NO. 137, ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA, PLAINTIFF

V.

STATE OF WYOMING

AND

STATE OF NORTH DAKOTA, DEFENDANTS

BEFORE THE HONORABLE BARTON H. THOMPSON JR.

SPECIAL MASTER

REPLY IN SUPPORT OF ANADARKO PETROLEUM CORPORATION'S REQUEST FOR MODIFICATION OF CASE MANAGEMENT ORDER AND FOR DIVIDED ARGUMENT

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Amicus Anadarko Petroleum Corporation ("Anadarko") submits this reply in support of its request for modification of the Special Master's Case Management Order No. 1 and for divided argument to permit Anadarko to participate in the oral argument scheduled for February 3, 2009, on the State of Wyoming's motion to dismiss. Anadarko's request should be granted. The State of Wyoming supports the request, and the Solicitor General does not object to it. Montana's arguments in opposition are unpersuasive.

I. This Court Has Ample Discretion To Permit Anadarko's Participation In The Hearing.

Montana argues that granting Anadarko the right to participate as an amicus in the hearing would somehow be inconsistent with Supreme Court Rule 28.7, which provides that "[i]n the absence of consent, counsel for an amicus curiae may seek leave of the Court to argue orally by a motion setting out specifically and concisely why oral argument would provide assistance to the Court not otherwise available," but that such motions "will be granted only in the most extraordinary circumstances." Montana is mistaken.

Rule 28.7 applies to oral arguments before the Court, not to hearings before a special master, as its terms make clear. *E.g.*, S. Ct. Rule 28.7.1 ("Counsel should assume that all *Justices* have read the briefs before oral argument.) (emphasis added). As the Special Master specifically noted at the November 13, 2008 status conference, hearings before special masters in original jurisdiction cases are not governed by the rather rigid procedures the Supreme Court Rules impose on other cases before the Supreme Court,

but are instead controlled only by Supreme Court Rule 17 and its limited and more flexible incorporation of federal rules of procedure. As the leading treatise on Supreme Court practice explains, "[a]lthough the Court customarily appoints a special master to take evidence on factual issues in an original case, the Court's rules make no provision respecting the proceedings before a Master, nor even mention a Master." Gressman, *et al.*, *Supreme Court Practice* ch.10.12, at 642 (9th ed. 2007). Consequently, "[t]he procedures depend, in part, on the discretion of the Master and the circumstances of the particular case." *Id.* Rule 28.7 therefore has no relevance to Anadarko's request to participate in the hearing, and Montana's reliance upon it as the principal ground to oppose Anadarko's motion is entirely misplaced.

II. Anadarko's Status As A Private Party Does Not Disqualify It From Participation In The Hearing As An Amicus.

Montana does not dispute that Anadarko has a direct interest in this case. *See* Montana Resp. at 4 ("Anadarko claims that it has a 'direct interest in this controversy and in the proper resolution of the motion to dismiss. *While this may be true*, it is no different than any other case in which an entity is allowed to file a brief as an *amicus curiae*. *See* Sup. Ct. Rule 37.") (emphasis added). As explained, Montana's reliance on procedures governing merits arguments before the Supreme Court is misplaced. Equally misplaced is Montana's assertion that Anadarko's status as a private party whose interests are allegedly subsumed by the State in which it resides or does business makes it ineligible to participate in the hearing.

To the contrary, the Supreme Court has explained that in original proceedings private parties with a direct interest in the dispute are commonly allowed to participate in the proceedings, even to the point of intervening as parties. In *Maryland v. Louisiana*, 451 U.S. 725, 745-46 n.21 (1981), for example, the Court approved the intervention as plaintiffs of 17 pipeline companies, because the Court concluded that the potential imposition on them of the challenged state tax gave them "a direct stake in this controversy" and would lead to "a full exposition of the issues" involved. In so doing, the Court observed "that it is not unusual to permit intervention of private parties in original actions." *Id.*; *see, e.g.*, *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (permitting numerous private parties to intervene to assert rights to portions of land in controversy between two states). Here, Anadarko is only seeking to participate at this stage of the proceedings as an amicus, not as an intervening party. Yet, it necessary follows that the same openness to participation in original jurisdiction cases by intervening private parties with a direct interest in the controversy applies to requests by such parties to participate as amicus. Accordingly, Anadarko's request should be granted.

III. Anadarko Has Interests Distinct From Wyoming's, And Its Participation Will Aid The Special Master's Resolution Of The Motion To Dismiss.

Montana asserts that "[t]he interests of Anadarko in this matter are represented in this forum by the State of Wyoming." Response, p. 3. That is not correct. Wyoming has a range of interests to represent in this proceeding, including the interests of agricultural users in Wyoming. Anadarko's interests may conflict with those of agricultural users.

For example, even if coalbed natural gas ("CBNG") uses of groundwater affect surface flow, as Montana alleges, there remains the question whether the conflict between CBNG users and agricultural users should be resolved according to the criteria of the Compact, under which priority of use is the sole criterion. By contrast, if the Compact does not apply, as we argue, the consequence is that that conflict among different types of uses must be resolved under the principles of equitable apportionment, under which a broader range of considerations may be taken into account. Under equitable apportionment, the Court could take into account not only the economic benefits of CBNG development to the State of Wyoming, but also (1) the environmental benefits to the Nation of the increased availability of natural gas, which emits far less greenhouse gases than alternative fuels,[1] and (2) the possibility that Montana can meet its needs more efficiently by construction of reservoirs along the Powder River. *See Colorado v. New Mexico*, 459 U.S. 176 (1982); *Colorado v. New Mexico*, 467 U.S. 310 (1984); *Nebraska v. Wyoming*, 515 U.S. 1, 11-13 (1995); Sax, Thompson, Leshy and Abrams, *Legal Control of Water Resources* (4th ed.), at 859-68. Particularly with regard to the first point, Wyoming's interests may differ from Anadarko's, and thus Anadarko has a right to be heard.

Moreover, contrary to Montana's assertion (at 4-5), Anadarko's alternative argument concerning the Compact's coverage of groundwater may warrant attention at the hearing. Anadarko's brief explains that even if the Compact is construed (contrary to

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[1] As noted in Anadarko's Motion Leave to File an Amicus Brief, CBNG production accounted for 9.4 percent of the natural gas production of this country in 2006, and that share is growing. Motion at p. 2.

its language and history) to cover some groundwater, it can only be read to cover groundwater that would otherwise naturally reach the surface of the River System in Montana. Anadarko is not asking the Special Master at this time to make a factual finding about the nature of the water produced during CBNG production, but rather is suggesting an alternative construction of the substantive scope of the Compact. In the event the Special Master disagrees with Wyoming's and Anadarko's principal argument that the Compact only governs surface water, it may be appropriate at the hearing to discuss what groundwater is covered by the Compact.

WHEREFORE, Anadarko respectfully requests that the Special Master modify Case Management Order No. 1 to allot 20 minutes of argument time to counsel for Anadarko in support of Wyoming's motion to dismiss.

Dated this 12th day of December, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Reply in Support of Anadarko Petroleum Corporation's Request for Modification of Case Management Order and for Divided Argument was served by first class mail, postage paid and by electronic mail, as noted, this 12th day of December, 2008, to the following:

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