

No. 137, Original

**In the
SUPREME COURT OF THE UNITED STATES**

STATE OF MONTANA

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

**BEFORE THE HONORABLE
BARTON H. THOMPSON, JR.
SPECIAL MASTER**

**STATE OF MONTANA'S RESPONSE TO ANADARKO'S
REQUEST FOR MODIFICATION OF
CASE MANAGEMENT ORDER AND DIVIDED ARGUMENT**

The State of Montana respectfully submits the following Response in Opposition to the Request of Anadarko Petroleum Corporation for Modification of Case Management Order and for Divided Argument (“Motion for Divided Argument”). In short, Anadarko, a private for-profit oil company, is not similarly situated to the United States, whose participation was specifically invited by the Court, and Anadarko has not shown the requisite circumstances to justify its participation in oral argument.

ARGUMENT

Anadarko is not a party, but rather is an *amicus curiae*, and therefore it may participate in oral argument only with special permission from the Court or the Special Master. Supreme Court Rule 28.7 provides:

In the absence of consent, counsel for *amicus curiae* may seek leave of the Court to argue orally by a motion setting out specifically and concisely why oral argument would provide assistance to the Court *not otherwise available*. *Such a motion will be granted only in the most extraordinary circumstances*. (Emphasis added).

Anadarko's Motion for Divided Argument should be denied for three independent reasons: (1) the arguments that Anadarko proposes to make are otherwise available to the Special Master through Wyoming; (2) the extraordinary circumstances required by Rule 28 are not present; and (3) Anadarko seeks to argue facts that are not before the Special Master on Wyoming's Motion to Dismiss.

A. Anadarko is properly represented by Wyoming which has adequately presented Anadarko's arguments.

In its Brief, Anadarko raises two legal arguments: (1) that the Yellowstone River Compact does not cover groundwater, *see* Anadarko Brief at 5-13; and (2) that the Compact does not protect pre-1950 water rights, *see id.* at 16-22. Anadarko also raises an additional fact-based argument that the Compact does not cover water produced during the extraction of coalbed methane because it does not affect surface flows of the Yellowstone River, *see id.* at 13-16.

Wyoming has fully addressed the two substantive issues raised by Anadarko in its Brief. Wyoming has addressed at length Anadarko's main claim that groundwater is not protected by the Yellowstone River Compact. *Compare* Anadarko Br. at 5-13, *with* Wyoming Br. at 59-64, *and* Wyoming Reply at 16-30. Further, Wyoming has also

briefed Anadarko's second substantive argument that the Compact does not protect Montana's pre-1950 water rights. *Compare* Anadarko Br. at 16-22, *with* Wyoming Br. at 39-50, *and* Wyoming Reply at 4-16. Indeed, Anadarko acknowledges in its Brief that its substantive arguments were addressed by Wyoming. Anadarko Br. at 14 (explaining that Anadarko "agree[s] with Wyoming that neither type of groundwater use is covered by the Compact"); *id.* at 16 (recognizing that the plain language and legislative history argument made by Anadarko was "discussed in Wyoming's brief").

Interstate compacts are negotiated to provide for an equitable division and apportionment of the compacted waters of an interstate stream. In entering the Yellowstone River Compact, Wyoming sought to protect its share of the waters for use by its citizens, including Anadarko. *See generally Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (a state has standing to sue as *parens patriae* for its citizens if "its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens"); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) ("the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain"). The interests of Anadarko in this matter are represented in this forum by the State of Wyoming.

Anadarko offers no substantive arguments not already presented by Wyoming. As a result, it has not, and cannot, meet its burden under Rule 28.7 of "setting out specifically and concisely why oral argument would provide assistance to the [Special Master] *not otherwise available*." Sup. Ct. Rule 28.7 (emphasis added). The Motion for Divided Argument should be denied.

B. Anadarko Has Not Shown The Extraordinary Circumstances Required For Amicus Participation In Oral Argument.

To succeed on its request to participate in oral argument, Anadarko must show that the “most extraordinary circumstances” are present. In support of its motion, Anadarko claims that it has a “direct interest in this controversy and in the proper resolution of the motion to dismiss.” Motion for Divided Argument at ¶ 3. While this may be true, it is no different than any other case in which an entity is allowed to file a brief as an *amicus curiae*. See Sup. Ct. Rule 37.

To succeed on its Motion for Divided Argument, Anadarko must show extraordinary circumstances that go beyond a direct interest in the matter. Because it has failed to do so, Anadarko’s Motion for Divided Argument should be denied.

C. Anadarko’s Fact-Based Argument Is Not Properly Before The Special Master On Wyoming’s Motion To Dismiss.

In addition to its substantive arguments, Anadarko also raises the fact-based argument that water pumped during coalbed methane extraction does not naturally reach the surface of the Yellowstone River or its tributaries. Anadarko Br. at 13-16.

The issue before Special Master now is Wyoming's motion in the nature of a 12(b)(6) motion to dismiss under the Federal Rules of Civil Procedure. For the purposes of a Rule 12(b)(6) motion, the Special Master assumes the factual allegations in the Complaint are true. See, *First Report of the Special Master (Nebraska's Motion to Dismiss), Kansas v. Colorado, Orig. No. 126, (2000)* at 18. Further, at this stage the complaint is construed in favor of the plaintiff. See, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). It is blackletter law that resolution of a motion to dismiss is inappropriate when it requires consideration of facts beyond the Complaint or where factual development is necessary. However, it has long been recognized that the Court “in original actions, passing as it does on issues of high public importance, has always been

liberal in allowing full development of the facts.” *United States v. Texas*, 339 U.S. 707, 715 (1950). Thus, the mere existence of a question of fact requires denial of the motion to dismiss.

As noted above, Montana's allegation that groundwater pumping in Wyoming, including coalbed methane water pumping, has interfered with Montana's enjoyment of its rights under the Yellowstone River Compact is, for purposes of this motion, assumed to be true. Not only are there no facts in the Motion to support Anadarko's argument to the contrary, but even if there were, such facts are not yet in issue. As a result, Anadarko's factual argument on this point in the argument is premature at this stage of the proceedings.

Respectfully submitted this 10th day of December, 2008

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and accurate copy of STATE OF MONTANA'S RESPONSE TO ANADARKO'S REQUEST FOR MODIFICATION OF CASE MANAGEMENT ORDER AND DIVIDED ARGUMENT by e-mail and first class mail to:

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DATED: December 10, 2008


