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Courts as Battlefields in Climate Fights

By JOHN SCHWARTZ

Tiny Kivalina, Alaska, does not have a hotel, a restaurant or a movie theater. But it has a very big lawsuit that might affect the way the nation deals with climate change.

Kivalina, an Inupiat Eskimo village of 400 perched on a barrier island north of the Arctic Circle, is accusing two dozen fuel and utility companies of helping to cause the climate change that it says is accelerating the island's erosion.

Blocks of sea ice used to protect the town's fragile coast from October on, but "we don't have buildup right now, and it is January," said Janet Mitchell, Kivalina's administrator. "We live in anxiety during high-winds seasons."

The village wants the companies, including ExxonMobil, Shell Oil, and many others, to pay the costs of relocating to the mainland, which could amount to as much as $400 million.

The case is one of three major lawsuits filed by environmental groups, private lawyers and state officials around the nation against big producers of heat-trapping gases. And though the village faces a difficult battle, the cases are gathering steam.

In recent months, two federal appeals courts reversed decisions by federal district courts to dismiss climate-change lawsuits, allowing the cases to go forward. In Connecticut, environmental lawyers joined forces with attorneys general of eight states and the City of New York seeking a court order to reduce greenhouse gas emissions.

In Mississippi, Gulf Coast property owners claim that industry-produced emissions that contribute to climate change increased the potency of Hurricane Katrina in 2005.

And although a federal judge in Oakland, Calif., dismissed the Kivalina suit in October, the village is appealing the decision.

Tracy D. Hester, who has taught a course in climate lawsuits at the University of Houston law school, said that with the issues "very much in play" in three circuits of the federal court system, "the game pieces are being set for eventual Supreme Court review."

The cases need not even get that far to have an impact, said James E. Tierney, the director of the National State Attorneys General program at Columbia Law School. Kivalina alleged in its complaint that the industry conspired "to suppress the awareness of the link" between emissions and climate change through "front

groups, fake citizens organizations and bogus scientific bodies."

That claim echoes those in suits against the tobacco industry that ultimately led to industry settlements and increased government regulation.

If the climate-change cases even get to the discovery stage, and if the energy industry possesses embarrassing e-mail messages and memorandums similar to those that proved devastating to tobacco companies, Mr. Tierney said, "it's a hammer" that could drive industries to the negotiating table.

The cases generally rely on the common-law doctrine of nuisance, the same concept that allows neighbors to sue one another over noises, odors and the like that interfere with the use or enjoyment of property. In the context of climate change, such cases were once derided as frivolous long shots that would be shot down quickly. Scott H. Segal, a lawyer for energy companies, joked in a 2004 article in Grist magazine that the cases brought "new meaning to the term 'nuisance lawsuit.' "

No one is laughing now. In a report issued last year, Swiss Re, an insurance giant, compared the suits to those that led dozens of companies in asbestos industries to file for bankruptcy, and predicted that "climate change-related liability will develop more quickly than asbestos-related claims."

The pressure from such suits, the report stated, "could become a significant issue within the next couple of years."

The American Justice Partnership, a business-oriented group that is critical of the plaintiffs' bar, argued in a 2008 report that the conspiracy accusations made the Kivalina case "the most dangerous litigation in America."

The case could stifle debate over climate-change issues, the report stated, and increase "the threat of being named as a defendant or co-conspirator subject to invasive and costly inquiry."

President Obama's senior adviser for energy and climate change, Carol M. Browner, underscored the potential for the suits to affect policy in a briefing with reporters in September. Citing the Connecticut case, Ms. Browner warned that "the courts are starting to take control of this issue," and argued that setting environmental standards "is best done through legislation."

She suggested that the situation increased the pressure on Congress to pass legislation to curb heat-trapping gases. The Environmental Protection Agency is drafting regulations on such emissions as dangerous pollutants under the Clean Air Act, an authority confirmed by the 2007 Supreme Court decision, Massachusetts v. E.P.A.

A bill to curb such gases that passed the House last year has not advanced in the Senate. And the climate talks last month in Copenhagen produced little.

That sense of inaction has left a situation in which those intent on reducing gas emissions could try to make the courts "a significant battleground," said Harold Kim, an official in the administration of President George W. Bush who is now senior vice president for reform initiatives at the United States Chamber Institute for Legal Reform.

“This is trending into an area that could be explosive — for better or for worse, depending on how you look at it,” Mr. Kim said.

Pat D. Hemlepp, a spokesman for American Electric Power, a defendant in the Connecticut case, said that he could not comment directly on the suit, but that “our view is that litigation is not the appropriate way to address climate concerns.”

The company, Mr. Hemlepp said, supports the House bill. “We are not one of those heels-dug-in, just-say-no companies on climate action,” he said.

Matthew F. Pawa, the lawyer who helped organize the Connecticut suit and the Kivalina litigation, said the cases were not about affecting public policy.

“I filed these cases because I expect and want to win in court,” Mr. Pawa said. “I’m a litigator, and that’s what I do.”

Despite the recent victories, climate lawsuits are still at a preliminary stage. Mr. Segal, the lawyer who made the “nuisance lawsuit” joke, said issues like proving climate change, its link to the companies and the further link to the damage “have not been addressed.”

If the cases go to trial, he said, “these burdens will be particularly tough in the climate context.”

A lawyer working with Mr. Pawa in the Kivalina suit, Stephen D. Susman, agreed that the road ahead was uphill.

“The legal landscape is horrible,” said Mr. Susman, of Houston. “No lawyer can say this is a way to make money.”

He also said he doubted that the cases would prompt large numbers of class-action suits, since courts would not be likely to allow the formation of a class of litigants among people with such diverse experiences.

Michael B. Gerrard, a professor at Columbia University law school and director of its Center for Climate Change Law, said the first efforts to sue tobacco companies had appeared to be weak as well.

“They lost the first cases; they kept on trying new theories,” Mr. Gerrard said, “and eventually won big.”