

## Ninth Circuit Hears Oral Argument in Climate Change Case

December 12, 2011 by [Sean Wajert](#)

The Ninth Circuit recently heard [oral argument](#) in a potentially significant case raising climate change issues. See *Kivalina v. Exxon Mobil Corp.*, No. 09-17490 (9th Cir.) (oral argument 11/28/11).

We have posted on [this case](#) before, in which the village of about 400 people alleged that, as a result of global warming, the Arctic sea ice that protects the Kivalina coast from storms has been diminished, and that resulting erosion requires relocation of the residents to another village. (The town of Kivalina is located at the tip of a six-mile-long barrier reef, about 70 miles north of the Arctic Circle on Alaska's northwest coast.) Plaintiffs sought damages under federal common law nuisance, state nuisance, and civil conspiracy theories. They alleged that defendants were a major part of the cause of excessive emissions of carbon dioxide and other greenhouse gases, which plaintiffs claimed are causing the global warming.

The defendants [properly noted](#) that many of the questions raised by the plaintiffs in this suit were inherently political; there are no traditional judicial standards available to adjudicate such political issues. They also argued that plaintiffs lacked standing under Article III because the injury to the plaintiffs was not "fairly traceable" to the conduct of the defendants.

After the District Court dismissed the case, 663 F. Supp. 2d 863 (N.D. Cal. 2009), the U.S. Supreme Court [rejected a global warming case](#) brought by a number of states and land trusts that sought injunctive relief against utilities under the Clean Air Act. See *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011). The *Kivalina* case is potentially significant as one of the first to apply and interpret the Supreme Court decision limiting climate change lawsuits under federal common law.

The plaintiffs in *Kivalina* argue that the *AEP* decision focused exclusively on injunctive relief and did not address damage claims under federal common law. *Kivalina* does not seek to set emissions caps. It seeks damages, [they argued](#). But that reading of the decision may overstate the importance of that fact; the Court focused on the issue of injunctive relief arguably because that was what was being sought by the states and land trusts. Defendants argued that displacement of the federal common law applies to both injunctive and damages remedies. When Congress crafted the regulatory framework establishing the Clean Air Act, it did not provide for any compensatory relief to an allegedly injured private party. Accordingly, a damages remedy should also be displaced. Recognizing the nuisance theory in this context would enable a federal judge to substitute a different balancing of interests from the one made by the EPA, to which Congress assigned this function.