Litigation Seeking to Establish Climate Change Impacts as a Common Law Nuisance

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Summary

Congressional inaction on climate change has led various entities to pursue climate change measures off Capitol Hill. Either in hopes of realizing substantive measures or to pressure Congress to act, such entities have looked to international forums, treaty negotiations, Environmental Protection Agency (EPA) action under the Clean Air Act, state and regional efforts, and—the topic here—lawsuits seeking to establish climate change impacts as a common law nuisance. If congressional efforts to block or delay EPA from addressing greenhouse gas (GHG) emissions are successful, that likely will give added importance to such nuisance suits. As background, a *private* nuisance is a substantial and unreasonable invasion of another's interest in the private use and enjoyment of land, without involving trespass; a *public* nuisance is an unreasonable interference with a right common to the general public.

In litigating a climate-change/nuisance suit, several issues arise at the outset and, if resolved against the plaintiff, prevent a claim from proceeding. First, there is the question whether the federal common law of nuisance has been displaced yet by EPA regulation of GHG emissions under the Clean Air Act. A second threshold issue is standing to sue, which asks whether a given party is an appropriate one to invoke the jurisdiction of a federal court. As developed by the Supreme Court, the Constitution requires that for a plaintiff to have standing in federal court, he/she must show injury in fact, that the injury was caused by the defendant, and that the remedy sought likely will ameliorate the injury. Suits seeking relief based on climate change claims have run into difficulty with one or more of these requirements. A third threshold issue is the political question doctrine, which is designed to restrain the judiciary from inappropriately interfering in matters reposed in the other branches of government. For example, the defendants in one case argued that one indicium of a political question—the Constitution's textual commitment of the issue to the executive or legislative branch—is displayed by climate change because using a nuisance case to reduce U.S. CO_2 emissions undermines the President's constitutional authority to manage foreign relations—in particular, to induce other nations to reduce *their* CO_2 emissions.

There are five common law/nuisance suits addressing climate change now or formerly active. Of the three no longer active, none were successful. Of the two still-active cases, one has recently leaped to center stage because the Supreme Court agreed to hear it. In *Connecticut v. American Electric Power Co., Inc.*, eight states sued five utility companies alleged to be emitting the most GHGs in the nation through their coal-fired electric power plants. Following a Second Circuit decision, the Supreme Court agreed on December 6, 2010, to resolve threshold issues in this case.

The other active case is *Native Village of Kivalina v. ExxonMobil Corp*., in which a coastal Eskimo village sued 24 oil and energy companies. Plaintiffs claim that the large quantities of GHGs defendants emit contribute to climate change, which in turn has caused coastal ice to melt, which in turn has caused coastal erosion that will require relocating the village. This case is pending before the Ninth Circuit, where it has been stayed pending the Supreme Court's ruling in *Connecticut*.

In early May 2011, the nuisance cases above were joined by 10 lawsuits (with more promised) seeking to address climate change by an entirely different common law theory: public trust doctrine. Given their recent filing, there have been no developments in these cases as yet.

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I. Introduction

Congressional inaction on climate change has led various entities to pursue climate change measures off Capitol Hill. Either in hopes of realizing substantive measures or to pressure Congress to act, such entities have looked to international forums, treaty negotiations, Environmental Protection Agency (EPA) action under the Clean Air Act, state and regional efforts, and—the topic here—common law suits, principally seeking to establish climate change impacts as a nuisance.

Many argue that courts will (and should) be unreceptive to dealing with a global problem such as climate change through individual common law suits.[1] Each suit, after all, brings before the court only a handful of defendants representing a tiny fraction of the problem. As well, nuisance law offers no clear standards to apply, asking courts, for example, to weigh vague policy factors. This is a recipe, it is argued, for inconsistent and confusing results from different courts. Questions of causation are also substantial: even if the court accepts that man-made greenhouse gas (GHG) emissions contribute to climate change, how can a plaintiff show that a particular adverse impact was caused by climate change, and further was caused by the GHG emissions of the defendants? And should the defendants' contribution to worldwide GHG emissions be viewed as *de minimis*—too small for a court to bother with? Questions of remedy are likely to be particularly intractable: what amount of emission reduction, or monetary compensation, should be required of a defendant given the likely miniscule fraction of worldwide GHG emissions contributed by that defendant? Finally, the law affords courts several easy ways of blocking nuisance-based climate change litigation, discussed in Part II, should courts decide it is inappropriate. At a minimum, no one argues that piecemeal litigation is preferable to a coherent legislative scheme.

Nonetheless, the use of common law lawsuits to attack climate change has its defenders, at least until Congress enacts legislation.[2] Plaintiffs argue with some merit that the kinds of harm attributed to climate change—ecosystem and weather modifications, increased flooding, and harm to human health—are all harms traditionally covered by nuisance doctrine. Moreover, if Congress succeeds in barring or postponing EPA regulatory action against GHG emissions under the Clean Air Act (as seems more likely in light of the November 2010 elections), the nuisance lawsuit option will gain added attention. Nor can the possibility that nuisance plaintiffs will prevail in some limited way be ruled out, though none has succeeded thus far. Five nuisance actions involving GHG emissions have been filed, of which two are still active.

Doubtless there is fascination in efforts to enlist a doctrine as ancient as nuisance to deal with a problem as contemporary as climate change. By way of background, nuisance law is centuries old, born in the medieval English courts. Nor has it ever been used to tackle a problem anywhere

[1] *See, e.g.*, Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 155 U. Pa. L. Rev. 1605, 1649 (2007) ("Realistically, the greatest function of litigation may be to prod legislative action."). *See also* Jim Gitzlaff, *Getting Back to Basics: Why Nuisance Claims Are of Limited Value in Shifting the Costs of Climate Change*, 39 Envtl. L. Rptr. 10,218 (March 2009).

[2] *See, e.g.*, Randall S. Abate, *Public Nuisance for the Environmental Justice Movement: The Right Thing and the Right Time*, 85 Wash. L. Rev. 197 (2010); Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, 39 Envtl. L. Rptr. 10,230 (March 2009); Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. Rev. 1827 (2008) (arguing that a nuisance-based climate change regime essentially becomes a carbon tax); Daniel V. Mumford, *Curbing Carbon Dioxide Emissions Through the Rebirth of Public Nuisance Laws—Environmental Legislation by the Courts*, 30 Wm. & Mary Envtl. L. & Policy Rev. 195 (2005); David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1 (2003).

near as complex as climate change. A nuisance may be either a private nuisance or a public nuisance. An activity constitutes a *private* nuisance if it is a substantial and unreasonable invasion of another's interest in the private use and enjoyment of land, without involving trespass.[3] Private nuisance actions are brought by the aggrieved landowner. An activity is a *public* nuisance if it creates an "unreasonable" interference with a right common to the general public.[4] Unreasonableness may rest on the activity significantly interfering with, among other things, public health and safety. Public nuisance cases are usually brought by the government rather than private entities, but may be brought by the latter if they suffer special injury.[5]

Part II of this report notes the recurring threshold issues raised by the use of nuisance law to deal with GHG emissions and climate change. Part III reviews the five nuisance cases filed to date attacking GHG emissions and/or climate change impacts. As mentioned, none of these cases has generated a final decision for plaintiffs as yet. At present, all eyes are on the Supreme Court, which on December 6, 2010, granted certiorari in *Connecticut v. American Electric Power Co., Inc*., instantly propelling this case to center stage and raising major implications for the other active case.

II. Recurring Issues

As the court decisions in Part III show, the use of nuisance actions to address GHG emissions presents the plaintiff with daunting hurdles—each of which must be surmounted at the outset of the litigation if it is to proceed.[6] Following is a brief introduction to the most salient of these threshold hurdles.

A. Federal Common Law

Because GHG emissions obviously move across state lines, a *federal* common law of nuisance seems likely to govern. However, the scope of federal courts' authority to develop their own common law, as state courts routinely develop state common law, has long been under Supreme Court scrutiny. Though the Court announced that it disfavored federal courts developing their own common law 73 years ago,[7] lower federal courts have continued to do precisely that in areas of national concern, in the absence of an applicable act of Congress. Many federal courts have decided challenges to interstate pollution based on the federal common law of nuisance, which generally hews to the same definitions of nuisance as the state cases.

Most important here, federal common law remedies are vulnerable to being displaced ("preempted") by acts of Congress. Federal common law, says the Supreme Court, is a "necessary expedient," and "when Congress addresses a question previously governed by a decision rested

[3] RESTATEMENT (SECOND) OF TORTS § 821D (1979).

[4] *Id.* at § 821B.

[5] To have suffered "special injury," a person must have incurred a different kind of interference than that suffered by the public at large, not just a greater harm from the same kind of interference. *Id.* at § 821B comments b. and d.

[6] *See generally* Kevin A. Gaynor et al., *Challenges Plaintiffs Face in Litigating Federal Common Law Climate Change Claims*, 40 Envtl. L. Rptr. (News and Analysis) 845 (Sept. 2010); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293 (2005).

[7] Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that "[t]here is no federal general common law"; rather, federal courts must apply the law of the relevant state except in matters governed by federal statute or the Constitution).

on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."[8] Otherwise put, "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance."[9] Thus, a question in some of the climate change cases has been whether the federal Clean Air Act displaces judge-made federal common law in the climate change area. The displacement argument was strengthened by the Supreme Court's 2007 decision in *Massachusetts v. EPA*,[10] holding that EPA has authority under the Clean Air Act to regulate GHG emissions. It was strengthened further by EPA's promulgation under the Clean Air Act of GHG-limiting regulations to take effect January 2, 2011.[11] Additional developments regarding the displacement question are discussed in Part III in connection with the Supreme Court's grant of certiorari in *Connecticut v. American Electric Power Co., Inc.*

If the federal common law of nuisance is deemed preempted, the state common law of nuisance may be applicable,[12] though there are substantial inefficiencies to having to file suit in multiple states.

B. Standing

The standing inquiry asks whether a given party is an appropriate one to invoke the jurisdiction of a federal court. Only a party with standing can bring suit in federal court. As developed by the Supreme Court, standing has constitutional and prudential (court-created) components. The constitutional side stems from the limitation of federal court jurisdiction in Article III of the Constitution to "Cases" and "Controversies." As explicated by the Court, this constraint demands that a plaintiff in federal court demonstrate that (1) he/she has been or imminently will be injured in a way that is concrete and particularized, and not speculative; (2) the injury is or will be caused by the defendant; and (3) there is a likelihood that the injury will be redressed by a favorable court decision.[13]

One can see readily that a suit seeking relief from climate change impacts may run into difficulty with each of the three constitutional standing requirements. For example, climate change modeling generally predicts only large-scale effects, allowing defendants to argue in many cases that the particular injury suffered by plaintiff was not shown to have been caused by climate change. Or that the defendants' GHG emissions were (or will be) at best a *de minimis* contributor to the injury. The third, redressability prong of standing suggests that plaintiffs seeking injunctive relief from a small number of GHG emitters may have a tougher time establishing standing than

[8] Milwaukee v. Illinois, 451 U.S. 304, 314 (1980) ("Milwaukee II").

[9] Illinois v. Milwaukee, 406 U.S. 91, 107 (1972) ("Milwaukee I"). Indeed, there is a presumption in favor of preemption. Matter of Oswego Barge Corp., 664 F.2d 327, 335 (2d Cir. 1981).

[10] 549 U.S. 497 (2007).

[11] 75 Fed. Reg. 25,323 (May 7, 2010) (EPA GHG emission standards for new light-duty motor vehicles, promulgated jointly with the National Highway Traffic Safety Administration's revised Corporate Average Fuel Economy standards for the same vehicles); 75 Fed. Reg. 31,514 (June 3, 2010) (EPA's Clean Air Act "tailoring rule" limiting New Source Review of new and modified stationary sources of GHG emissions and limiting Clean Air Act Title V permitting requirements).

[12] International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (although federal common law of interstate water pollution was preempted by *Milwaukee II*, state common law applied to Vermont citizens' suit against a New York paper company for pollution of Lake Champlain). Federal and state common law of nuisance cannot apply simultaneously. *See Milwaukee II*, 451 U.S. at 314 n.7 ("if federal common law exists, it is because state law cannot be used").

[13] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

those seeking monetary damages to pay for the costs of responding to climate change; the latter remedy is more likely to "redress" the harm.

Note that state plaintiffs may have a choice. They may bring suit as owner of natural resources or other property, in which case they face the same standing requirements as private entities, described above. Alternatively, states may sue in their *parens patriae* capacity—that is, as protector of their quasi-sovereign interests—in which case the Article III requirement is differently stated. For *parens patriae* standing, a state must articulate a quasi-sovereign interest—that is, one apart from the interests of particular private parties. A state's interest in the "health and well-being—both physical and economic—of its residents in general,"[14] if a substantial portion of those residents is affected, is a well-established quasi-sovereign interest.[15] Owing to these quasi-sovereign interests, the Court has said recently (in its only climate change case) that states are "not normal litigants for purposes of invoking federal jurisdiction," but rather face a lower standing threshold.[16]

As noted, standing doctrine has a prudential component as well as a constitutional one. Principles of prudential standing are not dictated by Article III; rather, they are "judicially self-imposed limits on the exercise of federal jurisdiction."[17] One such principle is "the rule barring adjudication of generalized grievances more appropriately addressed in the legislative branches."[18] Plainly this may be a concern with cases alleging climate change injuries, at least where such injuries are not concrete and personal.[19]

C. Political Question Doctrine

A federal court will refuse to resolve a case it regards as presenting a "political question," owing to the separation of powers in the Constitution.[20] Political question doctrine is "designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government."[21] Long ago, Chief Justice John Marshall wrote: "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[22]

[14] Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982).

[15] *Id.* at 604-605.

[16] Massachusetts v. EPA, 549 U.S. 497, 518 (2007).

[17] Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11 (2004), *quoting* Allen v. Wright, 468 U.S. 737, 751 (1984).

[18] *Elk Grove Unified School Dist.*, 542 U.S. at 12.

[19] The Supreme Court has expressly rejected the argument that just because climate change causes widespread harm, standing doctrine presents an insurmountable obstacle to establishing federal jurisdiction. But "[w]hile it does not matter how many persons have been injured by the alleged action [being challenged], the party must show that the action injures him in a concrete and personal way." Massachusetts v. EPA, 549 U.S. 497, 517 (2007), *quoting* Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring).

[20] Baker v. Carr, 369 U.S. 186, 210 (1962). *See also Massachusetts*, 549 U.S. at 516.

[21] United States v. Munoz-Flores, 495 U.S. 385, 394 (1990).

[22] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

Deciding whether a matter has been committed by the Constitution to a nonjudicial branch of government is, however, a "delicate exercise,"[23] and is decided on a case-by-case basis. The factors indicating a non-justiciable political question were famously stated by the Supreme Court in *Baker v. Carr* in 1962.[24] *Baker* stated six factors, of which the first three have played a role in the climate-change nuisance cases:

> Prominent on the surface of any case held to involve a political question is found [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion....

For example, the utility defendants in *Connecticut v. American Electric Power Co., Inc.*, discussed below, argued that the first factor—textually demonstrable constitutional commitment of the issue to the executive or legislative branch—was triggered because using a nuisance case to reduce U.S. emissions of CO_2 (the major GHG) would interfere with the President's authority to manage foreign relations. One reason: unilateral reductions of U.S. CO_2 emissions would hinder the President's efforts to induce other nations to reduce their emissions.[25]

Yet *Baker* made clear it was setting a high threshold for nonjusticiability. Unless one of the six factors is "inextricable" from the case, *Baker* said,[26] the case should not be dismissed on political question grounds. A political question case, it said, is different from one that is political merely in the sense that it involves an issue being intensely debated in the political realm.[27] Since *Baker* was decided almost a half-century ago, the Court has found few issues to present political questions, but the doctrine has been ubiquitous in the nuisance/climate change litigation.

III. Nuisance Actions Thus Far

A. Active Cases

1. Second Circuit: *Connecticut v. American Electric Power Co., Inc.*

Eight states, New York City, and three private land trusts brought nuisance actions, later consolidated, against five electric utility companies—chosen as allegedly the nation's largest emitters of CO_2, the major GHG, through their fossil-fuel electric power plants. Plaintiffs sought to require the electric utilities to abate their contribution to the nuisance of climate change by reducing their CO_2 emissions. No precise amount of emissions reduction was specified. They cited both the federal common law of nuisance, and, in the alternative, state common law and statutory nuisance law.

[23] *Baker*, 369 U.S. at 211.

[24] 369 U.S. 186, 216 (1962).

[25] 582 F.3d 309, 324 (2d Cir. 2009).

[26] *Baker*, 369 U.S. at 217.

[27] *Id. See also* U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 458 (1992).

In 2005, the federal district court held that because resolving the issues in the case required a balancing of economic, environmental, foreign policy, and national security interests, the court needed guidance from the political branches.[28] The absence of such guidance (there being no federal regulation of CO_2 as of 2005) meant to the court that the case satisfied one of the factors identified in *Baker v. Carr* as indicating a political question—namely, the case was "impossib[le] [to] decid[e] without an initial policy determination of a kind clearly for nonjudicial discretion." So the suit was dismissed.

Plaintiffs' appeal to the Second Circuit was notable in part because then-judge Sonia Sotomayor was on the three-judge panel that heard oral argument. Her later nomination to the Supreme Court while the case was under consideration by the panel ended her involvement in the case. The remaining judges on the panel, however, elected not to rehear the case with a new third judge. Instead, they held in 2009 that the district court had erred when it dismissed the case on political question grounds.[29] Where a case appears to be "an ordinary tort suit," the court said, there is no "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[30]

Additionally, the circuit court found that all plaintiffs had standing, and that all may properly maintain actions under the federal common law of nuisance. Finally, the circuit court held that the federal common law of nuisance had not been displaced by the regulatory scheme established under the Clean Air Act as of the date of decision,[31] or by the collective force of various other statutes touching in some way on GHGs or climate change (e.g., the National Climate Program Act of 1978).[32]

The Supreme Court granted certiorari on December 6, 2010, to resolve the three threshold issues addressed by the Second Circuit[33]—the three threshold issues discussed in Part II of this report. As described by petitioners (defendants below), the issues presented to the Court are (1) whether plaintiffs have standing to seek judicially fashioned emissions caps for the utilities' contribution to climate change, (2) whether a cause of action to cap CO_2 emissions exists under federal common law in light of the Clean Air Act assigning responsibility for regulating such emissions to EPA, and (3) whether plaintiffs' claims are governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion" (the second and third *Baker v. Carr* factors indicating a political question).

[28] 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

[29] 582 F.3d 309 (2d Cir. 2009).

[30] *Id.* at 331.

[31] The court warned that the question whether the federal common law of nuisance had been displaced might be answered differently at some future time when EPA actually regulates GHG emissions under the Clean Air Act. On January 2, 2011, that future time arrived. *See* note 11 *supra* and accompanying text.

[32] Because the court approved the federal common law of nuisance claims, it chose not to adjudicate the alternative state-law nuisance claims.

[33] No. 10-174. The name of the case in the Supreme Court is *American Electric Power Co., Inc. v. Connecticut*.

It has not escaped attention that the Supreme Court's grant of certiorari came despite the presence of several factors often leading it to pass up a case. There was no split in the circuits;[34] the decision below was interlocutory (it did not finally resolve the case); and subsequent developments might have made the Court's intervention unnecessary (EPA regulation of GHG emissions taking effect January 2, 2011, might have led the district court on remand to find the federal common law claims displaced).[35] Thus, it was speculated that the grant of certiorari was motivated at least in part by the likely desire of the Court's conservatives to limit the broad reading of Article III standing in *Massachusetts v. EPA*,[36] the Court's 2007 climate change decision. Also favoring grant of certiorari was the fact that the United States filed a brief on behalf of the Tennessee Valley Authority, one of the utility defendants, on the side of the private-utility petitioners.

Following the grant of certiorari, amicus participation has been heavy—32 briefs filed in all. One amicus brief, on the side of the utilities, was filed by 23 states, meaning that combined with the eight petitioner states, a total of 31 states are involved in this case.

At the oral argument before the Court, almost all the questions from the justices were directed at the displacement issue—that is, given that EPA regulation of GHG emissions from cars and some large stationary sources has now taken effect, is there is any room left for federal judges to be setting emission standards based on common law? The Second Circuit had explicitly noted this future possibility when it ruled in 2009 prior to EPA regulation of GHG emissions.[37] Favoring the displacement argument, several Supreme Court justices expressed skepticism that a district court was an institutionally competent and/or proper forum for dealing with climate change, at least in the total absence of legislative or agency standards to apply. On the other hand, the justices are doubtless aware of continuing efforts in the 112th Congress to repeal EPA's authority to regulate GHG emissions, which might conceivably undercut their support for displacement.

The Court's eventual decision, expected by June 2011, will almost certainly not reach the merits, since the petition for certiorari raised only threshold issues. A win for the petitioners (utilities) on *any one* of the three threshold issues results in dismissal of the federal claims in the case, leaving only the state claims. By contrast, a win by the respondents (states and private land trusts) on *all three* threshold issues does not ensure an ultimate win for them; it simply means that the case goes back to the district court for a trial on, among other things, whether a federal common law nuisance exists on the facts presented. All in all, ultimate success for the states and private land trusts will be an uphill climb. The importance of the litigation ultimately may well be in its contribution to the law of standing or when federal common law is displaced, not in addressing climate change.

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[34] However, petitioners point out in their reply brief on the petition for certiorari that the Second Circuit decision is at odds with all the *district court* climate change decisions.

[35] *See* note 11 *supra* and accompanying text. To the displacement argument, the state plaintiffs respond that the new EPA regulations will not preempt federal common law applicable to the coal-fired power *plants at issue in the lawsuit* because the new regulations target new and modified stationary sources of emissions, not the existing ones that are the basis of the suit. On the other hand, plaintiffs concede that if EPA were to adopt GHG emission standards for industry sectors such as coal-fired power plants (as it is reportedly considering), federal regulation *would* reach existing GHG emission sources and federal common law suits would have to be dismissed. *See* Gabriel Nelson, *EPA could end "nuisance" case, enviros tell Supreme Court*, E&E News PM (November 4, 2010).

[36] 549 U.S. 497 (2007). *See* four-Justice dissent by Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, *id*. at 535.

[37] *See* note 31 *supra* and accompanying text.

2. Ninth Circuit: *Native Village of Kivalina v. ExxonMobil Corp.*

An Inupiat Eskimo village on the northwest Alaska coast sued 24 oil and energy companies, claiming that the large quantities of GHGs they emit contribute to climate change. Climate change, the village contends, is destroying the village by melting Arctic sea ice that formerly protected it from winter storms, leading to massive coastal erosion that will require relocating the village's inhabitants at a cost of $95 million to $400 million. Plaintiffs invoke the federal common law of public nuisance, and state statutory or common law of private and public nuisance. They further press a civil conspiracy claim, asserting that some of the defendants have engaged in agreements to participate in the intentional creation or maintenance of a public nuisance—that is, global warming—by misleading the public as to the science of global warming. The suit seeks monetary damages.

In 2009, the district court held that the federal nuisance claim was barred by the political question doctrine (contrary to the Second Circuit's holding in *Connecticut* nine days earlier) and, independently, for lack of Article III standing.[38] Accordingly, defendants' motion to dismiss was granted. As to the political question issue, the court found that two *Baker* factors pointed to climate change presenting a political question. First, said the court, there is "a lack of judicially discoverable and manageable standards," and second, a decision cannot be rendered "without an initial policy determination of a kind clearly for nonjudicial discretion."

As for standing, the district court rejected plaintiffs' argument that it was enough for them to establish that defendants "contributed to" their injuries. The court explained that in the absence of federal standards limiting GHG emissions, no presumption arises that any defendant's actions harmed plaintiffs.[39] "Without that presumption, and especially given the extremely attenuated causation scenario alleged in Plaintiffs' Complaint, it is entirely irrelevant whether any defendant 'contributed' to the harm."[40] Nor, in view of the undifferentiated nature of GHG emissions from all global sources and their accumulation over long periods, is there any way to link any particular effect of climate change to a particular entity. Having dismissed the federal claim giving it original jurisdiction, the court declined to exercise its supplemental jurisdiction over the state law claims.

The village appealed to the U.S. Court of Appeals for the Ninth Circuit,[41] which has stayed the case pending the Supreme Court decision in *American Electric Power Co. v. Connecticut*.

As an aside, the liability insurer of one of the *Kivalina* defendants has filed suit seeking a declaratory judgment that should the defendant be found liable for damages in *Kivalina*, the insurer's general liability policies with the defendant will not apply.[42]

[38] 663 F. Supp. 2d 863 (N.D. Cal. 2009).

[39] As to the "absence of federal standards," this is due to change on January 2, 2011. *See* note 11 *supra* and accompanying text.

[40] *Id.* at 880.

[41] No. 09-17490.

[42] Steadfast Ins. Co. v. The AES Corp., No. 08-858 (Arlington County, Va., Cir. Ct. filed July 2008).

B. Cases Finally Resolved

1. Fifth Circuit: *Comer v. Murphy Oil USA*

In this asserted class action, owners of Mississippi Gulf coast property damaged by Hurricane Katrina sued certain oil, coal, and chemical companies doing business in the state under state law. They allege a multistep chain of causation—that the defendant companies emitted substantial amounts of GHGs, which contributed to global warming, which raised the sea level and made the waters of the Gulf of Mexico warmer, which caused Hurricane Katrina to hit the Gulf coast with greater ferocity, which increased the harm to plaintiffs' property caused by the hurricane. On this basis, plaintiffs asserted various state-law tort claims, including negligence, nuisance (public and private), and trespass, and seek compensatory damages. They also request punitive damages for gross negligence. Further, they claimed fraudulent misrepresentation and conspiracy to commit fraudulent misrepresentation, alleging that the oil and coal companies disseminated misinformation about global warming. Finally, plaintiffs made claims against their home insurance companies (e.g., breach of fiduciary duty claim for misrepresenting policy coverage, and violation of a state consumer-protection act) and their mortgage companies (arguing that they may not claim sums owed by plaintiffs for the value of the mortgaged property that was uninsured).

In a succinct order with no discussion, the district court, sitting in diversity, dismissed the action in 2007 for lack of plaintiff standing.[43] The court also found plaintiffs' claims nonjusticiable under the political question doctrine.

In 2009, a three-judge panel of the Fifth Circuit reversed and remanded.[44] Relying heavily on the Supreme Court's approval of standing in *Massachusetts v. EPA*, the panel ruled that plaintiffs here similarly had Article III standing to assert their negligence, nuisance, and trespass claims. As in *Massachusetts*, at least at the pleading stage, the asserted chain of causation described above was not too attenuated. Plaintiffs, however, were held to lack standing as to their other claims. On the other major issue in the case, the circuit court held that the tort claims were not, contrary to the district court, barred by political question doctrine. This ruling on the political question argument came three weeks after the identical ruling by the Second Circuit in *Connecticut v. American Electric Power*, *supra*, though the Fifth Circuit seemed to be aware of only the district court decision in that case.

At this point, events took an odd turn. In early 2010, after vacating the panel ruling and taking the case *en banc*, the Fifth Circuit made the unusual announcement that it lacked a quorum, so the appeal had to be dismissed.[45] As the court explained, seven of the court's 16 active-duty judges had initially recused themselves, leaving only nine judges to rule on the en banc petition. Those judges had decided 6-3 to vacate the panel decision and grant en banc rehearing. Subsequently, one of those nine recused herself, leaving only eight judges in regular active service who were not disqualified to hear the case. Since the requisite quorum to proceed is a *majority* of the 17 authorized active-duty judges on the court (including one vacancy)[46]—that is, nine judges—the

[43] 2007 WL 6942285 (S.D. Miss. August 30, 2007).

[44] 585 F.3d 855 (5th Cir. 2009).

[45] 607 F.3d 1049 (5th Cir. 2010).

[46] 28 U.S.C. § 46(c)-(d).

remaining eight judges concluded 5-3 they could not proceed with en banc review. Indeed, and more strikingly, they concluded they could not even reinstate the vacated panel decision.

The quorum ruling's effect was to deny appeal of the original district court decision (which the Fifth Circuit effectively reinstated). Arguing they have a right to have their appeal decided, the plaintiffs petitioned the Supreme Court on August 26, 2010, for a writ of mandamus directing the Fifth Circuit to reinstate petitioners' appeal and return the case to the three-judge panel for adjudication.[47] On January 10, 2011, the Court denied the petition, leaving the district court decision in favor of defendants as the final (and only) judicial resolution of the case.

2. Ninth Circuit: *California v. General Motors Corp.*

This action was filed by California against several automobile manufacturers based on the alleged contributions of their vehicles, through their GHG emissions, to climate change impacts in the state. The suit asserted that these impacts constitute a public nuisance under federal common law, and sought monetary damages (recall that *Connecticut v. American Electric Power* seeks injunctive relief).

In 2007, the district court dismissed the suit on a political-question rationale—namely, "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[48] The need for an "initial policy determination" by the political branches was supported, in the court's view, by the complexity of the climate change issue, the need for political guidance in divining what is an "unreasonable" interference with the public's rights (recall the definition of a public nuisance on page 2), and the global warming debate in the political branches. Ironically, the environmental "win" in *Massachusetts v. EPA* was cited by the court against the state, both because that decision found authority over GHG emissions to lie with the federal government and because it recognized a state's standing to press its grievances at the federal level.

California appealed to the Ninth Circuit, but in 2009 motioned for voluntary dismissal, which the circuit granted. Dismissal was sought as part of an agreement between the state, the Obama Administration, and the automobile manufacturers.

3. Second Circuit: *Korsinsky v. U.S. EPA*

Mr. Korsinsky filed this *pro se* suit alleging, in a difficult-to-understand complaint, that GHG emissions, by contributing to climate change, and numerous other pollutants threatened his health due to his enhanced vulnerability as an older person with sinus problems. He appeared to be requesting an injunction ordering EPA to require less pollution and ordering polluters to use his invention for reducing CO_2 emissions. The district court dismissed for lack of standing, and the U.S. Court of Appeals for the Second Circuit affirmed on the same ground in 2006, explaining that plaintiff's claim that global warming may cause him unspecified future injuries is "too speculative."[49]

[47] In re Ned Comer (No. 10-294).

[48] 2007 WL 2726871 (N.D. Cal. September 17, 2007).

[49] 192 Fed. Appx. 71 (2d Cir. 2006).

IV. A New Common Law Front: Public Trust Suits

In early May 2011, the nuisance lawsuits above were joined by 10 suits seeking to address climate change by an entirely different common law theory. At that time, teenagers and children (through their guardians ad litem[50]) plus a few environmental groups filed suits against the United States,[51] plus the states of Alaska, Arizona, California, Colorado, Minnesota, New Mexico, Oregon, Montana, and Washington. The claim is that the respective governments have a public trust responsibility to protect the atmosphere, and have failed to exercise their trustee responsibility to deal with the threat of global warming. Each suit asks the court for declaratory relief proclaiming that the atmosphere is a public trust resource and that the government in question has a fiduciary duty as trustee to protect it. The Montana suit is unique in alleging a basis for extending the public trust to the atmosphere under the state constitution and state statute.[52] Some of the suits ask for injunctive relief as well—as, for example, the suit against the United States, which asserts that the federal government has violated its trustee duties by allowing unsafe amounts of GHGs into the atmosphere and asks for an injunction requiring it to take action "consistent with the United States government's equitable share of the global effort." None of the suits seek money damages.

Press reports indicate that Our Children's Trust, an Oregon nonprofit, is leading the litigation effort, and that attorneys representing teenagers and children are preparing to file suits or petitions in every state and the District of Columbia.

By way of background, the public trust doctrine is an ancient common law principle—traceable back to Roman law and the Magna Carta—asserting that certain natural resources are held by the sovereign in special status.[53] Key aspects of that special status are that government may neither alienate public trust resources nor, more pertinent here, permit their injury by private parties. Rather, government has an affirmative duty to safeguard these resources for the benefit of the general public. The doctrine is generally a principle of state law, though there is limited recognition of a federal counterpart. After tidelands and the beds of navigable waterways, fish and wildlife are the natural resources most traditionally associated with the public trust doctrine; as far as preliminary research shows, courts have not yet applied the doctrine to the atmosphere, as the climate change/public trust lawsuits are seeking. That is not the only obstacle these suits may encounter—many of the same concerns running through the common law of nuisance cases described above doubtless will rear their heads in the public trust suits.

[50] That is, guardians for the purposes of the lawsuit—often appointed by a court when the plaintiff (or defendant) is a minor. The guardians ad litem in the suits here are chiefly the parents of the plaintiffs.

[51] Alec. L. v. Jackson, No. _____ (N.D. Cal. filed May 4, 2011).

[52] Barhaugh v. State of Montana, No. OP 11-0258 (Mont. Supreme Ct. filed May 4, 2011). In the Montana state constitution, the complaint cites art. IX, sec. 1 ("The state … shall maintain … a clean and healthful environment in Montana for present and future generations."), and art. II, sec. 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment....").

[53] *See generally* Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 69 Mich. L. Rev. 471 (1970), and Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. Davis L. Rev. 195 (1980).

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