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BEFORE THE ARIZONA POW  
AND TRANSMISSION LINE SITING COMMITTEE

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IN THE MATTER OF THE APPLICATION )  
OF SUNZIA TRANSMISSION LLC, IN )  
CONFORMANCE WITH THE )  
REQUIREMENTS OF ARIZONA REVISED )  
STATUTES 40-360, ET SEQ., FOR A )  
CERTIFICATE OF ENVIRONMENTAL )  
COMPATIBILITY AUTHORIZING THE )  
SUNZIA SOUTHWEST TRANSMISSION )  
PROJECT, WHICH INCLUDES THE )  
CONSTRUCTION OF TWO NEW 500 KV )  
TRANSMISSION LINES AND )  
ASSOCIATED FACILITIES )  
ORIGINATING AT A NEW SUBSTATION )  
(SUNZIA EAST) IN LINCOLN COUNTY, )  
NEW MEXICO, AND TERMINATING AT )  
THE PINAL CENTRAL SUBSTATION IN )  
PINAL COUNTY, ARIZONA. THE )  
ARIZONA PORTION OF THE PROJECT IS )  
LOCATED WITHIN GRAHAM, )  
GREENLEE, COCHISE, PINAL, AND )  
PIMA COUNTIES. )

Arizona Corporation Commission  
DOCKET NO. ~~D000000000~~ **D000000000** 15-0318-  
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NOV 03 2015

Case No. 171

DOCKETED BY *pk*

**BRIEFING ON IMPLICATIONS OF  
CHANGES TO PROPOSED ROUTE  
TO FEDERAL PROCESSES**

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On October 23, 2015, Chairman Chenal requested a briefing on the potential implications if the Line Siting Committee ("LSC") approved a Certificate of Environmental Compatibility ("CEC") for a modified or alternative route to the Proposed Route in SunZia Transmission, LLC's application for a CEC. The Proposed Route is identical to the Bureau of Land Management's ("BLM") Preferred Alternative Route ("PAR") approved in the January 23, 2015, Record of Decision ("ROD") for the SunZia Project. The ROD grants to SunZia the authority to construct, operate, and maintain the Project facilities on BLM-managed lands with terms and conditions contained within the ROD.

The ROD was issued after six plus years of environmental analyses of the SunZia Project, which included an analysis of a reasonable range of alternatives and all potential direct, indirect, and cumulative impacts of the SunZia Project to resources traversed or potentially impacted on federal lands, Arizona State trust lands, and private lands.

1 A comprehensive legal briefing of the potential implications with respect to the  
2 National Environmental Policy Act (“NEPA”), Section 7 of the Endangered Species Act  
3 (“Section 7”), 16 U.S.C. § 1531 *et seq.*, and Section 106 of the National Historic  
4 Preservation Act (“Section 106”), 36 C.F.R. Part 800, is contained herein. For ease of  
5 reference, a summary table is attached hereto as **Exhibit A**, summarizing the implications  
6 to the federal permitting regime, and associated federal law compliance, if the LSC  
7 ultimately issues a CEC for a modified version of or alternative route to the Proposed  
8 Route.<sup>1</sup>

9 **I. Background**

10 The LSC asked for a briefing on what level and type of supplemental compliance  
11 with federal law may be required to evaluate the modifications to the Proposed Route, or  
12 selection of a different alternative analyzed in the Final Environmental Impact Statement  
13 (“FEIS”). While the BLM has issued a ROD, there could be some additional NEPA  
14 compliance, or confirmation, depending on the modification to or selection of a different  
15 alternative than the Proposed Route. The need for, and type of, additional federal law  
16 processes is largely within the discretion of the federal agencies involved; however, the  
17 federal agencies have historically, with SunZia, been conservative and have favored an  
18 approach for additional process. Ultimately, the need for, and nature of, any supplemental  
19 steps for compliance with federal law is dependent on the nature of the change to the  
20 Proposed Route.

21 This briefing provides a “primer” on the duty to supplement, and then a breakdown  
22 in sections of the potential implications of the following scenarios:

- 23 • Modification to the Proposed Route on nonfederal lands (private or Arizona  
24 State trust land).

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25  
26 <sup>1</sup> Many of the procedural steps associated with federal laws are discretionary, and it would  
27 be at the BLM’s discretion to determine the need for the same. The statements contained  
28 in this table are estimates, based on general trends observed with the BLM and potential  
risks identified in relevant case law, some of which is summarized herein.

- Modification to the Proposed Route on federal lands.
- Selection of a different alternative analyzed in the FEIS.

II. Summary of Potential Implications of Post-ROD Route Changes With Respect to NEPA, Section 7, and Section 106

Before undertaking any major federal action significantly affecting the quality of the human environment, federal agencies must determine whether benefit of the action is outweighed by negative environmental implications requiring modifications to, or abandonment of, the proposed action. This is the essence of NEPA compliance. *See* 40 C.F.R. § 1500.1 *et seq.*; 43 C.F.R. § 46.200; 40 C.F.R. § 1508.23 and § 1508.18.

NEPA requires federal agencies to prepare an Environmental Impact Statement (“EIS”), or to supplement an existing EIS, for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Federal regulations permit an agency planning a major federal action to conduct an Environmental Assessment (“EA”) in order to determine whether it must prepare an EIS. 40 C.F.R. §§ 1501.4 and 1508.9(a)(1). If the EA shows that the proposed action will have no significant impact, “the agency may issue a finding of no significant impact (“FONSI”) and then execute the action.” *Sierra Club v. Babbitt*, 65 F.3d 1502, 1505 (9th Cir.1995); *California Trout v. Schaefer*, 58 F.3d 469, 472 (9th Cir.1995). If, however, the EA shows that the proposed activity will have a significant impact, the federal agency must prepare an EIS *before* proceeding with the proposed activity. 42 U.S.C. § 4332(2)(C); *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir.1988) (“Section 102(2)(C) of NEPA requires Federal agencies to file an EIS before undertaking ‘major Federal actions significantly affecting the quality of the human environment.’ ”), *cert. denied*, 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989); *see also Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir.1985) (“A central purpose of an EIS is to force the consideration of environmental impacts in the decision-making process.”).

The BLM was required to comply with NEPA prior to granting SunZia the authority to construct, operate, and maintain the Project facilities on BLM-managed lands with terms

1 and conditions contained within the ROD. The BLM complied with NEPA throughout the  
2 six-plus year process, which included the preparation of a Draft EIS, FEIS, EA, FONSI,  
3 and ROD, during which it also complied with Section 7 and Section 106. As part of the  
4 NEPA process, the BLM was required to, and did, consider all potential effects or impacts  
5 of the SunZia Project on resources associated with Federal, State, and private lands.<sup>2</sup>

6 A change in the Proposed Route does not *per se* trigger the need to prepare a  
7 supplemental EIS; rather, the question is whether the change is significant such that it is  
8 not within what the ROD approved or impacts the reliance on or use of the existing FEIS  
9 for the SunZia Project. See BLM NEPA Handbook, Section 5.3.2 (“Supplementation is  
10 not appropriate when new information or changed circumstances arise after the Federal  
11 action has been implemented. If the new information or changed circumstances impedes  
12 the use of the EIS for subsequent tiering for future decision-making, prepare a new EIS or  
13 EA and incorporate by reference relevant material from the old EIS.”).

14 Each of these scenarios could present a “changed circumstance” which could have  
15 NEPA implications if the change is such that the analysis in the FEIS no longer supports  
16 the ROD. Additionally, as part of the NEPA process for the SunZia Project, the BLM

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18 <sup>2</sup> See e.g. BLM Instruction Memorandum No. 2011-059 (February 7, 2011) expired on  
19 September 30, 2012, available online at  
20 [http://www.blm.gov/wo/st/en/info/regulations/Instruction\\_Memos\\_and\\_Bulletins/national](http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2011/IM_2011-59.html)  
21 [instruction/2011/IM\\_2011-59.html](http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2011/IM_2011-59.html) (last visited October 27, 2015) (“However, all non-  
22 Federal land alternatives considered by the BLM and the applicant during the pre-  
23 application process, including previously disturbed lands, and the rationale why they were  
24 not pursued by the agency and/or the applicant should be summarized in the NEPA  
25 document”); BLM NEPA Handbook, Section 6.5.2.1, available online at  
26 [http://www.blm.gov/style/medialib/blm/wo/Information\\_Resources\\_Management/policy/bl](http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf)  
27 [m\\_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf](http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf) (last visited October 27, 2015). (The  
28 non-federal portions of the Proposed Route were required to be analyzed during the NEPA  
process associated with the SunZia Project because they were “connected actions,” that is  
they are necessary component of the Project. “If the connected non-Federal action and its  
effects can be prevented by BLM decision-making, then the effects of the non-Federal  
action are properly considered indirect effects of the BLM action and must be analyzed as  
effects of the BLM action . . .”); 40 C.F.R. § 1508.8.

1 complied with Section 7 throughout the preparation of a Biological Assessment (“BA”)  
2 and the ultimate issuance and incorporation in the ROD of a Biological Opinion (“BiOp”).  
3 Both the BA and BiOp analyzed only the Proposed Route. A change in the Proposed  
4 Route could require an amendment to the BiOp if the change warranted re-initiation of  
5 Section 7 Consultation. *See* Final ESA Section 7 Consultation Handbook, available online  
6 at [https://www.fws.gov/ENDANGERED/esa-library/pdf/esa\\_section7\\_handbook.pdf](https://www.fws.gov/ENDANGERED/esa-library/pdf/esa_section7_handbook.pdf) (last  
7 visited October 30, 2015), p. 4-63 to 4-64. In certain instances, the requirement to amend a  
8 BiOp can trigger the duty to supplement under NEPA. *See San Luis & Delta-Mendota*  
9 *Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1044-45 (E.D. Cal. 2009).

10 The U.S. Fish and Wildlife Service (“FWS”) would have to evaluate any change to  
11 determine if it needed to re-initiate Section 7 Consultation. The FWS will re-initiate  
12 Section 7 Consultation to amend a BiOp in the following circumstances (only those  
13 relevant are listed):

- 14 • new information reveals effects of the SunZia Project may affect listed species or  
15 critical habitat in a manner or to an extent not considered in this opinion;
- 16 • the SunZia Project is subsequently modified in a manner that causes an effect to the  
17 listed species or critical habitat not considered in this opinion; or
- 18 • a new species is listed or critical habitat designated that may be affected by the  
19 action.

20 50 CFR §402.16. Typically, amending a BiOp is at least a 12-month process.

21 Additionally, as part of the NEPA process for the SunZia Project, the BLM  
22 complied with Section 106 through the preparation of a Programmatic Agreement (“PA”).  
23 The PA analyzed only the Proposed Route. A change in the Proposed Route would require  
24 an amendment to the PA, to, at the very least, update the information regarding where the  
25 pedestrian survey would take place. <http://www.achp.gov/agreementdocguidance.html#ch4-1>  
26 (last visited October 30, 2015) (“If an MOA or PA needs to be changed, including a change  
27 to extend the duration of the agreement, the changes are recorded in an [amendment]. . .  
28 Amendments are executed in the same manner as the original agreement. In other words,

1 the same signatories and invited signatories sign, and a fully-executed copy is filed with  
2 the ACHP.”). The PA contemplates amendments, and is designed for the same. An  
3 amendment to the PA would require that the invited signatories have an opportunity to  
4 review and comment on the amendment and sign the same. In certain instances, the  
5 requirement to amend a PA can trigger the duty to supplement under NEPA. *See Grand*  
6 *Canyon Trust v. Williams*, 38 F. Supp. 3d 1073, 1082-83 (D. Ariz. 2014).

7 **III. Modification to the Proposed Route on non-federal lands (private or Arizona**  
8 **State trust land)**

9 If the LSC approves a modified version of the Propose Route which only has  
10 changes to the portion traversing nonfederal lands, the ROD will only need to be changed,  
11 or the NEPA, Section 7, or Section 106 documentation updated, if the change is such that  
12 the analyses relied upon by the ROD are no longer reflective of the potential impact of the  
13 Project. Even with a change to the Proposed Route, the BLM may still rely upon the  
14 existing environmental analyses, and ROD, provided that the change does not present a  
15 new alternative with new impacts not previously analyzed or accounted for.

16 The BLM’s regulations indicate that, when possible, the BLM should “use existing  
17 NEPA analyses for assessing the impacts of a proposed action and any alternatives.” 43  
18 C.F.R. § 46.120. Prior to preparing a supplemental environmental analysis, the BLM may  
19 conduct a Determination of NEPA Adequacy (“DNA”) in order to evaluate whether  
20 existing NEPA documentation is adequate or whether an EA or Supplemental EIS must be  
21 prepared in response to the new circumstance. An EA may be used to supplement an EIS  
22 if a new circumstance does not cause new “significant” impacts to the environment. *See*  
23 *e.g.* 43 C.F.R. § 46.300; 40 C.F.R. § 1508.9; BLM NEPA Handbook, Sections 5.1, 5.3, and  
24 9. An EA is utilized to determine whether the new circumstance will cause a significant  
25 impact to the environment, and if so an EIS must be prepared; if there are no new  
26 “significant” impacts, the agency can issue a FONSI.

27 If the LSC approves a modified version of the Proposed Route, the BLM would  
28 likely prepare a DNA to confirm that change is consistent with the existing environmental

1 analyses. There are no proscribed time periods for completing a DNA, but it typically  
2 takes at least three months. However, if the change is only minor, for example if the LSC  
3 approved the Proposed Route with the Robson Alternative Number 2, the BLM could  
4 likely conclude, even without a DNA, that the existing environmental analyses are  
5 adequate and no changes to the ROD are warranted from a NEPA perspective.

6 The PA would have to be amended, as it currently only evaluates the Proposed  
7 Route. The Amendment to the PA would be significant, and the invited signatories would  
8 have an opportunity to renegotiate materials terms. Consequently, amending the PA at this  
9 scale could take between three and six months, or more.

10 A minor change, such as Robson Alternative 2, would be unlikely to warrant the re-  
11 initiation of Section 7 Consultation or the need to amend the BiOp. If the change were  
12 significant, then Section 7 Consultation would be reinitiated.

13 A change to the Proposed Route would require an amendment of the PA, as the PA  
14 is tied strictly to the current alignment. The PA contemplates amendments and is designed  
15 for the same. An amendment to the PA would require that the invited signatories have an  
16 opportunity to review and comment on the amendment and sign the same. Amending the  
17 PA would likely take up to 3 months for a minor modification, such as the Robson  
18 Alternative 2.

#### 19 **IV. Modification to the Proposed Route on federal lands**

20 If the LSC approves a modified version of the Propose Route with portions  
21 traversing federal lands, the ROD will need to be changed/amended, and the BLM would  
22 need to confirm that the existing NEPA documentation analyzes the potential impacts of  
23 the Project on the changed portion of the route traversing federal lands. Even with a  
24 change to the Proposed Route, the BLM may still rely upon the existing environmental  
25 analyses, and ROD, provided that the change does not present a new alternative with new  
26 impacts not previously analyzed or accounted for.

27 In this scenario, the BLM would conduct a DNA. If the DNA found that the route  
28 change presented new impacts, the BLM would likely prepare an EA. An EA should be

1 sufficient, provided that the change is minor. Typically, it takes between 12 to 18 months  
2 to prepare an EA. If the change were significant, meaning either a large portion of new  
3 federal lands were impacted or the alignment presented previously unanalyzed impacts,  
4 then the BLM would prepare a Supplemental EIS. A Supplement EIS process typically  
5 takes between 24 to 36 months. If either an EA or Supplemental EIS were prepared, the  
6 BLM would have to amend the ROD, which would take an additional three to six months.

7 The analysis for Section 7 Consultation and Section 106 is the same for this scenario  
8 as the previous section.

9 **V. Selection of an Alternative Route analyzed in the FEIS**

10 If the LSC selects a previously analyzed route, such as one of the Tucson  
11 Alternatives, the ROD will need to be changed/amended, and the BLM would need to  
12 confirm that the existing NEPA documentation does not need to be updated, the BiOp  
13 would have to be substantially revised and amended, and the PA would have to be  
14 substantially revised and amended.

15 In this scenario, the BLM would conduct a DNA. Because the alternatives were  
16 fully analyzed during the NEPA process, their selection would likely not warrant  
17 preparation of EA or EIS, unless there are changed circumstances associated with the  
18 affected environment. However, the Tucson Alternatives have significant impacts to  
19 environmental justice populations and, thus, selection of one of these alternatives would  
20 likely lead to the preparation of at least an EA and possibly an EIS. If either an EA or  
21 Supplemental EIS were prepared, the BLM would have to amend the ROD, which would  
22 take an additional 3 to 6 months on top of the 12 to 36 months needed for preparation of an  
23 EA and/or Supplemental EIS.

24 Section 7 Consultation would be re-initiated, as the current BiOp does not analyze  
25 other alternatives. The FWS would require a new BiOp, although it could be cast as an  
26 amendment to the existing BiOp. This process would take at least 12 months.

27 The PA would have to be amended, as it currently only evaluates the Proposed  
28 Route. The Amendment to the PA would be significant, and the invited signatories would

1 have an opportunity to renegotiate materials terms. Consequently, amending the PA at this  
2 scale could take between 3 to 6 months, or more.

3 **VI. Conclusion**

4 The SunZia Project has undergone significant evaluation and study involving  
5 potential environmental impacts associated with resources on federal and nonfederal lands.  
6 The SunZia Project has been evaluated, considered, and commented upon by several  
7 stakeholders, including the Arizona State Land Department (the primary landowner  
8 impacted by the SunZia Project).

9 If the LSC approves an alternative analyzed during the NEPA process, other than  
10 the Proposed Route, the Project would suffer a delay because of requirements associated  
11 with NEPA, Section 7, and Section 106. The same would be true, *i.e.* there would be a  
12 delay, if the LSC approves the Proposed Route with major modifications, particularly if  
13 such modifications involved federal lands.

14 If the LSC approves the Proposed Route, with minor modifications on the portions  
15 traversing nonfederal lands, such as Robson Alternative 2, there would likely only be  
16 minimal delays associated with Section 106 compliance, and no delays associated with  
17 NEPA or Section 7.

18 RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of November, 2015.

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1 **CERTIFICATE OF MAILING**

2 Pursuant to A.A.C. R14-3-204, the **ORIGINAL** of the foregoing and 25 copies filed this  
3 3<sup>rd</sup> day of November, 2015, with:

4 Utilities Division – Docket Control  
5 Arizona Corporation Commission  
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8 **COPY** of the foregoing emailed this 3<sup>rd</sup> day of November, 2015, to:

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By 

**EXHIBIT "A"**

<u>Potential Change to the Proposed Route</u>	<u>Determination of NEPA Adequacy, typically would take at least 3 months to complete.</u>	<u>Supplemental Environmental Assessment, typically would take between 6-12 months to complete</u>	<u>Supplemental Environmental Impact Statement, typically would take between 12-18 months to complete</u>	<u>Amendment to the Biological Opinion, typically would take about 12 months to complete.</u>	<u>Amendment to the Programmatic Agreement, typically would take between 3-6 months to complete</u>	<u>Supplement or Amendment to the ROD, typically would take between 3-6 months to complete.</u>	<u>Total additional time required, recognizing that some, but not all, additional analyses can occur contemporaneously</u>
Modification to the Proposed Route on non-federal lands (private or Arizona State trust land)	Likely required.	Maybe required, depending on total length and resources impacted.	Maybe required, depending on total length and resources impacted.	Required.	Required.	Required.	At least 15 to 18 months, but could be 18 to 21 months if an EA were required.
Modification to the Proposed Route on federal lands	Required	Likely required.	Maybe required, depending on total length and resources impacted.	Required.	Required.	Required.	Approximately 18 to 21 months.
Selection of a different alternative analyzed in the FEIS	Required.	Maybe required, depending on total length and resources impacted.	Maybe required, depending on total length and resources impacted.	Required.	Required.	Required.	Approximately 15 to 18 months.
Modification to the Proposed Route based on one of Robson's alternative alignments.	Unlikely to be required.	Unlikely to be required.	Unlikely to be required.	Unlikely to be required.	Minor amendment will be Required	Unlikely to be required, except maybe a minor amendment to reflect minor amendment to the PA.	Approximately 3 months.
Selection of one of the Tucson Alternatives.	Required.	Maybe required, depending on total length and resources impacted.	Maybe required, depending on total length and resources impacted.	Required.	Required.	Required.	Approximately 15 to 18 months.

Note that the following estimates do not account for time required for processing a right-of-way/lease application with the Arizona State Land Department (ASLD). The ASLD supports the Proposed Route, and in past conversation with the BLM and ASLD, there is significant concern that SunZia would be unable to secure access to ASLD's lands for any alternative to the Proposed Route.