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ENVIRONMENTAL LAW

NATIONAL AUDUBON SOCIETY v. DEPARTMENT OF WATER: THE NINTH CIRCUIT DISALLOWS FEDERAL COMMON LAW NUISANCE CLAIM FOR MONO LAKE WATER AND AIR POLLUTION

I. INTRODUCTION

In *National Audubon Society v. Department of Water*,[1] the Ninth Circuit held the Federal Water Pollution Control Act (FWPCA)[2] preempted National Audubon Society's (Audubon's) federal common law nuisance action against the Los Angeles Department of Water and Power (DWP) for polluting the water of California's Mono Lake.[3] The pollution, increased lake salinity and ion concentration, resulted from DWP's diversions of water from four feeder streams since 1940, according to Audubon.[4]

The Ninth Circuit also rejected Audubon's federal common law nuisance claim for air pollution created by high winds combined with alkali soil from the exposed lake bed.[5] The court did not decide whether the claim was preempted by the Clean Air Act because it found a federal common law nuisance air pollution action could not properly be asserted.[6] The Ninth Circuit

1. 869 F.2d 1196 (9th Cir. 1989) (per Brunetti, J.; other panel members were Goodwin, J., and Reinhardt, J., dissenting in part).

2. 33 U.S.C. §§ 1251-1376 (1982). The FWPCA is commonly referred to as the Clean Water Act which was codified as an amendment to the FWPCA in 1977. See *infra* note 126.

3. *National Audubon*, 869 F.2d at 1200.

4. *Id.* at 1198-99.

5. *Id.* at 1199.

6. *Id.* at 1205.

majority conceded there might be some limited federal interest in the nation's air quality,[7] but determined that the claim must fail because neither the rights and obligations of the United States as sovereign were involved[8] nor was there an interstate dispute that would make application of state law inappropriate.[9]

Subsequent to this decision, the California Supreme Court rejected an appeal by DWP to review *California Trout, Inc. v. State Water Resources Control Board*,[10] a state appellate court decision requiring California to recall and reissue DWP water diversion permits after conditioning them to provide sufficient streamflows for the fishery. Mono Lake benefits from this decision as decreased diversions will allow more water to flow into the lake.[11]

On September 22, 1989, Governor George Deukmejian signed two bills, known as the Environmental Water Act of 1989, designed to restore and preserve Mono Lake. Assembly Bill 1442[12] created a $65 million Environmental Water Fund.[13] As-

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7. *Id.* at 1204.

8. *National Audubon*, 869 F.2d at 1205.

9. *Id.* A third issue on appeal was whether the district court, having obtained jurisdiction pursuant to removal (see 28 U.S.C. § 1442(a)(1) (1982)), abused its discretion by deciding to remand the state law claims after the defendants deleted the original basis for removal in an amendment intended to defeat federal court jurisdiction. *National Audubon*, 869 F.2d at 1200. The Ninth Circuit acknowledged remand orders are not considered final for appellate review (citing Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, (1976) and 28 U.S.C. § 1291 (1987)), but the district court certified the decision, making the order discretionary and reviewable. *National Audubon*, 869 F.2d at 1205. The Ninth Circuit upheld the order based on the pendent jurisdiction doctrine, which supports giving a district court discretion to remand when the exercise of pendent jurisdiction is inappropriate. *Id.*

10. 207 Cal. App. 3d 585, 255 Cal. Rptr. 184 (Jan. 1989) (water appropriation permits must be conditioned for compliance with CAL. FISH & GAME CODE § 5937, mandating dam owners allow sufficient water flow for fishery below dam). National Audubon Society and the Mono Lake Committee joined CalTrout as plaintiffs in this suit.

11. In a separate state court action, El Dorado County Superior Court Judge Terrence M. Finney, ordered Los Angeles to stop diverting water from Mono Lake until March 30, 1990, so the lake's water level could be raised approximately two feet. Audubon and the Mono Lake Committee sought the preliminary injunction to stop the diversions until the suit went to trial. The Napa Register, August 23, 1989, at 29, col.2.

12. A.B. 1442, Reg. Sess., 1989. Assemblyman Bill Baker (D-Walnut Creek) sponsored the bill to amend section 11913 of the CAL. WATER CODE and to add sections 12303, 12929.10, 12929.12, and 12929.13 relating to water resources.

13. E. Robbins, Digest of Concurrence in Senate Amendments on A.B. 1442 at 2 (Sept. 15, 1989) (available from offices of California Assemblyman Phillip Isenberg).

sembly Bill 444[14] required as much as $60 million from the Water Fund to be spent to preserve Mono Lake.[15] This legislation ensures Mono Lake permanent protection by reducing the amount of diverted water.[16]

II. FACTS

Mono Lake, located in central California, east of Yosemite National Park, is the state's second largest natural body of water.[17] Since 1940, the Los Angeles DWP has diverted water from four freshwater streams that normally flow into the lake.[18] The diversions occurred pursuant to permits issued by the California Water Resources Control Board.[19] As a result of the lowered water volume, over 14,700 acres of lake bed have been exposed.[20] The lake has increased in salinity[21] because of the freshwater diversions, threatening bird and shrimp populations.[22]

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14. Assemblyman Phillip Isenberg (D-Sacramento) authored the bill to add Chapter 7.7 (codified as §§ 12929-12929.47) to the CAL. WATER CODE.

15. CAL. WATER CODE §§ 12929-12929.47 (West Supp. 1990). Together, DWP and the Mono Lake Committee may request grants to fund alternative water and power supplies for Los Angeles. *Id.* at 12929.22.

16. The legislation also states that it does not affect the rights or obligations of any party involved in Mono Lake Basin litigation. CAL. WATER CODE § 12929.25.

17. Appellant's Opening Brief at 4, National Audubon Soc'y v. Department of Water, 869 F.2d 1196 (9th Cir. 1989) (No. 85-2046). The lake is a natural saline lake that supports an abundant population of brine shrimp that feed a very large number of nesting and migratory birds. *Id.* The shrimp are commercially harvested by local industry. *Id.* Mono Lake is also a major tourist attraction. *Id.* Annually, more than a million people visit the lake to enjoy its scenic beauty, to recreate, and to use it for the scientific study of wildlife and geologic formations. *Id.*

18. *National Audubon*, 869 F.2d at 1198.

19. *Id.*

20. *Id.* Additionally, the exposed Lake bed is composed of fine-grained silt, clay, and volcanic glass particles. Appellant's Opening Brief at 5. The particles contain various soluble alkali chemicals that have precipitated out of the lake. *Id.* This material is whipped by high winds, creating dust storms (fugitive dust) that degrade the area's pristine air quality and extend to nearby federally owned lands and the state of Nevada. *Id.*

21. National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, (1983), *cert. denied*, 104 S. Ct. 413 (1983). Mono Lake has no outlets. It loses water only by evaporation and seepage. Natural salts do not evaporate with water, but are left behind. Prior to DWP diversions, the natural salinity was balanced by a continuous supply of fresh stream water. Due to the diversions, there is an imbalance between inflow and outflow that diminishes the lake's size and increases its salinity. *Id.*

22. Appellant's Opening Brief at 4.

In 1979, Audubon and others[23] filed an action in Mono County Superior Court against DWP, seeking declaratory and injunctive relief.[24] The parties asserted several causes of action: violation of the public trust,[25] violation of CAL. CONST. art. XVI, section 6,[26] a quiet title action to establish public trust rights in the waters of Mono Basin,[27] public and private nuisance (from mud and dust created by reliction),[28] and violation of CAL. CONST. art. X, section 4.[29]

DWP cross-complained against the State of California and several federal agencies.[30] The United States removed the action

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23. Other parties included Friends of the Earth, Mono Lake Committee, Los Angeles Audubon Society, David Gaines, Charles K. Simis, Walter Hansen, and John Boynton. *National Audubon*, 869 F.2d 1196.

24. *National Audubon*, 869 F.2d at 1198-99.

25. *Id.* California acquired title, as trustee for the public, of all navigable waterways and the lands lying beneath them when it was admitted to the union. The state has both the sovereign power and the duty to exercise continued supervision over the trust. City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 363, 162 Cal. Rptr. 327 (1980) (quiet title action brought against City of Berkeley and State of California) *cert denied*, 449 U.S. 840 (1980). *See also National Audubon Soc'y*, 33 Cal. 3d 419, 433-41, 658 P. 2d 709, 189 Cal. Rptr. 346. Parties acquiring rights in trust property usually hold them subject to the trust and can assert no vested right to use them in a manner harmful to the trust. *Id.*

26. *National Audubon*, 869 F.2d at 1198-99. CAL. CONST. art. XVI, § 6 prohibits a gift by the state of a state asset. It provides, in relevant part: "The Legislature shall have no power . . . to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever . . . ."

27. *National Audubon*, 869 F.2d at 1198-99.

28. *Id.*

29. *Id.* CAL. CONST. art. X, § 4 prohibits the obstruction of navigable waters. It provides:

> No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

30. *National Audubon*, 869 F.2d at 1199. Before DWP filed its four count cross-complaint, the case was transferred to Alpine County Superior Court. *Id.* The cross-complaint's first count sought adjudication of Basin water rights as to all appropriators; the second sought to quiet title to those rights. *Id.* The two counts named 117 cross-defendants, including all of the plaintiffs, the State of California, the United States Forest Service, the Bureau of Land Management, and numerous private water users. *Id.* The third cause of action requested the court declare that "to the extent that the United States has jurisdiction over California's exercise of its navigation trust, Congress has consented to the impairment of the navigable waters of Mono Lake." *Id.* Finally, DWP

to federal district court.[31] In order to facilitate remand of the state claims, DWP sought to amend its cross-complaint to delete the federal claim on which the district court found removal proper.[32] Alternatively, DWP asked the court to abstain.[33]

Audubon sought permission to amend its complaint to include a federal common law nuisance cause of action.[34] The organization claimed the lake is an "interstate or navigable" water in which there is an overriding federal interest,[35] and that the diversions lower the lake volume, causing water[36] and air pollution.[37]

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sought a declaration that conditions at the lake resulted from California's exercise of its police power, claiming that any nuisance at Mono Lake is attributable to the owner of the newly exposed lake bed. *Id.*

31. *National Audubon*, 869 F.2d at 1199. Removal was sought by the United States pursuant to 28 U.S.C. § 1442(a)(1), on the grounds that the cross-complaint named federal agencies. *Id.* DWP moved to remand but the district court denied the motion. National Audubon Soc'y v. Department of Water, 496 F. Supp. 499 (E.D. Cal. 1980).

32. *National Audubon*, 869 F.2d at 1199.

33. *Id.* Abstention occurs when a federal court refers state-law questions to state court instead of deciding the question itself. Abstention is recognized: (1) to avoid decision of a federal constitutional question where the case may be disposed of on questions of state law; (2) to avoid needless conflict with a state's administration of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket. These various doctrines overlap at times, and the courts have not always distinguished them clearly. CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS, § 52 (4th ed. 1983) [hereinafter WRIGHT].

34. *National Audubon*, 869 F.2d at 1199.

35. *Id.* The lake is east of Yosemite National Park and much of the surrounding area is federally owned. Appellant's Opening Brief at 12. Also, the lake has been continuously used in interstate commerce. *Id.* Audubon also relied on Illinois v. City of Milwaukee, 406 U.S. 91 (1972) in which the Supreme Court stated federal common law to abate a public nuisance in "interstate *or navigable* waters" is appropriate. *Id.* at 16 (emphasis in Audubon's brief). Also, *see infra* notes 68-78 and accompanying text.

36. *National Audubon*, 869 F.2d at 1199. Audubon maintained that if the diversions continued, the increasing salts in the lake would destroy the brine shrimp and make the water intolerable for waterfowl. Appellant's Opening Brief at 13. The organization argued that the CWA did not apply because the diversions were not subject to a federal permit nor did the CWA regulate pollution such as creation of a saline environment by the withholding of fresh water. *Id.* at 11-12. Further, CWA regulation of salt water intrusion was inapplicable because that is the "invasion of a body of fresh water by a body of salt water." *Id.* at 24 (citing *Glossary, Water and Waste Water Control Engineering* at 319 (3d ed. 1980)).

37. *National Audubon*, 869 F.2d at 1199. Audubon alleged that the strong winds blowing in the Mono Basin carry dust particles thousands of feet high and miles away, reducing visibility and air quality and threaten interstate public health. Appellant's Opening Brief at 14. Audubon also alleged that the Great Basin Unified Air Pollution Control District, which has jurisdiction over the Mono Basin, reported violations of national primary and secondary ambient air quality standards for particulates. *Id.* Also alleged was that the District expressed concern for violation of sulphate standards from

The district court granted both parties' motions.[38] Thereafter, the district court determined abstention would be appropriate.[39] The court ordered Audubon to file a state court action to determine the relationship between the public trust doctrine and California's water rights system[40] and establish whether exhaustion of administrative remedies was a prerequisite to Audubon's suit.[41]

After the state issues were resolved the parties returned to district court.[42] DWP, joined by the State of California, filed a motion for partial summary judgment directed against Audubon's federal nuisance claims[43] and renewed its motion for remand to state court.[44]

The district court granted in part and denied in part DWP's summary judgment motion.[45] The court held Audubon could state a federal common law nuisance claim for air pollution,[46] that the Clean Air Act (CAA) did not preempt the claim.[47] However, the court disallowed the water pollution claim, finding the FWPCA preempted it.[48]

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precipitation of sulphates in the receding lake's water as sulphates pose a known health hazard. *Id.* Audubon's brief further alleged that alkaline salt crystals are released as the lake recedes and they have been found to be harmful to humans and animals. *Id.*

38. *National Audubon*, 869 F.2d at 1199.

39. *Id.*

40. *Id.*

41. *Id.* The court retained jurisdiction over the case during the pendency of the state claim. *Id.* The state supreme court eventually reviewed the state action. The court held the public trust doctrine was not subsumed in the state water rights system. Furthermore, the court held that Audubon was not required to exhaust administrative remedies before the State Water Resources Control Board prior to filing suit. National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, (1983), *cert. denied sub nom.* Los Angeles Dep't of Water v. National Audubon Soc'y, 464 U.S. 977 (1983). The court construed CAL. WATER CODE § 2501 (West 1971) to allow persons claiming that a use of water harmed the public trust, to seek a Water Board determination (including reconsideration of previously granted rights) of the water allocation. However, claimants need not seek the remedy from the Water Board because the state supreme court held the courts share concurrent original jurisdiction with the Board. *Id.*

42. *National Audubon*, 869 F.2d at 1199.

43. *Id.*

44. *Id.* DWP filed the second motion to remand because, if the court granted its motion for partial summary judgment, no federal issue would remain to be decided. *Id.*

45. *Id.* at 1199-1200.

46. *Id.* at 1200.

47. *National Audubon*, 869 F.2d at 1200.

48. *Id.* In addition, the court granted the motion to remand the state law claims. *Id.* Consequently, the district court retained jurisdiction over the federal nuisance claim for

In 1984, the district court certified the following questions for interlocutory appeal:[49] whether the federal common law nuisance doctrine applies as a basis for restraining the water diversions;[50] assuming it does, whether it can be asserted in this case;[51] and finally, whether the district court, having obtained jurisdiction pursuant to the removal statute (28 U.S.C. § 1442(a)(1)), has discretion to remand this action to state court after DWP deleted the original basis for removal in an amendment intended to defeat federal court jurisdiction.[52]

On May 7, 1985, the district court issued a declaratory judgment[53] holding federal common law nuisance applied to state-authorized water diversions that cause potential air quality impacts but not potential water quality impacts.[54] California and Audubon appealed the judgment.[55] Audubon, California, and DWP appealed the questions certified for interlocutory appeal.[56]

III. BACKGROUND

A. THE CASE LAW

1. Federal Common Law

Justice Brandeis, writing for the majority in *Erie v. Tompkins*,[57] observed that "general" federal common law does not exist. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,[58] decided on the same day, the Supreme Court ac-

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dust pollution. *Id.*

49. *Id.* Two of the questions, dealing with whether Audubon could maintain an action for federal common law nuisance to restrain DWP's water diversions, were certified at the request of the State of California. Appellant's Opening Brief at 9. The third question, certified at Audubon's request, asked whether the court below, having properly obtained jurisdiction after the United States' removal, had discretion to remand the case to the state court. *Id.*

50. *National Audubon*, 869 F.2d at 1200.

51. *Id.*

52. *Id.*

53. *Id.* The district court issued an order for declaratory judgment pursuant to FED. R. CIV. P. 54(b). *National Audubon*, 869 F.2d at 1200.

54. *National Audubon*, 869 F.2d at 1200.

55. *Id.*

56. *Id.*

57. 304 U.S. 64 (1938) (federal courts in diversity actions must apply state-created substantive law).

58. 304 U.S. 92 (1938) (apportionment of La Plata River, an interstate stream, held to be a matter of federal common law).

knowledged that narrow areas remained where federal common law may be created to protect a federal interest.[59] Federal common law is appropriate even though the Constitution or an act of Congress has not provided specific guidance.[60] When disputes arise between two states, for example, the holding in *Hinderlider* indicates it is inappropriate for the court to apply one state's law over that of another.

Federal common law survived the *Erie* ruling, as the *Hinderlider* decision verifies,[61] although many questions remained about the situations in which federal law would continue to be applied.[62] In two cases prior to *Erie*, the Supreme Court applied federal common law to address interstate pollution.[63] However,

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59. *Id.* at 110. "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Id.*

60. *See* D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447 (1943) ("no consideration" defense not available to accommodation note maker in suit by federal agency as note assignee). Justice Jackson, in an oft-quoted concurring opinion wrote:

> A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. Federal law is no juridical chameleon changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon sources of the common law in cases such as the present.

Id. at 471-72 (citation omitted).

61. *See* WRIGHT, § 60, at 386-97. *See supra* note 33. After *Hinderlider*, several cases applied federal common law in very specific areas where there was strong federal interest and a need for uniform policy. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (federal common law applicable to United States foreign relations); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (right of the government to control issuance of commercial paper). Also, in the area of maritime law, federal common law has been consistently applied pursuant to U.S. CONST. art. II, § 2, which provides that judicial power shall extend to cases of admiralty and maritime jurisdiction. *See* WRIGHT, § 60, at 391.

62. *See* Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) in which the Court articulated that federal common law may be applied, "[i]n the absence of an applicable Act of Congress . . . ." *Id.*

63. In Missouri v. Illinois, 200 U.S. 496 (1906), the State of Missouri brought suit to

not until 33 years after *Erie* did a federal court, in *Texas v. Pankey*,[64] clearly invoke the federal common law nuisance doctrine for a public nuisance claim.[65] The Tenth Circuit's holding in *Pankey* followed the Supreme Court's rationale in *Georgia v. Tennessee Copper Co.*[66] in finding that interstate pollution should be a federal common law matter.[67] The United States Supreme Court shortly thereafter addressed the vitality of a federal common law nuisance doctrine.

In *Illinois v. City of Milwaukee*,[68] (*Milwaukee I*), Illinois sought to invoke the Supreme Court's original jurisdiction against Milwaukee for discharging raw or inadequately treated sewage into interstate waters.[69] The Court refused to exercise original jurisdiction, finding the district court had jurisdiction to resolve the matter because the dispute arose under federal law pursuant to 28 U.S.C. § 1331.[70] The Court cited *Pankey* as the

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restrain Chicago's sewage discharge into the Desplaines River. Missouri alleged the discharge would eventually contaminate the source of its drinking water (the Mississippi River). *Id.* at 517. In the second case, Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), the State of Georgia sought to enjoin the copper company from discharging noxious gas from their Tennessee plant. Georgia alleged the gas would, among other things, destroy its forest, orchards, and crops. *Id.* at 236.

64. 441 F.2d 236 (10th Cir. 1971) (Texas alleged New Mexico agricultural pesticides were polluting state waters).

65. *Id.* at 236. Public nuisance is, by definition, broader than private nuisance. It is "the doing of or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public." W. PAGE KEETON, D.B. DOBBS, R.E. KEETON, D.G. OWEN, PROSSER AND KEATON ON THE LAW OF TORTS § 90 n.2 (citation omitted) (5th ed. 1984).

66. 206 U.S. 230. The Court noted that Georgia, in its capacity of quasi-sovereign, "has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Id.* at 237.

67. *Pankey*, 441 F.2d at 240. The Tenth Circuit found, "[f]ederal common law and not [state] law [is] entitled and necessary to be recognized as a basis for dealing in uniform standards with the environmental rights of a State against improper impairment by sources outside its domain." *Id.* at 241. The court also noted that federal common law is sufficient to deal with "alleged federal rights" until the field "is regulated by comprehensive legislation or authorized administrative standards." *Id.*

68. 406 U.S. 91 (1972). Illinois maintained the Court had original jurisdiction pursuant to U.S. CONST. art III, § 2. cl. 2, which provides: "in all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction." *Id.* Also, 28 U.S.C. § 1251 (1982) provides that "(a) the Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more States." *Illinois v. Milwaukee*, 406 U.S. at 93.

69. *Id.* at 99-100.

70. *Id.* at 99. The Court determined that the question was "whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331(a)." *Id.* The Court held that it did and that §

controlling principle with regard to whether pollution of interstate or navigable waters created a federal common law action.

In *Milwaukee I*, the Court observed that federal common law applied to air and water in their ambient or interstate aspects.[71] The Court noted several statutes[72] indicative of Congress's concern for interstate water quality, including the FWPCA.[73] The Court found the remedy Illinois sought, abatement of the public nuisance,[74] was not within the "precise scope" of available remedies.[75] Further, statutory remedies were not the sole federal remedies available to address pollution.[76]

The Court acknowledged federal laws and regulations may eventually preempt the field of federal common law nuisance.[77] However, until statutory preemption occurs, federal courts have the power to hear federal common law nuisance suits.[78]

The scope of the federal common law nuisance doctrine remained uncertain after *Milwaukee I*. In *Committee for the Consideration of the Jones Falls Sewerage System v. Train*[79] (*Jones*

1331(a) included suits brought by a state. *Id.* As reviewed by the Court in *Milwaukee I*, 28 U.S.C. § 1331(a) provided that, "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." The current version of the statute provides, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." (Current version codified at 28 U.S.C. § 1331 (1982)).

71. *Milwaukee I*, 406 U.S. at 103. Douglas, J., writing for the majority noted, "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.*

72. *Milwaukee I*, 406 U.S. at 101. The other statutes referenced include the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4331-70 (1982)), the Fish and Wildlife Act of 1956 (16 U.S.C. § 742a), the Act of September 22, 1959 (16 U.S.C. § 760e) and the Fish and Wildlife Coordination Act (16 U.S.C. § 661). *Id.* at 101-02.

73. 33 U.S.C. §§ 1251-1376 (1982).

74. *Milwaukee I*, 406 U.S. at 93.

75. *Id.* at 103. The Court did not indicate why the FWPCA did not provide this remedy. It merely observed that the FWPCA's abatement procedure followed a "long drawn-out procedure." *Id.*

76. *Id.* "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Milwaukee I*, 406 U.S. at 103 (citing Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 457 (1957) (federal common law is remedy for labor-management contracts falling under § 301(a) of the Labor Management Relations Act of 1947)).

77. *Id.* at 107.

78. *Id.*

79. 539 F.2d 1006 (4th Cir. 1976) (federal common law precluded as compliance with

Falls), the Fourth Circuit found that interstate pollution was a necessary prerequisite for a successful federal common law nuisance claim.[80] However, the Seventh Circuit in *Illinois v. Outboard Marine Corp.*,[81] determined that *Milwaukee I* did not require interstate effects.[82]

The court in *Jones Falls* also held that federal common law nuisance actions were not available to private parties.[83] The Third Circuit, however, in *National Sea Clammers Association v. City of New York*,[84] found public nuisance actions available to private parties.[85]

In 1972, Congress amended the FWPCA.[86] After *Milwaukee I*, Supreme Court decisions initially focused on the interpretation of the 1972 amendments, not on whether the FWPCA preempted federal common law.[87] Other federal courts, however, continued to address preemption issues. In 1979, the Ninth Cir-

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the FWPCA 1972 Amendments).

80. *See also* Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975) (en banc) (federal common law nuisance inapplicable where no interstate pollution) *modified sub nom.* United States v. Reserve Mining Co., 543 F.2d 1210 (8th Cir. 1976).

81. 619 F.2d 623 (7th Cir. 1980) (Illinois sought federal common law nuisance remedy against in-state industrial polluter of Lake Michigan) *vacated and remanded on other grounds*, 453 U.S. 917 (1981).

82. *Outboard Marine*, 619 F.2d at 628.

83. *Jones Falls*, 539 F.2d at 1006. *See also* Township of Long Beach v. City of New York, 445 F. Supp. 1203 (D.N.J. 1978) (relief under federal common law nuisance action should not be extended to private persons); Parsell v. Shell Oil Co., 421 F. Supp. 1275 (D. Conn. 1976) (federal common law nuisance for water pollution does not provide basis for invoking federal jurisdiction for damages action brought by private plaintiffs) *aff'd*, 573 F.2d 1289 (1st Cir. 1977).

84. 616 F.2d 1222 (3d Cir. 1980) (class action against government officials for ocean pollution) *rev'd on other grounds sub nom.* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1980); *see infra* notes 95-98 and accompanying text.

85. *National Sea Clammers Ass'n*, 616 F.2d at 1233.

86. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)). The 1972 amendments are commonly called the Clean Water Act. The amendments established a regulatory system making waste discharges into national waters illegal without a National Pollutant Discharge Elimination System (NPDES) permit. *See* 33 U.S.C. §§ 1311 & 1342. All discharge points are regulated by the EPA. 33 U.S.C. § 1311(e). "Point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. 1362(14).

87. *See, e.g.*, Environmental Protection Agency v. California *ex rel.* State Water Resources Control Bd., 426 U.S. 200 (1976) (permit not required for federal facilities discharging pollution); Train v. City of New York, 420 U.S. 35 (1975) (EPA Administrator cannot allot states less than authorized federal financial assistance).

cuit ruled[88] that the CAA did not preempt a federal common law nuisance action.[89] Earlier that year the Seventh Circuit, in *Illinois v. City of Milwaukee*[90] ruled the FWPCA, even after the 1972 amendments, did not preempt federal common law nuisance claims.[91]

2. Federal Common Law Nuisance for Water Pollution Eliminated

In *Milwaukee v. Illinois*[92] (*Milwaukee II*), the Supreme Court disallowed a federal common law nuisance action as a remedy for interstate water pollution.[93] The Court stressed that Congress intended to establish, by enacting the 1972 amendments, an all-encompassing regulatory program for water pollution.[94]

Less than two months after *Milwaukee II*, the Supreme Court ruled[95] that the FWPCA and the Marine Protection, Re-

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88. California Tahoe Regional Planning Agency v. Jennings, 594 F.2d 181 (9th Cir. 1979) (federal common law nuisance action by California against Nevada to enjoin the development of a hotel-casino).

89. *Id.* at 193.

90. 599 F.2d 151 (7th Cir. 1979). Illinois filed this suit after the Court in *Milwaukee I* ruled the district court was the proper forum for Illinois to seek abatement of Milwaukee's sewage discharges. *See Milwaukee I*, 406 U.S. 91. The district court found the 1972 FWPCA amendments did not preclude federal common law nuisance. Illinois v. City of Milwaukee, 366 F. Supp. 298, 300 (N.D. Ill. 1973). Milwaukee appealed the district court's holding to the Seventh Circuit. Illinois v. City of Milwaukee, 599 F.2d 151, 155.

91. *Id.* at 162-64.

92. 451 U.S. 304 (1981). This case culminated the decade-long battle between Illinois and Milwaukee over Milwaukee's sewage discharges into Lake Michigan. The Seventh Circuit's decision that the 1972 FWPCA amendments had not preempted Illinois's federal common law nuisance claims was overturned because Wisconsin was discharging pursuant to a NPDES permit. *Id.* at 308-12.

93. *Id.* at 317. However, this ruling seems to be fact specific: "We conclude that, *at least so far as concerns the claims of respondents* . . . ." *Id.* at 317 (emphasis added); and ". . . no federal common-law remedy was available to respondents *in this case*." *Id.* at 332 (emphasis added).

94. *Milwaukee II*, 451 U.S. at 318. The Court determined, "*Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals. The 'major purpose' of the Amendments was 'to establish a *comprehensive* long-range policy for the elimination of water pollution.' S. REP. No. 92-414, at 95, 2 Leg. Hist. 1511." (emphasis supplied). *Id.*

95. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1980). *See supra* notes 84-85 and accompanying text.

search and Sanctuaries Act of 1972 (MPRSA)[96] preempted a federal common law nuisance claim for water pollution in coastal waters.[97] The Court followed the rationale enunciated in *Milwaukee II*.[98]

3. Preemption of Air Pollution Common Law Nuisance Claims

Since *Milwaukee I*, the Supreme Court has not addressed federal common law nuisance for air pollution or whether the Clean Air Act[99] preempts such an action. However, in *New England Legal Foundation v. Costle*,[100] the Second Circuit distinguished the CAA from the FWPCA finding a federal common law nuisance doctrine based on air pollution still existed. The court found it significant[101] that the CWA regulated all point sources of water pollution;[102] whereas the CAA failed to regulate air pollution from every source.[103]

The district court in *United States v. Kin-Buc*[104] also reasoned that similarities between the two acts did not necessarily lead to the conclusion that the CAA preempted a federal common law nuisance action.[105] The district court juxtaposed the case's facts against the Act's provisions and noted the CAA created a complete regulatory procedure: various pollutants had

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96. 33 U.S.C. § 1401-45 (1982).

97. *Sea Clammers*, 453 U.S. at 22 (1980).

98. *Id.* The Court concluded MPRSA was as comprehensive as the 1972 FWPCA amendments considered in *Milwaukee II*. *Id.*

99. 42 U.S.C. §§ 7401-7642 (1982).

100. 666 F.2d 30 (2d Cir. 1981).

101. *Id.* at 32 n.2.

102. *Id.* The Second Circuit noted that the Court in *Milwaukee II* also found this point significant. *Id.*

103. *Id.* "[*Milwaukee II*], found it especially significant that under the [CWA] the EPA regulated *every* point source of water pollution. [citations omitted] Under the [CAA], in contrast, the states and the EPA are not required to control effluents from every source, but only from those sources which are found by the states and the agency to threaten national ambient air quality standards. [citations omitted]." *Id.*

104. 532 F. Supp. 699 (D.N.J. 1982) (United States sought preliminary and injunctive relief and penalties for FWPCA violations and damages under common law nuisance for air and water pollution).

105. *Id.* at 701. "While the [CWA] regulates every point source of water pollution, the CAA regulates only those stationary sources of air pollution that are found to threaten national ambient air quality standards." *Id.* The court in *Kin-Buc* found the CAA must be evaluated on its own terms; the proper test is whether the act applied to a previously unregulated area. *Id.* at 701-02.

been identified, air quality standards set, and enforcement procedures implemented.[106] As the CAA addressed the particular issue under review, the court found it preempted a federal common law nuisance action under these circumstances.[107]

B. Statutory Provisions

Congress designed the FWPCA and the CAA with national interests in mind.[108] Each act gives the EPA authority to administer and enforce its mandates.[109] Each act also provides for citizen enforcement.[110] Despite similarities of purpose, the process differs in the manner in which each act achieves national protection of air and water.[111]

1. Federal Water Pollution Control Act

Congress enacted the FWPCA in 1948 to address national water quality concerns.[112] In 1972, Congress amended the FWPCA, establishing a comprehensive regulatory program.[113] The amendments created a permit program (National Pollutant Discharge Elimination System — referred to as "NPDES")[114] to regulate waste discharges.[115] A NPDES permit is required for every pollutant[116] discharged from every point source,[117] thus

106. *Id.* at 702.

107. *Id. See also* Reeger v. Mill Service, 593 F. Supp. 360 (W.D. Pa. 1984) "[w]e find the regulatory scheme under the [CAA] to be similar to that of the acts considered in *Sea Clammers*, and . . . apply the same principle of preemption." *Id.*

108. *See* 33 U.S.C. § 1251(a) and 42 U.S.C. § 7401(b) for Congressional intent.

109. 33 U.S.C. § 1251(d). Examples of EPA authority to administer CAA are: 42 U.S.C. § 7408(a) (EPA issues air quality criteria); 42 U.S.C. § 7410 (EPA administers preparation of, reviews, and approves state implementation plans setting forth air quality standards); and 42 U.S.C. § 7413 (federal enforcement procedures).

110. 33 U.S.C. § 1365 and 42 U.S.C. § 7604.

111. *See infra* notes 113-55 and accompanying text.

112. Federal Water Pollution Control Act of June 30, 1948, ch. 758, 62 Stat. 1155 (1948) (codified as amended in scattered sections of 33 U.S.C.).

113. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816 (1972) (codified as amended in scattered sections of 33 U.S.C.).

114. 33 U.S.C. § 1342 (1982).

115. *Id.* at § 1342(a).

116. *Id.* at § 1362(19). This section defines "pollution" as the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id.*

117. *Id.* § 1311(e). Point sources are defined as "any discernible, confined and discrete conveyance from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

forcing compliance with effluent limitations. Any unpermitted discharge is illegal.[118]

The permitting authority (the EPA or an EPA-approved state agency)[119] reviews the NPDES permit application and conditions it for compliance with FWPCA standards, setting forth specific effluent limitations.[120] The Act requires the discharger to submit monitoring data for review by the permit-granting authority.[121] The agency conducts additional monitoring through a sampling program.[122]

Section 208 of the FWPCA also addresses non-point sources of water pollution.[123] Section 208 requires states to prepare basin or area-wide waste treatment management plans for areas where water quality problems exist or are anticipated.[124] Non-point source pollution includes urban drainage, mining run-off, agricultural and silviculture runoff, as well as "salt water intrusion resulting from reductions of fresh water flow from any cause, including . . . diversion[s]."[125]

In 1977, Congress further amended the FWPCA.[126] The Clean Water Act (CWA) added section 101(g), which expressly prohibits the FWPCA from interfering with state water alloca-

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Discharges include "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft." *Id.* This definition excludes agricultural stormwater discharges and return flows, dams and reservoirs. National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1979) (EPA Administrator did not violate her discretionary duty by failing to regulate discharge of pollutants from dams under a NPDES permit). Courts have, however, interpreted "point source" broadly. *See* United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979) (leachate discharged from reserve sump due to construction flaws or inadequate size were "point source" discharges).

118. 33 U.S.C. § 1311(a).

119. *Id.* at § 1342(b).

120. *Id.* at § 1342.

121. *Id.* at §§ 1314(i) and 1318.

122. *Id.* at § 1342(b)(2)(B).

123. 33 U.S.C. § 1288.

124. *Id.*

125. *Id.* at § 1314(f). In 1987, the Act was amended to include section 319, further addressing non-point source water pollution. Federal Water Pollution Control Act as amended by Water Quality Act of 1987, Pub. L. No. 100-4, Stat. 7 (approved Feb. 4, 1987) (section 319 codified at 33 U.S.C. § 1329 (1982)).

126. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified at 33 U.S.C. §§ 1251-1376 (1982)).

tions.[127] Further, section 102(d)[128] of the CWA requires that the EPA study the relationship between water allocation and water quality.[129]

2. The Clean Air Act

The CAA creates a regulatory mechanism to protect air quality but does not regulate site-specific pollution through a permit program.[130] The CAA requires the EPA to designate air quality control regions.[131] Primary national ambient air quality standards are established by the EPA to protect public health.[132] Secondary standards for any pollutant that may reasonably be anticipated to endanger the public health are also established.[133] The Act further provides for uniform national standards of per-

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127. Section 101(g) provides:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Clean Water Act § 101 (g), 33 U.S.C. § 1251(g) (1982).

128. Clean Water Act § 102(d), 33 U.S.C. § 1252(d) (1982). This section provides, in part:

> The Administrator, after consultation with the States, and River Basin Commissions established under the Water Resources Planning Act shall submit a report to Congress on or before July 1, 1978, which analyzes the relationship between programs under this chapter, and the programs by which State and Federal agencies allocate quantities of water. Such report shall include recommendations concerning the policy in section 1251(g) of this title to improve coordination of efforts to reduce and eliminate pollution in concert with programs for managing water resources.

129. A draft report was issued in 1979 indicating four options were available to address water quality relating to reduced stream flows: (1) increased treatment levels; (2) limiting diversions and consumptive uses; (3) augmenting stream flows; and (4) relaxing water quality standards. EPA DRAFT REPORT, WATER QUALITY/WATER ALLOCATION COORDINATION STUDY (1979). The federal government has not responded to the options presented.

130. *See* 42 U.S.C. §§ 7401-7642 (1982).

131. 42 U.S.C. § 7407.

132. 42 U.S.C. § 7409(d).

133. 42 U.S.C. § 7409(b)(2).

formance for new stationary sources[134] of air pollution,[135] and emission standards for mobile sources of air pollution.[136]

The Act requires each state[137] to submit a State Implementation Plan to the EPA that implements, maintains, and enforces the ambient air quality standards in each air quality control region.[138] If the plan meets CAA requirements it will be approved by the EPA.[139] If the plan is inadequate or is not submitted, the EPA must revise or prepare an adequate implementation plan for the state.[140]

Where regions exceed the minimums imposed by the national standards, states must impose emission limitations on sources created prior to 1971 in order to reach the primary standards within three years of state plan approval.[141] Secondary standards must be met within a reasonable time period.[142] Areas with air quality better than the national standards are subject to the "Prevention of Significant Deterioration" regulations.[143]

Not all pollution emanating from all sources is regulated.[144] The CAA only regulates emission sources that the state finds threaten national ambient air quality.[145] The EPA's regulations governing the preparation and content of state plans[146] define regulated area sources of pollution to include "miscellaneous sources."[147] The Act purports to regulate particulates with an

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134. 42 U.S.C. § 7411(3) defines a stationary source as any building, structure, facility or installation which emits any air pollution. *Id.*

135. 42 U.S.C. § 7411.

136. 42 U.S.C. § 7521.

137. 42 U.S.C. § 7407(a) indicates that states have the primary responsibility to carry out the Act's mandate.

138. 42 U.S.C. § 7410.

139. 42 U.S.C. § 7410(2).

140. 42 U.S.C. § 7410(c)(1).

141. 42 U.S.C. § 7410(a)(2)(A).

142. *Id.*

143. 42 U.S.C. §§ 7470-91.

144. *See Costle*, 666 F.2d at 30. Because not all air pollution sources are regulated, (*e.g.*, sources that emit small amounts of pollution) the cumulative effect on air quality may not be adequately considered. *See Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740 (1983).

145. 42 U.S.C. § 7410(a)(2)(D). Unlike the CWA, the CAA does not regulate all point sources of pollution. *See Costle*, 666 F.2d 30, 32 n.2.

146. 40 C.F.R. § 51.110(h) (1989).

147. *Id.* § 51.100(l). The pre-1986 code, Appendix D, defined miscellaneous sources to include fires, coal refuse burning, agricultural burning, and "other" sources.

aerometric diameter of a nominal 10 microns or less[148] and fugitive dust[149] includes some regulated particulates.[150]

Before 1987, states with rural fugitive dust areas could discount fugitive dust when developing and enforcing State Implementation Plans.[151] When the EPA began regulating particulates on July 1, 1987, it categorized areas of the nation into three groups.[152] The Mono Lake area was placed in a group identified as an area with a strong likelihood of attaining particulate matter standards.[153]

Like the CWA, the CAA sets forth citizen suit provisions for its legal enforcement.[154] Under both acts, the right to other statutory or common law remedies is not limited when enforcement is sought.[155] Neither act specifically recognizes or proscribes the pursuit of federal common law actions.

C. Federal Deference to State Water Law

The federal government defers to the states in the matter of water allocation.[156] Western water law is based on the doctrine of prior appropriation under which water can be diverted for the beneficial use of nonappurtenant lands and priority of use is based on the chronological order of diversions.[157] The doctrine developed in response to conflicts over insufficient water supplies and the desire to develop the arid west.[158] California embedded this doctrine in its state water code.[159]

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148. 40 C.F.R. § 50.6(c).

149. Wind storms in the Mono Lake area cause exposed lakebed soil to contribute to "fugitive" dust. *See supra* note 20.

150. *See* 52 Fed. Reg. 24,716 (July 1, 1987) (Proposed Policy Statement).

151. *National Audubon*, 869 F.2d at 1202.

152. *Id.* This was based on whether an existing state plan might require revision due to the new regulation. *Id.*

153. *Id.*

154. 42 U.S.C. § 7604(a).

155. 42 U.S.C. § 7604(a) and 33 U.S.C. § 1365(a).

156. *See* California v. United States, 438 U.S. 645 (1978) (states can impose conditions on the "control, appropriation, use or distribution of water" in a federal reclamation project if not inconsistent with congressional directives concerning the project).

157. *See* National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

158. *See* California v. United States, 438 U.S. 645 (1978).

159. Cal. Water Code § 1225 (West Supp. 1990). California also recognizes the riparian rights doctrine which gives owners of property contiguous to a stream the right to

California owns title to its navigable waters, and the lands beneath it, as trustee for the public.[160] This sovereign right includes the right to control water use and allocations.[161] Consequently, California has exercised almost exclusive jurisdiction over domestic water use, unhampered by federal interference.[162]

IV. THE COURT'S ANALYSIS

A. MAJORITY

1. Federal Common Law Nuisance Action For Water Pollution

With little discussion, the majority affirmed the lower court's ruling that the FWPCA preempted Audubon's common law water pollution claim.[163] The court reasoned that the Supreme Court had unequivocally declared[164] the FWPCA to be a comprehensive statute preempting federal common law nuisance water pollution claims.[165]

2. Federal Common Law Nuisance Action For Air Pollution

The majority determined that Audubon could not properly assert a federal common law nuisance action based on air pollution.[166] The majority analyzed whether Audubon's nuisance action came within the "few and restricted" instances in which federal courts are authorized to fashion federal common law.[167]

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reasonable and beneficial use of water on their land. *See* National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 441.

160. *See* City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980), *cert. denied*, 449 U.S. 840 (1980).

161. California v. United States, 438 U.S. 645 at 657-58 (1978).

162. *Id.* The federal government holds implied reserved water rights for use on federal lands. *See* Cappaert v. United States, 426 U.S. 128 (1976) (water rights for national parks and monuments); *see also*, Winters v. United States, 207 U.S. 564 (1908) (water rights for Indian reservation).

163. National Audubon Soc'y v. Department of Water, 869 F.2d at 1200 (9th Cir. 1989).

164. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

165. *National Audubon*, 869 F.2d at 1200. Quoting *Sea Clammers* the majority found, " 'the federal common law of nuisance in the area of water pollution is entirely preempted by the more comprehensive scope of the FWPCA, which was completely revised after the decision in *Illinois v. Milwaukee*.' " [citations omitted]. *Id.*

166. *National Audubon*, 869 F.2d at 1200.

167. *Id.* at 1201, (*citing* Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1980) (federal courts not empowered to fashion a federal common law rule of

The court categorized these circumscribed instances as those in which a federal rule of decision is required to protect uniquely federal interests or those in which Congress has given the courts power to develop substantive law.[168]

a. Courts Not Empowered to Create Substantive Air Pollution Law

The majority found the CAA to be a comprehensive statute.[169] The court reviewed the Act's provisions setting forth national standards noting two sections[170] govern the establishment and revision of the National Ambient Air Quality Standards (NAAQS).[171] As Congress revised the standards for particulate pollution[172] the majority found the Mono Lake area probably had an adequate control strategy.[173]

The majority concluded the Act empowers only the EPA to identify dangerous or potentially dangerous pollutants and concentration levels.[174] It also noted the Act requires states to develop plans to implement, maintain, and enforce those standards.[175] Consequently, the majority determined Congress did not authorize the courts to develop a substantive common law for air pollution.[176]

b. Federal Common Law Unnecessary to Protect Uniquely Federal Interest

The majority found that a uniquely federal interest warranting the creation of federal common law exists only in narrow

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contribution among antitrust wrongdoers)).

168. *Id.* at 1201 (citing *Texas Industries*, 451 U.S. at 640).

169. *National Audubon*, 869 F.2d at 1201.

170. *Id.* 42 U.S.C. § 7408(1)(A) directs the EPA Administrator to identify pollutants which may reasonably be anticipated to endanger public health or welfare and to issue air quality criteria for them. 42 U.S.C. § 7409 directs the Administrator to propose and promulgate "primary" and "secondary" National Ambient Air Quality Standards for pollutants identified under the former section.

171. *National Audubon*, 869 F.2d at 1201-02. *See supra* notes 131-36 and accompanying text.

172. *Id.* at 1202. *See supra* notes 151-53 and accompanying text.

173. *National Audubon*, 869 F.2d at 1202.

174. *Id.*

175. *Id.*

176. *Id.*

circumstances; in this type of case it would be limited to situations in which the rights and obligations of the United States are involved or where there is an interstate dispute implicating the conflicting rights of states.[177] Audubon argued a significant federal interest existed in the Mono Lake area air quality in part because Mono Lake is proximate to federal lands.[178]

The majority found Congress recognized "some" limited federal interest in national air quality by enacting the CAA.[179] However, as the Act reserved to the state primary responsibility for air quality it concluded[180] there is not "a uniquely federal interest" in protecting the nation's air quality.[181] Moreover, to the extent that there is a general federal interest in air quality, Audubon failed to demonstrate that state law was inadequate or in conflict with federal policy or interests.[182] Thus, no rights or obligations of the United States warranted creation of federal common law.

Nor did the majority find this claim involved the kind of interstate dispute that required resolution under federal law.[183] Relying on two Supreme Court holdings, *Georgia v. Tennessee Copper Co.*[184] and *Milwaukee I*,[185] the majority explained that the Court had extended federal law only to those interstate controversies which involve a state suing sources outside of its own territory.[186] As *Aubudon* was a domestic dispute, involving pol-

177. *National Audubon*, 869 F.2d at 1202. The majority relied on Texas Industries v. Radcliffe Materials, 451 U.S. 630 (1980).

178. Appellant's Opening Brief at 15, National Aububon Soc'y v. Department of Water, 869 F.2d 1196 (9th Cir. 1989) (No. 85-2046).

179. *National Audubon*, 869 F.2d at 1203.

180. *Id.*

181. *Id.* at 1204. To reinforce its analysis the court added, "[a]lthough there might arguably be some unquantified federal interest . . . this . . . does not necessarily involve the authority and duties of the United States as sovereign to the extent that our federal system *requires* that the controversy be resolved under federal law to the exclusion of state law." *Id.* (emphasis in original). Hence, state law applied as the alleged federal policies or interests and a state common law nuisance action did not conflict. *Id.*

182. *Id.* at 1203-04.

183. *Id.* at 1204-05.

184. 206 U.S. 230 (1907).

185. 406 U.S. 91 (1972). *See supra* notes 68-78 and accompanying text.

186. *National Audubon*, 869 F.2d at 1205. "It appears that the Court considers only those interstate controversies which involve a state suing sources outside of its own territory because they are causing pollution within the state to be inappropriate for state law to control, and therefore subject to resolution according to federal common law." *Id.*

lution from a California source, the majority found it was not a "true" interstate controversy for which state law is not appropriate.[187]

B. DISSENT

1. There Is a Federal Interest

Judge Reinhardt, dissenting, argued the majority erred in assuming that a "uniquely federal interest" could be implicated only where there was a "right or obligation of the United States" or an "interstate dispute implicating the conflicting rights of states."[188] He reasoned the Supreme Court in *Milwaukee I* found air quality to be a matter of uniquely federal interest[189] and, absent a preemptive federal statute, federal courts are empowered to decide federal common law nuisance actions.[190] As the majority did not adequately distinguish *Audubon* from *Milwaukee I*, Judge Reinhardt argued its lead should be followed.[191]

Further, Judge Reinhardt maintained the CAA provisions demonstrated there "*was* a uniquely federal interest in air quality".[192] He urged that the CAA was similar to the pre-amended

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187. *National Audubon*, 869 F.2d at 1205. Because it did not recognize the federal common law claim, the court did not decide whether the CAA would have preempted it, or whether Audubon had standing to sue.

188. *National Audubon*, 869 F.2d 1196, 1207 (Reinhardt, J., dissenting).

189. *Id.* The fact that air quality is a matter of uniquely federal interest suffices for invoking the federal common law of nuisance. *Id.* Judge Reinhardt relied on the Supreme Court decision in *Milwaukee I*, 406 U.S. 91 (1972).

190. *National Audubon*, 869 F.2d at 1207. " '[F]ederal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance' . . . ." *Id.* (quoting Illinois v. City of Milwaukee, 406 U.S. 91 at 107). The federal interest established in *Milwaukee I* was not affected by *Milwaukee II*. *National Audubon*, 869 F.2d at 1207. Judge Reinhardt noted the later decision specifically dealt with preemption of the water pollution claim due to the 1972 FWPCA amendments. *Id.*

191. *National Audubon*, 869 F.2d at 1207-08. Judge Reinhardt noted the majority did not contend Congress occupied the field with respect to air pollution but rather declared there is no "federal interest" in air pollution. *Id.* He observed that while *Milwaukee I* involved water pollution and not air pollution, the Supreme Court relied on both to support finding federal common law governed the need for a uniform rule of decision. *Id.* The majority's apparent belief there was a uniquely federal interest in preserving the nation's waters but not the purity of its air was ungrounded. *Id.* at 1208. Further, the dissent faulted the majority for not revealing why water should be subject to uniform federal law but air subject to a "patchwork of state rules." *Id.*

192. *Id.* (emphasis in original).

FWPCA effective at the time of *Milwaukee I*,[193] and evidenced as much a federal interest in protecting air quality as did the FWPCA in protecting water quality before the 1972 amendments.[194]

2. Interstate Pollution Not Required

Judge Reinhardt determined interstate pollution was not prerequisite to state a claim because a federal interest was implicated.[195] He asserted the federal interest in clean air and water is unaffected by state boundaries.[196]

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193. *Id.* at 1208-09. "For example, for those types of pollutants regulated by the CAA, it is the federal government, not the states, that establishes national air quality standards." *Id.* (citing 42 U.S.C. § 7409). Judge Reinhardt compared this to *Milwaukee I*, where under the FWPCA if a state fails to establish water quality standards the EPA administrator promulgates one. *Id.*

Also, 42 U.S.C. § 7408(a)(1)(A) regulates air pollutants emitted by mobile and stationary sources that "may reasonably be anticipated to endanger public health or welfare." *Id.* Comparatively, water pollution under the pre-amended FWPCA could be abated when it endangered public health or welfare. *National Audubon*, 869 F.2d 1208. Finally, "the [CAA] authorizes the [EPA Administrator] to bring civil actions for noncompliance with the Act [citations omitted] [and] under the FWPCA the Attorney General may bring suit on behalf of the U.S. for abatement of pollution." *Id.* (citing *Milwaukee I*, 406 U.S. at 103).

The dissent concluded that just as the FWPCA evidenced a uniquely federal interest in water pollution, the CAA evidenced a similar federal interest in air pollution. *Id.* at 1208. As Congress has approved additional legislation in this area (reauthorizing and amending the CAA and CWA and enacting the Coastal Zone Management Act, and the Marine Protection, Research, and Sanctuaries Act) the federal interest in clean air and water has become even more apparent since *Milwaukee I*. *Id.* at 1208 n.3.

194. *Id.* at 1209. The majority found nothing in the CAA suggested Congress intended to rely upon a federal common law remedy for the Act's enforcement. The dissent concluded that was irrelevant to whether a federal interest was involved. *Id.*

195. *Id.* Judge Reinhardt's interpretation is based on language in *Milwaukee I* in which the Court held federal law " 'controls the pollution of interstate *or navigable* waters' and federal common law governs 'air and water in their *ambient or* interstate aspects.' " *Id.* (citing *Milwaukee I*, 406 U.S. at 102-03).

196. *National Audubon*, 869 F.2d at 1209. This was the Seventh Circuit's view in Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980), *vacated and remanded on other grounds*, 453 U.S. 917 (1981). There, the court stressed, "The Court's use of the term 'navigable waters' (in *Milwaukee I*) significantly suggests the breadth of the holding, for that term includes both the territorial seas and purely intrastate waters having no necessary interstate impact." *Outboard Marine*, 619 F.2d at 626-27. The Seventh Circuit declared the need for uniform rules of decision is equally strong whether or not the pollution has interstate effects. *Id.* at 628. *See also* National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1234 n.35 (3d Cir. 1980), *rev'd on grounds of preemption sub nom.* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

As to the majority's finding that the controversy was "purely domestic," Judge Reinhardt countered this was really an issue related to standing.[197]

3. Standing

Judge Reinhardt contended the majority confused the issue of claim permissibility with the issue of standing.[198] While the Supreme Court has not expressly decided whether a private plaintiff may bring a federal common law nuisance action, *Milwaukee I* suggested that a state complainant was not required.[199]

He found it significant that both acts provided for private enforcement[200] and reasoned that because private parties may seek a remedy for statutorily prohibited pollution, they may also seek remedies against pollution not addressed by the statutes.[201] Therefore, Judge Reinhardt concluded that the arguments weigh in favor of allowing Audubon to pursue its claim.[202]

4. Preemption by Clean Air Act

Although the majority did not address the issue, Judge Reinhardt found that the CAA did not preempt Audubon's

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197. *National Audubon*, 869 F.2d at 1210. Even if interstate pollution were required, Audubon would meet the test because it alleged the dust polluted Nevada's air as well as California's. *Id.* at 1209-10 n.5.

198. *Id.* at 1210. The opinion noted the majority did not cite authority for limiting standing to states as parties, but rather, cited cases in which the state was a party. *Id.*

199. *Id.* " '[I]t is not only the character of the parties that requires us to apply federal law.' [*Milwaukee I*] 406 U.S. at 105 n.6. Rather . . . federal common law applies 'where there is an overriding federal interest . . . or where the controversy touches basic interests of federalism.' " [citation omitted]. *National Audubon*, 869 F.2d at 1210.

Judge Reinhardt noted that in *National Sea Clammers*, 616 F.2d 1222 (3d Cir. 1980) the Third Circuit squarely held private parties may file federal common law nuisance actions. *National Audubon*, 869 F.2d at 1210.

200. *National Audubon*, 869 F.2d at 1210-11. *See* 33 U.S.C. § 1365; 42 U.S.C. § 7604.

201. *National Audubon*, 869 F.2d at 1211. Judge Reinhardt added that federal common law remedies, albeit not in the nuisance context, have been held available to private plaintiffs, citing Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). *See also*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). According to Judge Reinhardt there was neither supporting authority nor rationale to deviate from the general rule that federal common law remedies are available to private parties. It was noted the majority provided no reason beyond the fact the Supreme Court has not had occasion to decide the question in a nuisance context. *Id.* at 1211.

202. *Id.*

claim.[203] Relying on *Milwaukee II*'s preemption analysis, he declared that the statute must speak directly to the question in order to preempt common law. The CWA preempted federal common law because it was "an all-encompassing program of water pollution regulation."[204]

Unlike the CWA, the CAA does not regulate emissions from *every* source, but only from those sources found to threaten EPA promulgated air quality standards.[205] Accordingly, Judge Reinhardt determined the CAA allows federal courts "to improve on [its] program with federal common law," as did the pre-amended FWPCA.[206]

V. CRITIQUE

The Ninth Circuit's determination that Audubon could not assert a federal common law nuisance claim based on air pollution was the heart of its decision.[207] However, it is disturbing that Audubon's federal water pollution claim was so quickly rejected by the majority. The Ninth Circuit may have had no choice but to find preemption in light of Supreme Court precedent although this case exemplifies why the Court itself, may have been too hasty in concluding the nuisance doctrine extinguished.

According to Audubon, the Mono Lake diversions were not subject to a NPDES permit[208] and the FWPCA did not apply,[209]

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203. *Id.* at 1212.

204. *Id.* (citing *Milwaukee II*, 451 U.S. at 318).

205. *Id.* at 1212-13 (*relying on* New England Legal Found. v. Costle, 666 F.2d 30, 32 n.2 (2d. Cir. 1981)). Further, Congress has not amended the CAA to provide for a comprehensive regulatory scheme as it did for the CWA in 1972. *Id.* The CAA, like the old FWPCA, focuses on establishing parameters for tolerable levels of pollutants in the environment, while the CWA focuses on regulating *all* discharge of pollutants. *Id.* at 1213.

206. *Id.* (citing *Milwaukee II*, 451 U.S. at 319). Furthermore, the fact the EPA regulates wind-borne air pollution was insufficient to conclude the Act preempts federal common law. *Id.* at 1214. The old FWPCA also regulated the type of pollution which the plaintiff in *Milwaukee I* sought to have abated. But, because the remedy sought was "not within the precise scope" of those included in the FWPCA, and because the FWPCA was not all-encompassing, the Supreme Court concluded the federal common law of nuisance still applied. *Id.* at 1214.

207. *National Audubon*, 869 F.2d at 1204.

208. Appellant's Opening Brief at 11, National Audubon Soc'y v. Department of Water, 869 F.2d 1196 (9th Cir. 1989) (No. 85-2046). Because there was no point source discharge, CWA permit requirements were not triggered. *See supra* notes 112-17 and

making a federal statutory remedy unavailable.[210] The Ninth Circuit did not review the distinctions Audubon raised but responded summarily that the FWPCA preempted Audubon's water pollution nuisance claim[211] based on the Supreme Court's highly criticized opinion in *Sea Clammers*.[212]

The majority's approach indicates an unquestioned acceptance and liberal application of the broad scope of preemption that the Supreme Court set forth in *Milwaukee II* upon which *Sea Clammers* relied.[213] Unlike the instant case, however, *Milwaukee II* and *Sea Clammers* involved point-source pollution caused by a NPDES permitted discharge,[214] thus the CWA applied.[215]

A fair argument could be made that Audubon's water pollution claim was not preempted for much the same reason that the claim in *Milwaukee I* was not preempted.[216] As the Act did not address the issue under review there could be no preemption.[217] The Ninth Circuit's opinion suggests the end of the federal com-

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accompanying text.

209. Appellant's Opening Brief at 11-12. 33 U.S.C. § 1314(f) considers salt water intrusion resulting from fresh water flow reduction to be a non-point source pollutant although the CWA does not appear to provide an effective remedy. It merely provides for identification and evaluation of non-point pollution sources with pollution control methods to be developed at a later date. 33 U.S.C. § 1314(f). However, Mono Lake's alleged diversion-created saline environment was not akin to salt water intrusion. *See supra* note 36. Consequently, it appears the CWA does not address the instant case.

210. Appellant's Opening Brief at 11-12. Citing *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973), Audubon argued the Supreme Court has allowed "interstitial federal lawmaking" where a statute fails to provide a remedy. Appellant's Opening Brief at 34.

211. *National Audubon*, 869 F.2d at 1200.

212. *Id. See* Note, *The Hazardous Waste Regulatory Programs and the Federal Common Law of Nuisance: A Confusion Between Preemption and Codification*, 45 OHIO ST. L.J. 791, at 802 n.120 for criticism of this approach. Also, *National Audubon*, 869 F.2d at 1212 n.10, Reinhardt, J., dissenting, indicates the *Sea Clammers* holding seems to extend beyond the *Milwaukee II* holding.

213. *See supra* notes 92-98 and accompanying text. It has been observed that lower courts seem inclined to "broadly" apply the preemption doctrine despite extensive criticism of the *Milwaukee II* and *Sea Clammers* holdings. *See supra* note 212.

214. The Supreme Court has never expressly dealt with a federal common law nuisance water pollution issue *except* where the discharge has been subject to a NPDES permit. An exception is *Milwaukee I*, the parent of *Milwaukee II*, which was prior to the NPDES permit requirement.

215. *See supra* notes 112-22 and accompanying text.

216. *See supra* notes 71-78 and accompanying text.

217. See *Id.*

mon law nuisance action based on water pollution, regardless of the adequacy of the remedy provided by the FWPCA.

Although the majority's conclusion regarding water pollution is understandable in view of recent Supreme Court pronouncements, its treatment of the air pollution claim cannot be so easily forgiven despite the intuitive correctness of the holding. The court's analysis of the air pollution claim is intrinsically peculiar because the air pollution claim was determined not to be a matter of federal interest.[218] In contrast, the water pollution claim *was* found to be a matter of federal interest, subject to federal statutory law.[219]

The distinction the majority seems to have made between water and air pollution actions is tenuous but noteworthy. The fact the majority recognized there might be some federal common law air pollution claims with the requisite federal interest is encouraging because the CAA does not effectively regulate all air pollution, just as the pre-1972 FWPCA did not regulate all water pollution.

However, Mono Lake's air pollution was not found to be a matter of uniquely federal interest,[220] which seems inconsistent with the majority's reliance on a *national standard*[221] implemented by a *federal agency*[222] to conclude Congress did not empower it to enforce the CAA.[223] As the dissenting opinion noted, the Supreme Court in *Milwaukee I* determined air quality *was* a matter of uniquely federal interest.[224] The subsequent holding in *Milwaukee II* did not alter that determination,[225] so it is difficult

218. *National Audubon*, 869 F.2d at 1203. The Supreme Court in *Milwaukee I* found there is federal common law when dealing with air and water in their ambient or interstate aspects. However, the Ninth Circuit majority interpreted *Milwaukee I* as finding that there is no federal common law for rural fugitive dust. *Id.*

219. This inconsistency was noted by Judge Reinhardt, dissenting. *National Audubon*, 869 F.2d at 1207-08.

220. *Id.* at 1204.

221. Some particulate matter contained within fugitive dust, such as Mono Lake's dust, is regulated by the CAA. *National Audubon*, 869 F.2d at 1202.

222. *Id.*

223. *Id.* at 1201-02.

224. *Milwaukee I*, 406 U.S. at 103. The majority believed the Court's statement was made in the context of water pollution and dust pollution was not addressed. *National Audubon*, 869 F.2d at 1203.

225. *Milwaukee II* only dealt with the specific facts of the case, that is, whether the CWA applied to a discharge subject to a NPDES permit.

to understand why a federal interest was not found especially as the CAA provides that air quality *is* a national concern.[226] If national interests were significant enough for Congress to enact a federal statute then it follows that a federal interest must exist.[227]

Clearly, the Ninth Circuit majority thought the Mono Lake controversy should be decided by the state courts.[228] It is also clear that Audubon's air pollution claim was distinctly incidental to the water pollution claim with the principal goal being to reduce or stop the diversions. The majority, albeit unexpressly, may have identified this case as potentially raising a water rights issue.

If the Ninth Circuit had permitted the claim it would have had to decide what law to apply — federal law or state law. Application of federal law would have plainly interfered with the state's right to allocate its water as necessary. Therefore, to hold otherwise, the court would have ignored Congress's expressed prohibition that the CWA cannot interfere with state water allocations[229] and would have set the scene for federal interference in an area historically relegated to the state.[230]

VI. CONCLUSION

Although reinforcing the demise of federal common law nuisance actions for water pollution, the majority declined to nullify federal common law nuisance actions for air pollution. If a unique federal interest is found and the CAA does not provide a remedy, federal common law may still be applicable.

The Ninth Circuit's decision was correct because a decision for Audubon would have seriously disturbed state water policy. A successful federal common law action would have meddled

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226. 42 U.S.C. § 7401(b).

227. Significantly, the Ninth Circuit did not find preemption of the air pollution claim which indirectly seems to agree with the *Milwaukee I* holding, that is, if there is a statutory gap and it is necessary to protect a federal interest, federal common law may be applicable. However, in the instant case a true federal interest was not found.

228. *See National Audubon*, 869 F.2d at 1204.

229. 33 U.S.C. § 1251(g).

230. *See supra* notes 156-62 and accompanying text.

with the state's historic right to allocate its water as needed, a major federal interference inconsistent with judicial precedent and the CWA.

Although this case was an environmental defeat, the exhaustive battle to save Mono Lake has finally been won given recent state legislation[231] and court decisions[232] which will alleviate the water diversion created problems plaguing the lake.

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231. *See supra* notes 12-15 and accompanying text.
232. *See supra* notes 10-11 and accompanying text.
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