

**From:** [Seth Platt](#)  
**To:** [Scott Wyman](#); [Dean Trantalis](#); [Alain Boileau](#)  
**Subject:** Re: FW: Judge Dismisses Suit Against Oil Companies Over Climate Change Costs  
**Date:** Friday, June 29, 2018 11:28:18 AM  
**Attachments:** [image006.png](#)  
[image005.png](#)

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Hi Scott,

Thanks for forwarding. Below is some context for Dean and Alain's consideration.

While certainly not ideal, the Alsup decision to dismiss the cost-recovery cases filed by San Francisco and Oakland against five oil majors for climate damages may have little impact on the eventual outcome of the 11 related cases still in court.

There are several reasons for this, the central one being the underlying issue of whether these cases should be tried in state or federal court. All but one (New York City) of the 13 cases to date have been filed in state court. Under standard legal procedure, the defendants can then "remove" the cases to federal court, and the plaintiffs must then argue to "remand" the cases back to state court, if they chose to do so. Based on a number of legal precedents, there is general agreement in the legal profession that state courts are the proper and more advantageous venue for these cases. In the six other California cases, plaintiffs argued for remand and the judge (Chhabria) agreed, sending them back to state court. The remand order is being appealed, as Alsup's motion to dismiss will be appealed, but there is a very strong case to be made upholding Chhabria's decision to keep these six cases in state court.

In the SF and Oakland cases, however, the plaintiffs chose to stay in federal court. Alsup, a federal district court judge in the ninth circuit, dismissed the case on the grounds that global warming is a global problem, too large for a district court, and more appropriately resolved by the other two branches of government.

[Commenting](#) on the impact of Alsup's decision, Ann Carlson, the director of the Emmett Institute on Climate Change and the Environment at the UCLA School of Law, said "The overall effect on those state cases is negligible." Adding, "His decision is irrelevant from a legal perspective," as long as these cases stay in state courts.

Alsup's decision is really quite stunning when you step back and look at it. Judge Alsup says in his opinion that

- "[C]limate scientists are in vast consensus that the combustion of fossil fuels has... materially increased carbon dioxide levels, which in turn has materially increased the median temperature of the planet, which in turn has accelerated ice melt and raised (and continues to raise) the sea level." [p.4]

He acknowledges that

- “Glaciers around the world have been shrinking. Ice sheets over Greenland and Antarctica have been melting. The sea level has risen by about ... seven to eight inches since 1900. As our globe warms and the seas rise, coastal lands in Oakland and San Francisco will, without erection of seawalls and other infrastructure, eventually become submerged by the navigable waters of the United States.” [p.4]

He further acknowledges that Chevron, Exxon, BP, Shell and ConocoPhillips

- “are collectively responsible for over eleven percent of all carbon dioxide and methane pollution that has accumulated in the atmosphere since the Industrial Revolution” [p. 5]

And he points out that these same companies

- “have allegedly long known the threat fossil fuels pose to the global climate. Nonetheless, they continued to extract and produce them in massive amounts while engaging in widespread advertising and communications campaigns [that] portrayed fossil fuels as environmentally responsible and essential to human well-being and downplayed the risks of global warming by emphasizing the uncertainties of climate science or attacking the credibility of climate scientists.” [p. 5]

Nonetheless, he ends up concluding that

- “The problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case. While it remains true that our federal courts have authority to fashion common law remedies for claims based on global warming, courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches. The Court will stay its hand in favor of solutions by the legislative and executive branches.” [pp. 15-16]

The decision rests on a series of assumptions that seem to be completely divorced from the lawsuit actually filed by Oakland and San Francisco.

- First, the court held (back in February) that even though Oakland and San Francisco sued in state court under California nuisance law, the oil companies should have the right to move the case to federal court and to apply federal law rather than state law. Another federal judge, Vince Chhabria, reached the opposite conclusion in a group of virtually identical cases filed by other California cities and counties, and those cases were sent back to state court to be tried under California law. Eventually the 9th Circuit Court of Appeals will decide whether Judge Chhabria or Judge Alsup was correct. We believe Judge Chhabria’s decision remanding the cases to state court was better reasoned and is more likely to be upheld by the Court of Appeals.
- Second, having decided that federal law should govern, Judge Alsup then decides



that Oakland and San Francisco cannot sue under federal common law for nuisance abatement, because their claims involve “a harm caused by fossil fuel emissions”, and EPA has exclusive jurisdiction to set emission standards. But there is nothing about emission standards in the state court Complaints filed by Oakland and San Francisco. The lawsuits complain that the communities are being invaded by rising sea levels resulting from global warming which defendants knew their products would cause. The cities are not suing to prohibit or limit emissions. They are suing to require the defendants to pay their fair share to abate the nuisance their fossil fuel products admittedly have caused.

- Third, having ruled out any right to sue under federal common law with respect to emissions that are subject to EPA regulation, the court concludes that no federal common law claims can be brought with respect to non-U.S. emissions either. While EPA has no jurisdiction outside the U.S., the court decides that federal courts should “defer to the legislative and executive branches when it comes to such international problems” [pp. 9-10]

In sum, the court re-frames the local nuisance abatement case filed in state court by Oakland and San Francisco into a federal case involving “regulation of the worldwide problem of global warming”; one which calls for “a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case”; one which “should be determined by our political branches, not by our judiciary.” [p. 15]

While this is not the ruling we had hoped for, it is just is one pothole in a long road to climate justice. We are optimistic that as other judges consider cases like this, particularly state court judges applying state tort law, companies that made billions of dollars selling products they knew full well would inflict enormous damage on communities like San Francisco and Oakland will be required to bear a fair and equitable share of the cost of repairing and mitigating the damage they have caused. In the meantime, we will put our faith in the 9th Circuit Court of Appeals to conclude that Judge Chhabria got it right.

Oakland and San Francisco, like Marin County and San Mateo and Santa Cruz and others, should be allowed to proceed in state court under California law against companies whose products knowingly and intentionally contribute to the sea rise that threatens those communities.

By passing the buck to a do-nothing Congress and a climate-denying White House, the federal court proposes to stick local taxpayers in Oakland and San Francisco with the massive costs of dealing with global warming damages admittedly caused by fossil fuel companies’ products.

### **Here are a few other resources:**

The Union of Concerned Scientists and Earth Rights International also put out several blog



posts over the past couple days, discussing the issues with Judge Alsup's ruling. Essentially, this is just one judge's opinion (there will be an appeal) and his process was fraught with missteps. See links below:

[Union of Concerned Scientists: Judge Should Not Have Deferred to Congress, Executive Branch in Fossil-Fuel Climate Case](#)

[Union of Concerned Scientists: Six Key Facts Ignored in Dismissal of California Climate Suits vs. Fossil Fuel Companies](#)

[Earth Rights International: Three Key Errors in First Decision Dismissing Climate Nuisance Lawsuits."](#)

Additionally, we've seen several positive stories about how the Imperial Beach lawsuit is going full-steam ahead; community leaders are undeterred by the dismissal in San Francisco and Oakland, and still believe in the utility of these suits. Links below:

[San Diego Union Tribune: Imperial Beach pushes forward with lawsuit against oil companies](#)

Rob Nikolewski 6/27/18

A federal judge earlier this week may have tossed out a lawsuit brought by officials for the cities of San Francisco and Oakland, seeking to hold oil companies such as Chevron, BP and ExxonMobil liable for any costs related to climate change, but the mayor of Imperial Beach says a similar lawsuit his town is taking part in will proceed.

[Inside Climate News/KQED: This Tiny California Beach Town Is Suing Big Oil. It Sees This as a Fight for Survival.](#)

David Hasemyer 6/27/18

Among Serge Dedina's first stops on a brisk morning tour of this small seaside city is a wall that separates a row of frayed apartments from wetlands known as the San Diego Bay Wildlife Refuge. Artists are dabbing finishing touches on a mural of sea birds against a flamingo-pink wall.

On Tue, Jun 26, 2018 at 2:32 PM, Scott Wyman <[SWyman@fortlauderdale.gov](mailto:SWyman@fortlauderdale.gov)> wrote:

FYI

*Scott Wyman*

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**From:** Alain Boileau

**Sent:** Tuesday, June 26, 2018 1:41 PM

**To:** Dean Trantalis <[DTrantalis@fortlauderdale.gov](mailto:DTrantalis@fortlauderdale.gov)>

**Cc:** Scott Wyman <[SWyman@fortlauderdale.gov](mailto:SWyman@fortlauderdale.gov)>

**Subject:** Judge Dismisses Suit Against Oil Companies Over Climate Change Costs

Mayor:

With regards to the meeting we had yesterday, please see the attached Order, which was issued yesterday in the U.S. District Court for the Northern District of California, as well as the linked NY Times article, describing the dismissal of the City of Oakland and the State of California's lawsuit against BP, Chevron, ConocoPhillips, Exxon, and Shell, under the same nuisance and trespass theories being proposed to us. The articles suggests that similar attempts in years past have also been unsuccessful. The following is the final paragraph of the Order, which notably delegates the remedies to the Legislative and Executive branches of government.

“In sum, this order accepts the science behind global warming. So do both sides. The

dangers raised in the complaints are very real. But those dangers are worldwide. Their causes are

worldwide. The benefits of fossil fuels are worldwide. The problem deserves a solution on a

more vast scale than can be supplied by a district judge or jury in a public nuisance case. While it



remains true that our federal courts have authority to fashion common law remedies for claims

based on global warming, courts must also respect and defer to the other co-equal branches of

government when the problem at hand clearly deserves a solution best addressed by those

branches. The Court will stay its hand in favor of solutions by the legislative and executive branches.

For the reasons stated, defendants' motion to dismiss is **GRANTED.**"

From The New York Times:

Judge Dismisses Suit Against Oil Companies Over Climate Change Costs

<https://www.nytimes.com/2018/06/25/climate/climate-change-lawsuit-san-francisco-oakland.html>

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