

1 Howard Shanker, Attorney General
P.O. Box 830
2 Sells, Arizona 85634
AZ Bar No. 015547
3 Howard.Shanker@tonation-nsn.gov
(520) 383-3410
4 *Attorney for the Tohono O’odham Nation*

5 Alexander B. Ritchie, Attorney General
P.O. Box 40
6 San Carlos, Arizona. 85550
AZ Bar No. 019579
7 alex.ritchie@scat-nsn.gov
(928) 475-3344
8 *Attorney for the San Carlos Apache Tribe*

9 William S. Eubanks II
Elizabeth L. Lewis
10 EUBANKS & ASSOCIATES, PLLC
1629 K Street NW, Suite 300
11 Washington, DC 20006
DC Bar No. 987036 (Mr. Eubanks)
12 DC Bar No. 229702 (Ms. Lewis)
bill@eubankslegal.com
13 lizzie@eubankslegal.com
(970) 703-6060
14 *Attorneys for Plaintiffs Center for Biological
Diversity and Archaeology Southwest*

15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF ARIZONA**
17 **TUCSON DIVISION**

18 Tohono O’odham Nation *et al.*,) Case No. 4:24-cv-00034-JGZ
)
19 *Plaintiffs,*) **PLAINTIFFS’ MOTION FOR**
) **A TEMPORARY**
20 v.) **RESTRAINING ORDER**
) **AND PRELIMINARY**
21 U.S. Department of the Interior *et al.*,) **INJUNCTION, REQUEST**
) **FOR EXPEDITED HEARING,**
22 *Defendants.*) **AND MEMORANDUM OF**
POINTS AND AUTHORITIES

TABLE OF CONTENTS

1

2 TABLE OF AUTHORITIES..... iv

3 MEMORANDUM OF POINTS AND AUTHORITIES 1

4 INTRODUCTION..... 1

5 STATUTORY BACKGROUND..... 3

6 A. The NHPA 3

7 B. The APA 6

8 FACTUAL BACKGROUND 6

9 I. The San Pedro Valley Is An Important TCP..... 6

10 II. The 2016 Right-Of-Way Authorization Process..... 7

11 A. Project Scoping And Initial Concerns With San Pedro Valley Route..... 7

12 B. The 2012 Draft EIS And Initiation Of The Section 106 Process 9

13 C. The 2013 Final EIS 11

14 D. The Section 106 Programmatic Agreement..... 12

15 E. The 2015 ROD..... 14

16 III. The 2023 Right-Of-Way Authorization Process..... 14

17 A. The 2022 Draft EIS..... 14

18 B. The 2023 Final EIS 16

19 IV. Continuing Concerns Regarding BLM’s Failure To Comply With The NHPA.... 16

20 V. The Ongoing HPTP Process..... 17

21 VI. Issuance Of The Initial LNTP And Meetings To Address Adverse Effects On

22 Historic And Cultural Properties..... 21

23 VII. Issuance Of The Second LNTP And Ongoing Effects..... 22

24 ARGUMENT 23

1	I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS	23
2	A. BLM Cannot Rely On The PA To Satisfy Its Consultation Obligations.....	24
3	B. BLM Failed To Lawfully Identify Historic Properties.....	27
4	C. BLM’s Consultation Efforts Fell Short Of The NHPA’s Requirements.....	32
5	II. AN INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM..	36
6	III. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST FAVORS	
7	AN INJUNCTION	38
8	IV. NO BOND SHOULD BE REQUIRED	40
9	CONCLUSION	40

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
1 <i>All. for the Wild Rockies v. Cottrell</i> , 2 632 F.3d 1127 (9th Cir. 2011)	23, 36, 38
3 <i>Apache Survival Coal. v. United States</i> , 4 21 F.3d 895 (9th Cir. 1994)	24
5 <i>Cal. Pub. Util. Comm’n v. FERC</i> , 6 879 F.3d 966 (9th Cir. 2018)	27
7 <i>Coliseum Square Ass’n, Inc. v. Jackson</i> , 8 465 F.3d 215 (5th Cir. 2006)	36
9 <i>Colo. River Indian Tribes v. Marsh</i> , 10 605 F. Supp. 1425 (CD. Cal. 1985)	39
11 <i>Comanche Nation v. United States</i> , 12 No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008)	36
13 <i>Davis v. Minetta</i> , 14 302 F.3d 1104 (10th Cir. 2002)	40
15 <i>Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.</i> , 16 140 S. Ct. 1891 (2020).....	25, 28
17 <i>FCC v. Fox Television Stations, Inc.</i> , 18 556 U.S. 502 (2009).....	31
19 <i>Friends of Astor, Inc. v. City of Reading</i> , 20 No. 98-CV-4429, 1998 WL 684374 (E.D. Penn. Sept. 17, 1998).....	36
21 <i>Gerber v. Norton</i> , 22 294 F.3d 173 (D.C. Cir. 2002).....	35
23 <i>League of Wilderness Defs./Blue Mountains Biodiversity Proj. v.</i> 24 <i>Connaughton</i> , 25 752 F.3d 755 (9th Cir. 2014)	38
26 <i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.</i> , 27 463 U.S. 29 (1983).....	6, 29, 30, 31

1	<i>Muckleshoot Indian Tribe v. U.S. Forest Serv.,</i>	
2	177 F.3d 800 (9th Cir. 1999)	3
3	<i>Pennsylvania v. New Jersey,</i>	
4	426 U.S. 660 (1976) (per curiam).....	39
5	<i>Pit River Tribe v. U.S. Forest Serv.,</i>	
6	469 F.3d 768 (9th Cir. 2006)	31, 32
7	<i>Pueblo of Sandia v. United States,</i>	
8	50 F.3d 856 (10th Cir. 1995)	28, 29
9	<i>Quechan Tribe v. U.S. Dep’t of Interior,</i>	
10	755 F. Supp. 2d 1104 (S.D. Cal. 2010).....	24, 25, 27, 28, 30, 32, 34, 35, 36, 39
11	<i>S. Fork Band Council of W. Shoshone of Nev. v. Dep’t of the Interior,</i>	
12	588 F.3d 718 (9th Cir. 2009)	39
13	<i>Save Strawberry Canyon v. Dep’t of Energy,</i>	
14	613 F. Supp. 2d 1177 (N.D. Cal. 2009).....	40
15	<i>Se. Alaska Conservation Council v. U.S. Army Corps of Eng’rs,</i>	
16	479 F.3d 1148,1151 (9th Cir. 2007)	39
17	<i>Stuhlberg Int’l Sales Co. v. John D. Brush & Co.,</i>	
18	240 F.3d 832 (9th Cir. 2001)	23
19	<i>Tehama-Colusa Canal Auth. v. U.S. Dep’t of the Interior,</i>	
20	721 F.3d 1086 (9th Cir. 2013)	25
21	<i>People ex rel Van de Kamp v. Tahoe Reg’l Planning Agency,</i>	
22	766 F.2d 1316 (9th Cir. 1985)	40
23	<i>W. Watersheds Proj. v. Bernhardt,</i>	
24	428 F. Supp. 3d 327 (D. Or. 2019)	31
25	<i>Wilderness Soc’y v. Tyrrel,</i>	
26	701 F. Supp. 1473 (E.D. Cal. 1988)	40
27	<i>Winter v. NRDC,</i>	
28	555 U.S. 7 (2008).....	23
29	<u>Statutes</u>	
30	5 U.S.C. § 706(2).....	2, 6

1	54 U.S.C. § 300308	3
2	54 U.S.C. § 300320	3
3	54 U.S.C. § 304108(a).....	3
4	54 U.S.C. § 306108	3
5	Pub. L. No. 89-665	39
6	<u>Regulations</u>	
7	36 C.F.R. 800.1.....	4, 34
8	36 C.F.R. 800.1(c)	34
9	36 C.F.R. § 60.1.....	3
10	36 C.F.R. § 800.2.....	4, 25, 32, 33, 34, 35, 36
11	36 C.F.R. § 800.3.....	4
12	36 C.F.R. § 800.4.....	4, 5, 27, 28
13	36 C.F.R. § 800.5.....	4, 5
14	36 C.F.R. § 800.6(a).....	5, 26
15	36 C.F.R. § 800.8(c).....	35
16	36 C.F.R. § 800.14(b).....	5, 6
17	36 C.F.R. § 800.16.....	3, 4, 32
18	<u>Federal Register Notices</u>	
19	74 Fed. Reg. 25,764 (May 29, 2009).....	7
20	86 Fed. Reg. 30,066 (June 4, 2021).....	14
21		

1 Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs hereby move for a
2 temporary restraining order (“TRO”) and a preliminary injunction to enjoin Federal
3 Defendants’ September 27, 2023 and November 27, 2023 Limited Notices to Proceed
4 (“LNTPs”), authorizing SunZia Transmission, LLC to begin construction of a huge
5 transmission line that slices through the heart of one of the most important historic and
6 cultural resources in the American Southwest, the San Pedro Valley. This Motion is
7 supported by the following Memorandum of Points and Authorities and the
8 accompanying exhibits. Because construction in and around the San Pedro Valley is
9 currently proceeding, Plaintiffs respectfully request that this Court schedule an expedited
10 hearing on this Motion as soon as possible.

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **INTRODUCTION**

13 This case cries out for maintaining the status quo to avoid the desecration of
14 important cultural and historic sites in the San Pedro Valley that have provided immense
15 spiritual meaning and value to Tribes for millennia. Absent a temporary halt to
16 construction, these significant cultural resources will be irretrievably lost or impaired.

17 Here, Plaintiffs challenges the Bureau of Land Management’s (“BLM”) complete
18 disregard of its obligations under the National Historic Preservation Act (“NHPA”), 54
19 U.S.C. §§ 300101-307108, and the Administrative Procedure Act (“APA”), 5 U.S.C.
20 §§ 701-706, in issuing its September 27, 2023 and November 27, 2023 LNTP to SunZia
21 Transmission, LLC, authorizing the partial construction of the SunZia Southwest
22 Transmission Project (“the Project”), a massive high-voltage transmission line that will
23 cut through the heart of the San Pedro Valley and will cause serious, irreversible adverse
24 effects to Tribal traditional cultural properties (“TCPs”) and other cultural sites and
25 sacred areas, including areas with human remains.

26 Despite the statutory requirements and repeated calls from Plaintiffs and other
27 stakeholders to consider the views of Tribes with significant historic, cultural, and

1 religious interests in the area and work in good faith to avoid adverse effects to historic
2 and cultural properties, BLM issued the LNTPs based on a deeply flawed NHPA Section
3 106 consultation process that failed to accurately locate and identify TCPs and other
4 cultural resources and virtually ignored Tribal concerns. For example, although Plaintiffs
5 and other stakeholders have, since 2009, submitted overwhelming evidence of the
6 cultural significance of the San Pedro Valley as a cultural landscape to several Native
7 American Tribes, BLM failed to make a reasonable and good faith effort to identify the
8 Valley as a TCP, only recognizing the area as such when construction on the Project was
9 imminent. In turn, the agency's longstanding refusal to recognize this TCP corrupted the
10 entire Section 106 process, resulting in a severely limited, incomplete cultural resource
11 inventory and a consultation process that suffered from fatal procedural flaws. BLM's
12 decision to authorize construction activities in and around the San Pedro Valley based on
13 a facially deficient consultation process not only violates the NHPA and the APA, but has
14 caused, and will continue to cause, significant, irreparable, adverse effects to the TCP.
15 Additionally, BLM's decision threatens to disturb—or even destroy—human remains.
16 Thus, the threat to Plaintiffs' interests from BLM's actions cannot be overstated; as a
17 practical matter, with each passing day that construction continues, the range of available
18 measures to avoid, minimize, and mitigate the significant, irreparable, adverse effects to
19 the San Pedro Valley becomes increasingly restricted.

20 By issuing the LNTPs without lawfully addressing those impacts, BLM acted in a
21 manner that is “arbitrary, capricious, an abuse of discretion or otherwise not in
22 accordance with” the NHPA and “without observance of procedure required by law,”
23 within the meaning of the APA, 5 U.S.C. § 706(2). Accordingly, because Plaintiffs are
24 likely to succeed on the merits of this claim and also satisfy the other relevant factors,
25 Plaintiffs are entitled to a preliminary injunction and/or a temporary restraining order.

STATUTORY BACKGROUND

A. The NHPA

Section 106 of the NHPA requires that Interior “shall . . . take into account the effect” of any “undertaking” on historic properties. 54 U.S.C. § 306108.¹ Historic property” is broadly defined to include “any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the [National Register of Historic Places (“NRHP”)], including artifacts, records, and material remains relating to the district, site, building, structure, or object.” 54 U.S.C. § 300308.² The Advisory Council on Historic Preservation (“ACHP”) promulgates regulations implementing Section 106’s requirements that are binding on all federal agencies. 54 U.S.C. § 304108(a).

TCPs are those sites that are “eligible for inclusion in the [NRHP] because of [their] association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.” Ex. 1 at 4.³ TCPs may include “cultural landscapes,” *see id.* at 12, which are further defined as “geographic area[s] (including both cultural and natural resources and the wildlife or domestic animals therein) associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values,” Ex. 2 at 15. Such landscapes are eligible for inclusion on the NRHP “as long as [the landscape] was

¹ The term “undertaking” is broadly defined to mean “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency,” and relevant here, expressly includes activities “requiring a federal permit, license, or approval.” 54 U.S.C. § 300320; *accord* 36 C.F.R. § 800.16(y).

² The NRHP comprises a list of “districts, sites, buildings, structures, and objects significant in American history . . . archeology . . . and culture.” 36 C.F.R. § 60.1.

³ National Register Bulletin 38 “provides the recognized criteria for the Forest Service’s identification and assessment of places of cultural significance.” *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807 (9th Cir. 1999).

1 the location of a significant event or activity,” even if evidence of the event or activity is
2 absent. Ex. 1 at 12.

3 Where an agency determines that an undertaking “has the potential to cause effects
4 on historic properties,” it must initiate the Section 106 consultation process. 36 C.F.R.
5 § 800.3. Relevant here, the agency must “consult with any Indian tribes . . . that attach[]
6 religious and cultural significance to historic properties that may be affected by [the]
7 undertaking,” even if the “area of potential effect” (“APE”) is outside of reservation
8 boundaries. 36 C.F.R. § 800.2; *see also id.* § 800.4(b).⁴ Consultation must afford Tribes
9 “a reasonable opportunity to identify [] concerns about historic properties, advise on the
10 identification and evaluation of historic properties, including those of traditional religious
11 and cultural importance, articulate [their] views on the undertaking’s effects on such
12 properties, and participate in the resolution of adverse effects.” 36 C.F.R. § 800.2.⁵
13 Agencies are admonished that “[c]onsultation should commence early in the planning
14 process, in order to identify and discuss relevant preservation issues,” and allow for
15 consideration of “a broad range of alternatives.” *Id.* §§ 800.1, .2. Consultation must also
16 recognize the “unique legal relationship” between Tribes and the Federal government. *Id.*
17 § 800.2.

18 During consultation, the agency must “[d]etermine and document the [APE]” of
19 the undertaking. *Id.* § 800.4(a)(1). The agency must then “make a reasonable and good
20 faith effort” to identify historic properties (including properties that may potentially be
21 eligible for inclusion in the NRHP) within the APE. Such efforts “may include
22 background research, consultation, [and] oral history interviews.” *Id.* Agencies must

⁴ The APE is defined to include the area “within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties.” 36 C.F.R. § 800.16(d).

⁵ “An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the [NRHP] in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.” 36 C.F.R. § 800.5.

1 “review existing information on historic properties within the [APE], including any data
2 concerning possible historic properties not yet identified,” *id.* § 800.4(a)(2), and must
3 “seek information, as appropriate, from consulting parties, and other individuals and
4 organizations likely to have knowledge of, or concerns with, historic properties, and
5 identify issues relating to the undertaking's potential effects on historic properties,” *id.*
6 § 800.4(a)(3). BLM has an affirmative obligation to “[g]ather information from any
7 Indian tribe . . . to assist in identifying properties, including those located off tribal lands,
8 which may be of religious and cultural significance to them and may be eligible for the
9 National Register.” *Id.* § 800.4(a)(4).

10 Once historic properties are identified, the agency must evaluate the effects the
11 undertaking may have on historic properties. *Id.* § 800.5. Where the effects will be
12 adverse, the agency must “consult” with consulting parties “to develop alternatives or
13 modifications to the undertaking that could avoid, minimize, or mitigate” such effects. *Id.*
14 § 800.6(a). Agreed-upon measures to avoid, minimize, or mitigate effects are
15 documented in a memorandum of agreement, called a historic properties treatment plan
16 (“HPTP”). *Id.*

17 As an alternative to the Section 106 process, the agency may enter into a
18 Programmatic Agreement (“PA”). *Id.* § 800.14(b). PAs “govern the implementation of a
19 particular program or the resolution of adverse effects from certain complex project
20 situations or multiple undertakings.” *Id.* PAs may also provide for a “phased process” to
21 conduct the identification of historic properties and evaluation of adverse effects. *Id.*
22 § 800.4(b)(2). Such a process allows the agency to “defer final identification and
23 evaluation of historic properties” when the “alternatives under consideration consist of
24 corridors or large land areas.” *Id.* However, the agency must “proceed with the
25 identification and evaluation of historic properties” as specific aspects of an alternative
26 are “refined.” *Id.* “Compliance with the procedures established by an approved [PA]

1 satisfies the agency’s section 106 responsibilities for all individual undertakings . . .
 2 covered by the agreement.” *Id.* § 800.14(b).

3 **B. The APA**

4 The APA governs review of agency actions. Under the APA, a court must set
 5 aside agency actions that are “arbitrary, capricious, an abuse of discretion or otherwise
 6 not in accordance with law.” 5 U.S.C. § 706(2)(A). Agency action must be vacated where
 7 the agency has “entirely failed to consider an important aspect of the problem, offered an
 8 explanation for its decision that runs counter to the evidence before the agency,” or
 9 issued a decision “so implausible that it could not be ascribed to a difference in view or
 10 the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins.*
 11 *Co.*, 463 U.S. 29, 43 (1983).

12 **FACTUAL BACKGROUND**

13 **I. THE SAN PEDRO VALLEY IS AN IMPORTANT TCP**

14 The San Pedro Valley is one of the most intact cultural landscapes in southern
 15 Arizona, if not the entire Southwest. *See* Ex. 3 at 1. Members of the Tohono O’odham
 16 Nation, San Carlos Apache Tribe, Hopi Tribe, and Pueblo of Zuni claim ancestral
 17 connections to the Valley and continue to hold and foster deep relationships with the area
 18 that are an inseparable part of their respective communities’ cultural identities, collective
 19 histories, and continuing spiritual observances. *See, e.g.*, Ex. 4 at ¶ 7; Ex. 5 ¶¶ 11, 13; Ex.
 20 6 ¶ 16; Ex. 7 at 16; Ex. 8 at 19-22. Hence, the archaeological, cultural, and religious
 21 importance of the Valley to these Indigenous peoples is well-documented and cannot be
 22 overstated.⁶

⁶ BLM has itself recognized the significance of the San Pedro Valley to regional Indigenous peoples. For example, in 2012, the U.S. Geological Survey issued a pilot study in cooperation with BLM, which evaluated alternative methods and tools that quantify and value ecosystem services, using the San Pedro River Watershed as a case study. *See generally* Ex. 8. The report explains that the “San Pedro River watershed holds *immeasurable* significance to numerous American Indian tribes.” *Id.* at 65 (emphasis added); *see also id.* at 19 (explaining that the “San Pedro River watershed holds

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

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

3 In 2008, SunZia Transmission, LLC applied to BLM for a right-of-way to
4 construct and operate two new single-circuit overhead 500-kV transmission lines
5 originating in Lincoln County, New Mexico and terminating in Pinal County, Arizona.

6 In 2009, BLM published a notice of intent to prepare an Environmental Impact
7 Statement (“EIS”) pursuant to the National Environmental Policy Act (“NEPA”), 42
8 U.S.C. §§ 4321-4347, in which BLM noted that the Project may affect “visual
9 resources . . . [and] Native American *traditional cultural properties* and sacred places.”
10 74 Fed. Reg. 25,764 (May 29, 2009) (emphasis added).

11 In response to the scoping notice—and indeed, throughout the NEPA process—
12 Plaintiffs and other organizations with expertise in archaeology and cultural properties
13 repeatedly alerted BLM to the presence of significant historic and cultural resources,
14 including TCPs, along the proposed route. In particular, commenters raised serious
15 concerns regarding the significant adverse impacts that the Project will have on the San
16 Pedro Valley cultural landscape (and thus, on a TCP). *See* Ex. 1 at 12 (recognizing that
17 culturally significant landscapes are a type of TCP).

18 For example, Plaintiff Archaeology Southwest (“ASW”) informed BLM that the
19 preferred route “running west from the Safford area”—which includes the section
20 impacting the San Pedro Valley—“could significantly impact a *landscape of*
21 *significance*” to several Native American groups. Ex. 9 at 8 (emphasis added); *see also*
22 *id.* at 6 (describing the San Pedro Valley as a “rich *cultural landscape*” (emphasis
23 added).⁷ ASW emphasized the significance of the Valley as an “intact *cultural* and

important spiritual and cultural values, particularly for American Indian tribes with cultural or historic ties to the watershed”).

⁷ 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

1 natural *landscape*,” and explained that the “potential physical and visual impacts of the
2 introduction of transmission lines” to “this largely unfragmented landscape . . . cannot be
3 overstated.” Ex. 7 at 6 (emphasis added). In light of these impacts, ASW urged BLM to
4 conduct a full “evaluation of potential physical, visual and social/psychological impacts
5 to Native American TCPs and sacred landscapes.” *Id.* at 16; *see also* Ex. 9 at 8. In
6 particular, “[b]ecause TCPs and sacred landscapes are highly susceptible to visual
7 impacts, such as from above-ground transmission lines, and because mitigating such
8 impacts is very difficult,” ASW argued that “BLM should attempt to resolve tribal
9 concerns by avoiding TCPs and sacred landscapes all together.”⁸ Ex. 9 at 16. ASW
10 offered to lend its considerable expertise and data regarding the locations, condition, and
11 significance of cultural sites in the San Pedro Valley to assist BLM in the decisionmaking
12 process. *Id.*

13 In June 2010, Plaintiffs ASW and the Center for Biological Diversity likewise
14 informed BLM that the San Pedro Valley “represents ones of the most intact prehistoric,
15 *cultural landscapes* in southern Arizona, if not the whole Southwest.” Ex. 10 at 5. The
16 letter urged BLM to avoid “[t]his rich *cultural landscape* [that] remains under constant
17 threat of residential and commercial development, as well as looting and vandalism.” *Id.*

18 That same month, BLM informed ASW that the Section 106 process would be
19 initiated “[o]nce the preferred and alternative routes have been selected.” Ex. 11 at 3.
20 BLM assured ASW that “[t]his will take place well before the publication of a Draft
21 [EIS].” *Id.* However, in August 2011, BLM abruptly reversed course and informed
22 consulting parties that the Section 106 process would be formally initiated only “[a]fter

corporate name. Accordingly, for consistency and the convenience of the Court, this Complaint will use “ASW” throughout.

⁸ In light of the significant impacts to TCPs, ASW argued that “[e]very effort should be made to utilize” an existing right-of-way corridor to minimize—or even avoid—impacts to historic and cultural resources.” Ex. 9 at 6. ASW also asserted that BLM’s preferred route “deviate[s] from the existing” utility corridor “without adequate justification.” *Id.*

1 the Draft [EIS] is published.” Ex. 12 at 2. Hence, despite requests that BLM initiate the
2 Section 106 process early to ensure meaningful consultation, BLM elected to develop the
3 preferred route and its alternatives without the benefit of consulting party input as to the
4 location of, or adverse effects to, historic properties and cultural landscapes.

5 **B. The 2012 Draft EIS And Initiation Of The Section 106 Process**

6 In May 2012, BLM issued its Draft EIS for public comment. To fulfill its Section
7 106 responsibilities, BLM elected to use a “phased identification and evaluation
8 approach” for cultural resources. Ex. 13 at 25. Under this approach, BLM conducted a
9 “judgmental sample inventory” to predict the density of cultural resources at “selected
10 locations known to be sensitive for cultural resources.” *Id.* As a result of these initial
11 sample inventories, BLM estimated that a total of 188 historic and cultural sites would be
12 impacted by the agency’s preferred route through the San Pedro Valley. *See id.* at 32.
13 Notably, the initial sample inventories did *not* identify the San Pedro Valley as a TCP.

14 Consulting parties and agencies with expertise in federal trust and cultural
15 resources voiced serious concerns with BLM’s inadequate consideration of impacts to
16 those resources. For example, the National Park Service (“NPS”), the federal agency
17 charged with managing the NRHP and possessing special expertise in historic
18 preservation and cultural landscape identification and assessment, argued that “[t]he
19 section on tribal concerns is minimal” and “[f]urther efforts need to be made” to engage
20 the Tribes and address their concerns. *Id.* at 41. NPS also explained that “[c]ultural
21 resource sections throughout the [Draft] EIS focus primarily on archeological resources
22 and largely ignore other types of cultural resources such as . . . landscapes, and [TCPs].”
23 *Id.* at 42. According to NPS, “[t]his is not adequate to address (identify and evaluate)
24 [those] other types of cultural resources within the [APE].” *Id.* NPS additionally noted
25 that “[t]he government-to-government tribal consultation process appears inadequate.” *Id.*
26 In particular, “[r]esource impacts from the perspective of the tribes and cultural
27 communities are not addressed.” *Id.* at 43. NPS ultimately recommended that BLM

1 “more definitively describe and evaluate potential impacts to cultural landscapes and
2 resources surrounding NPS lands to effectively avoid, minimize, and potentially mitigate
3 impacts connected” to the Project. *Id.* at 39.

4 ASW criticized BLM’s failure to timely initiate Section 106 consultation to inform
5 the development of alternatives considered under NEPA. *See* Ex. 14 at 3. Noting that
6 BLM began scoping for the Project over three years prior, ASW asserted that such a
7 lengthy delay in “compliance with Section 106 will foreclose the opportunity . . . to
8 provide meaningful comments on the undertaking,” and risks “effectively removing from
9 consideration other siting alternatives that could ‘avoid, minimize or mitigate’ adverse
10 effects on historic properties.” *Id.* ASW urged BLM to immediately correct these errors
11 to avoid “impermissibly foreclos[ing] alternatives.” *Id.*

12 Plaintiff San Carlos Apache Tribe also expressed its “strenuous oppos[ition]” to
13 BLM’s preferred route through the San Pedro Valley, which “cross[es] through the
14 heartland of the Western Apache homeland” and “ha[s] the potential of impacting
15 culturally sensitive and sacred areas of significance and importance to the Tribe and the
16 Tribe’s members.” Ex. 15 at 3-4. The Tribe decried the “discontinuation of meaningful
17 consultation with the Tribe’s representatives and department managers” regarding the
18 impacts to cultural resources. *Id.* at 3. The Tribe concluded that “[t]he significance of the
19 area” that will be impacted by the preferred alternative “to the San Carlos Apache Tribe
20 and people cannot be overstated,” and offered to assist BLM “in any reasonable manner
21 possible,” including by providing BLM with information concerning “the historical
22 import of this area and its cultural significance to the San Carlos Apache people.” *Id.* at 5.

23 In October 2012, BLM initiated the Section 106 process and met with consulting
24 parties. *See* Ex. 16. Consulting parties reiterated their concerns with the late start of the
25 consultation process. In particular, the ACHP expressed “concern about the timing of
26 consultations and whether the current time line for the project will allow for meaningful
27 consultation,” and reminded BLM that “Section 106 also involves seeking and

1 considering relevant views and information relating to project alternatives early in the
2 process.” *Id.* at 3. Additionally, the Tribes and others “expressed a strong interest and the
3 desire to avoid impacts to” the San Pedro Valley. *Id.* In response to “a discussion about
4 modifying the proposed [P]roject alignment in that area,” BLM “agreed that this
5 approach would be *essential*.” *Id.* (emphasis added).

6 In February 2013, BLM circulated the draft PA to consulting parties. *See* Ex. 17.
7 In response to calls from Plaintiffs and other stakeholders that BLM consider alternative
8 routes that avoid the San Pedro Valley, BLM insisted that it “is not in a position to
9 reroute the [Project]” because the agency had “not made a final decision on whether to
10 [issue the] permit,” and “therefore . . . cannot decide on reroutes.” *Id.* at 2. BLM
11 reassured consulting parties that “the PA is the vehicle by which the agency resolves the
12 adverse effects of the project. It is a process that should be broad enough and flexible
13 enough to allow for all manner of avoidance and mitigation.” *Id.* BLM acknowledged the
14 consulting parties’ “loud and clear” objections, but nevertheless determined that it was
15 “not going to s[p]end time discussing” them during the development of the PA. *Id.*

16 C. The 2013 Final EIS

17 In June 2013, BLM issued its Final EIS. It explained that “[c]onsultation with
18 appropriate land management agencies, tribal governments, tribal historic preservation
19 officers [“THPOs”], and [state historic preservation officers (“SHPOs”)] is ongoing and
20 will result in a PA that will establish project-specific procedures for complying with the
21 NHPA, including those to follow during the execution of the Project.” Ex. 13 at 29. With
22 respect to its progress in developing an inventory of historic and cultural sites that may be
23 affected, BLM again kicked the can down the road, asserting that a field survey would
24 only be conducted once the Project route was actually approved. According to BLM,
25 Section 106 consultation “will continue during the post-EIS phases of Project
26 implementation prior to construction.” *Id.* at 36.

27 In response to concerns repeatedly raised by Plaintiffs and others regarding

1 BLM’s failure to engage in meaningful Section 106 consultation, BLM variously insisted
2 that “[c]onstruction of the Project along this [preferred] route would avoid the majority of
3 known cultural resource sites located along the San Pedro River”; that the Section 106
4 process—including the identification of an APE and any analysis of adverse effects to
5 historic properties—was ongoing; and that the agency would continue to compile and
6 document tribal concerns. *Id.* at 47. In response to the numerous comments requesting
7 that BLM assess the effects of the Project on TCPs within and comprising the San Pedro
8 Valley, BLM asserted both that “[n]o historic landscapes or cult[ural] geographies were
9 located in [the San Pedro Valley] area during the records check,” *id.* at 57, and that the
10 “San Pedro Valley has not been designated a cultural landscape (it is not located on NPS
11 lands) or a national historic district,” *id.* at 50.

12 **D. The Section 106 Programmatic Agreement**

13 In December 2014, BLM executed a PA to define the process for the identification
14 of historic properties and the resolution of adverse effects. *See* Ex. 18. As to
15 identification efforts, the PA directed SunZia Transmission, LLC to complete a draft
16 cultural resource inventory identifying “historic properties that could be affected by” the
17 Project. *Id.* at 6. The PA provided a process for consultation regarding the identification
18 of historic properties, including by directing BLM to seek input and comment on draft
19 and final cultural resource inventories from consulting parties on, *inter alia*: “[t]he
20 adequacy of the identification effort”; “[t]he NRHP eligibility of the cultural resources
21 identified”; “the assessment of effects . . . on the historic properties identified”; and
22 “[w]hether there are any properties of traditional cultural or religious importance to tribes
23 and ethnic groups that were not identified in the inventory and that may be affected by
24 the [Project].” *Id.* at 7.⁹ The PA obligated BLM to “continue to consult with Indian tribes

⁹ The PA provides that “[w]hen making determinations of NRHP eligibility, the BLM will consider historic sites, districts, buildings, structures and objects that are significant and meet the integrity criteria.” Ex. 18 at 8. Where a property has “traditional cultural

1 regarding properties of traditional religious and cultural importance to them that might be
2 affected by the [Project]” and stipulated that “[t]he consultation process *will remain open*
3 for any tribe that expresses a desire to participate.” *Id.* at 8.

4 The PA also set forth terms for the resolution of the Project’s adverse effects on
5 historic properties. For example, it establishes avoidance as the preferred method of
6 resolving adverse effects to historic properties—“BLM *shall*, if possible, *avoid* adverse
7 effects to *all types of historic properties.*” *Id.* at 9 (emphasis added). Avoidance measures
8 “may include (but are not limited to) realignment of the transmission line.” *Id.* Only
9 “[w]here avoidance is not possible,” may BLM consider measures to “minimize or
10 mitigate adverse effects to historic properties.” *Id.* If Tribes “have expressed concerns
11 about effects on properties to which they ascribe traditional religious and cultural
12 importance,” the PA requires BLM to “consult with them” regarding measures to resolve
13 the adverse effects. *Id.* To document the resolution of adverse effects, the PA requires
14 BLM to “ensure” the development of an HPTP, which will “address the effects of the
15 [Project] on historic properties . . . including [TCPs].” *Id.* The HPTP must be developed
16 through consultation with BLM and other consulting parties. *Id.* at 12-13.

17 In line with the NHPA and its regulations, the PA provides that “[r]equests for
18 authorizations of construction will be approved *only if such authorizations will not*
19 *restrict subsequent measures to avoid, minimize or mitigate the adverse effects to historic*
20 *properties through rerouting of the corridor or placement of ancillary facilities.*” *Id.* at
21 15 (emphasis added). The PA also provides that if “*any Consulting Party to this [PA]*
22 *object[s] at any time to any actions proposed or the manner in which the terms of th[e]*
23 *[Agreement] are implemented, the BLM shall consult with such party to resolve the*
24 *objection.*” *Id.* at 20 (emphasis added). To resolve an objection, BLM must “prepare a

values,” BLM will consider the “values expressed by the consulted tribes or other ethnic groups.” *Id.*

1 written response that takes into account any timely advice or comments regarding the
2 dispute from the ACHP [and] Consulting Parties” prior to any final decision. *Id.*

3 **E. The 2015 ROD**

4 In January 2015, BLM issued a Record of Decision (“ROD”) approving BLM’s
5 preferred Project route. *See* Ex. 19. According to the ROD, “consultation was completed
6 with the execution of the [PA] on December 17, 2014.” *Id.* at 11. In 2016, relying on the
7 Final EIS and ROD for its compliance with NEPA, BLM issued a right-of-way grant to
8 SunZia Transmission, LLC, authorizing the preferred route through the San Pedro Valley
9 TCP.

10 After issuance of the 2015 ROD, Section 106 consultation continued. In February
11 2018, the consulting parties were provided a draft cultural resource inventory. *See* Ex. 20
12 at 8. Conspicuously, despite numerous letters from Plaintiffs and others repeatedly
13 explaining the cultural significance of the San Pedro Valley to several Tribes and
14 specifically identifying the area as a TCP full of important historic and cultural resources,
15 the inventory did not identify the San Pedro Valley as such.

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

17 In December 2020 and September 2021, SunZia Transmission, LLC submitted
18 updated applications to BLM seeking to amend the existing right-of-way authorization to
19 modify four components after advanced design and engineering review. Relevant here,
20 the proposed changes include 25 miles of new access roads and 230 acres of additional
21 ancillary facilities in the San Pedro Valley.

22 **A. The 2022 Draft EIS**

23 In June 2021, BLM issued a scoping notice for the proposed amendments to the
24 right-of-way. *See* 86 Fed. Reg. 30,066 (June 4, 2021). Consulting parties, including
25 Plaintiffs, submitted comments urging BLM to, *inter alia*, consider “siting alternatives
26 that would re-route the line away from sensitive areas including avoiding crossings and
27 transmission along the San Pedro River.” Ex. 21 at 6.

1 In April 2022, BLM issued a Draft EIS to assess the impacts of the proposed
2 changes to the Project. BLM limited its analysis in the 2022 Draft EIS to the “four
3 Project components contained within SunZia’s application to amend the existing [right-
4 of-way] authorization.” Ex. 22 at 3. The agency stated that the 2022 Draft EIS “does not
5 revisit or reanalyze the previously analyzed and approved route . . . unless conditions
6 have changed that warrant new analysis.” *Id.* at 5.

7 With respect to the Section 106 process, the 2022 Draft EIS reported that since the
8 2013 Final EIS, data regarding historic and cultural sites and resources “have been *and*
9 *will be* collected through tribal consultation.” *Id.* at 8 (emphasis added). As to the
10 identification of TCPs along the Project route, BLM paradoxically acknowledged that “an
11 inventory for [TCPs] has not been completed at this time,” *id.*, yet also reported that “[n]o
12 [TCPs] or sacred sites were identified within the analysis area during the previous
13 consultation for the 2013 [final] EIS,” *id.* at 9. Despite nearly ten years of purportedly
14 “ongoing” consultations regarding cultural resources, BLM reported that “[n]o new data
15 are available for this Draft EIS.” *Id.*

16 Plaintiffs and others submitted extensive comments on the 2022 Draft EIS. ASW
17 directly responded to the 2022 Draft EIS’s assertion that BLM had not identified any
18 TCPs or sacred sites within the analysis area. *See* Ex. 23 at 2. ASW explained that the
19 “San Pedro Valley segments that [the Project] would irrevocably alter are integral to a
20 well-documented *cultural landscape*,” i.e., an NRHP-eligible historic property “having
21 exceptional integrity and significance derived primarily from its central roles in the
22 historical, cultural, and oral traditions of at least four distinct Indigenous Nations:
23 Apache, Hopi, Tohono O’odham, and Zuni.” *Id.* (emphasis added). It reminded BLM that
24 “[i]n and through meetings and communications with BLM since 2008, multiple Tribes
25 have confirmed the landscape-scale importance of the Middle and Lower San Pedro
26 Valley,” and directed BLM to various Tribe- and peer-reviewed resources to
27 “substantiate” the identification of TCPs within the San Pedro Valley. *Id.* at 2-3.

1 **B. The 2023 Final EIS**

2 In February 2023, BLM issued its Final EIS for the proposed modifications. In
3 response to comments, BLM asserted that “extensive tribal consultation and coordination
4 were conducted for the initial right-of-way application and in support of the first EIS
5 process from 2009 [to] 2015.” *See* Ex. 24 at 9. BLM explained that “[c]onsultation with
6 the interested tribes is on-going . . . under Section 106 through the processes described in
7 the project’s [PA].” *Id.* at 14. To demonstrate its compliance with NEPA and the NHPA,
8 BLM referred commenters to the 2013 Final EIS’s discussion of impacts to cultural
9 resources and insisted that together with the additional information provided in the 2023
10 Final EIS, BLM’s analysis of effects to cultural resources was sufficient. *See, e.g., id.* at
11 14, 17, 23. BLM asserted that it “is complying with the requirements of Section 106 of
12 the NHPA for the proposed [right-of-way] amendments.” *Id.* at 17. It pointed to its use of
13 an “executed [PA] to satisfy the requirements of Section 106 of the NHPA, including
14 considering the potential effects of [its] decisions on historic properties listed on or
15 eligible for the [NRHP].” *Id.*

16 With respect to TCPs, BLM again insisted that although “an inventory for TCPs
17 has not been completed,” “[n]o TCPs or sacred sites were identified within the analysis
18 area.” *Id.* at 5. Despite comments from ASW disputing this assertion and providing
19 substantiating evidence, BLM also once again reported that “[n]o new data are available.”
20 *Id.*

21 **IV. CONTINUING CONCERNS REGARDING BLM’S FAILURE TO**
22 **COMPLY WITH THE NHPA**

23 After issuance of the 2023 Final EIS, consulting parties, including the Arizona
24 SHPO, continued to engage with BLM regarding concerns with the Project’s adverse
25 effects to the San Pedro Valley TCP and deficiencies in the agency’s Section 106
26 consultation. In February 2023, the Arizona SHPO wrote BLM, requesting information
27 regarding the Section 106 process in light of tribal concerns with the Project’s “adverse

1 impacts to the cultural landscape of the San Pedro Valley.” Ex. 25 at 2. BLM dismissed
2 such concerns by conflating the NHPA process—which was still ongoing at the time of
3 the 2023 Final EIS and broadly implicated historic properties along the entire Project
4 route—with the more limited second NEPA process, arguing that “the scope of the
5 current NEPA effort . . . does not involve the route in Arizona at all.” *Id.* at 3. Thus,
6 according to BLM “[c]omments about” areas in Arizona, including the San Pedro Valley
7 TCP, would “not be pertinent” to the ongoing Section 106 process, *id.* at 4, even though
8 “an inventory for TCPs *has not been completed*,” Ex. 24 at 5 (emphasis added). In
9 subsequent communications with the Arizona SHPO, BLM flippantly suggested that the
10 Tribes “misread this situation with the [2023 Final] EIS,” and despite the agency’s efforts
11 “to set the record straight, . . . that is not the answer that [the Tribes] want to hear.” Ex.
12 25 at 4.

13 In March 2023, both the San Carlos Apache Tribe and the Tohono O’odham
14 Nation again requested that BLM meaningfully consult with the Tribes regarding the
15 Project’s adverse effects to the San Pedro Valley TCP. *See* Ex. 26. The Tribes noted their
16 longstanding concerns and BLM’s failure to address them. *See id.* at 2-4. The Tribes
17 urged BLM to immediately engage in consultations to avoid adverse effects to important
18 cultural sites. *See id.* at 3, 5.

19 In response, BLM informed the Tribe that the agency considered routing
20 alternatives during the 2013 Final EIS process. Ex. 27 at 2. BLM asserted that the
21 preferred route “balanced the considerations of diverse stakeholders and resource
22 concerns” and avoided “[a]dverse effects to many identified cultural resources.” *Id.* BLM
23 concluded that efforts to avoid, minimize, and mitigate adverse effects to historic
24 properties would be detailed in the forthcoming HPTP. *Id.* at 3-4.

25 **V. THE ONGOING HPTP PROCESS**

26 In August 2023, BLM sought to finalize its HPTP for direct and physical adverse
27 effects to historic properties in Arizona. Curiously (and contrary to the plain terms of the

1 PA), BLM elected to bifurcate its assessment, mitigation, and resolution of adverse
2 effects; the HPTP addressed only direct and physical effects and noted that “[a] separate
3 [HPTP] is being prepared to address additional adverse effects including visual, indirect,
4 and other effects, such as those to tribally sensitive properties, as well as cumulative
5 effects.” Ex. 28 at 8. Remarkably, despite letters dating back over a decade identifying
6 the San Pedro Valley as a TCP and an important cultural landscape to several Tribes,
7 BLM asserted that the area had only been “recently identified” as such. *Id.* It insisted that
8 the San Pedro Valley “will be considered in the second [HPTP],” which will ostensibly
9 “allow for a more-focused consideration of the mitigation of direct visual and tribal
10 effects.” *Id.*¹⁰

11 That same month, the San Carlos Apache Tribe, Tohono O’odham Nation, and
12 ASW submitted a notice of dispute to the Secretary of the Interior, BLM, and the ACHP
13 regarding BLM’s compliance with the NHPA in connection with the Project. The parties
14 disputed “BLM’s historic property identification process and [] BLM’s failure to properly
15 address the adverse effects to historic properties.” Ex. 29 at 2. According to the parties,
16 BLM “disregarded [their] requests to identify and consider TCPs, including the
17 likelihood that the San Pedro Valley itself is a TCP or traditional cultural landscape
18 eligible for listing in the [NRHP].” *Id.* at 3. They noted that “[o]n numerous occasions
19 over more than a decade,” they had advised BLM “of the presence of TCPs and of the
20 cultural salience of the San Pedro Valley as a whole.” *Id.* Yet, despite multiple requests
21 for additional consultation with Tribes and their representatives, the parties alleged that
22 BLM had not engaged in meaningful consultation and review of TCPs that will be
23 irreparably altered and harmed by the Project. *Id.* The Tribe and the Nation also alleged

¹⁰ BLM has yet to circulate a draft of this second HPTP to the consulting parties, even as construction in the San Pedro Valley continues to cause irreversible and irreparable harm to TCPs and other historic and cultural resources.

1 that they “ha[d] not been provided the opportunity for meaningful government-to-
2 government consultation.” *Id.* at 2.¹¹

3 In response to the dispute, BLM asserted that the agency had only learned of the
4 identification of the middle San Pedro Valley as a TCP through the March 2023 letters
5 submitted by the Tohono O’odham Nation and the San Carlos Apache Tribe. Ex. 31 at 2.
6 It stated that the agency then began to consult regarding the Project’s adverse effects on
7 the Valley. *Id.* BLM did not acknowledge that letters dating back over a decade had
8 informed the agency of the cultural and historic significance of the Valley to several
9 Tribes. BLM asserted that despite these longstanding concerns, “the [P]roject will not be
10 rerouted, as that portion of it was approved in January 2015.” *Id.* Instead, BLM invited
11 the disputing parties to work with BLM through the ongoing HPTP process to resolve the
12 Project’s adverse effects on historic and cultural properties. *Id.* at 3. BLM thus deferred
13 consideration of the Project’s adverse effects on the San Pedro Valley TCP until the
14 development of a second HPTP—i.e., at a juncture in the decisionmaking process where
15 BLM would no longer consider any alternatives that would avoid adverse effects to
16 historic and cultural properties, and would instead consider only how to mitigate such
17 effects.

18 On October 5, 2023, the objecting parties emailed BLM to offer a “roadmap” for
19 resolving the parties’ disputes. *See* Ex. 32 at 2. They reminded BLM of its NHPA duties,
20 including its obligation to identify historic properties through “a reasonable and good
21 faith effort,” and assess potential adverse effects to those properties. *Id.* (quoting 36
22 C.F.R. § 800.4(b)(1)). The parties “again direct[ed] BLM[’s] attention to [their] varied
23 notices and advisements, delivered to BLM in good faith since at least 2009, of the

¹¹ The objecting parties also disputed BLM’s decision to develop a second HPTP to resolve “non-physical adverse effects to historic properties, such as effects that are visual, indirect, or to tribal values.” Ex. 30 at 2. While Plaintiffs maintain that BLM’s actions in developing the HPTP contravene the NHPA and are arbitrary and capricious, the HPTP is not yet final, and therefore is not a part of this lawsuit.

1 presence and significance of TCPs in the San Pedro Valley.” *Id.* at 3. They also notified
2 BLM that their “dispute now includes BLM[’s] inattention to PA stipulations” requiring
3 BLM to: (1) “if possible, *avoid* adverse effects to all types of historic properties, with
4 input from Consulting Parties,” including by “*realignment of the transmission line*”
5 (emphasis added); and (2) “[w]here avoidance is not possible . . . [to] minimize or
6 mitigate adverse effects to historic properties if possible, with input from Consulting
7 Parties.” Ex. 32 at 2; Ex.18 at 9.

8 In October 2023, the ACHP informed BLM of its “concerns with how [the final
9 HPTP for direct/physical effects] and other reports and communications have been
10 characterized.” Ex. 33 at 2. The ACHP took issue with the HPTP’s reliance on
11 “‘archaeological methods’ to resolve adverse effects on historic properties and the
12 suggestion that it defers consideration of ‘Tribal values’ to a future treatment plan.” *Id.* It
13 admonished BLM that “[c]onsidering ‘Tribal values’ through consultation should occur
14 throughout the 106 process and reflected agreements and treatment plans,” and further,
15 that BLM must “acknowledge the special expertise of Tribes in assessing the eligibility
16 of historic properties that may possess religious and cultural significance to them.” *Id.*
17 The ACHP reminded BLM that such “expertise extends to understanding what actions
18 may cause adverse effects to those properties as well as the treatment methods that may
19 be appropriate and necessary to resolve those adverse effects—regardless of the nature or
20 type of historic property being affected.” *Id.* at 2-3. Because BLM does not possess this
21 “special expertise,” the ACHP advised that BLM “should rely on Tribes to provide
22 feedback as to whether proposed treatment methods may or may not be appropriate, such
23 as an overreliance on testing and data recovery, which in and of itself may constitute an
24 additional adverse effect.” *Id.* at 3.

1 **VI. ISSUANCE OF THE INITIAL LNTP AND MEETINGS TO ADDRESS**
2 **ADVERSE EFFECTS ON HISTORIC AND CULTURAL PROPERTIES**

3 On September 26, 2023, BLM issued an LNTP allowing SunZia Transmission,
4 LLC to “proceed with construction on segments of the project area crossing state and
5 private lands in the San Pedro Valley.” Ex. 34 at 2. BLM stated that “there are no historic
6 properties present in the transmission structure spans and roads subject to this LNTP.” *Id.*
7 On this basis, SunZia Transmission, LLC began construction in the San Pedro Valley,
8 including grading, site clearing, vegetation tagging, and placing heavy equipment in
9 sensitive areas. *See* Ex. 6 ¶¶ 19-30 (describing ongoing construction activities and their
10 adverse impacts on the San Pedro Valley TCP).

11 On October 31, 2023, the Tohono O’odham Nation, joined by the San Carlos
12 Apache Tribe and ASW, urged the Secretary of Interior to intervene and “halt the
13 unlawful and deeply harmful destruction of the San Pedro Valley.” Ex. 35 at 2. The
14 parties informed the Secretary that the LNTP was issued “based on BLM’s acceptance of
15 a flawed and incomplete historic property inventory report that BLM knew did not
16 identify or address many of the historic properties the Tribes,” including TCPs that they
17 and others had “repeatedly advised” BLM are present in the area. *Id.*

18 On November 8, 2023, BLM ordered “an immediate temporary suspension of
19 [SunZia Transmission, LLC’s] activities authorized within the San Pedro Valley LNTP.”
20 Ex. 36 at 2. BLM requested to “consult regarding your objections and [to] discuss a path
21 forward.” *Id.* After meetings with the objecting parties, on November 24, 2023, BLM
22 offered “an explanation of the why and how the [agency] intends to proceed.” Ex. 37 at 2.
23 BLM asserted that the agency and objecting parties “have two different interpretations of
24 what has occurred over the last 14 years through the development and subsequent
25 implementation of the [PA] for the Project,” and that those differences inform BLM’s
26 response and its “intended approach for proceeding through the [PA] process.” *Id.*

1 Significantly, BLM insisted that despite extensive correspondence since 2009, the
2 agency “did not receive sufficient details through consultation or otherwise about the San
3 Pedro Valley to previously consider the Valley, or resources within it, a TCP.” *Id.* at 4.
4 BLM stated that it was only informed of the potential TCP in February 2023, at which
5 time it “immediately endeavored to consult to understand more from the Tribes about the
6 area.” *Id.* at 5. BLM refused to reconsider its earlier decision, insisting that “the [PA]
7 does not offer the parties re-routing as a resolution or avoidance measure” because “BLM
8 does not have the ability to reconsider the 2015 approval of the transmission line,
9 especially for a segment of the transmission line that is on non-federal land and therefore
10 outside of the BLM’s direct jurisdiction.” *Id.* at 3. BLM also disputed the parties’ “most
11 troubling” suggestion that the PA requires the agency to consider realignment of the
12 Project to avoid adverse effects to TCPs. *Id.* at 5. According to BLM, “[w]hile the [PA]
13 contemplates avoidance to resolve adverse effects,” such avoidance measures are
14 “limited to minor adjustments to the design or construction location.” *Id.* at 6. BLM
15 concluded that the objecting parties’ “call for a re-route to the 2015 and 2016 decisions
16 now are untimely and not appropriately considered through the [PA] process.” *Id.*

17 **VII. ISSUANCE OF THE SECOND LNTP AND ONGOING EFFECTS**

18 On November 27, 2023, BLM issued a Second Amended LNTP, authorizing
19 SunZia Transmission, LLC to “proceed with construction on segments of the project area
20 crossing state and private lands in the San Pedro Valley.” Ex. 38 at 2. BLM reported that
21 although “it is appropriate to continue the process of evaluating San Pedro Valley as a
22 potential [TCP] through consultation,” the purported lateness of the information provided
23 by the Tribes rendered it inappropriate to “paus[e] portions of the Project until the BLM
24 evaluates and considers an amendment or addendum to the [HPTP] treatment plan to
25 cover San Pedro Valley.” *Id.* at 2-3. BLM therefore “lift[ed] the immediate temporary
26 suspension of all activities within San Pedro Valley” and authorized SunZia

1 Transmission, LLC “to continue activities consistent with the [initial September 27,
2 2023] LNTP.” *Id.* at 3.

3 ARGUMENT

4 “A plaintiff seeking a preliminary injunction must establish that [it] is likely to
5 succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of
6 preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is
7 in the public interest.” *Winter v. NRDC*, 555 U.S. 7, 20 (2008). The Ninth Circuit applies
8 a sliding scale test, under which a plaintiff is entitled to a preliminary injunction if it
9 shows “‘serious questions going to the merits’ and a hardship balance that tips sharply
10 toward the plaintiff,” so long as the plaintiff also shows that there is a likelihood of
11 irreparable injury and an injunction is in the public interest. *All. for the Wild Rockies v.*
12 *Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). The standard for a TRO is similar to the
13 standard for a preliminary injunction. *See Stuhlberg Int’l Sales Co. v. John D. Brush &*
14 *Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).

15 Plaintiffs satisfy each element for obtaining a TRO and/or preliminary injunction.
16 They are likely to succeed on the merits of their claim—or at least raise “serious
17 questions”—that BLM violated the NHPA by failing to make “reasonable and good faith
18 efforts” to identify historic properties and consult with the Tribes. Irreparable harm is
19 also likely in the absence of preliminary relief because construction of the Project on
20 culturally significant lands is currently ongoing and threatens TCPs of great cultural and
21 religious importance to the Tribes and their members. Once the TCPs are damaged or
22 destroyed, they cannot be replaced or restored, but are gone forever. Finally, the public
23 interest and balance of equities tip sharply in Plaintiff’s favor.

24 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS**

25 BLM issued the LNTPs prior to engaging in a reasonable, good faith effort to
26 identify TCPs that will be adversely affected by the Project, and without engaging in the
27 legally required Section 106 consultation process, particularly with respect to TCPs. In so

1 doing, BLM ignored the repeated entreaties of the Tribes and other stakeholders to
2 evaluate the Project’s effects on the San Pedro Valley TCP and cultural landscape until
3 the Project route had become a *fait accompli*. These actions violate the NHPA’s
4 requirement that agencies “stop, look, and listen” *prior* to engaging in activities that will
5 adversely affect historic properties. *See Apache Survival Coal. v. United States*, 21 F.3d
6 895, 906 (9th Cir. 1994).

7 **A. BLM Cannot Rely On The PA To Satisfy Its Consultation Obligations**

8 As an initial matter, BLM cannot rely solely on the PA to satisfy its Section 106
9 duties. The execution of a PA completes the Section 106 process “only if ‘executing’
10 means ‘carrying out;’ merely entering into a [PA] does not satisfy Section 106’s
11 consultation requirements.” *Quechan Tribe v. U.S. Dep’t of Interior*, 755 F. Supp. 2d
12 1104, 1110 (S.D. Cal. 2010). Here, the record demonstrates that BLM is decidedly not
13 “carrying out” the terms of the PA. To the contrary, the evidence suggests that BLM has
14 hidden behind the PA to avoid its obligation to engage in meaningful consultation
15 regarding TCPs.

16 The PA obligates BLM to “continue to consult with Indian tribes regarding
17 properties of traditional religious and cultural importance to them that might be affected
18 by the [Project].” Ex. 18 at 8. Yet, by 2023, when BLM was nearing the conclusion of its
19 Section 106 process, a cultural resources inventory for TCPs had not yet been completed.
20 *See* Ex. 24 at 5. While the execution of a PA “can result in the deferral of the consulting
21 process, [] it would only allow a temporary delay in consultation, until it is feasible to
22 identify and consult with the Tribes about historic properties.” *Quechan Tribe*, 755 F.
23 Supp. 2d at 1111. It was certainly feasible to consult with the Tribes regarding TCPs
24 along BLM’s preferred route earlier in the Project review process, as evidenced by the
25 fact that BLM purported to engage in consultation regarding other types of historic
26 properties within the APE. However, BLM delayed meaningful consultation regarding
27 TCPs until long after the Project route had been set—indeed, until *after* the first LNTP

1 had been issued—despite years of information documenting TCPs in the San Pedro
2 Valley going back to 2009. This result cannot be squared with BLM’s obligation to
3 commence consultation “early in the planning process.” 36 C.F.R. 800.2(c)(2)(ii)(A). Nor
4 can the years-long deferral in consultation until *after* the LNTP had been issued be
5 excused by reliance on the PA. *See Quechan Tribe*, 755 F. Supp. 2d at 1109-11 (rejecting
6 agency’s reliance on a PA where agency deferred consultation until *after* the issuance of
7 an EIS, and thus after much of the project planning had occurred).

8 BLM’s failure to “carry out” the PA is further demonstrated by its refusal to
9 meaningfully consider measures to *avoid* impacts to TCPs. The PA provides that BLM
10 “shall” seek to “avoid adverse effects to all types of historic properties.” Ex. 18 at 9. The
11 PA thus clearly establishes avoidance as the preferred method of resolving adverse
12 effects, and specifically identifies “realignment of the transmission line” as an avoidance
13 measure. *Id.* After the issuance of the initial LNTP and in response to Tribal protests,
14 BLM recast this provision, insisting that “[w]hile the [PA] contemplates avoidance to
15 resolve adverse effects, . . . avoidance, or even a re-route as contemplated through the
16 [PA], is limited to minor adjustments to the design or construction location.” Ex. 37 at 5-
17 6. This new definition appears not in the PA or the ROD, but in a post-decisional letter
18 attempting to justify BLM’s issuance of the LNTPs without complying with the NHPA.
19 *See id.* Accordingly, BLM’s novel and counter-textual position that it will not consider
20 avoidance measures is a post hoc rationalization, and must be rejected. *See Dep’t of*
21 *Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (“The basic
22 rule here is clear: An agency must defend its actions based on the reasons it gave when it
23 acted.”); *see also id.* (“The functional reasons for requiring contemporaneous
24 explanations apply with equal force regardless whether post hoc justifications are raised
25 in court by those appearing on behalf of the agency or by agency officials themselves.”).

26 Additionally, BLM’s argument is contrary to the plain terms of the PA. *Cf.*
27 *Tehama-Colusa Canal Auth. v. U.S. Dep’t of the Interior*, 721 F.3d 1086, 1093 (9th Cir.

1 2013) (“When the contract terms are clear, the parties’ intent must be ascertained from
2 the contract, and the contract terms connote their ordinary meaning.”). Again, the PA
3 clearly articulated a preference to “avoid” adverse effects to *all types* of historic
4 properties, including TCPs, and specifically identifies “realignment of the transmission
5 line” as an acceptable avoidance measure. Ex. 18 at 9. Further, the term “avoid” has a
6 specific meaning under the NHPA. *See, e.g.*, 36 C.F.R. § 800.6(a) (requiring alternatives
7 or modifications that can “avoid” effects before considering whether to “minimize” or
8 “mitigate”). BLM was thus obligated by the PA (and the NHPA) to consult with the
9 Tribes regarding alternatives that *avoid* adverse effects on TCPs. Its refusal to do so at
10 any point during the consultation process prior to the issuance of the LNTPs is
11 inconsistent with those obligations, as well as with the spirit and intent of the NHPA.

12 BLM also conveniently ignores that it had previously reassured consulting parties
13 that “the PA *is the vehicle by which the agency resolves the adverse effects* of the
14 [P]roject.” Ex. 17 at 2 (emphasis added). Indeed, during the initial NHPA consultation
15 meeting in October 2012, consulting parties expressed serious concerns with BLM’s
16 failure to include “relevant views and information . . . early in the process,” particularly
17 with respect to the development of alternatives. *See, e.g.*, Ex. 16 at 3. In response, BLM
18 “agreed” that “modifying the proposed [P]roject alignment” in the San Pedro Valley, “as
19 well as . . . adjustments to other segments of the final alignment elsewhere to avoid
20 impacts to historic properties . . . would be *essential*.” *Id.* (emphasis added). But, when
21 finalizing the PA in 2013, BLM insisted it was “not in a position to reroute” the Project
22 during the NEPA process. Ex. 17 at 2. Instead, according to BLM, the PA process
23 “should be broad enough and flexible enough to allow for *all manner of avoidance and*
24 *mitigation*.” *Id.* (emphasis added). Moreover, BLM said that it was “not going to s[p]end
25 time discussing” realignment options during consultation webinars. *Id.* Hence, BLM
26 signaled to consulting parties that the PA process would be the agency’s chosen—and
27 *only*—vehicle for assessing methods to avoid adverse effects to historic properties,

1 including “major reroutes” that were not examined during the NEPA process. *Id.* Yet,
2 now, BLM ignores these statements and insists that this long-promised mechanism is not
3 available, in a highly prejudicial reversal of position. Not only is this quintessentially
4 arbitrary, but it violates fundamental notions of fairness. *See, e.g., Cal. Pub. Util.*
5 *Comm’n v. FERC*, 879 F.3d 966, 977 (9th Cir. 2018) (“An agency may not, for example,
6 depart from a prior policy sub silentio[.]”).

7 Because BLM failed to comply with the PA’s procedures, the PA does not excuse
8 BLM from the NHPA’s consultation procedures. *See Quechan Tribe*, 755 F. Supp. 2d at
9 1110-11 (“[M]erely entering into a programmatic agreement does not satisfy Section
10 106’s consultation requirements.”).

11 **B. BLM Failed To Lawfully Identify Historic Properties**

12 The NHPA requires BLM to make a “reasonable and good faith effort” to identify
13 all historic properties within the APE and “determine whether identified properties are
14 eligible for listing on the [NRHP].” 36 C.F.R. § 800.4(b). It is impossible to conclude
15 that—or there are at least serious questions whether—BLM satisfied these duties.

16 In 2023, after nearly 10 years of the allegedly “ongoing” consultation process
17 during which BLM was repeatedly alerted to the significance of the San Pedro Valley
18 cultural landscape, BLM concluded that the Valley neither contained nor comprised a
19 TCP. Its sole source of information on TCPs in the San Pedro Valley was a “records
20 check.” *See* Ex. 13 at 57 (“No historic landscapes or cult[ural] geographies were located
21 in [the San Pedro Valley] area during the records check”).¹² While BLM’s efforts must
22 include a “[r]eview [of] existing information” on historic properties within the APE, 36

¹² BLM also insisted that the “lower San Pedro Valley has not been designated a cultural landscape (it is not located on NPS lands) or a national historic district.” Ex. 13 at 50. However, nothing in the NHPA requires that a cultural landscape be located on NPS lands to constitute a TCP eligible for listing in the NHRP. To the contrary, the NHPA requires BLM to evaluate identified historic properties within the APE—including cultural landscapes—for eligibility in the NHRP, regardless of land ownership. 36 C.F.R. § 800.4(c).

1 C.F.R. § 800.4(a)(2), they must also include “consultation, [and] oral history interviews”
2 with individuals and organizations with knowledge and expertise. *Id.* § 800.4(b). Since
3 2009, Plaintiffs, agencies with relevant expertise, and others have repeatedly informed
4 BLM of the tribal significance of the San Pedro Valley TCP. *See generally* Exs. 3, 7, 9,
5 10, 14, 15. Yet, BLM never followed up on that information and instead willfully ignored
6 it. BLM therefore not only failed to “seek information” from consulting parties “likely to
7 have knowledge of, or concerns with, historic properties” to be affected by the Project, 36
8 C.F.R. § 800.4(a)(3), but also neglected to “[g]ather information” from Tribes “to assist
9 in identifying properties” that have “religious and cultural significance” and which may
10 be eligible for inclusion on the NRHP, 36 C.F.R. § 800.4(a)(4). In these ways, BLM
11 violated the NHPA and its regulations. *See Quechan Tribe*, 755 F. Supp. 2d at 1119
12 (“The required consultation must at least meet the standards set forth in [the
13 regulations].”).

14 BLM attempts to avoid this inescapable conclusion by insisting that it received
15 only “vague notions of a potential cultural landscape” within the San Pedro Valley. Ex.
16 37 at 4 n.4. As an initial matter, because BLM makes this assertion in a post-decisional
17 letter to the Tribes, it must be rejected as a post-hoc rationalization. *See Regents*, 140 S.
18 Ct. at 1909 (“An agency must defend its actions based on the reasons it gave when it
19 acted.”). The assertion also fails on the merits. When identifying historic properties, BLM
20 is required to “reasonably pursue the information necessary to evaluate the [identified
21 property’s] eligibility for inclusion in the [NRHP].” *Pueblo of Sandia v. United States*, 50
22 F.3d 856, 860 (10th Cir. 1995). The Tenth Circuit held that an agency failed to make a
23 “reasonable effort” to identify TCPs where it did not “engage in further investigations”
24 after receiving information that “indicated the existence of [TCPs]” within a project’s
25 APE. *Id.* There, stakeholders provided “detailed ethnographic overview[s] of the tribe’s
26 religious and cultural connections” to the project area, and informed the agency that the
27 project would “significantly impair[] if not totally destroy[]” sites “critical to the religious

1 practice, cultural identify, and overall well-being” of Tribal members. *Id.* at 860-61. The
2 court found that the agency failed to make a reasonable effort to identify historic
3 properties because the information “clearly suggest[ed] that there is a sufficient
4 likelihood that the [project location] contains [TCPs] to warrant further investigation.” *Id.*
5 at 861.

6 The same result is required here. Consulting parties, including Plaintiffs,
7 submitted detailed comments repeatedly explaining the cultural significance of the San
8 Pedro Valley and urging BLM to engage with the Tribes regarding the Project’s adverse
9 effects. *S See generally* Exs. 3, 7, 9, 10, 14, 15. These communications were anything but
10 “vague.” They contained “detailed ethnographic overview[s] of the tribe’s religious and
11 cultural connections” to the Valley, and discussions of the impacts to culturally sensitive
12 and sacred areas of significance and importance to the Tribes. *Pueblo of Sandia*, 50 F.3d
13 at 860-61. This was more than sufficient to alert BLM to the “likelihood that the [San
14 Pedro Valley] contains [TCPs]” and to “warrant further investigation.” *Id.* at 861.
15 Accordingly, because “communications from the tribes indicated the existence of
16 [TCPs],” any “reasonable effort” to identify TCPs necessarily should have included
17 “further investigations” into the presence of TCPs, including cultural landscapes. *See id.*
18 at 860-61. BLM did not do so. As a result, the agency failed to “examine the relevant data
19 and articulate a . . . rational connection between the facts found and the choice made.”
20 *State Farm*, 463 U.S. at 43.

21 Any argument that BLM engaged in a reasonable, good faith effort to identify
22 TCPs is also undercut by the agency’s *admission* that it has not completed “an inventory
23 for TCPs.” Ex. 24 at 5. BLM has essentially stuck its head in the sand, insisting that there
24 are no TCPs present because it expressly refused to look for them. Rather than identify
25 and evaluate effects on the San Pedro Valley TCP, BLM instead repeatedly kicked the
26 can down the road. For instance, in response to Tribal concerns regarding the failure to
27 identify TCPs during the initial NEPA process, BLM insisted in the 2015 ROD that

1 “[c]ultural resources would continue to be considered during post-EIS phases of Project
2 implementation,” including by identifying historic properties within the APE and
3 assessing Projects effects. Ex. 19 at 14. And, up until the 2023 Final EIS, BLM stated
4 that “[c]onsultation with the interested tribes is on-going . . . under Section 106.” Ex. 24
5 at 14. But when the time to make a final decision (i.e., the LNTP) arrived, BLM relied on
6 revisionist history in asserting that there are no data to support the San Pedro Valley TCP.

7 Further, BLM’s suggestion that its approach was permissible under the phased
8 identification approach fails on its face. Dismissing the concerns voiced by consulting
9 parties early in the process, BLM explained that “[t]ribal concerns regarding this Project
10 are being compiled and will continue to be documented as the Project becomes more
11 defined.” Ex. 13 at 29. Setting aside the illogic of BLM’s insistence that the project is
12 “defined” enough to select a preferred route but somehow not sufficiently defined to
13 enable the identification of historic properties along that same route, the deferral
14 contemplated by the phased identification approach “is not indefinite.” *Quechan Tribe*,
15 755 F. Supp. 2d at 1110. Rather, the regulations “contemplate[] consultation on historic
16 properties as it becomes feasible.” *Id.* at 1111. BLM was therefore required to “identify
17 and consult with the Tribe[s] about the historic properties” that will be affected as soon as
18 it was “feasible”—i.e., “[a]s specific aspects or locations of an alternative are refined or
19 access is gained.” *Id.* Yet, there is no evidence that BLM sought to identify TCPs,
20 including cultural landscapes, at *any point* during the decade-long Section 106 process,
21 despite its clear obligation to do so. Instead, the record establishes that even though the
22 “specific aspects [and] locations” of the preferred route had long been set by the agency,
23 BLM deliberately delayed consideration of TCPs until it was too late. Accordingly, even
24 under a “phased approach,” BLM’s identification efforts failed to consider highly
25 relevant factors, *State Farm*, 463 U.S. at 43, and therefore were neither reasonable, nor
26 conducted in good faith.

1 To avoid the inevitable conclusion that it arbitrarily failed to consider potential
2 TCPs, BLM also insists that it was unaware of the San Pedro Valley TCP until March
3 2023. Ex. 31 at 2. Not so. In addition to a bevy of evidence showing repeated notification
4 to BLM of the San Pedro Valley TCP, the most salient evidence of BLM’s contrived
5 ignorance is that the agency ignored ASW’s *direct response* in January 2023 to the 2022
6 Draft EIS’s assertion that “[n]o TCPs . . . were identified within the analysis area.” Ex. 22
7 at 3 (quoting the 2022 Draft EIS). ASW specifically reminded BLM that since 2009,
8 “multiple Tribes have confirmed the landscape-scale importance of the . . . San Pedro
9 Valley,” and insisted that the Project segments in the San Pedro Valley “would
10 irrevocably alter . . . a well-documented *cultural landscape*,” i.e., an NRHP-eligible
11 historic property. *Id.* at 2. However, in the 2023 Final EIS, BLM made the identical
12 assertion. *See* Ex. 24 at 5. BLM “may not simply disregard . . . the facts in the record that
13 do not support [its] chosen outcome.” *W. Watersheds Proj. v. Bernhardt*, 428 F. Supp. 3d
14 327, 352 (D. Or. 2019) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537
15 (2009)). Because BLM’s self-serving claim of ignorance “entirely fail[s] to consider an
16 important aspect of the problem,” “runs counter to the evidence before the agency,” *State*
17 *Farm*, 463 U.S. at 43, and disregards inconvenient facts, *see Fox*, 556 U.S. at 537,
18 BLM’s failure to identify the San Pedro TCP before March 2023 violates the APA.

19 In sum, the NHPA obligated BLM to engage in a “reasonable and good faith
20 effort” to identify historic properties, including TCPs, that may be affected by the Project.
21 BLM did not do so, at least not until *after* the issuance of the LNTPs, despite over a
22 decade of information urging BLM to consider and avoid these TCPs. BLM’s actions
23 were not reasonable or conducted in good faith; accordingly, BLM’s decision to
24 authorize construction before complying with the NHPA’s identification requirements
25 was arbitrary and must be overturned. *See Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d
26 768, 788 (9th Cir. 2006) (holding that violation of the fiduciary duty to comply with the
27 NHPA’s requirements when approving a project vitiates the validity of that approval).

1 **C. BLM’s Consultation Efforts Fell Short Of The NHPA’s Requirements**

2 The NHPA’s regulations define the term “consultation” to mean “[t]he process of
3 seeking, discussing, and considering the views of other participants, and where feasible,
4 seeking agreement with them regarding matters arising in the section 106 process.” 36
5 C.F.R. § 800.16(f). “The consultation requirement is not an empty formality,” *Quechan*
6 *Tribe*, 755 F. Supp. 2d at 1108-09, and is heightened when it involves Indian Tribes
7 because of the federal Indian trust responsibility. *See Pit River Tribe*, 469 F.3d at 788
8 (recognizing that “[t]he federal government owes a fiduciary obligation to all Indian
9 tribes as a class” and therefore “agencies must at least show compliance with general
10 regulations and statutes” (quotations omitted)). Not only are there “serious questions” as
11 to whether BLM complied with the letter and spirit of the NHPA’s consultation
12 requirements, but the record establishes that BLM effectively deprived the Tribes of any
13 meaningful voice in the review of a Project that will have profoundly adverse effects on
14 highly significant cultural and religious sites. This, too, violates the agency’s obligations
15 under the NHPA.

16 The Project will have significant adverse effects on the San Pedro Valley TCP, an
17 area in which the Tribes have significant cultural and historic interests. Accordingly, the
18 Tribes were entitled to be consulted—and consulted meaningfully—on these matters.
19 “The required consultation must at least meet the standards set forth” in the NHPA’s
20 implementing regulations. *Quechan Tribe*, 755 F. Supp. 2d at 1119. In particular, BLM
21 must “ensure that” a Tribe is provided “a reasonable opportunity to identify its concerns
22 about historic properties, advise on the identification and evaluation of historic
23 properties, . . . articulate its views on the undertaking’s effects on such properties, and
24 participate in the resolution of adverse effects.” 36 C.F.R. § 800.2(c)(2)(ii). In other
25 words, to ensure meaningful consultation, BLM must include the Tribes in *every* step of
26 the Section 106 process, from identifying the APE, *to identifying historic properties*
27 *(including TCPs)*, to resolving any adverse effects on those properties.

1 The record demonstrates that BLM failed to comply with even these minimal
2 standards in several ways. First, as explained, BLM failed to provide the Tribes a
3 “reasonable opportunity” to “advise on the identification and evaluation of historic
4 properties.” 36 C.F.R. § 800.2(c)(2)(ii). For over a decade, consulting parties repeatedly
5 protested BLM’s preferred route, directed BLM to various Tribe- and peer-reviewed
6 resources to “substantiate” the identification of TCPs both within and comprising the San
7 Pedro Valley, and alerted BLM to serious deficiencies in the consultation process,
8 including the agency’s failure to engage in a meaningful discussion of the impacts to
9 cultural landscapes. *See, e.g.*, Ex. 10 at 5 & n.10 (describing the San Pedro Valley as a
10 “rich *cultural landscape*” and citing for support a paper published in the Forest Service
11 Proceedings (attached as Exhibit 39) (emphasis added)); *see also* Ex. 39 (discussing the
12 “results of a recent three-year long cultural landscapes project conducted in the San Pedro
13 Valley”).¹³ BLM virtually ignored these critical inputs and data, in violation of the NHPA
14 and its implementing regulations. *See* 36 C.F.R. § 800.2(c)(2)(ii).

15 Second, far from providing a “reasonable opportunity to identify [their] concerns
16 about historic properties,” *id.* § 800.2(c)(2)(ii), BLM deprived the Tribes of any useful
17 role or meaningful voice in the development and review of the Project and alternatives.
18 BLM disregarded repeated Tribal concerns regarding the San Pedro Valley TCP, while
19 assuring the Tribes that the ongoing Section 106 process would one day consider their
20 information and address their concerns. However, this additional process failed to
21 materialize. Consequently, the Tribes were unable to “articulate [their] views on the
22 [Project’s] effects” on TCPs, much less “participate in the resolution of adverse effects”
23 to TCPs by, e.g., developing avoidance measures. 36 C.F.R. § 800.2(c)(2)(ii).

¹³ Significantly, the Tribes’ concerns were echoed by NPS—an agency with expertise in historic and cultural resources—which criticized the consultation process as “not adequate” because BLM “largely ignore[s] . . . [TCPs]” and fails to address “[r]esource impacts from the perspective of the tribes and cultural communities.”

1 Third, the deficiencies of BLM’s consultation process are compounded by the
2 timing of consultation. The NHPA’s regulations demand that the Section 106 process be
3 “initiated early in the undertaking’s planning, so that a broad range of alternatives may be
4 considered during the planning process for the undertaking.” 36 C.F.R. 800.1(c). In
5 particular, with respect to Tribes, consultation “should commence early in the planning
6 process, in order to identify and discuss relevant preservation issues” and “must
7 recognize the government-to-government relationship between the Federal Government
8 and Indian tribes.” *Id.* § 800.2(c)(2)(ii). The Ninth Circuit has therefore “emphasized that
9 the timing of required review processes can affect the outcome and is to be discouraged.”
10 *Quechan Tribe*, 755 F. Supp. 2d at 1108 (citing *Pit River Tribe*, 469 F.3d at 785-86).

11 The Tribes were entitled to be consulted early in the process, “consistent with
12 [their] status as [] government[s].” *Id.* at 1119. That did not happen here. Although BLM
13 engaged in some communication with Tribes, those contacts were cursory and belated, in
14 violation of the NHPA. *See, e.g., Quechan Tribe*, 755 F. Supp. 2d at 1118 (recognizing
15 that “contact” is not “consultation”). Most egregiously, despite numerous requests to
16 consult with Tribes *before* development of the preferred route and its alternatives, BLM
17 did not even begin the Section 106 process until *after* the issuance of the 2012 Draft EIS,
18 i.e., well after the selection of BLM’s preferred route. *See Ex. 12* at 2. Thus, as a practical
19 matter, despite the agency’s obligation to commence consultation “early,” 36 C.F.R.
20 § 800.2(c)(2)(ii), the Tribes were deprived of any opportunity to provide information
21 regarding areas of religious or cultural significance at the time it mattered most.
22 Moreover, BLM’s selection of a preferred route and alternatives before commencing
23 NHPA compliance effectively removed from consideration other siting alternatives that
24 could “avoid, minimize or mitigate” adverse effects on historic properties; this is a result
25 the NHPA does not countenance. *See* 36 C.F.R. 800.1(c) (requiring consultation to begin
26 early enough to allow for consideration of a “broad range of alternatives”). Worse, when
27 the Tribes tried to raise this issue *repeatedly* over the course of many years, BLM

1 reassured them that alternatives to avoid impacts to historic properties *would* be
2 considered later in the NHPA process. However, as the record shows, “tomorrow” never
3 came.

4 BLM’s paltry defenses of its consultation process only reinforce that it failed to
5 comply with the NHPA. In the 2023 Final EIS, BLM responded to accusations of
6 noncompliance with the consultation requirement with citations to the cultural resources
7 sections of the 2013 and 2023 Final EISs, professions of good intent, and unsupported
8 assertions that BLM “is complying with the requirements of Section 106” through an
9 “executed [PA].” *See, e.g.,* Ex. 24 at 17, 20, 23. However, such “*pro forma* recitals do
10 not, by themselves, show BLM actually complied with the law.” *Quechan Tribe, 755 F.*
11 *Supp. 2d* at 1118.

12 As explained above, BLM’s reliance on the PA to discharge its Section 106
13 obligations is misplaced. Moreover, BLM’s discussion of cultural resources in the Final
14 EISs cannot satisfy its consultation obligations under the NHPA because the NHPA’s
15 regulations preclude the use of the NEPA process for Section 106 purposes except under
16 limited circumstances, which are not present here. *See* 36 C.F.R. § 800.8(c). And, the
17 cultural resources sections of the Final EISs make only passing reference to TCPs;
18 indeed, the 2023 Final EIS asserts that no TCPs or sacred sites had been identified within
19 the APE during *either* NEPA process. *See* Ex. 24 at 5. Neither Final EIS mentions the
20 information submitted by consulting parties alerting BLM to the San Pedro Valley TCP.
21 Accordingly, BLM’s citation to the Final EISs must be rejected; BLM cannot assert that
22 it considered a factor that it did not in fact consider. *Gerber v. Norton, 294 F.3d 173, 185*
23 *(D.C. Cir. 2002)* (“[S]tating that a factor was considered . . . is not a substitute for
24 considering it.”).

25 Finally, BLM’s cursory, belated acknowledgement of Tribal concerns fails to
26 “recognize the government-to-government relationship between the Federal Government
27 and Indian Tribes.” 36 C.F.R. § 800.2(c)(2)(ii). Consultation with Tribes must be

1 “conducted in a manner sensitive to the concerns and needs of the [Tribes].” *Id.*
2 § 800.2(c)(2)(ii)(C). As explained above, BLM denied the Tribes any meaningful
3 opportunity to express their concerns with the Project and its adverse effects on highly
4 significant TCPs until the die had been cast. Thus, far from receiving the “special
5 consideration in the course of [BLM’s] fulfillment of its consultation obligations” to
6 which they are “entitled,” *Quechan Tribe*, 755 F. Supp. 2d at 1109, the Tribes were
7 largely dismissed, sidelined, muzzled, and outright ignored. It is hard to imagine an
8 outcome more flagrantly inconsistent with the NHPA, and it is a grievous breach of the
9 “fiduciary duty” owed “to all Indian tribes.” *Id.* at 1110.

10 The NHPA “requires an agency to ‘stop, look and listen.’” *Comanche Nation v.*
11 *United States*, No. CIV-08-849-D, 2008 WL 4426621, at *19, (W.D. Okla. Sept. 23,
12 2008) (quoting *Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215, 225 (5th Cir.
13 2006)). However, “the evidence in the present case suggests that [BLM] merely paused,
14 glanced, and turned a deaf ear to warnings of adverse impact.” *Id.* Hence, BLM’s process
15 “fell short of the reasonable and good faith efforts required by the law.” *Id.*

16 **II. AN INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM**

17 The harm caused by the desecration and destruction of historic lands that play a
18 significant part in the history, culture, and religion of the Tribes is, by its very nature,
19 irreparable. *See Friends of Astor, Inc. v. City of Reading*, No. 98-CV-4429, 1998 WL
20 684374, at *12 & n.35 (E.D. Penn. Sept. 17, 1998) (noting that destruction of alleged
21 historical property would “clearly . . . result in irreparable harm”); *see also All. for the*
22 *Wild Rockies*, 632 F.3d at 1135 (“The Supreme Court has instructed us that
23 environmental injury, by its nature, can seldom be adequately remedied by money
24 damages and is often permanent or at least of long duration, i.e., irreparable.”) (internal
25 punctuation omitted). Absent a preliminary injunction, the Tribes and their members will
26 suffer serious irreversible harm, as explained in the attached declarations.

1 For instance, Declarant Joseph Anthony Burrell, an enrolled tribal member of the
2 San Xavier District of the Tohono O’odham Nation, Ex. 4 ¶ 3, explains that the Project
3 “will irreparably degrade the San Pedro Valley as a [TCP] and irreversibly impair the
4 important historic, cultural, and spiritual values it provides to the Nation and all of its
5 members,” *id.* ¶ 12. Mr. Burrell states that “hundreds of saguaros”—a sacred plant so
6 central to the Nation’s cultural and religious practices that they “consider [the plant] to be
7 *O’odham* (people)”—have already been marked for removal. *Id.* ¶ 13. The destruction of
8 these saguaros is not only an affront to the Nation’s culture, but a “violation of [their]
9 religious liberties.” *Id.* ¶ 14. Mr. Burrell further explains that the Project route “will harm
10 the integrity of the entire San Pedro Valley and its series of interlinked [ancestral]
11 habitation clusters as an O’odham cultural landscape.” *Id.* ¶ 20. He states that the
12 purported “mitigation plan to avoid adverse effects” to ancestral sites, which primarily
13 involves the collection and excavation of artifacts, is woefully insufficient to address the
14 Nation’s concerns regarding the “many possible spiritual harms that can result from the
15 heavy disturbance to the [ancestral] village sites” along the Project route. *Id.* ¶ 24. Mr.
16 Burrell concludes that:

17 The direct impact of construction through our village sites will adversely
18 impact our ability to learn about, connect with, and pay tribute to our
19 ancestors in these historic areas. Moreover, the indirect and cumulative
20 impacts that will result from construction—such as the extensive disturbance
21 to our sacred plants, animals, and waters caused by the towers and miles of
22 roads to be built—pose an existential and irreversible threat to the continuity
23 and maintenance of our distinct cultural identity as O’odham.

24 *Id.* ¶ 25.

25 Likewise, Ms. Vernelda Grant, an enrolled member of the San Carlos Apache
26 Tribe and the THPO for the Tribe, Ex. 40 ¶¶ 4, 9, states that “[n]one of the mitigation
27 measures proposed by BLM will preserve or protect the Project area, its cultural
28 properties or artifacts, or its environment,” *id.* ¶ 44. Ms. Grant further states that:

1 As the [THPO] and in my professional opinion, the Project will disturb
2 ancestral human remains that are buried in the area, increase the potential for
3 looting of archeological and cultural artifacts and materials in the nearby
4 public lands, and *forever harm the Apaches*, the families that come from the
5 area, us as professionals that work to protect these culturally significant
6 places, property and materials, and our entire tribal community. All these
7 things will be *negatively and permanently affected*, broken and destroyed.
8 The killing of a unique eco-system, as present in the San Pedro Valley, *can*
9 *never be mitigated and can never be reproduced*. In Apache belief, the
10 destruction and desecration of a place that excudes so much life like the San
11 Pedro Valley, will harm Apaches mentally, physically and spiritually. It
12 seems that our lives, as human beings, are not being considered as important
13 or valuable.

14 *Id.* ¶ 47 (emphasis added).

15 Accordingly, irreparable harm from ongoing construction activities authorized by
16 BLM will continue to occur in the absence of a preliminary injunction or TRO.

17 **III. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST**
18 **FAVORS AN INJUNCTION**

19 The balance of the equities tips sharply in favor of Plaintiffs. Once the Project is
20 constructed, the TCPs, habitation sites, and other important cultural resources that are
21 present on the land will be irretrievably lost not only for the Tribes and their members,
22 but to the detriment of society at large. Such harms “are permanent,” and outweigh any
23 harm to BLM or the developer caused by a “temporary delay.” *League of Wilderness*
24 *Defs./Blue Mountains Biodiversity Proj. v. Connaughton*, 752 F.3d 755, 765 (9th Cir.
25 2014).

26 Moreover, Plaintiffs were harmed, and continue to be harmed, by BLM’s failure to
27 engage in a meaningful, lawful Section 106 process, and that harm is perpetuated by
28 BLM’s approval of Project construction—which restricts the availability of measures to
29 avoid, minimize, and mitigate impacts to historic properties—without the benefit of
30 Plaintiffs’ input. *See All. For the Wild Rockies*, 632 F.3d at 1137-38. The Ninth Circuit
31 has emphasized that consultation with Tribes must begin early, and has warned that that

1 if consultation begins after other parties may have invested a great deal of time and
2 money, the other parties may become entrenched and inflexible, and the agency may be
3 inclined to tolerate degradation it would otherwise have insisted be avoided. *See Quechan*
4 *Tribe*, 755 F. Supp. 2d at 1121 (citation omitted). That is precisely what happened here:
5 BLM strung the Tribes along with promises to consider alternatives that would avoid
6 impacts to the San Pedro Valley TCP until the Project became a *fait accompli*. Thus, “the
7 fact that [BLM] [is] now pressed for time . . . after having invested a great deal of effort
8 and money is a problem of [its] own making and does not weigh in [its] favor.” *Id.*
9 Accordingly, any injury BLM may assert is entirely self-inflicted. *See, e.g., Pennsylvania*
10 *v. New Jersey*, 426 U.S. 660, 664, (1976) (per curiam) (holding that litigant cannot “be
11 heard to complain about damage inflicted by its own hand”).

12 Preliminary relief is also in the public interest. In enacting the NHPA, Congress
13 found that “historic properties significant to the Nation’s heritage are being lost or
14 substantially altered, often inadvertently, with increasing frequency” and that “the
15 preservation of this irreplaceable heritage *is in the public interest.*” Pub. L. No. 89-665,
16 *amended by* Pub. L. No. 96-515 (emphasis added). Accordingly, the proper identification
17 and preservation of cultural resources serves an important public interest. *See Colo. River*
18 *Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1440 (CD. Cal. 1985) (“The importance of
19 these sites transcends their spiritual value to the Tribes and, instead, evidences their
20 cultural significance to the general public”). It necessarily follows that “[s]uspending a
21 project until that [careful] consideration occurs comports with the public interest.” *S.*
22 *Fork Band Council of W. Shoshone of Nev. v. Dep’t of the Interior*, 588 F.3d 718, 728
23 (9th Cir. 2009) (finding public interest favored injunction and preservation of status quo
24 pending legal compliance); *Se. Alaska Conservation Council v. U.S. Army Corps of*
25 *Eng’rs*, 479 F.3d 1148, 1151 (9th Cir. 2007) (noting that “the whole point of the
26 injunction” is to maintain status quo pending evaluation). Hence, maintaining the status
27 quo pending further review of BLM’s compliance with the NHPA furthers the significant

1 public interest in cultural resource preservation and prevents imminent irreparable harm
2 to important cultural resources in the San Pedro Valley.

3 **IV. NO BOND SHOULD BE REQUIRED**

4 Under Rule 65, the Court may dispense with the security requirement or require
5 only a nominal bond. *See People ex rel Van de Kamp v. Tahoe Reg'l Planning Agency*,
6 766 F.2d 1316, 1325-36 (9th Cir. 1985). Courts often waive the bond requirement or
7 require nominal security in suits seeking to vindicate the public interest brought against
8 federal agencies. *See, e.g., Davis v. Minetta*, 302 F.3d 1104 (10th Cir. 2002) (where a
9 party is seeking to vindicate the public interest served by NEPA, a minimal bond amount
10 should be considered when granting a preliminary injunction); *Save Strawberry Canyon*
11 *v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1191 (N.D. Cal. 2009) (ordering no bond);
12 *Wilderness Soc'y v. Tyrrel*, 701 F. Supp. 1473, 1492 (E.D. Cal. 1988) (setting bond of
13 \$100 for injunction barring timber sale).

14 This Court should likewise waive the security requirement. Plaintiffs bring this
15 action to protect irreplaceable cultural resources. They have demonstrated a high
16 likelihood of success on the merits, and that irreparable harm will likely result in the
17 absence of injunctive relief. Plaintiffs have also demonstrated that the balance of the
18 equities and the public interest counsel strongly in favor of preliminary relief. A waiver
19 of security or nominal security amount is justified under these circumstances.

20 **CONCLUSION**

21 Based on the foregoing, the Plaintiffs respectfully request entry of a preliminary
22 injunction—and a TRO while the Court considers whether to issue a preliminary
23 injunction—to preserve the status quo pending completion of this litigation.

24 Dated: January 30, 2024

25 Respectfully submitted,

26 /s/Elizabeth L. Lewis

27 Elizabeth L. Lewis
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35

DC Bar No. 229702
lizzie@eubankslegal.com

William S. Eubanks II
DC Bar No. 987036
bill@eubankslegal.com

EUBANKS & ASSOCIATES, PLLC
1629 K Street NW, Suite 300
Washington, DC 20006
(970) 703-6060

*Attorneys for Plaintiffs Center
for Biological Diversity and Archaeology
Southwest*

Howard Shanker, Attorney General
AZ Bar No. 015547
Tohono O’odham Nation
P.O. Box 830
Sells, Arizona 85634
Howard.Shanker@tonation-nsn.gov
(520) 383-3410

Attorney for the Tohono O’odham Nation

Alexander B. Ritchie, Attorney General
AZ Bar No. 019579
San Carlos Apache Tribe
P.O. Box 40
San Carlos, Arizona. 85550
alex.ritchie@scat-nsn.gov
(928) 475-3344

Attorney for the San Carlos Apache Tribe