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15 UNITED STATES DISTRICT COURT

16 NORTHERN DISTRICT OF CALIFORNIA

17 OAKLAND DIVISION

18

19 NATIVE VILLAGE OF KIVALINA and)
 CITY OF KIVALINA,)
 20)
 Plaintiffs,)
 21)
 v.)
 22)
 EXXONMOBIL CORPORATION, et al.,)
 23)
 Defendants)
 24)
 25)

CASE NO. C 08-cv-01138 SBA

**PLAINTIFFS' CONSOLIDATED
 MEMORANDUM OF POINTS
 AND AUTHORITIES IN
 OPPOSITION TO DEFENDANTS'
 MOTIONS TO DISMISS PURSUANT
 TO FED. R. CIV. P. 12(b)(1) AND
 12(b)(6)**

Date: December 9, 2008, 1:00 p.m.
 Place: Courtroom 3
 Judge: Hon. Sandra B. Armstrong

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES v

INTRODUCTION 1

FACTUAL BACKGROUND 9

 A. Global Warming is Occurring. 9

 B. Defendants’ Emissions of Greenhouse Gases. 10

 C. Global Warming Impacts on Kivalina. 11

 D. The Conspiracy Defendants’ Actions Regarding Global Warming. 12

 E. Federal Global Warming Policy. 13

STANDARD OF REVIEW 16

ARGUMENT 17

I. KIVALINA HAS STATED A PROPER CLAIM OF PUBLIC NUISANCE UNDER FEDERAL COMMON LAW 17

 A. Federal Common Law Applies to Greenhouse Gas Emissions 17

 1. Kivalina’s Public Nuisance Claim Is Governed by Federal Common Law Under the *Milwaukee-Ouellette* Trilogy of Interstate Pollution Law 17

 2. Because Interstate Pollution Is a Recognized Enclave of Federal Common Law, There Is No New Law to Create 21

 B. Defendants’ Proposed Restrictions on the Federal Common Law of Public Nuisance Are Unavailing 25

 1. The Native Village of Kivalina and City of Kivalina Are Proper Federal Plaintiffs. 25

 2. The Federal Common Law of Public Nuisance Permits the Recovery of Damages 29

 3. Federal Nuisance Is Not Restricted to “Simple Type” Nuisances. 30

 4. “Noxious” Means “Harmful” 32

 5. The “Exacting Standards” of Proof on the Merits Are Inapplicable Here 33

 C. Kivalina Has Properly Pled the Elements of A Federal Public Nuisance Claim 34

1 1. Kivalina Has Properly Pled an Unreasonable Interference with Rights
2 Common to the General Public. 34
3 2. Kivalina Has Properly Pled Causation 36
4 a. Kivalina Has Properly Pled Causation-in-Fact 37
5 b. Kivalina Has Properly Pled Legal Causation 42
6 II. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR THIS CASE 44
7 A. An Interstate Pollution Case That Properly Invokes Federal Question Jurisdiction
8 Under *Milwaukee I* Does Not Present a Political Question 45
9 B. This Case Does Not Contradict Any U.S. Foreign or Domestic Policy 48
10 C. None of the Six *Baker v. Carr* Tests of a Political Question Are Satisfied 54
11 1. The Constitution Does Not Textually Commit to the
12 Political Branches the Issue of Compensating Victims of
13 Global Warming (*Baker* Factor One) 55
14 2. This Case Does Not Require the Court to Move Beyond
15 Judicial Expertise (*Baker* Factors Two and Three). 59
16 a. There Is No Absence of Judicially Discoverable and Manageable
17 Standards (*Baker* Factor Two). 60
18 b. This Case Does Not Require a Nonjudicial Policy Decision
19 (*Baker* Factor Three) 64
20 c. Prosecution of this Case Will Not Interfere with Important
21 Governmental Interests
22 (*Baker* Factors Four – Six). 69
23 III. KIVALINA’S FEDERAL NUISANCE CLAIM IS NOT PREEMPTED. 71
24 A. The Clean Act Air Does Not Preempt Kivalina’s
25 Federal Common Law Nuisance Claim 71
26 1. The CAA Does Not Preempt Federal Common Law Claims With Respect
27 to Pollutants For Which EPA Has Not Issued a Standard. 72
28 2. Permitting This Claim Would Not Frustrate the Purpose of the CAA. . . 78
29 B. The Hodgepodge of Other Federal Statues, Executive Orders, and Foreign Policy
30 Concerns Defendants Cite Do Not Preempt Kivalina’s Federal Common Law of
31 Nuisance Claim 78
32 IV. KIVALINA’S CLAIMS OF CONSPIRACY AND CONCERT OF ACTION ARE
33 PROPER 80
34 A. Kivalina Has Properly Pled a Conspiracy 80

1 1. Kivalina Has Sufficiently Alleged That Defendants Proximately Caused
 Its Injuries Pursuant to the Conspiracy 82

2

3 2. Kivalina Meets the Rule 9(b) Specificity Requirements 84

4 B. Kivalina’s Conspiracy Claim Is Not Barred by the First Amendment 86

5 1. The First Amendment Right to Petition the Government Does Not
 Apply to Media Campaigns Whose Primary Purpose Is to
 Mislead the Public 86

6

7 2. The Right to Petition the Government Does Not Extend to Knowingly
 False Statements or Statements Made with Reckless Disregard for the
 Truth 88

8

9 3. The Free Speech Clause Does Not Protect
 Deliberately False Statements 90

10 C. Kivalina Has Stated A Proper Claim of Concert of Action 93

11 V. KIVALINA HAS STANDING 95

12 A. Kivalina Meets All of the Requirements of the Traditional Standing
 Analysis 97

13

14 1. Kivalina Has Suffered an Actual and Concrete Injury 97

15

16 2. Kivalina’s Injury Is Directly Traceable to Defendants’ Actions 98

17 a. Defendants’ Greenhouse Gas Emissions Harm Kivalina 101

18 b. The Causal Chain Between Defendants’ Actions and Plaintiffs’
 Injuries Is Short, Direct and Straightforward 103

19 c. Geographic Proximity Is Not Necessary with a
 Global Problem 105

20 3. A Decision by this Court Awarding Damages Will Redress Kivalina’s
 Injury. 105

21 B. The Native Village of Kivalina Is Entitled to Any Special Solicitude
 Applicable to Sovereigns. 106

22 VI. DEFENDANTS’ REMAINING ARGUMENTS ARE WITHOUT MERIT 110

23 A. Kivalina’s Damages Are Not Speculative 110

24 B. Peabody’s Methane Emissions Are Not Expressly Authorized by Statute 110

25 C. Kivalina’s Claims Are Not Time-Barred 113

26 1. The California Statute of Limitations Does Not Bar This Case 113

27 2. If A Statute of Limitations Applies, It Must Be Alaska’s 116

28

1 3. Kivalina’s Case is Timely Under the Applicable Federal Statute of
2 Limitations 117

3 D. The Court Should Not Address State-Law Issues 120

4 E. Congress Has Not Preempted Kivalina’s State Law Claims 121

5 1. There Is No Express Preemption Because There Is No Explicit Preemption
6 Clause In Any Statute Indicating That Congress Expressly Preempted
7 Kivalina’s Cause of Action 122

8 2. There Is No Conflict Preemption Because There Is No Conflict Between
9 Kivalina’s Cause of Action and Any Federal Statute 122

10 3. There Is No Field Preemption Because the Federal Government Has Not
11 Comprehensively Occupied the Field of State-Law Nuisance Actions . 124

12 4. There Is No Conflict Between Kivalina’s State-Law Nuisance Action and
13 the President’s Foreign Affairs Power 125

14 F. Kivalina Has Stated Proper State-Law Claims 126

15 CONCLUSION 128

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Federal Cases

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Acri v. Varian Assocs., Inc., 114 F.3d 999 (9th Cir. 1997) 121

In re African-American Slave Descendants Litig., 471 F.3d 754 (7th Cir. 2006), *cert. denied*,
128 S. Ct. 92 (2007) 104

In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7 (E.D.N.Y. 2005) 70

In re Agent Orange Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984) 39

Alaska v. Native Vill. of Venetie Tribal Gov’t, 522 U.S. 520 (1998) 118

Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982) 27, 107, 108

Allen v. United Food & Commercial Workers Int’l Union, AFL-CIO,
43 F.3d 424 (9th Cir. 1994) 110

Allen v. Wright, 468 U.S. 737 (1984) 103

Alperin v. Vatican Bank, 410 F.3d 532 (9th Cir. 2005) 4, 47, 55, 57, 58, 61, 63, 70

American Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003) 125

Antolok v. United States, 873 F.2d 369 (D.C. Cir. 1989) 66

Arcade Water Dist. v. United States, 940 F.2d 1265 (9th Cir. 1991) 114

Arizona Copper Co. v. Gillespie, 230 U.S. 46 (1913) 127

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 19, 56, 74

Artesian Water Co. v. Gov’t of New Castle County, 659 F. Supp. 1269 (D. Del. 1987) 41

Ass’n of Wash. Pub. Hosp. Dists. v. Phillip Morris Inc., 241 F.3d 696 (9th Cir. 2001) 83

BMW of N. Am. v. Gore, 517 U.S. 559 (1996) 56

Baker v. Carr, 369 U.S. 186 (1962) 44, 47, 54, 55, 57, 95

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 29

Bank of N.Y. v. Fremont Gen. Corp., 523 F.3d 902 (9th Cir. 2008) 40, 41

Barajas v. Bermudez, 43 F.3d 1251 (9th Cir. 1994) 118

Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676 (E.D. La. 2006) .. 56, 64, 67

Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298 (1994) 52

Bartleson v. United States, 96 F.3d 1270 (9th Cir. 1996) 114, 115

1 *Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2003) 95

2 *Beaty v. Iraq*, 480 F. Supp. 2d 60 (D.D.C. 2007) 70

3 *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007) 17, 97

4 *Bell v. Hood*, 327 U.S. 678 (1946) 45

5 *In re: Blue Lake Forest Prods., Inc.*, 30 F.3d 1138 (9th Cir. 1994) 108

6 *Boim v. Quranic Literacy Inst.*, 291 F.3d 542 (7th Cir. 2002) 58

7 *Boos v. Barry*, 485 U.S. 312 (1988) 90

8 *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008) 24, 117

9 *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) 125

10 *Buckey v. County of Los Angeles*, 968 F.2d 791 (9th Cir. 1992) 16, 96, 104

11 *Burdett v. Reynoso*, No. C-06-00720, 2007 U.S. Dist. LEXIS 64871

12 (N.D. Cal. Aug. 23, 2007) 81

13 *Byram River v. Vill. of Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975) 26

14 *California v. General Motors Corp.*, 2007 WL 2726871

15 (N.D. Cal. Sept. 17, 2007) (“GM”) 4, 56, 61, 62, 65, 66, 121

16 *California v. Kinder Morgan Energy Partners, L.P.*, 2008 U.S. Dist. LEXIS 15640

17 (S.D. Cal. Feb. 29, 2008) 113, 114

18 *California v. S.S. Bournemouth*, 307 F. Supp. 922 (C.D. Cal. 1969) 29

19 *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d

20 536 (3d Cir. 2001) 104

21 *Canatella v. Stovitz*, 365 F. Supp. 2d 1064 (N.D. Cal. 2005) 89

22 *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 208 F.3d 885

23 (10th Cir. 2000) 86, 87

24 *Caterina v. Int’l Brotherhood of Painters & Allied Trades*, No. CV 477-233, 1978 U.S. Dist.

25 LEXIS 16351 (S.D. Ga. July 26, 1978) 81

26 *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151

27 (E.D. Cal. 2007) 5, 6, 50, 51, 54, 65, 79

28 *Chaplinsky v. New Hampshire*, 315 U.S. 568 88, 91

Chappell v. SCA Servs., Inc., 540 F. Supp. 1087 (C.D. Ill. 1982) 81

Cherokee Nation v. Georgia, 30 U.S. 1 (1831) 108

1 *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) 66

2 *Chong Yia Yang v. California Dep’t of Social Servs.*, 183 F.3d 953 (9th Cir. 1999) 52

3 *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979) 25, 29

4 *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (“*Milwaukee IP*”) passim

5 *City of Portland v. Boeing Co.*, 179 F. Supp. 2d 1190 (D. Or. 2001) 127

6 *City of St. Louis v. American Tobacco Co.*, 70 F. Supp. 2d 1008 (E.D. Mo. 1999) 43

7 *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263 (N.D. Okla. 2003), *vacated by*
 8 *settlement, City of Tulsa v. Tyson Foods, Inc.*, 2003 U.S. Dist. LEXIS
 23416 (N.D. Okla. July 16, 2003) 38

9 *Clipper Express v. Rocky Mountain Motor Tariff*, 674 F.2d 1252 (9th Cir. 1982) 87, 91

10 *Collins v. Olin Corp.*, 248 F.R.D. 95 (D. Conn. 2008) 41

11 *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) 45

12 *Committee for the Consideration of the Jones Falls Sewage System v. Train*, 539 F.2d
 13 1006 (4th Cir. 1976) 27

14 *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001) 35

15 *Concha v. London*, 62 F.3d 1493 (9th Cir. 1995) 84

16 *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265
 (S.D.N.Y. 2005) (“*AEP*”) 4, 56, 66

17 *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980) 92

18 *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) 46, 55

19 *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) 28, 47, 57, 73

20 *Cox v. City of Dallas*, 256 F.3d 281 (5th Cir. 2001) 34, 37

21 *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) 125

22 *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*,
 23 508 F.3d 508 (9th Cir. 2007) 51

24 *Curry v. Hall*, 839 F. Supp. 1437 (D. Or. 1993) 89, 90

25 *Dean v. City of Fresno*, 546 F. Supp. 2d 798 (E.D. Cal. 2008) 121

26 *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990 (E.D.N.Y. 1977) 92

27 *Duke Power Co. v. Carolina Env’tl. Study Group, Inc.*, 438 U.S. 59 (1978) 100, 101

28 *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774 (9th Cir. 2005) 44, 59

1 *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000) 100, 103

2 *Edgar v. Mite Corp.*, 457 U.S. 24 (1982) 56

3 *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) 21

4 *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008) 29, 72, 73, 74, 78

5 *In re Exxon Valdez*, 1994 WL 182856 (D. Alaska Mar. 23, 1994), *aff'd* 104 F.3d

6 1196 (9th Cir. 1997) 127, 128

7 *In re Exxon Valdez*, 104 F.3d 1196 (9th Cir. 1997) 28

8 *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001) 74

9 *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237 (3rd Cir. 2008) 76, 123

10 *Fin. Insts. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142 (2d Cir. 1992) 99

11 *Fisher v. Great Socialist People’s Libyan Arab Jamahiriya*, 541 F. Supp. 2d 46

12 (D.D.C. 2008) 58

13 *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003) 15

14 *Freeman v. Oakland Unified Sch. Dist.*, 179 F.3d 846 (9th Cir. 1999) 121

15 *Friends of the Earth Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358 (5th Cir. 1996) 105

16 *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*,

204 F.3d 149 (4th Cir. 2000) 95, 96, 99, 100, 101, 105

17 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 96, 97

18 *Garrison v. Louisiana*, 379 U.S. 64 (1964) 88, 89

19 *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) 122, 123

20 *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948 (S.D. Cal. 1996) 86

21 *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945) 107

22 *Georgia v. Tennessee Cooper*, 237 U.S. 474 (1915) 18

23 *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907) 18, 33, 100, 106, 107

24 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) 91

25 *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir. 1999) 80, 81, 82

26 *Gilder v. PGA Tour, Inc.*, 936 F.2d 417 (9th Cir. 1991) 121

27 *In re Glenfed, Inc. Sec. Litig.*, 42 F.3d 1541 (9th Cir. 1994) 84

28

1 *Goldwater v. Carter*, 444 U.S. 996 (1979) 55

2 *Gordan v. Texas*, 153 F.3d 190 (5th Cir. 1998) 67

3 *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*,
 4 508 F. Supp. 2d 295 (D. Vt. 2007) passim

5 *Gross v. German Found. Indus. Initiative*, 456 F.3d 363 (3d Cir. 2006) 4, 64, 70

6 *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280 (W.D. Tex. 1992) 124

7 *Healy v. Beer Inst.*, 491 U.S. 324 (1989) 56

8 *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006) 83

9 *Her Majesty the Queen in Right of the Province of Ontario v. Detroit*,
 874 F.2d 332 (6th Cir. 1989) 124

10 *Hillsborough County, Florida v. Automated Med. Labs. Inc.*, 471 U.S. 707 (1985) 122

11 *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) 21, 28, 29

12 *Idaho Conservation League v. Boer*, 362 F. Supp. 2d 1211 (D. Idaho 2004) 117

13 *Ileto v. Glock Inc.*, 349 F.3d 1191 (9th Cir. 2003) 43, 62, 83

14 *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600-62 (2003) 90

15 *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (“*Milwaukee P*”) passim

16 *Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979) 18, 29, 32, 33, 34, 40, 60

17 *Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. 1973) . 18, 32, 33, 40, 60

18 *Illinois v. Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982) 77, 78

19 *Int’l Ass’n of Machinists & Aerospace Workers v. TVA*, 108 F.3d 658 (6th Cir. 1997) . 117, 118

20 *Int’l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) 3, 17, 19, 20, 56, 120, 125

21 *Jackson v. Johns-Mansville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) 22, 23

22 *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221 (1986) 46, 57, 58, 70

23 *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) 58, 69

24 *Kale v. Combined Ins. Co.*, 924 F.2d 1161 (1st Cir. 1991) 120

25 *Kassa v. BP W. Coast Prods., LLC*, 2008 U.S. Dist. LEXIS 61668
 (N.D. Cal. Aug. 12, 2008) 80

26 *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991) 58

27 *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992) 4, 49, 58, 61, 64

28

1 *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008) 58

2 *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) 96, 99, 100

3 *In re MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d 593 (S.D.N.Y. 2001) 93, 94, 95

4 *In re MTBE Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 38792 (S.D.N.Y. May 13, 2008) ... 39

5 *In re MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d 348 (S.D.N.Y. 2005) 39

6 *Maine People’s Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277 (1st Cir. 2006) 64

7 *Maine v. M/V Tamano*, 357 F. Supp. 1097 (D. Me. 1973) 28, 29

8 *Marshall v. Kleppe*, 637 F.2d 1217 (9th Cir. 1980) 116

9 *Masayesva ex rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371 (9th Cir. 1997) 45, 67

10 *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) passim

11 *Mattoon v. Pittsfield*, 980 F.2d 1 (1992) 77

12 *McDonald v. Smith*, 472 U.S. 479 (1985) 89

13 *McMillan v. Togus Regional Office, Department of Veteran Affairs*,

14 294 F. Supp. 2d 305 (E.D.N.Y. 2003) 93

15 *Michie v. Great Lakes Steel Div. Nat’l Steel Corp.*, 495 F.2d 213 (6th Cir. 1974) 38

16 *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981) 27, 75

17 *Miller v. French*, 530 U.S. 327 (2000) 24

18 *Missouri v. Illinois*, 180 U.S. 208 (1901) (“*Missouri I*”) 30, 107

19 *Missouri v. Illinois*, 200 U.S. 496 (1906) (“*Missouri II*”) 30, 31, 33

20 *Montana Co. v. Gehring*, 75 F. 384 (9th Cir. 1896) 100

21 *Motor & Equipment Manufacturers Ass’n v. Nichols*, 142 F.3d 449 (D.C. Cir. 1998) 71

22 *In re Motor Vehicle Air Pollution Control Equip.*, 52 F.R.D. 398 (C.D. Cal. 1970) 81

23 *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68 (9th Cir. 1979) 110

24 *Nat’l Audubon Soc’y v. California*, 869 F.2d 1196 (9th Cir. 1988) . 19, 22, 23, 62, 75, 120, 124

25 *Nat’l Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974 (4th Cir. 1992) 98, 101

26 *Nat’l Sea Clammers Ass’n v. New York City*, 616 F.2d 1222 (3d Cir. 1980), *rev’d on other*

27 *grounds*, 453 U.S. 1 (1981) 27

28 *New England Legal Foundation v. Costle*, 666 F.2d 30 (1981) 74

1 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) 90, 91

2 *New York v. Shore Realty Corp.*, 1984 U.S. Dist. LEXIS 16183 (E.D.N.Y. 1984) 68

3 *North Dakota v. Minnesota*, 263 U.S. 365 (1923) 31, 32, 60

4 *North Star Steel Co. v. Thomas*, 515 U.S. 29 (1995) 118

5 *Northwest Env'tl. Defense Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957

6 (D. Or. 2006) 98, 102

7 *O'Connor v. Boeing N. Am.*, 311 F.3d 1139 (9th Cir. 2002) 115, 119, 120

8 *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971) 46

9 *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,

10 498 U.S. 505 (1991) 27

11 *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070

(2d Cir. 1982) 64, 66, 67

12 *Oregon Laborers-Employers Health & Welfare Trust Fund v. Phillip Morris, Inc.*,

13 185 F.3d 957 (9th Cir. 1999) 83

14 *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) 91, 92

15 *In re Oswego Barge*, 673 F.2d 47 (2d Cir. 1982) (“*Oswego Barge II*”) 77

16 *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981) (“*Oswego Barge I*”) 34, 77

17 *Ouellette v. Int'l Paper Co.*, 666 F. Supp. 58 (D. Vt. 1987) 19

18 *Oxycal Labs., Inc. v. Jeffers*, 909 F. Supp. 719 (S.D. Cal. 1995) 92

19 *Pangburn v. Culbertson*, 200 F.3d 65 (2d Cir. 1999) 81

20 *Papa v. United States*, 281 F.3d 1004 (9th Cir. 2002) 117

21 *Peters v. Amoco Oil Co.*, 57 F. Supp. 2d 1268 (M.D. Ala. 1999) 81

22 *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) 92

23 *Pony v. County of Los Angeles*, 433 F.3d 1138 (9th Cir. 2006) 103

24 *Prostar v. Massachi*, 239 F.3d 669 (5th Cir. 2001) 117, 118

25 *Pub. Interest Research Group of New Jersey v. Powell Duffryn Terminals Inc.*,

913 F.2d 64 (3d Cir. 1990) 98, 99, 101

26 *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988) 126

27 *Radio Corp. of America v. United States*, 341 U.S. 412 (1951) 64

28

1 *Raines v. Byrd*, 521 U.S. 811 (1997) 99

2 *Reeger v. Mill Serv., Inc.*, 593 F. Supp. 360 (W.D. Pa. 1984) 75

3 *In re Related Asbestos Cases*, 543 F. Supp. 1152 (N.D. Cal. 1982) 95

4 *Reynolds Metals Co. v. Martin*, 337 F.2d 780 (9th Cir. 1964) 119

5 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) 124

6 *Roney v. Gencorp*, 431 F. Supp. 2d 622 (S.D. W. Va. 2006) 94

7 *Rosebud Sioux Tribe v. South Dakota*, 709 F. Supp. 1502 (D.S.D. 1989), *vacated on other*
 8 *grounds*, 900 F.2d 1164 (8th Cir. 1990) 28

9 *Samaha v. Presbyterian Hosp.*, 757 F.2d 529 (2d Cir. 1985) 68

10 *Saunders v. Farmers Ins. Exch.*, 440 F.3d 940 (8th Cir. 2006) 103

11 *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005) 66

12 *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991) 116

13 *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 2006 U.S. Dist. LEXIS 73196
 (E.D.N.Y. 2006), *rev'd on other grounds by McLaughlin v. Am.*
 14 *Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008) 87, 88

15 *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988) 120

16 *Sierra Club v. Chevron USA, Inc.*, 834 F.2d 1517 (9th Cir. 1987) 117, 118, 119

17 *Sisseton-Wahpeton Sioux Tribes v. United States*, 90 F.3d 351 (9th Cir.1996) 107, 108

18 *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005) 28, 108

19 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) 24, 116

20 *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) 75, 76, 123

21 *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) 45

22 *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) 110

23 *Stream Pollution Control Bd. v. United States Steel Corp.*,
 512 F.2d 1036 (7th Cir. 1975) 26, 27

24 *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879
 (9th Cir. 2001) 108

25 *TechSearch L.L.C. v. Intel Corp.*, 286 F.3d 1360 (Fed. Cir. 2002) 64

26 *Technical Rubber Co. v. Buckeye Egg Farm, L.P.*, No. 2:99-CV-1413, 2000 U.S. Dist.
 27 LEXIS 8602 (S.D. Ohio June 16, 2000) 124

28

1 *Temple v. Synthes Corp.*, 498 U.S. 5 (1990) 68

2 *Texas Independent Producers and Royalty Owners Assoc. v. E.P.A.*, 410 F.3d 964
 3 (7th Cir. 2005) 102, 103

4 *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) 19, 21, 22

5 *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971) 26, 106

6 *Thornhill v. Alabama*, 310 U.S. 88 (1940) 92

7 *Time, Inc. v. Hill*, 385 U.S. 374 (1967) 89

8 *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495 (9th Cir. 2001) 17

9 *Township of Long Beach v. City of New York*, 445 F. Supp. 1203 (D.N.J. 1978) 25, 26

10 *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*,
 412 U.S. 669 (1973) 96, 103

11 *Ungar v. PLO*, 402 F.3d 274 (1st Cir. 2005) 58

12 *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004) 5

13 *United States Dep't of Commerce v. Montana*, 503 U.S. 442 (1992) 44

14 *United States v. Burlington N. & Santa Fe Ry. Co.*, 502 F.3d 781 (9th Cir. 2007),
 15 *as modified*, 520 F.3d 918 (9th Cir. 2008) 40, 41

16 *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983) 40

17 *United States v. Dae Rim Fishery Co.*, 794 F.2d 1392 (9th Cir. 1986) 119

18 *United States v. Ira S. Bushey & Sons*, 363 F. Supp. 110 (D. Vt. 1973) (“*Bushey II*”), *aff'd*
without opinion, 487 F.2d 1393 (2d Cir. 1973) 34, 35, 63

19 *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145 (D. Vt. 1972) (“*Bushey I*”) ... 35

20 *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982) 75

21 *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1 (1st Cir. 2005) 76

22 *United States v. Luce*, 141 F. 385 (C.C.D. Del. 1905) 38

23 *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544 (9th Cir. 1994) 119

24 *United States v. Philip Morris USA, Inc.*, 337 F. Supp. 2d 15 (D.D.C. 2004) 87

25 *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006) 87

26 *United States v. Sunoco, Inc.*, 501 F. Supp. 2d 656 (E.D. Pa. 2007) 41

27 *United States v. Tennessee Air Pollution Control Board*, 185 F.3d 529 (6th Cir. 1999) 75

28

1 *United States v. Texas*, 507 U.S. 529 (1993) 76

2 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097 (9th Cir. 2003) 84, 92

3 *Vieth v. Jubelirer*, 541 U.S. 267 (2004) 61

4 *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) 90

5 *Wang v. Masaitis*, 416 F.3d 992 (9th Cir. 2005) 55, 59

6 *Washington v. General Motors Corp.*, 406 U.S. 109 (1972) 34

7 *Wayte v. United States*, 470 U.S. 598 (1985) 89

8 *Weber v. Dep’t of Veterans Affairs*, 521 F.3d 1061 (9th Cir. 2008) 16

9 *Wernsing v. Thompson*, 423 F.3d 732 (7th Cir. 2005) 106

10 *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951) 33

11 *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) 86

12 *Williams v. Gerber Prods. Co.*, 523 F.3d 934 (9th Cir. 2008) 16

13 *Woods v. Asset Res.*, 2006 U.S. Dist. LEXIS 94325 (E.D. Cal. Dec. 21, 2006) 68

14 *Worcester v. Georgia*, 31 U.S. 515 (1832) 109

15 *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036 (N.D. Cal. 2007) 111

16 *Zschernig v. Miller*, 389 U.S. 429 (1968) 126

17

18 **State Cases**

19 *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280 (N.Y. 2001) 128

20 *American Motorcycle Ass’n v. Superior Court of Los Angeles County*,
578 P.2d 899 (Cal. 1978) 68

21 *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454 (Cal. 1994) 80

22 *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs. in Ariz.*,
712 P.2d 914 (Ariz. 1985) 127

23 *Beck Dev. Co. v. S. Pac. Transp. Co.*, 44 Cal. App. 4th 1160 (1996) 114

24 *California v. Gold Run Ditch & Mining Co.*, 4 P. 1152 (Cal. 1884) 37, 38, 113

25 *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002) 43

26 *City of New York v. Lead Indus. Ass’n, Inc.*, 597 N.Y.S.2d 698 (N.Y. App. Div. 1993) 95

27 *Countrywide Home Loans v. Superior Court*, 69 Cal. App. 4th 785 (1999) 68

28

1
 2 *Dep't of Health & Soc. Servs. v. Native Vill. of Curyung*,
 151 P.3d 388 (Alaska 2006) 28, 108, 109
 3 *Dodd v. Independence Stove & Furnace Co.*, 51 S.W.2d 114 (Mo. 1932) 32
 4 *ElGabri v. Lekas*, 681 A.2d 271 (R.I. 1996) 120
 5 *Fairbanks N. Star Borough v. Rogers & Babler*, 747 P.2d 528 (Alaska 1987) 44
 6 *Farmers Insurance Exchange v. State*, 175 Cal. App. 3d 494 (1985) 112
 7 *Farmy v. College Hous., Inc.*, 48 Cal. App. 3d 166 (1975) 112
 8 *Fernandes v. Portwine*, 56 P.3d 1 (Alaska 2002) 116
 9 *Friends of H St. v. City of Sacramento*, 20 Cal. App. 4th 152 (1993) 111, 113
 10 *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal. 3d 86 (1979) 111
 11 *John v. Baker*, 982 P.2d 738 (Alaska 1999) 109
 12 *Koll-Irvine Ctr. Prop. Owners Ass'n v. County of Orange*, 24 Cal. App. 4th 1036 (1994) .. 128
 13 *Landers v. East Texas Salt Water Disposal Co.*, 248 S.W.2d 731 (Tex. 1952) 39
 14 *Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125 (1991) 114
 15 *Massachusetts v. Goldenberg*, 155 N.E.2d 187 (Mass. 1959) 32
 16 *Mattoon v. City of Pittsfield*, 775 N.E.2d 770 (Mass. Ct. App. 2002) 77
 17 *McLearn v. Cowen & Co.*, 455 N.E.2d 1256 (N.Y. 1983) 121
 18 *Nestle v. City of Santa Monica*, 6 Cal. 3d 920 (1972) 111
 19 *O'Connor v. Raymark Indus.*, 518 N.E.2d 510 (Mass. 1988) 41
 20 *Rich v. City of Benicia*, 98 Cal. App. 3d 428 (1979) 35
 21 *Robinson v. Baugh*, 31 Mich. 290 (Mich. 1875) 100
 22 *Rothberg v. Reichelt*, 742 N.Y.S.2d 150 (N.Y. App. Div. 2002) 41
 23 *San Antonio Indep. School Dist. v. McKinney*, 936 S.W.2d 279 (Tex. 1996) 120
 24 *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) 93, 94
 25 *State Farm Fire & Cas. Co. v. White-Rodgers Corp.*, 77 P.3d 729 (Alaska 2003) 116
 26 *Suzuki v. City of Los Angeles*, 44 Cal. App. 4th 263 (1996) 111, 112
 27 *The Lockwood Co. v. Lawrence*, 77 Me. 297 (Me. 1885) 38
 28

1 *Turlock v. Bristow*, 103 Cal. App. 750 (1930) 114

2 *Varjabedian v. City of Los Angeles*, 20 Cal. 3d 285 (1977) 110, 112

3 *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976) 39

4 *Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal. App. 3d 116 (1971) 112

5 *Vincent v. Fairbanks Memorial Hosp.*, 862 P.2d 847 (Alaska 1993) 41, 43

6 *Wood v. Picillo*, 443 A.2d 1244 (R.I. 1982) 35

7 *Woodyear v. Schaefer*, 57 Md. 1 (Md. 1881) 38, 62

8 *Zack’s, Inc. v. City of Sausalito*, 165 Cal. App. 4th 1163 (2008) 114

9

10 **Treaties**

11 Agreement on Great Lakes Water Quality, Apr. 15, 1972,
U.S.-Canada, art. V, 23 U.S.T. 301 46

12 Kyoto Protocol to the United Nations Framework Convention on Climate Change,
Dec. 10, 1997, 37 I.L.M. 22 (1998) 15

13

14 United Nations Framework Convention on Climate Change, May 9, 1992,
1771 U.N.T.S. 107 14, 15

15

16 **Federal Statutes and Regulations**

17 15 U.S.C. § 2901-note 15

18 15 U.S.C. § 2931(a)(2) 15

19 18 U.S.C. § 1151 118

20 28 U.S.C. §1331 3

21 28 U.S.C. § 1331(a) 26

22 28 U.S.C. § 2415(b) 119

23 28 U.S.C. § 2462 119

24 42 U.S.C. § 1983 80

25 42 U.S.C. § 7401 78, 124

26 42 U.S.C. § 7403 15

27 42 U.S.C. § 7521(a)(1) 14, 71

28 42 U.S.C. § 7604(e) 122, 125

1 42 U.S.C. § 9601-75 (“CERCLA”) 40

2 P.L. 101-549, VIII, § 821, 104 Stat. 2699 (Nov. 15, 1990),
 3 reprinted in 42 U.S.C. § 7651k-note 16

4 30 C.F.R. 75.323(b)(1) 111

5 **Federal Legislative Materials**

6 Average Fuel Economy Standards for Light Trucks Model Years 2008-2001,
 7 71 Fed. Reg. 17,566 (Apr. 6, 2006) 51

8 Control of Emissions from New Highway Vehicles and Engines,
 68 Fed. Reg. 52,922 (Sept. 8, 2003) 50

9 73 Fed. Reg. 44,354 (July 30, 2008) 14, 72

10 73 Fed. Reg. 18,553 (Apr. 4, 2008) 108

11 151 Cong. Rec. §6980, §7033, §7037 52

12 151 Cong. Rec. § 7267, §7282 52

13 **Federal Rules**

14 Fed. R. Civ. P. 9(b) 84, 85

15 Fed. R. Civ. P. 12(b)(1) 17

16 **State Statutes**

17 Alaska Stat. § 09.10.050 (2008) 116

18 Cal. Civ. Code § 3482 110

19 Cal. Civ. Proc. Code §3490 113

20 **Other Authorities**

21 Cami Fraser, Note: Protecting Native Americans: The Tribe as *Parens Patriae*, 5 Mich. J.
 22 Race & L. 665 (2000) 28

23 James R. May, *Climate Change, Constitutional Consignment, and the Political Question*
 24 *Doctrine*, 58 Denver U. L. Rev. 919 (2008) 23, 63, 66

25 John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts,*
 26 *and Environmental Law*, 2 Ecology L.Q. 241 (1972) 26

27 Prosser & Keeton, *The Law of Torts* (5th ed. 1984) 35, 126

28

1 Restatement (Second) of Torts §821B 34, 35, 63
2 Restatement (Second) of Torts §821C 126, 127
3 Restatement (Second) of Torts § 433B 68
4 Restatement (Second) of Torts § 840E 37, 101
5 Restatement (Second) of Torts, § 879 80, 82
6 Restatement (Second) of Torts § 881 cmt. d 37
7 William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997 (1966) 127

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INTRODUCTION

1
2 The Native Village of Kivalina and the City of Kivalina (collectively “Kivalina”), bring
3 this case to obtain the funds they desperately need to move their village out of harm’s way.
4 Global warming threatens the village with imminent destruction. The sea ice that formerly
5 protected the village from fall and winter storms is in serious decline due to global warming, thus
6 exposing this Arctic village of Inupiat Eskimos, perched on a small barrier island on the Chukchi
7 Sea, to the battering ram of fall and winter storms. Today the village balances on the precipice,
8 just one big storm away from annihilation.

9 Kivalina brings this case by and through its governing bodies – a federally-recognized
10 Indian tribe and a municipality. Defendants are among the nation’s largest fossil fuel interests:
11 electric utilities, oil companies and the nation’s largest coal company. They all contribute to
12 global warming through their own emissions of massive quantities of greenhouse gases and the
13 production of fossil fuels. They all know they contribute to global warming and they have
14 known it for a very long time. Some of them have been covering up the harmful nature of their
15 conduct for years. The purpose of this suit is to recover the cost of relocation made necessary by
16 defendants’ years of conduct as major contributors to global warming.

17 Kivalina brings its suit here in California because most of the defendants do no business
18 at all in Alaska but all of them are engaged in substantial business in California. Three of the
19 defendants – Chevron Corporation, Chevron U.S.A., Inc., and Edison International – have their
20 principal places of business in California. California is thus the place where a large number of
21 the corporations responsible for a majority of the greenhouse gas emissions and fossil fuel
22 production in the United States may be sued in one court. There likely is no other state in the
23 nation where so many of the responsible corporations may be sued.

24 It is a common misconception that “everyone causes global warming.” It is a
25 misconception defendants have fueled over the years with a deceptive public relations campaign
26 using industry-funded scientific mouthpieces and front groups bearing innocuous-sounding
27 names resembling think tanks and scientific bodies. It is a misconception they push right into
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1 this Court with their legal briefs claiming that global warming is caused by people and animals
2 “breathing” – a fact they know to be untrue and that directly contradicts the allegations of the
3 complaint. As alleged in the complaint, it is the massive emissions of greenhouse gases from
4 fossil fuels that has knocked the natural carbon cycle of plants and animals out of balance and
5 caused the Earth to heat up.

6 It is true that there are many sources of greenhouse gas emissions from the burning of
7 fossil fuels throughout the nation and the world. But there is a surprising degree of concentration
8 of these emissions in the hands of a relatively small number of large corporations that dominate
9 their industries. The defendants here represent a significant number of those corporations – they
10 represent most of the biggest emitters and fossil fuel producers in the United States. And, as
11 alleged in the complaint, the United States is by far the biggest historical source of greenhouse
12 gas emissions in the world. Defendants’ scare tactic that everyone in the world would be liable
13 under Kivalina’s theory is incorrect and ignores both the extraordinary size of defendants’
14 contributions, their knowledge of the harms to which they have been contributing, and the
15 conduct of a core group of the defendants in covering it up.

16 Defendants’ conduct as described in the complaint is a classic public nuisance. A public
17 nuisance is an unreasonable interference with rights common to the general public.
18 Environmental cases are quintessential public nuisances. Under blackletter law, every polluter
19 who contributes to a nuisance is liable jointly and severally for the resulting indivisible injury to
20 property and natural resources – even when there are a large number of polluters and even where
21 each defendant’s conduct standing alone would not have created the nuisance. Neither causation
22 nor standing requires the tracing of molecules in a multiple-polluter case. In Superfund cases,
23 federal courts apply this principle all the time as a matter of federal common law that fills a gap
24 in the statute; Superfund cases, like this one, typically involve a very large number of polluters.
25 And while environmental cases often involve complex scientific issues, there is nothing about
26 the science of global warming that takes it beyond judicial ken. *See, e.g., Green Mountain*
27 *Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 310-25, 339-41 (D. Vt. 2007)

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1 (bench trial opinion resolving extensive global warming science issues).

2 Kivalina brings this case under the well-established *federal* common law of public
3 nuisance. Under *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (“*Milwaukee I*”), and
4 *City of Milwaukee v. Illinois*, 451 U.S. 304, 319 n.14 (1981) (“*Milwaukee II*”), pollution that is
5 both interstate in nature and unregulated by the federal political branches is governed by the
6 federal common law of public nuisance and presents a federal question under 28 U.S.C. §1331.
7 Defendants agree that greenhouse gas emissions are inherently interstate in nature. Defendants
8 also agree, and even emphasize, the lack of any regulation of greenhouse gases and of any
9 statutory or administrative mechanism under which Kivalina could seek compensation for its
10 global warming injuries. Moreover, global warming is a matter of uniquely federal interest, a
11 point that runs throughout the defendants’ briefs and that is a touchstone of federal common law.
12 Defendants thus concede the conditions that require application of the federal common law of
13 public nuisance here. Indeed, given the inherently interstate nature of all greenhouse gas
14 emissions, if this case does not validly invoke federal public nuisance, no case ever could.

15 Kivalina also has pled state-law nuisance claims in the alternative in order to preserve
16 them. The Supreme Court has held that federal public nuisance and state-law public nuisance are
17 mutually exclusive doctrines. *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). Thus, state
18 law can only come into play if federal common law becomes preempted. For example, if
19 Congress at some point were to amend the Clean Air Act by establishing a provision under which
20 Kivalina could seek compensation for its harms, then at that point Kivalina’s federal common
21 law claim here likely would be preempted and Kivalina would be forced to litigate its public
22 nuisance claims, if it needed to, under the state common law of each of the states where the
23 greenhouse gas emissions occur. *Id.* at 497 (when federal nuisance preempted, public nuisance
24 claim for interstate pollution may proceed under state common law as long as it is the law of the
25 source state). Here, that would likely require applying the laws of twenty or thirty (or more)
26 different states’ laws. But, there is no such preemptive federal statute here and thus federal
27 common law, not state common law, applies to Kivalina’s public nuisance claim. Since the
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1 state-law claims are within the Court’s supplemental jurisdiction, Kivalina nonetheless was
2 required to plead them in order to avoid the possibility of a *res judicata* effect on any subsequent
3 state court proceedings that might occur in the event a new federal statute is enacted that
4 preempts the federal claim here.

5 Kivalina recognizes, of course, that previous global warming tort cases sounding in
6 public nuisance have been dismissed under the political question doctrine. *California v. General*
7 *Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (“*GM*”), *appeal pending*, No.
8 07-1698 (9th Cir.); *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y.
9 2005), (“*AEP*”), *appeals pending*, Nos. 05-5104-cv; 05-5119-cv (2d Cir.); *see also Comer v.*
10 *Murphy Oil USA Inc.*, No. 1:05-CV-00436 (S.D. Miss. Aug. 30, 2007) (oral ruling from bench),
11 *appeal pending*, No. 07-60756 (5th Cir.). But this case differs from those cases in key respects.
12 Unlike *AEP*, this case pleads a conspiracy supported by detailed factual allegations. Unlike *AEP*,
13 this case seeks monetary damages and thus would not require the Court to set any kind of
14 emissions standard, something the *AEP* court viewed as a non-judicial task. The Ninth Circuit
15 has held that the fact that a case seeks *damages* is a “key” factor demonstrating that a case does
16 not present a political question. *Koochi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992).
17 Further, unlike *GM*, this case does not name product manufacturers as defendants but rather goes
18 directly after the greenhouse gas emitters and fossil fuel producers who are chiefly responsible
19 for the problem. And the *Comer* complaint was always hard to take seriously, relying as it did on
20 “the Magna Carta, [and] the 5th, 7th, 9th, and 14th amendments to the United States
21 Constitution.” *Comer* Third Amended Class Action Complaint ¶ 19.

22 Moreover, with all due respect for the courts that decided *AEP*, *GM*, and *Comer*, the
23 reasoning of those decisions cannot withstand scrutiny. They are like the initial round of district
24 court decisions dismissing Holocaust era claims as political questions that the appellate courts
25 have now reversed and rejected. *See Gross v. German Found. Indus. Initiative*, 456 F.3d 363,
26 389 (3d Cir. 2006) (reversing district court decision that had dismissed Holocaust claims under
27 political question doctrine); *Alperin v. Vatican Bank*, 410 F.3d 532, 546 (9th Cir. 2005)

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1 (reversing decision that had dismissed as political questions plaintiffs’ property claims against
2 Vatican Bank and other defendants for conversion of Nazi-era property); *Ungaro-Benages v.*
3 *Dresdner Bank AG*, 379 F.3d 1227, 1235 (11th Cir. 2004) (“The district court found that this
4 case implicates American foreign relations and, thus, is a political question, non-justiciable in
5 domestic courts. We disagree.”).

6 With a fresh look, this Court will see the errors in *AEP*, *GM* and *Comer*. The *AEP* court
7 misread the law of political question and U.S. global warming policy, perhaps in part because it
8 was a *sua sponte* decision made without the benefit of full briefing. Indeed, defendants in *AEP* –
9 several of whom are also defendants here – expressly disavowed the political question doctrine
10 as “wholly irrelevant” in their *AEP* district court brief, but apparently now have embraced it as a
11 legal tactic. *See infra* at Section II.A. To be fair to the *AEP* court, it was badly misled by a 2003
12 EPA ruling that the *AEP* court found compelling. That 2003 EPA ruling has now been
13 invalidated by the Supreme Court in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). Undaunted,
14 defendants invoke that EPA ruling endlessly here and in particular its misstatement of U.S.
15 foreign policy that *Massachusetts* expressly dismissed as outside the EPA’s statutory charge.
16 The *GM* decision and the *Comer* oral ruling from the bench both adopted the *AEP* reasoning with
17 its errors and added their own, including a continued reliance upon the invalidated EPA ruling
18 even in the face of the *Massachusetts* decision. This was clear error. *See Central Valley*
19 *Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1181 (E.D. Cal. 2007) (“the decision in
20 *Massachusetts* teaches that when the court seeks to determine what United States foreign policy
21 is, it must look to sources other than EPA.”); *Green Mountain*, 508 F. Supp. 2d at 396 (“In
22 *Massachusetts v. EPA*, the Supreme Court dismissed EPA’s contention that regulating
23 greenhouse gases domestically might impair the President’s ability to negotiate with developing
24 nations to reduce emissions.”), *appeals pending*, Nos. 07-4342, 07-4360 (2d Cir.).

25 If there is any U.S. foreign or domestic policy on global warming relevant to this damages
26 case, then, as demonstrated by *Central Valley* and *Green Mountain*, defendants have badly
27 distorted them. The *Green Mountain* court extensively reviewed U.S. foreign and domestic
28

1 policies on global warming and concluded that they are properly understood as the “*nation’s*
2 *emission reduction policies*.” 508 F. Supp. 2d at 395 (emphasis added). The court held:

3 Although the United States has consistently called for international consensus and
4 a comprehensive approach to global warming, *it has never disapproved of*
5 *domestic regulation of domestic GHG emissions*. To the contrary. . . . That the
6 United States did not ratify the Kyoto Protocol may be evidence that the United
7 States disapproved of international solutions that exempted developing countries,
8 and was concerned that such a plan would unfairly tax the United States economy;
9 *it is not evidence of an express policy against domestic regulation of*
10 *greenhouse gases*.

11 *Id.* at 396 (emphases added). Similarly, in *Central Valley*, after extensively reviewing the
12 question, the court found “absolutely nothing” to “support the contention that it is United States
13 foreign policy to limits its own efforts” to control greenhouse gas emissions. 529 F. Supp. 2d at
14 1187. Thus, *AEP*, *GM* and *Comer* have misread U.S. policy and these sweeping decisions would
15 invalidate every state law in the country regulating greenhouse gas emissions.

16 In any event, Kivalina here does not seek to regulate greenhouse gas emissions but rather
17 seeks monetary damages for the harms from past emissions. There is no international agreement
18 that could provide compensation to Kivalina with which this case could interfere. Nor does this
19 tort case conflict in any way with any federal statute or administrative regime. Defendants
20 themselves emphasize the absence of any such action by the political branches. To accept the
21 defendants’ political question and preemption arguments that this case somehow conflicts with a
22 vacuum, i.e., with the *absence* of a regulatory regime that could compensate Kivalina, would turn
23 the applicable law on its head.

24 This case sounding in tort law by domestic plaintiffs seeking monetary damages against
25 domestic defendants that are corporations – not foreign nations – is a far cry from the kinds of
26 cases that the Ninth Circuit and Supreme Court have found to interfere with foreign relations or
27 other matters assigned exclusively to Congress or the President. ExxonMobil may be bigger than
28 many foreign nations, but it is still a corporation, not a nation.

Kivalina has properly invoked the Court’s federal question jurisdiction and has stated a
claim under the federal common law of public nuisance.

A Note on Briefing

1
2 This Consolidated Opposition responds to five different 12(b)(1)/12(b)(6) motions: one
3 filed by the Utility Defendants¹ addressing counts 1, 2, and 4 (Docket 139, hereafter referred to as
4 “Utilities MTD”); one by “Certain Utility Defendants”² addressing count 3 (Docket 140,
5 “Utilities MTD Conspiracy”); one by the Oil Company Defendants³ under Rule 12(b)(1) (Docket
6 135, “Oil MTD 12(b)(1)”; and a second filed by the same defendants under Rule 12(b)(6)
7 (Docket 134, “Oil MTD 12(b)(6)”; and one filed by Peabody Energy Corporation (Docket 137,
8 “Peabody MTD”). Because of the considerable overlap of argument and defense, Plaintiffs have
9 chosen the option of filing a consolidated opposition brief addressing all of the arguments under
10 the Court’s Order at Docket 126. (Per the Court’s Order at Docket 126, Plaintiffs do not respond
11 here to the Utility or Peabody 12(b)(2) motions, Dockets 141 and 138 respectively.). For the ease
12 of the Court and the parties, Plaintiffs have created the table below detailing where the various
13 arguments across the briefs are found, and where they are responded to in this brief.

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 ¹ For the purposes of this brief, the “Utility Defendants” are the AES Corporation,
23 American Electric Power Company, Inc., American Electric Power Service Corporation, DTE
24 Energy Company, Duke Energy Corporation, Dynegy Holdings, Inc., Edison International,
MidAmerican Energy Holdings Company, Pinnacle West Capital Corporation, Reliant Energy,
Inc., Southern Company, and Xcel Energy Inc. *See* Docket 126 at n.1.

25 ² American Electric Power Company, Inc., Duke Energy Corporation and Southern
26 Company.

27 ³ ExxonMobil Corporation, Shell Oil Company, Chevron Corporation, Chevron U.S.A.
28 Inc., ConocoPhillips Company, BP America Inc., and BP Products North America Inc. Oil
12(b)(6) at 1.

Topic	Defendants' Briefing					Plaintiffs' Opposition
	Utilities MTD	Utilities MTD Conspiracy	Oil MTD 12(b)(1)	Oil MTD 12(b)(6)	Peabody MTD	<i>this brief</i>
	Docket 139	Docket 140	Docket 135	Docket 134	Docket 137	
Factual Summary	4-7	2-4	4-13	2-3	2-8	9-16
Standard of Review	7-8			3-4	8-9	16
Nuisance, Federal Common Law	21-26			9-15		17-35
Nuisance, Causation				4-9	18-20	36-43
Political Question	8-17		13-29		10-15	44-71
Federal Pre-emption	26-29			15-20	15-18	71-79
Conspiracy, Stating Claim		23-25		20-21	22-24	80-85
Conspiracy, First Amendment & <i>Noerr-Pennington</i>		15-23			24-25	86-93
Concert of Action	40-43				25-26	93-95
Standing	17-21	4-15	29-39		9-10	95-109
Damages					20	110
Statutory Authorization					21	110-13
Statute of Limitations	29-32					113-120
Preemption of State Law Claims	32-34					121-126
State Law Claims	35-40					120-21, 126-28

FACTUAL BACKGROUND

1
2 The Native Village of Kivalina and the City of Kivalina are the governing bodies of an
3 Inupiat Eskimo village of approximately 400 people. Complaint (“Compl.”) ¶¶ 1, 15. “Inupiat”
4 means “the people” and is the term used by the Natives of northern Alaska to describe them-
5 selves and their culture. *Id.* ¶ 15. Kivalina is located on the tip of a six-mile barrier reef located
6 between the Chukchi Sea and the Kivalina and Wulik Rivers on the Northwest coast of Alaska
7 within the Arctic Circle. *Id.* ¶¶ 1,15. Plaintiff Native Village of Kivalina is a self-governing,
8 federally recognized Tribe established under the provisions of the Indian Reorganization Act of
9 1934. *Id.* ¶ 13. Plaintiff City of Kivalina is a unified municipality that was incorporated in 1969
10 under Alaska state law. *Id.* ¶ 14. The Native Village of Kivalina, the City of Kivalina, and many
11 of the citizens and residents of Kivalina own property and structures in Kivalina. *Id.* ¶¶ 13-14.

A. Global Warming Is Occurring.

12
13 There is an overwhelming scientific consensus that anthropogenic emissions of
14 greenhouse gases (“GHGs”), primarily carbon dioxide from fossil fuel combustion and methane
15 releases from fossil fuel harvesting, are causing a change in the Earth’s climate. *Id.* ¶¶ 132-134.
16 Carbon dioxide is by far the most significant greenhouse gas emitted by human activity. *Id.* ¶
17 124. The combustion of fossil fuels adds large quantities of carbon dioxide to the atmosphere
18 that otherwise would have remained sequestered deep in the Earth. *Id.* ¶ 126. Processes on land
19 and in the oceans that remove carbon dioxide from the atmosphere are unable to keep pace with
20 these emissions. *Id.* As a result, the natural carbon cycle is out of balance and carbon dioxide
21 levels in the atmosphere are increasing every year. *Id.* The current level of carbon dioxide in the
22 atmosphere is higher than at any time in the last 650,000 years, and is likely higher than at any
23 time in the last 20 million years. *Id.* ¶ 125.

24 The eight warmest years in the instrumental record of global surface temperature dating
25 back to the mid-Nineteenth Century all have occurred since 1998, and the 14 warmest years all
26 have occurred since 1990. *Id.* ¶¶ 128, 181. The Arctic is warming at a rate approximately twice
27 the global average. *Id.* ¶ 129. The Arctic Climate Impact Assessment (“ACIA”), a
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1 comprehensive evaluation of arctic climate change and its impacts, found that the Arctic climate
2 is now heating rapidly and projected much larger changes. *Id.* ¶ 184. The ACIA found that
3 many coastal communities and facilities face increasing exposure to storms and thawing ground
4 will disrupt transportation, buildings, and other infrastructure. *Id.*

5 **B. Defendants' Emissions of Greenhouse Gases.**

6 All defendants and their predecessors in interest have directly emitted large quantities of
7 GHGs from the combustion of fossil fuels and have done so for many years. *Id.* ¶¶ 3, 180.
8 During most of this time, most of the defendants did little or nothing to control their GHG
9 emissions, but instead greatly increased their emissions. *Id.* ¶ 162. Because the planet's natural
10 systems take hundreds of years to absorb carbon dioxide, defendants' past GHG emissions
11 remain in the atmosphere. *Id.* ¶ 180.

12 Defendants BP p.l.c., BP America, Inc., BP Products North America, Inc., Chevron
13 Corporation, Chevron U.S.A. Inc., ConocoPhillips Company, ExxonMobil Corporation, Royal
14 Dutch Shell plc and Shell Oil Company (hereinafter "Oil Companies") have directly emitted
15 large quantities of GHGs through such activities as exploration, production and refining of
16 petroleum and manufacturing of chemicals. *Id.* ¶¶ 163, 164. Additionally, many Oil Companies
17 engage in coal mining, power generation, transmission of natural gas, and metals production, all
18 of which directly emit carbon dioxide and other GHGs. *Id.* ¶ 165. For example, defendant
19 ExxonMobil was one of the 100 largest electric power producers in the United States as of 2002.
20 *Id.* ¶ 168.

21 Defendants The AES Corporation, American Electric Power Company, Inc., American
22 Electric Power Service Corporation, DTE Energy Company, Duke Energy Corporation, Dynegy
23 Holdings, Inc., Edison International, MidAmerican Energy Holdings Company, Pinnacle West
24 Capital Corporation, Reliant Energy, Inc., The Southern Company, and Xcel Energy, Inc.
25 (hereinafter "Power Companies") are electric power corporations that emit millions of tons of
26 carbon dioxide each year from the combustion of fossil fuels and have been doing so for many
27 years. *Id.* ¶ 170. The Power Companies are among the largest emitters of carbon dioxide in the
28

1 United States. *Id.* Electric power plants that burn fossil fuels are the largest source of carbon
2 dioxide emissions in the United States and emit approximately 2.6 billion tons of carbon dioxide
3 each year. *Id.* ¶ 172. Electric generation and emissions of carbon dioxide have been heavily
4 concentrated in the U.S. in the largest power producers – in 2004, just 19 companies accounted
5 for 50 percent of industry emissions. *Id.* ¶ 171.

6 Defendant Peabody Energy Corporation (“Peabody”), a coal company, directly emits
7 large quantities of GHGs, principally methane, from its mining operations. *Id.* ¶ 177. In
8 addition, Peabody has produced billions of tons of coal for combustion that has resulted in the
9 emissions of billions of tons of GHGs. *Id.* ¶ 178.

10 C. Global Warming Impacts on Kivalina.

11 Global warming has reduced the Arctic sea ice commonly present in the fall, winter and
12 spring at Kivalina. *Id.* ¶¶ 4, 16. The sea ice – particularly land-fast sea ice – acts as a protective
13 barrier to the coastal storms that batter the coast of the Chukchi Sea. *Id.* ¶ 16. Rising
14 temperatures caused by global warming have affected the thickness, extent, and duration of sea
15 ice that forms along Kivalina’s coast. *Id.* ¶ 185. Due to global warming, the sea ice forms later
16 in the year, attaches to the coast later, breaks up earlier, and is less extensive and thinner, thus
17 subjecting Kivalina to coastal storm waves and surges and increased erosion. *Id.* ¶¶ 16, 185.
18 These storms and waves are destroying the land upon which Kivalina is located. *Id.* ¶¶ 4, 16.
19 Houses and buildings are in imminent danger of falling into the sea. *Id.* ¶ 4. Critical
20 infrastructure is imminently threatened with permanent destruction. *Id.* Kivalina must be
21 relocated soon or be abandoned and cease to exist. *Id.* ¶¶ 1, 4, 17, 185.

22 The U.S. Army Corps of Engineers and the U.S. Government Accountability Office
23 (“GAO”) both have concluded that Kivalina must be relocated due to global warming, and have
24 estimated the cost to be from \$95 million to \$400 million. *Id.* ¶ 1. The U.S. Army Corps of
25 Engineers, in an April, 2006 report on erosion suffered by Alaska Native Villages, concluded that
26 global warming has affected the extent of sea ice adjacent to Kivalina. *Id.* ¶ 185. The GAO, in a
27 December, 2003 report (“GAO Report”) also addressing erosion in Alaska Native Villages,
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1 reached similar conclusions regarding Kivalina: “[I]t is believed that the right combination of
2 storm events could flood the entire village at any time.” *Id.* ¶ 185. The GAO concluded that
3 “[r]emaining on the island . . . is no longer a viable option for the community.” *Id.* The GAO
4 Report did not address in any fashion the causes of global warming.

5 **D. The Conspiracy Defendants’ Actions Regarding Global Warming.**

6 There has been a long campaign by power, coal, and oil companies, including defendants
7 ExxonMobil Corporation, American Electric Power Company, Inc., BP America Inc., Chevron
8 Corporation, ConocoPhillips Company, Duke Energy Corporation, Peabody and The Southern
9 Company (“Conspiracy Defendants”), to mislead the public about the science of global warming.
10 *Id.* ¶ 189. Defendant ExxonMobil in particular has been heavily involved in this campaign. *Id.* ¶
11 231. ExxonMobil has channeled \$16 million over the 1998 to 2005 period to 42 organizations
12 that promote disinformation on global warming. *Id.* ¶ 231. Initially, this deceptive campaign
13 attempted to show that global warming was not occurring. *Id.* ¶ 189. Later, and continuing to
14 the present, it has attempted to demonstrate that global warming is good for the planet and its
15 inhabitants or that even if there may be ill effects, there is not enough scientific certainty to
16 warrant action. *Id.* The purpose of this campaign has been to convince the public at-large and
17 the victims of global warming that the process is not man-made. *Id.* The campaign has been
18 conducted directly by the Conspiracy Defendants, and through trade associations such as the
19 Edison Electric Institute (“EEI”) (which represents the electric power industry), the National
20 Mining Association (which represents the coal industry), and the Western Fuels Association
21 (which represents coal-burning utilities that own Wyoming coal fields). *Id.* ¶ 190.

22 For example, the Conspiracy Defendants were at relevant times members of the Global
23 Climate Coalition (“GCC”). *Id.* ¶ 198. The GCC provided public relations services for “global
24 warming skeptics” and attacked credible and preeminent expert scientists. *Id.* ¶¶ 191, 215-221.
25 In December, 1995, the GCC, via its Science and Technology Advisory Committee
26 (“GCC-STAC”), drafted a primer on the science of global warming for GCC members that
27 concluded in part: “The contrarian theories raise interesting questions about our total
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1 understanding of climate processes, but they do not offer convincing arguments against the
2 conventional model of greenhouse gas emission-induced climate change.” *Id.* ¶ 205.
3 Subsequently, the GCC and its members continued to publicize the contrarian theories about
4 global warming despite knowing that they were false. *Id.* ¶ 205. At a GCC meeting in February,
5 1996, for instance, EEI made a powerpoint presentation regarding the science of global warming
6 which stated in part that some of the impacts of global warming would be “potentially
7 irreversible” and include “significant loss of life.” *Id.* ¶ 207.

8 Despite their knowledge that global warming was real and presented extraordinary threats
9 to the planet and humanity, the Conspiracy Defendants continued to mislead the public regarding
10 global warming through their hired front groups and trade associations. For example, in
11 September, 1997, the GCC launched a national television, print and radio advertising campaign
12 falsely claiming that there was an open issue as to whether man-made greenhouse gases caused
13 global warming. *Id.* ¶ 222.

14 Industry formed a task force in the 1990s called the Global Climate Science
15 Communications Team (“GCST”). *Id.* ¶ 223. GCST members included some of the
16 defendants, including ExxonMobil, Chevron Corporation, and The Southern Company, and trade
17 associations including the American Petroleum Institute, which represents the interest of all of
18 the U.S. oil company defendants. *Id.* A 1998 GCST task force memo outlined an explicit
19 strategy to invest millions of dollars to manufacture uncertainty on the issue of global warming
20 and stated as its goal: “*Victory will be achieved when average citizens understand (recognize)*
21 *uncertainties in climate science*” and when public “*recognition of uncertainty becomes part of*
22 *the ‘conventional wisdom.’*” *Id.*

23 **E. Federal Global Warming Policy.**

24 As the Supreme Court recently held, EPA has statutory authority under the Clean Air Act
25 (“CAA”) to regulate greenhouse gas emissions, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).
26 In the wake of that decision in 2007, EPA has not taken action to regulate greenhouse gas
27 emissions from motor vehicles or from any other source. On July 30, 2008, the EPA published
28

1 its response to *Massachusetts v. EPA* in the Federal Register in an Advance Notice of Proposed
2 Rulemaking. See 73 Fed. Reg. 44354 (July 30, 2008). The EPA sought comment on “analyses
3 and policy alternatives regarding greenhouse gas (GHG) effects and regulation under the Clean
4 Air Act.” *Id.* at 44354. The EPA Administrator states in the preface to this proposed
5 rulemaking:

6 I believe the [Advance Notice of Proposed Rulemaking] demonstrates the Clean
7 Air Act, an outdated law originally enacted to control regional pollutants that
8 cause direct health effects, is ill-suited for the task of regulating global greenhouse
9 gases. Based on the analysis to date, pursuing this course of action would
10 inevitably result in a very complicated, time-consuming, and, likely, convoluted
11 set of regulations.

12 *Id.* at 44355. The EPA Administrator is the designated official under the CAA responsible for
13 deciding whether a particular pollutant endangers health or welfare – the prerequisite for EPA to
14 regulate a pollutant under the CAA. See 42 U.S.C. § 7521(a)(1). Thus, the EPA Administrator
15 has made clear his intent not to make the finding necessary for EPA to issue ambient air quality
16 standards for greenhouse gases under the CAA.

17 Even if the EPA and its Administrator were to reverse course, make an endangerment
18 finding, and establish ambient air quality standards for greenhouse gases, however, there is no
19 provision in the CAA or other laws for victims of air pollution generally or global warming
20 specifically to seek compensation.

21 Likewise, there are no limitations on defendants’ domestic emissions under any treaty.
22 The United States is a party to the United Nations Framework Convention on Climate Change
23 (“Framework Convention” or “UNFCCC”), May 9, 1992, 1771 U.N.T.S. 107. The Framework
24 Convention requires the United States and other developed nations to “adopt national policies
25 and take corresponding measures on the mitigation of climate change, by limiting its
26 anthropogenic emissions of greenhouse gases.” UNFCCC at art. IV § (2)(a). “These policies
27 and measures will demonstrate that developed countries are *taking the lead* in modifying
28 longer-term trends in anthropogenic emissions consistent with the objective of the Convention.”
Id. (emphasis added). The treaty expressly recognizes that “the largest share of historical and
current global emissions of greenhouse gases has originated in developed countries, that per

1 capita emissions in developing countries are still relatively low and that the share of global
2 emissions originating in developing countries will grow to meet their social and development
3 needs.” *Id.* at preamble. The treaty does not impose binding emissions limits but instead
4 establishes the general “aim of [the parties of] returning individually or jointly to their 1990
5 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases.” *Id.* at art.
6 IV § (2)(b).

7 A subsequent treaty, the Kyoto Protocol to the United Nations Framework Convention on
8 Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998), imposes nation-by-nation binding
9 emissions limits on the developed nations of the world but the United States has not ratified the
10 Protocol and thus is not a party to it. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 256
11 (2d Cir. 2003) (“A State only becomes bound by – that is, becomes a party to – a treaty when it
12 ratifies the treaty.”).

13 Apart from the Clean Air Act, Congress has enacted statutes requiring research on global
14 warming and interagency collaboration. These statutes recognize that global warming will have
15 severe adverse impacts in the United States and expressed a clear national policy in favor of
16 reducing such emissions. For example, the Global Climate Protection Act of 1987 provides:

17 United States policy should seek to . . . limit mankind’s adverse effect on the
18 global climate by–(A) slowing the rate of increase of concentrations of greenhouse
19 gases in the atmosphere in the near term; and (B) stabilizing or reducing
20 atmospheric concentrations of greenhouse gases over the long term

21 P.L. 100-204, Title XI, § 1103(a) (uncodified), *reprinted in* 15 U.S.C. § 2901-note. And the
22 Global Change Research Act of 1990, 15 U.S.C. § 2931(a)(2), recognizes that “human-induced
23 changes, in conjunction with natural fluctuations, may lead to significant global warming and
24 thus alter world climate patterns and increase global sea levels” with adverse effects on
25 “agricultural and marine production, coastal habitability, biological diversity, human health, and
26 global economic and social well-being.”

27 Congress has required research into technologies to reduce global warming pollution and
28 mandates that electric utilities report their carbon dioxide emissions levels to EPA. *See* 42
U.S.C. § 7403(g)(1) (section of CAA requiring research into “technologies for preventing or

1 reducing multiple air pollutants, including . . . carbon dioxide, from stationary sources, including
2 fossil fuel power plants”); P.L. 101-549, Title VIII, § 821, 104 Stat. 2699 (Nov. 15, 1990)
3 (uncodified), *reprinted in* 42 U.S.C. § 7651k-note (“Information Gathering on Greenhouse Gases
4 Contributing to Global Climate Change.”).

5 For their understanding of U.S. global warming policy, defendants rely upon: an EPA
6 ruling that the Supreme Court invalidated in *Massachusetts*, Utilities MTD at 12, 14, 16, 18, 34;
7 Oil MTD 12(b)(6) at 5, 7, 8, 23; Peabody MTD at 4; a fuel economy rule that was invalidated by
8 the Ninth Circuit, Utilities MTD at 6; and a wide variety of miscellaneous materials, such as a
9 press release, letters from the President to a group of Senators and a non binding sense of the
10 Senate resolution, *see* Oil MTD 12(b)(1) at 7-9; Utilities MTD at 6-7; Peabody MTD at 5. As set
11 forth below, these items are not official U.S. policy and cannot be relied upon here. *See infra*
12 Section II.B.

13 In sum, official U.S. policy as set forth in the UNFCCC and federal statutes is to mitigate
14 global warming by limiting greenhouse gas emissions and reducing the atmospheric
15 concentration of such gases. There is no binding emissions limit on U.S. emissions in any treaty
16 to which the U.S. is a party. The EPA is required to conduct technology research and utilities are
17 required to report their carbon dioxide emissions levels. EPA is authorized to regulate
18 greenhouse gases but has not issued any ambient air quality standards for greenhouse gases.
19 There is no statutory or administrative regime under which Kivalina could seek compensation.

20 STANDARD OF REVIEW

21 When a court considers a 12(b)(6) motion to dismiss a complaint, “[a]ll allegations of
22 material fact in the complaint are taken as true and construed in the light most favorable to the
23 plaintiff.” *Williams v. Gerber Prods. Co.*, 523 F.3d 934, 937 (9th Cir. 2008) (quotation omitted).
24 All reasonable inferences must be drawn in favor of the plaintiffs. *Buckey v. County of Los*
25 *Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). The complaint simply must “plead enough facts to
26 state a claim to relief that is plausible on its face.” *Weber v. Dep’t of Veterans Affairs*, 521 F.3d
27 1061, 1065 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007)).
28

1 When subject matter jurisdiction is challenged under Fed. R. Civ. P. 12(b)(1), the plaintiff must
2 demonstrate the “existence of whatever is essential to federal jurisdiction.” *Tosco Corp. v.*
3 *Cmtys. for a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001).

4 ARGUMENT

5 **I. KIVALINA HAS STATED A PROPER CLAIM OF PUBLIC NUISANCE UNDER 6 FEDERAL COMMON LAW.**

7 Kivalina has properly invoked the federal common law of public nuisance applicable to
8 unregulated, interstate pollution. Its Complaint properly alleges the elements of federal nuisance
9 and is grounded in a long line of multiple polluter cases.

10 **A. Federal Common Law Applies to Greenhouse Gas Emissions.**

11 **1. Kivalina’s Public Nuisance Claim Is Governed by Federal Common 12 Law Under the Milwaukee-Ouellette Trilogy of Interstate Pollution 13 Law.**

14 Defendants wrongly contend that federal common law does not apply to this case. In fact,
15 Kivalina brings its claims under a well-established framework of interstate pollution law. This
16 framework was set forth in three Supreme Court cases that provide the starting point for any
17 interstate pollution case: *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (“*Milwaukee I*”),
18 *City of Milwaukee v. Illinois*, 451 U.S. 304, 319 n.14 (1981) (“*Milwaukee II*”), and *International
19 Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). Under this framework, a plaintiff injured by
20 *interstate* pollution that is *unregulated* by the federal EPA may bring a claim under the federal
21 common law of public nuisance.

22 In *Milwaukee I*, Illinois filed a case under the Supreme Court’s original jurisdiction
23 against polluters from out of state. The defendants were Wisconsin municipalities discharging
24 inadequately-treated sewage into Lake Michigan, which contributed to bacterial contamination
25 along the Illinois shoreline. In a unanimous decision, the Supreme Court held that the federal
26 common law of public nuisance governs such a claim: “[w]hen we deal with air and water in
27 their ambient or interstate aspects, there is a federal common law.” *Milwaukee I* at 103; *see also*
28 *id.* at 107 (discussing federal “public nuisance”). The Court drew heavily upon the historic
decision in *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907), an air pollution case in which the

1 Court, in an opinion by Justice Holmes, allowed an interstate nuisance claim for what is now
2 recognized as acid rain. *See also Georgia v. Tennessee Cooper*, 237 U.S. 474 (1915) (setting
3 emissions limits on remaining defendant).

4 The Court observed in *Milwaukee I* that there were important federal interests at stake in
5 light of federal clean water statutes and that those federal interests called for application of
6 federal law. 406 U.S. at 101-02 (noting “a complex of laws recently enacted” relating to water
7 pollution). It held that “[w]hile the various federal environmental protection statutes will not
8 necessarily mark the outer bounds of the federal common law, they may provide useful
9 guidelines in fashioning [federal common law] rules of decision.” *Id.* at 103 n.5. The Court
10 observed that “new federal laws and new federal regulations may in time pre-empt the field of
11 federal common law of nuisance” but “until that comes to pass, federal courts will be
12 empowered” to hear interstate pollution cases. *Id.* at 107. *Milwaukee I* also held that a claim
13 under the federal common law gives rise to proper federal question jurisdiction. *Id.* at 100. The
14 Court thus declined to exercise its original jurisdiction and held that Illinois could re-file the case
15 in federal district court. *Id.* at 108.

16 Illinois thus proceeded to re-file its case in federal district court in Illinois under the
17 federal common law of public nuisance, joined now by Michigan as a co-plaintiff. Although
18 Michigan’s shoreline was too far from Wisconsin to be affected by the pathogens from
19 Wisconsin-borne sewage, Michigan alleged that the sewage pollution was the largest source of
20 nutrients that were contributing to eutrophication of the entire lake.⁴ The plaintiffs prevailed
21 after a bench trial, *Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. 1973),
22 and the Seventh Circuit affirmed most of the relief ordered by the district court, *Illinois v. City of*
23 *Milwaukee*, 599 F.2d 151 (7th Cir. 1979).

24 The Supreme Court granted *certiorari* to determine whether new federal legislation
25 enacted after its decision in *Milwaukee I*, i.e. – the Clean Water Act – had now preempted the
26

27 ⁴ Eutrophication is the process of overloading a freshwater body with nutrients, causing
28 algal blooms that deplete the water of oxygen and lead to a dead lake.

1 federal common law claim. The Court re-affirmed that federal common law applies when the
2 courts are “compelled to consider federal questions which cannot be answered from federal
3 statutes alone.” *Milwaukee II*, 451 U.S. at 314 (quotation omitted); *see also id.* at 319 n.14
4 (federal common law applies where “problems requiring federal answers are not addressed by
5 federal statutory law.”). The Court held the plaintiffs’ federal common law nuisance claim to be
6 preempted, however, because the new statute regulated the very sewage discharges at issue,
7 imposed numerical limits on them and provided the plaintiffs with a remedy. *Id.* at 320. The
8 Court thus vacated the lower court decision. *Id.* at 332. *Milwaukee II* did not reverse *Milwaukee*
9 *I* and the Supreme Court and lower courts have continued to rely upon *Milwaukee I* as good law.
10 *See, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 n.13 (1981); *Arkansas*
11 *v. Oklahoma*, 503 U.S. 91, 110 (1992) (“we have long recognized that interstate water pollution
12 is controlled by federal law.”); *Nat’l Audubon Soc’y v. California*, 869 F.2d 1196, 1203 (9th Cir.
13 1988).

14 The third chapter in the trilogy, *Ouellette*, arose when Vermont citizens invoked *state*
15 common law in a suit against a New York paper pulp mill that was polluting the air and water of
16 Vermont. The Supreme Court, reviewing only the water claim, re-affirmed that “the control of
17 interstate pollution is primarily a matter of federal law.” *Ouellette*, 479 U.S. at 492. It held,
18 however, that while the federal common law was unavailable to the plaintiffs under *Milwaukee*
19 *II*, they could sue under the state public nuisance law of the source state (there, New York),
20 because the savings clauses of the Clean Water Act expressly preserve “common law” claims
21 even where federal common law is preempted. *Id.* at 497 (“nothing in the Act bars aggrieved
22 individuals from bringing a nuisance claim pursuant to the law of the source State”). It further
23 held that the statute preempts application of more than one state’s common law and thus the law
24 of the state where the harm occurs may not be applied. On remand, the district court reached the
25 same conclusion with respect to the interstate air pollution claim. *Ouellette v. Int’l Paper Co.*,
26 666 F. Supp. 58, 62 (D. Vt. 1987) (public nuisance law of source state preserved; savings clauses
27 of Clean Air Act virtually identical to those of Clean Water Act).

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1 This trilogy of cases establishes a straightforward framework involving vertical and
 2 horizontal choices of law for an interstate air pollution case like Kivalina’s. Where such
 3 pollution is unregulated by the federal EPA, the federal common law of public nuisance applies.
 4 This federal common law is mutually exclusive with state common law. *Ouellette*, 479 U.S. at
 5 488 (“the implicit corollary of [*Milwaukee I*] was that state common law was preempted”);
 6 *Milwaukee II*, 451 U.S. at 314 n.7 (“If state law can be applied, there is no need for federal
 7 common law; if federal common law exists, it is because state law cannot be used.”). If EPA
 8 commences regulating the pollutant, then under *Milwaukee II* federal common law becomes
 9 preempted but state common law applies (vertical choice of law rule). The state law applied
 10 must be the law of the source state rather than the affected state (horizontal choice of law rule).
 11 Thus, as required by this framework, Kivalina has pled its public nuisance claim here under
 12 federal common law and pled its state-law nuisance claims only in the alternative, *see* Compl. ¶¶
 13 2, 263, as required.

14 Kivalina’s public nuisance claim falls squarely within the *Milwaukee I* category: a public
 15 nuisance claim for interstate pollution that is unregulated by EPA:

- 16 • **It is interstate pollution.** Carbon dioxide emissions are inherently
 17 interstate in nature. *See* Compl. ¶ 254; *see also* Utilities MTD at 32:13-14,
 18 33:11-12.
- 19 • **It is unregulated.** EPA has not issued any ambient air quality standard
 20 for greenhouse gases and certainly there is no federal liability regime
 21 under which Kivalina could seek compensatory damages, as defendants
 22 readily concede. *See* Oil MTD 12(b)(1) at 5 (“Notably, the political
 23 branches thus far have declined to adopt emission caps or standards . . .”);
 24 *id.* at 36 (“Here, of course, there is a complete absence of any statutory
 25 scheme that would define the relevant wrongful emissions of greenhouse
 26 gases . . .”); Utilities MTD at 28:1 (“Congress has not provided remedies
 27 for plaintiffs”); *id.* at 14:13-15 (“the political branches declined to adopt
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1 the Kyoto Protocol, which sought to impose emissions caps on developed
2 nations”). Although the EPA is authorized to regulate greenhouse gases
3 under the CAA, *Massachusetts*, 127 S. Ct at 1459, the EPA Administrator
4 has recently stated his intention not to issue such regulations. *See supra* at
5 Factual Background Section E. And even if the EPA were to issue new
6 greenhouse gas regulations in the future, there would still be no remedial
7 scheme for past emissions.

8 Federal common law applies.

9 **2. Because Interstate Pollution Is A Recognized Enclave of Federal
10 Common Law, There Is No New Law to Create.**

11 Defendants contend that the Court here would have to “create” a federal common law
12 cause of action as a new exception to *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). *See* Oil
13 MTD 12(b)(6) at 9; Utilities MTD at 24-26. But the federal common law of public nuisance
14 already exists by virtue of *Milwaukee I* and the earlier cases on which it is based; there is nothing
15 new to create.

16 The federal common law of public nuisance is a well-recognized species of “federal
17 specialized common law.” The Supreme Court recognized federal specialized common law in
18 *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), dealing with
19 apportionment of water in an interstate stream, the same day that it repudiated “federal *general*
20 common law” in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added).
21 *Milwaukee I* relied upon the simultaneous decisions in *Hinderlider* and *Erie* in recognizing
22 interstate pollution as a special enclave of federal law. 406 U.S. at 105 & n.7. As stated in one
23 of defendants’ lead cases, federal specialized common law applies to “interstate and international
24 disputes implicating the conflicting rights of States or our relations with foreign nations.” *Texas*
25 *Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). That is exactly the kind of
26 interstate dispute that arises in interstate pollution. *Texas Industries* recognized as much by
27 citing to *Milwaukee I* as an example of such an interstate dispute where federal common law
28 properly applies. *See id.* at 641 n.13. Federal common law governs this case because carbon

1 dioxide pollution crosses state lines, and, by contributing to the process of global warming,
2 causes transboundary harm in Alaska, where Kivalina is located.

3 Defendants rely heavily upon *National Audubon Society v. Department of Water*, 869
4 F.2d 1196 (9th Cir. 1998). See Oil MTD 12(b)(6) at 10-12. But *Audubon* plainly recognized that
5 under *Milwaukee I*, “there is a federal common law when dealing with air and water in their
6 ambient or interstate aspects.” 869 F.2d at 1203. While *Audubon* found, on the facts of that
7 case, no interstate dispute sufficient to trigger federal common law, it is easily distinguished.
8 *Audubon* involved localized *dust pollution* and thus the matter was appropriately resolved under
9 California law, where both the defendant and the harm were located and where the pollution
10 occurred. As the court noted, the plaintiff in *Audubon* had even filed a concurrent lawsuit under
11 state law in state court, thus demonstrating “that California nuisance law is both well-suited and
12 applicable to the case at bar.” *Id.* at 1204. Although the court was willing to assume that some
13 of the dust reached into Nevada, it held that “[b]ecause we conclude this is essentially a domestic
14 dispute and therefore not the sort of interstate controversy which makes application of state law
15 inappropriate, reliance on federal common law is unnecessary.” *Id.* at 1204; see also *id.* at 1205
16 (“we conclude that Audubon cannot properly assert a federal common law nuisance action based
17 on air pollution *on these facts.*”) (emphasis added). The localized dust pollution at issue in
18 *Audubon* could hardly be more different from the inherently interstate greenhouse gas emissions
19 at issue here.

20 Defendants also rely upon *Jackson v. Johns-Mansville Sales Corp.*, 750 F.2d 1314, 1324
21 (5th Cir. 1985) (en banc), which stated that federal common law is not triggered “merely because
22 the conflict is not confined within the boundaries of a single state.” See Oil MTD 12(b)(6) at 12.
23 *Jackson* did not address interstate pollution, however. In that case, the parties had litigated an
24 asbestos case under state law and, after a jury verdict was appealed, the Fifth Circuit requested
25 briefing on whether federal common law should apply to asbestos tort cases. It held that the
26 national nature of the asbestos industry and the fact that many affected victims live in different
27 states was not enough to trigger federal common law. *Id.* at 1324-25. The case is further
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1 evidence that *Milwaukee I* retains its vitality after *Milwaukee II*. *See id.* at 1324 (treating
2 *Milwaukee I* as good law). Moreover, *Jackson* does not purport to cast doubt on *Milwaukee I*'s
3 holding that interstate pollution is a matter of federal common law and especially so for a case
4 like this where the pollution is inherently interstate and even international due to its rapid
5 dispersal in the atmosphere.

6 An additional, alternative, basis for applying federal common law here is the uniquely
7 federal interest in global warming. *See Audubon*, 869 F.2d at 1203-04. It is true, as defendants
8 point out, that *Audubon* found there is “not a uniquely federal interest in protecting the *quality* of
9 the nation’s air.” *Id.* at 1203 (emphasis added). But that holding cannot be exported, as
10 defendants attempt to do, from the context of localized dust pollution, which affects air *quality*,
11 to this case dealing with a kind of global air pollution that affects the *climate* of every state. In
12 fact, as the Utilities frankly concede, “global climate change is predominantly a matter of federal
13 concern,” Utilities MTD at 32; they also emphasize the “uniquely federal nature of any response
14 to global warming,” *id.* at 33. If global warming does not raise a uniquely federal interest, no
15 pollution case ever could. As one commentator has observed;

16 Since the time Justice Holmes sat on the Court, federal common law for public
17 nuisance has served as a meaningful cause of action for states and individuals to
18 stop harmful activities and recover the costs of transboundary pollution. So too it
19 can with climate change. Indeed, the legal challenges of climate change seem a
20 particularly cozy fit for federal common law. It is transboundary. Legislative
21 enactments allowing for injunctive relief or money damages do not exist. A
22 patchwork of state common law responses is untenable. So one is left to wonder
23 for what federal common law can exist if not for climate change. And if current
24 circumstances concerning climate change do not warrant its use, then when
25 possibly could it be so.

26 James R. May, *Climate Change, Constitutional Consignment, and the Political Question*
27 *Doctrine*, 58 Denver U. L. Rev. 919, 921 (2008).

28 Because this case falls squarely within *Milwaukee I*, the Court may decline defendants’
invitation to travel down side trails having nothing to do with interstate pollution. Cases
addressing whether to “create” a new federal common law claim dealing with human rights or
whether to supplement an *existing statutory remedy* under Title VII or under the Clayton Act
with a common law right of contribution, *see* Utilities MTD at 24-26, are inapposite on their

1 face. There is no existing statutory remedy for greenhouse gas emissions. There is no
2 compensatory scheme for the damages alleged here. There is no “high policy” choice to be made
3 here, *see* Utilities MTD at 24:13, 25:18-20, that was not already made in *Milwaukee I*. There is
4 no separation of powers concern about whether creating some *new* species of federal common
5 law would intrude on the political branches. The Supreme Court crossed those bridges long ago
6 when it recognized interstate pollution as a proper enclave, however narrow, of federal common
7 law.⁵

8 Defendants barely disguise their wish that the Supreme Court would simply reverse
9 *Milwaukee I* and the earlier precedents upon which it is based. *See* Utilities MTD at 25 (“even if
10 *Milwaukee I* is good law”); *id.* at 21 (“outmoded theories of federal common law”); *id.* at 25
11 (“constitutionally suspect interstate nuisance action”). But the Supreme Court has never reversed
12 *Milwaukee I* and indeed has continued to embrace it. So did the Ninth Circuit in *Audubon*.
13 There is thus no occasion to create a new federal common law doctrine. This case invokes the
14 well-established enclave of federal common law applicable to interstate pollution.

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20 ⁵ Defendants’ argument against creating new federal common law is not only inapposite
21 but weak even on its own terms. For example, in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729
22 (2004), relied upon by defendants, *see* Peabody MTD at 15:26 - 16:2; Utilities MTD at 24:15-
23 19, 25:9-11, the Court plainly held that “*Erie did not* in terms bar any judicial recognition of new
24 substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified
25 limited enclaves in which federal courts may derive some substantive law in a common law
26 way.” *Id.* at 729 (emphasis added); *see also* *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080,
27 1099-1100 (N.D. Cal. 2008) (“*Sosa* held, in spite of the *Erie* presumption against federal
28 common law, that ‘post-*Erie* understanding has identified limited enclaves in which federal
courts may derive some substantive law in a common law way.’”) (quoting *Sosa*, 542 U.S. at
729). Further, defendants’ repeated argument that the use of federal common law violates
separation of powers by expanding judicial power at the expense of the political branches misses
the primary thrust of the separation of powers doctrine. *See* *Miller v. French*, 530 U.S. 327, 350
(2000) (“separation of powers principles are primarily addressed to the structural concerns of
protecting the role of the independent Judiciary within the constitutional design”).

1 **B. Defendants' Proposed Restrictions on the Federal Common Law of Public**
2 **Nuisance Are Unavailing.**

3 Defendants attempt to wriggle free of the straightforward legal framework requiring
4 application of federal common law to unregulated, interstate air pollution, but their arguments
5 badly miss the mark. Indeed, many of their arguments contending Kivalina has not stated a claim
6 under the federal common law of public nuisance are demonstrably incorrect.

7 The plaintiffs here are proper plaintiffs under federal common law, which recognizes
8 damages actions and is not limited to "simple" nuisances.

9 **1. The Native Village of Kivalina and City of Kivalina Are Proper**
10 **Federal Plaintiffs.**

11 The Native Village of Kivalina, a federally-recognized Indian tribe, and the City of
12 Kivalina, a municipal subdivision of a state, are proper federal plaintiffs. Defendants' argument
13 that federal nuisance is restricted exclusively to State plaintiffs is directly contradicted by the
14 case law.

15 *Milwaukee I* held that "it is not only the character of the parties that requires us to apply
16 federal law" but rather "where there is an overriding federal interest in the need for a uniform
17 rule of decision or where the controversy touches basic interests of federalism." 406 U.S. at 105.
18 Relying on this key language, the Seventh Circuit held in *City of Evansville v. Kentucky Liquid*
19 *Recycling, Inc.*, 604 F.2d 1008, 1017-19 (7th Cir. 1979), that federal nuisance is not restricted to
20 suits by States and thus the court permitted a federal nuisance suit for damages by a municipality.
21 As *Evansville* observed, in *Tennessee Copper* the Supreme Court had "implicitly assum[ed] that
22 even a private party might file suit to enjoin interstate air pollution." *Id.* at 1018 n.30 (citing
23 *Tennessee Copper*, 206 U.S. at 238). In *Township of Long Beach v. City of New York*, 445 F.
24 Supp. 1203, 1214 (D.N.J. 1978), the court held that it could "see no reason why the township
25 should not be entitled to bring an action based on the federal common law of nuisance."

26 Second, defendants' contention that the federal common law of public nuisance is rooted
27 exclusively in the rights of States, *see* Oil MTD 12(b)(1) at 11:26 - 13:3; Utilities MTD at 23:7-
28 11, overlooks the jurisdictional holding of *Milwaukee I*. The Article III grant of original

1 jurisdiction over controversies “in which a State shall be a party,” U.S. Const. art. III § 2, is no
2 longer the jurisdictional basis for interstate nuisance as it was in the time of *Tennessee Copper*.
3 Under *Milwaukee I*, interstate nuisances now “arise under” federal law. The nature of the subject
4 matter, not statehood, is the key. *Township of Long Beach*, 445 F. Supp. at 1214 (“No statement
5 was made [in *Milwaukee I*] that the interest of the State itself precipitated the development of
6 such common law.”). This Court has jurisdiction over this case because it presents a federal
7 question, not because it involves controversies between States and citizens of other States.
8 “There is nothing in the jurisdictional statute, 28 U.S.C. § 1331(a), on which the Supreme Court
9 based its opinion in [*Milwaukee I*], to suggest that suits by citizens should be treated differently
10 from suits by states.” John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement*
11 *(Second) of Torts, and Environmental Law*, 2 Ecology L. Q. 241, 280-81 (1972); *see also Byram*
12 *River v. Vill. of Port Chester*, 394 F. Supp. 618, 629 (S.D.N.Y. 1975) (permitting federal
13 nuisance action by private parties).

14 Indeed, States are entitled to pursue federal nuisance actions in federal district court under
15 federal question jurisdiction not *because* they are States but *notwithstanding* that they are States
16 who may invoke the Supreme Court’s original jurisdiction. *See Texas v. Pankey*, 441 F.2d 236,
17 242 (10th Cir. 1971) (“we hold that the State of Texas was not precluded on its character as a
18 party from bringing a federal-rights suit in the district court under § 1331(a)”), *cited in*
19 *Milwaukee I*, 406 U.S. at 99-100, 103, 108 n.9. And defendants’ theory of federal nuisance as
20 driven by the *quid pro quo* for the exchange of sovereign rights, Oil MTD 12(b)(6) at 14:22-28,
21 Utilities MTD 23:13-15, also cannot explain why interstate pollution cases filed by the United
22 States against private polluters arise under federal law. *See Stream Pollution Control Bd. v.*
23 *United States Steel Corp.*, 512 F.2d 1036, 1040 n.9 (7th Cir. 1975) (Stevens, J.) (argument that
24 federal nuisance “depends on the existence of a conflict between sovereigns” at odds with cases
25 permitting United States to sue in federal nuisance). It is the “broad language” of *Milwaukee I*

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1 focusing on the subject matter that is the touchstone, *id.* at 1040, not the identity of the parties.⁶

2 The defendants rely upon *Committee for the Consideration of the Jones Falls Sewage*
3 *System v. Train*, 539 F.2d 1006, 1009 (4th Cir. 1976) (en banc), but there the court plainly stated
4 that “[i]t is not essential that one or more states be formal parties if the interests of the state are
5 sufficiently implicated.” Here the interests of States are clearly implicated by global warming
6 given the similar global warming suits filed by eight States for injunctive relief and damages
7 under federal common law. *See AEP, GM, supra.*

8 The defendants also rely upon *Middlesex County Sewerage Authority v. National Sea*
9 *Clammers Association*, 453 U.S. 1 (1981), but there the plaintiffs were private parties, unlike
10 Kivalina. Moreover, defendants fail to acknowledge that the Court was careful in that case not to
11 address the question of whether non-States may sue. *See id.* at 11 n.17 (“We therefore need not
12 discuss the question whether the federal common law of nuisance could ever be the basis of a
13 suit for damages *by a private party.*”) (emphasis added). And the circuit court in that case had
14 allowed non-State plaintiffs to sue under federal nuisance law. *See Nat’l Sea Clammers Ass’n v.*
15 *New York City*, 616 F.2d 1222, 1233 (3d Cir. 1980) (“We hold that the common law nuisance
16 remedy recognized in *Illinois v. City of Milwaukee* is available in suits by private parties.”), *rev’d*
17 *on other grounds*, 453 U.S. 1 (1981). In fact, the Third Circuit concluded that “private parties
18 should be permitted, and indeed encouraged,” to participate in federal nuisance cases. *Id.* at
19 1234.

20 The Kivalina plaintiffs are not private parties. One of them is a subdivision of a state.
21 The other is a federally-recognized Indian Tribe with sovereign rights. *Oklahoma Tax Comm’n*
22 *v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (“Indian tribes
23 are ‘domestic depending nations’ that exercise inherent sovereign authority over their members
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26 ⁶ The defendants’ argument would even disqualify the States from pursuing their
27 proprietary claims where state-owned property is harmed by unregulated, interstate pollution.
28 *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601-02 (1982) (“As a proprietor, [a
State] is likely to have the same interests as other similarly situated proprietors. And like other
such proprietors it may at times need to pursue those interests in court.”).

1 and territories.”); *see also infra* p. 107-09 (regarding status of Alaskan tribes). That status
 2 significantly heightens the federal nature of this controversy. Indeed, if *arguendo* federal
 3 nuisance is based, as defendants contend, upon the idea that U.S. states voluntarily gave up their
 4 rights to curtail interstate harm by force as a condition of joining the Union, then, *a fortiori*, the
 5 nation’s Indian Tribes, who *involuntarily* gave up such rights and received the federal
 6 government’s protection in exchange, must be entitled to the same right of action. *See County of*
 7 *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234-36 & n.3 (1985) (recognizing tribal right to
 8 pursue federal common law cause of action where Tribes lost full rights as sovereigns but gained
 9 protection of federal government). Thus, Tribes share with U.S. states the right to bring *parens*
 10 *patriae* action on behalf of their citizens or tribal members. *See, e.g., Dep’t of Health & Soc.*
 11 *Servs. v. Native Vill. of Curyung*, 151 P.3d 388 (Alaska 2006) (Alaskan tribes may sue *parens*
 12 *patriae*).⁷ And the *parens patriae* doctrine itself has been relied upon in federal nuisance law.
 13 *See, e.g., Maine v. M/V Tamano*, 357 F. Supp. 1097, 1099 (D. Me. 1973) (collecting cases).

14 Finally, as a matter of policy, barring all non-State parties from suing in federal nuisance
 15 would render federal nuisance law inconsistent with all of its closest cousins. Non-state parties,
 16 including private parties, may sue not only under state nuisance law when they have special
 17 injury, but also:

- 18 • under federal maritime nuisance law when they have special injury, *In re*
 19 *Exxon Valdez*, 104 F.3d 1196, 1197-98 (9th Cir. 1997);
- 20 • under federal common law to resolve title to land dependent upon a
 21 boundary between States, *Hinderlider v. La Plata River & Cherry Creek*
Ditch Co., 304 U.S. 92, 111 & n.13 (1938) (citing cases); and

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 23 ⁷ *See also Skokomish Indian Tribe v. United States*, 410 F.3d 506, 514 (9th Cir. 2005)
 24 (“The Tribe here is not suing as an aggrieved purchaser, or in any other capacity resembling a
 25 private person[.]”); *Rosebud Sioux Tribe v. South Dakota*, 709 F. Supp. 1502, 1503 (D.S.D.
 26 1989) (“The plaintiffs are federally recognized Indian tribes who sue as sovereign governmental
 27 entities and as *parens patriae* on behalf of tribal members.”), *vacated on other grounds*, 900 F.2d
 28 1164 (8th Cir. 1990). A few courts have rejected *parens patriae* standing for Tribes where the
 Tribe was found not to be acting for all its members. *See* Cami Fraser, Note: Protecting Native
 Americans: The Tribe as *Parens Patriae*, 5 Mich. J. Race & L. 665 (2000) (reviewing cases and
 arguing that “all members” rule contradicts *parens patriae* law). Here, because the entire village
 must be relocated, the Tribe represents all its members.

- under federal common law to resolve disputes to water in interstate streams, *Id.* at 110; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964) (under *Hinderlider* “no State can undermine the federal interest in equitably apportioned interstate waters even if it deals with private parties.”); *see also Milwaukee I*, 406 U.S. at 105 & n.7 (relying upon *Hinderlider*).

The Native Village of Kivalina and City of Kivalina are proper federal plaintiffs.

2. The Federal Common Law of Public Nuisance Permits the Recovery of Damages.

Defendants argue that damages are unavailable under federal common law, *see* Oil MTD 12(b)(6) at 9:25-28, 14:4-20; Utilities MTD at 23:7-15, but they again are incorrect. In *Evansville*, for example, the court held that “a request for damages does not preclude the exercise of jurisdiction of a claim arising under the federal common law of interstate water pollution.” 604 F.2d at 1019. As the court held in that case:

The sewer district seems to assert that the Supreme Court’s decision in *Illinois v. Milwaukee* establishes a request for equitable relief as a “criterion” for maintaining a claim under the federal common law of interstate water pollution. We disagree. Plaintiffs in that case sought equitable relief because of the nature of the claimed injury. *See Illinois v. Milwaukee*, supra, 599 F.2d at 165. The Supreme Court’s discussion of Illinois’ right to maintain the action, therefore, focused on that type of claim. We find nothing in the opinion that supports the conclusion that equitable relief is exclusive or that a request for such relief is essential.

Id. at 1019 n.32; *see also Maine v. M/V Tamano*, 357 F. Supp. 1097, 1102 (D. Me. 1973) (“there is no apparent reason why the present action to recover such damages cannot be maintained.”); *California v. S.S. Bournemouth*, 307 F. Supp. 922, 929 (C.D. Cal. 1969) (same). Just recently, the Court has rejected an attempt “to sever remedies from their causes of action.” *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008).

Evansville is a correct statement of the law. Kivalina’s cause of action arises under federal law under *Milwaukee I* due to the inherently interstate nature of greenhouse gas emissions and the uniquely federal interests in global warming. These factors are entirely independent of the nature of the relief Kivalina seeks. Indeed, injunctive relief curtailing emissions would not make sense here, where Kivalina needs to move the village to avert further harm to which defendants contributed by their past conduct.

1 **3. Federal Nuisance is Not Restricted to “Simple Type” Nuisances.**

2 The defendants incorrectly argue that federal nuisances must only be of a “simple type.”
3 *See* Oil MTD 12(b)(6) at 13:4-14; Utilities MTD at 23:16-27. However, there is no such
4 limitation. Very few federal nuisance cases have used the term “simple” in connection with
5 “nuisance.” One of them contradicts the defendants’ argument and the others do not support it.

6 The first case is *Missouri v. Illinois*, 200 U.S. 496 (1906) (“*Missouri I*”), dealing with
7 sewage pollution alleged to have caused an increase in typhoid fever in a downstream state. Far
8 from tying federal nuisance to those nuisances of a “simple type,” the Court *distinguished* the
9 properly pled interstate nuisance action before it – dealing with invisible and odorless pathogens
10 in sewage – from the typical “simple” nuisance actions between neighbors:

11 We have studied the plaintiff’s statement of the facts in detail There is no
12 pretence that there is a nuisance of the simple kind that was known to the older
13 common law. There is nothing which can be detected by the unassisted senses –
 no visible increase of filth, no new smell. . . . The plaintiff’s case depends upon
 an inference of the unseen.

14 *Id.* at 522. The Court did not decide that such a non-simple nuisance was not actionable.
15 To the contrary, the Court expressly reaffirmed its prior decision, *Missouri v. Illinois*, 180
16 U.S. 208 (1901) (“*Missouri I*”), in which it held that Missouri was entitled to pursue its
17 (non-simple) federal nuisance case. *Missouri II*, 200 U.S. at 518, 520. In reaffirming its
18 prior decision in the case, “the actual facts [of which] have required for their establishment
19 the most ingenious experiments, and for their interpretation the most subtle speculations,
20 of modern science,” *id.* at 518, the Court could hardly have been clearer that federal
21 nuisance would *not* be limited to old-fashioned notions of filthiness, odors, and other
22 immediate and direct affronts to the senses that had characterized typical nuisances
23 between neighbors under the “older common law.” Rather, this new doctrine of federal
24 nuisance would also recognize subtle and unseen threats as revealed by the ingenuities of
25 science.⁸

26 _____

27 ⁸ Notably, the Court in *Missouri II* denied relief only following a full evidentiary
28 proceeding on the merits because the plaintiff had failed to demonstrate that the pathogens could
 survive the 357-mile trip downstream. Moreover, the defendant had demonstrated that its

1 The next federal nuisance case to use “simple” in connection with “nuisance” was
2 *North Dakota v. Minnesota*, 263 U.S. 365 (1923), dealing with flooding of land. The
3 Court reviewed state and federal nuisance cases and concluded:

4 It needs no argument, in the light of these authorities, to reach the
5 conclusion that, where one State, by a change in its method of draining
6 water from lands within its border, increases the flow into an interstate
7 stream, so that its natural capacity is greatly exceeded and the water is
8 thrown upon the farms of another State, the latter State has such an interest
9 as quasi-sovereign in the comfort, health and prosperity of its farm owners
10 that resort may be had to this Court for relief. It is the creation of a public
11 nuisance of simple type for which a State may properly ask an injunction.

12 *Id.* at 374. Thus, in context, the Court merely recognized that flooding of land is easily
13 cognizable as a nuisance. The Court nowhere said that “only” nuisances of a simple type
14 are cognizable in federal nuisance. And as it turned out, the evidence in *North Dakota* was
15 highly complex, involved a battle of experts, and required a lengthy and detailed factual
16 analysis by the Court. *Id.* at 376-88.

17 The only other time “simple” appears in a federal nuisance case in connection with
18 the word “nuisance” is in *Milwaukee I*, which merely reproduced much of the above block
19 quote from *North Dakota*, without comment, in a footnote. *Milwaukee I*, 406 U.S. at 106
20 n.8. The footnote follows the statement that “[w]hen it comes to water pollution this
21 Court has spoken in terms of ‘a public nuisance.’” *Id.* at 106. The Court then cites three
22 other cases that use the term “nuisance” or “public nuisance” (but not “simple” nuisance).
23 Thus, in context, the Court’s footnote was part and parcel of its point that “nuisance” is the
24 proper term and legal doctrine to employ in an interstate pollution case. The Court never
25 stated that “simple” should be taken as a limiting principle on federal nuisance.

26 In fact, *Illinois v. Milwaukee* was itself, like *Missouri v. Illinois*, predicated upon
27 an alleged increase in illness caused by invisible and odorless pathogens in sewage. *See*
28 *Milwaukee II*, 451 U.S. at 309. This non-simple claim was cognizable, as was the even

26 conduct (i.e., flushing large quantities of fresh water from Lake Michigan into the river along
27 with Chicago’s sewage) actually improved the water quality. 200 U.S. at 522-23. That Missouri
28 ultimately failed in her proof is of no moment here. This global warming case is at the *Missouri*
I stage, not the *Missouri II* stage.

1 less simple claim that defendants were contributing to eutrophication of an entire Great
2 Lake by way of the nutrient pollution contained in the sewage. *Id.* at 309 & n.3. The
3 bench trial in that non-simple nuisance case “took four months.” *Illinois v. City of*
4 *Milwaukee*, 1973 U.S. Dist. LEXIS 15607, at *3 (N.D. Ill. 1973), *aff’d in relevant part*
5 *and rev’d in part*, 599 F.2d 151 (7th Cir. 1979), *vacated on other grounds, Milwaukee II*.
6 There is no “simple” limitation on federal nuisance.

7 4. **“Noxious” Means “Harmful.”**

8 The Utilities further contend that federal nuisance is limited to “noxious”
9 pollutants and that carbon dioxide is not noxious. *See* Utilities MTD at 3:8-15, 22:13-14
10 & n.10, 23:16-17. But even if *arguendo* there were a case announcing such a limit (and
11 there is not), “noxious” just means “harmful or destructive to man or to other organisms.”
12 Webster’s Third New International Dictionary 1547 (1986); *accord* Black’s Law
13 Dictionary 960 (5th ed. 1979) (“hurtful”; “[t]hat which tends to cause injury, especially to
14 health or morals.”); *Massachusetts v. Goldenberg*, 155 N.E.2d 187, 192 (Mass. 1959)
15 (“the word ‘noxious’ means ‘hurtful, harmful, injurious, destructive, unwholesome’”). It
16 does not mean “toxic” or “poisonous.” *Dodd v. Independence Stove & Furnace Co.*, 51
17 S.W.2d 114, 118 (Mo. 1932) (“the word ‘noxious’” includes dusts “which are not in their
18 nature inherently harmful that is, of a poisonous nature”). As the primary cause of global
19 warming, carbon dioxide causes injuries of exceptional and extraordinary severity and is
20 thus “harmful.”

21 Moreover, the Utilities’ version of “noxious” is inconsistent with case law. Water
22 is not inherently harmful, yet too much water causes flooding and gives rise to a federal
23 nuisance claim. *North Dakota, supra*. Nor were the nutrients causing eutrophication in
24 *Illinois v. Milwaukee* inherently harmful. In short, any arguable limit on federal nuisances
25 to those that are “noxious” does not preclude this global warming case.

26 In a related argument derived from injunctive relief cases, the Utilities contend that
27 an interstate pollutant must cause its harm “immediately” in order to give rise to a federal
28

1 nuisance. *See* Utilities MTD at 3:8-15, 22:13-14, 23:16-17. But the lag time between
2 defendants' ongoing conduct and the manifestation of injury has never been held to defeat
3 a federal (or other) nuisance claim. The pathogens in *Missouri I and II* traveled hundreds
4 of miles downriver before causing injury. In *Illinois v. Milwaukee*, the district court held
5 that "[e]utrophication is a gradual process in which the changes from year to year are
6 imperceptible. One must measure in terms of decades if not longer intervals to see the
7 difference." 1973 U.S. Dist. LEXIS 15607, at *13. Here, the defendants' emissions
8 "rapidly" disperse into the atmosphere and defendants continue their conduct that
9 contributes to global warming. Global warming, like eutrophication, does not occur
10 overnight but is nonetheless a cognizable federal nuisance.

11 **5. The "Exacting Standards" of Proof on the Merits Are**
12 **Inapplicable Here.**

13 The Utilities point to the "exacting standards of judicial intervention" set forth in
14 *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951), in an attempt to set the bar
15 high on this motion to dismiss. *See* Utilities MTD at 22:17-19, 24:3. But the Court in that
16 case was referring to standards of *proof on the merits applicable in cases against*
17 *sovereign defendants* because of the "delicacy of interstate relationships." *Id.*; accord
18 *Missouri II*, 200 U.S. at 521 ("the case should be of serious magnitude, clearly and fully
19 *proved*"). Not only is this case not at the proof stage, the defendants here are not
20 sovereigns and thus the "sovereign state rationale recognized in the earlier cases is
21 inapplicable" to them. *Milwaukee, supra*, 599 F.2d at 167. The Utilities also call attention
22 to the Court's statement in *Tennessee Copper* counseling "caution" in a federal nuisance
23 case against private parties, but the Court was, again, addressing the standard for deciding
24 whether "the grounds alleged are proved," not whether a claim had been stated. *Tennessee*
25 *Copper*, 206 U.S. at 237. Further, the higher standard allows the Supreme Court to "cope
26 with original actions" and does not apply in district court. *Milwaukee, supra*, 599 F.2d at
27 166. The Court's statements regarding "exacting standards" and "caution" are irrelevant
28 here and should be treated with more caution and more exacting standards than the

1 Utilities have accorded them.

2 **C. Kivalina Has Properly Pled the Elements of a Federal Public Nuisance**
3 **Claim.**

4 Kivalina has properly pled the elements of federal nuisance, i.e., an unreasonable
5 interference with rights common to the general public. Kivalina's allegations also meet
6 the causation requirements applicable in multiple-polluter cases.

7 **1. Kivalina Has Properly Pled an Unreasonable Interference With**
8 **Rights Common to the General Public.**

9 Kivalina has properly pled a public nuisance under federal common law. Pollution
10 is a classic public nuisance. In *Washington v. General Motors Corp.*, 406 U.S. 109, 114
11 (1972), decided the same day as *Milwaukee I*, the Court declared that “[a]ir pollution is, of
12 course, one of the most notorious types of public nuisance in modern experience.” As the
13 Fifth Circuit has observed:

14 The theory of nuisance lends itself naturally to combating the harms created
15 by environmental problems. . . . The deepest doctrinal roots of modern
16 environmental law are found in principles of nuisance. . . . Nuisance actions
17 have challenged virtually every major industrial and municipal activity
18 which is today the subject of comprehensive environmental regulation.

19 *Cox v. City of Dallas*, 256 F.3d 281, 291 (5th Cir. 2001) (quotation omitted).

20 A public nuisance is an “unreasonable interference with rights common to the
21 general public.” *In re Oswego Barge Corp.*, 664 F.2d 327, 332 n.5 (2d Cir. 1981)
22 (“*Oswego Barge I*”) (federal common law); accord Restatement (Second) of Torts §
23 821B(1) (1979). Intent is not required under federal nuisance law. See *Illinois v. City of*
24 *Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979) (“The elements of a claim based on the
25 federal common law of nuisance are simply that the defendant is carrying on an activity
26 that is causing an injury or significant threat of injury to some cognizable interest of the
27 complainant.”), *vacated on other grounds, Milwaukee II*; *United States v. Ira S. Bushey &*
28 *Sons*, 363 F. Supp. 110, 120 (D. Vt. 1973) (“*Bushey II*”) (“there need be no intent”), *aff’d*

1 *without opinion*, 487 F.2d 1393 (2d Cir. 1973).⁹

2 Under any kind of public nuisance law – state or federal - “unreasonable” refers
 3 primarily to the interference, not the defendant’s conduct. *See Wood v. Picillo*, 443 A.2d
 4 1244, 1247 (R.I. 1982) (“liability in nuisance is predicated upon unreasonable injury rather
 5 than upon unreasonable conduct”); William L. Prosser and W. Page Keeton, *The Law of*
 6 *Torts* § 52 (5th ed. 1984) (the “interference . . . can be unreasonable even when the
 7 defendant’s conduct is reasonable.”). Unreasonableness is a question of fact. *United*
 8 *States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145, 150 (D. Vt. 1972) (“*Bushey I*”)
 9 (applying federal common law). It is often judged by a series of factors, including
 10 “[w]hether the conduct involves a significant interference with the public health, the
 11 public safety, the public peace, the public comfort or the public convenience,” or “whether
 12 the conduct is of a continuing nature or has produced a permanent or long-lasting effect,
 13 and, as the actor knows or has reason to know, has a significant effect upon the public
 14 right.” Restatement (Second) of Torts § 821B(2); *accord Bushey II*, 363 F. Supp. at
 15 120-21; *see also Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1353 n.30
 16 (Fed. Cir. 2001) (where “so many others are affected” the “conduct is unreasonable”)
 17 (quotation omitted).

18 Kivalina’s injuries are classic harms to “public rights.” *Rich v. City of Benicia*, 98
 19 Cal. App. 3d 428, 435 (1979) (“Unquestionably environmental concerns in general . . .
 20 involve preeminently important public rights.”); *cf. Bushey I*, 346 F. Supp. at 150 (plaintiff
 21 stated proper claim because “rights to the use and enjoyment of water not polluted by
 22 petroleum” are public rights under federal common law), *aff’d without opinion*, 487 F.2d

23
 24 ⁹ Where intent has been required in nuisance, such as in state law, it is satisfied where
 25 “the defendant has created or continued the condition causing the interference with full
 26 knowledge that the harm to the plaintiff’s interests are occurring or are substantially certain to
 27 follow.” Prosser & Keeton, *supra*, § 87. For example, “a defendant who continues to spray
 28 chemicals into the air after he is notified that they are blown onto the plaintiff’s land is to be
 regarded as intending that result.” *Id.* Kivalina has made proper allegations of intentional
 nuisance (and negligent nuisance) in the alternative to its strict liability nuisance allegations.
 Compl. ¶ 252.

1 1393 (2d Cir. 1973).

2 The harm alleged here, destruction of the entire village, is, on its face, clearly
3 unreasonable. Kivalina has properly pled an unreasonable interference with public rights.

4 **2. Kivalina Has Properly Pled Causation.**

5 Kivalina has properly pled causation under the federal common law of public
6 nuisance. Defendants mischaracterize Kivalina's complaint and misstate the applicable
7 law.

8 Defendants' causation argument commences by twisting the words of the
9 Complaint beyond recognition. In paragraph 132, Kivalina alleges that global warming is
10 caused by anthropogenic emissions rather than by natural causes: "Despite the attempts by
11 certain defendants to make the cause of climate change controversial in the popular media,
12 there has been for many years an overwhelming scientific consensus that human activity
13 that releases greenhouse gases is causing a change in the Earth's climate." Here is what
14 the defendants claim Kivalina meant by paragraph 132: "According to plaintiffs
15 themselves, the true cause of global warming, and thus of their injuries, is not defendants'
16 emissions, but all greenhouse-gas emitting 'human activity' worldwide since the dawn of
17 the Industrial Revolution." Oil MTD 12(b)(6) at 4; *see also id.* at 3. Defendants have
18 simply taken Kivalina's allegation that global-warming is non-natural and added their own
19 meaning, i.e., that all humans have caused global warming, in order to seek footing for an
20 attack on causation.

21 Plainly read, Kivalina alleges it has filed its case against most of the biggest
22 greenhouse gas emitters and producers of fuels that contribute to such emissions in the
23 U.S., the nation that itself is the single largest source of such emissions. Compl. ¶¶ 3, 170-
24 172. While anthropogenic greenhouse gases have been emitted for a long time, the rate of
25 such emissions has increased massively in recent decades. *Id.* ¶¶ 125, 173. Defendants
26 are among the largest sources of the problem anywhere in the world. *Id.* ¶¶ 3, 170-172.
27 Contrary to defendants' statements, global warming is not caused by billions of people

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1 “breathing” and there is no allegation in the complaint supporting such a statement – that
2 is simply more of the fossil fuel industry’s disinformation. *See* Utilities MTD at 10; Oil
3 MTD 12(b)(6) at 2; Oil MTD 12(b)(1) at 4. Rather, as the complaint alleges, “[t]he
4 combustion of fossil fuels adds large quantities of carbon (in the form of carbon dioxide)
5 to the atmosphere that otherwise would have remained sequestered deep in the Earth” and
6 as a result “*the natural carbon cycle is out of balance* and carbon dioxide levels in the
7 atmosphere are increasing every year.” Compl. ¶ 126 (emphasis added).

8 **a. Kivalina Has Properly Pled Causation-in-Fact.**

9 Kivalina has properly pled causation in fact. In a multiple polluter case sounding
10 in public nuisance, it is not necessary to trace molecules. Rather, each polluter who
11 contributes to the nuisance is liable.

12 Public nuisance liability attaches to any defendant who “contributes” to the
13 interference with a public right. *See, e.g., Cox*, 256 F.3d at 292 n.19 (“nuisance liability at
14 common law has been based on actions which ‘contribute’ to the creation of a nuisance”).
15 And “the fact that other persons contribute to a nuisance is not a bar to the defendant’s
16 liability for his own contribution.” Restatement (Second) of Torts § 840E; *see also*
17 Prosser & Keeton, § 52 (“Pollution of a stream to even a slight extent becomes
18 unreasonable when similar pollution by others makes the condition of the stream approach
19 the danger point.”). The fact that a polluter knows her emissions are combining with those
20 of others to cause harm increases the justification for applying this principle where there
21 are a large number of polluters. *See* Restatement (Second) of Torts § 881 cmt. d (“It is
22 also immaterial that the act of one of them by itself would not constitute a tort if the actor
23 knows or should know of the contributing acts of the others.”).

24 Three seminal state-law cases from the Nineteenth Century are illustrative of this
25 principle. In *California v. Gold Run Ditch & Mining Co.*, 4 P. 1152 (Cal. 1884),
26 California brought a public nuisance action against a mining company that was dumping
27 mine tailings in a river. The defendant’s pollution alone would not have caused injury
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1 given the “vast amount” of mining previously undertaken on the river and the large
 2 number of mines still operating. *Id.* at 1156. The court nonetheless affirmed liability
 3 because defendants were liable “jointly or severally.” *Id.* at 1157.

4 In *Woodyear v. Schaefer*, 57 Md. 1 (Md. 1881), a nuisance action against a water
 5 polluter by a downstream landowner, the court held:

6 It is no answer to a complaint of nuisance that a great many others are
 7 committing similar acts of nuisance upon the stream. Each and every one is
 8 liable to a separate action, and to be restrained. The extent to which the
 9 appellee has contributed to the nuisance, may be slight and scarcely
 10 appreciable. Standing alone, it might well be that it would only, very
 11 slightly, if at all, prove a source of annoyance. And so it might be, as to
 12 each of the other numerous persons contributing to the nuisance. Each
 13 standing alone, might amount to little or nothing. But it is when all are
 14 united together, and contribute to a common result, that they become
 15 important as factors, in producing the mischief complained of.

16 *Id.* at 9-10 (citations omitted). The court found the defendant liable.

17 In the third case, *The Lockwood Co. v. Lawrence*, 77 Me. 297 (Me. 1885), a
 18 downstream landowner sought an injunction against sawmill operators dumping waste into
 19 the stream. The court held:

20 In the case at bar, it may be that the act of any one respondent alone might
 21 not be sufficient cause for any well grounded action on the part of the
 22 complainants; but when the individual acts of the several respondents,
 23 through the combined results of these individual acts, produce appreciable
 24 and serious injury, it is a single result, not traceable perhaps to any
 25 particular one of these respondents, but a result for which they may be
 26 liable in equity as contributing to the common nuisance . . .

27 *Id.* at 309-10.¹⁰

28 This approach to nuisance in Nineteenth Century equity cases has given rise to the
 modern doctrine of joint and several liability in multiple-polluter cases, which now is the
 accepted rule in damages cases. *See, e.g., Michie v. Great Lakes Steel Div. Nat'l Steel
 Corp.*, 495 F.2d 213, 215-18 (6th Cir. 1974); *City of Tulsa v. Tyson Foods, Inc.*, 258 F.
 Supp. 2d 1263, 1297 (N.D. Okla. 2003) (“where there are multiple tortfeasors and the
 separate and independent acts of codefendants ‘concurred, commingled and combined’ to

¹⁰ These three cases have been relied upon in federal common law. *See United States v. Luce*, 141 F. 385, 412-13 (C.C.D. Del. 1905).

1 produce a single indivisible injury for which damages are sought, each defendant may be
 2 liable even though his/her acts alone might not have been a sufficient cause of the
 3 injury.”), *vacated by settlement, City of Tulsa v. Tyson Foods, Inc.*, 2003 U.S. Dist. LEXIS
 4 23416 (N.D. Okla. July 16, 2003); *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn.
 5 1976); *Landers v. East Texas Salt Water Disposal Co.*, 248 S.W.2d 731 (Tex. 1952); *see*
 6 *also In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 823 (E.D.N.Y. 1984) (“In
 7 the pollution and multiple crash cases, the degree to which the individual defendant’s
 8 actions contributed to an individual plaintiff’s injuries is unknown and generally
 9 unascertainable” yet “all defendants have been held liable”).¹¹

10 This principle is also the rule under federal common law. For example, in *Illinois*
 11 *v. Milwaukee*, defendants’ discharges of the nutrients nitrogen and phosphorus were
 12 contributing to eutrophication of the lake – as were thousands of other non-point sources
 13 all over the watershed (e.g., runoff from farms that used fertilizers; dishwasher and
 14 washing machine detergents from home septic systems). Defendants argued that the vast
 15 number of contributors defeated liability but the district court disagreed:

16 Defendants argue that on this state of the record there is no satisfactory
 17 proof of a causal relationship between their conduct and the problem of
 18 eutrophication of the lake. . . . In this connection, they point out that,
 19 whatever controls are imposed upon point sources, there will still be large
 20 inputs of nutrients from non-point sources which are not subject to control.
 21 If defendants’ argument were to be adopted, it would be impossible to
 22 impose liability on any polluter.

21 ¹¹ Defendants rely upon a products liability decision, *In re MTBE Products Liability*
 22 *Litigation*, 379 F. Supp. 2d 348, 372 (S.D.N.Y. 2005), which suggested that cases applying “the
 23 rule of concurrent wrongdoing typically involve a small number of tortfeasors.” *See* Oil MTD
 24 12(b)(6) at 8. But defendants fail to disclose that the *MTBE* court recently revised its opinion on
 25 this question and allowed that case to go to trial on a product liability theory of concurrent
 26 wrongdoing against a large number of oil companies that had contributed to water pollution. *See*
 27 *In re MTBE Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 38792, at *16-17, *40 (S.D.N.Y. May
 28 13, 2008) (acknowledging “confusion” had arisen “due to prior rulings in this case that were
 made without a fully developed evidentiary record” and holding that a “reasonable jury could
 conclude that each defendant’s gasoline was present within the well’s capture zone even if the
 jury concludes that it cannot identify the source of the spill that caused the well’s
 contamination”).

1 *Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. 1973), at *20-21,
2 *aff'd in relevant part and rev'd in part on other grounds*, 599 F.2d 151 (7th Cir. 1979),
3 *vacated on other grounds, Milwaukee II*. The court enjoined untreated discharges from
4 239 overflow points on the defendants' sewage systems under the federal common law of
5 public nuisance and the Seventh Circuit affirmed this aspect of the injunction. 599 F.2d at
6 177.

7 Federal courts regularly apply this principle of joint and several liability as a matter
8 of federal common law gap-filling under the Comprehensive Environmental Response,
9 Compensation and Liability Act, 42 U.S.C. § 9601-75 ("CERCLA"). Congress *did not*
10 legislatively establish joint and several liability in CERCLA; rather, federal courts have
11 applied joint and several liability in such cases *as a matter of federal common law*. *See,*
12 *e.g., United States v. Burlington N. & Santa Fe Ry. Co.*, 502 F.3d 781, 793-94 (9th Cir.
13 2007) (adopting rule of *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D.
14 Ohio 1983), that federal courts fashion federal common law rule of joint and several
15 liability under CERCLA), *as modified*, 520 F.3d 918 (9th Cir. 2008)). And CERCLA
16 cases typically involve very large numbers of contributors to a hazardous waste site. *See*
17 *id.* at 796 ("[t]ypically . . . there will be numerous hazardous substance generators or
18 transporters who have disposed of wastes at a particular site") (quotation omitted).

19 Defendants argue that they cannot be liable because their conduct was not a
20 "substantial factor" in causing the harm. *See Oil MTD 12(b)(6)* at 6. Their version of the
21 substantial factor test would render it indistinguishable from but-for causation. *See Oil*
22 *MTD 12(b)(6)* at 6. But "the substantial factor test is a broader rule of causality than the
23 'but for' test." *Bank of N.Y. v. Fremont Gen. Corp.*, 523 F.3d 902, 909 (9th Cir. 2008).
24 Under the correct formulation of the rule, "no consideration is given to the fact that after
25 the event it appears highly extraordinary that it should have brought about such harm or
26 that the actor's conduct has created a situation harmless unless acted upon by other forces
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1 for which the actor is not responsible.” *Id.* (quotations omitted).¹²

2 In *Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269,
3 1283 & n.25 (D. Del. 1987), a CERCLA case, the court set forth the “substantial factor
4 rule of causation as a matter of federal common law” and held:

5 “when the conduct of two or more actors is so related to an event that their
6 combined conduct, viewed as a whole, is a but-for cause of the event, and
7 application of the but-for rule to them individually would absolve all of
8 them, the conduct of each is a cause in fact of the event.”

9 *Id.* at 1283 (quoting Prosser & Keeton § 41, at 268). In other words, a defendant “may not
10 escape liability merely because other causes . . . have contributed to the result.” *Id.*;
11 *accord Burlington Northern*, 502 F.3d at 796 (“most of the leading cases on joint and
12 several liability under CERCLA have addressed divisibility under [Restatement] §
13 433A(1)(b) and thereby incorporated a modified concept of causation”). This federal
14 common law approach applies here. The substantial factor rule is not a talisman that
15 defeats the well-established rule that each polluter who contributes to a public nuisance is
16 liable jointly and severally.¹³

17 For their cramped view of substantial factor, defendants rely almost entirely upon a
18 single personal injury case decided under Alaska law, *Vincent v. Fairbanks Memorial
19 Hospital*, 862 P.2d 847 (Alaska 1993), which they contend is *more* appropriate authority

20 ¹² *Accord Collins v. Olin Corp.*, 248 F.R.D. 95, 104 (D. Conn. 2008) (“In fact, if Olin’s
21 conduct is found to be a substantial factor in the contamination of the properties, Olin’s conduct
22 can still be the legal cause even if other sources of contamination exist.”); *United States v.
23 Sunoco, Inc.*, 501 F. Supp. 2d 656, 662 (E.D. Pa. 2007) (where “the plaintiff has alleged that one
24 tract of land was polluted by numerous polluters who cumulatively added to a common,
25 indivisible physical injury” the fact “that the violations occurred sequentially rather than
26 simultaneously does not bar joint tortfeasor status where the acts combined as substantial factors
27 to form one physical injury”).

28 ¹³ The substantial factor test has an important qualitative element. *See, e.g., Rothberg v.
Reichelt*, 742 N.Y.S.2d 150, 152 (N.Y. App. Div. 2002) (“Whether the negligence of a particular
party was a substantial factor in causing an injury does not depend on the percentage of fault that
may be apportioned to that party.”); *O’Connor v. Raymark Indus.*, 518 N.E.2d 510, 513 (Mass.
1988) (“The substantial factor formulation is one concerning legal significance rather than factual
quantum.”).

1 for this multiple-polluter case than other multiple-polluter cases. *See* Oil MTD 12(b)(6) at
2 6-7. But to the extent that Alaska personal injury law conflates substantial factor and
3 but-for causation by requiring each defendant’s conduct *alone* to be a sufficient cause of
4 the harm even under the substantial factor test, it is incorrect and cannot be relied upon
5 under federal common law.

6 Defendants also cite no authority for their argument that the causation rule of
7 multiple-polluter cases must be tied to defendants that are operating in a “particular
8 location.” Oil MTD 12(b)(6) at 7. Here, defendants operate in far flung locations where
9 they emit global pollution that causes particularized harm to particular plaintiffs in
10 particular locations. Nothing in the law allows polluters to absolve themselves of the
11 usual causation rules by spreading out and devising a new means of transmitting harm
12 globally to their victims.

13 The complaint in this case alleges that each defendant emits massive quantities of
14 greenhouse gases, engages in other conduct contributing to global warming, and has
15 operated for a long time as a sophisticated company with knowledge that its actions were
16 contributing to global warming. Compl. ¶¶ 3, 162, 170-172, 180. Defendants’ actions
17 thus quantitatively dwarf by many orders of magnitude the greenhouse gas emissions of
18 the ordinary citizen who drives a car or owns a home that emits greenhouse gases and,
19 given defendants’ knowledge, their actions differ qualitatively as well. Defendants are
20 thus incorrect in contending that everyone would be liable for global warming. The
21 Complaint properly alleges defendants have contributed to global warming under the
22 federal common law of public nuisance.

23 **b. Kivalina Has Properly Pled Legal Causation.**

24 Kivalina properly has alleged legal, or proximate, cause. Compl. ¶¶ 3-5, 163-180,
25 251. The multiple-polluter cases set forth above amply demonstrate that the proximate
26 cause may be established in a case in which the polluter contributes to the nuisance that
27 harms the plaintiff. The substantial factor rule that defendants have argued under the
28

1 rubric of cause-in-fact, also is relevant to the legal or proximate cause analysis. *See, e.g.*,
2 *Ileto v. Glock Inc.*, 349 F.3d 1191, 1206 (9th Cir. 2003) (“Proximate cause limits the
3 defendant’s liability to those foreseeable consequences that the defendant’s negligence was
4 a substantial factor in producing.”) (quotations omitted); *Vincent*, 862 P.2d at 851 (“an
5 actor’s negligent conduct is a legal cause of harm to another if . . . his conduct is a
6 substantial factor in bringing about the harm”) (quotation omitted) (cited by defendants).
7 Thus, the above analysis of multiple polluter cases and the substantial factor rule applies
8 here as well and demonstrates that the allegations of the complaint adequately plead
9 proximate cause.

10 Moreover, defendants misconstrue proximate cause law generally. First, the issue
11 is not primarily one of law, as they contend, but rather primarily one of fact. *See Ileto*, 349
12 F.3d at 1206 (“Whether an act is the proximate cause of injury is generally a question of
13 fact”). It thus cannot be resolved on a motion to dismiss. Further, “proximity in point of
14 time or space is no part of the definition of proximate cause.” *Id.* at 1206 n.19. A leading
15 treatise on torts states:

16 Courts sometimes use short phrases to express ideas about proximate cause.
17 They may say or imply that a cause of harm is not proximate if it is
18 insignificant, remote, or logically unrelated to the harm that follows. These
19 phrases point in the right direction, but they are incomplete. The word
20 proximate means near or next or most immediate, and taken literally it
21 suggests that only the most immediate trigger of harm can be the proximate
cause. That simply is not the law. Several tortfeasors may all be proximate
causes of a single harm; the first tortfeasor in a sequence of events as well
as the last is often a proximate and responsible cause. ***And the defendant’s
misconduct is not too remote for liability merely because time or distance
separates the defendant’s act from the plaintiff’s harm.***

22 1 Dan B. Dobbs, *The Law of Torts* (2001) § 181, at 445 (emphasis added); *see also City of*
23 *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1147-48 (Ohio 2002) (denying
24 motion to dismiss public nuisance case on remoteness grounds); *City of St. Louis v.*
25 *American Tobacco Co.*, 70 F. Supp. 2d 1008, 1014 (E.D. Mo. 1999) (remoteness does not
26 bar city from pursuing case to recoup health care costs against tobacco companies).

27 Defendants point out that the ““event without millions of causes is simply
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1 inconceivable.” *Fairbanks N. Star Borough v. Rogers & Babler*, 747 P.2d 528, 532
2 (Alaska 1987) (quoting Prosser & Keeton on the Law of Torts, § 41, at 266 (5th ed. 1984),
3 *quoted in* Oil MTD 12(b)(6) at 4:28 - 5:1. But that general proposition just means that
4 *every tort case* calls for some line drawing on who may be liable. Wherever such a line
5 might be drawn here, the defendants are in the innermost circle as the largest contributors
6 in the nation that is the largest historical source of greenhouse gas emissions and given
7 their knowledge of the harm (and the conduct of a core group of them in conspiring and
8 covering it up). In any event, as recognized by the multiple-polluter case law, each
9 polluter who contributes to a nuisance is liable therefor.

10 **II. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR THIS CASE.**

11 This case does not remotely require the Court to engage in legislative or executive
12 functions. Rather, this is a case that asks the Court to perform its core Article III role to
13 resolve a current and real controversy between the parties, apply common law and, if
14 warranted, determine an appropriate damages award. The essence of Kivalina’s claim is
15 not, as defendants frame it, whether defendants’ conduct was reasonable, but whether the
16 harm and damage to Kivalina is unreasonable. As set forth below, there is no political
17 question here because this case can be resolved “through legal and factual analysis” and
18 does not require the court to “make a policy judgment of a legislative nature.” *EEOC v.*
19 *Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005).

20 Kivalina emphasizes at the outset that there is a fundamental difference between a
21 nonjusticiable political question and a political issue. *Baker*, 369 U.S. at 217 (“The
22 doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases.’”).
23 The defendants invite the Court to blur, if not erase, this important distinction. Moreover,
24 simply because global warming is an important political issue that even has been debated
25 in presidential campaigns does not mean it is a political question. *See United States Dep’t*
26 *of Commerce v. Montana*, 503 U.S. 442, 445, 458 (1992) (no political question
27 notwithstanding that issue of apportioning House seats “has motivated partisan and
28

1 sectional debate during important portions of our history” and was of “significance in
 2 [that] year’s congressional and Presidential elections”); *Masayesva ex rel. Hopi Indian*
 3 *Tribe v. Hale*, 118 F.3d 1371, 1375 (9th Cir. 1997) (no political question presented in
 4 dispute between the Navajos and the Hopis regarding land ownership even though the
 5 dispute was “part of the long running and emotion scarring controversy between the
 6 Navajo Nation and the Hopi Tribe, in which the legislative, executive and judicial
 7 branches of the United States have all figured prominently.”). This case is justiciable.

8 **A. An Interstate Pollution Case That Properly Invokes Federal Question**
 9 **Jurisdiction Under *Milwaukee I* Does Not Present a Political Question.**

10 Under the long-established federal common law of public nuisance, the federal
 11 judiciary has proper federal question jurisdiction over interstate pollution cases.
 12 *Milwaukee I*, at 100. That such jurisdiction is proper is beyond doubt and is wholly
 13 independent from the question of whether the plaintiff has stated a proper claim under
 14 federal law. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 96 (1998) (“the
 15 nonexistence of a cause of action [is] no proper basis for a jurisdictional dismissal.”); *Bell*
 16 *v. Hood*, 327 U.S. 678, 682 (1946). Further, there is a “virtually unflagging obligation of
 17 the federal courts to exercise the jurisdiction given them.” *Colo. River Water*
 18 *Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

19 A proper invocation of *Milwaukee I* federal question jurisdiction in an interstate
 20 pollution case does not present a political question. This proposition is evident from
 21 *Milwaukee I* itself. At the time the case was argued and decided, the Senate and House
 22 already had passed bills that would overhaul the nation’s water pollution laws and require
 23 sewage facilities such as those at issue in the case to adhere to strict permit limitations.
 24 See Cong. Q. Inc., *Congress and the Nation*, Vol. III 1969-1972, at 779-80 (1973). Like
 25 global warming, water pollution was a hotly contested political issue – President Nixon
 26 had immediately announced his opposition to the Senate bill. *Id.* at 794. Six months after
 27 the Court’s decision, a final bill was sent to the President, who vetoed (and denounced) it
 28 in October, 1972. *Id.* at 796. Within twenty-four hours, Congress overrode the veto. *Id.*

1 at 792. Pollution of the Great Lakes was a matter that also touched upon foreign relations:
2 as the Court was hearing *Milwaukee I*, the United States and Canada were negotiating a
3 treaty specifically addressing water pollution from municipal sewage and other sources.
4 The treaty was signed and entered into force only nine days before the Court rendered its
5 decision in *Milwaukee I*. See Agreement on Great Lakes Water Quality, Apr. 15, 1972,
6 U.S.-Canada, art. V, 23 U.S.T. 301. Despite all this intense activity in the political
7 branches on the subject at issue, the Court exercised its jurisdiction in *Milwaukee I*.

8 Further, in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), involving
9 international and interstate pollution of Lake Erie with mercury, the Court specifically
10 distinguished interstate pollution cases from “political questions” and held that under
11 *Tennessee Copper* and other interstate pollution cases, the judiciary is “empowered to
12 resolve this dispute in the first instance.” *Id.* at 496.

13 Here, defendants argue that the mere existence of international discussions and
14 consideration of federal legislation renders this case nonjusticiable. In defendants’ own
15 words, the political branches are “grappling” with the issue, Utilities MTD at 8, Oil MTD
16 12(b)(1) at 19, are engaged in “efforts” regarding global warming, Peabody at 15, and
17 Congress “continues to actively debate whether” to do anything, Oil MTD 12(b)(1) at 9.
18 They argue that the absence of any action at all by the political branches makes this case
19 nonjusticiable. See Oil MTD 12(b)(1) at 22 (“the political branches have refused to adopt
20 emissions caps”). They even call attention to the *absence* of a liability regime for victims
21 of global warming in bills that *failed to gain passage*. See Oil 12(b)(1) at 9:17-19. But if
22 the thin reeds of merely debating a public policy issue or simply failing to take action
23 could turn a case into a political question, then virtually every lawsuit that touched on any
24 aspect of public policy would be a nonjusticiable political question. Yet the law is clear
25 that the courts “will not find a political question ‘merely because [a] decision may have
26 significant political overtones’” or because it “‘touches foreign relations.’” *Corrie v.*
27 *Caterpillar, Inc.* 503 F.3d 974, 982 (9th Cir. 2007) (quoting *Japan Whaling Ass’n v. Am.*
28

1 *Cetacean Soc’y*, 478 U.S. 221, 230 (1986), and *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

2 If defendants’ thin reeds could support the political question doctrine, moreover,
3 *Milwaukee I* would be inexplicable. Although the Court did not address the political
4 question doctrine in *Milwaukee I*, “[n]onetheless, that the Court allowed the case to
5 proceed underscores that courts have a place in deciding [such] claims.” *Alperin v.*
6 *Vatican Bank*, 410 F.3d 532, 551 (9th Cir. 2005).

7 Importing the political question doctrine into the federal common law of public
8 nuisance is particularly objectionable because *Milwaukee II* establishes a specialized
9 separation of powers doctrine for resolving the very kind of objections that defendants
10 have raised here. That doctrine is preemption (or “displacement”) of federal common law.
11 Both doctrines – preemption of federal common law and political question – are species of
12 the separation of powers, *Milwaukee II*, 451 U.S. at 315; *Baker v. Carr*, 369 U.S. 186, 217
13 (1962), and thus should be read in harmony. The preemption of federal common law
14 doctrine demands a federal statute that speaks “‘directly to [the] question’ otherwise
15 answered by federal common law” *County of Oneida v. Oneida Indian Nation*, 470 U.S.
16 226, 236-37 (1985) (quoting *Milwaukee II*, 451 U.S. at 315). The Supreme Court has left
17 no doubt that the “question” in this preemption analysis is defined narrowly. *See Oneida*,
18 470 U.S. at 236-37 (federal common law continues to apply “when Congress has not
19 ‘spoken to a particular issue.’”) (quoting *Milwaukee II*, 451 U.S. at 313); *see generally*
20 *infra* Section III.

21 By asking the courts to import the political question doctrine into federal nuisance
22 law, defendants seek to turn the relevant separation of powers test of preemption on its
23 head: *inaction* on an interstate pollution issue rather than action renders the case a political
24 question in defendants’ upside down world. This “heads I win under preemption, tails you
25 lose under political question” approach is nonsensical and simply cannot be squared with
26 the Court’s careful separation of powers approach of *Milwaukee I*, *Milwaukee II* and
27 *Oneida Indian Nation*. These decisions require action and a remedy by the political
28

1 branches in order to stop the judiciary from exercising its traditional role, not inaction or
2 cogitation. By accepting defendants' invitation to analyze the question in a backwards
3 manner, the decisions in *AEP*, *GM* and *Comer* simply failed to grapple with the essence of
4 these controlling Supreme Court decisions about what kinds of congressional and
5 presidential actions may override federal common law.

6 To be fair to five of the defendants here who also are defendants in the *AEP* case
7 (American Electric Power Co., Inc., American Electric Power Service Corp., Duke
8 Energy Corp., The Southern Company and Xcel Energy, Inc.), they in fact did not invite
9 the district court in that case to apply the political question doctrine. They recognized its
10 inapplicability and to their credit said so directly to the district court: "The *Baker v. Carr*
11 test for determining when the political question doctrine bars adjudication of a recognized
12 cause of action is thus **wholly irrelevant**." See Brief of Appellants, *Open Space Institute,*
13 *et al. v. American Electric Power Co., et al.*, No. 05-5119-cv (2d Cir.) at 5 (quoting
14 defendants' district court brief) (emphasis added).¹⁴ Yet they are now urging the Second
15 Circuit to repeat the district court's error in *AEP* and they seek to replicate it here. They
16 were right the first time; the political question doctrine is wholly irrelevant.

17 This interstate pollution case is within the Court's federal question jurisdiction
18 and, like prior interstate pollution cases, is justiciable.

19 **B. This Case Does Not Contradict Any U.S. Foreign or Domestic Policy.**

20 At their core, defendants' political question arguments come down a contention
21 that this case would contradict some alleged decisions by the political branches in which
22 they allegedly "refused to adopt emissions caps," either in treaty negotiations or as a
23 matter of domestic policy. See *Oil MTD* 12(b)(1) at 22; *Utilities MTD* at 14. This
24 argument, which cuts across defendants' various theories under the various political
25 question tests of *Baker v. Carr*, badly misses the mark because it commits three
26

27 ¹⁴Available at
28 <http://www.pawalaw.com/assets/docs/Second%20Circuit%20Brief%20Final%20OSI.pdf>

1 fundamental errors. The *Baker* factors are addressed below but first Kivalina
2 demonstrates the fallacies of this argument.

3 First, *Kivalina does not seek to impose any emissions limits of any kind but*
4 *rather seeks monetary damages, a factor deemed “key” by the Ninth Circuit in the*
5 *political question analysis.* See *Koochi v. United States*, 976 F.2d 1328, 1332 (9th Cir.
6 1992) (“A key element in our conclusion that the plaintiffs’ action is justiciable is the fact
7 that the plaintiffs seek only damages for their injuries. Damage actions are particularly
8 judicially manageable.”). Defendants’ repeated argument that Kivalina’s tort suit seeking
9 damages would constitute a decision about future emissions caps or a decision that plants
10 should have been “shut down” years ago, see Utilities MTD at 11: 15-16, 20-21, 25, is
11 based upon a basic misunderstanding of public nuisance law:

12 Confusion has resulted from the fact that the intentional interference . . .
13 can be unreasonable even when the defendant’s conduct is reasonable. . . .
14 Thus, an industrial enterpriser who properly locates a cement plant or a
15 coal-burning electric generator, who exercises utmost care in the utilization
16 of known scientific techniques for minimizing the harm from the emission
17 of noxious smoke, dust and gas and who is serving society well by
18 engaging in the activity may yet be required to pay for the inevitable harm
19 caused to neighbors. This is simply a decision that the harm thus
20 intentionally inflicted should be regarded as a cost of doing the kind of
21 business in which the defendant is engaged.

22 Prosser & Keeton at § 88 at 629 (5th ed. 1984). *The “unreasonable” element of public*
23 *nuisance is focused entirely upon the harm, not upon the defendant’s conduct.* See also
24 *supra* at Section I.C.1. This monetary damages case does not seek any cap nor any
25 judgment that plants should have been shut down in the past.

26 Second, assuming *arguendo* that U.S. foreign policy is what defendants say - - i.e.,
27 a refusal to enter a treaty with binding emissions limits without a like commitment from
28 developing nations - - Kivalina has not here sued the United States to try to force it to join
a treaty of any kind, with or without developing nations.

Third, there is nothing in defendants’ description of foreign policy, or in any U.S.
law, that would prohibit domestic emissions limits in the United States. In fact, two courts
have expressly rejected the argument that U.S. foreign policy conflicts with domestic legal

1 limits on greenhouse gas emissions. In *Green Mountain Chrysler Plymouth Dodge Jeep v.*
2 *Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007), and *Central Valley Chrysler-Jeep, Inc. v.*
3 *Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), automobile companies sued states
4 seeking to invalidate their laws limiting motor vehicle greenhouse gas emissions. *Green*
5 *Mountain* resoundingly rejected the very argument made here:

6 Although the United States has consistently called for international
7 consensus and a comprehensive approach to global warming, it has never
8 disapproved of domestic regulation of domestic GHG emissions. To the
9 contrary. The United States has praised such efforts to the international
10 community. That the United States also encourages voluntary efforts to
11 reduce GHG emissions is not evidence that domestic regulatory programs
12 are antithetical to the country's foreign policy. That the United States did
13 not ratify the Kyoto Protocol may be evidence that the United States
14 disapproved of international solutions that exempted developing countries,
15 and was concerned that such a plan would unfairly tax the United States
16 economy; it is not evidence of an express policy against domestic
17 regulation of greenhouse gases.

18 In *Massachusetts v. EPA*, the Supreme Court dismissed EPA's contention that
19 regulating greenhouse gases domestically might impair the President's ability to
20 negotiate with developing nations to reduce emissions, noting that Congress
21 authorized the State Department, not EPA, to coordinate the formulation of United
22 States foreign policy concerning global climate change.

23 508 F. Supp. 2d at 396. So did *Central Valley*, 529 F. Supp. 2d at 1187 ("there is
24 absolutely nothing in any of the exhibits submitted to support the contention that it is
25 United States foreign policy to limit its own current efforts or the efforts of individual
26 states in controlling greenhouse gas emissions in order to leverage agreements with
27 foreign countries"). Defendants' wildly overbroad argument here would invalidate all
28 state laws regulating greenhouse gases – a result they no doubt desire, but that is at odds
with actual U.S. policy.

29 Defendants heavily rely upon the policy positions articulated in a 2003 EPA ruling
30 in which EPA declared that it lacked legal authority under the CAA to regulate greenhouse
31 gas emissions. See EPA, Control of Emissions from New Highway Vehicles and Engines,
32 68 Fed. Reg. 52,922 (Sept. 8, 2003), cited in *Utilities MTD* at 12, 14, 16, 18, 34; *Oil MTD*
33 12(b)(6) at 5, 7, 8, 23; *Peabody MTD* at 4. However, this is the EPA ruling that the
34 Supreme Court struck down in *Massachusetts*. See 127 S. Ct. at 1462-63. Of particular

1 note, in dismissing EPA’s concerns about the supposed foreign policy implications of
2 limiting domestic greenhouse gas emissions, concerns that defendants repeat endlessly
3 here, the Court held that it is the State Department that is statutorily designated with
4 formulating U.S. foreign policy on global warming, not EPA. *Id.* at 1463. The 2003 EPA
5 ruling cannot be relied upon for U.S. policy. *Central Valley*, 529 F. Supp. 2d at 1181
6 (“the decision in *Massachusetts* teaches that when the court seeks to determine what
7 United States foreign policy is, it must look to sources other than EPA because EPA’s
8 pronouncements of what is United States foreign policy, and what constitutes interference
9 with that policy, are not authoritative.”).¹⁵

10 Defendants also rely upon a final rule issued by the National Highway Traffic
11 Safety Administration (“NHTSA”) that attempted to establish fuel economy standards for
12 light trucks, and upon fuel economy laws generally. *See Average Fuel Economy*
13 *Standards for Light Trucks Model Years 2008-2011*, 71 Fed Reg. 17566 (Apr. 6, 2006),
14 *cited* in *Utilities MTD* at 6; *Oil MTD* 12(b)(1) at 8 (discussing fuel economy law).
15 According to the Utility Defendants, this rule shows that a federal agency is taking action
16 on global warming. But this rulemaking, too, has been judicially invalidated. *See Ctr. for*
17 *Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508 (9th Cir. 2007).
18 And the courts in *Green Mountain* and *Central Valley* both rejected the argument that the
19 federal fuel economy laws and the regulation of greenhouse gases are functionally
20 equivalent. *Central Valley*, 529 F. Supp. 2d at 1173-74 (state regulation of greenhouse gas
21 emissions from motor vehicles is not a de facto fuel economy law); *Green Mountain*, 508
22 F. Supp. 2d at 398 (same). Federal fuel economy laws do not constitute global warming
23 policy.

24 Defendants further attempt to cobble together their “policy” from a slew of
25

26 ¹⁵ The Utilities similarly rely upon a legal memo from the former general counsel of the
27 EPA that provided the rationale for EPA’s ill-fated 2003 ruling. *See Utilities MTD* at 12 (citing
28 memo by R. Fabricant). The Supreme Court decision in *Massachusetts* renders this legal memo –
and the list of policy reasons in it – dead letter.

1 miscellaneous materials. These include remarks by a former President in a speech to the
 2 National Geographic Society, a letter to four Senators from the outgoing President, a letter
 3 from the EPA Administrator to two Senators, two press releases from the outgoing
 4 administration, bills in Congress that are pending or that failed to gain passage, a
 5 newspaper article, and a non-binding sense of the Senate resolution. *See* Oil MTD
 6 12(b)(1) at 7-9; Utilities MTD at 6-7; Peabody MTD at 5.¹⁶ These documents do not have
 7 the force of law, are not legitimate sources of official U.S. policy, and should be
 8 disregarded. *See, e.g., Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298,
 9 329-30 (1994) (“The Executive Branch actions – press releases, letters, and *amicus* briefs
 10 – on which Colgate here relies are merely precatory” and “lack the force of law”); (“This
 11 Court generally is reluctant to draw inferences from Congress’ failure to act.”); *Chong Yia*
 12 *Yang v. California Dep’t of Social Servs.*, 183 F.3d 953, 958 n.3 (9th Cir. 1999) (“sense of
 13 Congress resolutions do not have the force of law.”).¹⁷

14 Indeed, in *Massachusetts* the Court rejected the same “failure to legislate”
 15 argument offered here. *See* 127 S. Ct. at 1460 (“EPA never identifies any action remotely
 16 suggesting that Congress meant to curtail its power to treat greenhouse gases as air
 17 pollutants. That subsequent Congresses have eschewed enacting binding emissions
 18 limitations to combat global warming tells us nothing about what Congress meant when it
 19 amended § 202(a)(1) in 1970 and 1977.”). Just as the failure to legislate did not create a

21 ¹⁶ The Utilities call one of the press releases a “transcript,” *see* Utilities MTD at 7, but it
 22 is still, by its own terms, just a press release.

23 ¹⁷ If the 1995 sense of the Senate resolution (“Byrd-Hagel Resolution”) relied upon by
 24 defendants were to be considered, then so should a later one that says the U.S. should adopt
 25 binding domestic emissions limits without awaiting action by other nations. *See* 151 Cong. Rec.
 26 §6980, §7033, §7037 (daily ed. June 22, 2005) (Senate resolution approved calling for legally
 27 binding limits “on emission of greenhouse gases that slow, stop, and reverse the growth of such
 28 emissions” and that “will encourage comparable action by other nations”); *see also* 151 Cong.
 Rec. § 7267, §7282 (daily ed. June 23, 2005) (“almost from the day of that vote [on the Byrd-
 Hagel Resolution] those on both sides of the issue have misrepresented and misconstrued its
 intent. What was meant as a guide for action has instead been invoked, time and again, as an
 excuse for inaction.”) (statement of Sen. Byrd, discussing Byrd-Hagel Resolution).

1 policy prohibiting EPA from taking action under the Clean Air Act, the failure to legislate
2 here does not create a policy in derogation of the judiciary's federal common law power.

3 The best source of official U.S. foreign policy on global warming is the Framework
4 Convention, which is the only global warming treaty or international agreement of any
5 kind to which the U.S. is a party. The Framework Convention expressly requires each of
6 the developed nation parties such as the United States to "adopt national policies and take
7 corresponding measures on the mitigation of climate change, by limiting its anthropogenic
8 emissions of greenhouse gases," UNFCCC at art. 4(2)(a). This provision does not apply to
9 the developing nation parties and the treaty could hardly be clearer that action in the
10 developed nations is not to await action in the developing nations: "These policies and
11 measures will demonstrate that developed countries are *taking the lead* in modifying
12 longer-term trends in anthropogenic emissions consistent with the objective of the
13 Convention." UNFCCC at Art. IV § 2(9). (emphasis added). That objective is the
14 "stabilization of greenhouse gas concentrations in the atmosphere at a level that would
15 prevent dangerous anthropogenic interference with the climate system." *Id.* at Art. 2. And
16 U.S. domestic law as expressed in federal statutes is also clear in establishing a policy that
17 greenhouse gas emissions should be reduced. *See supra* Factual Background Section E.
18 (quoting Global Climate Protection Act). Based upon these official sources of U.S. policy,
19 the court in *Green Mountain* rejected the argument that a domestic emissions reduction
20 measure constitutes an "intrusion into the 'field' of foreign affairs entrusted exclusively to
21 the national government," and held that such a measure "fits squarely within the *nations*
22 *emission reduction policies.*" 508 F. Supp. 2d at 395 (emphasis added).

23 In a last ditch effort to concoct a foreign policy that would conflict with any
24 domestic emissions reduction measure, the Utilities argue that mandatory domestic
25 emissions reductions measures are "bargaining chips" for the U.S. in international
26 negotiations. Utilities MTD at 16. The only evidence for this theory that the Utilities
27 offer is the rationale in the 2003 EPA ruling that the Court dismissed in *Massachusetts*.
28

1 As Judge Ishii held in *Central Valley*, the bizarre bargaining chip theory does not
2 accurately reflect or constitute U.S. policy and is not even logical:

3 Plaintiffs offer no evidentiary basis for the proposition that the United
4 States would get farther in its efforts to negotiate agreements with other
5 nations by withholding efforts to limit greenhouse gas emissions than by
6 leading the way by example. In essence, Plaintiffs' "bargaining chip"
7 theory of interference only makes logical sense if it would be a rational
8 negotiating strategy to refuse to stop pouring poison into the well from
9 which all must drink unless your bargaining partner agrees to do likewise.
10 The court declines to make any presumptions to that effect.

11 529 F. Supp. 2d at 1187.

12 In short, Kivalina seeks damages, not an emissions cap. A public nuisance case
13 seeking damages does not require a decision as to whether plants should have ever been
14 shut down but rather focuses on the unreasonableness of the harm. In any event the entire
15 premise of defendants' argument is incorrect: there is no U.S. foreign or domestic policy
16 prohibiting domestic emissions reductions. In fact U.S. policy is clear that greenhouse gas
17 emissions should be reduced. Thus, crux of defendants political question argument
18 positing a conflict between this case and U.S. policy, fails.

19 **C. None of the Six *Baker v. Carr* Tests of a Political Question Are**
20 **Satisfied.**

21 Even if the political question doctrine had any applicability here, this case presents
22 no political question. In its landmark decision in *Baker v. Carr*, 369 U.S. 186 (1962), the
23 Court rejected a political question argument in a case challenging apportionment of state
24 legislative districts. *Baker* identified six factors that may indicate a nonjusticiable political
25 question:

26 Prominent on the surface of any case held to involve a political question is
27 found [1] a textually demonstrable constitutional commitment of the issue
28 to a coordinate political department; or [2] a lack of judicially discoverable
and manageable standards for resolving it; or [3] the impossibility of
deciding without an initial policy determination of a kind clearly for
nonjudicial discretion; or [4] the impossibility of a court's undertaking
independent resolution without expressing lack of the respect due
coordinate branches of government; or [5] an unusual need for
unquestioning adherence to a political decision already made; or [6] the
potentiality of embarrassment from multifarious pronouncements by
various departments on one question.

1 369 U.S. at 217 (numbering added). “Unless one of these formulations is *inextricable*
 2 from the case at bar, there should be no dismissal for nonjusticiability on the ground of a
 3 political question’s presence.” (emphasis added). *Id.* The factors are listed in descending
 4 order of importance and there is a “disproportionate emphasis” on the first two. *Alperin*,
 5 410 F.3d at 545. Factors four through six are prudential factors. *Corrie v. Caterpillar*,
 6 503 F.3d 974, 981 (9th Cir. 2007).

7 The six *Baker* factors have been grouped into three general categories or
 8 “inquiries”:

9 (I) Does the issue involve resolution of questions committed by the text of
 10 the Constitution to a coordinate branch of Government? (ii) Would
 11 resolution of the question demand that a court move beyond areas of
 judicial expertise? (iii) Do prudential considerations counsel against
 judicial intervention?

12 *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005) (quoting *Goldwater v. Carter*, 444
 13 U.S. 996, 999 (1979) (Powell, J., concurring)). Under this tripartite approach, the first
 14 inquiry covers *Baker* factor one, the second inquiry covers *Baker* factors two and three,
 15 and the third inquiry cover *Baker* factors four through six. *Id.* at 995-96. None of the
 16 *Baker* factors is “inextricable” from the case at bar.

17 **1. The Constitution Does Not Textually Commit To The Political**
 18 **Branches the Issue of Compensating Victims of Global**
Warming (*Baker* Factor One).

19 There is no textually demonstrable constitutional commitment of global warming
 20 questions to the executive or legislative branches. Defendants wrongly contend that
 21 resolution of this case runs afoul of the Constitution’s commitment of foreign affairs to the
 22 political branches; Peabody and the Utilities also rely upon Congress’ power to regulate
 23 foreign and domestic commerce. *See Oil MTD 12(b)(1) at 22-23; Peabody MTD at 11-12;*
 24 *Utilities MTD at 17.*

25 The argument based upon Congress’ power to regulate commerce is never really
 26 explained but just mentioned in passing by Peabody and the Utilities. It vaguely contends
 27 that this case threatens a takeover of the nation’s energy policy. *See Peabody MTD at*
 28

1 12:1-5. A district court recently rejected a similar political question argument by a group
2 of oil companies in a case seeking to hold them responsible for damages associated with
3 Hurricane Katrina. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676,
4 682 n.3 (E.D. La. 2006). In *Barasich* the defendants contended that the case could force
5 them to cease oil exploration and production off the coast of Louisiana and thus threaten
6 the nation's energy supply but the court rejected this alarmist contention.

7 The *GM* court accepted the breathtakingly broad proposition that matters of
8 interstate commerce are political questions anytime Congress fails to regulate a matter, *see*
9 *GM*, 2007 WL 2726871, at *14, a notion that would wipe away most of the federal courts'
10 dockets. The *GM* court's error was to rely upon Supremacy Clause cases that prohibit
11 states from regulating interstate commerce through use of *state* tort law. *See id.*
12 (discussing *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Edgar v. Mite Corp.*, 457 U.S. 24
13 (1982); and *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996)). That line of cases is irrelevant
14 where, as here, a plaintiff invokes *federal law* and the power of the *federal* sovereign
15 through a *federal* court precisely because, as the Utilities admit, global warming is a
16 matter of uniquely federal concern. *See, e.g.*, Utilities MTD at 32:13-14 ("global climate
17 change is predominately a matter of federal concern"); *id.* at 33:19-20 ("the uniquely
18 federal nature of any response to global warming."). Where federal common law applies,
19 state law is not at issue. *See Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (interstate
20 pollution "is controlled by *federal law*"); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488
21 (1987) ("the implicit corollary of [*Milwaukee I*] was that state common law was
22 preempted"). Congress' commerce power, which constrains the application of state law, is
23 irrelevant here. The Oil Companies are right to ignore it.

24 Nor is there any textual commitment in the Constitution of global warming matters
25 to the political branches by virtue of their role in formulating foreign policy. The *AEP*
26 court found no such constitutional commitment. *See generally* 406 F. Supp. 2d 265.
27 While the *GM* court did, *see* 2007 WL 2726871, at *13-14, this too was clear error. It is
28

1 blackletter law that the generalized commitment of foreign policy to the political branches
2 does not mean that all cases touching on foreign relations are political questions. *Alperin*
3 *v. Vatican Bank*, 410 F.3d 532, 549 (9th Cir. 2005) (“it is error to suppose that every case
4 or controversy which touches foreign relations lies beyond judicial cognizance.”) (quoting
5 *Baker*, 369 U.S. at 211). On the contrary, even plenary power may be insufficient to
6 establish a constitutional commitment to warrant application of the political question
7 doctrine. *See, e.g., Oneida*, 470 U.S. at 249 (“Congress’ plenary power in Indian affairs
8 under Art. 1, § 8, cl. 3, does not mean that litigation involving such matters necessarily
9 entails nonjusticiable political questions.”). In *Oneida*, the Court held that *constitutional*
10 commitment was not established in a federal common law case alleging unlawful
11 possession of Indian lands *even though Congress had prohibited the transfer of Indian*
12 *lands without a federal treaty and authorized the President to eject unlawful settlers. See*
13 *id.* at 238 & n.11; *see also id.* at 249 n.24 (“Congress’ delegation to the President is not a
14 ‘textually demonstrable *constitutional* commitment.”) (quoting *Baker*, 369 U.S. at 217).
15 If such legislation does not suffice as constitutional commitment, then the much more
16 modest global warming legislation, which is devoid of any remedies at all for Kivalina,
17 cannot.

18 The case law is rife with examples of cases rejecting the political question
19 argument where the alleged threat to foreign affairs was far more credible than in this
20 global warming case by domestic plaintiffs against domestic corporations. For example,
21 in *Japan Whaling Ass’n v. American Cetacean Society*, 478 U.S. 221 (1986), wildlife
22 conservation groups sought a writ of mandamus to compel the Secretary of Commerce to
23 certify that Japan was violating a whaling treaty. The case was brought just days before
24 consummation of an executive agreement between the United States and Japan to resolve
25 the dispute and, when the district court issued the writ, Japan informed the United States
26 that it would adhere to the agreement only upon reversal of the writ. The Court held that
27 while it was “cognizant” of the foreign relations implications and of “the premier role
28

1 which both Congress and the Executive play in this field,” nonetheless there was no
2 political question because “under the Constitution, one of the Judiciary’s characteristic
3 roles is to interpret statutes, and we cannot shirk this responsibility merely because our
4 decision may have significant political overtones.” *Id.* at 230. The issue in that case was
5 “a matter of intense worldwide concern.” *Id.* at 242 (Marshall, J., dissenting on other
6 grounds).

7 In *Alperin*, the Ninth Circuit allowed common law claims to proceed for
8 conversion, unjust enrichment, restitution, and an accounting against the Vatican Bank
9 with respect to property lost and looted during the Nazi era. 410 F.3d at 551 (“Reparation
10 for stealing, even during wartime, is not a claim that finds textual commitment in the
11 Constitution.”). Similarly, in *Koochi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992),
12 the Ninth Circuit held that a tort suit for damages from the shooting of an Iranian airliner
13 by a United States warship is not a political question: “federal courts are competent to
14 determine both the merits of the plaintiffs’ suit and the extent of the relief to which
15 plaintiffs would be entitled.” In *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008),
16 the court rejected the political question argument and allowed the plaintiffs’ false
17 advertising claims to proceed against their employers – private military contractors
18 supporting U.S. troops in the Iraq War who allegedly misrepresented the level of safety the
19 plaintiffs could expect under the terms of their employment. The Second Circuit allowed
20 plaintiffs to bring a wrongful death claim against the Palestine Liberation Organization for
21 its role in the hijacking of an Italian ship in the high seas. *Klinghoffer v. S.N.C. Achille*
22 *Lauro*, 937 F.2d 44, 49-50 (2d Cir. 1991). In *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir.
23 1995), the Second Circuit held that Bosnian victims of atrocities could, without running
24 afoul of the political question doctrine, sue the leader of the Serbian insurgency for actions
25 committed on foreign soil.¹⁸ Viewed against these cases, this case against domestic

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27 ¹⁸ *Accord Ungar v. PLO*, 402 F.3d 274, 276 (1st Cir. 2005) (wrongful death claim on
28 behalf of Americans gunned down by Hamas group in Israel); *Boim v. Quranic Literacy Inst.*,
291 F.3d 542 (7th Cir. 2002) (same); *Fisher v. Great Socialist People’s Libyan Arab Jamahiriya*,

1 defendants by domestic plaintiffs for injuries arising from pollution cannot possibly be
2 considered an intrusion on foreign policy.

3 Defendants' argument comes down to an alleged conflict with U.S. foreign policy
4 that does not exist. *See supra* Section II.B. There are no constitutional provisions
5 expressly committing to the political branches exclusive authority to redress injuries
6 caused by global warming. Thus, under the first *Baker* factor this Court clearly retains its
7 authority to decide Kivalina's common law tort claims.

8 **2. This Case Does Not Require the Court to Move Beyond Judicial
9 Expertise (*Baker* Factors Two and Three).**

10 The second *Goldwater* inquiry "lumps together the second and third *Baker*
11 inquiries -- whether there is 'a lack of judicially discoverable and manageable standards'
12 and whether a decision is impossible 'without an initial policy determination of a kind
13 clearly for nonjudicial discretion.'" *Wang v. Masaitis*, 416 F.3d 992, 996 (9th Cir. 2005).
14 In other words, does the adjudication of Kivalina's claims require the court to "make a
15 policy judgment of a legislative [or executive] nature, rather than resolving the dispute
16 through legal and factual analysis." *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 784
17 (9th Cir. 2005).

18 Here, the answer is no. The Court is not being asked to determine what policy this
19 country should follow regarding global warming. The issue in dispute is whether the
20 conduct of the defendants has contributed to a public nuisance injurious to Kivalina and
21 for which it should receive compensation. The Court is not being asked and need not
22 determine what the appropriate levels of carbon dioxide emissions are. Rather, the inquiry
23 is simply whether the emissions and related conduct that has occurred has contributed to a
24 public nuisance under federal common law, and, if so, what measure of damages should be
25 awarded. These questions clearly fall within the court's expertise and authority.

26 _____
27 541 F. Supp. 2d 46 (D.D.C. 2008) (siblings of American killed in an airplane bombing in
28 Scotland stated a cause of action against Libya under the state-sponsored terrorism exception to
the foreign state immunity statute).

1 **a. There Is No Absence of Judicially Discoverable and**
2 **Manageable Standards (*Baker* Factor Two).**

3 The Oil Companies and Utilities wrongly contend that this case will force the
4 Court to make judgments about which past greenhouse gas emissions were reasonable and
5 which were not, and that there are no judicially-discoverable and manageable standards for
6 doing so. *See* Oil MTD 12(b)(1) at 21 (invoking second and third *Baker* factors); Utilities
7 MTD at 10. But no such judgments will be necessary. Public nuisance law asks whether
8 the harm is unreasonable, not whether defendants' conduct is unreasonable. *See supra*
9 Section I.C.1. Here, Kivalina seeks damages, not injunctive relief. Under public nuisance
10 law, a defendant may be required to pay for the harm to which she contributes even if the
11 activity in question is perfectly reasonable because the plaintiff is not required to suffer
12 unreasonable harm. Prosser & Keeton, *The Law of Torts* § 52 (5th ed. 1984).

13 The Utilities contend that one of their greenhouse gas, carbon dioxide, is naturally
14 occurring and ubiquitous and thus cannot contribute to a nuisance. *See* Utilities MTD at
15 10:7-10. But this is just an attempt to confuse. The complaint alleges that fossil fuel
16 emissions of carbon dioxide have knocked the natural carbon cycle out of balance.
17 Compl. ¶ 126. Global warming is not caused by breathing no matter how much the
18 defendants' have spent on a PR campaign to create this impression. Defendants'
19 emissions are not naturally occurring. Moreover, even if they were naturally occurring,
20 that would not insulate defendants. Naturally occurring and ubiquitous substances like
21 water and nutrients can give rise to a nuisance when they cause harm to property, such as
22 by flooding, or when industrial emissions so distort natural levels that they cause
23 ecological disruption. *See, e.g., North Dakota v. Minnesota*, 263 U.S. 365 (1923)
24 (interstate nuisance of flooding); *Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS
25 15607, at *24-25 (N.D. Ill. 1973) (enjoining nutrient pollution under federal common
26 law), *aff'd in relevant part and rev'd in part on other grounds*, 599 F.2d 151 (7th Cir.
27 1979), *vacated on other grounds, Milwaukee II*.

28 The Oil Companies' argument that Congress and the Executive Branch have "been

1 struggling for years to develop appropriate legal standards,” *see* Oil MTD 12(b)(1) at 21,
2 runs right into a wall of case law. The Ninth Circuit *rejects* the notion that years of
3 struggle to devise even a *judicially* manageable standard renders a case nonjusticiable. *See*
4 *Alperin*, 410 F.3d at 552-53 & n.13 (controlling law is reflected in the “refusal of five
5 Justices in *Vieth* to hold that no manageable standards existed despite what the plurality
6 termed ‘eighteen years of essentially pointless litigation’” and courts must continue to seek
7 legal standards) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality) (political
8 gerrymandering case)). If years of struggle by the judicial branch to devise a standard in
9 cases that directly attack the political process does not satisfy *Baker* factor two, then *a*
10 *fortiori* the alleged years of struggle by the political branches to devise a non-judicial
11 pollution standard applicable to private conduct certainly cannot satisfy it.

12 To be sure, the *GM* court found a lack of judicially manageable standards. But
13 each of its three reasons is demonstrably incorrect. First, it held that the long line of
14 interstate pollution cases stretching back over a hundred years are “distinguishable because
15 the remedies sought therein were equitable remedies to enjoin or abate the nuisance, rather
16 than the legal remedy of monetary damages sought in the current case.” *GM*, 2007 WL
17 2726871, at *15. That holding directly contradicts Ninth Circuit law that seeking damages
18 is a key indicator that the case is not a political question, *Koohi*, 976 F.2d at 1332, and
19 thus the *GM* court has the law exactly backwards.

20 Second, *GM* held there is no “convincing legal authority” that “the legal
21 framework for assessing global warming nuisance damages is well-established.” *GM*,
22 2007 WL 2726871, at *15. But that reasoning apparently means that any new kind of
23 harm, no matter how much it resembles a classic nuisance harm to public rights, cannot be
24 litigated under nuisance law unless some prior case already provided a standard by
25 resolving a nuisance case on the same topic. Yet nuisance law applies where the nature of
26 the harm is cognizable as a nuisance, not where the defendant’s conduct already has been
27 litigated as a nuisance. Otherwise, the doctrine could not have moved beyond butchers
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1 dumping blood in rivers, *Woodyear v. Schaefer*, 57 Md. 1 (Md. 1881), and other
2 Nineteenth Century kinds of conduct. Alternatively, the *GM* court may have meant that
3 Congress or EPA must provide a “well-established” remedy; but if so it is both a bootstrap
4 and it contradicts clear law that it is the very absence of such a statutory or administrative
5 standard that *justifies* application of federal common law. *Milwaukee II*, 451 U.S. at 319,
6 n.14 (federal common law applies where “problems requiring federal answers are not
7 addressed by federal statutory law.”).

8 Third, the *GM* court found the long line of interstate nuisance cases cited by the
9 plaintiff factually distinguishable because they involved “issues of local concern.” *GM*,
10 2007 WL 2726871, at *15. This holding also has the law exactly backwards. Federal
11 common law applies to “air and water in their ambient or interstate aspects,” *Milwaukee I*,
12 406 US at 103, as well as to matters in involving a “uniquely federal interest,” *Audubon*,
13 869 F.2d at 1203-04. *See also Iletto*, 349 F.3d at 1206 n.19 (“proximity in point of time or
14 space is no part of the definition of proximate cause.”) (quotation omitted). As alleged in
15 the complaint, carbon dioxide emissions are inherently interstate due to their rapid
16 dispersal in the atmosphere. Compl. ¶ 254. And as the Utilities correctly observe, “global
17 climate change is predominantly a matter of federal concern,” Utilities MTD at 32, and the
18 “nature of any response to global warming,” must be “uniquely federal,” *id.* at 33.
19 Federal common law applies where the pollution is *not* local.

20 Relatedly, *GM* distinguished prior interstate nuisance cases on the ground that they
21 involved pollution from a localized “source-certain.” *GM*, 2007 WL 2726871, at *15.
22 But pollution-as-nuisance law is not limited to localized sources or individual polluters. In
23 fact, cases against water polluters have often involved far distant sources and subsets of
24 very large numbers of polluters; the courts in such cases have been fully cognizant, even in
25 injunctive cases, that each polluter’s conduct alone would not create the nuisance. *See*
26 *supra* Section I.C.2.a. The same is true in Superfund cases, which typically involve large
27 numbers of polluters and which employ federal common law to resolve issues of causation
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1 and joint and several liability. *See id.* In *Milwaukee I*, there were countless sources of
2 nutrients spread all over the watershed feeding into Lake Michigan that were contributing
3 to eutrophication of the lake but that case was appropriate for resolution under federal
4 nuisance law unless and until the enactment of a preemptive federal statute that provided
5 an alternative federal remedy. *Id.*; *see also supra* Section III.

6 Under *Alperin*, the courts are to take “an exhaustive search for applicable
7 standards.” 410 F.3d at 552. The judicially discoverable and manageable standards here
8 are the same as they are in all nuisance cases. The Court must determine whether
9 defendants have contributed to an unreasonable interference with public rights. As set
10 forth above in Section I.C.1, unreasonableness is a question of fact judged by a series of
11 factors, including “[w]hether the conduct involves a significant interference with the
12 public health, the public safety, the public peace, the public comfort or the public
13 convenience,” or “whether the conduct is of a continuing nature or has produced a
14 permanent or long-lasting effect, and, as the actor knows or has reason to know, has a
15 significant effect upon the public right.” Restatement (Second) of Torts § 821B(2); *accord*
16 *Bushey II*, 363 F. Supp. at 120; *see also* May, *supra*, 58 Denver U. L. Rev. at 943 (*GM*
17 decision “seems to ignore that two centuries of common law amply supply judicial
18 standards for deciding whether there is an ‘unreasonable interference . . . with a right
19 common to the general public.’”). Defendants will be free to argue that their emissions are
20 not a substantial contributing factor to the nuisance despite the enormous size of their
21 emissions, their knowledge, and their conduct over the years in covering up the
22 consequences of their actions. And, again, as a damages case, there is no call here for
23 setting prospective standards or deciding whether any plant should have been shut down
24 years ago.

25 Finally, Defendant Peabody argues that the courts are not equipped to resolve the
26 scientific issues of global warming. *See* Peabody MTD at 12. But that proposition has
27 been disproved. *See Green Mountain*, 508 F. Supp. 2d at 310-25, 339-41 (resolving
28

1 extensive global warming science issues under *Daubert*).¹⁹

2 The second *Baker* factor -- which even the *AEP* court did not rely upon in that
3 injunctive case -- is not satisfied here.

4 **b. This Case Does Not Require a Nonjudicial Policy**
5 **Decision (*Baker* Factor Three).**

6 Defendants wrongly contend that this case calls for a non-judicial policy decision.
7 *See* Oil MTD 12(b)(1) at 16-20; Utilities MTD at 11-13. This argument is based almost
8 entirely upon their incorrect assumption that this Court would have to set a pollution
9 standard in order to resolve this monetary damages case. It would not and the decision in
10 *AEP* -- to the extent it has any validity after the Supreme Court's decision invalidating the
11 EPA ruling on which it was largely based -- is thus distinguishable as an injunctive relief
12 case. The courts are far better equipped than the political branches of government to
13 determine liability and assign damages and thus the political question doctrine is rarely
14 applied to damages claims. *Koohi*, 976 F.2d at 1331-1332; *see also Barasich*, 467 F.
15 Supp. 2d at 685 (collecting cases). And again, the unreasonableness element of nuisance
16 is focused on the harm.

17 The third *Baker* factor requires more than a subject matter that touches on foreign
18 relations. There must be a demonstration that the Court's decision would displace the
19 political branches in carrying out their respective roles. *Gross v. German Found.*
20 *Industrial Initiative*, 456 F.3d 363, 390 (3d Cir. 2006). That is impossible here, where

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22 ¹⁹ *See also Radio Corp. of America v. United States*, 341 U.S. 412, 426 (1951) (“[T]his
23 Court is not without experience in understanding the nature of such complicated issues. We have
24 had occasion before to consider complex scientific matters.”); *Maine People’s Alliance v.*
25 *Mallinckrodt, Inc.*, 471 F.3d 277, 293 (1st Cir. 2006) (“[F]ederal courts have proven, over time,
26 that they are equipped to adjudicate individual cases, regardless of the complexity of the issues
27 involved.”); *TechSearch L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1377 (Fed. Cir. 2002) (the
28 appointment of a technical advisor may be “helpful in assisting the court in understanding the
scientific and technical evidence it must consider.”); *see also Oneida Indian Nation of New York*
v. State of New York, 691 F.2d 1070, 1083 (2d Cir. 1982) (although a legislative solution to the
Native American land claims may be preferable, the “claims are justiciable notwithstanding the
complexity of the issues involved”).

1 Kivalina does not seek to force the United States to enter a treaty or to make international
2 commitments or even to make emissions reductions of any kind -- indeed, it does not seek
3 to force the United States Government to take any action at all.

4 The *GM* court improperly concluded that it would have to make an initial policy
5 decision of a nonjudicial kind in order to resolve a damages case, but again its decision is
6 demonstrably incorrect. It held that it would have “to create a quotient or standard” of
7 carbon dioxide emissions. *GM*, 2007 WL 2726871, at *8. This is just not the law in a
8 nuisance case seeking damages. *See supra* Section II.B at 49 (quoting Prosser & Keeton).
9 If a factory is polluting a river along with hundreds of other factories, it may be required to
10 pay for the harm to downstream landowners even if its conduct was reasonable and useful.
11 The court is not asked to decide if some lower amount of pollution would have been more
12 reasonable but rather, whether the defendant has contributed to plaintiff’s unreasonable
13 harm.

14 The *GM* court heavily relied upon the 2003 EPA ruling that the Supreme Court
15 invalidated in *Massachusetts* for its conclusions regarding U.S. policy. The *GM* court, like
16 defendants here, placed especial reliance upon the EPA ruling’s discussion of foreign
17 policy even though in *Massachusetts* the Supreme Court expressly dismissed this
18 discussion as outside the agency’s statutory charge. This was clear error. *Central Valley*,
19 529 F. Supp. 2d at 1181 (“the decision in *Massachusetts* teaches that when the court seeks
20 to determine what United States foreign policy is, it must look to sources other than
21 EPA.”); *Green Mountain*, 508 F. Supp. 2d at 396 (same). The EPA ruling must be
22 disregarded. As set forth above, even accepting *arguendo* the fallacy that a damages case
23 is an emissions regulation, U.S. foreign policy does not prohibit domestic emissions
24 reductions.

25 Indeed, the official U.S. policy is that such emissions should be reduced. *See*
26 *supra* Section II.B. Thus, even if an initial policy decision from the political branches
27 were necessary, it has been made. *See Milwaukee I* (relying upon general policies in
28

1 environmental statutes); *See also* May, *supra*, 58 Denver U. L. Rev. at 951 (*AEP* and *GM*
2 were “patently wrong to conclude that the elected branches have yet to make an initial
3 policy determination . . . [because] the United States has clearly adopted and currently
4 adheres to a ‘general principle’ to reduce emissions of [greenhouse gases]”).

5 Both *AEP* and *GM* also misread *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S.
6 837, 847, (1984), for the proposition that air pollution cases require the courts to strike a
7 balance between the social costs of pollution versus the economic interests that would be
8 impeded by pollution reduction measures. *AEP*, 406 F. Supp. 2d at 272; *GM*, 2007
9 WL2726871, at *7. Their partial quotes of *Chevron* failed to capture what the Court
10 actually said, which had nothing to do with judicial balancing but was referring only to the
11 *legislative task* of formulating a comprehensive policy to reduce air pollution. *See*
12 *Chevron*, 467 U.S. at 847 (“As always in this area, the *legislative struggle* was basically
13 between interests seeking strict schemes to reduce pollution rapidly to eliminate its social
14 costs and interests advancing the economic concern that strict schemes would retard
15 industrial development with attendant social costs.”) (emphasis added). *Chevron* is
16 irrelevant to the judicial task as it has nothing to say on the topic.²⁰

17 Defendants are also wrong that the “nature” and “scale” of the global warming
18 problem takes it out of judicial cognizance. *See* Oil MTD 12(b)(1) at 17. The courts have
19 rejected just such arguments. For example, in *Oneida Indian Nation of New York v. State*
20 *of New York*, 691 F.2d 1070 (2d Cir. 1982), the plaintiffs sought vindication of American
21 Indian title to over five million acres of New York land stretching from Pennsylvania to

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23 ²⁰ Defendants rely on *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005), and *Antolok*
24 *v. United States*, 873 F.2d. 369 (D.C. Cir. 1989), but the portion of the controlling opinion by
25 Judge Sentelle in *Antolok* on which defendants rely was not joined by the other judges on the
26 panel. Equally persuasive is the opinion of Judge Wald, who could not “fathom how any one of
27 [the plaintiffs’ arguments] could be deemed unfit for judicial resolution.” 873 F.2d. at 391,
28 Wald, J. (concurring in judgment). *Schneider* on its face is far different from this case: it was a
wrongful death claim against a former secretary of state and former CIA director for their alleged
role in covert CIA action to prevent the elected leader of the Chilean leftist collation from
assuming power.

1 the Canadian border:

2 The defendants point to the scale of the wrong alleged and the size of the
3 remedy sought as rendering the claims nonjusticiable. . . . Yet we know of
4 no principle of law that would relate the availability of judicial relief
5 inversely to the gravity of the wrong sought to be redressed. . . . However
6 preferable a legislative solution might be, in its absence the Oneidas'
7 claims are justiciable notwithstanding the complexity of the issues involved
8 and the magnitude of the relief requested.

9 *Id.* at 1083 (internal quotation marks and citation omitted). Many other courts have
10 rejected claims of inherent nonjusticiability based the upon the scale or the nature of an
11 issue.²¹

12 Finally, the Oil Companies have raised an amorphous set of objections under
13 *Baker* factors two and three to applying tort law and principles of joint and several liability
14 at all to global warming. *See* Oil MTD 12(b)(1) at 24-28. This argument largely
15 repackages their causation arguments, to which Kivalina will not respond further. It also
16 contends in alarmist fashion that this damages case would “set national (if not worldwide)
17 energy policy.” *Id.* at 26-27. The Oil Companies are wrong because imposing damages
18 does not set policy.

19 The crux of the Oil Companies’ argument about applying tort law to global
20 warming seems to be that since their pollution is global, they should get off the hook. But
21 simply because industry has found a way to cause harm to particular plaintiffs in particular
22 places through a form of global pollution does not mean that long-standing principles of
23 nuisance law do not apply. Sulfur dioxide pollution causes acid rain, which crosses
24 international boundaries. Is acid rain off limits to nuisance law? Mercury pollution
25 travels around the globe. Is mercury pollution off limits to nuisance? As far back as 1901,
26 the bacterial pollution that traveled hundreds of miles downriver at issue in *Missouri I*

27 ²¹ *See, e.g., Gordan v. Texas*, 153 F.3d 190, 195 (5th Cir. 1998); *Masayesva ex. rel. Hopi*
28 *Indian Tribe v. Hale*, 118 F.3d 1371 (9th Cir. 1997) (case addressing control and use of nearly 2
million acres of commonly held reservation land held to be a justiciable claim); *Barasich*, 467 F.
Supp. 2d at 685 (“that the plaintiffs’ suit arises from one of the costliest and deadliest natural
disasters in this nation’s history should not obscure the allegations in tort at the heart of
plaintiffs’ claims.”).

1 was, like global warming, something that had gone from unknown to scientifically known,
2 yet the Court held that the plaintiff had stated a claim for a harm that was invisible,
3 odorless and had not been previously litigated as a nuisance. *See supra* Section I.B.3
4 (discussing *Missouri v. Illinois*, 180 U.S. 208 (1901)).

5 The Oil Companies ask, in essence, why us? Why should we be the ones to bear
6 the brunt of paying for Kivalina's move? *See* Oil MTD 12(b)(1) at 24. The answer is that
7 they and their codefendants are responsible for more of the problem than anyone else in
8 the nation that is the biggest historical emitter of greenhouse gases. And a core group of
9 them have spent years distorting the truth about global warming. The Oil Companies will
10 have their day in court in which they can try to defeat joint and several liability by showing
11 either that they did not conspire or by trying to establish a basis for allocating liability
12 according to their respective shares of emissions and other culpable conduct. *See*
13 Restatement (Second) of Torts § 433B. They are wrong, however, in arguing that they can
14 add to this litigation all other emitters of greenhouse gases. *See* Oil MTD 12(b)(1) at 27:
15 4-9. A joint tortfeasor is not a necessary party, much less an indispensable one. *Temple v.*
16 *Synthes Corp.*, 498 U.S. 5, 7 (1990) ("It has long been the rule that it is not necessary for
17 all joint tortfeasors to be named as defendants in a single lawsuit.")²²

18 Finally, the Oil Companies' argument that there is an intractable problem about
19 what states' laws should apply, *see* Oil MTD 12(b)(1) at 27:17 - 28:13, misses the entire
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21 ²² *Accord, Samaha v. Presbyterian Hospital*, 757 F.2d 529, 531 (2d Cir. 1985) ("it is
22 settled federal law that joint tortfeasors are not indispensable parties"); *Woods v. Asset Res.*, 2006
23 U.S. Dist. LEXIS 94325, at *37 (E.D. Cal. Dec. 21, 2006) ("A joint tortfeasor is not a necessary
24 party because the liability of tortfeasors is joint and several; thus, complete relief may be afforded
25 by joining only one."); *New York v. Shore Realty Corp.*, 1984 U.S. Dist. LEXIS 16183, at *4
26 (E.D.N.Y. 1984) ("It is well settled law that one tortfeasor may not compel the joinder of other
27 alleged joint tortfeasors under Rule 19.") (nuisance case). *American Motorcycle Ass'n v.*
28 *Superior Court of Los Angeles County*, 578 P.2d 899 (Cal. 1978), on which defendants rely, Oil
MTD 12(b)(1) at 27, merely recognizes the principle of equitable indemnity, whereby defendants
may obtain contribution from other responsible parties. *See Countrywide Home Loans v.*
Superior Court, 69 Cal. App. 4th 785, 797 (Cal. App. 2d Dist. 1999) (discussing *American*
Motorcycle).

1 thrust of this case. State law should not apply here, rather, federal common law should
2 apply. The very potential for inconsistency in state laws identified by the Oil Companies
3 and the fact that defendants' emissions are emitted in scores of states whose laws would
4 apply under *Ouellette* is one more compelling reason why global warming tort cases must
5 be decided under one uniform federal standard. The oil companies accuse Kivalina of
6 obscuring the basis for its state law claims. *See* Oil MTD 12(b)(1) at 27. But its state law
7 claims are pled only in the alternative since they are the flip side of federal common law
8 under *Milwaukee I* and *II* and *Ouellette*. The defendants' accusation, moreover, is
9 hypocritical since the Oil Companies simultaneously say in their other brief that they "take
10 no position on the resolution of the choice-of-law question at this time." Oil MTD
11 12(b)(6) at 5 n.1. Kivalina has taken the position required by the Supreme Court in the
12 *Milwaukee-Ouellette* trilogy: federal common law applies unless and until there is
13 preemption and then the laws of the source states must apply.

14 This case requires no initial policy decision of a nonjudicial kind that has not
15 already been made.

16 **c. Prosecution of this Case Will Not Interfere with**
17 **Important Governmental Interests (*Baker* Factors Four**
Through Six).

18 The remaining *Baker* factors are prudential considerations. They are "relevant only
19 if judicial resolution of a question would contradict prior decisions taken by a political
20 branch in those limited contexts where such contradiction would seriously interfere with
21 important governmental interests." *Kadic v. Karadzic*, 70 F.3d 232, 249-250 (2d Cir.
22 1995). Neither *AEP* nor *GM* addressed them. The Oil Companies do not argue these
23 factors, conceding their inapplicability. The Utilities mention them only in passing, *see*
24 Utilities MTD at 16:28 – 17:1, in an argument based primarily upon factors one and three
25 and to which Kivalina already has responded, *see supra* Section II.B (addressing alleged
26 contradiction of U.S. policy). Peabody devotes a single sentence to factor four, contending
27 that resolving this case would be tantamount to this Court announcing the country's energy
28

1 policy.” Peabody MTD at 12, and does not address factor five and sit.

2 The prudential *Baker* factors are not satisfied here as the case law makes amply
3 clear. For example, in *Japan Whaling, supra*, the Court rejected defendants’ argument
4 that the sixth *Baker* factor would be violated by any decision “to command the Secretary
5 of Commerce, an Executive Branch official, to dishonor and repudiate an international
6 agreement.” *Id.* at 229. In rejecting this argument, the Supreme Court reasoned that it
7 could not “shirk this responsibility merely because [its] decision may have significant
8 political overtones.” *Id.* at 230.

9 Here there are no treaties and no executive agreements that would resolve
10 Kivalina’s claims. This lawsuit can be resolved therefore without implicating a prior
11 government decision. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7,
12 71 (E.D.N.Y. 2005) (the existing “agreements between the present Vietnam government
13 and the United States . . . do not address any issue raised in this case” and “the instant case
14 [therefore] does not require the refashioning of agreements by coordinate branches of
15 government.”). In fact, given the absence of any statutory or administrative claims process
16 for victims of global warming, this lawsuit is Plaintiffs’ *only* recourse. *See Alperin*, 410
17 F.3d at 558 (“In the landscape before us, this lawsuit is the only game in town with respect
18 to claimed looting and profiteering by the Vatican Bank.”); *cf. Gross v. German Found.*
19 *Indus. Initiative*, 456 F.3d 363, 387 (3d Cir. 2006) (“The mere existence of the Executive’s
20 power to extinguish claims made to the Judiciary for redress from foreign entities and to
21 resolve certain issues raised in those claims, *without an exercise of that power*, does not
22 render those claims nonjusticiable by virtue of being committed to a co-equal branch.”)
23 (emphasis added); *Beaty v. Iraq*, 480 F. Supp. 2d 60, 74 (D.D.C. 2007) (“So long as the
24 diplomatic solution hinted at by Iraq and the United States remains more fantasy than
25 reality, there is no direct conflict with American foreign policy and adjudication of the
26 particular claims at issue here.”).

27 Here, there is no treaty or international agreement providing claims process for
28

1 global warming victims. The prudential *Baker* factors are not satisfied. As not one of the
2 six *Baker* factors are met here, the political question doctrine is not applicable and
3 defendants' motions on this ground must fail.

4 **III. KIVALINA'S FEDERAL NUISANCE CLAIM IS NOT PREEMPTED.**

5 Kivalina's claim under the federal common law of public nuisance is not
6 preempted. Defendants fail to cite a single statutory or regulatory provision of the Clean
7 Air Act that could possibly preempt the federal common law of nuisance here. Although
8 the Supreme Court recently held that in *Massachusetts v. EPA* that the agency has
9 authority to regulate greenhouse gases under the Clean Air Act ("CAA"), EPA has yet to
10 adopt greenhouse gas regulations in the wake of this decision. And any such regulations
11 would be purely prospective. Kivalina seeks compensation, not civil penalties for
12 violating some future standard EPA might promulgate. Nor do the hodgepodge of statutes
13 and executive actions relating to global warming preempt Kivalina's claim. They merely
14 require research, study of the problem, the development of technology, and authorize
15 treaty discussions. No court has ever held that a hodgepodge of governmental actions
16 touching on the same general subject as a damages lawsuit preempts that lawsuit; that
17 argument runs directly afoul of *Milwaukee I*.

18 **A. The Clean Air Act Does Not Preempt Kivalina's Federal Common Law** 19 **Nuisance Claim.**

20 The Supreme Court held in *Massachusetts* that EPA has the authority to regulate
21 greenhouse gases. 127 S. Ct. at 1462. The Court did not, however, order EPA to regulate.
22 *See id.* at 1463 ("We need not and do not reach the question whether on remand EPA must
23 make an endangerment finding, or whether policy concerns can inform EPA's actions in
24 the event that it makes such a finding."). Under the CAA, the EPA Administrator must
25 make an endangerment finding before it may issue an ambient air quality standard. *See* 42
26 U.S.C. § 7521(a)(1); *see also Motor & Equipment Manufacturers Ass'n. v. Nichols*, 142
27 F.3d 449, 452 (D.C. Cir. 1998) (CAA regulates air pollution "by establishing air quality
28 standards for *certain* pollutants and controlling the emissions of approximately 189

1 hazardous pollutants.”) (emphasis added). Defendants fail to cite to *any* statute or
2 regulation that would support their federal preemption arguments; the mere prospect that
3 EPA may take action in the future has no preemptive force.

4 On July 30, 2008, the EPA published its response to *Massachusetts v. EPA* in the
5 Federal Register in an Advance Notice of Proposed Rulemaking. *See* 73 Fed. Reg.
6 44354-44520 (July 30, 2008). The EPA sought comment on “analyses and policy
7 alternatives regarding greenhouse gas (GHG) effects and regulation under the Clean Air
8 Act.” 73 Fed. Reg. 44354 (July 30, 2008). The EPA Administrator makes clear in the
9 preface to this proposed rulemaking. *See id.* at 73 Fed. Reg. 44355 (July 30, 2008) (“the
10 Clean Air Act is “an outdated law originally enacted to control regional pollutants that
11 cause direct health effects, [and] is ill-suited for the task of regulating global greenhouse
12 gases.”) (statement of EPA Administrator); *see also supra* Section Factual Background
13 Section E.

14 EPA’s inaction does not preempt Kivalina’s damages claim. There is no
15 preemption where there is no conflict. Here there is no conflict between Kivalina’s
16 common law nuisance action and the CAA for two reasons: (1) the CAA’s ambient air
17 standards are issued on a pollutant-by-pollutant basis that requires action by EPA in order
18 to regulate a particular kind of pollutant; there currently is no regulation of greenhouse
19 gases under this regime and thus nothing with which a global warming nuisance action
20 could conflict; and (2) such nuisance actions do not frustrate the purpose of the CAA.

21 **1. The CAA Does Not Preempt Federal Common Law Claims**
22 **With Respect to Pollutants For Which EPA Has Not Issued a**
23 **Standard.**

24 EPA’s inaction is insufficient to preempt federal common law. For Congress to
25 preempt a federal common law cause of action, it must “speak directly to the question
26 addressed by the common law.” *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619
(2008). This is a demanding test:

27 In determining whether a federal statute pre-empts common-law causes of
28 action, the relevant inquiry is whether the statute “[speaks] *directly* to [the]
question” otherwise answered by federal common law. *Milwaukee II*,

1 *supra*, at 315. (emphasis added). As we stated in *Milwaukee II*, federal
2 common law is used as a “necessary expedient” when Congress has not
3 “spoken to a *particular* issue.”
4 *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226,
5 237 (1985) (emphases in original). In *Oneida*, the Court held that a federal common law
6 claim for damages arising from illegal occupation of Native American lands was not
7 preempted by a statute that generally addressed the issue by prohibiting divestiture of such
8 lands absent a U.S. treaty. The legislation even authorized the President to remove,
9 forcibly, illegal occupants of aboriginal lands and thus provided for the Executive Branch
10 to provide some limited remedy. But it did not “address directly the problem of restoring
11 unlawfully conveyed lands to the Indians, *in contrast to the specific remedial provisions*
12 contained in [the water pollution statute at issue in *Milwaukee II*].” *Id.* at 238 (emphasis
13 added). The Court also held that a treaty requiring the Tribe to lodge complaints with the
14 President did not preempt federal common law. *Id.* at 249 n.24. *Oneida* is dispositive
15 here: legislation authorizing the Executive Branch to take action and providing limited
16 redress do not preempt a federal common law action that provides a different remedy. The
17 Supreme Court recently held that even the CWA, which it ruled in *Milwaukee II* was
18 sufficiently comprehensive to preempt a federal common law public nuisance suit to abate
19 the nuisance, did not preempt all federal lawsuits for compensatory damages caused by
20 water pollution: “[W]e see no clear indication of congressional intent to occupy the entire
21 field of pollution remedies.” *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008).
22 Similarly here, there is no indication that Congress intended the CAA to serve as a
23 comprehensive remedial scheme for injuries caused by greenhouse gases.

24 In *Milwaukee II*, the Court found preemption where the statute regulated the very
25 pollutant at issue and EPA had issued permits setting numerical limits on the discharges.

26 There is thus no question that the problem of effluent limitations has been
27 thoroughly addressed through the administrative scheme established by
28 Congress, as contemplated by Congress. This being so there is no basis for
29 a federal court to impose more stringent limitations than those imposed
30 under the regulatory regime by reference to federal common law

31 451 U.S. at 320; *accord*, *Arkansas v. Oklahoma*, 503 U.S. 91, 99 (1992) (*Milwaukee II*

1 found preemption because Congress had provided a federal remedy). Thus, preemption of
2 federal common law requires, at a minimum, a conflict between the pollution standard set
3 by EPA and the federal common law standard. That cannot happen here as the EPA does
4 not regulate greenhouse gas emissions.

5 In *In re Exxon Valdez*, 270 F.3d 1215, 1230 (9th Cir. 2001), *aff'd in rel. part*,
6 *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), the Ninth Circuit rejected a
7 preemption argument under the CWA because the defendant “does not argue that the
8 plaintiffs seek any remedies that might conflict with the decision of an administrative
9 agency charged with enforcement responsibility.” According to the court:

10 Where a private remedy does not interfere with administrative
11 judgments (as it would have in *Milwaukee*) and does not conflict
12 with the statutory scheme (as it would have in *Sea Clammers*), a
13 statute providing a comprehensive scheme of public remedies need
14 not be read to preempt a preexisting common law private remedy. It
15 is reasonable to infer that had Congress meant to limit the remedies
16 for private damage to private interests, it would have said so.

17 *Id.* at 1231. Again, there is no conflict here because the administrative remedy is non-
18 existent.

19 Here, moreover, there is a fundamental difference between the CAA and the
20 Federal Water Pollution Control Act as amended in 1972 that makes preemption far less
21 appropriate in the case of the CAA:

22 [T]he Clean Air Act differs substantially from the Water Pollution Control
23 Act in areas which the majority of the Court in *City of Milwaukee* found
24 were especially significant but which bear no relation to the facts herein.
25 For example, Justice Rehnquist, writing for the majority in *City of*
26 *Milwaukee*, found it especially significant that under the Water Pollution
27 Control Act the EPA regulated “every point source” of water pollution.
28 451 U.S. at 318 (emphasis in original). Under the Clean Air Act, in
contrast, the states and the EPA are not required to control effluents from
every source, but only from those sources which are found by the states and
the agency to threaten national ambient air quality standards.

29 *New England Legal Foundation v. Costle*, 666 F.2d 30, 32 n.2 (1981). Although *Costle*
30 ultimately did not decide the issue, its reasoning was right on point. The CAA stands in
31 sharp contrast to the Clean Water Act, which prohibits *all* discharges to navigable waters
32 from *all* point sources without a permit. *Milwaukee II*, 451 U.S. at 318; *Middlesex County*

1 *Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981).²³

2 Judge Reinhardt came to the same conclusion in his dissent in *National Audubon*
3 *Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1988). In *Audubon*, the majority
4 did not consider the preemptive force of the CAA because it concluded that the localized
5 dust pollution at issue was not “the sort of interstate controversy which makes application
6 of state law inappropriate[.]” *Id.* at 1205. In dissent, however, Judge Reinhardt concluded
7 that the plaintiffs had stated a proper federal common law nuisance claim, which brought
8 the preemption question to the fore. In his opinion, which is the only opinion in the case
9 to address preemption, he concluded that “the structure of the Clean Air Act is closer to
10 that of the pre-1972 Federal Water Pollution Control Act (FWPCA) – which the Supreme
11 Court held in *Milwaukee I* did not preempt federal common law,” in that it relies primarily
12 on national standards implemented by state plans rather than regulating all discharges of
13 pollutants, as the CWA does. *Id.* at 1212-14 (Reinhardt, Judge dissenting). He thus would
14 have held the CAA not to have preemptive force.²⁴

15 Cases addressing preemption of state law resoundingly reject the argument
16 defendants make here. For example, in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002),
17 which defendants themselves rely upon as relevant to the federal common law preemption
18 analysis, *see* Oil MTD 12(b)(6) at 19:26-27, the Court held that a wrongful death claim
19 against a boat manufacturer arising from the failure to use a propeller guard was not
20 preempted by the Coast Guard’s prior decision against a regulation that would have
21 required such devices on boats. The reason was that “the Coast Guard did not take the

22
23 ²³ Other courts have observed other differences between the CAA and the CWA. *See*,
24 *e.g.*, *United States v. Tennessee Air Pollution Control Board*, 185 F.3d 529, 534 (6th Cir. 1999)
25 (declining to follow CWA approach to waiver of sovereign immunity because of “significant
differences between the Clean Water Act and the Clean Air Act”).

26 ²⁴ Two district courts have found that the CAA preempts federal common law causes of
27 action for local, intrastate pollution that is regulated by EPA but those cases did not involve
28 interstate or unregulated pollution. *See Reeger v. Mill Serv., Inc.*, 593 F. Supp. 360, 363 (W.D.
Pa. 1984) (local emissions from a hazardous waste facility); *United States v. Kin-Buc, Inc.*, 532
F. Supp. 699 (D.N.J. 1982) (local air pollution from a landfill).

1 further step of deciding that, as a matter of policy, the States and their political
2 subdivisions should not impose some version of propeller guard regulation, and it most
3 definitely did not reject propeller guards as unsafe.” *Id.* at 67. The same is true here.
4 *Green Mountain*, 508 F. Supp. 2d at 396 (“Although the United States has consistently
5 called for international consensus and a comprehensive approach to global warming, it has
6 never disapproved of domestic regulation of domestic GHG emissions”).

7 Similarly, in *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237 (3rd Cir. 2008),
8 the court, applying *Sprietsma*, rejected a preemption claim based upon a variety of actions
9 by the FDA in relation to mercury pollution in fish, including an informal letter, a
10 consumer advisory, and a provision in its internal compliance guide recommending that
11 the agency initiate action if mercury concentrations exceeded a certain level. Such agency
12 actions did not “constitute[] a federal legal standard or binding regulatory action on the
13 subject which could give rise to a conflict, and indeed neither expresses a policy or
14 viewpoint or approach inherently inconsistent with [the] lawsuit.” *Id.* at 256. “State law
15 is not preempted whenever an agency has merely ‘studied’ or ‘considered’ an issue; state
16 law is preempted when federal *law* conflicts with state law.” *Id.* at 254 (emphasis
17 original). These state-law preemption decisions demonstrate the fallacy of defendants’
18 approach to discerning congressional intent.

19 The Utilities contend that there is a presumption in favor of preemption of federal
20 common law but they misstate the rule. *See* Utilities MTD at 27:5-7. In fact, there is a
21 presumption *against* preemption of federal common law. *United States v. Texas*, 507 U.S.
22 529, 534 (1993) (“Texas argues that this presumption favoring retention of existing law is
23 appropriate only with respect to state common law or federal maritime law” but “there is
24 no support in our cases for the proposition that the presumption has no application to
25 federal common law”); *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 10 (1st Cir.
26 2005) (“To show displacement of the [federal] common law causes of action . . .
27 [defendant] must overcome this presumption”). The contrary *Milwaukee II* presumption in
28 favor of preemption of federal common law applies *only* where Congress has provided a

1 comprehensive remedial scheme:

2 Section 1321(f) establishes a *comprehensive remedial scheme* providing for
 3 both strict liability up to specified limits and recovery of full costs upon
 4 proof of willful negligence or willful misconduct within the privity and
 5 knowledge of the owner. We must *therefore* start with a presumption that
 6 non-FWPCA maritime liabilities and remedies for oil spill cleanup costs of
 7 the United States have been preempted.

8 *In re Oswego Barge Corp.*, 664 F.2d 327, 339-40 (2d Cir. 1981) (“*Oswego Barge I*”),
 9 (emphasis added); *accord In re Oswego Barge*, 673 F.2d 47, 48 (2d Cir. 1982) (“*Oswego*
 10 *Barge II*”), 673 F.2d at 48 (“When Congress legislates on a subject *as comprehensively*
 11 *and precisely* as it has here, *City of Milwaukee* instructs that a presumption arises that
 12 common law within the scope of the subject of the legislation has been preempted.”)
 13 (emphasis added). There is no comprehensive or precise remedial scheme for the claims
 14 at issue here because there are no air quality standards for greenhouse gases, much less any
 15 regime for compensating global warming victims. Thus, the Utilities cannot avail
 16 themselves of the *Milwaukee II* presumption but rather must themselves rebut the
 17 presumption against preemption.²⁵

18 The Utilities also rely upon *Illinois v. Outboard Marine Corp.*, 680 F.2d 473 (7th
 19 Cir. 1982), *see* Utilities MTD at 27: 9-14, 28 n.13, but that case is quite different. In
 20 *Outboard Marine*, a water pollution case addressing the residual effects of discharges pre-
 21 dating amendment of the water pollution control statute at issue in *Milwaukee II*, the court

22 ²⁵ Kivalina acknowledges that *Mattoon v. Pittsfield*, 980 F.2d 1 (1992), may be viewed as
 23 contrary authority. In *Mattoon* the court held that the Federal Safe Drinking Water Act (SDWA)
 24 preempted a federal common law nuisance action for illnesses caused by drinking water
 25 contaminated by the *Giardia lamblia* pathogen even though the EPA did not regulate *Giardia*
 26 *lamblia* at the time of the incident. However, the Court should view *Mattoon* with great caution
 27 for several reasons. First, *Mattoon*’s federal common law analysis was entirely *dictum* as there
 28 was no interstate pollution at issue in the case and thus no basis for invoking the federal common
 law of public nuisance. Indeed, the common law nuisance claim was later re-filed and resolved
 in state court under state law, as it should have been to begin with. *See Mattoon v. City of*
Pittsfield, 775 N.E.2d 770 (Mass. Ct. App. 2002). Second, *Mattoon* failed even to cite the
 Supreme Court’s controlling decision in *Oneida* even though *Oneida* was decided some seven
 years prior to *Mattoon*. Third, *Mattoon* predated the Supreme Court’s decision in *Sprietsma* by
 nearly a decade.

1 found preemption because Congress had “obviously considered” the “problem of pre-1972
2 discharges, and *specifically the appropriate role in the statutory scheme for remedies*
3 *against polluters.*” *Id.* at 478 (emphasis added). No such legislation exists here.

4 **2. Permitting This Claim Would Not Frustrate the Purpose of the**
5 **CAA.**

6 Third, permitting a federal common law nuisance action to redress the harms
7 caused by defendants’ greenhouse gas emissions would not frustrate the purpose of the
8 CAA, which is to “protect and enhance the quality of the Nation’s air resources.” 42
9 U.S.C. §§ 7401(b)(1). The Supreme Court counsels against finding preemption where
10 citizens can retain their common law rights without interfering with the accomplishment
11 of the legislative objective. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619
12 (2008) (“[W]e find it too hard to conclude that a statute expressly geared to protecting
13 ‘water,’ ‘shorelines,’ and ‘natural resources’ was intended to eliminate *sub silentio* oil
14 companies’ common law duties to refrain from injuring the bodies and livelihoods of
15 private individuals.”). Kivalina’s common law nuisance action to recover damages is not
16 inconsistent with the protection and enhancement of this country’s air resources and in no
17 way frustrates accomplishment of that goal.

18 **B. The Hodgepodge of Other Federal Statutes, Executive Orders, and**
19 **Foreign Policy Concerns Defendants Cite Do Not Preempt Kivalina’s**
20 **Federal Common Law Nuisance Claim.**

21 Defendants also argue preemption based upon a hodgepodge of statutes and
22 miscellaneous governmental actions dealing with global warming. They cite, among other
23 things, motor vehicle fuel economy laws, the funding of development programs for
24 alternative energy technologies, statutes requiring scientific studies and research, etc. *See*
25 *Utilities MTD* at 27, *Peabody MTD* at 16. They also rely on the existence of treaty
26 negotiations.

27 Defendants can cite no case holding that a smattering of laws and regulations
28 touching on a subject matter somehow preempts a federal common law claim. Indeed, if
this were the law, *Milwaukee I* would be inexplicable. *See Milwaukee I*, 406 U.S. at

1 101-02 (“Congress has enacted numerous laws touching interstate waters,” including the
2 Rivers and Harbors Act of 1899, the Federal Water Pollution Control Act, the National
3 Environmental Policy Act of 1969, the Fish and Wildlife Act of 1956, and the Fish and
4 Wildlife Coordination Act); *id.* at 103 n.5 (“While the various federal environmental
5 protection statutes will not necessarily mark the outer bounds of the federal common law,
6 they may provide useful guidelines in fashioning [federal common law] rules of
7 decision.”).

8 In *Massachusetts*, the Court rejected the same argument defendants make here.
9 The EPA, supported by *amici* representing the oil and utility industries, pointed to these
10 same miscellaneous statutes touching on global warming as allegedly establishing a
11 congressional policy against any domestic limitations on greenhouse gases. The Court
12 rejected the argument, however, because “[c]ollaboration and research do not conflict with
13 any thoughtful regulatory effort; they complement it.” *Massachusetts*, 127 S. Ct. at 1461.

14 So too the Court dismissed the same foreign policy argument that defendants make
15 here. *Id.* at 1463. Defendants repeatedly cite to the 2003 EPA ruling for their
16 understanding of U.S. foreign policy, but the Court invalidated that ruling in
17 *Massachusetts* and expressly chastised EPA for wandering off its turf into foreign affairs.
18 Moreover, defendants are incorrect in alleging that there is any U.S. policy against
19 mandatory emissions reductions. *Green Mountain*, 508 F. Supp. 2d at 395, 396 (U.S.
20 global warming policies are “emission reduction policies” and U.S. foreign policy stance
21 “is not evidence of an express policy against domestic regulation of greenhouse gases”);
22 *Central Valley*, 529 F. Supp. 2d at 1187 (finding “absolutely nothing” to “support the
23 contention that it is United States foreign policy to limits its own efforts” to control
24 greenhouse gas emissions.”). Defendants also rely on a host of documents that are not
25 official U.S. policy and that therefore must be disregarded. *See supra* Section II.B.

26 Kivalina’s federal common law nuisance claim is *not* preempted.
27
28

1 **IV. KIVALINA’S CLAIMS OF CONSPIRACY AND CONCERT OF ACTION**
 2 **ARE PROPER.**

3 Defendants’ contentions that Kivalina’s conspiracy claim is not properly pled and
 4 that it runs afoul of the First Amendment and the *Noerr-Pennington* doctrine miss the
 5 mark. Kivalina has properly pled its conspiracy claim, with the requisite specificity, and
 6 neither the *Noerr-Pennington* doctrine for the Free Speech Clause protects deceptive
 7 conduct or deliberately false statements.²⁶

8 **A. Kivalina Has Properly Pled a Conspiracy.**

9 A civil conspiracy is a “combination of two or more persons who, by some
 10 concerted action, intend to accomplish some unlawful objective for the purpose of
 11 harming another which results in damage.” *Gilbrook v. City of Westminster*, 177 F.3d
 12 839, 856 (9th Cir. 1999) (en banc) (quotation omitted). The conspiring parties must have
 13 “reached a unity of purpose or a common design and understanding, or a meeting of the
 14 minds in an unlawful arrangement.” *Id.* (quotation omitted). Each participant in the
 15 conspiracy does not need to know the exact details of the plan. *Id.* Conspiracy “imposes
 16 liability on persons who, although not actually committing a tort themselves, share with
 17 the immediate tortfeasors a common plan or design in its perpetration.” *Applied Equip.*
 18 *Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 457 (Cal. 1994); *Kassa v. BP W. Coast*
 19 *Prods., LLC*, 2008 U.S. Dist. LEXIS 61668, at *23 (N.D. Cal. Aug. 12, 2008) (“a civil
 20 conspiracy is not an independent wrong; but a mechanism for imposing joint and several
 21 liability on the tortfeasors that agreed to inflict the wrong on the plaintiff.”); *see generally*
 22 Restatement (Second) of Torts, § 879.

23 Federal law applies to the conspiracy claim. A conspiracy claim arises under
 24 federal law where there is an underlying federal claim. For example, under the federal
 25 Civil Rights Act, 42 U.S.C. § 1983, a federal conspiracy claim may be pled as a separate

26 ²⁶ Defendants also challenge Kivalina’s standing to raise the conspiracy claim. Utilities
 27 MTD Conspiracy at 4-15. Because the conspiracy and concert of action claim are merely
 28 theories of liability and not independent torts, Kivalina’s standing to bring the underlying public
 nuisance is addressed *infra* Section V.

1 section 1983 claim even though the text of the statute is silent with respect to conspiracy.
2 *See, e.g., Gilbrook*, 177 F.3d at 856-57; *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir.
3 1999); *Burdett v. Reynoso*, No. C-06-00720, 2007 U.S. Dist. LEXIS 64871, at *89 (N.D.
4 Cal. Aug. 23, 2007); *see also Caterina v. Int’l Brotherhood of Painters & Allied Trades*,
5 No. CV 477-233, 1978 U.S. Dist. LEXIS 16351, at *9 n.6 (S.D. Ga. July 26, 1978)
6 (holding in Landrum-Griffin Act case that because the “action arises out of a federal
7 statute,” the “[f]ederal common law may therefore control as to conspiracy.”). In an
8 interstate pollution case where the federal common law of public nuisance applies,
9 Plaintiffs’ conspiracy claim must also be a matter of federal law. In any event, the
10 elements of a conspiracy are essentially the same under federal and state law and Kivalina
11 has properly pled conspiracy under federal and state law.

12 Nuisance is a proper underlying tort that will support a civil conspiracy. *See, e.g.,*
13 *Peters v. Amoco Oil Co.*, 57 F. Supp. 2d 1268, 1284 (M.D. Ala. 1999) (plaintiffs “have
14 sufficiently stated causes of actions for the claims underlying the conspiracy claims, to wit,
15 trespass, nuisance, and fraudulent concealment.”); *Chappell v. SCA Servs., Inc.*, 540 F.
16 Supp. 1087, 1091 (C.D. Ill. 1982) (“the allegations of this complaint sufficiently allege an
17 actionable conspiracy, since creation of a nuisance is itself an actionable wrong.”); *see*
18 *also In re Motor Vehicle Air Pollution Control Equip.*, 52 F.R.D. 398, 404 (C.D. Cal.
19 1970) (automakers’ conduct at issue in antitrust case by States “is in effect a conspiracy to
20 maintain a public nuisance—smog.”). As discussed in detail *supra* Section I, Kivalina has
21 stated a proper claim of public nuisance under federal common law. Thus, defendants’
22 initial contention that because Kivalina’s underlying nuisance claim fails so too does its
23 conspiracy claim is meritless. Utilities MTD Conspiracy at 23-24.

24 Kivalina has properly pled detailed factual averments in support of the elements of
25 conspiracy. *See* Compl. ¶¶ 189-248, 268-77. Specifically, Kivalina alleges that
26 defendants were aware of the devastating effects of their emissions but rather than
27 addressing the problem responsibly instead engaged in a deceptive media campaign to
28 manufacture doubt about the dangers and causes of global warming so that they could

1 continue their harmful emissions without pause. *Id.*, ¶¶ 189-248. Further, defendants,
 2 repeatedly and over a period of years, attacked directly and through front groups the
 3 objectivity and reasonableness of the mainstream scientific community, which had formed
 4 a broad general consensus about the dangers of global warming and its human-created root
 5 cause. *Id.*, ¶¶ 130-54, ¶¶ 191-248. Defendants also encouraged and assisted each other's
 6 injurious conduct. *Id.* ¶¶ 194, 205-08. Defendants' common plan or course of conduct to
 7 create public doubt allowed them to continue their injurious pollution unabated. *Id.*, ¶
 8 189. Kivalina thus has properly pled "a combination of two or more persons who, by
 9 some concerted action, intend to accomplish some unlawful objective for the purpose of
 10 harming another which results in damage." *Gilbrook*, 177 F.3d at 856.

11 **1. Kivalina Has Sufficiently Alleged That Defendants Proximately**
 12 **Caused Its Injuries Pursuant to the Conspiracy.**

13 The Utilities challenge the complaint's allegations as insufficient to establish
 14 proximate causation. *See Utilities MTD Conspiracy* at 24-25. However, they demand a
 15 separate injury from the conspiracy that is not required. Kivalina is injured by the
 16 defendants' public nuisance. The complaint alleges that the Conspiracy Defendants
 17 conspired to commit this nuisance. Therefore, as alleged in the complaint, there is a causal
 18 nexus between the conspiracy and the harm.

19 The Utilities focus upon the further allegations of the complaint that their
 20 conspiracy altered public behavior in a way that enhanced their ability to commit the
 21 nuisance. *See Utilities MTD Conspiracy* at 25:18-20. But causation can be established
 22 even without such a public response just as in any other conspiracy in which the
 23 underlying tort caused an injury. *See, e.g., Restatement (Second) of Torts*, § 879 cmt. d,
 24 illus. 5 ("A, a policeman, advises other policemen to use illegal methods of coercion upon
 25 B. A is subject to liability to B for batteries committed in accordance with the advice.").
 26 The extent to which each Conspiracy Defendant may have cooperated or aided and abetted
 27 the conspiracy is not a determination that needs to be made at this stage. Likewise,
 28 whether Kivalina's allegations are factually accurate (and whether the alternative theory of

1 a change in public behavior is factually accurate) is not the issue to be resolved on a
2 motion to dismiss: “[w]hether an act is the proximate cause of injury is generally a
3 question of fact; it is a question of law where the facts are uncontroverted and only one
4 deduction or inference may reasonably be drawn from those facts.” *Ileto v. Glock Inc.*,
5 349 F.3d 1191, 1206 (9th Cir. 2003) (reversing dismissal of public nuisance and other
6 claims against gun manufacturers).

7 In any event, according to Kivalina’s allegations, emissions caused Kivalina’s
8 injury by contributing to global warming and they cooperated in and/or provided
9 encouragement to a common plan and took steps to carry out their plan. These allegations
10 reveal “a direct relationship between the injury and the alleged wrongdoing,” *Ass’n of*
11 *Wash. Pub. Hosp. Districts v. Phillip Morris Inc.*, 241 F.3d 696, 701 (9th Cir. 2001),
12 sufficient to satisfy the pleading requirement of causation in civil conspiracy. *See Estate*
13 *of Heiser v. Islamic Republic of Iran* 466 F. Supp. 2d 229, 266-67 (D.D.C. 2006) (holding
14 the elements of civil conspiracy satisfied where defendants provided material support to
15 facilitate an unlawful terrorist attack), cited in *Utilities MTD Conspiracy* at 25.

16 Defendants’ conspiracy cases are inapposite. Both *Association of Washington*
17 *Public Hospital Districts*, and *Oregon Laborers-Employers Health & Welfare Trust Fund*
18 *v. Phillip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999), are cases where – unlike here – the
19 plaintiff’s injuries were entirely derivative of those of the true victim, who was not party to
20 the case. In *Association of Washington Public Hospital Districts*, public hospital districts
21 and their association sued tobacco companies and industry organizations to recover their
22 increased costs for treating their patients’ tobacco-related illnesses allegedly caused by the
23 tobacco companies’ unlawful antitrust, RICO and state common law violations. 241 F.3d
24 at 700. The court affirmed dismissal holding that the hospital districts’ “claimed damages
25 were not proximately caused by the Tobacco Firms’ unlawful conduct, but were instead
26 derivative of the personal injuries of smokers afflicted by tobacco-related illnesses.” *Id.* at
27 701. For similar reasons, the *Oregon Laborers-Employers* court affirmed dismissal of the
28 suit by employee health benefit trust funds against tobacco companies and their public

1 relations firms to recover the costs incurred treating their participants' smoking-related
 2 illnesses. Here, by contrast, the true victim is before the court: Kivalina is directly injured
 3 by defendants' unlawful conduct; its injury is not derivative of some third party.

4 Kivalina has properly pled a conspiracy claim.

5 2. Kivalina Meets the Rule 9(b) Specificity Requirements.

6 Peabody wrongly contends that the conspiracy claim allegations lack sufficient
 7 specificity. *See* Peabody MTD at 23. Only a subset of Kivalina's conspiracy claim
 8 allegations – those regarding fraudulent conduct – must be pled with particularity. *Vess v.*
 9 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003). Kivalina's conspiracy claim
 10 allegations regarding Peabody's intent or knowledge may be pleaded generally. Fed. R.
 11 Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be
 12 alleged generally."); *In re Glenfed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir. 1994),
 13 *superseded by statute on other grounds*. Finally, even for those allegations regarding
 14 Peabody's fraudulent conduct, the court "relax[es] pleading requirements where the
 15 relevant facts are known only to the defendant." *Concha v. London*, 62 F.3d 1493,1503
 16 (9th Cir. 1995). The purpose of the Rule 9 particularity requirement is to "ensure that
 17 defendants accused of the conduct specified have adequate notice of what they are alleged
 18 to have done, so that they may defend against the accusations." *Concha*, 62 F.3d at 1502.

19 Plaintiffs' allegations with respect to fraudulent acts relating to Peabody's
 20 participation in the conspiracy meet the pleading standard of Fed. R. Civ. P. 9(b).
 21 Kivalina alleges that Peabody conspired to maintain a public nuisance by engaging in a
 22 false media campaign to distort public understanding of the dangers of global warming.
 23 Compl., ¶¶ 189-230.²⁷ The Complaint provides Peabody with the approximate time, place
 24 and nature of the alleged fraudulent activities, *i.e.*, the use of numerous front organizations

25
 26 ²⁷ Peabody incorrectly states that it is "not even mentioned in the conspiracy allegations."
 27 Peabody MTD at 24. The "Conspiracy Defendants" were defined to include Peabody in
 28 paragraph 189 of the Complaint and so all subsequent references to "Conspiracy Defendants" in
 the Complaint include by definition Peabody. Peabody is mentioned in this way in paragraphs
 189, 190, 198 and 213 of the complaint.

1 to discredit mainstream, peer-reviewed scientific investigations and mislead the public
2 about the dangers of GHG emissions and global warming. *Id.* For example, Kivalina
3 alleges that Peabody was a member of the Global Climate Coalition (“GCC”). *Id.* ¶ 198.
4 The purpose of the GCC was to create a public perception of scientific uncertainty
5 regarding the need to reduce greenhouse gas emissions. *Id.* ¶¶ 190, 197-203. In
6 December, 1995, the GCC’s Science and Technology Advisory Committee advised GCC
7 members that the contrarian views they touted about the science of global warming were
8 not convincing arguments against the overwhelming body of scientific evidence at the
9 time that GHG emissions had caused global warming. *Id.* ¶¶ 205, 207. By at least
10 February, 1996, GCC members were aware of the results of a U.S. government study that
11 found that “the chance of changes since 1976 being purely natural is 1-20%” and
12 information contained within a powerpoint presentation by the Edison Electric Institute to
13 GCC members that stated that global agricultural productivity could be maintained relative
14 to current levels only up to the double the CO2 level, that some of the impacts of global
15 warming would be “potentially irreversible” and include “significant loss of life.” *Id.* ¶
16 207. Nonetheless, on September 9, 1997, the GCC launched a national television, radio
17 and print campaign, falsely claiming that there was an issue as to whether man-made GHG
18 emissions caused global warming. *Id.* ¶ 222. Furthermore, the GCC provided a video to
19 hundreds of journalists claiming that increased levels of carbon dioxide would increase
20 crop production and help to fight world hunger. *Id.* ¶ 204.

21 Thus, Kivalina’s allegations regarding Peabody’s fraudulent conduct contain
22 sufficient detail to put Peabody on notice of the allegations against it, especially where
23 further relevant facts about fraudulent actions involving Peabody are exclusively within
24 Peabody’s knowledge. The allegations regarding fraudulent acts relating to Peabody’s
25 participation in the conspiracy meet the pleading requirements of Fed. R. Civ. P. 9(b).
26 Peabody’s motion to dismiss the conspiracy claim against it on this basis should be denied.
27
28

1 **B. Kivalina’s Conspiracy Claim Is Not Barred By the First Amendment.**

2 Defendants’ contention that they are entitled to absolute, blanket immunity for all
 3 the conduct and knowingly false statements that comprised their deceptive public relations
 4 campaign about the dangers posed by their GHG emissions finds no support in the law.
 5 *See Utilities MTD Conspiracy at 15-23; Oil MTD 12(b)(1) at 21; and Peabody MTD at 24-*
 6 *25.* The Petition Clause of the First Amendment protects only one’s right “to petition the
 7 Government,” U.S. Const. amend. I, not intentional efforts to mislead the public. Of
 8 particular significance, whether the campaign is intended to influence the public or to
 9 influence the government is an issue of fact that cannot be resolved on a motion to
 10 dismiss. Moreover, even assuming without conceding that defendants engaged in genuine
 11 petitioning, the *Noerr-Pennington* doctrine does not protect defendants’ calculated
 12 falsehoods, deceptive conduct and statements outside the antitrust context. Finally,
 13 defendants’ deliberately false statements are not protected by the Free Speech Clause of
 14 the First Amendment.

15 **1. The First Amendment Right to Petition the Government Does**
 16 **Not Apply to Media Campaigns Whose Primary Purpose Is to**
 Mislead the Public.

17 Defendants’ assertion that the *Noerr-Pennington* doctrine protects their deceptive
 18 and misleading public relations campaign is wrong. “To the extent that Supreme Court
 19 precedent can be read to extend *Noerr-Pennington* outside of the antitrust context, it does
 20 so solely on the basis of the right to petition.” *Cardtoons, L.C. v. Major League Baseball*
 21 *Players Ass’n*, 208 F.3d 885, 889 (10th Cir. 2000); *White v. Lee*, 227 F.3d 1214, 1231 (9th
 22 Cir. 2000) (“*Noerr-Pennington* is a label for a form of First Amendment protection; to say
 23 that one does not have *Noerr-Pennington* immunity is to conclude that one’s petitioning
 24 activity is unprotected by the First Amendment.”); *accord Gen-Probe, Inc. v. Amoco*
 25 *Corp.*, 926 F. Supp. 948, 956 (S.D. Cal. 1996) (relied on by defendants) (“However, as to
 26 other federal claims, and in applying the immunity to state law claims, courts may not go
 27 beyond the constitutional basis [i.e., the Petition Clause] for the immunity.”). In turn, the
 28 protection afforded by the Petition Clause does not extend beyond genuine petitioning

1 activity: “The plain language of the First Amendment protects only those petitions which
2 are made to ‘the Government.’” *Cardtoons*, 208 F.3d at 892; *see id.* at 893 (holding “that
3 when the basis for immunity is the right to petition, purely private threats of litigation are
4 not protected because there is no petition addressed to the government.”). Significantly
5 here, whether the campaign is intended to influence the public or to influence the
6 government is an issue of fact that cannot be resolved on a motion to dismiss. *Clipper*
7 *Express v. Rocky Mountain Motor Tariff*, 674 F.2d 1252, 1264 (9th Cir. 1982); *United*
8 *States v. Philip Morris USA, Inc.*, 337 F. Supp. 2d 15, 24 (D.D.C. 2004).

9 Here, Kivalina alleges, *inter alia*, that defendants’ media campaign was not
10 directed at public officials, but conducted to convince consumers that global warming was
11 unrelated to their GHG emissions so as to encourage them to maintain (or increase)
12 personal consumption of defendants’ products and not to reduce consumption or seek less
13 harmful, alternative products. Compl., ¶¶ 189-248, *see supra* Factual Background Section
14 D. Thus, in *United States v. Philip Morris USA, Inc.*, when tobacco companies raised the
15 *Noerr-Pennington* doctrine as a defense to RICO liability for their media campaign to
16 downplay the dangers associated with smoking, the court rejected the defense, ruling that
17 “the *Noerr-Pennington* doctrine does not automatically characterize (and therefore
18 immunize) every public relations campaign as ‘petitioning’ of the government.” 337 F.
19 Supp. 2d 15, 26 (D.D.C. 2004). At a subsequent hearing, the court explained “if that were
20 the case, the *Noerr-Pennington* doctrine would extend to virtually all activities.” *United*
21 *States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 887 (D.D.C. 2006). The court ruled
22 that only those statements the tobacco manufacturers “made directly to legislative bodies
23 merit *Noerr-Pennington* immunity.” 449 F. Supp. 2d at 886. However, “the vast majority
24 of Defendants’ statements . . . made with the primary purpose of influencing smokers,
25 potential smokers, and the general public” were “not protected by the *Noerr-Pennington*
26 doctrine.” *Id.*; *accord Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 2006 U.S.
27 Dist. LEXIS 73196, at *1834 (E.D.N.Y. 2006), *rev’d on other grounds by McLaughlin v.*
28 *Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008).

1 The tobacco cases are particularly illuminating because defendants here used the
 2 same deceptive strategy as the tobacco companies: manufacturing uncertainty by raising
 3 doubts about even the most indisputable scientific evidence; using front groups to publicly
 4 further their desired message; promoting scientific spokespersons to persuade the media
 5 that there is still serious debate among scientists when, in fact, there is widespread
 6 consensus in the scientific community that defendants' position is irresponsible and
 7 shifting the focus away from meaningful action to a misleading charge about the need for
 8 "sound science." Compl., ¶¶ 223, 231, 247. In fact, some of the same public relations
 9 firms and individuals involved in the tobacco campaign were also involved in defendants'
 10 campaign to discredit scientific evidence about global warming. *Id.* ¶ 192. Because
 11 Kivalina's allegations regarding defendants' media campaign do not target direct
 12 communications with the government, the right to petition the government does not apply.

13 **2. The Right to Petition the Government Does Not Extend to**
 14 **Knowingly False Statements or Statements Made with Reckless**
Disregard for the Truth.

15 The First Amendment does not immunize deceptive conduct. While it may be true
 16 that the *Noerr Pennington* doctrine in the antitrust context protects deceptive conduct *as a*
 17 *matter of Sherman Act statutory construction*, there is no such immunity for deceptive acts
 18 outside that context. Rather, *Noerr Pennington* immunity here is a matter of pure First
 19 Amendment law, which does not protect deceptive conduct:

20 That speech is used as a tool for political ends does not
 21 automatically bring it under the protective mantle of the
 22 Constitution. For the use of the known lie as a tool is at once at
 23 odds with the premises of democratic government and with the
 24 orderly manner in which economic, social, or political change is to
 25 be effected. Calculated falsehood falls into that class of utterances
 26 which "are no essential part of any exposition of ideas, and are of
 such slight social value as a step to truth that any benefit that may
 be derived from them is clearly outweighed by the social interest in
 order and morality. . . ." *Chaplinsky v. New Hampshire*, 315 U. S.
 568, 572. Hence, the knowingly false statement and the false
 statement made with reckless disregard of the truth, do not enjoy
 constitutional protection.

27 *Garrison v. Louisiana*, 379 U. S. 64, 75 (1964). Thus, even if defendants' campaign here
 28 could be characterized as an exercise of their right to petition the government – a point

1 which Kivalina does not concede – defendants are still subject to liability for harm arising
2 from calculated falsehoods.

3 In *McDonald v. Smith*, 472 U.S. 479 (1985), the Supreme Court held that known
4 falsehoods communicated in a letter to the president were subject to defamation liability,
5 even if the letter was never made available to the public. Further, *McDonald* holds that
6 “[t]here is no sound basis for granting greater constitutional protection to statements made
7 in a petition to the [government] than other First Amendment expressions.” *Id.* at 485.
8 Thus, the “First Amendment right to petition the government for a redress of grievances . .
9 . is generally subject to the same constitutional analysis as the right to free speech.”
10 *Canatella v. Stovitz*, 365 F. Supp. 2d 1064, 1077 (N.D. Cal. 2005) (citing *Wayte v. United*
11 *States*, 470 U.S. 598, 610 n.11 (1985)); *Curry v. Hall*, 839 F. Supp. 1437, 1440 (D. Or.
12 1993) (“Speech contained in petitions to the government is not entitled to any greater
13 protection than utterances in any other context.”). And calculated falsehoods, “do not
14 enjoy constitutional protection.” *McDonald*, 472 U.S. at 487 (Brennan, J., concurring)
15 (quoting *Garrison*, 379 U.S. at 75) (emphasis added); accord *Time, Inc. v. Hill*, 385 U.S.
16 374, 393-94 (1967).

17 By way of further example, in *Curry v. Hall*, 839 F. Supp. 1437 (D. Or. 1993), the
18 plaintiff inmate was cited for a violation of a prison regulation when he filed a grievance
19 against prison officials, which allegedly contained false information. The court rejected
20 the plaintiff’s contention that the regulation violated his right to petition the government:

21 The fact that a false statement is included in a grievance does not
22 give the false statement a special First Amendment status,
23 transforming the statement into protected speech. No constitutional
24 right is implicated . . . because false statements are not generally
25 protected by the First Amendment.

26 *Id.* at 1441.

27 These cases illustrate that whether defendants’ statements were primarily intended
28 to influence the public or public officials is immaterial if they were known to be false.
The First Amendment petitioning right does not immunize false statements or deceptive
conduct.

1 **3. The Free Speech Clause Does Not Protect Deliberately False**
 2 **Statements.**

3 Defendants also contend that even if their activities are not legitimate petitioning
 4 of the government, they are still protected under the Free Speech Clause of the First
 5 Amendment. Utilities MTD Conspiracy at 20-23; Oil MTD 12(b)(6) at 21; Peabody MTD
 6 at 24-25. They argue that they have an “absolute right under the First Amendment.”²⁸ Not
 7 so. “[W]hat the First Amendment and our case law emphatically do not require . . . is a
 8 blanket exemption from fraud liability . . . for a [defendant] who intentionally misleads
 9 [its audience].” *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600-62
 10 (2003). Free speech protection does not apply to a deliberately false statement made “with
 11 knowledge that it was false or with reckless disregard of whether it was false or not.” *New*
 12 *York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (“*Sullivan*”). “Untruthful speech,
 13 commercial or otherwise, has never been protected for its own sake.” *Virginia State Bd. of*
 14 *Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).

15 Nor are defendants entitled to the “breathing space” defense, which provides “that
 16 in public debate our own citizens must tolerate insulting, and even outrageous, speech in
 17 order to provide adequate breathing space to the freedoms protected by the First
 18 Amendment.” *Boos v. Barry*, 485 U.S. 312, 322 (1988) (internal quotation marks
 19 omitted). First Amendment law distinguishes between mere errors and knowing
 20 deceptions:

21 Under the First Amendment there is no such thing as a false idea.
 22 However pernicious an opinion may seem, we depend for its
 23 correction not on the conscience of judges and juries but on the
 24 competition of other ideas. But there is no constitutional value in
 25 false statements of fact. Neither the intentional lie nor the careless
 26 error materially advances society’s interest in “uninhibited, robust,
 27 and wide-open” debate on public issues. *New York Times Co. v.*
 28 *Sullivan*, 376 U.S., at 270. They belong to that category of
 utterances which “are no essential part of any exposition of ideas,

26 ²⁸ Peabody MTD at 24. Utility defendants further argue that the First Amendment bars
 27 government restrictions on expression because of its message, its ideas, its subject matter, or its
 28 content. *Id.* at 20-21 (quoting *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972)). This argument
 applies to governmental regulations on speech, which is not at issue in this case.

1 and are of such slight social value as a step to truth that any benefit
2 that may be derived from them is clearly outweighed by the social
3 interest in order and morality.” *Chaplinsky v. New Hampshire*, 315
4 U.S. 568, 572 (1942).

5 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *see also Clipper Exxpress v.*
6 *Rocky Mtn. Motor Tariff Bur., Inc.*, 674 F.2d 1252, 1272 (9th Cir. 1982) (refusing to
7 extend First Amendment protection to deliberate falsity; “While we recognize that under
8 certain circumstances allowing the imposition of liability for statements can hamper
9 debate [citing *Sullivan*], this possibility does not require that all such [false] statements be
10 immunized from liability.”). Kivalina has alleged that defendants have engaged in
11 knowing deception, which is afforded no constitutional protection.

12 Defendants’ reliance on selected quotations from inapposite cases, taken out of
13 context, is misleading. For example, they cite *Sullivan* for the proposition that the Court
14 should not consider the truth of matters discussed in public debate. But the issue in
15 *Sullivan* was whether a journalist could be held liable for defamation based on a critique of
16 a public official. The Court concluded liability could attach where there was evidence of
17 actual malice, *i.e.*, knowing falsehood or reckless disregard of the truth. 376 U.S. at 280.
18 While the “half-truths” discussed by *Sullivan* may be tolerated of members of the press
19 reporting on public officials in their official capacity, *id.* at 273, it does not follow that
20 knowing distortions of the truth intended to deceive members of the public about the
21 dangers of GHG emissions are immune from conspiracy liability.

22 Defendants fare no better with *Organization for a Better Austin v. Keefe*, 402 U.S.
23 415 (1971), which they cite for the proposition that courts should not inquire into the truth
24 of the subject allegations. *Keefe* held that there is a strong presumption against imposing
25 *prior restraints* on free speech and assembly and the injunction preventing the defendant
26 organization from passing out pamphlets and peacefully picketing plaintiff’s business was
27 unconstitutional. *Id.* at 419. Thus, in cases involving *prior restraints*, which have no
28 bearing in this case, “the courts do not concern themselves with the truth or validity of the
publication” at issue. *Id.* at 418. Similarly, defendants’ reliance on *Consolidated Edison*

1 *Co. v. Public Service Commission*, 447 U.S. 530 (1980), striking down a commission
2 order to prevent a public utility from including along with its utility bills an insert
3 promoting nuclear energy is misplaced; that plaintiffs are not seeking a prior restraint on
4 speech.²⁹

5 Nor does *Demuth Development Corp. v. Merck & Co.*, 432 F. Supp. 990 (E.D.N.Y.
6 1977), support Defendants' assertion that the First Amendment prohibits courts from ever
7 entering "disputes over the truth or falsity of statements made in scientific debate."
8 Utilities MTD Conspiracy at 21-22. The sole issue in *Demuth* was whether the publisher
9 of a drug and chemical encyclopedia that had erroneously, but not willfully,
10 misrepresented for 14 years the toxicity of a chemical used in plaintiff's product could be
11 liable for damages. The quote that defendants improperly rely on is part of the court's
12 conclusion that *extending liability to such an innocent circumstance* "would serve neither
13 justice nor the public interest because of its manifestly chilling effect upon the right to
14 disseminate knowledge." *Id.* at 994.

15 Further, contrary to Peabody's representation, *Vess v. Ciba-Geigy Corp. USA*, 317
16 F.3d 1097 (9th Cir. 2003), does not hold that a *deceptive* advertising campaign is protected
17 speech. *Vess* dismissed a defectively pled false advertising claim; the sole remaining
18 question was whether an advertising campaign was free speech for the purposes of the
19 anti-SLAPP statute. *Id.* at 1110 (page cited by Peabody MTD at 24).

20 Finally, defendants' quotation regarding the appropriateness of a court inquiry into
21 the validity of a scientific theory misrepresents *Oxycal Laboratories, Inc. v. Jeffers*, 909 F.
22 Supp. 719 (S.D. Cal. 1995).³⁰ In *Oxycal* the issue was whether allegations that the

23
24 ²⁹ As evident from the quotation deployed by Peabody, MTD at 25, the statement from
25 *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940) also involves a prior restraint. Similarly, *Police*
26 *Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972), cited by Utilities MTD Conspiracy at 21, holds
27 that regulations placing subject matter restrictions on speech are prohibited under the First
28 Amendment, and, as such, is inapposite.

³⁰ Only *McMillan v. Togus Regional Office, Department of Veteran Affairs*, 294 F. Supp.
2d 305 (E.D.N.Y. 2003), appears to be properly represented as a case holding that the First

1 plaintiff's products contained a carcinogen in a book about the dangers of cancer was
2 commercial speech and thus subject to plaintiff's Lanham Act claim. Defendants'
3 selective quotation arises in context of the court's determination that the allegations were
4 not commercial speech. As such, the statements were not subject to the Lanham Act and
5 thus the court did not need to consider the validity of the defendant's theories:

6 The Court finds that the main purpose of Clark's book is not to
7 propose a commercial transaction, and Clark's writing is not solely
8 related to the economic interests of the speaker and its audience.
9 Clark has written a book setting out a comprehensive plan for the
elimination of the causes of cancer from peoples' lives. The Court
cannot inquir[e] into the validity of her scientific theories, nor
should it.

10 *Id.* at 724. As the full quote illustrates, there is no inherent impropriety of court evaluation
11 of evaluate scientific theories, a process that is routinely carried out when experts are
12 involved in litigation.

13 Defendants' deceptive public relations campaign and knowingly false statements
14 are not immunized by the *Noerr-Pennington* doctrine nor protected by the Petition or Free
15 Speech Clauses of the First Amendment.

16 C. Kivalina Has Stated A Proper Claim of Concert of Action.

17 A concert of action claim "permits a defendant to be held jointly and severally
18 liable if it commits a tortious act in concert with another or pursuant to a common design,
19 or a defendant gives substantial assistance to another knowing that the other's conduct
20 constitutes a breach of duty." *In re MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 632
21 (S.D.N.Y. 2001); *see also Sindell v. Abbott Labs.*, 607 P.2d 924, 932 (Cal. 1980)
22 (identifying elements of concert of action based on Restatement (Second) of Torts § 876).
23 Only a "tacit understanding" among defendants is required and not an "express
24 agreement." *Sindell*, 607 P.2d at 932. Defendants wrongly contend that a concert of

25 _____
26 Amendment protects scientific debate. But that case turned on the lack of proof that the National
27 Academy of Sciences had failed to adhere to established standards "in reviewing scientific
28 evidence and offering recommendations for further study" regarding the connection between
Agent Orange exposure and illnesses among Vietnam veterans. *Id.* at 321. Here, defendants are
not scientists but rather have intentionally distorted the prevailing scientific views.

1 action claim only is viable when there is a limited group of participants over a brief and
2 discrete period of time. *See* Peabody MTD at 25-26; Utilities MTD at 41-43. The caselaw
3 holds otherwise. *See In re MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d at 599 n.1, 601-02,
4 635 (denying motion to dismiss concert of action claim against 20 defendants involving
5 conduct over a period of at least 10 years); *see also Roney v. Gencorp*, 431 F. Supp. 2d
6 622, 634 (S.D. W. Va. 2006) (denying motion to dismiss plaintiff's claim based on concert
7 of action regarding the tortious conduct of over a dozen defendants during plaintiff's
8 17-year employment).

9 The Utilities argue that Kivalina has not alleged that defendants had a "tacit
10 understanding" or a "common plan" to accomplish a tortious result. Utilities MTD at 41-
11 43. As discussed above, Kivalina has sufficiently alleged that defendants engaged in a
12 concert of action to commit a tortious act, *i.e.*, a public nuisance, through the use of front
13 organizations, financed and promoted by defendants, to distort public understanding of
14 global warming in order to encourage energy consumption and maintain a global warming
15 nuisance. Compl. ¶¶ 189-248. For example, Kivalina has alleged that the "purpose of [the
16 long campaign by power, coal, and oil companies to mislead the public about the science
17 of global warming] has been to enable the electric power, coal, oil and other industries to
18 continue their conduct contributing to the public nuisance of global warming by
19 convincing the public at-large and the victims of global warming that the process is not
20 man-made when in fact it is." *Id.* ¶ 189. The complaint alleges that certain defendants
21 were members of the Global Climate Coalition ("GCC"). *Id.* ¶ 198. The GCC was
22 founded in 1989 by 46 corporations and trade associations representing all of the major
23 elements of U.S. industry and was one of the most outspoken industry groups in the
24 United States battling reductions in greenhouse gas emissions. *Id.* ¶ 196. Plaintiffs'
25 allegations are legally sufficient at the motion to dismiss stage of the litigation. *See In re*
26 *MTBE*, 175 F. Supp. 2d at 634-35 (denying motion to dismiss civil conspiracy and concert
27 of action claims based upon similar allegations); *In re Related Asbestos Cases*, 543 F.
28 Supp. 1152, 1159 (N.D. Cal. 1982) (denying motion to dismiss concert of action claim);

1 *see also City of New York v. Lead Indus. Ass'n, Inc.*, 597 N.Y.S.2d 698, 700-01 (N.Y.
2 App. Div. 1993) (affirming denial of motion to dismiss concert of action claim where
3 “manufacturing defendants allegedly coordinated their efforts to conceal the hazard, to
4 mislead the public and the government as to that hazard, and to market and promote the
5 use of the product despite their knowledge of the hazard.”). Notably, the *In re MTBE*
6 court rejected a motion to dismiss a concert of action claim involving allegations similar to
7 those here:

8 [P]laintiffs allege defendants formed joint task-forces and
9 committees such as the MTBE Committee and the OFA for the
10 specific purpose of suppressing or minimizing information
11 regarding MTBE hazards. Defendants also engaged in joint activity
12 to deceive the government as well as the public regarding these
13 same dangers. Plaintiffs further allege that defendants’ conspiracy
14 and the acts taken in furtherance of the conspiracy are a direct and
15 proximate cause of the MTBE contamination of their wells.
16 Plaintiffs are not required to allege the specific facts surrounding the
17 conspiracy at this stage of the litigation where the necessary
18 information [may be] within the knowledge and control of the
19 defendant[s] Thus, plaintiffs’ allegations of an agreement or
20 tacit understanding are sufficient to support their conspiracy claims
21 and concerted action theory of liability.

22 *In re MTBE*, 175 F. Supp. 2d at 634-35 (citations and quotations omitted). Defendants’
23 motions to dismiss the concert of action claim should be denied.

24 **V. KIVALINA HAS STANDING.**

25 Kivalina has standing to pursue its claims. The standing inquiry is fact-intensive
26 and thus, at the pleading stage, only requires general allegations. *Baur v. Veneman*, 352
27 F.3d 625, 631 (2d Cir. 2003) (“[A]t the pleading stage, standing allegations need not be
28 crafted with precise detail, nor must the plaintiff prove his allegations of injury.”).

“The standing inquiry ensures that a plaintiff has a sufficient personal stake in a
dispute to render judicial resolution appropriate.” *Friends of the Earth, Inc. v. Gaston*
Copper Recycling Corp., 204 F.3d 149, 153 (4th Cir. 2000); *see also Baker v. Carr*, 369
U.S. 186, 204 (1962). The Kivalina Plaintiffs unquestionably have a significant personal
stake in this dispute: their longstanding home and livelihood are threatened by defendants’
actions, and their survival hinges on their ability to relocate the village to safer ground.

1 To establish standing under Article III of the Constitution, plaintiffs must show
2 they have suffered an actual or imminent injury-in-fact, that the injury is fairly traceable to
3 the challenged action of the defendants, and that it is likely that the injury will be redressed
4 by this Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Kivalina
5 presently is suffering an injury—the destruction of its village—which has been caused in
6 part by the defendants’ contributions to global warming, and that injury is redressable
7 through the damages this suit seeks.

8 In reviewing defendants’ motions under Rules 12(b)(1) and 12(b)(6), this Court
9 must take all factual assertions alleged in the Complaint as true and must draw all
10 reasonable inferences in favor of plaintiffs. *Buckey v. County of Los Angeles*, 968 F.2d
11 791, 794 (9th Cir. 1992). Kivalina has pled sufficient facts that, when taken as true,
12 establish it has standing to bring the present suit. Defendants demand more specificity, but
13 a 12(b)(1) or 12(b)(6) motion to dismiss is not the proper vehicle to articulate such
14 demands. *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412
15 U.S. 669, 689 n.15 (1973) (“*SCRAP*”) (if defendants thought plaintiffs allegations were
16 “wholly barren of specifics,” they could have moved for a more definite statement
17 pursuant to Rule 12(e), moved for summary judgment, or utilized tools of civil discovery
18 to ascertain specifics, instead of filing a motion to dismiss). Furthermore, specifics as to
19 which particular emissions caused Kivalina’s injury and at what point in time, *see* Oil
20 MTD 12(b)(1) at 34, are not required in a multiple-polluter case even on the merits
21 because liability does not depend upon tracing molecules. *See supra* Section I.C.2; *see*
22 *also Gaston Copper*, 204 F.3d at 161 (plaintiff need not connect harm to “particular
23 molecules” emitted by defendants). And the standing requirements may not be used to
24 “raise the standing hurdle higher than the necessary showing for success on the merits in
25 an action.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167,
26 181 (2000).

27 Plaintiffs’ alleged harm is sufficiently concrete to withstand defendants’ Motions
28 to Dismiss. Kivalina has alleged facts about the science of global warming, Compl. ¶¶

1 123-34, defendants’ emissions and contributions to global warming, *id.* ¶¶ 163-80, and the
 2 harmful effects of such contributions on Kivalina’s property. *Id.* ¶ 185. Such detail
 3 cannot be characterized as a “formulaic recitation of the elements of a cause of action.”
 4 *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs have met the
 5 pleading requirements laid out in *Bell Atlantic Corp.*, “providing not only ‘fair notice’ of
 6 the nature of [each] claim, but also ‘grounds’ on which the claim rests.” *Id.* at 1965, n.3.

7 **A. Kivalina Meets All of the Requirements of the Traditional Standing**
 8 **Analysis.**

9 As the defendants concede, Kivalina has suffered an actual and concrete
 10 injury-in-fact. Plaintiffs have also shown that defendants’ emissions contribute to this
 11 injury, satisfying the causation prong of the Article III inquiry. Lastly, a favorable ruling
 12 awarding damages to Kivalina would redress its injuries.

13 **1. Kivalina Has Suffered an Actual and Concrete Injury.**

14 Rising temperatures in the Arctic have led to a loss of sea ice along Kivalina’s
 15 coast. Compl. ¶ 185. As a result, the village has become more vulnerable to waves, storm
 16 surges, and coastal erosion, causing significant property damage on the island. *Id.* The
 17 U.S. Army Corps of Engineers and the U.S. Government Accountability Office agree that
 18 because of global warming, plaintiffs must relocate their homes and businesses; remaining
 19 on the island is no longer a viable option. *Id.*

20 Defendants concede that Kivalina has suffered an actual and concrete injury. Not
 21 one of the defendants’ 12(b) motions contests that plaintiffs have satisfied the “injury”
 22 element of the standing analysis. Indeed, defendants accept the Army Corps of Engineers’
 23 findings that the island is vulnerable to “extreme Arctic weather conditions,” Oil MTD
 24 12(b)(1) at 10, and that “the village would have to be moved.” Peabody MTD at 26.

25 **2. Kivalina’s Injury Is Directly Traceable to Defendants’ Actions.**

26 In an environmental nuisance suit, plaintiffs can meet the requirements of Article
 27 III causation by showing that defendants contribute to their injuries. *Northwest Envtl.*
 28 *Defense Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 967 (D. Or. 2006). The

1 Supreme Court recently applied this principle of contribution to the global warming
 2 context in *Massachusetts v. EPA*, 127 S. Ct. 1438, 1457 (2007) (plaintiff had standing
 3 because EPA’s refusal to regulate greenhouse gas emissions contributed to its injuries).
 4 The Court found that the domestic transportation sector emitted 1.7 billion metric tons of
 5 carbon dioxide into the atmosphere in 1999 alone, or 6 percent of all worldwide emissions.
 6 The Court declined to establish a precise amount of emissions that would be unreasonable,
 7 finding instead that “judged by any standard” this “enormous quantity” of emissions
 8 amounted to a “meaningful contribution to greenhouse gas concentrations.”³¹
 9 *Massachusetts*, 127 S. Ct. at 1457-8. Likewise, here, defendants’ emissions alleged in the
 10 Complaint totaled more than 1.3 billion tons annually. *See* Compl. ¶¶ 21, 23, 29, 34, 39,
 11 46, 68, 72, 80, 86, 90, 93, 99, 103, 104, 111, 117, 122. This Court does not need to
 12 establish any standard or benchmark to deem this a “meaningful contribution.”

13 Additionally, “plaintiffs need not show that a particular defendant is the only cause
 14 of their injury, and that, therefore, absent the defendant’s activities, the plaintiffs would
 15 enjoy undisturbed use of a resource.” *Nat’l Res. Def. Council, Inc. v. Watkins*, 954 F.2d
 16 974, 980 (4th Cir. 1992). In other words, plaintiffs need not show tort-like “but-for”
 17 causation to establish standing. *Pub. Interest Research Group of New Jersey v. Powell*
 18 *Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990) (“*Powell Duffryn*”).

19 Defendants prematurely disregard *Powell Duffryn* and its progeny because the
 20 cases involve citizen suits under the Clean Water Act (“CWA”). Yet there is no reason to
 21 assume that the presence of a statutory scheme in those cases limits the rule that plaintiffs
 22 need only show contribution in CWA actions alone. Much to the contrary, *Powell Duffryn*
 23 explicitly states that “tort-like causation is not required by Article III.” *Powell Duffryn*,
 24 913 F.2d at 73 n.10 (emphasis added). Moreover, defendants’ repeated attempts to
 25

26 ³¹ It is important to note that in *Massachusetts*, the fact-intensive standing inquiry
 27 ultimately turned on declarations. 127 S. Ct. at 1455-57 (reviewing facts found in five
 28 declarations). The standing question here is similarly fact-specific and fact-intensive, and should
 not be resolved at the motion to dismiss stage.

1 distinguish air and water pollution cases fall flat. Interstate pollution suits most directly
2 inform the present action and cannot be summarily dismissed merely because they often
3 involve statutory violations.

4 Still, defendants try to draw an artificial and invalid distinction between common
5 law and statutory actions, arguing that the absence of a statutory scheme here is “fatal to
6 Plaintiffs’ effort to establish traceability.” Oil MTD 12(b)(1) at 36. But congressional
7 statutes cannot lessen the standing burden below what is required by Article III, nor can
8 they establish standing for plaintiffs who would otherwise not have it. *See, e.g., Raines v.*
9 *Byrd*, 521 U.S. 811, 820 n.3 (1997) (“Congress cannot erase Article III’s standing
10 requirements by statutorily granting the right to sue to a plaintiff who would not otherwise
11 have standing”); *Lujan II*, 504 U.S. at 560 (Article III is an “irreducible constitutional
12 minimum”); *Gaston Copper*, 204 F.3d at 155 (in addition to meeting the constitutional
13 minimum requirements for standing, an individual must also satisfy statutory requirements
14 beyond what is required by Article III).

15 Though Congress cannot “dispense with the dictates of Article III,” it can define
16 new legal rights for purposes of the injury-in-fact element of the standing analysis. *Fin.*
17 *Insts. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142, 147 (2d Cir. 1992). That
18 Congressional power is irrelevant here: Kivalina has demonstrated—undisputed by the
19 defendants—an “actual and concrete injury” under the common law of nuisance, and no
20 statutory scheme is required to establish that element. Defendants also point to the
21 Supreme Court’s discussion in *Massachusetts* about Congress’ power to define injuries
22 and articulate chains of causation, glossing over the qualification that such power is only
23 exercised to “‘give rise to a case or controversy *where none existed before.*’”

24 *Massachusetts*, 127 S. Ct. at 1453 (quoting *Lujan II*, 504 U.S. at 580) (emphasis added).
25 Contrary to defendants’ assertions, this does not amount to a wholesale relaxation of
26 standing requirements in statutory cases. It only expresses the well-established principle
27 that Congress can create new private rights of action where none previously existed. But
28 public nuisance actions have a longstanding tradition and history in the common law,

1 predating the current pollution-related statutes. *See, e.g., Georgia v. Tenn. Copper Co.*,
2 206 U.S. 230 (1907); *Montana Co. v. Gehring*, 75 F. 384 (9th Cir. 1896); *Robinson v.*
3 *Baugh*, 31 Mich. 290 (Mich. 1875).

4 It is true that some statutes relax the standing burden for plaintiffs who have been
5 accorded new rights under the statutory scheme. For instance, the Clean Water Act grants
6 new procedural rights to members of the public, and plaintiffs asserting those rights may
7 do so “without meeting all the normal standards.” *Lujan II*, 504 U.S. at 572 n.7. But
8 Kivalina’s right to sue for the *substantive* injury to its property under nuisance law is not
9 new nor does it need congressional authorization. Furthermore, citizen suits for
10 substantive injuries under the CWA face the exact same Article III standing test as those
11 brought under the common law. *See, e.g., Ecological Rights Found. v. Pacific Lumber*
12 *Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (CWA “extends standing to the outer
13 boundaries” of Article III); *Gaston Copper*, 204 F.3d at 155. *Powell Duffryn*, and other
14 cases that require plaintiffs merely to demonstrate defendants’ contributions to their
15 injuries, thus directly apply to the case at bar, and defendants have no footing to suggest
16 otherwise.

17 Defendants next speculate that Kivalina’s injuries might have occurred without
18 their emissions. Oil MTD 12(b)(1) at 34. This “inertia” argument has no legal
19 foundation, and such conjecture has no place in the standing analysis. “Whatever the
20 ultimate accuracy of this speculation, it is not responsive to the simple proposition” that
21 defendants “now do in fact” emit greenhouse gases that contribute to global warming.
22 *Duke Power Co. v. Carolina Env’tl. Study Group, Inc.*, 438 U.S. 59, 77 (1978). Kivalina
23 need not show that without defendants’ emissions, their injuries would not have occurred.
24 “A party seeking to invoke federal jurisdiction” does not need to “negate the kind of
25 speculative and hypothetical possibilities suggested in order to demonstrate the likely
26 effectiveness of judicial relief.” *Id.* at 78. It must only allege that the defendants have
27 caused some part of the actual injury. Even assuming *arguendo* that the inertia theory had
28 legal foundation, that fact-intensive defense is not appropriately deployed in a motion to

1 dismiss.

2 **a. Defendants' Greenhouse Gas Emissions Harm Kivalina.**

3 Kivalina has alleged facts demonstrating that defendants' emissions contribute to
4 global warming, which in turn causes its injury. Compl. ¶¶ 163-80. Defendants object
5 that the alleged injury cannot be traced to any one of their emissions, "as opposed to the
6 emissions of the many other emitters on the planet." Oil MTD 12(b)(1) at 30. Yet such
7 scientific certainty is not required to establish standing. Kivalina does not have to
8 demonstrate that defendants' emissions, and defendants' emissions alone, caused the
9 precise harm suffered. *Powell Duffryn*, 913 F.2d at 72. Rather, they "must merely show
10 that a defendant discharges a pollutant that causes or contributes to the kinds of injuries
11 alleged' in the specific geographic area of concern." *Gaston Copper*, 204 F.3d at 161
12 (quoting *Watkins*, 954 F.2d at 980). Here, the "geographic area of concern" is the entire
13 world, given the inherently global nature of global warming, as emphasized by the
14 defendants themselves. Oil MTD 12(b)(1) at 32.

15 The defendants contribute to global warming by emitting greenhouse gases that
16 mix in the atmosphere with the emissions of others. But the mere fact that others also
17 contribute to Kivalina's injury does not insulate the defendants in the present action from
18 liability for their own contributions. Restatement (Second) of Torts, § 840E. A plaintiff
19 can establish standing even if polluters other than the defendant contribute to its injury.
20 *See, e.g., Watkins*, 954 F.2d at 980 (although "highly probable" that polluters other than
21 defendant substantially contributed to the polluted state of river, plaintiffs had standing to
22 sue defendant for its contribution).

23 Defendants further contend that Kivalina's injuries can be attributed to any number
24 of emitters in the world and granting such "undifferentiated standing to sue almost anyone
25 and everyone in the whole world is the very antithesis of 'fair traceability.'" Oil MTD
26 12(b)(1) at 35. Defendants' position, however, is even more puzzling. Extending their
27 argument would mean that plaintiffs are less likely to obtain judicial relief from the most
28 threatening and widespread environmental injuries. This leads to the wholly "illogical

1 proposition” that “the greater the threatened harm, the less power the courts would have to
2 intercede.” *Owens Corning Corp.*, 434 F. Supp. 2d at 966. It is equally illogical that
3 Kivalina be denied any and all relief for its injuries merely because, worldwide, there is a
4 potentially large number of responsible parties who contribute to global warming.
5 Nonetheless, defendants maintain that Kivalina lacks standing because its injuries are
6 attributable not only to the defendants but also to a larger group of emitters not before this
7 Court. To make this point, they rely heavily on the holding in *Comer*, see Utilities MTD
8 at 18-19, Peabody MTD at 10, but an unpublished Mississippi district court decision has
9 no precedential value in this Court and does not provide persuasive guidance here.³²

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18 ³² Defendants also point to the Seventh Circuit decision in *Texas Independent Producers*
19 *and Royalty Owners Assoc. v. E.P.A.*, 410 F.3d 964 (7th Cir. 2005), for the proposition that
20 “failure to account for pollution attributable to others precluded traceability to one industry’s
21 discharges,” Utilities MTD at 19. Defendants fail to note, however, that the Seventh Circuit in
22 fact conceded that a plaintiff need only show that a defendant contributed to its injury. *Texas*
23 *Independent*, 410 F.3d at 974. The court eventually found that plaintiffs lacked standing but only
24 because they failed to show the defendants contributed *at all* to the polluted waterway. *Id.*
25 Kivalina, by contrast, has alleged facts sufficient to show that the defendants’ emissions have
26 contributed to global warming and its related effects on Kivalina’s property.

23 *Texas Independent* also falls into a subset of cases where the plaintiffs’ burden in
24 establishing standing is higher than the burden faced by Kivalina in the instant case. In *Texas*
25 *Independent*, the Seventh Circuit laid out the traditional elements of the standing analysis, but
26 added that “when, as here, ‘a plaintiff’s asserted injury arises from the government’s allegedly
27 unlawful regulation (or lack of regulation) of *someone else*, much more is needed.’” *Id.* at 971
28 (quoting *Lujan II*, 504 U.S. at 562 (emphasis in original)). Here, Kivalina’s injury does not stem
from defendants’ responses to unlawful government action or inaction, but rather from
defendants’ own independent choices and activities. Accordingly, Kivalina does not face the
heightened standing burden described in *Texas Independent* and *Lujan II*.

b. The Causal Chain Between Defendants' Actions and Plaintiffs' Injuries Is Short, Direct and Straightforward.

The line of causation between defendants' emissions and Kivalina's injuries is short and direct. Defendants' characterization of the causal link manipulates a straightforward process into an overly-complex chain. They insert multiple superfluous steps in an effort to make the chain appear "highly attenuated." Utilities MTD at 20-21. In reality, there are only three steps:

- (1) Defendants emit greenhouse gases. Compl. ¶¶ 163-80.
- (2) Defendants' emissions, combined with others in the atmosphere, trap heat and raise the temperature of the Earth's atmosphere. *Id.* ¶ 123.
- (3) The trapped heat leads to a loss of Arctic sea ice, leaving Kivalina vulnerable to storm surges and coastal erosion such that residents must relocate or face extermination. *Id.* ¶ 185.

This straight line between defendants' actions and plaintiffs' injury is the essence of traceability. *Saunders v. Farmers Ins. Exch.*, 440 F.3d 940, 943 (8th Cir. 2006) (injury must directly result from challenged conduct). Kivalina has clearly met the requirements of the second prong of the standing test.

Yet, even the defendants' overly-fragmented description of the process does not necessarily preempt a finding of traceability. First, the Supreme Court has rejected the "attenuated line of causation" argument at the pleading stage. *SCRAP*, 412 U.S. at 688-89. A chain with too many links is only an obstacle to establishing standing when the intervening steps require a high degree of speculation. *See, e.g., Allen v. Wright*, 468 U.S. 737, 758 (1984) (Court emphasized the "entirely speculative" nature of several of the links in plaintiffs' chain of causation); *Pony v. County of Los Angeles*, 433 F.3d 1138, 1145-6 (9th Cir. 2006). The underlying principle—and indeed, the very core of the standing inquiry—is to avoid hypothetical or conjectural jumps in showing causation. *Ecological Rights Found.*, 230 F.3d at 1152 ("the causal connection put forward for standing purposes cannot be too speculative, or rely on conjecture about the behavior of other parties but need not be so airtight at this stage of the litigation"). Here, not one of the links of the chain, even as described by the defendants, requires any speculative jumps: they are

1 merely factual assertions that map the science and effects of global warming. The truth of
2 such assertions can be ascertained through discovery and trial but must be assumed at this
3 point in the litigation. *Buckey*, 968 F.2d at 794.

4 Defendants also focus too narrowly on the number of links in the chain, though the
5 case law they rely on underscores that the true concern in a standing analysis is not the
6 number of links but the *level of speculation* required to move from one link to the next.
7 For instance, in *In re African-American Slave Descendants Litigation* the fatal flaw in
8 plaintiffs' alleged chain of causation was not the sheer number of links; rather, critical
9 links in the chain required excessive speculation. 471 F.3d 754, 759 (7th Cir. 2006), *cert.*
10 *denied*, 128 S. Ct. 92 (2007) (plaintiffs' argument depended too heavily on the possibility
11 that making slavery less profitable "might" have reduced the amount of it). Furthermore,
12 the plaintiffs in that case were seeking redress for wrongs done to their ancestors. The
13 Seventh Circuit accordingly decided the linkage between the wrong committed and the
14 plaintiffs themselves was too temporally remote. That, of course, is not the situation here,
15 as Kivalina is *presently* suffering injuries resulting from defendants' emissions. In
16 *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corporation* 273 F.3d
17 536 (3d Cir. 2001), plaintiffs lacked standing not because their chain of causation had
18 seven links, but rather because the conduct of intervening criminal actors insulated the
19 more removed gun manufacturers from liability. Defendants here similarly argue that the
20 emissions of third-parties, over whom they have no control, muddle the chain of causation.
21 But in *Beretta*, the relevant third-parties were individuals who could be held criminally
22 liable for their unlawful use of guns. With global warming there are not third parties
23 acting criminally nor other intervening causes. Defendants' greenhouse gas emissions
24 combine with each others and those of others to trap heat, which causes Kivalina's
25 injuries. Here, all emitters contribute to the injury – in fact, some, like defendants, more
26 than others – which is enough to establish causation. *See supra* discussion Sections
27 I.C.2.a, I.C.2.b.
28

1 **c. Geographic Proximity Is Not Necessary with a Global**
 2 **Problem.**

3 Geographic proximity can weigh into the causation inquiry but not in the formulaic
 4 fashion defendants propose. The Fifth Circuit, for instance, considered proximity in a
 5 citizen suit under the CWA but was careful to qualify its discussion of distance. *Friends*
 6 *of the Earth Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 362 (5th Cir. 1996) (“We
 7 do not impose a mileage or tributary limit for plaintiffs”). The court noted that “plaintiffs
 8 who use ‘waterways’ far downstream from the source of unlawful pollution may satisfy
 9 the ‘fairly traceable’ element.” *Id.* The propriety of measuring the geographic distance
 10 between a defendant’s activities and a plaintiff’s resulting injury depends on the particular
 11 nature and circumstances of each case. While in some water pollution disputes, it may be
 12 feasible and desirable to require plaintiffs to show a defendant’s effluent traveled
 13 downstream to their portion of the river, *see, e.g., id.*, a similar evidentiary requirement in
 14 the global warming context would be prohibitive. It would be impossible to trace the
 15 pathway of any particular greenhouse gas emission, as each combines in the atmosphere
 16 with other emissions, to create the effects described in plaintiffs’ Complaint. Compl. ¶¶
 17 181-185. These “elevated evidentiary hurdles are in no way mandated by Article III.”
 18 *Gaston Copper*, 204 F.3d at 163. The CWA’s polluted waterways provisions are entirely
 19 different: they govern the discharge and effect of specific toxins in localized bodies of
 20 water. By contrast, greenhouse gases are common pollutants that are mixed together in the
 21 atmosphere and cannot be similarly geographically circumscribed. This Court must keep
 22 pace with evolving developments in scientific and environmental understanding and
 23 provide relief for novel injuries accordingly.

24 **3. A Decision by this Court Awarding Damages Will Redress**
 25 **Kivalina’s Injury.**

26 Kivalina has standing “because a favorable decision by the district court will
 27 redress [its] injuries.” *Gaston Copper*, 204 F.3d at 162. The redressability prong of the
 28 standing analysis is meant to ensure that a plaintiff will personally “benefit in a tangible
 way from the court’s intervention.” *Id.* Here, Kivalina will undoubtedly benefit – they

1 will be awarded damages – and “injuries compensable in monetary damages can always be
2 redressed by a court judgment.” *Wernsing v. Thompson*, 423 F.3d 732, 745 (7th Cir.
3 2005). Kivalina’s injury can and would be redressed by damages for relocation. Indeed,
4 the Oil and Utility defendants concede this point.

5 Only Defendant Peabody Coal asserts a further standing problem under the
6 redressability prong, *see* Peabody MTD at 9, but its argument centers on the misguided
7 notion that this Court would need to establish a national policy on climate change or set
8 benchmarks on the reasonableness of greenhouse gas emissions in order to provide
9 Kivalina its requested relief. This premise is entirely without foundation. Peabody cites
10 no authority for its assertion; indeed, the case law suggests just the opposite. In the public
11 nuisance context, federal courts have, for more than a century, provided plaintiffs with
12 judicial relief without formulating national policy. *See, e.g., Tenn. Copper Co.*, 206 U.S.
13 at 238-239 (injunction issued “[w]ithout any attempt to go into details immaterial to the
14 suit” and without setting national benchmarks on transboundary air pollution). Federal
15 courts are best suited to provide relief in matters like the present action, where uniform
16 national standards and provisions for legislative or administrative relief are absent. *See*
17 *Milwaukee I*, 406 U.S. at 108 (citing *State of Tex. v. Pankey*, 441 F.2d 236, 241 (10th Cir.
18 1971) (“Until the field has been made the subject of comprehensive legislation or
19 authorized administrative standards, only a federal common law basis can provide an
20 adequate means for dealing with such claims as alleged federal rights.”)).

21 **B. The Native Village of Kivalina Is Entitled to Any Special Solitude**
22 **Applicable to Sovereigns.**

23 Defendants recognize the incongruence between their arguments on standing and
24 the recent holding in *Massachusetts*, where the Supreme Court affirmed standing in a
25 global warming case. 127 S. Ct. at 1458. Accordingly, defendants struggle to
26 circumscribe that decision by suggesting that the Court applied relaxed standing standards
27 that do not govern in the present case. Utilities MTD at 19. Though the Court did
28 comment on Massachusetts’ status as a state, *Massachusetts*, 127 S. Ct. at 1454, nothing in

1 the majority opinion indicates that without “special solicitude,” plaintiffs could not have
2 established standing.³³ Indeed, after the Court’s discussion of State standing and the
3 relaxed standing requirements for plaintiffs asserting *new* rights accorded by the Clean Air
4 Act, it proceeded to evaluate Massachusetts’ standing under the traditional three-pronged
5 test laid out in *Lujan II. Id.* at 1455-59. The State did not need, nor was it actually given,
6 any special solicitude by the Court. The central standing inquiry that the Court applied to
7 uphold standing in *Massachusetts* is thus no different than that which applies here. Just as
8 Massachusetts was able to establish it had standing by showing it had suffered an injury
9 caused by defendants’ contributions to global warming that could be redressed by court
10 intervention, Kivalina has standing under this traditional analysis as demonstrated above.

11 If this Court decides sovereign entities are entitled to special solicitude in the
12 analysis of standing, however, the Native Village of Kivalina must be considered under
13 those relaxed standards. It is well established that States have standing to bring suit on
14 behalf of their citizens in matters of public concern under the *parens patriae* doctrine.
15 *See, e.g., Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450 (1945); *Tenn. Copper Co.*
16 *206 U.S. at 237; Missouri v. Illinois*, 180 U.S. 208, 241 (1901). The interests that a
17 sovereign may protect through *parens patriae* actions are quasi-sovereign interests “that
18 the State has in the well-being of its populace.” *Alfred L. Snapp & Son, Inc. v. Puerto*
19 *Rico ex rel. Barez*, 458 U.S. 592, 602 (1982). Thus, while only sovereigns may bring
20 *parens patriae* claims, the injury the sovereign seeks to remedy is not to its sovereignty,
21 but rather to its larger population.

22 As a sovereign, Kivalina, like a State, has a “quasi-sovereign interest in the health
23 and well-being – both physical and economic – of its residents in general.” *Alfred L.*
24 *Snapp & Son*, 458 U.S. at 607 (state can bring suit as quasi-sovereign entity on behalf of
25 its residents); *see also Sisseton-Wahpeton Sioux Tribes v. United States*, 90 F.3d 351 (9th
26 Cir.1996). And, like a State, the Native Village has a “stake in protecting [these] quasi-

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28 ³³ For their proposition that the Court provided “special solicitude” to Massachusetts,
defendants’ only authority is Chief Justice Roberts’ *dissenting* opinion. Utilities MTD at 19.

1 sovereign interests.” *Massachusetts*, 127 S. Ct. at 1454. Indeed, the Alaska Supreme
 2 Court recently upheld the right of Alaska Native Villages to bring suit as *parens patriae*
 3 on behalf of their members. *Dep’t of Health & Soc. Servs. v. Native Vill. of Curyung*, 151
 4 P.3d 388, 399-400 (Alaska 2006).³⁴

5 The “special solicitude” discussion in *Massachusetts* centers on the unique
 6 relationship between States, as quasi-sovereigns, and the federal government. Like States,
 7 Tribes – including the Native Village of Kivalina – also possess a special relationship with
 8 the federal government.³⁵ See Indian Entities Recognized and Eligible to Receive Services
 9 from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553 (Apr. 4, 2008). This
 10 special relationship flows from the fact that the pre-existing sovereignty possessed by
 11 Tribes was limited, but not abolished, by their inclusion within the territorial bounds of the
 12 United States. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (defining the nature
 13 of the federal tribal protectorate relationship as “*domestic dependent nations*” whose
 14 “*relation to the United States resembles that of a ward to his guardian.*”) (emphasis
 15 added). The protectorate relationship did not extinguish tribal sovereignty because it was
 16 a “settled doctrine of the law of nations . . . that a weaker power does not surrender its
 17 independence – its right to self-government, by associating with a stronger, and taking its

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 19
 20 ³⁴ The Ninth Circuit applies the traditional *parens patriae* standing test from *Alfred L.*
 21 *Snapp & Son v. Puerto Rico*, 458 U.S. at 607, to Tribes. See *Table Bluff Reservation (Wiyot*
 22 *Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 885 (9th Cir. 2001). Numerous other Ninth Circuit
 23 decisions, without analysis, have implicitly approved Tribes litigating under the doctrine of
 24 *parens patriae*. See *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 514 (9th Cir. 2005)
 25 (“The Tribe here is not suing as an aggrieved purchaser, or in any other capacity resembling a
 private person[.]”) (quotations omitted), *cert. denied*, 546 U.S. 1090 (2006); *Sisseton-Wahpeton*
Sioux Tribe v. United States, 90 F.3d 351 (9th Cir. 1996), *cert. denied*, 519 U.S. 1011 (1996); *In*
re: Blue Lake Forest Prods., Inc., 30 F.3d 1138 (9th Cir. 1994), *cert. denied*, 513 U.S. 1059
 (1994).

26 ³⁵ Defendants attempt to differentiate Alaskan Native villages such as Kivalina from
 27 Tribes in the lower 48 states to make the case that Kivalina lacks sovereign tribal status. Utilities
 28 MTD at 19-20 n. 8. This is specious: Kivalina is a federally-recognized Tribe. See Indian
 Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian
 Affairs, 73 Fed. Reg. 18,553 (Apr. 4, 2008).

1 protection.” *Worcester v. Georgia*, 31 U.S. 515, 560-561 (1832). Because Tribes
 2 necessarily gave up certain rights – like the States – they too must be able to protect their
 3 sovereign interests in federal court.

4 The Utility Defendants ignore these obvious similarities and instead narrowly
 5 focus on the Native Village’s lack of territorial reach as a reason for why it should not be
 6 granted special solicitude.³⁶ Utilities MTD at 20 n.8. But a sovereign’s territoriality,
 7 though discussed, is not the primary concern in *Massachusetts*; it is merely used as a proxy
 8 to ascertain whether plaintiff Massachusetts had a stake in the outcome of the suit.
 9 *Massachusetts*, 127 S. Ct. at 1454 (“That Massachusetts does in fact own a great deal of
 10 the ‘territory alleged to be affected’ only reinforces the conclusion that its stake in the
 11 outcome of this case is sufficiently concrete.”). There is no need for such a proxy here: it
 12 is plainly apparent that the Native Village has a sufficient stake in ensuring the Tribe’s
 13 survival and relocating Kivalina to safer land. Having territorial reach is wholly irrelevant
 14 to the standing analysis so long as the plaintiffs’ “stake in the outcome” is demonstrably
 15 concrete, as it is here. *Id.*

16 Kivalina has properly pled factual averments that, if true, amply support its
 17 standing.

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 24 ³⁶ Defendants narrowly focus on the Native Village of Kivalina’s lack of territorial reach,
 25 emphasizing that the Alaska Native Claims Settlement Act (ANSCA) revoked all existing tribal
 26 reservations in the State. But the existence of tribal lands or a reservation is not a prerequisite to
 27 the existence of sovereign tribal power. *John v. Baker*, 982 P.2d 738, 752, 755, 759 (Alaska
 28 1999). Nothing in the ANSCA suggests Congress intended to “force Alaska Natives to abandon
 their sovereignty.” *Id.* at 753. Nor does it affect the Native Village of Kivalina’s ability to sue
 under the *parens patriae* doctrine. *Dep’t of Health & Soc. Servs. v. Native Vill. of Curyung*, 151
 P. 3d 388, 399-400 (Alaska 2006).

1 **VI. DEFENDANTS' REMAINING ARGUMENTS ARE WITHOUT MERIT.**

2 Defendants make a series of other arguments, some in only one paragraph, and
3 none of which are persuasive.

4 **A. Kivalina's Damages Are Not Speculative.**

5 Only Defendant Peabody Energy Corporation argues that the Federal government's
6 ongoing efforts to assist Kivalina with its environmental problems render Plaintiffs'
7 damages speculative. This argument is without merit. In determining whether damages
8 are speculative, the Ninth Circuit has "distinguished uncertain damage, which prevent[s]
9 recovery, from an uncertain *extent* of damage, which d[oes] not prevent recovery; that is,
10 the failure to establish an injury, from the not uncommon impression with regard to its
11 scope." *Allen v. United Food & Commercial Workers Int'l Union, AFL-CIO*, 43 F.3d 424,
12 427-28 (9th Cir. 1994) (emphasis in original). Thus, as it is indisputable that Kivalina
13 here has suffered current injuries, Peabody's challenge must be rejected. "The constant
14 tendency of the courts is to find some way in which damages can be awarded where a
15 wrong has been done. Difficulty of ascertainment is no longer confused with right of
16 recovery." *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 73 (9th Cir. 1979)
17 (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565-66
18 (1931)). Kivalina's damages are certain, not speculative.

19 **B. Peabody's Methane Emissions Are Not Expressly Authorized By
20 Statute.**

21 Peabody asserts the unique, but flawed, argument that it is not liable under tort law
22 because the methane emissions emanating from its mining operations are expressly
23 authorized by the Federal Mine Safety and Health Act of 1977 ("FMSHA"). Peabody
24 MTD at 21. This simply is not so.

25 In making this argument, Peabody relies upon Cal. Civ. Code § 3482, which
26 provides that "nothing which is done or maintained under the express authority of a statute
27 can be deemed a nuisance." While seemingly broad, this provision's exculpatory effect
28 has long been circumscribed by the California courts. *Varjabedian v. City of Los Angeles*,

1 20 Cal. 3d 285, 291 (1977); *see also Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d
 2 1036, 1101 (N.D. Cal. 2007) (“Section 3482 has been narrowly construed”); *Suzuki v. City*
 3 *of Los Angeles*, 44 Cal. App. 4th 263, 279 (1996) (noting that “decisions of [the
 4 California] Supreme Court have interpreted [Section 3482] very narrowly”); *Greater*
 5 *Westchester Homeowners Ass’n v. City of Los Angeles*, 26 Cal. 3d 86, 100 (1979) (The
 6 Supreme Court of California has “consistently applied a narrow construction to section
 7 3482 and to the principle therein embodied”). Section 3482, therefore, does not
 8 automatically prohibit all claims for nuisance that are premised on acts which are
 9 addressed by a statute. Rather, it is well-established that a:

10 statutory sanction cannot be pleaded in justification of acts which by the
 11 general rules of law constitute a nuisance, unless the acts complained of are
 12 by the express terms of the statute under which the justification is made, *or*
 13 *by the plainest and most necessary implication* from the powers expressly
 14 conferred, *so that it can be fairly stated that the legislature contemplated*
 15 *the doing of the very act which occasions the injury.*

16 *Friends of H St. v. City of Sacramento*, 20 Cal. App. 4th 152, 160 (1993) (emphasis in
 17 original) (quoting *Hassell v. San Francisco*, 11 Cal. 2d 168, 171 (1938)); *see also Nestle v.*
 18 *City of Santa Monica*, 6 Cal. 3d 920, 938 (1972) (same). Applying this standard, it is clear
 19 that Peabody cannot utilize Section 3482’s protection here.

20 The FMSHA neither expressly nor impliedly authorizes Peabody to emit methane
 21 into the environment in a manner that causes a nuisance. Consistent with its goal of
 22 ensuring the health and safety of miners, the FMSHA requires excessive methane to be
 23 ventilated in order to protect miners. 30 C.F.R. 75.323(b)(1). This requirement, which is
 24 the basis of Peabody’s express authorization argument, mandates only that “changes or
 25 adjustments shall be made at once to the ventilation system” if the methane concentration
 26 exceeds 1.0 percent in a working place or an intake air course. 30 C.F.R. 75.323(b)(1).
 27 By no means does that requirement, or any other contained within the FMSHA, expressly
 28 authorize unfettered atmospheric methane emissions.³⁷ Even more, there is no indication

³⁷ Notably, Peabody does not attempt to argue that its emissions were necessary to maintain acceptable workplace concentrations of methane.

1 that when enacting the FMSHA, Congress intended to authorize Peabody's emissions and
2 preempt Kivalina's nuisance claims. Surely, in seeking to protect the health and safety of
3 miners, Congress did not intend to authorize methane-related harm to Kivalina or the
4 environment. *See, e.g., Varjabedian*, 20 Cal. 3d at 285 (§ 3482 did not bar property
5 owners' action for nuisance related to emissions of noxious odors from nearby municipal
6 sewage treatment plan as the general authorization of municipal construction of the
7 sewage plant did not "expressly" sanction the production of any particular levels of odors
8 and such odors were not authorized by the "plainest and most necessary implication" from
9 general powers conferred; it could not be fairly said "that the Legislature contemplated, to
10 any extent, the creation of a malodorous nuisance when it authorized sewage plant
11 construction."); *Suzuki*, 44 Cal. App. 4th at 279 (use that is expressly allowed by a valid
12 use permit is subject to a nuisance action if the business operates in a manner that is
13 injurious to persons living and working in the area); *Venuto v. Owens-Corning Fiberglas*
14 *Corp.*, 22 Cal. App. 3d 116, 129 (1971) ("although the District was authorized to permit
15 defendant to emit pollutants within the standard of permissible limits set by the District,
16 we find nothing in the statute delineating the authority of the District which give it the
17 express authority to permit commercial enterprises to engage in activities which the law
18 pronounces to be a nuisance").³⁸ As such, Peabody's contention that its methane
19 emissions are excused by the FMSHA must be rejected.

20 Peabody cites two cases in which the courts found that Section 3482 barred
21 nuisance claims. As both cases involved unique and distinguishable circumstances,
22 neither is relevant here. In particular, the decision to bar plaintiffs' nuisance claim in
23 *Farmers Insurance Exchange v. State*, 175 Cal. App. 3d 494 (1985) was based on the fact
24 that the act alleged to be a nuisance (i.e., the release of chemically destructive spray into
25 the atmosphere) was precisely the act that was authorized by the express terms of the

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27 ³⁸ *See also Farny v. College Hous., Inc.*, 48 Cal. App. 3d 166 (1975) (exercise of a right
28 legislatively granted, even though the conditions of the exercise thereof are complied with in all
respects, will not immunize one from a nuisance claim).

1 statute in question. Conversely, here, the only conduct that is expressly authorized by the
2 FMSHA is the ventilation of methane in highly concentrated areas so as to prevent injury
3 to mine workers. Also, in *Friends of H. Street v. City of Sacramento*, the court barred
4 plaintiffs' nuisance claims because "California courts have consistently held alleged
5 nuisances arising from the construction, operation and maintenance of streets and
6 highways to be within the protection of section 3482." 20 Cal. App. 4th at 152, 161
7 (1993). Such reasoning plainly does not apply here.

8 **C. Kivalina's Claims Are Not Time-Barred.**

9 This case is not time-barred under any possible statute of limitations. The court
10 thus need not determine which statute of limitations applies. If California law applies as
11 the Utilities contend, the case was timely filed and any argument to the contrary raises
12 fact-intensive questions regarding continuing versus permanent nuisance and regarding the
13 discovery rule that cannot be resolved on a Rule 12 motion. If state law were to be
14 applied, it must be the Alaska limitations period applicable to public nuisance actions,
15 under which this case also was timely filed. If federal law applies, this case is timely
16 under the applicable federal statute of limitations or, at most, presents fact-intensive
17 questions under the discovery rule. The Utilities' statute of limitations argument, which
18 their co-defendants tellingly do not join, must be rejected.

19 **1. The California Statute of Limitations Does Not Bar This Case.**

20 If California law applies, there is no time bar for three reasons. First, Kivalina's
21 public nuisance claim is statutorily exempted from the statute of limitations. Cal. Civ.
22 Proc. Code § 3490 ("No lapse of time can legalize a public nuisance amounting to an
23 actual obstruction of a public right."). This statute exempts municipalities and other
24 public entities from the application of the statute of limitations. *See, e.g., California v.*
25 *Kinder Morgan Energy Partners, L.P.*, 2008 U.S. Dist. LEXIS 15640, at *21 (S.D. Cal.
26 Feb. 29, 2008) (public nuisance action by city seeking damages and other relief for
27 groundwater pollution exempted from statute of limitations by section 3490); *California v.*
28 *Gold Run Ditch & Mining Co.*, 4 P. 1152 (Cal. 1884) ("Nor can [a public nuisance] be

1 legalized by lapse of time.”); *Beck Dev. Co. v. S. Pac. Transp. Co.*, 44 Cal. App. 4th 1160,
2 1216 (1996); *Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1144 (1991);
3 *Turlock v. Bristow*, 103 Cal. App. 750, 755 (1930) (“Neither prescriptive rights, laches nor
4 the statute of limitations is a defense against the maintenance of a public nuisance.”); *see*
5 *also Zack’s, Inc. v. City of Sausalito*, 165 Cal. App. 4th 1163, 1191 (2008) (exempting
6 private party’s public nuisance claim from statute of limitations). The Native Village of
7 Kivalina and the City of Kivalina are indisputably public entities and thus are not subject
8 to a limitations defense in prosecuting a public nuisance.

9 Second, the Utilities recognize the need to determine whether, under California
10 law, the nuisance is a permanent or continuing one in order to resolve their statute of
11 limitations argument. *See* Utilities MTD at 30 n.16. A continuing nuisance is never
12 time-barred. But that issue is far too fact-intensive to be resolved on a motion to dismiss.
13 *See, e.g., Beck Dev. Co.*, 44 Cal. App. 4th at 1222 (“[T]here is no single overriding test
14 for determination whether a nuisance is permanent or continuing. The determination must
15 be made on the facts and circumstances of each case with guidance from the various tests
16 that have been set forth.”). The tests include the abatability of the nuisance, whether the
17 impact will “vary over time,” *id.* at 1218, and whether the nuisance is “an ongoing or
18 repeated disturbance,” *Bartleson v. United States*, 96 F.3d 1270, 1275 (9th Cir.1996)
19 (quotation omitted); *accord Arcade Water Dist. v. United States*, 940 F.2d 1265, 1268 (9th
20 Cir. 1991) (“In determining under California law whether the nuisance is continuing, the
21 most salient allegation is that contamination continues to leach into Arcade’s Well 31.”).

22 Many nuisances have characteristics of both continuing and permanent nuisances
23 and the issue thus requires full factual development. *See, e.g., Bartleson*, 96 F.3d at 1275
24 (nuisance at issue has “the appearance of a continuing nuisance” but also “has aspects of a
25 permanent nuisance”); *Arcade Water*, 940 F.2d at 1268-69 (dismissal of nuisance case was
26 improper where nuisance might be continuing); *see also Kinder Morgan*, 2008 U.S. Dist.
27 LEXIS at *24 n.4 (improper to limit damages to three year period preceding filing of
28 complaint on motion to dismiss on theory of continuing nuisance). Here, although the

1 GAO Report was issued in December 2003, the complaint also alleges that the erosion
2 problem is worsening over time and Kivalina has not yet been forced to evacuate the
3 island. Compl. ¶¶ 4, 17, 185.

4 Third, assuming *arguendo* the Utilities are correct that the nuisance here would
5 prove to be permanent, there still would be numerous factual questions under the
6 California discovery rule. The rule still requires that Kivalina have had knowledge more
7 than three years prior to filing the complaint that it had a *claim* in order to commence the
8 running of the limitations period. See *O'Connor v. Boeing N. Am.*, 311 F.3d 1139, 1147
9 (9th Cir. 2002) (under California law “the discovery rule provides that a limitations period
10 does not commence until a plaintiff discovers, or reasonably could have discovered, his
11 claim”); see also *Bartleson*, 96 F.3d at 1277 (affirming district court holding that statute of
12 limitations for permanent nuisance had not accrued given the proof at trial regarding
13 plaintiffs’ knowledge as to permanency of nuisance). The GAO Report merely identifies
14 global warming as a cause of harm to numerous Alaskan villages but is silent as to the
15 causes of global warming. It says nothing about whether global warming is natural or
16 anthropogenic. Much less does it identify specific industries or corporations as
17 responsible for the problem. Nor have defendants shown that Kivalina reviewed the report
18 or was aware of the portions of it mentioning global warming. Indeed, Kivalina is a
19 remote Arctic subsistence hunting and fishing village where most homes lack running
20 water, not a think tank where government reports are parsed and debated. The GAO
21 Report thus could not have made Kivalina “suspect,” *O'Connor*, 311 F.3d at 1147-48, that
22 global warming was not a natural phenomenon, much less that defendants had caused its
23 injuries. Nor is there any evidence of Kivalina being contemporaneously aware of the
24 report and its passing mention of global warming. The Utilities statute of limitations
25 argument thus fails on numerous grounds. The GAO Report is woefully insufficient to
26 commence the running of the statute of limitations under the discovery rule.

1 **2. If a State Statute of Limitations Applies, It Must Be Alaska's.**

2 The California statute of limitations almost certainly does not apply:

3 Although the general rule is that a federal court sitting in diversity applies
4 the conflict-of-law rules of the state in which it sits, jurisdiction in this case
5 is based on [the Foreign Sovereign Immunities Act], not diversity.
6 Therefore, federal common law applies to the choice of law rule
7 determination.

8 *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991)

9 (quotation and citations omitted). In a non-diversity case such as this, “there is a
10 presumption that the law of the place where the injury occurred applies.” *Id.* at 783.

11 Thus, for example, in *Marshall v. Kleppe*, 637 F.2d 1217, 1222 (9th Cir. 1980), a
12 *Bivens* action under federal common law in which federal question was the sole basis of
13 subject matter jurisdiction, the court held that it would apply the statute of limitation of the
14 state “in which the federal cause of action arises.” It is blackletter law that a cause of
15 action arises in the place where the injury occurs. *Id.* at 1223 (“Marshall suffered his
16 injury in California”); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004) (“[t]he courts
17 unanimously hold that a cause of action sounding in tort arises in the jurisdiction where
18 the last act necessary to establish liability occurred; *i.e.*, the jurisdiction in which injury
19 was received.”) (quotation omitted).

20 Here, the injury occurred in Alaska, which has a six-year limitation period for suits
21 involving waste and trespass to real property. Alaska Stat. § 09.10.050 (2008). In
22 *Fernandes v. Portwine*, the Alaska Supreme Court expanded the six-year limitation period
23 for waste and trespass to real property to include nuisance claims even where there was no
24 direct trespassory invasion. 56 P.3d 1 (Alaska 2002). Trespass has been given both a
25 narrow and broad meaning. *See State Farm Fire & Cas. Co. v. White-Rodgers Corp.*, 77
26 P.3d 729, 731 (Alaska 2003). The narrow meaning refers to an unlawful entry upon the
27 land of another. *Id.* The broad meaning encompasses, in a statute of limitations context,
28 any unlawful interference with one’s person, property or rights. *Id.* Thus, defendants’
 argument based upon an alleged December, 2003 commencement of the running of the
 statute cannot bar this case under the applicable Alaska statute of limitations.

1 **3. Kivalina's Case Is Timely Under the Applicable Federal Statute**
2 **of Limitations.**

3 Where a federal cause of action that contains no statute of limitations arises from a
4 matter of uniquely federal concern and the realities of litigating the federal claim call for a
5 nationally uniform statute of limitations, federal courts will borrow the closest federal
6 limitations period. *See, e.g., Papa v. United States*, 281 F.3d 1004, 1012-13 (9th Cir.
7 2002) (uniform federal statute of limitations required where international humans rights is
8 a matter of federal concern as evidenced by treaties and where "reality of litigating" claims
9 necessitates uniform approach); *Prostar v. Massachi*, 239 F.3d 669, 676-77 (5th Cir.
10 2001); *Int'l Ass'n of Machinists & Aerospace Workers v. TVA*, 108 F.3d 658 (6th Cir.
11 1997) (federal common law case); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080,
12 1099-1100 (N.D. Cal. 2008) (federal common law case). Indeed, the Ninth Circuit has
13 held that "a state statute of limitations should only be applied in the absence of a relevant
14 federal statute of limitations." *Sierra Club v. Chevron USA, Inc.*, 834 F.2d 1517, 1521
15 (9th Cir. 1987); *see also Idaho Conservation League v. Boer*, 362 F. Supp. 2d 1211 (D.
16 Idaho 2004) (relying on *Sierra Club* in Clean Air Act case).

17 Here, the case for application of a uniform federal statute of limitations is strong.
18 First, as defendants concede, there is a uniquely federal interest in the subject of global
19 warming. *See Utilities MTD* at 32-33. Indeed, the United States is party to a treaty that
20 calls for stabilizing atmospheric greenhouse gases at levels that will avoid dangerous
21 interference with the climate and has enacted statutory law calling for emissions
22 reductions. *See supra* Section II.B. Second, the "realities of litigating" a global warming
23 tort case are starkly interstate: the defendants here operate in numerous different states
24 where they emit greenhouse gases, their greenhouse gas emissions are inherently interstate
25 and international in nature due to the rapid dispersal of this form of pollution throughout
26 the atmosphere, and the climatological reaction to this pollution is also inherently
27 interstate and international in nature. Third, the Native Village of Kivalina is not an
28

1 ordinary plaintiff but a federally-recognized Tribe with federal sovereign rights.³⁹

2 By contrast, California has no interest in the application of its statute of limitations
3 here. California is simply the state where some of the defendants are headquartered and
4 where all defendants engage in business. In fact, most of the defendants dispute the
5 allegation that they do sufficient business in California to subject them to personal
6 jurisdiction here. If *arguendo* those personal jurisdiction objections have any merit, then
7 the cases against those defendants would have to be re-filed in their home states and, under
8 the Utilities' argument here that the law of the state where the case is filed applies, the
9 statute of limitations of each of those states would apply. This balkanized approach makes
10 no sense. Rather, this is exactly the kind of interstate scenario that calls for a uniform
11 federal rule. *See, e.g., TVA*, 108 F.3d at 666 (“an action against the TVA such as the one
12 at issue here may well implicate its relations with its employees in many or all of the seven
13 states in which it operates”); *Prostar*, 239 F.3d at 676 (“The application of state
14 conversion law in each of the fifty states would result in widely varying limitations periods
15 . . . [because] cable companies engage in multistate activities”). Indeed, application of a
16 patchwork of state statutes of limitation would frustrate the very national global warming
17 policies that defendants point to throughout their briefs. *See Sierra Club*, 834 F.2d at 1522
18 (national environmental policies frustrated by state statutes of limitations).⁴⁰

19
20 ³⁹ In *Alaska v. Native Village of Venetie Tribal Government* 522 U.S. 520 (1998), the
21 Court held that Alaskan tribal lands are not “Indian country” under 18 U.S.C. 1151 but was
22 careful to observe that its decision dealt only with the land question – not the status of the Tribe
23 itself. *See id.* at 531 n.5 (“it is *the land in question*, and not merely the Indian tribe inhabiting it,
that must be under the superintendence of the Federal Government” in order to be considered
federally-protected “Indian country”) (emphasis added).

24 ⁴⁰ Defendants cite *North Star Steel Company v. Thomas*, 515 U.S. 29 (1995), in which
25 the Supreme Court applied a state statute of limitations to a claim under the Worker Adjustment
26 and Retraining Notification Act (“WARN”). But as the Eleventh Circuit observed, “an action
27 under WARN almost always will involve an incident at a single plant in a single state” and thus
28 *North Star* does not control in an inherently multi-state case such as this. *TVA*, 108 F.3d at 666.
Defendants also cite *Barajas v. Bermudez*, 43 F.3d 1251 (9th Cir. 1994), but in that case the
plaintiffs never identified a federal cause of action as a closer analog than state law, *see id.* at
1256, whereas Kivalina does so here.

1 The relevant federal statute of limitations here is found at 28 U.S.C. § 2415(b),
2 which provides for a six year statute of limitations for trespass actions. Trespass and
3 nuisance are close cousins in environmental cases. *See, e.g., Reynolds Metals Co. v.*
4 *Martin*, 337 F.2d 780, 783-84 (9th Cir. 1964) (holding that trespass and nuisance
5 “overlap” and the “conduct complained of is both a trespass and a nuisance”). Federal
6 common law trespass is a particularly broad doctrine. *See United States v. Pend Oreille*
7 *Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1550 n.8 (9th Cir. 1994) (“The Supreme Court has
8 recognized a variety of federal common law causes of action to protect Indian lands from
9 trespass, including actions for ejectment, accounting of profits, and damages.”).
10 Alternatively, the three-year statute of limitations of section 2415(b) for an “action for
11 money damages . . . founded upon a tort” would apply if the court were for some reason to
12 reject the trespass limitations period. Although this limitations period is the same length
13 as the California limitation period urged by the Utilities, it is subject to a different
14 discovery rule. *See O’Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1148 (9th Cir. 2001)
15 (distinguishing California law because “we reject an interpretation of the federal discovery
16 rule that would commence limitations periods upon mere suspicion of the elements of the
17 claim”). Section 2415(b) would apply in a federal common law public nuisance case
18 brought by the United States, which is a closer analogy to this federal public nuisance case
19 than state-law public nuisance.⁴¹

20 Here, the Utilities argument, predicated on the December 2003 GAO Report, fails
21 under the applicable six-year statute of limitations. And even if the three-year federal

22
23 ⁴¹ The Clean Air Act and the Clean Water Act are federal codifications of public
24 nuisance but they contain no statutes of limitation. Section 2415 applies to these statutes. *See*
25 *United States v. Dae Rim Fishery Co.*, 794 F.2d 1392, 1394-95 (9th Cir. 1986) (finding six year
26 period of section 2415(a), governing federal contract actions, applicable in Clean Water Act case
27 due to quasi-contractual nature of action for recovery of cleanup costs and resolving issue under
28 three-year general tort provision of section 2415(b) in the alternative); *see also Sierra Club*, 834
F.2d at 1521-22 (citizen suit for civil penalties payable to government under Clean Water Act
governed by five year limitations period of 28 U.S.C. § 2462 applicable to actions by government
for civil penalties).

1 limitations period of section 2415(b) applicable to tort actions generally were to apply, the
2 fact-intensive issue of the discovery rule cannot be resolved on a motion to dismiss. *See*
3 *O'Connor*, 311 F.3d at 1150 (“Courts routinely recognize the ‘fact-intensive nature’ of the
4 determination of when a plaintiff is on notice of a claim.”). As set forth *supra* Factual
5 Background Section C, the factual basis for the Utilities’ limitations argument – the GAO
6 Report – merely mentions global warming as a cause of harm to numerous Alaskan
7 villages but is silent as to the cause of global warming. This is insufficient under the
8 federal discovery rule. *O'Connor*, 311 F.3d at 1150 (denying summary judgment where
9 defendants failed to establish that plaintiff knew or should have known that the
10 defendant’s “contamination was the cause of their diseases”).

11 This case is not time-barred under any applicable limitations period.

12 **D. The Court Should Not Address State-Law Issues.**

13 Because federal common law applies to this interstate pollution case, state
14 common law does not, and cannot, apply. *Ouellette*, 479 U.S. at 488 (“the implicit
15 corollary of [*Milwaukee I*] was that state common law was preempted”); *Nat’l Audubon*
16 *Soc’y v. Dep’t of Water*, 869 F.2d 1196, 1204 (9th Cir. 1988) (“If state law can be applied,
17 there is no need for federal common law; if federal common law exists, it is because state
18 law cannot be used.”) (quoting *Milwaukee II*, 451 U.S. at 313 n.7). Kivalina has pled its
19 state-law claims as a protective measure only in order to prevent the application of *res*
20 *judicata* in a subsequent state court case under state law in the event of a dismissal of the
21 federal claim here.⁴² Kivalina does not wish to litigate its state-law claims in federal court

23 ⁴² *See, e.g., Kale v. Combined Ins. Co.*, 924 F.2d 1161, 1165 (1st Cir. 1991) (“[w]hen a
24 plaintiff pleads a claim in federal court, he must, to avoid the onus of claim-splitting, bring all
25 related state claims in the same lawsuit so long as any suitable basis for subject matter
26 jurisdiction exists.”); *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361, 1368 (7th Cir. 1988)
27 (same); *San Antonio Indep. School Dist. v. McKinney*, 936 S.W.2d 279, 284 (Tex. 1996)
28 (“Because the federal court had jurisdiction to consider McKinney’s omitted state law claims
against the school district and its board of trustees, *res judicata* precludes subsequent litigation of
those claims in state court.”); *ElGabri v. Lekas*, 681 A.2d 271, 280 (R.I. 1996) (“once [the
plaintiff’s] federal action was fully litigated in the United States District Court, he was thereafter

1 because federal common law governs Kivalina's cause of action.

2 If the court should disagree and dismiss the federal claims, it should dismiss the
3 state-law claims without prejudice so Kivalina may re-file them in state court, the proper
4 forum. *See Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991); *Acri v. Varian*
5 *Assocs., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997) (en banc) (district courts should decline
6 jurisdiction over pendent claims when the federal claims are dismissed before trial); *Dean*
7 *v. City of Fresno*, 546 F. Supp. 2d 798, 821 (E.D. Cal. 2008) ("The general rule is 'when
8 federal claims are dismissed before trial . . . pendent state claims should also be
9 dismissed'" (citing cases). Such a dismissal is without prejudice. *See Freeman v.*
10 *Oakland Unified Sch. Dist.*, 179 F.3d 846, 847 (9th Cir. 1999) ("[d]ismissals for lack of
11 jurisdiction should be . . . without prejudice so that a plaintiff may reassert his claims in a
12 competent court.") (citation and internal quotation marks omitted); *People of State of*
13 *California v. Gen. Motors Corp.*, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007)
14 (state-law global warming claims dismissed without prejudice where court dismissed
15 federal claim). In fact, as the Utility defendants concede, this is the *only* proper result if
16 the Court dismisses the federal claims on subject matter jurisdiction grounds. *See Utilities*
17 *MTD* at 31 (citing *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991)). The
18 Court should thus decline to address defendants' arguments of state law.

19 **E. Congress Has Not Preempted Kivalina's State Common Law Nuisance**
20 **Claim.**

21 If the Court decides to address issues of state law on the merits, it should permit
22 Kivalina's state law nuisance claim to proceed because defendants have no plausible
23 argument that it is preempted. There are several ways in which Congress can preempt

24 _____
25 foreclosed in his state action from going forward with any cause of action that could have been
26 joined in his previously litigated federal action."); *McLearn v. Cowen & Co.*, 455 N.E.2d 1256,
27 1257 (N.Y. 1983) (plaintiff permitted to litigate state-law claim following dismissal of federal
28 case arising from same facts only because plaintiff obtained amended order of dismissal from
federal court stating that dismissal was "without prejudice to any claim which plaintiff may have
under state law.").

1 state action: (1) express preemption, where Congress explicitly preempts state law; (2)
2 conflict preemption, where state law conflicts with federal law; and (3) field preemption,
3 where Congress legislates either so comprehensively that it leaves no room for state
4 regulation or where the field is one of dominant federal interest. *Hillsborough County,*
5 *Florida v. Automated Med. Labs. Inc.*, 471 U.S. 707, 713 (1985). None of these exist
6 here.

7 **1. There Is No Express Preemption Because There Is No Explicit**
8 **Preemption Clause In Any Statute Indicating That Congress**
9 **Expressly Preempted Kivalina's Cause of Action.**

9 Defendants do not identify any preemption clause in a federal statute that would
10 expressly preempt Kivalina's cause of action. (The relevant statute is to the contrary; the
11 Clean Air Act includes a saving clause which suggests that it was not meant to supersede
12 preexisting state laws. 42 U.S.C. § 7604(e)). There can be no express preemption without
13 an explicit preemption clause.

14 **2. There Is No Conflict Preemption Because There Is No Conflict**
15 **Between Kivalina's Cause of Action and Any Federal Statute.**

16 Defendants sometimes appear to be suggesting a form of conflict preemption: As
17 the Utility defendants put it, state law is preempted "if there is an actual conflict between
18 federal and state law, or where compliance with both is impossible," *see* Utilities MTD at
19 32, or, as Peabody claims, the appropriate test is "where a state tort action would have a
20 regulatory effect that conflicts with federal law, the tort action is preempted by that federal
21 law" Peabody MTD at 17. However, conflict preemption only exists where there is a
22 specific federal statute that creates a clear conflict with a state tort-law action. In *Geier v.*
23 *American Honda Motor Co.*, 529 U.S. 861 (2000), for example, a case on which
24 defendants rely, the Supreme Court held that the National Traffic and Motor Vehicles
25 Safety Act's standards for phasing airbag technology and other passive-restraints into
26 newly manufactured cars preempted state tort liability by car companies for failure to
27 install airbags. A state-law action imposing liability for a failure to install airbags would
28 "stand as an obstacle to the accomplishment and execution" of the regulation, which

1 mandated a phased deployment of airbags and other equivalent safety devices. *Id.* at 883,
2 886.

3 Here, however, defendants can point to no specific, identifiable conflict with a
4 federal statute. In fact, it is clear that no such conflict exists. Peabody argues that
5 allowing tort liability for greenhouse gas emissions would be inconsistent with
6 “Congress’s authorization of EPA to regulate greenhouse gas emissions under the Clean
7 Air Act, but only after that agency has made a determination that a particular greenhouse
8 gas endangers human health.” Peabody MTD at 17. However, as explained in Section III,
9 the EPA has *not yet decided* whether to make an endangerment finding with respect to
10 greenhouse gases under the Clean Air Act. There cannot possibly be preemption in that
11 situation. “State law is not preempted whenever an agency has merely ‘studied’ or
12 ‘considered’ an issue; state law is preempted when federal *law* conflicts with state law.”
13 *Fellner*, 539 F.3d at 254. There is no preemption even where the agency affirmatively
14 decides not to regulate because such a decision simply means that the conduct did not
15 satisfy the criteria for regulation in the statute, *see Sprietsma v. Mercury Marine*, 537 U.S.
16 51, 60-62, 66-68 (2002); there can be even less of a preemption issue where the agency has
17 not yet made a decision either way.

18 Similarly, the Utility defendants argue that “any state-law damages award would
19 necessarily be premised on a finding that a defendant had exceeded some ‘acceptable’ or
20 ‘reasonable’ cap on emissions.” Utilities MTD at 32. However, that is simply not the
21 case. Kivalina’s action does not seek to impose injunctive relief; it only seeks
22 compensation for the damage it has suffered. The jury will not have to make a
23 determination whether defendants’ emissions are reasonable in some broad public policy
24 sense; rather, they will determine whether the emissions resulted in an unreasonable
25 interference with Kivalina’s use of its property.

1 **3. There Is No Field Preemption Because The Federal**
2 **Government Has Not Comprehensively Occupied the Field of**
3 **State-Law Nuisance Actions.**

4 At times, defendants appear to be arguing on a theory of field preemption. For
5 example, the Utility defendants argue that Congress has a “coordinated, comprehensive
6 national scheme.” Utilities MTD at 33. But this scheme is nothing more than the
7 hodgepodge of regulations and executive orders discussed in Section II.B. Generally, in
8 order for federal field preemption to occur, the field must already be occupied by a federal
9 statute “so pervasive” that it leaves “no room for the States to supplement it” or the federal
10 interest in the subject must be “so dominant that the federal system will be assumed to
11 preclude enforcement of state laws on the same subject.” *Rice v. Santa Fe Elevator Corp.*,
12 331 U.S. 218, 230 (1947). Of course, in order for this to occur, there must be a
13 “pervasive” federal statute or “federal system” in place. The defendants have not
14 identified any such statute or system which meets this criteria. The CAA does not meet
15 this criteria for the reasons identified in Section II.B, and several courts have expressly
16 held that the CAA does not preempt state common-law claims for pollution damages. *See*,
17 *e.g., Her Majesty the Queen in Right of the Province of Ontario v. Detroit*, 874 F.2d 332,
18 342-44 (6th Cir. 1989); *Technical Rubber Co. v. Buckeye Egg Farm, L.P.*, No.
19 2:99-CV-1413, 2000 U.S. Dist. LEXIS 8602, at *16 (S.D. Ohio June 16, 2000); *Gutierrez*
20 *v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1285 (W.D. Tex. 1992). The CAA explicitly
21 foresees a role for state action: It was Congress express purpose to “encourage or
22 otherwise promote reasonable Federal, *State, and local* governmental actions, consistent
23 with the provisions of this act for pollution prevention.” 42 U.S.C. § 7401(c) (emphasis
24 added). *See Nat’l Audubon Soc’y v. Dept. of Water*, 869 F.2d 1196, 1213 (9th Cir. 1988)
25 (Reinhardt, J., dissenting) (citing 42 U.S.C. §§ 7409, 7410 (1982)) (noting that the Clean
26 Air Act “continues to rely primarily on national air quality standards *that are implemented*
27 *through state plans.*”) (emphasis added). Although it only expressly applies to the
28 citizen-suit provision, the saving clause, which states that “[n]othing in this section shall

1 restrict any right which any person (or class of persons) may have under any statute or
 2 common law to seek enforcement of any emission standard or limitation *or to seek any*
 3 *other relief* (including relief against the Administrator or a State agency),” 42 U.S.C. §
 4 7604(e) (emphasis added), provides further support that Congress did not intend to
 5 preempt state common law actions.⁴³

6 **4. There Is No Conflict Between Kivalina’s State-Law Nuisance**
 7 **Action and the President’s Foreign Affairs Power.**

8 Finally, defendants argue that a state common law cause of action will somehow
 9 interfere with foreign affairs. Utilities MTD at 34, Peabody MTD at 17-18. However, it is
 10 hard to see how this could be the case – Kivalina’s action will not set an emissions limit,
 11 so there could be no express conflict with any emissions limits the President may
 12 eventually agree to, nor is it clear how compensating Kivalina for its injuries will
 13 somehow affect the President’s power to negotiate whatever treaties he or she will
 14 negotiate related to global warming. Defendants’ authorities on this issue each involve an
 15 express federal policy that clearly conflicts with a state policy: executive agreements with
 16 European nations that clearly conflicted with a California statute regarding insurance
 17 policies for Holocaust victims, *American Insurance Ass’n v. Garamendi*, 539 U.S. 396
 18 (2003); federal standards for escape hatch regulations that clearly conflicted with the
 19 negligence-based standards that would have been imposed in a state lawsuit, *Boyle v.*
 20 *United Technologies Corp.*, 487 U.S. 500 (1988); an attempt by the state of Massachusetts
 21 to impose sanctions on Burma that differed from the federal sanctions regime, *Crosby v.*

22
 23 ⁴³ In fact, even if the CAA were as comprehensive as the CWA Kivalina’s action would
 24 still be saved. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), for example, the
 25 Supreme Court held that the CWA – which the Court declared to have occupied the field of
 26 water pollution in *Milwaukee II* – did not pre-empt all state law nuisance actions but only those
 27 that could lead to inconsistent pollution standards. The Court held that Vermont could not sue
 28 under Vermont nuisance law (among other reasons, because it could result in multiple conflicting
 discharge standards), but Vermont could sue under New York nuisance law because the Clean
 Water Act explicitly permitted states to impose stricter standards on sources located within their
 states. *Id.* at 497-98.

1 *National Foreign Trade Council*, 530 U.S. 363 (2000); or an Oregon statute governing
2 probate procedures in Oregon for foreign residents that effectively required determinations
3 by Oregon courts of the policies of foreign countries, *Zschernig v. Miller*, 389 U.S. 429
4 (1968). Here, however, there is no express executive agreement or treaty with a foreign
5 nation that conflicts with Kivalina's lawsuit. Once more, "there is no federal preemption
6 *in vacuo*," *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S.
7 495, 503 (1988), and defendants have not identified any specific action of the executive or
8 legislative branch, whether in foreign affairs or any other field, that could create a conflict
9 with Kivalina's cause of action.

10 **F. Kivalina Has Stated Proper State Law Claims.**

11 The Utilities challenge Kivalina's state law public nuisance claims. They
12 regurgitate their causation arguments to which Kivalina already has responded. *See*
13 Section I.C.2. They further challenge Kivalina's ability to establish a duty. However, this
14 case sounds primarily in intentional nuisance, not negligent nuisance. Intent is established
15 in nuisance where "the defendant has created or continued the condition causing the
16 interference with full knowledge that the harm to the plaintiff's interests are occurring or
17 are substantially certain to follow." Prosser & Keeton, *supra*, § 87. *See supra* I.C.1.

18 The Utilities also challenge the element of "special injury" that controls whether a
19 private plaintiff may sue in public nuisance. *See* Utilities MTD at 39 (contesting "unique
20 injury").⁴⁴ Assuming *arguendo* that Plaintiffs are considered private plaintiffs, which they
21 are not, Plaintiffs satisfy the traditional public nuisance rule limiting the private right of
22 action to those with special injury. Special injury generally is defined as injury different in
23 kind from that suffered by the general public. *See* Restatement (Second) of Torts §
24 821C.⁴⁵ Physical harm to property or interference with use and enjoyment of property

26 ⁴⁴ Defendants have not argued that there is any "unique injury" requirement under
27 Kivalina's federal common law of public nuisance claim.

28 ⁴⁵ The Utilities distort the meaning of "general public" by narrowly defining it as a subset
of the public that is similarly situated to Kivalina, i.e., other Alaskan villages. *See* Utilities MTD

1 constitutes injury different in kind. *See, e.g., Ariz. Copper Co. v. Gillespie*, 230 U.S. 46,
 2 57 (1913) (“appellee alleged a special grievance to himself affecting the enjoyment and
 3 value of his property rights as a riparian owner”); *City of Portland v. Boeing Co.*, 179 F.
 4 Supp. 2d 1190, 1195–96 (D. Or. 2001) (“When a public nuisance interferes with an
 5 individual’s right to use and enjoy his real property, the individual suffers special injury
 6 and may bring an action against the perpetrator of the nuisance.”) (quotation omitted);
 7 *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs. in Ariz.*, 712 P.2d 914, 918
 8 (Ariz. 1985) (“[A]n injury to plaintiff’s interest in land is sufficient to distinguish
 9 plaintiff’s injuries from those experienced by the general public and to give the
 10 plaintiff-landowner standing to bring the action.”) (citations omitted). The reason for this
 11 rule is that “every plot of land [is] traditionally unique in the eyes of the law.” William L.
 12 Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 1018 (1966). The
 13 Plaintiffs have alleged that they own real property that is being destroyed to such an extent
 14 that the village must relocate or face extermination. Compl. ¶¶ 185-188.⁴⁶ Moreover, the
 15 members of the Native Village of Kivalina are injured in their real property and those
 16 interests are properly represented here by the Tribe under the *parens patriae* doctrine. *See*
 17 *supra* Section I.B.1.

18 Degree also is relevant to the different-in-kind analysis. Restatement (Second) of
 19 Torts § 821C cmt. c (“[I]n determining whether there is a difference in the kind of harm,
 20 the degree of interference may be a factor of importance that must be considered.”).
 21 Plaintiffs have alleged that their village is threatened with destruction such that they must

22
 23
 24 at 39 n.23. This is incorrect. For example, in *In re Exxon Valdez*, 1994 WL 182856 (D. Alaska
 25 Mar. 23, 1994), *aff’d* 104 F.3d 1196 (9th Cir. 1997), cited by the Utilities, the court applied the
 special injury rule by comparing the plaintiffs’ injury to that of all people who “reside in the
 Lower 48 states.” *Id.* at *2.

26 ⁴⁶ Contrary to the Utilities’ assertion, Kivalina has not alleged that its injuries are
 27 “common to native Alaskan coastal villages.” *See* Utilities MTD at 39. Rather, Kivalina has
 28 alleged that the impact of global warming is “more certain and severe” on it than on others in the
 general population. Compl. ¶ 188.

1 relocate or face extermination, *see* Compl. ¶ 185, and thus have injury that is greater in
2 degree than the average member of the general public.

3 Defendants' special injury argument improperly relies on cases addressing indirect
4 economic harm, rather than harm to real property, and thus these cases are not on point.
5 *See 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280,
6 293–94 (N.Y. 2001) (plaintiff suffered pecuniary losses from reduced business related to
7 street closures due to a building collapse); *Koll-Irvine Ctr. Prop. Owners Ass'n v. County*
8 *of Orange*, 24 Cal. App. 4th 1036, 1040 (1994) (plaintiffs suffered "mental anguish, risk
9 of higher insurance premiums, diminished property values and reduced usefulness of its
10 premises"). Similarly, cases not involving harm to the plaintiff's real property are
11 factually distinguishable and unavailing. *See In re Exxon Valdez*, 1994 WL 182856, at *2
12 (D. Alaska Mar. 23, 1994) (no special injury in maritime nuisance case where injury was
13 to natural resources and "[a]ll Alaskans have the right to lead subsistence lifestyles, not
14 just Alaska Natives"), *aff'd* 104 F.3d 1196 (9th Cir. 1997). Plaintiffs have alleged injury
15 different in kind from that of the general public.

16 CONCLUSION

17 For the foregoing reasons, defendants' motions to dismiss should be denied.

18 Dated: September 18, 2008

19
20 Respectfully submitted,

21 LAW OFFICES OF MATTHEW
22 F. PAWA, P.C.

CENTER ON RACE, POVERTY & THE
ENVIRONMENT

23
24 /s/ Matthew F. Pawa
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25
26 *[counsel signatures continue on following page]*
27
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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2008, I caused a copy of the foregoing
PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' RULE 12(b)(1)
AND 12(b)(6) MOTIONS TO DISMISS and PROPOSED ORDER DENYING
MOTIONS TO DISMISS to be delivered to counsel to all parties via the Court's
Electronic Case Filing system.

Dated: September 18, 2008

/S/ Luke W. Cole
Luke W. Cole

**CERTIFICATE OF COMPLIANCE WITH GENERAL ORDER 45
ATTESTATION OF SIGNATURE**

I, Luke W. Cole, hereby attest that concurrence in the filing of PLAINTIFFS'
CONSOLIDATED OPPOSITION TO DEFENDANTS' RULE 12(b)(1) AND 12(b)(6)
MOTIONS TO DISMISS has been obtained from all of the signatories.

Dated: September 18, 2008

/S/ Luke W. Cole
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