Gary J. Smith (SBN 141393)
BEVERIDGE & DIAMOND, P.C.
456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251
Telephone: (415) 262-4000
Facsimile: (415) 262-4040
gsmith@bdlaw.com

Peter J. Schaumberg, *pro hac vice* pending
James M. Auslander, *pro hac vice* pending
BEVERIDGE & DIAMOND, P.C.
1350 I St., N.W., Suite 700
Washington, DC 20005
Phone: (202) 789-6009
pschaumberg@bdlaw.com
jauslander@bdlaw.com
Attorneys for Proposed Intervenor
American Petroleum Institute

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, *et al.*, Plaintiffs, vs. RYAN ZINKE, *et al.*, Defendants.	Civil Case No. 3:17-cv-07186-WHO
SIERRA CLUB, *et al.*, Plaintiffs, vs. RYAN ZINKE, *et al.*, Defendants.	Civil Case No. 3:17-cv-7187-WHO **AMERICAN PETROLEUM INSTITUTE MOTION TO INTERVENE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Date: February 14, 2018 Time: 2:00 pm Courtroom: 2, 17th Floor Judge: Hon. William H. Orrick

NOTICE OF MOTION AND MOTION TO INTERVENE

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on February 14, 2018, at 2:00 p.m., or as soon thereafter as counsel may be heard in the courtroom of the Hon. William H. Orrick III, located at Courtroom 2, 17th Floor, San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, the American Petroleum Institute ("API") will and hereby does respectfully move this Court to intervene in these actions.

API asks this Court to grant intervention as of right pursuant to Federal Rule of Civil Procedure 24(a). API's intervention is timely, aims to avoid impairment of API's and its members' important economic and legal rights and interests in this action, and represents interests not adequately represented by the existing parties to this action. In the alternative, API seeks permissive intervention pursuant to Federal Rule of Civil Procedure 24(b), because API will raise common legal issues and defenses with the main actions.

API moves to intervene based on this Notice and Motion, the accompanying Memorandum of Points and Authorities in Support, the concurrently filed Declaration of Erik Milito, the accompanying [Proposed] Order, all pleadings and papers filed in this action, and such oral argument and other matters as may be presented to the Court at the time of the hearing.

Counsel for API has conferred with counsel for each party in this matter. The Defendants do not oppose this motion. Counsel for Plaintiffs oppose this motion.

Dated this 5th day of January, 2018.

Respectfully submitted,

/s/ Gary J. Smith

Gary J. Smith (SBN 141393)
BEVERIDGE & DIAMOND, P.C.
456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251
Telephone: (415) 262-4000
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Phone: (202) 789-6009
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jauslander@bdlaw.com
Attorneys for Proposed Intervenor
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

STATEMENT OF ISSUES TO BE DECIDED

Whether Proposed-Intervenor American Petroleum Institute ("API") may intervene in this action as of right under Federal Rule of Civil Procedure 24(a) or, in the alternative, permissively under Rule 24(b).

FACTUAL BACKGROUND

API adopts the statement of relevant facts set forth in the motion to intervene of Western Energy Alliance and Independent Petroleum Association of America. *See* Local Rule 7-4(a)(4) (calling for "succinct" statement); Dkt. 16 (No. 17-7186); Dkt. 41 (No. 17-7187). In sum, the "Suspension Rule" at issue extends by one year some, but not all, compliance dates under the recent Bureau of Land Management ("BLM") regulation entitled Waste Prevention, Production Subject to Royalties, and Resource Conservation; Final Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("Venting and Flaring Rule"); 82 Fed. Reg. 58,050 (Dec. 8, 2017). API adds that the government has announced that proposed revisions to the Venting and Flaring Rule are undergoing final internal review within the Office of Management of Budget, and that the final rulemaking may be completed in 2018. *State of Wyo. v. USDOI*, No. 2:16-cv-00285-SWS (consolidated) (D. Wyo.), Dkt. 176, 181. Parties to these cases already are litigating the Venting and Flaring Rule in the U.S. District Court for the District of Wyoming, in which API filed an amicus merits brief. *Id.*, Dkt. 152, 153. The parties also are litigating a prior postponement notice under 5 U.S.C. § 705, which now is on appeal to the Ninth Circuit. *State of Cal. v. BLM*, 17-17456 (9th Cir. Dec. 4, 2017). Plaintiffs now seek to reverse the "Suspension Rule," and API requests leave to intervene in its defense.

ARGUMENT

Contrary to the reasoned approach of the federal regulator, Plaintiffs in these cases nonsensically would compel immediate application of a regulation notwithstanding its fundamental flaws and correspondingly active reconsideration by BLM. API is a national trade association representing over 625 members from all aspects of America's oil and gas industry, including the exploration and production of oil and gas from federally-managed lands. API respectfully requests leave to intervene in support of Defendants to prevent needless disruption and significant, irreparable harm that its many members operating on BLM-managed oil and gas leases would suffer if the Suspension Rule were not upheld.

The industry will be directly and profoundly damaged if the suspended provisions of the Venting and Flaring Rule take effect because those provisions arbitrarily limit – and in many cases outright prohibit – the venting and flaring of economically unrecoverable gas from API members' BLM-managed oil and gas leases. Moreover, the United States, individual states, and private parties to this case do not represent private oil and gas industry interests. Thus, API presents compelling circumstances for intervention as of right. Alternatively, the Court should grant permissive intervention.

I. API IS ENTITLED TO INTERVENE AS OF RIGHT.

Under Federal Rule of Civil Procedure 24(a)(2), a party moving to intervene as of right in a case must "timely" show that it has "an interest relating to the property or transaction that is the subject of the action," that it "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," and that existing parties may not "adequately represent" that interest. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc); *Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, No. 16-CV-04294-WHO, 2016 WL 9458794 (N.D. Cal. Dec. 2, 2016). "[T]he requirements are broadly interpreted in favor of intervention," *Citizens for Balanced Use v. Mont .Wilderness Ass'n*, 647 F.3d 893, 897

(9th Cir. 2011), and the Court's "review is guided primarily by practical considerations, not technical distinctions." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (internal quotations and citation omitted).

API meets all requirements for intervention as of right: (1) these cases were filed recently and allowing API to join will cause no prejudice or delay; (2) API has significant protectable interests at stake in the litigation; (3) API's interests would be practically and seriously impaired by Plaintiffs' sought relief; and (4) the Federal Defendants cannot adequately represent the industry-specific interests of API and its members.

A. API's Motion to Intervene is Timely.

Plaintiffs filed their complaint merely two weeks ago, right before the holidays. API's motion precedes all deadlines in this Court, including the time to file responsive pleadings. *See Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (motion to intervene timely when filed prior to answer and any proceedings). API will meet the same deadlines established for the Federal Defendants, including for opposing Plaintiffs' motions for preliminary injunctive relief, unless otherwise ordered by the Court. Intervention thus will not cause any delay or prejudice other parties' pursuit of their claims or defenses. *See id.* (no prejudice where motion filed before any substantive court rulings); *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 857 (9th Cir. 2016) (delay is "the only 'prejudice' that is relevant"); *Guardians v. Hoover Mont. Trappers Ass'n*, No. CV 16-65-M-DWM, 2016 WL 7388316, at *1 (D. Mont. Dec. 20, 2016) (no prejudice where intervenor "would be able to follow the same briefing schedule assigned other parties"). Accordingly, API's promptly filed motion to intervene is timely.

B. API Has a Significant Protectable Interest in the Litigation, Threatened by Plaintiffs' Requested Relief.

API readily satisfies the related impairment of interest factors under Rule 24 to intervene here. A party "has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation." *Wilderness*

Soc'y, 630 F.3d at 1179 (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)). "Rule 24(a)(2) does not require a specific legal or equitable interest," but aims to achieve a comprehensive resolution "by involving as many apparently concerned persons as is compatible with efficiency and due process." *Wilderness Soc'y*, 630 F.3d at 1179 (quoting *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir.1980)). "[T]he relevant inquiry is whether the [outcome] 'may' impair rights 'as a practical matter' rather than whether the [outcome] will 'necessarily' impair them." *United States v. City of Los Angeles*, 288 F.3d 391, 401 (9th Cir. 2002).

Here, "[API] is a national trade association, which represents more than six hundred companies 'involved in all aspects of the oil and natural gas industry, including the exploration, production, shipping, transportation, and refining of crude oil.'" *Envtl. Def. Ctr. v. Bureau of Safety & Envtl. Enf't*, No. CV 14-9281, 2015 WL 12734012, at *2 (C.D. Cal. Apr. 2, 2015) (granting API intervention in challenge to federal oil and gas permits). API members – including entities that are not also members of the Western Energy Alliance and Independent Petroleum Association of America – hold oil and gas leases issued or managed by BLM. API represents the economic and legal interests of its members by actively participating in BLM rulemakings on venting and flaring on BLM and Indian lands, and in the pending litigation against the Venting and Flaring Rule.

These cases are critical to API's members because the originally-adopted Venting and Flaring Rule – especially the provisions addressed by the Suspension Rule – unlawfully exceeds BLM's Congressionally-limited authority and imposes economic impacts on lessees that BLM either failed to consider or failed to properly analyze. The 2016 Venting and Flaring Rule is an impermissible BLM attempt at environmental and climate regulation in the guise of "waste" prevention and natural resource conservation, and encroaches on the exclusive jurisdiction of the U.S. Environmental Protection Agency and the states to regulate air quality. It also capriciously removes the longstanding

economic underpinnings of the concept of "waste" in BLM's former regulations and as widely understood and applied by the oil and gas industry. The Suspension Rule reasonably and responsibly places the Venting and Flaring Rule's offending provisions on hold for only one year while the BLM reconsiders their purpose, necessity, and legal and practical viability.

The impact of enjoining or vacating the Suspension Rule would be felt across the American West. Requiring BLM to immediately implement standards that the agency now acknowledges constitute inappropriate regulatory overreach would cause serious and irrevocable financial consequences for API members who lease, produce, transport, pay royalties on, or are otherwise involved with federal or Indian oil and gas. If Plaintiffs were to succeed in enjoining the Suspension Rule, fully re-instituting the Venting and Flaring Rule would require operators to capture and market unprofitable quantities of gas at a loss – and also to pay royalties on such gas. That result would render uneconomic many oil wells that are currently profitable, and force some operators to prematurely shut in or abandon wells altogether. Additionally, costs incurred in pursuit of compliance with the Venting and Flaring Rule are unrecoverable even if BLM ultimately revises or vacates that Rule. Enjoining the Suspension Rule and re-instating the Venting and Flaring Rule provisions that BLM already has announced it will be proposing to amend also would create significant regulatory uncertainty, including for existing operations, which alone would impair the interests of API's members. *See WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010) (impairment may occur "[w]here a decision in the plaintiff[s'] favor would return the issue to the administrative decision-making process").

Thus, API has "an organizational interest—and its members a financial one—" in the outcome of this litigation, which could impair API's ability to "protect it and its members' interests." *See Guardians*, 2016 WL 7388316, at *1. By contrast, if the

Federal Defendants prevail, API and its members will not suffer the financial or regulatory disruption of a nationwide injunction, and will maintain the ability to continue economic lease operations until BLM completes its review, which BLM expects to do within the one-year period of the Suspension Rule. Because an injunction of the Suspension Rule would impair API's protectable interests, and because that harm would be avoided if the status quo is maintained, the Court should grant API intervention as of right.

C. Other Parties Cannot Adequately Represent API's Interests.

A proposed intervenor has only a "minimal" burden to show that its interests "may be" inadequately represented. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). Moreover, governmental entities frequently have interests divergent from, and thus cannot adequately represent, private industry. *Id.* (Secretary of Labor did not adequately represent union members); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) ("The interests of government and the private sector may diverge."); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 896 (N.D. Cal. 1984), *amended*, (N.D. Cal. Sept. 17, 1984) ("agency's interest in content of regulation will differ from the interest of the one governed by those regulations"); *Envtl. Def. Ctr.*, 2015 WL 12734012, at *4 ("although the Proposed Intervenors may share some common goals in this litigation, the Proposed Intervenors seek to protect their private interests while the Defendants have an interest in protecting the public in general").

API's intervention will ensure adequate protection of the oil and gas industry's interests in this litigation. Plaintiffs do not adequately represent API's interests because their legal position and sought relief in this litigation are adverse to API. *See United States v. Stringfellow*, 783 F.2d 821, 828 (9th Cir. 1986) (adverse party cannot adequately represent proposed intervenor's interests). Likewise, as addressed above, API and its members have a unique business interest in the Suspension Rule separate from BLM's interests in implementing a regulatory program consistent with its authority. Indeed, API

is adverse to BLM in the pre-existing litigation against the Venting and Flaring Rule in federal district court in Wyoming. The Suspension Rule provides incomplete relief to API's members by leaving intact several problematic provisions of the Venting and Flaring Rule. It is the regulated community, not BLM, that would principally incur the economic impacts if the Suspension Rule were not upheld. Because the government is still in the position of defending the Venting and Flaring Rule in the Wyoming litigation, it cannot fully and adequately speak for API's interests in defending against Plaintiffs' requested injunction of the Suspension Rule.

II. IN THE ALTERNATIVE, THE COURT SHOULD USE ITS DISCRETION TO PERMIT API TO INTERVENE.

If the Court denies intervention as of right, it should permit API to intervene under Federal Rule of Civil Procedure 24(b)(1)(B) ("On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact."). API will defend against the central legal claims and relief sought in this litigation. As explained above, intervention early in this litigation also will not "unduly delay or prejudice" existing parties. *See* Fed. R. Civ. P. 24(b)(3). Intervention here will especially "contribute to the equitable resolution of the case" given the "magnitude" of the impacts on "large and varied interests" if Plaintiffs' injunction were granted. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002). Thus, at a minimum, API should be granted permissive intervention.

CONCLUSION

API has a significant interest in the Suspension Rule, which would be seriously harmed by the injunction that Plaintiffs seek in this litigation. The Court should grant API's motion to intervene as of right under Rule 24(a)(2). In the alternative, the Court should grant permissive intervention pursuant to Rule 24(b)(2).

Dated this 5th day of January, 2018.

Respectfully submitted,

/s/ Gary J. Smith

Gary J. Smith (SBN 141393)
BEVERIDGE & DIAMOND, P.C.
456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251
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Attorneys for Proposed Intervenor
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