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

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

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

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

Tohono O'odham Nation *et al.*, *Plaintiffs*, v. U.S. Department of the Interior *et al.*, *Defendants*.	Case No. 4:24-cv-00034-JGZ **PLAINTIFFS' REPLY TO DEFENDANTS AND INTERVENOR'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER**

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INTRODUCTION

Plaintiffs will suffer immediate, irreparable harm in the absence of relief to preserve the status quo and avoid the desecration and destruction of important cultural and historic sites in the San Pedro Valley. Absent temporary, tailored relief to halt construction, this culturally significant landscape will be reduced to collateral damage of another broken promise to the Tribes.

In their motion, Plaintiffs explained myriad ways the Bureau of Land Management ("BLM") flouted its obligations under Section 106 of the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 300101-307108, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, when it issued Limited Notices to Proceed ("LNTPs") authorizing Sunzia Transmission, LLC ("Intervenor") to begin partial construction of the SunZia Southwest Transmission Project ("the Project") in the San Pedro Valley. The Project will cause serious, irreversible damage to Tribal Traditional Cultural Properties ("TCPs") and other cultural sites.

BLM's and Intervenor's responses fail to rebut Plaintiffs' claims, mischaracterize critical facts, raise several baseless jurisdictional defenses, and reiterate post hoc arguments that come too late and lack merit. For the reasons below, this Court should enter a preliminary injunction.

I. THE RESPONSES MISCHARACTERIZE THE FACTS AND THE LAW

A. BLM And Intervenor's Narrative Omits Critical Facts And Improperly Shifts The Burden Of Showing NHPA Compliance Onto Plaintiffs

BLM issued the LNTPs prior to a reasonable, good faith effort to identify TCPs that will be adversely affected by the Project, and without adhering to the legally required Section 106 consultation process, particularly with respect to TCPs. *See* Plaintiffs' Brief ("Pl.Br.") at 24-36. Indeed, as communications between BLM and consulting parties reveal, BLM ignored repeated entreaties for more than a decade to meaningfully consider the Project's effects on TCPs, including cultural landscapes. *See, e.g.*, *id.* at 33.

In response, BLM and Intervenor (collectively, "Defendants") insist that the numerous communications informing the agency of the likely existence of a TCP in the San Pedro Valley were insufficient to "'alert' anyone to the existence" of a potential TCP. Gov't Br. ("Gov.Br.") at 28; *see also* Intervenor's Br. ("Int.Br.") 25-26. Instead, Defendants revise history by claiming that "at no point did Plaintiffs identify the San Pedro Valley as a TCP." Gov.Br.19; *see also* Int.Br.25. Defendants also attempt to shift the burden of NHPA compliance onto Plaintiffs. The Court should reject these tactics.

Contrary to Defendants' assertions, Plaintiffs and others clearly communicated the cultural significance of the San Pedro Valley landscape to Tribes. *See, e.g.*, Pl. Ex. ("Pl.Ex.") 41 ¶ 7 (explaining that the San Carlos Apache Tribal Historic Preservation Officer ("THPO") "routinely characterized the entire San Pedro Valley as a TCP" in meetings with BLM during the "early stages of th[e] [P]roject," and communicated the elements of the "cultural landscape" directly connected to the Apache people).[1] BLM concedes, as it must, that it received comments identifying the San Pedro Valley as a significant *cultural landscape*, Gov.Br.13, 28. By insisting that such comments were nevertheless insufficient to alert BLM to the need for investigation, BLM disingenuously tries to divorce a cultural landscape from a TCP. The agency slices the salami too thin. As BLM well knows, the concepts of "cultural landscape" and "TCP" are intrinsically intertwined. Agency guidance and the caselaw make liberal use of both terms—in addition to other terms denoting areas of cultural or religious importance to Tribes that may be eligible for listing on the National Register of Historic Places ("NRHP"), including "traditional cultural district" and "traditional cultural place." *See generally* Pl.Ex.1; *Pueblo of Sandia v. United States*, 50 F.3d 856, 861 (10th Cir. 1995).

Indeed, BLM's own guidance explains that the identification of TCPs should be "aided by cultural landscape assessments." Pl.Ex.42 at 4. Guidance from the National Park Service ("NPS") developed to assist agencies in assessing TCPs and cultural

[1] For the Court's convenience, Plaintiffs' exhibits attached hereto will be numbered consecutively from those attached to Plaintiffs' initial motion, beginning with Exhibit 41.

landscapes likewise makes clear that "culturally significant natural landscape[s]" may constitute TCPs, and further, that cultural landscapes encompass TCPs and archaeological sites within a particular area. *See* Pl.Ex.1 at 12, 21; Pl.Ex.43 at 25; *see also* Pl.Ex.44 ¶ 20 (explaining that cultural landscape studies "are proven means for identifying cultural resources other than archaeological resources, especially TCPs").

Hence, as a practical matter, "cultural landscapes" and TCPs are inextricably intertwined. Indeed, according to NPS, a "cultural landscape" is a type of TCP. *See* Pl.Ex.1 at 12 (noting that a "culturally significant natural landscape" may fit the criteria for a TCP). And BLM knows this is the case. *See* Pl.Ex.44 ¶¶ 21-22; Pl.Ex.41 ¶ 6.[2] BLM's assertion that Plaintiffs' *repeated* references to the San Pedro Valley as a "culturally significant landscape" are insufficient to put the agency on notice that the area may comprise or contain one or more TCPs imposes a "magic words" test that not only ignores the functional equivalence of the terms, but also flouts the agency's affirmative obligations under the NHPA to gather information regarding cultural resources. *Cf. Nat'l Parks & Conserv. Ass'n v. BLM*, 606 F.3d 1058, 1065 (9th Cir. 2009) ("Plaintiffs need not state their claims in precise legal terms, and need only raise an issue with sufficient clarity to allow the decision maker to understand and rule on the issue raised." (quotation omitted)); *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 966 (9th Cir. 2002) (refusing to require "magic words" to "leave the courtroom door open to a challenge").

BLM also insists that it can ignore many of the comments explaining the cultural significance of the San Pedro Valley landscape to Tribes because they originated from non-tribal groups and "only a tribe possesses the special expertise to identify its own TCPs." Gov.Br.27-28. Not so. As an initial matter, the NHPA requires consultation with

[2] Indeed, BLM recently undertook a cultural landscape study in connection with renewable energy development in the California Desert "in consultation with California Tribes, Tribal organizations, and the California State Historic Preservation Office to fulfill the requirements" of Section 106. Pl.Ex.45 at 3; *see also* Pl.Ex.44 ¶ 21. The agency acknowledges that the "effort[] will identify *resources of religious and cultural significance*" that may be affected by renewable energy project siting. *Id.* BLM thus well knows that cultural landscapes must be evaluated during the Section 106 process.

"organizations likely to have knowledge of, or concerns with, historic properties in the area." 36 C.F.R. § 800.4(a)(3). For this reason, courts have found agencies to violate the NHPA's consultation requirements when they fail to investigate information regarding TCPs and cultural landscapes provided by non-tribal individuals possessing expertise. *See Pueblo of Sandia*, 50 F.3d at 861. So too here. Not only does Archaeology Southwest ("ASW") have considerable expertise in the historic and cultural resources of the San Pedro Valley, but BLM *relied* on ASW's expertise when developing the Project's preferred alternative under NEPA. *See* Int.Br.16-17. Indeed, as Intervenor acknowledges, ASW has been serving as an "advisor to the Tribes" during the Project's Section 106 process. *Id.* at 35. Defendants cannot lawfully concede ASW's special expertise and prominent role in the consultation process and then disregard ASW's expert input.

Defendants also attempt to improperly shift BLM's burden to comply with the NHPA to those that the law intends to protect. *See* Gov.Br.25; Int.Br.25-26. The Tribes' experience, described in Plaintiffs' motion and the attached declarations, illustrates the impracticability and unfairness of that system. Based on long experience with the federal government, the Tribes are reluctant to trust that federal agencies will meaningfully engage in the NHPA's consultation process. Indeed, when BLM requested information "about sacred areas that [the agency] should know about," Tribal members would only share "information that is not secret," due to "concerns with the confidentiality of information" and "cit[ing] a particularly bad experience . . . concerning the disclosure of confidential information" during a Section 106 consultation for another project. Gov't Ex. ("Gov.Ex.") 17 at 3. Yet, despite the NHPA's express recognition that Tribes "may be reluctant to divulge specific information" regarding sites of religious and cultural significance, 36 C.F.R. § 800.4(a)(4), BLM now argues that the Tribes—and *only* the Tribes—must affirmatively identify TCPs and provide sufficient information to allow BLM to make an eligibility determination. Gov.Br.28. This result cannot be squared with BLM's obligation to make a "reasonable effort" to identify TCPs. *See Pueblo of Sandia*, 50 F.3d at 861-62 (noting that the Tribe's reticence to share information about cultural

and religious sites was to be expected, and that the agency knew that the Tribes would typically decline to respond to general requests for information).

Likewise, Intervenor's argument that Plaintiffs fail to identify a TCP is premature. Int.Br. 25-26. During the Section 106 process, Plaintiffs repeatedly described the cultural significance of the San Pedro Valley and requested that BLM engage with the Tribes regarding the Project's effects to the "culturally significant landscape." *See* Pl.Br.29, 33. Based on these detailed descriptions, the Tohono O'odham Nation and others repeatedly requested that BLM conduct cultural landscape studies, *see* Gov.Ex.24 at 3; Gov.Ex.26 at 3-4; Gov.Ex.32 at 15, which BLM's own guidance recognizes as a common tool for BLM to identify TCPs, *see* Pl.Ex.42 at 4, 5. Thus, it is beyond dispute that Plaintiffs provided sufficient information to "indicate the existence of [TCPs]" such that any "reasonable effort" to identify TCPs necessarily should have included "further investigations" into the presence of TCPs, including cultural landscapes. *Pueblo of Sandia*, 50 F.3d at 860-61.[3] But BLM *never* conducted the necessary follow-up investigations (nor does BLM argue it did). Accordingly, BLM failed to "examine the relevant data and articulate a . . . rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Finally, Defendants harp on the fact that Plaintiffs allegedly failed to inform BLM of any San Pedro Valley TCP during the cultural resources inventory process. *See* Int.Br.29-30.; Gov.Br.27. This disingenuously ignores that BLM reneged on its promise to Plaintiffs. In a classic bait and switch, BLM assured Plaintiffs that it would conduct a cultural landscape survey *separate from* the cultural resources inventory. *See* Gov.Ex.32 at 15 (noting that BLM "agreed to do" a cultural landscape survey, which the Nation had repeatedly requested). Plaintiffs reasonably relied on BLM's representation. Indeed, as explained by Peter Steere, the Tohono O'odham Nation THPO, the Nation *repeatedly*

[3] Such investigations would culminate in the identification of the "tangible object[s] or feature[s]" that comprise the TCP that Intervenor alleges is lacking, Int.Br.26, as well as a determination of whether any identified TCP is eligible for listing on the NRHP.

engaged with BLM over *fourteen years* to explain "the need for and benefits from a cultural landscape study of the San Pedro Valley," and in response, "BLM advised the Nation not to concern itself with the fact that the [cultural resources inventory] did not include a cultural landscape study because, the agency said, this separate study would be completed before the [Historic Properties Treatment Plan]." Pl.Ex.46 ¶¶ 7-23, 26. The San Carlos Apache Tribe similarly reasonably relied on BLM's representation that a cultural landscape study would be completed, and thus did not raise the issue in comments on the inventory to address impacts on *archaeological* resources. Pl.Ex.41 ¶ 12. After BLM finalized the cultural resources inventory, however, BLM broke its promise to the Tribes and *never* conducted a separate cultural landscape survey. Pl.Ex.46 ¶ 23. BLM justified its refusal to conduct the promised study to the Nation by insisting that the "Nation was the only tribe to request it and 'no one has identified any 'cultural landscapes' anywhere along the route.'" *Id.* Not only is BLM's assertion belied by the bevy of evidence demonstrating that Plaintiffs *continuously raised* the issue of the San Pedro Valley cultural landscape with the agency since the inception of the Project, *see, e.g.*, *id.* ¶¶ 7-23; Pl.Ex.41 ¶ 9; Pl.Br.29, 33, it also cannot be squared with the government's "overriding duty . . . to deal fairly with Indians." *Cobell v. Norton*, 240 F.3d 1081, 1094 (D.C. Cir. 2001).[4]

B. Plaintiffs Challenge BLM's Section 106 Process, Which Culminated In Its Final Decision To Issue The LNTPs.

Defendants attempt to avoid scrutiny of BLM's NHPA compliance by conflating the Section 106 process with the NEPA process. The Court should reject this invitation.

[4] It is crystal clear that BLM committed to a cultural landscape survey prior to construction, but that it never conducted this survey. Indeed, as evidence of the parties' understanding during the relevant timeframe, Intervenor obtained a Certificate of Environmental Compatibility from the Arizona Corporation Commission in November 2015, which required as a condition of the certificate that "[a] Class III cultural resource survey *and cultural landscape study* ***shall*** *be conducted* to fully evaluate the impacts of the Project *on the cultural landscape* prior to the commencement of construction, pursuant to and as required by the PA." Pl.Ex.47 at 96, Condition 27 (emphases added).

Defendants insist that any challenge to the Project route is necessarily a challenge to the 2015 Record of Decision ("ROD"), which is time-barred. *See* Gov.Br.23; Int.Br.19-20. They are wrong. While an agency "may integrate" the ROD "into any other record it prepares" (e.g., the record prepared in connection with its NHPA obligations), a ROD, by definition, is the culmination of *the NEPA process* and, at bottom, is a NEPA decision that has no application outside NEPA's regulatory framework. 40 C.F.R. § 1505.2 (providing that a ROD "shall" set forth the agency's decision under NEPA); *see also Envtl. Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850 868 (9th Cir. 2022) ("The NEPA review process concludes" when an agency "issues an EIS and record of decision").[5]

Despite Defendants' attempts to muddy the waters, *see* Int.Br.23 (alleging that "Plaintiffs's [*sic*] sole objection to BLM's implementation of the PA is that the agency is not willing to re-open the 2015 ROD"), Plaintiffs do not challenge the 2015 ROD or BLM's NEPA process. *See* ECF No. 1-1 at 30-31 (Prayer for Relief). Instead, Plaintiffs challenge BLM's compliance with the *NHPA* and its failure to engage in reasonable, good faith efforts to identify TCPs and consult with Plaintiffs to resolve adverse effects to them. *Id.* While the laws are similar, "[e]ach mandates separate and distinct procedures, both of which must be complied with when historic buildings are affected." *Preserv. Coal. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982). Accordingly, the NHPA "process may be conducted separately, or . . . in conjunction with an environmental review under NEPA." *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 553 (8th Cir. 2003). Where, as here, the agency elects to use a "phased" approach to Section 106, the NHPA's implementing regulations permit an agency to "defer completion of the NHPA process until after the NEPA process has run its course," as long as any "NHPA issues [are] resolved by the time that the license is issued." *Id.* at 554; *see also* 54 U.S.C. § 306108 (requiring agencies to complete the Section 106 process "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any

[5] BLM's own guidance recognizes that the agency "has independent statutory obligations under NEPA and Section 106 of the NHPA." Pl.Ex.48 at 3.

license."). Thus, even *if* BLM satisfied its obligations under NEPA here—which is not at issue in this case—such compliance does *not* assure compliance with the NHPA.

Here, the 2015 ROD expressly adopts a phased approach to the Section 106 process and provides that the identification and evaluation of cultural resources "will be completed *after the ROD* and right-of-way permit are issued, *but prior to Project construction*." Pl.Ex.43 at 42 (emphases added); *see also* Pl.Ex.19 at 14 (providing in the 2015 ROD that "[c]ultural resources w[ill] continue to be considered during post-EIS phases of Project implementation, in accordance with an executed agreement."). The ROD further states that "[s]ite specific effects to historic properties"—i.e., the assessment and resolution of adverse effects through avoidance, minimization, and/or mitigation—"*will be assessed in compliance with the documentation required to satisfy the Project's Section 106 obligation under the PA*." Pl.Ex.43 at 42 (emphasis added) (citing 36 C.F.R. § 800.5). Hence, at the time BLM issued its 2015 ROD, the required steps of the Section 106 process—i.e., the identification of historic properties, the determination of whether the Project's effects on those properties would be "adverse," and the consideration of alternatives to resolve those adverse effects—had *not* yet been completed. The 2015 ROD thus concedes that BLM specifically designed *this* Section 106 process to conclude *after* the agency issued its final decision under NEPA. *Id.* Accordingly, while the 2015 ROD sets forth BLM's final decision under NEPA, it did not—and logically could not have—served as the agency's final decision under the NHPA regarding the identification of historic properties (such as TCPs) or the resolution of adverse effects to such properties.

In sum, Plaintiffs do not challenge the 2015 ROD nor did that NEPA decision serve as a final decision under the NHPA; rather, Plaintiffs correctly attack the LNTPs.

C. The LNTPs Are Final Agency Actions

Defendants contend that the LNTPs are unreviewable because they are "not discretionary [and] do not determine rights and obligations" and therefore are not final agency actions. This assertion cannot withstand scrutiny and runs counter to the "basic

presumption of judicial review [for] one suffering legal wrong because of agency action." *Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361, 370 (2018) (quotation omitted).

Agency action is "final" where two conditions are met: (1) the action marks the "consummation" of the agency's decisionmaking process; and (2) the action is one by which "rights or obligations have been determined," or from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Both conditions are satisfied here.

i. *The LNTPs Mark The Consummation Of BLM's NPHA Process*

The first prong of the *Bennett* test is satisfied where "the agency has rendered its last word on the matter." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.* ("*ONDA*"), 465 F.3d 977, 984 (9th Cir. 2006) (internal quotation marks omitted). Relevant here, the Ninth Circuit has recognized that an agency action that *implements* a prior decision may nevertheless also constitute a "final agency action" within the meaning of the APA. *Id.* at 984-86. In particular, the subsequent action may be sufficiently "final" where it allows the agency to "impose additional terms and conditions" in light of changed conditions, or "functions to start" or authorize a particular action by a permittee. *Id.* at 985.

Here, the LNTPs are BLM's "last word"—indeed, BLM's *only* determination under the NHPA—that construction activities in the San Pedro Valley will not adversely affect historic properties. *See* Pl.Ex.34 at 2 (finding that "there are no historic properties present in the transmission structure spans and roads subject to this LNTP"). The LNTPs also impose terms and conditions to ensure construction activities comply with federal laws, including by limiting the types and locations of such activities, and function as BLM's express authorization to proceed under the NHPA. *See* Pl.Ex.38 at 3 (allowing construction to proceed based on BLM's "determin[ation]" that Plaintiffs' objections raised during the administrative process "do[] not support pausing portions of the Project until the BLM evaluates and considers an amendment or addendum to the treatment plan to cover San Pedro Valley"). Accordingly, there can be no doubt that the LNTPs are "final" under the first *Bennett* prong. *See ONDA*, 465 F.3d at 985.

Intervenor suggests that the LNTPs are not "final" because they merely implement the decisions BLM made to issue the right-of-way grant in the 2015 and 2023 RODs. *See* Int.Br.20-21 (arguing that the LNTPs are "ministerial in nature"). This mischaracterizes the role of the LNTPs in BLM's management of historic resources. To be clear, contrary to Defendants' assertions, Plaintiffs are *not* arguing that the issuance of the LNTPs constituted a separate undertaking under the NHPA that triggered a new, distinct Section 106 process. *See id.* at 21; Gov.Br.30 n.11. Rather, Plaintiffs argue that by deciding to allow construction activities to proceed in the San Pedro Valley on the stated basis that such activities will not adversely affect historic properties, the LNTPs signify the culmination of BLM's decisionmaking process under the NHPA. Indeed, the statute and regulations *require* that "NHPA issues be resolved by the time that the [LNTPs] [are] issued." *Mid States Coal.*, 345 F.3d at 554; *see also* 54 U.S.C. § 306108 (requiring agencies to complete the Section 106 process "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.").[6]

While the ROD and right-of-way grant may obligate Intervenor "to comply with the [land use plan] and other applicable federal environmental requirements," the LNTP is the *only* instrument that instructs Intervenor on how to construct the Project without

[6] The cases cited by Intervenor are inapposite. *Moapa Band of Paiutes v. U.S. BLM*, Civ. No. 2:10-cv-02021, 2011 WL 4738120 (D. Nev. Oct. 6, 2011) involved a challenge to BLM's failure to prepare a new analysis *under NEPA* after it issued a right-of-way grant, but *prior to* BLM's issuance of a Notice to Proceed where "no major federal action was left to occur." *Id.* at *12-13. In *Battle Mountain Band v. U.S. BLM*, No. 3:16–CV–0268, 2016 WL 4497756 (D. Nev. Aug. 26, 2016), the plaintiffs declined to challenge BLM's compliance with Section 106 prior to the issuance of the Notice to Proceed, and actually "concede[d] that [] BLM complied with Section 106 for the project up to that point." *Id.* at *7. They raised the limited argument that the construction of the power line was a *new* undertaking under Section 106 distinct from the prior Section 106 process for the same project, which the court correctly rejected. *Id.* Here, in contrast, Plaintiffs challenge BLM's compliance with Section 106 since the Project's inception, which only recently culminated in the LNTPs. If anything, *Battle Mountain* exposes BLM's NHPA failures here—there, BLM investigated information from the tribe about potential TCPs, conducted surveys, and *twice* added new TCPs to the NRHP based on that information, both before *and after* "the project ROD and ROW had been issued." *Id.* at *3-4.

adversely affecting historic properties. *ONDA*, 465 F.3d at 985-86. BLM concedes as much, noting that LNTPs have not been issued for Project segments that an HPTP has not yet addressed. Gov.Br.30 n.10. Thus, far from being "discretionary," Int.Br.20, an LNTP can only be issued once the necessary terms and conditions of the right-of-way grant, including compliance with relevant federal statutes (such as the NHPA), are met. And, although Intervenor has already agreed generically to abide by federal law in accepting the terms of the right-of-way-grant, "that acknowledgment does not diminish the force of an [LNTP] as consummating [BLM's] decisionmaking process." *ONDA*, 465 F.3d at 986. "In sum, the issuance of an [LNTP] represents the consummation of [BLM's] determination regarding the extent, limitation, and other restrictions on [Intervenor's] right" to construct the Project "under the terms of the [right-of-way grant]." *Id.*

ii. *The LNTPs Have Legal Effect.*

Agency action is final and reviewable where it "impose[s] an obligation, den[ies] a right, or fix[es] some legal relationship as a consummation of the administrative process.'" *ONDA*, 465 F.3d at 986-87 (citing cases). Relevant here, the Ninth Circuit has held that "an agency action may be final if it has a "direct and immediate effect on the day-to-day business of the subject party." *Id.* at 987 (cleaned up). Courts must also consider "whether the [action] has the status of law or comparable legal force, and whether immediate compliance with its terms is expected." *Id.*

The second *Bennett* prong is easily satisfied here. The LNTPs impose limitations on the types and locations of construction activities permitted to ensure compliance with the NHPA's requirements. Indeed, the first LNTP expressly states as the explicit basis for BLM's decision that "there are no historic properties present in the" areas "subject to this LNTP." Pl.Ex.34 at 2. Because the 2015 ROD and 2016 right-of-way grant were issued *prior to* the identification of historic properties, the LNTPs are BLM's "principal means of imposing" the NHPA's requirements on the San Pedro Valley. *ONDA*, 465 F.3d at 989. "By restricting the rights of and conferring duties on [Intervenor] to bring" BLM's issuance of the right-of-way "into compliance with [the NHPA's] requirements," the

LNTPs are BLM's "definitive statement that fixes the legal relationship between BLM and [Intervenor]." *Id.* The LNTP thus carries legal consequences.

Intervenor suggests that an LNTP has no legal effect because it merely implements the decision made in the underlying ROD per the terms and conditions of that ROD and right-of-way grant. Int.Br.21. However, as the Ninth Circuit has recognized, "[s]imply because an [agency action's] authority is drawn from the [underlying] permit does not make the agency's decision reflected in th[at action] any less of a final agency action." *ONDA* 465 F.3d at 988. Indeed, the fact that BLM's suspension of the LNTPs resulted in the immediate stoppage of work under the right-of-way grant in the San Pedro Valley demonstrates the LNTPs' "legal force," as well as BLM's "expectation of "immediate compliance with its terms." *Id.* (citing cases).

Accordingly, the LNTPs are final agency action subject to judicial review. *Accord Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236 (3d Cir. 2011) ("We agree with the Service that the completion of the EIS *or issuance of an NTP would constitute final agency action*, but that does not mean that any determinations made by the Service prior to these actions are not final." (emphasis added)); *Duhring Res. Co. v. U.S. Forest Serv.*, No. 07-cv-0314E, 2009 WL 586429, at *5 (W.D. Penn. Mar. 6, 2009) (determining that a notice to proceed constitutes final agency action).

D. Plaintiffs' Claims Are Timely

Defendants repeatedly protest that Plaintiffs' objections are untimely because the route was set in 2015. However, Defendants again ignore the years of requests urging BLM to consider and investigate the Project's impacts on cultural landscapes (i.e., TCPs).

As an initial matter, the LNTPs are final agency actions subject to judicial review. *See supra* at 8-11. It is well-established that a challenge to a final agency action may "also include a challenge to the lawfulness" of the underlying decisionmaking process if that process "then matters, i.e., if the [action] plays a causal role with respect to the future, then-imminent, harm." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998). Here, BLM's actions to develop and implement the PA indisputably "play[] a

causal role" in BLM's decision to issue the LNTPs, which make the harm imminent from BLM's decision to proceed with construction before resolving glaring NHPA problems. Indeed, such actions serve as the factual predicates to BLM's decision to issue the LNTPs. Accordingly, contrary to BLM's assertion, *see* Gov.Br.23, Supreme Court precedent dictates that Plaintiffs *can* "challenge the lawfulness" of BLM's actions undertaken to comply with Section 106 without running afoul of the APA's statute of limitations. *Ohio Forestry*, 523 U.S. at 734.

Far from a "backdoor attack" on the 2015 ROD, *see* Gov.Br.23; Int.Br.23, or the 2023 ROD, *see* Gov.Br.23; Int.Br.22, such characterizations again improperly conflate the NEPA process with the NHPA process. Once again, Plaintiffs do not challenge BLM's NEPA process or the 2015 and 2023 RODs. Rather, Plaintiffs challenge the lawfulness of BLM's actions undertaken to comply with Section 106, which necessarily includes the underlying actions to develop and implement the PA. Logically and legally, Plaintiffs challenge appropriately reaches back to and includes BLM's underlying failure to adequately consider alternatives to avoid, minimize, or mitigate impacts to historic properties, including the realignment of the Project. *See Ohio Forestry*, 523 U.S. at 734.

Contrary to Defendants' assertions, it is beyond legitimate dispute that Plaintiffs diligently pursued their claims that BLM failed to comply with the NHPA. As explained, Pl.Br.7-23 Pl.Ex.41 ¶ 19, since BLM issued its scoping notice for the Project, Plaintiffs "maintained continued and consistent dialogue" with BLM throughout the Section 106 process. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 486, 862 (9th Cir. 2005). With these communications, Plaintiffs "made [their] position known" to BLM regarding the deficient consultation, and strongly encouraged the agency to reconsider the Project's route through the San Pedro Valley on multiple occasions, in order to avoid culturally significant landscapes. *Ocean Advocates*, 402 F.3d at 863. Plaintiffs were also reassured that "there wasn't a strict deadline for concerns" to be raised under the NHPA, and were promised "a continuous dialog." Pl.Ex.41 ¶ 18.

Moreover, as BLM's decisionmaking process proceeded, "no visible developments existed that would have motivated [Plaintiffs] to investigate any additional legal bases for challenging the [Project] or to prompt it to file suit." *Id.* at 863-64. Indeed, although BLM issued the right-of-way in 2016, construction did not begin in earnest until November 2023, when BLM issued the second LNTP. In the interim, BLM purported to be engaging in Section 106 consultation to identify historic properties and resolve adverse effects. As participants in this process, Plaintiffs had reasonably assumed such consultation would be carried out in good faith.

Finally, soon after the issuance of the first LNTP, which authorized Intervenor to begin construction of the Project, Plaintiffs formally protested BLM's decision under the NHPA. In response to the protest, BLM temporarily suspended the LNTP and invited Plaintiffs to discuss this matter, giving "[Plaintiffs] reason to believe that continuing to pursue administrative remedies with [BLM] might resolve the problem without having to litigate." *Ocean Advocates*, 402 F.3d at 863. Even after BLM issued the second LNTP, BLM's continued communications with Plaintiffs suggested that Plaintiffs may "resolve [their] [NHPA] concerns administratively in the first instance before spending the necessary time and expense to litigate." *Id.*

Under these circumstances, it cannot be said that Plaintiffs lacked diligence in pursuing their claims. Indeed, the Ninth Circuit has held that "delays of eight to ten years did not demonstrate lack of diligence when litigation commenced close in time to the final agency decision or authorization." *Ocean Advocates*, 402 F.3d at 863 (citations omitted)); *Preserv. Coal.*, 667 F.2d at 854–55. So too here, where Plaintiffs engaged in "continuous dialogue with [BLM] before it filed suit" and asserted its rights promptly after BLM issued its final decision to allow construction to proceed. *Id.* In short, BLM cannot demonstrate that Plaintiffs' claims are untimely.

II. PLAINTIFFS RAISE SERIOUS QUESTIONS AS TO BLM'S COMPLIANCE WITH THE NHPA

Plaintiffs explained that BLM failed to engage in good faith efforts to identify TCPs and consult with the Tribes. Unable to defend its NHPA compliance, BLM instead focuses on the alleged non-justiciability of Plaintiffs' challenges (which Plaintiffs thoroughly refute above), and the agency's purported compliance with the terms of the PA. But the PA and BLM's action pursuant to it do not excuse patent legal violations.

A. BLM Cannot Hide Behind The PA To Shield Its Actions From Review

Plaintiffs already explained why BLM cannot rely on the PA to satisfy its Section 106 obligations because BLM failed to carry out its duties under the agreement. Pl.Br.24-27. In particular, BLM delayed meaningful consultation regarding TCPs until after the Project route had been set, and refuses to consider measures to avoid impacts to TCPs, despite reassurances that the PA process "should be broad enough and flexible enough to allow for all manner of avoidance and mitigation." *Id.* at 26. BLM's responses lack merit.

First, Defendants insist that BLM complied with the PA by conducting a cultural resources inventory in 2018 and considering measures in HPTPs to avoid adverse effects. *See* Govt.Br.27; Int.Br.29-31. But that is beside the point. The Tribes repeatedly pointed out the need for a cultural landscape study to identify TCPs. *See supra* 1-6, 13. In light of BLM's assurances that a *separate* cultural landscape survey would be conducted, *see, e.g.*, Gov.Ex.32 at 15, the Tribes reasonably believed that there would be an opportunity for the Tribe's specialized input on TCPs at a later, different point in the NHPA process. *Accord* Pl.Ex.41 ¶ 12. Yet, this promised process never materialized. Thus, neither BLM's 2018 cultural resources inventory nor its HPTPs can cure the glaring deficiency in BLM's Section 106 process or its unexplained failure to identify TCPs through a cultural landscape study.

Second, Defendants argue that because the Tribes did not "raise the issue" of TCPs during the inventory process, Plaintiffs' challenges to the Project route selected in the 2015 ROD are time-barred. However, as explained, this assertion "conveniently ignores

that [BLM] had previously reassured consulting parties that 'the PA *is the vehicle by which the agency resolves the adverse effects* of the [P]roject,'" including through the consideration of "'*all manner of avoidance and mitigation*.'" Pl.Br.26.

Yet, Defendants continue to resist the inescapable conclusion that the PA obligates BLM to consider realignment of the Project. For example, BLM insists that the PA "does not 'clearly establish[] avoidance as the preferred method'" of resolving adverse effects. Govt.Br.31. But BLM then contradicts its assertion by acknowledging that the PA establishes a hierarchy of methods to resolve adverse effects—i.e., BLM may resort to minimization or mitigation of such effects only *after* it determines "avoidance is not possible." *Id.* Thus, while "avoidance" is not the only means of complying with the NHPA (and the PA), BLM must at least *consider* measures to avoid adverse effects to the culturally significant landscape of the San Pedro Valley. It is undisputed that BLM did not do so here. In fact, BLM refused to conduct a cultural landscape survey to identify TCPs, despite promising to do just that. BLM's failure to consider such important aspects of the problem renders its decision quintessentially arbitrary and capricious.[7]

Third, Defendants repeat their assertion that "the [PA] does not offer the parties re-routing as a resolution or avoidance measure" because "BLM does not have the ability to reconsider the 2015 approval of the transmission line, especially for a segment of the transmission line that is on non-federal land and therefore outside of the BLM's direct jurisdiction." Govt.Br.31-32. But the PA did not limit "avoidance, or even a re-route as contemplated through the Programmatic Agreement, . . . to minor adjustments to the

[7] For its part, Intervenor retorts that the quoted language "says the opposite of what [Plaintiffs] allege," pointing to another email that purportedly "explains that the PA is not the vehicle for larger reroutes." Int.Br.24. However, the cited email merely contains ASW's request to discuss "alignment modifications to the preferred alternative" at an upcoming meeting to develop the PA. It does not contain any response from BLM—let alone a response whereby BLM "rejected" an "effort to convert the PA into a collateral attack on the NEPA process," *id.*—nor does the email suggest that the listed topics were ASW's *only* concerns with the PA or the Project. Thus, Intervenor presents no evidence to support its revisionist reading of BLM's explicit written assurances to Plaintiffs.

design or construction location." *Id.* at 18-19. Rather, the PA's plain terms required BLM to prioritize the avoidance of "all types of historic properties," including through "realignment" of the Project. Pl.Ex.18 at 9. Thus, BLM's novel, self-serving reading of the PA's terms is a post hoc rationalization that must be rejected. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (rejecting agency's post hoc position because "[p]ermitting agencies to invoke belated justifications . . . can upset the orderly functioning of the process of review, . . . forcing both litigants and courts to chase a moving target"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (refusing to defer to "an agency's convenient litigating position").[8]

Fourth, Defendants argue that "it is simply not realistic to reroute the line outside the entire San Pedro Valley," given the advanced stage of BLM's review of the Project. Govt.Br.31. However, the practical realities created by BLM's own flagrant failures to comply with the Section 106 process cannot excuse BLM, legally or equitably, from complying with the avoidance obligations imposed by the NHPA and its regulations. *See Am. Wild Horse Pres. Campaign v. Jewell*, 847 F.3d 1174, 1188-89 (10th Cir. 2016) (holding that "these very practical realities do not provide BLM with the authority to construe [federal law] in a manner contrary to its plain and unambiguous terms").[9]

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[8] The Court must also reject BLM's disingenuous suggestion that the PA's discussion of new TCP discoveries during Project implementation applies here. Gov.Br.30-31. This is *not* a situation in which unknown landscapes or TCPs are identified for the first time during Project implementation; rather, the Tribes and ASW *for years* identified potential TCPs, requested a cultural landscape survey, and obtained BLM's commitment to do so. That BLM willfully ignored this information and failed to investigate does not transform these long-known TCPs into new discoveries during Project implementation.

[9] Defendants mischaracterize Plaintiffs' position. Plaintiffs do not argue that "avoidance of the San Pedro Valley is the only means of complying with the PA." Gov.Br.27. Instead, Plaintiffs advance the modest position that, consistent with the APA's basic requirements, the Section 106 process—and the PA itself—mandates that BLM at least *consider and analyze* measures to avoid cultural resources, including cultural landscapes, which BLM says it will not do here.

Finally, BLM argues that *Quechan Tribe* is inapposite because there, the Tribe "promptly challenged BLM's NHPA consultation and implementation of a PA" and "presented evidence that demonstrated they had contacted BLM early in the process" to notify the agency of the presence of cultural sites within the construction area. Gov.Br.24-25. BLM asserts that here, in contrast, the agency "engaged in good faith consultation with the tribes for years . . . and BLM has continued to engage in such efforts to identify historic properties and mitigate adverse effects in compliance with the PA." *Id.* However, as explained, Plaintiffs diligently engaged in the administrative process in an attempt to resolve their concerns without resort to litigation. *See supra* 13; Pl.Ex.46 ¶¶ 4-27. Once it became clear that BLM would not comply with the PA or statutory duties, Plaintiffs promptly filed suit to compel such compliance. *Quechan Tribe* is thus directly on point and supports Plaintiffs' argument that preliminary relief is necessary to ensure that BLM does not "glide over requirements imposed by Congressionally-approved statues and duly adopted regulations." *Quechan Tribe*, 755 F. Supp. 2d at 1119.[10]

In sum, Defendants have failed to rebut Plaintiffs' argument that BLM shirked its duties under the PA. Thus, the PA cannot justify BLM's patent violations of the NHPA's consultation procedures. Pl.Br.27 (citing *Quechan Tribe*, 755 F. Supp. 2d at 1110-11).

B. BLM Violated Section 106 of the NHPA

Stripped of its justiciability arguments and unable to hide behind the PA, BLM's failure to comply with the NHPA's requirements is laid bare. Because Plaintiffs have shown serious questions as to the merits, the Court should issue a preliminary injunction.

i. BLM Failed To Lawfully Identify TCPs

Plaintiffs explained that BLM failed to engage in reasonable, good faith efforts to identify TCPs by ignoring voluminous information submitted by Plaintiffs and other

[10] Intervenor vainly attempts to distinguish *Quechan Tribe* as "turning on the adequacy of government-to-government consultation rather than the particulars of a PA process." Int.Br.31. But that court expressly rejected the agency's attempt to rely on the PA. *See Quechan Tribe*, 755 F. Supp. 2d at 1110-11.

stakeholders regarding the Tribal significance of the San Pedro Valley TCP as a cultural landscape. In response, BLM insists that it was not aware of the identification of the San Pedro Valley as a potential cultural landscape—and therefore, a TCP eligible for inclusion on the NRHP—until March 2023. However, this assertion is undercut by the agency's failures to engage in reasonable, good faith efforts to identify historic properties or engage in meaningful consultation with the Tribes, in violation of the NHPA. Now, the agency attempts to rely on the legally inadequate process itself to justify what amounts to willful ignorance of the cultural significance of the San Pedro Valley. The court must reject this circular logic.

BLM's opposition doubles down on its post hoc assertion that Plaintiffs never "provided BLM with information about the San Pedro Valley as a TCP early in the process or before BLM approved the [2015] ROD." Gov.Br.25. In particular, BLM insists that it "did not receive any information suggesting the potential presence of a TCP within San Pedro Valley other than very vague notions of a potential cultural landscape." Pl.Ex.37 at 4 n.4. Not only is this an impermissible post hoc rationalization, but the record contains extensive, detailed communications from Tribes and others *dating back to 2009* that, at the very least, merited further investigation by BLM into the existence of TCPs in the Valley. *See, e.g.*, Pl.Ex.46 ¶ 4 (explaining that in 2009, the Tribes "insisted to the BLM that . . . the San Pedro Valley as a whole needed to be analyzed at the landscape-level because the entire San Pedro Valley was a rich cultural landscape worthy of the utmost protection under federal law"). Having been informed repeatedly of the "potential" existence of a "cultural landscape," BLM was obligated to engage in reasonable, good faith efforts to identify and evaluate its NRHP eligibility. *See Pueblo of Sandia*, 50 F.3d at 860-61; *Battle Mountain*, 2016 WL 4497756, at *3-4 (outlining BLM's TCP investigation duties).

BLM downplays this evidence by arguing that the comments "offered concerns about cultural sites without any suggestion that the entire San Pedro Valley represented a TCP." Gov.Br.25. But the record reveals a different story—stakeholders described the San

Pedro Valley as a "culturally significant landscape," i.e., a specific type of TCP, and as a result BLM agreed to conduct a cultural landscape survey to identify TCPs and determine their eligibility for the NRHP, which is the government's standard practice. *See supra* at 1-6. But BLM abruptly abandoned its commitment to conduct this survey, issuing the LNTPs before complying with this important aspect of the Section 106 process.

BLM fixates on the lack of the precise "size, location or nature" of the San Pedro Valley TCP to suggest that BLM engaged in reasonable, good faith efforts to identify TCPs and other cultural resources. But BLM does not explain why it did not "reasonably pursue the information necessary to evaluate the [identified property's] eligibility for inclusion in the [NRHP]." *Pueblo of Sandia*, 50 F.3d at 860. This failure is particularly egregious in view of BLM's prior promise that it *would* conduct a cultural landscape survey, which would have aided BLM in its identification of TCPs. Had BLM conducted this survey as Plaintiffs requested and the agency agreed, BLM would have the very information that BLM now asserts is necessary to delineate the boundaries of the San Pedro Valley TCP and make an NRHP eligibility determination as required by the NHPA.[11]

Once again, the burden to investigate information raising the prospect of a TCP, including a cultural landscape, rests squarely with BLM (not Tribes). Guidance from NPS (which manages the NRHP) explains the rigorous factual investigation and eligibility

[11] Identification of precise boundaries is not necessary to make eligibility determinations for the NRHP. *See* Pl.Ex.1 at 18 ("Defining the boundaries of a [TCP] can present considerable problems."). Indeed, in 2010, NPS determined that Nantucket Sound was eligible as a TCP due to its association with Native American exploration and settlement of Cape Cod and nearby islands. *See* Pl.Ex.49 at 5. Significantly, NPS explained that "[a]lthough the exact boundary is not precisely defined," Nantucket Sound itself was eligible "as an integral, contributing feature of a larger district." *Id.* NPS also noted that "the Sound is part of a larger, *culturally significant landscape* treasured by the Wampanoag tribes and inseparably associated with their history and traditional cultural practices and beliefs." *Id.* at 6. Because the Sound "and its surrounding areas" comprised a "traditional cultural landscape," the area was deemed to be a TCP eligible for the NRHP. *Id.* at 6-7.

determination process agencies must use when Tribes suggest the existence of a TCP. *See* Pl.Ex.1 at 5-16. Here, BLM repeatedly ignored detailed information from the Tribes and ASW specifically alerting BLM to a likely TCP in the San Pedro Valley and triggering BLM's duty to investigate these facts through established mechanisms. *See, e.g.*, Pl.Br.27-31; Pl.Ex.44 ¶¶ 15-19; Pl.Ex.46 ¶¶ 4-26. Although BLM knows that TCPs "may not necessarily come to light through the conduct of archeological, historical, or architectural surveys," BLM did not conduct *any* "interviews with knowledgeable users of the areas, or through other forms of ethnographic research" that is often the only way to ascertain "[t]he existence and significance of locations of [TCPs]." Pl.Ex.1 at 2. In this way, BLM turned the agency's NHPA obligations on their head by unreasonably disregarding information that obviously warranted investigation.

Finally, BLM suggests that "non-tribal group[s]" like ASW cannot "identify a tribe's own TCP." Gov.Br.28. However, that post hoc assertion is internally inconsistent with BLM's earlier acknowledgement of ASW's expertise in identifying Tribally-significant resources, and contrary to the plain language of the NHPA's regulations and the policies underlying Section 106. *See supra* at 3-4. As such, courts have faulted agencies for failing to investigate information regarding TCPs and cultural landscapes provided by *non-tribal* individuals possessing special expertise. *See Pueblo of Sandia*, 50 F.3d at 860-62 (finding that comments from "a highly qualified anthropologist who is an expert on the Sandia Pueblo" "clearly suggest that there is a sufficient likelihood that the canyon contains [TCPs] to warrant further investigation," and "thus hold[ing] that [the agency] did not make a reasonable effort to identify historic properties").

ii. *BLM Failed To Engage In Lawful Consultation*

Plaintiffs explained that BLM's dismissive treatment of the Tribes' concerns regarding TCPs in the San Pedro Valley fell far short of the standards set forth in the NHPA's regulations, including by failing to provide the Tribes with a reasonable opportunity to advise on the identification and evaluation of historic properties; depriving the Tribes of "any useful role or meaningful voice in the development and review of the

Project and alternatives"; and belatedly initiating the consultation process such that the consideration of alternatives to avoid (let alone minimize or mitigate) adverse effects on historic properties was effectively precluded. Pl.Br.32-36.

In response, BLM primarily restates its assertions, thoroughly refuted above, that it complied with the terms of the PA and that Plaintiffs' repeated requests to conduct a cultural landscape survey to consider the Project's effects on "culturally significant landscapes" were insufficient to alert BLM to the potential presence of TCPs. Gov.Br.25, 28. But BLM did not comply with the PA's terms, nor can BLM's self-serving characterizations of Plaintiffs' repeated calls for further investigation into the presence of TCPs, including cultural landscapes, justify the agency's failure to meaningfully engage with the Tribes early in the Project planning process.

The dispositive fact remains that although consultation with Tribes should begin *before* the development of any preferred route to ensure the meaningful consideration of alternatives to resolve adverse effects to historic properties, BLM did not begin the Section 106 process until *after* the issuance of the 2012 Draft EIS and the development of the preferred alternative. Significantly, the Advisory Council on Historic Preservation ("ACHP") raised this exact concern to BLM as early as 2012, explaining that BLM's decision to select the "preferred alternative for the undertaking before initiating Section 106 consultation . . . limit[ed] the information used to make that decision to only that gathered through the NEPA process." Gov.Ex.6 at 3. The ACHP noted that "[c]onsulting parties . . . are now requesting refinements in the preferred alternative to ensure that identified historic properties along that route are taken into account," and "urge[d] the BLM to work with these parties to ensure that their concerns are addressed and that, wherever possible, *the preferred route be adjusted to avoid adverse effects*." *Id.* (emphasis added). Yet, far from remedying this deficiency through the Section 106 process, the record shows (and BLM readily admits) that the consideration of alternative routes to avoid TCPs never occurred. The NHPA does not countenance such a result.

For its part, Intervenor insists that "BLM here has gone far beyond what the courts found sufficient to satisfy NHPA consultation obligations." Int.Br.32. In particular, it argues that BLM attempted to engage with the Tribes, including by providing the 2018 cultural resources inventory, but the Tribes failed to respond.[12] However, this overlooks that BLM now claims that consideration of TCP avoidance alternatives was too late even in 2018 (because any such consideration ended with the 2015 ROD). And it also conveniently ignores that BLM expressly committed to the Tribes that it would conduct a separate cultural landscape survey specifically for the purpose of collecting information and identifying potential cultural landscapes or other TCPs in order to make NRHP eligibility determinations. *See supra* at 5-6. Based upon this assurance, the Tribes reasonably understood that the cultural resources inventory was not the appropriate forum to communicate their concerns regarding TCPs, including cultural landscapes.[13]

Contrary to Intervenor's assertions, *Quechan Tribe* is directly on point. Intervenor argues that *Quechan Tribe* is inapposite "in light of BLM's significant outreach efforts to the Tribes over 14 years." Int.Br.32. However, as the *Quechan Tribe* court noted, "[t]he number of letters, reports, meetings, etc. . . . doesn't in itself show the NHPA-required consultation occurred." 755 F. Supp. 2d at 1118. To the contrary, many of these meetings amounted to informational meetings about the Project. *See, e.g.*, Gov.Ex.12 at 2; Gov.Ex.14 at 2-3; Gov.Ex.16 at 2; Gov.Ex.17 at 2; Gov.Ex.21 at 2. Additionally, many of those meetings did not constitute "meaningful" consultation, much less true government-

[12] It must be noted that the Tribes have extremely limited resources with which to address the hundreds of requests for consultation that come in each year. *See* Pl.Ex.41 ¶ 15; Pl.Ex.46 ¶ 3. In contrast, as a federal agency, BLM has vastly greater personnel and other resources to dedicate to individual projects.

[13] Intervenor cannot expediently change its view of what Section 106 or the PA requires, after making different representations to obtain a certificate from the Arizona Corporation Commission in 2015, which mandates that "[a] Class III cultural resource survey *and cultural landscape study* ***shall*** *be conducted* to fully evaluate the impacts of the Project *on the cultural landscape* prior to the commencement of construction, pursuant to and as required by the PA." Pl.Ex.47 at 96, Condition 27.

to-government consultation, because they were not attended by the relevant Tribal governing bodies. *See* Pl.Ex.41 ¶ 15; E.O. 13175 (recognizing that for consultation to be "meaningful," it must be conducted both early in the decisionmaking process and with the "elected or duly appointed officials of Indian tribal governments").

In later meetings, the Tribes continued to request that a cultural landscape study be completed in connection with the Project. *See, e.g.*, Gov.Ex.26 at 3; Gov.Ex.32 at 15. In response to comments on the 2018 cultural resources inventory, BLM acknowledged that the agency "agreed to do it." *Id.* at 111. Yet, this all-important study for identifying cultural landscapes and other TCPs never materialized. *See* Pl.Ex.24 at 5 (acknowledging in 2023 Final EIS that an inventory for TCPs had not been conducted). "[B]ecause of the lack of information, it was impossible for the Tribe to have been consulted meaningful[ly] as required in applicable regulations." *Quechan Tribe*, 755 F. Supp. 2d at 1118-19. Hence, as in *Quechan Tribe*, the documentary evidence shows that "BLM's invitation to 'consult,' then, amounted to little more than a general request for the tribe to gather its own information about all sites within the area." *Id.* at 1118.

As explained, "contact" is not synonymous with "consultation." *Quechan Tribe*, 755 F. Supp. 2d at 1118. Neither Intervenor nor BLM can escape the fact that since 2009, Plaintiffs and other stakeholders have repeatedly informed BLM that the San Pedro Valley comprises a "culturally significant landscape" that merits further investigation in the Section 106 process. Nor can Defendants deny that Plaintiffs repeatedly requested that a cultural landscape survey be conducted to understand the full impacts of the Project on historic and cultural resources. Such comments were more than sufficient to alert BLM to the fact that further investigation of potential TCPs within the Valley was necessary. *See, e.g.*, Pl.Ex.43 at 25 (defining "cultural landscape" to "include both [TCPs] and archaeological sites"). Yet, despite leading the Tribes to believe that a cultural landscape survey would occur while meaningful Tribal input and effect avoidance opportunities still existed, BLM never followed up on information suggesting the presence of cultural landscapes and other TCPs; it never conducted the promised cultural

landscape survey; and it now asks this Court to fault the Tribes for BLM's flagrant mishandling of its NHPA obligations.

In sum, Plaintiffs offered extensive documentary evidence demonstrating BLM's failure to engage in reasonable, good faith efforts to identify TCPs and consult with Tribes regarding the Project's adverse effects to TCPs. Defendants' attempts to justify BLM's failures fall flat and fail to recognize the "fiduciary duty" owed "to all Indian tribes." *Quechan Tribe*, 755 F. Supp. 2d at 1110. At the very least, the identified deficiencies in BLM's process raise serious questions as to whether the agency complied with the reasonable and good faith efforts required by the NHPA and its regulations. Accordingly, Plaintiffs have demonstrated a likelihood of success on the merits.

III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION

Plaintiffs explained that in the absence of preliminary relief to maintain the status quo, they would suffer irreparable harm because "the desecration and destruction of historic lands that play a significant part in the history, culture, and religion of the Tribes is, by its very nature, irreparable." Pl.Br.36. Defendants' responses lack merit.

First, BLM argues that Plaintiffs cannot suffer irreparable harm because BLM's NHPA process complied with the PA and the requirements of Section 106. Gov.Br.33-34. BLM's argument thus presumes the validity of the agency's Section 106 process, and improperly collapses the distinct inquiry into the likelihood of irreparable harm with the separate inquiry into likelihood of success (or serious questions) on the merits, which Plaintiffs already demonstrated above to tip in Plaintiffs' favor. Because BLM failed to engage in the reasonable and good faith efforts required by the NHPA, any argument that the Section 106 process will protect Plaintiffs from irreparable harm must be rejected.

Second, Defendants assert that Plaintiffs' claims of imminent irreparable harm are belied by their delays in notifying BLM of potential TCPs in the Valley and in filing suit. Gov.Br.35-36. However, as extensively explained, Plaintiffs repeatedly notified BLM for more than a decade of a culturally significant landscape in the San Pedro Valley;

extracted a commitment from BLM to conduct a cultural landscape survey to identify TCPs and determine NRHP eligibility of those TCPs prior to construction; and, once BLM broke its promise and issued the LNTPs allowing construction without first conducting the necessary survey to identify TCPs and determine their NRHP eligibility, Plaintiffs formally protested BLM's decision under the NHPA and then promptly filed suit only months later once it became clear in the administrative process that BLM refused to rectify these legal violations. *See supra* at 12-14. While there may be scenarios where parties delayed raising their concerns or filing suit, this is *not* that case.[14]

Third, BLM insists that "Plaintiffs' claimed injuries are too vague and speculative to support a finding that irreparable harm is likely to occur." Gov.Br.33. Specifically, it argues that "Plaintiffs' conclusory statements that the mitigation measures are insufficient do not meet Plaintiffs' burden" to show irreparable harm. *Id.* at 36. BLM misses the forest for the trees. For example, BLM insists that the harms to Plaintiffs are not irreparable because the PA and HPTP provide for the mitigation of adverse effects, including plans to address the discovery and treatment of human remains and to "avoid impacts to [sacred] saguaros *where possible* and to salvage them otherwise." *Id.* (emphasis added). BLM thus focuses on specific natural and archaeological sites. But the harms to Plaintiffs are to the integrity of the *culturally significant landscape* of the San Pedro Valley—which may be eligible for listing under the NRHP as a TCP—and those harms have never been addressed by any mitigation plan in either the PA or the HPTP, largely because BLM never conducted the long-promised cultural landscape survey.

Likewise, Intervenor argues that Plaintiffs' asserted harms "rest[] on bare, conclusory allegations." Int.Br.34. However, this ignores the detailed allegations from

[14] Not only do Defendants falsely create "delay" where none exists, but they overstate the import of delay on injunctive relief. The Ninth Circuit has held that "[d]elay by itself is *not a determinative factor* in whether the grant of interim relief is just and proper"; "although a failure to seek speedy relief can imply the lack of a need for such relief, such tardiness *is not particularly probative in the context of ongoing, worsening injuries*." *Cuviello v. Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019) (emphases added).

two Tribal members that ground disturbing construction activities for a massive, intrusive transmission line less than a mile from the San Pedro River and within sight of identified archaeological sites will cause deep spiritual, cultural, and aesthetic wounds. *See, e.g.*, Pl.Ex.9 ¶ 22. For instance, contrary to Intervenor's (and BLM's) assertions that Plaintiffs' allegations of irreparable harm are speculative, Mr. Burrell, an enrolled member of the San Xavier District of the Tohono O'odham Nation, specifically alleges that "the impact of the visual and physical imposition of a massive transmission line on O'odham collective experiences of our sacred sites in the area" will result in "spiritual harms." Pl.Ex.4 ¶ 24. Vernelda Grant, the THPO for the San Carlos Apache Tribe, likewise explains that "[a]rchaeology sites represent *one* of many elements of the cultural landscape that make up the uniqueness of the San Pedro Valley," and that the Tribe has always been deeply concerned about the Project's impacts to the Valley's cultural landscape, which is a part of the Tribe's ancestral homelands. Pl.Ex.41 ¶ 10. Indeed, "the desecration and destruction of the San Pedro Valley and surrounding areas will have a direct negative effect on the emotional, physical, mental and spiritual well-being of [Ms. Grant], the Apache, and other Indigenous communities." *Id.* ¶ 21. It is axiomatic that such harms are, by their very nature, irreparable. *See Friends of Astor, Inc. v. City of Reading*, at *12 & n.35, No. 98-CV-4429, 1998 WL 684374 (E.D. Penn. Sept. 17, 1998) (noting that destruction of alleged historical property would "clearly ... result in irreparable harm"); *see also All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) ("The Supreme Court has instructed us that environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." (internal punctuation omitted)).

Finally, Intervenor argues that Plaintiffs cannot be harmed because the LNTPs authorize construction where no historic properties have been identified. Int.Br.36. This, however, puts the cart before the horse—Section 106 required BLM to conduct a cultural landscape survey to follow up on credible information of potential cultural landscapes and other TCPs (which it agreed to do), but BLM never satisfied this legal duty. It would

be genuinely anomalous if BLM's failure to comply with a law that is intended to protect Tribal interests and preserve cultural resources of significance to Tribes could be used *against Tribes* to thwart their ability to show irreparable harm where, as here, Tribes' longstanding, important cultural landscapes are being bulldozed as a result of the federal government's serious legal missteps and the breaching of its fiduciary duty to the Tribes.

Accordingly, Plaintiffs have shown that irreparable harm to their interests in preserving and protecting the cultural landscape of the San Pedro Valley is not only likely, but virtually certain in the absence of a preliminary injunction.

IV. THE EQUITIES AND THE PUBLIC INTEREST FAVOR AN INJUNCTION TO MAINTAIN THE STATUS QUO

Plaintiffs explained that the balance of the equities favored Plaintiffs in light of the permanent harms to important cultural resources, and further that the significant public interest in historic preservation weighed in favor of preliminary relief. Pl.Br.38-40.

Intervenor asserts that "[t]he economic harm a TRO or PI would cause to SunZia weighs in the balance of equities against any injunctive relief." Int.Br.36. However, such temporary financial impacts to the Project proponent are not sufficient to trump injunctive relief, especially where the relief sought is temporary in nature and the significant cultural landscapes cannot be restored once destroyed. *See South Fork Band Council v. U.S. Dep't of the Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (finding an argument "cast principally in economic terms of employment loss" insufficient to tip balance of hardships away from plaintiff). Indeed, if the Project proceeds once BLM complies with its obligations under the NHPA, any harms to Intervenor will be mitigated.

Against the temporary (and speculative) harms asserted by Intervenor, the Court must weigh the indisputably permanent harms to cultural resources of great significance to both the Tribes and indeed, the entire United States. *See* Pl.Ex.3 at 1 (explaining that the San Pedro Valley is one of the most intact cultural landscapes in the entire Southwest). Under these circumstances, the balance of equities sharply tips toward Plaintiffs, because the harms they face are permanent, while Intervenor merely faces

temporary delay. *See League of Wilderness Defs./Blue Mountains Biodiversity Proj. v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) (citing cases).

Finally, Defendants' fail to show that an injunction would subvert the public interest. Although Defendants cite various Executive Orders prioritizing the development of renewable energy infrastructure, government policies likewise demand that federal agencies engage in *meaningful* consultation with Tribes and *avoid* adversely affecting culturally significant sites. *See, e.g.*, E.O. 13007 (directing agencies to "avoid adversely affecting the physical integrity of [] sacred sites"); E.O. 13175 (directing agencies to engage in meaningful government-to-government consultation with Tribes); Joint Secretarial Order 3403 (emphasizing the need to "incorporat[e] Tribal expertise and Indigenous knowledge into Federal land and resources management," including by "engag[ing] affected Indian Tribes in meaningful consultation at the earliest phases of planning and decision-making"). Nowhere do Defendants point to any Executive Order or other policy that relegates Tribal sovereignty and cultural resource preservation as subsidiary to renewable energy; if anything, the government's overriding fiduciary duty to Tribes dictates that fair dealing with Tribes is paramount to any single energy or other project pursued by corporate interests. Indeed, there is a significant public interest, which is given force by the NHPA and its implementing regulations, in good faith consultation with Indian tribes where federal actions are undertaken that implicate their sovereignty and cultural patrimony. *See Quechan Tribe*, 755 F. Supp. 2d at 1122 ("[I]n enacting NHPA Congress has adjudged the preservation of historic properties and the rights of Indian tribes to consultation to be in the public interest.").

The cases cited by Intervenor to support its proposition that the public interest prong weighs against injunctive relief in cases challenging renewable energy projects are distinguishable on the basis that the plaintiffs in each case failed to establish a likelihood of success on the merits of their claims and/or irreparable harm. *See Backcountry Against Dumps v. Abbott*, No. 10-cv-1222, 2011 WL 3567963, (S.D. Cal. Aug. 12, 2011) (finding the public interest weighed against injunction where plaintiffs failed to show that the

agency failed to adequately consider the effects of the action); *Protect Our Cmtys. Found. v. U.S. Dep't of Agric.*, 845 F. Supp. 2d 1102, 1118 (S.D. Cal. 2012) (explaining that plaintiff failed to show injunction was in the public interest where the EIS at issue was adequate); *W. Watersheds Proj. v. BLM*, 774 F. Supp. 2d 1089, 1102-04 (D. Nev. 2011) (acknowledging the public's "strong interest in preserving the environment and protecting [endangered] species," but finding that interest outweighed where plaintiff failed to show a likelihood of success on the merits or that irreparable harm would result in the absence of injuction); *W. Watersheds Proj. v. BLM*, No. 3:11–cv–00053, 2011 WL 1630789, at *6 (D. Nev. Apr 28, 2011) (denying motion for stay pending appeal for the same reasons as 774 F. Supp. 2d at 1104), *aff'd* 443 Fed. App'x 278 (9th Cir. Jul 15, 2011).[15]

In contrast, here, Plaintiffs have established both a likelihood of success (or at least serious questions) on the merits and that they will suffer irreparable harm in the absence of preliminary relief. Under these circumstances—and particularly where any delay in the Project will be merely temporary—the "well-established public interest in preserving nature and avoiding irreparable environmental injury" outweighs the countervailing public interest in a single renewable energy project that can still be built once BLM satisfies the strictures of the NHPA. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (cleaned up). Under such circumstances, courts have not hesitated to issue preliminary relief, even in cases challenging renewable energy projects. *See Quechan Tribe*, 755 F. Supp. 2d at 1106-07 (issuing preliminary injunction in challenge to solar energy project).

CONCLUSION

For these reasons, the Court should enter a preliminary injunction—and a TRO while the Court considers whether to impose a preliminary injunction—to preserve the status quo pending the completion of this litigation.

Dated: February 23, 2024

[15] Contrary to Intervenor's representation, *Backcountry Against Dumps v. Abbott*, No. 10–cv–1222, 2011 WL 3567963, (S.D. Cal. Aug. 12, 2011), is a NEPA case. *Id.* at *3.

Respectfully submitted,

/s/Elizabeth L. Lewis
Elizabeth L. Lewis
DC Bar No. 229702
lizzie@eubankslegal.com

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

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

Attorneys for Plaintiffs Center for Biological Diversity and Archaeology Southwest

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

Attorney for the Tohono O'odham Nation

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

Attorney for the San Carlos Apache Tribe