Emil A. Macasinag (State Bar No. 256953)
emacasinag@wshblaw.com
WOOD, SMITH, HENNING & BERMAN LLP
10960 Wilshire Boulevard, 18th Floor
Los Angeles, California 90024-3804
Phone: 310-481-7600 ♦ Fax: 310-481-7650

[ADDITIONAL COUNSEL LISTED ON FOLLOWING PAGE]

Attorneys for PROPOSED-INTERVENORS WESTERN ENERGY ALLIANCE and INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, by and through XAVIER BECERRA, ATTORNEY GENERAL; and the CALIFORNIA AIR RESOURCES BOARD; and STATE OF NEW MEXICO, by and through HECTOR BALDERAS, ATTORNEY GENERAL,

Plaintiffs,

v.

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

Defendants.

Case No. 4:18-cv-05712-DMR

PROPOSED-INTERVENORS WESTERN ENERGY ALLIANCE'S AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA'S MOTION TO INTERVENE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Filed Concurrently with Declaration of Kathleen M. Sgamma In Support Thereof; [PROPOSED] Order Thereon]

REQUESTED Hearing Date: October 25, 2018
REQUESTED Hearing Time: 9:30 a.m.
Courtroom: B, 15th Floor

[The Hon. Magistrate Judge Laurel Beeler]

Trial Date: None Set

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

Eric P. Waeckerlin – *Pro Hac Vice Pending*
epwaeckerlin@hollandhart.com
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, Colorado 80202
Tel: 303.295.8086 ♦ Fax: 303.975.5396

Kathleen C. Schroder – *Pro Hac Vice Pending*
Katie.Schroder@dgslaw.com
DAVIS GRAHAM & STUBBS LLP
1550 17th Street, Suite 500
Denver, Colorado 80202
Tel: 303.892.9400 ♦ Fax: 303.893.1379

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ◆ FAX 310-481-7650

TABLE OF CONTENTS

Page

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OTHER AUTHORITIES

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

NOTICE OF MOTION AND MOTION TO INTERVENE

TO THE COURT, AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on October 25, 2018 at 9:30 a.m. in Courtroom B, 15th Floor, 450 Golden Gate Avenue, San Francisco, California 94102, of the above-titled Court, Western Energy Alliance (Alliance) and the Independent Petroleum Association of America (IPAA) (collectively, the Proposed-Intervenors), will and hereby do move this Court for an Order granting the Proposed-Intervenors' Motion to Intervene in the above-titled action.

The Motion to Intervene is made pursuant to Federal Rule of Civil Procedure 24 because the Proposed-Intervenors have an interest in this action that will not be adequately represented by the named Defendants, and this interest is sufficient to warrant intervention as a matter of right under Rule 24(a), or, alternatively, by permissive intervention under Rule 24(b).

The Motion to Intervene is based on this Notice; the following Memorandum of Points and Authorities; the Declaration of Kathleen Sgamma and the [Proposed] Order filed concurrently herewith; all pleadings and papers filed in this action; and such oral argument and other evidence properly presented to the Court at a hearing on the Motion.

DATED: September 20, 2018

HOLLAND & HART LLP

By: /s/ Eric P. Waeckerlin

ERIC P. WAECKERLIN (*Pro Hac Vice Pending*)
Attorneys for PROPOSED-INTERVENORS
WESTERN ENERGY ALLIANCE and the
INDEPENDENT PETROLEUM ASSOCIATION OF
AMERICA

DATED: September 20, 2018

DAVIS GRAHAM & STUBBS LLP

By: /s/ Kathleen C. Schroder

KATHLEEN C. SCHRODER (*Pro Hac Vice Pending*)
Attorneys for PROPOSED-INTERVENORS
WESTERN ENERGY ALLIANCE and the
INDEPENDENT PETROLEUM ASSOCIATION OF
AMERICA

DATED: September 20, 2018

WOOD, SMITH, HENNING & BERMAN LLP

By: /s/ Emil A. Macasinag

EMIL A. MACASINAG
Attorneys for PROPOSED-INTERVENORS
WESTERN ENERGY ALLIANCE and the
INDEPENDENT PETROLEUM ASSOCIATION OF
AMERICA

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF ISSUES TO BE DECIDED

Whether Proposed-Intervenors Western Energy Alliance (Alliance) and Independent Petroleum Association of America (IPAA) (collectively, the Proposed-Intervenors) meet the requirements of Federal Rule of Civil Procedure 24 to intervene in this lawsuit.

STATEMENT OF RELEVANT FACTS

I. Plaintiffs' Current Legal Challenge

Plaintiffs' current action challenges a final rule issued by the Bureau of Land Management (BLM) in pre-publication form on September 18, 2018 titled "Waste Prevention, Production Subject to Royalties, and Resource Conservation; Recession or Revision of Certain Requirements" (the "2018 Rule"). The purpose of the 2018 Rule is to revise BLM's prior rule finalized in November 2016, 81 Fed. Reg 83,008 (Nov. 18, 2016), (the "2016 Rule") to reduce unnecessary compliance burdens, consistent with the BLM's existing statutory authorities, and re-establish longstanding requirements that had been replaced by the 2016 Rule. *See* 2018 Rule at 1. Plaintiffs' prayer for relief in this action requests (1) a declaration that the 2018 Rule is invalid, (2) an order vacating the 2018 Rule, and (3) an order reinstating the 2016 Rule.

Because Proposed-Intervenors have been active participants in the various lawsuits challenging BLM's waste prevention rules, the following summary of BLM's rulemaking leading up to the release of the 2018 Rule, as well as the multiple lawsuits challenging BLM's rules in multiple jurisdictions is directly relevant to establishing Proposed-Intervenors' substantial interest in intervening in this most recent challenge.

II. Rulemaking and Litigation History

The 2016 Rule purported to update the agency's standards to reduce venting and flaring of oil and gas production on public lands. Although the 2016 Rule took effect on January 17, 2017, it did not require compliance with several significant provisions until January 17, 2018 (these are known as the "phase-in provisions" and are more fully described below).

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

On November 23, 2016, the Proposed-Intervenors filed a motion for a preliminary injunction against BLM in the United States District Court for the District of Wyoming seeking to enjoin BLM from implementing the 2016 Rule because, among other reasons, it exceeded BLM's authority by comprehensively regulating air quality and was an arbitrary and capricious agency action. *Western Energy Alliance v. Zinke*, No. 2:16-cv-00280-SWS at Dkt. 12 (D. Wyo.). Proposed-Intervenors' motion included arguments that requiring oil and gas operators to comply with the 2016 Rule would impose significant immediate and irretrievable costs with no meaningful benefits with a particularly disproportionate impact on small operators and low-production oil and natural gas wells. *Id.* Shortly thereafter, the States of Wyoming and Montana filed a motion for preliminary injunction in a separate case seeking to enjoin BLM from implementing the 2016 Rule. *See Wyoming v. U.S. Dept. of the Interior*, No. 2:16-cv-00285-SWS at Dkt. 21 (D. Wyo). The States of North Dakota and Texas later intervened in the respective cases as petitioners and filed a motion for a preliminary injunction. The two cases were subsequently consolidated. Plaintiffs in the present action, along with a coalition of environmental groups, intervened as defendants in support of the 2016 Rule in the Wyoming litigation.

On January 16, 2017, the Wyoming District Court ruled on the pending motions for preliminary injunction. *Western Energy Alliance v. Zinke*, No. 2:16-cv-00280-SWS at Dkt. 87 (D. Wyo.). The Wyoming District Court observed that the "[2016 Rule] upends the [Clean Air Act's] cooperative federalism framework and usurps the authority Congress expressly delegated under the [Clean Air Act] to the [Environmental Protection Agency], states, and tribes to manage air quality." *Id.* at 17. Nonetheless, the Wyoming District Court denied the motions for preliminary injunction, finding it could not conclude at that time the 2016 Rule exceeded BLM's authority or was arbitrary and capricious. *Id.* at 28. The court explained the petitioners had not established all factors required for issuance of a preliminary injunction, in part because significant portions of the rule would not take effect for another year. *Id.* Since then, there have been numerous procedural issues and orders in this case which are more fully described below.

On June 15, 2017, pursuant to Administrative Procedure Act (APA) § 705, BLM postponed the provisions of the 2016 Rule set to take effect on January 17, 2018. 82 Fed. Reg. 27,430 (June 15, 2017) ("Postponement Notice"). On July 5, 2017, the Plaintiffs in the current action sued BLM, the Department of the Interior, and other defendants in this Court, alleging the Postponement Notice was unlawful. A coalition of seventeen conservation and tribal citizen groups filed a related action on July 10, 2017. These two cases were consolidated on July 24, 2017. Plaintiffs then moved for summary judgment. *See California v. U.S. Bureau of Land Mgmt.*, No. 3:17-cv-03804-EDL at Dkt. 11; *Sierra Club v. Zinke*, No. 3:17-cv-03885-EDL at Dkt. 37.

Soon after, the Proposed-Intervenors filed a motion to intervene. 3:17-cv-03804-EDL at Dkt. 43. On August 28, 2017, the Court granted the motion to intervene, finding the proposed conditions of intervention were reasonable and necessary in the interests of judicial economy, sound case management, and avoiding delay. 3:17-cv-03804-EDL at Dkt. 57 at 2.

On October 4, 2017, the Court granted Plaintiffs' summary judgment motions and vacated the Postponement Notice, concluding BLM's attempt to postpone compliance dates under the 2016 Rule without a full notice and comment period was not authorized under § 705 of the APA and was otherwise arbitrary and capricious. 3:17-cv-03804-EDL at Dkt. 95. This decision had the effect of reinstating the January 17, 2018 deadlines for compliance with various provisions of the 2016 Rule that had been postponed since June 15, 2017.

On October 5, 2017, BLM issued a proposed rule to suspend certain provisions of the 2016 Rule and offered a 30-day notice and comment period pursuant to § 553 of the APA. On December 8, 2017, BLM issued a final rule suspending certain provisions of the 2016 Rule ("Suspension Rule"). 82 Fed. Reg. at 58,050 (Dec. 8, 2017).

On December 19, 2017, the Plaintiffs again sued BLM, the Department of the Interior, and other defendants in this Court, this time claiming the Suspension Rule violated the APA and sought a preliminary injunction of the Suspension Rule. *See California v. U.S. Bureau of Land Mgmt.*, 3:17-cv-07186-WHO. In a related action filed that same day, the coalition of seventeen

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

conservation and tribal citizen groups alleged similar claims against Defendants. *See Sierra Club v. Zinke*, 3:17-cv-07187-WHO. These actions were consolidated. *See* 3:17-cv-07187-WHO at Dkt. 70.

The Proposed-Intervenors again filed a motion to intervene. 3:17-cv-07186-LB at Dkt. 16. Over Plaintiffs' objections, the Court granted the motion to intervene on February 26, 2018, finding that both the Alliance and IPAA met the standards for intervention under both Rules 24(a) and (b) and that "[b]ecause intervenors represent separate and distinct interests from … the named defendants," they were permitted "to file separate supplemental briefing and to participate in the hearing." *Id.* at Dkt. 90 at 1.

On February 22, 2018, this Court granted Plaintiffs' request to preliminarily enjoin the Suspension Rule. *Id.* at Dkt. 89 at 2. In the same order, the Court denied a motion filed by BLM and the States of North Dakota and Texas to transfer venue of the case challenging the Suspension Rule to the District of Wyoming, where their case is pending challenging the 2016 Rule. *Id.*

In response to this Court's ruling on preliminary injunction, multiple motions were filed in the District of Wyoming in February 2018, including motions to lift the stay of proceedings in the Wyoming litigation that had been put in place because of the Suspension Rule and Proposed-Intervenors' motion to preliminarily enjoin BLM from enforcing the 2016 Rule nationwide. *See Western Energy Alliance v. Zinke*, No. 2:16-cv-00280-SWS at Dkt. 194-197 (D. Wyo.).

On April 4, 2018, the Honorable Scott W. Skavdahl issued an order denying North Dakota and Texas' joint motion to lift the stay of proceedings and proceed to the merits and denying Proposed-Intervenors' request for preliminary injunction or vacatur of certain of the 2016 Rule provisions. *Id.* at Dkt. 215. Nonetheless, to preserve the status quo, Judge Skavdahl stayed the implementation of the 2016 Rule's "phase-in provisions," which were set to go into effect on January 17, 2018. *Id.* at 2, 10-11. The order further stayed the litigation until BLM finalized its rulemaking process. *Id.* at 10. The order did not rule on the merits of the Alliance's and IPAA's preferred relief—i.e., vacating the 2016 Rule or preliminarily enjoining portions of the 2016 Rule pending BLM revision. *See id.*; *see also* Dkt. 197 at 14-18.

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

The citizen groups appealed the Wyoming District Court's interlocutory order to the Tenth Circuit. *Wyoming et al. v. U.S. Dept. of the Interior*, Nos. 18-8027 & 18-8029 (10th Cir.). The two appeals were consolidated. The States of Wyoming and Montana, as well as the Proposed-Intervenors, moved to dismiss the appeals for lack of appellate jurisdiction. *See* No. 18-8029 Dkt. 01019976239 and 01019978713. The States of California and New Mexico intervened as appellants and moved to stay Judge Skavdahl's April 4, 2018, interlocutory order. *Id.* at Dkt. 1019979472. In an order dated June 4, 2018, the Tenth Circuit denied both the motions to dismiss and the motions for stay. No. 18-8027 at Dkt. 010110002174. The parties have not yet completed briefing the merits of the appeals.

Therefore, as of the date of this filing, the Tenth Circuit appeals remain active, as does the litigation before the Wyoming District Court. Proposed-Intervenors have taken the position in the Tenth Circuit that regardless of how the Tenth Circuit rules on the appeal, the only proper remedy would be a remand of the litigation to the district court to consider any change in circumstances, but that it would not be proper to dismiss the litigation, which is nearly fully briefed. *Id.* at Dkt. 010110053953 at 20. Such further consideration by the Wyoming District Court is even more important now that Plaintiff's prayer for relief in this action specifically requests revival of the 2016 Rule.

On September 18, 2018, BLM issued the pre-publication version of the 2018 Rule. The stated purpose of the 2018 Rule is to "revise [the 2016 Rule] in a manner that reduces unnecessary compliance burdens, is consistent with the BLM's existing statutory authorities, and re-establishes longstanding requirements that had been replaced." 2018 Rule at 1. In doing so, BLM concluded that "many provisions of the 2016 rule exceeded BLM's statutory authority to regulate for the prevention of waste," labeling the 2016 Rule a "novel" interpretation of the agency's waste authority under the Mineral Leasing Act (MLA). *Id.* at 9-10. BLM noted the "grave concerns" expressed by the Wyoming court regarding BLM's usurpation of the authority of the EPA and the States under the Clean Air Act." *Id.* at 12. BLM also now concludes that the 2016 Rule's compliance costs for industry and implementation costs for the BLM exceeded the rule's benefits

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

and would have disproportionately impacted smaller operators and low-producing, marginal wells. *Id*. at 13-17.

Accordingly, BLM is "rescinding the provisions of the 2016 Rule that imposed costs in excess of their resource conservation benefits or created the potential for impermissible conflict with the regulation of air quality by the EPA or the States under the Clean Air Act" replacing those with requirements contained in the 2016 Rule that are similar to, but with improvements on, those contained in NTL-4A. *Id*. at 12, 24. Among other things, the 2018 Rule rescinds the 2016 Rule's requirements for waste minimization plans, well drilling, well completion and related operations, pneumatic controllers, pneumatic diaphragm pumps, storage vessels, and Leak Detection and Repair (LDAR). *Id*. at 25-26. In addition, the 2018 Rule modifies or replaces the 2016 Rule's gas-capture requirements, downhole well maintenance and liquids unloading requirements, and measuring and reporting volumes of gas venting and flared. *Id*. at 26. The remaining modifications to the 2016 Rule are less significant than those noted above.

ARGUMENT

I. Legal Standard

Rule 24(a) allows for intervention of right, whereby on timely motion, the Court must permit intervention by anyone who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Alternatively, Rule 24(b) allows permissive intervention by anyone who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(2).

II. Proposed-Intervenors are Entitled to Intervene as a Matter of Right

A Court is required to permit intervention if "(1) the motion is timely; (2) the applicant [claims] a 'significantly protectable' interest relating to the property or transaction that is the subject of the action; (3) the applicant [is] so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

[is] inadequately represented by the parties to the action." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc); *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 896-97 (9th Cir. 2011). The Ninth Circuit interprets the requirements for intervention broadly in favor of intervention, guided by practical considerations, not technical distinctions. *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1148 (9th Cir. 2010); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001).

The Proposed-Intervenors are entitled to intervene because their motion is timely; they have significant protectable interests related to the subject of the action, i.e., Plaintiffs challenge to the 2018 Rule and requested relief for reinstatement of the 2016 Rule; the disposition of the action may impair their ability to protect those interests; and the named parties cannot adequately represent the interests of the Proposed-Intervenors.

a. Proposed-Intervenors' Motion is Timely.

The Proposed-Intervenors' motion is timely because it was filed at the earliest possible stage in this litigation and no delay occurred to prejudice the other parties. The Ninth Circuit considers three factors when determining timeliness: "(1) the stage of the proceedings; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (internal quotations omitted). This determination is construed broadly in favor of intervention. *Citizens for Balanced Use*, 647 F.3d at 897. Moreover, "[t]imeliness is to be determined from all circumstances." *U.S. ex rel. McGough v. Covington Tech. Co.*, 967 F.2d 1391, 1395 (9th Cir. 1992).

The Proposed-Intervenors seek to intervene at the very start of the proceedings. Plaintiffs filed their complaint on September 19, 2018, hours after the 2018 Rule was issued in its pre-publication form. At the time of this filing, no responsive pleadings have been filed. Courts have found motions to intervene were timely when they were filed before any defendant responded to the complaint or any dispositive motions had been filed, *see Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 162 F. Supp.3d 1053, 1056 (C.D. Cal. 2014), before the court decided any dispositive motions, *see People's Legislature v. Miller*, 2012 WL 3536767, at

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

*3 (D. Nev. Aug. 15, 2012), and even after a defendant filed a response to the complaint, *see, e.g.*, *Citizens for Balanced Use*, 647 F.3d at 897; *PEST Comm. v. Miller*, 648 F. Supp.2d 1202, 1212 (D. Nev. 2009). The Ninth Circuit has even found post-judgment motions to intervene to be timely. *See McGough*, 967 F.2d at 1395. Moreover, this Court has previously granted these same Proposed-Intervenors' intervention motion in the Suspension Rule where such motion was not filed even this early in the litigation.

Given this early stage of the litigation, no prejudice will result to the other parties if the Proposed-Intervenors participate in this lawsuit. Because no Defendant has responded to the complaint, the practical effect of involving another defendant is negligible, i.e., no different than had Plaintiffs sued the Proposed-Intervenors initially. Moreover, given that this motion was filed the day after Plaintiffs' filed their complaint, Plaintiffs cannot credibly argue this motion is delayed. *See United States v. California*, 538 F. App'x 759, 761 (9th Cir. 2013) ("A party seeking to intervene must act as soon as he knows or has reason to know that his interests might be adversely affected by the outcome of the litigation.").

b. The Proposed-Intervenors Have a Legally Protectable Interest Relating to the Subject of This Action.

The Proposed-Intervenors have a legally protectable interest in the 2018 Rule that is the subject of this litigation. An applicant for intervention has a "significant protectable interest" in an action if: (1) it asserts an interest that is protected under some law, and (2) there is a "relationship" between its legally protected interest and the plaintiff's claims. *Citizens for Balanced Use*, 647 F.3d at 897; *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003).

A prospective intervenor "has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation." *City of Emeryville v. Robinson*, 621 F.3d 1251, 1259 (9th Cir. 2010) (internal quotations omitted). The purpose of this element is to "involv[e] as many apparently concerned persons as is compatible with efficiency and due process." *Wilderness Soc'y*, 630 F.3d at 1179 (internal quotations omitted). In the context of injunctive relief, an applicant demonstrates a "significantly protectable interest" when "the

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

injunctive relief sought by the plaintiffs will have direct, immediate, and harmful effects upon a third party's legally protectable interests." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822.

The Proposed-Intervenors' members are companies involved in all aspects of environmentally responsible exploration and production of oil and natural gas in the West, including on federal and Indian leases.[1] *See e.g,* Sgamma Dec. at ¶¶ 3, 6. Accordingly, their members' operations will be governed by BLM's 2018 Rule and have already been subject to the provisions of the 2016 Rule that went into effect. *Id.* Further, a majority of the Alliance's members are small businesses with an average of 15 employees, Sgamma Dec. at ¶ 3, and IPAA's members have an average of 12 employees.[2]

The Proposed-Intervenors' interest in this case relates to the issues raised by Plaintiffs, including their prayer for relief requesting (1) a declaration that the 2018 Rule is invalid, (2) an order vacating the 2018 Rule, and (3) an order reinstating the 2016 Rule. Proposed-Intervenors' substantial interest in this litigation is demonstrated by numerous facts, including Proposed-Intervenors' initial lawsuit challenging the 2016 Rule, participation in the ongoing Wyoming and Tenth Circuit litigation regarding implementation of the 2016 Rule, and Proposed-Intervenors' intervention and participation in both lawsuits challenging aspects of this Rule in this Court.

Plaintiffs' current challenge to the 2018 Rule raises issues directly related to Proposed-Intervenors' interests in the several venues that have seen challenges to aspects of this rulemaking. These include BLM's lack of statutory authority for major provisions of the 2016 Rule, the 2016 Rule's disproportionate impacts on small operators and low-production wells, the 2016 Rule's improper use of costs and benefits, the BLM's improper use of its waste authority under the MLA, and the 2016 Rule's estimated impacts on royalties, among others. BLM identified each of these issues, among others, as rationale for promulgating the 2018 Rule, and Plaintiffs have challenged these and other issues in their lawsuit.

[1] https://www.ipaa.org/independent-producers/.

[2] https://www.ipaa.org/independent-producers/.

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

Moreover, if Plaintiffs' request for injunctive relief is granted, the Proposed-Intervenors' member companies would be immediately harmed. Specifically, these companies would need to divert significant financial and operational resources to comply with the 2016 Rule. This would include the need to comply with the most burdensome and costly January 17, 2018 compliance deadlines in the 2016 Rule (i.e., the "phase in provisions"). *See* Sgamma Dec. at ¶ 8. Therefore, if Plaintiffs were to succeed in obtaining the relief they seek, there would be a risk of direct, immediate, and harmful effect upon the Proposed-Intervenors, and the Proposed-Intervenors would lose rights afforded to them by the 2018 Rule. Thus, the Proposed-Intervenors have a legally protected interest that relates directly to the claims at issue in this action.

c. Absent Intervention, the Proposed-Intervenors' Ability to Protect Their Legal Interests Will be Impaired.

The continuation of this lawsuit and the possibility of the relief Plaintiffs' seek, without the Proposed-Intervenors' participation, would seriously undermine the Proposed-Intervenors' ability to protect their interests in the 2018 Rule. The Ninth Circuit has held, "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 (following the Rule 24 Advisory Committee Notes); *see also United States v. City of L.A.*, 288 F.3d 391, 398 (9th Cir. 2002) (courts consider and give weight to the "*practical* interest in the outcome of a particular case") (emphasis in original).

Here, the Proposed-Intervenors filed the initial litigation over the 2016 Rule in which they argue BLM had no statutory authority to enact the 2016 Rule, exceeded the statutory authority the agency does possess under the MLA, and is otherwise arbitrary and capricious. BLM has cited each of these reasons, among others, as rationale for the action taken in the 2018 Rule. Proposed-Intervenors' interests in defending the 2018 Rule directly conflicts with Plaintiffs' goal of invalidating that rule and reviving the 2016 Rule. Thus, to protect their legal interests, the Proposed-Intervenors must be able to participate in this lawsuit to defend against Plaintiffs' claims and requested relief.

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

d. The Proposed-Intervenors' Interests Are Not Adequately Represented by Defendants.

The Proposed-Intervenors' interests do not align with the named Defendants. In determining whether another party will adequately represent the interests of a prospective intervenor, the Ninth Court considers: "(1) whether the interest of a present party is such that it will undoubtedly make all of the intervenor's arguments; (2) whether the present party is capable and willing to make those arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822. A prospective intervenor must show that that the present parties' representation *may* be inadequate. *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822; *see also Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538–39 n.10 (1972). The burden for the prospective intervenor is "minimal." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823. It is sufficient for an applicant to show that, because of the difference in their interests, it is likely that the existing parties will not advance the same arguments as applicants. *Id*. at 823-24.

Here, the Proposed-Intervenors have an interest in the 2018 Rule that is not adequately represented by the existing parties. Proposed-Intervenors represent largely small oil and gas operators, many of whom operate low-producing wells affected by the rules. The 2016 Rule, as determined by BLM, would have had a drastic and disproportionate economic impact on smaller companies and low-producing wells. *See* Sgamma Dec. at ¶¶ 9, 10; *see also* 2018 Rule at 13-17 (noting that the 2016 Rule would have imposed significant, negative impacts on marginal oil and gas wells). Accordingly, Proposed-Intervenors are uniquely positioned in a way the current Defendants are not to speak to those issues and to defend the BLM's decision and administrative record on those points. Moreover, no other existing party is able or likely to advance these same arguments in the same manner.

If the 2018 Rule is invalidated and the 2016 Rule is reinstated, the Proposed-Intervenors' members would suffer significant, and potentially immediate, financial and operational burdens to comply with the suspended provisions of the 2016 Rule. *See* Sgamma Dec. at ¶¶ 8-12. Proposed-

Intervenors therefore have a significant interest in defending the 2018 Rule, preserving the regulatory status quo, and ultimately in not incurring burdens, costs, and enforcement risk with a revived 2016 Rule. The agency does not have these same interests. Accordingly, the Proposed-Intervenors have a legally protectable, substantial economic interest in this litigation that is distinct from BLM's interest in defending the 2018 Rule and these interests will not be adequately represented absent Proposed-Intervenors' participation.

III. Alternatively, the Proposed-Intervenors Should be Granted Permissive Intervention

If the Proposed-Intervenors' request for intervention as of right is denied, they have at the very least fulfilled the requirements for permissive intervention. Rule 24(b) allows permissive intervention by anyone who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). A court may grant permissive intervention when: (1) the applicant's claim or defense shares a common question of law or fact with the main action; (2) the motion is timely; and (3) there is an independent ground for jurisdiction. *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110-11 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d at 1180. The Court must also determine whether intervention would unduly delay the main action or unfairly prejudice existing parties. Fed. R. Civ. P. 24(b)(3).

a. There are Common Questions of Law and Fact

Proposed-Intervenors' defense shares a common question of both law and fact with this lawsuit: that is whether the 2016 Rule was lawful and adequately supported on the record and whether the 2018 Rule is lawful and adequately supported on the record. Unlike intervention of right under Rule 24(a), Rule 24(b) "dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *Kootenai Tribe*, 313 F.3d 1094 at 1108. For example, in *PEST Committee*, the district court found the proposed-intervenors sought to defend the constitutionality of two statutes, "the precise claim at issue in Plaintiffs' Motion for Partial Summary Judgment[.]" 648 F. Supp.2d at 1214. As a result, the court held the

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

proposed-intervenors demonstrated they shared a common question of law or fact with the main action. *Id.* Similarly, in this case, Plaintiffs seek to invalidate the 2018 Rule and reinstate the 2016 Rule and Proposed-Intervenors seek the opposite outcome. Thus, there are common question of both law and fact allowing for permissive intervention.

b. The Motion to Intervene is Timely

As with intervention of right, courts determine timeliness for permissive intervention from all the circumstances, including the stage of the proceedings, prejudice to the existing parties, and the length of, and reason for, the delay. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997). As explained above, the Proposed-Intervenors filed this motion at the earliest possible stage in this litigation—one day following Plaintiffs' lawsuit, before answers have been filed, and before any dispositive motion has been filed. Due to the early stage of the filing and the lack of delay, no party is prejudiced by the intervention of the Proposed-Intervenors. Additionally, intervention would neither unduly delay the main action not unfairly prejudice the main parties.

c. An Independent Ground for Jurisdiction is Not Necessary Because This is a Federal Question Case

"Where the proposed intervenor in a federal-question case brings no new claims, the jurisdictional concern drops away." *Freedom from Religion Found., Inc.*, 644 F.3d at 844. Thus, the jurisdictional element is irrelevant in the Proposed-Intervenors' motion to intervene because this is a federal question case and the Proposed-Intervenors do not seek to introduce any state law counterclaims or cross-claims. Accordingly, the Proposed-Intervenors need not make any further showing under this element.

STATEMENT OF PARTIES' POSITIONS

The undersigned counsel have conferred with counsel for the parties to the litigation. Counsel for the State of California has indicated that Plaintiffs do not oppose this motion. The Federal Defendants have not yet entered an appearance as of this filing.

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650

CONCLUSION

For the reasons stated above, the Proposed-Intervenors respectfully request that this Court enter an order granting them intervention as of right under Fed. R. Civ. P. 24(a). In the alternative, the Proposed-Intervenors respectfully request that this Court enter an order granting them permission to intervene under Fed. R. Civ. P. 24(b).

DATED: September 20, 2018 HOLLAND & HART LLP

By: /s/ Eric P. Waeckerlin

ERIC P. WAECKERLIN (*Pro Hac Vice Pending*)
Attorneys for PROPOSED-INTERVENORS
WESTERN ENERGY ALLIANCE and the
INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA

DATED: September 20, 2018 DAVIS GRAHAM & STUBBS LLP

By: /s/ Kathleen C. Schroder

KATHLEEN C. SCHRODER (*Pro Hac Vice Pending*)
Attorneys for PROPOSED-INTERVENORS
WESTERN ENERGY ALLIANCE and the
INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA

DATED: September 20, 2018 WOOD, SMITH, HENNING & BERMAN LLP

By: /s/ Emil A. Macasinag

EMIL A. MACASINAG
Attorneys for PROPOSED-INTERVENORS
WESTERN ENERGY ALLIANCE and the
INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
10960 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024-3804
TELEPHONE 310-481-7600 ♦ FAX 310-481-7650