Tort Law and Climate Change

Prof. Tracy Hester

Environmental Law
Fall 2015

Houston, Texas
September 8, 2015
Atmospheric CO$_2$ at Mauna Loa Observatory

Scripps Institution of Oceanography
NOAA Earth System Research Laboratory

YEAR


PARTS PER MILLION

320 340 360 380
EPA Greenhouse Gas Inventory

http://ghgdata.epa.gov/ghgp/main.do
Climate Change Litigation:
It’s already here

• Already active trial docket nationally
  – Over 200 active matters and prior decisions
  – Types: broader, more various than expected
    • NEPA, Endangered Species
    • Insurance coverage disputes

• Most notable actions: federal common law nuisance actions
Climate Change Litigation Tracking Tools

- Sabin Center for Climate Change Law – climate litigation chart

URL: [www.climatecasechart.com](http://www.climatecasechart.com)
To receive e-mail updates to this chart, send a request to margaret.barry@aporter.com
Past e-mail updates
Graph of cases arranged by type
Graph of cases arranged by year

CLIMATE CHANGE LITIGATION IN THE U.S.

- Statutory Claims
  - Force Government to Act
    - Clean Air Act
    - Other Statutes
  - Stop Government Action
    - NEPA
    - State NEPAs
    - Other Statutes
    - Challenges to Private Conduct
      - Challenges to Federal Action
      - Challenges to State and Municipal Vehicle Standards
      - Challenges to State Action
      - Challenges to Local Action
    - Industry Lawsuits
      - Challenges to State and Municipal Vehicle Standards
      - Challenges to Federal Action
      - Challenges to State Action
      - Challenges to Local Action

Columbia Law School Center for Climate Change Law

Databases:
- Non-U.S. Climate Litigation Chart
- Legislation Tracker
- Regulation Tracker
- Presidential Climate Action Tracker
- Municipal Law Resources
- Climate Law Bibliography
- Securities Disclosure Resources
- Offsite Protocol Compilation
- Great Building Law Update
- Climate Change Blog
- NEPA and State GIB Resources
- Hydraulic Fracturing Case Chart

Case Index

Created by: Michael B. Garrard, J. Cullen Howe, and T. Margaret Barry
Date last updated: August 3, 2015
Please send updates to: michael.garrard@law.columbia.edu
For detailed legal analysis, see Global Climate Change and U.S. Law (ABA 2014)
Climate Change Nuisance Lawsuits: Many Causes, Many Claims

Courts as Battlefields in Climate Fights

Erosion of the shoreline in Kivalina, Alaska, has led to a closely watched climate-change lawsuit.

By JOHN SCHWARTZ
Published: January 26, 2010
The Big Three

• **Connecticut v. AEP** (2d Cir.)
  – Eight AGs sued five power companies
  – U.S. Supreme Court ruled that federal common law nuisance claims were displaced by Clean Air Act

• **Comer v. Murphy Oil Co.** (5th Cir.)
  – Class action suit for Katrina property damages
  – Targets oil, coal, chemical and insurance companies
  – Fifth Circuit has dismissed in very odd fashion; district court just dismissed re-filed complaint and dismissed again

• **Native Village of Kivalina v. Exxon Mobil** (9th Cir.)
  – District court in California dismissed as political question
  – Ninth Circuit dismissed on displacement grounds as well
Climate Change Liability -- Key Thoughts and Themes

• Climate change tort lawsuits aren’t going away anytime soon

• Should fate of nuisance suits differ?
  – Relief sought (injunctions vs. damages)?
  – Claims and harms alleged?
  – Types of plaintiffs bringing claims?

• The battle to get into court is different than the battle within the court
  – Causation
  – Effectiveness of remedy
Future Directions in Climate Change Litigation

• State law claims and lawsuits

• Adaptation of tactics and strategy from tobacco and asbestos litigation
  – Collateral effects of certain claims (conspiracy)

• Transnational climate litigation claims
CHEVRON WAY

CHEVRON IN ECUADOR

38 YEARS

JUSTICE
Public Trust Litigation

- Public trust doctrine
  - Limits on state’s ability to alienate resources
  - Analogous to fiduciary duty
  - Used in water, submerged property cases

- Is the atmosphere a public trust?

• Tallies emissions back to 1882

• Claims about 5 percent of historical global carbon emissions from Exxon

• Alleges most releases occurred after climate concerns first raised
Climate Attribution Science and Litigation?
Fraction of Attributable Risk

Fractional change in the likelihood of exceeding a temperature threshold attributable to a particular causal factor


\[ P_0: \text{Probability of exceeding a threshold in the “world that might have been” (without that causal factor).} \]

\[ P_1: \text{Probability of exceeding a threshold in the actual world.} \]

\[ \text{FAR} = 1 - \left( \frac{P_0}{P_1} \right) \]
Extreme weather events that arose partially from anthropogenic climate change:

- European heat wave of 2003
- The cold US of 2008
- Moscow heatwave of 2010
- Cold European winter 2009/2010
- UK flooding in 2000
A final question (or two)

• If tort law won’t easily accommodate climate change damage claims, what’s the next step?
  – Legislation? (Texas)
  – Reform tort law itself?
  – Create something entirely new? (constitutional, administrative, sovereign claim settlement process)
Professor Tracy Hester
University of Houston Law Center

tdheste2@central.uh.edu
713-743-1152 (office)