Ch. 2: Environmental Law: A Structural Overview

Pages 110-116: THE IMPACT OF THE CLEAN AIR ACT ON STATE COMMON LAW ACTIONS
Several cities, counties and a state have filed common law nuisance suits against oil companies, seeking remedies in the face of damage wrought by climate change as part of a broader climate change litigation strategy.1 In March 2018 federal district judge Vincent Chhabria rejected an effort by oil companies to remove to federal court a state nuisance law climate suit brought by San Mateo and Marin counties and the city of Imperial Beach, California. Judge Chhabria ruled that the cases were properly brought in California state court. On June 25, 2018, U.S. District Judge William Alsup dismissed a similar climate nuisance suit filed by the cities of Oakland and San Francisco. After holding a "science tutorial" on climate change, Judge Alsup concluded that the dispute "is not over science." He observed that "All parties agree that fossil fuels have led to global warming and ocean rise and will continue to do so, and that eventually the navigable waters of the United States will intrude upon Oakland and San Francisco." Judge Alsup noted that if the lawsuit only pertained to GHG emissions within the U.S. it would be displaced by American Electric Power v. Connecticut (AEP) and Kivalina. But because it also involved emissions caused by the defendants' product sold outside the U.S., he did not find displacement. Instead he concluded that the lawsuits "are foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems." City of Oakland v. BP P.L.C.

On July 19, 2018, federal district judge John F. Keenan dismissed the city of New York's common law nuisance suit against Chevron, Conoco Phillips, ExxonMobil and Royal Dutch Shell for fossil fuel production that contributes to climate change. Citing AEP the judge held that the Clean Air Act displaces the federal common law of nuisance because it gives EPA responsibility to regulate emissions of greenhouse gases. Responding to the city's state law nuisance claim, Judge Keenan distinguished the case from AEP, which refused to decided whether the Clean Air Act displaces state law nuisance claims. Because New York City's case involved the use of fossil fuels sold worldwide, rather than emissions from specific power plants as in AEP, the judge held that state nuisance law could not be used because a single federal standard should apply. City of New York v. BP P.L.C. (July 19, 2018).

Similar lawsuits have been filed in several other states. Although it remains to be seen how successful these lawsuits will be, they reflect an increased willingness by state and local governments to address the multifaceted problems caused by climate change through common law nuisance litigation.

Note 7, Page 127: IS MASSACHUSETTS v. EPA's RECOGNITION OF STANDING IN CLIMATE CHANGE LITIGATION LIMITED TO CASES BROUGHT BY SOVEREIGN STATES? HAS THE FEDERAL GOVERNMENT BREACHED ITS CONSTITUTIONAL DUTIES BY FAILING TO PROTECT AGAINST CLIMATE CHANGE?: THE JULIANA CASE

In November 2016 a federal district court in Oregon rejected a motion to dismiss a "future generations" climate change lawsuit against the President and top U.S. officials. Juliana v.

U.S., 217 F.Supp.3d 1224 (D. Ore. 2016). The plaintiffs, who include 21 people then between the ages of eight and nineteen, allege that the federal government knew about the dangers of climate change for more than 50 years, but failed to take action to protect them. The children argue that this violated their substantive due process rights to life, liberty and property as well as the government's public trust obligations to hold natural resources in trust for future generations. The plaintiffs seek a declaration that their rights have been violated and an order requiring federal officials to develop a plan to control emissions of greenhouse gases.

The court rejected the government's arguments that the case raises a non-justiciable political question and that the plaintiffs lack standing. Federal district Judge Ann Aiken distinguished Washington Environmental Council v. Bellon, 732 F.3d 1131 (9th Cir. 2013), a case where an environmental group was held not to have standing to challenge a permit for a refinery for contributing to climate change. She noted that on a motion for summary judgment the court must accept the plaintiffs' allegations of injury and causation as true and that the lawsuit seeks to redress much more significant sources of GHG emissions than the refineries whose permitting was challenged in Bellon. The court also held that plaintiffs had adequately pleaded substantive due process and public trust violations by the federal government.

The Justice Department then petitioned the Ninth Circuit for a writ of mandamus to halt discovery and any trial, arguing that the federal government should not be subject to burdensome discovery when the plaintiffs have failed to state a justiciable claim. On March 7, 2018, a panel of Ninth Circuit judges denied without prejudice the federal government's motion for a writ of mandamus. In re United States, 884 F.3d 830 (9th Cir. 2018). The court held that the federal government had not met the "high bar for mandamus relief" at this stage of the litigation. It observed that it was "mindful that some of the plaintiffs' claims as currently pleaded are quite broad, and some of the remedies plaintiffs seek may not be available as redress." But the court left it for the district court to develop the record and to consider the claims raised by the plaintiffs. On July 30, 2018, the U.S. Supreme Court refused the federal government's request to stay discovery and the upcoming trial. United States v. U.S. District Court for Oregon, 139 S.Ct. 1 (2018). Like the Ninth Circuit, the Court cautioned that the "breadth of respondents' claims is striking, and it opined that "the justiciability of those claims presents substantial grounds for difference of opinion." The Court's order denying a writ of mandamus advised the federal district court hearing the case to "take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions."

On October 15, 2018, the district court again largely denied the government's dispositive notions and confirmed that an anticipated 50-day trial would commence on October 29. The federal government then sought from both the Ninth Circuit and the Supreme Court a writ of mandamus ordering the district court to dismiss the case. On October 19, 2018, Chief Justice John Roberts granted an administrative stay of discovery and trial pending the Court's disposition of the government's mandamus motion. In re United States, 139 S.Ct. 16 (2018). On November 2, the Court vacated the stay, but pointedly placed pressure on the Ninth Circuit to intervene. In Re United States, 139 S.Ct. 452 (2018). The Court noted that the government's mandamus petition also was before the Ninth Circuit. Although the Ninth Circuit previously had

denied two mandamus motions by the government, the Ninth Circuit's "basis for denying relief rested, in large part, on the early stage of the litigation, the likelihood that plaintiffs' claims would narrow as the case progressed, and the possibility of attaining relief through ordinary dispositive motions." The Supreme Court stated that these reasons were, "to a large extent, no longer pertinent" since the trial had been held in abeyance only because of the Chief Justice's stay. Justices Thomas and Gorsuch stated that they would have granted the stay.

In response, the Ninth Circuit on November 8 issued its own stay of the district court proceedings and it directed Judge Aiken promptly to resolve the government's motion for reconsideration of the denial of a request to certify the case for interlocutory review. Judge Aiken then reluctantly agreed on November 21, 2018 to certify the case for interlocutory review. Juliana v. United States, 2018 WL 6303774. On January 7, 2019, the Ninth Circuit agreed to hear the government's appeal of the denial of its motion to dismiss. Judge Friedland dissented from the decision to grant interlocutory review because he believed that the district judge did not truly believe that interlocutory review was warranted, but rather had responded to pressure from the higher courts. The case will be heard by the Ninth Circuit on an expedited basis with the government's opening brief due on February 1.

OTHER CLIMATE LAWSUITS
Professor Michael Gerrard of the Columbia University School of Law maintains a website tracking these cases at: http://www.climatecasechart.com/

pp. 127-137: ENVIRONMENTAL FEDERALISM: DOES THE ATOMIC ENERGY ACT PROHIBIT A STATE FROM BARRING URANIUM MINING?
In the case of Virginia Uranium v. Warren, No. 16-1275, the U.S. Supreme Court is considering the question whether the Atomic Energy Act (AEA) prohibits the state of Virginia from imposing a moratorium on uranium mining. The U.S. Court of Appeals for the Fourth Circuit upheld Virginia's law on the ground that the state moratorium was based on concerns about the environmental consequences of uranium mining and not the safety of nuclear power. 848 F.3d 590 (4th Cir. 2017). After a company that owns land on which a large uranium deposit had been discovered asked the Supreme Court to review the Fourth Circuit's decision, the U.S. Solicitor General agreed that the Court should review the case. The Solicitor General stated that Virginia had "conceded that, for purposes of their motion to dismiss, the courts should take as true petitioners' allegation that the Virginia moratorium was motivated by radiological-safety concerns. This Court therefore need not decide what evidence would be necessary or sufficient to prove those allegations. Rather, the Court need only decide whether such a motivation, if proved, would provide a sound basis for holding the Virginia moratorium to be preempted, even though the immediate object of the moratorium (uranium mining) is an activity subject to state rather than federal regulation." The Court granted cert on May 21, 2018 and oral argument was held on November 5, 2018. At oral argument the company conceded that states may regulate uranium mining, but it argued that Virginia's regulations have "the purpose and effect of regulating the radiological safety hazards of activities entrusted to the NRC (here, the milling of uranium and the management of the resulting tailings)".