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16
17 **UNITED STATES DISTRICT COURT**
18 **DISTRICT OF ARIZONA**
19 **TUCSON DIVISION**

19 Tohono O’odham Nation, *et al.*,

20 Plaintiffs,

21 v.

22 United States Department of the Interior,
23 *et al.*,

24 Defendants.

No. 4:24-cv-00034-JGZ

**FEDERAL DEFENDANTS’
OPPOSITION TO PLAINTIFFS’
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

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TABLE OF ACRONYMS

Abbreviation	Definition
ACHP	The Advisory Council on Historic Preservation
ASW	Archeology Southwest
BLM	Bureau of Land Management
EIS	Environmental Impact Statement
HPTP	Historic Properties Treatment Plan
LNTP	Limited Notice to Proceed
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
PA	Programmatic Agreement
RMP	Resource Management Plan
ROD	Record of Decision
ROW	Right-of-Way
SPV	San Pedro Valley
TCP	Traditional Cultural Property

I. INTRODUCTION

1
2 This case involves the Bureau of Land Management’s (“BLM”) 2015 approval of
3 a right-of-way for portions of the SunZia Southwest Transmission Line Project (the
4 “Project”)—an approval finalized nine years before Plaintiffs filed suit and sought
5 emergency relief to enjoin it. The Project is a transmission line designed to transport up
6 to 4,500 megawatts of primarily renewable energy from New Mexico to markets in
7 Arizona and California. The \$8 billion Project will benefit millions of Americans by
8 promoting renewable energy, enhancing America’s energy security, lowering energy
9 costs, making electricity more reliable in the face of extreme weather, and creating good-
10 paying jobs. The Project transverses 520 miles of federal, state, and private lands between
11 central New Mexico and central Arizona. Plaintiffs’ Motion seeks to stop construction
12 and to re-route the transmission line route around the San Pedro Valley, despite the fact
13 that the route has been set since 2015 and Plaintiffs never challenged that decision or
14 stated that it was necessary to avoid the entire San Pedro Valley (an enormous area) until
15 2023. Pls.’ Mot. for a TRO & Prelim. Inj., Request for Expedited Hearing, and Mem. of
16 P&A at 23, ECF No. 16 (“Pls.’ Mot.”). What’s more, the portion of the Project that
17 Plaintiffs seek to enjoin—a 50-mile segment in the San Pedro Valley in Arizona which
18 was considered in the 2013 Environmental Impact Statement (“EIS”) and 2015 Record of
19 Decision (“ROD”)—is *not* located on federal land.

20 Plaintiffs’ attempts to force a re-route of a necessary and long-approved Project
21 should be rejected. Their claims are clearly time barred and they have not met their heavy
22 burden to show that preliminary injunctive relief is appropriate here.

23 First, Plaintiffs have not shown substantial questions going to the merits of their
24 claims, let alone a likelihood of success. At bottom, Plaintiffs challenge BLM’s 2015
25 decision to grant a ROW for the SunZia transmission line that includes a segment
26 crossing non-federal lands in the San Pedro Valley and seek to enjoin construction on that
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1 part of the line. But that claim necessarily challenges BLM’s 2015 decision and is time-
2 barred. Moreover, Plaintiffs assert that BLM failed to make a reasonable and good faith
3 effort to identify the San Pedro Valley as a Traditional Cultural Property (“TCP”),
4 thereby violating Section 106 of the National Historic Preservation Act (“NHPA”). To
5 the contrary, the record shows that BLM engaged in lengthy, good faith consultation
6 efforts with the Tribes and other consulting parties regarding the San Pedro Valley before
7 entering into a Programmatic Agreement (“PA”) prior to BLM’s approval of the ROW in
8 2015. *See* Defs.’ Ex. 1 at 4, 41-42 [hereinafter 2015 ROD].¹ In any event, under the
9 NHPA and applicable regulations, the PA now governs Section 106 compliance. *See* 54
10 U.S.C. § 306114, 36 C.F.R. § 800.14(b). Plaintiffs have not seriously contended that
11 BLM is acting unreasonably under the terms of the PA.

12 Second, Plaintiffs have not shown the balance of harms justifies preliminary
13 injunctive relief. Despite years of consultation efforts leading up to the 2015 decision, at
14 no time from May 2009—when the EIS process began—until early 2023 did Plaintiffs
15 indicate to BLM that the entire San Pedro Valley should be considered a TCP. Then
16 Plaintiffs waited nearly another year before filing suit and seeking to preliminarily enjoin
17 the Project, during which time BLM tried diligently to set up consultations and learn
18 more about the Tribes’ concerns, without avail. In fact, Plaintiff Tribes still have not
19 offered details about a TCP designation in the San Pedro Valley, which encompasses an
20 extremely large area. Plaintiffs’ lack of diligence over more than a decade weighs heavily
21 against an injunction. This case could have been filed and fully resolved by now. In
22 addition, Plaintiffs fail to identify their imminent injury with enough specificity to carry

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1 their burden. That failure should be weighed against the strong public interest in the
2 Project being able to move forward so that its goals of clean and stable energy, necessary
3 infrastructure updates, and good jobs can be met without further delay. In addition, the
4 public has an interest in the finality of agency decision-making, such that decisions made
5 two administrations previously cannot be undone with information that could have been
6 presented earlier. The Court should deny Plaintiffs’ motion.

7 II. REGULATORY AND FACTUAL BACKGROUND

8 A. Section 106 Process

9 The NHPA “is a procedural statute requiring government agencies to ‘stop, look,
10 and listen’ before proceeding with agency action.” *Te-Moak of W. Shoshone of Nev. v.*
11 *U.S. Dep’t of Interior*, 608 F.3d 592, 610 (9th Cir. 2010). The NHPA does not prohibit
12 harm to historic properties but creates obligations “that are chiefly procedural in nature.”
13 *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005). This
14 statute “ha[s] the goal of generating information about the impact of federal actions on
15 the environment; and both require that the relevant federal agency carefully consider the
16 information produced.” *Id.*; see *Te-Moak Tribe*, 608 F.3d at 608.

17 The Advisory Council on Historic Preservation (“ACHP”) has promulgated
18 regulations under Section 106 to govern federal agency compliance with the NHPA. See
19 36 C.F.R. Part 800. Section 106 requires federal agencies to consider the potential effects
20 of federal agency “undertakings” on historic properties, which includes properties of
21 cultural or religious significance to Indian tribes. 16 U.S.C. § 470f; 54 U.S.C. §§ 306108,
22 302706(b); see also *United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th Cir.
23 1993). An “undertaking” is defined broadly to include any “project, activity, or program”
24 that requires a federal permit. 54 U.S.C. § 300320. Section 106 requires that whenever a
25 federal agency has “direct or indirect jurisdiction” over a project or program that could
26 affect historic properties, the federal agency must study ways to avoid or mitigate any
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25 federal agency has “direct or indirect jurisdiction” over a project or program that could
26 affect historic properties, the federal agency must study ways to avoid or mitigate any
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1 adverse impacts to those properties. *Tyler v. Cuomo*, 236 F.3d 1124, 1128 (9th Cir. 2000)
2 (citing 16 U.S.C. § 470f). A “historic property” is defined as “any prehistoric or historic
3 district, site, building, structure, or object included in, or eligible for inclusion in, the
4 National Register of Historic Places,” which “include[s] properties of traditional religious
5 and cultural importance to an Indian tribe or Native Hawaiian organization and that meet
6 the National Register criteria.” 36 C.F.R. § 800.16(l)(1).²

7 The identification of properties containing “cultural resources” is different from
8 the identification of those that are deemed to be a TCP. “Cultural resources” as a class is
9 not defined under Section 106. *See, e.g.*, 36 C.F.R. § 800.4(b)(1). Nor does the mere
10 existence of cultural resources suggest that a property is a TCP or that a discrete location
11 would qualify for eligibility for the National Register. Cultural resources may be
12 identified through means such as background research or a cultural resource inventory.
13 *Id.* Identification of a TCP, on the other hand, can only occur through consultation with
14 the traditional community, such as a tribe. *See generally Te-Moak Tribe*, 608 F.3d at 608
15 n.16.

16 The regulations provide for a four-step process, including (1) initiation of Section
17 106, 36 C.F.R. § 800.3(a); (2) identifying, through a reasonable and good faith efforts,
18 historic properties within the area of potential effects, and evaluating eligibility for listing
19 historic properties on the National Register, *id.* § 800.4(a)-(d); (3) assessing whether
20 effects of the undertaking on any eligible historic properties found is adverse, *id.* §
21 800.5(c); and (4) seeking to resolve any adverse effects, *id.* § 800.6. *Muckleshoot Indian*

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² The term “traditional cultural property” or “TCP,” is a term used to refer to
“properties of traditional religious and cultural importance” that may be eligible for
listing on the National Register under 16 U.S.C. § 470a(d)(6)(A).” *Te-Moak Tribe*,
608 F.3d at 608 n.16. The term TCP “describes land that Native American tribes
have identified as having cultural or religious significance.” *Id.*

1 *Tribe v. USFS*, 177 F.3d 800, 805 (9th Cir. 1999). These steps are accomplished through
2 consultation with parties with an interest in the effects of the undertaking. 36 C.F.R. §
3 800.1(a).

4 The regulations identify required parties, such as the State Historic Preservation
5 Officers (“SHPOs”), potentially interested consulting parties, and the important role of
6 tribes in the process. *Id.* § 800.2. The NHPA also acknowledges an agency’s obligation to
7 consult any tribes “that attach religious or cultural significance to [the affected]
8 property.” *Id.* § 3027606(b). Specifically, the NHPA’s implementing regulations require
9 agencies to provide federally recognized Indian tribes with “a reasonable opportunity to
10 identify its concerns about historic properties, advise on the identification and evaluation
11 of historic properties, including those of traditional and cultural importance, articulate its
12 views on the undertaking’s effects on such properties, and participate in the resolution of
13 adverse effects.” 36 C.F.R. § 800.2(c)(ii)(A).

14 The regulations direct agencies to conduct these consultations “early in the
15 process” in a “sensitive manner respectful of tribal sovereignty,” and recognizing “the
16 government-to-government relationship between the Federal Government and Indian
17 tribes.” 36 C.F.R. § 800.2(c)(2)(ii)(A)-(C). While the regulations lay out how the
18 consultation process should occur to identify historic properties, Section 106 does not
19 mandate that the permitting agency take any particular measures to protect these
20 resources. *Standing Rock Sioux Tribe v. U.S. Army Corp of Eng’rs*, 205 F. Supp. 3d 4, 8
21 (D.D.C. 2016) (citing *CTIA-Wireless Ass’n v. FCC*, 466 F.3d 105, 106-07 (D.C. Cir.
22 2006)).

23 The ACHP’s regulations specifically provide agencies with flexibility to meet the
24 requirements of Section 106 through alternate procedures. For example, the regulations
25 allow agencies to enter into a PA “to govern the implementation of a particular program
26 or the resolution of adverse effects from certain complex project situations or multiple
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1 undertakings.” *See* 36 C.F.R. § 800.14(b); *id.* § 800.14(b)(1) (listing example scenarios).
2 Where executed, a PA acknowledges circumstances in which an agency must phase the
3 steps in the process, e.g., a phased process for identification and evaluation of historic
4 properties “where alternatives under consideration consist of corridors or large land
5 areas,” until after an agency has approved an undertaking. *See id.* §§ 800.4(b)(2),
6 800.5(a)(3), 800.14(b)(3); *see also* 65 Fed. Reg. 77,698, 77,705-06 (Dec. 12, 2000)
7 (ACHP acknowledged the reality of large projects). When signed by the ACHP and
8 applicable SHPO, “[c]ompliance with the procedures established by an approved
9 programmatic agreement satisfies the agency’s section 106 responsibilities for all
10 individual undertakings of the program covered by the agreement until it expires or is
11 terminated” 36 C.F.R. § 800.14(b)(2)(iii); *see Mid States Coalition for Progress v.*
12 *Surface Transp. Bd.*, 345 F.3d 520, 554 (8th Cir. 2003). Under 36 C.F.R. § 800.14(f),
13 when an agency uses a PA, the agency must ensure it includes “appropriate government-
14 to-government consultation with affected Indian tribes.”

15 **B. The Project**

16 In 2008—16 years prior to the Complaint and Motion at issue—SunZia
17 Transmission, LLC (“SunZia”) applied for a right-of-way (“ROW”) to construct, operate,
18 and maintain the Project on public land administered by BLM. On public lands, the
19 Secretary of the Interior is authorized to “grant, issue, or renew rights-of-way . . . for
20 generation, transmission, and distribution of electric energy.” 43 U.S.C. § 1761(a)(4); 43
21 C.F.R. Part 2800. Under the Federal Land Policy and Management Act, BLM is entrusted
22 with managing public lands for multiple uses, including energy generation and
23 transmission facilities. *See* 43 U.S.C. § 1701(a)(7); 43 U.S.C. § 1761; *see also* 43 C.F.R.
24 § 2801.2.

25 The Project consists of two 500-kilovolt transmission lines and related facilities in
26 a 500-mile corridor located on federal, state, and private lands between central New
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1 Mexico and central Arizona. 2015 ROD at v, 1. The majority of the ROW crossing
2 federal lands are in New Mexico, in Arizona just west of the New Mexico border, or
3 southeast of Case Grande. None of the lands within the San Pedro Valley are BLM-
4 managed public lands. The Project’s objectives are “to increase available transfer
5 capability in an electrical grid that is currently insufficient to support the development,
6 access, and transport of additional energy generating resources, including renewable
7 energy, in New Mexico and Arizona.” Defs.’ Ex. 2 [hereinafter 2013 FEIS] at 1-8.³

8 **C. The NEPA Process**

9 To decide whether to approve the ROW over public lands, BLM prepared an EIS
10 under the National Environmental Policy Act (“NEPA”) to analyze and disclose the
11 potential impacts of the proposed Project on the environment. BLM served as the lead
12 federal agency on the EIS, with fourteen other federal and state cooperating agencies
13 participating. 2013 FEIS at E-1. The NEPA process was initiated in May 2009, when
14 BLM published a Notice of Intent to prepare an EIS. In response to public scoping
15 comments and extensive outreach, BLM modified elements of the proposal and
16 ultimately offered three scoping notices with public comment periods between June 2009
17 and June 2010. 2013 FEIS at 5-1-5-5. BLM prepared a draft EIS to analyze the impact of
18 the proposed Project and alternatives on identified resources and issues, including earth
19 and water resources, biological resources, cultural resources, and tribal concerns. *Id.* at 1-
20 10. The Draft EIS was made available for public review and comment in 2012, and BLM
21 considered substantive comments in preparation of the Final EIS, published in June 2013.
22 *Id.* at 1-12

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24
25 ³ Defendants’ Exhibit 2 includes only those portions of the 2013 FEIS that are cited.
26 The entire document is available electronically on BLM’s project website at
<https://eplanning.blm.gov/eplanning-ui/project/2013584/570>.

1 **D. Consultation with Plaintiff Tribes and the Section 106 Process**

2 “Consultation and coordination with federal, state, local, and intergovernmental
3 agencies, organizations, American Indian groups, and interested groups of individuals
4 was conducted to ensure that data was gathered and employed for analyses and that
5 agency and public sentiment, and values were considered and incorporated into decision
6 making.” 2015 ROD at 7. The EIS process included government-to-government
7 consultation with tribes, as well as consultation in accordance with the NHPA. In May
8 2009, BLM contacted twenty-one tribes, including Plaintiff Tribes here, to notify them of
9 the Project, initiate consultation, and invite them to participate as cooperating agencies in
10 preparation of the EIS, and to participate in the Section 106 consultation. 2013 FEIS at 1-
11 12, 5-6. The Tribes were also notified in April 2012 about the Project and were provided
12 with updates through the NEPA and NHPA process. BLM continued to consult with the
13 Tribes throughout the EIS process, meeting with the Tohono O’odham Nation four times
14 and with the San Carlos Apache Tribe three times between July 2009 and December 6,
15 2012. *Id.* at 5-7; Decl. of Jane Childress (“Childress Decl.”) ¶¶ 12-23.

16 Similarly, BLM initiated the NHPA Section 106 process shortly after the
17 publication of the Notice of Intent in May 2009 and coordinated the Section 106 process
18 with the NEPA process. Childress Decl. ¶ 10. The Section 106 consultation process is
19 intended to assess the effects of an undertaking on historic properties, which may include
20 archaeological, historical, or traditional cultural resources. 2015 ROD at 41. BLM
21 identified consulting parties for the Project, which included tribes, State Historic
22 Preservation Offices in Arizona and New Mexico, the Advisory Council on Historic
23 Preservation, and other agencies and organizations. The Tohono O’odham Nation, the
24 San Carlos Apache Tribe, and Archeology Southwest (“ASW”) all actively participated
25 in general Project consultations and as consulting parties for Section 106. *Id.* at 43;
26 Childress Decl. ¶¶ 12-23. The San Carlos Apache Tribe also made specific note about the
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1 San Pedro Valley in October 2011 and the BLM considered this issue then. Childress
2 Decl. ¶ 14.

3 Because the Section 106 process includes the identification of historic properties,
4 the process included several inventories. The first was a Class I inventory, which looked
5 at previous cultural resource surveys and sites and identified gaps in field-inventory
6 coverage across both states. 2013 FEIS, App’x C; 2015 ROD at 41; Childress Decl. ¶ 16.
7 “To supplement the Class I inventory, the BLM elected to collect a sample (Class II)
8 inventory that included areas where cultural resources would like occur; in particular,
9 survey units were located where the Project alternatives cross rivers and historic
10 trails” 2015 ROD at 41-42; Childress Decl. ¶ 16. As part of this Class II inventory,
11 in November 2012, BLM organized a visit to cultural resource sites in the San Pedro
12 basin at the location of the preferred alternative. Tribal Historic Preservation Officers
13 from the Tohono O’odham Nation attended. Childress Decl. ¶ 20, Atts. 18-19. BLM
14 received feedback from tribal members about treatment and mitigation to historic
15 properties, and this was ultimately incorporated into the Final HPTP. At this site visit, no
16 Tribe identified the San Pedro Valley as a TCP. *Id.*

17 Contrary to the premise of Plaintiffs’ motion—and despite their participation in
18 the NHPA process and multiple opportunities to do so, at no point during the process did
19 Plaintiffs identify the San Pedro Valley as a TCP. Plaintiffs’ comments bear this out. The
20 San Carlos Apache Tribe provided comment on the Draft EIS, in which it opposed the
21 selected route because of the potential impacts on culturally sensitive and sacred areas to
22 the tribe and their members and urged the BLM to select a route that went through
23 Tucson. 2013 FEIS at J-153. The comments did not, however, indicate that the entire San
24 Pedro Valley should be identified as an TCP for Section 106 purposes and did not
25 provide information that would justify such a finding. BLM explained in response that its
26 preferred route would cross the San Pedro River at the same location as the tribe’s
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1 preferred route, within an existing transmission line corridor, and that construction along
2 that route would avoid the majority of known cultural resource sites located along the San
3 Pedro River. *Id.*; see Childress Decl. ¶ 19, Att. 17. ASW commented on the Draft EIS
4 and stated that “[w]e appreciate that the information provided to the BLM consultants by
5 [ASW] concerning priority areas in Pinal County and the San Pedro River basis were
6 referenced in the DEIS. . . .” 2013 FEIS at J-534-38. It did not identify the entire San
7 Pedro Valley as a TCP. The Tohono O’odham Nation did not submit comments on the
8 draft EIS, nor did it indicate to BLM that the San Pedro Valley as a whole should be
9 considered a TCP. *See* Childress Decl. ¶ 21.

10 Due to the scope and complexity of the Project, BLM determined early in the
11 process that the undertaking would have an “adverse effect” on some historic properties.
12 In accordance with 36 C.F.R. § 800.6(a)(1), BLM notified the ACHP of the “adverse
13 effect” determination. *See* Childress Decl. ¶ 9. BLM spent a year negotiating the terms of
14 the PA with the ACHP, SHPOs, Tribes, and other consulting parties. *See id.* ¶¶ 22-24.
15 The ACHP concurred with the determination and agreed to participate in the resolution of
16 adverse effects. 2015 ROD at 41-42.

17 BLM thus entered into a PA to outline the required procedures for ensuring the
18 identification of historic properties, steps to consider whether the undertaking will
19 adversely affect the identified historic properties, and methods to resolve adverse effects.
20 *Id.* at 42. The PA provided that the identification and evaluation process would take place
21 after the ROD and ROW permit were issued but before construction. *Id.* “The PA also
22 establishes a process to address historic properties discovered or unanticipated effects
23 that occur to historic properties during construction or operation.” *Id.* The PA was signed
24 by, *inter alia*, BLM, SunZia, the Arizona and New Mexico State Historic Preservation
25 Officers, and the ACHP. Tohono O’odham Nation declined to sign the PA despite being
26 invited to do so. The San Carlos Apache Tribe also declined to sign the PA; ASW signed
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1 as a concurring party. PA at A1-35. The Section 106 consultation was completed with the
2 execution of the PA on December 17, 2014. 2015 ROD at 7.

3 **E. The 2015 ROD and issuance of the ROW grant**

4 In January 2015, based on the EIS and PA, BLM signed a ROD documenting its
5 decision to issue a ROW for the transmission line and associated facilities, including
6 detailed mitigation measures, across approximately 183 miles of BLM lands in Arizona
7 and New Mexico. 2015 ROD at 7-8. The ROD provided that construction could not
8 commence until SunZia received and accepted the ROW grant and also received “a
9 written Notice to Proceed, which will consist of separate work authorizations that must be
10 approved by” the BLM New Mexico State Director. *Id.* at 8. In 2016, the BLM issued the
11 ROW grant. Defs.’ Ex. 3 [hereinafter 2023 ROD] at vii.⁴

12 **F. The Amended ROW Grant**

13 In 2020, SunZia submitted an application to amend the ROW grant. *See* 86 Fed.
14 Reg. 30,066 (June 4, 2021). Specifically, SunZia sought to amend four components of the
15 existing ROW grant: (1) route modifications involving BLM-administered land in New
16 Mexico; (2) adding a ROW for access roads and temporary work areas outside the
17 granted ROW in Arizona; (3) rerouting a segment of the Project in New Mexico; and (4)
18 adding a substation to convert power from DC to AC. *Id.*; *see also* Decl. of Melanie
19 Barnes (“Barnes Decl.”) ¶ 10.⁵ Of these, the San Pedro Valley (which is in Arizona) is

21 ⁴ Defendants’ Exhibit 3 includes only those portions of the 2023 ROD that are cited
22 herein. The entire 2023 decision is available electronically on BLM’s project website
23 at
[https://eplanning.blm.gov/public_projects/2011785/200481766/20078613/25008479
5/20230517%20SunZia%20ROD_508.pdf](https://eplanning.blm.gov/public_projects/2011785/200481766/20078613/250084795/20230517%20SunZia%20ROD_508.pdf).

24
25 ⁵ When the parties brief the merits of the case, the Court’s review will be based on
26 the administrative record compiled by the BLM. *See Fla. Power & Light v. Lorion*,
470 U.S. 729, 744 (1985). Given the emergency nature of this briefing, the agency

1 implicated only by the second component—access roads and temporary work areas. The
2 relevant amendment did not alter—and, indeed, BLM was not presented with—a
3 modification of the transmission line route through the San Pedro Valley.

4 BLM prepared an EIS to address the environmental impacts of the proposed
5 changes. Importantly, the EIS did “not revisit or reanalyze the previously analyzed and
6 approved route from 2015 unless conditions have changed that warrant new analysis.”
7 Defs.’ Ex. 4 [hereinafter 2023 EIS] at ES-2.⁶ BLM prepared a draft EIS, received public
8 comments on the draft, then published a Final EIS that considered and incorporated
9 substantive comments in February 2023. *See* 2023 EIS at 1-6. The EIS also included a
10 Proposed Resource Management Plan (“RMP”) Amendment for the Project in New
11 Mexico and Arizona. *Id.* BLM, ACHP, the SHPOs, and other Consulting Parties
12 negotiated and executed on January 5, 2023, an amendment to the 2014 PA to add two
13 new federal agencies and to reflect only those proposed amendments to the existing
14 ROW. Childress Decl. ¶¶38-39. Otherwise, the stipulations negotiated in the 2014 PA
15 remained the same.

16 On May 19, 2023, the ROD for the SunZia ROW Amendment EIS and RMPA
17 was published. *See* 2023 ROD.

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22 has not yet compiled the administrative record. The documents cited in Ms. Barnes
and Ms. Childress’s declarations, however, will be part of the administrative record.

23 ⁶ Defendants’ Exhibit 4 includes only those portions of the 2015 ROD that are cited.
24 The entire FEIS is available electronically on BLM’s project website at
25 [https://eplanning.blm.gov/public_projects/2011785/200481766/20073926/25008010](https://eplanning.blm.gov/public_projects/2011785/200481766/20073926/250080108/SunZia_Right-of-way%20Amendment%20Public%20Final%20EIS_Vol%201_508_rev.pdf)
26 [8/SunZia_Right-of-](https://eplanning.blm.gov/public_projects/2011785/200481766/20073926/250080108/SunZia_Right-of-way%20Amendment%20Public%20Final%20EIS_Vol%201_508_rev.pdf)
[way%20Amendment%20Public%20Final%20EIS_Vol%201_508_rev.pdf](https://eplanning.blm.gov/public_projects/2011785/200481766/20073926/250080108/SunZia_Right-of-way%20Amendment%20Public%20Final%20EIS_Vol%201_508_rev.pdf).

1 **G. Arizona Historical Properties Treatment Plan Preparation**

2 To resolve direct and physical adverse effects associated with BLM's ROW, BLM
3 asked SunZia to prepare a Historic Properties Treatment Plan ("HPTP"), as required by
4 the PA. SunZia retained the Environmental Planning Group to prepare the HPTP to
5 avoid, minimize, or resolve adverse effects to historic properties, in accordance with
6 Section 106, BLM regulations, and the PA. The process for developing the Arizona
7 HPTP began in 2018 with a Class III pedestrian cultural resource survey of the Area of
8 Potential Effects for the route approved in the 2015 ROD, in accordance with the PA.
9 Childress Decl. ¶¶ 28-29.

10 Based on this survey, as well as the previous surveys, two draft cultural resource
11 Inventory Reports were prepared, one for the Arizona segment of the Project and one for
12 the New Mexico segment. On February 8, 2018, the cultural resource Inventory Reports
13 were distributed to PA consulting parties, including the Plaintiff Tribes and ASW, in
14 accordance with the PA. The letter transmitting the reports specifically requested
15 comments about "whether there are any properties of traditional cultural or religious
16 importance to the tribes and ethnic groups." Childress Decl. ¶ 29, Att. 33. Tohono
17 O'odham Nation commented on the main inventory report, asking about conducting a
18 cultural landscape study, but not identifying any TCPs. *Id.*, Att. 32. ASW and the San
19 Carlos Apache Tribe chose not to comment on the inventory reports.

20 On April 13, 2023, BLM held a meeting for the PA consulting parties, in which
21 BLM gave an update on the Project and explained how BLM was implementing the PA
22 and the upcoming process for review of the HPTPs in both states. Childress Decl. ¶ 44;
23 *id.*, Att. 53. BLM's archaeologist stated that BLM was not revisiting its original routing
24 decision in the San Pedro Valley because the Tribes had not previously raised the San
25 Pedro Valley as a TCP, the ROW had been issued many years prior, and the Tribes still
26 had not provided sufficient information from the tribes to classify the areas as a TCP. *Id.*

1 On June 20, 2023, BLM submitted the HPTP to Consulting Parties for an initial
2 review. Childress Decl. ¶ 47; *id.*, Atts. 58-59. In accordance with the PA, a consultation
3 meeting took place during the 45-day review on July 14, 2023. Childress Decl., Att. 60.
4 Representatives for different Tribes, including the Tohono O’odham Nation, were on the
5 call. *Id.* San Carlos Apache did not attend the call. *Id.* During this meeting, BLM and the
6 other Consulting Parties discussed the proposed treatments for direct effects to most
7 Arizona sites and related that BLM intended to develop a second HPTP to resolve the
8 adverse visual and indirect effects to certain properties. BLM also discussed the
9 Monitoring and Discovery Plans and the Plan of Action for Human Remains, as required
10 under the Native American Graves Protection and Repatriation Act. Childress Decl. ¶ 46.

11 BLM received comments on the draft HPTP from the Arizona SHPO and other
12 Consulting Parties. Childress Decl. ¶ 48, Atts. 61, 62. BLM addressed the comments and
13 transmitted a revised Arizona HPTP to the Consulting Parties for a final 21-day review
14 on August 28, 2023. *Id.* ¶ 50, Att. 63. The Arizona HPTP was finalized in consultation
15 with the State Historic Preservation Officer, in accordance with the PA on September 29,
16 2023. *Id.*, Att. 64.

17 **H. Efforts to Consult with Tribes in 2023**

18 In February 2023—ten years after the 2013 FEIS, eight years after the 2015 ROD,
19 four years after initiation of the HPTP—the Tohono O’odham Nation’s Tribal Historic
20 Preservation Officer emailed the BLM archaeologist stating for the first time that the
21 Tohono O’odham Nation regards the San Pedro Valley as a significant TCP, and that the
22 Project should be moved out of the San Pedro Valley. Childress Decl. ¶¶ 41-42. In March
23 2023, the San Carlos Apache Tribe sent a letter to the BLM Director identifying concerns
24 about the SunZia route in the San Pedro Valley. Barnes Decl. ¶ 11. The BLM New
25 Mexico State Director overseeing the Project also received a letter in March 2023 from
26 Tohono voicing similar concerns. *Id.* Both letters requested consultation with the BLM.

1 *Id.* This correspondence was the first time the Tribes focused on the entire San Pedro
2 Valley as a TCP, rather than discrete areas or historic and archaeological sites within the
3 Valley, as had been the case for the previous decade. Childress Decl. ¶ 42.

4 In accordance with the PA— and even though the route had been approved in
5 2015 and the ROW granted in 2016, and the consulting parties had already spent nearly
6 six years conducting inventories, evaluating properties, and developing treatment plans to
7 resolve adverse effects—BLM reached out to consult with the Tribes to understand more
8 about the area and their concerns. While BLM was preparing a response to the letters, it
9 also made efforts to contact the Tribes to discuss. Specifically, on April 26, 2023, the
10 State Director called the chairmen of both tribes, but was unable to speak with either
11 chairman. Barnes Decl. ¶ 14. The Tribes did not respond to the State Director’s phone
12 calls or messages. *Id.* In addition, the BLM archaeologist assigned to the Project also sent
13 the Tribes emails on June 1, and again on June 13, requesting a meeting. *Id.* ¶¶ 13, 16;
14 Childress Decl. ¶ 46.

15 On June 30, 2023, the BLM Director sent responses to the Tribes. Barnes Decl.
16 ¶ 17, Att. 11, 12. These letters explained that BLM evaluated different routing options for
17 the transmission line in 2012 through 2015, and that the 2015 ROD memorialized that
18 decision and the rationale. Barnes Decl., Att. 11. “After the BLM published the ROD in
19 January 2015, SunZia LLC was granted a [ROW] on BLM-managed lands in both
20 Arizona and New Mexico,” and SunZia had paid fees since 2016 to hold the ROW as
21 they secured financing and prepared to build the Project. *Id.* at 1. According to the letter,
22 the PA does not offer the parties re-routing as a resolution or avoidance measure because
23 BLM cannot reconsider the 2015 approval of the transmission line, particularly because
24 the section is on non-federal land and therefore outside the BLM’s direct jurisdiction. *Id.*

25 The letter also explained that the NEPA process for the ROW amendment was for
26 limited purposes, and that the re-routing being considered was intended to find a different
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1 route in New Mexico to avoid problems with locating the route near the White Sands
2 Missile Range. *Id.* at 1. BLM noted that the only part of the new NEPA process that
3 affected the San Pedro Valley “involved a total of 25 miles of new access roads and 230
4 acres of additional ancillary facilities such as staging areas and pulling and tensioning
5 sites,” and that these areas “were surveyed for cultural resources and no historic
6 properties were found.” *Id.* at 1-2. It also stated that in the San Pedro Valley, three sites
7 of the Sobaipuri culture were identified and will be avoided by construction. *Id.* at 2.

8 The letter also noted that BLM sent letters in December 2020 and May 2022 to
9 Tribes in Arizona and New Mexico notifying them of the EIS, requesting information,
10 and offering consultation on the amendments to the ROW, which did not involve re-
11 routing the transmission line in the San Pedro Valley. *Id.* The San Carlos Apache Tribe
12 responded to BLM in 2022 but did not request consultation. Barnes Decl., Att. 11. The
13 Tohono O’odham Nation did not respond to the letters. *Id.*, Att. 12. The letters requested
14 comments and suggestions to mitigate adverse effects from the Project and indicated that
15 BLM would set up a government-to-government consultation with the tribes. *Id.* at 3;
16 Barnes Decl., Att. 11 at 3. The Tribes never accepted the invitation to consult.

17 On August 4, 2023, the Tribes and Archaeology Southwest notified BLM that they
18 were invoking the dispute resolution procedure in the PA. Barnes Decl., Att. 13. Once
19 again, BLM attempted to contact both Tribes without response. Barnes Decl. ¶ 18, Att. 14
20 Despite the Tribes’ lack of response to BLM’s attempts to consult, BLM decided to
21 withhold its approval of a limited notice to proceed (“LNTP”)⁷ for construction in the San
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23 ⁷ Because the 2015 ROD did not authorize construction of any of the Project’s
24 facilities or permit other ground-disturbing activities in connection with the Project
25 on federal lands, SunZia could not begin construction until it, among other things,
26 received a written LNTP from BLM. 2015 ROD at viii. The written LNTP consist of
27 separate work authorizations that must be approved by BLM, and it is not granted
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1 Pedro Valley for one month in order to allow more time for the Tribes to respond. Barnes
2 Decl. ¶ 18-19. On August 31, 2023, BLM issued a LNTP for portions of the ROW on
3 state and private lands in Arizona outside the San Pedro Valley, but continued to delay
4 issuing the San Pedro Valley LNTP, despite impacts to SunZia’s construction schedule.
5 Barnes Decl. ¶ 19, Att. 17. Also on August 31, BLM Director responded to the August 4
6 letter from the disputing parties proposing that the first step to resolving the dispute was
7 to consult with the disputing parties, as set forth in the PA. *Id.* ¶ 20. BLM again stated to
8 the Tribes that the PA did not provide for re-routing of the line that was approved in
9 2015.

10 On September 13, 2023, the BLM New Mexico State Director reached out to the
11 Chairmen of Tohono O’odham Nation and the San Carlos Apache Tribe again inquiring
12 about their interest to meet. Barnes Decl. ¶ 21, Atts. 20-21. Having received no response,
13 on September 25, the State Director called both Tribes again and left messages, and again
14 did not receive a response. *Id.*, Atts. 22-24. On September 27, the State Director sent
15 separate emails to the Tohono O’odham Nation, the San Carlos Apache Tribe, and ASW
16 seeking once again to discuss the project and their invocation of the PA dispute resolution
17 process, but again did not receive any response. *Id.* ¶ 22, Atts. 25, 26, 27.

18 Having received no contact from the three disputing parties since their August 4,
19 2023, invocation of the dispute resolution despite repeated efforts to contact them, on
20 September 26, 2023, BLM issued a LNTP for construction of lands in San Pedro Valley
21 exclusive of areas that were still pending compliance with the Arizona HPTP. The LNTP
22 was not sent to SunZia until September 28, 2023. *Id.* ¶ 23, Att. 28.

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25 _____
26 until all other land use authorizations on non-BLM land have been obtained. *Id.*
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1 On October 31, 2023, Tohono O’odham Nation wrote to Secretary Haaland
2 seeking suspension of the San Pedro Valley LNTP and included the San Carlos Apache
3 Tribe and ASW as co-disputing parties. Barnes Decl. ¶ 25, Att. 31. This letter requested
4 that BLM withdraw or suspend authorization of the LNTP for the Arizona portion of the
5 Project. *Id.*

6 On November 8, 2023, to provide the Tribes yet more time to respond and provide
7 any information about a possible TCP, BLM ordered an immediate temporarily
8 suspension of construction in the San Pedro Valley. BLM also requested a meeting with
9 the Tribes within five days “to consult regarding your objections and discuss a path
10 forward.” Barnes Decl. ¶ 26, Atts. 32-36. On November 14, 2023, a virtual meeting took
11 place with the disputing parties, BLM and ACHP in attendance. *Id.*, Att. 38.

12 On November 24, 2023, the BLM Director responded to the Tribes. Barnes Decl. ¶
13 30, Att. 39. This letter explained that despite BLM’s “extensive efforts over many years
14 to elicit information relating to potential historic properties within the Project’s area of
15 potential effects[, t]he BLM did not receive sufficient details through consultation or
16 otherwise about the San Pedro Valley to previously consider the Valley, or resources
17 within it, a TCP.” *Id.* at 1-2. And the letter explained that while the Tribes and ASW took
18 the position that any construction in the San Pedro Valley was an adverse effect that
19 could be resolved only by re-routing the transmission line out of the Valley, BLM “does
20 not have the ability to reconsider the 2015 approval of the transmission line, especially
21 for a segment of the transmission line that is on non-federal land and therefore outside of
22 the BLM’s direct jurisdiction.” *Id.* at 2. Re-routing the transmission line segment “would
23 upend both a 2015 BLM decision and one made in 2016 by the Arizona Corporation
24 Commission, decisions that gave SunZia, LLC a valid right-of-way necessary for
25 construction of the transmission line.” *Id.* at 4-5. “Instead, avoidance, or even a re-route
26 as contemplated through the Programmatic Agreement, is limited to minor adjustments to
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1 the design or construction location, not a complete re-route of a 50-mile segment of the
2 500-mile plus transmission line.” *Id.* at 5.

3 Importantly, the letter explained BLM’s disagreement with Plaintiffs’ position that
4 they provided BLM with sufficient information to suggest the San Pedro Valley was a
5 potential TCP. At no point during the Section 106 process leading to the 2015 ROD or
6 the multi-year effort after the ROD to implement the terms of the PA did the Tribes or
7 other consulting parties provide BLM with a request that the San Pedro Valley be
8 considered a TCP, much less sufficient evidence to support that conclusion. *Id.* at 3. The
9 letter also described BLM’s multiple attempts to contact the Tribes, without response,
10 and stated that even at the November 14 meeting, the Tribes did not provide specifics
11 about the proposed TCP or even describe its exact location or boundaries. *Id.*

12 Despite BLM’s fundamental disagreement with Plaintiffs’ objections, BLM stated
13 that it “genuinely seeks to appropriately mitigate any impacts to a potential TCP,” and
14 asked to continue to consult with the Tribes “to evaluate San Pedro Valley and identify
15 appropriate measures to address any adverse effects.” *Id.* at 5. In addition, BLM stated
16 that it “would be willing to assume the San Pedro Valley is a TCP in order to
17 immediately begin to discuss mitigation,” provided multiple examples of potential
18 mitigation measures, and proposed two different potential paths forward. *Id.* at 5-6.
19 “Either way, we will continue to make every effort to consult with you and other Tribes,
20 obtain information from the Tribes about San Pedro Valley, and to develop, as
21 appropriate, treatment plans to address any adverse effects.” *Id.* at 5.

22 On November 27, 2023, the BLM Director notified the tribal leaders that the
23 suspension of the San Pedro Valley LNTP would be lifted, *see* Barnes Decl. ¶ 31, Att. 40,
24 and it was later issued. Barnes Decl. ¶ 33, Att. 47.

1 BLM has since continued to meet with the Tribes and ASW to discuss possible
2 mitigation measures, although the Tribes and ASW have established that their goal is
3 clearly to re-route the transmission line. Barnes Decl. ¶¶ 34-42.

4 III. STANDARD OF REVIEW

5 A. Preliminary injunction standard

6 “A preliminary injunction is an extraordinary remedy never awarded as of right.”
7 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).⁸ “It frequently is observed
8 that a preliminary injunction is an extraordinary and drastic remedy, one that should not
9 be granted unless the movant, by a clear showing, carries the burden of persuasion.”
10 *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). The “requirement for substantial proof
11 is much higher” for a motion for a preliminary injunction than it is for a motion for
12 summary judgment. *Mazurek*, 520 U.S. at 972.

13 “A plaintiff seeking a preliminary injunction must establish [1] that he is likely to
14 succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of
15 preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an
16 injunction is in the public interest.” *Winter*, 555 U.S. at 20; *see All. for the Wild Rockies*
17 *v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Plaintiffs bear the heavy burden of
18 proving that each of these four factors is met. *DISH Network Corp. v. FCC*, 653 F.3d
19 771, 776-77 (9th Cir. 2011). In the Ninth Circuit, “serious questions going to the merits
20 and a hardship balance that tips sharply toward the plaintiff can support issuance of a
21 preliminary injunction,” though only “so long as the plaintiff also shows that there is a
22 likelihood of irreparable injury, and that the injunction is in the public interest.” *All. For*
23 *the Wild Rockies*, 632 F.3d at 1132.

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25 ⁸ “The standard for issuing a TRO is ‘substantially identical’ to the standard for
26 issuing a preliminary injunction.” *Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*,
27 240 F.3d 832, 839 n.7 (9th Cir. 2001).

1 The plaintiff’s burden is not altered by invocation of an environmental statute,
2 such as the NHPA, as there is no presumption that an injunction automatically follows
3 the violation of an environmental statute. *See Amoco Prod. Co. v. Vill. of Gambell*, 480
4 U.S. 531, 542 (1987).

5 **B. Administrative Procedure Act**

6 Judicial review of agency decisions under the NHPA is governed by the APA, 5
7 U.S.C. §§ 701-706. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1095 (9th
8 Cir. 2005) (“[T]he APA established a specific mechanism for enforcing statutes like
9 NHPA.”). Final agency action is reviewed under 5 U.S.C. §§ 706(2), and such review is
10 highly deferential. *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707 (9th
11 Cir. 2009). Agency decisions may be overturned only if “arbitrary, capricious, an abuse
12 of discretion, or otherwise not in accordance with law.” 5 U.S.C. §§ 706(2)(A); *Native*
13 *Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002) (citations omitted).
14 The standard of review is narrow, as the court may not substitute its judgment for that of
15 the agency. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43
16 (1983); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Instead,
17 the Court “must consider whether the decision was based on a consideration of the
18 relevant factors and whether there has been a clear error of judgment.” *San Luis & Delta-*
19 *Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (quoting *Citizens to*
20 *Pres. Overton Park*, 401 U.S. at 416).

21 **IV. ARGUMENT**

22 Plaintiffs have not met their burden of showing they are entitled to preliminary
23 injunctive relief. They have not shown a likelihood of success on the merits of their
24 claims. Plaintiffs had every opportunity to raise their concerns about the San Pedro
25 Valley as a TCP before the transmission line route was determined but failed to do so. It
26 cannot now attack the routing decision or the consultation that led up to it because claims
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1 accrued more than six years ago and are time-barred. In addition, BLM fully complied
2 with the NHPA by entering into a PA and abiding by its terms. Plaintiffs also have not
3 demonstrated irreparable harm that, under the circumstances, would justify preliminary
4 injunctive relief. Again, Plaintiffs' failure to challenge the 2015 ROD or to provide
5 information to BLM about the San Pedro Valley as a TCP weighs against their claims of
6 harm now. Nor have they sufficiently demonstrated that they will be harmed, relying
7 instead on conclusory allegations that do not carry their burden of showing that imminent
8 harm is likely to occur. Finally, the balance of harms and the public interest weigh
9 against preliminary injunctive relief. The Project will benefit the public by promoting
10 renewable energy, enhancing the country's energy security, lowering energy costs,
11 making electricity more reliable in the face of climate change, and creating good-paying
12 jobs. Particularly given Plaintiffs' lack of diligence in pursuing their claims and failure to
13 show irreparable injury, the balance of the equities favors not issuing an injunction.

14 **A. Plaintiffs have not shown a serious question going to the merits, let alone a**
15 **likelihood of success on the merits.**

16 Plaintiffs' claims lack merit. First, Plaintiffs are clearly challenging the location of
17 the transmission line in the San Pedro Valley, which has been set since 2015, well outside
18 the six-year statute of limitations. Plaintiffs never challenged the 2015 ROD and cannot
19 do so now. Second, as evident from the lengthy and detailed record of consultations in
20 which the Plaintiffs participated, BLM complied with Section 106 when, after reasonable
21 and good faith consultations, it entered into a PA that was approved by the ACHP and
22 state historic preservation offices in 2014.

23 Third, the record demonstrates that BLM has continued its reasonable, good faith
24 consultation efforts with Plaintiffs in implementing the PA. And Plaintiffs do not
25 seriously argue that BLM is not acting in compliance with the PA.
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1 **1. Plaintiffs' challenge to the route of the transmission line through the**
2 **San Pedro Valley is barred by the statute of limitations.**

3 Plaintiffs claim that BLM failed to comply with Section 106 because, they assert,
4 the Agency issued the LNTPs prior to engaging in a reasonable and good faith effort to
5 identify TCPs that will be adversely affected by the Project and without engaging in
6 consultations with Plaintiffs to identify any such TCP. This claim is factually incorrect
7 and legally flawed.

8 As an initial matter, Plaintiffs cannot challenge BLM's compliance with Section
9 106 requirements under the NHPA prior to issuing the 2015 ROD. The ROD for the
10 Project was issued in 2015 and it set the preferred route as going through the San Pedro
11 Valley. Any challenges to either the ROD or the decision to adopt the route through the
12 San Pedro Valley are time-barred, as the statute of limitations for challenging final
13 agency action, such as the ROD, is six-years. 28 U.S.C. § 2104(a).

14 To the extent Plaintiffs are attempting to use the 2023 ROD to backdoor attack the
15 2015 ROD or otherwise challenge the siting of the ROW through the San Pedro Valley,
16 that effort also fails. In 2023, BLM only decided SunZia's narrow proposal to amend its
17 existing ROW; the 2023 ROD did not open the 2015 ROD for reconsideration. Nor did
18 any amendments relate to the siting of the line in the San Pedro Valley. 2023 ROD at 11-
19 12. Thus, a challenge to that 2023 decision—even if successful—could not result in
20 setting aside the 2015 Decision to site the line through that Valley. Moreover, because the
21 Project Amendment did not reopen the 2015 decision setting the route through the San
22 Pedro Valley or the 2016 ROW grant, Plaintiffs cannot use the amendment to challenge
23 those decisions or BLM's Section 106 compliance leading up to them. *Nat'l Min. Ass'n v.*
24 *DOI*, 70 F.3d 1345, 1352 (D.C. Cir. 1995) (explaining that an agency must seek to amend
25 or reconsider a time-barred decision before the judicial review period would start anew).

1 **2. The BLM complied with Section 106 through the PA.**

2 In any event, BLM complied with its NHPA obligations by engaging in lengthy
3 consultation over a period of years beginning in 2009, culminating in the PA to outline
4 the process to identify historic properties and assess and resolve any resulting impacts.
5 *See* 36 C.F.R. § 800.14(b)(3). “Compliance with the procedures established by an
6 approved programmatic agreement satisfies the agency’s section 106 responsibilities for
7 all individual undertakings of the program covered by the agreement until it expires or is
8 terminated[.]” *Id.* § 800.14(b)(2)(iii), (b)(3). Thus, BLM satisfied Section 106 by entering
9 into the PA. *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1216 (9th Cir. 2008); *see*
10 *also* 36 C.F.R. § 800.14(b)(2)(iii). And the PA—not the other provision of Section 106 or
11 its regulations—governs Section 106 compliance for the undertaking and all its parts. *See*
12 *Tyler*, 236 F.3d at 1129.

13 Recognizing its indirect jurisdiction over portions of the transmission line not on
14 federal lands, BLM agreed in the negotiated PA to include a process for consideration of
15 historic properties for all portions of the line—including those on state and private land.
16 *See* Childress Decl. ¶ 9. Consistent with 36 C.F.R. §§ 800.14(b)(3), 800.6(c), all required
17 signatories—BLM, Arizona SHPO, New Mexico SHPO, and ACHP—signed the PA
18 before BLM issued its decision in 2015. This shows BLM’s compliance with Section 106
19 of the NHPA, and the PA represents the substitute process the signatories would follow.
20 Childress Decl. ¶ 24; *see also* PA at A1-4. Thus, BLM satisfied the requirement to
21 consult to identify historic properties before approving the Project. *See* 36 C.F.R. §
22 800.1(c).

23 Plaintiffs rely heavily on *Quechan Tribe of Fort Yuma Indian Reservation v.*
24 *United States Department of the Interior*, but that case does not support their argument.
25 In *Quechan Tribe*, the tribe promptly challenged BLM’s NHPA consultation and
26 implementation of a PA for a right-of-way to use public lands for a solar energy project.
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1 755 F. Supp. 2d 1104, 1107-08 (S.D. Cal. 2010). The tribes presented evidence that
2 demonstrated they had contacted BLM early in the process to notify BLM about
3 important historic and cultural sites within the Project area, but BLM rebuffed and
4 ignored that information. *Id.* at 1109-11. The court found, under those facts, that BLM's
5 PA was not enough to satisfy its Section 106 requirements because BLM had ignored the
6 tribe's request for further consultation before the project was approved. *Id.* at 1110-11.

7 Here, on the other hand, BLM engaged in good faith efforts to consult with the
8 Tribes for years, well before implementing the PA or finalizing the 2015 ROD, and BLM
9 has continued to engage in such efforts to identify historic properties and mitigate
10 adverse effects in compliance with the PA. *See supra* Part II.D-E. This was sufficient to
11 satisfy 106 requirements. *See, e.g., Quechan Tribe of Ft. Yuma Indian Rsrv. v. DOI*, 927
12 F. Supp. 2d 921, 930-33 (S.D. Cal. 2013), *aff'd* 673 F. App'x 709 (9th Cir. 2016) (finding
13 BLM's Section 106 consultation was sufficient when it continued to engage in good faith
14 consultations efforts with the tribes); *Reno-Sparks Indian Colony v. Haaland*, 663 F.
15 Supp. 3d 1188, 1196-98 (D. Nev. 2023) (same).

16 Plaintiffs do not present any evidence that they provided BLM with information
17 about the San Pedro Valley as a TCP early in the process or before BLM approved the
18 ROD; indeed, the evidence shows that they did not make this claim until 2023, well after
19 the BLM made the decision to grant the ROW. While Plaintiffs point to various
20 communications, including the San Carlos Apache Tribe's comments on the Draft EIS
21 for the 2015 ROD those comments, as detailed below, offered concerns about cultural
22 sites without any suggestion that the *entire* San Pedro Valley represented a TCP. As
23 discussed above, identifying a cultural resource is distinct from identifying a TCP.
24 Alerting BLM to the existence of cultural resources does not automatically mean that the
25 cultural resources are TCPs. The comment letter also did not make any reference to
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1 eligibility for purposes of being a “historic property” under Section 106. *Quechan Tribe*
2 is therefore distinguishable from this case.

3 **3. BLM remains in compliance with the PA.**

4 Given Plaintiffs’ position that the only way to resolve the adverse effects to the
5 asserted TCP is to avoid the San Pedro Valley altogether—a claim that challenges the
6 2015 ROD and which is barred by the statute of limitations—this court need go no
7 further to deny plaintiffs’ motion. Regardless, the record also demonstrates that BLM has
8 fully complied with the terms of the PA in an effort to consider the Tribes’ new assertions
9 and ways that effects might be resolved short of reconsidering the routing decision made
10 in 2015. Compliance with the procedures established by an approved PA satisfies BLM’s
11 Section 106 responsibilities. 36 C.F.R. § 800.14(b)(2)(iii).

12 The PA provides for several phases. The first phase is aimed at completing a
13 cultural resources inventory to identify history properties that could be affected by the
14 Project. PA I.B at A1-5-6. During this phase, SunZia was required to complete the Class I
15 survey, the Class III Intensive Field Inventory of direct effects, and prepare a
16 comprehensive Inventory Report incorporating the findings from those surveys that BLM
17 provides to the concerned Tribes and other parties for review. PA I.B-E at A1-5-7. “BLM
18 shall continue to consult with Indian tribes regarding properties of traditional religious
19 and cultural importance to them that might be affected by the Undertaking and shall
20 provide opportunities for review and comment on draft and final versions of the
21 Inventory Report.” PA I.F at A1-7.

22 The second phase identified in the PA is to avoid and minimize the adverse effects
23 of the Project on historic properties. PA II at A1-8. Avoidance measures for cultural
24 resources may include realignment of the transmission line, but could also include other
25 measures, such as monitoring of construction near site areas. PA II.A.1 at *id.* Where
26 avoidance is not possible, BLM will minimize or mitigate adverse effects to historic
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1 properties, if possible, with input from consulting parties. PA II.B at *id.* Part of the
2 resolution of adverse effects is the development of HPTP. PA III at A1-8-13.

3 There is no question that BLM has complied with the PA. The first phase of
4 inventorying cultural resources occurred, with the Class III survey leading to the draft
5 inventory report being provided to the consulting parties for review and comment in
6 2017. *See* Childress Decl. ¶ 29, Atts. 32-33. This inventory process was important as it
7 was crucial to the identification effort and subsequent treatment plan process, and it
8 provided another avenue for the Tribes to raise any concerns and comment on, among
9 other things, “[w]hether there are any properties of traditional cultural or religious
10 importance to tribes and ethnic groups that were not identified in the inventory and that
11 may be affected by the Undertaking.” PA I.D at A1-6-7; *see also* Childress Decl. ¶ 28.
12 Again, notably the Tribes did not use the inventory process to identify any TCPs within
13 the San Pedro Valley. *See* Childress Decl. ¶¶ 31-32. BLM has also worked to develop
14 measures to avoid and minimize adverse effects. While Plaintiffs suggest that avoidance
15 of the San Pedro Valley is the only means of complying with the NHPA, the PA provides
16 other measures that will satisfy BLM’s obligations. BLM developed HPTPs to address
17 historic properties and the means by which impacts will be avoided or minimized.
18 Childress Decl. ¶ 34.

19 Plaintiffs’ assertion that “BLM has hidden behind the PA to avoid its obligation to
20 engage in meaningful consultation regarding TCPs” is legally and factually inaccurate.
21 *See* Pls.’ Mot. at 24. As to the law, ACHP’s regulations make clear that, once enacted, the
22 PA constitutes the terms of necessary Section 106 compliance. *See* 36 C.F.R. §
23 800.14(b).

24 As to the facts, Plaintiffs state they “submitted detailed comments repeatedly
25 explaining the cultural significance of the San Pedro Valley” to “alert BLM” that the San
26 Pedro Valley “contains TCPs[.]” Pls.’ Mot. at 29. Plaintiffs cite six documents that pre-
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1 date the 2015 ROD—five letters from non-tribal groups, and one 2012 letter from the San
2 Carlos Apache Tribe. *See id.* (citing Exs. 3, 7, 9, 10, 14, 15). First, as mentioned above,
3 and as Plaintiffs also concede, *see, e.g.*, Pls.’ Mot. at 29, only a tribe possesses the special
4 expertise to identify its own TCPs. *Battle Mountain Band of Te-Moak of Western*
5 *Shoshone Indians v. U.S. Bureau of Land Mgmt.*, 302 F. Supp. 3d 1226, 1237 (D. Nev.
6 2018). Thus, BLM does not unilaterally identify TCPs. *See* 43 C.F.R. § 800.4(b), (c); *see*
7 *also* Childress Decl. ¶ 33. Syllogistically, a non-tribal group, like ASW, cannot identify a
8 tribe’s own TCP. And there is no colorable argument that any of the letters Plaintiffs cite
9 to provide enough information that would “alert” anyone to the existence of the entire
10 San Pedro Valley being a potential TCP. For example, ASW’s letter dated November 25,
11 2009, states “[o]f particular concern is the lower San Pedro River Valley” which,
12 according to them, is an area “widely recognized for the significance of its intact cultural
13 resources as part of a broad cultural and economic landscape rather than as isolated
14 phenomena.” Pls.’ Mot., Ex. 7 at 5, ECF No. 16-12. Not only does the letter references
15 the “lower” San Pedro Valley, as opposed to the entire Valley, but it also fails to provide
16 any information regarding the precise size, location, or nature of the TCP that would be
17 necessary to locate or make an eligibility determination regarding the entire Valley.⁹

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21 ⁹ BLM does not dispute the tribal connections to the San Pedro Valley, nor does
22 BLM dispute that a TCP may exist that is important to the Tribes. But the Tribes did
23 not identify this potential TCP until years into the consultation process, nor given
24 BLM information about the size, location, or nature of the TCP as would be
25 necessary to locate the entire Valley or make an eligibility determination regarding
26 it. BLM has inquired many times about any potential historic property but to no
27 avail. Assuming that a TCP exists in the San Pedro Valley, without information
28 provided through consultation, BLM has no means to consider the potential adverse
effects are or ways to resolve such effects.

1 Plaintiffs attach two declarations by a tribal member of the Tohono O’odham
2 Nation and another member of the San Carlos Apache Tribe that provide some
3 information about the cultural significance of the San Pedro Valley. *See, e.g.*, Pls.’ Mot.,
4 Ex. 4 ¶¶ 6-12, ECF No. 16-9; Pls.’ Ex. 5 ¶¶ 10-16, ECF No. 16-10. But it is more telling
5 that Plaintiffs cannot point to anything demonstrating that this type of information has
6 ever been relayed to BLM before this lawsuit was initiated. *Compare* Pls.’ Exs. 3, 7, 9,
7 10, 14, 15 *with* Pls.’ Exs. 4-5 *and* Pls.’ Ex. 26 at 3 (“In this regard the [San Carlos
8 Apache] Tribe can save BLM a lot of effort: the entire middle San Pedro Valley is a
9 cultural landscape and traditional cultural property having great significance in Apache
10 cultural and religious traditions and in those of other tribes.”); *id.* at 6 (“There are
11 hundreds of localities in the San Pedro Valley with cultural, historical, archeological and
12 religious importance to the Tohono O’odham Nation and the Hopi, Zuni and Apache
13 tribes.”).

14 BLM’s effort following the ROW amendment in 2023 further shows a reasonable
15 implementation of the PA’s requirements. Plaintiffs sent letters in March 2023 suggesting
16 that the San Pedro Valley should be considered a potential TCP. Barnes Decl., Atts. 2, 5,
17 8. BLM immediately endeavored to understand more from the Tribes regarding the San
18 Pedro Valley. BLM reached out to the Tribes but received no response. *See* Barnes Decl.
19 ¶¶ 14, 18, Atts. 6, 7. To provide the Tribes with more time to respond, and despite the
20 impacts to the ROW holder’s construction plans, BLM even withheld the approval of the
21 LNTP for construction within the San Pedro Valley on state and private lands in Arizona.
22 Barnes Decl. ¶ 19.

1 Plaintiffs fixate on the LNTPs that were issued on September 27, 2023, and
2 November 27, 2023.¹⁰ But what they omit from their motion is that BLM had reached out
3 to Plaintiffs multiple times in advance of September 2023 and received no response.
4 Receiving no response from Plaintiffs, BLM then decided to issue the LNTP on
5 September 27, 2023—which involved some construction in the San Pedro Valley. Some
6 correspondence eventually did occur between Plaintiffs and BLM, and BLM even
7 temporarily suspended construction in the San Pedro Valley on November 8, 2023, upon
8 Plaintiffs’ request. Plaintiffs, however, maintained that the only path forward was to
9 remove all construction activities from the San Pedro Valley.¹¹

10 The PA addresses circumstances like those presented here—identification of a
11 potential TCP during the implementation of the Project. Stipulation VI in the PA provides
12 the process for potential historic properties that might be later discovered. PA VI at A1-
13 14-15. Relevant here, “[i]f the discovered cultural resource is subsequently identified by
14 an Indian tribe as a property of traditional religious and cultural importance, the BLM
15 shall consult with the appropriate tribe(s).” PA VI.A.2 at A1-15. In those consultations,
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18 ¹⁰ Notably, BLM has not issued any LNTPs for segments of the transmission line
19 that have not been addressed in a HPTP yet. Barnes Decl. ¶¶ 19, 41.

20 ¹¹ Plaintiffs assert that the LNTP is a “final agency decision.” Pls.’ Mot. at 30. An
21 LNTP is not an undertaking, and thus does not trigger an obligation under Section
22 106. *See Battle Mountain Band v. U.S. Bureau of Land Mgmt.*, No. 3:16-CV-0268-
23 LRH-WGC, 2016 WL 4497756, at *7 (D. Nev. Aug. 26, 2016) (“[W]here a project’s
24 Section 106 review has already been completed, and no new elements have been
25 added to the project, it does not amount to an undertaking.” (citing *McMillan Park*
26 *Committee v. Nat’l Cap. Plan. Comm’n*, 968 F.2d 1283, 1287-88 (D.C. Cir. 1992)).
The PA still controls, and as explained, BLM remains in compliance with the PA.
The LNTP also does not revive Plaintiffs’ untimely challenge to the 2015 decision—
the LNTP is implementing certain provisions of the ROW, not approving the ROW
in the first instance.

1 BLM would discuss the adverse effects on the TCP, and whether it would be possible to
2 avoid those effects. If it is not possible to avoid, then BLM must consult the tribes about
3 mitigation efforts. PA II.B at A1-8.

4 Despite Plaintiffs’ reading, the PA does not “clearly establish[] avoidance as the
5 preferred method.” *See* Pls.’ Mot. at 25. Rather, the PA provides that BLM shall, *if*
6 *possible*, avoid adverse effects to all historic properties with input from the consulting
7 parties. *See* PA II.A at A1-8. The PA provides some examples of potential “avoidance
8 measures” that *may* be appropriate for cultural resources —one being the “realignment of
9 the transmission line.” PA II.A.1. But when avoidance is not possible, the PA instructs
10 that BLM must minimize or mitigate adverse effects to historic properties. PA II.B at *id.*
11 This makes sense because the NHPA is a procedural statute that does not require any
12 particular action. *See San Carlos Apache Tribe*, 417 F.3d at 1097; *Standing Rock Sioux*
13 *Tribe v. U.S. Army Corps of Eng’rs*, 205 F. Supp. 3d 4, 32 (D.D.C. 2016).

14 Plaintiffs also inaccurately interpret “avoidance” to be the end all be all for
15 addressing any adverse effects to a newly discovered TCP. *See* Pls.’ Mot. at 25. But
16 under the circumstances here, it is simply not realistic to reroute the line outside the entire
17 San Pedro Valley based on information that was available to the Tribes well before 2015
18 when the ROW decision was issued and even throughout the extensive identification
19 process. Barnes Decl., Att. 43. That is why BLM articulated that “the [PA] does not offer
20 the parties re-routing as a resolution or avoidance measure” because “BLM does not have
21 the ability to reconsider the 2015 approval of the transmission line, especially for a
22 segment of the transmission line that is on non-federal land and therefore outside of the
23 BLM’s direct jurisdiction.”¹² Pls.’ Mot., Ex. 37 at 3, ECF No. 16-43. BLM has been clear

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25 ¹² This explanation relates to the Tribes claim that BLM was not complying with the
26 terms of the PA which includes consideration of avoidance to move the line out of
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1 in its position that it has no authority to re-open its 2015 ROW decision and reroute the
2 transmission line segment to avoid the San Pedro Valley entirely. *See, e.g.*, Barnes Decl.,
3 Att. 45. It also seems illogical that “avoidance” would only mean removing and rerouting
4 the transmission line from the entire San Pedro Valley. Especially because the 2015 ROD
5 set the Project route to go through the San Pedro Valley and BLM has consistently
6 communicated that it would not reroute the line. If Plaintiffs had an issue with 2015
7 decision, particularly the route within the San Pedro Valley, then they should have
8 challenged the decision within the relevant statutory period.

9 Plaintiffs misrepresent BLM’s position stated in its August 31, 2023, letter. *See*
10 Pls.’ Mot. at 31. Though BLM sought information from the Tribes since 2009, *see*
11 *generally* Childress Decl., it first learned, informally through Tohono O’odham Nation’s
12 Tribal Historic Preservation Officer communications with BLM’s archaeologist, of the
13 potential San Pedro Valley TCP in February 2023, and then officially through a letter to
14 BLM on March 23, 2023, because, as explained, the Tribes had never provided such
15 information. Childress ¶¶ 41-43. Plaintiffs do not provide any documents to illustrate the
16 supposed “bevy of evidence showing repeated notification . . . of the San Pedro Valley
17 TCP.”

18 In compliance with the PA, and good-faith efforts to work with the Tribes to reach
19 a resolution, consultation efforts to discuss mitigation options have been ongoing. *See*
20 Barnes Decl. ¶¶ 40-43. So far, these consultations efforts have led to tasking a working
21 group comprised of various tribal members and other experts to consider the appropriate
22 mitigation efforts for the San Pedro Valley.

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25 the entire San Pedro Valley. BLM’s interpretation of “avoidance” in the PA is far
26 from a “post hoc rationalization.” *See* Pls.’ Mot. at 25.

1 In sum, BLM has complied with its obligations under Section 106 through
2 implementation of the PA. Plaintiffs fail to show that BLM has violated any of its Section
3 106 obligations and therefore fail to raise even a serious question going to the merits.
4 Thus, the Court should deny Plaintiffs’ Motion without addressing the other preliminary
5 injunction factors because Plaintiffs have not shown serious questions going to the
6 merits. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1085 (9th Cir. 2014).

7 **B. Plaintiffs have not shown that irreparable harm that would warrant an**
8 **injunction.**

9 Should the Court reach the other factors, Plaintiffs have also failed to demonstrate
10 irreparable harm is likely that would justify an injunction here. “Under *Winter*, plaintiffs
11 must establish that irreparable harm is likely, not just possible, in order to obtain a
12 preliminary injunction.” *All. For the Wild Rockies*, 632 F.3d at 1131 (citing *Winter*, 555
13 U.S. at 22). Plaintiffs have failed to carry their burden of showing irreparable harm is
14 likely to occur for several reasons. *First*, BLM identified and protected cultural and
15 historic resources that could be affected by the Project, including by consulting the tribes
16 and completing cultural resources inventories in which Plaintiffs participated. The BLM
17 and other consulting parties also developed the PA, which provides a framework to avoid
18 and minimize the adverse effects of the Project on historic properties. *Second*, Plaintiffs’
19 claims of imminent irreparable harm are belied by their delays in providing BLM with
20 information about the San Pedro Valley being a TCP—including the period from when
21 consultation began in 2009 through when the routing decision was made in 2015—and
22 even continuing to date. *Third*, Plaintiffs’ claimed injuries are too vague and speculative
23 to support a finding that irreparable harm is likely to occur.

24 To the first point, Plaintiffs have not shown that irreparable harm is likely to occur
25 because BLM has taken extensive measures to prevent injury to historic and cultural
26 resources. BLM engaged in a thorough Section 106 process, beginning in 2009, with the
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1 Tribes and ASW, among other groups, participating as consulting parties. 2015 ROD at
2 41. BLM also engaged in government-to-government consultation with the Tribes as part
3 of the NEPA and NHPA process, including several meetings with both the Tohono
4 O’odham Nation and the San Carlos Apache Tribe. *Id.* at 43; Childress Decl. ¶¶ 10-25. At
5 no point during these consultations did the Tribes indicate to BLM that the entire San
6 Pedro Valley was an TCP, which would be expected if the conclusion to the contrary
7 could lead to irreparable harm.

8 BLM also conducted extensive surveys and inventories of cultural resources,
9 including a Class III pedestrian cultural resource survey of the Area of Potential Effects
10 for the route approved in the 2015 ROD, in accordance with the PA. During this
11 extensive field inventory, an archaeological crew and five cultural resource specialist
12 tribal members provided by the Tohono O’odham Nation and San Carlos Apache Tribe,
13 walked the Area of Potential Effects, including within the San Pedro Valley, to locate and
14 record all cultural properties in the area. After the survey, inventory reports were
15 provided to all Plaintiffs with a sixty-day window for comments. Of Plaintiffs, only
16 Tohono O’odham Nation commented on any of the inventory reports and did not identify
17 a TCP.

18 In addition, irreparable harm is unlikely to occur because the PA and the HPTP
19 provide an ongoing process for identifying cultural resources and treatment measures to
20 avoid, minimize, and mitigate impacts to any cultural resources. PA II.C at A1-8; Pls.’
21 Mot., Ex. 28 (HPTP). To date, BLM is following the process outlined in the PA. The
22 HPTP also contains a Monitoring and Discovery Plan, as well as provisions for discovery
23 of human remains, associated funerary objects, and sacred objects, even on non-federal
24 land such as the San Pedro Valley. PA II at A1-10-11; HPTP at A-13-14. Plaintiffs have
25 not demonstrated either that BLM is not adhering to the PA or the HPTP or that these
26 documents are ineffective in identifying resources or avoiding, minimizing, and
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1 mitigating impacts to cultural resources. BLM’s efforts to identify and address the effects
2 of the Project on historic properties demonstrates that irreparable harm is not likely to
3 occur.

4 Second, “Plaintiff’s long delay before seeking a preliminary injunction implies a
5 lack of urgency and irreparable harm.” *Oakland Trib., Inc. v. Chron. Pub. Co., Inc.*, 762
6 F.2d 1374, 1377 (9th Cir. 1985). Plaintiffs’ actions over the past decade contrast their
7 allegations of irreparable harm. Plaintiffs now—decades and two Administrations later—
8 assert that construction in the San Pedro Valley will cause irreparable harm, but as
9 discussed above, Plaintiffs did not present information to the BLM even suggesting that
10 the entire valley is an TCP until 2023, eight years after the ROD announcing the route
11 through the San Pedro Valley was signed and seven years after the ROW was granted.
12 This is a quintessential case of delay. If Plaintiffs believed the transmission line running
13 through the San Pedro Valley was going to have disastrous effects, they could have filed
14 suit challenging the ROD in 2015 and the litigation would have been long resolved. “A
15 preliminary injunction is sought upon the theory that there is an urgent need for speedy
16 action to protect the plaintiff’s rights. By sleeping on its rights, a plaintiff demonstrates
17 the lack of need for speedy action[.]” *Lydo Enterprises, Inc. v. City of Las Vegas*, 745
18 F.2d 1211, 1213 (9th Cir. 1984) (internal citation omitted).

19 Plaintiffs also delayed bringing this litigation. BLM issued a LNTP for work in the
20 San Pedro Valley in September 2023, then rescinded the notice to allow for additional
21 consultation, after which the LNTP was reissued in November 2023. Plaintiffs waited
22 until January 30, 2024, to file a motion for injunctive relief. Plaintiffs also did not
23 identify the San Pedro Valley as a TCP during the Class III survey or in response to the
24 inventory reports. Plaintiffs’ failure to indicate to BLM that the entire San Pedro Valley
25 should be protected, despite myriad opportunities to do so—even after the route
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1 traversing the Valley was selected—does not comport with their claims of imminent
2 injury now.

3 Further, even after the March 2023 letters purporting to identify the San Pedro
4 Valley as a TCP, the Tribes did not act with urgency. BLM reached out to the Tribes on
5 multiple occasions, without response. The BLM Arizona State Director reached out to the
6 tribes in June and August 2023, seeking to schedule a government-to-government
7 consultation, without response from the Tribes. Barnes Decl. ¶¶18, 22, Atts. 36-37. Nor
8 did they respond to BLM’s calls or other efforts to contact them. Barnes Decl. ¶¶ 15, 19,
9 23. Even after invoking the dispute resolution clause in the PA in early August 2023,
10 Plaintiffs did not respond to the BLM’s requests for a meeting. *See* Barnes Decl. ¶¶ 18-23

11 Finally, Plaintiffs’ conclusory statements that the mitigation measures are
12 insufficient, *see* Pls.’ Mot. at 36-38, do not meet Plaintiffs’ burden of demonstrating that
13 irreparable harm is likely to occur. *See Am. Passage Media Corp. v. Cass Commc’ns,*
14 *Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (“affidavits [that] are conclusory and without
15 sufficient support in fact” will not support a finding of irreparable injury). Plaintiffs make
16 blanket statements that the Project “will irreparably degrade the San Pedro Valley as a
17 [TCP]” and irreversibly impair the area, but do not provide specifics. Similarly, the
18 declarants state that the mitigation plan will be insufficient to avoid adverse effects, but
19 do not provide any details as to why the extensive surveys and mitigation plans in the PA
20 and HPTP are insufficient. For example, Ms. Grant states that the Project will disturb
21 ancestral human remains that are buried in the area but does not mention the PA and the
22 HPTP’s plans to address the discovery and treatment of human remains or explain why
23 they are insufficient to prevent adverse effects. Mr. Burrell also refers to the destruction
24 of saguaros, but the plan of development provides a saguaro treatment plan designed to
25 avoid impacts to saguaros where possible and to salvage them otherwise. A native plant
26 inventory was completed and submitted to the Arizona State Land Department, and the
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1 Project’s Biological Opinion “includes a goal of no net loss of saguaros and paniculate
2 agaves in or near the Project right-of-way, which will be met through salvage or
3 augmentation.” Defs.’ Ex. 5 at F-16.¹³ In short, Plaintiffs’ conclusory statements of harm
4 are insufficient to carry Plaintiffs’ burden here.

5 Plaintiffs delayed in pursuing their concerns and litigation and have not
6 demonstrated that irreparable harm is likely to occur in the absence of an injunction. The
7 Court should deny Plaintiffs’ Motion on that basis.

8 **C. The public interest and balance of inequities disfavor an injunction.**

9 Plaintiffs also fail to demonstrate, as they must, that a preliminary injunction
10 would serve the public interest. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391
11 (2006). When the government is a party, the analyses of the public interests and balance
12 of equities merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)
13 (citations omitted). In considering the balance of the equities between the parties,
14 traditionally a court “must balance the competing claims of injury and must consider the
15 effect on each party of the granting or withholding of the requested relief.” *Winter*, 555
16 U.S. at 24 (quoting *Amoco Prod. Co.*, 480 U.S. at 542). Without the requisite showing on
17 the merits and irreparable harm, a court “need not dwell on the final two factors” and,
18 “when considered alongside the [movant’s] failure to show irreparable harm, the final
19 two factors do not weigh in favor of a stay.” *E. Bay Sanctuary Covenant v. Trump*, 932
20 F.3d 742, 778-79 (9th Cir. 2018). But a court may deny a preliminary injunction, even
21 where irreparable injury to the movant exists if the injunction is contrary to the public
22 interest. *See Winter*, 555 U.S. at 22-23 (holding that even though plaintiffs showed a
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25 ¹³ Defendants’ Exhibit 5 includes only the portion of the Plan of Development that is
26 cited here. The entire document is available electronically on BLM’s project website
27 at <https://eplanning.blm.gov/eplanning-ui/project/2011785/570>.

1 “near certainty” of irreparable injury to marine mammals resulting from the Navy’s use
2 of mid-frequency active sonar, that harm was outweighed by the public interest in
3 facilitating effective naval training exercises); *Amoco*, 480 U.S. at 545-46; *Weinberger v.*
4 *Romero-Barcelo*, 456 U.S. 305, 312 (1982).

5 As noted above, because Plaintiffs have not made the necessary showing on the
6 merits and irreparable harm. But, if the Court concludes otherwise, it should find that the
7 public interest and the balance of equities favors weigh against an injunction. Plaintiffs
8 have been offered multiple opportunities to raise their claim that the Valley should be a
9 TCP or, at least, provide evidence sufficient to support that claim. In addition to failing to
10 raise this specific claim over two Administrations and sixteen years, Plaintiffs have
11 neglected to engage with the Department quickly and responsively. To conclude that the
12 balance of equities tips in favor of the Plaintiffs would render the Department’s diligent
13 efforts moot and invite litigation delays that would never allow an application or Record
14 of Decision to be settled. Allowing the Project to proceed is in the public’s interest. The
15 Project will not only help states across the western United States meet national climate
16 change goals, but it will provide stable, renewable energy sources of electricity to the
17 public which in turn, reduces climate impacts in the region by moving away from fossil
18 fuel sources.

19 Government policies support clean energy and prioritize the delivery of renewable
20 energy. In Executive Order 14008, “Tackling the Climate Crisis at Home and Abroad,”
21 the government recognized the “[t]he United States and the world face a profound
22 climate crisis.” Exec. Order 14008, 86 Fed. Reg. 7,619 (Feb 1, 2021). As part of the
23 government’s response to that crisis, the Executive Order announced the objective to
24 increase renewable energy production on public lands. *Id.* § 207. The Project also aligns
25 with Congressional goals set forth in the Energy Policy Act of 2005 which recognize the
26 need for increased transmission siting and permitting processes to better keep pace with
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1 the necessary infrastructure upgrades associated with projected development and
2 electrical load growth. 2015 ROD at 1-3. In doing so, “Congress has articulated the
3 public policy that our nation should incorporate clean energy as a necessary part of
4 America’s future, and it is essential to securing our nation’s energy independence and
5 decreasing greenhouse emissions.” *W. Watersheds Project v. Bureau of Land Mgmt.*, 774
6 F. Supp. 2d 1089, 103 (D. Nev. 2011), *aff’d*, 443 F. App’x 278 (9th Cir. 2011) (citing the
7 Energy Policy Act of 2005). Thus, the need for upgraded infrastructure to carry
8 renewable and traditional energy has been a focus of recent legislation and policies. *See*
9 2015 ROD at 3.

10 The Project furthers these important public interests. The Project will bring up to
11 4,500 megawatts of primarily renewable energy from New Mexico to markets in Arizona
12 and California. In all, the Project will help achieve these important policy goals because it
13 aims to tackle the climate crisis and bring clean, affordable, and reliable power to
14 millions of Americans. It will also benefit the public by providing well-paying jobs and
15 other economic benefits. The court’s review of the public interest is also constrained
16 because “responsible public officials . . . have already considered” the public interest in
17 enacting the policy at issue.” *Golden Gate Restaurant Ass’n v. City & Cty. of San*
18 *Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008)

19 Therefore, the public interest strongly favors letting the Project move forward. In
20 contrast, Plaintiffs fail to show that they will be harmed by allowing the Project to go
21 forward and did not present BLM with information (or file suit) in a timely fashion,
22 demonstrating a lack of irreparable harm. Intervenor-Defendant Pattern’s brief will
23 explain the particular risks to the Project if an injunction is issued. Thus, the balance of
24 equities tips toward the government and the public interest, and the Court should decline
25 to enter a preliminary injunction or a temporary restraining order.

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V. CONCLUSION

Here, Plaintiffs have not met their burden of proving any of the elements required to obtain a temporary restraining order or preliminary injunctive relief. This Project represents a long-studied route that was approved nearly a decade ago, and Plaintiffs’ attempts to force BLM to re-route the transmission line, despite their failure to raise issues at the appropriate time, should be rejected. Plaintiffs’ delay in challenging the route and bringing this action belie their claims that irreparable injury is likely to occur, and they are unable to offer anything other than speculative and conclusory assertions otherwise. The many public benefits of the Project far outweigh any harm to Plaintiffs, particularly given that BLM continues to work with Plaintiffs to discuss ways to mitigate any adverse effects. As such, Federal Defendants respectfully request that the Court deny Plaintiffs’ motion for a preliminary injunction.

Dated: February 13, 2024

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2024, I filed this document electronically through the CM/ECF system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Devon Lehman McCune
Senior Attorney