prudent Utility Practice or the requirements of governmental agencies having jurisdiction.

NorthWestern's Amended Arbitration Demand Claim for Relief ¶ 1.

Senate Bill 266 essentially addresses the same issues the laws of Washington and Oregon address, but does so by a different means in furtherance of different policies. Acting on the belief it is in the best interests of the citizens of Washington and Oregon, those states passed laws seeking to eliminate coal-fired generated electricity in their jurisdictions by requiring “each [Washington] electric utility [to] eliminate coal-fired resources from its allocation of electricity” to Washington customers by December 31, 2025. RCW Chapter 19-405. The Oregon statute prohibits Oregon utilities, including Portland General Electric Company and PacifiCorp, from using coal-fired resources to serve Oregon customers as of January 1, 2030. ORS 757.518(2).

The Montana Legislature, in enacting Senate Bill 266, has similarly acted on the belief it is in the best interests of the citizens of Montana to promote the use of coal-fired generated electricity. It does so by limiting the powers of owners of coal-fired electricity generating facilities, including the Project, from shutting

down such a facility while it is still functioning consistent with prudent utility practice.

Importantly, Plaintiffs are not under a mandate to “transition from Colstrip.” Pls.’ Br. at 5.⁸ While some of the Plaintiffs “will no longer be able to use Colstrip to serve Washington customers [by the end of 2025] (without paying substantial penalties designed to make that option economically irrational)”, and other Plaintiffs “are prohibited from using coal-fired resources to serve Oregon customers as of January 1, 2030” (Pls.’ Br. at 5-6), the Washington and Oregon statutes neither require Plaintiffs to close Colstrip nor even suggest that requirement. Rather, those statutes seek to “eliminate coal-fired resources from its allocation of electricity” to an electric utility’s “retail electricity consumers that are located **in this state**.” RCW 19.405.020(1) (emphasis added); RCW 19.405.030(1)(a); ORS 757.518(1)(a) & (2) (emphasis added). By these terms, Plaintiffs could sell their interests in the Project, relying instead on electricity generated from non-coal-fired facilities. Alternatively, Plaintiffs could sell their

⁸ Plaintiffs’ Brief contains contradictions in addressing their obligations under Washington and Oregon law. *Compare* Pls.’ Br. at 4-5 (“no longer . . . able to serve Washington customers (without paying substantial penalties . . .) . . . prohibit[ing] Oregon utilities . . . from using coal-fired resources to serve Oregon customers . . .” *with* Pls.’ Br. at 5 (“the PNW Owners are under a state mandate to transition from Colstrip”) *with* Pls.’ Br. at 21 (“subject to governmental mandates to eliminate Colstrip from their allocation of electricity to their customers.”) *with* Pls.’ Br. at 26 (“subject to a mandate to stop using electricity generated by Colstrip” and “remove Colstrip Units 3 and 4 from their Washington and Oregon electricity portfolios”).

allocation of electricity generated by the Project for distribution outside Washington and Oregon.

The Project provides an essential service to the citizens of Montana, and without it, NorthWestern's Montana customers might go without electricity especially during peak demand.⁹ Tabaracci Decl. at ¶ 16, 26-27. The Montana legislature has an interest in protecting its citizens and ensuring they have access to reliable, inexpensive electricity. The Montana legislature was not protecting a narrow interest.

B Were This Court to Issue an Injunction, It Should Compel the Owners to Move Forward Promptly with the Arbitration Proceedings

To prevail on a motion for a preliminary injunction, the moving party must show that: (1) it is likely to succeed on the merits on his claims; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) a preliminary injunction is in the public interest. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Even where a plaintiff demonstrates a likelihood of success on the merits of its claim, it “must also demonstrate that [it] is likely to suffer irreparable harm in

⁹ See testimony of David Hoffman, a NorthWestern representative. A transcript of Mr. Hoffman's testimony, given on February 23, 2021, is located at Exhibit A to the Declaration of Jeff Hanson at 16-18 of 151 (Tr. at 11-13) submitted by Plaintiffs in support of their motion; testimony of David Hoffman, given on March 24, 2021, Exhibit C to the Declaration of Jeff Hanson at 74-76 of 151 (Tr. at 4-6) submitted by Plaintiffs in support of their motion.

the absence of a preliminary injunction, and that the balance of equities and public interest tip in his favor.” *Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009). The latter three elements do not collapse into the merits question. *See DISH Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011).

Although the Ninth Circuit permits a sliding scale approach to the *Winter* test, *Munaf v. Geren*, 553 U.S. 674, 690, 128 S. Ct. 2207, 2219 (2008) and *Winter* stand for the proposition that the “sliding scale” approach should not be used to dramatically reduce (or eliminate) a moving party’s burden with respect to any of the standards for preliminary injunctive relief, including the likelihood of success on the merits. “A preliminary injunction is an ‘extraordinary and drastic remedy.’ It should never be awarded as of right.” *Munaf*, 553 U.S. at 679, 128 S. Ct. at 2213 (2008) (citing *Yakus v. United States*, 321 U.S. 414, 440, 64 S. Ct. 660 (1944)).

1. Protracted Court Litigation Will Cause Serious Damage to NorthWestern and Its Montana Customers

As stated throughout the preceding pages, NorthWestern, like any regulated utility, needs substantial lead time for NorthWestern to plan for, locate, obtain regulatory approval for, address inevitable litigation, and construct new sources of electrical generation to replace the Project were it closed prematurely. Tabaracci Decl. ¶¶ 13, 22. Time is of the essence.

NorthWestern began the arbitration process on February 9, 2021—over four months ago, and the Owners have made no meaningful progress to move these

proceedings forward. Each Plaintiff has responded to NorthWestern's amended arbitration demand, but Defendant Talen has submitted no formal response. The Owners have not appointed an arbitrator or arbitrators. Instead, they are disputing the terms governing the arbitration not covered in section 18 of the O&O Agreement. Plaintiffs commenced their Spokane County Superior Court proceedings (now removed to federal court in the Eastern District of Washington) to pursue their interpretation of the fundamental construct of the arbitration process.

Two motions are pending in the Eastern District of Washington (a motion to transfer to this court or stay the Washington litigation and a motion to remand to the Spokane Superior Court). Three motions are pending in this court (a motion to consolidate the two Montana lawsuits, the pending motion for a preliminary injunction, and Talen's newly-filed motion to remand Case No. 21-cv-0058). More motions are likely as are appeals from district court decisions. This litigation quagmire is supplanting the arbitration process, with no end in sight.

Without timely relief, the detrimental impact on NorthWestern and its Montana customers (the citizens of and businesses in Montana) will far eclipse the impact on the Plaintiffs. Only Defendant Talen, an electricity merchant and the

Project's operator, will largely escape suffering from delay.¹⁰

2. In Balancing the Equities, NorthWestern and Its Montana Customers Will Suffer the Greatest Harm if the Arbitration Is Substantially Delayed

“To determine which way the balance of the hardships tips, [the Court] must identify the possible harm caused by the preliminary injunction against the possibility of the harm caused by not issuing it.” *Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1108 (9th Cir. 1999). The Court weighs each “of the hardships of each party against each other.” *Id.* As a general matter, “[e]conomic harm may . . . be a factor in considering the balance of equities.” *See Earth Island Institute v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010).

Plaintiffs argue that “[i]n contrast to the significant harm that the [Plaintiffs] face, Defendant will suffer no harm from a preliminary injunction.” Pls.’ Br. at 27. Plaintiffs, however, fail to recognize that every day there is a delay in determining the number of votes necessary to close the Project, NorthWestern and its Montana clients continue to suffer substantial harm.

Without clear direction as to the vote required to shut down the Project, NorthWestern may not have the substantial time it will need to plan for, locate,

¹⁰ Talen is a subsidiary of Talen Energy, one of the largest independent power generation companies in North America which itself is owned by Riverstone Holdings, a private asset management firm that invests primarily within energy, power, and infrastructure. Talen also is the Operator of the Project as set forth in section 3 of the O&O Agreement.

obtain regulatory approval for, address inevitable litigation, and construct new sources of electrical generation to replace the Project. Tabaracci Decl. at ¶¶ 22, 26-27. Development of new utility assets can take many years, requiring long-range resource planning to identify a multi-year course of action to ensure there are enough utility resources to meet customer needs at a reasonable price and to comply with applicable laws and regulations. Tabaracci Decl. at ¶¶ 13-14. Further, the over 379,400 Montana customers risk going without power during peak times. Tabaracci Decl. at ¶ 28.

NorthWestern has attempted to minimize its harm and the harm its customers would experience by immediately serving the Owners with an arbitration demand to ascertain the vote required to shut down the Project, but up to this point, the other Owners have delayed the resolution of the arbitration dispute. NorthWestern's critical need to provide reliable energy to its customers tips the balance of equities against a preliminary injunction.

3. The Public Interest Is Best Protected by an Injunction that Compels the Owners to Move Forward Promptly with the Arbitration

The public interest inquiry is distinct from equity balancing, and “primarily addresses impact on non-parties rather than parties.” *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014). “In exercising their sound discretion, courts of equity should

pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winters*, 555 U.S. at 24 (quotation omitted).

Plaintiffs assert they are entitled to a preliminary injunction, in part, because there is no “risk that the [Plaintiffs] will close Colstrip in the immediate future.” Pls’ Br. at 28. However, Plaintiffs have insisted on and threatened to take actions now and in the immediate future that would cause or may be significant contributing factors leading to the closure of the Colstrip by 2025 (or sooner) in violation of the O&O Agreement, claiming that any decision to close can be decided without the support of all the co-owners.¹¹ NorthWestern has commenced an arbitration pursuant to section 18 of the O&O Agreement seeking a declaration, among others, that “Unless all the Owners vote unanimously to shut down the Project, all Owners and the Operator are bound by section 32 of the O&O Agreement to act reasonably and in good faith to ensure for the continued operation of the Project as long as the Project or any part thereof as originally constructed, reconstructed or added to is, or can be made, capable of producing electricity consistent with Prudent Utility Practice or the requirements of governmental agencies having jurisdiction”

The reality is that as long as it remains unclear what vote is required to close

¹¹ See Roberts Declaration at ¶ 42 (“The Pacific Northwest Owners had planned to call a vote to close Colstrip Unit 3 at the Committee meeting on May 19, 2021 under the terms of the O&O Agreement.”)

the Project, the more likely it will be that NorthWestern's Montana customers will suffer harm. Public interest compels the parties to move forward to prevent any disruption of power to NorthWestern's Montana-based customers.

4. Plaintiffs' Irreparable Harm Argument Suffers from Misdiagnosis

Plaintiffs make two arguments supporting their claim they will suffer irreparable harm if this Court does not enjoin the Montana Attorney General. Plaintiffs base both arguments on the false premise that "each PNW Owner is subject to a mandate to stop using electricity generated by Colstrip by the end of 2025 in Washington or by 2030 in Oregon." Pls.' Br. at 26.

As discussed at pages 9-10, *ante*, this premise is based on a misreading of the two statutes, RCW 19.405.020(1) & 19.405.030(1)(a); ORS 757.518(1)(a) & (2). Those statutes by their express terms simply require each Plaintiff to "eliminate coal-fired resources from [their] allocation of electricity" to their "retail electricity consumers that are located **in this state**." *Id.* (emphasis added). As Plaintiffs could sell their interests in the Project, relying instead on electricity generated from non-coal-fired facilities, or they could sell their allocation of electricity generated by the Project for distribution outside Washington and Oregon, they are under no mandate to shut Colstrip down.

Given the absence of a statutory mandate to close Colstrip, application of Senate Bill 266 will not put their constitutional rights in jeopardy by their

complying with the Washington and Oregon statutes. Further, the risk the Montana Attorney General may seek a fine of \$100,000 a day also does not arise from the mandates of the Washington and Oregon statutes. That risk arises instead from their own voluntary decision to seek closure of Colstrip as a way to comply with those statutes. This reality undercuts the false dichotomy they “must either abandon plans to transition away from Colstrip or face penalties of up to \$100,000 for each day they proceed with their plans.” Pls.’ Br at 26.

NorthWestern does agree with one aspect of Plaintiffs’ irreparable harm argument, however. There is a need to move forward with the arbitration now without substantial delay. NorthWestern agrees with one aspect of the Roberts’ Declaration quoted in Plaintiffs’ Brief at page 26: “Transitioning from sources of electricity is a complex and costly process that requires long-term planning to ensure utilities have sufficient generation for their customers load.” That reality is the very thing that creates real risk for NorthWestern and its Montana customers by a material delay in the commencement of the arbitration.

5. This Court Should Issue a Mandatory Injunction Compelling the Owners to Move Forward Promptly with the Arbitration Proceedings while Protecting Plaintiffs’ Ability to Argue Their Interpretation of the O&O Agreement

Plaintiffs and NorthWestern, each a public utility, need to move forward promptly with the arbitration proceedings. Given the long lead-time to transition from sources of electricity, delay injures them all. The Court should permit the

Owners to make good faith arguments in arbitration about the meaning of provisions in the O&O Agreement without risk of legal proceedings and possible fines. Senate Bill 266 should not be interpreted to chill a fair and appropriate arbitration of the issues.

CONCLUSION

For the reasons stated above, NorthWestern asks this Court to enter an order requiring the Owners to move forward promptly with the arbitration proceedings. That order should allow the Owners to make good faith arguments in arbitration about the meaning of provisions in the O&O Agreement without risk of legal proceedings and possible fines.

DATED: June 17, 2021

Respectfully submitted,

DORSEY & WHITNEY LLP

By: s/ J David Jackson
Stephen D. Bell, Esq.
Millennium Building
125 Bank Street, Suite 600
Missoula, Montana 59802-4407
Telephone: (406) 329-5590
bell.steve@dorsey.com

J Jackson, Esq. (*pro hac vice*)
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55402
Telephone: (612) 340-2760
jackson.j@dorsey.com

*Counsel for Defendant NorthWestern
Corporation*

CERTIFICATE OF COMPLIANCE

Pursuant to L.R 7.1(d)(2)(E), I certify that Defendant NorthWestern Corporation's Response to Plaintiffs' Motion for Preliminary Injunction is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Office Word 2016, is 4,448 words long, excluding Caption, Table of Contents and Authorities, and Certificate of Compliance.

Dated this 17th day of June, 2021.

DORSEY & WHITNEY LLP

s/ J David Jackson

J David Jackson

Stephen D. Bell

Attorneys for Defendant

NorthWestern Corporation