Steven B. Andersen, ISB # 2618
**KIRTON MCCONKIE**
999 W. Main Street, Ste. 100
Boise, Idaho 83702
Telephone: (208) 370-3325
E-mail: sandersen@kmclaw.com

Thomas C. Perry, ISB #7203
**J.R. SIMPLOT COMPANY**
1099 W. Front Street
Boise, Idaho 83707
Telephone: (208) 780-7430
E-mail: thomas.perry@simplot.com

Stephen J. Odell, OSB # 903530 (admitted *Pro Hac Vice*)
**MARTEN LAW LLP**
1050 SW Sixth Ave., Ste. 2150
Portland, Oregon 97204
Telephone: (503) 241-2648
E-mail: sodell@martenlaw.com

*Attorneys for Defendant-Intervenor J.R. Simplot Company*

**UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF IDAHO**

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| SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION,<br><br>Plaintiff,<br><br>LAURA DANIEL-DAVIS, Principal Deputy Assistant Secretary for Land and Minerals Management; UNITED STATES DEPARTMENT OF THE INTERIOR; and UNITED STATES BUREAU OF OF LAND MANAGEMENT,<br><br>Defendants,<br><br>and<br><br>J.R. SIMPLOT COMPANY,<br><br>Defendant-Intervenor. | Case No. 4:20-cv-00553-BLW<br><br>**DEFENDANT-INTERVENOR J.R. SIMPLOT COMPANY'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT PURSUANT TO THE APA** |

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## INTRODUCTION

The Blackrock Land Exchange is predicated on nearly thirty years of data and analysis and is the product of significant input and direction from Plaintiff Shoshone-Bannock Tribes ("Tribes"), federal and state regulatory agencies, and this Court in *Blackrock I*. The Bureau of Land Management ("BLM") compiled a thorough Final Environmental Impact Statement ("FEIS") to evaluate the exchange. The FEIS reflected several key developments, including: an in-depth characterization of site conditions; monitoring data revealing substantially improved environmental conditions at J.R. Simplot Company's ("Simplot's") Don Plant; meaningful details regarding Simplot's projected future use of the exchange lands and applicable regulatory requirements; and a new exchange alternative designed to address various Tribal concerns. ECF No. 60-1 at 1–3. Based on this robust analysis, BLM found that the substantial environmental progress achieved at the plant over the past decade will not be impeded by the projected minimal incremental impact from Simplot's planned activities on the exchange lands.

In its FEIS, BLM took the requisite "hard look" at the land exchange itself as well as the projected environmental effects of Simplot's plans to laterally expand its existing phosphogypsum stack ("gypsum stack") at the Don Plant and to construct cooling ponds to significantly reduce the plant's fluoride emissions. This "hard look" also led to multiple improvements to the land exchange itself, which further strengthened the public interest finding undergirding BLM's approval of the exchange in its Record of Decision ("ROD").

In their Reply Brief, the Tribes cannot—and do not—credibly refute the thoroughness of the FEIS or any of its principal environmental effects findings. Nor do they acknowledge any of the major changes Simplot detailed in its opening brief that have occurred since *Blackrock I*. The arguments in the Tribes' Reply further suffer from a failure to acknowledge the distinction between

legacy effects that resulted from the Don Plant's historical operations and those which have occurred over the past decade. Time has demonstrated that Simplot's source controls are effective. Still, the Tribes focus almost entirely on the expected duration of projected effects of Simplot's planned activities—but they ignore the small magnitude of impacts projected due to the effectiveness of source control measures. Their arguments are also premised on the notion that BLM can and has authorized Simplot's future activities on the exchange lands. But Simplot must still navigate a gauntlet of further permitting processes and regulatory approvals. Almost all these approvals provide opportunities for comment or consultation with the Tribes.

The Tribes also proffer a variety of (mostly new) arguments in an effort to poke holes in BLM's extensive analysis. These arguments effectively invite the Court to require BLM to nail down every conceivable detail associated with Simplot's future activities prior to the applicable permitting processes, to supervise the successful and ongoing remediation process at the plant, and to usurp the permitting and compliance authority of federal and state regulatory agencies.

The Court should decline that invitation and instead focus on the only proper legal questions before it: whether BLM considered the factors it was required to weigh in finding the Blackrock Land Exchange will well serve the public interest, exercised valid authority in approving the exchange, and took a "hard look" at the environmental impacts of the exchange and from Simplot's intended uses of the acquired lands. The Tribes offer nothing to undermine the soundness of BLM's findings, and their arguments regarding BLM's statutory authority do not hold up under scrutiny. As a result, they have failed to meet their burden to establish that BLM's approval of the land exchange was arbitrary and capricious or contrary to law. The Court should therefore grant Simplot's and Federal Defendants' Cross-Motions for Summary Judgment and deny the Tribes' Motion for Summary Judgment.

## ARGUMENT

### I. BLM Complied with NEPA in Evaluating Effects of the Exchange and RFAs.

The FEIS provides a comprehensive analysis of effects spanning seventeen categories of resources and values, including the Tribes' off-reservation treaty rights, air and water quality, as well as environmental justice and socioeconomic impacts. ECF No. 60-1 at 8–14. The Tribes focus on four overarching NEPA issues—none of which has merit.

First, the Tribes assert that the FEIS should have focused almost entirely on the Don Plant's legacy impacts resulting from historical practices, and that BLM's decision should have imposed conditions on Simplot's future activities that are within the jurisdiction of other agencies. But the FEIS squarely confronts those legacy issues, properly analyzes the current environmental status of the Plant site, and reasonably projects the incremental effects of the reasonably foreseeable activities ("RFAs") that Simplot plans to conduct on the acquired lands.[1] Second, the Tribes

[1] The Tribes object to the term "RFA" to describe Simplot's intended uses of the exchange lands and misread the record to suggest that expansion of its gypsum stack is the sole reason that Simplot sought to acquire such lands. See ECF No. 74 at 1 (citing FEIS at 1-1). But in doing so they omit the first half of the sentence they cite in the FEIS stating that "Simplot has indicated its intent to use the acquired Federal lands for construction of cooling ponds to implement legally enforceable controls." FEIS at 1-1 (AR0029560). In addition, Simplot has been unequivocal that its rationale for seeking the federal lands hinged on facilitating both the lateral expansion of its existing gypsum stack and construction of cooling pond(s) to reduce fluoride emissions. *See id.* App. E at 1-1–1-2 (Feasibility Study) (AR0029778–79). Moreover, the "RFA" term comes from CEQ's NEPA implementing regulations, as this Court recognized and explained in *Blackrock I*. *Shoshone-Bannock Tribes v. U.S. Department of the Interior (Blackrock I)*, 2012 WL 314038, No. 4:10–CV–004–BLW, at *8–*9 & n.1 (Feb. 1, 2012).

The RFAs do not have to be implemented exactly as projected in the FEIS. BLM properly recognized that it does not permit such construction activities, cannot condition its decision based on extra-statutory conditions, and that the actual permitting authorities may deny or modify plans based on further information. FEIS at 2-4 & Tbl. 2-3 (AR0029569) ("Actual disturbance locations would be finalized during final design and permitting and are subject to change"). This is consistent with the Court's own recognition in *Blackrock I* that BLM cannot be expected to "accurately predict every twist and turn." *Blackrock I*, 2012 WL 314038, at *1. The regulatory agencies with authority in the subsequent permit processes actively participated in the FEIS, which carefully clarifies the independent respective roles of these agencies to oversee and govern RFA

contend that BLM did not adequately analyze the FEIS's action alternatives against the Tribes' preferred No Action alternative—namely, one that would necessarily result in a complete shutdown of the Don Plant within the next decade. On the contrary, the record shows BLM adequately analyzed the scenario were it to have rejected the land exchange against a robust and fully developed environmental baseline based on nearly three decades of data. Third, the Tribes contend certain alternatives were arbitrarily eliminated from more detailed consideration in the FEIS. But BLM adequately explained why other alternatives were not viable or reasonable and hence were not brought forward for detailed consideration. Fourth, the Tribes seek to have the Court require yet further analysis into issues or metrics that stray far beyond what NEPA requires. Such additions would not serve the statute's purposes.

NEPA does not require "the most exhaustive environmental analysis theoretically possible, but merely that it take a 'hard look' at relevant factors." *Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1139 (9th Cir. 2006); *Audubon Soc'y of Portland v. Haaland*, 40 F.4th 967, 984 (9th Cir. 2022). Nor does NEPA require data to be presented in a particular format or prescribe any particular methodology. *See Ecology Ctr. v. Castaneda*, 574 F.3d 652, 667 (9th Cir. 2009). What matters is whether the agency's "hard look" is sufficient to allow an informed agency decision and public involvement. As explained in more detail below, the record demonstrates that BLM readily met that standard.

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implementation. *See, e.g.*, FEIS at 2-5–2-6 & H-2 ("Assessing Simplot's compliance with the regulatory requirements identified in the 2008 VCO/CA and the 2010 IRODA is the responsibility of DEQ and EPA outside of the NEPA process") (AR0029570–71 & AR0029953); *see also* AR0000297 (IDEQ stating the same).

### A. BLM Reasonably Found the Effects of the Exchange and RFAs Will Be Minimal.

The Tribes' arguments fail to seriously challenge BLM's compliance with NEPA. First, the Tribes do not point to any evidence in the record to contradict the effectiveness of Simplot's source control measures. The intermediate liner and extensive series of extraction wells are working effectively to dramatically reduce environmental impacts, including a significant reduction in phosphorus in the Portneuf River since 2008 and decreased gypsum stack seepage rates from 900 gallons per minute ("gpm") to 1 gpm. ECF No. 60-1 at 11–12. Second, the Tribes do not challenge the validity or efficacy of the model which projected that these future activities will have only an incremental impact on Portneuf River water quality, so minor as to effectively be immeasurable. *Id.* at 7–8,12–13. Third, the Tribes do not contest that Simplot must obtain further approvals from the regulators that have overseen the successful CERCLA cleanup and administer environmental laws such as the Clean Air Act. *Id.* at 15–17.

The evidence in the record supporting BLM's conclusions is sound. Yet the Tribes erroneously imply that Simplot's planned expanded gypsum stack will have impacts at a level comparable to those that resulted from the Don Plant's previously unlined gypsum stack, prior to any of the significant remediation and source control measures Simplot has implemented. But regulatory, environmental, and technological conditions have changed in the intervening years. The record—which accounts for the plant's legacy impacts—shows that the water quality effects from the RFAs are projected to measure only in the hundredths of a single percent of the existing baseline.[2] FEIS at 3-89–3-90 & Tbls. 3-15 & 3-16 (AR0029682–83).

[2] EPA's statement that it does not intend to expand the EMF Site to encompass the lands which BLM exchanged provides further record evidence in support of this distinction between historical effects that led to the designation of the Don Plant as part of a Superfund site and the projected effects of the RFAs. EPA's expectation is that CERCLA remedial actions will not be needed due

The Tribes further argue that it was arbitrary for BLM to rely on compliance with the regulatory frameworks and consent orders that will govern approval of the RFAs. ECF No. 74 at 45. They argue that alleged past environmental violations should create a presumption of future noncompliance at the Don Plant. But the true controlling presumption is that agencies will act with regularity in carrying out the laws they administer. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996). The sole case the Tribes cite in which a court declined to follow this presumption involved the defendant agency's refusal to account for specific findings in a Government Accountability Office report that another agency had been deficient in enforcing regulatory standards. *See Gulf Restoration Network v. Haaland*, 47 F.4th 795, 803 (D.C. Cir. 2022). That is not the case here. Indeed, the record illustrates the very opposite—that the Environmental Protection Agency ("EPA") and the Idaho Department of Environmental Quality ("IDEQ") have shown a serious commitment to protecting the environment through enforcement, voluntary orders, and adaptive management over the last two decades.[3] *See also* FEIS at 1-2, 1-3, 3-3, 3-8, 3-84 & 3-85 (AR0029561–62, AR0029596, AR0029601, AR0029677–78) (detailing compliance and regulatory efforts of these agencies). These same agencies will have the opportunity to weigh in on or seek to shape implementation of the RFAs. *See id.* at 3-89 (AR0029682); AR0000297. As described in Simplot's opening brief, ECF No. 60-1 at 15–17, and

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to the effectiveness of the source control measures Simplot has instituted at the Don Plant. AR0000309.

[3] The 2010 Amended Consent Decree is an illustrative example of the regulatory agencies' adaptive response to environmental conditions. Phosphorus is not considered a contaminant of concern under CERCLA and so it was not addressed in the original CD. In 2004, IDEQ evaluated the potential contributions of phosphorus to refine contributors' respective load allocations for purposes of meeting the Total Maximum Daily Load ("TMDL") for the Portneuf River. AR0063406–512. IDEQ followed up by requiring additional remedial actions of Simplot and setting regulatory targets to measure effectiveness. EPA followed suit by subsequently amending its CD in 2010 to reflect this change. FEIS at 3-84 (AR0029677).

reflected in Fig. 1 below, the Company must obtain three separate approvals from EPA and IDEQ, including many opportunities for tribal comment and consultation.

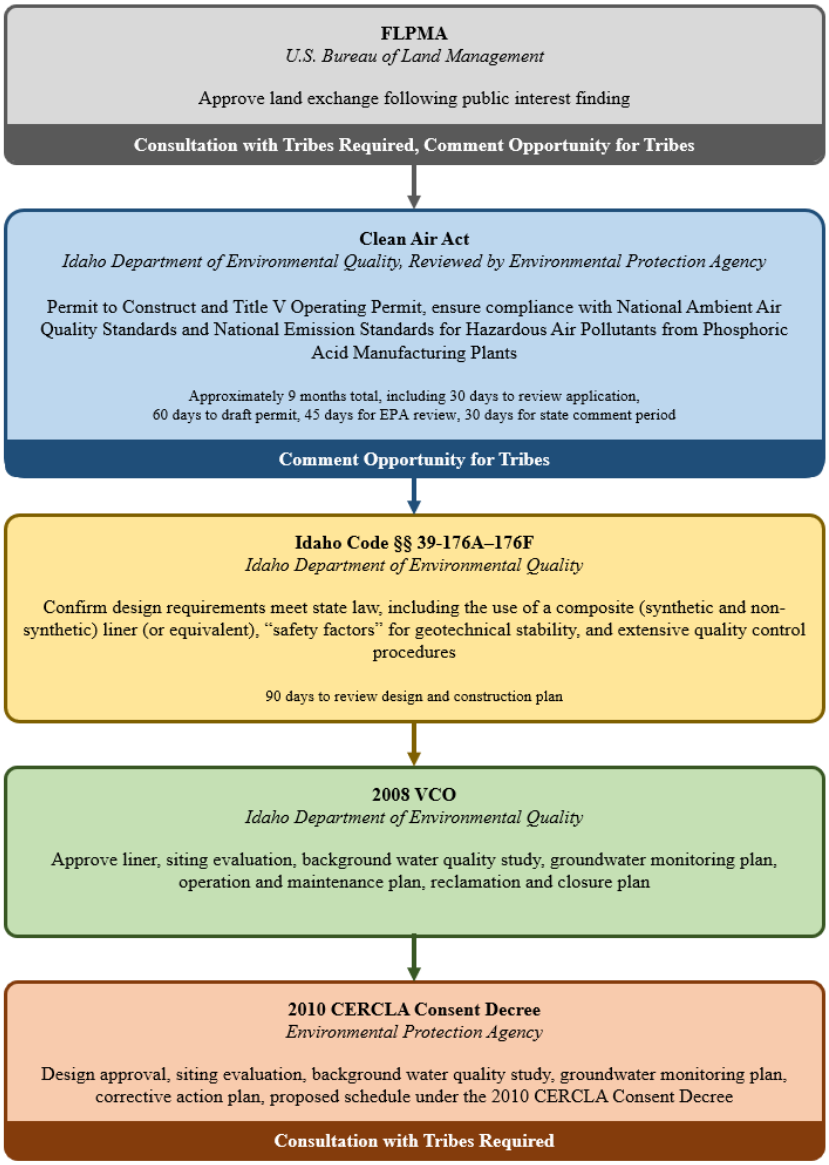


**Figure 1**

The Tribes do not dispute the adequacy of these requirements or standards: past, present, or future. BLM used the current effectiveness of regulatory requirements to project environmental impact associated with the RFAs. That reliance was reasonable given the specific requirements under both state and federal law. The presumption of regularity applies.

**B. BLM appropriately characterized the baseline in the FEIS.**

The environmental "baseline is not an independent legal requirement, but rather, a practical requirement in environmental analysis often employed to identify the environmental consequences of a proposed agency action." *Oregon Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 568 (9th Cir. 2016) (quotation omitted). NEPA regulations require that an EIS "succinctly describe the environment of the area(s) to be affected." 40 C.F.R. § 1502.15. An agency's baseline measurements need only be "based on accurate information and defensible reasoning." *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016) (quotation omitted).

BLM selected a baseline environmental condition based on decades of monitoring information that reflect current environmental conditions. BLM then compared the environmental impact of the land exchange and Simplot's conceptual design of the RFAs to that baseline to provide the agency and the public with the information needed to make an informed decision. This was an entirely appropriate way to evaluate the effects of the action.[4]

Instead of using current conditions, the Tribes argue that BLM should have set an entirely new baseline premised on what might happen a decade into the future. Specifically, the Tribes argue that BLM should have modeled an environmental baseline scenario based on their preferred (and seemingly post-hoc) "no action" alternative in which the Don Plant shuts down and the area is completely remediated.[5] ECF No. 74 at 28.

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[4] BLM's baseline follows the recommendation provided in its NEPA Handbook. AR0042544. BLM's analysis also follows the recommendations of the Tribes' own scoping comments. AR0064997 ("An incremental analysis effectively measures the baseline environmental concerns and then discusses the potential impacts from additional levels of contamination. While it is possible that the impacts will not be as significant as the existing facility, the addition of impacts from an expansion should be the focus of the analysis.").

[5] In this context it is worth noting that, contrary to the Tribes' repeated allegations, the Don Plant site is far from "unremediated." The record establishes that significant remediation has occurred

The Tribes cite no relevant cases that support their NEPA baseline argument, and precedent cuts squarely against it. *See, e.g.*, *Am. Rivers v. FERC*, 201 F.3d 1186, 1200 (9th Cir. 1999) (upholding FERC's use of conditions under the original hydropower license as the environmental baseline when considering relicensing); *Cascadia Wildlands v. BIA*, 801 F.3d 1105, 1111 (9th Cir. 2015) ("An agency . . . may satisfy NEPA by aggregating the cumulative effects of past projects into an environmental baseline, against which the incremental impact of a proposed project is measured"). Indeed, the only case that the Tribes cite is inapposite. It involved a NEPA evaluation in which "BLM did not use actual measurements [of air pollutants] from the Project site." *Great Basin*, 844 F.3d at 1101. Instead—without offering any explanation at all—the agency sought to extrapolate from certain measurements taken from a totally disparate location and simply assumed all other pollutants "to be 0." *Id.* at 1103. By contrast, the FEIS here provides a quantitative evaluation of the effects of continued operation of the Don Plant based on decades of monitoring data at and around the project site. FEIS at 3-87–3-90 (AR0029680–83); *id.* at H-51–H-63 (AR0030002–14).[6] This enables full comparison of the effects of the action to the preexisting situation. The ability to engage in such a comparison fulfills the purpose of NEPA.

The Tribes' new argument is another failed attempt to divert the Court's attention. The decision before BLM was whether to approve a proposed land exchange, not to permit or otherwise

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at the site as a result of Simplot's implementation of a variety of effective source control measures. *See, e.g.*, ECF No. 60-1 at 11–12.

[6] The Tribes' attempt to undercut Appendix H because it was prepared by one of Simplot's contractors is unpersuasive. ECF No. 74 at 28. Agencies may rely on the work of contractors in evaluating NEPA effects. *See* 40 C.F.R. § 1506.5(a); *Alliance for the Wild Rockies v. Peña*, No. 2:16-CV-294-RMP, 2018 WL 4760503, at *8 (E.D. Wash. Oct. 2, 2018). EPA and IDEQ reviewed and provided input on Appendix H. AR0000294–97 (IDEQ), AR0000309–10 (EPA).

approve the RFAs and/or pass judgment on the future of the Don Plant.[7] The ultimate full remediation of the EMF Site is a matter not for BLM, but rather for the regulatory agencies and wholly beyond the scope of this action. *See, e.g.*, 2001 EMF Consent Decree (AR0063186–267); 2008 IDEQ VCO (AR0064384–97); 2010 IRODA (AR0064651–706).

### C. BLM took a hard look at the environmental effects of the RFAs.

The FEIS reveals the proven success of current remediation efforts and how they have informed Simplot's planned actions on the exchange lands to ensure improvement continues uninterrupted into the future. ECF No. 60-1 at 12–13. Among other things, the FEIS provides detailed projections of the impacts of the land exchange and RFAs, including: continued downward trends in core contaminants in the groundwater and Portneuf River, FEIS at 3-88 (AR0029681); incremental increases in arsenic in groundwater within the processing area and phosphorus in the river which are projected to be approximately 0.04 percent and 0.07 percent over baseline respectively, *id.* at 3-90 (AR0029683); reduction in air emissions of fluoride and PM, *id.* at 3-11–3-12 (AR0029604–05); selection of an alternative that avoids cultural and Tribal resources in the Wind Canyon area while also maintaining Tribal access to culturally significant sites, *id.* at 3-20 (AR0029613); (AR0031075); *see also* ROD at 3 (AR0039171).

#### 1. Water Quality Impacts

The FEIS engages in a comprehensive and detailed analysis of projected effects on surface and groundwater resources from the Blackrock Land Exchange and RFAs. ECF No. 61-1 at 20–

[7] The Tribes assert that, because the existing gypsum stack is presently expected to reach capacity by approximately 2031, continued operation of the plant beyond that date is wholly contingent on expansion. The FEIS discloses instead that, once the existing stack reaches capacity, Simplot would likely need to "reduce production rates *or* even cease production." FEIS App. E at 1-2 (Feasibility Study) (AR0029779) (emphasis supplied).

22; ECF No. 60-1 at 20–24. The Tribes now make several arguments attempting to poke holes in this analysis.

First, the Tribes criticize the water quality effects analysis based on a mischaracterization of the record that the 2020 Exchange "involves land in an unstudied portion of the Portneuf watershed." ECF No. 74 at 28. To the contrary, the Water Resources Technical Report included an extensive examination of groundwater flows in the vicinity of the Don Plant extending to the Portneuf River. *See, e.g.*, FEIS at 3-82–3-83 & Figs. 3-6 & 3-7 (AR0029675-76); *id.* at H-56 & Fig. 5-5 (AR0030007). EPA comments on the draft Water Resources Technical Report noted the "excellent overview of geology and hydrology" that the report provided. AR0000309. EPA's comment further noted that "the subject land parcel is located upgradient of past Simplot releases to groundwater." *Id.* That gradient shows the direct applicability of studies completed on past groundwater on those historical releases on projected future releases—releases that would flow downgradient. As the map of Alternative B shows, the study area encompasses the exchange lands. FEIS App. C at Map 7 (AR0029740) (showing Alternative B study area). Contrary to the Tribes' contention, the water quality analysis addressed the groundwater flow directions relevant to evaluating the effects of the selected land exchange alternative.

The Tribes seek to undermine this 82-page Water Resources Technical Report by focusing on a single sentence. That sentence notes that concentrations in monitoring samples from Batiste Spring do not yet show a consistently declining trend in phosphorus and arsenic concentrations. ECF No. 74 at 30 (citing FEIS at H-34 (AR0029985)). But the Tribes overlook five relevant factors. First, the Water Resources Technical Report notes that a downward trend is still present at groundwater monitoring locations within the "Compliance Area." FEIS at H-26–H-27 & Fig. 3-2, H-35 & Fig. 3-9 (AR0029977–78 & AR0029986). Second, the readings at Batiste Spring

have still been considerably lower over time than at two of the groundwater monitoring sites within the Compliance Area. *Id.* at H-35 & Fig. 3-9 (AR0029986). Third, the Batiste Spring monitoring site is the farthest away from the Don Plant, *id.* at H-28 & Fig. 3-3 (AR0029979), and is therefore more likely to pick up other sources of contamination. *See* AR0041577 (IDEQ identifying five potential sources of nutrient loading to the Portneuf River in the reach at issue). Fourth, the Tribes do not contest the projections that the largest incremental increases in concentrations for arsenic in groundwater within the processing area and phosphorus at Siphon Bridge in the river will be approximately 0.04 percent and 0.07 percent over baseline respectively—a projection that reveals these constituents will be nearly identical with or without the exchange and RFAs. FEIS at 3-90 & Tbl. 3-16 (AR0029683). And, finally, recent groundwater monitoring data from 2019 reveals that all Contaminants of Concern are below applicable Maximum Contaminant Levels and Risk-Based Concentrations within the Compliance Area, including arsenic (with the exception of one slight exceedance at Batiste Spring). FEIS at 3-85 (AR0029678).

The Tribes further erroneously assert that the FEIS's comparative analysis of water quality effects is based on an assumption that "water quality impacts from Alternative B would be the same as for other alternatives." ECF No. 74 at 30. The FEIS does not rely on that assumption. The FEIS states that the effects of the Proposed Action and Alternative B are anticipated to be similar based in part on the extensively studied groundwater patterns while at the same time expressly noting differences as between the alternatives. FEIS at 3-91 (AR0029684). In a case on which the Tribes seek to rely, the Ninth Circuit upheld BLM's use of data from more than 100 miles away in its effects analysis. *Great Basin*, 844 F.3d at 1102. In that light, it cannot be arbitrary for BLM to have drawn from decades of data involving the same groundwater flow patterns and modeling done for adjoining land.

**2. Air Quality Impacts**

The Tribes largely reiterate their opening arguments on air quality effects in their Reply. They argue the FEIS completely ignored the effects of the selected alternative, Alternative B, because its federal exchange lands are further to the east than those in the Proposed Action and therefore closer to residences. ECF No. 74 at 26. Once again, this is not borne out by the record. First, there is projected to be an equivalent reduction in air emissions under both alternatives. FEIS at 3-11–3-13 (AR0029604–06). Second, as the FEIS expressly notes, "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." *Id.* at 3-13 (AR0029606).

The Tribes' argument is also inconsistent with other claims the Tribes advance in their Reply. For example, the Tribes also seek to discredit the Land Exchange because the conceptual design for the cooling ponds may not ultimately reflect the ultimate siting location. ECF No. 74 at 3–4. But in their post-hoc challenge to Simplot's intentions to reduce fluoride emissions, the Tribes overlook several key facts.

Assuming IDEQ approves the proposed adjustment, the basis of BLM's evaluation of Simplot's proposed exchange remains the same: Simplot needs the exchange lands to accomplish both of its stated objectives and decommissioning the cooling towers will reduce fluoride emissions. As a result of more detailed analysis Simplot undertook in preparing to submit its Permit to Construct the cooling ponds to IDEQ,[8] Simplot discovered that it could utilize a certain technology to achieve the same requisite fluoride reductions with a single cooling pond occupying

[8] Simplot acknowledges the Court's rulings that it will only consider materials in the Administrative Record as well as any extra-record materials the parties timely filed motions for the Court to consider. *See* ECF Nos. 24 & 33. Should the Court decide it wishes to additionally consider Simplot's Permit to Construct application, Simplot will promptly submit it.

a smaller footprint on existing disturbance. This proposed design moves the emissions source closer to the facility and further away from the residences to the east than the conceptual design in the Feasibility Study.[9] Use of that location is only possible because Simplot can rely on the gypsum stack expansion on the exchange lands; otherwise, Simplot would have to curtail the expected capacity of the existing stack. This proposed new geographic configuration of the cooling pond(s) aligns with the FEIS's explanation that its analysis was based on conceptual designs subject to modification as more data became available during the permitting process. FEIS at Table 2-3 (AR0029569). It does not meaningfully change the fundamental analysis of effects contained in the FEIS, and this approach is also wholly consistent with the Court's ruling in *Blackrock I* on reconsideration in which it stated that the EIS it was ordering BLM to prepare would not be able to nail down every uncertainty. *See Blackrock I*, 2012 WL 314038, at *1. The Tribes will also have the opportunity to comment and challenge any ultimate IDEQ approvals if they do not agree with the final cooling pond location.

The Tribes further attack the FEIS's air effects analysis for allegedly not evaluating effects on $PM_{2.5}$ emissions, but the record readily rebuts this assertion. *See, e.g.*, FEIS at 3-4–3-13 & Tbl. 3-1, 3-2, 3-3, 3-4, & Fig. 3-3 (AR0029597-29606). The FEIS finds that Simplot's plans to decommission the cooling tower would remove the Don Plant's largest source of $PM_{2.5}$. *Id.* at 3-4 (AR0029597). The plant's emissions of $PM_{2.5}$ already fall more than 75 percent below permit limits. *Id.* at 3-5 (AR0029598). Insofar as the FEIS emphasizes $PM_{10}$, that choice is sensible because the analysis area includes two $PM_{10}$ nonattainment areas. *Id.* at 3-3 (AR0029596).

[9] These developments are more than two years post-ROD—Simplot submitted the design and engineering plans to Idaho DEQ on October 31, 2022. The Tribes will receive a copy of these design plans. Since the cooling pond is considered a "phosphogypsum stack component" under Idaho law, the design must comply with statutory design requirements.

The Tribes contend that the FEIS's air quality analysis is also faulty for not including a health risk assessment. ECF No. 74 at 27. But this assertion is at odds with the record. First, the FEIS devotes multiple sections to effects on or potential risks to human health. *See, e.g.*, FEIS at 3-36 (AR0029629). Many of the substantive environmental laws the FEIS cites include standards explicitly based on public health effects, such as the Clean Air Act's National Ambient Air Quality Standards. *Id.* at 3-11–3-13 (AR0029604–06). Second, the record shows that EPA has consistently identified no material risks to human health from the EMF Site, particularly in the aftermath of the remediation measures prescribed by the CERCLA ROD. *See, e.g.*, *id.* at 3-36 (AR0029629); AR0063166.[10]

**3. Other Effects**

BLM actively solicited, worked to accommodate, and directly responded to tribal input throughout the process of preparing the FEIS. ROD at 12–13 (AR0039180–81). The Tribes nonetheless raise concerns over how the FEIS characterizes potential impacts to health, wildlife, socioeconomics, treaty rights, cultural resources, and environmental justice. ECF No. 74 at 32–43. The FEIS fully addresses each of these topics, and the Tribes have not shown how BLM's analysis fails to take the "hard look" required under NEPA to provide the agency and public with an understanding of the likely impacts of the exchange and the RFAs. The Court should reject the Tribes' critiques and find that BLM's robust analysis achieves NEPA's purposes. *See Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1104 (9th Cir. 2016).

[10] Although Simplot readily acknowledges that the Court indicated it would not rely on EPA's more recent human health risk reports in ruling on the merits of the Tribes' claims, it did allow them to be added to the judicial-review record. Within that context, Simplot merely highlights that EPA's latest studies corroborate its earlier findings in this regard. *See, e.g.*, Exh. G to 1st Prouty Declaration at 14 (noting that EPA finds that "[f]luoride levels do not present human health risks above CERCLA risk thresholds"), 25 ("EPA finds that no further action to prevent human health risks to Native Americans or subsistence users in the Off-Plant OU").

**a. Health**

The Tribes argue the FEIS's health analysis does not provide enough information on "direct" health impacts from radionuclides. ECF No. 74 at 32. However, the FEIS explains the distribution of particles potentially carrying radionuclides from the expanded gypsum stack will mirror that of the existing gypsum stack. FEIS at 3-36–3-37 (AR0029629–30). EPA has spent decades investigating and overseeing the CERCLA cleanup of the EMF Site. The FEIS refers to EPA's repeated findings that radionuclides pose no unacceptable human health risks. FEIS at 3-36 (AR0029629). The FEIS cites EPA's EMF Site webpage, which states "[t]here are currently no unacceptable human exposure pathways" and "the site is under control for human exposure." EPA, Eastern Michaud Flats Contamination[11]; FEIS at A-7 (AR0029722) (citing the webpage). The Tribes believe these findings should be based on "direct impacts from air emissions," rather than soil sampling. ECF No. 74 at 32. This amounts to an argument over packaging and methodology.[12] Moreover, the contaminants studied in the soil samples were "attributed to deposition *via air*[.]" FEIS at 3-35 (AR0029628) (emphasis supplied). No further studies were necessary to support a sound analysis.

The Tribes also argue that the health analysis should have included a worst-case scenario analysis for gypsum stack failure. ECF No. 74 at 32–33. NEPA does not mandate worst-case scenario analysis. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989). The FEIS nonetheless contains an entire section devoted to evaluation of geotechnical stability for the expanded gypsum stack, including information related to the potential for liner failure. FEIS at 3-

[11] Available at: https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Healthenv&id=1001308#Risk

[12] The Tribes have waived review of this argument as they did not raise it in comments.

29–3-34 (AR0029621–27); *see also* ECF No. 61-1 at 23–24. The section notes that IDEQ will review the design of the expanded gypsum stack to ensure compliance with applicable consent orders and Idaho law. FEIS at 3-30 (AR0029623). Simplot has further confirmed that the RFAs will be designed and engineered in accordance with current safety standards for earthen and gypsum containment dikes. *Id*.

**b. Wildlife**

The FEIS devoted an entire section of its analysis to addressing impacts to fish and wildlife. FEIS at 3-71–3-79 (AR0029664–72). The BLM Pocatello Field Office conducted a wildlife survey in 2019, and prepared Threatened and Endangered Wildlife Clearance Worksheets in 1995 and 2003. *See* AR0055764–66; AR0062774; AR0063395–96. BLM noted the lack of documented mortality in the area of the Don Plant and hypothesized that wildlife generally avoid the site due to human activity, the absence of desirable habitat characteristics, and the proximity of nearby habitat. FEIS at 3-71 (AR0029664). On that basis, BLM reasonably concluded that the expanded gypsum stack and cooling ponds "pose minimal risk of drowning entrapment and toxicity for migratory birds and other wildlife species." *Id.* The Tribes argue that BLM failed to account for the Tribes' historical experience observing wildlife in the area as well as the potential impacts to migratory birds.[13] ECF No. 74 at 33–35. The only case the Tribes cite in support of their argument is an inapposite, non-precedential memorandum disposition. *Klamath Siskiyou Wildlands Ctr. v. Grantham*, 642 F. App'x 742 (9th Cir. 2016) (unpublished). In that case, the agency entirely ignored photographic evidence of wildlife impacts. *Id*. at 744. Here, BLM disclosed potential

[13] The Tribes also argue the FEIS should have analyzed impacts to species protected under the Migratory Bird Treaty Act. The order the Tribes cite in support of this argument provides that it "goes into effect on December 3, 2021." DOI, Director's Order 225. The FEIS was published in May 2020 and the ROD was issued in August 2020, well before Order 225 was issued.

impacts to wildlife that may have used the former federal lands, but reasonably explained its conclusion that it found risks to be minimal.

**c. Socioeconomics**

The FEIS carefully examined and disclosed the potential socioeconomic impacts of the RFAs. The socioeconomic impacts analysis in the FEIS is based on a comprehensive socioeconomic technical report, included as Appendix G. FEIS App. G (AR0029884–940). The Tribes argue the scope of the study area for the analysis was improper, and that the FEIS should have examined the impacts on the Fort Hall Reservation as a whole. ECF No. 74 at 35. But the study area was identified based on the issues identified in the public scoping process and included "local economies within which most social and economic effects from the proposed land exchange would occur." FEIS at 3-92 (AR0029685). The FEIS discussed potential socioeconomic impacts to the Fort Hall Reservation, including nonmarket values, *id.* at G-28–29 (AR0029919–20), and fisheries, *id.* at 3-23 (AR0029616). In contrast, the Tribes provide no explanation for their assertion that the socioeconomic study area does not adequately reflect impacts to the Tribes. *Ctr. for Cmty. Action & Env't Just. v. Fed. Aviation Admin.*, 18 F.4th 592, 601–02 (9th Cir. 2021) ("Simply summarily asserting that the FAA should have expanded its General Study Area . . . is insufficient to render the . . . Area arbitrary[.]").

**d. Treaty rights and cultural resources**

The FEIS includes a detailed assessment of "tribal treaty rights, trust responsibilities, and tribal resources," and, after specifically detailing those rights and resources, examines the Blackrock Land Exchange's potential direct, indirect, and cumulative impacts on those rights and resources. FEIS at 3-20–3-28 (AR0029613–21). The Tribes argue that the FEIS discussion of treaty rights is not detailed enough. ECF No. 74 at 36–37. Specifically, the Tribes argue that the

FEIS should have provided analysis of potential mitigation that would allow for continued exercise of treaty rights on all exchange lands.[14] *Id.* at 36. Aside from representing a novel argument the Tribes failed to previously raise, the reasonableness of this alternative is undermined by the fact that BLM knew that Simplot sought the exchange lands to expand its existing gypsum stack. Preservation of all off-reservation treaty rights on the former federal exchange lands would be impracticable. The FEIS openly discloses the exchanged land would remain available for the exercise of off-reservation treaty rights under the no action alternative, that the federal exchange lands would not be available for such use following the exchange, and that under the chosen alternative, the Tribes would gain 113 acres of additional public land on which to exercise such rights. ROD at 4 (AR0039172); FEIS at 2-20 (AR0029585). NEPA is a disclosure statute—it does not require BLM to preserve the exercise of treaty rights on private lands through mitigation. *See Theodore Roosevelt Conserv. P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) ("NEPA does not require the agencies to discuss any particular mitigation plans that they might put in place, nor does it require agencies—or third parties—to effect any.") (quotation omitted).

The FEIS provides a detailed accounting for cultural resources. BLM consulted with both the Tribes and the state historic preservation office and conducted a "Class III cultural resources inventory" of all involved properties. FEIS at 3-15, 4-3–4-4 (AR0029608, AR0029704–05). The Tribes argue that BLM did not adequately discuss cultural resource impacts because the agency did not grapple with the "likely presence" of burial grounds on the exchanged federal lands based on evidence of bone fragments in rock crevices. ECF No. 74 at 37–38. The Tribes raised in Draft EIS and FEIS comments that an unspecified 2014 study identified bone fragments in rock crevices

[14] The Tribes also argue that the agency should have analyzed the distance of the lands at issue from the reservation. The FEIS fully discloses the locations of the lands.

on the FMC-owned lands. FEIS at I-19 (AR0030056); AR0065175–76. Neither comment indicates any evidence of bone fragments found on the exchange lands, and neither comment provides any evidence that would cast doubt on the conclusions of BLM's Class III inventory. BLM's analysis meets the agency's burden.

**e. Environmental justice**

Finally, the FEIS adequately analyzed and disclosed the environmental justice implications of the land exchange. The agency's environmental justice burden is no different from any other NEPA requirement—it need only meet the "hard look" standard. *See Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017). The Tribes reiterate their argument that the FEIS failed to sufficiently consider "the cumulative impacts of ongoing contamination combined with the historic wrong of previous" contamination at the site. ECF No. 74 at 42. This argument is not supported by the record. The FEIS discussed impacts on the Tribes from historic and current Don Plant operations, as well as impacts anticipated from the land exchange. *See* FEIS at 3-23–3-24, 3-27 (AR0029616–17, AR0029620). The Socioeconomic Technical Report includes a detailed analysis of environmental risk exposure, which discloses the disproportionate impacts borne by Tribal members. *Id.* at G-43–G-44 (AR0029934–35). The FEIS weighed environmental justice in its alternatives analysis. *Id.* at 1-6, 3-92–3-105 (AR0029565, AR0029685–98). BLM's environmental justice analysis is comprehensive and reflects the agency's commitment to recognize impacts on the Tribes. Simply repackaging these findings would not serve NEPA's purposes. *Sierra Club v. U.S. Dep't of Transp.*, 310 F. Supp. 2d 1168, 1196 (D. Nev. 2004) ("It would exalt form over substance to require [the agency] to . . . simply to reiterate its position.").

**D. BLM considered a reasonable set of alternatives.**

The record reveals exploration of a diverse array of alternatives in evaluating the land exchange. BLM ultimately settled on four for detailed consideration in the FEIS that it found were reasonable and would meet the Purpose and Need: the proposed action, Alternatives A and B, and the no-action alternative. BLM developed these alternatives through a comprehensive public process and only after a thorough Feasibility Study of options had been prepared. ECF No. 60-1 at 3–8. An EIS need not address every potential alternative—only "an appropriate range of alternatives." *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1181 (9th Cir. 1990).

The Tribes continue to argue that the FEIS failed to adequately justify the elimination of alternatives from further analysis. Specifically, the Tribes argue that the elimination of several cooling technology alternatives as economically infeasible, without including a detailed economic analysis, was unsubstantiated. ECF. No. 74 at 40. This argument is misguided. ECF No. 60-1 at 35–36. First, alternatives were not eliminated due solely to economic infeasibility. FEIS at 2-13–2-15 (AR0029578–80). Second, the Tribes cite *WildEarth Guardians v. Montana Snowmobile Association* for the proposition that agencies must provide underlying data when they make decisions. 790 F.3d 920, 925 (9th Cir. 2015). The case is not relevant, as it involved a situation where the underlying data was essential to evaluate one of the alternatives considered in depth. Here, the potential alternative technologies were eliminated before detailed consideration, and thus the agency's explanation need not be as extensive. "[A]lternatives eliminated from detailed study need only be briefly discussed." *Audubon Soc'y of Portland*, 40 F.4th at 981; *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1207 (9th Cir. 2004).

The Tribes also argue that the FEIS is insufficient because it "does not consider reasonable alternatives that Simplot continues to evaluate as potentially feasible." ECF No. 74 at 40–41. But

the only specific alternative the Tribes cite in support of this argument is a "hybrid" option somewhere between full indirect process water cooling and cooling ponds, both of which were fully considered in the Feasibility Study. FEIS App. E at 4-1–4-2 (AR0029798–99). Thus, it is an alternative well within the scope of those that were addressed. In addition, the Study expressly notes with respect to one-half of this hybrid option, involving Indirect Process Cooling, that "[s]tudies have shown that scaling tendencies and water balance implications make this alternative infeasible." *Id*. at 4-1 (AR0029798). Thus, this potential hybrid approach was still infeasible at the time BLM was evaluating alternatives as the FEIS notes at 2-14 (AR0029579). Moreover, as this Court recognized, adjustments to locations or specification of RFAs are to be expected. *Blackrock I*, 2012 WL 314038, at *1. The Tribes' demand to fully study every cooling technology is not what NEPA requires. "[A]n agency's discussion of alternatives must be bounded by some notion of feasibility." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (quotation omitted). The Tribes have failed to show BLM's analysis and selection of alternatives for detailed consideration was arbitrary and capricious.

## II. The Land Exchange Complied with FLPMA.

FLPMA authorizes the Secretary of the Interior to engage in land exchanges when the Department determines that the public interest will be "well served" by the exchange. 43 U.S.C. § 1716(a). The statute and its accompanying regulations provide an explicit list of public interest factors. *See id.*; *see also* 43 C.F.R. § 2200.0-6(b).

The Tribes challenge BLM's public interest determination despite ongoing improvement in environmental conditions and the redesign of the exchange to improve public and tribal access to lands. The Court may only set aside BLM's public interest finding if it finds the conclusion was arbitrary and capricious. *Ctr. For Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633,

641 (9th Cir. 2010). Courts ordinarily do "not pass upon the wisdom of the agency's perception of where the public interest lies." *Nat'l Coal Ass'n v. Hodel*, 675 F. Supp. 1231, 1245 (D. Mont. 1987) (quotation omitted), *aff'd sub nom. Northern Plains Res. Council v. Lujan*, 874 F.2d 661 (9th Cir. 1989). Again, the Tribes have not met the high bar necessary to overturn BLM's decision.

**A. BLM fully considered the required public interest factors.**

In its ROD approving the Land Exchange, BLM carefully weighed the positive and negative impacts that the exchange and RFAs would have on the public interest across a comprehensive set of 13 factors. ROD at 3–6 (AR0039171–4). BLM also properly considered relevant portions of the Administrative Record in addition to the FEIS. *Id.* at 3 (AR0039171). BLM reasonably concluded the land exchange would well serve the public interest. *Id*.

The Tribes previously raised arguments that BLM failed to consider the impact of the land exchange on cultural resources, Tribal housing plans, and water quality. ECF No. 37-1 at 18–20. As Simplot responded, BLM fully considered these issues and determined they were outweighed by the benefits of the exchange. ECF No. 60-1 at 37. The Tribes now shift to a different argument, that the public interest assessment failed to grapple with a new set of factors. ECF No. 74 at 15. These arguments fail for several reasons.

First, the Tribes have not alleged that BLM failed to consider a mandatory public interest factor.[15] Instead, they point to factors that BLM already examined, reframe factors, and/or raise

[15] *See* 43 U.S.C. § 1716(a) ("better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife."); 43 C.F.R. § 2200.0-6 ("Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs.").

new factors well beyond those required by statute or regulation. The ROD, the FEIS, and the entire Administrative Record reflect a genuine effort to carefully consider the interests of the Tribes. *See, e.g.*, FEIS at 3-15 (discussing a cave dwelling of significance to the Tribes) (AR0029608); *id.* at 3-23 (discussing the intrinsic value of the landscape to the Tribes) (AR0029616); *id.* (discussing the importance of local fisheries to the Tribes). The ROD and FEIS squarely address the potential historical and cultural uses that the Tribes will be foreclosed from engaging in on the former federal exchange lands. *See, e.g.*, ROD at 3–4 (AR0039171–2); FEIS at 3-23 & 3-25 (AR0029616 & AR0029618).

Similarly, the ROD and FEIS evenhandedly disclose the loss of the ability of the Tribes to exercise their rights on the former federal lands as well as the enhancement of that ability on the lands BLM acquired. *See, e.g.*, ROD at 4 (AR0039172). The Tribes cite no requirement to explicitly weigh the value of treaty rights in one parcel against another in the process of a land exchange. Nonetheless, BLM did weigh the comparative resource values of the two parcels and considered the exercise of treaty rights on the exchanged parcel. The Tribes' off-reservation treaty rights include the rights to cut timber, pasture livestock, hunt, and fish. FEIS at G-28–G-29 (AR0029919–20). The record contains no evidence of the Tribes' regular use of the exchange lands for timber gathering, livestock grazing, or fishing. *See id.* BLM further reasonably determined that the federal exchange lands have comparatively lower resource value because they "are located directly adjacent to" the Don Plant "and are within the off-site operable unit of the Eastern Michaud Flats Superfund Site[.]"[16] ROD at 4 (AR0039172).

[16] BLM's finding in this regard is consistent with the thrust underlying much of the Tribes' arguments urging the Court to find approval of the land exchange arbitrary and capricious largely because it will facilitate expansion of industrial activities in the vicinity of an area listed as a Superfund site. ECF No. 74 at 20–21.

BLM conducted a thorough examination of the exchange lands including consultation with the Tribes to properly catalogue potential cultural impacts. The agency determined that "the potential for undiscovered cultural sites in the analysis area is low." FEIS at 3-14 (AR0029607). BLM also concluded "[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[.]" *Id.* App. I at I-19–I-21 (AR0030056–58). Further, by the Tribes' own description, the "cliffs and crevices" of concern to the Tribes sit on lands excluded from Alternative B. *See* ECF-37-17 at 3–4, 8 (noting the "significance of the cliffs in Alternative A").

Dissatisfied with this analysis, it seems the Tribes are either seeking a repackaging of the analysis with specific terms or a more existential analysis of Tribal rights. There is no caselaw to support such an approach. Therefore, the Tribes' claims fail. *McFarland v. Kempthorne*, 545 F.3d 1106, 1110 (9th Cir. 2008) (clarifying that under the APA standard, the agency decision will be overturned "only if the agency relied on factors which Congress has not intended it to consider, [or it] entirely failed to consider an important aspect of the problem[.]").

In addition, the Tribes present factors for consideration that are not sufficiently concrete or reasonably foreseeable to have mandated their consideration in the ROD in any meaningful way. For example, the Tribes raise the factor of their "plans to offer housing in the Michaud Creek area" that are "*very near*" the exchange lands. ECF No. 74 at 19–20 (emphasis in original). The Tribes first raised this issue in comments following publication of the FEIS. AR0065171. The Tribes provided no additional details on this housing development proposal, such as its footprint, density, population, construction timeline, or even its location beyond the "Michaud Creek area"—a 9.3-mile-long waterbody spanning two counties. With so few details, it would not have been practicable for BLM to weigh the relative values beyond those housing impacts the agency already

analyzed in the FEIS. FEIS at G-4 (AR0029895) ("The Fort Hall Reservation has 2,146 total housing units, of which 252 are vacant.") & G-37 (AR0029928).

Finally, the Tribes cite a single case in favor of their arguments. ECF No. 74 at 18–19. That case involved a land exchange with a "fatally flawed" public interest finding where BLM did not list *any* disadvantages to the land exchange. *Ctr. For Biological Diversity*, 623 F.3d at 647. BLM thoroughly weighed the positive and negative outcomes of the land exchange here.

**B. BLM properly concluded that the land exchange was consistent with the Pocatello Resource Management Plan.**

BLM reviewed the Blackrock Land Exchange for conformity with the Approved Pocatello Resource Management Plan ("ARMP"). AR0060315. BLM concluded that "the intended use of the conveyed Federal lands will not significantly conflict with established management objectives on adjacent Federal lands[.]" ROD at 4 (AR0039172). BLM regulations provide that an action conforms with an RMP if "specifically provided for in the plan[.]" 43 C.F.R. § 1601.0-5(b). BLM identified the lands at issue as priority targets for exchange in the Pocatello RMP in 2012. FEIS at 1-4, 3-41–3-42 (AR0029563, AR0029634–35). As a result, the ARMP provided for the exchange. Of note, the Tribes served on the interdisciplinary team that prepared the ARMP.

The Tribes argue that the ROD conflicts with certain enumerated goals in the ARMP regarding the watershed and tribal treaty rights. ECF No. 74 at 20. The ROD explicitly weighs potential impacts to both water quality and treaty rights as two factors among the many that BLM considered in weighing its decision. ROD at 4–5 (AR0039172–73). Moreover, RMP goals are designed to serve as broadly formulated statements and are distinct from RMP designations and resource use determinations, which are the means by which the plan is to achieve its goals and objectives. 43 C.F.R. § 1610.1–.2.

The Tribes' vigorous argument illustrates their fundamental disagreement with BLM's decision. The Tribes oppose the Don Plant's operations, and their view of the public interest does not fully account for the value the Plant provides at national, state, and local scales.[17] FLPMA calls for a broader conception of the public interest. Multiple use and the inevitable discretion and agency judgments that come with it are at the heart of the statute. 43 U.S.C. § 1701 (declaring the policy of "multiple use and sustained yield"). Different land management plan priorities inevitably conflict in the day-to-day operation of our public lands. That is exactly why Congress used its plenary authority to task BLM with weighing those conflicting directives. BLM must weigh the interests and come to a rational conclusion. The Tribes argue for their own view of the public interest—but they have not shown that BLM acted arbitrarily or capriciously.

**C. BLM properly concluded the exchange would not impact Indian trust lands.**

FLPMA regulations require that BLM ensure that the "intended use of the conveyed Federal lands will not . . . significantly conflict with the established management objectives on adjacent . . . Indian trust lands." 43 C.F.R. § 2200.0-6(b)(2). The only adjacent[18] lands within the

[17] This is evinced by the many letters of support that BLM received for the Land Exchange from entities that also represent the public interest. *See, e.g.*, Letter from IDEQ (Oct. 16, 2018) (AR0012355); Letter from Idaho Office of Mineral & Energy Resources (Sept. 28, 2018) (AR0012345); Letter from Idaho Department of Fish & Game (Oct. 1, 2018) (AR0012349); Letter from Power County Commissioners (Oct. 15, 2018) (AR0012353); Letter from Bannock County Commissioners (Oct. 16, 2018) (AR0012357); Letter from Chubbuck Mayor (Sept. 25, 2018) (AR0012341); Letter from Pocatello Mayor (Sept. 26, 2018) (AR0012342); Letter from American Falls Mayor (Oct. 9, 2018) (AR0012352).

[18] The Tribes argue that "adjacent" should also be substituted with "nearby." They incorrectly contend that BLM regulations use the terms interchangeably. ECF No. 74 at 19 n.11. Closer examination of the language shows that the term "adjacent" is used in *contrast* with "nearby" to clarify that evaluators should not only look at those abutting properties, but properties that fall beyond those "adjacent" to the relevant parcel. BLM, *Final Rule: Exchanges—General Procedures*, 58 Fed. Reg. 60,904, 60,905 (Nov. 18, 1993) (responding to public comment) ("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").

reservation are owned by FMC Corporation—they are therefore not "Indian trust lands." As a result, the ROD concluded the uses of the exchange lands did not conflict with the management objectives of Indian trust lands. ROD at 4–5 (AR0039172–73).

FLPMA regulations do not define "Indian trust lands." BLM, using a straightforward interpretation of its own unambiguous regulation, concluded that "Indian trust lands" only includes those lands held in trust for the benefit of an Indian tribe. The Tribes argue instead that "Indian trust lands" should be read to encompass the separate and broader category known as "Indian country." ECF No. 74 at 20. That is not correct. Indian country is too broad—it includes "all land within the limits of any Indian reservation," plus "dependent Indian communities" and all remaining allotted lands. 18 U.S.C. § 1151; *see also Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998). To the extent the term is at all ambiguous, BLM's interpretation is entitled to deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019).[19]

### III. Section 5 of the 1900 Act Does Not Foreclose the Land Exchange.

The Tribes continue to maintain that Section 5 of the 1900 Cession Agreement Act precluded BLM from approving the Land Exchange. ECF No. 74 at 5–11; Act of June 6, 1900, 31 Stat. 672. In particular, although they appear to concede that FLPMA provides an independent source of authority for BLM to exchange federal lands, ECF No. 74 at 10, they nevertheless assert that Section 5's 160-acre limit on ceded land sales should be read as a constraint on this authority even though it is not listed in 43 U.S.C. § 1716(a). Thus, they argue the Land Exchange, which transfers 713.67 acres of federal land, ROD at 1 (AR0039169), is simply too big. The Tribes'

[19] Notwithstanding that the Tribes failed to properly raise the equal value requirement, *see* ECF No. 60-1 at 39 n.16, they continue to press the argument. The Tribes claim that Simplot, not BLM, developed the appraiser's scope of work. This argument is contradicted by the Administrative Record. The BLM Appraisal and Valuation Services Office selected the appraiser and provided the Statement of Work. AR0032883.

argument is flawed and contradicts over a century of public land law development, as outlined in Defendants' opening summary judgment briefs. ECF No. 60-1 at 40–45; ECF No. 61-1 at 11–14.

First, Section 5 does not derive from the negotiated 1898 Cession Agreement but was added during the federal legislative process culminating in enactment of the 1900 Act. The Cession Agreement itself does not address disposal of ceded lands at all. The Tribes gloss over this critical fact in their Reply. *See* ECF No. 74 at 12 (stating that "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" without acknowledging that the 1898 Agreement does not address disposal of ceded lands and Section 5 of the Act does not reference the Tribes). The Commissioner of Indian Affairs expressly noted the lack of any particular disposal methods in the 1898 Agreement, leading him to advise BLM's predecessor, the General Land Office, that Congress must fill that vacuum in crafting the 1900 Act as they saw fit. ECF No. 60-1 at 44. Land disposal and land management provisions were not negotiated with or developed for the benefit of the Tribes. Rather, those issues were left for Congress to resolve in the exercise of its plenary authority over public lands.

Second, the Tribes ignore the fact that Congress has exercised its plenary authority over public lands to modify and expand upon the disposal procedures for these ceded lands multiple times over the past 120 years since adoption of the 1900 Act.[20] These modifications to public land laws applying to the ceded lands are in addition to the 1904 statute referenced in Defendants'

[20] *See, e.g.*, Act of May 19, 1926, 69th Cong., 1st sess., ch. 337, Pub. L. No. 69-250, 44 Stat. 566 (1926) (adding "Isolated Tracts" statute as additional means to dispose of ceded lands); Act of May 4, 1932, 72d Cong., 1st sess., ch. 164, Pub. L. No. 72-118, 47 Stat. 146 (1932) (extending means of federal land disposal prescribed in Desert Land Act of 1877 to ceded lands, and describing 1900 Act as having "opened" the ceded lands "to entry").

opening briefs that erased the public auction requirement on which the Tribes rely.[21] These expansions of the authority of the United States to dispose of the ceded lands are also entirely consistent with the directive given by the House Committee on Public Lands in reporting out the 1904 Act, declaring that the ceded lands "should be opened to settlement and appropriation under the general laws of the United States." H.R. REP. NO. 57-3161, at 2 (1903).

The Tribes do not dispute that the United States "opened to settlement by the proclamation of the President" the ceded lands falling within the ambit of Section 5. 1900 Act § 5 (AR0039301). The 160-acre limitation by its own terms applies only to a "purchaser," and hence would not constrain land disposed of via exchange. 31 Stat. at 676. The 160-acre limit in the 1900 Act simply parallels the same limit in the Homestead Act of 1862 (one of the laws listed in Section 5 that FLPMA repealed), 12 Stat. 392. Paul W. Gates, *History of Public Land Law Development* 394 (1968).

"Entry" and "settlement" in public lands refers to the fact that prior to the 1930s "the public domain was open to selection, settlement, and entry under various public land laws" without further action by the Department of Interior. *Hopkins v. United States*, 414 F.2d 464, 469 (9th Cir. 1969). These are the terms used in the 1900 Act, which requires allotments to Tribal members "before any of the lands by this agreement ceded are opened to settlement or entry." Act of June 6, 1900, 31 Stat. 672, 675 (AR0039300) . Section 5 requires the remainder of the ceded lands be

[21] The Tribes attempt to dismiss this important statutory history as "extratextual" material that cannot be used to interpret a statute's meaning, and that specific action to completely repeal the entirety of the 1900 Act is required to abrogate the Tribes' treaty rights. ECF No. 74 at 11. These arguments are wrong. Statutory context, as opposed to legislative history (used to infer the intent of the drafters of the legislation), is not "extratextual." Rather, it is one of the traditional tools of statutory construction. *See Kisor*, 139 S. Ct. at 2415 (noting the relevance to statutory interpretation of "the text, structure, history, and purpose"). Nothing in this reading of the Act abrogates any treaty rights; the Tribes continue to have the same conditional usage rights on any ceded lands still in the public domain.

"opened to settlement by the proclamation of the President," which all parties agree occurred. *Id.* at 676 (AR0039301) .

Just as the lands were opened to settlement by the President, they were later closed to settlement—and thus the operation of Section 5—by Presidential action. The Pickett Act of 1910 authorized the President, "at any time in his discretion," to "temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States . . . and such withdrawals or reservations shall remain in force until revoked by [the President] or by an Act of Congress." Act of June 25, 1910, 61st Cong., 2d sess., ch. 421, § 1, 36 Stat. 847. President Franklin D. Roosevelt, exercising his Pickett Act authority, "withdrew all public lands in the ten western states from settlement and reserved those lands for classification[.]" *Hopkins*, 414 F.2d at 471. Accordingly, this land has been opened and then closed to homesteading with Congressional authority outside of Section 5.

The Tribes do not contend that the exchange lands have been classified as suitable for entry and settlement, nor that any party has attempted an entry. The lands remain withdrawn from entry and settlement, a withdrawal unaffected by FLPMA, since under the statute "[a]ll withdrawals . . . 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." FLPMA § 701(c).

Congress' exercise of plenary authority over these lands on multiple occasions underscores the point that the Tribes' proposed approach for how to reconcile the 1900 Act and FLPMA is inconsistent with the federal agency's implementation of evolving public land laws as well as unworkable. That is, the Tribes suggest that BLM should have both run the Land Exchange through Section 206(a) of FLPMA and then also subjected it to the elements of Section 5 of the 1900 Act. ECF No. 74 at 10. But doing so would ignore Congress's unmistakable intent in

enacting FLPMA to provide a coherent and uniform rubric for disposal of lands within the public domain. ECF No. 60-1 at 40–41. The Tribes' preferred interpretation would mean that BLM could only dispose of the ceded lands pursuant to the General Mining Law of 1872, 30 U.S.C. §§ 22–76, as it is the only one of the categories of statutes referenced in the 1900 Act that has not been specifically repealed and is otherwise applicable.[22] The Court should refrain from imposing such a straitjacket on Congress's grant of agency authority to dispose of lands within the public domain. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (noting that absurd results "are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Read in the proper context, the 1900 Act contains no ambiguity to be resolved in the Tribes' favor. "[C]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (citation omitted). The Tribes' novel statutory argument cannot displace the Federal government's reasonable and consistent interpretation of FLPMA.

## IV. The Land Exchange is Consistent with the Trust Duties of the United States.

The Tribes argue that BLM's approval of the Blackrock Land Exchange breached the United States' trust responsibility to manage disposal of the lands ceded by the Tribes in accordance with the 1900 Act. ECF No. 74 at 12–14. The Tribes agree with the Federal Defendants and Simplot that "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." *Gros Ventre*

[22] FLPMA repealed the Homestead Acts and townsite statutes, FLPMA § 702, 90 Stat. 2743, except for one minor townsite provision applicable only to the Forest Service. 16 U.S.C. § 478a. The Timber Culture Act was repealed by the General Revision Act of 1891. 26 Stat. 1095. The Timber and Stone Act was repealed in 1955. 69 Stat. 434.

*Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (citation omitted). The Tribes assert that BLM violated the 1900 Act, and that this violation constituted a breach of trust.

The central problem with this argument is that BLM lawfully approved the land exchange under FLPMA. Moreover, the 1900 Act in no way commits the government "to manage off-Reservation resources for the benefit of the Tribes." *Gros Ventre*, 469 F.3d at 812. Rather, the Fort Bridger Treaty, the 1898 Agreement, and the 1900 Act gave the Tribes the right to hunt, fish, cut timber, and pasture livestock on ceded lands only so long as these lands "remain part of the public domain." 31 Stat. 672, 674. The government thus is explicitly not required to keep the ceded lands in the public domain indefinitely, and the Tribes' off-reservation rights are therefore necessarily subject to this condition.[23]

The Tribes attempt to distinguish the facts here from *Gros Ventre* because they recognize that failure to do so dooms their claim. *Gros Ventre*, however, clearly applies. In that case the Ninth Circuit held that the United States did not breach its trust responsibility by approving, permitting, and failing to reclaim two gold mines located on lands ceded by the Gros Ventre Tribes. The court explained, "[a]lthough we recognize that activities occurring off of the Reservation may impact resources on the Reservation, the language in these treaties simply cannot be read to impose a specific fiduciary obligation on the government to manage non-tribal resources . . . for the benefit of the Tribes." *Gros Ventre*, 469 F.3d at 813. The court declined to find an obligation to protect non-tribal resources in the absence of a specific statutory duty.

[23] At the same time, as explained above, the Tribes have experienced a net gain of 113 acres on which to exercise their off-reservation rights as a result of the land exchange. ROD at 4 (AR0039172). They have also acknowledged that the new federal lands provide superior natural resources for the satisfaction of such rights. AR0063840 (Tribes' Fish & Wildlife Department stating that the original version of the land exchange that would have provided fewer lands to the federal government would nonetheless benefit off-reservation Treaty rights by providing future habitat protection for crucial deer and elk winter range in the Blackrock Canyon area).

The Tribes argue that their case more closely resembles *Navajo Nation v. DOI*, 26 F.4th 794 (9th Cir. 2022), *petition for cert. filed*, -- U.S. -- (July 19, 2022) (No. 22-51). In that case, the Ninth Circuit found a judicially enforceable trust duty based on federally reserved water rights under *Winters v. United States*, 207 U.S. 564 (1908) and the treaty establishing the Navajo Reservation. This case does not involve *Winters* rights. Instead, as in *Gros Ventre*, the Tribes' claim is that the United States had a trust duty to manage off-reservation resources a certain way in the absence of any such rights or specific statutory duty. *Gros Ventre* controls.

**V. The Tribes Are Not Entitled to the Extraordinary Relief They Seek.**

The Tribes cast their prayer for relief as simple vacatur of BLM's decision to approve the land exchange. But that relief would not come close to restoring the status quo that existed at the time of that approval. The Tribes now ask on summary judgment that the Court also "order titles to the land at issue transferred back[.]" ECF No. 74 at 48. Such relief would not only involve the exchanging of papers—it would require the return of payments, the unwinding of deed restrictions, new recording actions by county officials, and the loss of public access to the new federal lands. The land exchange occurred nearly two years ago, and the Tribes never sought preliminary relief to enjoin its effectuation. That strategic choice has consequences that would greatly hinder the affirmative permanent injunctive relief they now seek on summary judgment.

An injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Courts cannot impose any injunctive relief in the absence of a showing using the four-part *Monsanto* test. *See id.* at 156–58. The Tribes have made no attempt to apply this framework or explain the serious consequences of vacatur and rescinding the title transfer in this matter. *Cf. Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032, 1054 (D.C. Cir. 2021) (overturning vacatur

when "precise consequences of vacatur uncertain" and four-factor *Monsanto* analysis missing), *cert. denied sub nom. Dakota Access, LLC v. Standing Rock Sioux Tribe*, 142 S. Ct. 1187 (2022).

As explained above, the Tribes fail to point to anything in the record that materially undermines the validity of BLM's decision-making or their ability to have participated in the NEPA process preceding the land exchange. *See Idaho Wool*, 816 F.3d at 1104 (plaintiff must demonstrate that any NEPA "error caused the agency not to be fully aware of the environmental consequences of the proposed action, thereby precluding informed decisionmaking and public participation[.]"). Nor do any of the Tribes' scattershot claims establish that BLM's thorough analysis was arbitrary or capricious or that BLM could not sustain the same decision on remand. *See Allied-Signal v. U.S. NRC*, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

The Tribes' conclusory and truncated statements in their Reply are wholly inadequate to meet their burden of showing they are entitled to the extraordinary relief they ask the Court to provide on summary judgment, particularly in the absence of any evidence going to the equities.

**CONCLUSION**

For the foregoing reasons, the Court should grant summary judgment in favor of both Simplot and Federal Defendants and deny the Tribes' Motion for Summary Judgment in full.

Respectfully submitted this 2nd day of November 2022.

[s/ Steven B. Andersen]
Steven B. Andersen
KIRTON MCCONKIE
Stephen J. Odell
MARTEN LAW, LLP
Thomas C. Perry, Senior Counsel
J.R. SIMPLOT COMPANY

Attorneys for Defendant-Intervenor J.R. Simplot Company