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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION,

Plaintiff,

vs.

LAURA DANIEL-DAVIS, Principal Deputy Assistant Secretary for Land and Minerals Management, et al.

Defendants,

and

J.R. SIMPLOT COMPANY

Intervenor-Defendant.

Case No.: 4:20-cv-00553-BLW

**FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [ECF No. 37]**

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## INTRODUCTION

Federal Defendants Laura Daniel-Davis, United States Department of the Interior (the "Department" or "DOI"), and United States Bureau of Land Management ("BLM") hereby file this cross-motion for summary judgment and opposition to Plaintiff Shoshone-Bannock Indian Tribes of the Fort Hall Reservation's motion for summary judgment. The Tribes challenge the Department's decision to approve a land exchange between BLM and the J.R. Simplot Company ("Simplot"). Compl. (ECF No. 1). BLM authorized the land exchange under Section 206 of the Federal Lands Policy Management Act ("FLPMA") after determining that the public interest would be served by the exchange because the resource values and the public objectives served by the lands to be acquired outweighed those of the lands to be conveyed. Specifically, BLM determined that the land exchange would benefit the public from a net gain of 113 acres of land that would provide recreational opportunities, mule deer habitat, and consolidate federal land for more efficient and effective management of BLM lands. In addition, BLM determined that the land exchange would be in the public interest because it would extend the life of the Simplot Don Plant, with the associated continued employment and other social and economic benefits, and allow Simplot to meet the terms of a consent decree with the Idaho Department of Water Quality to reduce emissions by replacing the Plant's cooling towers with cooling ponds.

BLM prepared a thorough Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA") that adequately analyzed the relevant resources and issues implicated by the land exchange. BLM also complied with FLPMA and all other laws in making its decision. The record supports BLM's decision here, and Federal Defendants are therefore entitled to summary judgment.

## BACKGROUND

"In the 1940s, Simplot and FMC corporation built phosphate processing facilities about two miles northwest of the City of Pocatello." *Shoshone-Bannock Tribes of Fort Hall Rsrv. v. DOI*, No. 4:10-CV-004-BLW, 2011 WL 1743656, at *1 (D. Idaho May 3, 2011). Known as the "Don Plant," Simplot's facility processes phosphate ore to manufacture phosphate fertilizer and feed phosphates. Final Environmental Impact Statement ("FEIS") at ES-1 (AR0029544). As a by-product of this process, the plant produces phosphogypsum, which is "primarily gypsum and phosphorus, and includes contaminates such as arsenic, low-level radionuclides, selenium, zinc, cadmium, vanadium, fluoride, sodium, potassium, chloride, nitrates, ammonia, and sulfate." 2011 WL 1743656, at *1. This waste "is pumped as a slurry into a '[gypsum stack],' a storage facility 240 feet tall that spreads out over 400 acres." *Id.* The gypsum stack was unlined until 2017, and over the years, contaminants leached into groundwater, which discharges to springs and the Portneuf River, which flows onto the Fort Hall Indian Reservation. FEIS at 1-3 (AR0029562); *Shoshone-Bannock Tribes*, 2011 WL 1743656, at *1.

Simplot is subject to multiple consent decrees and voluntary consent orders with the U.S. Environmental Protection Agency ("EPA") and the Idaho Department of Environmental Quality ("IDEQ") requiring Simplot to take measures to reduce contamination by, *inter alia*, lining the existing and any future gypsum stacks and installing pollution controls and monitoring systems to reduce public health risks. FEIS at 1-2–3 (AR0029561–62). In addition, a 2016 Consent Order between Simplot and IDEQ requires Simplot to reduce fluoride emissions by 2026 by either replacing the existing reclaim cooling towers with a low-emission alternative or incorporating other measures that reduce fluoride emissions by more than 50 percent from the cooling towers. *Id.* at 1-3 (AR0029562).

Simplot initially proposed the land exchange to BLM in 1994 so that it could acquire public lands for new gypsum stacks near the Don Plant to extend the Don Plant's life. *Id.* at 1-1 (AR0029560). BLM prepared an Environmental Assessment ("EA") analyzing this proposal and in December 2007 issued a Decision Record and Finding of No Significant Impact approving the land exchange. *Id.* at 1-1–2 (AR0029560–61). The Tribes challenged this decision and this Court found that BLM acted arbitrarily and capriciously when it approved the land exchange without completing an EIS. 2011 WL 1743656, at *11–*12.

After the decision was remanded to BLM, BLM posted a Notice of Intent to prepare an EIS in the *Federal Register* on May 20, 2019, and provided a 45-day scoping period, during which BLM held two public scoping meetings. FEIS at 1-4 (AR0029563). BLM used the public comments received to identify data sources, inform the development of a range of reasonable alternatives, define the scope of analysis for the EIS, identify resource issues for detailed analysis, and solicit other information to be used in the development of the EIS. *Id.* BLM prepared a draft EIS, which it made available for comment in late 2019. *Id.* BLM considered the comments received, responded to the comments (including in Appendix I, which contains a table showing the comments and BLM's responses), and incorporated them into the final EIS where appropriate. *Id.*, App'x I (AR0030034–131). The final EIS was published in May 2020. *Id.*

The EIS described the proposed action as "a land exchange—referred to as the Blackrock Land Exchange—wherein Simplot proposes to acquire 719 acres of Federal land managed by the BLM adjacent to Simplot's Don Plant manufacturing site in Power and Bannock Counties, Idaho (i.e., Federal lands) in exchange for 667 acres of non-Federal land owned by Simplot in the Blackrock and Caddy Canyon areas in Bannock County approximately 5 miles southeast of Pocatello, Idaho (i.e., non-Federal lands)." *Id.* at 1-1 (AR0029560). The EIS stated that

"Simplot's purpose for the proposed land exchange is to implement legally enforceable controls as directed by the EPA and IDEQ," and specifically to construct cooling ponds near the Don Plant, as well as to maximize the Don Plant's operational life "by expanding gypsum stacks onto adjacent land." *Id.* at 1-3 (AR0029562). BLM's purpose in preparing the EIS was to evaluate and respond to the land exchange proposal under FLPMA. *Id.* at ES-1, 1-3 (AR0029544, AR0029562).

BLM reviewed the proposal for conformity with its existing land use plan, the Pocatello Resource Management Plan ("RMP"). *Id*. at 1-4 (AR0029563). BLM issued the RMP in 2012 under FLPMA and its regulations, and the RMP guides management of the public lands for BLM's Pocatello Field Office. RMP (AR0065396). BLM found that "Action LR-5.2.1 of the Pocatello RMP identifies lands potentially suitable for disposal by exchange, which include the Federal lands." FEIS at 1-4 (AR0029563).

The EIS considered the Proposed Action, two action alternatives, and a No Action alternative. The Proposed Action was an exchange of 719 acres of Federal land for 667 acres of non-Federal land. *Id.* at 2-1 (AR0029566). Alternative A, "developed based on comments received during scoping to consider a land exchange that results in a net gain of public lands and makes additional lands available for tribal uses," included "the same area of Federal and non-Federal lands as the Proposed Action, with the addition of voluntary mitigation Parcel A" and voluntary donation Parcel B, wherein Simplot would donate 950 acres of private property within the Fort Hall Reservation boundary to the Bureau of Indian Affairs for the benefit of the Tribes or to the Tribes directly. *Id*. at 2-9–10 (AR0029574–75). Parcel A included 160 acres of Simplot-owned land in the Blackrock Canyon area. *Id*. at 2-10 (AR0029575).

Alternative B, BLM's preferred alternative, "was developed based on comments received during scoping to adjust the boundary of the Federal lands to avoid cultural and tribal resources in the west canyon area on the north side of Howard Mountain." *Id.* at 2-11 (AR0029576). Alternative B included the same non-Federal lands as Alternative A, including Parcel A and B, but reconfigured the Federal lands in part so that BLM would retain "368 acres of Federal lands in the west canyon area that BLM would continue to manage in accordance with the Pocatello RMP . . ., including identified cultural and tribal resources." *Id.* at 2-12 (AR0029577). Thus, this Alternative involved the exchange of 711 acres of Federal lands for 827 acres of land from Simplot and a $25,000 donation from Simplot to the Tribes' Language Program. *Id.* at 2-11 (AR0029576). All three of the action alternatives were estimated to extend the life of the Don Plant to 2085. *Id*. at 2-13 (AR0029576). The EIS also examined the No Action Alternative, required by NEPA, wherein the Blackrock Land Exchange would not occur and the Don Plant's estimated life would end around 2031. *Id*.

The EIS also noted other alternatives that were briefly considered but were eliminated from further analysis, including further reductions in the Federal land exchange area, other fluoride reduction alternatives, other cooling pond locations, and gypsum stack alternatives. *Id.* at 2-13–15 (AR0029578–80). The EIS stated that these alternatives were not considered further because they generally would not support Simplot's purpose and need for the land exchange, would not meet the necessary fluoride reductions, were not technically or economically feasible, or were too remote and speculative. *Id*.

For each of the four alternatives that were considered in depth, the EIS examined the direct/indirect impacts and cumulative effects on twenty-one issues raised during internal and external scoping that BLM determined warranted detailed analysis, including air quality and

climate change; cultural resources; tribal treaty rights, trust responsibilities, and tribal resources; public health and safety; recreation; visual resources; fish and wildlife; water resources; and socioeconomics and environmental justice. *Id*. at 2-19–27 (AR0029584–92), 3-1–108 (AR0029594–701).

BLM coordinated with and consulted with the Tribes, both during the preparation of the 2007 EA and the 2020 EIS. *Id*. at 3-22 (AR0029615). For the EIS, BLM and the Tribes had staff-to-staff meetings in December 2018 and March 2019, where the Tribes were able to ask questions and express concerns about the land exchange. *Id.* Then, in March 2019, BLM and the Tribes initiated government-to-government consultation to discuss the process of moving forward with the EIS for the proposed land exchange. *Id.* The Tribes opposed the land exchange because of concerns about impacts on their treaty rights, degradation of natural resources, and impacts on cultural resources. *Id.* In April 2019, BLM re-initiated consultation under Section 106 of the National Historic Preservation Act. *Id.* BLM hosted site visits with tribal cultural staff in July and August 2019, and held government-to-government meetings with the Tribes in January and April 2020. Record of Decision ("ROD") at 12 (AR0039180).

In August 2020, DOI issued a ROD approving Alternative B and authorizing the exchange of 713.67 acres of Federal land for 666.46 acres of non-Federal land along with 160 acres of non-Federal land in the form of voluntary mitigation Parcel A. ROD at 1 (AR0039169). The ROD found that the non-Federal lands to be acquired in the exchange "contain important natural resources and other public values that will further BLM's land management objectives." *Id.* at 3 (AR0039171). It noted that Alternative B was developed to avoid cultural and tribal resources in the West Canyon area and would "allow for a net gain of public lands and will make additional lands available for tribal uses." *Id.* Although one National Register of Historic Places-

eligible site would be removed from Federal administration and protection, the patent issued to Simplot would be subject to a deed restriction to protect and provide tribal access to the site in perpetuity. *Id.* Accordingly, BLM found that Alternative B would have no adverse effect on this site.

BLM also determined that under FLPMA Section 206(a) and the regulations, "the public interest will be well served by completing the Blackrock Land Exchange because the resource values and the public objectives served by the lands to be acquired outweigh those of the lands to be conveyed." *Id.* In particular, BLM found that acquisition of the non-Federal lands and voluntary mitigation Parcel A would provide new recreation and access opportunities and "consolidate Federal land and facilitate more efficient and effective management of BLM lands within the Blackrock RMZ." *Id.* at 3–4 (AR0039171–72). The ROD stated that while the Federal lands exchanged would no longer be available for exercise of off-reservation tribal treaty rights, "exercise of tribal treaty rights will be available within the acquired non-Federal land and voluntary mitigation parcel A," with "a net gain of 113 acres of land available for exercise of off reservation tribal treaty rights." *Id.* at 4 (AR0039172). BLM also found that the land exchange would result in a net increase of mule deer habitat managed by BLM. *Id.* In addition, the ROD stated that the land exchange would increase the life of the Don Plant, with "continued employment, expenditures, taxes, and other long-term impacts on social and economic conditions in the region," as well as allow Simplot to meet IDEQ's fluoride reduction requirements. *Id*.

Finally, the ROD noted that the exchange was in the public interest because access to the Federal lands was limited by the Don Plant to the north and private lands to the east, and the Federal lands had lower resource values because "they are located directly adjacent to [the Don

Plant] and are within the off-site operable unit of the Eastern Michaud Flats Superfund Site." *Id*. BLM stated that "[t]he intended use of the conveyed Federal lands will not significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands," and found that the exchange is consistent with the RMP because it improves access to public land, improves the quality of recreation opportunities and experiences, and meets the management guidance for acquisition of private lands within the Blackrock Canyon Big Game Wildlife Area. *Id.* at 11 (AR0039179). The ROD also summarized the various comments received on the Final EIS, noted their consideration, and concluded that the comments "did not identify any significant new circumstances or information relevant to the environmental consequences described in the Final EIS." *Id.* at 15 (AR0039183). BLM signed the ROD on August 12, 2020, and the land exchange was completed in December 2020.

## STANDARD OF REVIEW

An agency's compliance with NEPA is reviewed under the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–06. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990); *ONRC Action v. BLM*, 150 F.3d 1132, 1135 (9th Cir. 1998). Under the APA, agency decisions may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In accordance with that standard, an agency's decision will be overturned

> only if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*McFarland v. Kempthorne,* 545 F.3d 1106, 1110 (9th Cir. 2008) (citations and quotation marks omitted). The standard of review is "highly deferential, presuming the agency action to be valid

and affirming the agency action if a reasonable basis exists for its decision." *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (citation omitted). "The APA does not allow the court to overturn an agency decision because it disagrees with the decision or with the agency's conclusions . . . ." *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) (citation omitted).

The Ninth Circuit has endorsed the use of summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure for review of agency actions under the APA. *See, e.g., Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471–72 (9th Cir. 1994) (discussing the standards of review under both the APA and Fed. R. Civ. P. 56).

## ARGUMENT

### I. BLM HAD AUTHORITY TO AUTHORIZE THE LAND EXCHANGE AND DID NOT VIOLATE THE 1898 AGREEMENT OR 1900 ACT.

The Tribes first argue that Federal Defendants' approval of the land exchange is invalid because it violates the 1898 Agreement and 1900 Act. Pl.'s Mem. in Supp. of Mot. for Summ. J. 10–16, ECF No. 37-1 ("Pl.'s Mem.")[1]. Specifically, they argue that the 1900 Act contains three requirements that the land exchange violates: (1) ceded lands are only subject to disposal under homestead, townsite, stone and timber, and mining laws; (2) no purchaser can purchase more than 160 acres of lands in the 1900 cession area; and (3) ceded lands within five miles of Pocatello can only be disposed of via public auction. None of the arguments demonstrate that

[1] Plaintiff submitted declarations and exhibits with their Motion for Summary Judgment that go toward establishing Plaintiff's standing. ECF No. 37-4–17. No party challenges Plaintiff's standing, and the Court therefore need not, and should not, consider the declarations or other extra-record evidence in its determination on the merits of the case. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.").

Federal Defendants acted unlawfully. FLPMA provides procedures for disposal akin to those in the earlier homestead, townsite, stone and timber, and mining laws, and therefore provides BLM with authority to enter into the land exchange.

In 1898, the Indians of the Fort Hall Reservation and a commission acting for the federal government reached an agreement wherein the Tribes agreed to "cede, grant, and relinquish to the United States all right, title, and interest" they had in a portion of the Fort Hall Reservation, which included the land transferred to Simplot in the present land exchange. Pl.'s Mem. 4; Act of June 6, 1900, 31 Stat. 672, 672–73 (Art. I) (1900) ("1898 Agreement"). The Agreement provided that "[s]o long as any of the lands ceded, granted, and relinquished under this treaty remain part of the public domain," the Tribes have the right to cut timber for their own use, pasture livestock, and to hunt and fish on those "public lands." *Id.* at 674 (Art. IV).

Congress ratified the Agreement in a 1900 Act. *Id*. at 675. The 1898 Agreement did not contain any provisions about disposal of the ceded lands. *See* Dep't of Interior, Agreement with Crow, Flathead, and Other Indians, S. Doc. No. 55-169 at 12–13 (2d Sess. 1898) (correspondence regarding "the manner of disposal of the lands ceded" to be added to proposed bill). In section 5 of the 1900 Act, however, Congress provided that, after allotments were made to Indians who had settled in the ceded area, "the residue of said ceded lands shall be opened to settlement by the proclamation of the President, and shall be subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States only." 31 Stat. at 676 (§ 5). Congress also added other provisions regarding disposal of the ceded lands, including that no purchaser can purchase more than 160 acres of ceded lands, and that the ceded lands within five miles of Pocatello must be sold at public action. *Id.*

In May 1902, President Roosevelt issued a proclamation announcing that the ceded lands, with certain exceptions, including "all of the lands within five miles of the boundary line of the town of Pocatello," would "be opened to settlement and entry under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in the statutes above specified" and applicable laws of the United States. Presidential Proclamation of May 7, 1902, 32 Stat. 1997, 1998. The proclamation also stated that lands within five miles of Pocatello would be offered at public auction on July 17, 1902, "at and after the hour of 12 o'clock, noon (Mountain Standard time)." *Id.*

In 1976, Congress enacted FLPMA to "provide guidance and a comprehensive statement of congressional policies concerning the management of the public lands." *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 737, 738 n.2 (10th Cir. 1982) (noting that "BLM and its predecessor[s] managed public lands under some 3,000 public land laws"); *see also* 43 U.S.C. § 1701 (congressional declaration of policy); *NWF v. Burford*, 676 F. Supp. 271, 272 (D.D.C. 1985), *aff'd*, 835 F.2d 305 (D.C. Cir. 1987). FLPMA applies to "public lands," which it defines broadly: "any land and interest in land owned by the United States . . . and administered by the Secretary of the Interior though the [BLM], without regard to how the United States acquired ownership." 43 U.S.C. § 1702(e). One of FLPMA's purposes is to provide "uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands . . . , requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved." 43 U.S.C. § 1701(a)(10). Section 206, governing exchanges, authorizes the Secretary of the Interior to exchange public lands upon a determination "that the public interest will be well served by making that

exchange." 43 U.S.C. § 1716(a). BLM made this determination in the ROD approving the land exchange. ROD at 3–6 (AR0039171–74).[2]

The Tribes argue that the Secretary could not dispose of the land under FLPMA because the 1900 Act provided that the ceded lands are "subject to disposal under homestead, townsite, stone and timber, and mining laws of the United States *only*." Pl.'s Mem. 10–16 (emphasis added). But Congress "has the authority and responsibility to manage federal lands," *United States v. Jenks*, 129 F.3d 1348, 1354 (10th Cir. 1997) (citing U.S. Const. art. IV, § 3); *United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997) (stating that "under the Property Clause, the United States can administer its federal lands any way it chooses"). In FLPMA, Congress changed federal public lands policy by repealing many subject-specific statutes that previously governed management and disposal of public lands, such as the homestead and townsite acts, and replacing them with a comprehensive scheme that applies to public lands managed by BLM. 43 U.S.C. §§ 1701, 1702; *see also* 90 Stat. 2789–90; FLPMA, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787–89 ("Repeal of laws relating to homesteading and small tracts"); *Id.* at § 703(a), 90 Stat. 2743, 2789–90 ("Repeal of laws related to disposal" including townsite reservation and sale); Timber and Stone Act, ch. 151, 20 Stat. 89 (1878) (repealed 1955); Timber Culture Act, 17 Stat. 605 (1873) (repealed 1891, 26 Stat. 1095); *Rocky Mountain Oil & Gas Ass'n*, 696 F.2d at 737, 738 n.2 (10th Cir. 1982) (citing 121 Cong. Rec. 1846 (1975)) (listing the Mining Act of 1872 and "the various homestead laws" as part of the "myriad" of public laws replaced by FLPMA). Indeed, BLM otherwise manages the federal lands involved in the exchange pursuant

[2] There is no question that the ceded lands are public lands as defined in FLPMA. The Tribes agreed to "cede, grant, and relinquish to the United States all right, title, and interest" in the ceded lands, for which the Tribe received a sum certain, and the land became part of "the public domain." *See* 31 Stat. at 672–74 (1898 Agreement, Art. I, II, IV).

to FLPMA, and they are included in the Pocatello RMP. *See* FEIS at 1-4 (AR0029563). Given that FLPMA now broadly governs public lands disposal, and that most of the subject-specific categories of disposal laws in Section 5 are no longer available, BLM properly interpreted FLPMA to provide a means of disposal for the public lands. *See* ROD at 3 (AR0039171).

To be clear, we do not argue that FLPMA repealed the 1900 Act. Instead, FLPMA provided BLM with a source of authority like those identified under the 1900 Act to dispose of the ceded lands at issue here. The two statutes can be harmonized by recognizing that the 1900 Act listed means of disposal that are no longer available, and that FLPMA now provides a means of disposing of public lands. *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (noting that the first step when addressing potentially competing statutory obligations is to "strive 'to give effect to both'" (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974))). Thus, FLPMA should be read to supplement, not to conflict with, Section 5's provisions.

The Tribes' other arguments regarding the 1900 Act are similarly misplaced. The Tribes argue that the lands could only be disposed of by public auction because they are within five miles of Pocatello, but a 1904 statute removed the auction requirement for such lands unsold after being opened to auction. *See* An Act Relating to Ceded Land on the Fort Hall Indian Reservation, Pub. L. No. 58-76, 33 Stat. 153 (1904); *see also Nixon v. Eldredge*, 42 Pub. Lands Dec. 153, 156, 1913 WL 1344 (finding that the statute removed the auction requirement and made lands within five miles of Pocatello "subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States in the same manner that the balance of said ceded lands outside of said 5-mile limit had been opened to entry previous to said act of March 30, 1904"). The Presidential Proclamation opened the lands for auction on June 17, 1902, "at and after the hour of 12 o'clock, noon (Mountain standard time)." 32 Stat. at 1998. Thus, the

lands were "subject to entry under and in accordance with the provisions of section five of said act. . . ." and the exchange did not run afoul of the 1900 Act's auction requirement.

Finally, the 160-acre limitation does not apply here as it applies only to land "purchasers." 31 Stat. at 676 (§ 5). Simplot did not "purchase" the land, as it was part of a land exchange. This is not just semantics. For example, FLPMA recognizes sales (43 U.S.C. § 1713) and exchanges (43 U.S.C. § 1716) as distinct disposal concepts. Similarly, the auction requirement refers to sales, not exchanges.

In short, BLM has the authority for the land exchange and Federal Defendants are entitled to summary judgment on Plaintiff's claims regarding the 1900 Act.

## II. THE LAND EXCHANGE COMPLIED WITH FLPMA.

Before authorizing a land exchange under the FLPMA, the DOI must determine that the public interest will be well served by the exchange. 43 U.S.C. § 1716(a); 43 C.F.R. § 2200.0-6(b) (2019). When making this determination, DOI must "give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife." 43 U.S.C. § 1716(a). DOI must also find that (1) the resource values and the public objectives of the federal lands are not more than the resource values of the non-federal lands, and (2) "[t]he intended use of the conveyed [f]ederal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent federal lands and Indian trust lands." 43 C.F.R. § 2200.0-6(b)(1)–(2).

### A. BLM Reasonably Determined that the Public Interest Is Served by the Land Exchange.

Under FLPMA Section 206(a) and 43 C.F.R. § 2200.0-6(b)(1) and (2), BLM reasonably determined that the public interest will be well served by the land exchange "because the

resource values and the public objectives served by the lands to be acquired outweigh those of the lands to be conveyed." ROD at 3 (AR0039171). BLM based this determination on its analysis of 13 distinct issues impacting the public interest. ROD at 3–6 (AR0039171–74). These issues included, among other things: tribal treaty rights; CERCLA clean-up of the Fort Hall Indian Reservation and adjacent lands; efforts to address historic groundwater and surface water contamination, and to achieve compliance with EPA and IDEQ consent orders; lower resource values of land being exchanged out of the public domain; wildlife habitat impacts; recreation impacts; socioeconomic impacts; and consolidation of federal lands to improve management. *Id*.

BLM determined the non-federal lands were equal to or better than those exchanged with respect to recreational opportunities, wildlife habitat, and quality of resources. *Id*. at 3–4 (AR0039171–72). In discussing impacts to off-reservation tribal treaty rights, the BLM noted that while the Federal lands will no longer be available for that use, the exchange would result in a net gain of 113 acres of land available to the Tribes for the exercise of off-reservation tribal treaty rights. *Id*. at 4 (AR0039172). BLM also considered that "[p]ast and present actions associated with the Don Plant have resulted in adverse impacts to groundwater and surface water in close proximity to the plant," and then discussed how the reasonably foreseeable operation of the cooling ponds and gypsum stack expansion would impact water resources. *Id*. at 5 (AR0039173). The ROD also explained that "the intended use of the conveyed Federal lands will not significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands." *Id*. at 4 (AR0039172).[3]

[3] The ROD explained that the Federal lands are not adjacent to any Indian Trust lands, and while a 24-acre parcel of the Federal lands is adjacent to the Fort Hall Reservation, those adjacent lands within the Reservation are privately owned by the FMC Corporation. ROD at 4–5 (AR0039172–72).

Moreover, BLM's public interest determination in the ROD does not stand on its own; it is supported by the analysis in the EIS. *See id*. at 3 (AR0039171) ("This Record of Decision is based on the consideration of the information from the Final EIS."); *Nat'l Coal Ass'n v. Hodel*, 675 F. Supp. 1231, 1244 (D. Mont. 1987) (considering EIS in judging sufficiency of public interest analysis in decision document), *aff'd sub nom. N. Plains Res. Council v. Lujan*, 874 F.2d 661 (9th Cir. 1989). The issues that the Tribes raise with respect to the public interest determination, such as impacts on water quality and tribal cultural resources, were sufficiently analyzed in the EIS. *See* Section III, *infra*.

In short, BLM's determination that the land exchange will have a net benefit to the public interest was both rational and sufficient under FLPMA, and should be afforded deference. *See Nat'l Coal Ass'n*, 675 F. Supp. at 1245 ("[T]he Court 'will not pass upon the wisdom of the agency's perception of where the public interest lies.'" (quoting *Telocator Network of Am. v. FCC*, 691 F.2d 525, 538 (D.C. Cir. 1982)).[4]

**B. The Equal Value Appraisal Met Applicable Requirements.**

BLM satisfied Section 206(b) of FLPMA which requires that any difference in the appraised values of the Federal and non-Federal lands may be equalized through a cash payment from an exchange proponent of up to 25 percent of the value of the Federal lands to be conveyed, and/or the acreages proposed for exchange may be adjusted. 43 U.S.C. § 1716(b). The Federal lands were appraised in 2020 at $645,000 and the non-Federal lands were appraised in 2020 at

[4] The Tribes also assert that the ROD fails to conform to the 2012 Pocatello Approved Resource Management Plant (ARMP) because it allegedly conflicts with certain enumerated goals and actions regarding the protection of water quality and tribal treaty rights and interests. Pl.'s Mem. 19–20. As explained above and in Section III, *infra*, these issues are adequately addressed both in the ROD's public interest determination and in the FEIS. *See also* ROD at 8 (AR0029176) (Land Use Plan Conformance).

$635,000. ROD at 7 (AR0039175). Therefore, Simplot was required to issue to BLM at closing a cash equalization payment of $10,000. *Id.* at 8 (AR0039175).[5]

The Tribes' contention that the equal value appraisal should consider non-monetary values such as environmental justice and BLM's trust responsibility is at odds with governing regulations that require a comparison of market values. *See* 43 C.F.R. 2201.3-2(a)(2) ("Estimate the value of the lands and interests as if in private ownership and available for sale in the open market"). Tribal treaty rights and interests are not a typical resource bought or sold in a competitive market involving private lands. The Tribes' reliance on *National Audubon Society v. Clark* is inapposite because that case involved a land exchange under the Alaska National Interest Lands Conservation Act ("ANILCA"), which is not applicable to land exchanges outside of Alaska. 606 F. Supp. 825, 827 (D. Alaska 1984). As the court noted, "'Public interest' exchanges under ANILCA are *exceptions to the general congressional requirement* that the Secretary only enter into exchanges of equal monetary value." *Id*. at 835 (emphasis added). While environmental justice, tribal resources, and other non-monetary values are certainly important considerations, BLM thoroughly and appropriately analyzed impacts to those values in the EIS, *see* Section III, *infra*, and was not required to also incorporate such considerations into its equal value analysis.

## III. BLM COMPLIED WITH NEPA.

NEPA serves the dual purposes of informing agency decision-makers of the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public so that they "may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*,

[5] The equal exchange appraisal did not include the value of voluntary mitigation Parcel A, which was appraised in 2020 at $104,000. ROD at 8, fn 1 (AR0039175).

490 U.S. 332, 349 (1989). To meet these dual purposes, NEPA requires that an agency prepare a comprehensive EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.3.[6] "The EIS 'shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.'" *Conservation Cong. v. Finley*, 774 F.3d 611, 616 (9th Cir. 2014) (quoting 40 C.F.R. § 1502.1).

In reviewing the sufficiency of an EIS, the courts evaluate whether the agency has presented a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (citation omitted). "[T]he reviewing court may not 'fly speck' an EIS and hold it insufficient on the basis of inconsequential, technical deficiencies." *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1184 (9th Cir. 1997) (citations omitted). If an agency takes a "hard look" at environmental consequences, its analysis should be upheld. *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Transp.*, 770 F.3d 1260, 1271 (9th Cir. 2014) (citation omitted). So long as adverse environmental effects of a proposed action are "adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson,* 490 U.S. at 350.

BLM's NEPA analysis provided a full and fair discussion of significant environmental impacts of the proposed action and its alternatives. *See* FEIS (AR0029528–766). The EIS itself is

[6] The Council on Environmental Quality issued new implementing regulations in 2020. *See* 85 Fed. Reg. 43,304 (July 16, 2020). Because the challenged administrative actions were subject to previous regulations, *see* 40 C.F.R. § 1506.13 (2020), all citations herein are to the version of the regulations in effect at the time of the relevant decisions, 40 C.F.R. Part 1500 (2019).

approximately 180 pages long, not accounting for hundreds of pages of appendices, which include a feasibility study, a socioeconomic technical report, and a water resource technical report. *Id.* (AR0029710–30766). The EIS provided detailed information on the affected environment's existing conditions and the potential for direct, indirect, and cumulative impacts from each of the four studied alternatives. *See id.* Ch. 2, 3 (AR0029566–701). Specifically, the EIS analyzed seventeen different environmental issue areas, including air quality and climate change, tribal rights, water resources, recreation, visual resources, wildlife, socioeconomics and environmental justice, and cultural resources. *See id.* Ch. 3 (AR0029594–701).

In addition, during the EIS scoping and drafting process, BLM consulted with the appropriate entities, including the Tribes and federal, state, and local government agencies, and worked with four cooperating agencies: IDEQ, the Idaho Governor's Office of Energy and Mineral Resources, the EPA, and the Bureau of Indian Affairs. *See id.* Ch. 4 (AR0029702–07). BLM provided information to the public as required by NEPA in issuing a notice of scoping, publishing the draft and final EIS, and soliciting and considering public comments at each stage. Not only did BLM respond to these comments in the EIS and the ROD, *see* ROD at 15 (AR0039183); FEIS App'x I (AR30034–30131), but it developed Alternative B specifically in response to comments requesting that BLM adjust the boundary of the Federal lands exchanged to avoid certain cultural and tribal resources. FEIS at ES-3 (AR0029546). Therefore, BLM satisfied NEPA's dual purposes by working with relevant stakeholders, responding to comments, and providing a thorough analysis of the environmental consequences of the land exchange.

**A. BLM Took a Hard Look at the Direct, Indirect, and Cumulative Impacts of the Land Exchange and Considered a Reasonable Range of Alternatives.**

1. BLM adequately considered the foreseeable environmental and health impacts from the land exchange.

The Tribes allege that BLM failed to adequately analyze certain environmental and health impacts from the land exchange. Pl.'s Mem. 24. The Tribes also argue that BLM did not adequately evaluate the impacts on water, air, and visual resources from Alternative B, which changed the location of the proposed gypsum stack expansion from that of the Proposed Action. *Id*. at 24–26. The EIS, however, included a robust analysis of these impacts and adequately outlined the differences between the Proposed Action and Alternative B. *See* FEIS 2-19–27 (AR0029583–92) (comparison chart of environmental effects of alternatives).

***Water Quality***

BLM analyzed in detail the potential impacts to water resources from the reasonably foreseeable actions of expanding the gypsum stacks and constructing cooling ponds on the exchanged lands. *Id.* at 3-87–91 (Water Resources section) (AR0029680–84).[7] BLM's analysis relied on the Water Resource Technical Report, located in Appendix H of the FEIS, which was a comprehensive modeling and technical analysis performed to assess the potential impacts to groundwater and surface water from the Proposed Action over the projected life of the Don Plant (up until 2085). *See* AR0029944–30033. This analysis found that "concentrations of contaminants of concern in monitoring wells, springs, and the Portneuf River have shown declining trends since source controls and extraction activities were implemented." FEIS at 3-86 (AR0029679). Based on this analysis, BLM concluded that, under the Proposed Action,

[7] As in other sections of the EIS, the potential impacts from the gypsum stack expansions and cooling ponds are analyzed as cumulative effects as opposed to direct or indirect effects.

"[o]peration of the cooling ponds and gypsum stack expansions on the Federal lands would result in minor incremental additions of phosphorous, arsenic and other constituent loading due to leakage of leachate through the liner." *Id.* at 3-87 (AR0029680). Despite these incremental additions, BLM predicted that total concentrations of arsenic and phosphorous would continue to decline due to implementation of source controls and groundwater extraction activities at the Don Plant. *Id.* at 3-90 (AR0029683).

BLM next explained that "the reconfigured gypsum stack expansions under Alternative B would have approximately the same gypsum waste disposal capacity as the gypsum stack expansions that would be developed as a result of the Proposed Action." *Id.* at 3-91 (AR0029684). BLM acknowledged that the different location of the gypsum stack expansions under Alternative B "could result in higher phosphorous and arsenic loading to groundwater extraction wells on the eastern side of the Don Plant site," but nonetheless concluded that "[it] is unlikely to affect the overall downward trend in concentrations resulting from the lining of the existing gypsum stacks and continued application of other source controls." *Id.* at 3-91 (AR0029684). Despite the fact that Alternative B will move the expanded gypsum stacks closer to the Portneuf River, analysis of groundwater flow paths from the cooling ponds (which are in the same location as under the Proposed Action) and gypsum stack expansion areas to the south and east of the existing gypsum stack demonstrated that the flow of contaminants would not be materially altered by the shift in location. *Id.* at H-50 (AR0030001); *see also* AR0029739–40 (maps of Proposed Action and Alternative B). Therefore, BLM reasonably determined that the existing groundwater flow analysis was sufficient for purposes of predicting water quality impacts from Alternative B. While the Tribes disagree with that analysis, BLM's reliance on the Technical Report and its conclusions regarding water quality impacts are scientific judgments

squarely within its expertise, and thus should be afforded deference. *See Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."); *see also San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 997 (9th Cir. 2014) (agency given "substantial discretion" in its reasoned choice of and reliance on modeling methods).

***Air Quality***

BLM thoroughly considered impacts to air quality from the land exchange. *See generally* FEIS at 3-3–14 (AR0029596–607). As BLM explained, one of the purposes of the land exchange is to allow Simplot to construct cooling ponds to reduce fluoride emissions coming from the existing cooling towers at the Don Plant as required under the 2016 IDEQ Consent Order. *Id.* at 3-11 (AR0029604). Once the cooling ponds are constructed and the cooling towers shut down, both fluoride and particulate matter emissions are expected to decrease substantially. *Id.* at 1-3, 3-11–12 (AR0029562, AR0029604–05). As for Alternative B, which would move the expanded gypsum stacks closer to residential areas to the east of the Don Plant (but further away from the Fort Hall Reservation), BLM concluded that "the overall reduction in fluoride and particulate matter emissions from construction of the cooling ponds is anticipated to negate the effects of moving the source of the emissions." *Id.* at 3-13 (AR0029606). Again, this sort of technical determination should be afforded deference. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 361 (1989) (Where the "analysis . . . requires a high degree of technical expertise," courts "must defer to the informed discretion of the responsible agency.").

***Visual Resources***

BLM also adequately evaluated the impacts to visual resources from the land exchange. *See* FEIS § 3.9 (AR0029636–40). BLM acknowledged that the construction of cooling ponds and gypsum stacks on the Federal lands would introduce contrasts to the landscape, altering the existing visual character from a generally natural landscape to a modified industrial landscape and explained where those changes would be most visible. *Id.* at 3-46 (AR0029639). As compared to the other action alternatives, BLM noted that Alternative B would convert 36 more acres of Federal lands and 15 more acres of Simplot private lands to a modified industrial landscape. *Id.* at 3-47 (AR0029640). BLM explained that while the different gypsum stack configuration under Alternative B would alter the visibility of the embankments as seen from certain observation points on nearby highways, the types of visual contrasts would be the same as for the action alternatives. *Id*. BLM did not "dismiss" these impacts, but rather outlined what those impacts would be as NEPA requires, and merely noted the fact that "the planned facilities would be similar in appearance to the existing gypsum stack and Don Plant facilities directly adjacent to the northern boundary of the Federal lands." *Id.* at 3-46 (AR0029639).

***Public Health and Safety***

BLM adequately analyzed impacts to public health and safety throughout the EIS, noting that "public safety issues associated with the land exchange and reasonably foreseeable actions include potential failure of the gypsum stacks and cooling ponds, exposure to hazardous or solid wastes, and air and water quality degradation and associated health and safety effects." *Id.* at 3-37 (AR0029630); *Id.* § 35 (Geotechnical Stability), § 36 (Hazardous or Solid Wastes), § 32 (Air Quality and Climate Change), § 317 (Water Resources).

First, BLM adequately accounted for a potential gypsum stack failure. In the Geotechnical Stability section of the EIS, BLM provided tables showing the analytical testing

results of chemical concentrations in the gypsum stack slurry and the cooling pound water. *Id.* at 3-31–32 (AR0029624–25). The EIS disclosed that some of the chemical constituents would cause concern if failure of a gypsum stack or cooling pond were to cause an uncontrolled release of fluids into the environment. *Id*. In the Water Resources section, the BLM noted that "[i]f a failure in the gypsum stack liners were to occur due to improper installation, geotechnical stresses, earthquakes, or other factors, the contaminants in the gypsum stack slurry [] could migrate into groundwater, resulting in adverse impacts on water resources." *Id.* at 3-90–91 (AR0029683–84). Recognizing that the "extent and severity of potential impacts on water resources from a liner failure" would depend on a variety of factors, BLM explained that Simplot would coordinate with IDEQ, EPA, and other appropriate parties on remedial actions in the event of failure. *Id.* at 3-91 (AR0029684). And BLM discussed the variations among alternatives and their corresponding risks. *See id.* at 3-33 (AR0029626) (discussing risk of gypsum stack failure under Alternative B as compared to the Proposed Action). Significantly, BLM noted that the No Action Alternative presented a higher risk of failure than the Proposed Action or Alternative B because the proposed expansion would allow a similar volume of water and slurry to be distributed over more individual ponds, thus reducing the depth of each individual pond and also providing redundancy in the containment system. *Id*. at 3-34 (AR0029627). The FEIS also discussed prior releases from the existing gypsum stack and the subsequent remedial actions conducted by Simplot with IDEQ's oversight and approval, and explained that further assessment of geotechnical stability will be conducted "during and after final engineering and in accordance with the existing Consent Orders." *Id*. at 3-29–30 (AR0029622–23).

Second, BLM adequately analyzed health impacts from past, present, and future pollution. The Hazardous or Solid Wastes section of the EIS disclosed that surface soils in the

Federal lands have elevated levels of some metals and inorganics, and that some vegetation has elevated fluoride levels. *See* FEIS at 3-35 (AR0029628). As explained in that same section, however, "the EMF Superfund Site risk assessment identified no unacceptable human health risks from elevated concentrations and only marginal ecological risks due to fluoride in vegetation." *Id*; *see also* AR0062904–24 (1995 EMF Baseline Human Health Risk Assessment). And although the EIS does not describe specific health impacts to the public from contaminates such as arsenic, it does describe the magnitude of estimated incremental increases in arsenic and phosphorus from implementing the reasonably foreseeable actions under the alternatives. *See* FEIS at 3-87–91 (AR0029680–84). BLM also explained that "the estimated magnitude of effects on water quality resulting from the reasonably foreseeable actions—including leakage of mercury, arsenic, and phosphorus described in Section 317 (*Water Resources*)—are not anticipated to adversely affect fisheries that are utilized by the Shoshone Bannock Tribes . . ." *Id.* at 3-104 (AR0029697). Finally, contrary to the Tribes' assertion, BLM analyzed the potential dispersal of radionuclides from wind erosion on the gypsum stacks. *Id.* at 3-36–37 (AR0029629–30); *see also id.* at 3-85–86 (AR0029678–79) (detailing results of radiological evaluation).[8]

***Wildlife***

BLM adequately analyzed impacts to fish and wildlife and described the occurrence of terrestrial wildlife within the Federal lands. *Id.* § 3.16. The BLM Pocatello Field Office wildlife

[8] Regarding the Tribes' claim that BLM improperly failed to consider impacts from the proposed Industrial Business Park, Pl.'s Mem. 28, BLM did not receive comments about this issue during scoping or drafting of the EIS. Regardless, during development of the Draft EIS, the BLM considered the potential actions (sale of/development) at the Hoku Plant, however future actions at the site seemed speculative. *See* AR0004418–25; AR0012818–19; *see also Envtl . Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014–15 (9th Cir. 2006) (holding that if "not enough information is available to permit meaningful consideration" and "the parameters of [a future] project [a]re unknown," the agency does not act arbitrarily by excluding those projects from its cumulative impact analysis.)

biologist conducted wildlife surveys within the Federal lands in 2019, and prepared Threatened and Endangered Wildlife Clearance Worksheets in 1995 and 2003. *See* AR0055764–66; AR0062774; AR0063395–96.

The EIS disclosed that the existing gypsum stack is not equipped with any mechanisms intended to exclude or deter wildlife, and that BLM had not conducted any formal monitoring to document instances of drowning, entrapment, or ingestion of toxic constituents by migratory birds and other wildlife species. FEIS at 3-71 (AR0029664). The EIS noted, however, that Simplot staff have not observed wildlife mortalities in association with operation of the existing gypsum stack. *Id*. BLM therefore hypothesized that wildlife avoid the gypsum stacks due to human activity, the absence of desirable habitat characteristics, and the proximity of extensive aquatic and wetland habitat associated with the nearby American Falls Reservoir. *Id*. It reasonably assumed on these bases that the planned gypsum stack and cooling ponds would pose minimal risk of drowning, entrapment, and toxicity for migratory birds and other wildlife species. *Id*.

In their comments on the Final EIS, the Tribes questioned this assumption and BLM's reliance on Simplot's staff's observations of wildlife, *see* AR0065176–77, but they provided no contrary evidence that migratory birds or other species land on the gypsum stacks, and no case law for the proposition that it was improper for BLM to rely on a project proponent's observational data in a NEPA analysis.[9]

[9] The Tribes also allege that BLM failed to explain how it complied with the Migratory Bird Treaty Act ("MBTA"). They did not raise this concern during scoping or drafting of the EIS. Regardless, the MBTA does not apply to BLM's action because the land exchange itself does not directly result in the taking of any migratory birds protected under the Act. *See Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991) (finding MBTA does not prohibit agencies from selling and logging timber from lands within areas that may provide suitable habitat for the

***Socioeconomics***

Finally, BLM adequately considered impacts to socioeconomics. BLM reasonably analyzed housing impacts within Power and Bannock County, which includes portions of the Fort Hall Reservation, commensurate with the scope of issues identified in the public scoping process or in public comments on the Draft EIS. *See* FEIS at 3-102 (AR0029695).[10] Also, BLM analyzed potential impacts to nonmarket values, such as social and quality-of-life impacts. The EIS disclosed that effects on nonmarket values under the Proposed Action would be greater than under the No Action Alternative because the Federal lands would be converted to an industrial landscape character, and because impacts on the natural environment and social/quality-of-life conditions could affect direct use, indirect use, and passive use nonmarket values. *Id.* at 3-103 (AR0029696).[11]

These analyses, taken together, more than satisfied BLM's duty under NEPA to take a hard look at the environmental and health impacts from the land exchange.

2. BLM considered impacts to the Tribes' treaty rights.

The Tribes also argue that the BLM failed to consider significant impacts on the Tribes' treaty rights, both from the land exchange's adverse environmental effects and from the loss of public land adjacent to the Fort Hall Reservation.[12] Pl.'s Mem. 29–31. Federal Defendants

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northern spotted owl because a "taking" under the MBTA is limited to deliberate acts done directly and intentionally to migratory birds).

[10] The Tribes did not raise any concern about impacts to their ability to offer housing in the Michaud Creek area during the scoping or drafting process.

[11] The Tribes' arguments focusing more specifically on socioeconomic impacts to the Tribes are addressed in Sections III.A.2, .3, and III.D below.

[12] While the Tribes do raise a breach of trust claim, the claim addressed in this section falls under NEPA and "is, in essence, a challenge to the adequacy of the EIS, and the normal APA standard of review applies." *Okanogan Highlands All. v. Williams*, 236 F.3d 468, 479 (9th Cir. 2000)

acknowledge that the Tribes' off-reservation treaty rights will be impacted. But the EIS's discussion of potential impacts on the Tribes' treaty rights is sufficient under Ninth Circuit precedent.

For example, in *Okanogan Highlands Alliance v. Williams*, the tribe argued that the Forest Service's approval of a gold mine did not properly consider the tribe's reserved right to hunt and fish on what were ceded lands. 236 F.3d 468, 478 (9th Cir. 2000). The Ninth Circuit found that the agency "took the requisite 'hard look' at the issues that will affect" the tribe's reserved rights because the EIS and ROD "contain[ed] numerous acknowledgements" of those rights and "examined the issues that will affect [them]." *Id.* at 479–80.[13]

BLM met that standard here. Section 3.4 of the EIS discussed "tribal treaty rights, trust responsibilities, and tribal resources," and, after identifying those rights and resources, examines the proposed action's and its alternatives' potential direct, indirect, and cumulative impacts on those rights and resources. FEIS at 3-20–28 (AR0029613–21). This section quoted the off-reservation rights provisions in the Fort Bridger Treaty, and the 1898 Agreement and 1900 Act. *Id.* at 3-21–22 (AR0029614–15). The EIS discussed the Tribes' active use of the land and resources outside the reservation, including particular resources valued by the Tribes. *Id.* at 3-23 (AR00296160). Against that backdrop, Chapter 2 of the EIS examined the proposed action and alternatives, and, for each, noted the impacts on treaty rights. For example, the EIS noted that the land would remain available for the Tribes to exercise off-reservation treaty rights under the no-

(citing *Morongo Band of Mission Indians v. FAA,* 161 F.3d 569, 573–74 (9th Cir. 1998)). We address the breach of trust claim separately below.

[13] Here, the Pocatello RMP also provides that decisions affecting BLM-administered public lands be made in consideration of reserved off-reservation treaty rights on unoccupied Federal lands and the right for the Tribes to graze livestock and cut timber on Federal lands within the ceded boundary. FEIS at 3-21 (AR0029614).

action alternative, and that the non-federal lands would not be available for such use. *Id.* at 2-20 (AR0029585).[14]

The EIS ultimately concluded that, while there would be impacts on treaty rights because the Tribes would lose access to the Federal lands exchanged, the Tribes would also gain access to the new federal land, including 160 additional acres. *Id.* at 3-28 (AR0029621). Further, the additional conveyance of private property to BLM or the Tribes as mitigation parcels would help mitigate adverse impacts on Tribal treaty rights. *Id*. The ROD echoes this conclusion: "the Federal lands will no longer be available for exercise of off-reservation tribal treaty rights; however, exercise of tribal treaty rights will be available within the acquired non-Federal land and voluntary mitigation parcel A. There would be a net gain of 113 acres of lands available for exercise of off reservation tribal treaty rights." ROD at 9 (AR0039177).[15]

The Tribes argue that the EIS did not consider the long-term impacts of the gypsum stack. But the EIS disclosed that the land exchange would allow the Don Plant to operate an additional 65 years and thus "increase the duration of ongoing effects from operation of the Don Plant," and its analysis of the important resources stated that the action alternatives would result in longer duration of impacts. *See, e.g.,* FEIS at 3-27–28 (AR0029620–21). With regard to treaty rights, the EIS also stated that "the reasonably foreseeable construction of cooling ponds and gypsum stack expansions on the Federal lands may damage or result in further loss or degradation of tribal resources that are important to" the Tribes. *Id.* at 3-27 (AR0029620).

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[14] Though not relating to treaty rights, the EIS also explained that the Tribes have sacred sites in the Federal lands that were exchanged and value landscape features in those lands. FEIS at 3-24 (AR0029617).

[15] The ROD and EIS also noted that public access to the Federal lands that were exchanged was limited and the resource values were lower because they "are located directly adjacent to" the Don Plant "and are within the off-site operable unit of the Eastern Michaud Flats Superfund Site." ROD at 4 (AR0039172).

Finally, the Tribes argue that the EIS failed to consider that the new federal lands include a former shooting area that they allege is likely to be contaminated by lead and other debris. But the EIS recognized that there was "an unauthorized shooting range" on the non-federal land, and that "Simplot created a permanent soil cover over the lead-contaminated area in 1996 and moved the drainage course of the soil cover to prevent future flows from eroding the fill." *Id.* at 3-35 (AR0029628). The Phase I environmental site assessment conducted during the EIS process found some areas where dispersed shooting had occurred, but no evidence of high-density use. *Id*. The EIS noted that there was some solid waste, such as target trash, on the site, but that it should be removed before acquisition. *Id*.; ROD at 3 (AR0039171). Though Federal Defendants appreciate and respect the Tribes' concerns, the EIS's discussion of potential impacts on treaty rights complied with the governing NEPA standard.

3. BLM considered impacts to cultural resources.

NEPA requires that an EIS include a "discussion" of "historic and cultural resources." *See N. Idaho Cmty. Action Network v. DOT*, 545 F.3d 1147, 1156 (9th Cir. 2008) (finding that EIS met NEPA standards when it considered impacts and discussed mitigation measures to minimize impacts). The EIS contains an adequate discussion of the project's potential impacts on cultural resources, and of BLM's efforts to mitigate those impacts.

In 2019, a Class III cultural resources inventory was conducted on the Federal lands, non-Federal lands, and voluntary mitigation Parcel A, and a cultural resources survey was conducted for voluntary donation Parcel B. FEIS at 3-15 (AR0029608). Three sites on the Federal lands are eligible for listing on the National Register of Historic Places. *Id.* The EIS also noted that "[w]hile many of the cultural sites are not recommended as eligible for listing on the [National Register of Historic Places ("NRHP")], they do provide important cultural history and

significance for the Shoshone-Bannock Tribes." *Id.* The EIS listed and discussed cultural sites and historic isolated finds on the lands involved in the exchange. *Id.* at 3-15–17 (AR0029608–10). The EIS also examined the direct and indirect impacts, as well as the cumulative effects, of each alternative on cultural resources. *Id.* at 3-17–20 (AR0029610–12).

Most notably, BLM's consideration of cultural resources is evident from the selection of Alternative B as the preferred alternative. Alternative B "was developed based on comments received during scoping to adjust the boundary of the Federal lands to avoid cultural and tribal resources in the west canyon area on the north side of Howard Mountain." *Id.* at 2-11 (AR0029576). The EIS stated that this alternative would "[r]esult in BLM retention of 368 acres of Federal lands in the west canyon area that the BLM would continue to manage in accordance with the Pocatello RMP (BLM 2012), including identified cultural and tribal resources." *Id.* at 2-12 (AR0029577). Several important cultural sites "would be retained in Federal ownership and, therefore, would not be damaged or destroyed from construction of the reasonably foreseeable actions of the cooling ponds and gypsum stacks on the Federal lands." *Id.* at 3-20 (AR0029613). This alternative also reconfigured the layout of the gypsum stack expansion and cooling ponds to avoid an NRHP site. *Id*.

The Tribes argue that the EIS does not consider the loss of protection for some historic sites on the federal lands that were transferred to Simplot, and that the land likely contains burial sites and other culturally significant sites. Pl.'s Mem. 31–33. But the EIS noted and addressed these concerns. BLM responded to the Tribes' comments by stating that the cultural resource surveys conducted on the Federal lands did not identify any burial sites, and "[t]here have been no specifically documented or recorded burial sites on the Federal lands." FEIS at I-19 (AR0030356). The EIS also acknowledged that some sites will lose federal protection, stating for

example that for the proposed alternative, several historical sites "are not within the footprints of the planned facilities, but would not be subject to protection under Federal laws and regulations, and could be damaged or destroyed in the course of future construction or operational activities." *Id.* at 3-19 (AR0029612). As the EIS explained, however, NRHP-eligible sites would be inventoried, recorded, and mitigated in accordance with a Memorandum of Agreement prepared under National Historic Preservation Act requirements before they were transferred out of Federal ownership. *Id.* The ROD, meanwhile, provided that BLM would issue a patent for the federal lands "subject to a deed restriction which would protect [an NRHP-eligible site] and provide tribal access to the site in perpetuity." ROD at 2 (AR0039170).

In short, the EIS considered and fully disclosed the impacts of the proposed project on cultural resources and adequately discussed corresponding mitigation measures. This satisfies NEPA's requirement to include a "discussion" of "historic and cultural resources." *See N. Idaho Cmty. Action Network*, 545 F.3d at 1156 (finding that EIS met NEPA standards when it considered impacts and discussed mitigation measures to minimize impacts).

4. BLM addressed cumulative impacts from the land exchange.

The Tribes next challenge BLM's cumulative impacts analysis. In conducting such an analysis, BLM was required to account for "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. BLM's cumulative effects analysis is detailed under each issue section in Chapter 3 of the FEIS.

First, as explained in Section III.A.1 above, BLM thoroughly discussed cumulative impacts to air, water, and health from past and present actions at the Don Plant, the EMF Superfund site, and other actions in the area. *See, e.g.*, FEIS §§ 3.2.2, 3.6.2, 3.7.2, 3.17.2. BLM

then analyzed how the proposed cooling ponds and expanded gypsum stacks would further impact these values over time. *Id.* §§ 3.2.4, 3.6.4, 3.7.4, 3.17.4. The Tribes nonetheless assert that BLM improperly limited its temporal analysis by failing to discuss the impacts from extending the life of the existing gypsum stack and the Don Plant. Pl.'s Mem. 34. But BLM's cumulative impacts analysis for water predicted incremental impacts when added to the impacts from past and ongoing operations until the year 2140. *See* FEIS at 3-87–91 (AR0029680–84). Similarly, BLM's cumulative impacts analysis for air estimated that the land exchange would extend the life of the Don Plant by an estimated 65 years, which would increase the duration of annual emissions from the plant, as well as greenhouse gas emissions. *Id.* at 3-11–13 (AR0029604–06).

The Tribes next challenge the geographic scope of BLM's water impacts analysis. BLM's analysis area for water resource impacts encompassed "the hydro-geologic areas that contain the Federal lands, the three operable units of the EMF Superfund Site, and downgradient areas including the Portneuf River." *Id.* at 3-79 (AR0029672). BLM reasonably relied on the assessment of water impacts at Batiste Spring to predict the impacts to water quality at the Fort Hall Reservation because "site-affected groundwater enters the Portneuf River within a small stretch of river between Swanson Road Spring and Batiste Spring," fewer than 2 miles upstream of where the river enters the Fort Hall Reservation. *Id.* at 3-88 (AR0029681). Therefore, BLM reasonably concluded that measurable impacts at Batiste Spring would be greater than or equal to impacts further downstream.

Finally, the Tribes assert that BLM did not directly address past releases of contaminants from the existing gypsum stacks, but "instead relie[d] on future remedial efforts to address the additional surface and groundwater pollution coming from the land exchange actions." Pl.'s

Mem. 35. But BLM's water impacts analysis thoroughly addressed past contamination from the existing gypsum stacks and predicted future contamination from the proposed gypsum stack expansions. *See* FEIS at 3-79–91 (AR0029672–84). BLM discussed past known releases from the existing gypsum stack that occurred in 2013, 2015, and 2016, and described the subsequent remedial actions taken. *Id.* at 3-29–30 (AR0029622–23). BLM then analyzed the potential impacts from future releases and described the likely remedial actions that would be taken. *Id.* at 3-30–33 (AR0029623–26). BLM, in sum, satisfied NEPA's mandate to estimate the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7.

5. BLM considered a reasonable range of alternatives.

NEPA's implementing regulations require agencies to "evaluate [all] reasonable alternatives." 40 C.F.R. § 1502.14(a). The range of alternatives an agency must consider is "dictated by the nature and scope of the proposed action." *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (citations omitted). As a result, "[p]roject alternatives derive from an Environmental Impact Statement's 'Purpose and Need' section." *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). "An agency need not . . . discuss alternatives similar to alternatives actually considered, or alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area." *N. Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (internal quotations and citation omitted). "Judicial review of the range of alternatives considered by an agency is governed by a rule of reason that requires an agency to set forth only those alternatives necessary to permit a reasoned choice." *California*, 690 F.2d at 767 (quotations and citation omitted). "Thus, an agency's consideration of alternatives is sufficient if it considers

an appropriate range of alternatives, even if it does not consider every available alternative." *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1181 (9th Cir. 1990).

BLM's purpose and need was to evaluate and respond to the land exchange proposal. FEIS at 1-3 (AR0029562). Simplot's purpose and need for the land exchange was "to implement legally enforceable controls as directed by the EPA and IDEQ . . . and to maximize the operational life of its ongoing phosphate processing operations at the Don Plant by expanding gypsum stacks onto adjacent lands." *Id*. BLM analyzed in detail four alternatives including a No Action alternative, and as required under NEPA, briefly explained why it eliminated certain other alternatives from further analysis. FEIS at 2-13–15; *see also City of Sausalito v. O'Neill*, 386 F.3d 1186, 1207 (9th Cir. 2004) ("For alternatives which were eliminated from detailed study, the EIS must *briefly discuss* the reasons for their having been eliminated." (internal citations, alterations, and quotations omitted)).

For example, BLM eliminated a fluoride process condensate alternative because, even after implementation, Simplot would likely still need to construct a cooling pond in order to meet fluoride emission reduction requirements under the 2016 Consent Order. Therefore, BLM explained that this alternative would not be economically feasible. FEIS at 2-13–15; *see also* FEIS App'x E at 4-1 (AR0029798) ("Preliminary studies show that the overall process is prohibitively expensive and a cooling pond would still be required."). Similarly, BLM eliminated the other fluoride reduction alternative (Indirect Process Water Cooling) because studies showed that "this alternative may not achieve the fluoride reductions necessary to meet the requirements of the 2016 Consent Order" and "it would not be technically or economically feasible." *Id.* at 2-13–14 (AR0029578–79), App'x E at 4-1 (AR0029798) ("Studies have shown that scaling tendencies and water balance implications make this alternative infeasible."). And BLM

explained that the alternatives of reducing the Federal land exchange area (§ 2.5.1) and disposing of waste offsite via a pipeline (§ 2.5.5) were eliminated because they would not meet the objectives of the land exchange and thus were outside of the purpose and need of the Proposed Action. *Id.* at 2-13, -15 (AR0029578, 80). Moreover, BLM noted that "construction of a pipeline would not address necessary fluoride reductions at the Don Plant as directed in the Consent Order." *Id.* at 2-15 (AR0029580). This "brief[] discuss[ion]" is all that NEPA requires. *City of Sausalito*, 386 F.3d at 1207.

6. A Supplemental EIS is not warranted.

"The duty to supplement an EIS is triggered 'where there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.... [and] there remains major Federal action to occur, as that term is used in § 4332(2)(C).'" *Stop B2H Coal. v. BLM*, 552 F. Supp. 3d 1101, 1121 (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 72–73 (2004) (alternations in original)). "Supplementation is not required 'every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information.' Whether new information requires supplemental analysis is a 'classic example of a factual dispute the resolution of which implicates substantial agency expertise.'" *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012) (quoting *Marsh*, 490 U.S. at 373-74, 376).

The Tribes argue that BLM is required to supplement the EIS to consider impacts from Alternative B. Pl.'s Mem. 37–38. This argument is meritless because Alternative B was already included and studied in both the Draft EIS and the FEIS. The direction to supplement an EIS is "after the EIS is finalized." *Tri-Valley CARES*, 671 F.3d at 1130. The Tribes do not point to new

information or changes to the proposal coming after either the Draft EIS or the FEIS was finalized or the decision made. There simply is no duty to supplement the FEIS to further study Alternative B.

To the extent the Tribes argue that BLM's consideration of Alternative B was inadequate, that argument is addressed above. As explained there, BLM reasonably relied on water and air quality studies analyzing the impacts from the Proposed Action to assess the impacts from Alternative B because, in its expert judgment, BLM determined that those studies were sufficient for its purposes. The cooling pond locations remained the same between the alternatives and the change in the location of a portion of the expanded gypsum stack did not hinder BLM's ability to assess or compare the impacts of the alternatives. And the Tribes have offered no evidence to show that BLM erred in its analysis of potential impacts from Alternative B.

**B. BLM Was Not Required to Assume that Simplot Will Develop a Different Plan.**

The Tribes argue that BLM should have considered "the real possibility that Simplot will develop a different plan for the gypstack and ponds once the land exchange is completed." Pl.'s Mem. 38–40. Specifically, the Tribes point to the EIS's acknowledgment that Alternative B was based on preliminary plans and that more detailed plans for the gypstack and cooling tower would be developed in the future as evidence that BLM improperly deferred consideration "to some unspecified future date." But BLM acted reasonably here by analyzing the proposed project's impacts, even if the plans—which depend in part on IDEQ—were not final.

Under NEPA, an agency can base its analysis on reasonable assumptions about future conditions, including by relying on preliminary plans if they are the best available data. As the Ninth Circuit has acknowledged, "NEPA requires that an EIS engage in reasonable forecasting." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011); *see also Okanogan Highlands*, 236 F.3d at 476 ("The exact environmental problems that will have to

be mitigated are not yet known because the Project does not exist."). "In determining what effects are 'reasonably foreseeable,' an agency must engage in 'reasonable forecasting and speculation,' with *reasonable* being the operative word." *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017) (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014))); *see also* 40 C.F.R. § 1508.8(b). NEPA also permits agencies to rely on draft plans in appropriate circumstances. *See, e.g., Robertson*, 490 U.S. at 353. In *Robertson*, for example, the Supreme Court held sufficient an EIS that discussed mitigation plans that were "merely conceptual" and would "be made more specific as part of the design and implementation stages of the planning process." *Id.* (quoting the EIS).

Here, BLM considered the reasonably foreseeable actions on the lands proposed for exchange: the construction of cooling ponds, expanded gypsum stacks, and associated infrastructure. *See* FEIS at 2-12 (AR0029577). BLM acknowledged in the EIS that its analysis was based on "preliminary conceptual designs" and that the actual design would be "finalized during design and permitting and . . . subject to change based on technical changes, final engineering, Don Plant production, and other factors." *Id.* at n.4. But the EIS also noted that "[i]f the land exchange is approved, the IDEQ will review and approve the designs and supporting documentation for any new gypsum stack in accordance with the aforementioned 2008 and 2016 Consent Orders between Simplot and the IDEQ (IDEQ 2008a, 2016)." *Id.* at 2-6 (AR0029571). BLM reasonably assumed that any liner would "meet or exceed the impermeability and durability standards of the current liner approved by the IDEQ." *Id.* at 2-5 (AR0029570), I-55 (AR0030092) ("No liner for the gypsum stacks or cooling ponds will be constructed without first being approved and permitted by the IDEQ."). Thus, the EIS explained that BLM did not consider different design options, such as different types of liners for the gypsum stacks, because

those features would be designed to meet "existing or future consent orders with the IDEQ and/or EPA, and Simplot would be responsible for determining final engineering and design details of the gypsum stack expansions and the cooling ponds and permitting these facilities in accordance with other Federal and State requirements." *Id.* at 2-15 (AR0029580).

BLM had particularly good reason to rely on the non-final plans because of the level of oversight from IDEQ and EPA. "[A]n agency may properly base its evaluation of environmental impacts on the assumption that other specialized agencies with jurisdiction will enforce permits and related mitigation measures according to the law." *Okanogan Highlands All. v. Williams*, No. CIV. 97-806-JE, 1999 WL 1029106, at *4 (D. Or. Jan. 12, 1999) ((citing *No GWEN All. of Lane Cty., Inc. v. Aldridge*, 855 F.2d 1380, 1386–87 (9th Cir. 1988); *City & Cty. of San Francisco v. United States*, 615 F.2d 498, 501 (9th Cir. 1980)), *aff'd,* 236 F.3d 468 (9th Cir. 2000); *see also Moapa Band of Paiutes v. BLM*, No. 2:10-CV-02021-KJD, 2011 WL 4738120, at *7 (D. Nev. Oct. 6, 2011) ("BLM also assumed in its determination that regulatory agencies charged with permit enforcement would ensure compliance with the permit requirements. This assumption is reasonable."), *aff'd*, 546 F. App'x 655 (9th Cir. 2013). BLM also was not required to consider alternatives with different types of liners for the gypsum stacks, given that any liner design would have to be approved by IDEQ, which has both the regulatory authority and expertise. *See Friends of Cap. Crescent Trail v. U.S. Army Corps of Eng'rs*, 453 F. Supp. 3d 804, 817–18 (D. Md. 2020) (holding that agency need not consider alternatives not considered feasible by agencies with more expertise in the area) , *aff'd*, 855 F. App'x 121 (4th Cir. 2021); *see also Hoosier Env't Council v. U.S. Army Corps of Eng'rs*, 722 F.3d 1053, 1061 (7th Cir. 2013) (noting that agency "isn't required to reinvent the wheel" or "usurp the responsibility that federal and state law have assigned to federal and state transportation authorities"). NEPA does

not require BLM to speculate about what IDEQ might require. *See id.*; *see also Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1163 (9th Cir. 1998) (recognizing that agencies "need not consider potential effects that are highly speculative or indefinite" (citation omitted)).

The Tribes' argument that BLM should have considered its lack of authority over the land once it becomes private is without merit because BLM fully considered and disclosed this fact. The EIS acknowledged in multiple places that if the land exchange was approved, Simplot would coordinate with IDEQ and other appropriate agencies for permitting of the gypsum stack expansions and the cooling ponds, and that these authorizations would be outside BLM's authority. FEIS at 2-3 (AR0029568) (noting the authorization of gypsum stack expansion and cooling ponds is under the authority of IDEQ and other regulatory agencies and outside BLM's authority). It stated that mitigation strategies that would take place after the exchange were not examined "because the BLM would no longer have authority to impose or enforce mitigation requirements for future activities on the Federal lands after they are conveyed to Simplot." *Id.* at 3-108 (AR0029701). Instead, therefore, BLM focused on mitigation that would occur before the land exchange, such as deed restrictions and transfer of the mitigation parcels. And, again, the extensive oversight and involvement of IDEQ and EPA over Simplot's operations gives a measure of certainty that the actions will be taken.

Thus, BLM acted reasonably in not assuming that Simplot would develop a different plan for the gypsum stacks and ponds after the exchange. *Id.* at 2-3–4 (AR0029568–69).

### C. BLM Properly Considered the History of Simplot and the Don Plant.

The Tribes also argue that BLM ignored "Simplot's history of non-compliance at the Don Plant." Pl.'s Mem. 40–41. But BLM's consideration of the Plant history was reasonable and BLM was not required to assume that Simplot would intentionally violate the law in the future.

The EIS appropriately noted the history of the Don Plant. Section 1.2.2., titled "site information and environmental requirements," discusses the history of phosphate mining in the area, including resulting environmental contamination and efforts to address the contamination. FEIS at 1-2–3 (AR0029561–62). In addition, in Chapter 3, the EIS describes "the affected environment," or existing conditions, for each of the resources of interest. For example, in the air quality section, the EIS stated that "[t]he Don Plant is a major stationary source of air pollutant emissions," and gives an in-depth analysis of the emissions from the plant. *Id*. at 3-4 (AR0029597). Similarly, the EIS stated that operation of the FMC plant and the Don Plant have affected groundwater quality in the area, and specifically discussed the contaminants occurring due to those plants. *Id*. at 3-83–84 (AR0029676–77).

Perhaps more importantly, the EIS also discussed the multiple consent decrees and orders that Simplot has entered into with IDEQ and EPA and remedial actions taken on the site to address past contamination and reduce future pollution. *Id*. at 1-2–3 (AR0029561–62); 3-85 (AR0029677) ("[CERCLA] remedies implemented by Simplot over the past couple of decades have resulted in improvements in groundwater and surface water quality."). There is no dispute that historically, phosphate mining and the Don Plant have contaminated the land and groundwater, but much of the contamination occurred before the mining companies or regulatory agencies understood the dangers of the different substances. The record demonstrates that Simplot is (and has been) working with EPA and IDEQ to reduce pollution. For example, much of Simplot's history of noncompliance with standards is the result of the gypsum stack being unlined. Simplot installed a lining on the gypsum stack in 2017 that has improved groundwater quality, and any new gypsum stacks built will be required to have a liner. *Id.* at 1-2–3, 2-5–6, 3-85 (AR0029561–62, AR0029570–71, AR0029677). And the Project is specifically designed to

help Simplot meet the 2016 Consent Order's requirement that Simplot reduce fluoride emissions by 2026 by replacing the existing cooling towers with cooling ponds on the former federal land, given that the cooling towers are the largest single source of emissions on the site. *See id.* at 1-3, 3-1, 3-4, App'x E at 1-1 (AR0029562, AR0029597, AR0029778, AR0029792).

Thus, while the Tribes take issue with the EIS's assumptions that Simplot will comply with " all applicable statutes, regulations, and rules governing the actions and/or inactions of private, local, State, tribal, and Federal interests that acquire jurisdiction in some capacity over said lands," Pl.'s Mem. 41, this assumption is reasonable in light of the extensive consent decrees and orders and monitoring by regulatory agencies. *See Okanogan Highlands All.*, 1999 WL 1029106, at *4 (finding that agencies can reasonably assume that "that other specialized agencies with jurisdiction will enforce permits and related mitigation measures according to the law"). The record also shows that Simplot is currently operating under the consent decrees and orders and thus BLM reasonably assumed that it will continue to do so. It would be arbitrary and capricious for BLM to assume that Simplot would begin to willfully violate the consent decrees and orders when the administrative record does not support that assumption.

**D. BLM Adequately Considered Environmental Justice Concerns.**

The Tribes argue that the EIS did not consider the environmental justice implications of the Tribes bearing a disproportionate burden of the impacts of the Don Plant's continued operation. It cannot be denied that the Tribes have felt the impacts of the Don Plant by nature of their proximity to the plant. The record is clear, however, that environmental justice and potential impacts on low income and minority populations were addressed in depth.

E.O. 12,898 instructs federal agencies to "identif[y] and address[], as appropriate, disproportionately high and adverse human health or environmental effects . . . on minority populations and low-income populations in the United States." Exec. Ord. No. 12,898, 59 Fed.

Reg. 7629, 7629 (Feb. 11, 1994). The E.O. makes clear that it "shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order." *Id.* at 7633. An environmental justice claim therefore cannot be brought directly under the E.O. However, an agency's analysis of environmental justice issues implicated by E.O. 12,898, at least in some judicial circuits, can be challenged as arbitrary and capricious as with other areas of NEPA analysis. *See Latin Ams. for Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin.*, 756 F.3d 447, 465 (6th Cir. 2014). "As always with NEPA, an agency is not required to select the course of action that best serves environmental justice, only to take a 'hard look' at environmental justice issues. *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) (citing *Latin Ams.*, 756 F.3d at 475–77).

Consistent with the E.O., and its NEPA obligations, BLM gave careful consideration to the land exchange's impacts on low-income and minority communities, expressly discussing the E.O. and environmental justice in the EIS. *See* FEIS at 3-95, 3-103–04 (AR0029688, AR0029696–97). BLM identified socioeconomics and environmental justice as an issue to be studied during the scoping process. *Id.* at 1-6 (AR0029565). The EIS contains an entire section on environmental justice, and includes a Socioeconomic Technical Report that discusses environmental justice. *Id.* § 3.18, Appx. G (AR0029685–98, AR0029884–940). As explained in the EIS, BLM used EJSCREEN, an environmental justice screening and mapping tool provided by the EPA. The agency also considered environmental justice as part of its Scoping process, and as part of its alternatives analysis—indeed, environmental justice impacts were one of the factors on which the agency weighed each alternative. *Id*. at 1-6, 3-92–105 (AR0029563, AR0029685–98). In sum, BLM's analysis of environmental justice goes into considerable depth and is more than sufficient under NEPA.

**E. BLM Adequately Responded to the Tribes' Comments.**

The Tribes assert that "BLM failed to adequately respond to many of the Tribes' significant comments." Pl.'s Mem. 44–45. Specifically, the Tribes assert that the BLM did not address the Tribes' request for information on groundwater impacts in the area being provided to Simplot under Alternative B, and did not address the health impacts from Alternative B being closer to a residential area. *Id.* at 44. The record belies this assertion.

"An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond ... in the final statement." 40 C.F.R. § 1503.4(a); *see also* 40 C.F.R. § 1502.9(b); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1182 (9th Cir. 2011). "After the FEIS is released, the agency has the option to request comments before making a final decision." *Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445, 451 (9th Cir. 2016) (citing 40 C.F.R. § 1503.1(b)).

The BLM solicited comments on the draft and final EIS and appropriately responded to comments received on the EIS, including from the Tribes. Appendix I, which contains the substantive comments made on the draft EIS, and a table showing the comment and BLM's response, noted that the "greatest number of substantive comments were parsed from letters submitted by the [Tribes]." FEIS at I-5, I-9, I-13–94 (AR0030042, AR0030046, AR0030050–131). The final EIS states that changes made between the draft and final EIS "include, but are not limited to . . . incorporation of new information and measures resulting from ongoing consultation with [the Tribes]." AR0029534. In addition, the ROD restated the Tribes' comments on the FEIS and stated that the "BLM considered the comments received during the Final EIS availability period when preparing this ROD," but did not find them to "identify any significant new circumstances or information relevant to the environmental consequences described in the Final EIS." ROD at 15 (AR0039184).

The record demonstrates that BLM addressed the Tribes' request for information on groundwater impacts. To the extent the Tribes are referring to the "Groundwater/Surface Water Remedy 2019 Annual Report Simplot Don Plant," the ROD stated that BLM reviewed the report and "determined that information in this report was consistent with predicted concentrations of phosphorus in the Portneuf River that were presented in Appendix H . . . of the Final EIS." *Id.* To the extent the Tribes are asserting that they did not receive "hydrologic studies and models that demonstrate how the original alternative could impact reservation resources over time," BLM responded to the Tribes' comments on the Draft EIS by referring to Appendix H (Water Resources Technical Report) for modeling and further information regarding groundwater, and pointing to Section 3.17.14.3 for analysis of impacts on water resources under Alternative B. I-75–78, I-88 (AR0030112–15, AR0030125).

Finally, the Tribes argue that BLM did not address the health impacts from Alternative B being closer to a residential area. In fact, the EIS disclosed that "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," but explained that the overall reduction in "emissions is anticipated to negate the effects of moving some of the emissions closer to nearby populations." FEIS at 3-13 (AR0029606). The EIS also stated that decommissioning the cooling towers would reduce emissions of fluoride and particulate matter and thus negate the impacts caused by placing gypsum stacks closer to nearby residences. *See id*. at 3-12 (AR0029605). "At these substantially lower levels of emissions, there would be negligible potential for any effects on nearby residences from the reasonably foreseeable actions." *Id.* at I-18 (AR0030055). BLM therefore responded to the Tribes' comments.

In short, BLM fully complied with NEPA in approving the land exchange.

## IV. THE TRIBES HAVE NOT STATED A VALID BREACH OF TRUST CLAIM.

Finally, the Tribes argue that BLM's approval of the Blackrock land exchange breached the United States' trust responsibility to regulate the disposal of the Tribes' ceded territory in accordance with the 1898 Agreement and the 1900 Act. Pl.'s Mem. 45–49. We do not intend to minimize the importance of the trust relationship between the Tribes and the United States. But a breach of trust action for non-monetary relief requires a tribe to identify a specific fiduciary duty placed on the government in a treaty, statute, or regulation, *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006), and the Tribes have not identified a specific duty here.

This case presents a situation similar to *Gros Ventre*, where the Tribes "claim[ed] that the government breached its trust responsibility to the Tribes by approving, permitting, and failing to reclaim [two gold mines located on land the Tribes had ceded], the operation of which had diminished and continues to diminish the quality and quantity of water resources available to the Tribes." *Id.* at 806. The Gros Ventre Tribes' treaty with the United States contained a provision wherein the United States "agreed to 'protect the . . . Indian nations against the commission of all depredations by the people of the said United States.'" *Id.* at 804. The Ninth Circuit held that the Gros Ventre Tribes did not have a valid cause of action for breach of trust because nothing in the treaties or cession agreements indicated "that the United States agreed to manage that land for the benefit of the Tribes in perpetuity, even after the Tribes later relinquished their ownership in that land." *Id.* at 813. "Although we recognize that activities occurring off of the Reservation may impact resources on the Reservation, the language in these treaties simply cannot be read to impose a specific fiduciary obligation on the government to manage non-tribal resources, such as the clean-up of nearby gold mine tailings, for the benefit of the Tribes." *Id.*

Similarly, here, Article II of the 1868 Fort Bridger Treaty's guarantee of an "absolute and undisturbed use and occupation" of the Reservation does not provide the necessary specific

fiduciary obligation, but recognizes "a general or limited trust obligation" to protect the Tribes' use and occupation of the Reservation. Fort Bridger Treaty of 1868 (AR0055983); *see Gros Ventre*, 469 F.3d at 813; *see Ute Indian Tribe of the Uintah & Ouray Res. v. United States*, 145 Fed. Cl. 609, 623 (2019) (finding that "undisturbed use and occupation" provision did not create fiduciary duty). And although the off-reservation activities certainly may impact tribal resources, the Tribes here have not identified a specific statutory or treaty obligation for the United States to manage off-Reservation resources for the benefit of the Tribes beyond what is otherwise required under existing federal environmental statutes. *Gros Ventre*, 469 F.3d at 813.

We do not dispute that the Fort Bridger Treaty, the 1898 Agreement, and the 1900 Act gave the Tribes the right to hunt, fish, cut timber, and pasture livestock, on ceded lands as long as they "remain part of the public domain." Pl.'s Mem. 45; 31 Stat. 672, 674 (1898 Agreement, Art. IV; Art. IV), Fort Bridger Treaty of 1868 (AR0055983) (The Tribes "will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon."). But the relevant provisions do not provide a basis for a breach of trust claim. The provisions create a conditional right *if* the land continues to be owned by the United States and in the public domain, but do not obligate the government to keep the land in the public domain. *See Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) (noting that Fort Bridger Treaty creates "conditional hunting right as against the United States"); *accord Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (interpreting identical language in a different treaty to mean the hunting right terminated when the land no longer belonged to the United States). The Tribes recognize as much elsewhere in their brief. *See* Pl.'s Mem. 30 ("These rights will be extinguished on the federal land at issue once the land becomes private.").

The 1898 Agreement and Section 5 of the 1900 Act also do not otherwise provide enforceable trust duties to preserve and protect the ceded lands. The Tribes argue that Section 5 limitations on disposal of the land were undertaken for the benefit of the Tribes and give the United States an enforceable responsibility to preserve and protect the ceded land. Pl.'s Mem. 48. Setting aside, as shown above, that the United States did not act unlawfully here, these provisions do not show "the government 'unambiguously agreeing' to manage off-Reservation resources for the benefit of the Tribes." *Gros Ventre*, 469 F.3d at 812. While it is true that the Agreement and Act, on the whole, "name or reference the Shoshone-Bannock Tribes over 25 times," Pl.'s Mem. 48, the disposal provisions that Congress added in Section 5 do not reference the Tribes. As in *Gros Ventre*, "it cannot be said that the United States agreed to manage [the ceded public domain] land for the benefit of the Tribes in perpetuity, even after the Tribes . . . relinquished their ownership in [the] land" outside reservation boundaries. *See* 469 F.3d at 813.

The Tribes argue that their case is more akin to the Ninth Circuit's decision in *Navajo Nation*, where the court inferred a judicially enforceable duty from the *Winters* doctrine,[16] and the treaty establishing the Navajo Reservation. *Navajo Nation v. DOI*, 26 F.4th 794, 810 (9th Cir. 2022)[17]; Pl.'s Mem. 47. The Tribes here, however, do not rely on *Winters* rights as a basis for their breach of trust claim. *See* Pl.'s Mem. 45–49; *Navajo*, 26 F.4th at 809–10 (distinguishing *Gros Ventre* because it did not involve *Winters* rights). And where *Navajo* involves a breach of

[16] *Winters v. United States*, 207 U.S. 564, 575–78 (1908), established the principle that "when the United States 'withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.'" *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1268 (9th Cir. 2017) (citing *Cappaert v. United States*, 426 U.S. 128, 138 (1976)).

[17] On July 15, 2022, the United States petitioned the Supreme Court for a writ of certiorari in *Navajo Nation*, Case No. 22-51.

trust for failure to quantify *Winters* rights for use *on* the Navajo reservation, the Tribes' breach of trust claim is related to off-reservation activities. *See Navajo*, 26 F.4th at 809 ("Here, the injunctive relief the Nation seeks would not require the federal government to manage off-reservation resources."). The Tribes have not identified a specific treaty or statutory directive to require BLM to manage those off-reservation resources for the Tribes' benefit and, consequently, have not identified a viable stand-alone claim for breach of trust.

## CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court grant Federal Defendants' Cross-Motion for Summary Judgment and deny the Tribes' Motion for Summary Judgment.

DATED this 17th day of August, 2022.

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