

Suncor v. Boulder County and a National Climate Settlement

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Note: This transcript preserves the substance and sequence of the conversation. Web citation links and interface-only citation markers have been simplified for readability.

User

What are the key arguments in Suncor v Boulder County?

Assistant

If you mean the current U.S. Supreme Court case, Suncor Energy (U.S.A.) Inc. v. County Commissioners of Boulder County, No. 25-170, it has become potentially one of the most consequential climate-liability cases the Court has considered. The Court granted review on February 23, 2026, and oral argument is scheduled for October 5, 2026.

The underlying lawsuit was filed by Boulder County and the City of Boulder against Suncor and ExxonMobil. Boulder alleges that the companies produced, promoted, marketed, and sold enormous quantities of fossil fuels while knowing and allegedly misrepresenting their climate dangers. Boulder seeks damages under Colorado tort law—including public and private nuisance, trespass, unjust enrichment, and civil conspiracy—for part of the costs of dealing with climate-related harms. Boulder does not claim the companies are solely responsible for climate change.

The central arguments now break down this way:

1. Suncor: Global climate change cannot be governed through state tort law. Suncor argues that Boulder's lawsuit necessarily seeks to impose liability for the effects of greenhouse-gas emissions occurring across state and national borders. Because climate change is inherently interstate and international, Suncor says federal law—not the tort law of individual states—must govern. Otherwise, potentially dozens of states could impose different standards of liability for the same worldwide production and use of fossil fuels.
2. Suncor: The Clean Air Act occupies the relevant federal regulatory space. The companies rely heavily on *American Electric Power v. Connecticut* (2011), where the Supreme Court held that the Clean Air Act displaced federal common-law claims seeking abatement of greenhouse-gas emissions. Their argument is essentially: if federal judges cannot use federal common law to establish climate-emission liability because Congress assigned the problem to the EPA and the Clean Air Act, states shouldn't be able to accomplish substantially the same thing through state tort law.
3. Suncor: Boulder cannot evade federal law by describing the case as deception or marketing. Suncor argues that, whatever labels Boulder attaches to its causes of action, the causal chain remains: fossil-fuel production → worldwide combustion → greenhouse-gas emissions → global warming → local damages. In Suncor's view, imposing damages on that basis effectively regulates conduct far beyond Colorado's borders.

4. Boulder: This is a traditional state tort suit, not emissions regulation. Boulder draws a critical distinction. It says it isn't asking a Colorado court to establish permissible greenhouse-gas emission levels, shut down oil production, or dictate national climate policy. It seeks compensation for local injuries allegedly caused partly by defendants' conduct—including deceptive marketing and upstream production activities. Those are traditional subjects of state tort law.

5. Boulder: Congress did not preempt these state-law remedies. Boulder argues that the Clean Air Act contains no provision eliminating these kinds of state tort claims. The Colorado Supreme Court agreed. It concluded in May 2025 that neither federal common law nor the Clean Air Act preempts Boulder's claims. Importantly, the Colorado court did not decide that Boulder will ultimately win; it held only that the claims may proceed.

6. Boulder: AEP actually weakens Suncor's federal-common-law argument. This is an interesting doctrinal twist. AEP held that the Clean Air Act displaced federal common law concerning greenhouse-gas emissions. The Colorado Supreme Court reasoned that once federal common law has been displaced, Suncor cannot resurrect that displaced federal common law and use it to preempt state law. The remaining question is ordinary statutory preemption: did Congress, through the Clean Air Act, preempt these particular state-law claims? The Colorado court said no.

There is also now a second Supreme Court issue that could be decisive before the Court ever reaches climate liability: jurisdiction. The Court specifically directed the parties to address whether it has statutory and Article III jurisdiction to hear the case at this interlocutory stage.

That creates an unusually important fork in the case. The questions before the Court are effectively:

“Can a state use its ordinary tort law to require fossil-fuel companies to pay damages for local injuries attributable to global climate change, or does the federal character of climate change and the Clean Air Act prevent states from imposing such liability?”

For your 100-Day Action Plan work, there is an especially important connection here. Suncor sits very close to the question we've discussed about courts versus Congress in climate policy. If the Court concludes that federal law precludes these state tort actions, the decision could make explicit congressional authorization of climate remedies considerably more important. Conversely, if Boulder prevails, state tort law could remain an independent avenue for allocating some climate damages even when federal climate policy changes from administration to administration.

And there is a useful distinction from Juliana, which we recently discussed. Juliana asks, in effect, whether courts can require government to address climate change; Suncor asks whether courts can apply traditional state tort law to make private companies compensate governments for alleged climate injuries. The separation-of-powers objection is therefore quite different.

Sources cited in the original response included the U.S. Supreme Court docket and Colorado Supreme Court decision.

User

Is there any useful parallel between this case and the tobacco settlement, where states are awarded damages related to the health-care costs of smoking?

Assistant

Yes. The tobacco litigation provides a genuinely useful parallel to *Suncor v. Boulder*, although it is not a perfect legal analogy. In fact, an amicus brief filed in *Suncor* expressly invokes the tobacco settlement as precedent for governments using traditional state-law litigation to recover public costs created by harmful products and alleged industry deception.

The strongest parallel is the cost-allocation principle.

In the tobacco cases, states argued essentially: Our taxpayers are paying enormous health-care costs associated with your products; you knew more about the risks than consumers did; you concealed or misrepresented those risks; therefore the industry should bear part of the resulting public cost. Those lawsuits ultimately produced the 1998 Master Settlement Agreement. The 46 participating states obtained payments initially estimated at roughly \$206 billion over the first 25 years, while four other states had previously reached separate settlements exceeding \$40 billion.

Boulder's theory has a strikingly similar structure:

Tobacco: smoking → disease → government health expenditures.

Climate: fossil-fuel use → greenhouse emissions → climate change → government adaptation and damage expenditures.

And in both cases, the plaintiffs add an important allegation about knowledge and deception.

Boulder alleges that Exxon and Suncor knew about the climate risks associated with their products but concealed or misrepresented those risks while continuing to promote fossil fuels. Those allegations remain allegations at this stage; the Colorado Supreme Court specifically said it was expressing no opinion about whether Boulder can ultimately prove its claims.

An especially interesting parallel

The tobacco experience helps answer one objection to climate-damages litigation: Cigarettes were legal products, so how could manufacturers be liable for government costs resulting from their use?

The answer was that legality of the product did not necessarily eliminate potential tort liability arising from its promotion, marketing, concealment of risks, and resulting costs. State tobacco suits included consumer-protection, fraud, antitrust and other theories in addition to reimbursement of Medicaid expenditures.

That distinction potentially matters enormously in *Suncor*. Boulder isn't simply arguing that selling oil was illegal. It alleges that defendants produced and promoted fossil fuels while concealing or misrepresenting known dangers and thereby contributed to costs now being incurred by local governments.

There is another parallel that I think is particularly relevant to your thinking about fossil-fuel liability as a potential source of climate adaptation funding. The tobacco settlement did not require a court to calculate precisely which cigarette manufactured by which company caused which individual illness and then send that particular medical bill to that company. The litigation eventually produced a negotiated industry-wide mechanism for transferring substantial costs from governments toward the companies whose products were associated with those costs.

That suggests a possible climate-policy model:

Rather than asking courts to reconstruct every dollar of climate damage through individual tort judgments, litigation could create pressure for a comprehensive settlement in which major fossil-fuel producers contribute to the public costs of climate adaptation and damages.

There are precedents beyond tobacco. The opioid litigation followed a similar pattern: governments alleged that companies' marketing and distribution practices contributed to a public-health crisis that imposed enormous public expenditures, eventually producing multibillion-dollar settlements. The tobacco/opioid analogy is expressly being presented to the Supreme Court in *Suncor*.

But there is one major weakness in the analogy

The causal chain in tobacco is comparatively short:

manufacturer → cigarette → smoker → disease → state medical expense.

Climate causation is much more diffuse:

producer → global fossil-fuel market → billions of users → worldwide emissions accumulated over decades → atmospheric change → particular climate effects → particular local damages.

And those emissions originated throughout the United States and the world. *Suncor* therefore argues that Boulder isn't really pursuing an ordinary product-liability case; it is attempting to impose Colorado tort law on the consequences of lawful activity occurring around the world.

That distinction goes straight to the question now before the Supreme Court: whether such claims can remain matters of state tort law or whether their inherently interstate and international character means they are governed—and potentially precluded—by federal law.

A potentially important idea for the 100-Day Plan

The tobacco analogy becomes stronger as a legislative model than as a strict judicial precedent.

Congress would not necessarily have to wait for hundreds of climate tort cases to work their way through the courts. It could investigate a national framework under which major fossil-fuel producers contribute toward measurable public climate costs—disaster recovery, resilience, wildfire protection, water infrastructure, coastal protection, and similar expenditures.

The tobacco experience supplies a historical model for the underlying principle:

When a lawful commercial product creates very large public costs, and governments allege that producers knew about and misrepresented important risks, governments have previously used litigation and settlement to shift part of those costs from taxpayers to the industry.

That doesn't establish that fossil-fuel companies are legally liable; *Suncor* is partly about whether state courts may even adjudicate these particular claims. But it does show that the broader “who pays?” question has a significant American precedent.

And there is an intriguing connection to an idea you've raised before: redirecting fossil-fuel-related revenues toward climate resilience and disaster recovery rather than leaving those costs principally with taxpayers. A national climate-damages framework modeled partly on the tobacco settlement could conceivably be another mechanism for accomplishing that objective.

User

When you say that Congress could "investigate" a national framework, are you saying that Congress could require fossil energy producers to contribute to state and local climate-change mitigation and adaptation costs., for example by supplementing federal disaster assistance? Is there precedent?

Assistant

Yes. Congress could enact a federal law requiring fossil-energy producers to contribute financially to climate mitigation, adaptation, disaster recovery, or some combination of them. The mechanism could be an excise tax or fee paid into a federal trust fund, with Congress specifying how the money could be spent—including grants or reimbursements to state and local governments. There are strong structural precedents for this approach, although a climate fund would raise design and constitutional questions of its own.

Several existing federal programs are particularly instructive.

Superfund may be the closest environmental precedent. Congress created the Hazardous Substance Superfund to finance cleanup when responsible parties cannot or do not pay. Congress historically imposed industry taxes to help finance it, and in 2021–22 reinstated taxes on chemical feedstocks and crude oil/imported petroleum products. CRS describes the rationale advanced for these taxes as the “polluter pays” principle—shifting some remediation costs from ordinary taxpayers toward industries associated with hazardous substances. The current petroleum tax was permanently reinstated by the Inflation Reduction Act.

The Oil Spill Liability Trust Fund is an even more direct fossil-fuel example. Federal law imposes an environmental tax on petroleum, with revenues going into a federal trust fund used to cover oil-spill removal costs and certain uncompensated damages.

The Black Lung Disability Trust Fund is another striking precedent. Congress imposed an excise tax on coal sold by producers and dedicated the proceeds to a federal trust fund that pays benefits associated with black-lung disease when responsible mine operators do not pay or cannot be identified.

Put those together with the tobacco settlement, and there is a recognizable policy pattern:

product/activity → foreseeable societal harm → substantial public expense → industry financial contribution toward those costs.

But there is an important legal difference. The tobacco Master Settlement Agreement was a negotiated settlement of state litigation. Superfund, the Oil Spill Liability Trust Fund and the Black Lung Disability Trust Fund are creatures of federal statute. For what you are contemplating in the 100-Day Action Plan, the latter precedents are probably more useful because they demonstrate Congress's ability to establish the financing mechanism directly rather than depending upon successful climate tort litigation.

What a climate version could look like

Congress could conceivably establish something like a Climate Damage and Resilience Trust Fund. The precise architecture would require serious legal and economic analysis, but conceptually

Congress could impose a fee or excise tax at an upstream point—perhaps on oil, natural gas and coal producers/importers—and dedicate the proceeds to specified climate-related expenditures.

For example, Congress could direct the fund toward FEMA disaster assistance; the federal share of disaster recovery; state and local resilience projects; wildfire protection; flood control; coastal protection; relocation or property acquisition in repeatedly damaged areas; water infrastructure; or other specifically defined climate-adaptation costs.

That would produce an important distinction from the Boulder litigation. Congress would not have to prove that Exxon or Suncor caused a particular Boulder wildfire, flood, heat wave or infrastructure expense. Congress could instead create a generally applicable financing system based upon a defined taxable activity, just as the petroleum tax finances Superfund without requiring proof that every company paying the tax contaminated the particular Superfund site where its money is ultimately spent.

That could substantially reduce the causation problem we identified in Suncor. Congress would be exercising its legislative taxing-and-spending authority rather than asking a court to attribute a particular climate injury to a particular producer.

Supplementing federal disaster assistance

Your specific idea is especially interesting. Congress could structure the fund so that industry revenue supplements rather than replaces FEMA appropriations.

For example, ordinary federal disaster assistance could continue, while a dedicated climate fund paid for additional costs associated with increasingly severe climate-related disasters or financed predisaster resilience intended to reduce future federal expenditures. Congress could prescribe formulas for allocating money among states and communities rather than requiring them to litigate damages individually.

There is a fiscal argument behind that structure that differs somewhat from the tort argument:

If climate change is increasing federal, state and local expenditures, should all of that incremental cost fall on general taxpayers, or should some portion be financed through charges associated with the fossil fuels whose combustion contributes to the underlying risk?

That is a policy question Congress can address legislatively without first establishing tort liability.

There would nevertheless be substantial disputes over who should pay and how much. A levy could fall on producers, refiners, importers, fossil-carbon content, emissions, or some combination. Economists would also ask how much of the charge producers would ultimately pass through to consumers. And policymakers would have to decide whether contributions should reflect current production, historical production, carbon content, estimated emissions, or some measure of attributable climate costs.

One distinction I would preserve in the 100-Day Plan

I would separate two concepts that can easily become conflated.

One is liability: You caused \$X in climate damages, so you owe \$X. That is roughly the territory occupied by cases such as Suncor, and causation becomes a central legal issue.

The other is cost allocation through taxation: Congress has determined that an industry whose products contribute to a costly externality should contribute to a public fund addressing that externality. Superfund, the oil-spill fund and black-lung fund provide much better analogues for that proposition.

That second approach is particularly worth researching for 100-Day Action Plan 2.0. It could connect fossil-fuel subsidies, FEMA/disaster costs, and the question of who pays for climate adaptation. Instead of simply proposing that fossil subsidies be eliminated, Congress could potentially redirect some federal fiscal support while establishing an industry-financed climate resilience and disaster trust fund modeled in part on Superfund and the Oil Spill Liability Trust Fund.

There is also a deeper question worth examining: Could Congress calculate the assessment retrospectively, based partly on companies' historical fossil-fuel production and associated emissions rather than merely taxing future production? That gets considerably more legally complicated, but it is much closer to the tobacco/Suncor concept you originally had in mind.

User

Yes, please do that additional research. Also, I would be concerned that Congress would increase fossil energy subsidies to offset the expenditures fossil energy companies would have to make to the disaster fund.

Assistant

Yes. The additional research makes the idea considerably more concrete—but it also suggests that the strongest federal design would look less like a retroactive tort judgment and more like a congressionally created cost-allocation system.

The most important precedent is the federal black-lung program. In *Usery v. Turner Elkhorn Mining Co.* (1976), the Supreme Court upheld legislation requiring coal operators to compensate miners for disabilities caused by employment that had occurred before the law was enacted. The Court said Congress could rationally allocate the costs of past harms to an industry that had benefited economically from the activity producing those harms.

That is surprisingly close to the principle you are considering:

fossil-fuel production in earlier decades → accumulated climate impacts → present and future public costs → allocation of part of those costs to the producers.

It does not mean that Congress could impose any retrospective climate charge it wanted. *Turner Elkhorn* emphasized the relationship between the companies being charged and the harm being compensated. And in *Eastern Enterprises v. Apfel* (1998), the Court showed that extremely burdensome retroactive liability imposed on a narrow group with an insufficient relationship to the obligation can encounter serious constitutional problems.

So I would distinguish three possible approaches.

1. A purely prospective excise tax would be legally the simplest. Congress could impose a tax on future extraction, refining, importation, carbon content, or some similar metric and deposit the proceeds into a Climate Resilience and Disaster Trust Fund.

2. A prospective charge whose rate reflects historical contribution is more ambitious but potentially defensible. Congress could say that each major producer's future assessment will be calculated partly according to its share of fossil fuels produced or refined during a specified historical period.

3. A direct retrospective liability assessment is the most vulnerable version. Congress could attempt it, and Turner Elkhorn provides meaningful support, but it would invite challenges under the Fifth Amendment and other constitutional provisions. *United States v. Carlton* confirms that retroactive economic legislation can survive due process if it serves a legitimate legislative purpose through rational means, but the Court there was dealing with a relatively short retroactive tax period.

We no longer have to imagine the climate version

Vermont and New York have actually enacted versions of what we're discussing.

Vermont's Climate Superfund law establishes strict liability for large fossil-fuel producers and refiners and calculates responsibility from emissions attributable to fossil fuels they extracted or refined during 1995–2024. The money is to finance climate adaptation.

New York went even further. Its Climate Change Superfund Act bases assessments on worldwide fossil-fuel extraction and refining during 2000–2024.

Those experiments also give us an important warning. On August 31, 2026, a federal district court struck down New York's law, holding that federal law preempts New York's attempt to impose this form of liability for global greenhouse-gas emissions; the court also found a federal foreign-affairs problem involving foreign producers.

That decision is extremely relevant—but it does not establish that Congress itself lacks authority to create a federal program. Indeed, one of the central objections to New York's statute was that climate emissions are a uniquely federal concern. A federal Climate Superfund enacted by Congress therefore avoids one of the biggest problems facing the state laws: federal preemption.

Vermont's law remains under challenge as of September 2026.

Your subsidy concern is very important

Suppose Congress imposed a \$10 billion annual climate assessment on the fossil industry, but simultaneously created \$10 billion of new production tax credits, royalty relief or other subsidies.

Economically, taxpayers might simply be giving the industry back what the disaster fund collected.

There are ways to make that substantially harder.

Congress could write an explicit anti-offset provision into the statute. For example, companies subject to the climate assessment could be prohibited from deducting the assessment itself from federal taxable income, or from claiming specifically identified credits or subsidies to offset it.

More comprehensively, the legislation could pair creation of the Climate Disaster Trust Fund with repeal or limitation of designated fossil-fuel tax preferences.

And there is a third design possibility that deserves serious consideration for the 100-Day Plan:

Make the assessment net of federal fossil-fuel subsidies received by the company.

For illustration, suppose Company A's climate assessment is calculated at \$500 million and it receives \$75 million in specified federal subsidies or tax benefits. Its required contribution could become \$575 million, not \$425 million.

That turns the incentive around. A subsidy could no longer be used indirectly to compensate the company for its climate assessment because an equivalent amount would be added back to its fund obligation.

There would need to be careful statutory definitions of what constitutes a “fossil-energy subsidy.”

But there is one limitation Congress cannot eliminate

One Congress cannot permanently prevent a later Congress from changing the law.

A 2029 Congress could enact a strong Climate Disaster Trust Fund with anti-offset provisions. A later Congress could repeal those provisions, reduce the assessment or enact new fossil-fuel subsidies.

So there is no completely impregnable statutory firewall.

There are, however, ways to create substantial political and fiscal transparency around any future attempt to undo it.

One useful provision would require Treasury, OMB or GAO to publish annually something like:

Gross fossil-industry assessments

– federal fossil-fuel subsidies/tax expenditures

= net industry contribution toward climate costs

That would make an offset visible.

I would also separate mitigation from adaptation

For this particular fund, I think the strongest conceptual connection is with adaptation, resilience and disaster costs, rather than general climate mitigation.

The causal and fiscal argument is clearer:

Climate change increases certain public costs → taxpayers currently absorb much of those costs → fossil-fuel producers contribute to a dedicated fund that helps meet those costs.

Possible uses could include FEMA disaster assistance, predisaster mitigation, flood protection, wildfire resilience, relocation from repeatedly damaged areas, coastal protection, water infrastructure and state/local matching funds.

Mitigation—renewable energy, efficiency, transportation electrification, methane reduction and so forth—could remain financed through other policies. Keeping the disaster fund focused on paying the public costs of climate damage also strengthens the analogy to Superfund, black lung and oil-spill liability.

This suggests a potentially significant 100-Day Plan proposal

I would tentatively frame it as a Federal Climate Resilience and Disaster Trust Fund, financed by large fossil-energy producers and importers.

Its architecture could have five elements:

1. Congress establishes a national fund supplementing—not replacing—ordinary FEMA and resilience appropriations.
2. Large fossil-fuel producers/refiners/importers contribute according to a statutory formula combining current activity with an appropriately justified measure of historical production or associated emissions.
3. Funds are dedicated to documented climate adaptation, resilience and disaster costs incurred by federal, state, tribal and local governments.
4. The statute contains anti-offset and anti-double-benefit provisions and simultaneously reviews or repeals designated fossil-fuel subsidies.
5. Treasury or GAO annually publishes the industry's net contribution after federal subsidies and tax preferences.

The historical-production provision requires the most legal work. I would not yet write it into the Plan as settled constitutional law. Turner Elkhorn gives it a serious foundation; Eastern Enterprises supplies a warning; and the New York litigation demonstrates how aggressively such schemes will be challenged.

One additional thought: your concern about subsidies points toward a broader principle for the 100-Day Plan that may be useful elsewhere—federal climate policy should be evaluated on a net basis. It makes little sense for government to tax or regulate carbon on one side of the ledger while subsidizing additional fossil production on the other.

User

Does this proposal lend itself to a master settlement agreement, as in tobacco, in which the ~30 state and local governments that have sued fossil energy companies agree to the new fund in lieu of continuing their tort and other compensation claims?

Assistant

Yes. A climate master settlement is conceptually possible, and the roughly three dozen state and local climate cases create the conditions from which such a settlement could emerge. But I would modify our earlier proposal in one important respect: the tobacco model suggests that Congress need not itself create the settlement. The governments and fossil-energy defendants could negotiate a nationwide agreement settling specified claims, while Congress separately creates—or coordinates with—a federal Climate Resilience and Disaster Fund.

The tobacco precedent is quite close structurally. In 1998, 46 states and several territories settled their lawsuits with the four largest cigarette manufacturers. The states released participating manufacturers from specified past and future state claims associated with smoking-related health costs; manufacturers agreed to continuing payments and other obligations. Four other states had already settled separately. The MSA was therefore principally a settlement of litigation, not an act of Congress.

A climate version could theoretically work along these lines:

Participating fossil-energy companies → make long-term payments into a national climate resilience/disaster fund

in return for

Participating states and local governments → dismiss existing climate-damages cases and release defined categories of related claims.

That could potentially accomplish something neither side can presently obtain with certainty through litigation.

Why fossil companies might agree

The bargain would have to give them something valuable. Litigation presently exposes companies to potentially large but highly uncertain liabilities in numerous jurisdictions, with decades of discovery, trials and appeals ahead.

A comprehensive settlement could replace that uncertainty with a predictable payment schedule. It could also resolve the enormous legal fight over causation—how much of a Boulder flood, California wildfire or coastal-protection expenditure is properly attributable to particular producers.

Why states and cities might agree

They would exchange the possibility of larger judgments—but also the possibility of losing—for a dependable revenue stream available for adaptation and disaster costs.

A negotiated national settlement could therefore offer governments certainty that litigation cannot.

But I would not simply copy the tobacco MSA

There is a major complication: who owns the claims?

Climate litigation is fragmented. States, counties and cities are plaintiffs under different state statutes and common-law doctrines. Some claims concern deception; others nuisance, failure to warn, trespass, consumer protection or damages.

Consequently, a climate MSA would need an extraordinarily careful release-of-claims provision specifying exactly what governments surrender.

I would be especially reluctant to make it something like: “Fossil-energy companies receive immunity from all future climate liability.”

A more limited bargain could settle governmental monetary claims arising from historical fossil-fuel production, marketing and associated climate damages through a specified date, while preserving enforcement actions involving future misconduct, violations of environmental statutes, fraud occurring after settlement, criminal conduct, and perhaps other specifically enumerated matters.

Congress could nevertheless play a very important role

Rather than Congress simply imposing a Climate Superfund assessment and hoping it survives litigation, imagine a two-track national settlement:

Track 1 — Settlement. State and local plaintiffs and participating fossil companies negotiate resolution of the existing climate cases, including a formula for industry contributions.

Track 2 — Federal legislation. Congress establishes the permanent Climate Resilience and Disaster Trust Fund, determines eligible expenditures and distribution formulas, addresses taxation and

federal subsidies, and potentially establishes rules for companies that do not participate in the settlement.

Congressional involvement could also address a problem the states themselves cannot: national uniformity.

A federal statute does not face the particular federal-preemption problem that state laws face because Congress is the source of the federal law.

And your subsidy concern becomes even more important

If fossil companies surrendered billions annually in settlement payments and Congress subsequently compensated them with new subsidies, the settlement's cost-allocation purpose could be substantially undermined.

I would therefore consider making the anti-offset principle part of the settlement as well as the legislation.

There is also an important lesson from tobacco here. The tobacco MSA did not guarantee that settlement revenues would actually be spent on tobacco-related health programs.

I would not repeat that feature.

A climate agreement could dedicate the money to defined purposes: disaster assistance, resilience, adaptation, infrastructure hardening, wildfire protection, flood mitigation, managed retreat and similar costs. It could explicitly require that the money supplement rather than supplant existing federal disaster appropriations.

One feature might make the bargain considerably more attractive

The settlement could solve the historical-liability problem we were just discussing.

Instead of Congress unilaterally imposing retroactive liability based on 30 or 50 years of production—which invites constitutional challenges—the companies could agree contractually to a payment formula reflecting historical production or attributable emissions as consideration for settlement of pending claims.

That is a materially different legal posture.

The government isn't simply announcing: "You owe \$100 billion because of what you legally did 40 years ago."

The parties are saying: "There are disputed claims concerning historical conduct and damages. In exchange for releases of those claims, defendants agree to make payments according to this formula."

That brings us much closer to conventional mass-tort settlement.

There is another tobacco precedent worth borrowing

The tobacco MSA wasn't exclusively financial. It imposed restrictions on marketing, required disclosure of previously secret documents, prohibited certain misrepresentations, and made substantial amounts of industry information public.

That raises an interesting possibility for climate litigation because alleged deception is central to many of these lawsuits.

A climate MSA might therefore contain both:

Financial provisions: long-term contributions to climate resilience and disaster recovery.

Conduct provisions: disclosure of relevant historical climate research; preservation/publication of documents produced through litigation; prohibitions on material misrepresentations concerning climate effects; standardized reporting of emissions or fossil production.

I therefore think this deserves a place in our 100-Day Action Plan research file, but I would present it as an option requiring legal development rather than a finished recommendation.

The proposition worth investigating is something like:

Convene negotiations for a National Climate Damages Settlement among fossil-energy producers and state and local governments with pending climate-damage claims, coupled with federal legislation establishing a permanent Climate Resilience and Disaster Trust Fund. Participating governments would release defined historical claims in exchange for long-term industry contributions based on an agreed formula, while Congress would ensure that settlement proceeds supplement rather than replace existing federal disaster and resilience funding.

And I see one potentially significant strategic advantage over the proposal we started with: it turns the existing lawsuits from an obstacle into leverage for a negotiated national solution. Neither side has to concede the fundamental question of legal liability. Governments receive resources for increasingly expensive climate impacts; companies purchase resolution of a large body of uncertain litigation.

Whether that bargain could realistically encompass all the current state and municipal cases—and whether Congress could create incentives for nonparticipating companies and governments without impermissibly extinguishing their claims—is the next legal question I would investigate.

User

Please investigate that next question.

Assistant

I investigated it, and the answer is yes—with an important modification. A national climate settlement could probably encompass most or potentially all of the existing governmental climate-damages litigation, but the strongest structure would combine a voluntary master settlement with federal legislation that creates incentives for universal participation. Congress should be cautious about simply extinguishing unwilling plaintiffs' claims.

The tobacco experience and, even more usefully, the recent national opioid settlements show how this could work.

1. Tobacco solved almost exactly the participation problem we're considering

When the 1998 tobacco Master Settlement Agreement was negotiated, more than 40 states had filed lawsuits, while other states had potential claims. Ultimately, 46 states, D.C., and five territories

joined; Florida, Minnesota, Mississippi and Texas had already negotiated separate settlements. More than 45 tobacco manufacturers eventually participated.

Crucially, the agreement defined the governmental parties releasing claims broadly. It covered settling states and, to the extent the state officials had legal authority to do so, their political subdivisions—including municipalities, counties and other public entities.

That qualification matters for climate litigation. A state attorney general cannot necessarily extinguish an independently held claim belonging to Boulder, Honolulu or another municipality merely by signing an agreement. State law determines how much authority an attorney general has over local-government claims.

So a climate MSA should probably obtain individual participation from municipalities that have filed suits, rather than depending entirely upon state AGs to release their claims.

2. The opioid settlements provide an even better model

The national opioid settlements developed a mechanism specifically for this problem.

States join; local governments then have an opportunity to become Participating Subdivisions. A municipality that has already sued participates by signing the settlement and dismissing its lawsuit with prejudice. Non-litigating municipalities can also join and release their claims.

That is probably a better architecture for climate litigation than copying tobacco literally.

Imagine a National Climate Settlement Agreement with three levels of participation:

States sign and release specified governmental climate-damage claims.

Counties and municipalities individually opt in, dismiss their existing cases, and receive an allocated share of settlement benefits.

Fossil-energy companies join as participating producers and receive releases from participating governmental plaintiffs.

No government would initially have to be forced to participate.

3. The difficult question is: what about holdouts?

Here tobacco provides an ingenious precedent.

Manufacturers that refused to join the MSA weren't simply permitted to gain a competitive advantage over companies making settlement payments. States enacted nonparticipating-manufacturer statutes. In general, nonparticipants had to deposit roughly comparable amounts into escrow against possible future judgments.

That created a powerful incentive to join without literally requiring settlement.

A federal climate program could potentially employ the same general idea, although its constitutionality would depend heavily on its exact design.

Suppose Exxon, Chevron and Shell joined a Climate MSA but another large producer refused. Congress could impose a generally applicable fossil-energy assessment financing the Climate Resilience and Disaster Trust Fund. A participating company's contractual settlement payments could count toward some or all of its statutory obligation.

Thus:

Participant: \$2 billion statutory assessment – \$2 billion qualifying settlement payment = no additional assessment.

Nonparticipant: \$2 billion statutory assessment – \$0 settlement payment = \$2 billion federal assessment.

That is much cleaner than legislating, “Join the settlement or we’ll punish you.” The federal assessment would exist independently to finance climate costs; settlement payments would receive appropriate credit against it.

It also addresses the free-rider problem: companies couldn’t escape both settlement liability and contribution to the national disaster fund simply by refusing to sign.

4. What about a state or city that refuses to settle?

I would treat governmental holdouts differently.

Suppose Honolulu believes its case is exceptionally strong and wants its day in court. Congress attempting simply to decree that “Honolulu’s cause of action no longer exists” would raise substantially more difficult federalism, due-process and constitutional questions, particularly where the claim arises under state law.

It isn’t necessary.

Let Honolulu continue litigating.

But prevent double recovery. If Honolulu eventually receives a judgment covering climate costs for which it has already received money from the federal climate fund, legislation could establish appropriate coordination between the two sources where constitutionally permissible.

More importantly, the settlement itself could make participation attractive. Participating communities could receive predictable long-term funding without proving causation, deception, damages or each defendant’s proportional responsibility in court.

The bargain becomes:

Settle: guaranteed share of a national climate-damage revenue stream.

Don’t settle: retain your lawsuit and its potential upside, but also bear its costs, delay and risk.

That preserves governmental choice rather than coercing settlement.

5. Congress should not extinguish private claims

This is another important tobacco lesson.

The MSA resolved governmental claims. It did not grant tobacco companies universal immunity from lawsuits brought by individual smokers.

I would follow that principle closely.

A climate MSA could resolve governmental claims for disaster-response expenditures, infrastructure damage, adaptation and resilience, coastal protection, wildfire expenditures, water-system impacts, and government property damage.

But it needn't extinguish a homeowner's claim for property damage, a farmer's claim for losses, a tribal claim, securities litigation, criminal liability, environmental-law enforcement, or future claims involving new misconduct.

Indeed, trying to purchase complete immunity from climate liability would make the proposal considerably harder legally and politically.

6. The release itself could be carefully divided between past and future conduct

Tobacco offers a sophisticated precedent here. Its MSA broadly released governmental claims arising from past conduct, including future damages resulting from that past conduct. But its treatment of future conduct was narrower.

A climate agreement could make a similar distinction.

For example, participating governments might release monetary claims associated with fossil fuels produced and marketed through December 31, 2028.

But the agreement could expressly preserve claims based upon subsequent fraud, statutory violations, failure to comply with the settlement, environmental violations or other future misconduct.

That would give companies finality concerning historical climate litigation without giving them a perpetual license for whatever they might subsequently do.

7. There is a major advantage to combining the settlement with the federal fund

This is where I think the concept becomes substantially stronger than either Suncor litigation alone or a Climate Superfund alone.

We could create something like this:

National Climate Resilience and Disaster Settlement

Industry contribution: Major fossil-energy producers make annual payments based on an agreed formula involving production/carbon contribution.

Government consideration: Participating states and municipalities dismiss and release specified historical climate-damage claims.

Federal contribution: Congress establishes the Climate Resilience and Disaster Trust Fund and the mechanism for collecting and distributing industry payments.

Nonparticipating companies: Remain subject to the generally applicable federal climate assessment and remain exposed to litigation.

Nonparticipating governments: Retain their claims but do not receive whatever additional benefits are reserved contractually for settling governments.

Private parties: Their rights are unaffected unless separately addressed by law.

Future wrongdoing: Not immunized.

That is a recognizable descendant of tobacco rather than a replica of it.

8. There is one more tobacco provision we should definitely borrow

The tobacco states worried that nonparticipating companies would undercut companies making settlement payments. Their escrow laws therefore prevented nonparticipants from gaining an economic advantage simply by refusing to settle.

Combine that principle with your concern about fossil-fuel subsidies, and we get an unusually coherent rule:

Neither nonparticipation in the settlement nor federal fossil-energy subsidies should allow a producer to escape its proportionate contribution to the public costs addressed by the Climate Resilience and Disaster Trust Fund.

Congress could therefore calculate the statutory contribution first and then specify what qualifies as a credit. Settlement payments qualify. Ordinary federal subsidies do not.

Separately, Congress could review and repeal fossil-production subsidies.

9. There is also a potentially powerful negotiating moment

The present litigation landscape is fragmented and uncertain. Some climate suits have survived preliminary challenges while others have been dismissed.

That uncertainty can actually facilitate settlement.

Plaintiffs face the possibility that courts ultimately eliminate much of their recovery. Defendants face the possibility that some cases reach discovery and trial and produce very large judgments.

Settlement converts reciprocal uncertainty into a negotiated price.

Where I think this leaves the 100-Day Plan

This idea has moved from an interesting analogy to something deserving serious policy and legal development.

A new president probably shouldn't dictate the terms of a settlement involving independent states and municipalities. Instead, an administration could convene the parties.

During the first 100 days, the President could direct DOJ, Treasury, EPA, FEMA and other appropriate agencies to develop the federal component of a potential Climate Resilience and Disaster Trust Fund and invite state attorneys general, municipal plaintiffs, tribal representatives and fossil-energy producers to explore a national settlement.

Congress would ultimately be asked to establish the statutory fund and assessment system.

That preserves an important principle: the litigants negotiate the settlement; Congress creates the national financing framework.

And one finding from this research changes my thinking somewhat. The opioid settlements may be an even more useful procedural precedent than tobacco. Tobacco gives us the conceptual model—industry payments in exchange for governmental releases. Opioids give us a modern mechanism for coordinating states, thousands of local governments and numerous defendants while allowing individual political subdivisions formally to participate and dismiss their own litigation.

For the 100-Day Plan, I would therefore study both models side-by-side before drafting the proposal. The next useful piece of work would be a short legal/policy memorandum laying out the

proposed architecture, constitutional vulnerabilities, settlement mechanics, allocation formula, anti-subsidy protections, and exactly what claims would—and would not—be released.

User

Please produce the legal/policy memorandum.

Assistant

I've prepared the legal/policy memorandum as a Word document. It develops the tobacco/opioid settlement model, federal trust-fund structure, treatment of holdouts, historical-emissions issue, constitutional vulnerabilities, subsidy safeguards, scope of releases, and a possible first-100-days implementation path.

I've treated it as a working policy-development memorandum rather than a legal opinion, particularly because the Supreme Court's forthcoming decision in Suncor could materially affect the settlement dynamics and preemption analysis.

A Word document was provided: Climate_Master_Settlement_Legal_Policy_Memorandum.docx

User

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