

'IT WOULD BE IMPROPER FOR BIG CORPORATIONS TO BE DESTROYING THE ATMOSPHERE AND NOT COMMIT A TORT.'

— MATT PAWA, ATTORNEY

The same joint and several liability concept is applied in Superfund cases involving the cleanup of hazardous dumps, according to Pawa. A company in part responsible can be sued for the entire amount and then forced to sue other polluters for their share.

Pawa said he used emissions data to identify the largest producers of global warming pollution among companies subject to the jurisdiction of the U.S. courts. The U.S. is itself the largest historical emitter of global warming pollutants that persist for hundreds of years in the atmosphere.

"The most direct emitters are the electric power companies," Pawa said, noting that five companies are responsible for 25 percent of U.S. power company emissions of carbon dioxide.

Another key legal argument in the Kivalina case to increase the corporations' liability is conspiracy. The conspiracy tactic is similar to that used to wring billions from the tobacco industry. Two tobacco lawyers, one who worked for tobacco companies and one who worked for victims, are assisting Pawa on the case.

"Despite their knowledge that global warming was real and presented extraordinary threats to the planet and humanity, the Conspiracy Defendants continued to mislead the public regarding global warming through their hired front groups and trade associations," the lawsuit complaint document alleges.

The lawsuit points to scientific evidence of the threat of global warming dating back to an 1896 report of a Swedish scientist and notes the recent public statements of corporate executive defendants recognizing the problem. Comparing industry PR tactics to the "scientists" employed by the tobacco industry, the lawsuit alleges a previous "nefarious campaign of deception and denial" by the polluters.

"ExxonMobil has channeled \$16 million over the 1998 to 2005 period to 42 organizations that promote disinformation on global warming," the lawsuit states.

Pawa said one tobacco industry lobbying group calling for "sound science" against linking tobacco to cancer has now switched to global warming. "It was from tobacco, and now they use it on global warming."

Previous global warming lawsuits by states have been thrown out on the grounds

that they ask the courts to take political action better taken by Congress and regulators.

But the Kivalina lawsuit argues that it's different. The lawsuit doesn't seek complex regulations but is simply a nuisance lawsuit for the cost of relocating the village, according to legal filings.

Nor would the lawsuit interfere with any treaties with other nations regarding global warming, the lawsuit argues. "ExxonMobil may be bigger than many foreign nations, but it is still a corporation, not a nation."

Common law allows nuisance lawsuits in cases like global warming where the government has not regulated carbon emissions and preempted such lawsuits, the Kivalina attorneys argue.

Pawa admits that if the Obama administration did start regulating carbon dioxide emissions for global warming or if a cap and trade system gave polluters the right to their emissions, it could hurt his case. "We would have a bona fide preemption issue," he said.

WARMING TACTICS

San Francisco consumer lawyer Christopher Dolan told the UO conference that if the Kivalina lawsuit fails, attorneys could try other approaches.

Dolan said nuisance cases may allow courts to balance the industry's interest against the public's. But he cited a number of court cases indicating that suing for trespass may get around the weighing requirement.

To convince juries used to watching the forensic TV show *CSI*, Dolan said lawyers could use the growing amount of data produced by NASA and other projects tracking carbon emissions down to the building level.

Dolan said political backing could also help. State attorneys general could help provide legal standing for lawsuits, he said. Congress and legislatures could require laws requiring "a calorie count based on emissions" for products and facilities. If they lie on the labels, "we can sue them," he said.

But to get such popular support and really make climate change torts like Kivalina's "the next wave" will take a new name, Dolan argues. "You've got to change the words," he said. "It's planetary poisoning litigation," he suggested, or "environmental catastrophe litigation."

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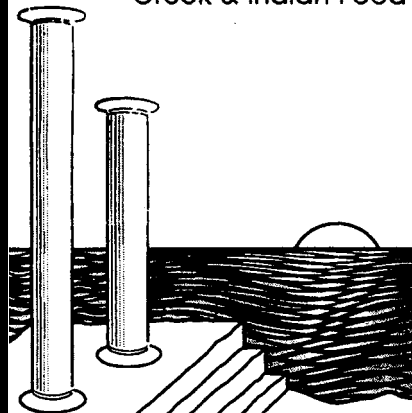
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