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 PEABODY ENERGY CORPORATION

12 UNITED STATES DISTRICT COURT  
 13  
 14 NORTHERN DISTRICT OF CALIFORNIA  
 15  
 16 OAKLAND DIVISION

16	NATIVE VILLAGE OF KIVALINA, <i>et al.</i> ,	)	CASE NO. C08-01138 SBA
17	Plaintiffs,	)	<b>NOTICE OF MOTION AND MOTION TO DISMISS OF DEFENDANT PEABODY ENERGY CORPORATION FOR LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO FED. R. CIV. P. 12(b)(1) AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED PURSUANT TO FED. R. CIV. P. 12(b)(6)</b>
18	v.	)	
19	EXXONMOBIL CORPORATION, <i>et al.</i> ,	)	
20	Defendants	)	
21		)	
22		)	
23		)	
24		)	DATE: December 9, 2008.
25		)	TIME: 1 P.M.
		)	JUDGE: Hon. Sandra B. Armstrong

26 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:  
 27 PLEASE TAKE NOTICE that at 1 p.m. on December, 9, 2008, or as soon thereafter as  
 28

1 the matter may be heard, in the above-entitled court, defendant PEABODY ENERGY  
2 CORPORATION (“Peabody”) will move and hereby does move pursuant to Rules 12(b)(1) and  
3 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing the Complaint with  
4 prejudice.

5  
6 By this Motion and the accompanying Memorandum of Points and Authorities, Peabody  
7 seeks an order dismissing the Complaint with prejudice and without leave to amend.

8 DATED: June 30, 2008  
9  
10 CROWELL & MORING LLP  
11 By: /s/ STEVEN P. RICE  
12  
13 Attorney for Defendant  
14 PEABODY ENERGY CORPORATION  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 Plaintiffs are an Alaskan tribe and an incorporated Alaskan municipality where they  
4 reside, which is located 70 miles north of the Arctic Circle. They have filed an action asking this  
5 Court in California to find that some two dozen companies, including Peabody Energy  
6 Corporation (“Peabody”), are responsible for property damage in Alaska allegedly resulting from  
7 loss of Arctic sea ice. They do so under a “global warming” tort theory that has no basis in  
8 either federal or state law.  
9

10 Peabody moves to dismiss this action pursuant to Rules 12(b)(1) and 12(b)(6) of the  
11 Federal Rules of Civil Procedure because the Court lacks subject matter jurisdiction and  
12 plaintiffs have failed to state a claim upon which relief may be granted. *First*, the Court does not  
13 have subject matter jurisdiction over the lawsuit. Plaintiffs lack Article III standing to bring their  
14 claims because their alleged injury is not fairly traceable to the actions of Peabody. *Second*,  
15 plaintiffs’ claims are nonjusticiable under political question doctrine because climate change and  
16 the related phenomenon of “global warming” are uniquely political in nature, bound up in  
17 questions of this nation’s energy and economic policy, foreign and domestic relations, as well as  
18 interstate and foreign commerce. *Third*, plaintiffs’ claims are either displaced or preempted by  
19 the Clean Air Act and other acts and policies of Congress and the Executive Branch, which  
20 embody a federal policy that would be undermined by allowing so-called tort lawsuits like this  
21 one to proceed, under either a federal or state common law theory.<sup>1</sup> *Fourth*, plaintiffs’ nuisance  
22  
23

24 \_\_\_\_\_  
25 <sup>1</sup> Were this case to proceed, it would pose complex choice-of-law issues. The Court need not  
26 address those issues at this stage, because plaintiffs’ state law claims are defective regardless of  
27 which state’s law applies. The weaknesses of plaintiffs’ state law claims law are illustrated  
28 below using California law; however, Peabody does not concede that California law governs  
plaintiffs’ state law claims.

1 claims fail because the Complaint does not plausibly demonstrate that Peabody caused plaintiffs'  
2 alleged injuries. *Fifth*, plaintiffs cannot show that they have been injured. *Sixth*, where plaintiffs  
3 base their nuisance claims on the emission by Peabody of methane from mining operations, such  
4 conduct is expressly authorized by statute. *Seventh*, plaintiffs' claim of civil conspiracy to  
5 commit a nuisance fails because plaintiffs cannot state the underlying claim for nuisance.  
6 *Eighth*, to the extent the conspiracy is premised on a conspiracy to commit fraud, it fails because  
7 plaintiffs have not pled facts relating to any alleged fraud with the specificity required by Rule  
8 9(b). *Ninth*, the conspiracy claim must also fail as to Peabody because Peabody's alleged actions  
9 are protected by the First Amendment. *Tenth*, plaintiffs' concert of action claim fails because  
10 plaintiffs cannot show that Peabody caused any damages to plaintiffs or encouraged others to do  
11 so.  
12

## 13 **II. BACKGROUND**

### 14 **A. The Climate Change Backdrop**

15 Congress and the Executive Branch have long been focused on the issue of climate  
16 change, as the following brief summary demonstrates.<sup>2</sup>

17 As early as 1978, Congress enacted the National Climate Program Act, 15 U.S.C. § 2901,  
18 *et seq.*, through which it established a national climate program to study climate change.  
19

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20 <sup>2</sup> In deciding this motion, the Court may take notice of laws, proposed legislation, conventions,  
21 rules and other matters of public record. *See, e.g.*, 44 U.S.C. § 1507 (2006) (contents of Federal  
22 Register "shall be judicially noticed"); *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir.  
23 2001) (matters of public record); *Romine v. Diversified Collection Servs., Inc.*, 155 F.3d 1142,  
24 1146 (9th Cir. 1998) (publicly issued letters from an agency); *Green v. United States*, 67 F.2d  
25 846 (9th Cir. 1933) (presidential proclamations); *Yeboah v. United States Dep't of Justice*, 345  
26 F.3d 216, 222 n.3 (3d Cir. 2003) (pending legislation); *County of Suffolk v. First Am. Real Estate*  
*Solutions*, 261 F.3d 179, 189 n.5 (2d Cir. 2001) (same); *Coupe v. Fed. Express Corp.*, 121 F.3d  
1022, 1026 n.3 (6th Cir. 1997) (Federal Register); *Connecticut v. Am. Elec. Power Co.*, 406 F.  
Supp. 2d 265, 268 (S.D.N.Y. 2005) ("*AEP*"), *appeal docketed*, No. 05-5104 (2d Cir. Sept. 22,  
2005).

1 Congress followed in 1980 with the Energy Security Act, 94 Stat. 611, 774-75, through which it  
2 directed the Office of Science and Technology Policy to work with the National Academy of  
3 Sciences to study the impact of fossil fuel consumption and related activities on the Earth's  
4 atmosphere. In 1987, the Secretary of State was charged by Congress to coordinate international  
5 negotiations on the topic of global warming on behalf of the United States. Global Climate  
6 Protection Act, 15 U.S.C. § 2901 note; *id.* § 2952(a). In the same legislation, Congress directed  
7 EPA to propose to Congress a “coordinated national policy on global climate change.” *Id.* §  
8 2901 note. In 1990, Congress enacted the Global Change Research Act, 15 U.S.C. §§ 2931-38,  
9 establishing a ten-year, comprehensive research program to study global climate issues and  
10 trends. Congress has also enacted laws focusing on global warming and its effects with respect  
11 to agriculture, Global Climate Change Prevention Act, 104 Stat. 4058 (1990), and energy,  
12 Energy Policy Act of 1992, 106 Stat. 2776, 3002.  
13  
14

15 In 1992, President George H.W. Bush signed the United Nations Framework Convention  
16 on Climate Change (“UNFCCC”), which stemmed from the 1987 Global Climate Protection Act,  
17 and which the Senate subsequently ratified. *See* UNFCCC art. 2, May 9, 1992, 31 I.L.M. 849, S.  
18 Treaty Doc. No. 102-38 (1992). The UNFCCC brought together an international coalition of  
19 countries to address global warming on the global stage. This convention in turn negotiated and  
20 created the Kyoto Protocol in 1997, which President Clinton signed but which was never  
21 presented to the United States Senate for ratification. Indeed, the Senate passed a resolution  
22 specifically objecting to the Kyoto Protocol. *See* S. Res. 98, 105th Cong. (1997). The Senate  
23 expressed the view that the protocol would harm the U.S. economy by too severely curtailing  
24 carbon dioxide emissions while doing nothing to regulate the emissions of developing nations  
25 such as China and India, both significant emitters of carbon dioxide. Congress subsequently  
26

1 passed a series of laws barring EPA from implementing the Kyoto Protocol. Veterans Benefits  
2 Administration, 112 Stat. 2461, 2496 (1998); 113 Stat. 1047, 1080 (1999); 114 Stat. 1441,  
3 1441A-41 (1999).

4 The current administration has adopted a policy of working in cooperation with other  
5 countries to address global warming and climate change through a “prudent” and “realistic and  
6 effective long-term approach.” Control of Emissions from New Highway Vehicles and Engines,  
7 68 Fed. Reg. 52,922, 52,933 (Sept. 8, 2003). The EPA has stated: “It is hard to imagine any  
8 issue in the environmental area having greater economic and political significance than  
9 regulation of activities that might lead to global climate change.” *Id.* at 52,928. The EPA also  
10 has reaffirmed the view of the Administration that “climate change raises important foreign  
11 policy issues” which are “the President’s prerogative to address,” *id.* at 52,931, and that  
12 “[v]irtually every sector of the U.S. economy is either directly or indirectly a source of  
13 [greenhouse gas] emissions, and the countries of the world are involved in scientific, technical,  
14 and political-level discussions about climate change.” *Id.* at 52,928.

15  
16  
17 Furthermore, the Clean Air Act already provides a means for regulating greenhouse  
18 gases. *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1462 (2007). In *Massachusetts*, the Supreme  
19 Court overturned an EPA denial of rulemaking petition asking the agency to regulate greenhouse  
20 gas emissions from new motor vehicles under section 202(a)(1) of the Clean Air Act. The Court  
21 held that greenhouses gases, including carbon dioxide, fall within the Act’s definition of “air  
22 pollutant,” and thus can be regulated by EPA under certain prescribed circumstances. Because  
23 EPA had previously denied the petition for rulemaking on the basis that it lacked authority to  
24 regulate greenhouse gas emissions under the Clean Air Act for the purpose of addressing climate  
25 change, the petition for rulemaking was remanded back to EPA for reconsideration in light of the  
26

1 Court's opinion.

2 In response to the Court's decision in *Massachusetts*, EPA has announced its intention to  
3 issue an Advance Notice of Proposed Rulemaking to solicit public comment on numerous issues  
4 related to possible regulation of greenhouse gases under the Clean Air Act, including possible  
5 regulation of sources other than motor vehicles. See Letter from Stephen L. Johnson, EPA  
6 Administrator to Henry A. Waxman and Tom Davis, U.S. Representatives (March 27, 2008),  
7 available at <http://oversight.house.gov/documents/20080327170233.pdf>.

9 Not only does the Clean Air Act allow EPA to regulate greenhouse gas emissions,  
10 Congress has been actively debating comprehensive legislation focused specifically on  
11 greenhouse gas emissions and the broader issue of climate change. See Climate Security Act, S.  
12 3036, 110th Cong. (2008); see also Climate Stewardship and Innovation Act of 2007, S. 280,  
13 110th Cong. (2007); Low Carbon Economy Act of 2007, S. 1766, 110th Cong. (2007); Electric  
14 Utility Cap and Trade Act of 2007, S. 317, 110th Cong. (2007); Global Warming Pollution  
15 Reduction Act, S. 309, 110th Cong. (2007).

17 In other words, the political process for addressing climate change issues has long  
18 functioned and continues to function.

19 **B. The Federal Response to Coastal Erosion in Kivalina**

20 Kivalina is the subject of Congressional attention. Over 60 years ago, Congress  
21 empowered the United States Army Corps of Engineers to address conditions caused by coastal  
22 erosion in the United States. Since then, Congress has specifically directed the Corps to assess  
23 and provide technical support to respond to erosion in Alaskan communities, including,  
24 specifically, Kivalina. The Corps' sources of authority and major federal actions include:

- 26 • The Flood Control Act of 1946, Pub. L. No. 79-526, § 14, authorizes the Corps to

1 provide emergency shore protection, and the Rivers and Harbors Act of 1962,  
2 Pub. L. No. 87-874, § 103, authorizes the agency to reduce coastal storm damage.  
3 The Shore Protection Cost Sharing Act of 1946, Pub. L. No. 79-727, also  
4 authorizes the Corps to undertake coastal storm damage reduction projects.

- 4 • Congress has authorized the Corps to provide technical assistance to Native  
5 American Tribes under the Tribal Partnership Program. *See* Water Development  
6 Act of 2000, Pub. L. No. 106-541, § 203.
- 6 • In 2003, Congress authorized and directed the Corps to study coastal erosion in  
7 seven Alaskan communities, including Kivalina. It asked the Corps to report on  
8 several specific issues, including the costs of relocating these communities and  
9 the time period that each community faces for relocation. Congress also directed  
10 the agency to carry out any further necessary studies to address impacts of  
11 erosion. *See* Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7,  
12 H.R. Rep. No. 108-10, at 807 (2003) (Conf. Rep.), S. Rep. No. 107-220, at 23-24  
13 (2002). Congress approved full federal funding for the coastal erosion study. *See*  
14 Energy and Water Development Appropriations Act of 2004, Pub. L. No. 108-  
15 137, § 12 (2003). The Corps submitted a report to Congress on its findings in  
16 April 2006.
- 13 • In 2004, Congress approved full federal funding for the preparation of a baseline  
14 erosion study to coordinate and plan responses and assistance for specified  
15 Alaskan villages – including Kivalina. Consolidated Appropriations Act, 2005,  
16 Pub. L. No. 108-447 (2004). The study is currently ongoing, and the Corps  
17 expects to publish a final report of the study in late 2008.
- 17 • Also in 2004, Congress passed Section 117 of the Consolidated Appropriations  
18 Act of 2005, which authorizes the Corps to carry out, *at full federal expense*,  
19 construction and other projects for storm damage prevention and reduction,  
20 coastal erosion, and ice and glacial damage in Alaska, *including relocation of*  
21 *affected communities and construction of replacement facilities*. *See*  
22 Consolidated Appropriations Act of 2005, Pub. L. 108-447, § 117 (2004).
- 21 • Pursuant to its Section 117 authority, the Corps has developed plans to undertake  
22 a special project in Kivalina that includes construction of a 3,100-foot-long rock  
23 revetment around the city to protect it from coastal erosion. Construction of  
24 approximately 900 feet of revetment is expected to begin in 2008. According to  
25 the Corps, work on the project will start in increments and additional revetment  
26 will be constructed as needed to control erosion – possibly over the next 10 or  
27 more years. The Corps already has prepared an Environmental Assessment and  
28 Finding of No Significant Impact for this project, which was released in

1 September 2007. See U.S. Army Corps of Engineers, *Environmental Assessment*  
 2 *and Finding of No Significant Impact: Section 117 Expedited Erosion Control*  
*Project Kivalina, Alaska* (2007).<sup>3</sup>

- 3
- 4 • In June 2006, the Corps released a final report assessing relocation needs and  
 5 options for Kivalina. U.S. Army Corps of Engineers, *Kivalina Relocation Master*  
*Plan, Final Report* (2006).<sup>4</sup> The investigation and report were conducted  
 6 pursuant to congressional direction. See Consolidated Appropriations Resolution,  
 7 2003, Pub. L. No. 108-7; H.R. Rep. No. 108-10, at 807; S. Rep. No. 107-220, at  
 23-24; Energy and Water Development Appropriations Act, 2004, Pub. L. 108-  
 137; H.R. Rep. No. 108-357, § 112 (2003) (Conf. Rep.).

### 8 C. The Allegations Against Peabody

9 Notwithstanding the political nature of climate change, and the specific mechanisms  
 10 created by Congress to address problems of coastal erosion in Kivalina, plaintiffs now seek to  
 11 hold Peabody and a selected group of other companies liable for the purported effects of climate  
 12 change on Kivalina. Plaintiffs bring claims for public nuisance under the federal common law,  
 13 public and private nuisance under state law, civil conspiracy and concert of action. Among other  
 14 things, plaintiffs ask the Court to award them monetary damages in an unspecified amount, and  
 15 to enter a declaratory judgment for future monetary expenses and damages as plaintiffs may  
 16 incur “in connection with the nuisance of global warming.” Complaint at ¶ 67.  
 17

18 The following allegations form the basis of plaintiffs’ claims against Peabody:

- 19
- 20 • Global warming is destroying the village of Kivalina, and the village will either  
 21 need to be abandoned or relocated at great cost. *Id.* ¶¶ 1, 186.
- 22  
23

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24 <sup>3</sup> Available at  
 25 <http://www.poa.usace.army.mil/en/cw/Kivalina/Kivalina%20Erosion%20Control%20Environmental%20Assessment%20and%20FONSI.pdf>.

26 <sup>4</sup> Available at <http://www.poa.usace.army.mil/en/cw/Kivalina/Kivalina.html>.

- 1 • Greenhouse gases trap atmospheric heat and cause global warming, which in turn  
2 causes arctic ice to melt. The melting of the arctic ice has resulted in the loss of  
3 protection from winter sea storms and increased Kivalina’s vulnerability to  
4 coastal erosion. Coastal erosion risks destruction of structures and infrastructure  
5 in the village, and Kivalina is in danger of flooding. *Id.* ¶¶ 4, 185.
- 6 • Peabody, a Delaware corporation, emits greenhouse gases through mining  
7 operations. *Id.* ¶¶ 52, 53, 177. It produces coal which, through subsequent  
8 combustion, results in additional greenhouse gas emissions. *Id.* ¶ 178.
- 9 • Peabody is seeking to build two additional coal-fired power plants that will burn  
10 additional coal and not capture or store the carbon dioxide released in the process.  
11 *Id.* ¶ 179.
- 12 • Peabody participated in a “campaign” to inform the public that there is scientific  
13 uncertainty about the cause and effects of global warming. *Id.* ¶ 189.

### 11 III. ARGUMENT

#### 12 A. Standard of Review

##### 13 1. Rule 12(b)(1) – Subject Matter Jurisdiction.

14 Where a federal court lacks subject matter jurisdiction over a case, it dismisses under  
15 Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(b)(1). Federal  
16 courts are courts of limited jurisdiction, and the plaintiff always bears the burden of  
17 demonstrating the existence of subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins.*  
18 *Co.*, 511 U.S. 375, 377 (1994). When ruling on a Rule 12(b)(1) motion to dismiss, the Court  
19 may look beyond the complaint to matters of public record. *See White v. Lee*, 227 F.3d 1214,  
20 1242 (9th Cir. 2000).

##### 22 2. Rule 12(b)(6) – Failure to State a Claim.

23 Rule 12(b)(6) requires dismissal “where there is no cognizable legal theory or an absence  
24 of sufficient facts alleged to support a cognizable legal theory.” *Navarro v. Block*, 250 F.3d 729,  
25 732 (9th Cir. 2001). Conclusory allegations are insufficient to defeat a motion to dismiss, and  
26

1 the Court may not draw unreasonable inferences in plaintiffs' favor. *See Cholla Ready Mix, Inc.*  
2 *v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) (citations and quotations omitted). As the Supreme  
3 Court recently declared, plaintiffs' allegations must demonstrate that their right to relief is more  
4 than merely conceivable – it must be *plausible* on its face. *See Bell Atlantic Corp. v. Twombly*,  
5 127 S. Ct. 1955, 1964-65 (2007).

6  
7 **B. Plaintiffs Lack Standing.**

8 Plaintiffs lack standing to pursue their claims. To demonstrate Article III standing,  
9 plaintiffs must show (1) they have suffered an “injury in fact,” meaning a concrete and  
10 particularized injury that is not “conjectural” or “hypothetical”; (2) a credible causal connection  
11 between the injury and the conduct complained of, meaning that the injury is “fairly . . .  
12 trace[able] to the challenged action of the defendant”; and (3) it is “likely” as opposed to  
13 “speculative” that the injury will be “redressed by a favorable decision.” *Lujan v. Defenders of*  
14 *Wildlife*, 504 U.S. 555, 560-61 (1992) (plurality opinion) (internal citations and footnotes  
15 omitted). Plaintiffs fail this test.

17 *First*, plaintiffs fail to plead facts permitting a finding or inference that their alleged  
18 injuries are “fairly traceable” to Peabody. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997). The  
19 Complaint does not allege any facts that permit a finding or inference that *Peabody's actions*,  
20 versus the actions of literally every other greenhouse gas emitter on the planet, today and in the  
21 past, caused erosion of plaintiffs' village.

22  
23 *Second*, the Complaint does not contain any facts permitting a finding or inference that  
24 plaintiffs' claims are redressable by the Court. For this Court to provide plaintiffs their requested  
25 remedy, it would first have to establish its own national policy on climate change and global  
26 warming, since it would have to establish a benchmark by which a jury could fairly weigh the

1 reasonably of defendants' greenhouse gas emissions. In creating its own policy, the Court  
2 would run the risk of contradicting policies established over the course of several decades by the  
3 Congress and the Executive Branch, including policies currently being considered by Congress.  
4 The Court should not accede to plaintiffs' request to invade the province of the other branches on  
5 climate change policy. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992).

6  
7 Another global warming tort suit was dismissed by a federal court on standing grounds.  
8 In *Comer v. Murphy Oil USA, Inc.*, No. 05-436 (S.D. Miss. Aug. 30, 2007) (unpublished) (Exh.  
9 1), *appeal docketed*, No. 07-60756 (5th Cir. Oct. 22, 2007), plaintiffs brought a purported class  
10 action on behalf of a putative class of Mississippi residents and property owners who alleged  
11 damages stemming from Hurricane Katrina. The *Comer* plaintiffs asserted tort claims (including  
12 nuisance claims) against many of the same companies who are defendants in this case (including  
13 Peabody). The *Comer* plaintiffs alleged that defendants' greenhouse gas emissions caused  
14 global warming, which in turn warmed the oceans, increased storms and storm intensity, and  
15 ultimately increased the intensity of Hurricane Katrina, thereby producing the alleged injuries,  
16 including property damage and coastal erosion. The court dismissed the case on standing  
17 grounds, *inter alia*, finding plaintiffs' claims not fairly traceable to defendants. This Court  
18 should reach the same conclusion.  
19

20  
21 **C. The Complaint Raises Nonjusticiable Political Questions.**

22 Although plaintiffs have dressed up this case as a traditional tort action for damages, in  
23 reality plaintiffs ask this Court to usurp the work of Congress and the Executive Branch and  
24 establish the nation's climate change policy. The Constitution prohibits the Court from doing so.  
25  
26

1                   **1. Plaintiffs' Claims Trigger *Baker v. Carr* Political Question**  
2                   **Considerations.**

3                   The political question doctrine “is primarily a function of the separation of powers.”  
4                   *Baker v. Carr*, 369 U.S. 186, 210 (1962). The judiciary has a critical, yet confined, role in our  
5                   tripartite form of government: when cases present political questions, “judicial review would be  
6                   inconsistent with the Framers’ insistence that our system be one of checks and balances.” *Nixon*  
7                   *v. United States*, 506 U.S. 224, 234-35 (1993). Thus, where a case turns on a political question,  
8                   courts lack the subject matter jurisdiction necessary to proceed. *See Schlesinger v. Reservists*  
9                   *Comm. to Stop the War*, 418 U.S. 208, 215 (1974). When political and policy choices are front  
10                  and center, “[t]he responsibilities for assessing the wisdom of such policy choices and resolving  
11                  the struggle between competing views of the public interest are not judicial ones.” *Chevron*  
12                  *U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

14                  The Supreme Court has identified six separate grounds on which a claim is rendered  
15                  nonjusticiable:

16                         (1) a textually demonstrable constitutional commitment of the issue to a  
17                         coordinate political department; or (2) a lack of judicially discoverable and  
18                         manageable standards for resolving it; or (3) the impossibility of deciding without  
19                         an initial policy determination of a kind clearly for nonjudicial discretion; or (4)  
20                         the impossibility of a court's undertaking independent resolution without  
21                         expressing lack of the respect due coordinate branches of government; or (5) an  
22                         unusual need for unquestioning adherence to a political decision already made; or  
23                         (6) the potentiality of embarrassment from multifarious pronouncements by  
24                         various departments on one question.

25                  *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (quoting *Baker*, 369 U.S. at 217). This case  
26                  implicates many of the *Baker* grounds.

27                  The first *Baker* ground is met because resolution of the issues surrounding global  
28                  warming implicate matters that are constitutionally committed to the political branches. Foreign  
29                  policy is committed by the text of the Constitution to the Office of the President. U.S. Const. art.

1 II §§ 2, 3. Congress is empowered to regulate foreign and domestic commerce. U.S. Const. art.  
2 I § 8. The fundamental separation of powers principles embodied in the Constitution would be  
3 meaningless if the judiciary were to take over formulation and implementation of domestic  
4 economic and energy policy and to restrict the President’s international negotiating strategy on  
5 climate change by subjecting lawful business activities to “global warming” tort liability.  
6

7 On the second *Baker* ground, the judicial branch of government is not equipped with a set  
8 of “manageable standards” for resolving the challenges presented by the scientific theories of  
9 global warming. Nor are courts equipped to formulate the nation’s policy on the issue. Plaintiffs  
10 nevertheless ask this Court to find Peabody – a coal producer engaged in legal business conduct  
11 – responsible for emitting certain gases, thereby causing global warming, thereby causing arctic  
12 sea ice to melt, thereby exposing plaintiffs’ village to greater coastal erosion during winter sea  
13 storms.  
14

15 The third *Baker* ground is implicated because an “initial policy determination” (*Jubelirer*,  
16 541 U.S. at 278) regarding global warming theory and regulation is inextricably intertwined with  
17 the Complaint’s request for relief. In suing Peabody on a “nuisance” theory, plaintiffs  
18 effectively ask the Court to rule on our nation’s choices about use of fossil fuels for energy, and  
19 more generally to decide the energy policy of the United States Government. Doing so would  
20 implicate the fourth *Baker* ground, in that it would be tantamount to this Court announcing the  
21 country’s energy policy to Congress and the Executive Branch and directing a new and different  
22 regulatory approach with respect to entities such as Peabody.  
23

24 **2. Other Courts Have Dismissed Similar Cases on Political Question**  
25 **Grounds.**

26 Other courts faced with similar lawsuits have dismissed them, recognizing that the courts  
27

1 are not the appropriate forum to resolve disputes arising out of injuries allegedly caused by  
2 global warming. In *AEP*, the plaintiffs sought abatement of the defendant electric utilities'  
3 alleged "contributions to the phenomenon commonly known as global warming." 406 F. Supp.  
4 2d at 268. The *AEP* plaintiffs alleged that the defendants were the largest emitters of carbon  
5 dioxide in the United States, and asserted (as plaintiffs assert here) that plaintiffs' case was "a  
6 simple nuisance claim of the kind courts have adjudicated in the past." *Id.* at 272. After  
7 analyzing the political question jurisprudence, and taking into consideration the extensive public  
8 track record of executive and congressional action on global warming, the Southern District of  
9 New York court dismissed the action. In the *AEP* court's words, "none of the pollution-as-  
10 public-nuisance cases cited by Plaintiffs has touched on so many areas of national and  
11 international policy. The scope and magnitude of the relief Plaintiffs seek reveals the  
12 transcendently legislative nature of this litigation." *Id.* (emphasis added). As the *AEP* court  
13 recognized, the claims before it could not be adjudicated without addressing the "initial policy  
14 determination[s]" surrounding global warming, determinations which have been and remain "an  
15 undertaking for the political branches." *Id.* at 273-74. The Southern District of Mississippi court  
16 reached a similar conclusion in *Comer*, finding that the claims in that case raised nonjusticiable  
17 political questions. *See* Exh. 1.

20 Likewise, in *California v. General Motors Corp.*, another judge of this Court reached a  
21 similar result. In that case, the State of California sued General Motors and other automakers for  
22 creating or contributing to global warming, which the State of California packaged as a public  
23 nuisance. As in *AEP* and *Comer*, the Court dismissed the claims as raising nonjusticiable  
24 political questions. *California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871, at  
25 \*14 (N.D. Cal. Sept. 17, 2007).

1 The same outcome follows here. It is irrelevant for purposes of the political question  
2 analysis that plaintiffs seek monetary damages rather than abatement or other injunctive relief.  
3 An award of damages is no less a form of regulation than an injunction, a statute or an Executive  
4 Order. “The obligation to pay compensation can be, indeed is designed to be, a potent method of  
5 governing conduct and controlling policy.” *Cipollone*, 505 U.S. at 521. *See also Perry v.*  
6 *Mercedes-Benz of N. Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (“We agree [with our sister  
7 circuit courts] that state damages awards based on tort liability can have a regulatory effect.”)  
8 (alteration added). Where, as here, resolution of plaintiffs’ claims would impinge on the  
9 prerogatives of the political branches of government, the form of relief sought is not  
10 determinative. For this reason, courts routinely dismiss cases seeking monetary damages on  
11 political question grounds. *See, e.g., Bancoult v. McNamara*, 445 F.3d 427, 438 (D.C. Cir. 2006)  
12 (dismissing suit for compensatory and punitive damages against United States and former  
13 government officials for eviction from island of Diego Garcia during the Cold War). *See also*  
14 *Antolok v. United States*, 873 F.2d 369, 383-84 (D.C. Cir. 1989) (“It is the political nature of the  
15 [merits] question, not the *tort* nature of the individual claims, that bars our review and in which  
16 the Judiciary has no expertise.”) (emphasis in original).

17  
18  
19 Indeed, in *California v. General Motors*, the Court addressed this very issue. The State  
20 of California attempted to distinguish *AEP* on grounds that the *AEP* plaintiffs sought equitable  
21 relief, whereas California was seeking damages. 2007 WL 2726871, at \*8. The Court rejected  
22 this distinction, stating that “[r]egardless of the type of relief sought, the Court must still make an  
23 initial policy decision in deciding whether there has been an unreasonable interference with a  
24 right common to the general public.” *Id.* (citation and internal quotation marks deleted). The  
25 Court observed that in order to find for plaintiffs, it would necessarily have to create a standard  
26

1 by which alleged emitters could be judged, which would necessarily require it to weigh  
2 competing interests – environmental, economic, industrial development – which are the  
3 bailiwick of the political branches, not judges and juries. *Id.*

4 Because the questions framing this action “‘uniquely demand single-voiced statement of  
5 the Government’s views,’” they are “political questions that are consigned to the political  
6 branches.” *AEP*, 406 F. Supp. 2d at 274 (citing *Baker*, 369 U.S. at 211). Allowing this lawsuit  
7 to proceed would pit this Court against decades of efforts by the two political branches on the  
8 subject of greenhouse gas emissions.

10 **D. Plaintiffs’ Federal Common Law Claim Is Displaced and State  
11 Common Law Claims Are Preempted.**

12 Plaintiffs’ purported federal common law claim conflicts with, and is therefore displaced  
13 by, federal law and other actions and policies of the political branches. This is true for two  
14 reasons: the claim (1) conflicts with the regulatory approach Congress has opted to take with  
15 respect to global warming; and (2) conflicts with the political branches’ control over our nation’s  
16 foreign policy.

17 **1. The Federal Common Law Claim is Displaced.**

18 Federal courts, unlike state courts, do not have the power to develop and apply their own  
19 rules of decision – they are not common law courts. *See City of Milwaukee v. Illinois*, 451 U.S.  
20 304, 312-13, 317 (1981); *Nat’l Audubon Soc’y v. Dep’t of Water*, 869 F.2d 1196, 1201 (9th Cir.  
21 1988). The notion of a “federal common law” is thus an extremely limited one, and is found  
22 only where Congress has given the courts the power to develop substantive law, or where “a  
23 federal rule of decision is necessary to protect uniquely federal interests.” *Texas Indus., Inc. v.*  
24 *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (emphasis added). For the most part, private  
25  
26

1 rights of action are for Congress to create. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 727  
2 (2004); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Milwaukee*, 451 U.S. at 313 (stating  
3 that *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), stands for the proposition that federal  
4 courts should leave the creation of private causes of action to Congress).

5 This is especially true where (1) the “collateral consequences” of recognizing such an  
6 action would have a potential adverse risk on foreign relations, *Sosa*, 542 U.S. at 727; or (2)  
7 Congress has already addressed the issue at hand and provided a remedy. *Milwaukee*, 451 U.S.  
8 at 314-15; *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994). Both concerns militate in favor  
9 of holding that to the extent a federal common law “global warming” nuisance claim even exists,  
10 it has been displaced by the actions of Congress and the Executive.  
11

12 The past actions of the political branches demonstrate a clear foreign policy objective of  
13 refraining from joining a global alliance to severely curtail carbon dioxide emissions unless the  
14 emissions of developing nations are similarly curtailed. Furthermore, as the Supreme Court  
15 recognized in *Massachusetts v. EPA*, Congress already has provided a mechanism for regulating  
16 domestic greenhouse gas emissions in the Clean Air Act, upon a finding by EPA that such  
17 emissions endanger human health or welfare. *See Massachusetts v. EPA*, 127 S. Ct. at 1462; 42  
18 U.S.C. § 7521(a)(1) (2006). If Congress desires a different approach, it is free to enact new  
19 legislation. What is clear is that Congress has spoken directly on this issue, and there is no room  
20 for the federal courts to craft their own rules of decision.<sup>5</sup> *See Milwaukee*, 451 U.S. at 317. *See*  
21 *also Matter of Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) (citing *Milwaukee* in  
22

23  
24 <sup>5</sup> Were the Court to find plaintiffs’ state law nuisance claims tenable (which it should not for the  
25 reasons stated below), the federal common law claim should be dismissed because there cannot  
26 be both a federal and state common law governing the same conduct. *See National Audubon*,  
869 F.2d at 1204.

1 concluding that “federal common law has been preempted as to every question to which the  
2 legislative scheme ‘spoke directly,’ and every problem that Congress has ‘addressed,’” and  
3 pointing out that “separation of powers concerns create a presumption in favor of preemption  
4 [displacement] of federal common law whenever it can be said that Congress has legislated on  
5 the subject”).

## 7 **2. Plaintiffs’ State Common Law Nuisance Claims Are Preempted.**

8 For similar reasons, plaintiffs’ alternative state law nuisance claims are preempted. It is  
9 fundamental that where a state tort action would have a regulatory effect that conflicts with  
10 federal law, the tort action is preempted by that federal law. *See, e.g., Buckman Co. v. Plaintiffs’*  
11 *Legal Committee*, 531 U.S. 341, 348 (2001). In this case, plaintiffs’ state law nuisance claims, if  
12 successful, would essentially require Peabody to conduct its business operations (should it wish  
13 to avoid recurring liability) in a manner dictated by plaintiffs and this Court. The result would be  
14 regulation of Peabody’s business activities in a manner inconsistent with the policies established  
15 by our national political branches, including Congress’s authorization of EPA to regulate  
16 greenhouse gas emissions under the Clean Air Act, but only after that agency has made a  
17 determination that a particular greenhouse gas endangers human health. Because plaintiffs’ state  
18 law nuisance claims “must yield to the regulation of Congress,” they are preempted. *See Crosby*  
19 *v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000). Permitting 50 conflicting judge-made  
20 legal regimes to develop on top of this federal authority would be inimical to our federal system.  
21

22  
23 As noted above, the regulatory effect of plaintiffs’ nuisance claims would also conflict  
24 with the ability of Congress and the Executive Branch to establish and coordinate the United  
25 States’ foreign policy on global warming. Through the UNFCCC, the Executive Branch, with  
26 the approval of the Senate, adopted a policy of working with other nations, through international  
27

1 bodies, to coordinate a cohesive approach to global warming. *See* UNFCCC, S. Treaty Doc. No.  
2 102-38 (President George H.W. Bush stating: “the global nature of climate change calls for the  
3 widest possible cooperation by all countries and their participation in an effective and  
4 appropriate international response”). It was to this end that, in 1997, the Senate passed a  
5 resolution objecting to the adoption of the Kyoto Protocol. Because the effects of such a tort  
6 regime bear directly on the political branches’ ability to conduct the nation’s foreign policy,  
7 plaintiffs’ state law nuisance claims are preempted. *See, e.g., Am. Ins. Ass’n v. Garamendi*, 539  
8 U.S. 396 (2003); *Crosby*, 530 U.S. at 373 (holding that state laws that stand as an obstacle to the  
9 execution of foreign policy are preempted).

11 **E. The Complaint Does Not Plausibly Demonstrate That Peabody**  
12 **Proximately Caused Plaintiffs’ Alleged Injuries.**

13 Plaintiffs’ nuisance claims under either federal or state common law suffer from  
14 the additional defect that the Complaint does not plausibly demonstrate Peabody  
15 proximately caused any injury allegedly suffered by the plaintiffs. *See Twombly*, 127 S.  
16 Ct. at 1974.

17 Proximate cause is a necessary element of plaintiffs’ nuisance claim. *See Martinez v.*  
18 *Pacific Bell*, 225 Cal. App. 3d 1557, 1565 (Cal. Ct. App. 1990). The concept of “proximate  
19 cause” is a familiar limitation on tort claims, invoked frequently in actions like this to  
20 “eliminate[] the bizarre” and to separate legitimate theories of liability from “various far-fetched  
21 hypotheticals.” *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536  
22 (1995) (citation omitted). As the United States Supreme Court has observed:

23  
24  
25 In a philosophical sense, the consequences of an act go forward to eternity, and  
26 the causes of an event go back to the dawn of human events, and beyond. But  
27 any attempt to impose responsibility upon such a basis would result in infinite  
28 liability for all wrongful acts, and would set society on edge and fill the courts  
with endless litigation.

1 *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 n.10 (1992) (citing W. Keeton, D. Dobbs,  
2 R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984) (internal  
3 quotations and citation omitted)).  
4

5 To establish causation, a plaintiff must show a “direct relation between the injury asserted  
6 and the injurious conduct alleged.” *Id.* at 268. “Proximate causation depends to a great extent  
7 on considerations of the fairness of imposing liability for remote consequences.” *Babbitt v.*  
8 *Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 713 (1995) (O’Connor, J.,  
9 concurring). Where a complaint does not contain facts that would permit an inference that  
10 defendant’s actions were the proximate cause of a plaintiff’s alleged injuries, courts do not  
11 hesitate to dismiss. *See, e.g., Martinez*, 225 Cal. App. 3d at 1566 (“[T]he issue of proximate  
12 cause ... becomes a question of law when the facts of the case permit only one reasonable  
13 conclusion.”) (citations omitted); *Port Auth. of New York and New Jersey v. Arcadian Corp.*, 189  
14 F.3d 305, 317-18 (3d Cir. 1999) (proximate cause determination turns on “mixed considerations  
15 of logic, common sense, justice, policy and precedent,” and that “the court may conclude as a  
16 matter of law that defendants’ actions were not the proximate cause of the plaintiff’s injury”).  
17  
18

19 The indisputable fact that all living organisms, human and animal activity, and advanced  
20 human efforts such as industrial and transportation methods, as well as innumerable planetary  
21 events (such as volcanic eruptions and natural degradation of plant matter), emit greenhouse  
22 gases precludes plaintiffs from showing that Peabody is the proximate cause of their alleged  
23 injuries. Plaintiffs’ Complaint does not plausibly demonstrate, or give rise to a reasonable  
24 inference, that *Peabody’s* emissions of greenhouse gases were a substantial factor in bringing  
25 about plaintiffs’ alleged injuries.  
26

1 Furthermore, plaintiffs must be able to show that their alleged injuries were proximately  
2 caused by *Peabody's conduct*, and not merely the result of the independent and intervening acts  
3 of others. *See Martinez*, 225 Cal. App. 3d at 1565. Although plaintiffs do not clearly allege  
4 precisely what Peabody conduct is the basis for their nuisance claims, to the extent they base  
5 their nuisance claims on Peabody's coal production (and not emissions), such conduct is too far  
6 removed in the chain of causation to have proximately caused plaintiffs' alleged injuries. *See*,  
7 *e.g.*, Complaint ¶ 178 (claiming that Peabody is responsible for "produc[ing] billions of tons of  
8 coal for combustion that has resulted in the emissions of billions of tons of greenhouse gases").  
9 Because plaintiffs cannot state that Peabody's activities constitute a substantial factor in causing  
10 their alleged injuries, plaintiffs' claim for nuisance fails as a matter of law as to Peabody.

11  
12 **F. Plaintiffs' Damages Are Speculative.**

13 Plaintiffs' state law nuisance claims also fail because they do not meet the requirements  
14 of damage. "An essential element of a cause of action for nuisance is damage or injury." *See*,  
15 *e.g.*, *Helix Land Co. v. City of San Diego*, 82 Cal. App. 3d 932, 950 (Cal. Ct. App. 1978) (citing  
16 *Meigs v. Pinkham*, 159 Cal. 104, 109 (1910)); *Jordan v. City of Santa Barbara*, 46 Cal. App. 4th  
17 1245, 1257 (Cal. Ct. App. 1996) (citation omitted).

18  
19 The Complaint purports to seek damages relating to injuries plaintiffs allege from coastal  
20 erosion to compensate them for the costs of relocation. Complaint ¶¶ 1, 250, 260, 264, 266.  
21 Given the ongoing efforts by the federal government to address these issues, plaintiffs' damages  
22 are too speculative to support a claim for relief. *Nat'l Audubon Soc'y Inc. v. Davis*, 307 F.3d  
23 835, 858 (9th Cir. 2002) (affirming dismissal based on plaintiffs' failure to state a claim where  
24 alleged damages rested on increased costs of flood damage that were "highly speculative").  
25  
26





1           **I. Plaintiffs Fail to Plead Facts With Specificity Under Fed. R. Civ. P.**  
2           **9(b).**

3           Although it is not clear from the allegations in the Complaint, to the extent plaintiffs  
4 attempt to state a claim for conspiracy to commit fraud as to Peabody, the claim should be  
5 dismissed because plaintiffs fail to allege any acts of fraud with the specificity required by Rule  
6 9(b) of the Federal Rules of Civil Procedure.<sup>6</sup> *See, e.g., Intel Learning Tech., Inc. v. Beijing*  
7 *Kaidi Educ.*, No. 06-7541, 2007 WL 2288329, \*4 (N.D. Cal. Aug. 9, 2007). A plaintiff cannot  
8 evade the heightened pleading requirements for fraud “by avoiding the use of that magic word.”  
9 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1108 (9th Cir. 2003). Rule 9(b) imposes a  
10 heightened pleading requirement when fraud forms the basis for a claim. *See Vess*, 317 F.3d at  
11 1106 (Rule 9(b) requires notice of “particular misconduct” allowing defendants to “defend  
12 against the charge and not just deny that they have done anything wrong”) (citations and internal  
13 quotation marks omitted).  
14

15           The Complaint offers no specifics about Peabody’s supposedly *misleading* conduct.<sup>7</sup>  
16 Instead, it refers vaguely to the activities of certain trade associations, groups, and organizations  
17 that allegedly represent “the coal industry” or that have the word “coal” in their names. *See, e.g.,*  
18 Complaint ¶¶ 190, 194, 201. The Complaint offers no allegations about Peabody’s supposed role  
19 in these groups, or exactly when, where, or how Peabody contributed to a purported campaign to  
20

21 \_\_\_\_\_  
22 <sup>6</sup> The Complaint states that “[t]here has been a long campaign by power, coal, and oil companies  
23 to *mislead* the public about the science of global warming” and “[t]he purpose of this campaign  
24 has been to enable the electric power, coal, oil and other industries to continue their conduct  
contributing to the public nuisance of global warming by convincing the public at-large and the  
victims of global warming that the process is not man-made when in fact it is.” Complaint ¶ 189  
(emphasis added); *see also id.* ¶ 269.

25 <sup>7</sup> Nor is there any allegation that anyone was actually misled, let alone *by Peabody*. Thus, any  
26 fraud-based conspiracy claim fails for lack of reliance. *See Vess*, 317 F.3d at 1105.

1 mislead the public. In fact, apart from the first paragraph under the Complaint’s “civil  
2 conspiracy allegations,” which alleges that Peabody was one of eight defendants involved in a  
3 campaign to mislead the public about the science of global warming, Peabody is not even  
4 mentioned in the conspiracy allegations. Under Rule 9(b), the conspiracy claim against Peabody  
5 fails. *See Intel Learning Tech.*, 2007 WL 2288329, at \*11 (claims for fraudulent conduct must  
6 allege the precise time, place, and nature of the misleading statements, misrepresentations, or  
7 specific acts of fraud) (citing *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994); *In re GlenFed,*  
8 *Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir. 1994), *superseded by statute on other grounds*,  
9 Private Sec. Litig. Reform Act of 1995, 15 U.S.C. § 78u-4 (2006).  
10

11 **J. Peabody’s Actions Are Protected by the First Amendment.**

12 In defiance of one last constitutional safeguard, plaintiffs seek to regulate speech. In  
13 particular, they seek to forbid the sharing of information with which they do not agree.  
14 Assuming for arguments’ sake that various parties, including Peabody, hatched a plan to cast  
15 doubt in the public’s mind about the science of global warming, they had an absolute right to do  
16 so under the First Amendment.  
17

18 The Complaint alleges a deception of the public about global warming, effectuated  
19 through articles in the *Wall Street Journal*, *Washington Times*, and *New York Times* (Complaint  
20 ¶¶ 191, 218-19), through radio and television campaigns and the mails (*id.* ¶¶ 194, 222), and  
21 through presentations, press releases, and the publication of reports, memos, and newsletters, all  
22 distributed to the public or available for public review (*id.* ¶¶ 204, 205, 207, 212-13, 223, 229).  
23 Plaintiffs allege, in short, that defendants have engaged in the lawful, free exercise of speech on  
24 an issue of profound public interest. *See Vess*, 317 F.3d at 1110 (medical professional  
25 association’s publication of its diagnostic manual and advocacy group’s public campaign touting  
26

1 the benefits of a particular drug were protected speech, notwithstanding alleged conspiracy  
2 consisting of acts of making false statements and misrepresentations, and spreading  
3 misinformation); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446-47 (2d Cir. 2001)  
4 (recognizing that it is well settled that the First Amendment protects “scientific expression and  
5 debate” as much as political or artistic expression) (citation omitted).

6  
7 Plaintiffs’ allegations of “falsity” presupposes that debate regarding the causes and  
8 effects of global warming opinion is both inappropriate and closed to further scientific and  
9 political scrutiny.<sup>8</sup> The airing of opposing and even controversial opinions, however, is the  
10 lifeblood of the First Amendment. Participating in public debate on a matter of public  
11 importance is not tortious, and neither is joining with others to spread one’s message. *See*  
12 *Thornhill v. State of Alabama*, 310 U.S. 88, 101-02 (1940) (“The freedom of speech ...  
13 guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully  
14 all matters of public concern without previous restraint or fear of subsequent punishment.”);  
15 *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982) (“one of the foundations of our  
16 society is the right of individuals to combine with other persons in pursuit of a common goal by  
17 lawful means”).

18  
19 **K. Plaintiffs Fail to State a Claim for Concert of Action.**

20 Plaintiffs’ “concert of action” claim – apparently an attempt to hold Peabody jointly and  
21 severally liable for the whole of plaintiffs’ alleged damages (*see* Complaint ¶ 282) – does not  
22 state a cognizable claim. The concert of action theory of liability was first recognized in  
23 *Summers v. Tice*, 33 Cal. 2d 80 (1948). There, the plaintiff was struck in the eye when two

24  
25 <sup>8</sup> The Complaint itself demonstrates the value of the debate, noting that some of the alleged  
26 “conspirators” re-thought their positions over time. *See, e.g.*, Complaint ¶¶ 209, 243.

1 hunters each negligently shot their guns in his direction. Although plaintiff could not establish  
2 which of the two hunters was directly responsible for his injuries, the court held that he could  
3 recover damages from both. *Id.* at 86. Following *Summers*, California courts have imposed  
4 liability on such grounds only in limited circumstances in which a small number of individuals  
5 engaged in actions occurring over a discrete and brief period of time that caused injury to a  
6 single plaintiff. *See, e.g., Chavers*, 107 Cal. App. 4th at 615. In such circumstances, defendants  
7 are held liable either as a direct participant in the acts which caused injury, or because they  
8 encouraged and assisted the person who directly caused the injuries by participating in joint  
9 activity. *See Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 605-06 (1980).

11 Here, plaintiffs cannot demonstrate that Peabody directly caused any damages or  
12 encouraged others who have. *See* Restatement (Second) of Torts § 876 (concert of action  
13 liability may attach to an actor who personally causes harm to plaintiff as well as one who  
14 “knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or  
15 encouragement to the other”). There is no allegation that Peabody is directly responsible for any  
16 tortious conduct against plaintiffs, and the Complaint is equally devoid of allegations that  
17 Peabody has given “substantial assistance or encouragement” to anyone who has personally  
18 caused harm to plaintiffs. Plaintiffs’ incantation of “conspiracy” is not enough. *See Twombly*,  
19 127 S. Ct. at 1965 (“a formulaic recitation of the elements of a cause of action will not do”).  
20

21 The remedy for plaintiffs’ loss of their lands does not lie in this Court. The Corps noted  
22 in a 2006 Report outlining relocation options for Kivalina that “[i]t has long been apparent that  
23 the island would eventually succumb to natural forces, and that the village would have to be  
24 moved.” U.S. Army Corps of Engineers, *Kivalina Relocation Master Plan, Final Report* ES-1.  
25 No case law supports holding Peabody jointly and severally liable with others under a “concert  
26

1 of action” theory for “the natural forces” that have long been eroding plaintiffs’ homeland, and  
2 this case should not be used as the vehicle for a novel extension of this theory of relief. *See, e.g.,*  
3 *Moore v. Regents of the Univ. of California*, 51 Cal. 3d 120, 142 (1990) (declining to extend  
4 traditional tort principles to cover plaintiff’s novel claim for conversion where issues raised by  
5 plaintiff’s claim were better suited to legislative resolution).  
6

7 **CONCLUSION**

8 The Complaint should be dismissed as to Peabody Energy Corporation for lack of subject  
9 matter jurisdiction and for failure to state a claim.

10  
11 DATED: June 30, 2008

Respectfully Submitted,

CROWELL & MORING LLP

By: /s/ STEVEN P. RICE

14 Attorney for Defendant

15 PEABODY ENERGY CORPORATION  
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**CERTIFICATE OF SERVICE**

1  
2 I, Tracy A. Roman, certify that on June 30, 2008, I electronically filed the foregoing  
3 Notice of Motion and Motion to Dismiss of Defendant Peabody Energy Corporation for Lack of  
4 Subject Matter Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(1) and for Failure to State a Claim  
5 Upon Which Relief May Be Granted Pursuant to Fed. R. Civ. P. 12(b)(6), as well as the  
6 accompanying Proposed Order, through the Court's ECF System and the document is available  
7 for downloading. I also certify that on June 30, 2008, copies of the foregoing documents were  
8 served via U. S. Mail on the following:  
9

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**ATTESTATION OF SIGNATURES**

I hereby attest that I have on file all holograph signatures for any signatures indicated by a “conformed” signature (/S/) within this e-filed document.

/s/ Tracy A. Roman