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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE WILDERNESS SOCIETY, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants,

and

EDISON ELECTRIC INSTITUTE, AMERICAN PUBLIC POWER ASSOCIATION, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AMERICAN GAS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL ASSOCIATION OF MANUFACTURERS,

Proposed Intervenor-Defendants.

No. 3:09-cv-03048-VRW

NOTICE OF MOTION AND MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS; MEMORANDUM OR POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: February 11, 2010
Time: 10:00 a.m.
Courtroom 6, 17th Floor

The Honorable Vaughn R. Walker
U.S. District Chief Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

NOTICE TO PLAINTIFFS, DEFENDANTS, AND THEIR ATTORNEYS OF RECORD 1

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE 2

INTRODUCTION AND BACKGROUND 2

The Energy Policy Act of 2005 2

Plaintiffs' Lawsuit 5

THE ASSOCIATIONS AND THEIR INTERESTS IN THIS ACTION 6

Edison Electric Institute 6

American Public Power Association 9

National Rural Electric Cooperative Association 10

American Gas Association 12

Chamber of Commerce of the United States of America 13

National Association of Manufacturers 14

ARGUMENT 15

I. The Associations Are Entitled to Intervention of Right 15

A. This Motion to Intervene Is Timely 16

B. The Associations Have Legally Protectable Interests That May Be Impaired by Disposition of This Case 17

C. The Associations' Interests Are Not Adequately Represented by Existing Parties 20

II. Permissive Intervention Should Be Granted 22

CONCLUSION 23

CERTIFICATION OF INTERESTED PERSONS OR ENTITIES 24

TABLE OF AUTHORITIES

Cases

American Chemistry Council, et al. v. Sierra Club, et al., No. 09-495 (U.S. pending) 13

American Petroleum Instit. v. Salazar, No. 08-0764 (EGS) (D.D.C. stipulation of dismissal Apr. 30, 2009) 13, 14

Californians for Safe Dump Truck Transportation v. Mendonca, 152 F.3d 1184 (9th Cir. 1998) 18

Conservation Law Foundation of New England v. Mosbacher, 966 F.2d 39 (1st Cir. 1992) 18

County of Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980) 17, 19

Edison Electric Inst. v. Piedmont Environmental Council, No. 09-343 (U.S. pending) 8, 13

Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009) 8, 11, 14

Forest Guardians v. Dombeck, 131 F.3d 1309 (9th Cir. 1997) 18

Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392 (9th Cir. 1995) 16, 17, 19

In re: Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation, MDL 1993, No. 1:08-mc-764 (D.D.C., pending) 8, 14

Kleissler v. U.S. Forest Serv., 157 F.3d 964 (3d Cir. 1998) 18, 19

Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094 (9th Cir. 2002) 2, 22, 23

Louisiana Envtl. Action Network v. EPA, 172 F.3d 65 (D.C. Cir. 1999) 9

Massachusetts v. EPA, 549 U.S. 497 (2007) 8, 11

Mille Lacs Band of Chippewa Indians v. State of Minnesota, 989 F.2d 994 (8th Cir. 1993) 21

National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) 8, 11

Natural Res. Def. Council v. Costle, 561 F.2d 904 (D.C. Cir. 1977) 21

North Carolina v. Tennessee Valley Auth., No. 09-1623 (4th Cir. pending) 14

Northwest Forest Resource Council v. Glickman, 82 F.3d 825 (9th Cir. 1996) 16

S.D. Warren Co. v. Maine Board of Environmental Protection, 547 U.S. 370 (2006) 8, 11

SEC v. U.S. Realty & Improvement Co., 310 U.S. 434 (1940) 22

Sierra Club v. EPA, 995 F.2d 1478 (9th Cir. 1993) 16

Sierra Club v. EPA, No. 09-1018 (D.C. Cir. pending) 14

Sierra Club v. Espy, 18 F.3d 1202 (5th Cir. 1994) 18

Sierra Club v. Glickman, 82 F.3d 106 (5th Cir. 1996) 18

Southern California Gas Co. v. City of Santa Ana, 336 F.3d 885 (9th Cir. 2003) 9

Southwest Center for Biological Diversity v. Berg, 268 F.3d 810 (9th Cir. 2001) 17

Trbovich v. United Mine Workers of America, 404 U.S. 528 (1972) 20, 21

United States v. Stringfellow, 783 F.2d 821 (9th Cir. 1986) 20

Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105 (9th Cir. 2000) 17

Wilderness Soc'y v. Dep't of Energy, No. 08-71074 (9th Cir.) 8, 11

Statutes

5 U.S.C. § 553 6

16 U.S.C. § 824p 10

16 U.S.C. § 1536(a)(2) 6

16 U.S.C. § 1604 6

42 U.S.C. § 4332 2

42 U.S.C. § 15925 3

42 U.S.C. § 15926 ..... 3, 4

43 U.S.C. § 1702(o) 4

43 U.S.C. §§ 1701-1785 5

Pub. L. No. 109-58, § 1221(a), 119 Stat. 946 (2005) 3

Pub. L. No. 109-58, § 1241, 119 Stat. 961 (2005) 3

Pub. L. No. 109-58, § 1813, 119 Stat. 1127 (2005) 3

Pub. L. No. 109-58, 119 Stat. 594-1143 (2005) 2

Other Authorities

150 Cong. Rec. S2732 (daily ed. Apr. 5, 2004) 3

151 Cong. Rec. H2195 (daily ed. Apr. 20, 2005) 3

74 Fed. Reg. 66496 (Dec. 15, 2009) 21

7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1916 (2d ed. 1986) 16

Energy Information Administration, ANNUAL ENERGY OUTLOOK 2008 (June 2008) 7

Rules

Fed. R. Civ. P. 24(a)(2) 2, 15, 17, 18
Fed. R. Civ. P. 24(b)(2) 2, 22
Fed. R. Civ. P. 24(c) 2

NOTICE TO PLAINTIFFS, DEFENDANTS, AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on Thursday, February 11, 2010, at 10:00 a.m., or as soon as this matter may be heard, in the courtroom of the Honorable Vaughn R. Walker (Courtroom 6), the Edison Electric Institute, American Public Power Association, National Rural Electric Cooperative Association, American Gas Association, Chamber of Commerce of the United States of America, and National Association of Manufacturers (collectively "the Associations") will and do hereby move the Court to grant them intervention under Rule 24 of the Federal Rules of Civil Procedure.

This motion will be based upon this Notice of Motion, Motion to Intervene, and the Points and Authorities in Support thereof, as well as the pleadings and papers filed herein.

DATED: December 17, 2009

By: */s/ J. Michael Klise*

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POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

Pursuant to Rules 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure, the Edison Electric Institute, American Public Power Association, National Rural Electric Cooperative Association, American Gas Association, Chamber of Commerce of the United States of America, and National Association of Manufacturers (collectively "the Associations") move for intervention of right or permissive intervention in this action. The Associations would be aligned with Federal Defendants, and against Plaintiffs The Wilderness Society, *et al.* Pursuant to Rule 24(c), a proposed Answer accompanies this motion, as does a proposed Order.

Plaintiffs raise claims under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, and four other federal statutes. Ninth Circuit precedent allows a non-federal party to intervene permissively in defense of claims under NEPA, but limits intervention as of right on NEPA claims to the remedy phase. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108-09 (9th Cir. 2002) (granting permissive intervention on NEPA claims). Therefore, the Associations move to intervene as of right in all aspects of this case except the merits phase of Plaintiffs' NEPA claims (Claims 1-3, described below); and to intervene permissively in all aspects of this case.

INTRODUCTION AND BACKGROUND

The Energy Policy Act of 2005. This lawsuit seeks to overturn and enjoin the first important steps taken by federal agencies to implement § 368 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594-1143 ("EPAct"). Fifteen organizational plaintiffs[1] challenge actions taken by the U.S. Department of Energy ("DOE"), the U.S. Department of the Interior/Bureau of Land Management ("BLM"), and the U.S. Department of Agriculture/U.S. Forest Service ("USFS") (collectively, "the agencies") in designating energy corridors on federal lands in the Western U.S.

[1] Plaintiffs are The Wilderness Society, BARK, Center for Biological Diversity, Defenders of Wildlife, Great Old Broads for Wilderness, Klamath Siskiyou Wildlands Center, National Parks Conservation Association, National Trust for Historic Preservation, Natural Resources Defense Council, Oregon Natural Desert Association, Sierra Club, Southern Utah Wilderness Alliance, Western Resource Advocates, Western Watersheds Project, and San Miguel County, Colorado. First Amended Complaint for Declaratory and Injunctive Relief, Doc. #17, at ¶¶ 7-21.

under § 368(a) and (d) of the EPAct. These actions are referred to as the West-wide Energy Corridors ("WWEC") project.[2]

Section 368, 42 U.S.C. § 15926, is one of several EPAct provisions aimed at improving energy infrastructure siting,[3] which Congress recognized was a significant concern that needed to be addressed through legislation. For example, during floor debate of H.R. 6, which ultimately was enacted as EPAct, Representative Shimkus noted that the bill "helps expand the transmission grid and block the backlogs that helped cause the major blackout we had 2 years ago." 151 Cong. Rec. H2195 (daily ed. Apr. 20, 2005). Similarly, upon introduction of a similar bill, S. 2095, a year earlier, Senator Domenici said that to avoid future blackouts, the U.S. needs to invest in critical transmission infrastructure and streamline the permitting of siting for lines. 150 Cong. Rec. S2732 (daily ed. Apr. 5, 2004).

Section 368 provides in pertinent part:

> (a) **Western States.** Not later than 2 years after the date of enactment of this Act [enacted Aug. 8, 2005], the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Defense, the Secretary of Energy, and the Secretary of the Interior (in this section referred to collectively as "the Secretaries"), in consultation with the Federal Energy Regulatory Commission, States, tribal or local units of governments as appropriate, affected utility industries, and other interested persons, shall consult with each other and shall–
>
> (1) designate, under their respective authorities, corridors for oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities on Federal land in the eleven

---

[2] The Plaintiffs use this designation, and the Associations will adopt it for ease of reference because the agencies themselves characterize it as "West-wide," http://corridoreis.anl.gov/index.cfm, although the individual corridors and set of corridors the agencies have designated in fact are not "West-wide" but are more modest in scope.

[3] Other EPAct energy infrastructure provisions include: § 1221(a), 119 Stat. 946, which (1) authorizes DOE to designate as "national interest electric transmission corridors" general geographic areas where electricity congestion is so significant it raises national or regional concerns, (2) authorizes the Federal Energy Regulatory Commission ("FERC") to approve electric transmission facilities in those areas, in particular if states fail to act in a timely manner, and (3) directs DOE to coordinate federal permitting of all transmission facilities; § 1241, 119 Stat. 961, which provides cost recovery and financial incentives to promote new transmission investment; § 367, 42 U.S.C. § 15925, which requires BLM and USFS to base their fees for linear rights-of-way on federal lands on fair market value rather than other more aggressive measures; and § 1813, 119 Stat. 1127, which requires the Secretaries of Energy and the Interior to study the need for reform of Indian tribal fees for energy rights-of-way across tribal lands.

> contiguous Western States (as defined in section 103(o) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702(o));[4]
>
> (2) perform any environmental reviews that may be required to complete the designation of such corridors; and
>
> (3) incorporate the designated corridors into the relevant agency land use and resource management plans or equivalent plans.
>
> ****
>
> (d) **Considerations.** In carrying out this section, the Secretaries shall take into account the need for upgraded and new electricity transmission and distribution facilities to–
>
> (1) improve reliability;
>
> (2) relieve congestion; and
>
> (3) enhance the capability of the national grid to deliver electricity.

42 U.S.C. § 15926(a), (d).

Section 368 further contemplates the designation of additional corridors besides those in the 11 Western States. Section 368(b) provides for the identification and designation of corridors in other states not later that 4 years after the date of the EPAct's enactment, and § 368(c) requires the Secretaries, in consultation with FERC and other specified parties, to establish procedures that ensure additional corridors are promptly identified and designated as necessary. 42 U.S.C. § 15926(b)-(c).

In enacting § 368, Congress intended that the Departments of Agriculture, Commerce, Defense, Energy, and Interior, in consultation with FERC, help meet the nation's energy infrastructure needs by planning for and facilitating the siting of necessary infrastructure across federal lands. During hearings leading to enactment of EPAct, energy industry representatives had identified the need to improve the federal permitting process for energy infrastructure, including siting of facilities on federal lands, as a major concern.[5] By enacting § 368, Congress sought to

---

[4] The eleven Western States are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. 43 U.S.C. § 1702(o).

[5] For example, in testimony submitted to the House Energy and Commerce Subcommittee on Energy and Air Quality in conjunction with hearings in March 2003, Edison Electric Institute (continued...)

address this federal lands issue while achieving several benefits: (1) consideration of infrastructure needs by the federal agencies responsible for implementing § 368 on a regional basis, with a focus on infrastructure reliability, congestion, and capability; (2) improved planning to accommodate energy infrastructure on federal lands in energy corridors; and (3) preliminary environmental review and analysis to allow for expedited procedures when the time comes to site within a designated corridor.

The corridor designation effort required under § 368 is critical to facilitating necessary improvements to the nation's electric grid, particularly in the Western U.S. The § 368 process provides an avenue for coordination by federal agencies in planning for the siting of linear facilities and enables the agencies to take a grid-wide perspective essential for moving power from remotely located generation assets – or potential generation assets – to major population centers where demand is growing notwithstanding aggressive energy efficiency programs. Section 368 also sets deadlines for initial corridor designations. These features are unique to the § 368 process. Therefore, the prompt completion of the first § 368 corridor designations is important if the interstate corridors required to transport oil, gas, and hydrogen, and interstate transmission lines to carry electricity from renewable resources, clean coal, and other resources, are to be available.

Plaintiffs' Lawsuit. Plaintiffs challenge the Final Programmatic Environmental Impact Statement ("PEIS") issued by BLM and the Departments of Energy, Agriculture, and Defense on November 28, 2008; the Record of Decision ("ROD") issued by BLM on January 14, 2009, amending 92 resource management plans ("RMPs") prepared under the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701-1785; and a ROD issued by the USFS on January

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(...continued)
Executive Vice President David Owens noted that the Institute strongly supported "the designation and development of corridors for transmission across federal lands." He also noted that one bill being considered would not address the "fragmented federal permitting process for rights-of-way when multiple federal jurisdictions are involved, working under their own deadlines and without any coordination with the state process," and that the bill "does nothing to reduce or eliminate multiple and duplicative environmental reviews and the frequent refusal of federal agencies to engage until the state process is done." Congress ultimately addressed these concerns in EPAct §§ 368 and 1221(a).

14, 2009, amending 38 land and resource management plans ("LRMPs") prepared under the National Forest Management Act ("NFMA"), 16 U.S.C. § 1604. These voluminous documents and supporting materials are available at the multi-agency web site dedicated to the WWEC, http://corridoreis.anl.gov/index.cfm.

The First Amended Complaint (Doc. #17), filed September 14, 2009, raises 9 claims:

Claims 1 through 3 allege violations of NEPA for failure to consider a reasonable range of alternatives, failure to consider and disclose environmental impacts, and failure to consider cumulative impacts. *Id.* ¶¶ 107-119.

Claim 4 alleges violations of FLPMA for failure to assure consideration of and consistency with federal, state, and local land-use plans and policies. *Id.* ¶¶ 120-123.

Claim 5 alleges violations of FLPMA, its implementing regulations, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, through failure to permit "public protest" of RMP amendments, and amendment of protest procedures without public notice and comment. *Id.* ¶¶ 124-129.

Claim 6 alleges failure to insure no jeopardy or adverse critical habitat modification for threatened or endangered species through consultation with federal wildlife services under § 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2). *Id.* ¶¶ 130-133.

Claims 7 through 9 allege violations of EPAct § 368 for failure to consult with other units of government and interested persons (§ 368(a)), failure to perform all necessary environmental reviews (§ 368(a)(2)), and failure to take into account "the need for upgraded and new electricity transmission and distribution facilities" (§ 368(d)). *Id.* ¶¶ 134-146.

Plaintiffs seek declaratory relief, an order setting aside the PEIS and RODs, and attorneys' fees under the Equal Access to Justice Act and the ESA. *Id.* at 57.

THE ASSOCIATIONS AND THEIR INTERESTS IN THIS ACTION

Edison Electric Institute ("EEI"). EEI is the association of U.S. shareholder-owned electric companies. EEI's members own electric generation and transmission systems and deliver electricity to end users in virtually all U.S. states, including the 11 Western states covered by the

WWEC project. EEI's members represent about 70 percent of the U.S. electric power industry and serve 95 percent of the ultimate customers in the shareholder-owned segment of the industry. EEI represents its members interests through advocacy before Congress, regulatory agencies, and the courts on issues of direct concern to its members. *See* Declaration of Quinlan J. Shea, III ("Shea Decl.") ¶¶ 2, 4, 5, & Ex. A (a list of EEI member companies and a map depicting their service territories nationwide) (appended as Ex. 1 to this Motion).

EEI's members construct, own, operate, and rely on transmission facilities to deliver electricity to their wholesale and retail customers. Furthermore, EEI's members anticipate that they will need to build substantial new transmission infrastructure in the coming decade, in order to accommodate population growth and increased electrification of our economy, to meet new reliability standards imposed under EPAct § 1211, to make the transmission grid "smarter" and more efficient, and to connect new renewable energy resources to the grid, thereby helping to diversify our nation's energy supply. Shea Decl. ¶¶ 3, 6, 9.

In fact, DOE's Energy Information Administration ("EIA") projects that net electric demand will increase 30 percent by 2030, even after taking into account energy-efficiency gains due to market-driven efficiency improvements, stricter building codes, and appliance and other efficiency standards mandated by the Energy Independence and Security Act of 2007. EIA, ANNUAL ENERGY OUTLOOK 2008 at 10 (June 2008) (http://www.eia.doe.gov/oiaf/aeo/). Even with substantial energy-efficiency measures, new and replacement power plant capacity is projected to total 150,000 megawatts (MW) and cost $560 billion by 2030. Transmission and distribution investment needs are projected to total an even larger $900 billion by 2030. Shea Decl. ¶ 6.

Electric transmission facilities are located on linear rights-of-way that, especially in the Western U.S., often must traverse federal lands. Federal ownership of land in the Western U.S. is so vast that it is often effectively impossible to site a line without use of some federal lands. Moreover, EEI members have found that the federal land use authorization process is one of the more difficult aspects of siting and retaining transmission facilities. Federal land use authorizations often are not well coordinated with state authorizations, and companies can face daunting and at times

insurmountable hurdles to siting new facilities on federal lands, including delay and uncertainty that alone can preclude a project from going forward. Shea Decl. ¶ 7.

For these reasons, EEI has long supported the identification and designation of corridors across federal lands in 11 Western states to facilitate the siting of future transmission and other linear energy facilities. Indeed, EEI and its Western member companies participated in a 20-year dialogue with federal agencies preceding enactment of EPAct § 368 in the hope that the agencies would designate corridors as the agencies were authorized to do under FLPMA. That dialogue resulted in the development of a Western Regional Corridor Study, but no corridors. Section 368 was enacted to move the corridor designation process along on a timeline. Shea Decl. ¶ 8.

EEI presented testimony at Congressional hearings on enactment and implementation of the EPAct (including the April 15, 2008 Congressional hearing cited in the First Amended Complaint (¶ 73)), encouraging Congress to enact and provide for effective implementation of provisions such as § 368 aimed at improving transmission siting. Furthermore, EEI provided comments to the agencies in response to their notice-and-comment proceedings and public meetings in implementing § 368, including in response to the agencies' Notice of Intent to Prepare a PEIS, draft PEIS, and preliminary corridor map, cited in the First Amended Complaint (¶¶ 58, 61, and 63)). Shea Decl. ¶ 4. In addition, EEI has participated actively in court cases challenging implementation of EPAct transmission-related provisions, as well as cases involving environmental and economic issues similar to the ones presented in this case.[6]

[6] Those cases include: *Edison Electric Inst. v. Piedmont Environmental Council*, No. 09-343 (U.S. pending) (petitioner; petition for certiorari pending over FERC transmission siting authority under EPAct § 1221(a)); *The Wilderness Soc'y v. Dep't of Energy*, No. 08-71074 (9th Cir.) (intervenor in pending case over DOE-designated national interest electric transmission corridors under EPAct § 1221(a)); *In re: Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation*, MDL 1993, No. 1:08-mc-764 (D.D.C., pending) (intervenor; applicability of ESA constraints to facilities, including electric utilities, that emit greenhouse gases); *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (member of petitioner Utility Water Act Group; U.S. Environmental Protection Agency ("EPA") Clean Water Act § 316(b) rule for existing power plant cooling water intake structures); *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (member of amicus Utility Water Act Group; applicability of ESA to Clean Water Act § 402 permitting); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (member of amicus Utility Air Regulatory Group, regulation of greenhouse gas emissions under Clean Air Act); *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) (amicus; application of Clean Water Act (continued...)

EEI members anticipate that corridor designations under § 368 will improve the federal land use authorization process for transmission facilities, and these companies anticipate using corridors designated under EPAct § 368 to assist in siting new facilities. In particular, § 368 should help to avoid unnecessary analyses and delays in siting and permitting facilities, which are needed to facilitate compliance with mandatory reliability standards, to reduce the risk of power supply disruptions, to diversify energy supply, and for other reasons already mentioned. Shea Decl. ¶ 7.

Thus, EEI and its members have a direct interest in this lawsuit that warrants intervention to protect. The outcome of this case will affect the ability of energy companies to construct, own, operate, and rely on transmission and related facilities using the energy corridors at issue in this case, and loss of some or all of these corridors could block some facilities entirely. Shea Decl. ¶¶ 10-12.

American Public Power Association ("APPA"). APPA is the association of the nation's publicly-owned electric utility systems, including state public power agencies and municipal electric utilities that serve some of the nation's largest cities as well as a vast majority that serve small and medium-size communities. APPA represents the interests of more than 2,000 publicly-owned electric utility systems across the country, serving approximately 45 million Americans, seeking to provide reliable, efficient electric service to their local customers at lowest possible cost consistent with good environmental stewardship. *See* Declaration of Joy E. Ditto ("Ditto Decl.") ¶¶ 2-3, appended as Ex. 2 to this Motion.

The great majority of APPA's members are "transmission dependent" utilities, meaning that they must pay third parties, including investor-owned and federally-owned electric utilities, for access to the bulk electric transmission system to transmit electricity from power plants for distribution to their retail customers. These utilities therefore have a strong interest in ensuring that entities developing transmission projects can successfully site and construct the needed facilities.

(...continued)
§ 401 in hydropower relicensing context); *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d 885 (9th Cir. 2003) (amicus; increases in franchise fees not in accordance with city's agreement with affected utilities); and *Louisiana Envtl. Action Network v. EPA*, 172 F.3d 65 (D.C. Cir. 1999) (intervenor; variances from waste treatment standards under Resource Conservation and Recovery Act). *See* Shea Decl. ¶ 5.

There are, in addition, a number of public power systems that themselves own significant higher voltage transmission facilities. These include systems located in Western states, where the siting of transmission facilities across federal lands is a vitally important issue. Based on 2003 data from the EIA (2003 being the last year that EIA collected this data), APPA estimates that approximately 110 public power utilities own approximately eight percent of the nation's transmission lines of 138 kilovolts (kV) or greater. Ditto Decl. ¶ 4.

For these reasons, APPA has a strong interest in this lawsuit, in which Plaintiffs challenge a project that is essential to the siting and construction of transmission facilities across federal lands in vast areas of 11 Western states. APPA has long been concerned that development of new transmission infrastructure is not keeping pace with increased demands for electric power, and that the slow pace is hampering the development of new generation resources, including low-carbon resources. APPA accordingly supported before Congress a number of provisions of the EPAct intended to foster the siting and construction of additional transmission facilities, including the National Interest Electric Transmission Corridor and federal "backstop" siting provisions set out in new § 216 of the Federal Power Act, 16 U.S.C. § 824p, as added by EPAct § 1221(a). For the same reasons, APPA supported the establishment of the WWEC pursuant to § 368 of the EPAct. Such corridors will facilitate development of the transmission infrastructure needed in the West, including facilities required to access new low carbon generation resources. Ditto Decl. ¶¶ 5-6.

This lawsuit threatens APPA's interests because it seeks to delay and impede implementation of § 368, if not prevent it altogether, and to impose additional procedural and substantive regulatory burdens on the siting and construction of electric transmission lines, to the detriment of APPA's member companies and the consumers they serve. Ditto Decl. ¶¶ 7-8.

National Rural Electric Cooperative Association ("NRECA"). NRECA is the not-for-profit national service organization representing approximately 930 not-for-profit, member-owned rural electric cooperatives. The great majority of these cooperatives are distribution cooperatives, which provide retail electric service to over 42 million consumer-owners in 47 states, including the 11 Western states covered by the WWEC project. Kilowatt-hour sales by rural electric cooperatives

account for approximately 10% of total electricity sales in the United States. NRECA's members also include approximately 65 generation and transmission ("G&T") cooperatives, which supply wholesale power to their distribution cooperative owner-members. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost. *See* Declaration of Richard Meyer ("Meyer Decl.") ¶ 2 & Ex. A (list of NRECA members), appended as Ex. 3 to this motion.

Since its founding in 1942, NRECA has been an advocate for consumer-owned cooperatives on energy and operational issues as well as rural community and economic development. NRECA provides national leadership and member assistance through legislative representation before the U.S. Congress and the Executive Branch; representation in legal and regulatory proceedings affecting electric service and the environment;[7] communication; education and consulting for cooperative directors, managers, and employees; energy, environmental, and information research and technology; training and conferences; and insurance, employee benefits, and financial services.

NRECA actively supported passage of the EPAct of 2005 and has continued to be actively engaged in its implementation before regulatory agencies such as FERC and the courts of the United States, to help provide a more secure future for all Americans by bringing policy into alignment with the economic, environmental, and technical realities of the 21st century. NRECA's members are vitally interested in the WWEC project, which will help ensure the timely construction and

[7] Cases in which NRECA is participating or has participated on behalf of its members on various environmental and economic issues include: *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (U.S. Environmental Protection Agency Clean Water Act § 316(b) rule for existing power plant cooling water intake structures; participated as member of Petitioner Utility Water Act Group); *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (applicability of ESA to Clean Water Act § 402 permitting; participated as a member of *amicus* Utility Water Act Group); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (regulation of greenhouse gases under Clean Air Act; member of *amicus* Utility Air Regulatory Group); *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) (application of Clean Water Act § 401 in hydropower relicensing context; participated as a member of *amicus* Utility Water Act Group); *Edison Electric Inst. v. Piedmont Environmental Council*, No. 09-343 (U.S., petition for certiorari pending) (petitioner seeking review of Fourth Circuit decision on federal transmission siting authority); and *The Wilderness Soc'y v. Dep't of Energy*, No. 08-71074 (9th Cir., pending) (intervenor in action seeking review of orders designating electric transmission corridors). Meyer Decl. ¶ 4.

maintenance of electric transmission facilities to deliver electricity reliably, efficiently, and economically to their customers. These interests would be impeded by the relief Plaintiffs seek here – an injunction against implementing the WWEC project unless and until additional analysis is performed and additional regulatory constraints and compliance costs are imposed. Meyer Decl. ¶¶ 6, 8, 9.

American Gas Association ("AGA"). AGA is the association of U.S. public and shareholder-owned natural gas distribution companies. AGA's members own natural gas transmission and distribution systems and deliver natural gas transmitted through interstate natural gas transmission pipelines to end users in virtually all U.S. states, including the 11 Western states covered by the WWEC project challenged in this lawsuit. AGA's members serve almost 93 percent of the ultimate residential, commercial and industrial customers in the U.S. *See* Declaration of Michael L. Murray ("Murray Decl.") ¶ 2 & Ex. A (list of AGA member companies), appended as Ex. 4 to this motion.

AGA advocates on behalf of its members before Congress, federal and state regulatory agencies, the courts, and various industry organizations on issues of importance to its members, including the Energy Policy Act of 2005. AGA takes an active role in monitoring, advocating, and commenting on issues of importance to its members, including the ongoing public dialogue about global climate change. Murray Decl. ¶¶ 3-4.

The WWEC project is essential to the U.S. infrastructure, and therefore to AGA's members, to meet the country's growing demand for natural gas transmission through energy corridors. It is important to avoid unnecessary analyses and delays in siting and permitting the natural gas transmission facilities that may fall within these Corridors, in order to continue supplying natural gas to the end use customers AGA's members' serve. Thus, AGA has a direct and substantial interest in proceedings such as this case, which may adversely affect the siting, construction, permitting, and operation of natural gas transmission facilities. Murray Decl. ¶¶ 5-7.

AGA members' interests are directly threatened by this lawsuit: Plaintiffs seek to enjoin the WWEC PEIS and RODs and thereby directly impede, and impose additional costs and regulatory

burdens on, key components of the U.S. infrastructure. Thus, AGA's members' interests would be substantially impaired if Plaintiffs' requested relief is granted. Murray Decl. ¶ 8.

Chamber of Commerce of the United States of America ("Chamber"). The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. *See* Declaration of Karen A. Harbert ¶ 2 ("Harbert Decl."), appended as Ex. 5 to this motion.

The Chamber's members operate and have businesses and interests in every sector of the economy and transact business throughout the United States (including the 11 Western states covered by the WWEC) and around the world. The Chamber's various members include, *inter alia*: members of the oil and gas industry that explore, produce, refine, distribute, and market at locations across the U.S.; members of the electric utility industry that generate and transmit electricity throughout the U.S.; and millions of businesses that require access to reliable and affordable sources to meet their energy needs. Harbert Decl. ¶ 2.

The Chamber advocates on behalf of its members before Congress, federal and state regulatory agencies, the courts, and various industry organizations. The Chamber is participating or has participated in numerous court cases on various energy, environmental, and economic issues. Harbert Decl. ¶ 3.[8]

As both producers and consumers of energy resources that will be directly affected by the WWEC project, the Chamber's members have strong interests in ensuring that the WWEC project proceeds on schedule to meet the increased demand for domestic sources of energy. Availability of

[8] ThOse cases include: *American Chemistry Council, et al. v. Sierra Club, et al.*, No. 09-495 (U.S. pending) (validity of startup, shutdown & malfunction rule promulgated pursuant to Clean Air Act); *Edison Electric Institute v. Piedmont Environmental Council, et al.*, No. 09-343 (U.S. pending) (ability of states to undermine federal decisions as to siting of facilities within the national transmission grid); *American Petroleum Instit. v. Salazar*, No. 08-0764 (D.D.C. stipulation of dismissal Apr. 30, 2009) (validity of Alaska Gap in exemption for greenhouse gas emissions under the Endangered Species Act ("ESA")); and *In re: Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation*, MDL 1993, No. 1:08-mc-764 (D.D.C. pending) (applicability of ESA constraints to facilities, including electric utilities, that emit greenhouse gases). Harbert Decl. ¶ 3.

a reliable and affordable energy supply is vital to the nation's economy and the businesses that provide goods, services, and jobs on which our nation relies. *Id.* ¶ 4. Thus, the Chamber has a direct interest in this litigation, which seeks to set aside the WWEC project for failure to comply with the EPAct, FLPMA, the ESA, and NEPA. The Chamber's interests are directly threatened by this lawsuit. Plaintiffs seek to enjoin the WWEC PEIS and RODs and thereby directly impede, and impose additional costs and regulatory burdens on, the development of electric utility facilities, oil and gas transmission facilities, and other key components of the U.S. energy infrastructure. The Chamber's members' interests would be substantially impaired if Plaintiffs' requested relief is granted. *Id.* ¶ 5.

National Association of Manufacturers ("NAM"). The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards. *See* Declaration of Keith McCoy ("McCoy Decl.") ¶ 4, appended as Ex. 6 to this motion.

The NAM advocates on behalf of its members before Congress, federal and state regulatory agencies, the courts, and various industry organizations.[9] The NAM has over 1,000 member companies in the 11 Western states covered by the WWEC project. Because manufacturers

[9] Cases in which NAM is participating or has participated on behalf of its members on various environmental and economic issues include: *American Petroleum Instit. v. Salazar*, No. 08-0764 (EGS) (D.D.C. stipulation of dismissal Apr. 30, 2009) (validity of Alaska Gap in exemption for greenhouse gas emissions under ESA); *In re: Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation*, MDL 1993, No. 1:08-mc-764 (D.D.C., pending) (applicability of ESA constraints to facilities, including electric utilities, that emit greenhouse gases); *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (EPA Clean Water Act § 316(b) rule for existing power plant cooling water intake structures; participating as member of Cooling Water Intake Structure Coalition); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (regulation of GHGs under Clean Air Act; member of *amicus* CO2 Litigation Group); *Sierra Club v. EPA*, No. 09-1018 (D.C. Cir. pending) (whether carbon dioxide must be considered in EPA PSD permitting); *North Carolina v. Tennessee Valley Auth.*, No. 09-1623 (4th Cir. pending) (state law public nuisance claims against TVA power plant emissions).

consume approximately one-third of the energy used in the U.S., NAM members need access to reliable and affordable power generation. In addition, some NAM members generate and distribute electricity to consumers throughout the United States. McCoy Decl. ¶¶ 4-6.

The NAM endorsed the EPAct, which includes many provisions necessary to expedite development of a modernized electricity grid to meet increased demand. Furthermore, the NAM endorses policies that will expedite development of a "smart grid," which will save manufacturers money. A modern grid will give manufacturers options when it comes to the amount and type of power they use, and when to use those energy resources. It will allow power providers, including NAM members, the tools to better manage energy demand with available resources. The siting, construction, and continued operation of existing and new electric facilities frequently require federal land use authorizations, which § 368 is meant to facilitate. The NAM supports the identification and designation of corridors across federal lands under that section. Plaintiffs' lawsuit threatens these interests by seeking to block implementation of and impose additional delays and regulatory constraints on the WWEC, which otherwise would facilitate development of a modern energy grid in the 11 Western states. McCoy Decl. ¶¶ 7-9.

* * *

As described above and in the argument that follows, the Associations have interests that would be substantially impaired if Plaintiffs' requested relief is granted. Thus, the Associations move to intervene in this action in support of the WWEC project.

ARGUMENT

I. The Associations Are Entitled to Intervention of Right

Rule 24(a)(2) provides for intervention of right:

> On timely motion, the court must permit anyone to intervene 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). Under this rule, a party "must" be granted intervention of right if it meets four requirements:

> (1) the motion must be timely; (2) the applicant must have a 'significantly protectable' interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Sierra Club v. EPA, 995 F.2d 1478, 1481 (9th Cir. 1993) (finding the City of Phoenix was entitled to intervention of right to protect its Clean Water Act permit). The "rule is construed broadly, in favor of the applicants for intervention." *Id*. (internal quotation omitted). The Associations satisfy these requirements here.

A. This Motion to Intervene Is Timely

Courts "consider three criteria in determining whether a motion to intervene is timely: (1) the stage of the proceedings; (2) whether the parties would be prejudiced; and (3) the reason for any delay in moving to intervene." *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 833 (9th Cir. 1996). This motion is timely under those criteria.

This case is at an early stage following the filing of the First Amended Complaint on September 14, 2009 (Doc. #17). *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (intervention motion sought four months after the Complaint's filing found to be timely in an ESA case). Defendants have not yet filed an Answer, and the parties have jointly moved for and obtained two stays of this action totaling 120 days, to January 26, 2010.[10] Hence, this motion is timely. *See Sierra Club v. EPA*, 995 F.2d at 1481 (granting intervention where application made "before the EPA had even filed its answer"); 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1916, at 435-39 (2d ed. 1986) (a motion to intervene "made before the existing parties have joined issue in the pleadings has been regarded as clearly timely").

[10] *See* Order (Sept. 28, 2009), Doc. #24 (granting first stay); Doc. # 26 (stipulating to further 60-day stay); Order (Dec. 10, 2009), Doc. #27 (extending stay).

In addition, neither Plaintiffs nor Defendants will suffer undue delay by the timing of this motion to intervene. The Associations agree to abide by any litigation schedule that may be set by the Court or agreed to by the parties.

B. The Associations Have Legally Protectable Interests That May Be Impaired by Disposition of This Case

Rule 24(a)(2) is satisfied "when the applicant claims an interest relating to the property or transaction which is the subject of the action" and "disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." The interest test seeks to involve "as many apparently concerned persons as is compatible with efficiency and due process." *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980).

As shown above and in the accompanying declarations, the Associations' members have economic interests that may be impaired and that warrant full intervention of right (except, under Ninth Circuit case law, on the NEPA claims[11]), and full intervention of right on all claims in any remedial stage of this case. Specifically, the Associations' members are engaged in businesses that help assure the reliability of, and/or are dependent upon, the nation's energy infrastructure, including developing energy resources and transporting or transmitting those resources to meet current customer demand and projected load growth. In meeting these responsibilities, the Associations' members work closely with their state public utility commissions and through regional planning bodies to achieve an outcome that balances many different interests. The WWEC project advances those interests by providing an avenue for coordination by the federal agencies in planning for the siting of linear facilities on federal lands and enables the agencies to take a grid-wide perspective

[11] Despite the Ninth Circuit's statements on construing Rule 24 liberally in favor of intervention, the Circuit limits defendant-side intervention on NEPA claims because "the federal government is the only proper defendant in an action to compel compliance with NEPA." *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1114 (9th Cir. 2000). The Ninth Circuit reasons that because a private party cannot violate NEPA, it cannot be a defendant on the merits in a NEPA compliance action as a matter of intervention of right, but can only intervene as of right with respect to the remedy. *Id*. But, the Ninth Circuit's special approach to intervention in NEPA cases does not extend to claims alleging violations of other environmental laws. *See Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 817-24 (9th Cir. 2001) and *Idaho Farm Bureau Fed'n*, 58 F.3d at 1397-98 & n.3). Thus, except for the Plaintiffs' NEPA Claims (Claims 1-3), that limiting principle does not apply here.

essential for moving power from remotely located generation assets – or potential generation assets – to major population centers where demand is growing, notwithstanding aggressive energy efficiency programs. Such business interests and regulated industry interests are sufficient for intervention of right, as the Ninth Circuit and many other courts have recognized.[12]

The Associations' members' interests would be substantially impaired if Plaintiffs' requested relief is granted, particularly given Rule 24(a)(2)'s focus on avoiding "practical" impairment. If Plaintiffs prevail, the WWEC project would be declared unlawful and enjoined, thus depriving the Associations' members and the public of EPAct § 368's much-needed mechanism for meeting the country's growing energy needs. Even if future siting and permitting of electrical, oil, gas, and other utility facilities on federal lands are not blocked altogether as a result of a decision in Plaintiffs' favor, the facilities would incur further delays and additional costs as regulatory and permitting agencies and the Associations' members that are subject to them take steps to comply with the additional procedural requirements and operating constraints the Plaintiffs would impose under FLPMA, NEPA, the ESA, and the EPAct. For example, Plaintiffs' lengthy list reiterating their comments on the Draft PEIS alleges multiple deficiencies under NEPA that they say must be cured before implementation of the WWEC can occur. Compl. (Doc. #71) at ¶¶ 59-72. In addition, Plaintiffs would have the agencies consider additional alternatives to the WWEC, and consider additional alleged environmental impacts. *E.g.*, *id.* ¶¶ 81-86.

[12] *E.g.*, *Californians for Safe Dump Truck Transportation v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (employees with economic interest in higher wages granted intervention of right in a case that could limit wages); *Kleissler v. U.S. Forest Service*, 157 F.3d 964, 973 (3d Cir. 1998) (timber companies' interest in existing and future U.S. Forest Service timber sales contracts is "substantial interest, directly related to and threatened by" lawsuit challenging timber sale projects, and "meets the requirements of Rule 24(a)"); *Forest Guardians v. Dombeck*, 131 F.3d 1309, 1313 (9th Cir. 1997) (timber company should have been granted intervention of right); *Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996) (farming interests granted intervention in a case that could adversely affect them); *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994) (timber industry granted intervention of right in a National Forest case seeking to reduce the timber supply and curtail timber harvest contracts); *Conservation Law Foundation of New England v. Mosbacher*, 966 F.2d 39, 43-44 (1st Cir. 1992) (fishing industry granted intervention of right in a case seeking greater regulation of fishing).

Additional delays and operational constraints for utilities could also occur if Plaintiffs prevail on their ESA claim. *See* Compl. ¶¶ 93-95, 130-133. If, as Plaintiffs allege, the Defendant agencies must engage in consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service just to begin implementing the WWEC at the programmatic level, these further costly and time-consuming delays will occur before any individual utility projects can actually commence on the ground. And once individual projects do commence, they could be subject to additional operational constraints and costs stemming from the programmatic ESA consultation Plaintiffs demand.

Lengthy delays in permitting a proposed project are problematic for permit applicants and consumers alike, because such delays can add significantly to the overall cost of a project, a cost that will be born ultimately by the consumer. And such delays also can adversely impact consumers in additional ways: (1) by increasing the cost of energy during the permitting period because it costs more to transmit power along congested lines, and (2) by putting them at risk for power disruptions and shortages of energy resources if the proposed line is needed for reliability.

The Associations also have a legally cognizable interest in the integrity of the process in which they have participated leading to development of the WWEC, to ensure that the views they have advocated to Congress and the agencies have a voice in this lawsuit. The Associations should be "entitled to intervene as of right" because this action "challenge[s] the legality" of implementation of "measure[s they have] supported." *Idaho Farm Bureau*, 58 F.3d at 1397.

Further, due process and simple fairness suggest that all the stakeholders potentially affected by the challenged federal actions should be represented in this litigation. Those stakeholders are the Plaintiffs who have issued the challenged decisions implementing the WWEC, the Federal Defendants, and the private-sector and non-federal economic interests that, along with the energy-dependent public, will bear the brunt of a decision in Plaintiffs' favor. *See County of Fresno*, 622 F.3d at 438 (the interest test allows involvement by "as many apparently concerned persons as is compatible with efficiency and due process"); *Kleissler*, 157 F.3d at 971 (in cases pitting private, state, and federal interests against each other, "[r]igid rules [barring intervention] contravene a major

premise of intervention – the protection of third parties affected by the pending litigation. Evenhandedness is of paramount importance.").

C. The Associations' Interests Are Not Adequately Represented by Existing Parties

The final criterion for intervention of right is whether the representation of the Associations' interests by existing parties "may be" inadequate. The "burden of that showing should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538-39 n.10 (1972); *Southwest Center*, 268 F.3d at 822-23.

The Associations' interests clearly are not represented by the Plaintiffs. The Plaintiffs seek to invalidate and enjoin the WWEC project, whereas the Associations would intervene in defense of it. *See United States v. Stringfellow*, 783 F.2d 821, 828 (9th Cir. 1986) (adverse party cannot adequately represent applicant's interests).

Likewise, the Associations' interests are not adequately represented by the Federal Defendants. Though the Associations and Federal Defendants would both defend the agencies' WWEC actions against the Plaintiffs' insistence on additional environmental review and operational constraints, the Associations and Federal Defendants have distinctly different interests at stake. First, Federal Defendants must represent the broad public interest, whereas the Associations have distinguishable private economic interests in avoiding disruption of their members' business operations. *See Trbovich*, 404 U.S. at 538-39. The Associations' interests focus on ensuring adequate oil, gas, and electric infrastructure to meet their own energy needs as well as their customers' needs and to ensure a reliable, affordable energy supply for the nation's economy. The Federal Defendants' focus is necessarily broader and different, including a focus on management of federal lands and regulation of land use to support such infrastructure.

Second, the Associations and their members have strong interests in the aspects of the case concerning global climate change. Their private-sector interests are not adequately represented by any existing party. The Associations' interests relate to rights-of-way for oil, gas, and electric utilities, which are essential to the U.S. infrastructure and have been targeted by Plaintiffs as contributing to climate change. *See* Compl. ¶¶ 86, 114. If anything, the Federal Defendants would

play a *regulatory* role on climate change,[13] and Associations' members would be among the regulated entities. *See Trbovich*, 404 U.S. at 539. *See also Kleissler*, 157 F.3d at 973-74 ("[t]he straightforward business interests asserted by intervenors may become lost in the thicket of sometimes inconsistent governmental policies").

Third, the Associations and the Federal Defendants may well take different positions on jurisdictional, merits, and remedy issues. The Federal Defendants have entered into settlement discussions with the Plaintiffs, and the Associations and the Federal Defendants are likely to have different perspectives on items to be included in any settlement – a difference that may be highlighted by the change in Administration that occurred after issuance of the PEIS and the RODs. Because this case impacts the Associations' members' economic future, the Court should grant intervention to provide the Associations with a voice in settlement discussions. Indeed, the existence of settlement negotiations underscores the need for intervention to protect unrepresented interests that may be affected:

> Prejudice that results from the mere fact that a proposed intervenor opposes one's position and may be unwilling to settle always exists when a party with an adverse interest seeks intervention. Any prejudice to the [plaintiff's] ability to settle results not from the fact of the [applicant's] delay in seeking intervention, but rather from the [applicant's] presence in the suit. *Rule 24(a) protects precisely this ability to intervene in litigation to protect one's interests.*

Mille Lacs Band of Chippewa Indians v. State of Minnesota, 989 F.2d 994, 999 (8th Cir. 1993) (emphasis added). *See also Natural Res. Def. Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1977) (granting intervention to regulated industry to contest settlement agreement between EPA and environmental groups).

In addition, the Associations will add a necessary element to the proceedings. Granting intervention will ensure that all affected interests (the environmentalists, the Federal agency Defendants, and the affected industries) are heard. This case implicates energy corridors in 11 of the

[13] The federal government's regulatory role is illustrated by EPA's issuance two days ago of a final rule entitled "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," 74 Fed. Reg. 66496 (Dec. 15, 2009).

largest states in the nation, and 130 federal land management plans covering that extensive area, with enormous potential consequences for the West's energy supply and economy. The Associations' participation will help to ensure that the Court is aware of the broad impacts of the case by giving industry stakeholders and energy consumers a voice in this important lawsuit. This in turn will promote the interests of fairness and a more informed decision by the Court.

II. Permissive Intervention Should Be Granted

If the Court should find that the Associations have not satisfied all technical aspects for intervention of right, the Associations request that the Court grant them permissive intervention under Rule 24(b)(2). Further, though as discussed above the Ninth Circuit generally proscribes intervenor-of-right participation as to the merits of NEPA claims, that Court in other cases has, and this Court can and should, grant permissive intervention to participate in this case on merits of the Plaintiffs' NEPA claims. The Court should thus grant the Associations either permissive or of-right intervention as to all other claims presented, including both the merits and remedial aspects of the claims, given the integral importance of the underlying issues to this case. *See Kootenai*, 313 F.3d at 1108-09.

Permissive intervention can be granted for all phases of a case (including NEPA claims in the Ninth Circuit) if: (1) the applicant's motion is timely; and (2) its claim or defense and the main action share a common question of law or fact. *Kootenai*, 313 F.3d at 1110-11 (affirming that environmental groups were correctly granted permissive intervention by the district court and could defend the merits of NEPA and land-use planning compliance of federal roadless area rules on appeal). Since Rule 24(b) "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation," the interest-based limitation on intervention of right on the merits of NEPA claims simply does not arise in permissive intervention. *Kootenai*, 313 F.3d at 1108 (quoting *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940)).

This motion is timely for the reasons presented above in Section I.A. The Associations also satisfy the commonality element of Rule 24(b). As was found true of the intervenors in *Kootenai*,

313 F.3d at 1110-11, because the Associations seek to defend the challenged federal agency actions, their defenses have questions of law and fact in common with the Plaintiffs' claims.

In *Kootenai Tribe*, the Ninth Circuit found that the "magnitude of th[e] case is such" that environmental groups' "intervention will contribute to the equitable resolution of this case." 313 F.3d at 1111. Similarly here, the magnitude of this case is significant – it implicates energy corridors in 11 of the largest states in the nation, and 130 federal land management plans covering that extensive area. The Associations' participation will contribute to the equitable resolution of this case by giving commercial, utility, and non-federal public stakeholders a voice in this important lawsuit.

Thus, the Associations (like the affected and participating environmental groups in *Kootenai Tribe*) should be granted at least permissive intervenor status in this entire action.

CONCLUSION

The Associations should be granted Intervenor-Defendant status to participate fully in this case.

Respectfully submitted,

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Dated: December 17, 2009

CERTIFICATION OF INTERESTED PERSONS OR ENTITIES

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

Dated: December 17, 2009

/s/ J. Michael Klise
J. Michael Klise
Attorney for Proposed Intervenors