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

MONTANA'S RESPONSE IN OPPOSITION TO MOTION OF ANADARKO PETROLEUM CORPORATION FOR LEAVE TO INTERVENE

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Montana hereby responds in opposition to the Motion of Anadarko Petroleum Corporation for Leave to Intervene ("Motion"). For the reasons set out below, the Motion should be denied.

INTRODUCTION

Anadarko Petroleum Corporation ("Anadarko") is a water user in Wyoming. Anadarko pumps water from wells pursuant to permits issued by the Wyoming State Engineer to facilitate the extraction of coal bed methane ("CBM"). Such pumping is included in Montana's Bill of Complaint along with all the other water uses alleged to have caused a violation of the Yellowstone River Compact ("Compact"). The question before the Special Master is whether the Court should permit Anadarko to participate fully by allowing it to intervene as a party in this case. Montana submits that the Court should not allow Anadarko to intervene.

SUMMARY OF ARGUMENT

The States of Wyoming, Montana and North Dakota entered into the Compact "to remove all causes of present and future controversy between said States and between persons in one and persons in another." The States are the signatories to the Compact. Accordingly, the States fully represent their water users with respect to the Compact. Further, Anadarko is in no way unique as a water user. If Anadarko is allowed to intervene there is no principled basis for denying intervention to the multitude of other water users in Wyoming and Montana. Moreover, Anadarko has taken no position different from Wyoming. The allowance of a new representative of

some, but not all, Wyoming interests would be confusing and disruptive. Any intervention will unnecessarily delay and complicate the progress of the case. A State should speak to the Court with one voice.

I. The Standard For Intervention In Original Jurisdiction Water Disputes Is Stringent

The Court declared the proper standard for intervention in original jurisdiction interstate water disputes in *New Jersey v. New York*, 345 U.S. 369 (1953). The State of New Jersey had sued the State of New York and New York City in 1929 for an equitable apportionment of the Delaware River. Pennsylvania was permitted to intervene, and the Court entered a decree. *New Jersey v. New York*, 283 U.S. 805 (1931). Approximately twenty years later, the New York parties sought to reopen the decree, and Philadelphia sought to intervene, asserting its unquestioned interest in the use of Delaware River water. 345 U.S. at 371-72. The Court denied leave to intervene, finding that "Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters." *Id.* at 373. The Court stated that a proposed intervenor such as Philadelphia must show "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Ibid.* Anadarko acknowledges this standard.[1] Motion at 4.

[1] Anadarko does not rely on the new test proposed in the First Interim Report of the Special Master in *South Carolina v. North Carolina,* No. 138, Orig. (Nov. 25, 2008) ("Rep."). *See* Motion at 5 n.5. That test has been criticized. *See* Brief for the United States as Amicus Curiae in Support of Plaintiff's Exceptions. Even if that new standard were adopted, however, it would not support intervention by Anadarko in this case. Anadarko is not an "instrumentality authorized to carry out the wrongful conduct

The Court reaffirmed this rule in a subsequent interstate water dispute. In *Nebraska v. Wyoming*, 515 U.S. 1 (1995), Wyoming asserted a crossclaim against the United States alleging improper management of federal reservoirs. *Id.* at 15. The United States opposed the motion for leave to file the crossclaim on the basis that the motion would open the door for intervention by individual water users and holders of storage-water contracts. *Id.* at 21. The Court allowed the crossclaim to be filed over the objection. In so holding, the Court explained that the United States' concern was addressed by the "general rule" for intervention in interstate disputes in the original jurisdiction:

> Ordinarily, in a suit by one State against another subject to the original jurisdiction of this Court, each State must be deemed to represent all its citizens. A State is presumed to speak in the best interests of those citizens, and requests to intervene by individual contractees may be treated under the general rule that an individual's motion to intervene in this Court will be denied absent a "showing [of] some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state."

Id. at 21-22 (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953)). Pursuant to this "general rule," in order to be allowed to intervene in this original action, Anadarko must show: (1) a compelling interest in its own right distinct from its interest in a class with all other citizens and creatures of the state; and (2) that its interest is not properly represented by Wyoming. Each of these elements is discussed below.

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or injury for which the complaining state seeks relief," Rep. 21. As long as Wyoming provides the water, in amount and timing, at the stateline as required by the Compact, the identity and types of water users in Wyoming are of no concern. For the same reason, Anadarko does not have "an independent property interest that is directly implicated by the original dispute or is a substantial factor in the dispute." *Ibid.* Further, Anadarko does not "otherwise [have] a 'direct stake' in the outcome of the action." *Ibid.* Montana seeks no relief against Anadarko, and Wyoming may choose not to curtail CBM pumping as a means of achieving Compact compliance. Finally, Anadarko would not "advance the 'full exposition' of the issues" in this case for the reasons explained in Section V of this brief.

II. Anadarko Lacks A Compelling Interest In Its Own Right

Anadarko's motion to intervene should be denied because it lacks a "compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state." *New Jersey v. New York*, 345 U.S. at 373. If the City of Philadelphia couldn't show a compelling interest on the Delaware River, separate from the State of Pennsylvania, Anadarko cannot do so here. Anadarko falls far short of meeting this test.

Montana has asserted a sovereign claim against Wyoming alleging that *Wyoming* has violated the Yellowstone River Compact by allowing its users to engage in new depletions of water by (1) the irrigation of new acreage, (2) the use of new and expanded storage facilities, (3) groundwater pumping for irrigation and other purposes, including groundwater pumping associated with CBM production, and (4) the increased consumption of water on existing irrigated acreage. Put simply, Montana claims that Wyoming has exceeded its aggregate share of water under the Compact. This is an action between States in their sovereign capacity. Adding the voice of a single user in one of the States and not others in other States would be both unfair and confusing, and would complicate and delay resolution of the case. Accordingly, the Court has noted that "individual users of water . . . ordinarily would have no right to intervene in an original action in this Court." *United States v. Nevada*, 412 U.S. 534, 538 (1973).

Anadarko's position with respect to Montana's Complaint is that of a Wyoming water user. Like the Wyoming farmers irrigating new acreage, the Wyoming users relying on expanded storage, the Wyoming irrigators and other users pumping

groundwater, the Wyoming users relying on increased consumption, and the other Wyoming CBM producers, Anadarko could be affected by the outcome of this case, as could users in Montana that depend on enforcement of the Compact. Each of these categories of water users, including Anadarko, has a permit from the State of Wyoming in one shape or form allowing it to use its water. Each of these categories of water users in Wyoming, including Anadarko, must divide Wyoming's share of water under the Compact. Anadarko is not unique – it is simply one water user among many.[2] Moreover, considerations of fairness suggest that allowing one or more users from Wyoming to appear individually would mean that counterpart users from Montana should also be allowed, thus demonstrating the potential mischief that would be created if Anadarko's intervention were allowed.

The general rule that "each state must be deemed to represent all its citizens," page 3, *supra*, is consistent with the language of the Yellowstone River Compact itself. The Compact begins by stating that the *States* are entering into the Compact "to remove all causes of present and future controversy between said States and between *persons* in one and *persons* in another." Compact ¶ 1 (emphasis added). Article I of the Compact then addresses the relation between the States and their water users directly :

> A. Where *the name of a State* is used in this Compact, as a party thereto, it *shall be construed to include* the individuals, *corporations*, partnerships, associations, districts, administrative departments, bureaus,

[2] Anadarko cites *Maryland v. Louisiana,* 451 U.S. 725 (1981), for the proposition that Anadarko should be allowed to intervene because it has a "direct stake in this controversy." Motion at 5; *see also id.* at 10. In that case, the Court allowed a group of pipeline companies to intervene in a dispute regarding a tax imposed on the pipeline companies by the State of Louisiana. Unlike the dispute in *Maryland v. Louisiana*, however, the dispute here over the waters of an interstate river that has been apportioned by compact directly implicates the sovereign interests of Montana and Wyoming. *See also Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935)(denying the Secretary of Interior leave to intervene because he asserted the mere interest of an individual water user).

> political subdivisions, agencies, persons, permittees, *appropriators*, and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said State.
>
> B. *Any* individual, *corporation*, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or an *appropriator* authorized by or under the laws of a signatory State and all others using, claiming or in any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said State, *shall be subject to the terms of this Compact*.

Compact, art. I. (emphasis added) It is hard to conceive of a clearer signal from the Compact itself that the sovereign States were to be the representatives of their water users and citizens with respect to the Compact.

Anadarko argues that this case differs from the Court's precedents because "Here, the issue is whether water production associated with CBM development is subject to the Compact at all." Motion at 6. The Special Master has already determined that pumping of hydrologically connected ground water can violate the Compact. Memorandum Opinion of the Special Master on Wyoming's Motion to Dismiss Bill of Complaint at 30-37, 42. This is as true for Montana's claims regarding increased irrigation, increased storage, and increased consumption, as it is for Montana's groundwater claim. Thus, Anadarko is incorrect that this factor sets it apart from other Wyoming water users.

Next, Anadarko claims that its interest in the suit is distinct from other Wyoming water users because its interest "arises from its unique business operation." Motion at 6. But Anadarko states no basis for this claim. On the contrary, there are thousands of CBM wells pumping in Wyoming involving many businesses and property interests. In

addition, there are other water users who also have distinct business interests, such as farming, that rely on surface or groundwater. In the end, Anadarko is just one of hundreds or thousands of water users that rely on Wyoming's allocation of water under the Yellowstone River Compact.

III. Anadarko Has Failed To Show That It Is Not Properly Represented By The State Of Wyoming

Anadarko bears the burden of showing that it is not properly represented by the State of Wyoming. *New Jersey v. New York*, 345 U.S. at 373 (potential intervenor must show a compelling interest "which is not properly represented by the state"). The Court has recognized "the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *Id.* at 372. (quoting *Kentucky v. Indiana,* 281 U.S. 163, 173-74 (1930)). The present case is one "involving a matter of sovereign interest," and Wyoming therefore represents all of its water users.

At a bare minimum, the standard requires Anadarko to "point out a single *concrete consideration* in respect to which the [State's] position does not represent [the potential intervenor's] interests." *New Jersey v. New York*, 345 U.S. at 374 (emphasis added). Anadarko, however, does not identify *any* "concrete consideration" in which its interests diverge from Wyoming. That is because Anadarko, like Wyoming, is opposed to any reduction in any amount of water, including groundwater, that Wyoming currently uses.

Anadarko asserts that its interests are not properly represented by Wyoming because Wyoming "must consider a broad range of interests" in determining its position on groundwater issues, and Wyoming's "political stake in balancing these interests *is not likely to coincide*" with Anadarko's interests. Motion at 7 (emphasis added). Thus, Anadarko's motion to intervene is based on the supposition that Wyoming's position *may* not coincide with Anadarko's. Notably absent from this assertion is any "concrete consideration" on which Wyoming and Anadarko diverge.

Indeed, Wyoming and Anadarko (as amicus curiae) have marched in lockstep in the early stages of the litigation. Anadarko's and Wyoming's relative positions on the Motion to Dismiss are instructive. In its Amicus Brief ("Anadarko Brief") in Support of Wyoming's Motion to Dismiss Bill of Complaint ("Wyo. Motion"), Anadarko raised two substantive arguments: (1) that the Yellowstone River Compact does not cover groundwater, *see* Anadarko Brief at 5-16; and (2) that the Compact does not protect pre-1950 water rights, *see id.* at 16-22. Not surprisingly, Wyoming fully addressed both substantive issues raised by Anadarko in a manner that was entirely consistent with Anadarko's position. Specifically, Wyoming agreed with Anadarko's main position that groundwater is not affected by the Yellowstone River Compact. *Compare* Anadarko Brief at 5-13, *with* Wyo. Motion at 59-63 *and* Wyo. Reply at 16-29. Indeed Anadarko explicitly "agree[d] with Wyoming that neither type of groundwater use is covered by the Compact." *Id.* at 14. Likewise, Wyoming fully briefed Anadarko's second substantive argument that the Compact does not protect Montana's pre-1950 water rights. *Compare* Wyo. Motion at 39-50 *and* Wyo. Reply at 4-16 *with* Anadarko

Br. at 16-22. In sum, Anadarko offers no concrete positions that are distinct from Wyoming. As a result, it has not, and can not, meet its burden under the Court's precedent of showing a compelling interest "which is not properly represented by the state."

As part of its argument that it is not adequately represented by the State of Wyoming, Anadarko asserts that this proceeding is analogous to one in which "a governmental agency had promulgated a new regulation restricting Anadarko's conduct of its CBM operations." Motion at 7. Anadarko argues that "there would be no question as to Anadarko's right to intervene in litigation challenging the regulation." *Ibid.* This argument misconceives, however, the proper function of the Court's original jurisdiction to decide controversies between two States. The argument assumes that the function of the Court in its original jurisdiction is analogous to "judicial review of administrative action by a federal agency." *Texas v. New Mexico*, 462 U.S. 554, 566 (1983). That analogy has been rejected by the Court. *See id.* at 567-571. Therefore, Anadarko's analogy to judicial review of a regulation adopted by an administrative agency provides no justification for intervention in the present proceeding.

Furthermore, Anadarko's reliance on Federal Rule of Civil Procedure 24 and related case law is misplaced. As described above, the Court has expressed a standard for intervention in interstate water disputes. *See New Jersey v. New York,* 345 U.S. at 373. Montana is not aware of any interstate water dispute in the original jurisdiction in which the Court applied Civil Rule 24. The lack of any reference to Civil Rule 24 by

the Court in resolving motions to intervene in the original jurisdiction is consistent with the Court's nuanced approach to procedural determinations in its original jurisdiction.[3]

IV. This Case Is *Not* an Appropriate Case for Intervention

The Supreme Court has made clear that it will not allow the original jurisdiction to be "expanded to the dimensions of ordinary class actions." *New Jersey v. New York*, 345 U.S. at 373. In denying Philadelphia's motion to intervene, the Court stated that if it "evaluate[d] all the separate interests in Pennsylvania," it could "be drawn into an intramural dispute over the distribution of water within the Commonwealth." *Id.* The Court was also guided by its concern that, if Philadelphia intervened, other cities and private entities along the river would seek to do the same. *Id.*

The Court applied similar reasoning in *Utah v. United States*, 394 U.S. 89 (1969). In that case, Utah brought suit against the United States to quiet title to lands that resulted from the shrinking of the Great Salt Lake. *Id.* at 90. A private corporation sought to intervene on the basis that it claimed title to some of the land at issue. *Id.* at 96. As in *New Jersey v. New York*, which was not cited, the Court expressed concern about the number of potential intervenors: "If [the private corporation] is admitted, fairness would require the admission of any of the other 120 private landholders who wish to quiet their title to portions of the relicted lands, greatly increasing the complexity of the litigation." *Id.* at 95-96.

[3] In *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995), the Court stated, "We have found that the solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure, Rule 15 (a) . . . does not suit cases within this Court's original jurisdiction").

The same concern applies in the present case. Montana's basic complaint is that Wyoming is using more than its share of water allocated by the Compact. It seeks relief in the form of an injunction enjoining Wyoming's aggregate uses that exceed the Compact allocation. Montana does not seek to enjoin any particular CBM production or any other specific Wyoming water use, so long as Montana is kept whole. All Wyoming water users in the Tongue and Powder basins are potentially affected by Montana's claims. As in *Utah v. United States*, there is no principled basis on which the Court could allow Anadarko's intervention, but deny other water users in either State the same right. Allowing Anadarko to intervene would negatively affect this case in two respects. First, instead of each State speaking to the Court with a single voice, a cacophony of individual voices would arise. *See New Jersey v. New York*, 345 U.S. at 372-73 (explaining that the Court should not "be drawn into an intramural dispute over the distribution of water within [a State]"). Second, allowing intervention by instate water users such as Anadarko would exponentially increase the complexity of the case.[4]

V. Intervention By Anadarko Will Not Aid The Full Exposition Of The Issues

For its last argument in support of intervention, Anadarko claims that "Anadarko's intervention will assist in the full exposition of the issues related to the Compact's

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[4] In *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F.Supp 972, 973 (D. Mass 1943), the court observed:

> It is easy enough to see what are the arguments against intervention where, as here the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair.

coverage of groundwater produced during CBM extraction." Motion at 10. On the contrary, Anadarko does not offer any technical expertise that is not already available to the States through their respective in-house experts. As demonstrated in *Kansas v. Colorado*, No. 105, Original, the States are fully capable of marshalling the expert analysis and testimony necessary to address the factual issues in their case. See, First through Fifth Reports of the Special Master, *Kansas v. Colorado*, No. 105, Orig. (available at www.supremecourtus.gov). The data and information that Anadarko offers to make available if allowed to become a party will also presumably be available to the parties and the Special Master even if Anadarko is not made a party, either through Anadarko's cooperation or, if necessary, the subpoena power of the Special Master. *See Montana v. Wyoming & North Dakota*, 129 S.Ct. 480 (2008) (order appointing Special Master).

CONCLUSION

Anadarko does not satisfy the stringent standards for intervention in original jurisdiction water disputes between sovereign States. Intervention would also delay and complicate this proceeding and increase costs and the use of judicial resources. Moreover, a State should speak to the Court with a single voice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Montana's Response in Opposition to Motion of Anadarko Petroleum Corporation for Leave to Intervene was served by electronic mail and by placing the same in the United States mail, postage paid, this 18th day of September, 2009, to the following:

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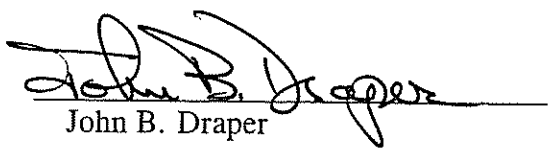

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