NO. 93, ORIGINAL

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

STATE OF OKLAHOMA,

Plaintiff,

v.

STATE OF ARKANSAS; THE CITY OF FAYETTEVILLE, ARKANSAS, et al.,

Defendants.

ON MOTION FOR LEAVE TO FILE COMPLAINT IN THE ORIGINAL ACTION

BRIEF IN RESPONSE TO AMICUS CURIAE BRIEF OF THE STATE OF ILLINOIS AND TENNESSEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

STATUTES:

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STATEMENT

At first, reading the Amicus Curiae Brief of the State of Illinois and the State of Tennessee contains reasoning that is so openly fallacious that no reply seems needed. However, to avoid the appearance that by silence these defendants agree with any of the propositions in that brief or the underlying rationale of that brief, defendants file this response.

ARGUMENT

The basic thrust of the Amicus Curiae Brief of the State of Illinois and the State of Tennessee goes to the proposition that in the absence of Federal Common Law, State Common Law and Statutory Law is somehow magically revived as the controlling law in disputes involving interstate waters. This view basically disregards the existence of the Federal Clean Water Act of 1977, 33 U.S.C. (and Supp. V) 1251 et seq.

The very nature of this case, a dispute between two states within our Union, goes directly to the heart of the distribution of power and administration of justice between the states. It is so fundamental as to not require citation that in such disputes the law of one state must not be given predominance over the laws of all other states. The chaos that would be created is simple to visualize.

For this reason, in disputes between the states *and in the absence of a federal statute occupying the field,* Federal Common Law must govern this type of dispute. *Milwaukee I.* Prior to the passage of The Clean Water Act of 1977, 33 U.S.C. 1251 et seq. Federal Common Law did, in fact, have a place in interstate disputes involving water pollution. *Milwaukee I.* That body of Federal Common Law involved both Federal principals and principals "absorbed" as Federal Law from the existing bodies of State Law. *Textile Workers v. Lincoln Mills,* 353 U.S. 448 at 457 (1956).

This process of absorption is part of a process giving stability and uniformity to laws that will distribute justice between and among the various states of our Union. Illinois and Tennessee recognize this fact at page 7 of their brief in the following language:

> In *Milwaukee I* this Court said that "it is federal, not state, law that *in the end* controls the pollution of interstate or navigable waters." 406 U.S. at 102 (emphasis added). This teaching is consistent with longstanding Supremacy Clause principles used to resolve any conflicts created by the exercise of *concurrent* lawmaking powers. While it existed, federal common law may have governed to the exclusion of state law. See U.S. Brief at 13.

However, Illinois and Tennessee begin to go astray by failing to recognize that the C.W.A. was intended to occupy the entire field. *Milwaukee II*. This clearly means that Federal Common Law and the State Law concepts which it has absorbed no longer apply. Neither State Law nor Federal Law which has presumably absorbed the State Law any longer control this particular type of dispute.

If any State Law is to survive it must be by language contained in the statutory scheme.

The nature of the private remedies preserved by the C.W.A. were discussed in detail by this Court in *Milwaukee II* in the following language:

> Respondents argue that congressional intent to preserve the federal common law remedy recognized in *Illinois v. Milwaukee* is evident in §§510 and 505(e) of the statute, 33 U.S.C. §§1370, 1365(e). Section 510 provides that nothing in the Act shall preclude States from adopting and enforcing *limitations on the discharge of pollutants* more strengent than those adopted under the Act. It is one thing, however, to say that States may adopt

more stringent limitations through state administrative processes, or even that States may establish such limitations through state nuisance law, *and apply them to in-state discharges. It is quite another to say that the States may call upon federal courts to employ federal common law to establish more stringent standards applicable to out-of-state discharges.* Any standards established under federal common law are federal standards, and so the authority of States to impose more stringent standards under §510 would not seem relevant. Section 510 clearly contemplates state authority to establish more stringent pollution limitations; nothing in it, however, suggests that this was to be done by federal court actions premised on federal common law.

Subsection 505(e) provides:

> "*Nothing in this section* shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a state agency)" (emphasis supplied).

Respondents argue that this evinces an intent to preserve the federal common law of nuisance. We, however, are inclined to view the quoted provision

> as meaning what it says: that nothing in §505, the citizen suit provision, should be read as limiting any other remedies which might exist.

Milwaukee II at 101 S.Ct., 1797 and 1798. (Emphasis supplied)

It is clear that Congress simply wished to maintain the right of one ctizen within a single state to sue another citizen in that state for discharges taking place in that state. Under those particular circumstances the need for uniformity provided by the C.W.A. in disputes *between* states is not required. This type of single state suit is not inconsistent with the uniformity brought about by the C.W.A. and the consistency in uniformity which we must have in our Federal Laws to resolve disputes between and among states.

CONCLUSION

The C.W.A. preempts both State Law and Federal Common Law in relation to disputes between states regarding the pollution of *interstate* waters. It does not require a vivid imagination to forecast the chaos to the C.W.A. and the uniformity that it has created in relation to disputes involving pollution of interstate waters, if the legislature of each state is permitted freedom to impose whatever water quality standard it may deem appropriate on all of its sister states.

Respectfully submitted,

HUDSON FOODS, INC., FORREST PARK CANNING COMPANY, SPRINGDALE FARMS, INC., STEELE CANNING COMPANY, PARSONS FEED & FARM SUPPLY, INC., KELLEY CANNING COMPANY AND TYSON FOODS, INC.

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