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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, Plaintiff, v. LAURA DANIEL-DAVIS, Principal Deputy Assistant Secretary for Land and Mineral Management, *et al*, Defendants, and J.R. SIMPLOT COMPANY Defendant-Intervenor.	Case No. 4:20-cv-00553 **PLAINTIFF SHOSHONE-BANNOCK TRIBES' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, ECF No. 37, AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT, ECF Nos. 60 & 61**

TABLE OF CONTENTS

INTRODUCTION

On December 5, 2020, the Shoshone-Bannock Tribes (Tribes) filed a complaint challenging the Blackrock Land Exchange Record of Decision (ROD) issued by the U.S. Department of the Interior's Bureau of Land Management (BLM). The ROD approved a land exchange between BLM and J.R. Simplot Company (Simplot) that will result in the construction of cooling ponds and expansion of the Simplot Don Plant phosphogypsum stack (gypstack) on the Eastern Michaud Flats (EMF) Superfund site. The land exchange failed to comply with the Act of June 6, 1900, ch. 813, 31 Stat 672 (1900 Act), which requires certain procedures to be followed when the United States disposes of lands that were formerly within the Fort Hall Reservation and that the Tribes ceded under the Agreement of February 5, 1898 (1898 Agreement). BLM's failure to comply with the 1900 Act also violated the federal government's trust responsibility to the Tribes, guaranteed by the Fort Bridger Treaty of 1868, the 1898 Agreement, and 1900 Act. Additionally, the ROD and the Final Environmental Impact Statement (FEIS) on which it is based failed to comply with the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA), respectively. For all these reasons, the ROD and land exchange should be vacated and the matter remanded to the BLM.

It is uncontested that, by facilitating the gypstack expansion, the land exchange will extend the life of the Don Plant by an estimated 65 years. *See, e.g.*, Fed. Defs.' Mem. in Supp. of Cross-Mot. for Summ. J., ECF No. 61-1 (Fed. Mem.) at 33 (citing FEIS). In their briefs, Simplot and BLM refer to the gypstack expansion and new cooling ponds as "RFAs" (reasonably foreseeably actions), but this is just a euphemism: the gypstack, at least, is the sole purpose of the land exchange. *See* FEIS at 1-1 (A0029560) (Simplot's purpose and need for the project is to "maximize the operational life of its ongoing phosphate processing operations at the Don Plant by expanding gypsum stacks onto adjacent land.").

The gypstack expansion will prolong air emissions, water contamination, and greenhouse gas emissions and impact additional generations of Idahoans and Shoshone-Bannock Tribal members. As the Court explained in its previous decision regarding this matter, Simplot's objective for the land exchange is "building a new waste storage facility on or close by a Superfund Site that was created by the storage of that very same waste." *Shoshone-Bannock Tribes of Fort Hall Rsrv. v. U.S. Dep't of Interior*, No. 4:10-CV-004-BLW, 2011 WL 1743656, at *1 (D. Idaho May 3, 2011) (*Blackrock I*). In 2011, the dominant physical feature of the Don Plant was a gypstack over 240 feet tall. *Blackrock I* at *1. In the past ten years, it undoubtedly has grown even taller. Now, as facilitated by the land exchange, Simplot plans to expand the gypstack system outward. *See* AR0059912. The land exchange facilitates continued growth of not just the gypstack but an entire complex of facilities. *See* Def.-Int. Simplot's Br. in Support of Cross-Mot. for Summ. J. Pursuant to the APA and Pl.'s Mot. for Summ. J., ECF No. 60-1 (Simplot Mem.) at 10 n.8 (explaining the extensive ponds and systems that support the gypstack). The land exchange will also require continued phosphate ore mining at Simplot's Smoky Canyon mine and at a proposed new mine, the Dairy Syncline Mine, to accommodate the extended operating life of the Don Plant. FEIS at 3-105 (AR0029698); *id.* at Appx. E (AR0029820).

Simplot has spent years remediating the impacts of its operations, and that work is nowhere near finished; in fact, there is no end in sight.[1] Contaminants are released throughout the Don Plant's manufacturing process and are present in surface water and groundwater. Water quality monitoring reveals arsenic, phosphorus, nitrate, cadmium, chromium, sulfate and pH contamination of the Portneuf River, and there are "plumes of groundwater under and around the

[1] For example, as EPA notes, "the predicted total phosphorous concentration in the Portneuf River at Siphon Road will remain above 0.075 mg/L [the regulatory target] in perpetuity with the existing remedial activities." EPA Comments on FEIS (July 21, 2020) (AR0001397).

[Simplot Don] plant contaminated with arsenic, phosphorus and nitrate," as well as exceedances of "Safe Drinking Water Act MCLs [maximum contaminant levels] for the following: antimony, barium, beryllium, copper, lead, mercury, nickel, radium-226, selenium, thallium, gross alpha, and gross beta" at the EMF site. EPA Comments on FEIS (July 21, 2020) (AR0001397). "Arsenic accumulates in the body, typically through drinking water, and increases the risk for various types of cancers and other health problems." *Blackrock I* at *3. The contaminated surface and groundwater flows into the Tribes' Fort Hall Reservation and neighboring lands where the Tribes hold treaty rights. Even though the gypstack is now lined, contaminants from the gypstack, including phosphorus, continue to move from groundwater under the gypstack into the Portneuf River. *See, e.g.*, EPA Comments on DEIS (AR0039080). The Portneuf River flows past the plant and onto the Fort Hall Reservation through the "Bottoms," an important area for Tribal traditional and ceremonial activities. Residual contaminants will remain throughout the current mountain-sized gypsum stack for decades and it will continue to leach contaminants into groundwater long after the facility is closed. Simplot's own modeling and assessment estimates, based on plant operation until 2084, "residual effects on groundwater and surface water lasting until about 2130," FEIS at H-74 (AR0030025). Despite approving a land exchange that will exacerbate these risks by expanding the gypstack, *see, e.g.,* AR0039212, BLM fails to disclose basic facts in the FEIS about the resulting threats to human health and the environment, such as the additional amount of waste to be produced over the next 65 years of plant operation. *See, e.g.,* FEIS at 2-5 (AR0029570) (describing the acreage to be disturbed by the gypstack expansion but not the amount of waste that will be produced).

Moreover, Simplot's other stated objective for the land exchange—to replace the Don Plant cooling towers with lower-emitting cooling ponds, *see, e.g.*, FEIS at 2-13—appears to have been

a smoke screen. A Simplot declarant now explains that a single cooling pond is all that is needed and it will be constructed on *longstanding Simplot* land. Koulermos Decl., ECF No. 59-3, ¶ 17 n.6.[2] Nevertheless, in its merits brief, Simplot states: "[t]he 2020 Exchange will also enable Simplot to decommission its current cooling towers at the Don Plant and replace them with lower-emission cooling ponds." Simplot Mem. at 4.

In their response memoranda, Federal Defendants and Simplot argue that, in issuing the ROD, BLM checked every required box to approve the Blackrock Land Exchange, even though BLM failed to fully disclose and weigh impacts to the Tribes and the Fort Hall Reservation in its environmental and public interest review. They also argue that the 1900 Act does not govern the exchange because FLPMA superseded (without repealing) the 1900 Act, and they rely on a semantic argument that a land exchange where money exchanged hands involves no "purchase" of land, even though FLPMA itself clarifies that the statute remains in force and there is no legal difference between a purchase and an exchange for purposes of the 1900 Act. Federal Defendants' and Simplot's responsive arguments do not correct the flaws in the ROD. The Court should remand the FEIS and vacate the ROD and land exchange, for the reasons explained in the Tribes' Memorandum in Support of Motion for Summary Judgment (SBT Mem.), ECF No. 37-1, and addressed further below.

STANDING

Neither Federal Defendants nor Simplot seriously contests the Tribes' standing. Federal Defendants note that no party challenges Plaintiff's standing and straightforwardly acknowledge that "the Tribes' off-reservation treaty right will be impacted." Fed. Mem. at 9 n.1, 27-28. Simplot,

[2] Also, as early commenters on the land exchange explained, "it is disingenuous and misleading to the public to suggest that cooling ponds are required as a reason for Simplot needing this land exchange," because of other options for fluoride reduction. EIS at I-50 (AR0030087).

despite filing a motion to strike the bulk of the Wright and Small declarations which the Tribes submitted in support of standing, does not object to key paragraphs in those declarations that provide independent bases for standing. *See*, *e.g.*, Wright Decl., ECF No. 37-4 ¶ 25 (construction of expanded gypstack would alter the visual character of the mountainside); Simplot Am. Mem. in Support of Def.-Int.'s Mot. to Strike, ECF No. 64-1 at 8 (no argument concerning Wright Decl. ¶ 25); Small Decl., ECF No. 37-17 ¶ 8 ("[t]he Tribes consider the area as a whole to be a significant traditional cultural landscape"); Simplot Am. Mem. in Support of Mot. to Strike at 19-20 (no argument concerning Small Decl. ¶ 8). Similarly, all parties agree that the Tribes lost areas in the exchange where they previously exercised their off-reservation treaty rights: "the federal lands transferred to Simplot in the challenged land exchange are within the Tribes' aboriginal homelands as set forth in the 1868 Fort Bridger Treaty." Tribes' Statement of Material Facts, ECF No. 37-3 ¶ 7, Fed. Defs.' Resp. to Tribes' Statement of Material Facts, ECF No. 63-1 ¶ 7 (not disputing the quoted sentence in paragraph 7); Simplot Resp. to Tribes' Statement of Material Facts, ECF No. 62 ¶ 7 (same). *See generally* Tribes' Opp. to Simplot Mot. to Strike Decls. at 7-9.[3]

ARGUMENT

I. Federal Defendants and Simplot Fail to Refute the Tribes' Claim that the Challenged Land Exchange Violates the Plain and Specific Ceded Land Disposal Requirements of the 1900 Act.

Federal Defendants and Simplot argue the BLM had authority to authorize the challenged land exchange and did not violate the 1898 Agreement or the 1900 Act by asserting that 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." Fed. Mem. at 10. However, Federal Defendants concede that the plain language of the

[3] The redressability of the Tribes' claims is discussed in § V, *infra*.

1900 Act ratified the 1898 Agreement and that Section 5 of the 1900 Act provided: 1) the ceded lands are subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States only; 2) no purchaser can purchase more than 160 acres of ceded lands; and 3) the ceded lands within five miles of Pocatello must be sold at public auction. Fed. Mem. at 10.

To support the argument that compliance with FLPMA justifies ignoring the clear land disposal requirements of the 1900 Act, Federal Defendants and Simplot point to a 1902 proclamation from President Roosevelt announcing that all 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 law of the United States. Presidential Proclamation of May 7, 1902, 32 Stat. 1997, 1998. However, the proclamation of a President does not override a congressional act such as the 1900 Act. Even if it did, a close reading of the proclamation shows that it opened some ceded land to settlement, but the 160-acre limit requirement was followed and preserved.

Federal Defendants next argue that "a 1904 statute removed the auction requirement for such lands unsold after being opened to auction." Fed. Mem. at 13 (citing An Act Relating to Ceded Land on the Fort Hall Indian Reservation, Pub. L. No. 58-76, 33 Stat. 153 (1904)). This Act provided that ceded lands within five miles of Pocatello offered for sale at public auction on and after July 17, 1902 in accordance with the 1900 Act and the May 17, 1902 proclamation of President Roosevelt "which remain unsold after such offering, shall be subject to entry under and in accordance with the provisions of section five of said Act and at the prices therein fixed, at a time and in accordance with regulations to be prescribed by the Secretary of the Interior." 33 State 153, 154 (1904). Regardless of the auction requirement, the 1904 Act reaffirmed that remaining

unsold ceded lands are subject to Section 5 of the Act, which include disposal under specific laws and the limit that "no purchaser shall be permitted in any manner to purchase more than one hundred and sixty acres." 33 Stat. 672, 676.

Federal Defendants and Simplot attempt to dismiss the 160-acre purchase limit by asserting that Simplot is not a "purchaser." Federal Defendants reference FLPMA's recognition of sales (43 U.S.C. § 1713) and exchanges (43 U.S.C. § 1716) as distinct concepts. This argument should be rejected. Section 5 of the 1900 Act, which includes plain language limiting disposal of ceded lands to no more than 160 acres, was enacted 76 years before FLPMA. FLPMA's distinction between "sales" and "exchanges" should not be used to interpret the meaning of "purchaser" under the 1900 Act. Section 5 of the 1900 Act states: "no purchaser shall be permitted *in any manner* to purchase more than one hundred and sixty acres of the [ceded lands]." 33 Stat. 672, 676 (emphasis added). The Court should interpret "in any manner" to include acquisition of ceded lands in any manner including exchanges.

Federal Defendants correctly point out that Congress has the authority to manage public lands and that FLPMA repealed many subject-specific statutes that previously governed management and disposal of public lands. Fed. Mem. at 12. However, Federal Defendants again concede that Congress has never repealed the 1900 Act or abrogated the 1898 Agreement. Federal Defendants admit in their brief: "To be clear, we do not argue that FLPMA repealed the 1900 Act." *Id.* at 13. Instead, Federal Defendants suggest (without supporting legal authority) that the BLM's alleged compliance with FLPMA in approving the challenged land exchange satisfies its legal obligation because FLPMA is "a source of authority like those identified under the 1900 Act." *Id.* Aside from the lack of any legal authority for this statement, the problem with this argument is the

plain language of the unrepealed 1900 Act contains three specific requirements that were indisputably not followed in BLM's approval of the challenged land exchange in this case.

If Congress had intended to repeal the ceded land disposal requirements set forth in Section 5 of the 1900 Act, it could certainly have done so. As Federal Defendants recognize, FLPMA explicitly repealed a large number of statutes. In Section 702 of FLPMA, Congress specifically repealed 147 statutes and acts of Congress effective the day FLPMA was approved. *See* Pub. L. 94-579, 90 Stat. 2744, 2787-89 (October 21, 1976). And, in Section 703, Congress further specifically repealed another 104 statutes and acts of Congress effective on the tenth anniversary of approval of FLPMA. *Id.* at 2789-91. That is 251 statutes and prior acts that Congress specifically listed as repealed by FLPMA. It is noteworthy that these sections include repeal language affecting Indian lands. It is thus clear that if Congress had wanted to erase the ceded land disposal requirements of Section 5 of the 1900 Act by passage of FLPMA, it would simply have said so. *See United States v. Fausto*, 484 U.S. 439, 453, 108 S. Ct. 668, 676 (1988) ("[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change).

FLPMA did not repeal or somehow by implication cancel the 1900 Act's ceded land disposal requirements. When FLPMA was approved in 1976, Section 701 stated in part:

> TITLE VII— EFFECT ON EXISTING RIGHTS; REPEAL OF EXISTING LAWS; SEVERABILITY
> EFFECT ON EXISTING RIGHTS
>
> Sec. 701. // 43 USC 1701 note. // (a) Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.
>
> . . . .
>
> (c) All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law.
>
> . . . .

> (f) Nothing in this Act shall be deemed to repeal any existing law *by implication*.
> . . . .
> (h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

Pub. L. 94–579 (S 507), October 21, 1976, 90 Stat 2743 (emphasis added). Both the language in Section 701 of FLPMA and well-settled principles of statutory construction support the Tribes' argument that the Court should recognize the binding nature of the 1900 Act's requirements for disposal of the ceded lands at issue in this case.

After acknowledging that the 1900 Act has not been repealed, Federal Defendants assert that the 1900 Act and FLPMA 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." Fed. Mem. at 13. Federal Defendants and Simplot cite no legal authority for the proposition that FLPMA somehow supersedes the ceded land disposal requirements of Section 5 of the 1900 Act because there is no such legal authority. Instead, Federal Defendants cite to *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) for the proposition that the Court should "strive to give effect to both" competing statutory obligations in this case. *Id.* (internal quotations omitted). While this is a rule generally true for statutory interpretation, the Court in *Epic Systems Corp.* went on to direct: "And in approaching a claimed conflict, we come armed with the 'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute." *Id.* (citing *United States v. Fausto,* 484 U.S. 439, 452 (1988); *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) ("It is well settled, however, that repeals by implication are not favored, and will not be found unless an intent to repeal is "'clear and manifest.'") (internal citations omitted).

In addition to the statutory construction rules cited above, to the extent the plain language of the ceded land disposal requirements of Section 5 of the 1900 Act calls for interpretation, the

Court must interpret the statute liberally in favor of the Tribes in this case. In Indian law there is a canon that, where a statute is not clear, it must be interpreted liberally in favor of Indians. *Rancheria v. Jewell*, 776 F.3d 706, 712 (9th Cir. 2015) (citing *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985)). The Ninth Circuit has stated: "We are also mindful that 'the standard principles of statutory construction do not have their usual force in cases involving Indian law.'" *United States v. Errol D., Jr.*, 292 F.3d 1159, 1163–64 (9th Cir. 2002) (quoting *Montana v. Blackfeet Tribe of Indians*); *see also EEOC v. Karuk Tribe Hous. Auth.,* 260 F.3d 1071, 1082 (9th Cir. 2001). Because of the unique trust relationship between the United States and Indian tribes, ambiguous provisions in both treaty and non-treaty matters should be "construed liberally" in favor of the Indians. *United States v. Errol D., Jr.*, 292 F.3d at 1163–64 (citing *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985)); *see also White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143–44 (1980) (Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence").

Nothing in the language between Section 5 of the 1900 Act and FLPMA suggests the existence of an "irreconcilable conflict" that would justify a repeal of the 1900 Act by implication. *See Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 468 (1982). To the contrary, the ceded land disposal requirements in the 1900 Act and FLPMA fit together sensibly. The BLM could have, and should have, reviewed the challenged land exchange through application of FLPMA while at the same time recognizing the unique restrictions Congress placed on disposal of the ceded lands through passage of Section 5 of the 1900 Act. This is a "harmonization" of the two laws, which makes more sense than ignoring one for the other as the Federal Defendants suggest.

Finally, Simplot argues the Court should ignore Section 5 of the 1900 Act because it is "obsolete," "century-old," and "a dead letter." Simplot argues that "a series of congressional and executive actions" including the Taylor Grazing Act of 1934 withdrew the lands at issue from entry or settlement such that Section 5 of the 1900 Act had no further applicability after 1936.[4] As the United States Supreme Court recently stated, however: "There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help 'clear up . . . not create' ambiguity about a statute's original meaning." *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2469 (2020) (quoting *Milner v. Dept. of Navy*, 562 U.S. 562 (2011)). The terms of Section 5 of the 1900 Act are clear, and the Act has not been repealed by FLPMA or otherwise. The Ninth Circuit has already determined that specific congressional action is required to extinguish the treaty rights contained in the 1898 Agreement. *Swim v. Bergland*, 696 F.2d 712, 717-18 (1983) (stating "in 1900 Congress ratified the 1898 Agreement, which reserved grazing rights to the Tribes. Subsequent congressional action would therefore be necessary to modify or abrogate its terms."). Therefore, this Court should reject Simplot's argument that these extratextual materials change the plain requirements of Section 5 of the 1900 Act. For the above reasons, the Court should reject Federal Defendants' and Simplot's argument that Section 206(a) of FLPMA (43 U.S.C. § 1710) provided BLM with authority to approve the challenged land exchange in this case without complying with the requirements of Section 5 of the 1900 Act.

[4] It is noteworthy that Federal Defendants do not join in this argument from Simplot, and instead concede that the 1900 Act has not been repealed. Fed. Mem. at 13.

II. The Department of Interior's Approval of the Challenged Land Exchange is a Breach of the United States' Trust Responsibility Owed to the Shoshone-Bannock Tribes Created by the 1898 Agreement, the 1900 Act, and the Fort Bridger Treaty of 1868.

Federal Defendants and Simplot agree that the legal standard for a breach of trust claim for non-monetary relief is articulated by the Ninth Circuit in *Navajo Nation v. U.S. Dept. of the Interior*, 26 F.4th 794 (2022): "an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." *Id.* at 808 (quoting *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006)). Both the Federal Defendants and Simplot argue that the 1898 Agreement and the 1900 Act do not create an enforceable duty of the United States. They are wrong.

The case at hand is not like *Gros Ventre*. The government's approval challenged there was permitting two gold mines on the tribe's ceded land. Notably, the tribal plaintiffs in *Gros Ventre* based their breach of trust claim on "common law trust claims" and "generally applicable statutes and regulations." *Id.* at 809-10. In sharp contrast, the 1898 Agreement and 1900 Act specifically name the Shoshone-Bannock Tribes and recognize specific off-reservation treaty rights along with particular requirements for disposal of the ceded lands. In this case, the BLM disposed outright of the Shoshone-Bannock Tribes' ceded land by ignoring the plain requirements of the 1900 Act, which "approved the 1898 Agreement verbatim." *Swim v. Bergland*, 696 F.2d 712, 714 (1983). The 1898 Agreement was "accepted, ratified, and confirmed" by Congress in the 1900 Act and the two must be read together.[5]

[5] The Ninth Circuit in *Swim* stated: "Agreements between the United States and Indian tribes are to be construed according to the probable understanding of the original tribal signatories." *Id.* at 716.

The ceded land disposal requirements in Section 5 of the 1900 Act can and should be fairly read to be for the benefit of the Shoshone-Bannock Tribes, who retained treaty rights on the ceded lands including timber, grazing, hunting, and fishing rights. Therefore, the 1900 Act, and the 1898 Agreement set forth within the Act, establish both treaty rights on the ceded lands together with specific statutory duties of the United States that must be followed for disposal of the ceded lands and termination of the Tribes' treaty rights on those lands. This duty created by the 1898 Agreement and the 1900 Act is sufficient to establish a breach of trust claim.[6]

It is undisputed that the 1900 Act has not been repealed, and it is undisputed that the ceded land disposal requirements in Section 5 of the Act were not followed. The 1900 Act creates a clear federal duty to preserve the Tribes' treaty rights on the ceded lands consistent with the land disposal requirements set forth in Section 5 of the 1900 Act. It is noteworthy that the 1900 Act ratifies the 1898 Agreement, which itself refers to the agreement as a "treaty."[7] Read as a whole, the 1900 Act establishes the Tribes' off-reservation rights to timber, grazing, hunting, and fishing on the ceded lands, together with specific land disposal obligations of the United States which operate to preserve the Tribes' off-reservation usufructuary rights recognized by the 1900 Act. This interpretation of the 1898 Agreement and 1900 Act is consistent with the applicable canon of statutory construction discussed above—that ambiguous provisions in both treaty and non-treaty matters should be "construed liberally" in favor of the Indians. *United States v. Errol D., Jr.*, 292

[6] *Cf. United States v. Mitchell*, 463 U.S. 206, 226 (1983) (finding that the statutes and regulations at issue "clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources.").

[7] Article IV of the 1898 Agreement states: "So long as any of the lands ceded, granted, and relinquished under this ***treaty*** remain part of the public domain, Indians belonging to the above-mentioned tribes, and living on the reduced reservation, shall have the right, without any charge therefor, to cut timber for their own use, but not for sale, and to pasture their livestock on said public lands, and to hunt thereon and to fish in the streams thereof." 31 Stat. 672, 674 (emphasis added).

F.3d at 1163–64 (citing *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 247); *see also White Mountain Apache Tribe v. Bracker,* 448 U.S. at 143–44.

For these reasons, the Court should find that the 1900 Act and the 1898 Agreement created a specific trust duty for the United States regarding its disposal of the Tribes' ceded lands subject to the Act and the Tribes' off-reservation treaty rights. The Court should further find that the BLM's failure to adhere to the requirements of the 1900 Act amount to a breach of trust and grant summary judgment in favor of the Tribes on this claim.

III. BLM's FLPMA Analysis was Deficient, and Neither Federal Defendants Nor Simplot Can Explain Away the BLM's Failure to Comply with the Law.

As the Tribes discussed in their opening brief, FLPMA requires BLM to manage its public lands to promote environmental and resource values. Consistent with those requirements, before exchanging federal land, BLM must make certain determinations based on a thorough and accurate representation of the proposed land exchange. *See* 43 U.S.C. §§ 1701(a)(8), 1715-17. In its ROD authorizing the Blackrock Land Exchange, BLM failed to explain how it weighed the effects of the exchange under FLPMA's required public interest determination; it failed to ensure consistency with federal management goals, including the Approved Resource Management Plan (ARMP); and it failed to ensure that the exchanged lands were of equal value. These failures require the Court to set aside the ROD.

A. BLM's Public Interest Determination Failed to Balance Required Factors.

Courts have overturned public interest determinations that did not accurately describe the environmental effects of a land exchange because "[w]ithout an accurate picture of the environmental consequences of the land exchange, BLM cannot determine if the 'public interest will be well served by making the exchange.'" *Ctr. for Biol. Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 647 (9th Cir. 2010) *("CBD")*. Courts must ensure that agencies engage in "reasoned

decisionmaking" and assess whether a decision was "based on a consideration of the relevant factors." *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, -- U.S. --, 140 S. Ct. 1891, 1905 (2020) (internal citations omitted). A court may review only "the grounds that the agency invoked when it took the action." *Id.* at 1907 (internal citations omitted). If the explanation is inadequate, a court must remand the decision to the agency. *Id.* at 1907-08.

The public interest discussion in the ROD failed to grapple with important consequences of the land exchange, including: the uses and historical context of the federal lands to be exchanged, the Tribes' exercise of important off-reservation treaty rights protected by the Fort Bridger Treaty, the likely presence of burial grounds on the exchanged federal lands, impacts on the Tribes' cultural landscape, the Tribes' plans to offer housing in the Michaud Creek area, and the Approved Resource Management Plan. *See* SBT Mem. at 17-19; AR0039171-75 (ROD public interest determination). By failing to discuss those issues, or to discuss them accurately, BLM failed to include or accurately weigh the relevant factors in its public interest determination, rendering its determination invalid.

For example, while the ROD mentions "exercise of tribal treaty rights," it does not consider the cultural significance of changing where those rights may be exercised. Instead, BLM implies that the exchanged parcels are fungible in this regard. ROD at 4 (AR0039172) (describing a "net gain of 113 acres of lands available for exercise of off reservation tribal treaty rights."). It also does not discuss the likely disturbance of burial grounds due to the exchange. The ROD also incorrectly assesses the additional groundwater contamination likely to result from the expansion of the gypstack. BLM compares the expected future concentrations of arsenic and phosphorous in groundwater with the contamination from the *current* gypstack, ROD at 5 (AR0039173). Instead, BLM should have compared the contamination expected from implementing the land exchange to

the reasonably foreseeable future concentrations of those contaminants resulting from the no action alternative, that is, if the plant is decommissioned and the area remediated. *See* Simplot Mem. at 49 (noting that the current gypstack is anticipated to reach capacity in 2031).[8] An agency must explain why its baseline is reasonable, and a failure to do so prevents meaningful public scrutiny of the process. *See Great Basin Resource Watch v. Bureau of Land Management,* 844 F.3d 1095, 1102-13 (9th Cir. 2016) (applying this principle in the NEPA context). For all these reasons, BLM fails to paint an "accurate picture of the environmental consequences," making its public interest determination unlawful. *CBD*, 623 F.3d at 647.[9]

In their response memoranda, Federal Defendants and Simplot do not identify any portions of the ROD that explicitly address these factors. Instead, they highlight BLM's discretion in making a public interest determination and suggest that the Court should consider discussions from the FEIS when reviewing the public interest determination. *See* Fed. Mem. at 16; Simplot Mem. at 30. That discretion is not, however, unfettered, as the *CBD* case explains: if BLM fails to discuss a key relevant factor, no deference can be given to its determination. *CBD*, 623 F.3d at 650.

[8] In its discussion of the environmentally preferable alternative, BLM acknowledges that "[r]educing or ceasing production at the Don Plant earlier than the action alternatives would reduce the extent and duration of cumulative impacts to natural resources associated with the Don Plant including air emissions leaching of contaminants and other impacts to natural resources." ROD at 10 (AR0039178). However, the ROD's public interest analysis does not compare the impacts of the reasonably foreseeable actions to the proper baseline where the plant is decommissioned and the area remediated. The modeling discussed in the FEIS predicts that concentrations of arsenic will eventually decline to 0.004 mg/L after the plant is shut down. AR0029681 (discussing water quality modeling based on a shutdown *after* the proposed gypsum stack expansion). If the gypstack is not expanded and the plant shuts down in a few years, *see* Simplot Mem. at 49, that concentration would be arrived at more quickly and years of arsenic and other pollution from the gypstack would be avoided.

[9] In addition, by addressing the land exchange on its own, with only oblique references to the gypstack expansion and cooling ponds as "reasonably foreseeable actions," BLM minimizes the impacts of the exchange and distorts the public interest assessment. Simplot's brief defending the ROD follows the same strategy.

Second, the ROD is the reviewable decision document for FLPMA purposes, not the FEIS. ROD at 16 (AR0039184). While an agency may, in some circumstances, consider a relevant EIS when evaluating a public interest determination, *see, e.g.*, Fed. Mem. at 16 (collecting cases), agencies must, based on principles of "reasoned decisionmaking" discussed above, explain their reliance on an EIS. As BLM recognizes, the public interest analysis is a balancing test, *see id.*, ROD at 8 (AR0039176) (explaining how BLM balanced factors in its public interest determination), and, without an explicit discussion of the factors balanced, the agency has failed to reasonably explain its decision and to comply with FLPMA.

Simplot and Federal Defendants claim that the public interest determination was sufficient because the ROD mentions tribal treaty rights and the FEIS discusses cultural interests. Simplot Mem. at 37 n.14; Fed. Mem. at 16. Those discrete references, in two separate documents, do not discharge BLM's responsibility to conduct a public interest determination that balances key factors. Moreover, FLPMA specifically lists "cultural resources" as a factor to be weighed in the public interest determination, 43 C.F.R. § 2200.0-6(b), and failure to consider it there is error.

Next, Federal Defendants and Simplot argue that BLM properly found, as required by 43 C.F.R. § § 2200.0-6(b), that the intended use of the exchanged land "will not significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands." Simplot Mem. at 38; Fed. Mem. at 15 n.3 (both citing ROD at 4-5) (AR0039172-73). As Defendants note, this determination was not based on a review of management objectives but, instead, based on BLM's conclusion that there were no adjacent "Indian trust" lands because FMC owns the adjacent lands. Simplot Mem. at 38; Fed. Mem. at 15 n.3. Once again, Defendants (and BLM) rely on semantics. BLM's conclusion overlooks the fact that, because the FMC parcel is within the Fort Hall Indian Reservation, it cannot be considered as a segregable land parcel. On the contrary, 18

U.S.C. § 1151, which defines the categories of Indian country and thereby defines the scope of the federal government's jurisdiction over and responsibility for tribal lands, states specifically that the term "Indian country" includes "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."[10] FMC's ownership of the adjacent lands therefore does not affect their Indian country status as reservation under § 1151(a), nor should it affect BLM's responsibility to consider management objectives for that parcel. Indeed, tribal trust lands are not even listed as a separate category of Indian country, but instead are subsumed within the "reservation" category. *E.g.*, *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *Hydro Resources, Inc. v. EPA*, 198 F.3d 1224, 1249 (10th Cir. 2000); *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000).

Moreover, although FLPMA and its implementing regulations do not define the term "Indian trust lands" and do not explain why the BLM must consider management objectives for those lands, that requirement, which applies equally to adjacent federal lands, appears to stem from the federal government's trust responsibility for tribal lands. The federal government has the same trust responsibility for reservations as for tribal trust lands (indeed, one is merely a subset of the other). Simplot cites 25 U.S.C. § 2201(4) (defining "trust or restricted lands") as support for its argument that "Indian trust land" refers only to allotment parcels or acquired lands where the United States holds the title for the benefit of a Tribe or individual Tribal members. Simplot Mem. at 38. However, that statutory provision is part of the Indian Land Consolidation Act, 25 U.S.C.

[10] Although Section 1151 appears in the criminal code, it is the governing definition of Indian country in civil contexts as well. *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 (1998).

§§ 2201-21, not FLPMA, and is not relevant here. For these reasons, BLM should have found that the land exchange was adjacent to Indian trust land and considered management objectives accordingly.

Regardless of whether the FMC parcel is considered "Indian trust land" under FLPMA, 43 C.F.R. § 2200.0-6(b)(2) does not require BLM to consider only *directly* adjacent Indian trust lands and for that additional reason BLM should have considered conflicts with management objectives on the adjacent or nearby Fort Hall Reservation.[11] Moreover, impacts to the Reservation should have been weighed as part of the non-exclusive list of factors to be discussed in a public interest determination, including meeting the needs of "local residents and their economies," "cultural resources," and promotion of multiple-use values. *See* 43 C.F.R. § 2200.0-6(b).

For example, BLM failed to consider the impact of the land exchange on the Tribes' plans to offer membership housing in the Michaud Creek area. SBT Mem. at 18. Federal Defendants do not respond to this argument in their FLPMA argument Section. Fed. Mem. at 14-17. Simplot responds that the Tribes do not explain whether the planned Michaud Creek housing area is on trust land adjacent to the exchanged lands or how the exchange significantly interferes with the Tribes' management objectives. Simplot Mem. at 37 n.14. The significant conflict between offering membership housing on lands *very near* an expanding industrial facility that includes a mountainous gypstack emitting multiple pollutants and contaminants is obvious and was raised prior to the ROD's issuance. *See* Tribes' FEIS Comments (AR0065171) ("Expanding the gypsum

[11] "Adjacent" is not a defined term in BLM's land-exchange regulations. *See* 43 C.F.R. § 2200.0-5. In fact, in the Federal Register notice accompanying the exchange regulations, BLM uses "adjacent" and "nearby" interchangeably. BLM, *Final Rule: Exchanges—General Procedures*, 58 Fed. Reg. 60904, 60905 (Nov. 18, 1993) ("Use of nearby property is always considered by the appraiser in determining the highest and best use, but limiting consideration to adjacent properties could result in inaccurate estimates of value").

stack [is] expanding a source that led to the site being listed [as a Superfund site]. Having an expanded superfund site would decrease our ability to offer housing to our membership in the Michaud Creek area representing a direct impact on our ability to govern and plan effectively for the health and wellbeing of our membership").[12]

B. BLM Failed to Comply with FLPMA's Public Interest Requirement because the ROD Did Not Address or Conform to Important Management Objectives in the ARMP.

The land exchange also fails to meet the goals in the 2012 BLM ARMP for the Pocatello Field Office, in violation of FLPMA. *See* 43 U.S.C. § 1732(a) (requiring management decisions to be "in accordance with the land use plans"); *see also* 43 C.F.R. § 1610.5-3(a); SBT Mem. at 19-20. Instead, BLM's approval of the ROD conflicts with the ARMP by failing to protect and maintain watersheds and by failing to "provide for tribal treaty rights and interests on unoccupied public lands." ARMP Goal SW-2 (Soils and Water) (ARMP-20) (AR0065415); *see also* ARMP Goal TR-1 (ARMP-19) (AR0065414). As explained more fully in Section IV, *infra* (discussing NEPA), the proposed gypstack expansion has the potential to impact the Portneuf River and the associated values of that watershed, including the important Bottoms area known as Jimmy Drinks, by adding to off-site migration of waste through subsurface flow into the River and increasing the areas that would be impacted by a liner failure or a catastrophic gypstack failure. The new location for the gypstack expansion that was approved in the land exchange did not include a hydrologic

[12] The Tribes submitted these comments the same day as BLM emailed a follow-up request for government-to-government consultation on the land exchange, and during the same period as BLM's other requests to conduct meetings with the Tribes. AR0065183, AR0065351. Despite BLM's stated willingness to consider the Tribes' concerns, and even though BLM received a contemporaneous formal statement from the Tribes expressing their concern as to the proximity of the gypstack to the planned housing development (the FEIS comments), the ROD that BLM issued the following month does not discuss impacts to Tribal housing.

evaluation of that site to fully examine impacts to tribal waters downstream of the expansion site. BLM therefore failed to ensure that the exchange was consistent with the ARMP.

Federal Defendants do not respond to these ARMP-based concerns except to state that the issues were "adequately addressed" in the ROD's public interest determination and the FEIS. Fed. Mem. at 16 n.4; Simplot Mem. at 38-39. The ROD does not, however, address the management objectives related to SW-2 (protecting watersheds) or TR-1 (honoring treaty rights), just discussed, let alone reconcile the conflict between the exchange and those objectives. Instead, it discusses facets of ARMP Goal LR-5, which is focused on "administrative management efficiency, natural resources management and protection, and public benefit," including Goal LR 5-2.1, about lands "potentially suitable for disposal by exchange"; and discusses Goal FW-1.1.10, the management guidance related to acquiring public lands within the Blackrock Canyon Big Game Wildlife Area. ROD at 8 (AR0039176). Although the ARMP designates the exchanged lands as "potentially suitable" for disposal, this designation must be read in the context of the ARMP's other management goals and information developed since the ARMP was signed, which was ten years ago. *See* ARMP LR-5.2.1 (ARMP–80) (AR0065467). For this reason, before an exchange occurs, BLM must affirmatively answer the question "[d]oes the proposal meet the intent of FLPMA?" before addressing whether the land exchange satisfies the zone definitions in the ARMP. *See* ARMP-79 (AR0065466). BLM did not fully address whether the land exchange was consistent with the ARMP's overall management goals and so failed to satisfy FLPMA.[13]

[13] Simplot argues that the Tribes did not challenge the Pocatello ARMP's designation of which lands are destined for private acquisition within the six-year statute of limitations. Simplot Mem. at 38. As just explained, the Tribes' concern is not with the designation of lands destined for acquisition but rather that the exchange, with its expected result (expansion of the gypstack), is fundamentally inconsistent with multiple ARMP management goals and FLPMA.

C. BLM Failed to Comply with FLPMA's "Equal Value Exchange" Requirement.

BLM also failed to comply with the FLPMA requirement that "the values of the lands . . . shall be equal," or shall be "equalized by the payment of money to the grantor or to the Secretary." 43 U.S.C. § 1716(b). SBT Mem. at 20-21. As the Tribes explained in their opening brief, "a mere comparison of dollar amounts is inadequate" and a land exchange with significant adverse effects "cannot be valued solely from a monetary standpoint" because of BLM's trust responsibilities to the Tribes and its obligation to consider environmental justice concerns. *Id.* at 20-21.

Federal Defendants appear to acknowledge that BLM has these responsibilities but argue that they are not part of the FLPMA equal value process. Fed. Mem. 16-17. They explain "Tribal treaty rights and interests are not a typical resource bought or sold in a competitive market involving private lands." Their arguments mischaracterize the equal value process.[14]

First, reading federal treaty, trust, and environmental justice obligations out of the FLPMA equal value process runs the risk of reading them out of FLPMA altogether: it would mean that an exchange could take place even if those obligations are not considered, based solely on a myopic view of the market value of the lands at issue and a similarly narrow view of the public interest determination. That approach does not satisfy either those significant federal obligations or FLPMA itself, nor does it satisfy the various executive orders, policies, and agreements discussed in SBT Mem. at 20-21.

[14] The equal value requirement is mandated by FLPMA and therefore compliance is required whether or not the issue was raised in the administrative process leading to the ROD. Only Simplot argues that the Tribes failed to exhaust this concern. Simplot Mem. at 39 n.16 (failing to respond to the Tribes' argument beyond making an exhaustion argument). BLM was already aware of the need to comply with the equal value requirement, ROD at 7-8 (AR0039175-76), and therefore "there was no need for [the Tribes] to specifically raise the issue of FLPMA compliance." *Upper Green River All. v. BLM*, No. 2:19-CV-146-SWS, 2022 WL 1493053, at *17 (D. Wyo. Apr. 5, 2022).

Second, market value under FLPMA is a broad concept that includes many values not usually "bought or sold," in Federal Defendants' words. For example, the FLPMA regulations include "historic, wildlife, recreation, wilderness, scenic, cultural, or other resource values" as values that should be part of a market value appraisal. 43 C.F.R. § 2201.3-2(a)(3). Throughout the statutory text, FLPMA similarly refers to cultural, historical, scientific, and other usually nonmonetary values, consistent with a broad definition of the term "values." *See, e.g.*, 43 U.S.C. § 1702(a), (c). Although these values must be monetized to conduct the appraisal—the FLPMA regulations require that the appraisal consider these values to the extent they "are reflected in prices paid for similar properties in the competitive market," 43 C.F.R. § 2201.3-2(a)(3)—they cannot be ignored. Instead, these usually nonmonetary values must be weighed as part of the equal value exchange.

The BLM appraiser that evaluated the federal land designated under Alternative B, which was the alternative selected in the ROD, ignored values such as these in its appraisal, likely because the appraiser's statement of work required the appraiser to ignore non-economic highest and best uses when estimating market value. *See* Appraisal Report (May 12, 2020) at ¶ 12 (AR0032887).[15] The appraisal report does not discuss or even mention BLM's duty to protect the Tribes' exercise of their off-reservation treaty rights or the cultural value of the subject property. Appraisal Report (AR0032811-32942). The appraisal therefore did not comply with the FLPMA equal value process.[16]

[15] Notably, Simplot appears to have provided the scope of work to the appraiser. It is stated to be an attachment to the contract the appraiser will have with Simplot (not BLM). Appraisal Report at 1 (AR0032883).

[16] The appraiser also cited the Forest Service land exchange regulations rather than the BLM regulations. *See* AR0032829 (citing 36 C.F.R. § 254).

Lastly, BLM's appraisal of the federal land that was to be exchanged did not adequately consider Simplot's plan for that land. *See Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000) (invalidating appraisal based on a failure to evaluate the intended purpose of the parcel). The appraisal finds that the highest and best use of the federal land to be provided to Simplot under Alternative B is "continued agricultural and recreational uses, wildlife habitat, [and] watershed[,] with speculative investment potential." AR0032867. It also notes, "[t]he subject [the original federal property] would likely fall between the third and fourth broad categories, that of speculative development land and land with no development potential." *Id*. The appraisal fails to address the very purpose of the land exchange—to create an industrial site on the federal land to be exchanged—or discuss the value of that land as an industrial site. *See, e.g.*, *Bisson*, 231 F.3d at 1184 ("Here, the use of the land as a landfill was not only reasonable, it was the specific intent of the exchange that it be used for that purpose. There is no principled reason why the BLM, or any federal agency, should remain willfully blind to the value of federal lands by acting contrary to the most elementary principles of real estate transactions.") The appraisal therefore failed to comply with FLPMA's appraisal requirements as explained by the Ninth Circuit in *Bisson*, and the ROD should be vacated and remanded on this basis as well.

IV. BLM's Reliance on the FEIS was Misplaced because the FEIS Did Not Comply with NEPA.

BLM's ROD approving the land exchange relied on an insufficient environmental impact statement that failed to adequately consider significant direct, indirect, and cumulative impacts of the proposed land exchange or reasonable alternatives to the proposal, including significant impacts from historic, present, and anticipated future environmental contamination, related health impacts, and impacts on tribal treaty rights and cultural resources. The FEIS did not appropriately address impacts to environmental justice communities, including the Tribes, who are bearing the

brunt of all these impacts. Federal Defendants and Simplot attempt to identify portions of the FEIS where these impacts are addressed but can point only to cursory discussions or conclusory statements without sufficient record support. The ROD is therefore defective and should be vacated and remanded to the agency because it relied on an invalid FEIS, in violation of NEPA and the Administrative Procedure Act.

A. The FEIS Did Not Take the Required Hard Look at Significant Impacts from Construction of the Planned Facilities and Continued Operation of the Plant and Did Not Fully Address Cumulative Impacts or Reasonable Alternatives.

1. The FEIS Failed To Take a Hard Look at Significant Environmental and Health Impacts Resulting from the Land Exchange.

The Tribes have suffered for decades from pollutants emanating from the Don Plant and contaminating the Reservation and their environment, and they will continue to be adversely impacted by that pollution for decades into the future. SBT Mem. at 24. That historic injustice should have been acknowledged throughout the FEIS. Instead, as discussed below, BLM expresses unwarranted optimism that future measures, like a new lining for the gypstack or cooling ponds replacing cooling towers, will resolve issues with contamination. Nowhere in the FEIS does the BLM fully grapple with its decision to facilitate the continued operation and expansion of the Don Plant while the area is still an unremediated Superfund site, that is, while it is still heavily contaminated and will remain so for years, even without the additional pollution that will result from continued plant operations.[17]

[17] The multiple declarations proffered to the Court by Simplot give an idea of the work needed to clean up at least a portion of the contamination the company created in the past and the work still needed to comply with the consent orders and other remedial orders imposed on the company.

- ***The FEIS failed to take a hard look at air impacts from the land exchange and failed to adequately consider localized impacts.***

Simplot's proposed expansion under Alternative B for the land exchange will move sources of fluoride and particulate matter (PM) closer to residences east of the Don Plant than under the other two alternatives. *See* SBT Mem. at 25. The FEIS did not analyze air impacts from Alternative B in any detail, including ignoring the impacts of moving the sources closer to residences; instead, BLM made a blanket statement that overall increases in fluoride and PM will be negated by installing cooling ponds and decommissioning the cooling towers. *Id*.; FEIS at 3-11 – 3-12 (AR0029604-05). BLM also does not discuss harmful $PM_{2.5}$ emissions or include any predictions about reductions in $PM_{2.5}$ emissions from the proposed alternatives, singling out PM_{10} emissions only. SBT Mem. at 25; FEIS § 3.2.4.3 (AR0029606).[18]

Alternative B will impact not only a greater number of people than the other alternatives, since there are more residences to the east of the site, but also more grazing animals, yet the increase was neither modeled for human health nor was an ecological risk assessment conducted, in violation of NEPA. *See* Tribes' FEIS Comments (AR0065169); *see, e.g.*, *Town of Winthrop v. F.A.A.*, 535 F.3d 1, 12 (1st Cir. 2008) (explaining that "[t]he measurement of health effects is integral to an EIS" and upholding EIS where the agency conducted a dispersion analysis of PM to estimate health effects); *see also Nat. Res. Def. Council, Inc. v. U.S. Dep't of Transp.*, 770 F.3d 1260, 1272 (9th Cir. 2014) (upholding EIS with health risk assessment that addressed risks from increased $PM_{2.5}$ concentrations in the area immediately adjacent to the project). BLM's FEIS fails

[18] According to EPA, "Small particles less than 10 micrometers in diameter pose the greatest problems, because they can get deep into your lungs, and some may even get into your bloodstream." https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm (last viewed 9/25/22).

to discuss localized air impacts from Alternative B or acknowledge that these air impacts are an important health issue, as discussed further *infra*.

In response, Federal Defendants do not address the lack of a health risk assessment or localized air-quality analyses but cite, instead, Simplot's analyses of the overall impact of cooling tower construction.[19] Fed. Mem. at 22 (citing FEIS at 1-3, 3-11 - 3-12, AR0029562, 29604-05).[20] Simplot argues that BLM properly evaluated impacts to air emissions by assuming that "Simplot would comply with applicable Clean Air Act standards as well as the 2016 IDEQ [Idaho Department of Environmental Quality] Consent Order." Simplot Mem. at 24. It then acknowledges its ongoing fluoride-in-forage exceedances of Idaho state standards, *id.* at 25, as the Tribes pointed out in their opening brief. SBT Mem. at 40. These exceedances call into question the FEIS's assumption that air emissions will meet the applicable limits under state and federal clean air laws. Although in normal circumstances it is reasonable to assume that a regulatory agency will ensure compliance with applicable requirements, that assumption falls by the wayside "when credible evidence seems to undercut the assumption," *Gulf Restoration Network v. Haaland*, No. 20-5179, -- F.4th --, 2022 WL 3722429, at *6 (D.C. Cir. Aug. 30, 2022).

- ***Impacts from ground- and surface water contamination were insufficiently analyzed in the FEIS.***

The FEIS does not describe the foreseeable cumulative impacts of the land exchange on water resources. First, the FEIS does not quantify the impacts of keeping the Don Plant open versus closing it and remediating the area. *See* SBT Mem. at 34-35. Its analysis is thus based on an

[19] As noted elsewhere, Simplot now admits that it does not need the exchanged lands to build the cooling ponds and decommission the cooling towers.

[20] Federal Defendants do not respond to the Tribes' arguments that the FEIS failed to consider greenhouse gas emissions beyond noting that the FEIS states that the continued operation of the Don Plant will allow increased production of GHGs. Fed. Mem. at 33.

incorrect baseline. The FEIS also does not adequately study the impacts of Alternative B, which involves land in an unstudied portion of the Portneuf watershed. *Id.* at 25. Finally, rather than conduct a proper analysis of the impacts to the Reservation from ground- or surface water contamination, BLM analyzed possible impacts to the Reservation based only on the contaminated groundwater that reaches one monitored point, Batiste Spring.

Federal Defendants nevertheless claim that BLM analyzed water quality impacts "in detail," Fed. Mem. at 20, noting that the FEIS addresses the "incremental additions" of contaminants from the operation of the cooling ponds and gypstack expansion and that Simplot's contractor predicts, based on modeling efforts, that total concentrations of key contaminants in groundwater will continue to decline, even with the predicted expansion of the Don Plant. *Id*. at 20-21; *see also* Simplot Mem. at 20-21 (same). Defendants do not, however, point to anywhere in the FEIS that quantifies the cumulative impacts of the land exchange on surface and groundwater by comparing these additional pollutant loads not to the situation where the plant continues to operate but to the proper baseline, namely, the plant shutting down in 2031 and subsequent remediation. *See, e.g.*, EPA Comments on DEIS, AR0039082. The FEIS compares contamination expected after the gypstack expansion to contamination from ongoing, existing operations. FEIS at 3-87 (AR0029680) (explaining that the baseline is "estimated impacts on water quality from ongoing operations, including source controls and extraction activities"); FEIS at Appx. H-51 (AR0030002) (providing "modeling and assessment of ongoing operations" and stating, "[t]o be consistent with the evaluation of the proposed expansion ongoing operations are assumed to continue until 2085.").[21] A failure to select and justify a proper baseline is error that affects the

[21] In response to EPA's comments, BLM added the following cursory statement to its description of water quality impacts from the land exchange: "Failure to obtain the Federal lands for expansion of the gypsum stacks would eliminate the potential leaching of contaminants from

water quality analysis and prevents meaningful public scrutiny of the decision-making process.[22] *See Great Basin Resource Watch v. BLM*, 844 F.3d 1095, 1102-03 (9th Cir. 2016) (faulting an agency for selecting a baseline that was not based on "defensible reasoning") (internal citations and quotations omitted).[23]

In addition, the FEIS evaluated the incremental water contamination from the land exchange but did not map the likely paths of increased contamination due to the cumulative impacts of allowing for ongoing contamination, through the land exchange, together with existing contamination from the site. This approach disregards this Court's admonition that a cumulative effects analysis under NEPA must determine. "(5) What are the groundwater flows under the canyon that might add to the existing contamination?" *Blackrock I*, at *9; *see also* EPA Comments on FEIS, AR0001397 (suggesting that BLM map existing contamination plumes and reasonably foreseeable increases).[24] Understanding the contamination pathways is especially important for

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the expanded gypsum stacks." FEIS at 3-91 (AR0029684). It also noted that, under the no action alternative, if the Plant closes because alternative strategies fail, "potential impacts on water resources associated with production at the Don Plant would be reduced compared to the action alternatives." *Id.*

[22] This baseline error also affects the analysis of air emissions in the FEIS. For example, the FEIS reports that the potential increase in allowable emissions from fluoride from the cooling ponds and expanded gypsum stack would be 117 tons per year of fluoride, presumably as compared to existing operations. FEIS at 3-11 (AR0029604). The FEIS does not quantify anticipated additional emissions using a baseline of the plant shutting down. Similarly, in describing the no-action alternative, the FEIS states that if the gypstack reaches design capacity in 2031, "emissions associated with production at the Don Plant would end approximately 65 years sooner than under the action alternatives," FEIS at 3-14 (AR0029607), but does not quantify this difference.

[23] Simplot cites *Great Basin Resource Watch* to support its argument that the Tribes do not contest BLM's characterization of baseline conditions as a prerequisite to studying the proposed action. Simplot Mem. at 23. In the Tribes' opening brief, however, they noted that the FEIS failed to "discuss the environmental and health impacts of extending the operating life of the existing gypstacks and thereby of the Don Plant in general." SBT Mem. at 34.

[24] Simplot incorrectly suggests that the Tribes are arguing that the BLM "should have confined its analysis to effects of past actions before Simplot's implementation of the lion's share of its remedial measures." Simplot Mem. at 22.

the Tribes because the area is growing quickly and the Tribes are also planning residential development to support future generations of Tribal members. *See* Tribes' Comments on the DEIS (AR0039091); FEIS at G-5 (AR0029896) (explaining housing growth in the area). Many residences in the area depend on private well water, FEIS at G-9 (AR0029900), and thus understanding the contamination pathways and how they may affect and be affected by new wells serving the new homes is critical to protect human health.

The FEIS also assumed, without adequate support, that the water quality impacts from Alternative B would be the same as for other alternatives. *See* SBT Mem. at 24-25. The FEIS concedes that Alternative B "could result in higher phosphorous and arsenic loading to groundwater extraction wells on the eastern side of the Don Plant site," but concludes 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). Both Federal Defendants and Simplot attempt to defend this assumption. Federal Defendants argue that an "analysis of groundwater flow paths from the cooling ponds . . . demonstrated that the flow of contaminants would not be materially altered by the shift in location." Fed. Mem. at 21. Simplot argues that a study of groundwater flows near the Don Plant showed that they migrate toward the Portneuf River from both the west and east sides of the canyon, so no further analysis of the change in location was required. Simplot Mem. at 33. Yet, both these theories are called into question by the stagnant concentration of contaminants at Batiste Spring (which happens to be the FEIS's proxy for impacts to the downriver Reservation). *See, e.g.,* FEIS at App. H-34 (AR0029985) (the water resource report prepared by Simplot's contractor states that while concentrations of arsenic and phosphorous have fallen in many areas, "[c]oncentrations from Batiste Spring [upstream of the Reservation] … have not yet shown a

declining trend.") The FEIS does not grapple with this anomaly or explain why it does not undermine the FEIS's predictions of falling contaminant concentrations or its assumption that that the impacts of different alternatives are interchangeable. Instead, it simply states the problem:

> Concentrations of contaminants in groundwater in key wells within the compliance area (*e.g.*, monitoring wells 537A and 538A directly upgradient of that springhead) show a generally downward trend since 2015; however, concentrations in samples taken from Batiste Spring do not show a declining trend.

See FEIS at 3-86 (AR0029679). If there are local anomalies in the "overall downward trend," then it stands to reason that the switch to Alternative B could have local effects that the FEIS does not address. As the Tribes stated in their comments on the FEIS, contamination from the eastern portion of the site "will not have [the] advantage of mixing with clean water coming from the Michaud Flats prior to entering the [Portneuf] River." Tribes' FEIS Comments (AR0065180). In addition, the water resources technical report did not evaluate Alternative B and relied on stale data. Tribes' DEIS Comments (AR0039111-13). And, in general, the FEIS does not justify reaching a conclusion that Alternative B will not have an impact on groundwater contamination, despite it being in an unstudied portion of the Portneuf watershed.

- ***The FEIS fails to take a hard look at visual impacts from the Land Exchange and its effects***

The FEIS cursorily describes visual impacts from the proposed land exchange, but does not fully evaluate the visual impacts likely from the selected Alternative B. *See* SBT Mem. at 25-26. For example, the FEIS states that Alternative B would convert 36 more acres of Federal lands and 15 more acres of Simplot private lands to a modified industrial landscape, FEIS at 3-47 (AR0029640), but does not discuss the impacts from this conversion. Among other things, huge quantities of dust blow off the gypstack, clouding the atmosphere in addition to posing hazards to human health discussed below. Federal Defendants cite portions of the FEIS that discuss how

Alternative B would alter the visibility of the gypstack from the highways, Fed. Mem. at 23, but does not discuss how the different gypstack configurations will impact the view from the Reservation or how it will affect the viewshed of places that are culturally important to the Tribes. NEPA's hard look demands more.

- ***The FEIS does not fully assess health impacts from continued operation of the gypstack or its expansion.***

The FEIS fails to adequately disclose impacts to health from surface emissions of fine particles blowing off the gypstack, mental health impacts from the construction of a towering gypstack near residential neighborhoods, health impacts from contaminated water that continues to flow from the gypstack, and the possible risk of a catastrophic failure of the gypstack. *See* SBT Mem. at 28-29. In response, Federal Defendants point to partial assessments of these risks and analyses that have not yet been completed. *See* Fed. Mem. at 23-24.

For example, Federal Defendants acknowledge that the "EIS does not describe specific health impacts to the public from contaminates such as arsenic." Fed. Mem. at 25. In addition, BLM's response to the Tribes' comments on the need for an evaluation of the health impacts of radionuclides points to "the findings of an investigation of soil radionuclides in the … EMF Superfund Site" FEIS, App. I-18 (AR0030055), but not to an evaluation of the direct impacts from air emissions. The FEIS contains no discussion of how radionuclide emissions affect people living or working nearby or how relocating sources of radionuclide contamination to the east under Alternative B may affect health risks.

The FEIS also should have included an analysis of a possible catastrophic failure of the gypstack and liner and estimated where the materials and water would flow. SBT Mem. at 28. The FEIS "disclosed that some of the chemical constituents would cause concern" in the event of an uncontrolled release, Fed. Mem. at 24 (referencing FEIS 3-31 – 3-32 (AR0029624-25), but stated

that the impacts would, as Federal Defendants explain, "depend on a variety of factors" and that further assessment of geotechnical stability could await the final engineering process, at some future date. Fed. Mem. at 24. Existing site models could have allowed BLM to provide the estimates the Tribes requested. For example, the Water Resource Assessment, attached as Appendix H to the FEIS, used a conceptual site model that could incorporate different liner leakage rates to help predict the environmental impact of these possible events. FEIS at H-41 (AR0029992) (explaining assumptions regarding different leakage rates). Moreover, these events are not unlikely. The Simplot site has experienced prior releases from the gypstack. Fed. Mem. at 24. The analysis of predictable environmental impacts like a gypstack release or liner failure should have been examined in the FEIS as part of a "hard look" analysis.

- ***The FEIS fails to take a hard look at impacts to wildlife and relies on anecdotal evidence from Simplot's workers while ignoring the Tribes' observations.***

The Tribes have observed that ducks, geese, migratory birds, and deer frequent the area of the Simplot Don Plant. Tribes' FEIS Comments (AR0065176-77). Moreover, at the adjacent former FMC plant, netting was placed on ponds when the facility was operating to deter wildlife interactions. *Id.* The FEIS ignores this information and instead relies on anecdotes from Simplot staff—who are not described as biologists or scientists (or as working all night as a camera trap might)—who say they have not personally observed wildlife mortalities near the gypstack. *See* FEIS 3-71 (AR0029664). Failure to consider the Tribes' experience and the history of animal impacts at the EMF site violates NEPA's hard look requirement. *See, e.g.*, *Klamath Siskiyou Wildlands Ctr. v. Grantham*, 642 F. App. 742, 744 (9th Cir. 2016). Further, since the FEIS relied on Simplot staff's anecdotal reports, it should have likewise considered the Tribes' countervailing observations—particularly because the expanded gypstack lacks mechanisms to deter wildlife and

will be built in an area wildlife currently frequent—or at least clarified why Simplot's anecdotal reports were entitled to more weight than the Tribes'. *See* SBT Mem. at 26-27.

Additionally, the FEIS does not address the likely impacts of the expanded gypstack and accompanying power lines on migratory birds, including the red-tailed hawk and the red-winged blackbird observed during field studies. Federal Defendants argue that no analysis of impacts to species protected under the Migratory Bird Treaty Act (MBTA) was required because "take" under the MBTA is defined as "deliberate acts done directly and intentionally to migratory birds." Fed. Mem. at 26 n.9. As the Department of Interior has clarified, its enforcement discretion is no longer limited by the invalidated opinion issued during the prior administration. *See* DOI, Director's Order 225, Subject: Incidental Take of Migratory Birds (Oct. 5, 2021) ("Incidental take means the taking or killing of migratory birds that results from, but is not the purpose of, an activity").[25] Thus, the reasonably foreseeable effects of the proposed action most certainly implicate the MBTA, and BLM's failure to address these impacts also violates NEPA's hard look requirement. *See* SBT Mem. at 27-28.

Federal Defendants also note that the Tribes raised issues in their FEIS comments that were not raised in their DEIS or scoping comments, including impacts to migratory birds. Fed. Mem. at 26 n.9; *see also id.* at 27 n.10 (impacts to the Tribes' ability to offer housing in the Michaud Creek area). The Tribes raised both these issues in their FEIS comments. *See* Tribes' FEIS Comments, AR0065176-77 (migratory birds), AR0065171 (Michaud Creek housing). Federal Defendants do

[25] Violations of the MBTA are serious offenses. Courts have found *criminal* liability for industrial activities that incidentally kill birds protected by the MBTA. *See United States v. Apollo Energies, Inc.*, 611 F.3d 679, 684–90 (10th Cir. 2010) (affirming MTBA liability after FWS inspectors found dead bird remains in unprotected oil field equipment that birds were known to enter); *United States v. FMC Corp.*, 572 F.2d 902, 907 (2d. Cir. 1978); *Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior*, 478 F. Supp. 3d 469, 479 (S.D.N.Y. 2020).

not argue that the Tribes waived their opportunity to bring these issues before the Court, and they cannot. BLM opened a comment period on the FEIS and responded in the ROD to comments that were received. Thus, the agency had a full opportunity to rectify issues related to these comments and the issues are preserved for the Court's review. *See, e.g.*, *Today's IV, Inc. v. Fed. Transit Admin.*, No. LA CV13-00378 JAK, 2014 WL 3827489, at *15 (C.D. Cal. May 29, 2014) (explaining that because issues were raised in comments on an FEIS, "the issue was not waived") (citing *'Ilio'ulaokalani,* 464 F.3d 1083 (9th Cir. 2006)), *aff'd sub nom. Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445 (9th Cir. 2016). Simplot's more extreme argument that the Tribes forfeited their ability to seek judicial review must be rejected for the same reason. *See* Simplot Mem. at 31 n.12.

- ***The FEIS fails to examine socioeconomic impacts to the Tribes.***

The FEIS also neglects to fully evaluate the socioeconomic impacts to the Tribes from the proposed gypstack expansion. SBT Mem. at 26. The FEIS includes no discussion of socioeconomic impacts to the Reservation as a whole or to Tribal members. *See* FEIS 3-102-103 (AR0029695-96). Instead, it incidentally evaluates impacts to the Reservation by examining impacts within Power and Bannock Counties, rather than examining impacts to the Reservation as an entity. *Id.*[26] In addition, the Tribes explained in their FEIS comments that the proposed alternative will affect the Tribes' plans to offer membership housing in the Michaud Creek area, a fact that BLM did not address. In response to the Tribes' comment letter, BLM merely stated in the ROD, "[t]he comments did not identify any significant new circumstances or information

[26] Likewise, as discussed below in the environmental justice section, the FEIS identified only two block groups with the Reservation as "potential environmental justice communit[ies]" and therefore limited portions of its environmental justice analysis to those block groups rather than addressing the Reservation as a whole. *See* FEIS at 3-98, 3-103 (AR0029691, AR0029696).

relevant to the environmental consequences described in the Final EIS." ROD at 15 (AR0039183). Likewise, in their response memorandum, Federal Defendants state BLM's analyses "more than satisfied BLM's duty under NEPA." Fed. Mem. at 27. On the contrary, BLM's cursory discussion of socioeconomic impacts to the Reservation fails to take a hard look at the issue, particularly in light of the environmental justice concerns discussed in Section IV.B, *infra*.

2. The FEIS Fails To Adequately Discuss Impacts to the Tribes' Treaty Rights.

As noted in the Tribes' opening brief, the BLM was required to weigh the request of a private, for-profit company seeking to continue its significantly polluting industrial operations against the treaty-protected rights of the Tribes, including off-reservation treaty rights. SBT Mem. at 29-31. The federal land that Simplot obtained is adjacent to the Reservation and thus was more heavily used by the Tribes than is likely to occur on the land BLM acquired in its place, as the FEIS acknowledges, FEIS at 3-25 (AR0029618) ("the non-Federal lands likely do not contain the same tribal significance as the Federal lands (e.g., cultural sites, possible burial sites, viewsheds, audio sites)"). The non-Federal lands are approximately 16 miles away from the Fort Hall Reservation, whereas the Federal lands are directly adjacent to the Fort Hall Reservation."). But the FEIS discounts the impact of exchanging important, reservation-adjacent lands for a lead-contaminated (although allegedly remediated) parcel farther away by speaking in terms of a "net gain" of lands available for off-reservation treaty rights. *Id.* It does not discuss mitigation for the overall impact of replacing tribally significant lands with previously contaminated ones; instead, it mentions retaining certain individual sites under federal ownership (compared to Alternative A) to preserve Tribal access to those sites, but not to the formerly federal land as a whole. *See* FEIS at 3-25 (AR0029618). In short, impacts to the Tribes' treaty-protected rights were insufficiently analyzed in the FEIS.

Federal Defendants argue that a nod in the FEIS to the existence of treaty rights is sufficient to discharge BLM's duties under NEPA. *See also* Simplot Mem. at 30. In support, Federal Defendants cite *Okanogan Highlands All. v. Williams*, 236 F.3d 468 (9th Cir. 2000), but in that case the court found that the EIS sufficiently "examined the issues that will affect [the tribe's] reserved rights and concluded that the Project will have no significant effects on hunting and fishing resources in the North Half." *Okanogan Highlands All.*, 236 F.3d at 479.

In our case, in contrast, the FEIS could not and did not reach the same conclusion. BLM made no finding that would overcome the fact that "the non-Federal lands likely do not contain the same tribal significance as the Federal lands." FEIS at 3-25 (AR0029618). The FEIS also failed to fully address the Tribes' concerns with lead contamination on the newly available federal land.[27] The FEIS states that the land has been "remediated," FEIS at 3-41 (AR0029634), but land, once harmed, cannot be easily restored to its prior wholeness. Land once spoiled is not the same for purposes of treaty rights exercise. *See, e.g.*, AR0065179 (explaining that Tribal members expect off-reservation treaty rights areas that "will continue to be a healthy place for our future generations to thrive.").

3. The FEIS Fails To Adequately Consider Impacts on Cultural Resources.

The land exchange took out of federal control a parcel of land within the Tribes' aboriginal homelands that was important for the exercise of their treaty rights and contains culturally important sites. *See* SBT Mem. at 31-33. Federal Defendants suggest that the FEIS "fully disclosed the impacts" on cultural resources. Fed. Mem. at 31-32; *see also* Simplot Mem. at 27-28. Instead,

[27] The FEIS discloses that the non-federal lands were also covered in trash that Simplot was urged to remove before the exchange. FEIS at 3-35 (AR0029628) (describing "[s]olid waste such [as] target trash, pallets, wire, tires, camper shell, and scrap metal were also observed within the non-Federal lands").

the FEIS dismissed them. As noted in the Tribes' comments on the DEIS and FEIS, bone fragments interred in a rock crevice, along with other nearby rock crevices, make it very likely that the federal land subject to the exchange contains burial and other spiritual sites. Tribes' FEIS Comments (AR0065175-76); Tribes' DEIS Comments (AR0039089).[28] BLM's response in the FEIS to the Tribes' DEIS comments about this evidence is that "[t]here have been no specifically documented or recorded burial sites on the Federal lands." FEIS at I-19 (AR0030056). This response completely discounts the evidence presented by the Tribes and the Heritage Tribal Office site reconnaissance about the federal lands subject to the exchange. For example, the FEIS concludes that the "potential for undiscovered cultural sites in the analysis area is low," based on "recent Class III inventories conducted for the Blackrock Land Exchange EIS and [a] review of previous inventories." FEIS at 3-14 (AR0029607). This list does not mention the Tribes' evidence of bone fragments or other features imparting significance to the land that only the Tribes would comprehend, nor does it mention the Tribal Office's site reconnaissance. *See* FEIS I-19 (AR0030056) (BLM response to the Tribes' comments cites the cultural resource surveys).

4. The FEIS Does Not Fully Address Cumulative Impacts Because it Uses an Artificial Baseline for Comparison and Fails To Consider the Legacy of Past Contamination.

The FEIS fails to quantify the true cumulative impacts of the land exchange because it compares contamination from the proposed alternatives to an artificial baseline of ongoing operations at the Don Plant rather than accurately quantifying the extra decades of contamination that will occur because of the land exchange. *See supra* § IV.A.1 (impacts from ground- and surface water contamination). In addition, because the FEIS's effects analyses for air, water,

[28] Contrary to Simplot's suggestion, Simplot Mem. at 28, these items constitute concrete evidence, not "highly speculative" statements.

cultural resources, and visual impacts are deficient, *see supra* Section IV.A, BLM's overall cumulative effects analysis is likewise inadequate, *see* SBT Mem. at 34-35.

The FEIS also fails to adequately discuss the cumulative greenhouse gas or climate impacts of the land exchange. Although it quantifies increased GHG emissions from the expanded gypstack and cooling ponds it again uses the wrong baseline: it does not quantify emissions from extending the life of the plant or from the additional phosphate mining that extending plant operations will cause. *See* FEIS summary table at 2-19 (AR0029584); FEIS at 3-105 (AR0029698). Moreover, it does not distinguish between the various alternatives, saying only that the climate change effects are the same for all. *See* FEIS summary table at 2-19 (AR0029584); SBT Mem. at 24. An EIS must do more to consider climate impacts. If the BLM can quantify the benefits of keeping the Don Plant in operation, like estimating the number of jobs supported or the income from that labor, *see* FEIS at ES-15 (AR0029558), it can likewise quantify the costs of greenhouse gas emissions. *See, e.g.*, *WildEarth Guardians v. Bernhardt*, No. CV 17-80-BLG-SPW, 2021 WL 363955, at *9–10 (D. Mont. Feb. 3, 2021), *appeal dismissed sub nom. Montana Env't Info. Ctr. v. Haaland*, No. 21-35294, 2021 WL 3077586 (9th Cir. June 23, 2021) ("Although NEPA does not require federal agencies to engage in a cost-benefit analysis, when an agency chooses to quantify the socioeconomic benefits of a proposed action, it would be arbitrary and capricious for the agency to undervalue the socioeconomic costs of that plan by failing to include a balanced quantification of those costs.").

Finally, for the reasons discussed more fully below, *see* § IV.B, the cumulative effects discussion is deficient because it fails to discuss historic wrongs to the Tribes, including the past legacy of contamination of the Reservation as well as impacts to the Tribes' exercise of off-reservation treaty rights.

5. The FEIS Failed To Consider Reasonable Alternatives to the Proposed Action and the Cursory Discussion Defendants Highlight Does Not Satisfy that Duty.

The BLM eliminated several alternatives from consideration in the FEIS without sufficient explanation. *See* SBT Mem. at 36-37. For example, the FEIS's explanation that several alternatives were eliminated because of an (unidentified) economic analysis, FEIS at 2-13-2-14 (AR0029578-79), fails to satisfy the basic requirement that an agency show its work. *See* 40 C.F.R. § 1502.21 (2019) ("No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment.").

Federal Defendants highlight this discussion in the FEIS and state that BLM need only "briefly explain[]" its reasons for eliminating alternatives from fulsome consideration. *See* Fed. Mem. at 35-36; *see also* Simplot Mem. at 35. Regardless of whether an agency's written rejection of an alternative is short or long, it must provide the "reasons for [its] elimination." *See* 40 C.F.R. § 1502.14(a) (2019); *DHS* v. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1905 (APA "requires agencies to engage in reasoned decisionmaking") (citations and quotations omitted). To reject an alternative based on "economic feasibility" without an economic analysis to support that conclusion is unreasonable. *See, e.g.*, *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (finding a NEPA violation when the agency's stated reason for rejecting an alternative lacks support in the record); *see also WildEarth Guardians v. Mont. Snowmobile Ass'n*, 790 F.3d 920, 925 (9th Cir. 2015) ("To fulfill NEPA's public disclosure requirements, the agency must provide to the public 'the underlying environmental data' from which the [agency] develops its opinions and arrives at its decisions.").

BLM's FEIS also does not consider reasonable alternatives that Simplot continues to evaluate as potentially feasible. For example, Simplot provided several conceptual designs for the

gypstack expansion and cooling ponds in its "Feasibility Study." *See* FEIS Appx. E (AR0029768-0029851). The Study recognized that Simplot needed more time and study before it could eliminate certain alternatives. *See* AR0029798 ("Simplot is currently investigating hybrid options somewhere between full indirect process water cooling and cooling ponds. This investigation is ongoing."). The FEIS rejected these hybrid alternatives before the work was completed. Moreover, Simplot has now concluded based on its ongoing investigation that it can build the cooling ponds on its own land, Koulermos Decl., ECF No. 59-3, ¶ 17 n.6, highlighting BLM's flawed approach in rejecting alternatives with a smaller footprint.

6. At the Least, Supplementation of the FEIS Is Required Here.

For all the foregoing reasons BLM is required to supplement the FEIS to discuss the many issues not fully addressed, including health impacts, impacts to the Reservation, and the combined impacts of the past contamination and anticipated future contamination, among others. *See also* SBT Mem. at 24-26, 37-38. In addition, Simplot has now admitted that it does not need the exchanged lands to build its cooling ponds or to satisfy the terms of the IDEQ Consent Order, calling into question the very purpose and need for the land exchange. BLM must reevaluate the exchange based on this significant new information and Simplot's statement to the contrary must be rejected. *See* Simplot Mem. at 32 ("Nor has any significant new information relating to the effects of the 2020 Exchange arisen following publication of the FEIS."). *See* 40 C.F.R. § 1502.9(c)(1)(ii) (2019) (supplementation is required if "significant new circumstances or information . . .bearing on the proposed action or its impacts" comes to light).

B. <u>The FEIS Did Not Adequately Consider Environmental Justice.</u>

Despite NEPA's requirement to consider environmental justice (EJ) impacts as part of any "hard look" analysis, the FEIS fails to sufficiently consider the "disproportionate impacts" of the

land exchange on the Tribes and their Reservation. SBT Mem. at 42-44. This analysis must include considering both future impacts from the expanded gypstack and past and present wrongs from the historic and ongoing contamination from the Don Plant.

The imperative to consider past wrongs to environmental justice communities is confirmed by Executive Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021). The Executive Order states a commitment "to empower our workers and communities; promote and protect our public health and the environment; and conserve our national treasures and monuments, places that secure our national memory. *Where the Federal Government has failed to meet that commitment in the past, it must advance environmental justice*." (emphasis added). Yet, the FEIS's EJ discussion includes very little mention of impacts to the Reservation or areas of off-reservation treaty rights and does not address the cumulative impacts of ongoing contamination combined with the historic wrong of previous (and not-yet-fully remediated) contamination from Simplot's and others' past activities.

In response, Federal Defendants and Simplot note that the FEIS considered EPA's EJSCREEN Tool and that several FEIS sections discuss EJ. Fed. Mem. at 42-43; Simplot Mem. at 28-30. The EJSCREEN Tool simply identified the census block groups within the Fort Hall Reservation in order to determine the existence of a potential environmental justice community; it did not conduct an EJ analysis. FEIS at 3-97 – 3-98 (AR0029690-91). And the inclusion of several sections mentioning EJ is meaningless if those sections do not engage key EJ issues: impacts to Tribal members and their health and well-being, including cumulative impacts and past wrongs. The FEIS fails in this regard. For example, FEIS § 3.18.4.1.5 (AR0029696), although it is labelled "Environmental Justice," discusses impacts on minority populations in only the first paragraph and in only summary form with no analysis. The remainder of the section (which is only 1 ½ pages in

any event) discusses air emissions and water pollution without relating these harms back to the Tribes, other than stating that general Clean Water Act requirements would prevent or minimize "impacts on the riparian zone along the Portneuf River" and so these impacts would not "disproportionately affect minority or low-income populations." This error is compounded by the FEIS's failure to perform an adequate health impact assessment, including for specific impacts to the Tribes, as described above. To this, Defendants have no response. The FEIS's EJ discussion is deficient and violates NEPA on this basis alone.

C. The FEIS Failed to Address Simplot's Proposed Plans for the Gypstack and Ponds, Despite being Required to Do So Based on Prospective Regulatory Compliance.

As noted by cooperating agency partners and other commenters, the FEIS was required to consider proposed design options for the cooling ponds and expanded gypstack when it evaluated the effects of the proposed land exchange. *See* SBT Mem. at 38-40; *see also* FEIS at 2-15 (AR0029580); EPA Comment on DEIS (AR0039082-83). These possible impacts were all "reasonably foreseeable" because they were part of Simplot's planning for the gypstack expansion and cooling pond development. At the least, the FEIS should have included updated information on the options that Simplot was studying, *see* FEIS Appx. E at 4-1 (AR0029798), rather than waiving off any responsibility because the facilities would be on private land *after* the land exchange took place, FEIS § 2.5.6 (AR0029580). As this Court noted in 2011, to fully address cumulative impacts for the proposed land exchange, BLM should have, at a minimum, answered basic questions about the proposed construction:

> (1) How much waste would be stored in the canyon? (2) How would the canyon [ ] be prepared for storage? (3) What type of liner would be used? (4) How would the liner be installed in the canyon terrain?

Blackrock I, at *9. *See* 40 C.F.R. § 1508.7 (2019) (defining "cumulative impact").

Federal Defendants also argue that BLM was not required to evaluate the preliminary design options and locations for the gypstack and cooling ponds given "the level of oversight from IDEQ and EPA." Fed. Mem. at 38-39; *see also* FEIS at 3-30 (AR0029623) (IDEQ will review designs for gypstack). But, regardless of whether it was reasonable to assume that Simplot would comply with IDEQ and EPA's specifications, Simplot had *already* provided conceptual locations for its expanded gypstack and cooling ponds that BLM should have analyzed in the FEIS. *See* FEIS App. E (AR0029768-851). As this Court recognized in the challenge to the prior exchange, much was already known in 2011 about Simplot's likely plans for its expansion,

> Simplot has long eyed this land, it need not make a blind guess about where it would prefer locating the new gyp stack on that land. Likewise, its estimates of the amount of waste to be stored will not be plucked out of thin air but will be based on the production history of the Don [P]lant and projections made in the ordinary course of business. The choice of liners and other protective features is not an exotic task but something that the parties are currently engaged in as they shore up the existing gyp stack.

Shoshone-Bannock Tribes of Fort Hall Rsrv. v. U.S. Dep't of the Interior, No. 4:10-CV-004-BLW, 2012 WL 314038, at *1 (D. Idaho Feb. 1, 2012). As the Court recognized, the information was available for BLM to analyze but then, as now, it chose not to.

BLM also could not avoid considering "mitigation strategies that would take place after the exchange," *see* Fed. Mem. at 40, like the alternatives discussed above, on the ground that "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." FEIS at 3-108 (AR0029701). Regardless of whether BLM lacked authority to impose mitigation for future activities on the exchanged federal lands, which is questionable,[29] it could not fail to consider possible Simplot

[29] For example, BLM imposed a deed restriction in the ROD to mitigate impacts to a National Historic Preservation Act-protected parcel on the exchanged lands. *See* ROD at 5 (AR0039179).

activities simply because they would be undertaken by a private entity. *See* 40 C.F.R. § 1508.7 (2019) (defining "cumulative impact" as including the activities of a "person" in addition to those of federal agencies); *see also Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1993), *as amended on denial of reh'g* (July 5, 1994) (rejecting an argument that a federal agency did not need to analyze impacts from non-Federal actions because it could not control them as inconsistent with 40 C.F.R. § 1508.7, "which specifically requires such analysis.").

Moreover, it was unreasonable for BLM to rely on compliance with applicable regulations and consent orders regarding the gypstack and cooling ponds. Federal Defendants argue in their response memorandum that agencies, in general, may permissibly rely on a prediction that permitting authorities will ensure future compliance with environmental laws. Fed. Mem. at 37-40; *see also* Simplot Mem. at 34. The D.C. Circuit recently clarified, however, that no such reliance is appropriate where, as here, there is a legitimate objection that enforcement has not been effective in addressing past contamination. *See e.g.*, *Gulf Restoration Network v. Haaland*,, -- 2022 WL 3722429, at *6 (an agency may not assume effective enforcement when credible evidence undercuts that assumption). EPA and IDEQ have both brought enforcement actions against Simplot, and the company has failed to completely address existing groundwater and other sources of contamination, including failing to meet agreed-upon goals to reduce phosphorous concentrations in the Portneuf River. Simplot along with other phosphate processing plants across the country was also the subject of a 2014 EPA National Enforcement Initiative for violations of the Clean Air Act and RCRA. *See* EPA, Public Comment on EPA's National Enforcement Initiatives for Fiscal Years 2017-2019*,* 80 Fed. Reg. 55352, 55352 (Sept. 15, 2015). The Clean Air Act claims were settled, *United States v. J.R. Simplot Co.*, No. 1:15-CV-562-BLW (D. Idaho) (Mem. Decision and Order Approving Consent Decree, Apr. 12, 2016), but the RCRA claims are

still pending. BLM cannot justify its refusal to evaluate the environmental impacts of Simplot's proposed design options by assuming that Simplot's compliance efforts will result in predictable environmental outcomes, given the challenges Simplot has already faced. Moreover, when considering the sufficiency of relying on an environmental assessment alone for this project, this Court rejected the argument that future regulatory processes would serve to discharge present NEPA duties. *See Blackrock I,* at *11-12 (explaining that the IDEQ and EPA agreements to oversee the gypstack construction do not substitute for the NEPA requirement to "consider detailed information concerning significant environmental impacts").

D. BLM Failed To Respond to Several of the Tribes' Concerns.

BLM failed to respond to significant comments raised during the NEPA process and issued the FEIS without resolving some of the Tribes' fundamental concerns with the land exchange. Federal Defendants argue that BLM provided responses to the Tribes' comments by acknowledging them in comment response sections of the FEIS and ROD. Fed. Mem. at 44. Providing a response without substantively addressing the concern raised, or dismissing concerns generally as failing to constitute "significant new circumstances or information," *id.* (citing FEIS and ROD), is not a meaningful response to significant comments. *See* 40 C.F.R. § 1502.9(c) (2019) ("At appropriate points in the final statement, the agency shall discuss any responsible opposing view that was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised."); *Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1169 (9th Cir. 2003). For example, BLM did not respond to the Tribes' concern about groundwater impacts under Alternative B due to the location of that alternative in an unstudied watershed. Instead, BLM simply referred to the prior study in FEIS Appx. H, as Federal Defendants acknowledge, Fed. Mem. at 45. The Tribes also raised concerns with BLM's failure to address

health impacts from Alternative B. Tribes' FEIS Comments ¶ 2(a) (AR0065169); *see also* SBT Mem. at 44. In its response, BLM explains that the "potential incremental effects on contamination" are in the FEIS, FEIS at I-47 (AR0030084), but does not identify or even discuss where the FEIS addresses health impacts. As discussed above, the BLM discounted the Tribes' comments related to the cultural significance of the exchanged federal lands. These are not meaningful responses and do not satisfy BLM's duties to respond to comments.

V. Additional Briefing on Remedy is Not Necessary because Vacatur is the Only Reasonable Remedy Given the Numerous Violations that Led to BLM's Approval of the Land Exchange.

Simplot argues that the Tribes have not shown that "the Court could provide the extraordinary remedy the Tribes seek on summary judgment." Simplot Mem. at 48. Vacatur of the underlying action is the *ordinary* remedy when an agency has acted unlawfully. *See, e.g.*, *DHS* v. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1905 (APA "requires agencies to engage in reasoned decisionmaking, and directs that agency actions be set aside if they are arbitrary or capricious" (citations and quotations omitted)). If the Court finds a violation of law in this case, Simplot also asks the Court to offer it additional briefing to address the appropriate remedy. Simplot Mem. at 50.[30]

Remedy briefing is not necessary in this case. BLM has violated FLPMA and NEPA, both of which are key environmental statutes, in addition to violating the 1900 Act and breaching its trust responsibilities. Vacatur also is the only appropriate remedy here because many of BLM's failures cannot be corrected by simply providing, after the fact, the missing rationale for the agency

[30] Simplot proposes to address equitable factors, such as whether vacating the ROD will jeopardize "Simplot's ability to meet a key regulatory milestone with IDEQ—namely the massive $70-80 million dollar investment to decommission the cooling tours and replace that cooling capacity with the construction of cooling ponds to reduce fluoride emissions." Simplot Mem. at 49. This may not be a genuine concern given the new proposed location of the cooling ponds.

action. *See Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 420 (1971). If the Court is inclined to grant Simplot's request, however, the Tribes request leave to file a responsive memorandum.

CONCLUSION

For the foregoing reasons and all those in the Tribes' prior briefs and filings, the Court should grant the Tribes' motion for summary judgment, vacate the Defendants' August 12, 2020, Blackrock Land Exchange Record of Decision, and order titles to the land at issue transferred back to the original owners prior to the Record of Decision on August 12, 2020.

Dated this 3rd day of October 2022.

Respectfully submitted,

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

/s/ Jill E. Grant
Jill Elise Grant

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