

Climate-change litigation is heating up. Will the legal strategy that brought down Big Tobacco work against Big Oil?

BY STEPHAN FARIS



Conspiracy Theory

**SANDBAGS LINE** the quickly eroding coast of Kivalina, Alaska, which climate change may soon make uninhabitable.

(Photo by Jan Van Der Woning/TCS/Zuma Press)

During the tobacco wars of the 1990s, attorneys Steve Susman and Steve Berman stood on opposite sides of the courtroom. Berman represented 13 states in what was then seen as a quixotic attempt to recover smoking-related medical costs, and conceived the strategy that would break the tobacco industry's back: an emphasis on charges of conspiracy to deceive the public about the dangers of cigarettes. Susman had turned down offers to represent Massachusetts and Texas against the cigarette makers; instead he defended Philip Morris—until 1998, when the industry settled for more than \$200 billion, the biggest civil settlement ever. Now, a decade later, the two lawyers find themselves on the same side of the aisle, working on a case that seems just as improbable as the ones that brought down Big Tobacco ever did—and with implications that could be at least as far-reaching.

The Eskimo village of Kivalina sits on the tip of an eight-mile barrier reef on the west coast of Alaska. Fierce storms are ripping apart the shores. Residents report sinkholes in nearby riverbanks. Despite emergency erosion-control efforts, the crumbling coast threatens the village's school and electric plant. In 2006, the U.S. Army Corps of Engineers concluded that Kivalina would be uninhabitable in as little as 10 years, and that relocating its approximately 400 residents would cost at least \$95 million. Global climate change, the Corps report said, had shortened

the season during which the sea was frozen, leaving the community more vulnerable to winter storms.

As scientific evidence accumulates on the destructive impact of carbon-dioxide emissions, a handful of lawyers are beginning to bring suits against the major contributors to climate change. Their arguments, so far, have not been well received; the courts have been understandably reluctant to hold a specific group of defendants responsible for a problem for which everyone on Earth bears some responsibility. Lawsuits in California, Mississippi, and New York have been dismissed by judges who say a ruling would require them to balance the perils of greenhouse gases against the benefits of fossil fuels—something best handled by legislatures.

But Susman and Berman have been intrigued by the possibilities. Both have added various environmental and energy cases to their portfolios over the years, and Susman recently taught a class on climate-change litigation at the University of Houston Law Center. Over time, the two trial lawyers have become convinced that they have the playbook necessary to win big cases against the country's largest emitters. It's the same game plan that brought down Big Tobacco. And in Kivalina—where the link between global warming and material damage is strong—they believe they've found the perfect challenger.

In February, Berman and Susman—along with two attorneys who have previously worked on behalf of the village, and Matt Pawa, an environmental lawyer specializing in global warming—filed suit in federal court against 24 oil, coal, and electric companies, claiming that their emissions are partially responsible for the coastal destruction in Kivalina. More important, the suit also accuses eight of the firms (American Electric Power, BP America, Chevron, ConocoPhillips, Duke Energy, ExxonMobil, Peabody Energy, and Southern Company) of conspiring to cover up the threat of man-made climate change, in much the same way the tobacco industry tried to conceal the risks of smoking—by using a series of think tanks and other organizations to falsely sow public doubt in an emerging scientific consensus.

This second charge arguably eliminates the need for a judge to determine how much greenhouse-gas production—from refining fossil fuel and burning it to produce energy—is acceptable. “You’re not asking the court to evaluate the reasonableness of the conduct,” Berman says. “You’re asking a court to evaluate if somebody conspired to lie.” Monetary damages to Kivalina need not be sourced exclusively to the defendants’ emissions; they would derive from bad-faith efforts to prevent the enactment of public measures that might have slowed the warming.

Berman and Susman aren't alone in drawing parallels between the actions of the defendants and those of the tobacco industry. The Union of Concerned Scientists, an environmental advocacy group, has accused ExxonMobil of adopting the cigarette manufacturers' strategy of covertly establishing “front” groups, promoting writers who exaggerate uncertainties in the science, and improperly

cultivating ties within the government. The oil company, it says, has “funneled approximately \$16 million to carefully chosen organizations that promote disinformation on global warming.”

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“The strategy to foster doubt is very effective,” says Naomi Oreskes, a professor of history and science studies at the University of California at San Diego. Oreskes is writing a book on the similar methods that the tobacco and fossil-fuel industries have used to challenge unwelcome scientific evidence. “If ‘nobody knows,’” she says, “then nobody is to blame. If ‘nobody knows,’ then how can we do anything about it?”

The research and public-awareness efforts funded by Big Oil involve some of the same scientists and other professionals who once worked on behalf of Big Tobacco. For instance, Frederick Seitz, a former president of the National Academy of Sciences, who died in March, served as a research adviser for R. J. Reynolds Tobacco Company and then founded the George C. Marshall Institute, an ExxonMobil-funded think tank that has challenged the connection between greenhouse gases and global warming. (The academy dissociated itself from Seitz’s conclusions in 1998.)

The energy industry’s ties to government, like the tobacco industry’s, have been unusually tight, and its lobbying efforts demonstrably effective. Philip Cooney, a liaison between the Bush administration and federal environmental agencies, edited uncertainty into reports on global warming by top government scientists from 2001 until 2005, when he resigned after examples of his changes were published by *The New York Times*. Before joining the White House, Cooney had worked for the American Petroleum Institute; a week after his departure, Exxon-Mobil announced he was joining the company. “In a sense, ExxonMobil walked right into the room of the science program,” says Rick Piltz, the federal official who blew the whistle on Cooney. A government memo obtained by Greenpeace outlines a State Department official’s talking points for a meeting with energy-company lobbyists: the president, the memo says, “rejected Kyoto, in part, based on input from you.”

Proving that energy companies tried to slow government action on global warming won’t be hard. The challenge in the Kivalina case, as it was in the breakthrough tobacco cases, will be to prove that these companies lied in the course of their business, and were aware that the consequences could be dangerous. “You don’t want to interfere too much with efforts by people to lobby,” says Eric Posner, a professor at the University of Chicago Law School. “On the other hand, if they’re deliberately engaging in deception, there’s a stronger argument.”

Climate-change litigation is so new that legal experts have little idea how to handicap it; in unexplored areas of tort law, cases become pivotal only in

hindsight. Some legal scholars are skeptical of the merits of the Kivalina case, but many others are looking on with interest. The cultural and political winds are certainly blowing in a favorable direction—and these winds often affect courts and juries. That factor, along with the very deep pockets of Big Oil, is likely to keep the lawsuits coming, testing different theories and different arguments. “It’s sort of like when infantry used to charge the machine guns,” says Joseph Wayne Smith, an Australian lawyer and the author of *Climate Change Litigation*. “A lot of them would get mowed down, but eventually a wave would get through and take out the pillbox.”

The first tobacco suits were filed in the 1950s, but it wasn’t until 1988 that lawyers were able to find chinks in the industry’s armor. The first lawsuit to succeed was also the first to accuse the industry of conspiracy. It’s anyone’s guess whether climate-change litigation, when mapped to that time line, is closer to the 1950s or to 1988. Indeed, it’s not clear whether warming-related monetary damages will ever be won from energy companies—much less whether they should be. But if the charges do stick in the Kivalina case, the defendants can expect many more in short order, as island nations, ski resorts, drought-stricken communities, and hurricane victims line up for their share. Regulation and litigation are two sides of the same coin. By working aggressively to prevent one, the energy companies may have left themselves open to the other.

*Update: Matt Pawa's name was added to the online version of this article on May 21.*