ARTICLES

CLIMATE JUSTICE LITIGATION IN THE UNITED STATES—A PRIMER

by Barry E. Hill and Emily Bergeron

Barry E. Hill is a Visiting Scholar at the Environmental Law Institute and Adjunct Professor at Vermont Law and Graduate School, and author of Environmental Justice: Legal Theory and Practice (ELI Press 5th ed. 2022). *Emily Bergeron is an Associate Professor in the Department of Historic Preservation at the University of Kentucky.*

SUMMARY

Over the last three decades, numerous studies have concluded that African American, Hispanic, Native American, Alaska Native, Native Hawaiian, and working-class White communities are disproportionately exposed to environmental harms and risks. More recent studies have concluded that although the adverse effects of climate change are being felt throughout the United States, they are not evenly distributed. This Article explores how several states have initiated climate justice litigation to address this issue. Specifically, it examines how Rhode Island, Minnesota, and the District of Columbia have filed state-law claims against fossil fuel companies, asking state courts to consider liability, compensation, and remedies for harms related to climate change. It concludes that tribes, acting as sovereigns, may also want to consider climate justice litigation.

Climate change litigation has been growing, with the number of cases around the world having doubled since 2015, bringing the total number to more than 2,000.[1] The United Nations Environment Programme's (UNEP's) January 2021 report defines "'climate change litigation' to include cases that raise material issues of law relating to climate change mitigation, adaptation, or the science of climate change."[2]

Prof. Jeffrey D. Sachs,[3] former director of the Earth Institute at Columbia University, has urged citizens to pursue oil and gas companies as major polluters[4] as well as negligent governments, for liability and damages; and to "flood the courts with lawsuits" demanding the right to a safe and clean environment.[5] Currently, more than two dozen U.S. states and cities have brought claims against the fossil fuel industry, claiming, in part, that Big Oil[6] compa-

1. Dharna Noor, *"Game Changing": Spate of US Lawsuits Calls Big Oil to Account for Climate Crisis*," Guardian (June 7, 2023), https://www.theguardian.com/us-news/2023/jun/07/climate-crisis-big-oil-lawsuits-constitution. *See also* Lesley Clark, *Climate Action Shifts to the Courts as Lawsuits Proliferate Worldwide*, Climatewire (Sept. 25, 2023), https://subscriber.politicopro.com/article/eenews/2023/09/25/climate-action-shifts-to-the-courts-as-lawsuits-proliferate-worldwide-00117820 (according to one estimate, nearly one-fourth of U.S. and U.S. territory residents now live in a jurisdiction with a climate change lawsuit).
2. The UNEP report provides an overview of the current state of climate change litigation globally, as well as an assessment of global climate change litigation trends. It finds that a rapid increase in climate litigation has occurred around the world. UNEP, Global Climate Litigation Report: 2020 Status Review (2020), https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y.
3. Professor Sachs is an economist, academic, public policy analyst, and former director of the Earth Institute at Columbia University, where he holds the title of University Professor. He is known for his work on sustainable development, economic development, and the fight to end poverty. Sachs is director of the Center for Sustainable Development at Columbia University and president of the United Nations Sustainable Development Solutions Network. Wikipedia, *Jeffrey Sachs*, https://en.wikipedia.org/wiki/Jeffrey_Sachs (last edited Feb. 20, 2024).
4. *See* Noah Walker-Crawford, *A Peruvian Farmer Is Trying to Hold Energy Giant RWE Responsible for Climate Change—The Inside Story of His Groundbreaking Court Case*, Conversation (Nov. 27, 2023), https://theconversation.com/a-peruvian-farmer-is-trying-to-hold-energy-giant-rwe-responsible-for-climate-change-the-inside-story-of-his-groundbreaking-court-case-218408. In this climate justice case, a Peruvian farmer and mountain guide, Saúl Luciano Lliuya, has sued to hold the German energy giant RWE responsible for accelerating the glacial melt in the Peruvian Andes, which has brought about the threat posed by the flooding or mudslides in Huaraz, Peru. This unprecedented litigation, *Luciano Lliuya v. RWE AG*, is before the judges of the Higher Regional Court of Hamm, which declared the case to be admissible on November 30, 2017, and has begun hearing evidence against the oil company. RWE is said to be responsible for 0.47% of the world's industrial greenhouse gas emissions between 1854 and 2010. Climate Change Litigation Databases, *Luciano Lliuya v. RWE AG*, https://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/ (last visited Feb. 23, 2024).
5. Jeffrey Sachs, A Proposal for Climate Justice, Lecture Delivered at the London School of Economics and Political Science and Hosted by the Grantham Research Institute on Climate Change and the Environment, YouTube (Oct. 3, 2017), https://www.youtube.com/watch?v=CZGGoY3tzmw.
6. According to Wikipedia, "Big Oil" is a name used to describe the world's six or seven largest publicly traded and investor-owned oil and gas companies. Wikipedia, *Big Oil*, https://en.wikipedia.org/wiki/Big_Oil (last edited Feb. 15, 2024).

nies were aware of the dangers of burning oil and gas, and actively hid that information from consumers and investors for decades.[7]

One recently released study revealed that, based upon internal company memoranda, ExxonMobil made "breathtakingly" accurate climate predictions in the 1970s that its fossil fuel products could lead to global warming, with "dramatic environmental effects before the year 2050."[8] ExxonMobil has been accused of suppressing climate change research, as well as spreading doubt about climate change in its marketing.[9] Consequently, cases against oil and gas corporations seek to force those entities to "mitigate, adapt or compensate for losses resulting from climate change," thereby "influencing corporate behaviour and strategies in relation to climate change."[10]

Climate change litigation in the United States brought by state and local governments seeking to make major polluters pay has been broad, asserting legal claims including consumer protection; fraud; misrepresentation; failure to warn; public and private nuisance; trespass; negligence; design defect; impairment of public trust resources; state environmental rights act violations; unjust enrichment; conspiracy; antitrust; product liability; and, most recently, racketeering.[11]

This Article explores how two U.S. states and the nation's capital have initiated climate justice litigation to address this environmental and public health issue. Part I examines the definition of climate justice. Part II discusses the first climate justice lawsuit in the United States. Part III reviews how and why Rhode Island, Minnesota, and the District of Columbia have filed state-law climate claims against fossil fuel companies that cannot be successfully removed to federal court. Their attorneys general want state courts to ultimately consider liability, compensation, and remedies for harms related to climate change, and those lawsuits specifically discuss climate justice for the residents of sacrifice zones[12] in the complaints. Part IV discusses tribal issues, including the recent U.S. Supreme Court decision in *Arizona v. Navajo Nation*,[13] and concludes by arguing that tribes, acting as sovereigns, may want to consider filing climate justice litigation claims against fossil fuel companies in state courts.

I. Definition of Climate Justice

Climate justice is a subset of environmental justice. The U.S. Environmental Protection Agency (EPA) defines "environmental justice" as the *fair treatment* and *meaningful involvement* of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. This goal, according to EPA, will be achieved when everyone enjoys (1) the same degree of protection from environmental and health hazards; and (2) equal access to the decisionmaking process to have a healthy environment in which to live, learn, and work.[14] The Agency's definition is focused primarily on the issuance of permits and the operation of pollution-generating facilities sited in disproportionately affected communities.

A special concern of the Agency is the adverse impact on the health of residents of those sacrifice zones who have been environmentally overburdened—exposed disproportionately to environmental harms and risks compared with other communities. Over the past 30 years, numerous independent studies have consistently found that certain communities in the United States, including African American, Hispanic, Native American, Alaska Native, Native Hawaiian, and working-class White communities, face a disproportionate burden of environmental harms and risks.[15] This disparity has been observed in relation to exposure to various environmental hazards because of historical factors, such as redlining, zoning practices, and the discriminatory policies of federal, state, and local governments.[16]

---

7. Noor, *supra* note 1.
8. Stefan Rahmstorf et al., *Assessing ExxonMobil's Global Warming Projections*, 379 Science eabk0063 (2023), https://www.science.org/doi/10.1126/science.abk0063.
9. Geoffrey Supran & Naomi Oreskes, *Assessing ExxonMobil's Climate Change Communications (1977-2014)*, 12 Env't Rsch. Letters 084019 (2017), https://iopscience.iop.org/article/10.1088/1748-9326/aa815f/pdf.
10. Geetanjali Ganguly et al., *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 Oxford J. Legal Stud. 841 (2018), *available at* https://academic.oup.com/ojls/article/38/4/841/5140101.
11. Center for Climate Integrity, *Climate Accountability Lawsuits: Cases Underway to Make Climate Polluters Pay*, https://climateintegrity.org/uploads/media/Legal-CaseChart-08302023.pdf (last revised Aug. 30, 2023).
12. According to the Climate Reality Project:

    > Sacrifice zones are **often defined** as populated areas with high levels of pollution and environmental hazards, thanks to nearby toxic or polluting industrial facilities. These areas are called "sacrifice zones" because the health and safety of people in these communities is being effectively sacrificed for the economic gains and prosperity of others.

    Climate Reality Project, *Sacrifice Zones 101*, https://www.climaterealityproject.org/sacrifice-zones (last visited Feb. 23, 2024). *See also* Barry E. Hill, *Sacrifice Zones*, 38 Env't F. 26 (2021); Steve Lerner, Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States (2010) (author traveled to 12 communities from New York to Alaska to collect stories from residents who live in communities that are on the front line and in the middle of toxic "sacrifice zones," some of the most polluted and poisoned places in America).
13. No. 21-1484, 53 ELR 20095 (U.S. June 22, 2023). On June 22, 2023, the Supreme Court issued a ruling in the consolidated cases of *Navajo Nation v. U.S. Department of the Interior* (No. 22-51) and *Arizona v. Navajo Nation* (No. 21-1484).
14. U.S. EPA, *Environmental Justice*, https://www.epa.gov/environmentaljustice (last updated Feb. 6, 2024).
15. *See* Christopher Tessum et al., *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure*, 116 PNAS 6001 (2019); Ihab Makati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 Am. J. Pub. Health 480 (2018); Jamie Vickery & Lori M. Hunter, *Native Americans: Where Is Environmental Justice Research?*, 29 Soc'y & Nat. Res. 26 (2016); Liam Downey & Brian Hawkins, *Race, Income, and Environmental Inequality in the United States*, 51 Socio. Persp. 759 (2008); Melody Kapilialoha MacKenzie et al., *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, Nat. Res. & Env't, Winter 2007, at 37-42, 79; Commission for Racial Justice, United Church of Christ, Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities With Hazardous Waste Sites (1987).
16. The federal government has sought in various ways since President Bill Clinton issued on February 11, 1994, Executive Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-

More recently, research has highlighted that the adverse effects of climate change are not uniformly distributed across the United States.[17] The same communities that already experience disproportionate exposure to environmental harms and risks are also more susceptible to climate-related risks like flooding, hurricanes, and extreme heat.[18] Further, those communities often already lack access to essential resources such as quality health care, emergency services, and reliable infrastructure. As a result, sacrifice zone residents are less equipped to effectively respond to climate-related disasters, which can exacerbate the adverse health impacts of events like heat waves. This perpetuates a cycle of vulnerability.

Climate justice is a concept that addresses the just division, fair sharing, and equitable distribution of the burdens of climate change and its mitigation and responsibilities to deal with climate change. It has been described as encompassing "a set of rights and obligations, which corporations, individuals and governments have towards those vulnerable people who will be in a way significantly disproportionately affected by climate change."[19] "Justice," "fairness," and "equity" are not completely identical, but they are in the same family of related terms and are often used interchangeably in negotiations and politics.

Applied ethics, research, and activism using these terms approach anthropogenic climate change as an ethical, legal, and political issue, rather than one that is purely environmental or physical in nature. This is done by relating the causes and effects of climate change to concepts of justice, particularly environmental justice and social justice. Climate justice examines concepts such as equality, human rights, collective rights, and the historical responsibilities for climate change.

Thus, climate justice is a concept that shares significant overlap with environmental justice. The focus of the Environmental Justice Movement[20] is on the disproportionate exposure to environmental harms and risks, whereas the Climate Justice Movement[21] is concerned with the equitable distribution of the impacts of climate change and the benefits of actions taken to mitigate and adapt to it. It recognizes that vulnerable communities tend to be disproportionately affected by the consequences despite making fewer contributions to climate change. It further emphasizes the need to address both the causes and consequences of climate change and to ensure that the burdens of mitigation and adaptation are not unfairly placed on disadvantaged groups. In sum, the Climate Justice Movement intends to highlight the disparate impacts of climate change on vulnerable communities as well as to promote a fair distribution of resources to address the adverse impacts of climate change.

EPA recognizes that climate change does not affect all communities proportionally.[22] In September 2021, the Agency released a comprehensive peer-reviewed report, "Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts."[23] EPA researchers sought to provide a better understanding of the degree to which four socially vulnerable populations—defined based on income; educational attainment; race and ethnicity; and age—may be more exposed to the highest impacts of climate change in six categories: air quality and health; extreme temperatures and health; extreme temperature and labor; coastal flooding and traffic; coastal flooding and property; and inland flooding and property. The Agency researchers concluded:

Income Populations, to address the disproportionate environmental harms and risks in affected communities.

Currently, the Joseph Biden Administration is proactively engaged in this effort. On April 21, 2023, President Biden issued Executive Order No. 14096, Revitalizing Our Nation's Commitment to Environmental Justice for All, which is the policy to pursue a "whole-of-government approach" to address instances of environmental injustice. *Executive Order on Revitalizing Our Nation's Commitment to Environmental Justice for All*, White House (Apr. 21, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/04/21/executive-order-on-revitalizing-our-nations-commitment-to-environmental-justice-for-all/. *See* Pamela King, *DOJ Enlists "Small Army" to Fight Pollution in Vulnerable Communities*, Greenwire (Oct. 16, 2023), https://www.eenews.net/articles/doj-enlists-small-army-to-fight-pollution-in-vulnerable-communities/:

> Since last year, [the U.S. Department of Justice's (DOJ's)] Environment and Natural Resources Division (ENRD) has been on a mission to help President Joe Biden carry out his goal of helping people of color and low-income communities fight pollution and the impacts of climate change. As part of that effort, all 94 of DOJ's local U.S. attorneys' offices are now equipped with at least one civil or criminal lawyer who serves as an environmental justice coordinator.

17. See the McKinsey Institute for Black Economic Mobility's study "Impacts of Climate Change on Black Populations in the United States," where researchers compared the location of some Black communities with analyses showing climate hazards, like wildfires, extreme heat, hurricanes, and flooding. They examined 11 U.S. southeastern states as well as the Baltimore and New Orleans metropolitan areas. Those cities were chosen based "on their diverse populations, history of redlining and segregation, and geographic locations with a susceptibility to flooding," the report said. According to these researchers:

> From business owners to workers, consumers to producers, and spenders to savers, Black participation is robust in all segments of the US economy. However there are preexisting economic inequities that could be exacerbated by climate change. There's a higher concentration of Black workers in low-wage frontline jobs. Black people save $75 billion less than their White peers. One out of five Black Americans live in food deserts, with limited access to fresh, healthy food options. This racial gap could grow wider as Black communities experience the effects of climate change.

Zach Bruick et al., *Impacts of Climate Change on Black Populations in the United States*, McKinsey Inst. for Black Econ. Mobility (Nov. 20, 2023), https://www.mckinsey.com/bem/our-insights/impacts-of-climate-change-on-black-populations-in-the-united-states.

18. *See* Ana Isabel Baptista et al., *Landscape Assessment of the U.S. Environmental Justice Movement: Transformative Strategies for Climate Justice*, 16 Env't Just. 111 (2023), *available at* https://www.liebertpub.com/doi/10.1089/env.2021.0075.
19. Wikipedia, *Climate Justice*, https://en.m.wikipedia.org/wiki/Climate_justice (last edited Feb. 22, 2024).
20. *See* NRDC, *The Environmental Justice Movement* (Aug. 22, 2023), https://www.nrdc.org/stories/environmental-justice-movement.
21. *See* Josh Gabbatiss & Ayesha Tandon, *In-Depth Q&A: What Is "Climate Justice"?*, Carbon Brief (Oct. 4, 2021), https://www.carbonbrief.org/in-depth-qa-what-is-climate-justice (providing, among other things, a comprehensive discussion of the Climate Justice Movement).
22. *See* U.S. EPA, *Climate Equity*, https://www.epa.gov/climateimpacts/climate-equity (last updated Jan. 2, 2024).
23. U.S. EPA, Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts (2021) (EPA 430-R-21-003), https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf.

> Of the four socially vulnerable groups examined, minorities are most likely to currently live in areas where the analyses project the highest levels of climate change impacts with 2°C of global warming or 50 [centimeters] of global sea level rise.
>
> - Black and African American individuals are 40% more likely than non-Black and non-African American individuals to currently live in areas with the highest projected increases in mortality rates due to climate-driven changes in extreme temperatures. In addition, Black and African American individuals are 34% more likely to live in areas with the highest projected increases in childhood asthma diagnoses due to climate-driven changes in particulate air pollution.
> - Hispanic and Latino individuals are 43% more likely than non-Hispanic and non-Latino individuals to currently live in areas with the highest projected labor hour losses in weather-exposed industries due to climate-driven increases in high-temperature days. Hispanic and Latino individuals are also 50% more likely to live in coastal areas with the highest projected increases in traffic delays from climate-driven changes in high-tide flooding.
> - American Indian and Alaska Native individuals are 48% more likely than non-American Indian and non-Alaska Native individuals to currently live in areas where the highest percentage of land is projected to be inundated due to sea level rise. American Indian and Alaska Native individuals are also 37% more likely to live in areas with the highest projected labor hour losses in weather-exposed industries due to climate-driven increases in high-temperature days.
> - Asian individuals are 23% more likely than non-Asian individuals to currently live in coastal areas with the highest projected increases in traffic delays from climate-driven changes in high-tide flooding.[24]

For purposes of this Article, we concur with the Agency that the concept of equity[25] is at the heart of climate justice because Indigenous communities, and other minority and/or low-income communities, will continue to be disproportionately affected as climate change persists. Climate equity, according to EPA, is the goal of recognizing and addressing the unequal burdens made worse by climate change, while ensuring that all people share the benefits of climate protection efforts.[26] We will point out, based upon the complaints that have been filed by states in climate justice litigation against oil and gas corporations, that those communities face a greater vulnerability to the adverse impacts of climate change.

We will highlight in the conclusion that the health of Indigenous populations is adversely affected by the consequences of climate change regarding water-related illnesses; mental health effects; food system impacts; and respiratory illnesses, according to the Agency.[27] Climate-related hazards also threatened the health of an Indigenous population in Alaska, leading to the first climate justice lawsuit in the United States.

II. *Kivalina*—The First Climate Justice Lawsuit in the United States

Arctic temperatures are rising at twice the rate of the global average, resulting in violent ocean storms, flooding, and erosion.[28] The native village of Kivalina, a federally recognized Indian tribe, and the city of Kivalina, an Alaskan municipality (jointly referred to as "Kivalina"), sit on a narrow six-mile barrier island between the Chukchi Sea and the Kivalina River. Once guarded from winter storms by sea ice, the Alaskan Iñupiaq community on Kivalina face the rising waters of storm surges, coastal erosion, and patchy sea ice that makes subsistence hunting and fishing dangerous and difficult.

The eroding island threatens the village's infrastructure and housing as global warming melts the sea ice that once protected the village, threatening the village's existence and forcing the community to grapple with the difficult decision of whether to remain in their ancestral homeland, despite the increasing threats posed by climate change, or to move to a more stable area, a situation complicated by issues of cultural preservation, social ties, economic factors, and logistical challenges. No road connects Kivalina to mainland Alaska. Its residents are among the poorest people in the United States. Relocation poses an estimated cost between $95 million to $400 million, according to the Alaska District of the U.S. Army Corps of Engineers and the U.S. Government Accountability Office.[29]

Erosion and sea-level rise have damaged critical infrastructure such as roads, buildings, and sewage systems, creating hazardous living conditions and disrupting the daily existence of Kivalina's residents. Vulnerability is heightened by Kivalina's remote location, limited resources, and the costliness of infrastructure repairs and upgrades. Degradation is not restricted to the coast. Thawing permafrost

24. *Id.*
25. *See* Rosa Manzo, *Climate Equity or Climate Justice? More Than a Question of Terminology*, IUCN (Mar. 19, 2021), https://www.iucn.org/news/world-commission-environmental-law/202103/climate-equity-or-climate-justice-more-a-question-terminology.
26. U.S. EPA, *supra* note 22.
27. *See* U.S. EPA, *Climate Change and the Health of Indigenous Populations*, https://www.epa.gov/climateimpacts/climate-change-and-health-indigenous-populations (last updated Dec. 27, 2023).
28. *See* F. Stuart Chapin III et al., *Alaska*, *in* Climate Change Impacts in the United States: The Third National Climate Assessment 514 (J.M. Melillo et al. eds., U.S. Global Change Research Program 2014), https://nca2014.globalchange.gov/downloads/high/NCA3_Full_Report_22_Alaska_HighRes.pdf.
29. Michael Brubaker et al., Climate Change in Kivalina, Alaska (2011), https://anthc.org/wp-content/uploads/2016/01/CCH_AR_012011_Climate-Change-in-Kivalina.pdf.

has led stream banks of the Wulik River to wash sediment into the community's water supply.[30]

Ice cellars used for food storage have melted at unusual times of the year. Food security has been impacted, diminishing fish on the Wulik River, changing caribou migration routes due to reduced availability of berries and greens, and shrinking sea ice, making hunting sea mammals increasingly difficult, leaving more residents facing hunger. Heavy snowstorms have led to increased extended school absences and have coincided with increasing visits to health clinics to address anxiety and injury from weather. These disruptions not only impact the physical well-being of the community, but also have broader cultural and social implications.

On February 26, 2008, consequently, the native village of Kivalina and the city of Kivalina filed a climate justice lawsuit in the federal District Court for Northern California against nine fossil fuel companies (ExxonMobil Corporation; BP P.L.C.; BP America, Inc.; BP Products North America, Inc.; Chevron Corporation; Chevron U.S.A., Inc.; ConocoPhillips Company; Royal Dutch Shell PLC; and Shell Oil Company), one coal company (Peabody Energy Corporation), and 14 electric power companies (AES Corporation; American Electric Power Company, Inc. (AEP); American Electric Power Services Corporation; DTE Energy Company; Duke Energy Corporation; Dynegy Holdings, Inc.; Edison International; MidAmerican Energy Holdings Company; Mirant Corporation; NRG Energy; Pinnacle West Capital Corporation; Reliant Energy, Inc.; Southern Company; and Excel Energy, Inc.).[31]

Kivalina was represented by two nonprofit legal organizations—the Native American Rights Fund, and the Center on Race, Poverty, and the Environment. Six additional law firms' attorneys provided the team with considerable tort law experience to develop and prosecute the first climate justice lawsuit in federal court seeking damages from the fossil fuel industry for loss of property due to climate change, including monetary damages and a declaratory judgment for any future expenses and damages incurred in connection with global warming.

The complaint alleged a breach of the federal common law of public nuisance[32] for the unreasonable discharge of greenhouse gases leading to global warming. The lawsuit claimed damages due to the defendant companies' contributions to global warming based upon the federal common law of public nuisance. The lawsuit alleged, in sum, that the top global warming polluters in the Unites States are substantially contributing to global warming, and the resulting damage to Kivalina.

The plaintiffs also accused some defendants of civil conspiracy and concerted action. The plaintiffs claimed that the defendants were "conspiring to mislead the public about the science of global warming"—a civil conspiracy charge reminiscent of public nuisance complaints raised against Big Tobacco[33] and the suppression of health data.[34] The plaintiffs alleged:

> Defendants ExxonMobil, AEP, BP America Inc., Chevron Corporation, ConocoPhillips Company, Duke Energy, Peabody, and Southern ("Conspiracy Defendants") have engaged in agreements to participate in an unlawful act or a lawful act in an unlawful means. The Conspiracy Defendants have engaged in agreements to participate in the intentional creation, contribution to and/or maintenance of a public nuisance, global warming. The Conspiracy Defendants participated and/or continue to participate in an agreement with each other to mislead the public with respect to the science of global warming and to delay public awareness of the issue—so that they could continue contributing to, maintaining and/or creating the nuisance without demands from the public that they change their behavior as a condition of further buying their products. At all times the Conspiracy Defendants were concerned that the public would become concerned by global warming and that the growing concern would force a change in the Conspiracy Defendants' behavior which would be costly. Delaying these costs was the major objective of the conspiracies described herein.[35]

On September 30, 2009, District Court Judge Saundra B. Armstrong issued an order granting the defendants' motion to dismiss for lack of subject matter jurisdiction.[36] The court held that the question of how best to address climate change was a political question not appropriate for a federal court. A second issue was whether future plaintiffs must establish geographic proximity to greenhouse gas polluters to establish causality. The court concluded the plaintiffs must prove "use of their property is negatively impacted by virtue of their proximity to the discharge." To do otherwise "suggests that every inhabitant on this

30. Millie Hawley, *Relocating Kivalina*, U.S. Climate Resilience Toolkit (June 21, 2023), https://toolkit.climate.gov/case-studies/relocating-kivalina.

31. Complaint for Damages, Native Vill. of Kivalina v. ExxonMobil Corp., No. 4:08-cv-01138-SBA (N.D. Cal. Feb. 26, 2008), https://climatecasechart.com/wp-content/uploads/case-documents/2008/20080226_docket-408-cv-01138-SBA_complaint.pdf.

32. The common law of public nuisance arose in 12th-century England as a criminal writ brought by a sovereign to protect the exercise of rights common to his subjects. The federal common law of public nuisance provides an example of a legal rule in development in the United States. In short, this legal doctrine allows parties to file a lawsuit in federal court to stop pollution. *See* Paul J. Wahlbeck, *The Development of a Legal Rule: The Federal Common Law of Public Nuisance*, 32 Law & Soc'y Rev. 613 (1998).

33. According to Wikipedia, "Big Tobacco" is a name used to refer to the largest companies in the tobacco industry. Wikipedia, *Big Tobacco*, https://en.wikipedia.org/wiki/Big_Tobacco (last edited Jan. 30, 2024).

34. On August 17, 2006, the U.S. government and the American Cancer Society with other plaintiffs won a major court case against Big Tobacco in the U.S. District Court for the District of Columbia. District Court Judge Gladys Kessler found tobacco companies guilty of lying to the American public about the deadly effects of cigarettes and secondhand smoke. United States v. Philip Morris USA, Inc., No. 99-2496 (GK) (D.D.C. 2006), https://assets.tobaccofreekids.org/content/what_we_do/industry_watch/doj/FinalOpinion.pdf.

35. Complaint for Damages ¶ 269, Native Vill. of Kivalina v. ExxonMobil Corp., No. 4:08-cv-01138-SBA (N.D. Cal. Feb. 26, 2008).

36. Order Granting Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction, Native Vill. of Kivalina v. ExxonMobil Corp., No. C-08-1138-SBA, 39 ELR 20236 (N.D. Cal. Sept. 30, 2009), https://climatecasechart.com/wp-content/uploads/case-documents/2009/20090930_docket-408-cv-01138-SBA_order.pdf.

Earth is within the zone of discharge, thereby effectively eliminating the issue of geographic proximity in any case involving harms caused by global warming." Importantly, the court dismissed the state-law nuisance claims without prejudice, meaning that the plaintiffs could have pursued their lawsuit in a state court. Arguably, a state common-law claim for nuisance for greenhouse gases would be viable.[37]

On September 21, 2012, the U.S. Court of Appeals for the Ninth Circuit affirmed dismissal of the lawsuit.[38] The appellate court held that the plaintiffs could not sue under a theory of the federal common law of public nuisance given that it had been displaced by the Clean Air Act (CAA),[39] which does not provide monetary damages as a remedy, preventing Kivalina from seeking damages in a lawsuit brought in federal court. On February 25, 2013, Kivalina filed a petition for a writ of certiorari[40] with the Supreme Court, but the Court denied the petition without comment on May 20, 2013. According to the U.S. Climate Resilience Toolkit case study "Relocating Kivalina," the native village of Kivalina has not been relocated yet by federal, state, regional, and local partners, and continues to buy time.[41]

Thus, Kivalina lost the first climate justice case in federal court in the United States seeking damages from the fossil fuel industry for the loss of property due to climate change, raising questions as to the appropriateness of such claims being filed in federal courts.[42] Subsequently, an article in an American Bar Association (ABA) publication questioned the efficacy of filing climate change tort cases in federal court in the future:

> The decision in *Kivalina*, given its heavy reliance on *AEP*,[43] might be viewed as simply affirming existing law, as opposed to announcing any new legal principle. But the panel's holding, even if pre-ordained, is nevertheless important: it confirms that the displacement analysis of *AEP* applies to all federal common law "climate change" claims, whatever the nature of the relief sought. That holding, assuming it does not categorically bar all such claims, at the least presents another large hurdle to future plaintiffs who would seek to address issues relating to greenhouse gases and climate change through federal common law litigation, rather than the legislative and regulatory process.[44]

Arguably, Rhode Island, Minnesota, and the District of Columbia learned a valuable lesson from the *Kivalina* lawsuit—file the lawsuit in state court based solely on state-law claims to avoid the argument that climate change should be addressed by "Congress, the President, or the voters at large" since it is a political question, and because "federal courts cannot provide a remedy."[45]

III. Rhode Island, Minnesota, and the District of Columbia

Across the globe, climate change litigation challenges governments, drawing links between human suffering and the incompatibility of their policies with the Paris Agreement[46]

37. *See* F. William Brownell, *State Common Law of Public Nuisance in the Modern Administrative State*, 24 Nat. Res. & Env't 34 (2010), *available at* https://www.huntonak.com/images/content/3/6/v3/3638/Common-Law-Public-Nuisance-4.10.pdf.
38. Native Vill. of Kivalina v. ExxonMobil Corp., No. 4:08-cv-01138-SBA, 42 ELR 20195 (9th Cir. Sept. 21, 2012), https://climatecasechart.com/wp-content/uploads/case-documents/2012/20120921_docket-09-17490_opinion.pdf.
39. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618. The CAA is the primary federal air quality law, which is intended to reduce and control air pollution nationwide and to reduce the adverse impacts of air pollution on the environment and public health. *See* U.S. EPA, *Evolution of the Clean Air Act*, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act (last updated Nov. 21, 2023). *See also* U.S. EPA, *Summary of the Clean Air Act*, https://www.epa.gov/laws-regulations/summary-clean-air-act (last updated Sept. 6, 2023).
40. Native Vill. of Kivalina v. ExxonMobil Corp., No. 12-1072 (U.S. Feb. 25, 2013), https://climatecasechart.com/wp-content/uploads/case-documents/2013/20130225_docket-12-1072_petition-for-writ-of-certiorari-1.pdf.
41. The U.S. Climate Resilience Toolkit case study "Relocating Kivalina" states: "In 2000, the community settled on a nearby—and potentially safer—site for relocation, dubbed Kiniktuuraq. However, investigations by the U.S. Army Corps of Engineers determined that Kiniktuuraq could also fall victim to climate change impacts over time. Thus, the search for a new home for Kivalina residents continues." Moreover, it states:
    > Kivalina IRA President Millie Hawley says that this is a process that "belongs to the people of Kivalina. We'll visualize where we're at, where we can be, and how we can move in that direction. There are 229 Tribes in Alaska. Five villages have the same climate change issues, some worse than ours. If you do this project in Kivalina, you do this work for them. They would all benefit from this in their villages."

    Hawley, *supra* note 30.
42. Although the native village of Kivalina was unsuccessful in its claim, it along with four other Indian tribes (the Isle de Jean Charles Band of Biloxi-Chitimacha-Choctaw Indians of Louisiana, the Point-au-Chien Indian Tribe, Grand Caillou/Dulac Band of Biloxi-Chitimacha-Choctaw Tribe, and the Atakapa-Ishak Chawasha Tribe of the Grand Bayou Indian Village) submitted a complaint to the United Nations on January 16, 2020, alleging that the U.S. government and the states of Alaska and Louisiana violated their human rights in failing to address climate displacement. The complaint asks that special rapporteurs investigate and recommend that the U.S. government, Alaska, and Louisiana address climate displacement. On September 15, 2020, the special rapporteurs communicated the case to the U.S. government, detailed the allegations, sought clarification on the measures taken by the government, and included a reference annex on international human rights law. *See* Climate Change Litigation Databases, *Rights of Indigenous People in Addressing Climate-Forced Displacement*, https://climatecasechart.com/non-us-case/rights-of-indigenous-people-in-addressing-climate-forced-displacement/ (last visited Feb. 23, 2024).
43. American Elec. Power Co. v. Connecticut, 564 U.S. 410, 41 ELR 20210 (2011) (holding that federal common claims seeking emissions caps against "major" sources of greenhouse gases are displaced by the CAA).
44. Quin M. Sorenson, *Native Village of Kivalina v. ExxonMobil Corp.: The End of "Climate Change" Tort Litigation?*, A.B.A. Trends (Jan. 1, 2013), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2012_13/january_february/native_village_kivalina_v_exxonmobil_corp_end_climate_change_tort_litigation/.
45. Juliana v. United States, No. 18-36082, 50 ELR 20025 (9th Cir. Jan. 17, 2020), https://climatecasechart.com/wp-content/uploads/case-documents/2020/20200117_docket-18-36082_opinion.pdf.
46. The Paris Agreement was adopted at the 21st Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change on December 12, 2015, was signed on October 5, 2016, and entered into force on November 4, 2016. The Paris Agreement's central aim was to strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius. The three goals of the Paris Agreement were to provide financing to developing countries to mitigate climate change, strengthen resilience, and enhance abilities to adapt to climate impacts. Paris Agreement to the United Nations Framework Convention on

goals or with commitments to reach net-zero harmful emissions later in the decade, as well as with the risk of greenwashing by private companies.[47] But for purposes of this Article, climate justice litigation filed by a state (or tribe) in state court against a fossil fuel company recognizes that climate change has and will continue to disproportionately affect the residents of sacrifice zones. Thus, climate change litigation has become a strategic tool for a state to push for climate justice by including compensation for losses incurred by all communities, including minority and/or low-income communities.

A. *Rhode Island v. Chevron Corp.*

In July 2018, in the first case brought by a state against fossil fuel companies in the United States in state court, Peter F. Kilmartin, then-attorney general of Rhode Island, sued 21 fossil fuel companies in Rhode Island Superior Court.[48] The companies are Chevron Corporation; Chevron U.S.A. Inc.; ExxonMobil Corporation; BP P.L.C.; BP America, Inc.; BP Products North America, Inc.; Royal Dutch Shell PLC; Motiva Enterprises, LLC; Shell Oil Products Company LLC; Citgo Petroleum Corporation; ConocoPhillips; ConocoPhillips Company; Phillips 66; Marathon Oil Company; Marathon Oil Corporation; Marathon Petroleum Corporation; Marathon Petroleum Company LP; Speedway LLC; Hess Corporation; Lukoil Pan Americas, LLC; and Getty Petroleum Marketing, Inc.

Attorney General Kilmartin alleged that the 21 companies were directly responsible for the release of hundreds of gigatons of carbon dioxide (CO_2) emissions between 1965 and 2015, which, consequently, caused the harms that Rhode Island had experienced and will continue to experience in the future. The severe harms included substantial sea-level rise, more frequent and relentless flooding, extreme precipitation events, and heat and drought. The complaint specifically discussed the adverse effects of climate change on Rhode Island's disadvantaged communities with respect to the adverse public health impacts of anthropogenic global warming.[49]

Attorney General Kilmartin asserted eight state-law-based legal claims against the defendants for producing, promoting, and marketing their fossil fuel products, while concealing the known hazards of those products. The eight claims are (1) public nuisance,[50] (2) strict liability for failure to warn,[51] (3) strict liability for design defect,[52] (4) negligent

Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, https://unfccc.int/sites/default/files/resource/parisagreement_publication.pdf.

47. *See* Inger Andersen, *In the Fight for Climate Justice, Litigation Is Taking the Lead*, Hill (July 27, 2023), https://thehill.com/opinion/energy-environment/4118516-in-the-fight-for-climate-justice-litigation-is-taking-the-lead/.

48. Complaint, State v. Chevron Corp., No. PC-2018-4716 (R.I. Super. Ct. filed July 2, 2018), https://climatecasechart.com/wp-content/uploads/case-documents/2018/20180702_docket-PC-2018-4716_complaint.pdf.

49. The complaint stated:

> Sea level rise, increased air temperatures and changes to the hydrologic cycle associated with anthropogenic climate change have resulted and will result in public health impacts for the state of Rhode Island.
>
> Extreme weather events, such as hurricanes and inland flooding, have immediate health consequences, including danger to personal safety and longer-term consequences, including social and economic disruption, population displacement, and mental trauma.
>
> Extreme heat-induced public health impacts in the State will result in increased risk of heat-related illnesses such as heat exhaustion and dehydration, increased hospitalizations, and death. Increased heat also intensifies the photochemical reactions that produce smog, ground level ozone, and fine particulate matter ($PM_{2.5}$), which contribute to and exacerbate respiratory disease in children and adults. Increased heat and CO_2 enhance the growth of plants that produce pollen, which are associated with allergies.
>
> In addition, the warming climate system will create disease-related public health impacts in the State, including but not limited to, increased incidence of cyanobacteria blooms (toxic alga) in aquatic systems and vector-borne disease with migration of animal and insect disease vectors.
>
> Public health impacts of these climatological changes are likely to be disproportionately borne by communities made vulnerable by geographic, racial, or income disparities.

Id. paras. 88-93.

Moreover:

> The State has incurred and will continue to incur expenses in planning, preparing for, and treating the public health impacts associated with anthropogenic global warming. Rhode Islanders are more likely to seek emergency on hotter days. On days when the temperatures reach 90°F, hospitalizations in the State for heat and dehydration increase 60% amongst those aged between 18 and 64, compared to the hospitalization rate on 80°F days. Climate models predict that ambient surface temperature will increase by an average of 1.6°F by 2022, resulting in 378 more emergency department visits due to extreme heat in the months of April through October. Vulnerable populations such as the disabled, elderly, children, communities of color, and low income are more likely to suffer health effects from high air temperatures.

Id. para. 213.

50. The complaint stated:

> The public nuisance caused, contributed to, maintained, and/or participated in by Defendants has caused and/or imminently threatens to cause substantial injury to the environment of the State, in which the public has interests represented by and protected by the State in its *parens patriae* capacity. The public nuisance has also caused and/or imminently threatens to cause substantial injury to property directly owned by the State. In particular, higher sea level, more frequent and extreme droughts, more frequent and extreme precipitation events, more frequent and extreme heat waves, and the associated consequences of those physical and environmental changes . . . .

Id. para. 231.

51. The complaint explained:

> Throughout the times at issue, Defendants individually and collectively had actual and/or constructive knowledge, in light of the scientific knowledge generally accepted at the time, that fossil fuel products release greenhouse gases into the atmosphere that inevitably cause, *inter alia,* global warming, sea level rise, more frequent and extreme droughts, more frequent and extreme precipitation events, more frequent and extreme heat waves, and the associated consequences of those physical and environmental changes.

Id. para. 242.

52. According to the complaint:

> Defendants, and each of them, extracted raw fossil fuel products, including crude oil, coal, and natural gas from the Earth and placed those fossil fuel products into the stream of commerce; and owed a duty to all persons whom Defendants' fossil fuel products might foreseeably harm, including Plaintiff, not to market any product which is unreasonably dangerous for its intended use.

Id. para. 252.

design defect,[53] (5) negligent failure to warn,[54] (6) trespass,[55] (7) impairment of public trust resources,[56] and (8) violation of Rhode Island's Environmental Rights Act.[57]

Rhode Island sought judgment against the defendants to recover costs from severe storms and drought to considerable sea-level rise and coastal flooding for: (1) compensatory damages in an amount according to proof; (2) equitable relief, including abatement of the nuisances complained of; (3) reasonable attorney fees as permitted by law; (4) punitive damages; (5) disgorgement of profits; (6) costs of the lawsuit; and (7) for such and other relief as the court may deem proper.

On July 13, 2018, defendant Shell Oil Products Company, LLC filed its notice of removal action, and removed the lawsuit to federal court. Shell argued that the district court had federal question jurisdiction because Rhode Island's claims should be governed by federal common law since they "[i]mplicate uniquely federal interests" such as international relations, national security, and nationwide economic development. Moreover, Shell argued that federal law completely preempts Rhode Island's state-law claims. Additionally, Shell argued that the district court had original jurisdiction under the Outer Continental Shelf Lands Act (OCSLA), the federal officer removal statute, and the federal enclave doctrine.[58]

On July 22, 2019, District Court Chief Judge William E. Smith remanded the case back to state court by finding, among other things:

1. The federal common law could not completely preempt the state's public nuisance claim "absent congressional say-so."
2. Neither the CAA nor the foreign affairs doctrine completely preempt the state-law claims.
3. The arguments regarding OCSLA, the federal enclave doctrine, the federal officer removal statute, and so on, are not persuasive.[59]

In short, Chief Judge Smith found no federal jurisdiction under the various statutes and doctrines asserted by the defendants. The defendants appealed the district court's remand decision to the U.S. Court of Appeals for the First Circuit.

On October 29, 2020, the First Circuit affirmed Chief Judge Smith's decision to remand the case back to state court.[60] The appellate court concluded, among other things, that the federal officer removal doctrine did not apply in the case. State court proceedings, however, were put on hold on August 13, 2020, pending the Supreme Court's consideration of personal jurisdiction in unrelated climate litigation cases.[61] On May 17, 2021, the Supreme Court vacated and remanded the First Circuit's affirmance of the remand order after determining in the *Mayor & City Council of Baltimore v. BP P.L.C.*[62] climate change case that federal appellate courts have jurisdiction to consider appeals on all grounds for removal when the federal officer removal statute is one basis for removal.[63] On May 23, 2022, the First Circuit again affirmed the

53. The complaint stated:
> Defendants knew or should have known of the climate effects inherently caused by the normal use and operation of their fossil fuel products, including the likelihood and likely severity of global and local sea level rise and its consequences, and including injuries to Plaintiff, its citizens, and its natural resources, as described herein.

Id. para. 265.

54. "Defendants, and each of them, at all times had a duty to issue adequate warnings to Plaintiff, the public, consumers, and public officials of the reasonably foreseeable or knowable risks posed by their fossil fuel products." *Id.* para. 274.

55. "The State of Rhode Island did not give permission for Defendants, or any of them, to cause floodwaters, extreme precipitation, landslides, saltwater, and other materials to enter its property as a result of the use of Defendants' fossil fuel products." *Id.* para. 288.

56. According to the complaint:
> The General Assembly has repeatedly declared that coastal resources of the State, plant and animal life within the State, and the State's watershed are critical natural resources inuring to the benefit of the public. The General Assembly has thus found and declared that "the coastal resources of Rhode island, a rich variety of natural, commercial, industrial, recreational, and aesthetic assets, are of immediate and potential value to the present and future development of this state," and that "it shall be the policy of this state to preserve, protect, develop, and, where possible, restore the coastal resources of the state for this and succeeding generations." R.I. Gen. Laws §§46-6-1-2.5; 46-23-1(a)(2).

Id. para. 297.

57. The state claimed:
> The General Assembly has further found and declared that "each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state," and that "it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction." R.I. Gen. Laws §10-20-1.

Id. para. 307.

58. Notice of Filing of Notice of Removal of Action to Federal Court, State v. Chevron Corp., No. 1:18-cv-00395-WES-LDA (R.I. Super. Ct. July 13, 2018), https://climatecasechart.com/wp-content/uploads/case-documents/2018/20180713_docket-118-cv-00395_notice.pdf.

59. Opinion and Order, Rhode Island v. Chevron Corp., No. 1:18-cv-00395-WES-LDA, 49 ELR 20126 (D.R.I. July 22, 2019), https://climatecasechart.com/wp-content/uploads/case-documents/2019/20190722_docket-118-cv-00395_opinion-and-order-1.pdf.

60. Opinion, Rhode Island v. Chevron Corp., No. 19-1818 (1st Cir. Oct. 29, 2020), https://climatecasechart.com/wp-content/uploads/case-documents/2020/20201029_docket-19-1818_opinion.pdf.

61. Decision, State v. Chevron Corp., No. PC-2018-4716 (R.I. Super. Ct. Aug. 13, 2020), https://climatecasechart.com/wp-content/uploads/case-documents/2020/20200813_docket-PC-2018-4716_decision.pdf.

62. 141 S. Ct. 1532, 51 ELR 20086 (2021), https://www.supremecourt.gov/opinions/20pdf/19-1189_p86b.pdf. The Supreme Court, in a 7-1 opinion by Justice Neil Gorsuch, held that where defendant energy companies premised 28 U.S.C. §1447(d) removal in part on the federal officer removal statute, §1442, the Fourth Circuit erred in holding that it lacked jurisdiction to consider all grounds for removal rejected by the district court. Justice Sonia Sotomayor filed a dissenting opinion. Justice Samuel Alito took no part in the consideration or decision of this case. The judgment was issued on June 18, 2021.

63. *See* Benjamin M. Barczewski, Congressional Research Service, Climate Liability Suits: Is There a Path to Federal Court? (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10805/2 (discussing the effect of the Supreme Court's decision in the *BP* case and removal jurisdiction, and how the federal courts of appeals now have the additional authority to review all grounds for removal so long as the defendant raised either the federal officer removal or civil rights arguments in the petition for removal).

district court order remanding the climate change lawsuit back to state court.[64]

On April 24, 2023, the Supreme Court issued an order denying the fossil fuels companies' petition for certiorari on jurisdictional issues in *Shell Oil Products v. Rhode Island*.[65] The fossil fuel companies had asked the Supreme Court to consider whether there was federal jurisdiction over state-law claims. Thus, the Court cleared the way for the Rhode Island lawsuit to proceed.[66] At the time of the Supreme Court's denial of certiorari, "[t]wenty appellate judges across six circuit courts, 13 federal district judges, and the U.S. Department of Justice have all agreed the cases should be heard in state courts."[67]

On April 28, 2023, Rhode Island Superior Court Judge William E. Carnes Jr. issued a ruling finding that there was a sufficient alleged connection and granting the state's motion to compel jurisdictional discovery into defendants' contacts with Rhode Island, as well as the defendants' activities and the injuries therefrom.[68] Judge Carnes observed that the notion of liability and compensation for the loss and damage caused by industrial greenhouse gas emissions to countries around the world was under scrutiny at the United Nations Climate Change Conference.[69] The court found no compelling argument that would prevent the parties from engaging in limited jurisdictional discovery, which could help address the question raised at the United Nations Climate Change Conference: "who pays for the damage and loss this State has had to incur from climate change effects?"[70]

On June 7, 2023, alleging bias in Judge Carnes' statement, the defendants filed the memorandum of law in support of their motions to clarify and strike portions of the court's April 28, 2023, decision.[71] The defendants wanted the court to "clarify the scope of discovery and remove the Decision's references to and reliance on the Articles."[72] Judge Carnes had, in his April 2023 jurisdictional discovery ruling, conducted original research, referring in the decision to viewpoints from the United Nations Climate Change Conference and two news articles from the Associated Press, to which the defendants had no opportunity to respond.

On September 8, 2023, Judge Carnes issued an order stating that he would not base any findings in the case on the articles cited in the jurisdictional discovery decision, and would only base the court's findings on evidence once it was properly presented in the proceedings.[73] This climate justice case is moving toward a jury trial in Rhode Island Superior Court.

B. Minnesota v. American Petroleum Institute

On June 24, 2020, Keith Ellison, the attorney general of Minnesota, filed a lawsuit against the American Petroleum Institute, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Koch Industries, Inc., Flint Hills Resources LP, and Flint Hills Resources Pine Bend, LLC in state court. Minnesota's lawsuit alleged that the defendants caused a "climate-change crisis" in the state through a "campaign of deception" to mislead consumers about the science of climate change and by failing to disclose their knowledge that fossil fuel products cause global warming.[74] The complaint was filed in Ramsey County District Court, Second Judicial District of Minnesota.

Attorney General Ellison alleged that the fossil fuel defendants understood since the 1970s the devastating effects that their products would have on the climate, including in Minnesota, but engaged in a highly effective public relations campaign to mislead Minnesotans about the consequences of using their fossil fuel products. During this period, Minnesota suffered billions of dollars of economic harm due to climate change, while the defendants reaped billions in profits by selling their products.

The complaint specifically discussed the adverse impacts of climate change on Minnesota's vulnerable communities

64. The appellate court concurred with the rulings of other courts, asserting that there was no federal jurisdiction over Rhode Island's claims. This decision was based on, among other things, the finding that, even if matters like regulating interstate pollution, advancing energy independence, and crafting climate change treaties were considered exclusive federal interests, the oil companies did not meet the second condition for establishing federal common law. This condition requires a "significant conflict" to exist between a federal policy or interest and the application of state law. Further, it was noted that statutes such as the CAA and the Clean Water Act (CWA) had supplanted any previous federal common law that may have existed. Rhode Island v. Shell Oil Prods. Co., No. 19-1818, 52 ELR 20059 (1st Cir. May 23, 2022), https://climatecasechart.com/wp-content/uploads/case-documents/2022/20220523_docket-19-1818_opinion.pdf.

65. No. 22-524 (U.S. Apr. 24, 2023), https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230424_docket-22-361_order-list-1.pdf.

66. *See* Mary Serreze, *US Supreme Court Declines to Hear R.I. Climate Lawsuit*, Providence Bus. First (Apr. 24, 2023), https://www.bizjournals.com/rhodeisland/news/2023/04/24/supreme-court-declines-ri-climate-lawsuit.html. *See* Patrick Parenteau & John Dernbach, *More Than Two Dozen Cities and States Are Suing Big Oil Over Climate Change—They Just Got a Boost From the US Supreme Court*, Conversation (May 23, 2023), https://theconversation.com/more-than-two-dozen-cities-and-states-are-suing-big-oil-over-climate-change-they-just-got-a-boost-from-the-us-supreme-court-205009.

67. Sanjali DeSilva, *Supreme Court Rejects Fossil Fuel Companies' Petitions to Hear Appeals in Climate Lawsuits*, Union Concerned Scientists (Apr. 24, 2023), https://www.ucsusa.org/about/news/supreme-court-rejects-fossil-fuel-companies-petitions-hear-appeals-climate-lawsuits.

68. State v. Chevron Corp., No. PC-2018-4716 (R.I. Super. Ct. Apr. 28, 2023), https://www.courts.ri.gov/Courts/SuperiorCourt/SuperiorDecisions/18-4716-05-01-23.pdf.

69. *Id.* at 8.

70. *Id.* at 9.

71. Defendants' Memorandum of Law in Support of Their Motion to Clarify and Strike Portions of the Court's April 28, 2023, Decision, State v. Chevron Corp., No. PC-2018-4716 (R.I. Super. Ct. filed June 7, 2023), https://subscriber.politicopro.com/eenews/f/eenews/?id=00000189-8e9c-d9b3-abcf-cebefdec0000.

72. *Id.*

73. *See* John O'Brien, *Judge in R.I. Climate Change Case Responds to Bias Arguments*, Legal Newsline (Sept. 8, 2023), https://legalnewsline.com/stories/649552951-judge-in-r-i-climate-change-case-responds-to-bias-arguments.

74. Complaint, State v. American Petroleum Inst., No. 62-CV-3837 (Minn. Dist. Ct. filed June 24, 2020), https://climatecasechart.com/wp-content/uploads/case-documents/2020/20200624_docket-62-CV-20-3837_complaint.pdf.

with respect to (1) rising temperatures,[75] (2) public health,[76] and (3) planning costs.[77] It asserted legal claims under several state laws:

1. Minnesota Consumer Fraud Act §325F.69 by engaging "in a civil conspiracy with each other, with organizations not directly engaged in the sale of fossil-fuel products, and with individuals to mislead the public and decision makers about the consequences of using their products."
2. Claims for strict and negligent liability for failure "to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in its use. Where the manufacturer has actual or constructive knowledge of danger to users, the manufacturer has a duty to give warning of such dangers."
3. Claims for common-law fraud and "misrepresentations of material facts about the certainty and consensus about the science of climate change, the role their products played in causing climate change, the consequences of climate change, and the need to act quickly to mitigate climate change and the harms that it would bring."
4. Minnesota Statutes §325D.44, subdivision 1 "by engaging in deceptive acts and trade practices."
5. Minnesota's False Statement in Advertising Act §325F.67 "by making, publishing, disseminating, circulating, and/or placing before the public advertisements regarding fossil fuels containing material assertions, representations, and/or statements of facts which were untrue, deceptive, and/or misleading."[78]

Among other things, Minnesota requested the court to compel the defendants and their agents to make all their climate change-related research public. Minnesota also sought the implementation of a public education campaign in the state to address the issue of climate change, to be funded by the defendants. Further, it sought civil penalties, restitution to address the significant harm and damage caused to the state due to the defendants' unlawful actions, and the disgorgement of profits gained through such actions. Additionally, Minnesota asked the court to grant attorney fees and cover the costs related to the investigation and litigation.[79]

On July 27, 2020, the fossil fuel defendants filed a notice of removal action with the federal district court in Minnesota and removed the climate case to federal court.[80] In sum, the defendant oil companies argued that the lawsuit involved complex federal statutory, regulatory, and constitutional issues that a federal court should hear, although Minnesota's case was based on state-law-based consumer protection, strict liability, and negligent failure-to-warn claims. On August 26, Attorney General Ellison filed a motion to remand to state court on the grounds that

75. The complaint stated:
> Extreme heat in urban centers like Minneapolis and St. Paul can cause dangerous living conditions. Data from the Minnesota Department of Health show that between 2000 and 2017 there were over 12,000 emergency department visits and nearly 60 deaths directly attributable to heat exposure. Those living in poverty and people of color are particularly vulnerable to extreme heat events. Additionally, "[p]regnant women exposed to high temperatures or air pollution are more likely to have children who are premature, underweight or stillborn, and African-American mothers and babies are harmed at a much higher rate than the population at large[.]"

Id. para. 140.

76. According to the complaint:
> Asthma disproportionately impacts children, women, African-Americans, and people with low incomes. Data from the Minnesota Department of Health's Asthma Program show one in 14 children and one in 13 adults currently have asthma. In Minnesota in 2014, asthma cost an estimated $669.3 million, including $614.9 million in direct medical expenses and $54.3 million in lost work days. In 2016, there were 18,200 Emergency Room visits and 1,900 hospitalizations for asthma across Minnesota. In 2017, there were 55 deaths due to asthma. . . .
>
> Vulnerable populations such as the disabled, the elderly, children, people who live alone, people of color, and less-resourced communities are more likely to suffer health effects from higher air temperatures, flooding, and air pollution.

Id. paras. 159, 160.

77. According to the state:
> The Minnesota Department of Health is planning for the likelihood that more Minnesotans will be seeking emergency help on hotter days. The State of Minnesota, through the Minnesota Department of Health and local health agencies, has provided public education to some vulnerable communities about central cooling centers where people could go for relief, and has incurred costs educating the public about what to do in extreme heat.

Id. para. 167.

78. *Id.*

79. Complaint, State v. American Petroleum Inst., No. 62-CV-3837 (Minn. Dist. Ct. filed June 24, 2020).

80. Notice of Removal, Minnesota v. American Petroleum Inst., No. 20-cv-01636-JRT-HB (D. Minn. filed July 27, 2020), https://climatecasechart.com/wp-content/uploads/case-documents/2020/20200727_docket-020-cv-01636_notice-of-removal-1.pdf. The notice stated, among other things:
> The Complaint improperly attempts to apply state law to interstate and, indeed, international activity to which federal law and only federal law applies. The policy decisions surrounding the use of fossil fuels and the threat of climate change "require consideration of competing social, political, and economic forces," as well as "economic [and] defense considerations." *Juliana v. United States*, 947 F.3d 1159, 1172 (9th Cir. 2020) (internal quotation marks and citations omitted). "[A]ny effective plan [to reduce fossil fuel emissions] would necessarily require a host of complex policy decisions entrusted . . . to the wisdom and discretion of the executive and legislative branches" of the federal government. This lawsuit thus implicates bedrock divisions of federal-state responsibility, and the claims fall squarely on the federal side. The domestic aspects of this case are governed by the Clean Air Act and Environmental Protection Agency ("EPA") regulations, and the international aspects of the case are governed by the Foreign Commerce Clause and the foreign affairs powers of the federal government. The production and sale of fossil fuels is lawful throughout the world, and many countries encourage the production of oil and gas within their borders—often going to great lengths to do so. As the United States has noted in a brief filed in a similar climate change action: "Where, as here, the Cities seek to project state law into the jurisdiction of other nations, the potential is particularly great . . . for interference with United States foreign policy." Brief for the United States, *City of Oakland v. BP p.l.c.*, 960 F.3d 570 (2020) . . . .
>
> In sum, the Complaint intrudes on the federal political branches' exclusive authority to address important issues of national and international energy and environmental policy. The balance between the use of fossil fuels and reduction of greenhouse gas emissions is an interstate and international issue, and the Attorney General's claims directly implicating this issue can be addressed only on a national level by the federal courts. Accordingly, the Complaint should be heard in this federal forum.

Id. paras. 19, 20.

removal to federal court was improper because the lawsuit did not raise any federal claims and that the Ramsey District Court is the appropriate forum for adjudicating the exclusively state-law-based claims.[81]

On March 31, 2021, District Court Chief Judge John R. Tunheim granted Minnesota's motion to remand to state court.[82] Chief Judge Tunheim found that the defendants failed to meet their burden of establishing that federal jurisdiction was warranted on any of the grounds that they asserted:

1. Federal common law related to interstate pollution, navigable waters, and foreign affairs.
2. The presence of disputed and substantial federal issues based on the defendants' interpretation of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 313-14 (2005), jurisdiction doctrine.
3. The federal officer removal statute.
4. OCSLA, which established original jurisdiction in federal courts.
5. Federal jurisdiction was appropriate because federal enclaves were implicated.
6. The Class Action Fairness Act on the theory that this climate litigation was, in actuality, a class action.
7. Diversity jurisdiction since the citizens of Minnesota were completely diverse from the defendants.[83]

Defendants appealed. On March 23, 2023, the U.S. Court of Appeals for the Eighth Circuit remanded the case back to state court.[84] The appellate court held: "Minnesota's claims are not removable under the general removal statute, the federal officer removal statute, the Outer Continental Shelf Lands Act, or the Class Action Fairness Act. The district court was correct to remand the case, so we affirm."[85] The appellate court noted that it was "joining five of its sister circuits in rejecting arguments for federal jurisdiction in climate change litigation brought by state and local governments."[86]

The defendants appealed. On January 8, 2024, the Supreme Court denied certiorari.[87] This climate justice case is moving toward a jury trial in Ramsey County District Court, Second Judicial District of Minnesota.

C. District of Columbia v. Exxon Mobil Corp.

On June 25, 2020, Karl A. Racine, then-attorney general for the District of Columbia, filed the District of Columbia's lawsuit against Exxon Mobil Corporation, ExxonMobil Oil Corporation, Royal Dutch Shell, PLC, Shell Oil Company, BP P.L.C., BP America Inc., Chevron Corporation, and Chevron U.S.A. Inc. for misleading consumers about the role their fossil fuel products played in causing global warming.[88] The complaint specifically discussed the adverse impacts of climate change on the District's disadvantaged communities with respect to sea-level rise.[89]

Attorney General Racine set forth four claims against the fossil fuel defendants for violating the District's Consumer Protection Procedures Act (CPPA)[90] by systematically and intentionally misleading District consumers about their oil and gas products' central role in causing climate change. The harms caused by climate change include increased sea-level rise; increased ocean temperatures; extreme weather, including heat and drought; damage to public infrastructure and social systems; and exacerbating economic inequality.

The complaint asserted claims under the CPPA, alleging a number of deceptive acts and practices in its marketing, promotion, and sale of fossil fuel products.[91] The District asked the court to (1) permanently enjoin the defendants from violating the CPPA; (2) order them to pay restitution or damages; (3) award civil penalties in an amount to be

81. Motion to Remand to State Court, Minnesota v. American Petroleum Inst., No. 20-cv-01636-JRT-HB (D. Minn. filed Aug. 26, 2020), https://legacy-assets.eenews.net/open_files/assets/2020/08/28/document_cw_01.pdf.
82. Memorandum Opinion and Order Granting Motion to Remand and Denying Motion to Stay, Minnesota v. American Petroleum Inst., No. 20-1636(JRT/HB), 51 ELR 20057 (D. Minn. Mar. 31, 2021), https://climatecasechart.com/wp-content/uploads/case-documents/2021/20210331_docket-020-cv-01636_memorandum-opinion.pdf.
83. *Id.*
84. Minnesota v. American Petroleum Inst., No. 21-1752, 53 ELR 20049 (8th Cir. Mar. 23, 2023), https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230323_docket-21-1752_opinion.pdf.
85. *Id.*
86. The appellate court cited the following jurisdictional cases: Rhode Island v. Shell Oil Prods. Co., L.L.C. (*Shell Oil III*), 35 F.4th 44, 52 ELR 20059 (1st Cir. 2022); City of Hoboken v. Chevron Corp., 45 F.4th 699, 52 ELR 20099 (3d Cir. 2022); Mayor & City Council of Balt. v. BP P.L.C. (*Baltimore III*), 31 F.4th 178, 52 ELR 20044 (4th Cir. 2022); County of San Mateo v. Chevron Corp. (*San Mateo III*), 32 F.4th 733, 52 ELR 20049 (9th Cir. 2022); Board of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc. (*Boulder III*), 25 F.4th 1238, 52 ELR 20020 (10th Cir. 2022). *But cf.* City of New York v. Chevron Corp., 993 F.3d 81, 51 ELR 20058 (2d Cir. 2021).
87. American Petroleum Inst. v. Minnesota, No. 23-168 (U.S. Jan. 8, 2024), https://climatecasechart.com/wp-content/uploads/case-documents/2024/20240108_docket-23-168_order-list-1.pdf.
88. Complaint, District of Columbia v. Exxon Mobil Corp., No. 2020 CA 002892 B (D.C. Super. Ct. filed June 25, 2020), https://oag.dc.gov/sites/default/files/2020-06/DC-v-Exxon-BP-Chevron-Shell-Filed-Complaint.pdf.
89. According to the complaint:

> Sea levels have also been rising as a result of climate change. Oceans have warmed, causing their volumes to expand, and glaciers and land-based ice have melted, contributing additional fresh water to the oceans' volumes and resulting in global sea level rise. Relative sea level rise in the District has been higher than global sea level rise because the local landmass in the region also has been sinking as the result of long-term land subsidence. Sea level rise is expected to continue, and even accelerate, in the future due to climate change.
>
> Located at the confluence of the Anacostia and the Potomac, two tidally influenced rivers, the District is vulnerable to inland drainage and riverine and coastal flooding. Because of global warming, the District is experiencing more frequent and extreme precipitation events and associated flooding. The District will continue to experience flooding, extreme weather, and heat waves exacerbated by climate change, with particularly severe impacts in low-income communities and communities of color.

Id. paras. 96, 97.
90. D.C. Code §§28-3901 et seq.
91. *Id.*

proven at trial; (4) award the District the costs of the lawsuit; and (5) award the District reasonable attorney fees.[92]

On July 17, 2020, the defendants filed their notice of removal action.[93] They asserted several grounds for removal: (1) that the case raised disputed and substantial federal questions; (2) that the claims arose under federal common law; (3) that the claims arose out of federal enclaves; (4) that the federal officer removal doctrine applied; (5) that the case was removable under the Class Action Fairness Act; and (6) that the diversity of citizenship created removal jurisdiction. In sum, the defendants argued that the District of Columbia's lawsuit involved complex areas of federal statutory, federal regulatory, and federal claims that a federal court should hear.

On August 17, 2020, Attorney General Racine filed a notice of motion and motion to remand to state court since the D.C. Superior Court is the appropriate forum for adjudicating exclusively District of Columbia law claims under the CPPA.[94] Further, Attorney General Racine pointed out that federal jurisdiction was improper because the District's lawsuit did not arise under the asserted federal statutes or constitutional provisions.

On November 12, 2022, District Court Judge Timothy J. Kelly determined that there was no federal jurisdiction over the CPPA and granted the District's motion to remand the case back to the D.C. Superior Court.[95] District Court Judge Kelly determined:

1. The defendant fossil fuel companies failed to show that federal common law should apply to D.C.'s claims. The court reasoned that even assuming D.C.'s claims implicated "uniquely federal" interests (e.g., interstate pollution, navigable waters of the United States, and foreign affairs), the defendants did not show a "significant conflict" between those interests and D.C.'s claims.
2. Even if federal common law applied, the well-pleaded complaint rule would bar federal jurisdiction, rejecting the suggestion that the doctrine of complete preemption provided an exception to the well-pleaded complaint rule in this case. The court noted that the Supreme Court has only recognized complete preemption in the context of federal statutes, not federal common law.
3. The defendants did not establish that the *Grable* exception to the well-pleaded complaint rule applied because the defendants failed to identify a disputed federal issue that was necessary to resolve D.C.'s consumer protection claims.
4. The federal enclave jurisdiction doctrine did not apply and that removal was improper under OCSLA's broad jurisdictional grant because the alleged false advertising and misleading information campaigns were not "operation[s]" under the Act and because activities on the outer continental shelf were not shown to be the but-for cause of D.C.'s injuries.
5. The federal officer removal doctrine did not apply because even if the defendants acted under the federal government's direction in their development of fossil fuel products, there was not a nexus between D.C.'s claims and the asserted federal authority.
6. There was no diversity jurisdiction or jurisdiction under the Class Action Fairness Act.[96]

On January 30, 2023, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit denied the defendants' emergency motion for a stay pending appeal of District Court Judge Kelly's remand order because the fossil fuel companies had not met the "high standard" for demonstrating irreparable injury.[97] On February 15, 2023, the case was remanded back to the D.C. Superior Court while the fossil fuel companies appealed the remand order.

92. *Id.*
93. Notice of Removal, District of Columbia v. Exxon Mobil Corp., No. 1:20-cv-01932 (D.D.C. July 17, 2020), https://climatecasechart.com/wp-content/uploads/case-documents/2020/20200717_docket-120-cv-01932_notice-of-removal.pdf. Among other things, the notice stated:

> The Complaint does little to mask the core purpose of the Attorney General's lawsuit—namely, to force reductions in fossil fuel production and sales—all under the guise of municipal consumer protection laws. For example, the Complaint alleges that "*none* of Defendants' fossil fuel products are 'green' or 'clean'; they all pollute and ultimately warm the planet." Compl. ¶ 8 (emphasis added). According to the Complaint, "Defendants' deception" was "detriment[al]" to "DC consumers and the public generally" because it allegedly "enabled the unabated and expanded *extraction*, *production*, promotion, marketing, and sale of Defendants' fossil fuel products." *Id.* ¶ 2 (emphasis added). Indeed, the Complaint asserts that "the development, production, refining, and consumer use of [Defendants'] fossil fuel products—including gasoline and motor oil—emit large volumes of greenhouse gases, which cause global climate change." *Id.* ¶ 71; *see also id.* ¶ 106 ("Defendants' fossil fuel products are the primary driver of global warming."); ¶ 149 (asserting that "current levels of fossil fuel use—even purportedly 'cleaner' or more efficient products—represent a direct threat to District residents and the environment"). The only solution, in the Attorney General's view, is to cease reliance on fossil fuels. *Id.* ¶ 52 ("[T]he continued use of fossil fuel products contributes to severe environmental and health threats at significant economic cost."); ¶ 31 ("[T]here is still time to save the world's peoples from the catastrophic consequence of pollution, but time is running out." . . .
>
> In sum, the Complaint intrudes on the federal political branches' [sic] exclusive authority to address important issues of national and international policy. The balance between the use of fossil fuels and reduction of greenhouse gas emissions is an interstate and international issue, and the Attorney General's claims directly implicating this issue can be addressed only on a national level by the federal courts. Accordingly, the Complaint should be heard in this federal forum.

Id. paras. 12, 19.

94. Notice of Motion and Motion to Remand to State Court, District of Columbia v. Exxon Mobil Corp., No. 20-1932(TKJ) (D.D.C. Aug. 17, 2020), https://legacy-assets.eenews.net/open_files/assets/2020/08/20/document_cw_01.pdf.
95. Memorandum Opinion, District of Columbia v. Exxon Mobil Corp., No. 1:20-cv-01932-TJK, 52 ELR 20124 (D.D.C. Nov. 12, 2022), https://climatecasechart.com/wp-content/uploads/case-documents/2022/20221112_docket-120-cv-01932_memorandum-opinion-1.pdf.
96. *Id.*
97. District of Columbia v. Exxon Mobil Corp., No. 22-7163 (D.C. Cir. Jan. 30, 2023), https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230130_docket-22-7163_order.pdf.

On December 19, 2023, the D.C. Court of Appeals determined that the remand to the D.C. Superior Court was proper:

> Under the well-pleaded complaint rule, the cause of action chosen by the plaintiff usually determines the existence of federal jurisdiction. This case is no exception. The District brought suit exclusively under the D.C. Code, and the Companies have provided no basis for federal jurisdiction. We affirm the district court's order remanding this case to the Superior Court of the District of Columbia.[98]

This climate justice case is moving toward a jury trial in D.C. Superior Court.

In sum, recitation of the climate change lawsuits filed by Rhode Island, Minnesota, and the District of Columbia indicates that their litigation strategy is sound, as the cases will remain in state court and will be adjudicated by state court judges. With this strategy, those plaintiffs have avoided making legal claims that raised, in any way, questions of federal law, and instead raised legal theories that traditionally have been state-law claims (e.g., claims of public and private nuisance, trespass, and violations of consumer protection laws, etc.). Those plaintiffs have invoked state law entirely for their causes of action.

Those plaintiffs have argued in the complaints that the fossil fuel industry has been engaged in disinformation campaigns regarding climate change. Those plaintiffs have successfully argued that their lawsuits should not be removed to federal court based upon the following federal removal statutes: (1) Title 28 U.S.C. §1441—Actions removable generally, which allows a defendant to remove a case from state court to federal court so long as the case is one that could have been brought in federal court originally; or (2) Title 28 U.S.C. §1442—Federal officers or agencies sued or prosecuted, which allows a defendant federal officer (or someone who acted at the direction of a federal officer) to assert a defense based on federal law to remove a case to federal court even where the plaintiff's claims rest entirely on state law.

In conclusion, the Rhode Island, Minnesota, and District of Columbia plaintiffs are just a few of dozens of states, cities, towns, and municipalities in the United States and its territories who have filed lawsuits in state courts aimed at holding fossil fuel companies accountable for climate damages and deceiving the public about the harm their products have and will continue to cause.

IV. Implications for Tribal Climate Justice Claims

Climate change is a significant factor for the drought conditions in the western United States. Drier conditions are mainly driven by increased evapotranspiration from rising temperatures and snowpack melting earlier in the season, creating longer dry periods.

According to a recent study,[99] the megadrought is the region's driest in at least 1,200 years. Thanks to the region's high temperatures and low precipitation levels from summer 2020 through summer 2021, the current drought has exceeded the severity of a late-1500s megadrought that previously had been identified as the most severe drought in the 1,200 years that the scientists studied. As of February 10, 2022, according to the U.S. Drought Monitor, 95% of the western United States was experiencing drought conditions.[100] In short, the past 22 years have been the driest in the western United States in at least the previous 1,200 years.[101]

The long-term drought conditions in the southwestern United States directly impact the Navajo Nation (the Nation). The Nation is a federally recognized Indian tribe[102] that signed the 1849 Treaty[103] and the 1868 Treaty[104] with

98. District of Columbia v. Exxon Mobil Corp., No. 22-7163, 54 ELR 20002 (D.C. Cir. Dec. 19, 2023), https://climatecasechart.com/wp-content/uploads/case-documents/2023/20231219_docket-22-7163_opinion.pdf.

99. A. Park Williams et al., *Rapid Intensification of the Emerging Southwestern North American Megadrought in 2020-2021*, 12 Nature Climate Change 232 (2022), *available at* https://doi.org/10.1038/s41558-022-01290-z. The study was a collaboration among researchers from the University of California, Los Angeles, National Aeronautics and Space Administration, and the Columbia Climate School.

100. *See* the U.S. Department of Agriculture Economic Research Service, *Drought in the Western United States*, https://www.ers.usda.gov/newsroom/trending-topics/drought-in-the-western-united-states (last updated Feb. 9, 2024).

101. José Pablo Ortiz Partida, *Causes and Consequences of Epic Western US Drought*, Union Concerned Scientists: Equation (Mar. 7, 2022), https://blog.ucsusa.org/pablo-ortiz/causes-and-consequences-of-epic-western-us-drought.

102. According to the National Congress of American Indians, there are currently 573 federally recognized tribes. Two hundred twenty-nine of those tribal nations are in Alaska; the remaining tribes are in 35 other states. These federally recognized tribes are self-governing nations, sovereign nations maintaining authority over their members, resources, and territories. They retain control over all matters not relinquished by treaty, taken by the U.S. Congress, or altered by their status as a "domestic dependent nation" as determined by the Supreme Court in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The U.S. government recognizes these nations as distinct political groups, dealing with them on a government-to-government basis. National Congress of American Indians, *Policy Issues*, https://www.ncai.org/policy-issues/tribal-governance (last visited Mar. 8, 2024). Moreover, according to the Bureau of Indian Affairs:

> A **federally recognized tribe** is an American Indian or Alaska Native tribal entity that is recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation, and is eligible for funding and services from the Bureau of Indian Affairs.
>
> Furthermore, federally recognized tribes are recognized as possessing certain inherent rights of self-government (i.e., tribal sovereignty) and are entitled to receive certain federal benefits, services, and protections because of their special relationship with the United States. At present, there are 574 federally recognized American Indian and Alaska Native tribes and villages.

Bureau of Indian Affairs, *Frequently Asked Questions*, https://www.bia.gov/frequently-asked-questions (last visited Mar. 8, 2024).

103. The treaty was ratified by the U.S. Senate on September 24, 1850. In that 1849 Treaty, the Navajo Tribe recognized that the Navajos were now within the jurisdiction of the United States, and the Navajos agreed to cease hostilities and to maintain "perpetual peace" with the United States. Treaty With the Navaho, Sept. 9, 1849, 9 Stat. 974, https://treaties.okstate.edu/treaties/treaty-with-the-navaho-1849-0583.

104. Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, https://courts.navajo-nsn.gov/Treaty1868.htm. This treaty, signed by 29 Navajo leaders and 10 officers of the U.S. Army on June 1, 1868, officially recognized the sovereignty of the Navajo Tribe. This treaty was ratified by the Senate on July 23, 1868, and was proclaimed by President Andrew Johnson on August 12, 1868. By signing the 1868 Treaty,

the United States, establishing a "permanent home" for the Navajo people. The Nation[105] is in the Four Corners region of the southwestern United States[106] and sits within four river basins (the Upper and Lower Colorado River Basins in Arizona; the San Juan River Basin of New Mexico; and a small portion of the Rio Grande River Basin). However, on the Navajo Reservation, water is scarce, and the drought is pervasive.[107] The Navajo Reservation spans 17 million acres.

The Nation relies on groundwater from the Coconino aquifer, the Dakota aquifer, the Navajo aquifer, and several other aquifers.[108] Thirty percent of Navajo homes have no running water. About one-third of Navajo homes are deficient in plumbing and kitchen facilities.[109] Moreover, hauling water in 55-gallon drums can cost 20 times what it does in neighboring off-reservation communities. In sum, the Nation has severe water infrastructure deficiencies that impact the Navajo people's health, economy, and welfare.[110]

Many tribal members have had to rely on wells and other localized water sources. Finite groundwater is the primary water source for the Nation. Because of the need for more water, the Nation, consequently, sought a right to draw water from the Colorado River, which flows along the Nation's northwest boundary, and all of the Nation falls within the Colorado River Basin in northern Arizona. The Nation has never had the right to use the water, and none of the Navajo's water is drawn from the Colorado River. As early as the 1922 Colorado River Compact, when the U.S. government entered agreements with the seven basin states aimed at dividing fairly the waters of the Colorado River among those states, the Nation was excluded entirely from the negotiations.

In 2003, the Nation filed its initial complaint in the U.S. District Court for the District of Arizona against the U.S. Department of the Interior and others. The complaint alleged a breach-of-trust claim against the U.S. government for its failure to consider the Nation's undetermined water rights. The Nation argued that the 1849 and 1868 treaties signed with the U.S. government that established the reservation, in conjunction with the implied reservation of water established in *Winters v. United States*,[111] are sufficient to create a fiduciary duty between the Nation and the U.S. government.

The Nation asked the federal district court judge to order the U.S. government to determine the Nation's water needs and to devise a plan to meet those needs. The district court judge determined the court lacked jurisdiction to rule on the breach-of-trust claim due to the claim falling within the Supreme Court's retained and exclusive jurisdiction pursuant to *Arizona v. California*.[112] Chief District Court Judge G. Murray Snow dismissed the complaint with prejudice.[113]

On February 17, 2022, the Ninth Circuit reversed and held that the Nation had identified provisions in its treaties, as well as the *Winters* doctrine that imposed fiduciary obligations on the U.S. government to ensure an adequate water supply for the Navajo Reservation.[114] The case was appealed to the Supreme Court by the Joseph Biden Administration and the states of Arizona, Nevada, and Colorado.[115] The issue was whether the U.S. government owed the Nation an affirmative, judicially enforceable fiduciary duty to assess and address the Nation's need for water from particular sources, in the absence of any substantive source of law that expressly established such a duty.

On July 24, 2023, in a 5-4 majority decision, writing for the majority, Associate Justice Brett Kavanaugh (joined by Chief Justice John Roberts, and Associate Justices Clarence Thomas, Samuel Alito, and Amy Coney Barrett) reversed the decision of the Ninth Circuit and held that the treaties were stipulations of property rights rather than obligations of the U.S. government to fulfill any proposed purposes of said treaties. Thus, the U.S. government had no affirmative duty to assess the Nation's water needs, develop a plan to secure the needed water, and potentially build pipelines, pumps, wells, or other water infrastructure—either to facilitate better access to water on the reservation or to transport off-reservation water onto the reservation. Additionally, Kavanaugh noted that the U.S. government would owe no obligation to assist in these requests by the Nation

the Navajo (Diné) Nation agreed to cease war against the United States, allow U.S. government officials to live within their lands and oversee their obligations to the Diné, and permit the construction of railroads through their lands.

According to a 2023 Sierra Club article:

> The 1868 treaty, and the purpose of the reservation, was agreed to under duress for the Navajo—after their release from captivity. In 1863, 10,000 Diné were forcibly marched some 400 miles from their homes to Bosque Redondo, an internment camp in New Mexico. During this genocidal effort to eradicate Diné culture and language, thousands of Diné died of dysentery, exposure, and starvation, or were shot by soldiers. The Diné were promised a return to their traditional lands, where a reservation would be their permanent home.

Morgan Sjogren, *Supreme Court Rules Against Navajo Nation in Colorado River Case*, Sierra Club (June 23, 2023), https://www.sierraclub.org/sierra/supreme-court-rules-against-navajo-nation-colorado-river-case.

105. The Nation encompasses more than 27,000 square miles in the Southwest within portions of Arizona, New Mexico, and Utah. According to the 2010 U.S. census, the on-reservation population is 173,667 and the total Navajo population is 332,129.
106. The Four Corners are the southeastern corner of Utah, the northeastern corner of Arizona, the northwestern corner of New Mexico, and the southwestern corner of Colorado.
107. *See* ArcGIS StoryMaps, *Water Security on the Navajo Nation*, https://storymaps.arcgis.com/stories/591cdbfe18eb4aaea687139fc10c0c90 (last visited Feb. 23, 2024).
108. *See* Tribal Water Use, *Tribal Water Uses in the Colorado River Basin*, http://www.tribalwateruse.org (last visited Feb. 23, 2024).
109. Navajo Relief Fund, *Living Conditions*, http://www.nativepartnership.org/site/PageServer?pagename=nrf_livingconditions (last visited Feb. 23, 2024).
110. *See* Navajo Nation Department of Water Resources, *Home Page*, https://nndwr.navajo-nsn.gov/ (last visited Feb. 23, 2024).
111. 207 U.S. 564 (1908).
112. 373 U.S. 546 (1963).
113. Navajo Nation v. U.S. Dep't of Interior, No. CV-03-00507-PCT-GMS (D. Ariz. Aug. 23, 2019).
114. Navajo Nation v. U.S. Dep't of the Interior, 26 F.4th 794, 809-14 (9th Cir. 2022).
115. The Supreme Court consolidated the *Navajo Nation v. U.S. Department of the Interior* (No. 22-51) and *Arizona v. Navajo Nation* (No. 21-1484) cases for oral argument. The states of Arizona, Nevada, Colorado, and the Metropolitan Water District of Southern California are collectively referred to as "Arizona."

unless the tribal requests were explicitly stated within the treaty itself.[116]

Nonetheless, the lack of water and the physical infrastructure to pipe it across the vast reaches of the 17-million-acre reservation remains one of the biggest challenges facing the Nation's leaders. Arguably, the Nation has two viable options. One option is that the Nation could consider reopening long-running legal proceedings concerning the allocation of Colorado River water, which the Supreme Court oversees to adjudicate interstate disputes under Article IX of the 1964 decree.[117] As one reporter stated:

> Now, one option for [the] Navajo Nation would be to seek to reopen long-running litigation over the allocation of Colorado River water that the Supreme Court itself oversaw as part of its role adjudicating disputes between states. The tribe filed a motion to intervene in that case decades ago and was denied.
>
> In Thursday's ruling, the court left open the possibility of the tribe intervening in water rights cases, a point that Gorsuch seized upon in his dissenting opinion.
>
> "After today, it is hard to see how this court (or any court) could ever again fairly deny a request from the Navajo to intervene in litigation over the Colorado River or other water sources to which they might have a claim," he wrote.[118]

The Nation deserves a seat at the proverbial table with other states[119] since it has been said, "If you don't have a seat at the table, you're probably on the menu."[120] According to two ABA commentators:

> Although the Court's ruling was limited to a breach of trust claim, the intervenors argued that at bottom, this case was about the Navajo Nation's desire to obtain a federal reserved right to Lower Colorado River [(LCR)] water. The intervenors argued that any such claim can only be heard pursuant to a motion to reopen the Consolidated Decree in *Arizona v. California* due to the Court's retained and exclusive jurisdiction over the allocation of water from the LCR.
>
> Many see this case as a preservation of the status quo. If the Navajo Nation wishes to pursue a federal reserved right claim to the flows of the LCR, then it must ask the Supreme Court to revisit its long-standing decision in Arizona v. California or, as the majority suggested, ask Congress to find a legislative solution "in light of the competing contemporary needs for water."[121]

A second option is for the Nation's attorney general[122] to file simultaneously with litigation over Colorado River water allocation a climate justice lawsuit against Big Oil in state court for monetary damages, and to use those funds to construct the physical infrastructure to support the required extensive and careful water management on the reservation.

As discussed above, climate justice lawsuits have been filed in state courts by attorneys general on a range of legal grounds, including, but not limited to, consumer protection; fraud; misrepresentation; failure to warn; nuisance; trespass; negligence; design defects; public trust resource impairment; state environmental rights amendments; fraud and deceit; unjust enrichment; conspiracy; racketeering; antitrust; and product liability. The Nation, acting as a sovereign state, could file a climate justice lawsuit against Big Oil using any of those state-law legal grounds.[123] The

116. 599 U.S. 555 (2023).

117. Article IX of the Supreme Court Decree in *Arizona v. California*, 376 U.S. 340 (1964), https://www.usbr.gov/lc/region/pao/pdfiles/supctdec.pdf, provides:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

118. Lawrence Hurley, *Supreme Court Rules Against Navajo Nation in Water Rights Dispute*, NBC News (June 22, 2023), https://www.nbcnews.com/politics/supreme-court/supreme-court-rules-navajo-nation-water-rights-dispute-rcna83584.

119. *See* Camille von Kaenel, *Why a Las Vegas Casino Holds the Key to Western Water*, Politico (Dec. 13, 2023), https://www.politico.com/news/2023/12/13/meet-the-colorado-rivers-power-players-00131530. Camille von Kaenel discussed the powerful Colorado River Water Users Association as follows:

> The country's highest-stakes water fight in a century is playing out this week at a Las Vegas casino. The seven Western states that share the Colorado River are facing a looming spring deadline to agree on how to share its dwindling flows. The negotiations will shape the future of the West—and they'll depend, more than anything, on the personalities around the table.
>
> ****
>
> The Colorado River Water Users Association conference kicking off Wednesday at the Paris Las Vegas Hotel and Casino draws everyone with a stake in the West's most important waterway, from the general managers responsible for delivering water to some of the country's largest cities to the bolo tie-wearing cowboys responsible for opening the headgates at their local irrigation districts.

120. "Politicians Ann Richards and Elizabeth Warren have each received credit for this remark." *If You Are Not at the Table Then You're Probably on the Menu*, Quote Investigator (Nov. 15, 2020), https://quoteinvestigator.com/2020/11/15/table-menu/.

121. *See* Rita Maguire & Nicole Klobas, *The Supreme Court's Decision in* Arizona v. Navajo Nation: *A Tale of Scarce Water and Treaty Rights in the Southwest*, A.B.A. Trends (Nov. 1, 2023), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2023-2024/november-december-2023/supreme-courts-decision-in-arizona-v-navajo-nation/.

122. Ethel Branch is the Nation's current attorney general. She is the Nation's 13th attorney general. Navajo Nation Department of Justice, *Directory*, https://nndoj.navajo-nsn.gov/Directory/Office-of-Attorney-General (last visited Feb. 23, 2024).

123. According to EPA:

> Several federal environmental laws authorize EPA to treat eligible federally recognized Indian tribes in a similar manner as a state (TAS) for implementing and managing certain environmental programs. The Clean Air Act (CAA), Clean Water Act (CWA), and Safe Drinking Water Act (SDWA) expressly provide the authority for Indian tribes to play essentially the same role in Indian country that states do within state lands. . . .
>
> The basic requirements for applying for TAS are that the tribe must:
>
> - be federally recognized,
> - have a governing body carrying out substantial governmental duties and powers,
> - have appropriate authority, and
> - be capable of carrying out the functions of the program.

U.S. EPA, *Tribal Assumption of Federal Laws—Treatment as a State (TAS)*, https://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas (last updated Feb. 1, 2024).

Nation has been approved by EPA to be treated as a state in accordance with the Clean Water Act (CWA).[124]

Arguably, for a variety of reasons, New Mexico's state courts[125] might be a suitable jurisdiction for the Nation to consider filing a climate justice lawsuit. First, a 2022 poll conducted by the Environmental Defense Fund's election advocacy partner, EDF Action, surveyed New Mexicans from across the state and revealed that voters favored more decisive action on climate change and candidates who supported such measures.[126] Notably, New Mexico's current governor, Michelle Lujan Grisham, has gained national and international recognition for her climate change initiatives. Since taking office, Governor Lujan Grisham has sought to establish New Mexico as a climate leader by committing the state to a 45% reduction in climate pollution by 2030 compared to 2005 levels, signing the Energy Transition Act (ETA)[127] into law in 2019, and initiating the state's first rules to curb methane emissions from the oil and gas industry. Additionally, she issued an executive order to address climate change in 2019.[128]

Moreover, Governor Lujan Grisham has actively participated in the past two United Nations Climate Change Conferences, in Glasgow, Scotland,[129] and Sharm el-Sheikh, Egypt,[130] where she discussed her state's stringent regulations aimed at significantly reducing natural gas emissions from fossil fuel operations. On paper, New Mexico's regulations are among the most robust in the country. She also holds the co-chair position-elect of the U.S. Climate Alliance, a bipartisan climate action coalition of 24 governors and territories, representing 55% of the U.S. population and 60% of the U.S. economy, who are committed to securing America's net-zero future by advancing state-led, high-impact climate action, and achieving the goals of the Paris Agreement.[131] Governor Lujan Grisham also has been appointed by President Biden to the Council of Governors, a bipartisan group of 10 governors focused on improving national and state responses to security threats.[132]

Second, the New Mexico Constitution has provisions dedicated to protecting human health and the environment:

- The New Mexico Constitution guarantees New Mexicans a healthful and beautiful environment and mandates that the state control pollution to avoid despoiling its air, water, and other natural resources (Article XX, §21).
- The New Mexico Constitution also guarantees New Mexicans fundamental rights: enjoying and defending life and liberty; acquiring, possessing, and protecting property; and seeking and obtaining safety and happiness, as well as equal protection under the law (Article II, §§4 and 18).

Access to clean and safe drinking water is a fundamental right, and is consistent with a healthful environment for the Navajo people.

Third, the Supreme Court of New Mexico has recognized the importance of a community's "quality of life" in the case *In re Application of Rhino Environmental Services*.[133] There, a low-income Hispanic community raised objections at a public hearing to the siting of another landfill. The legal issue was whether the state's Environment Department was required pursuant to the regulations "to admit and consider evidence addressing the impact of a proposed landfill, including the cumulative effects of the proliferation of landfills and other industrial sites, on a community's quality of life."[134] The court determined:

> Given the Legislature's goal to involve the public in the permitting process to the fullest extent possible, we do not agree with the Court of Appeals that the Secretary was not allowed to consider testimony relating to the community's quality of life. The Legislature clearly believed public participation is vital to the success of the Solid Waste Act. Members of the public generally are not technical experts. The Legislature did not require scientific evidence in opposition to a landfill permit, but instead envisioned that ordinary concerns about a community's quality of life could influence the decision to issue a landfill permit. . . . Therefore, the Secretary should consider issues relating to

124. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.

125. According to the abstract for the booklet "New Mexico State Courts," compiled by the Administrative Assistant to the Chief Justice of the Supreme Court of New Mexico, Ruth J. Thomas, and describing New Mexico's court system:

> The court system is designed to settle disputes which arise between people who live in a complex society. Courts in New Mexico's system include the State supreme court, the court of appeals, district courts, probate courts, small claims court, municipal courts, and magistrate courts. Magistrate court is the State court of limited jurisdiction. The majority of cases are handled in these courts.

U.S. Department of Justice, *New Mexico State Courts*, https://www.ojp.gov/ncjrs/virtual-library/abstracts/new-mexico-state-courts (last visited Mar. 8, 2024).

126. Adrian Hedden, *Climate Change, Fossil Fuel Policies Leading Issues in New Mexico's November Election*, Carlsbad Current-Argus (Aug. 25, 2022), https://www.currentargus.com/story/news/2022/08/25/climate-change-fossil-fuel-policies-top-issues-in-new-mexico-election/65416616007/.

127. The ETA set a statewide renewable energy standard of 50% by 2030 for New Mexico investor-owned utilities and rural electric cooperatives and a goal of 80% by 2040, in addition to setting zero-carbon resources standards for investor-owned utilities by 2045 and rural electric cooperatives by 2050. The ETA set a net-zero carbon resource goal for New Mexico investor-owned utilities by 2045. The legislation also created funds meant to provide economic development, work force training, and tribal relief to those affected by the closure of the San Juan Generating Station. S.B. 489, 54th Leg., 1st Sess. (N.M. 2019), https://www.nmlegis.gov/Sessions/19%20Regular/bills/senate/SB0489.pdf.

128. Exec. Order No. 2019-003, Executive Order on Addressing Climate Change and Energy Waste Prevention (Jan. 29, 2019), https://www.governor.state.nm.us/wp-content/uploads/2019/01/EO_2019-003.pdf.

129. United Nations, *COP26: Together for Our Planet*, https://www.un.org/en/climatechange/cop26 (last visited Feb. 23, 2024).

130. United Nations Climate Change, *Five Key Takeaways From COP 27*, https://unfccc.int/process-and-meetings/conferences/sharm-el-sheikh-climate-change-conference-november-2022/five-key-takeaways-from-cop27 (last visited Feb. 23, 2024).

131. U.S. Climate Alliance, *Home Page*, https://usclimatealliance.org/ (last visited Mar. 6, 2024).

132. Press Release, Office of Governor Michelle Lujan Grisham, Gov. Lujan Grisham to be Appointed to Council of Governors by President Biden (Feb. 9, 2023), https://www.governor.state.nm.us/2023/02/09/gov-lujan-grisham-to-be-appointed-to-council-of-governors-by-president-biden/.

133. 138 N.M. 133 (2005).

134. *Id.*

public health and welfare not addressed by specific technical regulations.[135]

Most assuredly, the lack of access to clean and safe drinking water is a "quality of life" issue for the Navajo people. This quality-of-life problem is exacerbated further by the 500 abandoned uranium mines on the Nation's lands, the exposure of the Navajo people to uranium radiation, the cleanup of those mines, and EPA's troubled history of enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[136] on the Navajo Reservation.[137]

Fourth, New Mexico's consumer protection provisions also offer potential advantages for climate justice litigation. Most consumer fraud cases in the state are covered under the New Mexico Unfair Practices Act (UPA). The UPA is consumer-friendly and broadly interprets deceptive conduct, encompassing not only intentional deception, but also negligent misrepresentations and omissions likely to confuse consumers. While the statute requires knowledge[138] as an element of deceptive practices, the state's supreme court has clarified that this requirement can be satisfied if the party knows or should know the statement's deceptive nature. Therefore, it does not pose a significant obstacle, as it does not necessitate the establishment of actual knowledge. Courts have also narrowly interpreted the statute's exemptions, refusing to consider them as blanket exemptions for specific industries.[139]

Fifth, New Mexico has already agreed to recognize the Nation's water rights in the San Juan River Basin in the state. This settlement agreement between the Nation, the U.S. government, and the state was approved by the U.S. Congress in 2009.[140]

Sixth, New Mexico did not join the Biden Administration and Arizona, Nevada, and Colorado in the Nation's water rights case before the Supreme Court that concluded that the U.S. government did not have an "affirmative duty" to address the water needs of the Navajo people.

Considering all these factors, New Mexico's political, judicial, executive, constitutional, and regulatory environment, and its proactive stance on environmental issues, suggest that it would be an ideal jurisdiction for the Nation to file climate justice litigation.

As was so aptly stated by the Ninth Circuit in the *Navajo Nation v. U.S. Department of the Interior* case: "Water is essential to life on earth, . . . and it is particularly essential for healthy human societies."[141] Indeed, in a historic vote on July 28, 2010, the United Nations General Assembly declared that safe and clean drinking water is a fundamental human right. Resolution 64/292 specifically states that the United Nations "[r]ecognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights."[142] By a vote of 122 in favor to none against with 41 abstentions, the General Assembly adopted the resolution.

Notably, the United States was one of the 41 Member countries that abstained from voting in favor of the resolution. The U.S. representative was concerned with whether this human right was an enforceable human right, whether internationally or domestically.[143] Thus, according to the U.S. government, access to clean and safe drinking water was and still is not a human right.[144]

Climate change has adversely affected access to clean and safe drinking water.[145] The Nation, consequently, must assert its right to water from the LCR[146] because of the unmistakable relationship between clean and safe drinking water and public health by submitting a request to the Supreme Court to intervene in litigation over the Colorado River or other water sources. At the same time, the Nation may want to consider filing a climate justice lawsuit against Big Oil in state court for monetary damages, and to use those funds to construct the physical infrastructure to support the required extensive and careful water management on the Navajo Reservation.[147]

---

135. *Id.*
136. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.
137. *See* Barry E. Hill, *Environmental Justice and the Transition From Fossil Fuels to Renewable Energy*, 53 ELR 10317 (Apr. 2023), https://www.elr.info/articles/elr-articles/environmental-justice-and-transition-fossil-fuels-renewable-energy. *See also* Kate Holland & Tenzin Shakya, *Navajo Nation Faces Possible New Threats After Decades of Uranium Mining*, ABC News (Dec. 7, 2023), https://abcnews.go.com/US/navajo-nation-faces-new-threats-after-decades-uranium/story?id=105270472.
138. Stevenson v. Louis Dreyfus Corp., 811 P.2d 1308 (N.M. 1991).
139. Carolyn Carter, National Consumer Law Center, Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws (2018), https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf.
140. *See* Letter from Elizabeth B. Prelogar, U.S. Solicitor General, to Scott S. Harris, Clerk of the U.S. Supreme Court (Apr. 7, 2023), https://www.supremecourt.gov/DocketPDF/21/21-1484/263064/20230407155342053_Letter%2021-1484%20%2022-51.pdf. The letter was sent because, "[d]uring oral argument in these cases, Justice Alito asked the federal government about 'the total amount of water that has been supplied to the Navajo and whether there's a per capita calculation.'"
141. 996 F.3d 623, 626, 51 ELR 20073 (9th Cir. 2021).
142. G.A. Res. 64/292, The Human Right to Water and Sanitation (July 28, 2010), https://digitallibrary.un.org/record/687002?ln=en.
143. *See* U.S. Mission to the United Nations, Explanation of Position for the Human Rights to Safe Drinking Water and Sanitation Resolution (Nov. 15, 2021), https://usun.usmission.gov/explanation-of-position-for-the-human-rights-to-safe-drinking-water-and-sanitation-resolution.
144. *See* Kevin Murray & Sara Kominers, Northeastern University School of Law, The Human Right to Water in the United States: A Primer for Lawyers & Community Leaders (2021), https://law.northeastern.edu/wp-content/uploads/2021/04/phrge-water-primer.pdf.
145. *See* Barry E. Hill, *Human Rights, Environmental Justice, and Climate Change: Flint, Michigan*, 46 Hum. Rts. 14 (2021).
146. *See* Christopher Flavelle, *Colorado River States Are Racing to Agree on Cuts Before Inauguration Day*, N.Y. Times (Jan. 6, 2024), https://www.nytimes.com/2024/01/06/climate/colorado-river-negotiations.html.
147. On December 6, 2023, President Biden signed Executive Order No. 14112, Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self Determination (88 Fed. Reg. 86021 (Dec. 11, 2023)). According to the White House:

> The Executive Order signed today is the third Order President Biden has signed to strengthen our nation-to-nation relationship, strengthen Tribal consultation, and deepen the federal government's respect for Tribal sovereignty. This Executive Order also builds on the historic investments President Biden has made in Indian Country, including: . . .
>
> - $13 billion in the Bipartisan Infrastructure Law to build high-speed internet, roads, bridges, public transit, *clean water*, and *improve sanitation* in Tribal communities.

Two Washington State tribes have already filed climate justice litigation against Big Oil in state court based upon state-law claims. On December 20, 2023, the Makah Indian Tribe[148] and the Shoalwater Bay Indian Tribe[149] each filed complaints for damages and injunctive relief in the King County Superior Court of the state of Washington against ExxonMobil, Shell, Chevron, BP, ConocoPhillips, and Phillips 66.[150] The tribes accused the Big Oil companies of creating a "public nuisance" and violating the state's Products Liability Act by "deceptive and unfair conduct."

The tribes are requesting jury trials and court orders that the companies fund "an abatement fund to be managed by the tribe[s] to remediate and adapt [their] Reservation lands, natural resources, and infrastructure."[151] The tribes are the first tribal governments to sue Big Oil for deceiving the public about the dangers of greenhouse gases based solely on state law in state court. They are represented by the California-based law firm Sher Edling LLP, which has represented states, public agencies, and businesses in high-impact environmental law cases, as well as local governments on their climate liability lawsuits.

To summarize, while it is difficult for most of us in the United States to imagine living in a household without running water, that is what too many Navajos face on a daily basis living on the reservation. As the Ninth Circuit in *Navajo Nation* emphasized, access to clean water is "particularly essential for healthy human societies,"[152] which is the same sentiment echoed by the United Nations General Assembly's 2010 recognition that "safe and clean drinking water and sanitation is essential for the full enjoyment of life and all human rights."[153] The Supreme Court's failure to acknowledge this undeniable fact illustrates the need for the Navajo Nation to act boldly now to address climate change's adverse impacts on its dwindling water resources.

The Navajo Nation can seek recourse through litigation to ensure physical accessibility to a sufficient supply of safe, clean drinking water. Therefore, following the legal strategy of state and local governments as well as the Makah Indian Tribe and the Shoalwater Bay Indian Tribe in filing climate justice litigation in state court, the Nation may be able to secure the financial resources for vital water infrastructure projects while, at the same time, asserting its right to Colorado River water. By leveraging these options, the Nation can hold Big Oil accountable and move toward providing a future for its people where access to safe, clean drinking water and sanitation is a reality.

- $700 million in the Inflation Reduction Act, to invest in Native communities for *climate resilience and adaptation programs*, *drought mitigation*, home electrification, and clean energy development.

Fact Sheet, White House, President Biden Signs Historic Executive Order to Usher in the Next Era of Tribal Self-Determination (Dec. 6, 2023) (emphasis added), https://www.whitehouse.gov/briefing-room/statements-releases/2023/12/06/fact-sheet-president-biden-signs-historic-executive-order-to-usher-in-the-next-era-of-tribal-self-determination/. However, unless the Nation has access to water from the LCR, the tribe will not be able to take advantage of those government programs under those federal laws to build a comprehensive water infrastructure for the Diné.

148. Complaint, Makah Indian Tribe v. Exxon Mobil Corp., No. 23-2-25216-1 SEA (Dec. 20, 2023), https://climatecasechart.com/case/makah-indian-tribe-v-exxon-mobil-corp/.

149. Complaint, Shoalwater Bay Indian Tribe v. Exxon Mobil Corp., No. 23-2-25215-2 SEA (Dec. 20, 2023), https://climatecasechart.com/case/shoalwater-bay-indian-tribe-v-exxon-mobil-corp/.

150. *See* Julia Conley, *Tribes Sue Six Oil Giants for Climate Deception*, Common Dreams (Dec. 20, 2023), https://www.commondreams.org/news/tribes-sue-oil-companies. *See also* Lesley Clark, *Tribes File First Climate Deception Lawsuits Against Oil Companies*, Climatewire (Dec. 21, 2023), https://subscriber.politicopro.com/article/eenews/2023/12/21/tribes-file-first-climate-deception-lawsuits-against-oil-companies-00132785.

151. Complaint at 97, Makah Indian Tribe v. Exxon Mobil Corp., No. 23-2-25216-1 SEA (Dec. 20, 2023), https://climatecasechart.com/case/makah-indian-tribe-v-exxon-mobil-corp/.

152. Navajo Nation v. U.S. Dep't of the Interior, 996 F.3d 623, 631, 51 ELR 20073 (9th Cir. 2021).

153. *See* G.A. Res. 64/292, *supra* note 142. Moreover, the United Nations Department of Economic and Social Affairs (UNDESA) has developed the following measures for addressing questions regarding: (1) What is a "sufficient water supply" for each person?; (2) What is "safe" water?; (3) What is "acceptable" water?; (4) What is "physically accessible" water?; and (5) What is affordable" water?:

- **Sufficient**. The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene. According to the World Health Organization (WHO), between **50 and 100 litres** of water per person per day are needed to ensure that most basic needs are met and few health concerns arise.
- **Safe.** The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health. Measures of drinking-water safety are usually defined by national and/or local standards for drinking-water quality. **The World Health Organization (WHO)** Guidelines for drinking-water quality provide a basis for the development of national standards that, if properly implemented, will ensure the safety of drinking-water.
- **Acceptable.** Water should be of an acceptable colour, odour and taste for each personal or domestic use. [. . .] All water facilities and services must be culturally appropriate and sensitive to **gender, lifecycle** and **privacy** requirements.
- **Physically accessible.** Everyone has the right to a water and sanitation service that is physically accessible within, or in the immediate vicinity of the household, educational institution, workplace or health institution. According to WHO, the water source has to be within **1,000 metres** of the home and collection time should not exceed **30 minutes.**
- **Affordable.** Water, and water facilities and services, must be affordable for all. The United Nations Development Programme (UNDP) suggests that water costs should not exceed **3 per cent** of household income.

See UNDESA, *International Decade for Action "WATER FOR LIFE" 2005-2015*, https://www.un.org/waterforlifedecade/human_right_to_water.shtml (last visited Mar. 8, 2024).