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 BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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February, 1983

* See inside caption for complete list of parties.

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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 BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PRELIMINARY STATEMENT

On December 22, 1982, the United States filed an amicus curiae brief in this matter in opposition to the Motion for Leave to File Complaint filed by the State of Oklahoma. The points raised by the United States in its brief essentially mirror those raised earlier by the named Defendants and plow no new argumentative ground. The allegations raised essentially state that Oklahoma has alternative procedural avenues open to it through the provisions of the Clean Water Act and its amendments, 33 U.S.C. (and Supp. V) 1251, *et seq.*, and that potential redress sought under theories of state or federal common law nuisance have been foreclosed by this Court's decisions in *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) and *Middlesex County Sewerage Authority* v. *Nat'l Sea Clammers Assoc.*, 453 U.S. 1 (1981), and their lower court progeny. These arguments are raised with the explicit acknowledgement by the United States that it is shifting its stance and reversing its earlier positions stated in the *Milwaukee* and *Sea Clammers* cases.

In reply, Oklahoma points out once again that the alternative procedural avenues highlighted by the United States are apparently not open to Oklahoma and that Congress has specifically indicated its intent that preexisting common law nuisance actions are available to states attempting to abate demonstrable nuisances arising from interstate water pollution.

ARGUMENT

In its amicus brief, the United States has averred that Oklahoma still has alternative remedies available to it through which Oklahoma may attempt to abate the nuisance alleged in its complaint. The United States has stated that Oklahoma may seek redress under the provisions of 33 U.S.C. (Supp. V) 1342(b)(1)(c)(i) and 33 U.S.C. 1365 for instances in which a party is violating a permit issued to it, that Oklahoma may seek modification of permits already issued if the state is in possession of previously unavailable information regarding the effect of pollutants discharged by the provisions of 33 U.S.C. (Supp. V) 1342(b)(1)(c)(iii), and that it may raise anew any concerns it has at five-year intervals under the provisions of 33 U.S.C. (Supp. V) 1342(b)(1)(B).

These arguments beg the question and do not rebut Oklahoma's claims. As Oklahoma previously stated, the activities of the State of Arkansas and the several municipalities named as Defendants are not apparently violative of any permit issued by federal regulatory authorities or of any Arkansas law or regulation. To force Oklahoma to seek such administrative redress as to all its complaints merely because a few of the business entity-defendants occassionally violate their respective permits would be tantamount to a condemnation that the nuisance complained of must be approached in a piecemeal fashion in various tribunals which might well react to the charges made in differing manners. Conservation of time, expense and judicial economy dictates that the matter should be resolved before one body. The only entity having direct jurisdic-

tion between controverises between states is this Court, and the United States has not argued that Oklahoma can utilize the procedures outlined in Sections 1342(b)(1)(c)(i) or 1365 against Arkansas or the named municipalities.

The allegations that Oklahoma has procedural avenues open to it under Section 1342(b)(1)(c)(iii)'s provisions concerning changed conditions similarly is not responsive to Oklahoma's charges. Federal regulatory policies concerning the types of nutrients and phosphates complained of in this matter are such that these types of materials are not governed or taken into account when permits are issued or reviewed. It is chimerical to contend that Oklahoma can attempt to have a permit modified or terminated based upon changed conditions when the type of condition in question is not even considered by the regulatory agency to begin with.

As to the argument by the United States that Oklahoma can seek review of the permits issued at five-year intervals under Section 1342(b)(1)(c)(i)'s provisions, the rationale fails to take into account that the nuisance complained of is being exascerbated daily at the present time. Oklahoma should not be expected to idly sit by for a five-year period, suffering the degradation of its scenic waters all the time, in order to attempt to abate a demonstrable nuisance situation. Additionally, as noted immediately above and in the Reply Brief filed earlier in this matter, nutrients and phosphates of the types complained of are not taken into account when federal regulatory decisions concerning effluent discharge permits are made.

Whether or not Oklahoma should be able to seek redress through this Court is dependent upon a number of considerations. It is fundamental that compliance with a permit issued by a regulatory body is no defense to a nuisance action. *See,* e.g., *Baltimore & Potomac R. Co.* v. *Fifth Baptist Church,* 108 U.S. 317 (1883); *New York* v. *New Jersey,* 256 U.S. 296, 308 (1921). Under the Constitution, a state cannot be compelled to bring its complaint against another state or its citizens in that state's courts. *Wisconsin* v. *Pelican Ins. Co.,* 127 U.S. 265, 289 (1888).

If a question of federal law is at issue, resort may be had to that law to determine controversies between states. However, another matter arises when no federal law is applicable. In such cases, either state law must be resorted to and applied or the courts must fashion an intersticial law to govern. There are many reasons why state law may well be applied in suits by one state against another in original actions before this Court. *See,* Note, *The Original Jurisdiction of the United States Supreme Court,* 11 Stan.L.Rev. 665 (July, 1959). Indeed, this Court has recently recognized that one state may validly apply its laws, in certain circumstances, to the detriment of a sister state, even without the consent of that state. *See,* e.g., *Nevada* v. *Hall,* 440 U.S. 410 (1979).

Federal intersticial law can oust applicable state law only if Congress has expressed its plain intention to do so in unequivocal terms. *See, Wallis* v. *Pan American Pet. Corp.,* 384 U.S. 63, 68 (1966); *Miree* v. *DeKalb County Georgia,* 433 U.S. 25, 32 (1977); Mishkin, *Some Further Last Words on Erie — The Thread,* 87 Harv.L.Rev. 1682 (1974). When federal preemption is asserted, one must

begin with the assumption that federalism and the sharing of powers is called for, absent a clear mandate by Congress to the contrary. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This assumption is derived from the basic split of power outlined in the Constitution and from due regard for the presuppositions of a federal system, including the principle of diffusion of power as a promoter of democracy. *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 643 (1973) (Rehnquist, J., dissenting opinion).

Whether or not there should be total preemption by federal law of a field of regulation depends on two factors. First, is the state law in question in direct conflict with applicable federal law? Second, if not, is there a clear mandate that Congress has promulgated expressing its intention that all state laws on a particular subject be preempted? *See, Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963). The mere fact that applicable state law is more stringent than federal law does not create the type of direct conflict necessary to warrant total federal preemption. *Id.*, at 142-143. In this area, Congress simply has not expressed any intent that state law or federal common law has been preempted by the Clean Water Act's provisions and amendments.

As to federal law grounds, Section 1370 of Title 33 of the United States Code expressly reserved the availability of preexisting nuisance law to states or individuals seeking to abate water pollution problems, stating:

> "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 jurisdic-

tion of the States with respect to the waters (*including boundary waters*) of such States." (Emphasis added)

Further, the House Public Works Committee stated that it had rejected several suggestions that preemption had occurred in 1972. *See*, 1 Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93rd Congress, 1st Leg. Hist. 823 (1973).

The House Report on the 1972 Amendments states:

"Subsection (e) provides that the right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected."

1 Cong. Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93rd Cong., 1 Leg. Hist. 821 (1973).

Similarly, the Senate Report states:

"It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this act would not be a defense to a common law action for damages."

2 Cong. Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93rd Cong., 2 Leg. Hist. 1499 (1973).

Similar denials of federal preemption are evidenced in reference to the 1977 Amendments to the Act. *See*, 4 Cong. Research Service, *A Legislative History of the Clean Water Act of 1977*, 95th Cong. Sen.R. No. 370, 4 Leg. Hist. 676 (1978).

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 (1803). To deny Oklahoma an avenue to redress this readily demonstrable nuisance, in spite of express Congressional language to the contrary, would be to foster an absurdity and contradiction to well-organized government, and to encourage the future despoilation of the only free-flowing scenic river left in Oklahoma.

CONCLUSION

WHEREFORE, premises considered, the State of Oklahoma respectfully prays this Court to grant permission to file the Complaint submitted.

Respectfully submitted,

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