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Environmental Law Summary

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ENENVIRONMENTAL LAW

SUMMARY

NO NUISANCE CLAIM PERMITTED IN FEDERAL COURT FOR AIR OR WATER POLLUTION

I. INTRODUCTION

In National Audubon Soc'y v. Department of Water,¹ the Ninth Circuit decided that the Audubon Society could not state federal common law nuisance claims against the Los Angeles Department of Water and others for air and water pollution arising out of the diversion of fresh water streams from California's Mono Lake.² The court held that the Federal Water Pollution Control Act preempts federal nuisance claims based on water pollution.³ The Ninth Circuit held that the plaintiff could not state a federal nuisance claim for air pollution because this case does not involve any uniquely federal interests and because a true interstate dispute has not arisen.⁴ The court declined to decide whether or not the Audubon Society's air pollution claim was preempted by the federal Clean Air Act.⁵

¹ National Audubon Soc'y v. Department of Water, 858 F.2d 1409 (9th Cir. 1988) (per Brunetti, C.J.; the other panel members were Goodwin, J. and Reinhardt, J., dissenting).
² Id. at 1418.
³ Id.
⁴ Id. at 1416-17.
⁵ Id. at 1418.
II. FACTS

This case consolidates appeals from a suit filed by the National Audubon Society and others against the Los Angeles Department of Water and Power ("DWP") to restrain the DWP's diversion of four fresh water streams that would otherwise flow to Mono Lake.\(^6\) It is part of an ongoing effort by citizens and environmental groups to protect Mono Lake.\(^7\) The Audubon Society alleged that this diversion of Mono Lake's fresh water, by lowering the level of the lake, has caused water pollution in the form of increased salinity.\(^8\) Also, the Audubon Society's federal nuisance claim alleged that the diversion caused dust storms to rise from the uncovered lake bed resulting in air pollution.\(^9\)

The district court held that the water pollution claim was preempted by the Federal Water Pollution Control Act ("FWPCA").\(^10\) Furthermore, the district court held that the Audubon Society could state a federal common law nuisance claim for air pollution and that the claim was not preempted by the Clean Air Act.\(^11\) Finally, the district court remanded the state claims to the state court.\(^12\)

III. COURT'S ANALYSIS

A. MAJORITY

The Ninth Circuit first considered whether the FWPCA preempts federal common law nuisance claims.\(^13\) It then reviewed the question of whether the Audubon Society should be

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7. See e.g., *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419 (1983). Suit was filed for the same purpose: to prevent the diversion of the water from Mono Lake to Los Angeles. The California Supreme Court held that the state of California has an affirmative duty to take the public trust into account in the planning and allocation of water resources. In fact, this case has been pending in various forms for approximately ten years. *National Audubon Soc'y*, 858 F.2d at 1410. The present case represents consolidated interlocutory appeals and appeals as-of-right which arose from a lawsuit originally filed in 1979 by the National Audubon Society and others. *Id.*
9. *Id.* at 1412.
12. *Id.*
permitted to state a federal common law nuisance claim for air pollution.  

A. FEDERAL COMMON LAW NUISANCE CLAIM - WATER POLLUTION

The Ninth Circuit affirmed the district court's ruling that the FWPCA preempts federal common law nuisance claims on the subject of water pollution. The Ninth Circuit stated that the law was clear, relying on a recent Supreme Court decision, Middlesex County Sewerage Authority v. National Sea Clammers Ass'n. The court pointed out that where federal legislation occupies the field, the federal legislation preempts all federal common law. The Supreme Court unequivocally stated in Middlesex that "the federal common law of nuisance in the area of water pollution is entirely preempted by the more comprehensive scope of the FWPCA." The Ninth Circuit therefore swiftly denied the Audubon Society's federal common law nuisance claim for water pollution.

B. FEDERAL COMMON LAW NUISANCE CLAIM - AIR POLLUTION

Whether or not the Audubon Society can state a claim for air pollution is a much more difficult problem because the Supreme Court has not yet decided whether the Clean Air Act preempts federal common law nuisance suits for air pollution. In connection with this claim, the court considered the general nature of federal common law and whether or not substantive air pollution law should be developed by the federal courts to remedy the problems at Mono Lake. The Ninth Circuit preliminarily noted that "there is no general federal common law." The court said, "[f]ederal courts, unlike state courts, are not

14. Id. at 1413-17.
15. Id. at 1412.
16. Id. See also Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). The plaintiffs in this case were fishermen who alleged damage to fishing grounds caused by discharges and ocean dumping of sewage and other waste.
20. Id. at 1413.
21. Id.
22. Id.
general common law courts and do not possess a general power
to develop and apply their own rules of decision."23 However,
the court noted that the Supreme Court has "recognized the
need and authority of [federal] courts to fashion federal com-
mon law in a ‘few and restricted’ instances."24 These instances
fall into two categories: those in which a federal rule of decision
is "necessary to protect uniquely federal interests"25 and those
in which Congress has given the courts the power to develop
substantive law.26

The Ninth Circuit analyzed whether Congress gave the
courts the power to develop federal substantive law27 and noted
that the leading statute regulating air pollution is the Clean Air
Act.28 The court engaged in a detailed review of various sections
of the Clean Air Act.29 The Clean Air Act authorizes the Envi­
rornental Protection Agency to promulgate air standards and
regulations to implement those standards.30 The Ninth Circuit
noted that the Clean Air Act provides the Environmental Pro­
tection Agency and the states the power to remedy air pollution
under the statute.31 Therefore, the court reasoned that federal
common law would apply only if there was a unique federal in-

v. Tompkins, 304 U.S. 64,78 (1938).
24. National Audubon Soc’y, 858 F.2d at 1413, (citing Texas Industries, Inc. v. Rad­
651 (1963).
27. National Audubon Soc’y, 858 F.2d at 1413.
28. Id., see also the Clean Air Act, 42 U.S.C. § 7401 et. seq. (1982). The legislative
purpose of the Clean Air Act is “to protect and enhance the quality of the Nation’s air
resources so as to promote the public health and welfare and the productive capacity of
30. Id. at 1414. The court noted that two sections of the Clean Air Act govern the
establishment and revision of the national ambient air quality standards. Section 108
directs the Administrator of the Environmental Protection Agency to identify pollutants
which may reasonably be anticipated to endanger public health or welfare and to issue
air quality criteria for them. Id., see also The Clean Air Act, 42 U.S.C. § 7408 (1982).
Section 109 directs the Administrator to propose and promulgate primary and secondary
national ambient air quality standards for pollutants identified under section 108. The
Clean Air Act, 42 U.S.C. § 7409 (1982). Interestingly, the Environmental Protection
Agency has evaluated the “fugitive dust” problem in the Mono Lake area and has classi­

terest, or "true interstate disputes." The Ninth Circuit noted that by promulgating the Clean Act Congress recognized some limited federal interest in air quality. However, the court noted that individual states and local governments have "primary responsibility for assuring air quality" within their borders. The court concluded that the issues presented in this case do not require resolution under federal law. The court concluded that this case does not implicate any "uniquely federal interests" and therefore the Audubon Society cannot make a federal common law nuisance claim for air pollution. The court compared this case to other factually intensive cases alleging interstate pollution. The court noted that the Supreme 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." Although the Ninth Circuit acknowledged that this case could evolve into a dispute involving conflicting rights of states, it nonetheless concluded that National Audubon Society involved essentially a "domestic dispute."

B. DISSENT

In a lengthy dissent, Judge Reinhardt agreed with the majority that the plaintiffs' claim for water pollution was preempted by the FWPCA. However, Judge Reinhardt strongly disagreed with the majority on the issue of the application of federal common law nuisance doctrine to air pollution. He asserted that "the provisions of that Act [The Clean Air Act] serve

32. Id. at 1416-17.
33. Id. at 1415.
34. Id. quoting The Clean Air Act, 42 U.S.C. § 7407(a). The Clean Air Act also declares that "the prevention and control of air pollution at its source is the primary responsibility of states and governments." The Clean Air Act, 42 U.S.C. § 7401(a)(3).
35. Id. at 1416.
36. National Audubon Soc'y, 858 F.2d at 1416.
37. Id. at 1417. See also State of Illinois v. City of Milwaukee, 406 U.S. 91 (1972), holding that the courts may apply federal common law in a case involving an action for water pollution caused by one state's sewerage entities polluting Lake Michigan and affecting adjoining states. Illinois, 406 U.S. at 107.
38. Id.
39. Id.
40. Id. at 1418.
41. National Audubon Soc'y, 858 F.2d at 1418.
to demonstrate that there is a uniquely federal interest in air quality.\(^{42}\) He contended that the Clean Air Act is not an “all-encompassing program” and does not preempt federal common law.\(^{43}\) The dissent argued that the Clean Air Act is less comprehensive than that of the Clean Water Act “in that the former statute does not control emissions from every source, but only from those sources that are found to threaten the air quality standards promulgated by the [Environmental Protection Agency].”\(^{44}\) Therefore, Judge Reinhardt concluded that the Clean Air Act does not preempt federal common law nuisance claims for air pollution in general or for the plaintiffs’ claim in particular.\(^{45}\)

IV. CONCLUSION

Supporters of preserving Mono Lake failed in yet another judicial move to thwart the siphoning off of the lake’s fresh water supply. This case involved the attempted application of nuisance doctrine to areas protected by federal law. In National Audubon Society, the Ninth Circuit rejected federal common law nuisance claims regarding the alleged water and air pollution in the Mono Lake region.\(^{46}\)

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\(^{42}\) Id. at 1420.

\(^{43}\) Id. at 1425.

\(^{44}\) Id. at 1425.

\(^{45}\) National Audubon Soc’y, 858 F.2d at 1426.

\(^{46}\) National Audubon Soc’y, 858 F.2d at 1418.

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