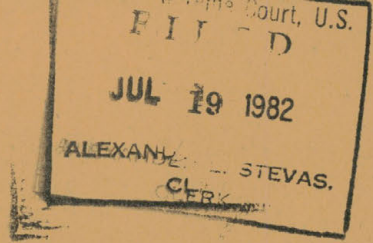


NO. 93 ORIGINAL



IN THE
Supreme Court Of The United States
OCTOBER TERM, 1981

THE STATE OF OKLAHOMA,

Plaintiff,

v.

THE STATE OF ARKANSAS,
THE CITY OF
FAYETTEVILLE, ARKANSAS, ET AL,

Defendants.

**ON MOTION FOR LEAVE TO FILE COMPLAINT
IN ORIGINAL ACTION**

**BRIEF OF SEPARATE DEFENDANT
CITY OF FAYETTEVILLE, ARKANSAS
IN OPPOSITION TO MOTION FOR LEAVE
TO FILE COMPLAINT**

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ENTRY OF APPEARANCE

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, James N. McCord, attorney at law, enters his appearance as counsel of record for separate defendant City of Fayetteville, Arkansas.

/s/ James N. McCord

**BRIEF IN OPPOSITION OF MOTION
FOR LEAVE TO FILE COMPLAINT**

Pursuant to Rule 9.5 of the Rules of the Supreme Court of the United States, separate defendant City of Fayetteville, Arkansas, files the following brief in opposition to the motion for leave to file complaint by the State of Oklahoma.

I.

THE MOTION OF THE STATE OF OKLAHOMA FOR LEAVE TO FILE AN ORIGINAL ACTION AGAINST THE CITY OF FAYETTEVILLE, ARKANSAS, SHOULD BE DENIED BECAUSE THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 33 U.S.C. §§1251 *et seq.*, PROVIDE OKLAHOMA A FORUM IN WHICH TO PROTECT ITS INTERESTS.

The State of Oklahoma has moved for leave to file an original action against the State of Arkansas, the City of Fayetteville, Arkansas, several other Arkansas municipalities and numerous corporate defendants. The cause of action alleged is pollution of the Illinois River, an interstate waterway. The relief sought against the City of Fayetteville is an injunction to restrain the City from constructing a new wastewater treatment facility on the Illinois River in Arkansas near the Oklahoma border. Plaintiffs' complaint alleges that the City's proposal to discharge wastewater effluent into the Illinois River will constitute a continuing trespass and a nuisance under federal common law and Oklahoma common law. Jurisdiction is invoked under 28 U.S.C. §1251 and U. S. Const., Art. III, §2.

In *Illinois v. City of Milwaukee*, 406 U.S. 91, 72 S.Ct. 1385, 31 L.Ed. 2d 712 (1972), this Court denied the motion

of Illinois to file an original action against four Wisconsin cities for interstate water pollution, stating:

"It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.' . . . We construe 28 U.S.C. §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. And 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 forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." 406 U.S. 93.

The Court in *Illinois v. City of Milwaukee*, *supra*, held that federal law, not state law, controls the pollution of interstate or navigable waters, but declined to exercise original jurisdiction because (1) the action was between a state and political subdivisions of another state, rather than between different states, and (2) the appropriate district court would have jurisdiction to give relief under federal common law against the nuisance of interstate water pollution.

Following *Illinois v. Milwaukee*, *supra*, Congress passed the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1251 *et seq.*, which established a new system of regulation making it illegal for anyone to discharge pollutants into the nation's water except pursuant to a permit incorporating specific effluent limitations. Permits are issued by either the Environmental Protection Agency (EPA) or a qualifying state agency. In *Milwaukee v. Illinois*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed. 2d 114

(1981), this Court ruled, that as a result of the 1972 amendments, a federal common law remedy is no longer available for abatement of a nuisance caused by interstate water pollution. The Court concluded that the 1972 amendments pre-empted the federal common law and provide ample opportunity for a state affected by the decision of a neighboring state's permit granting agency to seek redress. The majority reasoned as follows:

"It is also significant that Congress addressed in the 1972 amendments one of the major concerns underlying the recognition of federal common law in *Illinois v. Milwaukee*. We were concerned in that case that Illinois did not have any forum in which to protect its interests unless federal common law were created In the 1972 amendments, Congress provided ample opportunity for a state affected by decisions of a neighboring state's permit granting agency to seek redress. . . . The basic grievance of respondents is that the permits issued to petitioners pursuant to the Act do not impose stringent enough controls on petitioners' discharges. The statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit granting process. It would be quite inconsistent with this scheme if federal courts were in effect to 'write their own ticket' under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them." 451 U.S. at 325-326.

The City of Fayetteville has not yet been issued a permit by the EPA to discharge wastewater effluent into the Illinois River. Should the City be issued such a permit, Oklahoma can seek review of the EPA's decision by the Court of Appeals, as Arkansas has not obtained EPA approval of its own NPDES program. 33 U.S.C. §1369(b) (1) (F); *Save the Bay, Inc. v. Administrator of E.P.A.*, 556 F.2d 1282, 1291 (5th Cir. 1977).

Oklahoma's motion for leave to file an original action against the City of Fayetteville should be denied as the Federal Water Pollution Control Act Amendments of 1972 provide Oklahoma a forum in which to protect its interests, and Oklahoma has not exhausted the administrative permit procedures prescribed by said amendments. No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. *Myers v. Bethlehem Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 463-64, 82 L.Ed 638 (1938).

CONCLUSION

For the above reasons, separate defendant City of Fayetteville, Arkansas, respectfully submits that Oklahoma's motion for leave to file an original action against said defendant should be denied.

Respectfully submitted,

CITY OF FAYETTEVILLE, ARKANSAS,
Defendant

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