No. 83, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

REPLY OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION TO EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF THE SPECIAL MASTER, DATED MAY 14, 1980

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In our brief *amici curiae* of June 1979 in support of the plaintiffs' motion for leave to file a complaint and our brief *amici curiae* of November 1979 in support of plaintiffs' motion for judgment on the pleadings, we advised the Court that both the United States and the Federal Energy Regulatory Commission have a substantial and immediate interest in this litigation involving the Louisiana First Use Tax on natural gas.

As a consumer of natural gas in the operation of military and civilian installations, the United States is directly affected by the additional costs imposed by the First Use Tax. The United States is also 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. If the federal government's lessees are compelled to pay the First Use Tax, the revenues received by the United States from these leases could be significantly reduced. Finally, the Louisiana First Use Tax conflicts with the federal regulation of the sale and transportation of natural gas in interstate commerce. The impact of the Louisiana tax is to increase the price of gas extracted from federally-leased areas.

ARGUMENT

1. The Special Master correctly recommended that the Court grant the motion of the United States and the Federal Energy Regulatory Commission to intervene as plaintiffs. As he noted in his report (page 5), while the interest of the United States and the Commission is somewhat different from that of the original plaintiffs, "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." In support of his recommendation, the Special Master cited the fact that the United States is not only a consumer of natural gas but has a separate interest because of its responsibilities under the Outer Continental Shelf Lands Act, 43 U.S.C. 1331-1343. Moreover, since the plaintiffs rely upon actions of the United States and the Commission for their claims as to the unconstitutionality of the Louisiana First Use Tax, Fed. R. Civ. P. 24(b) supports the federal intervention. See also *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929); *Arizona* v. *California*, 344 U.S. 919 (1953); *Oklahoma* v. *Texas*, 253 U.S. 465 (1920); *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953).[1]

[1]Louisiana seeks to distinguish (Br. 36) *Wisconsin* v. *Illinois*, *supra*, and *New Jersey* v. *New York*, *supra*, on the ground that "the United States at no time appeared as an intervenor." But the United States was an active participant in subsequent proceedings in the former case for many years, first as an *amicus curiae* (*e.g.*, 352 U.S. 983, 984 (1957); 359 U.S. 963 (1959); 360 U.S. 712, 713, 714 (1959)), later as an

2. Louisiana argues that neither the United States nor the Federal Energy Regulatory Commission should be permitted to intervene as parties in this case and that the Special Master erred in so recommending. In support of its position, Louisiana claims that: (a) the United States did not allege that the injuries for which it seeks redress were directly caused by Louisiana (Br. 29); (b) that, even as a consumer of natural gas, the United States has no cause of action against Louisiana for increased costs of gas because the tax is imposed upon the producer and transporter of the gas and simply "passed on" to the United States (Br. 29); and (c) that the Federal Energy Regulatory Commission, and not Louisiana, is responsible for the pipelines' passing on of the additional cost represented by the tax to consumers such as the United States (Br. 31). Moreover, Louisiana disputes (Br. 31) the government's claim that the United States is directly affected by the tax in its capacity as a lessor under leases authorizing production of natural gas from federal enclaves and the Outer Continental Shelf over which it

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intervenor (361 U.S. 956 (1960)), and we contributed to the formulation of the proposed decree that the Court entered on June 12, 1967. 388 U.S. 426. The potentially affected interests of the United States included navigation in the Great Lakes, the St. Lawrence Seaway and the Illinois Waterway, hydroelectric power development on the Niagara and St. Lawrence Rivers, pollution and other threats to public health in and around the Great Lakes, the national interest in the Great Lakes-St. Lawrence system as a unique natural resource, and finally, the maintenance of friendly relations with Canada.

Moreover, while the United States did not intervene in *New Jersey* v. *New York*, *supra*, the Special Master's (and our) citation of that case is to the portion of this Court's opinion denying a motion by the City of Philadelphia to intervene because its interests were adequately represented by Pennsylvania. Here, by contrast while the United States supports the plaintiff States, its concerns and interests are different.

has exclusive jurisdiction. Finally, Louisiana contests (Br. 33-35) the proposed intervention of the Federal Energy Regulatory Commission on the ground that there is no conflict between the First Use Tax and the federal regulation of the sale and transportation of natural gas in interstate commerce.

a. The most cursory examination of the Complaint in Intervention establishes that the United States has alleged "injur[ies] that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 72, 74 (1978). Specifically, the United States alleges that it "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[,]" and that, as the lessor under leases authorizing various persons to produce natural gas from federal enclaves and the Outer Continental Shelf, it may suffer a significant reduction in revenues from those leases if its lessees must bear the First Use Tax.[2] Complaint in Intervention, paras. VI-VII.

Plainly, a decision by this Court will "redress the claimed injuries." *Duke Power Co.* v. *Carolina Environmental Study Group*, *supra*, 438 U.S. at 74. If, as we submit, the Court holds that the First Use Tax is unconstitutional, the United States will not incur additional operating costs and a potential loss of revenues. If the tax is upheld, however, then the United

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[2] The government is not required to await the actual loss of revenues before seeking relief. It is sufficient that the injury is impending. *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593 (1923).

States will suffer the burden of these additional costs and reduction in revenues.

b. Moreover, it is immaterial that the First Use Tax is not imposed directly upon the United States. For present purposes, it is sufficient that the First Use Tax triggers a chain of events that results in the imposition of additional costs upon the United States. That fact gives the United States standing to pursue a cause of action against Louisiana involving "a matter of grave public concern in which the [plaintiff States and the federal government], as the representative[s] of the public, h[ave] an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law" *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 592 (1923). See also *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339-344 (1979).

c. At all events, even if it were necessary that the First Use Tax be imposed upon the United States, it is plain that the Act requires that the tax will not be absorbed by the pipelines but will be passed on to the ultimate consumers. Section 47:1303C of the First Use Tax Act, La. Rev. Stat. Ann. (West Supp. 1980), abrogates "agreement[s] or contract[s] by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas * * * on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or * * * any other grounds for reimbursement or refund[.]" In its answer, Louisiana admits that Section 47:1303C requires that the First Use Tax be passed along to natural gas consumers. It states that "the sole purpose, intent, and application of [Section 47:1303C is] to ensure that the First Use Tax will not unreasonably burden any person within the interstate commerce stream but will be passed along to the ultimate users and consumers." Answer, para. LX, at 21. "There can be no doubt from the clear wording of the statute that the [Louisiana] Legislature intended that this [First Use] tax be passed on to the purchaser." *First Agricultural Nat. Bank* v. *Tax Comm'n*, 392 U.S. 339, 348 (1968). See also *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 607-609 (1975); *Diamond National Corp.* v. *State Board of Equalization*, 425 U.S. 268 (1976); *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 97, 99 (1941); *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954); *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941).

The fact that the Act requires that the First Use Tax be passed on to the ultimate consumer is further supported by the authoritative legislative history, which takes the form of statements made during the hearings before the Louisiana legislature. Representative Tauzin, the sponsor of the First Use Tax, and others stated that the effective date of the tax had been deferred to give the pipelines time to reflect the tax in their rates,[3] that the pipelines would not bear the tax because they could pass it along to their customers,[4] that the tax had been structured to require that it be passed along to the ultimate consumers not to the gas producers,[5] and that gas consumers in

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[3]*Hearings on H.B. 768 Before the Revenue and Fiscal Affairs Comm. of the Louisiana Senate* 4, 5-6, 12-13 (June 26, 1978) (Rep. Tauzin) (hereinafter "*Senate Hearings*"); *Hearings on H.B. 768 Before the Comm. on Ways and Means of the Louisiana House of Representatives* 2 (June 6, 1978) (Rep. Tauzin) (hereinafter *"House Hearings of June 6, 1978").*

[4]*Senate Hearings,* 4, 5-6, 26-27 (Rep. Tauzin); *id.* at 19 (Mr. Garner); *House Hearings of June 6, 1978*, 3 (Rep. Tauzin).

[5]*Senate Hearings,* 3-5 (Rep. Tauzin); *Hearings on H.B. 768 Before the Comm. on Ways and Means of the Louisiana House of Representatives* 13 (June 5, 1978) (Rep. Tauzin) (hereinafter *"House Hearings of June 5, 1978).*

Louisiana are protected from any impact resulting from the tax.[6] These remarks reinforce the explicit language of Section 47:1303C and confirm our submission that Louisiana has enacted an elaborate taxing scheme which is designed to ensure that the tax will be borne solely by consumers in other states. There is accordingly no basis to Louisiana's claim that the tax is not borne by the United States in its capacity as a consumer of natural gas and as a lessor of production areas in federal enclaves.

d. Given the plainly-stated prohibition of Section 47:1303C against the owner of the gas passing on the cost of the First Use Tax to the producer, Louisiana blinks at the realities of gas regulation and economics in contending that the imposition of the tax on the ultimate consumer is a consequence of the voluntary actions of either the pipelines or the Commission.

As regulated utilities, the pipelines are entitled to recover in their rates prudently incurred costs including taxes for "no public utility [can] be compelled to absorb its own costs and not pass them on to the consumer." *Public Service Commission of New York* v. *Federal Power Commission*, 467 F. 2d 361, 370 (D.C. Cir. 1972); *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Galveston Electric Co.* v. *Galveston*, 258 U.S. 388, 399 (1922); *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 163 F. 2d 433, 437, 451 (D.C. Cir. 1947). Since the Louisiana tax at issue amounts to approximately $225 million per year, the prohibition against passing on the tax back to the producers virtually requires the pipelines to pass it on to the consumers.

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[6]*Senate Hearings*, 3-5, 13 (Rep. Tauzin); *House Hearings of June 5, 1978*, 4 (Rep. Tauzin), 5 (Rep. Bagart and Rep. Guidry), 6 (Rep. Laborde), 8 (Rep. Bruneau); *House Hearings of June 6, 1978*, 10, 17 (Mr. Brooksher), 37 (Mr. Steimel), 40 (Rep. Leach).

There was nothing voluntary about such action. The pipelines cannot remain in business if they are required ultimately to absorb this massive cost.

e. Finally, Louisiana contests the proposed intervention of the Federal Energy Regulatory Commission. But the conflict between Section 47:1303C of the First Use Tax Act and the Commission's exclusive regulatory jurisdiction over the transportation and sale of natural gas in interstate commerce could not be more palpable. The Commission has consistently held that a pipeline's natural gas customers do not receive any benefits from the pipelines transportation of liquid and liquefiable hydrocarbons for the owners, and that the costs associated with the transportation and delivery of such products at the inlet of a processing plant must be borne by the producers, who benefit from such activities, and not by the natural gas consumers.[7] However, Section 47:1303C seeks to preclude the Commission from classifying the First Use Tax as a cost associated with the extraction of hydrocarbons. It does this by prohibiting the pipelines from obtaining reimbursement from the owner of the extracted hydrocarbons and requiring the pipeline to seek reimbursement, if at all, from subsequent purchasers, *i.e.*, consumers, of the natural gas.

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[7] *Union Oil Company of California, et al.*, Docket No. C177-828, *et al.*, order at 7, 10-11 (Apr. 12, 1978); *Canadian Superior Oil (U.S.) Ltd., et al.*, Docket No. C177-802 (Mar. 28, 1978); *High Island Offshore System*, Docket Nos. CP75-104, *et al.*, order at 10, 16-17, 18 (June 4, 1976); *Tennessee Gas Pipeline Co. et al.*, 38 F.P.C. 691, 698 (1967); *Northern Natural Gas Co.*, 28 F.P.C. 1155, 1163-1165 (1962), aff'd *sub nom. Mid-America Pipeline Co.* v. *FPC*, 330 F. 2d 226 (D.C. Cir. 1964); *Continental Oil Co., et al.*, 27 F.P.C. 96, 107-108 (1962); *Texas Eastern Transmission Corporation*, 11 F.P.C. 435, 447 (1952). See also *Pipeline Costs Allocable To The Transportation Of Liquids, Liquefiable Hydrocarbons, etc., For Others*, 47 F.P.C. 208 (1972), rev'd on other grounds *sub nom. Mobil Oil Corp.* v. *FPC*, 483 F. 2d 1238 (D.C. Cir. 1973).

The conflict between the Louisiana tax and the Commission's authority is therefore not an abstraction. To the contrary, the First Use Tax trenches upon "matters which directly affect the ability of the [Commission] to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which [is] an objective of the Natural Gas Act [and the Natural Gas Policy Act]." *Northern Natural Gas Co.* v. *Kansas Commission*, 372 U.S. 84, 91-92 (1963). In these circumstances, the Commission's "right to intervene [has] a substantial basis * * *, [and] it would seem fairest to permit [it] to speak for itself." *Utah* v. *United States,* 394 U.S. 89, 92 (1969). See also Fed. R. Civ. P. 24(b).

CONCLUSION

For the reasons stated above and in the Special Master's Report, the motion of the United States and the Federal Energy Regulatory Commission to intervene as plaintiffs should be granted.

Respectfully submitted.

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