

The Suncor Sets on the Fossil Fuel Empire: Why the Fight for Climate Justice Will Take Place in State Courts

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Introduction

In recent years, numerous states have sued big oil companies over their role in causing the climate crisis and the lies they perpetuated to hide it. One of the most notable cases came out of Colorado, where the city of Boulder, Boulder County, and San Miguel County sued Exxon Mobil and Suncor Energy.¹ This blog post will lay out Big Oil’s history of climate misinformation, then discuss *Boulder County v. Suncor Energy* and its implications for future climate litigation.

Background

I. Exxon and the Climate “Hoax”

The legal battle over climate change has been ongoing for decades but not as long as fossil companies have known about the impacts their product has on the environment. Exxon has known about climate change and the role fossil fuel plays in it since 1977, a full eleven years before the issue became public.² In 1978, a senior company scientist named James F. Black warned company executives “that man has a time window of five to ten years before the need for hard decisions regarding changes in energy strategies becomes critical.”³ For more than a

¹ Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022).

² Shannon Hall, *Exxon Knew about Climate Change almost 40 years ago*, SCI. AM., (Oct. 26, 2015), <https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/>.

³ NEELA BANERJEE ET AL., EXXON: THE ROAD NOT TAKEN 1 (2015).

decade, the company turned its attention to researching the issue, including CO₂ sampling and climate modeling, but then it did a 180.⁴

Instead of leading the research into climate change, Exxon began lobbying to prevent limitations on greenhouse gas emissions in the United States and abroad.⁵ In 1989, Exxon helped create the Global Climate Coalition to question the science of climate change.⁶ The Coalition was instrumental in keeping the United States, China, and India from signing the Kyoto Protocol.⁷ The American Petroleum Institute, of which Exxon is a member, even sent out a 1998 memo proclaiming that victory would be achieved when “[a]verage citizens ‘understand’ (recognize) uncertainties in climate science,” and “recognition of uncertainties becomes part of the ‘conventional wisdom.’”⁸ The goal was to seed doubt in people’s minds, all while killing the planet behind our backs.

Exxon and other fossil fuel manufacturers knew about the reality of climate change for decades and rather than do something about it, they ran a misinformation campaign so that they would continue to make a profit. It is unsurprising that several states have leveled numerous charges against these corporations, similar to campaigns against tobacco companies on account of their own misinformation campaigns.

II. Where We’ve Been: Procedural Posture for the Case Against Exxon and Suncor

The claims against Suncor and Exxon include public nuisance, private nuisance, trespass, unjust enrichment, violation of the Colorado Consumer Protection Act, and civil conspiracy.⁹ All

⁴ *Id.*

⁵ *Id.* at 2.

⁶ Hall, *supra* note 2.

⁷ *Id.*

⁸ KATHY MULVEY ET AL., THE CLIMATE DECEPTION DOSSIERS 10 (2015).

⁹ *Suncor Energy*, 25 F.4th at 1248.

claims are made under state law; no federal claims were made.¹⁰ The Defendants filed a Notice of Removal in the United States District Court for the District of Colorado that asserted seven grounds for removal, including under the federal officer removal statute, 28 U.S.C. § 1442, pursuant to 28 U.S.C. § 1447(d).¹¹ The district judge rejected all seven claims and remanded the case back to the state court.¹²

Defendants appealed to the Tenth Circuit on six of the grounds. Normally, “orders remanding removed cases to state court are not appealable ‘except that an order remanding a case to the State court from which it was removed pursuant to § 1442 (federal officer removal) or § 1443 (civil rights cases) of this title shall be reviewable by appeal or otherwise.’”¹³ Thus, the Tenth Circuit initially held that appellate jurisdiction was limited to the federal officer basis for removal.¹⁴

This decision was overturned when a similar case made its way to the Supreme Court. In *BP P.L.C. v. Mayor and City Council of Baltimore*, the Court held that the “appellate review is not confined to a defendant’s removal arguments under the federal officer and civil rights removal statutes...[i]nstead, a court of appeals may review the merits of all theories for removal that a district court has rejected.”¹⁵ Thus, the initial decision in *Suncor* had been overruled, appellate jurisdiction was extended to all six grounds, and the case was remanded back to the Tenth Circuit.¹⁶ The Tenth Circuit reviewed all six grounds and rejected them before remanding back to state court. The reasoning will not be discussed here because “statutes conferring jurisdiction

¹⁰ *Id.*

¹¹ *Id.* at 1249.

¹² *Id.*

¹³ *Id.* at 1246 (quoting 28 U.S.C. § 1447(d)).

¹⁴ *Id.*

¹⁵ *BP P.L.C. v. Mayor & City Council of Baltimore*, 593 U.S. 230, 236 (2021).

¹⁶ *Suncor Energy*, 25 F.4th at 10.

on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction."¹⁷ Further, defendants, “as the parties removing to federal court, bear the burden of establishing jurisdiction by a preponderance of the evidence.”¹⁸ The important thing to note about the procedural posture up to this point is that every court that took the case denied federal jurisdiction on all grounds in favor of state jurisdiction. Thus, any court within the Tenth Circuit facing similar facts is bound by *stare decisis* and should rule in favor of state jurisdiction.

In an unsurprising turn of events, Suncor and Exxon once again appealed, this time to the Supreme Court, arguing that the municipalities’ claims fell under federal common law, not state law.¹⁹ However, in a somewhat surprising turn of events given the Court’s hostile history with environmental issues and its ruling in *BP P.L.C. v. Mayor & City Council of Baltimore*, the Court denied cert.²⁰ Only Justice Kavanaugh would have granted the petition; though, Justice Alito did not take part in the decision.²¹ Though the Supreme Court did not give its reasoning in denying cert, its decision suggests that it broadly agrees with the Tenth Circuit’s reasoning and decision. Other circuits have taken note of this and followed in the Tenth’s footsteps, including the First, Second, Third, Fourth, Ninth, and the District of D.C.²² In all of these courts, similar cases brought by municipalities against Big Oil will be tried in state court.

Analysis

I. Where We’re Going: The Implications of *Suncor* for Future Climate Litigation

¹⁷ United States ex rel. King v. Hillcrest Health Ctr., Inc., 264 F.3d 1271, 1280 (10th Cir. 2001).

¹⁸ *Suncor Energy*, 25 F.4th at 1250 (citing *Dutcher v. Matheson*, 733 F.3d 980, 985 (10th Cir. 2013)).

¹⁹ SCOTUSBLOG, *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm’rs of Boulder Cnty.*, SCOTUSBLOG (Apr. 24, 2023), <https://www.scotusblog.com/case-files/cases/suncor-energy-u-s-a-inc-v-board-of-county-commissioners-of-boulder-county/>.

²⁰ *Id.*

²¹ *Id.*

²² See *Rhode Island v. Shell Oil Prods. Co, LLC*, 35 F.4th 44 (1st Cir. 2022); *Connecticut v. Exxon Mobil Corp.* 83 F.4th 122 (2d Cir. 2023); *City of Hoboken v. Chevron Corp.* 45 F.4th 699 (3d Cir. 2022); *Mayor & City of Baltimore v. BP P.L.C.* 31 F.4th 178 (4th Cir. 2022); *City & Cnty. Of Honolulu v. Sunoco LP* 39 F.4th 1101 (9th Cir. 2022); *Dist. of Columbia v. Exxon Mobil Corp.* 640 F. Supp. 3d 95 (D.D.C. 2022).

Some people may be wondering at this point, so what? The merit of the municipalities' claims has yet to be decided. All of the litigation up until this point has been about jurisdiction, a legal issue that the public (rather fairly) does not particularly care about.

Well, there is a reason that Big Oil wants these cases in federal court so badly, and it is not just a tactic to delay proceedings. Federal courts have already dismissed claims similar to those made by the municipalities, while state courts have been historically friendlier to such claims.²³ One reason for this, and one often cited by the municipalities' attorneys, is that state courts pull their juries from people actually impacted by the Defendant's alleged actions. For instance, the Marshall Wildfire ravaged Colorado in 2021, burning 6,000 acres, forcing 30,000 people to evacuate, and destroying almost a thousand homes and businesses.²⁴ Climate change has been known to worsen the effects of wildfires.²⁵ The people in Colorado impacted by the fire and climate change more broadly are more likely to be sympathetic to the municipalities' arguments.

Another reason that states and municipalities want these cases in state courts is because of the history of tobacco litigation. In those cases, courts ruled Big Tobacco's actions amounted to a "public nuisance."²⁶ Like Big Oil, Big Tobacco attempted to take their arguments to federal court only to have the Supreme Court send them right back to state court.²⁷ In *Cipollone v. Ligette Group, Inc.*, the Supreme Court held that claims based on a common law legal duty (for example, the duty of manufacturers to not mislead consumers or misrepresent the harms their

²³ Sam Brasch, *Boulder's blockbuster climate lawsuit against Suncor and Exxon Mobil has a path forward*, COLO. PUB. RADIO (Apr. 24, 2023), <https://www.cpr.org/2023/04/24/boulder-climate-lawsuit-suncor-exxon-mobil/>.

²⁴ Kristin Myers, *President Joe Biden Approves FEMA After Colorado Wildfires, 3 Presumed Dead*, BLAST (Jan. 2, 2022), <https://theblast.com/152050/biden-approves-fema-for-colorado/>.

²⁵ Nat'l Oceanic and Atmosphere Admin., *Wildfire climate change connection*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. (July 24, 2023) <https://www.noaa.gov/noaa-wildfire/wildfire-climate-connection>.

²⁶ *Cipollone v. Ligette Grp., Inc.* 505 U.S. 504 (1992).

²⁷ *Id.*

products cause) is not preempted by federal law.²⁸ *Cipollone*, along with many other cases, culminated in 46 states Attorneys General and the four largest tobacco manufacturers creating the Master Settlement Agreement.²⁹ The agreement “requires the tobacco industry to pay the settling states billions of dollars annually forever, forbids participating cigarette manufacturers from targeting youth, imposes restrictions on advertising and promotional activities, and bans or restricts transit advertising, outdoor advertising, product placement in media, branded merchandise, free product samples, and sponsorships.”³⁰ The municipalities’ attorneys are hoping to have similar success against Big Oil on similar claims for misrepresentation.³¹

There is still a long way to go before Big Oil is held accountable, and even if Plaintiffs win, it may be too late to stop the worst effects of climate change. Still, *Suncor* is undeniably a win for climate justice.

²⁸ *Id.*

²⁹ Pub. Health L. Ctr, *Master Settlement Agreement*, COUNTERING THE TOBACCO EPIDEMIC, <https://www.publichealthlawcenter.org/topics/commercial-tobacco-control/master-settlement-agreement>.

³⁰ *Id.*

³¹ Brasch, *supra* note 23.