The Native village of Kivalina, Alaska: see it now, because it will be gone in a few years.

Not much of a surprise here; a Ninth Circuit panel "has ruled against the northwest Alaska village of Kivalina, which sued energy companies over claims that greenhouse emissions contributed to global warming that is threatening the community's existence." The village brought a common-law public nuisance claim against the oil companies, but the panel held that federal common law actions are displaced by the Clean Air Act. Interestingly, the AP article gets it quite wrong on the basis of the panel's decision: AP says that the panel held that Kivalina did not have standing to sue. It did no such thing: the decision was a displacement case, not a standing case. (District Judge Pro wrote separately to argue that Kivalina lacked standing, but that played no part in the majority opinion).

Once the Supreme Court decided Connecticut v. AEP federal common law actions on climate change seem to be out the window. And justifiably so, as I have argued: the Clean Air Act displaces federal common law relating to climate change.

There is one wrinkle that the decision treats perfunctorily, however. The Kivalina plaintiffs were suing for damages, which means that they want damages for climate change harms that accrued *before* the Supreme Court's opinion in *Massachusetts v. EPA* (which held that the Clean Air Act allows EPA to regulate greenhouse gases). They argued that those damages should be cognizable because they occurred before Supreme Court precedents.

The Ninth Circuit panel rejected this argument, noting that the Supreme Court, in *Milwaukee v. Illinois II* held that the Clean Water Act's displacement of federal common law left no room for action concerning retrospective damages. Very true. But the retrospective action of displacement will vary from statute to statute and situation to situation. Simply because the Supremes held that the Clean *Water* Act in *Milwaukee II* displaced damages actions retrospectively does not necessarily imply that the same result follows here from the Clean *Air* Act. It also doesn't mean that the Clean Air Act *doesn't* apply retrospectively; making a conclusion on this would require an analysis of the Clean Air Act itself — a task that the Ninth Circuit panel did not engage in. (For what it's worth, Roy Cohn loses here, too: this was anything but an anti-environmental panel. The majority opinion was written by Judge Sidney Thomas, who is often sympathetic to environmental causes, and joined by Judge Richard Clifton, a George W. Bush appointee from Hawai'i who is one of the nation's endangered number of Republican moderates).

In any event, common law nuisance actions for climate change will move to where I said several years ago they should be: state common law actions. Simply because the Clean Air Act *displaces* federal common law hardly implies that it *pre-empts* state common law. When the Clean Air Act wants to pre-empt — as in, for example, the case of regulations on automobiles — it says so very clearly. It says nothing about displacing state nuisance law, which remains vital. So the state law actions may have purchase.