




10-1980

Maryland v. Louisiana

Lewis F. Powell Jr.

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Relist

Manuel

SUPPLEMENTAL MEMORANDUM

September 24, 1979 Conference
List 1, Sheet 62

No. 83 Orig.

MARYLAND

v.

LOUISIANA

1. Answer of Louisiana

2. Motion of Louisiana for
Appointment of Special Master

3. Motion of Maryland for
Judgment on the Pleadings

The Court presently has before it (Summmer List 23, Sheet 3) Louisiana's Answer and Motion for Appointment of Special Master. On September 18, Maryland filed a Motion for Judgment on the Pleadings.

Mr. Rodak indicated that he is reluctant to list Md.'s motion on a second supplemental list because there is no emergency and the Conference begins next Monday. Md.'s motion will appear on a future Conference List. However, Mr. Rodak asked me to circulate this memorandum so that the Court would know Md. has filed a motion for judgment on the pleadings.

It would be appropriate to decide Louisiana's Motion for Appointment of Special Master and Md.'s Motion for Judgment on the Pleadings

I would relist -
DOS

Answer doesn't
affect relisting -

at the same time. Accordingly, all the Court need do now is relist Louisiana's Motion.

9/19/79

Marsel

PJC

Yes

Appoint Master,
Refer case,

Richman

Summer List 23, Sheet 3

No. 83 Original

MARYLAND

v.

LOUISIANA

Answer of Louisiana
Also Motion of Louisiana
for Appointment of Special
Master

FACTS: On June 18, the Court granted leave to file the complaint and allowed La. 60 days to answer. La. has done so, and also moves for appointment of a master because the pleadings disclose many questions of fact which must be tried.

DISCUSSION: Unless, by the first Conference, Md. or the SG object and show why a master is not necessary, the case should be referred. The pleadings certainly do not reveal exactly how La.'s tax works or its impact on plaintiff states.

There are no responses to motion.

8/22/79

Richman

PJC

I would agree with legal counsel -

DOS

No. 83 Orig.

Master.

Ned's motion
is not yet on our
list. Harry Thibodeau we
should await it.
Ned. is moving for judgment
& opposes appointment of
Master.

1. Grant motion to intervene
2. Deny La. motion to Dismiss
3. Defer TI's (MD's) motion for judgment on pleadings - this is a SG
4. Defer motion of SG & Fed Energy Comm. for judgment on

RECOMMENDATIONS LISTED BELOW

Caldwell

- 1 agree that we should grant the motions to intervene and deny the motions of Louisiana to dismiss that require a Special Master. We could require On the merits, the case seems in the posture of, in effect, La. to document this claim. a motion for summary judgment by the plaintiff states.
6. Case may be complicated enough. The Court could either direct La. to file papers supporting its claim that relevant facts are in dispute, or simply set the motions for argument at which both the

SUPPLEMENTAL MEMORANDUM

January 4, 1980 Conference
List 1, Sheet 4

No. 83 Orig.

(The 10 pleadings and motions before the Court are listed directly below */)

Maryland

v.

Louisiana

relevance of the allegedly disputed facts and the merits of the legal issues would most logically be considered together.
Ellen

- 1) - 1. Answer of State of Louisiana
- 2) Defer: direct La. to respond. 2. Motion for Appointment of Special Master
- 3) grant 3. Motion of Columbia Gas Transmission Corp., et al. for Leave to Intervene
- 4) grant 4. Motion of State of N.J. for Leave to Intervene
- 5) grant 5. Motion of Columbia Gas Transmission Corp., et al. for Leave to File Answer to Motion for Appointment of Special Master

*/ Prior motions and pleadings in this matter have been addressed by the Legal Office in memos dated 6/6/79, 8/22/79, 9/19/79, and in two dated 6/12/79.

6) Defer

7) grant leave; 7.
defer motion.

8) grant

9) —

10) Defer

6. Motion of Plaintiff, Judgment on Pleadings
7. Motion of Columbia Gas Transmission Corp., et al. for Leave to File Motion for Judgment on the Pleadings
8. Motion of Associated Gas Distributors for Leave to File a Brief, as Amicus Curiae
9. Brief of the State of Maryland in Opposition to the State of Louisiana's Motion to Dismiss
10. Motion of the United States and Federal Energy Regulatory Commission for Judgment on the Pleadings as Amici Curiae

CONTENTIONS:

- I Louisiana's Opposition to the Motion for Leave to Intervene by indicated pipeline companies.
 1. Ptrs. have no statutory right, nor any independent jurisdictional basis to intervene;
 - 2 Ptrs' interests are being adequately represented by the existing parties here, and by themselves in La. state court;
 3. Permitting suit by out-of-state citizens against the State of Louisiana is contrary to the provisions of the Eleventh Amendment.
- II. Pltf state's (Md.) Motion for Judgment on the Pleadings:
 1. There is no genuine issue as to any material fact;
 2. Louisiana's first use tax violates:
 - a. Supremacy Clause, in that it interferes with the Natural Gas Act (15 U.S.C. §717), and FERC's rate-making authority. The first use tax imposes

a severance tax on natural gas produced outside Louisiana, particularly on the outer continental shelf (OCS); but the OCSLA (43 U.S.C.A. §1333 (2) (A)) states that the state's tax laws shall not apply to the OCS;

b. Commerce Clause:

- (1) A state may not directly tax the flow of natural gas in interstate commerce; Louisiana is doing so, but claiming "uses" which, in fact, are artificial;
- (2) The First Use tax, in conjunction with the severance tax credit, discriminates in favor of pipeline companies that produce natural resources subject to the Louisiana Severance Tax, and burdens those that do not;
- (3) The tax is unfairly apportioned, thus creating the risk of multiple taxation.

III. Motion of the pipeline companies for leave to file answer to Motion for Appointment of a Special Master:

1. Judgment on the Pleadings is appropriate for the reasons stated above by Maryland;
2. The \$275 million impact on consumers requires summary disposition by this Court rather than a delay for appointment of Special Master.

IV. Response of pipeline companies to Louisiana's Opposition to their Motion to Intervene:

1. Plaintiff states' suit against Louisiana is not contrary to the Eleventh Amendment. The purpose of the Eleventh Amendment is to prevent suits seeking to impose liability which must be paid from the general revenues of a state, rather than those seeking prospective relief against unconstitutional actions (i.e., money held in escrow);
2. Louisiana R.S. 47:1576 specifically demonstrates that Louisiana has waived any perceived immunity of the Eleventh Amendment;
3. The pipeline companies should be permitted to intervene under Rule 24 since their interests are not adequately represented by the various state attorneys general.

V. Motion of the Associated Gas Distributors (AGD) to File as Amicus:

1. Petitioners have consented to such filing since the AGD makes substantially the same arguments; however, Louisiana objects;
2. AGD has a substantial and direct interest in this litigation because:
 - a. AGD is an unincorporated gas distributing company serving 11 million people, who constitute 25 percent of the nation's interstate natural gas customers;
 - b. More than one half of the natural gas purchased by AGD is produced on the OCS and is transported

through Louisiana and subject to Louisiana's first use tax;

- c. The FERC has approved the plan which permits gas pipeline companies, against whom the tax is levied, to recoup the tax payment from the gas distributors who then must pass it on to their customers.

VI. Louisiana's Motion to Dismiss, in Opposition to the Md. Motion for Judgment on the Pleadings:

1. Dismissal:

- a. The pipeline companies, (who bear the "legal incidence" of the Louisiana first use tax) are the real parties in interest, not the plaintiff states; pltf states have no standing since their interests are remote; as such, there is no original jurisdiction in this Court for the private pipeline companies against the sovereign Louisiana; therefore dismissal is warranted.
- b. The pipeline companies have already filed a similar action in a Louisiana state court, now pending; the state court is a more suitable forum to interpret the constitutional issues prior to reaching this Court; therefore, the plaintiff states should seek to intervene in Louisiana State Court and not here;

2. Judgment on the Pleadings:

- a. The state court is more suitable to render factual determinations:

- b. "Uses" within the State of Louisiana include compression, dehydration, separation, measurement, processing, and storage, in an effort to make the end product economically transportable; once gas is processed in Louisiana, it is ready for consumption and receives no further processing in other states;
3. If this Court decides to proceed with this matter as an original case, Louisiana requests the appointment of a Special Master; if this Court decides to proceed without a Special Master, then Louisiana requests an opportunity to brief and orally argue the merits.

VII New Jersey's Motion for Leave to Intervene and to File a Complaint:

1. New Jersey is similarly situated to the other plaintiff states with substantially the same complaint;
2. New Jersey imports nearly all of its natural gas from Louisiana, receiving the bulk of that from the OCS;
3. The economic impact on the State of New Jersey is approximately \$20,000 annually; the economic impact on the State of New Jersey's general welfare exceeds \$17 million annually.

VIII Motion of the Pipeline Companies for Leave to File and for Judgment on the Pleadings.

(This Motion includes substantially the same arguments as those submitted by the plaintiff states.)

IX Maryland's Opposition to Louisiana's Motion to Dismiss:

1. Louisiana has offered no valid reason for this Court to reverse its earlier decision acknowledging standing of the plaintiff states:
 - a. The mammoth economic burden directly imposed by the first use tax on the plaintiff states and their economies is sufficient to grant them standing;
 - b. It is inconsistent for Louisiana to contend that the pipeline companies are real parties in interest while denying that those companies have a right to intervene;
 - c. Louisiana has, in effect, conceded standing in this Court by recognizing standing of the plaintiff states to sue in Louisiana courts;
2. Louisiana courts are not an appropriate forum for resolution of this matter for the reasons stated in the original Maryland complaint:
 - a. Whatever state court proceedings occur after this Court exercises original jurisdiction are irrelevant to the disposition of this case in this Court;
 - b. The first use tax refund suit mechanism established by Louisiana permits neither injunctive nor declaratory relief against collection of the tax; without such relief, which only this Court can grant, Louisiana will

continue to collect millions of dollars in taxes, perhaps for years;

- c. Requiring resort to Louisiana courts runs counter to the rationale of the Supreme Court's original jurisdiction over cases involving states; no state should be compelled to resort to the tribunals of another for redress, since parochial factors might often lead to the appearance, or reality, of partiality;

3. No additional facts are necessary for judgment on the pleadings:

- a. Louisiana's reliance on instate processing of natural gas as factual issues is misplaced; even if it were proved, it would have no bearing on whether federal law precludes imposition of the tax, or whether the tax discriminates on its face against interstate commerce;
- e. The tax is imposed on the total volume of gas and is not apportioned.

X SG and FERC's Motion for Judgment on the Pleadings:

(The SG argues substantially the same claims as the plaintiff states. Additionally, he has lodged with the Clerk's office a copy of the Hearings on HB 768 before the Committee on Ways and Means of the Louisiana House of Representatives, which discusses the Louisiana Statute under consideration.)

DISCUSSION: It would appear that sufficient direct and substantial interests in this litigation have been demonstrated to warrant intervention by both the State of New Jersey and the named pipeline companies, as well as amicus status for AGD.

Secondly, La's arguments for dismissal seem untimely. In granting Md. leave to file the complaint, this Court has presumably resolved, adverse to La., the sufficiency of the plaintiff states interests vis-a-vis the pipeline companies, as well as the impropriety of allowing the merits of this case to be determined initially by La. courts. (As to the latter, see L.O. Memo, 6/6/79, pp. 3-4)

Thirdly, La. lists eight matters (in its Answer, pp 24-25) as constituting factual controversies warranting appointment of a special master. All other parties and amici, (including the SG) in their motion for judgment on the pleadings, do not appear to contest those facts; rather, they contend that each is irrelevant to resolution of the merits. In response, La. seems only to assert that the extent of in-state natural gas processing requires factual determination.

The complexity of the case, alone, seems to warrant referral to a special master. However, the argument of Md. and the SG that this is purely a legal controversy ripe for judgment on the pleadings is persuasive. No clear factual dispute is apparent from the pleadings. If the Court is inclined to agree, La. asks that it first be permitted to support its request for referral to a special master. Prior to rendering judgment on the pleadings, it would seem

appropriate as a minimum to direct La. to specify the facts which require an evidentiary hearing, as well as their relevance to a proper resolution of the issues in question.

12/19/79

Caldwell

The pleadings and motions now before the Court are listed at pp. 1-2.

MARYLAND

vs.

LOUISIANA

Cheers!

{
Appnt/
Special
Master
}

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT					MERITS		MOTION		ABSENT	NOT VOTING		
		G	D	N	POST	DIS	AFF	REV	AFF	G	D					
Burger, Ch. J.				Set for Hearing on App. 5/Master												
Brennan, J.				"	"	"	"	"	"	"	"	"				
Stewart, J.				App 5/Master												
White, J.				"	"	"	"	"	"	"	"	"				
Marshall, J.				Set for Hearing												
Blackmun, J.				"	"	"	"	"	"	"	"	"				
Powell, J.				App 5/Master												
Rehnquist, J.				"	"	"	"	"	"	"	"	"				
Stevens, J.				"	"	"	"	"	"	"	"	"				

Discuss

*Enter order appointing
Master and refer all
papers.
Marsel*

February 29, 1980
List 3, Sheet 3

No. 83 Original

Maryland

Answer of La. and nine motions

v.

Louisiana

This case appeared on list 1, sheet 1, of the Jan. 4 Conf. At that time the Court decided to appoint a special master. Nothing new has been filed. Apparently the Court has to enter an order referring all these papers to the master (or grant or deny any particular motions on which it wishes to take special action). See memo from this office for Jan 4 Conf.

Marsel

2-28-80

Ref to Special Master - Jon

Court
Argued, 19...
Submitted, 19...

Voted on....., 19...
Assigned....., 19...
Announced....., 19...

No83 Orig.

v8.

LOUISIANA

Relisted.

LOUISIANA

isted.

*John says there
was an error in
Confession list.*

1 Special
master
has been
appointed
- John Davis

Except for
9 times 2 & 5

[illegible]

I have checked
the amicus brief
of the Associated
Gas Distributors
^{northern} & Commonwealth National
Gas Co nor Commonwealth
Industries is listed as
a member. Even if they
were, this alone would
not require disqualification

Allow
Intervention

ADOPT REPORT
OF SPECIAL MASTER

Memo

June 5, 1980 Conference
List 1, Sheet 5

No. 83 Original

Report of Special Master

MARYLAND, et al.

v.

LOUISIANA

SUMMARY: The Special Master, John Davis, has filed a report. He recommends that (1) the motion of Columbia Gas Transmission Corporation and 16 other pipelines to intervene as plaintiffs be granted; (2) New Jersey's motion for leave to file an intervening complaint be granted; (3) the motion of the U.S. and the Federal Energy Regulatory Commission (FERC) to intervene and file a complaint in intervention be granted; and (4) that the motion of the Associated Gas Distributors for leave to file a brief amicus curiae in support of Maryland's motion for judgment on pleadings be granted.

I'd adopt the report - Ellen

FACTS: This action was initiated in March 1979 by Maryland and seven other states. They attacked the constitutionality of a La. statute imposing a "first use tax" on natural gas produced from the Outer Continental Shelf in federal enclaves, and other imported gas moving into La. It was alleged that the La. statute violates the Commerce Clause of the Constitution as well as the Supremacy Clause, the Import-Export Clause and Equal Protection of the law. Over La.'s opposition, the Court granted leave to file in June 1979 La. filed an answer asserting the legality and constitutionality of its statute, and John Davis was appointed Special Master in March of 1980.

1. In Sept. 1979, Columbia Gas Transmission Corp. and 16 other pipeline companies filed motions to intervene as parties-plaintiff and to file complaints which alleged that the first use tax makes them liable for the payment of the tax and deprives them of the protection afforded by the Constitution. The Master recommends that their motion be granted because the interests of the pipelines in the outcome of this suit is direct and material. It is asserted that the amount involved, which falls directly on the pipelines who own and control the gas at the time the tax is imposed, is \$250 million annually. The pipelines were therefore be the taxpayers presumably entitled to recover taxes already paid if the La. Act were declared unconstitutional and repayment ordered. Moreover, since the pipelines have been permitted to pass the cost of the tax along to the purchasers of the gas, it has a direct effect on the price of the gas to the ultimate consumer and therefore its competitive position with respect to competing fuels. While the interest of

the pipelines differ from those of other parties, their claims of unconstitutionality raise the same issues and require the same proof. La. opposes intervention, and argues that the pipelines are not proper parties to Original actions since they could not have commenced it in the first place. However, the Master notes that intervention of non-states in Original actions has been allowed once the Court has taken jurisdiction Okla. v. Tex., 258 U.S. 574. The constitutional limitations on Original actions does not prevent intervention by private parties once the Court has been given jurisdiction. La. raised an 11th Amendment objection. The Master states that this Court has permitted the intervention of private parties without specifically addressing this issue. In the Master's view intervention here is materially different from an Original suit against the state by a citizen of another state. Here, La. is already a party to a proceeding in which the validity of its tax is under attack. If it loses the suit, it would presumably be liable to repay the tax it has already collected and intervention of the pipelines would not constitute an additional claim against the assets of the state nor would it affect the future imposition of the tax, which would be forbidden or permitted depending on the outcome of this suit. The difference would be that of permitting the pipelines to assert their claim directly rather than relying on the states, of which they are not even citizens to assert their claim. To relegate the pipelines to their remedy in the La. courts would result in duplicative litigation with the possibility of conflicting results. Therefore the purpose of expeditiously carrying forth with these proceedings

the Master recommends that the pipelines be permitted to intervene, reserving the final determination of the applicability of the 11th Amendment until the final decision of this case.

2. In Oct. 1979, the State of New Jersey filed a motion for leave to intervene as party-plaintiff, alleging facts comparable to those alleged by plaintiffs, and asserting the same claims as to the unconstitutionality of the La. statutes. La. opposes intervention but the Master recommends that New Jersey be allowed to intervene and file its complaint because claims are virtually indistinguishable from that of other plaintiffs. Had New Jersey opted to file a wholly independent original action the Court would have granted the motion in order to act consistently with its original action. Filing as an intervenor has the advantage of promoting judicial economy and placing New Jersey on equal footing with the eight states in the original action. No claim has been made that permitting intervention would unduly delay or prejudice the adjudication of the rights of the original parties and granting the motion appears consistent with past Supreme Court practice. (Pa. v. Conn., 401 U.S. 391 and Rule 24(b) of the Federal Rules of Civil Proc.).

3. In April 1980, the U.S. and the FERC filed a motion for leave to intervene and file a complaint alleging their interests as the federal agency responsible for natural gas regulation, as the lessor of gas producing property on the Outer Continental Shelf, and as a consumer of natural gas subjected to the tax. The complaint alleges the unconstitutionality of the La. statutes both under the Commerce Clause and the Supremacy Clause.

La. has not yet filed a response. The Master recommends that intervention be allowed. While the interests of the U.S. and the FERC are somewhat different from the original plaintiffs their participation will assist in completing the litigation with the participation of all parties which have a direct and important interest. Apart from its interest as a consumer of natural gas, the U.S. has a separate interest because of its responsibilities under the Outer Continental Shelf Act.

Plaintiffs in this case rely upon actions of the U.S. and the FERC under the Outer Continental Shelf Act and the Natural Gas Act for their claims as to the unconstitutionality of the first use tax and therefore under Rule 24(b) of the Federal Rules of Civil Proc., intervention is appropriate. The Court has previously permitted the U.S. to intervene under comparable circumstances Cf., Wisc. v. Ill., 278 U.S. 362; New Jersey v. New York, 345 U.S. 369, 373.

4. Associated Gas Distributors filed a motion for leave to file a brief amicus curiae in support of plaintiffs' motion on the pleadings. Although some of the parties withheld consent, no formal opposition has been filed. The Master notes that the interest of the Association arises from the fact that it is an association of gas distributors serving 11 million customers along the eastern seaboard. While the argument of the Association differs in minor details from that of the pipelines, the pipelines are not now parties and the view of the distributors may be helpful in the disposition of the case. The Master therefore recommends that the motion for leave to file an amicus brief be granted.

RESPONSE: La. has filed a letter with the Court stating that it would like an opportunity to file objections to the Report of the Special Master.

DISCUSSION: The Report of the Special Master appears correct and the Court could simply enter an order adopting the Master's Report. Presumably the Master has filed this Report now so that the Court may act before adjourning. If the Court is inclined to allow La. to file exceptions, it should be done on an expedited basis so that the Court may enter an order in this case before it adjourns.

There is no response.

5/29/80

Marsel

Ops in petn

See Paul's
suggestion that we
defer motions until
Master's reports

GRANT: Motion of NJ for leave to
file complaint

GRANT: Motion of US and FERC to
intervene and file complaint

GRANT: Motion of Col. Gas Trans. Co
to intervene

GRANT: Motion of Assoc. Gas Distr. for
leave to file amicus brief

DEFER: Resolution of jurisdictional issue
Caldwell

Response and a Reply by
United States to
Exceptions to Report of
the Special Master

Summer List 23, Sheet 3

No. 83 Original

MARYLAND

v.

LOUISIANA

SUMMARY: By order of the Court on March 3, 1980, Special Master John F. Davis was appointed to make recommendations in this original litigation which seeks declaratory and injunctive relief from La.'s tax on the first "use" in La. of natural gas traveling through that state to other states from the federally-owned Outer Continental Shelf. The same order referred motions of Columbia Gas Transmission Corporation and 16 other pipelines, and of the State of New Jersey for leave to intervene to the Master. The Master filed a report making recommendations on those motions, ^{1/} and La. has now

^{1/}See Legal Officer memo, dated May 29, 1980.

I think I would be inclined to defer ruling on the motions to intervene ~~etc.~~ etc., until the Master ~~has~~ submits its recommendation on Louisiana's motion to dismiss. The Master's report on the latter motion apparently is imminent. Paul C.

filed exceptions to this report. The United States and the pipeline companies have filed responses to the exceptions.

SPECIAL MASTER'S REPORT: The Special Master recommends that: (1) The motion of Columbia Gas Transmission Corporation and 16 other pipelines to intervene as plaintiffs be granted; (2) New Jersey's motion for leave to file an intervening complaint be granted; (3) The motion of the United States and the Federal Energy Regulatory Commission (FERC) to intervene and to file a complaint in intervention be granted; and (4) The motion of gas distributors for leave to file a brief amicus curiae in support of Maryland's motion for judgment on the pleadings be granted.

LOUISIANA'S EXCEPTIONS: (1) La. argues that the intervention motions need not be resolved until the jurisdiction of the Court over the original action has been established, because serious questions as to whether the plaintiff states have alleged a properly justiciable controversy remain. That motion is presently pending before the Special Master, who has indicated he will render his report thereon during September 1980. Thus, any attempt to invoke the Court's original jurisdiction prior to resolution of this issue is premature. Louisiana suggests that this Court defer consideration of these exceptions to the Master's report on the intervention motions until he submits his report on La.'s motion to dismiss. The plaintiff states, La. argues, have erroneously interpreted this Court's grant of leave to file a complaint as constituting a final adjudication on the issue of this Court's original jurisdiction in this matter.

(2) New Jersey's motion to file an intervening complaint also raises jurisdictional problems. The Master recommended that

New Jersey be allowed to intervene to file this complaint, which is virtually indistinguishable from those of the eight plaintiff states, on the theory that this Court would have granted the motion for leave to file in order to act consistently with its action in the Md. case. However, this reasoning is faulty, says La., because this Court's grant of leave to file a complaint is not tantamount to a final determination that original jurisdiction in this case lies.

Secondly, New Jersey's complaint is devoted exclusively to the claim that La.'s first use tax statute is unconstitutional under the Commerce Clause and the Supremacy Clause. However, these same constitutional issues are pending in various other judicial forums. The La. courts have yet to render an interpretation upon the constitutionality of that statute. Railroad Commission v. Pullman Company, 312 U.S. 496 (1941) counsels abstention whenever a federal court is otherwise forced to interpret state law without the benefit of prior state court consideration. For this Court to render a decision on the constitutional issues raised by New Jersey at this point might result in an advisory opinion, depending upon the La. state court interpretation.

Thirdly, original jurisdictional should not be granted in this litigation because of the Tax Injunction Act of 1937, 28 U.S.C. 1341, which provides that federal districts "shall not enjoin. . .the assessment, levy or collection of any tax under state law where a plain, speedy, and efficient remedy may be had in the courts of such state."

Fourthly, New Jersey's only complaint is that the price of natural gas consumed by the state and many of its citizens contains a "hidden" tax that the interstate transporter has succeeded in pass-

ing on to the consumer.. There is no precedent for such a consumer type cause of action.

Fifthly, New Jersey has asserted no injury to its sovereign interests. The ability of a state to purchase gas or any other commodity free of any "hidden" or "pass on" taxes is hardly the hallmark of the sovereign or quasi-sovereign concern.

Sixthly, New Jersey is seeking to invoke this Court's original jurisdiction over "controversies between two states" in order to secure a refund of taxes paid to La. by private pipeline taxpayers. To do so, a plaintiff state must bring that action on its own behalf and not on behalf of private citizens; and any action brought by one state against another violates the 11th Amendment if the plaintiff state is actually suing to recover for injuries to designated individuals.

(3) The motion of the United States and the FERC also raises jurisdictional problems. Their intervention cannot be allowed on the presupposition that this Court's original jurisdiction in this case has been established. Until that issue is resolved, intervention is premature. And since no independent basis of jurisdiction exists, their motion must fail.

Secondly, the commercial interests and entities are the ones with standing to protest the state tax or regulation imposed on their interstate activities; no standing exists for the United States and the FERC. Unless a government body is itself engaged in some form of interstate commerce, governmental representatives have no roving commission to adopt a cause of the commercial beneficiaries under the Commerce Clause. Louisiana v. Texas, 176 U.S. 1, 19 (1900).

Moreover, the Master bases his recommendation that the United States and the FERC should be permitted to intervene on their respective responsibilities under the Outer Continental Shelf Act and the Natural Gas Act. However, the United States does not seek any kind of relief that would even arguably protect the interests of the United States with respect to the Shelf; and there is no claim that a particular provision of the Natural Gas Act has been violated.

(4) Intervention of the pipeline companies as plaintiffs destroys jurisdiction of this Court. La. agrees that the pipeline companies are the real parties in interest as to the first use tax. However, La. takes exception to the Master's proposition that the pipeline companies should be allowed intervention here despite the fact that they would not be proper parties to an original action. Secondly, La. disagrees with the Master's view that the applicability of the 11th Amendment can be reserved until the final decision of the case.

(5) The motion of Associated Gas Distributors for leave to file a brief amicus curiae in support of the plaintiff states' motion for judgment on the pleading should not be granted pending resolution of the fundamental issue of jurisdiction.

RESPONSE OF THE UNITED STATES AND FERC: The Special Master correctly recommended that the Court grant the motion of the United States and the FERC to intervene as plaintiffs, because;

(1) The United States is a consumer of natural gas in the operation of military and civilian installations and is thereby directly affected by the initial costs imposed by the La. first use tax. As the lessor under leases authorizing various persons to produce natural gas from federal enclaves and the Outer Continental Shelf,

it may suffer a significant reduction in revenues in those leases if its lessees must bear the first use tax. (2) It is immaterial that the first use tax is not imposed directly upon the United States. It is sufficient that the first use tax triggers a chain of events that results in the imposition of additional costs upon the United States. That fact gives the United States standing to pursue this cause of action as a matter of great public concern. (3) La. has enacted an elaborate taxing scheme which is designed to ensure that the tax may be borne solely by consumers in other states. There is accordingly no basis to La.'s claim that the tax is not borne by the United States in its capacity as a consumer of natural gas and as a lessor of production areas in federal enclaves. (4) There is no basis to La.'s claim that the imposition of the tax on the ultimate consumer is a consequence of the voluntary actions of either the pipelines or the FERC. That action was not voluntary, as the pipeline cannot remain in business if they are required ultimately to absorb this massive cost of approximately 225 million dollars a year. (5) The first use tax trenches upon matters which directly affect the ability of the FERC to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which is an objective of the Natural Gas Act. In these circumstances the FERC should be permitted to speak for itself.

RESPONSE OF THE PIPELINE COMPANIES: Permitting intervention of the pipeline companies will not destroy the jurisdiction of this Court. La. recognizes that the pipeline companies are real parties in interest. Thus, intervention by the pipeline companies is a matter ancillary to the dispute between the plaintiff states and La.,

and therefore within the Court's ancillary jurisdiction. It does not require independent jurisdictional grounds, and will not destroy the original jurisdiction of the Court. The Court's disposition of the plaintiff states' controversy with La. would generally be dispositive of the pipeline companies' controversy as well.

The 11th Amendment does not bar intervention by the pipeline companies, who do not seek an order directing La. to refund the taxes paid; rather, the pipelines seek only a declaration that the tax is unconstitutional. Such a declaration clearly does not run afoul of the prohibitions of the 11th Amendment. And it is further apparent in light of the language of La. R.S. 47:1576, that La. has waived whatever immunity it might have had under the 11th Amendment to the pipelines' participation in this litigation.

The fact that the pipeline companies are also pursuing their claims in certain state court proceedings pending in La. does not defeat their intervention in this case. Intervention in this action not only will avoid protracted and duplicative litigation in La. courts, but would also ensure protection of the pipelines' interests in the very suit which will ultimately decide the constitutional question affecting those interests.

DISCUSSION: The Court may wish at this time to render a final decision on the issue of jurisdiction, as La. urges. Presumably, by granting the plaintiff states leave to file a complaint, jurisdiction has been found, at least preliminarily, subject to later review. However, the Court may elect to defer resolution of this issue until it renders a decision on the merits. See, e.g.,

United States v. West Virginia, 295 U.S. 463 (1935); Louisiana v. Texas, 176 U.S. 1 (1900). The Court may also wish to await the Master's recommendation on La.'s motion to dismiss.

Secondly, as the Master notes, New Jersey should be granted leave to file its complaint in order to promote judicial economy and consistency since its complaint is "virtually indistinguishable from the complaint of the State of Maryland and its co-plaintiffs."

Thirdly, the U.S. and FERC should be permitted to intervene even though their interests are slightly different from those of the plaintiff states. The Master observed:

Apart from its interest as a consumer of natural gas, the United States has a separate interest because of its responsibilities under the Outer Continental Shelf Act, 43 U.S.C. 1331-43. The Federal Energy Regulatory Commission is involved as the administrative agency responsible for the execution of the Natural Gas Act, 15 U.S.C. 717-717w and the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351.

Fourthly, La. admits that the pipeline companies are the real parties in interest; but La. argues that permitting their intervention would destroy the jurisdiction of the Court, reasoning that private companies cannot institute original litigation. The Master properly rejected this contention, recognizing that intervention by a private party is permissible once this Court obtains jurisdiction. See Texas v. Louisiana, 416 U.S. 965 (1974). And without specifically addressing the Eleventh Amendment issue, this Court has permitted intervention by private parties against states in original cases. Oklahoma v. Texas, 258 U.S. 574 (1922).

Finally, the Associated Gas Distributors should be permitted to file a brief amicus curiae since the cost of the tax has been passed on to them, and by them to their eleven million customers.

The Master's reasoning is persuasive.

9/22/80

Caldwell

Sp. Master's Report is
included in La.'s Exceptions

PJC

Caldwell

Discuss

October 10, 1980 Conference
List 1, Sheet 5

No. 83 Orig.

MARYLAND, et al.

v.

LOUISIANA

Report of Special Master
on Motions of the Plaintiffs
for Judgment on the Pleadings
and of the Defendant for
Dismissal of the Complaint

SUMMARY: Special Master John Davis has filed his second interim Report ^{1/} in this original litigation concerning La.'s tax on the first "use" of natural gas traveling through that state to others from the federally-owned Outer Continental Shelf. In this report, he recommends denial of plaintiffs' motion for judgment on the pleadings, as well defendant's motion for dismissal of the complaint.

1/The Special Master's first report, filed on May 14, 1980, concerns various motions to intervene, and is discussed in legal officer memo dated May 29, 1980. Exceptions to that report are addressed in legal officer memo dated September 22, 1980.

In view of the importance
of the case, oral argument on
the motions seems justified. PS

ON THE MOTION TO DISMISS THE COMPLAINT: Defendant La. presents three arguments for dismissal of the complaint;

(a) La. argues that the states lack standing to attack the constitutionality of the tax because the tax is imposed on the owners at the time of the first use of the gas; the fact that those owners have passed the tax on in the form of higher gas prices does not give the states' standing to sue either for their own increased costs or for the increased costs to their citizens. The Master concluded that by reason of both the La. statute (which states that the owners liable for the tax are not allowed to pass it back to the producers) and the orders of FERC (which direct that the amount of the La. first use tax be handed on to customers), the ultimate cost of the tax is now borne by the plaintiff states and by consumers in the plaintiff states. Clearly this is a burden on consumers. Therefore, those parties required to stand the cost of the tax should be accorded standing to contest its constitutionality.

(b) La. alleges that the case is not a proper one to invoke the original jurisdiction of the Court since it really is not a dispute between the plaintiff states and La., but between the pipelines or gas consumers and La. The Master rejected this contention and concluded that the case falls within the original jurisdiction of the Court. With respect to the impact of the tax on

consumers, the plaintiffs allege damage both in their proprietary status as users of natural gas in their various governmental functions and as parens patriae. As consumers of natural gas forced to pay higher prices by reason of the first use tax, the states are not suing parens patriae or in any other representative capacity; they are suing to protect their own treasuries.

(c) La. thirdly argues that the dispute could be better tried in some other court, preferably a La. court where state questions of construction can be decided, and where constitutional issues can be tried on a full record and then appealed if necessary to this Court. In response, the Master observed that three cases are currently pending in lower courts, but that neither is a suitable substitute for this original action. In the state cases, the plaintiff states lack standing and the court apparently has no authority to grant injunctive relief pending the outcome of the cases. The refunds, if ordered appear to be limited as to interest to six percent which would result in a substantial advantage to La. and damage to the plaintiff states in view of the quarter of a billion dollars which is being collected annually. Moreover, the plaintiff states should not be required to depend on private

parties to conduct their litigation and protect their interests. As for the case pending in the DC, that case was stayed by the DC, and that stay was affirmed on appeal to CA 5. And clearly the Constitution grants exclusive jurisdiction over the plaintiff states' case against La. to this Court. Moreover, it would seem unwarranted to permit this litigation to be delayed unnecessarily in trial and appellate action through the federal courts. The Master reasoned that this case is distinguishable from Arizona v. New Mexico, 425 U.S. 794 (1976), wherein this Court dismissed the complaint and permitted the issues to be litigated in some other forum, because in that case, Arizona could be heard on its own behalf in the state court. The plaintiffs here cannot represent themselves in state court. Also in the Arizona case, the issue was decided on the motion for leave to file, whereas in this case, leave to file has already been granted.

Finally, the Master reasoned that this case is appropriate for this Court's attention, both because of the huge sums of money involved and because of the sheer number of states affected (30). He therefore recommends that the motion to dismiss the complaint be denied.

MOTION FOR JUDGMENT ON THE PLEADINGS: The plaintiff states maintain that no evidentiary hearing is necessary and that they

are entitled to judgment on the basis of the complaint and answer.

The plaintiff states recognize that there are numerous facts in dispute. However, they argue that the La. first use tax should be declared unconstitutional on the basis of facts that are not in dispute, on facts as to which the court may take judicial notice, and on principles of law established by this Court.

Secondly, they aver that the tax Act must be invalidated because under the Supremacy Clause, it is overruled by the Natural Gas Act, the Natural Gas Policy Act of 1978 and the Outer Continental Shelf Act.

Thirdly, the plaintiff states urge that the Act be invalidated because it encroaches on the exclusive interstate commerce field which is assigned to federal control.

The Master concluded that evidentiary hearings are necessary, and that the facts set forth in the complaint and answer are thus far insufficient to require that the Act be invalidated on the basis of the Supremacy Clause. He noted that there are federal and state provisions which may be irreconcilable in operation, and the La. first use tax may interfere with the federal regulatory process. But he reasoned that the interference may be so indirect and peripheral, and so subject to administrative adjustment as to permit the state and federal programs to co-exist. With respect to the Interstate Commerce Clause claim, the Special Master opined that a determination of the validity of the tax could be made on the pleadings. But he preferred to withhold a conclusion until the issues could be tested against facts developed in an evidentiary hearing, to avoid excessive use of judicial notice.

DISCUSSION: This case is inordinately complex, and a decision on the motions requires substantial insight into the merits as well. Although the Special Master's conclusions are well-reasoned and persuasive, oral argument could be helpful. Setting these cases for oral argument seems to be the appropriate course consistent with the Court's decision during the Sept. 29, 1980 Conference to hear argument on the intervention and amicus motions.

The Court may also wish to direct the parties to file exceptions.

10/ /80

Caldwell

PJC

Discuss

leave to file
SET the exceptions and
replies for oral argument
Caldwell

I need to check
parties
12/12

December 12, 1980 Conference
List 3, Sheet 2

No. 83 Original

MARYLAND

v.

LOUISIANA

Exceptions to Report of the
Special Master Received

Motion of Columbia Gas
Transmission Corp., et al.
for Leave to File Exceptions
to Report of the Special Master

Motion of Columbia Gas
Transmission Corp., et al.
for Leave to File Reply to
Louisiana's Exceptions

SUMMARY: On Sept. 15, 1980, Special Master John Davis filed his second interim report^{1/} in this original litigation concerning La.'s tax on the first "use" of natural gas traveling through that state to others from the federally-owned Outer Continental Shelf. In this report, he recommends denial of plaintiffs' motion for judgment on the pleadings, as well as defendant's motion for dismissal of the complaint. Exceptions have been filed to the report, and replies have been filed to the exceptions.

^{1/}See Legal Officer memo for the Oct. 10, 1980 Conference.

I agree, I guess (?)
PS

EXCEPTIONS OF LOUISIANA: La. excepts to the Special Master's report because of:

(1) the Master's refusal to recommend that the complaint be dismissed on the ground that the pending tax refund suit filed by the pipeline company taxpayers in the La. state courts provides an appropriate forum in which the issues may be litigated, in light of Arizona v. New Mexico, 425 U.S. 794, 797 (1976), thus making it unnecessary for the Court to exercise original jurisdiction;

(2) the Master's refusal to recommend that the complaint be dismissed on the ground that the plaintiff states lack standing, either as proprietary users of natural gas or as parens patriae of their gas-consuming citizens, to protest the constitutionality of the statute as applied to private pipeline taxpayers that in turn pass on to consumers the cost of the tax;

(3) the Master's failure to recommend that the complaint be dismissed on the ground that the complaint does not allege a cause of action or controversy "between two or more states" within the meaning of Art. 3 of the Constitution or 28 U.S.C. §1251(a)(1), thus depriving this Court of original jurisdiction;

(4) the Master's refusal to recommend that the complaint be dismissed on the ground that this Court's original jurisdiction should not be invoked so as to interfere with the administration of the La. statute, particularly before the La. state courts have had an opportunity to give the statute an authoritative construction, interpretation, and application;

(5) the Master's refusal to recommend that the complaint be dismissed on the ground that the plaintiff states seek to invoke the original jurisdiction of the Court merely to litigate, as volunteers,

the tax and constitutional claims of the real parties in interest, the private pipeline taxpayers upon whom the legal incidence of the La. first use tax directly falls.

MOTION OF THE PIPELINE COMPANIES FOR LEAVE TO FILE A REPLY TO LOUISIANA'S EXCEPTIONS AND MEMORANDUM REPLY: In recommending that the motion to dismiss be denied, the Master rejected La.'s contention that the alternative state forum be made available instead of this Court's original jurisdiction. La. nevertheless urged that the alternative state forum be made available, and further contended that Arizona v. New Mexico, 425 U.S. 196 (1976) calls for dismissal of the case.

The pipeline companies contend that the Master's recommendation denying La.'s motion to dismiss is proper. They distinguish the Arizona case because that case was decided on the motion for leave to file; in the case at bar, they argue, this Court has already accepted jurisdiction by its order of June 18. Secondly, the state court proceeding in this case has lain virtually dormant for the past 18 months. Thirdly, the pipeline companies maintain that it is virtually inevitable that the validity of the tax ultimately will be decided by this Court and that no compelling reasons have been advanced to demonstrate a reason for delay. Fourthly, they assert that the prolonged delays which would ensue in reaching a definitive ruling on the controversy here constitute potent reasons against deferring the controversy to the La. state courts, specifically due to the huge sums of money involved (approximately 250 million dollars) and the wide-spread impact of the La. tax (affecting million of customers in some 30 states) together with the importance of the constitutional issues involved.

Finally, because La. is unable to show any potential prejudice resulting from original jurisdiction in this Court for this case, the pipeline companies urge that the Master's recommendation to deny La.'s motion to dismiss be adopted.

REPLY OF THE PLAINTIFF STATES TO LOUISIANA'S EXCEPTIONS: Plaintiff states advance essentially two arguments:

(1) that the plaintiff states are directly and grievously harmed by the first use tax and have sufficient standing to invoke the exclusive original jurisdiction of the Court;

(2) that this Court is the only appropriate and adequate forum in which the claims of the plaintiff states may be litigated.^{2/}

MOTION OF THE PIPELINE COMPANIES FOR LEAVE TO FILE EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER, AND BRIEF IN SUPPORT THEREOF: The pipeline companies except to the report by alleging that the Master failed to find that the first use tax on its face:

(1) improperly infringes upon the regulatory scheme established by the Natural Gas Act and the Natural Gas Policy Act of 1978 in violation of the Supremacy Clause;

(2) conflicts with the Outer Continental Shelf Lands Act in violation of the Supremacy Clause;

(3) thwarts the comprehensive regulatory scheme established by the Outer Continental Shelf Lands Act and the Coastal Zone Management Act in violation of the Supremacy Clause;

(4) unlawfully discriminates against interstate commerce in violation of the Interstate Commerce Clause;

(5) exposes the pipeline company taxpayers to the risk of multiple taxation in violation of the Commerce Clause.^{3/}

^{2/}These arguments are more fully summarized in Legal Officer memo dated Dec. 19, 1979, pp. 7-8.

^{3/}These arguments are more fully summarized in Legal Officer memo dated Dec. 19, 1979, pp. 6-7.

EXCEPTIONS OF THE PLAINTIFF STATES: The plaintiff states except, essentially for the same reasons as noted by the pipeline companies above, to the Master's recommendation that their motion for judgment on the pleadings be denied. They further except to the Master's conclusion that "the [fair] apportionment requirement has [no] application here, unless the tax is so large as to put a barrier in the path of interstate commerce." Report at 36. Furthermore, they except to the Master's finding that "what adjustments can be made in the base prices, and what allowances can be made between buyers and sellers which might reduce or eliminate any disadvantage of one over the other," Report at 35, and "the very real dispute among the parties" about "processing," Report at 27, are relevant to the determination of the plaintiffs' claim. Plaintiffs claim that the first use tax discriminates against interstate commerce and therefore violates the Commerce Clause.^{4/}

REPLY OF LOUISIANA TO THE EXCEPTIONS OF THE PLAINTIFF STATES: La. continues to press for dismissal of the complaint. Moreover, they support the Special Master in his recommendation that the motions for judgment on the pleadings be denied. Here, La. substantially reiterates its arguments advanced in support of its dismissal motion. La. contends that this case is inappropriate for the Court's original jurisdiction; and in any event, they urge that an evidentiary hearing precede the determination on the constitutional validity of the tax statute.

EXCEPTIONS OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION: The SG contends that the plaintiffs are entitled to judg-

^{4/}See Legal Officer memo for the Oct. 10, 1980 Conf., pp. 4-5.

ment on the pleadings without further evidentiary proceedings because, as they assert, the pleadings sufficiently establish that the La. first use tax conflicts with the federal regulation of the sale and exclusive transportation of natural gas in interstate commerce and is therefore invalid under the Supremacy Clause because; (1) the gas subject to the first use tax moves in interstate commerce; (2) the taxable "uses" enumerated in the La. statute do not interrupt the journey of the gas in interstate commerce; (3) the La. tax interferes with the federal regulation of the transportation and sale of natural gas and interstate commerce; and (4) no evidentiary proceedings are necessary to establish the invalidity of this tax under the Supremacy Clause.

The SG further contends that the pleadings established that the La. tax is invalid under the Commerce Clause because: (1) the tax is a transit levy on gas moving in interstate commerce; and (2) the La. tax is not fairly apportioned and discriminates against interstate commerce.

DISCUSSION: The motions of the pipeline companies for leave to file exceptions and to file a reply should both be granted.

The remaining exceptions and replies are largely a repeat of arguments advanced by the parties and putative parties at earlier stages of this litigation. They primarily serve to crystalize the issues for oral argument which the Court, by order of Oct. 6, has already directed to be conducted.

The listed exceptions and replies should now be set for oral argument.

12/11/80

Caldwell

PJC

to my attention
 on Dec 29th

MARYLAND

vs.

LOUISIANA

12/29
 I'll state out
 of motion by
 Columbia Gas until
 its relationship
 with Commonwealth
 Natural Resources
 is clarified

Exceptions to Report of the Special Master received. Motion of Columbia
 Gas Transmission Corporation for leave to file Exceptions to Report of
 the Special Master. Motion of Columbia Gas Transmission Corp. for
 leave to file reply to Louisiana's Exceptions.

But after
 discussion
 by RW held
 case resolved
 for now

Received & file,
 & set for argument as
 to L.A.

Grant motion of
 Columbia to file.
 Columbia has been
 allowed to intervene

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	APF	REV	APF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

I took no part at this time
 (I need to do some checking)

January 8, 1981

83 Orig. Maryland v. Louisiana

Dear Mike:

Please mark me out on the public record in any subsequent action in this case.

Sincerely,

Mr. Michael Rodak, Jr.

lfp/ss

cc: The Chief Justice
Mr. Justice Stevens

Dear Chief and John: In view of one of the new parties among the long list of "pipeline companies" makes it desirable for me to remain out of this case for the future.

*The Company is Columbia Gas.
My disqualification, however, is
due to Commonwealth Natural Resources
- my client & in which I also own stock.
There is a merger plan - not yet
consummated or even approved by
Regulatory agencies. 5/25/81*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



March 31, 1981

Re: 83 Original - Maryland v. Louisiana

Dear Byron:

Please join me.

Respectfully,

A handwritten signature, appearing to be "John", is written below the word "Respectfully,".

Justice White

Copies to the Conference

March 31, 1981

83 Orig. Maryland v. Louisiana

Dear Byron:

Please show at the end of the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 4, 1981



RE: No. 83 Orig. Maryland v. Louisiana

Dear Byron:

I agree.

Sincerely,

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 4, 1981

Re: No. 83, Original-Maryland v. Louisiana

Dear Byron:

Please join me.

Sincerely,

J.M.

T.M.

Justice White

cc: The Conference

[illegible]