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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; AUSTIN KNUDSEN,** in his official capacity as Attorney General for the State of Montana, Defendants.	Case No. 1:21-cv-00047-SPW-KLD **PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT KNUDSEN'S MOTION TO STAY**

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I. INTRODUCTION

The arguments made by Attorney General Knudsen in support of his motion to stay are directed at a summary judgment motion that has not been filed. The Attorney General asks the Court to stay proceedings because the Colstrip owners have arbitrable disputes over what vote is required to close a unit of Colstrip, insisting that this question must be resolved in arbitration before the Court can decide whether Senate Bill ("SB") 266 is unconstitutional. But the summary judgment motion filed by Plaintiffs (the "PNW Owners") challenging SB 266 (Doc. 104) does not include that issue. Instead of addressing the arguments and facts in the motion, the Attorney General's motion cites allegations in the *complaint* that are not argued in the motion. The PNW Owners' challenges to SB 266 in their summary judgment motion are independent of the claims subject to arbitration, and thus the requested stay is unwarranted.

The Court should also reject the Attorney General's alternative request under Federal Rule of Civil Procedure 56(d) for a six-month extension to respond to the summary judgment motion. In support, the Attorney General simply submitted a laundry list of discovery topics, making no attempt to satisfy the requirements of Rule 56(d). The granular discovery that the Attorney General seeks is not needed here—as evidenced by his inability to offer specific facts

sought and any explanation concerning how those facts would preclude summary judgment.

The Court should reject the Attorney General's third argument that a stay would promote judicial economy based on the motion to remand pending in Case No. CV 21-58-BLG-SPW-TJC and motion to consolidate pending in this case because case number -58 concerns only the constitutionality of SB 265, which is not at issue in this motion.

No stay or extension is needed for the Court to decide the PNW Owners' constitutional challenges to SB 266. The real purpose of the Attorney General's motion—filed on the day its response to the summary judgment motion was due—is delay. The Court should deny the Attorney General's motion for stay.

II. ARGUMENT

A. No stay is warranted because the Constitutional challenges to SB 266 are independent of the claims subject to arbitration.

The Attorney General's request to stay proceedings pending arbitration relies on a fundamental mischaracterization of the PNW Owners' motion for partial summary judgment challenging SB 266. The Attorney General insists that "[u]ntil an arbitrator resolves—in the first instance—the parties' disputes regarding what the O&O Agreement says, Plaintiffs' claims regarding SB 266's effect on

their rights under O&O Agreement are not ripe for judicial review." Doc. 117 at 7.[1] Elsewhere the Attorney General argues that "[b]ecause Plaintiffs' constitutional claims regarding SB 266 are based on their allegations of what the O&O Agreement says, arbitration must occur before this Court can consider those claims." *Id.* at 6. In support, the Attorney General points to the Colstrip owners' dispute over whether the O&O Agreement requires unanimous consent to close a generating unit. *Id.* at 5–6.

The parties' dispute over the vote requirement, however, is not relevant to the PNW Owners' summary judgment motion. Nor are the other associated contract disputes that are subject to arbitration. The PNW Owners' motion for summary judgment avoids the disputes subject to arbitration. The claims to be arbitrated concern closure of Colstrip (i.e., the vote needed and other alleged requirements or rights to do so) and the owners' obligations in the absence of a unanimous vote to close. Declaration of Dallas DeLuca ("DeLuca Decl.") Ex. A (excerpt from Amended Arbitration Demand).

By contrast, the motion for summary judgment argues that SB 266 is unconstitutional because it:

[1] Page references throughout this brief are to the ECF-stamped page numbers.

- "effectively eliminates the PNW Owners' contract *right to arbitrate* whether a less than unanimous vote is required to close Colstrip," Doc. 104 at 16 (emphasis added);
- "nullifies the PNW Owners' *right to advocate* their position that, under the Agreement, some or all of Colstrip can be shut down with less than a unanimous vote of the owners," *id.* at 17 (emphasis added);
- "provides for up to a *$100,000-per-day fine* on each PNW Owner for any 'conduct' that could bring about a closure without unanimous consent," *id.* at 18 (emphasis added);
- "subjects each PNW Owner to a staggering $100,000-per-day 'civil fine' simply for exercising their contractual rights to *propose* the closure of, or to *vote* to close, one or both units," *id.* at 19 (emphasis added);[2]
- impairs the PNW Owners' right to vote no on a proposed budget for reasons unrelated to an attempt to bring about closure with less-than-unanimous consent (e.g., because of budget inefficiencies), *id.* at 21;

[2] Note that none of the arguments turns on the merits of the contract dispute over the vote requirement. *See also* Doc. 104 at 17 n.9 ("The PNW Owners are not asking this Court to rule whether the Agreement provides that a less than unanimous vote can close one or both units of Colstrip or whether it requires a unanimous vote; that is a question for the arbitrator.").

- subjects each PNW Owner to potential $100,000-per-day "fines if the PNW Owners did not approve an annual budget proposed by Talen [Montana, LLC ("Talen")]," *id.*;
- "impairs several contract rights" including "the right (1) to vote against awards of certain contracts, change orders, or payment of controverted claims (Section 17(f)(iv)); (2) to vote against construction budgets for repair of the Project (Section 17(f)(vi)); and (3) to vote against settlement of substantial third-party claims (Section 17(f)(viii))." Doc. 104 at 21–22.
- impairs the right to arbitrate budget disputes, *id.* at 22;
- "imposes a draconian fine of up to $100,000 per day for [refusing to pay a monthly bill for operation of Colstrip, which] would otherwise trigger default provisions and remedies under the Agreement," *id.*;
- "burden[s] out-of-state utilities with a choice between paying an exorbitant $100,000 per day fine or, to avoid the fine, remaining invested in a Montana electrical plant that produces power that those utilities will not be able to use to serve their customers in Washington and Oregon after 2025 and 2029," *id.* at 29;

- "requires the PNW Owners to continue to operate and source electricity from Montana instead of obtaining that same amount of power from other states, forcing them to 'divert' resources to continue operating Colstrip, resources that 'might otherwise go to' other states," *id.* at 31; and
- imposes an excessive burden on interstate commerce compared to the putative local benefits, *id.* at 32.

None of the arguments above requires resolution of the claims subject to arbitration. This realization presumably explains why the Attorney General's motion to stay is directed at allegations in the PNW Owners First Amended Complaint (Doc. 32), not at the arguments advanced in their motion for summary judgment (Docs. 102–104).

The Attorney General's citation to the arbitration acts of Montana and Washington is not on point. Doc. 117 at 6. The Colstrip owners' contract claims are indeed subject to arbitration. But their constitutional challenges to SB 266, of course, are not. And because the arguments in the PNW Owners' summary judgment motion are independent of the arbitrable claims, the statutory stay provisions and authority on arbitrability cited by the Attorney General are irrelevant. The Attorney General cites no authority that supports a stay of a summary judgment motion addressing nonarbitrable claims and issues.

The Court can and should decide the issues presented in the summary judgment motion; there is no justification for delay. The Court should deny the Attorney General's request for a stay pending arbitration.

B. Deferral of the motion for summary judgment is not warranted under Rule 56(d).

The Court should also reject the Attorney General's alternative request for a six-month extension to respond to the summary judgment motion. Once again, the Attorney General fails to base its argument on the PNW Owners' arguments in their motion for summary judgment. And instead of addressing the requirements of Rule 56(d), the Attorney General simply provides a list of discovery topics and conclusory statements that he needs discovery on those topics to respond to the summary judgment motion. Doc. 117 at 8–11. The Attorney General's motion fails to meet the requirements of Rule 56(d), and the discovery sought would not preclude summary judgment.

1. The requirements of Rule 56(d).

To justify staying a motion for summary judgment under Rule 56(d), the "nonmovant" must "show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Rule 56(d) requires the nonmovant to make three showings: (1) that "it has set forth in affidavit form *the specific facts* it hopes to elicit from further discovery; (2) the facts sought exist;

and (3) the sought-after facts are essential to oppose summary judgment." *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 678 (9th Cir. 2018) (citation omitted). "Failure to comply with these requirements is a proper ground for denying relief." *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002). Importantly, the nonmovant cannot use the reply brief in support of its motion to stay to meet any of these three requirements. Doing so would violate not only the general rule that "a party may not raise new arguments for the first time in its reply brief," but also the specific requirement in Rule 56(d) that the showing be "set forth" in an affidavit or declaration. *Lexington Ins. Co. v. Scott Homes Multifamily, Inc.*, 2013 WL 4026892, at *2 (D. Ariz. Aug. 7, 2013). Here, the Attorney General has not made any of the three showings required to satisfy Rule 56(d).

2. The Attorney General does not identify "specific facts" he hopes to elicit in discovery.

To begin, the declaration filed in support of the Attorney General's motion fails to "set forth … *the specific facts* it hopes to elicit." *Stevens*, 899 F.3d at 678 (citation omitted). Instead, it simply points to sixteen categories of information that the Attorney General seeks in his recently served discovery requests, without identifying any specific facts that those requests would reveal. *See* Doc. 118 at 3–5 ¶¶ 9.a–p.

Pointing to general categories of evidence—without identifying any "specific facts" that evidence might produce—is not enough. The Ninth Circuit has held that a declaration that "identified the documents sought but not the facts within those documents that would assist . . . in opposing summary judgment" did not satisfy the nonmovant's burden under Rule 56(d). *Pac. Rim Land Dev., LLC v. Imperial Pac. Int'l (CNMI), LLC*, 2021 WL 4872460, at *1 (9th Cir. Oct. 19, 2021). For example, a declaration stating the plaintiff "had not yet received transcripts of several witness' depositions" was facially deficient because it did not "refer to any specific fact in these depositions." *Tatum v. City & Cnty. of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006). And a declaration's "broad request" that "sought 'all documents' and 'all communications' to 'investigate the validity of [a] Consent Agreement and Assignment Agreement" at issue did not satisfy Rule 56(d). *Russell Rd. Food & Beverage, LLC v. Spencer*, 829 F.3d 1152, 1157 n.3 (9th Cir. 2016). The Attorney General's declaration suffers from the same basic flaw identified in these cases.

District courts in the Ninth Circuit routinely deny Rule 56(d) motions where nonmovants provide a "laundry list of discovery requests" but "fail to articulate what specific facts they believe further discovery would reveal." *Hansen v. Liberty*

Mut. Fire Ins. Co., 2012 WL 4611013, at *7 (D. Nev. Sept. 30, 2012).[3] Courts in other circuits have similarly denied continuances under Rule 56(d) where the nonmovant's declaration "only listed general categories of discovery without pointing to the specific facts that discovery would reveal." *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1334 (11th Cir. 2021).

Nor is it enough that the Attorney General wants to "verify" the facts set out in the PNW Owners' Statement of Undisputed Facts. Doc. 117 at 8. As discussed in Part II.B.4 below, those facts are based on statutes or publicly available records, are not in dispute, or are supported by declarations submitted by the PNW Owners. The mere "hope that evidence to contradict the affidavits would transpire at deposition" does not justify "more time for discovery." *Cont'l Mar. of San Francisco, Inc.* v. *Pac. Coast Metal Trades Dist. Council, Metal Trades Dep't*, 817 F.2d 1391, 1395 (9th Cir. 1987). The Attorney General does not identify any basis for doubting the declarants' credibility. And "an unspecific hope of undermining

[3] *See, e.g.*, *Clauder v. County of San Bernardino*, 2016 WL 145864, at *4 (C.D. Cal. Jan. 11, 2016) ("Plaintiff's counsel's laundry list of additional discovery does not identify with specificity the facts he hopes to obtain."); *Pruitt v. Ryan*, 2016 WL 1376444, at *3 (D. Ariz. Apr. 7, 2016) (denying a continuance where the nonmovant's declaration simply listed "the discovery requests in his Second Request for Production of Documents"); *Grant v. Alperovich*, 2014 WL 1268701, at *3 (W.D. Wash. Mar. 26, 2014) (denying a continuance where the declaration simply "list[ed] several categories of information about which she seeks to conduct discovery").

[their] credibility" does not "suffice[] to avert summary judgment." *Frederick S. Wyle Prof'l Corp. v. Texaco, Inc.*, 764 F.2d 604, 608 (9th Cir. 1985) (collecting decisions). Accordingly, district courts in the Ninth Circuit and elsewhere have denied Rule 56(d) motions where the nonmovant's request for a continuance boiled down to "a desire to test declarants' credibility." *Tedesco v. Pepe*, 2012 WL 13012419, at *7 (C.D. Cal. July 17, 2012); *see also, e.g.*, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 993 (C.D. Cal. 2006).[4]

3. The Attorney General does not provide any basis for his assertion that additional discovery would lead to the kind of facts he seeks.

The Attorney General's declaration also fails to meet the second Rule 56(d) requirement. Beyond the failure to identify "specific facts," it does not "provide any basis or factual support for [his] assertions that further discovery would lead to [such] facts." *Stevens*, 899 F.3d at 679. Instead, it simply asserts that "[d]iscovery *may* demonstrate that Plaintiffs' interpretation of the O&O Agreement is baseless or that the perceived harm is not supported by sufficient admissible facts." Doc. 118 at 6 ¶ 11 (emphasis added). But a nonmovant cannot merely assert that discovery might produce evidence to obtain a Rule 56(d) continuance. *Getz v.*

[4] As discussed in Part II.C below, the PNW Owners offered to make summary judgment declarants Brett Greene and Ronald Roberts available for targeted depositions in early December, but Defendant Talen "tabled" its request for those depositions, and the Attorney General expressed no interest in taking them.

Boeing Co., 654 F.3d 852, 865 (9th Cir. 2011) (refusing to let the nonmovants simply "suggest that the I/O data *might* have provided evidence of an 'electrical anomaly'"). That is not the kind of "specific explanation" required to satisfy Rule 56(d). *Stevens*, 899 F.3d at 679.

4. The Attorney General has not established that the information he seeks would preclude summary judgment.

The Attorney General also fails to make the third showing required by Rule 56(d). A nonmovant "must make clear" that the facts sought through the additional discovery "would preclude summary judgment." *Garrett v. City & County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987). Evidence that is only "generically relevant" is insufficient; the party invoking Rule 56(d) must show that the anticipated evidence is "essential" to oppose summary judgment. *See Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp*., 525 F.3d 822, 829 (9th Cir. 2008). Crucially, it is not enough to explain that the evidence might negate some allegations in the complaint. The nonmovant must show that the additional information would meaningfully impact "the issues upon which the summary judgment [motion] [i]s based." *Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994). If the showing is not "'pertinent to the issues' on the summary judgment motion," then the nonmovant has not met its burden. *W. World Ins. Co.*

v. Prof'l Collection Consultants, 721 F. App'x 621, 623–24 (9th Cir. 2018) (quoting *Tatum*, 441 F.3d at 1100).

Here, the Attorney General's declaration is facially deficient. It contains no "specified reasons" why the facts obtained through additional discovery are "essential to justify" the Attorney General's "opposition" to the pending motion for summary judgment. Fed. R. Civ. P. 56(d). Instead, the declaration simply asserts that the Attorney General "is severely disadvantaged in [his] ability to respond" and that unspecified "facts and defenses must be fleshed out before any dispositive motion is entertained." Doc. 118 at 3 ¶ 8, 6 ¶ 12. Such "conclusory" assertions fall short of the detailed explanation required by Rule 56(d). *W. World Ins.*, 721 F. App'x at 623–24; *see also Tatum*, 441 F.3d 1090, 1100–01 ("The declaration does not explain how a continuance would have allowed Tatum to produce evidence creating a factual issue regarding probable cause.").

Additionally, the Attorney General's motion fails to tie the discovery sought to the specific grounds for summary judgment raised by the PNW Owners. Instead, the Attorney General focuses on allegations from the Amended Complaint, *see* Doc. 117 at 3–5, 10, and effectively ignores the specific grounds for the PNW Owners' motion, which receives only one general citation, *id.* at 10 ("*See generally*, Doc. 104."). The Attorney General's motion thus fails to provide an

explanation that is "pertinent to the issues on the summary judgment motion." *W. World Ins. Co.*, 721 Fed. App'x at 623–24 (cleaned up).

A proper evaluation of the Attorney General's discovery topics—with reference to the arguments advanced in the PNW Owners' summary judgment motion—reveals that deferring the Court's decision on the summary judgment motion is unwarranted. Apart from a general request for the identification of "persons with knowledge,"[5] the discovery topics can be grouped in four categories:

- Legal mandates and the need to transition away from Colstrip. Five of the Attorney General's discovery topics concern the legal mandates in Washington and Oregon faced by the PNW Owners and their plans and efforts to transition away from Colstrip in response to the mandates.[6] These topics present legal issues and concern publicly available records, and there is no genuine dispute that the PNW Owners are taking steps to transition away from Colstrip in response

[5] Doc. 118 at 5 (topic (o)).

[6] See the Attorney General's discovery topics (a) ("Governmental mandates"), (f) ("inability to serve . . . customers using Colstrip"), (h) ("plans for transitioning"), (n) (obligation and steps to remove Colstrip from energy portfolio), and (p) (long-term electricity portfolio plans and potential closure of Colstrip). Doc. 118 ¶ 9, at 3–5. The categories listed in the brief correspond to Request for Production ("RFP") Nos. 3, 6, 8, 9, 15, 18 and Interrogatory Nos. 1, 10, 11, 14. Doc. 118-1.

to mandates imposed by Washington and Oregon. The Attorney General has known about these issues in detail since the PNW Owners filed their amended complaint on May 19 and motion for preliminary injunction on May 27. Docs. 32, 37.

- Colstrip owners' contract disputes and arbitration. Three of the Attorney General's discovery categories relate to the Colstrip owners' contract disputes that are subject to arbitration.[7] As discussed in Part II.A above, the summary judgment claims are independent of the contract disputes subject to arbitration. *See* DeLuca Decl. Ex. A. (On December 3, 2021, the PNW Owners produced to the Attorney General the parties' arbitration demands, responses to arbitration demands, and related correspondence. DeLuca Decl. ¶ 17.)[8]

[7] *See* the Attorney General's discovery topics (b) ("contract disputes"), (c) ("status of arbitration"), and (g) (O&O Agreement and how interpreted historically). Doc. 118 ¶ 9, at 4. The topics correspond to RFP Nos. 1, 2, 4, 5, 7, 10 and Interrogatory Nos. 6, 12. Doc. 118-1.

[8] The Attorney General's RFP No. 2 asks for "all correspondence between the Colstrip owners and Operators related to the O&O Agreement." Doc. 118-1 at 11. In addition to being objectionable as grossly overbroad, unduly burdensome, and not proportional to the needs of the case, the request is an example of a wish for helpful evidence that might exist, rather than the specificity required to satisfy Rule 56(d).

- Past budget approvals. The Attorney General's discovery category (i), "[i]nformation regarding past budget approvals," Doc. 118 ¶ 9, at 4, corresponds to two objectionable RFPs: "all documentation of budget negotiations between Colstrip Owners and Operators for the past five years" and "copies of all budgets and draft budgets for operation of Colstrip for the past ten years," Doc. 118-1, at 16 (RFP Nos. 11 and 12). The Attorney General's motion offers no hint to explain why he believes past budgets and budget negotiations are relevant to the PNW Owners' summary judgment motion, which argues only that SB 266 is unconstitutional because it impairs the right of the PNW Owners to vote no on current or future proposed budgets, subjects them to potential $100,000-per-day fines if they do not approve a Talen-proposed budget or fail to pay a monthly operations bill, and impairs their right to arbitrate budget disputes. Doc. 104 at 21–22.
- Impairment, harms, and burdens. The remaining six discovery categories identified in the Attorney General's motion concern how SB 266 harms the PNW Owners.[9] Those six topics correspond to three

[9] See the Attorney General's discovery topics (d) (favoring of Montana interests at expense of out-of-state utilities), (e) (impairment of contract rights), (j) (punishment of Colstrip owners for exercising contract rights), (k) (how it

interrogatories in the Attorney's General's discovery requests.[10] The PNW Owners' brief in support of its motion for summary judgment and supporting declarations serve as answers to those interrogatories with respect to the issues raised in the summary judgment motion. Thus, the interrogatories cannot support application of Rule 56(d).[11]

In sum, examination of the discovery sought reveals that it would not preclude summary judgment—which likely explains why the Attorney General made no attempt to comply with Rule 56(d) and instead relied on conclusory statements and a superficial list of discovery topics. The Court should deny the Attorney General's Rule 56(d) motion.

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discriminates against PNW owners), (l) (burdens on PNW owners), and (m) (alleged harm). Doc. 117 at 9.

[10] Interrogatory No. 2: "Identify each and every way SB 266 'impairs the parties' rights under the O&O Agreement' (Doc. 32, ¶ 5) including each specific provision of the O&O Agreement Plaintiffs believe is impaired with the reasons why." Interrogatory No. 3: "Identify each and every way SB 266 violates the Commerce Clause." Interrogatory No. 4: "Identify each and every way SB 266 violates the Contract Clause." Doc. 118-1 at 13.

[11] Additionally, as is present in this case, a discriminatory purpose alone is sufficient to violate the Dormant Commerce Clause. *See* Doc. 100 (Preliminary Injunction Order) at 9–10 ¶¶ 14-17. Indeed, a finding of discriminatory purpose precludes any "inquiry into . . . the burden on interstate commerce." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270 (1984). So, as a matter of law, the Attorney General's desire to probe the "burdens" on the PNW Owners cannot change the conclusion that SB 266 violates the Commerce Clause.

C. If the Court defers consideration of the motion, an extension should be much shorter than the six months requested by the Attorney General.

If the Court nevertheless concludes that an extension to permit discovery is warranted, it should reject the Attorney General's request for a six-month extension. As evident from the discussion above, the request for an additional six months is not tied to discovery needs specific to the pending motion for summary judgment. Accelerated and narrowly targeted discovery would more than suffice. Notably, as discussed below, the Attorney General and Talen already declined that opportunity, preferring instead to seek a lengthy delay.

The Attorney General served its discovery requests on November 10, and Talen followed two days later with a request to depose PGE's Brett Greene and PSE's Ronald Roberts on the factual assertions contained in their declarations. Docs. 105, 106; DeLuca Decl. Ex. C. The PNW Owners responded by trying to arrange accelerated depositions and an extended briefing schedule. Specifically, on a November 24 call among all parties' counsel, the PNW Owners offered to make Mr. Greene and Mr. Roberts available for the requested depositions. DeLuca Decl. ¶ 8. The PNW Owners planned to offer to make the witnesses available December 3 and December 7 and to modify the briefing schedule so Talen and NorthWestern's responses to the summary judgment motion would be due one week after the second deposition. DeLuca Decl. ¶ 10. Talen, however, informed

counsel that it was "tabling" the requested depositions to await other discovery. DeLuca Decl. ¶ 9. Talen and NorthWestern said they would respond to the motion on December 3, their current deadline, without the PNW Owners' responses to the Attorney General's discovery requests or the depositions.[12] Docs. 113, 114; DeLuca Decl. ¶ 12. The Attorney General expressed no interest in accelerated depositions. DeLuca Decl. ¶ 9. And when the PNW Owners announced they would timely respond to the written discovery, but will object to some requests, counsel for the Attorney General announced that no member of the Attorney General's office would be available to confer on discovery objections or for any other conferences between December 10 and December 31. DeLuca Decl. ¶ 14.

It is clear that the Attorney General and Talen seek to delay resolution of the constitutional challenges presented in the summary judgment motion. The Court should prevent that. The issues presented are appropriate for prompt resolution and ready for review on the current record. If the Attorney General's Rule 56(d) motion is granted, the additional time should be limited for the reasons above and because delay in the ultimate vindication of the PNW Owners' constitutional rights is prejudicial.[13]

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[12] The Attorney General never requested an extension and instead filed its motion to stay on November 19, the deadline for his response.

[13] The PNW Owners request that the Court not delay deciding their motion for summary judgment concerning SB 265 (Doc. 88). That motion can be decided

D. The pending motion for consolidation has no bearing on the PNW Owners' motion for summary judgment.

The Court should reject the Attorney General's final argument in favor of a stay. The Attorney General contends that "there is the potential that Plaintiffs' summary judgment motion may be mooted by consolidation" of case No. CV-21-58 with this case. Doc. 117 at 12. There is no such risk, however, as case number -58 is an action filed by Talen concerning *SB 265* and arbitration. No. CV-21-58 Doc. 4. It has nothing to do with the claims asserted by the PNW Owners in their motion for summary judgment challenging *SB 266*.

On December 1, 2021, Magistrate Judge Cavan issued his Findings and Recommendation that case number -58 be remanded to the District Court for Yellowstone County. Doc. 56. If that recommendation is adopted, it would moot the Attorney General's final request for stay.

III. CONCLUSION

For the reasons above, the Court should deny Attorney General Knudsen's Motion to Stay.

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before completion of the parties' briefing on the motion for summary judgment concerning SB 266 and any without regard to any potential stay under Rule 56(d). The parties are not likely to agree on the procedures for arbitration, and thus will not be able to start arbitration, until the motion challenging SB 265 is decided.

DATED this 3rd day of December, 2021.

/s/ Jeffrey M. Hanson

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that Plaintiffs' Reply in Support of Motion for Entry of an Order Further Defining Terms and Scope of Preliminary Injunction Issued on October 13, 2021 is: printed with proportionately spaced Times New Roman text with 14-point typeface; is double-spaced; and the word count, calculated by Microsoft Office Word, is 4,559 words long, including footnotes, but excluding the Caption, Signature Blocks, Certificate of Service, Tables of Contents and Authorities, and Certificate of Compliance.

DATED: December 3, 2021

/s/ Jeffrey M. Hanson
Jeffrey M. Hanson

CERTIFICATE OF SERVICE

I certify that on this date, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

DATED: December 3, 2021

/s/ Jeffrey M. Hanson
Jeffrey M. Hanson