Approved April 23, 1983
Date

MINUTES OF THE HOUSE COMMITTEE ON ASSESSMENT AND TAXATION.

The meeting was called to order by Representative Jim Braden at
Chairperson

2:00 ~~a.m.~~/p.m. on April 19, 1983 in room 313-S of the Capitol.

All members were present except:

Representative Kent Ott who was excused.

Committee staff present:

Wayne Morris, Research Department
Tom Severn, Research Department
Don Hayward, Revisor of Statutes' Office
Nancy Wolff, Secretary to the Committee

Conferees appearing before the committee:

Representative Kerry Patrick
Bill Brown, Kansas Power and Light
Don Willoughby, InterNorth
Pete McGill - Energy Transportation System, Inc.
- The Garden City Company
- Legislative Policy Group
Dick Brewster, Amoco
Gaines Bell, Getty Tracking & Transportation
Richard Soehlke, Getty Refining and Marketing Co.
Ron Gaches, Kansas Association of Commerce and Industry
George Sims, Mobil Oil
Representative Jim Patterson
Allen Caldwell, Koch Industries, Inc.
Don Schnacke, KIOGA
Glenn Cogswell, Northwest Central Pipeline (Cities Service)
Mary Ellen Conlee, City Manager's Office, Wichita
Bob Anderson, Kansas/Nebraska Natural Gas Co., Inc.
Steve Bedmar, Total Petroleum
Bill Henry, Kansas Engineering Society
Louis Foster, Derby Refining Company
Albert Zapanta, Atlantic Richfield
Mary Mayfield, Farmland Industries

The meeting was called to order by the Chairman.

Representative Kerry Patrick spoke in favor of House Bill 2571 which would impose a tax on the transmission of liquids through pipelines within the state of Kansas. He also proposed some amendments in the amounts of the taxes to be imposed: in Line 174, change $.001 to $.00001; in line 179, change $.001 to $.0001; and in line 184, following the word "water", insert "or unit of coal". (Attachment I and II)

No Att. I

William Brown, Vice President of The Kansas Power and Light Company, testified in opposition to House Bill 2571. (Attachment III)

Don Willoughby, InterNorth, Inc., spoke in opposition to House Bill 2571. (Attachment IV)

Pete McGill, ETSI Pipeline Project, The Garden City Company, and The Legislative Policy Group, spoke in opposition to House Bill 2571. (Attachments V, VI, and VII)

Two representatives of Getty Pipeline and Refining and Marketing, Gaines Bell and Richard G. Soehlke, testified in opposition to the legislation. (Attachments VIII and IX)

Dick Brewster, Amoco, spoke in opposition to House Bill 2571.

No Att. X

Representative Jim Patterson, of Independence, presented testimony relative to Sinclair Pipeline Co. and his opposition to House Bill 2571. He also presented the Committee with a book, 800 Miles to Valdez, which gives the story of the building of the Alaska Pipeline. (Attachments XI and XII)

MINUTES OF THE HOUSE COMMITTEE ON ASSESSMENT AND TAXATION,

room 313-S, Statehouse, at 2:00 ~~a.m.~~/p.m. on April 19, 1983.

George Sims of Mobil Oil Corporation, testified in opposition to House Bill 2571. (Attachment XIII)

Ron Gaches, Kansas Association of Commerce and Industry, spoke in opposition to the Legislation. (Attachment XIV)

Allan Caldwell, on behalf of Koch Industries, Inc., testified in opposition to House Bill 2571. (Attachment XV)

Don Schnacke, Kansas Independent Oil and Gas Association, opposed the enactment of House Bill 2571. (Attachment XVI)

Glenn Cogswell, in behalf of Northwest Central Pipeline Corporation, spoke in opposition to the bill. (Attachment XVII)

Mary Ellen Conlee, Public Affairs Director of the City of Wichita, testified that the pipeline transportation of water and other commodities, would place a significant and unwarranted expense on the users of the Wichita water system, and should be opposed. (Attachment XVIII)

Bob Anderson, representing the Kansas/Nebraska Natural Gas Co., Inc., testified in opposition to House Bill 2571. (Attachment XIX)

Stephen Bednar, of Total Petroleum, spoke in opposition to House Bill 2571. (Attachment XX)

Bill Henry, Executive Vice-President of the Kansas Engineering Society appeared before the committee to oppose some portions of House Bill 2571. (Attachment XXI)

Lewis Foster, representing Derby Refining Company in Wichita, spoke in opposition to House Bill 2571. (Attachment XXII)

Albert Zapanta, Atlantic Richfield, testified in opposition to the legislation.

Mark Mayfield, Farmland Industries, spoke in opposition to House Bill 2571.

The meeting was adjourned.

DATE: April 19, 1983

GUEST REGISTER

HOUSE

ASSESSMENT & TAXATION
COMMITTEE

| NAME | ORGANIZATION | ADDRESS |
|---|---|---|
| Chip Wheelen | Legis. Policy Group | Topeka |
| G. M. Gooch | KAW Pipeline Co. | Russell, KS. |
| F. D. Marts | Jayhawk Pipeline Corp. | Wichita, Ks. |
| Jim Patterson | Legislature 8th Dist. | Independence |
| Ron Gaches | KACI | Topeka |
| Carol Syday | Ks Geol. Survey | Lawrence |
| Steven Carr | Kansas Power & Light | Topeka |
| William E. Brown | KPL | Topeka |
| N. A. Vahldieck | KP & L | Topeka |
| K. S. Doehle | Getty Refining & Marketing | Eldorado |
| Gaines Bell | Getty Pipeline, Inc. | Eldorado, Ks. |
| [illegible] | Mobil | Houston |
| Walter Dunn | EOKOGA | Topeka |
| Jim Willoughby | INI | Topeka |
| Stephen Bednar | Attorney for Total Pet. | Wichita |
| Linda Shultz | Pete McGill & Associates | Topeka |
| Bill Perdue | KPL | " |
| Gerald Kelly | K.N.W.C. | Dighton |
| Tim Underwood | KAR | Topeka |
| Jerry Conrad | KGE | Topeka |
| M. C. Bergmann | Ks Railroad Association | Topeka |
| Kirby P. Hagemann | KDOR | Mayetta |
| [illegible] | KWO | Topeka |

DATE: _____

GUEST REGISTER

HOUSE

ASSESSMENT & TAXATION
COMMITTEE

| NAME | ORGANIZATION | ADDRESS |
|---|---|---|
| Bill Kenney | Ks Engineering Society | Topeka |
| Lee Rolfs | Ks. St. Bd of Ag-DWR | Topeka |
| James Power | Ks Dept Health & Envir | Topeka |
| Andy Fordemwalt | Panhandle Eastern P.L. Co | K. City |
| MARK MAYFIELD | Farmland Industries | Kansas City |
| John Singleton | Cities Service | Tulsa |
| Thomas Kramer | KPC | Topeka |
| Ross Marken | KPC | Topeka |
| [illegible] | UNITED TEL CO. | TOPEKA |
| Glenn D Cogswell | Northwest Central Pipeline Corp. | Topeka |
| Donald P. Schnacke | Kans. Indep. Oil & Gas Assn. | Topeka. |
| Arthur A. Glassman | Michigan-Wisc. Pipeline Co | Topeka. |
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Testimony on H.B. 2571

I. Introduction

If we must have additional tax increases, this bill gives us the unique opportunity of passing a tax that those who reside out of state will pay for. Instead of taxing Kansans, we have the rare opportunity to tax, if needed, those businesses and individuals who live outside of the state; and isn't this to be the preferred policy of the Legislature as opposed to income, sales, or gas tax increases which will fall almost exclusively on Kansans? These industries impose a substantial burden on Kansas government in providing the necessary infrastructure and maintaining it and pose an ever present threat to the environment. This bill asks that they pay their fair share.

I will show that at the utmost only 15% of this tax will fall on consumers and businesses located in Kansas. The remaining 85% of the tax will fall on those persons who reside outside of the state. Assuming a total pass through of the costs, less than 4% of the costs of this tax measure will fall on Kansas consumers.

II. Analysis of Bill

A) Basis of Tax

I. This tax is imposed on two bases:

1) the continued right of transmission pipelines as public utilities which they are so defined in KSA 66-104 to exercise the right of eminent domain as provided in KSA 17-618 and KSA 26-501 to 516, and

2) the use of facilities greater than 15 miles in length for the transportation of any hydrocarbon or any other liquefied matter by transmission pipelines.

The tax is leveled not upon the oil or gas or helium or whatever is transported through the transmission pipelines, it is on the use of those facilities for the transportation of those goods through Kansas. The imposition of the tax is not on the goods transported through the pipeline, it is on the business of transporting those goods via transmission pipelines through the state. (See Section 3 (f) lines 196-204, p. 6)

ATTACHMENT I
4-19-83

B) Economic Analysis of the Bill

I. Impact on consumers of tax - on natural gas:

1) According to July, 1982, State Energy Data Report published by the Department of Energy, their most recent figures show that total residential demand for natural gas (dry) in the State of Kansas was 85 billion cubic feet. But remember these flowed through Kansas transmission pipelines 2.56 trillion cubic feet of gas in the same 1981 year.

Kansas Natural Gas
residential consumption = 85 billion cubic feet.
3.34% of total natural gas flowing through Kansas transmission pipelines.

Total natural gas flow through Kansas transmission pipelines = 2526 billion cubic feet.

2) Mathematically:

Kansas Natural Gas
residential consumption = 85 billion cubic feet.
3.37% of total natural gas flowing through Kansas transmission pipelines.

Total natural gas flow through Kansas transmission pipelines 2526 trillion cubic feet.

C) Average Residential Cost Increase

1) Assuming that the average transmission pipeline length is 1,000 miles, that is the length of the pipeline which delivers the gas to the average Kansas home.

According to May, 1982, Kansas Energy Profiles compiled by the Kansas Energy Office, the typical Kansas home in 1981 used 126.5 mcf of gas.

Using our above assumptions and the tax rate in this bill, this would raise the average Kansan's gas bill by $1.265 per year. That's right, only $1.26 per year, 10 cents a month.

2) 1) But the increase will not be even that high on the average, for the average length of pipeline segment to most Kansas consumers is only 200 miles long. 2) Further, due to higher prices, average mcf consumption has fallen so increase will be less.

3) Area that is served by KPL transmission line to Rossville, Kansas, is total length of 1800 miles long. This includes all of the offshoots from it. The area served by this pipeline would be hit the hardest by the tax. Yet this area of the state according to the American Gas Association presently enjoys the lowest cost gas of any area in the country. Assuming all the KPL gas goes through to Rossville, maximum increase is $2.00 per year.

D) Impact on Industrial,Commercial Factor - on gas

1) According to the same report, the average commercial user uses 729.4 mcf and industrial uses 47,088.8 mcf per year. According to the KCC total commercial and industrial use of natural gas (dry) is estimated to be 365 billion cubic feet.

2) Mathematically:

Kansas Natural Gas commercial and industrial consumption = $\frac{365 \text{ bcf}}{2526 \text{ bcf}}$

14.2% of total natural gas flowing through Kansas transmission pipelines.

Total natural gas flow through Kansas transmission pipelines - 25216 trillion cubic feet.

3) Average Cost Increase

Same assumptions as above, according to the same Kansas Energy Office Report we would be raising

1) commercial user costs $7.29 per year

2) industrial user costs $470.88 per year

4) Same arguments on average cost not actually being this high.

E) Kansas Pipeline Center of the Country

As the map shows, Kansas is truly the pipeline highway center of the country. Look at the following numbered pipelines on the map:

| Pipeline | Gas Destination | % Gas Disposal in Kansas |
|---|---|---|
| 1) Michigan-Wisconsin Pipeline | Mideastern States | 1% |

| | Pipeline | Gas Destination | % Gas Disposal in Kansas |
|---|---|---|---|
| 2) | Natural Gas Pipeline of America | Mideastern States | 2% |
| 3) | Internorth | Upper Midwest (Nebr. Minn. Iowa,etc.) | 11% |
| 4) | Panhandle | States east of Kansas | 17% |
| 5) | Champlin Refining Co. | Rock Rapids, Iowa | 0% |
| 6) | Peoples Natural Gas | Denver, Colorado | 1% |

According to discussions with officials in the KCC and Kansas Energy Office if the tax is imposed, these companies will not be able to reroute much or any of the matter flowing through the pipeline. Why?

1) The shortest distance between two points is a straight line. Many of these pipelines are on the diagonal, re-routing around the state would involve significantly greater transportation costs--greater than the tax would impose.
2) Unable to build new pipelines due to need to have environmental impact studies and cost of money. Witness the problems of ETSI.
3) Structure of pipeline system. According to KCC and Kansas Energy Office officials no exist capacity even exists to bypass Kansas lines in other states.
4) If not raw products through lines and abandon them then ownership of lines reverts back to the state or to the owners of the land on which pipelines run over and through.

F) Impact on Consumers and Business Sector on this tax on oil and refined products.

Using the Gerking Report, an economic analysis of the impact of the severance tax study paid for by the oil industry.

According to the Gerking Report:

1) Natural gas liquids - there will be no pass through of added production costs on natural gas liquids.
2) Oil and gasoline - offers no opinion other than extrapotating what he says and applying it to references the transmission pipeline companies and/or the refineries will be unable to pass the cost through directly to Kansans.

3) One might have argued at one time that the imposition of such a tax would harm the refinery business, and I would agree with you. But with the decontrol of domestic oil prices and the elimination of the entitlement subsidies to refineries, this is no longer the case. With the elimination of these subsidies, refineries in Coffeyville, Chanute, Phillipsburg, Kansas City, Kansas, and Sugar Creek (K.C., Mo. area suburb) have all been shut down. The jobs in these refineries have been permanently lost. So the tax cannot hurt them.

The efficient refineries in Eldorado and Arkansas City have undergone in recent years substantial capital improvement programs. Discussions with Total Petroleum officials, owners of the Ark City refinery, indicate that due to the utilization of their plant, their crude oil which they purchase in eastern Kansas counties is shipped to a refinery they own in Michigan.

Furthermore, most of the oil and refined product lines crisscross the state without refining any oil in the state. For example, Champlin Petroleum has a major pipeline running in a straight line the width of the state without dropping a drop of product in the state. Amoco Production Company has two pipelines running through the state which also drop no oil or refined products in the state. And Amoco, according the PUD figures, is the largest transporter of oil and refined products in the state.

Conclusion: In all of the economic analysis of the impact that the passage of this measure would have on the state's consumers, both household and businessmen, it has been assumed that from an accounting point of view that the interstate pipelines, major integrated oil and gas companies, the Mobils, the Amocos, etc., and transmission pipeline companies will be able to directly apportion the costs to a specific geographic area. I would argue that this tax increase if passed would be such an insignificant increase in their total tax bill and due to the deeply integrated

system under which they operate and the accounting rules under which they operate, such an apportionment to Kansans would be impossible.

Please ask the opponents how they can specifically assess the tax to Kansans; and remember if they can, 83% of the tax will be borne by out of state consumers.

III. Rate of Imposition of the Tax and Revenue Raised.

A) Oil and Refined Products - see Sec. 3(c), p. 5 (includes natural gas liquids).

1) Expressed mathematically:

Unit of oil x No. of transmission pipeline miles x rate of taxation = total amount of revenue generated

2) 1982 Figures

1) 316 million barrels of crude oil and refined products passing through Kansas (excludes Getty, Champlin, and Kaw pipelines).

2) Total transmission pipeline mileage = 10,752 miles.

3) According to Division of Property Valuation, Department of Revenue, in 1981 there was an estimated 85 billion barrel miles of crude oil and product in Kansas.

85,000,000,000 x .0001 = $8,500,000

Source: Division of Property Valuation, Kansas Department of Revenue, April 15, 1983.

Discussions that I have had with some of the opponents to this bill this figure, since barrel/miles are reported to PUD via a FERC report in Washington, I feel is pretty accurate.

B) Water, Coal, and other Liquefied Matter - See Sec. 3(d), p.5.

1) Water - same mathematical formula as for oil.

2) Revenue raised - today.

According to Jack Burris, Bureau of Water Supply, Department of Health and Environment, the City of Wichita would presently pay $46,000 more per year for their water supplies out of Lake Cheney and the equous beds in Harvey County.

Impact on the water rates would be less than $.00001 per 1000 gallons of use.

According to the same individual, the following towns <u>might</u> have to pay some additional tax, but the amount would be in the <u>thousands</u> per year:

1) Edgington, Johnson County
2) Russell, Ellis County
3) Kiowa, Barber County
4) Wellsville, Franklin County
5) Wellington, Sumner County
6) Potwin, Sedgwick County
7) White Water, Sedgwick County

Question arises as to whether or not they would even pay since according to him, the transmission of water arises out of a sale from one <u>end user</u> to another. (See Sec. 2, lines 135-140, p. 4.

3) <u>Revenue Estimates - future</u>.

This bill would impact on the Central Wholesale Water District. That project which is to transport water from Milford Lake to eleven Kansas towns in central Kansas.

According to Mr. Burris, they have requested 120 million gallons of water per day, but only 108 million gallons per day is available.

The transmission pipeline is to be 125 miles long and assuming 100 million gallons per day times the rate of taxation will cost this district $456,250 per year assuming that all the water goes the entire length of the pipeline. Since it will not according to this office, a total tax increase of about $250,000 per year should be raised. This assumes that all the water <u>only</u> travels one-half of the length of the pipeline.

This will raise the average water consumer in Wichita's water bill less than 1 cent per year.

4) Under Attorney General opinion as it applied to SB 61 and 62, this tax <u>cannot</u> affect any existing contract for any state sale of any water to any city, county in this state.

5) Coal - no revenue projections have been made on the ETSI coal slurry pipeline.

C) Natural Gas and Helium - See Section 3(a) p. 5.

1) Expressed Mathematically:

Unit of Natural Gas x Length of transmission pipeline x rate of taxation = total amount of revenue

2) 1981 Figures - see Legislative Research memo.

The total revenue garnered would be $13,530,400 at a maximum because of some drop offs. Discount 20% - raise $9.9 million. 1983-84 total revenue from tax = $18.6 million.

Respectfully ask the Committee Chairman to request of the eleven interstate and one intrastate pipeline companies where and how much each of them drop off along the line to get a more accurate figure on how much is raised.

IV. Legal Analysis of the Bill

A) Introduction:

I need not point out to this Committee that it is the role of the Legislative Branch of government to set policy. It is the function of the courts to determine its constitutionality. So in one sense the Committee needs to make the policy decision,first do we need additional revenue, and two if so what tax do we increase or levy to raise the money. It need not concern itself with the constitutionality of this bill.

However, because of the newness of this tax questions will be raised as to its constitutionality. This bill is, in my opinion, a constitutional one. I have also consulted with various other attorneys who believe it to be constitutional.

Before going through the cases briefly with you, I would like to make these four statements:

1) There is a general rule of law held by all courts that any law enacted by the Legislature or Congress is presumed to be constitutionally valid and that the courts

will endeavor to do all which is reasonably possible to uphold it. We also have severability clause.

2) 4 R Act. You might ask what this has to do with the discussion. Under the 4 R Act the Kansas Legislature could not pass this type of bill and impose this type of tax on railroads and the use of railroad tracks. No such protection under federal law exists for transmission pipeline companies. According to my research, they have twice lobbied quite hard in Congress to get 4 R Act type protection for themselves and have failed. What concerns me then that they might someday get 4 R Act type protection and under supremacy clause - this avenue to raise revenue would be foreclosed. By their seeking to get this type of 4 R Act protection, this tells me that their attorneys realize that if drafted properly such as the bill before you today, they will have to pay such a tax. If not, why would they be seeking this protection.

3) Remember these same oil and gas companies will argue that this measure is unconstitutional just as they did the Kansas Natural Gas Price Protection Act. A measure that was upheld by a unanimous decision of both the Kansas and U.S. Supreme Courts.

4) The bill is modeled after new legislation drafted and introduced in Louisiana in response to Declaration of U.S. Supreme Court in Maryland v. Louisiana in 451 U.S. 725 (1981). We'll briefly analyze that case. But this Bill has been discussed with figures in Louisiana Department of Revenue and attorney who argued Louisiana case in U.S. Supreme Court, and they believe they have a constitutional bill which we followed here.

CORRECTIONS

1) Line 163, page 5

By adding after the word domestic, "Which qualifies as a public utility or common carrier under any Kansas law or ordinance or any federal law."

2) Line 174, page 5

By striking $.001 and substituting $.00001.

3) Line 179, page 5

By striking $.001 and substituting $.0001.

4) Line 184, page 5

By adding after each unit of water "or unit of coal."

III. Commonwealth Edison v. Montana.
49 L.W. 4957 (1981)

A). Facts:

At p. 4957 1). Montana Severance Tax must be evaluated under Complete Auto Parts Test.

2). 30% Severance Tax - 90% of it pass through out of state.

B). Rules
At p. 4959 1).

> In reviewing Commerce Clause challenges to state taxes our goal has instead been to establish a consistent and rational method of inquiry focusing on "the practical effect of a challenged tax." *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U. S. 425, 443 (1980). See *Moorman Mfg. Co. v. Bair*, 437 U. S. 267, 276–281 (1978); *Washington Revenue Dept. v. Association of Wash. Stevedoring Cos.*, *supra*, at 743–751; *Complete Auto Transit, Inc. v. Brady*, *supra*, at 277–279. We conclude that the same "practical" analysis should apply in reviewing Commerce Clause challenges to state severance taxes.
>
> In the first place, there is no real distinction—in terms of economic effects—between severance taxes and other types of state taxes that have been subjected to Commerce Clause scrutiny. See, e. g., *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157 (1954); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947); *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U. S. 90 (1937), both overruled in *Washington Revenue Dept. v. Association of Wash. Stevedoring Cos.*, *supra*. A State taxes [illegible] on a "local" activity preceding entry of the goods into interstate

> [illegible] unapproved. We agree with appellants that the Montana tax must be evaluated under *Complete Auto Transit*'s four-part test. Under that test, a state tax does not offend the Commerce Clause if it "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 services provided by the State." 430 U. S., at 279.

At p. 4959 2). No discrimination against interstate commerce just because burden/cost of tax is outside of state

> Appellants assert that the Montana tax "discriminate[s] against interstate commerce" because 90% of Montana coal is shipped to other States under contracts that shift the tax burden primarily to non-Montana utility companies and thus to citizens of other States. But the Montana tax is computed at the same rate regardless of the final destination of the coal, and there is no suggestion here that the tax is administered in a manner that departs from this even-handed formula. We are not, therefore, confronted here with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other discrimination cases. See, e. g., *Maryland v. Louisiana*, — U. S. —, [illegible]; *Boston Stock Exchange v. State Tax Comm'n*, 429 U. S. 318 (1977); cf. *Lewis v. BT Investment Managers, Inc.*, 447 U. S. 27 (1980); *Philadelphia v. New Jersey*, [illegible]
>
> Instead, the gravamen of appellants' claim is that a state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers. Appellants do not suggest that this assertion is based on any of this Court's prior discriminatory tax cases. In fact, a similar claim was considered and rejected in *Heisler*. There, it was argued that Pennsylvania had a virtual monopoly of anthracite coal and that, because some of the coal was shipped out of State, the tax discriminated against nonpermissibly burdened interstate commerce. [illegible] 53. The Court, however, dismissed [illegible] previous pronouncements, 240 U. S., at

III. B) 2)

At p. 4960

supra, at 461–462. Consequently, to accept appellants' theory and invalidate the Montana tax solely because most of Montana's coal is shipped across the very state borders that ordinarily are to be considered irrelevant would require a significant and, in our view, unwarranted departure from the rationale of our prior discrimination cases.

— treatment. As previously noted, there is no real discrimination in this case: the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers.

3). Argue against 4th prong of Complete Auto Parts Test,

At p. 4960

not fairly related to the [redacted] because of coal mining." Thus, appellants' objection is to the *rate* of the Montana tax, and even then, their only complaint is that the *amount* the State receives in taxes far exceeds the *value* of the services provided to the coal mining industry. In objecting to the tax on this ground, appellants may be assuming that the Montana tax is, in fact, intended to reimburse the State for the cost of specific services furnished to the coal mining industry. Alternatively, appellants could be arguing that a State's power to tax an activity connected to interstate commerce cannot exceed the value of the services specifically provided to the activity. Either way, the premise of appellants' argument is invalid. Furthermore, appellants have completely misunderstood the nature of the inquiry under the fourth prong of the *Complete Auto Transit* test.

The Montana Supreme Court held that the coal severance tax is "imposed for the general support of the government." — Mont., at —, 615 P. 2d, at 856, and we have no reason to question this characterization of the Montana tax as a general revenue tax." C-

(1921). Moreover, there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. Instead, our consistent rule has been:

> "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 521–522 (1937) (citations omitted).

The relevant inquiry under the fourth prong of the *Complete Auto Transit* test" is not, as appellants suggest, the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities." Rather, the test is

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closely connected to the first prong of the *Complete Auto Transit* test

III B. 3).

At p. 4962

> Against this background, we have little difficulty concluding that the Montana tax satisfies the fourth prong of the *Complete Auto Transit* test. The "operating incidence" of the tax, see *General Motors Corp.* v. *Washington*, *supra*, at 440–441, is on the mining of coal within Montana. Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection to those activities. *Id.*, at 441. Compare *Nippert* v. *City of Richmond*, 327 U. S., at 427. When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and the advantages of a civilized society." *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S., at 228, quoting *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S., at 445.

IV. Maryland v. Louisiana
451 U.S. 725 (1981)

[430 US 274]

COMPLETE AUTO TRANSIT, INC., Appellant,

v

CHARLES R. BRADY, Jr., etc.

430 US 274, 51 L Ed 2d 326, 97 S Ct 1076, reh den 430 US 976, 42 L Ed 2d 371, 97 S Ct 1669

[No. 76–29]

Argued January 19, 1977. Decided March 7, 1977.

SUMMARY

This case presented the question whether the application of a Mississippi tax on "the privilege of doing business" within the state to the activity in interstate commerce of a motor carrier in transporting an out-of-state manufacturer's automobiles between points in the state violated the commerce clause of the Federal Constitution (Art I, § 8, cl 3). After paying tax assessments under protest, the motor carrier instituted a refund action in the Chancery Court of the First Judicial District of Hinds County, Mississippi, which sustained the tax assessments. The Supreme Court of Mississippi affirmed (330 So 2d 268).

On appeal, the United States Supreme Court affirmed. In an opinion by BLACKMUN, J., expressing the unanimous view of the court, it was held (1) overruling Spector Motor Service v O'Connor (1951) 340 US 602, 95 L Ed 573, 71 S Ct 508, that a state tax on the "privilege of doing business" in the state was not per se unconstitutional under the commerce clause merely because it was applied to an activity that was part of interstate commerce, and (2) that the application of the Mississippi tax to the taxpayer in the case at bar did not violate the commerce clause, since there was no claim that the activity taxed did not have a sufficient nexus with the state to justify a tax, or that the tax was not fairly related to benefits provided by the state to the taxpayer, or that the tax discriminated against interstate commerce, or that the tax was not fairly apportioned to local activities.

Briefs of Counsel, p 878, infra.



ATTACHMENT II

4-19-83

# COMPLETE AUTO TRANSIT, INC. v BRADY

430 US 274, 51 L Ed 2d 326, 97 S Ct 1076

## HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

**Commerce § 298 — motor carrier — state tax on interstate activity**

1a, 1b, 1c. The application of a state tax on "the privilege of doing business" within the state to the activity in interstate commerce of a motor carrier in transporting an out-of-state manufacturer's automobiles between points in the state does not violate the commerce clause of the Federal Constitution (Art I, § 8, cl 3), where there is no claim that the activity taxed does not have a sufficient nexus with the state to justify a tax, or that the tax is not fairly related to benefits provided by the state to the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned to local activities.

**Commerce §§ 237, 249 — validity of state tax**

2a, 2b, 2c. A state tax on the "privilege of doing business" in the state is not per se unconstitutional under the commerce clause of the Federal Constitution (Art I, § 8, cl 3) merely because it is applied to an activity that is part of interstate commerce; interstate commerce does not enjoy a "free trade" immunity from state taxation, and administrative convenience in adopting a rule of absolute immunity is insufficient justification for abandoning the principle that interstate commerce may be made to pay its way.

## TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

15A Am Jur 2d, Commerce §§ 58–65; 71 Am Jur 2d, State and Local Taxation §§ 244–253

22 Am Jur Pl & Pr Forms (Rev Ed), State and Local Taxation, Form 416

USCS, Constitution, Article I, Section 8, Clause 3

US L Ed Digest, Commerce § 298

ALR Digests, Commerce § 105

L Ed Index to Annos, Commerce

ALR Quick Index, Taxes

Federal Quick Index, Commerce; Privilege Tax

## ANNOTATION REFERENCES

Validity, under commerce clause of Federal Constitution, of state gross receipts or income taxes involving interstate transactions. 34 L Ed 2d 749.

Validity, under Federal Constitution, of state tax on, or measured by, net income of a foreign corporation. 3 L Ed 2d 1787.

Validity, under Federal Constitution of state tax on, or measured by, income of foreign corporation. 67 ALR2d 1322.

State taxation of motor carriers as affected by commerce clause. 17 ALR2d 421.

State excise, privilege, or franchise tax upon foreign corporations as affected by commerce clause. 105 ALR 11, 139 ALR 950.

Tax as unlawful discrimination against interstate commerce by reason of possibility of taxation in other states. 117 ALR 444.

SYLLABUS BY REPORTER OF DECISIONS

A Mississippi tax on the privilege of doing business in the State *held* not to violate the Commerce Clause when it is applied to an interstate activity (here the transportation by motor carrier in Mississippi to Mississippi dealers of cars manufactured outside the State) 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. Spector Motor Service v O'Connor, 340 US 602, 95 L Ed 573, 71 S Ct 508, overruled.

330 So 2d 268, affirmed.

Blackmun, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

**Alan W. Perry** argued the cause for appellant.

**James H. Haddock** argued the cause for appellee.

Briefs of Counsel, p 878, infra.

OPINION OF THE COURT

Mr. Justice **Blackmun** delivered the opinion of the Court.

[1a] Once again we are presented with " 'the perennial problem of the validity of a state tax for the privilege of carrying on, within a state, certain activities' related to a corporation's operation of an interstate business." Colonial Pipeline Co. v Traigle, 421 US 100, 101, 44 L Ed 2d 1, 95 S Ct 1538 (1975), quoting Memphis Gas Co. v Stone, 335 US 80, 85, 92 L Ed 1832, 68 S Ct 1475 (1948). The issue in this case is whether Mississippi runs afoul of the Commerce Clause, U.S. Const, Art I, § 8, cl 3, when it applies the tax it imposes on "the privilege of . . . doing business" within the State to appellant's activity in interstate commerce. The Supreme Court of Mississippi unanimously sustained the tax against

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appellant's constitutional challenge. 330 So 2d 268 (1976). We noted probable jurisdiction in order to consider anew the applicable principles in this troublesome area. 429 US 813, 50 L Ed 2d 72, 97 S Ct 52 (1976).

I

The taxes in question are sales taxes assessed by the Mississippi State Tax Commission against the appellant, Complete Auto Transit, Inc., for the period from August 1, 1968, through July 31, 1972. The assessments were made pursuant to the following Mississippi statutes:

"There is hereby levied and assessed and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections." Miss Code Ann, 1942, § 10105 (1972 Supp), as amended.[1]

"Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this State, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent of the gross income of such business

1. The statute is now § 27-65-13 of the State's 1972 Code.

. . . ." § 10109(2), as amended.[2]

[430 US 276]

Any person liable for the tax is required to add it to the gross sales price and, "insofar as practicable," to collect it at the time the sales price is collected. § 10117, as amended.[3]

Appellant is a Michigan corporation engaged in the business of transporting motor vehicles by motor carrier for General Motors Corporation. General Motors assembles outside Mississippi vehicles that are destined for dealers within the State. The vehicles are then shipped by rail to Jackson, Miss., where, usually within 48 hours, they are loaded onto appellant's trucks and transported by appellant to the Mississippi dealers. App 47–48, 78–79, 86–87. Appellant is paid on a contract basis for the transportation from the railhead to the dealers.[4] Id., at 50–51, 68.

By letter dated October 5, 1971, the Mississippi Tax Commission

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informed appellant that it was being assessed taxes and interest totaling $122,160.59 for the sales of transportation services during the three-year period from August 1, 1968, through July 31, 1971.[5] Remittance within 10 days was requested. Id., at 9–10. By similar letter dated December 28, 1972, the Commission advised appellant of an assessment of $42,990.89 for the period from August 1, 1971, through July 31, 1972. Id., at 11–12. Appellant paid the assessments under protest and, in April 1973, pursuant to § 10121.1, as amended, of the 1942 Code (now § 27-65-47 of the

2. This statute is now § 27-65-19(2) of the 1972 Code. It was amended, effective August 1, 1972, to exclude the transportation of property. Laws 1972, c 506, § 2.

Section 10109, as codified in 1942, imposed a tax on gross income from all transportation, with gross income defined to exclude "so much thereof as is derived from business conducted in commerce between this State and other States of the United States . . . which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America." In 1955, this exclusionary language was eliminated and the statute was amended to cover only transportation "between points within this state." Laws 1955, c 109, § 10. The amendment gave the statute essentially the form it possessed during the period relevant here.

It might be argued that the statute as so amended evinces an intent to reach only intrastate commerce, and that it should be so construed. Appellant, however, does not make that argument, and the Supreme Court of Mississippi clearly viewed that statute as applying to both intrastate commerce and interstate commerce.

We are advised by the appellee that the tax has been applied only to commercial transactions in which a distinct service is performed and payment made for transportation from one point within the State to another point within the State. Tr of Oral Arg 34–35, 38.

3. This statute is now § 27-65-31 of the 1972 Code. Violation of the requirements of the section is a misdemeanor. Ibid.

4. The parties understandably go to great pains to describe the details of the bills of lading, and the responsibility of various entities for the vehicles as they travel from the assembly plant to the dealers. Appellant seeks to demonstrate that the transportation it provides from the railhead to the dealers is part of a movement in interstate commerce. Appellee argues that appellant's transportation is intrastate business, but further argues that even if the activity is part of interstate commerce, the tax is not unconstitutional. Brief for Appellant 11–14; Brief for Appellee 12–24; Reply Brief for Appellant 14–16. The Mississippi courts, in upholding the tax, assumed that the transportation is in interstate commerce. For present purposes, we make the same assumption.

5. Although appellant had been operating in Mississippi since 1960, App 77, the state audit and assessment covered only the period beginning August 1, 1968. Id., at 37–38. No effort had been made to apply the tax to appellant for any period prior to that date.

1972 Code), instituted the present refund action in the Chancery Court of the First Judicial District of Hinds County.

Appellant claimed that its transportation was but one part of an interstate movement, and that the taxes assessed and paid were unconstitutional as applied to operations in interstate commerce. App 4, 6–7. The Chancery Court, in an unreported opinion, sustained the assessments. Id., at 99–102.

The Mississippi Supreme Court affirmed. It concluded:

> "It will be noted that Taxpayer has a large operation in this State. It is dependent upon the State for police protection and other State services the same as other citizens. It should pay its fair share of taxes so long, but only so long, as the tax does not discriminate against interstate commerce, and there is no danger of interstate commerce being smothered by cumulative taxes of several states. There is no possibility of any other state duplicating the tax involved in this case." 330 So 2d, at 272.

Appellant, in its complaint in Chancery Court, did *not* allege that its activity which Mississippi taxes does not have a

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sufficient nexus with the State; or that the tax discriminates against interstate commerce; or that the tax is unfairly apportioned; or that it is unrelated to services provided by the State.[6] No such claims were made before the Mississippi Supreme Court, and although appellant argues here that a tax on "the privilege of engaging in interstate commerce" creates an unacceptable risk of discrimination and undue burdens, Brief for Appellant 20–27, it does not claim that discrimination or undue burdens exist in fact.

**[2a]** Appellant's attack is based solely on decisions of this Court holding that a tax on the "privilege" of engaging in an activity in the State may not be applied to an activity that is part of interstate commerce. See, e.g., Spector Motor Service v O'Connor, 340 US 602, 95 L Ed 573, 71 S Ct 508 (1951); Freeman v Hewit, 329 US 249, 91 L Ed 265, 67 S Ct 274 (1946). This rule looks only to the fact that the incidence of the tax is the "privilege of doing business"; it deems irrelevant any consideration of the practical effect of the tax. The rule reflects an underlying philosophy that interstate commerce should enjoy a sort of "free trade" immunity from state taxation.[7]

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6. See Boston Stock Exchange v State Tax Comm'n, 429 US 318, 50 L Ed 2d 514, 97 S Ct 599 (1977); General Motors Corp. v Washington, 377 US 436, 12 L Ed 2d 430, 84 S Ct 1564 (1964); Illinois Cent. R. Co. v Minnesota, 309 US 157, 84 L Ed 670, 60 S Ct 419 (1940); Ingels v Morf, 300 US 290, 81 L Ed 653, 57 S Ct 439 (1937). See also Standard Steel Co. v Washington Rev. Dept. 419 US 560, 42 L Ed 2d 719, 95 S Ct 706 (1975), and Clark v Paul Gray, Inc. 306 US 583, 83 L Ed 1001, 59 S Ct 744 (1939).

7. The Court summarized the "free trade" view in Freeman v Hewit, 329 US, at 252, 91 L Ed 265, 67 S Ct 274:

"[T]he Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. . . . This limitation on State power . . . does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance."

[430 US 279]

Appellee, in its turn, relies on decisions of this Court stating that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." Western Live Stock v Bureau of Revenue, 303 US 250, 254, 82 L Ed 823, 58 S Ct 546, 115 ALR 944 (1938). These decisions[8] have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when 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.

Over the years, the Court has applied this practical analysis in approving many types of tax that avoided running afoul of the prohibition against taxing the "privilege of doing business," but in each instance it has refused to overrule the prohibition. Under the present state of the law, the Spector rule, as it has come to be known, has no relationship to economic realities. Rather it stands only as a trap for the unwary draftsman.

## II

The modern origin of the Spector rule may be found in Freeman v Hewit, supra.[9] At issue in Freeman was the application

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of an Indiana tax upon "the receipt of the entire gross income" of residents and domiciliaries. 329 US, at 250, 91 L Ed 265, 67 S Ct 274. Indiana sought to impose this tax on income generated when a trustee of an Indiana estate instructed his local stockbroker to sell certain securities. The broker arranged with correspondents in New York to sell the securities on the New York Stock Exchange. The securities were sold, and the New York brokers, after deducting expense and commission, transmitted the proceeds to the Indiana broker who in turn delivered them, less his commission, to the trustee. The Indiana Supreme Court sustained the tax, but this Court reversed.

Mr. Justice Frankfurter, speaking for five Members of the Court, announced a blanket prohibition against any state taxation imposed

8. See, e.g., General Motors Corp. v Washington, supra; Northwestern Cement Co. v Minnesota, 358 US 450, 3 L Ed 2d 421, 79 S Ct 357, 67 ALR2d 1292 (1959); Memphis Gas Co. v Stone, 335 US 80, 92 L Ed 1832, 68 S Ct 1475 (1948); Wisconsin v J. C. Penney Co. 311 US 435, 444, 85 L Ed 267, 61 S Ct 246, 130 ALR 1229 (1940).

9. Although we mention Freeman as the starting point, elements of the views expressed therein, and the positions that underlie that debate, were evident in prior opinions. Compare State Tax on Railway Gross Receipts, 15 Wall 284, 21 L Ed 164 (1873), with Fargo v Michigan, 121 US 230, 30 L Ed 888, 7 S Ct 857 (1887); and compare Di Santo v Pennsylvania, 273 US 34, 71 L Ed 524, 47 S Ct 267 (1927), and Cooney v Mountain States Tel. Co. 294 US 384, 79 L Ed 934, 55 S Ct 477 (1935), with Western Live Stock v Bureau of Revenue, 303 US 250, 82 L Ed 823, 58 S Ct 546, 115 ALR 944 (1938). See generally P. Hartman, State Taxation of Interstate Commerce (1953); Barrett, State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What Have You?, 4 Vand L Rev 496 (1951), and writings cited therein at 496 n 1; Dunham, Gross Receipts Taxes on Interstate Transactions, 47 Colum L Rev 211 (1947).

directly on an interstate transaction. He explicitly deemed unnecessary to the decision of the case any showing of discrimination against interstate commerce or error in apportionment of the tax. Id., at 254, 256–257, 91 L Ed 265, 67 S Ct 274. He recognized that a State could constitutionally tax local manufacture, impose license taxes on corporations doing business in the State, tax property within the State, and tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce. Id., at 255, 91 L Ed 265, 67 S Ct 274. Nevertheless, a direct tax on interstate sales, even if fairly apportioned and nondiscriminatory, was held to be unconstitutional per se.

Mr. Justice Rutledge, in a lengthy concurring opinion, argued that the tax should be judged by its economic effects rather than by its formal phrasing. After reviewing the Court's prior decisions, he concluded: "The fact is that 'direct incidence' of a state tax or regulation . . . has long since been discarded as being in itself sufficient to outlaw state legislation." Id., at 265–266, 91 L Ed 265, 67 S Ct 274. In his view, a state tax is unconstitutional

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only if the activity lacks the necessary connection with the taxing state to give "jurisdiction to tax," id., at 271, 91 L Ed 265, 67 S Ct 274, or if the tax discriminates against interstate commerce, or if the activity is subject to multiple taxation. Id., at 276–277, 91 L Ed 265, 67 S Ct 274.[10]

The rule announced in Freeman was viewed in the commentary as a triumph of formalism over substance, providing little guidance even as to formal requirements. See P. Hartman, State Taxation of Interstate Commerce 200–204 (1953); Dunham, Gross Receipts Taxes on Interstate Transactions, 47 Colum L Rev 211 (1947). Although the rule might have been utilized as the keystone of a movement toward absolute immunity of interstate commerce from state taxation,[11] the Court consistently has indicated that "interstate commerce may be made to pay its way," and has moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology.

The narrowing of the rule to one of draftsmanship and phraseology began with another Mississippi case, Memphis Gas Co. v Stone, 335 US 80, 92 L Ed 1832, 68 S Ct 1475 (1948). Memphis Natural Gas Company owned and operated a pipeline running from Louisiana to Memphis. Approximately 135 miles of the line were in Mississippi. Mississippi imposed a "franchise or excise" tax measured by "the value of the capital used, invested or employed in the exercise of any power, privilege or right enjoyed by [a corporation] within this state." Miss Code Ann, 1942, § 9313. The Mississippi Supreme Court upheld the tax, and this Court affirmed.

In an opinion for himself and two

10. Mr. Justice Rutledge agreed with the result the Court reached in Freeman because of his belief that the apportionment problem was best solved if States other than the market State were forbidden to impose unapportioned gross receipts taxes of the kind Indiana sought to exact.

11. A consistent application of the doctrine of immunity for interstate commerce, of course, would have necessitated overruling the cases approved by the Freeman Court that upheld taxes whose burden, although indirect, fell on interstate commerce.

others, Mr. Justice Reed
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noted that the tax was not discriminatory, that there was no possibility of multiple taxation, that the amount of the tax was reasonable, and that the tax was properly apportioned to the investment in Mississippi. 335 US, at 87–88, 92 L Ed 1832, 68 S Ct 1475. He then went on to consider whether the tax was "upon the privilege of doing interstate business within the state." Id., at 88, 92 L Ed 1832, 68 S Ct 1475. He drew a distinction between a tax on "the privilege of doing interstate business" and a tax on "the privilege of exercising corporate functions within the State," and held that while the former is unconstitutional, the latter is not barred by the Commerce Clause. Id., at 88–93, 92 L Ed 1832, 68 S Ct 1475. He then approved the tax there at issue because

> "there is no attempt to tax the privilege of doing an interstate business or to secure anything from the corporation by this statute except compensation for the protection of the enumerated local activities of 'maintaining, keeping in repair, and otherwise in manning the facilities.'" Id., at 93, 92 L Ed 1832, 68 S Ct 1475.

Mr. Justice Black concurred in the judgment without opinion. Id., at 96, 92 L Ed 1832, 68 S Ct 1475. Mr. Justice Rutledge provided the fifth vote, stating in his concurrence:

> "[I]t is enough for me to sustain the tax imposed in this case that it is one clearly within the state's power to lay insofar as any limitation of due process or 'jurisdiction to tax' in that sense is concerned; it is nondiscriminatory, that is, places no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character; is duly apportioned, that is, does not undertake to tax any interstate activities carried on outside the state's borders; and cannot be repeated by any other state." Id., at 96–97, 92 L Ed 1832, 68 S Ct 1475 (footnotes omitted).

Four Justices dissented, id., at 99, 92 L Ed 1832, 68 S Ct 1475, on the grounds that it had not been shown that the State afforded any protection in
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return for the tax,[12] and that, therefore, the tax must be viewed as one on the "privilege" of engaging in interstate commerce. The dissenters recognized that an identical effect could be achieved by an increase in the ad valorem property tax, id., at 104, 92 L Ed 1832, 68 S Ct 1475, but would have held, notwithstanding, that a tax on the "privilege" is unconstitutional.

The prohibition against state taxation of the "privilege" of engaging in commerce that is interstate was reaffirmed in Spector Motor Service v O'Connor, 340 US 602, 95 L Ed 573, 71 S Ct 508 (1951), a case similar on its facts to the instant case. The

12. In arriving at this conclusion, the dissent relied upon a construction of a stipulation entered into by the parties, 335 US, at 100–101, 92 L Ed 1832, 68 S Ct 1475, and upon an independent review of the record. The plurality rejected the dissent's reading of the stipulation and noted, in addition, that the question presented in the petition for certiorari did not raise a claim that the State was providing no service for which it could ask recompense. Id., at 83–84, 92 L Ed 1832, 68 S Ct 1475. The plurality then relied on the Supreme Court of Mississippi's holding that the State did provide protection that could properly be the subject of a tax.

taxpayer there was a Missouri corporation engaged exclusively in interstate trucking. Some of its shipments originated or terminated in Connecticut. Connecticut imposed on a corporation a "tax or excise upon its franchise for the privilege of carrying on or doing business within the state," measured by apportioned net income. Id., at 603–604, n 1, 95 L Ed 573, 71 S Ct 508. Spector brought suit in federal court to enjoin collection of the tax as applied to its activities. The District Court issued the injunction. The Second Circuit reversed. This Court, with three Justices in dissent, in turn reversed the Court of Appeals and held the tax unconstitutional as applied.

The Court recognized that "where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate

[430 US 284]

and intrastate." Id., at 609–610, 95 L Ed 573, 71 S Ct 508 (footnote omitted). It held, nevertheless, that a tax on the "privilege" of doing business is unconstitutional if applied against what is exclusively interstate commerce. The dissenters argued, on the other hand, id., at 610, 95 L Ed 573, 71 S Ct 508, that there is no constitutional difference between an "exclusively interstate" business and a "mixed" business, and that a fairly apportioned and nondiscriminatory tax on either type is not prohibited by the Commerce Clause.

The Spector rule was applied in Railway Express Agency v Virginia, 347 US 359, 98 L Ed 757, 74 S Ct 558 (1954) (Railway Express I), to declare unconstitutional a State's "annual license tax" levied on gross receipts for the "privilege of doing business in this State." The Court, by a 5-to-4 vote, held that the tax on gross receipts was a tax on the privilege of doing business rather than a tax on property in the State, as Virginia contended.

Virginia thereupon revised the wording of its statute to impose a "franchise tax" on "intangible property" in the form of "going concern" value as measured by gross receipts. The tax was again asserted against the Agency which in Virginia was engaged exclusively in interstate commerce. This Court's opinion, buttressed by two concurring opinions and one concurrence in the result, upheld the reworded statute as not violative of the Spector rule. Railway Express Agency v Virginia, 358 US 434, 3 L Ed 2d 450, 79 S Ct 411 (1959) (Railway Express II). In upholding the statute, the Court's opinion recognized that the rule against taxing the "privilege" of doing interstate business had created a situation where "the use of magic words or labels" could "disable an otherwise constitutional levy." Id., at 441, 3 L Ed 2d 450, 79 S Ct 411.

There was no real economic difference between the statutes in Railway Express I and Railway Express II. The Court long since had recognized that interstate commerce may be made to pay its way. Yet under the Spector rule, the economic realities in Railway Express I became irrelevant. The

[430 US 285]

Spector rule had come to operate only as a rule of draftsmanship, and served only to distract the courts and parties from

their inquiry into whether the challenged tax produced results forbidden by the Commerce Clause.

On the day it announced Railway Express II, the Court further confirmed that a State, with proper drafting, may tax exclusively interstate commerce so long as the tax does not create any effect forbidden by the Commerce Clause. In Northwestern Cement Co. v Minnesota, 358 US 450, 3 L Ed 2d 421, 79 S Ct 357, 67 ALR2d 1292 (1959), the Court held that net income from the interstate operations of a foreign corporation may be subjected to state taxation, provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the tax. Limited in that way, the tax could be levied even though the income was generated exclusively by interstate sales. Spector was distinguished, briefly and in passing, as a case in which "the incidence" of the tax "was the privilege of doing business." 358 US, at 464, 3 L Ed 2d 421, 79 S Ct 357, 67 ALR2d 1292.

Thus, applying the rule of Northwestern Cement to the facts of Spector, it is clear that Connecticut could have taxed the apportioned net income derived from the exclusively interstate commerce. It could not, however, tax the "privilege" of doing business as measured by the apportioned net income. The reason for attaching constitutional significance to a semantic difference is difficult to discern.

The unsatisfactory operation of the Spector rule is well demonstrated by our recent case of Colonial Pipeline Co. v Traigle, 421 US 100, 44 L Ed 2d 1, 95 S Ct 1538 (1975). Colonial was a Delaware corporation with an interstate pipeline running through Louisiana for approximately 258 miles. It maintained a work force and pumping stations in Louisiana to keep the pipeline flowing, but it did no intrastate business in that State. Id., at 101–102, 44 L Ed 2d 1, 95 S Ct 1538. In 1962, Louisiana imposed on Colonial a franchise tax for "the privilege of carrying on or doing business" in the State. The Louisiana Court of Appeal invalidated the

[430 US 286]

tax as violative of the rule of Spector. Colonial Pipeline Co. v Mouton, 228 So 2d 718 (1969). The Supreme Court of Louisiana refused review. 255 La 474, 231 So 2d 393 (1970). The Louisiana Legislature, perhaps recognizing that it had run afoul of a rule of words rather than a rule of substance, then redrafted the statute to levy the tax, as an alternative incident, on the "qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form." Again, the Court of Appeal held the tax unconstitutional as applied to the appellant. Colonial Pipeline Co. v Agerton, 275 So 2d 834 (1973). But this time the Louisiana Supreme Court upheld the new tax. 289 So 2d 93 (1974).

By a 7-to-1 vote, this Court affirmed. No question had been raised as to the propriety of the apportionment of the tax, and no claim was made that the tax was discriminatory. 421 US, at 101, 44 L Ed 2d 1, 95 S Ct 1538. The Court noted that the tax was imposed on that aspect of interstate commerce to which the State bore a special relation, and that the State bestowed powers, privileges, and benefits sufficient to support a tax on doing business in the corporate form in Louisiana. Id., at 109, 44 L Ed 2d 1, 95 S Ct 1538.

Accordingly, on the authority of Memphis Gas, the tax was held to be constitutional. The Court distinguished Spector on the familiar ground that it involved a tax on the privilege of carrying on interstate commerce, while the Louisiana Legislature, in contrast, had worded the statute at issue "narrowly to confine the impost to one related to appellant's activities within the State in the corporate form." 421 US, at 113–114, 44 L Ed 2d 1, 95 S Ct 1538.[13]

[430 US 287]

While refraining from overruling Spector, the Court noted:

> "[D]ecisions of this Court, particularly during recent decades, have sustained nondiscriminatory properly apportioned state corporate taxes upon foreign corporations doing an exclusively interstate business when the tax is related to a corporation's local activities and the State has provided benefits and protections for those activities for which it is justified in asking a fair and reasonable return." Id., at 108, 44 L Ed 2d 1, 95 S Ct 1538.

One commentator concluded: "After reading Colonial, only the most sanguine taxpayer would conclude that the Court maintains a serious belief in the doctrine that the privilege of doing interstate business is immune from state taxation." Hellerstein, State Taxation of Interstate Business and the Supreme Court, 1974 Term: Standard Pressed Steel and Colonial Pipeline, 62 Va L Rev 149, 188 (1976).[14]

## III

[1b] In this case, of course, we are confronted with a situation like that presented in Spector. The tax is labeled a privilege tax "for the privilege of . . . doing business" in Mississippi, § 10105 of the State's 1942 Code, as amended, and the activity taxed is, or has been assumed to be, interstate commerce. We note again that no claim is made that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned.

[430 US 288]

The view of the Commerce Clause that gave rise to the rule of Spector perhaps was not without some substance. Nonetheless, the possibility of defending it in the abstract does not alter the fact that the Court has rejected the proposition that interstate commerce is immune from state taxation:

> "It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. 'It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from

13. Five Members of the Court joined in the opinion distinguishing Spector. Two concurred in the judgment, but viewed Spector as indistinguishable and would have overruled it. 421 US, at 114–116, 44 L Ed 2d 1, 95 S Ct 1538. One also viewed Spector as indistinguishable, but felt that it was an established precedent until forthrightly overruled. Id., at 116, 44 L Ed 2d 1, 95 S Ct 1538. Mr. Justice Douglas took no part.

14. Less charitably put: "In light of the expanding scope of the state taxing power over interstate commerce, Spector is an anachronism. . . . Continued adherence to Spector, especially after Northwestern States Portland Cement, cannot be justified." Comment, Pipelines, Privileges and Labels: Colonial Pipeline Co. v Traigle, 70 Nw U L Rev 835, 854 (1975).

their just share of state tax burden even though it increases the cost of doing business.' Western Live Stock v Bureau of Revenue, 303 US 250, 254, [82 L Ed 823, 58 S Ct 546, 115 ALR 944], (1938)." Colonial Pipeline Co. v Traigle, 421 US, at 108, 44 L Ed 2d 1, 95 S Ct 1538.

[2b] Not only has the philosophy underlying the rule been rejected, but the rule itself has been stripped of any practical significance. If Mississippi had called its tax one on "net income" or on the "going concern value" of appellant's business, the Spector rule could not invalidate it. There is no economic consequence that follows necessarily from the use of the particular words, "privilege of doing business," and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect. Simply put, the Spector rule does not address the problems with which the Commerce Clause is concerned.[15] Accordingly, we now reject the rule of

[430 US 289]

Spector Motor Service, Inc. v O'Connor, that a state tax on the "privilege of doing business" is per se unconstitutional when it is applied to interstate commerce, and that case is overruled.

[1c] There being no objection to Mississippi's tax on appellant except that it was imposed on nothing other than the "privilege of doing business" that is interstate, the judgment of the Supreme Court of Mississippi is affirmed.

It is so ordered.

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15. It might be argued that "privilege" taxes, by focusing on the doing of business, are easily tailored to single out interstate businesses and subject them to effects forbidden by the Commerce Clause, and that, therefore, "privilege" taxes should be subjected to a per se rule against their imposition on interstate business. Yet property taxes also may be tailored to differentiate between property used in transportation and other types of property, see Railway Express II, 358 US 434, 3 L Ed 2d 450, 79 S Ct 411 (1959); an income tax could use different rates for different types of business; and a tax on the "privilege of doing business in corporate form" could be made to change with the nature of the corporate activity involved. Any tailored tax of this sort creates an increased danger of error in apportionment, of discrimination against interstate commerce, and of a lack of relationship to the services provided by the State. See Freeman v Hewit, 329 US, at 265–266, n 13, 91 L Ed 265, 67 S Ct 274 (concurring opinion). A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce. We perceive no reason, however, why a tax on the "privilege of doing business" should be viewed as creating a qualitatively different danger so as to require a per se rule of unconstitutionality.

[2c] It might also be argued that adoption of a rule of absolute immunity for interstate commerce (a rule that would, of course, go beyond Spector) would relieve this Court of difficult judgments that on occasion will have to be made. We believe, however, that administrative convenience, in this instance, is insufficient justification for abandoning the principle that "interstate commerce may be made to pay its way."

[435 US 734]

DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON, Petitioner,

v

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES et al.

435 US 734, 55 L Ed 2d 682, 98 S Ct 1388

[No. 76–1706]

Argued January 16–17, 1978. Decided April 26, 1978.

**SUMMARY**

An association of private stevedoring companies and a corporation consisting of port authorities that engaged in stevedoring activities instituted an action against the Department of Revenue of the State of Washington in the Superior Court of Thurston County, Washington, seeking a declaratory judgment to the effect that Washington's application of its business and occupation tax to the gross income from in-state stevedoring activities in loading and unloading ships' cargo, including imports, exports, and other goods, violated the commerce clause (Art I, § 8, cl 3) and the import-export clause (Art I, § 10, cl 2) of the Federal Constitution. The Superior Court issued a declaratory judgment that the tax was invalid to the extent it related to stevedoring in interstate or foreign commerce, the court holding that notwithstanding later decisions of the United States Supreme Court under the commerce clause, the case in bar was controlled by the decision in Puget Sound Stevedoring Co. v Tax Commission (1937) 302 US 90, 82 L Ed 68, 58 S Ct 72, which had invalidated the Washington tax as applied to stevedoring because it applied directly to interstate commerce, and by the decision in Joseph v Carter & W. Stevedoring Co. (1947) 330 US 422, 91 L Ed 993, 67 S Ct 815, which reaffirmed the rule of the Puget Sound case. Upon certification for direct appeal, the Supreme Court of Washington affirmed (88 Wash 2d 315, 559 P2d 997).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by BLACKMUN, J., joined by BURGER, Ch. J., and STEWART, WHITE, MARSHALL, REHNQUIST, and STEVENS, JJ., and joined in pertinent part by POWELL, J., it was held (1) overruling the Puget Sound and Joseph cases, supra, that a state tax was not invalid under the commerce clause

Briefs of Counsel, p 964, infra.

merely because it was imposed directly on the privilege of conducting interstate business; (2) that application of the Washington tax to in-state stevedoring activities did not violate the commerce clause, since (a) the stevedoring activities were conducted entirely within the state, there thus being an obvious nexus between the activities and the state, (b) the tax was fairly apportioned by being levied solely on the value of the loading and unloading that occurred in the state, (c) the tax rate applied generally to all businesses rendering services, there thus being no discrimination against interstate commerce, and (d) there had been no showing that the tax was not fairly related to services and protection provided by the state; and (3) that the Washington tax, as applied to in-state stevedoring activities, was not an "impost or duty" and thus did not violate the import-export clause, since none of the policies of the clause were threatened because (a) the tax, as a general business tax that applied to virtually all businesses in the state, did not create any special protective tariff and was assessed only upon business conducted entirely within the state, thus not impeding the federal government's power to conduct foreign policy and regulate foreign trade, (b) the tax merely compensated the state for services and protection extended to the stevedoring business, thus not depriving the federal government of any substantial import revenues, (c) the tax was imposed on a taxpayer with reasonable nexus to the state, was properly apportioned, did not discriminate, and related reasonably to services provided by the state, thus not violating the import-export clause's policy of preventing rivalry and friction among the states, and (d) even though the taxed activity occurred while imports and exports were still in transit, nevertheless the tax fell only on the business of loading and unloading ships, not on the goods themselves.

POWELL, J., concurring in part and concurring in the result, expressed the view that with regard to the validity under the import-export clause of state levies relating to goods in transit through the state, the inquiry should not be whether the tax related to the value of the goods or to their handling, but instead should be whether the state was simply making the imported goods pay their own way, as opposed to exacting a fee merely for the privilege of moving through the state.

BRENNAN, J., did not participate.

## HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

**Commerce §§ 43(3), 338 — income from stevedoring activities — state taxation**

1a–1d. The application of a state's business and occupation tax to the gross income from in-state stevedoring activities in loading and unloading ships' cargo does not violate the commerce clause of the Federal Constitution (Art I, § 8, cl 3), even though the activities are part of interstate or foreign commerce and the state tax thus imposes a direct tax on the privilege of engaging in interstate commerce, where (1) the stevedoring activities were conducted entirely within the state, there thus being an obvious nexus between the activities and the state, (2) the tax was fairly apportioned by being levied solely on the value of the loading and unloading that occurred in the state, (3) the tax rate applied generally to all businesses rendering services, there thus being no discrimination against interstate commerce, and (4) there was no showing that the tax was not fairly related to services and protection provided by the state.

**Commerce § 350 — import-export clause — tax on income from stevedoring activities**

2a–2d. A state's business and occupation tax, as applied to the gross income from in-state stevedoring activities in loading and unloading ships' cargo, including imports, exports, and other goods, is not an "impost or duty" and thus does not violate the import-export clause of the Federal Constitution (Art I, § 10, cl 2), which bars states from imposing imposts or duties on imports and exports, where none of the policies of the

### TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

71 Am Jur 2d, State and Local Taxation §§ 117–121, 244–253, 421, 422, 459

22 Am Jur Pl & Pr Forms (Rev), State and Local Taxation, Form 416

USCS, Constitution, Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2

US L Ed Digest, Commerce §§ 338, 350

ALR Digests, Commerce §§ 110, 137

L Ed Index to Annos, Commerce; Duties

ALR Quick Index, Commerce; Duties; Import-Export Clause; Taxes

Federal Quick Index, Commerce; Imports and Exports; Taxation

### ANNOTATION REFERENCES

Effect on state and local taxes of the import-export clause in Article I, § 10, clause 2 of the Federal Constitution. 46 L Ed 2d 955.

Validity, under commerce clause of Federal Constitution, of state gross receipts or income taxes involving interstate transactions. 34 L Ed 2d 749.

Property destined for, or in course of, removal from state as subject to taxation therein. 11 ALR2d 938.

clause were threatened since (1) the tax, as a general business tax that applied to virtually all businesses in the state, did not create any special protective tariff and was assessed only upon business conducted entirely within the state, thus not impeding the federal government's power to conduct foreign policy and regulate foreign trade, (2) the tax merely compensated the state for services and protection extended by the state to the stevedoring business, thus not depriving the federal government of any substantial import revenues, (3) the tax was imposed on a taxpayer with reasonable nexus to the state, was properly apportioned to in-state activities, did not discriminate, and related reasonably to services provided by the state, thus not violating the import-export clause's policy of preventing rivalry and friction among the states, and (4) even though the taxed activity occurred while imports and exports were still in transit, nevertheless the tax fell only on the business of loading and unloading ships, not on the goods themselves.

**Commerce § 249 — validity of state tax**

3. Under appropriate conditions, a state may tax directly the privilege of conducting interstate business without violating the commerce clause of the Federal Constitution (Art I, § 8, cl 3).

**Commerce §§ 245, 246 — validity of state tax — apportionment — multiple taxation**

4. When a state's general business tax levies only on the value of services performed within the state, the tax is properly apportioned for purposes of the commerce clause of the Federal Constitution (Art I, § 8, cl 3), and multiple taxation by other states cannot occur.

**Commerce §§ 237, 246 — validity of state tax — cost of state government**

5. Since a state has a significant interest in exacting from interstate commerce its fair share of the cost of state government, all state tax burdens do not impermissibly impede interstate commerce in violation of the commerce clause of the Federal Constitution (Art I, § 8, cl 3); the commerce clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity.

**Commerce § 96; Courts § 116 — commerce clause — state legislation — Supreme Court decision**

6. Even if a decision of the United States Supreme Court effects an important change in commerce clause jurisprudence, nevertheless it does not offend the separation of powers principle because it does not restrict the ability of Congress to regulate commerce; the prohibitive effect on state legislation of the commerce clause (Art I, § 8, cl 3)—which does not state a prohibition but merely grants specific power to Congress—results from the supremacy clause (Art VI, cl 2) and the decisions of the Supreme Court.

**Commerce § 246 — state tax — apportionment to intrastate activities**

7a, 7b. State taxes relating to interstate commerce that are not apportioned to activities conducted within the state are vulnerable to attack under the commerce clause of the Federal Constitution (Art I, § 8, cl 3).

**Commerce §§ 237, 244, 246 — validity of state tax**

8. Interstate commerce must bear its fair share of the state tax burden; state taxes are not invalid under the commerce clause of the Federal Constitution (Art I, § 8, cl 3) if they (1) are applied to activity with substantial nexus with the state, (2) are fairly apportioned, (3) do not discriminate against interstate commerce, and (4) are fairly related to the services provided by the state.

**Commerce §§ 144, 237, 346 — commerce clause — import-export clause**

9. The commerce clause of the Federal Constitution (Art I, § 8, cl 3) touches all state taxation and regulation of interstate and foreign commerce, whereas the

import-export clause (Art I, § 10, cl 2) bans only state imposts or duties on imports or exports.

**Commerce § 345 — import-export clause — policy**

10. The policy of the import-export clause of the Federal Constitution (Art I, § 10, cl 2)—which generally bars states from imposing imposts or duties on imports or exports—of preventing rivalry and friction among the states is vindicated if a state tax falls upon a taxpayer with reasonable nexus to the state, is properly apportioned, does not discriminate, and relates reasonably to services provided by the state.

**Commerce § 345 — import-export clause — tax relating to goods in transit**

11. A state tax relating to goods in transit is not an "impost or duty" prohibited by the import-export clause of the Federal Constitution (Art I, § 10, cl 2) if the tax offends none of the policies behind the clause, at least where the taxation falls upon a service distinct from the goods and their value.

**Commerce § 345 — import-export clause — tax relating to exports**

12. With regard to the import-export clause of the Federal Constitution (Art I, § 10, cl 2), which generally bars states from imposing imposts or duties on imports or exports, a state tax relating to exports is to be tested for its conformance with the clause's policies of precluding state disruption of the United States' foreign policy and avoiding friction and trade barriers among the states; if such constitutional interests are not disturbed, the tax is not to be considered an "impost or duty."

**Commerce § 346 — import-export clause — "imposts or duties"**

13. Under the import-export clause of the Federal Constitution (Art I, § 10, cl 2), which bars states from imposing "imposts or duties" on imports or exports, the term "impost or duty" is not self-defining and does not necessarily encompass all taxes; the absolute ban is only of "imposts or duties" and not of all taxes.

**Commerce §§ 350, 357 — import-export clause — tax on income from stevedoring activities**

14. The application of a state's business and occupation tax to the gross income from in-state stevedoring activities in loading and unloading ships' cargo, including imports, does not violate the import-export clause of the Federal Constitution (Art I, § 10, cl 2) merely because the tax relates to imports themselves while they remain a part of commerce, since the test of the validity of the tax is whether it is an "impost or duty" that offends constitutional policies protected by the clause, not whether the goods have retained or lost their status as imports under the rejected "original package" analysis.

**Commerce § 350 — import-export clause — taxation of income from stevedoring activities**

15. A state's business and occupation tax, as applied to the gross income from in-state stevedoring activities in loading and unloading ships' cargo, including imports and exports, is not invalid under the import-export clause of the Federal Constitution (Art I, § 10, cl 2) on the ground that it imposes a transit fee upon inland consumers in other states, since the import-export clause's policy of preventing interstate tariffs, rivalries, and friction is not violated when commerce is required to pay for state governmental services it enjoys, and since requiring coastal states to subsidize the commerce of inland consumers might exacerbate rather than diminish interstate rivalries and hostility; fair taxation is assured under the import-export clause by the prohibition on discrimination and the requirements of apportionment, nexus, and reasonable relationship between tax and benefits.

# WASHINGTON REV. DEPT. v STEVEDORING ASSN.

435 US 734, 55 L Ed 2d 682, 98 S Ct 1388

## SYLLABUS BY REPORTER OF DECISIONS

1. The State of Washington's business and occupation tax does not violate the Commerce Clause by taxing the interstate commerce activity of stevedoring within the State. Complete Auto Transit, Inc. v Brady, 430 US 274, 51 L Ed 2d 326, 97 S Ct 1076, followed; Puget Sound Stevedoring Co. v State Tax Comm'n, 302 US 90, 82 L Ed 68, 58 S Ct 72, and Joseph v Carter & Weekes Stevedoring Co. 330 US 422, 91 L Ed 993, 67 S Ct 815, overruled.

(a) A State under appropriate conditions may tax directly the privilege of conducting interstate business. Complete Auto Transit, Inc. v Brady, supra.

(b) When a general business tax levies only on the value of services performed within the State, the tax is properly apportioned and multiple burdens on interstate commerce cannot occur.

(c) All state tax burdens do not impermissibly impede interstate commerce, and the Commerce Clause balance tips against the state tax only when it unfairly burdens commerce by exacting from the interstate activity more than its just share of the cost of state government.

(d) State taxes are valid under the Commerce Clause, where they are applied to activity having a substantial nexus with the State, are fairly apportioned, do not discriminate against interstate commerce, and are fairly related to the services provided by the State; and here the Washington tax in question meets this standard, since the stevedoring operations are entirely conducted within the State, the tax is levied solely on the value of the loading and unloading occurring in the State, the tax rate is applied to stevedoring as well as generally to businesses rendering services, and there is nothing in the record to show that the tax is not fairly related to services and protection provided by the State.

2. Nor is the Washington business and occupation tax, as applied to stevedoring so as to reach services provided wholly within the State to imports, exports, and other goods, among the "Imposts or Duties" prohibited by the Import-Export Clause. Michelin Tire Corp. v Wages, 423 US 276, 46 L Ed 2d 495, 96 S Ct 535.

(a) The application of the tax to stevedoring threatens none of the Import-Export Clause's policies of precluding state disruption of United States foreign policy, protecting federal revenues, and avoiding friction and trade barriers among the States. The tax as so applied does not restrain the Federal Government's ability to conduct foreign policy. Its effect on federal import revenue is merely to compensate the State for services and protection extended to the stevedoring business. The policy against interstate friction and rivalry is vindicated, as is the Commerce Clause's similar policy, if the tax falls upon a taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State.

(b) While, as distinguished from Michelin Tire Corp. v Wages, supra, where the goods taxed were no longer in transit, the activity taxed here occurs while imports and exports are in transit, nevertheless the tax does not fall on the goods themselves but reaches only the business of loading and unloading ships, i.e., the business of transporting cargo, within the State, and hence the tax is not a prohibited "Impost or Duty" when it violates none of the policies of the Import-Export Clause.

(c) While here the stevedores load and unload imports and exports, whereas in Michelin Tire Corp. v Wages, supra, the state tax in question touched only imports, nevertheless the Michelin approach of analyzing the nature of the tax to determine whether it is a prohibited "Impost or Duty" should apply to taxation involving exports as well as imports. Any tax relating to exports can be tested for its conformity to the Import-Export Clause's policies of precluding state disruption of United States foreign policy and avoiding friction and trade barriers among the States, al-

though the tax does not serve the Clause's policy of protecting federal revenues in view of the fact that the Constitution forbids federal taxation of exports.

(d) The Import-Export Clause does not effect an absolute ban on all state taxation of imports and exports, but only on "Imposts or Duties."

(e) To say that the Washington tax violates the Import-Export Clause because it taxes the imports themselves while they remain a part of commerce, would be to resurrect the now rejected "original package" analysis whereby goods enjoyed immunity from state taxation as long as they retained their status as imports by remaining in their import packages.

(f) The Washington tax is not invalid under the Import-Export Clause as constituting the imposition of a transit fee upon inland customers, since, as is the case in Commerce Clause jurisprudence, interstate friction will not chafe when commerce pays for the state services it enjoys. Fair taxation will be assured by the prohibition on discrimination and the requirements of apportionment, nexus, and reasonable relationship between tax and benefits.

88 Wash 2d 315, 559 P2d 997, reversed and remanded.

Blackmun, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, White, Marshall, Rehnquist, and Stevens, JJ., joined, and in all but Part III-B of which Powell, J., joined. Powell, J., filed an opinion concurring in part and concurring in the result. Brennan, J., took no part in the consideration or decision of the case.

APPEARANCES OF COUNSEL

**Slade Gorton** argued the cause for petitioner.

**John T. Piper** argued the cause for respondents.

Briefs of Counsel, p 964, infra.

OPINION OF THE COURT

Mr. Justice **Blackmun** delivered the opinion of the Court.

**[1a, 2a]** For the second time in this century, the State of Washington would apply its business and occupation tax to stevedoring. The State's first application of the tax to stevedoring was unsuccessful, for it was held to be unconstitutional as violative of the Commerce Clause[1] of the United States Constitution. Puget Sound Stevedoring Co. v State Tax Comm'n, 302 US 90, 82 L Ed 68, 58 S Ct 72 (1937). The Court now faces the question whether Washington's second attempt violates either the Commerce Clause or the Import-Export Clause.[2]

[435 US 737]

I

Stevedoring is the business of loading and unloading cargo from ships.[3] Private stevedoring compa-

1. "The Congress shall have Power . . .

. . . . . .

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. Const, Art I, § 8, cl 3.

2. "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress." U.S. Const, Art I, § 10, cl 2.

3. The record does not contain a precise definition or description of the business of stevedoring or of the activities of respondents and their respective members. By admitting the factual allegations in the respondents' Petition for Declaratory Judgment on Validity of Rule, App 3-7, petitioner Department of

nies constitute respondent Association of Washington Stevedoring Companies; respondent Washington Public Ports Association is a nonprofit corporation consisting of port authorities that engage in stevedoring activities. App 3. In 1974 petitioner Department of Revenue of the State of Washington adopted Revised Rule 193, pt D, Wash Admin Code 458-20-193-D, to implement the State's 1% business and occupation tax on

[435 US 738]

services, set forth in Wash Rev Code §§ 82.04.220 and 82.04.290 (1976).[4] The Rule applies the tax to stevedoring and reads in pertinent part as set forth in the margin.[5]

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Revenue accepted paragraph VI of that petition. That paragraph alleged that the private companies that constitute respondent Association of Washington Stevedoring Companies "are engaged in the same stevedoring activities that were held not taxable in Puget Sound Stevedoring Co." This Court explained the activities of the appellant Stevedoring Company in Puget Sound as follows:

"What was done by this appellant in the business of loading and unloading was not prolonged beyond the stage of transportation and its reasonable incidents. . . . True, the service did not begin or end at the ship's side, where the cargo is placed upon a sling attached to the ship's tackle. It took in the work of carriage to and from the 'first place of rest,' which means that it covered the space between the hold of the vessel and a convenient point of discharge upon the dock. . . . The fact is stipulated, however, that no matter by whom the work is done or paid for, 'stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the "first place of rest," and vice versa.' " 302 US, at 93, 82 L Ed 68, 58 S Ct 72.

4. Section 82.04.220 reads:

"There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be."

Section 82.04.290 reads in pertinent part:

"Upon every person engaging within this state in any business activity other than or in addition to those enumerated in . . . ; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one percent. This section includes, among others, and without limiting the scope hereof . . . , persons engaged in the business of rendering any type of service which does not constitute a 'sale at retail' or a 'sale at wholesale.' "

We note, also, that § 82.04.460 reads in part:

"Any person rendering services taxable under RCW 82.04.290 and maintaining places of business both within and without this state which contribute to the rendition of such services shall, for the purpose of computing tax liability under RCW 82.04.290, apportion to this state that portion of his gross income which is derived from services rendered within this state."

A temporary additional tax of 6% of the base tax is now imposed for the period from June 1, 1976, through June 30, 1979. 1977 Wash Laws, 1st Ex Sess, ch 324, § 1, and 1975–1976 Wash Laws, 2d Ex Sess, ch 130, § 3, codified as Wash Rev Code § 82.04.2901 (Supp 1977).

5. "In computing tax there may be deducted from gross income the amount thereof derived as compensation for performance of services which in themselves constitute interstate or foreign commerce to the extent that a tax measured thereby constitutes an impermissible burden upon such commerce. A tax does not constitute an impermissible burden upon interstate or foreign commerce unless the tax discriminates against that commerce by placing a burden thereon that is not borne by intrastate commerce, or unless the tax subjects the activity to the risk of repeated exactions of the same nature from other states. Transporting across the state's boundaries is exempt, whereas supplying such transporters with facilities, arranging accommodations, providing funds and the like, by which they engage in such commerce is taxable.

"EXAMPLES OF EXEMPT INCOME:

"1. Income from those activities which consist of the actual transportation of persons or property across the state's boundaries is exempt.

. . . . . .

"EXAMPLES OF TAXABLE INCOME:

. . . . . .

"3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable."

Revised Rule 193D restores the original scope of the Washington business and occupation tax. After initial imposition

[435 US 739]

of the tax in 1935,[6] the then State Tax Commission[7] adopted Rule 198 of the Rules and Regulations Relating to the Revenue Act of 1935.[8] That Rule permitted taxpayers to deduct certain income received from interstate and foreign commerce. Income from stevedoring, however, was not described as deductible. When, in 1937, this Court in Puget Sound invalidated the application of the tax to stevedoring, the Commission complied by adding stevedoring income to the list of

[435 US 740]

deductions.[9] The deduction for stevedoring remained in effect until the revision of Rule 193 in 1974.[10]

Seeking to retain their theretofore-enjoyed exemption from the tax, respondents in January 1975 sought from the Superior Court of Thurston County, Wash., a declaratory judgment to the effect that Revised Rule 193D violated both the Commerce Clause and the Import-Export Clause. They urged that the case was controlled by Puget Sound, which this Court had reaffirmed in Joseph v Carter & Weekes Stevedoring Co. 330 US 422, 433, 91 L Ed 993, 67 S Ct 815 (1947) (together, the Stevedoring Cases). Absent a clear invitation from this Court, respondents submitted that the Superior Court could not avoid the force of the Stevedoring Cases, which had never been overruled. Record 9.[11]

6. 1935 Wash Laws, ch 180.

7. The Tax Commission was abolished in 1967, and, with specified exceptions, its powers, duties, and functions were transferred to the Director of the Department of Revenue. 1967 Wash Laws, Ex Sess, ch 26, § 7.

8. Rule 198, as it was in effect in 1936 and 1937, that is, prior to the decision in Puget Sound, read in part:
"In computing the tax under the classification of 'Service and Other Business Activities' there may be deducted from gross income of the business the amount thereof derived as compensation for the performance of services which in themselves constitute foreign or interstate commerce to an extent that a tax measured by the compensation received therefrom constitutes a direct burden upon such commerce. Included in the above are those activities which involve the actual transportation of goods or commodities in foreign commerce or commerce between the states; the transmission of communications from a point within the state to a point outside the state and vice versa; the solicitation of freight for foreign or interstate shipment; and the selling of tickets for foreign and interstate passage accommodations." Rules and Regulations Relating to the Revenue Act of 1935, Rule 198, p 122 (1936); id., at 133 (1937).

9. Effective May 1, 1939, Rule 198 read in part:
"In computing the tax under the classification of 'Service and Other Business Activities' there may be deducted from gross income of the business the amount thereof derived as compensation for the performance of services which in themselves constitute foreign or interstate commerce to an extent that a tax measured by the compensation received therefrom constitutes a direct burden upon such commerce. Included in the above are . . . and the compensation received by a contracting stevedoring company for loading and unloading cargo from vessels where such cargo is moving in interstate or foreign commerce and where the work is actually directed and controlled by the stevedoring company . . . ." Id., at 137 (1939).

10. Rules and Regulations Relating to the Revenue Act of 1935, Rule 193, p 94 (1943), and id., Rule 193, p 123 (1970).

11. In a reply brief, respondents supported the continuing validity of the Stevedoring Cases. In particular, they argued:

"Final, and we think conclusive, proof of the continued vitality of the stevedoring cases lies in the language of Spector Motor Service, Inc. v O'Connor, 340 US 602, 95 L Ed 573, 71 S Ct 508 . . . (1951), decided *after* all four of the 'major' cases relied on by the State. We have previously noted that Spector struck down a tax on the activity of moving goods in interstate commerce." Record 69 (emphasis in original).

Petitioner replied that this Court had invited rejection

[435 US 741]

of those cases by casting doubt on the Commerce Clause analysis that distinguished between direct and indirect taxation of interstate commerce. Id., at 25–37, citing, e.g., Interstate Pipe Line Co. v Stone, 337 US 662, 93 L Ed 1613, 69 S Ct 1264 (1949); Western Live Stock v Bureau of Revenue, 303 US 250, 82 L Ed 823, 58 S Ct 546, 115 ALR 944 (1938). Petitioner also argued that the Rule did not violate the Commerce Clause because it taxed only intrastate activity, namely, the loading and unloading of ships, Record 17–20, and because it levied only a nondiscriminatory tax apportioned to the activity within the State. Id., at 20–22. The Rule did not impose any "Imposts or Duties on Imports or Exports" because it taxed merely the stevedoring services and not the goods themselves, id., at 22–25, citing Canton R. Co. v Rogan, 340 US 511, 95 L Ed 488, 71 S Ct 447, 20 ALR2d 145 (1951). The Superior Court, however, not surprisingly, considered itself bound by the Stevedoring Cases. It therefore issued a declaratory judgment that Rule 193D was invalid to the extent it related to stevedoring in interstate or foreign commerce. App 17-18.[12]

Petitioner appealed to the Washington Court of Appeals. Record 77. That court certified the case for direct appeal to the State's Supreme Court, citing Wash Rev Code § 2.06.030(c) (1976), and Wash Supreme Court Rule on Appeal I-14(1)(c) (now Rule 4.2(a)(2), Wash Rules of Court (1977)).

[435 US 742]

After accepting certification, the Supreme Court, with two justices dissenting, affirmed the judgment of the Superior Court. 88 Wash 2d 315, 559 P2d 997 (1977). The majority considered petitioner's argument that recent cases[13] had eroded the holdings in the Stevedoring Cases. It concluded, nonetheless:

> "[W]e must hold the tax invalid; we do so in recognition of our duty to abide by controlling United States Supreme Court decisions construing the federal constitution. Hence, we find it unnecessary to discuss the aforementioned

Spector was overruled last Term in Complete Auto Transit, Inc. v Brady, 430 US 274, 288–289, 51 L Ed 2d 326, 97 S Ct 1076 (1977), decided after respondents advanced the above argument.

12. In its oral decision the Superior Court noted its doubt about the continued validity of the Stevedoring Cases:
"It would seem to the Court . . . that there certainly is a swing away from the Puget Sound and Carter and Weekes cases . . . ." App 8. "It sticks in this Court's mind, however, that there has to be a reason, of which is beyond the ability of this Court to comprehend, that everyone has shied from the stevedoring cases, and many minds obviously more brilliant than mine have not been able to overturn those cases directly in thirty-eight years . . . ." Id., at 11. "Under those circumstances the Court does hold that the Puget Sound and Carter and Weekes cases are the law of the land, as exemplified by those decisions; that they have not been reversed by implication, nor has there been an invitation to anyone to reverse those cases." Id., at 13–14.

13. The court stated, 88 Wash 2d, at 318, 559 P2d, at 998, that petitioner had cited Michelin Tire Corp. v Wages, 423 US 276, 46 L Ed 2d 495, 96 S Ct 535 (1976); Colonial Pipeline Co. v Traigle, 421 US 100, 44 L Ed 2d 1, 95 S Ct 1538 (1975); Canton R. Co. v Rogan, 340 US 511, 95 L Ed 488, 71 S Ct 447, 20 ALR2d 145 (1951); Interstate Pipe Line Co. v Stone, 337 US 662, 93 L Ed 1613, 69 S Ct 1264 (1949); and Central Greyhound Lines, Inc. v Mealey, 334 US 653, 92 L Ed 1633, 68 S Ct 1260 (1948).

cases beyond the fact that nowhere in them do we find language criticizing, expressly contradicting, or overruling (even impliedly) the stevedoring cases.

. . . . .

"Fully mindful of our prior criticism of the principles and reasoning of the stevedore cases (see Washington-Oregon Shippers Cooperative Ass'n v Schumacher, 59 Wn 2d 159, 167, 367 P2d 112, 115–116 (1961)), we must nevertheless hold the instant tax on stevedoring invalid." 88 Wash 2d, at 318–320, 559 P2d, at 998–999.

The two dissenting justices would have upheld the tax against the Commerce Clause attack on the ground that recent cases had eroded the direct-indirect taxation analysis employed in the Stevedoring Cases. They found no violation of the Import-Export Clause because the State had taxed only the activity of stevedoring, not the imports or exports themselves. Even if stevedoring were considered part of interstate or foreign commerce, the Washington tax was valid because it did not discriminate against importing or exporting, did not impair transportation, did not impose multiple burdens, and did not

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regulate commerce. 88 Wash 2d, at 320–322, 559 P2d, at 999–1000.

Because of the possible impact on the issues made by our intervening decision in Complete Auto Transit, Inc. v Brady, 430 US 274, 51 L Ed 2d 326, 97 S Ct 1076 (1977), filed after the Washington Supreme Court's ruling, we granted certiorari. 434 US 815, 54 L Ed 2d 70, 98 S Ct 51 (1977).

## II

## The Commerce Clause

### A

In Puget Sound Stevedoring Co. v State Tax Comm'n, the Court invalidated the Washington business and occupation tax on stevedoring only because it applied directly to interstate commerce. Stevedoring was interstate commerce, according to the Court, because:

"Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work so indispensable is as much an agency of commerce as shipowner or master." 302 US, at 92, 82 L Ed 68, 58 S Ct 72.

Without further analysis, the Court concluded:

"The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling." Id., at 94, 82 L Ed 68, 58 S Ct 72.

The petitioners (officers of New York City) in Joseph v Carter & Weekes Stevedoring Co., urged the Court to overrule Puget Sound. They argued that intervening cases[14] had permitted

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local taxation

14. They cited, among others, four particular cases. The first was Department of Treasury v Wood Preserving Corp. 313 US 62, 85 L Ed 1188, 61 S Ct 885 (1941). In that case the Court sustained an Indiana tax on the gross receipts of a foreign corporation from purchase and resale of timber in Indiana. The transaction was considered local even though the timber was to be transported, after the resale, to Ohio for creosote treatment by the

of gross proceeds derived from interstate commerce. They concluded, therefore, that the Commerce Clause did not preclude the application to stevedoring of the New York City business tax on the gross receipts of a stevedoring corporation. The Court disagreed on the theory that the intervening cases permitted taxation only of local activity separate and distinct from interstate commerce. 330 US, at 430–433, 91 L Ed 993, 67 S Ct 815. This separation theory was necessary, said the Court, because it served to diminish the threat of multiple taxation on commerce; if the tax actually fell on intrastate activity, there was less likelihood that other taxing jurisdictions could duplicate the levy. Id., at 429, 91 L Ed 993, 67 S Ct 815. Stevedoring, however, was not separated from interstate commerce because, as previously enunciated in Puget Sound, it *was* interstate commerce:

> "Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company. 'What makes the

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> tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.' Freeman v Hewit, [329 US 249,] 256, [91 L Ed 265, 67 S Ct 274]." 330 US, at 433, 91 L Ed 993, 67 S Ct 815.

Because the tax in the present case is indistinguishable from the taxes at issue in Puget Sound and in Carter & Weekes, the Stevedoring Cases control today's decision on the Commerce Clause issue unless more recent precedent and a new analysis require rejection of their reasoning.

**[1b, 3]** We conclude that Complete Auto Transit, Inc. v Brady, where the Court held that a State under appropriate conditions may tax directly the privilege of conducting interstate business, requires such rejection. In Complete Auto, Mississippi levied a gross-receipts tax on the privilege of doing business within the State. It applied the tax to the appellant, a Michigan corporation transporting motor vehicles manufactured outside Mississippi. After the vehicles were shipped into Mississippi by railroad, the appellant moved them by truck to Mississippi dealers. This Court assumed that appellant's activity was

foreign corporation. The second case was McGoldrick v Berwind-White Co. 309 US 33, 84 L Ed 565, 60 S Ct 388, 22 Ohio Ops 84, 128 ALR 876 (1940). There a Pennsylvania corporation sold coal to New York City consumers through a city sales office. Even though the coal was shipped from Pennsylvania, the Court permitted the city to tax the sale because the tax was conditioned on local activity, that is, the delivery of goods within New York upon their purchase in New York for consumption in New York. The third case was Southern Pacific Co. v Gallagher, 306 US 167, 83 L Ed 586, 59 S Ct 389 (1939). There California was permitted to impose a tax on storage and use with respect to the retention and ownership of goods brought into the State by an interstate railroad for its own use. The fourth was Western Live Stock v Bureau of Revenue, 303 US 250, 82 L Ed 823, 58 S Ct 546, 115 ALR 944 (1938). There the Court upheld a New Mexico privilege tax upon the gross receipts from the sale of advertising. It concluded that the business was local even though a magazine with interstate circulation and advertising was published.

in interstate commerce. 430 US, at 276 n 4, 91 L Ed 265, 67 S Ct 274.

The Mississippi tax survived the Commerce Clause attack. Absolute immunity from state tax did not exist for interstate businesses because it "'"was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business."'" Id., at 288, 91 L Ed 265, 67 S Ct 274, quoting Western Live Stock v Bureau of Revenue, 303 US, at 254, 82 L Ed 823, 58 S Ct 546, 115 ALR 944, and Colonial Pipeline Co. v Traigle, 421 US 100, 108, 44 L Ed 2d 1, 95 S Ct 1538 (1975). The Court therefore specifically overruled Spector Motor Service, Inc. v O'Connor, 340 US 602, 95 L Ed 573, 71 S Ct 508 (1951), where a direct gross-receipts tax on the privilege of engaging in interstate commerce had been invalidated. 430 US, at 288–289, 51 L Ed 2d 326, 97 S Ct 1076.

The principles of Complete Auto also lead us now to question the underpinnings of the Stevedoring Cases. First, Puget Sound invalidated the Washington tax on stevedoring activity only because it burdened the privilege of engaging in interstate

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commerce. Because Complete Auto permits a State properly to tax the privilege of engaging in interstate commerce, the basis for the holding in Puget Sound is removed completely.[15]

Second, Carter & Weekes supported its reaffirmance of Puget Sound by arguing that a direct privilege tax would threaten multiple burdens on interstate commerce to a greater extent than would taxes on local activity connected to commerce. But Complete Auto recognized that errors of apportionment that may lead to multiple burdens may be corrected when they occur. 430 US, at 288–289, n 15, 51 L Ed 2d 326, 97 S Ct 1076.[16]

[4] The argument of Carter & Weekes was an abstraction. No multiple burdens were demonstrated.

15. That the holding in Spector parallels that in Puget Sound is demonstrated by the authorities relied upon or provided by both cases in the past. Spector relied on Carter & Weekes, which reaffirmed Puget Sound, and upon Freeman v Hewit, 329 US 249, 91 L Ed 265, 67 S Ct 274 (1946). 340 US, at 609, 95 L Ed 573, 71 S Ct 508. Freeman, in turn, relied upon Puget Sound, 329 US, at 257, 91 L Ed 265, 67 S Ct 274, and Carter & Weekes relied upon Freeman, 330 US, at 433, 91 L Ed 993, 67 S Ct 815. Both Freeman and Puget Sound relied upon Galveston, H. & S. A. R. Co. v Texas, 210 US 217, 52 L Ed 1031, 28 S Ct 638 (1908). 329 US, at 257, 91 L Ed 265, 67 S Ct 274; 302 US, at 94, 82 L Ed 68, 58 S Ct 72.

Respondents, also, have observed the parallel between Spector and the Stevedoring Cases. In their reply brief to the Superior Court, they argued that Spector, which had not then been overruled by Complete Auto, was dispositive on the question of the continued vitality of Puget Sound and Carter & Weekes. See n 11, supra.

16. Subsequent to Carter & Weekes, the Court explained more precisely its concern about multiple burdens on interstate commerce:

"While the economic wisdom of state net income taxes is one of state policy not for our decision, one of the 'realities' raised by the parties is the possibility of a multiple burden resulting from the exactions in question. The answer is that none is shown to exist here. . . . Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. . . . We cannot deal in abstractions. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do." Northwestern Cement Co. v Minnesota, 358 US 450, 462–463, 3 L Ed 2d 421, 79 S Ct 357, 67 ALR2d 1292 (1959).

When a general business tax levies only on the value of services performed within the State, the tax is properly apportioned and multiple burdens

[435 US 747]

logically cannot occur.[17] The reasoning of Carter & Weekes, therefore, no longer supports automatic tax immunity for stevedoring from a levy such as the Washington business and occupation tax.

Third, Carter & Weekes reaffirmed Puget Sound on a basis rejected by Complete Auto and previous cases. Carter & Weekes considered *any* direct tax on interstate commerce to be unconstitutional because it burdened or interfered with commerce. 330 US, at 433, 91 L Ed 993, 67 S Ct 815. In support of that conclusion, the Court there cited only Southern Pacific Co. v Arizona ex rel. Sullivan, 325 US 761, 767 89 L Ed 1915, 67 S Ct 1515 (1945), the case where Arizona's limitations on the length of trains were invalidated. In Southern Pacific, however, the Court had not struck down the legislation merely because it burdened interstate commerce. Instead, it weighed the burden against the State's interests in limiting the size of trains:

> "The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free . . . ." Id., at 775–776, 89 L Ed 1915, 65 S Ct 1515.

Only after concluding that railroad safety was not advanced by the regulations, did the Court invalidate them. They contravened the Commerce Clause because the burden on interstate commerce outweighed the State's interests.

[435 US 748]

[5] Although the balancing of safety interests naturally differs from the balancing of state financial needs, Complete Auto recognized that a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government. 430 US, at 288, 51 L Ed 2d 326, 97 S Ct 1076. Accord, Colonial Pipeline Co. v Traigle, 421 US, at 108, 44 L Ed 2d 1, 95 S Ct 1538; Western Live Stock v Bureau of Revenue, 303 US, at 254, 82 L Ed 823, 58 S Ct 546, 115 ALR 944. All tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity. Again, then, the analysis of Carter & Weekes must be rejected.

B

Respondents' additional arguments do not demonstrate the wisdom of, or need for, preserving the Stevedoring Cases. First, respondents attempt to distinguish so-

17. Carter & Weekes has received criticism from commentators for its reliance on the possibility of the imposition of multiple tax burdens. Professor Hartman argued that the burden on interstate commerce imposed by a privilege tax "is multiple only because the elements of transportation itself are multiple." P. Hartman, State Taxation of Interstate Commerce 204 (1953). Because the loading or unloading of a ship is confined to one State, no other State could tax that particular phase of commerce. "Thus, the Court's basis for the unconstitutionality of the Weekes tax assumed the existence of a premise which did not exist, except in the mind of a majority of the Justices." Id., at 205. See Hellerstein, State Taxation Under the Commerce Clause: An Historical Perspective, 29 Vand L Rev 335 (1976).

called movement cases, in which tax immunity has been broad, from nonmovement cases, in which the immunity traditionally has been narrower. Brief for Respondents 23–28. Movement cases involve taxation on transport, such as the Texas tax on a natural gas pipeline in Michigan-Wisconsin Pipe Line Co. v Calvert, 347 US 157, 98 L Ed 583, 74 S Ct 396 (1954). Nonmovement cases involve taxation on commerce that does not move goods, such as the New Mexico tax on publishing newspapers and magazines in Western Live Stock v Bureau of Revenue. This distinction, however, disregards Complete Auto, a movement case which held that a state privilege tax on the business of moving goods in interstate commerce is not per se unconstitutional.

Second, respondents would distinguish Complete Auto on the ground that it concerned only intrastate commerce, that is, the movement of vehicles from a Mississippi railhead to Mississippi dealers. Brief for Respondents 26–28. This purported distinction ignores two facts. In Complete Auto, we expressly assumed that the activity was interstate, a segment of the movement of vehicles from the out-of-state manufacturer
[435 US 749]
to the in-state dealers. 430 US, at 276 n 4, 51 L Ed 2d 326, 97 S Ct 1076. Moreover, the stevedoring activity of respondents occurs completely within the State of Washington, even though the activity is a part of interstate or foreign commerce. The situation was the same in Complete Auto, and that case, thus, is not distinguishable from the present one.

**[6, 7a]** Third, respondents suggest that what they regard as such an important change in Commerce Clause jurisprudence should come from Congress and not from this Court. To begin with, our rejection of the Stevedoring Cases does not effect a significant present change in the law. The primary alteration occurred in Complete Auto. Even if this case did effect an important change, it would not offend the separation-of-powers principle because it does not restrict the ability of Congress to regulate commerce. The Commerce Clause does not state a prohibition; it merely grants specific power to Congress. The prohibitive effect of the Clause on state legislation results from the Supremacy Clause and the decisions of this Court. See, e.g., Cooley v Board of Wardens, 12 How 299, 13 L Ed 996 (1852); Gibbons v Ogden, 9 Wheat 1, 6 L Ed 23 (1824). If Congress prefers less disruption of interstate commerce, it will act.[18]

**[1c]** Consistent with Complete Auto, then, we hold that the Wash-

18. **[7b]** Respondents seem to be particularly concerned about the continued validity of Michigan-Wisconsin Pipe Line Co. v Calvert, 347 US 157, 98 L Ed 583, 74 S Ct 396 (1954). There, Texas levied a tax on the production of natural gas measured by the entire volume of gas to be shipped in interstate commerce. A refinery extracted the gas from crude oil and transported it 300 yards to the pipeline. The State identified, as a local incident, the transfer of gas from the refinery to the pipeline. This Court declared the tax unconstitutional because it amounted to an unapportioned levy on the transportation of the entire volume of gas. The exaction did not relate to the length of the Texas portion of the pipeline or to the percentage of the taxpayer's business taking place in Texas. Today's decision does not question the Michigan-Wisconsin judgment, because Washington apportions its business and occupation tax to activity within the State. Taxes that are not so apportioned remain vulnerable to Commerce Clause attack.

ington business and occupation tax does not violate the

[435 US 750]

Commerce CLause by taxing the interstate commerce activity of stevedoring. To the extent that Puget Sound Stevedoring Co. v State Tax Comm'n and Joseph v Carter & Weekes Stevedoring Co. stand to the contrary, each is overruled.

C

[8] With the distinction between direct and indirect taxation of interstate commerce thus discarded, the constitutionality under the Commerce Clause of the application of the Washington business and occupation tax to stevedoring depends upon the practical effect of the exaction. As was recognized in Western Live Stock v Bureau of Revenue, 303 US 250, 82 Ed 823, 58 S Ct 546, 115 ALR 944 (1938), interstate commerce must bear its fair share of the state tax burden. The Court repeatedly has sustained taxes that are applied to activity with a substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State. E. g., General Motors Corp. v Washington, 377 US 436, 12 L Ed 2d 430, 84 S Ct 1564 (1964); Northwestern Cement Co. v Minnesota, 358 US 450, 3 L Ed 2d 421, 79 S Ct 357, 67 ALR2d 1292 (1959); Memphis Gas Co. v Stone, 335 US 80, 92 L Ed 1832, 68 S Ct 1475 (1948); Wisconsin v J. C. Penney Co. 311 US 435, 85 L Ed 267, 61 S Ct 246, 130 ALR 1229 (1940); see Complete Auto Transit, Inc. v Brady, 430 US, at 279, and n 8, 51 L Ed 2d 326, 97 S Ct 1076.

[1d] Respondents proved no facts in the Superior Court that, under the above test, would justify invalidation of the Washington tax. The record contains nothing that minimizes the obvious nexus between Washington and respondents; indeed, respondents conduct their entire stevedoring operations within the State. Nor have respondents successfully attacked the apportionment of the Washington system. The tax under challenge was levied solely on the value of the loading and unloading that occurred in Washington. Although the rate of taxation varies with the type of business activity, respondents have not demonstrated how the 1% rate, which applies to them and generally to businesses rendering services, discriminates against interstate commerce. Finally, nothing in the

[435 US 751]

record suggests that the tax is not fairly related to services and protection provided by the State. In short, because respondents relied below on the per se approach of Puget Sound and Carter & Weekes, they developed no factual basis on which to declare the Washington tax unconstitutional as applied to their members and their stevedoring activities.

III

The Import-Export Clause

[9] Having decided that the Commerce Clause does not per se invalidate the application of the Washington tax to stevedoring, we must face the question whether the tax contravenes the Import-Export Clause. Although the parties dispute the meaning of the prohibition of "Imposts or Duties on Imports or Exports," they agree that it differs from the ban the Commerce Clause erects against burdens and taxation on interstate commerce. Brief for Petitioner 32–33; Brief for Respondents 9–10; Tr of Oral Arg 13, 22. The Court has

noted before that the Import-Export Clause states an absolute ban, whereas the Commerce Clause merely grants power to Congress. Richfield Oil Corp. v State Board, 329 US 69, 75, 91 L Ed 80, 67 S Ct 156 (1946). On the other hand, the Commerce Clause touches all state taxation and regulation of interstate and foreign commerce, whereas the Import-Export Clause bans only "Imposts or Duties on Imports or Exports." Michelin Tire Corp. v Wages, 423 US 276, 279, 290–294, 46 L Ed 2d 495, 96 S Ct 535 (1976). The resolution of the Commerce Clause issue, therefore, does not dispose of the Import-Export Clause question.

A

In Michelin the Court upheld the application of a general ad valorem property tax to imported tires and tubes. The Court surveyed the history and purposes of the Import-Export Clause to determine, for the first time, which taxes fell within the absolute ban on "Imposts or Duties." Id., at 283–286, 46 L Ed 2d 495, 96 S Ct 535.

[435 US 752]

Previous cases had assumed that all taxes on imports and exports and on the importing and exporting processes were banned by the Clause. See, e.g., Department of Revenue v James B. Beam Distilling Co. 377 US 341, 343, 12 L Ed 2d 362, 84 S Ct 1247 (1964); Richfield Oil Corp. v State Board, 329 US, at 76, 91 L Ed 80, 67 S Ct 156; Joseph v Carter & Weekes Stevedoring Co. 330 US, at 445, 91 L Ed 993, 67 S Ct 815 (Douglas, J., dissenting in part); Anglo-Chilean Corp. v Alabama, 288 US 218, 226–227, 77 L Ed 710, 53 S Ct 373 (1933); License Cases, 5 How 504, 575–576, 12 L Ed 256 (1847) (opinion of Taney, C. J.). Before Michelin, the primary consideration was whether the tax under review reached imports or exports. With respect to imports, the analysis applied the original package doctrine of Brown v Maryland, 12 Wheat 419, 6 L Ed 678 (1827); see, e. g., Department of Revenue v James B. Beam Distilling Co.; Anglo-Chilean Corp. v Alabama; Low v Austin, 13 Wall 29, 20 L Ed 517 (1872), overruled in Michelin Tire Corp. v Wages. So long as the goods retained their status as imports by remaining in their import packages, they enjoyed immunity from state taxation. With respect to exports, the dispositive question was whether the goods had entered the "export stream," the final, continuous journey out of the country. Kosydar v National Cash Register Co. 417 US 62, 70–71, 40 L Ed 2d 660, 94 S Ct 2108, 69 Ohio Ops 2d 120 (1974); Empresa Siderurgica v County of Merced, 337 US 154, 157, 93 L Ed 1276, 69 S Ct 995 (1949); A. G. Spalding & Bros. v Edwards, 262 US 66, 69, 67 L Ed 865, 43 S Ct 485 (1923); Coe v Errol, 116 US 517, 526, 527, 29 L Ed 715, 6 S Ct 475 (1886). As soon as the journey began, tax immunity attached.

Michelin initiated a different approach to Import-Export Clause cases. It ignored the simple question whether the tires and tubes were imports. Instead, it analyzed the nature of the tax to determine whether it was an "Impost or Duty." 423 US, at 279, 290–294, 46 L Ed 2d 495, 96 S Ct 535. Specifically, the analysis examined whether the exaction offended any of the three policy considerations leading to the presence of the Clause:

"The Framers of the Constitution thus sought to alleviate three

main concerns . . . : the Federal Government

[435 US 753]

must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically." Id., at 285–286, 46 L Ed 2d 495, 96 S Ct 535 (footnotes omitted).

The ad valorem property tax there at issue offended none of these policies. It did not usurp the Federal Government's authority to regulate foreign relations since it did not "fall on imports as such because of their place of origin." Id., at 286, 46 L Ed 2d 495, 96 S Ct 535. As a general tax applicable to all property in the State, it could not have been used to create special protective tariffs and could not have been applied selectively to encourage or discourage importation in a manner inconsistent with federal policy. Further, the tax deprived the Federal Government of no revenues to which it was entitled. The exaction merely paid for services, such as fire and police protection, supplied by the local government. Although the tax would increase the cost of the imports to consumers, its effect on the demand for Michelin tubes and tires was insubstantial. The tax, therefore, would not significantly diminish the number of imports on which the Federal Government could levy import duties and would not deprive it of income indirectly. Finally, the tax would not disturb harmony among the States because the coastal jurisdictions would receive compensation only for services and protection extended to the imports. Although intending to prevent coastal States from abusing their geographical positions, the Framers also did not expect residents

[435 US 754]

of the ports to subsidize commerce headed inland. The Court therefore concluded that the Georgia ad valorem property tax was not an "Impost or Duty," within the meaning of the Import-Export Clause, because it offended none of the policies behind that Clause.

**[2b]** A similar approach demonstrates that the application of the Washington business and occupation tax to stevedoring threatens no Import-Export Clause policy. First, the tax does not restrain the ability of the Federal Government to conduct foreign policy. As a general business tax that applies to virtually all businesses in the State, it has not created any special protective tariff. The assessments in this case are only upon business conducted entirely within Washington. No foreign business or vessel is taxed. Respondents, therefore, have demonstrated no impediment posed by the tax upon the regulation of foreign trade by the United States.

Second, the effect of the Washington tax on federal import revenues is identical to the effect in Michelin. The tax merely compensates the State for services and protection extended by Washington to the steve-

doring business. Any indirect effect on the demand for imported goods because of the tax on the value of loading and unloading them from their ships is even less substantial than the effect of the direct ad valorem property tax on the imported goods themselves.

**[10]** Third, the desire to prevent interstate rivalry and friction does not vary significantly from the primary purpose of the Commerce Clause. See P. Hartman, State Taxation of Interstate Commerce 2–3 (1953).[19] The third Import-Export Clause policy, therefore, is vindicated if the tax falls upon a

[435 US 755]

taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State. As has been explained in Part II-C, supra, the record in this case, as presently developed, reveals the presence of all these factors.

Under the analysis of Michelin, then, the application of the Washington business and occupation tax to stevedoring violates no Import-Export Clause policy and therefore should not qualify as an "Impost or Duty" subject to the absolute ban of the Clause.

B

**[2c, 11]** The Court in Michelin qualified its holding with the observation that Georgia had applied the property tax to goods "no longer in transit." 423 US, at 302, 46 L Ed 2d 495, 96 S Ct 535.[20] Because the goods were no longer in transit, however, the Court did not have to face the question whether a tax relating to goods in transit would be an "Impost or Duty" even if it offended none of the policies behind the Clause. Inasmuch as we now face this inquiry, we note two distinctions between this case and Michelin. First, the activity taxed here occurs while imports and exports are in transit. Second, however, the tax does not fall on the goods themselves. The levy reaches only the business of loading and unloading ships or, in other words, the business of transporting cargo within the State of Washington. Despite the existence of the first distinction, the presence of the second leads to the conclusion that the Washington tax is not a prohibited "Impost or Duty" when it violates none of the policies.

In Canton R. Co. v Rogan, 340 US 511, 95 L Ed 488, 71 S Ct 447, 20 ALR2d 145 (1951), the Court upheld a gross-receipts tax on a steam railroad operating

[435 US 756]

exclusively within the Port of Baltimore. The railroad operated a marine terminal and owned rail lines connecting the docks to the trunk lines of major railroads. It switched and pulled cars, stored imports and exports

19. "Two of the chief weaknesses of the Articles of Confederation were the lack of power in Congress to regulate foreign and interstate commerce, and the presence of power in the States to do so. The almost catastrophic results from this sort of situation were harmful commercial wars and reprisals at home among the States . . . ." P. Hartman, State Taxation of Interstate Commerce 2 (1953), citing, e.g., The Federalist Nos. 7, 11, 22 (Hamilton), No. 42 (Madison).

20. Commentators have noted the qualification but have questioned its significance. See W. Hellerstein, Michelin Tire Corp. v Wages: Enhanced State Power to Tax Imports, 1976 S Ct Rev 99, 122–126; Comment, 30 Rutgers L Rev 193, 203 (1976); Note, 12 Wake Forest L Rev 1055, 1062 (1976).

pending transport, supplied wharfage, weighed imports and exports, and rented a stevedoring crane. Somewhat less than half of the company's 1946 gross receipts were derived from the transport of imports or exports. The company contended that this income was immune, under the Import-Export Clause, from the state tax. The Court rejected that argument primarily on the ground that immunity of services incidental to importing and exporting was not so broad as the immunity of the goods themselves:[21]

> "The difference is that in the present case the tax is not on the *goods* but on the *handling* of them at the port. An article may be an export and immune from a tax long before or long after it reaches the port. But when the tax is on activities connected with the export or import the range of immunity cannot be so wide.
>
> [435 US 757]
>
> ". . . The broader definition which appellant tenders distorts the ordinary meaning of the terms. It would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined." Id., at 514–515, 95 L Ed 488, 71 S Ct 447, 20 ALR2d 145 (emphasis in original).

In Canton R. Co. the Court did not have to reach the question about taxation of stevedoring because the company did not load or unload ships.[22] As implied in the opinion, however, id., at 515, 95 L Ed 488, 71 S Ct 447, 20 ALR2d 145, the only distinction between stevedoring and the railroad services was that the loading and unloading of ships crossed the waterline. This is a distinction without economic significance in the present context. The transportation services in both settings are necessary to the import-export process. Taxation in neither setting relates to the value of the goods, and therefore in neither can it be considered taxation upon the goods themselves. The force of Canton R. Co. therefore prompts the conclusion that the Michelin policy analysis should not be discarded merely because the goods are in transit, at least where the taxation

21. The Court distinguished the Maryland tax from others struck down by the Court. Canton R. Co. v Rogan, 340 US 511, 513–514, 95 L Ed 488, 71 S Ct 447, 20 ALR2d 145 (1951), distinguishing Richfield Oil Corp. v State Board, 329 US 69, 91 L Ed 80, 67 S Ct 156 (1946); Thames & Mersey Ins. Co. v United States, 237 US 19, 59 L Ed 821, 35 S Ct 496 (1915); and Fairbank v United States, 181 US 283, 45 L Ed 862, 21 S Ct 648 (1901). In these cases the State had taxed either the goods or activity so connected with the goods that the levy amounted to a tax on the goods themselves. In Richfield, the tax fell upon the sale of goods and was overturned because the Court had always considered a tax on the sale of goods to be a tax on the goods themselves. See Brown v Maryland, 12 Wheat 419, 439, 6 L Ed 678 (1827). The sale had no value or significance apart from the goods. Similarly, the stamp tax on bills of lading in Fairbank effectively taxed the goods because the bills represented the goods. The basis for distinguishing Thames & Mersey is less clear because there the tax fell upon marine insurance policies. Arguably, the policies had a value apart from the value of the goods. In distinguishing that case from the taxation of stevedoring activities, however, one might note that the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships.

22. The Court expressly noted that it did not need to reach the stevedoring issue. 340 US, at 515, 95 L Ed 488, 71 S Ct 447, 20 ALR2d 145. It was also reserved in the companion case of Western Maryland R. Co. v Rogan, 340 US 520, 522, 95 L Ed 501, 71 S Ct 450 (1951).

falls upon a service distinct from the goods and their value.[23]

C

Another factual distinction between this case and Michelin is that here the stevedores load and unload imports and exports

[435 US 758]

whereas in Michelin the Georgia tax touched only imports. As noted in Part III-A, supra, the analysis in the export cases has differed from that in the import cases. In the former, the question was when did the export enter the export stream; in the latter, the question was when did the goods escape their original package. The questions differed, for example, because an export could enter its export package and not secure tax immunity until later when it began its journey out of the country. Until Michelin, an import retained its immunity so long as it remained in its original package.

[12] Despite these formal differences, the Michelin approach should apply to taxation involving exports as well as imports. The prohibition on the taxation of exports is contained in the same Clause as that regarding imports. The export-tax ban vindicates two of the three policies identified in Michelin. It precludes state disruption of the United States foreign policy.[24] It does not serve to protect federal revenues, however, because the Constitution forbids federal taxation of exports. U.S. Const, Art I, § 9, cl 5;[25] see United States v Hvoslef, 237 US 1, 59 L Ed 813, 35 S Ct 459 (1915). But it does avoid friction and trade barriers among the States. As a result, any tax relating to exports can be tested for its conformance with the first and third policies. If the constitutional interests are not disturbed, the tax should not be considered an "Impost or Duty" any more than should a tax related to imports. This approach is consistent with Canton R. Co., which permitted taxation of income from services connected to both imports and exports. The respondents' gross receipts from loading exports, therefore, are as subject to the Washington business and occupation tax as are the receipts from unloading imports.

[435 US 759]

D

None of respondents' additional arguments convinces us that the Michelin approach should not be applied in this case to sustain the tax.

[13] First, respondents contend that the Import-Export Clause effects an absolute prohibition on all taxation of imports and exports. The ban must be absolute, they argue, in order to give the Clause meaning apart from the Commerce Clause. They support this contention primarily with dicta from Richfield Oil, 329 US, at 75–78, 91 L Ed 80, 67 S

23. We do not reach the question of the applicability of the Michelin approach when a State directly taxes imports or exports in transit.

Our Brother Powell, as his concurring opinion indicates, obviously would prefer to reach the issue today, even though the facts of the present case, as he agrees, do not present a case of a tax on goods in transit. As in Michelin, decided less than three years ago, we prefer to defer decision until a case with pertinent facts is presented. At that time, with full argument, the issue with all its ramifications may be decided.

24. See Abramson, State Taxation of Exports: The Stream of Constitutionality, 54 NC L Rev 59 (1975).

25. "No Tax or Duty shall be laid on Articles exported from any State."

Ct 156, and with the partial dissent in Carter & Weekes, 330 US, at 444–445, 91 L Ed 993, 67 S Ct 815. Neither, however, provides persuasive support because neither recognized that the term "Impost or Duty" is not self-defining and does not necessarily encompass all taxes. The partial dissent in Carter & Weekes did not address the term at all. Richfield Oil's discussion was limited to the question whether the tax fell upon the sale or upon the right to retail. 329 US, at 83–84, 91 L Ed 80, 67 S Ct 815. The State apparently conceded that the Clause precluded all taxes on exports and the process of exporting. Id., at 84, 91 L Ed 80, 67 S Ct 815. The use of these two cases, therefore, ignores the central holding of Michelin that the absolute ban is only of "Imposts or Duties" and not of all taxes. Further, an absolute ban of all taxes is not necessary to distinguish the Import-Export Clause from the Commerce Clause. Under the Michelin approach, any tax offending either of the first two Import-Export policies becomes suspect regardless of whether it creates interstate friction. Commerce Clause analysis, on the other hand, responds to neither of the first two policies. Finally, to conclude that "Imposts or Duties" encompasses all taxes makes superfluous several of the terms of Art I, § 8, cl 1, of the Constitution, which grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises." In particular, the Framers apparently did not include "Excises," such as an exaction on the privilege of doing business, within the scope of "Imposts" or "Duties." See Michelin, 423 US, at 291–292, n 12, 46 L Ed 2d 495, 96 S Ct 535, citing

[435 US 760]

2 M. Farrand, The Records of the Federal Convention of 1787, p 305 (1911), and 3 id., at 203–204.[26]

[14] Second, respondents would distinguish Michelin on the ground that Georgia levied a property tax on the mass of goods in the State, whereas Washington would tax the imports themselves while they remain a part of commerce. This distinction is supported only by citation to the License Cases, 5 How, at 576, 12 L Ed 256 (opinion of Taney, C.J.). The argument must be rejected, however, because it resurrects the original package analysis. See id., at 574–575, 12 L Ed 256. Rather than examining whether the taxes are "Imposts or Duties" that offend constitutional policies, the contention would have the Court explore when goods lose their status as imports and exports. This is precisely the inquiry the Court abandoned in Michelin, 423 US, at 279, 46 L Ed 2d 495, 96 S Ct 535. Nothing in the License Cases, in which a fractioned Court produced nine opinions, prompts a return to the exclusive consideration of what constitutes an import or export.

[15] Third, respondents submit that the Washington tax imposes a transit fee upon inland consumers. Regardless of the validity of such a toll under the Commerce Clause, respondents conclude that it violates the Import-Export Clause. The prob-

26. But see 1 W. Crosskey, Politics and the Constitution in the History of the United States 296–297 (1953), cited in 423 US, at 290–291, 46 L Ed 2d 495, 96 S Ct 535, in which the author argues that the concept of "Duties" encompassed excises. He does not explain, however, why Art I, § 8, cl 1, enumerated "Taxes, Duties, Imposts and Excises" if the Framers intended duties to include excises.

lem with that analysis is that it does not explain how the policy of preserving harmonious commerce among the States and of preventing interstate tariffs, rivalries, and friction, differs as between the two Clauses. After years of development of Commerce Clause jurisprudence, the Court has concluded that interstate friction will not chafe when commerce pays for the governmental services it enjoys. See Part II, supra. Requiring coastal States to subsidize the commerce of inland consumers may well exacerbate, rather than diminish,

[435 US 761]

rivalries and hostility. Fair taxation will be assured by the prohibition on discrimination and the requirements of apportionment, nexus, and reasonable relationship between tax and benefits. To the extent that the Import-Export Clause was intended to preserve interstate harmony, the four safeguards will vindicate the policy. To the extent that other policies are protected by the Import-Export Clause, the analysis of an Art I, § 10, challenge must extend beyond that required by a Commerce Clause dispute. But distinctions not based on differences in constitutional policy are not required. Because respondents identify no such variation in policy, their transit-fee argument must be rejected.

E

[2d] The Washington business and occupation tax, as applied to stevedoring, reaches services provided wholly within the State of Washington to imports, exports, and other goods. The application violates none of the constitutional policies identified in Michelin. It is, therefore, not among the "Imposts or Duties" within the prohibition of the Import-Export Clause.

IV

The judgment of the Supreme Court of Washington is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.[27]

It is so ordered.

Mr. Justice **Brennan** took no part in the consideration or decision of this case.

SEPARATE OPINION

Mr. Justice **Powell,** concurring in part and concurring in the result.

I join the opinion of the Court with the exception of Part III-B. As that section of the Court's opinion appears to

[435 US 762]

resurrect the discarded "direct-indirect" test, I cannot join it.

In Michelin Tire Corp. v Wages, 423 US 276, 46 L Ed 2d 495, 96 S Ct 535 (1976), this Court abandoned the traditional, formalistic methods of determining the validity of state levies under the Import-Export Clause and applied a functional analysis based on the exaction's relationship to the three policies that underlie the Clause: (i) preservation of uniform federal regulation of foreign relations; (ii) protection of federal revenue derived from imports; and (iii) maintenance of harmony among the inland States and the seaboard

27. See generally Hellerstein, State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?, 75 Mich L Rev 1426 (1977).

States. The nondiscriminatory ad valorem property tax in Michelin was held not to violate any of those policies, but the Court suggested that even a nondiscriminatory tax on goods merely in transit through the State might run afoul of the Import-Export Clause.

The question the Court addresses today in Part III-B is whether the business tax at issue here is such a tax upon goods in transit. The Court gives a negative answer, apparently for two reasons. The first is that Canton R. Co. v Rogan, 340 US 511, 95 L Ed 488, 71 S Ct 447, 20 ALR2d 145 (1951), indicates that this is a tax "not on the *goods* but on the *handling* of them at the port." Id., at 514, 95 L Ed 488, 71 S Ct 447, 20 ALR2d 145 (emphasis in original). While Canton R. Co. provides precedential support for the proposition that a tax of this kind is not invalid under the Import-Export Clause, its rather artificial distinction between taxes on the handling of the goods and taxes on the goods themselves harks back to the arid "direct-indirect" distinction that we rejected in Complete Auto Transit, Inc. v Brady, 430 US 274, 51 L Ed 2d 326, 97 S Ct 1076 (1977), in favor of analysis framed in light of economic reality.

The Court's second reason for holding that the instant tax is not one on goods in transit has the surface appearance of economic-reality analysis, but turns out to be the "direct-indirect" test in another guise. The Court likens this tax to the one at issue in Canton R. Co. and declares that since "[t]axation in neither setting relates to the value of the goods, . . . in neither can it be considered taxation upon the goods themselves."

[435 US 763]

Ante, at 757, 55 L Ed 2d, at 701. That this distinction has no economic significance is apparent from the fact that it is possible to design transit fees that are imposed "directly" upon the goods, even though the amount of the exaction bears no relation to the value of the goods. For example, a State could levy a transit fee of $5 per ton or $10 per cubic yard. These taxes would bear no more relation to the value of the goods than does the tax at issue here, which is based on the volume of the stevedoring companies' business, and, in turn, on the volume of goods passing through the port. Thus, the Court does not explain satisfactorily its pronouncement that Washington's business tax upon stevedoring—in economic terms—is not the type of transit fee that the Michelin Court questioned.

In my view, this issue can be resolved only with reference to the analysis adopted in Michelin. The Court's initial mention of the validity of transit fees in that decision is found in a discussion concerning the right of the taxing state to seek a quid pro quo for benefits conferred by the State:

> "There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods. An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States. In effect,

the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State. [The tax at issue] obviously stands on a different footing, and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when

[435 US 764]

the tax is assessed." 423 US, at 289–290, 46 L Ed 2d 495, 96 S Ct 535. (Footnotes omitted.)

In questioning the validity of "transit fees," the Michelin Court was concerned with exactions that bore no relation to services and benefits conferred by the State. Thus, the transit-fee inquiry cannot be answered by determining whether or not the tax relates to the value of the goods; instead, it must be answered by inquiring whether the State is simply making the imported goods pay their own way, as opposed to exacting a fee merely for "the privilege of moving through a State." Ibid.

The Court already has answered that question in this case. In Part II-C, the Court observes that "nothing in the record suggests that the tax is not fairly related to services and protection provided by the state." Ante, at 750–751, 55 L Ed 2d, at 697. Since the stevedoring companies undoubtedly avail themselves of police and fire protection, as well as other benefits Washington offers its local businesses, this statement cannot be questioned. For that reason, I agree with the Court's conclusion that the business tax at issue here is not a "transit fee" within the prohibition of the Import-Export Clause.

by the Louisiana courts. The other issue on which the Commission declines to speculate is whether its predecessor would have regarded a favored nations clause in a pre-1961 contract as lawful. Again, speculation is wholly unnecessary. The Commission actually confronted that precise issue in 1961. Although it concluded that such escalation clauses should be prohibited in the future, it specifically decided that it would not eliminate such provisions from previously executed contracts.[34] That the Commission's treatment of that issue in 1961 is applicable to the contracts between respondents and Arkla is demonstrated by the fact that the escalated rates are accepted by the Court and the Commission for the purpose of computing respondents' damages for the period between 1972 and 1975. If the favored nations clause in this pre-1961 contract were not perfectly lawful, respondents would receive no damages at all, rather than the truncated recovery which the Court's holding today allows.

The Commission also has expressed concern about the impact of this damages award on its broader "regulatory responsibilities." See *Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI76-28 (Nov. 5, 1980), in App. to Supplemental Memorandum for the United States and the Federal Energy Regulatory Commission as *Amici Curiae* 1a, 13a. Two specific concerns are identified—that the burden of the award might be passed on to consumers, and that it might give rise to other claims that favored nations clauses have been breached. The short answer to the first concern is that there is no more reason to assume that this award will justify an increase in utility rates than any other damages judgment that a public utility may be required to pay; if the regulatory concern is valid, the agency having jurisdiction over Arkla's sales has ample authority to require its stockholders rather than its customers to bear this additional cost. The second concern seems exaggerated because it applies only to contracts executed before 1961, see *supra*, at 21-22, and n. 34, and it seems unlikely that many large purchasers of natural gas could successfully have concealed violations of escalation clauses from their suppliers. To the extent that this case does have counterparts in such contracts, however, it seems to me that those cases should be decided in the same way. After all, we are concerned here merely with cases in which a utility has failed to pay an agreed price that is well below the just and reasonable ceiling set by the Commission.

I agree that speculation about what the Commissioners might have done in 1961 is inappropriate. Unlike the Court, however, I see no need to speculate in this case. Rather than speculate, I would presume that the Commission would have acted in a lawful manner and that it would then have perceived the correct answer to disputed questions that have subsequently been resolved.

In my judgment, the Court's decision today is founded on nothing more than the mechanical application to this case of principles developed in other contexts to serve other purposes. The Court commits manifest error by applying the filed rate doctrine to ratify action by Arkla that not only breached its contract with respondents, but also directly undercut the substantive policies identified in § 4 of the Natural Gas Act. Because absolutely no federal interest is served by today's intrusion into state contract law, I respectfully dissent.

REUBEN GOLDBERG, Washington, D.C.(ROBERT ROBERTS, JR., MARLIN RISINGER, JR., W. MICHAEL ADAMS, BLANCHARD, WALKER, O'QUIN & ROBERTS, GLENN W. LETHAM, GOLDBERG, FIELDMAN & LETHAM, P.C., with him on the brief) for petitioners; JAMES FLEET HOWELL, Shreveport, La. for respondent.

No. 80-581

Commonwealth Edison Company et al., Appellants, *v.* State of Montana et al. | On Appeal from the Supreme Court of Montana.

Syllabus

No. 80-581. Argued March 30, 1981—Decided July 2, 1981

Montana imposes a severance tax on each ton of coal mined in the State, including coal mined on federal land. The tax is levied at varying rates depending on the value, energy content, and method of extraction of the coal, and may equal, at a maximum, 30% of the "contract sales price." Appellants, certain Montana coal producers and 11 of their out-of-state utility company customers, sought refunds, in a Montana state court, of severance taxes paid under protest and declaratory and injunctive relief, contending that the tax was invalid under the Commerce and Supremacy Clauses of the United States Constitution. Without receiving any evidence, the trial court upheld the tax, and the Montana Supreme Court affirmed.

*Held:*

1. The Montana severance tax does not violate the Commerce Clause.

(a) A state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, and its progeny are disapproved. The Montana tax must be evaluated under the test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279, whereby a state tax does not offend the Commerce Clause if it "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 services provided by the State."

(b) Montana's tax comports with the requirements of the *Complete Auto Transit* test. The tax is not invalid under the third prong of the test on the alleged ground that it discriminates against interstate commerce because 90% of Montana coal is shipped to other States under contracts that shift the tax burden primarily to non-Montana utility companies and thus to citizens of other States. There is no real discrimination since the tax is computed at the same rate regardless of the final destination of the coal and the tax burden is borne according to the amount of coal consumed, not according to any distinction be-

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"This case presents a question of concurrent jurisdiction, not primary or exclusive jurisdiction. The Commission has jurisdiction over rates, filing and notice as to both Arkla and Respondents. While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the court to decide these contract questions." *Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI76-28 (March 8, 1976), in Joint App. 177, 180 (footnote omitted).

On May 18, 1979, the Federal Energy Regulatory Commission reexamined this issue and came to the same conclusion, although for different reasons, in the order from which I have quoted in n. 14, *supra*.

[34] After explaining its reasons for prohibiting indefinite escalation clauses in newly executed contracts, the Commission stated:

"However, we are convinced that we cannot declare the escalation provisions in Pure's contracts with El Paso void or voidable, and thus in effect strike them from the contracts. There is no question but that these exceedingly material parts of the contracts were a basic part of the exchange between the parties in arriving at these agreements. Under familiar rules of law, if these material provisions are stricken, the contracts, which lack any provisions for the severability of parts found invalid, must also fall. This would result in legal and regulatory problems that might cause material harm to the public, harm that might well exceed the injurious effects of the escalation provisions themselves. For example, if these provisions were striken and the contracts fell, the producer's sales might then presumably constitute *ex parte* offerings of gas and the producer could change its rates at will, unimpeded by any contractual limitations of the kind that presently exist. Thus, instead of being limited under the *Mobile* and related decisions only to increases permitted by contractual provisions, the company could file for increases whenever it happened to feel justified in doing so. Thus the uncertainty and spiraling prices resulting from the escalation clauses might well be compounded many times over." *The Pure Oil Company*, 25 F. P. C. 383, 388-389 (1961).

tween in-state and out-of-state consumers. Nor is there any merit to appellants' contention that they are entitled to an opportunity to prove that the tax is not "fairly related to the services provided by the State" by showing that the *amount* of the taxes collected exceeds the *value* of the services provided to the coal mining industry. The fourth prong of the *Complete Auto Transit* test requires only that the *measure* of the tax be reasonably related to the extent of the taxpayer's contact with the State, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a just share of the state tax burden. Because it is measured as a percentage of the value of the coal taken, the Montana tax, a general revenue tax, is in proper proportion to appellants' activities within the State and, therefore, to their enjoyment of the opportunities and protection which the State has afforded in connection with those activities, such as police and fire protection, the benefit of a trained work force, and the advantages of a civilized society. The appropriate level or rate of taxation is essentially a matter for legislative, not judicial, resolution.

2. Nor does Montana's tax violate the Supremacy Clause.

(a) The tax is not invalid as being inconsistent with the Mineral Lands Leasing Act of 1920, as amended. Even assuming that the tax may reduce royalty payments to the Federal Government under leases executed in Montana, this fact alone does not demonstrate that the tax is inconsistent with the Act. Indeed, in § 32 of the Act, Congress expressly authorized the States to impose severance taxes on federal lessees without imposing any limits on the amount of such taxes. And there is nothing in the language or legislative history of the Act or its amendments to support appellants' assertion that Congress intended to maximize and capture through royalties *all* "economic rents" (the difference between the cost of production and the market price of the coal) from the mining of federal coal, and then to divide the proceeds with the State in accordance with the statutory formula. The history speaks in terms of securing a "fair return to the public" and if, as was held in *Mid-Northern Oil Co.* v. *Walker*, 268 U. S. 45, the States, under § 32, may levy and collect taxes as though the Federal Government were not concerned, the manner in which the Federal Government collects receipts from its lessees and then shares them with the States has no bearing on the validity of a state tax.

(b) The tax is not unconstitutional on the alleged ground that it frustrates national energy policies, reflected in several federal statutes, encouraging production and use of coal, and appellants are not entitled to a hearing to explore the contours of these national policies and to adduce evidence supporting their claim. General statements in federal statutes reciting the objective of encouraging the use of coal do not demonstrate a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal. Nor is Montana's tax pre-empted by the Powerplant and Industrial Fuel Use Act of 1978. Section 601 (a)(2) of that Act clearly contemplates the continued existence, not the pre-emption, of state severance taxes on coal. Furthermore, the legislative history of that section reveals that Congress enacted the provision with Montana's tax specifically in mind.

— Mont. —, 615 P. 2d 847, affirmed.

MARSHALL, J., delivered the opinion of the Court in which BURGER, C. J., and BRENNAN, STEWART, WHITE, and REHNQUIST, JJ., joined. WHITE, J., filed a concurring opinion. BLACKMUN, J., filed a dissenting opinion, in which POWELL and STEVENS, JJ., joined.

JUSTICE MARSHALL delivered the opinion of the Court.

Montana, like many other States, imposes a severance tax on mineral production in the State. In this appeal, we consider whether the tax Montana levies on each ton of coal mined in the State, Mont. Code § 15–35–101 *et seq.* (1979), violates the Commerce and Supremacy Clauses of the United States Constitution.

## I

Buried beneath Montana are large deposits of low sulphur coal, most of it on federal land. Since 1921, Montana has imposed a severance tax on the output of Montana coal mines, including coal mined on federal land. After commissioning a study of coal production taxes in 1974, see House Resolution Nos. 45 and 63, Senate Resolution No. 83, Laws of Montana, 1619–1620, 1653–1654, 1683–1684 (March 14 & 16, 1974); Montana Legislative Council, Fossil Fuel Taxation (1974), in 1975, the Montana Legislature enacted the tax schedule at issue in this case. Mont. Code § 15–35–103 (1979). The tax is levied at varying rates depending on the value, energy content, and method of extraction of the coal, and may equal at a maximum, 30% of the "contract sales price."[1] Under the terms of a 1976 amendment to the Montana Constitution, after Dec. 31, 1979, at least 50% of the revenues generated by the tax must be paid into a permanent trust fund, the principal of which may be appropriated only by a vote of three-fourths of the members of each house of the legislature. Montana Const. Art. IX, § 5.

Appellants, 4 Montana coal producers and 11 of their out-of-state utility company customers, filed these suits in Montana state court in 1978. They sought refunds of over $5.4 million in severance taxes paid under protest, a declaration that the tax is invalid under the Supremacy and Commerce Clauses, and an injunction against further collection of the tax. Without receiving any evidence, the court upheld the tax and dismissed the complaints.

On appeal, the Montana Supreme Court affirmed the judgment of the trial court. — Mont. —, 615 P. 2d 847 (1980). The supreme court held that the tax is not subject to scrutiny under the Commerce Clause[2] because it is imposed on the severance of coal, which the court characterized as an intrastate activity preceding entry of the coal into interstate commerce. In this regard, the Montana court relied on this Court's decisions in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245 (1922), *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172 (1923), and *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284 (1927), which employed similar reasoning in upholding state severance taxes against Commerce Clause challenges. As an alternative basis for its resolution of the Commerce Clause issue, the Montana court held, as a matter of law, that the tax survives scrutiny under the four-part test articulated by this Court in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977). The Montana court also rejected appellants' Supremacy Clause[3] challenge, concluding that appellants had failed to show that the Montana tax conflicts with any federal statute.

We noted probable jurisdiction, — U. S. — (1980), to consider the important issues raised. We now affirm.

## II

### A

As an initial matter, appellants assert that the Montana Supreme Court erred in concluding that the Montana tax is not subject to the strictures of the Commerce Clause. In appellants' view, *Heisler's* "mechanical" approach, which looks to whether a state tax is levied on goods prior to their entry into interstate commerce, no longer accurately reflects the law. Appellants contend that the correct analysis focuses on whether the challenged tax substantially affects interstate commerce, in which case it must be scrutinized under the *Complete Auto Transit* test.

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[1] Under Mont. Code § 15–35–103 (1979), the value of the coal is determined by the "contract sales price" which is defined as "the price of coal extracted and prepared for shipment f. o. b. mine, excluding the amount charged by the seller to pay taxes paid on production . . . ." § 15–35–102 (1) (1979). Taxes paid on production are defined in § 15–35–102 (6) (1979). Because production taxes are excluded from the computation of the value of the coal, the effective rate of the tax is lower than the statutory rate.

[2] "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U. S. Const. Art. I, § 8, cl. 3.

[3] The "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . ." U. S. Const. Art. VI, cl. 2.

We agree that *Heisler*'s reasoning has been undermined by more recent cases. The *Heisler* analysis evolved at a time when the Commerce Clause was thought to prohibit the States from imposing any direct taxes on interstate commerce. See, *e. g.*, *Helson & Randolph* v. *Kentucky*, 279 U. S. 245, 250–252 (1929); *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, 562 (1925). Consequently, the distinction between intrastate activities and interstate commerce was crucial to protecting the States' taxing power.[4]

The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a "local" or intrastate activity. See *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 350 (1977); *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 141–142 (1970); *Nippert* v. *City of Richmond*, 327 U. S. 416, 423–424 (1946). Correspondingly, the Court has rejected the notion that state taxes levied on interstate commerce are *per se* invalid. See, *e. g.*, *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S. 734 (1978); *Complete Auto Transit, Inc.* v. *Brady*, *supra*. In reviewing Commerce Clause challenges to state taxes, our goal has instead been to "establish a consistent and rational method of inquiry" focusing on "the practical effect of a challenged tax." *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S. 425, 443 (1980). See *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 276–281 (1978); *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.*, *supra*, at 743–751; *Complete Auto Transit, Inc.* v. *Brady*, *supra*, at 227–279. We conclude that the same "practical" analysis should apply in reviewing Commerce Clause challenges to state severance taxes.

In the first place, there is no real distinction—in terms of economic effects—between severance taxes and other types of state taxes that have been subjected to Commerce Clause scrutiny.[5] See, *e. g.*, *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954); *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947); *Puget Sound Stevedoring Co.* v. *State Tax Comm'n*, 302 U. S. 90 (1937), both overruled in *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.*, *supra*.[6] State taxes levied on a "local" activity preceding entry of the goods into interstate commerce may substantially affect interstate commerce, and this effect is the proper focus of Commerce Clause inquiry. See *Mobil Oil Corp.* v. *Commissioner of Taxes*, *supra*, 445 U. S., at 443. Second, this Court has acknowledged that "a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government." *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.*, *supra*, at 748. As the Court has stated, "'[e]ven interstate business must pay its way.'" *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254 (1938), quoting *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252, 259 (1919). Consequently, the *Heisler* Court's concern that a loss of state taxing authority would be an inevitable result of subjecting taxes on "local" activities to Commerce Clause scrutiny is no longer tenable.

We therefore hold that a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in *Heisler* and its progeny are disapproved.[7] We agree with appellants that the Montana tax must be evaluated under *Complete Auto Transit*'s four-part test. Under that test, a state tax does not offend the Commerce Clause if it "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 services provided by the State." 430 U. S., at 279.

B

Appellants do not dispute that the Montana tax satisfies the first two prongs of *Complete Auto Transit* test. As the Montana Supreme Court noted, "there can be no argument here that a substantial, in fact, the only nexus of the severance of coal is established in Montana." — Mont., at —, 615 P. 2d, at 855. Nor is there any question here regarding apportionment or potential multiple taxation, for as the state court observed, "the severance can occur in no other state" and "no other state can tax the severance." *Ibid.* Appellants do contend, however, that the Montana tax is invalid under the third and fourth prongs of the *Complete Auto Transit* test.

Appellants assert that the Montana tax "discriminate[s] against interstate commerce" because 90% of Montana coal is shipped to other States under contracts that shift the tax burden primarily to non-Montana utility companies and thus to citizens of other States. But the Montana tax is computed at the same rate regardless of the final destination of the coal, and there is no suggestion here that the tax is administered in a manner that departs from this even-handed formula. We are not, therefore, confronted here with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other "discrimination" cases. See, *e. g.*, *Maryland* v. *Louisiana*, — U. S. — (1981); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318 (1977); cf. *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27 (1980); *Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978).

Instead, the gravamen of appellants' claim is that a state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers. Appellants do not suggest that this assertion is based on any of this Court's prior discriminatory tax cases. In fact, a similar claim was considered and re-

[4] The *Heisler* Court explained that any other approach would "nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production." *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259–260 (1922).

Of course, the "fruits of California" and the "wheat of the West" have long since been held to be within the reach of the Commerce Clause. *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970); *Wickard* v. *Filburn*, 317 U. S. 111 (1942).

[5] The *Heisler* approach has been criticized as unresponsive to economic reality. See Hellerstein, Constitutional Constraints on State and Local Taxation of Energy Resources, 31 Nat'l Tax J. 245, 249 (1979); Brown, The Open Economy: Justice Frankfurter and the Position of the Judiciary, 67 Yale L. J. 219, 232–233 (1957); Developments in the Law: Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953, 970–971 (1962) (Developments).

[6] The *Heisler* approach has forced the Court to draw distinctions that can only be described as opaque. Compare, for example, *East Ohio Gas Co.* v. *Tax Comm'n*, 283 U. S. 465 (1931) (movement of gas into local supply lines at reduced pressure constitutes local business) with *State Tax Comm'n* v. *Interstate Natural Gas Co., Inc.*, 284 U. S. 41 (1931) (movement of gas into local supply lines constitutes part of interstate business).

[7] This is not to suggest, however, that *Heisler* and its progeny were wrongly decided.

jected in *Heisler*. There, it was argued that Pennsylvania had a virtual monopoly of anthracite coal and that, because 80% of the coal was shipped out of State, the tax discriminated against and impermissibly burdened interstate commerce. 260 U. S. 251–253. The Court, however, dismissed these factors as "adventitious considerations." 260 U. S., at 259. We share the *Heisler* Court's misgivings about judging the validity of a state tax by assessing the State's "monopoly" position or its "exportation" of the tax burden out of State.

The premise of our discrimination cases is that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327, 330 (1944). See *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 350 (1977); *Boston Stock Exchange* v. *State Tax Comm'n*, *supra*, at 328. Under such a regime, the borders between the States are essentially irrelevant. As the Court stated in *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 255 (1911), "in matters of foreign and interstate commerce there are no state lines." See *Boston Stock Exchange* v. *State Tax Comm'n*, *supra*, at 331–332. Consequently, to accept appellants' theory and invalidate the Montana tax solely because most of Montana's coal is shipped across the very state borders that ordinarily are to be considered irrelevant would require a significant and, in our view, unwarranted departure from the rationale of our prior discrimination cases.

Furthermore, appellants' assertion that Montana may not "exploit" its "monopoly" position by exporting tax burdens to other States, cannot rest on a claim that there is need to protect the out-of-state consumers of Montana coal from discriminatory tax treatment. As previously noted, there is no real discrimination in this case; the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers. Rather, appellants assume that the Commerce Clause gives residents of one State a right of access at "reasonable" prices to resources located in another State that is richly endowed with such resources, without regard to whether and on what terms residents of the resource-rich State have access to the resources. We are not convinced that the Commerce Clause, of its own force, gives the residents of one State the right to control in this fashion the terms of resource development and depletion in a sister State. Cf. *Philadelphia* v. *New Jersey*, *supra*, 437 U. S., at 626.[9]

In any event, appellants' discrimination theory ultimately collapses into their claim that the Montana tax is invalid under the fourth prong of the *Complete Auto Transit* test: that the tax is not "fairly related to the services provided by the State." 430 U. S., at 279. Because appellants concede that Montana may impose *some* severance tax on coal mined in the State,[9] the only remaining foundation for their discrimination theory is a claim that the tax burden borne by the out-of-state consumers of Montana coal is excessive. This is, of course, merely a variant of appellants' assertion that the Montana tax does not satisfy the "fairly related" prong of the *Complete Auto Transit* test, and it is to this contention that we now turn.

Appellants argue that they are entitled to an opportunity to prove that the amount collected under the Montana tax is not fairly related to the additional costs the State incurs because of coal mining.[10] Thus, appellants' objection is to the *rate* of the Montana tax, and even then, their only complaint is that the *amount* the State receives in taxes far exceeds the *value* of the services provided to the coal mining industry. In objecting to the tax on this ground, appellants may be assuming that the Montana tax is, in fact, intended to reimburse the State for the cost of specific services furnished to the coal mining industry. Alternatively, appellants could be arguing that a State's power to tax an activity connected to interstate commerce cannot exceed the value of the services specifically provided to the activity. Either way, the premise of appellants' argument is invalid. Furthermore, appellants have completely misunderstood the nature of the inquiry under the fourth prong of the *Complete Auto Transit* test.

The Montana Supreme Court held that the coal severance tax is "imposed for the general support of the government." — Mont., at —, 615 P. 2d, at 856, and we have no reason to question this characterization of the Montana tax as a general revenue tax.[11] Consequently, in reviewing appellant's contentions, we put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes" that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services. See, *e. g.*, *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972); *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939); *Ingels* v. *Morf*, 300 U. S. 290 (1937).[12]

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[8] Nor do we share appellants' apparent view that the Commerce Clause injects principles of antitrust law into the relations between the States by reference to such imprecise standards as whether one State is "exploiting" its "monopoly" position with respect to a natural resource when the flow of commerce among them is not otherwise impeded. The threshold questions whether a State enjoys a "monopoly" position and whether the tax burden is shifted out-of-state, rather than borne by in-state producers and consumers, would require complex factual inquiries about such issues as elasticity of demand for the product and alternate sources of supply. Moreover, under this approach, the constitutionality of a state tax could well turn on whether the in-state producer is able, through sales contracts or otherwise, to shift the burden of the tax forward to its out-of-state customers. As the Supreme Court of Montana observed, "[i]t would be strange indeed if the legality of a tax could be made to depend on the vagaries of the terms of contracts." — Mont., at —, 615 P. 2d, at 856. It has been suggested that the "formidable evidentiary difficulties in appraising the geographical distribution of industry, with a view toward determining a state's monopolistic position, might make the Court's inquiry futile." *Developments*, *supra* n. 5, at 970. See W. Hellerstein, *supra* n. 5, at 248–249.

[9] Since this Court has held that interstate commerce must bear its fair share of state tax burden, see *Western Live Stock Bureau* v. *Bureau of Revenue*, 303 U. S. 250, 254 (1938), appellants cannot argue that *no* severance tax may be imposed on coal primarily destined for interstate commerce.

[10] Appellants expect to show that the "legitimate local impact costs [of coal mining]—for schools, roads, police, fire and health protection, and environmental protection and the like—might amount to approximately 2 [cents] per ton, compared to present average revenues from the severance tax alone of over $2.00 per ton." Brief for Appellants, at 12. Appellants contend that inasmuch as 50% of the revenues generated by the Montana tax is "cached away, in effect, for unrelated and unknown purposes," it is clear that the tax is not fairly related to the services furnished by the State. Reply Brief for Appellants, at 8.

At oral argument before the Montana Supreme Court, appellants' counsel suggested that a tax of "perhaps twelve and a half to fifteen percent of the value of the coal" would be constitutional. — Mont. —, —, 651 P. 2d 847, 851 (1980).

[11] Contrary to appellants' suggestion, the fact that 50% of the proceeds of the severance tax is paid into a trust fund does not undermine the Montana court's conclusion that the tax is a general revenue tax. Nothing in the Constitution prohibits the people of Montana from choosing to allocate a portion of current tax revenues for use by future generations.

[12] As the Court has stated, "such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes." *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, 190 (1931). Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing, based on factual evidence in the record, that "the fees

This Court has indicated that States have considerable latitude in imposing general revenue taxes. The Court has, for example, consistently rejected claims that the Due Process Clause of the Fourteenth Amendment stands as a barrier against taxes that are "unreasonable" or "unduly burdensome." See, *e. g., Pittsburgh* v. *Alco Parking Corp.*, 417 U. S. 369 (1974); *Magnano Co.* v. *Hamilton*, 292 U. S. 40 (1934); *Alaska Fish Salting & By-Products Co.* v. *Smith*, 255 U. S. 44 (1921). Moreover, there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. Instead, our consistent rule has been:

> "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 521–522 (1937) (citations omitted).

See *St. Louis & S. W. R. Co.* v. *Nattin*, 277 U. S. 157, 159 (1928); *Thomas* v. *Gay*, 169 U. S. 264, 280 (1898).

There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce; particularly when the tax is levied on an activity conducted within the State. "The exploitation by foreign corporations [or consumers] of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations." *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331, 334–335 (1939); see also *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949). To accept appellants' apparent suggestion that the Commerce Clause prohibits the States from requiring an activity connected to interstate commerce to contribute to the general cost of providing governmental services, as distinct from those costs attributable to the taxed activity, would place such commerce in a privileged position. But as we recently reiterated, "'[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.'" *Colonial Pipeline Co.* v. *Traigle*, 421 U. S. 100, 108 (1975), quoting *Western Live Stock* v. *Bureau of Revenue*, 303 U. S., at 254. The "just share of state tax burden" includes sharing in the cost of providing "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S., at 228, quoting *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S., at 445. See *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S., at 750–751; *id.*, at 764 (POWELL, J., concurring); *General Motors Corp.* v. *Washington*, 377 U. S. 436, 440–441 (1964).

Furthermore, there can be no question that Montana may constitutionally raise general revenue by imposing a severance tax on coal mined in the State. The entire value of the coal, before transportation, originates in the State, and mining of the coal depletes the resource base and wealth of the State, thereby diminishing a future source of taxes and economic activity.[13] Cf. *Maryland* v. *Louisiana*, — U. S., at — (slip op., at 32). In many respects, a severance tax is like a real property tax, which has never been doubted as a legitimate means of raising revenue by the situs State (quite apart from the right of that or any other State to tax income derived from use of the property). See, *e. g., Old Dominion Steamship Co.* v. *Virginia*, 198 U. S. 299 (1905); *Western Union Telegraph Co.* v. *Gottlieb*, 190 U. S. 412 (1903); *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688 (1895). When, as here, a general revenue tax does not discriminate against interstate commerce and is apportioned to activities occurring within the State, the State "is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940). As we explained in *General Motors Corp.* v. *Washington*, *supra*, at 440–441,

> "the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes, the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. . . . As was said in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940), '[t]he simple but controlling question is whether the state has given anything for which it can ask return.'"

The relevant inquiry under the fourth prong of the *Complete Auto Transit* test[14] is not, as appellants suggest, the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities.[15] Rather, the test is

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charged do not appear to be manifestly disproportionate to the services rendered . . . ." *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 599 (1939). See *id.*, at 598–600; *Ingels* v. *Morf*, 300 U. S. 290, 296–297 (1937).

One commentator has suggested that these "user" charges "are not true revenue measures and . . . the considerations applicable to ordinary tax measures do not apply." P. Hartman, State Taxation of Interstate Commerce 20, n. 72 (1953). Instead, "user" fees "partak[e] . . . of the nature of a rent charged by the State, based upon its proprietary interest in its public property, [rather] than of a tax, as that term is thought of in a technical sense." *Id.*, at 122. See generally *id.*, at 122–130.

[13] Most of the States raise revenue by levying a severance tax on mineral production. The first such tax was imposed by Michigan in 1846. See United States Department of Agriculture, State Taxation of Mineral Deposits and Production (1978). By 1979, 33 States had adopted some type of severance tax. See Bureau of Census, State Government Tax Collections in 1979, Table 3 (1980).

[14] The fourth prong of the *Complete Auto Transit* test is derived from *General Motors*, *J. C. Penney*, and similar cases. See *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279, n. 8 (1977); see also *National Geographic Society* v. *California Board of Equalization*, 430 U. S. 551, 558 (1977).

[15] Indeed, the words "amount" and "value" were not even used in *Complete Auto Transit*. See 430 U. S., at 279. Similarly, our cases

closely connected to the first prong of the *Complete Auto Transit* test. Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. See *National Bellas Hess, Inc.* v. *Illinois Revenue Dept.*, 386 U. S. 753 (1967). Beyond that threshold requirement, the fourth prong of the *Complete Auto Transit* test imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a "just share of state tax burden." *Western Live Stock Bureau* v. *Bureau of Revenue*, 303 U. S., at 254. See *National Geographic Society* v. *California Board of Equalization*, 430 U. S. 551 (1977); *Standard Pressed Steel Co.* v. *Washington Revenue Dept.*, 419 U. S. 560 (1975). As the Court explained in *Wisconsin* v. *J. C. Penney Co.*, *supra*, at 446 (emphasis added), "the incidence of the tax *as well as its measure* [must be] tied to the earnings which the State . . . has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes."

Against this background, we have little difficulty concluding that the Montana tax satisfies the fourth prong of the *Complete Auto Transit* test. The "operating incidence" of the tax, see *General Motors Corp.* v. *Washington*, *supra*, at 440–441, is on the mining of coal within Montana. Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection to those activities. *Id.*, at 441. Compare *Nippert* v. *City of Richmond*, 327 U. S., at 427. When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S., at 228, quoting *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S., at 445.

Appellants argue, however, that the fourth prong of the *Complete Auto Transit* test must be construed as requiring a factual inquiry into the relationship between the revenues generated by a tax and costs incurred on account of the taxed activity, in order provide a mechanism for judicial disapproval under the Commerce Clause of state taxes that are excessive. This assertion reveals that appellants labor under a misconception about a court's role in cases such as this.[16] The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution.[17] See *Helson & Randolph* v. *Kentucky*, 279 U. S. 245, 252 (1929); cf. *Pittsburgh* v. *Alco Parking Corp.*, 417 U. S. 369 (1974); *Magnano Co.* v. *Hamilton*, 292 U. S. 40 (1934). In essence, appellants ask this Court to prescribe a test for the validity of state taxes that would require state and federal courts, as a matter of federal constitutional law, to calculate acceptable rates or levels of taxation of activities that are conceded to be legitimate subjects of taxation. This we decline to do.

In the first place, it is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application in a wide variety of individual cases. But even apart from the difficulty of the judicial undertaking, the nature of the factfinding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process. Under our federal system, the determination is to be made by state legislatures in the first instance and, if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests.[18] Cf. *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S., at 448–449; *Moorman Manufacturing Co.* v. *Bair*, 437 U. S., at 280.

Furthermore, the reference in the cases to police and fire protection and other advantages of civilized society is not, as appellants suggest, a disingenuous incantation designed to avoid a more searching inquiry into the relationship between the *value* of the benefits conferred on the taxpayer and the *amount* of taxes it pays. Rather, when the measure of a tax is reasonably related to the taxpayer's activities or presence in the State—from which it derives some benefit such as the substantial privilege of mining coal—the taxpayer will realize, in proper proportion to the taxes it pays, "[t]he only benefit to which it is constitutionally entitled . . . [:] that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S., at 522. Correspondingly, when the measure of a tax bears no relationship to the taxpayers presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce. See *Nippert* v. *City of Richmond*, 327 U. S., at 427; cf. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954). We are satisfied that the Montana tax, assessed under a formula that relates the tax liability to the value of appellant coal producers' activities within the State, comports with the requirements of the *Complete Auto Transit* test. We therefore turn to appellants' contention that the tax is invalid under the Supremacy Clause.

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applying the *Complete Auto Transit* test have not mentioned either of these words. See *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 228 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S. 425, 443 (1980); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 444–445 (1979); *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S. 734, 750 (1978); *National Geographic Society* v. *California Board of Equalization*, *supra*, at 558.

[16] In any event, the linchpin of appellants' contention is the incorrect assumption that the amount of state taxes that may be levied on an activity connected to interstate commerce is limited by the costs incurred by the State on account of that activity. Only then does it make sense to advocate judicial examination of the relationship between taxes paid and benefits provided. But as we have previously noted, see *supra*, at 12, interstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct "benefit." In such circumstances, absent an equal protection challenge (which appellants do not raise), and unless a court is to second-guess legislative decisions about the amount or disposition of tax revenues, it is difficult to see how the court is to go about comparing costs and benefits in order to decide whether the tax burden on an activity connected to interstate commerce is excessive.

[17] Of course, a taxing statute may be judicially disapproved if it is "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44 (1934).

[18] The controversy over the Montana tax has not escaped the attention of the Congress. Several bills were introduced during the 96th Congress to limit the rate of state severance taxes. See S. 2695, H. R. 6625, H. R. 6654 and H. R. 7163. Similar bills have been introduced in the 97th Congress. See S. 178, H. R. 1313.

III

A

Appellants contend that the Montana tax, as applied to mining of federally owned coal, is invalid under the Supremacy Clause because it "substantially frustrates" the purposes of the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437, 30 U. S. C. § 181 *et seq.* (1920 Act), as amended by the Federal Coal Leasing Amendments Act of 1975, Pub. L. 94–377, 90 Stat. 1083 (1975 Amendments). Appellants argue that under the 1920 Act, the "economic rents" attributable to the mining of coal on federal land—*i. e.*, the difference between the cost of production (including a reasonable profit) and the market price of the coal—are to be captured by the Federal Government in the form of royalty payments from federal lessees. The payments thus received are then to be divided between the States and the Federal Government according to a formula prescribed by the Act.[19] In appellants' view, the Montana tax seriously undercuts and disrupts the 1920 Act's division of revenues between the federal and state governments by appropriating directly to Montana a major portion of the "economic rents." Appellants contend the Montana tax will alter the statutory scheme by causing potential coal producers to reduce the amount they are willing to bid in royalties on federal leases.

As an initial matter, we note that this argument rests on a factual premise—that the principal effect of the tax is to shift a major portion of the relatively fixed "economic rents" attributable to the extraction of federally owned coal from the Federal Treasury to the State of Montana—that appears to be inconsistent with the premise of appellants' Commerce Clause claims. In pressing their Commerce Clause arguments, appellants assert that Montana tax increases the cost of Montana coal, thereby *increasing* the total amount of "economic rents," and that the burden of the tax is borne by out-of-state consumers, not the Federal Treasury.[20] But even assuming that the Montana tax may reduce royalty payments to the Federal Government under leases executed in Montana, this fact alone hardly demonstrates that the tax is inconsistent with the 1920 Act. Indeed, appellants' argument is substantially undermined by the fact that in § 32 of the 1920 Act, 30 U. S. C. § 189, Congress expressly authorized the States to impose severance taxes on federal lessees without imposing any limits on the amount of such taxes. Section 32 provides in pertinent part:

"Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, outputs of mines, or other rights, property, or assets of any lessee of the United States."

This Court had occasion to construe § 32 soon after it was enacted. The Court explained that

> "Congress . . . meant by the proviso to say in effect that, although the act deals with the letting of public lands and the relations of the [federal] government to the lessees thereof, nothing in it shall be so construed as to affect the right of the states, in respect of such private persons and corporations, to *levy and collect taxes as though the government were not concerned*. . . .
>
> . . . . .
>
> "We think the proviso plainly discloses the intention of Congress that *persons and corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation otherwise lawful.*" *Mid-Northern Oil Co.* v. *Walker*, 268 U. S. 45, 48–50 (1925) (emphasis added).

It necessarily follows that if the Montana tax is "otherwise lawful," the 1920 Act does not forbid it.

Appellants contend that the Montana tax is not "otherwise lawful" because it conflicts with the very purpose of the 1920 Act. We do not agree. There is nothing in language or legislative history of either the 1920 Act or the 1975 Amendments to support appellants' assertion that Congress intended to maximize and capture *all* "economic rents" from the mining of federal coal, and then to distribute the proceeds in accordance with the statutory formula. The House Report on the 1975 Amendments, for example, speaks only in terms of a congressional intent to secure a "fair return to the public." H. R. Rep. No. 94–681, at 17–18 (1975). Moreover, appellants' argument proves too much. By definition, any state taxation of federal lessees reduces the "economic rents" accruing to the Federal Government, and appellants' argument would preclude any such taxes despite the explicit grant of taxing authority to the States by § 32. Finally, appellants' contention necessarily depends on inferences to be drawn from §§ 7 and 35 of the 1920 Act, 30 U. S. C. §§ 207 and 191, which, as amended, prescribe the statutory formula for the division of the payments received by the Federal Government. See Comp. ¶¶ 38–41, J. S. App. 57a–58a. Yet § 32 of the 1920 Act states that "[n]othing in this chapter"—which includes §§ 7 and 35—"shall be construed or held to affect the rights of the States . . . to levy and collect taxes upon . . . output of mines . . . of any lessee of the United States." 30 U. S. C. § 189. And if, as the Court has held, the States may "levy and collect taxes as though the [federal] government were not concerned," *Mid-Northern Oil Co.* v. *Walker*, *supra*, at 49, the manner in which the Federal Government collects receipts from its lessees and then shares them with the States has no bearing on the validity of a state tax. We therefore reject appellants' contention that the Montana tax must be invalidated as inconsistent with the Mineral Lands Leasing Act.

B

The final issue we must consider is appellants' assertion that the Montana tax is unconstitutional because it substantially frustrates national energy policies, reflected in several federal statutes, encouraging the production and use of coal, particularly low sulphur coal such as is found in Montana. Appellants insist that they are entitled to a hearing to explore the contours of these national policies and to adduce

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[19] As originally enacted in 1920, § 35 of the Mineral Lands Leasing Act, ch. 85, 41 Stat. 450, 30 U. S. C. § 191 (1970 ed.), provided that all receipts from the leasing of public lands under the Act were to be paid into the United States Treasury and then divided as follows: 37.5% to the State in which the leased lands are located; 52.5% to the reclamation fund created by the Reclamation Act of 1902, ch. 1093, § 1, 32 Stat. 388, 43 U. S. C. § 391; and the remaining 10% to be deposited in the Treasury under "miscellaneous receipts."

Section 35 was amended by § 9 (a) of the Federal Coal Leasing Amendments Act of 1975, Pub. L. 94–377, 90 Stat. 1089, to provide for a new statutory formula which is currently in effect. Under this formula, the State in which the mining occurs receives 50% of the revenues, the reclamation fund receives 40%, and the United States Treasury the remaining 10%. 30 U. S. C. § 191.

[20] Indeed, appellants alleged in their complaints that the contracts between appellant coal producers and appellant utility companies *require* the utility companies to reimburse the coal producers for their severance tax payments, and that the ultimate incidence of the tax primarily falls on the utilities' out-of-state customers. Comp. ¶¶ 17, 18, Jurisdictional Statement Appendix (J. S. App.) 53a–54a. Presumably, with regard to these contracts, the Federal Government's receipts will be unaffected by the Montana tax.

evidence supporting their claim that the Montana tax substantially frustrates and impairs the policies.

We cannot quarrel with appellants' recitation of federal statutes encouraging the use of coal. Appellants correctly note that § 2 (6) of the Energy Policy and Conservation Act of 1975, 42 U. S. C. § 6201 (6), declares that one of the Act's purposes is "to reduce the demand for petroleum products and natural gas through programs designed to provide greater availability and use of this Nation's abundant coal resources." And § 102 (b)(3) of the Powerplant and Industrial Fuel Use Act of 1978 (PIFUA), 42 U. S. C. § 8301 (b)(3) (1976 ed., Supp. III), recites a similar objective "to encourage and foster the greater use coal and other alternative fuels, in lieu of natural gas and petroleum, as a primary energy source." We do not, however, accept appellants' implicit suggestion that these general statements demonstrate a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal. In *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978), we rejected a pre-emption argument similar to the one appellants urge here. There, it was argued that the "basic national policy favoring free competition" reflected in the Sherman Act pre-empted a state law regulating retail distribution of gasoline. *Id.*, at 133. The Court acknowledged the conflict between the state law and this national policy, but rejected the suggestion that the "broad implications" of the Sherman Act should be construed as a congressional decision to pre-empt the state law. *Id.*, at 133–134. Cf. *New Motor Vehicle Bd. of California* v. *Orrin W. Fox Co.*, 439 U. S. 96, 110–111 (1978). As we have frequently indicated, "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Chicago North Western & Transp. Co.* v. *Kalo Brick & Tile*, — U. S. —, — (1981), quoting *Florida Lime & Avocado Growers, Inc.*, v. *Paul*, 373 U. S. 132, 142 (1963). See *Alessi* v. *Raybestos-Manhattan, Inc.*, — U. S. —, — (1981); *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525–526 (1977); *Perez* v. *Campbell*, 402 U. S. 637, 649 (1971). In cases such as this, it is necessary to look beyond general expressions of "national policy" to specific federal statutes with which the state law is claimed to conflict.[21] The only specific statutory provisions favoring the use of coal cited by appellants are those in PIFUA.

PIFUA prohibits new electric power plants or new major fuel-burning installations from using natural gas or petroleum as a primary energy source, and prohibits existing facilities from using natural gas as a primary energy source after 1989. 42 U. S. C. §§ 8311 (1), 8312 (a) (1976 ed., Supp. III). Appellants contend that "the manifest purpose of this Act to favor the use of coal is clear." Brief for Appellants, at 37. As the statute itself makes clear, however, Congress did not intend PIFUA to pre-empt state severance taxes on coal. Section 601 (a)(1) of PIFUA, 42 U. S. C. § 8401 (a)(1), provides for federal financial assistance to areas of a State adversely affected by increased coal or uranium mining, based upon findings by the Governor of the State that the state or local government lacks the financial resources to meet increased demand for housing or public services and facilities in such areas. Section 601 (a)(2), 42 U. S. C. (1976 ed., Supp. III) § 8401 (a)(2), then provides that

> "increased revenues, *including severance tax revenues*, royalties, and similar fees to the State and local governments which are associated with the increase in coal or uranium development activities . . . shall be taken into account in determining if a State or local government lacks financial resources."

This section clearly contemplates the continued existence, not the pre-emption, of state severance taxes on coal and other minerals.

Furthermore, the legislative history of § 601 (a)(2) reveals that Congress enacted this provision with Montana's tax specifically in mind. The Senate version of the PIFUA bill provided for impact aid, but the House bill did not. See H. R. Conf. Rep. No. 95–1749, at 93 (1978). The Senate's proposal for impact aid was opposed by the House conferees, who took the position that the States would be able to satisfy the demand for additional facilities and services caused by increased coal production through imposition of severance taxes and, in Western States, through royalties received under the Mineral Lands Leasing Act. See Transcript of the Joint Conference on Energy, at 1822, 1824, 1832, 1834–1837, 1839 (Nov. 9, 1977) (Tr.), reprinted in 2 United States Department of Energy, Legislative History of the Powerplant and Industrial Fuel Use Act, 777, 779, 787, 789–792, 794 (1978) (Legislative History). In explaining the objections of the House conferees, Rep. Eckhardt pointed out:

> "[T]he western states may collect severance taxes on that coal.
>
> "As I pointed out [see Tr. 1822, *Legislative History* at 777], Montana already collects $3 a ton on severance taxes on coal and still enjoys a 50 percent royalty return. As the price of coal goes up . . . these severance taxes in addition go up.
>
> "This is a percentage tax, not a flat tax in most instances.
>
> "If we are going to merely determine on the basis of impact on a particular community in a state how much money is going to go to that community, without taking into account how much that community is enriched, I think we are going to have people who are so angry at us in Congress . . . ." Tr. 1835, Legislative History, at 790.

Section 601 (a)(2) was obviously included in PIFUA as a response to these concerns, for it provides that severance taxes and royalties are to be "taken into account" in determining eligibility for impact aid. The legislative history of § 601 (a)(2) thus confirms what seems evident from the face of the statute—that Montana's severance tax is not pre-empted by PIFUA. Since PIFUA is the only federal statute that even comes close to providing a specific basis for appellants' claims that the Montana statute "substantially frustrates" federal energy policies, this aspect of appellants' Supremacy Clause argument must also fail.[22]

## IV

In sum, we conclude that appellants have failed to demonstrate either that the Montana tax suffers from any of the constitutional defects alleged in their complaints, or that a trial is necessary to resolve the issue of the constitutionality of the tax. Consequently, the judgment of the Supreme Court of Montana is affirmed.

*So ordered.*

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[21] Thus, in *Exxon*, after rejecting the "national policy" pre-emption argument, the Court went on to consider more focused allegations concerning alleged conflicts between the state law and specific provisions of the Robinson-Patman Act. *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 129–133 (1978).

[22] Appellants' assertion that the Montana tax is pre-empted by the Clean Air Act, 42 U. S. C. § 7401 *et seq.* (1976 ed., Supp. III), merits little discussion. The Clean Air Act does not mandate the use of coal; it merely prescribes standards governing the emission of sulphur dioxide when coal is used. Any effect those standards might have on the use of high or low sulphur coal is incidental.

JUSTICE BLACKMUN, with whom JUSTICE POWELL and JUSTICE STEVENS join, dissenting.

In *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), a unanimous Court observed: "A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect upon interstate commerce." *Id.*, at 288–289, n. 15. In this case, appellants have alleged that Montana's severance tax on coal is tailored to single out interstate commerce, and that it produces a forbidden effect on that commerce because the tax bears no "relationship to the services provided by the State." *Ibid.* The Court today concludes that appellants are not entitled to a *trial* on this claim. Because I believe that the "careful scrutiny" due a tailored tax makes a trial here necessary, I respectfully dissent.

I

The State of Montana has approximately 25% of all known United States coal reserves, and more than 50% of the Nation's low-sulfur coal reserves.[1] Department of Energy, Demonstrated Reserve Base of Coal in the United States on January 1, 1979, p. 8 (1981); National Coal Assn., Coal Data 1978, p. I–6. Approximately 70–75% of Montana's coal lies under land owned by the Federal Government in the State. See Hearings on H. R. 6625, H. R. 6654, and H. R. 7163 before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 96th Cong., 2d Sess., 22 (1980) (Hearings) (statement of Rep. Vento). The great bulk of the coal mined in Montana—indeed, allegedly as much as 90%, see *ante*, at 6—is exported to other States pursuant to long-term purchase contracts with out-of-state utilities. See H. R. Rep. No. 96–1527, pt. 1, pp. 3–4 (1980). Those contracts typically provide that the costs of state taxation shall be passed on to the utilities; in turn, fuel adjustment clauses allow the utilities to pass the cost of taxation along to their consumers. *Ibid.* Because federal environmental legislation has increased the demand for low-sulfur coal, *id.*, at 3, and because the Montana coal fields occupy a "pivotal" geographic position in the midwestern and northwestern energy markets, see J. Krutilla & A. Fisher with R. Rice, Economic and Fiscal Impacts of Coal Development: Northern Great Plains xvi (1978) (Krutilla), Montana has supplied an increasing percentage of the Nation's coal.[2]

In 1975, following the Arab oil embargo and the first federal coal conversion legislation, the Montana Legislature, by 1975 Mont. Laws, ch. 525, increased the State's severance tax on coal from a flat rate of approximately 34 cents per ton to a maximum rate of 30% of the "contract sales price." Mont. Code Ann. § 15–35–103 (1979).[3] See H. R. Rep. No. 96–1527, pt. 1, p. 3. The legislative history of this tax is illuminating. The Joint Conference Committees of the Montana Legislature that recommended this amendment acknowledged: "It is true that this is a higher rate of taxation than that levied by any other American state on the coal industry."[4] Statement to Accompany the Report of the Free Joint Conference Committees on Coal Taxation, p. 1. The Committees pointed out, however, that the Province of Alberta, Canada, recently had raised sharply its royalty on natural gas, thereby forcing consumers of Alberta gas in Montana and elsewhere to finance involuntarily Alberta's "universities, hospitals, reduction of other taxes, etc." *Ibid.* Stating that "we should . . . look north to Alberta," the Conference Committees observed: "While coal is not as scarce as natural gas, most of the Montana coal now produced is committed for sale under long-term contracts and will be purchased with this tax added to its price." *Ibid.* The Committees noted that although some new coal contracts might shift to Wyoming to take advantage of that State's lower severance tax, Montana's severance tax was comparable to that recently enacted by North Dakota.[5] Thus, the Committees had no doubt that the coal industry would grow even with this tax, since "the combined coal reserves of Montana and North Dakota are simply too great a part of the nation's fossil fuel resources to be ignored because of taxes at these levels."[6] *Ibid.*

As the Montana Legislature foresaw, the imposition of this severance tax has generated enormous revenues for the State. Montana collected $33.6 million in severance taxes in fiscal year 1978. H R. Rep. No. 96–1527, pt. 1, p. 3, and appellants alleged that it would collect not less than $40 million in fiscal year 1979. App. to Juris. Statement 55a. It has been suggested that by the year 2010, Montana will have

[1] Montana and Wyoming together contain 40% of all United States coal reserves and 68% of all reserves of low-sulfur coal. H. R. Rep. No. 96–1527, pt. 1, p. 3 (1980).

[2] Together with Wyoming, Montana supplied 10% of the United States' demand for coal in 1977: it is estimated that Montana and Wyoming will supply 33% of the Nation's coal by 1990. Hearings 22 (statement of Rep. Vento).

[3] The pre-1975 rate was 12, 22, 34 or 40 cents per ton depending on the Btu content of the coal mined. Krutilla, at 50. Appellants state that coal taxed at 34 cents per ton prior to the 1975 amendment is now typically taxed at the effective rate of $2.08 per ton. Brief for Appellants 7–8.

[4] In fact, the study of coal production taxes commissioned by the Montana Legislature in 1974, see *ante*, at 1, found that while other States may have imposed a higher overall tax burden on coal, "no coal state had, through 1973, higher severance and property taxes than Montana." Subcommittee on Fossil Fuel Taxation, Interim Study on Fossil Fuel Taxation 14 (1974). Thus, even prior to the 1975 amendment, "Montana and its local governments tax[ed] the *production* of fossil fuels at a higher rate than any competitive state . . . ." (Emphasis in original.) *Ibid.*

[5] North Dakota taxes lignite at a flat rate that is estimated to equal about 20% of value. See H. R. Rep. No. 96–1527, pt. 1, p. 3 (1980). Apparently inspired by these examples, Wyoming increased its state severance and local ad valorem taxes to a combined total of approximately 17½% of value. Wyo. Stat. §§ 39–2–202, 39–2–402, 39–6–302 (a)–(f), and 39–6–303 (a) (1977 and Supp. 1980). See H. R. Rep. No. 96–1527, pt. 1, p. 3. With the possible exception of North Dakota's tax on lignite, the severance taxes imposed by Montana and Wyoming are higher than the taxes imposed on energy reserves by any other State. *Ibid.*

Significantly, however, other western States have considered or are considering raising their taxes on coal production. *Ibid.* One study concluded that "'[t]ax leadership' in the western states appears to be an emerging reality," and that informal cartel arrangements may arise among these States. Church, Conflicting Federal, State and Local Interest Trends in State and Local Energy Taxation: Coal and Copper—A Case in Point, 31 Nat. Tax J. 269, 278 (1978). Indeed, the 1974 Montana Subcommittee on Fossil Fuel Taxation, see n. 4, *supra*, was directed by the Montana Legislature "to investigate the feasibility and value of multistate taxation of coal with the Dakotas and Wyoming, and to contract and cooperate joining with these other states to achieve that end . . . ." House Resolution No. 45, 1974 Mont. Laws, p. 1620. The Subcommittee recommended that the Executive pursue this goal. Subcommittee on Fossil Fuel Taxation, *supra*, at 2.

[6] One of the principal sponsors of the severance tax bill explained to the Montana Legislature:

"Most of Montana's coal is shipped out of state to power plants and utility companies in the Midwest. In reviewing the [long-term] contracts between the coal companies and the utility companies who purchase the coal, all of the contracts that were shown to our Legislative Committee contain an escalation clause for taxes. In other words, the local companies simply add the additional taxes to their bill, and the entire cost is passed on to the purchasers in the Midwest or elsewhere. Because most of the purchasers are regulated utility companies, it is reasonable to assume these companies will, in turn, pass on their extra costs to their customers." Towe, Explanation of Reasons for Montana's Coal Tax 4, cited in Brief for Appellants 34.

collected more than $20 billion through the implementation of this tax. Hearings 22 (statement of Rep. Vento).

No less remarkable is the increasing percentage of total revenue represented by the severance tax. In 1972, the then current flat rate severance tax on coal provided only 0.4% of Montana's total tax revenue; in contrast, in the year following the 1975 amendment, the coal severance tax supplied 11.4% of the State's total tax revenue. See Griffin & Shelton, Coal Severance Tax Policies in the Rocky Mountain States, 7 Pol. Studies J. 29, 33 (1978). Appellants assert that the tax now supplies almost 20% of the State's total revenue. Tr. of Oral Arg. 31. Indeed, the funds generated by the tax have been so large that, beginning in 1980, at least 50% of the severance tax is to be transferred and dedicated to a permanent trust fund, the principal of which must "forever remain inviolate" unless appropriated by a vote of three-fourths of the members of each house of the legislature. Mont. Const., Art. IX, § 5. Moreover, in 1979, Montana passed legislation providing property and income tax relief for state residents. 1979 Mont. Laws, ch. 698.

Appellants' complaint alleged that Montana's severance tax is ultimately borne by out-of-state consumers, and for the purposes of this appeal that allegation is to be treated as true.[7] Appellants further alleged that the tax bears no reasonable relationship to the services or protection provided by the State. The issue here, of course, is whether they are entitled to a trial on that claim, not whether they will succeed on the merits. It should be noted, however, that Montana imposes numerous other taxes upon coal mining.[8] In addition, because 70% to 75% of the coal-bearing land in Montana is owned by the Federal Government, Montana derives a large amount of coal mining revenue from the United States as well.[9] In light of these circumstances, the Interstate and Foreign Commerce Committee of the United States House of Representatives concluded that Montana's coal severance tax results in revenues "far in excess of the direct and indirect impact costs attributable to the coal production." H. R. Rep. No. 96-1527, pt. 1, p. 2. Several commentators have agreed that Montana and other similarly situated western States have pursued a policy of "OPEC-like revenue maximization," and that the Montana tax accordingly bears no reasonable relationship to the services and protection afforded by the State. R. Nehring & B. Zycher with J. Wharton, Coal Development and Government Regulation in the Northern Great Plains: A Preliminary Report 148 (1976); Church, at 272. See Krutilla, at 185. These findings, of course, are not dispositive of the issue whether the Montana severance tax is "fairly related" to the services provided by the State within the meaning of our prior cases. They do suggest, however, that appellants' claim is a substantial one. The failure of the Court to acknowledge this stems, it seems to me, from a misreading of our prior cases. It is to those cases that I now turn.

## II

This Court's Commerce Clause cases have been marked by tension between two competing concepts: the view that interstate commerce should enjoy a "free trade" immunity from state taxation, see, *e. g.*, *Freeman* v. *Hewit*, 329 U. S. 249, 252 (1946), and the view that interstate commerce may be required to " 'pay its way.' " see, *e. g.*, *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254 (1938). See generally *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S., at 278–281, 288–289, n. 15; Simet & Lynn, Interstate Commerce Must Pay Its Way: The Demise of Spector, 31 Nat. Tax J. 53 (1978); Hellerstein, Foreword, State Taxation Under the Commerce Clause: An Historical Perspective, 29 Vand. L. Rev. 335, 335–339 (1976). In *Complete Auto Transit*, the Court resolved that tension by unanimously reaffirming that interstate commerce is not immune from state taxation. 430 U. S., at 288. But at the same time the Court made clear that not all state taxation of interstate commerce is valid; a state tax will be sustained against Commerce Clause challenge *only* if "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." *Id.*, at 279. See *Maryland* v. *Louisiana*, — U. S. —, — (1981) (slip op. 27).

The Court today acknowledges and, indeed, holds that a Commerce Clause challenge to a state severance tax must be evaluated under *Complete Auto Transit's* four-part test. *Ante*, at 6. I fully agree. I cannot agree, however, with the Court's application of that test to the facts of the present case. Appellants concede, and the Court properly concludes, that the first two prongs of the test—substantial nexus and fair apportionment—are satisfied here. The Court also correctly observes that Montana's severance tax is facially neutral. It does not automatically follow, however, that the Montana severance tax does not unduly burden or interfere with interstate commerce. The gravamen of appellants' complaint is that the severance tax does not satisfy the fourth prong of the *Complete Auto Transit* test because it is tailored to, and does, force interstate commerce to pay *more* than its way. Under our established precedents, appellants are entitled to a trial on this claim.

The Court's conclusion to the contrary rests on the premise that the relevant inquiry under the fourth prong of the *Complete Auto Transit* test is simply whether the *measure* of the tax is fixed as a percentage of the value of the coal taken. *Ante*, at 15. This interpretation emasculates the fourth prong. No trial will ever be necessary on the issue of fair relationship so long as a State is careful to impose a proportional rather than a flat tax rate; thus, the Court's rule is no less "mechanical" than the approach entertained in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245 (1922), dis-

[7] The Montana Supreme Court observed that under Montana law, facts well pleaded in the complaint must be accepted as true on review of a judgment of dismissal; it therefore necessarily held that appellants could not prevail "under any view of the alleged facts." — Mont. —, 615 P. 2d 847, 849 (1980). See also Tr. of Oral Arg. 17–18.

[8] In addition to the severance tax on coal, Montana imposes a gross proceeds tax, Mont. Code Ann. § 15-6-132 (1979), a resource indemnity trust tax, § 15-38-104, a property tax on mining equipment, § 15-6-138 (b), and a corporation license tax, § 15-31-101. See Krutilla, at 50–54. Furthermore, all costs of reclamation must be borne by the coal companies under both federal and state law, and Montana requires each company to purchase a reclamation bond prior to the commencement of mining operations. § 82-4-338.

[9] By federal statute, 50% of the "sales, bonuses, royalties, and rentals" of federal public lands are payable to the State within which the leased land lies "to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities and (iii) provision of public service . . . ." Mineral Lands Leasing Act of 1920, § 35, 41 Stat. 450, as amended, 30 U. S. C. § 191. An additional 40% of this federal revenue from mineral leases is indirectly returned to the States through a reclamation fund. *Ibid.* Moreover, § 601 of the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-650, 92 Stat. 3323, 42 U. S. C. § 8401 (1976 ed., Supp. III), authorizes federal grants to areas affected by increased coal production.

approved today. *ante*, at 5.[10] Under the Court's reasoning, any ad valorem tax will satisfy the fourth prong; indeed, the Court implicitly ratifies Montana's contention that it is free to tax this coal at 100% or even 1000% of value, should it choose to do so. Tr. of Oral Arg. 21. Likewise, the Court's analysis indicates that Montana's severance tax would not run afoul of the Commerce Clause even if it raised sufficient revenue to allow Montana to eliminate all other taxes upon its citizens.[11]

The Court's prior cases neither require nor support such a startling result.[12] The Court often has noted that "'[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their *just share* of state tax burden even though it increases the cost of doing the business.'" *Complete Auto Transit*, 430 U. S., at 279 (emphasis added), quoting *Western Live Stock*, 303 U. S., at 254. See *Maryland* v. *Louisiana*, — U. S., at — (slip op. 27). Accordingly, interstate commerce cannot claim any exemption from a state tax that "is fairly related to the services provided by the State." *Complete Auto Transit*, 430 U. S., at 279. We have not interpreted this requirement of "fair relation" in a narrow sense; interstate commerce may be required to share equally with intrastate commerce the cost of providing "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 228 (1980), quoting *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 445 (1979). See, *e. g.*, *Nippert* v. *Richmond*, 327 U. S. 416, 433 (1946). Moreover, interstate commerce can be required to "pay its own way" in a narrower sense as well: the State may tax interstate commerce for the purpose of recovering those costs attributable to the activity itself. See, *e. g.*, *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252 (1919).[13]

The Court has never suggested, however, that interstate commerce may be required to pay *more* than its own way. The Court today fails to recognize that the Commerce Clause does impose limits upon the State's power to impose even facially neutral and properly apportioned taxes. See *ante*, at 11–12. In *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 163 (1954), Texas argued that no inquiry into the constitutionality of a facially neutral tax on the "taking" of gas was necessary because the State "has afforded great benefits and protection to pipeline companies." The *Calvert* Court rejected this argument, holding that "these benefits are relevant here only to show that the essential requirements of due process have been met sufficient to justify the imposition of *any* tax on the interstate activity." *Id.*, at 163–164. The Court held, *id.*, at 164, that when a tax is challenged on Commerce Clause grounds its validity "'depends on other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce,'" quoting *Nippert* v. *Richmond*, 327 U. S., at 424. Accordingly, while the Commerce Clause does not require that interstate commerce be placed in a privileged position, it does require that it not be unduly burdened. In framing its taxing measures to reach interstate commerce, the State must be "at pains to do so in a manner which avoids the evils forbidden by the commerce clause and puts that commerce *actually* on a plane of equality with local trade in local taxation." *Nippert*, 327 U. S., at 434 (emphasis added).

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[10] This is a marked departure from the Court's prior cases. Rather than suggesting such a mechanical test, those cases imply that a tax will be struck down under the fourth prong of the *Complete Auto Transit* test if the plaintiff establishes a factual record that the tax is not fairly related to the services and protection provided by the State. See, *e. g.*, *Washington Rev. Dept.* v. *Stevedoring Assn.*, 435 U. S. 734, 750–751 (1978); *id.*, at 764 (POWELL, J., concurring in part and concurring in the result). See *Merrion* v. *Jicarilla Apache Tribe*, 617 F. 2d 537, 545, n. 4 (CA10 1980) (en banc), cert. pending, Nos. 80–11 and 80–15. Even the trial court in the present case recognized that if it reached this question it "would necessarily have to deny the motion to dismiss and proceed to a factual determination." App. 37a.

[11] As the example of Alaska illustrates, this prospect is not a fanciful one. Ninety percent of Alaska's revenue derives from petroleum taxes and royalties; because of the massive sums that have been so raised, that State's income tax has been eliminated. See N. Y. Times, June 5, 1981, section 1, p. A10, col. 1. As noted above, Montana's severance tax already allegedly accounts for 20% of its total tax revenue, and the State has enacted property and income tax relief.

[12] The Court apparently derives its interpretation of the fourth prong of the *Complete Auto Transit* test primarily from *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940), and *General Motors Corp.* v. *Washington*, 377 U. S. 436 (1964). *Ante*, at 13–15. In neither of those cases, however, did the Court consider the question presented here. *J. C. Penney* involved a *Fourteenth Amendment* challenge brought by a foreign corporation to a Wisconsin tax imposed on domestic and foreign corporations "for the privilege of declaring . . . dividends" out of income from property located and business transacted in Wisconsin. The corporation argued that because the income from the Wisconsin transactions had been transferred to New York, Wisconsin had "no jurisdiction to tax" those amounts. 311 U. S., at 436. The Court rejected that argument, holding that "[t]he fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and the transactions within a state for which the tax is an exaction." *Id.*, at 445. In *General Motors*, the question before the Court was the validity of an unapportioned tax on the gross receipts of a corporation in interstate commerce. The Court concluded that there was a sufficient nexus to uphold the tax. 377 U. S., at 448. See *id.*, at 449–450 (BRENNAN, J., dissenting).

[13] In *Postal Telegraph-Cable Co.*, a telegraph company engaged in interstate commerce challenged both an annual license tax and an annual tax of $2 for each telegraph pole that the company maintained in the city of Richmond, Va. The Court sustained the validity of the license tax on the ground that it was simply a nondiscriminatory "exercise of the police power . . . for revenue purposes." 249 U. S., at 257. In contrast, the pole tax was subjected to stricter scrutiny; the Court stated that while interstate commerce must pay its way, the authority remains in the courts,

"on proper application, to determine whether, under the conditions prevailing in a given case, the charge made is reasonably proportionate to the service to be rendered and the liabilities involved, or whether it is a disguised attempt to impose a burden on interstate commerce." *Id.*, at 260.

The Court has continued to scrutinize carefully taxes on interstate commerce that are designed to reimburse the State for the particular costs imposed by that commerce. See, *e. g.*, *Evansville-Vanderburgh Airport Authority* v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972); *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939); *Ingels* v. *Morf*, 300 U. S. 290 (1937). In analyzing such taxes, it has required that there be factual evidence in the record that "the fees charged do not appear to be manifestly disproportionate to the services rendered." *Clark*, 306 U. S., at 599. The Court concludes that this test has no bearing here because the Montana Supreme Court held that the coal severance tax was "imposed for the general support of the government." *Ante*, at 10. In fact, however, the matter is not nearly so clear as the Court suggests. The Montana court also implied that the tax was designed at least in part to compensate the State for the special costs attributable to coal mining. — Mont., at —, —, 615 P. 2d, at 850, 855, as have appellees here. Brief for Appellees 1–3, 26–27.

Indeed, the stated objectives of the 1975 amendment were to: "(a) preserve or modestly increase revenues going to the general fund, (b) to respond to current social impacts attributable to coal development, and (c) to invest in the future, when new energy technologies reduce our dependence on coal and mining activity may decline." Statement to Accompany the Report of the Free Joint Conference Committees on Coal Taxation, p. 1. Since the tax was designed only to "preserve or modestly increase" general revenues, it is appropriate for a court to inquire here whether the "surplus" revenue Montana has received from this severance tax is "manifestly disproportionate" to the present or future costs attributable to coal development.

Thus, the Court has been particularly vigilant to review taxes that "single out interstate business," since "[a]ny tailored tax of this sort creates an increased danger of error in apportionment, of discrimination against interstate commerce, and of a lack of relationship to the services provided by the State." *Complete Auto Transit*, 430 U. S., at 288–289, n. 15.[14] Moreover, the Court's vigilance has not been limited to taxes that discriminate upon their face: "Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern." *Nippert*, 327 U. S., at 431. See *Maryland* v. *Louisiana*, — U. S., at — (slip op., 29). This is particularly true when the challenged tax, while facially neutral, falls so heavily upon interstate commerce that its burden "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 Co.*, 309 U. S. 33, 46, n. 2 (1940). Cf. *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429, 446–447 (1978). In sum, then, when a tax has been "tailored" to reach interstate commerce, the Court's cases suggest that we require a closer "fit" under the fourth prong of the *Complete Auto Transit* test than when interstate commerce has not been singled out by the challenged tax.

As a number of commentators have noted, state severance taxes upon minerals are particularly susceptible to "tailoring." "Like a tollgate lying athwart a trade route, a severance or processing tax conditions access to natural resources." Developments in the Law, Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953, 970 (1962) (Harvard Developments). Thus, to the extent that the taxing jurisdiction approaches a monopoly position in the mineral, and consumption is largely outside the State, such taxes are "[e]conomically and politically analogous to transportation taxes exploiting geographical position." Brown, The Open Economy: Justice Frankfurter and the Position of the Judiciary, 67 Yale L. J. 219, 232 (1957). See also Hellerstein, Constitutional Constraints on State and Local Taxation of Energy Resources, 31 Nat. Tax J. 245, 249–250 (1978); R. Posner, Economic Analysis of Law 510–514 (2d ed. 1977). But just as a port State may require that imports pay their own way even though the tax levied increases the cost of goods purchased by inland customers, see *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 288 (1976),[15] so also may a mineral-rich State require that those who consume its resources pay a fair share of the general costs of government, as well as the specific costs attributable to the commerce itself. Thus, the mere fact that the burden of a severance tax is largely shifted forward to out-of-state consumers does not, standing alone, make out a Commerce Clause violation. See Hellerstein, *supra*, at 249. But the Clause *is* violated when, as appellants allege is the case here, the State effectively selects "a class of out-of-state taxpayers to shoulder a tax burden grossly in excess of any costs imposed directly or indirectly by such taxpayers on the State." *Ibid.*

[14] *Complete Auto Transit* gave several examples of "tailored" taxes: property taxes designed to differentiate between property used in transportation and other types of property; an income tax using different rates for different types of business; and a tax on the "privilege of doing business in corporate form" that changed with the nature of the corporate activity involved. 430 U. S., at 288, n. 15. A severance tax using different rates for different minerals is, of course, directly analogous to these examples.

[15] See also *Washington Rev. Dept.* v. *Stevedoring Assn.*, 435 U. S. 734, 754–755 (1978); *id.*, at 764 (POWELL, J., concurring in part and concurring in the result).

III

It is true that a trial in this case would require "complex factual inquiries" into whether economic conditions are such that Montana is in fact able to export the burden of its severance tax, *ante*, at 8, n. 8.[16] I do not believe, however, that this threshold inquiry is beyond judicial competence.[17] If the trial court were to determine that the tax is exported, it would then have to determine whether the tax is "fairly related," within the meaning of *Complete Auto Transit*. The Court to the contrary, this would not require the trial court "to second-guess legislative decisions about the amount or disposition of tax revenues." *Ante*, at 16, n. 16. If the tax is in fact a legitimate general revenue measure identical or roughly comparable to taxes imposed upon similar industries, a court's inquiry is at an end; on the other hand, if the tax singles out this particular interstate activity and charges it with a grossly disproportionate share of the general costs of government,[18] the court must determine whether there is some reasonable basis for the legislative judgment that the tax is necessary to compensate the State for the particular costs imposed by the activity.

To be sure, the task is likely to prove to be a formidable one; but its difficulty does not excuse our failure to undertake it. This case poses extremely grave issues that threaten both to "polarize the Nation," see H. R. Rep. No. 96–1527, pt. 1, p. 2 (1980), and to reawaken "the tendencies toward economic Balkanization" that the Commerce Clause was designed to remedy. See *Hughes* v. *Oklahoma*, 441 U. S. 322, 325–326 (1979). It is no answer to say that the matter is better left to Congress:[19]

> "While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of

[16] The degree to which a tax may be "exported" turns on such factors as the taxing jurisdiction's relative dominance of the market, the elasticity of demand for the product, and the availability of adequate substitutes. See, *e. g.*, McLure, Economic Constraints on State and Local Taxation of Energy Resources, 31 Nat. Tax J. 257, 257–259 (1978); Posner, at 510–512. Commentators are in disagreement over the likelihood that coal severance taxes are in fact exported. Compare, *e. g.*, McLure, at 259, and Gillis & Peprah, Severance Taxes on Coal and Uranium in the Sunbelt, Tex. Bus. Rev. 302, 308 (1980), with Church, at 277, and Griffin, at 33. It is clear, however, that that likelihood increases to the extent that the taxing States form a cartel arrangement. Gillis, at 308. See n. 5, *supra*. Whether the tax is in fact exported here is, of course, an issue for trial.

[17] There is no basis for the conclusion that the issues presented would be more difficult than those routinely dealt with in complex civil litigation. See, *e. g.*, *Milwaukee* v. *Illinois*, — U. S., —, — (1981) (slip op. 17) (dissenting opinion). "The complexity of a properly presented federal question is hardly a suitable basis for denying federal courts the power to adjudicate." *Id.*, at —, n. 25.

[18] See n. 13, *supra*. Cf. *Maryland* v. *Louisiana*, — U. S. —, —, n. 27 (slip op. 28, n. 27) (reciting argument of United States that use of 75% of proceeds of Louisiana's "First-Use Tax" to service general debt, and only 25% to alleviate alleged environmental damage from pipeline activities, suggests that tax was not fairly apportioned to value of activities occurring within the State.)

[19] As the Court notes, the issue has not escaped congressional attention. *Ante*, at 17. No bill, however, has yet been passed, and this Court is not disabled to act in the interim; to the contrary, strong policy and institutional considerations suggest that it is appropriate that the Court consider this issue. See Brown, at 222. Indeed, whereas Montana argues that the question presented here is one better left to Congress, in 1980 hearings before the Senate Committee on Energy and Natural Resources, the then Governor of Montana took the position that the reasonableness of this tax was "a question most properly left to [the] court," not a congressional committee. See Hearing on S. 2695 before the Senate Committee on Energy and Natural Resources, 96th Cong., 2d Sess., 237 (1980).

congressional action . . . . Perhaps even more than by its interpretation of the written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution." *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 534–535 (1949).

I would not lightly abandon that role.[20] Because I believe that appellants are entitled to an opportunity to prove that, in Holmes' words, Montana's severance tax "embodies what the Commerce Clause was meant to end," I dissent.[21]

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JUSTICE WHITE, concurring,

This is a very troublesome case for me, and I join the Court's opinion with considerable doubt and with the realization that Montana's levy on consumers in other States may in the long run prove to be an intolerable and unacceptable burden on commerce. Indeed, there is particular force in the argument that the tax is here and now unconstitutional. Montana collects most of its tax from coal lands owned by the Federal Government and hence by all of the people of this country, while at the same time sharing equally and directly with the Federal Government all of the royalties reserved under the leases the United States has negotiated on its land in the State of Montana. This share is intended to compensate the State for the burdens that coal mining may impose upon it. Also, as JUSTICE BLACKMUN cogently points out, *post*, at ——, n. 9, another 40% of the federal revenue from mineral leases is indirectly returned to the States through a reclamation fund. In addition, there is statutory provision for federal grants to areas affected by increased coal production.

But this very fact gives me pause and counsels withholding our hand, at least for now. Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. It is also very much aware of the Nation's energy needs, of the Montana tax and of the trend in the energy-rich States to aggrandize their position and perhaps lessen the tax burdens on their own citizens by imposing unusually high taxes on mineral extraction. Yet, Congress is so far content to let the matter rest, and we are counseled by the Executive Branch through the Solicitor General not to overturn the Montana tax as inconsistent with either the Commerce Clause or federal statutory policy in the field of energy or otherwise. The constitutional authority and the machinery to thwart efforts such as those of Montana, if thought unacceptable, are available to Congress, and surely Montana and other similarly situated States do not have the political power to impose their will on the rest of the country. As I presently see it, therefore, the better part of both wisdom and valor is to respect the judgment of the other branches of the Government. I join the opinion and the judgment of the Court.

WILLIAM P. ROGERS, New York, N.Y. (WILLIAM R. GLENDON, STANLEY GODOFSKY, STEPHEN FROLING, JAMES N. BENEDICT, ROGERS & WELLS, PATRICK F. HOOKS and THOMAS A. BUDEWITZ with him on the brief) for appellants; MIKE GREELY, Attorney General, of Helena, Mont. (MIKE McGRATH, Assistant Attorney General, MIKE McCARTER, Assistant Attorney General and A. RAYMOND RANDOLPH, JR. with him on the brief) for appellees.

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[20] Justice Holmes' words are relevant:

"I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end." O. Holmes, Law and the Court, in Collected Legal Papers 291, 295–296 (reprint, 1952).

[21] I agree with the Court that appellants' Supremacy Clause claims are without merit.

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No. 80–2078

Dames & Moore, Petitioner, v. Donald T. Regan, Secretary of the Treasury, et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Syllabus

No. 80–2078. Argued June 24, 1981—Decided July 2, 1981

In response to the seizure of American personnel as hostages at the American Embassy in Tehran, Iran, President Carter, pursuant to the International Emergency Economic Powers Act (IEEPA), declared a national emergency on November 14, 1979, and blocked the removal or transfer of all property and interests in property of the Government of Iran which were subject to the jurisdiction of the United States. The Treasury Department then issued implementing regulations providing that "[unless] licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since [November 14, 1979] there existed any interest of Iran;" and that any licenses or authorizations granted could be "amended, modified, or revoked at any time." The President then granted a general license that authorized certain judicial proceedings, including prejudgment attachments, against Iran but did not allow the entry of any judgment or decree. On December 19, 1979, petitioner filed suit in Federal District Court against the Government of Iran, the Atomic Energy Organization of Iran, and a number of Iranian banks, alleging that it was owed a certain amount of money for services performed under a contract with the Atomic Energy Organization. The District Court issued orders of attachment against the defendants' property, and property of certain Iranian banks was then attached to secure any judgment that might be entered against them. Subsequently, on January 19, 1981, the Americans held hostage were released by Iran pursuant to an agreement with the United States. Under this agreement the United States was obligated to terminate all legal proceedings in United States courts involving claims of United States nationals against Iran, to nullify all attachments and judgments obtained therein, and to bring about the termination of such claims through binding arbitration in an Iran-United States Claims Tribunal. The President at the same time issued implementing Executive Orders revoking all licenses that permitted the exercise of "any right, power, or privilege" with regard to Iranian funds, nullifying all non-Iranian interests in such assets acquired after the blocking order of November 14, 1979, and requiring banks holding Iranian assets to transfer them to the Federal Reserve Bank of New York to be held or transferred as directed by the Secretary of the Treasury. On February 24, 1981, President Reagan issued an Executive Order which ratified President Carter's Executive Orders and "suspended" all claims that may be presented to the Claims Tribunal, but which provided that the suspension of a claim terminates if the Claims Tribunal determines that it has no jurisdiction over the claim. Meanwhile, the District Court granted summary judgment for petitioner and awarded it the amount claimed under the contract plus interest, but stayed execution of the judgment pending appeal by the defendants, and ordered that all prejudgment attachments against the defendants be vacated and that further proceedings against the bank defendants be stayed. Petitioner then filed an action in Federal District Court against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the various Executive Orders and regulations implementing the agreement with Iran. It was alleged that the action of the President and the Secretary of the Treasury were beyond their statutory and constitutional powers, and, in any event, were unconstitutional to the extent they adversely affect petitioner's final judgment against Iran and the Atomic Energy Organization, its execution of that judgment, its prejudgment attachments, and its ability to continue to litigate against the Iranian banks. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted, but entered an injunction pending appeal to the Court of Appeals prohibiting the United States from requiring the transfer of Iranian property that is subject to any writ of attachment issued by any court in petitioner's

[451 US 725]

# STATE OF MARYLAND et al., Plaintiffs,

v

# STATE OF LOUISIANA

451 US 725, 68 L Ed 2d 576, 101 S Ct 2114

[No. 83, Orig.]

Argued January 19, 1981. Decided May 26, 1981.

**Decision:** Louisiana's "first use" tax imposed on certain uses of natural gas brought into state, principally from outer continental shelf, held violative of supremacy clause and commerce clause of United States Constitution.

## SUMMARY

Eight states filed a motion for leave to file a complaint under the United States Supreme Court's original jurisdiction pursuant to Article III, Section 2 of the United States Constitution, seeking a declaratory judgment that Louisiana's "first use" tax imposed on certain uses of natural gas brought into the state, principally from the outer continental shelf, was unconstitutional under, among other things, the United States Constitution's commerce clause (Art I, § 8, cl 3) and supremacy clause (Art VI, cl 2), and sought injunctive relief against Louisiana or its agents collecting the tax with respect to any gas in interstate commerce as well as the refund of taxes already collected. The Supreme Court granted the motion for leave to file (61 L Ed 2d 307), and subsequently appointed a Special Master to facilitate handling of the suit (63 L Ed 2d 597). The Special Master issued two reports, the first report recommending that the Supreme Court approve the motions of New Jersey, the United States, the Federal Energy Regulatory Commission, and several pipeline companies to intervene as plaintiffs, and the second report recommending that (1) the Supreme Court deny Louisiana's motion to dismiss and reject the submissions that the plaintiff states had no standing to bring the action and that the case was not an appropriate one for the exercise of the Supreme Court's original jurisdiction, and (2) the plaintiff states' motion for judgment on the pleadings on the grounds that the tax was unconstitutional on its face be denied and that further evidentiary hearings be conducted, even though the statute was constitutionally suspect in certain respects.

**SUBJECT OF ANNOTATION**

Beginning on page 969, infra

Original jurisdiction of United States Supreme Court in suits between states

Briefs of Counsel, p 967, infra.

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On exceptions to the reports of the Special Master, the United States Supreme Court overruled exceptions and adopted the recommendations contained in the first report, rejected exceptions to the second report's recommendation that the motion to dismiss be denied, and sustained exceptions to the recommendation that judgment on the pleadings be denied pending further evidentiary hearing. In an opinion by WHITE, J., joined by BURGER, Ch. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, and STEVENS, JJ., it was held that (1) the plaintiff states, as substantial consumers of natural gas, had standing to bring suit against Louisiana since their gas costs had increased as a direct result of the imposition of the first use tax so that they were directly affected in a substantial and real way so as to justify the exercise of the Supreme Court's original jurisdiction, and jurisdiction was supported by the states' interest as parens patriae in protecting their citizens from substantial economic injury presented by imposition of the tax, since individual consumers could not be expected to litigate the validity of the tax and were foreclosed from suing for a refund in the state's courts, (2) the action was an appropriate case for the exercise of the Supreme Court's exclusive jurisdiction under 28 USCS § 1251(a), even though there were pending state court lawsuits raising the identical constitutional challenges to the validity of the tax, since neither the plaintiff states nor the United States was a named party in any of the state actions nor had they sought leave to intervene and the tax implicated serious and important concerns of federalism fully in accord with the purposes and reach of the Supreme Court's original jurisdiction and the tax affected the United States' interest in the administration of the outer continental shelf thus making the case an appropriate one for the exercise of the Supreme Court's original jurisdiction under 28 USCS § 1251(b)(2) permitting suits by the United States against a state, (3) a provision of Louisiana's tax declaring that the tax be deemed a cost associated with uses made by the owner in preparation of marketing of the gas and prohibiting allocation of the costs to any party except the ultimate consumer violated the supremacy clause by interfering with the authority of the Federal Energy Regulatory Commission, under the Natural Gas Act (15 USCS §§ 717a et seq.), as amended by the Gas Policy Act of 1978 (15 USCS §§ 3301 et seq.), to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers, and (4) Louisiana's first use tax violated the commerce clause by discriminating against interstate commerce in favor of local interests as a necessary result of various tax credits and exclusions in the statute and other state statutes, whereby state consumers of outer continental shelf gas were substantially protected against the impact of the tax and had the benefit of untaxed outer continental shelf gas which could be cheaper than locally produced gas, while outer continental shelf gas moving out of the state was burdened by the tax, the tax not being justified as a compensatory tax, compensating for the effect of the state's severance tax on local production of natural gas, the state having no sovereign interest in being compensated for the severance of resources from federally-owned outer continental shelf land.

BURGER, Ch. J., concurred, expressing satisfaction with the court's resolution of the case, but also stating that there was much validity to the

dissenting opinion of Justice Rehnquist which should keep the Supreme Court alert to any effort to extend the use of its original jurisdiction.

REHNQUIST, J., dissenting, expressed the view that this was not an appropriate case for the exercise of the original jurisdiction of the United States Supreme Court, since the nature of the interest which the plaintiff states sought to vindicate was indistinguishable from the interest and rights of a private citizen for the states' claim was of no greater seriousness and dignity than the claim of any other consumer and since there were alternate forums in which these interests could be vindicated.

POWELL, J., did not participate.

## HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

**States, Territories, and Possessions § 39 — supremacy clause — state tax on natural gas — conflict with Federal Natural Gas Act**

1a–1c. A provision of a state's "first use" tax imposed on certain uses of nat-

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32 Am Jur 2d, Federal Practice and Procedure §§ 217, 218, 220; 71 Am Jur 2d, State and Local Taxation §§ 252, 253, 426

2 Federal Procedural Forms L Ed, Appeal, Certiorari, and Review §§ 3:721 et seq.

28 USCS § 1251; Constitution, Article I, Section 8, Clause 3, and Article VI, Clause 2

US L Ed Digest, Commerce § 302; States, Territories, and Possessions § 39; Supreme Court of the United States §§ 48, 54.5, 57, 61, 68

L Ed Index to Annos, Commerce; States; Supreme Court of the United States

ALR Quick Index, Commerce; Sales or Use Tax; States

Federal Quick Index, Sales and Use Tax; State Taxes; Supreme Court of the United States

### ANNOTATION REFERENCES

Original jurisdiction of United States Supreme Court in suits between states. 68 L Ed 2d 969.

Intervention and joinder of parties in action in Supreme Court under its original jurisdiction. 62 L Ed 2d 897.

Supreme Court's construction of Eleventh Amendment restricting federal judicial power to entertain suits against a state. 50 L Ed 2d 928.

When may a state sue on behalf of its citizens? 89 L Ed 1081.

Suits between states in the Supreme Court. 74 L Ed 784, 98 L Ed 85.

State's standing to sue on behalf of its citizens. 42 ALR Fed 23.

ural gas brought into the state, principally from the outer continental shelf, declaring that the tax be deemed a cost associated with uses made by the owner in preparation of marketing of the gas and prohibiting allocation of the cost to any party except the ultimate consumer violates the supremacy clause of the United States Constitution (Art VI, cl 2) by interfering with the authority of the Federal Energy Regulatory Commission, under the National Gas Act (15 USCS §§ 717a et seq.), as amended by the Gas Policy Act of 1978 (15 USCS §§ 3301 et seq.), to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers.

**Commerce § 302 — state "first use" tax — imposition on interstate gas pipelines**

2a–2c. A state's "first use" tax imposed on certain uses of natural gas brought into the state, principally from the outer continental shelf, violates the commerce clause of the United States Constitution (Art I, § 8, cl 3) by discriminating against interstate commerce in favor of local interests as a necessary result of various tax credits and exclusions in the statute and other state statutes, whereby state consumers of outer continental shelf gas are substantially protected against the impact of the tax and have the benefit of untaxed outer continental shelf gas which may be cheaper than locally produced gas, while outer continental shelf gas moving out of the state is burdened by the tax, the tax not being justified as a compensatory tax, compensating for the effect of the state's severance tax on local production of natural gas, the state having no sovereign interest in being compensated for the severance of resources from federally-owned outer continental shelf land.

**Supreme Court of the United States §§ 48, 59 — suits between states — standing to sue — direct and representative capacities**

3a–3c. States which are substantial consumers of natural gas have standing to bring suit against another state under the United States Supreme Court's original jurisdiction, challenging the validity of that state's "first use" tax imposed on certain uses of natural gas brought into the state, principally from the outer continental shelf, the plaintiff states, whose gas costs have increased as a direct result of the imposition of the tax, being directly affected in a substantial and real way so as to justify the exercise of the Supreme Court's jurisdiction; jurisdiction is also supported by the states' interest as parens patriae, in protecting their citizens from substantial economic injury presented by imposition of the tax, where individual consumers (1) cannot be expected to litigate the validity of the tax given the small amounts each consumer would be paid and (2) as not being directly responsible to the state for payment of the taxes, are foreclosed from suing for a refund in the state's courts.

*[See annotation p 969, infra]*

**Supreme Court of the United States §§ 54.5, 61, 68 — suit between states — exclusive jurisdiction — appropriateness**

4a, 4b. An action by several states, the United States, and a number of pipeline companies challenging the validity of a state's "first use" tax imposed on certain uses of natural gas brought into the state, principally from the outer continental shelf, is an appropriate case for the exercise of the United States Supreme Court's exclusive jurisdiction under 28 USCS § 1251(a), even though there are pending state court lawsuits raising the identical constitutional challenges to the validity of the tax, where neither the plaintiff states nor the United States is a named party in any of the state actions nor have they sought leave to intervene and the tax implicates serious and important concerns of federalism fully in accord with the purposes and reach of the Supreme Court's original jurisdiction, and the fact that the tax affects the United States' interest in the administration of the outer continental shelf makes the case an appropriate one

for the exercise of the Supreme Court's original jurisdiction under 28 USCS § 1251(b)(2) permitting suits by the United States against a state. (Rehnquist, J., dissented from this holding.)

*[See annotation p 969, infra]*

**Supreme Court of the United States §§ 54.5 — suits between states — proper controversy**

5. In order for an action between states to constitute a proper controversy under the United States Supreme Court's original jurisdiction, it must appear that the complaining state has suffered a wrong through the action of the other state, furnishing ground for judicial redress, or is asserting a right against the other state which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence.

*[See annotation p 969, infra]*

**Parties § 3 — standing to sue — constitutional requirement**

6. Standing to sue exists for federal constitutional purposes if the injury alleged fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.

**Supreme Court of the United States §§ 48, 59 — suits by states — nominal or representative capacity**

7. A state is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens, but it may act as the representative or its citizens in original actions before the United States Supreme Court where the injury alleged affects the general population of a state in a substantial way.

*[See annotation p 969, infra]*

**Supreme Court of the United States § 4 — original jurisdiction — appropriateness requirement**

8. The United States Supreme Court's original jurisdiction should be exercised sparingly; the congressional grant of exclusive jurisdiction under 28 USCS § 1251(a) requires resort to the Supreme Court's obligatory jurisdiction only in appropriate cases.

*[See annotation p 969, infra]*

**Supreme Court of the United States § 54 — suits between state — appropriateness of original jurisdiction**

9. The issue of the appropriateness of the United States Supreme Court's exercise of jurisdiction in an original action between states must be determined on a case-by-case basis.

*[See annotation p 969, infra]*

**Supreme Court of the United States § 68 — original jurisdiction — suits by United States against state**

10. While the United States Supreme Court does not have exclusive jurisdiction in suits brought by the United States against a state, the Supreme Court may entertain such suits as original actions in appropriate circumstances.

**Supreme Court of the United States § 54 — suits between states — original jurisdiction — effect of Eleventh Amendment**

11a, 11b. The United States Supreme Court's original jurisdiction is not affected by the provisions of the Eleventh Amendment, the Amendment only withholding federal judicial power in suits against the state by citizens of another state, or by citizens or subjects of any foreign state; an original action between two states only violates the Eleventh Amendment if the plaintiff state is actually suing to recover for injuries to specific citizens.

*[See annotation p 969, infra]*

**Supreme Court of the United States § 42 — original jurisdiction — applicability of Tax Injunction Act**

12a, 12b. The Tax Injunction Act (28 USCS § 1341) is inapplicable in an original action before the United States Supreme Court, the Act by its terms only applying to injunctions issued by Federal District Courts.

*[See annotation p 969, infra]*

**Supreme Court of the United States § 74.5 — intervention in original action — state with standing to sue**

13a, 13b. In an original action before the United States Supreme Court by several states against another state chal-

lenging the validity of that state's "first use" tax imposed on certain uses of natural gas brought into the state, principally from the outer continental shelf, a state whose allegations of injury are identical to that of the original plaintiff states has standing and should be permitted to intervene.

**Supreme Court of the United States § 74.5 — suit between states — intervention by United States**

14a, 14b. In an original action before the United States Supreme Court brought by several states against another state challenging the validity of that state's "first use" tax imposed on certain uses of natural gas brought into the state, principally from the outer continental shelf, the United States' interest in the operation of the Outer Continental Shelf Lands Act (43 USCS §§ 1331 et seq.) and the Federal Energy Regulatory Commission's interest in the operation of the Natural Gas Act (15 USCS §§ 717a et seq.) are sufficiently important to warrant their intervention as party plaintiffs.

**Supreme Court of the United States § 74.5 — suit between states — intervention by pipeline companies**

15a, 15b. In an original action before the United States Supreme Court brought by several states against another state challenging the validity of that state's "first use" tax imposed on certain uses of natural gas brought into the state, principally from the outer continental shelf, the Supreme Court will grant the motion of pipeline companies to intervene as plaintiffs, where the tax is directly imposed on the owner of imported gas and the pipelines most often own the gas, the companies therefore having a direct stake in the controversy.

**States, Territories, and Possessions § 18 — supremacy clause — conflicting state and federal laws**

16. Under the supremacy clause of the United States Constitution (Art VI, cl 2), all state provisions conflicting with the constitution and laws of the United States are without effect.

**States, Territories, and Possessions § 18 — conflicting state and federal statutes**

17. A state statute is void to the extent it conflicts with a federal statute if, for example, compliance with both federal and state regulations is a physical impossibility, or where the law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

**Statutes § 51 — invalidity of provision of state statute — effect on entire statute**

18a, 18b. A finding by the United States Supreme Court that a provision of Louisiana's "first use" tax imposed on certain uses of natural gas brought into the state principally from the outer continental shelf—declaring that the tax is deemed a cost associated with uses made by the owner in preparation of marketing of the gas and prohibiting allocation of the cost to any party except the ultimate consumer—is unconstitutional does not render the entire tax act null and void under another provision of the statute providing that in the event of a "final and unappealable judicial decision" upholding the right of any owner to "enforce a contract or agreement otherwise rendered unenforceable" by the provisions concerning cost allocations, the entire act will be null and void, the precise terms of the Louisiana statute not being met despite the fact that a final and unappealable determination of the unconstitutionality of the provision had been made, since a specific contractual provision was not involved in that determination.

**Commerce §§ 237, 244, 246 — validity of state tax**

19. A state tax is not per se invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way; the state's right to tax interstate is limited, and no state tax may be sustained unless

the tax (1) has a substantial nexus with the state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state.

**Commerce § 242 — prohibition of discriminatory state tax**

20. No state, consistent with the commerce clause of the United States Constitution (Art I, § 8, cl 3), may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business.

**Commerce § 50 — interstate commerce — flow of gas from outer continental shelf**

21. The flow of gas from wells on the outer continental shelf, through processing plants in a state, and through interstate pipelines to ultimate consumers in over 30 states constitutes interstate commerce.

**Commerce § 246 — tax and interstate commerce — reasonable apportionment**

22a, 22b. To be valid, a tax on interstate commerce must be reasonably apportioned to the value of the activities occurring within the state upon which the tax is imposed.

**Commerce § 50 — interstate commerce — gas crossing state line**

23. Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey.

**Commerce §§ 239, 242 — validity of state tax — assessment — discriminatory effect**

24. Under commerce clause analysis, a state tax must be assessed in light of its actual effect considered in conjunction with other provisions of a state's tax scheme, and in each case it is the duty of the United States Supreme Court to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.

**Commerce § 242 — validity of state tax — discrimination**

25. The United States Supreme Court need not know how unequal a state tax is before concluding that it unconstitutionally discriminates.

SYLLABUS BY REPORTER OF DECISIONS

In this original action, several States, joined by the United States, the Federal Energy Regulatory Commission (FERC), and a number of pipeline companies, challenge the constitutionality of Louisiana's tax on the "first use" of any natural gas brought into Louisiana which was not previously subjected to taxation by another State or the United States. The primary effect of the tax, which is imposed on pipeline companies, is on gas produced in the federal Outer Continental Shelf (OCS) and then piped to processing plants in Louisiana and, for the most part, eventually sold to out-of-state consumers. The first-use tax statute (Act), as well as provisions of other Louisiana statutes, provides a number of exemptions from and credits for the tax whereby Louisiana consumers of OCS gas for the most part are not burdened by the tax, but it uniformly applies to gas moving out of the State. Section 47:1303C of the Act declares that "the tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas," and prohibits any attempt to allocate the cost of the tax to any party except the ultimate consumer. A Special Master filed reports, including one recommending that Louisiana's motion to dismiss on jurisdictional grounds be denied, and that the plaintiff States' motion for judgment on the pleadings be denied and further evidentiary hearings be conducted. Exceptions were filed to the reports.

*Held:*

1. Louisiana's exceptions to the Special Master's recommendation that the motion to dismiss be denied are rejected.

(a) Louisiana's First-Use Tax, while imposed on the pipelines, is passed on to the ultimate consumer. Thus the plaintiff States, as major purchasers of natural gas whose cost has increased as a direct result of imposition of the tax, are directly affected in a "substantial and real" way so as to justify the exercise of this Court's original jurisdiction under Art III, § 2, cl 2, of the Constitution, which provides for such jurisdiction over cases in which a "State shall be a Party," and 28 USC § 1251(a) (1976 ed, Supp III) [28 USCS § 1251(a)], which provides that this Court shall have "original and exclusive jurisdiction of all controversies between two or more States." Jurisdiction is also supported by the plaintiff States' interests as parens patriae, acting to protect their citizens from substantial economic injury presented by imposition of the First-Use Tax. Pennsylvania v West Virginia, 262 US 553, 67 L Ed 1117, 43 S Ct 658, 1 Ohio L Abs 627, 32 ALR 300.

(b) This case is an appropriate one for the exercise of this Court's exclusive jurisdiction under § 1251(a), even though state-court actions are pending in Louisiana in which the constitutional issues raised here are presented. Neither the plaintiff States, the United States, nor the FERC is a named party in any of the state actions, and they have not sought to intervene therein. Louisiana's tax, affecting millions of consumers in over 30 States, implicates serious and important concerns of federalism fully in accord with the purposes and reach of this Court's original jurisdiction. The exercise of original jurisdiction is also justified because the tax affects the United States' interests in the administration of the OCS area and the case is therefore an appropriate one for the exercise of this Court's nonexclusive original jurisdiction, under 28 USC § 1251(b)(2) (1976 ed, Supp III) [28 USCS § 1251(b)(2)], of suits brought by the United States against a State. Arizona v New Mexico, 425 US 794, 48 L Ed 2d 376, 96 S Ct 1845, distinguished.

2. Plaintiffs' exceptions to the Special Master's recommendation that judgment on the pleadings be denied pending further evidentiary hearings, are sustained.

(a) Section 47:1303C of the Louisiana Act violates the Supremacy Clause. Under the Natural Gas Act, determining pipeline and producer costs is the task of the FERC in the first instance, subject to judicial review. In exercising its authority to regulate the determination of the proper allocation of costs associated with the interstate sale of natural gas to consumers, the FERC normally allocates part of the processing costs between marketable hydrocarbons extracted in the course of processing and the "dried" gas, insisting that the owners of the hydrocarbons bear a fair share of the expense associated with processing rather than passing all of the costs on to the gas consumers. However, § 47:1303C provides that the amount of the Louisiana tax is a cost associated with uses made by the owner in preparation of marketing the natural gas and forecloses the owner from seeking reimbursement for payment of the tax from any third party other than a purchaser of the gas, even though the third party may be the owner of marketable hydrocarbons extracted from processing. Thus the Louisiana statute is inconsistent with the federal scheme and must give way. Cf. Northern Natural Gas Co. v State Corporation Comm'n of Kansas, 372 US 84, 9 L Ed 2d 601, 83 S Ct 646.

(b) The First-use Tax is unconstitutional under the Commerce Clause. The flow of gas from OCS wells, through processing plants in Louisiana, and through interstate pipelines to the ultimate consumers in over 30 States, constitutes interstate commerce and, even though "interrupted" by certain events in Louisiana, is a continual flow of gas in interstate commerce. The tax impermissibly discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions provided in the Act and other Louisiana statutes whereby Louisiana consumers of OCS gas are substantially protected against the impact of the tax, whereas OCS gas moving

out of the State is burdened with the tax. Nor can the tax be justified as a "compensatory" tax, compensating for the effect of the State's severance tax on local production of natural gas, since Louisiana has no sovereign interest in being compensated for the severance of resources from the federally owned OCS land.

Exceptions to Special Master's report sustained in part and overruled in part.

White, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Stewart, Marshall, Blackmun, and Stevens, JJ., joined. Burger, C. J., filed a concurring opinion. Rehnquist, J., filed a dissenting opinion. Powell, J., took no part in the consideration or decision of the case.

APPEARANCES OF COUNSEL

**Stephen H. Sachs** argued the cause for plaintiff States.

**Stuart A. Smith** argued the cause for the United States.

**Frank J. Peragine** argued the cause for the intervenor Pipeline Companies.

**Eugene Gressman** and **Robert G. Pugh** argued the cause for the defendant.

Briefs of Counsel, p 967, infra.

OPINION OF THE COURT

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Justice **White** delivered the opinion of the Court.

[1a, 2a] In this original action, several States, joined by the United States and a number of pipeline companies, challenge the constitutionality of Louisiana's "First-Use Tax" imposed on certain uses of natural gas brought into Louisiana, principally from the Outer Continental Shelf (OCS), as violative of the Supremacy Clause and the Commerce Clause of the United States Constitution.

I

The lands beneath the Gulf of Mexico have large reserves of oil and natural gas. Initially, these reserves could not be developed due to technological difficulties associated with offshore drilling. In 1938, the first drilling rig was constructed off the coast of Louisiana, and with the advent of new technologies,

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offshore drilling has become commonplace.[1] Exploration and development of the Continental Shelf in the Gulf of Mexico have become large industries providing a substantial percentage of the natural gas used in this country.[2] Most of the gas being extracted from the lands underlying the Gulf is piped to refining plants located in

1. The earliest offshore oil production occurred in 1896 off the coast of California. The early ventures were extensions of onshore drilling projects. U.S. Dept. of Interior, Mineral Resource Management of the Outer Continental Shelf, Geological Survey Circular 720, p 2 (1975). The first offshore well drilled from a mobile platform, the dominant technology used today, located out of sight from land was drilled 12 miles from the Louisiana coast in 1947. Ibid. In its proffer of evidence, the State of Louisiana estimated that there exist over 13,000 wells operating in OCS lands in the Gulf of Mexico. See Proffer of Proof of Louisiana to Special Master 8. According to one source, 948 offshore wells were drilled of the coast of Louisiana in 1978. Braunstein & Allen, Developments in Louisiana Gulf Coast Offshore in 1978, 63 AAPG Bull 1310 (Aug. 1979).

2. In 1970, South Louisiana, an area including both the onshore and offshore area adjacent to Louisiana, was responsible for the production of approximately 33% of domestic natural gas production. See Federal Power Comm'n, Bureau of Natural Gas, National Gas Supply and Demand, 1971–1990, Staff Rep No. 2, pp 20–22 (1972); J. Schanz & H. Frank, Natural Gas in the Future National

coastal portions of Louisiana where the gas is "dried"—the liquefiable hydrocarbons gathered and removed —on its way to ultimate distribution to consumers in over 30 States. It is estimated that 98% of the OCS gas processed in Louisiana is eventually sold to out-of-state consumers with the 2% remainder consumed

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within Louisiana.[3] The contractual arrangements between a producer of gas and the pipeline companies vary. Most often, the producer sells the gas to the pipeline companies at the wellhead, although the producer may retain an interest in any extractable components. Some producers, however, retain full ownership rights and simply pay a flat fee for the use of the pipeline companies' facilities.[4]

The ownership and control of these large reserves of natural gas have been much disputed. In United States v Louisiana, 339 US 699, 94 L Ed 1216, 70 S Ct 914 (1950), the Court applied the principle of its holding in United States v California, 332 US 19, 91 L Ed 1889, 67 S Ct 1658 (1947)—that the United States possesses paramount rights to lands beneath the Pacific Ocean seaward of California's low-water mark —to the offshore areas adjacent to Louisiana. In 1953, Congress passed the Submerged Lands Act, 43 USC §§ 1301–1315 [43 USCS §§ 1301–1315], ceding any federal interest in the lands within three miles of the coast, while confirming the Federal Government's interest in the area seaward of the 3-mile limit.[5] See United States v Louisiana, 363 US 1, 4 L Ed 2d 1025, 80 S Ct 961 (1960); United States v Maine, 420 US 515, 521–526, 43 L Ed 2d 363, 95 S Ct 1155 (1975). In the same year, Congress passed the outer Continental Shelf Lands Act, 43 USC §§ 1331–1343 [43 USCS §§ 1331–1343] (OCS Act), which declared that 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 . . . ." § 1332. The OCS Act also established procedures for federal leasing of OCS land to develop mineral resources. While the passage of these Acts established the

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respective legal interests of the parties, there has been extensive litigation to establish the legal boundaries of the federal OCS domain. See generally United States v Louisiana, 446 US 253, 254–260, 64 L Ed 2d 196, 100 S Ct 1618 (1980) (detailing

Energy Pattern, in Regulation of the Natural Gas Producing Industry 18–19 (K. Brown ed 1972). As of 1973, over 25 trillion cubic feet of natural gas had been produced from Louisiana's offshore lands, with approximately 77% coming from federal OCS areas. Geological Survey Circular 720, supra, at 28 (Table 13). It has been estimated that the present reserves in the offshore area adjacent to the Gulf States is approximately 38 trillion cubic feet of gas. J. Hewitt, J. Knipmeyer, & E. Schluntz, Estimated Oil and Gas Reserves, Gulf of Mexico Outer Continental Shelf II (U. S. Dept. of Interior, Geological Survey, Dec. 31, 1979).

3. See Proffer of Proof of Louisiana to Special Master 21 (Fact No. 43).

4. See id., at 11–13 (Facts No. 19–22).

5. Representatives from the State of Louisiana, as well as from other Gulf States, appeared before Congress in support of a measure to provide the States with a share of any income from that part of the Outer Continental Shelf abutting their respective States. See Hearings on S 1901 before the Senate Committee on Interior and Insular Affairs, 83d Cong, 1st Sess, 185–188, 191–193, 265–266 (1953).

the history of the "long-continuing and sometimes strained controversy" between the United States and Louisiana concerning the OCS lands).

In 1978, the Louisiana Legislature enacted a tax of seven cents per thousand cubic feet of natural gas[6] on the "first use" of any gas imported into Louisiana which was not previously subjected to taxation by another State or the United States. La Rev Stat Ann §§ 47:1301–47:1307 (West Supp 1981) (Act). The Tax imposed is precisely equal to the severance tax the State imposes on Louisiana gas producers. The Tax is owed by the owner of the gas at the time the first taxable "use" occurs within Louisiana. § 1305B. About 85% of the OCS gas brought ashore is owned by the pipeline companies, the rest by the producers. Since most States impose their own severance tax, it is acknowledged that the primary effect of the First-Use Tax will be on gas produced in the federal OCS area and then piped to processing plants located within Louisiana. It has been estimated that Louisiana would receive at least $150 million in annual receipts from the First-Use Tax.[7]

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The stated purpose of the First-Use Tax was to reimburse the people of Louisiana for damages to the State's waterbottoms, barrier islands, and coastal areas resulting from the introduction of natural gas into Louisiana from areas not subject to state taxes as well as to compensate for the costs incurred by the State in protecting those resources. § 1301C. Moreover, the Tax was designed to equalize competition between gas produced in Louisiana and subject to the state severance tax of seven cents per thousand cubic feet, and gas produced elsewhere not subject to a severance tax such as OCS gas. § 1301A. The Act specified a number of different uses justifying imposition of the First-Use Tax including sale, processing, transportation, use in manufacturing, treatment, or "other ascertainable action at a point within the state." § 1302(8).[8]

6. A thousand cubic feet of gas was defined, as is commonplace in the industry, as that amount of gas which occupies that volume at a temperature of 60 degrees Fahrenheit and 15.025 pounds per square inch of pressure absolute. La Rev Stat Ann § 47:1303(B) (West Supp 1981).

7. Estimates of the annual revenues from the First-Use Tax have varied. The plaintiff States and the United States estimated the annual receipts to be $225 million, while the pipeline companies suggested $275 million. See also, Note, The Louisiana First-Use Tax: Does It Violate the Commerce Clause?, 53 Tulane L Rev 1474 (1979) ($170 million); First-Use Tax, 31 La Coastal L Rep No. 31 (Oct. 1978) ($185 million in first year).

Part II of the First-Use Tax Act created the First-Use Trust Fund. Receipts of the Tax were to be placed in the fund and expended in accordance with the terms of the Act. La Rev Stat Ann § 47:1351 (West Supp 1981). Specifically, the Act provided that 75% of the proceeds would go towards retirement of the general debt of the State. § 1351A(2). Also 25% of the proceeds were to be deposited in a Barrier Islands Conservation Account to be used to fund capital improvements for projects designed to "conserve, preserve, and maintain the barrier islands, reefs, and shores of the coastline of Louisiana." § 1351A(3).

8. A taxable "use" was 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." 47 La Rev Stat § 1302(8).

The Act itself, as well as provisions found elsewhere in the state statutes, provided a number of exemptions from and credits for the First-Use Tax. The severance tax credit provided that any taxpayer subject to the First-Use Tax was entitled to a direct tax credit on any Louisiana severance tax owed in connection with the extraction of natural resources within the State. La Rev Stat Ann § 47: 647 (West Supp

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1981).[9] Second, municipal or state-regulated electric generating plants and natural gas distributing services located within Louisiana, as well as any direct purchaser of gas used for consumption directly by that purchaser, were provided tax credits on other Louisiana taxes upon a 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 . . . ," which implicitly includes any increases resulting from the First-Use Tax. La Rev Stat Ann § 47:11B (West Supp 1981).[10] Furthermore, imported natural gas used for drilling oil or gas within the State was exempted from the First-Use Tax. 47 La Rev Stat § 1303A. Thus, Louisiana consumers of OCS gas for the most part are not burdened by the Tax, but it does uniformly apply to gas moving out of the State. The Act also purported to establish the legal effect of the Tax in terms of defining the proper allocation of the Tax among

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potentially liable parties. Specifically, the Act declared that the "tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas." § 1303C. Any contract which attempted to allocate the cost of the Tax to any party except the ultimate consumer was declared to be "against public policy and unenforceable to that extent." Ibid.

On March 29, 1979, eight States filed a motion for leave to file a complaint under this Court's original jurisdiction pursuant to Art III, § 2, of the Constitution. The complaint sought a declaratory judgment that the First-Use Tax was unconstitutional under: (1) the Commerce Clause, Art I, § 8, cl 3; (2) the Supremacy Clause, Art VI, cl 2; (3) the Import-Export Clause, Art I, § 10, cl 2; (4) the Impairment of Contracts Clause, Art I, § 10, cl 2; and (5) the Equal Protection Clause of the Fourteenth Amendment. The

9. The Severance Tax Credit bill was passed at the same time as the First-Use Tax, and provides as follows:

"A. (1) Every taxpayer liable for and remitting taxes levied and collected pursuant to [the First-Use Tax] and each taxpayer who bears such taxes as a direct result of contractual terms or agreements applied in disregard of RS 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."

The tax credit also assigns the order in which the credit shall be applied depending on the type of severance credit paid. The credit is first applied to oil severance taxes and lists in descending order the other resources subject to severance tax credit. § 647A(2). The tax credit does not affect any severance taxes assessed by the local parishes. § 647C.

10. The statutory provision exempts from the tax credit provision any increases in wellhead price attributable to inflation.

plaintiff States also sought injunctive relief against the State or its agents collecting the Tax with respect to any gas in interstate commerce as well as a refund of taxes already collected. We granted plaintiffs' motion for leave to file on June 18, 1979. 442 US 937, 61 L Ed 2d 307, 99 S Ct 2876. Subsequently, as is usual, we appointed a Special Master to facilitate handling of the suit. 445 US 913, 63 L Ed 2d 597, 100 S Ct 1271 (1980). To date, the Special Master has issued two reports. In the first report, dated May 14, 1980, the Special Master recommended that the Court approve the motions of New Jersey, the United States, the Federal Energy Regulatory Commission (FERC), and 17 pipeline companies to intervene as plaintiffs. The Master's second report was issued on September 15, 1980, and essentially made two recommendations. First, the Master recommended that we deny Louisiana's motion to dismiss and reject the submissions that the plaintiff States had no standing to bring the action and that the case was not an appropriate one for the exercise of our original jurisdiction. Second, on the plaintiff States' motion for judgment on the pleadings on the grounds that the Tax was unconstitutional on its face, the Special Master, while recognizing

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that the statute was constitutionally suspect in certain respects, recommended that the motion be denied and that further evidentiary hearings be conducted. We heard oral argument on the exceptions filed to the reports.

## II

**[3a, 4a]** Initially, we must resolve Louisiana's contention, rejected by the Special Master, that the case should be dismissed. In support of its motion, Louisiana presents two principal arguments. First, Louisiana contends that the plaintiff States lack standing to bring the suit under the Court's original jurisdiction. Second, Louisiana argues that even if the bare requirements for exercise of our original jurisdiction have been met, this case is not an appropriate one to entertain here because of certain pending state-court actions in Louisiana in which the constitutional issues sought to be presented may be addressed. See Arizona v New Mexico, 425 US 794, 797, 48 L Ed 2d 376, 96 S Ct 1845 (1976). See also Ohio v Wyandotte Chemicals Corp., 401 US 493, 501, 28 L Ed 2d 256, 91 S Ct 1005, 57 Ohio Ops 2d 351 (1971). We agree with the Special Master that both contentions should be rejected.

### A

### 1

**[3b, 5]** The Constitution provides for this Court's original jurisdiction over cases in which a "State shall be a Party." Art III, § 2, cl 2. Congress has in turn provided that the Supreme Court shall have "original and exclusive jurisdiction of all controversies between two or more States." 28 USC § 1251(a) (1976 ed, Supp III) [28 USCS § 1251(a)]. In order to constitute a proper "controversy" under our original jurisdiction, "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of

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jurisprudence." Massachusetts v

Missouri, 308 US 1, 15, 84 L Ed 3, 60 S Ct 39 (1939). See New York v Illinois, 274 US 488, 490, 71 L Ed 1164, 47 S Ct 661 (1927); Texas v Florida, 306 US 398, 405, 83 L Ed 817, 59 S Ct 563, 121 ALR 1179 (1939).[11]

[6] Louisiana asserts that this case should be dismissed for want of standing because the Tax is imposed on the pipeline companies and not directly on the ultimate consumers. Under its view, the alleged interests of the plaintiff States do not fall within the type of "sovereignty" concerns justifying exercise of our original jurisdiction. Standing to sue, however, exists for constitutional purposes if the injury alleged "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." Simon v Eastern Kentucky Welfare Rights Organization, 426 US 26, 41–42, 48 L Ed 2d 450, 96 S Ct 1917 (1976). See Duke Power Co. v Carolina Environmental Study Group, Inc., 438 US 59, 72–81, 57 L Ed 2d 595, 98 S Ct 2620 (1978). This is clearly the case here. The plaintiff States are substantial consumers of natural gas.[12] The First-Use Tax, while imposed on the pipeline companies, is clearly intended to be passed on to the ultimate consumer. Indeed, the statute forbids the Tax from being passed on or back to any third party other than the purchaser of the gas and explicitly directs that it should be considered as a cost of preparing the gas for market. La Rev Stat Ann § 47:1303(c) (West Supp

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1981). In fact, the pipeline companies, with the approval of the FERC, have passed on the cost of the First-Use Tax to their customers. See Louisiana First-Use Tax in Pipeline Rate Cases, Docket No. RM78–23, Order No. 10, 43 Fed Reg 45553 (1978).[13] Thus, the Special Master properly determined that "although the tax is collected from the pipelines, it is really a burden on consumers." Second Report, at 12. It is clear that the plaintiff States, as major purchasers of natural gas whose cost has increased as a direct result of Louisiana's imposition of the First-Use Tax, are directly affected in a "substantial and real"

11. See generally New York v New Jersey, 256 US 296, 309, 65 L Ed 937, 41 S Ct 492 (1921) ("Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence").

12. As alleged in the complaint, the annual increase in natural gas costs directly associated with the First-Use Tax with respect to each of the plaintiff States is as follows: Maryland ($60,000); New York ($300,000); Massachusetts ($25,000); Rhode Island ($25,000); Illinois ($270,000); Indiana ($70,000); Michigan ($650,000); Wisconsin ($70,000); New Jersey ($20,000). See Complaint, at 12–16. Total direct injuries to the plaintiff States was estimated to be $1.5 million, and injury to the citizen consumers was estimated at $120 million. Id., at 16.

13. In approving the pass-through, the FERC did not accept the constitutionality of the First-Use Tax; FERC has consistently taken the position that the Tax is unconstitutional. Moreover, approval of the pass-through was expressly conditioned on the pipeline companies' taking legal action to determine the legality of the Tax, and to provide for refund to the customers should it be declared unconstitutional. Administrative proceedings before the FERC are continuing, and the agency has issued an order to show cause why the gas producers should not be required to pay the portion of the First-Use Tax relating to liquid or liquefiable hydrocarbons transported with or extracted from the gas subject to the Tax.

way so as to justify their exercise of this Court's original jurisdiction.

2

[3c, 7] Jurisdiction is also supported by the States' interest as parens patriae. A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens. See Oklahoma ex rel. Johnson v Cook, 304 US 387, 82 L Ed 1416, 58 S Ct 954 (1938); New Hampshire v Louisiana, 108 US 76, 27 L Ed 656, 2 S Ct 176 (1883). But it may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way. See, e.g., Missouri v Illinois, 180 US 208, 45 L Ed 497, 21 S Ct 331 (1901); Kansas v Colorado, 185 US 125, 46 L Ed 838, 22 S Ct 552 (1902); Georgia v Tennessee Copper Co. 206 US 230, 51 L Ed 1038, 27 S Ct 618 (1907). See generally Note, The Original Jurisdiction of the United States Supreme Court, 11 Stan L

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Rev 665, 671–678 (1959). Cf. Hawaii v Standard Oil Co. 405 US 251, 257–259, 31 L Ed 2d 184, 92 S Ct 885 (1972) (the Court has recognized the right of a State to sue as parens patriae "to prevent or repair harm to its 'quasi-sovereign' interests" in original jurisdiction suits).

In this respect, this case is functionally indistinguishable from Pennsylvania v West Virginia, 262 US 553, 67 L Ed 1117, 43 S Ct 658, 1 Ohio L Abs 627, 32 ALR 300 (1923), in which the Court entertained a suit brought by one State against another. In that case, West Virginia, then the leading producer of natural gas, required gas producers in the State to meet the needs of all local customers before shipping any gas interstate. Ohio and Pennsylvania moved for leave to file a complaint under the Court's original jurisdiction claiming that the statute violated the Commerce Clause in that the statute would have the effect of cutting off supplies of natural gas to those States. Both States claimed to be protecting a twofold interest—"one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected." The Court granted leave to file finding both interests to be substantial. With respect to representing the interests of its citizens the Court stated:

> "The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law." Id., at 592, 67 L Ed 1117, 43 S Ct 658, 1 Ohio L Abs 627, 32 ALR 300.

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Pennsylvania v West Virginia counsels that we should not dismiss this action. Plaintiff States have alleged substantial and serious injury to

their proprietary interests as consumers of natural gas as a direct result of the allegedly unconstitutional actions of Louisiana. This direct injury is also supported by the States' interest in protecting its citizens from substantial economic injury presented by imposition of the First-Use Tax. Nor does the incidence of the Tax fall on a small group of citizens who are likely to challenge the Tax directly. Rather, a great many citizens in each of the plaintiff States are themselves consumers of natural gas and are faced with increased costs aggregating millions of dollars per year. As the Special Master observed, individual consumers cannot be expected to litigate the validity of the First-Use Tax given that the amounts paid by each consumer are likely to be relatively small. Moreover, because the consumers are not directly responsible to Louisiana for payment of the taxes, they of course are foreclosed from suing for a refund in Louisiana's courts. In such circumstances, exercise of our original jurisdiction is proper.

B

[4b, 8] With respect to Louisiana's second argument, it is true that we have construed the congressional grant of exclusive jurisdiction under § 1251(a) as requiring resort to our obligatory jurisdiction only in "appropriate cases." Illinois v City of Milwaukee, 406 US 91, 93, 31 L Ed 2d 712, 92 S Ct 1385 (1972); Arizona v New Mexico, 425 US, at 796–797, 48 L Ed 2d 376, 96 S Ct 1845. This view is consistent with the general observation that the Court's original jurisdiction should be exercised "sparingly." United States v Nevada, 412 US 534, 538, 37 L Ed 2d 132, 93 S Ct 2763 (1973). See Ohio v Wyandotte Chemicals Corp. 401 US, at 501, 28 L Ed 2d 256, 91 S Ct 1005, 57 Ohio Ops 2d 351; Massachusetts v Missouri, 308 US, at 18–20, 84 L Ed 3, 60 S Ct 39.[14] In City of Milwaukee, we noted that what is

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"appropriate" involves not only "the seriousness and dignity of the claim," but also "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." 406 US, at 93, 31 L Ed 2d 712, 92 S Ct 1385. Louisiana urges that presently pending state lawsuits raising the identical constitutional issues presented here constitute sufficient reason to forgo the exercise of our original jurisdiction.

There have been filed in various lower courts several suits challenging the constitutionality of the First-Use Tax. The first suit was brought by Louisiana in state court seeking a declaratory judgment that the First-Use Tax is constitutional. Edwards v Transcontinental Gas Pipe Line Corp., No. 216,867 (19th Judicial Dist., East Baton Rouge Parish). Among the named defendants

14. In Ohio v Wyandotte Chemicals Corp., 401 US, at 497, 28 L Ed 2d 256, 91 S Ct 1005, 57 Ohio Ops 2d 351, the Court noted that "[a]s our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, government contracts, and so forth. It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies."

were all of the pipeline companies doing business in the State. The pipeline companies sought to have the Tax declared unconstitutional.[15] Other lawsuits were filed in state court seeking a refund of taxes paid under protest. Southern Natural Gas Co. v McNamara, No. 225,533 (19th Judicial District, East Baton Rouge Parish). These refund actions were filed after this Court granted plaintiff States' motion for leave to file their complaint.[16]

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Since under Louisiana law there is no provision for interim injunctive relief, the pipeline companies were required to pay the tax. The receipts have been put in an escrow account subject to refund with interest paid on the account at the rate of 6%. Neither the plaintiff States, the United States, nor the FERC is a named party in any of the state actions nor have they filed leave to intervene, although Louisiana represented at oral argument that such a motion would not be opposed.[17] The final suit was commenced by the FERC against various state officials seeking to enjoin enforcement of the First-Use Tax on constitutional grounds. FERC v McNamara, No. CA 78–384 (MD La). That action is presently stayed.

In City of Milwaukee, on which Louisiana relies, the proposed suit by Illinois against four municipalities did not fall within our exclusive grant of original jurisdiction because political subdivisions of the State could not be considered as a State for purposes of 28 USC § 1251(a) (1976 ed, Supp III) [28 USCS § 1251(a)] 406 US, at 94–98, 31 L Ed 2d 712, 92 S Ct 1385. Similarly, the decision in Wyandotte Chemicals did not involve § 1251(a), since it was a suit between a State and citizens of another State and so did not fall under our exclusive jurisdiction. Louisiana also relies,

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however, on Arizona v New Mexico for an example of a case where we determined not to exercise our exclusive jurisdiction in a case between States because the matter was "inappropriate" for determination.[18]

15. The pipeline companies removed the case to federal court. Louisiana's motion to remand was granted, essentially on the ground that the intervention of the Federal District Court would be contrary to the provisions of the Tax Injunction Act, 28 USC § 1341 [28 USCS § 1341]. Edwards v Transcontinental Gas Pipe Line Corp. 464 F Supp 654 (MD La 1979).

16. By granting plaintiffs' motions for leave to file, we rejected Louisiana's motions that the case should be dismissed. Moreover, when we referred the case to the Special Master we expressly referred to him all pending motions *except* for Louisiana's motion to dismiss. See 445 US 913, 63 L Ed 2d 597, 100 S Ct 1271 (1980). Usually, when we decline to exercise our original jurisdiction, we do so by denying the motion for leave to file. See Arizona v New Mexico, 425 US 794, 48 L Ed 2d 376, 96 S Ct 1845 (1976). Although it is arguable that the Special Master was not empowered to consider Louisiana's motion since we did not refer the question to him, we nonetheless rely on his report in light of the fact that we must consider Louisiana's motion to dismiss on the merits in any event, and because the matter went forward before the Special Master on the assumption that the motion to dismiss had been referred. Accordingly, we now see no reason not to acquiesce in the Special Master's views that the issues were properly before him.

17. See Tr of Oral Arg 55–58. It is acknowledged that but for the "invitation" there exists no procedural mechanism in Louisiana for the plaintiff States or the United States to be made parties to the state refund suit.

18. In Pennsylvania v New Jersey, 426 US 660, 49 L Ed 2d 124, 96 S Ct 2333 (1976), we denied leave to file to a number of States challenging commuter income tax provisions adopted by certain other States. That case, however, clearly has no applicability to the present action. In Pennsylvania, the only rea-

In that case, we denied Arizona's motion for leave to file a complaint against New Mexico. Arizona was suing to challenge New Mexico's electrical energy Tax which imposed a net kilowatt hour tax on any electric utility generating electricity in New Mexico. Arizona sought a declaratory judgment that the tax constituted, inter alia, an unconstitutional discrimination against interstate commerce. Arizona brought the suit in its proprietary capacity as a consumer of electricity generated in New Mexico and as parens patriae for its citizens. Arizona further alleged that it had no other forum in which to vindicate its interests. New Mexico asserted that the three Arizona utilities affected by the statute had chosen not to pay the tax and instead had jointly filed suit in state court seeking a declaratory judgment that the tax was unconstitutional. This Court held that "[i]n the circumstances of this case, we are persuaded that the pending state-court action provides an appropriate forum in which the *issues* tendered

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here may be litigated." 425 US, at 797, 48 L Ed 2d 376, 96 S Ct 1845 (emphasis in original).

**[9]** Of course, the issue of appropriateness in an original action between States must be determined on a case-by-case basis. Despite the facial similarity with Arizona v New Mexico, there are significant differences from the present case that compel an opposite result. First, one of the three electric companies involved in the state-court action in New Mexico was a political subdivision of the State of Arizona. Arizona's interests were thus actually being represented by one of the named parties to the suit. In this case, none of the plaintiff States is directly represented in the tax refund case.[19] It is also important to note that Arizona had itself not suffered any direct harm as of the time that it moved for leave to file a complaint since none of the utilities had yet paid the tax. Unlike the present case, it was highly uncertain whether Arizona's interest as a purchaser of electricity had been adversely affected.[20] New Mexico's procedure did not limit the utility companies to seeking a refund of taxes already paid, but rather permitted the companies to refuse to pay the tax pending a declaration of the statute's constitutionality. In contrast, Louisiana requires the Tax to be

son that the complaining States were denied tax revenues was because their legislatures had determined to give a credit for taxes paid to other States, and, to this extent, any injury was voluntarily suffered. Id., at 664, 49 L Ed 2d 124, 96 S Ct 2333. Moreover, jurisdiction was not proper under the parens patriae doctrine since the claims represented the aggregation of individual claims for wrongfully paid taxes which the individual commuter taxpayers were able to contest. Id., at 665–666, 48 L Ed 2d 124, 96 S Ct 2333. See generally Massachusetts v Missouri, 308 US 1, 19–20, 84 L Ed 3, 60 S Ct 39 (1939). In this case, the plaintiff States are not responsible in any way for the economic impact of the Tax. Moreover, unlike the situation in Pennsylvania, individual citizens have no forum in which to challenge the Tax because they did not directly pay the Tax and are not entitled to bring refund actions in Louisiana.

19. Despite the fact that these parties have been invited to intervene, see n 17, supra, the Louisiana refund action is an imperfect forum, primarily because no injunctive relief prior to the determination on the merits is possible under Louisiana law. See La Rev Stat Ann §§ 47:1575, 47:1576 (West 1970 and Supp 1981).

20. See 425 US, at 798, 48 L Ed 2d 376, 96 S Ct 1845 (Stevens, J., concurring).

paid pending the refund action with interest accruing at the rate of 6%. As recognized by the Special Master, the effect of the limited interest rate is to permit Louisiana to benefit from any delay attendant to the state court proceedings even if the Tax is ultimately found unconstitutional.

The tax at issue in the Arizona case did not sufficiently implicate the unique concerns of federalism forming the basis of our original jurisdiction. At most, the New Mexico tax

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affected only some residents in one State. In the present case, the magnitude and effect of the First-Use Tax is far greater. The anticipated $150-million yearly tax is intended to be and is being passed on to millions of consumers in over 30 States. Unlike the day-to-day taxing measures which spurred the Court's observations in Wyandotte, it is not at all a "waste" of this Court's time to consider the validity of a tax with the structure and effect of Louisiana's First-Use Tax. Indeed, there is nothing ordinary about the Tax. Given the underlying claim that Louisiana is attempting, in effect, to levy the Tax as a substitute for a severance tax on gas extracted from areas that belong to the people at large to the relative detriment of the other States in the Union, it is clear that the First-Use Tax implicates serious and important concerns of federalism fully in accord with the purposes and reach of our original jurisdiction.

**[10]** The exercise of our original jurisdiction is also supported by the fact that the First-Use Tax affects the United States' interests in the administration of the Outer Continental Shelf—a factor totally absent in Arizona v New Mexico. While we do not have exclusive jurisdiction in suits brought by the United States against a State, see 28 USC § 1251(b)(2) (1976 ed, Supp III) [28 USCS § 1251(b)(2)], we may entertain such suits as original actions in appropriate circumstances. See, e.g., United States v California, 332 US 19, 91 L Ed 1889, 67 S Ct 1658 (1947). See also United States v Alaska, 422 US 184, 186, n 2, 45 L Ed 2d 109, 95 S Ct 2240 (1975). To be sure, we "seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." United States v Nevada, 412 US, at 538, 37 L Ed 2d 132, 93 S Ct 2763. In this case, however, it is clear that a district court action brought by the United States, which necessarily would not include the plaintiff States, would be an inadequate forum in light of the present posture of this case. In addition, because of the interest of the United States in protecting its rights in the OCS area, with ramifications for all coastal States, as well

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as its interests under the regulatory mechanism that supervises the production and development of natural gas resources, we believe that this case is an appropriate one for the exercise of our original jurisdiction under § 1251(b)(2).

**[11a, 12a, 13a, 14a, 15a]** For the reasons stated above, we reject Louisiana's exceptions to the report of the Special Master, and accept the recommendation that we deny Louisiana's motion to dismiss.[21]

21. **[11b, 12b]** We note in passing that Louisiana's other arguments against the exercise of our original jurisdiction are lacking in merit. First, our original jurisdiction is not

[451 US 746]

## III

[1b, 16, 17] On the merits, plaintiffs argue that the First-Use Tax violates the Supremacy Clause because it interferes with federal regulation of the transportation and sale of natural gas in interstate commerce. The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art VI, cl 2. It is basic to this constitutional command that all conflicting state provisions be without effect. See McCulloch v Maryland, 4 Wheat 316, 427, 4 L Ed 579 (1819). See Hines v Davidowitz, 312 US 52, 85 L Ed 581, 61 S Ct 399 (1941). Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. See Rice v Santa Fe Elevator Corp. 331 US 218, 230, 91 L Ed 1447, 67 S Ct 1146 (1947). But as the Court stated in Rice:

> "Such a purpose [to displace state law] may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Pennsylvania R. Co. v Public Service Comm'n, 250 US 566, 569, [63 L Ed 1142, 40 S Ct 36]; Cloverleaf Butter Co. v Patterson, 315 US 148, [86 L Ed 754, 62 S Ct 491]. Or the Act of Congress may touch a field in which the federal interest

affected by the provisions of the Eleventh Amendment which only withholds federal judicial power in suits against a State "by Citizens of another State, or by Citizens or Subjects of any Foreign State." Thus, an original action between two States only violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to specific individuals. Hawaii v Standard Oil Co. 405 US 251, 258–259, n 12, 31 L Ed 2d 184, 92 S Ct 885 (1972). Second, the Tax Injunction Act, which by its terms only applies to injunctions issued by federal district courts, 28 USC § 1341 [28 USCS § 1341], is inapplicable in original actions. We thus reject Louisiana's exceptions based on these grounds.

[13b, 14b, 15b] Louisiana also excepted to each of the recommendations made by the Special Master in his first report concerning various preliminary matters. Given the above determination on Louisiana's motion to dismiss, we reject each of Louisiana's exceptions and adopt the recommendations contained in the Special Master's first report. Specifically, we agree that New Jersey, whose allegations of injury are identical to that of the original plaintiff States, clearly has standing and should be permitted to intervene. Second, we believe that the United States' interests in the operation of the OCS Act and the FERC's interests in the operation of the Natural Gas Act are sufficiently important to warrant their intervention as party plaintiffs, see supra, at 744 and this page, 68 L Ed 2d, at 594. We have often permitted the United States to intervene in appropriate cases where distinctively federal interests, best presented by the United States itself are at stake. See, e.g., Arizona v California, 344 US 919, 97 L Ed 708, 73 S Ct 385 (1953); Oklahoma v Texas, 253 US 465, 64 L Ed 1015, 40 S Ct 58 (1920). Third, the Master recommended that we grant the motion of 17 pipeline companies to intervene as plaintiffs. Given that the Tax is directly imposed on the owner of imported gas and that the pipelines most often own the gas, those companies have a direct stake in this controversy and in the interest of a full exposition of the issues, we accept the Special Master's recommendation that the pipeline companies be permitted to intervene, noting that it is not unusual to permit intervention of private parties in original actions. See Oklahoma v Texas, 258 US 574, 66 L Ed 771, 42 S Ct 406 (1922). Cf. Trbovich v Mine Workers, 404 US 528, 536–539, 30 L Ed 2d 686, 92 S Ct 630 (1972). Finally, we agree with the Special Master that the Associated Gas Distributors should be permitted to file an amicus brief.

is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Hines v Davidowitz, 312 US 52, [85 L Ed 581, 61 S Ct 399]. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Southern R. Co. v Railroad Commission, 236 US 439, [59 L Ed 661, 35 S Ct 304]; Charleston

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& W. C. R. Co. v Varnville Co. 237 US 597, [59 L Ed 1137, 35 S Ct 715]; New York Central R. Co. v Winfield, 244 US 147, [61 L Ed 1045, 37 S Ct 546]; Napier v Atlantic Coast Line R. Co., [272 US 605, 71 L Ed 432, 47 S Ct 207]. Or the state policy may produce a result inconsistent with the objective of the federal statute. Hill v Florida, 325 US 538, [89 L Ed 1782, 65 S Ct 1373]." Ibid.

Of course, a state statute is void to the extent it conflicts with a federal statute—if, for example, "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v Paul, 373 US 132, 142–143, 10 L Ed 2d 248, 83 S Ct 1210 (1963), or where the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v Davidowitz, supra, at 67, 85 L Ed 581, 61 S Ct 399. See generally Ray v Atlantic Richfield Co. 435 US 151, 157–158, 55 L Ed 2d 179, 98 S Ct 988 (1978); City of Burbank v Lockheed Air Terminal, Inc. 411 US 624, 633, 36 L Ed 2d 547, 93 S Ct 1854 (1973).

Plaintiffs argue that § 1303C of the Act violates the Natural Gas Act, 15 USC §§ 717–717w (1976 ed and Supp III) [15 USCS §§ 717–717w] (Gas Act), as amended by the Natural Gas Policy Act of 1978.[22] In 1938, Congress enacted the Gas Act to assure

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that consumers of natural gas receive a fair price and also to protect against the economic power of the interstate pipelines. See FPC v Hope Natural Gas Co. 320 US 591, 610, 612, 88 L Ed 333, 64 S Ct 281 (1944); Atlantic Refining Co. v Public Service Comm'n of New York, 360 US 378, 388–389, 3 L Ed 2d 1312, 79 S Ct 1246 (1959). The Gas Act was intended to provide the Federal Power Commission, now the FERC, with authority to regulate the wholesale pricing of natural gas in the flow of interstate commerce from wellhead to delivery to consumers. Phillips Petroleum Co. v Wisconsin, 347 US 672, 682, 98 L Ed 1035, 74 S Ct 794 (1954).

Under the present law, natural gas owners are entitled to recover

22. The Natural Gas Policy Act of 1978 was enacted to alleviate the adverse economic effects of the disparate treatment of intrastate and interstate natural gas sales. Under 15 USC § 3320 (1976 ed, Supp III) [15 USCS § 3320], a price for the first sale of gas shall not be considered to exceed the maximum lawful price if it is necessary to recover "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."

Plaintiffs also argue that the entire scheme of taxation in Louisiana with its series of tax credits and exemptions, see text, infra, at 756–758, 68 L Ed 2d, at 601–603, necessarily interferes with the FERC's comprehensive authority to regulate the price of gas. The Special Master determined that the decision was difficult to make given the fact that the FERC had permitted the cost to be passed on. The Special Master concluded that it may ultimately be decided that some of the costs are beyond the reach of the FERC, or that the Tax is not a "substantial hindrance" to the Commission. We do not need to reach plaintiffs' exception on this point given our resolution on the other issues presented.

from their customers all legitimate costs associated with the production, processing, and transportation of natural gas. See FPC v United Gas Pipe Line Co. 386 US 237, 243, 18 L Ed 2d 18, 87 S Ct 1003 (1967) (cost of service normally includes proper allowance for taxes and this allowance is "obviously within the jurisdiction of the Commission"). As part of the First-Use Tax, Louisiana has directed that the amount of the Tax should be "deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas." § 1303C.[23]

[451 US 749]

The Act further provides that an owner shall not have an enforceable right to seek reimbursement for payment of the Tax from any third party other than a purchaser of the gas, ibid., even though the third party may be the owner of marketable hydrocarbons that are extracted from the gas in the course of processing.

The effect of § 1303C is to interfere with the FERC's authority to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers. The unprocessed gas obtained at the wellhead contains extractable hydrocarbons which are most often owned and sold separately from the "dried" gas. The FERC normally allocates part of the processing costs between these related products, and insists that the owners of the liquefiable hydrocarbons bear a fair share of the expense associated with processing.[24] See generally FPC v United Gas Pipe Line Co., supra, at 243, 18 L Ed 2d 18, 87 S Ct 1003 ("income and expense of unregulated and regulated activities should be segregated"). By specifying that the First-Use Tax is a processing cost to be either borne by the pipeline or other owner without compensation, an unlikely event in light of the large sums involved, or passed on to purchasers, Louisiana has attempted a substantial usurpation of the authority of the FERC by dictating to the pipelines the alloca-

23. Section 1303C provides:
"[The First-Use 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."

24. See Mobil Oil Corp. v FPC, 157 US App DC 235, 238–240, 483 F2d 1238, 1241–1243 (1973); Detroit v FPC, 97 US App DC 260, 269–271, 230 F2d 810, 819–821 (1955), cert denied, 352 US 829, 1 L Ed 2d 48, 77 S Ct 34 (1956); Union Oil Company of California, Docket No. C177–828 et al., p 11 (FERC, Apr. 12, 1978); Canadian Superior Oil (US) Ltd., Docket No. C177–802 et al., p 4 (FERC, Mar. 28, 1978); Tennessee Gas Pipeline Co. 38 FPC 691, 698 (1967); Continental Oil Co. 27 FPC 96, 107–108 (1962). Removal reduces both the volume and heat content of the natural gas ultimately received by the gas consumers. See Area Rate Proceeding, 40 FPC 530, 611 (1968), aff'd, 428 F2d 407 (CA5), cert denied, 400 US 950, 27 L Ed 2d 257, 91 S Ct 241, 243, 244 (1970).

tion of processing costs for the interstate shipment

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of natural gas. Owners of natural gas are foreclosed by the operation of § 1303C from entering into valid contracts requiring the owners of the extracted hydrocarbons to reimburse the pipelines for costs associated with transporting and processing these products. The effect of § 1303C is to shift the incidence of certain expenses, which the FERC insists are incurred substantially for the benefit of the owners of extractable hydrocarbons, to the ultimate consumer of the processed gas without the prior approval of the FERC.

The effect of § 1303C is akin to the state regulation overturned in Northern Natural Gas Co. v State Corporation Comm'n of Kansas, 372 US 84, 92, 9 L Ed 2d 601, 83 S Ct 646 (1963). In Northern Natural Gas, a state administrative agency's rule required an interstate pipeline company to purchase natural gas ratably from all the wells in a particular field. The Court held that the rule violated the superior interests of the Federal Government under the Gas Act. The state Commission's order shifted the burden of performing the "complex task of balancing the output of thousands of natural gas wells within the State" to the pipeline company. This requirement "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." Ibid.

While the Special Master noted that the FERC was of the opinion that the First-Use Tax was impermissible, the Special Master refused to recommend that the Court grant plaintiffs' motion for judgment on the Supremacy Clause issue respecting § 1303C because he discerned a factual issue concerning the nature of the gas-drying process. Under the Special Master's view, if the facts demonstrated that processing was done for the profit of the owners of the extractable hydrocarbons, then the position of the FERC that such costs

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should not be passed on to the consumers was correct. If, however, the processing was done as a means of standardizing the heat content of the gas for sale to consumers, then it would be reasonable to pass the Tax forward, and thus § 1303C would be consistent with Gas Act policy. The Special Master concluded that this question was best resolved after suitable factual development, and that in any event, it may be that "in the end FERC's orders can be adjusted so that the laws will mesh without conflict."

[18a] It is our view, however, that the issue is ripe for decision without further evidentiary hearings. Under the Gas Act, determining pipeline and producer costs is the task of the FERC in the first instance, subject to judicial review. Hence, the further hearings contemplated by the Special Master to determine whether and how processing costs are to be allocated are as inappropriate as Louisiana's effort to pre-empt those decisions by a statute directing that processing costs be passed on to the consumer. Even if the FERC ultimately determined that such expenses should be passed on in toto, this kind of decisionmaking is within the

jurisdiction of the FERC; and the Louisiana statute, like the state Commission's order in Northern Natural Gas, supra, is inconsistent with the federal scheme and must give way. At the very least, there is an "imminent possibility of collision," ibid.[25] The FERC need not adjust its rulings to accommodate the Louisiana statute. To the contrary, the State may not trespass on the authority of the federal agency. As we see it, plaintiffs are entitled to judgment on the pleadings that

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§ 1303C is invalid under the Supremacy Clause. To that extent, therefore, we sustain plaintiffs' exceptions to the Special Master's second report.[26]

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25. It is no answer to note that the FERC has administratively determined that the Tax may be passed on. The agency's position is that the Tax is unconstitutional as an invasion of its authority; and as a condition for permitting the pipeline companies to pass the Tax through to consumers, has required that the companies "undertak[e] all legal action . . . to determine the constitutionality of the tax," and secure means for an effective refund should any taxes paid be returned upon a final finding that the Tax was unconstitutional. 43 Fed Reg 45553 (1978).

26. **[18b]** The United States argues that once § 1303C is found unconstitutional the entire Act falls under § 4 of the Act which provides that in the event of a "final and unappealable judicial decision" upholding the right of any owner to "enforce a contract or agreement otherwise rendered unenforceable by RS 47:1303(C)," the following consequences would occur:

"(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."

Since a specific contractual provision is not involved here, the precise terms of the Louisiana statute are not met despite the fact that a final and unappealable determination of the unconstitutionality of § 1303C has been made. Accordingly, we are not in position, based on the provision contained in § 4, to determine that the entire Act is null and void.

Plaintiff States, as well as the pipeline companies, also press another Supremacy Clause issue, contending that the first-use tax is inconsistent with the OCS Act, 43 USC §§ 1331–1356 (1976 ed and Supp III) [43 USCS §§ 1331–1356]. Under § 1332, it is declared to be the policy of the United States that "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." Section 1333(a)(1) expressly extends the Constitution and laws of the United States to the subsoil and seabed of the shelf. While the Act borrows "applicable and not inconsistent" state laws for certain purposes, such as were necessary to fill gaps in federal law, see Rodrigue v Aetna Casualty & Surety Co. 395 US 352, 355–359, 23 L Ed 2d 360, 89 S Ct 1835 (1969), it expressly declares that "[s]tate taxation laws shall not apply to the outer Continental Shelf." § 1333(a)(2)(A). Moreover, the OCS Act provides that the provision for adopting state law "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." § 1333(a)(3). By passing the OCS Act, Congress "emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit . . . ." United States v Maine, 420 US 515, 526, 43 L Ed 2d 363, 95 S Ct 1155 (1975).

Plaintiff States contend that despite the fact that the First-Use statute declares that it is not taxing the gas itself and thus is not a state-imposed severance tax on OCS production, the inevitable intent and result of the Act is to impose a tax on the OCS production in contravention of the express prohibition of the OCS Act. It is clear that a State has no valid interest in imposing a severance tax on federal OCS land. In part, Louisiana purports to justify the Tax as a means of alleviating the alleged discrimination against Louisiana gas caused by the fact that Louisiana gas must pay the state severance tax while OCS gas does not. But if correcting the claimed imbalance were the sole justification asserted for the First-Use Tax, there would be grave doubt about the validity of the Tax. The proper fee or charge for drilling for gas on the

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IV

[2b, 19, 20] Plaintiffs also argue that the First-Use Tax violates the Commerce Clause of the United States Constitution which provides that "[t]he Congress shall have Power . . . [t]o

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regulate Commerce . . . among the several States . . . ." Art I, § 8, cl 3. Prior case law has established that a state tax is not per se invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way. Complete Auto Transit, Inc. v Brady, 430 US 274, 51 L Ed 2d 326, 97 S Ct 1076 (1977). See Western Live Stock v Bureau of Revenue, 303 US 250, 82 L Ed 823, 58 S Ct 546, 115 ALR 944 (1938). The State's right to tax interstate is limited, however, and no state tax may be sustained unless the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State. Washington Revenue Dept. v Washington Stevedoring Assn., 435 US 734, 750, 55 L Ed 2d 682, 98 S Ct 1388 (1978). One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." Northwestern States Portland Cement Co. v Minnesota, 358 US 450, 458, 3 L Ed 2d 421, 79 S Ct 357, 67 ALR2d 1292 (1959). See Boston Stock Exchange v State Tax Comm'n, 429 US 318, 329, 50 L Ed 2d 514, 97 S Ct 599 (1977). This antidiscrimination principle "follows inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. Boston Stock Exchange, supra. See Dean Milk Co. v

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OCS is a determination which is *solely* within the province of the Federal Government. Even if the United States were to decide to open up development to all comers at no charge in order to spur development of natural gas, Louisiana would have no interest in overriding that decision by imposing a tax to equalize the cost of local production with that on the federal OCS area. Permitting the States to exercise such power would adversely affect the price which the Government could command from private developers in their bid price. As clearly required by the OCS Act, Louisiana's sovereign interest in the development of offshore mineral interests stops at its 3-mile border. Louisiana, however, presses certain environmental interests as well in support of its First-Use Tax, and in light of this submission, we do not resolve the issue whether the tax necessarily infringes on the sovereign interests of the United States in the OCS.

The intervening pipeline companies also argue that Louisiana has no valid environmental interest in imposing the First-Use Tax since the measure is pre-empted by the Coastal Zone Management Act of 1972, 86 Stat 1280, as amended, 16 USCS §§ 1451–1464 (1974 and Supp 1981). The Coastal Zone Management Act provides federal funds to compensate States for environmental damage occurring as a result of offshore energy development to States which agree to comply with the standards mandated by the Act. The importance of the concerns for environmental damage are expressly recognized in the OCS Act. See 43 USC § 1332(4)(A) (1976 ed, Supp III) [43 USCS § 1332(4)(A)]. We need not reach this contention in light of our disposition of the other claims, and to this extent the exceptions of the plaintiff States and the pipeline companies are overruled.

Madison, 340 US 349, 356, 95 L Ed 329, 71 S Ct 295 (1951).

[21, 22a, 23] Initially, it is clear to us that the flow of gas from the OCS wells, through processing plants in Louisiana, and through interstate pipelines to the ultimate consumers in over 30 States constitutes interstate commerce. Louisiana argues that the taxable "uses" within the State break the flow of commerce and are wholly local events. But although the Louisiana "uses" may possess a sufficient local nexus to support

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otherwise valid taxation,[27] we do not agree that the flow of gas from the wellhead to the consumer, even though "interrupted" by certain events, is anything but a continual flow of gas in interstate commerce. Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey. California

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v Lo-Vaca Gathering Co. 379 US 366, 369, 13 L Ed 2d 357, 85 S Ct 486 (1965). See Michigan-Wisconsin Pipe Line Co. v Calvert, 347 US 157, 163, 98 L Ed 583, 74 S Ct 396 (1954); FPC v East Ohio Gas Co. 338 US 464, 472–473, 94 L Ed 268, 70 S Ct 266 (1950); Deep South Oil Co. v FPC, 247 F2d 882, 887–888 (CA5 1957). See generally Illinois Natural Gas Co. v Central Illinois Public Service Co. 314 US 498, 503–504, 86 L Ed 371, 62 S Ct 384 (1942) (fact of sale does not serve to change the "essential interstate nature of the business").

[24] A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." Best & Co. v Maxwell, 311 US 454,

27. The United States suggests that the uses enunciated in the Act do not have a sufficient local nexus to support the Tax under the Commerce Clause. See Michigan-Wisconsin Pipe Line Co. v Calvert, 347 US 157, 98 L Ed 583, 74 S Ct 396 (1954). While the local nexus of certain of the uses is suspect, other uses would appear to have a substantial local nexus so that on the present record it would be difficult to say that the entire Tax was unconstitutional on this ground. The Act contains a severability clause providing that if any use is found to be an unconstitutional basis for taxation, the next use would be taxed. See La Rev Stat Ann § 47:1303(F) (West Supp 1981). Given our resolution on the discrimination charge, we find it unnecessary to reach the local nexus claim especially in light of the severability clause. To this extent, the exception of the United States and the FERC is overruled.

[22b] The United States and the plaintiff States also argue that the First-Use Tax is not fairly apportioned. To be valid, a tax on interstate commerce must be reasonably apportioned to the value of the activities occurring within the State upon which the Tax is imposed. See Washington Revenue Dept. v Washington Stevedoring Assn., 435 US 734, 746–747, 55 L Ed 2d 682, 98 S Ct 1388 (1978). It is submitted that several factors suggest this principle is being violated. First, the Tax is imposed on each use as a function of the volume of the gas subject to the use, without attempting to tailor the amount of the Tax depending on the nature or extent of the actual use of the gas within Louisiana. Second, the use of the proceeds of the First-Use Tax demonstrates that the Tax is substantially in excess of the amount fairly associated with the local uses. Under the Act, 75% of the proceeds are used to service Louisiana's general debt, while only one-quarter is directly used to alleviate the alleged environmental damage caused by the pipeline activities. Third, the State has not demonstrated a sufficient relationship between other services provided by the State and the amount of the First-Use Taxes provided. In light of our determination that the Tax is discriminatory, however, we need not determine the apportionment issue. The exceptions of the United States, the FERC, and the plaintiff States to this extent are also overruled.

455–456, 85 L Ed 275, 61 S Ct 334 (1940). See Halliburton Oil Well Cementing Co. v Reily, 373 US 64, 69, 10 L Ed 2d 202, 83 S Ct 1201 (1963); Gregg Dyeing Co. v Query, 286 US 472, 478–480, 76 L Ed 1232, 52 S Ct 631, 84 ALR 831 (1932). In this case, the Louisiana First-Use Tax unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions. No further hearings are necessary to sustain this conclusion. Under the specific provisions of the First-Use Tax, OCS gas used for certain purposes within Louisiana is exempted from the Tax. OCS gas consumed in Louisiana for (1) producing oil, natural gas, or sulphur; (2) processing natural gas for the extraction of liquefiable hydrocarbons; or (3) manufacturing fertilizer and anhydrous ammonia, is exempt from the First-Use Tax. § 1303A. Competitive users in other States are burdened with the Tax. Other Louisiana statutes, enacted as part of the First-Use Tax package, provide important tax credits favoring local interests. Under the Severance Tax Credit, an owner paying the First-Use Tax on OCS gas receives an equivalent tax credit on any state severance tax owed in connection with production in Louisiana. § 47:647 (West Supp 1981). On its face, this credit favors those who both own OCS gas and engage in

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Louisiana production.[28] The obvious economic effect of this Severance Tax Credit is to encourage natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within Louisiana rather than to invest in further OCS development or in production in other States. Finally, under the Louisiana statutes, any utility producing electricity with OCS gas, any natural gas distributor dealing in OCS gas, or any direct purchaser of OCS gas for consumption by the purchaser in Louisiana may recoup any increase in the cost of gas attributable to the First-Use Tax through credits against various taxes or a combination of taxes otherwise owed to the State of Louisiana. § 47:11(B) (West Supp 1981). Louisiana consumers of OCS gas are thus substantially protected against the impact of the first-use tax and have the benefit of untaxed OCS gas which because it is not subject to either a severance tax or the First-Use Tax may be cheaper than locally produced gas. OCS gas

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moving out of the State, however, is bur-

28. The United States has provided an example which the Special Master used to illustrate the possible discrimination:
"This difference can be illustrated by the following example. Owner A has 1000 mcf of OCS gas; owner B has 500 mcf of OCS gas and 500 mcf of gas subject to Louisiana's severance tax. A owes $70 of first use tax; B owes $35 of first use tax and $35 in severance tax. B, however, pays only $35 in first use taxes. He owes no severance tax because he can credit the first use payment against the severance tax liability." Second Report, at 34, n 18. It has been observed that the credit means that "gas extracted offshore and gas extracted in Louisiana will be treated the same for Louisiana tax purposes only when the First Use Taxpayer has no severance tax liability to absorb the First Use Taxes." As a result, First-Use Taxpayers have an incentive to "undertake mineral extraction activities in Louisiana so as to minimize their effective First Use Tax burden and to compete on equal terms with other First Use Taxpayers whose First Use Tax burden has already been so minimized." W. Hellerstein, State Taxation in the Federal System: Perspectives on Louisiana's First Use Tax on Natural Gas, Shell Foundation Lecture at Tulane University School of Law (Nov. 20, 1980), pp 23–24.

dened with the First-Use Tax.[29]

The Special Master was aware that the effect of the Louisiana tax system is to favor local interests. With respect to the Severance Tax Credit, the Special Master noted that "[s]ince there is no apparent relation between the ownership of outer continental shelf gas and the production of gas in Louisiana, it is hard to understand Louisiana's motive in permitting this credit, but it obviously aids an intrastate operation in a way not available to a pipeline engaged only in interstate transportation or producing gas outside of Louisiana." Second Report, at 34. Moreover, the credit available to electrical generating plants, gas distributing services, and direct purchasers resulted in Louisiana customers being "protected in whole or in part from the incidence of the tax which is passed on to consumers out of the State." Ibid. Despite these concerns, the Special Master did not recommend granting plaintiffs' motion to invalidate the Tax under the Commerce Clause because, as he saw it, it was difficult to tell the effect of the various credits given the totality of the operation of the state tax provisions. Thus, instead of being discriminatory, the "actuality of operation" test required by Halliburton Oil Well Cementing Co. v Reily, supra, at 69, 10 L Ed 2d 202, 83 S Ct 1201, might demonstrate after a full hearing that the First-Use Tax is a proper " 'compensating' tax intended to complement the state severance tax as the use tax complemented the sales tax in Henneford v Silas Mason Co. 300 US 577, [81 L Ed 814, 57 S Ct 524] (1937)." Second Report, at 35.

In our view, the First-Use Tax cannot be justified as a compensatory tax. The concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate. Here, Louisiana claims that the

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First-Use Tax compensates for the effect of the State's severance tax on local production of natural gas. To be sure, Louisiana has an interest in protecting its natural resources, and, like most States, has chosen to impose a severance tax on the privilege of severing resources from its soil. See Bel Oil Corp. v Roland, 242 La 498, 137 So 2d 308, appeal dism'd, 371 US 2, 9 L Ed 2d 48, 83 S Ct 22 (1962); Edwards v Parker, 332 So 2d 175 (La 1976). But the First-Use Tax is not designed to meet these same ends since Louisiana has no sovereign interest in being compensated for the severance of resources from the federally owned OCS land. The two events are not comparable in the same fashion as a use tax complements a sales tax. In that case, a State is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the State. No such equality exists in this instance.

The common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce. See Boston Stock Exchange, 429 US, at 331–332, 50 L Ed 2d 514, 97 S Ct 599;

29. Of course, § 1303C itself may result in substantial discrimination since owners of gas subject to the state severance tax are not prohibited from allocating that cost to someone other than the ultimate consumer.

Henneford, v Silas Mason Co., 300 US 577, 583–584, 81 L Ed 814, 57 S Ct 524 (1937). See generally Halliburton Oil, 373 US, at 70, 10 L Ed 2d 202, 83 S Ct 1201 ("equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state"). As already demonstrated, however, the pattern of credits and exemptions allowed under the Louisiana statute undeniably violates this principle of equality. As we have said, OCS gas may generally be consumed in Louisiana without the burden of the First-Use Tax. Its principal application is to gas moving out of the State. Of course, it does equalize the tax burdens on OCS gas leaving the State and Louisiana gas going into the interstate market. But this sort of equalization is not the kind of "compensating" effect that our cases have recognized.

**[25]** It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates. Accordingly, we grant plaintiffs' exception that the First-Use Tax is unconstitutional under the Commerce Clause because it unfairly discriminates against purchasers of gas moving through Louisiana in interstate commerce.

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## V

**[1c, 2c]** In conclusion, we hold that § 1303C violates the Supremacy Clause and that the First-Use Tax is unconstitutional under the Commerce Clause. Judgment to that effect and enjoining further collection of the Tax shall be entered. Jurisdiction over the case is retained in the event that further proceedings are required to implement the judgment.

So ordered.

Justice **Powell** took no part in the consideration or decision of this case.

## SEPARATE OPINIONS

Chief Justice **Burger,** concurring.

There is much validity in Justice Rehnquist's dissenting opinion, and it should keep us alert to any effort to expand the use of our original jurisdiction. However, I am satisfied that the Court's resolution of this case is sound, and I therefore join the Court's opinion.

Justice **Rehnquist,** dissenting.

There is no question that this controversy falls within the literal terms of the constitutional and statutory grant of original jurisdiction to this Court. U. S. Const, Art III, § 2, cl 2; 28 USC § 1251(a) (1976 ed, Supp III) [28 USCS § 1251(a)]. As the Court stated in Illinois v Milwaukee, 406 US 91, 93, 31 L Ed 2d 712, 92 S Ct 1385 (1972), however, "[w]e construe 28 USC § 1251(a)(1) [28 USCS § 1251(a)(1)], as we do Art III, § 2, cl 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases." Because of the nature of the interests which the plaintiff States seek to vindicate in this original action, and because of the existence of alternative forums in which these interests can be vindicated, I do not consider this an "ap-

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propriate case" for the exercise of original jurisdiction. The plaintiff States have not, in my view, established the "strictest necessity" required for invoking this Court's original jurisdiction, Ohio v Wyandotte Chemicals Corp. 401 US 493, 505, 28 L Ed 2d 256, 91 S Ct 1005, 57 Ohio Ops 2d 351 (1971), and therefore I would grant defendant Louisiana's motion to dismiss the complaint.

I

It has been a consistent and dominant theme in decisions of this Court that our original jurisdiction should be exercised with considerable restraint and only after searching inquiry into the necessity for doing so. As we noted in Illinois v Milwaukee, "[i]t has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.' " 406 US, at 93, 31 L Ed 2d 712, 92 S Ct 1385 (quoting Utah v United States, 394 US 89, 95, 22 L Ed 2d 99, 89 S Ct 761 (1969)). Chief Justice Fuller wrote in 1900 that original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute . . . ." Louisiana v Texas, 176 US 1, 15, 44 L Ed 347, 20 S Ct 251. The reasons underlying this restraint have also been long established. The Court has wisely insisted that original jurisdiction be sparingly invoked because it is not suited to functioning as a nisi prius tribunal. "This Court is . . . structured to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original jurisdiction cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence." Ohio v Wyandotte Chemicals Corp. supra, at 498, 28 L Ed 2d 256, 91 S Ct 1005, 57 Ohio Ops 2d 351.[1]

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Over 40 years ago, when the Court's docket was considerably lighter than it is today, Chief Justice Hughes articulated the concern that accepting original jurisdiction cases "in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it." Massachusetts v Missouri, 308 US 1, 19, 84 L Ed 3, 60 S Ct 39 (1939). The Court has recognized that expending its time and resources on original jurisdiction cases detracts from its primary responsibility as an appellate tribunal. "The breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired." Washington v General Motors Corp. 406 US 109, 113, 31 L Ed 2d 727, 92 S Ct 1396 (1972). See also Illinois v Milwaukee, supra, at 93–94, 31 L Ed 2d 712, 92 S Ct 1385 ("We incline to

1. It is true that in this case the Court decides that judgment on the pleadings is appropriate, and that therefore it is not necessary to conduct a trial. I do not understand the Court, however, to be ruling that original jurisdiction is appropriate only when a trial is not necessary, and therefore in accepting original jurisdiction of this case the Court opens the door to similar cases which may necessitate a trial.

a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer"). Original jurisdiction cases represent an "intrusion on society's interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court . . . ." Ohio v Wyandotte Chemicals Corp., supra, at 505, 28 L Ed 2d 256, 91 S Ct 1005, 57 Ohio Ops 2d 351.

None of these concerns are adequately answered by the expedient of employing a Special Master to conduct hearings, receive evidence, and submit recommendations for our review. It is no reflection on the quality of the work by the Special Master in this case or any other master in any other original jurisdiction case to find it unsatisfactory to delegate the

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proper functions of this Court. Of course this Court cannot sit to receive evidence or conduct trials—but that fact should counsel reluctance to accept cases where the situation might arise, not resolution of the problem by empowering an individual to act in our stead. I for one think justice is far better served by trials in the lower courts, with appropriate review, than by trials before a Special Master whose rulings this Court simply cannot consider with the care and attention it should. It is one thing to review findings of a district court or state court, empowered to make findings in its own right, and quite another to accept (or reject) recommendations when this Court is in theory the primary factfinder. As Chief Justice Stone put it in Georgia v Pennsylvania R. Co. 324 US 439, 470, 89 L Ed 1051, 65 S Ct 716 (1945) (dissenting opinion): "In an original suit, even when the case is first referred to a master, this Court has the duty of making an independent examination of the evidence, a time-consuming process which seriously interferes with the discharge of our ever-increasing appellate duties."

II

The prudential process by which the Court culls "appropriate" original jurisdiction cases from those which are inappropriate involves two inquiries. In Massachusetts v Missouri, supra, at 18, 84 L Ed 3, 60 S Ct 39, the Court noted:

> "In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interests of the complaining State—the essential quality of the right asserted—but we must also inquire whether recourse to that jurisdiction . . . is necessary for the State's protection."

This dual inquiry was reaffirmed in Washington v General Motors Corp., supra, at 113, 31 L Ed 2d 727, 92 S Ct 1396. Or, as put in Illinois v Milwaukee, 406 US, at 93, 31 L Ed 2d 712, 92 S Ct 1385, "the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another

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forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." The first prong of the inquiry thus involves an assessment of the "nature of the interests of the complaining state," "the essential quality of the right asserted," "the seriousness and dignity of the claim," and the second prong an

examination of the availability of an alternative forum.

The Court accepts original jurisdiction in this case for two separate reasons: because the plaintiff States are injured in their capacity as purchasers of natural gas, ante, at 736–737, 68 L Ed 2d, at 589–590, and because the plaintiff States may sue as parens patriae, ante, at 737–739, 68 L Ed 2d, at 589–591. In ruling that jurisdiction exists because of the plaintiff States' own purchases of natural gas, the Court does not even purport to consider the nature or essential quality of the States' claim or whether it is of sufficient "seriousness and dignity" to justify invoking our "delicate and grave" original jurisdiction. The Court recognizes that "unique concerns of federalism" form the basis of our original jurisdiction, ante, at 743, 68 L Ed 2d, at 593, but does not explain how such concerns are implicated simply because one State levies a tax on an item which is eventually passed onto consumers, one of which happens to be another State. The "nature of the interests of the complaining state—the essential quality of the right asserted" is indistinguishable from the interest and right of a private citizen, and the States' claim is of no greater "seriousness and dignity" than the claim of any other consumer.

I would hold that, as a general rule, when a State's claim is indistinguishable from the claim of any other private consumer it is insufficient to invoke our original jurisdiction. The Court in the past has referred to claims by a State in its capacity simply as consumer or owner as mere "makeweights." See Georgia v Pennsylvania R. Co., supra, at 450, 89 L Ed 1051, 65 S Ct 716; Georgia v Tennessee Copper Co. 206 US 230, 237, 51 L Ed 1038, 27 S Ct 618 (1907); see also Pennsylvania v West Virginia, 262 US 553, 611, 67 L Ed 1117, 43 S Ct 658, 1 Ohio L Abs 627, 32 ALR 300

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(1923) (Brandeis, J., dissenting). Cf. Kansas v Colorado, 206 US 46, 98, 51 L Ed 956, 27 S Ct 655 (1907). I do not think such a makeweight should suffice to invoke our original jurisdiction, particularly since States now act as consumers in a vast array of areas.

The fact that States now purchase countless varieties of items for their own use which were not purchased 50 or even 25 years ago suggests that concern for our own limited resources is not the only factor which should motivate us in allowing our original jurisdiction to be invoked sparingly. With the greatly increased litigation dockets in most state and federal trial courts, there will be the strongest temptation for various interest groups within the State to attempt to persuade the Attorney General of that State to bring an action in the name of the State in order to make an end run around the barriers of time and delay which would confront them if they were merely private litigants.[2] Thus in permitting indiscriminate use of our original jurisdiction we not only consume our own scarce

2. Experience teaches that these are not empty concerns. See, e.g., New Hampshire v Louisiana, 108 US 76, 89, 27 L Ed 656, 2 S Ct 176 (1883) (State suing as assignee of bondholders, bondholders funding lawsuit and to collect any award); North Dakota v Minnesota, 263 US 365, 375, 68 L Ed 342, 44 S Ct 138 (1923) (state suing for flood damage to farmers' land, farmers funding lawsuit and to collect any award).

resources, but permit in effect the bypassing of ordinary trial courts where private parties are required to litigate the same issues. Such a departure from past practice risks the creation of an entirely separate system for litigation in this country, standing side by side with the state-court systems and the federal-court system. It will obviously be tempting to many interests of a variety of persuasions on the merits of a particular issue to "start at the top," so to speak, and have the luxury of litigating only before a Special Master followed by the appellate-type review which this Court necessarily gives to his findings and recommendations.

If all that is required to invoke our original jurisdiction

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is an injury to the State as consumer caused by the regulatory activity of another State, the list of cases which could be pressed as original-jurisdiction cases must be endless. The Court's opinion contains no limiting principle, as mandated by the frequent statements that our original jurisdiction be sparingly invoked and the required inquiry into the nature of the State's claim.

I would require that the State's claim involve some tangible relation to the State's sovereign interests. Our original jurisdiction should not be trivialized and open to run-of-the-mill claims simply because they are brought by a State, but rather should be limited to complaints by States qua States. This would include the prototypical original action, boundary disputes, and the familiar cases involving disputes over water rights. In such cases, the State seeks to vindicate its rights as a State, a political entity.[3] Since nothing about the complaint in this case involves sovereign interests, I would hold that there is no jurisdiction on the basis of the States' own purchases of natural gas.[4]

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Nor is this an appropriate case for the plaintiff States to invoke original jurisdiction as parens patriae. The Court announces that a State may sue in this capacity in an original action "where the injury alleged affects the general population of a State in a substantial way," ante, at 737, 68 L Ed 2d, at 590, but the established rule, which may be different than the Court's paraphrase, was

3. Requiring that a State's claim implicate sovereignty interests also serves the oft-repeated expression in our opinions that the Court will not interfere with action by one State unless the injury to the complaining State is of "serious magnitude." See Alabama v Arizona, 291 US 286, 292, 78 L Ed 798, 54 S Ct 399 (1934); Colorado v Kansas, 320 US 383, 393, and n 8, 88 L Ed 116, 64 S Ct 176 (1943). The Court cites this concern, ante, at 736, n 11, 68 L Ed 2d, at 589, but does not explain why a tax of seven cents per thousand cubic feet of gas is an injury of "serious magnitude."

4. It is true that the Court has exercised original jurisdiction in cases where the right asserted by a complaining State cannot truly be considered a right affecting sovereign interests. I do not doubt the Court's *power* to exercise original jurisdiction in such cases, nor do I in this case. The decision that a particular type of case was an "appropriate" one for original jurisdiction a century ago, however, does not mean that the same sort of case is an appropriate one today. Justice Harlan explicitly recognized in Ohio v Wyandotte Chemicals Corp., 400 US 493, 497–499, 28 L Ed 2d 256, 91 S Ct 1005, 57 Ohio Ops 2d 351 (1971), that societal changes and "the evolution of this Court's responsibilities in the American legal system" affected the determination of what was an appropriate case in which to exercise original jurisdiction. The increase in state regulatory efforts on the one hand and the role of States as consumers on the other suggests that new considerations need to be brought to bear on the present question.

articulated in Pennsylvania v New Jersey, 426 US 660, 665, 49 L Ed 2d 124, 96 S Ct 2333 (1976) (per curiam) in these terms: "It has . . . become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." In Oklahoma v Cook, 304 US 387, 394, 82 L Ed 1416, 58 S Ct 954 (1938), Chief Justice Hughes stressed that the principle that a State may sue as parens patriae "does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy."

Here the plaintiff States are not suing to advance a sovereign or quasi-sovereign interest. Rather they are suing to promote the economic interests of those of their citizens who purchase and use natural gas. Advancing the economic interests of a limited group of citizens, however, is not sufficient to support parens patriae original jurisdiction. In Oklahoma v Atchison, T. & S. F. R. Co. 220 US 277, 289, 55 L Ed 465, 31 S Ct 434 (1911), the Court ruled that a State had no standing to challenge in an original action unreasonable freight rates imposed by citizens of another State affecting shippers within the State. In New Hampshire v Louisiana, 108 US 76, 27 L Ed 656, 2 S Ct 176 (1883),

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the Court rejected an effort by New Hampshire to collect as assignee on Louisiana state bonds, when the proceeds would end up in the hands of the assignors, New Hampshire citizens. And in North Dakota v Minnesota, 263 US 365, 68 L Ed 342, 44 S Ct 138 (1923), the Court turned back an effort by the plaintiff State to sue for flood damage to farmers' land. In my view this suit, brought to benefit state consumers of natural gas, is closer to these cases than those cited by the Court, Missouri v Illinois, 180 US 208, 241, 45 L Ed 497, 21 S Ct 331 (1901) (health menace to entire State from spread of contagious diseases specifically noted); Kansas v Colorado, 185 US 125, 46 L Ed 838, 22 S Ct 552 (1902) (rights to water); Georgia v Tennessee Copper Co., 206 US 230, 51 L Ed 1038, 27 S Ct 618 (1907) (rights to air in unpolluted State).

The Court relies heavily on Pennsylvania v West Virginia, 262 US 553, 67 L Ed 1117, 43 S Ct 658, 1 Ohio L Abs 627, 32 ALR 300 (1923), which it describes as "functionally indistinguishable" from the case before us. Ante, at 738–739, 68 L Ed 2d, at 590–591. I think Pennsylvania v West Virginia, decided over the dissents of Justices Holmes, Brandeis, and McReynolds, is readily distinguishable, "functionally" or otherwise. The harm in Pennsylvania v West Virginia was the threatened complete cessation of deliveries of natural gas. This harmed all the citizens of the State, since it would have prevented any of them from purchasing the natural gas. The harm involved was also far more serious than the harm in this case. In Pennsylvania v West Virginia, the harm was the complete halt in deliveries of a commodity upon which citizens of the plaintiff State depended. The opinion there stressed the direct link to the "health, comfort and welfare" of the citizens of Pennsylvania and the serious jeopardy they would be in if their supply of heating gas were suddenly cut off. 262 US, at 591–592, 67 L

Ed 1117, 43 S Ct 658, 1 Ohio L Abs 627, 32 ALR 300. Such a direct link to health and welfare is simply not present in this case. The distinction between an increase in the cost of a commodity passed onto consumers complained of here, and the complete cessation of a service upon which citizens depended, seems palpable.

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III

The exercise of original jurisdiction in this case is particularly inappropriate since the issues the plaintiff States would have us decide not only can be but in fact are being litigated in other forums. Although this case would come within our original and exclusive jurisdiction if appropriate, the question whether it is appropriate depends in part on the availability of alternative forums. See Illinois v Milwaukee, 406 US, at 93, 31 L Ed 2d 712, 92 S Ct 1385; Arizona v New Mexico, 425 US 794, 796–797, 48 L Ed 2d 376, 96 S Ct 1845 (1976).[5]

The precise issues which the Court finds it somehow necessary to reach today are raised in actions which are currently pending in a Louisiana state court. An action by Louisiana seeking a declaratory judgment that its First-Use Tax is constitutional is pending, Edwards v Transcontinental Gas Pipe Line Corp., No. 216,867 (19th Judicial Dist., East Baton Rouge Parish), as is a refund suit brought by the 17 pipeline companies actually liable for the tax, Southern Natural Gas Co., v McNamara, No. 225,533 (19th Judicial Dist., East Baton Rouge Parish). The pipeline companies raise in the Louisiana proceeding the identical challenges raised by the plaintiff States in the present case.[6]

In view of the foregoing I consider Arizona v New Mexico, supra, controlling. There the Court declined to exercise original

[451 US 770]

and exclusive jurisdiction over a suit brought by Arizona challenging injury to it and its citizens as consumers of electricity generated in New Mexico and subject to a New Mexico tax. As here, the tax was imposed on utilities, not directly on the consumers. The Court quoted language from Illinois v Milwaukee, supra, and Massachusetts v Missouri, 308 US 1, 84 L Ed 3, 60 S Ct 39 (1939), concerning the sparing use of our original jurisdiction and the appropriateness of considering alternative forums, and noted that the utilities, like the pipeline companies here, had sued in state court. The Court concluded that "[i]n the circumstances of this case, we are persuaded that the pending state court action provides an appropriate forum in which the *issues* tendered here may be litigated" (emphasis in original). 425

5. The Court's dismissal of the significance of Illinois v Milwaukee and Ohio v Wyandotte Chemicals Corp. as cases not within the exclusive jurisdiction of this Court thus simply does not wash. Illinois v Milwaukee indicated the appropriateness of considering the existence of alternative forums in the context of original and exclusive jurisdiction. Arizona v New Mexico makes the appropriateness of such consideration in original and exclusive jurisdiction cases quite clear.

6. The fact that the pipeline companies have seen fit to bring suit on their own behalf undermines the analysis of the Court that the consumers of the gas, both the States and the States' citizens, are the real parties in interest. The pipeline companies obviously have a sufficient interest to justify their suit.

US, at 797, 48 L Ed 2d 376, 96 S Ct 1845. Although the Court in this case stresses that the plaintiff States are not parties in the Louisiana state-court proceedings, in Arizona v New Mexico we specifically emphasized that the relevant question was whether the *issues* could be litigated elsewhere.

## IV

The basic problem with the Court's opinion, in my view, is that it articulates no limiting principles that would prevent this Court from being deluged by original actions brought by States simply in their role as consumers or on behalf of groups of their citizens as consumers. Perhaps the principles sketched in this dissent are not the best limiting principles which could be devised, but the difficulty in developing such principles does not lessen the need for them. The absence of limiting principles in the Court's opinion, I fear, "could well pave the way for putting this Court into a quandary whereby we must opt either to pick and choose arbitrarily among similarly situated litigants or to devote truly enormous portions of our energies to such matters." Ohio v Wyandotte Chemicals Corp. 401 US, at 504, 28 L Ed 2d 256, 91 S Ct 1005, 57 Ohio Ops 2d 351.[7] The problem

[451 US 771]

is accentuated in this case because it falls within our original and exclusive jurisdiction, which means that similar cases not only can be but *must* be brought here.

In conclusion I can do no better than quote from a dissent Justice Frankfurter penned under similar circumstances:

> "Jurisdictional doubts inevitably lose force once leave has been given to file a bill, a master has been appointed, long hearings have been held, and a weighty report has been submitted. And so, were this the last as well as the first assumption of jurisdiction by this Court of a controversy like the present, even serious doubts about it might well go unexpressed. But if experience is any guide, the present decision will give momentum to kindred litigation and reliance upon it beyond the scope of the special facts of this case. . . . [L]egal doctrines have, in an odd kind of way, the faculty of self-generating extension. Therefore, in pricking out the lines of future development of what is new doctrine, the importance of these issues may make it not inappropriate to indicate difficulties which I have not been able to overcome and potential abuses to which the doctrine is not unlikely to give rise." Texas v Florida, 306 US 398, 434, 83 L Ed 817, 595 Ct 563, 121 ALR 1179 (1939).[8]

7. It is hardly satisfactory simply to note, as does the Court, that "the issue of appropriateness in an original action between States must be determined on a case-by-case basis." Ante, at 743, 68 L Ed 2d, at 593.

8. Because of my views on the jurisdictional question I find it unnecessary to address the merits of this case, beyond noting that the pressure in original actions to avoid factual inquiries which this Court of course cannot make may go far to explain the entry of judgment on the pleadings over the ruling by the Special Master that further factual development is necessary to a proper resolution of the issues.

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EDITOR'S NOTE

An annotation on "Original jurisdiction of United States Supreme Court in suits between states," appears p 969, infra.

STATEMENT BY

WILLIAM E. BROWN, VICE PRESIDENT

THE KANSAS POWER AND LIGHT COMPANY

ON HOUSE BILL 2571

BEFORE THE HOUSE ASSESSMENT AND TAXATION COMMITTEE

APRIL 19, 1983

Mr. Chairman and Members of the Committee:

I am William E. Brown, Vice President of The Kansas Power and Light Company.

KPL opposes House Bill 2571 because it would raise rates for our 132,000 natural gas customers, many of whom are also constituents of members of this committee. The 119 communities KPL serves are spread from Medicine Lodge to Atchison and include such towns as Wakefield, Junction City, Salina, Emporia, Kingman and Bushton.

It is our understanding that the tax rate of .001 dollars set out in line 174 of the bill is a mistake and was intended to be .001 cents or we are informed this morning possibly .0001 cents. Using the first corrected figure we calculate that HB 2571, had it been in effect during 1982 would have added $1,139,157 to the cost of gas on KPL's main system alone. Under the bill as originally written that figure would have been $113,915,828. Whatever the actual level of the tax would be is not the important point. The bill will raise rates on our main system and on the other two systems where we purchase gas from Northwest Central Pipeline for resale in four cities and from Northern Natural Gas Company which we resell in 9 communities.

This tax will simply be passed on to gas users in the form of higher rates and HB 2571 constitutes a hidden tax on customers.

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Its passage would be inconsistent with previous legislative efforts, such as the removal of the state sales tax on residential bills and the passage of the Kansas Price Protection Act designed to help hold down utility costs to the citizens of Kansas.

There is continual pressure to force the costs of natural gas even higher to the consumer through the NGPA on the federal level down to the reduction in allowable production in the Hugoton Field recently ordered in Kansas. Adding another layer of taxes on the costs of delivering gas only pushes customer bills up.

KPL believes enactment of this legislation would be a step in the wrong direction. We urge you to reject House Bill 2571.

Thank you, Mr. Chairman. I would be happy to respond to any questions.

TESTIMONY ON HB 2571

before the House Assessment and Taxation Committee

April 19, 1983

Mr. Chairman and members of the Committee, my name is Don Willoughby and I am here today representing InterNorth, Inc., a diversified energy-based corporation involved in natural gas, liquid fuels, petrochemicals and exploration and production.

We are testifying in opposition to HB 2571, a bill imposing a tax upon the use of pipelines for moving various products.

This bill is very similar to legislation introduced in Louisiana last year. The Louisiana bill, HB 1660, or as it was commonly called, the Coastal Wetlands Environmental Levy (CWEL), was introduced by Louisiana after its First Use Tax was declared unconstitutional by the U.S. Supreme Court. The bill's author drafted this bill (HB 1660) to correct the deficiencies the Supreme Court found in the First Use Tax bill. Fortunately for those of us living outside the State of Louisiana, the bill <u>failed</u> to pass the Louisiana Legislature.

Today, we are looking at HB 2571, a similar piece of legislation. So similar that large pieces of the Louisiana bill appear verbatum in HB 2571.

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InterNorth opposes HB 2571 or any other method of taxation which incorporates the principles upon which HB 2571 is based. There is no question that the tax will produce higher energy costs, leading to a further stagnation in the economy. That stagnation will mean additional unemployment, less industrial growth and ultimately retard oil and gas exploration. HB 2571 will raise millions of dollars per year, but at a cost to the economies of Kansas and the nation.

Our company is particularly concerned about the impact this additional tax will have on an already soft-economy. In many areas of this country the natural gas industry is very close to losing major commercial/industrial markets due to rising costs of gas. In some cases that market is switching to alternate fuels. The prime results of that switch are an increased dependence on imported oil and the corresponding fueling of inflation. In the more serious cases we are seeing these businesses simply closing their doors indefinitely or permanently. The costs to society when this happens are only too obvious. Legislation such as HB 2571 can only magnify this situation. The one area where we cannot economically afford to increase costs via taxation is energy.

It is not only in the commercial and industrial sector that this tax could have a profound negative effect. In much of our service territory agriculture is an economic cornerstone. The agricultural industry has been hit extremely hard by inflation, rising interest rates, and material costs at a time when prices for their products are, in many instances, less than their costs of production. Natural gas is an extremely important element of

this industry, whether it be in the manufacture of fertilizer, the drying of grain, or the irrigation of the field. The margin for the farmer continues to decrease. HB 2571 will make that margin even slimmer. Not only will increases in energy costs in this area continue to fuel inflation, but they are likely to break the fragile thread that is keeping some farmers in business.

Obviously, it would be misleading to link all increases in the cost of gas, and the resultant negative economic impact, to a single piece of legislation such as HB 2571. The major source of the increases are contained in the pricing provisions of the NGPA. But while we may have limited impact on federal wellhead pricing, there is no question that there are efforts which can and should be made to hold down other costs which add to increasing natural gas prices. The defeat of HB 2571 will be a strong step in that direction. Opposing HB 2571 will not, in and of itself, turn the economy around. But the $14.5 million/ year (at $.001) that our customers will save if it is defeated, coupled with the millions of dollars saved by customers of other systems, will go a long way toward keeping the doors on that local industrial concern open, keeping the small family farmer in business, and helping to moderate our families' energy costs in the future.

Major impact on this country's economy is the practical result of taxes such as HB 2571. We are just as concerned with some of the theoretical implications of this proposal. Like many states, Kansas has substantially increased spending with

windfalls in the State Treasury the past few years. The loss of those windfalls now has the State scrambling to make ends meet. We believe the HB 2571 proposal is simply a method of replacing revenues lost, not an environmental and infrastructure damage bill. At best HB 2571 is a veiled attempt to increase Kansas taxes without the political consequences. At worst, it is an opportunistic effort to have consumers in other states help to fund the Kansas Treasury.

The bill seeks appropriate compensation for environmental damage caused by the activities of the pipeline industry. Using this argument as a policy basis for the legislation is more than a bit strained when the State has told the pipeline industry that it is compatible with a need to preserve the environment. This State encouragement has been responsible for much of the industry's activity in the State. Now that the State needs revenues, we believe it simply finds it convenient to cite environmental harm and demand compensation.

Even giving the benefit of doubt to the environmental concerns, we cannot agree that compensation for this damage, if in fact it exists, should run to the States general fund for use in capital expenditure projects and customary state expenses. In an economic period when public and private sector budgets are requiring extensive financial sacrifices, we cannot justify Kansas's efforts to preserve the status quo partially at other's expense.

If states continue to attempt to place taxes like HB 2571 on their resources and the industries that make the use of those resources feasible, we will soon be faced with an "every man for

himself" attitude between the States. We can imagine a scenario where States will claim a right to compensation for travel by other States' citizens across their boundaries or claims could be made for compensation due to rail service across state lines, etc. Each state will seek to be more creative than the next in exating penalties for contract with it. Needless to say, we perceive this to be a frightening prospect. Defeat of legislation like HB 2571 will unquestionably help to mitigate this divisiveness.

There is no question that HB 2571 becomes a substantial burden upon interstate commerce. This question will no doubt be settled by the courts. We seriously question whether the benefits which might be received from this tax can justify the continuing court challenges over its constitutionality.

In summary, we believe HB 2571 to be nothing more than an attempt to raise the taxes of Kansans and others without the political consequences of direct tax increases. The tax clearly places an additonal burden on interstate commerce and increases the cost of oil and gas at a time when both of these industries are facing rapidly escalating costs for exploration, production, and transportation. The costs of this tax must ultimately be passed on to the consumer in an already severely burdened and soft economy.

We strongly urge the members of this Committee and the entire Kansas Legislature to carefully study the effects HB 2571 will have on your constituents, our country, and our economy as a whole. We believe that you will conclude that its negative aspects far out-weight the positive.

Mr. Chairman, we would like to once again thank you for the opportunity to appear. I will be happy to address any questions the members might have.

For further information contact:

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PETE McGILL & ASSOCIATES
PUBLIC RELATIONS & BUSINESS CONSULTING

Testimony provided the House Committee on Assessment and Taxation
April 19, 1983 - Re: HB 2571

Mr. Chairman, Members of the Committee, thank you for giving me the opportunity to appear in opposition to HB 2571.

My name is Pete McGill and I am here today representing ETSI Pipeline Project, which is the company proposing to delevelop the coal slurry pipeline. That will be a pipeline approximately 40" in diameter to be used for the transportation of coal in slurry form. It will originate in Campbell County, Wyoming and be constructed in a southeasterly direction through Colorado, Kansas, Oklahoma, Arkansas and possibly Louisiana.

The pipeline may eventually be 1400 miles in length, and when operating at full capacity, would transport approximately 30 million tons of coal per year. This pipeline would be entirely buried at depths of not less than three feet below the surface. The system would transport a semi-liquid mixture of coal that has been pulverized to the consistency of sugar and, at the mine mouth, combined with equal amounts of water (by weight). This would create a slurry substance that would flow by gravity with the aid of a modest pressure system (about 600 pounds per square inch maximum) until it reaches

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the destination. There will be a few pump stations along the route, at fixed points, dependent upon the need to maintain constant flow. In Kansas, as presently designed, there would be two such stations.

Mr. Chairman, I appear here in a somewhat different capacity than others who testify. I join with those that have appeared here before me and, undoubtedly, those that will follow that may be concerned about the grave constitutional questions regarding HB 2571. We seriously question whether a "use tax" imposed on ETSI's coal slurry pipeline would violate the laws governing interstate commerce. Furthermore, disregarding the constitutional question of state vs. federal authority in such matters, we also question the technicalities of the bill in its current form. This bill was drafted in a manner that does not reflect the normal excellency of your Revisor of Statutes Office. From our standpoint, it is so ambiguous and unclear as to intent, that we find it exceptionally difficult to prepare testimony in response to such a proposal.

It is apparent in the title that pipeline transportation of water and/or coal were intended to be taxed. From that point on it becomes less clear who and what are to be taxed, how that tax might be calculated and who would pay it. I am not completely certain that ETSI would be subject to the provision of HB 2571, but since we are the only coal slurry pipeline currently proposing to cross Kansas and since there is reference to "a transmission pipeline of coal" in the editorial section of the bill, I can only conclude it must have some applicability to ETSI.

However, the author of the bill on page 6, in section (f) makes reference to all the products in the title, including coal, and then specifically states in lines 202-204 that such tax is to be, and I quote, "only upon the use of facilities for transportation through Kansas and for their continued right to exercise the privilege of the power of eminent domain".

Does this mean that by being included under the provisions of this act, the state is granting the power of eminent domain to coal slurry pipelines? The ETSI Pipeline Project does not have now, and never has had, the right of eminent domain in Kansas. ETSI has successfully completed the optioning of all the right-of-way across Kansas, 325.30 miles, involving more than 700 parcels of property, without the right of eminent domain. This was accomplished, to the amazement of many, by negotiating with the individual landowners, agreeing to pay them a reasonable amount for an easement and agreeing to pay them an additional amount for any crop damage. This was done through agreement between ETSI and the individuals involved--by private contract.

ETSI also spent more than $7,000,000 for an environmental impact study and worked under the direction of and in conjunction with the Federal Bureau of Land Management. The study took more than two years to be approved and the conclusions are very explicit. They do not in anyway reflect the assumptions contained in the preamble to HB 2571. While I am on that subject, I refer you to lines 0089 to the middle of 0097 on page 3. I would like for someone to tell me of the inherent danger of the

product itself in reference to coal in slurry form. It is non-toxic, non-explosive and no chemicals are added.

On page 5, section (d), the bill refers to "every person who is using more than 15 miles of facilities for the transportation of water and other liquefied products". We can only assume that the broad definition of liquefied products may have been intended to include coal slurry. However, on page 6, under Section 4,(a), and I quote, "The owner or owners of the oil, natural gas, gas liquids, refined products, coal, water, helium and any other liquefied matter transported through facilities located in Kansas shall file with the department of revenue", etc. I think we can assume from this language that it is intended that the owners of the coal will be required to report and pay the tax.

The ETSI Pipeline Project does not own any coal. The ETSI Pipeline Project is a transportation company and their customers make their own contract for the purchase of coal. ETSI merely agrees to transport it to the customers' requested destination.

ETSI, however, will own the water. ETSI has contracted with the state of South Dakota for an adequate amount of water to assure the delivery of such coal in slurry form for the next several years. Obviously, there will be several firms that contract for pipeline capacity in order to transport their coal in this one system. That coal will be mixed with ETSI's water. That should create an adequate level of confusion to

make this bill extremely difficult, if not impossible, to administer in regard to coal slurry transmission.

In conclusion, Mr. Chairman and Members of the Committe, I wish to strongly re-affirm my constitutional reservations about a statute being so broad that it imposes an undue burden on interstate commerce. I know full well that this committee will explore that thoroughly, if they have not already done so, before any serious consideration can be given to an act with such broad, yet vague, ramifications.

ETSI does not have eminent domain in Kansas and has contracted individually with the landowners and agreed to pay any and all damages in an amount agreed to by that landowner. Not in the broadest sense of the word can ETSI abuse anyone or take advantage of anyone. As I have said before, it is the free enterprise system at work in its finest tradition.

ETSI will be paying approximately $8,000,000 in annual ad valorum taxes to 15 counties in Kansas and will provide nearly $9,000,000 in annual expenditures in this state in addition to those taxes. Is it possible that a given state may come in and impose a tax after a contract price has already been agreed for a given period of time between the transportation company and the consumer of the coal? I doubt it. Obviously, any such tax will be built into the rate base of the utility companies, and the people or consumer of the end product will be paying for the higher utility costs. I think that is a matter of concern to this legislature.

The reason that companies are willing to spend billions of dollars in developing a coal slurry pipeline is to provide an economical and competitive form of coal transportation. Burlington Northern, the largest rail system in the United States, apparently realized the advantages because they are now exploring the possibility of developing their own slurry pipeline.

Mr. Chairman, and Members of the Committee, I apologize for the amount of time I have taken here today, but I do urge you to reject HB 2571 and any other such concept.

PETE McGILL & ASSOCIATES
PUBLIC RELATIONS & BUSINESS CONSULTING

STATEMENT OF POSITION OF THE GARDEN CITY COMPANY, P.O. BOX 597, GARDEN CITY, KANSAS 67846, PRESENTED TO THE HOUSE COMMITTEE ON ASSESSMENT AND TAXATION, APRIL 19, 1983, BY PETE McGILL.

Mr. Chairman and Members of the Committee. The Garden City Company, headquartered in Garden City, manages 28,000 acres of irrigated farm land in western Kansas. We have in excess of 75 miles of pipeline to support this irrigation system. As HB 2571 is presently drafted, it is not clear to us if any of that pipeline is to be taxed, or all in excess of 15 miles, or the entire 75 miles.

If, indeed, it is to be taxed, this appears to be totally inconsistent with long range irrigation plans of this state. We have been encouraged to develop a pipeline system to be used for irrigation purposes to conserve water. Other systems that us "ditch" systems for transportation of water, and there are miles of such a method used in western Kansas, would not be subject to this tax under this bill. Are we to be penalized for cooperating with the State for the conservation of water by developing such a pipeline.

Subsection (9) on page 4 of HB 2571, as it defines "trans-

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portation" is not at all clear. It states "from pumping station to any end user or the movement from pumping station to the point of actual transfer to any local distribution system of . . . water . . ." At what point might our facilities become a distribution system if at all?

Further, it seems absurd to us to suggest our farming irrigation system will cause environmental harm, as suggested on page 2. We fail to understand how a leak in the transmission water pipeline poses a threat to the environment, commerce and people of the State of Kansas. We also fail to see how our irrigation system has any connection with sedimentation and silting at state reservoirs.

If we are, in fact, subjected to the provision of HB 2571, we assume additional capital outlay would be involved to monitor the number of units of water transmitted and additional administrative expense in calculation and reporting. It would be difficult to predict how many additional state employees would be involved in policing such a system.

Mr. Chairman and Members of the Committee, our entire farming operation is in the middle of some of the most arid parts of the state of Kansas. We respectfully suggest if serious consideration is to be given to taxing transmission lines for water, that an exemption of some type be created for legitimate farming operations that have developed their own expensive irrigation systems through the use of pipelines.

We personally believe the entire philosophy sets a very dangerous precedent and that HB 2571 should be defeated.

PETE McGILL & ASSOCIATES
PUBLIC RELATIONS & BUSINESS CONSULTING

STATEMENT OF POSITION OF THE LEGISLATIVE POLICY GROUP TO THE HOUSE COMMITTEE ON ASSESSMENT AND TAXATION, PRESENTED BY PETE McGILL ON APRIL 19, 1983.

Mr. Chairman and Members of the Committee. The Legislative Policy Group is a group of more than 30 counties in western Kansas, represented by County Commissioners, County Attorneys, County Clerks, County Treasurers and other county officials.

They wish to go on record as being quite concerned about the ramifications of HB 2571. The bill as presently drafted is so ambiguous and unclear that we are not at all certain of the effects on the counties represented.

We are quite concerned that an unusual precedent would be set by such a taxing procedure that might at some future date erode or eliminate our local property taxes on such transmission lines.

We are not certain how rural water districts are involved, if at all.

We are not certain of the effect on the county and city water supplies of the areas we represent. Our portion of the state is quite conscious of the depletion of our greatest natural resource,

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water. Our water tables are declining and if at some future date, we are to rely on sources removed from our immediate area for additional sources of water, will we be subjected to an additional state penalty in the form of taxation merely for transmission?

We are quite concerned that an additional state tax on transmission lines could have an adverse effect on our local ad valorum tax base. Fewer gas, oil, or water lines would be installed and such a tax would encourage abandonment of some existing lines.

Mr. Chairman and Members of the Committee, the Legislative Policy Group is opposed to the entire concept contained in HB 2571 and strongly urges its defeat.

Thank you, Mr. Chairman and members of the Committee.

My name is Gaines Bell. I serve as the manager of the Kansas operating division of Getty Pipeline based in El Dorado, Kansas. Getty Pipeline is the transportation subsidiary of Getty Oil Company which has been operating out of El Dorado since 1919. Getty Pipeline employs approximately 80 people in Kansas. Our operations include approximately 2,000 miles of wholly owned pipeline and 300 miles of partially owned pipeline.

I am here today to voice our strong opposition to House Bill 2571. The bill, if passed, has the potential to do substancial environmental and economic harm to the State of Kansas and its citizens as well as the potential to increase the need to establish and maintain an expensive infrastructure.

I have reviewed the bill as drafted. Section 1, paragraphs (A), (C), (D) and (E) state the legislative intent or reasoning for considering this proposed new tax as it relates to oil and gas pipelines. The bill states that the revenue raised from this additional tax is needed to address three specific problems, or preceived problems. They are: 1) pipelines pose a "threat to the health and safety of commerce and the people of Kansas"; 2) pipelines have created a "need to establish and maintain an expensive infrastructure," and; 3)

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the power of eminent domain held by pipeline companies "is disruptive to public and private property rights, expectations and public right of ways." If the reasons for enacting this onerous tax are as stated in the bill, the legislature is basing their reasons on inaccurate, indefensible rationale. This reasoning does not take into account the present day operations of pipeline companies.

As I can only speak for Getty Pipeline, I would like to address these three concerns the legislature has identified as they relate to our company.

1) Health and Safety

The cost for all clean up and land restoration associated with a leak or spill is borne by the company owning the pipeline. If a major leak should occur, in addition to the cost of the clean up, land restoration and pipeline repair, a fine is levied against the pipeline owner by the U.S. Coast Guard. These fines are assessed against the owner whether the leak was a result of their negligence, the negligence of another or an act to God. In addition, adequate protection is afforded to the private and public sectors through the court system if damage estimates are in dispute. Therefore, the additional funds collected through this tax are unnecessary. Getty has had few major leaks during its many years of operation. Those

that have occurred have been inspected by the Health Department after final clean up and restoration, and have been given high marks. Kansas has an excellent safety record. This tax will not have an effect on the continuation of this safety record.

2) Infrastructure Need

Getty Pipeline owns and operates a gathering system which serves between 1,700 and 2,000 small producing wells, mostly stripper wells. With the additional tax burden projected at approximately $6 million to our company alone, the economic consequences on this gathering system must be evaluated with the possible outcome a shutdown. Approximately 35,000 barrels are transported through this gathering system each day. Without the continued operations of this system, the only means for small producers to get their product to market will be by truck. One truck hauls 160 barrels. This translates into 200 additional truck loads per day on Kansas roads, bridges and highways as a result of Getty's operations only. This would have much greater impact on the environment and infrastructure of this state than the present pipeline operations.

3) Eminent Domain

Of the 2,000 miles of pipeline owned by Getty Pipeline, less than 1 percent of land acquired for the purposes of laying pipeline was acquired by eminent domain. The remaining 99 percent was purchased through private negotiations

with private owners. Private negotiations are the best method of acquiring property for both parties involved. The right of eminent domain has not been used in an abusive manner and has not impacted negatively upon this State.

In conclusion, the imposition of this tax will serve neither the concerns raised by the legislature nor the interest of this State by putting an undue hardship upon a major industry contributing to the economic vitality of the State. We would be happy to meet with members of the legislature at a future date to discuss your concerns as we, too, are interested in the well being of the State and its citizens.

We must urge you now, however, to oppose House Bill 2571 as it is not in the best interest of Kansas and its citizens.

To: Tom Sloan

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STATEMENT BY

RICHARD G. SOEHLKE

VICE PRESIDENT-MANUFACTURING

CENTRAL REGION

GETTY REFINING AND MARKETING COMPANY

TOPEKA, KANSAS

APRIL 19, 1983

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2/8

Thank you, Mr. Chairman.

My name is Richard G. Soehlke. I am Vice President-Manufacturing-Central Region for Getty Refining and Marketing Company based in Tulsa, Oklahoma. We appreciate having the opportunity to present our facts and views on the proposed pipeline tax legislation embodied in House Bill 2571.

In a nutshell, we see this bill as bad legislation. It reminds me of a man who went out to shoot some food for his family but shot himself in the foot instead. House Bill 2571 appears to have negative ramifications far broader in scope than might initially be perceived. Not only will it do severe harm to the refining and marketing segment of the petroleum industry, but also to the pipelines and production portions. Beyond this, the injury will carry through to most areas of the economy, including agriculture and the general consumer, not the least of which is the rural user of liquefied petroleum gas.

In support of these general views, I offer the following specific comments.

Getty Refining and Marketing Company is the domestic manufacturing and marketing subsidiary of Getty Oil Company, headquartered in Los Angeles, California. This subsidiary's manufacturing responsibilities include the company's refinery at El Dorado, where I am located. By virtue of this operation, which is the state's largest refinery, we are one of the state's larger employers and one of the largest purchasers of Kansas crude oil.

At the El Dorado refinery alone, we employ 538 taxpayers, with an annual payroll of some $17.8 million. The refinery's feedstock normally includes some 35,000 barrels per day of Kansas crude oil, plus an additional 35,000 barrels per day of crude oil and 13,000 barrels daily of natural gas liquids transported via Kansas pipelines.

I mention these facts and figures to provide an idea of the scope of our operations in the Sunflower State, so that my later remarks may be considered against an appropriate background.

Getty's El Dorado refinery was founded in 1917 and has been continually modified and up-graded at a cost of many millions of dollars. Please keep in mind the fact that these investments are continuing at a time when the "downstream" portion of the petroleum business -- that is, the refining and marketing segments -- are in particularly dire economic straits. As you are aware, I am sure, two refineries in Kansas and one in Missouri just outside Kansas City recently have been forced to close because of deteriorating economic conditions. This picture is being repeated many times across our nation, as those refineries struggling to survive are operating at an average of about 65 percent of capacity, according to the April 11 edition of the Oil and Gas Journal.

The April 18 edition of Time magazine quoted industry authority Dan Lundberg, publisher of The Lundberg Letter, as saying the refining and marketing end of the petroleum business would lose nearly $2.3

billion in the first quarter of the current year, and must hope for a firming of prices to recoup these losses and remain a viable economic force.

As knowledgeable citizens and consumers, you are aware, no doubt, that nationwide prices for petroleum products have declined sharply in recent months, leading the Consumer Price Index downward. And while some positive aspects may be seen in this situation, there are significant negative implications, evidenced by the unhealthy condition of the refining and marketing business.

And while the health of this business is principally our concern, it must be yours also, for imposition of this proposed additional burden of taxation may be the final straw for many businesses in this state. I am not so politically unsophisticated as to imply any kind of threat to the distinguished Kansas legislature, but I would be doing the state, our employees, stockholders and consumers a disservice if I failed to point out some of the adverse implications of this proposed legislation.

First, admittedly, our ox would be gored. There should be no question but that Getty Refining and Marketing Company and other branches of Getty Oil Company operations in Kansas would be severely damaged.

The initial financial impact on Getty Refining and Marketing Company would be on the order of $6.8 million per year. I am confident you are thinking, "that's your problem." And you're right. How to solve it also is our problem.

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There is absolutely no way my company can afford to absorb this kind of additional burden. We are not breaking even right now, even without the imposition of this tax. Therefore, the first option we must examine is whether this tax can be passed through to the ultimate consumer. That is, will the marketplace allow us to raise our prices enough to recover the tax. Right now and in the forseeable future, we do not believe it will.

The obvious alternative is something we do not even wish to consider.

We and the other Kansas-based refineries would be hit three times by this tax -- first on the raw material coming in, second on any natural gas used as fuel, and third on the finished product going out of the refinery. This is because the vast majority of the feedstocks, fuel and finished products of Kansas refineries move by pipeline.

Kansas refiners would be unable to recover the proposed tax because they supply such a small portion of the petroleum products sold in the state and supplied to surrounding states and would be unable to influence the pump prices upward in the extremely competitive market environment. Obviously, then, out-of-state refiners, which would be taxed only on the portion of their finished products that moved by pipeline within the boundaries of Kansas, would have a competitive advantage.

You are aware, I am confident, that a major portion of the finished product from our El Dorado refinery is shipped to Colorado. Hence, it would be natural and reasonable to say, "Fine, pass on the

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increased cost to the folks in Colorado." On the surface, such an attitude may even seem reasonable. The fact is, though, that the Rocky Mountain area constitutes a more fiercely competitive petroleum market, so the idea of selling our product at a price higher than our competition does is totally unrealistic.

And the competition in the Rockies would have the advantage of being supplied by refineries that do not utilize pipelines that cross Kansas.

If we cannot sell our Kansas-produced fuel in Colorado, we must seek another market. Let me assure you, if you have any doubt, that everyone is trying mightily to gain a larger and hopefully more profitable share of the gasoline market, but those attaining any significant success are rare indeed. Thus rather than exporting a tax, the legislation reduces the economic viability of Kansas-based businesses in comparison with their out-of-state competitors.

I must also mention that the producers of crude oil in Kansas would sustain further economic disincentive. When a purchaser buys the crude oil at the lease, he apparently would become responsible for the proposed transportion tax. Obviously, the purchaser, who is also the transporter, will attempt to recover the tax from the producer. Thus, the Kansas crude producer may expect to receive enough less for his crude to keep that crude competitive with other state's oil, not subject to the proposed tax. The bottom line is that the Kansas producer, who already finds sizable portions of his revenue taxed away, would see another bite taken out of his income.

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If the legislation is enacted as proposed, and our doubts as to the ability to pass the increase through to the consumer are validated, all Kansas refiners must carefully examine their options. May I suggest you look at the situation from this perspective: We have the largest and presumably the most modern and therefore the most efficiently operating refinery in the state. If our refining and marketing are hard-pressed to be economically viable, what kind of shape do you think all the other Kansas refiners are in?

One of the most disturbing aspects of this legislation is that it reflects a change in the rules after the game has started. We and the other refiners in the state have made our investments and plans on the basis of what we perceived to be an environment conducive to growth and stability, an atmosphere that encouraged and nutured business and commercial ventures.

Then, with remarkably short notice, we discover that the oil business is expected to provide the resources to fill huge portions of the deficit in the state's coffers. Hard on the heels of a debilitating severance tax measure comes the second devasting blow--the legislation being considered here today.

We had believed that Getty in particular and our industry in general were held in higher esteem in Kansas. Our company has enjoyed an excellent relationship with the people of this state for more than 65 years and look forward to its continuation for many more. But in large measure, the basis for that relationship has been a mutual

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respect by the industrial and governmental segments of the state's society - a respect that produced a healthy economic environment in which business enterprise could flourish to the benefit of entrepreneur, consumer and government.

We respectfully urge defeat of legislation such as House Bill No. 2571, which would undermine such an environment.

STATE OF KANSAS

JIM PATTERSON
REPRESENTATIVE, EIGHTH DISTRICT
2612 N. 10TH STREET
INDEPENDENCE, KANSAS 67301

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: ENERGY AND NATURAL RESOURCES
LOCAL GOVERNMENT
LABOR AND INDUSTRY

Chairman Braden

Testimony before the
House Assessment and Taxation
Committee, April 19, 1983

Mr. Chairman and members of the Committee, I am Representative Jim Patterson from Independence. In general I am appearing for the benefit of all the people of Kansas but more specifically for the people in the 8th legislative district which includes Independence and the surrounding area.

Although I am speaking with regard to all pipelines, I will use one I know best as an illustration.

I am opposed to H.B. 2571. Section 1 of the bill uses three pages to set forth Public Policy Statements. It is recognized that this prelude or introduction is known in law as a shot-gun approach. The idea is to throw in everything pertaining to health, safety and general welfare hoping to make the taxing part of the bill constitutional. If such policy statements is accepted by the courts, then it is said that the inherent police powers of the state are paramount and therefore hold the taxing provision constitutional.

I challenge this Public Policy Statement as incorrect and falsely stated. I will dwell upon lines 33 through 39. I quote "Due to the inherently dangerous nature of the products themselves, the transmission of these products under high pressure pose a constant

and ever present threat to the health and safety of commerce and the people of the state of Kansas."

In order to show this statement as incorrect and for addtional purposes to be stated later, I handed you the story of Sinclair Pipe Line Co. reprinted from Pipe Line News, November 1959. If you will read the second paragraph on page 4 you will see the earliest predecessor of the Arco Pipeline had its origin around the turn of the 20th century. The history dates from 1895. This pipeline, from that date to this, has demonstrated a safe operation unparallel by any industry. This same pipeline has consistently practised a good neighbor policy not only with landowners that granted easements but to the surrounding neighborhood through which this line operated. Enviroment has always been its concern.

This article also illustrates the technical advances in the laying and operation of pipelines up to 1959.

You note from this article that the pipeline headquarters has been in Independence since 1904 when it moved there from Neodesha. During this long history with the community, it is my opinion that this pipeline has contributed more to the infrastructure of the state of Kansas than the state has contributed to the Company.

At present about 230 to 250 employees are located in a five story building in Independence. Except for a very few, these employees are professionals. The employees are engineers, advanced management people, technical computer people of the highest level.

The Independence office is the headquarters for Arco Pipeline Company.

I hand you a map that shows the transportation pipelines and stock companies. I call your attention to the inset in the

lower left hand corner of the map. The purple line shows petro-chemical lines. The bill does not yet include this. I point this out primarily to show how a pipeline today may be operated from most any geographically location within a nation. Those petrochemical lines are operated by a computer in a room of the building in Independence. The entire pipeline system is computer operated. The system pin-points a problem so quickly that it can be handled almost instantaneously. This is an added feature to safety and the enviroment.

In the upper lefthand side of the map you see the Trans-Alaska Pipeline System. I will return to this later.

On the back of the map you will see a brief summary of todays operations of 8,100 plus miles of crude lines, 3,800 miles of refined products, 800 mile 4 foot Trans-Alaska Pipelines. Of this total mileage you see little of the lines within the state of Kansas.

The crude lines and the product lines are common carriers. Tariffs are on file with Federal Energy Regulation Commission. Any owner of crude or products may ship on these pipelines. These pipelines do not own the crude or products moving through the lines.

The lines are computer operated. A computer in Independence controls those lines through the mid-section of the nation including the petro-chemical lines around Houston. The computer operation makes it easy to change the location of the operation.

Approximately two years ago, at a time the parent company was reviewing the operations location for maximum efficiency and minimum cost, the Kansas Tax Department was proposing an allocation factor for interstate income that would amount to an abnormally high income tax. We almost lost the pipeline headquarters at that time. The company agreed to approximately more than double previous amounts

of income tax, but still less than $2 million proposed. This type of activity by the Tax Department and bills similar to H.B. 2571 every couple of years is likely to lose this and other similar companies.

Kansas benefits from the Kansas sales tax, Kansas franchise tax, Kansas income tax and ad-valorem tax. In Montgomery County, Kansas, for years, the largest taxpayer of ad-valorem (property tax) has been: Northwest Central Pipelines (formerly Cities Service Pipeline), Arco Pipeline, Kansas Gas and Electric, Union Gas and Southwest Bell Telephone. In addition to the company paid taxes, the employees contribute a hefty amount of taxes.

The economic benefit is only one of many. The employees are community leaders in civic and social affairs. The employees of this company over the years have been outstanding contributors to the culture of Kansas. Current and retired employees are artists in the broadest sense. We have painters, musicians, actors, educators, etc.

Annually, Independence draws the largest gathering in this state - the employees and ex-employees of the Pipeline Company does and has made major contributions to the outstanding Kansas event that now brings people from all over the United States and some foreign countries.

The greatest engineering feat of this century and the most expensive privately financed construction project in history is the Alaska Pipeline. Mr. Chairman I hand you this 213 page book entitled <u>800 Miles to Valdez</u> to further show the expertise used in todays construction of pipeline; the absolute assurance there is minimum environmental harm; and the least amount of threat to the health

and safety of commerce and people. The construction of this pipeline cost almost $8 billion. More than 1½ million barrels of oil flows through this line daily.

A reading of this book will explain the laying of a pipeline through permafrost, under and over rivers without change in the channels or adverse affect upon the terrain. You will see that the pipeline was buried in someplaces and raised in others so it would not interfere with the migration of the caribou and other wild-life. The building of the pipeline becomes a focal point and testing ground for issues such as conservation and environmental protection.

Mr. Chairman, it seems to me this bill cannot stand if the Public Policy Statement fails. The evidence submitted here this afternoon definitely indicates the construction, maintenance and continued presence of these pipelines does not produce substantial environmental harm. Likewise the history and other facts presented proves the transmission of these products does not pose a threat to the health and safety of commerce and the people of the State of Kansas.

I ask you to defeat H.B. 2571.

*The Story of*

# SINCLAIR PIPE LINE CO.

***One of the Largest and Oldest Crude Oil and Products Pipe Line Systems in the World.***

**By ELTON STERRETT**
***Engineering Editor***

Reprinted from PIPE LINE NEWS, November 1959

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**By ELTON STERRETT**
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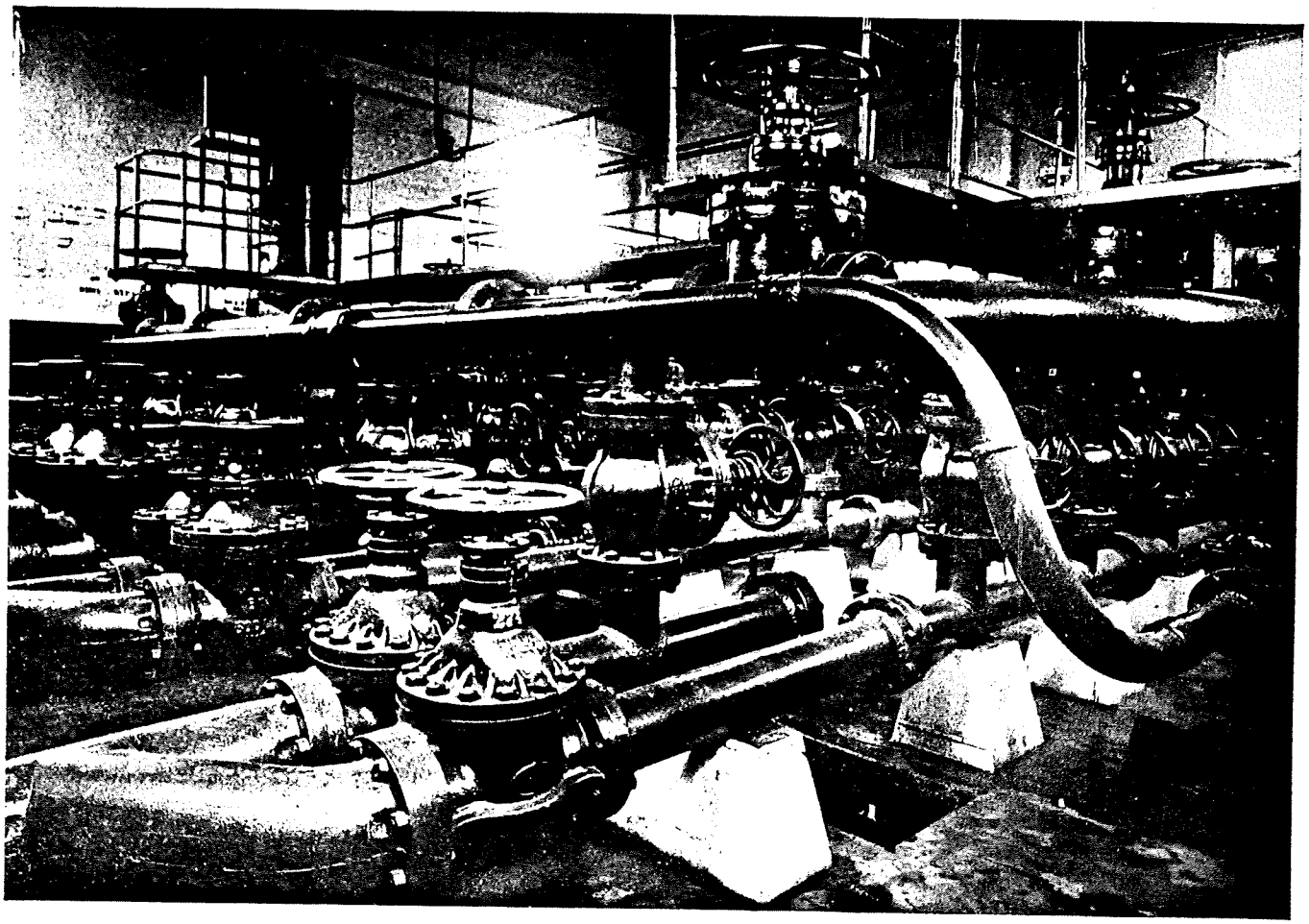


The manifold and gate valve assembly at Marceline station. Cast fittings and a multiplicity of flanges characterised this early pump station. To shift flow, the operator had to clambe over lines and spin the wheels by hand.

# THE STORY OF SINCLAIR PIPE LINE COMPANY

SINCLAIR PIPE LINE CO., with undivided interest in 10,954 miles of common carrier pipelines, is a giant among giant pipeline systems. But it has not always been so big, having had not one, but two, starts which eventually led to the vast network now doing honor to its founder, Harry F. Sinclair.

The earliest predecessor of the present system had its origin around the turn of the 20th century as the Kansas Oil & Gas Co., with a few miles of 2-inch pipe as its trunk or "main." A year later the name of the company was changed to Prairie Oil & Gas Co. to avoid confusion with another company carrying the word "Kansas" in its title. The new Prairie company took over the properties within the State of Kansas formerly held by the Forest Oil Co. (founded circa 1890) which had been active in Kansas from 1895. The activities of the company consisted in laying gathering lines, building storage tanks, and selling oil for tank car delivery.

In 1903 the young company built its first "trunk line." It was a 6-inch screwed line, 32 miles in length, connecting the flush Caney field gathering system direct to a refinery at Neodesha, Kan.

From this early start Prairie expanded rapidly. A trunk line to the Kansas City area from Humboldt was of 8-inch pipe, 115 miles in length, and was completed in 1904. In that same year all 16 of the company's employees moved from Neodesha to Independence, Kan. The entire force and its meager office equipment made the move inside one box car.

In 1905 the system trebled its length by constructing 441 miles of 8-inch main line from Sugar Creek, near Kansas City, Mo., to Whiting, Ind. Much of this line was laid on the right of way of the Santa Fe Railroad with pipe being strung from work trains. Only a year later the 8-inch was paralleled by a line of the then unprecedented diameter of 12-inches —a size crowding close on the limits of tolerance and joint-tightness with threaded pipe under the field method of making up joints by the "hammer and tongs" procedure.

By January, 1915, Prairie consisted of more than 2,610 miles of trunkline, ranging from 6 to 12-inch, and was the largest pipeline system, in terms of miles of trunk, in the world.

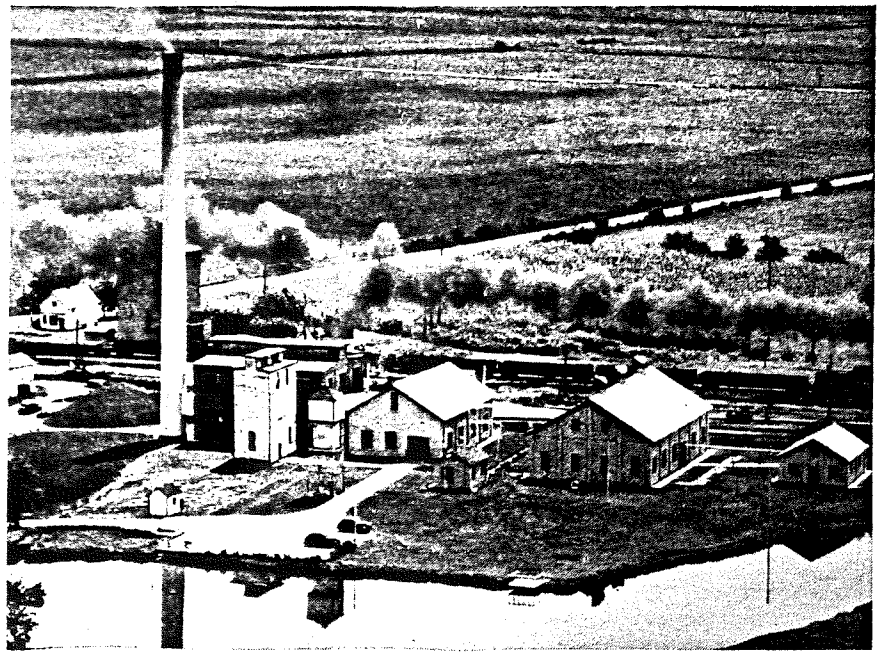
Prairie Oil & Gas Co. was owned by National Transit Co., itself owned by Standard Oil Co. (N.J.). But in 1911 the United States Supreme Court brought about the dissolution of the vast Standard empire, and as a result Prairie became a separate unit. Further rulings from the Supreme Court, which defined interstate pipelines as common carriers, brought about the formation of the Prairie Pipe Line Co. as an individual corporation, organized in January, 1915, and first in business as a pipeline entity on February First of that year. Head offices of the newly formed pipeline company remained in Independence, Kan., now serving as headquarters for the Sinclair Pipe Line Co.

### *First Pipeline Named "Sinclair"*

Not until 1916 was there a pipeline bearing the Sinclair name. This was the 487-mile system of 2 to 6-inch pipe acquired by H. F. Sinclair when the Sinclair Oil & Refining Co. was organized. The mileage was a composite taken over from three small refining companies. Early in May of that year planning was initiated on a line from Drumright, Okla., to the Chicago area. Over much of the distance the pipeline paralleled the Prairie line, the right-of-way sticking as closely as possible to the tracks of the Atchison, Topeka and Santa Fe Railway. Long sections of the line were laid on the railroad right-of-way. Roads were practically nonexistent, and stringing was from railroad flat cars to mule-drawn wagons for the ultimate placing along the ditch.

Humboldt, Kan., again entered the picture: this time as the terminus of the 145-mile, 6-inch main line east from Drumright, and as the initiating station for the 528-mile, 8-inch trunk to Chicago. Pipeline spreads on this construction resembled small armies, numbering upwards of 1,000 men and progressing through the muscular efforts of hundreds of Missouri mules. All pipe was screw-joined, the hammer man still retaining his post as head of the make-up crew.

The new Sinclair pipeline paralleled the Prairie line over much of the span between Humboldt and Chicago—as likewise did its working organization. Lacking pipeliners in the Sinclair organization, two veteran pipeliners from Prairie were brought over. The two men were John R. Manion, to serve as general manager; and Frank Hadley, to be



**Steam stations were common on the early lines of the Prairie System. This one is at Kerman. Note coal piles flanking tall stack.**

**EARL W. UNRUH**
**President and Director and Chairman of the Executive Committee**

**Following graduation from Bethel College, North Newton, Kansas with a degree in chemistry, and further study at Tulsa University, where he was awarded a degree in chemical engineering, he entered employ of Sinclair Oil & Gas Company as an engineer in the spring of 1938. Early in 1941 he was transferrred to Sinclair Refining Company — Pipe Line Department — as an engineer with headquarters at Harrisburg, Penna. Subsequently named chief dispatcher, in January, 1943, he was promoted to chief engineer of the company's products pipeline system. Moving to Independence, Kansas in January, 1949, to take over the duties of chief engineer of all crude oil and products pipelines, he was made Part-Interest Executive on June 1, 1953, serving in that capacity until January 10, 1956, when he was elected vice president in charge of operations. He attained his present post March 2nd, 1957.**

chief engineer. Many of the station personnel — operators, oilers and gaugers—also came from the Prairie line, which served as basic training ground for them. Other operating men were drawn from the National Transit Co., back in Pennsylvania, so that by the time construction was completed in March, 1918, the stations, some 40 miles apart, were all manned. Reciprocating duplex pumps, powered either by Snow, Busch or MacIntosh internal-combustion (diesel) engines outfitted most of the stations; some, however, used Snow steam pumps powered by boilers drawing crude oil fuel from the line.

In the days of flush production the life of an oilfield sometimes was a matter of months, or at the most a very few years, and a pipeline was forced to be constantly reaching out toward new sources of crude. Changes in the production picture frequently brought about abrupt changes in the direction of a line under construction, and even the reversal of flow as originally contemplated. Thus a line Sinclair was building south from the existing network of trunklines was carried into the Healdton field, and projected for extension to the Gulf of Mexico. The newly discovered Ranger, Tex., field needed pipeline outlets, and the proposed extension southward was turned southwest to tap the new area, crude being moved thence to Kansas City and Chicago instead of toward the Gulf.

In 1919 the far-flung Sinclair interests were merged to form the Sinclair Consolidated Oil Corp., which owned some 2,443 miles of trunk and gathering lines, representing an investment of nearly $33 million. On Feb. 9, 1921, H. F. Sinclair sold a one-half interest in the Sinclair Pipe Line Co. to the Standard Oil Co. of Indiana for a cash consideration of $16,389,914; the Sinclair organization to manage and operate the line. This sale averted the construction of a parallel line by the Standard interests, and at the same time absorbed open throughput capacity then existing in the Sinclair system.

Two years after the sale of half interest both Prairie Sinclair Pipe Line built 8-inch lines some 130 miles in length from the newly discovered Mexia field to connect with their north-bound trunk system near Jacksboro, Tex., on the Ranger-Chicago line. Sinclair thereby progressed that much closer toward its earlier objective of a Gulf port, though flow in the new line was northward to fulfill an oil purchase contract of 17 million barrels.

This additional oil demanded even greater capacity to Chicago and both systems all the way from Drumright (Cushing, Okla.) to the northern terminus were paralleled with 380 miles of 8- and over 500 miles of 12-inch line — this latter being the first pipe of this diameter laid by the Sinclair company. It's expansion project was completed in 1917; some eleven years after the first 12-inch laid by the Prairie system to the same market.

Meantime The Pure Oil Co., found itself with heavy production in the new Mexia field and its subsidiary, Pure Oil Pipe Line Co. of

**J. D. McCONNELL**
**Vice President Economics and Planning and Director**

**Began his pipeline career with Prairie Pipe Line Company in 1921, at Independence, Kansas, after graduation from the University of Wisconsin in electrical engineering. With the exception of six months employment with the Los Angeles Gas & Electric Co., he has been continuously with the pipeline since that date. During his service with Prairie and Sinclair he has been successively civil engineer, district foreman, district superintendent, assistant division superintendent, and assistant chief engineer, with assignments in appraisal and valuation work, pipeline survey and location, pump station design and construction and pipeline maintenance, operation and construction. In July, 1951, he was made administrative assistant in the executive department, and was assigned to supervision of the company's "Big Inch" line from Cushing, Oklahoma, to East Chicago, Indiana. In 1953 he was named general manager of crude oil lines, becoming director of engineering on February 1, 1956. He was elected vice president and director of crude line operations on March 2, 1957.**

**G. M. JOHNSON**
**Vice President Engineering and Operations and Director**

**Entered the service of Prairie Pipe Line Company at Eastland, Texas, March 10, 1920, as a draftsman. On June 1, 1926, he was transferred to Pure Oil Pipe Line Company of Texas, a wholly owned subsidiary of Prairie Pipe Line Co., as a field engineer, with headquarters at Mexia, Texas. Early in 1932 he became engineering supervisor and assistant in operations in the Fort Worth offices of the Sinclair-Prairie Pipe Line Co., in 1943 being made superintendent of the Texas Division of Sinclair Refining Co.—Pipe Line Department. Following formation of Sinclair Pipe Line Company he continued in the same capacity until April 1, 1953, he was named vice president in charge of crude oil lines and moved to the general headquarters at Independence, Kansas. He was named vice president and director at the meeting of the Sinclair board of directors on March 2, 1957.**

**A. M. STAFFORD**
**Vice President and Director**

**Joined the home office accounting department of the Sinclair organization in New York City on July 21, 1919. Among the duties performed while in that department was that of participation in the opening of the books of the parent company. In February, 1923, he was transferred to the New York production office, later being made assistant to the executive in charge. When the Sinclair company began construction of its products pipeline system in 1941, he was made assistant to the vice president in charge of pipelines, in September, 1948 being named New York representative of the pipeline department. On January 4, 1951, he was elected vice president and director of the pipeline company.**

Texas undertook construction in 1921 of an 8-inch line from Mexia to Pure's refinery and loading docks at Port Arthur, Tex. Sinclair, thru a subsidiary known as Sinclair Prairie Pipe Line Co. (of Texas), then built a 12-inch line from near Huffman, Texas to its refinery at Houston. In 1925 The Prairie Pipe Line Co. acquired 50 per cent of the stock in Pure Oil Pipe Line Co. of Texas and in 1926 purchased the remaining 50 per cent but continued to operate the facility as a separate corporate entity.

Development of Wyoming production far beyond any possible local consumption of refined petroleum led Sinclair, always in the forefront in Wyoming development, to plan a line eastward to supplant the trains of tank cars which up to then had provided the only outlet for excess crude. Much of the crude stock then going to Standard of Indiana was making the long haul, as was Sinclair's Wyoming crude. As Standard was half owner of the Sinclair system, it was only natural that that company should press for construction of a pipeline to the area. As a result, Sinclair undertook the building of a 717-mile trunk line to tap the Wyoming fields, reaching from Clayton, Wyo., near the booming Salt Creek field, to a junction with the existing Sinclair system at Freeman, Mo., south of Kansas City. Most of the mileage was 12-inch, some 10-inch, and a portion composed of looped 8-inch. Started in March, 1923, the line was completed in 344 days—remarkable time for the way in which pipelines were then laid—and a month was required to fill the line with crude, after which the 17 stations with 40,000 b/d capacity moved a daily throughput of 25,000 barrels.

Only four years after its opening, the Wyoming line was shut down. Production had dwindled each year until a surplus over local requirements no longer existed, while transportation costs to Midwest refining centers via the long line would not compete with those of lines from other less remote producing areas. Following the shut-down, Sinclair subsequently moved many of the pumps and their prime movers to other points on its system.

### *Sale to Standard Oil Co. (Ind.)*

The Sinclair Pipe Line Co. and its companion Crude Oil Purchasing Co., for nine years owned jointly by Sinclair and Standard of Indiana in 1930 became wholly owned by Standard of Indiana through a purchase which at that time was one

**L. B. MOON**
**Vice President Pipeline Operations and Director**

**Began his affiliation with Sinclair Oil & Gas Company in the gasoline department at Seminole, Oklahoma, in 1927. Was transferred to Sinclair Refining Company in 1931 on refinery construction. A year later he returned to Sinclair Oil & Gas Company as foreman of plant construction and maintenance in Texas, Oklahoma and Kansas. In 1934 was sent to Wyoming on gasoline plant operations, remaining there until 1941, when he was transferred to Harrisburg, Penna., with the newly organized products pipeline division, as superintendent of construction. The company initiated products pipeline construction in Texas during 1947, where he was transferred to supervise construction. A year later he was made a division superintendent, by the products pipeline department, having charge of the Southwestern District. In September, 1950, he was made general manager of the products pipeline department, and on January 4, 1951, was made vice president and director of the Products Pipe Lines of the newly formed Sinclair Pipe Line Company.**

**H. J. AMEND**
**Vice President and Director**

**Began with Prairie Pipe Line Company in 1917 as a night clerk, and began his ascent up the ladder in the company's accounting department, successively holding administrative and supervisory posts therein, being named assistant auditor in 1948. Effective January 1, 1952, he was elected to the company's board of directors and advanced to the position of auditor, in which capacity he supervised and administered the company's accounting department. On January 10, 1956, he was elected to the board of directors.**

**J. H. RENARD**
**Vice-President and Director**

**After schooling at Central Pennsylvania College of Business, he entered the service of Sinclair Refining Co., Pipe Line Department, at Mechanicsburg, Pa., in 1943, where he worked in the Treasury Department. In 1944, he moved to Columbus, Ohio, which was then headquarters of the Products Pipe Line Division. After military service in 1945, he rejoined Sinclair in May, 1946, and on Jan. 1, 1947, was promoted to department head of the Treasury Department. He served in that capacity until transferred to Independence, Kans. on Sept. 1, 1947. After serving in administrative positions for over four years, he was elected assistant secretary and assistant treasurer of Sinclair Pipe Line Co. in April, 1957. In Sept., 1953, he was promoted to Executive Assistant to the President. In Sept., 1959, he was elected vice-president, director and a member of the Executive Committee.**

of the biggest financial transactions on record. Standard paid Sinclair $72 million for his holdings. Thus the first pipeline to bear the Sinclair name passed out of his hands.

With construction of the modern Ajax line in 1930, Prairie was left with little or no throughput; making it a natural carrier for the Sinclair crude formerly transported in the Sinclair system for its Chicago area needs.

By 1930 the Prairie Pipe Line had become a system of many parallel lines and loops, with groups of relatively small pumping units, individually driven. The art of batching was then unknown, and the company attempted to segregate different crudes throughout its system, a plan which required shippers to provide extensive tank farms and one which resulted in uneconomic utilization of pumping facilities. Prairie was characterized in a company report as "a small-diameter pipe development, one of the oldest in the industry, and in the main obsolete in physical plant and excessively costly in maintenance and operation."

In 1928, the company's last big year, the Prairie system had about 26,000 miles of pipeline, some 4,400 miles in 12-inch diameter pipe, more than 20,000 in 8-inch pipe, and the remainder in smaller sizes. In places the main line consisted of as many as ten parallel 8-inch lines. The system was delivering around 200,000 b/d, three-fourths of that amount to the St. Louis, Chicago and other Mid-West markets with remainder going on to eastern refineries via connecting carriers.

One year later some of the line's largest users tried unsuccessfully for tariff revisions and, rebuffed, laid twin 10-inch lines from Glenn Pool to Wood River. This cut seriously into the Prairie system's throughput, and the acquisition of full interest in the Sinclair system by the Standard Oil Company of Indiana meant that Prairie's largest user had suddenly doubled its pipeline connections and store of crule. For the year 1931 the loss was some $670,000 in operating revenue. Only partial use of the system by Sinclair kept Prairie going.

Rumors of a Sinclair - Prairie merger began to circulate as early as 1928, and the following year the Wall Street Journal quoted Harry F. Sinclair as discussing negotiations with Prairie. In 1930 Sinclair's annual report stated "In order to make provision for expansion and possible consolidations your board of directors has authorized . . . an increase in the authorized common capital stock from 10 million to 20 million shares."

On Jan. 14, 1932, stockholders of Sinclair and the two Prairie companies were notified that the three boards of directors had reached an agreement for consolidation. The move involved stock transfers only, with Prairie Pipe Line Co. stock-

**J. P. MAIN**
**Secretary-Treasurer and Director**

**Began his pipeline career with Prairie Pipe Line Company on August 19, 1915, in the accounting department in Independence, Kansas. Between June 16, 1917, and May 3, 1919, he saw service with the 110th Engineers, 35th Division, returning to Prairie in June of 1919, being employed in various company field offices until 1921, when he was transferred to the general offices at Independence, in the Stock Transfer Department. For a year he was employed in the executive department of the company, being assigned to the treasury department on April 1, 1944. January 1, 1947, he was elected Junior Assistant Treasurer of Sinclair Refining Company, being promoted to Senior Assistant Treasurer 16 months later. On January 4, 1951, he was made secretary-treasurer and elected a director.**

holders being given 14 shares of Sinclair for each ten shares of their own company. (Prairie Oil & Gas stockholders got share for share). The name of the new organization was to be "Consolidated Oil Corp." When the merger was completed, it had required 8,110,000 shares of the newly increased capitalization to effect the exchange of Sinclair Consolidated stock for the outstanding Prairie Oil & Gas and Prairie Pipe Line holdings, with some 6,107,000 shares of the stock in the hands of the original Sinclair group. Following consummation of the transfer, the word "Sinclair" was dropped from the corporate name. Prairie stockholders had voted almost 90 per cent for the plan, with only some 3 per cent dissenting.

In the first fiscal year of the new Consolidated Oil Corp. only the former Prairie Pipe Line, now termed the Sinclair-Prairie Pipe Line Co., reported a profit, but this proved to be large enough to offset the losses of the other corporate divisions.

Sinclair-Prairie Pipe Line Co. in 1932 had C. H. Koontz as chairman of the board, J. R. Manion as president, and board members were E. H. Chandler, A. D. Sloan, R. B. Hanna, W. F. Gates and Frank Hadley. President Manion, who had become general manager for Sinclair after leaving Prairie in 1918, was thus to head the Prairie system again after a 14-year lapse. W. F. Gates, who had headed Prairie in 1915, was named as president in the incorporation papers, but retired before actual operation of the new company had gotten under way. At about this same time announcement was made that the Sinclair building,

**D. C. PHILLIPS**
**General Attorney**

**Was graduated from the University of Oklahoma with two degrees, bachelor of science in general engineering and bachelor of laws. He served in the armed forces for more than three years, attaining the rank of first lieutenant in the Army Air Force. In August, 1949, he joined the legal staff of the Sinclair Oil & Gas Company at Tulsa, shortly after completing his undergraduate work. In May, 1954, he transferred to Sinclair Pipe Line Company, reporting to the general offices in Independence. On January 1, 1957, he became general attorney and co-ordinator for the company.**

in Independence, Kan., was to remain as headquarters. Thus the old Prairie Pipe Line Co.'s home office served to house the Sinclair-Prairie organization. In 1929 the East wing was added to the original building built in 1917 carrying out the architectural style of the initial unit. It now houses the pipeline operations for the far-flung Sinclair Pipe Line System.

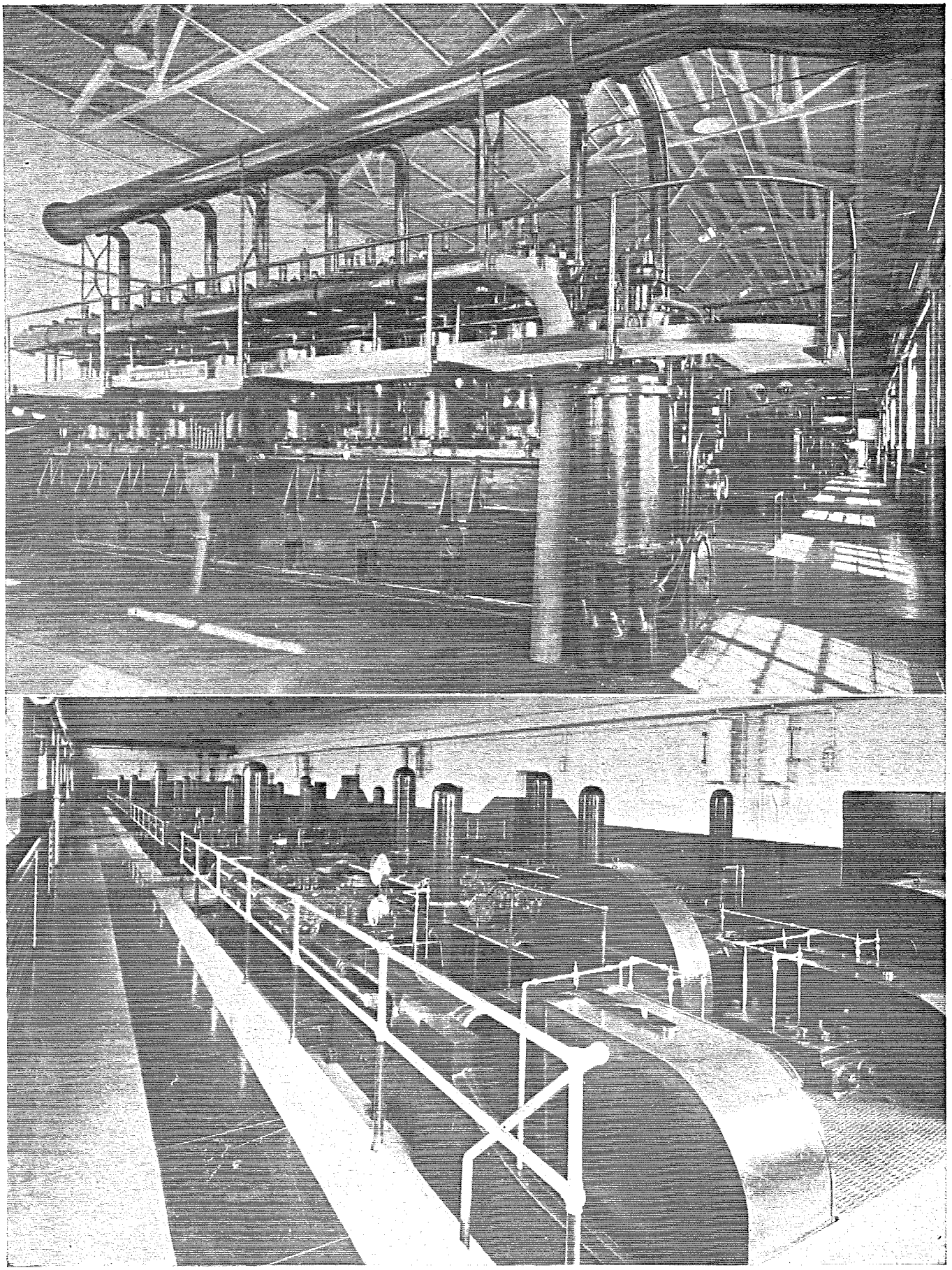
***Early Construction Methods***

Early in the history of pipelines the railroads recognized they were on the losing end of a struggle with pipelines for oil transportation, and the more progressive railway companies followed the principle of "if ye can't lick 'em, jine em." The Santa Fe, enjoying much of the rail transfer of crude from Kansas and Oklahoma fields to the Chicago area, in 1904 entered into an agreement with the Prairie Pipe Line Co. for longitudinal occupation of that railway company's right-of-way between Sibley, Mo., and Joliet, Ill. This grant of 400 miles was the longest pipeline mileage agreement of record then, and probably still stands today.

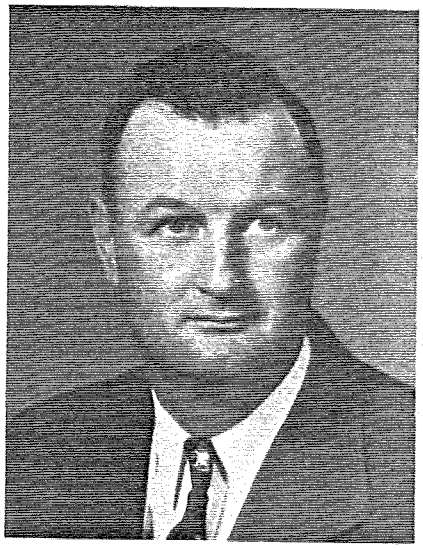
Following the successful negotiations with the Santa Fe, Prairie made a similar arrangement with

**K. T. FELDMAN**
**Part-Interest Executive**

**Graduated in 1933 from Kansas University with degree of B. S. in M. E., entering the employ of the Sinclair organization in August, 1935, in the general engineering department of crude oil pipelines. Assigned to Products pipe line department in Harrisburg, Penna., in 1940. Was with the Corps of Engineers, U.S.A. in the engineers pipeline school from July, 1942, to November, 1945. Returned to Sinclair as assistant chief engineer, products pipeline, at Columbus, Ohio. made division engineer, eastern division, in September, 1947, being loaned to Platte Pipe Line Company as chief engineer in the fall of 1950. He returned to Sinclair Pipe Line Company as its chief engineer in 1952. He was nade director of engineering in April, 1954, and on January 31, 1956, made Part-Interest Executive.**



Views in the engine room (above) and in the pump room of Marceline station. This was one of the first stations to use air bottles to absorb pulsation in fluid flow. A fire wall with packed shaft apertures segregated the MacIntosh-Seymour diesels from the adjacent pump batteries.



**C. T. CARTER**
**Director of Engineering**

**Was graduated from Kansas State College, Manhattan, Kansas, in 1938, with degree of B. S. in M.E. The summer of that year he joined the Sinclair Refining Company—Pipe Line Department, in Kansas City, as a mechanical engineer. January, 1947, saw his promotion to district superintendent of the company's Kansas City district, where he remained until transferred to Independence in January of 1952, where he had supervision of the construction of the new pump stations on the company's "Big Inch" line. On July 1, 1953, after serving some months as assistant head of the Oil movements Department of Sinclair Pipe Line, he was promoted to head of that department. In February, 1956, he was made general manager, crude oil lines, and effective, November 1, 1957, assigned to his present post as director of engineering.**

**GLENN O. ASH**
**Purchasing Agent**

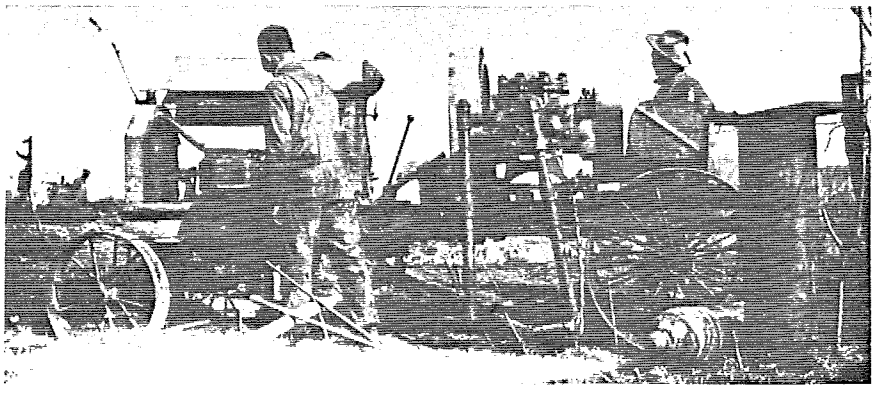
**Went with Sinclair Oil Company, in Tulsa, Oklahoma, on November 5, 1919, coming to the oil company from service in the army, and starting as an invoice clerk. In 1921 he was promoted to a buyer in the purchasing department of the oil company, progressing steadily in the department at Tulsa, where he remained until 1951. In 1950 he was made assistant purchasing agent for the Sinclair firm, being transferred to Independence on February 1, 1951, to take over the post of purchasing agent for the newly organized Sinclair Pipe Line Company.**

**CLAUDE M. COTTON**
**Auditor and Director**

**Started with the company as elevator boy, in the company headquarters building at Independence, at the age of 17, on August 12, 1929, eventually transferring to the payroll section of the accounting department. In 1938 he was transferred to the IBM machine accounting for the pipeline department, serving as supervisor of that section until 1948, when he was transferred to the internal auditing department as accountant. In 1954 he was named assistant auditor ,and promoted to auditor January 17, 1956. He was elected to the board of directors on March 2, 1957.**

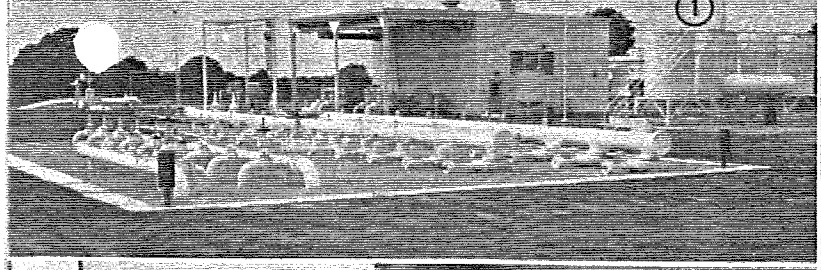
the Missouri Pacific Railroad. In later years this plan was extended to cover the laying of multiple lines. Prairie Pipe Line's four 8-inch lines from Carrollton, Mo., to Wood River, Ill., were laid under a similar license agreement with the Chicago, Burlington & Quincy Railroad Co.

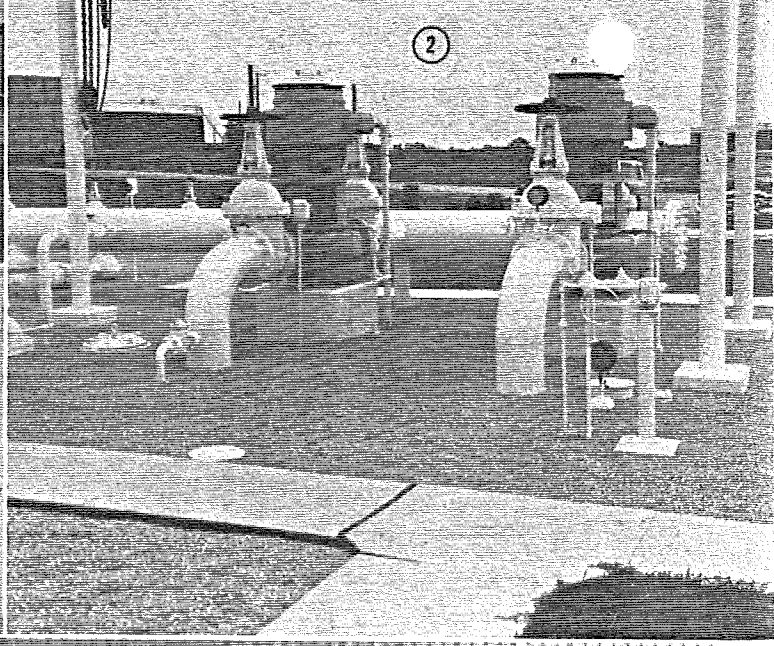
On the Sibley-Joliet line Prairie strung pipe directly along the right-of-way. Railroad cars—flats or low side gondolas—transporting the pipe from Eastern pipe mills were routed out along the pipeline construction front. As the main line was cleared, the work train carrying laborers and cars of pipe would progress to the point where pipe was needed, the men would swarm over the cars, and pitch pipe into the ditch alongside the track. By moving the string of cars alternately forward and backward, the 20-foot mill random lengths of pipe could be strung in a

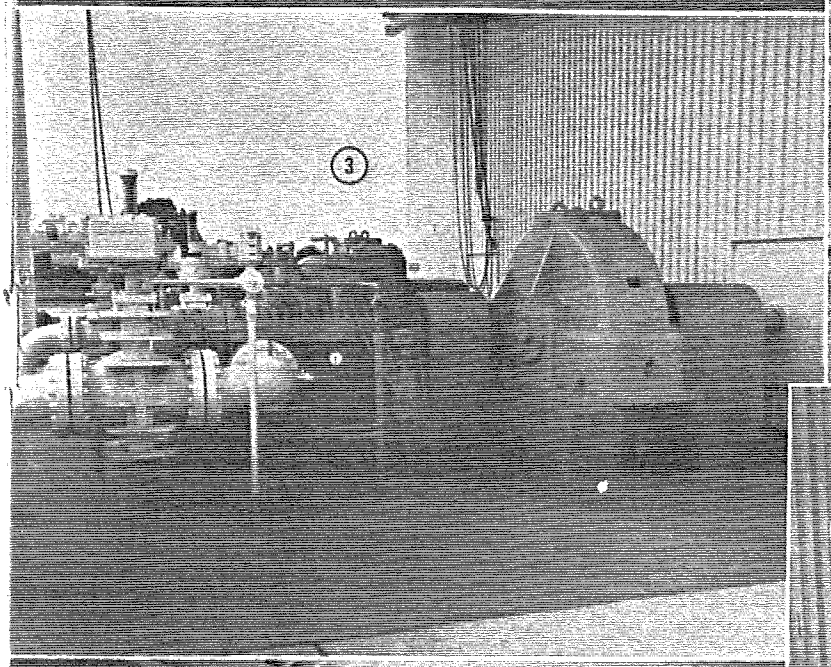


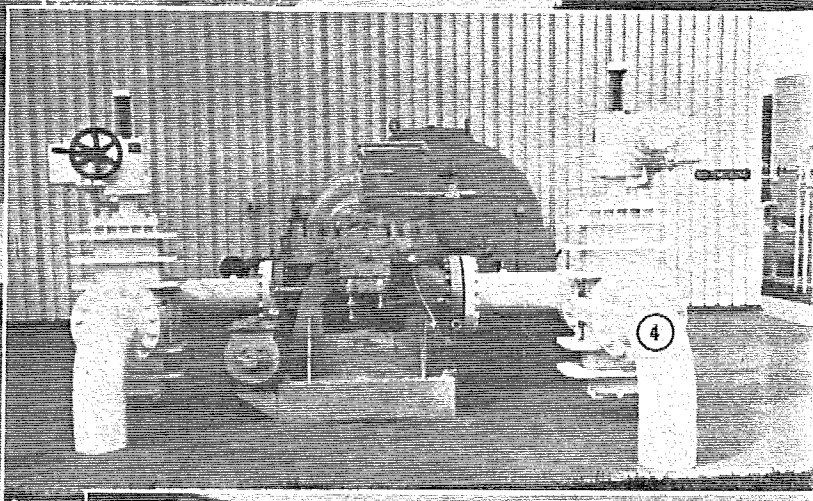
Portable pick-up pump used in the early "20's. Used to salvage oil from leaks, it had a capacity of 80 bbl./hr. Note iron wheels on this early automotive equipment.

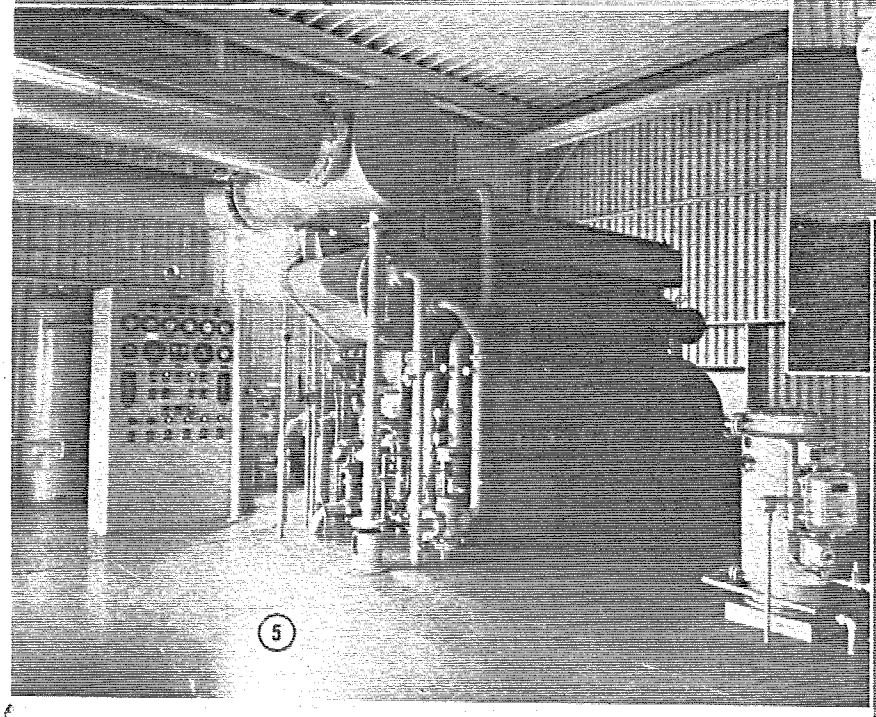
(1) Manifold at Teague station showing, partially obscured by the fire extinguisher housing, incoming lines, and main suction header, all Kerotest valve equipped. (2) The two booster pumps, one for each outgoing line, utilizing United Centrifugal Pumps, powered by Allis-Chalmers motors. (3) One of the main line United Centrifugal pumps, driven by a Lufkin step-up gear with 4.28/1 ratio. (4) End view of one pump, showing Grove suction and discharge valves. (5) One of the two Nordberg Dua-fuel engines powering the main line pumps. The engines are housed, the pumps and step-up gears under roof but with no side enclosures. (6) The panel in the control room of Teague station. Back of box in foreground houses telemetering gauging unit, electronically connected to all tanks on farm. (7) The four-bay Young fin-fan cooling unit, one bay each for cooling water and for lube oil on each of the Nordbergs. (8) The fuel oil battery, flanking the station building. Tank at stairway holds make-up water for engine cooling, the other three vertical tanks contain diesel fuel, while horizontal tank is for engine lube oil. Teague station is on the crude oil section of the Sinclair system, delivering to the refinery at Houston, Texas.

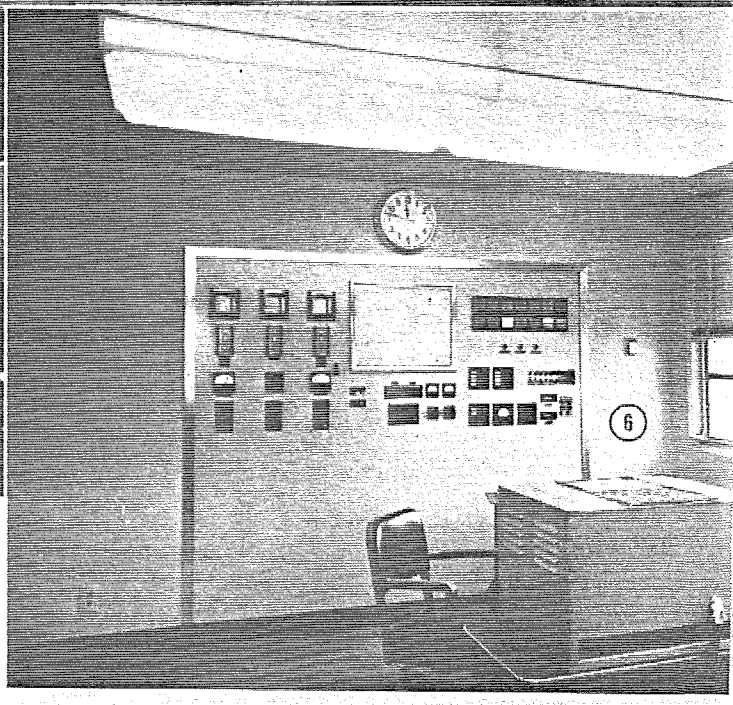


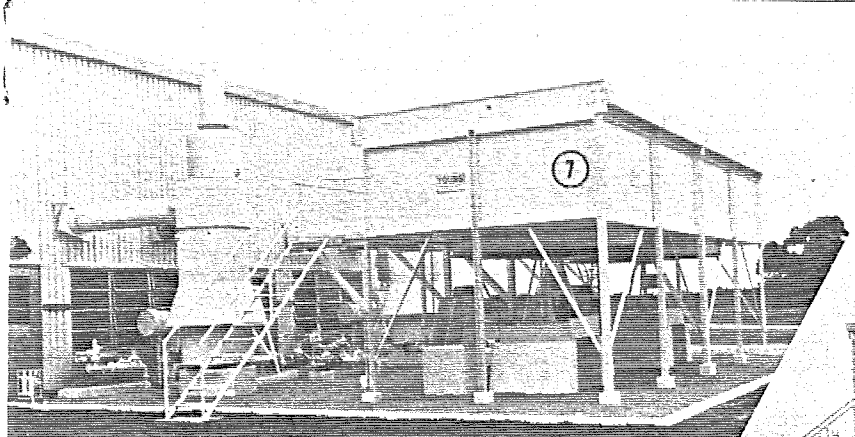


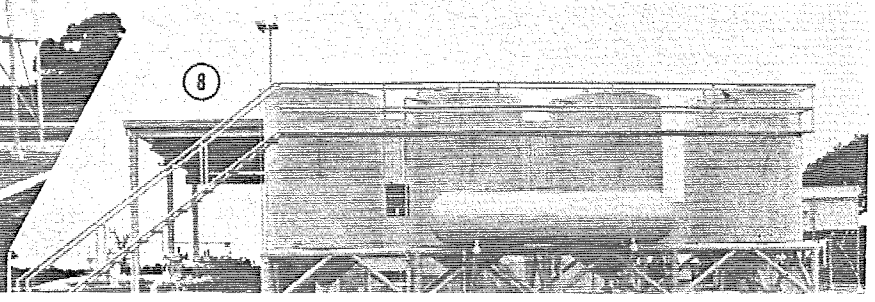


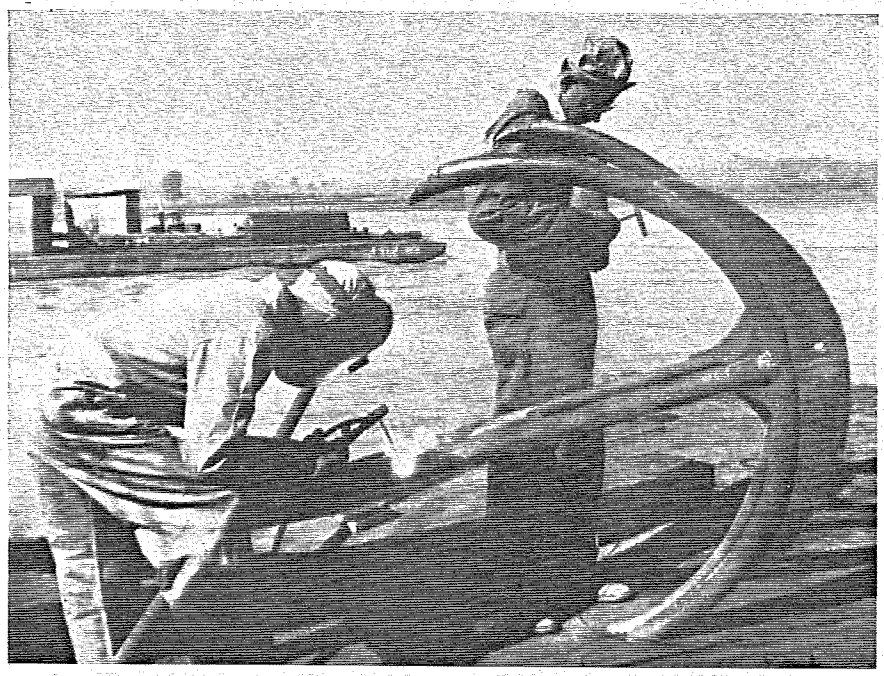












**Welders exercise their ingenuity to build up an anchor on one of the crossings of the Missouri river. Photo taken in 1948.**

continuous line. The threaded pipe was shipped with a coupling or "collar" on one end, a thread protector on the other and joint damage as the pipe was being unloaded was minimized.

Use of railroad cars eliminated stockpiling, did away with double handling in unloading and stringing, and saved about 95 per cent of the teaming bill. The railroads also cooperated in solving the problem of housing the pipeline gangs. With as many as 1,000 men in a gang—now known as a "pipeline spread" the problem of housing and feeding such an army was beyond the resources of many small towns. To care for these men, the railroads furnished strings of bunk cars, each with its mess kitchens, and hauled the men from the siding where the night had been spent out to the scene of pipelaying; the reverse of the operation took the work train out of the way of other traffic at night.

### *Pipeline Costs Fifty Years Ago*

In 1908 pipeline construction costs were on a par with other costs of that era. As part of the preparation for a law suit to determine the legality of Prairie's lines in Oklahoma the company outlined costs as follows: 25 miles of 8-inch line would cost $5,000 per mile; labor (each company laid its own lines in those days) was figured at $1,200 per mile; and right-of-way was estimated at 20¢ per mile. Cover was to be 18 inches.

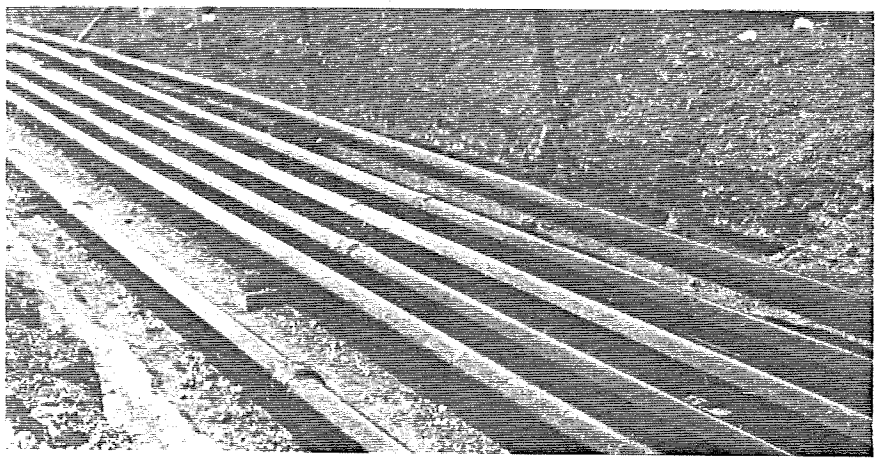
Another line, according to figures released by Prairie, to reach to the Gulf of Mexico, envisioned five pumping stations at a cost of $50,000 each. A station would employ eight men—on 12-hour shifts—at a wage of $90.00 per month, or a total operating payroll per station of $720.00 per month. A maintenance crew of 15 men would be required, at $75.00 per man per month, or a payroll of $1,125.00 per month. It was anticipated that such a line could be laid at a rate of a mile per day in good weather.

### *Modernization Program*

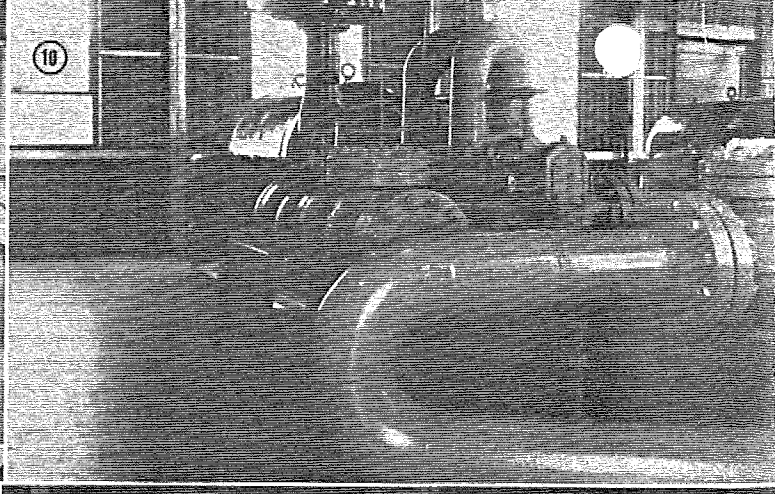
By the time the present Sinclair Pipe Line Company was formed, in 1951, the old Prairie lines and station equipment had far outlived their usefulness, and the costs for moving Sinclair crude to the Chicago area were the highest of all pipelines. Coincident with the formation of the pipeline subsidiary P. C. Spencer, president of Sinclair Oil Corp., announced that the new pipeline company would construct a 20-22-inch line from Cushing, Okla., to Chicago, which was later changed to 22 - 24-inch. To be 670 miles in length, the line would be powered by six pump stations, all electrically powered, and with a throughput of 145,000 b/d.

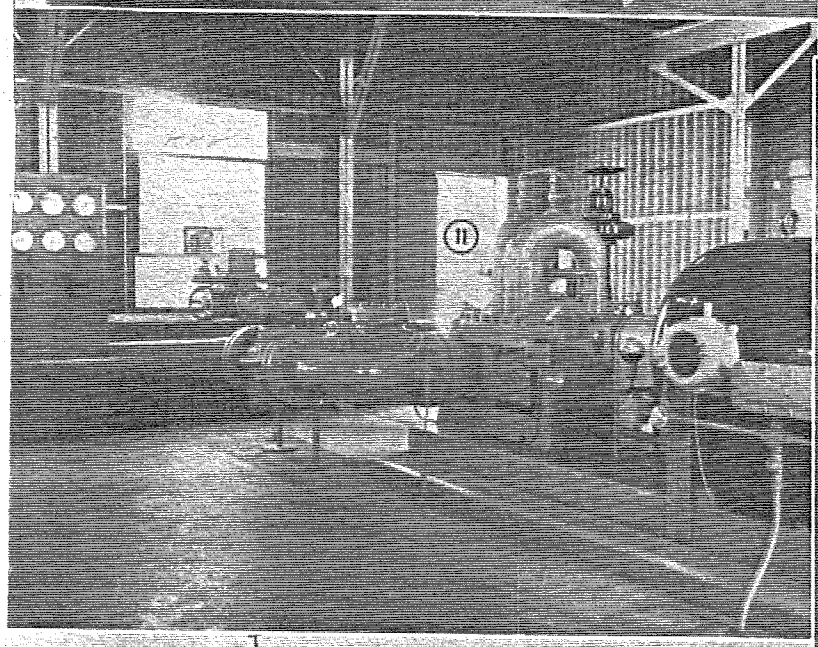
Officials of the new pipeline company were Roy J. Tibbets, president; William H. Morris, A. M. Stafford, R. C. Bearden, L. B. Moon and Charles Fitzgerald, vice presidents; J. P. Main, secretary-treasurer; and W. H. McBrayer, counsel. Completion of the line, early in 1953, gave Sinclair Pipe Line the lowest per barrel cost for any oil moved from the Mid-Continent producing area to Chicago. Throughput, for the entire system, had totaled some 170 million barrels in 1952, first year of the new company's operation. This figure jumped to 199 million barrels in 1954. By the end of 1958 the figure was too big to be expressed in terms of yearly throughput; daily pumping of both crude and products totaled 643,872 barrels.

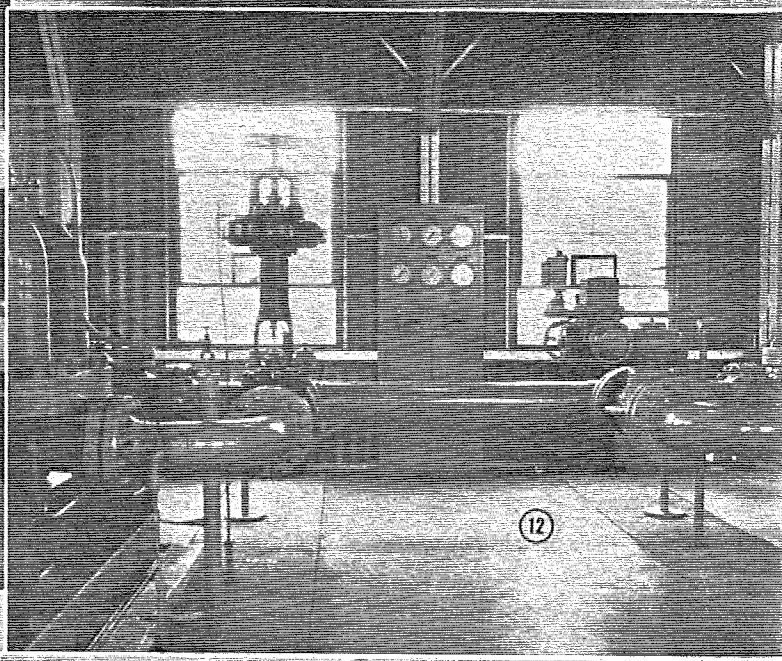
In 1953 to reinforce operations by decentralization and distribution of management authority, the company began a far-reaching program of reorganization. At a board meeting on April 1, 1953, Roy Tibbets was made chairman of the board and William H. Morris elevated to the presidency. G. M. Johnson was named vice president and added to the board, and R. C. Bearden given the post of executive vice president. Less than three years later, on Jan. 10, 1956, H. J. Amend, Earl W. Unruh and C. F. McCoy were elected vice presidents and, together with

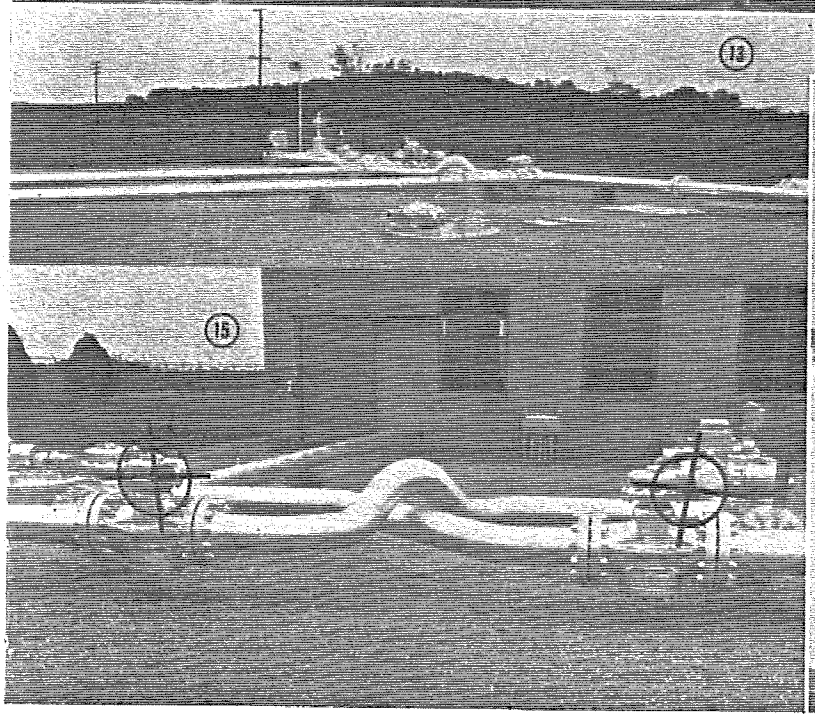


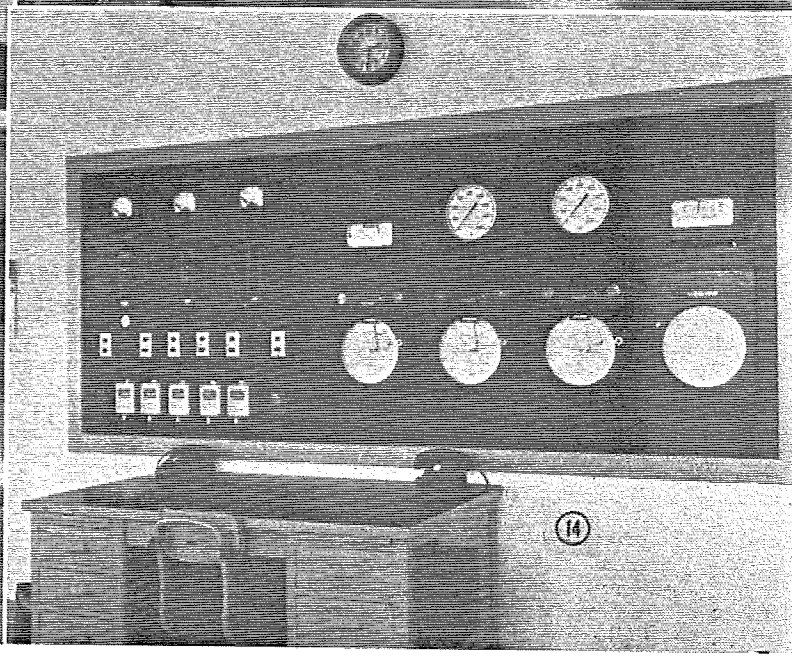
**Corrosion tests called for coating examination in the early days. Here the "system" is exposed to show effects of soil on six lines with different coatings.**



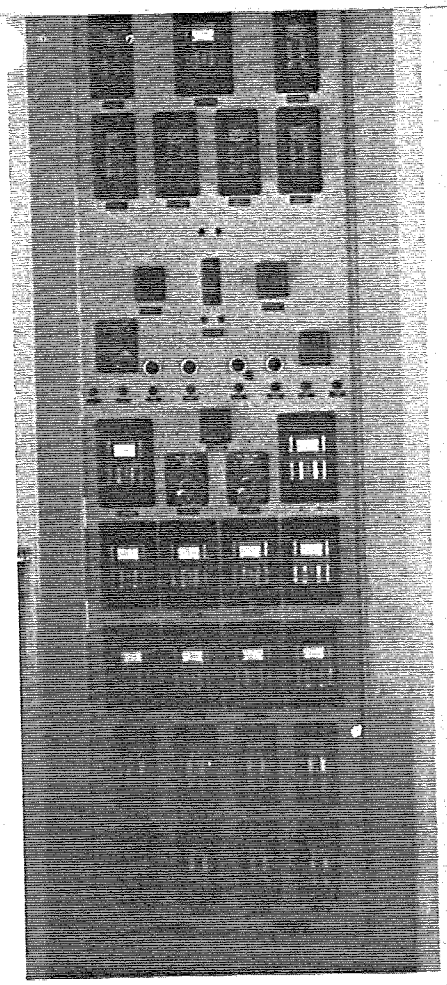








(9) The products line station at Hearne, Texas, showing one of the two General Electric motors, driving a United Centrifugal pump. The square box mounted on the pump body at the parting line is a Robertshaw vibration switch. (10) The reverse bend in the suction line to one pump, necessitated by the dual service range of the pump, with a Mason-Neian regulator in the background. (11) Pump, panel, and portion of interconnecting line which allows pumps to operate in parallel or series, depending on hydraulic conditions of line. (12) A second view of station piping between pumps. (13) Sump pump and manifold at Hearne. (14) The panel at Hearne, with two sets of units, one for each pump. Bristol recording units transmit pump throughput directly to dispatcher's office in Independence, Kansas. (15) The unique crossover in the station manifold, which enables one pump—either pump, to be on line with other cut off, or both pumps to operate in parallel or for No. 1 to deliver to the suction for Pump No.2.



**The panel mounting the automatic controls at Hearne station which determine sequence and duty of pumps through a predetermined time schedule.**

A. A. Davidson, counsel, made responsible for coordination of the company's staff and operational functions.

On March 2, 1957, Earl W. Unruh was elected president, G. M. Johnson named vice president in charge of operations; and J. D. McConnell was made a director and vice president in charge of crude oil operations.

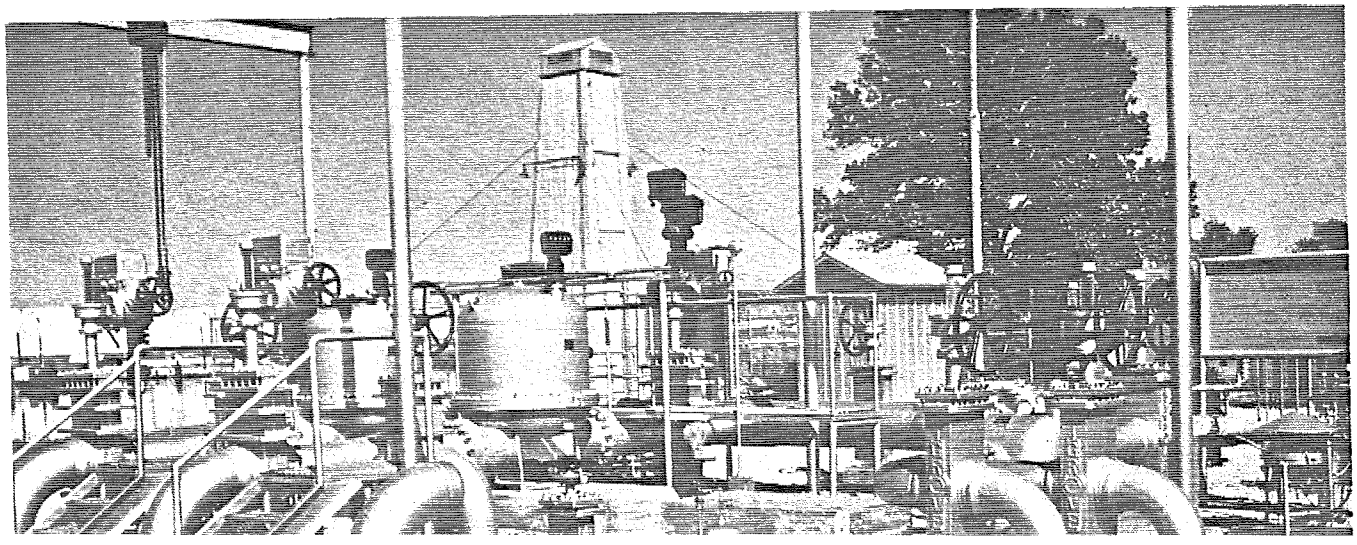
As of Nov. 1, 1959, the company officials are Earl W. Unruh, president; G. M. Johnson, vice president, engineering and operations; H. J. Amend, financial vice president; A. M. Stafford, vice president; L. B. Moon, vice president, pipeline operations; J. D. McConnell, vice president, economics and planning; J. H. Renard, vice president; J. P. Main, secretary-treasurer; and C. M. Cotten, auditor. All named are also directors and with the exception of Vice President Stafford, headquartered in New York, are located at the pipeline company's main building in Independence, Kan.

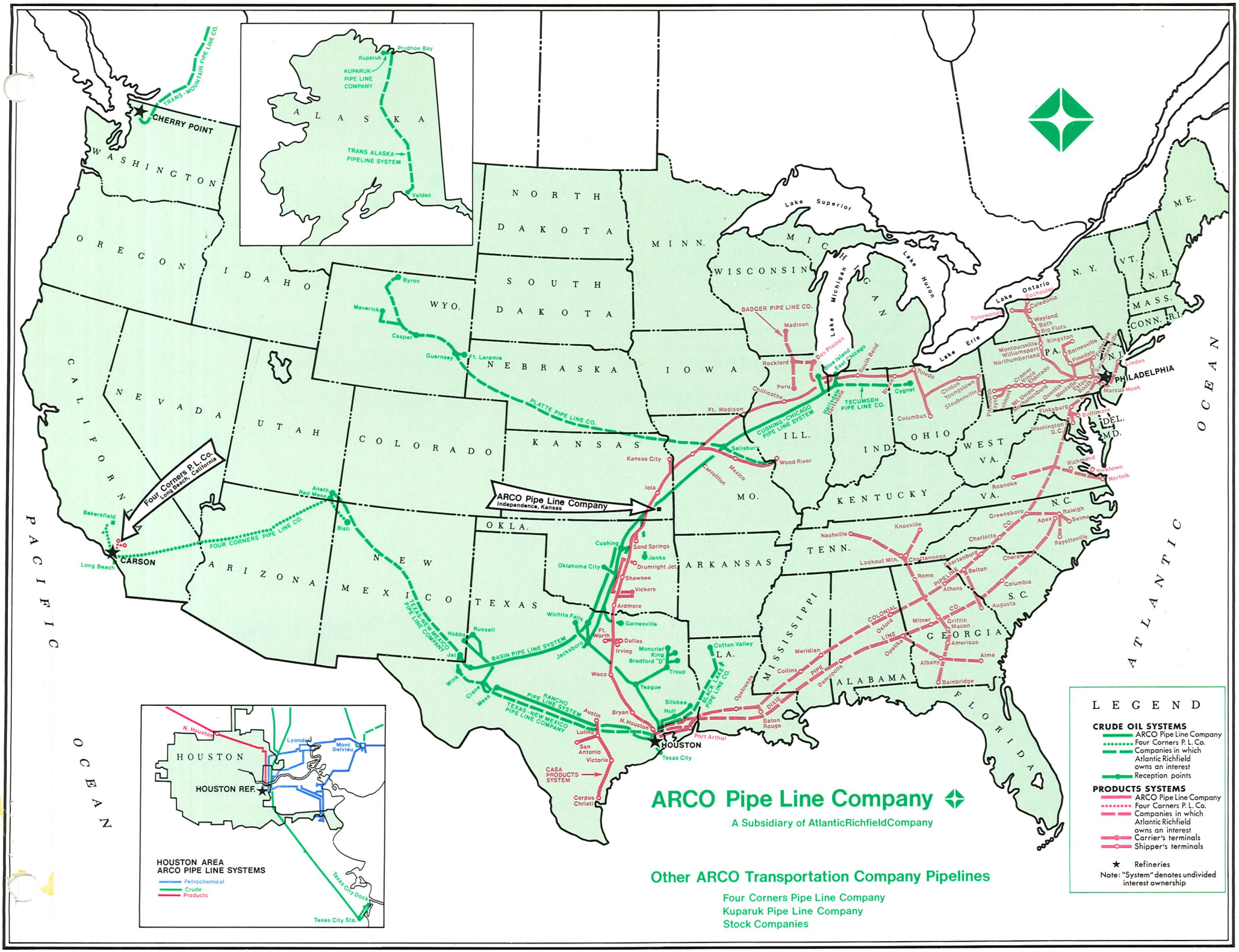
Sinclair was among the first of the pipeline companies to introduce the use of air chambers on both suction and discharge lines at pump stations to lessen the severity of line surges. Since the earlier step toward modernization with the construction of the 22 - 24-inch line to Chicago in 1953, it has expanded its system, and has adopted and adapted automation to its stations wherever practicable. The system includes stations which are "satellite" stations, controlled from master stations elsewhere on the line; it also has completely automatic stations on some of its products lines, true automation —being accomplished through control of some stations by hydraulic conditions existing in the line. Both types of stations are of the unattended type, being monitored by equipment designed to protect against any type of equipment failure, unauthorized entrance, and natural hazard.

During 1958 Sinclair Pipe Line completed a large diameter line to move crude oil from North Texas to the Gulf. This 300-mile line provides a greatly reduced unit cost than was possible over the line it replaced. A connecting link was also built between this new line and the partially owned Basin Pipe Line System. Through stock ownership the company participated in the construction of a crude oil line from the Four Corners, thru stock ownership, as well as in a large diameter products line from the Philadelphia area through Pennsylvania to Cleveland, Ohio. Both these part-ownership lines will effect noteworthy savings in barrel transportation costs over earlier, small diameter lines.

Today Sinclair Pipe Line Co. is sole owner or owner of an undivided interest in 10,974 miles and thru stock ownership interest an additional 11,000 miles of common carrier pipelines. Gathering and transportation of crude oil require 7,706 miles; refined petroleum products 3,248 miles. Line diameters range up to 24-inch on the crude lines, to 16-inch on the products system. To power these pipeline miles, the company operates 239 pump stations, 49 of these being on the products lines. The crude lines serve the Mid-Continent, Texas, New Mexico and Wyoming producing areas, transporting crude to refining centers at Houston and Corpus Christi in Texas, East Chicago in Indiana, and Sinclair, in Wyoming. Sinclair products lines serve major population centers in 14 states east of the Rocky Mountains with petroleum products from refining areas at Philadelphia, East Chicago, Houston, Corpus Christi and Wood River, Ill. Connections to other common carriers make Sinclair products available to most refining and consuming localities east of the Continental Divide.

**The end of one Sinclair crude oil line. The tower in the central background is at the Houston Refinery end of the line, and marks the riser and entry into the pipeline tunnel under the Houston Ship Channel. A similar tunnel across the channel takes the pipe down into the tunnel, bored well beneath any possible deepening of the waterway. All throughput is metered through the two Brodie meters at left center, each having a capacity of 5,000 Bbls/hr. The Grove valves controlling flow to the meters are Limitorque operated, by remote control. The flow from either meter may be deflected to check through a 1,000 bbl. vertical tank meter prover. Delivery from pipeline to refinery thru these meters, used as delivery proof, eliminates the use of tank gauging.**




ALASKA
Prudhoe Bay
Kuparuk
KUPARUK PIPE LINE COMPANY
TRANS ALASKA PIPELINE SYSTEM
Valdez
TRANS-MOUNTAIN PIPE LINE CO.
CHERRY POINT
WASHINGTON
OREGON
IDAHO
NORTH DAKOTA
SOUTH DAKOTA
MINN.
WISCONSIN
MICH.
Lake Superior
Lake Michigan
Lake Huron
Lake Erie
Lake Ontario
N. Y.
VT.
ME.
N. H.
MASS.
CONN.
R.I.
N. J.
PA.
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WYO.
NEBRASKA
IOWA
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N. C.
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TENN.
MISSISSIPPI
ALABAMA
GEORGIA
FLORIDA
LA.
TEXAS
OKLA.
KANSAS
MO.
ARKANSAS
NEVADA
UTAH
COLORADO
ARIZONA
NEW MEXICO
CALIFORNIA
PACIFIC OCEAN
ATLANTIC OCEAN
Byron
Maverick
Casper
Guernsey
Ft. Laramie
PLATTE PIPE LINE CO.
BADGER PIPE LINE CO.
Madison
Rockford
Des Plaines
Blue Island
East Chicago
South Bend
Peru
Chillicothe
Ft. Madison
Harrisburg
TECUMSEH PIPE LINE CO.
Toledo
Cygnet
Columbus
CUSHING-CHICAGO PIPE LINE SYSTEM
Salisbury
Wood River
Kansas City
Iola
Carrollton
Mexico
ARCO Pipe Line Company
Independence, Kansas
Four Corners P.L.Co.
Long Beach, California
FOUR CORNERS PIPE LINE CO.
Aneth
Red Mesa
Bisti
Bakersfield
Long Beach
CARSON
Cushing
Sand Springs
Jenks
Drumright Jct.
Oklahoma City
Shawnee
Vickers
Ardmore
Wichita Falls
Gainesville
Ft. Worth
Dallas
Irving
Moncrief
King
Bradford "D"
Troup
Waco
Teague
Hobbs
Russell
Jal
Wink
Crane
Mesa
TEXAS-NEW MEXICO PIPE LINE COMPANY
BASIN PIPE LINE SYSTEM
Jacksboro
RANCHO PIPE LINE SYSTEM
Austin
Bryan
N. Houston
Luling
San Antonio
Victoria
CASA PRODUCTS SYSTEM
Corpus Christi
Silsbee
Hull
Cotton Valley
Opelousas
JACK LAKE PIPE LINE CO.
DIXIE PIPE LINE
Port Arthur
Baton Rouge
HOUSTON
Texas City
Rochester
Caledonia
Wayland
Bath
Big Flats
Tonawanda
Montoursville
Williamsport
Northumberland
Kingston
Barnesville
Pinedale
Cramer
Lingle
Eldorado
Mt. Union
Mechanicsburg
Quentin
Norristown
Exton
Boothwyn
Linden
PHILADELPHIA
Marcus Hook
Pittsburgh
Johnstown
Finksburg
Baltimore
Washington D.C.
Richmond
Yorktown
Norfolk
Roanoke
Knoxville
Nashville
Lookout Mtn.
Chattanooga
Charlotte
Greensboro
Apex
Raleigh
Selma
Fayetteville
Spartanburg
Cherawe
Belton
Rome
Athens
Columbia
Augusta
Milner
Griffin
Macon
Americus
Albany
Alma
Bainbridge
Meridian
Collins
Oxford
Opelika
Demopolis
COLONIAL PIPE LINE CO.
HOUSTON AREA
ARCO PIPE LINE SYSTEMS
Petrochemical
Crude
Products
N. Houston
Lyondell
Mont Belvieu
HOUSTON REF.
Texas City Dock
Texas City Sta.
ARCO Pipe Line Company
A Subsidiary of AtlanticRichfieldCompany
Other ARCO Transportation Company Pipelines
Four Corners Pipe Line Company
Kuparuk Pipe Line Company
Stock Companies
LEGEND
CRUDE OIL SYSTEMS
ARCO Pipe Line Company
Four Corners P. L. Co.
Companies in which Atlantic Richfield owns an interest
Reception points
PRODUCTS SYSTEMS
ARCO Pipe Line Company
Four Corners P. L. Co.
Companies in which Atlantic Richfield owns an interest
Carrier's terminals
Shipper's terminals
Refineries
Note: "System" denotes undivided interest ownership

ARCO Pipe Line Company headquartered in Independence, Kansas since 1904, operates its pipeline system and an extensive microwave communications system in 12 states. Its Alaskan Division is headquartered in Los Angeles,California. Four Corners Pipe Line Company, headquartered in Long Beach, California, operates pipeline systems in the states of California, Arizona, Utah and New Mexico. Kuparuk Pipe Line Company, headquartered in Los Angeles, operates a 27-mile pipeline in Alaska.

Atlantic Richfield Company, through its subsidiaries, ARCO Pipe Line Company, Four Corners Pipe Line Company and Kuparuk Pipe Line Company, operates or owns one of the most extensive pipeline systems in the United States. The 8,100-plus mile network of crude oil pipelines transports crude oil from the producing areas of Texas, Oklahoma, California and New Mexico to refineries in Houston, Texas, Carson, California and to terminals and refineries in other areas. This network includes the 800-mile 48-inch Trans Alaska Pipeline which transports crude oil from the Prudhoe Bay area of Northern Alaska to its ice-free port of Valdez on the South and the 16-inch Kuparuk Pipe Line connecting the Kuparuk field to the Trans Alaska Pipeline. Also, multiple line segments in the greater Houston area transports petrochemical products and related feedstock materials serving several major plants of the petrochemical industry in that area. Separate products pipeline systems of approximately 3,800 miles transport refined petroleum products from refineries to distribution terminals in 11 states from New York to the Gulf Coast and in the Los Angeles Basin.

In addition, Atlantic Richfield Company has an interest in 10 other pipeline companies throughout the lower United States and Alaska.

An industry "first" was scored in pipeline operations with the operations computer control system. The crude oil and product line operations are programmed into the computer control systems located in Independence, Kansas and Long Beach, California. Utilizing the extensive communications system, these computerized controls permit a high degree of operating safety and automation.

In addition to optimizing electric power requirements, it is possible for the computer to start and stop pumping units, take gauge and meter readings, calculate volume of fluids in tanks, calculate shipment completion and arrival times, constantly monitor pumping operations and alarms, and print out hourly, daily and monthly operating reports. On-line computers are used for closed loop pipeline operation and accounting.

# ARCO Pipe Line Company

Subsidiary of AtlanticRichfieldCompany

## Other ARCO Transportation Company Pipelines

Four Corners Pipe Line Company
Kuparuk Pipe Line Company
Stock Companies

HB 2571

Mr. Chairman and Members of the Committee:

House Bill 2571 which places a tax on the transportation of pipeline products is anti-consumer and anti-producer legislation. In order for pipelines to continue to operate it will be necessary to pass the tax on to the consumer in higher prices or pass it back to the producer in lower prices for their products.

Pipelines must compete with other forms of transportation and if the tax is excessive and the cost cannot be passed on or back then they will be abandoned. If abandoned there will be a loss of jobs and taxes on the local ad valorem tax rolls.

There is a great unrest in the consuming public now and to add to their costs in Kansas with the pass through of the severance tax and a pipeline tax will cause the unrest to become greater. In the case of natural gas this tax could cost up to about 80% of the cost of some Hugoton gas. As an example an MCF or 1000 cubic feet of gas is sold for about 50¢ (old gas Hugoton field). If it's transported 400 miles through a pipeline the tax is $.001 per unit per mile or 40 cents. If you use the average rate used to estimate the value of gas for the severance tax of $1.35 the tax rate is 29%. I do not believe you will want to go home and face these consumers and tell them you raised the cost of natural gas on their utility bills by this amount.

Another factor that must be considered is the competition between states for industry. The high taxes will make Kansas energy more expensive than surrounding states and we will not be in a position to compete as a site or location for new industry.

ATTACHMENT XIII
4-19-83

Kansas also has a number of small refineries. This tax may raise the cost of crude to them which they will try to pass on to the consumer. Small refineries are in tough economic times and as we have seen two refineries, one in Phillipsburg and one in Kansas City, have closed. We ask you not to place an additional burden on these units which may result in their closing and the loss of jobs connected with them.

We feel this tax is punitive in nature and should not be passed. We ask the committee to table this bill or to report it adversely.

George Sims
Mobil Oil Corporation
4/19/83

**Legislative Testimony**

Kansas Association of Commerce and Industry

500 First National Tower, One Townsite Plaza Topeka, Kansas 66603 A/C 913 357-6321

April 19, 1983

KANSAS ASSOCIATION OF COMMERCE AND INDUSTRY

Testimony Before the

HOUSE ASSESSMENT AND TAXATION COMMITTEE

REGARDING: HB 2571, TAX ON USE OF PIPELINE FACILITIES

Thank you Mr. Chairman for this opportunity to express the concerns of the Kansas Association of Commerce and Industry regarding the proposal to impose a tax on the use of pipeline facilities in Kansas. I am Ron Gaches, General Counsel for KACI.

The Kansas Association of Commerce and Industry (KACI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KACI is comprised of more than 3,000 businesses plus 215 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KACI's members having less than 25 employees, and 86% having less than 100 employees.

The KACI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

KACI is opposed to the passage of HB 2571 for several reasons. The tax proposed in HB 2571 is arbitrary and discriminatory in nature. No reasonable rationale has been suggested by the proponents for requiring the user of pipeline facilities to pay an additional tax to support services enjoyed by all Kansans.

- MORE -

The public policy statement included in section one of this proposal is inaccurate, misleading, and damaging to the Kansas business climate. Pipelines do not constitute the hazard suggested in section one.

The true impact of this type of tax would eventually be felt by all Kansans. A pipeline use tax would increase the cost of energy for most Kansas consumers, residential, commercial, and industrial. While the energy cost increase may be small for some residential users, the higher cost for industrial users would be significant and would make Kansas a less attractive location for new industrial development and expansion of existing Kansas industries. The negative impact would delay economic recovery in Kansas and prolong our high unemployment levels.

The suggestion that this tax is desirable because it would be paid by non-Kansans ignores the real threat of retaliatory taxes that might be passed by other states that would impact on Kansas. Our experience with severance taxes demonstrates that this retaliatory tax policy does exist.

Finally, to suggest that the tax is reasonable because the pipelines can't be moved fails to recognize the development of pipelines outside of Kansas that would be capable of transporting much of the products now transported by pipelines in Kansas. Certainly, this tax would discourage development of any additional pipelines in Kansas.

For these reasons we urge you to reject HB 2571. If Kansans are not prepared to pay the rising cost of state government then perhaps the level of services should be curtailed. Growth in the state budget of nine percent should not be acceptable in recessionary times. The public sector should follow the lead of the private sector in curtailing the growth of spending.

BEFORE THE

KANSAS HOUSE COMMITTEE

ON ASSESSMENT AND TAXATION

TESTIMONY OF

H. ALLAN CALDWELL

ON BEHALF OF

KOCH INDUSTRIES, INC.

APRIL 19, 1983

ATTACHMENT XV

4-19-83

My name is Allan Caldwell. I am representing Koch Industries, Inc., which is a privately owned oil company headquartered in Wichita. While the great majority of its operations are in states other than Kansas, Koch does, through subsidiaries, operate several hundred miles of pipelines in Kansas. The proposed House Bill No. 2571 would constitute a second major tax on the Kansas oil and gas industry from this 1983 legislature. It is an alarming proposal which promises to significantly impact Koch's business operations and its decisions on future expansion within the State of Kansas. Koch feels that its contribution to the industrial strength of the State of Kansas is not insignificant and that this proposed bill is a further example of the worsening business atmosphere for energy related businesses in our State.

Koch finds the proposed legislation objectionable for several reasons:

I

The attempted justification for this proposed tax is that the "continued presence of these pipelines . . . are presently producing substantial environmental harm. Moreover, the activities associated with oil and gas transportation and development have created a need to establish and maintain an expensive infrastructure in part in the State, including but not limited to highways, roads, bridges, schools, hospitals, unemployment compensation, detention centers, welfare assistance and other public improvements."

The above is an erroneous argument designed to justify a tax on the basis of protecting society from a burden and a danger which does not exist.

Pipelines, both liquid and gas, are strictly regulated by the federal government. 49 USC subchapter D concerning Pipeline Safety, (Parts 190, 191, 192, 193 and 195) sets forth detailed and specific regulations for the construction, maintenance and operation of liquid and gas pipelines. Kansas is a participant in the Federal safety programs and receives funds from the Federal Government in that regard.

The United States presently uses approximately five billion barrels of petroleum products a year of which most, at one time or another, travels through a pipeline. There are presently existing 227,000 miles of oil pipelines in the United States connecting our nations petroleum producing, refining and marketing areas. In 1981 pipelines were responsible for 46.2% of all crude oil and refined products transported in the United States. During this time they carried a total of 575.9 billion ton-miles of crude oil and products (A ton-mile represents movement of one ton of freight one mile) from which only six of a total of the 53,496 transportation deaths were related to oil pipelines. Of the approximate 2.3 billion barrels of oil moved by pipelines in 1980 (assuming 46.2% of 5 billion barrels) only 289,445 barrels, or less than .012% of the total oil moved, was lost through spills. (Oil Pipeline of the United States, Association of Oil Pipe Lines).

Oil pipelines have a record of safety unequaled by any other transportation mode. While carrying the 46.2% of all crude oil and refined products they had only 219 accidents in the entire country in 1980.

(Annual Report on Pipeline Safety, 1980, U.S Department of Transportation).

Pipelines are by far the safest method of transportation of a vital commodity. Additional pipeline transportation greatly reduces the wear and tear on the states highway - trucks being the only alternative to pipeline transportation in Kansas. Instead of increasing the cost of maintaining an infrastructure, pipelines greatly reduce that cost.

II

The Bill would place an unconscionable burden upon the Kansas oil and gas producer and transporter. The producer, already hit with the new severance tax which we are assured will be passed during this session, would have added to his cost of production 10¢ per barrel for every hundred miles he must move his product within the State. He will be forced to either truck the crude, thereby exposing the people of the State of Kansas to significantly higher risks of accident and human error than that inherent in the pipeline systems of the state, or the added tax which will place him at a competitive disadvantage with out-of-state producers.

This transportation tax will clearly discriminate against and most heavily impact producers in the western portion of the State who must transport their product over many miles to the refineries in the east. The producer's obvious alternative will be to move his product outside the State of Kansas as quickly as possible to refineries in adjoining states. The result will be counter productive for Kansas. The Kansas exploration industry will be encouraged to move its activities elsewhere. This will reduce employment and other benefits associated with exploration and production. This will ultimately result in less

not more, revenue available to the State Treasury.

The impact of this proposed legislation on the transporter is unclear, except that it will significantly impact its administrative burden. Under §2(g), "transportation" is defined as being the "movement from the pumping station to the city gate or from the pumping station to any end user." This definition creates an ambiguity as to what is meant by the "pumping station". Gathering systems are constructed with numerous pumps and tanks to gather crude oil for injection into a pipeline system. Whether this bill is designed to impact such gathering systems cannot be told from its language.

Providing information on mileage and number of barrels pumped over the vast network of gathering and transmission lines in the Kansas will be extremely burdensome to the transportation company. It will significantly add to its cost of doing business thereby threatening its economic viability.

The one who will ultimately pay this very significant increase in energy cost will be the Kansas consumer who has already suffered the additional burden of increased gas and electricity costs during the winter of 1982 to 1983. When the gasoline tax has increased 05¢ per gallon, and the State of Kansas is adding a severance tax its citizens are already facing rising energy costs. It is difficult to understand that this legislature would add to that burden by the imposition of this tax.

Under this plan everyone loses, the producer, the royalty owner, the transporter, the consumer and the State.

III

This statute is patently unconstitutional as a violation of the Commerce Clause of the United States Constitution. This statute will impact all transportation by pipeline through the State of Kansas and will violate the very purpose of the commerce clause which was to create an area of free trade throughout the nation. The Commerce Clause vested the power of taxing interstate commerce in Congress and not in the states. The imposition of a tax such as that proposed in this bill would essentially resurrect the customs barriers which the Commerce Clause was designed to eliminate. If Kansas can impose a transportation tax on products shipped across its border why cannot Colorado, Wyoming and California? Such actions would result in chaos.

This constitutional prohibition has been addressed on numerous occasions by the Courts of this Nation. In, State vs. Montana Utilities Co., 133 P 2d 354 (Mont. 1943), a "license tax" directed at interstate transportation of gas produced in the state and intrastate distribution of gas produced within or without the state was found to be unconstitutional.

The United States Supreme Court in Michigan - Wisconsin Pipe Line Co. vs. Calvert, 347 US 157, 74 S. Ct. 396 (1954), held a "gathering tax" on gas taken into a pipeline system also to be unconstitutional. The court found that such a tax would cause a multiple burden upon commerce among the states.

See also Maryland vs. Louisiana, ____ US _____, 101 S. Ct. 2114 (1981); Louisiana - Nevada Transit Company vs. Fontenot, 233 La 600, 97 So. 2d 409 (1957).

Koch Industries, Inc., presently has its coporate headquarters in the State of Kansas and pays a significant amount of state income and property taxes into the Kansas Treasury. It employs in excess of 1,500 people who are, consumers, homeowners and taxpayers and who also contribute substantially to the revenues of the state.

The stated purpose for the enactment of this statute is erroneous. The pipeline industry does not produce a "substantial environmental harm" nor does its existence create the need for an "expensive infrastructure . . . in the state". In fact it relieves such a need. Such arguments are baseless and contrary to all evidence as to the safety record and history of the pipeline industry. The pipeline industry moves more product at a lower cost with less environmental impact and safety consequences than any other transportation mode in the United States. It does not impose an environmental threat or economic burden upon the State of Kansas and its citizens. In fact, the State of Kansas and its citizens substantially benefit from the existence of the pipeline network in this state. There is no discernible justification for the imposition of this tax. This tax will place the Kansas producer at a severe disadvantage in relation to the producers of adjoining states. He is already to be burdened with the severance tax and now in addition he will be burdened with a very substantial added tax for transportation. This will undeniably discourage the Kansas exploration and production industry, reduce employment and royalty income available to Kansas landowners. Also Kansas refineries in the state will be affected because the added cost of transporting crude oil to and refined products from their facilities.

Finally, this proposal is clearly unconstitutional as a violation of the Commerce Clause of the U. S. Constitution. It taxes interstate commerce which is exclusively reserved to the Federal Government.

Kansas should learn from Michigan's experience that burdening an industry to heavily with taxes forces it to relocate where the free enterprise system is still permitted to operate. Surely Kansas can learn this lesson by example and not by experience.

Annotations USCS
US. Constitution



imposed by a state statute on movement of automobiles into state in caravans for sale is not established by proof that same fees are not imposed on other classes of traffic, where classification employed by statute is found to be reasonable, and nothing is shown to negative existence of compensating differences in various classes of traffic comparable to differences in fees imposed thereon. Clark v Paul Gray, Inc. (1939) 306 US 583, 83 L Ed 1001, 59 S Ct 744.

Kentucky could not impose tax on Kentucky "franchise" of Michigan common carrier trucking corporation engaged solely in interstate commerce in delivery of new automobiles to dealers in Kentucky and in passing through that state enroute to dealers in other states. Commercial Carriers, Inc. v Kentucky Tax Com. (1959, Ky) 321 SW2d 42.

**216. Air transportation**

It is constitutionally permissible objective to have interstate commerce bear fair share of costs to states of airports constructed and maintained for purpose of aiding interstate air travel, and at least until Congress chooses to enact nationwide rule, power to collect fees to help defray such costs will not be denied to states; state or municipal charge of $1 for each passenger enplaning on commercial airplane is not unconstitutional where (1) charge is designed only to make user of state-provided facilities pay reasonable charge to help defray costs of their construction and maintenance, (2) charge does not discriminate against interstate commerce and travel, (3) charge reflects fair approximation of use of facilities for whose benefit it is imposed, (4) charge is not shown to be excessive in relation to airport costs incurred by taxing authority, (5) charge is not in conflict with any federal policies furthering uniform national regulation of air transportation, and (6) there is no suggestion that charge does not in fact advance constitutionally permissible objective of having interstate commerce bear fair share of costs to states of airports constructed and maintained for purpose of aiding interstate air travel. Evansville-Vanderburgh Airport Authority Dist. v Delta Airlines, Inc. (1972) 405 US 707, 31 L Ed 2d 620, 92 S Ct 1349.

City and county of Los Angeles did not have power to levy, on apportional basis, taxes upon Scandinavian-owned and based aircraft used exclusively in foreign commerce. Scandinavian Airlines System, Inc. v County of Los Angeles (1961) 56 Cal 2d 11, 14 Cal Rptr 25, 363 P2d 25, cert den 368 US 899, 7 L Ed 2d 94, 82 S Ct 175.

*Annotations:*

Validity, under commerce clause of Federal Constitution, of state tolls or taxes on, or affecting, interstate or foreign air carriers or passengers. 31 L Ed 2d 975.

**217. Pipelines**

State-produced oil, gathered by pipe line company and transported by it under local tariff covering intrastate transportation and storage, was, so far as it became part of stream of oil that was flowing through company's pipes to state line and beyond, moving in interstate commerce from time it left wells, so as to prevent state from subjecting company to license or occupation tax measured by volume of such traffic, and none less so because, if different orders from producers had been received by pipe line company, it would have changed destination toward which oil was started and at which it in fact arrived, pipe line company, not producer, being master of destination of any specific oil. Eureka Pipe Line Co. v Hallanan (1921) 257 US 265, 66 L Ed 227, 42 S Ct 101.

Corporation engaged in gathering and purchasing natural gas, which it distributes through its pipes, may not be subjected to state license or occupation tax measured by volume of traffic, where great body of gas starts for points outside state, and goes to them either in company's own pipes or those of connecting companies, to whom it sells, although necessities of business require much smaller amount of gas, destined to points inside state, to be carried undistinguished in same pipes, and although, as to gas sold to connecting companies, seller and purchasers may change their minds before gas leaves state, and precise proportions between local and outside deliveries may not have been fixed. United Fuel Gas Co. v Hallanan (1921) 257 US 277, 66 L Ed 234, 42 S Ct 105.

Operation of pipe line across state to carry crude oil from one state to another is interstate commerce, which is beyond power of state to tax; that foreign corporation engaged in transporting crude petroleum by pipe line across state applies for and receives license from state to do business within its limits, which empowers it to exercise power of eminent domain, does not render it subject to payment of annual franchise tax; maintenance by foreign corporation operating pipe line within state in interstate commerce, of telephone and telegraph lines exclusively in furtherance of its interstate business, does not render it subject to payment of annual license fee to state; maintenance by foreign corporation operating pipe line to carry crude oil in interstate commerce across state, of office within its limits, where its accounts are kept, and from which it purchases supplies, employs labor, and enters into contracts, and of pumping stations to





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other property used exclusively
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Pipe Line Corp. v Monier (192
L Ed 439, 45 S Ct 184.

State privilege tax imposed o
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State Tax Com. v Interstate
(1931) 284 US 41, 76 L Ed 156

Imposition of state franchise
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Constitution where corporation
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their convenience. Southern Na
Alabama (1937) 301 US 148, 8
Ct 696.

Commerce clause is infringed
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tire volume of gas "taken," as
state natural gas pipeline comp
ble incidence is taking of gas
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347 US 157, 98 L Ed 583, 74 S
347 US 931, 98 L Ed 1083, 74 S

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Line Co. v Carpentier (1957) 10
NE2d 115.

State statutes requiring pipe
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State gathering tax could not
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Louisiana-Nevada Transit Co. v
233 La 600, 97 So 2d 409.

State tax, imposed on persons
state pipelines through state, whi
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accelerate passage of oil, and of automobiles and other property used exclusively in prosecution of its interstate business, does not render it subject to payments of annual license tax to state. Ozark Pipe Line Corp. v Monier (1925) 266 US 555, 69 L Ed 439, 45 S Ct 184.

State privilege tax imposed on foreign corporation selling to distributors in state natural gas piped from another state after reducing pressure, is invalid as burden upon interstate commerce. State Tax Com. v Interstate Natural Gas Co. (1931) 284 US 41, 76 L Ed 156, 52 S Ct 62.

Imposition of state franchise tax measured by amount of capital employed in state upon foreign corporation having its commercial domicil in state, engaged in transmission and sale of natural gas purchased from producers outside state, is not repugnant to commerce clause of Federal Constitution where corporation engages in local activities by reducing pressure of gas at point of delivery to meet needs and requirements of local purchasers and by establishing service lines for their convenience. Southern Natural Gas Corp. v Alabama (1937) 301 US 148, 81 L Ed 970, 57 S Ct 696.

Commerce clause is infringed by Texas tax on occupation of "gathering gas," measured by entire volume of gas "taken," as applied to interstate natural gas pipeline company, where taxable incidence is taking of gas from outlet of independent gasoline plant within state for purpose of immediate interstate transmission. Michigan-Wisconsin Pipe Line Co. v Calvert (1954) 347 US 157, 98 L Ed 583, 74 S Ct 396, reh den 347 US 931, 98 L Ed 1083, 74 S Ct 528.

Illinois franchise tax on foreign corporations is laid on exercise on privilege of doing intrastate business, and pipeline corporation engaged exclusively in interstate business, which had been domesticated, was not subject to tax on mere granting of unexercised privilege. Sinclair Pipe Line Co. v Carpentier (1957) 10 Ill 2d 300, 140 NE2d 115.

State statutes requiring pipe line companies engaged in interstate commerce to obtain permits and pay license fees violate commerce clause. State ex rel. Board of Railroad Com'rs v Stanolind Pipe Line Co. (1933) 216 Iowa 436, 249 NW 366.

State gathering tax could not be constitutionally imposed upon pipe-line company purchasing gas from Louisiana leaseholds and transporting approximately 80% of it in interstate commerce. Louisiana-Nevada Transit Co. v Fontenot (1957) 233 La 600, 97 So 2d 409.

State tax, imposed on persons operating interstate pipelines through state, which was stated to be for privilege of receiving benefits and protection of laws of state, is nonetheless violation of Commerce Clause of Federal Constitution and cannot stand. Coleman v Trunkline Gas Co. (1953) 218 Miss 285, 63 So 2d 73, cert den 346 US 824, 98 L Ed 349, 74 S Ct 41.

Missouri corporation franchise tax, imposing tax upon privilege of doing business as corporation, applied to foreign pipeline company transporting elements of gasoline into such state, making deliveries in tanks at its terminal, but blending elements into finished product thereafter, did not violate commerce clause. State v Phillips Pipe Line Co. (1936) 339 Mo 459, 97 SW2d 109, affd 302 US 642, 82 L Ed 499, 58 S Ct 53.

Montana statute imposing license tax on persons engaged in business of conveying through pipeline gas produced within state for use outside state, was void although it was nondiscriminatory with respect to gas conveyed for use within state, and Congress had not occupied field. State v Montana-Dakota Utilities Co. (1943) 114 Mont 161, 133 P2d 354.

**218. Transportation agents**

Business of agent, being to solicit passenger traffic out of California into and through other states to New York city, is part of interstate commerce, which cannot be restricted or taxed by municipal corporation. McCall v California (1890) 136 US 104, 34 L Ed 391, 10 S Ct 881.

State or municipality cannot impose license tax upon agent of steamship engaged in interstate and foreign commerce, whose duty is to solicit business, issue bills of lading, collect freight, and generally look after loading and unloading, and payment of bills. Texas Transport & Terminal Co. v New Orleans (1924) 264 US 150, 68 L Ed 611, 44 S Ct 242, 34 ALR 907.

New York City general business tax, imposed on appellant's local activities performed at instance of and on behalf of either domestic exporters or foreign importers and, described most generally, involving services of appellant at New York City in coordinating and expediting movement from inland points to ocean carriers of American-produced goods which were carried by ship to foreign ports, was valid. Mohegan International Corp. v New York (1961) 9 NY2d 69, 211 NYS2d 161, 172 NE2d 546, cert den 366 US 764, 6 L Ed 2d 854, 81 S Ct 1671, reh den 368 US 907, 7 L Ed 2d 102, 82 S Ct 168.

Tennessee statute requiring agents of motor transportation companies to procure license and give bond to answer in damages to customers obtained by him for motor transportation is valid. Bowen v Hannah (1934) 167 Tenn 451, 71 SW2d 672.

KIOGA
KANSAS INDEPENDENT OIL & GAS ASSOCIATION
500 BROADWAY PLAZA • WICHITA, KANSAS 67202 • (316) 263-7297

To: House Committee on Assessment & Taxation

Re: HB 2571
April 19, 1983

We have reviewed HB 2571 and oppose its enactment.

The allegations contained in the preamble of section one are subject to heavy criticism. Rather than pick it apart we only comment that we do not agree with section one and the conclusions contained there in.

We oppose this bill because it is another tax upon our industry. We believe the 1983 legislature has inflicted enough damage to our industry this session!

Our objections to this bill are primarily directed at what the effect will be on crude oil and natural gas producers of Kansas.

There is old maxim:, "You can't get something for nothing". Like the severance tax, you passed this year, there will be detrimental effects. In this bill the pipeline must, (1) absorb the tax; (2) pass it on to users or consumers: or (3) reduce the price it pays producers.

We consider the reduction of price to producers an indirect form of another severance tax.

There is a limit to how many taxes a pipeline and a business can absorb before that business entity will collapse. Chief Justice Marshall in the famous case of McCulloch vs. Maryland stated "The power to tax involves the power to destroy". The tax under this bill directed at pipelines will only add to the present tax burden these lines bear.

Passing taxes on to consumers, users, refineries and industrial plants is a cowardly way of levying taxes. The indirect taxation of the people at the expense of business should be stopped. Three refineries using Kansas crude oil closed in 1982. This tax will accelerate the day when further refineries will close in Kansas.

We do not believe for a minute this legislature can legally impose a tax on inter-state transportation as it seems to propose under the definition of (c) "facilities" - relating to transmission lines " through the state of Kansas". And, if you were able to do so, we would expect neighboring states to retaliate with similar taxes of their own. All of which is another terrible signal of a poor economic development climate we are sending to business throughout Kansas and to prospective business we think we may attract to Kansas.

ATTACHMENT XVI
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This tax on natural gas transportation would surely end up as an increase to the consuming public - a policy this legislature seems to be avoiding at all costs. The transportation tax imposed by this bill would compute to approach the cost of some gas in Kansas, which is known to have the lowest price in America. Crude oil prices in Kansas are now $1.65/barrel lower than Oklahoma crude oil. An added cost of transportation of Kansas crude oil, would be passed to crude oil producers, and impact negatively on the sale and transportation of Kansas crude oil.

The severance tax you have imposed on natural gas this session equates to one of the highest taxes on natural gas found in the nation. For some intra-state producers there is no ability to pass that tax on. I can already report to you that some producers in Kansas are making plans to move their risk drilling capital effort to other states, where prospects are better, the taxing climate is not so harsh, and where the industry is being encouraged rather than discouraged as it is here in Kansas.

The 1983 legislature has become known as one that has doubled our production taxes; it advocates interference in our right to contract; it advocates freezing our prices; and now under this bill it would tax what we transport through pipelines.

We say "enough is enough". Please do not pass this legislation.

Donald P. Schnacke

Testimony
of
Glenn D. Cogswell
in behalf of
Northwest Central Pipeline Corporation
before the
House Committee on Assessment and Taxation
RE: HB 2571

Mr. Chairman and Members of the Committee:

My name is Glenn Cogswell. I am appearing here today in behalf of Northwest Central Pipeline Corporation in opposition to this bill.

By virtue of the jurisdiction of this Committee, most of you know that we are already one of the very largest taxpayers in the State of Kansas. With the severance tax, we may be vying for the top spot on that unenviable list. And now we are confronted with the astronomical taxes envisioned in this Bill! We are beginning to feel as if we are in the same position with respect to solving the financial difficulties of Kansas as the little Dutch boy who stuck his thumb in the dike to hold back the threatening seas. But, sad to say, it is not the Company's thumb at stake, rather it is the pocketbooks of the some 3,000,000 people we serve, over a third of whom live in Kansas.

But let me tell you some other facts about Northwest Central to illustrate the impact this Bill will have on the company - and of more importance - on the consumers we serve. We are an interstate natural gas transmission company serving the eastern half of Kansas, the western third of Missouri, and portions of Texas, Oklahoma and Nebraska. In performing this service, we utilize a network of pipelines, 5,200 miles of which are in Kansas. We supply about 55% of all the natural gas consumed in Kansas and have more Kansas reserves dedicated to our system than any other company. These facts make it imperative that we give you our views on this bill and we appreciate this opportunity to do so.

We speak in opposition to this bill for the following reasons:

ATTACHMENT XVII
4-19-83

1. It would be expected of any interstate pipeline company to commence its objections to this Bill by citing legal authority holding this type of bill to be unconstitutional. But I will pass over this flaw in the Bill - not because of any doubts - but because I'm sure others will cover that point and I want to be sure that other serious flaws are called to your attention.

2. You should know that our pipeline system is not presently designed, constructed, or operated in a fashion that would make the MCF-per-mile calculations required by this Bill anything less than an administrative impossibility. We can, of course, dig up each of our pipelines that enter or leave the state and install meters so as to measure throughput. Additionally, our engineers can probably design our system within the state so as to pinpoint the location of the hundreds of additional meters that would be required to measure the MCF-per-mile journey of gas within our Kansas network of pipelines, our experts can calculate the outlay of time and capital that would be involved and the number of additional employees that would be required to service these additional facilities, but they haven't done so. The additional costs, all of which we would pass on to our customers, are difficult to estimate, but there is little doubt they would number in the millions of dollars.

3. Given time, of course, we can estimate the cost of the massive restructuring of our system to accommodate the administrative requirements of the Bill. We can, even now, make a reasonably good estimate of the taxes to be derived on our system alone, which, too, will be passed through to our customers. Taking into consideration the volumes of gas flowing into, through, and out of Kansas forecast for 1983, and estimating an average

journey in Kansas of 250 miles for each such MCF of gas, we estimate the additional annual cost to our consumers resulting from this Bill to be approximately $50 million. For the 1,000,000 Kansans supplied by us, this would represent an increase of approximately 25¢ per MCF.

Thus the costs of this measure, when passed on to the consumer, would represent a significant increase in natural gas bills. This, at a time when concern over, and attempts to reduce natural gas bills have never been greater. We are well aware of the position of most members of this legislature regarding the current cost of natural gas, as evidenced by the number of so-called price control bills and resolutions introduced this session. At Northwest Central, we are proud to have taken a leadership role within the industry in efforts to reduce prices. In fact, this past Friday we announced successful resolution of our efforts to renegotiate take-or-pay provisions on high-cost Wyoming gas, thus permitting greater volumes of low-cost Kansas gas to flow in our system, to the ultimate benefit of our customers. This Bill would only serve to blunt the positive effects of these efforts to which we have devoted so much time and attention and discourage our ongoing efforts for further price reductions. Surely, that is not the result any of us should knowingly seek.

4. We must also point out that passage of this Bill in Kansas would almost certainly invite other states in which we operate to retaliate by passing a similar tax. Such taxes would, in turn, be passed on to Kansas consumers served by us and other pipelines.

5. Finally, we would point out that the natural gas transmission industry has long been recognized as having an enviable safety record, a stable workforce, an outstanding record of helping to solve local problems, and as

being in the forefront of environmentally-benign operations. To suggest, as this Bill does, that the activities of the natural gas transmission industry are the basis of the need for roads, bridges, schools, hospitals, welfare assistance, detention centers, and the like, is unworthy of this body.

In short, the safety and environmental issue is not a valid nor substantial basis for the need for the tax. This bill is purely and simply a money-raising scheme - and, based on the estimate of our system alone, a gigantic amount is involved! Moreover, it evidences neither concern for the Kansas consumer nor understanding of our industry.

We trust this committee will agree that this is a bad Bill and - as such - not worthy of consideration.

ATTACHMENT #4
Office of the City Manager
☐ EHD ☐ SH
☐ RGF ☐ TH
☐ [illegible] ☐ MEC
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CHECK FOR SAFETY AT WORK AT HOME AT PLAY ON THE HIGHWAY ALL AROUND

**THE CITY OF WICHITA**

**OFFICE OF** WATER DEPARTMENT

**DATE** April 18, 1983

**TO** Mary Ellen Conlee, Public Affairs Director

**FROM** John D. Wynkoop, Director of Water and Water Pollution Control

**SUBJECT** House Bill 2571

House Bill 2571, which would tax the pipeline transportation of water and other commodities, would place a significant and unwarranted expense on the users of the Wichita water system, and should be opposed.

The direct annual cost to the water utility would be almost $50,000 for water now brought in from Cheney Reservoir and the Equus Beds. If water is acquired from Milford reservoir, the annual tax on that water would be $275,000.

This assessment would be totally out of line with any state burden caused by the transportation of this water. In fact, the construction and maintenance practices for Wichita's pipelines have relieved the state of all of the expenses for which the bill seeks compensation. The three existing pipelines were constructed prior to 1965. Any disruption of terrain during their construction is certainly no expense to the state at this date. Whether or not eminent domain was exercised, the city compensated each property owner for the use of right-of-way, so there was no expense to the state for right-of-way. Likewise, whatever damage results from a leak or its repair, is localized and promptly rectified by the water utility or the property owner. There has been no lingering ecological harm from the construction or repair of any of Wichita's pipelines, and no expense to the state whatsoever. In the future, pipelines will likely be built and operated with these same considerations, so it is difficult to imagine any expense to the state for future pipelines.

Wichita's sources of water were constructed and are maintained solely at the expense of the city of Wichita. Use of water from these sources, one of which is underground, has absolutely no effect on silting in state reservoirs, or on the future maintenance cost of state reservoirs. It is hardly proper to try to recover the cost of state reservoirs by taxing an unrelated activity.

Access to Wichita's pipelines is gained on private roads and roads constructed for the general motoring public. Motor fuel taxes, which the Wichita water utility pays, defray the cost of maintaining these roads. Any additional state expense for schools, hospitals, social services, and infrastructure is conjectural, since only six people are employed to operate these pipelines. Taxes paid by these people on their property, income, and purchases pay for any added strain on state services which they cause.

The Wichita water utility is legally exempt from general property taxes. The utility pays special property tax assessments, sales, fuel, and unemployment taxes, which compensate other governing bodies for the load on public services that is due to its operations. Rather than reimbursing the state for actual unrecovered costs, however, House Bill 2571 is clearly an attempt to raise

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House Bill 2571

money from a specialized sector of the economy to support general expenses. The bill fails to consider the costs already paid, and to be paid in the future, by the city of Wichita, on its own, to protect the public interest from any financial burden associated with its pipelines. The tax would be unjustified and unreasonable.

Your efforts to oppose House Bill 2571 will be appreciated.

John D. Wynkoop
Director of Water and
Water Pollution Control

JDW/b

Adopted by the Wichita City Commission 4-19-83

TRUNKLINE GAS COMPANY
3600 BISSONNET
P. O. BOX 1642
HOUSTON, TEXAS 77001

ARTHUR A. BAUM
ATTORNEY

April 18, 1983

TELEPHONE (713) 664-3401
TWX 910-881-2363

Mr. Robert Anderson
Anderson, Byrd & Richeson
Attorneys-At-Law
P. O. Box 7
Ottawa, Kansas 66067

Re: Louisiana Coastal Wetlands
Environmental Levy ("CWEL Tax")

Dear Mr. Anderson:

In our conversation today, you indicated that the State of Kansas is considering passage of a tax similar to Louisiana Governor Treen's proposed Coastal Wetlands Enviornmental Levy ("CWEL Tax", H.B. 1666) which was defeated last year in the Louisiana legislature. Pursuant to your request, attached is a copy of H. B. 1666.

The Louisiana bill would have imposed a tax on the transportation of oil and gas through the Louisiana wetlands. The rates to have been imposed under the CWEL tax were as follows:

(a) Natural Gas - One cent (1¢) per mile or fraction thereof for the first six miles. (A maximum tax of 6¢ per Mcf.)

(b) Crude Oil - Six cents (6¢) per mile or fraction thereof for each of the first six miles. (A maximum of 36¢ per barrel of oil.)

The purpose of the bill was to raise revenue to compensate the state for "the destruction of the wetlands, the disruption of natural water circulation patterns, saltwater intrusion into the heart of the wetland system ... and erosion throughout the entire coastal area."

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The bill was opposed by Chambers of Commerce of New Orleans, Lake Charles, Shreveport and Lafayette, Louisiana. During hearings before Louisiana House Ways and Means Committee, testimony was presented that the CWEL tax, if passed, would (1) have meant higher utility bills for the average Louisiana consumer; (2) caused plant closings in the state and caused unemployment; (3) encouraged rerouting of oil and gas into states that did not impose such a tax; and (4) probably have been declared unconstitutional. The bill was defeated on June 17, 1982.

If you need any further information on the bill, please advise.

Irwin A. Bain

IAB/GAA

2799L

House Assessment and Taxation Committee April 19, 1983

STATEMENT IN OPPOSITION
TO HOUSE BILL NO. 2571

Total Petroleum owns and operates a 40,000 barrel refinery at Arkansas City, Kansas. In addition, Total markets gasoline through its Vickers stations and owns and operates 200 miles of oil and gas pipeline within the State of Kansas.

Total Petroleum opposes House Bill No. 2571 for the following reasons:

1. The tax would place an additional burden on refineries in Kansas at a time when refineries are already experiencing huge operating losses. Some refineries have closed because of heavy losses, and the outlook for the refinery business is very bleak.

2. Taxing the transmission of oil and gas within Kansas would have a detrimental effect on having adequate distribution systems for refined products. Without adequate distribution systems, any shortages of gas, fuel oil or other petroleum products would be more acute and prolonged.

3. Taxing of the transmission of crude oil and gas would be another form of severance tax on those oil and gas wells utilizing pipeline transmission.

4. Due to recent refinery closings, much of the Kansas crude oil production is being transported to refineries located outside the State of Kansas. Because of transportation charges, the price paid for Kansas crude is less than that paid for Oklahoma crude. Taxing the transmission of oil and gas would further lower the price

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4-19-83

received for Kansas crude.

5. House Bill No. 2571 violates the interstate commerce clause and is unconstitutional.

6. The record does not support the allegations contained in the preamble of the bill concerning safety and environmental harm of pipelines in Kansas.

Respectfully submitted,

STEPHEN J. BEDNAR
Attorney for Total Petroleum

TESTIMONY
April 19, 1983

HOUSE ASSESSMENT TAXATION COMMITTEE

RE: H.B. 2571

Chairman Braden, Members of the Committee, I am Bill Henry, Executive Vice President of the Kansas Engineering Society, appearing today before you on behalf of the more than 1400 members of the Society in opposition to certain portions of H.B. 2571.

The Kansas Engineering Society is only too familiar with the dilemma you, our elected representatives, face in this session concerning the State's current fiscal situation.

There are, of course, a variety of steps open to you, but almost all deal with some form of tax increase, for some segment, some group, somebody within our State.

As Professional Engineers, KES members believe in paying taxes for services rendered. However, they also believe there should be some strong policy basis for imposing a new tax.

To be frank, KES can find no such basis for the tax on water that is proposed in Section 3, Subsection d, on Page 5 of the bill as printed.

That Section provides that for water and other liquified products anyone that transfers such water or liquified products by pipeline more than 15 miles will be obligated to pay the State of Kansas a tax at the rate of $.001 of each 1,000 gallons of water times the number of miles transported.

This tax would affect more users of water in the State than many might realize. For example, the Post Rock Rural Water District based in Ellsworth County, but which also will have users in Lincoln, Russell and even Saline Counties, and will require 1,000 to 2,000 miles of pipeline to service this district. And, of course, the amount passing through the pipeline will vary depending upon the particular area to

which the pipeline is directed. These people in the Post Rock District will already be paying $.07 for every 1,000 gallons through the Corps of Engineers for this water.

This is not an isolated example. Most of our Rural Water Districts pipeline systems cover more than a 15 mile minimum threshold that is included in this bill.

In addition, of course, many of our municipal units across the State are now transporting water more than 15 miles and there are plans in the mill for the Central Kansas Consortium to transmit water from Milford Reservoir to cities throughout the Central Kansas region.

Part of KES's long standing water policy is that the State should utilize the resources that it has available to it as efficiently as possible. It is going to be downright difficult and almost physically impossible to consider such transportation of water, considering the capital costs, the money these cities will already be paying the State under the provisions of S.B. 61, to see an added tax on the pipeline transportation of these waters.

This tax will not promote the best and most efficient utilization of the use of our State waters. In the preamble of the bill, it is observed that the transmission of water - while not in itself inherently dangerous - will pose a threat to the environment, commerce and people of the State of Kansas.

It is argued further that the purchasers of these waters from reservoirs and the transmission of the same will cause the sedimentation or silting rate to increase and bring about upon the State a substantial burden to pay for greater services in dredging and maintaining said reservoirs.

Those of you who have served on the Energy and Natural Resources Committee this Session know that provision is being made for this type of expense to the State in the charges that have been assessed against water users of Federal Reservoir Water under the provisions of S.B. 61. More than half of that money will be placed in a Water Conservation Fund, which is to be utilized for just such purposes as dredging and establishing new sources of water for all the citizens of the State. Those who contract for water out of Milford, for instance, will be paying in excess of $.11 per 1,000 gallons of water, and more than half of that $.11 figure will go to provide new funds via the Conservation Fund route. H.B. 2571 wants to again charge for this service in another form.

It is only too obvious that the basis or policy for this additional tax on water is to provide some remuneration to the State for "environmental" damage, which - if it does occur - will already be paid for out of the $.11 fee authorized by S.B. 61.

The Kansas Engineering Society would welcome the opportunity to provide more data, if requested, in this area to the Committee.

Respectfully submitted,

William M. Henry
Executive Vice President
Kansas Engineering Society

April 19, 1983

STATEMENT ON

HB 2571

BY

LEWIS FOSTER
DERBY REFINING COMPANY
WICHITA, KANSAS

BEFORE

HOUSE ASSESSMENT

AND

TAXATION COMMITTEE

April 19, 1983

ATTACHMENT XXII

4-19-83

Derby Refining Company was founded in Wichita in 1920. During its sixty-three year history it has grown to supply motor fuels to over 500 stations in twelve states from its refinery and general headquarters in Kansas.

The company acquires 30,000 barrels of crude oil daily and manufactures primarily motor fuels. It employs 500 Kansans.

Derby strongly protests HB 2571 which it believes is blatantly unfair, is written to tax twice (both raw material and finished products) and will reduce jobs and drive energy from the state.

The Bill deserves severe condemnation for its implications to the future of the state and its citizens:

1. Owners of crude oil will send their crude supplies out of Kansas by the most direct and cheapest route to other states where its energy potential can be utilized more efficiently... Thus depriving Kansas refineries, such as Derby, of a much needed critical raw material.
2. Some refineries will find it more attractive economically to move the finished products of gasoline and diesel fuel to other nearby states for marketing reasons.
3. Marginal refineries, and there are a number in Kansas, will consider closing their operations in the state because the higher cost of doing business will make them uneconomic and non-competitive.

Within Kansas or near our borders seven refineries have closed in the past two years, ending an available energy resource of about 10 million gallons of motor fuels daily. When a motor fuel shortage occurs again, Kansas will not find it as easy to get by as we did in the late 1970's.

Here are the impact figures for Derby in both crude oil and finished products:



April 19, 1983

| | |
|---|---|
| Crude Oil | $1,314,882.00 |
| Finished Products | 664,507.00 |
| TOTAL | $1,979,389.00 |

Derby distributes in eleven states besides Kansas. The $2 million tax bill for HB 2571 adds to the cost of product that Derby must position in those states.

We cannot remain competitive with this handicap.

Energy is the most heavily taxed industry in America. Kansas, which for years ranked high in its climate to attract business and jobs to the state, is slipping and threatens to become known as the state with the legislature that socks business and discourages the free enterprise system that has made our country and our state unique and strong.

We urge you to defeat HB 2571.