No. 93, Original

# In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF OKLAHOMA,
*Plaintiff,*

v.

THE STATE OF ARKANSAS, ET AL.,*
*Defendants.*

## REPLY TO DEFENDANTS' BRIEFS IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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## QUESTIONS PRESENTED

1. Whether the Supreme Court should accept original jurisdiction and grant permission to the State of Oklahoma to file the Complaint presented in Case No. 93, Original.

2. Whether federal common law or state law can be utilized to fill in an interstice in the federal statutory system of regulating effluent discharges into navigable waters.

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No. 93, Original

In the
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OCTOBER TERM, 1981

STATE OF OKLAHOMA,
*Plaintiff,*

VERSUS

STATE OF ARKANSAS; CITY OF SPRINGDALE, ARKANSAS; CITY OF ROGERS, ARKANSAS; CITY OF GENTRY, ARKANSAS; CITY OF PRAIRIE GROVE, ARKANSAS; CITY OF SILOAM SPRINGS, ARKANSAS; CITY OF FAYETTEVILLE, ARKANSAS; ASHLAND WARREN, INC. (formerly d/b/a and a/k/a Arkhola Sand & Gravel Company); EARL A. HARRIS, INC. (formerly d/b/a and a/k/a Harris Baking Company); HILLBILLY ENTERPRISES, INC. (d/b/a Hillbilly Smokehouse); HUDSON FOODS, INC.; WAR EAGLE MILL; ARKANSAS VINEGAR COMPANY, INC. (formerly d/b/a and a/k/a Rogers Vinegar Company and Speas Company); CARGILL, INC.; FOREMOST FOODS COMPANY, INC.; FORREST PARK CANNING COMPANY; SAV-MOR FEEDER COMPANY; SEYMOUR FOODS, INC.; SPRINGDALE FARMS, INC.; STEELE CANNING COMPANY; PARSONS FEED & FARM SUPPLY, INC.; KELLEY CANNING COMPANY; SIMMONS INDUSTRIES, INC.; IVERSEN BAKING COMPANY; HARDCASTLE FOODS, INC.; ROGERS COCA-COLA BOTTLING COMPANY; TYSON'S FOODS, INC.; and DELCO MANUFACTURING COMPANY,
*Defendants.*

**REPLY TO DEFENDANTS' BRIEFS IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT**

## PRELIMINARY STATEMENT

The State of Oklahoma, by and through its attorney of record, Jan Eric Cartwright, Attorney General of Oklahoma, has asked permission of the Court to file an action against the State of Arkansas, six Arkansas municipalities, and eighteen private businesses located in or around those municipalities. Oklahoma's request is based upon complaints that phosphate and nutrient effluent discharges controlled and regulated by Arkansas, made over a period of years and continuing today by the named municipalities and businesses, are causing the eutrophication and eventual destruction of the Illinois River in Oklahoma. The Illinois River above the Tenkiller Reservoir is the only free-flowing natural scenic river of its kind in the State and is protected internally within Oklahoma to the highest degree accorded by law as a legislatively-denominated, unique scenic river. These discharges constitute wrongful trespasses into the Oklahoma Scenic Rivers Commission's protected area, and, although not violative of any federal or Arkansas rule, regulation or statute, nonetheless are interfering with and preventing the use of this area by Oklahoma and her citizens as an aesthetic, scenic river. These discharges will ultimately, if unchecked, destroy the area for such use.

The three separate briefs filed by the various Defendants all raise two basic arguments. First, the Defendants aver that no justiciable claims have been presented, due to the Court's ruling in *City of Milwaukee* v. *Illinois and Michigan*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981). Second, the Defendants argue that Oklahoma has remedies available to it under the provisions of the 1972

Amendments of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, that should be exhausted before this Court should entertain accepting jurisdiction. In addition to these common arguments, one group of private business Defendants objects that its members are not proper parties, as effluents discharged by those entities allegedly flow only through publicly owned municipal sewage treatment facilities.

In brief reply, Oklahoma respectfully submits that the direct controversy between Oklahoma and Arkansas at issue sufficiently invokes the original jurisdiction of the Court provided for in Article III, Section 2, of the Constitution. Oklahoma anticipates, if original jurisdiction is assumed, that the Court would remit the controversy to a master or district court for hearing.

The phosphate and nutrient effluent discharges complained of do not violate any applicable federal or State of Arkansas statutes, rules or regulations. Nonetheless, those same discharges are actually and directly causing the eutrophication of the Illinois River in Oklahoma and constitute trespasses and nuisances under traditional theories of law. The addition of similar discharges by the City of Fayetteville will significantly exacerbate this situation. The Court should note that these discharges would be illegal if made within Oklahoma.

Oklahoma further submits that the 1972 Federal Water Pollution Control Act Amendments do not make exhaustion of procedures outlined therein a prerequisite to seeking alternative available relief, nor do they textually foreclose long-established common-law theories of recovery,

thereby providing Oklahoma with no protection against nuisances caused by phosphate and nutrient discharges of the type complained of, particularly in light of the recent changes in condition of both supervision and aid by the federal government.

## ARGUMENT AND AUTHORITIES

### I

### SUIT BY ONE STATE AGAINST ANOTHER VESTS THIS COURT WITH ORIGINAL JURISDICTION TO HEAR THE CONTROVERSY.

Article III, Section 2 of the United States Constitution provides, in pertinent part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different States; — between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Title 28 U.S.C. § 1251 further provides:

> "(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.
>
> "(b) The Supreme Court shall have original but not exclusive jurisdiction of:
>
> "(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;
>
> "(2) All controversies between the United States and a State;
>
> "(3) All actions or proceedings by a State against the citizens of another State or against aliens. June 25, 1948, c. 646, 62 Stat. 927.
>
> "As amended Sept. 30, 1978, Pub.L. 95-393, § 8(b), 92 Stat. 810."

The State of Oklahoma is aware that this Court exercises its original jurisdiction sparingly, *see Illinois* v. *City of Milwaukee*, 406 U.S. 91, 72 S.Ct. 1385, 31 L.Ed.2d 712 (1972), at 406 U.S. 93 (hereafter referred to as *Milwaukee I*), and that availability of another forum where the controversy may be litigated is an appropriate consideration in determining whether or not to assume jurisdiction, *Id.* This instant controversy, however, involves a situation distinguishable from that of *Milwaukee I*, supra, in that, joined as a Defendant, is the State of Arkansas and not merely a State political subdivision thereof, as was the case in *Milwaukee I*, supra.

In 1972, Congress enacted amendments to the Federal Water Pollution Control Act, P.L. 92-500, 86 Stat. 816, 33 U.S.C. §§ 1251 *et seq.* The stated objective of these amend-

ments was to "restore and maintain the chemical, physical and biological integrity of the Nation's Waters." 33 U.S.C. § 1251(a). Every point source discharge not allowed by the National Pollutant Discharge Elimination System (NPDES) in some manner was declared unlawful. 33 U.S.C. § 1311 (a). The Administrator of the federal Environmental Protection Agency (EPA) was vested with overall supervision of the NPDES system, 33 U.S.C. § 1251(d), but Congress stated that its policy was that the several States manage construction grant programs and implement permit programs called for under the Act. 33 U.S.C. § 1251(b). In this regard, the EPA is vested with overall supervision of the NPDES system, 33 U.S.C. § 1251(d), and has the authority to authorize state programs meeting EPA guidelines to administer their own permit system in lieu of direct EPA oversight. *See* 33 U.S.C. § 1342(b).

In the State of Arkansas, the Arkansas Department of Pollution Control and Ecology (Department), has been given statutory authority to administer a statewide permit system for discharges into navigable waters within Arkansas in lieu of that of the EPA. *See* ARK. STAT. ANN. § 82-1904(12)(2). Additionally, the Department is authorized to promulgate rules and regulations to control these discharges, ARK. STAT. ANN. § 82-1904(10). The Department, in turn, has promulgated Regulation No. 2, "Regulation Establishing Water Quality Standards for Surface Waters of the State of Arkansas" to qualify for EPA mandated status. As separate Defendant City of Fayetteville has pointed out on page 5 of its Brief, Arkansas has not yet obtained EPA approval of its statewide program. Yet, the State operates on an interim basis under Arkansas regulations approved by the EPA.

These regulations, adopted by Arkansas in conjunction with regulation of dischargers in that State, in no way address discharges of phosphates and nutrients of the type complained of in Oklahoma's Complaint. Other regulations for dischargers other than publicly-owned treatment works similarly fail to address the problem. The various businesses named are permitted by Arkansas to inject high concentrations of effluents through their respective municipal facilities. Oklahoma believes, and has reason to believe, that these additional effluents seriously overload the municipal facilities, contributing to and exacerbating the wrongs alleged in Oklahoma's Complaint. Additionally, however, Oklahoma believes, and has reason to believe, that a number of these entities also discharge intermittently directly into the waters flowing into the Illinois River. The various municipalities in question operate their facilities through EPA guidelines, and all in some manner have received past federal aid through funding grants. The EPA, therefore, may be an interested party to this controversy under Rules 19 and 20 of the Federal Rules of Civil Procedure, and may well be deemed by the Court at a future time to be an indispensible party herein. However, the threshold question here is whether a controversy has been alleged vesting this Court with original jurisdiction. Consideration of alleged misjoinder of parties in reference to the EPA and some of the businesses named as Defendants are ancillary to the jurisdictional question. Further, such concerns do not serve as cause for dismissal of this proceeding. *See* FED. R. CIV. P. 21.

## II

## THE PROVISIONS OF PUBLIC LAW 92-500, 33 U.S.C. §§ 1251 ET SEQ., ARE NOT PREREQUISITES TO REDRESS BY THIS COURT.

It is alleged by the Defendants that Oklahoma has adequate resort to the courts under the provisions of the Federal Water Pollution Control Act (FWPCA). As pointed out on page 10 of the State of Arkansas' Brief, the EPA Administrator can respond to violations of the Act under the provisions of 33 U.S.C. §§ 1309, 1319. However, as far as Oklahoma can determine, these Defendants are not violating any statute, rule, regulation, standard or guideline promulgated by either federal or State of Arkansas authorities.

Title 33 U.S.C. § 1365(a) provides for citizen's suits to be brought against alleged violators of "an effluent standard or limitation under this chapter" or against the EPA Administrator where there is an alleged failure to perform an act or duty not discretionary with the Administrator. Once again, as no apparent standards are being violated due to the lack of any applicable rule concerning phosphates and nutrients of the type complained of, the verbiage of the statute apparently forecloses redress through that procedure. Decisions by the Administrator concerning phosphate effluents are discretionary in nature. Further, there are no mandatory phosphate guidelines established by the EPA under its delegated authority.

Similarly, review of a decision in promulgating general standards of performance, pretreatment standards, or in making a determination in reference to a State program

may only be initiated within ninety (90) days of the decision of the Administrator. 33 U.S.C. § 1369(b)(1). When the standards and guidelines were set for Arkansas and the various treatment facilities owned by the Defendants, Oklahoma had no way of knowing that, years later, a problem of the magnitude now faced by Oklahoma would erupt, and review is now apparently foreclosed.

Further, nothing in the language of Title 33 U.S.C. § 1342's provisions regarding administrative procedures serves as a jurisdictional bar to relief from this Court. As Justice Blackmun noted in his dissenting opinion in *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) (hereafter referred to as *Milwaukee II*), the Conference Committee considering the 1977 amendments to the Act was presented with a proposal that would have made such participation a jurisdictional prerequisite, and the proposal was rejected. *Milwaukee II*, supra, at 346, at page 346, n.20. In Section 312(f)(1) of the Act, 33 U.S.C. § 1322(f)(1), Congress specifically manifested its intent to foreclose the applicability of other laws and thus has demonstrated that it could easily have preempted pre-existing common-law rights if it had chosen to do so. However, Title 33 U.S.C. § 1370 states, in pertinent part:

> "Except as expressly provided in this chapter nothing in this chapter shall . . . (2) be construed as impairing or in any manner affecting *any* right or jurisdiction of the States with respect to the waters (*including boundary waters*) of such States." (Emphasis added)

The Court, in *Milwaukee II*, supra, and in *Middlesex County Sewerage Authority* v. *Nat'l Sea Clammers Assoc.*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), construed that Section as applying only to intrastate waters. The State of Oklahoma respectfully submits that the focus by the Court previously has overlooked the import of the inclusion of the phrase "(including boundary waters) of such States" contained in the provision. It is inherently impossible that boundary waters of any State be wholly intrastate. The phraseology employed, coupled with the evidence that the Congress specifically abrogated certain other applicable laws while not doing so as to common-law remedies should compel a finding that Section 1342 procedures are not exclusive nor prerequisites to other available avenues of redress. Further, as mentioned, the various review procedures outlined in the FWPCA are apparently foreclosed to Oklahoma at this time, through no fault of the State of Oklahoma.

## III

## EFFLUENT DISCHARGES OF PHOSPHATES AND RELATED NUTRIENTS ARE GAPS IN THE STATUTORY REGULATION OF NAVIGABLE WATERS, AND, THEREFORE, FEDERAL COMMON LAW IS APPLICABLE.

Federal common law, long before the ruling handed down in *Milwaukee I*, supra, existed giving States protection from unreasonable interference with their natural environment and resources when the interference stems from another State or its citizens. *Georgia* v. *Tennessee Co.*, 206 U.S. 230, 237-239, 27 S.Ct. 618, 619-620, 51 L.Ed. 1038 (1907); *Missouri* v. *Illinois*, 200 U.S. 496, 520, 526, 26 S.Ct. 268, 269, 272, 50 L.Ed. 572 (1906). *See New Jersey* v. *City of New York*, 283 U.S. 473, 51 S.Ct. 519, 75 L.Ed. 1176 (1931); *New York* v. *New Jersey*, 256 U.S. 296, 41 S.Ct. 492, 65 L.Ed. 937 (1921).

In *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), the Court made clear that, as federal courts are courts of limited jurisdiction, they lack general power to formulate their own rules of decision. *Id.*, at 78. The Court did not therein, however, upset or disturb a "deeply rooted, more specialized federal common law" that has arisen to effectuate federal interests embodied in the Constitution or an Act of Congress such as the resolution of interstate disputes and the implementation of national statutory or regulatory policies. *Milwaukee II*, supra, at 334 (J. Blackmun dissenting).

In 1906, in *Missouri* v. *Illinois*, supra, the Court assumed original jurisdiction on claims based on common-law theories protesting against alleged water pollution. In

*Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 91 S.Ct. 1005, 28 L.Ed.2d 256 (1971), the Court once again recognized its power to resolve issues involving the federal common law of nuisance, although declining in that case to assume original jurisdiction. Justice Douglas, dissenting from the Court's decision to decline jurisdiction, stated, on pages 405-406:

> "The complaint in this case presents basically a classic type of case congenial to our original jurisdiction. It is to abate a public nuisance."

Justice Douglas then went on to state that "the pollution complained of . . . if proved, certainly creates a public nuisance of a seriousness and magnitude which a State by our historic standards may prosecute or pursue as parens patriae." 401 U.S., at 506.

The 1972 decision in *Milwaukee I*, supra, reaffirmed the existence of federal common law of nuisance. However, in 1981, after the States of Illinois and Michigan had spent nine years proceeding through the lower courts on nuisance theories, the Court, in an opinion written by Justice Rehnquist, reversed itself and held that Public Law 92-500, the 1972 amendments to the Federal Water Pollution Control Act, had preempted the field of federal common law in reference to water pollution. *Milwaukee II*, supra, 451 U.S., at 332. Of particular note in this regard is the further statement of the Court that:

> "Federal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme." *Id.*, 451 U.S., at 320.

In a case following closely upon the heels of the *Milwaukee II* decision, *Middlesex County Sewerage Authority* v. *Nat'l Sea Clammers Assoc.*, 353 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), the Court once again stated that "the federal common law of nuisance in the area of water pollution is entirely preempted by the more comprehensive scope of the FWPCA . . .". *Id.*, at 22.

These statements by the Court dismiss the plain language of Section 505 of the 1972 Amendments. If this concept is carried through to the extreme degree that a federal court could never, under any circumstances, impose more stringent effluent standards than those imposed by the regulating agency, the State of Oklahoma could only resort to an exercise in procedural futility that effectively denies it a remedy for a wrong that Oklahoma believes, and has reason to believe, it can readily demonstrate to this Court.

While the FWPCA's provisions are far reaching, and while the objective by Congress was broadly stated to be "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters", 33 U.S.C. § 1251(a), the regulation of phosphate and nutrient discharges of the type complained of by Oklahoma present an unforeseen gap in the regulatory scheme administered by the EPA and by Arkansas.

In 43 Fed. Reg. 32857 (July 28, 1978), the EPA described pollutant criteria employed by the agency in making a decision whether or not to list a particular substance as a conventional pollutant. Three *potential* types of conventional pollutants were identified: oxygen demanding substances, solids, and nutrients. *Id.; see also* 46 Fed. Reg.

1023 (January 5, 1981). Two groups of criteria were established that represented characteristics common to all three classes of pollutants. First, they are biodegradable, oxygen demanding materials and solids which have similar characteristics to naturally occurring biodegradable substances. *Id.* Second, the pollutants so listed traditionally have been the primary focus of wastewater control. *Id.*

In a "Notice Denying Addition of Phosphate" to this Conventional Pollutant List, 46 Fed. Reg. 1023 (January 5, 1981), the Administrator of the EPA emphatically denied a petition asking the agency to add phosphates to its list of regulated conventional pollutants. The Administrator noted that:

> "Phosphates are naturally occurring and ubiquitous in the aquatic environment: They serve as nutrients in the growth of aquatic organisms and the growth of aquatic vegetation." *Id.* at 1024.

However, the decision was made to deny addition of phosphates due to the fact that phosphate is not, technically speaking, an oxygen-demanding substance itself (although it was not refuted that phosphate is indirectly an oxygen-demanding substance due to being essential to the growth of aquatic microorganisms and to the growth of and subsequent decay of aquatic vegetation, both of which *are* involved in biological processes that deplete dissolved oxygen), that it is not, technically speaking, biodegradable in the sense that a living organism can alter its chemical characteristics, and particularly because the elimination or control of excessive phosphates is not, and has never been, a traditional and primary focus of wastewater control. *Id.*

The Administrator noted:

> ". . . conventional pollutants are those removed by primary and secondary treatment at Publicly Owned Treatment Works (POTWs). Phosphates are not commonly removed by primary or secondary treatment at POTWs and have not traditionally been the primary focus of this conventional treatment technology. Phosphates removal technology consisting of chemical precipitation exists but is recognized by the Agency as wastewater treatment beyond conventional. Furthermore, although conventional secondary treatment can result in some *incidental* removal of phosphates, incidental pollutant removal is not, however, equivalent to intended removal. Obviously, only intended removal can be the primary focus in treatment technology. Phosphates, therefore, do not meet the criterion of being traditionally the primary focus of wastewater control." *Id.*

It is obvious from this language, and from language employed elsewhere in the notice and the FWPCA's amendments, that a primary, perhaps even central, concern of the EPA is the cost-effectiveness of declaring a pollutant to be conventional in order to classify it for mandatory regulation. Phosphates and nutrients of the type complained of by Oklahoma *are unregulated,* both as a matter of law and as a matter of administrative practice. They are not conventional pollutants, nor are they toxic pollutants required to be regulated.

In the instant controversy, each Defendant municipality discharges significant amounts of phosphates and nutrients into the Illinois River. Rogers, Arkansas and Springdale, Arkansas alone discharge well over 650 pounds

of phosphates into the Illinois River each day. Studies by Oklahoma indicate that since 1976 alone, the length in river miles necessary for the Illinois River in Oklahoma to assimilate present discharges has increased by thirty (30) miles of river. The problem worsens each day.

These discharges are not regulated by the EPA or Arkansas. The monetary figures necessary to control phosphates have always played a prominent part in its decisions in this area, and no discharger in Arkansas has ever been forced to fully cope with problems resulting from phosphate discharges. The recent amendments to Title 33 entitled the "Municipal Wastewater Treatment Construction Grant Amendments of 1981", P.L. 97-117, 95 Stat. 1623, 33 U.S.C. 1381 *et seq.*, and others, will make treatment of phosphates under current EPA guidelines impossible. The amount of federal contributions available to fund municipal treatment facilities has been drastically reduced from 75% of total cost to 20%. P.L. 97-117, Section 2(a). Deadlines for municipal compliance with EPA standards have been extended from July 1, 1983 to July 1, 1988. P.L. 97-117, Section 21(a). Further, a new amendment to the FWPCA from the Act, Section 218(a), provides:

"COST EFFECTIVENESS

"Sec. 218. (a) It is the policy of Congress that a project for water treatment and management undertaken with federal financial assistance under this Act by any State, municipality, or intermunicipal or interstate agency shall be considered as an overall waste treatment system for waste treatment management, and shall be that system which constitutes the most economical and cost-effective combination of devices and systems used in the storage, treatment, recycling,

and reclamation of municipal sewage or industrial wastes of a liquid nature to implement section 201 of this Act, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping power, and other equipment, and their appurtenances; extension, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of the treatment process (including land used for the storage of treated wastewater in land treatment systems prior to land application) or which is used for ultimate disposal of residues resulting from such treatment; water efficiency measures and devices; and any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems; to meet the requirements of this Act."

The Federal Water Pollution Control Act, once envisioned as an all-encompassing, national water pollution control program, which was apparently the view of the FWCPA held by this Court in *Milwaukee II,* is now, in fact, a much more limited scheme, which bases its objectives and standards on subjective decisions of cost-effectiveness. These subjective decisions, in turn, are based on availability of federal revenues.

In the parlance of a term of common usage today, Oklahoma is faced with a classic "Catch-22" situation. The nutrient and phosphate discharges complained of violate

no federal or Arkansas controls, as publicly owned municipal treatment plants are not required to neutralize these effluents. Even the most stringent guidelines suggested by the EPA, if used and enforced, would not prevent the eutrophication process already begun, which worsens daily. Indeed, in this regard, the State of Arkansas has recently *lowered* the level of protection accorded the Illinois River, in Arkansas to a standard far below that afforded the river in Oklahoma. This action increases five-fold the amount of some effluents dischargeable into the river in Arkansas, and is a calculated step to assist Fayetteville in building a new treatment facility on the river for the first time.

Oklahoma cannot seek judicial review of Arkansas or EPA guidelines affirmed by the Administrator because, in Justice Rehnquist's words, federal courts lack authority to impose more stringent effluent limitations than those imposed by the agency charged with administering the regulatory scheme.

While it is conceded that the 1972 Amendments to the FWPCA are far reaching in nature, there is a demonstrable gap in protection that Oklahoma can and will prove. That gap requires relief by the judicial intervention of this Court, or irreparable injuries will result.

It is a general and indisputable rule of Anglo-American common law, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded. *Marbury* v. *Madison,* 1 Cranch 137, 163, 2 L.Ed. 60 (1803). As the Court stated in *Kendall* v. *United States,* 12 Pet. 524, 624, 9 L.Ed. 1181 (1838):

> "[T]he power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, although a clear and undeniable right should be shown to exist."

That Congress may have intended the 1972 revisions in the FWPCA to be comprehensive is not determinative of the matter before this Court, inasmuch as Congress frequently intends legislation to be comprehensive, only later to discover an omission. Indeed, the Water Pollution Control Act of 1948, P.L. 80-845, 62 Stat. 1155, was also a broad and systematic scheme for dealing with pollution of waterways, yet it was later deemed insufficient and was superseded by laws calculated to more readily deal with contemporary problems. Unfortunately, although not surprisingly, if the 1972 amendments to the FWPCA ever did in fact comprise a comprehensive, national scheme of water pollution control, they no longer do so.

## IV

## ABSENT FEDERAL COMMON LAW TO FILL IN GAPS IN REGULATORY SCHEMES MANDATED BY STATUTE, RESORT TO APPLICABLE STATE LAW IS APPROPRIATE.

It is well established that the several States historically have had inherent power to police the interstate pollution of their boundary waters. *See Askew* v. *American Waterways Operators,* 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed. 2d 290 (1973); *Ohio* v. *Wyandotte Chemical Corp.,* supra. Pollution of interstate navigable waters, obviously a concern of the federal government, has also historically been the concern of federal common law. *See generally, Missouri* v. *Illinois,* supra.

The question presented by the Defendants relative to the claims based on Oklahoma's substantive law misses the point of including same in the Complaint. Obviously, it would be incongruous that both federal and state common law could be applied at the same time to fill in the gaps left out of a federal statutory scheme. However, one or the other must be available or courts would be wholly powerless to render decisions on controversies not clearly covered by statutory law. An appropriate remark in this regard was provided by Chief Justice Marshall in *Sturges* v. *Crowninshed,* 4 Wheat (17 U.S.) 122, 196, 4 L.Ed. 529 (1819), when he stated:

> "It has been said, that Congress has exercised this power, and, by doing so, has extinguished the power of the States, which cannot be revived by repealing the law of Congress.

> "We do not think so. If the right of the States to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished. It can only be suspended, by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the States; but it removes a disability to its exercise, which was created by the act of Congress."

Similarly, in *Chicago & N.W. R.R. Co.* v. *Fuller,* 84 U.S. 560, 21 L.Ed. 710 (1873), the Court stated, at 84 U.S. 568:

> "In the complex system of polity which exists in this country the powers of government may be divided into four classes:
>
> "Those which belong exclusively to the states.
>
> "Those which belong exclusively to the national government.
>
> "Those which may be exercised concurrently and independently by both.
>
> "And those which may be exercised by the states, but only until Congress shall see fit to act upon the subject.
>
> 'The authority of the State then retires and lies in abeyance until the occasion for its exercise shall recur. Ex parte McNeil, 13 Wall. 240," *Id.* at 568.

The evidence necessary to show that applicable state laws are to be preempted from application to a controversy must be supplied through unambiguous language on behalf of Congress. *Florida Lime & Avocado Growers* v. *Paul,* 373 U.S. 132, 147, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). Absent such clear and unambiguous language showing an

intent to preempt applicable state law, such preemption should not be found to have taken place. *New York State Dep't of Social Services* v. *Dublino,* 413 U.S. 405, 415, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973); *Isbrandtsen Co.* v. *Johnson,* 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952) (citing further cases).

The legislative history of the FWPCA 1972 amendments indicates that Congress rejected in most instances any suggestions for preemption by the federal government of all control over navigable waters. *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93rd Cong., 1, Leg. Hist. 823 (1973). Indeed, Congress, in this instance, mandated that adoption of state laws for more stringent standards than those promulgated by the Act's provisions was allowable. *See* 33 U.S.C. § 1370. Also, this Court's decision in *Milwaukee II,* supra, stated that the allegedly comprehensive character of a federal statute is not relevant to the question of whether state law may still be applied in certain instances. *Milwaukee II,* supra, at 451 U.S., at 316. Justice Blackmun, dissenting in that case, went even further and stated that the majority opinion encouraged "recourse to State law wherever the federal statutory scheme is perceived to offer inadequate protection against pollution from outside the State, either in its enforcement standards or in the remedies afforded. This recourse is now inevitable . . ." *Id.,* at 451 U.S. 353 (Blackmun J. dissenting).

In delineating the legitimate scope of the federal common law in *Milwaukee I,* supra, the Court's majority opinion expressly noted the relevance of applicable state standards, adding that "a State with high-water-quality

standards *may well ask that its strict standards be honored and that it not be compelled to lower itself* to the more degrading standards of a neighbor." *Id.*, 406 U.S. at 107 (Emphasis added).

Oklahoma, in pleading both federal common-law claims and State law claims has done no more than plead alternatively, as provided for by law. FED. R. CIV. P. 8(e)(2). Resort to appropriate civil procedure rules for the district courts is proper in areas not specifically covered by the Rules of the Supreme Court. SUP. CT. R. 9, 28 U.S.C. (1980). Unless federal common law is applicable, resort to applicable Oklahoma law is the only option apparently available to it to seek relief from the wrongs being suffered. The FWPCA offers no avenue of redress in this particular area.

## CONCLUSION

WHEREFORE, premises considered, the State of Oklahoma respectfully prays this Court reject Defendants' objections and grant permission to file the Complaint submitted to the Court.

Respectfully submitted,

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