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17 *Inc., Hydro-Resources, Inc., and Squire*
18 *Motor Inns, Inc.*

19 **IN THE UNITED STATES DISTRICT COURT**
20 **DISTRICT OF ARIZONA**

21 Havasupai Tribe,
22
23 Plaintiff,
24
25 vs.

Case No. 3:16-cv-08290-GMS
MOTION TO DISMISS

26 Anasazi Water Co., L.L.C., Cataract
Natural Reserve Land, LLC, City of
Williams, William Collins, William &
Lorraine Collins Family Trust, Grand
Canyon Equipment, Inc., Energy Fuels
Resources (USA) Inc., EFR Arizona Strip
LLC, Halvorson-Seibold, Inc., Hydro-
Resources, Inc., Jentri LLC, Lure Maker,
LLC, Pernell McGuire, McGuire
Investments LLC, Alvin J. Reed,
Christine G. Reed, Squire Motor Inns, Inc.,
Randy Topel, Topel Properties LLC,
Defendants.

1 Defendants Halvorson-Siebold, Inc., Hydro-Resources, Inc., and Squire Motor
2 Inns, Inc. ("Defendants"), through their attorneys, undersigned, and pursuant to Rules
3 12(b)(6) and 12(b)(7), Fed. R. Civ. P., hereby move to dismiss the above-captioned
4 Complaint filed by Plaintiff Havasupai Tribe. The Havasupai Tribe has launched a novel,
5 misguided effort to establish its asserted, unquantified water rights claims to a tributary of
6 the fully allocated Colorado River by suing a handful of well-owners located between 40
7 and 80 miles away on the Coconino Plateau. While perhaps well meaning, the Tribe
8 cannot accomplish its aims in the lawsuit it has brought. For the reasons explained more
9 fully in the attached Memorandum of Points and Authorities, the Tribe's lawsuit (i) does
10 not state a claim against the named defendants upon which relief can be granted, and (ii)
11 fails to join numerous parties that are indispensable to a proper water rights adjudication
12 or settlement. It is not the proper legal course for the Tribe to take to establish its water
13 rights. Because all defendants are similarly situated -- each is alleged to be a well owner
14 far from the Tribe's land who collectively do not comprise the class of potential water
15 rights claimants -- the Complaint cannot proceed against any of them and must be
16 dismissed in its entirety.

17 RESPECTFULLY SUBMITTED this 3rd day of January, 2017.

18 By s/ Jeremy A. Lite

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Inns, Inc.*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Hydro-Resources, Inc. is certificated by the Arizona Corporation
4 Commission ("ACC") to be the water utility service provider for the town of Tusayan,
5 Arizona, gateway to Grand Canyon National Park. [See ACC Decision No. 74742
6 (September 15, 2014), at p. 52 (attached hereto as Exhibit A)]. As the certificated water
7 utility service provider, Hydro-Resources is required by the ACC to provide water to the
8 residents and visitors of Tusayan, as well as to the Grand Canyon National Park Airport.
9 Hydro-Resources also supplies water utility service to at least six fire hydrants. [*Id.*, p.
10 36]. The Tribe's effort to enjoin the use of groundwater wells would, if successful,
11 effectively shut down all water utility service in Tusayan, including water used for
12 residents, visitors, airport operations, and fire suppression, would contravene orders of the
13 ACC, and would make the South Rim of the Grand Canyon inaccessible to all but the
14 most intrepid.¹

15 Defendant Squire Motor Inns, Inc. is a Washington corporation that owns and
16 operates the Best Western Premier Grand Canyon Squire Inn in Tusayan, a 318-room
17 hotel providing lodging to thousands of visitors to the Grand Canyon every year. [*Id.*, p.
18 7]. Defendant Halverson-Siebold, Inc. is, like the other defendants, allegedly the owner of

19 ¹ This background information is derived from public records and is provided so the Court
20 and parties understand the extreme nature of the Tribe's action. The information is not
21 specifically necessary for the Court to dismiss the Complaint on the legal grounds asserted
22 below. Therefore, it does not convert this Motion to Dismiss into a motion for summary
23 judgment. See *Little Gem Life Sci., LLC v. Orphan Med., Inc.*, 537 F.3d 913, 916 (8th Cir.
24 2008) (ruling that the court can consider public records without converting a motion under
25 Rule 12(d) when records are background facts, do not contradict the complaint, and are
26 not critical to the outcome of the motion). In addition, since this Motion is also brought
under Rule 12(b)(7), the court may go outside the pleadings and look to extrinsic evidence
and documents when ruling on a motion to dismiss for failure to join a necessary party.
See, e.g., *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960); *Davis Cos. v. Emerald
Casino, Inc.*, 268 F.3d 477, 480 n.4 (7th Cir. 2001).

1 a well on the Coconino Plateau. [Compl. (ECF No. 1), ¶ 12]. The Tribe's lawsuit poses
2 an existential threat to water utility service, to the hotel, and to the community as a whole.

3 Plaintiff Havasupai Tribe is a federally recognized Indian tribe located in the
4 Village of Supai, along Havasu Creek, a tributary to the Colorado River. [Compl., ¶¶ 1,
5 6]. In its Complaint, the Tribe seeks relief in the form of a "declaratory judgment that the
6 Tribe has aboriginal and federally-reserved water rights in the full flow of Havasu Creek
7 and the springs, seeps, and streams on its reservation and Traditional Use Lands" and on
8 that basis seeks to prohibit Defendants from operating their wells. [Compl., Prayer for
9 Relief, p. 19]. According to information publicly available from the Arizona Department
10 of Water Resources ("ADWR"), the wells identified in the Tribe's Complaint as subject to
11 their request for injunction (Compl., ¶¶ 7-18) are located approximately 40 to 80 miles
12 away from the Village of Supai, where the Tribe resides. [See Well Location Map
13 prepared from ADWR records, attached hereto as Exhibit B].²

14 The Tribe's action is a direct threat to Defendants and to the survival of the
15 community of Tusayan. The Tribe's long-delayed effort to assert and quantify its water
16 rights is perhaps understandable, particularly since most other tribes in the State of
17 Arizona have already perfected and quantified their water rights claims. But, as explained
18 below, those tribes have done so through other means, through proper channels, and not
19 by suing a handful of distant well owners, to the exclusion of dozens of other necessary
20 parties. Most Indian water rights claims are settled by an Act of Congress. Other claims
21 are defined in comprehensive adjudications involving all of the necessary parties,
22 including units of the federal and state government, or by federal government contract.
23 None are resolved on the backs of distant well owners, whose connection with the Tribe's

24 ² The location of things on maps and the distances between them are both subject to
25 judicial notice. *See U.S. v. Perea-Rey*, 680 F.3d 1179, 1182, n.1 (9th Cir. 2012)
26 (accepting Google map and satellite image and online distance calculation).

1 surface water claims is tenuous at best and who do not come close to comprising the
2 necessary parties for such an adjudication to validly occur.³

3 To be clear, the issue before the Court is not the factual question whether certain
4 wells located far away from Supai are hydrologically connected to Havasu Creek and are
5 having a significant effect on the amount of water there -- assertions which Defendants
6 would vigorously dispute. Instead, the issue presented is whether the Tribe may establish
7 and quantify the water rights it claims through various formative statutes, and seeks in its
8 requested declaratory judgment, by suing a handful of well owners, and the clear answer
9 is that the Tribe cannot accomplish that aim in this lawsuit. If the Tribe believes it has a
10 valid claim to water rights in Havasu Creek and the Grand Canyon, it must establish and
11 quantify them through proper means. In the meantime, the present action must be
12 dismissed.

13 **II. THE COMPLAINT SHOULD BE DISMISSED UNDER RULE 12(b)(6) AS**
14 **IT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE**
15 **GRANTED**

16 **A. The Tribe Cannot Win a Judgment Establishing Its Water Rights by**
17 **Suing the Defendants It Has Named**

18 "A district court's dismissal for failure to state a claim under Federal Rule of
19 Procedure 12(b)(6) is proper if there is a 'lack of a cognizable legal theory[.]'"
20 *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (citing *Balistreri v.*
21 *Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988)). *Accord, e.g., Stitt v. Citibank,*
22 *N.A.*, 942 F.Supp.2d 944, 951 (N.D. Cal. 2013) ("Dismissal may be based on . . . the lack
23 of a cognizable legal theory[.]"). The Havasupai Tribe's effort to win its requested
24 "declaratory judgment that the Tribe has aboriginal and federally-reserved water rights in
the full flow of Havasu Creek and the springs, seeps, and streams on its reservation and

25 ³ In accordance with the Court's Order of December 19, 2016 (ECF No. 11), counsel for
26 Defendants files its Certification of Conferral as Exhibit C hereto. The parties have been
unable to agree that the Complaint is curable by a permissible amendment.

1 Traditional Use Lands" (Compl, Prayer for Relief, page 19) fails to present a cognizable
2 legal theory against the defendants the Tribe has sued.

3 The Ninth Circuit Court of Appeals has criticized the filing of "[s]omething labeled
4 a complaint but written more like a press release." *McHenry v. Renne*, 84 F.3d 1172,
5 1180 (9th Cir. 1996). The same criticism may be leveled here, where the Complaint
6 recounts the Tribe's history in narrative prose but does not, and cannot, identify a legal
7 theory by which the Tribe may perfect and quantify its water rights by suing these
8 Defendants.

9 The Havasupai Tribe's effort diverges significantly from what has been done in the
10 past, and what should be done here, to establish, perfect, quantify, and enforce tribal water
11 rights. Federally-recognized Indian Tribes located within the State of Arizona have
12 invariably sought to establish their water rights through federal legislation, comprehensive
13 adjudication, or federal contract, as summarized in the table below.

14

15 **Table 1: Water Rights of Arizona Tribes**

16 Arizona Tribe	16 Source of Water Right
17 Ak-Chin Indian Community of 18 Papago Indians of the 19 Maricopa, Ak-Chin Reservation	20 Ak-Chin Indian Water Rights Settlement Act of 21 1978; Pub.L. 95-328, 92 Stat. 409 (1978), as 22 amended, Pub.L. 98-530, 98 Stat. 2698 (1984), as 23 amended, Pub.L. 102-497, 106 Stat. 3258 (1992), 24 as amended, Pub. L. 106-285, 114 Stat. 878 (2000)
21 Cocopah Indian Tribe	22 Final Consolidated Decree, <i>Arizona v. California</i> , 23 547 U.S. 150 (2006), and previous decrees entered 24 in that action, including 376 U.S. 340 (1964), 383 25 U.S. 268 (1966), 439 U.S. 419 (1979), 466 U.S. 26 144 (1984), and 531 U.S. 1 (2000)

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Table 1: Water Rights of Arizona Tribes	
Arizona Tribe	Source of Water Right
Colorado River Indian Tribes	Final Consolidated Decree, <i>Arizona v. California</i> , 547 U.S. 150 (2006), and previous decrees entered in that action, including 376 U.S. 340 (1964), 383 U.S. 268 (1966), 439 U.S. 419 (1979), 466 U.S. 144 (1984), and 531 U.S. 1 (2000)
Fort McDowell Indian Community	Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub.L. 101-628, 104 Stat. 4469, 4480 (1990), as amended Pub. L. 109-221, § 104, 120 Stat. 2650 (2006)
Fort Mojave Indian Tribe	Final Consolidated Decree, <i>Arizona v. California</i> , 547 U.S. 150 (2006), and previous decrees entered in that action, including 376 U.S. 340 (1964), 383 U.S. 268 (1966), 439 U.S. 419 (1979), 466 U.S. 144 (1984), and 531 U.S. 1 (2000)
Fort Yuma Quechan Indian Tribe	Final Consolidated Decree, <i>Arizona v. California</i> , 547 U.S. 150 (2006), and previous decrees entered in that action, including 376 U.S. 340 (1964), 383 U.S. 268 (1966), 439 U.S. 419 (1979), 466 U.S. 144 (1984), and 531 U.S. 1 (2000)
Gila River Indian Community	Gila River Indian Community Water Rights Settlement Act (Title II of the Arizona Water Settlements Act of 2004), Pub.L. No. 108-451; 118 Stat. 3478, 3504 (2004) Globe Equity No. 59 Decree in <i>United States v. Gila Valley Irr. Distr.</i> (D. Ariz. 1935)
Hopi Tribe	Participation in the ongoing General Adjudication of all Rights to Use Water in the Little Colorado River System and Source, Apache County (Arizona) Superior Court, Case No. CV6417-201
Hualapai Tribe	Bill Williams River Water Rights Settlement Act of 2014, Pub. L. 113-223, 128 Stat. 2097 (2014)

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Table 1: Water Rights of Arizona Tribes	
Arizona Tribe	Source of Water Right
Kaibab Band of Paiute Indians	Water Agreement between National Park Service and Kaibab Paiute Tribe, April 13, 1972
Navajo Nation	Northwestern New Mexico Rural Water Projects Act (Navajo-Gallup Water Supply Project/Navajo Nation Water Rights), Pub.L. No. 111-11; 123 Stat 991, 1367 (2009) Participation in the ongoing General Adjudication of all Rights to Use Water in the Little Colorado River System and Source, Apache County (Arizona) Superior Court, Case No. CV6417
Pascua Yaqui Tribe	1980 CAP Contract with Department of Interior
Salt River Pima-Maricopa Indian Community	Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub.L. 100-512, 102 Stat. 2549 (1988), as amended, Pub.L. 102-238, 105 Stat. 1908 (1991); 1910 Kent Decree
San Carlos Apache Indian Tribe	San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, 106 Stat. 4600, as amended, Pub. L. No. 103-435, § 13, 108 Stat. 4566 (1994), as amended, Pub. L. No. 104-91, § 202, 110 Stat. 7 (1996), as amended, Pub. L. No. 104-261, 110 Stat. 3176 (1996), as amended, Pub. L. No. 105-18, § 5003, 111 Stat. 158 (1997), as amended, Pub. L. No. 108-451, 118 Stat. 3573 (2004) (Title IV of Arizona Water Rights Settlement Act of 2004) Globe Equity No. 59 Decree in <i>United States v. Gila Valley Irr. Distr.</i> (D. Ariz. 1935)
San Xavier and Schuk Toak Districts, Tohono O'odham Nation (formerly Papago)	Southern Arizona Water Rights Settlement Act Pub.L. 97-293, 96 Stat. 1274 (1982), as amended Pub.L. 102-497, 106 Stat. 3256 (1992)

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Table 1: Water Rights of Arizona Tribes	
Arizona Tribe	Source of Water Right
Tohono O'odham Nation	Southern Arizona Water Rights Settlement Act, Pub. L. 97-293, 96 Stat. 1261 (1982); as amended, Pub.L. 102-497, 106 Stat. 3255, 3526 (1992), Title III of the Arizona Water Settlements Act of 2004 Pub.L. No. 108-451; 118 Stat. 3535 (2004)
White Mountain Apache Tribe	White Mountain Apache Tribe Water Rights Quantification Act of 2010, Pub.L. 111-291, Title III, 124 Stat. 3064, 3073 (2010)
Yavapai-Apache Nation	Participation in the ongoing General Adjudication of all Rights to Use Water in the Gila River System and Source, Maricopa County (Arizona) Superior Court, and related cases
Yavapai-Prescott Indian Tribe	Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub.L. No. 103-434, 108 Stat. 4526 (1994), as amended, Pub. L. 104-91, § 201, 110 Stat. 7 (1996)
Zuni Indian Tribe	Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub.L. No. 108-34, 117 Stat. 782 (2003)

In all of these cases, tribal water rights were or are being asserted and established in a comprehensive adjudication (some of which are ongoing), by federal legislation subject to deliberation, or, rarely, by a federal contract establishing delivery rights. For example, the Navajo Nation and Hopi Tribe are currently participating in the *General Adjudication of All Rights to Use Water in the Little Colorado River System and Source*, pending in Arizona state court. The decisions and decrees in the line of cases in *Arizona v. California*, from 373 U.S. 546 (1963) to 547 U.S. 150 (2006), where certain tribal water rights were recognized, form the heart of the Law of the River, a complex assemblage of case law, legislation, agreements, and decrees. This history does not require exposition

1 here, for nowhere in it is precedent for the present action by the Havasupai Tribe. Even
2 though, on information and belief, the Havasupai Tribe has been assigned a federal
3 negotiating team to assist in perfecting and quantifying the Tribe's water rights through
4 proper legal means, the Tribe has determined not to take the proper course.⁴

5 The Tribe's diversion from the norm is not merely academic. It is legally fatal.
6 The Tribe cannot accomplish the relief it seeks -- "declaratory judgment that the Tribe has
7 aboriginal and federally-reserved water rights in the full flow of Havasu Creek and the
8 springs, seeps, and streams on its reservation and Traditional Use Lands" -- in this action
9 because the relief the Tribe seeks cannot be won from these Defendants. To illustrate the
10 point: If every defendant sued in this action defaulted or conceded to the Tribe's requested
11 declaratory relief, it wouldn't make it so. A perfected and quantified Tribal water right to
12 "the full flow of Havasu Creek and the springs, seeps, and streams on its reservation and
13 Traditional Use Lands" is not something these defendants have the ability to grant to the
14 Tribe; *it is not something the Tribe can sue these defendants to get.*

15 This is the fundamental flaw in the Tribe's action. To state a claim, a plaintiff must
16 plead "a cognizable legal theory" entitling it to relief from the defendants it has sued.
17 *Conservation Force, supra*, 646 F.3d at 1242. "Rule 12(b)(6) authorizes a court to
18 dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S.
19 319, 326 (1989). Where the relief requested cannot be obtained from the defendants who
20 were sued, the complaint does not assert a cognizable legal theory and should be

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22 ⁴ The process of negotiating Indian water rights claims with the assistance of federal
23 negotiators is not moribund. The Department of Interior just held a consultation session
24 with Tribal governments in Phoenix on October 9, 2016, and is accepting written input
25 from Tribes in response to that event through January 31, 2017. See:
26 [https://www.doi.gov/sites/doi.gov/files/uploads/2016-09-09_dear_tribal_leaders-
consultation_2016_iwrs.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/2016-09-09_dear_tribal_leaders_consultation_2016_iwrs.pdf). The Havasupai Tribe can decide for itself whether to
participate in the federal process designed to win formal recognition of its water rights
claims, but suing a handful of distant well owners is not an equally viable option.

1 dismissed. *Conservation Force, supra*, 646 F.3d at 1242. While the Complaint here
2 points to statutes affecting the Tribe and its land use authority, it points to no piece of
3 legislation, no treaty, no case that grants the Tribe its requested "water rights in the full
4 flow of Havasu Creek and the springs, seeps, and streams on its reservation and
5 Traditional Use Lands." The *Winters* doctrine, derived from *Winters v. United States*, 207
6 U.S. 564 (1908), certainly does not convey a perfected, quantified water right to the
7 Havasupai Tribe, nor do any of the statutes or cases cited in its Complaint -- not even
8 allegedly. If they did, the Tribe would not need to request those rights from the Court in
9 this action, but it has.

10 The Tribe's effort to win recognition and quantification of its asserted water rights
11 by suing a handful of well-owner defendants located 40 to 80 miles away cannot lead to
12 the result the Tribe desires to obtain. And since the Tribe cannot achieve through this
13 action its desired declaratory relief, it cannot presume to enforce through a dramatic and
14 damaging injunction the water rights it has yet to perfect or quantify. *See In re General*
15 *Adjudication of All Rights to Use Water In the Gila River System and Source ("Gila*
16 *River")*, 195 Ariz. 411, 421 n.12, 989 P.2d 739, 749 n.12 (Ariz. 1999) ("We . . . reject as
17 premature the argument of the Arizona Tribes that we should immediately enjoin pumping
18 that is [allegedly] depleting water beneath reservations. *Until federal rights are*
19 *quantified*, it cannot be determined which if any of the tribes are entitled to such relief.")
20 (emphasis added). And further, "[t]o solve the conflict and uncertainty that reserved
21 rights engender, *we must quantify them . . .*" *Id.* at 422, 989 P.2d at 750 (emphasis added).
22 On this basis, the action must be dismissed under Rule 12(b)(6).

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1 **III. THE COMPLAINT SHOULD BE DISMISSED UNDER RULE 12(b)(7)**
2 **BECAUSE IT FAILS TO JOIN -- AND CANNOT JOIN -- INDISPENSIBLE**
3 **PARTIES**

4 Even if the Tribe had validly asserted a claim for relief, its failure and inability to
5 join all indispensable parties under Rule 19 is further reason to dismiss under Rule
6 12(b)(7). Rule 19 provides, in relevant part:

7 (a) Persons Required to Be Joined if Feasible.

8 (1) *Required Party*. A person who is subject to service of process and
9 whose joinder will not deprive the court of subject-matter jurisdiction must
10 be joined as a party if:

11 (A) in that person's absence, the court cannot accord complete relief among
12 existing parties; or

13 (B) that person claims an interest relating to the subject of the action and is
14 so situated that disposing of the action in the person's absence may:

15 (i) as a practical matter impair or impede the person's ability to protect the
16 interest; . . .

17 (b) *When Joinder Is Not Feasible*. If a person who is required to be joined if
18 feasible cannot be joined, the court must determine whether, in equity and
19 good conscience, the action should proceed among the existing parties or
20 should be dismissed. The factors for the court to consider include:

21 (1) the extent to which a judgment rendered in the person's absence might
22 prejudice that person or the existing parties;

23 (2) the extent to which any prejudice could be lessened or avoided . . .

24 (3) whether a judgment rendered in the person's absence would be adequate;
25 and

26 (4) whether the plaintiff would have an adequate remedy if the action were
dismissed for nonjoinder.

A motion to dismiss under Rule 12(b)(7) and Rule 19 "poses three successive
inquiries. First, the court must determine whether a nonparty should be joined under Rule
19(a). . . . If an absentee meets the requirements of Rule 19(a), the second stage is for the
court to determine whether it is feasible to order that the absentee be joined. Finally, if

1 joinder is not feasible, the court must determine at the third stage whether the action must
2 be dismissed." *E.E.O.C. v. Peabody Western Coal Co.*, 610 F.3d 1070, 1078 (9th Cir.
3 2010) (internal quotation marks and citations omitted).

4 The State of Arizona has been assigned the right to 2,800,000 acre-feet of water per
5 year from the Colorado River, if available. *See Arizona v. California*, 373 U.S. 546, 565
6 (1963); *Arizona v. California*, 547 U.S. 150, 155 (2006). In that line of cases, the
7 Supreme Court resolved claims by the United States, by several states, by a number of
8 tribes, and other parties. The State of Arizona has been a participant in every water rights
9 adjudication involving tribal water claims within the state and, it is believed, every
10 relevant tribal water rights settlement, as identified in Table 1 above. The Havasupai
11 Tribe cannot hope to establish, perfect, and quantify its water rights claims to a tributary
12 of the fully-allocated Colorado River without involving the State of Arizona, which has
13 millions of acre-feet of water at stake and is a regular participant in such proceedings.⁵
14 Yet, the Tribe cannot sue Arizona in federal court: the Eleventh Amendment to the U.S.
15 Constitution prohibits it. *See Papasan v. Allain*, 478 U.S. 265, 275 (1986) (confirming
16 that, under the Eleventh Amendment, states cannot be sued in federal court, whether by
17 their own citizens or citizens of another state).

18 In addition, much of the vast water right the Tribe seeks is reserved to the United
19 States. The Complaint alleges that many of the seeps and springs comprising the Tribe's
20 claimed Traditional Use Area and related water rights are located within the Grand
21 Canyon National Park, operated by the National Park Service. [Compl., ¶¶ 25, 27, 34, 41,

22 ⁵ The State of Arizona has other interests at stake, in addition to its water rights. The
23 Arizona Department of Transportation owns the Grand Canyon Airport, which receives
24 water utility service from the wells the Tribe wants to shut down and which is used not
25 only for tourism but also for health and safety emergencies. And the ACC, which is an
26 independent body of State government created by the Arizona Constitution, has ordered
Hydro-Resources to provide water utility service within its certificated area using the
same wells the Tribe wants to shut down.

1 and 51]. The Tribe cannot validly establish water rights to seeps and springs in a national
2 park without involving the Department of Interior or other appropriate federal agency.
3 The federal government can be sued in state court to adjudicate water rights claims.
4 Under the McCarran Amendment, 43 U.S.C. § 666, the sovereign immunity of the federal
5 government is waived for the adjudication of water rights in state court, including the
6 adjudication of federal claims and those of federally recognized Indian tribes.

7 Even if the Tribe just went after well owners, which is not a valid scheme, it has
8 omitted scores of them from its lawsuit. A quick search of ADWR records reveals dozens
9 of wells located in the vicinity, including wells owned by the U.S. Forest Service and the
10 State of Arizona, among others, many of them much closer to the Tribe's land than
11 Defendants' wells are, yet most of these well owners have not been sued. [See Map of
12 Area Wells based on data from ADWR, Exhibit D hereto]. Since the Tribe has not
13 initiated a comprehensive adjudication, there are likely to be other unnamed parties who
14 have an interest in the water the Tribe is attempting to claim as its right.

15 Therefore, under Rule 19(a), the Tribe has omitted a number of necessary
16 defendants, including the State, the United States, other well owners, and an unknown
17 number of other potential water rights claimants within reach of its unprecedented water
18 rights claims. Without them -- especially without the State of Arizona and the federal
19 government -- the court cannot accord complete relief and the Tribe cannot win its
20 requested declaratory judgment that it has first priority rights to "the full flow of Havasu
21 Creek and the springs, seeps, and streams on its reservation and Traditional Use Lands"
22 and on that basis may prohibit groundwater use up to 80 miles away. At least one of these
23 primary indispensable parties, the State, cannot be joined because it is not subject to suit
24 in this forum. The first two prongs of the *Peabody* test are satisfied.

25 So is the third. "A nonparty in whose absence an action must be dismissed is one
26 who 'not only [has] an interest in the controversy, but [has] an interest of such a nature

1 that a final decree cannot be made without either affecting that interest, or leaving the
2 controversy in such a condition that its final termination may be wholly inconsistent with
3 equity and good conscience." *Peabody, supra*, 610 F.3d at 1078 (quoting *Shields v.*
4 *Barrow*, 58 U.S. 130, 139 (1855)). A decree establishing the Tribe's asserted water rights
5 cannot be made in the absence of the state and federal parties. And with respect to the
6 state, "[i]f the necessary party enjoys sovereign immunity from suit, some courts have
7 noted that there may be little need for balancing Rule 19(b) factors because immunity
8 itself may be viewed as one of those interests compelling by themselves, which requires
9 dismissing the suit." *Dawavendewa v. Salt River Project, Agr. Imp. & Power Distr.*, 276
10 F.3d 1150, 1162 (9th Cir. 2002) (internal quotation marks omitted).

11 There are alternative forums where the Tribe can and should properly resolve its
12 water rights claims: (i) the federally-assisted settlement process, culminating in an Act of
13 Congress, as so many other Arizona tribes have done, or (ii) a comprehensive water rights
14 adjudication in state court, where the state can be involved, as it must be, and where the
15 federal government has consented to suit under the McCarran Amendment. Under Ariz.
16 Rev. Stat. § 45-252(A), "[o]ne or more water users upon a river system and source, the
17 water rights of which have not been previously adjudicated . . . may file a petition to have
18 determined in a general adjudication the nature, extent and relative priority of the water
19 rights of all persons in the river system and source." The process articulated by this
20 statute provides potential claimants with the right and opportunity to participate in the
21 adjudication so that water rights and priorities can be comprehensively and fairly
22 determined. The Tribe's present action against a handful of distant well owners, to the
23 exclusion of other necessary parties, would not accomplish this and cannot result in the
24 declaration the Tribe seeks in its Complaint.

25 Based on the foregoing, the Complaint must be dismissed under Rule 12(b)(7) for
26 failure to join indispensable parties under Rule 19.

1 **IV. THE TRIBE'S CASE MIGHT ALSO REQUIRE DISMISSAL FOR LACK**
2 **OF SUBJECT-MATTER JURISDICTION UNDER RULE 12(b)(1)**

3 Defendants reserve the right to assert that the case must also be dismissed under
4 Rule 12(b)(1). The Tribe seeks a declaration concerning its claim to water rights in
5 Havasu Creek and various seeps and springs adjacent to the Colorado River. The exact
6 location of these features is not clear, other than that some or all of them are apparently in
7 Grand Canyon National Park. [See Compl., ¶¶ 25, 27, 34, 41, and 51]. The allocation of
8 water rights in the Colorado River is a unique matter within the exclusive jurisdiction of
9 the U.S. Supreme Court, through its assigned Special Master. As stated in *Arizona v.*
10 *California*, 530 U.S. 392, 422 (2000): "The Court shall retain jurisdiction herein to order
11 such further proceedings and enter such supplemental decree as may be deemed
12 appropriate." As noted above, several Arizona Tribes have perfected and quantified their
13 water rights in the Colorado River by participating in the *Arizona v. California* line of
14 cases. It may be that the Havasupai Tribe must do the same.

15 **V. CONCLUSION**

16 Through its attorneys, the Tribe has not filed a complaint so much as a press
17 release. The Tribe has no legally cognizable claim to perfect and quantify its asserted
18 water rights to the full flow of Havasu Creek and various seeps and springs by suing a
19 handful of well owners located 40 to 80 miles away and excluding multiple parties that
20 are obviously indispensable to any attempted water rights adjudication. Legal and proper
21 means are available to the Tribe to establish and quantify, and then perhaps to enforce, its
22 water rights. This action is not a viable alternative. The Complaint must be dismissed in
23 its entirety, without leave to amend because the defects in this action cannot be cured by
24 amendment.
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RESPECTFULLY SUBMITTED this 3rd day of January, 2017.

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CERTIFICATE OF SERVICE

1
2 I hereby certify that on January 3rd, 2017, a copy of the foregoing document was
3 filed electronically. A Notice of Electronic Filing (NEF) will be sent by operation of the
4 Court's Electronic Case Filing (ECF) system to the filing party, the assigned Judge and
5 any registered user in the case as indicated on the NEF. In addition, a copy of the
6 foregoing has been sent by U.S. Mail this day to:

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