NO. 93 ORIGINAL

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

STATE OF OKLAHOMA,

Plaintiff,

VS.

STATE OF ARKANSAS, ET AL.,

Defendants.

Brief of State of Arkansas; City of Gentry; City of Prairie Grove; City of Rogers; City of Siloam Springs; City of Springdale; Delco Manufacturing Co.; Foremost Foods Co., Inc.; Forrest Park Canning Co.; Hardcastle Foods; Harris Baking Co.; Iversen Baking Co.; Sav-More Feeder Co.; Seymour Foods; Simmons Industries, Inc.; Steele Canning Co.; and War Eagle Mill in Opposition To Motion For Leave To File Complaint

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

The State of Arkansas, on its own behalf and on behalf of the following defendants: City of Gentry; City of Prairie Grove; City of Rogers; City of Siloam Springs; City of Springdale; Delco Manufacturing Co.; Foremost Foods Co., Inc.; Forrest Park Canning Co.; Hardcastle Foods; Harris Baking Co.; Iversen Baking Co.; Sav-More Feeder Co.; Seymour Foods; Simmons Industries, Inc.; Steele Canning Co.; and War Eagle Mill, respectfully submits this Brief in Opposition to the Motion for Leave to File Complaint, filed in this action by the State of Oklahoma.

STATEMENT OF THE CASE

Plaintiff State of Oklahoma has moved for leave to file an original action in this Court seeking both injunctive and monetary relief against the State of Arkansas, six Arkansas municipalities, and 18 private companies for allegedly causing pollution of the Illinois River, a stream which originates in northwestern Arkansas and flows through three counties in eastern Oklahoma. Plaintiff alleges that the municipalities (except the City of Fayetteville) and companies are causing pollution by municipal wastewater discharges, stormwater runoff discharges, and industrial/business effluent discharges. Plaintiff faults the State of Arkansas for failing "to adequately regulate and control these types of discharges in any manner" and for permitting the other defendants (except the City of Fayetteville) "to discharge harmful and dangerous concentrations of 'nutrients' and phosphates that ultimately flow into and harm the Illinois River in Oklahoma resulting in severe damage to said Illinois River within Oklahoma . . . ." Complaint at 9, paragraph 32.

The City of Fayetteville is alleged to have adopted a plan "to construct a new wastewater treatment facility to be located on the Illinois River in the State of Arkansas and has adopted a wastewater treatment plan calling for the discharge of water effluent containing high concentrations of 'nutrients' and phosphates directly into the Illinois River in the State of Arkansas." Complaint at 14, paragraph 51. Plaintiff seeks to enjoin this plan.

The claims for relief are purportedly based on federal and state remedies. Claims one through three are based on federal common law claims of trespass, public nuisance, and private nuisance. Complaint at 14-18. Claims four

through six are grounded on Oklahoma state common law and Title 50, Oklahoma Statutes 1971, §§1, 2, and 3. Complaint at 20-23. The relief prayed for is a mandatory injunction or, in the alternative, monetary damages of not less than $100,000,000.

FACTUAL BACKGROUND

Under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251 *et seq* ("FWPCA" or "the Act"), the discharge of any pollutants into waters of the United States is illegal, except pursuant to a permit. The permits are issued by the Environmental Protection Agency ("EPA") or by a state agency qualified under §402(b) of the Act, 33 USC §1342(b). The State of Arkansas, through its Department of Pollution Control and Ecology, has not sought to be qualified as a permit granting agency under the superintendence of EPA. Thus, all National Pollutant Discharge Elimination System ("NPDES") permits within the State of Arkansas are issued by EPA, which is not named as a defendant herein.[1] Each of the six cities named as defendants has a current, valid NPDES permit issued by EPA.

The Complaint does not specify whether Oklahoma contends that the 18 private defendants are discharging into one of the six permitted municipal treatment plants or directly into a stream. Based on the information presently available to Arkansas, none of the private defendants are discharging any effluent directly into receiving waters, but rather are discharging (after pretreatment) into one

[1]Inasmuch as all NPDES permits within Arkansas are issued by EPA, it would appear that EPA would be an indispensable party under Fed. R. Civ. P. 19.

of the six permitted municipal wastewater treatment plants. Indeed, none of the private defendants hold a NPDES permit which would be required if they were discharging directly into a stream. Moreover, at least three of the private defendants are not operating at all.

The NPDES permit held by the City of Fayetteville is for its existing treatment plant. This plant does not discharge into the Illinois River watershed, and Oklahoma makes no complaint in respect thereto. Rather, Oklahoma complains that Fayetteville "has voted to construct a new wastewater treatment facility to be located on the Illinois River in the State of Arkansas and has adopted a wastewater treatment plan calling for" discharges directly into the Illinois River in Arkansas. Complaint at 14, paragraph 51. But the facts are, as Oklahoma must know, that no application has yet been filed with EPA for an NPDES permit for such a plant, no public hearing has yet been held by EPA, and no permit has been or perhaps ever will be issued. What Oklahoma apparently seeks — indeed, its transparently obvious purpose in bringing this action — is to foreclose any prospect that the Illinois River plant will be constructed. As demonstrated below, it asks this Court to ignore the existence of the FWPCA and EPA and, on the basis of federal common law and obscure, inapplicable state nuisance and trespass statutes, substitute its judgment for that of EPA with respect to a project still in the "talking stage". Oklahoma should not be permitted to bypass the comprehensive enforcement scheme of the FWPCA.

ARGUMENT

A. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

1. *There Are No Federal Common Law Remedies For Water Pollution.*

Although federal common law remedies for water pollution did exist at one time, see *Illinois v. Milwaukee,* 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed. 2d 712 (1972) (hereinafter referred to as "*Milwaukee I*"), this Court within the last year has twice held that all federal common law remedies for water pollution were extinguished by the FWPCA. *City of Milwaukee v. States of Illinois and Michigan,* 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed. 2d 114 (1981) (hereinafter referred to as "*Milwaukee II*"); *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.,* —— U.S. ——, 101 S.Ct. 2615, 69 L.Ed. 2d 435 (1981).

Claims one, two and three of the complaint herein are all based on alleged federal common law claims. The applicability of federal common law claims in water pollution litigation has been squarely rejected:

> [T]he federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the FWPCA.

Id., 69 L.Ed. 2d at 451-452. Accordingly, it is clear beyond peradventure that Oklahoma has failed to state a valid claim under federal common law.

2. *Allegations of Interstate Water Pollution Must Be Resolved by Resort to Federal Law, Not State Statutory or Common Law Remedies.*

Claims four, five, and six of the complaint seek to raise claims of public and private nuisance under Oklahoma statutes and trespass under Oklahoma common law. Complaint at 20-24. Thus, Oklahoma seeks to enforce its standards on municipalities and businesses within the State of Arkansas and upon the State of Arkansas itself. As demonstrated herein, assuming these remedies are still available to redress water pollution, they cannot be utilized by one State to impose its standards upon another State. In the context of interstate water pollution, federal law is the exclusive method of recourse.

This Court has previously acknowledged that interstate water pollution must be resolved according to federal law. In *Milwaukee I,* the Court quoted with approval from a Tenth Circuit decision and held that federal — not state — common law governed interstate water pollution:

> Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a *State against improper impairment by sources outside its domain.* (Emphasis added.)

Milwaukee I, 406 U.S. at 107 n.9.

Subsequent to the decision in *Milwaukee I,* Illinois refiled its suit in federal district court, relying on not only federal common law, but also on state statutory and common law remedies. See *Milwaukee II,* 451 U.S. at 310 n.4. The applicability of state common law and statutory

remedies was uniformly rejected. First, the District Court said that "the case should be decided under the principles of the federal common law of nuisance." *Id.* On appeal, the Seventh Circuit Court of Appeals held that "it is federal common law and not state statutory or common law that controls in this case. . . ." *Illinois v. City of Milwaukee*, 599 F.2d 151, 177 n.53 (7th Cir. 1979). Finally, Illinois sought certiorari on the precise question of whether state law was still available to redress water pollution, and certiorari was denied. *Illinois v. City of Milwaukee*, 451 U.S. 982, 101 S.Ct. 2313, 68 L.Ed. 2d 839 (1981); see *Milwaukee II*, 451 U.S. at 310 n.4; accord, *City of Evansville v. Kentucky Liquid Recycling*, 604 F.2d 1008 (7th Cir. 1979).

Since the State of Oklahoma chose not to file any brief in support of their Motion for Leave to File Complaint, defendants are without clues as to what, if any, authority Oklahoma believes supports the application of the general state remedies of nuisance and trespass to the complex area of interstate water pollution. However, a brief examination of the possible bases will demonstrate that there simply is no authority for this claim. For example, while *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 91 S.Ct. 1005, 28 L.Ed. 256 (1971), did hold that the question of out-of-state pollution would have to be decided by resort to state law, *id.* at 498-499, this holding was overruled by *Milwaukee I*, where the Court stated that it was "clear that it is federal, not state, law that in the end controls the pollution of *interstate . . . waters.*" (Emphasis supplied.) 406 U.S. at 102. This overruling was expressly recognized in *Milwaukee II*. 451 U.S. at 327 n.19.

Similarly, section 510 of the FWPCA does not authorize a State to impose its own standards upon another State.

Section 510 provides that nothing in the Act prohibits a State from adopting standards governing pollution which are more stringent than the federal standards. However, the application of a more rigorous state standard must be limited to purely intrastate discharges:

> It is one thing, however, to say that States may adopt more stringent limitations . . . through state nuisance law, and apply them to in-state discharges. It is quite another to say that States may call upon *federal* courts to employ *federal* common law to establish more stringent standards applicable to out-of-state dischargers. (Emphasis in original.)

Milwaukee II, 451 U.S. at 327-328. Implicit in the Court's discussion is a finding that while purely *intrastate* pollution may be the subject of more stringent *state* standards, *interstate* pollution is governed solely by *federal* standards. Indeed, our federal system mandates such a result. If a State could impose more stringent standards on its sister States than those required by FWPCA, the comprehensive regulatory scheme envisioned by Congress, see *Milwaukee II,* 451 U.S. at 317-319, would be rendered futile, and each State would have to comply with the varying standards imposed by its bordering States.[2] See *Chicago Park District v. Sanitary District of Hammond,* 530 F. Supp. 291, 293 (N.D. Ill. 1981).

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[2]Indeed, if Oklahoma can impose its standards on Arkansas and its citizens with regard to the Illinois River, there is no reason why Arkansas cannot impose its standards on Oklahoma with regard to rivers that flow from Oklahoma into Arkansas, such as the Arkansas River. (There is evidence that the Arkansas River experiences substantial pollution in Oklahoma.)

In *Chicago Park District,* an Illinois citizen sued an Indiana municipality and business for alleged water pollution in violation of Illinois statutory and common law. The Court dismissed the state common law and statutory claims, holding that the FWPCA pre-empted state statutory or common law where interstate polluters are involved. 530 F. Supp. 292, 295. The Court recognized that federalism required uniformity in the interstate regulation of pollution and that *Milwaukee I* called for federal standards to govern interstate pollution.[3] The Court stated:

> Replacement of federal common law by a comprehensive federal statutory scheme . . . does not make inapplicable the teaching of [*Milwaukee I* that federal, and not state, law governs]. It would be bizarre to hold that state law claims were pre-empted by federal common law but not by the comprehensive federal statute that in turn pre-empted that federal common law. Uniformity in the interstate regulation of pollution is a concern

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[3]Although an initial decision by a different judge in a related case to **Chicago Park District** reached a contrary result, see **Scott v. City of Hammond, Indiana,** 519 F. Supp. 292 (N.D. Ill. 1981), the **Chicago Park District** decision apparently represents the law of the case. See **Chicago Park District,** 530 F.Supp. at 294-295. At any rate, even the initial, contrary decision in **Scott v. City of Hammond, Indiana** supports defendants' position herein. Here, the State of Oklahoma seeks to impose its standards upon the State of Arkansas, which is another sovereign state. In that situation, even plaintiffs in **Scott v. City of Hammond, Indiana** conceded that state law could not be applied.

> Plaintiffs . . . contend . . . state law is automatically ousted when state law cannot constitutionally be applied. The only situation where such a result is mandated is in cases between two sovereign states. In that event, the law of neither state can prevail and federal law must govern.

519 F. Supp. at 296.

> of the same magnitude whatever form the federal response may take.

Id., 530 F. Supp. at 292-293.

Thus, although under Section 510 of the FWPCA the State of Oklahoma is free to require Oklahoma citizens to meet more stringent standards than those required under the FWPCA, the State of Oklahoma cannot give extra-territorial effect to those standards. Congress has provided in the FWPCA the exclusive remedy for interstate water pollution, and this Court has clearly stated that federal, rather than state, law must govern allegations of interstate water pollution. *Milwaukee I*, 406 U.S. at 107 n.9.

B. OKLAHOMA SHOULD BE REMITTED TO ITS REMEDIES UNDER THE FWPCA.

Because Oklahoma has failed to state a valid cause of action, the Court should decline to invoke its original jurisdiction in this case. However, Oklahoma is not without an adequate remedy. The FWPCA contains thorough enforcement mechanisms which Oklahoma can seek to utilize. These enforcement mechanisms are summarized in *Middlesex County Sewage Authority v. National Sea Clammers*, where the Court noted that the FWPCA contains:

> unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citizens. The FWPCA . . . authorizes the EPA Administrator to respond to violations of the Act with compliance orders and civil suits. §309, 33 U.S.C. §1319. He may seek a civil penalty of up to $10,000 per day, *id.* §309(d), 33 U.S.C. §1319(d), and criminal penalties also are available, *id.* at §309(e), 33

> U.S.C. §1319(c) . . . . In addition, under §509(b), 33 U.S.C. §1369(b) "any interested person" may seek judicial review in the United States Courts of Appeals of various particular actions by the Administrator, including establishment of effluent standards and issuance of permits for discharge of pollutants. Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for enforcement. *Id.*, at §1369(b)(2).

69 L.Ed. 2d at 446-447.

An additional and perhaps more important remedy is provided in the citizen suit provision of the FWPCA, §505(a) of the Act, 33 U.S.C. §1365(a), which provides that:

> Any citizen may commence a civil action on his own behalf.
>
> (1) Against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter . . . or
>
> (2) Against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

This section even contains an enforcement provision explicitly covering violation of NPDES effluent limitations in one State (*e.g.*, Arkansas) which allegedly is causing an adverse effect in a downstream State (*e.g.*, Oklahoma):

> (h) A Governor of a State may commence a civil action under subsection (a) of this section, with-

> out regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

33 U.S.C. §1365(h).

Thus, Congress has made specific provisions for a factual situation where one State alleges another is polluting its waters. This is additional evidence of Congressional intent to "cover the field" in water pollution and provide the exclusive remedy for interstate pollution.

The foregoing remedial provisions apply to the State of Oklahoma and provide adequate remedies under federal law. The term "citizen" is defined in subsection (g) to mean "a person or persons having an interest which is or may be adversely affected," and the definition of "person" includes a State. §502(a) of the Act, 33 U.S.C. §1362(5).

C. CONCLUSION

The Court has long held that its original jurisdiction should be invoked "sparingly." *E.g., Milwaukee I,* 406 U.S. at 93. Further, the initial burden upon Oklahoma to plead a claim upon which relief can be granted is heavier than that imposed on parties in private litigation:

> The burden upon the plaintiff State fully and clearly to establish all essential elements of its case is greater than that generally required to be borne

> by one seeking an injunction in a suit between private parties.

Alabama v. Arizona, 291 U.S. 286, 292, 54 S.Ct. 399, 78 L.Ed. 798 (1934); accord, *Connecticut v. Massachusetts*, 282 U.S. 660, 669, 51 S.Ct. 286, 75 L.Ed. 602 (1931).

When Oklahoma's Motion and Complaint (along with the noticeable absence of any brief in support of the motion) are measured against the applicable standard, it is manifest that Oklahoma has not stated a claim upon which relief can be granted. Accordingly, the Motion for Leave to File Complaint should be denied, and the State of Arkansas should be awarded its costs, including attorneys' fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rules 9 and 28 of the Rules of the Supreme Court of the United States, three copies of the foregoing Brief in Oppsition to Motion for Leave to File Complaint have been served upon Jan Eric Cartwright, Attorney General of Oklahoma, 112 State Capitol Building, Oklahoma City, Oklahoma, 73105, counsel for plaintiff, and upon the Honorable George High, Governor, State of Oklahoma, State Capitol, Oklahoma City, Oklahoma 73105, by depositing same in the United States mail, with first-class postage prepaid on the 21st day of July, 1982. In addition, copies of the brief have been served upon all other defendants named herein.

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