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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
TUCSON DIVISION

Tohono O'odham Nation, *et al.*,

Plaintiffs,

v.

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

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

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

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

First, Plaintiffs have not shown substantial questions going to the merits of their claims, let alone a likelihood of success. At bottom, Plaintiffs challenge BLM's 2015 decision to grant a ROW for the SunZia transmission line that includes a segment crossing non-federal lands in the San Pedro Valley and seek to enjoin construction on that

part of the line. But that claim necessarily challenges BLM's 2015 decision and is time-barred. Moreover, Plaintiffs assert that BLM failed to make a reasonable and good faith effort to identify the San Pedro Valley as a Traditional Cultural Property ("TCP"), thereby violating Section 106 of the National Historic Preservation Act ("NHPA"). To the contrary, the record shows that BLM engaged in lengthy, good faith consultation efforts with the Tribes and other consulting parties regarding the San Pedro Valley before entering into a Programmatic Agreement ("PA") prior to BLM's approval of the ROW in 2015. *See* Defs.' Ex. 1 at 4, 41-42 [hereinafter 2015 ROD].[1] In any event, under the NHPA and applicable regulations, the PA now governs Section 106 compliance. *See* 54 U.S.C. § 306114, 36 C.F.R. § 800.14(b). Plaintiffs have not seriously contended that BLM is acting unreasonably under the terms of the PA.

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

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[1] Defendants' Exhibit 1 includes only those portions of the 2015 ROD that are cited. The entire 2015 decision is available electronically on BLM's project website at https://eplanning.blm.gov/public_projects/2013584/200486954/20040619/250046814/SunZia%20ROD%20with%20Appendices%20(January%202015).pdf.

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

II. REGULATORY AND FACTUAL BACKGROUND

A. Section 106 Process

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

The Advisory Council on Historic Preservation ("ACHP") has promulgated regulations under Section 106 to govern federal agency compliance with the NHPA. *See* 36 C.F.R. Part 800. Section 106 requires federal agencies to consider the potential effects of federal agency "undertakings" on historic properties, which includes properties of cultural or religious significance to Indian tribes. 16 U.S.C. § 470f; 54 U.S.C. §§ 306108, 302706(b); *see also United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th Cir. 1993). An "undertaking" is defined broadly to include any "project, activity, or program" that requires a federal permit. 54 U.S.C. § 300320. Section 106 requires that whenever a federal agency has "direct or indirect jurisdiction" over a project or program that could affect historic properties, the federal agency must study ways to avoid or mitigate any

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adverse impacts to those properties. *Tyler v. Cuomo*, 236 F.3d 1124, 1128 (9th Cir. 2000) (citing 16 U.S.C. § 470f). A "historic property" is defined as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places," which "include[s] properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria." 36 C.F.R. § 800.16(*l*)(1).[2]

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

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

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

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

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

The ACHP's regulations specifically provide agencies with flexibility to meet the requirements of Section 106 through alternate procedures. For example, the regulations allow agencies to enter into a PA "to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple

undertakings." *See* 36 C.F.R. § 800.14(b); *id.* § 800.14(b)(1) (listing example scenarios). Where executed, a PA acknowledges circumstances in which an agency must phase the steps in the process, e.g., a phased process for identification and evaluation of historic properties "where alternatives under consideration consist of corridors or large land areas," until after an agency has approved an undertaking. *See id.* §§ 800.4(b)(2), 800.5(a)(3), 800.14(b)(3); *see also* 65 Fed. Reg. 77,698, 77,705-06 (Dec. 12, 2000) (ACHP acknowledged the reality of large projects). When signed by the ACHP and applicable SHPO, "[c]ompliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated . . . ." 36 C.F.R. § 800.14(b)(2)(iii); *see Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 554 (8th Cir. 2003). Under 36 C.F.R. § 800.14(f), when an agency uses a PA, the agency must ensure it includes "appropriate government-to-government consultation with affected Indian tribes."

B. The Project

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

The Project consists of two 500-kilovolt transmission lines and related facilities in a 500-mile corridor located on federal, state, and private lands between central New

Mexico and central Arizona. 2015 ROD at v, 1. The majority of the ROW crossing federal lands are in New Mexico, in Arizona just west of the New Mexico border, or southeast of Case Grande. None of the lands within the San Pedro Valley are BLM-managed public lands. The Project's objectives are "to increase available transfer capability in an electrical grid that is currently insufficient to support the development, access, and transport of additional energy generating resources, including renewable energy, in New Mexico and Arizona." Defs.' Ex. 2 [hereinafter 2013 FEIS] at 1-8.[3]

C. The NEPA Process

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

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

D. Consultation with Plaintiff Tribes and the Section 106 Process

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

Similarly, BLM initiated the NHPA Section 106 process shortly after the publication of the Notice of Intent in May 2009 and coordinated the Section 106 process with the NEPA process. Childress Decl. ¶ 10. The Section 106 consultation process is intended to assess the effects of an undertaking on historic properties, which may include archaeological, historical, or traditional cultural resources. 2015 ROD at 41. BLM identified consulting parties for the Project, which included tribes, State Historic Preservation Offices in Arizona and New Mexico, the Advisory Council on Historic Preservation, and other agencies and organizations. The Tohono O'odham Nation, the San Carlos Apache Tribe, and Archeology Southwest ("ASW") all actively participated in general Project consultations and as consulting parties for Section 106. *Id.* at 43; Childress Decl. ¶¶ 12-23. The San Carlos Apache Tribe also made specific note about the

San Pedro Valley in October 2011 and the BLM considered this issue then. Childress Decl. ¶ 14.

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

Contrary to the premise of Plaintiffs' motion—and despite their participation in the NHPA process and multiple opportunities to do so, at no point during the process did Plaintiffs identify the San Pedro Valley as a TCP. Plaintiffs' comments bear this out. The San Carlos Apache Tribe provided comment on the Draft EIS, in which it opposed the selected route because of the potential impacts on culturally sensitive and sacred areas to the tribe and their members and urged the BLM to select a route that went through Tucson. 2013 FEIS at J-153. The comments did not, however, indicate that the entire San Pedro Valley should be identified as an TCP for Section 106 purposes and did not provide information that would justify such a finding. BLM explained in response that its preferred route would cross the San Pedro River at the same location as the tribe's

preferred route, within an existing transmission line corridor, and that construction along that route would avoid the majority of known cultural resource sites located along the San Pedro River. *Id.*; *see* Childress Decl. ¶ 19, Att. 17. ASW commented on the Draft EIS and stated that "[w]e appreciate that the information provided to the BLM consultants by [ASW] concerning priority areas in Pinal County and the San Pedro River basis were referenced in the DEIS. . . ." 2013 FEIS at J-534-38. It did not identify the entire San Pedro Valley as a TCP. The Tohono O'odham Nation did not submit comments on the draft EIS, nor did it indicate to BLM that the San Pedro Valley as a whole should be considered a TCP. *See* Childress Decl. ¶ 21.

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

BLM thus entered into a PA to outline the required procedures for ensuring the identification of historic properties, steps to consider whether the undertaking will adversely affect the identified historic properties, and methods to resolve adverse effects. *Id.* at 42. The PA provided that the identification and evaluation process would take place after the ROD and ROW permit were issued but before construction. *Id.* "The PA also establishes a process to address historic properties discovered or unanticipated effects that occur to historic properties during construction or operation." *Id.* The PA was signed by, *inter alia*, BLM, SunZia, the Arizona and New Mexico State Historic Preservation Officers, and the ACHP. Tohono O'odham Nation declined to sign the PA despite being invited to do so. The San Carlos Apache Tribe also declined to sign the PA; ASW signed

as a concurring party. PA at A1-35. The Section 106 consultation was completed with the execution of the PA on December 17, 2014. 2015 ROD at 7.

E. The 2015 ROD and issuance of the ROW grant

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

F. The Amended ROW Grant

In 2020, SunZia submitted an application to amend the ROW grant. *See* 86 Fed. Reg. 30,066 (June 4, 2021). Specifically, SunZia sought to amend four components of the existing ROW grant: (1) route modifications involving BLM-administered land in New Mexico; (2) adding a ROW for access roads and temporary work areas outside the granted ROW in Arizona; (3) rerouting a segment of the Project in New Mexico; and (4) adding a substation to convert power from DC to AC. *Id.*; *see also* Decl. of Melanie Barnes ("Barnes Decl.") ¶ 10.[5] Of these, the San Pedro Valley (which is in Arizona) is

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

[5] When the parties brief the merits of the case, the Court's review will be based on 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

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

BLM prepared an EIS to address the environmental impacts of the proposed changes. Importantly, the EIS did "not revisit or reanalyze the previously analyzed and approved route from 2015 unless conditions have changed that warrant new analysis." Defs.' Ex. 4 [hereinafter 2023 EIS] at ES-2.[6] BLM prepared a draft EIS, received public comments on the draft, then published a Final EIS that considered and incorporated substantive comments in February 2023. *See* 2023 EIS at 1-6. The EIS also included a Proposed Resource Management Plan ("RMP") Amendment for the Project in New Mexico and Arizona. *Id.* BLM, ACHP, the SHPOs, and other Consulting Parties negotiated and executed on January 5, 2023, an amendment to the 2014 PA to add two new federal agencies and to reflect only those proposed amendments to the existing ROW. Childress Decl. ¶¶38-39. Otherwise, the stipulations negotiated in the 2014 PA remained the same.

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

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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.

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

G. Arizona Historical Properties Treatment Plan Preparation

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

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

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

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

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

H. Efforts to Consult with Tribes in 2023

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

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

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

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

The letter also explained that the NEPA process for the ROW amendment was for limited purposes, and that the re-routing being considered was intended to find a different

route in New Mexico to avoid problems with locating the route near the White Sands Missile Range. *Id.* at 1. BLM noted that the only part of the new NEPA process that affected the San Pedro Valley "involved a total of 25 miles of new access roads and 230 acres of additional ancillary facilities such as staging areas and pulling and tensioning sites," and that these areas "were surveyed for cultural resources and no historic properties were found." *Id.* at 1-2. It also stated that in the San Pedro Valley, three sites of the Sobaipuri culture were identified and will be avoided by construction. *Id.* at 2.

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

On August 4, 2023, the Tribes and Archaeology Southwest notified BLM that they were invoking the dispute resolution procedure in the PA. Barnes Decl., Att. 13. Once again, BLM attempted to contact both Tribes without response. Barnes Decl. ¶ 18, Att. 14 Despite the Tribes' lack of response to BLM's attempts to consult, BLM decided to withhold its approval of a limited notice to proceed ("LNTP")[7] for construction in the San

[7] Because the 2015 ROD did not authorize construction of any of the Project's facilities or permitother ground-disturbing activities in connection with the Project on federal lands, SunZia could not begin construction until it, among other things, received a written LNTP from BLM. 2015 ROD at viii. The written LNTP consist of separate work authorizations that must be approved by BLM, and it is not granted

Pedro Valley for one month in order to allow more time for the Tribes to respond. Barnes Decl. ¶ 18-19. On August 31, 2023, BLM issued a LNTP for portions of the ROW on state and private lands in Arizona outside the San Pedro Valley, but continued to delay issuing the San Pedro Valley LNTP, despite impacts to SunZia's construction schedule. Barnes Decl. ¶ 19, Att. 17. Also on August 31, BLM Director responded to the August 4 letter from the disputing parties proposing that the first step to resolving the dispute was to consult with the disputing parties, as set forth in the PA. *Id.* ¶ 20. BLM again stated to the Tribes that the PA did not provide for re-routing of the line that was approved in 2015.

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

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

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until all other land use authorizations on non-BLM land have been obtained. *Id.*

On October 31, 2023, Tohono O'odham Nation wrote to Secretary Haaland seeking suspension of the San Pedro Valley LNTP and included the San Carlos Apache Tribe and ASW as co-disputing parties. Barnes Decl. ¶ 25, Att. 31. This letter requested that BLM withdraw or suspend authorization of the LNTP for the Arizona portion of the Project. *Id.*

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

On November 24, 2023, the BLM Director responded to the Tribes. Barnes Decl. ¶ 30, Att. 39. This letter explained that despite BLM's "extensive efforts over many years to elicit information relating to potential historic properties within the Project's area of potential effects[, t]he BLM did not receive sufficient details through consultation or otherwise about the San Pedro Valley to previously consider the Valley, or resources within it, a TCP." *Id.* at 1-2. And the letter explained that while the Tribes and ASW took the position that any construction in the San Pedro Valley was an adverse effect that could be resolved only by re-routing the transmission line out of the Valley, 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." *Id.* at 2. Re-routing the transmission line segment "would upend both a 2015 BLM decision and one made in 2016 by the Arizona Corporation Commission, decisions that gave SunZia, LLC a valid right-of-way necessary for construction of the transmission line." *Id.* at 4-5. "Instead, avoidance, or even a re-route as contemplated through the Programmatic Agreement, is limited to minor adjustments to

the design or construction location, not a complete re-route of a 50-mile segment of the 500-mile plus transmission line." *Id*. at 5.

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

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

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

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

III. STANDARD OF REVIEW

A. Preliminary injunction standard

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

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

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[8] "The standard for issuing a TRO is 'substantially identical' to the standard for issuing a preliminary injunction." *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).

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

B. Administrative Procedure Act

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

IV. ARGUMENT

Plaintiffs have not met their burden of showing they are entitled to preliminary injunctive relief. They have not shown a likelihood of success on the merits of their claims. Plaintiffs had every opportunity to raise their concerns about the San Pedro Valley as a TCP before the transmission line route was determined but failed to do so. It cannot now attack the routing decision or the consultation that led up to it because claims

accrued more than six years ago and are time-barred. In addition, BLM fully complied with the NHPA by entering into a PA and abiding by its terms. Plaintiffs also have not demonstrated irreparable harm that, under the circumstances, would justify preliminary injunctive relief. Again, Plaintiffs' failure to challenge the 2015 ROD or to provide information to BLM about the San Pedro Valley as a TCP weighs against their claims of harm now. Nor have they sufficiently demonstrated that they will be harmed, relying instead on conclusory allegations that do not carry their burden of showing that imminent harm is likely to occur. Finally, the balance of harms and the public interest weigh against preliminary injunctive relief. The Project will benefit the public by promoting renewable energy, enhancing the country's energy security, lowering energy costs, making electricity more reliable in the face of climate change, and creating good-paying jobs. Particularly given Plaintiffs' lack of diligence in pursuing their claims and failure to show irreparable injury, the balance of the equities favors not issuing an injunction.

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

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

Third, the record demonstrates that BLM has continued its reasonable, good faith consultation efforts with Plaintiffs in implementing the PA. And Plaintiffs do not seriously argue that BLM is not acting in compliance with the PA.

1. Plaintiffs' challenge to the route of the transmission line through the San Pedro Valley is barred by the statute of limitations.

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

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

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

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

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

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

Plaintiffs rely heavily on *Quechan Tribe of Fort Yuma Indian Reservation v. United States Department of the Interior*, but that case does not support their argument. In *Quechan Tribe*, the tribe promptly challenged BLM's NHPA consultation and implementation of a PA for a right-of-way to use public lands for a solar energy project.

755 F. Supp. 2d 1104, 1107-08 (S.D. Cal. 2010). The tribes presented evidence that demonstrated they had contacted BLM early in the process to notify BLM about important historic and cultural sites within the Project area, but BLM rebuffed and ignored that information. *Id.* at 1109-11. The court found, under those facts, that BLM's PA was not enough to satisfy its Section 106 requirements because BLM had ignored the tribe's request for further consultation before the project was approved. *Id.* at 1110-11.

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

Plaintiffs do not present any evidence that they provided BLM with information about the San Pedro Valley as a TCP early in the process or before BLM approved the ROD; indeed, the evidence shows that they did not make this claim until 2023, well after the BLM made the decision to grant the ROW. While Plaintiffs point to various communications, including the San Carlos Apache Tribe's comments on the Draft EIS for the 2015 ROD those comments, as detailed below, offered concerns about cultural sites without any suggestion that the *entire* San Pedro Valley represented a TCP. As discussed above, identifying a cultural resource is distinct from identifying a TCP. Alerting BLM to the existence of cultural resources does not automatically mean that the cultural resources are TCPs. The comment letter also did not make any reference to

eligibility for purposes of being a "historic property" under Section 106. *Quechan Tribe* is therefore distinguishable from this case.

3. BLM remains in compliance with the PA.

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

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

The second phase identified in the PA is to avoid and minimize the adverse effects of the Project on historic properties. PA II at A1-8. Avoidance measures for cultural resources may include realignment of the transmission line, but could also include other measures, such as monitoring of construction near site areas. PA II.A.1 at *id*. Where avoidance is not possible, BLM will minimize or mitigate adverse effects to historic

properties, if possible, with input from consulting parties. PA II.B at *id*. Part of the resolution of adverse effects is the development of HPTP. PA III at A1-8-13.

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

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

As to the facts, Plaintiffs state they "submitted detailed comments repeatedly explaining the cultural significance of the San Pedro Valley" to "alert BLM" that the San Pedro Valley "contains TCPs[.]" Pls.' Mot. at 29. Plaintiffs cite six documents that pre-

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

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

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

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

Plaintiffs fixate on the LNTPs that were issued on September 27, 2023, and November 27, 2023.[10] But what they omit from their motion is that BLM had reached out to Plaintiffs multiple times in advance of September 2023 and received no response. Receiving no response from Plaintiffs, BLM then decided to issue the LNTP on September 27, 2023—which involved some construction in the San Pedro Valley. Some correspondence eventually did occur between Plaintiffs and BLM, and BLM even temporarily suspended construction in the San Pedro Valley on November 8, 2023, upon Plaintiffs' request. Plaintiffs, however, maintained that the only path forward was to remove all construction activities from the San Pedro Valley.[11]

The PA addresses circumstances like those presented here—identification of a potential TCP during the implementation of the Project. Stipulation VI in the PA provides the process for potential historic properties that might be later discovered. PA VI at A1-14-15. Relevant here, "[i]f the discovered cultural resource is subsequently identified by an Indian tribe as a property of traditional religious and cultural importance, the BLM shall consult with the appropriate tribe(s)." PA VI.A.2 at A1-15. In those consultations,

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[10] Notably, BLM has not issued any LNTPs for segments of the transmission line that have not been addressed in a HPTP yet. Barnes Decl. ¶¶ 19, 41.

[11] Plaintiffs assert that the LNTP is a "final agency decision." Pls.' Mot. at 30. An LNTP is not an undertaking, and thus does not trigger an obligation under Section 106. *See Battle Mountain Band v. U.S. Bureau of Land Mgmt.*, No. 3:16-CV-0268-LRH-WGC, 2016 WL 4497756, at *7 (D. Nev. Aug. 26, 2016) ("[W]here a project's Section 106 review has already been completed, and no new elements have been added to the project, it does not amount to an undertaking." (citing *McMillan Park 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.

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

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

Plaintiffs also inaccurately interpret "avoidance" to be the end all be all for addressing any adverse effects to a newly discovered TCP. *See* Pls.' Mot. at 25. But under the circumstances here, it is simply not realistic to reroute the line outside the entire San Pedro Valley based on information that was available to the Tribes well before 2015 when the ROW decision was issued and even throughout the extensive identification process. Barnes Decl., Att. 43. That is why BLM articulated 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."[12] Pls.' Mot., Ex. 37 at 3, ECF No. 16-43. BLM has been clear

[12] This explanation relates to the Tribes claim that BLM was not complying with the terms of the PA which includes consideration of avoidance to move the line out of

in its position that it has no authority to re-open its 2015 ROW decision and reroute the transmission line segment to avoid the San Pedro Valley entirely. *See, e.g.*, Barnes Decl., Att. 45. It also seems illogical that "avoidance" would only mean removing and rerouting the transmission line from the entire San Pedro Valley. Especially because the 2015 ROD set the Project route to go through the San Pedro Valley and BLM has consistently communicated that it would not reroute the line. If Plaintiffs had an issue with 2015 decision, particularly the route within the San Pedro Valley, then they should have challenged the decision within the relevant statutory period.

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

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

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

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

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

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

To the first point, Plaintiffs have not shown that irreparable harm is likely to occur because BLM has taken extensive measures to prevent injury to historic and cultural resources. BLM engaged in a thorough Section 106 process, beginning in 2009, with the

Tribes and ASW, among other groups, participating as consulting parties. 2015 ROD at 41. BLM also engaged in government-to-government consultation with the Tribes as part of the NEPA and NHPA process, including several meetings with both the Tohono O'odham Nation and the San Carlos Apache Tribe. *Id.* at 43; Childress Decl. ¶¶ 10-25. At no point during these consultations did the Tribes indicate to BLM that the entire San Pedro Valley was an TCP, which would be expected if the conclusion to the contrary could lead to irreparable harm.

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

In addition, irreparable harm is unlikely to occur because the PA and the HPTP provide an ongoing process for identifying cultural resources and treatment measures to avoid, minimize, and mitigate impacts to any cultural resources. PA II.C at A1-8; Pls.' Mot., Ex. 28 (HPTP). To date, BLM is following the process outlined in the PA. The HPTP also contains a Monitoring and Discovery Plan, as well as provisions for discovery of human remains, associated funerary objects, and sacred objects, even on non-federal land such as the San Pedro Valley. PA II at A1-10-11; HPTP at A-13-14. Plaintiffs have not demonstrated either that BLM is not adhering to the PA or the HPTP or that these documents are ineffective in identifying resources or avoiding, minimizing, and

mitigating impacts to cultural resources. BLM's efforts to identify and address the effects of the Project on historic properties demonstrates that irreparable harm is not likely to occur.

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

Plaintiffs also delayed bringing this litigation. BLM issued a LNTP for work in the San Pedro Valley in September 2023, then rescinded the notice to allow for additional consultation, after which the LNTP was reissued in November 2023. Plaintiffs waited until January 30, 2024, to file a motion for injunctive relief. Plaintiffs also did not identify the San Pedro Valley as a TCP during the Class III survey or in response to the inventory reports. Plaintiffs' failure to indicate to BLM that the entire San Pedro Valley should be protected, despite myriad opportunities to do so—even after the route

traversing the Valley was selected—does not comport with their claims of imminent injury now.

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

Finally, Plaintiffs' conclusory statements that the mitigation measures are insufficient, *see* Pls.' Mot. at 36-38, do not meet Plaintiffs' burden of demonstrating that irreparable harm is likely to occur. *See Am. Passage Media Corp. v. Cass Commc'ns, Inc.,* 750 F.2d 1470, 1473 (9th Cir. 1985) ("affidavits [that] are conclusory and without sufficient support in fact" will not support a finding of irreparable injury). Plaintiffs make blanket statements that the Project "will irreparably degrade the San Pedro Valley as a [TCP]" and irreversibly impair the area, but do not provide specifics. Similarly, the declarants state that the mitigation plan will be insufficient to avoid adverse effects, but do not provide any details as to why the extensive surveys and mitigation plans in the PA and HPTP are insufficient. For example, Ms. Grant states that the Project will disturb ancestral human remains that are buried in the area but does not mention the PA and the HPTP's plans to address the discovery and treatment of human remains or explain why they are insufficient to prevent adverse effects. Mr. Burrell also refers to the destruction of saguaros, but the plan of development provides a saguaro treatment plan designed to avoid impacts to saguaros where possible and to salvage them otherwise. A native plant inventory was completed and submitted to the Arizona State Land Department, and the

Project's Biological Opinion "includes a goal of no net loss of saguaros and paniculate agaves in or near the Project right-of-way, which will be met through salvage or augmentation." Defs.' Ex. 5 at F-16.[13] In short, Plaintiffs' conclusory statements of harm are insufficient to carry Plaintiffs' burden here.

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

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

Plaintiffs also fail to demonstrate, as they must, that a preliminary injunction would serve the public interest. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). When the government is a party, the analyses of the public interests and balance of equities merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citations omitted). In considering the balance of the equities between the parties, traditionally a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co.*, 480 U.S. at 542). Without the requisite showing on the merits and irreparable harm, a court "need not dwell on the final two factors" and, "when considered alongside the [movant's] failure to show irreparable harm, the final two factors do not weigh in favor of a stay." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778-79 (9th Cir. 2018). But a court may deny a preliminary injunction, even where irreparable injury to the movant exists if the injunction is contrary to the public interest. *See Winter*, 555 U.S. at 22-23 (holding that even though plaintiffs showed a

[13] Defendants' Exhibit 5 includes only the portion of the Plan of Development that is cited here. The entire document is available electronically on BLM's project website at https://eplanning.blm.gov/eplanning-ui/project/2011785/570.

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

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

Government policies support clean energy and prioritize the delivery of renewable energy. In Executive Order 14008, "Tackling the Climate Crisis at Home and Abroad," the government recognized the "[t]he United States and the world face a profound climate crisis." Exec. Order 14008, 86 Fed. Reg. 7,619 (Feb 1, 2021). As part of the government's response to that crisis, the Executive Order announced the objective to increase renewable energy production on public lands. *Id.* § 207. The Project also aligns with Congressional goals set forth in the Energy Policy Act of 2005 which recognize the need for increased transmission siting and permitting processes to better keep pace with

the necessary infrastructure upgrades associated with projected development and electrical load growth. 2015 ROD at 1-3. In doing so, "Congress has articulated the public policy that our nation should incorporate clean energy as a necessary part of America's future, and it is essential to securing our nation's energy independence and decreasing greenhouse emissions." *W. Watersheds Project v. Bureau of Land Mgmt.*, 774 F. Supp. 2d 1089, 103 (D. Nev. 2011), *aff'd*, 443 F. App'x 278 (9th Cir. 2011) (citing the Energy Policy Act of 2005). Thus, the need for upgraded infrastructure to carry renewable and traditional energy has been a focus of recent legislation and policies. *See* 2015 ROD at 3.

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

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

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
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