IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH, HEALTHY GULF, SIERRA CLUB, and CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs,

v.

DEBRA A. HAALAND, in her official capacity as SECRETARY OF THE INERIOR, LAURA DANIEL-DAVIS, in her official capacity as ASSISTANT SECRETARY OF THE INTERIOR FOR LAND AND MINERALS MANAGEMENT, U.S. DEPARTMENT OF THE INTERIOR, and BUREAU OF OCEAN ENERGY MANAGEMENT,

Defendants,

and

STATE OF LOUISIANA,
Intervenor-Defendant,

CHEVRON U.S.A. INC.,
6001 Bollinger Canyon Road
San Ramon, California 94583-2324

Proposed Intervenor/Defendant.

Civil Action No. 21-cv-02317

CHEVRON U.S.A. INC.'S REPLY
IN SUPPORT OF MOTION TO INTERVENE IN SUPPORT OF DEFENDANTS

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INTRODUCTION

Plaintiffs do not dispute that Chevron U.S.A. Inc. ("Chevron"), as the high bidder on 34 tracts in Lease Sale 257, has legally protectable interests that will be affected by this litigation, that Chevron would have Article III standing in this litigation, and, if Plaintiffs prevail in this litigation, that their requested remedy will adversely affect Chevron's substantial interests. Notwithstanding their implicit concession that this litigation threatens Chevron's interests, Plaintiffs oppose both intervention as of right and permissive intervention because they claim that Chevron's interests are adequately represented by existing parties and that Chevron's motion is untimely. Neither argument withstands scrutiny.

Plaintiffs' argument that the State of Louisiana adequately represents Chevron's property and contractual interests fails because a sovereign State has far more diverse interests. Louisiana's interest in protecting its legal victory in another litigation is not specific to the 34 tracts on which Chevron was a high bidder. Thus, the State could support remedies or settlements in this case that would preserve the State's previous victory at the expense of Chevron's anticipated leases. Plaintiffs' claim that Intervenor American Petroleum Institute ("API")[1] can adequately represent Chevron's interests fails because, like the State of Louisiana, API has broader interests than Chevron's 34 leases and may take positions on behalf of its diverse membership that would adversely affect Chevron's specific presumptive leases. Indeed, if Plaintiffs' demand that any lease awards be vacated were granted and a new lease auction occurred, competitors' knowledge of prior high bid amounts could result in Chevron's leases being awarded to other API members having higher bids in a second round and the State gaining

[11] This Court granted API's motion to intervene after Chevron's motion and Plaintiffs' Response were filed. *See* Mem. Op. & Order, ECF No. 60.

added revenues from such higher bids. In any case, API lacks Chevron's knowledge and specific business interests regarding Chevron's 34 leases, which makes it unable to represent Chevron in the same way Chevron can represent itself.

Plaintiffs' argument that Chevron's motion is untimely fails for two reasons. First, Plaintiffs rejected Chevron's proposed briefing schedule that would allow Chevron's merits briefing to be completed at the same time as all of the other defendants; thus, it is not Chevron's intervention, but Plaintiffs' *rejection* of the proposed schedule that would cause any delay beyond the previously established briefing schedule. Further, Plaintiffs' argument that Chevron should have recognized its interest in the litigation before the results of the Lease Sale were announced rests on speculation that its bids would exceed those of its competitors and improperly attempts to substitute Plaintiffs' judgment for Chevron's regarding Chevron's own interests.

Because Chevron has unquestioned interests that are directly threatened by this litigation, because those interests are not adequately represented by existing parties, and because Chevron's motion was timely, Chevron should be granted intervention as of right. Alternatively, Chevron should be granted permissive intervention to protect its interests.

ARGUMENT

I. CHEVRON IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

A. Chevron's Interests Are Not Adequately Represented by the Parties.

Plaintiffs' argument that Chevron's interests in this litigation are adequately represented by Intervenors State of Louisiana and API (Pls.' Resp., ECF No. 59 at 6–11) overlooks the divergent interests between Chevron and each Intervenor. Louisiana is a sovereign state whose interests are necessarily broader than Chevron's. Similarly, the broad interests of API's many members could differ from those of Chevron.

Plaintiffs paint with far too broad a brush when they assert that the State of Louisiana and Chevron share the "same 'ultimate objective'" in this litigation. *Id.* at 6 (citation omitted). This Court has already rejected Plaintiffs' contention that Louisiana adequately represents API because "API provide[d] a litany of compelling reasons why Louisiana cannot appropriately represent its interest," concluding that "[i]t is . . . well-established in this Circuit that 'governmental entities do not adequately represent the interests of aspiring intervenors.'" Mem. Op. and Order, ECF No. 60 at 6 (citation omitted). The same rationale precludes Louisiana from adequately representing Chevron's interests. The State of Louisiana has intervened in this suit because "[a] victory for Plaintiffs in *this* suit . . . would contradict the Louisiana court's order" in a separate proceeding in which the State is a plaintiff. La. Mot. to Intervene, ECF No. 13 at 1. Louisiana's arguments present a broad-based challenge to a suite of actions by federal officials related to oil and gas leasing. Louisiana plainly stated that its interest in this litigation is to preserve the legal victory it obtained in the Louisiana case. Louisiana has a general interest in the Lease Sale, but it does not have an interest in specific parcels, as Chevron does. Chevron's "ultimate objective" in this litigation is maintaining the validity of leases only on the 34 tracts for which it was the high bidder. Thus, Plaintiffs are incorrect that Louisiana and Chevron share an "ultimate objective." Pls.' Resp., ECF No. 59 at 6 (citation omitted). Indeed, Plaintiffs have no answer for the extensive case law cited in Chevron's motion to intervene holding that government entities can rarely adequately represent private parties. *See* Chevron Mot. to Intervene, ECF No. 53 at 11–12. Because Louisiana's stated interest here is distinct from Chevron's, the State cannot adequately represent Chevron's specific interests, and the entities' merits briefing proves the point.

Perhaps because its "ultimate objective" is preserving its victory in separate litigation as opposed to preserving specific leases, Louisiana provided little argument on remedy, addressing only one legal theory governing the requested relief. *See* La. Cross-Mot. for Summ. J., ECF No. 42-1 at 21–22. In contrast, in Chevron's proposed merits brief, Chevron devoted its argument to the various legal theories governing Plaintiffs' requested relief and how that relief specifically affects Chevron as an anticipated leaseholder. *See* Chevron Proposed Opp'n & Mot. for Summ. J., ECF No. 55-1 at 3–7. This briefing "also highlights this litigation's threat to [Chevron's] existing investments, distinguishing it from any 'comparable economic risk' on Louisiana's part because the state 'does not spend anything on acquiring and operating offshore federal oil and gas leases.'" Mem. Op. & Order, ECF No. 60 at 6 (citation omitted). The Court need not speculate whether Louisiana would adequately represent Chevron's interests because the briefing is already available for the Court showing that Louisiana's interest in the remedy differs from Chevron's such that Louisiana put forth different and more limited arguments than Chevron would if granted intervention.

Moreover, as the case progresses, the State may choose not to oppose remedies or settlements that would preserve the State's legal victory at the expense of Chevron's anticipated leases. Plaintiffs maintain that they do not seek a remedy under which the Bureau of Ocean Energy Management ("BOEM") could complete "some additional paperwork" and then repeat the same lease sale. Pls.' Resp., ECF No. 59 at 9. Thus, if the parties consider settlement prior to a merits resolution, they may seek commitments from BOEM that would exclude areas from leasing that include Chevron's anticipated leases. Indeed, Plaintiffs went so far as to suggest that it is "pure speculation" that the tracts on which Chevron was a high bidder would be available if the sale were repeated. *Id.* at 10. Louisiana has a nondifferentiated interest in the Lease Sale and

in defending its legal victory compelling Administration officials to comply with federal law dictating the timing and frequency of oil and gas lease sales. It does not have a specific interest in the lease tracts for which Chevron has now disclosed its proprietary interest.

API's broad-based interests are also not adequate to represent Chevron's specific interests in the 34 tracts on which it was the high bidder. As this Court has recognized, "API represents more than 600 companies involved in the oil and gas industry." Mem. Op. & Order, ECF No. 60 at 4. Plaintiffs' attempt to distinguish the long history of industry lessees and industry trade associations concurrently intervening in defense of a lease sale (Pls.' Resp., ECF No. 59 at 8 n.1) is unavailing because Plaintiffs base their distinction of this case on their incorrect assertion that Chevron's interests and API's are completely aligned. Here, just as in the other lease sale cases in which both entities intervened, Chevron's interests surmount the low bar for intervention in addition to API because their interests "might diverge." *Id.*; *see also* Mem. Op. & Order, ECF No. 60 at 5–6 (acknowledging that "[t]he burden of showing that the representation of the existing parties 'may be inadequate' is 'minimal'" (citation omitted)). For example, like Louisiana, API has a broad interest defending the Lease Sale, but it is not specifically focused on the 34 tracts for which Chevron was the high bidder. Several of Plaintiffs' arguments, such as their claims regarding the Rice's whale, pipeline safety, deepwater drilling, hydraulic fracturing, and wind programs, have geographically specific implications. These claims will have different implications for different lessees. API may take positions or even consider resolving the case in a way that would disadvantage specific tracts if necessary to achieve API's ultimate objective of defending the Lease Sale as a whole, rather than the 34 specific tracts that are the focus of Chevron's participation. Courts in this Circuit have repeatedly held that the possibility of this kind of divergence is sufficient to demonstrate that an

existing party cannot adequately represent a proposed intervenor's interests. *See* Chevron Mot. to Intervene, ECF No. 53 at 10–13.

B. This Motion Is Timely.

Plaintiffs dispute Chevron's timeliness with the unfounded claim that Chevron's motion will prejudice them "by adding undue delay to the resolution of this case on the merits." Pls.' Resp., ECF No. 59 at 11. Considering the expedited briefing schedule negotiated by the parties prior to the Lease Sale (thus excluding any presumptive lessees), Chevron proposed to the parties a briefing schedule for its participation that would not delay the resolution on the merits. Specifically, Chevron committed to file a reply brief on the same date as other defendants, so that *no delay would result*. *See* Chevron Mot. to Intervene, ECF No. 53 at 6–7. Plaintiffs chose to refuse that offer, although they responded to Intervenor API's proposed briefing prior to the Court granting intervention. *See* Pls.' Combined Resp./Reply, ECF No. 52 at 2 n.1, 5 n.2, 9 n.4, 26, 30 n.8, 31, 36, 43–48. Thus, any delay to the schedule to allow for a future response to Chevron's merits brief after intervention is granted is of Plaintiffs' own making.

Moreover, Plaintiffs do not address Chevron's additional argument that, because it seeks to address remedy and the Federal Defendants have requested separate briefing on remedy, Chevron's intervention is timely and aligned with the purposes for which it seeks to intervene. *See* Chevron Mot. to Intervene, ECF No. 53 at 5. Plaintiffs' sole focus on the time elapsed since the Complaint was filed is contrary to case law which determines timeliness as a multi-factor analysis based upon a "consideration of all the circumstances, especially weighing the factors of 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." *United States v. British Am. Tobacco Austl.*

Servs., Ltd., 437 F.3d 1235, 1238 (D.C. Cir. 2006) (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980)) (emphasis added).

Finally, Plaintiffs claim that Chevron offered "no good reason" for the timing of its intervention, dismissing Chevron's plainly stated explanation that despite an intervening holiday it filed less than seven business days after learning that it was the high bidder on tracts in the Lease Sale. *See* Chevron Mot. to Intervene, ECF No. 53 at 4–5. That is when Chevron had a sufficiently concrete interest to support intervention.

As Plaintiffs acknowledge, the key point to determine timeliness is when the applicant "knew or should have known that any of its *rights would be directly affected* by th[e] litigation." *See* Pls.' Resp., ECF No. 59 at 12 (quoting *Nat'l Wildlife Fed'n v. Burford*, 878 F.2d 422, 434 (D.C. Cir. 1989) (emphasis added), *rev'd on other grounds sub nom. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990)). Plaintiffs' claim that this point came when Chevron became aware of the litigation betrays Plaintiffs' fundamental misunderstanding of the economic system they seek to disrupt. Chevron is best positioned to assess its own interests. Despite Plaintiffs' assertions to the contrary, Chevron did not know at the time the Complaint was filed whether it would eventually acquire a right that would be affected by Plaintiffs' suit.

After the BOEM issued the Record of Decision to hold the Lease Sale, Chevron had to make a business decision regarding whether to participate and had to see the results of the sale before it knew whether it was the presumptive high bidder on any parcels auctioned at the sale. Making multi-million-dollar bids requires analysis of existing lease positions and careful future planning. Whereas API could reasonably anticipate based upon past results that some unspecified members of industry would be the high bidders in the Lease Sale, Chevron had to both make the business decision to participate and wait to see if its participation would bear fruit

in successful bids. Because the Outer Continental Shelf Lands Act requires competitive sealed bid auctions, Chevron could not know until the Lease Sale results were announced whether any of its bids would be successful. Thus, until it knew that it was the high bidder, Chevron had no more than a speculative interest in this litigation. Contrary to Plaintiffs' argument, this is not a question of the legal doctrine of ripeness, but instead a question of when a potential litigant determines that its potential interests are sufficiently certain to warrant the considerable expense of moving to intervene to protect them. Put simply, until it could be reasonably confident that it had rights to protect, Chevron could not know "that any of its *rights* ***would*** *be directly affected* by" this litigation. *Nat'l Wildlife Fed'n*, 878 F.2d at 434 (emphasis added).

II. IN THE ALTERNATIVE, CHEVRON SHOULD BE GRANTED PERMISSIVE INTERVENTION.

Rule 24 is construed "liberally" in favor of potential intervenors. *In re Vitamins Antitrust Litig.*, Nos. 99-197 (TFH), 1285, 2001 U.S. Dist. LEXIS 25068, at *29 (D.D.C. Mar. 19, 2001). Here, Plaintiffs do not dispute that Chevron has an interest in this litigation and that their requested remedy would adversely impact Chevron's interest. Thus, they concede that the central question of permissive intervention—whether the proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact," Fed. R. Civ. P. 24(b)(1)(B)—is met here. Nevertheless, Plaintiffs oppose permissive intervention for the same flawed reasons they oppose intervention as of right.

As discussed above, because Plaintiffs rejected Chevron's proposed schedule that would allow Chevron's participation without delaying the final completion of the briefing schedule, any delay resulting from Chevron's intervention is solely attributable to Plaintiffs and therefore not a basis on which to deny Chevron's intervention. Further, Plaintiffs' assertions that Chevron's interests are no different than existing parties do not make it so. Chevron has distinct interests in

this litigation, which it articulated in its Motion to Intervene, its Proposed Opposition and Motion for Summary Judgment, and this brief. Absent intervention, Chevron will lack the opportunity to defend its substantial interests in the specific Gulf of Mexico leases for which it is the apparent high bidder and has already paid the United States government one-fifth of the bonus bids.

Finally, Plaintiffs' suggestion that treating Chevron's proposed merits brief as an amicus brief is an adequate substitute for intervention would deprive Chevron of an important right. As a party, Chevron could comment on and contribute input to any proposed settlement. *See Local 93, Int'l Ass'n of Firefighters v City of Cleveland*, 478 U.S. 501, 529 (1986) ("an intervenor is entitled to present evidence and have its objections heard at hearings on whether to approve a consent decree"). Such a settlement, should Plaintiffs seek one from the Federal Defendants, would directly affect Chevron's rights. Plaintiffs' suggestion could thus deny the Court the benefit of the perspective of those most affected if a settlement were proposed. Chevron maintains that it should be allowed to intervene to provide its informed perspective on its own rights, and not be made a bystander while other entities debate their more general interests at the expense of Chevron's anticipated specific leases.

CONCLUSION

Chevron respectfully moves the Court for leave to intervene in this matter without limitation, file the proposed Answer (ECF No. 53-1), file Chevron's Proposed Opposition and Motion for Summary Judgment, and set a briefing schedule for Plaintiffs to respond.

Respectfully submitted this 15th day of December, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 2021, I caused a true and correct copy of the foregoing Reply In Support of Motion to Intervene in Support of Defendants to be filed with the Court electronically and served by the Court's CM/ECF system upon listed counsel for the Plaintiffs, Federal Defendants, Intervenor-Defendant, and Proposed Intervenor American Petroleum Institute:

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