

## Landmark Oklahoma CAFO Litigation Faces Supreme Court Hurdle

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The state of Oklahoma's efforts to hold concentrated animal feeding operations (CAFOs) liable under federal Superfund law for animal wastes is facing a challenge from its neighboring state of Arkansas, which is asking the Supreme Court to intervene on constitutional grounds.

The recent high court filings by the states mark the latest action in a long-running dispute between the two states over water quality in the region, where numerous CAFOs and other agricultural facilities are located. It also follows a 2003 deal brokered by EPA that allowed several Arkansas cities to avoid Oklahoma's stringent discharge limits for phosphorous, but left large poultry operations in the state subject to the limits. Arkansas poultry growers criticized the deal at the time, saying it was excessively burdensome on their facilities.

At issue is a groundbreaking lawsuit filed in federal court in June 2005 by Oklahoma Attorney General Drew Edmondson (D) against more than a dozen poultry growers operating in Oklahoma and Arkansas. The suit, *Oklahoma v. Tyson Foods, Inc.*, seeks to hold the poultry growers liable under Superfund for animal wastes used as fertilizer throughout the Illinois River Watershed, which has increased phosphorous and other contamination.

Oklahoma maintains that the companies face cleanup and natural resource damage liability under Superfund for the wastes, and also says the wastes are a hazardous substance under the Resource Conservation & Recovery Act. Additional claims under state and common law are included in the case.

But Arkansas in November 2005 petitioned the U.S. Supreme Court -- which has jurisdiction over disputes between states -- to intervene in the litigation, charging that Oklahoma's actions represent an attempt to impose its laws and regulations on Arkansas businesses. "Through a lawsuit, the state of Oklahoma is trying to impose its laws on Arkansas citizens and companies," Arkansas Attorney General Mike Beebe (D) said at the time. "There are already provisions in place to improve water quality in the Arkansas River Basin and Oklahoma should respect our progress in addressing these issues instead of trying to force Arkansas farmers and other businesses to abide by Oklahoma law."

In its petition to the court, Arkansas charges the Oklahoma lawsuit violates Arkansas sovereignty and the Constitution's Commerce Clause by attempting to regulate economic activity that occurs in Arkansas. In addition, Arkansas argues that a 1970 agreement between the states -- the Arkansas River Basin Compact -- is the proper venue for resolving any water quality issues.

But Oklahoma is disputing Arkansas' claims, and urging the high court in its own Jan. 6 filing not to intervene in the litigation. "Arkansas' proposed lawsuit is nothing more than an attempt by Arkansas to use its status as a state to shield private companies from being held liable for their intentional pollution of Oklahoma's natural resources," the filing states. "Oklahoma's lawsuit is not a dispute with the state of Arkansas, despite Arkansas' repeated assertions to the contrary.

Oklahoma has not sued Arkansas and Oklahoma's lawsuit does not challenge the adequacy of Arkansas laws."

Oklahoma is citing a 1976 Supreme Court case, *Arizona v. New Mexico*, to convince the court not to intervene. "Arizona v. New Mexico instructs that deference should be given to lower courts when the issues raised by a request for this court's original jurisdiction are currently pending in the lower court," the filing states.

Oklahoma further maintains that Arkansas lacks standing to bring a suit before the Supreme Court because it "has not been injured by Oklahoma's attempt to seek redress" from the poultry growers. Finally, Oklahoma notes that the Arkansas River compact commission lacks jurisdiction to resolve disputes between states and private parties.

The dispute between the states comes as increased attention is being focused on the applicability of Superfund to CAFO wastes. Sen. Larry Craig (R-ID) in recent years has repeatedly tried to amend Superfund to exclude such wastes from the law, but has failed thus far. However, a key House subcommittee held a hearing on the issue late last year, and Rep. Ralph Hall (R-TX) has introduced a House bill exempting CAFO wastes from the law.

In addition, EPA is implementing a controversial enforcement agreement that would exempt participating CAFOs from enforcement under Superfund and the Clean Air Act in exchange for participating in a study of air emissions from their facilities.