

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,)
)
Plaintiff,)
)
v.)
)
TYSON FOODS, INC., et al.,)
)
Defendants.)

Case No. 05-cv-329-GKF(SAJ)

STATE OF OKLAHOMA'S RESPONSE TO BRIEF OF
AMICUS CURIAE OKLAHOMA FARM BUREAU INC. [DKT #1552]

Comes now Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), and responds to the brief of *amicus curiae* Oklahoma Farm Bureau Inc. [DKT # 1552].

1. Contrary to the Oklahoma Farm Bureau's suggestion, the sought-after RCRA injunction is not "a collateral attack on the regulatory process" or inconsistent with the policy decisions of the Oklahoma legislature. Rather, the sought-after RCRA injunction is wholly consistent with the State's agricultural laws specifically and the State's environmental laws generally, as well as the Oklahoma legislature's statements of policy. For example:

a. 2 Okla. St. § 10-9.7(B)(4)(a) & (b) provides: "Poultry waste handling, treatment, management and removal shall: (a) not create an environmental or a public health hazard, (b) not result in the contamination of waters of the state"

b. 2 Okla. St. § 10-9.7(B)(1) provides: "There shall be no discharge of poultry waste to the waters of the state."

c. 27A Okla. Stat. § 2-6-105(A) provides: "It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance."

d. 27A Okla. Stat. § 2-6-102 provides: "Whereas the pollution of the waters of this State constitutes a menace to public health and welfare . . . it is hereby declared to be the public policy of this state . . . to provide that no waste or pollutant be discharged into any waters of the state or other placed in a location likely to affect such waters without first being given the degree of treatment or taking such other measures as necessary to protect the legitimate beneficial uses of such waters [and] to provide for the prevention, abatement and control of new or existing water pollution"

e. 82 Okla. Stat. § 1084.1 provides: "Whereas the pollution of the waters of this state constitutes a menace to public health and welfare . . . it is hereby declared to be the public policy of this state to conserve and utilize the waters of the state and to protect, maintain and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses"

2. Contrary to Oklahoma Farm Bureau's suggestion, the law is very clear that an imminent and substantial endangerment claim under 42 U.S.C. § 6972(a)(1)(B) is not superseded by a state law. *See* State of Oklahoma's Reply to Defendants' George's Inc.'s and George's Farms, Inc.'s Separate Response Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, pp. 3-5; State of Oklahoma's Reply to "Defendants' Memorandum in Opposition to Plaintiffs' [sic] Motion for Preliminary Injunction" [DKT #1564], pp. 18-19.

3. Oklahoma Farm Bureau improperly attempts to insinuate itself into the "balancing of the harms" analysis. This is improper for the following reasons:

a. A "balancing the harms" analysis is not done where, as is the case here, the plaintiff is a sovereign and the activity complained of may endanger the public health. *See* State of Oklahoma's Motion for Preliminary Injunction and Integrated Brief in Support Thereof [DKT #1373], pp. 22-23; State of Oklahoma's Reply to "Defendants' Memorandum in Opposition to Plaintiffs' [sic] Motion for Preliminary Injunction" [DKT #1564], pp. 17-18.

b. Even were purported harms to be balanced, the purported harms to be balanced would be those to Defendants, not third persons. *See* State of Oklahoma's Reply to "Defendants' Memorandum in Opposition to Plaintiffs' [sic] Motion for Preliminary Injunction" [DKT #1564], pp. 17-18.

c. Even were purported harms of third persons to be balanced, the law is clear that a third person's purported potential financial damages generally do not outweigh potential harm to the environment. *See* State of Oklahoma's Reply to "Defendants' Memorandum in Opposition to Plaintiffs' [sic] Motion for Preliminary Injunction" [DKT #1564], pp. 17-18.

d. Fourth and finally, the affidavits attached to brief of *amicus curiae* Oklahoma Farm Bureau are improper, and should not be considered. *Amicus* arguments should be limited to the existing record. *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F.Supp.2d 1061, 1068 (N.D. Cal. 2005) ("The Tribe may participate as *amicus curiae*, but its participation is restricted to suggestions relative to matters apparent on the record or to matters of practice") (emphasis added). This Court's January 8, 2008 Order

granted Oklahoma Farm Bureau's request for leave to file a brief; it said nothing of allowing Oklahoma Farm Bureau leave to proffer evidentiary materials with that brief. *See* DKT #1446; *see also* *Sierra Club v. Federal Emergency Management Agency*, 2007 WL 3472851, *1 (S.D. Tex. Nov. 14, 2007) ("The extent, if any, to which an *amicus curiae* should be permitted to participate in a pending action is solely within the broad discretion of the district court") (collecting cases). Allowing the inclusion of such affidavits is unfair to the State since the State will not be afforded the right of cross-examination. *See, e.g., United States v. Michigan*, 940 F.2d 143, 163-64 (6th Cir.1991) (disapproving of the "legal mutant characterized as 'litigating *amicus curiae*'" because it impinged on the inherent rights of the real parties in interest).

Conclusion

The Oklahoma Farm Bureau's *amicus curiae* brief is legally and factually irrelevant, and should be accorded no weight. Moreover, the affidavits attached to it should not be considered. The State's Motion for Preliminary Injunction should be granted.

Respectfully Submitted,

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