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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, Plaintiff, vs. LAURA DANIEL-DAVIS, Principal Deputy Assistant Secretary for Land and Minerals Management, et al. Defendants, and J.R. SIMPLOT COMPANY Intervenor-Defendant.	Case No.: 4:20-cv-00553-BLW FEDERAL DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT [ECF No. 61]

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INTRODUCTION

The Environmental Impact Statement ("EIS") in this case was developed over the course of years and contains extensive information describing the proposed land exchange and the reasonably foreseeable actions resulting from the action: Simplot's construction of cooling ponds to implement legally enforceable controls, expanded gypsum stacks, and extended operational life of its phosphate processing operations at the Don Plant. The Tribes' reply brief demonstrates that the Tribes oppose the expansion and continued operation of the Don Plant and disagree with the agency's decision to approve the land exchange. It does not, however, demonstrate that Federal Defendants acted arbitrarily, capriciously, abused their discretion or otherwise acted not in accordance with law.

Federal Defendants' actions were authorized by the Federal Land Policy and Management Act ("FLPMA") and are not inconsistent with the Act of June 6, 1900, 31 Stat. 672 (the "1900 Act"). Federal Defendants also complied with any enforceable trust responsibilities provided in the Fort Bridger Treaty and the 1900 Act and underlying 1898 Agreement. In addition, the Tribes have not shown that Federal Defendants' finding that the land exchange was in the public interest under FLPMA was arbitrary or capricious, or that the EIS failed to consider any relevant factor or to disclose the environmental impacts of the proposed action and its alternatives under the National Environmental Policy Act ("NEPA"). Federal Defendants therefore are entitled to summary judgment in their favor.

I. ARGUMENT

A. BLM's authorization of the land exchange did not violate the 1900 Act.

Federal Defendants had authority to authorize the land exchange and did not violate the 1900 Act's provisions. When the 1900 Act was passed, it provided that the lands would be

"subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States only." 1900 Act § 5, 31 Stat. at 676. It also provided that purchasers could not purchase more than 160 acres of land and that lands within five miles of Pocatello must be sold by public auction. After the Act was passed, Congress repealed the auction requirement for lands within five miles of Pocatello, and repealed the homestead, townsite, and timber laws[1] that previously allowed individuals to acquire title in public land, and passed FLPMA as a successor to these repealed acts. FLPMA now provides the primary means of disposal for public lands, regardless of how they were acquired or for what purpose they are disposed. 43 U.S.C. §§ 1701(a)(3), (10), 1702(e). As such, FLPMA today serves as the "homestead, townsite, stone and timber, and mining laws of the United States" for purposes of land disposal in the context of the 1900 Act. Thus, BLM properly interpreted FLPMA as providing a means of disposal here.

In addition, the Court should read the 160-acre limitation on "purchases" in accordance with its plain language, and find that the 1904 Act removed the auction requirement.

1. FLPMA provides BLM with authority for the land exchange.

The Tribes continue to assert that BLM could only dispose of the land through the categories of laws listed in Section 5. This interpretation ignores Congress's stated purpose in enacting FLPMA. The Tribes' interpretation of the 1900 Act fails to harmonize that Act with FLPMA's disposal authority, or to explain why that disposal authority does not apply here, and

[1] While parts of the pre-FLPMA mining laws are still effective, including the Mining Law of 1872, 30 U.S.C. §§ 22–76, these laws are no longer used to dispose of federal lands, in light of a statutory moratorium on the patenting of new mining claims or sites, and on the further processing of existing patent applications. *See* Dep't of the Interior and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-332 §§ 112–13, 108 Stat. 2499, 2519 (1994). The primary modern statute governing federal stone resources is the Materials Act of 1947, as amended, 30 U.S.C. § 601–04, which similarly does not provide for disposal of the underlying public lands.

would leave Federal Defendants without any viable means to dispose of public lands in the ceded area. The Tribes' argument therefore should be rejected.[2]

As initial matter, the Tribes are incorrect that the Section 5 of the 1900 Act was static, forever insulating the ceded lands from any lawful exercise of Congress's legislative authority. Indeed, Congress has amended the 1900 Act. It did so in 1904, when it removed the public auction requirement for the lands within five miles of Pocatello. *See* An Act Relating to Ceded Lands on the Fort Hall Indian Reservation, Pub. L. 58-76, 33 Stat. 153 (1904). And Congress has provided that laws allowing the sale of isolated and disconnected land parcels and of desert lands would apply to the ceded lands on the former Fort Hall Indian Reservation. *See* Pub. L. No. 72-119, ch. 164, 47 Stat. 146 (1932) ("Extending the provisions of the Act entitled 'An Act to provide for the sale of desert lands in certain States and Territories,' approved March 3, 1877 (19 Stat. 377), and Acts amendatory thereof, to ceded lands of the Fort Hall Indian Reservation"); Pub. L. No. 69-252, ch. 337, 44 Stat. 566 ("An Act extending the provisions of section 2455 of the United States Revised Statutes to ceded lands of the Fort Hall Indian Reservation"). The aforementioned laws extending the desert land laws and isolated tract laws to the ceded lands either do not mention the 1900 Act or mention it only by way of describing the lands to which the law applies. *See* 47 Stat. at 146; 44 Stat. at 566. But, without question, these laws added means of disposal not provided in Section 5 as originally passed.

Similarly, FLPMA's land disposal authority can be (and should be) read in harmony with Section 5. Notably, the 1900 Act does not refer to the disposal laws by specific name, such as the

[2] The Tribes misunderstand Federal Defendants' argument regarding the 1902 Proclamation. The 1900 Act said that the lands would be opened to settlement by proclamation of the President, and the Proclamation opened the lands for settlement subject to the conditions in the 1900 Act. Federal Defendants do not argue that the Proclamation overrode the 1900 Act.

Homestead Act of 1862, but instead more generally as "the homestead, townsite, stone and timber, and mining laws of the United States." That Congress named the general categories instead of specific acts indicates that it intended to open the land to disposal via the general laws in use at that time that were applicable to the area. A House Report accompanying the 1904 Act, which removed the auction provision for the lands within five miles of Pocatello and made them subject to the same means of disposal as provided in Section 5, supports this view. The Report recommended passing the bill because "it is for the best interest not only of the local section where these lands are situated, but also for the entire county, that these lands should be opened to settlement and appropriation *under the general laws of the United States*," and went on to state that "[t]he bill in question," which applied Section 5's disposal provisions, "will accomplish this, and we recommend its favorable consideration and passage." H.R. Rep. No. 57-3161, at 2 (1903), Sale of unsold portion of Fort Hall Indian Reservation, Idaho (emphasis added). FLPMA is now the general law of the United States for disposal of public lands and it should be read in harmony with Section 5.

The Tribes assert that, if Congress intended to repeal the ceded land disposal requirements set forth in Section 5 of the 1900 Act, it could have done so. But, for the reasons we have explained, explicit amendment of the 1900 Act was not required. By replacing the prior "homestead, townsite, stone and timber, and mining laws of the United States" with a new statute governing these same purposes, Congress authorized those means of disposal in the 1900 Act area. Thus, the way to give effect to both statutes—which, as Federal Defendants argued in their opening brief, is what BLM must do when presented with arguably competing statutory obligations—is to read FLPMA as supplanting the *means* of disposal listed in that Act. Indeed, under Plaintiffs' view, the lands could have been disposed of under the non-discretionary

homestead and townsite laws, but given that FLPMA replaced those laws, the BLM could not dispose of the lands at all if FLPMA's disposal provisions do not apply.

The Tribes agree that harmonization is appropriate, but assert that BLM should have harmonized FLPMA and the 1900 Act by reviewing the land exchange through application of FLPMA but adhering to "the unique restrictions Congress placed on disposal of the ceded lands through passage of Section 5 of the 1900 Act." Pl.'s Br. in Supp. of Mot. For Summ. J. & in Opp'n to Defs.' Cross-Mots. For Summ. J. at 10 ("Pl.'s Reply"). The Tribes do not explain, however, how their interpretation of FLPMA and the 1900 Act harmonizes the two laws, or how BLM could dispose of the lands via the now-nonexistent homestead, townsite, stone and timber, and mining laws. Under the Tribes' interpretation, the means of disposal listed in Section 5 are the only means by which Federal Defendants could dispose of the property and Federal Defendants therefore would have few to no options for disposing of the land. This is not harmonization because it gives no effect to FLPMA.

2. The 1904 Act removed the auction requirement.

It is somewhat unclear as to whether the Tribes contend that the auction limitation still applies. They acknowledge the 1904 Act removing the auction provisions, but later state again that "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." Pl.'s Reply 7–8. They offer no reason why the Court should ignore the 1904 Act.

3. Purchase should be read according to its plain meaning.

Finally, the 1900 Act's provision that "no purchaser shall be permitted to purchase more than one hundred and sixty acres of the land" by its plain language applies only to purchases, not exchanges. The Tribes argue that the Court should ignore the plain meaning of the words "purchase" and "purchaser," in lieu of a reading that would expand the definition of "purchase"

to mean acquire "in any manner." Pl.'s Reply 7. The Tribes provide no legal authority and no reason why the Court should ignore the statute's plain language. This position is also at odds with the Tribes' other arguments that the 1900 Act must be read strictly. *See, e.g., id.* at 11 ("The terms of Section 5 of the 1900 Act are clear. . . ."). And because the language is clear, the canon of construction that instructs that ambiguous statutory terms should be interpreted in favor of Indians is not relevant. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (stating that "statutes are to be construed liberally in favor of the Indians, with *ambiguous* provisions interpreted to their benefit" (emphasis added)). The Court should, therefore, reject the Tribes' interpretation and hold that limitations on "purchase" do not apply to the exchange.

In sum, FLPMA provided the authority for the land exchange here, and Federal Defendants did not act contrary to the 1900 Act. The Court should grant summary judgment to Federal Defendants on Plaintiff's First Claim.

B. Federal Defendants did not breach their trust responsibility to the Tribes in approving the land exchange.

To state a valid breach of trust claim, the Tribes must identify a treaty, statute, or regulation that creates an enforceable trust duty and show that Federal Defendants violated that duty. *See Navajo Nation v. U.S. Dep't of the Interior*, 26 F.4th 794, 808 (9th Cir. 2022), *pet. for cert. docketed*, No. 22-51 (U.S. July 19, 2022); *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006). The Tribes have not done so. They assert that "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." Pl.'s Reply 13. Federal Defendants are entitled to summary judgment on this claim for several reasons.

First, Federal Defendants did not act contrary to the 1900 Act. As shown above, FLPMA gave Federal Defendants disposal authority here, the 1900 Act's 160-acre limit applies only to purchasers, and the 1904 Act removed the auction requirement. Thus, to the extent that the 1900 Act contains an enforceable trust duty to dispose of the ceded lands, Federal Defendants did not act contrary to that duty here.

Second, neither the 1898 Agreement nor the 1900 Act require Federal Defendants to protect the ceded land or keep it in the public domain. Instead, the Tribes have off-reservation rights on the ceded lands only "[s]o long as any of the lands ceded, granted, and relinquished under this treaty remain part of the public domain." 1898 Agreement, Art. IV, 31 Stat. at 674; *see Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) (holding that the Fort Bridger Treaty provision that gave the Tribes the right to hunt on "the unoccupied lands of the United States so long as game may be found thereon," created only conditional right valid if the land is unoccupied and game is found on the land); *accord Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (interpreting identical language in a different treaty to mean the hunting right terminated when the land no longer belonged to the United States). The Tribes have not pointed to any statutory or treaty provision that creates a duty to protect the ceded lands.

And, third, the United States is not required to manage the ceded land for the Tribes' benefit. As in *Gros Ventre*, the Tribes seek to have Federal Defendants "manage resources that exist off of the Reservation." *Navajo*, 26 F.4th at 808 (quoting *Gros Ventre*, 469 F.3d at 812–13). The *Gros Ventre* court found that nothing in the treaties or cession agreements indicated "that the United States agreed to manage [off-reservation land] for the benefit of the Tribes in perpetuity, even after the Tribes later relinquished their ownership in that land." *Gros Ventre*, 469 F.3d at 813. Here, too, the Tribes have not identified a statute, treaty, or regulation that gives Federal

Defendants specific trust obligations to manage or protect the ceded lands—which are *not* held in trust for the Tribes—for the Tribes' benefit. Accordingly, summary judgment should be granted in favor of Federal Defendants on the Tribes' breach of trust claim.

C. The land exchange complied with FLPMA.

1. BLM reasonably determined that the public interest is served by the land exchange.

In approving a land exchange, BLM must determine that the public interest will be well served by the exchange. 43 U.S.C. § 1716(a); 43 C.F.R. § 2200.0-6(b) (2019). The Tribes argue that BLM's public interest determination was inadequate by taking issue with the location of BLM's analysis in the record, and by alleging that BLM failed to "grapple" with certain consequences of the land exchange—allegations which are belied by the record. BLM sympathizes with the Tribes' position in this case, but the public interest determination requires BLM to balance multiple competing interests in line with its multiple use mandate, not just the Tribes'.[3] BLM's public interest determination was lawful, entitled to deference, and should be upheld. *See Nat'l Coal Ass'n v. Hodel*, 675 F. Supp. 1231, 1245 (D. Mont. 1987), *aff'd sub. nom.*, *N. Plains Res. Council v. Lujan*, 874 F.2d 661 (9th Cir. 1989) ("[T]he Court will not pass upon the wisdom of the agency's perception of where the public interest lies." (internal quotations and citation omitted)); *see also W. Land Exch. Project v. Dombeck*, 47 F. Supp. 2d 1196, 1210 (D. Or. 1999) (upholding land exchange and deferring to agency's public interest determination even where there would be detrimental environmental impacts from the exchange).

[3] FLPMA mandates that BLM manage public lands "on the basis of multiple use," 43 U.S.C. §1701(a)(12), which requires BLM to balance sometimes competing interests, such as the protection of environmental resources, *id*. at § 1701(a)(8) and "the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands . . ." *id*. 1701(a)(12).

a. The Court is not limited to the ROD in considering the public interest determination.

The Tribes' contention that the ROD is the only document that can be considered in evaluating the sufficiency of BLM's public interest determination is not supported by relevant precedent. Rather, the entire record must be considered "to determine whether the agency's decision was based on a reasonable consideration of the relevant factors." *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1069 (9th Cir. 2010). For example, in *National Parks & Conservation Association*, the Ninth Circuit reversed the district court's finding that BLM had failed to consider certain values in its public interest determination because the lower court based its analysis on the ROD only and failed to consider analysis in the EIS. *Id.*; *see also Nat'l Coal Ass'n*, 675 F. Supp. at 1244 (considering EIS in judging sufficiency of public interest analysis in decision document).

b. The ROD nevertheless contains a reasonable discussions of the relevant public interest values.

The ROD here nonetheless discussed the relevant public interest values.[4] In weighing impacts to off-reservation tribal treaty rights, for example, BLM explained that while the Federal lands will no longer be available for that use, the exchange would result in a net gain of 113 acres of land available to the Tribes for the exercise of off-reservation tribal treaty rights.[5] ROD

[4] The Tribes argue that BLM erred by using the conditions on the ground pre-project as the baseline. Pl.'s Reply 15–16. BLM used the proper baseline, as discussed further in the water quality section below.

[5] The Tribes contend that BLM failed to account for the cultural significance of changing the lands available for off-reservation treaty rights exercise. Pl.'s Reply 15. That is not true. First, Alternative B addressed many of the Tribe's substantiated concerns regarding the cultural significance of ceded lands. ROD at 9–10 (AR0038177–78). Second, the ROD disclosed that "[f]ollowing conveyance the Federal lands will no longer be available for exercise of off-reservation tribal treaty rights[.]"). ROD at 4 (AR0038172). Second, the EIS explicitly acknowledged the relative cultural significance of the exchanged lands. FEIS at 3-25 (AR0029618) ("Although the non-Federal lands may support the same general activities as the Federal land (e.g., opportunities for hunting, fishing, gathering, and livestock grazing) the non-

at 4 (AR0039172). And with respect to cultural resources, the ROD noted that BLM consulted with the Tribes multiple times on cultural resources issues and conducted a Class III cultural resources inventory under the National Historic Preservation Act. ROD at 12 (AR0039180). Indeed, the selected alternative was specifically designed "to avoid cultural and tribal resources in the West Canyon area on the north side of Howard Mountain . . . [and to] allow for a net gain of public lands and will make additional lands available for tribal uses." ROD at 3 (AR0039171); *see also* FEIS at 3-25 (AR0029618) (under Alternative B, certain sites "which were determined not eligible for the NRHP, as well as the cave dwelling in the Wind Canyon cliffs area that is culturally significant to the Shoshone-Bannock Tribes, would also be retained in Federal ownership"). The ROD also provides that "[t]he patent will also be issued to Simplot subject to a deed restriction which would protect National Register of Historic Places (NRHP)-eligible site 10PR979 (SB-02-HL) and provide tribal access to the site in perpetuity." ROD at 2 (AR0039170).

As for burial grounds, the record establishes that BLM gave due regard to this issue. The FEIS disclosed repeatedly the Tribes' concern that the Federal lands could include possible burial sites. *See* FEIS at 3-23, -24, -25, -95, G-28, -29, -41, I-19, -20, -65, -69. In response to those concerns, the FEIS explained that "[t]here have been no specifically documented or recorded burial sites on the Federal lands and no burial sites were identified during the cultural resource surveys conducted on the Federal lands." FEIS at I-19 (AR0030056). The Tribes did not provide any evidence of bone fragments or burial sites on the Federal lands, and have cited here only to their own comments submitted on the Draft and Final versions of the EIS. Pl. Reply 37.

Federal lands likely do not contain the same tribal significance as the Federal lands (e.g., cultural sites, possible burial sites, viewsheds, audio sites).").

This is insufficient to cast doubt on or undermine the thoroughness or validity of the conclusions of the Class III cultural resources inventory conducted in support of BLM's analysis that found no burial sites. BLM's analysis is amply supported by the record and is not arbitrary and capricious.

c. There are no adjacent Indian trust lands.

Finally, the Tribes' argument that BLM failed to consider management objectives on adjacent Indian trust lands is unavailing because there are no adjacent Indian trust lands to the exchanged lands. In authorizing a land exchange, BLM must find that "[t]he intended use of the conveyed [f]ederal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent federal lands and Indian trust lands." 43 C.F.R. § 2200.0-6(b)(2) (2019). Indian trust lands are lands that are held by the United States in trust for the Tribe. As explained in the ROD, the only adjacent lands to the exchanged lands within the Fort Hall Reservation are privately owned by the FMC Corporation.[6] ROD at 4–5 (AR0039172–72). Thus, there were no established management objectives on that land for

[6] The Tribes also contend that BLM's obligations under 43 C.F.R. § 2200.0-6(b)(2) was not limited to considering only "directly adjacent" lands, and that BLM should have extended its consideration to "nearby" lands. Pl.'s Reply 19. But the words "adjacent" and "nearby" are not equivalent, either under a plain reading or in the Federal Register notice to which the Tribes cite. Read in context, that notice shows that BLM used the two terms in contrast, not interchangeably:

> One commenter stated that the definition of "highest and best use" may be too broad and recommended that the phrase "and present use of surrounding and/or adjacent property" be added after the words "based on market evidence." 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. Therefore, no change was made to the definition in the final rule.

BLM, *Final Rule: Exchanges—General Procedures*, 58 Fed. Reg. 60,904, 60,905 (Nov. 18, 1993).

BLM to consider. Therefore, those lands are not Indian trust lands under the regulations, even if they are inside the Reservation boundaries.[7]

BLM also had no obligation to weigh more heavily the belatedly-raised concern that the exchange would affect the Tribes' ability to offer housing in the Michaud Creek area. Despite having known about the proposed land exchange for almost 15 years, the Tribes waited to raise this concern until after the EIS had been finalized. AR0039198. In addition, the Tribes provided no details or concrete evidence regarding this housing, and their comments do not even describe it as a "plan," but merely state that "an expanded superfund site would decrease our ability to offer housing to our membership in the Michaud Creek area."[8] AR0039198. The Tribes thus provide no evidence that their concern about offering housing in a general location, at an unspecified time, without any further details made the public interest determination unreasonable.

2. The ROD conforms with the ARMP's Management Objectives.

BLM's approval of the ROD conforms with the 2012 Pocatello Amended Resource Management Plan ("ARMP"). *See* 43 U.S.C. § 1732(a) (BLM must "manage the public lands . . . in accordance with the land use plans."). The Tribes contend that BLM's approval of the ROD conflicts with two goals in the ARMP related to watershed management and tribal rights and interests in unoccupied public lands. Pl.'s Reply 20 (citing ARMP Goals SW-2 and TR-1). However, "[o]ther than rehashing their NEPA arguments, Plaintiffs fail to point to any specific examples of how the challenged decisions are inconsistent with the RMP's requirements." *Native*

[7] The Tribes' reference to a statute defining the term "Indian country" is inapposite, regardless of whether it is applied in civil contexts other than FLPMA. Neither FLPMA nor its implementing regulations use the term Indian country; rather, the regulations use the distinct and more specific term "Indian trust lands."

[8] In addition, the superfund site boundaries are established and are not being expanded to include the exchanged land.

Ecosystem Council v. Judice, No. CV 18-55-BLG-SPW, 2019 U.S. Dist. LEXIS 39720, at *25 (D. Mont. Mar. 12, 2019).

First, the Tribes do not explain how the ROD conflicts with Goal SW-2 to "[p]rotect and maintain watersheds so that they appropriately capture, retain and release water of quality that meets state and national standards and do not impair source water protection areas." ARMP-20. As explained in the section discussing NEPA below and in Federal Defendants' opening brief, BLM thoroughly considered impacts to ground and surface water from the land exchange, and reasonably concluded that total concentrations of arsenic and phosphorous would continue to decline due to implementation of source controls and groundwater extraction activities at the Don Plant. FEIS at 3-90 (AR0029683). The Tribes have not provided any evidence in the record, or elsewhere, that undermines BLM's analysis.

Second, the Tribes fail to explain how the ROD conflicts with Goal TR-1 to "[p]rovide for Tribal Treaty Rights and Interests on unoccupied public lands and public lands with the ceded reservation boundary." ARMP-19. The only Action items under this Goal are to make land management decisions in consideration of the 1868 Fort Bridger Treaty and to consult with Tribal governments on actions that could affect treaty rights. *Id*. BLM did both here and nothing in the RMP prohibits BLM from approving a land exchange that takes one parcel of ceded lands out of public ownership in exchange for other ceded lands in a different location.

In short, "[b]ecause BLM balanced the [A]RMP's competing management objectives, and took steps to ensure environmental protection, the ROD is not inconsistent with the [A]RMP as a whole." *Theodore Roosevelt Cons. P'ship v. Salazar*, 605 F. Supp. 2d 263, 284 (D.D.C. 2009), *aff'd*, 616 F.3d 497 (D.C. Cir. 2010).

3. BLM complied with FLPMA's equal value requirements.

While the Tribes insist that BLM's equal value analysis is flawed because certain adverse effects "cannot be valued solely from a monetary standpoint," Pl.'s Reply 22, they ultimately concede that "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.'" *Id.* at 23 (citing 43 C.F.R. § 2201.3-2(a)(3)). The Tribes fail to explain how the appraisal in this case deviated from that regulatory standard, and they make no attempt to explain how BLM can or should have monetized those values differently while still adhering to the regulatory mandate that it consider those values only to the extent they "are reflected in prices paid for similar properties in the competitive market." *Id.*

Moreover, reading the equal value appraisal requirements as they are written—based on market values—would not, as the Tribes contend, read "federal treaty, trust, and environmental justice obligations . . . out of FLPMA altogether." *Id.* at 22. The equal value appraisal is but one part of BLM's obligations under FLPMA in approving a land exchange and is meant to ensure that the property values exchanged are monetarily equal. *See* 43 U.S.C. § 1716(b). That the equal value appraisal is based on monetary considerations does not undermine BLM's obligations to consider "federal treaty, trust, and environmental justice" values in, for example, its public interest determination under FLPMA or in its NEPA analyses.

Importantly, the Tribes fail to present any evidence of prices paid for similar properties that reflect these values, let alone ones in this particular competitive market. The appraisal contains a list of comparable sales and it, like the remainder of the record, is devoid of evidence that the prices of such properties includes estimates of tribal trust or cultural resource values. AR0032849-51. BLM therefore cannot consider these nonmonetary factors as there is simply no

information that indicates they are reflected in the "prices paid for similar properties in the competitive market." 43 C.F.R. § 2201.3-2(a)(3).

Finally, the Tribes argue that the appraisal did not adequately consider Simplot's plan for the acquired land. Pl.'s Reply 24. The Tribes rely on *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000), which is distinguishable from the case at hand. In *Bisson*, a mining company looked to acquire federal lands not for expansion of its mining operations but, instead, to build a regional landfill. *Id*. at 1175. However, the appraisal determined that the highest and best use of the subject lands was "for utilization in conjunction with the current mining operation of the Gold Fields Mesquite Mine." *Id.* at 1182–83. The *Bisson* Court found that the appraisal was flawed because it failed to consider the intended use of the acquired land at all. *Id.* at 1181 n.10. The Court also noted that valuing "the land's highest and best use as mine support" rendered "the land virtually valueless in terms of market value." *Id*. at 1183 n.11.

Here, contrary to the Tribes' suggestions, the appraisal took into consideration the reasonably foreseeable uses of the lands acquired by Simplot. The highest and best use was determined as "agricultural uses with speculative investment as allowed by zoning."[9] AR0032867. However, the appraiser immediately noted "the property has appeal to an adjacent property owner for expansion and investment purposes." *Id.* That adjacent property owner is Simplot and the company's Don Plant. FEIS App'x C, Map 3 (AR0029736). The appraiser

[9] The "as allowed by zoning" statement is critical. "In analyzing the market value of the federal property the appraiser has assumed that the lands and interests are in private ownership zoned consistent with similar non-federal properties in the market area and are available for sale on the open market in accordance with UASFLA Section 112 page 53." AR0032828; *see also* AR0032830 (explaining that the "highest and best use" determination may consider only permissible (legal) uses permitted by zoning). Thus, the appraiser accurately determined a highest and best use reflecting the applicable zoning for comparable lands in the area. AR0032866 ("Legally, the subject [land] is restricted to agricultural, public and single family residential uses as allowed by current zoning.").

further explained that "[p]roperty values are higher than supportable by purely agricultural uses with investment speculation and potential for recreation and related uses being strong drivers in the current market." AR0032867 ("The current mountain recreation uses of the property will continue; however the highest and best use must also include the element of speculation or investment."). The appraiser then used a sales comparison approach to value the federal lands based on sales of similar nearby lands and came to a valuation of $645,000. AR0032875. The Tribes have provided no evidence that the lands were undervalued.

In conclusion, Federal Defendants complied with FLPMA and are entitled to summary judgment on Plaintiff's FLPMA claim.

D. BLM Complied with NEPA.

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

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

BLM's analysis of foreseeable impacts from the land exchange satisfied NEPA's "hard look" requirement. The Tribes suggest that BLM's "optimism" about the effectiveness of proposed measures to resolve or prevent contamination at the Don Plant are "unwarranted." However, BLM's conclusions about the likely impacts from contamination are supported by the disclosed science and the Tribes have failed to provide any evidence to support their view.[10] As in much of their two briefs in support of their motion for summary judgment, the Tribes make unsupported statements without citing to the record or any relevant case law. This is especially problematic given the voluminous record in this case and over 1,200 pages of analysis in the EIS.

[10] For example, the Tribes state without any support that they "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." Pl.'s Reply 25.

See United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv., No. 3:21-cv-00255-JMK, 2022 U.S. Dist. LEXIS 109879, at *50–51 n.202 (D. Alaska June 21, 2022) ("Plaintiffs' minimal citation to the record and legal citation [is] particularly problematic where the length of the Final [Environmental Assessment] produced by [the agency] contains nearly 500 pages of analysis."). As the party challenging the agency's decision, the Tribes bear the burden of persuasion. *Ctr. for Cmty. Action & Envtl. Justice*, 18 F.4th at 599 ("[E]ven assuming the [agency] made missteps[,] the burden is on petitioners to demonstrate that the [agency's] ultimate conclusions are unreasonable." (citation omitted)). The Tribes have failed to carry this burden.

Air Quality

BLM's consideration of impacts to air quality meets NEPA's standards. As the FEIS explained:

> As stated in Section 3.2 (Air Quality and Climate Change), closure of the existing cooling towers would eliminate fluoride and particulate matter emissions from the towers. The new cooling ponds and gypsum stack expansions would have fluoride and particulate matter emissions associated with their operation; however, the net effect of these reasonably foreseeable actions would be a decrease in PM_{10}, $PM_{2.5}$, and fluoride emissions at the Don Plant. Furthermore, because of the decrease in the fluoride emissions from the cooling towers closure, the fluoride in forage concentrations are anticipated to decrease in all forage sampling areas with no exceedances of the State standards. Similarly, the overall reduction in particulate matter emissions is anticipated to negate the effects of moving some of the emissions closer to nearby populations.

FEIS at 3-103–104 (AR0029696–97). Moreover, as evidenced by that paragraph, BLM did discuss $PM_{2.5}$ emissions ,including predictions about reductions in $PM_{2.5}$ emissions. *Id.*; *see also* FEIS Ch. 3.2 (Air Quality and Climate Change) (repeatedly discussing $PM_{2.5}$ emissions); FEIS 3-6–7 (AR0029599–600) (showing no exceedances of $PM_{2.5}$ standards at air quality monitoring stations since at least 2009). Moreover, multiple studies have shown that there are no unacceptable risks to public health from PM emissions at the EMF site or the Don Plant. *See* AR0063536 (finding that "PM10 and PM25 are no longer a public health hazard in Chubbuck

and Pocatello as well as on the Fort Hall Indian Reservation"); AR006538. The Tribes have not submitted any countervailing evidence.

The Tribes have also failed to show that BLM did not adequately consider fluoride emissions. Fluoride emissions were discussed in depth, including the fact that the fluoride-in-forage standard has been exceeded. FEIS 3-61 (AR0029657). BLM also noted that "Alternative B could result in slightly higher ambient concentrations of fluoride and particulate matter, as well as higher fluoride in forage concentrations, closer to residences." FEIS 3-13 (AR0029606). It is worth restating that NEPA is a procedural statute; it does not mandate that BLM disapprove actions that could have a negative impact on the environment. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989). Regardless, despite acknowledging the possibility of higher fluoride in forage concentrations under Alternative B, BLM nonetheless concluded that, based on modeling fluoride, concentrations in soil would decrease under the action alternatives. FEIS 3-61 (AR0029654) ("The fluoride in forage concentrations are anticipated to decrease in all forage sampling areas with no exceedances of the State standards."). Indeed, one of the purposes of the land exchange was to allow Simplot to meet the requirements of its Consent Order with IDEQ to reduce fluoride emissions. FEIS 1-3 (AR0029532). With respect to human health, the relevant public health agencies have determined that fluoride emissions from the EMF site and the Don Plant pose no unacceptable risk to human health. *See* AR0002992 ("In order to better understand risks to tribal members harvesting plants in the Bottoms Area from fluoride exposure, in 2011 EPA collected soil and vegetation samples from a plot in the Bottoms Area. The results found fluoride concentrations consistent with background levels."); FEIS 3-36 (AR0029629) (finding no unacceptable human health risks from elevated fluoride levels in vegetation and only

marginal ecological risks). The Consent Order is in place to address possible ecological risks from fluoride emissions. *See* FEIS 1-3 (AR0029562).[11]

Water Quality.

The Tribes argue that the FEIS does not properly quantify impacts because it relies on an incorrect baseline and does not quantify the impacts of keeping the Don Plant open versus closing it and remediating the area. Pl.'s Reply 27–28. The Tribes insist that the baseline should be "the plant shutting down in 2031 and subsequent remediation," Pl.'s Reply 28, but BLM used the proper baseline by relying on conditions as they existed before the agency action and not on a future speculative scenario.

The baseline represents the conditions that exist before an agency action is taken, against which the project's effects can be evaluated. *See Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016). NEPA requires agencies to examine a no action alternative, which "is meant to 'provide a baseline against which the action alternative"—in this case, the land exchange—is evaluated.'" *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2010) (quoting *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998)). The no action alternative "allows policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed

[11] The Tribes question BLM's assumption that regulatory agencies will ensure compliance with applicable limits under state and federal clean air laws. *See* Pl.'s Reply 27 (citing to *Gulf Restoration Network v. Haaland*, 47 F.4th 795, 803 (D.C. Cir. 2022) for proposition that assumption falls by the wayside when credible evidence seems to undercut it). *Gulf Restoration* is inapposite because in that case the agency had arbitrarily declined to consider a GAO report indicating flaws in the relevant regulatory agency's enforcement effectiveness. *Id*. Here, there was no evidence presented to undercut BLM's assumption that IDEQ and EPA will continue to ensure compliance with applicable environmental statutes and the Tribes have offered none. Rather, the record shows that these regulatory agencies have worked with Simplot (and FMC) for decades to ensure remediation of the EMF site and the 2016 Consent Order evidences that IDEQ is enforcing compliance with fluoride emissions standards. FEIS 1-3 (AR0029562).

action." *Id.* (citing 40 C.F.R. § 1502.14(d)). "Without establishing the baseline conditions which exist . . . before [a project] begins, there is simply no way to determine what effect the [project] will have on the environment and, consequently, no way to comply with NEPA." *Great Basin*, (quoting *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988)).

The No Action Alternative as outlined in the FEIS, is not the decommissioning of the Don Plant and the remediation of the area, as the Tribes represent to the Court. Instead, Section 2.4 of the FEIS succinctly states that under the No Action Alternative, "[c]urrent ownership and existing uses of the Federal and non-Federal lands would persist for the foreseeable future." FEIS 2-13 (AR0029576). This complies with NEPA's requirements, as it allows analysis of the environmental consequences of each alternative to be weighed against the conditions that exist without agency action.

Moreover, the "assessment of baseline conditions 'must be based on accurate information and defensible reasoning.'" *Great Basin*, 844 F.3d at 1101. There would be no way to have accurate information about future conditions as the Tribes suggest because the possibility of the site being shut down and remediated is speculative. While it is true that Simplot has suggested that selection of the No Action Alternative would force the company to reduce production or cease operations earlier than under the Proposed Action, FEIS 2-13 (AR0029576), it is unclear what that would involve or when that would occur. FEIS 2-8, 2-13 (AR0029571, AR0029576)

The Tribes also assert that BLM's analysis of possible impacts to the Reservation by focusing on one monitored point was inadequate, but do not explain why this would result in inaccurate or deficient results. As such, they have not carried their burden of showing that the agency acted arbitrarily *See Great Basin*, 844 F.3d at 1101 ("Plaintiffs have not shown that this

choice rested on inaccurate information or indefensible reasoning." (citing *Or. Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 570 (9th Cir. 2016))). The EIS explained why this site was used. FEIS at 3-88 (AR0029681). "The reviewing court should not 'flyspeck' the agency's decision to hold it insufficient based on 'inconsequential, technical deficiencies.'" *Bair v. Cal. State Dep't of Transp.*, 867 F. Supp. 2d 1058, 1065 (N.D. Cal. 2012) (quoting *Friends of the Southeast's Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir.1998).

The Tribes next complain that the FEIS does not explain why samples from Batiste Spring are not yet showing a declining trend in concentrations of phosphorus and arsenic. Pl.'s Reply 30–31. But the FEIS explains that overall concentrations of contaminants of concern have shown declining trends, and the concentrations in the Batiste Spring samples have consistently been below those at other sites. *See* FEIS H-35 (AR0029986). The Tribes also provides no evidence or authority indicating that the lack of a declining trend at Batiste Springs is indicative of groundwater flows being other than that described in the FEIS and Water Resources Report.

Finally, the Tribes' contention that the area is unstudied and should have been mapped disregards the thorough examination of groundwater flows in the Water Resources Report. *See, e.g.*, FEIS 3-82–83(AR0029675–76), H-26–35 (AR0029977–86). In fact, the Report contains a map of groundwater flow paths. FEIS H-56 (AR0030007). The FEIS studied and disclosed the likely impacts on water resources, and its analysis met NEPA's requirements.[12]

[12] The Tribes also take issue with BLM's decision to use acreage rather than weight of the gypsum to be placed onto the expanded gypsum stack in their analysis of projected effects of that expansion. Pl.'s Reply 3. But such methodological choices going to the selection of which metrics to use fit squarely within an agency's discretion under NEPA. *See League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1218 (9th Cir. 2008) ("It is not for this court to tell the [agency] what specific evidence to include, nor how specifically to present it."). To get at the potential environmental effects of the expanded gypsum stack, particularly as it relates to water quality, affected acreage of surface disturbance is a more

Visual Resources.

The Tribes argue that BLM's analysis of impacts to visual resources is insufficient because it should have addressed dust, the view from the Reservation, and the viewshed of places that are culturally important to the Tribes. Pl.'s Reply 31–32. But BLM's analysis was reasonable. *See* Fed. Defs.' Br. 23; FEIS § 3.9 (AR0029636–40). The EIS explained that the observation points were chosen because they are on the most commonly traveled routes where the Federal lands are in view. FEIS 3-45 (AR0029638). The EIS also notes that the surfaces of the gypsum stacks and cooling ponds are at a lower elevation than the surrounding terrain, which decreases the visual impacts. *Id*. at 3-46 (AR0029639). Moreover, Alternative B resulted in the gypsum stacks being farther away from the Reservation, and the EIS notes that this configuration "is likely to increase the visibility of embankments as seen from the observation point northeast of the Don Plant." *Id.* at 3-47 (AR0029640). It also notes that there would be more visual contrasts created by the embankment in the east canyon and south canyon areas, whereas the Reservation is west of the Don Plant. *Id.* The EIS also discussed visual disturbance in various other places. It acknowledges that the land exchange will change the visual character in certain ways. *See id.* at ES-10 (AR0029553) (summarizing impacts on visual resources); 2-20 (AR0029585) (noting impacts on tribal treaty rights from visual resources generally from the past, present, and ongoing activities at the Don Plant). This analysis is sufficient to meet NEPA's hard look requirement.

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relevant metric than is gypsum volume in any event. *See, e.g.*, FEIS at H-63–64 (AR0030014–15) (addressing potential leakage rate in terms of gallons per minute/acre).

Public Health and Safety.

BLM also adequately discussed public health impacts. *See* Fed. Defs.' Br. 23–25. Regarding radionuclides, a 2004 Public Health Assessment of the EMF site found no adverse health effects as the result of radiological emissions to the atmosphere. *See* AR0063533. Similarly, the EPA's 2015 Five-Year Review found no health impacts from radionuclides in soil or surface water. AR0003005. That review also found that remedial actions at both the FMC and Simplot Operating Units "currently being implemented are adequately controlling all human health exposure pathways that could result in unacceptable risks." AR0002963–64; *see also* AR006538 ("At present BCEH classifies the EMF site as a No Apparent Public Health Hazard . . . .").

As for water contamination, there are no known human health hazards from present or projected contamination. Arsenic is only a public health hazard if it is above certain levels in drinking water. While arsenic is slightly elevated at Batiste Spring, Batiste Spring is not a drinking water site, nor is the Portneuf River (and it is not monitored for arsenic for that reason). And only incremental increases in arsenic and phosphorus are expected. FEIS 3-90 (AR0029683) ("These increases represent approximately 0.04 percent and 0.07 percent of the existing baseline (year 2019) concentrations of arsenic and phosphorus, respectively, at these monitoring locations."). The FEIS also shows that all Contaminants of Concern are below applicable Maximum Contaminant Levels and Risk-Based Concentrations, including arsenic (with the exception of Batiste Spring, where arsenic concentrations slightly exceeded the Maximum Contaminant Level). FEIS at 3-85 (AR0029678).

Wildlife Impacts.

BLM adequately considered impacts to wildlife. *See* Fed. Defs.' Br. 25–26. BLM did wildlife surveys of the Federal and non-Federal lands. FEIS 3-72 (AR0029665). The Tribes' anecdotal evidence involved wildlife seen near the Don Plant—not wildlife seen on, or impacted by, the gypsum stacks. S*ee* AR0065176–77. BLM did not "ignore" the Tribes' comments. Instead, BLM's analysis focused on information pertaining to potential wildlife mortalities from the gypsum stacks. The record is devoid of any instances of known wildlife mortality reports from the public or cooperating agency Idaho Fish and Game. Based on that information, BLM reasonably concluded that wildlife avoid the gypsum stacks due to human activity, the absence of desirable habitat characteristics, and the proximity of extensive aquatic and wetland habitat associated with the nearby American Falls Reservoir. FEIS 3-71 (AR0029664).

In addition, the FEIS notes that it was prepared in accordance with, *inter alia*, the Migratory Bird Treaty Act as amended. FEIS 1-5 (AR0029564). BLM analyzed the impacts on migratory birds and reasonably concluded that the land exchange would not have a significant impact on migratory birds. FEIS 3-71 (AR0029664). The Tribes do not cite to any evidence in the record showing impacts to migratory birds. Pl.'s Reply 33. Instead, the Tribes cite to an October 2021 U.S. Fish and Wildlife Service Order changing the Service's policy on incidental take of migratory birds. The Order was passed after the agency's decision in this case, and therefore was not applicable at the time of the decision.

Socioeconomics

The EIS evaluated the land exchange's potential impact on the communities most likely to experience socioeconomic impacts from the proposed land exchange, FEIS 3-92 (AR0029685), G-31 (AR0029922), including in the Socioeconomic Technical Report at

Appendix G. *See* EIS App'x G (AR0029884–940). The Tribes fault the EIS for not discussing the specific socioeconomic impacts to the Reservation and to tribal members, but, as described elsewhere, Federal Defendants more than adequately analyzed the impacts of the land exchange on the Tribes. The socioeconomic analysis also takes a hard look at the Reservation's labor and employment data and the number and percent of people in minority or low-income populations on the Reservation, as well as the community services provided by the Reservation. EIS at 3-93, 3-94, 3-96 (AR0029686, AR00029687, AR0029689). There is no support for the Tribes' contention that the socioeconomic analysis is insufficient because it focuses on groups that include but are not limited to the Reservation, particularly when impacts to the Reservation are analyzed throughout the EIS.

The Tribes also argue that BLM failed to consider impacts on the Tribes' plans to offer membership housing in the Michaud Creek area. But the Tribes did not raise this issue until after the Final EIS was issued. CEQ regulations require BLM to respond to all substantive comments in its preparation of a final EIS, but there is no such obligation to respond to comments received after the EIS is finalized. 40 C.F.R. § 1503.4. Nor was BLM under any obligation to supplement its FEIS based on the Tribes' late comments. BLM must supplement an EIS when there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). But BLM reasonably determined that the Tribes' comments on the FEIS did not "identify any significant new circumstances or information relevant to the environmental consequences described in the Final EIS." ROD at 15 (AR0039183). This is particularly reasonable given the lack of detail or concrete evidence the Tribes have provided about housing plans in this area.

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

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

The Tribes frame the BLM decision as choosing between a private company with "significantly polluting industrial operations" and "the treaty-protected rights of the Tribes, including off-reservation treaty rights." Pl.'s Reply 36. But BLM's decision here was whether or not to approve the land exchange under FLPMA; it did not "choose" between Simplot and the Tribes. FEIS 1-3 (AR0029562). More significantly here, however, the choice BLM made is not relevant for NEPA purposes, as NEPA requires only informed decision making and public disclosure. Here, the EIS disclosed the potential impacts to treaty rights, in terms of losing culturally significant areas and the fact that the Federal lands would not be available for the exercise of off-Reservation treaty rights. FEIS 3-20–28 (AR0029613–21). The EIS considered the fact that the Tribes might prefer the land closer to the Reservation, but also noted the net gain in land available for exercise of off-reservation treaty rights. *Id.* The EIS also explains that the non-Federal lands received in the exchange had the benefit of not being next to a Superfund site and had higher resource values. FEIS 3-49 (AR0029642).

The Tribes say that the EIS did not consider mitigation for loss, but the selected alternative included a 160-acre parcel of land that would be transferred to BLM and available for off-reservation treaty rights, and 950 acres of land inside the Reservation that would be either given to the Tribes directly or to the BIA to hold in trust for the Tribes. FEIS 3-25–26 (AR00296162–63); *see also* 2-10 (AR0029575) (discussing voluntary mitigation making additional lands available to tribal uses). The BLM also developed Alternative B for the specific purpose of keeping certain culturally-significant sites under federal control so that the Tribe

would continue to have access to them. FEIS 3-28 (AR00296165). The Tribes do not mention any of these factors in their briefs.

Instead, they contend that the EIS downplayed the importance of the closer Federal lands and exchanged them for a lead-contaminated site farther away. But, as the Tribes admit, the EIS discussed the fact that the Federal lands to be exchanged may have had more significance to the Tribes. Pl.'s Reply 36 (citing FEIS 3-25). The ROD also notes that the Federal lands had lower resource values because they are directly next to the Superfund Site. NEPA requires a discussion of impacts to the tribal treaty rights; it does not require that the BLM select the alternative with the least impact to treaty rights, or choose the land the Tribes preferred.

The Tribes also contend that the EIS did not fully address the Tribes' concerns about lead contamination, but the EIS states that, although there was a former unauthorized shooting range on the site, the land has been remediated. FEIS 3-35 (AR0029628); ROD at 3 (AR0039171). The Tribes do not show otherwise, except to assert that land "cannot be easily restored to its prior wholeness," and that land that was "once spoiled is not the same for purposes of treaty rights exercise." Pl.'s Reply 37. These statements are insufficient to demonstrate a NEPA violation, particularly since there is no evidence that these arguments were made before the agency during the administrative process. *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978) (holding that "it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions").

And, as explained above, the Tribes have conditional rights to off-reservation lands, but Federal Defendants have no obligation to keep those lands in the public domain so the Tribes can exercise their rights, or to protect those lands.

c. BLM considered impacts to cultural resources.

Federal Defendants' opening brief thoroughly explains the measures BLM took to consider and mitigate the impacts to cultural resources, which included: (1) a cultural resources surveys on the Federal lands, non-Federal lands, voluntary mitigation Parcel A, and voluntary donation Parcel B; (2) the development of Alternative B "based on comments received during scoping to adjust the boundary of the Federal lands to avoid cultural and tribal resources in the west canyon area on the north side of Howard Mountain; (3) a Memorandum of Agreement prepared under National Historic Preservation Act to inventory, record, and mitigate NRHP-eligible sites under NHPA standards before they were transferred out of Federal ownership; and (4) BLM issuing a patent for the federal lands "subject to a deed restriction which would protect [an NRHP-eligible site] and provide tribal access to the site in perpetuity." ROD at 2 (AR0039170); *Id.* at 2-11 (AR0029576); FEIS at 3-15 (AR0029608).

The Tribes assert in their Reply Brief that the land exchange took out of federal control a parcel of land that was important for the Tribes and contains culturally important sites, and that BLM discounted evidence presented by the Tribes and Heritage Tribal Office site reconnaissance. The Tribes do not cite to the record for these comments and it is unclear exactly to what the Tribes refer. BLM did respond to the Tribes' comments that the land likely contains burial sites, FEIS at I-19 (AR0030356); *see supra* § 3.A.1.b., and protected all the cultural sites that it was aware of from the cultural resource study and previous studies. The Tribes have not shown that they presented evidence that was ignored, nor have they demonstrated that the EIS failed to take a hard look at cultural resources. The EIS's discussion is more than adequate. *See N. Idaho Cmty. Action Network v. USDOT*, 545 F.3d 1147, 1156 (9th Cir. 2008) (finding that EIS met NEPA standards when it considered impacts and discussed mitigation measures to minimize impacts).

d. BLM addressed cumulative impacts from the land exchange.

The Tribes argue that the EIS failed to quantify the true cumulative impacts because it compared "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." Pl.'s Reply 38. But the conditions as they exist before agency action is the proper baseline for comparison. BLM identified the conditions in existence before the land exchange ("ongoing operations at the Don Plant") and analyzed each alternative to see how the baseline would be affected. The Tribes do not explain how this process is deficient and cite only to their own brief as support. They argue, instead, that the "baseline" should include the effects "from extending the life of the plant or from additional phosphate mining that extending plant operations will cause." *Id*. at 39. But these effects are not the baseline; they are the environmental consequences of the action and alternatives.

The Tribes next contend that BLM improperly considered cumulative greenhouse gas emissions, but this argument again relies on the Tribes' preference for a different baseline—a preference with no basis in law, as discussed above. As the record demonstrates, BLM properly quantified the greenhouse gas conditions as they existed before the land exchange (the baseline) and compared them to what they would be after implementation of Alternative B with the reasonably foreseeable actions. NEPA requires no more under the circumstances.[13]

[13] Regarding quantification of greenhouse gas emissions, the record states: "Operation of the gypsum stack expansions and the cooling ponds would result in a net increase in operational power consumption at the Don Plant by approximately 40,000 megawatt-hours per year, an increase in greenhouse gas emissions of approximately 12,000 metric tons per year of carbon dioxide equivalent. This is an increase of slightly more than 10 percent over current greenhouse gas emissions levels associated with the Don Plant." ES-6 (AR0029549); *see also* EIS at 3-104 (AR0029697) ("this would result in an increase of greenhouse gas emissions of approximately 12,000 metric tpy of CO_2e. . . an increase of slightly more than 10 percent over current greenhouse gas emissions levels associated with the Don Plant . . . .").

To the extent the Tribe asserts that emission totals should be different for each alternative, this argument is mistaken. The different alternatives look at different lands for exchange, and the substitution of different parcels of land does not have increased greenhouse gas emissions. The emissions come from the expanded gypsum stacks and cooling ponds and the extended operation of the Don Plant, which is the same under any alternative.

e. BLM considered reasonable alternatives.

The Tribes argue that the record must contain the economic analysis upon which the agency relied to reject certain alternatives from detailed study as economically unfeasible, but offers no support for this proposition and it is not consistent with the regulations or case law. The Ninth Circuit recently reiterated that "'for alternatives which were eliminated from detailed study,' an agency need only 'briefly discuss the reasons for their having been eliminated.'" *Audubon Soc'y of Portland v. Haaland*, 40 F.4th 967, 980 (9th Cir. 2022) (quoting 40 C.F.R. § 1502.14). The EIS meets this requirement. The EIS explains why alternatives were rejected and provides a feasibility study that provides more information. EIS 2-13–15; App'x E.

Muckleshoot Indian Tribe v. USFS, 177 F.3d 800, 813 (9th Cir. 1999), is inapposite. There, the court found that the agency erred by dismissing an alternative "that was more consistent with its basic policy objectives than the alternatives that were the subject of final consideration," particularly because the agency considered "only a no action alternative along with two virtually identical alternatives." *Id*. The case involved a land exchange, and the agency eliminated an alternative of placing deed restrictions on the land traded requiring it to be managed under Forest Service standards on the grounds that deed restrictions would decrease the exchanging party's incentive to trade. The court found this unreasonable given that the Forest Service did not consider means to increase incentive to trade by offering additional acreage or decreasing the amount of land the agency would receive in the exchange. Counsel conceded at

oral argument that deed restrictions would have been a viable alternative. *Id.* The case does not stand for the proposition that a detailed economic analysis must be in the record before an agency can reject an alternative from further consideration, as the Tribes imply.

The Tribes also assert that the EIS rejected other alternatives that are still being studied, such as a hybrid option somewhere between a full indirect process water cooling option and cooling ponds. Pl.'s Reply 40. But BLM approved the land exchange, not the precise mechanism through which Simplot will reduce fluoride to meet IDEQ's requirements. The Don Plant operations were the reasonably foreseeable impacts of the land exchange and not the BLM's action. And at the time the alternatives were eliminated, they were not technologically feasible and thus were reasonably eliminated from further detailed analysis. "[A]n EIS 'need not consider an infinite range of alternatives, only reasonable or feasible ones.'" *Audubon Soc'y*, 40 F.4th at 981 (quoting *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1207 (9th Cir. 2004)). The Tribes have not shown that BLM acted unreasonably.

f. A Supplemental EIS is not warranted because there is no agency action yet to occur.

No supplemental EIS is warranted because Plaintiffs fail to identify any significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. *See* 40 C.F.R. § 1502.9(c)(1). More fundamentally, however, no supplemental EIS is required because the challenged agency action is complete. The Supreme Court has made clear that "supplementation is necessary only if there remains 'major Federal action' to occur as that term is used in 42 U.S.C. § 4332(2)." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 73 (2004) (quoting *Marsh*, 490 U.S. at 370–374) (internal quotation marks omitted). In this case, the challenged agency action was the approval of the land exchange, and that action was completed on August 12, 2020. Meanwhile, the "significant new information"

that serves as the predicate for the Tribes' supplementation claim arose only after BLM had completed the challenged land exchange decision. Pls.' Reply 41. Because there was no major Federal action remaining at that time, no duty to supplement could have been triggered by that information.

2. BLM Adequately Considered Environmental Justice Concerns.

The Tribes argue that the EIS did not consider the environmental justice implications of the Tribes bearing a disproportionate burden of the impacts of the Don Plant's continued operation. It cannot be denied that the Tribes have felt the impacts of the Don Plant by nature of their proximity to the plant, and that BLM had an obligation to evaluate environmental justice and associated impacts in the EIS under Executive Order 12898 (1994).[14] The record is clear, however, that environmental justice and potential impacts on low income and minority populations were addressed.

The Tribes argue that the environmental justice discussion "contains very little mention of impacts to the Reservation or areas of off-reservation treaty rights." Pl.'s Reply 42. But, as discussed above, other parts of the EIS focus extensively on these concerns. The Court should not find that the EIS violated NEPA by not repeating these discussions explicitly in the environmental justice section of the EIS, particularly when the BLM gave careful consideration to the land exchange's impacts on low-income and minority communities, relied on an environmental justice screening and mapping tool provided by EPA, expressly discussed environmental justice in the EIS, and considered impacts on the Tribes throughout the EIS. *See* FEIS at 3-95, 3-103–04 (AR0029688, AR0029696–97); Appx. G (AR0029685–98, AR0029884–

[14] To the extent that the Tribes argue that BLM independently failed to comply with Executive Order 13990, that EO issued several months after the ROD was signed. In any event, BLM does not argue that it did not have an obligation to consider environmental justice and associated impacts, but rather that it fulfilled that obligation under the applicable Executive Order 12898.

940) (Socioeconomic Technical Report that discusses environmental justice). In sum, BLM's analysis of environmental justice is sufficient under NEPA. *See Friends of the Southeast's Future*, 153 F.3d at 1063 (stating that the court "may not flyspeck the document and hold it insufficient on the basis of inconsequential, technical deficiencies." (quoting *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996)).

3. BLM properly considered Simplot's proposed plans.

The Tribes argue that the FEIS was required to consider proposed design options for the cooling ponds and expanded gypsum stacks when it evaluated the effects of the proposed land exchange. Pl.'s Reply 43–46. They suggest that BLM did not consider the design options or provide sufficient information about Simplot's likely plans for its expansion. *Id*. at 44. But BLM considered the reasonably foreseeable actions on the lands proposed for exchange: the construction of cooling ponds, expanded gypsum stacks, and associated infrastructure. *See* FEIS at 2-12 (AR0029577). After the remand from this Court in 2011, BLM engaged in extensive analysis of detailed information concerning significant environmental impacts. The EIS is thorough and contains ample information about the proposed land exchange and Simplot's proposed actions after the land exchange.

BLM acknowledges in the EIS that its analysis was based on "preliminary conceptual designs" and that the actual design would be "finalized during design and permitting and . . . subject to change based on technical changes, final engineering, Don Plant production, and other factors." *Id.* at n.4. The EIS reasonably assumed that any liner would "meet or exceed the impermeability and durability standards of the current liner approved by the IDEQ." *Id.* at 2-5 (AR0029570), I-55 (AR0030092) ("No liner for the gypsum stacks or cooling ponds will be constructed without first being approved and permitted by the IDEQ."). Thus, the final design

options were not necessary to conduct a meaningful and adequate analysis of environmental considerations.

The Tribes' argument that the EIS ignored the location of the expanded gypsum stacks and cooling ponds is incorrect. *See* Pl.'s Reply 44. The EIS considered the conceptual locations for its expanded gypsum stack and cooling ponds, and even contains maps showing each alternative with the location of the proposed cooling ponds and gypsum stack expansions. FEIS App'x C, Map 6, 7. In addition, Alternative B moved the locations and extent of the expanded gypsum stack, as discussed in the EIS. FEIS at 2-12 ("As depicted in Appendix C, Map 7, Simplot has provided preliminary conceptual locations of the gypsum stacks and cooling ponds for Alternative B based on current information.").

BLM's discussion of mitigation was also reasonable. The EIS contains extensive discussion of mitigation measures. BLM did not, as the Tribes suggest, ignore impacts or activities simply because they would be undertaken by a private entity, as shown by the fact that BLM analyzed the gypsum stack expansion and cooling ponds—undertaken by Simplot, a private entity—as foreseeable effects of the land exchange. Instead, BLM chose not to rely on mitigation measures that would take place after transfer because BLM did not permit the cooling ponds or gypsum stack expansion, and cannot control Simplot's operation of the Don Plant on its own private lands. This was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A).

The Tribes also suggest that it was unreasonable for BLM to assume that IDEQ and EPA would enforce regulatory requirements because Simplot has not yet completely addressed existing contamination or met agreed-upon goals to reduce phosphorous concentrations in the Portneuf River. Pl.'s Reply 45. This is not a case where EPA and IDEQ are not engaging in

effective enforcement, as they are, and have been, actively involved for decades. FEIS 1-2–1-3 (AR0029561–62); *see Gulf Restoration Network*, 47 F.4th at 803 ("Of course, an agency may assume effective enforcement in the ordinary case."); *see also supra* n.11. Thus, the Tribes' reliance on *Gulf Restoration Network* is not warranted. There, the agency assumed effective enforcement by another agency, despite "a report about deficiencies in [the other agency's] enforcement of existing safety and environmental regulations." *Id*. No such evidence of deficiencies in enforcement exist here.

4. BLM Adequately Responded to the Tribes' Comments.

Federal Defendants recognize that the Tribes disagree with their decision to approve the land exchange, but NEPA does not require an agency to resolve all concerns. The regulations requires the agency to disclose information and respond to comments submitted on a draft EIS. *See* 40 C.F.R. § 1503.1. They also provide that an agency "may request comments on a final environmental impact statement before the decision is finally made," but contain no requirement that the agency specifically respond to comments or that all issues be resolved. BLM did not ignore the Tribes' comments, and even responded to comments submitted following publication of the FEIS concerning groundwater, health impacts, and the cultural significance of the land to the Tribes. BLM, in sum, met NEPA's requirements here.

II. CONCLUSION

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

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