Paul C. Echo Hawk (ISB # 5802)
ECHO HAWK LAW OFFICE
P.O. Box 4166
Pocatello, Idaho 83205
Telephone: (208) 705-9503
Facsimile: (208) 904-3878
paul@echohawklaw.com

William F. Bacon, General Counsel (ISB # 2766)
SHOSHONE-BANNOCK TRIBES
P.O. Box 306
Fort Hall, Idaho 83203
Telephone: (208) 478-3822
Facsimile: (208) 237-9736
bbacon@sbtribes.com

Attorneys for the Shoshone-Bannock Tribes

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, Plaintiff, v. CASEY HAMMOND, ACTING ASSISTANT SECRETARY FOR LAND AND MINERALS MANAGEMENT, UNITED STATES DEPARTMENT OF THE INTERIOR and UNITED STATES BUREAU OF LAND MANAGEMENT, Defendants.	Case No. 4:20-cv-00553 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff Shoshone-Bannock Tribes, through its attorneys, allege as follows:

I. INTRODUCTION

1. This is an appeal from the August 12, 2020 Blackrock Land Exchange Record of Decision issued by the United States Department of the Interior ("DOI") to approve a land exchange that will result in the expansion of the Pocatello Simplot Don Plant ("Simplot") phosphogypsum stacks ("gypsum stacks") located on the Eastern Michaud Flats NPL Superfund

site.[1] The Record of Decision was issued following publication of a Final Environmental Impact Statement ("FEIS" or "EIS") on May 15, 2020.[2] The land exchange approves Simplot's acquisition of 719 acres of federal land managed by the Bureau of Land Management ("BLM") in exchange for 667 acres of non-federal land owned by Simplot. The federal lands selected for the exchange are on Howard Mountain adjacent to the existing Simplot Don Plant and partially within the Eastern Michaud Flats NPL Superfund site. The non-federal land parcels owned by Simplot are located south of Pocatello, Idaho in the Blackrock Canyon area.[3]

2. The Plaintiff Shoshone-Bannock Tribes ("Tribes"), files this suit for declaratory and injunctive relief under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706, the Act of June 6, 1900 (31 Stat. 672 and 32 Stat. 1997), the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701 et seq., the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 et seq., the Council on Environmental Quality regulations, Executive Order 12898, the National Historic Preservation Act, 16 U.S.C. §§ 470 et seq., and implementing regulations, the Fort Bridger Treaty of 1868 (15 Stat. 673), as well as other applicable federal laws and regulations, challenging the decision of the United States Department of the Interior to approve the large land exchange with the J.R. Simplot Company ("Simplot") that will facilitate the expansion of the gypsum stacks at the Simplot Pocatello Don Plant and the Eastern Michaud Flats ("EMF") NPL Superfund site in Idaho adjacent to the Fort Hall Reservation.

---

[1] A copy of the August 12, 2020 Record of Decision is attached hereto as **Exhibit A**.

[2] The 3-volume FEIS and related federal documents, including the Record of Decision, can be accessed here: https://eplanning.blm.gov/eplanning-ui/project/119626/570.

[3] A map showing the federal land and Simplot land parcels subject to the land exchange can be found in Appendix A of the Record of Decision. *See* **Exhibit A**.

3. The Fort Hall Reservation is adjacent to the lands on Howard Mountain and the EMF superfund site. However, the entire area at issue is within the Tribes' aboriginal homelands as set forth in the 1868 Fort Bridger Treaty with the Eastern Band of Shoshoni and Bannock Tribes of Idaho (15 Stat. 673)[4] and entirely within the portion of the original Fort Hall Reservation ceded by the Tribes in 1898 ("1898 Cession Agreement"), ratified by the Act of June 6, 1900 (31 Stat. 672) (the "1900 Act").[5] Article 4 of the Fort Bridger Treaty recognizes the Tribes' off-reservation hunting and fishing rights, including on the federal land selected for exchange in this case. The EIS does not properly analyze and consider the reasonably foreseeable and indirect environmental impacts resulting from the expansion of the Simplot gypsum stack on the selected exchange lands. These impacts include negative effects on groundwater, air quality, human health & safety, plants & animals, a Tribal cultural site, and Tribal off-reservation treaty rights. The EIS also does not properly analyze and consider the cumulative effects and indirect impacts of the land exchange on the environment and public interests.

4. The Tribes submit this appeal based on Defendants' failure to: 1) comply with Act of June 6, 1900; 2) comply with the requirements of FLPMA; 3) prepare an EIS that satisfies the requirements of NEPA; and 4) uphold the federal government's trust responsibility to the Shoshone-Bannock Tribes guaranteed by the Fort Bridger Treat of 1868. In approving the land exchange, the DOI failed to adequately protect the public interest and environmental resources, including the cultural and environmental resources at and around the land exchange area as required by law.

[4] *See* **Exhibit B** (Fort Bridger Treaty of 1868, 15 Stat. 673).

[5] *See* **Exhibit C** (1900 Act, 31 Stat. 672).

II. THE PARTIES

5. The Shoshone-Bannock Tribes is a federally recognized sovereign Indian Tribe organized pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the act of June 15, 1935 (49 Stat. 378). The Tribes have standing to challenge agency action under the provisions of the APA. The lands selected for exchange are within the Tribes' aboriginal and ceded territory and subject to the Tribes' treaty rights. The Tribes are impacted by the land exchange because of the loss of treaty territory, damage to fish and wildlife species, diminished cultural use and enjoyment of the area, and increased environmental pollution and degradation that will result from expanding the Simplot gypsum stacks. The Tribes are further impacted by the increased damage to critical Reservation environmental and cultural resources that will result from expansion of pollution activity at the EMF Superfund site.

6. Defendant Casey Hammond is the Acting Assistant Secretary for Land and Minerals Management. He was previously the Principal Deputy Assistant Secretary for Land and Minerals Management. He signed the August 12, 2020 Record of Decision challenged here. He signed the Record of Decision exercising the apparent authority of the Assistant Secretary, Land and Minerals Management. He is sued solely in his official capacity.

7. The Defendant United States Department of the Interior ("DOI") is an agency of the United States government with oversight responsibilities for the federal lands subject to the challenged land exchange. The Department of the Interior at all relevant times controlled, supervised, and administered the lands subject to the challenged exchange which are part of the Tribes' ceded territory and subject to the Tribes' off-Reservation treaty rights. At all relevant times the Department of the Interior owed a legal duty and a trust responsibility to the Tribes to

protect and preserve the Fort Hall Reservation and the land and resources subject to the Tribes' treaty rights and interests.

8. Defendant Bureau of Land Management ("BLM") is an agency of the DOI. The BLM has responsibility for the federal lands selected for the exchange.

III. JURISDICTION AND VENUE

9. The Shoshone-Bannock Tribes have a right to bring this action pursuant to the APA, the 1900 Act, FLPMA, NEPA, and the Fort Bridger Treaty of 1868. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as defendant), 28 U.S.C. § 1362 (Indian tribes), and 5 U.S.C. §§ 701-706 (judicial review provisions of the Administrative Procedures Act). An actual justiciable controversy now exists between Plaintiff and Defendants. The Court therefore has jurisdiction to issue a declaratory judgment and the requested injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 701-706.

10. The United States has waived sovereign immunity in this action pursuant to 5 U.S.C. § 701.

11. Venue for this action is proper in the Federal District Court for the District of Idaho under 28 U.S.C. § 1391 (b) and (e). A substantial part of the events and omissions giving rise to the Tribes' claims occurred in the Federal District of Idaho. The BLM Pocatello Field Office is located in Pocatello, Bannock County, Idaho. The federal land selected for exchange is located on Howard Mountain in Bannock and Power Counties, Idaho. The private land subject to the exchange is in the Blackrock Canyon area within Bannock County, Idaho.

IV. FACTUAL ALLEGATIONS

12. The allegations in the preceding paragraphs are reasserted as if fully set forth herein.

13. The Plaintiff Shoshone-Bannock Tribes ("Tribes") is a federally recognized Indian Tribe occupying reserved Indian lands on the Fort Hall Reservation.

14. In the summer of 1987, the EPA detected elevated levels of heavy metals in sediments of the unlined ponds that served both the Simplot and former FMC phosphate processing operations and in wastewater at the Simplot Pocatello Don Plant facility. In addition, arsenic, cadmium, and selenium were detected in monitoring wells in the deep confined aquifer. In all, 2,530 acres of land surrounding the phosphate facilities were found to have contamination levels of concern. The Simplot Pocatello Don Plant was classified as part of the Eastern Michaud Flats ("EMF") Superfund site located adjacent to the Fort Hall Reservation, the Portneuf River, and the Cities of Pocatello and Chubbuck. The EMF site was listed on the National Priority List ("NPL") in 1990, and the site covers approximately 2,530 acres. Simplot and the FMC Corporation phosphate ore companies are the principle responsible parties at the NPL Superfund site. These processing facilities operated from the early 1940's until the FMC facility closed in the December of 2001. The Simplot facility is still an active operating facility.

15. The Simplot Don Plant and EMF site are sources of known substantial environmental contamination and pollution of the local area and Reservation environment affecting important natural resources and human health. Specifically, groundwater contamination caused by the existing gypsum stacks at the Simplot Pocatello Don Plant is one of the major justifications for designating the site as a Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Public wells within 3

miles of the area provide drinking water to an estimated 55,000 people and are used to irrigate over 2,000 acres of crops.

16. In 1994, Simplot submitted a land exchange proposal to the BLM Pocatello Field Office for Simplot to acquire from BLM lands adjacent to Simplot's Don Plant for a buffer zone area and future gypsum stack construction. In 1996, the exchange process moved forward and an Environmental Assessment (EA) to analyze impacts of the proposed exchange was initiated. Shortly thereafter, the land exchange was put on hold.

17. In 2002, Simplot renewed talks with the BLM and asked that proposed land exchange include additional public and private lands. The proposed land exchange at that time contemplated an exchange of 718.56 of public land adjacent to the Simplot Pocatello Don Plant for 666.92 acres of private land in the Blackrock and Caddy Canyon areas located southeast of Pocatello.

18. On March 7, 2005, April 3, 2007, and June 19, 2007, the Tribes sent letters to the BLM outlining a number of objections to the proposed land exchange and requesting a response from the BLM. On December 21, 2007 the BLM Pocatello Field Manager issued a Decision Record, Finding of No Significant Impact ("FONSI"), and Environmental Assessment ("EA") with a determination to approve the land exchange between the BLM and Simplot. On February 5, 2008 the Tribes sent the BLM a letter protesting the decision to issue a FONSI for the land exchange. The letter identified numerous concerns which were inadequately addressed in the EA and requested clarification regarding the Tribes opposition to the land exchange. On February 21, 2008, the EPA sent BLM at letter expressing a number of concerns about the potential significant, indirect impacts that may result from construction of an additional phosphogypsum stack on the selected federal lands. On February 25, 2008, the Tribes sent BLM a supplemental

letter of protest reiterating and presenting additional information regarding the numerous Tribal concerns with the land exchange and gypsum stack expansion.

19. On October 2, 2008, the BLM Idaho State Director issued a letter dismissing the Tribes' protest of the land exchange. On October 3, 2008, the BLM sent EPA a letter rejecting EPA's recommendations relating to land exchange.

20. The Tribes filed a Notice of Appeal and Petition For Stay on October 30, 2008. The Tribes submitted a Statement of Reasons supporting the appeal on November 19, 2008. Simplot submitted a Motion for Intervention and Response to Petition for Stay on November 25, 2008. On February 9, 2009 the Interior Board of Land Appeals ("IBLA") issued an order permitting Simplot to intervene and denying the Tribes' request for a stay. On June 5, 2009, the IBLA issued a decision affirming the decision of the BLM State Director dismissing the Tribes' protest of the December 21, 2007 Decision Record/FONSI/EA. The Tribes then timely appealed to this Court from the BLM/IBLA decisions.

21. On May 3, 2011, this Court, after considering briefing and legal argument, ordered the BLM to prepare a full EIS. *See Shoshone-Bannock Tribes v. United States Department of the Interior*, 2011 WL 1743656. The land exchange rejected by this Court in 2011 is nearly identical to the land exchange challenged in this case.

22. Simplot appealed to the Ninth Circuit Court of Appeals from this Court's 2011 decision. On September 17, 2012, the Ninth Circuit entered an Order dismissing Simplot's appeal pursuant to Simplot's Motion to Voluntarily Dismiss Appeal.[6]

23. In 2018, Simplot contacted the Idaho delegation to the United States Congress and requested legislation which would mandate approval of the land exchange between Simplot

[6] *See* Order Dismissing Appeal, Dkt. 16, 9th Cir. Case No. 8325726, September 17, 2012.

and the BLM, circumventing this Court's decision rejecting the land exchange challenged in this case and requiring completion of a proper EIS. Because the proposed legislation was a mandatory transfer, there would have been no discretionary authority to determine under the FLMPA or other laws whether the transfer was in the best interest of the public. The legislation did not make it through committee or to the floor for a vote.

24. On May 20, 2019, the BLM issued a scoping document for the proposed Blackrock Land Exchange. A draft EIS ("DEIS") was released on December 13, 2019. In early January 2020, Tribes engaged in government-to-government consultation with the BLM and communicated their continued and longstanding opposition and concerns with the proposed land exchange. On January 31, 2020, the Tribes submitted written comments to the DEIS opposing the proposed land exchange.[7] On February 7, 2020 the Tribes also submitted a DEIS comment letter specifically addressing Tribal cultural resource concerns.[8] A final EIS ("FEIS" or "EIS") was released on May 15, 2020.[9] The Tribes submitted written comments to the FEIS in opposition to the land exchange on July 16, 2020.[10]

25. On August 12, 2020, the Record of Decision approving the land exchange was signed by the Principal Deputy Assistant Secretary for the Department of the Interior "Exercising the authority of the Assistant Secretary, Land and Minerals Management." The signature page of the Record of Decision states: "I approve the Blackrock Land Exchange Decision for the reasons explained above. The approval of this decision constitutes the final decision of the DOI and, in accordance with the regulations at 43 CFR § 4.410(a)(3), is not subject to appeal under

[7] *See* **Exhibit D** (January 31, 2020 Letter from Tribes, Comments on DEIS).

[8] *See* **Exhibit E** (February 7, 2020 Letter from Tribes, Cultural Resource Concerns).

[9] The 3-volume FEIS and related federal documents, including the Record of Decision, can be accessed here: https://eplanning.blm.gov/eplanning-ui/project/119626/570.

[10] *See* **Exhibit F** (July 16, 2020 Letter from Tribes, Comments on FEIS).

Departmental regulations at 43 CFR Part 4. Any challenge to this decision must be brought in Federal District Court."[11]

26. The 719 acres of federal public land subject to the challenged land exchange is located in both Power and Bannock counties and is adjacent to Simplot's existing gypsum storage area and phosphate processing facility known as the Simplot Pocatello Don Plant. This public land subject to the land exchange is entirely within the Tribes' aboriginal and ceded territory and entirely within the original Fort Hall Reservation. If upheld, the land exchange would privatize public land previously subject to the Tribes' off-reservation treaty rights, which were also specifically reaffirmed by the 1900 Act.

27. The 667 acres of private land offered by Simplot in the land exchange is located in the Blackrock and Caddy Canyon areas approximately nine miles southeast of Pocatello.[12]

28. The Tribes assert that the required NEPA process was not followed in properly analyzing the land exchange in this case. The Tribes oppose the land exchange and resulting expansion of the Simplot gypsum stacks at the EMF Superfund site because it will result in unnecessary and undue degradation and negative environmental impacts to the Fort Hall Reservation, areas of Tribal interests, and protected rights described below.

Water Resources

29. The Fort Hall Reservation spans 840 square miles in southeastern Idaho, and approximately ninety-seven percent of it is tribal land or land held in trust by the United States. The Portneuf River flows through the Reservation. The Tribes rely on the river and the Fort Hall

[11] *See* **Exhibit A** at pg. 16.

[12] A map showing the federal and Simplot lands can be found at Appendix A to the Record of Decision attached hereto as **Exhibit A**.

Bottoms for subsistence fishing, hunting, and gathering. The area is also vital to the Tribes' historical cultural practices, including the Sundance.

30. Uncontroverted evidence shows that contaminated groundwater is flowing into the Portneuf River—a resource essential to the Tribes' subsistence and cultural practices. There is ongoing damage to the Portneuf River and connected groundwater resources, which will increase from the expanded waste activity facilitated by the land exchange challenged in this case.

31. Simplot has to-date been unable to demonstrate that the company can capture the continual flow of contaminated groundwater from the existing gypsum stacks. The gypsum stack is a continuing source of contamination, and the land exchange (and intended expansion of the Simplot gypsum stacks) will increase and exacerbate the environmental harms caused by increased contaminated groundwater flow into the Portneuf River and Fort Hall Bottoms area of the Reservation. In March of 2009, the EPA proposed changes to the Record of Decision (ROD) for the Simplot Operable Unit (Simplot OU) of the EMF Superfund site. Major components of the EPA's recommended changes included:

- Identifying phosphorus in groundwater as a "contaminant of concern".
- Characterizing all contamination sources at or near the phosphoric acid plant.
- Control of all phosphorus contamination sources to the extent practicable.
- Installation of a high-density polyethylene (HDPE) liner on top of the phosphogypsum pile, which is known as the "gypstack," to minimize process water infiltration through the gypstack and into groundwater.
- Continued development, operation, and maintenance of the groundwater extraction system to address those areas where arsenic and phosphorus concentrations remain above cleanup standards or levels of concern.

32. The EIS still does not sufficiently acknowledge and analyze the land exchange's negative impacts on groundwater, and the EIS fails to properly analyze the risk of increased groundwater contamination caused by the expanded surface area of the gypsum stacks.

Air Quality

33. Air quality will be adversely affected by the challenged land exchange and associated expansion of the surface area of the gypsum stacks because the expansion will increase fugitive dust and increase the re-distribution of contaminants to the populated downwind locations in Pocatello/Chubbuck and the Fort Hall Reservation. The EMF ROD noted that fugitive dust may be a source of contaminants. (EMF ROD 5.6.4 Air). Section 6.1.7.3 of the EMF ROD points out that contaminants are found downwind of the EMF site and those contaminants are found surrounding the entire site. Increasing the surface area of the gypsum stacks increases these adverse environmental impacts. The EIS fails to sufficiently analyze the environmental impacts of increasing the surface area of the gypsum stacks through the land exchange. The land exchange allows the existing Simplot operations to continue air-borne emissions that cause damage to area environment and natural resources.

34. For over two decades, the Simplot Don Plant has regularly exceeded the State of Idaho's regulatory standard for air emissions of fluoride from industrial stacks at the facility. As a result, excessive amounts of fluoride have been deposited on soil and vegetation in surrounding tribal, private, and federal lands in the area. In some instances, livestock (and potentially wildlife) that consumed the contaminated flora have suffered from fluorosis, as indicated by tooth loss and bone density loss.

35. Wind also carries fine particles of radioactive material from the gypsum stacks to the Reservation and toward the cities of Chubbuck and Pocatello. The EIS does not adequately

evaluate the health impacts, both physical and mental, that result from living adjacent to one of the nation's most hazardous toxic sites (a National Priority List Superfund site). The land exchange will increase the source of the contamination that has polluted the area and created health stressors. Expansion of the gypsum stacks results in a greater surface area exposure of the contaminant source. The challenged land exchange will result in increased negative health and environmental effects not only to members of the Tribes but residents in the cities of Chubbuck and Pocatello.

The 1898 Cession Agreement and 1900 Act

36. After conducting an exhaustive title research on the federal lands that would be transferred to Simplot, the Tribes have concluded the federal land is part of the ceded lands affected by the 1898 Cession Agreement and 1900 Act (referred to herein as the "Ceded lands").

37. In 1867, President Johnson established the Reservation by Executive Order. The following year the 1868 Fort Bridger Treaty ("Treaty") was negotiated and affirmed by the United States Senate in February 1869, reaffirming the Reservation as the Tribes' permanent home. The Treaty reserved to the Tribes the right to exercise off-reservation hunting, gathering, and fishing rights. Subsequently, Tribes entered into a series of cession agreements with the United States and, in 1900 ceded approximately 416,000 acres of the Reservation to the federal government. The Tribes maintain and practice their Treaty rights on the current Reservation, the Ceded Lands, aboriginal territory, and unoccupied lands of the United States.

38. As part of the 1900 Act, the Tribes retain certain rights on the Ceded Lands. Article IV of the 1900 Act states, "So long as any of the lands ceded, granted, and relinquished under this treaty remain part of the public domain, Indians belong to the above-mentioned tribes, and living on the reduced reservation, shall have the right, without any change, therefore, to cut

timber for their own use, but not for sale, and to pasture, their livestock on said public lands, and to hunt thereon and to fish in the streams thereof." *See* 1900 Act, 31 Stat. 672, 674.

39. Further, the Tribes expressly reserved specific usufructuary rights on their aboriginal lands remaining in the public domain, including retained priority rights to hunt, fish, gather, graze, and cut timber for personal use. In 1972, the Idaho Supreme Court, in *State v. Tinno*, 94 Idaho 759, 497 P2d 1386 (1972) affirmed that the Tribes' hunting, fishing, and gathering rights extend to all unoccupied off-Reservation federal lands that are part of the aboriginal (or pre-Treaty) domain of the Shoshones and the Bannocks. The Tribes' Treaty rights on Ceded lands were also recognized by the Ninth Circuit Court of Appeals in *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983). The continuing existence of the Tribes' off-reservation treaty rights was recently reaffirmed by the United States Supreme Court's recent decision in *Herrera v. Wyoming*, 139 S. Ct. 1686, 1694-1701 (2019) (repudiating the holding in *Ward v. Racehorse*, 163 U.S. 504, 516 (1896) that tribal off-reservation treaty rights terminate at statehood). These treaty rights are not "privileges" given to the Tribes by the United States but rather are property interests that the Tribes reserved when entering the Fort Bridger Treaty of 1868 with the United States. The transfer of the federal lands to a private company through the challenged land exchange violates those Tribal Treaty rights. The Tribes retain rights on the federal lands subject to the land exchange, and the Tribes will lose those rights if it is transferred to Simplot.

40. The federal lands and resources located thereon are an integral component of the Tribes' contemporary subsistence and traditional cultural practices. Tribal members actively hunt on this land and maintain traditional and cultural practices on it. In addition, this land likely contains burial sites, as discussed within the Cultural Resource letter submitted to the BLM by

the Tribes.[13] The challenged land exchange will infringe upon the vested rights of the Tribes and Tribal members seeking to exercise their reserved and guaranteed Treaty Rights. The EIS fails to acknowledge and consider the requirements of the 1900 Act, and the challenged land exchange violates the express provisions of the Act.

Tribal Cultural Site & Resources

41. The federal public land that would be given to Simplot in the challenged land exchange lies within the original Reservation, and the Tribes have and maintain significant historical and cultural ties to this land. By transferring these federal lands to Simplot, it will be not be subject to federal laws and executive orders protecting Tribal cultural resources, including the Native American Graves Protection and Repatriation Act, the National Historic Preservation Act, the Archaeological Resources Protection Act, American Indian Religious Freedom Act (AIRFA), FLPMA, NEPA, and Executive Orders 12898 and 13007. Accordingly, Simplot would have no obligation to protect places of cultural and historical significance to the Tribes or the public on the land and no obligation to provide information about its activities on its expanded gypsum stack area.

42. The federal land subject to the exchange is part of the Tribes' traditional cultural land area and includes likely burial sites, spiritual sites, spring sites, waterways, archaeological sites, campsites, trails, healing locations, battlegrounds, and hunting, fishing, and gathering locations. While archaeological reports prepared by BLM contractors have identified different types of cultural properties in the area, the Tribes consider the area as a whole to be a significant traditional cultural landscape that provides a valuable picture of the Tribes' ancestral relationship to the area.

[13] *See* **Exhibit E**.

43. For the past century, Tribal members have used the open rangelands on the Reservation and on the Ceded lands for their cattle herds, using traditional methods of grazing, feeding, calving, branding, and roundup. Simplot's proposed expansion of the gypsum stacks would destroy these resources and the integrity of the landscape.

44. The Tribes object to the challenged land exchange because of the impacts to archaeological and likely burial sites on the federal lands. Historically, the Shoshone and Bannock people placed deceased individuals in rock features such as cliffs and crevices. Within one mile of the federal lands, there is a documented cliff burial. In 2014, bone fragments were found on an FMC-owned parcel that had been interred in a rock crevice. The Tribes' Heritage Tribal Office (HeTO) and the Language and Cultural Preservation Staff performed a site reconnaissance and found other rock crevices in the area.

45. The current cultural resources inventory described in the EIS fails to capture the significance of the cliffs of the Wind Canyon located within the proposed area of exchange despite the Tribes' site visit to the area with BLM Archaeologist and Pocatello Field Office representatives. The location of the cave/dwelling with an entrance made of juniper was pointed out to BLM representatives and photos were taken. This cave-dwelling is culturally significant. It is known to have multiple focuses. The view out of the cave is of the Bannock Creek area and Bannock Peak, and tribal members frequenting the site could see the whole Pocatello Valley to the east and to the north a view of all the buttes. It was likely used as a lookout point to provide warnings through smoke signals of any immediate dangers or other messages. There is evidence of hearths nearby and throughout Howard Mountain to support the claim of signal fires. The EIS neglected to adequately inventory the cave dwelling and similar areas in the cultural resources inventory.

46. The Tribes are concerned that additional burial sites may be located on the federal lands. During the site visit potential archaeological sites in the rocks, including rock shelters and possible crevice burials, were observed. The Tribes have significant concerns that transferring this land out of federal ownership may inadvertently transfer human remains that may be present in rock cliffs. Given the federal trust responsibility of managing and protecting tribal cultural resources, the proposed transfer of land to private ownership would remove federal management responsibility and the ability to protect cultural resources and human remains that may be undiscovered in the cliffs.

47. Howard Mountain is an area Tribal members have clearly identified as a significant cultural site. In the Bannock language, the mountain range above Pocatello is called "Pukutada'a na Kaiva." Here, the high mountains along with the swirling winds create optimum conditions inspiring the development of new meaningful and powerful songs for the tribal people. This area as described by a Tribal Elder, La Salle Pocatello, as an area where "one seeks songs." In an interview conducted in the early 1970s, he indicated that tribal elders used high places to find their songs and the mountains above Pocatello are a significant area to "catch songs." The Tribes HeTO asked the BLM to capture this additional resource not addressed in previous inventories regarding sound as is noted in an interview of Mr. Pocatello.

48. A Tribal member noted the following:

> "This range holds evidence of our people. We don't see the physical and political boundaries acknowledged by our non-Indian intruders; but see the land as a whole, without ownership as our ancestors told us. It is our religious belief that the Creator put us here to live in harmony with all living beings, and that all things have a spirit and a power. Prayer and offerings were life to our people. One did not just take."

(Exhibit F at pg. 10).

Tribal Treaty Rights

49. The EIS recognizes that the land exchange will reduce a Tribal treaty right area but does not adequately address the impact of reducing public lands available for the exercise of Tribal treaty rights. The Fort Bridger Treaty of 1868 guarantees the Tribes' right to hunt, fish, gather, and conduct grazing on the unoccupied lands of the United States. The land exchange reduces these treaty lands in an area adjacent to the Fort Hall Reservation, and the EIS does not conduct an adequate analysis of this impact and mitigation of the treaty rights reduction.

50. The challenged land exchange violates the guarantee in Article II of the Fort Bridger Treaty of an "absolute and undisturbed use and occupation" of the Fort Hall Reservation. The promise of off-reservation Treaty rights reserved in Article IV begins by stating that "[the Tribes] will make said reservations their permanent home. and they will make no permanent settlement elsewhere." The Tribes are permanently situated on the Fort Hall Reservation. Accordingly, protecting the lands, water, and air of the Reservation is of critical importance. Permitting Ceded lands to be exchanged by the federal government to increase the size of and pollution from a superfund site violates the Treaty guarantee of a permanent homeland on the Fort Hall Reservation. The Tribes should not be subjected to long-term and persistent risks as a result of a discretionary land exchange that will allow for the growth of contamination that has been demonstrated to be hazardous to human health for generations to come.

51. Article V of the Fort Bridger Treaty of 1868 requires the federal government to make a "prompt and diligent inquiry into such matters of complaint by and against the Indians" and a finding on whether there is a "depredation on person or property" that would be compensable under law and otherwise consistent with the provisions of the Treaty. The

challenged land exchange undoubtably impacts critical resources and areas of the Fort Hall Reservation in violation of Treaty promises.

52. At the heart of this land exchange is the interest of a private company seeking an accommodation to continue industrial operations that create substantial and permanent pollution and contamination. This interest must be viewed in light of the Tribal interest in preserving a permeant homeland for tribal members, who will reside on the Reservation land forever. Expansion of industrial operations, which have resulted in an existing and unremediated superfund site, threatens and directly impacts the Tribes' health and welfare, economic security, political integrity and the Tribes' ability to plan for any new residences in affected areas due to enhanced risks to groundwater, air, and other pollutants beyond the foreseeable future. Facilitating the continued operation of the Simplot Don Plant through the challenged land exchange also extends the contamination to the Fort Hall Bottoms Area, which is a vital location for Tribal member subsistence hunting, fishing, and gathering, as well as important cultural practices.

Title Defects of Simplot Parcels of Land

53. During the NEPA process in this case, the Tribes contracted with First American Title Company ("Title Company") in Pocatello, Idaho, to conduct a comprehensive title search for the Simplot land parcels subject to the land exchange. The title report prepared by the Title Company raised questions relating to rightful ownership of two of Simplot's parcels.

54. The Title Company found that the most recent recorded instrument for a 38.38 acre parcel within Section 7 (R4015002401) is a warranty deed from Simplot to the federal government executed in 1978. This title report indicates the United States may already own a

parcel within the lands Simplot proposes to transfer to the United States as part of the land exchange.

55. The Title Company could find no original instrument transferring parcel 14B (county identifier R4013009700) out of federal holding either through a land patent or other mechanism. The original instrument that the Title Company could identify for this parcel is a quitclaim deed from 1965 transferring ownership from the Western Portland Cement Company jointly to the Portland Cement Company of Utah and the Ideal Cement Company. While Simplot does have a warranty deed for this parcel, the title research shows that there is uncertainty over the original title and the Federal Government may still have ownership of this parcel.

56. While it is possible that there may have been modern property boundary alterations or title transfers that the Title Company was unable to find, the report indicates that there is a lack of clarity regarding the title status of at least two parcels and possibly all of the parcels proposed in the exchange. Given this confusion, the land exchange Record of Decision should be reversed and the BLM should be ordered to conduct a full title search and execute proper due diligence to accurately determine ownership. The Tribes are also not aware of the existence of an acceptable title commitment issued by a land title company as required by the Department of Justice Title Standards and the BLM Land Exchange Handbook. The BLM has an obligation to the public to act with the utmost care in managing and exchanging federal lands and should investigate and resolve title irregularities identified by the Title Company. The resolution of this investigation should be publicly documented.

57. The proposed federal lands to be exchanged include land in which the Tribes have a reversionary ownership interest. To give formal notice of its interest and litigation related thereto, the Tribes filed a Notice of Lis Pendens and recorded the Notice in Power and Bannock

counties on November 26, 2019. The Notice officially advises all parties about the Tribes' interest in the land and that related litigation is currently pending in *Shoshone-Bannock Tribes v. United States of America, et al.*, Case No. 4: 18-CV-00285-DCN. Among other parcels, the Notice identifies "the northeastern parcel comer of Section 17, Wl/2, NWI/4, Wl/2S Wl/4, Township 6 South, Range 34 East Boise Meridian, Bannock County," which is within the 1882 railroad right of way, as land in which the Tribes have a reversionary ownership interest protected by the Act of 1882, 22 Stat. 148, and the Act of 1888, 25 Stat. 452. By those Acts, Congress affirmed and protected the Tribes' reversionary interest in the subject land. The Notice was sent via certified mail to Simplot's Registered Agent on December 31, 2019 and via email to in-house counsel on January 17, 2020.

Environmental Justice

58. Under Executive Order 12898 (1994) and subsequent guidelines adopted by federal agencies, the NEPA process must utilize a heightened sense of judgment for projects that will have a disproportionate impact on protected populations. The Tribes have expressed their objections to the challenged land exchange clearly over many years to both Simplot and the federal government. The EIS does not include adequate mitigation measures to address the serious impacts to the Reservation resulting from the continuing pollution from the EMF superfund site. There is no dispute that Simplot's pollution activities are contaminating Reservation water resources, polluting the air, and harming Reservation plants, fish, animals, and cultural use of traditional areas of the Reservation. The EIS fails to address the disproportionate impacts of the land exchange on the Reservation, leaving tribal members and their posterity to bear a disproportionate burden of Simplot's industrial contamination.

Cumulative and Reasonably Foreseeable Impacts

59. The Simplot site is part of the EMF NPL Superfund site, which has substantial known negative impacts on the area environment and human health. The EIS does not sufficiently analyze the impact of increasing the size of the gypsum stacks and their length of use before remediation. Facilitating the expanded storage of hazardous waste, hazardous substances, and other toxic materials at the Simplot site may compromise the EMF CERCLA remediation and natural resources restoration efforts. The EIS does not properly analyze the increased risk that harmful by-products of Simplot's activities will migrate to Reservation lands and local environment and cause additional damage and risk to Tribal member health, the residents of the Fort Hall Reservation, and to the residents of the surrounding communities. The EIS discussion of cumulative impacts contains largely conclusory statements with little or no supporting data and lacks significant analysis required by NEPA and its implementing regulations. This is woefully inadequate under NEPA standards which require complete quantifiable analysis through a meaningful EIS.

The Blackrock Land Exchange Final Environmental Impact Statement

60. The following paragraphs set forth the Tribes objections to the EIS. Each of these issues were not adequately evaluated in the EIS and form a fundamental flaw in the decision to approve this land exchange.

61. Failure to adequately evaluate and disclose water quality impacts to the Portneuf River and Fort Hall Reservation. The Simplot Operable Unit of the EMF Superfund Site has ongoing impacts to groundwater and surface water resources, and particularly concerning are the impacts to surface and groundwater resources that are located within the boundaries of the Fort Hall Reservation. The selected alternative is in a different and unstudied portion of the Portneuf

River watershed that may likely have off-site impacts to Reservation lands. The Tribes requested, and did not receive, hydrologic studies and models that demonstrate how the original alternative could impact Reservation resources over time. The DOI and BLM did not adequately analyze and disclose the environmental consequences of the proposed action to community members. The proposed action will have negative consequences to resources that are already negatively impacted. According to the "Groundwater/Surface Water Remedy 2019 Annual Report Simplot Don Plant" dated March 2020, there is a significant amount of contamination bypassing the extraction system at the base of the phosphogypsum stack and flowing to the Portneuf River and onto the Reservation:

- 1.86 lb./day of arsenic is leaking from the gypsum stack;
- 20,131 lb./day of sulfate is leaking from the gypsum stack;
- 1,739 lb./day of phosphorus is leaking from the gypsum stack
- 0.86 lb./day of arsenic is estimated to bypass the extraction wells and flow off-site;
- 10,669 lb./day of sulfate is estimated to bypass the extraction wells and flow off-site; and
- 729 lb./day of phosphorus is estimated to bypass the extraction wells and flow off-site.

62. Even after lining the gypsum stacks, years of ongoing upkeep and maintenance at the Simplot Don Plant, replacing leaking sumps and pipes, and the operation of an extraction system that removes contaminated water from the underlying aquifer, the remediation efforts have not been enough to prevent contamination from entering the Portneuf River and flowing onto the Reservation. With the expansion of the gypsum stacks and building 97 acres of ponds

closer to community members, there will be additional increases in groundwater contamination in the long-term.

63. Failure to adequately evaluate air quality impacts. The FEIS states the selected alternative would move and increase the source of fluoride and particulate matter emissions closer to residences east of the Don Plant, but the general public and Tribes did not get to comment and the full consequences from these ponds were neither analyzed nor disclosed to the public.

64. The Defendants' assessment of the effects on air quality and climate change is incorrect. The addition of 97 acres of cooling ponds that will emit fluoride particles will have a direct effect on the community as a whole and in particular residents closest to the east side expansion of the gypsum stacks. The Simplot Don Plan has historically, and is currently, in violation of its state issued permit for fluoride emissions. Persons living on Cottage Avenue and within the City of Chubbuck are regularly notified that fluoride particles measured within their property limits have exceeded the permit standards. A risk assessment of the impacts to grazing animals on small tracts of land, as suggested by an IDEQ risk assessment, has not been conducted in the area. The additional fluoride emissions from these 97-acre ponds, despite the removal of other sources, has not been modeled for human health or ecological risk assessment purposes.

65. If the challenged land exchange is upheld, any additional exceedance and liability from fluoride exceedances will be the responsibility of the BLM. The BLM should require a risk assessment measuring the additional impacts to property owners in the area prior to allowing the additional 97 acres of wastewater ponds. The location of the gypsum stack expansions and associated releases of fluoride and particulate matter emissions will be situated farther east.

Because the gypsum stacks will be located closer to residences east of the Don Plant, Alternative B could result in slightly higher ambient concentrations of fluoride and particulate matter as well as higher fluoride in forage concentrations closer to residences. Other cumulative effects on air quality and climate change would be the same as described for the Proposed Action.

66. Failure to adequately evaluate impacts on visual resources. The expected construction of cooling ponds and gypsum stacks on the Federal lands would alter the existing visual character of the east mountainside. These actions would convert an estimated 290 acres of the Federal lands and 188 acres of Simplot lands from a generally natural landscape to an industrial landscape, with radioactive gypsum waste. These changes would be in contrast to surrounding undeveloped lands to the west, south, and east of the Federal lands.

67. Failure to comply with the terms of the 1900 Act. While the EIS describes at length the authorities that the BLM has to engage in for the exchange of lands to "benefit of the public," the EIS does not describe how those actions are consistent with previous acts of Congress that deal directly with how the federal lands subject to the challenged land exchange can be disposed of. Specifically, Section 5 of the 1900 Act states "the residue of said ceded lands shall be opened to settlement by the proclamation of the President, and shall be subject to disposal under homestead, townsite, stone and timber, and mining laws of the United States . . . ." 31 Stat. 672, 676. The Act further provides that no purchaser shall be permitted in any manner to purchase more than one hundred and sixty acres of the ceded lands. *See id.*

68. The Tribes have consistently raised this issue as a point for the BLM to evaluate and requested a formal opinion on the applicability of this section to the Ceded lands. There was a clearly delineated process for disposing of ceded lands for homestead, town-site, stone and timber lands, or mining lands, but there is no process to exchange lands with a private company

in excess of the 160-acre limit to facilitate the expansion of a superfund site. This violation of the 1900 Act was not considered by the EIS.

69. Section 5 of the 1900 Act further requires the federal government to sell the parcels at public auction. The proposed alternatives do not address this noncompliance with an Act of Congress and the process for disposal of the Ceded lands was not followed by the Defendants in this case. Accordingly, the decision of the DOI in the Record of Decision violates the 1900 Act.

70. Development and Selection of a New Alternative for the Land Exchange Requires Adequate Evaluation. Under 40 CFR 1502.9 "Agencies: (1) Shall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." Clearly, the development of a completely new alternative, in a completely new and unstudied and undisclosed geographic location warrants a formal supplement to the current FEIS prior to a decision being issued by the DOI or BLM. By issuing a new alternative without fully analyzing and disclosing its potential effects or adequately studying those impacts, the public and Tribes were denied an opportunity to effectively consult on those issues which may be present. Based on the procedural requirements of NEPA, the BLM should be required to conduct supplemental studies on the new location and adequately characterize them prior to a decision on the challenged land exchange.

71. Proposed Development of Gypsum Stacks and Appurtenant Facilities by Simplot is not Legally Binding after the Land Exchange is Completed. The FEIS does evaluate potential scenarios that would occur if a gypsum stack of a similar description were constructed on the

parcel of land exchanged near Howard Mountain. But the FEIS is surprisingly mute on a very real possibility that the final development of a gypsum stack by Simplot will not actually mirror what was described and analyzed in the document. The BLM has been very clear that, as an agency, they will not permit or control development after the exchange occurs so the information in the FEIS is really hypothetical at best. The Tribes do not agree with a land exchange that is free of restrictive covenants that will protect the health of the Fort Hall Reservation resources and residents; in fact, it runs counter to the Tribes sovereign interests to promote the safe and orderly development of their lands.

72. The EIS failed to disclose and consider the current regulatory status of the Simplot Gypsum Stacks. On August 30, 2007 the EPA notified Simplot of ongoing violations of the Clean Air Act ("CAA"), National Emissions Standard for Hazardous Air Pollutants ("NESHAP"), and the Resource Conservation and Recovery Act ("RCRA"). The violations were identified during an October 2005 inspection conducted by the EPA at the Simplot Don Plant and through subsequent exchanges of information between Simplot and EPA.[14] The violations relate to Simplot's gypsum production and storage activity, and the challenged land exchange is expected to result in expanded gypsum stacks at the Simplot Pocatello Don Plant. The violations identified by the EPA have not been fully resolved and addressed. The EIS in this case failed to adequately advise the public and tribal membership of the EPA-identified violations, and the EIS does not adequately consider and analyze the violations and the foreseeable likelihood that similar violations will exist for Simplot's expanded gypsum stacks resulting from the challenged land exchange. Further, the EIS does not adequately disclose or analyze the regulatory framework of the gypsum stack. The State of Idaho Department of Environmental Quality (the

[14] A copy of the EPA's Notice of Violation letter to Simplot dated August 30, 2007 is attached hereto as **Exhibit G**.

regulatory body that will oversees the operation and maintenance of the gypsum stack and the proposed expansion of a gypsum stack onto the federal lands exchanged) exempts the regulation of the phosphogypsum. *See* I.C. § 39-176A(d) (as added by 2020, ch. 51, § 1, p.119) and IDAPA 58.01.06.001.03.b.vi (exempting from regulation phosphogypsum). Because of this, the public will not have the protections afforded to them through the public notices, public comment and other features built into regulations to notify the public about hazardous waste operations in their communities.

73. The Proposed Land Exchange will Facilitate Development that Expands an Operable Unit and Gypsum Stacks that are responsible for contamination that lead to the listing of a Superfund Site and Increases Exposure Risks to Tribal Members. The Fort Hall Reservation is the permanent home for members of the Shoshone-Bannock Tribes recognized by the Fort Bridger Treaty of 1868. Currently a portion of the Eastern Michaud Flats superfund site sits within the exterior boundaries of the Reservation and has continuing adverse impacts to Tribal members and resources. The current management of the EMF site notwithstanding, the Tribes object to the land exchange because it represents an expansion of those operations and a continuation of negative impacts to the Tribal membership. The Fort Hall Reservation is not an industrial area; it is a mix of residential and agricultural properties with a trend toward the Tribes needing housing opportunities for tribal members. Expanding the gypsum stacks will impact the Tribes' ability to offer housing to tribal members in the Michaud Creek area, representing a direct impact on the Tribes' ability to govern and plan effectively for the health and well-being of the Tribal membership.

74. Environmental Justice. The challenged land exchange has a disproportionate impact on the Shoshone-Bannock Tribes and the Native American community on the Fort Hall

Reservation. In the past three decades since the listing of the Eastern Michaud Flats superfund site on the National Priorities List the Tribes have been dealing with the direct and indirect effects of ongoing contamination from the EMF area. This expansion will increase contaminants to waters that flow directly onto the Reservation, have the potential to impact residential groundwater resources on the Reservation, and will increase air pollution that will be received across thousands of acres of Reservation land. These impacts will be shouldered by the tribal membership.

75. Insufficient analyses of eliminated alternatives. The EIS is required to have a substantive real analysis about the environmental effects of the proposed actions. Discussing the alternatives eliminated from Analysis, the EIS provided very limited and poor analyses why some alternatives were eliminated.

76. Failure to Perform Adequate Analysis of the Environmental Impacts of Land to be Provided by Simplot. The property offered by Simplot has an area that is used as a shooting area and would appear likely contaminated with lead and other debris from the activity. Additionally, the title to the lands has not been properly addressed.

77. Inadequate Analysis of the Ownership of the Lands Provided by Simplot. The EIS does not address whether Simplot has proper legal title to all the properties it is offering in the exchange. Items of concern identified should include, but are not limited to, those identified by tax identification numbers set forth on pages 6 and 7 of the Shoshone-Bannock Tribes' FEIS comments dated July 16, 2020.[15]

78. Inadequate Analysis of Value Performed on Exchanged Properties. The Federal Land Policy and Management Act of 1976 ("FLPMA") requires exchanges of land to be equal.

[15] *See* **Exhibit F**.

43 U.S.C. 1716(b). No appraisals or statements of value appear to be completed by licensed and/or qualified appraisers identifying the values of the property accordance with 42 U.S.C. 1716(b) and (h). Valuations should include value of the land sought as being available for industrial use, which the other property is not. The property value is greater than $150,000, which mandates an official valuation by a qualified appraiser. There also should have been an analysis of whether land is within National Forest System or not and how the conclusion was reached.

79. Failure to Adequately Evaluate Impact on Wildlife. The existing gypsum stack area is not equipped with any mechanisms intended to deter wildlife, and no formal monitoring has been conducted to document instances of drowning, entrapment, or ingestion of toxic constituents by migratory birds and other wildlife species. Simplot staff have not observed and considered wildlife mortalities in association with operation of the existing gypsum stacks. Tribal experience in the area, including when ponds were open at a facility adjacent to Simplot, is that wildlife has continuously frequented the area. The gypsum stacks' proximity to wetlands and the nearby Fort Hall Bottoms will likely negatively impact duck, geese, migratory birds, and deer that frequent the area. The Tribes request a monitoring program be put in place to identify wildlife in the area and ensure no migratory birds land on the toxic open water bodies on the gypsum stacks. Simplot's decision not to report nor monitor wildlife does not mean they are not present. The EIS should have more fully analyzed the impact of the land exchange on wildlife.

80. Failure to Adequately Evaluate Socioeconomic Impact. The EIS does not address and consider the impacts of the proposed Industrial Business park within one mile of the proposed expansion, at the former Hoku Polysilicon site. Analysis and disclosure of impacts to air, water, soils, and socioeconomics must be completed. Tribal members and community

members are already disproportionately impacted from recognized conditions including NPL Superfund sites, wastewater discharge, and ozone. The EIS has not properly analyzed or disclosed the additional health impacts the community and tribal members will be exposed to as a result of the challenged land exchange. No information has been disclosed regarding arsenic exposure in the groundwater or radioactivity that blows off the gypsum stacks. No information was analyzed or disclosed to the public regarding gypsum, and in particular the radioactivity from it, whether it be gamma, alpha or beta radiation and the impacts to community members from constructing this source closer to residential neighborhoods. Expansion of the gypsum stacks will increase the surface area leading to an increase in surface emissions. The FEIS should have disclosed and provided an analysis of the dust that will blow off an expanded gypsum stack area. A complete analysis and disclosure of all potential impacts, include a catastrophic failure of the gypsum stacks and where the materials and water would be expected to flow, should have been included in the EIS.

81. Concerns of impacts to Shoshone-Bannock Permanent Homeland and Reserved Treaty Rights. Several articles of the Fort Bridger Treaty of 1868 relate to the lands subject to the challenged land exchange. The EIS fails to adequately characterize these treaty rights and assess the impacts from the land exchange. Of particular importance is the Treaty's Article II promise that the Fort Hall Reservation is for the "absolute and undisturbed use and occupation" of the Shoshone-Bannock Tribes. In discussing the guarantee of off-Reservation hunting rights Article IV states: "[the Tribes] will make said reservation(s) their permanent home, and they will make no permanent settlement elsewhere." Because the Fort Hall Reservation is the only permanent homeland for the Tribes, protection of the Reservation lands, water, air, plants, and wildlife has

special importance. The EIS fails to adequately consider the impacts of the land exchange on Reservation resources.

82. Article V of the Treaty requires a "prompt and diligent inquiry into such matters of complaint by and against the Indians" and a finding on whether there is a "depredation on person or property" that would be compensable under law and otherwise consistent with the provisions of the Treaty. The DOI and BLM have failed to adhere to this responsibility and obligation, and the EIS does not adequately address this objection and deficiency.

83. Additional Points of Inadequate Analysis in the FEIS. Several additional deficiencies in the FEIS are outlined in the Tribes' July 16, 2020 comments to the FEIS at pages 13 and 4, which are incorporated by this reference.[16]

V. FIRST CLAIM FOR RELIEF

(Violations of 1900 Act and 1898 Cession Agreement)

84. The allegations in the preceding paragraphs are reasserted as if fully set forth herein.

85. In 1868 Fort Bridger Treaty was negotiated and was ratified by the United States Senate in 1869, reaffirming the Reservation as the Tribes' permanent home. The Treaty reserved to the Tribes the right to exercise off-reservation hunting, gathering, and fishing rights. Subsequently, Tribes entered into a series of cession agreements with the United States and, in 1900 ceded 418,560 acres of the Reservation to the federal government. The Tribes maintain and practice their Treaty rights on the current Reservation, Ceded lands, aboriginal territory, and unoccupied lands of the United States.

[16] *See* **Exhibit F**.

86. As part of the 1900 Cession Agreement, the Tribes retain certain rights on our Ceded Lands. Article IV of the 1900 Cession Agreement states, "So long as any of the lands ceded, granted, and relinquished under this treaty remain part of the public domain, Indians belong to the above-mentioned tribes, and living on the reduced reservation, shall have the right, without any change, therefore, to cut timber for their own use, but not for sale, and to pasture, their livestock on said public lands, and to hunt thereon and to fish in the streams thereof." [17]

87. Further, the Tribes expressly reserved specific usufructuary rights for lands remaining in the public domain, including retained priority rights to hunt, fish, gather, graze, and cut timber for personal use. The Tribes retain rights on the federal lands subject to the land exchange, and the Tribes will lose those rights if it is transferred to Simplot.

88. The Federal land subject to the challenged land exchange is within the Ceded lands of the Shoshone-Bannock Tribes subject to the 1900 Act and 1898 Cession Agreement. The DOI and BLM officials are subject to specific duties, responsibilities, and requirements under the Act and with respect to transfer and disposal of the Federal Ceded lands subject to the challenged land exchange. Specifically, Section 5 of the 1900 Act states "the residue of said ceded lands shall be opened to settlement by the proclamation of the President, and shall be subject to disposal under homestead, townsite, stone and timber, and mining laws of the United States . . . ." 31 Stat. 672, 676. The Act further provides that any ceded lands within five miles of Pocatello must be sold at public auction for not less than ten dollars per acre, and that no purchaser shall be permitted in any manner to purchase more than one hundred and sixty acres of the ceded lands. *See id.*

[17] *See* Act of June 6, 1900, 31 Stat. 672. A copy is attached as **Exhibit C**.

89. The Federal Ceded lands and resources located on it are an integral component of the Tribes' contemporary subsistence and traditional cultural practices. Tribal members actively hunt on this land and maintain traditional and cultural practices on it. In addition, this land likely contains burial sites, as discussed within the Cultural Resource letter submitted to the BLM by the Tribes.[18] The challenged land exchange will infringe upon the vested rights of the Tribes and Tribal members seeking to exercise their guaranteed Treaty Rights. The EIS fails to acknowledge and consider the requirements of the 1900 Act, and the challenged land exchange violates the provisions and specific requirements and restrictions in the Act.

90. The DOI Deputy Assistant Secretary's August 12, 2020 Record of Decision to approve the Blackrock Land Exchange and transfer of the Federal Ceded lands to Simplot, a private company, through the challenged land exchange violates the Fort Bridger Treaty of 1868 and the specific requirements of the 1900 Act and 1898 Cession Agreement. The land exchange Record of Decision, if upheld, will cause irreparable harm and damages to the Tribes.

91. Accordingly, the Tribes pray for relief as set forth below.

VI. SECOND CLAIM FOR RELIEF

(FLPMA and APA Violations)

92. The allegations in the preceding paragraphs are reasserted as if fully set forth herein.

93. Under the Federal Land Policy and Management Act of 1976 ("FLPMA"), Congress declared that it is the policy of the United States to manage the public lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air, and atmospheric, water resource, and archeological values; that, where appropriate, will preserve

[18] *See* **Exhibit E**.

and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use." 43 U.S.C. § 1701(a)(8).

94. FLPMA imposes particular responsibilities, obligations, and requirements upon the DOI/BLM in evaluating and considering the challenged land exchange. FLPMA obligated the DOI/BLM to undertake a complete and proper analysis whether the challenged land exchange is in the public interest.

95. The land exchange will create unnecessary and undue degradation of the public lands by giving the selected public land to the Simplot Company for expansion of its gypsum stacks at a known NPL Superfund site. There is no rational connection between the land exchange decision and the factual evidence available for analysis. In this case, the DOI and BLM did not undertake the proper analysis required by FLPMA to address the environmental effects of the land exchange.

96. In this case, there was insufficient government-to-government consultation with the Tribes and important tribal interests and objections were not properly considered.

97. The approval of the challenged land exchange is not in the best interest of the public. The potential long-term harm to surrounding communities, the tribal membership, and the affected lands including the Reservation have not fully been evaluated or mitigated. The land exchange will result in increased environmental contamination of the region and permanent impairment of the federal lands. The land exchange with negatively impact the Reservation and Tribal cultural resources, Tribal health, and will compound the environmental injustice of Simplot's ongoing pollution activities.

98. The DOI's August 12, 2020 approval of the land exchange in the Record of Decision will permit the expansion of an existing superfund site on the National Priority List and will increase the existing and continuing pollution and contamination problems at the Pocatello Simplot Don Plant. The DOI's approval decision is arbitrary, capricious, an abuse of discretion, not in accordance with the law, and runs counter to the evidence before the BLM and DOI. The DOI's approval of the land exchange in the Record of Decision fails to meet the requirements for land acquisition under FLPMA. In light of the existing circumstances and evidence, the decision is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise. The decision also failed to follow procedures required by law. The land exchange Record of Decision, if upheld, will cause irreparable harm and damages to the Tribes.

99. Accordingly, the Tribes pray for relief as set forth below.

VII. THIRD CLAIM FOR RELIEF

(NEPA and APA Violations)

100. The allegations in the preceding paragraphs are reasserted as if fully set forth herein.

101. NEPA establishes procedures that require the BLM to take a "hard look" at the environmental consequences of the land exchange. Chief among these procedures is the preparation of an appropriate environmental impact statement ("EIS"). Every EIS must provide a full and fair discussion of significant environmental impacts of the proposed agency action. Pursuant to CEQ regulations, federal agencies must ensure the professional integrity of the discussions and analysis in each EIS. NEPA documents must be supported by evidence that the agency has made the necessary environmental analysis. Unsupported conclusions and assumptions violate NEPA.

102. In addition, every EIS must rigorously explore and objectively evaluate all reasonable alternatives to that action, including a no-action alternative. The analysis of alternatives to the proposed action is the heart of the environmental impact statement. The existence of reasonable but unexamined alternatives renders an EIS inadequate.

103. The land exchange challenged in this action is a major federal action significantly affecting the environment. As such, the land exchange proposal required the preparation of an EIS.

104. The BLM violated NEPA by failing to take a "hard look" at the environmental consequences of the land exchange in the EIS. The DOI and BLM failed to adequately analyze and respond to substantive comments submitted by the Tribes in opposition to the land exchange.

105. To comply with NEPA, the DOI and BLM must consider all direct, indirect, and cumulative environmental impacts of the proposed action. Cumulative effects include impacts resulting from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions. In this case, the DOI and BLM failed to fully consider the direct, indirect, and cumulative impacts of and from the land exchange. The DOI and BLM here failed to consider the cumulative effects on the Fort Hall Reservation and tribal members that may result from the challenged land exchange. The DOI and BLM improperly restricted their review in geographic scope, and the agencies should have fully considered the impacts of the land exchange on the Fort Hall Reservation.

106. The EIS is substantially deficient in the areas set forth in the factual allegations section above.

107. The DOI decision approving the land exchange was not supported by substantial evidence and was arbitrary, capricious, an abuse of discretion, and contrary to the public interest.

The DOI's actions and omissions in approving the land exchange violate NEPA and its implementing regulations.

108. The land exchange Record of Decision, if upheld, will cause irreparable harm and damages to the Tribes.

109. Accordingly, the Tribes pray for relief as set forth below.

VIII. FOURTH CLAIM FOR RELIEF

(Violation of Fort Bridger Treaty of 1868)

110. The allegations in the preceding paragraphs are reasserted as if fully set forth herein.

111. In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under many acts of Congress and numerous Supreme Court decisions, the Government of the United States has charged itself with moral obligations of the highest responsibility and trust with respect to Indian tribes. Its conduct as disclosed in the acts of those who represent it in dealings with the Indians should therefore be judged by the most exacting fiduciary standards. *See e.g.*, *United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). This trust responsibility restrains federal governmental action that affects Indians and therefore is an important source of protection for Indian rights. The trust responsibility of the United States applies to all federal agencies and to federal actions occurring outside the boundaries of Indian reservations. *See, e.g.*, *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981). Numerous executive orders also require the government to protect Tribal interests including, but not limited to: Executive Order 13175 (government to government consultation policy for proposed federal actions affecting tribes), Executive Order 12898 (Environmental Justice), Executive Order 13007 (Indian

Sacred Sites), and Executive Order 11593 (Protection and Enhancement of the Cultural Environment).

112. The Fort Bridger Treaty of 1868 promises that the Fort Hall Reservation is reserved as the permanent homeland for the Shoshone-Bannock Tribes. The Treaty guarantees hunting, fishing, and gathering rights to provide for the subsistence of Tribal members living on the Reservation. The Treaty also includes a promise that the federal government will protect the tribal members living on the Reservation.

113. Approval of the challenged land exchange by the DOI, a United States agency, breaches the obligations of the United States government under the Treaty.

114. The EIS recognizes that the land exchange will reduce Tribal treaty right area but does not adequately address the impact of reducing public lands available for the exercise of Tribal treaty rights. The Fort Bridger Treaty of 1868 guarantees the Tribes' right to hunt, fish, gather, and conduct grazing on the unoccupied lands of the United States. The land exchange reduces these treaty lands in an area adjacent to the Fort Hall Reservation, and the EIS does not conduct an adequate analysis of this impact and mitigation of the treaty rights reduction.

115. The challenged land exchange violates the guarantee in Article II of the Fort Bridger Treaty of an "absolute and undisturbed use and occupation" of the Fort Hall Reservation. The promise of off-reservation Treaty rights reserved in Article IV begins by stating that "[the Tribes] will make said reservations their permanent home. and they will make no permanent settlement elsewhere." The Tribes are permanently situated on the Fort Hall Reservation. Accordingly, protecting the lands, water, and air of the Reservation is of critical importance. Permitting Ceded lands to be exchanged by the federal government to increase the size of and pollution from a superfund site violates the Treaty guarantee of a permanent homeland on the

Fort Hall Reservation. The Tribes should not be subjected to the long-term or persistent impacts of Simplot's pollution activities as a result of a discretionary land exchange that will allow for the growth of contamination that has been demonstrated to be hazardous to human health for generations to come.

116. Article V of the Fort Bridger Treaty of 1868 requires the federal government to make a "prompt and diligent inquiry into such matters of complaint by and against the Indians" and a finding on whether there is a "depredation on person or property" that would be compensable under law and otherwise consistent with the provisions of the Treaty. The challenged land exchange undoubtably impacts critical resources and areas of the Fort Hall Reservation in violation of Treaty promises.

117. At the heart of this land exchange is the interest of a private company seeking an accommodation to continue industrial operations. This interest must be viewed in light of the Tribal interest in preserving a permanent homeland for tribal members, who will reside on the Reservation land forever. Expansion of industrial operations, which have resulted in an existing and unremediated superfund site, threatens and directly impacts the Tribes' health and welfare, economic security, political integrity and the Tribes' ability to plan for any new residences in affected areas due to enhanced risks to groundwater, air, and other pollutants beyond the foreseeable future. Facilitating the continued operation of the Simplot Don Plant through the challenged land exchange also extends the contamination to the Fort Hall Bottoms Area, which is a vital location for Tribal member subsistence hunting, fishing, and gathering, as well as important and sensitive cultural practices, including the Sundance.

118. In approving the land exchange, the BLM has failed to live up to its trust responsibility and the obligations imposed by the above-referenced executive orders designed to

protect Indian tribal interests. The land exchange Record of Decision, if upheld, will cause irreparable harm and damages to the Tribes.

119. Accordingly, the Tribes pray for relief as set forth below.

IX. PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, by and through undersigned counsel, respectfully requests judgment against Defendants jointly and severally, as follows:

A. For an order declaring that the DOI's decision approving the Blackrock Land Exchange, including the issuance of the Record of Decision and EIS, violate the 1900 Act, FLPMA, NEPA, the APA, and their implementing regulations.

B. For an order declaring that the DOI's decision approving the Blackrock Land Exchange, including the issuance of the Record of Decision and EIS, violate the Fort Bridger Treaty of 1868 and the United States' trust responsibility.

C. For an immediate and permanent injunction prohibiting Defendants, their agents, servants, employees, and all others acting in concert with them, or subject to their authority or control, from proceeding with the land exchange, pending full compliance with the requirements of applicable law.

D. For an award of costs, including attorney's fees, incurred with respect to the commencement and prosecution of this action, pursuant to 28 U.S.C. § 2412 et seq. and any other applicable statutory or equitable principles.

E. For an order granting such further declaratory and/or injunctive relief this Court deems just and proper under the facts presented.

For such further relief as the Court deems necessary and proper or order to remedy Defendants' violations of law and to protect and preserve public lands and the Fort Hall Reservation.

DATE: December 5, 2020.

ECHO HAWK LAW OFFICE

/s/ Paul C. Echo Hawk
Paul C. Echo Hawk

SHOSHONE-BANNOCK TRIBES

/s/ William F. Bacon.
William F. Bacon, General Counsel

Attorneys for the Shoshone-Bannock Tribes

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December 2020, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Secretary David Bernhardt Asst. Sec. Casey Hammond Department of the Interior 1849 C Street, N.W. Washington, D.C. 20240 Telephone: (202) 208-3100 Facsimile: (202) 208-5584	☒ ☐ ☐ ☐ ☐	Registered/Certified Mail Hand Delivered Overnight Mail Telecopy (Fax) CM/ECF
Deputy Director William P. Pendley Deputy Director Michael Nedd Bureau of Land Management 1849 C Street NW, Rm. 5665 Washington DC 20240 Telephone: (202) 208-3801 Facsimile: (202) 208-5242	☒ ☐ ☐ ☐ ☐	Registered/Certified Mail Hand Delivered Overnight Mail Telecopy (Fax) CM/ECF
William Barr United States Attorney General U.S. Department of Justice 950 Pennsylvania Avenue, NW Washington, D.C. 20530-0001	☒ ☐ ☐ ☐ ☐	Registered/Certified Mail Hand Delivered Overnight Mail Telecopy (Fax) CM/ECF
Bart M. Davis, United States Attorney Attention: Civil Process Clerk 1290 W. Myrtle Street, Suite 500 Boise, Idaho 83702 Telephone: (208) 334-1211 Facsimile: (208) 334-9375	☒ ☐ ☐ ☐ ☐	Registered/Certified Mail Hand Delivered Overnight Mail Telecopy (Fax) CM/ECF

/s/ Paul C. Echo Hawk
Paul C. Echo Hawk