

# *Native Village of Kivalina v. ExxonMobil Corp: Say Goodbye to Federal Public Nuisance Claims for Greenhouse Gas Emissions*

## INTRODUCTION

The Native Village of Kivalina is located in a remote part of Alaska.<sup>1</sup> Through sea level rise and the increase of coastal erosion, this area has been greatly affected by global climate change.<sup>2</sup> The sea ice that once protected the village's land has been worn down, and storms that once hit the ice now devastate the area.<sup>3</sup> Seeking monetary damages for the destruction caused by flooding, the Kivalina tribe brought a public nuisance claim against a total of twenty-two utilities, energy producers, and oil companies, together and individually ("Energy Producers").<sup>4</sup> Kivalina argued that the greenhouse gas (GHG) emissions from the Energy Producers were contributing to climate change and therefore constituted "a substantial and unreasonable interference with public rights, including the rights to use and enjoy public and private property in Kivalina."<sup>5</sup>

The Ninth Circuit, however, did not reach the merits of the claim, as it concluded that the Clean Air Act (CAA) displaced the federal common law of public nuisance.<sup>6</sup> The CAA, enforced by the Environmental Protection Agency (EPA), regulates air emissions from point source pollutants and covers the scope of this issue. Therefore, because Congress delegated the duty to regulate air emissions to the EPA, the EPA has the power to decide cases regarding emissions. Federal common law claims of public nuisance regarding the effects of airborne pollution emissions are no longer viable, a ruling that leaves plaintiffs such as Kivalina with what seems like no judicial avenue to seek relief.

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1. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012).

2. U.S. ARMY CORPS OF ENGINEERS ALASKA DISTRICT, ALASKA BASELINE EROSION ASSESSMENT AVETA REPORT SUMMARY—KIVALINA, ALASKA 2 (2009), available at [http://www.poa.usace.army.mil/Portals/34/docs/civilworks/BEA/Kivalina\\_Final%20Report.pdf](http://www.poa.usace.army.mil/Portals/34/docs/civilworks/BEA/Kivalina_Final%20Report.pdf) [hereinafter EROSION ASSESSMENT].

3. *Id.*

4. *Kivalina*, 696 F.3d at 853.

5. *Id.* at 854.

6. *Id.* at 853.

## I. BACKGROUND

The Native Village of Kivalina is a traditional Inupiat Eskimo community located about 625 miles northwest of Anchorage, Alaska.<sup>7</sup> Sea ice has long protected the village from winter coastal storms.<sup>8</sup> However, in recent years, climate change has altered the natural cycle of sea ice formation.<sup>9</sup> Increasingly, sea ice has formed later and melted earlier, leaving Kivalina's land unprotected for longer amounts of time, especially during the heightened storm season.<sup>10</sup> Subsequently, storms and massive waves have eroded the land.<sup>11</sup> Should this continue, the entire village could be destroyed.<sup>12</sup>

In 2009, Kivalina filed a claim in the District Court in the Northern District of California. The complaint alleged that the Energy Producers' emissions were contributing to global climate change and therefore their actions constituted a public nuisance.<sup>13</sup> Under federal common law, "public nuisance is an unreasonable interference with a right common to the general public."<sup>14</sup> However, federal common law public nuisance claims can be brought only when the courts are "compelled to consider federal questions 'which cannot be answered from federal statutes alone.'"<sup>15</sup>

The District Court held that Kivalina's claims were "barred by the political question doctrine and for lack of standing under Article III."<sup>16</sup> Under the political question doctrine, the determinations it would have to make in order to resolve the nuisance claim were issues that should be determined by either the legislative or executive branch.<sup>17</sup> Because this inquiry would have involved political determinations, it was out of the jurisdiction of the court.<sup>18</sup> The Supreme Court has set forth six factors, "any one of which demonstrates the presence of a nonjusticiable political question."<sup>19</sup> The District Court found that two of the three factors relevant to this case, namely the lack of judicially discoverable and manageable standards for resolving the case, and the impossibility of deciding the case without an initial policy determination of a kind clearly for nonjudicial discretion, were in favor of precluding judicial consideration of Kivalina's claims.<sup>20</sup>

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7. See *Community: Kivalina*, DEP'T OF COMMERCE, CMTY. AND ECON. DEV., OFFICE OF CMTY. AND REG'L AFFAIRS, <http://commerce.alaska.gov/cra/DCRAExternal/community/Details/d0e03d80-1671-4b3e-ad86-f1e195e7467d> (last visited Apr. 17, 2013).

8. *Kivalina*, 696 F.3d at 854.

9. EROSION ASSESSMENT, *supra* note 2, at 2.

10. *Kivalina*, 696 F.3d. at 853; *See id.*

11. *See* EROSION ASSESSMENT, *supra* note 2, at 2–3.

12. *Kivalina*, 696 F.3d at 853.

13. *Id.* at 854.

14. RESTATEMENT (SECOND) OF TORTS, § 821B(1) (1979).

15. *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981).

16. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009).

17. *Id.* at 871.

18. *Id.*

19. *Id.* *See also* *Baker v. Carr*, 369 U.S. 186, 210 (1962).

20. *Kivalina*, 663 F. Supp. 2d. at 876–77.

In order to evaluate a claim under federal public nuisance, the extent of the harm to Kivalina must be evaluated in light of the entire circumstances, including the utility of the Energy Producers' actions.<sup>21</sup> Although the court has provided guidance on other nuisance issues relating to various types of pollution, those cases involved a level of specificity that is absent in this case.<sup>22</sup> Kivalina sought "to impose liability and damages on a scale unlike any prior environmental pollution case" because the damage caused by climate change "involves a series of events disconnected from the discharge itself."<sup>23</sup> The court found that this would force the court to determine what an acceptable level of GHG emissions from the defendants would be, a decision that would have to be made without the guidance of judicial standards.<sup>24</sup>

Further, the court felt uncomfortable with the fact that resolving this public nuisance claim involved a question about exactly who should bear the cost of climate change.<sup>25</sup> Through this lawsuit, the plaintiffs were essentially asking the court to make a political decision that the Energy Producers' should be the only ones to bear the costs of contributing to climate change.<sup>26</sup> Assessing the fault and costs associated with climate change were decisions that the court determined were better left for the executive or legislative branch.<sup>27</sup>

In addition, the District Court found that Kivalina lacked standing under Article III.<sup>28</sup> The standing issue in this case pertained to "the causation requirement" of standing.<sup>29</sup> Due to the fact that there are no federal standards regarding the limit of greenhouse gas emissions, there is no presumption that it is substantially likely that any of the defendants' conduct harmed plaintiffs.<sup>30</sup> Therefore, even if any of the defendants could have contributed to climate change and the subsequent harm that it is causing Kivalina, standing alone is not sufficient to establish injury.<sup>31</sup> Furthermore, Kivalina had not argued that the "seed" of their injury can be traced any of the Energy Producers.<sup>32</sup> In fact, Kivalina conceded that climate change "is attributable to numerous entities which individually and cumulatively over the span of centuries created the effects they are now experiencing."<sup>33</sup> Therefore, there are many other culprits allegedly responsible for the events leading to the harm Kivalina is

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21. *Id.* at 874.

22. *Id.* at 875.

23. *Id.* at 876.

24. *Id.*

25. *Id.* at 876–77.

26. *Id.* at 877.

27. *Id.*

28. *Id.* at 882.

29. *Id.* at 877.

30. *Id.* at 880.

31. *Id.*

32. *Id.*

33. *Id.*

experiencing, and hence, they could not meet Article III's causation requirement.<sup>34</sup>

After the District Court dismissed the case for lack of standing under Article III and for being barred by the political question doctrine, Kivalina appealed to the Ninth Circuit, which took up the issue in 2012.

## II. HOLDING

The Ninth Circuit affirmed the decision of the District Court and dismissed Kivalina's claim for lack of subject matter jurisdiction. It held that the Clean Air Act displaced Kivalina's public nuisance claim, meaning that they could not recover damages from the Energy Producers using the federal common law of public nuisance. Under the doctrine of displacement, federal common law is displaced when a federal statute directly answers the federal question at hand.<sup>35</sup> When Congress addresses a federal issue through a statute, "there is no gap for federal common law to fill."<sup>36</sup> Here, the court found that the Supreme Court had already stated that Congress addressed the issue of GHG emissions from stationary sources through the CAA and therefore had displaced federal common law nuisance claims arising under this same issue.<sup>37</sup> If the Kivalina tribe wants to find relief, the court held that they must find another route, either through the CAA itself, or by appealing to the EPA to change or add remedies specifically tailored to this type of claim.<sup>38</sup>

In so holding, the court relied on the Supreme Court decision in *American Electric Power Co., Inc. v. Connecticut (AEP)*.<sup>39</sup> The Court here held that because the Clean Air Act "'provides a means to seek limits on emissions of carbon dioxide from domestic power plants' . . . 'the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement' of such emissions."<sup>40</sup>

Even though the plaintiffs in *AEP* were seeking abatement as opposed to damages, under the displacement doctrine, the Supreme Court has ruled that the type of remedy sought is irrelevant.<sup>41</sup> The Supreme Court has previously stated that, "when Congress has acted to occupy the entire field, that action displaces any previously available federal common law action."<sup>42</sup> Despite the plaintiffs

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34. *Id.* at 881.

35. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856 (9th Cir. 2012).

36. *Id.* (citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 313–14 (1981)).

37. *Id.*

38. *See id.* at 858.

39. *Id.* at 856 (citing *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537–38 (2011)).

40. *Id.* at 856 (quoting *AEP*, 131 S. Ct. 2527, 2537–38).

41. *Kivalina*, 696 F.3d at 857. *See also* *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 (2008); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21–22 (1981).

42. *Kivalina*, 696 F.3d at 857 (citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 314, 325 (1981)).

in *Kivalina* seeking damages as a remedy instead of injunctive relief, the law governing the claim was still precluded under the same reasoning as in *AEP*.

### III. ANALYSIS

The Native Village of Kivalina is likely not the only community that is going to be affected by global climate change in this way and the holding in *Kivalina* will make it extremely difficult for any party affected to find legal relief. Due to the unique nature of climate change and the complexity of its causes and subsequent effects, it seems unclear as to how any plaintiff in a situation similar to the Kivalina tribe would be able to recover.

Historically, air pollution has been regulated by the CAA, but the CAA does not specifically address the effects that GHG emissions have on specific people, communities, or areas.<sup>43</sup> Currently, GHG emissions “from the largest stationary sources” are regulated by the CAA through a permit program, but the CAA does not have a remedy for those who claim to be adversely affected by specific GHG emitters.<sup>44</sup>

The holding in this case prohibits any further federal public nuisance claims regarding the effects of global warming. Practically speaking, this presents a difficult conundrum for the families and communities affected by climate change. How can such people recover from the effects of global warming, whether it be coastal erosion like Kivalina, or increases in disease and losses of crops?

The United States’ legal system does not have a way for communities like Kivalina to recover under current circumstances, as the CAA does not provide relief for damages. The court in *Kivalina* stated that the type of relief sought does not matter when discussing whether or not the CAA applies.<sup>45</sup> However, seeking damages is substantially different than seeking abatement and it is difficult to comprehend why this difference does not matter under the doctrine of displacement. Kivalina is not asking that the Energy Producers stop polluting. Rather, they are simply asking that they be compensated for the damages that the Energy Producers allegedly caused. As stated earlier, the CAA only regulates pollution standards from point-source emitters, but does not provide for any damages by the effects of the pollution it regulates.<sup>46</sup> Plaintiffs seeking an injunction or an emissions reduction can instead go through the regulatory scheme of the CAA and possibly suggest a proposed rulemaking to change the allowable pollution levels. A plaintiff such as Kivalina, however, who is seeking damages for harms that have already occurred, currently has no remedy under the CAA.

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43. See Petition for Writ of Certiorari at i, *Native Vill. of Kivalina v. ExxonMobil Corp.*, No. 12-1072 (Feb. 23, 2013). The Court has yet to take action on the Kivalina Petition.

44. *Id.*

45. *Kivalina*, 696 F.3d at 857.

46. Petition for Writ of Certiorari, *supra* note 43, at i.

Under the CAA, Congress did not provide for a damages remedy. Such an absence begs the question of whether or not Congress intended to displace common law nuisance claims such as the one in *Kivalina* when they passed the CAA. The Supreme Court's discussion in *AEP* seems to indicate that the CAA was not intended to provide relief in situations such as the one in this case.<sup>47</sup> In *AEP*, the Supreme Court noted that the CAA directs the EPA to compile a list of stationary sources that cause or contribute "to air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>48</sup> Once a pollutant is listed, the EPA must set performance standards for emission sources from that category.<sup>49</sup> However, even though the CAA provides multiple avenues for enforcement such as inspections, monitoring and even criminal penalties for knowingly violating the standards, there are no damages for harm caused by emissions of these pollutants.<sup>50</sup> Therefore, although the EPA is currently engaged in setting standards for GHG emissions from fossil-fuel power plants, it seems unlikely that *Kivalina* would be able to recover under the enforcement avenues in place under the CAA.<sup>51</sup>

Furthermore, the court's holding that the CAA displaces *Kivalina*'s public nuisance claim is dubious itself, considering certain provisions in the CAA. The CAA's Savings Clause is particularly instructive. The clause provides: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."<sup>52</sup> The clause specifically states that the CAA is not meant to restrict any right that a person would have to seek any other relief. This right to seek relief can be provided by the federal courts, namely relief in the form of damages under a federal common law nuisance claim.

However, even if the court did not hold that the CAA displaced federal nuisance claims in this case, it is unclear how the defendants could conclusively be shown to have caused the harm. As the District Court's opinion makes clear, due to the nature of climate change and its effects, the causal connection between the defendant's actions and the harm that *Kivalina* is suffering is not strong and would likely not hold up to the burden of proof required in federal nuisance claim.<sup>53</sup>

One option still open to *Kivalina* is to seek relief for public nuisance under state law. The court in *Kivalina* held that the CAA only displaces federal law public nuisance claims, not that it pre-empts state common law. The ruling

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47. See *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537–538 (2011).

48. *Id.* at 2537; 42 U.S.C. § 7411(b)(1)(A) (2006).

49. *Am. Elec. Power*, 131 S. Ct. at 2537; 42 U.S.C. § 7411(b)(1)(B), (d)(1).

50. See 42 U.S.C. § 7411(c)(2), (d)(2).

51. *Am. Elec. Power*, 131 S. Ct. at 2538.

52. 42 U.S.C. § 7604(e).

53. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 880 (9th Cir. 2012).

therefore leaves the door open for these types of claims to be brought in state court.<sup>54</sup> Yet, less than a month after the *Kivalina* decision, the District Court for the Western District of Pennsylvania found “that the Clean Air Act displaced all *state* common law claims relating to dust emissions from a coal-fired power plant.”<sup>55</sup> In *Bell v. Cheswick Generating Station*, plaintiffs sought relief from damages caused by emissions from the Cheswick Generating Station.<sup>56</sup> The court reasoned that because the CAA “represents a comprehensive statutory and regulatory scheme” that Cheswick must abide by, the plaintiffs’ claims and the relief sought “impermissibly encroach on and interfere with that regulatory scheme.”<sup>57</sup> Therefore the plaintiff’s state public nuisance claim was found to be pre-empted by the CAA.<sup>58</sup> The case will most certainly be appealed, but if the decision is upheld, all state common law claims (at least in this jurisdiction) involving air emissions will also be pre-empted, and yet another door will close in *Kivalina*’s quest for recovery.<sup>59</sup> Following this potential affirmation, the future for *Kivalina*-like claims to be heard is uncertain.

#### CONCLUSION

The *Kivalina* decision stands as a benchmark for litigation regarding public nuisance claims and the effects of global climate change. Its lasting effect is yet to be determined, but it certainly throws federal public nuisance claims out the window for relief from pollution caused by GHG emissions, leaving plaintiffs such as *Kivalina* with what seems like no judicial avenue to obtain relief.

*Nicole Johnson*

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54. Jonathan Zasloff, *Ninth Circuit Rules Against Indian Tribe’s Climate Change Suit*, LEGAL PLANET (Sept. 21, 2012), <http://legalplanet.wordpress.com/2012/09/21/ninth-circuit-rules-against-indian-tribes-climate-change-suit/>.

55. *Court Rules Clean Air Act Preempts State Common Law Nuisance Actions*, TROUTMAN SANDERS LLP WASHINGTON ENERGY REPORT, <http://www.troutmansandersenergyreport.com/2012/10/court-rules-clean-air-act-preempts-state-common-law-nuisance-actions/> (last visited Apr. 17, 2013).

56. *Bell v. Cheswick Generation Station*, No. 2:12-cv-929, 2012 WL 4857796, at \*1–2, (W.D. Pa. Oct. 12, 2012).

57. *Id.* at \*8.

58. *Id.*

59. *See id.* (explaining how the CAA preempts federal common law nuisance claims).