Michael R. Matthias (Cal. Bar No. 57728)
BAKER & HOSTETLER LLP
11601 Wilshire Boulevard, Suite 1400
Los Angeles, California 90025-0509
Telephone: 310.820.8800
Facsimile: 310.820.8859
mmatthias@bakerlaw.com

Mark S. Barron (*pro hac vice* pending)
L. Poe Leggette (*pro hac vice* pending)
Alexander K. Obrecht (*pro hac vice* pending)
BAKER & HOSTETLER LLP
1801 California Street, Suite 4400
Denver, Colorado 80202-2662
Telephone: 303.861.0600
Facsimile: 303.861.7805
mbarron@bakerlaw.com
pleggette@bakerlaw.com
aobrecht@bakerlaw.com

Attorneys for Independent Petroleum Association of America and Western Energy Alliance

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through XAVIER BECERRA, Attorney General,

Plaintiff,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT; JOSEPH BALASH, Assistant Secretary for Land and Minerals Management, United States Department of the Interior; and RYAN ZINKE, Secretary of the Interior,

Defendants,

&

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA and WESTERN ENERGY ALLIANCE,

Applicant-Intervenors.

Case No.: 4:18-cv-00521-KAW

[Honorable Kandis A. Westmore]

CONSOLIDATED NOTICE OF MOTION AND MOTION TO INTERVENE ON BEHALF OF DEFENDANTS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Filed concurrently with Exs. A-D; (Proposed) Order; (Proposed) Answer]

Date: March 29, 2018
Time: 1:30 pm
Courtroom: 4

Action Filed: January 24, 2018

NOTICE OF MOTION AND MOTION

On March 29, 2018, at 1:30 pm or as soon thereafter as the matter may be heard, before the Honorable Kandis A. Westmore in the above-titled Court, 1301 Clay Street, Oakland, California 94612, the Independent Petroleum Association of America and Western Energy Alliance (collectively, the "Associations") will, and hereby do, move for leave to intervene as a defendant under Rule 24 of the Federal Rules of Civil Procedure.

The Associations request intervention as of right or, in the alternative, permissive intervention. The Associations submit in support of their motion the enclosed Memorandum of Points and Authorities and supporting exhibits. Also attached is the Associations' proposed Answer to Plaintiff's Complaint.

Before filing this motion, the Associations' counsel conferred with counsel for all current parties concerning the relief requested in this motion. On February 16, 2018, Plaintiff's counsel advised the Associations that Plaintiff does not oppose the relief the Associations request in this motion. On February 20, 2018, the federal defendants' counsel advised the Associations that federal defendants do not oppose the relief the Associations request in this motion.

Submitted respectfully this 22nd day of February, 2018,

/s/ *Michael R. Matthias*
Michael R. Matthias
BAKER & HOSTETLER LLP
11601 Wilshire Boulevard, Suite 1400
Los Angeles, California 90025-0509
Telephone: 310.820.8800
Facsimile: 310.820.8859
mmatthias@bakerlaw.com

Mark S. Barron
L. Poe Leggette
Alexander K. Obrecht
BAKER & HOSTETLER LLP
1801 California Street, Suite 4400
Denver, Colorado 80202-2662
Telephone: 303.861.0600
Facsimile: 303.861.7805
mbarron@bakerlaw.com
pleggette@bakerlaw.com
aobrecht@bakerlaw.com

Attorneys for Independent Petroleum Association of America and Western Energy Alliance

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MEMORANDUM OF POINTS AND AUTHORITES

Intervenor-Applicants Independent Petroleum Association of America and Western Energy Alliance (collectively, the "Associations") submit respectfully this motion for leave to intervene under Rule 24 of the Federal Rules of Civil Procedure. Plaintiff in this action seeks to overturn, reverse, or delay a final regulation necessary to bring the Bureau of Land Management ("BLM") into compliance with controlling substantive and administrative law. In March 2015, BLM issued a final regulation purporting to regulate hydraulic fracturing on federal and Indian lands. *See* 80 Fed. Reg. 16,128 (Mar. 26, 2015) (the "2015 Rule"). The 2015 Rule never went into effect because a federal district court determined both that: (i) BLM lacked the statutory authority to promulgate the rule; and (ii) the 2015 Rule was likely to be found invalid as a matter of administrative law. On December 29, 2017, BLM repealed the 2015 Rule. *See* 82 Fed. Reg. 61,924 (Dec. 29, 2017) (the "Repeal Rule"). Given the dubious legality of the 2015 Rule and the serious problems the federal district court identified with scientific, technical, and engineering bases underlying the 2015 Rule, it was reasonable for BLM to reconsider and rescind the 2015 Rule. Plaintiff here overlooks the entirety of this procedural history and disregards the reality that BLM never demonstrated the 2015 Rule would provide any incremental public benefit, environmental or otherwise.

From the beginning, the Associations have actively engaged to assist BLM's rulemaking efforts related to hydraulic fracturing. The Associations offered significant substantive comments responsive to each of the proposals BLM published before finalizing the 2015 Rule and the Associations' members have conducted dozens of formal and informal meetings with BLM officials to provide technical insight into how hydraulic fracturing is conducted on federal lands and to explain the likely environmental and economic consequences of BLM's regulatory efforts. When BLM finalized the 2015 Rule, the Associations initiated a legal challenge, successfully establishing that the 2015 Rule was technically and legally invalid. Because Plaintiff's suit threatens to impose regulatory burdens on the Associations' members disconnected from any meaningful public benefit and represents a collateral attack on the Associations' legal challenge to the 2015 Rule, this Court should grant the Associations' motion for intervention.

I. RELEVANT BACKGROUND.

For more than a decade, oil and natural gas production from domestic wells has increased steadily. Virtually all of this increased production has come through the application of the well stimulation technology known as hydraulic fracturing – the procedure by which oil and gas producers inject water, sand, and certain chemicals into tight-rock formations to create fissures in the rock that allow oil and gas to escape for collection in a well. *See* 80 Fed. Reg. at 16,131 (estimating that 90% of wells drilled on federal lands in 2013 were stimulated using hydraulic fracturing). At the time BLM initiated the rulemaking that preceded the 2015 Rule, BLM understood that the oil and gas industry has been using hydraulic fracturing "since the late 1940s," Ex. A, Mem. from Michael D. Nedd, Assistant Dir., Minerals & Realty Mgmt. to Robert V. Abbey, Dir., BLM at 1 (Apr. 7, 2010),[1] and that hydraulic fracturing has been used to extract hydrocarbons from shale since at least the 1970s. *See* Ex. B, Adam Wilson, *Econ. & Tech. Drive Dev. of Unconventional Oil & Gas Reservoirs*, J. Petroleum Tech. (July 2012) ("The increase in oil and gas prices during the 1970s led to both an increase of rig count and the development of new technologies, such as massive hydraulic fracturing.").[2] BLM has described hydraulic fracturing as "a proven process with minimal technical problems." Ex. A at 1.

On May 11, 2012, BLM issued proposed regulations purporting to "regulate hydraulic fracturing on public land and Indian land." 77 Fed. Reg. 27,691, 27,691 (May 11, 2012). On September 10, 2012, the Associations submitted comments responsive to that proposal. *See* Letter from Daniel T. Naatz & Kathleen Sgamma to Director, Bureau of Land Mgmt. (Sept. 10, 2012).[3] BLM reports that it received approximately 177,000 public comments on this initial proposal. *See* 80 Fed. Reg. at 16,131.

More than a year later, on May 24, 2013, BLM issued a revised proposed rule, representing that the agency had "used the comments on [the May 2012 draft rule] to make improvements" to the agency's proposal. 78 Fed. Reg. 31,636, 31,637 (May 24, 2013). On August 22, 2013, the

[1] Exhibit A was included in the administrative record BLM filed in *Wyoming v. Jewell*, No. 2:15-CV-043-SWS (D. Wyo.) with designated Bates numbers DOIAR0002389-DOIAR0002389_0003.
[2] Exhibit B was included in the administrative record BLM filed in *Wyoming v. Jewell*, No. 2:15-CV-043-SWS (D. Wyo.) with designated Bates numbers DOIAR0025660-DOIAR0025662.
[3] Available at: http://www.regulations.gov/#!documentDetail;D=BLM-2012-0001-7373.

Associations submitted technical comments responsive to the revised proposal. *See* Letter from Dan Naatz & Kathleen Sgamma to Neil Kornze (Aug. 22, 2013).[4] BLM reports that it received more than 1.35 million public comments responsive to the revised proposal. *See* 80 Fed. Reg. at 16,131.

On March 20, 2015, four-and-a-half years after initiating the rulemaking process, BLM issued the 2015 Rule.[5] On the same day, the Associations jointly filed a lawsuit challenging the 2015 Rule in the United States District Court for the District of Wyoming. The Associations contended, among other arguments, that aspects of the 2015 Rule: (i) violate federal law; (ii) lack justification; (iii) do not account for meaningful technical comments submitted during the rulemaking process; (iv) do not represent a logical outgrowth from the regulations proposed during the rulemaking process; and/or (v) exceed BLM's statutory authority. Shortly after, four States and the Ute Indian Tribe filed companion suits challenging the legality of the 2015 Rule.

On September 30, 2015, the district court entered a preliminary injunction, precluding the implementation of the 2015 Rule during the pendency of the litigation challenging the rule. *See Wyoming v. Jewell*, No. 2:15-CV-043-SWS (D. Wyo.), Order on Mots. for Prelim. Inj., filed Sept. 30, 2015 (ECF No. 130). The district court determined that the 2015 Rule was likely to be found invalid under the Administrative Procedure Act because: (i) BLM has not identified any legally supportable justifications for adopting the 2015 Rule and imposing the costs associated with the rule; (ii) components of the 2015 Rule do not represent a logical outgrowth of BLM's regulatory proposals; (iii) the 2015 Rule's failure to protect confidential commercial information is contrary to federal law; (iv) certain provisions of the 2015 Rule represent an unexplained departure from existing policies; (v) components of the 2015 Rule are irrationally structured making compliance impossible; (vi) the 2015 Rule's cost assessments rely on unsupported assumptions; and (vii) BLM lacks statutory authority to implement the 2015 Rule.

On June 21, 2016, the district court entered its final ruling on the merits. *See Wyoming v. Jewell*, No. 2:15-CV-043-SWS (D. Wyo.), Order on Pets. for Review of Final Agency Action,

[4] Available at: http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5410.
[5] Although announced on March 20, 2015, the final rule was published in the *Federal Register* on March 26, 2015.

filed June 21, 2016 (ECF No. 219). Consistent with its findings at the preliminary injunction stage, the district court ruled that BLM lacked the statutory authority to promulgate the hydraulic fracturing rule. Because the district court's finding on the question of statutory authority was dispositive of all claims the Petitioners presented, the district court did not revisit the additional flaws in BLM's rulemaking identified during the preliminary injunction phase of the case. *Id.* at 26-27. Both BLM and special interest advocacy groups that had intervened in the 2015 lawsuit on BLM's behalf appealed the district court's merits decision to the United States Court of Appeals for the Tenth Circuit.

On March 28, 2017, President Trump signed an Executive Order directing all federal agencies to enact policies "to promote clean and safe development of our Nation's vast energy resources" and to avoid "burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." Exec. Order 13,783, *Promoting Energy Independence & Econ. Growth* (Mar. 28, 2017). The President's Order expressly directs the Secretary of the Interior to, "as soon as practicable," publish for notice and comment "proposed rules suspending, revising, or rescinding" the 2015 Rule. *Id.* § 7(b)(i).

On the next day, March 29, 2017, Secretary Zinke issued Secretary's Order No. 3349. Order No. 3349 states that the Department of the Interior's objective "is to identify agency actions that unnecessarily burden the development or utilization of the Nation's energy resources and support action to appropriately and lawfully suspend, revise, or rescind such agency actions as soon as practicable." Consistent with that approach, the Secretary indicated that BLM "shall proceed expeditiously with proposing to rescind the [2015 Rule]." U.S. Dep't of the Interior, Sec'y Order 3349 § (c)(1).

On July 25, 2017, BLM published a proposed rule that would rescind the 2015 Rule and restore BLM's regulations to the form in which the regulations existed before the 2015 Rule was finalized. *See* 82 Fed. Reg. 34,464 (July 25, 2017). On September 25, 2017, the Associations submitted technical comments responsive to the rescission proposal.[6]

[6] Available at: https://www.regulations.gov/document?D=BLM-2017-0001-0412.

On September 21, 2017, the Tenth Circuit dismissed all remaining proceedings related to the lawsuit over the 2015 Rule without addressing the merits of the case. *See Wyoming v. Zinke*, 871 F.3d 1133 (10th Cir. 2017). The Tenth Circuit concluded that, given BLM's initiation of a rulemaking intended to reconsider the 2015 Rule and the unequivocal executive orders that President Trump and Secretary Zinke issued directing BLM to rescind the 2015 Rule, it would be a waste of judicial resources to continue litigation over the 2015 Rule. *Id.* at 1143. Among other factors influential to its decision, the Tenth Circuit noted expressly that the continuation of oil and gas development under the status quo would not pose any hardship to BLM or the environment. *Id.*

On December 29, 2017, BLM issued the Repeal Rule. With one limited exception, the Repeal Rule returns the sections of the Code of Federal Regulations that the 2015 Rule modified to the language that existed immediately before the 2015 Rule's effective date. *See* 82 Fed. Reg. at 61,924. On January 24, 2017, Plaintiff initiated this lawsuit, seeking to have the Repeal Rule set aside.

II. THE ASSOCIATIONS HAVE STANDING.

The Independent Petroleum Association of America ("IPAA") is the leading national upstream trade association representing thousands of independent oil and natural gas producers and service companies across the United States. *See* Ex. C, Decl. of Daniel T. Naatz ¶ 3. Independent producers generally include non-integrated oil and gas companies that receive nearly all revenue from production at the wellhead.[7] One of IPAA's primary purposes is to advocate for its members' interests in continued and responsible oil and gas development before Congress and federal agencies and in the judicial system. *See id.*

Western Energy Alliance (the "Alliance") represents over 300 members involved in all aspects of environmentally responsible exploration and production of oil and natural gas on federal and Indian lands across the western United States. *See* Ex. D, Decl. of Kathleen Sgamma ¶ 3. The Alliance advocates for its members' interests related to federal legislative, regulatory,

[7] The typical independent oil and natural gas producer is a small business that employs an average of just twelve people. *See* Independent Petroleum Ass'n of Am., *Who Are America's Independent Producers?*, http://www.ipaa.org/independent-producers/.

environmental, and public lands policy issues. *See id.* The Alliance often appears before Congress and federal agencies and in the judicial system to represent its members. *See id.*

On their members' behalf, the Associations have actively participated in the rulemaking processes associated with the 2015 Rule and the Repeal Rule. Among other efforts, the Associations attended public information sessions, conducted legal and technical meetings with federal officials and staff, submitted substantive comments in response to proposed rules, and led litigation challenging the implementation of the 2015 Rule. *See* Ex. C ¶¶ 5-6; Ex. D ¶¶ 5-6.

"An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000); *accord Airline Serv. Provider Ass'n v. L.A. World Airports*, 873 F.3d 1074, 1078 (9th Cir. 2017). The Associations satisfy each of these requirements.

Plaintiff's goal in this lawsuit is to impose permitting and regulatory burdens upon the Associations' members; Plaintiff understands that the Associations' members will incur compliance costs if Plaintiff prevails. *See* Compl. for Declaraory & Injunctive Relief ¶ 37, at 13, filed Jan. 24, 2018 (ECF No. 1) (citing BLM's Regulatory Impact Analysis for the proposition that compliance with the 2015 Rule would cost approximately $9,690 per well). The Ninth Circuit has explained that the "economic costs of complying with a licensing scheme can be sufficient for standing," *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 980 (9th Cir. 2013), even where "the extent of [the] economic harm is not readily determinable." *Cent. Ariz. Water Conservation Dist. v. U.S. Envtl. Prot. Agency*, 990 F.2d 1531, 1538 (9th Cir. 1993). Representation in this litigation is germane to the Associations' continuing efforts to facilitate responsible oil and gas development on public lands; the Associations regularly participate in litigation to advance the objectives of the oil and gas industry and have led litigation challenging the 2015 Rule specifically. Nor does this suit require the participation of any individual members—the regulations that are the subject of this lawsuit are universally applicable to all oil and gas operators and no individual

operator is necessary for the parties and the Court to resolve the legal issues on which this case is premised. *See Airline Serv. Providers*, 873 F.3d at 1079.

III. THE ASSOCIATIONS ARE ENTITLED TO INTERVENE.

Rule 24(a)(2) of the Federal Rules of Civil Procedure affords any party the right to intervene in an action upon a timely motion if: (i) the movant claims an interest relating to the property or transaction which is the subject of the action; (ii) the movant's interest may be impaired or impeded; and (iii) the existing parties do not adequately represent the movant's position. The United States Court of Appeals for the Ninth Circuit "construe[s] Rule 24(a) liberally in favor of intervenors" and evaluates applications for intervention "primarily by practical considerations, not technical distinctions." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001) (internal quotation omitted). Recognizing the unique and undisputed interest of the Associations and their members, this court and other federal courts have repeatedly permitted oil and gas trade associations – including the Associations – to intervene in lawsuits concerning regulation and management of oil and gas operations. *See*, *e.g.*, *Wildearth Guardians v. Jewell*, 320 F.R.D. 1, 2 (D.D.C. 2017) (including the Alliance among several trade associations admitted as interveners in lawsuit challenging approval of oil and gas leases on federal lands in Colorado, Wyoming, and Utah); *California v. U.S. Bureau of Land Mgmt.*, No. 17-cv-03804-EDL (N.D. Cal.), Order Granting Proposed Intervenors' Unopposed Mots. to Intervene, filed Aug. 28, 2017 (ECF No. 57) (admitting Associations as interveners in challenge to BLM's deferral of a final rule related to venting and flaring from oil and gas wells); *Wildearth Guardians v. Jewell*, No. 2:14-cv-00833-JWS, 2014 WL 7411857 (D. Ariz. Dec. 31, 2014) (granting the Alliance leave to intervene in special interest group's challenge to denial of an endangered species listing); *Chevron, U.S.A., Inc. v. Fed. Energy Regulatory Comm'n*, 193 F. Supp. 2d 54, 57 n.1 (D.D.C. 2002) (recognizing IPAA as an intervenor in suit challenging regulations affecting oil and gas pipelines on the outer continental shelf).

A. THE ASSOCIATIONS' MOTION IS TIMELY.

A motion to intervene is timely when filed at an early stage in the proceedings, the existing parties will not be prejudiced, and intervention will not cause disruption or delay in the

proceedings. *See Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). The Associations seek to intervene early in the case, before the parties engage in any substantive proceedings. The federal defendants have not yet answered Plaintiff's Complaint and the Court has not yet entered any case management order for substantive proceedings. *See Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (finding a motion to intervene timely and non-prejudicial to existing parties when the movant filed the motion before federal defendants filed an Answer and before the court had entered any substantive rulings). Because the Associations' participation will neither delay nor prejudice these proceedings, the Associations' motion is timely.

B. THE ASSOCIATIONS POSSESS AN INTEREST IN THE PROCEEDING.

Oil and gas development in the United States is carried out exclusively through private oil and gas companies taking leases and then engaging in exploration efforts that, if successful, will lead to production. The Associations collectively represent thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts. Independent producers drill about ninety-five percent of American oil and natural gas wells, produce about fifty-four percent of American oil, and more than eighty-five percent of American natural gas. *See* Ex. C ¶ 3.

It is these exploration and development companies that Plaintiff's lawsuit will most significantly affect. Contemporary oil and natural gas development almost invariably involves hydraulic fracturing. *See* 80 Fed. Reg. at 16,131. Hydraulic fracturing allows producers to extract hydrocarbons from tight-rock formations that are often uneconomic when using alternative completion techniques. The Associations' members are therefore keenly interested in their ability to design and implement hydraulic fracturing operations in a cost-effective, environmentally sensitive manner.

The Associations also have an interest in the Repeal Rule itself. The Ninth Circuit has emphasized that "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995). For many years, the Associations have participated actively in

BLM's efforts to develop hydraulic fracturing regulations. The Associations submitted technical comments responsive to each of the proposed rules that preceded the 2015 Rule and the proposed rule that preceded the Repeal Rule. *See* Ex. C ¶¶ 5,7; Ex. D ¶¶ 5,7. Among other efforts, the Associations' staff and members have: (i) devoted thousands of hours to attending and participating in public information sessions concerning hydraulic fracturing; (ii) conducted dozens of legal and technical meetings with federal, state, and local lawmakers, officials, and staff promoting the responsible use of hydraulic fracturing; and (iii) advocated for responsible drilling and production techniques in a variety of public and private fora. *See* Ex. C ¶ 4; Ex. D ¶ 4. After BLM issued the 2015 Rule, the Associations led the litigation that established BLM lacked the statutory authority to promulgate the 2015 Rule and that the 2015 Rule violated fundamental tenets of administrative law. *See Independent Petroleum Ass'n of Am. v. Jewell*, No. 2:15-cv-00041-SWS (D. Wyo.). Because the Associations' consistent and comprehensive involvement in hydraulic fracturing policy and the Associations' support for the Repeal Rule represent a "significantly protectable interest," intervention is appropriate. *Nw. Forest Res. Council*, 82 F.3d at 837-38 (collecting cases in which the Ninth Circuit granted intervention because the applicant for intervention had been "directly involved in the enactment of the law or in the administrative proceedings out of which the litigation arose").

C. THE ASSOCIATIONS' INTEREST WILL BE IMPAIRED WITHOUT INTERVENTION.

Satisfaction of the "impairment" requirement flows from the Associations' legally protectable interest in the transactions and property underlying the case. *See California ex rel. Lockyer v. United States*, 450 F.3d 436, (9th Cir. 2006) ("[W]e have taken the view that 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."); *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001) (emphasizing that "the question of impairment is not separate from the question of existence of an interest"). "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene."

Sw. Ctr. for Biological Diversity, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee's note).

As indicated above, the Associations' members are actively involved in the development of oil and gas wells on federal lands, *see* Ex. C ¶ 3; Ex. D ¶, a process that almost invariably includes hydraulic fracturing. The equitable relief that Plaintiff seeks here would impose new regulatory burdens on that development, resulting in production delays and increased operational costs. The prescriptive nature of many of the provisions would also restrict members' operational flexibility and restrict individual members' ability to customize any individual hydraulic fracturing operation to prevent waste and maximize environmental sensitivity.

Equally important, Plaintiff's request that this Court direct BLM to immediately implement the 2015 Rule constitutes a collateral attack on the District of Wyoming's ruling that the 2015 Rule was invalid as a matter of law. The Associations expended significant time, resources, and money litigating the validity of the 2015 Rule. When the Associations presented their case to the federal district court – the only court that has ever considered the substantive merits of the 2015 Rule – the district court entered judgment on the Associations' behalf. Yet were Plaintiff to prevail in this action, the Associations would be deprived of their beneficial interest in that result. Because practical and legal impairment of the Associations' interest is possible if intervention is denied, the Court should grant the Associations' motion to intervene.

D. EXISTING PARTIES WILL NOT ADEQUATELY REPRESENT THE ASSOCIATIONS.

The burden to demonstrate inadequate representation is minimal and the applicant need only show that representation of his interest "may be" inadequate" *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). The Ninth Circuit has recognized that when the defendant in a particular case is a government agency, "the government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'" *Citizens for Balanced Use*, 647 F.3d at 899 (quoting *Wildearth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009)).

The interest of the Associations' members as non-federal entities with a direct economic stake in the controversy are very different from the interests of the federal regulatory agency and officials named as defendants in this lawsuit. Although the Association and the federal defendants share certain common goals, such partial overlap of interests does not guarantee that the federal defendants will adequately represent the Associations' interests. Given BLM's multiple use role in balancing environmental protection and oil and gas development, the Associations cannot rely on the agency to represent the Associations' specific interests.

Indeed several illustrative examples demonstrate that many of BLM's legal positions in this lawsuit are unlikely to align with positions that the Associations might advance. Despite the change in the agency's policy following the issuance of Executive Order 13,783 and Secretarial Order 3349, BLM never withdrew its appeal of the merits decision in the 2015 lawsuit, suggesting BLM continues to believe the agency had the statutory authority to promulgate the 2015 Rule; the Associations contend that BLM lacked statutory authority to issue the 2015 Rule. BLM appears to suggest that provisions in the 2015 Rule that were meant to address inter-well communication, or "frack hits," during hydraulic fracturing operations were a logical outgrowth of the proposed rules preceding the 2015 Rule, *see* 82 Fed. Reg. at 61,932, and that references to "non-routine fracturing" in regulations existing before the issuance of the 2015 Rule apply to hydraulic fracturing operations, *see id.* at 61,926; the Associations have taken positions in the 2015 lawsuit and in the Associations' technical comments on the proposed rule preceding the Repeal Rule that are directly contrary to BLM's analysis on these points. And BLM asserts in the Repeal Rule that operational costs attributable to complying with the 2015 Rule's requirements would have been approximately $14 million to $34 million per year, equating to $9,690 per well, *see id.* at 61,925; the Associations contend that BLM has significantly underestimated the compliance costs and that actual compliance costs, conservatively estimated, would have amounted to more than $220 million per year. Given these differences in legal understanding and because the federal defendants have no obligation to protect the Associations' economic and operational interests in the Repeal Rule, the federal defendants cannot adequately represent the Associations in this lawsuit.

IV. THE ASSOCIATIONS QUALIFY FOR PERMISSIVE INTERVENTION.

In addition to qualifying for intervention as of right, the Associations satisfy the prerequisites for permissive intervention. Under Rule 24(b)(1)(B), the Court may grant permissive intervention when a movant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Whether to grant permissive intervention lies within the discretion of the district court. *See Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015). "[I]n exercising its discretion, the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

The Associations' defenses will share common questions of law or fact with both the Plaintiff's claims and the defenses the federal defendants are likely to raise. Among other commonalities, whether the 2015 Rule was a valid exercise of agency power and whether the Repeal Rule is arbitrary and capricious will be central to all parties' legal arguments in this case. And rather than prejudice the adjudication of Plaintiff's challenge, the Associations' participation is necessary to ensure that the Court's review is complete, thorough, and considers the viewpoint of those entities the 2015 Rule and the Repeal Rule most directly affect— independent oil and gas producers. None of the existing parties will be able to provide the detailed understanding of member companies' historic and anticipated operations that the Associations can provide. That understanding will facilitate the Court's ability to evaluate whether the rulemaking in which the federal defendants engaged is commensurate to the development activities BLM intends to (and has the authority to) regulate. Because the Associations' unique knowledge of oil and gas operations and the oil and gas industry's participation in the two rulemakings that are the subject of this lawsuit will assist the Court to resolve this case, the Associations are entitled to permissive intervention.

V. CONCLUSION.

Plaintiff's suit threatens to compromise the Associations' ability to protect their members' economic and operational interests and undermine the Associations' efforts to advocate for hydraulic fracturing policy that complies with administrative and substantive law. Because the Associations are legally entitled to participate in this case and because the Associations'

participation will facilitate the Court's ability to resolve Plaintiff's challenges, the Court should grant the Associations' motion.

Submitted respectfully this 22nd day of February, 2018,

/s/ *Michael R. Matthias*

Michael R. Matthias
BAKER & HOSTETLER LLP
11601 Wilshire Boulevard, Suite 1400
Los Angeles, California 90025-0509
Telephone: 310.820.8800
Facsimile: 310.820.8859
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Facsimile: 303.861.7805
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