

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

---

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.

SPECIAL MASTER

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TRANSCRIPT OF HEARING

on

ANADARKO'S MOTION TO INTERVENE

The Byron White United States Courthouse  
1823 Stout Street, 1st Floor Courtroom  
Denver, Colorado 80257

October 8, 2009 - 9:00 a.m.

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1                   A P P E A R A N C E S   (Continued)

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1 McCutchen for Anadarko as well, Your Honor.

2 SPECIAL MASTER: Thank you. And next for the  
3 State of Montana.

4 MR. DRAPER: Your Honor, I'm John Draper. I  
5 have with me Jeffrey Wechsler, and also Jennifer  
6 Anders from the Attorney General's Office of Montana.

7 SPECIAL MASTER: Okay, thank you. Next for  
8 the State of Wyoming?

9 MR. MICHAEL: Your Honor, Peter Michael from  
10 the Wyoming Attorney General's Office and with me is  
11 David Willms, also from the Wyoming Attorney General's  
12 office. By the way, Your Honor, on this motion to  
13 intervene Mr. Willms has been admitted to the Supreme  
14 Court and he'll be handling any questions you may have  
15 on that issue.

16 SPECIAL MASTER: Thank you very much and  
17 welcome.

18 MR. WILLMS: Thank you.

19 SPECIAL MASTER: And counsel for Amicus  
20 United States?

21 MR. DUBOIS: Good morning, Your Honor. James  
22 DuBois for the United States.

23 SPECIAL MASTER: And is there anyone here  
24 from North Dakota?

25 MR. SATTLER: Todd Sattler from the Attorney

1 General's Office of North Dakota.

2 SPECIAL MASTER: Thank you. And then are  
3 there any other amicus represented -- there are no  
4 amicus on this particular motion. Okay, great. Thank  
5 you.

6 So let me start out by noting that I have  
7 read and reviewed I think all of the relevant papers  
8 for this particular motion, so I've read and reviewed  
9 the briefs in this case, I've read and reviewed all of  
10 the relevant case law including reports and memoranda  
11 decisions of other Special Masters dealing with  
12 motions to intervene, and I've also taken a look at  
13 the briefs in South Carolina versus North Carolina.

14 I realize that in this particular motion that  
15 Anadarko is reserving the right to rely on whatever  
16 standard the United States Supreme Court announces  
17 when it does rule on the exceptions in South Carolina  
18 versus North Carolina if those are different from what  
19 the Supreme Court said in New Jersey versus New York,  
20 but just like all the parties have in their briefs in  
21 this particular case I would like to focus as much as  
22 possible on the standards set out in New Jersey versus  
23 New York.

24 That's really for several reasons. Number  
25 one, although I've certainly been wrong on these

1 issues in the past I think it's unlikely the Supreme  
2 Court will simply abandon the standards that it set  
3 out in that case, and I notice that virtually all of  
4 the various parties in the South Carolina versus North  
5 Carolina case have basically argued that what the  
6 Special Master did in that case was simply rely upon  
7 the New Jersey versus New York standard but then  
8 elaborated on it.

9           Just so that you have a sense of where I'm  
10 beginning, I think that the Supreme Court's decisions  
11 are fairly clear that ordinarily water users do not  
12 have a right to intervene in these type of original  
13 cases. I think that's clear from New Jersey versus  
14 New York, U.S. versus Nevada, Nebraska versus Wyoming.  
15 So the question here is whether there is something  
16 about the facts of this particular case that take  
17 Anadarko out of the ordinary and justify intervention.

18           Under New York versus New Jersey that  
19 question resolves itself, as all of you have  
20 suggested, in the three issues: First, does Anadarko  
21 have a compelling interest; second of all, is that  
22 interest separate from the interest of other water  
23 users; and third, will Wyoming adequately represent  
24 that interest. And so what I would really appreciate  
25 is the parties focusing on those three aspects of the

1 standard in New Jersey versus New York as well as any  
2 practical considerations that you think help  
3 illuminate how the Court should apply that standard in  
4 this particular case.

5           And unless the counsel disagree I would  
6 suggest that we hear from the various counsel in the  
7 following order: Start out with Anadarko since it's  
8 your motion. Then I do have several questions for  
9 Wyoming. I would suggest that I have an opportunity  
10 to ask those questions next.

11           Then we'll hear from Montana, then the United  
12 States as amicus. If South Dakota would like to have  
13 some time to make a statement of any sort, I would be  
14 happy to welcome it at that stage. And then after  
15 that we'll come back to Anadarko again so you have an  
16 opportunity to respond to anything any of the other  
17 parties have said.

18           Also, as hopefully my assistant let you all  
19 know by e-mail yesterday, my guess is that we can  
20 probably resolve this in about an hour and a half but  
21 I'm not going to stick to any particular time  
22 guidelines.

23           But if you could in making your comments -- I  
24 generally think that from the standpoint of Anadarko  
25 and Montana that you each have about a half an hour,



1 and as I said I have some specific questions for  
2 Wyoming. You're also welcome, if you want to, to make  
3 a brief statement. And then the United States, I  
4 welcome any comments that you also have.

5 So any objections to placing things in that  
6 order? If not, then I assume, Mr. Wigmore, you'll be  
7 making the argument for Anadarko?

8 I also have to say I feel somewhat lonely up  
9 here. Last time I think we were in Courtroom 2, but  
10 this one I sort of feel as if I should have more  
11 people up here.

12 MR. WIGMORE: Thank you, Your Honor. Michael  
13 Wigmore, Bingham McCutchen, on behalf of Movant  
14 Anadarko Petroleum Corporation. May it please the  
15 Court.

16 Anadarko has moved to intervene in this  
17 original jurisdiction action involving resolution of  
18 issues under interstate compact, not because it is  
19 seeking to maximize its allocation under that compact,  
20 as was the case with other intervenors in cases in  
21 which the Supreme Court has denied intervention, but  
22 instead Anadarko is intervening in order to address  
23 the threshold issue of whether the waters that  
24 Anadarko pumps are compacted in the first place.

25 And because of that, while -- as you

1 acknowledged, most of our briefings relate to a test  
2 that's set forth in *New Jersey v. New York*. The  
3 circumstances of this case are very different from the  
4 circumstances of *New Jersey v. New York* and other  
5 original jurisdiction compact issues, and in this  
6 instance we believe that *Anadarko* does satisfy the  
7 test for intervention.

8           Now, your preliminary statements obligated  
9 the need to give my introduction as to our thoughts on  
10 Federal Rule of Civil Procedure 24 and the South  
11 Carolina and North Carolina test, but I think suffice  
12 it to say that it seems clear that the test that the  
13 Supreme Court propounded in *New Jersey v. New York*  
14 certainly appears to be more stringent than either the  
15 Federal Rule of Civil Procedure test of intervention  
16 or the test that was adopted by the Special Master in  
17 South Carolina and North Carolina.

18           As you know, we haven't waived the use of  
19 those tests if that's what the Supreme Court elects to  
20 adopt, but we believe and the reason that we focused  
21 on the *New Jersey v. New York* case is that we  
22 satisfied even the standards in that case, which are  
23 the most stringent that the Supreme Court appears to  
24 have applied in original jurisdiction water issues.

25           So as you mentioned, there's essentially

1 three elements to the New Jersey v. New York test,  
2 that we have a compelling interest that is apart from  
3 all the other citizens and creatures of this state and  
4 that that interest is not properly represented by the  
5 State of Wyoming in this instance.

6 SPECIAL MASTER: Can I just interrupt you?  
7 I'll add one more thing that might make the argument  
8 at least a minute or two shorter.

9 Assume for the moment that I agree with you  
10 that you have a compelling interest. You clearly have  
11 an interest in how this case is resolved and given the  
12 economic aspects of that let's assume for the moment  
13 you have a compelling interest.

14 It strikes me that under New Jersey versus  
15 New York that there are really two key things that I  
16 really hope that you zero in on. The first is the  
17 degree to which the interest that Anadarko has here is  
18 separate from the interest of other water users that  
19 might be impacted by the decision, and I think equally  
20 importantly -- and I know you do address both of these  
21 in your briefs, but equally if not more importantly  
22 why you believe that Wyoming in this case does not  
23 adequately represent the interest of Anadarko.

24 MR. WIGMORE: I will and in fact I was -- as  
25 you mentioned, I was going to point out that I don't

1 think anybody here is seriously contesting the  
2 compelling nature of our interest.

3 SPECIAL MASTER: I'm inclined to ask Montana  
4 that, though.

5 MR. WIGMORE: The issue of whether or not our  
6 interest is distinct from the other interests of  
7 citizens and creatures of this state, in our interest  
8 because we have made clear that we're seeking  
9 intervention to address the issue of compact coverage  
10 as opposed to the issue of maximizing our allocation  
11 of any waters that are deemed to be compacted, which  
12 the Supreme Court has found to be an intramural  
13 dispute that is not necessary to have all parties  
14 intervene in that aspect of an original jurisdiction  
15 case, but we're seeking to address the threshold issue  
16 of whether waters that are pumped from deep  
17 groundwater, where deep groundwater is pumped in the  
18 context of CBM production were in fact compacted in  
19 the first place, because if they are not then Anadarko  
20 -- frankly there's no need for Anadarko to likely  
21 participate in any remedy stage because our water is  
22 not subject to the compact.

23 So in that way, and I'll discuss why we think  
24 that's the case, but the significant difference in the  
25 circumstances here versus the situation of the City of

1 Philadelphia in the New Jersey v. New York case and  
2 other cases in which users of water that are  
3 unquestionably subject to a compact or to an equitable  
4 allocation sought intervention, we are seeking  
5 intervention initially to address a threshold issue of  
6 whether our waters are compacted.

7           And let me say that our issues differ --  
8 contrary to the arguments of Montana and the United  
9 States, we have very distinct interests with respect  
10 to that issue than other water users in Wyoming. The  
11 surface water users and even as a result of the  
12 Special Master's first memorandum opinion the alluvial  
13 agricultural groundwater pumping, there seems to be  
14 very little dispute that those waters are in fact  
15 compacted, and therefore parties that may have an  
16 interest simply in surface diversion or shallow  
17 alluvial pumping, their interests are in fact limited  
18 to this intramural dispute in a remedy stage in trying  
19 to maximize their allocation.

20           Anadarko, on the other hand, we pump from on  
21 the shallow end now of approximately -- and I don't  
22 think we need to get into all the merits of why we  
23 believe we're not covered, but just so that you  
24 understand why we believe we are situated differently  
25 than other water users, Anadarko's pumping occurs at

1 on the shallow end a depth of about 800 feet and on  
2 the deep end at a depth of over 3,000 feet.

3           And so if you think about surface water  
4 diversions that are -- that appear clearly to be  
5 covered by the compact in expressed language, based on  
6 your memorandum opinion alluvial groundwater -- you  
7 know, when you concluded that some forms of  
8 groundwater that are hydrologically interconnected may  
9 result in violation of the compact the alluvial  
10 groundwaters, which in this area -- again I won't get  
11 into the merits, but say we're in a 60 to 80 foot  
12 depth range in the alluvial zone for the waters in the  
13 Yellowstone River system.

14           You then go below that through several  
15 hundred or in some instances several thousand feet of  
16 confining aquitards of shale with interlineated sand  
17 layers to hit the coal seams from which we're pumping,  
18 and the pumping that occurs in that area is very  
19 different from the alluvial groundwater pumping that  
20 arguably is covered by the compact.

21           And in fact, the BLM as part of our  
22 authorizations to conduct coal bed methane production  
23 on BLM lands requires there to be monitoring wells in  
24 some of these interlineated sand layers. For  
25 instance, and they generally require them to be in the

1 next most upper sand layer above the coal seam.

2           And so we have monitoring wells that have  
3 been installed for years where we've been pumping from  
4 coal seams from hundreds or thousands of feet below  
5 ground and there is if at all a negligible drawdown in  
6 even the next most upper sand layer, which may be 100  
7 feet above the area in which we're pumping, still  
8 several hundred to several thousand feet below ground  
9 level.

10           And again, I don't think we need to get into  
11 the merits as to why we don't believe the compact  
12 covers our activities, but it's an example of why  
13 we're not situated similarly to all other users of  
14 water that may be covered by the compact.

15           Along those lines is -- let me state there's  
16 a Wyoming statute that the United States relies on  
17 that talks about the integration of groundwater and  
18 surface water, but that statute states that  
19 groundwater is regulated with surface water when those  
20 waters are so integrated as to constitute in fact one  
21 source of supply.

22           And it may be more appropriate for the State  
23 of Wyoming to address this, but my understanding is  
24 that there has now been a decision by the State of  
25 Wyoming as to how to apply that at least in the

1 context of the State statute, and it was to address  
2 again the shallow alluvial groundwater pumping where  
3 the State made a determination that that pumping may  
4 materially deplete the surface flows.

5           There's another issue as well that goes to  
6 not only the issue of compact coverage, how should the  
7 compact be interpreted as to the deep ground well,  
8 groundwater pumping, and that is that as we've alluded  
9 to in our papers and a report by the State of Montana  
10 concedes is that in many instances coal bed methane  
11 operations do not deplete the waters of the system and  
12 in fact they enhance the waters of the system, and in  
13 doing so as Montana acknowledges in its reply brief or  
14 its reply letter brief on the Special Master's  
15 original memorandum opinion and as the Special Master  
16 addressed in your supplemental opinion the concept of  
17 consumption or depletion is an essential element of  
18 beneficial use.

19           And so another reason that we're situated  
20 differently than other water users that may be  
21 governed by the compact is that in most -- we believe  
22 again this is a factual issue that gets to the actual  
23 merits of our claim, but in most instances if not all  
24 instances we believe that our operations actually  
25 enhance surface flows and do not deplete them and



1 because they're not depleted for consumptive uses they  
2 do not constitute a beneficial use that's subject to  
3 regulation of the compact.

4           So there again this is an argument that  
5 Anadarko can make that none of the other parties in  
6 this case to our knowledge can make or certainly has  
7 made at least to date.

8           Let me if you have any -- if you don't have  
9 any questions at this time about why our interest is  
10 distinct from all other users in the state I can  
11 address the issue of why we believe that the State of  
12 Wyoming does not properly represent the interests of  
13 Anadarko.

14           SPECIAL MASTER: Because those are relatively  
15 close together why don't you go ahead and address that  
16 particular issue and then I do have some questions.

17           MR. WIGMORE: Okay. As we explained in our  
18 papers, in this context when you apply the test set  
19 forth by the United States in *New Jersey v. New York*  
20 we don't believe that the State of Wyoming or any  
21 other party to this proceeding properly represents the  
22 interests of Anadarko here.

23           And that test of proper representation that  
24 was -- *New Jersey v. New York* has to be read in how  
25 that test was applied in that case. In that case the

1 party seeking to intervene was a political subdivision  
2 of the State of Pennsylvania, which was already a  
3 party to the action. Likewise, unlike Anadarko, that  
4 party was seeking simply to maximize its allocation  
5 under the equitable allocation before the Court in  
6 that instance.

7           And finally, this is not a situation like the  
8 situation in the New Jersey case where Anadarko's  
9 intervention would compromise important sovereign  
10 values. As the parties have addressed in this case,  
11 the allocation of waters subject to the compact, that  
12 issue does implicate an important quasi-sovereign  
13 issue as to how the State of Wyoming is going to  
14 allocate within the state of Wyoming waters of the  
15 state that are subject to the compact.

16           Conversely, in our instance we're simply --  
17 our rights in this case do not derive -- they're not  
18 subsidiary to the State of Wyoming's interest. We  
19 have a completely separate interest. We're saying  
20 we're not covered at all.

21           And on that point, you know, it's not a  
22 situation where you have a political subdivision of  
23 the State that's seeking to impeach a sovereign on an  
24 important sovereign issue. As is the case in a lot of  
25 litigation, certainly in the environmental field, we

1 seek to take a position that differs from -- that may  
2 differ from the State of Wyoming.

3           Now, Montana argues that the test of proper  
4 representation as it was applied to the City of  
5 Philadelphia under the facts of that case requires at  
6 least some concrete issue where our interests don't  
7 align, and Anadarko's position is that that is how the  
8 test of proper representation was applied by the  
9 Supreme Court to the City of Philadelphia, which is a  
10 political subdivision, which was solely seeking to  
11 maximize its allocation, and that is not the  
12 circumstances of our case.

13           The issue in our case on proper  
14 representation we believe should be guided in our  
15 instance more from the guidance provided by what is  
16 proper representation under the Federal Rules of Civil  
17 Procedure as that issue has been addressed by the  
18 Supreme Court and other courts in many other cases.

19           Now, we understand as a result of the special  
20 nature of original jurisdiction actions it may not be  
21 as liberally applied or the minimal burden that has  
22 been attributed to that element of the test for  
23 intervention as is the case in normal litigation, but  
24 here we don't believe that because our -- we're  
25 situated differently that it necessarily has to rise

1 to a level of concrete conflict with the position of  
2 Wyoming.

3           But along those lines, at this point it's  
4 certainly not clear that the State of Wyoming and  
5 Anadarko's interests on the coverage issues will  
6 align.

7           For example, as a result of the Special  
8 Master's memorandum opinions it seems clear that  
9 alluvial groundwater pumping is subject to the  
10 compact. The State of Wyoming and the citizens of the  
11 State of Wyoming, agricultural interest farmers may  
12 seek to include more waters under the compact in order  
13 to have available to the State of Wyoming an  
14 additional ability to try and satisfy any calls that  
15 may be made under the compact.

16           Likewise, the parties with prior time --  
17 post-1950 but prior in time appropriations may seek to  
18 have as broad coverage under the compact as possible,  
19 again in order to say that if there's a situation  
20 where post-1950s uses need to be curtailed that their  
21 uses have a priority over subsequent uses.

22           For example, CBM pumping is a relatively new  
23 use. It's -- from a temporal standpoint it's a very  
24 junior use of water in the state of Wyoming. And so  
25 in those instances it's not clear because as we

1 pointed out the test that the State of Montana and the  
2 United States have pointed to where you have to  
3 presume that the State represents the interests of all  
4 of its citizens, at least in this initial -- at least  
5 in the initial proceeding under *parens patriae*  
6 doctrine, that Anadarko is not a citizen of the State  
7 of Wyoming when many of its other water users in fact  
8 are citizens of the State of Wyoming, and it's  
9 certainly not inconceivable that the State of Wyoming  
10 may take the position, as states often do, to the  
11 benefit of their own citizens over that of a foreign  
12 corporation.

13           Anadarko is incorporated and the other  
14 company that's owned by Anadarko, they are both  
15 incorporated in Delaware and their principal place of  
16 business is in Texas. We're not a citizen of the  
17 State of Wyoming.

18           And let me just point out the issue is not --  
19 while our interests may align with the State of  
20 Wyoming and in fact to this point in the case they  
21 have -- and Anadarko didn't seek to intervene on the  
22 issue of whether groundwater was covered at all. In  
23 that case our interests align, you know, directly with  
24 the interests of Wyoming. We submitted an amicus  
25 brief on that point. Because the groundwater wasn't

1 covered at all then again we have an issue to be  
2 resolved in the context of the remedy phase.

3           But the test for proper representation is not  
4 simply that our interests align, and that's clear from  
5 the Maryland versus Louisiana case where the Supreme  
6 Court allowed intervention by 17 pipeline companies  
7 notwithstanding the fact that a number of states had  
8 also intervened, and the states in those instances --  
9 in that case both the states and the pipeline  
10 companies were arguing that the tax that was  
11 promulgated by the State of Louisiana was  
12 unconstitutional and there their interests were  
13 completely aligned.

14           Notwithstanding, the Supreme Court allowed  
15 intervention by 17 private parties in that case  
16 because the Supreme Court found that they had a direct  
17 stake in the controversy, as Anadarko does here in the  
18 context of the coverage issue, and also that their  
19 participation would lead to fuller exposition of the  
20 issues.

21           Let me just conclude by saying there's also  
22 -- we believe we have satisfied the test as it's  
23 applied to our situation that the Supreme Court  
24 propounded in *New Jersey v. New York*, but we recognize  
25 that there are potential considerations of the Supreme

1 Court for limiting intervention in these types of  
2 matters.

3           This is not a case where the grant of  
4 intervention of Anadarko would lead to what's being  
5 referred to as a class action or whatever. As we  
6 explained earlier, these other parties, the surface  
7 water users, the shallow alluvial pumpers, they are  
8 similarly situated to the City of Philadelphia and if  
9 you apply that test the Supreme Court has never  
10 allowed intervention on those grounds, so arguments  
11 that somehow thousands of folks are going to come in  
12 and likewise intervene are really just not credible.

13           The issue, though, is what do you do about  
14 other CBM pumpers and we acknowledge that, that there  
15 are other CBM pumpers that are similarly situated, and  
16 to that we would simply respond that this case has  
17 been going on for three years. There are no other  
18 parties who have sought intervention, and if any other  
19 CBM pumper did seek intervention at this relatively  
20 late time they would not only have to overcome a  
21 timeliness issue but also an issue of whether Anadarko  
22 has represented their interests because there our  
23 interests are completely aligned.

24           SPECIAL MASTER: So let me stop you here.  
25 Maybe this would be a good time to get in some

1 questions.

2           So, first of all, on the question of the  
3 adequacy of the representation by Wyoming, I  
4 understand that you don't believe that there needs to  
5 be a concrete conflict of interest that is currently  
6 shown between Anadarko's position and the position of  
7 Wyoming, but what is the test in your view?

8           MR. WIGMORE: Well, the test is whether or  
9 not the State of Wyoming properly represents our  
10 interests and that is not shown simply by an alignment  
11 of interest, which was the case in Maryland versus  
12 Louisiana.

13           We have a number of arguments that -- for  
14 instance, the issue of whether or not CBM pumping  
15 constitutes a beneficial use because it's not in  
16 consumptive use is unique to Anadarko in this matter.  
17 There's no reason for the State to address that issue.

18           You know, we cannot think of any and  
19 certainly nobody has raised the issue as to whether or  
20 not there's a party here who has the argument that  
21 notwithstanding -- that their pumping does not deplete  
22 flows in the Yellowstone River system but instead  
23 enhances those flows, and how that issue is going to  
24 be addressed in the context of the compact the State  
25 of Wyoming doesn't need to address.



1           Frankly, no party but Anadarko needs to  
2 address that issue and we can't rely on the State of  
3 Wyoming. It has to represent not only its own  
4 interests but the interests of the citizens under the  
5 parens patriae doctrine. There's no reason -- there's  
6 a number of issues the State of Wyoming has to  
7 address. There's no reason why it even needs to  
8 address that issue while Anadarko does.

9           SPECIAL MASTER: So up until this point in  
10 time Wyoming has taken the position that groundwater  
11 is not covered by the compact, and one certainly can  
12 imagine that maybe Wyoming would at this stage,  
13 assuming the Supreme Court doesn't decide differently  
14 on the issue that I've already addressed, that there's  
15 different types of groundwater, maybe some types of  
16 groundwater that they will say is covered, others are  
17 not, but it strikes me at this point that I would be  
18 speculating to determine whether or not Wyoming is  
19 going to basically stop representing some of the  
20 groundwater users in that state.

21           MR. WIGMORE: Well, you know, to some degree  
22 but as the United States argues, well, we'll just put  
23 -- there are two arguments, we'll just put this off,  
24 it's going to be addressed in the remedy, which is  
25 somewhat of a boot-strapping argument because they

1 presume that we're actually covered in order to  
2 address the issue of remedy. We believe that we're  
3 not. We shouldn't in fact have any need to  
4 participate in a remedy stage here.

5           But, you know, at that point we while our  
6 interests were clearly aligned with the State of  
7 Wyoming that no groundwater is covered we did not seek  
8 intervention. At this point as a result of your  
9 rulings it's clear that some groundwater is covered  
10 while some is not, and there is nothing in the  
11 jurisprudence of the original jurisdiction actions or  
12 generally with respect to intervention that says we  
13 have to wait to see whether or not Wyoming does in  
14 fact -- whether Wyoming will draw the line the same  
15 place that we would or whether Wyoming would take  
16 positions contrary to us.

17           Because at this point Wyoming has a number of  
18 its citizens that are subject -- that pump groundwater  
19 that are subject to this compact, and as we've  
20 explained there may be, you know, situations where  
21 citizens of Wyoming want to see everybody in that  
22 system so that there's more options available to the  
23 State of Wyoming as to how to satisfy its obligations  
24 under the compact.

25           And as we pointed out, you know, if -- for us

1 -- for Anadarko to wait with the position of the  
2 United States and see whether conflict develops, at  
3 that point it simply may be too late, because we're  
4 not seeking to maximize our allocation of the compact.  
5 We're seeking to address the threshold issue of what  
6 is covered.

7           And by the time that issue is briefed and we  
8 make a determination that Wyoming is not properly  
9 representing or adequately representing the interests  
10 of Anadarko, it may be too late at that point for us  
11 to intervene because at that point a number of issues  
12 of -- discovery may have occurred, we may have our own  
13 views on the evidence in this case and we may have our  
14 own legal theories.

15           And so by -- you know, there's no support for  
16 saying, well, yeah, there may be a conflict but why  
17 don't we wait till there's an actual conflict. By the  
18 time there's an actual conflict it may be too late.  
19 And that has never been a test that's been applied in  
20 an original jurisdiction action, and we don't believe  
21 it should be applied here.

22           SPECIAL MASTER: So --

23           MR. WIGMORE: I apologize. Further to that  
24 thought, which is from the standpoint of judicial  
25 efficiency our issue if we believe -- we believe this

1 is properly resolved and our groundwater pumping isn't  
2 covered by the compact, then for all intents and  
3 purposes we're likely out of this litigation because  
4 we're not subject to the remedy, and Wyoming has no  
5 State authority short of the finding of waste of  
6 curtailing our groundwater pumping that's not subject  
7 to the compact.

8           So I think in this instance judicial  
9 efficiency would be to allow us to intervene at this  
10 point to address that threshold issue, at which point  
11 the Court can then determine whether or not in what --  
12 in what context our future participation is warranted,  
13 as opposed to the reverse, which is wait and see if  
14 there is a conflict and by that time our interests may  
15 -- you know, we may not be able to properly pursue  
16 them.

17           SPECIAL MASTER: So I understand entirely  
18 your concern that if I were to wait to see whether or  
19 not there were any type of conflict that arises  
20 between your position and Wyoming that that might pose  
21 various problems, but I still am trying to determine  
22 is your view then that under New Jersey versus New  
23 York as applied here that all I need to do is to come  
24 up with a potential situation where it might be that  
25 Wyoming will take a position that would be different

1 from yours, but I don't need to see any evidence that  
2 in fact that's going to happen?

3 MR. WIGMORE: Well, we frankly can't know.  
4 It's speculation on either side, so if you apply that  
5 test you can't speculate whether -- at this point  
6 whether Wyoming will or will not. We've argued that  
7 our interests are sufficiently unique and distinct  
8 from not only other water users but the interests of  
9 Wyoming in its *parens patriae* role, that there is a  
10 sufficient threat or a substantial likelihood that our  
11 interests may diverge at some point, which has been  
12 found under Federal rules which the Supreme Court uses  
13 as the guide to allow for intervention.

14 It's what we're -- it's certainly not the  
15 case in our view that the test as applied -- the test  
16 under *New Jersey v. New York* is proper representation  
17 as applied in that case because of the circumstances  
18 of that case, and it raises a host of sovereignty  
19 issues that aren't relevant at this -- in this  
20 context, that the Supreme Court in that case required  
21 a concrete conflict and could not find one. We don't  
22 believe that that's a requirement in all instances in  
23 order to apply the proper representation test to the  
24 party to intervene.

25 SPECIAL MASTER: And I'm interested also in

1 your argument that because Anadarko is not a citizen  
2 of Wyoming that that also suggests that the standard  
3 here should be different than for Philadelphia in the  
4 New Jersey versus New York case.

5           So is your suggestion that to the degree that  
6 a party is not a citizen of the state, which  
7 presumably would mean the parties that are  
8 corporations incorporated outside of the state or  
9 people who hold water rights but are not necessarily  
10 residents of the state, that it should be easier for  
11 them to intervene?

12           MR. WIGMORE: No, because in that case you're  
13 talking about people with water rights that are  
14 unquestionably compacted. In that instance still the  
15 State of Wyoming in its sovereign role will determine  
16 how to allocate waters within the state of Wyoming  
17 regardless of whether those -- the water users that  
18 are subject to the compact, are subject to the  
19 allocation, are foreign or citizens.

20           Under New Jersey v. New York, the test that's  
21 applied there, those parties would not be allowed to  
22 intervene because that's again one of these intramural  
23 disputes that the State of Wyoming has to resolve.  
24 What we're saying is that in our context not only are  
25 we not seeking to intervene for purposes of maximizing

1 our allocation in the intramural dispute within the  
2 State of Wyoming, we're seeking the threshold issue as  
3 to whether or not our waters are in fact compacted.

4           And in addition to that, on that issue, on  
5 the compacting issue, not the intramural dispute, the  
6 cases define that the states who are presumed to  
7 represent the best interests of its citizens don't  
8 necessarily apply to us, because Wyoming representing  
9 the best interests of its citizens may make a  
10 determination that it takes a position on behalf of  
11 its citizens that are adverse to Anadarko, which is a  
12 foreign corporation.

13           SPECIAL MASTER: And that particular position  
14 would be that in this particular case that if the  
15 compact applies to groundwater users in the alluvial  
16 area that it should also apply to the type of deep  
17 groundwater extraction that you're engaged in because  
18 then it's a larger pie to divide?

19           MR. WIGMORE: Yeah, where the line is drawn  
20 for coverage. I mean the initial determination of it,  
21 you know, based on your memorandum opinion is that  
22 some ground -- some groundwaters are hydrologically  
23 connected, may be subject to enforcement under the  
24 compact.

25           Now, our -- you know, it's entirely possible

1 that the State of Wyoming will draw that line  
2 differently. It's also possible that the State of  
3 Wyoming just doesn't care about that issue and will  
4 not adequately represent our interests because it's  
5 not an issue for the State of Wyoming. It's frankly  
6 an issue for CBM pumpers, who for the most -- or at  
7 least in Anadarko's case are not citizens of the State  
8 of Wyoming.

9           Likewise, the issue of whether or not our  
10 operations here constitute a beneficial use, it's not  
11 an issue that the State need even to address, and so  
12 in that instance we believe we've made a sufficient  
13 showing that the State of Wyoming does not properly  
14 represent our interests because otherwise, you know,  
15 at that point if that in fact turns out to be the  
16 case, and we won't speculate at this point whether it  
17 will or will not, but that is not an appropriate basis  
18 for denying intervention, to speculate, well, maybe  
19 Wyoming will adequately represent us. Well, we're not  
20 frankly willing to take that chance and we think we've  
21 satisfied the test.

22           SPECIAL MASTER: So I understand your  
23 argument also that the Court doesn't need to worry  
24 about the other CBM pumpers because if other CBM  
25 pumpers would show up a month from now or six months



1 from now that there would be both a timeliness issue  
2 and then in addition to that, though, you said that,  
3 well, Anadarko would adequately represent their  
4 interests, so your position would then be that if  
5 somebody shows up six months from now, if I decided  
6 that it was still timely, that I could deny the motion  
7 to intervene on the grounds that I've already  
8 permitted Anadarko to intervene?

9 MR. WIGMORE: I mean that's within the  
10 Court's discretion managing the docket. That's a  
11 decision for the Special Master. What we're saying  
12 is, you know, there are -- if another CBM pumper moved  
13 in at some point then that entity would have to  
14 address all of these same issues and the additional  
15 burden of Anadarko's, arguably adequately representing  
16 interests of CBM pumpers.

17 But even if you were to allow those parties  
18 to intervene, as we pointed out in our reply brief,  
19 there's only eight companies in the Powder River Basin  
20 pumping more than 100 million MCF annually and  
21 Anadarko pumps over 100 million MCF.

22 So if those parties sought to intervene it's  
23 certainly within the power of this Court, as the  
24 Supreme Court has done in the past, to tailor those  
25 parties' participation in a manner that doesn't

1    disrupt the proceedings, as was the case in Maryland  
2    versus Louisiana for 17 pipeline companies. The  
3    states had already intervened and their argument was  
4    the tax was unconstitutional.

5           The Supreme Court found that the private  
6    parties also had a direct interest in the case, that  
7    their participation would lead to a full resolution of  
8    the issues, and allowed 17 in, where all their  
9    interests seemed to be the same but required them to  
10   file a single brief, and that's -- the Court certainly  
11   has the power to manage its docket in a way that if  
12   one or other of these CBM pumpers sought to intervene  
13   at this point if the Court decided to grant that  
14   intervention they could file a joint brief.

15           SPECIAL MASTER: So let me go back to the  
16   distinctness of Anadarko's interest. Again, I  
17   understand your position that you're quite different  
18   from the alluvial groundwater pumpers, but first of  
19   all just looking at the groundwater pumpers,  
20   presumably there may well be some groundwater pumpers  
21   who are farther away from one of the tributaries than  
22   others and who might believe that although maybe there  
23   is some groundwater covered they're not covered  
24   because their impact on the river is less than people  
25   who are closer.

1           In addition to that, because of the fact that  
2 the issue remains open as to whether or not the  
3 Section 5A of the compact applies to reservoirs on  
4 some of the tributaries, you could imagine that people  
5 who operate those reservoirs or who have water coming  
6 from those reservoirs would also be interested at this  
7 particular point in time in arguing that, well, that  
8 doesn't -- that water is not covered by the compact.

9           So isn't there actually quite a large  
10 potential group of water users out there right now  
11 that might argue they're in exactly the same position  
12 as Anadarko?

13           MR. WIGMORE: Let me take the second point  
14 first, which is the reservoir issue. That's not an  
15 issue of coverage. Those waters are clearly subject  
16 to coverage. The determination you made is that it  
17 cannot rely -- it cannot result in a violation, so  
18 there's no argument by the -- well, let me put aside  
19 the tributary issue which you've deferred to.

20           You know, the issue of reservoirs, the way it  
21 was analyzed in the supplemental opinion was whether  
22 or not it results in a violation of the compact, not  
23 whether it was compacted in the first instance.  
24 Certainly those are waters of the Yellowstone River  
25 system. Those are waters within the Yellowstone River

1 Basin. Those two issues are -- our position is that  
2 the waters that we pump are not in the basin, they're  
3 not part of the Yellowstone River system, and they're  
4 not compacted in the first place. It's not an issue  
5 at least at this stage whether or not our operations  
6 can result in a violation.

7           On your second -- on your first point, we are  
8 not seeking to intervene as to how whatever test --  
9 you've determined that some forms of groundwater  
10 pumping that are hydrologically interconnected are  
11 subject to the compact. We're seeking to intervene on  
12 the issue of what that test is, not how that test is  
13 applied with respect to any particular well, any  
14 particular company.

15           For instance, you know, in some instances the  
16 determination is made that, well, okay, if over the  
17 course of 40 years there's a 28 percent drawdown of  
18 the surface flows, 28 percent of the groundwater  
19 discharge, then that's considered a hydrological  
20 connection that's sufficient to bring those operations  
21 within the compact.

22           Anadarko is seeking to intervene solely on  
23 the issue of what does the compact cover, what test is  
24 to be applied. We're not seeking to have frankly this  
25 Court or the Supreme Court then apply that test to any

1 individual user to see whether or not it's satisfied.  
2 That seems to be more a remedy issue that's determined  
3 at least initially by the State of Wyoming.

4 SPECIAL MASTER: So then if I were to rule  
5 that Anadarko could intervene but for the limited  
6 purpose of determining whether or not -- for the  
7 limited purpose of determining the standard for  
8 whether or not groundwater was covered by the compact?

9 MR. WIGMORE: The extent to which groundwater  
10 is covered, I think that's right because you've  
11 already made a determination that some groundwater is  
12 covered.

13 SPECIAL MASTER: But that would be  
14 satisfactory to Anadarko?

15 MR. WIGMORE: At this point that's correct  
16 because the only issue -- the only issue that I can  
17 think at this time is if -- it seems to me that if  
18 that issue was resolved in favor of Anadarko there  
19 would be no need -- likely no need for Anadarko to  
20 participate in the rest of the case because our waters  
21 are not compacted.

22 And to the extent Wyoming has any authority  
23 to curtail or regulate our pumping it's pursuant to  
24 Wyoming State law. It's not pursuant to the compact.  
25 So there wouldn't be a need for us to continue to

1 participate in this case if we're successful on that  
2 point.

3           If we were unsuccessful and the Court  
4 determines that, you know, our groundwater pumping is  
5 in fact compacted, as we've discussed there are  
6 certain issues that are Anadarko's -- arguments that  
7 Anadarko can make that at least to date no other party  
8 in this case has made or is likely to make because it  
9 doesn't affect them, namely the fact that our  
10 operations increase surface flows, they do not  
11 decrease them, and whether or not that's in fact a  
12 beneficial use that can result in a violation of the  
13 compact.

14           But certainly as an initial matter  
15 intervention on the issue of coverage of the compact  
16 of CBM groundwater is sufficient to address our  
17 concerns at this point.

18           SPECIAL MASTER: So let me ask you several  
19 other questions. One is that in a variety of original  
20 jurisdiction cases involving water resources one of  
21 the issues is exactly what water is covered, so for  
22 example in Arizona versus California one of the  
23 questions there was whether or not water in some of  
24 the Arizona tributaries was covered.

25           MR. WIGMORE: Uh-huh.

1           SPECIAL MASTER:  So would your position be  
2  that generally in original jurisdiction cases if one  
3  of the issues was whether or not water of a particular  
4  river or a particular area is -- should be included in  
5  an equitable apportionment or is covered by a  
6  Congressional apportionment or a compact or a prior  
7  settlement agreement that in those situations  
8  generally parties should be permitted to intervene?

9           MR. WIGMORE:  Well, if their interest is  
10 limited to -- I think it's easier in the context of  
11 the compact because the compacts -- and they use  
12 different terms.  They spell out which waters are  
13 compacted and which ones are not, or at least they  
14 purport to.  The question is whether you're in or out.

15           But our position would be and we're not aware  
16 of any other parties having made this argument or  
17 certainly any reported decisions on whether any party  
18 has raised the issue of compact coverage that we're  
19 aware that has ever been addressed by the Supreme  
20 Court, but yes, our position would be if the threshold  
21 issue is coverage then how the New Jersey v. New York  
22 test is applied, if that's the test that the Supreme  
23 Court sticks with, in our situation that we can  
24 satisfy it.  We should be able to intervene in this  
25 matter.

1           If in another case there's another issue  
2 involving not one of these intramural disputes where  
3 somebody is simply seeking to maximize their  
4 allocation, but instead there is a credible claim that  
5 waters are not compacted or not subject to equitable  
6 allocation then we think the New Jersey v. New York  
7 test is applied to that party, or to allow for  
8 intervention.

9           But to our knowledge the Supreme Court has  
10 not addressed that issue, and it doesn't seem as  
11 though that's going to lead to the sorts of concerns  
12 that the Court has expressed in prior original  
13 jurisdiction cases where if you do allow in any entity  
14 that is simply seeking to maximize its allocation in  
15 this intramural dispute there's no reason or no  
16 logical basis to exclude all others.

17           But we think our -- it goes to the issue of  
18 whether we have an interest distinct from all other  
19 citizens and creatures of the state, and in this  
20 particular instance involving this compact we believe  
21 that we do. And while we're not aware of anybody  
22 having made that argument in other contexts, if  
23 somebody can, we believe yes, offer intervention under  
24 those situations.

25           SPECIAL MASTER: So I want to get back to



1 again the suggestion by the United States that the  
2 Court could deny the current motion to intervene but  
3 keep open the option that under changed circumstances  
4 that Anadarko would be permitted to intervene in the  
5 future. Are you familiar with how the Special Master  
6 handled intervention by the Basin Electric Power  
7 Corporation in the Nebraska versus Wyoming case?

8 MR. WIGMORE: I'm not.

9 SPECIAL MASTER: Okay. I guess that probably  
10 answers the question, because in that case the Special  
11 Master initially denied intervention but then at a  
12 later point in time when more facts came forward to  
13 suggest that there might very well be a difference in  
14 the legal position of Wyoming and the Basin Electric  
15 Power Corporation did finally permit intervention, and  
16 I was just curious as to why you would see that not  
17 working effectively here.

18 MR. WIGMORE: I'm not familiar with the  
19 Special Master's decision in that case, but again the  
20 point that we would like to make is that the issue  
21 that we are seeking intervention on is the threshold  
22 issue that has to be determined initially. It's not  
23 just a simple coverage issue. The United States'  
24 argument that we ought to wait doesn't cite any  
25 support for that other than, well, we can see if

1 things change, and frankly from my client's standpoint  
2 that's not an adequate response.

3           There is not any -- there hasn't been any  
4 credible argument that we don't have a compelling  
5 interest in this case. We have a very compelling  
6 interest. Our business in the state of Wyoming relies  
7 on the ability to pump deep groundwater. That's a  
8 very compelling interest, and if we are covered by the  
9 compact that interest may be compromised because we  
10 recognize that we are a post-50 user and in fact we  
11 are very recent use.

12           And to say without any support that, well, we  
13 can just wait and see if things really go south for  
14 Anadarko, at that point it may be too late for us, and  
15 in that context when the Supreme Court has addressed  
16 the issue of intervention generally it is noted that  
17 the burden for showing that the State -- a State may  
18 not adequately represent a private party's interest  
19 because the State has to represent the interests of  
20 all its citizens and it cannot simply represent the  
21 economic interests of one party, that the burden for  
22 them for inadequate representation is minimal, and we  
23 think in this context we've satisfied that test.

24           SPECIAL MASTER: So final question is, let's  
25 assume that I denied this motion to intervene but I

1 permitted Anadarko to play an active amicus role, that  
2 you would be able to file amicus briefs on the issues  
3 that you've been focusing on, that there might even be  
4 limited ability to introduce evidence as amicus on  
5 these particular questions. Would that get you what  
6 you need?

7 MR. WIGMORE: Well, I can't speculate as to  
8 how a limited role we would have, but just starting  
9 from the premise and belief we've satisfied the test  
10 for intervention, we believe we have a right to be a  
11 party in this case, that it's appropriate to allow us  
12 to be a party to this case.

13 And again on the issues of whether our  
14 interests diverge, it is not clear to me that solely  
15 being an amicus, even if we were allowed to continue  
16 to file amicus briefs on legal issues, you know, a  
17 number of these factors in determining the scope of  
18 the coverage are very technical in nature, they're  
19 very fact specific, and we may have -- we certainly  
20 believe that we should have the ability to  
21 cross-examine the experts and how that would work in  
22 the context of an expanded amicus is just not clear to  
23 me at this point.

24 SPECIAL MASTER: Okay. Thank you. Well,  
25 I've already kept you up there longer than I promised

1 that I would, and I'll have another opportunity to ask  
2 you any questions after I hear from other counsel.

3 But thank you very much for your argument.

4 MR. WIGMORE: Thank you.

5 SPECIAL MASTER: So next, counsel for  
6 Wyoming.

7 MR. WILLMS: Thank you, Your Honor. My name  
8 is David Willms. I represent the State of Wyoming.  
9 May it please the Court.

10 SPECIAL MASTER: Yes.

11 MR. WILLMS: I'll start off with saying that  
12 the State of Wyoming did not file a brief in this --  
13 in response to this motion and as such I don't really  
14 have any prepared remarks or arguments, but you  
15 indicated that you might have some questions for the  
16 State of Wyoming and I would entertain those  
17 questions.

18 SPECIAL MASTER: So let me start out by  
19 asking, is there any reason that Wyoming does not  
20 believe that it would adequately represent the  
21 interests of Anadarko and the various other CBM  
22 pumpers in this case?

23 MR. WILLMS: Well, I think at this point it's  
24 difficult for Wyoming to answer that question fairly.  
25 We have a lot of -- within our own state a lot of

1 competing interests, political interests as well as  
2 public interests. Obviously we have a duty to  
3 represent the interests of the public for the state,  
4 but at this point I mean we don't know whether we're  
5 going -- even going to take exceptions to the  
6 groundwater decisions that Special Master made here,  
7 let alone how we'll represent our constituency, our  
8 state, the public with respect to groundwater as we  
9 move forward.

10           We have an election for governor coming up in  
11 a year. With that tends to come a new Attorney  
12 General. Our State engineer, who's our client, is a  
13 political appointee. We take our direction from all  
14 of those people.

15           What we are thinking today might be  
16 completely different from what we think two years from  
17 now on how we'll represent the state's interests. So  
18 that's a really -- at this point it's a fairly  
19 difficult question to answer and I don't know that we  
20 can give a firm answer.

21           SPECIAL MASTER: So I understand that you  
22 don't want to speculate into the future, but just  
23 thinking about this particular point in time do you  
24 see any reason why Wyoming is likely not to properly  
25 represent the interests of the CBM pumpers in the

1 state of Wyoming?

2 MR. WILLMS: Again, at this particular  
3 instance it's -- I'm still stuck in kind of the same  
4 position of saying, well, at this particular instance  
5 we would like to be able to adequately represent  
6 everybody but we know that, for example, up in the  
7 Powder River Basin we have some landowners that love  
8 CBM, we have some landowners that hate CBM, so we have  
9 -- within the basin itself and amongst individual  
10 water users, surface water, groundwater users, there  
11 are competing interests right now and I don't think  
12 even right now we can -- we can say we would like to  
13 be able to. I don't know that we can say we can.

14 SPECIAL MASTER: Let me ask the question a  
15 little bit differently, which is I've assumed that as  
16 a general matter Wyoming would argue that whatever  
17 groundwater is -- well, let me just ask the question  
18 right now. Wyoming has taken the position in the past  
19 that groundwater was not covered in the compact. Does  
20 Wyoming currently have a position if, as I said in the  
21 memorandum opinion, groundwater of some sort is  
22 covered as to what groundwater is covered?

23 MR. WILLMS: I think within our own -- as far  
24 as what's covered by the compact, I don't think we've  
25 made -- obviously there are a lot of -- we're a long

1 ways away from being able to say what groundwater may  
2 or may not be covered.

3           Like I said before, we haven't even come to  
4 the decision yet whether we would like to file a bill  
5 of exceptions on whether all groundwater should be  
6 excluded from the compact or whether as you've  
7 suggested to the extent it's interconnected whether it  
8 should be interconnected, what groundwater actually is  
9 considered interconnected. I think there are -- we  
10 need the technical expertise and background and we're  
11 probably a ways away from being able to make that  
12 determination.

13           I think from our -- the standpoint of within  
14 our own state and how we manage the conjunctive  
15 resource would probably suggest that we don't see many  
16 examples where this coal bed methane water is really  
17 impacting the surface flows as far as how we make our  
18 own statutes, but how we would treat it under this  
19 compact we just haven't made that decision. Like I  
20 said, we haven't even come to the point of whether  
21 we've decided to file a bill of exceptions or not.

22           SPECIAL MASTER: And counsel for Anadarko  
23 mentioned that he thought there was a decision in  
24 Wyoming now which elucidates what groundwater might be  
25 covered by Wyoming statute, and I assume that was a

1 reference to Sections 41-3-915 and 916? Are you  
2 familiar with that decision?

3 MR. WILLMS: Yeah, I am familiar. It was a  
4 District Court case and it was -- there was a claim of  
5 depletion of surface flow by a well that I believe was  
6 in the alluvium, maybe about 100 feet deep or so, and  
7 the decision of the State engineer on a regulatory  
8 matter interpreting that statute was to say that in  
9 fact within a matter of days or maybe a week that if  
10 you shut that well off then actual water would come to  
11 the surface, diverter's head gate.

12 And that -- there's an unreported District  
13 Court decision on that. It wasn't appealed to the  
14 Supreme Court. It was really decided on procedural  
15 issue rather than the technical aspect of this  
16 interconnectivity. So really we have the guidance of  
17 the interpretation of the State engineer at this point  
18 on that statute.

19 SPECIAL MASTER: And that District Court  
20 opinion did not address the substance of the question  
21 of how you apply the Wyoming statute?

22 MR. WILLMS: I believe that's correct. I  
23 understand it to be a procedural -- it was a  
24 procedural case really as to the timing of regulation,  
25 whether there was the right to an administrative



1 appeal under our statute or whether the decision in  
2 fact had to happen so quickly that it could be made by  
3 the State engineer and it wasn't entitled to  
4 administrative hearing, and I think that was the  
5 question in front of the District Court, was a  
6 procedural one, not a technical one.

7 Right now the way that the State engineers  
8 interpreted that regulation, or that statute is that  
9 to be that one single source of supply you really have  
10 to see nearly immediate impact, and within a matter of  
11 days, something that we certainly to this point  
12 haven't seen with CBM, probably we would be surprised  
13 to see in the future, anytime in the future with CBM.  
14 I don't see that statute as being one that would ever  
15 necessarily be applied to regulating CBM product  
16 water.

17 SPECIAL MASTER: Thank you. And I heard you  
18 say a moment ago that that decision was unreported,  
19 but was there a written decision in that case?

20 MR. WILLMS: You know, I can't answer that  
21 with confidence.

22 SPECIAL MASTER: If there was one could I get  
23 a -- could you supply me with a copy of that?

24 MR. WILLMS: Sure.

25 SPECIAL MASTER: And I also do not know the

1 law of Wyoming. Will appellate courts in Wyoming, are  
2 they entitled to rely upon unpublished District Court  
3 opinions? In California, for example, there's a rule  
4 that if a decision is unpublished then other courts  
5 are not permitted to cite it.

6 MR. WILLMS: I don't know the answer to that.  
7 I haven't seen them cited. They may have been. I  
8 don't know of any particular rule.

9 SPECIAL MASTER: And do you know of any  
10 instance in which Wyoming has decided that under  
11 Wyoming statute 41-3-915 and 916 that CBM water should  
12 be integrated with surface water?

13 MR. WILLMS: I have not, and like I said I  
14 would be surprised to see that in the future as well,  
15 just based on the way that statute has been  
16 interpreted to this point.

17 SPECIAL MASTER: And so Wyoming's current  
18 position with respect to Anadarko's motion is that you  
19 do not oppose it or do you support it?

20 MR. WILLMS: We do not oppose it.

21 SPECIAL MASTER: And why?

22 MR. WILLMS: Why don't we oppose the motion?

23 SPECIAL MASTER: Why don't you oppose it?

24 MR. WILLMS: I think that gets back to it --  
25 I would suggest the reason we don't really oppose the

1 motion is, for one, if they are allowed to intervene  
2 there could be some certain advantages, you know,  
3 potentially to both parties to have their  
4 intervention. Obviously discovery, the ability to  
5 seek discovery from Anadarko from not only the State  
6 of Wyoming but also the State of Montana, there could  
7 be some benefits there. Also towards deciding that  
8 threshold issue that was spoke about earlier.

9           On the flip side, if you were to choose not  
10 to allow Anadarko to intervene obviously we as the  
11 State of Wyoming would do the best of our ability to  
12 represent all the interests within the state, and so I  
13 think from that perspective we just don't really  
14 oppose. There could be some advantages, but I don't  
15 think it would be a hurdle, a potential hurdle to us  
16 if they're not allowed to intervene either.

17           I think, like I said, we just don't oppose.  
18 We're fine with whatever decision the Special Master  
19 makes here.

20           SPECIAL MASTER: Thanks. And just one final  
21 factual question that you might not know the answer  
22 to. Do you have an estimate as to how many  
23 groundwater users, and in this category I will put CBM  
24 pumpers, but how many potential groundwater users in  
25 Wyoming could be impacted by a final decision in this

1 case?

2 MR. WILLMS: You said you wanted to include  
3 CBM?

4 SPECIAL MASTER: Include CBM.

5 MR. WILLMS: Depending on that threshold  
6 question of what groundwater is --

7 SPECIAL MASTER: Let's leave it open to  
8 anyone who is pumping groundwater that might  
9 potentially be hydrologically interconnected with the  
10 surface water, and I again recognize that Anadarko's  
11 position is that if there is any it's relatively  
12 unlikely and relatively would be a minor  
13 interconnection.

14 MR. WILLMS: I guess for the sake of argument  
15 I'll just include all groundwater and say to some  
16 extent all groundwater pumpers within the state are to  
17 some extent hydrologically connected, just for the  
18 sake of argument.

19 I think you find that -- and this is just --  
20 I don't have hard and fast numbers so I wouldn't rely  
21 on this, but I would say easily if half of those --  
22 easily half of those are probably CBM. Probably 40  
23 percent of the rest of what's left are de minimis.  
24 We're talking domestic, household uses. And then a  
25 very small fraction and I would say less than five

1 percent are agricultural uses, industrial, municipal,  
2 very small percent there.

3 Total numbers, I couldn't tell you. I would  
4 suspect -- well, I think there are 12,000 or 13,000  
5 coal bed methane wells, I might be incorrect, divided  
6 by however many companies there are. I think the vast  
7 majority are from about eight companies. So there's  
8 eight users there, some smaller companies, and then --  
9 I'm kind of rambling because I don't really know a  
10 firm number.

11 SPECIAL MASTER: I'm not asking you to -- I'm  
12 just trying to get a sense.

13 MR. WILLMS: I think you find that the bulk  
14 of the wells in that basin are either CBM or domestic  
15 wells that have de minimis uses, and then a very small  
16 percentage make up the rest of the wells in that  
17 basin.

18 SPECIAL MASTER: Okay, thank you very much.

19 MR. WILLMS: Okay.

20 SPECIAL MASTER: So next then is Mr. Draper.

21 MR. DRAPER: Thank you, Your Honor, and may  
22 it please the Court. You opened with questions that  
23 you asked Anadarko with a suggestion that you agreed  
24 that their interest was compelling and that the other  
25 parts of the New Jersey/New York test were the ones

1 that you wanted to focus on and you were going to ask  
2 me whether we agreed they were compelling.

3 I think in a subjective sense Anadarko's  
4 interest in maintaining its water use is a compelling  
5 interest as it sees it, but I think just that it's  
6 important to Anadarko to be able to keep doing what  
7 it's doing with respect to its water use it's no less  
8 important than the water use is to the other water  
9 users in these two basins in the Tongue and Powder  
10 rivers.

11 So in a subjective sense I suppose one could  
12 see that -- not fault them for saying that their  
13 interests seem to them to be compelling, but I think  
14 the word compelling is used by the Supreme Court there  
15 in a little bit fuller sense. It's used in  
16 conjunction with whether it's a compelling -- from the  
17 Court's point of view that their voice be heard  
18 separate and apart from the sovereign state which they  
19 are a part and from which they take their right to use  
20 water.

21 SPECIAL MASTER: So let me just stop you  
22 there. Maybe I can rephrase it, which is if I assumed  
23 -- if I found that Anadarko's interest in this  
24 particular case was separate from the interests of the  
25 majority of other water users and that the State of

1 Wyoming was not a proper representative of that  
2 particular interest, would there be any other reason  
3 to still deny the motion to intervene or does it  
4 really come down to those two questions of whether or  
5 not Anadarko had shown an interest which is  
6 sufficiently different from everyone else that we  
7 don't have to worry about everybody seeking to  
8 intervene and at the same time also that the Court can  
9 and in this particular case not assume that Wyoming is  
10 going to be a proper representative?

11 MR. DRAPER: I think the Supreme Court used  
12 those concepts of compelling interests and distinct  
13 from other users in the same breath, and they're not  
14 totally separable, and I read the New Jersey/New York  
15 test as saying there must be some compelling reason  
16 from the Court's point of view, not just that people  
17 need to drink water, they need water for their  
18 industrial processes, they need water for their  
19 agricultural uses.

20 Those of course from a subjective point of  
21 view are perhaps the most compelling personal  
22 subjective interests that a person can have, and if  
23 that were the test it wouldn't be very useful, but I  
24 think they were talking about something else.

25 They were talking about the fact that before

1 the Court in these original jurisdiction interstate  
2 water cases are the states acting in a very pure  
3 fashion in their sovereign interest, and in those  
4 situations the states are at the height of their  
5 sovereign powers and their duty and necessity of  
6 representing all their constituents.

7           And that includes people who -- and companies  
8 who might not be called citizens so that they can go  
9 down and vote at the ballot box. It includes all of  
10 those who take their ability, their right to pump,  
11 their right to divert, their right to use water under  
12 the laws of that sovereign state. And if someone  
13 happens to sell their water right to somebody who  
14 lives across the state line or perhaps lives in New  
15 York City, it doesn't change the status -- it doesn't  
16 change the status of that water right vis-a-vis the  
17 state.

18           SPECIAL MASTER: So then if we take  
19 Anadarko's two major arguments, the first one as I  
20 understand it is that their interest is separate from  
21 the majority of other water users in this area because  
22 of the fact that they believe given how deep they're  
23 pumping, where they are pumping from, that there's a  
24 very big argument that that water should be included  
25 and that therefore they're different from other



1 groundwater users and other water right holders,  
2 what's your response to that?

3 MR. DRAPER: Our response is that they have  
4 been making this argument since they filed their first  
5 amicus brief in this case, that as a matter of fact  
6 they are hydrologically separate or mostly separate  
7 from the compacted flows, surface flows of the  
8 Yellowstone system.

9 However, those factual allegations were  
10 premature at the stage of determining whether the  
11 motion for leave to file or the motion to dismiss  
12 should be granted in either case, and I think it's  
13 important to separate their position with respect to  
14 coverage of CBM pumping into its legal and factual  
15 aspects.

16 Your Honor has already ruled what the legal  
17 standard is going to be subject to review by the  
18 Court, and that is to the extent that it's  
19 hydrologically connected to the surface compacted  
20 flows groundwater pumping will be accounted for, and  
21 it's that factual question, is there an  
22 interconnection.

23 There may be some wells, there obviously will  
24 be some wells where the hydrologic connection as a  
25 matter of fact is going to be determined later in this

1 case to be outside the test, the legal test of the  
2 scope of the compact that has been set out by the  
3 Special Master.

4           SPECIAL MASTER: So let me actually correct  
5 you there, that what I said in the memorandum opinion  
6 was not that all hydrologically interconnected water  
7 would be governed by the compact or addressed under  
8 Section 5A, but that at least some of the  
9 hydrologically interconnected waters would be.

10           You have different states that have taken  
11 different positions on exactly what groundwater should  
12 be governed like surface water and one of the  
13 questions that remains open in this case is exactly  
14 what the final standard is. So again all the  
15 memorandum opinion said was that some of that water  
16 was covered.

17           MR. DRAPER: And thank you for that  
18 clarification and that is fully expressed in your  
19 opinion, and it's reminiscent of the decision that had  
20 to be made by the Special Master in Nebraska versus --  
21 Kansas versus Nebraska and Colorado case where he was  
22 faced with the argument in that case by Colorado that  
23 while some water was perhaps subject to the compact  
24 because it was alluvial that the Ogallala groundwater,  
25 which was deeper and less well-understood and there

1 was something in the record to indicate the states  
2 agreed they did not fully understand that other  
3 groundwater source, that it was therefore excluded and  
4 the Special Master held in that case that depending on  
5 what the facts showed if it was hydraulically  
6 connected such that the groundwater pumping in that  
7 case affected the compact flows then it would be  
8 included in the accounting.

9           SPECIAL MASTER: So my question is, getting  
10 back to Anadarko's position, my understanding of what  
11 Anadarko is saying, they can correct me when they come  
12 back up later, is again that although according to  
13 Anadarko it might be relatively obvious that the  
14 groundwater users in the alluvial plane would be  
15 covered that it is a greater stretch to cover the type  
16 of CBM pumping that they're engaged in and that  
17 therefore their interest here is really quite distinct  
18 from other groundwater users who are not CBM pumpers  
19 and quite different from all surface water users.

20           So my first question is, do you disagree with  
21 that?

22           MR. DRAPER: I do.

23           SPECIAL MASTER: And why?

24           MR. DRAPER: Because that description of  
25 their own situation, Anadarko's situation does not

1 differentiate them from the majority of water users in  
2 the Tongue and Powder River basins. Each user is  
3 going to have a different distance from the stream.  
4 Some of these users, surface to groundwater may be  
5 very high in the basin where they would claim whatever  
6 they do has no effect, or they may be on a tributary  
7 where they claim that there is no coverage of the  
8 tributaries, of the interstate tributaries.

9           So you have every CBM user is going to have a  
10 different set of wells, different circumstances,  
11 different depths of completion, different distances  
12 from tributaries and tributaries and tributaries.

13           There is a continuum, a myriad of factual  
14 questions that become very clear when you look at the  
15 groundwater pumping, but they're also there with  
16 respect to various kinds of surface users, including  
17 as Your Honor has mentioned the reservoirs on the  
18 tributaries.

19           If Your Honor was to agree that they have a  
20 distinct interest because they are claiming they're  
21 not covered, then there's a whole host of reservoir  
22 owners and many, many people who depend on those  
23 reservoirs who would have the same strength of  
24 argument to come in as an intervenor seeing that the  
25 Court was willing to entertain that kind of

1 participation.

2           SPECIAL MASTER: And one of the questions  
3 that I asked counsel for Anadarko was the potential  
4 implications of a decision granting a motion to  
5 intervene here for other original jurisdiction water  
6 cases, and for example I brought up the Arizona versus  
7 California case and the question whether or not  
8 tributary water that rose purely in Arizona was  
9 included under the apportionment that the Congress  
10 made in the Boulder Canyon Act.

11           From your experience in original jurisdiction  
12 water cases can you think of other instances where if  
13 I rule for Anadarko in this case it would have  
14 implications?

15           MR. DRAPER: Yes. Going back to the  
16 Republican River case, which is fairly recent, that is  
17 Kansas versus Nebraska and Colorado. In that case a  
18 relatively large group of would-be intervenors sought  
19 to participate and actually they weren't seeking  
20 intervention, they were seeking to participate as  
21 amici curiae in the proceedings in that case, and  
22 there was some -- if I remember the number correctly,  
23 it was something like 19 public power districts.

24           The power is generated by public power  
25 districts in Nebraska and many of them have water

1 rights, and they pointed out correctly that their  
2 water rights were subject to the scope of the  
3 complaint that had been filed in that case and that  
4 they needed to be allowed to participate at least as  
5 amici curiae. That was opposed by Kansas and Special  
6 Master McKusick ruled that they would not be allowed  
7 to participate as amici curiae.

8           And that's very similar to this kind of case.  
9 We have one company here but there are a number of  
10 other larger companies and then we have smaller CBM  
11 producers as we've heard who obviously feel they have  
12 compelling interests and it's certainly subjective  
13 that they are compelling.

14           SPECIAL MASTER: So actually let me rephrase  
15 the question. It probably wasn't that clear. Can you  
16 think of other jurisdictional water cases where one of  
17 the issues was whether or not specific water was  
18 actually covered by a compact, prior settlement  
19 agreement, or Congressional apportionment?

20           MR. DRAPER: Well, I think it's endemic to  
21 these cases that there is always going to be the  
22 question of scope, how far does it reach. A very  
23 typical one is does it reach groundwater, but there  
24 are many others. One that Your Honor mentioned with  
25 respect to tributaries in Colorado is another example.

1           But it's almost a threshold question, and you  
2 can see it in the suggestion that we've seen from the  
3 Solicitor General of the United States in several of  
4 these cases recently, that while they may support a  
5 motion for leave to file a complaint they also  
6 recommend to the Court that the Court entertain a  
7 motion to dismiss and clarify the legal issues, and  
8 those are primarily issues of scope.

9           So there's nothing to differentiate this  
10 position of Anadarko. It runs through all its  
11 arguments really that it is somehow separate and  
12 unique. It's separate from other water users in the  
13 basin. It also says it's not covered by the Supreme  
14 Court precedent in New Jersey versus New York because  
15 it has a better interest or a better reason to be  
16 admitted as intervenor than the City of Philadelphia.

17           And the reason that they state, if I  
18 understand them correctly, is that they are  
19 challenging the application of compact to them. It  
20 has the potential to affect their water use, and they  
21 are taking that -- well, the reason it could affect it  
22 is because maybe you determined that this compact  
23 applies to their type of water use and they have a  
24 special unique position to express on that.

25           And I would say, first of all, there's no --

1 to get back to your question about precedence, there's  
2 no precedent for that kind of distinction.

3           SPECIAL MASTER: So let me move to the last  
4 part of the New Jersey versus New York standard, which  
5 is whether or not the interest in this particular case  
6 of Anadarko is properly represented by in this case  
7 Wyoming. So help me on this. What is your view as to  
8 what Anadarko would actually have to show in order to  
9 satisfy that particular part of the test?

10           Assume again that I find their interest  
11 compelling. I think it's separate from the interest  
12 of other water holders. Strikes me that a key part of  
13 this is a question of proper representation by Wyoming  
14 and what I'm trying to figure out is what exactly is  
15 the standard that I should use for determining whether  
16 or not their interest is properly represented?

17           MR. DRAPER: I think that's a question with  
18 which I've struggled because there's almost no way out  
19 of it. If they are represented sufficiently then  
20 there's no reason for them -- for Anadarko to also be  
21 complicating the proceedings. If they aren't  
22 represented properly by the State of Wyoming then they  
23 are going to be in this court to impeach their own  
24 state. They're going to be trying to put a wedge  
25 between their position and the position of the



1 sovereign state against whom relief is sought.

2           You're aware I'm sure that we stated no claim  
3 for relief against Anadarko or any CBM producer. We  
4 used that as an illustration of the type of  
5 groundwater pumping that was occurring, but we have  
6 asked for no relief against any particular water user.

7           The relief requested in this case is against  
8 the State of Wyoming, and it seems to me to be  
9 contrary to the fundamental view that the Court takes  
10 of these cases to allow a water user within a state to  
11 come into this court and challenge the position or  
12 take a different position than the sovereign state who  
13 is the party to the compact, and in this case the  
14 compact is very clear that these states represent  
15 their water users and those who use as a result as  
16 Anadarko does pursuant to permits and just a general  
17 allowance by the State of the water uses that occur  
18 within the Tongue and Powder basins in Wyoming.

19           SPECIAL MASTER: So I've actually noted the  
20 same type of tension that you just mentioned in the  
21 decisions dealing with motions to intervene in  
22 original jurisdiction actions, which if you look at  
23 the standard one of the questions on the standard is  
24 whether or not there's going to be proper  
25 representation.

1           On the other hand, when the Court talks about  
2 the practical reasons not to permit intervention one  
3 of the concerns they mention is the possibility that  
4 the State will be impeached by one of its own water  
5 users, and to the degree that you weren't trying to  
6 show that a State will not properly represent you the  
7 temptation is to say that they have a different  
8 interest than we do, but that will then seem to  
9 confirm the concern about impeachment.

10           So I've seen exactly the same tension in  
11 cases, but it still leaves me with a question of when  
12 you are applying the New Jersey versus New York  
13 standard what is the test? How do I determine whether  
14 or not Anadarko's interest is properly represented?

15           MR. DRAPER: I think the Supreme Court was  
16 leaving open the possibility that there might be some  
17 instance someday where there would be a different  
18 interest that could be properly entertained by the  
19 Court. I frankly have not been able to imagine one.

20           SPECIAL MASTER: So let me stop you there  
21 very quickly and ask you the same question I asked  
22 Anadarko. So are you familiar with the Special  
23 Master's -- I guess it's the 17th memorandum of the  
24 Special Master on Nebraska versus Wyoming in which he  
25 finally permitted Basin Electric Power Cooperative to

1 intervene?

2 MR. DRAPER: No, I'm not, Your Honor. I have  
3 heard the name Basin Electric and I know a little bit  
4 about that litigation, but I'm not familiar with the  
5 situation with respect to the intervention of Basin  
6 Electric or why the Master thought that that was  
7 eventually appropriate.

8 I would note that it seems to be just in a  
9 Special Master's report so it wasn't something that  
10 was the subject of an exception and ruled upon by the  
11 Court itself. But as to the merits and particular  
12 facts I'm not in a position to comment.

13 SPECIAL MASTER: Okay. So let me turn  
14 finally to some practical considerations. So, first  
15 of all, if I were to -- let me just ask it quite  
16 frankly. What would be so horrible about my  
17 permitting Anadarko to intervene in this particular  
18 action?

19 Let me assume -- I obviously would want to be  
20 utilizing the test that the Supreme Court set out, but  
21 if I concluded that they appeared to satisfy that test  
22 are there any practical problems that that would  
23 present?

24 MR. DRAPER: Yes, I think there are. First  
25 of all, other parties who had perhaps considered

1 seeking intervention but had decided to hold off would  
2 be emboldened to now apply to you, and there are many  
3 parties that you can I think plausibly imagine being  
4 tempted by such a ruling.

5           While we've talked about other CBM companies,  
6 other groundwater users, for instance, there are also  
7 those who oppose CBM pumping. And there's just been a  
8 challenge decided by the Wyoming Supreme Court by  
9 people who oppose CBM pumping where they were trying  
10 to get the State of Wyoming and the State engineer to  
11 tighten up its control. He does issue permits but  
12 their concern was that they weren't regulating it  
13 tightly enough.

14           Those people I think would at least think to  
15 themselves, well, we have now questions about how this  
16 CBM pumping that we're concerned about can go forward  
17 in this case. The individual companies are in here.  
18 There's nobody to speak to the other side of that  
19 issue.

20           There is a question of fairness that has been  
21 recognized by the Court both in the New Jersey/New  
22 York decision and in the Utah versus United States  
23 decisions. For instance, the Utah decision  
24 specifically talked about the fairness concerns, if  
25 they allowed one property owner to come in in that

1 sovereign dispute about Salt Lake, then the other 120  
2 similarly situated landowners would in all fairness  
3 have to be considered in the same way. So I think  
4 there's a huge problem there.

5 Other problems that I see if they were  
6 allowed, it would complicate this case. It would  
7 delay it. Right now you have a small number of  
8 sovereign parties in front of you. You would now  
9 increase that percentage-wise significantly.

10 In each instance there is the opportunity to  
11 submit briefs. There's the suggestion by counsel  
12 today that they would want to be considered to provide  
13 their own experts, to cross-examine the State's  
14 experts. Even the State of Wyoming's experts would be  
15 open to them.

16 It would slow down this process and one of  
17 the things that the Court I know likes to see is an  
18 expeditious resolution of these cases, and I think  
19 that's one of the major concerns that was behind the  
20 decision of Justice McKusick when he ruled on the  
21 motion for leave to participate amici curiae in the  
22 Republican River case.

23 SPECIAL MASTER: So finally, let's assume  
24 that I didn't grant the motion to intervene but that I  
25 want to make sure that there was a full exposition of

1 relevant issues and that I knew all of the potential  
2 issues that could arise if the compact applied to CBM  
3 pumping. Help me think about other mechanisms, short  
4 of intervention, that I might be able to utilize.  
5 Obviously Anadarko could with leave serve as amicus  
6 and provide amicus briefs. Could I permit Anadarko as  
7 amicus to present limited evidence?

8 MR. DRAPER: Your Honor, our position would  
9 be that this would lead to unnecessary complications.  
10 It's totally unnecessary to allow a party to  
11 participate as you say, as was recognized by the  
12 Master in the Republican case.

13 And if you look at some of these recent  
14 cases, Kansas versus Colorado case on the Arkansas  
15 River is one that involved a lot of technical  
16 evidence, a lot of geological evidence, hydrologic,  
17 engineering evidence. There were 207 days of trial in  
18 that case and most of those days were concerned with  
19 expert testimony, and a large part of that was  
20 testimony relating to the hydrologic processes, how do  
21 you model them, how do you quantify the timing,  
22 location and so on of depletions, and take into  
23 account the different locations of wells and the  
24 different formations from which they pump.

25 That was all part and parcel of that case,

1 and it went -- it was completely handled I would say  
2 by the Special Master with the presentation of  
3 evidence by the states. They have at their disposal  
4 considerable resources.

5           Anadarko being a user under Wyoming law might  
6 be employed by the State of Wyoming -- not employed in  
7 a literal sense but they might be asked to provide a  
8 few witnesses, but they're State of Wyoming witnesses  
9 and the State of Wyoming puts those witnesses on,  
10 knows that they are prepared to give opinions that are  
11 consistent with the position of the State of Wyoming  
12 and are not going to create havoc with two different  
13 positions on a multitude of different issues, that  
14 even with the one extra party that we're talking about  
15 could severely complicate this proceeding.

16           So I think there is no practical need to make  
17 Anadarko a party. If it were a party then it could do  
18 everything, including take exceptions, or to become a  
19 friend of the Court in a formal sense. It has access  
20 to do that through the State of Wyoming.

21           And if the State of Wyoming believes that  
22 that would be helpful in defending the sovereign  
23 interests of the State of Wyoming, which are what are  
24 at stake in this case, then it can put those witnesses  
25 on. And it's the one that determines which witnesses

1 go on, which positions the State of Wyoming is taking,  
2 and you and the Supreme Court hear one voice from the  
3 State of Wyoming, not several.

4 SPECIAL MASTER: Okay. Thank you very much.  
5 Is there anything else you want to say that's not  
6 already in the briefs?

7 MR. DRAPER: I think that covers it, Your  
8 Honor.

9 SPECIAL MASTER: Okay. Thank you very much.  
10 So Mr. DuBois of the United States.

11 MR. DUBOIS: Good morning, Your Honor. Jim  
12 DuBois for the United States.

13 I think what we have before us is Anadarko  
14 and a dispute between sovereigns and an issue of a  
15 uniquely sovereign interest, and in a case in which  
16 the standards set by the Court are set to protect the  
17 sovereign dignity of the states you have Anadarko  
18 wanting to intervene in order to impeach its  
19 sovereignty on matters that are essentially matters of  
20 policy and interpretation of a contract between the  
21 sovereigns to which Anadarko is a stranger.

22 That is not the standard that has been set by  
23 the Court. I think the question you have to consider  
24 is whether or not there is a principled station that  
25 can be drawn for Anadarko that makes them truly unique



1 from all other users and diverters of the state. I  
2 don't think that is present in this case.

3           The standards set out in New Jersey versus  
4 New York are very stringent as far as interventions in  
5 sovereign affairs. This is a dispute between  
6 sovereigns and an agreement between sovereigns. In  
7 such suit the courts have been very protective, the  
8 Supreme Court has been very protective of the  
9 necessary sovereign dignity of the states. That is  
10 the nature of these cases.

11           And I think that you raised a relevant  
12 question, what does changing the standard or having a  
13 lax standard do, not just in this case. It's not a  
14 matter necessarily of who is actually going to  
15 intervene in this case. Our concern is more with the  
16 standard and with opening the doors to a large variety  
17 of folks to come in and enter into the case.

18           And really the issue that Anadarko wants to  
19 address is the liability issue, you know, are they --  
20 I guess it's two part. One, is there -- does the  
21 pumping cause a diversion to the interstate  
22 tributaries, does it move water, and two, even if it  
23 does, as I understand their argument today, even if it  
24 does impact those streams do they have to pay for it  
25 or does that burden get borne by somebody else within

1 the state of Wyoming, which ultimately is an  
2 intrastate dispute.

3           And I think that something that occurred to  
4 me when you were questioning Mr. Draper was that if  
5 you accept Anadarko's position, does that in fact  
6 invite other intervenors who would also have a  
7 compelling interest because they too rely on water for  
8 their economic well-being to come in and say, wait a  
9 second, you are expecting -- these other users, you're  
10 expecting me as a junior user to absorb the depletion  
11 to the river, the diversion from the river that is  
12 actually caused by a third party, so again intramural  
13 disputes within a state, and I think that that is  
14 critically important.

15           On the matter of whether Wyoming adequately  
16 represents Anadarko I think you have hit on a critical  
17 point. Under the Supreme Court's cases in applying --  
18 the way they have applied the *parens patriae* doctrine,  
19 I think that it is difficult to demonstrate. I think  
20 it's a matter of law. The State is deemed to be  
21 fulfilling its representational duties to all of the  
22 citizens, and so as a matter of law it is established  
23 that representation is adequate.

24           I think that the question you've raised, the  
25 question you perhaps were raising by your attempt to

1 discuss Basin Electric is in what standard you apply  
2 that. I think that given that as a matter of law  
3 adequate representation is essentially established by  
4 *parens patriae* that what Anadarko would have to show  
5 -- and I will note that the United States opposed  
6 Basin Electric's intervention even leading up to the  
7 17th, so I believe that were that the situation before  
8 he would probably still be saying intervention was  
9 inappropriate, but what the Master did in applying New  
10 Jersey to the Basin Electric situation was basically  
11 recognized that they were to the point where they had  
12 a conflict, an absolute concrete direct conflict.

13           Wyoming to take Basin's part would have been  
14 arguing for an injunction against itself. Clearly the  
15 Court didn't really think that that was realistic.  
16 And Nebraska, if I recall the background of that case,  
17 had taken a position that was contrary to what Basin  
18 was proposing.

19           So in that situation, which is the only  
20 situation I know of in which intervention was allowed  
21 by a party to this sort of sovereign action, you had  
22 actually a situation where there was a direct concrete  
23 conflict that could not be resolved and with an entity  
24 with a compelling interest that was unique in that  
25 particular case.

1           You had a situation in which you truly had a  
2 compelling interest -- I mean compelling interest,  
3 everyone who relies on water can make an argument that  
4 they've got a compelling interest. The farmer whose  
5 crops are going to die if he doesn't have water has a  
6 compelling interest. Whether it's unique from  
7 everyone else -- but in that case you had a compelling  
8 interest that was a unique, one of a kind, sui  
9 generis, unique interest, and you had a unique  
10 conflict.

11           And in that kind of case intervention may be  
12 appropriate, but in this situation you are simply  
13 arguing about liability just like everyone else, you  
14 know, am I responsible, am I part of the State's  
15 problem so that the State may or may not come after  
16 me, but again the rest of that becomes how the -- how  
17 the remedy works is a matter of State law, intrastate.

18           So in our view it is -- the standard is very  
19 narrow for intervention. It has not been met here.  
20 The Court has allowed really only sovereigns to  
21 intervene, except in this one situation where there  
22 was a direct conflict.

23           SPECIAL MASTER: So that's quite helpful.  
24 Let me again sort of move over just for a moment to  
25 the more practical side of this, and again if I'm

1 interested in the full exposition of the issues, short  
2 of granting the motion to intervene could you give me  
3 some guidance as to what types of mechanisms Special  
4 Masters have used to bring out the type of evidence  
5 and positions that Anadarko would like to present?

6 MR. DUBOIS: I think, Your Honor, that going  
7 back to Basin Electric, Basin Electric participated as  
8 amicus for the better part of 15 years in that case.  
9 I assume -- certainly obvious to have amicus status,  
10 there could be third-party discovery against -- to get  
11 whatever information that may be relevant. I'm  
12 assuming that Anadarko has every incentive to give  
13 technical information to the State of Wyoming, Montana  
14 maybe not so much.

15 I think that there is at least a suggestion,  
16 although I do not know the parameters, that Basin  
17 Electric was allowed to be an active amicus, and I'm  
18 not sure exactly how that was defined but I suspect  
19 that you as Special Master have a lot of leeway in how  
20 far you move this up to an amicus participation as  
21 opposed to the limits you have as far as who should  
22 properly be allowed to intervene. I'm not sure there  
23 are hard and fast limits on that that -- there's none  
24 that I know of, I should say.

25 SPECIAL MASTER: Thank you. Anything else?

1           MR. DUBOIS:  You know, I've tried to jump to  
2   the primary questions that you had.  I think Mr.  
3   Draper has covered everything else regarding the  
4   nature of the doors that would be being opened if  
5   there's not a -- not merely a pragmatic determination,  
6   gee, only Anadarko is here, to the broader question of  
7   opening the flood gates to a variety of other folks  
8   that may have liability related issues.  So I think  
9   that unless you have other questions that takes care  
10  of it.

11           SPECIAL MASTER:  Actually let me follow up  
12  with just one additional question.

13           MR. DUBOIS:  Sure.

14           SPECIAL MASTER:  So as you mentioned in the  
15  beginning of your argument, obviously one of the  
16  things that I need to be thinking about is not only  
17  the implications in this particular case but also  
18  implication in other original jurisdiction cases, so  
19  are you aware of other original jurisdiction cases  
20  where again one of the questions is whether or not  
21  particular water is covered by a compact settlement  
22  agreement and therefore if Anadarko's motion was  
23  granted here it would also open up the opportunity for  
24  intervention in other cases?

25           MR. DUBOIS:  I don't know of any offhand that

1 that issue directly came up, although all of the cases  
2 in which groundwater or groundwater modeling  
3 ultimately comes into play do indirectly involve the  
4 question when you start to look at what pumping is  
5 impacting the river.

6           There's always going to be some level of  
7 determination of whether pumping in particular areas,  
8 in particular aquifers impacts the river. I know that  
9 there are aquifers that are not included in the  
10 groundwater modeling that Mr. Draper is so familiar  
11 with with the hydrologic institutional model.

12           So, you know, it's implicitly there, but I'm  
13 not aware of any cases in which it directly came up.

14           SPECIAL MASTER: And then again when I asked  
15 Mr. Draper what the potential practical problems were  
16 with allowing intervention in this particular case, he  
17 mentioned concern about more parties potentially  
18 seeking to intervene, fairness regarding which parties  
19 -- which water users would be represented and which  
20 water users would not be represented, and also  
21 potential complications and delay of the case.

22           Are there any other problems other than those  
23 that you would see in granting a motion to intervene  
24 here? I know the United States has mentioned the  
25 question of settlement in the South Carolina versus

1 North Carolina case.

2 MR. DUBOIS: Certainly if you -- I mean one  
3 odd complication is that you in granting intervention  
4 would put a citizen, say, in the position of being  
5 able to take exceptions to legal propositions or  
6 interpretation of the compact to which its sovereign  
7 has a different opinion.

8 I mean if Wyoming, for instance, does not  
9 choose to take exception you are inviting Anadarko to  
10 take exception in an interstate dispute over a  
11 contract between the states. A stranger to the  
12 contract, if you will, is coming in and appealing that  
13 to the Supreme Court. I find that to be an odd  
14 position to contemplate.

15 I think that there is always the potential  
16 problem of the situation as we noted in our brief that  
17 the states want to settle. Now you've got an  
18 intervenor who has got a direct real party interest as  
19 a litigant, who has the ability to argue, to deny  
20 states the ability to settle and to present again a  
21 unique conflict to the sovereign nature of this case.

22 Aside from that and the obvious complications  
23 in delay, and potential as I said that you're inviting  
24 others who now have a contrary interest to Anadarko as  
25 -- if you follow the logic of their argument that even



1 if they are depleting the river it's not their  
2 problem, it's somebody else's problem to deal with the  
3 impacts that are caused in Montana, that's going to  
4 rebound up to somebody else and are you then creating  
5 a compelling interest in those parties because they  
6 are contrary to the position being taken by Anadarko.  
7 I think that you are potentially broadening the scope  
8 of folks who may have -- who may claim to have a  
9 similar interest in this litigation.

10           SPECIAL MASTER: So actually two more  
11 questions. First of all, could you help me understand  
12 exactly what the position of an intervenor is if the  
13 states in this particular case were to agree on a  
14 settlement? So assume that I let Anadarko intervene  
15 and that Wyoming, Montana, North Dakota agree on a  
16 settlement. What would Anadarko's ability be at that  
17 point to oppose it?

18           MR. DUBOIS: An interesting and not fully  
19 formed question. That's one of the reasons that that  
20 sort of thing concerns us. They are -- if they are in  
21 as a full litigant there is the question whether or  
22 not they could interfere with settlement. I am not --  
23 I don't know of any case in which that's been  
24 particularly relevant because intervention basically  
25 is not allowed in these cases absent something -- some

1 unique compelling concrete conflict.

2 Other than that you've got the states acting  
3 in sovereign capacities, so what the exact nature of  
4 their ability is I'm not sure, Your Honor. It's never  
5 been tested. There's a reason it's never been tested.

6 SPECIAL MASTER: Okay, then the second  
7 question goes to the concern that the Supreme Court  
8 addresses in the New Jersey versus New York case, that  
9 if a party is permitted to intervene that that party  
10 might judicially impeach a State on matters of policy,  
11 and as I mentioned in my discussion with Mr. Draper  
12 there is this sort of interesting potential tension in  
13 the cases that to permit intervention you have to  
14 conclude that the State would not properly represent  
15 the interest of the intervenor, and yet at the same  
16 time if as you suggest what you would need to find in  
17 order to conclude that the State would not properly  
18 represent the interest is that there's a conflict of  
19 interest between the parties, that would seem exactly  
20 the situation where the intervenor would then be  
21 impeaching the State.

22 So two questions, you can address them in the  
23 order you want. First of all, any thoughts about that  
24 tension, but the second question is, does it make a  
25 difference in this particular case that Anadarko is

1 not a citizen of Wyoming?

2           That language comes up in New Jersey versus  
3 New York where I would imagine particularly  
4 embarrassing for a City to be impeaching the State in  
5 which it is a political subdivision, but in this  
6 particular situation if Anadarko was permitted to  
7 intervene Wyoming would not be being impeached by even  
8 one of its own citizens but a corporation from outside  
9 of the state.

10           MR. DUBOIS: I think that that is the citizen  
11 in the sense of corporate citizen. They are  
12 withdrawing water -- it's not a water rights permit  
13 per se, but they are withdrawing water and potentially  
14 -- now, I have no idea whether they are actually  
15 deferring water from the interstate tributaries, but  
16 at least potentially drawing water out of the system,  
17 out of the Yellowstone tributaries, under -- acting  
18 pursuant to a license given to them by the State.

19           I think for practical purposes you have to be  
20 viewing all such water users, all such people who are  
21 withdrawing water, impacting the streams, as citizens  
22 of that state because they are operating under a  
23 license from that state.

24           And I've forgotten the second question, Your  
25 Honor.

1           SPECIAL MASTER: Do you have any thoughts on  
2 that potential tension?

3           MR. DUBOIS: I think that -- I guess there is  
4 some minor tension, but if you view it in the context  
5 of the very restrictive parameters that are put on  
6 them because of the legal assumptions under *parens*  
7 *patriae* that the State is in fact representing its  
8 citizens that you're only getting there -- I think  
9 that they draw it -- they drew it very, very narrowly  
10 for a reason. They don't want the citizens of the  
11 state to be impeaching them.

12           And it's really only where you have got  
13 conflict that the Court is I think acknowledging that  
14 there are limits no matter what to the *parens patriae*,  
15 that you are going to have situations, Basin Electric,  
16 in which the State simply cannot and does not  
17 represent the users.

18           In this case I don't think you have that. I  
19 don't think it's been shown at all that the State of  
20 Wyoming would not be fully trying to protect the whole  
21 nation -- the whole notion, excuse me, of whether or  
22 not groundwater pumping from a particular area or a  
23 particular aquifer does or does not impact the  
24 tributary streams.

25           I think that the notion that the State

1 because some pumpers would want to expand the scope of  
2 area covered only makes logical sense if your  
3 underlying assumption is that this coal bed methane  
4 pumping is in fact diverting water from the interstate  
5 tributaries. Otherwise the notion that the State is  
6 going to throw its net wide in order to have more  
7 people to correct the problem on the interstate  
8 tributaries is illogical unless they're already  
9 impacting the interstate tributaries. Sweeping the  
10 net wide makes no difference if it doesn't impact the  
11 tributaries.

12 So the State clearly has not merely a  
13 parallel interest but an identical interest in making  
14 sure that there's an exclusion of those water uses  
15 that do not impact the stream. I mean sweeping it  
16 wider to take in people who don't impact the stream  
17 makes no sense.

18 SPECIAL MASTER: Okay. Thank you very much.

19 MR. DUBOIS: Thank you.

20 SPECIAL MASTER: So, first of all, Mr.  
21 Sattler, do you have anything you wanted to add?

22 MR. SATTLER: Thank you, Your Honor. I do  
23 not.

24 SPECIAL MASTER: Okay. Thank you very much.

25 So, Mr. Wigmore, my guess is you're dying to respond

1 to what people have said so far?

2 MR. WIGMORE: I am but could we just take  
3 maybe a five-minute break?

4 SPECIAL MASTER: That would be perfectly  
5 fine. Let's take a five-minute break and so we'll  
6 come back about 12 or 13 after the hour.

7 (Recess taken from 11:08 to 11:16 a.m.)

8 SPECIAL MASTER: Mr. Wigmore.

9 MR. WIGMORE: Thank you, Your Honor. Michael  
10 Wigmore for Anadarko. Let me just -- I'll address  
11 initially some of the arguments of the State of  
12 Montana and then some of the arguments of the United  
13 States and then a couple of just other questions that  
14 you asked.

15 On the issue of whether or not Anadarko has a  
16 compelling interest, we certainly believe that we've  
17 demonstrated we do, but more importantly neither the  
18 State of Montana nor the United States argued to the  
19 contrary in their oppositions. Neither one argued  
20 that our interest was not compelling.

21 They argued that our interest was not  
22 situated differently than all other users, and as a  
23 result while I appreciate the Special Master asking  
24 questions on the topic that argument has been waived.  
25 They cannot raise now in oral argument an issue that

1 was not raised in their opposition and we did not have  
2 an opportunity to address in our reply.

3           The only, you know, reasonable way to  
4 interpret the test in New Jersey v. New York is a  
5 two-part test, compelling interest separate and apart  
6 from all other citizens of the state and then second  
7 whether our interest is properly represented. Neither  
8 the United States nor the State of Montana addressed  
9 it separately that we do not have a compelling  
10 interest here.

11           Let me just talk a little bit about why our  
12 interest is separate and compelling, again to  
13 reiterate, and as we discussed earlier it just -- it  
14 almost defies reality to try and equate Anadarko's  
15 position with that of another -- a surface water user  
16 or even an alluvial pumper in this case, for a number  
17 of reasons.

18           One, as we discussed, Anadarko, its  
19 operations actually add water to the surface water  
20 flows. It puts us situated differently than any other  
21 party. There's no other party that's raised that.  
22 Neither Montana nor the United States purport to have  
23 an example of anybody else that may raise that issue.

24           As you discussed, there's a significant issue  
25 with respect to the hydrologic connection. Your

1 memorandum opinion states that some hydrologically  
2 connected groundwaters may be subject to the compact  
3 and the resolution of that issue, which is a compact  
4 coverage issue, is a very different -- it's very  
5 different with respect to CBM groundwater than it is  
6 with respect to alluvial pumping.

7           And finally, and this goes -- this goes to an  
8 issue of coverage. This compact sets up an annual  
9 allocation system. Essentially the percentage is  
10 reset every October 1st and when you are talking about  
11 pumping that to the extent it may have an effect, and  
12 we don't believe any can be shown, but to the extent  
13 you can model or even show an effect on surface flows  
14 you're talking about geologic periods of time.

15           And so I think it's relevant not just to --  
16 and I'll get to the point of conflicting arguments  
17 about coverage versus liability. The fact that when  
18 you're pumping from thousands of feet below ground,  
19 that to the extent there may be any impact on surface  
20 water flows it happens over tens of thousands of years  
21 or some period of geologic time, certainly not in the  
22 context of a compact that resets every October 1st.

23           That goes to the issue of coverage and how  
24 this compact should be interpreted to groundwater  
25 pumping, not just issues of liability that the United



1 States and Montana argue. It's a fundamental question  
2 as to how this compact should be interpreted in the  
3 context of groundwater pumping.

4 But along those lines, and again contrary to  
5 argument that Montana made, as we made it very clear  
6 we're not seeking to involve the Special Master or the  
7 Supreme Court in factual resolution of whether  
8 specific activities are governed by the compact. What  
9 we're seeking to intervene on is the test that will be  
10 applied in determining which groundwaters are in fact  
11 compacted.

12 As you correctly noted, your opinion states  
13 that at least some that are hydrologically connected,  
14 but once that test is developed and that is an issue  
15 that's a threshold issue here on coverage, once that  
16 test is developed how that test is applied in  
17 individual situations is an issue to be resolved in  
18 one of -- in these intramural disputes and it's not an  
19 issue that we're seeking to have this Court address  
20 with our participation.

21 Just a couple issues. You know, discussion  
22 of the Republican River example, that seems to be  
23 unclear, an example where we're talking about -- that  
24 the State of Montana raised, it's an issue of an  
25 intramural dispute, water users addressing waters that

1 are clearly compacted.

2           On that point Montana argued that this issue  
3 is endemic to these types of cases. Well, if it was  
4 endemic you would think there would be a decision on  
5 it. And we have not found a case, Montana has not  
6 cited a case, United States has not cited a case where  
7 this issue has been addressed. It has always come up  
8 in the context of parties seeking to intervene in  
9 order to maximize their allocation.

10           And so this parade of horrors that may  
11 occur as a result of allowing Anadarko's intervention  
12 in this matter is simply just not credible. It's not  
13 -- to our knowledge this issue has not been addressed  
14 previously and there is no one else to put it at issue  
15 certainly in this case.

16           And also on the issue of our interest, we're  
17 not arguing that in New Jersey versus New York we have  
18 a better argument than the City of Philadelphia. What  
19 we're saying is we have a different argument. The  
20 City of Philadelphia is a political subdivision of the  
21 State of Pennsylvania that was a party to that action  
22 who was seeking to maximize its allocation in that  
23 case, and that is not our situation here.

24           What we're saying here is we have a different  
25 interest and our interest is different from that, of

1 all the other citizens of the state who are water  
2 users, and for that reason we satisfy the test. We've  
3 acknowledged that the test in New Jersey v. New York  
4 is the one to be applied here.

5 Let me talk just a little bit about the  
6 proper representation issue, and this is an issue  
7 that's obviously received a lot of discussion. The  
8 quote from the New Jersey case is, as a result of a  
9 necessary recognition of sovereign dignity that --  
10 this is on Page 691 of the U.S. -- sorry, that's not  
11 right. It's 691 of the Supreme Court report. I don't  
12 know which version you have.

13 SPECIAL MASTER: I actually have it in front  
14 of me.

15 MR. WIGMORE: I'm sorry?

16 SPECIAL MASTER: I have it in front of me.

17 MR. WIGMORE: Okay. The issue of impeaching  
18 the State, you know, that you would otherwise allow a  
19 citizen to impeach a State on matters of policy,  
20 that's not the issue here. This compact is Federal  
21 law and the question that's presented to you or that  
22 Anadarko wishes to address is whether that Federal law  
23 covers Anadarko's activities.

24 We impeach the State of Wyoming all the time  
25 on that issue. It's not unreasonable. Frankly most

1 environmental litigation in this country relates to  
2 taking a position different than a sovereign, and in  
3 fact intervention has been allowed in, for instance,  
4 taxation cases. There's no more sovereign power than  
5 the power of the State to tax almost, and yet  
6 intervention has been allowed there.

7           So this idea that simply by taking any  
8 position in an original jurisdiction action that  
9 conflicts with the position of the State somehow  
10 impugns the State's sovereignty is just not the case.  
11 We're not seeking to -- first of all, as we discussed,  
12 we're not a citizen of the State of Wyoming, but even  
13 if we were it's not a situation where we're impeaching  
14 the State of Wyoming on a matter of policy within the  
15 State.

16           You know, we don't know what position the  
17 State of Wyoming is going to take, but if the State of  
18 Wyoming takes the position that CBM is covered by this  
19 compact then, yes, we will take a contrary position  
20 not unlike any other contrary position that we take in  
21 arguing that a State or the United States has  
22 improperly interpreted a Federal law. That's what's  
23 involved here.

24           Along those lines, we don't have an interest  
25 here that's subsidiary to the State of Wyoming. One

1 of the critical factors in the New Jersey test was  
2 that the City of Philadelphia's interests were  
3 necessarily subservient to those of the State of  
4 Pennsylvania, and that does potentially bring into  
5 play a sovereign power when you have a political  
6 subdivision whose rights necessarily derive from the  
7 State taking a position contrary to the State.

8           We're not seeking to enforce a right that's  
9 subsidiary to Wyoming under the compact. We're saying  
10 the compact doesn't apply to us, and in that manner  
11 it's no different from any other Federal law.

12           The Salt Lake case the State of Montana  
13 mentioned, it's frankly really not on point. As they  
14 acknowledged in their brief, the Court does not cite  
15 New Jersey v. New York and there's a reason for that.  
16 The issue in that case is frankly that there was a  
17 stipulation that obviated the participation of any  
18 private landowners and in fact the Supreme Court noted  
19 in the absence of the stipulation that private  
20 landowners in that case may have an argument for  
21 participating in the case, but in that case it was  
22 really an issue that the stipulation obviated any  
23 private participation.

24           An argument that the State of Montana made  
25 that the compact presumes the State represents the

1 interest of the citizens, and the United States -- the  
2 United States' opposition on Page 6 is clear. It  
3 says, claims arising under such an agreement,  
4 therefore, seek to vindicate sovereign or  
5 quasi-sovereign interest.

6 Our claim doesn't arise under the compact.  
7 Those are the intramural disputes as to how water is  
8 going to be allocated subsequently. Our claim is that  
9 the compact does not apply to us, and the State of  
10 Wyoming's position on the interpretation of Federal  
11 law are -- to the extent that we take a different  
12 position that doesn't call into -- that doesn't  
13 question their sovereignty at all. That happens all  
14 the time. This is not a claim under the compact.  
15 We're claiming we're not covered by the compact.  
16 Montana makes a similar argument as well.

17 As I said, with respect to some of the  
18 arguments the United States made, you know, again,  
19 this is not a -- this is not -- we're not impeaching  
20 the State of Wyoming on a policy issue. We are  
21 seeking to have an interpretation of Federal law and  
22 we believe this Federal law does not apply to us.

23 And again in the United States' argument they  
24 improperly conflate the issue of coverage with the  
25 issue of liability. As we said, we're not seeking to

1 -- we're seeking to intervene on the issue of  
2 coverage, whether or not we're subject to this compact  
3 at all, not how the compact may be subsequently  
4 applied to individual users once the test for scope  
5 has been addressed.

6           On the issue -- and also on the issue of  
7 proper representation, the conflict I think that you  
8 properly pointed out is that, you know, we've -- I  
9 think we've demonstrated that the *parens patriae*  
10 presumption doesn't apply here. First of all, we're  
11 not a citizen, and *parens patriae* applies to a  
12 sovereign representing the interests of its citizens.

13           And in fact, there are a number of citizens  
14 and the argument why Montana may not adequately or  
15 properly represent our interests is that it does  
16 have --

17           SPECIAL MASTER: You mean Wyoming.

18           MR. WIGMORE: I'm sorry. The State of  
19 Wyoming doesn't properly represent our interests. And  
20 as Mr. Willms stated, within the state of Wyoming some  
21 people like CBM pumping and some people hate it. It's  
22 just not an issue where the State of Wyoming marches  
23 in lockstep, and so we cannot anticipate that a -- the  
24 *parens patriae* presumption, which applies to citizens,  
25 would speculate that the State of Wyoming will

1 adequately represent our interests.

2           And in addition to that, we've also got the  
3 differentiation that we -- our interests do not align  
4 with the interests -- we have different interests as  
5 we've discussed than the other citizens of the state.  
6 So the conflict can be resolved because where the  
7 *parens patriae* presumption doesn't apply then  
8 necessarily you could impeach the State.

9           On the other hand, if the *parens patriae* does  
10 apply then you -- where the State is supposed to be  
11 representing the interests of its citizens then you  
12 can see a rationale for not allowing intervention.  
13 But in -- I mean the State of Wyoming can't defend an  
14 environmental enforcement action on the basis of the  
15 fact that *parens patriae* has the best interest of the  
16 State and therefore you an individual entity that may  
17 see it differently can't argue otherwise.

18           The United States said at one point that it's  
19 a matter of -- that something -- I apologize, I didn't  
20 catch it, but that it appeared to be a matter of law  
21 on the issue of proper representation. Well, if it  
22 was a matter of law the rule would simply be that you  
23 cannot intervene in an original jurisdiction action  
24 involving water, and that's clearly -- that's not the  
25 case. That is not what the Supreme Court said in New



1 Jersey v. New York.

2           You know, it's set up as you mentioned, it's  
3 a catch-22 where you could not argue that if the  
4 *parens patriae* applies and presume to adequately  
5 represent us, then you would never be able to  
6 intervene. The test is not that intervention is  
7 precluded in more cases. It's certainly a very  
8 difficult test and one that has -- but has not been  
9 addressed in our situation.

10           And just on the issue of settlement, you  
11 know, I think it's reasonable to assume that-- and  
12 this again happens all the time, that the original  
13 parties seek to settle the case, then if an intervenor  
14 disagrees with that settlement it can move -- oppose  
15 the settlement. But the Court certainly has the  
16 authority, as is done all the time, to enter a  
17 settlement over the opposition of the intervenor.  
18 That again -- that's not unusual.

19           And as you've mentioned, if in the context of  
20 settlement it were to get the case behind you, to  
21 accommodate the interests of the citizens, for  
22 whatever reasons the State of Wyoming decides to draw  
23 the line in an area that would encompass our  
24 activities, that's right, we would, that's what we  
25 would do, we would seek to oppose it, but the

1 settlement could certainly still be entered over the  
2 opposition of an intervenor, and that happens all the  
3 time.

4           One last thing, the analogy that the United  
5 States made about sweeping all these parties into a  
6 net, the compact doesn't guarantee any flows at all.  
7 It sets up a tiering system of pre-1950, supplemental  
8 water, post-1950, so I just don't think the analogy  
9 works because we're not guaranteeing flows -- as  
10 recognized in your opinion, there's no guarantee under  
11 the compact of a certain level of flow. There's a  
12 protection of pre-1950 uses as against supplemental  
13 uses and post-1950 uses.

14           Unless you have any questions I think that's  
15 all I have at this point.

16           SPECIAL MASTER: Okay, that's quite useful.  
17 I do have two quick questions. The first one is I'm  
18 curious as to your response to I think one of the  
19 hypotheticals that Mr. DuBois made in his argument.  
20 As I understood -- well, he raised it. It's the  
21 following hypothetical.

22           Let's assume that I granted Anadarko's motion  
23 to intervene and then one of the groundwater users in  
24 the alluvial plane came forward and said that they  
25 would like to intervene, that there were two principal

1 reasons they wanted to intervene. One was that their  
2 interest was not necessarily the same as the State of  
3 Wyoming's because the State of Wyoming might want to  
4 draw a relatively close line between what groundwater  
5 was covered so that, you know, if you're really close  
6 to the river then maybe that would be fine but they  
7 wouldn't want to extend it too far out, particularly  
8 to CBM users, and that they wanted to make sure that  
9 there was somebody there arguing for the largest  
10 possible coverage of groundwater users.

11 And so that would be their first argument and  
12 their second argument would be that the CBM users have  
13 a representative now, which is Anadarko, and there  
14 needs to be somebody who represents the other  
15 groundwater users. So what would I respond to that?

16 MR. WIGMORE: Well, I think the response is  
17 that, again, the United States has improperly  
18 conflated the coverage argument with the liability  
19 argument. I mean we stipulate that, you know, once  
20 the issue of coverage, the test for coverage under  
21 this compact is determined by you and the Supreme  
22 Court how that compact is applied, you know, if -- and  
23 we don't think we should be but if we're covered by  
24 it, and how does it apply to groundwater users,  
25 alluvial pumpers, CBM pumping, that becomes then what

1 the Supreme Court has held to be an intramural dispute  
2 and our ability to intervene on that issue seems to be  
3 -- would seem to be extremely limited.

4 I mean, you know, I can't say it's never  
5 going to happen. I mean at some point somebody may be  
6 able to intervene and -- or like the Republican River  
7 issue, may be an intramural dispute, there is some  
8 situation where you have a concrete conflict and  
9 intervention is permissible, but that question  
10 conflates the issue of coverage under the compact and  
11 liability.

12 And once -- if we're in we're in and we're  
13 like everybody else. Then our interests, you know --  
14 there's an issue of whether we're a citizen or not,  
15 but there's certainly a better argument for the  
16 application of *parens patriae* doctrine because now the  
17 State of Wyoming is making a determination from policy  
18 standpoint as to how to allocate waters under its  
19 power.

20 But that's not the issue that we're seeking  
21 to -- we're seeking to intervene on coverage and based  
22 -- you know, nobody has moved to intervene on that  
23 issue, and based on your initial memorandum opinion  
24 there seems to be little dispute on the issue of  
25 limited groundwater.

1           SPECIAL MASTER:  What if again the alluvial  
2 groundwater user who's coming to intervene says all we  
3 care about is coverage, what we want to make sure of  
4 though is that there's somebody in this particular  
5 proceeding who's arguing for the broadest possible  
6 coverage imaginable because if we're going to be  
7 included we want to make sure that everybody who has  
8 an impact on the tributaries to the Yellowstone River  
9 are also included, and right now you have the State of  
10 Wyoming but the State of Wyoming might very well argue  
11 for narrow coverage and Anadarko is there and we know  
12 it's going to argue for narrow coverage, there's no  
13 one in the proceeding who we can guarantee is going to  
14 argue for broad coverage, which is what we care about?

15           MR. WIGMORE:  Well, I think, you know, in  
16 that instance if their argument is coverage versus an  
17 allocation then the Court would continue to have to  
18 ascertain whether or not the State of Wyoming  
19 represents that party's interests properly, and if --  
20 among the factors that we raised, we are not a citizen  
21 of the State of Wyoming.  That would be a relevant  
22 factor to consider, whether an alluvial pumper is a  
23 citizen or not.

24           We've noted that our interest on that issue  
25 is separate and distinct from virtually every -- I

1 don't know from every other party because we have a  
2 particular issue of our use has increased flows as  
3 opposed to decreased flows. So, you know, like --  
4 maybe, yeah, by allowing Anadarko to intervene in this  
5 instance there's certainly a possibility that other  
6 people would likewise seek to intervene, but to date  
7 there's no other dispute about coverage other than the  
8 CBM pumping where anybody has sought to intervene.

9           SPECIAL MASTER: Okay, thanks. And another  
10 point that Mr. DuBois made was that we're dealing here  
11 with a compact. The compact is the equivalent for  
12 domestic purposes of an international treaty. It is a  
13 contract between in this particular case three  
14 sovereign entities, Wyoming, Montana and North Dakota.

15           And so isn't this exactly the type of  
16 situation where the question of what it covers is a  
17 question between the sovereign entities that are  
18 parties to that contract rather than as Mr. DuBois  
19 said basically serves some interested bystanders?

20           MR. WIGMORE: No, interested -- it's not just  
21 a contract. It is Federal law, and that Federal law  
22 applies to Anadarko or not, and the issue of the  
23 extent of Federal law is litigated all the time. You  
24 know, in sovereign entities, even sovereigns as  
25 against their citizens or as against companies that

1 operates within their boundaries take different  
2 positions with respect to the extent of Federal law  
3 all the time.

4           When you're talking about implementation of  
5 the compact at a State level and policy decisions the  
6 State is going to make with respect to allocations,  
7 then yes, maybe those sovereign issues really are  
8 paramount and that's why the Supreme Court is not  
9 allowing intervention on that issue.

10           But it's not just a -- it's not just a  
11 contract among these three parties. There's Federal  
12 law that applies or not to Anadarko and the issue of  
13 whether Federal law applies to us is litigated all the  
14 time and in that respect this issue is no different  
15 from any other challenge to the extent of Federal law.  
16 The States of Wyoming and Montana have no special  
17 solicitude in determining how Federal law applies to  
18 Anadarko Petroleum Corporation.

19           SPECIAL MASTER: Okay, thank you. That's  
20 been very helpful. So let me thank all of the  
21 parties. One of the things that I found in this  
22 particular proceeding is even things that might look  
23 easy initially are always more difficult when you look  
24 more closely at them, and so these oral arguments are  
25 extremely valuable to me and so I appreciate all the

1 time that you've put into it and the two and a half  
2 hours or so we've spent on it this morning.

3 (Proceedings concluded at 11:42 a.m.)

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## 1 REPORTER'S CERTIFICATE

2 I, Cheryl A. Palmer, a Registered  
3 Professional Reporter and Notary Public within the  
4 State of Colorado, appointed to take the hearing on  
5 Anadarko's motion to intervene, do hereby certify that  
6 the proceedings were taken by me at 1823 Stout Street,  
7 1st Floor Courtroom, Denver, Colorado, on October 8,  
8 2009; that the proceedings were thereafter reduced to  
9 typewritten form by means of computer-aided  
10 transcription; that the foregoing is an accurate  
11 transcript of the proceedings at that time.

12 I further certify that I am not related to  
13 any party herein or their counsel and have no interest  
14 in the result of this litigation.

15 IN WITNESS WHEREOF, I have hereunto set my  
16 hand and affixed my Notarial Seal this 13th day of  
17 October, 2009.

18

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21

22 My commission expires October 23, 2010.

23

24

25

\_\_\_\_\_  
CHERYL A. PALMER  
Registered Professional Reporter

1 PLEASE ATTACH TO YOUR COPY OF THE HEARING  
2 ON ANADARKO'S MOTION TO INTERVENE

3 Re: Montana v. Wyoming and North Dakota  
4 No. 137, Original - United States Supreme Court  
5 Date of Hearing: October 8, 2009

6 THIS TRANSCRIPT HAS BEEN FILED

7 XXX Signature waived or not required

8 \_\_\_\_\_ Reading and signing was not requested by the  
deponent

9 \_\_\_\_\_ Not signed, notice duly given pursuant to the  
10 Rules of Civil Procedure

11 \_\_\_\_\_ Unsigned; signed signature page and change  
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19 Enclosures: (As above noted)

20  
21 cc: Michael B. Wigmore, Esq.  
22 Jennifer M. Anders, Esq.  
23 John B. Draper, Esq.  
24 Peter K. Michael, Esq.  
James J. DuBois, Esq.  
Todd A. Sattler, Esq.

25