

ALERT

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Ninth Circuit Rejects Global Warming Nuisance Claim: Native Village of Kivalina v. ExxonMobil Corp

On September 21, 2012, the 9th Circuit Court of Appeals upheld a District Court decision dismissing the claims of the Native Village of Kivalina and the City of Kivalina (collectively Kivalina) asserting that some of the largest energy companies in the United States (collectively Energy Producers) were responsible for coastal erosion caused by greenhouse gas emissions and resulting global warming. The court found that since the Clean Air Act (CAA) provides a means to seek limitations on the release of greenhouse gases, the federal courts are preempted from providing judicial relief.

Kivalina is a remote village that is home to approximately 400 residents. It sits on a six-mile barrier reef on the northwest coast of Alaska, approximately 70 miles north of the Arctic Circle and has been a home to the Inupiat Native Alaskans for hundreds of years. For much of Kivalina's history, arctic sea ice served as a barrier against waves and protected the village from erosion. However, sea ice levels have decreased significantly in recent years leaving the village vulnerable to storms and flooding. Kivalina contended that the diminishing arctic sea ice levels are caused by fossil-fuel related greenhouse gases and global warming.

Kivalina brought suit against the Energy Producers alleging that the Energy Producers' substantial contribution to global warming, in the form of the release of greenhouse gas emissions, represented a public nuisance under the federal common law. Kivalina also claimed that the Energy Producers were guilty of creating a civil conspiracy to conceal the harmful effects of global warming.

The Circuit Court dismissed both claims, holding that a federal common law claim does not lie when the question is controlled by federal legislation that displaces otherwise applicable federal common law. The court held that Kivalina's claim was preempted by the CAA, which the Supreme Court earlier held in *Massachusetts v. EPA* (2008) empowered the Environmental Protection Agency (EPA) to regulate greenhouse gas emissions. In essence, the Court found that Congress already had "spoke directly" to the issue of regulating greenhouse gas emissions.

Additionally, the Circuit Court stated that the Supreme Court's decision in *American Electric Power Co., Inc. v. Connecticut (AEP)* (2011) required the action against the Energy Producers be dismissed. In *AEP*, the Supreme Court ruled the CAA and the EPA actions it authorizes preempted a federal common law action against the five largest emitters of carbon dioxide in the United States.

Although in *AEP*, the plaintiffs sought injunctive relief through the court-ordered imposition of emissions caps and in *Kivalina*, the plaintiffs sought damages for alleged harm already caused, the Circuit Court stated that if a cause of action is displaced by federal legislation, then the displacement extends to all remedies. The plaintiffs' civil conspiracy claim against the Energy Producers also failed since it was based upon the substantive public nuisance claim and could not stand on its own once the nuisance claim was dismissed. Given the importance of the *Kivalina* decision, an appeal of the 9th Circuit's decision to the U.S. Supreme Court is likely.

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