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**UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION**

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

Plaintiffs,

v.

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

Case No. 1:21-cv-00047-SPW-KLD

PACIFIC NORTHWEST
OWNERS' REPLY IN SUPPORT
OF MOTION TO CONSOLIDATE

Defendants.	
TALEN MONTANA, LLC,	
Plaintiff,	
v.	
AVISTA CORPORATION; NORTHWESTERN CORPORATION; PACIFICORP; PORTLAND GENERAL ELECTRIC COMPANY; and PUGET SOUND ENERGY, INC.,	
Defendants.	

Case No. 1:21-cv-00058-SPW-TJC

(removed from Montana Thirteenth
Judicial District Court,
Yellowstone County, Cause No.
DV-21-0511)

Pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, on June 3, 2021, Plaintiffs Avista Corporation, PacifiCorp, Portland General Electric Company, and Puget Sound Energy, Inc. (“PNW Owners”) filed a motion to consolidate (“Motion”) *Talen Montana, LLC v. Avista Corporation, et al.*, Case No. 1:21-cv-00058-SPW-TJC (“*Talen*”)¹ with *Portland General Electric Company, et al. v. NorthWestern Corporation, et al.*, Case No. 1:21-cv-00047-SPW-KLD (“*Portland General Electric*”). NorthWestern Corporation does not

¹ *Talen* was originally filed by the Plaintiff, Talen Montana, LLC, in Montana Thirteenth Judicial Court Yellowstone County on May 4, 2021. The Plaintiff filed its first amended complaint on May 5, 2021. This case was removed to the United States District Court for the District of Montana, Billings Division, on May 17, 2021.

oppose the Motion² and Austin Knudsen, in his official capacity as Attorney General for the State of Montana, takes no position on the Motion. Only Talen Montana, LLC (“Talen”) opposes this motion.

As discussed in the PNW Owners’ Memorandum in Support of the Motion to Consolidate, *Talen* and *Portland General Electric* involve common questions of law or fact and consolidation will serve the interests of efficiency and judicial economy. On June 17, 2021, Talen filed its response (“Response”) opposing the Motion. In its Response, Talen does not dispute that *Talen* and *Portland General Electric* involve common questions of law or fact or that consolidation will serve the interests of efficiency and judicial economy. Instead, Talen generally asserts two arguments in opposition to consolidation: (i) that the Pacific Northwest Owners improperly removed the case because there is not complete diversity of citizenship; therefore the Court should remand *Talen* to the Montana Thirteenth Judicial Court for Yellowstone County, and (ii) that the Motion is premature because there is an issue of whether there is a ripe dispute in *Portland General Electric*. Both arguments are without merit.

² On June 17, 2021, NorthWestern filed a response to the Motion in which it stated that it favors consolidation and it “agrees Case No. 21-cv-00047 should be consolidated with Case No. 21-cv-00058.”

I. When the Parties are Properly Aligned, There is Complete Diversity of Citizenship in *Talen*.

Talen objects to consolidation because, in its view, there is not complete diversity between the plaintiff and the defendants. Talen’s argument appears to be based on the fact that, in its First Amended Complaint (“FAC”) originally filed as Cause No. DV-21-0511 in the Thirteenth Judicial District Court, Yellowstone County (“State Action”), Talen named NorthWestern Corporation as a defendant. Talen and NorthWestern are both organized in the State of Delaware, and Talen therefore asserts that there is not complete diversity of citizenship required for removal. Talen’s argument fails to recognize that NorthWestern’s and Talen’s ultimate interests in this proceeding are aligned and that there is, therefore, complete diversity of citizenship when the parties are properly aligned.

Federal courts have broad authority to “look beyond the pleadings, and arrange” or realign “the parties according to their sides in the dispute.” *City of Indianapolis v. Chase Nat’l Bank of N.Y.*, 314 U.S. 63, 69, 62 S. Ct. 15, 86 L. Ed. 47 (1941) (internal quotation marks omitted). The courts, not the parties, are responsible for aligning the parties according to their interests, and the alignment alleged by a plaintiff is not binding on the courts. *Dolch v. United Cal. Bank*, 702 F.2d 178, 180 (9th Cir. 1980), *citing City of Indianapolis*, 314 U.S. at 69.

“Courts may realign parties, according to their ultimate interests, whether the realignment has the effect of conferring or denying subject matter jurisdiction on the

court.” *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1133 (9th Cir. 2006), *citing Standard Oil Co. of Cal. v. Perkins*, 347 F.2d 379, 382 (9th Cir. 1965). “[I]n a declaratory-judgment action against multiple defendants, if the court finds that no controversy exists between the plaintiff and one of the defendants, it need not dismiss the action but can realign the defendant as a plaintiff, when appropriate.” § 2768 Procedure in Declaratory Actions, 10B Fed. Prac. & Proc. Civ. § 2768 (4th ed.).

In considering the issue of realignment, the Ninth Circuit follows this “primary purpose” or “primary matter” test. *Prudential Real Estate Affiliates v. PPR Realty Inc.*, 204 F.3d 867, 873 (9th Cir. 2000); *Continental Airlines Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 (9th Cir. 1987); *Dolch*, 702 F.2d at 181. Under this standard, courts align parties in accordance with the primary dispute in the controversy, “despite the fact that there may be actual and substantial ancillary or secondary issues to the primary issue.” *US Fidelity & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085, 1089 (6th Cir. 1992).

As discussed in the Pacific Northwest Owners’ Notice of Removal filed in *Talen* (“Notice of Removal”), NorthWestern is on the same side as Talen in the dispute over the interpretation of the parties’ agreement and the operation of Colstrip, and is aligned with Talen in its interests in the outcome of the State

Action.³ Like Talen, NorthWestern seeks to prevent Colstrip from closing.⁴ Also, both Talen and NorthWestern lobbied in favor of the Montana law that is the basis for Talen's FAC.⁵ (As discussed in the PNW Owners Opposition to Talen's Motion to Remand, Talen incorrectly argues that the primary purpose of the State Action was to address whether the parties have a ripe dispute because (1) ripeness is not in the prayer for relief and (2) ripeness is a question for the arbitrator.)

In sum, there can be no real dispute that Talen's and NorthWestern's interests are aligned concerning SB 265 and that those interests are adverse to the interests of the other four defendants in the State Action. It follows that, when the parties are properly aligned, there is complete diversity of citizenship. Talen's argument to the contrary is without merit.

II. Ripeness

In its Response, Talen asserts that the Motion to Consolidate is premature because "[a] key issue in 1:21-cv-00047 is whether there is even a ripe dispute, including for the reasons explained in Talen Montana's Opposition to the Motion for Preliminary Injunction, filed June 17, 2021 (1:21-cv-00047, at No. 60 (D. Mont))."⁶ Talen's argument that the Motion is premature is without merit, as

³ Notice of Removal at ¶¶ 6.7-6.8.

⁴ *Id.*

⁵ *Id.*

⁶ Response at 2.

discussed below and more fully in the Pacific Northwest Owners' Reply in Support of Motion for Preliminary Injunction, filed on July 1, 2021, in Case No. 1:21-cv-00047.

In its Opposition to the Motion for Preliminary Injunction in Case No. 1:21-cv-00047-SPW-KLD ("Opposition"), which Talen relies on for its ripeness argument here, Talen argues that the Pacific Northwest Owners' claims regarding Senate Bill 266 ("SB 266") are unlikely to succeed on the merits because those claims are not ripe.⁷ Talen's argument relies heavily on *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) ("*Thomas*"), which articulated a three-part test for determining ripeness:

- 1) Plaintiffs have articulated a concrete plan to violate the law in question; 2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and 3) history of past prosecution.

This three-part test does not apply, however, where a plaintiff has *already* suffered "actual, ongoing ... harm" that is "fairly traceable" to the challenged law. *See Nat'l Audubon Soc. v. Davis*, 307 F.3d 835, 855 (9th Cir. 2002). In such cases, the plaintiff has standing and a constitutionally ripe claim.⁸ *See id.*

That is the case here. SB 266 injured the PNW Owners when it was enacted, because it impaired the PNW Owners' contractual rights under the Ownership and

⁷ Opposition at 6-9.

⁸ "[R]ipeness coincides squarely with standing's injury in fact prong." *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1153 (9th Cir. 2017) (cleaned up).

Operating Agreement between the owners (“Agreement”) and thereby “extinguish[ed] [the PNW Owners’] expectancy interest[s]”—“an injury which is actual, concrete, and particularized.” *Lazar v. Kronkce*, 862 F.3d 1186, 1198-99 (9th Cir. 2017); *see also HRPT Props. Tr. v. Lingle*, 715 F. Supp. 2d 1115, 1131 (D. Haw. 2010) (concluding Contract Clause claim was ripe because “Act 189 injures HPRT by changing the lease.”).

Relying on the three-part test articulated in *Thomas*, Talen appears to argue that the PNW Owners must articulate a concrete plan to close Colstrip, even though SB 266 states:

Conduct 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 is an unfair or deceptive act or practice in the conduct of trade or commerce in accordance with 30-14-103.

Articulating a concrete plan to close Colstrip could arguably be conduct that violates SB 266. In other words, in Talen’s view, the PNW Owners must expose themselves to potential prosecution under SB 266 in order to make their claim that SB 266 is unconstitutional ripe.

Talen fails to recognize that, where action threatened by the government is concerned, as is the case with SB 266, a plaintiff is not required to expose itself to liability before bringing a suit to challenge the basis of the threat. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29, 127 S. Ct. 764, 772–73, 166 L. Ed.

2d 604 (2007). As the Court recognized in *MedImmune*, a “plaintiff’s own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.” *Id.* at 129.

There can be no question that there is an actual threat of Montana enforcing SB 266 against the PNW Owners.⁹ SB 266 was enacted specifically to prohibit the PNW Owners from exercising their contractual rights with regard to Colstrip. The Governor issued “a specific warning” in signing SB 266 declaring that he “signed SB 265 and 266” because “Montana stands with Colstrip.” Declaration of Jeffrey M. Hanson in Support of Motion for Preliminary Injunction filed in Case No. 1:21-cv-00047-SPW-KLD (“Hanson Decl.”) ¶ 8. Likewise, “the history” of the statute favors a ripeness finding. *Thomas*, 220 F.3d at 1139. It is undisputed, and the legislative record leaves no doubt, that SB 266 was specifically targeted at Colstrip, the PNW Owners, and the Agreement. *See* Hanson Decl. Exs. A, C.

The PNW Owners’ claims in *Portland General Electric* regarding SB 266 are ripe. Talen’s arguments to the contrary are without merit.

⁹ On June 17, 2021, Austin Knudsen in his official capacity as the Attorney General for the State of Montana filed a notice of no position regarding the PNW Owners’ Motion for Preliminary Injunction in Case No. 1:21-cv-00047-SPW-KLD (“Notice”) stating that “the State does not anticipate enforcing Senate Bill 266 in the immediate future.” Notice at 2. It is not clear when or under what conditions the State will or will not seek to enforce SB 266. The State’s vague statement that it “does not anticipate enforcing SB 266 in the immediate future” does not eliminate the actual threat of the government enforcing SB 266 against the PNW Owners.

III. Conclusion

For the reasons stated in their Memorandum in Support of Motion to Consolidate and herein, the PNW Owners respectfully request that the Court consolidate *Talen* with *Portland General Electric* and continue the consolidated case under *Portland General Electric*.

I certify that this memorandum contains less than 3,250 words, in compliance with the Local Civil Rules.

Dated this 1st day of July, 2021.

HANSBERRY & JOURDONNAIS, PLLC

/s/ Charles E. Hansberry

Charles E. Hansberry

Jenny M. Jourdonnais

*Attorneys for Plaintiffs Portland
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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2021, a copy of the foregoing document was served on the following persons:

Via ECF:

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