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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 83, Original

STATE OF MARYLAND, *et al.*,
Plaintiffs

versus

STATE OF LOUISIANA

RESPONSE OF PIPELINE COMPANIES TO LOUISIANA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT OF MAY 14, 1980

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STATEMENT

This original proceeding brought by Maryland *et al.* (plaintiff States) involves an attack on numerous grounds upon the constitutionality of Louisiana's so-called First Use Tax on Natural Gas (Tax) enacted in 1978, La. R.S. 47:1301 *et seq.* The statute imposes a tax of seven cents per Mcf principally upon natural gas produced from the outer continental shelf and transported through Louisiana to various other states. It

purports to be assessed upon the first "use", as therein defined, of the natural gas within Louisiana and its incidence falls directly upon the pipeline companies which purchase the gas at the wellhead and transport it for eventual use and resale in and outside Louisiana.[1]

Following the Court's grant, over Louisiana's strong opposition, of the plaintiff States' motion for leave to file complaint on June 18, 1979 (442 U.S. 937), seventeen pipeline companies on August 28, 1979, jointly filed a motion for leave to intervene as plaintiffs.[2] Pointing out, *inter alia,* that the incidence of the Tax was upon them,[3] the pipelines alleged that they had substantial interests which, while different from those of the plaintiff States in certain material respects, would nevertheless be

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[1]The Tax and related laws enacted at the same time contain a series of exemptions and credits which serve to limit the Tax's scope as summarized in the text. See Appendices A to D to pipelines' motion to intervene filed August 28, 1979.

[2]The pipelines companies seeking intervention, all interstate natural gas companies subject to regulation by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, and the Natural Gas Policy Act, 15 U.S.C. 3301 *et seq.*, are Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company, a Division of Tenneco, Inc., Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company and United Gas Pipe Line Company.

[3]The pipelines' motion estimated that their obligation under the Tax would aggregate nearly $275,000,000 in the first year alone.

affected directly and materially by the Court's disposition of the case.[4] The proposed complaint attached to the pipelines' motion raised the same constitutional issues as those raised by the plaintiff States. On September 24, 1979, Louisiana filed its opposition to the pipelines' motion, to which the pipelines responded on October 9, 1979.

In the meanwhile, on September 4, 1979, the plaintiff States filed a motion for judgment on the pleadings which was later supported by separate pleadings filed by the pipelines as well as jointly by the United States and FERC.[5] On October 22, 1979, Louisiana filed a motion to dismiss the complaint along with an opposition to the motions for summary disposition.[6]

On March 3, 1980, the Court issued its order appointing a Special Master, ____ U.S. ____, 100 S. Ct. 1271 (1980). In the order the Court expressly listed all the pending motions other than Louisiana's motion to dismiss as being referred to the Special Master for his recommendation. Following a hearing on March 26,

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[4]The pipelines' pleadings further noted that in contrast to the plaintiff States, they were deeply involved in the day-by-day operations of the natural gas industry and hence had superior ability to marshall facts should a full factual development be found to be necessary.

[5]Hereinafter sometimes collectively referred to as the United States.

[6]Also, on October 22, 1979, the State of New Jersey filed its motion for leave to intervene to which was attached its proposed complaint, raising the same constitutional issues as the plaintiff States.

1980, the United States on April 2, 1980, filed a motion for leave to intervene to which was attached a proposed complaint raising the same constitutional issues as the plaintiff States.

On May 14, 1980, the Special Master issued his Report recommending the granting of all intervention requests. With regard to the pipelines, the Special Master noted that their interest "in the outcome of this suit is direct and material" (Rep., p. 6) and that while their interests differed from those of the plaintiff 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. . . (Rep., p. 7).

Further, the Special Master rejected Louisiana's contention that the pipelines are not proper parties to the proceedings since they could not have commenced it in the first place, observing in pertinent part (Rep., p. 7):

> . . . 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.

Finally, noting several of the reasons militating against adoption of Louisiana's Eleventh Amendment arguments, the Master concluded with the recommendation that (Rep., pp. 8-9):

> . . .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.[7]

ARGUMENT

THE SPECIAL MASTER'S RECOMMENDATION THAT THE PIPELINES BE PERMITTED TO INTERVENE IS SUPPORTED BY ALL APPLICABLE PRINCIPLES

A. Louisiana Does Not Question That The Pipelines Satisfy The Requirements For Intervention

Louisiana (Br., p. 37) specifically notes that it "has no quarrel with" the Special Master's findings that

> the First Use Tax "falls directly" on . . . [the pipelines], that they are "directly liable" for its payment, and "would therefore be the taxpayers presumably entitled to recover

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[7]See Memorandum Opinion in *Oklahoma v. Texas*, 257 U.S. 609 (1921) and Opinion in that case at 258 U.S. 574 (1922) (allowing proposed intervenors to appear and participate in hearings prior to decision on their motions to intervene).

> taxes already paid if the [Louisiana] act were declared unconstitutional and repayment ordered." (Report, p. A-7).

Under well settled principles, the facts thus admitted clearly establish the propriety of permitting intervention by the pipelines. See, e.g., *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977); *Donaldson v. United States*, 400 U.S. 517, 531 (1971); *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972); *Arizona* v. *New Nexico*, 425 U.S. 794, 797-798 (1976). As shown below, the various arguments by which Louisiana seeks to counteract the effect of these admissions have neither merit nor substance. Significantly, Louisiana has not suggested, and cannot suggest, that it would be harmed if the pipelines' intervention is allowed, whereas the detriment to the pipelines, if they are not allowed to participate in this action which would decide the constitutionality of the Tax, is obvious.

B. The Plaintiff States Are Not Surrogates For The Pipelines

Louisiana's contention (e.g., Br. p. 41) that the plaintiff States are "posing as surrogates" for the pipelines is made of whole cloth. As the premise for this argument, Louisiana asserts (Br., p. 37):

> 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.

These assertions, however, misstate the true situation. Although the pipeline companies are real parties in interest, this does not mean that they are the *only* such parties as Louisiana in effect contends. To the contrary, the plaintiff States are also real parties in interest. Louisiana's several arguments (Br., pp. 37-40) purporting to show otherwise are far-fetched and strained.[8]

To be sure, many of the arguments advanced by the pipelines are also advanced by the plaintiff States in attacking the Tax on constitutional grounds. But these arguments are in furtherance of their own direct interests which they are seeking to advance and protect, quite apart from those of the pipelines.

Accepting the premise that the plaintiff States have properly invoked this Court's original jurisdiction, no amount of circular reasoning can relegate them to the status of mere surrogates for the pipelines. To the contrary, each has significant interests of its own at issue in the case.

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[8]See Brief of plaintiff States in Support of Motion for Leave to File Complaint dated March 29, 1979 and their Brief in Opposition to Motion to Dismiss dated November 14, 1979.

In a word, Louisiana's argument improperly ignores the distinction between litigants seeking to invoke the original jurisdiction of the Court and those (such as the pipelines) seeking to intervene in an action as to which the original jurisdiction of the Court has already been properly invoked by the original plaintiffs.

C. Article III Of the Constitution Does Not Bar Intervention By Non-State Parties In Original Proceedings Between States

Louisiana treats the pipelines' intervention as a separate action to be consolidated with the States' suit. It is not. It is a matter ancillary to the dispute between the plaintiff States and Louisiana, and therefore within the Court's ancillary jurisdiction. It does not require independent jurisdictional grounds. In this regard, it should be noted that Louisiana (Br., p. 38) does not deny that, as found by the Special Master (Rep., p. 7), the Court permitted intervention of non-state parties in *Oklahoma v. Texas,* 258 U.S. 547 (1922) and *Texas v. Louisiana,* 416 U.S. 965 (1974), 426 U.S. 465 (1976).

Instead, Louisiana seeks to distinguish these cases on the ground that they are limited to *in rem* proceedings; according to Lousiana (Br., p. 38):

> Once the Court's jurisdiction is attached to the property *in rem,* it acquired ancillary jurisdiction in considering all claims thereto.

But, while it is true that these cases involved *in rem* situations, the distinction which Louisiana seeks to draw is inappropriate for it does not address or refute the principle established by these cases, *i.e.,* that the intervention of non-state parties does not destroy the original jurisdiction of the Supreme Court. In these

cases, the Court allowed the intervention of non-state parties because it felt that to decline to do so would preclude these parties from ever being able to assert their interests if a final adjudication were made in the Supreme Court without their participation. Thus, the results of these cases apply fully to the instant case, where the subject matter of the controversy between the pipelines and Louisiana is the same as that between the plaintiff states and Louisiana, and the Court's disposition of the plaintiff States-Louisiana controversy would, in large measure, also be dispositive of the pipelines-Louisiana controversy. See, also, *Utah v. United States,* 394 U.S. 89 (1969).[9]

Nor is Louisiana's position (Br., p. 39) helped by its reliance upon *California* v. *Southern Pacific Co.,* 157 U.S. 209 (1895). In that case, the parties seeking to intervene as defendants were citizens of the plaintiff state, and thus the controversy was characterized as ones between a state and its own citizens. The Court held that such a suit was not within its original Supreme Court jurisdiction over "all cases. . . in which a State shall be Party," U.S. Const. art. 3, § 2, cl. 2, is limited by the constitutional grant of federal jurisdiction generally. Analyzed in terms of the identity of the parties as opposed to the subject matter, the judicial

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[9]While the Court in *Utah* denied intervention to a non-state party, it was on the limited ground that the issues had been so limited by stipulation that the Court's decision would have no impact on the private party. However, as the Master noted (Rep., p. 8), the Court went on to observe that absent the 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.

power of the United States extends only to controversies between two or more states, controversies between a state and citizens of *another* state, and controversies between a state and foreign states, citizens or subjects. U.S. Const. art. 3, § 2, cl. 3. Accordingly, the Court held that a controversy between a state and its own citizens is not within its original jurisdiction.

Significantly, the Court recognized that a controversy between a state and citizens of *another* state would be within its jurisdiction. Unlike the situation in *Southern Pacific*, the controversy between Louisiana and the pipelines both comes within federal court jurisdiction generally and is a case in which a state is a party. Therefore, the Supreme Court has original jurisdiction of the controversy.[10]

In sum, while satisfaction of the requirements set out in Article III is a prerequisite to original jurisdiction in the Court, once these requirements have been satisfied as they are here, there is nothing in Article III mandating additional jurisdictional limitations precluding the joinder of non-state parties. See, *United States v. West Virginia*, 295 U.S. 463, 470-471 (1935) (holding that the Court's original jurisdiction embraces a suit where the United States is plaintiff, a state is defendant, and private parties are co-defendants).

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[10]*New Mexico v. Lane*, 243 U.S. 52, 57-58 (1917) and *Texas v. I.C.C.*, 258 U.S. 158, 164 (1927) also cited by Louisiana (Br., p. 39) similarly do not help Louisiana. The statements apparently relied on by Louisiana are conclusory, without any supportive analysis and, in any case, were made as part of an alternative secondary ground.

D. The Eleventh Amendment Does Not Bar Intervention By The Pipelines

Louisiana (Br., pp. 40-41) contends further that the intervention by the pipelines is barred by the Eleventh Amendment. But this argument is based on Louisiana's erroneous postulation (Br., p. 41) that the plaintiff States are "posing as surrogates" for the pipelines (but see *supra,* pp. 5-6). In addition, it overlooks the fact that the pipelines' complaint does not seek an order from the Court directing Louisiana to refund the taxes paid (see Br., pp. 40-41). Rather, the pipeline's complaint seeks only a declaration that the Tax is unconstitutional. Such a declaration clearly does not run afoul of the prohibitions of the Eleventh Amendment.

Louisiana (Br., p. 41) argues that "[t]he 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." A more precise statement of the law is that "[o]ne of the primary purposes of the Eleventh Amendment is the protection of the states' fiscal integrity," *Huecker* v. *Milburn,* 538 F.2d 1241, 1243 (6th Cir. 1976); see also *Edelman* v. *Jordan,* 415 U.S. 651 (1974). In view of the facts that the First Use Tax payments were made under protest, must be and are being held in escrow, and thus cannot be put to use, or even placed in its treasury, by Louisiana, any decision declaring the Tax to be unconstitutional would have no effect on Louisiana's fiscal integrity.

Moreover, inasmuch as the Eleventh Amendment does not apply to the case brought by the plaintiff States against Louisiana, so that "Louisiana is already a party to

a proceeding in which the validity of its tax is under attack" (Rep., p. 8), there is no good reason for invoking that Amendment to bar *intervention* by the pipelines. As the Special Master points out (Rep., p. 8), intervention differs materially from the institution of original suits. As he also found, not only would participation of the pipelines as parties "not complicate the trial of the case, delay it or prejudice the rights of the original parties" (Rep., p. 7), but also it would not affect the relief ultimately granted (Rep., p. 8). Consequently, the considerations underlying the Eleventh Amendment are plainly inapplicable.[11]

Additionally, even if the Eleventh Amendment might otherwise be applicable, it is apparent in light of the sweeping waiver on tax matters contained in La. R.S. 47:1576,[12] that Louisiana has waived whatever immunity it might have had to the pipelines' participation in the instant suit.[13] Thus Section 1576B provides "a legal remedy and right of action in *any* state or *federal court* having jurisdiction of the parties and subject matter, for

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[11]Cf. *United States v. State Tax Comm'n*, 481 F.2d 963, 975 (1st Cir. 1973); *United States v. Arlington County*, 326 F.2d 929, 932-933 (4th Cir. 1964); *United States v. State Board of Equalization*, 450 F. Supp. 1030, 1032 (N.D. Cal. 1978).

[12]The Court of Appeals for the Fifth Circuit has consistently recognized Section 1576 as constituting a valid waiver of Louisiana's Eleventh Amendment immunity. See, e.g., *Mississippi River Fuel Corp. v. Cocreham*, 382 F.2d 929 (5th Cir. 1967), *cert. den.*, 390 U.S. 1014 (1968); *Shell Oil Company v. Mouton*, 410 F.2d 715, 716 (5th Cir. 1969).

[13]The Special Master did not deal with this matter since he was of the view that granting the pipelines intervention "is appropriate apart from any waier of immunity" (Rep., p.8, fn. 1).

a full and complete adjudication of any and all questions . . . as to legality of any tax accrued or accruing, or the method of enforcement thereof."[14] In addition to repeating the critical language providing for "a legal remedy in the state or federal courts," Section 1576C goes on specifically to include within the waiver cases in which the "taxes are claimed to be an unlawful burden upon interstate commerce . . . in violation of any Act of Congress or the United States Constitution," as well as "cases where jurisdiction is vested in any of the courts of the United States."[15]

The latter two provisions alone — and particularly when read in conjunction with the general waiver provided in Section 1576 — clearly evidence Lousiana's willingness to waive whatever immunity it might otherwise have had and to permit taxpayers such as the pipelines to participate in proceedings such as those here involved. See, e.g., *Great Northern Life Insurance Co.* v. *Read,* 322 U.S. 47, 54 (1944); *Kennecott Copper Corp. v. State Tax Comm'n,* 327 U.S. 573, 577 (1946); *J. Reagan v. Farmers' Loan & Trust Co.,* 154 U.S. 362 (1894); *Soni v. Board of Trustees,* 513 F.2d 347, 352-53 (6th Cir.1975) *cert. den.,* 426 U.S. 919 (1976).

E. The Pendency Of The Pipelines' Refund Suit in State Court is No Bar To Their Intervention In This Case

The fact that the pipeline companies are also pursuing their claims in certain state court proceedings

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[14]Emphasis supplied.

[15]The full text of La. R.S. 47:1576 is set out in the Appendix, *infra,* pp. 17-18.

pending in Louisiana does not detract from their intervening in this case.

Those proceedings, -- the first instituted by the Governor and other Lousiana officials against the pipeline companies and others, seeking a declaratory judgment that the tax does not run afoul of the federal Constitution, and the second brought by the pipelines under Louisiana's statutory payment-under-protest procedure (R.S. La. 47:1576) seeking refund of the taxes paid under protest -- will be controlled as a practical matter by the ultimate decision of this Court. Clearly, and despite Louisiana's attempted denial (Br., p. 42), the pipelines had little choice as to their participation as litigants in both of those cases: just as they were required to respond to the Governor's declaratory action suit, they were likewise required to sue for refund pursuant to the statutory scheme under pain of forfeiting all taxes paid under protest.

In the case now before the Court, the pipelines seek to avail themselves of the opportunity to intervene in a proceeding, properly brought by other parties, in which this Court is called upon to make the ultimate disposition with respect to the validity of the Tax, and which provides a single, superior vehicle for the resolution of all disputes concerning all parties. The pipelines' intervention in this action not only will avoid protracted and duplicative litigation in the Louisiana courts, but would also ensure protection and assertion of the pipelines' distinct interests in the very suit which will ultimately decide the constitutional question affecting those interests.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should overrule Louisiana's exceptions to the intervention of the pipelines and adopt the recommendations thereon set out in the Report of the Special Master dated May 14, 1980.

Respectfully submitted,

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APPENDIX

§ 1576. Remittance of tax under protests; remedy at law for recovery and interest on amount recovered

A. A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest, or other charges imposed in this Subtitle. The person resisting the payment of any amount found due by the collector, or of enforcement of any provisions of this Subtitle, shall remit the amount found due to the collector and at that time shall give the collector notice of his intention to file suit for the recovery thereof. Upon receipt of this notice, the amount remitted shall be placed in an escrow account and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds in the excrow account shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of six percent per annum covering the period from the date the funds were received by the collector to the date of refund.

B. This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Subtitle as to the

legality of any tax accrued or accruing or the method of enforcement thereof. In such action, service of process upon the collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

C. This Section shall be construed to provide a legal remedy in the state or federal courts, by action of law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the state of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

D. Upon request of a person and proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, such person, upon agreement to abide by the decision of the courts, may remit the additional assessment under protest, but need not file and additional suit. In such cases the tax so paid under protest shall be placed in an escrow account and held by the collector until the question of law involved has been determined by the courts and shall then be disposed of as therein provided.
Amended by Acts 1975, No. 458, §1.