No. 112, Original

In The

Supreme Court of the United States

October Term, 1987

STATE OF WYOMING,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

REPORT OF SPECIAL MASTER

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INTRODUCTION

An Oklahoma statute requires Oklahoma coal-fired electric generating plants producing power for sale in Oklahoma to burn a mixture of coal that contains at least ten percent Oklahoma-mined coal. OKLA. STAT. tit. 45, § 939 (Supp. 1986). In this original action against Oklahoma in this Court, Wyoming asserts that the statute violates the Commerce Clause of the Constitution, art. I, § 8, cl. 3.

The Court granted Wyoming leave to file its bill of complaint over Oklahoma's objection. (108 S. Ct. 2893.) Oklahoma then filed a motion to dismiss the complaint and an answer. The Court denied the motion to dismiss (109 S. Ct. 300) and referred the case to the undersigned as Special Master (109 S. Ct. 1334).

Both parties having stated that they intended to move for summary judgment, a discovery and briefing schedule was set and later extended at the request of the parties. Both parties filed motions for summary judgment and briefs in support and in opposition.

Each of the parties then, at the direction of the Special Master, filed a statement identifying what it contended would be genuine issues as to material facts if its motion for summary judgment were denied and the opposing party's motion for summary judgment were yet to be ruled upon. After examining these submissions, I have concluded that there is no genuine issue as to any material fact, and I recommend that the Court deny Oklahoma's motion, grant Wyoming's motion, and enter summary judgment for Wyoming for the reasons to be stated.

RECOMMENDED FINDINGS OF FACT

The parties have entered into an agreed stipulation of facts. They have also submitted affidavits and other materials in support of their respective motions for summary judgment. The findings that follow are based on the stipulation and unrebutted submissions. Although the parties disagree on several issues of fact, and therefore no findings are made on those issues, in my opinion those issues are not material and this is an appropriate case for summary judgment.

A. Wyoming's Severance Tax.

Wyoming imposes a severance tax on coal extracted from land within the state, WYO. STAT. §§ 39-6-301 to 39-6-308 (1977). The tax is assessed against the person or company extracting the coal and is payable when the coal is extracted, regardless of when it is ultimately sold. The valuation of the coal for severance tax purposes is based on its fair market value and is assessed in accordance with WYO. STAT. § 39-2-202 (1977).

Since 1981, Wyoming has collected severance taxes on coal extracted by eight mining companies that sell coal to four Oklahoma electric utilities. These utilities are Oklahoma Gas and Electric Company, Public Service Company of Oklahoma and Western Farmers Electric Cooperative, all privately owned, and Grand River Dam Authority, an agency of the State of Oklahoma.

B. The Oklahoma Act.

In March, 1986, the Oklahoma legislature adopted, and the governor signed, the Act challenged in this case, Act of March 26, 1986, Ch. 43, 1986 Okla. Laws 74 (codified at OKLA. STAT. tit. 45, §§ 939 and 939.1 (Supp. 1986)). The Act, which became effective January 1, 1987, provides as follows:

> Coal-fired electric generating plants—burning Oklahoma coal.
>
> All entities providing electric power for sale to the consumer in Oklahoma and generating said power from coal-fired plants located in Oklahoma shall burn a mixture of coal that contains a minimum of ten percent (10%) Oklahoma-mined coal, as calculated on a BTU ("British Thermal Unit") basis.

OKLA. STAT. tit. 45, § 939 (Supp. 1986). The Act further provides:

> Cost increases to consumers and impairment of certain contracts prohibited.
>
> The cost to the entity shall not increase cost to the consumer or exceed the energy cost of existing long-

> term contracts for out-of-state coal preference including preference given Oklahoma vendors as provided in Section 85.32 of Title 74 of the Oklahoma statutes.

Id. § 939.1.

C. Purpose of the Oklahoma Act.

The same Oklahoma legislature, the Fortieth, at its session the previous year, had adopted a concurrent resolution "requesting Oklahoma utility companies using coal-fired generating plants to blend ten percent Oklahoma coal with their present use of Wyoming coal." Okla. S. Res. 20, 40th Leg., 1985 Okla. Sess. Laws 1694. The resolution stated that compliance would have the effect of "keeping a portion of ratepayer dollars in Oklahoma and promoting economic development" and also stated:

> WHEREAS, The coal-fired electric plants being used by Oklahoma utilities are exclusively using Wyoming coal; and . . .
>
> WHEREAS, A 1982 Ozark Council Report states that $9 million of the ratepayers [sic] dollars was paid as severance tax to the State of Wyoming; and . . .
>
> NOW, THEREFORE, BE IT RESOLVED . . . :
>
> THAT Oklahoma utilities using coal-fired generating plants seriously consider using a blend of at least ten percent Oklahoma coal with Wyoming coal . . . [and]
>
> THAT the result of such a blend would assure at least a portion of the ratepayer dollars remaining in Oklahoma and enhancing the economy of the State of Oklahoma. . . .

Id.

As the statistics on coal purchases by the utilities reported below at pp. 7-8 show, only one of the four utilities heeded this precatory resolution, and that one did so only to the extent of purchasing two-fifths of one percent of its requirements from an Oklahoma producer. The following March, at its second session, the legislature adopted the challenged Act, thus mandating the ten-percent minimum purchases that the resolution the previous year had requested.

Sixteen months after the effective date of the Act, there having been substantially less than full compliance by any of the utilities, *see* pp. 7-8 below, the next Oklahoma Legislature adopted a concurrent resolution directing the Grand River Dam Authority, to comply with the Act. Okla. S. Res. 82, 41st Leg., 1988 Okla. Sess. Laws 1915. That resolution included the following recitals:

> WHEREAS, the passage of [the Act] has provided over 700 new jobs in Oklahoma's coal mining industry and related employment sectors; and . . .
>
> WHEREAS, another benefit of [the Act] is an additional $31 million of taxable income has been generated through the purchase of Oklahoma-mined coal . . .

Id.

In this proceeding, Oklahoma asserts that these resolutions should not be considered as evidence of the Oklahoma legislature's purpose in adopting the Act, and that the Act was adopted for other purposes. When asked by Wyoming's Request for Admissions to admit that "[t]he passage of the Act was for the purpose of enhancing and encouraging the production and sale of coal mined in Oklahoma," Oklahoma answered as follows:

> Admitted in part and denied in part. The Act . . . was designed to promote lower utility rates in Oklahoma by insuring that Oklahoma electric utilities would not

> become solely reliant on a single source of supply primarily shipped by a single railroad company. Reliance on sole suppliers and shippers constituted a threat to competitive utility rates. The threat to reasonable utility rates was made even greater when Congress lifted rail price controls.
>
> Oklahoma's Act . . . eliminated this sole reliance, increased competition and lessened the likelihood that Oklahoma utility ratepayers would be harmed by energy supply cutoffs. Oklahoma admits that in advancing the interests of its ratepayers, it chose also to enhance local production and availability of coal.

Oklahoma's Response to Wyoming's Request for Admission No. 1.

D. The History of Purchases of Wyoming-Mined Coal by Oklahoma Electric Utilities.

During the years 1981 through 1986, the four Oklahoma electric utilities had purchased nearly 100 percent of their coal from Wyoming sources. After January 1, 1987, the effective date of the Act, these utilities reduced their purchases of Wyoming coal and purchased some coal mined in Oklahoma. The following charts show the percentages of each utility's purchases of Oklahoma-mined coal and Wyoming-mined coal on an annual basis from 1981 to the first four months of 1989:

GRAND RIVER DAM AUTHORITY

Year	Percentage of Coal Purchased From Wyoming	Percentage of Coal Purchased From Oklahoma
1981	100.0	0.0
1982	100.0	0.0
1983	100.0	0.0
1984	99.5	0.5
1985	100.0	0.0
1986	96.8	3.2
1987	95.5	4.5
1988	96.6	3.4
1989 (Jan.-Apr.)	97.4	2.6

OKLAHOMA GAS AND ELECTRIC COMPANY

Year	Percentage of Coal Purchased From Wyoming	Percentage of Coal Purchased From Oklahoma
1980	100.0	0.0
1981	100.0	0.0
1982	100.0	0.0
1983	100.0	0.0
1984	100.0	0.0
1985	99.6	0.4
1986	98.0	2.0
1987	93.9	6.1
1988	92.6	7.4
1989 (Jan.-Apr.)	96.7	3.3

PUBLIC SERVICE COMPANY OF OKLAHOMA

Year	Percentage of Coal Purchased From Wyoming	Percentage of Coal Purchased From Oklahoma
1980	100.0	0.0
1981	100.0	0.0
1982	100.0	0.0
1983	100.0	0.0
1984	99.7	0.3
1985	100.0	0.0
1986	98.1	1.9
1987	94.3	5.7
1988	96.5	3.5
1989 (Jan.-Apr.)	96.8	3.2

WESTERN FARMERS ELECTRIC COOPERATIVE

Year	Percentage of Coal Purchased From Wyoming	Percentage of Coal Purchased From Oklahoma
1981	100.0	0.0
1982	100.0	0.0
1983	100.0	0.0
1984	100.0	0.0
1985	100.0	0.0
1986	100.0	0.0
1987	94.2	5.8
1988	95.7	4.3
1989 (Jan.-Apr.)	94.6	5.4

(Stipulation, ¶¶ 10-12).

At the time the Act went into effect, all Wyoming coal destined for Oklahoma utilities was shipped over the Burlington Northern Railroad. Pursuant to federal statute, the rates for transportation by rail between Wyoming and Oklahoma are regulated by the Interstate Commerce Commission. 49 U.S.C. § 11501 *et seq.* (1982). This federal regulatory scheme preempts any state regulation of interstate rail rates. *See State of Texas v. United States*, 730 F.2d 339, 347 (5th Cir.), *cert. denied*, 469 U.S. 892 (1984).

E. The Properties of Wyoming-Mined Coal Compared with Oklahoma-Mined Coal.

Although not relevant in my view of the case, the comparative properties of Wyoming and Oklahoma coal have been stipulated by the parties. Their stipulation is in substance as follows:

Wyoming-mined coal has a lower average sulfur content but also a lower average BTU (British Thermal Unit) rating than Oklahoma-mined coal. Sulfur escapes and pollutes the air when the coal is burned. BTU rating reflects the heat generating efficiency of the coal when burned.

Coal extracted from Wyoming's Powder River Basin, the source of Wyoming-mined coal shipped to Oklahoma electric utilities since 1980, has had an average sulfur content between .38 and .40 as a percentage of weight. (Stipulation, ¶ 24.) The average sulfur content of Oklahoma coal delivered to Oklahoma utilities since 1985 has ranged from 1.20 to 1.51 as a percentage of weight. (Stipulation, ¶ 25.)

Oklahoma coal used by Oklahoma electric utilities has a higher average BTU rating than the Wyoming-mined coal they use. This means that it takes less of this Oklahoma-mined coal by weight to generate the same amount of energy as the Wyoming-mined coal used by the Oklahoma utilities.

RECOMMENDED CONCLUSIONS OF LAW

The cross motions for summary judgment present three legal issues that require a recommendation to the Court:

1. Whether Wyoming has standing to bring this action.
2. Whether the Act, in requiring that Oklahoma utilities burn a mixture of coal at least ten percent of which was mined in Oklahoma, violates the Commerce Clause of the Constitution, art. I, § 8, cl. 3.
3. Whether the Act's application to coal purchases by the Grand River Dam Authority, which is owned by the State of Oklahoma, is severable from the rest of the Act so that its constitutionality may be considered under the "market participant" doctrine, and, if so, whether the Act is valid insofar as it applies to the Authority.

These legal issues can be resolved without deciding any genuine issue of material fact. Summary judgment is therefore appropriate.

I.

Wyoming's Standing to Sue

Oklahoma argues that Wyoming lacks standing to bring this original action. Essentially the same argument was twice presented by Oklahoma to the Court, first in opposition to Wyoming's motion for leave to file the complaint and again, after the complaint had been filed, in support of Oklahoma's motion to dismiss. As noted above, the Court granted leave to file and denied the motion to dismiss before entering its order of reference. It is inferable that the motion to dismiss was denied on the merits. On at least one occasion when the Court's intention with respect to a dispositive motion has been otherwise, it has referred the motion to the Special Master. *See Maryland v. Louisiana*, 451 U.S. 725, 734-35 (1981) (after granting leave to file, 442 U.S. 937, the Court referred a motion for judgment on the pleadings to a Special Master, 445 U.S. 913). I recommend that the Court adhere to what appears to be its determination that Wyoming has standing to bring this action.

Oklahoma argues that any injury to Wyoming's severance tax revenues is indirect and derivative. The causal link between the Act and Wyoming's tax revenues is said to be attenuated because the tax applies to the extraction rather than the sale of the coal.

The effect of the Oklahoma statute has been to deprive Wyoming of severance tax revenues. It is undisputed that since January 1, 1987, the effective date of the Act, purchases by Oklahoma electric utilities of Wyoming-mined coal, as a percentage of their total coal purchases, have declined. (*See* pp. 7-8, *supra.*) The decline came when, in response to the adoption of the Act, those utilities began purchasing Oklahoma-mined coal. The coal that, in the absence of the Act, would have been sold to Oklahoma utilities by a Wyoming producer would have been subject to the tax when extracted. Wyoming's loss of severance tax revenues "fairly can be traced" to the Act. *See Maryland v. Louisiana*, 451 U.S. 725, 736 (1981) (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)).

Oklahoma relies on four cases for its contention that Wyoming's loss of revenue is "derivative" and not sufficiently "direct" to support standing. In three of these cases, the courts rejected attempts to base standing on contentions that acts by United States government agencies had injured the state's economy and thereby caused a decline in the state's general tax revenues. *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir.), *cert. denied*, 429 U.S. 977 (1976) (Small Business Administration's classification of disaster area); *State of Iowa ex rel. Miller v. Block*, 771 F.2d 347 (8th Cir. 1985), *cert. denied*, 478 U.S. 1012 (1986) (Department of Agriculture's implementation of disaster relief programs); *American Motorcyclist Association v. Watt*, 534 F. Supp. 923 (C.D. Cal. 1981) (Department of Interior's implementation of desert conservation plan).

In each case the state relied upon an alleged injury to the state's economy in general and the corresponding effect on general tax revenues, rather than a specific direct injury in the form of a loss of specific tax revenues. None of these cases is analogous to the case at bar. Arguments based on the *parens patriae* doctrine, which is discussed below, were also asserted as alternative grounds of jurisdiction in these cases and were rejected by the courts.

The fourth case Oklahoma cites in support of its indirect and derivative argument is the district court's decision in *Puerto Rico v. Alfred L. Snapp & Son, Inc.*, 469 F. Supp. 928 (W.D. Va. 1979). Oklahoma cites only the district court's decision in that case, however, neglecting to mention the reversal by the Fourth Circuit, 632 F.2d 365 (1980), and the affirmance of the Fourth Circuit's decision by this Court, *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592 (1982). (Okla. Br., Nov. 1989, p. 16.) Both the Fourth Circuit and this Court sustained standing. This Court's decision in *Snapp* is discussed below in the discussion of the *parens patriae* issue.

This Court has limited the exercise of its original jurisdiction under 28 U.S.C. § 1251(a) to "appropriate cases." *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972); *Arizona v. New Mexico*, 425 U.S. 794, 796-97 (1976) (per curiam). Whether a case meets this standard depends upon "the seriousness and dignity of the claim" as well as "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois v. Milwaukee*, 406 U.S. at 93. "Of course, the issue of appropriateness in an original action between States must be determined on a case-by-case basis." *Maryland v. Louisiana*, 451 U.S. at 743.

The present case is appropriate for the exercise of this Court's original jurisdiction because of the nature of Wyoming's claim and the absence of other pending litigation involving the same parties or issues. Like the Commerce Clause challenge raised in *Maryland v. Louisiana*, Wyoming's claim "implicates serious and important concerns of federalism fully in accord with the purposes and reach of [the Court's] original jurisdiction." 451 U.S. at 744. The constitutionality of the Act is not being litigated in another forum; a challenge in the Oklahoma courts brought by a group of Oklahoma consumers recently was dismissed for lack of standing. *See Northeast Oklahoma Electric Cooperative, Inc. v. Grand River Dam Authority*, Case No. C-88—127 (Dist. Ct. Craig Cy., Okla.) (consumers did not suffer injury because the Act prohibits any increase in cost to consumers).

Oklahoma also argues that Wyoming has only itself to blame for any reductions in severance tax revenues, because it has lowered its severance tax rate (from 10.5 percent in 1986 to 8.5 percent in 1987) and has based the tax on the coal's market value, which has been declining, rather than on tonnage produced.

That Wyoming could have recovered additional severance tax revenues by maintaining a higher severance tax rate or by basing the tax on volume has no relevance to the loss of severance tax revenues on coal sold to Oklahoma utilities. The availability of alternative means of generating tax revenues is not analogous to the reciprocity provisions that the Court has held to constitute "self inflicted injury." *See Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam) (each plaintiff state's own policy of giving taxpayers credit for commuter taxes paid in neighboring states caused the injury to the state and, therefore, the state had no standing to challenge the constitutionality of the commuter taxes).

An additional question relating to standing is whether Wyoming may assert grounds that are not stated in its complaint, in which the only ground pleaded is the one just discussed, *i.e.*, that the challenged Oklahoma statute reduces the severance taxes Wyoming collects on coal mined in the state. The unpleaded grounds are additional effects of the statute, *viz.*, (a) reduction of the amount of *ad valorem* taxes Wyoming collects on the coal mined in Wyoming, which are used to finance various local government functions, and (b) reduction of the royalties received on coal mined from federally owned land in Wyoming, which are shared equally between Wyoming and the federal government. Oklahoma contends that Wyoming, because it pleaded only the severance-tax effect, cannot prove or argue other effects. Wyoming responds that on a motion for summary judgment "the formal issues framed by the pleadings are not controlling," citing 10A Wright, Miller and Kane, *Federal Practice and Procedure* § 2721, p. 43 (1983). (Reply Brief, p. 17, n.9.)

The order appointing the Special Master, as is customary, grants the Special Master "authority to fix the time and conditions for filing of additional pleadings." (109 S. Ct. 1334.) Assuming this authority includes granting leave to amend, it would be inappropriate to exercise it here, because Wyoming has not sought leave to amend. In any event, it is unnecessary to consider the additional grounds, because standing exists for the reason already stated.

Wyoming's standing based on its direct injury makes it unnecessary to consider whether the *parens patriae* doctrine would give Wyoming standing. If, however, the only basis asserted for standing were the *parens patriae* doctrine, I would recommend that the Court determine that Wyoming lacks standing.

A state may bring a federal action as *parens patriae* only if the state articulates a "quasi-sovereign" interest, "apart from the interests of particular private parties." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. at 607. In the *Snapp* case the Court recognized as quasi-governmental the Territory's interests in the health and well-being of its general population and in assuring that the benefits of the federal system were not denied its general population. The allegations on the basis of which Puerto Rico's standing was sustained were that certain apple growers in Virginia had violated federal laws that gave laborers who were United States citizens preference over foreign temporary laborers. Analyzing and applying the Court's decisions on standing and the *parens patriae* doctrine, *id.* at 600-10, the Court held that standing was established by allegations that the defendants "discriminated against Puerto Ricans in favor of foreign laborers," and "that Puerto Ricans were denied the benefit of the access to domestic work opportunities that [certain federal statutes] were designed to secure for United States workers," *id.* at 608. These allegations were held "to fall within the Commonwealth's quasi-sovereign interests and, therefore . . . [to] support a *parens patriae* action." *Id.*

In *Snapp,* only 780 Puerto Rican workers were victims of Virginia's discrimination, and the impact on the economy of Puerto Rico was, therefore, concededly slight. The Court nevertheless held that the Puerto Rico could bring a *parens patriae* action. The Court noted that a state has a quasi-sovereign interest in the health and well-being, physical and economic, of its residents in general and in not being denied its rightful status in the federal system, including an "interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce," 458 U.S. at 608 (citing *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923)).

Justice Brennan's concurring opinion in *Snapp,* joined by three other Justices, points out, however, that a *parens patriae* action may be cognizable in a federal district court but nevertheless may not be an appropriate case for the exercise of the Supreme Court's original jurisdiction. Different considerations are applicable to the exercise of original jurisdiction, including the institutional limitations on the Court's ability to accommodate such actions. 458 U.S. at 610-11. If the instant action had been brought in a district court, the right of Wyoming to proceed as *parens patriae* would be evaluated by different standards, and a closer question would be presented. Wyoming has alleged injury, however, aside from its loss of tax revenues, to a select group of coal producers rather than its general population. I would not recommend that standing be recognized on the basis of the *parens patriae* doctrine.

II.

The Commerce Clause Issue

A. General Principles.

Although the Commerce Clause, art. I, § 8, cl. 3, literally read, is a grant of power to Congress, it has long been interpreted as "directly limit[ing] the power of the States to discriminate against interstate commerce." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). *See, e.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35-36 (1980); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). This "negative" aspect of the Commerce Clause arises from "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual states within their respective spheres." *Healy v. Beer Institute, Inc.*, 109 S. Ct. 2491, 2499 (1989). In its negative aspect the clause prohibits "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 273-274.

The Court has distinguished between state statutes that have only an "incidental" effect on interstate commerce, *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and those that clearly discriminate against interstate commerce, *see New Energy Co. of Indiana v. Limbach*, 486 U.S. at 274; *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 36-37; *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978). It has been said that if the statute "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. In contrast, when the state statute amounts to simple economic protectionism, a "virtually *per se* rule of invalidity" has been applied. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). *See, e.g., Maine v. Taylor*, 477 U.S. 131, 148 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

The Court said in *Brown-Forman Distillers v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986), "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." The Court also has observed that "state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 274. Even state laws that respond to legitimate local concerns violate the Commerce Clause if they discriminate arbitrarily against interstate commerce, for "the evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia v. New Jersey*, 437 U.S. at 626.

Despite the two-tiered approach based on the distinction between "incidental" and "direct" effects on interstate commerce, the Court has acknowledged "that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce*

Church balancing approach." *Brown-Forman Distillers v. New York State Liquor Authority,* 476 U.S. at 579. Under either approach, the critical consideration is the statute's overall effect on both local and interstate commerce. *Id.*; *Healy v. Beer Institute, Inc.*, 109 S. Ct. 2491, 2499 (1989).

It is for the Court to determine whether the purpose of a challenged statute relates to a legitimate local concern, and the "name, description or characterization given it by the legislature or the courts of the State" do not bind the Court in making that determination. *Hughes v. Oklahoma,* 441 U.S. at 336. Almost any state law burdening interstate commerce can be rationalized as a regulatory measure intended to protect the citizens of the state. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). Uncritical deference to the state's assertion of purpose "would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. Madison,* 340 U.S. 349, 354 (1951).

B. The Oklahoma Act Discriminates Against Interstate Commerce on Its Face and in Practical Effect.

The initial inquiry is whether the statute discriminates against interstate commerce on its face or in practical effect. From the language of the Oklahoma Act and the stipulated evidence concerning the source of coal purchased by Oklahoma utilities before and after the adoption of the Act, it appears that the Act is discriminatory in both respects.

Section 939 of the Act expressly reserves a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other states. This preference for coal from domestic sources cannot be characterized as anything other than protectionist, because it purports to exclude coal mined in other states based solely on its origin. *See New Energy Co. of Indiana v. Limbach*, 486 U.S. at 274 ("The Ohio provision at issue here explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination"); *Philadelphia v. New Jersey*, 437 U.S. at 626-27 (the Commerce Clause forbids discrimination "against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently").

The stipulated evidence confirms that the Act is discriminatory in effect as well as on its face. From 1981 to 1986, Wyoming provided nearly 100 percent of the coal purchased by Oklahoma utilities generating electrical power for Oklahoma consumers. Following the effective date of the Act, January 1, 1987, Oklahoma utilities purchased Oklahoma coal in amounts ranging from 3.4% to 7.4% of their needs on an annual basis and reduced their purchases of Wyoming-mined coal by corresponding amounts. (*See* pp. 7-8, *supra*.)

Oklahoma argues that it is significant that the Act sets aside only a "small portion" of the Oklahoma coal market and does not place an "overall burden" on out-of-state coal producers doing business in Oklahoma. (Okla. Nov. 1989 Br., p. 30.) The volume of commerce involved, however, does not determine whether a statute discriminates against interstate commerce. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 268-69 (tax exemption for domestic wines improperly discriminated against interstate commerce, despite the small volume of sales and the absence of a present competitive threat); *cf. New Energy Co. of Indiana v. Limbach*, 486 U.S. at 276-277 ("Varying the strength of the bar against economic protectionism according to the size and number of in-state and out-of-state firms affected would serve no purpose except the creation of new uncertainties in an already complex field."). The undisputed evidence demonstrates that the Act has caused Oklahoma utilities to purchase substantial quantities of coal from Oklahoma mines that, in the absence of the Act, they would have purchased from Wyoming mines.

The discrimination against interstate commerce contained in Section 939 of the Act is not diminished by Section 939.1. The latter provision protects Oklahoma consumers from any cost increase due to compliance with the Act and relieves Oklahoma utilities from compliance with the Act if the cost of Oklahoma coal "exceeds the cost of existing long term contracts for out-of-state coal." The possibility that the Act may in some circumstances relieve Oklahoma utilities of the obligation to purchase Oklahoma-mined coal does not eliminate its discriminatory effect. *Philadelphia v. New Jersey*, 437 U.S. at 628 (a New Jersey statute prohibiting importation of waste from other states, albeit with exceptions, was held to be an impermissible barrier against movement of interstate commerce); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 40-42 (a Florida statute prohibiting some, but not all, out-of-state investment concerns from entering local markets was held to violate the Commerce Clause). Also irrelevant are disputed issues relating to the interpretation of Section 939.1 and the comparison of "spot" coal prices with long-term contracts for Wyoming coal. (*See* September 1989, Wyo. Br., p. 26); November 1989 Okla. Br., p. 10.)

C. The Act's Deliberate Discrimination Against Interstate Commerce Is Not Justified by Any Purpose Advanced by Oklahoma.

1.

Oklahoma argues that the Court must accept its proffered justifications for the statute and ignore the Oklahoma legislature's resolutions expressing a protectionist purpose because, under Oklahoma law, legislative resolutions are not evidence of the intent of the legislature.

The 1985 resolution was adopted in the first session of the same Oklahoma legislature that adopted the challenged statute in its second session the following year. The resolution "request[ed] Oklahoma utility companies using coal-fired generating plants to consider plans to blend ten percent Oklahoma coal with their present use of Wyoming coal." Okla. S. Res. 20, 40th Leg., 1985 Okla. Sess. Laws 1694. When the utilities failed to heed this request, the same legislature promptly adopted the challenged statute, mandating what it had requested the previous year. (*See* pp. 4-5, *supra.*)

Oklahoma argues, however, that under that state's law "a legislative resolution is merely an expression of opinion and has no force or effect of law," and that "[o]nly measures passed by both houses of the legislature and then signed by the Governor become law in Oklahoma." (Okla. November 1989 Br., p. 32.) Oklahoma also asserts, citing a case in which the legislature had attempted to interpret an existing statute by a resolution (*Stephens Produce Co. v. Stephens*, 332 P.2d 674 (Okla. 1958)), that the resolution is not part of the legislative history of the act because under Oklahoma law legislative resolutions "may not be used to express legislative intent." (Okla. Nov. 1989 Br., p. 32.) Yet in its answer to a Wyoming interrogatory, served in the discovery phase of this case, asking why the Oklahoma legislature adopted the statute, Oklahoma acknowledged that resort may be had to, *inter alia*, "available legislative history." (Answers to Wyoming's Interrogatory No. 2.)

When deciding whether a state statute is consistent with the United States Constitution, this Court should not be foreclosed by a rule of state law from examining, in order to determine the purpose of the statute, joint resolutions of the legislature that adopted the statute. If the legislative resolution were considered, it would be impossible rationally to escape the conclusion that the challenged statute was adopted for a protectionist purpose, despite Oklahoma's present protestations. In similar circumstances, the Court dismissed a reason advanced by the state after passage of a challenged statute as having "the flavor of *post hoc* rationalization," the "bare assertion" of which "is certainly inadequate to survive the scrutiny invoked by the facial discrimination of" the statute. *Hughes v. Oklahoma,* 441 U.S. at 338 n.20.

The issue of legislative purpose is one of fact, however, *Maine v. Taylor*, 477 U.S. at 144-45, and in view of the teaching of that case it would be inappropriate to grant the motion without receiving evidence as to legislative purpose, if the purposes advanced by Oklahoma, assuming them to be the real purposes, would justify Oklahoma's statute under the Commerce Clause.

2.

Oklahoma does not, however, seek to offer evidence that the purposes of the Act were as it asserts. Its Statement of Genuine Issues filed in connection with the motions for summary judgment lists issues that relate only to the effect of the Act, not to its purpose. It will nevertheless be assumed for present purposes that Oklahoma would argue that its purpose is shown by the effects, and, further, that Oklahoma is correct in that argument.

Oklahoma's Statement of Genuine Issues lists six issues, all related to the effects of the Act:

1. Whether the Act "fosters an increase in coal suppliers," resulting in "more competitive coal prices and/or transportation prices."
2. Whether it "increases the availability of local supplies of coal and thus lessens the likelihood . . . and potential impact of fuel shortages or cutoffs" of coal.
3. Whether it "preserves the availability of local coal supplies," thereby reducing the need for "expensive rail shipping."
4. Whether the Act, in fostering competition and local coal prices, "lessens the likelihood of higher utility rates to the Oklahoma taxpayer."
5. Whether it "assists in the regulation of utility rates."

The sixth issue listed by Oklahoma, *viz.*, "Whether the State of Wyoming has suffered any direct injury from Oklahoma's Act," can be put aside here, because the pertinent facts are not in dispute and the direct-injury issue is dealt with in Part I above.

If it is assumed that the five other listed issues should be answered in the affirmative, Oklahoma still has not met its heavy burden of constitutionally justifying the discrimination against interstate commerce. Issues 1, 3, 4 and 5 are purely economic. Issue 2, relating to potential fuel shortages or cutoffs, purports to be more than economic, but it cannot be accepted as a justification for trade barriers in view of the reasoning of the Court in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, and

H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 537-38 (1949).

Baldwin is described by Professor Tribe as "the leading case" in the line of cases holding unconstitutional under the Commerce Clause "[s]tate efforts to protect local economic interests through measures limiting access to local markets by out-of-state sellers or suppliers." Tribe, *American Constitutional Law* 413-14 (2d Ed. 1988). That case dealt with a New York statute that provided for a minimum price for milk sold by producers to dealers. To prevent out-of-state milk producers from undercutting the price, the statute also prohibited resale within the state of any milk purchased outside the state at prices lower than the minimum price. The Court held the statute to be a barrier to trade violative of the Commerce Clause. The justification asserted by New York and found by the Court to be insufficient was, in Justice Cardozo's words, as follows:

> The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk; the supply being put in jeopardy when the farmers of the state are unable to earn a living income .... [T]he economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich.

The Court stated further,

> To give entrance to that excuse would be to invite a speedy end to our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

Id. at 523. Accepting the state's justification as sufficient, said Justice Cardozo, "would be to eat up the rule under the guise of an exception." *Id.*

The Court went on in *Baldwin* to deal with another argument, *viz.*, that the higher prices were justified as a means of removing the temptation for out-of-state milk producers to save money at the expense of sanitary precautions. There were other means of accomplishing this objective that would not impermissibly burden commerce, said the Court. *Id.* at 524.

In the case at bar, Oklahoma's exclusion of ten percent of the coal to be used by Oklahoma utilities is analogous to the burden placed on commerce in *Baldwin*. Assuming that one of the purposes of the Oklahoma statute is the non-economic one of protecting Oklahoma consumers from coal shortages, that purpose is no more benign or important than that asserted by the state in *Baldwin* and held by the Court to be an insufficient justification for the statute.

In *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. at 531-533, 535, 538, Justice Jackson, writing for the majority of six justices, quoted from and relied upon the *Baldwin* decision in holding another New York statute invalid as applied. The statute had been applied to deny a New York license for an additional milk-receiving plant proposed to be used for receiving milk to be sent out of state for processing and consumption. The asserted justifications were that the proposed plant would divert milk from other plants, increasing the costs of handling milk at these plants and depriving them of milk needed during seasons of shortage, and also "would tend to a destructive competition in a market already adequately served." 336 U.S. at 529. Speaking of the Commerce Clause's implied ban on economic protectionism, the Court said,

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, including the vital power of erecting customs barriers against foreign competition,

> has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. Seelig*, 294 U.S. [511], 527, 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.'

336 U.S. at 537-38. *See also Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928) (state cannot prohibit export of shellfish); *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 956-58 (1982) (state cannot use reciprocity rule to prohibit export of ground water); *West, Attorney General of the State of Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229, 261-62 (1911) (state cannot prohibit export of natural gas); *Pennsylvania v. West Virginia*, 262 U.S. at 596 (state cannot prohibit export of coal).

Oklahoma's statute conflicts with this principle of political unity. Oklahoma attempts to protect its citizens' economic interests at the expense of the tax revenue interests of other states and of the economic interests of coal producers in those other states. If this rationale were accepted, the effect would be, in Justice Cardozo's words, "to eat up the rule under the guise of an exception." *Baldwin v. Seelig*, 294 U.S. at 523.

Neither in *Baldwin* nor in *Hood* did the Court suggest that the statute would have been upheld if the state could have demonstrated that its purpose of assuring the supply of an essential commodity could not have been achieved by available non-discriminatory means, although such a demonstration is usually stated as a part of the balancing test in the Court's opinions (*e.g.*, *Maine v. Taylor*, 477 U.S. at 140; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. at 958). It would appear that there was no other means of achieving New York's purpose in *Baldwin* or *Hood*. If the no-other-means element were an essential part of the balancing test and the plausibility of the state's assertion of purpose is not to be questioned, the Commerce Clause would impose few, if any, restraints upon the states. *Cf. Dean Milk Co. v. Madison*, 340 U.S. at 354 (quoted *supra* at p. 19).

In any event, Oklahoma does not argue or offer to prove that the asserted purposes of the Oklahoma Act cannot be achieved by non-discriminatory means. As Professor Tribe has noted, some commentators have expressed the view that the requirement of proof that there are no non-discriminatory alternatives is "so strict that it never could be met." *See* Tribe, *American Constitutional Law* 415-416 n.13 (1988). Tribe describes *Maine v. Taylor*, 477 U.S. 131, in which the burden was found to have been met, as "an exceptional case." In that case the Court rejected a Commerce Clause challenge to a Maine statute prohibiting importation of baitfish into the state. The Court based its holding on an evidentiary showing that the statute was necessary to protect against contamination of Maine fisheries from non-native baitfish, and that no other means of protection was available. The justification found sufficient related to the environment, an area in which, Tribe observes (at 415), the Court has been especially sensitive to the interest and responsibility of the states. I do not understand that case to dilute the principle that the Commerce Clause precludes a state from reserving a segment of a market within the state for sellers in the state. There is no case in which the Court has sustained a state's attempt to do so.

The protectionism embodied in the challenged Oklahoma statute is not a permissible means of protecting the interests the state advances. As the Court stated in *Philadelphia v. New Jersey*, 437 U.S. at 626, "the evil of protectionism can reside in legislative means as well as legislative ends." Here, the legislative means chosen by Oklahoma are explicitly discriminatory and contravene "the general principle that the Commerce Clause prohibits a state from using its regulatory power to protect its own citizens from outside competition." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 44. *See also Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 273.

In summary, I recommend that the Court find that there is no issue of material fact, and that the justification advanced by Oklahoma is an insufficient basis for the challenged statute's discrimination against interstate commerce. For purposes of the recommendation, I accept Oklahoma's representation that the Act was adopted to increase the sources of coal for Oklahoma utilities in order to hold down utility rates over the long term and in order to avoid dependence on the single railroad that delivered coal from Wyoming mines to the Oklahoma utilities; and I also assume that the genuine issues asserted by Oklahoma as precluding summary judgment, pp. 24-25, *supra*, (except for direct injury, which is a legal issue) would be resolved in Oklahoma's favor.

D. The Act Is Not Immune From Commerce Clause Scrutiny as Part of Oklahoma's Regulation of Utility Rates.

Oklahoma also argues that the required use of Oklahoma-mined coal by utilities generating electric power in the state is part of its regulation of retail utility rates and is therefore immune from a challenge under the Commerce Clause. Oklahoma contends that, because the Federal Power Act, 16 U.S.C. § 824 (1982), leaves the regulation of retail electric rates to the states, state regulation of those rates is exempted from the strictures of the Commerce Clause.

Even if it is assumed that the Act constitutes an exercise of Oklahoma's retail utility ratemaking powers, the Act is not exempt from scrutiny under the Commerce

Clause. In reviewing challenges to state laws concerning utility regulation, the Court has applied Commerce Clause analyses. Indeed, the Court has expressly held that § 201(b) of the Federal Power Act, which contains the same language as § 824(b), on which Oklahoma relies, does not constitute an affirmative grant of authority permitting the states to burden interstate commerce. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341-343 (1982). Oklahoma attempts to distinguish the holding in *New England Power Co.* on the grounds that the case involved a complete ban on hydroelectric power, which was clearly outside that the "lawful authority" contemplated when the Federal Power Act was passed in 1935, *see* 16 U.S.C. § 824(b) (1982). No authority is cited, however, suggesting that in-state purchase quotas imposed on utilities in an effort to regulate utility rates are within the "lawful authority" referred to in Section 824(b), or that a partial rather than a complete ban on interstate commerce is permissible. State statutes regulating utilities have been subjected to the same scrutiny under the Commerce Clause as other legislation. Although upholding the state statutes reviewed, the Court in *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329, 336-37 (1951) (state law requiring natural gas sellers to obtain a permit did not violate the Commerce Clause), and in *Arkansas Electric Cooperative Corp. v. Arkansas Public Utility Commission*, 461 U.S. 375, 394 (1983) (state regulation of wholesale utility rates) considered the commerce clause challenge on the merits. The challenged statute is not immune from Commerce Clause restraints.

III.

Severability

Oklahoma argues that even if the statute is unconstitutional as it applies to the three privately owned electric utilities in Oklahoma, it should be upheld as it applies to the plant owned and operated by Grand River Dam Authority, an agency of the state, *see* OKLA. STAT., tit. 82, § 861, acting as a market participant.

In applying the Commerce Clause, the Court has drawn a distinction between states acting as market regulators and states acting as market participants. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806-10 (1976). Although the Commerce Clause restricts the ability of states to impose tax and regulatory measures burdening interstate commerce, it does not place restrictions upon states acting as market participants in the free market. *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 810. If the Oklahoma Act applied only to purchases by the Grand River Dam Authority, it would constitute a purchasing decision by the State. As such, it would fit within the "market participant" exception to the restrictions imposed by the Commerce Clause on state action.

The market-participant exception is available to Oklahoma, however, only if the application of the Act to the Authority may be considered separately, or severed, from its application to privately owned utilities. Severability under these circumstances is to be determined under state law. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623-24 (1985); *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982).

When the question of severability has arisen in a case originating in a state court, this Court has declined to decide that issue and has remanded the case to the state court for decision of the issue. *Hooper v. Bernalillo County Assessor, supra,* 472 U.S. at 623-24; *Zobel v. Williams,* 457 U.S. 55, 65 (1982). I recommend that a similar course be followed here, even though the state law question arises in the context of applying the commerce clause and the market participant exception to that clause. If the recommendation were followed, this Court would enter judgment with respect to the three privately owned utilities (Oklahoma Gas and Electric Company, Public Service Company of Oklahoma, and Oklahoma and Western Farmers Electric Cooperative) and dismiss the claim insofar as it relates to Grand River Dam Authority, without prejudice to the right of Wyoming to assert the claim as to the Authority in an appropriate forum.

If, however, the Court were to decide to exercise jurisdiction over the claim as to the Authority, I would recommend that its decision be that the application of the Act to the Authority is severable from its application to the three privately owned utilities, and thus protected by the market participant doctrine, for the following reasons.

Oklahoma courts have held that valid portions of a statute are severable "unless it is evident that the Legislature would not have enacted the valid provisions with the invalid provisions removed, if with the invalid provisions removed the rest of the act is fully operative at law." *Englebrecht v. Day,* 208 P.2d 538, 544 (Okla. 1949). The Oklahoma legislature made its intent clear in this instance by including the following severability clause in the Act:

> The provisions of this act are severable and if any part provision shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

Act of March 26, 1986, Ch. 43, 1986 Okla. Laws 74. Under Oklahoma law, a severability clause creates a presumption that the legislature would have adopted the statute with the unconstitutional portions omitted. *Englebrecht v. Day*, 208 P.2d 538, 544 (Okla. 1949); *Williams v. Oklahoma*, 542 P.2d 554, 595-96 (Okla. 1975).

Here severing the application of the Act to the Authority from the unconstitutional application to privately owned utilities does not offend the general principle that "[o]rdinarily, exceptions should not be read into [a] statute which are not made by the legislative body." *See Grand River Dam Authority v. Oklahoma*, 645 P.2d 1011, 1018 (Okla. 1982). The purpose of that principle is to assure compliance with the intention of the legislature. *Id.* at 1018; *Udall v. Udall*, 613 P.2d 742, 745 (Okla. 1980). Severance in this case would seem to be consistent with the intent of the Oklahoma legislature.

Alabama Power Company and The Wyoming Mining Association have filed briefs as *amici curiae*, pursuant to leave of Court granted before entry of the order of reference. Burlington Northern Railroad Company has filed a Statement of Endorsement of the brief *amicus curiae* of The Wyoming Mining Association, pursuant to leave granted by the Special Master after entry of the order of reference. These briefs have been considered by the Special Master.

CONCLUSION

For the foregoing reasons, I recommend as follows:

1. Wyoming should be held to have standing to bring this action.

2. Wyoming's motion for summary judgment should be granted and declaratory and injunctive relief should issue with respect to the Act as it applies to Oklahoma Gas and Electric Company, Public Service Company of Oklahoma, and Oklahoma and Western Farmers Electric Cooperative, the privately owned utilities, on the ground that the Act is unconstitutional under the Commerce Clause. As to Grand River Dam Authority, the action should be dismissed without prejudice to its right to assert its claim in an appropriate forum; alternatively, the Act should be held valid insofar as it applies to the Grand River Dam Authority.

3. Oklahoma's motion for summary judgment should be denied.

Respectfully submitted,

PHILIP W. TONE
Special Master

Dated: June 29, 1990