UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, et al. Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, et al. Defendants.	Civil Action No. 1:22-cv-1716-TSC

OXY USA INC.'S, OXY USA WTP LP'S, AND ANADARKO E&P ONSHORE LLC'S MOTION TO INTERVENE IN SUPPORT OF DEFENDANTS AND MEMORANDUM OF LAW IN SUPPORT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

BACKGROUND 1

A. Proposed Intervenors' Approved Applications For Permits To Drill 1

B. Proposed Intervenors' Reliance Interests 2

C. This Action 2

ARGUMENT 3

I. Proposed Intervenors Have Article III Standing To Intervene 4

II. Proposed Intervenors Are Entitled To Intervene As Of Right 5

A. Proposed Intervenors' Motion Is Timely 6

B. Proposed Intervenors Have A Direct Interest In The Property That Is The Subject Of This Litigation 6

C. The Disposition Of This Litigation May "Impair Or Impede" Proposed Intervenors' Ability To Protect Its Interest 7

D. Proposed Intervenors' Interests Are Not Adequately Represented By The Government 8

III. Alternatively, Proposed Intervenors Should Be Permitted To Intervene Under Rule 24(b) 9

IV. Assuming Intervention Is Granted, Proposed Intervenors' Response To The Complaint Should Be Due On The Same Day As Defendants' Response 12

CONCLUSION 13

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

CASES

Page(s)

Alaska Wilderness League v. Jewell, 99 F. Supp. 3d 112 (D.D.C. 2015) 5

Crossroads Grassroots Policy Strategy v. Federal Election Commission, 788 F.3d 312 (D.C. Cir. 2015) 4, 5, 8

Deutsche Bank National Trust Co. v. Federal Deposit Insurance Commission, 717 F.3d 189 (D.C. Cir. 2013) 4

Dimond v. District of Columbia, 792 F.2d 179 (D.C. Cir. 1986) 7

EEOC v. National Children's Center, Inc., 146 F.3d 1042 (D.C. Cir. 1998) 10

Foster v. Gueory, 655 F.2d 1319 (D.C. Cir. 1981) 7

Franconia Minerals (US), LLC v. United States, 319 F.R.D. 261 (D. Minn. 2017) 10, 11

Friends of Animals v. Kempthorne, 452 F. Supp. 2d 64 (D.D.C. 2006) 5

Fund for Animals, Inc. v. Norton, 322 F.3d 728 (D.C. Cir. 2003) 4, 5, 8

Hughes v. Abell, 2014 WL 12787807 (D.D.C. Feb. 10, 2014) 12

Karsner v. Lothian, 532 F.3d 876 (D.C. Cir. 2008) 6

Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004) 12

National Parks Conservation Association v. EPA, 759 F.3d 969 (8th Cir. 2014) 5, 9

Navistar, Inc. v. Jackson, 840 F. Supp. 2d 357 (D.D.C. 2012) 5

Peaje Investments LLC v. García-Padilla, 845 F.3d 505 (1st Cir. 2017) 12

Roane v. Leonhart, 741 F.3d 147 (D.C. Cir. 2014) 6

Sierra Club v. Van Antwerp, 523 F. Supp. 2d 5 (D.D.C. 2007) 10, 11

Southern Utah Wilderness Alliance v. Norton, 2002 WL 32617198 (D.D.C. June 28, 2002) 5, 9

Trbovich v. United Mine Workers, 404 U.S. 528 (1972) 8, 9

WildEarth Guardians v. Jewell, 320 F.R.D. 1 (D.D.C. 2017) 5

WildEarth Guardians v. Salazar, 272 F.R.D. 4 (D.D.C. 2010) 5

Wilderness Society, Center for Native Ecosystems v. Wisely,
524 F. Supp. 2d 1285 (D. Colo. 2007) 11

DOCKETED CASES

Amneal Pharmaceuticals LLC v. Food & Drug Administration,
No. 17-cv-180 (D.D.C. Mar. 6, 2017) 13

Voyageur Outward Bound School v. United States, No. 18-cv-1463
(D.D.C. June 28, 2018) 12

STATUTES AND RULES

28 U.S.C. §1331 10

Federal Rule of Civil Procedure 24 ..... passim

OXY USA Inc., OXY USA WTP LP, and Anadarko E&P Onshore LLC (collectively "Proposed Intervenors") move under Federal Rule of Civil Procedure 24(a)(2) to intervene as of right as defendants in this case. Proposed Intervenors have the right to intervene because this motion is timely, Proposed Intervenors benefited from government actions that this lawsuit challenges, success on plaintiffs' claims would remove that benefit, and no current party adequately represents Proposed Intervenors' interests. In the alternative, Proposed Intervenors move for permissive intervention under Rule 24(b)(1)(B). Proposed Intervenors further request that, if this motion is granted, the Court also grant Proposed Intervenors leave to defer filing an answer or other responsive pleading until such time as defendants are required to answer, or upon order of this Court.

Plaintiffs and defendants each take no position on the motion but reserve the right to file a response after reviewing it.

BACKGROUND

A. Proposed Intervenors' Approved Applications For Permits To Drill

This lawsuit challenges defendants' approval of thousands of applications for permits to drill ("APDs") on federal land in New Mexico and Wyoming. *See, e.g.*, Compl. ¶1. Of the APDs specifically identified in the complaint, 139 were issued to Proposed Intervenors: 112 in New Mexico and 27 in Wyoming. Janiszewski Decl. (Ex. A) ¶5. Proposed Intervenors acquired these mineral rights over the past many years through dozens of government lease sales and acquisitions from other

companies, and have diligently applied for permits to responsibly develop the acreage position. *Id.* ¶¶6-8.

In addition, Proposed Intervenors possess mineral interests in New Mexico and Wyoming not specifically identified in the complaint. For instance, Proposed Intervenors have another 36 APDs in Wyoming and 54 APDs in New Mexico that have been submitted to the Interior Department's Bureau of Land Management ("BLM") and are pending government approval. Janiszewski Decl. ¶9. A ruling for plaintiffs, depending on its exact contours, could put these interests at risk as well.

B. Proposed Intervenors' Reliance Interests

In reliance on defendants' approval of the APDs at issue here, Proposed Intervenors have begun drilling pursuant to some of its permits. Proposed Intervenors also have concrete plans to continue developing acreage they have leased in the New Mexico Permian and Powder River Basins, and elsewhere on federal lands, including by submitting additional APDs for government approval. Janiszewski Decl. ¶10. Proposed Intervenors and their predecessors have expended billions of dollars on drilling, completing, equipping, and maintaining assets in the New Mexico Permian and Powder River Basins. *Id.* ¶4.

C. This Action

Plaintiffs filed this action on June 15, 2022, alleging that defendants, in approving the APDs, failed to comply with the National Environmental Policy Act, the Endangered Species Act, the Federal Land Policy and Management Act, and those three statutes' implementing regulations. *E.g.*, Compl. ¶1. Among plaintiffs' requested relief is that defendants' approval of Proposed Intervenors' and the other

APDs be vacated, and that defendants be enjoined from approving any future onshore APDs until they have "fully complied" with the statutory and regulatory requirements plaintiffs say defendants violated. *Id.* at 61 (Relief Requested).

ARGUMENT

Proposed Intervenors' motion to intervene in this litigation to defend the approval of their APDs should be granted. Proposed Intervenors and their predecessors have expended billions of dollars on drilling, completing, equipping, and maintaining assets in the New Mexico Permian and Powder River Basins. Those investments were made in reliance on the well-established regulatory process for the granting of such mineral rights by the federal government—namely, preparation by the BLM of a resource management plan for a given area; offering of specific parcels for lease to private companies through a competitive bidding process; and, finally, review and approval of APDs submitted by lessees.

Plaintiffs' challenge to defendants' approval of well over 100 of Proposed Intervenors' APDs thus threatens Proposed Intervenors' ability to recover on the enormous investments they have made in reliance on the mineral rights reflected in their leases and drilling permits. Proposed Intervenors therefore have a right to intervene to defend the validity of their permits. Indeed, courts routinely grant intervention to the beneficiaries of agency action where that action is challenged.

In the alternative, Proposed Intervenors should be permitted to intervene under Rule 24(b) because the requirements under that rule are met.

I. PROPOSED INTERVENORS HAVE ARTICLE III STANDING TO INTERVENE

As a threshold matter, "intervenors must demonstrate Article III standing." *Deutsche Bank National Trust Co. v. Federal Deposit Insurance Commission*, 717 F.3d 189, 193 (D.C. Cir. 2013). That "requires a showing of injury-in-fact, causation, and redressability." *Id.* Proposed Intervenors meet each requirement.

To begin with, "sufficient injury in fact" generally exists "where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads Grassroots Policy Strategy v. Federal Election Commission*, 788 F.3d 312, 317 (D.C. Cir. 2015). That is the situation here: Proposed Intervenors benefited from the government's decision to approve the APDs—because the approval allowed Proposed Intervenors to begin actual development of their oil and gas interests—and if plaintiffs were to prevail here that benefit would be taken away, meaning that Proposed Intervenors' investments and continuing revenue would be lost. Under D.C. Circuit precedent, this "'threatened loss' of th[e] [agency's] favorable action constitutes a 'concrete and imminent injury'" for purposes of Article III. *Id.* at 318 (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003)).

As to causation, Proposed Intervenors' "injury is directly traceable to" plaintiffs' challenge to BLM's approval decision. *Crossroads Grassroots*, 788 F.3d at 316. Again, if plaintiffs prevail here, at least 139 of Proposed Intervenors' approved APDs will be set aside, nullifying the myriad benefits that Proposed Intervenors received from their approval.

Finally, a resolution of this litigation in Proposed Intervenors' favor would prevent or redress the injury Proposed Intervenors face, by confirming the validity of the permits that plaintiffs expressly challenge and preserving BLM's authority to approve Proposed Intervenors' other APDs in the future. Simply put, Proposed Intervenors "can prevent the injury by defeating [plaintiffs'] challenge in the district court proceedings." *Crossroads Grassroots*, 788 F.3d at 316.

II. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS OF RIGHT

Under Rule 24(a)(2), a movant has the right to intervene if (1) its motion is "timely," (2) the movant "claims an interest relating to the property or transaction that is the subject of the action," (3) the movant "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," and (4) the existing parties do not already "adequately represent that interest." Fed. R. Civ. P. 24(a)(2). *See generally Fund for Animals*, 322 F.3d at 731. Courts in this district and elsewhere routinely find all four requirements met with entities whose leases, permits, projects, or other rights are challenged in lawsuits against the approving agencies. *See, e.g.*, *WildEarth Guardians v. Salazar*, 272 F.R.D. 4, 14-15 (D.D.C. 2010); *Alaska Wilderness League v. Jewell*, 99 F. Supp. 3d 112, 122 (D.D.C. 2015); *WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 3 (D.D.C. 2017); *Navistar, Inc. v. Jackson*, 840 F. Supp. 2d 357, 361-362 (D.D.C. 2012); *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 69-70 (D.D.C. 2006); *Southern Utah Wilderness Alliance v. Norton*, 2002 WL 32617198, at *5 (D.D.C. June 28, 2002); *National Parks Conservation Association v. EPA*, 759 F.3d 969, 976-

977 (8th Cir. 2014). Because all four Rule 24(a) requirements are also met here, the same outcome is warranted.

A. Proposed Intervenors' Motion Is Timely

The D.C. Circuit evaluates timeliness "in consideration of all the circumstances, especially weighing the … time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008). At its core, the timeliness requirement "is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014).

Here, Proposed Intervenors have filed their motion to intervene just over two weeks after the lawsuit was filed. No defendant has even acknowledged service, no schedule for any future proceedings has been set, and no responsive pleading or dispositive motion has been filed. Indeed, there have been no docket entries in the case at all since the day it was filed. Hence, there is no credible claim that any party would be prejudiced by any delay caused by this motion, or that this nascent litigation would otherwise be unduly disrupted.

B. Proposed Intervenors Have A Direct Interest In The Property That Is The Subject Of This Litigation

As noted, the "property … that is the subject of the action," Fed. R. Civ. P. 24(a)(2), includes more than 100 of Proposed Intervenors' drilling permits; plaintiffs challenge defendants' approval of those permits (and seek to prevent defendants

from approving any others). Proposed Intervenors' property rights as lessees and permittees, and their resulting financial stake in the outcome of this litigation, are sufficient "interests" for purposes of Rule 24(a). In fact, the D.C. Circuit has said that "[a]n intervenor's interest is *obvious* when he asserts a claim to property that is the subject matter of the suit." *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (emphasis added); *accord Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (potential intervenor's financial interests sufficient to support intervention).

C. The Disposition Of This Litigation May "Impair Or Impede" Proposed Intervenors' Ability To Protect Its Interest

Plaintiffs seek an order from this Court that, among other things, would invalidate 139 of Proposed Intervenors' approved drilling permits. *See* Compl. at 61 (Relief Requested). If plaintiffs prevailed, therefore, Proposed Intervenors' ability to recover their substantial investment would be threatened, as would their ability to move forward with the drilling and extraction of oil and gas contemplated in their leases and permits. This easily satisfies the requirement that the disposition "may as a practical matter impair or impede" (Fed. R. Civ. P. 24(a)(2)) Proposed Intervenors' ability to protect their rights and interests. *See Dimond*, 792 F.2d at 192.

Moreover, the complaint seeks a nationwide injunction against the approval of *any* future APDs on federal land. Compl. at 61 (Relief Requested). Setting aside the dubious basis for such far-reaching relief, the mere request for it implicates Proposed Intervenors' mineral interests beyond the specifically identified APDs. As

noted, Proposed Intervenors have dozens of pending APDs; they plan to apply for additional permits on their existing leases over the next five years; and they are actively taking steps to develop the mineral interests they possess across over 100,000 acres of federal land outside of the Permian and Powder River Basins. This further confirms the importance of Proposed Intervenors' participation in this suit to protect their rights and interests.

D. Proposed Intervenors' Interests Are Not Adequately Represented By The Government

The last requirement for intervention as of right is a showing that the current defendants' "representation of [Proposed Intervenors'] interest[s] 'may be' inadequate." *Fund for Animals*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). The D.C. Circuit has described this requirement as both "not onerous" and "low." *Crossroads Grassroots*, 788 F.3d at 321. Indeed, "a movant ordinarily should be allowed to intervene unless it is *clear* that the party will provide adequate representation." *Id.* (emphasis added) (quotation marks omitted).

That "low" burden is met here because the government and Proposed Intervenors have distinct interests in this case. In fact, the D.C. Circuit "look[s] skeptically on government entities serving as adequate advocates for private parties," *Crossroads Grassroots*, 788 F.3d at 321, and accordingly has "often concluded that government entities do not adequately represent the interests of aspiring intervenors," *Fund for Animals*, 322 F.3d at 736. Again, that is the situation here, because Proposed Intervenors' interests in their drilling permits are

proprietary and financial, whereas the government's interests are in appropriately exercising its regulatory responsibilities and managing public lands.

In comparable situations, courts have recognized these two sets of interests to be divergent. In one case, for example, another judge of this Court observed that the government is "required to represent the 'broad public interest as owners of the public lands and as lessors under the [l]eases,'" not necessarily the "specific interests or economic concerns" of a private lessee. *Southern Utah*, 2002 WL 32617198, at *5. And in another case, the D.C. Circuit, in reversing a denial of intervention of right, observed that a power plant owner's "interests in its … facility diverge from the EPA's general interests in assuring that the proper regulatory procedures are followed." *National Parks*, 759 F.3d at 977. Here, moreover, Proposed Intervenors "cannot be assured that the [agency's] current position will remain static or unaffected by unanticipated policy shifts." *Id.* (quotation marks omitted).

In short, there is little question that the government's representation of Proposed Intervenors' distinct interests in this case "may be" inadequate, which confirms Proposed Intervenors' entitlement to intervene, *Trbovich*, 404 U.S. at 538 n.10.

III. ALTERNATIVELY, PROPOSED INTERVENORS SHOULD BE PERMITTED TO INTERVENE UNDER RULE 24(b)

In the alternative, Proposed Intervenors request permissive intervention under Rule 24(b)(1)(B). That rule provides that this Court may permit intervention where there is: "(1) an independent ground for subject matter jurisdiction; (2) a

timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *EEOC v. National Children's Center, Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Rule 24(b) also requires that the Court consider "whether the proposed intervention 'will unduly delay or prejudice the adjudication of the original parties' rights.'" *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 8, 10 (D.D.C. 2007) (quoting Fed. R. Civ. P. 24(b)(3)).

All of these considerations support intervention here. First, this Court has subject-matter jurisdiction because Proposed Intervenors are not proposing to advance any claims of their own, and plaintiffs' claims relating to Proposed Intervenors' drilling permits "aris[e] under" the laws of the United States, 28 U.S.C. §1331, because the claims allege violations of federal statutes, *see Van Antwerp*, 523 F. Supp. 2d at 10.

Second, as explained above (*see* p. 6), Proposed Intervenors' intervention motion is timely.

Third, Proposed Intervenors' defenses have questions of law and fact in common with the main action. Proposed Intervenors "seek[ ] to uphold, under the APA, the same actions that Plaintiffs seek to overturn … 'Thus, applicant[s'] claims and the main action obviously share many common questions of law and perhaps of fact.'" *Franconia Minerals (US), LLC v. United States*, 319 F.R.D. 261, 268 (D. Minn. 2017) (alteration in original). Proposed Intervenors, moreover, will "present defenses to the precise claims brought by plaintiffs." *Van Antwerp*, 523 F. Supp. 2d at 10.

Finally, permitting Proposed Intervenors to intervene will not unduly delay or prejudice the adjudication of the rights of the original parties because this litigation was initiated just over two weeks ago. *See Van Antwerp*, 523 F. Supp. 2d at 10 (granting permissive intervention when the motion was filed "within fifteen days after the complaint"). This case "is in its earliest stages—discovery has not commenced [and] no Rule 26(f) conference has been held … Accordingly, any concerns related to rework or repetition are minimal." *Franconia*, 319 F.R.D. at 268. Although "adding a new defendant will naturally increase the burden on the original litigants in terms of new filings and new seats 'at the table,' that alone is insufficient to warrant denial of the motion to intervene—the addition must be 'unduly' burdensome, not just burdensome." *Id.*

Analogous case law confirms that the permissive-intervention factors are met here. For example, in *Wilderness Society v. Wisely*, 524 F. Supp. 2d 1285 (D. Colo. 2007), the court granted permissive intervention to the holder of oil and gas leases in a lawsuit by environmental groups against the government challenging the validity of those leases, *see id.* at 1293-1294. And in *Sierra Club v. Van Antwerp*, the court granted permissive intervention to the owners and developer of a shopping mall in a challenge to the government's issuance of a Clean Water Act permit and a concurrence letter. *See* 523 F. Supp. 2d at 8, 10. Permissive intervention is likewise warranted here in the event the Court concludes that the requirements for intervention of right are not met.

IV. ASSUMING INTERVENTION IS GRANTED, PROPOSED INTERVENORS' RESPONSE TO THE COMPLAINT SHOULD BE DUE ON THE SAME DAY AS DEFENDANTS' RESPONSE

Rule 24 requires a motion to intervene to be "accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). "Several circuits," however, including the D.C. Circuit, "have eschewed overly technical readings of Rule 24(c)." *Peaje Investments LLC v. García-Padilla*, 845 F.3d 505, 515 (1st Cir. 2017) (citing *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1236 n.19 (D.C. Cir. 2004) (en banc)). Indeed, where there is no claim of "inadequate notice" regarding the potential intervenor's claims, the D.C. Circuit has seen "no reason to bar intervention based solely upon this technical defect, if defect it be." *Massachusetts*, 373 F.3d at 1236 n.19. Hence, as another judge in this district has explained, "because the requirement is designed to help determine whether the movant has a claim or defense that shares a common question of law or fact, courts have approved intervention motions without a pleading where the court was otherwise apprised of the grounds for a motion." *Hughes v. Abell*, 2014 WL 12787807, at *7 (D.D.C. Feb. 10, 2014) (internal quotation marks omitted). Proposed Intervenors' memorandum and the accompanying declaration provide the parties with ample notice. Accordingly, should Proposed Intervenors' motion to intervene be granted, Proposed Intervenors request that they be allowed to defer the filing of an answer in intervention until the federal defendants are required to answer. *See, e.g.*, Minute Order, *Voyageur Outward Bound School, v. United States,* No. 18-cv-1463 (D.D.C. June 28, 2018) ("[Intervenors] shall file an answer to the complaint or other responsive pleading at the same time that Defendant is required

to file an answer to the complaint or other responsive pleading"); Minute Order, *Amneal Pharmaceuticals LLC v. Food & Drug Administration*, No. 17-cv-180 (D.D.C. Mar. 6, 2017) ("intervenors need not file their answer … until after the resolution of the parties' cross-motions for summary judgment").

CONCLUSION

The Court should grant Proposed Intervenors' motion to intervene under Rule 24(a) or, in the alternative, under Rule 24(b).

Dated: July 1, 2022

Respectfully submitted.

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CERTIFICATE OF CONFERENCE (LOCAL RULE 7(m))

On July 1, 2022, counsel for proposed intervenor-defendants e-mailed counsel for plaintiffs and defendants to request their respective clients' positions on this motion. Plaintiffs and defendants each take no position on the motion but reserve the right to file a response after reviewing it.

s/ Daniel S. Volchok
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