

1 (Doc. 1 ¶ 1.) The Hopi Tribe made their lands available for the mine with the understanding
2 that NGS would create revenues for the Hope Tribe until at least 2044. (Doc. 1 ¶ 1.)
3 Peabody Western Coal Company (“Peabody”) owns and operates the Kayenta Mine, which
4 supplies coal to NGS. (Doc. 1 ¶ 8.) The United Mine Workers of America (“UMWA”)
5 represent approximately 340 employees of the Kayenta Mine. (Doc. 1 ¶ 7.) The Kayenta
6 Mine and NGS are important to the welfare of the Hope Tribe and Page, Arizona. (Doc. 1
7 ¶ 37.) The Kayenta Mine employs 345 people, many Native Americans, and, between it
8 and NGS, supports thousands of jobs and employs 845 people. (Doc. 1 ¶ 37.) The Hopi
9 Tribe receives substantial royalties from the Kayenta Mine. (Doc. 1 ¶ 39.) Other Indian
10 tribes in Arizona also benefit from NGS. (Doc. 1 ¶ 41.)

11 In February 2017, the non-federal NGS owners (the “NGS owners”) announced
12 their intent to close NGS at the end of 2019. (Doc. 1 ¶ 27.) NGS stakeholders began actively
13 looking for buyers willing to run NGS after 2019. (Doc. 1 ¶ 27.) CAWCD, the entity in
14 charge of fulfilling the Central Arizona Project’s (“CAP”) water requirements, which is
15 also NGS’s single, largest consumer, began pursuing alternative sources of power for that
16 need. (Doc. 1 ¶¶ 24, 27, 36.) In November 2017, the Secretary of the Interior asked
17 CAWCD to commit to purchasing its power from NGS after 2019, if NGS remained open,
18 but CAWCD declined. (Doc. 1 ¶ 28.) On April 5, 2018, CAWCD announced at its board
19 meeting that it was not legally obligated to buy power from NGS beyond 2019, even if
20 NGS remained open. (Doc. 1 ¶ 32.) An interested buyer came forward, the Avenue Capital
21 Group and Middle River Power (collectively, “Middle River”), and five other potential
22 buyers expressed interest in buying NGS. (Doc. 1 ¶ 29; Doc. 41 at 10.)

23 CAWCD’s determination that it is not obligated to buy CAP’s power requirements
24 from NGS so long as NGS remains open makes it more likely that both NGS and the
25 Kayenta Mine will close. (Doc. 1 ¶ 36.) It will be less economical for an interested buyer
26 to find sufficient power consumers to replace CAP’s power consumption if CAWCD does
27 not continue buying its power from NGS. (Doc. 1 ¶ 36.) As a result, it will be less
28 economical to run NGS, and a potential buyer’s interest will likely wane. (Doc. 1 ¶ 36.) If

1 a buyer walks away, NGS and the Kayenta Mine would close at the end of 2019 absent
2 unforeseen developments. (Doc. 1 ¶ 36.)

3 **B. Procedural Background**

4 On May 1, 2018, Plaintiffs filed their Complaint. (Doc. 1.) Plaintiffs seek a
5 declaratory judgment against CAWCD and an injunction. They ask the Court to declare:
6 1) that Section 303 of the Basin Project Act obligates CAWCD to acquire CAP's power
7 requirements from NGS so long as NGS remains open and 2) that CAWCD's decision that
8 it is not obligated to purchase CAP's power requirements from NGS is preempted by
9 federal law and is ultra vires. (Doc. 1 ¶¶ 46-48.) They also ask the Court to order that
10 CAWCD acquire CAP's power requirements from NGS so long as NGS remains open.
11 (Doc. 1 at 15 ¶ e.) On July 19, 2018, the Community moved to intervene as a defendant.
12 (Doc. 18.)

13 On August 2, 2018, CAWCD filed its Motion to Dismiss and Request for Judicial
14 Notice. (Docs. 22, 23.) On August 21, 2018, the Court granted the Community's Motion
15 to Intervene (Doc. 35), and the Community filed its Motion to Dismiss (Doc. 36). On
16 September 18, 2018, Plaintiffs filed a Joint Response to CAWCD's and the Community's
17 Motions to Dismiss and its Response to CAWCD's Motion for Judicial Notice. (Doc. 41.)
18 On October 24, 2018, CAWCD and the Community filed their Motions to Dismiss. (Docs.
19 46, 47.) On January 18, 2019, the parties filed a Joint Notice of a Party Interested in
20 Acquiring NGS. (Doc. 48.)

21 **II. Standard**

22 "For purposes of ruling on a motion to dismiss for want of standing, ... courts must
23 accept as true all material allegations of the complaint and must construe the complaint in
24 favor of the complaining party." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir.
25 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). "A Rule 12(b)(1) jurisdictional
26 attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th
27 Cir. 2004); see *Thornhill Publ'g Co. v. Gen. Tel. & Elecs.*, 594 F.2d 730, 733 (9th Cir.
28 1979). "In a facial attack, the challenger asserts that the allegations contained in the

1 complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a
2 factual attack, the challenger disputes the truth of the allegations that, by themselves, would
3 otherwise invoke federal jurisdiction.” *Safe Air for Everyone*, 373 F.3d at 1039.

4 **III. Discussion**

5 **A. Judicial Notice**

6 Although generally a court may not consider matters outside the pleadings in ruling
7 on a motion to dismiss, the court may take judicial notice of matters of public record outside
8 the pleadings. *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986),
9 overruled on other grounds by *Astoria Fed. Sav. & Loan Ass’n. v. Solimino*, 501 U.S. 104
10 (1991); see Federal Rule of Evidence (“Rule”) 201(b)(2) (stating that a court may take
11 judicial notice of facts that are “not subject to reasonable dispute” and which “can be
12 accurately and readily determined from sources whose accuracy cannot reasonably be
13 questioned”). Where judicial notice is requested, and the court receives sufficient
14 information, judicial notice is mandatory. Fed. R. Evid. 201(c).

15 CAWCD seeks judicial notice of its Exhibits 1-4 in its Motion for Judicial Notice.
16 (Doc. 23.) Plaintiffs do not oppose the Court taking judicial notice of those exhibits for the
17 purposes of ruling on CAWCD’s and the Community’s Motions to Dismiss, so long as the
18 exhibits do not turn the motions into ones for summary judgment and are given their
19 appropriate characterization. (*See* Doc. 40.) Therefore, after reviewing the exhibits, the
20 Court grants CAWCD’s Motion for Judicial Notice and will take judicial notice of Exhibits
21 1-4: (1) Amended Navajo Power Marketing Plan issued by the Department of Interior,
22 Bureau of Reclamation, published in the Federal Register at 72 Fed. Reg. 54289 (Sept. 24,
23 2007) (the “Marketing Plan”); (2) Western Contract No. 11-DSR-12296, or, Reclamation
24 Contract No. 1-CU-30-P121 (the “Western Contract”); (3) a November 30, 2017 press
25 release of the Department of the Interior (the “DOI Press Release”); and (4) a letter dated
26 June 1, 2008 from Timothy R. Petty, Ph.D., Assistant Secretary for Water and Science,
27 United States Department of the Interior, to the Board of Directors and General Manager
28 of the Central Arizona Project (the “Secretary’s Letter”). (Doc. 23, Exs. 1-4.)

1 **B. Motions to Dismiss**

2 Defendant CAWCD and Intervenor-Defendant the Community (the “Defendants”)
3 make substantially the same arguments. Defendants argue that the Court must dismiss
4 Plaintiffs’ Complaint because (1) the Court lacks subject matter jurisdiction; (2)
5 indispensable parties cannot be joined; and (3) it fails to state a claim for relief. (Doc. 22.)
6 Because the Court finds that it lacks jurisdiction, as discussed below, the Court does not
7 address whether indispensable parties are at issue or whether Plaintiffs fail to state a claim.

8 **1. Lack of Standing**

9 Before reaching the merits, the Court must first address Defendants’ standing claim.
10 *AOM Grp., LLC v. Provident Funding Assocs. L.P.*, No. CV-10-605-PHX-MHM, 2010
11 WL 3342020, at *1 (D. Ariz. Aug. 25, 2010) (citing *Steel Co. v. Citizens for a Better Env’t*,
12 523 U.S. 83, 102 (1998)). Article III federal courts are limited to deciding “cases” and
13 “controversies.” U.S. Const. art. III, § 2; *Valley Forge Christian Coll. v. Ams. United for*
14 *Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). The Declaratory Judgment
15 Act’s “case of actual controversy” requirement and Article III’s “case” or “controversy”
16 requirement are the same. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007).
17 The plaintiff bears the burden of establishing the existence of a justiciable case or
18 controversy, and “‘must demonstrate standing for each claim he seeks to press’ and ‘for
19 each form of relief’ that is sought.” *Davis v. Federal Election Comm’n*, 554 U.S. 724, 734
20 (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

21 “Standing is a core component of the Article III case or controversy requirement.”
22 *Barnum Timber Co. v. EPA*, 633 F.3d 894, 897 (9th Cir. 2011) (citing *Lujan v. Defenders*
23 *of Wildlife*, 504 U.S. 555, 560 (1992)). To establish Article III standing: (1) a plaintiff
24 “must have suffered an injury in fact—an invasion of a legally protected interest which is
25 (a) concrete and particularized, and (b) actual or imminent, not conjectural or
26 hypothetical”; (2) “there must be a causal connection between the injury and the conduct
27 complained of—the injury has to be fairly traceable to the challenged action of the
28 defendant, and not the result of independent action of some third party not before the

1 court”; and (3) “it must be likely, as opposed to merely speculative that the injury will be
2 redressed by a favorable decision.” *Lujan*, 504 U.S. at 560-61; *see also Barnum Timber*
3 *Co.*, 633 F.3d at 905.

4 Turning to Plaintiffs’ Complaint, they allege that if CAWCD continues to make
5 statements that it is not obligated to buy power from NGS or enters into power contracts
6 with other suppliers, “CAWCD will make it more likely that NGS will close.” (Doc. 1 ¶
7 34.) They allege that though there are potential buyers, “they may lose interest and walk
8 away in the near future if CAWCD continues to float its responsibility to purchase CAP’s
9 power requirements from NGS. Once the buyers walk, the demise of NGS will be assured.
10 And its closure will wreak havoc [on Plaintiffs].” (Doc. 1 ¶ 34.) In other words, they argue
11 that CAWCD is harming the sale process of NGS by announcing it is not obligated to buy
12 power from NGS (and engaging in the process of searching for alternative power sources).

13 *Injury in Fact.* A plaintiff “must have suffered an injury in fact—an invasion of a
14 legally protected interest which is (a) concrete and particularized, and (b) actual or
15 imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560. Here, Plaintiffs have
16 not stated an injury in fact. They argue their injury in fact is the harm to the ongoing sale
17 of NGS. Specifically, they allege that they “suffer concrete injury from CAWCD’s
18 unlawful actions that directly harm the potential buyers of NGS.” (Doc. 41 at 17.)
19 However, Plaintiffs do not establish how they have a cognizable legal interest in an ongoing
20 sale between potential buyers of NGS and NGS owners. They fail to raise the distinction
21 between potential buyers having a concrete interest in enjoining CAWCD’s alleged
22 unlawful actions and theirs, which is one removed. Indeed, as Defendants argue, in the
23 cases relied upon by Plaintiffs, standing was conferred on parties who were either buyers,
24 sellers, or otherwise had some stake in the sale process itself. While the potential buyers in
25 this case—third parties—would likely have standing, Plaintiffs do not account for their
26 position as reapers of the benefits from the risks associated in the sale process felt by the
27 potential buyers.

28

1 For example, in *Clinton v. City of New York*, 524 U.S. 417 (1998), the Supreme
2 Court found that a farm cooperative had standing, at least in part, because it was engaged
3 in ongoing negotiations with the owner of a processing plant and was actively searching
4 for other processing facilities to purchase. Specifically, it held that the cooperative had
5 been deprived of a “statutory bargaining chip,” which inflicted “a sufficient likelihood of
6 economic injury to establish standing under our precedents.” *Id.* at 432. In *Northeastern*
7 *Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666
8 (1993), the Supreme Court found an injury in fact where the party could not “compete on
9 an equal footing in the bidding process....” In *CAWCD v. EPA*, 990 F.2d 1531, 1538 (9th
10 Cir. 1993), the Ninth Circuit held that CAWCD had standing because, though its harm
11 might have been indirect, it was obligated to reimburse the Government for a portion of
12 NGS’s compliance costs. In *Bryant v. Yellen*, 447 U.S. 352, 367-68 (1980), the Supreme
13 Court found that landowners had standing, or a sufficient stake in the outcome of the
14 controversy, because the owners wished to purchase the land at issue.

15 In sum, the cases Plaintiffs hang their injury in fact claim on show that courts have
16 found Article III standing where an aggrieved party was either a buyer or seller, attempting
17 to buy or sell, or somehow established a connection, *i.e.*, in privity, to the sale process so
18 as to adequately allege a “concrete injury” under this theory. Plaintiffs do not share that
19 critical factor. Plaintiffs do not allege that they are a buyer of NGS, they have any authority
20 to sell or are participating in the sale negotiations, or have otherwise induced some stake
21 in the sale process, other than, assuming a sale of NGS both happens and goes south,
22 Plaintiffs will, admittedly, be detrimentally affected. The cases relied upon by Plaintiffs,
23 however, do not support that the latter is a sufficient injury. Accordingly, Plaintiffs have
24 not met their burden to show an injury in fact.

25 *Traceability.* To establish traceability, “there must be a causal connection between
26 the injury and the conduct complained of—the injury has to be fairly traceable to the
27 challenged action of the defendant, and not the result of independent action of some third
28 party not before the court.” *Lujan*, 504 U.S. at 560. Plaintiffs argue that their injuries are

1 fairly traceable to CAWCD because CAWCD’s conduct will likely make a sale of NGS
2 less likely because a “potential buyers’ interest will likely wane” due to its largest
3 consumer taking its business elsewhere. (Doc. 41 at 20.) Therefore, it is more likely that
4 NGS will not be sold, which would result in the Kayenta Mine closing, the Hopi Tribe
5 losing money, and UMWA workers losing their jobs (among other hardships). (Doc. 41 at
6 20.) To support these claims, Plaintiffs cite to Middle River’s letter to CAWCD, which
7 states that, based on “public comments,” Middle River envisioned that CAWCD would
8 retain its existing ownership interest in NGS and would continue to utilize its share of the
9 plant. (Doc. 1, Ex. D.) It also argues that, with CAWCD taking its business elsewhere, “it
10 will be difficult for the interested buyer to find sufficient power consumers to replace
11 CAP’s power consumption” because CAP is its single, largest consumer of power. (Doc.
12 41 at 20.) In response, CAWCD argues that it is “illogical to suggest theoretical potential
13 buyers” will care about CAWCD’s power purchasing decisions. (Doc. 22 at 7.) Similarly,
14 the Community argues that the NGS owners’ decision to close NGS, despite its largest
15 consumer still intact, renders speculative Plaintiffs’ claims that future decisions of potential
16 buyers about the feasibility of NGS operations will depend on CAWCD’s purchasing NGS
17 power. (Doc. 36 at 15.)

18 Simply following Plaintiffs’ chain of causation evidences the speculative nature of
19 traceability here. Plaintiffs are correct in that actions by third parties may not defeat
20 causation on that basis alone; but, Plaintiffs acknowledge that “the links [may not be]
21 hypothetical or tenuous.” (Doc. 40 at 19, citing *Wash. Env’tl. Council v. Bellon*, 732 F.3d
22 1131, 1141-42 (9th Cir. 2013)). While the Court disagrees with Defendants to the extent
23 they argue it is “illogical” or of little importance that CAWCD, the entity controlling
24 NGS’s largest consumer of power, will not be an important factor a potential buyer will
25 likely consider, the Court does agree with Defendants that it is speculative to guess to what
26 extent the potential buyer might consider that factor more substantial than another.

27 The Court finds that, here, the causation chain is simply too weak. Even accepting
28 as true that (1) CAWCD’s conduct will *likely* make a sale of NGS *less likely* (2) because a

1 potential buyer's interest will *likely* wane (3) due to NGS's largest consumer of power
2 taking its business elsewhere, (4) which *would* result in NGS's closure (and then the
3 Mine's), the Court cannot say that "[CAWCD's] action[s are] 'substantially likely' to cause
4 [Plaintiffs'] injuries despite the presence of intermediary parties." *CAWCD*, 990 F.2d at
5 1538. Indeed, assuming as true that CAWCD will make a sale of NGS less likely, so to
6 would the fact that no potential buyer could come forward, or that a potential buyer would
7 not want to buy NGS because of pending, relevant legislation, or that the NGS owners will
8 not agree to certain sales terms—the list goes on. Plaintiffs argue that they "do not need to
9 plead or prove that NGS would be sold but for CAWCD's illegal actions." (Doc. 41 at 18.)
10 Even so, however, they are required to show that it is "substantially likely" that CAWCD's
11 actions are the cause of the harm to the ongoing sale process, which they cannot do.

12 CAWCD is not the only party who will or could have a detrimental impact on the
13 sale process—the NGS owners and potential buyers (or lack thereof) are the parties who
14 will determine what happens in the sale process. Though Plaintiffs attempt to confine their
15 "harm" to that only CAWCD is inflicting on the sale process, that necessarily requires the
16 assumption that potential buyers will consider their status as the providers of the largest
17 consumer of power as the most influential or at least substantial factor in determining
18 whether to pursue or consummate a sale. But, as evidenced by Plaintiffs, Middle River
19 knew that CAWCD had stated its intent to and was indeed looking for other power sources
20 and, yet, it decided to press on in the negotiations nonetheless.

21 While the Court accepts as true that a potential buyer will be more inclined to want
22 to buy NGS with its largest consumer intact, so to could a buyer be more inclined to want
23 to buy if state legislatures do not pass environmental laws that could negatively affect
24 NGS's viability. In other words, who is to say that having NGS's largest consumer "intact,"
25 so as to make it more economical to run than if not, is a more significant or the motivating
26 factor in a potential buyer's decision to buy? Even if it were, that does not account for the
27 NGS owners' decisions about what offer they might be willing to accept from a buyer. In
28 other words, while it is not speculative to conclude that a potential buyer is more likely to

1 buy a power plant with its largest customer intact, it is speculative to conclude that that
2 factor is what is substantially causing the harm to Plaintiffs. The argument that “if the
3 potential buyers walk away, NGS and Kayenta would close at the end of 2019 absent
4 unforeseen developments” demonstrates the issue. (Doc. 1 ¶ 36.) One, if a potential buyer
5 walks away, there is no way to trace the harm, or, rather, why that buyer walked away, to
6 CAWCD’s alleged illegal actions. Second, as Plaintiffs agree, NGS is already destined to
7 close in 2019. The Court simply cannot say, with any degree of certainty, that CAWCD’s
8 alleged illegal actions, as opposed to third parties, would be the significant factor in causing
9 a potential buyer to walk away from a deal or otherwise “harm” the ongoing sale process.
10 Therefore, Plaintiffs have not met their burden on traceability.

11 *Redressability.* Redressability requires that “it must be likely, as opposed to merely
12 speculative that the injury will be redressed by a favorable decision.” *Lujan*, 504 U.S. at
13 561. Plaintiffs do not need to demonstrate that their injuries *will* be redressed, but they do
14 need to show a significant increase in the likelihood that the plaintiff would obtain relief
15 that directly redresses the injury suffered in order to establish Article III standing. *Novak*
16 *v. United States*, 795 F.3d 1012, 1019-20 (9th Cir. 2015) (quoting *ASARCO Inc. v. Kadish*,
17 490 U.S. 605, 615 (1989)). “There is no standing if, following a favorable decision,
18 whether the injury would be redressed would still depend on ‘the unfettered choices made
19 by independent actors not before the courts.’” *Id.* at 1020.

20 Here, Plaintiffs’ injuries are not likely to be redressed by a favorable decision
21 because a declaration that CAWCD must continue buying power from NGS, and a court’s
22 order to that effect, will not make it likely that the harm to the ongoing sale process would
23 be eliminated. Indeed, even if CAWCD were to continue buying power from NGS so long
24 as it was open, the sale process could be “harmed” by either the NGS owners or the
25 potential buyers. This is also assuming that any potential buyer would consider CAWCD’s
26 purchasing power to be more of an influence in their decision about whether to pursue and
27 consummate a sale than another factor. While Plaintiffs argue that the sale process would
28 no longer be hindered by CAWCD’s alleged unlawful conduct, as already analyzed, there

1 is no way to discern how much “harm” CAWCD would inflict due to their alleged unlawful
2 actions as opposed to third parties’ independent decisions. In sum, the Court finds that it is
3 not likely that an order from this Court would reduce the probability of the injuries. Thus,
4 Plaintiffs do not meet their burden on redressability.

5 **IV. Conclusion**

6 For the reasons stated above CAWCD’s and the Community’s Motions to Dismiss
7 are granted. Accordingly, Plaintiffs’ Complaint is dismissed for want of subject matter
8 jurisdiction. However, Plaintiffs are given leave to amend solely to address standing.

9 Accordingly,

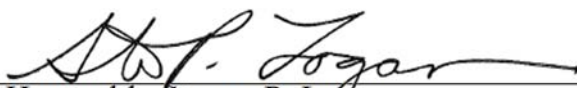
10 **IT IS ORDERED:**

- 11 1. That Defendant Central Arizona Water Conservation District’s Motion to
12 Dismiss (Doc. 22) is **granted**;
- 13 2. That Defendant Central Arizona Water Conservation District’s Motion for
14 Judicial Notice (Doc. 23) is **granted**; and
- 15 3. That Intervenor-Defendant Gila River Indian Community’s Motion to
16 Dismiss (Doc. 36) is **granted**.

17 **IT IS FURTHER ORDERED:**

- 18 4. That Plaintiffs’ Complaint is **dismissed**;
- 19 5. That Plaintiffs have until **April 19, 2019** to file an amended complaint; and
- 20 6. That Defendants have **three weeks** from the date Plaintiffs file an amended
21 complaint to file respective motions to dismiss.

22 Dated this 31st day of March, 2019.

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24 
25 Honorable Steven P. Logan
26 United States District Judge
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