As Holly noted the other day, Judge Saundra Brown Armstrong of the Northern District of California has thrown out the Kivalina tribe's climate change lawsuit against big oil and coal producers. Was she right to do so? The answer, I think, is yes — but for procedural, not substantive reasons.

Judge Armstrong's argument that the case constitutes a nonjusticiable political question is, in my view, quite wrong. It's a tort suit; courts decide torts suits all the time. Complexity and difficulty do not turn a lawsuit into a political question. Yes, public nuisance is vague. And you know what? So are a lot of legal standards.

Her argument about standing rests on firmer ground, so to speak. Massachusetts v. EPA granted standing to states, mainly because Justice Kennedy — who basically runs the Supreme Court — worried about the fact that states give up a whole lot of rights when they agreed to join the Union, so it would be unfair to say that they could not enforce federal law in federal courts.

That said, Indian tribes are sovereign, at least formally. And it seems strange to have solicitude for states, which joined the Union voluntarily, as opposed to Indian tribes, which . . . uh . . . didn't. Besides, the only decision on point to this is the Second Circuit's holding in Connecticut v. AEP, which opened the standing gates substantially.

So why do I think that Judge Armstrong got it right? Because she is a district judge. Justiciability and standing are pretty much pure questions of law; appellate judges love to fill up pages of the Federal Reporter writing about them.

If I were a federal district judge, I would not relish going through the entire process of discovery, motions to compel, depositions, summary judgment proceedings, and then maybe even a trial — only to then find out that the folks on the Ninth Circuit think that the whole thing ought to be thrown out. That's precisely what happened in the *Milwaukee v. Illinois* litigation, which forms the basis of the contemporary climate change cases: the trial and appellate courts spent *seven years* hearing the thing, only to be told by the Supremes that the Clean Water Act had displaced the common law upon which it rested.

Put another way, one could read Judge Armstrong's ruling not so much as a decision but rather as a sort of interlocutory appeal. She's asking the Ninth Circuit: do you people want me to do this? The Ninth Circuit should say yes. But I can't really blame an overworked district judge for making sure.