

Memo: Defenses Asserted in Climate Change Cases

I. Removal

- A. State Claims preempted by the Clean Air Act (CLA)
- B. Preempted by the Outer Continental Shelf Lands Act (OCSLA)
- C. Arise from actions of a Federal Officer
- D. Arise from actions on a Federal Enclave
- E. Incorporate affirmative Federal Constitutional elements imposed by the First Amendment (commercial speech, petition for redress of grievance)
- F. Are related to bankruptcy cases
- G. Are subject to Admiralty jurisdiction

II. Lack of Jurisdiction

- A. Defendants not subject to General jurisdiction in state (not incorporated or PPOB in the state)
- B. Defendants not subject to Specific jurisdiction
 - 1. Claims don't arise from Ds' actions in the state
 - a. Claims based on global greenhouse gas emissions, not local contacts
 - b. 5 largest companies' products account for only 11% of global emissions since the Industrial Revolution—therefore actions in the state account for negligible amount of global emissions contributing to climate change
 - 2. Exercising jurisdiction over Ds unreasonable and conflict with Federalism principles
 - a. It would conflict with home states' jurisdiction over Ds
 - b. Using state's laws to regulate Ds' nationwide/worldwide activities

III. Failure to State a Claim (at pleading stage)

- A. Claims, whether based on production or promotion, are governed by federal common law, rather than state common law (federal law applies to disputes involving interstate air or water pollution). With respect to domestic emissions, congress displaced federal common law with the Clean Air Act. With respect to foreign emissions, foreign policy considerations foreclose any federal common law remedy. (Based on 2nd Circuit's dismissal of New York City's case)

IV. Cases Where Claims Dismissed

- A. New York City v. BP, et.al.

<http://climatecasechart.com/case/city-new-york-v-bp-plc/>

B. King County v. BP, et.al. (voluntarily dismissed with motions to dismiss for lack of jurisdiction and failure to state a claim pending)

<http://climatecasechart.com/case/king-county-v-bp-plc/>

C. Native Village of Kivalina v. ExxonMobil, et.al.

<http://climatecasechart.com/case/native-village-of-kivalina-v-exxonmobil-corp/>