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

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

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**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.

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

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

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

16 10. Plaintiff ARCHAEOLOGY SOUTHWEST is a 501(c)(3) nonprofit  
17 organization headquartered in Tucson, Arizona. Founded in 1989, Archaeology  
18 Southwest has over 2,000 members around the country.<sup>1</sup> 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

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

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

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

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

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

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

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

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

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

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

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

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

## 24 **STATUTORY BACKGROUND**

### 25 **A. NHPA**

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

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

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

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

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

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

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

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

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

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

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

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



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

2 § 800.4.<sup>2</sup>

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

15           **C. Administrative Procedure Act**

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

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<sup>4</sup> 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>.

<sup>5</sup> 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