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Best Brief for Appellee (EPA): Nineteenth Annual Pace National Environmental Law Moot Court Competition

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MEASURING BRIEF*

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELTH CIRCUIT

CA No. 06-2006
CA No. 06-2007

PROVINCE OF INUKSUK and
VILLAGE OF AKULI,
Appellants-Petitioners
v.
GENERGY CORP., ATOMIC ENERGY, INC.,
CENTENNIAL POWER CO., POWER SUPPLIERS CO.,
And FIRST ENERGY, LTD.,
Appellees-Respondent
v.
STEPHEN JOHNSON, ADMINISTRATOR,
U.S. Environmental Protection Agency,
Appellee-Respondent

Appealed from the United States District Court of New Union

MEASURING BRIEF FOR THE RESPONDENT-APPELLEE
STEPHEN JOHNSON, ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY

THE CATHOLIC UNIVERSITY OF AMERICA
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* This brief has been reprinted in its original form.

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT

The United States District Court for the State of New Union exercised federal question subject-matter jurisdiction[1] over the consolidated cases by the Plaintiffs against the Power Companies and the U.S. Environmental Protection Agency ("EPA").

The United States Court of Appeals for the Twelfth Circuit has subject matter jurisdiction over both final orders of the District Court pursuant to 28 U.S.C. § 1291.

The matter comes before this court pursuant to the issuance of a final order by the District Court in the granting of both motions for summary judgment filed by the EPA and the Power Companies in their entirety.[2]

QUESTIONS PRESENTED

1. After *Illinois v. City of Milwaukee* does there remain a federal common law of nuisance that could be applied to carbon dioxide emissions from power plants in New Union?

1. 28 U.S.C. § 1331
2. Fed. R. Civ. P. 56(d).

2. If a public nuisance exists related to CO_2 under either federal or state law, is it appropriate to apply the *Landers v. East Texas Salt Water Disposal Co.* rule on indivisible harm to the circumstances in this case?

3. Should the precautionary principle, a principle of customary international law, be a consideration in balancing benefits versus harm in a nuisance analysis?

4. Is the harm to plaintiffs Province of Inuksuk and Village of Akuli sufficiently concrete to provide standing to bring the nuisance action?

5. Is U.S. EPA required by section 115 of the Clean Air Act to notify the Governor of New Union that the State must amend its State Implementation Plan to reduce emissions from the defendant power plants to a level consistent with emissions that can be achieved using the currently available control technology?

6. Is the United States government, acting through the EPA, required under the *Trail Smelter* doctrine to reduce CO_2 emissions to levels that can be achieved through the application of currently available control technology so as to minimize harm to a neighboring country?

STATEMENT OF THE CASE

The case pertains to two consolidated actions by the Plaintiffs-Appellants against five defendant power companies on nuisance and international law claims and a citizen's suit against the U.S. EPA on Clean Air Act ("Act") and international law claims.[3] This appeal is from the final order of the United States District Court for the State of New Union issued on June 12, 2006, granting the motions for summary judgment filed by the EPA and the Power Companies.[4]

STATEMENT OF FACTS

The Province of Inuksuk and the Village of Akuli are plaintiffs in this consolidated action concerning the impact of climate change on their area's ice cover which they use for harvesting and travel.[5] The Province/Village filed a citizen suit against the EPA under section 115 of the Clean Air Act ("Act") and the Trail

3. Record at 1.
4. Record at 4, 12.
5. Record at 4-5.

Smelter doctrine in international law.[6] They also filed a civil suit against five power companies located in the State of New Union on federal common law nuisance, public nuisance law, and international law claims seeking monetary damages in the amount of $260 million and an injunction requiring the plants to reduce the CO_2 emissions by 50 percent, the level currently achievable through technology.[7]

Two duly constituted international agencies have released general reports concerning climate change affecting the area at issue.[8] The International Climate Change Research Panel ("ICCRP") issued the Artic Climate Impact Assessment in 2004 researched by scientists and finding that the Artic Region has seen the fastest rate of climate change over the last few decades.[9] The Inuit Commission released the Inuksuk Study that noted thawing of permafrost, loss of sea ice, and rising temperatures. It predicted flooding may affect the Village of Akuli within three years.[10]

The Village voted in summer, 2005, to relocate the entire village inland at a cost of approximately $260 million.[11] The Village is comprised of the Inuit, the people native to Inuktitut.[12] Akuli is located within the newly formed Canadian Province of Inuksuk. The Province has about 11,000 residents across approximately 300,000 square miles and is bordered by the Hudson Bay and the Hudson Strait.[13] Two Akuli residents referenced in the record include Sheila Weyiouna, who owns a general supplies store near the water, and John Kiyutelluk, a full-time fisherman who owns a home and wharf.[14] Mr. Kiyutelluk's wharf may have to be relocated about 20 kilometers away and may be shut down during the relocation.[15]

The record is completely silent on the details of the power plants, other than their company names: Genergy Corp., Atomic Energy, Inc., Centennial Power Co., Power Suppliers Co., and

6. Record at 1-2.
7. Record at 1.
8. Record at 5-6.
9. Record at 6.
10. Record at 5.
11. Record at 5.
12. *Id.*
13. Record at 4-5.
14. Record at 6.
15. *Id.*

First Energy, Ltd.[16] No operating information is provided, such as the amount or type of emissions by each company, the type of technology used by each company, and so forth.

STANDARD OF REVIEW

The standard of review on appeal of the consolidated claims herein is *de novo* regarding whether the District Court properly concluded based upon the record that no genuine dispute of material facts existed when viewed in the light most favorable to the nonmoving party,[17] i.e., the Plaintiffs. This standard applies throughout all arguments raised since all issues are on appeal pursuant to the granting of the motions for summary judgment filed by both the EPA and the Power Companies in their entirety.[18]

SUMMARY OF THE ARGUMENT

Inuksuk and Akuli have not demonstrated an injury in fact to trigger standing in a federal court. Their shortcomings in this arena lie with the speculative nature of their alleged harm.

The EPA has no obligation to issue an endangerment finding under section 115 of the Act, nor could it issue such a finding sua sponte or without a concurrent reciprocity finding. In this case, the EPA permissibly declined to issue either finding as it received no request from the Secretary of State to make a finding and the international reports it received appeared to merely document change in climate conditions in the Province. Neither report requested specific relief from the EPA regarding these defendant power companies, nor did the reports establish a causal link between these companies and the noted climate change.

The United States government, through the EPA, is not affected by the *Trail Smelter* case since it is non-binding customary international law and does not delineate a requirement of the government to reduce CO^2 emissions through currently available control technology.

The Clean Air Act and its subsequent amendments fully preempted the preexisting federal common law of nuisance. One of the brightest indicators of this preemption was the clear congressional intent as evidenced in the legislative history. Furthermore,

16. Record at 4.
17. Fed. R. Civ. P. 56(c) (1987).
18. Record at 12.

the comprehensive nature of the Act and the scientifically complex issues it addresses are more appropriately decided by an elected body of legislators than a judiciary.

The *Landers* rule could be appropriately applied in the instant case if this court were to find that a public nuisance exists under either federal or state law. The indivisible nature of the plaintiffs alleged harm requires the application of this rule, otherwise the plaintiffs could potentially lose all avenues of recovery for their injury.

The precautionary principle is inapplicable to this case because there is no federal common law nuisance analysis. Even if there were, the principle would at most be a non-binding evidence of customary international law that U.S. courts are not required to consider in rendering decisions.

ARGUMENT

I. THE HARM ALLEGED BY THE PETITIONERS IS TOO SPECULATIVE TO PROVIDE STANDING TO BRING THE NUISANCE ACTION

The Petitioners cannot satisfy the requirements to establish standing in federal court. The requirement of standing is firmly rooted in Article III of the Constitution of the United States which confers power upon the courts to hear only actual "cases or controversies."[19] From this general doctrine, American courts have extrapolated various tests to deal with the issue. In *Lujan v. Defenders of Wildlife*[20] the Supreme Court articulated a clear three-part test that courts are to use when determining whether a litigant has standing.[21] "The party invoking federal jurisdiction bears the burden of establishing these elements."[22] The plaintiff must show that it suffered an "injury in fact".[23] The plaintiff must also establish causation between the contested conduct and the injury.[24]Finally, the plaintiff must demonstrate that the injury will be "redressed by a favorable decision."[25] As stated in *Lujan*, to overcome a motion for summary judgment, a plaintiff "must set

19. U.S. CONST. art. III, § 2, cl. 1.
20. *Lujan v. Defenders of Wildlife*, 504 US 555 (1992).
21. *Id.* at 560.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

forth by affidavit or other evidence of specific facts for which purposes of the summary judgment motion will be taken as true."[26]

When agency action is at issue, Congress has provided statutory standing through the Administrative Procedure Act.[27] However, the Supreme Court declared that a plaintiff challenging government action must still establish that they have suffered an "injury in fact."[28] This honorable court has highlighted the issue of whether Inuksuk and Akuli have suffered a "concrete" injury. While this respondent would argue that the plaintiffs not only fail to establish a "concrete" injury but also to sufficiently demonstrate that that their alleged harm will be redressed by a favorable court decision, we will restrict our discussion in deference to the court's direction. In light of plaintiffs' failure to establish anything but a speculative harm, the court below properly granted the defendants' summary judgment motion.

A. The plaintiffs have not demonstrated that the injury they anticipate is actual or imminent.

This respondent will make no attempt to trivialize the gravity of the plaintiffs' situation. However, "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy."[29] The constitutional requirement of standing is an indispensable hurdle to be leapt by any party wishing to utilize a court of the United States.[30] The EPA acknowledges the fact that for the purpose of a summary judgment motion, the evidence put forth by the plaintiffs should be given credibility.[31] However, even affording their theories this added credence, the plaintiffs have not suffered an "injury in fact" as required by law.

The *Lujan* court defined an "injury in fact" as follows. The plaintiff must demonstrate that they suffered an "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[32] Additionally, they must do this using affidavits or other specific

26. *Id.* at 561.

27. 5 U.S.C. 702 (1976).

28. *Association of Data Processing Serv. Orgs., Inc., v. Camp*, 397 U.S. 150, 152 (1970).

29. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 486 (1982).

30. *Id.* at 475-76.

31. *Lujan*, 504 U.S. at 561.

32. *Id.* at 560.

facts.[33] The plaintiffs in *Lujan* filed an action based on the Endangered Species Act. They claimed the Secretary of the Interior failed to consult with other agencies in regard to overseas activity. This, they asserted, led to the extinction of endangered and threatened species and interfered with their right to enjoy the animals at some indeterminate time in the future.[34] Because the plaintiffs claimed that they would suffer an injury "some day", the Supreme Court held that the plaintiffs alleged harm was not "actual or imminent" as required by the doctrine.[35]

Contrast *Lujan* with the case of *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[36] The plaintiffs in *Friends of the Earth* alleged that the violation of mercury discharge limits prevented them from enjoying the recreational area in and around the North Tyger River.[37] In an opinion authored by Justice Ginsburg, the Supreme Court granted standing to the plaintiffs stating that because members of the plaintiffs' class could smell and see the pollutants accumulating in the river. This, the court stated, was more than "general averments and conclusory allegations."[38]

Inuksuk and Akuli claim that they must move the village inland.[39] Their decision to move the village is based on a hypothetical projection that atmospheric warming will cause flooding and increased susceptibility to waves, storm surges and erosion.[40] These projections are conjectural in nature. Unlike the situation in *Laidlaw* where the pollutants in the river had an immediate impact on the day to day lives of the plaintiff, the Appellants filed this suit based on something that might (or might not) happen in the future. The fact that the Village voted to begin making preparations to move inland now has no bearing on whether the alleged injury is imminent. While the EPA has conceded that a decrease in ice cover is likely a result of global warming, it does not concede that the Appellants are justified in taking such drastic measures. Much like the plaintiffs in *Lujan*, they base their claim on an as-

33. *Id.* at 561.
34. *Id.* at 562.
35. *Id.* at 564.
36. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167 (2000).
37. *Id.* at 181-82.
38. *Id.* at 184. (*quoting Lujan v. National Wildlife Federation* 497 U.S. 871, 888 (1990)).
39. Record at 5.
40. *Id.*

sertion that some day in the future their fears may become a reality. They are acting on the assumption that an assembly of environmental factors will coalesce to make their doomsday predictions a reality. Such an inference cannot withstand the scrutiny of Article III standing.

II. THE EPA HAS NO MANDATORY DUTY TO MAKE AN ENDANGERMENT FINDING UNDER SECTION 115 OF THE CLEAN AIR ACT.

The EPA is not obligated to issue an endangerment finding as permitted under section 115 of the Act because it has discretion in the "reasonably may be anticipated" test regarding the endangerment. Nor did the EPA abuse its discretion in deciding against issuing the finding because it made a reasoned decision that took account of scientific facts and policy considerations involved in the climate change patterns in the Province of Inuksuk. Regardless of whether the EPA permissibly determined it did not have reason to believe an endangerment exists, the EPA is barred from making an endangerment finding in the absence of a reciprocity finding.

A. Section 115 of the Clean Air Act Provides the EPA with Discretion Regarding Endangerment Findings.

The Act contains a provision permitting the EPA to regulate air pollutants that it deems have a negative impact on an international scale. It imposes three requirements prior to the EPA being permitted to issue an endangerment finding: (1) information about the pollution from an international agency; (2) a reasonable belief in the pollution being the cause of the endangerment; and, (3) reciprocity between the nations.[41] The issuance of an endangerment finding by the EPA triggers the State Implementation Plan ("SIP") revision procedure requested of the state receiving the notice to the extent it can "prevent or eliminate the endangerment."[42]

As section 115 of the Act states, if the EPA Administrator:

> has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests him to do so . . . the Administrator shall give

41. Clean Air Act § 115(a), 42 U.S.C. 7415(a) (1982).
42. 42 U.S.C. 7415(b).

> formal notification thereof to the Governor of the State in which the emissions originate.[43]

Such belief in an endangerment may only be made "upon receipt of reports, surveys or studies from any duly constituted international agency."[44] The third requirement regarding reciprocity between the nations holds that an endangerment finding may only be made concerning "a foreign country which the Administrator determines has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by . . ." this Act.[45]

The EPA's interpretation of the section 115 requirements must be examined to see whether: (1) where the Congressional intent is "clear," the agency gave "effect to the unambiguously expressed intent of Congress;" and, (2) if the intent is not unambiguous, "whether the agency's answer is based on a permissible construction of the statute."[46] Here, the legislative history of the 1977 amendments to the Act show that Congress intended section 115 to "reflect the test of 'reasonably may be anticipated' to endanger public health" and require that such test will only be applied upon "a request by a duly constituted international agency as a condition for the Administrator to act."[47]

With respect to the requirement of a request by international agency for the EPA to act, here, appellants point to two international studies on the condition of the Village of Akuli and the Artic region. However, the Inuit Commission's Inuksuk Study merely explains the current status of the environmental conditions of the sea ice and permafrost and predicted potential impacts on Akuli. It did not state what the cause of the changes in those conditions may be, beyond changes in precipitation and temperature. Nor did it ask the EPA to take any action, much less specifically regulate the emissions from the defendant power plants.[48] Likewise, the Artic Climate Impact Assessment comments on the climate change in the Artic region and does not pinpoint the cause of the

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43. 42 U.S.C. 7415(a).

44. *Id.*

45. 42 U.S.C. 7415(c).

46. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

47. H.R. Conf. Rep. 95-564, at 1517 (1977).

48. Record at 5-6.

climate change or request action by any agency, much less the EPA.[49]

This issue originally commenced when the Province of Inuksuk petitioned the EPA to regulate the CO^2 emissions emitted by the defendant power plants.[50] It did not result from a request by either an international agency as expected by the Congress or by any request from the Governor of the State involved as expressly allowed for in the Act.

Even had one of these requirements been met, the EPA still had discretion under the "reasonably may be anticipated" test to decide not to issue a finding. Though under the *Chevron* test the Act does not expressly define "reasonably may be anticipated," the EPA did permissibly interpret the discretionary power it has over endangerment findings. The *Chevron* court held that if the agency's interpretation reflects "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[51]

The EPA's decision here reflects a reasonable consideration of the factors involved in issuing an endangerment finding. As the Court of Appeals for the District of Columbia stated, the EPA does not have a an obligation to issue a finding since "the words 'whenever' the Administrator 'has reason to believe' imply a degree of discretion underlying the endangerment finding."[52] But since a finding then does raise an obligation on the part of the EPA to notify the Governor of the State because the Act states the EPA "shall" send notice,[53] there is a "specific [statutory] linkage between the endangerment finding and the remedial procedures."[54]

The court agreed that a "unitary proceeding"[55] regarding issuing an endangerment finding and then sending notice to the State does reflect the statutory linkage between these two processes: "if there is insufficient information to enable the Administrator to implement those remedies, the promulgation of an endangerment

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49. *Id.* at 6.
50. Record at 7.
51. 467 U.S. at 845 (*quoting United States v. Shimer*, 367 U.S. 374, 382-83, (1961)).
52. *Her Majesty the Queen in Right of Ontario,* 912 F.2d 1525, 1533 (D.C. Cir. 1990).
53. 42 U.S.C. 7415(b).
54. 912 F.2d at 1533.
55. 912 F.2d at 1534.

finding alone would largely be pointless."[56] This linkage then, in the court's view, evidences that "the EPA's view that the Administrator must have sufficient evidence correlating the endangerment to sources of pollution within a particular State before he can exercise his discretion to make endangerment findings is both reasonable and consistent with the statute."[57] As then Appellate Judge Scalia noted in a similar case involving section 115: "In the context of a complex, multi-source pollution problem like acid deposition [i.e., acid rain], identification of the problem does not necessarily bring with it identification of the blameworthy states."[58]

In the case at bar, the EPA does not object to the findings of the international reports that the changing ice cover in the Province is due to atmospheric warning; however, the EPA has received no information confirming that those changes are specifically due to CO^2, much less from emissions from these five defendant power plants.[59] Without knowing which specific source(s) are the cause of the pollution contributing to the loss of ice cover, the EPA cannot know with any certainty which states it would be required under the Act to send notice to about an endangerment finding. This would result in an endangerment finding without effect.[60]

With respect to the reciprocity finding, the record is silent as to whether or not the EPA reached such a determination. The *Ontario* decision emanated from letters from then EPA Administrator Douglas M. Costle to Senators Muskie and Mitchell stating in part that "Canadian legislation regarding transboundary air pollution" does provide the United States with "essentially the same rights" as under the Act. The court determined the letters constituted final rules, but could not be given force and effect since they had not undergone the notice and public comment process. Regardless of their status, the letters also stated that "whether Canada in fact exercises or interprets that authority in a manner that provides essentially the same rights to the U.S. is a 'dynamic' determination 'which will continue to be influenced by Canadian action now and in the future.'"

This court is unable at this time to decide on whether the EPA erred in not issuing an endangerment finding since it did not ar-

56. *Id.* at 1533.
57. *Id.*
58. *Thomas v. State*, 802 F.2 1443, 1446 (D.C. Cir. 1986).
59. Record at 7-8.
60. 912 F.2d at 1534.

ticulate a reciprocity finding. Without the latter finding, this court cannot fully determine whether the EPA could have permissibly issued an endangerment finding. As a result, this court should affirm the decision of the District Court that the EPA permissibly exercised its discretion that an endangerment finding is not appropriate in this case, or in the alternative, remand with instructions to clarify the record to determine whether a reciprocity finding exists.

B. The EPA Did Not Abuse Its Discretion In Determining that an Endangerment Finding Would Be Inappropriate.

Judicial review of agency actions will result in the "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[61] An agency's refusal to institute rulemaking proceedings shall be overturned "'only in the rarest and most compelling of circumstances'"[62] when there have been "'plain errors of law, suggesting that the agency has been blind to the source of its delegated power'."[63] This is viewed as to whether the agency made a "reasoned" decision.[64]

In *Massachusetts v. EPA*, the court looked at an analogous provision of the Act in relation whether to regulate CO^2 from motor vehicles to help alleviate climate change wherein the EPA could make a "threshold 'judgment' about whether to regulate. . .[gave] the Administrator considerable discretion."[65] The court further held that Congress does not limit the EPA to consideration of scientific evidence in reaching decisions about whether to regulate, but can also look to "policy judgments."[66] The court held that "a reviewing court 'will uphold agency conclusions based on policy judgments' 'when an agency must resolve issues on the frontiers of scientific knowledge.'"[67]

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61. 42 U.S.C. 7607(d)(9)(a); 5 U.S.C. § 706(2)(A) (1982).

62. *American Horse Protection Ass'n, Inc. v. Lying*, 812 F.2d 1, 5 (D.C. Cir. 1987), (*quoting WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 818 (D.C. Cir. 1981)).

63. 812 F.2d at 5 (*quoting State Farm Mutual Automobile Insurance Co. v. Department of Transportation*, 680 F.2d 206, 221 (D.C. Cir. 1982)).

64. 812 F.2d at 5 (*quoting Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 52 (1983)).

65. *Massachusetts v. EPA*, 415 F.3d 50, 57-58, (D.C. Cir. 2005) (*quoting Ethyl Corp. v. EPA*, 541 F.2d 1, 20 (D.C.Cir.1976)).

66. *Id.* at 58 (*quoting* 541 F.2d at 26).

67. 415 F.3d at 58 (*quoting Envtl. Def. Fund v. EPA*, 598 F.2d 62, 82 (D.C.Cir.1978)).

In the present case, the plaintiffs seek the reviewing court to require the EPA to issue a finding relating to climate change, a complex scientific phenomenon. The traditional practice of courts affording administrative agencies deference in their decision making, as demonstrated by the *Massachusetts* case, should be applied here as well. Through its expertise, the EPA is in the better position to know whether the purpose of section 115 of the Act can be effectuated by issuing a finding.

The EPA did not abuse its discretion because the EPA has determined that there is "considerable uncertainty as to the causal relationship between greenhouse gas emissions from U.S. power plants and atmospheric warming in Inuksuk, Canada."[68] Here the court did not avoid the Congressional intent in that there are multiple purposes in the statute that sometimes may conflict with one another. While the EPA does not have an obligation per the statutory language to issue an endangerment finding, an obligation to notify the State(s) affected does become an express mandatory duty upon the EPA which it cannot carry out with certainty in this case.

This court should affirm the District Court ruling that the EPA did not abuse its discretion in declining to issue an endangerment finding against the defendant power plants since the remedial process of requiring an SIP provision cannot be implemented based on the frustrated situation of ascertaining which states are responsible for the sources of endangerment.

III. THE *TRAIL SMELTER* DOCTRINE DOES NOT BIND THE UNITED STATES GOVERNMENT TO REDUCE CO EMISSIONS BECAUSE INTERNATIONAL LAW IS INAPPLICABLE IN DECIDING U.S. CASE LAW.

The issue of whether the United States government, through the EPA, must reduce CO^2 emissions through the application of currently available control technology is a non-justiciable political question which this court lacks subject matter jurisdiction to grant such remedy. In the alternative, if the *Trail Smelter* doctrine is applied to the case it would have no binding effect since customary international law does not bind U.S. courts. If the court views *Trail Smelter* persuasively, it would still fail to meet the clear and convincing evidence burden since there has been no

68. Record at 11.

proof offered connecting these five defendant power companies as the source of the pollution causing the climate change in the Province. Further, *Trail Smelter* did not require the government to impose certain regulations to curb the pollution.

A. The Issue is a Non-Justiciable Political Question.

The remedy sought by the Appellants requiring the defendant power companies to reduce their CO^2 emissions "to help prevent future damages to other coastal villages" is "transcendently legislative [in] nature" and therefore a non-justiciable political question.[69] In a similar case involving suit against power companies for the "'public nuisance' for 'global warming'," the court affirmed that "cases presenting political questions are consigned to the political branches that are accountable to the People, not to the Judiciary, and the Judiciary is without power to resolve them."[70]

The court looked to the fact that: "Congress has recognized that carbon dioxide emissions cause global warming and that global warming will have severe adverse impacts in the United States, but it has declined to impose any formal limits on such emissions."[71] It further examined the *Chevron* decision that held air pollution cases require the court "to strike a balance 'between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes [will] retard industrial development with attendant social costs.'"[72]

The court also referenced how the topic of global warming has been discussed at the last three Presidential debates and continues to be a topic frequently debated in Congress and on an international scale.[73] The holding that this issue, since consensus is still not present in the United States or within the international community, presents a non-justiciable political question pointed to how many areas of law a decision on this topic could affect and, thus, "an initial policy determination of a kind clearly for non-judicial discretion" is required."[74]

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69. Record at 11.

70. *Connecticut v. American Elec. Power Co., Inc.*, 406 F.Supp. 2d 265, 267 (S.D.N.Y.2005).

71. *Id.* at 268-269 (*citing* The Global Climate Protection Act of 1987, P.L. 100-204, Title XI, §§ 1102-03, reprinted at 15 U.S.C. § 2901 note).

72. 406 F.Supp. 2d at 272 (*quoting* 467 U.S. at 847).

73. *Id.*

74. *Id.* at 274 (*quoting Vieth v. Jubelirer,* 541 U.S. 267, 278 (2004)).

Here, since the same issue of global warming is raised with respect to the ice cover in the Province's area, the same non-justiciable political question is raised and should be dismissed for lack of subject matter jurisdiction.

B. International Law is Not Binding on U.S. Courts.

In the alternative, the Trail Smelter doctrine still would not affect the outcome of this case even if the court considered it. There are only three main sources of international law: (1) international agreements, including treaties, and bilateral and multilateral agreements; (2) customary international law seen as a "general and consistent practice of states followed by them from a sense of legal obligation; and, (3) general principles of international law "common to the major legal systems."[75] Customary international law generally is non-binding on U.S. courts because it does not "have the quality of the law . . . in that they do not regulate activities, relations, or interests in the United States.[76]

The Inuit people of Alaska and northern Canada, for example, filed a petition in December, 2005, with the Inter-American Commission on Human Rights to try the issue of the refusal of the United States to engage in efforts to combat global warming. The Tuvalu government of the island nation also plans to raise a similar claim at the International Court of Justice ("ICJ") against the United States and Australia; however, since nation States must voluntarily submit to the ICJ jurisdiction, the case may never materialize. Even if the ICJ issues an advisory opinion, it would again be non-binding.[77] Given that an international arbitration tribunal decided the *Trail Smelter* case, it is evidence of customary international law which has no per se binding effect on any nation's courts. At most, the *Trail Smelter* case, if consistent with already existing U.S. law, may be viewed by the court as persuasive authority.

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75. Restatement (Third) Foreign Relations § 102 (1987).

76. *Id.* at § 111 cmt. (c); *cf.* Linda A. Malone, *Environmental Regulation of Land Use at the International Level, in* 1 Envtl. Reg. of Land Use § 1:4 (2006), stating that "binding standards have been limited to addressing environmental problems on a case-by-case basis.").

77. Cinnamon Carlarne, *Climate Change Policies An Ocean Apart: E.U. and U.S. Climate Change Policies Compared,* 14 Penn. St. Envtl. L. Rev. 435, 456 (2006).

C. *Trail Smelter* Does Not Obligate the United States Government to Cap CO_2 Emissions.

Assuming *arguendo* that U.S. courts could decide this issue on the basis of international law, the landmark case for applying customary international law to cases involving transboundary harm between two or more foreign nations is the Arbitral Tribunal case of *US v. Canada*, commonly referred to as the *Trail Smelter* case.[78] An international tribunal held the Canadian government liable to damage caused to agriculture and timberland in the State of Washington from the release of sulphur dioxide fumes emitted down the Columbia River valley from a copper smelter in British Columbia.[79] The tribunal held that:

> [un]der the principles of international law [. . .] no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another or of the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence.[80]

The case ultimately held Canada financially liable for the damage caused to the area in the United States and required the smelter to halt operations to the extent they continue to cause damage.[81]

This holding requires a showing of material damage, not mere passage of pollution across another sovereign's border. The general standard that no nation shall permit transboundary environmental harm of another nation, also referred to as *sic utero tuo*, later became codified in the non-binding Principle 21 of the United Nations Conference on the Human Environment in Stockholm, commonly referred to as the Stockholm Declarations.[82]

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78. Trail Smelter Arbitral Tribunal (U.S. v. Can.), Arbitral Tribunal, 3 R. Int'l Arb. Awards 1905 (1949), *reprinted in* 35 AM J. Int'l L. 684 (1941).

79. Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. Rev. 363, 420 (2005).

80. Marie-Claire Cordonier Segger, *Weaving the Rules For Our Common Future: Principles, Practices and Prospects for International Sustainable Development Law*, (Centre for International Sustainable Development Law, 2002), p. 38 (*quoting Trail Smelter* 35 Am J. Int'l L. at 699).

81. 1 Envtl. Reg. of Land Use § 1:4.

82. Erik K. Moller, *The United States-Canadian Acid Rain Crisis: Proposal for an International Agreement*, 36 UCLA L. Rev. 1207, 1228 (1989) (*citing Report of the United Nations Conference on the Human Environment*, Stockholm, 1 U.N. GAOR, U.N. Doc. A/Conf., 48/14 (1972)).

Since the *Trail Smelter* case, however, is an international case, it has no binding effect on the U.S. courts. Even if it were binding law, though, the case did not specify how the cause of the pollution should be controlled despite the harm being material since the economy of the Village of Akuli depends upon harvesting the land and ice that is being affected by the climate change.[83] This material harm would have to be demonstrated at the intermediate level of burden of proof, i.e., clear and convincing evidence.[84] *Trail Smelter*, however, restrained the source of the pollution, the smelter, from continuing to allow the pollution to occur. If *Trail Smelter* were applied to this case, it still would not necessarily follow that the EPA would be required to intervene by implementing regulations that would reduce CO_2 emissions through the application of currently available control technology. Accordingly, the District Court should be affirmed in its decision denying the Appellants recovery under the *Trail Smelter* doctrine.

IV. THE CLEAN AIR ACT AND ITS AMENDMENTS PREEMTED THE FEDERAL COMMON LAW OF NUISANCE AS INTENDED BY CONGRESS

Prior to the enactment of the Clean Air Act, this court may have decided a case such as this using the federal common law of nuisance. However, the Supreme Court of the United States distinctly stated in *City of Milwaukee v. Illinois and Michigan* that when Congress acts to fill an area previously occupied by the common law, the common law is displaced.[85] *City of Milwaukee v. Illinois and Michigan* arose due the discharge of sewage into Lake Michigan by sewage treatment plants on the Wisconsin shore of the lake. The court originally heard the case prior to the Congressional enactment of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter the "Clean Water Act"). At that time, the court held that a federal common law of nuisance did exist and may be applicable to the issue at hand.[86] However, the court recognized that "new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance.[87] The Supreme Court revisited the issue several years later, after the passage of the 1972 amendments and held that

83. Record at 5.
84. 32A C.J.S. *Evidence* § 1306 (2006).
85. *City of Milwaukee v. Illinois and Michigan,* 451 U.S. 304, 332 (1981).
86. *Illinois v. Milwaukee*, 406 U.S. 91 (1972).
87. *Id.* at 107.

such a preemption had in fact occurred. The court relied on several factors in coming to this decision. Namely, the court stated that Congress intended the Clean Water Act to be an "all-encompassing program of water pollution regulation."[88] Furthermore, the court noted that the complexity of the water pollution control is more appropriately dealt with by Congress than the courts.[89] Though *City of Milwaukee* dealt with the Clean Water Act, the principles developed in that case are directly analogous to the application of the Clean Air Act in the instant case.[90]

A. Congress eliminated the Federal Common Law of nuisance by enacting a measure as comprehensive as the Clean Air Act.

In determining whether statutory or common law applies to a federal issue, the Rhenquist court emphatically stated that, "we start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."[91] The court acknowledges that clear congressional intent is necessary for a judicial body to hold that federal law preempts state common law.[92] This premise is based in the Constitution's protection of states' rights and the fact that the states are not represented in the federal courts as they are in Congress. However, this proposition actually strengthens the argument that congressional action (federal law) should "displace" federal common law. After all, the states enjoy considerable voting influence in Congress and none in the federal courts.

The Rhenquist court utilized several factors in their decision. Specifically, they mentioned Congress' intent "to establish an all-encompassing program of water pollution regulation."[93] They also noted that the purpose of the Amendments was "to establish a comprehensive long-range policy for the elimination of water pollution."[94] Finally, the court made mention of the fact that the comprehensive nature of the legislation leaves no room for the court to apply any federal common law.[95] The same factors, when

88. *City of Milwaukee* at 318.
89. *Id.* at 325.
90. Record at 8.
91. *City of Milwaukee* at 317.
92. *Id.* at 317 n.9.
93. *Id.* at 318.
94. *Id.*
95. *Id.*

applied to the case hand, indicate that similar treatment should be given by this court to the Clean Air Act.

To first ascertain Congressional intent with regard to the Clean Air Act we look to the text of the legislation itself. Section 101 states that the purposes of the Act are to "protect and enhance the quality of the Nation's air resources", to "initiate and accelerate a national research and development program to achieve the prevention and control of air pollution," and to "encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this Act, for pollution prevention."[96] This broad and sweeping mandate for the legislation demonstrates Congress' intent to fill the space previously occupied by the common law.

Courts also should employ the legislative history as a tool for deciphering the meaning and implications of legislation. If any doubt remains as to the meaning of the statute, that doubt is removed by the legislative history.[97] The legislative history surrounding the Clean Air Act shows clear Congressional intent to displace any preexisting Federal Common Law. During the Senate debates in 1990, Al Gore expressed his congratulations to the Congress on their completed work and stated, "It is a comprehensive bill addressing many of the threats now confronting our environment."[98] This is but one example of the members of Congress demonstrating their belief that they were indeed passing comprehensive legislation. "The bill we are offering for your approval is the most comprehensive clean air bill—and the most comprehensive environmental bill—ever written."[99] If there were any doubt that the previous Amendments to the Clean Air Act had been sufficiently comprehensive to displace the federal common law, Representative John David Dingell summarily dispensed it. Representative Dingell, who had participated in the writing of every clean air bill ever passed stated, "None of those previous measures remotely approaches the complexity or comprehensiveness of the bill we are considering today. . . With this legislation, we are addressing the full range of air quality issues."[100] If the *City of Milwaukee* court held that the Clean Water Act was a comprehensive measure, how could any court deem the Clean Air Act

96. Clean Air Act § 101(a), 42 U.S.C. 7401(a) (1990).
97. *Bankamerica Corp. v. U.S.* 462 U.S. 122, 123 (1983).
98. 136 Cong. Rec. S592-02 (1990).
99. 136 Cong. Rec. H2511-02 (1990).
100. 136 Cong. Rec. H12845-03 (1990).

to be any less comprehensive in light of this illustrative legislative history?

The legislative history of the 1990 Amendments contains further evidence that Congress intended to eliminate the federal common law. A search of the history reveals that all references to any element of federal common law which may survive the Amendments are made with disdain. One member of the Congress, expressing his opposition to several proposed Amendments, stated, "In fact, these provisions may be a thinly veiled effort to institute federal common law. Thus, they would raise new problems without opportunity for clear technical or administrative solutions. I oppose these provisions stringently!"[101] Senator Allen Simpson referred to a proposed Amendment to Section 121 as "our old and tired friend the 'Federal Common Law of Nuisance' in but a new guise. It would broaden the current Interstate pollution provisions of the Act to such an extent that the Federal judiciary would be given an open-ended mandate to create an entirely new overlay of regulatory requirements . . . ."[102] His criticism of this proposed Amendment is particularly relevant because he discusses a hypothetical situation in which a citizen of Canada might seek injunctive relief in a United States Federal Court for adverse environmental effects allegedly caused by an American company. The proposed Amendment to Section 121 would have provided this right.The Senator illustrated his disagreement with this proposition; "Is the law to be created by Congress and administered by the States and EPA or is it to be superseded by law created and enforced by individual litigants and judges throughout the land, according to their own wide ranging notions of what is 'appropriate' public policy?"[103]

When the 101st Congress finally passed the 1990 Amendments to the Clean Air Act, the language of Section 121 was left untouched. This clear rejection of the federal common law of nuisance cannot be ignored. Senator Simpson and the Congress contemplated a situation identical to the issue at hand, and rejected it outright. The Environmental Protection Agency respectfully urges this court to follow suit.

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101. S. Rep. No. 100-231, at 337 (1987).

102. S. Rep. No. 98-426, at 97 (1984).

103. *Id.* at 98.

B. Congress is the appropriate body to deal with an issue as complex as air pollution control.

The role of the federal judiciary does not include encroachment upon the legislative duties of Congress. In fact the constitutional doctrine of separation of powers mandates this. "Our "commitment to the separation of powers is too fundamental" to continue to rely on federal common law "by judicially decreeing what accords with 'common sense and the public weal' " when Congress has addressed the problem."[104] Judicial deference to Congress is even more crucial when the issues before the court are of a complex nature. "This deference recognizes that, as an institution, Congress is far better equipped than the judiciary to evaluate the vast amounts of data bearing upon complex issues . . . ."[105]

In *City of Milwaukee*, the Rhenquist court used similar reasoning and held that the issue of water pollution was far too complex to be adjudicated and decided upon by the court. "Not only are the technical problems difficult—doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise—but the general area is particularly unsuited to the approach inevitable under a regime of federal common law."[106]The Clean Air Act is no less complex than the Clean Water Act. An attempt to intertwine its provisions with a federal common law would lead to the "sporadic" and "ad hoc" enforcement that Congress complained of.[107]

V. THE INDIVISIBLE NATURE OF THE ALLEGED HARM REQUIRES AN APPLICATION OF THE LANDERS TEST SO AS TO PROVIDE THE PLAINTIFFS WITH A POSSIBILITY OF REDRESS.

The Environmental Protection Agency contends that the link between the alleged injury and the actions complained of is far too tenuous to support a claim. However, if this honorable court were to decide that a public nuisance exists under the federal or state system, the question of liability and damages must be addressed. Under the doctrine expounded by the court in the *Landers* case,

104. *City of Milwaukee* at 315.
105. *Bartnicki v. Vopper,* 532 U.S. 514, 550 (2001).
106. *City of Milwaukee* at 325.
107. *Id.* at 325 (quoting S. Rep. No. 92-414, at 95 (1971)).

the power companies of New Union would be held jointly and severally liable for any damages that Plaintiffs can prove.

Decided in 1952, *Landers v. East Texas Salt Water Disposal Co.* addressed the issue of how to apportion liability among multiple tortfeasors who are not acting in concert.[108] The *Landers* case arose out of a claim by a landowner regarding the pollution of a lake on his land.[109] The landowner claimed that two companies, who maintained pipe lines adjacent to his land, had negligently allowed the pipes to leak, thereby killing the fish in his lake and further causing him damage.[110] Both the trial court and the appellate court found for the defendants based on the rule explained in *Sun Oil Co. V. Robisheaux.*[111] They held that a lack of concert of action and unity of design between the defendants precluded the defendants from being jointly and severally liable for the plaintiff's injuries.[112] The Supreme Court of Texas reversed in the name of justice, bolstering their argument by noting that the Robicheaux rule did not enjoy universal acceptance.[113] The rule which emerged from their analysis was tailored to fit cases, such as the instant case, in which apportioning out damages with any measure of accuracy would be impossible. They stated that,

> Where the tortuous acts of two or more wrongdoers join to produce an indivisible injury . . . which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit.[114]

Common law precedent such as the *Landers* case are dispositive in light of the fact that the Restatement (Third) of Torts takes no position on "joint and several liability for independent tortfeasors who do not act intentionally."[115] An analysis of cases which dealt with this issue reveals that the approach advocated by the Village and the Province is a sound one.

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108. *Landers v. East Texas Salt Water Disposal Co.* 248 S.W.2d 731 (1952).
109. *Id.* 732.
110. *Id.*
111. *Sun Oil Co. V. Robisheaux*, 23 S.W.2d 713 (Tex. 1930).
112. *Landers* at 732.
113. *Id.* at 733, 734.
114. *Id.* at 734.
115. Restatement (Third) of Torts: Apportionment Liab. § 10 cmt. a. (2000).

The *Landers* court placed a great deal of emphasis on the fact that the injury suffered by the plaintiff could not easily be apportioned among the alleged tortfeasors. They criticized the *Robicheaux* court for making it nearly impossible for an injured plaintiff to recover against multiple tortfeasors for an indivisible harm.[116] The issue in the instant case then becomes whether the harm suffered by the Province of Inuksuk and the Village of Akuli is "indivisible" under the *Landers Rule.* If the injury is indivisible, practicality and the interests of justice are best served by applying the *Landers* rule.

A. The harm suffered by Inuksuk and Akuli is indivisible in nature.

Before courts will apply a *Landers* style rule of joint and several liability, they must first determine whether the injury is truly indivisible. The case of *Union Texas Petroleum Corp. v. Jackson*[117] dealt with the alleged contamination of a town's groundwater supply by defendant oil companies. In light of insufficient evidence to be able to accurately apportion liability and recognizing that doing so would be impractical, the court held the harm was single and indivisible.[118] They went on to state that "where several persons are guilty of separate and independent acts of negligence which combine to produce directly a single injury, the courts will not attempt to apportion the damage, especially where it is impracticable to do so. . . . ."[119] The impracticality of attempting to apportion liability among the New Union power companies cannot be overstated.

The cause of the harm in the *Landers* case was a mixture of salt water and oil flowing into the plaintiff's lake.[120] The pollutant in the *Landers* case had a definite source, the leaky pipes, and the plaintiff had some idea of how much salt water/oil was leaking onto his land and into his lake.[121] Even in light of these relatively straightforward levels of pollution, the court found that the harm was indivisible. Like the *Landers* plaintiff, the Village and Province in the instant case know the amount of pollutants

116. *Landers* at 734.
117. *Union Texas Petroleum Corp. v. Jackson* 909 P.2d 131, 149 (Okl.App.,1995).
118. *Id.* at 149.
119. *Id.*
120. *Id.* at 732.
121. *Id.*

emitted by the New Union power companies.[122] However, unlike in *Landers* where the sources of pollution were adjacent to the polluted area, the power companies in this case are a continent away.[123] Any attempt to break down the proportion of liability among the Defendant power companies would be futile.

B. The indivisible nature of the alleged harm claimed by the Plaintiffs calls for the application of the *Landers* model of joint and several liability.

The *Landers* court stated that that the burden of apportioning the liability among the tortfeasors would be "onerous."[124] Such a burden would deprive the plaintiff of his right to relief. While the burden of proving the share of liability in *Landers* would have been difficult indeed, it cannot approach the burden that would be imposed on the Village and Province were this court to require them to apportion the liability of the Defendant utility companies. If requiring the *Landers* plaintiff to apportion liability among the tortfeasors would be "onerous," forcing the Village and Province in the instant case would be oppressive.

While the issue of whether to saddle multiple tortfeasors with joint and several liability is hotly contested, the case of *Michie v. Great Lakes Steel Division, Nat. Steel Corp.*[125] is instructive. The plaintiffs in *Michie* were thirty seven Canadian residents. They claimed that seven power plants in the United States were discharging pollutants into the air and thus causing a nuisance. Like the situation with the New Union power plants, the *Michie* defendants were not acting in concert. The *Michie* court held that assuming the plaintiffs could prove liability, ". . . if the cumulative effects of their acts is a single indivisible injury which it cannot certainly be said would have resulted but for the concurrence of such acts, the actors are to be held liable as joint tort feasors."[126] Given the indivisible nature of pollutants emitted by the New Union power plants and alleged to have caused the injury to the Province and the Village, the above stated rule of joint and several liability should be applied.

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122. Record at 6.
123. *Id.* at 4.
124. *Landers* at 735.
125. *Michie v. Great Lakes Steel Division, Nat. Steel Corp.* 495 F.2d 213 (C.A.Mich. 1974).
126. *Id.* at 215-16 (*quoting Watts v. Smith*, 134 N.W.2d 194 (Mich. 1965), (*quoting Meier v. Holt*, 80 N.W.2d 207 (Mich. 1956)).

C. A failure to apply the *Landers* rule would effectively deprive the Plaintiffs of an avenue of redress for their injuries.

The Province of Inuksuk and the Village of Akuli will have a difficult time establishing that the carbon dioxide discharged by the New Union power plants actually caused their injuries they allege. However, should they prove successful in their pursuit to show liability, an application of the *Landers* rule is the only way that they could hope to recover damages. In effect, the *Landers* rule shifted the burden of proof regarding apportionment of damages from the plaintiffs to the defendants.

The importance of applying *Landers* in this case is compounded by the fact that an unknown number of entities undoubtedly contributed to the injuries complained of. While the New Union power companies greatly contribute to the amount of carbon dioxide in the atmosphere, they are certainly not the only contributors. The Defendant power companies will likely make such an argument but the *Landers* court provides for their protection as well. "If fewer than the whole number of wrongdoers are joined as defendants to plaintiff's suit, those joined may by proper cross action under the governing rules bring in those omitted."[127]

Once again, the necessity of applying the *Landers* rule for joint and several liability will never be realized unless Inuksuk and Akuli can meet the burden of proof with regards to liability and causation. If they do, their injuries are of a nature that attempting to decipher what percentage of the liability the New Union companies must assume would be a Herculean task. An application of the *Landers* rule to the case at hand is paramount to preserving an avenue for relief for Inuksuk and Akuli as well as future litigants who tackle this issue.

VI. THE PRECAUTIONARY PRINCIPLE SHOULD NOT BE A FACTOR IN THE BALANCING TEST IN NUISANCE ANALYSIS BECAUSE THE PRINCIPLE DOES NOT APPLY AS A MATTER OF INTERNATIONAL LAW AND SUCH ANALYSIS IS IRRELEVANT.

The common law tort action of nuisance requires the court to use a balancing test to weigh the utility of the conduct with the

127. *Landers* at 734.

gravity of the harm caused by it.[128] Some of the factors to examine under this test include: (1) extent and type of interference; (2) its "social value;" (3) the "character of the locality involved;" and, (4) the burden of avoiding the harm.[129]

The precautionary principle is a tenet of customary international law that provides that a "lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[130] It places a duty upon nation States "to take 'remedial action even in the absence of provable environmental harm, simply on the evidence of significant risk thereof.'"[131] It involves "financial liability for anything that goes wrong and a duty to monitor, understand, investigate, inform and act."[132] Though this principle is espoused as serving as another limit on a State's ability to permit transboundary pollution, the principle is not well established international law and lacks a clear definition.[133]

The issue of whether the precautionary principle should be considered in the nuisance balancing test is irrelevant to this case because of the aforementioned reasons that nuisance analysis does not apply. Even if it did, the precautionary principle is a non-binding doctrine of customary international law. There are no evidences of this principle being applied by U.S. courts in the context of transboundary air pollution. This District Court should be affirmed in holding not to reach this question.

CONCLUSION

The court below properly granted summary judgment to the defendants based on the plaintiffs' lack of standing to bring this issue before the court. The plaintiffs failed to establish a concrete injury through affidavit and specific evidence as required by law.

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128. Restatement (Second) of Torts § 827 cmt. (a) (1979).

129. *Id.*

130. Rio Declaration on Environment and Development, June 13, 1992, art. 15, 31 I.L.M. 874.

131. Dan Turlock, L. of Water Rights and Resources § 11:8 (*quoting* Handl, *Environmental Security and Global Change: The Challenge to International Law, in* Environmental Protection and International Law 59, 99 (1991)).

132. William H. Rodgers, Jr., Rodgers' Environmental Law, 3 Envtl. L. (West) § 5:1, fn. 53.

133. Dan Turlock, L. of Water Rights and Resources § 11:8 (*citing* Tinker, *Responsibility for Biological Diversity Conservation Under International Law,* 28 Vanderbilt J. of Transnational Law 777, 797-798 (1995)).

This court should affirm the District Court's holding that the EPA has no obligation to issue an endangerment finding under section 115 of the Act, nor could it issue such a finding sua sponte or without a concurrent reciprocity finding.

The District Court should also be affirmed on the basis that the United States government, through the EPA, is not affected by the *Trail Smelter* case since it is non-binding customary international law and does not delineate a requirement of the government to reduce CO^2 emissions through currently available control technology.

The District Court's holding that the federal common law of nuisance was preempted by congressional action should be affirmed. Congress clearly stated its intent for the preemption of the federal common law through the legislative history. What more, the comprehensive nature of the Clean Air Act indicates Congress' intent to do away with the federal common law of nuisance.

Were this court to find that a federal common law of nuisance survived Congress' decisive action, it should apply the *Landers* rule. The indivisible nature of the alleged injury and the fact that any other approach would place an unfair burden on the plaintiffs strongly support the use of *Landers* for the instant case.

The District Court was correct in declining to consider the issue regarding the precautionary principle. The principle is inapplicable to this case as non-binding evidence of customary international law and irrelevant since there is no federal common law of nuisance.