

**No. 137, ORIGINAL**

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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**STATE OF MONTANA, PLAINTIFF**

**v.**

**STATE OF WYOMING**

**AND**

**STATE OF NORTH DAKOTA, DEFENDANTS**

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**BEFORE THE HONORABLE BARTON H. THOMPSON JR.  
SPECIAL MASTER**

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**MOTION OF ANADARKO PETROLEUM CORPORATION  
FOR LEAVE TO INTERVENE**

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Anadarko Petroleum Corporation (“Anadarko”) seeks leave to intervene as a party in Case No. Orig. 137, a case brought by the State of Montana (“Montana”) against the State of Wyoming (“Wyoming”) and the State of North Dakota (“North Dakota”), seeking an interpretation and enforcement of the Yellowstone River Compact (the “Compact”).

## INTRODUCTION

Anadarko engages in the extraction of natural gas from coal seams in the Powder River Basin, referred to as coalbed natural gas (“CBNG”) or coalbed methane (“CBM”). The Powder River is one of the Yellowstone River’s tributaries, and as such is covered by the Compact. CBM production is a process whereby groundwater is pumped from coal seams to free natural gas otherwise trapped in the coal. Decl. of John A. Broman (“Broman Decl.”), attached, ¶2. Montana’s Complaint specifically targets CBM operations. It alleges that “[s]ince January 1, 1950 [the effective date of the Compact], Wyoming has allowed . . . the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins, in violation of Montana’s rights under Article V of the Compact.” Compl. ¶11.

The Special Master’s Memorandum Opinion holds that “the Compact protects pre-1950 appropriators from interference by at least some forms of groundwater pumping that date from after January 1, 1950 where the groundwater is hydrologically interconnected to the surface channels of the Yellowstone River and its surface tributaries.” Mem. Op. of the Special Master on Wyoming’s Mot. To Dismiss Bill of Compl., slip op., at 35 (dated June 2, 2009) (“Mem. Op.”). That holding may resolve the issue of Compact

coverage for most groundwater pumping for agricultural use. But most CBM pumping takes place at depths that agricultural pumping may not reach. Broman Decl. ¶2. At these levels, Anadarko does not believe that such pumping falls within the “some forms” of groundwater pumping held by the Memorandum Opinion to be covered by the Compact, particularly because there is at least a serious issue at these depths whether any meaningful hydrological interconnection exists between the coal seams reached by CBM pumping and the surface water of the Powder River within Montana. *See N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1158 (9th Cir. 2003) (holding that CBM water pumped to the surface in the Powder River Basin in Montana requires an NPDES permit before discharge into the Tongue River: “Because CBM water comes from deep underground aquifers, it would not reach the Tongue River were it not for Fidelity’s extraction process.”). Some analysts believe CBM operations may reduce surface flows in limited circumstances (where a spring or stream is fed by the coal seam from which the water is pumped), but may also *increase* surface waters where the water pumped to the surface is discharged to a surface pond or directly to the stream.<sup>1</sup>

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<sup>1</sup> See Kristin Keith and Jim Bauder (Montana State University-Bozeman) and John Wheaton (Montana Bureau of Mines and Geology), *Frequently Asked Questions, Coal Bed Methane (CBM)*, MSU Bozeman, Department of Land Resources and Environmental Sciences, Water Quality & Irrigation Management (2003), <http://waterquality.montana.edu/docs/methane/cbmfaq.shtml>:

Will CBM development reduce flow to streams, springs and wells? As a result of the large amount of water being pumped from coal seam aquifers, there is concern of impact to springs and streams and to the level of water in drinking and livestock wells. The answer to this question is very location specific. If a spring or stream is fed by a coal seam aquifer (the coal seam surfaces and discharges water into a stream or spring), CBM

The Memorandum Opinion also recognizes that subsequent proceedings will address the issue of “the exact circumstances under which groundwater pumping violates Article V(A).” Mem. Op. at 37. With respect to this issue as well, CBM operations present unique features. As noted, CBM operations may actually increase surface flow, by bringing to the surface water that otherwise would remain underground.<sup>2</sup> There would be a serious question under the Compact whether CBM operations in these circumstances would constitute a violation of Article V(A). And the question whether the Compact with a yearly allocation system (see Mem. Op. at 10) applies, and if so how, would become particularly complex if the short-term effect of pumping were to increase surface flow, while it is alleged that there may be a long-term effect decreasing surface flow.<sup>3</sup>

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development in the local area may decrease flow to those water bodies. If a spring or stream is not fed by a coal seam aquifer, decreases in flow would be minimal. However, if CBM product water is land applied or impounded in a holding pond (most often these ponds are not lined and discharge to the subsurface), streams down slope may have increased flow during development due to subsurface flow.

<sup>2</sup> See note 1 *supra*.

<sup>3</sup> The Environmental Impact Statement (“EIS”) prepared by the Bureau of Land Management (“BLM”) for the Powder River Basin Oil and Gas Project concluded that water from CBM operations would likely *enhance* river flows:

Reservoirs downstream of the Project Area likely would receive more water and could take in additional sediment as a consequence of CBM development. The large capacity of these reservoirs would likely minimize any increases in concentrations of suspended sediment that may occur as a result of CBM development in upstream drainages. *Additional water would better support adjudicated water uses downstream.*

U.S. Department of the Interior, Bureau of Land Management, Wyoming State Office, Final Environmental Impact Statement and Proposed Plan Amendment for the Powder River Basin Oil and Gas Project (WY-070-02-065) (“BLM EIS”), at 4-123 to 4-124 (Jan.

There would also be a serious issue whether the Compact applies at all to pumping operations with such a pattern of alleged varying multi-year effects.<sup>4</sup> The issue of whether the Compact would apply, and if so how, would become even more complex if it were shown that CBM operations enhanced surface flow in one year and it were alleged that it might decrease surface flow several years later.

### ARGUMENT

Anadarko should be allowed to intervene to protect its interests in the proper resolution of these issues. Anadarko has a “compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.” *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (citation omitted). Moreover, this case is an appropriate one for intervention,

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2003), *available at* [http://www.blm.gov/wy/st/en/info/NEPA/bfodocs/prb\\_eis.html](http://www.blm.gov/wy/st/en/info/NEPA/bfodocs/prb_eis.html) (emphasis added).

<sup>4</sup> The BLM’s EIS (note 3 *supra*) analyzes possible effects of CBM development on levels of nearby groundwater, but contains no suggestion or analysis of possible negative impact on surface water levels. Even as to drawdown effects on nearby groundwater, the EIS suggests there might be significant time lapses. For example, as to one aquifer that has a “long history of CBM development,” the EIS states:

Drawdowns in the deep Wasatch sands would tend to occur several years after drawdown in the coal. *The maximum modeled drawdown in the coal in the Caballo Creek model would occur about 6 years earlier than the maximum modeled drawdown in the deep Wasatch sands* (Figure 4-30). Drawdown in the shallow Wasatch sands is expected to occur only near mines and areas where the target coal seam for CBM development is nearer the surface.

BLM EIS, note 3 *supra*, at 4-47 (emphasis added).

and Anadarko's participation as a party will aid the full exposition of issues in future proceedings.

**A. Anadarko Has A Compelling Interest In Its Own Right.**

This suit directly targets Anadarko's CBM operations.<sup>5</sup> Montana alleges that Wyoming has violated Montana's rights under the Compact by "allow[ing] the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins . . . ." Compl. ¶11. If the Compact is interpreted to cover CBM groundwaters and Montana were to prevail, Anadarko's ability to produce natural gas from coal beds in areas below the Powder River could be compromised. As the direct target of suit, Anadarko's interests are "compelling" and distinct from its "interest in a class with all other citizens and creatures of the state." *New Jersey*, 345 U.S. at 373. Anadarko has a "direct stake in this controversy" and its participation will aid in a "full exposition of the issues." *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (citations omitted). In such cases, "it is not unusual to permit intervention of private parties in original actions." *Id.* (citations omitted).

The present case does not seek an equitable allocation, in which the rights of each user of the body of water subject to allocation "can rise no higher than those of [the State], and an adjudication of [the State's] rights will necessarily bind him." *Nebraska v.*

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<sup>5</sup> In contrast to the circumstances of *South Carolina v. North Carolina*, No. 138, Original, for example, where South Carolina identified in its Bill of Complaint certain large water users as examples to support its claim for equitable allocation of the Catawba River, here Montana targets Anadarko's operations directly, and a threshold issue that must be resolved in this proceeding is whether Anadarko's water production associated with CBM development is subject to allocation under the Compact at all.



*Wyoming*, 295 U.S. 40, 43 (1935). Here, the issue is whether water production associated with CBM development is subject to the Compact at all. Anadarko's interest relating to the scope of coverage of the Compact is unique, and differs from the interests of other water users in maximizing their allocation. Instead, it is the interest of a party claiming that it is not subject to allocation under the Compact in the first place.

Anadarko's interest is distinct from its "interest in a class with all other citizens and creatures of the state." *New Jersey*, 345 U.S. at 373. It arises from its unique business operation, in which only a limited number of firms participate. Thus, compared to cases in which individual water users bound by the Court's interstate allocation seek intervention to protect their individual interests, allowing Anadarko's intervention would not turn this case into an unwieldy class action. *Cf. Kentucky v. Indiana*, 281 U.S. 163, 174 (1930) (dismissing complaint as to individuals; "[o]therwise, all the citizens of both states, as one citizen, voter, and taxpayer has as much right as another in this respect, would be entitled to be heard"). Indeed, intervention should prove helpful to the Court, since Anadarko has access to a wealth of information concerning CBM operations and the related issues of hydrology -- information necessary to an informed conclusion regarding the coverage of a Compact designed to control surface flow.

**B. Anadarko's Interest Is Not Adequately Represented By The State Of Wyoming.**

Anadarko's interest in CBM production is not adequately represented by the State of Wyoming. If, as the Special Master has held, the Compact covers *some* groundwater, then it is not at all clear where the State's interest lies in defining the line or lines between

covered and uncovered groundwater. For example, one key parameter of coverage may be the location of the pumping; in the views of some experts, the effect of groundwater pumping on surface water may be “very location specific.”<sup>6</sup> Another parameter may be the depth of the pumping. The State must consider a broad range of interests in determining its position with regard to how these parameters of coverage are defined. The State’s political stake in balancing these interests is not likely to coincide with Anadarko’s stake in preserving the viability one of its most significant business operations.

If a governmental agency had promulgated a new regulation restricting Anadarko’s conduct of its CBM operations, there would be no question as to Anadarko’s right to intervene in litigation challenging the regulation. *Cf. Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). No one would argue that the State could adequately represent Anadarko’s interests. The Compact, if interpreted in this action to apply to CBM groundwater, would be a new regulation restricting Anadarko’s CBM operations; Anadarko has as much right to represent its own interests in challenging this regulation as it would if the regulation had come from another source. *Maryland*, 451 U.S. at 745 n.21 (allowing intervention to challenge allegedly illegal tax).

Under Federal Rule 24, which the Court has used as a “guide” in original actions, *Arizona v. California*, 460 U.S. 605, 614-15 (1983), a proposed intervenor need show only “sufficient doubt about the adequacy of representation,” *Trbovich v. United Mine*

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<sup>6</sup> See note 1 *supra*.

*Workers of Am.*, 404 U.S. 528, 538 (1972), and “that representation of his interest ‘may be’ inadequate.” *Id.* at 538 n.10. Moreover, the “burden of making that showing should be treated as minimal.” *Id.* In this case, there is more than just “doubt” as to the adequacy of Wyoming’s representation, and Anadarko’s showing on this issue is more than just “minimal.” As previously described, the State must resolve multiple interests that are not likely to coincide concerning what position it should take with respect to the parameters of groundwater coverage under the Compact. Where there are multiple conflicting interests, “[t]he *parens patriae* presumption . . . does not present an obstacle to intervention.” *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003). Accordingly, with respect to issues of Compact coverage, Anadarko is not adequately represented by a government whose primary charge is the general public interest. *Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986) (“Since State Farm’s interest cannot be subsumed within the shared interest of the citizens of the District of Columbia, no presumption exists that the District will adequately represent its interests.”) (citation omitted); *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44-45 (1st Cir. 1992) (“[A] governmental entity charged by law with representing the public interest of its citizens might shirk its duty were it to advance the narrower interest of a private entity. In that instance, the agency might find itself in a conflict of interest.”) (citations omitted); *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001) (collecting cases).

**C. This Is An Appropriate Case For Intervention.**

As indicated above, this is not a case involving claims for the equitable allocation of water rights among users that are concededly covered by an allocation system. Rather, it involves the proper construction of the Yellowstone River Compact, which has the force and effect of federal law. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938). The future proceedings in this case will necessary resolve whether, as a matter of federal law, groundwater produced during CBM operations is water that has been allocated by the Compact. Mem. Op. at 10-11, 37. Because that question relates solely to the scope of the Compact, Anadarko’s intervention presents no risk of drawing the Court into “an intramural dispute over the distribution of water within the [State].” *New Jersey*, 345 U.S. at 373. Moreover, because Montana’s complaint directly targets CBM production in Wyoming, and because Anadarko is a principal producer of CBM in Wyoming and the only entity that has sought to participate in these proceedings, Anadarko’s intervention poses no risk of turning these proceedings into a “class action” comprised of all water users in the States. *Id.*

Instead, intervention would permit Anadarko to participate fully in the proper resolution of a question of federal law in which, by the nature of Montana’s complaint, it has a direct and compelling interest. The fact that Wyoming may take the same or a similar position on that question of federal law (assuming that Wyoming devotes much attention to it, given the numerous other issues it will be addressing in future proceedings) does not defeat the appropriateness of intervention. *See, e.g., Texas v. Louisiana*, 426 U.S. 465, 466 (1976) (allowing Port Arthur, Texas to intervene in a case

in which Texas was a party and presumably would have advanced the same interests); *Maryland*, 451 U.S. at 745 n.21 (permitting intervention by pipeline companies, even though the complaining states had the same interests). These cases, as well as those discussed above, are consistent with the general rule that a non-state entity may properly be a party to an original action where it has a “direct stake” in the controversy. *See Maryland*, 451 U.S. at 745 n.21. That rule fully supports intervention by Anadarko’s whose vested state interests are directly challenged by Montana’s Complaint. And nothing about the nature of this case supports application of a different rule.

**D. Intervention By Anadarko Will Aid The Full Exposition Of The Issues.**

There can be no question that Anadarko’s intervention will assist in the full exposition of the issues related to the Compact’s coverage of groundwater produced during CBM extraction. The proper resolution of that question will require consideration of highly technical and likely expert data and opinions concerning the hydrology of the region, the specifics of CBM production, and the disposition of groundwater extracted during the process and its likely effects on surface waters in Wyoming and Montana. Anadarko is uniquely positioned to provide much of this information, and its intervention at this time will ensure that this Court will have a full and adequate record on which to base its judgment concerning the scope of the Compact.

**CONCLUSION**

Because it has a compelling interest in the outcome of this suit not shared with other citizens of the State, and because the State cannot adequately represent its interest,

Anadarko Petroleum Corporation respectfully requests that its motion to intervene be granted.

Dated this 17th day of July, 2009.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Motion of Anadarko Petroleum Corporation for Leave to Intervene was served by first class mail, postage paid and by electronic mail, as noted, this 17th day of July, 2009, to the following:

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---

**DECLARATION OF JOHN BROMAN**

I, John A. Broman, swear and affirm under the penalties of perjury that I am over 18 years of age and otherwise competent to testify as to the matters herein, which are based on my personal knowledge.

1. I am employed by Anadarko Petroleum Corporation (“Anadarko”). I am the General Manager of Anadarko’s coalbed natural gas operations in the Rocky Mountain Region. I am familiar with Anadarko’s oil and gas development operations in Wyoming.

2. Anadarko owns and operates gas development sites in the area of the Powder River Basin of Wyoming that produce natural gas from coal bed formations (CBNG). Production of CBNG, also referred to as coalbed methane or “CBM,” is a process whereby water is pumped from coal seams to free natural gas otherwise trapped in the coal. The depth of the

coal seams from which Anadarko develops CBNG resources in the Powder River Basin varies, but most production occurs from seams that range in depth from 500 feet below the surface to 2,700 feet below the surface.

3. CBNG production generates a large volume of water, and in many situations the volume of water requires the use of multiple management methods, including discharge to surface water or to holding ponds. Where Anadarko discharges to surface waters, it obtains as necessary SPDES permits issued by the Wyoming DEQ, as provided under federal and state law.

*Ramie Martinez*  
Subscribed and sworn to before me  
this 15<sup>th</sup> day of July, 2009

*John A. Broman*  
John A. Broman

