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American Petroleum Institute

14 **IN THE UNITED STATES DISTRICT COURT**

15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16 STATE OF CALIFORNIA,	)	Civil Case No. 4:18-cv-0521-HSG
)	
17 Plaintiff,)	
)	
18 vs.)	
)	
19 UNITED STATES BUREAU OF LAND)	
20 MANAGEMENT, <i>et al.</i> ,)	
)	
21 Defendants.	)	Civil Case No. 4:18-cv-0524-HSG

22 SIERRA CLUB, <i>et al.</i>,	)	AMERICAN PETROLEUM
	)	INSTITUTE MOTION TO
23 Plaintiff,	)	INTERVENE; MEMORANDUM
	)	OF POINTS AND AUTHORITIES
24 vs.	)	IN SUPPORT
)	
25 RYAN ZINKE, <i>et al.</i>,	)	Date: July 5, 2018
	)	Time: 2:00 pm
26 Defendants.	)	Courtroom: 2, 4th Floor
	)	Judge: Hon. Haywood S. Gilliam, Jr.

1 **NOTICE OF MOTION AND MOTION TO INTERVENE**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that, on July 5, 2018, at 2:00 p.m., or as soon thereafter
4 as counsel may be heard in the courtroom of the Hon. Haywood S. Gilliam, Jr., located at
5 the Ronald V. Dellums Federal Building and United States Courthouse, Courtroom 2, 4th
6 Floor, 1301 Clay Street, Oakland, California 94162, the American Petroleum Institute
7 (“API”) will and hereby does respectfully move this Court to intervene as a Defendant in
8 these actions.

9 API asks this Court to grant intervention as of right pursuant to Federal Rule of
10 Civil Procedure 24(a). API’s intervention is timely, aims to avoid impairment of API’s
11 and its members’ important economic and legal rights and interests in these actions, which
12 are not adequately represented by the existing parties or other Proposed-Intervenors to this
13 action. Alternatively, API seeks permissive intervention pursuant to Federal Rule of Civil
14 Procedure 24(b), because API will raise common legal issues and defenses with the main
15 actions.

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

21 Counsel for API has conferred with counsel for each party in this matter. Federal
22 Defendants do not oppose API’s intervention. Plaintiffs in both cases conditioned their
23 consent to API’s intervention on API’s agreeing to file consolidated merits briefs with
24 Proposed-Intervenors Independent Petroleum Association (“IPAA”) and Western Energy
25 Alliance (“WEA”). API did not agree to waive any potential rights with respect to
26 briefing and maintains that consolidated briefing is an inappropriate condition on API’s
27 intervention as of right. Issues of briefing among the parties would be more appropriately

1 addressed in the normal course, during subsequent negotiation of a joint case management
2 statement to be filed with the Court. Consequently, Plaintiffs stated that they oppose
3 API's motion.

4 Dated this 30th day of March, 2018.

5
6
7 Respectfully submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**
2 **IN SUPPORT OF MOTION TO INTERVENE**

3 **STATEMENT OF ISSUES TO BE DECIDED**

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

7 **FACTUAL BACKGROUND**

8 On March 26, 2015, the Bureau of Land Management (“BLM”) promulgated a
9 final rule that would regulate hydraulic fracturing on federal and Indian lands (“Hydraulic
10 Fracturing Rule”). 80 Fed. Reg. 16,128. That same day, the States of Wyoming and
11 Colorado and industry groups filed a lawsuit in the U.S. District Court for the District of
12 Wyoming challenging the validity of the Hydraulic Fracturing Rule. *Wyoming v. Jewell*,
13 No. 2:15-cv-043 (D. Wyo.). On September 30, 2015, the Wyoming District Court
14 temporarily enjoined implementation of the Hydraulic Fracturing Rule, finding that BLM:
15 (i) impermissibly exceeded the scope of its statutory authority; (ii) failed to adequately
16 protect confidential business information; (iii) created regulatory requirements impossible
17 to comply with; and (iv) adopted mandatory requirements in a final rule without first
18 providing adequate public notice and opportunity to comment. *Id.*, Order on Mots. for
19 Prelim. Injunction (ECF No. 130). The Wyoming District Court later ruled against BLM
20 on the merits of the Hydraulic Fracturing Rule, holding that BLM lacked statutory
21 authority to regulate hydraulic fracturing. *Id.*, Order on Pets. for Review of Final Agency
22 Action (ECF No. 219). The federal government appealed to the Tenth Circuit. *Id.*, Notice
23 of Appeal (ECF No. 221).

24 During the pendency of the appeal, President Trump issued Executive Order
25 (“E.O.”) 13,783, which directed the Secretary of the Interior to publish for notice and
26 comment “proposed rules suspending, revising, or rescinding” the Hydraulic Fracturing
27

1 Declaration of Eric Milito (“Milito Decl.”) at ¶ 6. API respectfully requests leave to
2 intervene in support of Defendants to prevent needless disruption and significant,
3 irreparable harm that its many members operating on federal and Indian oil and gas leases
4 would suffer if the Court were to grant Plaintiffs’ requested relief. *Id.* at ¶¶ 11, 13-15.

5 API’s members will be directly damaged if the invalidated provisions of the
6 Hydraulic Fracturing Rule were to take effect, because those provisions impose expensive,
7 arbitrary, and duplicative regulatory burdens on API members that own or operate federal
8 and Indian oil and gas leases and require in many cases costly and permanent capital
9 modifications to infrastructure. Imposing the requirements of the hydraulic fracturing rule
10 would also jeopardize the legally-protected confidentiality of sensitive commercial
11 information related to hydraulic fracturing fluid composition and use. *Id.* at ¶ 13.

12 The other parties to this case do not represent API’s unique industry interests, in
13 part because (i) Federal Defendants’ governmental interests are distinct from API’s and its
14 members’ commercial interests; (ii) API’s membership represents a diverse cross-section
15 of the oil and gas and associated industries not represented by the other private parties;
16 and (iii) the remaining parties are adverse. *Id.* at ¶ 17. Thus, API presents compelling
17 circumstances for intervention as of right. Alternatively, the Court should grant
18 permissive intervention.

19 **I. API IS ENTITLED TO INTERVENE AS OF RIGHT.**

20 Federal Rule of Civil Procedure 24(a)(2) requires a party moving to intervene as of
21 right to “timely” show that it has “an interest relating to the property or transaction that is
22 the subject of the action,” that it “is so situated that disposing of the action may as a
23 practical matter impair or impede the movant’s ability to protect its interest,” and that
24 existing parties may not “adequately represent” that interest. *Wilderness Soc’y v. U.S.*
25 *Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc); *Hoopa Valley Tribe v. Nat’l*
26 *Marine Fisheries Serv.*, No. 16-CV-04294-WHO, 2016 WL 9458794 (N.D. Cal. Dec. 2,
27 2016). “[T]he requirements are broadly interpreted in favor of intervention,” *Citizens for*

1 *Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011), and the
2 Court's "review is guided primarily by practical considerations, not technical
3 distinctions." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001)
4 (internal quotations and citation omitted).

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

11 **A. API's Motion to Intervene is Timely.**

12 API's motion precedes all deadlines in this Court, including the deadline for the
13 Federal Defendants to file responsive pleadings. *See Nw. Forest Res. Council v.*
14 *Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (motion to intervene timely when filed prior to
15 answer and any proceedings). Plaintiffs filed their complaints at the end of January, and
16 Federal Defendants have not yet filed Answers or otherwise responded to Plaintiffs'
17 complaints. The cases were assigned to this Court on March 7, and the case management
18 conference is scheduled for May 1. API will meet deadlines established for the Federal
19 Defendants, unless otherwise ordered by the Court. Intervention thus will not cause any
20 delay or prejudice other parties' pursuit of their claims or defenses. *See id.* (no prejudice
21 where motion filed before any substantive court rulings); *Smith v. Los Angeles Unified*
22 *Sch. Dist.*, 830 F.3d 843, 857 (9th Cir. 2016) (delay is "the only 'prejudice' that is
23 relevant"); *Guardians v. Hoover Mont. Trappers Ass'n*, No. CV 16-65-M-DWM, 2016
24 WL 7388316, at *1 (D. Mont. Dec. 20, 2016) (no prejudice where intervenor "would be
25 able to follow the same briefing schedule assigned other parties"). Accordingly, API's
26 motion is timely.

1 **B. API Has a Significant Protectable Interest in the Litigation, Which Is**
2 **Threatened by Plaintiffs’ Requested Relief.**

3 API readily satisfies the related impairment of interest factors under Rule 24 to
4 intervene. A party “has a sufficient interest for intervention purposes if it will suffer a
5 practical impairment of its interests as a result of the pending litigation.” *Wilderness*
6 *Soc’y*, 630 F.3d at 1179 (quoting *California ex rel. Lockyer v. United States*, 450 F.3d
7 436, 441 (9th Cir. 2006)). “Rule 24(a)(2) does not require a specific legal or equitable
8 interest,” but aims to achieve a comprehensive resolution “by involving as many
9 apparently concerned persons as is compatible with efficiency and due process.”
10 *Wilderness Soc’y*, 630 F.3d at 1179 (quoting *County of Fresno v. Andrus*, 622 F.2d 436,
11 438 (9th Cir.1980)). “[T]he relevant inquiry is whether the [outcome] ‘may’ impair rights
12 ‘as a practical matter’ rather than whether the [outcome] will ‘necessarily’ impair them.”
13 *United States v. City of Los Angeles*, 288 F.3d 391, 401 (9th Cir. 2002) (internal citation
14 omitted).

15 API “is a national trade association, which represents more than six hundred
16 companies ‘involved in all aspects of the oil and natural gas industry, including the
17 exploration, production, shipping, transportation, and refining of crude oil.’” *Envtl. Def.*
18 *Ctr. v. Bureau of Safety & Envtl. Enf’t*, No. CV 14-9281, 2015 WL 12734012, at *2 (C.D.
19 Cal. Apr. 2, 2015) (granting API intervention in challenge to federal oil and gas permits).
20 Accordingly, this Court recently granted API intervenor status in a similar case involving
21 a challenge to a BLM regulation suspending the effective date of a 2016 rule governing
22 venting and flaring on BLM-managed oil and gas leases, which would similarly impair the
23 rights and interests of API’s members. *California v. BLM*, No. 17-cv-7186 (N.D. Cal.),
24 Order Granting Mots. to Intervene (ECF No. 90) (granting API intervention in challenge
25 to BLM suspension of 2016 “venting and flaring” rule); *Sierra Club v. Zinke*, No. 17-cv-
26 7187 (N.D. Cal.), Order Granting Mots. to Intervene (ECF No. 82) (same). Milito Decl. ¶
27 8. API members hold thousands of BLM-issued oil and gas leases on federal and Indian

1 lands, almost all of which require hydraulic fracturing to fully and economically develop.
2 API represents the economic and legal interests of its members by actively participating in
3 BLM rulemaking efforts. Milito Decl. at ¶ 7. API regularly participates in lawsuits
4 related to regulatory efforts of BLM and other Department of the Interior agencies. *E.g.*,
5 *California v. BLM*, No. 17-cv-7186 (N.D. Cal.); *Sierra Club v. Zinke*, No. 17-cv-7187
6 (N.D. Cal.). *Id.* API prepared detailed comments on each of BLM's hydraulic fracturing-
7 related regulatory proposals, including the Rescission Rule at issue in this case. *See*
8 www.regulations.gov, Dkt. No. 2017-15696, Comment No. BLM-2017-0001-0396 (API
9 comments on proposed Rescission Rule); *id.*, Dkt. No. BLM-2013-13708, Comment No.
10 BLM-2012-0002-5497 (API comments on May 24, 2013 proposed Hydraulic Fracturing
11 rule); *id.*, Dkt. No. BLM-2012-11304, Comment No. BLM-2012-0001-7379 (API
12 comments on May 11, 2012 proposed Hydraulic Fracturing Rule); Milito Decl. at ¶ 7.

13 Participation in the instant cases is critical to API's members because virtually all
14 modern onshore oil and gas development involves hydraulic fracturing, and API's
15 members are interested in preserving their ability to design and implement hydraulic
16 fracturing in a cost-effective and rational manner that preserves the confidentiality of
17 proprietary business information and protects trade secrets. Milito Decl. at ¶¶ 9, 13-14.
18 The consequences of granting Plaintiffs' requested relief, i.e., vacating the Rescission
19 Rule and imposing for the first time the requirements of the Hydraulic Fracturing Rule on
20 federal and Indian oil and gas lessees, would be felt across the country. *Id.* at ¶ 13. Such
21 a result would subject API members to new and expensive regulatory burdens that the
22 U.S. District Court for the District of Wyoming recognized could not even be rationally
23 implemented. *Id.* at ¶¶ 13-14. It would also foster a continued environment of regulatory
24 uncertainty that would impair lessees' ability to properly and economically develop their
25 leases. *Id.* at ¶ 14. In fact, requiring BLM to implement standards already judicially
26 determined to be beyond BLM's statutory purview, and which the agency now
27 acknowledges constitute an inappropriate regulatory overreach, would create conflicting

1 legal mandates for BLM to resolve via new regulations, and expose API members who
2 lease, produce, or develop federal or Indian oil and gas leases to the vagaries of potentially
3 inconsistent regulatory regimes. *Id.*; see *WildEarth Guardians v. Nat'l Park Serv.*, 604
4 F.3d 1192, 1199 (10th Cir. 2010) (impairment may occur “[w]here a decision in the
5 plaintiff[s’] favor would return the issue to the administrative decision-making process”).

6 Thus, API has “an organizational interest—and its members a financial one—” in
7 the outcome of this litigation, which could impair API’s ability to “protect it and its
8 members’ interests.” See *Guardians*, 2016 WL 7388316, at *1. By contrast, if the
9 Federal Defendants prevail, API and its members will not suffer any financial or
10 regulatory disruption, and will maintain the ability to continue economic lease operations.
11 Milito Decl. at ¶¶ 11, 15, 16. Because invalidation of the Rescission Rule, and imposition
12 of the Hydraulic Fracturing Rule, would impair API’s protectable interests, and because
13 that harm would be avoided if this case were resolved in API’s favor, the Court should
14 grant API intervention as of right.

15 **C. Other Parties Cannot Adequately Represent API’s Interests.**

16 A proposed intervenor has only a “minimal” burden to show that its interests “may
17 be” inadequately represented. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528,
18 538 n.10 (1972). Moreover, governmental entities frequently have interests divergent
19 from, and thus cannot adequately represent, private industry. *Id.* (Secretary of Labor did
20 not adequately represent union members); *Sw. Ctr. for Biological Diversity v. Berg*, 268
21 F.3d 810, 823 (9th Cir. 2001) (“The interests of government and the private sector may
22 diverge.”); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 896 (N.D. Cal. 1984), *amended*,
23 (N.D. Cal. Sep. 17, 1984) (“agency’s interest in content of regulation will differ from the
24 interest of the one governed by those regulations”); *Envtl. Def. Ctr.*, 2015 WL 12734012,
25 at *4 (“although the Proposed Intervenors may share some common goals in this
26 litigation, the Proposed Intervenors seek to protect their private interests while the
27 Defendants have an interest in protecting the public in general”).

1 API's intervention will ensure adequate protection of the entire oil and gas
2 industry's interests and the interests of associated industries in this litigation. Plaintiffs do
3 not adequately represent API's interests because their legal position, and the relief sought
4 in this litigation, are adverse to API. *See United States v. Stringfellow*, 783 F.2d 821, 828
5 (9th Cir. 1986) (adverse party cannot adequately represent proposed intervenor's
6 interests); Milito Decl. at ¶ 17.a. Likewise, as addressed above, API and its members have
7 a unique business interest in the Rescission Rule separate from BLM's administrative
8 interests. Milito Decl. at ¶ 17.b. Although API and BLM share a common goal in this
9 case to uphold the Rescission Rule, BLM's legal positions are unlikely to align with some
10 of the arguments API might make. For example, BLM continues to assert compliance
11 costs associated with the 2015 Hydraulic Fracturing Rule in the range of \$14-\$34 million
12 per year, its same estimate as in 2015. 82 Fed. Reg. at 61,925. But API contends that
13 BLM continues to significantly underestimate the compliance costs associated with
14 implementing the Hydraulic Fracturing Rule, and therefore now underestimates the
15 benefits associated with the Rescission Rule. Milito Decl. at ¶ 17.b; *see* Advanced
16 Resources International Inc., Challenges Associated with assessing Impacts of BLM
17 Proposed Hydraulic Fracturing Rule, at 3, 18, www.regulations.gov, Dkt. No. 2017-
18 15696, Comment No. BLM-2017-0001-0396, ("estimated costs associated with this rule
19 could . . . [be] as much as \$2.7 billion per year"). Given these differences, and because
20 Federal Defendants have no obligation to protect API members' economic or operational
21 interests, Federal Defendants cannot adequately represent API in this lawsuit.

22 Finally, though they are not yet parties to this case, the other Proposed-Intervenors
23 representing independent and Western oil and gas companies that operate in the
24 exploration and production sector of the oil and gas industry do not adequately represent
25 the interests of API's broader membership, which also includes service and supply
26 companies, petroleum refiners, pipeline companies, LNG exporters, petroleum shippers,
27 steel makers, and other sectors of the industry that are not members of these other

1 organizations. Milito Decl. at ¶¶ 6, 17.c. Indeed, in another recent case involving BLM
2 rulemaking, this Court granted intervention separately to API and to other industry groups.
3 *California*, No. 17-cv-7186, Order Granting Mots. to Intervene (ECF No. 90) (granting
4 API intervention in challenge to BLM suspension of 2016 “venting and flaring” rule);
5 *Sierra Club*, No. 17-cv-7187, Order Granting Mots. to Intervene (ECF No. 82) (same).
6 The same result should be reached here.

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

9 If the Court is not inclined to allow API to intervene as of right, it should permit
10 API to intervene under Federal Rule of Civil Procedure 24(b)(1)(B) (“On timely motion,
11 the court may permit anyone to intervene who . . . has a claim or defense that shares with
12 the main action a common question of law or fact.”). API will defend against the central
13 legal claims and the relief sought in this litigation. As explained above, intervention early
14 in this litigation also will not “unduly delay or prejudice” existing parties. *See* Fed. R.
15 Civ. P. 24(b)(3). Intervention here will especially “contribute to the equitable resolution
16 of this case” given the “magnitude” of the impacts on “large and varied interests” if
17 Plaintiffs’ injunction were granted. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094,
18 1111 (9th Cir. 2002). Thus, at a minimum, the Court should exercise its discretion and
19 grant API permissive intervention.

20 **CONCLUSION**

21 API has a significant interest in the Rescission Rule, which would be seriously
22 harmed by the relief that Plaintiffs seek in this litigation. The Court should grant API’s
23 motion to intervene as of right under Rule 24(a)(2). In the alternative, the Court should
24 grant permissive intervention pursuant to Rule 24(b)(1)(B).

25 Dated this 30th day of March, 2018.

1 Respectfully submitted,

2
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