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

MOTION OF INDICATED PIPELINE COMPANIES FOR LEAVE TO FILE AND MOTION FOR JUDGMENT ON THE PLEADINGS WITH ACCOMPANYING BRIEF

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November 5, 1979

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MOTION OF INDICATED PIPELINE COMPANIES FOR LEAVE TO FILE MOTION FOR JUDGMENT ON THE PLEADINGS WITH ACCOMPANYING BRIEF

The indicated pipeline companies* respectfully move the Court for leave to file the attached Motion for Judgment on the Pleadings with accompanying brief, and in support of this motion show:

*Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmissin 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 ("indicated pipeline companies" or "pipeline companies").

1.

On August 28, 1979, the pipeline companies moved for leave to intervene as plaintiffs in this action on the basis that, as the persons responsible for payment of Louisiana's First Use Tax on Natural Gas, they have significantly protectable interests at issue in this litigation which are not adequately represented by any other party, and that their intervention is appropriate to aid in the resolution of issues directly affecting their interests. The Court has not yet acted on their motion for leave to intervene.*

2.

On September 18, 1979, the plaintiffs moved for judgment on the pleadings. Louisiana responded to that motion on October 22, 1979 and also moved to dismiss the case on jurisdictional grounds.

3.

The pipeline companies believe that this case can and should be disposed of summarily, and that, as intervening plaintiffs, they can contribute significantly to the development and presentation of the issues which the Court must consider in order to decide any motion for summary disposition.

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* The plaintiffs do not opose the pipeline companies' intervention, but Louisiana has filed an opposition to the intervention. On October 9, 1979, the pipeline companies filed a response to that opposition.

WHEREFORE, the pipeline companies pray that they be allowed to file the attached Motion for Judgment on the Pleadings with accompanying brief.

Respectfully submitted,

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STATE OF LOUISIANA,

Defendant

MOTION FOR JUDGMENT ON THE PLEADINGS

The pipeline companies respectfully move the Court for judgment on the pleadings, and in support show that on the basis of the pleadings on file herein, there exists no genuine issue of material fact as to the invalidity of Louisiana's First Use Tax on Natural Gas under the constitution and laws of the United States.

WHEREFORE, the pipeline companies pray that judgment be rendered herein in their favor, declaring Louisiana's First Use Tax on Natural Gas void and unenforceable.

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

JURISDICTION

The States of Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island and Wisconsin ("plaintiffs"), have invoked the original jurisdiction of this Court to challenge the constitutionality of the Louisiana First Use Tax on Natural Gas, La. R.S. 47:1301-07 ("First Use Tax"). Original exclusive jurisdiction in this Court of the plaintiffs' action is established by article III, §2, clauses 1 and 2 of the United States Constitution and 28 U.S.C. 1251(a).

The pipeline companies, as the persons responsible for payment of the First Use Tax, have moved for leave to

intervene to assert and protect their significant interests. Original jurisdiction in this Court of the pipeline companies' action is also established by article III, §2, clauses 1 and 2 of the United States Constitution.

QUESTIONS PRESENTED

1. Whether the First Use Tax is void under the Supremacy Clause of the United States Constitution because it

(a) invades the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC" or Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. 717, *et seq.*, to regulate the transportation and sale for resale of natural gas in interstate commerce (related to this issue is whether the First Use Tax prevents the Commission from discharging its responsibilities under Section 110 of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. 3301, *et seq.);* and

(b) conflicts with the express provisions, and prevents the accomplishment and execution of the purposes and objectives, of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. 1331, *et seq.*, and interferes with the comprehensive, preemptive scheme of the OCSLA and the Coastal Zone Management Act ("CZMA"), 16 U.S.C. 1451, *et seq.*, which regulates, and compensates for, the effects of coastal energy resource development.

2. Whether the First Use Tax violates the Commerce Clause of the United States Constitution because it (a) is not fairly apportioned and creates the risk of multiple taxation; and (b) discriminates against interstate commerce.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article 1, §8, clause 3 of the United States Constitution provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and wth the Indian Tribes.

2. Article VI, clause 2 of the United States Constiution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Sections of the NGA cited herein are set out in full in Appendix A.

4. Sections of the NGPA cited herein are set out in full in Appendix B.

5. Sections of the CZMA cited herein are set out in full in Appendix C.

6. Sections of the OCSLA cited herein are set out in full in Appendix D.

7. The First Use Tax on Natural Gas, Act 294 of 1978, La. R.S. 47:1301-1307, is set out in full in Appendix E.

8. Sections of the Louisiana General Severance Tax, La. R.S. 47:631, *et seq.*, including the First Use Tax on Natural Gas — Severance Tax Credit, La. R.S. 47:647, are set out in full in Appendix F.

9. The Tax Credit for Electric and Natural Gas Service, La. R.S. 47:11, is set out in full in Appendix G.

STATEMENT

The State of Louisiana, by Act No. 294 of 1978, enacted the First Use Tax on Natural Gas, which imposes a tax of seven cents per Mcf on "natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to [Louisiana] or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country." La. R.S. 47:1303A.

The stated purpose of the tax is to compensate Louisiana's citizens for alleged "costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana" and to reimburse Louisiana's citizens for alleged "damages to the state's waterbottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity within the state associated with such natural gas." La. R.S. 47:1301C.

The purported incidence of the tax is on "use" of the gas within Louisiana, defined as:

> the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state. La. R.S. 47:1302(8).

However, gas otherwise subject to the tax is exempt if it is ultimately used or consumed in Louisiana for certain specified purposes, including "the drilling for or production of oil, natural gas, sulphur," "the manufacture of fertilizer and anhydrous ammonia,"and processing for the extraction of liquefiable hydrocarbons. La. R.S. 47:1303A.

Additionally, as part of the First Use Tax package, the Louisiana legislature enacted the Severance Tax Credit, which grants to producers of natural resources in Louisiana who are also First Use Tax taxpayers, a direct tax credit, equal to the amount of First Use Tax paid, against severance taxes owed by that taxpayer to the state; and the Tax Credit for Electric and Natural Gas Service, which grants to Louisiana utilities and direct purchasers of natural gas a direct tax credit, against any other Louisiana tax liability, to compensate for increased natural gas costs attributable to the First Use Tax.

The tax is payable by the owners of the gas. La. R.S. 47:1305A. The statute declares "as against public policy," and makes unenforceable, any contractual provision which would entitle the owner of natural gas subjected to a "use" in Louisiana to recover the amount of taxes paid from any person other than a purchaser of the gas. La. R.S. 47:1303C. If for any reason the owner of natural gas subjected to a first "use" fails to comply with the reporting and payment provisions of the First Use Tax, the statute mandates that the gas subject to the tax "shall be treated as contraband and shall be seized and sold." La. R.S. 47: 1306B.

The pipeline companies are natural gas companies as defined in Section 2 of the NGA, and are regulated by FERC. They acquire natural gas produced from the outer continental shelf (a federal domain beyond the territorial boundaries of Louisiana, defined and delineated in the OCSLA) and from onshore federal enclaves, and transport said gas through their own pipeline systems or have it transported through the pipeline systems of others into or through Louisiana, in various streams in interstate commerce, for sale for resale under rate schedules or tariffs approved by and on file with FERC, to gas distribution companies, municipalities, and other pipeline companies, and/or for direct sale to other customers, all under certificates of public convenience and necessity issued by FERC.

Natural gas produced from the outer continental shelf ("OCS") or onshore federal enclaves is not subject to the imposition of a severance tax or other tax upon the volume of production by any state or territory of the United States,

nor is it subject to the imposition of an import tax or tariff by the United States. However, a severance tax is paid on gas produced in Louisiana, La. R.S. 47:631, *et seq.*, and in neighboring states from which gas may be transported through Louisiana. See *e.g.*, Tex. Tax. — Gen. Ann. art. 3.01 (Vernon. 1960); Miss. Code 1942 §§9417.5-01, *et seq.*

The First Use Tax therefore applies only to gas produced from the OCS or onshore federal enclaves with the vast majority of this gas originating from the OCS. This gas is dedicated to interstate commerce from the moment of production. The pipeline companies transport virtually all of the gas subject to the First Use Tax into and through other states. The aspects of this transportation through other states are as easily described as "uses" (as defined in the Louisiana statute), as are the aspects of the transportation into or through Louisiana.

The First Use Tax and its companion statutes clearly show that the First Use Tax is aimed squarely at gas produced from federal domains and destined for ultimate consumption by persons in other states, and is designed so that the economic burden of the tax falls exclusively on the pipeline companies and on consumers in other states. If upheld, it will cost the pipeline companies and their customers an estimated 275 million dollars annually.

SUMMARY OF ARGUMENT

I. THE FIRST USE TAX IS VOID UNDER THE SUPREMACY CLAUSE

A. The First Use Tax Invades the Exclusive Jurisdiction of the Federal Energy Regulatory Commission Under the Natural Gas Act

When Congress enacted the NGA, it created a "complete, permanent and effective bond of protection" for the natural gas consumer. *Atlantic Refining Co. v. Pub. Serv. Comm'n of N. Y.*, 360 U.S. 378, 388 (1959). To achieve this objective, Congress created the Federal Power Commission, now FERC, and vested that body with exclusive jurisdiction over the sales for resale by, and services and facilities of, natural gas companies selling and transporting natural gas in interstate commerce. *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947). To the extent Congress has exercised its power to regulate the sale and transportation of natural gas in interstate commerce, it has preempted state regulation of these areas. *Northern Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84 (1963).

The First Use Tax is void under the Supremacy Clause because it interferes with the Commission's paramount authority to regulate the sales and service of natural gas companies subject to its jurisdiction.

By providing for the nullification of material pricing provisions in contracts between natural gas pipeline com-

panies and their producer-suppliers, under which the Commission has previously authorized, or may authorize, service to the public as being required by the public convenience and necessity, the First Use Tax interferes with the Commission's administration and enforcement of contracts subject to its jurisdiction, and adversely affects its ability to set just and reasonable rates for sales and services provided by the consumer. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

Despite its characterization, it is clear that the First Use Tax is a charge or rate on the transportation of natural gas from federal domains into and through Louisiana. Just as a state may not directly set minimum rates for wellhead sales of natural gas, *Natural Gas Pipe Line Co. of America v. Panoma Corp.*, 349 U.S. 44 (1955), *Cities Service Gas Co. v. State Corp. Comm'n of Kan.*, 355 U.S. 391 (1958), it also may not establish, directly or indirectly, a rate or charge on the transportation of natural gas in interstate commerce. Clearly, the establishment of such rates or charges interferes with the Commission's jurisdiction to set just and reasonable rates for the customers served by the pipeline companies.

The regulatory aspects of the First Use Tax permeate the statute and usurp the exclusive jurisdiction of FERC to assure just and reasonable rates for the transportation and sale of natural gas in interstate commerce. The interstate transportation of natural gas is an area in which federal regulation is so pervasive, and the federal interest so dominant, that the First Use Tax must be deemed invalid simply because it infringes upon the area, even absent

consideration of its many demonstrable conflicts with the regulatory authority of FERC. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

B. The First Use Tax Conflicts With the Outer Continental Shelf Lands Act And the Coastal Zone Management Act

The OCSLA prohibits the application of state taxation laws to the OCS, 43 U.S.C. 1333(a)(2)(A), and provides that no state shall have "any interest in . . . the property and natural resources [of] . . . or the revenues [from]" the OCS, 43 U.S.C. 1333(a)(3). The legislative history of the OCSLA shows that Louisiana and other coastal states sought authorization to tax the resources of, and participate in the revenues from, the OCS, but that Congress made a conscious decision to the contrary. The structure of the First Use Tax makes clear its purpose to tax the natural gas of the OCS and to participate in the revenues derived from OCS development, and the tax is accordingly proscribed by the Supremacy Clause.

The OCSLA Amendments of 1978 and the CZMA represent a comprehensive statutory scheme designed to promote OCS activities in conjunction with sound principles of coastal zone management. To encourage OCS development and to provide reasonable compensation to states for OCS impacts, Congress established a coastal energy impact fund ("CEIF"), which was intended to be the sole source of OCS derived financial support for coastal states. The First Use Tax undermines the comprehensive scheme of coordinating coastal energy and environmental

concerns. If it is not declared invalid, Louisiana will obtain indirectly that which Congress specifically has forbidden, *i.e.*, an unfettered share in OCS derived funds.

II. THE FIRST USE TAX VIOLATES THE COMMERCE CLAUSE

A. The First Use Tax Is Unapportioned And Creates The Risk Of Multiple Taxation.

The First Use Tax is imposed on the total volume of natural gas moving in interstate commerce and is thus unapportioned. Virtually all of the gas subject to the tax is ultimately consumed in states other than Louisiana. Because Louisiana measures the tax by the total volume of gas subjected to "uses" in that state, and because many of these "uses" are repeated in other states, those states would have the power to impose an identical tax on the same volume of gas. The First Use Tax accordingly creates a substantial risk of multiple taxation. *Michigan Wisconsin Pipe Line Company v. Calvert,* 347 U.S. 157 (1954); *Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434 (1939). Because the First Use Tax is unapportioned, the proper test for determining its constitutionality is whether it creates the risk of multiple taxation, not whether such taxation actually exists. *Central Railroad v. Pennsylvania,* 370 U.S. 607 (1962); *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250 (1938).

B. The First Use Tax Discriminates Against Interstate Commerce

The First Use Tax burdens only natural gas produced

from the OCS or onshore federal enclaves. Because there is no valid reason to treat such gas differently from gas produced in Louisiana, the First Use Tax discriminates against interstate commerce. *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978); *Sonneborn Bros. v. Cureton,* 262 U.S. 506 (1923).

The First Use Tax, in combination with the Severance Tax Credit, permits First Use Tax taxpayers who also produce natural resources in Louisiana, a dollar-for-dollar credit for First Use taxes paid against their severance tax liability. The First Use Tax thus discriminates against the interstate commerce conducted by those taxpayers (the pipeline companies) which do not produce natural resources in the state. *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318 (1977).

The First Use Tax, in conjunction with the Tax Credit for Electric and Natural Gas Service, and various exemptions for in-state uses of natural gas, is designed to impose the entire economic burden of the tax on the pipeline companies and their out-of-state consumers. Louisiana has thereby singled out interstate commerce for tax treatment not shared by its own residents. The First Use Tax is accordingly unconstitutional. *Nippert v. City of Richmond,* 327 U.S. 416 (1946); *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963).

ARGUMENT

I.

THE FIRST USE TAX IS VOID UNDER THE SUPREMACY CLAUSE

The Supremacy Clause provides that the constitution and all laws made pursuant to it shall be the supreme law of the land. State laws which interfere with, frustrate the full effectiveness of, or are contrary to federal regulatory measures cannot be permitted to stand. *First Iowa Hydro-Electric Coop. v. FPC,* 328 U.S. 152 (1946); *Pub. Util. Comm'n of Cal. v. United States,* 355 U.S. 534 (1958); *Free v. Bland,* 369 U.S. 663 (1962); *Nash v. Florida Indus. Comm'n,* 389 U.S. 235 (1967); *Perez v. Campbell,* 402 U.S. 637 (1971); *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 158 (1978); *Arizona Public Service Co. v. Snead,* ___ U.S. ___, 60 L. Ed 2d 106, 99 S.Ct. 1629 (1979).

A. THE FIRST USE TAX INVADES THE EXCLUSIVE JURISDICTION OF THE FEDERAL ENERGY REGULATORY COMMISSION UNDER THE NATURAL GAS ACT.

To provide a "complete, permanent and effective bond of protection" for the natural gas consumer, *Atlantic Refining Co. v. Pub. Serv. Comm'n of N. Y.,* 360 U.S. 378, 388, Congress declared in Section 1(a) of the NGA, that the "business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal Regulation in matters relating to

the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." Congress, therefore, preempted the areas covered by the NGA for regulation by FERC to the exclusion of the states. The First Use Tax patently infringes upon that preemption in violation of the Supremacy Clause.

1. Congress Has Preempted the Areas Covered By the Natural Gas Act

Section 1(b) of the NGA vests jurisdiction in the Commission over: (1) the transportation of natural gas in interstate commerce; (2) the sale of that gas for resale in interstate commerce; and (3) natural gas companies engaged in such transportation or sale. *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947); *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972). In vesting the Commission with such jurisdiction, Congress was undertaking to fill the gap disclosed by the Court's decisions that the states had no authority as a constitutional matter to regulate wholesale sales in interstate commerce since they were a matter of national, not local, concern. *See, e.g., Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924); *Pub. Util. Comm'n of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). *Cf. FPC v. East Ohio Gas Co.*, 338 U.S. 464, 469-74 (1950).

In furtherance of the Commission's regulation over sales for resale, Section 4(a) of the NGA provides in part:

> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transporation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

Likewise, Section 5(a) of the NGA complements Section 4 by vesting authority in the Commission, *inter alia,* to investigate all such jurisdictional rates and to establish the appropriate rates upon a finding after hearing that the existing rates are unjust, unreasonable, unduly discriminatory, or preferential. *See e.g., United Gas Pipe Line Co. v. Mobile Gas Service Corp.,* 350 U.S. 332 (1956).

Congress also vested the Commission with jurisdiction over the initiation and termination of interstate transportation and/or sales for resale. Sections 7(c) and (e) of the NGA require the issuance by the Commission of a certificate of public convenience and necessity as a condition to any undertaking by a natural gas company to make new sales for resale or to provide new transportation service. Section 7(b) of the NGA prohibits a natural gas company from discontinuing or abandoning an existing sale for resale or transportation service without Commission approval. In sum, the Commission has been given comprehensive and exclusive regulatory jurisdiction over the sales, services and facilities of natural gas companies transporting and selling natural gas in interstate commerce.

The Court has repeatedly made clear that Congress has preempted the field covered by the NGA to the exclusion of the states. *See, e.g., Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.,* 314 U.S. 498, 506-509 (1942); *FPC v. Louisiana Power & Light Co.,* 406 U.S. 621 (1972). The Court's decisions in *Cities Service Gas Co. v. Peerless Oil & Gas Co.,* 340 U.S. 179 (1950) and *Natural Gas Pipeline Co. of America v. Panoma Corp.,* 349 U.S. 44 (1955), graphically illustrate the history, development and broad scope of federal preemption of the sale and transportation of natural gas in interstate commerce. In particular, they demonstrate that the area preempted by the NGA is much broader than that which was previously immune from state regulation under the Commerce Clause.

In *Cities Service Gas Co. v. Peerless Oil & Gas Co.,* the Court considered the validity of state orders setting minimum wellhead prices on gas sold in interstate commerce, and sustained the state's action as a constitutional matter under the Commerce Clause; it specifically noted, however, that it had not considered any question of conflict with the NGA:

> Whether the Gas Act authorizes the Power Commission to set field prices on sales by independent producers, or leaves that factor to the states is not before this Court. 340 U.S. 179, 188-89.

The Court answered this question in *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672 (1954), and held that the NGA required the Commission to set wellhead prices for gas sold in interstate commerce. In the *Natural*

Gas Pipeline case, the Court next considered the validity of a state minimum wellhead price order for gas sold in interstate commerce. However, this time the Court dealt with the matter interms of such order's conflict with the NGA, in light of its decision in *Phillips Petroleum.*

In *Natural Gas Pipeline,* the state court had sustained the state's order as within this Court's earlier holdings. However, on appeal, this Court set the minimum price order aside, observing in a *per curiam* opinion that *Phillips* had established the Commission's jurisdiction over wellhead prices to the exclusion of the states, and that *Peerless* was inapplicable since it dealt only "with constitutional questions and not the construction of the Natural Gas Act." 349 U.S. 44, 45. *See also Cities Service Gas Co. v. State Corp. Comm'n of Kan.,* 355 U.S. 391 (1958).

The Court elaborated on the Commission's plenary jurisdiction in *Northern Natural Gas Co. v. State Corp. Comm'n of Kan.,* 372 U.S. 84 (1963), in which it held that an order of the Kansas Commission requiring pipeline companies to purchase gas ratably from local wells, improperly invaded the FPC's exclusive jurisdiction even though, as Kansas argued, the order did not involve the pricing of gas:

> *The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas . . .* [or] *for state regulations which would indirectly achieve the same result.* These state orders necessarily deal with matters which directly affect the ability of the Federal Power Commission to regulate comprehensively and effectively the

transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act. They therefore invalidly invade the federal agency's exclusive domain. (Citations and footnotes omitted)[1]

* * *

The danger of interference with the federal regulatory scheme arises because these orders are unmistakably and unambiguously directed at *purchasers* who take gas in Kansas for resale after transportation in interstate commerce. . . Moreover, any readjustment of purchasing pattern which such orders might require of purchasers who previously took unratably could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States. This relationship is a matter with respect to which Congress has given the Federal Power Commission paramount and exclusive authority. (Citations omitted, italics in original) 372 U.S. 84, 91-92.

The Court also rejected the state's principal contention that ratable taking was essential for the conservation of natural gas, and that conservation was a function of state power, declaring:

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[1] Emphasis supplied throughout unless otherwise noted.

> There is no doubt that the States do possess power to allocate and conserve scarce natural resources upon and beneath their lands. We have recognized such power with particular respect to natural gas. . . . But the problem of this case is not as to the existence or even the scope of a State's power to conserve its natural resources; the problem is only whether the Constitution sanctions the particular means chosen by Kansas to exercise the conceded power if those means threaten effectuation of the federal regulatory scheme.
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> * * *
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> [O]ur cases have consistently recognized a significant distinction, which bears directly upon the constitutional consequences, between conservation measures aimed directly at interstate purchasers and wholesalers for resale, and those aimed at producers and production. The former cannot be sustained when they threaten, as here, the achievement of the comprehensive scheme of federal regulation. *Id.* at 93-4.

More recently, the Court affirmed, *per curiam,* the holding of a three-judge court setting aside orders of the Oklahoma Corporation Commission which had prohibited the sale of gas below specified prices. *See Oklahoma Corp. Comm'n v. FPC,* 415 U.S. 961 (1974), *aff'g FPC v. Oklahoma Corp. Comm'n,* 362 F. Supp. 522 (W.D. Okla. 1973). The district court had held that the orders constituted an indirect attempt to fix rates for interstate sales and

thereby conflicted with the Commission's exclusive regulatory authority to set just and reasonable rates for such sales.

These decisions make clear that when the First Use Tax is examined in the context of the NGA and the Commission's broad responsibility under that statute to so regulate as to protect the natural gas consumer, it patently infringes upon the Commission's exclusive jurisdiction.

2. The First Use Tax Interferes With The Commission's Regulatory Authority Over Natural Gas Contracts

Under Sections 4, 5 and 7 of the NGA, the Commission has regulatory authority over contracts for the sale and transportation of natural gas in interstate commerce.

In *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), the Court emphasized the critical importance of the Commission's regulation of contracts under the NGA:

> The Natural Gas Act permits the relations between the parties to be established initially by contract, *the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.* 350 U.S. 332, 338-39.

Accordingly, the Court concluded that contracts subject to the Commission's jurisdiction under the NGA "remain fully

subject to the *paramount power* of the Commission to modify them when necessary in the public interest." *Id.* at 344.

Mobile Gas Service Corp. recognizes that Sections 4 and 5 of the NGA charge the Commission with the responsibility to assure that such contracts, as well as rates for the transportation and sale of natural gas, are just and reasonable, and that these sections require an appropriate filing with the Commission of any changes in previously filed contracts or rates. 350 U.S. 332, 341. Further, *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), holds that these provisions require that the services provided by natural gas companies subject to Commission jurisdiction be nondiscriminatory. These holdings make clear the Commission's paramount authority under the NGA over contracts subject to its jurisdiction. Changes to the pertinent provisions of a contract, particularly those relating to rates and services, may not be made effective without prior notice to and approval by the Commission.

The NGA prohibits the commencement of service under contracts subject to Commission jurisdiction without prior Commission approval under Section 7. Once Commission-approved service commences, it may not be changed or terminated without prior approval of the Commission under Section 7(b).[2] In *FPC v. Louisiana Power & Light Co.*, the Court stressed the importance of

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[2] By providing drastic penalties for non payment of the tax for any reason, *i.e.*, "seizure and sale" of the gas, the First Use Tax may interfere with the Commission's statutory authority with respect to abandonment of service.

uniform national control over such service. See also *California v. Southland Royalty Co.*, 436 U.S. 519, 524 (1978), underscoring the Commission's authority to control the terms of service to the interstate market.

The First Use Tax clearly interferes with the Commission's authority under the NGA by altering and prohibiting certain material pricing provisions in contracts for the sale of natural gas subject to the Commission's jurisdiction.

Section 1303C of the First Use Tax provides in pertinent part that:

> Any agreement or contract 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, is hereby declared to be against public policy and unenforceable to that extent.

This Section impermissibly interferes with FERC's regulatory functions by undertaking to nullify any provision of contracts between pipeline companies and their suppliers for tax reimbursement by the supplier, even though any such contract would have been previously accepted and approved by the Commission as being required by the public convenience and necessity. As pointed out by the Commission:

> Many of these contracts have been incorporated into certificates of public convenience and necessity issued by this Commission and the Federal Power Commission . . . [M]any existing sales of natural gas, which are subject to the First Use Tax, remain subject to the regulatory structure of the Natural Gas Act, which provides in Section 7, 15 U.S.C. §717f, that the contracts and certificates for such sales may not be amended without prior Commission approval. Furthermore, under the NGPA [Natural Gas Policy Act of 1978], the Commission has the authority to determine whether costs of processing natural gas to remove liquids may be recovered from the purchasers of the processed gas and passed on to consumers. NPGA §110(a)(2). Order No. 10-B at 8-10; 43 Fed. Reg. 13460, 13462, n. 16, March 12, 1979.

Thus, the First Use Tax, if permitted to stand, would undercut and alter, without Commission approval, contract and federal certificate rights and obligations between pipeline companies and their suppliers, despite the Commission's conclusion that any such contracts are just and reasonable and the services thereunder are required by the public convenience and necessity. By providing for the nullification of the terms and provisions of such contracts, the First Use Tax usurps the Commission's regulatory role and, indeed, destroys the very foundation on which the Commission's regulation is based. As recognized in *Northern Natural,* 372 U.S. 84, 92, such a result would "seriously impair the Federal Commission's authority to

regulate the intricate relationship between the purchasers' cost structure and eventual costs to wholesale customers who sell to consumers in other states."

Equally notable, as the Commission has recognized, the First Use Tax would also interfere with the Commission's jurisdiction under Section 110(a)(2) of the NGPA. That Section empowers the Commission by "rule or order" to allow a seller of natural gas to recover from the purchaser of such natural gas "any costs of . . . processing, treating, . . . or transporting . . . natural gas . . . borne by the seller. . . ." The Commission stated in its Order No. 10-B that the First Use Tax interferes with this authority. By nullifying material pricing provisions in contracts between pipeline companies and their suppliers, whereby sellers may have agreed to bear these costs, and by forcing the pipeline companies and their customers to incur the costs associated with the asserted "uses" of processing, treating and transportation, the Commission is deprived of its authority to determine whether to allow these costs in the prices charged by sellers for their gas.

3. The First Use Tax Imposes a Rate or Charge For the Transportation Of Natural Gas In Interstate Commerce Which Unconstitutionally Interferes With the Commission's Paramount Responsibility To Assure Just And Reasonable Rates and Services

Through the First Use Tax, Louisiana attempts to mandate the terms and conditions of interstate transportation of natural gas in and through Louisiana. When

Congress enacted the NGA, it "occupied the field" of transportation of natural gas in interstate commerce to the exclusion of the states, *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 519, and charged the Commission with paramount responsibility for regulating that activity in terms of rates and services. A state can no more validly establish a rate for the transportation of natural gas in interstate commerce than it can set minimum prices for wellhead sales of natural gas or indirectly affect such prices through the vehicle of ratable take orders. *Natural Gas Pipeline Co. of America v. Panoma Corp.; Cities Service Gas Co. v. State Corp. Comm'n of Kansas; Oklahoma Corp. Comm'n v. FPC.* Such activity interferes with the Commission's paramount and exclusive jurisdiction to regulate the rates and charges for the transportation of natural gas in interstate commerce and to protect the interest of the ultimate consumer.

Despite its characterization as a "tax," it is clear that the practical effect of the First Use Tax is to impose a rate or charge on the transportation of natural gas in interstate commerce into or through Louisiana. Clear and dispositive proof of this conclusion may be obtained from an analysis of the provisions of the statute.

First, the statute has been carefully crafted to limit its applicability to gas produced from federal domains. Such gas is principally produced from the OCS, but also includes certain volumes of gas produced from onshore federal enclaves. By its very nature this gas is dedicated to interstate commerce from the moment of its production. *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); 15 U.S.C.

3301(18). The limitation of the tax to gas produced from federal domains results because Section 1303A limits the applicability of the statute to "natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to [Louisiana] or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country." Likewise, Section 1301C defines "one of [the] express purposes of [the] tax" as being "the exaction of . . . compensation for . . . costs which . . . enure solely to the benefit of owners of natural gas produced *beyond* the boundaries of Louisiana." Since Louisiana and other gas producing states have severance taxes, or their like, and since this gas is exempted from the reach of the First Use Tax, the tax is, in fact, a charge upon gas produced from federal territory and transported into or through Louisiana.

Second, it is clear that the drafters of the First Use Tax sought to create the impression that the levy would be upon "uses" of the gas within Louisiana, and not upon the transportation of such gas in interstate commerce. However, in so doing, the Louisiana Legislature, as did the Texas Legislature in *Michigan Wisconsin Pipe Line Co. v. Calvert,* took refuge in a "beggared definition."

Thus, "use" as defined by the statute, does not involve consumption. Indeed, when the gas is actually used or consumed within Louisiana, such use is exempted from the reach of the First Use Tax. For example, Section 1303A provides in pertinent part:

> The tax levied herein shall not apply to natural gas otherwise subject thereto when such gas is used or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state; nor shall it apply to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydrocarbons, provided shrinkage volumes shall not exceed equivalent gas volumes of the extracted liquids computed by recognized conversion factors used by the Gas Processors Association nor shall it apply to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state.

The "use" defined by the First Use Tax is a highly artificial concept. Section 1302(8) defines "use" as:

> [1] the sale; [2] the transportation in [Louisiana] to the point of delivery at the inlet of any processing plant; [3] the transportation in [Louisiana] of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; [4] transfer of possession or relinquishment of control at a delivery point in [Louisiana]; [5] processing for the extraction of liquefiable component products or waste materials; [6] use in manufacturing; [7] treatment; [8] or other ascertainable action at a point within the state.

These statutory "uses" do no more than locate the point in time at which the tax will apply to the gas or its

transportation, and assist in identifying the taxpayer. What the statute defines as "uses" necessarily relate only to the ownership or transportation of the gas. Thus, Section 1302(9) defines the taxpaying owner as the person with title to the gas "at the time a use occurs," but excludes "any person to whom temporary possession and control has [at the time a "use" occurs in the State] been transferred." However, the tax is imposed on an owner who is merely "allowing the performance" of a "use" within the state. This results in the anomaly that an owner may be liable for the tax even though he has no contact whatsoever with the "use" in question. Section 1303E.

The first four "uses" defined in Section 1302(8) relate to the sale, the transfer of possession, or certain aspects of the transportation of gas within Louisiana. Patently, such "uses" on their face do not involve any use of the gas within Louisiana affecting the continuity of the intersate journey through that state. Nor do they involve any substantial economic factor justifying the finding of "separate local activity." *Cf. Michigan Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 169.

The two "uses" defined in Sections 1302(8) [2] and [3] involve "transportation" of natural gas in interstate commerce, since the transportation of natural gas to the point of delivery at the inlet of any processing plant and the transportation of any unprocessed natural gas to the point of delivery of any measurement or storage facility do not affect the continuity of the interstate journey of the gas. *Compare Michigan Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 166-67 (incidence of tax on activity *subsequent to* introduction of gas in interstate commerce, rendering tax invalid).

The sale of natural gas, defined in Section 1302(7) as "the transfer of ownership of and title to natural gas from one person to another for valuable consideration" and made a "use" by Section 1302(8)[1], does not interrupt the transportation of the gas in interstate commerce. *East Ohio Gas Co. v. Tax Comm'n of Ohio,* 283 U.S. 465 (1931). Nor does the transfer of possession or relinquishment of control, made a "use" by Section 1302(8)[4], remove the gas from transportation in interstate commerce. *Id.* Indeed, the sale, exchange and transportation of natural gas are all subject to the Commission's jurisdiction under Section 7 of the NGA.

Processing, made a "use" by Section 1302(8)[5], is directly intertwined with the transportation of the gas in interstate commerce and does not interrupt its continuous flow. *Deep South Oil Co. of Texas v. FPC,* 247 F.2d 882 (5th. Cir. 1957). Moreover, careful scrutiny of the statute belies the assertion that the tax is imposed on "processing." The tax is imposed on the owner, La. R.S. 47:1305A and 1303C, rather than the processor or user of the gas. The amount of the tax is not related in any way to the rate, measure, amount, economic value or any other measurable aspects of processing distinct from transportation itself. Rather, the total volume of the gas which flows continuously through processing is taxed. Section 1303A, B. The volume of gas actually consumed in processing is exempted from the tax. Section 1303A. The tax affects only the owner, even if he merely transports the gas and "allow[s] the performance" of processing. Section 1303E. The statute precludes the owner (the pipeline companies) from shifting the tax to the actual processor. Section 1303C. The tax is therefore not actually upon processing, but in reality is upon the gas or the transportation "at the time of [processing]." Section 1302(9).

Many of these same considerations apply to "use in manufacturing," made a "use" by Section 1302(8)[6], and "treatment," made a "use" by Section 1302(8)[7]. Additionally, two significant manufacturing uses, consumption in the manufacture of fertilizer and anhydrous ammonia, are exempt from the tax. Section 1303A. Louisiana consumers who actually use the gas in manufacturing or otherwise are given a tax credit for increased costs due to the First Use Tax. *See* pp. 78-81, *infra.* Thus, the burden of the tax is borne solely by those engaged in the transportation of the gas in interstate commerce, and by the ultimate consumers of the gas in other states. Finally, "treatment," and "other ascertainable action" (made a "use" by Section 1302 (8)[8]), are so patently vague as to be constitutionally impermissible on that basis alone.

In sum, the incidence of the First Use Tax is upon gas moving in, and constituting an integral part of, interstate commerce into, within or through Louisiana.

Third, the regulatory effect of the statute requires the tremendous costs incurred by the pipeline companies in paying the tax to be passed on to the ultimate consumers. Indicative of the magnitude of such enormous costs is the fact that the pipeline companies will be required to pay Louisiana well in excess of one quarter of a billion dollars annually.

The statute clearly intends that the full brunt of the tax be shouldered by ultimate consumers by forcing increases in the prices paid by them for the gas produced from federal domains. Section 1303C expressly provides:

> this tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas.

Since it is a well-established principle of public utility law that taxes validly incurred constitute a cost to be recovered under the cost-of-service method used by the Commission in fixing rates for natural gas pipeline companies, it is obvious that the effect, as well as the design, of the above provision is for the First Use Tax to be passed on to the purchasers of the gas, and thereby have a direct impact — by at least the amount of such tax — upon the prices to be paid by ultimate purchasers and consumers of the gas.[3] *Mississippi River Fuel Corp. v. FPC,* 163 F.2d 433 (D.C. Cir. 1947); *Galveston Electric Co. v. City of Galveston,* 258 U.S. 388 (1922).

The same effect, and design, is also evident from the further provision of the same Section 1303C proscribing as against the public interest and unenforceable:

> Any agreement or contract by which an owner of natural gas . . . claims a right to reimbursement or refund of such taxes from any other party in interest other than a purchaser of such natural gas.

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[3] There is no question that the Commission has so construed the effect of the tax. See the Commission's Order No. 10, 43 Fed. Reg. 45553 (Oct. 3, 1978), Order No. 10-A, 43 Fed. Reg. 60438 (Dec. 28, 1978), Order No. 10-B, 43 Fed. Reg. 13460 (March 12, 1979), 44 Fed Reg. 21330 (April 10, 1979) and 44 Fed. Reg. 46291 (Aug. 7, 1979).

By undertaking to prevent the pipeline companies from enforcing contractual provisions for refund or reimbursement against others than the purchaser of the gas, the Louisiana Legislature would leave them no choice as a practical matter but to look to the rates charged their customers as the source of reimbursement or recovery of the tax.

This clearly regulatory feature of the statute — the assurance that consumers would bear the full brunt of the tax — was deemed by Louisiana's Legislature to be of such crucial and overriding importance, that it also provided, in Section 4 of the statute, that in the event of a final judicial determination "upholding the right of an owner [of natural gas] to enforce a contract or agreement otherwise rendered unenforceable by Section 1303C," then, depending on whether the contractual-reimbursement provision is couched in terms of taxes or costs incurred by the owner, no tax shall be due on the affected gas, or the entire statute "shall be null and void." It is thus established that this regulatory aspect of the tax was considered by the Legislature to be paramount, and that the levy of the tax is secondary to the assignment of its burden.

The First Use Tax is nothing more than Louisiana's rate or charge for the transportation of natural gas produced from federal domains in interstate commerce across its borders. The states are prohibited from setting such rates and charges. By virtue of the NGA, Congress has preempted the areas of transportation and sale of natural gas in interstate commerce and has charged the Commission with exclusive responsibility for establishing just and reasonable rates for these activities.

There is no practical difference between the First Use Tax and the minimum price orders set aside in *Natural Gas Pipeline Co. of America v. Panoma Corp., Cities Service Gas Co. v. State Corp. Comm'n of Kan.* and *Oklahoma Corp. Comm'n v. FPC.*[4] In the minimum price cases, the states attempted to set minimum rates for wellhead sales of natural gas in interstate commerce. Here, Louisiana, under the guise of a tax, has imposed a rate or charge for the transportation of natural gas, produced from federal domains, into and through the state, and has designed it so as to force its imposition on consumers in other states. In the minimum price cases, the Court held such state measures unconstitutional because they interfered with the Commission's exclusive jurisdiction to set just and reasonable rates for wellhead sales of natural gas in interstate commerce. Louisiana's tax is equally unconstitutional because it attempts to set rates for the transportation of natural gas across its boundaries and invades the Commission's exclusive jurisdiction over the rates charged for the sale and transportation of natural gas in interstate commerce.

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[4]The district court in *Oklahoma Corp. Comm'n* placed considerable emphasis on the fact that the orders involved an increase of more than $30,000,000 annually in the rates paid by the ultimate consumers (362 F. Supp. 522, 533). This is to be compared with the increase of nearly ten times that much which would result under the First Use Tax.

Even assuming, *arguendo,* that the First Use Tax is only an indirect interference with the Commission's exclusive rate-making responsibility, it is nonetheless invalid under the holding in *Northern Natural:*

> The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas ... or for state regulations which would indirectly achieve the same result." 372 U.S. 84, 91.

In addition, and equally important for present purposes, *Northern Natural* holds that the state order there involved constituted such an improper invasion because it potentially interfered with the Commission's discharge of its "authority to regulate the intricate relationship between the purchasers and the eventual costs . . . to consumers in other states." *Id.* at 92. Since the First Use Tax directly affects the costs includable in the cost-of-service used by the Commission in the discharge of its ratemaking responsibility, the tax plainly results in a far more direct interference with the relationships subject to the Commission's regulation than did the ratable take order rejected in *Northern Natural.*

B. THE FIRST USE TAX CONFLICTS WITH THE OUTER CONTINENTAL SHELF LANDS ACT AND THE COASTAL ZONE MANAGEMENT ACT.

A state statute will be declared unconstitutional under the Supremacy Clause if, among other things, it conflicts

with a valid federal statute. Such a conflict will be found when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941); *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 158 (1978).

By its terms, the First Use Tax applies primarily to gas produced from the OCS. By taxing such gas, the First Use Tax conflicts with, and prevents accomplishment of the full purposes of, the express prohibitions in the OCSLA against state taxation of such gas and, therefore, cannot stand under the Supremacy Clause. The OCSLA and CZMA, and their legislative histories, clearly establish that the states are prohibited from taxing OCS gas and that the CEIF program established by the CZMA is the sole means for compensating states for the effects of OCS activities.

1. The Outer Continental Shelf Lands Act Prohibits State Taxation Of Outer Continental Shelf Gas

Section 4(a)(2) of the OCSLA, 43 U.S.C. 1333(a)(2)(A), which adopts state laws to the extent that they are applicable and not inconsistent with federal laws, concludes by providing:

> State taxation laws shall not apply to the outer Continental Shelf.

Section 4(a)(3) of the OCSLA, 43 U.S.C. 1333(a)(3), similarly provides:

> (3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

These provisions, taken either separately or together, clearly manifest a Congressional intent to prohibit state taxation of OCS gas such as that sought to be imposed by the First Use Tax.

This Congressional intent is equally evident from the Act's legislative history,[5] which shows that Congress considered and rejected efforts by the coastal states, notably Texas and Louisiana, to share in the revenues from and to impose taxes on OCS gas production. Louisiana's effort by the First Use Tax to obtain "some measure of reimbursement . . . for damages [alleged to be] a direct consequence of activity within the state associated with such natural gas by the owners thereof," Section 1301C, in effect seeks revenues from OCS gas expressly denied by Congress.

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[5]When called on to decide whether a state law conflicts with a federal statute, this Court has invariably looked to the legislative history of the federal statute to determine the Congressional purpose in enacting it. Such an inquiry is certainly appropriate here regarding the OCSLA's provisions prohibiting application of state taxation laws to, or state claims to the resources and revenues from, the OCS. *See, e.g., Arizona Public Service Co. v. Snead*, ___ U.S. ___, 99 S.Ct. 1629 (1979); *New York Tel. Co. v. New York Dept. of Labor*, ___ U.S. ___, 99 S.Ct. 1328 (1979); *Malone v. White Motor Corp.*, 435 U.S. 497 (1978).

Representatives of coastal states testifying at the extensive hearings before the Senate Committee repeatedly urged that the proposed legislation authorize their states to tax the production of OCS gas or to share in the revenues derived therefrom, to compensate them for expenses resulting from OCS activity. Hearings before the Senate Committee on Interior and Insular Affairs on S. 1901 (Outer Continental Shelf), 83rd Cong., 1st Sess. ("Hearings"). For example, in its prepared statement, the Texas School Land Board, comprised of the Governor, the Attorney General of Texas, and the Commissioner of the General Land Office of Texas, testified that:

> Along with the right of the States to share in the leasing of and revenues from this area, we think it is imperative that any legislation passed with respect to this area should also provide for the extension of the police power of each coastal State to that portion of the Continental Shelf within the State boundaries or which would be within the boundaries of such State if extended seaward to the outer edge of the Continental Shelf. This police power should include, among other things, the power of taxation, conservation, and control of the manner of conducting geophysical operations. Hearings, pp. 185-6.
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> We do not believe that Texas and the other coastal States should be treated as 'stepchildren' merely because this area is within or contiguous to their borders by being required to bear the entire

> expense of providing and maintaining the onshore public facilities, such as highways, ports, etc., necessary for the successful prosecution of off-shore drilling operations. Instead, we believe that these States should be assisted in this by being allotted a share of the revenues derived from the leasing of oil, gas, and other minerals in this area . . . The extension of the taxing power of the coastal States to this area would yield additional moneys to these States for use in the construction and maintenance of onshore facilities and in providing for the enforcement of the police powers and conservation measures of the States in the Continental Shelf area. Id. *187-8.*

See also Hearings, pp. 191-3 (colloquy between Senator Daniel of Texas and Attorney General Shepperd of Texas).

The testimony of Louisiana's Attorney General was to the same effect:

> As time goes on thousands of workmen in the outer Continental Shelf will bring their families with them to Louisiana. Placing wives and children in comfortable homes, if available, and in adjusting them to Louisiana's benevolences will be the first thought of the workmen in this area.
>
> Oil companies will use our highways and roads to transport heavy machinery and equipment to supply bases.

> This will materially increase the cost of construction and maintenance of thoroughfares, particularly in marsh territory where road and bridge building and maintenance involve costs which stagger the imagination. Louisiana excels in charity hospitals and free hospitalization. Families of workmen and the workmen themselves will use those facilities. Such hospitals are not going to inquire into the impecunious circumstances of workmen and their families when accidents occur, immediate medical care is essential, and the saving of precious lives is necessary.
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> * * *
>
> Substantial increases in the number of school children will impose a tremendous burden on our school system and the State finances. Hearing, pp. 265-6.

In light thereof, Louisiana's Attorney General urged:

> If we are deprived of severance taxes in the outer Continental Shelf, which normally would serve this financial need, we must either draw upon the revenue derived from severance taxes imposed in all areas within the States [sic] boundaries, or look for other sources of revenue.
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> * * *

> Assuming that the committee will appreciate the aforementioned problems of the contributing States, we can only suggest three possible solutions: (1) Authorization to the several States to levy severance taxes in such areas; (2) a reasonable share in the proceeds from leases and production; or (3) the payment of a definite sum of money periodically. *Id.* at 266.[6]

The legislative history of the OCSLA further clarifies that, despite these efforts by the coastal states, Congress not only declined to permit them to share in OCS revenues or tax OCS resources, but undertook affirmatively to proscribe such actions.

H.R. 5134, the bill proposed by the House Committee, provided generally for the application of state laws to the OCS to the extent consistent with applicable federal law, but flatly and unequivocally prohibited the application of state taxation laws. Section 9 contains this explicit priviso:

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[6] *See also* Minority Report of Louisiana's Senator Long, S. Rep. No. 411, 83rd Cong., 1st Sess., p. 65, and comments of Texas Senator Daniel, 99 Cong. Rec. 7131-2, who argued:

> "Mr. President, I believe that any revenues derived from the Continental Shelf adjacent to coastal States should be divided, at least to some extent, with the coastal States. The coastal States need revenues with which to carry on their services to companies and to individuals who reside on shore but work on the outer Continental Shelf. . . .
>
> "I believe that in all fairness the States should receive some percentage of the revenues, or at least have the right to tax the private lessees who operate on the outer Continental Shelf."

> *Provided however* that state taxation laws shall not apply in such areas of the outer continental shelf.

H. Rep. No. 413, 1953 U.S. Code Cong. & Ad. News 2177, submitted by the House Judiciary Committee, elaborated upon these provisions as follows:

> Section 9(a) constitutes a legislative confirmation of the jurisdiction of the United States over the natural resources of the subsoil and seabed of the outer Continental Shelf outside State boundaries. It makes applicable to that area Federal laws and authorizes the Secretary of the Interior to administer the provisions of this title and to adopt such rules and regulations as are not inconsistent with Federal laws to apply therein.
>
> The Secretary of the Interior is also given the discretionary power to adopt the laws of coastal States, if the State so provides, to be applicable to that portion of the area which would be within the boundaries of the State should such boundaries be extended seaward to the outer margin of the Continental Shelf. In this regard, the Secretary determines and publishes the lines limiting each such area.
>
> *Provision is made, however, that State taxation laws cannot apply in these areas.* But provision is made for reimbursement of abutting States for the reasonable cost of the administration of such laws. *Id.* at 2180.

The Senate Committee on Interior and Insular Affairs proposed that the House bill be modified in a number of respects. First, in lieu of extending state laws to the OCS, it provided for the adoption of state laws as the law of the United States applicable to the subsoil, seabed and the structures connected with the development of the mineral resources. See S. Rep. No. 411, 83rd Cong., 1st Sess., p. 2. Since state laws as such were not to apply, the Senate Committee deleted the provision for reimbursement of state expenses. Instead, it provided for the payment of all the revenues into the federal treasury and expressly rejected a number of proposals which would have disbursed such revenues differently. *Id.* at 2-3. One such proposal, specifically rejected by the Committee:

> [W]ould have given to the States one-half of the amount of the additional royalty collected in lieu of State severance taxes to compensate for services rendered the workers of the outer shelf and their families by the States. *Id.* at 3.

In its subsequent analysis of the proposed legislation, the Senate Committee summarized what it had done in this regard as follows:

> Section 9 provides that all rentals, royalties and other sums paid under any lease on the outer Continental Shelf for the period from June 5, 1950, to the time of the enactment of the act, and all such revenues received thereafter, including bonuses paid for leases, shall be deposited in the Treasury of the United States and credited to miscellaneous receipts. As previously stated, *no*

> *part of these revenues are to go to any coastal State for any purpose whatever,* nor does the bill as reported by the committee dedicate them to any specific purpose. Rather, such funds are available for appropriation by the Congress for necessary expenses of Government in accordance with the Constitution of the United States. *Id.* at 13-14.

Just as it thus made clear that the states were not to share in the revenues, the Senate Committee also went out of its way to make clear its intent that state taxation laws were not to apply.

> It is the committee's collective judgment that under the terms of S. 1901 as reported, *State taxation laws necessarily are excluded from applicability in this area of exclusive Federal jurisdiction* not inside the boundaries of any State. Paragraph (3) of section 4(a) specifically commands that—
>
> The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom. *Id.* at 3.

In following the Senate approach as to the applicable law on the OCS, the Conference Committee not only accepted the language which the Senate Committee had

included in its proposed bill as implementing its intent to prohibit the applicability of-state tax laws, but went on to remove any possible lingering doubts on that score by adding the following sentence at the end of paragraph (2) of Section 4(a):

> State taxation laws shall not apply to the outer Continental Shelf.

The Conference Committee explained this addition as follows:

> As provided in the original House bill, State taxation laws are *specifically banned.* 1953 U.S. Code Cong. & Ad. News 2184.

The legislative history thus plainly discloses a considered and deliberate Congressional decision against permitting the adjoining states any access to proceeds from the production of OCS gas, either by way of sharing in the revenues or imposing taxes on it.[7] Instead, Congress specifically decided that the revenues from and resources of the OCS would benefit the nation as a whole and would be beyond the reach of any individual state.

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[7]If Congress had left the door open for coastal states to compensate themselves for alleged costs and impacts associated with OCS development, by enactment of taxes such as the First Use Tax or otherwise, Congress would have had no reason to amend the CZMA to provide for such compensation. *See pp. 55-61 infra.* As in *Malone v. White Motor Corp.*, 435 U.S. 497 (1978), the purpose of a preemptive statute may be ascertained not only from its own legislative history but also from the legislative history of a subsequently adopted statute.

2. The First Use Tax is a Tax on Gas Produced From the Outer Continental Shelf

The OCS bordering Louisiana is a prolific source of natural gas, and much of the gas so produced is transported in and through Louisiana in its journey to the ultimate markets for consumption. The OCS gas thus brought into Louisiana constitutes nearly all of the gas subject to the First Use Tax, and the Louisiana statute is specifically designed to impose a tax on this OCS gas.

By making the tax applicable only to gas "upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to [Louisiana] or any other state or territory of the United States," Louisiana has in effect exempted any gas produced in neighboring states (and transported into or through Louisiana), as well as that produced in Louisiana, since the legislatures in those states have enacted severance or production taxes applicable to gas produced within their boundaries. *See p. 15 supra.*

On the other hand, the exclusionary language does not extend to gas produced from the OCS. Congress has not imposed any "severance tax or tax upon the volume of production" on gas produced from the OCS. Hence, the OCS gas is not exempt from the First Use Tax. Moreover, and more important for present purposes, the exclusionary language of the First Use Tax would not extend to gas produced from the OCS in any case, *even if Congress had imposed* "a severance tax or tax upon the volume of production" upon such gas. As already noted, the exclusion from the First Use Tax applies only with respect to gas on which a severance tax "has been paid or is legally due to be

paid, to *this state or any other state or territory of the United States*", not to taxes paid or due to the United States itself.

Section 1301C further evidences the design of the First Use Tax to reach primarily OCS gas. That section declares "one of the express purposes of [the] tax" as being "the exaction of ... compensation ... for ... the costs ... which ... enure solely to the benefit of the owners of natural gas *produced beyond the boundaries of Louisiana*".

Not only is the First Use Tax designed primarily to reach OCS gas, it is measured by the total volume of gas (in the same manner and at the same rate as Louisiana's severance tax), and is imposed on the owner of the gas, not the "user" thereof. Moreover, "use" as defined in the First Use Tax, Section 1302(8), is a highly artificial concept involving little, if any, actual use of the gas within the State of Louisiana. *See* pp. 34-36 *supra*. These "uses" are merely aspects of the gas' movement in and through the state, and are inextricably connected with its interstate transportation from the OCS to its ultimate destinations.

These factors, taken together, show that the First Use Tax is for all practical purposes a tax on the natural gas produced from the OCS. At the least, it is Louisiana's attempt to use its position as a coastal state to participate directly in the revenues produced from development of OCS gas, thereby circumventing the Congressional decision to the contrary. As such, the First Use Tax frustrates accomplishment of the Congressional purposes and objectives behind the OCSLA.

3. The First Use Tax Interferes With The Comprehensive CZMA-OCSLA Program Enacted By Congress

In enacting the OCSLA, Congress recognized the paramount responsibility of the federal government to regulate OCS activities:

> [B]ecause of the possible conflicts between exploitation of the oil and gas resources in the Outer Continental Shelf and other uses of the marine environment, including fish and shellfish growth and recovery, and recreational activity, *the federal government must assume responsibility for the minimization or elimination of any conflict* associated with such exploitation. 43 U.S.C. 1801(13).

The pervasiveness of federal control over OCS activities is emphasized by the comprehensive manner in which potential OCS impacts on the coastal zone are identified and controlled in the federal regulatory scheme.[8]

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[8]For example, under the OCSLA, a $200 million fund is available to pay for clean up and removal costs incurred by federal, state, and local authorities. 43 U.S.C. 1812 (a),(c)(1). The fund compensates for economic losses including: removal costs and damages including injury to, or destruction of, real or personal property; injury to, or destruction of, natural resources; loss of tax revenue for a period of one year due to injury to real or personal property. 43 U.S.C. 1813(a)(1),(2); 1811 (14),(22).

Strict liability is imposed on operators of OCS offshore facilities for removal and clean up costs, and an amount up to $35 million for all damages, resulting from oil spills. 43 U.S.C. 1814(b)(2).

(footnote continued on next page)

The CZMA recognizes the coastal zone as a resource of local, state and national significance. It also declares energy self-sufficiency to be a national objective. 16 U.S.C. 1451(i). The legislative scheme of the OCSLA-CZMA seeks to balance these objectives so as to preserve the coastal zone environment while accommodating competing uses, including energy related activities, in the area. These objectives are advanced by providing to coastal states federal financial assistance to compensate for impacts derived from OCS energy activities.[9] 16 U.S.C. 1456a(a)(1). Participation by a coastal state in the federal funding program is predicated on its developing a coastal management program which meets criteria set out in the CZMA to plan, preserve, and enhance the coastal zone. 16 U.S.C. 1454(b)(1)-(9), 1456a(g)(1). These programs must be designed to "achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic

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A separate Fisherman's Contingency Fund compensates commercial fishermen for damage or loss to fishing gear and economic losses resulting from OCS activities. 43 U.S.C. 1843(c)(1). The Fisherman's Contingency Fund is supported by fees collected from holders of leases, exploration permits, easements and rights-of-way issued under the OCSLA.

[9]OCS energy activities are defined as:

> Any exploration for, or any development or production of, oil or natural gas from the Outer Continental Shelf... or the siting, construction, expansion, or operation of any new or expanded energy facilities directly required by such exploration, development, or production. 16 U.S.C. 1453 (12).

values as well as to needs for economic development. 16 U.S.C. 1452(b).[10]

The CZMA establishes a coastal energy impact fund ("CEIF") program which provides grants, loans, and guarantees to coastal states. The CEIF program compensates for and ameliorates consequences of OCS activity on coastal states, by disbursing monies to such states to enable them to provide new or improved public facilities and services and to retire state and local bonds issued as a result thereof. 16 U.S.C. 1456a(b)(5)(A). Coastal states are also able to utilize CEIF grants to prevent, reduce, or ameliorate loss of valuable environmental or recreational resources resulting from coastal energy activities. 16 U.S.C. 1456a(b)(5)(C).[11] The amount of CEIF money available to a coastal state for reimbursement of costs related to these activities is based on a formula which directly reflects the degree of offshore activity impacting the state. 16 U.S.C. 1456a(b)(2)(A),(B),(C). In addition to these formula grants, funds are also provided to states to study and plan for economic, sociological and environmental consequences of new or expanded OCS activities. 16 U.S.C.

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[10]Management program development grants are provided to reimburse 80% of the costs incurred by a coastal state in developing and implementing an approved coastal management program. 16 U.S.C. 1455(a).

[11]Valuable environmental resources are defined to include "areas of land or water that are or have been largely in a natural state or whose value is derived primarily from ecological considerations" and areas designated under a state's approved coastal zone management program as areas of particular concern. 15 C.F.R. 931.72 (c) (1).

1456a(e)(1). From 1976 to the present, Louisiana has received substantial CEIF monies.[12]

As discussed above, coastal states have repeatedly sought an unfettered share of OCS royalties. *See,* pp. 45-8 *supra.* Congress, in responding to the demands of the coastal states in this regard, instead adopted the CEIF program. The Conference Report regarding the 1978 amendments to OCSLA states:

> The Coastal Energy Impact Program, and in particular, the formula grants section, was intended to satisfy the States' requests for a portion of the revenues which accrue to the Federal Government from the sale of leases on the Outer Continental Shelf. The States argued that most of the social, economic and environmental impacts from OCS development has (sic) occurred, and will continue to occur, in the coastal zone of the States, 1978 U.S. Code Cong. & Ad. News 1599.

That the fund fully compensates for any net adverse impacts on coastal states is evidenced by the following excerpt from the legislative history of the 1976 Amendments to the CZMA:

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[12] $56,944,705 -Credit Assitance.
$29,877,340 -Formula Grants
$ 217,406 -Planning Assistance
$ 778,937 -Environmental Grants

Côte de la Louisiane (Coastal Resources Program, Louisiana Department of Transportation and Development) Volume 4, No. 2, September, 1979.

> [I]mpact grants will be made only when a State can demonstrate that an energy facility or energy resource development can be expected to produce a net balance of adverse impacts over the course of its operational lifetime. Demonstration of net adverse impacts is required in recognition of the fact that such a facility or development generally can be expected to produce positive benefits, such as increased tax revenues and assessed property values from land use changes and population increases, as well as negative effects, such as environmental damage or increased demands on public facilities and services. *The purpose of the grant provision in the impact fund is to offset any net amount by which the expected or actual costs exceed the expected or actual benefits.* 1976 U.S. Code Cong. & Ad. News 1791.

Nevertheless, coastal states argued during the hearings to amend the OCSLA in 1978 that the existing $50 million per year CEIF program was inadequate to provide sufficient funds to coastal states. States bordering the Gulf of Mexico also criticized the CEIF program as being insufficient to compensate for past and ongoing OCS activities. Accordingly, the CEIF program was amended to compensate for impacts from past and ongoing OCS activities as well as future ones. However, Congress reaffirmed the existing scheme set out in the CZMA that the CEIF program, not participation in revenue-sharing funds derived from OCS leases, is the sole means of compensating states for the effects of OCS activities:

> Witnesses before the committee divided on an approach to resolve these problems. Some argued for a straight revenue-sharing amendment to the Outer Continental Shelf Lands Act, while other (sic) argued for modification of the CEIF. The committee decided to amend the CZMA. It felt that a revenue-sharing proposal attached to the Outer Continental Shelf Lands Act, with little or no reference to the planning and management work presently being carried out by coastal States might devastate those coastal management efforts.
>
> * * *
>
> Only within the framework of a *comprehensive management program* will Federal OCS funds be utilized in a reasonable and effective manner. 1978 U.S. Code Cong. & Ad. News 1600-1601.

Congressional rejection of a proposed amendment, which would have allowed states to participate in unfettered revenue-sharing, demonstrates the intent of Congress that the CEIF program serve as the sole source of compensation to coastal states. To allow otherwise would have destroyed the comprehensive scheme of the OCSLA-CZMA which ties CEIF participation to coastal management planning.

The First Use Tax is designed primarily to reach natural gas from the OCS. *See* pp. 53-4 *supra.* It is clear from the statutory language and legislative histories of the OCSLA and the CZMA that, prior to creation of the CEIF program, Congress precluded states from participating in OCS derived revenues. The pervasiveness of the OCSLA-

CZMA program in promoting, regulating and compensating for OCS activities evidences the intent of Congress to continue to preclude states from participation in this area, except through the CZMA. The First Use Tax, which will allow Louisiana to amass more than seven times the amount of OCS derived funds available through the CEIF program, will accomplish that which was expressly rejected by Congress.

II.

THE FIRST USE TAX VIOLATES THE COMMERCE CLAUSE

A state tax imposed on interstate commerce or incidents thereof is invalid under the Commerce Clause unless "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977); *Department of Revenue of Washington v. Ass'n of WashingtonStevedoring Companies,* 435 U.S. 734 (1978).

The First Use Tax on its face violates at least two of these criteria: it is not fairly apportioned and thus creates the risk of multiple taxation on the same gas subjected to the First Use Tax; and it unfairly discriminates against interstate commerce.

A. THE FIRST USE TAX IS A TAX ON INTERSTATE COMMERCE.

The only gas subject to the First Use Tax is gas which is produced from the OCS or onshore federal enclaves and transported into and through Louisiana. *See* pp. 33-4, 53-4 *supra.* Although some of the gas subjected to the First Use Tax is ultimately consumed in Louisiana, [13] the vast majority of this gas is merely transported through the state for ultimate consumption in other states. The nature of this movement, from the OCS or onshore federal enclaves into or through Louisiana, constitutes interstate commerce. *California v. Lo-Vaca Gathering Co.,* 379 U.S. 366 (1965). Indeed, such federal gas is dedicated to interstate commerce from the moment of its production. 15 U.S.C. 3301(18).

The gas begins its interstate journey when it leaves the production platforms in the Gulf of Mexico and ends it when it is delivered to gas distribution companies or municipalities for distribution to the ultimate consumers, in some cases directly to consumers. While in the State of Louisiana, and while being subjected to the "uses" which nominally give rise to the First Use Tax, the gas does not come to rest, but is constantly moving. The "uses" to which the gas is subjected are inextricably connected with this interstate movement. None of these uses justifies a finding of "separate local activity". *Michigan Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 169 (1954). *See* pp. 34-7 *supra.*

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[13]As a result of the exemptions and credits which are part of the First Use Tax package, Louisiana consumers are effectively relieved from the tax. *See* pp. 78-81 *infra.*

There can be no doubt that the First Use Tax is a tax on interstate commerce. Moreover, a tax, such as this one, designed to single out interstate commerce "must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288, n. 15.

B. THE FIRST USE TAX IS UNAPPORTIONED AND CREATES THE RISK OF MULTIPLE TAXATION

1. The First Use Tax Creates A Substantial Risk of Multiple Taxation

The First Use Tax is imposed on the total volume of natural gas "used" in Louisiana. La. R.S. 47:1303B. Given the all encompassing definition of "use" in Section 1302(8), the First Use Tax will reach virtually every molecule of natural gas produced from the OCS or onshore federal enclaves and transported into or through Louisiana. No attempt is made to apportion the tax to relate to a taxpayer's activities in the state; rather, every taxpayer pays the identical tax on every Mcf of its federal gas subjected to a "use" within the state, regardless of the extent of that taxpayer's activities, revenues or facilities in the state. The tax is, therefore, unapportioned. *See, e.g., Department of Revenue of Washington v. Ass'n of Washington Stevedoring Companies,* 435 U.S. 734, 749, n. 18, discussing *Michigan Wisconsin Pipe Line Co. v. Calvert.*

Unlike traditional use taxes, the First Use Tax is levied on property which has not "come to rest" in the taxing state, but which is continuously moving through the state; its imposition is not related to the consumption of the gas within the state, but rather is on transportation of the gas into or through the state in interstate commerce. The tax is determined by measuring the total volume of gas subjected to the activities defined as "uses".

After the natural gas on which the First Use Tax is imposed leaves Louisiana, it is transported through various states until it reaches its ultimate destinations. Particularly in light of the sweeping nature of "use" as defined in the First Use Tax, it is apparent that, in the course of such transporation, the gas unavoidably is subjected to activities in other states which are the same or similar to those defined as uses in the First Use Tax. Hence, other states, downstream from Louisiana, may impose similar taxes on the same volume of gas.

Since the states in which such activities occur have the same relationship to the gas as Louisiana, if the First Use Tax is upheld, they all would have the constitutional power to impose an identical tax on the same volume of gas as is imposed by the First Use Tax. Thus, the danger of multiple taxation is real and substantial. *See* Mr. Justice Rutledge's single opinion in *McCleod v. Dilworth,* 322 U.S. 327, 349 (1944); *General Trading Co. v. State Tax Comm'n* 322 U.S. 335; and *International Harvester Company v. Department of Treasury,* 322 U.S. 340.

Given the fact that these states have the the same power to tax the same natural gas as Louisiana, Louisiana is barred from imposing this unapportioned tax on the gas. *Standard Oil Co. v. Peck,* 342 U.S. 382 (1952); *Central Railroad v. Pennsylvania,* 370 U.S. 607 (1962). Upholding the validity of the First Use Tax either would abrogate any limitations on state power to tax interstate commerce or would create a "first-come-first-tax" rule [*General Motors Corp. v. Washington,* 377 U.S. 436, 458 (1964) (dissenting opinion)], which would have no support in prior decisions and no relationship to any rational policy of regulating the states' right to generate revenue.

Louisiana has argued that there is no danger of multiple taxation because "the uses upon which the tax is levied do not occur outside" its borders.[14] This is immaterial. The fact that the activities upon which a state tax is purportedly based occur within the taxing state does not insure its constitutionality under the multiple taxation doctrine. If either such activities, or the method of measuring the tax, subject interstate commerce to risk of multiple taxation, the Commerce Clause is violated. *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 260 (1938).

The First Use Tax is similar to taxes declared unconstitutional under the multiple taxation test by two earlier decisions of this Court. In *Michigan Wisconsin Pipe Line Co. v. Calvert,* Texas imposed a

[14]Brief in Opposition to Motion for Leave to File Complaint, p. 22.

"gas gathering tax" on the "first taking" of gas into interstate pipelines. The tax was measured by the total volume of gas so taken. Although the "first taking" of the gas occurred in Texas, measuring the tax by the entire volume of gas made it invalid since "if Texas may impose this 'first taking' tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or 'unloading' from the pipeline of the same gas when it arrives for distribution" and "Oklahoma might then seek to tax the first taking of the gas as it crossed into that State". 347 U.S. 157, 170. *See also Department of Revenue of Washington v. Ass'n of Washington Stevedoring Companies,* 435 U.S. 734, 749, n. 18.

In *Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434 (1939), the Court reviewed the constitutionality of the Washington business activities tax which was measured by the gross receipts generated by the taxpayer from its business of marketing fruit shipped from Wahington to other states. The tax was invalidated for the following reasons:

> Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and with-

> out the state and burdens the commerce in direct porportion to its volume. 305 U.S. 434, 438.

As with the unconstitutional tax in *Calvert,* states other than Louisiana may exact a tax, identical to the First Use Tax, on the "last use" or "first in-state use", of the same gas subject to the Louisiana tax. As with the unconstitutional tax in *Henneford,* the First Use Tax, because of the way it is measured, is imposed on the entire interstate activity (transportation of natural gas) both within and without Louisiana.

Thus, the First Use Tax does not pass constitutional muster merely because it is based on alleged "uses" occurring within Louisiana. The method of measuring the tax by the entire volume of natural gas subjects the owners of the gas to the risk of multiple taxation.

2. The Risk of Multiple Taxation, Not its Existence, Is the Proper Test for Determining the Constitutionality Of the First Use Tax

In balancing the states' needs to generate revenue against the federal government's constitutional power to regulate interstate commerce, the Court has uniformly invalidated taxes, such as the First Use Tax, which are not apportioned in some manner to the activities of the taxpayers carried on within their borders. *J.D. Adams Mfg. Co. v. Storen,* 304 U.S. 307 (1938); *Gwin, White & Prince, Inc. v. Henneford; Michigan Wisconsin Pipe Line Co. v. Calvert; Central Railroad Co. v. Pennsylvania,* 370 U.S. 607 (1962); *Evco v. Jones,* 409 U.S. 91 (1972). The "vice characteristic of those [taxes] which have been held invalid

is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed ... or added to ... with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 255-56.

These taxes have been struck down because of the risk that a second state, with an equal constitutional right to tax the same property or transaction as the taxing state, will impose a tax on such property or transaction. "Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." *J. D. Adams Mfg. Co. v. Storen,* 304 U.S. 307, 311.

The focus of this analysis is on the power of other states to impose similar taxes on the activity or property taxed by the taxing state. If the property or transaction reached by the taxing state could also be taxed by a second state, then an unapportioned tax on the full value of the transaction or the taxpayer's property is unconstitutional. *Standard Oil Company v. Peck,* 341 U.S. 382 (1952); *Michigan Wisconsin Pipe Line Co. v. Calvert; Central Railroad v. Pennsylvania.*

That the risk of multiple taxation is the proper formulation of the test has been recognized by this Court in numerous opinions dealing with varied taxes, such as sales taxes, *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33 (1940); gross receipts taxes, *Western Live Stock v. Bureau of Revenue; Gwin, White & Prince, Inc. v.*

Henneford; Evco v. Jones; Standard Pressed Steel Co. v. Washington Dep't of Revenue, 419 U.S. 560 (1975); gross income taxes, *J.D. Adams Mfg. Co. v. Storen;* gas gathering taxes, *Michigan Wisconsin Pipe Line Co. v. Calvert;* and personal property taxes, *Standard Oil v. Peck; Central Railroad v. Pennsylvania.*

Mr. Justice Frankfurter, in *Freeman v. Hewit,* 329 U.S. 249 (1946), rejected the contention that the validity of a gross receipts tax should depend on whether another state has imposed a similar tax on the transaction:

> If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incident of the varying tax laws of the various States at a particular moment. 329 U.S. 249, 256.

Decisions which have required a showing of actual multiple taxation merely evidence the Court's second method for analyzing the multiple tax burden imposed by a state tax in situations where the taxing state has attempted to apportion the tax to activities within its borders.

Thus, in *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450 (1959), the Court reviewed "state net income tax laws levying taxes on that portion of a foreign corporation's net income earned from and fairly apportioned to business activities within the taxing State." 358 U.S. 450, 452. Since "[l]ogically it is impossible, when the tax is fairly apportioned to have the same income taxed twice", 358 U.S. at 462, the Court refused to speculate concerning the multiple burdens imposed by this apportioned tax. Rather, the taxpayers were required to show that the apportionment formula placed a burden upon interstate commerce, a requirement which they failed to meet. The Court indicated that it did not intend for the actual multiple taxation standard to apply to an unapportioned tax by stating that "[t]his is not an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share". *Id.*

In *General Motors corp. v. Washington,* 377 U.S. 436 (1964), the Court reviewed the Washington business activities tax which was measured by gross receipts derived from sales of goods delivered in Washington. Hence, the tax was apportioned to reach only those activities of the taxpayer involving sales consummated within the taxing state. The Court, citing the actual multiple taxation test established in *Northwestern States Portland Cement* for apportioned taxes, held that the taxpayer had failed to meet its burden of proving actual multiple taxation. The Court did not discuss the risk test applicable to unapportioned taxes since this Washington tax, as described in a later decision, was "apportioned exactly to the activities taxed". *Standard Pressed Steel Co. v. Washington Dep't of Revenue,* 419 U.S. 560, 564 (1975).

This substantial burden on taxpayers challenging *apportioned* state taxes, most recently evidenced by the Court's opinion in *Moorman Mfg. Co. v. Bair,* 437 U.S. 267 (1978), has no relevance to taxpayers, such as the pipeline companies here, challenging *unapportioned* state taxes.

The dual analysis applied by the Court to determine the multiple taxation issue is eminently reasonable. It makes clear to the states that the Court will respect their right to collect revenues if they make a reasonable effort not to burden interstate commerce. At the same time, the risk test for multiple taxation invalidates taxes adopted in disregard of the Court's requirement of fair apportionment.

Not only is the First Use Tax unapportioned, it is aimed squarely at interstate commerce. The proper multiple taxation test is whether the *risk* of cumulative taxes exist. This Court need not wait until such a duplicative burden is actually imposed, but rather should take action at this time to safeguard interstate commerce from the risk of multiple taxation.

C. THE FIRST USE TAX DISCRIMINATES AGAINST INTERSTATE COMMERCE

1. The First Use Tax Discriminates Against Interstate Commerce Because It Is Imposed Solely On Natural Gas Transported Into And Through Louisiana From the Outer Continental Shelf And Onshore Federal Enclaves

The First Use Tax applies only to natural gas originating from OCS or onshore federal enclaves, and not

to gas produced in Louisiana. *See* pp. 33-4, 53-4 *supra.* A state tax which is so designed as to apply only to merchandise originating in another state unconstitutionally discriminates against interstate commerce. *Sonneborn Bros. v. Cureton,* 262 U.S. 506, 516 (1923); *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978).

Even accepting *arguendo* Louisiana's erroneous legal conclusion that the "uses" occur prior to the introduction of the gas into interstate commerce,[15] the First Use Tax violates the Commerce Clause because it discriminates solely on the basis of the out-of-state origin of the gas. For purposes of this argument, the critical question is not whether the natural gas is moving in interstate commerce or whether it has come to rest in the state at the time it is subjected to a "use", but whether the First Use Tax is discriminitory because it is imposed on certain gas solely because of its origin outside the state. As the Court stated in *Sonneborn Bros. v. Cureton,* 262 U.S. 506, 516:

> A state tax upon merchandise brought in from another state or upon its sales ... after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence because of its origin in another state.

See also Baldwin v. G.A.F. Seelig, 294 U.S. 511, 527 (1935). In *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 332, n.12 (1977), the Court noted that a state may not tax a local event at the end of interstate commerce if the tax discriminates between transactions on the basis of some

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[15] Brief in Opposition to Motion for Leave to File Complaint, p. 23.

interstate element, citing *International Harvestor Co. v. Dep't of Treasury,* 332 U.S. 340, 347-48 (1944) and *Welton v. Missouri,* 91 U.S. 275 (1876).

Regardless of the legitimacy of the purposes for which the First Use Tax was enacted, they "may not be accomplished by discrimianting against articles of commerce coming from outside the State unelss there is some reason, apart from their origin, to treat them differently." *City of Philadelphia v. New Jersey,* 437 U.S. 617, 626-27. *In City of Philadelphia,* this Court invalidated a New Jersey statute prohibiting the dumping, in New Jersey landfills, of solid wastes originating from other states. New Jersey attempted to support the statute on the grounds that it was a valid exercise of its police powers, and, rather than favoring in-state competitive interests, it actually denied economic opportunities to New Jersey landfill operators, some of whom were plaintiffs in the suit. While this Court accepted *arguendo* the validity of New Jersey's contention, it nevertheless held the statute unconstitutional under the Commerce Clause, since environmental harms suffered by the state obviously were caused equally by solid wastes in interstate and intrastate commerce. Accordingly, it held that, although New Jersey could pursue its health environmental goals by reducing the flow of all solid waste into the state's landfills, the statute blocked "the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse to New Jersey's landfill sites", 437 U.S. 617, 629, a legislative effort barred by the Commerce Clause.

The First Use Tax is imposed to compensate Louisiana for alleged damage caused by the pipeline industry to the state's water bottoms, barrier islands, and coastal areas and alleged costs incurred by the state in providing services and support to the pipeline industry. La. R.S. 47:1301C, 1303A. However, this supposed damage suffered by Louisiana obviously cannot be attributed solely to the activities of pipelines transporting natural gas produced from the OCS or other federal enclaves. The transportation of oil and gas produced from offshore and coastal areas within the boundaries of Louisiana plainly would cause the same or similar damage and create the need for the same governmental services. Louisiana thus provides no valid justification or explanation for saddling gas produced outside its borders with the entire burden of compensating it for these alleged damages and costs.

Louisiana's sole explanation for imposing the First Use Tax only on the natural gas produced from the OCS or other federal enclaves is that, since natural gas produced in Louisiana and other states has been subjected to a severance tax, it suffers a competitive disadvantage to OCS gas, so that the First Use Tax merely "removes the discrimination or disadvantage imposed upon" gas produced in Louisiana.[16]

This argument amounts to an attempt to justify the First Use Tax under the "compensating tax" theory used to uphold traditional use taxes. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Traditional use taxes complement sales taxes by insuring that the *same* activities, purchases at retail, will be subject to an equal tax burden regardless of

[16]Brief in Opposition to Motion for Leave to File Complant, p. 23.

where the purchase is made, thereby placing the same in-state and out-of-state activities on equal footing. In contrast, severance taxes and the First Use Tax are imposed on different activities to exact compensation for different effects on the taxing state. *see* pp. 77-8 *infra.* They are not complementary, and payment of one is no justification for exemption from the other.

Thus, no reason exists to justify imposing the total burden of this tax on the OCS gas owned by the pipeline companies and moving in interstate commerce. The First Use Tax is a blatant attempt to single out for taxation certain gas solely because of its out-of-state origin.

Regulatory statutes which facially discriminate against articles of commerce solely because of their out-of-state origin have been subjected to a "virtually *per se* rule of invalidity." *City of Philadelphia v. New Jersey,* 437 U.S. 617, 624. "At a minimum, such facial discrimination invokes the strictest scrutiny of any legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma,* ___ *U.S.* ___, 99 S. Ct. Ct. 1727, 1737 (1979). Because the First Use Tax is characterized by Louisiana as a *tax,* its facial discrimination against interstate commerce renders it invalid without further inquiry. *Boston Stock Exchange v. State Tax Comm'n; Sonneborn Bros. v. Cureton.* This is particularly true of a tax such as the First Use Tax, which is imposed on interstate commerce or incidents thereof. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279.

2. The First Use Tax, In Combination With the Severance Tax Credit, Discriminates Against the Interstate Commerce Conducted By the Pipeline Companies.

Contemporaneously with Louisiana's imposition of the First Use Tax on natural gas produced from the OCS or onshore federal enclaves and transported into or through Louisiana, it enacted the Severance Tax Credit, La. R.S. 47:647 (Appendix F) which allows to "[e]very taxpayer liable for and remitting" the First Use Tax "a direct tax credit, at any time following payment of such tax, but not in excess of the amount which must be borne by such taxpayer, against severance taxes owed by such taxpayer to the state." La. R.S. 47:647A(1).

Since the Severance Tax Credit eliminates the First Use Tax burden on owners of OCS gas which also produce natural resources in Louisiana, its effect is to discriminate against the pipeline companies, which are not engaged in the production of natural resources in Lousiana,[17] in favor of companies ("producers") which, in addition to owning OCS gas subjected to the identical activities as that owned by the pipeline companies, also are involved in local activities which Louisiana seeks to protect and advance: the production of natural resources within the borders of the state.[18]

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[17]Although some of the pipeline companies engage in a small amount of natural gas production in Louisiana, and pay some severance tax on that production, they will not be entitled to claim any severance tax credit on this production until March 31, 1982. La. R.S. 47:647A(2).

[18]The producers, which are the principal beneficiaries of the severance tax credit, are primarily engaged in the production of natural resources. For those companies, transportation of natural gas is merely incidental to their production activities. By contrast, the predominant business activity of the pipeline companies is the transportation and sale of natural gas in interstate commerce.

The Severance Tax is levied as recompense for the severing of natural resources from the soil or water of Louisiana. La. R.S. 47:631; *Edwards v. Parker,* 332 So.2d 175 (La. 1976). Thus, the activities reached by the Severance Tax are totally distinct from the alleged activities on which the First Use Tax is imposed. Similarly, the purposes underlying the two taxes are totally distinct. The Severance Tax is imposed to compensate Louisiana for the loss of natural resources produced from within its borders. The First Use Tax is imposed to compensate Louisiana for the alleged costs incurred by the State in providing services and support to the pipeline industry and the alleged environmental damage caused to the state's coastal areas by such industry. La. R.S. 47:1301C. With the taxes thus imposed being on totally different activities and designed to compensate for the impact of those activities on totally different state interests, they clearly are neither equivalent nor complementary.

The fact that the producers must pay taxes on activities wholly different from and unrelated to those reached by the First Use Tax is no justification for eliminating their First Use Tax liability. The alleged costs of governmental services and impacts on the environment are the same notwithstanding the identity of the taxpayer upon whom the tax is imposed. The Severance Tax Credit, by nullifying as a practical matter the producers' liability for the First Use Tax, violates the condition precedent for a valid state tax: equal tax treatment for taxpayers similarly situated. *Halliburton Oil Well Comenting Co. v. Reily,* 373 U.S. 64 (1963).

Louisiana's discrimination against the interstate commerce conducted by the non-producing pipeline companies cannot be justified under the "compensating tax" theory underlying traditional use taxes, *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937), for the same reason that this theory cannot justify the discrimination which results because the First Use Tax is not imposed on gas which is subject to a severance tax. *See* p. 74, *supra.*

The fact that Louisiana has discriminated between two types of interstate commerce, *i.e.,* interstate transportation by the pipeline companies and interstate transportation by the producers, does not save the First Use Tax from invalidity under the Commerce Clause. "[T]he clear import of our Commerce Clause cases is that such discrimination [*i.e.,* "between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses"] is constitutionally impermissible." *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 335 (1977). Louisiana has favored the interstate commerce conducted by the producers in order to encourage the continuance and increase of production acitivities by such companies in the state. By doing so, it has impermissibly discriminated against the interstate commerce conducted by non-producing pipeline companies. The First Use Tax is accordingly invalid.

3. The First Use Tax, in Conjunction With the Tax Credit For Electric And Natural Gas Service And Various Exemptions For In-State Uses Of Natural Gas Otherwise Subject To the Tax, Discriminates Against Interstate Commerce By Imposing the Entire Economic Incidence Of the First Use Tax On Interstate Commerce

The First Use Tax is designed to impose a levy on the interstate transportation of natural gas, the great bulk of which is destined for consumption in other states. In addition, as part of the First Use Tax package, Louisiana also enacted the Tax Credit for Electric and Natural Gas Service (Appendix G), and exemptions for natural gas, otherwise subject to the tax, consumed in specified uses in Louisiana, Section 1303A, to insure, to the maximum practical extent, that its citizens will not incur one iota of additional cost because of the collection of the First Use Tax.

La. R.S. 47:11B provides in part:

> Every electric generating plant and natural gas distribution service municipally owned or regulated, or regulated by the Louisiana Public Service Commission, and every direct purchaser of natural gas from the owner of the natural gas, other than an owner of natural gas regulated by a municipality or the state, for consumption only by such purchaser, shall be allowed a direct tax credit against any tax or combination of taxes, other than severance taxes, owed to the state, upon showing that fuel costs for electricity generation or natural gas distribution or consumption have increased as a direct result of increases in transportation and *marketing costs* of natural gas delivered from the federal domain of the outer continental shelf and upon which such entities are dependent for a portion of their supply.

In Section 1303C, the First Use Tax is declared to be a "cost associated with uses made by the owner in preparation of *marketing* of the natural gas". Thus, it is clear that this tax credit is designed to apply to increased costs attributable to the First Use Tax. Moreover, by providing a credit to Louisiana utilities and direct purchasers of the gas, every Louisiana consumer is effectively shielded from the First Use Tax.

Section 1303A exempts natural gas otherwise subject to the First Use Tax when the gas is used or consumed in Louisiana in the drilling for or production of oil, natural gas and sulphur; in the processing of natural gas; or in the manufacture of fertilizer and anhydrous ammonia. Natural gas consumed for similar purposes in other states is not exempt from the First Use Tax. The result of this disparity in treatment is that certain in-state consumers are favored to the disadvantage of identical out-of-state consumers..

This Court has long recognized that a state tax aimed at the citizens or products of another state is a clear discrimination against interstate commerce. *Welton v. Missouri,* 91 U.S. 275 (1876); *Webber v. Virginia,* 103 U.S. 344 (1880); *Walling v. Michigan,* 116 U.S. 446 (1886); *Robbins v. Taxing District of Shelby County,* 120 U.S. 489 (1887); *Nippert v. City of Richmond,* 327 U.S. 416 (1946). The rationale underlying these and all Commerce Clause discrimination cases is applicable here: a state may not single out interstate commerce for tax treatment not shared by its own residents.

The entire burden of the First Use Tax, which could total annually in excess of $275 million, will ultimately be borne by consumers in states other than Louisiana. As

nonresidents they had no voice in the legislative process which culminated in the passage of the First Use Tax. "Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45, n. 2 (1940).

The economic incidence of the First Use Tax results in an absolute inequality between similarly situated in-state and out-of-state consumers, and thus discriminates against interstate commerce. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963). Louisiana "cannot . . . use a fiscal formula . . . to project the taxing power of the state plainly beyond its borders." *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 365 (1940). The First Use Tax, especially when taken in conjunction with the Tax Credit for Electric and Natural Gas Service and exemptions for certain in-state uses, offends all notions of equal treatment for interstate commerce, and is invalid on its face.

CONCLUSION

For all of the foregoing reasons, the pipeline companies respectfully submit that the First use Tax violates the constitution and laws of the United States and should be declared void and unenforceable.

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APPENDIX

NATURAL GAS ACT 15 U.S.C. 717, *et seq.*

§ 717.

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * *

§ 717a. Definitions

SEC. 2. When used in this act, unless the context otherwise requires—

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

§ 717c. Rates and charges; schedules; suspension of new rates

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be

made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company [1a] or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; [1a] and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or

service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

§ 717d. Fixing rates and charges; determination of cost of production or transportation

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective

schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * *

§ 717f. Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U. S. C. § 717f (a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

APPENDIX B

NATURAL GAS POLICY ACT OF 1978 15 U.S.C. 3301, *et seq.*

§ 3301. Definitions

* * *

(18) Committed or dedicated to interstate commerce.—

(A) General rule — The term "committed or dedicated to interstate commerce", when used with respect to natural gas, means—

(i) natural gas which is from the Outer Continental Shelf; and

(ii) natural gas which if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act.

(B) Exclusion.—Such term does not apply with respect to—

(i) natural gas sold in interstate commerce (within the meaning of the Natural Gas Act)—

(I) under section 6 of the Emergency Natural Gas Act of 1977;

(II) under any limited term certificate, granted pursuant to section 7 of the Natural Gas Act, which contains a pregrant of abandonment of service for such natural gas;

(III) under any emergency regulation under the second proviso of section 7(c) of the Natural Gas Act; or

(IV) to the user by the producer and transported under any certificate, granted pursuant to section 7 (c) of the Natural Gas Act, if such certificate was specifically granted for the transportation of that natural gas for such user;

(ii) natural gas for which abandonment of service was granted before November 9, 1978, under section 7 of the Natural Gas Act; and

(iii) natural gas which, but for this clause, would be committed or dedicated to interstate commerce under sub-paragraph (A) (ii) by reason of the action of any person (including any successor in interest thereof, other than by means of any reversion of a leasehold interest), if on May 31, 1978—

(I) neither that person, nor any affiliate thereof, had any right to explore for, develop, produce, or sell such natural gas; and

(II) such natural gas was not being sold in interstate commerce (within the meaning of the Natural Gas Act) for resale (other than any sale described in clause (i) (I), (II), or (III)).

* * *

§ 3320. Treatment of state severance taxes and certain production-related costs

(a) **Allowance for State severance taxes and certain production-related costs.**—except as provided in subsection (b) of this section, a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exceeds the maximum lawful price to the extend necessary to recover—

(1) State severance taxes attributable to the production of such natural gas and borne by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b) of this section; and

(2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

APPENDIX C

COASTAL ZONE MANAGEMENT ACT, 16 U.S.C. 1451, *et seq.*

§ 1451. Congressional findings

The Congress finds that—

* * *

(i) The national objective of attaining a greater degree of energy self-sufficiency would be advanced by providing Federal financial assistance to meet state and local needs resulting from new or expanded energy activity in or affecting the coastal zone.

* * *

§ 1452. Congressional declaration of policy

The Congress finds and declares that it is the national policy (a) to preserve, protect develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations, (b) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development.

* * *

§ 1453. Definitions

For the purposes of this chapter—

* * *

(12) The term "outer Continental Shelf energy activity" means any exploration for, or any

development or production of, oil or natural gas from the outer Continental Shelf (as defined in section 1331(a) of Title 43), or the siting, construction, expansion, or operation of any new or expanded energy facilities directly required by such exploration, development, or production.

* * *

§ 1454. Management program development grants—Authorization

* * *

Program requirements

(b) The management program for each coastal state shall include each of the following requirements:

(1) An identification of the boundaries of the coastal zone subject to teh management program.

(2) A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.

(3) An inventory and designation of areas of particular concern within the coastal zone.

(4) An identification of the means by which the state proposes to exert control over the land uses and water uses referred to in paragraph (2), including a listing of relevant constitutional provisions, laws, regulations, and judicial decisions.

(5) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

(6) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, area wide, state, regional, and inter-state agencies in the management process.

(7) A definition of the term "beach" and a

planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value.

(8) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for anticipating and managing the impacts from such facilities.

(9) A planning process for (A) assessing the effects of shoreline erosion (however caused), and (B) studying and evaluating ways to control, or lessen the impact of, such erosion, and to restore areas adversely affected by such erosion.

No management program is required to meet the requirements in paragraphs (7), (8), and (9) before October 1, 1978.

* * *

§ 1455. Administrative grants—Authorization

(a) The Secretary may make a grant annually to any coastal state for not more than 80 per centum of the costs of administering such state's management program if the Secretary (1) finds that such program meets the requirements of section 1454(b) of this title, and (2) approves such program in accordance with subsection (c), (d), and (e) of this section.

* * *

§ 1456a. Coastal energy impact program—Administration and coordination by Secretary; financial assistance; audit; rules and regulations

(a)(1) The Secretary shall administer and coordinate, as part of the coastal zone management activities of the Federal Government provided for under this chapter, a coastal energy impact program. Such program shall consist of the provision of financial assistance to meet the needs of coastal states and local governments in such states resulting

from specified activities involving energy development. Such assistance, which includes—

(A) grants, under subsection (b) of this section, to coastal states for the purposes set forth in subsection (b)(5) of this section with respect to consequences resulting from the energy activities specified therein;

(B) grants, under subsection (c)(1) of this section, to coastal states for study of, and planning for, consequences relating to new or expanded energy facilities in, or which significantly affect, the coastal zone;

(c) grants, under subsection (c) (2) of this section, to coastal states and units of general purpose local government to assist such states and units to provide new or improved public facilities or public services which are required as a result of coastal energy activity;

(E) guarantees, under subsection (d) (2) of this section and subject to the provisions of subsection (f) of this section, of bonds or other evidences of indebtedness issued by coastal states and units of general purpose local government for the purpose of providing new or improved public facilities or public services which are required as a result of coastal energy activity;

(F) grants or other assistance, under subsection (d)(3) of this section, to coastal states and units of general purpose local government to enable such states and units to meet obligations under loans or guarantees under subsection (d)(1) or (2) of this section which they are unable to meet as they mature, for reasons specified in subsection (d)(3) of this section; and

(G) grants, under subsection (d)(4) of this section, to coastal states which have suffered, are suffering, or will suffer and unavoidable loss of a valuable environmental or recreational resource; shall be provided, administered, and coordinated by the

Secretary in accordance with the provisions of this section and under the rules and regulations required to be promulgated pursuant to paragraph (2). Any such financial assistance shall be subject to audit under section 1459 of this title.

* * *

Grants; calcuations; appropriation adjustments; purposes and priority of proceeds; supervision by Secretary

(b)(1) The Secretary shall make grants annually to coastal states, in accordance with the provisions of this subsection.

(2) Subject to paragraph (3), the amounts payable to coastal states under this subsection shall be, with respect to any such state or any fiscal year, the sum of the amounts calculated, with respect to such state, pursuant to subparagraphs (A), (B) and (C):

(A) An amount which bears, to one-half of the amount appropriated for the purpose of funding grants under this subsection for such fiscal year, the same ratio that the amount of outer Continental Shelf acreage which is adjacent to such state and which is newly leased by the Federal Government in the immediately preceding fiscal year bears to the total amount of outer Continental Shelf acreage which is newly leased by the Federal Government in such preceding year.

(B) An amount which bears, to one-quarter of the amount appropriated for such purpose for such fiscal year, the same ratio that the volume of oil and natural gas produced in the immediately preceding fiscal year from the outer Continental Shelf acreage which is adjacent to such state and which is leased by the Federal Government bears to the total volume of oil and natural gas produced in such year from all of the outer Continental Shelf acreage which is leased by the Federal Government.

(C) An amount which bears, to one-quarter of the amount appropriated for such purpose for such fiscal year, the same ratio that the volume of oil and natural gas produced from outer Continental Shelf acreage leased by the Federal Government which is first landed in such state in the immediately preceding fiscal year bears to the total volume of oil and natural gas produced from all outer Continental Shelf acreage leased by the Federal Government which is first landed in all of the coastal states in such year.

* * *

(5) Each coastal state shall use the proceeds of grants received by it under this subsection for the following purposes (except that priority shall be given to the use of such proceeds for the purpose set forth in subparagraph (A)):

(A) The retirement of state and local bonds, if any, which are guaranteed under subsection (d)(2) of this section; except that, if the amount of such grants is insufficient to retire both state and local bonds, priority shall be given to retiring local bonds.

* * *

(C) The prevention, reduction, or amelioration of any unavoidable loss in such state's coastal zone of any valuable environmental or recreational resource if such loss results from coastal energy activity.

* * *

Rules and regulations; financial assistance, formula, and procedures; criteria for review; criteria and procedures for repayment; loan requirements, terms, and conditions; interest rates

(e) Rules and regulations with respect to the following matters shall be promulgated by the Secretary as soon as practicable, but not later than 270 days after July 26, 1976.

(1) A formula and procedures for apportioning

equitably, among the coastal states, the amounts which are available for the provision of financial assistance under subsection (d) of this section. Such formula shall be based on, and limited to, the following factors:

(A) the number of additional individuals who are expected to become employed in new or expanded coastal energy activity, and the related new population, who reside in the respective coastal states.

(B) The standardized unit costs (as determined by the Secretary by rule), in the relevant regions of such states, for new or improved public facilities and public services which are required as a result of such expected employment and th erlated new population.

* * *

Eligibility requirements; apportionment of assistance

(g)(1) No coastal state is eligible to receive any financial assistance under this section unless such state—

(A) has a mangement program which has been approved under section 1455 of this title;

(B) is receiving a grant under section 1454(c) or (d) of this title; or

(C) is, in the judgment of the Secretary, making satisfactory progress toward the development of a management program which is consistent with the policies set forth in section 1452 of this title.

APPENDIX D

OUTER CONTINENTAL SHELF LANDS ACT 43 U.S.C. 1331 *et seq.*

§ 1331. Definitions

When used in this subchapter—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

* * *

§ 1332. Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control and power of disposition as provided in this subchapter;

(2) this subchapter shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and noncoastal areas of the coastal States, and on other

affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments—

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts; and

(B) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf;

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the water or subsoil and seabed, or other occurrences which may cause damage to teh environment or to property, or endanger life or health.

§ 1333. Laws and regulations governing lands—Constitution and United States laws; laws of adjacent States; publication of projected State lines; international

boundary disputes; restriction on State taxation and jurisdiction

(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artifical islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other then a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

* * *

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and

subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978 43 U.S.C. 1801 *et seq.*

§ 1801 Congressional findings

The Congress finds and declares that—

* * *

(13) because of the possible conflicts between exploitation of the oil and gas resources in the Outer Continental Shelf and other uses of the marine environment, including fish and shellfish growth and recovery, and recreational activity, the Federal Government must assume responsibility for the minimization or elimination of any conflict associated with such exploitation;

* * *

§ 1811. Definitions

* * *

(14) "cleanup costs" means costs of reasonable measures taken, after an incident has occurred, to prevent, minimize, or mitigate oil pollution from such incident;

* * *

(22) "removal costs" means—

(A) costs incurred under subsection (c), (d), or *(l)* of section 1321 of Title 33, and section 1474 of Title 33; and

(B) cleanup costs, other than the costs described in sub-paragraph (A);

* * *

§ 1812. Offshore Oil Pollution Compensation Fund—Establishment in Treasury; limitation on amount; administration by Secretary of Transportation and Secretary of Treasury

(a) There is hereby established in the Treasury of the United States on Offshore Oil Pollution Compensation Fund in an amount not to exceed $200,000,000, except that such limitation shall be increased to the extent necessary to permit any moneys recovered or collected which are referred to in subsection (b)(2) of this section to be paid into the Fund. The Fund shall be administered by the Secretary and the Secretary of the Treasury as specified in this subchapter. The Fund may sue and be sued in its own name.

* * *

Use of moneys; promulgation of regulations

(c) The Fund shall be immediately available for—

(1) removal costs described in section 1811(22) of this title;

* * *

§ 1813. Claims for economic loss from oil pollution—Permissible claims

(a) Claims for economic loss, arising out of or directly resulting from oil pollution, may be asserted for—

(1) removal costs; and

(2) damages, including—

(A) injury to, or destruction of, real or personal property;

(B) loss of use of real or personal property;

(C) injury to, or destruction of, natural resources;

(D) loss of use of natural resources;

(E) loss of profits or impairment of earning capacity due to injury to, or destruction of, real or personal property or natural resources; and

(F) loss of tax revenue for a period of one year due to injury to real or personal property.

* * *

§ 1814. Scope of liability—Liability of owners and operators of non-public vessels or offshore facilities

(a) Subject to the provisions of subsections (b) and (c) of this section, the owner and operator of a vessel other than a public vessel, or of an offshore facility, which is the source of oil pollution, or poses a threat of oil pollution in circumstances which justify the incurrence of the type of

costs described in section 1811(22) of this title, shall be jointly, severally, and strictly liable for all loss for which a claim may be asserted under section 1813 of this title.

Limitation of liability

(b) Except when the incident is caused primarily by willful misconduct or gross negligence, within the privity or knowledge of the owner or operator, or is caused primarily by a violation, within the privity or knowledge of the owner or operator, of applicable safety, construction, or operating standards or regulations of the Federal Government, the total of the liability under subsection (a) of this section incurred by, or on behalf of, the owner or operator shall be—

(1) in the case of a vessel, limited to $250,000 or $300 per gross ton, whichever is greater, except when the owner or operator of a vessel fails or refuses to provide all reasonable cooperation and assistance requested by the responsible Federal official in furtherance of cleanup activities; or

(2) in the case of an offshore facility, the total of removal and cleanup costs, and an amount limited to $35,000,000 for all damages.

* * *

§ 1843. Duties and powers of Secretary—Prescription and amendment of regulations respecting settlement of claims; identification classification of potential hazards to commercial fishing

* * *

Disbursement of payments to compensate commercial fishermen; restrictions

(c)(1) Payments shall be disbursed by the Secretary from the appropriate area account to compensate commercial fishermen for actual and consequential damages, including loss of profits, due to damages to, or loss of, fishing gear by materials, equipment, tools, containers, or other items associated with oil and gas exploration, development, or production activities in such area, whether or not such damage occurred in such area.

* * *

APPENDIX E

FIRST USE TAX ON NATURAL GAS

ACT NO. 294

HOUSE BILL NO. 768

An Act to amend Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 by adding thereto a new Chapter to be designated as Chapter 16 thereof to contain a Part I comprising Sections 1301 through 1307, providing for the levy and collection of a tax on the first use, in the state of Louisiana, of natural gas produced outside of the territorial limits of the state of Louisiana, which is not subject to the levy of an Import tax or customs duty by the United States as an Import from a foreign country, and upon which no severance tax or tax upon the volume of production has been paid to any state or territory of the United States; providing a definition of first use and for other definitions; providing for exclusions from the tax; providing for the Imposition and rate of the tax; declaring certain contractual agreements unenforceable; providing for the point at which the gas is measured and the tax assessed; providing for the reporting and collection thereof and promulgation of regulations; providing for commingling; providing penalties; providing for the disposition of the collections of the tax; and providing otherwise both generally and specifically with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Chapter 16 of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 containing a Part I and comprising Sections 1301 through 1307 of Title 47 is hereby enacted to read as follows:

CHAPTER 16. FIRST USE TAX

PART I. FIRST USE TAX ON NATURAL GAS

§ 1301. State policy

A. The conservation of natural resources is of vital concern to the present and future welfare of our state and nation, and it is the policy of the state of Louisiana, in the exercise of its police and taxing power, to prevent the physical and economic waste of its natural resources. It is recognized that other existing laws providing limitations upon the production of oil and gas are allowed within the state, and the imposition of a tax upon the severance of these natural resources from the soil and water of the state fail to prevent the economic waste of these Louisiana natural resources and will unfairly tax Louisiana producers in a discriminatory fashion, unless the state equally and uniformly taxes the introduction for the first time into the economy of the state natural gas which has not been otherwise or elsewhere subject to taxation by or within the United States.

B. The waterbottoms, barrier islands and coastal areas within this state are also valuable natural resources, as they provide essential habitat for many forms of wildlife and aquatic life in Louisiana, help protect our coast-line from erosion, and are of aesthetic, commercial and recreational value to the citizens of our state and nation. It is further recognized that while other existing laws, applicable to the production of oil and natural gas, provide recompense in the form of taxes to the people of the state of Louisiana for adverse effects on the natural resources, barrier islands, waterbottoms, and shorelands of this state, these laws fail to provide protection for such valuable natural resources or compensation to the people of Louisiana for the necessary adverse effects caused by entry for use for the first time in

Louisiana, under the protection of the state's laws, of natural gas which has not been subject to taxation otherwise or elsewhere by or within the United States unless the state levies an equitable tax thereon.

C. It is one of the express purposes of this tax to require the exaction of fair and reasonable compensation to the citizens of this state for the costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana, although introduced into the state, and to provide some measure of reimbursement to teh citizens for damages to the state's waterbottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity within the state associated with such natural gas by the owners thereof.

§ 1302. Definitions

The definitions hereinafter set forth shall have the meanings ascribed to them unless the context of use clearly indicates otherwise:

(1) "Oil, condensate, distillate or similar hydrocarbons" are liquid hydrocarbons remaining in a liquid state at 15,025 pounds per square inch absolute and sixty degrees Fahrenheit.

(2) "Natural gas" is natural or casinghead gaseous phase hydrocarbons remaining after separation from either oil, condensate, or distillate and measured at a pressure base of 15,025 pounds per square inch absolute at a temperature base of sixty degrees Fahrenheit.

(3) "Processing" is the scrubbing of a natural gas stream by specifically applied mechanical processes of absorption, adsorption, compression, cooling, cryogenics, refrigeration or any combination thereof for the purpose of extracting natural or casinghead gasoline, methane, ethane, propane, butane and other liquefiable hydrocarbons.

(4) "Refining" is the process by which crude oil, distillate and condensate are separated or fractionated into the various component parts or purified.

(5) "Storage" means and include any keeping or retention in this state of oil and natural gas.

(6) "Measurement" is any process by which the volume of natural gas affected by this Part is determined.

(7) "Sale" is the transfer of ownership of and title to natural gas from one person to another for valuable consideration.

(8) "Use" is: the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state.

(9) "Owner" is the person or person having title to and the right to alienate the natural gas subject to the tax at the time a use occurs in the state. It shall not include any person to whom temporary possession or control has been transferred. In the event of a sale the purchaser shall be deemed the owner.

§ 1303 Impostion; exclusions; commingling

A. Pursuant to the exercise of the police and taxing powers of the state for the purpose of preventing economic and physical waste of our natural resources and for protecting and providing compensation for adverse effects upon the state's shorelands, waterbottoms and barrier islands, there is hereby levied and imposed a tax upon the first occurrence within this state of any use, as defined in this Part, of any natural gas upon which no severance tax or

tax upon the volume of production has been paid, or is legally due to be paid, to this state or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country. The tax levied herein shall not apply to natural gas otherwise subject thereto when such gas is used or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state; nor shall it apply to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydro-carbons, provided shrinkage volumes shall not exceed equivalent gas volumes of the extracted liquids computed by recognized conversion factors used by the Gas Processors Association nor shall it apply to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state.

B. The tax imposed by Subsection A of this Section shall be computed at a rate of seven cents on each unit of natural gas as to which a use first occurs within the state. For the purposes of this tax a unit shall be one thousand cubic feet of natural gas as measured at a pressure base of 15.025 pounds per square inch absolute and at a temperature base of sixty degrees Fahrenheit.

C. In furtherance of the public policy and purpose set forth in Section 1301 of this part, and particularly Subsection C of said Section, this tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas. Any agreement or contract 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, is hereby declared to be against public policy and unenforceable to that extent.

Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund 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 that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or refund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest.

D. When natural gas subject to the tax levied in this Part is commingled with oil and/or natural gas not subject to the tax levied herein, it shall be presumed that the volumes withdrawn from the commingled mass by the first use shall be in the same ratio as the ratio of the resources entering the commingled mass.

E. Nothing in this Part shall be construed as imposing any tax on the production, severance, or ownership of natural gas produced outside of the boundaries of the state of Louisiana, it being the intention of this Part that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use within the state.

F. If any use as defined in this Part and first occurring is determined not to be a constitutionally taxable incident, the tax shall be imposed upon the use first occurring thereafter.

§ 1304. Authority of the collector of revenue to promulgate rules and regulations

The collector of revenue is authorized to promulgate

rules and regulations necessary to effect the intent and purpose of this Part, including regulations concerning the measurement of products associated with the incidents taxed herein.

§ 1305. Reports and payments; reimbursement limitations

A. The owner or owners of the natural gas at the time a use first occurs in this state shall file with the Department of Revenue and Taxation on or before the last day of each month following the month of first use, statements on forms procured from the department, showing the volumes, values, owners and such other information as the department may require by law or regulation for computing and assessing the amount of tax due under this Part.

B. The taxes levied by this Part shall be due and payable to the Department of Revenue and Taxation monthly on or before the last day of the month following the month to which the tax is applicable by the owner or owners of the natural gas stream at the time any use, as defined herein, first occurs within the state.

§ 1306. Delinquent tax; failure to report or pay

A. The tax provided by this Part shall become delinquent after the date fixed for each monthly report to be filed in the office of the collector, and from such time shall be subject to the addition of interest, penalties, and costs as provided in Chapter 18, Subtitle II of this Title.

B. The failure to report or pay, within ninety days, in the manner and at the time required herein, the tax imposed by this Part on the first use of natural gas is unlawful, and the natural gas shall be deemed illegal gas subject to the provisions of R.S. 30:19 and, as such, shall be treated as contraband and shall be seized and sold as provided by R.S. 30:20.

§ 1307 Disposition of collections

The secretary shall remit all collections of taxes provided by this Part each month to the state treasurer, not later than the tenth day of the month following the month in which collections are made. The state treasurer shall credit all such collections to the state treasury.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

This Act shall become effective immediately upon signature by the governor and the adoption by the legislature of House Bill 140 of the 1978 Regular Session; provided however that taxes shall not begin to accrue on natural gas subject to the tax levied by this Part until 7:00 A.M. on April 1, 1979.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Section 4. Notwithstanding the provisions of Section 2 of this Act, in the event that a final and unappealable judicial decision is rendered upholding the right of an owner to enforce a contract or agreement otherwise rendered unenforceable by R.S. 47:1303(C) of this Act, the following consequences shall insue:

(1) If the right upheld arises from the provisions of a contract or agreement requiring any other party to reimburse or refund to an owner taxes incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, then the tax levied in this Act shall not be due in respect to

natural gas previously and thereafter sold pursuant to any contract or agreement containing such requirement, and the secretary of the Department of Revenue and Taxation shall forthwith return to each taxpayer all taxes previously paid in respect to such natural gas, together with interest at the rate of six percent per annum from the date the taxes were paid; or

(2) If the right upheld arises from the provisions of a contract or agreement requiring any other party to reimburse or refund to an owner costs or expenses incurred by such owner by virtue of separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, then this Act shall be null and void and the secretary shall forthwith return to each taxpayer all taxes previously paid, together with interest at the rate of six percent per annum from the date of payment.

All taxpayers receiving refunds and interest pursuant to this Section shall in turn remit such refunds and interest pursuant to this Section shall in turn remit such refunds and interest to all other parties from whom they have received payments pursuant to the aforesaid provisions of such contracts.

Approved July 6, 1978.

APPENDIX F

LOUISIANA GENERAL SEVERANCE TAX CREDIT La. R.S. 47:631 *et seq.*

§ 631. Impositions of tax

Taxes as authorized by Section 21 of Article X of the Constitution of Louisiana, are hereby levied upon all natural resources severed from the soil or water, including all forms of timber, including pulp woods, and turpentine and other forest products; minerals such as oil, gas, natural gasoline, distillate, condensate, casinghead gasoline, sulphur, salt, coal, lignite and ores; also marble, stone, gravel, sand, shells and other natural deposits; and the salt content in brine.

* * *

§ 633. Rates of tax

The taxes on natural resources severed from the soil or water levied by R.S. 47:631 shall be predicated on the quantity or value of the products or resources severed and shall be paid at the following rates:

* * *

(9) On gas seven cents per thousand cubic feet, measured at a base pressure of 15,025 poiunds per square inch absolute and at the temperature base of sixty degrees Fahrenheit; provided that whenever the conditions of pressure and temperature differ from the above bases, conversion of the volume from these conditions to the above bases shall be made in accordance with the Ideal Gas Laws with correction for deviation from Boyle's Law, which correction must be made unless the pressure at the point of measurement is two hundred pounds per square inch gauge, or less, all in accordance with methods and

tables generally recognized by and commonly used in the natural gas industry. For all purposes of computing standard cubic feet of gas under this Section the barometric pressure shall be assumed to be 14.7 pounds per square inch absolute at the place of measurement.

* * *

LOUISIANA FIRST USE TAX-SEVERANCE TAX CREDIT

§ 647. Severance tax credit, priority

A. (1) Every taxpayer liable for an remitting taxes levied and collected pursuant to R.S. 47:1301 through R.S. 47:1307 and each taxpayer who bears such taxes as a direct result of contractual terms of aggrements applied in disregard to R.S. 47:1303(C), shall be allowed a direct tax credit, at any time following payment of such tax, but, not in excess of the amount which must be borne by such taxpayer, against severance taxes owed by such taxpayer to the state, the amount of which credit shall not exceed the amount of severance taxes for which such taxpayer is liable to the state as a direct consequence of the privilege of severing natural resources from the surface of the soil or water of the state. A taxpayer who bears any portion of the tax levied pursuant to R.S. 47:1301 through R.S. 47:1307 as a direct result of contractual terms or agreements applied in disregard to R.S. 47:1303(C), shall be entitled to a credit under this Section only after there has been a determination by the Louisiana Supreme Court or the appropriate United States District Court that such taxpayer must bear the tax, provided that if the taxpayer or the state has sought and been denied a preliminary injunction enjoining the application of such contractual terms or agreements sought to be rendered in applicable by R.S. 47:1303(C), then such taxpayer shall be entitled to a credit under this Section from

the date of denial of the preliminary injunction. In the event that this Section is declared invalid as to tax credit authorized hereunder, such invalidity shall be prospective only.

(2) The tax credit provided in Paragraph (1) of this Subsection shall be allowed in the following manner: The credit shall be applied first against any severance tax owed on oil as provided in R.S. 47:633(7). If there is any credit remaining that the taxpayer may still apply against severance taxes after applying it against oil, the balance shall then be applied against any severance tax owed on distillate, condensate, or similar natural resources as provided in R.S. 47:633(8)(a). Any balance of credits then remaining which the taxpayer may apply against severance taxes owned, shall be applied against natural gasoline, casinghead gasoline, and other natural gas liquids, ethane, or methane recovered through processing gas after separation of oil, distillate, condensate, or similar natural resources as provided in R.S. 47:633(8)(b). If there remain any tax credits that may be applied against severance taxes owed by the taxpayer, he may then apply them against severance taxes owed on sulphur as provided in R.S. 47:633(10). If there remain any tax credits thereafter that may be applied against severance taxes owed by the taxpayer, he may then apply them against severance taxes owed on gas as provided in R.S. 47:633(9); provided however, that such credits which may be applied against severance taxes owed on gas shall not be allowed until after March 31, 1982.

B. No tax credit pursuant to this Section shall be allowed for any taxes remitted pursuant to R.S. 47:1301 through 1307 for which a taxpayer has an enforceable right to reimbursement from a third party. A taxpayer claiming any credit under this Section shall furnish to the secretary of the Department of Revenue and Taxation all applicable contracts and other information requested by the secretary,

which relate to such taxpayer's possible right to reimbursement. If the secretary determines that the taxpayer has an enforceable right to reimbursement, which the taxpayer is not actually receiving, the secretary shall so rule. WIthin thirty days of receipt of notice of such ruling the taxpayer shall have the right to appeal such ruling to the Louisiana Board of Tax Appeals which board shall determine in open meeting whether there is sufficient evidence to support the ruling of the secretary. If the board determines that there is not sufficient evidence it shall overrule the secretary and the taxpayer shall not be required to take any other action in order to receive the tax credit provided by this Section. If the board determines that there is sufficient evidence, the taxpayer shall thereafter have a period of ninety days within which to institute any administrative or judicial proceedings necessary to assert such right to reimbursement. The taxpayer shall pursue such administrative or judicial proceedings with due diligence. At all times prior to commencement of such administrative or judicial proceedings and during the pendency thereof, and during any appeals therefrom, the taxpayer shall continue to be entitled to the credit provided in this Section; provided that if no action is taken by the taxpayer to assert the right to reimbursement within ninety days no further credit shall be granted and the state shall have the right to recover from the taxpayer any credits granted prior to the expiration of such time. If it is determined in any administrative proceedings that a taxpayer has no right to such reimbursement, then the taxpayer shall not be entitled to continue receiving the credit allowed by this Section, unless the taxpayer within the time allowed by applicable law seeks judicial review of such administrative determination and pursues such judicial review to a final and unappealable judgment. If the administrative or judicial determination establishes that the taxpayer has an enforceable right to reimbursement of the

taxes levied pursuant to R.S. 47:1301 through 1307, and if the taxpayer is so reimbursed, then such taxpayer shall be liable to the state for additional severance taxes equivalent to the amount of taxes levied under R.S. 47:1301 through 1307 for which such taxpayer has received reimbursement. The taxpayer shall also pay to the state interest on such taxes at the rate prescribed in R.S. 47:1601, accruing from the date on which the credit attributable to such taxes was taken to the date of final payment but only to the extent of any interest which the taxpayer has itself received on the amount of reimbursement.

C. The credit allowed by this Section shall not affect the percentage allocation of severance tax proceeds otherwise due to any parish, and the secretary of the Department of Revenue and Taxation, with the concurrence of the state treasurer shall, by regulation,establish such procedures as may be deemed necessary to provide therefor.

D. The secretary of the Department of Revenue and Taxation shall promulgate rules and regulations necessary for the implementation and administration of the tax credit provided for herein.

APPENDIX G

TAX CREDIT FOR ELECTRIC AND NATURAL GAS SERVICE La. R.S. 47:11

§ 11. Tax credit for electric and natural gas service

A. Recognizing that the state of Louisiana must depend upon natural gas produced in the federal domain of the outer continental shelf as a supplement to its declining domestic supply, and recognizing that this natural gas is regulated exclusively by agencies of the federal government and is therefore outside of the regulatory jurisdiction of the state of Louisiana, and that the necessarily higher transportation and marketing costs for such natural gas results in higher fuel costs for utilities and industries within the state dependent thereon, the following tax credits, being deemed fair and in the best interest of the state, are hereby authorized.

B. Every electric generating plant and natural gas distribution service municipally owned or regulated, or regulated by the Louisiana Public Service Commission and every direct purchaser of natural gas from the owner of the natural gas, other than an owner of natural gas regulated by a municipality or the state, for consumption only by such purchaser, shall be allowed a direct tax credit against any tax or combination of taxes, other than severance taxes, owed to the state, upon showing that fuel costs for electricity generation or natural gas distribution or consumption have increased as a direct result of increases in transportation and marketing costs of natural gas delivered from the federal domain of the outer continental shelf and upon which such entities are dependent for a portion of their supply. Increased transportation and marketing costs shall be issued tax warrants in amounts not to exceed in the aggregate the difference between the increase in the fuel costs and the tax or taxes owed to the state, which tax

warrants may be used in the payment of any tax or combination of taxes owed to any parish, municipality, political subdivision or other taxing authority of the state. Tax credits and warrants shall be issued annually hereunder and shall not exceed two million dollars inthe aggregate. No electric generating plant, natural gas distribution service, or other affected purchaser shall be issued tax credits or warrants totaling less than two hundred fifty dollars annually, except that increased costs totaling less than the minimum credit established herein may be carried forward and accumulated for three years from the year in which the increased costs occur in order that the applicant may utilize the tax credit authorized herein prior to the end of the prescriptive period otherwise set forth in this Title. In the event that total increased fuel costs exceed two million dollars in the aggregate, the Secretary of the Department of Revenue and Taxation shall issue tax credits and warrants based on a formula to be fixed by regulation which shall insure each qualifying applicant a proportionate share of the maximum tax credits established herein.

C. The secretary of the Department of Revenue and Taxation shall promulgate rules providing for the determination of the amount of any tax credit or tax warrant provided for herein and for administration of the provisions of this Section.

D. The state shall have a right of recovery of tax credits granted pursuant to this Section in the event that increased transportation and marketing costs for which credits ar granted hereunder are reimbursed or refunded for any reason to any entity receiving the credit.

CERTIFICATE OF SERVICE

I, Daniel F. Collins, a member of the Bar of this Court, do hereby certify that three (3) copies of each of the foregoing motions and brief were served upon each other party separately represented in this proceeding by depositing said copies in the United States mail, properly addressed, with airmail postage prepaid, pursuant to Rule 33 of the Rules of the Court, this 5th day of November, 1979.

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Daniel F. Collins