Today, the Ninth Circuit issued an opinion affirming a federal district court decision to dismiss the lawsuit filed by the Native Alaskan Village of Kivalina that sought damages from oil and electric power companies whose greenhouse gas emissions have contributed to climate change. Kivalina contended that the companies' greenhouse gas emissions constituted a public nuisance that contributed to the sea level rise and permafrost melting that threatens their community.

Co-bloggers Rick Frank, Holly Doremus, and Jonathan Zasloff have blogged about this case previously. Holly reported on the federal district court holding, which resulted in dismissal of the case as a nonjusticiable political question and, alternatively, for lack of standing. Jonathan explained why he thought the district court decision was understandable as a query to the Ninth Circuit about whether courts should be examining this type of question at all: " do you people want me to do this?" Finally, Rick explained that even if the plaintiffs' case could overcome the two reasons for dismissal relied on by the federal district court, the Ninth Circuit would likely rule in favor of the defendants as a consequence of the Supreme Court's holding in *American Electric Power v. Connecticut*, in which the Court held that the Clean Air Act, and federal regulations under that law to address greenhouse gas emissions, displace federal public nuisance law as a tool to address climate change. (Rick also provided some useful factual context about Kivalina's dire situation.)

It turns out that Rick was correct in his estimation that this "strong and clear signal from the Supreme Court" about displacement would mean that the plaintiffs would lose on the merits of their case.

The only reasonable distinction to make between this case and the *American Electric Power* case was that this case sought damages as a remedy, while *American Electric Power* sought injunctive relief. But the Ninth Circuit rejected the notion that this distinction ought to make this case turn out differently, noting that in its view, "the Supreme Court has instructed that the type of remedy asserted is not relevant to the applicability of the doctrine of displacement. The court concluded that "the Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief."

This case seems an exceedingly unlikely one for Supreme Court review. As a result, the use of the federal common law of public nuisance as a remedy for emissions that have caused climate change is likely over. The question remains, though: what is a town such as Kivalina to do?