

The Kivalina Conundrum: Is there Remedy for Climate Change Refugees?

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Introduction

Kivalina, an indigenous Inupiat village located on a remote island off the Alaskan coast, faces imminent submersion if it does not find the resources to relocate by 2025, when the entire village is predicted to be underwater.¹ The sea ice that previously protected Kivalina from harsh weather conditions and erosion has been adversely affected by climate change, exposing the village more than ever to the region's dangerous storm surges.² Worsening environmental conditions have left Kivalina with two options: move or drown.³ The indigenous residents, who have lived in single-story wooden cabins on the island for well over a century, do not have the financial resources to relocate.⁴ Kivalina sued in 2009 seeking damages from twenty-four greenhouse gas (GHG)-emitting corporations, but the Ninth Circuit, on the basis that the Clean Air Act (CAA) displaces all common law suits for emissions remedies, dismissed the suit.⁵

How can Kivalina and other disproportionately affected communities recover compensation for losses and damages due to climate change? United States federal courts have directed us to the CAA for the answer to this question with the *Kivalina* holding.⁶ Yet the CAA does not include any provisions for such remedies, and its Savings Clause ironically suggests

¹ Stephen Sackur, *The Alaskan Village Set to Disappear under Water in a Decade*, BBC NEWS MAGAZINE (JULY 29, 2013), available at <http://www.bbc.co.uk/news/magazine-23346370>.

² See Nichole Johnson, *Native Village of Kivalina v. ExxonMobil Corp: Say Goodbye to Federal Public Nuisance Claims for Greenhouse Gas Emissions*, 40 ECOLOGY L.Q. 557, 557–63 (2013).

³ See *Alaska Baseline Erosion Assessment*, U.S. ARMY CORPS OF ENGINEERS ALASKA DISTRICT 2 (2009), available at http://www.poa.usace.army.mil/Portals/34/docs/civilworks/BEA/Kivalina_Final%20Report.pdf [hereinafter *Erosion Assessment*].

⁴ See Julia Lynn Rubin, *Alaskan Village Underwater in a Decade: America's First Climate Change Refugees*, HEADLINES AND GLOBAL NEWS (July 30, 2013), available at <http://www.hngn.com/articles/8891/20130730/alaskan-village-underwater-decade-americas-first-climate-change-refugees-photos.html>.

⁵ Johnson, *supra* note 2, at 557.

⁶ *Id.* at 560.

that the courts, not the legislature, have the power to offer these affected populations relief.⁷ This has created a gap in common law and legislation that neither Congress nor the judicial system is willing to fill, leaving vulnerable communities like Kivalina with seemingly no viable avenue for recovery for damages resulting from climate change.⁸

Part I of this paper introduces the indigenous Kivalina Village and how it has been adversely affected by global warming. Part II describes the procedural history behind its federal nuisance suit's dismissal to provide a framework for understanding the legal obstacles for plaintiffs like Kivalina. Part III analyzes potential legal avenues and obstacles for Kivalina and other vulnerable communities disproportionately affected by climate change seeking remedies. Part IV explains how Kivalina fits into the broader climate justice movement ideals.

I. *Background*

A protective barrier of sea ice has long shielded the Alaskan Native Village of Kivalina from harsh winter storms.⁹ This self-governing, federally recognized village of approximately 400 Inupiat residents is located at the tip of a barrier reef situated seventy miles north of the Arctic Circle between the Chukchi Sea and the Kivalina and Wulik Rivers.¹⁰ Recently, climate change has caused the sea ice barrier to thin.¹¹ This alteration in the sea ice and its formation cycle has left Kivalina more susceptible to the region's harsh storms for longer periods than ever before.¹² As a result, the storms and surges that affect the Chukchi Sea coastline have begun to erode the banks of the island.¹³ The U.S. Army Corps of Engineers predicts that continual

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197, 206 (2010).

¹¹ *See id.*

¹² Johnson, *supra* note 2, at 558.

¹³ *See Erosion Assessment, supra* note 3.

erosion will gradually submerge the entire village underwater as early as 2025.¹⁴ Kivalina council leader Colleen Swan summed up the situation succinctly: “If we’re still here in ten years time, we either wait for the flood and die, or just walk away and go someplace else.”¹⁵ Unfortunately, “walking away” comes with quite a price tag, and the subsisting Kivalina Village cannot currently afford to foot the bill.¹⁶ Relocating inhabitants to higher ground- building a road, houses, and a school- could cost up to \$400 million, and there is no public source for the funds.¹⁷ Meanwhile, Kivalina has no means to evacuate the remote island if a damaging storm surge hits, and there is nowhere on the island to seek refuge.¹⁸

II. *Procedural History: The Displacement Doctrine Hurdle and the Supreme Court’s Snub*

In an effort to finance their relocation, the City of Kivalina and Native Village of Kivalina filed a federal common law nuisance suit against twenty-four oil, energy, and utility companies, including Exxon Mobil Corp., BP America, Duke Energy Corp., and Shell Oil Co.¹⁹ Kivalina alleged that the defendants, through GHG emissions, have contributed to the global warming that has caused the sea ice alteration that is forcing them to leave the island.²⁰ Kivalina sought damages that would equal the cost of moving to higher ground, which was alleged to be between \$95 million and \$400 million.²¹ It did not seek injunctive relief to stop the defendants from continuing to emit GHG’s.²² The suit was filed in the District Court of the Northern District

¹⁴ *Id.*

¹⁵ Rubin, *supra* note 4.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Case Comment, *Supreme Court Won’t Review Climate Change Case: Native Village of Kivalina v. Exxon Mobil Corp.*, 31 No. 9 WESTLAW J. TOXIC TORTS 6, *2 (2013) [hereinafter *Supreme Court*].

¹⁹ Johnson, *supra* note 2, at 558.

²⁰ *Id.* Greenhouse gases, methane and carbon dioxide, are the output of human activity such as combustion of fossil fuels, coal mining, and oil drilling. These activities cause the planet to heat, resulting in oceans becoming less efficient at removing carbon dioxide from the atmosphere. Subsequently, the planet then reflects less energy back into space which then causes “white, snowy or icy areas” to darken, absorb more heat, and melt. Native Village of Kivalina v. Exxon Mobil Corp., 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009).

²¹ Abate, *supra* note 10, at 207.

²² *Id.*

of California, where most of the defendants are headquartered or conduct the majority of their operations.²³

The district court dismissed the case,²⁴ concluding that it did not have subject matter jurisdiction because of the “political question doctrine,” and because Kivalina lacked Article III standing as their claims were not “fairly traceable” to the defendants to establish causation.²⁵ On appeal, the Ninth Circuit held that the federal courts had no subject matter jurisdiction over the issue because the CAA “displaced” all federal common law claims regarding GHG emissions.²⁶ Under the “displacement doctrine,” federal common law claims can only be heard on the merits if the court must answer federal questions that are not addressed by federal legislative statutes.²⁷ Congress has established that air emissions from stationary sources are to be regulated under the CAA by the Environmental Protection Agency (EPA).²⁸ The Ninth Circuit therefore held that because GHG emissions are a matter of the CAA, a federal legislative statute, the case presented a federal question that the court cannot answer.²⁹ Under this holding, all federal common law nuisance suits regarding GHG emissions are “displaced” and must be regulated by the CAA.³⁰ The Ninth Circuit acknowledged the problem their holding created for the remedy-seeking Kivalina, who continue themselves to “b[e] displaced by the rising sea” in the wake of the opinion.³¹ The court held that it was not the place of the judicial branch to make policy determinations regarding liability for fossil fuel emissions.³² The Ninth Circuit relied on the

²³ Case Comment, *Alaska Villagers Ask Supreme Court to Restore Climate Change Case: Native Village of Kivalina v. ExxonMobil Corp.*, 33 No. 18 WESTLAW J. ENVTL 2, *1 (2013) [hereinafter *Alaska Villagers*].

²⁴ Abate, *supra* note 10, at 223.

²⁵ *Id.*

²⁶ *Alaska Villagers*, *supra* note 23, at *2.

²⁷ Johnson, *supra* note 2, at 560.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Supreme Court*, *supra* note 18, at *2.

³² *Id.*

Supreme Court’s decision in *American Electric Power Co. v. Connecticut (AEP)*,³³ holding that only the legislative and executive branches can make policy to solve the problem of liability for damages caused by climate change.³⁴

The Ninth Circuit further extended the *AEP* decision that the CAA displaced common law suits regarding emissions by holding that plaintiffs could not recover compensatory damages.³⁵ In *AEP*, the Supreme Court held it did not have the power to order defendants to cease GHG emission because the legislative branch specifically regulated and set emission standards through the CAA to be enforced by the EPA.³⁶ The *AEP* decision barred plaintiffs seeking injunctive relief against GHG emitters from doing so through the courts, as it would “step on the toes” of the CAA because emission regulation is its expressly enumerated function.³⁷ Though the Supreme Court held that regulating emission limits would overstep its power, remedies sought for damages caused by the emissions regulated by the CAA are not included in the statute.³⁸ Thus, based on the *AEP* rationale, compensatory remedies would seemingly not be displaced in the same way that injunctive relief was.³⁹ However, *Kivalina* sought such compensatory remedies not enumerated by the CAA, distinguishing it from the injunction seeking *AEP* plaintiffs, but were nonetheless barred from doing so.⁴⁰ The Ninth Circuit held that if a cause of action was displaced, then that displacement is extended to all possible remedies as well.⁴¹ With this holding, the court expanded the Supreme Court’s framework for emissions litigation to not only include injunctive relief as displaced, but also

³³ 131 S. Ct. 2527 (2011).

³⁴ *Id.*

³⁵ Johnson, *supra* note 2, at 560.

³⁶ Mark (“Buzz”) Belleville; Katherine Kennedy, *Cool Lawsuits- Is Climate Change Litigation Dead After Kivalina v. Exxonmobil?* 7 APPALACHIAN NAT. RESOURCES L.J. 51, 55 (2011-2013).

³⁷ *Id.*

³⁸ *See id.*

³⁹ *See id.* at 55.

⁴⁰ *See id.* at 47.

⁴¹ Belleville, *supra* note 36, at 59.

compensatory damages even though they are not mentioned in the CAA.⁴² This expansive interpretation poses displacement as a formidable hurdle for vulnerable populations seeking legal relief for damages resulting from climate change.⁴³

In March 2013, the residents of Kivalina petitioned the Supreme Court to grant certiorari to reverse the Ninth Circuit decision that the CAA displaces federal common law claims of public nuisance seeking compensatory damages caused by climate change.⁴⁴ They argued that the Ninth Circuit's decision directly opposed *Exxon Shipping Co. v. Baker*,⁴⁵ where the Supreme Court held that the Clean Water Act (CWA) did not displace common law damages.⁴⁶ In response to the petition, defendant corporations asked the Court not to review the case, citing *Kivalina* lacked standing due to an inability to "fairly trace" the causation of their harm through climate change back to their actions.⁴⁷ The Supreme Court decided to let the Ninth Circuit's ruling that common law suits seeking compensatory damages caused by climate change were displaced by the CAA stand, without commenting on their denial of the writ.⁴⁸

III. *In the Wake of the Court's Opinion: Are There Other Avenues for Remedy?*

The problem with the holding that the CAA displaces the potential to recover damages in a common law suit is that the statute does not provide for damages as a remedy for a harm already incurred.⁴⁹ The CAA regulates emission standards but does not address how such emissions affect specific populations or areas, and provides no remedy for the damages created

⁴² *Id.*

⁴³ *Id.* at 74.

⁴⁴ *Alaska Villagers*, *supra* note 23, at *1.

⁴⁵ 554 U.S. 471 (2008).

⁴⁶ *Id.*

⁴⁷ Case Comment, *Companies Urge Supreme Court Not to Review Climate Change Case: Native Village of Kivalina v. ExxonMobil Corp.*, 33 No. 22 WESTLAW J. ENVTL 2, *1 (2013).

⁴⁸ *Supreme Court*, *supra* note 18, at *2.

⁴⁹ Johnson, *supra* note 2, at 561.

by the very pollution it purports to regulate.⁵⁰ The statute only regulates emissions from “point-source pollutants,” those that are a single, identifiable source.⁵¹ Moreover, the only way to enforce standards for these major stationary sources is through inspections and sanctions.⁵²

Precluded from federal common law nuisance claims by the CAA and unable to recover damages under the statute as it currently stands, how will populations like Kivalina seek and recover remedy for damages resulting from GHG emissions?

Kivalina and other groups seeking “climate justice” could appeal to the EPA to amend the CAA to cover the scope of remedy sought for adverse effects of air emissions.⁵³ The statute’s only current mention of damages is that they are not restricted by the statute from being sought under the common law.⁵⁴ This makes the Ninth Circuit’s holding somewhat confusing, as the court’s decision to apply the “displacement doctrine” to *Kivalina* overlaying this CAA savings clause seems to purport the opposite.⁵⁵ The clause states that nothing 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).⁵⁶ This would seem to give Kivalina the power to seek remedy through federal nuisance common law—exactly what the Ninth Circuit held it was precluded from doing.⁵⁷

⁵⁰ See Petition for Writ of Certiorari, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 133 S. Ct. 2390 (Feb. 23, 2013).

⁵¹ *Id.*

⁵² Johnson, *supra* note 2, at 561.

⁵³ *Id.* at 562.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

Another option is to seek relief under state common law nuisance claims because the Ninth Circuit held that only federal common law suits were pre-empted by the CAA.⁵⁸ However, less than a month after the *Kivalina* opinion, the District Court for the Western District of Pennsylvania found that the CAA did in fact displace all state common law claims arising out of dust emissions.⁵⁹ The case will most likely be appealed, but if the decision is upheld, state common law claims will also no longer be a viable avenue to seek relief for these sorts of damages.⁶⁰

Even if the climate change legal remedy landscape eventually evolves to allow plaintiffs such as *Kivalina* to seek relief under federal or state common law, proving causation remains a hurdle.⁶¹ When evaluating allegations of injury from environmental harm, the Supreme Court uses a three-prong test: plaintiff has (1) suffered a concrete and particularized injury; (2) the injury is fairly traceable to the defendant; and (3) a favorable decision will likely redress that injury.⁶² While *Kivalina* seems to meet the first and third prongs, they may have difficulty proving their injury is “fairly traceable.”⁶³ *Kivalina* alleged that climate change caused by GHG emissions of the defendants caused increased erosion of their land and adversely affected the sea ice barrier, which in turn is forcing them to choose between unaffordable relocation and submersion.⁶⁴ Whether this will meet the “fairly traceable” requirement will hinge on whether the courts adopt a more lenient standard that would only require them to show the defendant’s

⁵⁸ Jonathan Zasloff, *Ninth Circuit Rules against Indian Tribe’s Climate Change Suit*, LEGAL PLANET (Sept. 21, 2012), available at <http://legalplanet.wordpress.com/2012/09/21/ninth-circuit-rules-against-indian-tribes-climate-change-suit/>.

⁵⁹ *Court Rules Clean Air Act Preempts State Common Law Nuisance Actions*, TROUTMAN SANDERS LLP WASHINGTON ENERGY REPORT, available at <http://www.troutmansandersenergyreport.com/2012/10/court-rules-clean-air-act-preempts-state-common-law-nuisance-actions/> (last visited Jan. 7, 2014).

⁶⁰ Johnson, *supra* note 2, at 563.

⁶¹ Belleville, *supra* note 36, at 60.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

GHG emissions “contributed to” the global warming that caused the plaintiff’s injury.⁶⁵ The Supreme Court used such a relaxed standard for a state plaintiff in *Massachusetts v. EPA*,⁶⁶ but it is unclear as to whether they would extend this relaxed standard to private plaintiffs seeking relief from GHG emission harms.⁶⁷

Political recognition of international liability to vulnerable populations disproportionately affected by climate change could materialize into a viable avenue for remedy where domestic liability sought by common law claims has failed.⁶⁸ Recent developments in the Kyoto Protocol, a legally binding international treaty holding governments accountable for reduction of GHG emissions, may provide future relief for climate change damages.⁶⁹ In a paradigmatic shift in rationale, the United States⁷⁰ and other attendees of the most recent UNFCCC to extend and revise the Protocol agreed to a “loss and damage” clause that will potentially hold developed, industrialized countries responsible and financially liable for losses and damages caused by climate change in more vulnerable developing countries.⁷¹ The UNFCCC discussion of the clause specifically addressed more vulnerable and less financially capable island nations in danger of submersion due to global warming.⁷² This differs from the previous Kyoto framework, which compelled developed countries to help developing ones obtain clean energy and adapt to

⁶⁵ *Id.*

⁶⁶ 549 U.S. 497 (2007). In *Mass v. EPA*, the state and local government brought suit against the EPA for not regulating motor vehicle emissions that contribute to global warming. The Supreme Court held the plaintiff had standing to bring the suit without meeting the traditional standard for redressability, as a sovereign state that had a special procedural right to protect its interest. Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 PENN ST. L. REV. 1, 17 (2007).

⁶⁷ Belleville, *supra* note 36, at 61.

⁶⁸ Abate, *supra* note 10, at 192.

⁶⁹ Alistair Doyle and Barbara Lewis, *UPDATE 3- Doha Climate Talks Throw Lifeline to Kyoto Protocol*, REUTERS (Dec. 8, 2012), available at <http://www.reuters.com/article/2012/12/08/climate-talks-idUSL5E8N83DI20121208>.

⁷⁰ The United States is not a ratifying member of the Kyoto Protocol, but attends the yearly COP and is a key party to negotiations as one of the world’s top GHG emitters. *See id.*

⁷¹ Andrew Schatz et al., *International Environmental Law*, 47 INT’L LAW. 435, 437 (2013).

⁷² Roger Harrabin, *UN Climate Talks Extend Kyoto Protocol, Promise Compensation*, BBC NEWS SCIENCE & ENVIRONMENT (Dec. 8, 2012), available at <http://www.bbc.co.uk/news/science-environment-20653018>.

climate change, but did not suggest they accept responsibility for damages they sustained.⁷³ While disproportionately affected nations would be able to seek compensation through the proposed clause, it is unclear from UNFCCC reports if vulnerable populations like Kivalina who are located within highly industrialized countries without domestic means for remedy could be compensated as well.⁷⁴ The potential for a future mechanism to hold countries accountable depends on availability of financial resources.⁷⁵ The convention will revisit the possibility of an international accountability mechanism at the upcoming November 2013 meeting in Warsaw.⁷⁶ This international accountability framework would also protect against a potential “shuffle” effect that effective U.S. common law suits could have on U.S. corporations, giving them an incentive to relocate operations outside of the country in order to avoid costly litigation.⁷⁷

IV. *Poster Child Plaintiffs for the Climate Justice Movement*

As subsistence fishers and farmers,⁷⁸ Kivalina is a poster child plaintiff for the “climate justice” movement and its efforts to offer human rights relief for vulnerable populations disproportionately affected by climate change.⁷⁹ Kivalina and other indigenous populations who may seek similar remedy do very little, if anything, to contribute to the GHG emissions responsible for global warming.⁸⁰ Thus they will likely be able to avoid the “unclean hands” defense previously used by defendants to escape liability in suits brought by states asserting that plaintiffs emit GHG’s to cause global warming and are also at fault.⁸¹ From the environmental

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ John Farrell, *Who Should Pay the Costs of Climate Disasters?*, GRIST (Jan. 9, 2013), available at <http://grist.org/article/who-should-pay-the-costs-of-climate-disasters/>.

⁷⁷ Jennifer Kilinski, *International Climate Change Liability: A Myth or a Reality?*, 18 J. TRANSNAT'L L. & POL'Y 377 (2009).

⁷⁸ *Kivalina*, NANA.COM, <http://nana.com/regional/about-us/overview-of-region/kivalina/> (last visited Jan. 7, 2014).

⁷⁹ See Abate, *supra* note 10.

⁸⁰ *Id.* at 410.

⁸¹ Kilinski, *supra* note 77.

justice movement’s perspective, these economically disadvantaged populations should not have to bear the cost of adverse effects of climate change on their communities.⁸² Cases like *Kivalina* underscore the belief that GHG emitting companies whose emissions contribute to global warming and have significant monetary resources should bear this financial burden.⁸³

Conclusion

Precluded from federal common law nuisance claims by the CAA and unable to recover damages under the statute as it currently stands, it remains uncertain how populations like Kivalina will be able to seek remedy for damages from GHG emissions.⁸⁴ State public nuisance suits are unlikely to be a feasible avenue, and even if they become viable, proving causation remains an obstacle.⁸⁵ Congress could amend the CAA to include remedies within its scope, but has made no indication that it will do so.⁸⁶ International liability seems possible based on the shift of UNFCCC rationale to include accountability of all countries to vulnerable ones, but will depend on the formation of a liability mechanism.⁸⁷ Even if the “loss and damage” clause materializes into actionable liability in the future, it is unclear if disproportionately affected populations within developed nations will be able to seek remedy under the clause.⁸⁸ There is currently a gap in the legal system for vulnerable populations like the Native Village of Kivalina seeking compensation for the adverse effects of climate change on their communities, and an answer to the question of how they will be afforded remedy for what they have lost is becoming

⁸² See Abate, *supra* note 10.

⁸³ *Id.*

⁸⁴ See Johnson, *supra* note 2.

⁸⁵ *Id.*

⁸⁶ James Flynn, *Climate of Confusion: Climate Change Litigation in the Wake of American Electric Power Company v. Connecticut*, 29 GA. ST. U. L. REV. 823, 854 (2013).

⁸⁷ See Harrabin, *supra* note 72.

⁸⁸ *Id.*

increasingly urgent.⁸⁹ Kivalina is not the first within this class to be disproportionately affected by climate change, and it will certainly not be the last.⁹⁰

⁸⁹ See Johnson, *supra* note 2.

⁹⁰ See Randall S. Abate & Elizabeth Ann Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and its Impacts on Indigenous Peoples*, 26 TUL. ENVTL. L.J. 179 (2013).