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 OF ANADARKO PETROLEUM CORPORATION TO OPPOSITIONS TO ITS MOTION FOR LEAVE TO INTERVENE

DAVE OWENS
ASSOCIATE GENERAL COUNSEL
NATALIE EADES
ANADARKO PETROLEUM CORPORATION
P.O. Box 1330
Houston, TX 77251

JAMES J. DRAGNA*
*Counsel of Record
BINGHAM MCCUTCHEN LLP
355 South Grand Ave., Ste. 4400
Los Angeles, CA 90071
(213) 680-6436

MICHAEL B. WIGMORE
DAVID B. SALMONS
ROBERT V. ZENER
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000

Counsel for Anadarko Petroleum Corporation

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REPLY OF ANADARKO PETROLEUM COPORATION TO OPPOSITIONS TO ITS MOTION FOR LEAVE TO INTERVENE

I. ANADARKO SATISFIES THE TESTS FOR INTERVENTION

In its Motion for Leave to Intervene ("Motion"), Anadarko pointed out that Montana's Complaint directly targets coalbed methane ("CBM") operations, Compl. ¶ 11, and seeks relief that would impose limitations on CBM pumping in a manner that could compromise Anadarko's ability to produce natural gas from coal beds. As such, Anadarko asserts an interest in the case that "differs from the interests of other water users in maximizing their allocation" of water subject to the Compact. Motion 6. Anardarko seeks intervention to advance its claims that its underground pumping "is not subject to allocation under the Compact in the first place." *Id.* That interest, Anadarko argued, is "distinct" and "compelling" -- analogous to the interest of any business firm in challenging a government regulation seeking to subject its operations to a regulation that had not previously applied. *Id.* 6, 7. As such, Anadarko's interest meets the requirement of *New Jersey v. New York*, 345 U.S. 369 (1953) that the intervenor's interest be "compelling" and "distinct."[1]

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[1] Montana and the United States argue that Anadarko has waived any claim to invoke the standard for intervention proposed by the Special Master in *South Carolina v. North Carolina*, No. 138, which would align it to the standard for any original action. U.S. Opp. 6 n. 1; Montana Opp. 2 n. 1. That is not correct; Anadarko simply argued that it meets the more stringent standard for intervention the Supreme Court set forth in *New Jersey v. New York.* Anadarko also argued that it meets the standards of Federal Rule 24, which the Court has used as a guide in original actions. Motion 7-8. If the Supreme Court ultimately adopts the test applied by the Special Master in *South Carolina v. North Carolina*, it seems beyond dispute Anadarko would satisfy that test for intervention.

In their Oppositions, Montana and the United States misapprehend Anadarko's argument, and misapply the test set forth in *New Jersey v. New York* to the circumstances here.

The fact that Anadarko is not a beneficiary of the Compact, as the United States points out, U.S. Opp. 3, is beside the point. Anadarko does not assert that it is a beneficiary of the Compact. Rather, it asserts that its actions are outside the scope of the Compact, and the relief Montana seeks under the Compact in this action will harm its right to conduct a lawful business. As such, Anadarko asserts a right that traditionally has received judicial protection.

Montana asserts that its Complaint does not "seek to enjoin any particular CBM production or any other specific Wyoming water use, so long as Montana is kept whole." Montana Opp. 11. But Montana alleges that Wyoming's allowance of post-1950 CBM pumping "is in violation of Montana's rights under Article V of the Compact." Compl. ¶ 11. The effect of these allegations would be to subordinate Anadarko's CBM operations to pre-1950 Montana uses of water downstream. Anadarko alleges that this could compromise its business operations. That is a clear and compelling interest in the case.

The United States argues that a controversy among water users over how to allocate water *subject to the Compact* is a matter for intrastate administration, inappropriate for resolution in this proceeding. U.S. Opp. 3-4, 9. Similarly, Montana argues that the Compact itself designated the State parties as representatives of all persons claiming a right to use the waters of the Yellowstone River System. Montana

Opp. 7-8. But Anadarko does not claim that it is a user of waters of the Yellowstone River System subject to the Compact. Anadarko is not, as the United States asserts, "a mere incidental beneficiary to Wyoming's interest in the Compact," U.S. Opp. 7, or as Montana asserts, "simply one water user among many." Montana Opp. 5. Instead, Anadarko claims the opposite -- that the CBM water it pumps is *not* part of the Yellowstone River System subject to the Compact, and thus is not subordinate to pre-1950 downstream users under the Compact. Anadarko seeks intervention on the issue of what water the Compact covers, not how to allocate water that is covered. Thus, Anadarko's argument must be addressed in this proceeding, and not as part of any subsequent intrastate "intramural dispute over the distribution of water" subject to the Compact. *New Jersey v. New York*, 345 U.S. at 373.

A. Anadarko has a right to intervene to challenge Compact coverage of CBM pumping.

The United States and Montana ignore the basic distinction between intervention to challenge Compact coverage, and intervention to maximize allocation of water concededly covered. They argue that Anadarko's interest is no different from the interest of the City of Philadelphia in allocation of Delaware River water -- an interest the Supreme Court held to be an inadequate basis for intervention in *New Jersey v. New York*, 345 U.S. at 372-74. U.S. Opp. 5; Montana Opp. 2, 4. But in that case, as the United States' brief correctly describes, Philadelphia sought to intervene on the basis of "its own 'unquestioned' interest in Delaware River water." U.S. Opp. 5 (citing *New Jersey v. New York*, 345 U.S. at 371-72). Philadelphia did not dispute that Delaware

River water was properly subject to allocation in the suit. Instead, it sought intervention to maximize its own allocation. The Court held Philadelphia's interest was not a "compelling" interest distinct from the interests of all other Delaware River water users.

Montana argues that the Special Master has already ruled that the Compact covers "at least some forms of groundwater pumping . . . where the groundwater is hydrologically interconnected" to the surface channels of the Yellowstone River and its surface tributaries. Memorandum Opinion (June 2, 2009) ("Mem. Op.") 35, cited in Montana Opp. 6. But the Special Master's carefully worded ruling leaves open whether, or under what circumstances, CBM water is "hydrologically interconnected" to the surface channels and, if so, what "forms of groundwater pumping" are covered. The ruling also leaves open the issue of "the exact circumstances under which groundwater pumping violates Article V(A) [of the Compact]." Mem. Op. 37. Anadarko seeks intervention to address these issues.

These are not easy issues, particularly in view of the great depths at which most CBM pumping occurs, the fact that pumping may *enhance* rather than deplete surface flows (as water pumped to the surface is discharged directly to surface water or to unlined ponds), and any eventual depletive effect on surface water may occur many years later, if at all, and possibly outside of areas where water would otherwise be available for diversion in Montana. See Motion 2-4. And there is the further issue of whether a Compact based on a system of annual allocation was intended to cover pumping that may have variable effects over a period of many years. Motion 3-4. It ignores reality to argue

that these issues are akin to the competition among covered water users for allocation of annual surface diversions -- the issue at stake in *New Jersey v. New York.*

B. Compact coverage of CBM pumping is not an "intramural dispute" that the State of Wyoming can determine.

Montana argues that the Compact coverage issues Anadarko raises are merely an "intramural dispute over the distribution of water within [the State]." Montana Opp. 10 (quoting *New Jersey v. New York,* 345 U.S. at 373). Similarly, the United States argues that resolution of coverage issues "will primarily be a function of intrastate administration within Wyoming." U.S. Opp. 9. That is because, the United States argues, "ground water and surface water are legally integrated in Wyoming" so that "if Wyoming is found in breach of the Compact, the effect of achieving Compact compliance on both surface and groundwater users will be determined by Wyoming state law." *Id.*

That is not accurate. Under the Wyoming statute the United States cites, the State Engineer may establish priorities of rights as between users of underground waters and surface waters where underground waters and surface streams, "are so interconnected as to constitute in fact one source of supply." Wyo. Stat. Ann. § 41-3-916. Most CBM pumping -- even if it were (erroneously) deemed to be "hydrologically interconnected" for purposes of the Compact -- would not be "so interconnected [to the surface water] as to constitute in fact one source of supply." Wyo. Stat. Ann. § 41-3-916. In these circumstances, the *only* basis for the State to restrict CBM pumping would be the Compact. The State would *not* have authority to reach CBM pumping unless it were held

to be covered by the Compact. And Compact coverage is an issue that must be addressed in this proceeding. If Anadarko is correct in its contention that CBM water is not covered by the Compact, there would be no other basis in State law to restrict CBM pumping as part of a remedy under the Compact. The United States' suggestion that the coverage issue can be relegated to "intrastate administration within Wyoming," U.S. Opp. 9, has no foundation.

At another point of its brief, the United States asserts that, if Wyoming is found liable, the State will then have to decide "which Wyoming uses would be curtailed as part of a remedy." U.S. Opp. 4. We agree that it is up to the State, if it is liable, to decide which Wyoming *uses of water subject to the Compact* could be curtailed as part of a remedy. But the issue of what waters are subject to the Compact must first be resolved in this proceeding, and Anadarko is entitled to intervene to address that issue.

C. Wyoming cannot provide adequate representation of Anadarko's interests.

The United States argues that Wyoming can nevertheless provide adequate representation of Anadarko's interest, because the State "has a clear interest in limiting the extent of its water resources that will be affected by the Compact." U.S. Opp. 10. The United States contends that, "at this early point in the litigation," it "must be assumed" that "Wyoming will fully litigate the issues" relating to the Compact's coverage of CBM pumping. *Id.* Montana also points out that, on the Motion to Dismiss, Wyoming agreed with Anadarko's position that the Compact does not cover any ground water. Montana Opp. 8-9.

However, with the Special Master's ruling that the Compact covers "at least some forms" of underground water that is "hydrologically interconnected" with surface water, Mem. Op. 35, the litigation has entered into a new phase. Under the Special Master's ruling, it is all but certain that most if not all alluvial agricultural pumping is covered by the Compact, while the status of most CBM pumping remains at issue. In these circumstances, it is not at all clear where the State's interest lies. Some agricultural users may feel that if the groundwater they rely on is subject to the Compact, it might be to their advantage to have the Compact interpreted so as to expand the reach of groundwater potentially available to satisfy the demands of downstream users in Montana with a prior claim. How the State may resolve these interests is not clear. But it cannot be presumed that the State will resolve them favorably to CBM pumping. 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).

The United States suggests that Anadarko could be given leave to intervene if, during the hearing, divergences appear between Wyoming's position and Anadarko's interests. U.S. Opp. 10. But divergences may not be apparent until after an issue has been tried, and at that point even intervention as of right may be subject to conditions to avoid retrial. *Beauregard, Inc. v. Sword Services L.L.C.,* 107 F.3d 351, 352-3 (5th Cir. 1997). Where, as here, there is ample basis for intervention, it is no answer to say that intervention may be allowed later if a problem develops.

Montana argues, under *New Jersey v. New York*, that Anadarko must wait until a "concrete" conflict develops between its position and Wyoming's, no matter how late in

the proceeding that may happen. Montana Opp. 7 (quoting *New Jersey v. New York*, 345 U.S. at 374). The Court's insistence on a "concrete" conflict in that case, however, was in the context of a dispute among users seeking to maximize their allocation of water concededly covered by the litigation -- a context in which the State is presumed initially to represent the interests of all its covered water users. Here, there is no such presumption, because Anadarko is disputing Compact coverage rather than seeking to maximize its allocation of covered water. In that context, which was not addressed in *New Jersey v. New York*, the presumption of *parens patriae* is not sufficient to overcome the State's conflict of interest. *South Dakota v. Ubbelohde*, 330 F.3d at 1025.

Moreover, while "each State must be deemed to represent all its citizens," *Nebraska v. Wyoming*, 515 U.S. 1, 4 (1995), Anadarko is not a citizen of Wyoming.

D. There are no other reasons to deny intervention.

The United States and Montana suggest that Anadarko can protect its interests by providing information to Wyoming, or participating as *amicus*. U.S. Opp. 10; Montana Opp. 12. But the problem is not access to information. The problem is what position the parties will take concerning the lines to be drawn between groundwater that is covered by the Compact and groundwater that is not. *Amicus* briefs are not sufficient for that purpose, because both the presentation of expert witnesses, and the cross examination of other parties' witnesses, must be informed by the parties' positions concerning where the lines should be drawn. If the State decides to support a line other than where Anadarko would draw it, late intervention or an *amicus* brief would not be sufficient; it would be

necessary to reopen the hearing so Anadarko could offer its own expert evidence and cross examine the other parties' experts -- a highly inefficient mode of proceeding.

Nor is it adequate to suggest that if Anadarko is let in, there would be no principled basis to exclude other CBM pumpers.[2] U.S. Opp 7-9, Montana Opp. 6-7. The fact of the matter is that no other CBM pumpers have sought to intervene; if they did they would have to explain why Anadarko does not adequately represent their interests; and they would also have to explain why they were coming in late despite the fact that this suit has been pending for nearly three years.[3] In any event, the potential of multiple intervenors is not a basis for denying intervention. *See Maryland v. Louisiana*, 451 U.S. 725, 745 n. 21 (1981) (allowing intervention of 17 pipeline companies in original action). Where the intervenors' interests are aligned, the Special Master has ample discretion to prevent duplicative presentations (such as requiring joint briefs, as was done in *Maryland v. Louisiana*).

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[2] As explained above, arguments that allowing Anadarko to intervene would open the floodgates for intervention by "the multitude of other water users in Wyoming and Montana," Montana Opp. 1, are specious.

[3] Montana asserts that there are "thousands" of CBM wells pumping in Wyoming. Montana Opp. 6. The United States cites a web site listing "dozens of other companies apparently operating, and producing CBM, in the Tongue and Powder River drainages in Wyoming." U.S. Opp. 7. However, most of these drillers are very small operations, unlikely to separately intervene. Statistics of the Wyoming Oil and Gas Conservation Commission show that there are currently only eight companies producing over 10 million Mcf of gas from CBM drilling annually in the Powder River Basin. Of these, the two Anadarko companies (Anadarko Petroleum Corporation and Lance Oil & Gas Company), produce a combined total of over 105 million Mcf. http://wogcc.state.wy.us/ (select "Statistics"/"Production"/"Basin Production")

II. CONCLUSION

For the reasons set forth above and Anadarko's Motion for Leave to Intervene, the Motion should be granted.

Respectfully submitted,

JAMES J. DRAGNA*
*Counsel of Record
BINGHAM MCCUTCHEN LLP
355 South Grand Ave., Ste. 4400
Los Angeles, CA 90071
(213) 680-6436

MICHAEL B. WIGMORE
DAVID B. SALMONS
ROBERT V. ZENER
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000

Counsel for
Anadarko Petroleum Corporation

DAVE OWENS
ASSOCIATE GENERAL COUNSEL
NATALIE EADES
ANADARKO PETROLEUM
CORPORATION
P.O. Box 1330
Houston, TX 77251

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Reply of Anadarko Petroleum Corporation to Oppositions to Its Motion for Leave to Intervene was served by first class mail, postage paid and by electronic mail, as noted, this 25th day of September, 2009, to the following:

Barton H. Thompson Jr.
Susan Carter, Assistant
Woods Institute at Stanford University
Jerry Yang and Akiko Yamazaki
Environment & Energy Building, MC-4205
473 via Ortega
Stanford, CA 94305-4205
(650) 736-8668
susan.carter@stanford.edu
Special Master

Jennifer Anders
Montana Attorney General's Office
215 North Sanders, P.O. Box 201401
Helena, MT 59620-1401
(406) 444-5894
janders@mt.gov

John B. Draper (counsel of record)
Montgomery & Andrews
325 Paseo de Peralta
Santa Fe, NM 87501
(505) 986-2525
jdraper@montand.com
Counsel for Montana

Todd Adam Sattler (counsel of record)
North Dakota Attorney General's Office
500 North Ninth Street
Bismarck, ND 58501
(701) 328-3640
tsattler@nd.gov
Counsel for North Dakota

Peter Michael (counsel of record)
Jay Jerde
David J. Willms
Wyoming Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002
(307) 777-6196
pmicha@state.wy.us
Counsel for Wyoming

James Dubois
U.S. Dept. of Justice
Environment and Natural Resources
Division Natural Resources Section
1961 Stout Street, 8th Floor
Denver, CO 80294
(303) 844-1375
james.dubois@usdoj.gov

William M. Jay
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
(202) 514-1375
william.m.jay@usdoj.gov
Counsel for the United States

Jeanne S. Whiteing
Whiteing & Smith
1136 Pearl Street, Suite 203
Boulder, CO 80302
jwhiteing@whiteingsmith.com
Counsel for N. Cheyenne

Sandra Franco

Sandra Franco