



*Climate Change Tort Litigation After
AEP and Kivalina*

December 3, 2012

Seth D. Jaffe, Esq.

- Public nuisance is a creation of federal common law
- Where Congress acts in a field, that action displaces any pre-existing federal common law
- Nature of Congressional action is irrelevant as to whether common law is displaced – “the relevant question for purposes of displacement is “whether the field has been occupied, not whether it has been occupied in a particular manner.”
- CAA displaces federal common law regarding GHG emissions

The Decision in Kivalina

- Was Kivalina distinguishable from AEP?
 - Plaintiffs argued that they only sought damages, whereas the CAA addresses emissions levels and regulations going forward
 - Ninth Circuit concluded that the type of relief sought by plaintiffs is not relevant to displacement analysis
 - Question is whether cause of action has been displaced. If so, any and all remedies are displaced.

■ Public Trust Doctrine

– *Alec L. v. Jackson*

- No federal public trust doctrine
- If there ever had been, it was displaced by the CAA, citing *AEP*

– *Sanders-Reed v. Martinez*

- Public trust claim under New Mexico law
- Survived motion to dismiss – no comprehensive decision
- Request for interlocutory appeal denied

- *North Carolina v. TVA*
 - District Court imposed injunction on upwind emissions from upwind power plants due to health impacts from sub-NAAQS concentrations in North Carolina
 - Court of Appeals vacated injunction – “injunction would encourage courts to use vague public nuisance standards to scuttle the nation’s carefully created system”
 - These types of public nuisance cases seem foreclosed by AEP

Bringing It Home – A Massachusetts Example

- *Palmer Renewable Energy* Decision
 - Petitioners argued that, even if facility would comply with NAAQS, it would still cause a “condition of air pollution” due to alleged adverse impacts at sub-NAAQS levels
 - MassDEP rejected the argument
 - Not precisely a public nuisance case, but still an attempt to circumvent the regulatory standard-setting process