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Number 83, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

versus

STATE OF LOUISIANA,

Defendant

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF SPECIAL MASTER, DATED MAY 14, 1980 AND BRIEF IN SUPPORT THEREOF

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Defendant

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF SPECIAL MASTER, DATED MAY 14, 1980

The State of Louisiana, the defendant herein, excepts to the Special Master's Report, dated May 14, 1980, in the following respects:

Exception No. 1

The State of Louisiana excepts to the Special Master's premature consideration of the intervention motions of (a) the State of New Jersey, (b) the United States and the Federal Energy Regulatory Commission, and (c) the seventeen pipeline companies, without first addressing the jurisdictional, standing and prudential problems raised by the State of Louisiana in its answer and motion to dismiss.

Exception No. 2

The State of Louisiana excepts to the Special Master's recommendation that the motion of the State of New Jersey for leave to file a complaint as intervenor be granted.

Exception No. 3

The State of Louisiana excepts to the Special Master's recommendation that the motion of the United States and the Federal Energy Regulatory Commission to intervene and file a complaint in intervention be granted.

Exception No. 4

The State of Louisiana excepts to the Special Master's recommendation that the seventeen pipeline companies be permitted to intervene as plaintiffs.

Exception No. 5

The State of Louisiana excepts to the Special Master's reservation of "the final determination of the applicability of the Eleventh Amendment until the final decision of the case."

Exception No. 6

The State of Louisiana excepts to all the Special Master's findings of fact and conclusions of law with respect to the foregoing five exceptions.

Exception No. 7

The State of Louisiana excepts to the Special Master's recommendation that the motion of Associated Gas Distributors in support of plaintiffs' motion for judgment on the pleadings be granted.

Respectfully submitted in pursuance of the Order of the Court dated June 9, 1980.

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BRIEF IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF SPECIAL MASTER

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BRIEF IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF SPECIAL MASTER

STATEMENT OF THE CASE

On March 29, 1979, the eight Plaintiff States moved for leave to file a complaint against the State of Louisiana. The proposed complaint sought (1) a declaration that the Louisiana First Use Tax "is unconstitutional and unenforceable with respect to natural gas transported or sold in interstate or foreign commerce;" (2) preliminary and permanent injunctions prohibiting Louisiana from collecting that tax; and (3) an order "that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce be refunded to the taxpayers together with interest thereon."

Paragraph I of the proposed complaint asserted that

> The exclusive original jurisdiction of this Court is invoked under the Constitution of the United States, article III, section 2, clauses 1 and 2 ("Controversies between two or more States"), and 28 U.S.C. §1251 (a) (1) (1976). Plaintiffs have no other plain, speedy or adequate remedy at law and have no remedy whatsoever in any other federal court.

In Paragraph III of the complaint it was further alleged that

> Plaintiffs bring this action in their proprietary capacities as substantial purchasers of natural gas upon which the [Louisiana] First Use Tax will be imposed, and in those capacities will sustain substantial monetary damages as a result of the First Use Tax. Plaintiffs also bring this action in their *parens patriae*, or quasi-sovereign capacities, as guardians of the health, welfare and prosperity of the citizens of Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island, and Wisconsin.

Louisiana responded to the motion for leave to file by a brief in opposition that challenged not only the substantiality of the federal constitutional issues respecting the First Use Tax but also the standings of the Plaintiff States to raise those issues. Standing was questioned from the standpoint of the Plaintiffs' alleged proprietary capacities as gas consumers and their alleged *parens patriae* representation of their citizens. Louisiana further urged that maintenance of this action was precluded by the prudential absention doctrine reflected in *Arizona v. New Mexico*, 425 U.S. 794 (1976).

Thereafter the United States and the Federal Energy Regulatory Commission, as *amici curiae*, filed a brief asserting that the Plaintiff States did have standing and that the case was otherwise appropriate for the exercise of original jurisdiction. The *Arizona* case was distinguished *inter alia* because in the instant situation there was — at the time the *amici* brief was filed — no pending suit in any other court that was thought to be "an appropriate vehicle" for the decision of the constitutional issues raised by the Plaintiff States.[1]

On June 18, 1979, this Court entered an order that simply granted the motion for leave to file the bill of complaint and gave the State of Louisiana sixty days to answer. No mention was made of the objections raised by Louisiana. Nor was there any finding or determination that the Plaintiff States had standing to raise their constitutional objections to the First Use Tax or that this Court's original jurisdiction had been properly invoked.

On August 17, 1979, Louisiana filed an answer to the complaint. The answer addressed each paragraph of the complaint, specifically denying the allegations of jurisdiction in Paragraph I of the complaint and the allegations of standing in Paragraph III "either in their proprietary capacity or as *parens patriae* on behalf of their respective citizens." Paragraph LXVII of the answer recited the additional allegation that "plaintiff states are without standing to institute and prosecute this action, and this Court has no original jurisdiction of this cause, all for the reasons set forth in Louisiana's brief in opposition to Plaintiffs' motion for leave to file complaint herein."

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[1]In the *Arizona* case, 425 U.S. at 796, it appeared that a declaratory judgment action had been filed by three Arizona utilities in a New Mexico state court prior to Arizona's filing of its motion in this Court to file a bill of complaint. That state court action raised the same constitutional issues that Arizona sought to raise in this Court.

This paragraph of the answer also asserted that the Plaintiff States "have other judicial remedies available to them by way of intervention in pending legal proceedings in the courts of Louisiana through which the issues sought to be raised here may be fully litigated and, if necessary, ultimately brought to this Court by direct appeal."

The "pending legal proceedings in the courts of Louisiana" referred to in Paragraph LXVII of the answer related to the filing in a Louisiana state court on June 22, 1979—just four days after this Court granted leave to file the Plaintiff States' complaint — of a tax refund suit by the seventeen private pipeline companies. That suit alleged that the Louisiana First Use Tax was unconstitutional for precisely the same reasons that are asserted before this Court by the Plaintiff States. *Southern Natural Gas Co., et al, v. McNamara, Louisiana Department of Revenue and Taxation and the State of Louisiana,* Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, Number 225,533.[2] Louisiana's answer was accompanied by a motion for the appointment of a Special Master.

On August 28, 1979, the seventeen pipeline companies upon whom Louisiana's First Used Tax is levied filed a motion for leave to intervene as plaintiffs in this Court and to file a complaint. The proposed complaint, attached to the motion, asserted in its first paragraph that leave was being sought "to file this Complaint in Intervention pursuant to article III, §2, clauses 1 and 2 of the Constitution of the United States ('Controversies ... between a State and Citizens of another State'); Rule 9 of this Court; and Rule 24 of the Federal Rules of Civil Procedure." Paragraph 10 of the proposed complaint stated that each intervenor had timely instituted suit in the Louisiana state court (the aforementioned case No. 225,533) to recover from the

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[2]The petition in that tax refund suit has been reproduced in full (pp. A-1 to A-11) in the Appendix to Louisiana's Brief in Response to Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae, filed in this Court on December 5, 1979.

State of Louisiana all First Use Taxes that had been paid each month under protest. The proposed complaint then proceeded to allege the identical constitutional defects in the First Use Tax statute that had been asserted by the Plaintiff States in their complaint on file in this Court and by the same seventeen pipeline companies in their tax refund petition on file in the Louisiana state court.

On September 18, 1979, the eight Plaintiff States filed a motion for judgment on the pleadings. That motion was later supported by the United States and the Federal Energy Regulatory Commission as *amici curiae.* The seventeen pipeline companies, whose motion to intervene and to file a complaint lay unacted upon by the Court, filed a separate motion for leave to file their own motion for judgment on the pleadings, with accompanying brief in support thereof.

In the meantime, on October 22, 1979, the State of Louisiana filed a motion to dismiss the complaint of the Plaintiff States, combined with a supporting brief and a brief in opposition to the pending motion of the Plaintiff States for judgment on the pleadings. This motion to dismiss renewed and expanded the jurisdictional and prudential objections that Louisiana had expressed in its earlier opposition to the motion for leave to file the complaint, objections which had been restated in Louisiana's answer to the complaint. Special emphasis was given to the newly-demonstrated availability of an alternative forum in the Louisiana state courts wherein the identical constitutional issues were being raised and pursued. This was said to put this case on all fours with the absention situation before this Court in the *Arizona v. New Mexico* litigation. Emphasis was also given the total absence of any real sovereign interest in the Plaintiff States, other than that of being gas consumers; it was becoming increasingly clear, said Louisiana, that the Plaintiff States were simply volunteering to pursue the tax refund claims of the private taxpayers, the seventeen pipeline companies.

In response to Louisiana's motion to dismiss, the Plaintiffs' brief in opposition asserted (p. 6) that this Court's June 18 order, which had merely allowed the complaint to be filed, constituted an acknowledgment of the standing of the Plaintiff States to bring this original action, inasmuch as the Court had "acted in the face of Louisiana's brief in opposition" to the filing, "which urged that the plaintiff states lacked standing." This Court, said the Plaintiff States, "should not reverse its decision acknowledging the standing of the plaintiff states to bring this suit" (p. 6).

As to Louisiana's prudential objections in its answer and motion to dismiss, relative to the recently filed tax refund suit in the Louisiana state courts, the Plaintiff States' opposition brief (pp. 6-7) asserted that the Court's June 18 order reflected a considered rejection of Louisiana's claim in this respect. That order, reiterated the brief (p. 7), constituted "this Court's decision to exercise its original jurisdiction."

On October 22, 1979, the State of New Jersey filed a motion for leave to intervene as a party plaintiff, alleging in its proposed complaint facts and issues comparable to those in the complaint of the eight Plaintiff States. Louisiana duly filed an opposition to this motion.

Out of this welter of complaints, answers, motions, oppositions, and briefs, not all of which have been described herein, came this Court's order of March 3, 1980. That order granted Louisiana's motion to appoint a Special Master and appointed the Honorable John F. Davis as the Special Master. The Court thereby referred all pending matters to the Special Master.

The Special Master invited briefs and statements from all concerned respecting the efforts of the private pipeline companies and the State of New Jersey to intervene as parties plaintiff and to file separate complaints. After being urged to do so by the Special Master,[3] the United States and the Federal Energy

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[3]At the hearing held on March 21, 1980, the Special Master stated to Government counsel (Tr. 85) that if the time comes "when you feel you want to participate in this case, you are not going to be able to just tell me you want to participate in the case. We will have the delay of getting a report to get it to the

(Continued)

Regulatory Commission abandoned their *amici* stance and filed their own motion for leave to intervene as plaintiffs and to file an attached Complaint in Intervention. This complaint sought to invoke the jurisdiction of this Court "under Section 1251 (b) (2) of Title 28 of the United States Code." Like the complaint of the Plaintiff States, this complaint in intervention requested a declaration of the constitutional invalidity of Louisiana's First Use Tax statute, as well as an order that all revenues collected pursuant to that statute "be refunded to the taxpayers together with interest thereon." The complaint, apparently unable to assert what relief the interests of the United States necessitated, merely requested that the Court "grant such relief as the Court may deem appropriate and necessary to protect the interests of the United States and the Federal Energy Regulatory Commission."

On May 14, 1980, the Special Master filed his interim report respecting motions for leave to intervene and to appear as *amici curiae.* The Special Master therein recommended that the State of New Jersey, the United States and the Federal Energy Regulatory Commission, and the seventeen pipeline taxpayers all be allowed to intervene as parties plaintiff. To each of these motions there was attached a complaint raising the same constitutional issues contained in the complaint of the Plaintiff States, as well as in the complaint of the seventeen pipeline companies in their tax refund suit in Louisiana.

Arguments were held on June 19, 1980, before the Special Master relative to Louisiana's motion to dismiss the complaint filed by the Plaintiff States, as well as the Plaintiff States' motion for judgment on the pleadings. The Special Master has promised a report and recommendations on those two motions by

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(Continued)
Court and getting the Court to act on it. I can't grant you intervention in the case. All I can do is recommend to the Court ... You may be in trouble and we can't get you in just overnight."

To that statement, Government counsel responded: "I understand, and I think the United States will take steps to protect itself" (Tr. 85).

September of 1980. In addition, the Special Master requested and received a Proffer of Proof by the State of Louisiana as the facts that it considers to be in dispute and thus necessary to be proved should an evidentiary hearing be scheduled to determine the constitutional issues arising under the Commerce Clause, the Supremacy Clause, the Import-Export Clause, the Contract Clause and the Equal Protection Clause.

To recapitulate, the State of Louisiana is involved in at least eleven judicial proceedings. In each of these proceedings the same five constitutional objections as to the validity of the First Use Tax statute are at issue.

FEDERAL PROCEEDINGS

(1-4) Before this Court in the instant case, one complaint has been filed by the eight Plaintiff States. The Special Master has recommended that three sets of parties be allowed to intervene (New Jersey, the United States and Federal Energy Regulatory Commission, and seventeen pipeline companies). Proposed complaints are attached to the three intervention motions.

(5) A complaint was filed by the Federal Energy Regulatory Commission against Shirley McNamara, et al., in the Middle District of Louisiana, Civil Action 78-384. A motion to stay was granted. See opinion reproduced in the Appendix to the Motion to Dismiss and Brief in Support of Motion to Dismiss and in Opposition to Motion for Judgment on the Pleadings, filed by the defendant in this Court on October 22, 1979. The matter was appealed to the Fifth Circuit and there docketed as No. 79-1403. On the day of argument, the matter was stayed.

STATE PROCEEDINGS

(6) On September 22, 1978, Edwin W. Edwards, et al., filed a petition for declaratory relief, naming as defendants, among others, all of the pipelines doing business in Louisiana. All of these pipelines, except Mississippi River Transmission Corporation, filed a reconventional demand (cross-claim), asserting these constitutional grounds. The

pipeline companies removed the case to the federal court where a motion to remand was granted. (464 F. Supp. 654, USDC MD LA. 1979).

(7) A petition was filed on May 29, 1979, by Arkansas Louisiana Gas Company against Shirley McNamara, et al., under Docket Number 224,695, Division J, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

(8) The seventeen pipeline companies filed a petition, for refund of taxes paid under protest, against Shirley McNamara, et al., on the 22nd day of June, 1979, under Docket Number 225,533, Division D, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana. Pertinent parts of this petition may be found in the Appendix to the Brief of the State of Louisiana in Response to Brief of the United States and the Federal Energy Regulatory Commission as *Amici Curiae*, filed herein on December 5, 1979.

(9) A petition was filed by Pennzoil Oil & Gas, Inc. against Shirley McNamara, et al., on the 27th day of June, 1979, under Docket Number 225,649, Division D, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

(10) A petition was filed by Pogo Producing Company against Shirley McNamara, et al., on the 27th day of June, 1979, under Docket Number 225,650, Division H, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

(11) A petition was filed by Pennzoil Louisiana and Texas Offshore, Inc., against Shirley McNamara, et al., on the 27th day of June, 1979, under Docket Number 225,651, Division F, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

This plethora of challenges to the constitutionality of Louisiana's First Use Tax statute makes it unnecessary for this Court to devote its valuable time and energies to developing the constitutional issues in the first instance. There is no want of another suitable 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. City of Milwaukee*, 406 U.S. 91, 93 (1972).

Indeed, the most suitable forum of all is that of the state courts of Louisiana, where the taxpayers' refund suit is already pending. See No. 8 in the above list. That is the only forum that can provide an authoritative construction and interpretation of this new and complex state tax statute. That is the only forum that can provide on-the-spot development of constitutional facts. And that is the only forum that can provide the relief that the parties all seek, i.e., a refund of the taxes paid by the pipeline companies. See *Washington v. General Motors Corp.*, 406 U.S. 109, 114 (1972). As was said in *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939),

> To open this Court to actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it.

ARGUMENT

I.

THE INTERVENTION MOTIONS NEED NOT BE RESOLVED UNTIL THE JURISDICTION OF THE COURT OVER THE ORIGINAL ACTION HAS BEEN ESTABLISHED

Underlying all the intervention motions now before the Court is the fact that the putative intervenors seek to attach themselves to one of what Article III described as "controversies between two or more States." As Chief Justice Fuller said in *Louisiana v. Texas*, 176 U.S. 1, 15 (1900), "it is apparent that the jurisdiction [over such controversies] is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable."

But there are serious and unresolved questions in this case whether there is an "absolute necessity" to exercise the original jurisdiction that the Plaintiff States seek to invoke. Moreover, there are serious and unresolved questions whether the Plaintiff States have alleged a "properly justiciable" controversy in their complaint before this Court. Those questions are posed by the State of Louisiana both in its answer to the complaint and in its motion to dismiss the action. That motion is presently pending before the Special Master, the parties have submitted both written and oral arguments, and the Special Master has indicated an intent to render a report thereon by September of 1980. But the point is that this Court's original jurisdiction to entertain the principal suit, to which the intervention motions are addressed, has not been resolved, established, or conceded.

Until the dark clouds over this attempt to invoke the Court's original jurisdiction have been dissipated, any action on a motion to intervene must be premature. If it ultimately be concluded that the original action filed by the Plaintiff States suffers from a terminal jurisdictional defect, or even a prudential disfavor, the interventions recommended by the Special Master become as "sound and fury, signifying nothing." For it is well established that intervention presupposes the pendency of an action within the Court's jurisdiction, into which the intervenor seeks to enter.[4] And it is also elementary that intervention cannot cure any jurisdiction if none existed before. *United States ex rel.*

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[4]"An existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit or action by which a third person is permitted to make himself a party, either joining the plaintiff in claiming what is sought by the complaint, or uniting with the defendant in resisting the claims of the plaintiff, or demanding something adversely to both of them." *Kendrick v. Kendrick*, 16 F.2d 744, 745 (5th Cir. 1927), *cert. denied*, 273 U.S. 758. See also *Rocca v. Thompson*, 223 U.S. 317, 331 (1912); *Stewart v. Dunham*, 115 U.S. 61, 64 (1885).

Texas Portland Cement Co. v. McCord, 233 U.S. 157, 163-164 (1914); C. Wright and A. Miller, 7A Federal Practice and Procedure §1917, pp. 584-585 (1972).

Because the Special Master has seen fit to place the intervention cart before the jurisdictional horse, arguments in support of or in opposition to the recommended interventions must necessarily be speculative and incomplete to a distressing degree. These efforts to intervene can be fully assessed and resolved only after the Court's jurisdiction over the original action has been finally established. The State of Louisiana therefore suggests that this Court might deem it appropriate to defer consideration of these exceptions to the Special Master's report on the intervention motions until the Special Master has submitted his report on Louisiana's motion to dismiss. That motion brings into focus all the jurisdictional, standing and prudential problems that seemingly plague the complaint filed by the Plaintiff States. Indeed, this Court's action on the motion to dismiss, whatever be the Special Master's recommendation with respect thereto, may well be dispositive of the entire case. Thus if the Court becomes convinced that the Plaintiffs' complaint, for any of a number of reasons, cannot or need not be pursued, then the intervention motions become moot and ineligible for resolution.

One further comment is necessary at this point. The Plaintiff States and some of the putative intervenors have consistently argued, without citation of authority, that this Court's order of June 18, 1979, granting leave to file the complaint and inviting an answer thereto, constitutes a final adjudication that the Court's original jurisdiction has been properly invoked. This argument is drawn from the fact that Louisiana's opposition to the motion for leave to file advanced some jurisdictional and prudential objections to the filing.

But the argument is constructed of sand. To begin with, this Court's exercise of its original jurisdiction powers is not so highly structured or stylized that the grant of leave to file a complaint must always be deemed a rejection of any and all jurisdictional objections to the filing. True, the Court does have discretion, in assessing a motion for leave to file, to consider jurisdictional objections, and has frequently done so. See, e.g., *Arizona v. New Mexico*, 425 U.S. 794 (1976); *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976); *Massachusetts v. Missouri*, 308 U.S. 1 (1939). And when jurisdictional objections are considered in connection with a motion for leave to file, the Court's treatment of the objections normally takes the form of a well-rounded opinion. *Ibid.* Seldom if ever does the Court reject non-frivolous jurisdictional objections, filed by a sovereign State, in an off-hand summary fashion.

But there are numerous instances where the Court has considered it the better part of discretion to allow the complaint to be filed despite jurisdictional protests and to reserve for a later time a consideration of those protests. See, e.g., *Louisiana v. Texas*, 176 U.S. 1, 2 (1900); *United States v. West Virginia*, 295 U.S. 463, 457 (1935); *Kansas v. United States*, 204 U.S. 331, 337 (1907). Obviously, not only the parties but the Court itself can raise, *sua sponte*, jurisdictional defects long after the filing of the complaint. In *California v. Southern Pacific Co.*, 157 U.S. 229 (1895), an original action was dismissed, persumably *sua sponte*, after both a bill of complaint and amendment thereto were filed by leave of Court, issue joined, a motion to intervene denied, the commissioner's report filed with the Court, and the matter argued on the merits. See also *Minnesota v. Northern Securities Co.*, 184 U.S. 199 (1902).

Such a deferred course of action might be deemed appropriate where the jurisdictional and prudential problems are viewed as too important and complex, or perhaps too entangled with public interests, to permit quick resolution at the pre-filing stage. Whatever the reason, however, the Court appears to have followed such an option in this case. In so doing, the Court gave not the slightest indication that it had considered, let alone rejected, the jurisdictional objections. Nor is there any basis for concluding that the Court's order of June 18 was entered "with prejudice" to Louisiana's procedural right to renew such objections in the answer that the Court requested, or in the subsequently filed motion to dismiss.

To hold that such a routine filing order, entered in the exercise of judicial discretion, is a jurisdictional precedent is to denigrate the jealous regard this Court has shown for a carefully limited exercise of its original jurisdiction. It is inconceivable that such an order means, among other things, that (1) the Plaintiff States have a justiciable case or controversy with the State of Louisiana with respect to a tax levied on private pipeline companies in Louisiana, (2) the Plaintiff States have standing to act as volunteers in assisting the private pipeline companies in their effort to secure tax refunds, and (3) the Plaintiff States, by representing the interests and claims of the private pipeline companies, can invoke this Court's original jurisdiction in total disregard of the Eleventh Amendment jurisprudence. It is impossible, in short, to extract such monumentally significant jurisdictional rulings out of the peremptory order of June 18, 1979.

Where cases on the appellate docket have been fully reviewed without mention of any jurisdictional problems in the written opinions, the Court has consistently noted that such plenary review "is no basis for considering it as authoritative on the jurisdictional issue, it being the firm policy of this Court not to recognize the exercise of jurisdiction as precedent where the [jurisdictional] issue was ignored." *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 137 n. 2 (1947), and cases cited. See also *Hagans v. Lavine*, 415 U.S. 528, 533 n. 5 (1974), and cases cited ("when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us").

It would be passing strange were the order of June 18 to be construed as one that turned this Court's back on the historic right of litigants to raise basic jurisdictional objections at any stage of a proceeding. This Court does not lightly assume exercise of its original jurisdiction; nor does it lightly dismiss the grave type of jurisdictional objections that Louisiana has raised.

Like the order in *State of Idaho ex rel. Andrus v. Oregon*, 429 U.S. 163, 164 (1976), the June 18 order in the instant case "is not a judgment that the bill of complaint, to the extent that permission to file is granted, states a claim upon which relief may be granted." Nor is it a judgment that the Plaintiff States have standing to invoke the original jurisdiction of the Court under the circumstances here evident.

The conclusion follows that the jurisdictional, standing and prudential problems raised by Louisiana's answer and motion to dismiss have not been addressed or resolved by this Court. They remain open for argument and adjudication. And because they remain so totally unresolved, it cannot be said as yet that there has been any final determination that the original action, into which the putative intervenors seek to fit themselves, is properly or jurisdictionally before this Court.

II.
NEW JERSEY'S MOTION TO FILE AN INTERVENING COMPLAINT RAISES SERIOUS JURISDICTIONAL PROBLEMS

The Special Master has recommended that the State of New Jersey be allowed to intervene in order to file a complaint that is "virtually indistinguishable" from the complaint filed by the eight Plaintiff States. Had New Jersey opted to file a wholly independent original action, said the Special Master, this Court would have granted the motion for leave to file "in order to act consistently with its action in the Maryland case" (Report, p. A-5).

The major difficulty with this recommendation is its prematurity. Were it clear that this Court is satisfied that the Maryland complaint meets all Article III requirements as to jurisdiction and "case or controversy," there could be no quarrel with the recommendation as to New Jersey. But that is not the case. As we have seen, the June 18, 1979 order allowing the Plaintiff States to file a complaint cannot be read as a ruling rejecting all jurisdictional, standing and prudential objections.

Those objections, embodied in Louisiana's answer and motion to dismiss, have yet to be resolved. And until they are resolved, it is sheer speculation to say that this Court would have granted leave to New Jersey to file an identical complaint simply to be consistent with the June 18 order.

This is but an example of the uncertainties that attend a premature grant of intervention. This Court has repeatedly warned that "our original jurisdictions should be involved sparingly." *Utah v. United States*, 394 U.S. 89, 95 (1969); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). And long ago the Court established that "the mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another State or her citizens." *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 287 (1888). These sentiments certainly do not constitute an open invitation to all States to intervene, in the name of consistency, in any case on the original docket in which other States are the plaintiffs. The notion of consistency, with all its hobgoblin characteristics, is not an excuse for allowing another State to intervene and to file another "virtually indistinguishable" complaint before the Article III validity of the principal complaint has been established. The addition of New Jersey as an intervening plaintiff at this point in the proceeding does nothing to advance the resolution of the Article III problems or the adjudication of the rights of the original parties. Until the Article III legitimacy of the parent suit has been established, it is premature to add to this Court's workload what is at best another highly questionable complaint. Certainly there is no precedent for such a premature intervention.[5]

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[5]The Special Master states that granting New Jersey's motion "appears to be consistent with past Supreme Court practice, *Pennsylvania v. Connecticut*, 401 U.S. 931, ..." (Report, p. A-5). Obviously he has reference to the case known as *Pennsylvania v. New York*, 407 U.S. 206 (1972), in which Connecticut had earlier been allowed to intervene as a party plaintiff, 400 U.S. 811. Footnote 2 of the Court's opinion, 407 U.S. at 207, summarizes the various interventions that were allowed in that case.
(Continued)

The Special Master has also suggested that New Jersey's intervention at this early stage "has the advantage of promoting judicial economy and placing New Jersey on an equal footing with the eight states in the original suit." (Report, p. A-5). What elements of judicial economy are advanced by forcing this Court to address the Article III problems of nine rather than eight States is difficult to see. But the "equal footing" that such intervention purports to achieve does little more than expose the fragile and dubious nature of the "footing" of the complaint filed by the eight Plaintiff States. Since New Jersey's proposed complaint is "virtually indistinguishable" from the complaint already on file, it shares all the Article III defects that mark the "footing" of the main complaint.

While it is premature to assess and resolve the Article III problems in the context of a report on intervention motions, it is relevant to note the presence of a multitude of Article III problems on the face of New Jersey's proposed complaint. The fact that such problems are so readily apparent serves as a warning against New Jersey's premature entry into the case. It will be time enough to permit such intervention when and if this Court's original jurisdiction over this constitutional tax dispute has been considered and affirmed.

The weaknesses revealed in the "footing" of New Jersey's proposed complaint may be summarized as follows:

(Continued)

But the various intervenors allowed in *Pennsylvania v. New York* afford no precedent for allowing New Jersey to intervene in this case. Interventions were allowed in *Pennsylvania* in the context of a situation where the Court much earlier had confirmed the existence of the Court's original and exclusive jurisdiction over the matter in litigation. *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 79 (1961). In the instant case, however, such jurisdiction has not been established.

Moreover, the *Pennsylvania* litigation involved competing claims by various States to escheat, or take custody of, unclaimed funds paid to Western Union Telegraph Co. for the purchase of money orders. The intervenors simply filed their respective claims to those funds in the form of complaints, alleging *in rem* causes of action. But the instant complaints against Louisiana are strictly *in personam* in nature, involving no claims by the Plaintiff States to money or property held by Louisiana.

(1) New Jersey's complaint is devoted exclusively to the claim that Louisiana's First Use Tax statute is unconstitutional in several respects, including alleged invalidity under the Commerce Clause and the Supremacy Clause. It is common knowledge, however, that these very same constitutional issues are at stake in various other judicial forums; in particular, those issues are being raised by the pipeline taxpayers in their tax refund suit in the Louisiana courts, a remedy that this Court has found fully adequate to warrant federal court absention. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 296-297 (1943).

Thus this Court's decision in *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976), becomes fully applicable. In that original proceeding, like this one, "the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated." To borrow some words from the Special Master (Report, p. A-5), this Court "in order to act consistently with its action in the [Arizona] case" should abstain from processing this original proceeding and allow the constitutional issues to be adjudicated in the pending tax refund suits in Louisiana.

(2) The constitutional issues raised by New Jersey's complaint necessarily depend upon a reading of the Louisiana First Use Tax statute, which the Louisiana courts have yet to interpret. This brings into focus the abstention concepts generated by *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). *Pullman* counsels abstention whenever a federal court is otherwise forced to interpret state law without the benefit of state court consideration and therefore under circumstances where a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time. In the circumstances here present, therefore, this Court's decision on the constitutional issues raised in New Jersey's complaint may well be advisory, and the underlying litigation rendered meaningless.

(3) Among the prayers for relief in the New Jersey complaint are requests for preliminary and permanent injunctions prohibiting Louisiana and its agents and employees from collecting the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce. Such requests immediately raise substantial questions as to the impact of the Tax Injunction Act of 1937, 28 U.S.C. §1341, on the exercise of this Court's original jurisdiction. by its terms, that Act provides that federal districts "shall not enjoin ... the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

But as this Court observed in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943), this statute reflects a much broader prudential concern that the federal judiciary not use its injunctive or equity powers to interfere with a State's internal economy and its administration of state tax statutes in particular. And since there is here present a "plain, speedy and efficient remedy" by way of a tax refund suit in the Louisiana state courts (which is precisely the same Louisiana remedy found adequate in *Huffman)*, this Court may well wish to abstain from enjoining the collection of Louisiana's First Use Tax in the spirit if not the word of the Tax Injunction Act.

(4) New Jersey's broad facial attack on Louisiana's First Use Tax statute poses still another threat to our federal system of government in the form of "needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 471 (1945). What was said in this regard recently in *Moore v. Sims*, 442 U.S. 415, 60 L.Ed.2d 994, 1007 (1979), applies to New Jersey's effort to use this Court as the original vehicle for assaulting a new and complex statute of a sister state:

> State courts are the principal expositors of state law. Almost every constitutional challenge - and particularly one as far ranging as that involved in this case - offers the op-

portunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals. *Trainor v. Hernandez*, 431 U.S. 434, 445, 52 L.Ed.2d 486, 97. S. Ct. 1911 (1977). The price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims - a postulate we have repeatedly and emphatically rejected.

As was further said in *Moore v. Sims*, 60 L.Ed.2d at 1007, with respect to all facets of abstention, "the only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims." That "adequate opportunity" is demonstrably present in the form of the Louisiana tax refund procedure. All of which leads back to *Arizona v. New Mexico*, 425 U.S. at 797, where the Court declined to grant leave to file Arizona's bill of complaint, functionally indistinguishable from New Jersey's complaint, inasmuch as New Mexico, like Louisiana, provided an appropriate state court forum "in which the *issues* tendered here may be litigated."

(5) New Jersey's proposed complaint is an unabashed effort to secure from this Court a declaratory judgment that the Louisiana First Use Tax statute is unconstitutional and unenforceable on its face. New Jersey seeks such a declaration without awaiting any interpretation or construction of the statute by the Louisiana courts in the pending tax refund suits. Such an effort is totally misplaced.

This Court's jurisprudence has long frowned on attempts to initiate interpretation of state statutes in federal courts, at least where no emergency exists. In *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944), the Court noted that "as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." Yet New Jersey would have this Court guess as to which aspects or interpretations of the First Use Tax statute might create problems under the Commerce Clause, the Supremacy Clause, the Import-Export Clause, the Contract Clause, and the Equal Protection Clause. And this Court is expected to perform this gargantuan task under the rubric of reading the face of the statute.

All the parties plaintiff in this case, supported by the United States, New Jersey and the pipeline taxpayers, have sought a summary judgment of the unconstitutionality of this statute on the basis of the pleadings alone. Every effort by Louisiana to suggest that there may exist some critical factual disputes or statutory ambiguities has been rebuffed by those parties. The Special Master still has that motion for judgment on the pleadings under advisement. But it is not too late, in assessing the propriety of adding New Jersey's complaint to that of the eight Plaintiff States,[6] to recall the words of the Court in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229 (1957). While the context of that case was different from the instant one, the language with reference to interpreting another Louisiana statute could not be more pertinent:

> The Supreme Court of Louisiana has never considered the specific issue or even discussed generally the rationale of the statute, especially with reference to problems of constitutionality the District Court recognized the importance of the statute in deciding this case; it also recognized that a problem of interpretation was involved, that the statute cannot be read by him who runs. What are the situations to which the statute is applicable? Is the statute merely declaratory of prior Louisiana law? What are the problems that it was designed to meet? The answers to those questions are, or may be, relevant. Before attempting to answer them and to decide their relation to the issues in the case,

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[6]If the Court approves the Special Master's recommendation that New Jersey be allowed to intervene and file its complaint, the State of Louisiana assumes that it will be given time in which to answer.

> we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court .... It need hardly be added that the state courts in such a [Louisiana declaratory judgment] proceeding can decide definitively only questions of state law that are not subject to overriding federal law.

(6) New Jersey's proposed complaint makes plain that this is not a controversy between New Jersey and Louisiana and thus does not fall within this Court's original jurisdiction. Article III, Section 2, clauses 1 and 2; 28 U.S.C. §1251(a) (1).

It has long been the rule that in order to engage this Court's original jurisdiction, a plaintiff State like New Jersey must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State, Louisiana in this instance. *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976); *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939). But the New Jersey complaint is devoid of any allegation that Louisiana has imposed or levied its First Use Tax on the State of New Jersey or on any of its citizens. The complaint simply alleges (Par. XIII) that the Federal Energy Regulatory Commission "has adopted procedures which ... permit the pipelines required to pay the First Use Tax to collect the amount of such tax from their customers pursuant to an automatic tracking mechanism." The complaint then candidly admits (Par. XV) that it is the "interstate natural gas pipeline companies who are subject to the tax and who will collect such tax from plaintiff state [New Jersey] and its citizens."

The interposition of the pipeline taxpayers and the Commission erases any direct casual nexus between New Jersey and Louisiana. Whatever injury New Jersey or its gas consuming inhabitants have suffered is due not to the imposition of the First Use Tax but to the voluntary acts of the pipeline taxpayers in seeking and obtaining approval from the Federal Energy Regulatory Commission to pass the tax on to the consumers of natural gas.

In short, New Jersey has failed to allege any kind of injury inflicted by Louisiana that gives rise to any "common-law rights of action." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 259 (1972). New Jersey's only complaint is that the price of natural gas, consumed by the State and many of its citizens, contains a "hidden" tax that the interstate transporter has succeeded in passing on to the consumers. There is no precedent for such a consumer-type cause of action. Cf. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). And were one to be recognized in the context of the original jurisdiction exercisable by this Court, a veritable avalanche of interstate suits might ensue. Each State would then be free to protest in this Court every tax levied by another State on products sold or consumed in the former, thus furthering the "balkanization" evil.

(7) Closely aligned with the fact that New Jersey has alleged no injury directly caused by Louisiana is the fact that New Jersey has asserted no injury to its sovereign interests.

It is settled doctrine that "a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated." *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976). It is equally clear that a State has standing to sue only when it is the real party in interest. See *Kansas v. United States*, 204 U.S. 331 (1907); *Oklahoma v. Atchison, T.&S.F.R. Co.*, 220 U.S. 277 (1911).

What sovereign or quasi-sovereign interest of New Jersey is at stake in this instance? New Jersey seems to complain only that the gas that it purchases to heat or cool its state-owned buildings, as well as the gas consumed by more than 1,800,000 New Jersey residents (Par. XVIII), will be impacted by the fact that the "interstate natural gas pipeline companies who are subject to the tax" are determined to pass on the "resulting economic burdens and hardships" (Par. XV) of the First Use Tax to the consumers, public and private. But the ability of a State to purchase gas or any other commodity free of any "hidden" or "passed-on" taxes is hardly the hallmark of a sovereign or quasi-sovereign concern. If New Jersey has any complaint at all, either directly or as *parens patriae*, it should be directed at the pipeline taxpayers or the federal authorities who have permitted the burdens of the Louisiana tax to be passed on to the consumers.

Moreover, New Jersey can acquire no standing, *parens patriae*, or otherwise, to vindicate any of the constitutional provisions mentioned in the complaint. Particularly is that true as to the Commerce Clause, upon which the complaint places such heavy reliance in its first "cause of action" (Pars. XIX-XXXI). More than eighty years ago, when Louisiana protested the imposition by Texas of a quarantine on commerce from Louisiana thought to be infected with yellow fever, *Louisiana v. Texas*, 176 U.S. 1, 19 (1900), Louisiana was advised by this Court that

> Inasmuch as the vindication of the freedom of interstate commerce is not committed to the state of Louisiana, and that state is not engaged in such commerce, the cause of action must be regarded, not as involving any infringement of the powers of the state of Louisiana, or any special injury to her property, but as asserting that the state is entitled to seek relief in this way because the matters complained of affect her citizens at large.

That lesson is as applicable to New Jersey as it was to Louisiana.[7]

Nor can it be said that New Jersey has any sovereign interest in testing the constitutionality of another State's tax laws, whatever may be the indirect impact on New Jersey's economy. As the first Mr. Justice Harlan said in his concurring opinion in *Louisiana v. Texas*, 176 U.S. at 24,

> When the Constitution gave this court jurisdiction of controversies between states, it did not thereby authorize a state to bring another state to the bar of this court for the purpose of testing the constitutionality of local statutes or regulations that do not affect the property or the powers of

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[7]Compare *Pennsylvania v. West Virginia*, 262 U.S. 553, 591-592 (1923), where the two States were held to have standing to protest West Virginia legislation directing producers of natural gas to favor West Virginia consumers, thereby threatening to cut off gas supplies to the complaining States and their gas consuming citizens.

the complaining state in its sovereign or corporate capacity, but which at most affect only the rights of individual citizens or corporations engaged in interstate commerce.

(8) The ultimate defect in New Jersey's proposed complaint is found by relating the admission in Par. X that the First Use Tax "will be required to be paid by interstate natural gas pipeline companies" with the prayer for relief lettered (d), where this Court is required to

> (d) Order that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce be refunded to the taxpayers together with interest thereon;

In other words, New Jersey proposes to invoke this Court's exclusive original jurisdiction over "Controversies between two or more States"[8] in order to secure a refund of taxes paid to the State of Louisiana by private pipeline taxpayers. Such an attempt is at war with the most fundamental concepts of this Court's original jurisdiction.

First, to invoke such original jurisdiction properly, the plaintiff State must bring an action on its own behalf and not on behalf of particular citizens. See, e.g., *New Hampshire v. Louisiana,* 108 U.S. 76 (1883); *Louisiana v. Texas,* 176 U.S. 1 (1900); *Oklahoma v. Atchison, T.&S.F.R. Co.,* 220 U.S. 277 (1911); *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 258 n. 12 (1972); *Pennsylvania v. New Jersey,* 426 U.S. 660 (1976). It is not enough, of course, that a State is the named plaintiff. *Florida v. Mellon,* 273 U.S. 12, 17 (1927). Nor is it enough that a State has acquired the legal title to a cause of action against the defendant State, where the recovery is sought for the benefit of another who is the real party in interest. *New Hampshire v.*

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[8]Paragraph I of the complaint seeks to invoke the Court's exclusive original jurisdiction over controversies between two or more States, as provided in Article III, Section 2, clauses 1 and 2 of the Constitution and 28 U.S.C. §1251 (a)(1).

Louisiana, supra, 91 ("one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens"). See also *Oklahoma et rel. Johnson v. Cook,* 304 U.S. 387, 392-394 (1938).

The underlying point of these decisions is that, in determining the scope of the Court's original jurisdiction over controversies between States, the Court must look to the asserted cause of action, the nature of the plaintiff State's interest, and the beneficiary of the remedy sought. On all those counts, New Jersey's proposed complaint must fail: (1) it has asserted a consumer-type cause of action that has no precedents in American jurisprudence; (2) it has alleged no sovereign or quasi-sovereign interest in taxes paid in Louisiana by private pipeline taxpayers; and (3) the only meaningful relief sought is a refund of taxes paid by those taxpayers. Even that relief is highly theoretical, for there is no assertion that New Jersey or its citizens will benefit in any way by a tax refund.

In sum, the real parties in interest are the private pipeline taxpayers. Those are the ones who have a true "case or controversy" with the State of Louisiana. All that New Jersey proposes to do, in filing its "indistinguishable" complaint, is to act as still another volunteer to help the taxpayers secure a refund. That hardly comports with the sovereign or quasi-sovereign interests of New Jersey or any other State.

Second, any action brought by one State against another violates the Eleventh Amendment if the Plaintiff State is actually suing to recover for injuries to designated individuals. *New Hampshire v. Louisiana,* 108 U.S. 76 (1883); *North Dakota v. Minnesota,* 263 U.S. 365, 376 (1923). The language of the Eleventh Amendment withdraws from the judicial power of the United States any suit commenced or prosecuted *by* citizens of one State *against* another State. Thus the Amendment is violated if private citizens assign or transfer their private claims to a State to prosecute in the name of that State. This Court has never tolerated such subterfuge.

It should make no difference here that New Jersey proposes to volunteer as a tax refund agent for the private pipeline companies, rather than to receive the tax refund claims by assignment or some statutory scheme. See *New Hampshire v. Louisiana, supra,* where New Hampshire by statute volunteered to take by assignment any unpaid written obligation of another State and to bring such suits in this Court as may be necessary to recover the money due.

Enough has been said about this effort to subvert the original jurisdiction of this Court over true cases or controversies between States. The Court should simply decline to affirm the Special Master's recommendation that New Jersey be allowed to intervene in order to file what turns out to be a frivolous complaint.

III.

THE MOTION OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION TO INTERVENE AS PLAINTIFFS RAISES SERIOUS JURISDICTIONAL PROBLEMS

The Special Master's recommendation that the United States and the Federal Energy Regulatory Commission (hereinafter FERC) be allowed to "intervene as plaintiffs" is both premature and erroneous.

Such intervention was recommended in this case by virtue of Rule 24(b) of the Federal Rules of Civil Procedure, which deals with permissive intervention rather than intervention as of right. But Rule 24(b) does not deal with matters of jurisdiction, and it is well established that

> Intervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action. Intervention presupposes the pendency of

> an action in a court of competent jurisdiction and cannot create jurisdiction if none existed before. However if there is an independent basis for jurisdiction with regard to the intervenor the court has discretion to treat his pleading as a separate action in order to adjudicate the claims raised by him.
>
> C. Wright and A. Miller
> 7A Federal Practice and
> Procedure, §1917,
> pp. 584-586 (1972).

See also *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914); *Kendrick v. Kendrick*, 16 F.2nd 744 (5th Cir. 1926), *cert. denied*, 273 U.S. 758; *Interstate Commerce Commission v. Southern Railway Co.*, 380 F. Supp. 386, 394 M.D. GA. 1974); *Jacobs v. District Director of Internal Revenue*, 217 F. Supp. 104 (S.D.N.Y. 1963).

The United States and FERC are thus stuck on the horns of a dilemma. On the one hand, their intervention cannot be allowed on the presupposition that this Court's original jurisdiction over the action brought by the Plaintiff States has been established. Until that jurisdiction has been authenticated, intervention is premature and should be withheld; there is simply no established main cause to which intervention may safely attach as an ancillary or subordinate adjunct. On the other hand, to the extent that the United States and FERC must rely on the existence of an independent basis for jurisdiction, no such basis is apparent.

United States Claims

The United States purports to invoke, as an independent basis of jurisdiction, the original jurisdiction of this Court under 28 U.S.C. §1251(b) (2) over "All controversies between the United States and a State." See Par. I of Complaint in Intervention. The United States accordingly must meet all Article III "case or controversy" requirements. *United States v. California*, 332 U.S. 19, 24-26 (1947). The "controversy" with the State of Louisiana that the United States asserts in its Complaint in Intervention is as follows:

VI.

> The United States is a consumer of natural gas in the

operation of military and civilian installations and is thereby directly affected by the additional costs imposed by the Louisiana First Use Tax.

VII.

The United States is the lessor under leases authorizing various persons to produce natural gas from federal enclaves and the Outer Continental Shelf, over which it has exclusive jurisdiction (see 43 U.S.C. 1331-1343). It is believed that if the federal government's lessees are subject to Louisiana First Use Tax, the revenues received by the United States from its leases will be significantly reduced.

VIII.

Under Article I, Section 8, clause 3 of the Constitution, the federal government is responsible for the regulation of interstate and foreign commerce.

As respects the "consumer" controversy alleged in Paragraph VI, the claim suffers from the same defects apparent in the identical and "indistinguishable" claim made by New Jersey, as well as by the Plaintiff States. See pp. 22, 23 *supra*. In summary fashion, those defects are:

(1) The complaint of the United States does not allege that the injury for which it seeks redress was directly caused by the actions of the State of Louisiana. The "additional costs imposed by the Louisiana First Use Tax" are not alleged to have been directly imposed by Louisiana upon the military and civilian installations of the United States. That those installations may be "directly affected" by the additional costs imposed by the tax is not the equivalent of a direct tax imposed by Louisiana.

(2) The reference to military and civilian institutions being "directly affected" by the additional costs imposed by the First Use Tax is but another way of saying that the United States as a consumer or purchaser of natural gas is "directly affected" by any increase in the cost of that gas. But no consumer, whether it

be the United States, another State or a private citizen, has a cause of action against those governmental units that impose taxes upon the manufacturer or transporter of a given product, which taxes are "passed on" to the consumer in the form of increased costs.

(3) The true gravamen of the Complaint in Intervention is that the additional costs resulting from the First Use Tax have been passed on to consumers like the United States. But Louisiana is not responsible for such a passing-on. Rather, the responsibility ultimately lies with FERC, an agency of the United States. It was FERC that gave approval and sanction to the pipeline taxpayers' request that the costs of the tax be passed on to the consumers.[9] Thus the injuries claimed by the United States must be deemed "self-inflicted," *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Nothing prevents the United States or FERC from withdrawing that approval, thereby forcing the private taxpayers to absorb the costs of the tax. In that circumstance, the United States cannot "be heard to complain about damage inflicted by its own hand," *Ibid.*

(4) It thus becomes apparent that the United States, as a consumer, is not a real party in interest in this litigation and cannot invoke this Court's original jurisdiction. *United States v. Minnesota*, 270 U.S. 181, 193 (1926). Indeed, the Complaint in Intervention that the United States proposes to file is an unabashed acknowledgment that the United States, like the State of New Jersey and the eight Plaintiff States, is acting solely

[9]FERC's authorization for passing on the cost of the First Use Tax from the taxpayers to the consumers is embodied in the following:

State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order No. 10, "Order Establishing Procedures Governing Pipeline Recovery of the State of Louisiana First Use Tax," issued August 28, 1978, 43 Fed. Reg. 45, 553 (October 3, 1978); Order No. 10-A, "Order on Rehearing, Modifying Prior Order, Amending Regulation and Requesting Comment," issued December 20, 1978, 43 Fed. Reg. 60, 438 (December 28, 1978), Appeal Docketed, Tennessee Gas Pipeline Company v. Fed. Energy Regulatory Commission, No. 78-38-13, et al (4th Cir., December 26, 1978); and Order No. 10-B, "Order on Rehearing, Modifying Prior Order and Amending Regulations," issued March 2, 1979, 44 Fed. Reg. 13, 460 (March 12, 1979).

as a volunteer in assisting the pipeline taxpayers to obtain a refund of their taxes. Subparagraph (c) of the prayer for relief asks that the Court

> order that all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce be refunded to the taxpayers together with interest thereon; . . . .

There is no recorded instance in the past where the United States has sought to invoke this Court's original jurisdiction to secure a tax refund for the benefit of private taxpayers. Suffice it to say that the novelty of this attempt does not support its legitimacy.

Paragraph VII of the Complaint in Intervention expresses a hazy belief that there may be a second kind of "controversy" as between the United States and Louisiana. "It is believed," we are told by Paragraph VII, "that if the federal government's lessees [on the Outer Continental Shelf] are subject to Louisiana First Use Tax, the revenues received by the United States from its leases will be significantly reduced." This allegation or belief is apparently the basis of the Special Master's comment (Report, p. A-6) that "the United States has a separate interest because of its responsibilities under the Outer Continental Shelf Act, 43 U.S.C. 1331-43."

For purposes of asserting standing or a cause of action, Paragraph VII is worthless. The United States of course has exclusive jurisdiction and responsibilities as to the Outer Continental Shelf. But it is not alleged that Louisiana's First Use Tax interferes with that jurisdiction or responsibilities in any way. The Shelf does not constitute a *res* before this Court as to which the United States and Louisiana are making conflicting claims. It is not alleged that the uses concerning which the tax is applicable, including the processing of the gas, in Louisiana is levied on the Shelf's producer-lesses, or that the tax is structured so as to discourage leasing gas wells on the Shelf. Nor is any kind of relief sought that would even arguably protect the interests of the United States with respect to the Shelf.

In short, as in *United States v. West Virginia*, 295 U.S. 463, 473 (1935), "there is presented here, as respects the State, no case of an actual or threatened interference with the authority of the United States." Until that authority is threatened with invasion by acts of the State, "there is no question presented which is justiciable by a federal court." *Ibid.* 474. See also *Commonwealth of Pennsylvania v. Kleppe*, 533 F.2nd 668, 672 (D.C. Cir. 1976), *cert. denied* 429 U.S. 977. Nor can a mere expression of belief, supplemented by use of the conditional word "if," do service for an allegation of injury in fact, either real or threatened, that gives rise to a real controversy.

Paragraph VIII of the Complaint in Intervention asserts that the Federal Government is responsible for the regulation of interstate and foreign commerce, citing the Commerce Clause of the Constitution. Presumably in this case, the United States cites this Clause to support its standing and its cause of action in its effort to strike down a state tax that allegedly is discriminatory against certain private interstate natural gas transporters.

But reliance on the Commerce Clause in this context is dubious and illusory. To begin with, it is Congress - not the Federal Government and not even the United States - that is given the power to "regulate" interstate commerce. Secondly, we are not dealing in this case with any problem as to the power of Congress to regulate the interstate transmission of natural gas. Rather we are concerned here with what Mr. Justice Jackson called one of "these great silences of the Constitution," *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949), i.e. one of the "negative implications" of the Commerce Clause whereby this Court rather than the Constitution determines the doctrinal limitations on state interference with interstate commerce. L. Tribe, American Constitutional Law, 320-321 (1978).

The Complaint in Intervention mistakenly assumes that the United States (inexplicably renamed "the federal government" in Paragraph VIII) is responsible for the enforcement of the negative implications of the Commerce Clause. When we are dealing with negative implications we are dealing with state police powers to regulate and tax interstate commerce up to the point where this Court determines that the exercise of such power collides with the superior regulatory power of Congress. The bottom line, however, is the fact that the beneficiaries of the negative implications of the Commerce Clause are those interests or entities that are themselves engaged in commerce.

Generally, then, the commercial interests and entities are the ones with standing to protest some state tax or regulation imposed on their interstate activities. Unless a government body is itself engaged in some form of interstate commerce, governmental representatives have no roving commission to champion the cause of the commercial beneficiaries of the negative implications of the Commerce Clause. This Court recognized that fact in *Louisiana v. Texas*, 176 U.S. 1, 19 (1900), when it ruled that "the vindication of the freedom of interstate commerce is not committed to the State of Louisiana." By the same token, it is not committed to the United States or "the federal government."[10]

FERC Claims

The Special Master indiscriminately has recommended that both the United States and FERC be allowed to "intervene as plaintiffs" in this original proceeding. And both the United States and FERC join in a Complaint in Intervention, Paragraph I of which asserts that the original jurisdiction of this Court under 28 U.S.C. §1251(b) (2) is invoked.

Whatever may be the problems associated with the efforts of the United States to become a party plaintiff in this case, they pale in comparison with the difficulties confronting FERC. By

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[10]The United States does have standing to protest the physical clogging of interstate channels. See *New York v. New Jersey*, 256 U.S. 296, 303-308 (1921); *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925). But the more intangible burdens on commerce imposed by state taxation or regulation are equite another matter.

what authority does an agency of the United States seek to invoke the original jurisdiction of this Court? Where is the precedent for such an agency suing a sovereign State in this Court, even by way of intervention? Cf. *United States v. West Virginia*, 295 U.S. 463 (1935), where the United States unsuccessfully sought leave to file a complaint in its name only in a matter in which the Federal Power Commission was much involved.

The Special Master sought to justify FERC's intervention as a plaintiff by reference to the provisions in Rule 24(b) that permits a federal or state governmental officer or agency to intervene in any case where a party relies for ground of claim or defense upon a statute or executive order administered by that agency or officer. But Rule 24(b) cannot be superimposed so cavalierly on top of this Court's very limited and sparingly exercised original jurisdiction. If FERC is not authorized by Article III or §1251(b) (2) to invoke the original jurisdiction of this Court in suits involving a State, Rule 24(b) cannot give FERC that power to invoke through the intervention medium.

Moreover, the interest of FERC in entering this original action as a plaintiff is not evident. Paragraph IX of the Complaint in Intervention states that FERC, by virtue of the Natural Gas Act and the Natural Gas Policy Act of 1978, has exclusive authority to set rates for the sale and transportation of natural gas in interstate commerce. FERC also is responsible for the regulation of the interstate sale and transportation of natural gas and the cost and rates of pipelines, including the apportionment of costs among producers, processors, and consumers of natural gas.

Without further ado, Paragraph IX suddenly announces that the Louisiana First Use Tax "conflicts with the federal regulation of the sale and transportation of natural gas in interstate commerce and is therefore invalid under the Supremacy Clause of the Constitution." The thought is added that because the "principal impact of the tax is to increase the price of gas" extracted from the Outer Continental Shelf or otherwise shipped through Louisiana in interstate commerce, "the Louisiana tax is incompatible with the federal regulatory scheme."

But at no point in Paragraph IX, or anywhere else for that matter, is there any claim or specification that a particular provision of the Natural Gas Act or the Natural Gas Policy Act of 1978 has been violated.[11] Nor is there any articulation of the points at which the First Use Tax "conflicts with" or becomes "incompatible with" the federal regulatory scheme. There is nothing but the "hit-and-run" technique of pleading conflicts and incompatibility, in the hope that somehow this Court will ferret out some true conflicts and thus protect the interest of FERC - as the prayer for relief requests.

The failure of Paragraph IX to cite any conflicts renders meaningless the Supremacy Clause claim, even assuming that Clause is a viable basis for invoking this Court's original jurisdiction at the behest of a federal agency. It is instructive to note that the basic question involved in a preemption claim "is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965). But if the original business of this Court permits it to compare two or more statutes, it should be advised precisely what parts of which statutes are to be compared.

Perhaps FERC means to say that the First Use Tax is a cost, and thus is subject to FERC's superior power of regulating all costs associated with the sale and transportation of natural gas. The difficulty with this argument, however, is that Section 110 of the Natural Gas Policy Act of 1978, 15 U.S.C. §3320, authorizes FERC to include in the maximum lawful first sale price "any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas." Pursuant to Section 110, FERC has considered the Louisiana First Use Tax to be a cost of processing and thus eligible to be incorporated in the maximum first sale price set by FERC. That is the sense of

[11]Section 505 of the Natural Gas Policy Act of 1978, 15 U.S.C. §3414, allows FERC to institute injunction proceedings in federal courts where there is a violation of the Act. No such violation has been charged in the administration of the First Use Tax.

FERC's Orders 10, 10-A and 10-B,[12] and that is why the cost of the Louisiana First Use Tax has been passed on to the consumers. Moreover, that is why Louisiana is in no way responsible for adding the cost of the First Use Tax to the cost of gas.

In truth, there is no substance whatever in the Paragraph IX claim of conflict and incompatibility. The First Use Tax has meshed very neatly into the operation and administration of the Natural Gas Policy Act. The State of Louisiana suggests that this Court's original jurisdiction should not be encrusted with such statutory trivia. Paragraph IX must fail for lack of a substantial question.

The Special Master, in recommending that the intervention motion of the United States and FERC be granted, stated that it would not only be "highly desirable" to join the United States as a party but that the Court has permitted intervention by the United States "under comparable circumstances" in cases involving disputes between two or more States. (Report, pp. A-5, A-6.) Unfortunately, the cited cases do not bear out those remarks. In two, *Wisconsin v. Illinois*, 278 U.S. 367 (1929), and *New Jersey v. New York*, 345 U.S. 369, 373 (1953) the United States at no time appeared as an intervenor. In the other three cases, *Texas v. Louisiana*, 410 U.S. 702, 712-714 (1973); *Arizona v. California*, 344 U.S. 919 (1953); *Oklahoma v. Texas*, 253 U.S. 465 (1920), the United States was allowed to intervene in disputes over claims of land or water. The latter cases are quite different from the instant one in that they involved *in rem* disputes. The *in personam* circumstances of this case could hardly be less comparable.

The State of Louisiana accordingly renews its exception to the Special Master's recommendation that both the United States and FERC be allowed to intervene as plaintiffs.

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[12]These orders are cited in footnote 9, *supra*, page 30.

IV.

INTERVENTION OF PIPELINE COMPANIES AS PLAINTIFFS DESTROYS THE JURISDICTION OF THIS COURT

In recommending the intervention as plaintiffs of the seventeen private pipeline parties, the Special Master acknowledged that the First Use Tax "falls directly" on them, that they are "directly liable" for its payment, and "would therefore be the taxpayers presumably entitled to recover taxes already paid if the [Louisiana] act were declared unconstitutional and repayment ordered." (Report, p. A-7.)

The State of Louisiana has no quarrel with any of those findings. It is common ground in this case that these pipeline companies are the real parties in interest as to the First Use Tax. They might even be deemed indispensable parties to this tax controversy. And it would appear uncontestable that the only real "case or controversy" is that between the pipeline companies and the State of Louisiana. That is the "controversy," of course, that is currently going forward in the pipelines' tax refund suit in the Louisiana state courts.

Intervention by Improper Parties

The first point of departure for the State of Louisiana is the Special Master's proposition that the pipeline companies should be allowed intervention here despite the fact that they would not be proper parties to an original action. (Report, p. A-8.) That conclusion proceeds upon the mistaken assumption that this Court "has held that the Constitutional limitations on original actions before it does not prevent intervention by private parties once the Court has been given jurisdiction of the case." *Ibid.*

With all due respect to the Special Master, the State of Louisiana submits that quite the opposite is true, for the following reasons:

(1) As demonstrated in Part I of this brief, this Court has yet to resolve the jurisdiction problems pertaining to the filing of the complaint of the eight Plaintiff States. Hence it is not yet a fact that this Court "has been given jurisdiction of [this] case."

(2) The Special Master's reliance on *Oklahoma v. Texas*, 258 U.S. 574 (1922), and *Texas v. Louisiana*, 416 U.S. 965 (1974), for the thesis that a non-state party can be allowed to intervene without destroying the jurisdiction of the Court is misplaced. Both those cases involved adverse claims to property by two contiguous States, where there never was any question as to the original and exclusive jurisdiction of this Court. Permitting other non-state property claimants to intervene could not possibly have affected the Court's jurisdiction once it had properly been invoked as to the two contesting States. Once the Court's jurisdiction attached to the property *in rem*, it acquired ancillary jurisdiction to consider all claims thereto.

As the Court explained in *Oklahoma v. Texas*, 258 U.S. at 581,

> In its first stage this was a suit by one state against another. When the United States intervened it became also a suit by the United States against those states. In its enlarged phase, it presents in appropriate form the conflicting claims of the two states and the United States to the river bed, and calls for their adjudication. The other claims, being for particular tracts and funds in the receiver's possession and exclusively under our control, are brought before us because no other court lawfully can interfere with or disturb that possession or control. It long has been settled that claims to property or funds of which a court has taken possession and control through a receiver or like officer may be dealt with as ancillary to the suit wherein the possession is taken and the control exercised, —*and this although independent suits to enforce the claims could not be entertained in that court.* [Emphasis added]

Similarily, in *Texas v. Louisiana*, 426 U.S. at 466, the City of Port Arthur, Texas, "was permitted to intervene for purposes of protecting its interest in the island claims of the United States." This intervention was allowed after the dispute between Texas and Louisiana had been resolved and after the United States was allowed to intervene (414 U.S. 1107) to assert its claim of ownership to the islands in question.

(3) The Special Master's comment that constitutional limitations on original actions, once jurisdiction attaches, are irrelevant in assessing intervention is wrong for quite another reason. As pointed out long ago in *California v.Southern Pacific Co.*, 157 U.S. 229, 257-258 (1895), this Court's original jurisdiction "depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. In one description of cases the character of the parties is everything, the nature of the case nothing. In the other description of cases the nature of the case is everything, the character of the parties nothing."

This point comes out most clearly in cases initiated here by a State suing a citizen of another State, a situation where "the character of the parties is everything." In a series of cases brought by a State against a defendant citizen of another State, the Court has held that even after original jurisdiction has properly been invoked in the first instance the action must be dismissed if the State joins one of its own citizens as a defendant. *California v. Southern Pacific Co., supra; New Mexico v. Lane*, 243 U.S. 52, 57-58 (1917); *Minnesota v. Northern Securities Co.*, 184 U.S. 199 (1902); *Texas v. I.C.C.*, 258 U.S. 158, 164 (1922); *Louisiana v. Cummins*, 314 U.S. 577 (1941); and see *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 463-464 (1945). The single exception is where the citizens of the plaintiff State is joined as a mere formal or nominal party. *Florida v. Anderson*, 91 U.S. 667, 676-677 (1875). The same result would clearly follow if the real party in interest intervenes as a party defendant in such a suit.

This case involves another facet of original jurisdiction where "the character of the parties is everything," i.e. a suit brought by one State against another State. Intervention as a *party plaintiff* in such a case must be carefully screened. If it becomes clear, even after filing of the complaint has been allowed, that the real party in interest is a private person, the plaintiff State may lose its capacity to continue such a suit, for the State can sue only on its own behalf and not on behalf of particular citizens or individuals. See *Louisiana v. Texas*, 176 U.S. 1 (1900); *Oklahoma v. Atchison, T.&S.F. Co.*, 220 U.S. 277 (1911). That the private real party in interest makes himself known as a putative intervenor would not appear to change this jurisdictional problem.

Indeed, constitutional consequences can ensue if the private party intervenes as a party plaintiff in such an original suit. Not only may the entry of the private party reveal the shallowness of the plaintiff State's status but it may implicate the Eleventh Amendment's ban on suits against a State by a citizen of another State. See, e.g., *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *North Dakota v. Minnesota*, 263 U.S. 365, 386 (1923). It is at this point that the State of Louisiana makes its second break with the Special Master's reasoning respecting intervention as plaintiffs by the real private parties in interest, the pipeline taxpayers.

Eleventh Amendment Problems

The State of Louisiana takes exception to the Special Master's view that the applicability of the Eleventh Amendment can be reserved until the final decision of the case. (Report, p. A-8). If the Amendment is applicable, it is applicable here and now. Allowing these private parties in now as plaintiffs will so drastically charge the jurisdictional atmosphere of the case as to call for its instant dismissal. Indeed, the damage may already have been done.

From the moment the complaint of the eight Plaintiff States was drafted, let alone filed, it has been obvious that the only real parties in interest in this tax controversy are the private pipeline taxpayers. That complaint and each succeeding complaint in intervention have sought not only a declaration of invalidity but one concrete form of relief — a refund of the taxes paid by these taxpayers.

The whole purpose of the Eleventh Amendment was to protect States like Louisiana from being forced to respond in this Court, or any other federal court, to tax refund claims asserted by citizens of other States. That the claim is asserted at this time by the putative intervenors — the taxpayers — does not soften the fact that the complaint of the Plaintiff States inplicated the Eleventh Amendment from the start. Nor does it alter the fact that the United States and FERC, while not technically bound by the Eleventh Amendment, have joined in pursuit of the tax refund claims of the private pipeline companies.

The short of it is that however and how many times it becomes clear that the Plaintiff States are posing as surrogates for private claimants, the Eleventh Amendment erects an absolute bar to continuation of an original action in this Court. At this point, not at the end of the case, the principle of the Eleventh Amendment comes into effective operation. The entire judicial power granted by the Constitution does not embrace authority in this Court to entertain such a suit, particularly in the absence of the State's consent. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934).

Without doubt, this is one of the most important jurisdictional problems ever to be brought to this Court's original docket. None of the cases cited by the Special Master come even close to answering the Eleventh Amendment problems that populate this case. e.g., *Utah v. United States*, 394 U.S. 89 (1969); *New Jersey v. New York*, 345 U.S. 369, 372 (1953). Not the least troublesome of these problems is the Special Master's remark (Report, pp. A-8, 9) that to "relegate the pipelines to their remedy in the Louisiana courts would result in duplicative litigation with the possibility of conflicting results."

The State of Louisiana can reply only that the original jurisdiction of this Court and the prudential considerations that underlie it are too vital to permit them to be undermined by a concern that private taxpayers, fully able to assert their own rights, might have to pursue the remedy that they themselves have chosen to follow in the Louisiana courts. The exercise of this Court's original jurisdiction is not an award to private parties who seek by intervention "to assert their claim directly [in this Court] rather than relying on the states, of which they are not even citizens, to assert their claims for them" (Report, p. A-8.)

The recommendation that the seventeen pipeline companies be allowed to intervene as plaintiffs must be rejected.

V.

THE AMICUS CURIAE BRIEF

The State of Louisiana has excepted to the recommendation that the motion of Associated Gas Distributors for leave to file a brief *amicus curiae* be granted at this time. Since the brief is in support of the motion of the Plaintiff States for judgment on the pleadings, in a case in which jurisdiction of this Court to continue the case is in such peril, there appears little if any reason for filing such a brief at this time.

CONCLUSION

For these various reasons, the State of Louisiana requests that all of its Exceptions to the Special Master's Report, dated May 14, 1980, be sustained.

All of the above and foregoing is thus respectfully submitted.

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CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, counsel of record for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 9th day of July, 1980, I served copies of the *Exceptions of the State of Louisiana to the Report of Special Master dated May 14, 1980 and Brief in Support Thereof*, by depositing three copies thereof in a United States mailbox, with postage prepaid, addressed to counsel of record at his or her post office address. Their names and addresses are as follows:

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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 83, ORIGINAL

STATE OF MARYLAND, *et. al.*,
Plaintiffs,

v.

STATE OF LOUISIANA,
Defendant.

ON MOTIONS FOR LEAVE TO INTERVENE AND TO APPEAR AS *AMICUS CURIAE*

REPORT OF SPECIAL MASTER

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Special Master

May 14, 1980

IN THE
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ON MOTIONS FOR LEAVE TO INTERVENE AND TO APPEAR AS *AMICUS CURIAE*

REPORT OF SPECIAL MASTER

By order of the Court dated March 3, 1980, the undersigned was appointed Special Master in the above entitled case. By the same order motions of Columbia Gas Transmission Corporation and sixteen other pipelines, and of the State of New Jersey for leave to intervene were referred to the Special Master.

Thereafter, on April 2, 1980, the United States and the Federal Energy Regulatory Commission filed a motion for leave to intervene. Although no specific order of reference of this motion has been made to the Special Master, he assumes for the purpose of this report that he is authorized to advise the Court as to the disposition of the motion pursuant to the provision in the order of March 3, 1980, that "the Special Master is directed to submit such reports as he may deem appropriate." The Special Master finds that a report on the motion of the United States and the Federal Energy Regulatory Commission to intervene is appropriate in order to permit the proceedings to be carried forward without further delay.

The order of March 3, 1980, also referred to the Special Master a motion of Associated Gas Distributors for leave to file a brief *amicus curiae in support of the plaintiff's motion for judgment* on the pleadings.

This report deals with the above motions. No report is now made on the motion for judgment on the pleadings since the Special Master finds such a report at the present time would be premature pending further presentations to the Special Master by the parties on the need to hold evidentiary hearings in the case.

FACTS

So far as is necessary for the disposition of these motions, this action was initiated by a motion for leave to file a bill of complaint in an original action made on March 29, 1979, by the states of Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island and Wisconsin. The attached complaint alleged the unconstitutionality of a Louisiana statute, designated as R.S. 47:1301-1307, imposing a "first use tax" on natural gas produced from the Outer Continental Shelf and federal enclaves, and other imported gas moving into Louisiana. The Louisiana statute is alleged to violate the commerce clause of the United States Constitution as well as the supremacy clause, the import-export clause and equal protection of the law. Over the opposition of Louisiana the Court on June 18, 1979, granted the motion for leave to file the complaint. On August 17, 1979, Louisiana filed an answer to the complaint addressing each paragraph of the complaint and asserting the legality and constitutionality of the statutes attacked and further asserting that many factual controversies were raised by the pleadings necessitating evidentiary hearings. The plaintiffs have filed a motion for judgment on the pleadings and Louisiana has filed a motion to dismiss the complaint. These motions are still pending, but, in the view of the Special Master, are not ripe for determination pending further presentations by the parties.

On September 24, 1979, Columbia Gas Transmission Corp. and sixteen other pipeline companies filed motions to intervene as parties plaintiff and to file complaints which alleged that the first use tax makes them liable for the payment of the tax and deprives them of protections afforded by the Constitution. On September 24, 1979, Louisiana filed an opposition to this motion.

On October 22, 1979, the State of New Jersey filed a motion for leave to intervene as a party plaintiff alleging facts comparable to those alleged by the complaining states and asserting the same claims as to the unconstitutionality of the Louisiana statutes. On December 3, 1979, Louisiana filed an opposition to this motion.

On April 2, 1980, the United States and the Federal Energy Regulatory Commission filed a motion for leave to intervene and file an intervention complaint alleging their interests as the federal agency responsible for natural gas regulation, as the lessor of gas producing property on the outer continental shelf, and as a consumer of natural gas subjected to the tax. The complaint alleges the unconstitutionality of the Louisiana statutes both under the commerce clause and the supremacy clause. At the date this report was prepared, no response to this motion had been filed by Louisiana.

On October 24, 1979, Associated Gas Distributors filed a motion for leave to file a brief *amicus curiae* in support of the plaintiffs' motion for judgment on the pleadings. Although some of the parties withheld consent to filing this brief, making the motion for leave to file necessary, no formal opposition has been filed.

RECOMMENDATIONS

I.

NEW JERSEY'S MOTION FOR LEAVE TO FILE AN INTERVENING COMPLAINT.

It is not contested that the complaint which New Jersey moves to file is virtually indistinguishable from the complaint of the State of Maryland and its co-plaintiffs. New Jersey merely adds the facts applicable to it and its citizens. Under these circumstances it would seem clear that, had New Jersey opted to file a wholly independent original action, the Court in order to act consistently with its action in the Maryland case, would have granted the motion. Filing as an intervenor has the advantage of promoting judicial economy and placing New Jersey on an equal footing with the eight states in the original suit. No claim has been made that permitting intervention will unduely delay or prejudice the adjudication of the rights of the original parties. Granting the motion appears to be consistent with past Supreme Court practice, *Pennsylvania v. Connecticut*, 401 U.S. 931, and with the standard provided by Rule 24(b) of the Federal Rules of Civil Procedure, which by Rule 9 of this Court's Rules may be taken as a guide to procedure in original actions in this Court where their application is appropriate. The applicant's claim and that in the main action have common questions of fact and law.

The Special Master recommends that the motion of New Jersey to intervene and file its complaint be granted.

II.

MOTION OF THE UNITED STATES AND FEDERAL REGULATORY COMMISSION TO INTERVENE AND FILE A COMPLAINT IN INTERVENTION.

The interest in the dispute of the United States and the Commission is somewhat different from that of the original plaintiffs. However, from the point of view of completing the litigation with the participation of all parties which have a direct and important interest in it, it is not only appropriate, but highly desirable that the United States be joined as a party. *Cf. Texas v. Louisiana*, 410 U.S. 702, 712-14. Apart from its interest as a consumer of natural gas, the United States has a separate interest because of its responsibilities under the Outer Continental Shelf Act, 43 U.S.C. 1331-43. The Federal Energy Regulatory Commission is involved as the administrative agency responsible for the execution of the Natural Gas Act, 15 U.S.C. 717-717w and the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351. Rule 24(b) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 9 of the rules of this Court, provides:

> When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.

In this case the plaintiffs do in fact rely upon actions of the United States and the Federal Energy Regulatory Commission under both the Outer Continental Shelf Act and the Natural Gas Acts for their claims as to the unconstitutionality of the first use tax.

In the past the Court has permitted the United States to intervene under comparable circumstances in original cases involving disputes between two or more states. *Wisconsin v. Il-*

linois, 278 U.S. 362; *Arizona v. California*, 344 U.S. 919; *Oklahoma v. Texas*, 253 U.S. 465; *New Jersey v. New York*, 345 U.S. 369, 373.

The Special Master recommends that the motion of the United States and the Federal Energy Regulatory Commission to intervene as plaintiffs be granted.

III.

MOTION OF COLUMBIA GAS TRANSMISSION CORPORATION AND SIXTEEN OTHER PIPELINES TO INTERVENE AS PLAINTIFFS.

The interests of the pipelines in the outcome of this suit is direct and material. The first use tax falls directly on the pipelines who own and control the gas at the time the tax is imposed and who are directly liable for its payment. It is asserted that the amount involved annually is $250,000,000. The pipelines would therefore be the taxpayers presumably entitled to recover taxes already paid if the act were declared unconstitutional and repayment ordered. Moreover, since the pipelines have been permitted to pass the cost of the tax along to the purchasers of the gas, it has a direct effect on the price of the gas to the ultimate consumer and therefore its competitive position with respect to competing fuels.

While the interests of the pipelines differ from those of the states and the United States, their claims of unconstitutionality raise the same issues and require the same proof as the others. Therefore, to permit the pipelines to participate as parties should not complicate the trial of the case, delay it, or prejudice the rights of the original parties.

Louisiana, which opposes the intervention, argues that the pipelines are not proper parties to an original action since they could not have commenced it in the first place. However, the Court has permitted the intervention of non-states in original actions once the Court has taken jurisdiction of a case. *Oklahoma* *v. Texas*, 258 U.S. 574; *Texas v. Louisiana*, 416 U.S. 965. Very clearly the Court has held that the Constitutional limitations on original actions before it does not prevent intervention by private parties once the Court has been given jurisdiction of the case.

Louisiana asserts that the Eleventh Amendment, denying jurisdiction in the federal courts over suits against a state by a citizen of another state, prevents the intervention of the pipelines, which are citizens of various states other than Louisiana. Without specifically addressing the issue of the impact of the Eleventh Amendment, this Court has permitted the intervention of private parties in opposition to states which were parties to original actions. *Oklahoma v. Texas*, 258 U.S. 574; *Texas v. Louisiana*, 416 U.S. 965. The question as to the applicability of the Eleventh Amendment was left open in *New Jersey v. New York*, 345 U.S. 369, 372. And in *Utah v. United States*, 394 U.S. 89, where a Special Master had found that the state had not waived its sovereign immunity, the court agreed to the denial of intervention, but not on the ground that was suggested by the Special Master. The Court found that the issues in the case had been narrowed by stipulation and suggested that absent that stipulation "Morton's right to intervene would have had a substantial basis. ... it would have been fairest to permit Morton to speak for itself." 394 U.S. at 92.

Intervention appears to me materially different from an original suit against a state by a citizen of another state. Here Louisiana is already a party to a proceeding in which the validity of its tax is under attack. If it loses the suit, it would presumably be liable to repay the taxes already collected and intervention of the pipelines would not constitute an additional claim against the assets of the state. Nor would it affect the future imposition of the tax, which would be forbidden or permitted depending on the outcome of the suit by Maryland and its sister states. The difference would be that of permitting the pipelines to assert their claim directly rather than relying on the states, of which they are not even citizens, to assert their claims for them. To relegate the pipelines to their remedy in the Louisiana courts would result in duplicative litigation with the possibility of conflicting results.[1]

The Special Master recommends that for the purpose of expeditiously carrying forward these proceedings the pipelines be permitted to intervene, reserving the final determination of the applicability of the Eleventh Amendment until the final decision of the case.

IV.

MOTION OF ASSOCIATED GAS DISTRIBUTORS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS.

The interest of the Association in this proceeding arises from the fact that it is an association of gas distributors serving eleven million customers along the eastern seaboard. It asserts that more than half of the gas sold by its members comes from the Outer Continental Shelf and has moved through Louisiana, thus being subjected to that state's first use tax. The cost of the tax has been passed on to them and by them to their customers. In the brief *amicus curiae* attached to the motion it is argued that the tax is unconstitutional under both the supremacy clause and the commerce clause.

While the argument of the Association differs in minor detail from that of the pipelines, the pipelines are not now parties and the views of the distributors may be helpful in the disposition of the case.

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[1]The pipelines assert a waiver of immunity by a Louisiana statute permitting a suit at law in state or federal courts to recover the tax if paid under protest. La. R.S. 47:1576. Louisiana responds that the consent to be sued does not cover the type of action here involved. The Special Master makes no recommendation on the resolution of this dispute since he believes the grant of the motion is appropriate apart from any waiver of immunity.

The Special Master recommends that the motion of Associated Gas Distributors for leave to file a brief *amicus curiae* supporting the plaintiffs' motion for judgment on the pleadings be granted.

Respectfully submitted,

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Special Master

May 14, 1980