No. 137, Original

In the

Supreme Court of the United States

STATE OF MONTANA, Plaintiff

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA, Defendants

MEMORANDUM OPINION OF THE SPECIAL MASTER

ON THE MOTION OF ANADARKO PETROLEUM CORPORATION

FOR LEAVE TO INTERVENE

BARTON H. THOMPSON, JR.
Special Master
Jerry Yang & Akiko Yamazaki Environment
& Energy Building
473 Via Ortega
MC: 4205
Stanford, California 94305

December 18, 2009

MEMORANDUM OPINION OF THE SPECIAL MASTER ON THE MOTION OF ANADARKO PETROLEUM CORPORATION FOR LEAVE TO INTERVENE

Anadarko Petroleum Corporation ("Anadarko") seeks leave to intervene as a party. Anadarko extracts natural gas from coal seams in the basin of the Powder River, one of the tributaries to the Yellowstone River that is subject to the Yellowstone River Compact (the "Compact") and at issue in this case. Declaration of John A. Broman ¶ 2 ("Broman Declaration"), attached to the Motion of Anadarko Petroleum Corporation for Leave to Intervene ("Motion to Intervene"). During its production process, Anadarko pumps groundwater from coal seams in order to free the natural gas trapped in the coal. Id. Montana's Complaint alleges that the "pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins" is impairing downstream flows and violating its rights under the Compact. Bill of Complaint ¶ 11. Montana, however, seeks no relief directly against Anadarko, nor is Anadarko specifically mentioned in Montana's Complaint.

Montana and the United States, as *amicus curiae*, oppose Anadarko's Motion to Intervene. Wyoming, by contrast, has filed a letter brief noting that it does not object to the motion to intervene. At the hearing on Anadarko's motion, Wyoming reaffirmed that it does not oppose Anadarko's motion, and added that it would be "fine with whatever decision the Special Master makes" on the motion. Intervention Hearing Trans., p. 51, lines 17-19.[1] North Dakota, which is not playing an active role in the case, has not filed any papers regarding the Motion to Intervene, nor did it present any oral argument at the hearing on the motion.

For the reasons discussed below, I conclude that the Motion to Intervene should be denied. At this point in time, Anadarko has failed to show either that it has an interest sufficiently distinct from all other groundwater users in the basins of the Yellowstone

[1] References to the transcript of the October 8, 2009 hearing on Anadarko's Motion to Intervene are indicated by Intervention Hearing Trans., followed by the relevant pages and lines of the transcript.

River tributaries to justify intervention or, more importantly, that the State of Wyoming will not properly represent Anadarko's interests. Intervention at this stage could unnecessarily complicate the case and, during discovery and trial, potentially lengthen the proceedings. Anadarko can help inform the resolution of issues concerning the Compact's coverage of groundwater through the mechanisms available to an *amicus curiae* without becoming a party to this original matter. Intervention is unnecessary for full exploration of the issues.

The Legal Standard for Intervention

The Supreme Court's prior decisions in interstate water disputes suggest that intervention by private and public water users is generally neither necessary nor desirable and that special masters should therefore employ a high standard in considering motions to intervene. See, e.g., New Jersey v. New York, 345 U.S. 369 (1953) (denying the City of Philadelphia's motion to intervene in an interstate dispute involving the Delaware River). Special masters, in turn, have been cautious about granting motions to intervene, lest original jurisdiction matters involving sovereign states turn into "intramural disputes" or *de facto* class actions involving multiple parties each pursuing their own parochial interests.

In deciding a motion to intervene in original jurisdiction actions, it is appropriate to assume, absent evidence to the contrary, that states will adequately and appropriately represent the interests of their water users. In original jurisdiction actions, states "act as the representative" of their citizens as a whole. Maryland v. Louisiana, 451 U.S. 725, 737 (1981). The *parens patriae* doctrine recognizes "the principle that the state, when a party to a suit involved a matter of sovereign interest, 'must be deemed to represent all its citizens.'" New Jersey v. New York, 345 U.S. at 372, quoting Kentucky v. Indiana, 281 U.S. 163, 173-174 (1930). See also Nebraska v. Wyoming, 515 U.S. 1, 21-22 (1995) (noting that a "State is presumed to speak in the best interests" of all its citizens). Although the Court often speaks of states representing all their "*citizens*," states in interstate water disputes stand as representatives of all their water users, whether or not

those water users are technically citizens of the states. See, e.g., Nebraska v. Wyoming, 295 U.S. 40, 43 (1935) (holding that the United States Secretary of the Interior was not an indispensable party in an interstate water dispute involving the North Platte River, despite a local federal reclamation project, because Wyoming would "stand in judgment for him as for any other appropriator").

Original jurisdiction actions involving interstate waters, moreover, inherently deal with sovereign interests that supersede the interests of individual water users. Interstate water disputes before the Supreme Court are cases "between States, each acting as a quasi-sovereign and representative of the interests and rights of her people in a controversy with the other." Wyoming v. Colorado, 286 U.S. 494, 508-509 (1932). The waters of a state affect the prosperity of its people as a whole. As a result, interstate water disputes rise "above a mere question of local private right and involve[] a matter of state interest." Kansas v. Colorado, 206 U.S. 46, 99 (1907). See also Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (interstate water disputes involve the "unique interests" of sovereign states).

In litigating or otherwise resolving interstate water disputes, states sometimes have to take positions that advantage or disadvantage particular water users within their jurisdictions. How an interstate waterway is defined, what types of waters are included, and what approach is used to divide those waters may benefit some water users more than others. Montana, North Dakota, and Wyoming had to engage in such tradeoffs in negotiating the Compact at issue in this case. Given such issues, water users understandably may wish to intervene in interstate water cases in order to represent their own interests. In most interstate water cases, however, these issues are typically questions for the states to address in their sovereign capacities. In addressing them, states are presumed to speak in the best interests of their citizens as a whole, and intervention by individual water users is neither necessary nor desirable except in unusual circumstances. *Nebraska v. Wyoming*, 515 U.S. at 21. Permitting private water users or even the state's political subdivisions to intervene could lead to the state being "judicially impeached on matters of policy by its own subjects" and the Supreme Court being

"drawn into an intramural dispute over the distribution of water within" a state. *New Jersey v. New York*, 345 U.S. at 373.

As the Supreme Court has observed, there are not only jurisprudential but practical reasons to set a high standard for intervention in interstate water disputes. Such disputes often affect hundreds, if not thousands, of water users in the involved states. If the principle of *parens patriae* were ignored and intervention freely granted, there could be "no practical limitation on the number of citizens, as such, who would be entitled to be made parties," and the Supreme Court's original jurisdiction could readily be "expanded to the dimensions of ordinary class actions." *New Jersey v. New York*, 345 U.S. at 373. See also Utah v. United States, 394 U.S. 89 (1969) (denying intervention by a private landowner, in part because, if intervention were allowed, "fairness would require the admission of any of the other 120 private landowners" in a similar position, "greatly increasing the complexity of this litigation"). Intervenors have a right to make motions, to propound written discovery, to participate in depositions, to present expert and other testimony and participate actively at trial, to file exceptions, to participate in oral arguments before the special master and the Supreme Court, and to object to settlements.[2] "Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair." Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F. Supp. 972, 973 (D. Mass. 1943). Interventions therefore run the significant risk of slowing down and unnecessarily increasing the complexity of original jurisdiction matters before the Supreme Court.

[2] Oral argument on Anadarko's motion suggested that there is some uncertainty regarding the exact rights of an intervenor who disagrees with a proposed settlement among the states in an original jurisdiction matter. According to the United States, the question is an "interesting and not fully formed question. That's one of the reasons that [a motion to intervene by a private water user] concerns us. They are – if they are in as a full litigant there is the question whether or not they could interfere with the settlement." Intervention Hearing Trans., p. 81, lines 18-22. Ordinary federal cases suggest that an intervenor cannot block a settlement among the original parties to the action merely by withholding consent. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986). The parties appear to agree, however, that an intervenor at a minimum would have the right to object to any settlement that affects the intervenor's interests.

For all of the reasons discussed above, the Supreme Court has set a high standard for intervention in original jurisdiction cases. The Court's decision in *New Jersey v. New York* sets out the standard test for intervention in interstate water disputes heard as part of the Court's original jurisdiction. According to the Court, a private entity should be permitted to intervene only where (1) it has "some compelling interest in [its] own right," (2) that interest is different from the interests of "all other citizens and creatures of the state" as a class, and (3) the interest is "not properly represented by the state." 345 U.S. at 373. See also *Nebraska v. Wyoming*, 515 U.S. at 21-22. Individual water users "ordinarily … have no right to intervene in an original action" before the Court. United States v. Nevada, 412 U.S. 534, 538 (1973).

The Supreme Court and its special masters have seldom allowed intervention by water users in interstate water disputes. The Supreme Court itself appears to have approved intervention by a water user in only one case. In a later chapter of *Arizona v. California*, the Supreme Court granted several Indian tribes leave to intervene, emphasizing the role of tribes as "independent qualified members of the modern body politic." 460 U.S. 605, 615 (1983), quoting Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 369 (1968) & Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943). Given this role, the Court did not want to discourage the tribes' "participation in litigation critical to their welfare" and found *New York v. New Jersey* inapposite. Id. at 615 & n.5.

I have been able to find only two other instances where a special master has permitted a water user to intervene in an original matter involving interstate waters. In the first, Wyoming-based Basin Electric Power Cooperative ("Basin Electric") sought to intervene at the outset of Nebraska v. Wyoming (No. 108, Original). Basin Electric operated the Grayrocks Dam and Reservoir on the Laramie River and sought to intervene to defend against claims by Nebraska that Basin Electric's operations violated a 1945 equitable apportionment decree. The Special Master initially refused to permit Basin Electric to intervene, finding that Basin Electric had not shown a unique and compelling interest that Wyoming would not properly represent. See First Interim Report of the Special Master, Nebraska v. Wyoming 12 (No. 108, Original, June 14, 1989). In this

regard, the Special Master found that Basin Electric's posture was "comparable to that of the City of Philadelphia in *New Jersey v. New York.*" Id. at 12 n.23. Instead of allowing Basin Electric to intervene, the Special Master allowed Basin Electric to participate actively as an *amicus curiae.* Id. at 6, 12.[3]

A decade later, *after* subsequent changes in the case left Basin Electric directly adverse to Wyoming, the Special Master concluded that Basin Electric had a unique and compelling interest that Wyoming did not adequately represent and therefore allowed Basin Electric to formally intervene. Seventeenth Memorandum of the Special Master on Petition to Intervene of Basin Electric Power Cooperative, Nebraska v. Wyoming 1 (No. 108, Original, April 2, 1999). In permitting Basin Electric to intervene, the Special Master observed that Basin Electric's status had "become *sui generis* in the history of parties attempting to intervene in original jurisdiction cases." Id. at 12-13. *Nebraska v. Wyoming* thus confirms that special masters should generally not permit individual water users to intervene unless and until a conflict of interest arises with the state whose water they divert and use, but instead should allow them to participate, if and when appropriate, as *amici*.

In the second instance, the Special Master in South Carolina v. North Carolina (No. 138, Original) recently permitted several water users to intervene. First Interim Report of the Special Master, South Carolina v. North Carolina (No. 138, Original, Nov. 25, 2008). In granting the motions to intervene, the Special Master set out a standard for evaluating motions to intervene that appears to be laxer than that set out in *New Jersey v. New York.* South Carolina filed exceptions to the report of the Special Master, and the Supreme Court is currently considering the appropriateness of intervention in that action.

Anadarko suggests that the standard for intervention might be lower in a case, such as this one, involving the interpretation and application of an interstate compact than in an original jurisdiction case, such as *New Jersey v. New York,* seeking an equitable

[3] At the same time he denied Basin Electric's motion to intervene, the Special Master also denied four additional motions to intervene. First Interim Report of the Special Master, Nebraska v. Wyoming 6-14 (No. 108, Original, June 14, 1989).

apportionment of the waters of an interstate river. See Motion to Intervene, p. 5. As Anadarko notes, the rights of water users in an equitable apportionment case are derivative of those of the state in which they withdraw the water. See *Nebraska v. Wyoming*, 295 U.S. at 43 (water user's rights "can rise no higher than those of" the State). In Anadarko's view, compacts, by contrast, are akin to federal statutes or regulations. Anadarko therefore suggests that it should have as much right to participate in interpreting a compact as it would in challenging a new federal regulation. Motion to Intervene, pp. 7 & 9.

Compacts, however, are agreements among states acting in their sovereign capacity. The only signatories to the Compact in this case are Montana, North Dakota, and Wyoming. Because Congress must consent to any compact, judicial interpretation of compacts draw on the rules of statutory interpretation, and compacts have the force of federal law. New Jersey v. New York, 531 U.S. 767, 811 (1998) (federal law); Oklahoma v. New Mexico, 501 U.S. 221, 234 n.5 (1991) (applying rules of statutory interpretation); Texas v. New Mexico, 462 U.S. 554, 564 (1983), quoting Cuyler v. Adams, 449 U.S. 433, 438 (1981) (federal law). However, these aspects of compact procedure, interpretation, and authority do not change the fact that compacts are sovereign, not private, agreements. Given the sovereign character of compacts, there is no justification for using a lower standard for intervention in cases involving compacts than in cases seeking equitable apportionments.

Anadarko's Motion to Intervene

Turning from the general standards for intervention in interstate water disputes before the Supreme Court to Anadarko's Motion to Intervene, I conclude that Anadarko has failed to show that it currently meets the standards for intervention set out in *New Jersey v. New York.* Anadarko would appear to have a significant interest in one of the central questions in this case: what groundwater withdrawals, if any, does section V(A) of the Yellowstone River Compact constrain? As noted above, Anadarko pumps groundwater from coal seams in the Powder River basin in order to free the natural gas

trapped in the coal. Broman Declaration, supra, ¶ 2. Such natural gas is known as coalbed natural gas or coalbed methane ("CBM"). Id. The production of CBM uses a large volume of water. Id. ¶ 3. If the Supreme Court ultimately concludes that the Yellowstone River Compact protects pre-1950 appropriators in Montana from groundwater withdrawals occurring as part of Anadarko's CBM operations in the Powder River basin, this holding could negatively affect Anadarko's ability to produce natural gas from coal beds in the Powder River basin and thereby "compromise its business operations." See Reply of Anadarko Petroleum Corporation to Oppositions to Its Motion for Leave to Intervene, Sept. 25, 2009, p. 2 ("Anadarko Reply"); Motion to Intervene, p. 5.[4]

Anadarko, however, has failed to establish either that its interest in this case is significantly different from that of other post-1950 water users in the river basins at issue in this case or, more importantly, that Wyoming will not properly represent its interest. Turning to the first issue, Anadarko argues that its interest is unique and different from other water users in the river basins because it does not believe that it is "subject to allocation under the Compact in the first place." Motion to Intervene, p. 6. Assuming that this is a meaningful distinction, any groundwater user in the relevant river basins could make the same argument. In my Memorandum Opinion denying Wyoming's Motion to Dismiss, I concluded only that the Compact

> protects pre-1950 appropriators from interference by at least *some* forms of groundwater pumping that date from after January 1, 1950 where the groundwater is hydrologically interconnected to the surface channels of the Yellowstone River and its surface tributaries. *The question of the exact*

[4] Such a holding would not necessarily require Wyoming to restrict Anadarko's pumping of groundwater. Montana seeks only to protect its appropriators; it does not specify how Wyoming should provide that protection. So long as Wyoming reduces withdrawals from the Yellowstone River in other ways that offset the effect of Anadarko's groundwater impacts (and thereby protects pre-1950 Montana appropriators), Montana arguably would have no ground to complain under the Compact. If the Supreme Court ultimately concludes that the Compact protects pre-1950 appropriators from Anadarko's operations, however, Wyoming would seem likely to restrict Anadarko's pumping to whatever degree is necessary to avoid violating the Compact, posing a serious risk to Anadarko's operations.

circumstances under which groundwater pumping violates Article V(A) is appropriately left to subsequent proceedings in this case.

Memorandum Opinion of the Special Master on Wyoming's Motion to Dismiss Bill of Complaint, p. 42 (emphasis added). All post-1950 groundwater users therefore can claim to have an interest at this stage of the proceedings in establishing a test that would preclude their pumping operations from the reach of Article V(A) of the Compact.

Anadarko argues that there are particularly strong reasons not to extend Article V(A) to CBM operations in the Powder River basin. According to Anadarko, for example, "CBM pumping takes place at depths that agricultural pumping may not reach" and where "there is at least a serious issue … whether any meaningful hydrological interconnection exists [with] the surface water of the Powder River within Montana." Motion to Intervene, p. 2. Anadarko also argues that, while some experts believe that CBM operations can "reduce surface flows in limited circumstances," CBM can also "*increase* surface waters where the water pumped to the surface is discharged to a surface pond or directly to the stream." Id. However, even if Anadarko has stronger arguments than many shallower groundwater users that Article V(A) does not limit its groundwater extraction, this does not separate Anadarko's interest from that of other groundwater users. The difference between Anadarko's interest and that of other groundwater users is at best one of degree rather than kind. Like Anadarko, all groundwater users currently have an interest in excluding their activities from the specific reach of the Compact.

If I were to grant Anadarko's motion to intervene, therefore, there would be no basis for denying applications of other groundwater users seeking to intervene. Anadarko suggests that there is little risk of its intervention leading to the intervention of other water users and the devolution of this action into a *de facto* class action. Motion to Intervene, p. 9. As Anadarko notes, it is the only water user that to date has sought to intervene. This procedural setting, however, is no different from *New Jersey v. New York*, where only Philadelphia was seeking to intervene. Allowing Anadarko to intervene in this action might well prompt other water users to raise similar motions to intervene. According to Montana, there are "thousands of CBM wells pumping in Wyoming involving many

businesses and property interests." Montana's Response in Opposition to Motion of Anadarko Petroleum Corporation for Leave to Intervene, Sept. 18, 2009, at 6. See also Intervention Hearing Trans., p. 53, lines 3-6 (total number of CBM wells is 12,000 to 13,000). Although only eight companies apparently engage in the vast majority of CBM pumping (id., p. 33, lines 17-21; see also Anadarko Reply, at 9 n.3), all companies could potentially seek to intervene.

Anadarko responds that, if other water users seek to intervene, I could deny their motions either as untimely or on the ground that Anadarko would adequately represent their interests. Anadarko Reply, at 9. Other water users, however, could reasonably argue that they had previously assumed that motions to intervene would be denied or that, because Anadarko has become a party, they now need to intervene to protect their own separate interests. Granting leave to intervene to Anadarko alone among all groundwater and surface-water users could risk inappropriately biasing the proceeding in favor of Anadarko's interests. Furthermore, although Anadarko might adequately represent the interests of other CBM drillers, the very arguments that Anadarko makes in favor of intervention (i.e., that its interests are distinct from those of other water users) suggests that they could not adequately represent other non-CBM water users. Only states reflect the broad interests of all water users, which is why intervention by individual water users is generally not allowed in interstate water disputes before the Supreme Court.

Even if I concluded that Anadarko has a unique interest in this case that is significantly different from that of other water users, moreover, Anadarko has failed to show that Wyoming will not properly represent Anadarko. In its Motion to Dismiss, Wyoming argued that the Compact does not apply to *any* groundwater, a position that is totally consistent with that of Anadarko. Although I have concluded that the Compact reaches at least some groundwater that is hydrologically interconnected with the waters of the Yellowstone River, there is currently no evidence that Wyoming will not continue to try to minimize the reach of the Compact and argue that the Compact applies only to groundwater with the strongest hydrological connections.

Anadarko speculates that Wyoming's views of what groundwater, if any, is covered by Article V(A) of the Compact might diverge from the views of Anadarko. According to Anadarko, Wyoming has multiple, potentially conflicting interests in the resolution of this case and therefore its determination of how to define coverage "is not likely to coincide with Anadarko's stake in preserving the viability [of] one of its most significant business operations." Motion to Intervene, p. 7. Indeed, Anadarko suggests that Wyoming might conclude for political reasons that it is in the best interests of the State to include CBM pumping in the groundwater covered by Article V(A) of the Compact. According to Anadarko, "it is not at all clear where the State's interest lies. Some agricultural users may feel that if the groundwater they rely on is subject to the Compact, it might be to their advantage to have the Compact interpreted so as to expand the reach of groundwater potentially available to satisfy the demands of downstream users in Montana with a prior claim." Anadarko Reply, p. 7. See also Intervention Hearing Trans., p. 20, lines 10-15 ("The State of Wyoming and the citizens of the State of Wyoming, agricultural interest farmers, may seek to include more waters under the compact in order to have available to the State of Wyoming an additional ability to try and satisfy any calls that may be made under the compact").

Anadarko's effort to show why Wyoming *might* not properly represent the interests of Anadarko and other CBM pumpers in Wyoming is factually unconvincing. If Anadarko's operations actually do affect the amount of water that reaches downstream users in Montana, Wyoming does not have to argue that the Compact reaches such operations in order to offset other violations of the Compact by restricting Anadarko's pumping. Wyoming can simply exercise its state powers to restrict Anadarko's operations. Indeed, if Anadarko's pumping is covered by the Compact, that inclusion could reduce Wyoming's ability to offset other violations because the rights of pre-1950 Montana appropriators might require the cessation of *all* pumping in Wyoming. By contrast, if Anadarko's operations do not affect the water that reaches downstream users, extending the reach of the Compact to those operations will not help other groundwater users, because a reduction in Anadarko's pumping will not remedy any impact that those other groundwater users have on pre-1950 appropriators in Montana.

Whatever the factual merits of Anadarko's argument, moreover, the argument is at best conjecture and not actual evidence of a conflict between Wyoming's position in this case and the interests of CBM pumpers such as Anadarko. Anadarko notes that, to establish a right to intervene under Federal Rule of Civil Procedure 24, someone moving to intervene need not show that representation by the government would be inadequate. Instead, the movant need establish only "sufficient doubt about the adequacy of representation" and that "representation of his interest 'may be' inadequate." Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 & n. 10 (1972). As Anadarko also recognizes, however, the Federal Rules "are only a guide to procedures in an original action." *Arizona v. California*, 460 U.S. at 614; see United States Supreme Court Rule 9.2.

Given the unique nature of original jurisdiction matters before the Supreme Court, a private water user seeking to intervene must demonstrate more than a mere chance that the state within which it is operating will not properly represent its interests. Even in regular civil matters before federal district courts, a number of circuit courts have demanded a "strong affirmative showing that the sovereign is not fairly representing the interests" of the proposed intervenor. United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 985 (2d Cir. 1984). See also Environmental Defense Fund v. Higginson, 631 F.2d 738, 740 (D.C. Cir. 1979). The standard is even higher in original matters where states' sovereign interest over water is involved. In *New Jersey v. New York*, Philadelphia also argued that it could not "rely for an adequate presentation of its interest upon Pennsylvania," noting that it was "without any guide" as to what Pennsylvania's "policy on the Delaware now is or later may be." Memorandum in Support of the Motion of the City of Philadelphia for Leave to Intervene and To File an Answer to the Petition of the City of New York for Modification of the Decree, New Jersey v. New York, at 6 (No. 5, Original, March 7, 1953). The Court, however, denied Philadelphia's motion to intervene, noting that the city had "been unable to point out a *single concrete consideration* in respect to which the Commonwealth's position does not represent Philadelphia's interests." 345 U.S. at 374 (emphasis added). Similarly, in this case, Anadarko has failed to show any concrete evidence that Wyoming will not properly represent Anadarko's interests as a user of groundwater in that State.

As explained earlier, a state "must be deemed to represent all of its citizens" in interstate water litigation. New Jersey v. New York, 345 U.S. at 372, quoting Kentucky v.

Indiana, 281 U.S. 163, 173-174 (1930). In answer to my question as to whether Wyoming will appropriately represent the interests of Anadarko and other CBM companies in this litigation, the State of Wyoming at the hearing on Anadarko's Motion to Intervene noted that it was difficult to answer the question because it was not sure yet what positions it would take in the litigation in the future. See, e.g., Intervention Hearing Trans., p. 45, lines 15-20. Wyoming's comments at the hearing, however, give little reason to believe that it will not properly represent Anadarko's interests. According to Wyoming, "if [the Court] were to choose not to allow Anadarko to intervene obviously we as the State of Wyoming would do the best of our ability to represent all the interests within the state." Id. at 51, lines 9-12. At this point in time, Wyoming "would like to be able to adequately represent everybody." Id. at 46, lines 4-6. Although Wyoming has not made a determination of how it specifically will handle the CBM issue, moreover, its implementation of its state water laws is reportedly consistent with the position that CBM groundwater is not closely linked hydrologically with most surface waters. See id. at 47, lines 13-19 (from "the standpoint of within our own state and how we manage the conjunctive resource would probably suggest that we don't see many examples where this coal bed methane water is really impacting the surface flows as far as how we make our own statutes, but how we would treat it under this compact we just haven't made that decision").

Practical considerations also militate against permitting Anadarko to intervene at this point in time. Even if no other water user sought to follow in Anadarko's footsteps and moved to intervene, Anadarko's intervention still would unnecessarily complicate this action and could potentially delay the action's ultimate resolution. Most immediately, intervention would permit Anadarko to file exceptions before the Supreme Court to any and all elements of the first interim report and to participate, along with the states who are the parties to the Compact, in any oral argument before the Court. When the case returns from the Court, Anadarko would be entitled to participate actively in discovery, to present expert and other testimony, to cross-examine witnesses at trial, and to object to settlements. Absent evidence that Wyoming will not properly represent Anadarko's interests, there is no justification for complicating the case and potentially delaying its resolution.

Granting Anadarko's Motion to Intervene, moreover, would also establish a precedent for intervention by water users in future interstate water disputes before the

Supreme Court. As Montana noted during the hearing on Anadarko's motion, the question of scope is "endemic" to interstate water disputes. Interstate Hearing Trans., p. 62, lines 20-22. Several recent interstate water cases involving interstate compacts, for example, have involved the question of what, if any, groundwater is covered under the compact. See, e.g., Kansas v. Colorado, 543 U.S. 86, 90-91 (2004); Kansas v. Nebraska, 530 U.S. 1272 (2000); see also Texas v. New Mexico, 462 U.S. 554 (1983). Under Anadarko's arguments, groundwater users in such cases could contend in the future that they should be permitted to intervene to show that the compact at issue does not cover either groundwater use in general or their particular groundwater use. Other interstate water disputes before the Supreme Court have often involved similar questions regarding what types of water and waterbodies are included in compacts, Congressional apportionments, or prior judicial decrees. See, e.g., Arizona v. California, 373 U.S. 546 (1963) (dealing with the question of whether the Boulder Canyon Project Act included Arizona tributaries to the Colorado River in its apportionment of Colorado River waters). Under Anadarko's arguments, water users again could seek to intervene in such actions on the theory that they are seeking only to establish that particular waters or waterbodies are or are not included.

Two other issues raised by Anadarko deserve brief response. First, Anadarko notes in passing that it is not a citizen of Wyoming (Anadarko Reply, p. 8) but instead is incorporated in Delaware with its principal place of business in Texas (Intervention Hearing Trans., p. 21, lines 13-16), suggesting that the normal assumption that states will properly represent individual water users is inappropriate in this case. According to Anadarko, "it's certainly not inconceivable that the State of Wyoming may take the position, as states often do, to the benefit of their own citizens over that of a foreign corporation." Id., p. 21, lines 8-12. As noted earlier, however, the presumption that states will provide proper representation in interstate water disputes applies not simply to citizens of a state but to all of its water users. States in their sovereign capacity have an interest in protecting their waters from claims of other states, no matter who is using or not using the waters. If intervention standards varied depending on whether a water user is a citizen of a state, foreign corporations would be at an advantage in seeking to intervene, and any corporation who wished to intervene could simply change its state of incorporation in order to improve its odds of being permitted to intervene. Anadarko recognizes that foreign corporations do not normally enjoy a greater right to intervene (e.g., Intervention Hearing Trans., p. 30, lines 12-

19), although it suggests that this case is different because it is arguing that it is not covered by the Compact. As noted earlier, however, the latter distinction is not relevant to this motion.

Second, during oral argument, Anadarko urged that, because it does not believe its operations are covered by the Compact, its rights and interests are "not subsidiary to the State of Wyoming's interest. We have a completely separate interest." Intervention Hearing Trans., p. 18, lines 17-19. Anadarko's interests are subsidiary to Wyoming's interest, however, not because its operations might be covered by the Compact (an issue that has not been resolved yet), but because it is utilizing the water resources of the State. On the question whether the groundwater that Anadarko is extracting as part of its CBM operations are part of the Yellowstone River waters allocated by the Compact, Anadarko's rights are derivative of the rights of Wyoming.

Conclusion

In summary, Anadarko has not met the standard for intervention in interstate water disputes set out in *New Jersey v. New York.* Anadarko has not shown that it has a compelling interest that is different in kind or character from those of "all other citizens and creatures of the state." 345 U.S. at 373. More importantly, Anadarko has not shown that its interest will not be properly represented by the State of Wyoming. Indeed, Wyoming noted during the hearing on Anadarko's Motion to Intervene that it plans to "represent all the interests within the state" to the best of its ability. Intervention Hearing Trans., p. 51, lines 9-12. Far from aiding in the resolution of this action, intervention at the moment would inevitably complicate the proceedings and could ultimately delay the action's conclusion. If the circumstances of this case should change in the future in a manner that would meet the requirements for intervention, Anadarko can bring a new motion to intervene at that time.

While Anadarko has not met the standard for intervention in interstate water disputes before the Supreme Court, Anadarko makes a strong argument that it can provide useful information and argument on whether and how the Compact applies to

groundwater extraction, particularly in the context of CBM production. As Anadarko notes in its motion, it has "access to a wealth of information concerning CBM operations and the related issues of hydrology." Motion to Intervene, p. 6. Intervention, however, is not currently needed to obtain the benefit of Anadarko's perspective and expertise. Allowing Anadarko to participate actively as an *amicus curiae*, where appropriate, should permit Anadarko to inform these proceedings and represent its interests without carrying the problems of intervention discussed earlier. I have already allowed Anadarko to file a brief as *amicus curiae* in support of Wyoming's Motion to Dismiss (although I denied Anadarko's motion to participate in the oral argument on that motion). See Case Management Order No. 1, Nov. 25, 2008, ¶ 6 (granting motion for leave to file brief); Modification to Case Management Order No. 1, Dec. 12, 2008, ¶ 2 (denying motion for divided argument). I will continue to use my procedural authority in this case to ensure the full and fair exposition of the factual and legal issues.[5] Given Wyoming's participation in the case and my authority to permit Anadarko to provide information and argument as an *amicus* and to otherwise ensure a full development of issues that might not be completely addressed by the states themselves, Anadarko's intervention as a party is not currently required to fully and appropriately develop the issues in this matter.

For the reasons stated above, Anadarko's Motion to Intervene is denied.

[5] In Nebraska v. Wyoming, the Special Master "provided for active involvement in the case by the *amici,* allowing them to present affidavits, file briefs, including reply briefs, as well as the potential to participate more fully respecting key matters in the proceedings upon showing of good cause." First Interim Report of the Special Master, Nebraska v. Wyoming 6 (No. 108, Original, June 14, 1989). The Special Master suggested that an *amicus* could even "selectively be permitted to introduce evidence … to develop certain issues." Third Interim Report on Motions To Amend the Pleadings, Nebraska v. Wyoming (Dec. 11, 2000). In resolving the current motion to intervene, I do not address the question of what specific roles Anadarko might appropriately and helpfully play in this action as an *amicus*.