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26 IN THE UNITED STATES DISTRICT COURT  
27 FOR THE DISTRICT OF ARIZONA  
28 TUCSON DIVISION

18 Tohono O’odham Nation; San Carlos  
19 Apache Tribel Archaeology Southwest;  
20 and Center for Biological Diversity,,

21 Plaintiffs,

22 vs.

23 U.S. Department of the Interior; Deb  
24 Haaland, U.S. Secretary of Interior; and  
25 U.S. Bureau of Land Management,,

26 Defendants,

27 and

28 SunZia Transmission, LLC

Intervenor-Defendant.

Case No. 4:24-cv-00034 JGZ

**INTERVENOR-DEFENDANT  
SUNZIA TRANSMISSION, LLC’S  
RESPONSE TO PLAINTIFFS’  
MOTION FOR TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

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*The SunZia Transmission Project will accelerate our nation’s transition to a clean energy economy by unlocking renewable resources, creating jobs, lowering costs, and boosting local economies.*

Secretary of the Interior Deb Haaland<sup>1</sup>

**I. INTRODUCTION**

Plaintiffs cannot justify a preliminary injunction in this case. Their calls to avoid the San Pedro Valley come nine years after the transmission line route through the Valley was approved – three years after the statute of limitations for such claims expired. 28 U.S.C. § 2401(a). They did not assert that the entire San Pedro Valley should be considered a landscape-scale Traditional Cultural Property (TCP) until 2023, four years after the Bureau of Land Management (BLM) completed the identification of historic properties potentially affected by the SunZia Transmission Project (Project), through a detailed inventory process – an inventory that the Tohono O’odham Nation and the San Carlos Apache Tribe (the Tribes) participated in and they and Archaeology Southwest<sup>2</sup> had the opportunity to review and comment on in 2018, and from which Plaintiffs now say the valley-wide TCP is “conspicuously” missing. Finally, this motion comes four months after construction started in the Valley, far too late to justify a claim of irreparable harm.

Before turning to the merits of the Plaintiffs’ claims and the other preliminary injunction factors, it is important to recognize what this case is **not** about:

- The Tribes and their concerns have not been ignored. They have not been shut out or denied information about the Project. BLM has engaged with them on a government-to-government basis for fifteen years.

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<sup>1</sup> Sept. 1, 2023, statement regarding groundbreaking of the SunZia Transmission Project, available at: [Biden-Harris Administration Celebrates Groundbreaking of New SunZia Transmission Line That Will Deliver Clean, Reliable, Affordable Energy to Millions of Americans | U.S. Department of the Interior \(doi.gov\)](https://www.doi.gov/biden-harris-administration-celebrates-groundbreaking-of-new-sunzia-transmission-line-that-will-deliver-clean-reliable-affordable-energy-to-millions-of-americans).

<sup>2</sup> Plaintiff Center for Biological Diversity was not an NHPA consulting party and its participation was not of a similar level or nature to the other Plaintiffs.



- 1 • The Project is not directly impacting the concentrated string of  
2 archaeological and cultural sites that parallel the San Pedro River.
- 3 • No known archaeological or cultural sites in the San Pedro Valley, or known  
4 human remains, will be directly affected by the Project. As with any project,  
5 unanticipated discoveries may occur, but a detailed Monitoring and  
6 Discovery Plan is in place to address this possibility.
- 7 • No federal or tribally-held land is at issue. The route in the San Pedro basin  
8 is located entirely on private and state land.
- 9 • BLM did not approve the Project's route in 2023. It was approved as a final  
10 agency action in 2015, after six years of thorough study and consultation,  
11 and reflected the Tribes' timely input in determining the final route.

12 Plaintiffs focus on their communications with BLM in 2023 regarding the implementation  
13 of a Programmatic Agreement (PA), executed in 2014 to satisfy requirements of the  
14 National Historic Preservation Act (NHPA).<sup>3</sup> Plaintiffs cast their dispute as a NHPA  
15 violation, but their objective is to challenge the Project's route, which was approved by  
16 BLM's 2015 ROD. The statute of limitations has run on that claim.

17 Even if this suit were not time barred, which it is, Plaintiffs still cannot support a  
18 preliminary injunction because their claims have no merit. During the consultation that  
19 preceded BLM's approval of the Project route in 2015, the Tribes and Archaeology  
20 Southwest participated actively in that process and all focused on protecting a string of  
21 archaeological and cultural sites along the San Pedro River. In response to their input, the  
22 Project's route through the broader San Pedro basin stays well away from the river except  
23 at the river crossing and avoids those identified cultural resources.

24 Despite their frequent use of the Traditional Cultural Property (TCP) label during  
25 the last year – 14 years into Project permitting – the Tribes and Archaeology Southwest  
26 made no mention of a landscape-scale TCP before the 2015 ROD, or in 2018 when  
27 reviewing the cultural resource Inventory Report (the vehicle under the PA for identifying  
28 Historic Properties affected by the Project), nor did members of the Tribes who  
participated in the cultural resource inventories. And to this day, while they apply the TCP

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<sup>3</sup> 54 U.S.C. § 300101, *et seq.* In 2014, Congress recodified the NHPA, moving it from Title 16 to Title 54. Pub. L. No. 113–287, § 7, 128 Stat. 3272, 3272–73 (2014).

1 label as if it were self-evident, they have not identified actual geographic boundaries for  
2 a valley-wide TCP,<sup>4</sup> or the characteristics that would justify use of the label, despite  
3 repeated requests from BLM that they do so. *See* Docs. 16-37, 16-43. Mere general  
4 references to the historical significance of a geographic location is not sufficient under the  
5 NHPA to designate a TCP.

6 After the Project's route was approved, BLM followed the 2014 PA process,  
7 continuing to make a "reasonable and good faith effort" to identify any additional cultural  
8 resources along the Project route and adopt localized changes to avoid those resources. 36  
9 C.F.R. § 800.4(b)(1). As a result, the route avoids direct impacts to all cultural resources  
10 identified in the San Pedro basin. Declaration of Steve Swanson (Swanson Decl.), ¶ 22.  
11 In addition, the route is miles from cultural resources identified by Archeology Southwest  
12 along the Valley floor except at the San Pedro River crossing, *See* Natalie McCue (McCue  
13 Decl.), Ex. 7, a fact touted by Plaintiff Archeology Southwest in a paper it published in  
14 2013. Swanson Decl., Ex. 5. BLM has met its obligations to identify Historic Properties  
15 and engage in tribal consultation per the NHPA.

16 This motion also comes too late for Plaintiffs to show irreparable harm. *See Reno*  
17 *Sparks Indian Colony v. Haaland*, 663 F.Supp.3d 1188, 1201 (D. Nev. 2023). The Project  
18 was under construction in the San Pedro Valley for four months before the Plaintiffs filed  
19 their motion. *See* Doc. 16-40.

20 The balance of harms and public policy considerations also tilt sharply against an  
21 injunction and in favor of the Project. A preliminary injunction will threaten the viability  
22 of Intervenor SunZia Transmission, LLC's (SunZia) 550-mile Project. Doc. 11, ¶¶ 17-23.  
23 This Project will connect the largest set of wind energy projects constructed in the U.S. to  
24 date (3,515 megawatts of generating capacity) to markets in the West, delivering

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25  
26 <sup>4</sup> Even in their filings with the Court, they have not identified the geographic extent of the  
27 claimed TCP. When they refer to the San Pedro Valley, it is unclear whether they mean  
28 the middle and lower basin (which is 3,680 square miles, Swanson Decl., ¶ 22) or only  
some portion. Their references to the Lower or Middle San Pedro Valley are equally  
ambiguous.

1 renewable electricity to power the needs of 3 million Americans, reducing U.S.  
2 greenhouse gas emissions by 0.2%. Doc.11, ¶11. The Project, as the sole outlet for the  
3 wind energy projects, is thus essential to their viability, making a preliminary injunction  
4 also a critical threat to this new large-scale source of near-term clean renewable energy,  
5 let alone the \$11 billion in project financing for this Project and the SunZia Wind Projects  
6 – the largest renewable energy financing in North America. *Id.*, ¶¶ 21-23. It also would  
7 send a chilling message for the future development of clean energy infrastructure if project  
8 opponents are allowed to stop construction of a project to revisit an agency decision, made  
9 after a thorough, six year consultation and permitting process, nine years later. The lenders  
10 and investors in the Project relied on the finality of the route decision made nine years ago  
11 as part of their decision to finance the Project.

## 12 **II. FACTUAL BACKGROUND**

### 13 **A. The Project and associated wind projects are the largest clean** 14 **renewable energy infrastructure project in U.S. history and will** 15 **provide a significant step forward in our nation’s efforts to transition** 16 **to renewable energy.**

17 SunZia is developing the Project, a 550-mile 3,000-megawatt (MW) high-voltage  
18 direct current transmission line, to deliver the renewable energy produced by the planned  
19 3,515 MW wind energy generating projects located in Lincoln, Torrance and San Miguel  
20 Counties in New Mexico (the SunZia Wind Projects). Doc. 11, ¶ 4. The Federal Energy  
21 Regulatory Commission has approved the SunZia Wind Projects as the sole firm  
22 transmission customer of the Project and thus the Project provides the sole interconnection  
23 point for the transmission of electricity generated from the SunZia Wind Projects on to  
24 the grid. *Id.*, ¶ 11. The Project will deliver that power to customers, primarily in Arizona  
25 and California. *Id.*, ¶ 4. Together, the Project and the associated SunZia Wind Projects  
26 will deliver enough renewable electricity to western markets to provide power to 3 million  
27 people and singlehandedly reduce U.S. greenhouse gas emissions by 0.2%. *Id.*, ¶ 11.

28 Despite the current turbulence in the world’s financial markets, \$11 billion in  
project financing closed in December 2023 to finance construction of both the Project and

1 the SunZia Wind Projects. Doc. 11, ¶ 23; McCue Decl. ¶ 37. This represents the largest  
2 renewable energy financing in North America. Doc. 11., ¶ 23. Total economic benefits  
3 from the projects are estimated to be more than \$20 billion, with a substantial share of the  
4 direct, indirect and induced benefits, as well as fiscal impacts, occurring in Arizona and  
5 New Mexico. McCue Decl., ¶ 37 and Ex. 5.

6 Construction of the Project and the SunZia Wind Projects, which is well underway,  
7 is expected to produce 2,000 jobs at peak activity. Currently, there are approximately 698  
8 workers on site across Arizona and New Mexico constructing the Project. At the same  
9 time, there are 371 workers on site in New Mexico constructing the SunZia Wind Projects.  
10 McCue Decl., ¶ 37.

11 The total cost of the Project will be about \$4 billion, of which approximately \$1.4  
12 billion had been spent through December 31, 2023, with another \$56 million posted in  
13 surety bonds. Doc.11., ¶ 1, 3. In addition, the total cost of the SunZia Wind Projects will  
14 be about \$7 billion, of which \$2 billion had been spent through December 31, 2023, with  
15 another \$188 million in letters of credit. *Id.*, ¶ 4.

16 The Project, which has been in development for 15 years, is scheduled to be  
17 energized in late 2025 and fully available for commercial operation in early 2026. Doc.  
18 11, ¶ 3. The SunZia Wind Projects are scheduled to be completed in early 2026, after the  
19 Project is placed in service. *Id.*, ¶ 4.

20 **B. An order that stops construction in the San Pedro Valley at this late**  
21 **stage will threaten the viability of the transmission line and the wind**  
22 **projects it will serve.**

23 All of that investment to date in the Project and related SunZia Wind Projects, as  
24 well as the years of development, permitting and planning work, is at risk if an injunction  
25 were to be issued. Construction of a 550-mile transmission line is a massive undertaking,  
26 years in the planning and with significant capital expenditures in preparation, and with  
27 construction now occurring simultaneously at different locations along the Project route.  
28 The Project began construction in April 2023 with work on four staging areas located on  
private and state land. Doc. 11., ¶ 2. Work did not begin in the San Pedro Valley until

1 BLM issued its September 27, 2023, Limited Notice to Proceed (LNTP) authorizing  
 2 construction in areas where no historic properties were present. Doc. 26-40; Doc. 11, ¶  
 3 16. To date, across all of the Project, BLM has issued fifteen LNTPs for construction on  
 4 federal lands in Arizona and New Mexico, including construction on state and private  
 5 lands where historic properties have been identified. McCue Decl., ¶ 34. BLM has  
 6 separately issued twelve cultural resource LNTPs for state and private lands in Arizona  
 7 and New Mexico where no historic properties have been identified. *Id.* Only one LNTP  
 8 has been challenged by Plaintiffs: the September 27, 2023, LNTP which involves no  
 9 historic properties, and which was suspended November 8 and then reinstated November  
 10 27. McCue Decl., ¶ 21; Docs. 16-40, 16-42, 16-44.

11       There are two key construction locations in the San Pedro Valley area. There is  
 12 approximately eight miles of the route in the Paige Canyon area, where construction was  
 13 authorized by the September 27 LNTP (reinstated on November 27). McCue Decl., ¶ 5.<sup>5</sup>  
 14 As a result of commitments made during the Arizona permitting process, helicopters are  
 15 required to construct the line in this area rather than using access roads. These  
 16 commitments were made to minimize surface disturbance and environmental and cultural  
 17 resource impacts. Doc. 11, ¶ 17. Helicopters are supporting plant salvage, clearing of  
 18 foundation sites and drilling for and installing transmission line structure foundations. *Id.*,  
 19 ¶ 18. Heat imposes physical and safety limitations on helicopter operations. *Id.* To  
 20 maintain its construction schedule, SunZia must complete the pads and foundations for 35  
 21 structures by May 2024, due to the limitations on helicopter-supported construction. *Id.*  
 22 While the foundations will be completed in May, the erection of structures on those  
 23 foundations is not scheduled to occur until next winter (late 2024). *Id.* This second phase  
 24 is scheduled to be completed in the spring of 2025, again due to the constraints of  
 25 helicopter operations. *Id.*

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 28 <sup>5</sup> A second LNTP for construction near three sites, where avoidance monitoring is required,  
 was issued in January 2024. McCue Decl., ¶ 35.

1 The second key location is the San Pedro River crossing, where a seasonal  
2 restriction on construction activity was imposed to protect wildlife habitat in that area.  
3 Doc. 11, ¶ 19. Construction on the east side of the crossing was authorized by the  
4 September 27 LNTP. *Id.*, ¶ 21. Another LNTP for structures immediately west of the river  
5 is expected this spring. McCue Decl., ¶ 36. Foundations for structures near the River must  
6 be completed before the seasonal restriction takes effect to maintain the construction  
7 schedule. Doc. 11, ¶ 20. There is, therefore, no further room in this schedule for delay.

8 The consequences of not completing construction in these two parts of the San  
9 Pedro Valley area on the current schedule would be severe for the Project as a whole. Doc.  
10 11, ¶ 20. They are significant limiting factors for completion of the entire Project. *Id.* If  
11 the construction scheduled between now and May 2024 at these two locations is delayed,  
12 that would delay scheduled completion of the Project for at least a year. *Id.* That delay  
13 would put the commercial viability of the entire project – wind and transmission – at risk.  
14 *Id.* It would have a cascading effect on the time frames for completion of the Project and  
15 related SunZia Wind Projects, that would likely cause a material default under the  
16 integrated financing for both projects. *Id.*, ¶ 22. Even if the financing default could  
17 somehow be restructured and the financing preserved, at a minimum this would also  
18 adversely impact the timing of equipment deliveries and that too would adversely impact  
19 the viability of both projects. *Id.* There is strong demand for some of the key equipment  
20 components of the Project and delay in required progress payments –would result in the  
21 Project losing its place in the suppliers’ queue, resulting in delivery delays as long as six  
22 years – which would not be viable. *Id.*, ¶ 20.

23 In addition, the Power Purchase Agreements for the SunZia Wind Projects are  
24 contractually tied to the Project’s current construction schedule, including energizing the  
25 Project in late 2025. Doc. 11, ¶ 21. The SunZia Wind Projects’ energy is actively being  
26 marketed to be available in 2026, and a significant portion of the power supply has already  
27 been competitively procured by a diverse group of utilities, including municipal entities,  
28 community choice aggregators, and energy service providers in California, which



1 collectively serve more than 11 million customers. *Id.* Some of these parties have already  
2 included these procurement agreements in their plans for complying with state reliability  
3 requirements, and the California Public Utility Commission (CPUC) has accepted those  
4 compliance plans. *Id.* These agreements thus include defined delivery deadlines and are  
5 at risk of default and termination if delivery of power is materially delayed. In addition to  
6 frustrating the needs of these offtake counterparties and the mandates of the CPUC,  
7 termination of these agreements would also trigger a material default under the financing.

8 **C. BLM engaged in robust consultation during the six years of permitting**  
9 **that preceded the 2015 approval of the Project's route through the San**  
10 **Pedro basin and the concerns Plaintiffs raised in those consultations**  
11 **were addressed at that time.**

12 In 2008, SunZia applied under the Federal Land Policy Management Act (FLPMA)  
13 to BLM for a transmission line right-of-way (ROW) from central New Mexico to south-  
14 central Arizona. McCue Decl., ¶ 2. While BLM's ROW Grant only authorizes the use of  
15 federal lands, to satisfy requirements of NHPA and the National Environmental Policy  
16 Act (NEPA), BLM's permitting process also considered the potential effects of the Project  
17 on state and private lands. *Id.*, ¶ 3-4. None of the Project route is on tribally-held lands.  
18 *Id.*, ¶ 2.

19 BLM began the NEPA scoping process in 2009, holding 14 public meetings, with  
20 about 500 attendees and received 1,400 comments. Swanson Decl., ¶ 4. The Center for  
21 Desert Archaeology, which later became Archaeology Southwest, submitted scoping  
22 comments. *Id.* There were no tribal comments during the NEPA scoping process, *id.*, but  
23 BLM engaged directly with the Native American Tribes in the region, sending letters at  
24 the start of scoping to 22 Native American Tribes. *Id.*, ¶ 5. BLM also held tribal  
25 consultation meetings during the scoping period, including with representatives of the  
26 Tohono O'odham Nation on July 21, 2009, and the San Carlos Apache Tribe on October  
27 16, 2009. *Id.*

28 In response to scoping comments concerning the proposed routes, including  
alternatives in the San Pedro Valley, BLM extended the study area to evaluate routes in

1 the Tucson area. In October 2009, BLM held a public scoping meeting in Tucson to review  
2 the new alternatives and included routes impacting the Tohono O’odham Nation’s Schuk  
3 Toak District and San Xavier District. Swanson Decl., ¶ 9. The San Xavier District  
4 Council adopted a resolution in 2011 supporting the SunZia Project but opposing any  
5 route that would cross its District. *Id.*, Ex. 4. The greater impacts of the Tucson route were  
6 discussed in the 2013 FEIS and it was not selected in the 2015 ROD.

7 During the course of the permitting process that resulted in the 2015 ROD,  
8 Plaintiffs expressed concerns regarding the route through the San Pedro Valley. Some of  
9 their comments referred to the Valley as a cultural landscape, but did not describe it as a  
10 TCP. Rather, they used the term to denote the concentration of identified archaeological  
11 and cultural sites along the River, not to the Valley as a whole. For example, Archaeology  
12 Southwest’s 2009 scoping comments, while characterizing the San Pedro as a cultural  
13 landscape, linked that concern to the archaeological record of human habitation and noted  
14 that they are typically found within a mile-wide corridor centered on the river. Doc. 16-  
15 15 at 6. For reference, McCue Decl. Ex. 7 is a map showing the Project route and its  
16 distance from the river and Ex. 8 shows the Project route in relation to the watershed.

17 Archaeology Southwest’s comments also offered to share spatial data on the  
18 locations, condition and significance of archaeological sites in the Valley. Doc. 16-15 at  
19 6. During the Section 106 consultation and NEPA process, it provided BLM with the  
20 location of “Priority Conservation Areas” in Pinal County and Pima County, including the  
21 San Pedro basin. Doc. 16-20; Swanson Decl., ¶ 10. These are cultural resource areas  
22 identified as conservation priorities by expert opinion (tribal, archaeological, heritage  
23 management) during workshops that were hosted by Archaeology Southwest in  
24 partnership with the National Trust for Historic Preservation. *Id.*; Doc. 16-20; Swanson  
25 Decl., ¶ 10 & Ex. 5.

26 The Final EIS that BLM published in 2013 acknowledged this information,  
27 explaining that the priority areas are prehistoric sites and site complexes that meet one or  
28 more criteria for the National Register, meaning they would have to be addressed under



1 NHPA if affected by the Project. McCue Decl., Ex. 2 at 3-147. The data provided by  
2 Archaeology Southwest included 10 priority areas in the San Pedro basin and, as a result  
3 of this input, all 10 were avoided by the preferred alternative Project route identified in  
4 the EIS. Swanson Decl., ¶10. Archaeology Southwest’s 2013 paper acknowledged this  
5 avoidance and touted the benefits of the planning effort it led as having resulted in the  
6 Project avoiding priority conservation areas. *Id.*, Ex. 5 at 12-13 & Fig. 9.

7       The San Carlos Apache Tribe likewise focused its input during the 2009-2015  
8 period on protecting the archaeological and cultural resource sites that are primarily  
9 located near the river. At a tribal consultation meeting in October 2011, Vernelda Grant,  
10 the Tribal Historic Preservation Officer for Plaintiff San Carlos Apache Tribe, expressed  
11 concerns about the alternative Project routes that go near the river “because of the  
12 archaeological and natural resources.” Swanson Decl., Ex. 3. These concerns were  
13 acknowledged by BLM and captured in the 2013 Final EIS. McCue Decl., Ex. 2 at 3-198.  
14 The Tribe’s 2012 NEPA comments likewise emphasized cultural sites and sacred areas,  
15 Doc. 16-2 at 4, particularly the Camp Grant Massacre site, *id.* at 5, and potential ecological  
16 impacts in the San Pedro Valley. *Id.* at 6. An alternative route near the massacre site was  
17 considered but, in part due to this tribal input, eliminated during the permitting process.  
18 In an October 2012 consultation meeting, the Tribe expressed concerns about sacred  
19 places that could be impacted, but suggested those impacts could be avoided through  
20 ongoing communication. McCue Decl., Ex. 2 at 3-199. The Tribe did not suggest the entire  
21 proposed Project route had to be changed to avoid those impacts. *Id.* There was also,  
22 notably, no mention of the San Pedro Valley as a potential valley-wide TCP.

23       BLM met with the Tohono O’odham Nation Cultural Preservation Commission in  
24 November 2012, which was concerned about the timing of the survey to identify specific  
25 cultural resource sites within the Project route but, again, did not mention a valley-wide  
26 TCP. McCue Decl., Ex. 3 at 3-199. BLM met with the Nation’s Legislative Council in  
27 December 2012, where Council members expressed concerns about health impacts of  
28 living near transmission lines and about impacts from the Tucson alternative route but

1 notably they also did not mention a valley-wide TCP. *Id.* However, the 2013 Final EIS  
2 recognized the Nation’s concern about the alternative routes considered in the San Pedro  
3 Valley “due to archaeological and natural resources in the area.” *Id.*, p. 3-195.

4 In November 2012, BLM organized a visit to cultural resource sites in the San  
5 Pedro basin at the proposed River crossing. Swanson Decl., ¶ 12, 29. Tribal Historic  
6 Preservation Officers for both Plaintiff Tribes attended. *Id.* Feedback was taken from  
7 Tribal members, specifically around treatment and mitigation of the cultural resources at  
8 that location, as discussed above. *Id.* That tribal input was ultimately incorporated into the  
9 Historic Property Treatment Plan (HPTP). *Id.*; Doc. 16-34 at 95. At the site visit, again no  
10 Tribe identified the San Pedro Valley as a potential TCP. Swanson Decl., ¶ 12.

11 Despite Plaintiffs’ allegations to the contrary, BLM did undertake meaningful  
12 government-to-government consultation, holding 14 meetings with interested tribes  
13 regarding the Project between July 2009 and December 2012. Swanson Decl., ¶ 7. The  
14 input that BLM received from consultation with Native American Tribes, along with  
15 information gained from research directed by BLM, was summarized in the 2013 Final  
16 EIS for the Project ROW. McCue Decl., Ex. 2 at 3-146 – 3-199. The FEIS listed the known  
17 cultural resources that the San Pedro basin route would cross or be near (within 0.25  
18 miles). *Id.* at 3-192, 4-140 – 4-141 (referred to as subroute 4C2c). The Tribes’ input during  
19 this period was focused on these tangible cultural resources, and they made no specific  
20 assertions regarding a potential valley-wide TCP.

21 **D. The Project route avoids and minimizes cultural resource impacts in**  
22 **the San Pedro Valley.**

23 San Pedro Valley is not a pristine area free of development and significant  
24 infrastructure; the portion of the Project route that passes through the area parallels  
25 existing infrastructure to the extent feasible. From the east, the route parallels two existing  
26 transmission lines to the San Pedro River crossing. *See* McCue Decl., Ex. 3 at 24. The  
27 potential impacts to riparian habitat, land uses, and visual resources are lower at the  
28 selected River crossing location compared to alternatives to the north (a designated

1 Important Bird Area). *Id.*, pp. 24-25 & Ex. 7. From the River crossing, the route continues  
2 to the northwest, running 2 to 6 miles west of the River. *Id.*, p. 25; see McCue Decl., ¶ 39  
3 and Ex. 7. This portion of the route parallels an existing pipeline, then turns west and  
4 parallels two existing transmission lines. McCue Decl., Ex. 3 at 25.

5 The 2013 Final EIS for the Project ROW explained that, among the alternative  
6 routes in the San Pedro, the route BLM ultimately selected had the fewest impacts to  
7 cultural resources, based upon Class I records review, including a map of cultural resource  
8 priority areas provided by Archaeology Southwest (McCue Decl., Ex. 2 at 3-147), as well  
9 as Class II sampling at river crossings and other locations known or predicted to be  
10 culturally sensitive. Swanson Decl., ¶ 6; McCue Decl., Ex. 2. It also concluded that  
11 cumulative effects of the Project, including on cultural properties of significance to tribes,  
12 would be minimal given the developed nature of the area, with substantial portions of the  
13 route paralleling existing transmission lines and a pipeline. *Id.*

14 At the river crossing, after taking into account feedback that representatives of  
15 Plaintiff Tohono O’odham Nation provided to BLM during a field visit in 2012, *see*  
16 Swanson Decl., ¶ 29; Doc. 16-34 at 95, the Project was redesigned to avoid direct impacts  
17 to a cluster of sites through careful structure placement and access road routing, Doc. 16-  
18 34 at 95-96, thereby accomplishing a complete avoidance of direct impacts to any known  
19 cultural sites in San Pedro Valley. Swanson Decl., ¶ 22. In fact, the mitigation provided  
20 by the treatment plan for this area (collection of archaeological information as mitigation  
21 for potential cumulative effects) was developed in response to tribal member requests  
22 during the site visit. Doc. 16-34 at 95.

23 **E. BLM satisfied its NHPA obligations by executing a Programmatic**  
24 **Agreement (PA) in 2014 and following the PA process.**

25 When an undertaking is complex – which the Project certainly is – and the full  
26 effects to historic properties cannot be readily determined prior to an agency decision,  
27 NHPA regulations allow development of a PA to phase the NHPA Section 106 process.  
28 36 C.F.R. § 800.14(b)(2). When a PA has been adopted, compliance with the PA

1 procedures satisfies the agency's Section 106 responsibilities *Id.*, § 800.14(b)(2)(iii). In  
2 accordance with these regulations, the 2014 PA sets out a process for (i) identifying  
3 cultural resources potentially affected by the Project, (ii) determining their eligibility for  
4 listing in the National Register, (iii) determining the effects of the Project on the resources,  
5 and (iv) resolving those effects through development of HPTPs. PA Stipulations I, II, and  
6 III (Doc. 16-34 at 5-14).

7 In accordance with the 2014 PA, a Class III pedestrian cultural resource survey was  
8 completed for the Area of Potential Effects (APE)<sup>6</sup> for the Project route. Swanson Decl.,  
9 ¶15. The survey crew was assisted by four cultural resource specialist tribal members  
10 provided by the Tribes, who accompanied the archaeological crew throughout the survey,  
11 including within the San Pedro basin. *Id.*, ¶¶16-21. No traditional use areas were identified  
12 by tribal participants, nor was a valley-wide TCP discussed. *Id.*, ¶20 The survey found  
13 only 14 archaeological sites in the APE within the San Pedro basin, and direct impacts to  
14 those that were found were subsequently avoided, *id.*, with mitigation for potential  
15 cumulative impacts to the sites at the river crossing. *Id.*, ¶ 29. Plaintiffs assert that 500  
16 archaeological sites have been identified in the area. Again, Plaintiffs provide no  
17 geographic context for this claim, but it must refer to the region as a whole (the middle  
18 and lower watershed totals about 3,680 square miles), since the Class III survey identified  
19 only 14 sites in the APE (which totals 9 square miles). *Id.*, ¶ 22.

20 Draft cultural resource Inventory Reports were prepared based upon the Class III  
21 surveys, *Id.*, ¶ 23, again in accordance with the PA Stip. I.D. The Arizona Draft Inventory  
22 Report was distributed in early 2018 to consulting parties, including the Tribes and  
23 Archaeology Southwest, for a 60-day comment period. *Id.* The Final Inventory Report  
24 were issued in June 2018. *Id.* As the Project design advanced, additional Class III surveys  
25

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26 <sup>6</sup> The APE is the geographic area within which the undertaking may directly or indirectly  
27 alter the character or use of historic properties. 36 C.F.R. § 800.16. Here, the Class III  
28 survey area was a 400-foot corridor along the transmission line route, and 150 feet for  
access roads. Swanson Decl., ¶ 15.

1 were completed and addenda to the Inventory Reports were issued in May 2018 and  
2 August 2022. *Id.*, ¶24. The Arizona Addendum Reports were finalized February 10, 2023.  
3 *Id.*, ¶25. The Arizona SHPO and the Advisory Council on Historic Preservation (ACHP)  
4 concurred with the findings of the Class III Inventory Reports and Addendum Reports.  
5 *Id.*, ¶25.

6 Importantly, Archaeology Southwest and the Tribes provided no comments in 2018  
7 on the adequacy of the identification of cultural resources in the Arizona Inventory Report,  
8 did not ask BLM to identify the San Pedro Valley as a landscape-scale TCP in the  
9 Inventory Reports, and did not provide information that could otherwise support such a  
10 TCP claim. Swanson Decl., ¶23. The Tohono O’odham Nation’s comments on the  
11 Inventory Report were favorable and did not say that the survey failed to identify a TCP  
12 in the San Pedro Valley or anywhere else. *Id.*, ¶23. Archaeology Southwest and the San  
13 Carlos Apache Tribe did not comment on the Class III Inventory Report or the Addendum  
14 Report. *Id.*, ¶¶23, 24. The Tohono O’odham Nation commented on the addendum Class  
15 III report for Arizona, also without making any claims regarding a valley-wide TCP, and  
16 the comments it did make were used to revise the addendum report. *Id.*, ¶24.

17 In November 2018, an indirect visual effects assessment of the cultural resources  
18 identified in the Inventory Reports was distributed to consulting parties including Plaintiff  
19 Tribes and Archaeology Southwest, for a 60-day comment period. Swanson Decl., ¶ 27.  
20 This report assessed visual effects on cultural resources within five miles of the 2015  
21 approved route. *Id.* Plaintiffs did not comment on the visual effects assessment, nor ask  
22 that it be revised to include a San Pedro Valley TCP. *Id.*

23 In accordance with PA Stipulation III.A, the Inventory Reports were used to  
24 develop the HPTPs. Swanson Decl., 28. On June 20, 2023, a revised draft of the Arizona  
25 HPTP was provided to all consulting parties for a 45-day review period. *Id.*, ¶ 37. On July  
26 14, BLM held a meeting with consulting parties to discuss the HPTP. *Id.*, ¶ 39. On August  
27 29, 2023, BLM distributed a further revised Arizona HPTP to the consulting parties for  
28

1 an additional 21-day review, reflecting input it had received in the June draft. *Id.*, ¶ 41.  
2 The HPTP became final September 29, 2023. *Id.*

3 The PA provides that once the Inventory Reports were finalized, BLM could issue  
4 authorization to construct in areas where no Historic Properties had been identified. *Stip.*  
5 V.A. BLM issued an LNTP on September 27, 2023 allowing construction to proceed in  
6 the San Pedro Valley in areas of the route where no historic properties were present. In  
7 January 2024, an additional LNTP was issued that authorized construction at three  
8 locations along the route in the San Pedro Valley west of the river where cultural sites will  
9 be avoided (no direct impacts) but ground disturbance will occur within 100 feet of the  
10 sites and so avoidance monitoring is required. *McCue Decl.*, ¶¶ 22, 35.

11 **F. The Tribes did not suggest the entire San Pedro Valley be identified as**  
12 **a TCP until early 2023 and did not respond to BLM's request for**  
13 **evidence to support that claim.**

14 As the history recounted above demonstrates, before 2023 the Tribes and  
15 Archaeology Southwest generically spoke of a San Pedro Valley cultural landscape, but  
16 their input and comments focused on the priority cultural conservation sites identified near  
17 the river and the associated history of human habitation at those sites. They never  
18 identified a valley-wide TCP in their comments or during field investigations. It was not  
19 until March of 2023, 14 years into the NHPA process, that the Tribes notified BLM of a  
20 claim that the entire San Pedro Valley should be designated as a landscape-scale TCP.  
21 *Swanson Decl.*, ¶¶ 31-33. A month later, during a virtual meeting of the consulting parties,  
22 BLM responded that it had not received the information it would need to evaluate impacts  
23 to a TCP and that receiving comments on the HPTPs, then under development, that  
24 identified a TCP (with maps and a description) would be helpful. *Id.*, ¶35. Despite that  
25 specific request, no such comments were ever submitted. In a follow-up email exchange  
26 with the consulting parties, BLM again asked for maps and descriptions of this valley-  
27 wide TCP, noting that the issue should have been raised when the Class III Inventory  
28 Reports were under review in 2018. *Swanson Decl. Ex. 6.* BLM added that during prior



1 consultations with the Tribes, no one asked BLM to consider the middle San Pedro Valley  
2 a TCP. *Id.*

3 Plaintiffs have told neither BLM nor this Court what the boundaries of the claimed  
4 TCP may be. For reference, McCue Decl. Ex. 8 is a map of the San Pedro River watershed.  
5 The middle and lower basin, where the Project is located, totals about 3,680 square miles.  
6 Swanson Decl., ¶ 22. The Project's APE in the basin totals 9 square miles. *Id.*

7 On August 4, 2023, despite not being signatories to the PA, the Tribes and  
8 Archaeology Southwest wrote to the Secretary of the Interior, invoking the PA's dispute  
9 resolution provision, and lodged a protest that the agency had not identified the entire San  
10 Pedro Valley as a TCP. McCue Decl., ¶ 16. On August 31, 2023, BLM responded to the  
11 notice of dispute, clarifying that the Tribes had not provided any additional information  
12 regarding the claimed valley-wide TCP and that since March it had been trying to meet  
13 with them to try to obtain this information but the Tribes had not been responsive. *Id.*, ¶  
14 17 & Doc. 16-37.

15 A meeting between BLM, tribal representatives and Archaeology Southwest did  
16 finally occur on November 14, but no information supporting the claimed TCP was  
17 provided in that meeting. McCue Decl., ¶ 26. BLM wrote again to the Tribes on November  
18 24, 2023, noting again that no evidence supporting a TCP had been presented at any point  
19 in the years of consultation, but offering to work with the Tribes to identify a TCP and  
20 consider mitigation alternatives. *Id.*, ¶ 27 & Doc. 16-43. BLM once again ruled out moving  
21 the Project out of the San Pedro Valley, since the route had been approved in 2015 and  
22 the Tribes' request to reroute the line to address a claimed TCP was untimely. *Id.*

23 **G. The 2023 Project route amendment did not revisit the San Pedro basin**  
24 **route.**

25 A change to the Project's route in New Mexico was developed between 2018 and  
26 2020. Doc. 11, ¶ 12. SunZia applied to BLM for a route amendment in New Mexico in  
27 2020. *Id.* The application also provided further details about access roads and temporary  
28 disturbance areas needed in Arizona for construction along the route approved in 2015.

1 McCue Decl., ¶ 8. The application did not seek any change to the route in or around the  
2 San Pedro Valley. *Id.*

3 The potential impacts of temporary construction and permanent access roads had  
4 been modeled and evaluated in the 2013 FEIS, but at the time construction plans were not  
5 sufficiently developed to identify precise access road locations. Doc. 11, ¶ 15. The 2015  
6 ROD thus contemplated final access road locations being identified in the Project’s Plan  
7 of Development. Doc. 11, ¶ 15. Since access plans had been finalized by the time the 2020  
8 amendment was submitted, to assure full disclosure they were included in BLM’s  
9 consideration of the route change in New Mexico. *Id.* Cultural resource surveys were  
10 completed for all access road locations (part of the addendum reports), and all access roads  
11 in the San Pedro Valley avoid all cultural resources. *Id.*; see Doc. 16-33.

### 12 **III. ARGUMENT**

#### 13 **A. Legal standard for preliminary injunctive relief.**

14 Preliminary injunctive relief is a matter of equitable discretion and is “an  
15 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is  
16 entitled to such relief.” *Winter v. NRDC*, 555 U.S. 7, 22, 129 S.Ct. 365 (2008) (citation  
17 omitted). “A party can obtain a preliminary injunction by showing that (1) it is ‘likely to  
18 succeed on the merits,’ (2) it is ‘likely to suffer irreparable harm in the absence of  
19 preliminary relief,’ (3) ‘the balance of equities tips in [its] favor,’ and (4) ‘an injunction is  
20 in the public interest.’” *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir.  
21 2017) (*alteration in original*) (*quoting Winter*, 555 U.S. at 20).

22 The Ninth Circuit has held that its “serious question” test survived the *Winter*  
23 decision, which provides that it is sufficient for a plaintiff to demonstrate that there are  
24 *serious* questions going to the merits if the balance of hardships tips *sharply* in the  
25 plaintiff’s favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9<sup>th</sup> Cir.  
26 2011). However, the Ninth Circuit has further held that, while meeting the “serious  
27 question” test can support the issuance of a preliminary injunction, the plaintiff must also  
28



1 meet the other two prongs of the *Winter* test, showing that there is a likelihood of  
2 irreparable injury and that the injunction is in the public interest. *Id.* at 1135.

3 **B. Plaintiffs’ claims do not have any merit.**

4 Plaintiffs bring their claims under the NHPA. Complaint, ¶ 1. “The NHPA is a  
5 procedural statute requiring government agencies to ‘stop, look, and listen’ before  
6 proceeding with agency action.” *Center for Biological Diversity v. Mattis*, 868 F.3d 803,  
7 816 n.5 (9<sup>th</sup> Cir. 2017) (internal quotations and citations omitted). Section 106 of the  
8 NHPA, 54 U.S.C. §306108, “neither ... forbid[s] destruction of historic sites nor ...  
9 command[s] their preservation.” *North Oakland Voters Alliance v. City of Oakland*, 1992  
10 WL 367096, \*3 (N.D. Cal. 1992) (quoting *United States v. 162.20 Acres of Land*, 639  
11 F.2d 299, 302 (5<sup>th</sup> Cir.), *cert. denied*, 454 U.S. 828 (1981)). Instead, it requires federal  
12 agencies to consider the potential effects of agency actions on historic properties. *Te-Moak*  
13 *Tribe of W. Shoshone of Nev. v. U.S. Dep’t of the Interior*, 608 F.3d 592, 610 (9th Cir.  
14 2010).

15 The Section 106 process “seeks to accommodate historic preservation concerns  
16 with the needs of Federal undertakings through consultation” to obtain input from a variety  
17 of interested parties, including Tribes. 36 C.F.R. §§ 800.1(a), 800.3. “Consultation” does  
18 not mean agreement, and consulting parties do not have a veto, nor does it require that the  
19 consulting parties support the final outcome. It is “the process of seeking, discussing, and  
20 considering the views of other participants, and, *where feasible*, seeking agreement with  
21 them regarding matters arising in the section 106 process.” 36 C.F.R. § 800.16(f)  
22 (emphasis added).

23 Two of BLM’s obligations under the NHPA are at issue in this case: (1) whether  
24 the agency made a “reasonable and good faith effort” to identify Historic Properties, 36  
25 CFR § 800.4(b)(1); and (2) whether BLM had fulfilled its obligation to engage in  
26 government-to-government consultation with interested Tribes, 36 C.F.R. §  
27 800.2(c)(2)(ii)(C), and to provide them with a “reasonable opportunity” to identify  
28

1 Historic Properties, to express concerns regarding those properties, and to participate in  
2 the resolution of those concerns. 36 C.F.R. § 800.2(c)(2)(ii)(A).

3 As explained below, Plaintiffs' claims are not timely and they are without merit, as  
4 they are refuted by the Plaintiffs' own Complaint, their own documents, their input during  
5 field investigations, and the history of thorough and comprehensive consultation on the  
6 Project and the significant avoidance, minimization and mitigation of effects that did  
7 occur.

8 **1. Objections to the existing route through the San Pedro basin and**  
9 **efforts to relocate that route are time-barred.**

10 Plaintiffs argue that BLM ignored the Project's effects on the San Pedro Valley  
11 until the route had become a *fait accompli*, by which they mean the Project was under  
12 construction. PI Mot. at 24. But the route became final and unappealable in 2021, when  
13 the six-year statute of limitations for challenges to the 2015 ROD expired, *see* 28 U.S.C.  
14 § 2401(a), not when construction began.

15 Plaintiffs' claims all seek, as their ultimate remedy, the relocation of the approved  
16 Project route; they object to the Project's existing route through the San Pedro basin,  
17 which they claim BLM still has an obligation to avoid. *See, e.g.*, Complaint, ¶¶ 104-105,  
18 107, 110, 119, 121-122, 124, 126, 136-137. As Plaintiffs admit, that route was approved  
19 by BLM as part of its 2015 ROD. Complaint, ¶ 80. Plaintiffs seek to vacate the 2015 ROD  
20 and the limited notices to proceed (LNTPs) BLM has issued under authority of that ROD.  
21 Complaint, Prayer for Relief ¶¶ 1-4 (Doc. 1-1). This claim is meritless, as discussed below,  
22 and it also is untimely. Plaintiffs bring this case under the Administrative Procedure Act  
23 (APA). Complaint ¶ 4 (Doc. 1). APA claims must be brought within six years of the  
24 agency action that is challenged. 28 U.S.C. § 2401(a); *Gros Ventre Tribe v. United States*,  
25 469 F.3d 801, 814 n. 12 (9th Cir. 2006).

26 Plaintiffs frankly admit that they are objecting to BLM's 2015 ROD and the NHPA  
27 consultation that resulted in that decision. Complaint, ¶¶ 49-82 (Doc. 1 and 1-1); PI Mot.  
28 pp. 7-14 (Doc. 16). Having been approved by the Interior Department's Assistant

1 Secretary, the 2015 ROD was BLM’s final agency action. *See* Doc. 16-25 at 3; 43 CFR  
2 §4.410(a)(3). And as Plaintiffs have noted, NHPA consultation to support that decision  
3 was completed with the execution of the PA on December 17, 2014. Doc. 16-25 at 11.  
4 Even if their claims had merit, which they don’t, Plaintiffs cannot prevail on their claims  
5 because they have been brought years too late. 28 U.S.C. § 2401(a). SunZia and the  
6 related SunZia Wind Projects properly relied on the finality of that agency action in  
7 planning, equipment procurement, power marketing, capital outlays, and financing and  
8 Plaintiffs’ belated claims should not be permitted to upset those settled expectations.

9 **2. BLM’s LNTPs are not reviewable under the APA.**

10 Apparently recognizing that they cannot directly challenge the 2015 ROD,  
11 Plaintiffs seek to frame their suit as a challenge to the LNTP that BLM issued in  
12 September 2023. Complaint, ¶¶1, 13-14, 17, 130, Prayer for Relief ¶¶ 113. But it was the  
13 2015 ROD, not the LNTP, that approved the route through the San Pedro Valley. *See* 2015  
14 ROD at 4 (Selected Alternative), 5 (Subroute 4C2c). SunZia’s cooperation in  
15 implementing the PA, including on state and private lands not otherwise subject to federal  
16 jurisdiction (e.g., the San Pedro basin segment), is a condition of the 2015 ROD. McCue  
17 Decl., Ex. 3 at 11. The LNTP merely confirmed that this precondition for construction on  
18 the route approved by the 2015 ROD was satisfied. *See* Docs. 16-40, 16-44. Thus, this  
19 effort at reframing of the relevant agency action also must fail.

20 The APA defines “agency action” as “the whole or a part of an agency rule, order,  
21 license, sanction, relief, or the equivalent or denial thereof, or failure to act.” *San*  
22 *Francisco Herring Ass’n v. U.S. Dep’t of Interior*, 946 F.3d 564, 575 (9th Cir. 2019)  
23 (quoting 5 U.S.C. § 551(13)). To be reviewable, an agency action must be final. *See Or.*  
24 *Nat. Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006). An agency  
25 action is final where it “mark[s] the consummation of the agency’s decisionmaking  
26 process” and is “one by which rights or obligations have been determined, or from which  
27 legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal  
28 quotations omitted). A BLM Notice to Proceed is not discretionary, does not determine

1 rights or obligations, and so not a final agency action. *See Moapa Band of Paiutes v. U.S.*  
2 *Bureau of Land Mgmt.*, No. 2:10-CV-02021-KJD, 2011 WL 4738120, at \*12–13 (D. Nev.  
3 Oct. 6, 2011), *aff'd sub nom. Moapa Band of Paiutes v. Bureau of Land Mgmt.*, 546 F.  
4 App'x 655 (9th Cir. 2013) (NTP was not a “major federal action” under NEPA because it  
5 was not discretionary).

6 Plaintiffs’ claims ignore the ministerial nature of an LTNP. Taken to its logical  
7 conclusion, their theory would lead to a never-ending process of restarting a new NHPA  
8 review each time an agency issued a successive LNTP, long after the ROD had been  
9 issued. That would destroy any ability of an applicant to rely on finality of the  
10 administrative process, while excusing project opponents for failing to exhaust their  
11 administrative and legal remedies. BLM uses LNTPs to authorize the holder of a right-of-  
12 way to start or resume construction when the developer has satisfied certain right-of-way  
13 terms and conditions. *See* 43 C.F.R. § 2805.10(b)(2) (ROW grant may be conditioned on  
14 approval of Plan of Development and issuance of a Notice to Proceed). For FLMPA ROW  
15 grants, an LNTP implements the decisions made in the underlying ROD per the terms and  
16 conditions of that ROD and ROW Grant. *See* 43 C.F.R. § 2805.10(b)(2) (ROW grant may  
17 be conditioned on approval of Plan of Development and issuance of a Notice to Proceed).  
18 For NHPA purposes, LNTPs also do not trigger new NHPA Section 106 consultation  
19 obligations. *Battle Mountain Band v. United States Bureau of Land Mgmt.*, 2016 WL  
20 4497756, \*7 (D. Nev. Aug. 26, 2016) (LNTP for construction of previously authorized  
21 transmission line was not a new NHPA “undertaking,” despite the discovery of new  
22 cultural artifacts after the ROD was issued and redesign of the transmission line to avoid  
23 those new cultural sites). As LNTPs are not final agency action, Plaintiffs challenge to  
24 BLM’s September 2023 LNTP (reinstated in November 2023) cannot pass the APA’s  
25 threshold requirement, and so too must fail.

1                   **3. The 2023 ROD and related NEPA analysis is irrelevant to**  
2                   **Plaintiffs' claims.**

3                   Plaintiffs also attempt to resuscitate their claims to no avail by invoking the 2023  
4 amended ROD involving the New Mexico route change and ancillary changes in Arizona.  
5 SunZia's 2020 application and BLM's 2023 ROD, however, made no changes to the  
6 Project's route in the San Pedro basin. Doc. 11, ¶¶ 12-15; McCue Decl., ¶ 8. The only  
7 action affecting the area at issue in this case was approval of refined construction access  
8 and support area plans. *Id.* BLM's 2013 FEIS used modeling to evaluate the potential  
9 effect of access roads, since exact locations were not yet defined. Doc. 11 at ¶ 15. SunZia's  
10 2020 application provided the exact locations, which were then analyzed in the NEPA  
11 process and approved by the 2023 ROD. *Id.* No cultural resources were found in surveys  
12 of these routes. *Id.*

13                   Because BLM's 2023 decision did not revisit or change the Arizona portion of the  
14 route, the statute of limitations for challenges to the 2015 ROD was unaffected by the  
15 2023 ROD. *See Oceana Inc. v. Bryson*, 940 F. Supp. 2d 1029, 1044-45 (N.D. Cal. 2013)  
16 (amendment to Fishery Management Plan did no re-open earlier plan amendment adopting  
17 Plan); *Am. Iron & Steel Inst. V. U.S. E.P.A.*, 886 F.2d 390 (D.C. Cir. 1989).

18                   **4. The PA is not a back door allowing Plaintiffs to avoid the finality**  
19                   **of the 2015 ROD.**

20                   The PA, executed in 2014, was appropriately developed to implement the Section  
21 106 process. *See* 36 C.F.R. § 800.14(b). The PA may contain provisions that defer the  
22 final identification and evaluation of Historic Properties (those eligible for listing on the  
23 National Register) until after the agency decision. *Id.*, § 800.4(b)(2). When a PA has been  
24 adopted, “[c]ompliance with the procedures established by an approved programmatic  
25 agreement satisfies the agency's section 106 responsibilities.” *Id.*, § 800.14(b)(2)(iii). The  
26 PA is a tool for executing the NHPA process: (1) identification of properties within the  
27 Area of Potential Effects of the Undertaking that are eligible for listing on the National  
28 Register (Historic Properties); (2) assessment of adverse effects to those Historic

1 Properties; and (3) resolution of the adverse effects. 36 CFR §§ 800.4–800.6. That  
2 sequence is reflected in the Project PA. Doc. 16-24 (Stipulations I, II, and III).

3 Plaintiffs’s sole objection to BLM’s implementation of the PA is that the agency is  
4 not willing to re-open the 2015 ROD. *See* PI Mot. at 24-27. They claim that their request  
5 to BLM – in 2023 – to identify the San Pedro Valley as a valley-wide TCP triggered an  
6 obligation to consider moving the Project route out of the San Pedro basin. Embedded  
7 within Plaintiffs’ assertion is the false assumption that the 2015 ROD and its approval of  
8 the San Pedro basin segment of the route was not a final agency action. Plaintiffs do not  
9 cite to a single case supporting that proposition. Indeed, the ROD itself directly contradicts  
10 that false assumption: “My approval of these decisions constitutes the final decision of the  
11 DOI ....” Doc. 16- 25 at 2. Plaintiffs aver that they raised their concerns from the outset,  
12 which means they should have challenged the ROD upon its issuance many years ago.  
13 They did not, and their attempt to revisit that final agency action now must fail.

14 Plaintiffs cannot use the PA process to challenge the underlying agency action –  
15 the 2015 ROD approving the federal ROW and the route on state and private land. The  
16 ongoing nature of the PA process does not prevent the 2015 ROD from being a final  
17 agency action; implementation of the PA is a condition of the 2015 ROD. McCue Decl.,  
18 Ex. 3 at 11.. This proposition, taken to its logical conclusion, would negate any benefit  
19 that a PA provides, as its existence would prevent the underlying agency action from  
20 becoming final by allowing any opposing party to repeatedly revisit, and thereby defer the  
21 finality of, the agency action at any later point, simply by revealing the existence of a  
22 property it had known but withheld from the inventory, causing potentially endless delays.

23 Nothing in the NHPA regulations, the PA, or caselaw supports the notion that a  
24 consulting party can require a PA process to be reset and repeated, let alone that this reset  
25 can re-open a final agency action made nine years earlier. *See Reno Sparks Indian Colony*  
26 *v. Haaland*, 663 F.Supp.3d 1188, 1197 (D. Nev. 2023)(denying injunction as tribe  
27 belatedly asserted broad, non-specific claims of a TCP at the HPTP stage).

28



1 Plaintiffs also seek to rescue their time-barred claims by wrongly claiming that  
2 BLM told them alternative routes would remain on the table and be considered in the PA  
3 process. PI Mot. at 24-27. Plaintiffs rely almost exclusively on a February 2013 email  
4 from BLM's cultural resource lead, which not only predates the ROD but also says the  
5 opposite of what they allege. Doc. 16-23. In response to Archaeology Southwest's request  
6 that the PA meeting discuss rerouting segments of the preferred alternative, McCue Decl.,  
7 Ex. 1, the BLM email explains that the PA is not the vehicle for larger reroutes, which  
8 will be addressed in the NEPA process and in the agency's permitting decision, if at all.  
9 Doc. 16-23. Plaintiffs try to turn the plain language of the email on its head, suggesting  
10 BLM's employee meant that the NEPA process would not consider major reroutes, which  
11 would instead be the province of the PA. PI Mot. at 26. To the contrary, BLM's employee  
12 rejected Archaeology Southwest's effort to convert the PA into a collateral attack on the  
13 NEPA process. Of course, not long after, BLM carefully explained its route selection  
14 undertaken in the NEPA process and 2015 ROD. McCue Decl., Exs. 2 & 3.

15 Plaintiffs also argue that the PA provision identifying "realignment of the  
16 transmission" as a potential avoidance measure meant that BLM's selection of a route in  
17 the 2015 ROD was somehow not final, entirely subject to change, and the PA process  
18 could force a reroute through Tucson, a route that had been evaluated fully in the NEPA  
19 process and rejected. PI Mot. at 25, citing PA Stip. II.A.1. Not only is this strained  
20 interpretation counter to the basic principles of administrative law, but also to the  
21 Plaintiffs' understanding at the time. At the October 2012 consulting parties meeting, the  
22 parties discussed adjusting the Project alignment to avoid specific cultural sites. Doc. 16-  
23 22 at 3. The discussion shows that the consulting parties understood the common meaning  
24 of realignment to be minor adjustments to avoid direct impacts to particular sites. Indeed,  
25 during the course of the PA process, minor alignment adjustments were made to avoid  
26 direct impacts on the handful of cultural sites actually identified within the Project route,  
27 including at the recommendations of the Tribes. *See* Swanson Decl., ¶¶ 22, 29. In sum,  
28 the PA process cannot be used to undue a final agency action nine years after the fact.

1                   **5. The Tribes have not identified a TCP.**

2                   When stripped of hyperbole, Plaintiffs’ core grievance is that BLM did not identify  
3 the entire San Pedro Valley (whatever its boundaries may be) as a TCP and then rely upon  
4 it to reroute the Project out of the San Pedro basin. Presumably, had the entire San Pedro  
5 Valley been eligible for treatment as a TCP – for example, upon a showing of traditional  
6 use areas, customs, or beliefs tied to the area, grounding features in the landscape that give  
7 it cultural integrity, and community-based, long-term connection to the area for cultural  
8 purposes – it would have been flagged in 2009 with a level of specificity and certainty  
9 that is not reflected in the official record that the Tribes helped to develop. But BLM had  
10 good reason for not doing so: the Tribes and Archaeology Southwest did not assert the  
11 existence of a valley-wide TCP until 2023 and to this day have never linked this expansive  
12 claim to any tangible features of the Valley, nor explained how the claimed valley-wide  
13 TCP meets National Register eligibility criteria, as required to identify TCP. *See Te-Moak*  
14 *Tribe*, 608 F.3d at 611. They have not even identified where it is located. *Hoonah Indian*  
15 *Ass’n v. Morrison*, 170 F.3d 1223, 1232 (9<sup>th</sup> Cir. 1999) (“That important things happened  
16 in a general area is not enough to make the area a ‘site.’”). During the entire route selection  
17 process, BLM understood the cultural importance of the Valley, and based on materials  
18 presented during consultation, understood that cultural importance to be the priority  
19 cultural resource sites Archaeology Southwest identified in 2012, Doc. 16-20, and not  
20 with a valley-wide TCP, the characteristics and tangible elements of which have yet to be  
21 identified.

22                   Historic properties protected by the NHPA are “any prehistoric or historic district,  
23 site, building, structure, or object included in, or eligible for inclusion in, the National  
24 Register” and include “properties of traditional religious and cultural importance to an  
25 Indian tribe or Native Hawaiian organization and that meet the National Register criteria.”  
26 36 C.F.R. § 800.16(l)(1) (Historic Property). “Properties of traditional religious and  
27 cultural importance” are commonly referred to as “traditional cultural properties” or  
28 “TCPs.” *See* National Park Service, National Register Bulletin 38 (Doc. 16-3).



1 A TCP is considered a Historic Property because of its association with cultural  
2 practices or beliefs of a living community that (a) are rooted in that community’s history,  
3 and (b) are important in maintaining the continuing cultural identity of the community.  
4 Doc. 16-3 at 4. The attributes that give a traditional cultural property significance often  
5 are intangible in nature. Doc. 16-3 at 6. However, the National Register lists, and NHPA  
6 Section 106 requires the review of effects on, *tangible* cultural resources. *Id.* While  
7 intangible cultural resources, and the beliefs or practices associated with a TCP, are  
8 important to defining significance of the TCP, “the entity evaluated [for National Register  
9 eligibility] must be a tangible property – that is, a district, site, building structure, or  
10 object.” *Id.* at 12.

11 The Ninth Circuit has recognized this distinction:

12 Although it is understandable that the Tribe values the landscape of a project  
13 area as a whole, the NHPA requires that the BLM protect only against adverse  
14 effects on the features of these areas that make them eligible for the National  
15 Register.

16 *Te-Moak Tribe*, 608 F.3d at 611. And in *Hoonah Indian Ass’n*, the Circuit observed: “That  
17 a general unbounded and imprecisely located area has important cultural significance is  
18 not enough.” 170 F.3d 1223, 1232 (9<sup>th</sup> Cir. 1999) (location of Tribe’s march undefined).

19 Not only must a TCP be a tangible object or feature, it also must meet one or more  
20 of the National Register listing criteria. 36 C.F.R. § 800.16(i)(1). The relevant criteria here  
21 are “associated with events that have made a significant contribution to the broad patterns  
22 of our history,” *id.*, § 60.4(a); and “have yielded, or may be likely to yield, information  
23 important in prehistory or history.” *Id.*, § 60.4(d). While the archaeological features, the  
24 ancestral village sites, and the other tangible traces of historic occupation in the Valley  
25 likely meet these criteria, McCue Decl., Ex. 2 at p. 3-147, Plaintiffs cannot establish that  
26 the entire Valley meets either of these criteria. As a result, the bedrock of their claim, that  
27 the entire Valley should be identified as a TCP, is likely to fail. *See Te-Moak Tribe*, 608  
28 F.3d at 611; *Hoonah Indian Ass’n*, 170 F.3d at 1232.

1 A similar issue arose in litigation over the proposed Cape Wind project, which was  
2 to be located in Nantucket Sound. Much like the Plaintiffs' proposed TCP for the entire  
3 San Pedro Valley, the Wampanoag Tribe asserted that the entire Sound was a TCP, but  
4 BLM only recognized specific locations from which tribal members viewed the Sound as  
5 National Register-eligible. *Public Employees for Environmental Responsibility v.*  
6 *Beaudreau*, 25 F.Supp.3d 67, 121 (D.D.C. 2020). The agency found that it was only those  
7 tangible locations that met the National Register listing criteria. *Id.* That determination  
8 was upheld by the D.C. District Court. *Id.*

9 These important criteria put in context BLM's responses to the new assertion, first  
10 made in 2023, that BLM should identify the entire San Pedro Valley as a TCP. In April  
11 2023, BLM's cultural resource lead responded to the new claims that the entire Valley  
12 should be designated as a TCP:

13 You are telling us that the middle San Pedro Valley is a cultural landscape and  
14 TCP, and clearly eligible for the National Register, but BLM cannot call it that  
15 without the proper process being followed with input from Tribes. Part of  
16 Section 106 is to evaluate properties and then determine eligibility for the  
17 National Register. We have to have an identified property to evaluate.

18 Swanson Decl., Ex. 6. BLM properly asked that the location and tangible features of the  
19 claimed TCP be identified and for an explanation of how those features fit within the  
20 relevant National Register criteria. *Id.*

21 When the Tribes and Archaeology Southwest asserted a valley-wide TCP in their  
22 August 4, 2023, protest, BLM responded on August 31, 2023, noting again that the Tribes  
23 had not identified the San Pedro Valley as a TCP when the Inventory Reports were  
24 circulated in 2018. Doc. 16-37. And once again the August 4 protest failed to identify  
25 tangible locations that could be considered for eligibility as a TCP, or the characteristics  
26 of those locations if they existed that might qualify them under the National Register  
27 criteria. Doc. See 16-35.

28 After further exchanges, on November 8, 2023, BLM suspended Project  
construction in the San Pedro basin to give the Tribes a final chance to come forward with  
information that would identify a tangible place within the San Pedro Valley as a potential

1 TCP. Doc. 16-42. BLM allowed construction to resume on November 27, 2023, because  
 2 once again – as in all communications since the issue was first raised – the Tribes had not  
 3 offered evidence of a landscape-scale TCP. Doc. 16-44.

4 Archaeology Southwest, as a nonprofit dedicated to work with cultural resources  
 5 in the Southwest and advisor to the Tribes, clearly has a detailed understanding of the  
 6 requirements to be met for establishing the existence of a TCP. And yet none of  
 7 Archaeology Southwest’s communications to BLM, in 2023 or at any point during the  
 8 permitting process, attempt to explain how the entire Valley – as opposed to the  
 9 archaeological and cultural resources adjacent to the river that were the focus of its efforts  
 10 – could qualify as a TCP. It also is instructive that Plaintiffs’ motion supports its TCP  
 11 assertion with declarations from tribal members that speak in generalities, without  
 12 identifying specific locations or activities. PI Mot. at 6, Docs. 16-9 and 16-10.

13 In its declaration submitted to support the PI motion, Archaeology Southwest  
 14 acknowledges that the tangible features of interest are the same specific archaeological  
 15 and cultural sites, mostly near the river, that were identified before the 2015 ROD. Doc.  
 16 16-11 ¶ 16. The declaration also speaks to the intangible significance of those features,  
 17 *id.*, but as the Ninth Circuit observed in *Te-Moak Tribe*, the NHPA process is applied to  
 18 potential impacts on physical features. 608 F.3d at 611; *see Beaudreau*, 25 F.Supp.3d at  
 19 121. The attributes that give tangible sites their significance may be intangible in nature,  
 20 Doc. 16-3 at 6, but “the entity evaluated [for National Register eligibility] must be a  
 21 tangible property.” *Id.* at 12.

22 BLM has properly attended to the actual archaeological and cultural sites in the  
 23 Valley. *See Te-Moak Tribe*, 608 F.3d at 611; *Beaudreau*, 25 F.Supp.3d 67, 121. Plaintiffs  
 24 still have not offered BLM a map showing the location of a valley-wide TCP<sup>7</sup> or

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25  
 26 <sup>7</sup> Very recently (December 11, 2023), Archaeology Southwest showed BLM four specific  
 27 locations within the San Pedro Valley that they now assert are potential TCP locations.  
 28 However, no supporting information regarding the characteristics of those sites was  
 provided. McCue Decl., ¶ 31. In addition, no valley-wide TCP map has been provided,  
 nor any information to support that claim.

1 information about its features or characteristics that could be related to the National  
2 Register listing criteria. Still, BLM’s November 24, 2023, letter demonstrates the agency’s  
3 willingness to continue meaningful consultation, even though the Tribes have not justified  
4 this additional effort. Doc. 16-43. BLM continues to go above and beyond its obligation  
5 under the NHPA to provide the Tribes with a “reasonable opportunity” to identify what  
6 they now claim is a valley-wide TCP, 36 C.F.R. §800.2(c)(2)(ii)(A), but the Tribes have  
7 not availed themselves of that opportunity.

8 **6. BLM followed the PA process for identifying Historic**  
9 **Properties.**

10 Despite raising the specter of Project construction disturbing human remains and  
11 destroying cultural artifacts, Docs.16-9 & 16-10, Plaintiffs have not identified any  
12 physical site with archaeological, cultural, or human remains that has been overlooked in  
13 the NHPA process, nor any such site within the San Pedro Valley that has been or will be  
14 adversely affected by the Project. The absence of such effects is no accident. It is the result  
15 of the years-long consultation efforts designed to minimize impacts to cultural resources.

16 Plaintiffs argue that BLM did not follow the PA process for identifying Historic  
17 Properties, PI Mot. at 24-27, but the cultural resource sites they are concerned for were  
18 protected before the PA process started, as the sites Plaintiffs identified before the 2015  
19 ROD were completely avoided. Swanson Decl., ¶¶ 10-13, Docs. 16- 20, 16-21.

20 As the PA process advanced, pedestrian surveys of the route were completed in  
21 2018, with tribal cultural resource specialists participating all along the way. Swanson  
22 Decl., ¶¶15-21. Those tribal representatives never mentioned a valley-wide TCP during  
23 field investigations, *id.*, ¶ 20, nor did the Tribes mention a valley-wide TCP in comments  
24 on the draft Arizona Inventory Report that was sent to the consulting parties, including  
25 the Tribes and Archaeology Southwest, in early 2018. *Id.*, ¶ 23-26. The SHPO and ACHP  
26 all concurred with the findings of the Arizona Class III Inventory Report, which were  
27 deemed final in June 2018. *Id.*, ¶¶ 23, 25.

1 Plaintiffs now tell the Court that the absence of a San Pedro Valley TCP in that  
 2 report was “conspicuous.” PI Mot. at 14. What is conspicuous, however, is that they had  
 3 ample opportunity but did not raise the existence of a valley-wide TCP six years ago  
 4 during the PA process. PA Stip. I.(D) (Inventory Reports provided to concerned tribes for  
 5 60-day comment period); I.D (after comment, revised reports sent to tribes for 60-day  
 6 review); I.E.1 (Inventory Reports complete the identification of Register-eligible  
 7 properties) (Doc. 16-24). As BLM pointed out in 2023, that would have been the best time  
 8 to raise the issue with BLM. Swanson Decl., Ex. 6. However, they chose not to do so.<sup>8</sup>

9 Plaintiffs nevertheless assert that the PA left them free to identify new Historic  
 10 Properties of any scale or significance at any time, pointing to BLM’s commitment to  
 11 continue consultation with Native American Tribes. PI Mot at 24, citing PA Stip. I.F. But  
 12 they ignore the remainder of the sentence, that BLM “shall provide opportunities for  
 13 review and comment on draft and final version of the Inventory Report.” Doc. 16-24 at 8.  
 14 The Inventory Reports are the PA’s vehicle for identifying Historic Properties, PA Stip.  
 15 I.E.1, and the Tribes participated in their development without identifying a valley-wide  
 16 TCP. At no point did the Tribes or Archaeology Southwest comment that the Inventory  
 17 Reports should identify the San Pedro Valley as a TCP. Swanson Decl., ¶¶ 23-27.

18 Plaintiffs, not BLM, failed to follow the plain terms of the PA. *Cf* PI Mot. at 25-  
 19 26. They cannot fault BLM for refusing at this late stage to consider a reroute out of the  
 20 Valley when in early 2023, five years after affected Historic Properties had been identified  
 21 through the PA process, they first came forward with a TCP claim. Indeed, BLM has gone  
 22 above and beyond what the PA requires, giving them countless opportunities to actually

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23  
 24 <sup>8</sup> An assessment of indirect visual effects on cultural resources identified in the Inventory  
 25 Reports was sent to the consulting parties in November 2018. Swanson Decl., ¶ 27. The  
 26 assessment analyzed visually sensitive cultural resource sites in the San Pedro basin that  
 27 had been identified in the Inventory Reports. *Id.* Consulting parties, including the Tribes  
 28 and Archaeology Southwest, were given 60 days to review and provide input. *Id.* This  
 presented yet another timely opportunity for Plaintiffs to have notified BLM of the  
 potential existence of a TCP in the San Pedro Valley, but again they chose not to provide  
 further input. *Id.*

1 identify this claimed TCP outside of the PA process and at an untimely stage of the Project,  
2 including the extreme measure of pausing SunZia’s construction mid-stream. BLM had  
3 no obligation to do so. *See Reno Sparks Indian Colony*, 663 F.Supp.3d at 1201 (rejecting  
4 tribe’s assertion that BLM failed to follow NHPA process when tribe belatedly raised a  
5 general objection saying all properties identified in an HPTP should be protected).

6 As the mainstay of their PA argument, Plaintiffs rely upon a quote from *Quechan*  
7 *Tribe v. U.S. Dept. of the Interior*, 755 F.Supp.2d 1104 (S.D. Cal. 2010), regarding a  
8 programmatic agreement, but that case turned on the adequacy of government-to-  
9 government consultation rather than the particulars of a PA process. 755 F.Supp.2d  
10 at 1118-1120. The irrelevance of *Quechan* to this case is discussed below, in the correct  
11 context of government-to-government consultation.

12 Plaintiffs’ reliance on *Pueblo of Sandia v. U.S.*, 50 F.3d 856 (10<sup>th</sup> Cir. 1995) is  
13 likewise misplaced. There, the Pueblo informed the Forest Service that a canyon contained  
14 sites of religious and traditional importance, and that the Pueblo was reluctant to share  
15 information about spiritual and cultural practices and locations. 50 F.3d at 860-61. Here,  
16 the Tribes and Archaeology Southwest told BLM the specific locations of the priority  
17 cultural resource areas in the region, Swanson Decl., Ex. 3, Doc. 16-20. BLM acted on  
18 that information, McCue Decl., Ex. 2 at 3-147, and Archaeology Southwest recognized  
19 that those sites were being avoided. Swanson Decl., Ex. 5. In *Pueblo of Sandia*, the Forest  
20 Service had information in hand and ignored it. 50 F.3d 860-61. That is not the case here.

21 *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768 (9<sup>th</sup> Cir. 2006) also provides no  
22 support to Plaintiffs. There, the court rejected a Forest Service argument that no NHPA  
23 consultation was required because there was no “undertaking.” *Id.* at 787. Here, the Tribes  
24 had ample opportunity through the PA process to contribute to the identification of  
25 Historic Properties, which they exercised, but without identifying a valley-wide TCP.

26  
27  
28



1                   **7. BLM satisfied its Section 106 and government-to-government**  
2                   **consultation obligations.**

3                   NHPA implementing regulations require BLM to engage in “government-to-  
4 government” consultation with recognized Indian tribes. 36 C.F.R. § 800.2(c)(2)(ii)(C).  
5 The purpose of consultation with Indian tribes under NHPA is “to ensure that all types of  
6 historic properties and all public interests in such properties are given due consideration.”  
7 *Te-Moak Tribe*, 608 F.3d at 609 (quoting 16 U.S.C. § 470a(d)(1)(A) (2013)). NHPA  
8 regulations require the agency give tribes a “reasonable opportunity” to identify historic  
9 properties, to express concerns regarding those properties, and to participate in the  
10 resolution of those concerns. 36 C.F.R. § 800.2(c)(2)(ii)(A).

11                   BLM’s efforts here fulfilled that obligation and are easily distinguished from  
12 *Quechan*, 755 F.Supp.2d 1104, heavily relied upon by Plaintiffs. In that case, BLM did  
13 not meet with the Tribe’s government until after the project was approved, and indeed  
14 “rebuffed” the Tribe’s request that the agency meet with the tribal council. *Id.* at 1118-19.  
15 The situation in *Quechan* could not be less relevant to the facts of this case, in light of  
16 BLM’s significant outreach efforts to the Tribes over 14 years. Here, BLM held 14  
17 meetings with interested tribes regarding the Project between July 2009 and December  
18 2012, and hosted an extensive site visit in 2012 with the Tribes’ representatives in the San  
19 Pedro Valley, incorporating their feedback to avoid identified sites, as reflected in the  
20 2013 FEIS. Swanson Decl., ¶ 7. The engagement with Tribes continued thereafter, with  
21 the Tribes’ participation in additional, extensive field surveys completed in 2018, where  
22 again their input informed avoidance and mitigation measures in the San Pedro Valley  
23 area. *Id.*, ¶¶ 12, 16-21, 29.

24                   Indeed, BLM here has gone far beyond what the courts found sufficient to satisfy  
25 NHPA consultation obligations in a later case involving the Quechan Tribe, *Quechan*  
26 *Tribe of the Ft. Yuma Rsrv. v. U.S. Dep’t of the Interior*, 927 F. Supp. 2d 921, 930-33  
27 (S.D. Cal. 2013), *aff’d* 673 F. App’x 709 (9th Cir. 2016). In this later *Quechan* case, the  
28 Tribe did not respond to BLM’s offers to consult for almost two years, but BLM continued

1 to provide information to the Tribe and ultimately the Tribe did engage. 927 F.Supp. 2d  
2 at 931-33. BLM also met its obligation there to provide information to the Tribe about the  
3 identification of Historic Properties, even though the Tribe chose not to respond. *Id.* at  
4 933. Here, BLM has engaged in far more consultation than occurred in the later *Quechan*  
5 case (where BLM’s actions satisfied NHPA requirements), including active engagement  
6 before the 2015 ROD and during the PA process. Similar to the later *Quechan* case, here  
7 the Tribes chose not to engage during some stages of the PA process. For example, they  
8 did not respond to the Inventory Reports in 2018 (even though they now say the absence  
9 of a valley-wide TCP was “conspicuous,” PI Mot. at 14). BLM not only shared  
10 information with the Tribes but met with them to obtain their input on the draft HPTP.  
11 Swanson Decl., ¶39-41. BLM cannot be faulted for the Tribes’ failure to request  
12 identification of a valley-wide TCP, either before the 2015 ROD was issued or in response  
13 to the 2018 Inventory Reports. *See* 927 F.Supp.2d at 933.

14 BLM’s actions here also compare favorably to those of the Forest Service in  
15 *Concerned Citizens and Retired Miners Coalition v. U.S. Forest Service*, where this Court  
16 found consultation satisfactory where all communications occurred through  
17 correspondence and there were no in-person meetings. 279 F.Supp.3d 898, 939-942 (D.  
18 Ariz. 2017). The Court rejected comparisons to the earlier *Quechan* decision. 279  
19 F.Supp.3d at 942. Similarly, in litigation over the Cape Wind offshore wind project,  
20 objections that the federal agency had not taken enough time to identify Historic Properties  
21 were rejected based upon the several years of consultation with interested tribes and other  
22 parties. *Beaudreau*, 25 F.Supp.3d at 120. Here BLM’s consultation efforts have gone well  
23 beyond what is required by the NHPA.

24 **C. The Plaintiffs have not demonstrated irreparable harm to their**  
25 **interests in the absence of preliminary relief.**

26 Under *Winter*, plaintiffs must establish that irreparable harm is likely, not just  
27 possible, in order to obtain a preliminary injunction. *Winter*, 555 U.S. 7, 22 (2008).  
28 “Issuing an [injunction] based only on a possibility of irreparable harm is inconsistent with



1 our characterization of injunctive relief as an extraordinary remedy that may only be  
2 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.* (emphasis  
3 added)(citation omitted). “A preliminary injunction is an extraordinary remedy never  
4 awarded as of right.” *Id.* at 24 (citation omitted). In the context of a challenge to a  
5 procedural statute such as the NHPA, there is no presumption of irreparable harm. *Amoco*  
6 *Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987) (finding a presumption of  
7 irreparable harm “contrary to traditional equitable principles” in the context of purported  
8 procedural violations of federal statutes); *see also Reno Sparks Indian Colony*, 663  
9 F.Supp.3d at 1201.

10 Here, Plaintiffs’ assertion of irreparable harm is hollow, resting on bare, conclusory  
11 allegations and they have failed to meet their burden to make a clear showing of  
12 irreparable harm. They purport to challenge an LNTP that authorized construction where  
13 no Historic Properties have been identified, Doc. 16-40, as a vehicle to revisit a 2015  
14 agency decision. The only real “harm” to Plaintiffs is that they have been denied the  
15 opportunity to turn back the clock and re-open a final agency action made nine years ago.

16 They make generalized references that construction activities will “cause adverse  
17 effects to historic properties of great cultural, spiritual, and religious significance,” that  
18 construction will irreparably harm historic, cultural, and indigenous resources and  
19 “grading, site clearing, vegetation tagging, and removal and placement of heavy  
20 equipment in sensitive areas” with no further detail. *See, e.g.*, Complaint ¶¶ 12, 13, 115  
21 (Doc. 1). There is no specificity regarding the alleged harm, such as an actual incident  
22 where construction activity has hurt a significant aspect of the alleged TCP. A declaration  
23 showing that construction is occurring, Doc. 16-11, does not demonstrate irreparable  
24 harm. A clear showing is required to justify the extreme remedy of an injunction, as “any  
25 alleged injury to religious/cultural items or tribal members’ sensibilities does not  
26 automatically constitute irreparable harm.” *Colorado River Indian Tribes v. U.S. Dep’t*  
27 *of Interior*, 2012 WL 12894189 (C.D. Cal. May 24, 2012) \*6 (citations omitted).

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1 Plaintiffs are attempting to create a sense of urgency and harm where none exists.  
2 Plaintiffs wrongly claim, with no specific proof, that Project construction will cause heavy  
3 disturbance to ancestral village sites, harm the integrity of interlinking sites, and even  
4 disturb human remains within the San Pedro Valley. PI Mot. at 38-40. To the contrary,  
5 and as a result of consultation with the Tribes, the Project route intentionally avoids  
6 identified sites. Swanson Decl., ¶ 20. At the river crossing Project structures have been  
7 redesigned to ensure avoidance and cumulative impact mitigation measures are required  
8 under the HPTP, all based on input from representatives of the Tohono O’odham Nation.  
9 *Id.*, ¶ 29; Doc. 16-34 at 95. The HPTP requires submission of a report on implementation  
10 of mitigation measures, with an opportunity for consulting parties – including the Tribes  
11 – to review and comment on its adequacy before construction proceeds in that area.  
12 McCue Decl., ¶ 36.

13 The declarations that Plaintiffs offer to show irreparable harm also are unavailing.  
14 The facts of the Inventory Report and the HPTP contradict Ms. Grant’s opinion that  
15 ancestral remains will be disturbed in the Valley. PI Br. at 38. Moreover, in a Tribal  
16 consultation meeting in 2011, Ms. Grant was concerned that the Project not go near the  
17 river and its archaeological sites and natural resources, rather than about the presence of  
18 the Project anywhere in the San Pedro basin. Swanson Decl., Ex. 3. The route is more than  
19 a mile from the river, except at the crossing. McCue Decl. Ex. 7.

20 Plaintiffs’ declaration from an enrolled member of the San Xavier District of the  
21 Tohono O’odham Nation, PI Br. at 37, fails to mention that the District adopted a  
22 resolution in 2011 supporting the Project but objecting to the proposed Tucson route that  
23 would have crossed District land. Swanson Decl. Ex. 4. Plaintiffs also express concern  
24 about impact on saguaros, which are not unique to the Valley (Swanson Decl., ¶ 26)  
25 ignoring the Project’s strong commitment to relocate saguaros where possible and to plant  
26 five times as many as are removed. McCue Decl. Ex. 6 at 7. Finally, the only agave  
27 cultivation site affected by the Project is outside the Valley. Swanson Decl., ¶ 30.

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1 Plaintiffs also fail to mention that the LNTP they have challenged in this suit  
2 involves areas where there were no historic properties identified (including during  
3 pedestrian field surveys). McCue Decl., 21. Plaintiffs present a vague threat of imminent,  
4 irreversible harm to an unsubstantiated valley-wide TCP first asserted in 2023 to achieve  
5 their larger goal – reconsideration of the 2015 ROD.

6 Plaintiffs’ significant delay in seeking injunctive relief also “weighs  
7 determinatively against a finding of irreparable harm.” *Reno Sparks Indian Colony*, 663  
8 F.Supp.3d at 1201 (citing *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213  
9 (9th Cir. 1984) (“A delay in seeking a preliminary injunction is a factor to be considered  
10 in weighing the propriety of relief.”). Plaintiffs inexplicably did not seek relief following  
11 execution of the PA in 2014 or upon the issuance of the ROD in 2015, even though the  
12 Complaint reveals that they had concerns at the time with those agency actions. It is  
13 equally telling that the Plaintiffs have waited over four months to seek injunctive relief  
14 after authorized construction began in the San Pedro basin in September 2023. These  
15 significant delays are clear evidence that there is no risk of irreparable harm, nor have they  
16 pointed to any real irreparable harm to their interests.

17 **D. The balance of equities tips sharply against the Tribes.**

18 The economic harm a TRO or PI would cause to SunZia weighs in the balance of  
19 equities against any injunctive relief. *See Earth Island Inst. v. Carlton*, 626 F.3d 462, 475  
20 (9th Cir. 2010) (courts should consider economic interests in the balance of equities  
21 prong). SunZia is at a critical stage of financing and construction on a complex, multi-  
22 billion dollar project that took years to bring to fruition and is a centerpiece of the nation’s  
23 transition to renewable energy. Doc. 11, ¶¶ 1-4, 11. There are two areas within the San  
24 Pedro basin that are particularly time-sensitive because of constraints that have been  
25 placed on the construction process to protect environmental and cultural resources: Paige  
26 Canyon and the San Pedro River crossing. *Id.*, ¶¶ 17-19. Not maintaining the construction  
27 schedule at those locations between now and May 2024 will at a minimum delay  
28

1 completion of the entire Project by a year, and thus trigger cascading effects that would  
 2 threaten the viability of the Project and the associated SunZia Wind Projects. *Id.*, ¶ 20, 22.

3 A TRO or PI would threaten not only the \$11 billion investment in the transmission  
 4 line and wind projects, but also would take renewable energy away from entities that serve  
 5 more than 11 million customers, have already signed agreements to obtain electricity from  
 6 the Project, and have relied on the availability of that power in 2026 to meet their climate  
 7 and reliability obligations to the California Public Utility Commission (CPUC). Doc. 11,  
 8 ¶ 21, 22.

9 Against the harm that would be wrought by derailing this important set of clean  
 10 renewable energy projects and the jobs and economic benefits they provide to Arizona  
 11 and New Mexico, Plaintiffs can point only to their recent, and now time barred,  
 12 unsubstantiated claim of a valley-wide TCP – of which they provided BLM with no  
 13 evidence and failed to raise over 15 years of consultation – with which they hope to require  
 14 relocation of the Project out of the valley, in effect killing these projects. The balance of  
 15 hardships tilts sharply against issuance of a preliminary injunction.

16 **E. An Injunction is not in the public interest.**

17 “In exercising their sound discretion, courts of equity should pay particular regard  
 18 for the public consequences in employing the extraordinary remedy of injunction.”  
 19 *Winter*, 555 U.S. at 24 (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982);  
 20 *see also Railroad Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941).

21 SunZia Transmission is a critical piece of our nation’s priority effort to foster the  
 22 development of renewable energy:

23 The SunZia Transmission Project is a game-changer for America’s clean energy  
 24 economy and for our fight to save the planet. To tackle the climate crisis and bring  
 25 clean, affordable, reliable power to American families, we need to build high-  
 performance transmission projects like this one all across the country.

26 John Podesta, Senior Advisor to the President for Clean Energy Innovation and  
 27 Implementation.<sup>9</sup>

28 <sup>9</sup> Sept. 1, 2023, statement regarding groundbreaking of the SunZia Transmission Project,  
 SUNZIA TRANSMISSION, LLC’S RESPONSE TO  
 PLAINTIFFS’ PRELIMINARY INJUNCTION MOTION

1           The use of public lands to foster the development of renewable energy has been a  
 2 national priority for nearly two decades. The Energy Policy Act of 2005 directed the  
 3 Department of the Interior to authorize 10,000 MW of renewable energy on public land  
 4 by 2015. Pub.L. 109–58, § 211, 119 Stat. 594, 660 (2005). More recently, the Energy Act  
 5 of 2020 directs the Secretary of the Interior to “seek to issue permits that, in total, authorize  
 6 production of not less than 25 gigawatts of electricity from wind, solar, and geothermal  
 7 energy projects by not later than 2025, through management of public lands and  
 8 administration of Federal laws.”<sup>10</sup> President Biden also has issued Executive Order  
 9 14008,<sup>11</sup> which directed the Secretary to “review siting and permitting processes on public  
 10 lands” with a goal of increasing “renewable energy production on those lands . . . while  
 11 ensuring robust protection for our lands, waters, and biodiversity and creating good jobs.”

12           District courts in the Ninth Circuit, in other NHPA and NEPA challenges to  
 13 renewable energy-related projects, have held that the public interest prong weighs against  
 14 an injunction. *See Backcountry Against Dumps v. Abbott*, No. 10-cv-1222, 2011 WL  
 15 3567963, \*8 (S.D. Cal. Aug. 12, 2011) (an NHPA case, weighing the economic harm  
 16 posed by injunction to transmission line developer and denying injunction; enjoining the  
 17 construction of transmission lines that will carry renewable energy is not in the public  
 18 interest in part because “[t]he development of renewable energy is a national energy  
 19 priority”); *Protect Our Communities Foundation v. U.S. Dep’t of Agriculture*, 845  
 20 F.Supp.2d 1102, 1116-18 (S.D.Cal. 2012) (affirming holding that injunction against  
 21 transmission line carrying renewable energy is not in the public interest). In *Western*  
 22 *Watersheds Project v. Bureau of Land Management*, the district court held that the public  
 23 interest prong favored the construction of a wind energy facility: “The public has a strong

24 \_\_\_\_\_  
 25 available at: [Biden-Harris Administration Celebrates Groundbreaking of New SunZia  
 26 Transmission Line That Will Deliver Clean, Reliable, Affordable Energy to Millions of  
 27 Americans | U.S. Department of the Interior \(doi.gov\)](#).

27 <sup>10</sup> Energy Act of 2020 (P.L. 116-260, Division Z), Sec. 3104.

28 <sup>11</sup> E.O. 14008, *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7619  
 (Feb. 1, 2021).

1 interest in the project. Congress has articulated the public policy that our nation should  
2 incorporate clean energy as a necessary part of America's future and it is essential to  
3 securing our nation's energy independence and decreasing green house emissions. ... It is  
4 also important to Nevada's economic and clean energy goals. ... The project, which has  
5 contracted with Nevada Energy will certainly help the state reach these goals.” 774  
6 F.Supp.2d 1089 (D.Nev. 2011); *see also* 2011 WL 1630789 (D.Nev. Apr 28, 2011)  
7 (denying motion for Stay Pending appeal); 443 Fed.Appx. 278 (9th Cir. Jul 15, 2011)  
8 (affirming denial of injunction pending appeal).

9 **IV. CONCLUSION**

10 Plaintiffs' claims are not likely to succeed on the merits, they cannot show  
11 irreparable injury, the balance of equities tips sharply against the Plaintiffs and against  
12 granting preliminary injunctive relief, and a preliminary injunction also would not be in  
13 the public interest. Accordingly, SunZia respectfully urges the Court to deny Plaintiffs'  
14 motion.

15  
16 Dated this 13th day of February, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2024 I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

/s/ Svend Brandt-Erichsen  
Svend Brandt-Erichsen