

No. 137, ORIGINAL



IN THE  
SUPREME COURT OF THE UNITED STATES



STATE OF MONTANA, Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA, Defendants



BEFORE THE HONORABLE BARTON H. THOMPSON JR.  
SPECIAL MASTER



BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE



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## INTEREST OF THE UNITED STATES

Anadarko Petroleum Corporation's ("Anadarko") Motion to Intervene in this matter presents a question regarding the standards for intervention in interstate compact enforcement cases brought before the Supreme Court under its original jurisdiction. The United States administers numerous water projects and represents sovereign interests of the United States and various Indian Tribes in interstate litigation, including in compact enforcement actions. See, e.g., *Nebraska v. Wyoming*, 515 U.S. 1, 4 (1995); *Kansas v. Colorado*, 514 U.S. 673, 675 (1995). The United States also frequently participates in other litigation within the Court's original jurisdiction, as a plaintiff, a defendant, and an intervenor. E.g., *United States v. Alaska*, 521 U.S. 1, 4 (1997) (plaintiff); *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 277 & n.6 (1982) (defendant); *Texas v. Louisiana*, 414 U.S. 1107 (1973) (mem.) (intervenor). The United States therefore has an interest in the proper application of the standards set by the Supreme Court to govern intervention in original actions, particularly as they implicate the orderly and efficient litigation and resolution of disputes among sovereigns.

The United States has also submitted its views as amicus curiae on other matters relating to the management of the Court's original-jurisdiction docket, often at the Court's invitation. See, e.g., *Montana v. Wyoming*, 550 U.S. 932 (2007); *Alabama v. North Carolina*, 537 U.S. 806 (2002).

## STATEMENT

Montana's Bill of Complaint asserts that Montana's pre-January 1, 1950 ("Pre-Compact") water rights are protected by Art. V(A) of the Yellowstone River Compact ("Compact"), and that Wyoming has injured those rights by allowing various new post-Compact

uses of water in the Tongue and Powder River Basins (the "Interstate Tributaries"). Compl. ¶¶ 9-13; Br. in Supp. of Compl. 19. Montana alleges that Wyoming has allowed those post-Compact uses to continue diversion from the Interstate Tributaries when Montana's pre-Compact rights are short of water.

The diversions alleged to be impacting Montana's pre-Compact water rights include: (1) fifteen reservoirs built in the Wyoming portion of the Powder and Tongue River Basins since January 1, 1950, Compl. ¶ 9; Br. in Supp. of Compl. 14; (2) irrigation of new lands in the Powder and Tongue River drainages since January 1, 1950, Compl. ¶ 10; Br. in Supp. of Compl. 14; (3) increasing the consumption of water on lands irrigated prior to January 1, 1950 by implementing new irrigation methods that reduce the amount of water making its way back to the stream. Compl. ¶ 12; Br. in Supp. of Compl. 15-16; and (4) pumping of groundwater for irrigation and other uses. Compl. ¶ 11; Br. in Supp. of Compl. 15. Within this last category, Montana specifically alleges that "[s]ince January 1, 1950 [the effective date of the Compact], Wyoming has allowed ... the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins, in violation of Montana's rights under Article V of the Compact." Compl. ¶11.

Wyoming has moved to dismiss the Complaint, and the Special Master has recommended that that motion be denied. The Special Master's opinion recognized 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." Mem. Op. of the Special

Master on Wyoming's Mot. To Dismiss Bill of Compl., slip op., at 35 (dated June 2, 2009) ("Mem. Op. ").

On July 17, 2009, Anadarko filed a Motion for Leave to Intervene ("Anadarko Mot.") as a defendant. Anadarko is neither a party to, nor a specific beneficiary of, the Compact. Anadarko asserts that it engages in the extraction of natural gas from coal seams in the Powder River Basin, often referred to as coalbed methane ("CBM"). Anadarko Mot. at 1. As part of this process, groundwater is pumped from coal seams to free natural gas otherwise trapped in the coal. *Id.* However, Anadarko asserts that the groundwater it pumps may not be hydrologically interconnected to the flows in the Interstate Tributaries at issue in this case. *Id.* at 2-3. Therefore, it seeks to intervene as a party to this matter in order to defend its interests in continued groundwater pumping as part of its CBM extraction process.

#### SUMMARY OF ARGUMENT

The standard for intervention in this original action between States is established by *New Jersey v. New York*, 345 U.S.369 (1953) (per curiam). There a city with an interest in the water of the river whose waters were the subject of the original action sought to intervene, and this Court denied permission, because the city was properly represented by its State in the dispute among sovereigns. The Court held that because of the sovereign nature of the dispute, "[a]n intervenor whose state is already a party should have the burden of showing *some compelling interest in his own right*, apart from his interest in a class with all other citizens and creatures of the state, *which interest is not properly represented by the state.*" *Id.* at 373 (emphases added).

Applying this standard to the instant case, the proposed intervenor does not have a sufficiently distinct interest at stake to justify allowing it to interject itself into this case as a

party alongside the States. Montana’s theory of Compact breach requires it to establish that Wyoming has allowed Post-Compact water users—not any particular Wyoming water user—to divert water from the Interstate Tributaries to the injury of Pre-Compact water users in Montana. At present, Anadarko has the same interest as every other groundwater user in the Tongue and Powder River Basins: defeating Montana’s theory of liability. That interest is represented by the State of Wyoming. If Wyoming is nonetheless found liable, the question would then arise as to which Wyoming uses would be curtailed as part of a remedy. That is precisely the sort of intrastate matter that the Supreme Court has held should *not* be injected by intervenors into a sovereign interstate dispute. In the circumstances of this case at present, intervention by Anadarko is not appropriate under the rule established in *New Jersey v New York*.

#### ARGUMENT

**A. As Anadarko Recognizes, The Supreme Court’s Decision In *New Jersey v. New York* Establishes The Appropriate Standards For Intervention By A Non-Sovereign In This Case.**

1. “Ordinarily, in a suit by one State against another subject to the original jurisdiction of this Court, each State must be deemed to represent all its citizens. A State is presumed to speak in the best interests of those citizens.” *Nebraska v. Wyoming*, 515 U.S. at 21 (some internal quotation marks and other citations omitted). Out of respect for the unique nature of disputes between sovereigns, the Court has set a stringent standard to be applied in allowing intervention by non-sovereign entities. The seminal case establishing this standard is *New Jersey v. New York*, 345 U.S. 369 (1953).

In *New Jersey*, the Court denied permission for Philadelphia to intervene in an equitable apportionment action to which Pennsylvania was already a party. New Jersey had sued New

York (and New York City) concerning the waters of the Delaware River, and its tributaries; Pennsylvania had intervened; and the Court had entered its equitable decree apportioning the river system. *Id.* at 370-371. Twenty years later, the defendants sought to reopen the decree. Pennsylvania opposed reopening, and at that point Philadelphia sought to intervene, citing its own “unquestioned” interest in Delaware River water. See *id.* at 371-372.

The Court denied permission to intervene, holding that “[a]n intervenor whose state is already a party should have the burden of showing *some compelling interest in his own right*, apart from his interest in a class with all other citizens and creatures of the state, *which interest is not properly represented by the state.*” *Id.* at 373 (emphasis added). That requirement flowed from “the principle that the state, when a party to a suit involving a matter of sovereign interest, ‘must be deemed to represent all its citizens,’ ” for several reasons. *Id.* at 372 (quoting *Kentucky v. Indiana*, 281 U.S. at 173). First, treating the State as the representative of its citizens “is a necessary recognition of sovereign dignity,” as it prevents the State from being “judicially impeached on matters of policy by its own subjects.” *Id.* at 373. Second, the rule serves “good judicial administration,” because allowing water users like Philadelphia to intervene alongside their States would leave “no practical limitation on the number of citizens, as such, who would be entitled to be made parties.” *Id.*

2. This case implicates the same special sovereign interests that are at stake in equitable-apportionment actions. The Compact represents the party States’ agreement on a method of apportioning the waters of the Yellowstone River System, with the approval of Congress and the President. See, e.g., *Nebraska v Wyoming*, 515 U.S. at 22 (interstate water disputes are “resolved by compact or decree without the participation of individual claimants”).



The Supreme Court has consistently treated original actions by one State to enforce an interstate compact against another state as sovereign disputes. Claims arising under such an agreement therefore seek to vindicate sovereign or quasi-sovereign interests. *Id.* at 20.

Anadarko correctly adopts the standards set forth in *New Jersey v. New York* in its motion. Anadarko Mot. at 4, 5, 6.<sup>1/</sup> Therefore, the issue is whether Anadarko has shown that it has “some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.” *New Jersey v. New York*, 345 U.S. at 373.

We note, however, that Anadarko also seeks to draw support from cases interpreting Rule 24 of the Federal Rules of Civil Procedure. Anadarko Mot. At 7-8. Those Rules “may be taken as guides” in original actions, Sup. Ct. R. 17.2, but are not controlling. In particular, the Court’s reference to Rule 24 in permitting the intervention of several sovereign Indian Tribes, even though the United States could speak on their behalf, see *Arizona v. California*, 460 U.S. 605, 614-615 & n.5 (1983), should not be read to suggest that *any* individual or entity who could intervene in civil litigation may intervene in original proceedings on the same showing.

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<sup>1/</sup> The entities seeking intervention in *South Carolina v. North Carolina*, No. 138, Original, have argued in the Supreme Court that the standard for intervention is identical in *any* original action. Accord First Interim Report of the Special Master 24, *South Carolina*, *supra*. As the United States has explained in its brief in that case, the participation of individual, non-sovereign claimants is less appropriate in a case where the competing States are advancing sovereign interests, rather than proprietary interests or interests that derive from individual water users. The Supreme Court will decide the matter this Term. That dispute is apparently not implicated here, because Anadarko agrees that *New Jersey v. New York* sets the standard for resolving its motion.

**B. Anadarko's Circumstances Do Not Currently Warrant Intervention**

At present, it appears that Anadarko does not have a compelling interest in its own right that is separate and apart from other groundwater pumpers or other Post-Compact water users in Wyoming. Indeed, although Anadarko refers to its interests as “unique,” it also concedes that its intervention is no different from that of any other groundwater pumper on the Wyoming side of the Yellowstone River Basin. Anadarko Mot. 6. Anadarko's interest in minimizing the extent to which Wyoming's water resources are affected by any judgment is already represented by the State of Wyoming. Anadarko, as a mere incidental beneficiary to Wyoming's interest in the Compact, should not be granted permission to intervene.

1. Unlike the City of New York in *New Jersey v. New York*, Anadarko has not been specifically named as a defendant in this action, nor has Montana sought relief against it. Montana's Complaint does not, contrary to Anadarko's suggestion, target “Anadarko's operations directly,” Anadarko Mot. 5 at n.5. While water diversions from CBM operations are listed as a potential cause of injury, no specific producer or location is specified. Anadarko therefore stands in the same position as every one of the many other CBM producers in the Tongue and Powder River basins. See <http://wogcc.state.wy.us> (at “CoalBed” tab listing dozens of other companies apparently operating, and producing CBM, in the Tongue and Powder River drainages in Wyoming). Anadarko presents nothing about its own operation, or about the location of its leases, that is compelling in its own right and apart from the interests of the class of CBM groundwater pumpers.

Anadarko simply wants to litigate whether its actions cause the alleged impacts to flows in the Interstate Tributaries. It also seeks to litigate the issue of what degree of hydrological

connection is necessary to implicate the enforcement or accounting of water under the Compact. In these respects, Anadarko is no different than anyone else in the classes of water users whose actions are listed in the Montana Complaint. Indeed, Montana's contention that Wyoming is in breach will presumably require it to establish the volume of Wyoming's Post-Compact diversions, including all groundwater diversions. The degree of hydrological connection necessary to represent a "diversion" under the Compact is an issue shared by most, if not all, groundwater pumpers in the basins. If Anadarko is allowed to intervene to litigate this issue, there is no logical bar to intervention by any other pumpers in the basin. Like Anadarko, all pumpers can claim a vested economic interest in continued pumping. All might claim that the impact of their pumping is too attenuated or too difficult to enforce in real time to constitute a "diversion" under the Compact. Conversely, even if Anadarko can establish on technical grounds that its pumping at specified locations does not divert water from the Interstate Tributaries, it does not necessarily establish that pumping of groundwater by other companies, or at other locations, does not effect a diversion of water from those streams, or that Wyoming is not in breach of the Compact. Thus if Anadarko is allowed to intervene, there is no logical bar to prevent the intervention of all CBM producers and groundwater pumpers generally.

2. Montana highlights several other water practices in its Bill of Complaint, including acreage additions and increases in efficiency, that are alleged to cause Compact violations. Because Anadarko is seeking intervention to address causation, its intervention would also open the door to other water users who might want to argue that they, too, are not causing a decrease in the flow of Interstate Tributaries. Like Anadarko, each would want to argue the facts specific to their operation or location. Allowing intervention by Anadarko would

leave no practical limitation on the number of Wyoming citizens who would be entitled to become parties, thus frustrating the principles of very limited intervention set forth in *New Jersey v. New York*.

3. Ultimately, the impact of this proceeding on Anadarko will primarily be a function of intrastate administration within Wyoming. As explained by the Memorandum Opinion, the Compact establishes a three-level hierarchy, at the top of which are the Pre-Compact appropriative rights. Mem. Op. at 13-14. If the Pre-Compact water rights in Montana are suffering shortages that cannot be remedied by curtailment of Post-Compact water rights in Montana, then potentially all new diversions in Wyoming are subject to curtailment. Mem. Op. at 20. The Compact does not specify which uses must be curtailed within one State to ensure that State's compliance with the Compact's interstate allocation. Instead, how a State complies is left to state law, at least in the first instance, and groundwater and surface water are legally integrated in Wyoming. See Wyo. Stat. Ann. § 41-3-916; 41-3-915. Therefore, if Wyoming is found in breach of the Compact, the effect of achieving Compact compliance on both surface water and groundwater users will be determined by Wyoming state law. Anadarko's interest in establishing that its groundwater pumping does not amount to a "diversion" under the Compact is primarily an interest in ensuring that, if Wyoming is consuming more than its allocated share of water, the burden of any remedy will be borne by other Wyoming water users. As the Court established in *New Jersey v. New York*, such intrastate disputes are not, and should not, be the province of the Supreme Court.

4. Because Anadarko's interests, at this point in time, appear to be no different from any user of groundwater (or even surface water) on the Wyoming side of the compacted basin,

Anadarko has not made a compelling case that the State of Wyoming will not adequately represent its interests in this matter. It is well established that in interstate litigation a state “must be deemed to represent all of its citizens.” *New Jersey v. New York*, 345 U.S. at 372 (citations omitted). Here, Wyoming has a clear interest in limiting the extent of its water resources that will be affected by the Compact. It must be assumed, at this early point in the litigation, that Wyoming will fully litigate the issues related to the hydrologic and geographic reach of the Compact, and the degree of hydrogeological connection or pumping impact necessary to be included in the accounting of “diversions” under the Compact. Wyoming also has an interest in minimizing the scope of any Compact breach and the effect of any breach on those water resources that are implicated by the Compact.

Anadarko emphasizes that hydrologic information in its possession may be helpful to this litigation. Anadarko may provide that information to Wyoming directly or in these proceedings as an *amicus*, and even if it were not already participating, the States could likely obtain that information (from Anadarko or any other groundwater user) through third party discovery. Cf. Fed. R. Civ. P. 45; *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965).

**C. Anadarko Can Be Given Leave To Renew Its Motion If Circumstances Warrant In The Future.**

At this stage of this proceeding, no divergence is apparent between Wyoming’s litigation interests and those of all Wyoming water users, including Anadarko. The motion to intervene therefore should be denied. If circumstances significantly change such that Anadarko believes it can satisfy the standards for intervention at some future stage of the case, the Special Master can entertain a renewed motion based on those changed circumstances.

**CONCLUSION**

The motion for leave to intervene should be denied.

Respectfully submitted this 18<sup>th</sup> day of September, 2009.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the United States, **BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE**, Case No. 137, Original, was served by electronic mail and was duly served upon the following parties, by first-class mail postage-prepaid, this 18<sup>th</sup> day of September, 2009, as follows:



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