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33 **IN THE UNITED STATES DISTRICT COURT**
34 **FOR THE DISTRICT OF ARIZONA**
35 **TUCSON DIVISION**

36
37 Tohono O’odham Nation; San Carlos Apache) Case No.
38 Tribe; Archaeology Southwest; and Center)
39 for Biological Diversity) **COMPLAINT FOR**
40) **DECLARATORY JUDGMENT**
41 *Plaintiffs,*) **AND INJUNCTIVE RELIEF**
42)

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v.)
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U.S. Department of the Interior; Deb Haaland,)
U.S. Secretary of Interior; and U.S. Bureau of)
Land Management;)
)
Defendants.)

INTRODUCTION

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2 1. This action challenges the Bureau of Land Management’s (“BLM”) failure to comply with the National Historic Preservation Act (“NHPA”), 54 U.S.C. §§ 300101-307108, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706—as well as Executive Orders 13007 and 13175, Secretarial Order 3403, and President Biden’s November 30, 2022 Memorandum on Uniform Standards for Tribal Consultation—in issuing its September 27, 2023 and November 27, 2023 Limited Notices to Proceed (“LNTP”) to SunZia Transmission, LLC, authorizing the partial construction of the SunZia Southwest Transmission Project (“the Project”), a massive high-voltage transmission line that will cut through the heart of the middle and lower San Pedro Valley and will cause serious, irreversible adverse effects on Tribal cultural sites and sacred areas, including areas with human remains. *See* 54 U.S.C. § 306108; 36 C.F.R. § 800.1(c).

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15 2. Despite repeated calls from Plaintiffs and others to conduct a legally adequate inventory of historic properties and cultural resources that would be impacted by the Project prior to the authorization of any construction activities, BLM issued the LNTPs based on a deeply flawed NHPA Section 106 consultation process that failed to accurately locate and identify historic and cultural resources. In particular, although Plaintiffs and others have submitted overwhelming evidence of the cultural significance of the San Pedro Valley as a cultural landscape to several Native American Tribes since 2009, BLM failed to make a reasonable and good faith effort to identify the Valley as a traditional cultural property until March 2023 at the earliest. In turn, the agency’s longstanding refusal to recognize this traditional cultural property corrupted the entire Section 106 process, resulting in a severely limited, incomplete cultural resource inventory that failed to identify historic sites in and around the San

1 Pedro Valley. Consequently, BLM’s assertion in the LNTPs that “there are no
2 historic properties present” within the construction footprint is factually and
3 legally baseless, and Project construction authorized by the LNTPs has caused,
4 and will continue to cause, serious, adverse effects to historic sites, including
5 traditional cultural properties, in violation of the NHPA, its implementing
6 regulations, and the APA.

7 3. For these reasons and those set forth below, BLM’s decision to issue
8 the LNTPs authorizing construction in the San Pedro Valley and significant,
9 irreversible impacts in one of our nation’s most important historic and cultural
10 regions without addressing these impacts in the manner required by the NHPA is
11 “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with
12 law” and “without observance of procedure required by law,” within the meaning
13 of the judicial review provision of the APA, 5 U.S.C. § 706(2). Accordingly,
14 BLM’s LNTP should be vacated and remanded to the agency for further
15 consideration.

16 **JURISDICTION AND VENUE**

17 4. This Court has jurisdiction over this action pursuant to the APA, 5
18 U.S.C. §§ 701-706; 28 U.S.C. § 1331 (federal question jurisdiction), with claims
19 arising under the APA and the NHPA. *See* 28 U.S.C. §1346 (United States as
20 defendant); 28 U.S.C. § 1362 (“District courts shall have original jurisdiction of
21 all civil actions, brought by any Indian Tribe or band with a governing body duly
22 recognized by the Secretary of the Interior, wherein the matter in controversy
23 arises under the Constitution, laws, or treaties of the United States.”). Plaintiffs
24 have exhausted the available administrative remedies and have no other remedy at
25 law.

26 5. This action involves the United States as a defendant and arises
27 under the laws of the United States. An actual, justiciable controversy exists

1 between the parties within the meaning of 28 U.S.C. § 2201(a). Jurisdiction is
2 conferred by 28 U.S.C. § 1331. This Court may grant declaratory relief and
3 additional relief pursuant to 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 701-706.

4 6. Venue is proper in this judicial district and Court pursuant to 28
5 U.S.C. § 1391(e)(1)(B) because a “substantial part of the events or omissions
6 giving rise to the claim occurred” in this district, and a substantial part of the
7 property that is the subject of this action is situated in this district. A large portion
8 of the Project would be located in Arizona’s San Pedro Valley. Venue is also
9 proper in the Tucson Division pursuant to Civil Local Rules 77.1 and 5.1, because
10 this case is founded on causes of action arising in the Tucson Division. A
11 significant portion of the disputed Project is located in Pima County.

12 **PARTIES**

13 7. Plaintiff TOHONO O’ODHAM NATION is a federally-recognized
14 Indian tribe with a governing body recognized by the Secretary of the Interior. In
15 addition to the Tohono O’odham Nation’s reservation lands, the Nation maintains
16 deep historical, cultural, and spiritual connections to its broader ancestral
17 territories including the San Pedro Valley. Many tribal members trace their lineage
18 to the Sobaipuri O’odham, whose numerous villages along the San Pedro River
19 were documented by the first Spanish conquistadors upon their arrival to the area
20 in the early 1500s. Additionally, the Nation’s tribal members are descendants of
21 the Hohokam, the ancient people who previously lived and flourished along the
22 rivers of Southern Arizona including the San Pedro River. The Middle San Pedro
23 Valley is a Traditional Cultural Landscape of the Tohono O’odham Nation and the
24 many tribes whom they have shared this valley with for millennia.

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26 8. Plaintiff SAN CARLOS APACHE TRIBE is a federally-recognized
27 Indian tribe, organized pursuant to Section 16 of the Indian Reorganization Act of

1 1934 (48 Stat. 984), with a governing body recognized by the Secretary of the
2 Interior. The San Carlos Apache Reservation (“Reservation”) is situated in three
3 counties in eastern Arizona— Gila, Pinal, and Graham. The Reservation is a much
4 smaller portion of the larger aboriginal and ancestral homelands of the Tribe and
5 Western Apaches. The Tribe has a strong religious, historic, and cultural
6 connection to the lands and waters in the San Pedro Valley where the Project is to
7 be located and operated. Indeed, long before Anglo-Europeans appeared in the
8 western hemisphere, the Tribe’s and its members’ ancestors lived on the land in
9 the San Pedro Valley. The Project, its associated facilities, and connected activities
10 will occur within culturally sensitive and sacred areas of significance and
11 importance to the Tribe and the Tribe’s members.

12 9. By filing this action, the Plaintiff Tribes do not waive their sovereign
13 immunity and do not consent to suit as to any claim, demand, offset, or cause of
14 action of the United States, its agencies, officers, agents, or any other person or
15 entity in this or any other court.

16 10. Plaintiff ARCHAEOLOGY SOUTHWEST is a 501(c)(3) nonprofit
17 organization headquartered in Tucson, Arizona. Founded in 1989, Archaeology
18 Southwest has over 2,000 members around the country.¹ For over three decades,
19 Archaeology Southwest has practiced a holistic, conservation-based approach to
20 exploring the places of the past—a concept it calls “Preservation Archaeology.”
21 By exploring what makes a place unique and sharing this knowledge in innovative

¹ On January 1, 2012, the Center for Desert Archaeology changed its corporate name to Archaeology Southwest. No other aspect of the organization changed apart from the corporate name. As Archaeology Southwest informed BLM in its comments on the 2012 Draft Environmental Impact Statement (“EIS”) for the Project, “[a]ny . . . correspondence submitted by the Center for Desert Archaeology should be considered information provided by Archaeology Southwest.” Accordingly, for consistency and the convenience of the Court, this Complaint will use “Archaeology Southwest” throughout.

1 ways, Archaeology Southwest seeks to foster meaningful connections to the past
2 and respectfully safeguard its irreplaceable resources. A key element of the
3 Preservation Archaeology mission, therefore, is to connect the places and stories
4 of the past to the people and values of the present. Archaeology Southwest
5 achieves its mission by supporting low-impact research, educating the public
6 about the invaluable archaeological resources within its study areas, and protecting
7 historically inimitable places through conservation easements so that these places
8 may be shared by future generations of Americans. Relevant here, Archaeology
9 Southwest has sponsored and coordinated over a decade of intensive cultural
10 resource inventories, research, and Tribal and public engagement centered on the
11 San Pedro Valley.

12 11. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit
13 membership corporation with offices in Arizona, California, Colorado, Florida,
14 Hawaii, Minnesota, Nevada, North Carolina, Oregon, Washington, Washington
15 D.C., and Mexico. The Center works through science, law, and policy to secure a
16 future for all species, great or small, hovering on the brink of extinction. The
17 Center is actively involved in species and habitat protection issues worldwide,
18 including throughout the southwestern United States, and actively advocates for
19 increased protections for species and their habitats and landscape connectivity in
20 Arizona and specifically in the San Pedro Valley. The Center works to support
21 preservation of indigenous cultural landscapes and traditional cultural properties
22 as well as other historic properties to benefit human welfare which is deeply
23 linked to nature, wildlife, and habitat.

24 12. Clearing, grading, road construction, and other ground-disturbing
25 activities are causing and will continue to cause adverse effects to historic
26 properties of great cultural, spiritual, and religious significance to the Tohono
27 O'odham Nation, San Carlos Apache Tribe, and their members, including

1 destruction of landscape integrity and connectivity that is harming, degrading, and
2 adversely affecting important cultural values of this traditional cultural landscape.
3 These activities are also causing the loss and displacement from the landscape of
4 the native flora and fauna including many plants and animals sacred to the Tribes
5 including tagging and relocation of saguaro cacti. Construction activities are also
6 harming and will continue to harm sacred water resources including springs,
7 seeps, and the San Pedro River itself by fundamentally changing the landscape
8 structure and water flow across the landscape. Plaintiffs are harmed by the adverse
9 effects to these historic properties, including the traditional cultural properties and
10 indigenous and other historic properties in the San Pedro Valley. By transforming
11 the landscape these activities are impairing the integrity of the cultural landscape
12 for future generations. The operation of earth-moving equipment, the displacement
13 of soils and boulders, and the killing of hundreds (and likely thousands) of plants
14 and animals that are vital elements of the San Pedro Valley historic property are
15 causing unmistakably significant, adverse effects and are radically diminishing the
16 integrity of these historic resources. That these construction activities have been
17 authorized without proper consultation and without affording the affected Tribes
18 an opportunity to provide the ceremonial treatments that could have helped to
19 avoid or reduce these impacts only exacerbated the on-the-ground injuries that are
20 now occurring.

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Figure 1: Aerial picture of new access roads and tower pad sites west of the San Pedro River, near Redrock Canyon. Photos taken by Archaeology Southwest with the support of a volunteer pilot and Lighthawk, a non-profit organization on November 13th, 2023, approximate coordinates: 32.17471, -110.34917.

13. Plaintiffs’ significant interests in historic, cultural, and indigenous resources in the San Pedro Valley will be irreparably harmed if construction proceeds under the LNTP due to irreversible damage to historic properties including traditional cultural properties, religious and cultural properties, and a major transformation of the indigenous cultural landscape.

14. Plaintiffs’ and their members’ injuries would be redressed by the relief sought, which would vacate the LNTP, thereby halt construction, and require Defendants to comply with federal law prior to authorizing any further construction activities.

15. Defendant DEB HAALAND, U.S. Secretary of Interior, is sued in her official capacity. As Secretary, she is charged with overseeing the management of the nation’s lands within the jurisdiction of the Department of the Interior and its agencies, including BLM, as well as the Department of the

1 Interior's and its agencies' compliance with NHPA. The Secretary is further
2 charged with implementing statutes, regulations, and Executive Orders and is
3 responsible for government-to-government consultation with Indian tribes and
4 pursuant to the NHPA, 54 U.S.C. §§ 306102, 302706, 36 CFR § 800.2(c)(2)(ii),
5 and Executive Orders 13007 and 13175.

6 16. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR
7 is responsible for the administration and implementation of the NHPA in its
8 undertakings and for compliance with all other federal laws applicable to agencies
9 within the Department of the Interior, including BLM.

10 17. Defendant BUREAU OF LAND MANAGEMENT is a federal
11 agency within the Department of the Interior charged with the management of
12 certain public lands and has legal responsibility for ensuring that its actions
13 comply with the NHPA and other laws. BLM issued the LNTP to SunZia at issue
14 in this case, as well as other decisions and documents referenced herein. BLM has
15 an obligation to consult and coordinate with the TOHONO O'ODHAM NATION,
16 the SAN CARLOS APACHE TRIBE, the HOPI TRIBE, and the ZUNI PUEBLO
17 and other governmental units when making findings and determinations under
18 Section 106 of the NHPA regarding the effects of BLM-approved projects on
19 cultural resources. Importantly, BLM has a fiduciary duty under the federal trust
20 responsibility to consult and coordinate with the Tribes and protect the Tribes'
21 properties, including traditional cultural properties, sacred sites, and cultural items
22 (term from NAGPRA, if included) when approving and assessing the effects of
23 projects.

24 **STATUTORY BACKGROUND**

25 **A. NHPA**

26 18. Congress enacted the NHPA in 1966, with the express intent that
27 "the historical and cultural foundations of the nation should be preserved as a

1 living part of our community life and development in order to give a sense of
2 orientation to the American People.” Pub. L. 89-665, 80 Stat. 915 (1966).

3 19. Section 106 of the NHPA requires that federal agencies “take into
4 account the effect” of any “undertaking” on historic properties. 54 U.S.C. §
5 306108. The term “undertaking” is broadly defined to mean “a project, activity, or
6 program funded in whole or in part under the direct or indirect jurisdiction of a
7 Federal agency,” and relevant here, expressly includes activities “requiring a
8 federal permit, license, or approval.” *Id.* § 300320; *accord* 36 C.F.R. § 800.16(y).
9 “Historic property” is likewise broadly defined to include “any prehistoric or
10 historic district, site, building, structure, or object included on, or eligible for
11 inclusion on, the National Register, including artifacts, records, and material
12 remains relating to the district, site, building, structure, or object.” 54 U.S.C.
13 § 300308.

14 20. The NHPA also established the Advisory Council on Historic
15 Preservation (“ACHP”), an independent agency with the authority to issue binding
16 regulations to implement Section 106. *Id.* §§ 304101-304102. Relevant here, those
17 regulations provide that agencies “must complete the Section 106 process *prior to*
18 the approval of . . . the undertaking or *prior to* the issuance of any license.” 36
19 C.F.R. § 800.1(c) (emphases added). Although agencies may authorize
20 “nondestructive project planning activities before completing compliance with
21 section 106,” they may only do so where “such actions do not restrict the
22 subsequent consideration of alternatives to avoid, minimize or mitigate the
23 undertaking’s adverse effects on historic properties.” *Id.* § 800.1(c). Agencies
24 must also “ensure that the section 106 process is initiated early in the
25 undertaking’s planning, so that a broad range of alternatives may be considered
26 during the planning process for the undertaking.” *Id.*; *see also id.* § 800.2 (noting
27 that consultation on historic properties of significance to Native American tribes

1 “should commence early in the planning process, in order to identify and discuss
2 relevant preservation issues and resolve concerns about the confidentiality of
3 information on historic properties”).

4 21. Incorporating the knowledge, views, and expertise of Native
5 American Tribes is central to the NHPA and its Section 106 process. Indeed, the
6 Section 106 implementing regulations remind agencies of the “unique legal
7 relationship” between the federal government and “Indian tribes set forth in the
8 Constitution of the United States, treaties, statutes, and court decisions.” *Id.* §
9 800.2. Accordingly, “[c]onsultation with Indian tribes should be conducted in a
10 sensitive manner respectful of tribal sovereignty,” and further, “must recognize the
11 government-to-government relationship between the Federal Government and
12 Indian tribes.” *Id.* In particular, agencies:

13 [S]hall ensure that consultation in the section 106 process provides the
14 Indian tribe . . . a reasonable opportunity to identify its concerns about
15 historic properties, advise on the identification and evaluation of
16 historic properties, including those of traditional religious and cultural
17 importance, articulate its views on the undertaking’s effects on such
18 properties, and participate in the resolution of adverse effects.

19 *Id.* The agency must “make a reasonable and good faith effort to identify Indian
20 tribes . . . that shall be consulted in the section 106 process, and “shall consult with
21 a representative designated by such Indian tribe . . . regarding undertakings
22 occurring on or affecting historic properties” of interest to the Tribe. *Id.*
23 Additionally, to ensure a meaningful process that recognizes the relationship
24 between the United States and Native American Tribes, “[c]onsultation should
25 commence early in the planning process, in order to identify and discuss relevant
26 preservation issues.” *Id.*

27 22. The Section 106 process requires agencies to “consult with any
28 Indian Tribe . . . that attaches religious or cultural significance” to historic
29 properties that may be affected by an undertaking. *Id.* § 800.4; *see also* 54 U.S.C.

1 § 302706 (requiring agencies “in carrying out [their] responsibilities under
2 [Section 106],” to “consult with any Indian tribe . . . that attaches religious and
3 cultural significance to [historic properties that may be affected by the
4 undertaking]”). Significantly, “[t]his requirement applies regardless of the location
5 of the historic property.” 36 C.F.R. § 800.4. In other words, consultation under
6 Section 106 must occur regarding sites with “religious and cultural significance”
7 even if they occur on ancestral or ceded land outside of a Tribe’s reservation
8 boundaries. *Id.*

9 23. Agencies are also directed to “seek and consider the views of the
10 public in a manner that reflects the nature and complexity of the undertaking and
11 its effects on historic properties, the likely interest of the public in the effects on
12 historic properties, confidentiality concerns of private individuals and businesses,
13 and the relationship of the Federal involvement to the undertaking.” *Id.* § 800.2.

14 24. Where an agency determines that an undertaking “has the potential
15 to cause effects on historic properties,” it must initiate the Section 106 process. *Id.*
16 § 800.3. As part of that process, the agency must “[d]etermine and document the
17 area of potential effects” (“APE”) of the undertaking. *Id.* § 800.4(a)(1). The APE
18 is defined by regulation to include the area “within which an undertaking may
19 directly or indirectly cause alterations in the character or use of historic
20 properties.” *Id.* § 800.16(d). The size and scope of the APE “is influenced by the
21 scale and nature of an undertaking and may be different for different kinds of
22 effects caused by the undertaking.” *Id.* The agency must determine the APE in
23 consultation with the State Historic Preservation Officer (“SHPO”) and/or Tribal
24 Historic Preservation Officer (“THPO”), and must proactively seek information
25 about such sites from consulting parties, individuals or organizations “likely to

1 have knowledge of . . . historic properties in the area,” including Tribes. *Id.*

2 § 800.4.²

3 25. Once the APE is delineated, the agency must “make a reasonable
4 and good faith effort” to identify historic properties within that area, in
5 consultation with the SHPO, THPO, and “any Indian tribe . . . that might attach
6 religious and cultural significance to properties within the area of potential
7 effects.” 36 C.F.R. § 800.4(b). The agency must also identify properties within the
8 APE that have not been previously evaluated for eligibility for inclusion on the
9 National Register of Historic Places (“NRHP”), but nevertheless meet the criteria
10 for inclusion. *Id.* § 800.4(a)(4), (c). “Where alternatives under consideration
11 consist of corridors or large land areas . . . the [agency] may use a phased process
12 to conduct identification and evaluation efforts.” *Id.* § 800.4(b)(2). Final
13 identification and evaluation of historic properties may also be deferred “if it is
14 specifically provided for” in a Programmatic Agreement or other appropriate
15 documentation as allowed under the regulations. *Id.* Under those circumstances,
16 the agency “should establish the likely presence of historic properties within the
17 [APE] for each alternative . . . through background research, consultation and an
18 appropriate level of field investigation,” and taking into account the views of the
19 SHPO/THPO and other consulting parties. *Id.* The regulations require that the
20 agency “proceed with the identification and evaluation of historic properties” as
21 specific aspects of an alternative are “refined.” *Id.*

22 26. The NHPA authorizes the Secretary of the Interior to maintain the
23 NRHP as a list of “districts, sites, buildings, structures, and objects significant in

² Consulting parties include the State Historic Preservation Officer (“SHPO”) and/or the Tribal Historic Preservation Officer (“THPO”), if applicable. 36 C.F.R. § 800.2. Consulting party status is also awarded to Tribes where the undertaking occurs on tribal land, or where the undertaking may affect culturally significant sites. *Id.*

1 American history, architecture, archeology, engineering and culture.” 36 C.F.R. §
2 60.1. “Site” is defined by regulation to broadly include “the location of a
3 significant event, a prehistoric or historic occupation or activity, or a building or
4 structure, whether standing, ruined, or vanished, where the location itself
5 maintains historical or archeological value regardless of the value of any existing
6 structure.” *Id.* § 60.3. “Thus, a property may be defined as a ‘site’ as long as it was
7 the location of a significant event or activity, regardless of whether the event or
8 activity left any evidence of its occurrence.” NAT’L PARK SERV., NAT’L REG.
9 BULLETIN NO. 38, *Guidelines for Evaluating and Documenting Traditional*
10 *Cultural Properties* 9 (1998) [hereinafter NAT’L REG. BULLETIN NO. 38].
11 Moreover, “[a] culturally significant natural landscape may be classified as a site,
12 as may the specific location where significant traditional events, activities, or
13 cultural observances have taken place.” *Id.* Accordingly, traditional cultural
14 properties—including culturally significant landscapes—are eligible for inclusion
15 in the NRHP.

16 27. A traditional cultural property is “defined generally as one that is
17 eligible for inclusion in the [NRHP] because of its association with cultural
18 practices or beliefs of a living community that (a) are rooted in that community’s
19 history, and (b) are important in maintaining the continuing cultural identity of the
20 community.” *Id.* Such properties may include “traditional cultural landscapes,”
21 which are large-scale historic properties of religious and cultural significance to
22 Native American Tribes, “comprised of multiple, linked features that form a
23 cohesive ‘landscape.’” ADVISORY COUNCIL ON HISTORIC PRES., NATIVE
24 AMERICAN TRADITIONAL CULTURAL LANDSCAPES ACTION PLAN (2011).

25 28. Once historic properties within the APE are identified, the agency
26 must evaluate the historic significance of such sites and determine whether they
27 are potentially eligible for listing under the NRHP. 36 C.F.R. § 800.4(c). When

1 “assessing the eligibility of historic properties that may possess religious and
2 cultural significance” to Tribes, the agency must “acknowledge” the tribe’s
3 “special expertise.” *Id.* Where the agency determines that a property meets the
4 NRHP criteria and the SHPO/THPO agrees, “the property shall be considered
5 eligible for the National Register for section 106 purposes.” *Id.* Where the agency
6 determines that the NRHP criteria are not met and the SHPO/THPO agrees, “the
7 property shall be considered not eligible.” *Id.* In the event of a disagreement
8 between the agency and the SHPO/THPO, the agency must refer the determination
9 to the Secretary of Interior. *Id.* “If an Indian tribe . . . that attaches religious and
10 cultural significance to a property off tribal lands does not agree” with the
11 agency’s determination, “it may ask the [ACHP] to request the agency official to
12 obtain a determination of eligibility” from the Secretary of Interior.” *Id.*

13 29. Where the agency identifies historic properties that may be affected
14 by the undertaking, the agency must “notify all consulting parties, including
15 Indian tribes . . . , [and] invite their views on the effects and assess adverse
16 effects” of the undertaking on those properties. 36 C.F.R. § 800.4.

17 30. Once historic properties that may be affected by the proposed
18 undertaking are identified, the agency must, in consultation with the SHPO and/or
19 THPO and “any Indian tribe . . . that attaches religious and cultural significance to
20 identified historic properties,” determine whether the undertaking will have
21 “adverse effects” on the identified historic properties. *Id.* § 800.5. An adverse
22 effect is defined by regulation to include “when an undertaking may alter, directly
23 or indirectly, any of the characteristics of a historic property that qualify the
24 property for inclusion in the [NRHP] in a manner that would diminish the integrity
25 of the property’s location, design, setting, materials, workmanship, feeling, or
26 association.” *Id.* In making its determination, the agency must consider “all
27 qualifying characteristics of a historic property, including those that may have

1 been identified subsequent to the original evaluation of the property’s eligibility
2 for the [NRHP].” *Id.* Significantly, “[a]dverse effects may include reasonably
3 foreseeable effects caused by the undertaking that may occur later in time, be
4 farther removed in distance or be cumulative.” *Id.*

5 31. If, as a result of the review of the undertaking’s effects to historic
6 properties, the agency determines that there will be no adverse effects, then the
7 agency’s NHPA obligations are fulfilled and it may move forward with
8 authorization and implementation of the undertaking. However, “[i]f an adverse
9 effect is found, the agency . . . shall consult further to resolve the adverse effect.”
10 *Id.* § 800.5.

11 32. To resolve adverse effects on historic properties, the agency must
12 “consult with the SHPO/THPO and other consulting parties, including Indian
13 tribes . . . , to develop and evaluate alternatives or modifications to the undertaking
14 that could avoid, minimize, or mitigate adverse effects on historic properties.” 36
15 C.F.R. § 800.6. The ACHP may participate in this resolution process. *Id.* Where,
16 as here, the ACHP elects to participate, and the agency, the SHPO/THPO, and the
17 ACHP “agree on how the adverse effects will be resolved, they shall execute a
18 memorandum of agreement.” *Id.* This memorandum of agreement “evidences the
19 agency[‘s] compliance with section 106 and [its implementing regulations] and
20 shall govern the undertaking.” *Id.* The agency shall ensure that the undertaking is
21 carried out in accordance with the memorandum of agreement.

22 33. Relevant here, for “complex project situations,” a memorandum of
23 agreement may take the form of a “programmatic agreement.” 36 C.F.R. § 800.14.
24 Such agreements are suitable for “when effects on historic properties are similar
25 and repetitive or are multi-State or regional in scope;” “when effects on historic
26 properties cannot be fully determined prior to approval of an undertaking;” or

1 when “nonfederal parties are delegated major decision-making responsibilities,”
2 among other situations. *Id.* § 800.14(b)(1).

3 34. The Section 106 implementing regulations identify three categories
4 of signatories to programmatic agreements developed to address the potential
5 adverse impacts of a complex project. First, the agency, SHPO/THPO, and ACHP
6 are “signatories” and “have sole authority to execute, amend or terminate the
7 agreement.” 36 C.F.R. § 800.6. Second, the agency may invite additional parties,
8 including any tribe that “attaches religious and cultural significance to historic
9 properties located off tribal lands,” to sign as “Invited Signatories.” *Id.* These
10 parties “have the same rights with regard to seeking amendment or termination” of
11 the agreement as the signatories. *Id.* Finally, the agency may invite all consulting
12 parties to sign as “Concurring Signatories.” *Id.* The refusal of any Invited or
13 Concurring Signatory to sign the agreement “does not invalidate” the agreement.
14 *Id.*

15 **B. Executive Orders 13007 And 13175 And Joint Secretarial Order**
16 **3403**

17 35. Issued in May 1996, Executive Order 13007 provides that agencies
18 responsible for managing federal lands “shall, to the extent practicable . . .
19 accommodate access to and ceremonial use of Indian sacred sites by Indian
20 religious practitioners and avoid adversely affecting the physical integrity of such
21 sacred sites.” The order defines “sacred site” to include “any specific, discrete,
22 narrowly delineated location on Federal land that is identified by an Indian tribe . .
23 . as sacred by virtue of its established religious significance to, or ceremonial use
24 by, an Indian religion.”³

³ The full text of Executive Order 13007 can be found on the Department of Interior’s website. See <https://www.doi.gov/pmb/cadr/programs/native/Executive-Order-13007>.

1 36. Issued in November 2000, Executive Order 13175 directed agencies
2 to engage in meaningful government-to-government consultation with Native
3 American Tribes, provide regulatory and statutory waivers to Tribes to increase
4 flexible policy approaches at the Tribal level, and use consensual mechanisms for
5 developing regulations on issues relating to Tribal self-government, Tribal trust
6 resources, or Indian Tribal treaty and other rights.⁴

7 37. In addition, Joint Secretarial Order 3403, issued by the Secretaries of
8 Agriculture, Interior, and Commerce, built upon the two executive orders to
9 further emphasize the need to “incorporat[e] Tribal expertise and Indigenous
10 knowledge into Federal land and resources management.” For example, the Order
11 directed the Departments to “engage affected Indian Tribes in meaningful
12 consultation at the earliest phases of planning and decision-making relating to the
13 management of Federal lands to ensure that Tribes can shape the direction of
14 management.”⁵

15 **C. Administrative Procedure Act**

16 42. Under the APA, a reviewing court “shall” set aside agency actions,
17 findings, or conclusions when they are arbitrary, capricious, an abuse of
18 discretion, or otherwise not in accordance with law, or when they are adopted
19 “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (D). An
20 agency action is arbitrary and capricious if the agency “relied on factors which
21 Congress has not intended it to consider, entirely failed to consider an important

⁴ The full text of Executive Order 13175 can be found on the Department of Interior’s website. See <https://www.doi.gov/pmb/cadr/programs/native/Executive-Order-13175>.

⁵ The full text of Joint Secretarial Order 3403 can be found on the Department of Interior’s website. See <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf>.

1 aspect of the problem, offered an explanation for its decision that runs counter to
2 the evidence before the agency,” or if the agency’s decision “is so implausible that
3 it could not be ascribed to a difference in view or the product of agency expertise.”
4 *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43
5 (1983).

6 43. When reviewing agency action under the APA, the court must
7 ensure that the agency reviewed the relevant data and articulated a satisfactory
8 explanation establishing a “rational connection between the facts found and the
9 choice made.” *State Farm*, 463 U.S. at 43. The agency’s failure to do so renders its
10 decision arbitrary and capricious. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360,
11 378 (1989).

12 **FACTUAL BACKGROUND**

13 14 **I. THE SAN PEDRO VALLEY AS A TRADITIONAL CULTURAL** 15 **PROPERTY**

16 44. The historic and cultural importance of the San Pedro River Valley
17 to four different groups of people indigenous to the state of Arizona is well-
18 documented. Members of the Tohono O’odham, Hopi, Zuni, and Western Apache
19 tribes claim ancestral connections to the area. “While each group has its own
20 unique cultural landscapes with varied geographical areas and temporal ranges, the
21 San Pedro Valley is a common element linking them all.” Roger Anyon et al.,
22 *Natural Setting as Cultural Landscapes: The Power of Place and Tradition*, 2005
23 USDA FOREST SERV. PROCEEDINGS RMRS-P-36 273, available at
24 <https://tinyurl.com/2s4vf9nu>.

25 45. The San Pedro Valley represents one of the most intact, prehistoric
26 and historical period, cultural landscapes in southern Arizona, if not the whole
27 Southwest. Cultural landscapes “are fashioned by cultural groups from the natural
28 environment” and thus, “encompass both the land itself and how individuals

1 perceive the land given their particular values and beliefs.” *Id.* at 274. In other
2 words, “[c]ultural landscapes are created and maintained by cultures that instill
3 values, beliefs, and historical memory in the people belonging to a community,”
4 and as a result, “can be sustained for long periods without physical use.” *Id.*

5 46. The San Pedro Valley cultural landscape, like others, consists of
6 multiple overlays of interwoven biophysical and sociocultural features and values
7 that cohere in senses of place and belonging deeply felt by Indigenous people and
8 communities. More than 10,000 years of tightly coupled human and natural
9 history centered on and enabled by the perennial flow of the San Pedro River have
10 made the Valley a perpetual home for many Tribes that possesses extraordinary
11 cultural, religious, and archaeological significance.

12 47. Significantly, the importance of the San Pedro Valley cultural
13 landscape to the Tohono O’odham Nation and to Hopi, Zuni, and Western Apache
14 tribes does not reside in isolated spots, but rather in the area as a whole.
15 Accordingly, the entire cultural landscape is considered a “traditional cultural
16 property.” Such properties are “eligible for inclusion in the National Register
17 because of [their] association with cultural practices or beliefs of a living
18 community that (a) are rooted in that community's history, and (b) are important in
19 maintaining the continuing cultural identity of the community.” NAT’L REG.
20 BULLETIN NO. 38 at 1.

21 48. BLM itself has recognized the significance of the San Pedro Valley
22 to indigenous people. For example, in 2012, BLM and the United States
23 Geological Survey (another agency within the Department of the Interior), issued a
24 pilot study evaluating alternative methods and tools that quantify and value
25 ecosystem services, using the San Pedro River Watershed as a case study. *See*
26 Kenneth J. Bagstad et al., US GEOLOGICAL SURV., *Ecosystem Services Valuation*
27 *to Support Decisionmaking on Public Lands—A Case Study of the San Pedro*

1 *River Watershed* 2012 Sci. Investigations Rep. 2012-5251, available at
2 <https://tinyurl.com/4yycf756>. The report explains that the “San Pedro River
3 watershed holds *immeasurable* significance to numerous American Indian tribes.”
4 Kenneth J. Bagstad et al., *supra* at 54 (emphasis added); *see also id.* at 8
5 (explaining that the “San Pedro River watershed holds important spiritual and
6 cultural values, particularly for American Indian tribes with cultural or historic ties
7 to the watershed”).

8 **II. THE 2016 RIGHT-OF-WAY AUTHORIZATION PROCESS**

9 49. In 2008, SunZia Transmission, LLC submitted an application to
10 BLM for a right-of-way to construct and operate two new single-circuit overhead
11 500-kilovolt transmission lines originating at a new substation in Lincoln County,
12 New Mexico, and terminating at the Pinal Central Substation in Pinal County,
13 Arizona.

14 **A. Initial Efforts To Inventory Cultural And Historic Resources**

15 50. BLM uses different types of surveys to evaluate areas for the
16 presence of cultural resources. A Class I survey is “a professionally prepared study
17 that includes a compilation and analysis of all reasonably available cultural
18 resource data and literature, and a management-focused, interpretative, narrative
19 overview, and synthesis of the data.” BLM Manual, 8110—Identifying and
20 Evaluating Cultural Resources 8110.21A.1 (Rel.8–73, 12/03/04). A Class II
21 survey is a “probabilistic field survey” or “statistically based sample survey” that
22 “aid[s] in characterizing the probable density, diversity, and distribution of cultural
23 properties in an area.” *Id.* 8110.21B.1. A Class III survey is an “[i]ntensive”
24 survey that involves “a professionally conducted, thorough pedestrian survey of an
25 entire target area ... intended to locate and record all historic properties” and that
26 “provides managers and cultural resource specialists with a complete record of
27 cultural properties.” *Id.* 8110.21C.1, 8110.21C.3.

1 51. In 2009, BLM began to inventory the cultural and historic resources
2 that may be affected by the Project. BLM elected to use a “phased identification
3 and evaluation” process, asserting that such an approach “is appropriate for
4 projects where alternatives under consideration consist of corridors or large land
5 areas.”

6 52. BLM first conducted a “Class I records review,” which aimed to
7 identify “prior inventories, research, and previously recorded sites within the study
8 corridor, which was 1 mile from the edge of the 1,000-foot corridor for each
9 alternative.” According to BLM, “[t]his review resulted in an enormous amount of
10 data, so results for an area within 0.25 mile of the Project centerline were
11 analyzed.” The Class I review thus “identified known cultural resource sites
12 located within the 0.25-mile-wide study area, as well as significant cultural
13 resources outside of the Class I study area that could be affected by the Project
14 (such as historic trails, NRHP-listed sites and districts, and places of traditional
15 cultural importance).”

16 53. After the completion of the Class I review, BLM “completed a Class
17 II judgmental sample inventory for all alternatives at selected locations known to
18 be sensitive for cultural resources (i.e., river and historic trail crossings).” As a
19 result of the Class II judgmental sample inventory, BLM estimated that a total of
20 188 historic and cultural sites would be impacted by the agency’s preferred route
21 alternative through the San Pedro Valley. According to BLM, “[s]eventy percent
22 of the anticipated sites could have moderate to high sensitivity, which would
23 require mitigation if impacted by Project construction.”

24 54. On information and belief, BLM did not identify the San Pedro
25 Valley as a traditional cultural landscape, nor as a traditional cultural property, in
26 either the Class I or Class II surveys.

1 **B. Project Scoping And Initial Concerns With San Pedro Valley**
2 **Route**

3 55. On May 29, 2009, BLM published a notice of intent to prepare an
4 Environmental Impact Statement (“EIS”) pursuant to the National Environmental
5 Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347.

6 56. Throughout the NEPA process, Plaintiffs and other organizations
7 with considerable expertise in archaeology and cultural properties repeatedly
8 alerted BLM to the presence of significant historic and cultural resources along the
9 proposed transmission line route. Plaintiffs and others also raised concerns with
10 respect to the significant adverse impacts that the proposed right-of-way and
11 transmission line would indisputably have on the San Pedro Valley cultural
12 landscape and historic sites therein. For example, in August 2009, Archaeology
13 Southwest wrote to BLM to “express [its] concerns and recommendations
14 regarding” the proposed transmission line. In particular, the organization informed
15 BLM that “meaningful consideration of the potential direct, indirect, and
16 cumulative impacts on historic and cultural resources and alternatives to avoid
17 those impacts seems especially important for this proposal because BLM has
18 already acknowledged that the project has the potential to affect ‘. . . visual
19 resources, National Historic Trails and related viewsheds; Native American
20 traditional cultural properties and sacred places.’” (quoting 74 Fed. Reg. 25,764
21 (May 29, 2009)).

22 57. Archaeology Southwest urged BLM to accurately identify
23 significant historic and cultural properties within the action area, particularly those
24 within the San Pedro Valley. The letter explained that “[t]he San Pedro . . .
25 drainage[] contain[s] near-complete records of 12,000 years of past human
26 activity, including both Native American and Euro-American.” This “scale of
27 regional preservation provides an opportunity to interpret sites as part of a broad

1 cultural and economic landscape rather than as isolated phenomena.” Additionally,
2 the “great time depth” permits the study of “changes in this human landscape over
3 the full time span during which people have inhabited the New World.” The scope
4 and scale of the archaeological record underscores its value; the opportunity to
5 study the entire cultural landscape over thousands of years is “no longer available
6 in many Arizona valleys (e.g., Phoenix, Tucson, Safford) where agricultural and,
7 subsequently, urban development destroyed much of the archaeological record
8 before adequate documentation could take place.” Additionally, the cultural
9 landscape and non-renewable cultural resources it houses holds great value to
10 “current and future stakeholders, including Native American groups,
11 archaeologists, local residents and the interested public.” Indeed, researchers
12 “have identified over 500 archaeological sites in the lower San Pedro Valley,”
13 approximately one-third of which “contain architecture and probably human
14 remains.”

15 58. Archaeology Southwest also urged BLM to consider alternatives to
16 the proposed right-of-way that would avoid impacts to cultural and historic
17 properties and resources. For example, the organization explained that “[e]very
18 effort should be made to utilize” an existing right-of-way corridor to minimize—
19 or even avoid—impacts to historic and cultural resources. The letter further
20 asserted that BLM’s preferred alternative “deviate[s] from the existing” corridor
21 “without adequate justification.”

22 59. Archaeology Southwest further explained that “[e]arly and thorough
23 consultation with Native American groups that may have connections to lands
24 within and adjacent to the transmission line corridors is extremely important,” and
25 urged BLM to include “[a]n evaluation of potential physical, visual and
26 social/psychological impacts to Native American [traditional cultural properties]
27 and sacred landscapes . . . in the EIS.” In particular, “[b]ecause [traditional cultural

1 properties] and sacred landscapes are highly susceptible to visual impacts, such as
2 from above-ground transmission lines, and because mitigating such impacts is
3 very difficult, BLM should attempt to resolve tribal concerns by avoiding
4 [traditional cultural properties] and sacred landscapes all together.” The
5 organization explained that the preferred Project route in the lower San Pedro
6 Valley “could significantly impact a landscape of significance to Native American
7 groups.” Archaeology Southwest thus informed BLM of the status of the San
8 Pedro Valley as a landscape of significance to Native American histories and
9 cultures—i.e., a traditional cultural landscape. To assist in the agency’s
10 decisionmaking process, Archaeology Southwest offered to BLM its considerable
11 expertise and data regarding the locations, condition, and significance of
12 archaeological sites in the San Pedro Valley. The organization also offered to
13 “provide BLM with supplemental information about the relationship between
14 archaeological record of southern Arizona and the oral traditions of” the Akimel
15 O’odham, Tohono O’odham, Hopi and Zuni peoples.

16 60. In November 2009, Archaeology Southwest submitted another letter
17 to BLM expressing its continued concerns about the route proposed for the
18 transmission project. The group again informed BLM of the cultural significance
19 of the San Pedro Valley and its intact cultural and natural landscape. The
20 organization noted that “[c]urrently, this largely unfragmented landscape contains
21 no major linear facility, so the potential physical and visual impacts of the
22 introduction of transmission lines of this size cannot be overstated.” The letter
23 again urged BLM to consider alternative routes that minimized—or even
24 avoided—impacts to historic and cultural resources.

25 61. By letter in June 2010, BLM informed Archaeology Southwest that
26 “[o]nce the preferred and alternative routes have been selected, the Section 106

1 process will be initiated.” The agency assured the groups that “[t]his will take
2 place *well before* the publication of a Draft [EIS].” (emphasis added).

3 62. In June 2010, Archaeology again wrote to BLM to express its
4 increasing alarm at the potential impacts that the proposed right-of-way grant
5 would have on historic and cultural resources in the San Pedro Valley. In light of
6 the information generated through the scoping process, the organizations argued
7 that the impacts to cultural resources in this area would be “unacceptable under
8 any ‘mitigation’ scenario,” and “strongly encourage[d]” BLM to “drop th[is]
9 alignment from further consideration.”

10 63. In August 2011, BLM abruptly reversed course and informed
11 consulting parties that the Section 106 process would be initiated “[a]fter the Draft
12 [EIS] is published.”

13 **C. The 2012 Draft EIS**

14 64. In May 2012, BLM published its Draft EIS for public comment.

15 65. In August 2012, Archaeology Southwest submitted comments on the
16 Draft EIS notifying BLM of the agency’s failure to comply with the Section 106
17 process. Agency guidance dictates that the NHPA process should be initiated prior
18 to the NEPA scoping process so that the NHPA process can inform the
19 development of alternatives under NEPA. *See* IM No. 2012-108. However,
20 although the organization had been informed of its status as a consulting party by
21 letter in August 2011, BLM had yet to provide any meaningful opportunity for
22 input or discussion on the Project’s impacts or alternatives. Nor had BLM given
23 the Arizona SHPO “the opportunity to provide specific input to the identification
24 of alternatives, selection of the draft preferred alternative, or the analysis of
25 impacts to historic resources.” Thus, the Draft EIS’s range of alternatives—
26 including the preferred alternative—was developed without the benefit of input
27 from consulting parties and experts regarding impacts to cultural and historic

1 resources. The organization expressed its “concern[] that waiting until a final
2 alternative is selected before beginning compliance with Section 106 will
3 foreclose the opportunity of the [ACHP] to provide meaningful comments on the
4 undertaking.” Indeed, despite the agency’s obligation under Section 106 to
5 “develop and evaluate measures to ‘avoid, minimize or mitigate’ the adverse
6 effects of their actions before finalizing such actions,” BLM expressed its
7 intention to “select a[n] . . . alternative before commencing NHPA compliance,
8 effectively removing from consideration other siting alternatives that could ‘avoid,
9 minimize or mitigate’ adverse effects on historic properties.” The organization
10 urged BLM to immediately comply with Section 106 to “ensure that BLM does
11 not select a project alternative before Section 106 consultation, which would
12 impermissibly foreclose alternatives, such as selecting a different route or route
13 segments, to ‘avoid, minimize or mitigate’ the adverse effects of the project.”

14 66. In August 2012, the San Carlos Apache Tribe submitted comments
15 on the Draft EIS expressing its “strenuous oppos[ition]” to BLM’s preferred route
16 for the Project. The San Carlos Apache Tribe explained that the proposed routes
17 through the San Pedro Valley “cross through the heartland of the Western Apache
18 homeland” and “have the potential of impacting culturally sensitive and sacred
19 areas of significance and importance to the Tribe and the Tribe’s members.” The
20 Tribe explained that it “emphatically opposes these routes,” primarily because of
21 “the discontinuation of meaningful consultation with the Tribe’s representatives
22 and department managers” regarding the impacts to cultural resources and
23 landscapes. Despite promises of further consultation pursuant to Section 106, such
24 additional process failed to materialize. The Tribe also expressed concerns
25 regarding the qualifications of cultural consultants and archaeologists employed
26 by SunZia Transmission, LLC given the well-documented “subtlety of Apache
27 sites and the difficulty in proper identification of remains,” and requested that such

1 personnel be “thoroughly vetted for their knowledge of Apache culture, tradition
2 and religion and the identification of Apache cultural sites and sacred areas.”

3 67. In its comments, the San Carlos Apache Tribe noted that its concerns
4 regarding BLM and SunZia Transmission, LLC’s “sensitivity regarding Apache
5 cultural sites, sacred areas, plant gathering areas and identification of remains is
6 only exacerbated by the complete lack of sensitivity in the description of cultural
7 resources” along the preferred right-of-way route alternative. For example, the
8 Tribe informed BLM that the Draft EIS’s discussion of the preferred alternative
9 “fails to address the location of Camp Grant, the Camp Grant Apache Reservation
10 and the Camp Grant Massacre site and their significance to the San Carlos Apache
11 Tribe.” The Camp Grant Massacre occurred in 1871, when a group of Anglo-
12 Americans, Mexicans, and Tohono O’odham came upon and slaughtered between
13 110 and 144 unarmed Apache, most of whom were women and children. Those
14 who participated in the massacre were later acquitted. Apache remains have been
15 found throughout the area of the massacre. The Tribe explained that “[t]he failure
16 to mention these events or sites is an insult to Apache people” and “renders the
17 entire proposed cultural consultation process . . . suspect.” The Tribe concluded
18 that “[t]he significance of the area” that will be impacted by the preferred
19 alternative “to the San Carlos Apache Tribe and people cannot be overstated.” The
20 Tribe offered to assist BLM “in any reasonable manner possible,” including by
21 providing BLM with information concerning “the historical import of this area and
22 its cultural significance to the San Carlos Apache people.”

23 68. Federal agencies with expertise in federal trust and cultural resources
24 also voiced their concerns with BLM’s inadequate consideration of impacts to
25 those resources. For example, the National Park Service (“NPS”) argued that
26 “[t]he section on tribal concerns is minimal” and that “[f]urther efforts need to be
27 made” to engage the tribes and address their concerns. NPS also explained that

1 “[c]ultural resource sections throughout the [Draft] EIS focus primarily on
2 archeological resources and largely ignore other types of cultural resources such as
3 historic buildings, structures, objects, landscapes, and traditional cultural
4 properties.” According to NPS, “[t]his is not adequate to address (identify and
5 evaluate) other types of cultural resources within the study area.” Moreover, “[t]he
6 government-to-government tribal consultation process appears inadequate.” In
7 particular, “[r]esource impacts from the perspective of the tribes and cultural
8 communities are not addressed.” NPS ultimately recommended that BLM “more
9 definitively describe and evaluate potential impacts to cultural landscapes and
10 resources surrounding NPS lands to effectively avoid, minimize, and potentially
11 mitigate impacts connected” to the Project. The agency offered to host and
12 facilitate face-to-face meetings with Tribes that would be affected by the Project’s
13 activities on NPS land.

14 **D. The 2013 Final EIS**

15 69. BLM issued its Final EIS in June 2013. The Final EIS explained that
16 “[t]ribal concerns regarding this Project are being compiled and will continue to be
17 documented as the Project becomes more defined.” The Final EIS also explained
18 that “[c]onsultation with appropriate land management agencies, tribal
19 governments, [THPOs], and SHPOs is ongoing and will result in a [Programmatic
20 Agreement] that will establish project-specific procedures for complying with the
21 NHPA, including those to follow during the execution of the Project.” With
22 respect to the agency’s progress in developing an inventory of historic and cultural
23 sites that may be affected by the Project, BLM acknowledged that the Class II
24 judgmental sample inventory had been completed. The agency stated that “[a]n
25 intensive Class III pedestrian inventory of any route that may be ultimately
26 approved identifying all the cultural resources will be completed,” after which the
27 identified resources will “be evaluated for their eligibility to the National

1 Register.” Accordingly, Section 106 consultation “will continue during the post-
2 EIS phases of Project implementation prior to construction.”

3 70. In response to the myriad concerns repeatedly raised by Plaintiffs
4 and others regarding BLM’s failure to engage in meaningful consultation under
5 Section 106, BLM merely kicked the proverbial can down the road. The agency
6 variously insisted that “[c]onstruction of the Project along this [preferred] route
7 would avoid the majority of known cultural resource sites located along the San
8 Pedro River, and avoid impacts to cultural resources within the Tucson area”; that
9 the Section 106 process—including the identification of an APE and any analysis
10 of adverse effects—was ongoing and would continue to compile and document
11 tribal concerns; and that “[t]he list of preparers and contributors includes BLM and
12 consultant cultural resources specialists,” several of whom “have . . . degrees in
13 Anthropology and Landscape Architecture.”

14 71. In 2013, Plaintiff Center for Biological Diversity and others
15 submitted an official protest to BLM raising grave concerns about the Project, as
16 allowed under BLM’s regulations. Relevant here, the Center noted the discrepancy
17 between BLM’s identification of a mere 188 sites that may be affected by BLM’s
18 preferred alternative and Archaeology Southwest’s conclusion that it had
19 identified over 500 archeological sites in the San Pedro River Valley,
20 approximately one-third of which contain architecture and probable human
21 remains. According to the protest, “[t]his discrepancy highlights a high degree of
22 uncertainty regarding potential impacts of the SunZia Project to cultural
23 resources” and underscores the need to “evaluate the use of existing transmission
24 and transportation corridors with less harmful effects.” The protest also reiterated
25 the concerns voiced by the San Carlos Apache Tribe regarding the integrity of the
26 Section 106 process and informed BLM that the organizations “share the Tribe’s
27 strenuous opposition to [the preferred alternative route],” and it requested that

1 “BLM implement the No Action Alternative to address these tribal concerns.”

2 BLM denied all protests submitted on the Project.

3 **E. The Section 106 Programmatic Agreement**

4 72. In December 2014, BLM executed a Programmatic Agreement
5 pursuant to the NHPA and its implementing regulations. BLM, the New Mexico
6 and Arizona SHPOs, and the ACHP (which agreed to participate to resolve
7 adverse effects) were signatories to the Agreement. SunZia Transmissions, LLC
8 was an invited signatory. Several tribes, including Plaintiff Tribes, participated in
9 consultations for the development of the Agreement. The Tohono O’odham
10 Nation was invited to be an Invited Signatory to the Agreement; however, the
11 Tribe declined to sign. Other Tribes were invited to be Concurring Parties to the
12 Agreement; however, no Tribe signed. Archaeology Southwest was also invited to
13 be a Concurring Party, but declined to sign. Accordingly, neither the Tribes, nor
14 Archaeology Southwest are bound by the terms of the Programmatic Agreement.
15 *See* 36 C.F.R. § 800.6.

16 73. The Programmatic Agreement defined the scale of the APE for
17 direct and indirect effects, i.e., generally a 420- to 1020-foot wide right-of-way
18 corridor and areas visible and within five miles of any Project component,
19 respectively. The Agreement directed SunZia Transmission, LLC to complete a
20 cultural resource inventory “to identify historic properties that could be affected
21 by” the Project. The initial inventory is to consist of: a Class I existing data (or
22 “records review”) inventory “of all previously recorded cultural resources within
23 0.25 mile of the direct and indirect effects APEs”; and a “Class III Intensive Field
24 Inventory of the direct effects APE” and including cultural resources within the
25 indirect effects APE where the Project is visible to such resources.

26 74. Based upon the initial inventory, SunZia Transmission, LLC must
27 prepare a comprehensive Inventory Report “incorporating findings from” the

1 initial inventories for each state, which must “include NRHP eligibility
2 recommendations and assessments of direct, indirect, and cumulative effects
3 within the APE.” Draft Inventory Reports must be submitted to BLM, which must
4 forward the draft reports to consulting parties, including concerned Tribes, for
5 review and comment on matters including: “[t]he adequacy of the identification
6 effort”; “[t]he NRHP eligibility of the cultural resources identified”; “the
7 assessment of effects . . . on the historic properties identified”; and “[w]hether
8 there are any properties of traditional cultural or religious importance to tribes and
9 ethnic groups that were not identified in the inventory and that may be affected by
10 the [Project].” BLM must consider comments on draft reports that are submitted
11 within sixty days.

12 75. The Programmatic Agreement provides that “[w]hen making
13 determinations of NRHP eligibility, the BLM will consider historic sites, districts,
14 buildings, structures and objects that are significant and meet the integrity
15 criteria.” Where a property has “traditional cultural values,” BLM will consider
16 the “values expressed by the consulted tribes or other ethnic groups.” Copies of
17 BLM’s NRHP eligibility determinations will be provided to consulting parties for
18 review and comment.

19 76. The Programmatic Agreement reports that “BLM has consulted with
20 Indian tribes whose aboriginal territories included portions of the [Project] area or
21 who have previously expressed interest in undertakings within the APE.” The
22 Agreement obligated BLM to “continue to consult with Indian tribes regarding
23 properties of traditional religious and cultural importance to them that might be
24 affected by the [Project]” and to “provide opportunities for review and comment
25 on draft and final versions of the Inventory Report.” The Agreement stipulated
26 that “[t]he consultation process *will remain open* for any tribe that expresses a
27 desire to participate.”

1 77. The Programmatic Agreement also sets forth terms for the resolution
2 of adverse effects of the Project on historic properties. For example, the
3 Agreement provides that “BLM shall, if possible, *avoid* adverse effects to *all types*
4 *of historic properties.*” (emphasis added). Avoidance measures “may include (but
5 are not limited to) realignment of the transmission line.” “Where avoidance is not
6 possible,” BLM must “minimize or mitigate adverse effects to historic properties,
7 if possible.” The Programmatic Agreement thus establishes avoidance as the
8 preferred method of resolving adverse effects to historic properties. Additionally,
9 the Agreement provides that “[i]f any Indian tribes or other Native American
10 groups have expressed concerns about effects on properties to which they ascribe
11 traditional religious and cultural importance, BLM shall consult with them and the
12 appropriate SHPO” regarding measures to resolve the adverse effects. The
13 Agreement also directs SunZia Transmission, LLC to prepare a Historic Properties
14 Treatment Plan (“HPTP”) to address the direct, indirect, and cumulative adverse
15 effects of the Project on historic properties, including traditional cultural
16 properties. The HPTP will be developed through consultation with BLM, the New
17 Mexico and Arizona SHPOs, and other consulting parties. Once complete, the
18 HPTP is incorporated into the Project’s Plan of Development.

19 78. Consistent with the NHPA’s implementing regulations, the
20 Programmatic Agreement provides that “[r]equests for authorizations of
21 construction will be approved *only if such authorizations will not restrict*
22 *subsequent measures to avoid, minimize or mitigate the adverse effects to historic*
23 *properties through rerouting of the corridor or placement of ancillary facilities.*”

24 79. The Programmatic Agreement also provides that if “*any Consulting*
25 *Party to this [Agreement] object[s] at any time* to any actions proposed or the
26 manner in which the terms of th[e] [Agreement] are implemented, the BLM *shall*
27 *consult* with such party to resolve the objection.” If BLM determines that the

1 objection cannot be resolved, the agency must “[f]orward all documentation
2 relevant to the dispute, including [the agency’s] proposed resolution to the
3 ACHP.” The ACHP must then advise BLM on the resolution of the objection
4 within thirty days. BLM must then “prepare a written response that takes into
5 account any timely advice or comments regarding the dispute from the ACHP
6 [and] Consulting Parties” prior to proceeding to its final decision.

7 **F. The 2015 ROD**

8 80. In January 2015, BLM issued a Record of Decision (“ROD”)
9 approving the proposed right-of-way for the transmission line. In 2016, relying on
10 the Final EIS and ROD for its compliance with NEPA, BLM issued a right-of-way
11 grant to SunZia Transmission, LLC, authorizing use of a 400-foot-wide corridor
12 across 183 miles of private, state-administered, and BLM-administered land.
13 However, the Project (as approved) was never built.

14 81. With respect to cultural resources, the 2015 ROD reported that
15 government-to-government consultations under NEPA and the NHPA, as well as
16 Section 106 consultations under the NHPA, were conducted in support of the
17 Project. The 2015 ROD reported that several Tribes were designated as consulting
18 parties for the Section 106 process, including the Tohono O’odham Nation, Gila
19 River Indian Community, Salt River Pima-Maricopa Indian Community, Ak-Chin
20 Indian Community, Pueblo of Isleta, Pueblo of Ysleta del Sur, Pueblo of Zuni,
21 Mescalero Apache, Fort Sill Apache, San Carlos Apache, and White Mountain
22 Apache. According to the 2015 ROD, “consultation was completed with the
23 execution of the [Programmatic Agreement] on December 17, 2014.”

24 82. According to BLM, in February 2018, Consulting Parties were
25 provided draft Class III Intensive Field Inventories and given sixty days to provide
26 written comments concerning properties of traditional cultural or religious
27 importance that were not identified in the report. Conspicuously, despite numerous

1 letters from Plaintiffs and others repeatedly explaining the cultural significance of
2 the middle and lower San Pedro Valley to several Native America Tribes and
3 specifically identifying the area as a traditional cultural property full of important
4 historic and cultural resources, the inventory did not identify the San Pedro Valley
5 as such.

6 **III. THE 2023 RIGHT-OF-WAY AUTHORIZATION PROCESS**

7 83. In December 2020 and September 2021, SunZia Transmission, LLC
8 submitted updated applications to BLM seeking to amend the existing right-of-
9 way authorization to accommodate advanced design and engineering review.
10 Specifically, the updated applications sought changes to four components of the
11 approved right-of-way grant. Relevant here, the proposed changes include 25
12 miles of new access roads and 230 acres of additional ancillary facilities in the San
13 Pedro Valley.

14 **A. The 2022 Draft EIS**

15 84. In June 2021, BLM issued a scoping notice for the proposed
16 amendments to the right-of-way. Archeology Southwest submitted comments on
17 the scoping notice, urging BLM to critically examine the need for the Project,
18 particularly in light of the significant ground disturbance contemplated by the
19 addition of hundreds of miles of new and improved access roads. The Center for
20 Biological Diversity also submitted comments urging BLM to consider “siting
21 alternatives that would re-route the line away from sensitive areas including
22 avoiding crossings and transmission along the San Pedro River.”

23 85. In April 2022, BLM issued a Draft EIS to assess the impacts of the
24 proposed changes to the Project. BLM expressly limited its analysis in the 2022
25 Draft EIS to the “four Project components contained within SunZia’s application
26 to amend the existing [right-of-way] authorization.” BLM thus insisted that the
27 2022 Draft EIS “does not revisit or reanalyze the previously analyzed and

1 approved route . . . unless conditions have changed that warrant new analysis,”
2 and that for those unchanged portions of the Project, the 2013 final EIS, 2015
3 ROD, and 2016 right-of-way grant constituted the agency’s final decision.

4 86. The 2022 Draft EIS reported that since the 2013 Final EIS, data
5 regarding historic and cultural sites and resources “have been and will be collected
6 through tribal consultation.” Paradoxically, the 2022 Draft EIS acknowledged that
7 “an inventory for [traditional cultural properties] has not been completed at this
8 time,” yet also reported that “[n]o [traditional cultural properties] or sacred sites
9 were identified within the analysis area during the previous consultation for the
10 2013 [final] EIS.” Despite nearly ten years of purportedly “ongoing” consultations
11 regarding cultural resources, BLM reported that “[n]o new data are available for
12 this Draft EIS.”

13 87. Regarding cultural resources, the 2022 Draft EIS acknowledged that
14 the proposed access roads and temporary work areas may impact “places or
15 resources of concern [that] were identified along the project route.” Indeed,
16 “[g]round disturbance from the proposed access roads outside the granted right-of-
17 way could impact 68 resources in New Mexico and Arizona,” of which “twenty-
18 seven are NRHP-eligible and nineteen are unevaluated.” With respect to the
19 proposed temporary work areas, associated “[g]round disturbance . . . could
20 impact 24 cultural resources; eight of the resources are NRHP-eligible and 10 are
21 unevaluated.” The 2022 draft EIS did not discuss regional or local impacts to
22 cultural resources resulting from the proposed changes to the Project.

23 88. Plaintiffs and others submitted extensive comments on various
24 aspects of the 2022 Draft EIS. Relevant here, commenters criticized BLM’s
25 decision to “analyze the new . . . application as a minor amendment to an approved
26 [right-of-way] grant instead of for what the Project is: a major bundle of
27 additional, significant, and impossible to adequately mitigate impacts to unique

1 and fragile environments.” Commenters also explained that “survey coverage” for
2 cultural resources “is low for this set of routes or for any other routes,” and
3 consequently, “it is incumbent upon [] BLM” to thoroughly examine the project
4 area and identify historic and cultural resources prior to Project approval.
5 Commenters also urged BLM to engage with tribal communities with “culturally,
6 ancestrally, and currently significant” connections with the affected area.
7 Commenters reminded BLM that “[i]t is particularly important to recognize that
8 the alterations to the landscape in this region could have wider impact than to just
9 the land directly within the boundaries.” Indeed, [t]he impact increased human
10 activities, and those from ancillary activities like construction and maintenance,
11 could have broader, unforeseen cumulative consequences on this sensitive
12 landscape.”

13 89. In January 2023, Archeology Southwest directly responded to the
14 2022 Draft EIS’s assertion that BLM had not identified any traditional cultural
15 properties or sacred sites within the analysis area. Archeology Southwest
16 explained that “the middle and lower San Pedro Valley segments that [the Project]
17 would irrevocably alter are integral to a well-documented *cultural landscape*,” i.e.,
18 an NRHP-eligible historic property “having exceptional integrity and significance
19 derived primarily from its central roles in the historical, cultural, and oral
20 traditions of at least four distinct Indigenous Nations: Apache, Hopi, Tohono
21 O’odham, and Zuni.” (emphasis added). The organization reminded BLM that
22 “[i]n and through meetings and communications with BLM since 2008, multiple
23 Tribes have confirmed the landscape-scale importance of the Middle and Lower
24 San Pedro Valley,” and directed BLM to various Tribe- and peer-reviewed
25 resources to “substantiate” the identification of traditional cultural properties
26 within the San Pedro Valley, and indeed, the inclusion of the Middle and Lower
27 San Pedro Valley on the NRHP.

1 **B. The 2023 Final EIS**

2 90. In February 2023, BLM issued its Final EIS for the proposed Project
3 modifications. With respect to impacts to historic and cultural resources, the 2023
4 Final EIS asserted that “extensive tribal consultation and coordination were
5 conducted for the initial right-of-way application and in support of the first EIS
6 process from 2009–2015.” According to BLM, the 2023 Final EIS and right-of-
7 way grant amendment “is a continuation of the overall [right-of-way] process, in
8 which interested tribes have participated for over a decade.” BLM explained that
9 “[c]onsultation with the interested tribes is on-going though the NEPA process and
10 under Section 106 through the processes described in the project’s programmatic
11 agreement, including by transmitting annual reports with updates to the Project to
12 concerned tribes, as well as Class III addendum inventory reports for review and
13 comment”. Yet, the 2023 Final EIS once again admitted that “an inventory for
14 [traditional cultural properties] has not been completed at this time,” but also
15 asserted that “[n]o [traditional cultural properties] or sacred sites were identified
16 within the analysis area during the previous consultation for the 2013 [final] EIS.”
17 BLM also once again reported that “[n]o new data are available for this Final
18 EIS.”

19 91. In response to comments criticizing the agency’s lackluster efforts to
20 meaningfully consult with concerned tribes regarding the impacts to significant
21 historic and cultural resources, BLM referred commenters to the 2013 Final EIS’s
22 discussion of impacts to cultural resources and insisted that together with the 2023
23 Final EIS’s discussion of the impacts to cultural resources from the proposed
24 modifications to the right-of-way grant, the agency’s analysis of such impacts was
25 sufficient. BLM further explained that it “is complying with the requirements of
26 Section 106 of the NHPA for the proposed [right-of-way] amendments.”
27 Specifically, BLM pointed to its use of a “executed programmatic agreement to

1 satisfy the requirements of Section 106 of the NHPA, including considering the
2 potential effects of their decisions on historic properties listed on or eligible for the
3 [NRHP].”

4
5 **IV. CONTINUING CONCERNS REGARDING BLM’S FAILURE TO**
6 **COMPLY WITH THE NHPA**

7 92. In February 2023, the Arizona SHPO wrote to BLM, requesting
8 information regarding the Section 106 process in light of tribal concerns with the
9 Project’s “adverse impacts to the cultural landscape of the San Pedro Valley and to
10 Sobaipuri O’odham sites therein.” BLM dismissed such concerns, arguing that
11 “the scope of the current NEPA effort . . . does not involve the route in Arizona at
12 all.” Rather, according to BLM, the 2023 Final EIS “was done to analyze
13 completely new routes in New Mexico” due to the original route’s conflicts with
14 military sites. Therefore, “[c]omments about other areas”—i.e., areas outside of
15 New Mexico, including the San Pedro Valley and its cultural resources—“would
16 not be pertinent.” BLM did not explain how the multiple comments regarding the
17 presence of traditional cultural properties in the San Pedro Valley were not
18 “pertinent” to the Section 106 process—which was still ongoing at the time of the
19 2023 Final EIS—particularly where the agency acknowledged in the 2023 Final
20 EIS that “an inventory for [traditional cultural properties] *has not been completed*
21 *at this time.*” Similarly, despite the addition of about 25 miles of previously
22 unanalyzed access and construction roads, the BLM insisted that comments and
23 concerns relating to the San Pedro Valley could not receive further consideration.

24 93. BLM reported to the Arizona SHPO that in communications with the
25 THPO at Tohono O’odham Nation, the agency had “suggested that [the Tribe’s]
26 issues are serious and that [BLM and the Tribe] should engage in government to
27 government consultations.” However, in a subsequent email to the Arizona SHPO
28 regarding these same issues, BLM dismissively suggested that the Tribes “misread

1 this situation with the [2023 Final] EIS” and that the agency “tried . . . to set the
2 record straight, but that is not the answer that [the Tribes] want to hear.”

3 94. In March 2023, the San Carlos Apache Tribe wrote BLM to request
4 “meaningful consultation” concerning the significant adverse impacts that the
5 Project will have on the San Pedro Valley. The Tribe noted that it “is especially
6 concerned about the highly intrusive, all-new transmission corridor through the
7 San Pedro Valley,” an area that “is the fragile core for the largest expanse of
8 unfragmented land in the Southwest” and that “includes the southern half of the
9 San Carlos Apache Reservation.” The Tribe informed BLM that “the Valley is the
10 home to more than 60 landforms named and remembered in our Apache language”
11 and “also hosts thousands of localities having religious, cultural, historical, and
12 archaeological importance to Apache, O’odham, Hopi, and Zuni peoples.”
13 Accordingly, “the entire middle San Pedro Valley is a cultural landscape and
14 traditional cultural property having great significance in Apache cultural and
15 religious traditions and in those of other tribes.” The Tribe concluded that “the
16 proposal to approve this project in advance of transparent, place-specific tribal
17 consultations does not comport with provisions of . . . the [NHPA], Executive
18 Order No. 13175, the recent proclamations of the Biden Administration, and other
19 related law and policy.” The Tribe urged BLM to consider alternative routes that
20 would avoid adverse effects to this important cultural landscape, asserting that
21 “[u]nless and until there a transparent analysis emerges from these parties and the
22 [2023 final EIS] reflects the Tribe’s values and concerns, the Tribe must protest
23 the FEIS and SunZia in general.”

24 95. In March 2023, the Tohono O’odham Nation also wrote to BLM to
25 again express its longstanding concerns with the Project’s impacts on the San
26 Pedro Valley. The Tribe noted its “well-documented cultural, religious, ancestral,
27 and oral history connections with the Arizona lands on which the [Project] is

1 proposed to be constructed.” According to the Tribe, “[t]he concerns of the
2 Tohono O’odham Nation have been expressed for many years in a long series of
3 consultation meetings with [BLM],” yet “[m]any of these concerns have not been
4 addressed regarding visual impacts to the San Pedro River Valley, an important
5 ‘traditional cultural landscape’ significant to the Tohono O’odham Nation and
6 other Tribes in Arizona.” The Tribe also noted its longstanding “concerns over
7 direct impacts to individual cultural resource sites that will be destroyed by” the
8 Project’s construction and access roads. Despite these concerns, “[i]nput . . .
9 regarding adverse impacts to individual cultural sites and the San Pedro River
10 Valley Traditional Cultural Place has largely been ignored,” as have
11 “[r]ecommendations to move the [Project] out of the San Pedro Valley Traditional
12 Cultural landscape.” The Tribe requested that BLM “resume consultations with
13 the affected Tribes regarding adverse impacts to the cultural landscape of the San
14 Pedro Valley and individual cultural sites, with the goal of moving the proposed
15 [Project] out of the valley.”

16 96. In March 2023, Archaeology Southwest filed a formal protest to the
17 2023 Final EIS. The protest focused on two primary issues: “(a) inadequate BLM
18 attention to cultural resource identification, analysis, and impact assessment and
19 avoidance; and (b) [failure] to complete meaningful consultations with federally
20 recognized Tribes who consider the San Pedro Valley to be part of their
21 Territories.” According to the protest, BLM’s failure to meaningfully consider
22 these two issues “resulted in an FEIS that is premature and incomplete because
23 essential cultural resource and Tribal consultation data and perspective were
24 excluded from the FEIS analysis of alternatives, especially the No Action
25 Alternative.” In April 2023, BLM denied Archaeology Southwest’s protest.

26 97. In June 2023, BLM responded to the San Carlos Apache Tribe’s
27 March 2023 letter. BLM informed the Tribe that the agency considered routing

1 alternatives during the 2013 Final EIS process. According to the agency, “the
2 route chosen balanced the considerations of diverse stakeholders and resource
3 concerns.” BLM explained that the 2023 Final EIS process was initiated primarily
4 “to find a different route in New Mexico . . . due to factors concerning the White
5 Sands Missile Range.” BLM insisted that since 2018, “all consulting parties” have
6 been “provided detailed cultural resource inventory reports and invited to
7 comment and provide information on those reports.” BLM did not state whether
8 an inventory for traditional cultural properties had been completed for the entire
9 Project area and provided to the parties. Additionally, although BLM insisted that
10 it had attended several meetings with consulting parties, including affected Tribes,
11 in order to “provide updates” on the Project and “address questions and concerns”
12 from the Tohono O’odham Nation and the San Carlos Apache, BLM did not
13 specifically address those concerns in its response. Nor did the agency discuss any
14 process for the resolution of the concerns expressed by the San Carlos Apache at
15 those meetings or in its March 2023 letter. Instead, BLM asserted, without
16 evidence, that “[a]dverse effects to many identified cultural resources were
17 avoided in both Arizona and New Mexico.” BLM concluded that efforts to avoid,
18 minimize, and mitigate adverse effects to historic properties would be detailed in
19 the forthcoming HPTP, and invited the San Carlos Apache to participate in the
20 development of the document.

21 98. In July 2023, BLM transmitted the proposed HPTP to Consulting
22 Parties in Arizona. BLM noted that the only HPTP developed at the time was to
23 assess the “direct, physical effects of the [Project].” At a meeting with Consulting
24 Parties to discuss the document, BLM explained that “another HPTP [will be]
25 developed to resolve the adverse visual effects and other indirect effects to historic
26 properties.” BLM did not explain how its plan to bifurcate the assessment,
27 mitigation, and resolution of adverse effects to such an important cultural

1 landscape as the San Pedro Valley was consistent with either the Programmatic
2 Agreement, which contemplated a single HPTP addressing all adverse effects to
3 historic properties for each state, or the agency’s obligations to engage in
4 comprehensive consultation to avoid, minimize, and mitigate direct and indirect
5 impacts to historic and cultural properties under the NHPA.

6 **V. THE ONGOING HPTP PROCESS**

7 **A. Development Of The HPTP For Direct/Physical Effects**

8 99. In August 2023, BLM finalized its proposed HPTP for direct and
9 physical adverse effects to historic properties Arizona. The finalized HPTP
10 explained that “[a] separate treatment plan is being prepared to address additional
11 adverse effects including visual, indirect, and other effects, such as those to
12 tribally sensitive properties, as well as cumulative effects.” Thus, the second, yet-
13 to-be-developed HPTP will resolve “effects that extend beyond physical effects,”
14 including visual, indirect, and other effects.

15 100. Remarkably, despite letters dating back over a decade informing
16 BLM that the San Pedro Valley was considered by several Consulting Parties to be
17 traditional cultural property and constitute a cultural landscape, BLM asserted that
18 the area had only been “recently identified” as such. BLM insisted that the San
19 Pedro Valley “will be considered in the second [HPTP],” which will ostensibly
20 “allow for a more-focused consideration of the mitigation of direct visual and
21 tribal effects,” which are still subject to additional tribal and Consulting Party
22 consultations at certain sites. BLM did not explain how deferral of consideration
23 of adverse effects (including direct effects) to the culturally significant San Pedro
24 Valley until the last possible stage in the Project planning process could be
25 squared with its obligations to “initiate[] [the Section 106 process] early in the
26 undertaking’s planning, so that a broad range of alternatives may be considered
27 during the planning process,” and to ensure that its actions do not restrict or

1 foreclose the “consideration of alternatives to avoid, minimize or mitigate the
2 undertaking's adverse effects on historic properties.”

3 101. On August 3, 2023, the Arizona SHPO submitted highly critical
4 comments on BLM’s proposed HPTP, noting that it was “greatly concerned by the
5 lack of consideration of tribal values in the proposed research.” Significantly, the
6 SHPO articulated its “strong[] belie[f] that the HPTPs prepared in conjunction
7 with Section 106 of the [NHPA] compliance should address adverse effects to *all*
8 *classes* of historic properties adversely affected by an undertaking.” In particular,
9 the SHPO noted its “concern [over] the lack of discussion regarding landscape
10 level effects to historic properties,” for “[a]s the BLM is aware, consulting parties
11 to the [Project] programmatic agreement have identified the San Pedro Valley as a
12 cultural landscape.” Accordingly, the SHPO “recommend[ed] that documentation
13 and [NRHP] evaluation of this landscape (and any others that might be identified)
14 utilizing appropriate historic contexts be considered as mitigation,” which “could
15 then be used to help address landscape level effects to historic properties.”

16 102. Relatedly, the SHPO admonished BLM’s inadequate discussion of
17 cumulative effects to historic properties in the HPTP, noting that BLM merely
18 “identifies *potential* cumulative adverse effects at several sites.” Moreover, with
19 respect to the resolution of cumulative adverse effects, the HPTP merely identifies
20 “additional data recovery” without explaining why such mitigation is appropriate
21 or whether other mitigation methods were considered. The SHPO thus
22 recommended “adding discussion . . . that addresses the nature and conditions
23 under which these cumulative effects may occur.” The SHPO further urged that
24 “all forms of mitigation—not just archaeological data recovery—should be
25 presented.” In light of the serious deficiencies in the HPTP, the SHPO concluded
26 that the document should be revised to address all comments. Only after those

1 deficiencies are corrected can the SHPO “better evaluate the adequacy of the
2 proposed archaeological sampling strategies.”

3 103. In August 2023, the San Carlos Apache Tribe, Tohono O’odham
4 Nation, and Archaeology Southwest jointly submitted a notice of dispute to the
5 Secretary of the Interior, BLM, and the ACHP regarding BLM’s compliance with
6 the NHPA in connection with the Project. Specifically, the parties “dispute[d] the
7 BLM’s historic property identification process and the BLM’s failure to properly
8 address the adverse effects to historic properties affected by the [Project].”
9 According to the parties, “BLM . . . disregarded [their] requests to identify and
10 consider [traditional cultural properties], including the likelihood that the San
11 Pedro Valley itself is a [traditional cultural property] or traditional cultural
12 landscape eligible for listing in the [NRHP].” The parties noted that “[o]n
13 numerous occasions over more than a decade,” they had advised BLM “of the
14 presence of [traditional cultural properties] and of the cultural salience of the San
15 Pedro Valley as a whole.” Yet, despite multiple requests for additional
16 consultations with affected Tribes and their knowledgeable representatives, the
17 parties alleged that BLM had yet to engage in any meaningful consultation and
18 review of traditional cultural properties that will be irreparably altered and harmed
19 by the Project. The Tribe and the Nation also alleged that they “ha[d] not been
20 provided the opportunity for meaningful government-to-government
21 consultation.” The parties reminded BLM of its obligations under Joint Secretarial
22 Order No. 3403 to “give consideration and deference to Tribal proposals,
23 recommendations, and knowledge that affect management decisions on such
24 lands,” and requested that BLM immediately come into compliance with the
25 NHPA.

26 104. In August 2023, BLM responded to the San Carlos Apache Tribe,
27 Tohono O’odham Nation, and Archaeology Southwest’s joint dispute. BLM

1 asserted that it had only been informed of the identification of the middle San
2 Pedro Valley as a traditional cultural property through the March 2023 letters
3 submitted by the Tohono O’odham Nation and the San Carlos Apache Tribe.
4 According to BLM, upon receiving this information, the agency began to consult
5 regarding the Project’s adverse effects on the Valley. BLM did not acknowledge
6 that, in fact, letters dating back over a decade had informed the agency of the
7 cultural and historic significance of the Valley to several tribes. Nor did BLM
8 acknowledge that by ignoring the overwhelming evidence supporting the
9 identification of the San Pedro Valley as traditional cultural property—which
10 again, had been submitted to the agency for over a decade—until at least March
11 2023, BLM skewed its Section 106 process from the beginning.

12 105. For example, by refusing to make a reasonable and good faith effort
13 to identify the San Pedro Valley as a traditional cultural property during the 2014
14 NEPA and NHPA processes, BLM avoided its duty at that time to “develop and
15 evaluate alternatives or modifications to the [Project] that could avoid, minimize,
16 or mitigate adverse effects on” the San Pedro Valley, when the portion of the
17 Project that runs through the area was initially approved. By the time that BLM
18 finally acknowledged in its letter that the San Pedro Valley is a traditional cultural
19 property, the siting for the Arizona portion of the Project was a *fait accompli*.
20 Hence, in its August 2023 response to the joint dispute, BLM asserted that despite
21 tribal concerns, “the [P]roject will not be rerouted, as that portion of it was
22 approved in January 2015.” Instead, BLM invited the disputing parties to work
23 with the agency through the ongoing HPTP process to resolve the Project’s
24 adverse effects on historic and cultural properties. BLM thus deferred
25 consideration of the Project’s adverse effects on the San Pedro Valley until the
26 development of a second HPTP—i.e., at a juncture in the decisionmaking process
27 where BLM would no longer consider alternatives that would avoid adverse

1 effects to historic and cultural properties, and would instead consider only how to
2 mitigate such effects.

3 **B. The Final HPTP For Direct/Physical Effects**

4 106. In September 2023, BLM notified the Consulting Parties that the
5 HPTP for direct, physical effects “has been finalized in consultation with the
6 Arizona SHPO.”

7 107. On October 5, 2023, Archaeology Southwest emailed BLM on
8 behalf of the objecting parties (i.e., Archaeology Southwest, the Tohono O’odham
9 Nation, and the San Carlos Apache Tribe) to offer a “roadmap” for resolving the
10 parties’ disputes with the agency regarding the Project. The parties noted that the
11 Programmatic Agreement made “no mention of a second HPTP,” but rather
12 references “*an* HPTP for each state that will address the effects of the proposed
13 [Project] on historic properties during the [Project], including traditional cultural
14 properties.” The parties informed BLM that they had not received any “reference
15 to or consultation with” the consulting parties regarding the proposed second
16 HPTP. The parties therefore notified BLM that their “dispute now includes
17 BLM[’s] inattention to [Programmatic Agreement] stipulations” requiring BLM
18 to: (1) “if possible, *avoid* adverse effects to all types of historic properties, with
19 input from Consulting Parties,” including by “*realignment of the transmission*
20 *line*” (emphasis added); and (2) “[w]here avoidance is not possible . . . [to]
21 minimize or mitigate adverse effects to historic properties if possible, with input
22 from Consulting Parties.”

23 108. Regarding BLM’s decision to develop a second HPTP to resolve
24 “non-physical adverse effects to historic properties, such as effects that are visual,
25 indirect, or to tribal values,” the objecting parties argued that neither the NHPA,
26 nor its implementing regulations, nor the Programmatic Agreement “provide any
27 basis for partitioning adverse effects to historic properties in terms of physical and

1 non-physical.” The parties asserted that BLM’s “attempt to erect such a partition
2 without prior consultation . . . appears to be . . . arbitrary and capricious,”
3 including because such a division would “limit options for dispute resolution.”
4 The parties urged BLM to comply with the terms of the Programmatic Agreement
5 moving forward, including by preparing a single HPTP to address all adverse
6 effects to historic properties.

7 109. The objecting parties reminded BLM of its responsibility, pursuant
8 to the NHPA and its implementing regulations, to identify historic properties
9 through “a reasonable and good faith effort,” (quoting 36 C.F.R. § 800.4(b)1), and
10 assess potential adverse effects to those properties. The parties urged BLM to,
11 consistent with those obligations, complete the identification of and assessment of
12 adverse effects to historic properties within the Project’s APE, as that process is
13 “integral to the framing and substance of the efforts . . . to resolve potential
14 adverse effects.” The parties “again direct[ed] BLM[’s] attention to [their] varied
15 notices and advisements, delivered to BLM in good faith since at least 2009, of the
16 presence and significance of [traditional cultural properties] in the San Pedro
17 Valley.”

18 110. The parties requested that BLM respond to its objections by
19 confirming its commitment to the NHPA, its implementing regulations, and the
20 Programmatic Agreement, and by providing concrete steps that the agency
21 planned to take to ensure its compliance with same as respects the identification,
22 assessment, and resolution of the Project’s adverse effects on traditional cultural
23 properties and/or cultural landscapes in or comprising the San Pedro Valley. The
24 objecting parties further urged BLM to “prioritize the avoidance of potential
25 adverse effects to historic properties, especially [traditional cultural properties]
26 and cultural landscapes” in and comprising the San Pedro Valley, in accordance
27 with the NHPA, its implementing regulations, and the Programmatic Agreement.

1 111. In October 2023, the ACHP informed BLM of its “concerns with
2 how [the final HPTP for direct/physical effects] and other reports and
3 communications have been characterized.” Specifically, the ACHP took issue with
4 the HPTP’s reliance on “‘archaeological methods’ to resolve adverse effects on
5 historic properties and the suggestion that it defers consideration of ‘Tribal values’
6 to a future treatment plan.” The ACHP admonished BLM that “[c]onsidering
7 ‘Tribal values’ through consultation should occur throughout the 106 process and
8 reflected agreements and treatment plans,” and further, that “Section 106
9 implementing regulations at 36 CFR § 800.4(c)(1) state that federal agencies shall
10 acknowledge the special expertise of Tribes in assessing the eligibility of historic
11 properties that may possess religious and cultural significance to them.” The
12 ACHP reminded BLM that such “expertise extends to understanding what actions
13 may cause adverse effects to those properties as well as the treatment methods that
14 may be appropriate and necessary to resolve those adverse effects—regardless of
15 the nature or type of historic property being affected.” Because federal agencies—
16 including BLM—do not possess this “special expertise,” they “should rely on
17 Tribes to provide feedback as to whether proposed treatment methods may or may
18 not be appropriate, such as an overreliance on testing and data recovery, which in
19 and of itself may constitute an additional adverse effect.”

20 112. The ACHP also noted that BLM’s approach of developing multiple
21 HPTPs for each state (i.e., an HPTP to address direct/physical adverse effects and
22 a second HPTP to address indirect and “other” effects to traditional cultural
23 properties) “is inconsistent with the terms of the [Programmatic Agreement],”
24 which called for a single HPTP for each state addressing all of the adverse effects
25 to historic properties and cultural resources therein. The ACHP recommended that
26 BLM reconcile these approaches, and posited that “BLM cannot authorize

1 construction until all parts of this report (considering all aspect's *[sic]* of the
2 undertaking's effects on historic properties) have been finalized and approved."

3 113. Also in October 2023, the Pueblo of Zuni informed BLM that it was
4 joining the August 2023 dispute submitted by the Tohono O'odham Nation, San
5 Carlos Apache Tribe, and Archaeology Southwest. The Pueblo of Zuni entered the
6 dispute "because the BLM has failed to identify, evaluate, and consider the effects
7 of the proposed [Project] on Zuni (as well as other Tribal) properties of traditional
8 religious and cultural importance located within the [APE]." Additionally, "the
9 identification, evaluation, assessment of effect(s) and resolution of adverse effects
10 is demonstrably determined solely through the narrow disciplining of Western
11 archaeology and the associated limiting ontological view of the environment." The
12 Pueblo of Zuni asserted that "[t]he Zuni people have a strong traditional cultural,
13 heritage, and religious connections to the San Pedro Valley" that are "well
14 documented." Yet, BLM has yet to acknowledge or document historically
15 significant landmarks or cultural landscapes. The Pueblo of Zuni urged BLM to
16 "acknowledge and act upon [its] fiduciary, statutory, and regulatory obligations"
17 to the Native American Tribes and peoples affected by the Project and "to follow
18 the fundamental dictates of the NHPA."

19
20 **VI. ISSUANCE OF THE INITIAL LNTP AND MEETINGS TO**
21 **ADDRESS ADVERSE EFFECTS ON HISTORIC AND CULTURAL**
22 **PROPERTIES**

23 114. On September 26, 2023, BLM issued an LNTP authorizing SunZia
24 Transmission, LLC to "proceed with construction on segments of the project area
25 crossing state and private lands in the San Pedro Valley." To discharge its Section
26 106 obligations, BLM argued that "there are no historic properties present in the
27 transmission structure spans and roads subject to this LNTP." However, BLM did
28 not explain how allowing construction to begin in an area that the agency itself

1 recognized as a traditional cultural property prior to concluding any type of review
2 of adverse direct and indirect effects on that property was consistent with the
3 NHPA and its implementing regulations. Nor did BLM acknowledge that by
4 authorizing construction on state and private lands adjacent to culturally
5 significant federal lands in the San Pedro Valley, the agency effectively foreclosed
6 consideration of alternatives to avoid, minimize, or mitigate adverse effects on the
7 traditional cultural property prior to the conclusion of the Section 106 process.

8 115. On the basis of BLM’s September 26, 2023 LNTP, SunZia
9 Transmission, LLC began construction of the Project in the San Pedro Valley,
10 including grading, site clearing, vegetation tagging, and removal and placement of
11 heavy equipment in sensitive areas. On information and belief, these activities
12 adversely affected historic properties, including traditional cultural properties and
13 cultural landscapes, prior to the completion of the Section 106 and government-to-
14 government consultation processes required by the NHPA, its implementing
15 regulations, and the Programmatic Agreement.

16 116. On October 31, 2023, the Tohono O’odham Nation, joined by the
17 San Carlos Apache Tribe and Archaeology Southwest, implored the Secretary of
18 Interior to intervene and “halt the unlawful and deeply harmful destruction of the
19 San Pedro Valley.” The parties “specifically request[ed] that [the Secretary]
20 withdraw or suspend the [LNTP] . . . for the Arizona portion of the [Project].” The
21 parties informed the Secretary that the LNTP had been issued “based on BLM’s
22 acceptance of a flawed and incomplete historic property inventory report that
23 BLM knew did not identify or address many of the historic properties the Tribes,”
24 including traditional cultural properties that the parties and others had “repeatedly
25 advised” BLM are present in the area. Indeed, for over a decade the parties had
26 “advised BLM of the presence of [traditional cultural properties] and of the
27 cultural salience of the San Pedro Valley as a whole.” Additionally, the LNTP had

1 been issued “in advance of the completion of both the historic property
2 identification process and the [HPTP] adversely affected by the [Project].” The
3 parties additionally alleged that BLM had issued the LNTP without any advance
4 notice to consulting parties, and prior to the resolution of the parties’ August 2023
5 dispute, which identified the San Pedro Valley as a historic property eligible for
6 listing in the NRHP. The parties reminded the Secretary of BLM’s responsibility
7 pursuant to Joint Secretarial Order No. 3403 to “give consideration and deference
8 to Tribal proposals, recommendations, and knowledge that affect management
9 decisions on such lands.” Yet, according to the parties, “[i]nstead of shouldering
10 these obligations and meeting Section 106 requirements for compliance with the
11 [NHPA] in consultation with Tribes, BLM has made clear its intentions to
12 prioritize [SunZia Transmissions, LLC’s] interests.” The parties thus requested the
13 Secretary’s immediate intervention to ensure BLM complied with its statutory,
14 regulatory, and fiduciary responsibilities to Native American Tribes.

15 117. On November 8, 2023, BLM responded to the Tohono O’odham
16 Nation, joined by the San Carlos Apache Tribe and Archaeology Southwest’s
17 October 31, 2023 letter to inform the parties that BLM ordered “an immediate
18 temporary suspension of [SunZia Transmissions, LLC’s] activities authorized
19 within the San Pedro Valley LNTP.” BLM requested to meet with the parties
20 “within the next 5 days to consult regarding your objections and [to] discuss a path
21 forward.”

22 118. On November 14, 2023, the Hopi Tribe informed BLM that it was
23 joining the objections submitted by the Tohono O’odham Nation, San Carlos
24 Apache Tribe, Pueblo of Zuni, and Archaeology Southwest. The Hopi Tribe also
25 expressed its concern that “BLM proceeded to approve two final environmental
26 impact statements and the substandard [HPTP]—all - without [an] effective effort

1 to place the archaeological surveys in the broader contexts of region-scale Hopi,
2 O'odham, Zuni, or Apache history and geography.”

3 119. Also on November 14, 2023, BLM met with officials from the
4 Tohono O’odham Nation, San Carlos Apache Tribe, Pueblo of Zuni, the Hopi
5 Tribe, and Archaeology Southwest in an attempt to resolve the parties’ concerns
6 with the Project. Because tribal representatives were unable to attend given the
7 short scheduling, BLM acknowledged that the meeting “did not constitute
8 government-to-government consultation.” On information and belief, BLM
9 informed attendees that the agency granted the right-of-way through the San Pedro
10 Valley in 2015 and cannot consider re-routing the Project.

11 120. On November 24, 2023, BLM responded to the objections raised by
12 the Tohono O’odham Nation, San Carlos Apache Tribe, Pueblo of Zuni, the Hopi
13 Tribe, and Archaeology Southwest and offered “an explanation of the why and
14 how the [agency] intends to proceed.” As an initial matter, BLM asserted that the
15 agency and objecting parties “have two different interpretations of what has
16 occurred over the last 14 years through the development and subsequent
17 implementation of the Programmatic Agreement for the Project,” and that those
18 differences “serve as the basis for [BLM’s] response to most of the objections
19 raised and explain the BLM’s intended approach for proceeding through the
20 Programmatic Agreement process.” To wit, BLM insisted that despite over a
21 decade of correspondence highlighting the importance of the San Pedro Valley to
22 the Tribes, the agency “did not receive sufficient details through consultation or
23 otherwise about the San Pedro Valley to previously consider the Valley, or
24 resources within it, a [traditional cultural property].”

25 121. BLM acknowledged that the Tribes consider “any construction
26 within the [San Pedro Valley] [to be] an adverse effect, as defined in the
27 Programmatic Agreement,” and that the only resolution of that adverse effect “is

1 to re-route the transmission line out of the San Pedro Valley because that would
2 constitute avoidance of an adverse effect under the Programmatic Agreement.”
3 However, BLM insisted that “the Programmatic Agreement does not offer the
4 parties re-routing as a resolution or avoidance measure” because “BLM does not
5 have the ability to reconsider the 2015 approval of the transmission line, especially
6 for a segment of the transmission line that is on non-federal land and therefore
7 outside of the BLM’s direct jurisdiction.” BLM did not acknowledge that adverse
8 impacts to historic properties on private or state land are, at minimum, an indirect
9 effect of BLM’s decision to issue a right-of-way authorization to accommodate the
10 Project, and as such, BLM must consider, analyze, and ultimately, work to avoid,
11 minimize, or mitigate those effects pursuant to the NHPA and its implementing
12 regulations. Nor did BLM acknowledge that the selected route alternative for the
13 segment that runs through the San Pedro Valley “has the most BLM land” of all of
14 the alternatives considered for the segment. BLM’s decision with respect to the
15 management and use of those federal lands has a significant impact on the route
16 selection.

17 122. BLM likewise acknowledged the Tribes and Archaeology
18 Southwest’s objections, including the assertion that the agency ignored
19 information provided since at least 2009 regarding the San Pedro Valley’s
20 eligibility as a historic place by virtue of comprising a traditional cultural property,
21 as well as the argument that “BLM’s proposed approach of considering San Pedro
22 Valley as a potential TCP and preparing a second [HPTP]” is “impermissible
23 under the Programmatic Agreement.” However, BLM “fundamentally disagree[d]
24 with the objections,” arguing that the “objections continue to rest on a factually
25 unsupported premise that the Tribes provided the BLM with sufficient information
26 to suggest San Pedro Valley was a potential [traditional cultural property], . . . and
27 that the BLM failed to consult with Tribes to evaluate San Pedro Valley consistent

1 with [the Programmatic Agreement].” BLM insisted that it “did not receive any
2 specific information suggesting the San Pedro Valley should be considered a
3 [traditional cultural property] as part of the [Programmatic Agreement] process.”
4 BLM thus refused to acknowledge the numerous comments submitted to the
5 agency throughout the NEPA and NHPA planning processes by various
6 Consulting Parties and other stakeholders explaining the significance—and putting
7 the agency on notice—of the San Pedro Valley to the Tribes, including the 2009
8 scoping comments submitted by Archaeology Southwest and the National Trust
9 for Historic Preservation, which *specifically stated* that the preferred Project route
10 in the lower San Pedro Valley “could significantly impact a landscape of
11 significance to Native American groups.” Instead, BLM held the party line,
12 insisting that the agency adhered to the consultation process demanded by the
13 NHPA, its implementing regulations, and the Programmatic Agreement.

14 123. Instead, BLM insisted that the issue of the San Pedro Valley as a
15 potential traditional cultural property was first broached to the agency in “late
16 February 2023” by the Tohono O’odham Nation’s THPO. BLM argued that upon
17 receiving comments submitted by the Nation and others in March 2023 raising the
18 same point—i.e., that the San Pedro should be considered a traditional cultural
19 property—the agency “immediately endeavored to consult to understand more
20 from the Tribes about the area.” The agency insinuated that its efforts to engage
21 with the Tribes regarding this important cultural landscape at such a late hour in
22 the Project planning process merited special praise, since “BLM did so even
23 though it had issued its right-of-way authorization decision in 2015”; “had spent
24 nearly 6 years conducting inventories, evaluating properties, and developing
25 treatment plans to resolve adverse effects”; and, together with Consulting Parties,
26 “were getting close to finalizing the [HPTP].” BLM then relied on the purported
27 “lateness of the information,” coupled with the assertion that “pausing the

1 considerable, long-term effort to get to the [HPTP] [would be] both unreasonable
2 and disruptive to SunZia’s construction timeline,” as justification for its decision
3 to develop “an addendum or second [HPTP].” BLM admitted that its “reasons
4 were less about whether the Programmatic Agreement specifically allowed for a
5 second (or addendum) [HPTP] and more about the timing of the request to
6 consider San Pedro Valley as a potential [traditional cultural property].”
7 According to BLM, despite the fact that the plain terms of the Programmatic
8 Agreement call for a *single* HPTP for each state, the agency’s chosen approach of
9 developing a second HPTP to address the adverse effects of the Project on the San
10 Pedro Valley *while ground-disturbing activities in the Valley are ongoing* and
11 adversely impacting the very historic property the HPTP is being developed to
12 address “was—and still is—a reasonable solution.”

13 124. BLM’s response to objections also disputed the “suggestion that the
14 Programmatic Agreement obligates the BLM to re-open its 2015 right-of-way
15 decision and potentially re-route this transmission line segment to entirely avoid
16 the San Pedro Valley.” BLM flatly refused to reconsider its earlier decision.
17 Instead, BLM offered to “assume the San Pedro Valley is a [traditional cultural
18 property] in order to immediately begin to discuss mitigation.” BLM did not
19 explain how its approach—specifically, delaying acknowledgement of the
20 existence of a traditional cultural property until it is ostensibly too late in the
21 planning process to meaningfully examine measures to avoid or minimize adverse
22 effects to the property—can be squared with its obligations under the NHPA, its
23 implementing regulations, and/or the Programmatic Agreement.

24 125. On November 24, 2023, BLM also wrote to the ACHP to respond to
25 the ACHP’s November 13, 2023 letter and to inform the ACHP of BLM’s plans to
26 proceed with the Project. BLM’s letter to the ACHP largely mirrored its letter,
27 sent on the same date, to the Tribes and Archaeology Southwest dismissing the

1 organizations' objections. Additionally, in response to the ACHP's "suggestion
2 that the Tribes have raised this concern [regarding the status of the San Pedro
3 Valley]," BLM "disagree[d]" with the position that it "had sufficient information
4 of San Pedro Valley as a potential [traditional cultural property] before February
5 2023." In response to the ACHP's "reminder of [BLM's] obligation to identify
6 and evaluate historic properties through a reasonable and good faith effort," BLM
7 acknowledged its obligation to "seek to identify and evaluate historic properties
8 through a reasonable and good faith effort," but attempted to pass responsibility
9 for the alleged lapse in communication onto the Tribes. BLM insisted that it
10 "sought to consult with the Tribes through a reasonable and good faith effort to
11 identify and evaluate historic properties, but "did not receive any information
12 suggesting the potential presence of a [traditional cultural property] within San
13 Pedro Valley other than very vague notions of a potential cultural landscape."
14 Again, despite repeated references to the "long history of the Project supported by
15 the record of communications," BLM refused to acknowledge the multiple
16 comments submitted by Consulting Parties and other stakeholders explaining the
17 importance of the San Pedro Valley to the various Tribes, and raising grave
18 concerns about the Project's impacts on the historically and culturally significant
19 area and its resources.

20 **VII. ISSUANCE OF THE SECOND LNTP AND ONGOING ADVERSE**
21 **EFFECTS ON HISTORIC AND CULTURAL PROPERTIES**

22 126. On November 27, 2023, BLM issued SunZia Transmission, LLC a
23 Second Amended LNTP, authorizing SunZia Transmission, LLC to "proceed with
24 construction on segments of the project area crossing state and private lands in the
25 San Pedro Valley." According to the Second Amended LNTP, "BLM believes it is
26 appropriate to continue the process of evaluating San Pedro Valley as a potential
27 traditional cultural property (TCP) through consultation." However, in light of

1 “the timing of the information provided by the Tribes relative to the many years
2 the consulting parties worked towards completing the steps of the [Programmatic
3 Agreement] process and [an HPTP],” the agency determined that it would be
4 inappropriate to “paus[e] portions of the Project until the BLM evaluates and
5 considers an amendment or addendum to the [HPTP] treatment plan to cover San
6 Pedro Valley.” The agency further explained that it “was not persuaded by the
7 objecting parties’ focus on using any evaluation of San Pedro Valley under the
8 [Programmatic Agreement] to reconsider the BLM’s decision approving the right-
9 of-way in 2015, as this is outside of the [Programmatic Agreement] process.”
10 BLM did not explain how this decision is consistent with its obligations under the
11 NHPA, its implementing regulations, or the Programmatic Agreement, including
12 BLM’s obligation to complete the Section 106 process *prior to* the approval of . . .
13 the undertaking or *prior to* the issuance of any license.” 36 C.F.R. § 800.1(c)
14 (emphases added). Instead, BLM “lift[ed] the immediate temporary suspension of
15 all activities within San Pedro Valley” and authorized SunZia Transmission, LLC
16 “to continue activities consistent with the [initial September 27, 2023] LNTP.”

17 127. Pursuant to the terms of the September 27, 2023 and November 27,
18 2023 LNTPs, SunZia Transmission, LLC have begun ground-disturbing activities
19 in the San Pedro Valley. These activities, including, but not limited to, grading and
20 road construction in preparation for construction of towers, is causing and will
21 continue to cause serious, adverse effects to historic properties, including
22 traditional cultural properties and cultural landscapes. For example, grading and
23 road construction will destroy landscape connectivity essential to the religious,
24 historic, and cultural values that the San Pedro Valley embodies for the Tribes.
25 Additionally, construction activities will restrict the consideration of alternatives
26 to avoid, minimize, or mitigate the adverse effects of the Project on the San Pedro

1 Valley, in accordance with the NHPA, its implementing regulations, and the
2 Programmatic Agreement.

3 128. Construction activities are also causing the loss and displacement
4 from the landscape of the native flora and fauna including many plants and
5 animals sacred to the Tribes including tagging and relocation of saguaro cacti.
6 Construction activities are also harming and will continue to harm sacred water
7 resources including springs, seeps, and the San Pedro River itself by
8 fundamentally changing the landscape structure and water flow across the
9 landscape. The Plaintiffs are harmed by the irreversible, adverse effects to these
10 historic properties, including the traditional cultural property and other historic
11 resources in the San Pedro Valley.

12 **CLAIMS FOR RELIEF**

13 **Claim 1 – Violations of the NHPA and the APA**

14 129. Plaintiffs incorporate by reference and re-allege all allegations set
15 forth above.

16 130. This Claim for Relief challenges Defendants’ violations of the
17 NHPA and its implementing regulations in granting the right-of-way and
18 authorizing construction on the Project through the September 27, 2023 and
19 November 27, 2023 LNTPs. Plaintiffs bring this claim pursuant to the judicial
20 review provisions of the APA, 5 U.S.C. § 706. Defendants violated the NHPA and
21 its regulations in multiple respects through the challenged action, including but not
22 limited to the following:

23 131. By failing to engage in meaningful consultation under Section 106
24 and/or government-to-government consultation early in the Project planning that
25 complies with the NHPA and its implementing regulations—including the
26 requirements that consultation commences early in the planning process;
27 recognizes the government-to-government relationship between the Federal

1 Government and Native American Tribes; is sensitive to the concerns and needs of
2 Native American Tribes; and provides a reasonable opportunity to affected Tribes
3 to identify concerns about historic properties and articulate their views on the
4 undertaking's effects on such properties—BLM violated the NHPA, its
5 implementing regulations, and the APA.

6 132. By authorizing Project activities that may have adverse effects on
7 historic and cultural resources without first making a reasonable and good faith
8 effort to identify all such resources (including traditional cultural properties)
9 within the APE, evaluating the potential effects the Project may have on identified
10 historic properties, and resolving the adverse effects on historic properties through
11 the development of avoidance, minimization, and mitigation measures, BLM
12 violated the NHPA, its implementing regulations, and the APA.

13 133. By authorizing Project activities that may have adverse effects on
14 historic properties based on an inventory of historic properties that the agency
15 knew or should have known was inadequate and inaccurate in light of evidence
16 submitted to the agency, BLM violated the NHPA, its implementing regulations,
17 and the APA.

18 134. By authorizing Project activities that may have adverse effects on
19 historic properties based on an inadequate and inaccurate inventory of historic
20 properties prior to the completion of the Section 106 process, BLM restricted the
21 subsequent consideration of alternatives to avoid, minimize, or mitigate the
22 Project's adverse effects on historic properties (including traditional cultural
23 properties) in violation of the NHPA, its implementing regulations, and the APA.

24 135. By authorizing Project activities that may have adverse effects on
25 historic properties prior to the completion of the HPTP process—and specifically,
26 during the development of a second HPTP that will ostensibly address, for the first

1 time, the Project’s effects on the traditional cultural landscape of the San Pedro
2 Valley—BLM violated the NHPA, its implementing regulations, and the APA.

3 136. By failing to identify the San Pedro Valley as a traditional cultural
4 landscape early in the process such that alternatives to avoid, minimize, or
5 mitigate the Project’s adverse effects on all historic properties could be
6 meaningfully considered before the Project becomes a *fait accompli*, BLM
7 precluded meaningful consultation and consideration of alternatives in violation of
8 the NHPA, its implementing regulations, and the APA.

9 137. By failing to meaningfully engage with the Tribes regarding the
10 cultural and historic significance of the San Pedro Valley and the sites contained
11 therein—including, e.g., by relying on an inadequate and inaccurate inventory of
12 cultural and archaeological sites that was limited to *known* sites and failed to
13 account for tribal knowledge and expertise—despite numerous requests for
14 additional consultation under Section 106 and/or government-to government
15 consultations, BLM violated the NHPA, its implementing regulations, and the
16 APA.

17 138. Absent injunctive and declaratory relieve, Plaintiffs and their
18 interests in various historic, cultural, and other resources have been and will
19 continue to be irreparably harmed.

20 **PRAYER FOR RELIEF**

21 **WHEREFORE**, Plaintiffs respectfully request that this Court:

22 1. Declare that Defendants violated the NHPA, its implementing
23 regulations, and the APA in issuing the September 27, 2023 and November 27,
24 2023 LNTPs in the San Pedro Valley prior to the completion of a legally adequate
25 Section 106 process;

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