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

Tohono O'odham Nation; San Carlos Apache	)	Case No.
Tribe; Archaeology Southwest; and Center	)	
for Biological Diversity	)	COMPLAINT FOR
	)	DECLARATORY JUDGMENT
<i>Plaintiffs,</i>	)	AND INJUNCTIVE RELIEF
	)	

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

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

INTRODUCTION

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

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

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

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

16 **JURISDICTION AND VENUE**

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

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

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

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

12 **PARTIES**

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

25
26 8. Plaintiff SAN CARLOS APACHE TRIBE is a federally-recognized
27 Indian tribe, organized pursuant to Section 16 of the Indian Reorganization Act of

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

24 **STATUTORY BACKGROUND**

25 **A. NHPA**

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

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

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

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

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

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

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

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

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

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

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

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

1 have knowledge of . . . historic properties in the area,” including Tribes. *Id.*
 2 § 800.4.²

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

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

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

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

27. A traditional cultural property is “defined generally as one that is eligible for inclusion in the [NRHP] because of its 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.” *Id.* Such properties may include “traditional cultural landscapes,” which are large-scale historic properties of religious and cultural significance to Native American Tribes, “comprised of multiple, linked features that form a cohesive ‘landscape.’” ADVISORY COUNCIL ON HISTORIC PRES., NATIVE AMERICAN TRADITIONAL CULTURAL LANDSCAPES ACTION PLAN (2011).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Administrative Procedure Act

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

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

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

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

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

12 **FACTUAL BACKGROUND**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 **C. The 2012 Draft EIS**

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

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

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

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

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

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

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

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

14 **D. The 2013 Final EIS**

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

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

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

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

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

2 BLM denied all protests submitted on the Project.

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

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

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

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