No. 23-35543, 23-35544

In the United States Court of Appeals for the Ninth Circuit

SHOSHONE BANNOCK TRIBES OF THE FORT HALL RESERVATION,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES BUREAU OF LAND MANAGEMENT; AND LAURA DANIEL-DAVIS, PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR LAND AND MINERALS MANAGEMENT,

Defendants-Appellant,

AND

J.R. SIMPLOT COMPANY,
Defendant-Intervenor-Appellant.

On Interlocutory Appeal from the United States District Court for the District of Idaho, No. 4:20-cv-00553-BLW (Hon. B. Lynn Winmill)

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INTRODUCTION

On August 12, 2020, the U.S. Department of the Interior's Bureau of Land Management (BLM) issued a Record of Decision (ROD) approving a land exchange (Exchange) with J.R. Simplot Company (Simplot). The Exchange was designed to provide land to Simplot for the expansion of an industrial waste pile on a Superfund site on and adjacent to the Shoshone-Bannock Tribes' (Tribes) Fort Hall Reservation. The Simplot Don Plant and its phosphogypsum stack (gypstack), the waste pile at issue, have contaminated land, water, and air since the 1940s, when the plant opened its doors. Simplot has pursued this Exchange for almost 30 years and the Tribes have opposed it at every opportunity, culminating in the Tribes' challenge to the 2020 ROD.

The district court invalidated the Exchange on several grounds. Specifically, the court found the Exchange failed to comply with the Act of June 6, 1900, ch. 813, 31 Stat. 672 (1900 Act), which requires certain procedures to be followed when the United States disposes of lands that were formerly within the Fort Hall Reservation but which the Tribes ceded under the Agreement of February 5, 1898, 31 Stat. at 672-675 (1898 Agreement). BLM's failure to comply with the 1900 Act also violated the federal government's trust responsibility to the Tribes, guaranteed by the Fort Bridger Treaty of 1868, the 1898 Agreement, and the 1900 Act ratifying that Agreement.

Additionally, the court found the ROD and the Environmental Impact Statement (EIS) on which it was based failed to comply with the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA), respectively. Simplot's purpose for negotiating the Exchange was well known and was stated in the EIS and ROD, yet BLM's appraisal of the land Simplot acquired did not consider Simplot's planned use for the land and its effect on the market, violating FLPMA's valuation requirements. BLM also violated FLPMA by failing to weigh cultural resources in its public interest determination. Finally, BLM violated NEPA by overlooking Simplot's design options and preliminary plans for the plant's cooling ponds and gypstack expansion and—considering Simplot's mixed compliance history—by unjustifiably relying on oversight by the Idaho Department of Environmental Quality (IDEQ) and the U.S. Environmental Protection Agency (EPA) rather than independently evaluating impacts from the proposed action.

The Exchange, if upheld, and the resulting gypstack expansion is the cheapest but not the only way for Simplot to continue operating its plant. It would perpetuate, for the economic benefit of a private corporation, the legacy of contamination the Tribes have endured. Moreover, it would do so in violation of the plain language of applicable laws, the government's trust duties, and binding precedent, as the district court determined. This Court should, therefore, affirm the district court's order.

JURISDICTIONAL STATEMENT

On June 30, 2023, the district court certified its order for interlocutory appeal. 1-FedER-5. Ten days later, on July 10, 2023, the Federal Appellants filed a conditional petition for permission to appeal, and Simplot filed a petition for permission to appeal. 28 U.S.C. § 1292(b). This Court granted both petitions on August 16, 2023.[1]

STATEMENT OF THE ISSUES

1. Whether the 1900 Act, which FLPMA did not explicitly repeal and which therefore was preserved under FLPMA § 701(f), precluded BLM from authorizing the Exchange.

2. Whether FLPMA and its implementing regulations required BLM to consider Simplot's well-known, long-planned use for the public land it sought to acquire through the Exchange when appraising the value of that land, making that land worth more than any permissible "equal value" payment could cover.

[1] The Tribes opposed certification in the district court and in this Court on the grounds that none of the claims satisfied the interlocutory appeal standard in 28 U.S.C. § 1292(b) because none presented a controlling question of law upon which there was substantial ground for a difference of opinion and because an interlocutory appeal would not "materially advance the ultimate termination of the litigation." The district court rejected those arguments, as did the motions panel by granting this appeal.

3. Whether BLM failed to make a valid public interest determination by omitting the Tribes' cultural resources when balancing FLPMA's public interest factors in its ROD.

4. Whether BLM violated NEPA by failing to assess the environmental impacts from Simplot's site design options and locations and by instead relying on regulatory agencies' oversight despite Simplot's history of noncompliance.

STATEMENT OF THE CASE

A. The Don Plant and Its Legacy of Contamination.

Simplot began operating its Don Plant, adjacent to the Fort Hall Reservation, in the 1940s. Federal Appellants' Opening Br. (Fed. Br.), No. 23-35543, ECF No. 15, at 10. While producing phosphate fertilizer, the Don Plant also produces phosphogypsum, a waste product containing arsenic, heavy metals, and radioactive substances, which Simplot stores in a gypstack. 1-FedER-9.[2] EPA detected contamination emanating from the Don Plant, including the gypstack, as many as 40 years ago, and that contamination has entered the air, groundwater, soil, and vegetation on and around the site, including on the Fort Hall Reservation. 1-FedER-9-11. In 1990, EPA listed the Eastern Michaud Flats (EMF) Superfund site,

[2] Citations to Federal Appellants' Excerpts of Record, filed in Docket No. 23-35543, are cited as "FedER." Those to Simplot's Excerpts of Record, filed in Docket No. 23-35544, are cited as "SimplotER." Citations to the Tribes' Excerpts of Record are cited as "SER."

comprising 2,530 acres and including Simplot's facility, on the National Priorities List under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). National Priorities List for Uncontrolled Hazardous Waste Sites, 55 Fed. Reg. 35502, 35513 (Aug. 30, 1990). EPA issued its record of decision specifying cleanup requirements for the site in 1998. 3-FedER-501.

The contaminated surface and groundwater flow into the Tribes' Fort Hall Reservation and neighboring lands where the Tribes retain treaty rights. 1-FedER-8-9, 12. Although the gypstack is now lined, contaminants in the gypstack, including phosphorus and heavy metals, continue to leach through the gypstack and move from groundwater under the gypstack into the Portneuf River. 2-FedER-166, 6 SimplotER-1176. The Portneuf River flows past the plant and onto the Fort Hall Reservation through the "Bottoms," an important area for Tribal traditional and ceremonial activities. Residual contaminants will remain throughout the current mountain-sized gypstack for decades and will continue to leach into groundwater long after the facility is closed; Simplot's own modeling and assessment, assuming plant operation until 2084, estimate "residual effects on groundwater and surface water lasting until about 2130." 6-SimplotER-1187.

Since the Superfund designation and continuing through today, Simplot has been subject to multiple consent orders to address issues at its facility under

CERCLA, the Clean Air Act, and Idaho's fluoride-in-forage standards. 1-FedER-10-11. Clean-up of the site is ongoing and is nowhere near finished.[3]

Idaho's consent order requires Simplot to replace the plant's cooling towers with a low-emission alternative or otherwise significantly reduce fluoride emissions. 1-FedER-11. One purpose of the Exchange was for Simplot to build cooling ponds on the acquired land to reduce fluoride emissions. 3-FedER-356. Simplot no longer plans to use the acquired land for cooling ponds; rather, it plans to build a cooling pond on its existing land and expand the gypstack onto the acquired land. 2-SimplotER-176-177.

Simplot, BLM, and the District Court acknowledged there are other options that might allow the Don Plant to continue operating, without expanding the gypstack. 1-FedER-42 ("numerous options" to operate at reduced production without the Exchange); 3-FedER-404 (mentioning a waste-disposal pipeline alternative to a gypstack); 3-FedER-402-403 (rejecting fluoride emission reduction options other than cooling ponds based on economic infeasibility but without an economic analysis).

[3] For example, as the EPA noted in its comments on the Exchange, "the predicted total phosphorous concentration in the Portneuf River at Siphon Road will remain above 0.075 mg/L [the regulatory target] in perpetuity with the existing remedial activities." 2-FedER-166.

The Exchange facilitates the expansion of the gypstack and allows the Don Plant to continue operating next to the Fort Hall Reservation for an estimated additional 65 years. 1-FedER-11, 46. The Exchange will also trigger continued phosphate ore mining at Simplot's Smoky Canyon mine and at a proposed new mine, the Dairy Syncline Mine, to accommodate the extended operating life of the Don Plant. 3-FedER-522; 5-SimplotER-981.

B. History of the Exchange.

Almost thirty years ago, BLM and Simplot began discussions to implement the Exchange so Simplot could expand its gypstack, thereby enabling additional hazardous waste to be stored at the EMF site. 1-FedER-12. These discussions stalled while EPA initially addressed Superfund issues at the site but resumed in 2002, after EPA and Simplot entered the first of several consent decrees and orders to address groundwater and other contamination from the Simplot Operating Unit. 1-FedER-10-12; 3-FedER-368. BLM approved the Exchange several years later, although environmental violations continued. 1-FedER-10-12.

The Tribes have consistently opposed this Exchange through written objections, appeals, and court challenges, asserting it violated the BLM's trust obligations, NEPA, and FLPMA. 1-FedER-12-13; 3-SimplotER-408-411. The first iteration of the Exchange was overturned for failure to comply with NEPA, 42 U.S.C. §§ 4321-4370h. *Shoshone-Bannock Tribes of Fort Hall Rsrv. v. U.S. Dep't*

of Interior, No. 4:10-CV-004-BLW, 2011 WL 1743656, at *12 (D. Idaho May 3, 2011) (*Blackrock I*). The district court characterized Simplot's objective for the Exchange as "building a new waste storage facility on or close by a Superfund Site that was created by the storage of that very same waste." *Blackrock I*, at *1. It did not address the Tribes' breach of trust or FLPMA claims. *Id.* at *12.

C. Legal Background.

1. Treaty Context of the Exchange and the 1900 Act.

The Fort Bridger Treaty of 1868 established the Fort Hall Reservation as the Tribes' permanent home. 15 Stat. 673 (1868). Later, in the Indian Appropriations Act of 1896, Congress authorized the Secretary of the Interior (Secretary) to appoint a commission to negotiate with the members of the Fort Hall Reservation for "the surrender of any portion of their . . . reservation[], or for such modification of existing treaties as may be deemed desirable by said Indians and the Secretary." Ch. 398, 29 Stat. 321, 342. In 1898, the commission negotiated an agreement with the Tribes for the surrender of certain lands, which was ratified by Congress in Section 1 of the 1900 Act. Article IV of the 1898 Agreement preserves all preexisting treaty rights not incompatible with the Agreement, which includes the Tribes' rights on the ceded lands. 31 Stat. at 674. Article IV also refers to the 1898 Agreement as a treaty. *Id.*; *see Swim v. Bergland*, 696 F.2d 712, 717-18 (9th Cir. 1983) ("[I]n 1900 Congress ratified the 1898 Agreement, which reserved grazing rights to the Tribes.

Subsequent congressional action would therefore be necessary to modify or abrogate its terms.").

In 1900, when it ratified the 1898 Agreement, Congress enacted several provisions describing how the Agreement would be implemented. Section 5 of the 1900 Act places specific limitations on how the federal government may dispose of ceded lands, two of which apply to the current Exchange. First, the 1900 Act requires that ceded lands "shall be subject to disposal under the homestead, town-site, stone and timber, and mining laws of the United States only." 1900 Act § 5, 31 Stat. at 676. Second, the 1900 Act states that "no purchaser shall be permitted in any manner to purchase more than one hundred and sixty acres of the [ceded] land." *Id.* The exchanged federal parcel is approximately 700 acres. 2-FedER-124.

The Exchange moves lands previously available for the Tribes' exercise of off-reservation treaty rights, confirmed by the 1868 Fort Bridger Treaty, into the hands of Simplot. The new public lands available for the Tribes' exercise of treaty rights are significantly farther from the reservation. Simplot's Opening Br. (Simplot Br.), No. 23-35544, ECF No. 21 at 15 (showing map).

2. FLPMA and NEPA Requirements for an Exchange.

Under FLPMA, lands to be exchanged must be of equal value or capable of being equalized by a payment that does not exceed 25% of the value of the federal land. 43 U.S.C. § 1716(b); 43 C.F.R. § 2201.6(b). The appraisal must estimate the

value of the land "as if in private ownership and available for sale in the open market," considering the "highest and best use." 43 C.F.R. § 2201.3-2(a)(1)-(2). The highest and best use means the "most probable legal use of a property, based on market evidence as of the date of valuation." 43 C.F.R. § 2200.0-5(k). Market value should be based on "a competitive and open market under all conditions requisite to a fair sale, where the buyer and seller each acts prudently and knowledgeably, and the price is not affected by undue influence." *Id.* § 2200.0-5(n). Market value determinations should conform, "to the extent appropriate," with the Uniform Appraisal Standards for Federal Land Acquisitions (UAS). 43 C.F.R. § 2201.3.

Additionally, BLM may approve land exchanges only when it determines "the public interest will be well served." 43 U.S.C. § 1716(a). BLM "must find that: (1) The resource values and the public objectives that the Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the resource values of the non-Federal lands or interests and the public objectives they could serve if acquired." 43 C.F.R. § 2200.0-6(b). "Cultural resources" are listed as a factor to be weighed in the public interest determination. *Id.*

Under NEPA, agencies must analyze the direct, indirect, and cumulative impacts of a federal agency action like the Exchange. 40 C.F.R. §§ 1508.7-1508.8

(2019).[4] A cumulative impact is an "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions," 40 C.F.R. § 1508.7. Similarly, "[i]ndirect effects" include those which are "reasonably foreseeable." 40 C.F.R. § 1508.8(b).

D. Procedural History of the Exchange.

BLM proposed the Exchange in 2019. 1-FedER-12-13. The federal land is on Howard Mountain adjacent to the Don Plant, a place of Tribal historical and cultural significance. 3-FedER-446; 2-FedER-158. The Simplot parcels are located south of Pocatello, Idaho in the Blackrock Canyon area. 2-FedER-144 (showing map). The federal land consists entirely of Tribal lands ceded to the United States under the 1898 Agreement.

Notice of BLM's draft EIS ("DEIS") evaluating the Exchange was published in the Federal Register on December 20, 2019. 3-FedER-387. In early January 2020, the Tribes engaged in government-to-government consultation with BLM and communicated their continued and longstanding opposition and concerns with the proposed Exchange. On January 31, 2020, the Tribes submitted written comments on the DEIS opposing the Exchange. 1-SER-9-42. On February 7, 2020, the Tribes submitted another comment letter addressing Tribal cultural resource concerns. 1-SER-6-8.

[4] Citations to the Council on Environmental Quality's NEPA regulations are to the 2019 version of those regulations, which was the version in effect when the BLM prepared the EIS.

BLM released the final EIS on May 15, 2020. 3-FedER-358. In the EIS, BLM selected a different alternative (Alternative B) farther east than the proposed alternative. 3-FedER-356-57; 2-FedER-144 (map showing Alternatives A and B). The EIS did not fully analyze the environmental impacts of expanding the gypstack onto new lands and installing cooling ponds; it merely noted that Simplot had developed preliminary design plans and locations for these features. 1-FedER-40. BLM relied on other agencies' enforcement capabilities instead of assessing the environmental impacts of the Exchange, stating it "must assume" compliance with applicable law despite 30 years of failed enforcement efforts and ongoing environmental violations. 3-FedER-384.

On May 12, 2020, an appraisal of Alternative B was completed. 2-FedER-219. The appraisal did not consider Simplot's proposal to build an industrial waste site on the federal land to be exchanged. Instead, the appraisal found the highest and best use for that land was "continued agriculture and recreational uses, wildlife habitat, watershed[,] with speculative investment potential." 2-FedER-275. Although acknowledging "the highest and best use must also include the element of speculation or investment" and noting 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," *id*., the reason for possible speculation—other than perhaps agricultural or recreational uses—was

not discussed. None of the comparables in the appraisal were for an industrial waste site, despite it being Simplot's proposed use for the Exchange. The appraisal valued the federal land at $645,000 and the non-federal lands at $635,000 and Simplot was therefore required to provide BLM a cash equalization payment of $10,000. 2-FedER-68-69, 130-131.

On July 16, 2020, the Tribes submitted written comments on the EIS, again opposing the Exchange. 2-FedER-149. The Tribes argued, *inter alia*, that the Exchange did not comply with FLPMA's valuation provisions and the appraisal should have valued the land for industrial use. 2-FedER-156.

On August 12, 2020, BLM issued a ROD approving the Exchange. The signature page of the ROD states: "I approve the Blackrock Land Exchange Decision for the reasons explained above. The approval of this decision constitutes the final decision of the [Department of the Interior]." 2-FedER-139. In the ROD, the BLM evaluated several of the public interest factors required under FLPMA, 43 U.S.C. § 1716(a), 43 C.F.R. § 2200.0-6(b), but did not describe impacts to cultural resources and did not balance that required factor in the ROD's public interest determination. 2-FedER-126-29, 131.

Two days after the ROD was signed, the Tribes announced they intended to challenge the Exchange. 1-SER-43. In December 2020, before the Exchange was completed and within four months of the ROD being issued, the Tribes filed a

complaint challenging the Exchange and seeking declaratory and injunctive relief. 2-FedER-78-119. As the litigation proceeded, the Tribes sought and received an order from the district court requiring Simplot to provide notice of any work at least 30 days before undertaking that work. 1-SER-5.[5]

The district court resolved cross-motions for summary judgment for all claims in its March 31, 2023 order, granting summary judgment to the Tribes in part and to Appellants in part. 1-FedER-56-57. In its order granting in part the Tribes' motion for summary judgment, the district court identified significant violations of law that took place during the Exchange, including the federal government's breach of its trust responsibility due to violations of the 1900 Act, as well as violations of FLPMA and NEPA.

Specifically, the court found the Exchange violated the 1900 Act based on the "clear" language of the statute and, in the alternative, found support for its conclusion based on the Indian canons of construction. 1-FedER-17-22. Even if congressional intent is considered, the court noted FLPMA explicitly repealed

[5] Federal Appellants state the Tribes did not seek a preliminary injunction. Fed. Br. at 14. The issue of remedy is not on appeal, and the Tribes anticipate addressing the implication of the government's statement at the appropriate time. For purposes of this interlocutory appeal, the Tribes highlight the absence of notice by Simplot of any substantial work on the federal parcel and note their opposition to the Exchange has been long and unwavering and that, in their complaint, they sought "an immediate and permanent injunction . . . from proceeding with the land exchange." 2-FedER-118.

hundreds of statutes but not the 1900 Act and did not "repeal any existing law by implication." 1-FedER-19. Finally, the court found that, had Congress intended to repeal the ceded land disposal requirements in Section 5 of the 1900 Act, it could have done so, but did not. *Id*.

The court found a breach of the federal government's trust responsibility to the Tribes based on violation of the 1900 Act. 1-FedER-22 ("BLM's decision to approve the Blackrock Land Exchange is therefore 'not in accordance with law' in violation of the [Administrative Procedure Act (APA)] and represents a breach of the federal government's trust responsibility to the Tribes.").

The court also found the Exchange violated FLPMA's valuation requirements. The court determined the appraisal for the Exchange did not "meaningfully consider the use of the land to build gypstacks," 1-FedER-31, which was Simplot's intended use for the land, 1-FedER-34-35, and found the appraisal's "comparables [] are not actually comparable." 1-FedER-34. The court did not rely on Simplot's intended use alone—a use that was certainly "reasonably probable" because Simplot "has stood by that plan for nearly 30 years," 1-FedER-32—but found Simplot's intended use "profoundly affects the most basic underpinnings of market value: supply and demand," 1-FedER-34, and therefore "cannot be ignored," 1-FedER-35. The court found it appropriate to consider Simplot's interest in the land as part of market supply and demand because "[t]hat comports with basic economics:

a private party's need is—definitionally—what drives market value." 1-FedER-34. The court concluded BLM's failure to consider these facts made BLM "'willfully blind' to the potential value of the land involved in the Blackrock Land Exchange for gypstack use," 1-FedER-35 (applying and quoting *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000)).

The court also found BLM failed to comply with FLPMA's public interest requirements. Although the EIS considered impacts to cultural resources, the ROD —the decision document under FLPMA—did not describe how BLM balanced cultural resource protection in making its public interest determination. 1-FedER-26-27. Because of this failure, "the ROD gives the Court no basis to review the public interest determination," in violation of the APA. 1-FedER-28.

Finally, the court agreed with the Tribes' NEPA claim that BLM failed to adequately consider known design options and locations for the cooling pond and gypstack, 1-FedER-39-40, and improperly relied on other agencies' enforcement to ensure compliance with applicable law, 1-FedER-40-41, despite the "decades-long history of enforcement with mixed results." 1-FedER-41.

The court ordered remedy briefing but, before that briefing was filed, the court permitted Simplot to brief a motion to certify the case for interlocutory appeal. Over the Tribes' and the Federal Appellants' opposition, the court certified the case for appeal and stayed the case pending the Ninth Circuit's disposition of Simplot's

subsequent petition for interlocutory appeal. 1-FedER-2-6. A motions panel of the Ninth Circuit granted Simplot's petition and this interlocutory appeal followed.

STANDARD OF REVIEW

The APA, 5 U.S.C. § 706(2), authorizes a court to hold unlawful and set aside agency action found to be: (1) outside the scope of the agency's authority, (2) not in compliance with prescribed procedures, and (3) otherwise arbitrary, capricious or an abuse of discretion. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415-17 (1971). Agency action will be set aside if "the agency has . . . entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm*, 463 U.S. 29, 43 (1983). Although this standard of review is ultimately narrow and agency action is "entitled to a presumption of regularity," review must nevertheless be "searching and careful," and "thorough, probing, [and] in-depth." *Overton Park*, 401 U.S. at 415-16.[6]

[6] The Supreme Court recently heard arguments regarding the continuing vitality of *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*). Pet. for Writ of Cert. at i-ii, *Loper Bright Enterprises v. Raimondo*, No. 22-451 (U.S. Nov. 10, 2022); *Loper Bright Enterprises v. Raimondo*, 143 S.Ct. 2429 (2023). The Court's decision may affect current law on agency deference, which could in turn affect the Tribes' NEPA and FLPMA claims, 1-FedER-45, and necessitate supplemental briefing.

SUMMARY OF THE ARGUMENT

1. The plain language of the 1900 Act limits disposal of the Tribes' ceded lands, including the BLM land involved in the Exchange, and BLM did not comply with those restrictions. Congress spoke carefully in designating which disposal regimes (homestead, stone, timber, etc.) were available and limited such disposals to 160 acres. The Exchange did not follow any of the prescribed laws and the BLM land exceeded the allowable size. The Court need go no further in invalidating the Exchange and affirming the district court. Moreover, FLPMA did not explicitly repeal or replace the 1900 Act and, since the 1900 Act is a specific, place-based statute, it can only be repealed explicitly, as FLPMA itself makes clear, *see* FLPMA § 701(f) ("Nothing in this Act shall be deemed to repeal any existing law by implication").

2. Because the Exchange violated the plain language of the 1900 Act, the government breached its trust duties to the Tribes.

3. BLM performed an appraisal of the lands subject to the Exchange, but the appraisal did not consider Simplot's planned use of the federal land as an industrial waste site for Simplot's Don Plant or adequately consider speculative market pressures generated by Simplot's demand. The highest and best use means the "most probable legal use of a property, based on market evidence as of the date of valuation." 43 C.F.R. § 2200.0-5(k). The appraisal therefore undervalued the land,

in contravention of FLPMA's requirements. If the land had been appraised correctly, the Exchange would likely be impermissible under FLPMA § 206(b), which limits the difference in value between the exchanged parcels to 25%.

4. BLM also violated FLPMA because its public interest determination was incomplete. "Cultural resources" is a factor to be weighed when making that determination. 43 C.F.R. § 2200.0-6(b). By not discussing how it balanced *all* the required factors, including cultural resources, when making its determination, BLM not only failed to demonstrate the Exchange would be in the public interest, but also violated the APA's requirement of reasoned, record-based decision-making.

5. Finally, BLM violated NEPA because it did not consider environmental impacts from Simplot's design options for the gypstack and cooling ponds under Alternative B, even though that information was known when BLM prepared the EIS. BLM also wrongly determined that it need not evaluate those impacts because it could rely on oversight from the IDEQ and EPA to ensure compliance with applicable laws. Courts have explained that no such reliance is appropriate where, as here, there is evidence that enforcement has been ineffective.

ARGUMENT

I. The District Court was Correct to Find that BLM Must Comply with the 1900 Act.

A. The Exchange was Contrary to the Plain Language of the 1900 Act.

BLM did not comply with the plain language of the 1900 Act. First, Section 5 of the 1900 Act requires that ceded lands "shall be subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States *only*." 31 Stat. at 676 (emphasis added). Congress considered the types of disposal statutes to be included and referred to them specifically, rather than incorporating the public land laws generally. *See* S. Rep. 56-60 at 16 (1900) (draft without "stone and timber," in original statutory text); H.R. Rep. No. 55-1507 at 1 (1898). Second, Section 5 also states that "no purchaser shall be permitted in any manner to purchase more than one hundred and sixty acres of the [ceded] land." The Exchange did not take place under the relevant laws and the BLM land comprised over 700 acres. 2-FedER-124. The Court need look no further in invalidating the Exchange and affirming the district court.

Appellants' argument that this result does not make "more sense" than their preferred reading, Fed. Br. at 26, and their assertions about what constitutes "a sensible reading" of the statute, Simplot Br. at 41, are beside the point. When Congress has spoken, as it did in the 1900 Act, its language must be respected.

Federal Appellants suggest the Court may not reach the Tribes' argument regarding the 160-acre limitation because the district court did not rule on it, Fed. Br. at 31 n.5, but courts certify orders, not claims, *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011), and therefore all issues raised below are ripe for consideration. Indeed, a court may affirm on any basis in the record, even in an interlocutory appeal. *Angle v. United States*, 709 F.2d 570, 573 (9th Cir. 1983); *see also Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 375 (D.C. Cir. 2017) (affirming, on interlocutory appeal, denial of a preliminary injunction for reasons other than those the district court cited). Even if a court declines to rule on an issue, it may offer guidance on remand on issues not certified for an interlocutory appeal. *See, e.g., Barbato v. Greystone All., LLC*, 916 F.3d 260, 269 (3d Cir. 2019).

Federal Appellants argue in the same footnote that the 160-acre limitation does not apply because Simplot is not a "purchaser" under the 1900 Act, which addresses a sale and not a land exchange. Fed. Br. at 31 n.5. Yet this crabbed reading of "purchaser" is inconsistent with the 1900 Act. Section 5 of the 1900 Act states: "no purchaser shall be permitted *in any manner* to purchase more than one hundred and sixty acres of the [ceded lands]." 33 Stat. at 676 (emphasis added). An exchange is tantamount to a purchase. As already discussed, FLPMA requires an appraisal

and, if necessary, equalization payments, acknowledging that land is being monetized and transferred, as in a purchase.[7]

Finally, Federal Appellants argue that reference in Section 4 of the 1900 Act to a sale "to the highest bidder" suggests the Act does not apply to exchanges. Fed. Br. at 31 n.5. Section 4, however, requires the sale of *improvements* on lands Tribal members relinquish but it does not apply to the lands themselves. Section 5 is the provision at issue here, and it does not reference "sales" but instead more broadly references "disposal" or "purchase" of the ceded lands. Appellants' argument also does not address the expansive language "in any manner," quoted above.

B. FLPMA Makes Clear It Does Not Displace or Repeal the 1900 Act.

In FLPMA, Congress repealed 147 statutes and acts of Congress effective the day FLPMA was approved, *see* Pub. L. No. 94-579 § 702, 90 Stat. 2743, 2787-89 (1976), and Congress repealed another 104 statutes and acts of Congress effective on the tenth anniversary of approval of FLPMA, *id.* § 703, at 2789-91. But Congress

[7] The term "purchase" had a broad meaning in 1900 and has essentially the same meaning today. *See, e.g., Purchaser*, Webster's Complete Dictionary of the English Language Unabridged (1886 ed.): a "purchaser" is "one who acquires an estate in lands by his own act or agreement, or who takes or obtains an estate by any means other than by descent or inheritance" or "one who acquires property for a consideration, generally of money." *Compare Purchase* (legal definition), Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/purchase: a "purchase" is "the acquiring of real property by any means other than descent or inheritance" or "the acquiring of an interest in property especially in exchange for valuable consideration."

did not repeal the 1900 Act. 1-FedER-19.[8] Since Congress explicitly repealed all these statutes, other repeals should not be implied. *Cf. Complaint of McLinn*, 744 F.2d 677, 683 (9th Cir. 1984) (doctrine of "expressio unius est exclusio alterius"). Moreover, FLPMA § 701(f) (codified at 43 U.S.C. § 1701 note) specifically states: "[n]othing in this Act shall be deemed to repeal any existing law by implication." 90 Stat. at 2786.[9]

Additionally, amendments or repeals by implication are not presumed unless the intention of the legislature to repeal is clear and manifest, and here the opposite is true, as FLPMA § 701(f) confirms. *United States v. Fausto*, 484 U.S. 439, 453 (1988) ("[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change"). Absent explicit language in FLPMA, therefore, FLPMA cannot supersede, impliedly repeal, or displace the 1900 Act.

Moreover, the 1900 Act is a specific, place-based statute, and "a statute dealing with a narrow, precise, and specific subject is not submerged by a later

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[8] In contrast, FLPMA repealed statutes making the homestead laws applicable to ceded areas of other reservations. *See, e.g.*, FLPMA, 90 Stat. at 2787 (repealing 32 Stat. 384 (1902), addressing the applicability of the homestead laws to former areas of the Ute Indian Reservation in Colorado).

[9] *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (provisions in the Statutes at Large retain the force of law even if they are omitted from the U.S. Code); *Koonwaiyou v. Blinken*, 69 F.4th 1004, 1008 (9th Cir. 2023).

enacted statute covering a more generalized spectrum," like FLPMA. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 663 (2007) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)); *accord Morton v. Mancari*, 417 U.S. 535, 550-551 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); *Kidd v. U.S. Dep't of Interior, Bureau of Land Mgmt.*, 756 F.2d 1410, 1411 (9th Cir. 1985) (general language of Taylor Grazing Act does not repeal by implication the specific language of Desert Land Entry Act and, in addition, "[t]he two acts serve different purposes"). As Appellants acknowledge, FLPMA did not impliedly or otherwise repeal the 1900 Act. Fed. Br. at 25; Simplot Br. at 45.[10]

Congress's intent in passing FLPMA was to clarify the legal regime governing public lands and maintain landholders' existing rights, except where FLPMA explicitly repealed prior statutes. FLPMA's legislative history emphasizes that FLPMA's drafters carefully decided which laws to repeal and which to maintain. S. Rep. 94-583 at 26-27 (1975) ("The list of laws to be repealed is specific. The bill would not repeal or modify any law or segment of law not specifically contained in that list"). The 1900 Act was not repealed and therefore must be given effect.

[10] Given FLPMA's statement against implied repeal, it would be anomalous to deem it repealed the 1900 Act. *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020); *cf.* Fed. Br. at 30 (reading text to avoid creating "anomalies").

BLM could have, and should have, recognized the unique restrictions Congress placed on disposal of the ceded lands through passage of Section 5 of the 1900 Act and its preservation under FLPMA, rather than ignoring the earlier law and deeming it nullified by the later, as the Appellants suggest.[11] If Congress wishes to change that outcome in the future it may do so. *Swim v. Bergland*, 696 F.2d at 717-18.

C. Appellants Misapply Various Principles of Statutory Construction in their Effort to Claim that FLPMA Repeals or Supersedes the 1900 Act.

In the guise of harmonizing FLPMA with the 1900 Act, Appellants in effect argue that FLPMA made the 1900 Act a dead letter. To support their claim, Appellants misread the purposes and plain language of FLPMA and of post-1900 statutes addressing ceded lands. Consequently, none of their arguments justifies reversal of the district court.

1. FLPMA Does Not Substitute for the Disposal Statutes Discussed in the 1900 Act via the "Reference Canon" or Otherwise.

Section 5 of the 1900 Act requires the Tribes' ceded lands to "be subject to disposal under homestead, townsite, stone and timber, and mining laws of the United

[11] FLPMA regulations continue to recognize the vitality of the mineral laws as a method for disposing of public lands, showing that disposal statutes can coexist with FLPMA, just like the 1900 Act. *See* 43 C.F.R. § 2201.1-2(a)-(c) (federal lands shall be segregated from appropriation under the public land laws and mineral laws for a period not to exceed five years from the date of record notation).

States only." Simplot nevertheless argues that a statutory "harmonization principle compels reading Section 5 of the 1900 Act not to define exclusive means of disposal forever, irrespective of other, later-enacted laws (like FLPMA) conferring additional disposal authority." Simplot Br. at 40. Similarly, Federal Appellants claim FLPMA is the "successor" statute, "a source of land disposition authority that is analogous to the old categories that it supplanted," Fed. Br. at 24, or "the modern version of these [disposal] laws," *id*. at 26, relying on "harmonization" and a "reference canon" of construction to avoid the limitation of the word "only." Appellants claim that because the 1900 Act does not reference specific statutes but instead references general types of disposal laws (homestead laws, grazing laws, etc.), it should be interpreted to incorporate FLPMA as a later-enacted disposal law, based on the reference canon articulated in *Jam v. Int'l. Finance Corp.*, 586 U.S. 199, 209 (2019).

FLPMA is not, however, another disposal law. Instead, FLPMA announced a "policy of retention." 43 U.S.C. § 1701(a)(1) ("it is the policy of the United States that (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest."). If disposal is in the public interest, then FLPMA provides for "uniform procedures for any disposal of public lands, . . . and the exchange of such lands." *Id.* § 1701(a)(10); *Sierra Club v. Watt*, 608 F. Supp. 305, 309 (E.D. Cal. 1985) ("FLPMA reflected a major change in federal

policy" from private ownership to "permanent federal ownership" unless the national interest dictates otherwise); *see also Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 738 (10th Cir. 1982) ("The national policy declared in the FLPMA stands in marked contrast to the many older public land statutes that provided for the wholesale disposition of public lands.").[12]

While these statutory statements speak for themselves and further inquiry into legislative intent is not called for, FLPMA's legislative history reinforces the statute's stated policy. As Congress developed FLPMA, it noted that the new statute implemented a "retention policy" and disposal was limited. S. Rep. No. 94-583 at 25. For this reason—FLPMA's "policy of retention," signaling its different purpose from the disposal laws listed in the 1900 Act—Appellants' arguments that the 1900 Act be read to incorporate FLPMA through use of "harmonization" or the "reference canon" of statutory interpretation must fail.

Appellants attempt to shore up their argument by misconstruing "only" to mean any federal law, Simplot Br. at 34-35, or any federal land disposal law, Fed. Br. at 27, and contend that the district court improperly read the 1900 Act to "restrict[] additional disposal methods into perpetuity," Simplot Br. at 34. On the

[12] *See also* 43 U.S.C. § 1701(a)(8) (goal to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" and "preserve and protect certain public lands in their natural condition"); *id.* § 1782 (designation of wilderness areas).

contrary, the district court's opinion relies on the express language of the statute to reach the same conclusion stated above: "only" means "these types of laws [listed in the 1900 Act] are the exclusive means of lawful disposal," and *FLPMA was not one of these types of laws*. 1-FedER-17-18 (FLPMA "is not a homestead, townsite, stone and timber, or mining law.").

As the district court explained, extratextual sources cannot defeat the clear language of the 1900 Act. 1-FedER-19 (citing *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2469 (2020)); *accord Trim v. Reward Zone USA LLC*, 76 F.4th 1157, 1161 (9th Cir. 2023) ("[o]ur inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (citations and internal quotation marks omitted); *see also United States v. Ho*, 984 F.3d 191, 202 (2d Cir. 2020) ("Because that language is plain, we decline Ho's invitation to read an unexpressed limitation into the statute through an unnecessary resort to the reference canon."). Given FLPMA's stated purposes and policies, which differ markedly from disposal statute purposes, it cannot serve as a "reference" or substitute for the prior disposal laws or another source of authority like those identified in the 1900 Act.[13]

[13] If anything, the statutes referenced in the 1900 Act should be interpreted as they were at the time they were referenced. When interpreting a statutory term, the court's job is to interpret the words consistent with their "ordinary meaning . . . at the time Congress enacted the statute." *Wis. Cent. Ltd. v. U.S.*, 585 U.S. 274, 277 (2018) (citations omitted). These laws certainly could not have been intended to incorporate a law enacted 75 years later.

To the extent statutory canons are required to interpret the 1900 Act and its interaction with FLPMA, moreover, the correct canon is the Indian canon of construction, which overcomes other, general canons of construction. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 n.5 (1999). The Indian canon applies "regardless of the form of enactment," *Chickasaw Nation v. United States*, 534 U.S. 84, 101 (2001) (O'Connor, J., dissenting), and its application is especially hard to controvert here where the 1900 Act ratifies the 1898 Agreement and refers to it as a "treaty." 31 Stat. at 674.

Appellants argue that the 1900 Act disposal requirements were not included for the benefit of the Tribes, making the Indian canon inapplicable. Fed. Br. at 28-29; Simplot Br. at 32, 48-49.[14] Even if the disposal language was not negotiated as part of the 1898 Agreement and instead drafted solely by the federal government, the 1900 Act nevertheless limited disposal, which is beneficial to the Tribes for at least three reasons. First, the Tribes retained usufructuary off-reservation treaty rights if the lands remained in the public domain, as the district court and all parties recognized. *See, e.g.*, 1-FedER-20. Thus, contrary to Federal Appellants' suggestion, the Tribes continue to "retain[] an interest in the lands," Fed. Br. at 29, subject to the 1900 Act. Second, the Secretary has the discretionary authority to restore to tribal

[14] *But cf. Swim v. Bergland*, 696 F.2d at 718 ("In 1967 the Tribes reached a stipulated settlement with the United States for additional compensation for the occupancy rights ceded by the Article I of the 1898 Agreement.").

ownership the remaining surplus lands of any Indian reservation opened under statutes like the 1900 Act, as long as they are still in the public domain. 25 U.S.C. § 5103. Third, none of the laws mentioned in the 1900 Act (homestead, etc.) would allow Simplot to acquire the land at issue to expand a waste disposal site already contaminating groundwater to such an extent that the site was designated a Superfund site.

If FLPMA and the 1900 Act are to be harmonized, as Appellants profess to do, FLPMA still cannot be read to nullify the 1900 Act in its entirety. It remains possible to implement FLPMA by giving effect to the 1900 Act's 160-acre limitation, even if other aspects of the 1900 Act – the specific disposal laws – are ignored.[15]

2. Other Disposal Statutes Enacted After 1900 But Prior to FLPMA Do Not Compel a Finding that the 1900 Act Was Displaced by FLPMA's Exchange Provisions.

Appellants reference various statutes enacted post-1900 Act but pre-FLPMA that affected the Tribes' ceded lands, claiming they support construing FLPMA as a method for disposing of those lands without the constraints of the 1900 Act. Their argument fails to acknowledge key differences between these older authorities and FLPMA.

[15] FLPMA already limits "approximately equal value" exchanges to land worth no more than $150,000, 43 U.S.C. § 1716(h)(1)(A), so a 160-acre limitation would not be incongruous.

Unlike FLPMA, these early laws addressed *disposal* of the ceded lands subject to the 1900 Act, and they did so only if specific procedures were followed. Significantly, many of these disposal laws explicitly addressed the Tribes' ceded lands or the 1900 Act, unlike FLPMA which, as already discussed, did not. *See*, *e.g.*, Act of Mar. 30, 1904, ch. 854, 33 Stat. 153 (Simplot Br. at 35), which refers to "ceded lands on the Fort Hall Indian Reservation" in its title and also references the 1900 Act in its text, removing the auction requirement in that Act; Act of May 12, 1920, ch. 181, 41 Stat. 596 (Fed. Br. at 27), addressing ceded land adjacent to the City of Pocatello (next to the Tribes' reservation), subject to existing rights previously acquired under federal laws (which would include the 1900 Act); Act of May 19, 1926, ch. 337, 44 Stat. 566 (Fed. Br. at 27, Simplot Br. at 35-36), applying to "ceded lands of the Fort Hall Indian Reservation," as indicated in the title and the text;[16] Act of May 4, 1932, ch. 164, 47 Stat. 146 (Simplot Br. at 36), making the desert lands disposal laws "applicable to the ceded lands on the former Fort Hall Indian Reservation opened to entry by the Act of June 6, 1900 (31 Stat. 672).").[17]

[16] FLPMA repealed this Isolated Tracts law. § 703(a), 90 Stat. at 2790.

[17] Simplot maintains that BLM's decision in 1970 to withhold lands from disposal under "agricultural land laws" suggests "the public-lands laws generally" applied to the ceded lands and therefore the 1900 Act's restrictions no longer applied. Simplot Br. at 40. But an administrative decision cannot override a clear statute. *Sturgeon v. Frost*, 587 U.S. 28, 46 n.3 (2019) (discussing *Chevron*).

These laws do not demonstrate "that [Congress] understood Section 5 to leave open disposal under other federal statutes." Simplot Br. at 35. On the contrary, they demonstrate that when Congress wants to amend authority provided under a prior law, it has a clear path for doing so: acknowledging the prior law and addressing it. FLPMA did just that by listing all the laws it amended or superseded, FLPMA §§ 702-703, 90 Stat. at 2787-91, *see* Part I.B above, and the 1900 Act is conspicuously absent from those lists.

Additionally, it is unclear if the disposal laws cited by Appellants were ever applicable to the areas subject to the Exchange. No party has identified any authority showing that any of the Tribes' ceded lands were disposed of under the Isolated Tracts Law or Desert Lands Act just described. And no party has identified a case showing how those statutes were reconciled with the 1900 Act.[18]

[18] Simplot identifies the Taylor Grazing Act as another means of disposal different from those listed in the 1900 Act. Simplot Br. at 36. The Taylor Grazing Act is not a disposal law but rather one protecting public grazing lands. 43 U.S.C. § 315. It explicitly does not "diminish, restrict, or impair any right . . . initiated under existing law." *Id*. Indeed, Section 11 of the Act, which apportions grazing fees collected on "Indian ceded lands," states specifically that "final disposition" of those lands will take place "under applicable laws, treaties, or agreements." 43 U.S.C. § 315j. Moreover, the Act's exchange provision cited in Simplot's brief was repealed in 1976 by FLPMA. 90 Stat. at 2793 (repealing 43 U.S.C. § 315g).

3. Appellants' Additional Efforts to Make an End-Run Around FLPMA's Provision Against Implied Repeals are Unavailing.

Appellants' additional arguments that FLPMA effectively repeals and replaces the 1900 Act, despite FLPMA's explicit statement to the contrary, are similarly unpersuasive. They do not overcome the basic principle of statutory interpretation discussed in Part I.B above that broad, later enactments do not nullify specific, earlier ones, absent the express intent of Congress.

Simplot claims FLPMA must be construed as replacing the 1900 Act because that approach is "necessary to make the later enacted law work." Simplot Br. at 42, citing *Radzanower* and *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) ("later act" should be given effect if it "covers the whole subject of the earlier one and is clearly intended as a substitute."). That proposition was not applied in either case, however. In *Radzanower*, the Court found the "basic purposes of the [later act] can be fairly served by giving full effect to the provisions of [the earlier act]," 426 U.S. at 155, and the specific provisions of the earlier act prevail. The *Posadas* court also did not find an implied repeal of an earlier statute, but instead found the later statute amended the prior statute because it specifically repeated and changed the prior text, 296 U.S. at 505-506, just like the scenarios discussed in Part I.C.2, above. Similarly, the court in *Ctr. for Investigative Reporting v. U.S. Dep't of Just.*, 14 F.4th 916, 927 (9th Cir. 2021), which Federal Appellants cite for the same proposition, Fed. Br. at 24, discussed a statutory regime where the subsequent statute addressed a very

specific situation (a FOIA exemption) and, as in *Posadas*, repeated the prior statutory language and amended it. FLPMA does not repeat and amend the 1900 Act nor address its impact on the 1900 Act in any way beyond its broad statement *against* implied repeal.

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989), cited in Simplot Br. at 45, also is inapposite. In the Supreme Court's own words, "this case does not involve two statutes that . . . supplement[ed] one another, nor is it a case where a more general statute is claimed to have repealed by implication an earlier statute dealing with a narrower subject." 488 U.S. at 438 (citations omitted). Instead, it was uncertain whether the earlier statute applied at all to the situation at bar, *Id.* at 436, and the Court held the earlier statute continued to have vitality after the passage of the later law, *id.* at 438. Finally, in FLPMA, unlike the law at issue in *Amerada Hess,* Congress spoke clearly and specifically about which statutes were repealed and which were not.

The other cases Simplot cites to support its claim that FLPMA enables BLM to circumvent the 1900 Act are distinguishable because they provided two alternative paths to condemn land, which is different from the interaction between the 1900 Act and FLPMA. Simplot Br. at 39-40. For example, in *Blackfeet Indian Tribe v. Montana Power Co.*, 838 F.2d 1055 (9th Cir. 1988), *Yellowfish v. City of Stillwater*, 691 F.2d 926 (10th Cir. 1982), and *Nicodemus v. Washington Water*

Power Co., 264 F.2d 614 (9th Cir. 1959), the two competing statutory condemnation paths at issue were deemed to be "coexisting" rather than "in direct conflict," *Blackfeet*, 838 F.2d at 1058. *See also Yellowfish*, 691 F.2d at 930 (the later statute provides "an alternative method" for acquiring allotted land); *Nicodemus*, 264 F.2d at 618 (the two statutes "offer two methods" for obtaining an easement across allotted lands).

Simplot also argues that FLPMA's "notwithstanding" language overrides the 1900 Act. 43 U.S.C. § 1715(a) (authorizing the Secretary, "[n]otwithstanding any other provisions of law . . . to *acquire* by purchase, exchange, donation, or eminent domain," public lands or interests therein) (emphasis added). Simplot Br. at 27-28. This provision applies only to the *acquisition* of public lands, not their disposal, and therefore has no bearing on the 1900 Act; § 1716 pertains to disposal and does not contain the "notwithstanding" language. Simplot's position is, moreover, contrary to this Court's precedent, which holds that "notwithstanding" language does not override other statutes unless there is clear legislative intent to do so. *United States v. Novak*, 476 F.3d 1041, 1052 (9th Cir. 2007) (requiring clear indicia of an intent to override another statute's prohibitions, based on the plain text of the statute at issue).[19]

[19] Indeed, the FLPMA "notwithstanding" language cannot be read to sweep aside all other statutes that could apply to a land exchange, such as general environmental laws like NEPA.

Simplot's reliance on *Marcello v. Bonds*, 349 U.S. 302 (1955), is inapposite. Simplot Br. at 45-46. In *Marcello*, the Court found a clear indication that the subsequent statute was intended to supersede the procedures of an earlier statute, and, in fact, Congress had enacted a law to that effect, overruling a Supreme Court decision.

Likewise, Simplot's reliance on *National Coal Ass'n v. Hodel*, 617 F. Supp. 584 (D.D.C. 1985), Simplot Br. at 44, is unavailing. There, coal trade associations attempted to block a federal land exchange by arguing that the Mineral Leasing Act of 1920 (MLA), which does not allow an interstate carrier to acquire federal coal lands, similarly prohibited an interstate carrier from acquiring coal lands through a FLPMA exchange. *See National Coal Ass'n v. Hodel*, 825 F.2d 523, 525-26 (D.C. Cir. 1987). However, the MLA's restriction on coal leasing *contained an explicit exemption* for FLPMA exchanges. *Id.* at 528. Therefore, the court rejected the coal associations' arguments that the earlier law was implicitly incorporated into FLPMA. *Id.* FLPMA contains no such indicia of superseding the 1900 Act; it contains the opposite, in fact, in § 701(f).

Finally, Simplot relies on *Department of Homeland Security v. MacLean*, 574 U.S. 383 (2015), to argue the Court should ignore § 701(f) and any rule against implied repeals. Simplot Br. at 43-44. But that case discusses a scenario not applicable here. In *MacLean*, the Supreme Court held only statutes, not regulations,

created a prohibited act for purposes of the scope of protections under a whistleblower statute. Therefore, a statute giving the agency discretion to define prohibited acts and the whistleblower statute both continued to have effect, and the presumption against implied repeals "has no relevance" in that situation. 574 U.S. at 396-98. This case is far removed from FLPMA and has no bearing on whether FLPMA repealed, impliedly or otherwise, the 1900 Act.

D. Simplot's Alarmist Predictions of Ensuing "Havoc" Do Not and Cannot Compel a Different Result in this Case.

This case is about one portion of one statute—1900 Act § 5—involving only the Tribes' ceded lands; a holding in the Tribes' favor would affect *this* Exchange, not others. Simplot tries to broaden the issues to other statutes addressing other situations to suggest the Court's holding will have seismic consequences. Those statutes, however, despite being cession laws from the same era, are irrelevant to the matter at hand, and Simplot's arguments seem deliberately alarmist. Many of the allegedly similar cession laws cited by Simplot do not refer to the same disposal regimes, do not include a 160-acre limitation, and differ sufficiently from Section 5 such that affirmance of the district court may not impact those laws. SimplotAdd. 30-64.

Moreover, Simplot's parade of horribles must give way to the plain language of the 1900 Act, because courts must follow the law as written. *McGirt v. Oklahoma*, 140 S. Ct. at 2469. As the district court noted, the judicial branch cannot rewrite

statutes just to suit litigants disappointed by the outcome those statutes dictate. 1-FedER-22. FLPMA was drafted as a comprehensive statutory scheme to create a new retention policy for public lands and the laws repealed or retained were carefully considered. *Supra* I.A.[20] Simplot's concerns, and Appellants' concerns generally that properly reading the statutes at issue means keeping ceded lands in federal ownership "in perpetuity," Fed. Br. at 2-3 & 31 n.5, are best addressed to Congress.[21]

Invalidating the Exchange should not be seen as a problematic result. It preserves the Tribes' exercise of off-reservation treaty rights consistent with the United States' trust obligations, *see infra*. Simplot may continue to operate its Don Plant by exploring alternative methods of waste disposal and contaminant reduction that do not further burden the Fort Hall Reservation, its members, and local residents. It may be "inconvenient" for Appellants to return to the drawing board to facilitate the continued operation of the Don Plant, 1-FedER-22, but it is the law.

"Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social

[20] Simplot goes so far as to argue—based on a pre-FLPMA case—that special rules apply to public land laws and that Congress may act without awareness of prior statutes, Simplot Br. at 39, even though, in developing FLPMA as a comprehensive overhaul, Congress carefully considered the statues to be repealed.

[21] Simplot claims that one Congress cannot bind future Congresses, Simplot Br. at 33, but no one argues it can. Congress can, of course amend or repeal the 1900 Act or amend FLPMA at any time.

problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Wis. Cent. Ltd.*, 585 U.S. at 284. The district court's 1900 Act holdings should be affirmed.

II. BLM's Approval of the Exchange Breached the United States' Trust Responsibility Owed to the Tribes, Created by the Fort Bridger Treaty of 1868, the 1898 Agreement, and the 1900 Act.

The 1898 Agreement and 1900 Act specifically name the Tribes and impose requirements for disposal of their ceded lands. With the Exchange, BLM disposed outright of the Tribes' ceded land by ignoring the plain requirements of the 1900 Act, which "approved the 1898 Agreement verbatim." *Swim*, 696 F.2d at 714. The 1898 Agreement, which in Art. IV refers to itself as a "treaty," was "accepted, ratified, and confirmed" by Congress in the 1900 Act and the two must be read together.[22] The 1900 Act and the 1898 Agreement establish treaty rights on the ceded lands together with specific statutory duties the United States must follow for disposal of the ceded lands and termination of the Tribes' treaty rights on those lands. Breach of these rights and duties therefore are the basis for a breach of trust claim.

In establishing a breach of trust, an Indian tribe "must establish, among other things, that the text of a treaty, statute, or regulation imposed certain duties on the United States." *Arizona v. Navajo Nation*, 599 U.S. 555, 563 (2023) (internal

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

citations omitted). Those duties need not, however, be specific to tribes; the trust responsibility requires "compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006).

The 1900 Act confirms the Tribes' off-reservation rights to timber, grazing, hunting, and fishing on the ceded lands and imposes specific land disposal obligations of the United States to preserve the Tribes' off-reservation usufructuary rights. This interpretation of the 1898 Agreement and 1900 Act is consistent with the Indian canon of statutory construction, namely, provisions in both treaty and non-treaty matters should be "construed liberally" in favor of the Indians. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). The 1900 Act and the 1898 Agreement created a specific federal trust duty regarding disposal of the Tribes' ceded lands subject to the Act. BLM's failure to adhere to the Act's requirements was a breach of trust.

Federal Appellants do not address the Tribes' breach of trust claim.[23] Simplot argues the Court cannot "fashion new duties for the government that appear nowhere in a statute or treaty." Simplot Br. at 49 (citing *Arizona v. Navajo Nation*). The Tribes

[23] They characterize the district court's opinion as addressing "four . . . conclusions adverse to [Federal Appellants]," Fed. Br. at 1, rather than five.

agree that case provides the legal standard for breach of trust claims and submit the 1900 Act supplies the relevant duties that were breached.

This Court should therefore affirm the district court's holding that, regardless of whether the 1900 Act is read as imposing a specific duty restricting the means of removing lands from the public domain or as a generally applicable law, the government breached its trust responsibility. 1-FedER-17.

III. BLM Failed to Consider Simplot's Intended Use for the Property, Thereby Violating FLPMA's Valuation Requirements.

Even if the Exchange was consistent with the 1900 Act, BLM's appraisal of the exchanged lands violated FLPMA's regulations. 43 C.F.R. § 2201.3-2(a)(1)-(2). Moreover, once a proper appraisal is performed, it will reveal that the difference in value between the exchanged lands vastly exceeds the 25% maximum set by FLPMA § 206(b) and 43 C.F.R. § 2201.6(b), rendering the Exchange invalid.

The appraisal did not consider Simplot's planned use for the federal land as an industrial waste site for the Don Plant, which was a fatal flaw. Instead, the appraisal determined the "highest and best use" of the federal land, *id*. § 2201.3-2(a)(1), was "continued agricultural and recreational uses, wildlife habitat, watershed[,] with speculative investment potential," 2-FedER-275, despite widespread knowledge of Simplot's intended and astronomically more lucrative use for the land. The appraisal noted the property's appeal "to an adjacent property

owner for expansion and investment purposes," *id.*, which, if it implied Simplot, was merely a "vague gesture to Simplot's intentions" that did not "meaningfully consider" the intended use of the land. 1-FedER-31. The appraisal instead valued the lands by assessing "properties with minimal development potential" largely used for agriculture, 1-FedER-257, and did not consider comparables with an industrial waste site or anything similar.

Under FLPMA, land to be exchanged must be appraised at market value, "as if in private ownership and available for sale in the open market," considering its "highest and best use." 43 C.F.R. § 2201.3-2(a)(1)-(2). The "highest and best use" means the "most probable legal use of a property, based on market evidence as of the date of valuation." *Id.* § 2200.0-5(k). Market value is based on "a competitive and open market under all conditions requisite to a fair sale, where the buyer and seller each acts prudently and knowledgeably, and the price is not affected by undue influence." *Id.* § 2200.0-5(n). Market value determinations should conform to the UAS. 43 C.F.R. § 2201.3.[24] The UAS requires the appraisal to consider "reasonably probable" uses of the land as part of the "highest and best use" determination, UAS 4.3.1, noting "the nonfederal party's proposed use may well be a feasible highest and best use that must be considered." UAS 4.10. at 186.

[24] The Appraisal Foundation, Uniform Appraisal Standards for Federal Land Acquisitions (2016), http://www.usdoj.gov/enrd/land-ack/.

Ninth Circuit caselaw confirms that the project proponent's intended use should be considered even if that entity has a unique ability to implement that use, contrary to Federal Appellants' assertions, Fed. Br. at 33-35. For example, in *Desert Citizens* the project proponent sought the property at issue for use as a landfill. Because the property was surrounded by the project proponent's existing land, no one could compete for the project, leading the district court to conclude the intended use should not be considered. *See* 231 F.3d at 1180. The Ninth Circuit reversed, finding the appraisal should have considered the value of the land as a landfill, even though it was unlikely any competing landfill proposals existed. *Id.* at 1181-82.[25] *See also National Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1063 (9th Cir. 2010) (an appraisal finding "the 'highest and best use' of the public lands in question was 'holding for speculative investment'" was insufficient because it did not discuss the project proponent's landfill proposal).

The district court was therefore correct to find the appraisal here violated FLPMA by not considering the probable use of the land as an industrial waste site: the very purpose of the land exchange. 1-FedER-31-32; *Desert Citizens*, 231 F.3d at

[25] The Ninth Circuit noted that other landfills were proposed for the *region*. *Id.* Similarly here, there are other industrial waste facilities in the region, such as Bayer's phosphate operation-related waste disposal sites in Soda Springs, Idaho and Republic Services Company's waste disposal facility in Grand View, Idaho. On remand, BLM should evaluate whether recent sales of these types of parcels could be considered comparables for the Exchange.

1184 ("the use of the land as a landfill was not only reasonable, but it was also the specific intent of the exchange that it be used for that purpose."); *accord National Parks*, 606 F.3d at 1066-1069. Simplot and BLM have been planning for almost 30 years to allow a gypstack on the property. 1-FedER-12, 32-33.

Appellants attempt to distinguish *Desert Citizens* and *National Parks*, arguing that a single market player cannot affect market demand. Fed. Br. at 35-38; Simplot Br. at 60-62; *see also id*. at 52 (suggesting the district court required the value of the land to be equated to "the value attached to it by a single prospective acquirer"). These arguments twist the court's reasoning. The court explains the appraisal violated FLPMA because the value of the land to Simplot affected the *overall* market value, 1-FedER-34 ("the fact that the land here is uniquely valuable to Simplot must be considered in the appraisal because it profoundly affects the most basic underpinnings of market value: supply and demand."). The court thus found being "willfully blind" to this value was arbitrary and capricious because it ignored an important aspect of the problem. 1-FedER-35.

While the UAS (4.10. at 186) states that "neither an existing federal use nor a nonfederal party's proposed use can be considered unless there is competitive demand for that use in the private market," *see* Fed. Br. at 34, the UAS and the cases it cites draw a fine-grained distinction between the permissible consideration of a proposed use as evidence of market demand and the impermissible consideration in

condemnation cases of values unique to the project proponent that do not inform market value. UAS 4.3.2.2., 4.10. at 186-187. As *Desert Citizens* explains, "The inquiry in a condemnation case is 'just compensation' and not simply 'market value.'" 231 F.3d at 1183. However, "[w]hile seeking payment from the condemnor because of a particular value of the property to the condemnor generally is not allowed, establishing the highest and best use by reference to the condemnor's proposed use generally is permitted." *Id*. at 1183, n. 13. Here, Simplot's demand for the property has existed for 30 years and has inevitably shaped market demand and value. Simplot's discussion of principles and cases applicable to condemnations that do not consider this distinction are inapposite. *See* Simplot Br. at 54-57.[26]

Indeed, as Federal Appellants acknowledge, market demand for land can be created by market pressures from a major market participant—like Simplot—who affects the relevant market for a property by generating speculation:

> Sometimes a single market participant can influence real estate prices even if that market participant is the only one who would use the land

[26] Federal Appellants argue that Simplot's proposed use could not be considered because the presumptive zoning of the land was agricultural, Fed. Br. at 19, 36-37, but, as discussed in *Desert Citizens*: "if a proposed use is reasonable and not merely speculative or conjectural, an element of risk is an insufficient basis upon which to exclude that use from consideration. The case law is replete with examples of highest and best uses for which various contingencies must occur prior to their effectuation." 231 F.3d at 1184. The EIS acknowledges that it is reasonably foreseeable that Simplot would receive the permits needed to build its industrial waste site on the property. *E.g.*, 3-FedER-388.

> for a particular proposed use—since the presence of that participant may generate market speculation from others.

Fed. Br. at 37. Accordingly, the *Desert Citizens* court noted that private sellers would be aware of the project proponent's proposed use of the land and this awareness could affect market prices. 231 F.3d at 1183 n.14 ("A private owner . . . would certainly take into consideration the value of the land to the proposed buyer. No private seller would be willing to transfer his land to [the project proponent] for the "open-space" price of $350 an acre knowing that [the project proponent] stood to reap substantial profits from the use of the property as a landfill. A private seller would, at the very least, want his property appraised for use as a landfill before selling it.").

The appraisal for the Exchange did not adequately factor these considerations into the appraisal. The market value of a property should be based on the existing business or wants of the community and "all of the uses for which a property is suitable." UAS 4.2.1.4.; *see also* UAS 4.3.2.2. (market demand may be shown based on preliminary discussions with the relevant businesses who could occupy the land). The appraisal acknowledged the wrong speculative possibility to explain "[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." 2-FedER-275 (emphasis added). This conclusion seems to equate the potential for recreation and other uses with investment speculation, without

acknowledging Simplot's need for the land as a driver of its market value. The district court identified this fundamental flaw. 1-FedER-31-32. As a result, "the comparables used in the appraisal are not actually comparable." 1-FedER-34.

Appellants have not established that the purpose of FLPMA's exchange provisions and valuation regulations is to give an industrial owner a windfall, as happened here. In fact, FLPMA and its regulations seem designed to avoid this possibility by requiring equal values and limiting cash equalization payments to 25% of the value of federal lands. FLPMA § 206(b); 43 C.F.R. § 2201.6(b). A proper appraisal will show an exponential increase in the federal land's value, considering Simplot's assertions that the land was needed to keep the Don Plant—a multi-million dollar-phosphate processing facility—operating for another 65 years. 3-FedER-429. Once this appraisal is conducted, the Exchange undoubtedly will be rejected for exceeding the 25% differential. [27]

Finally, the Court should reject Appellants' suggestions that the Tribes failed to preserve their valuation argument. Federal Appellants assert the Tribes

[27] The following statistics in the EIS provide a ballpark sense of how much the land could be worth: the Don Plant and related facilities pay $3,916,306 in real property and personal taxes. 3-FedER-517. Moreover, construction of the reasonably foreseeable actions—the gypstacks and cooling ponds—under the proposed action is estimated to provide 3,763 jobs and $172 million in labor income. 3-FedER-520. Although extra-record, Forbes.com estimates Simplot's 2020 revenues at approximately $6 billion. https://www.forbes.com/companies/jr-simplot/?sh=6734d39724ce.

"developed no meaningful argument" that BLM undervalued the property or at most gave the argument a "short presentation," Fed. Br. at 32-33, and Simplot goes farther and claims the Tribes' valuation argument should "not have been entertained at all." Simplot Br. at 52 (citing a case where the Ninth Circuit declined to address an argument that was made for the first time in a reply brief on appeal).

The Tribes in fact raised valuation arguments in comments on the EIS, 2-FedER-156 ("Valuations should include value of the land sought as being available for industrial use"), and in their briefs to the court below, 2-FedER-60-62 (summary judgment reply); 2-FedER-66-67 (summary judgment opening brief). The Tribes also discussed these valuation deficiencies at oral argument and referred to FLPMA's 25% maximum equalization requirement. *See* 2-SimplotER-90-92 (consideration of industrial use and 25% maximum equalization payment), 2-SimplotER-150-52 (consideration of industrial use).

Even if the Tribes had not raised these issues, FLPMA mandates the valuation requirements and BLM acknowledged its duty to comply in its ROD, 2-FedER-130-131, obviating any need for the Tribes to preserve the issue. As the Ninth Circuit has explained, "[t]he agency . . . bears the primary responsibility to ensure that it complies with [the law]," particularly if "the agency ha[d] independent knowledge of the issues that concern petitioners." *Barnes v. U.S. Dep't of Transp.*, 655 F.3d

1124, 1132 (9th Cir. 2011); *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1093 (9th Cir. 2006).[28]

The district court's holding that BLM's appraisal violated FLPMA's valuation requirements should be upheld.

IV. BLM Omitted Cultural Resources from its Public Interest Determination, Making that Determination Arbitrary and Capricious.

FLPMA authorizes BLM to approve land exchanges only when it determines "the public interest will be well served." 43 U.S.C. § 1716(a). FLPMA's regulations provide more detail: BLM "must find that: (1) The resource values and the public objectives that the Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the resource values of the non-Federal lands or interests and the public objectives they could serve if acquired." 43 C.F.R. § 2200.0-6(b). "Cultural resources" is listed as a factor that "shall" be weighed in the public interest determination. *Id*.

BLM recognized the need for a balancing test, *see* 2-FedER-126 ("resource values and the public objectives served by the lands to be acquired outweigh those of the lands to be conveyed"), 2-FedER-130 ("net benefit"), but BLM failed to

[28] Moreover, it is "longstanding precedent" that the Court may "affirm a ruling on any ground supported by the record, even if that ground is not asserted by the appellee." *Ctr. for Investigative Reporting*, 14 F.4th at 943 (Bumatay, J., dissenting) (citing *Angle v. United States*, 709 F.2d at 573).

balance protection of cultural resources in its public interest determination in the ROD. 2-FedER-126-130.

For example, while the ROD mentioned "exercise of tribal treaty rights," 2-FedER-127, it did not consider the cultural significance of the land exchanged. As the district court found, 1-FedER-28, the ROD did not weigh the "'great intrinsic value [that the Tribes place on] the Federal lands offered for exchange" or the fact that although the newly obtained lands "may support the same general activities as the Federal land . . . the non-Federal lands likely do not contain the same tribal significance as the Federal lands."' (citing and quoting the EIS). *Id.* Instead, BLM implied the parcels are fungible as to treaty rights exercise. 2-FedER-127 (describing a "net gain of 113 acres of lands available for exercise of off reservation tribal treaty rights."). The ROD also did not discuss the likely disturbance of burial grounds.

The ROD, not the EIS, is the reviewable decision document for FLPMA purposes. 2-FedER-139. By not explicitly discussing how it balanced *all* the required factors, BLM failed to reasonably explain its decision and to comply with FLPMA. 1-FedER-27-28. While an agency may, in some circumstances, consider a relevant EIS when making a public interest determination, as BLM did here, agencies must explain their reliance on an EIS and must do so in the context of the balancing required by FLPMA. As a result, because the ROD "listed many advantages and disadvantages of the land exchange," 1-FedER-27, but failed to explain how it

weighed all the public interest factors, the district court could not review BLM's "black box decision-making process." 1-FedER-28.

An implied reference to a discussion in the EIS does not discharge BLM's responsibility to conduct a public interest determination with a sufficient balancing of the factors. BLM did not appropriately acknowledge, discuss, or balance protection of cultural resources in making its public interest determination. Agency discretion is not unfettered. As the district court explained, even under a deferential standard, "The public interest finding is arbitrary and capricious if BLM fails to consider any mandatory factors or to make the necessary determinations." 1-FedER-25. *See also* 1-FedER-28 ("BLM's failure to weigh these considerations—which the EIS indicated are significant—in the ROD gives the Court no basis to review the public interest determination.")

None of Appellants' arguments alters this conclusion. In short, Appellants argue that by referencing the more thorough analysis in the EIS, the ROD adequately balanced the necessary factors. Fed. Br. at 41; Simplot Br. at 63. For example, Simplot contends reference to the EIS was sufficient because "[n]either FLPMA nor any implementing regulation specifies the procedural vehicle through which the Bureau must make a public-interest determination. See 43 U.S.C. § 1716(a); 43 C.F.R. § 2200.0-6(b)." Simplot Br. at 64-65. But the statute and regulation Simplot cites require BLM to balance the required factors to make a public interest

determination. The purpose of an EIS is different, to take a "hard look" at the environmental impacts of a proposed action, but no balancing of factors is required. NEPA is a purely procedural statute. Thus, while BLM may have considered the FLPMA factors in the EIS under NEPA, it did not balance them and the EIS cannot substitute for the ROD. 1-FedER-27.

Appellants likewise argue that the Court should uphold a decision of "less than ideal clarity," or simply find harmless error. Simplot Br. at 65; Fed. Br. at 43, 45-46. In support, Simplot cites two cases that allegedly require the Court to approve BLM's public interest determination. Simplot Br. at 65-66. Neither case, however, stands for the proposition that a court can conduct a public interest balancing of all the appropriate factors when BLM does not do so.

In *Greer Coalition, Inc. v. U.S. Forest Service*, 470 F. App'x 630, 635 (9th Cir. 2012), the court approved the Forest Service's public interest determination even though it did not discuss impacts to wildlife or plants. Although the court's reasoning is cursory, it appears to have concluded that the agency properly discounted these impacts because the EIS found "[t]he proposed action would result in no negative effect on [threatened, endangered, or sensitive] plant and animal species and their habitat." *Id.* Thus, the court upheld the public interest determination not because it allowed the Forest Service to conduct the public interest determination

by reference to the EIS but because it found the EIS did not substantiate petitioners' concern.

Similarly, in *National Parks*, the Ninth Circuit upheld a public interest determination and reversed the district court where the lower court entirely ignored the analysis in the EIS as well as the public interest balancing performed during an appeal by the BLM's Interior Board of Land Appeals (IBLA). 606 F.3d at 1065, 1069; *see also id.* at 1080-81 (dissent quoting the public interest balancing performed by the IBLA). The court found the IBLA decision, not the ROD, was the final decision subject to review.

Finally, contrary to Federal Appellants' arguments, Fed. Br. at 45, it was not harmless error for BLM to fail to make a full public interest determination. Courts must ensure that agencies engage in "reasoned decisionmaking" and assess whether a decision was "based on a consideration of the relevant factors." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (internal citations omitted). A court may review only "the grounds that the agency invoked when it took the action." *Id.* at 1907-1908 (internal citations omitted). If the explanation is inadequate, as it was here, a court may not do the agency's work but instead must remand the decision to the agency. *Id.* BLM must be held accountable to the public to show its work and explain itself. Because it failed to balance all the appropriate public interest factors in its ROD, the district court's holding must be affirmed.

V. The District Court Correctly Found the EIS was Deficient Because It Failed to Consider Simplot's Preliminary Design Plans and Improperly Assumed Effective Enforcement.

The district court found BLM's EIS was deficient for two related reasons. First, BLM failed to consider detailed information regarding significant environmental impacts from Simplot's preliminary design plans and locations for the cooling ponds and gypstack under Alternative B, even though that information was known at the time BLM prepared the EIS. 1-FedER-39-40 (citing the EIS, 5-SimplotER-740). Second, BLM's reliance on other agencies' enforcement of applicable laws did not cure this failure, in light of record evidence that, even with over 30 years of enforcement efforts, Simplot still has not "completely addressed existing contamination or met agreed-upon goals to reduce phosphorous concentrations in the Portneuf River." 1-FedER-41 (citations and quotations omitted). As the district court held, "[a]t a minimum, NEPA required BLM to analyze the past efficacy of enforcement before relying on the other agencies." *Id*.

NEPA requires federal agencies to "assess the environmental impact of proposed actions that 'significantly affect[ ] the quality of the human environment.'" *WildEarth Guardians v. Provencio*, 923 F.3d 655, 668 (9th Cir. 2019) (quoting 42 U.S.C. § 4332(C)). Rather than conducting this hard look, BLM avoided it.

First, Simplot provided conceptual locations for its expanded gypstack and cooling ponds under Alternative B, along with preliminary conceptual design plans

for that alternative, *see* EIS App. E (5-SimplotER-929-1012), which BLM should have analyzed. At the least, the EIS should have included updated information on the options that Simplot was studying based on the shift to Alternative B, 5-SimplotER-959, rather than waving off any responsibility because the facilities would be on private land after the Exchange took place.

General statements about possible effects and risks do not constitute the hard look required by NEPA without an explanation for why the agency could not supply more definitive information. *Or. Nat. Desert Ass'n v. Rose*, 921 F.3d 1185, 1191 (9th Cir. 2019); *Te-Moak Tribe of W. Shoshone of Nevada v. U.S.*, 608 F.3d 592, 602 (9th Cir. 2010). Agencies also may not "postpone analysis of an environmental consequence to the last possible moment"; they must consider impacts "as soon as it can reasonably be done." *Kern v. BLM*, 284 F.3d 1062, 1072 (9th Cir. 2002).

Simplot contends the district court erred when it ordered BLM to consider Simplot's existing design options as part of the EIS because it is for the agency, not the court, to determine the "degree of detail" required as part of its "broad discretion to engage in reasonable forecasting." Simplot Br. at 70 (citation omitted). Simplot conveniently ignores that no forecasting was required here: the court found BLM failed to evaluate the *existing* preliminary design plans and locations. 1-FedER-40.

It also was not a valid excuse that implementation of the plans would take place after the Exchange, when BLM "would no longer have authority to impose or

enforce mitigation requirements" because the Federal lands would have been conveyed to Simplot. 3-FedER-525. BLM violated NEPA by failing to consider possible Simplot activities simply because they would be undertaken by a private entity. *See* 40 C.F.R. § 1508.7 (defining "cumulative impact" as including the activities of a "person" in addition to those of federal agencies); *see also Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1993), *as amended on denial of reh'g* (July 5, 1994) (rejecting an argument that a federal agency did not need to analyze impacts from non-Federal actions because it could not control them as inconsistent with 40 C.F.R. § 1508.7, "which specifically requires such analysis.").

Future regulatory processes in any event do not discharge present NEPA duties to consider significant environmental impacts. *See Blackrock I*, at *11-12 (IDEQ and EPA agreements to oversee the gypstack construction did not substitute for the NEPA requirement to "consider detailed information concerning significant environmental impacts"); *S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (rejecting argument that "impacts need not be evaluated because the [] facility operates pursuant to a state permit under the Clean Air Act").

Second, BLM's error was magnified by its reliance on future compliance with applicable regulations and consent orders regarding the gypstack and cooling ponds, in light of the agencies' past ineffective enforcement and Simplot's past compliance

history. In evaluating the impacts of the Exchange in the EIS, BLM determined it could rely on oversight from IDEQ and EPA, and "assume[d] that the transferred lands will be managed in conformance with all applicable statutes, regulations, and rules governing the actions and/or inactions of private local, State, tribal, and Federal interests that acquire jurisdiction in some capacity over said lands." 3-FedER-384. Although in many cases, like those cited in Simplot Br. at 71-72, such reliance may be appropriate, that proposition holds only in the absence of evidence questioning that reliance. *See, e.g.*, *City & Cnty. of San Francisco v. United States*, 615 F.2d 498, 501 (9th Cir. 1980) ("[T]he Review Panel stated its decision not to require an EIS was based on assurances that plans for the reopening of the Hunters Point facility had in fact been 'well-coordinated with the City of San Francisco.' The City did not dispute this assertion in the district court and has not done so in this court, although it would be uniquely situated to know if the problem had in fact gone uncorrected.").

No such reliance is appropriate here, where there is a legitimate objection that enforcement has not been effective in addressing past contamination. *See, e.g.*, *Gulf Restoration Network v. Haaland*, 47 F.4th 795, 803 (D.C. Cir. 2022) (an agency may not assume effective enforcement when credible evidence undercuts that assumption); *N.M.. v. BLM*, 565 F.3d 683, 715 (10th Cir. 2009) ("Contravening the inference that existing protections are always 100% effective, the record contains

evidence that, despite this regulatory scheme, [] contamination . . . has happened frequently throughout New Mexico in the past.").

Federal Appellants argue that Simplot's history of work under consent decrees and settlements makes this case "clearly distinguishable from *Gulf Restoration Network*." Fed. Br. at 48. *See also id.* 48-50; Simplot Br. at 72-73. Simplot also contends that "[p]rivate litigants' post hoc critiques of regulators' work cannot overcome the presumption of regularity without rendering it a dead letter." Simplot Br. at 73. But in making these arguments, Appellants do not address the facts of this case: although EPA and IDEQ have both brought enforcement actions against Simplot, the company has failed to completely address existing contamination, including failing to meet agreed-upon goals to reduce phosphorous concentrations in the Portneuf River. 2-FedER-165-67. Indeed, although extra record, just last year EPA lodged a new proposed consent decree under the Clean Air Act, CERCLA, RCRA, and the Emergency Planning and Community Right to Know Act regarding Simplot's additional violations of federal environmental laws. 88 Fed. Reg. 47907 (July 25, 2023).[29] The district court rightly found BLM's EIS deficient for failure to

[29] On March 20, 2024, EPA moved the U.S. District Court for Idaho to approve and enter the proposed consent decree (CD). *U.S. v. J.R. Simplot Co*., No. 1:23-00322-DCN, ECF No. 10. The CD requires Simplot to build cooling ponds to address fluoride emissions and provides that if the outcome of this litigation makes it "infeasible" to construct the ponds, Simplot may, subject to EPA's approval, implement an alternative fluoride reduction plan to minimize cooling tower fluoride emissions to the greatest extent practicable. *See* CD ¶¶ 30-34. It seems unlikely

grapple with these realities, and for asserting instead that the transferred lands will be managed in conformance with all applicable laws. 1-FedER-40.

BLM cannot justify its refusal to evaluate the environmental impacts of Simplot's proposed design options by assuming that future compliance efforts will be effective, given BLM's knowledge of those options and of the challenges Simplot has already faced. "It is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now." *Env't Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006). The district court's conclusion that the EIS was deficient should therefore be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court and remand to that court for entry of a just remedy.

Simplot will need to claim infeasibility, however, because it no longer plans to use the acquired land for cooling ponds; rather, it plans to build a cooling pond on its existing land. 2-SimplotER-176-177.

Date: April 5, 2024

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STATEMENT OF RELATED CASES

Case Nos. 23-35544 and 23-35543 are related as they both arise out of the same underlying interlocutory order.

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s): 23-35543 and 23-35544

I am the attorney or self-represented party.

This brief contains 14,396 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

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☐ complies with the word limit of Cir. R. 32-1.
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/s/ Jill Elise Grant
Jill Elise Grant
Dated: April 5, 2024

ADDENDUM

Except for the following, all applicable statutes, etc., are contained in the brief or addenda of Appellants the United States and Defendant-Intervenor-Appellant Simplot.

Index

43 U.S.C. § 1701(a)-(b)

§1701. Congressional declaration of policy

(a) The Congress declares that it is the policy of the United States that-

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

(3) public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive action or statute before October 21, 1976, be reviewed in accordance with the provisions of this Act;

(4) the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action;

(5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

(6) judicial review of public land adjudication decisions be provided by law;

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

(9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;

(10) uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

(13) the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

(b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

43 U.S.C. § 1715(a)

§1715. Acquisitions of public lands and access over non-Federal lands to National Forest System units

(a) Authorization and limitations on authority of Secretary of the Interior and Secretary of Agriculture

Notwithstanding any other provisions of law, the Secretary, with respect to the public lands and the Secretary of Agriculture, with respect to the acquisition of access over non-Federal lands to units of the National Forest System, are authorized to acquire pursuant to this Act by purchase, exchange, donation, or eminent domain, lands or interests therein: Provided, That with respect to the public lands, the Secretary may exercise the power of eminent domain only if necessary to secure access to public lands, and then only if the lands so acquired are confined to as narrow a corridor as is necessary to serve such purpose. Nothing in this subsection shall be construed as expanding or limiting the authority of the Secretary of Agriculture to acquire land by eminent domain within the boundaries of units of the National Forest System.

. . . .

43 C.F.R. § 2200.0-5(k)
§ 2200.0–5 Definitions.

. . . .

(k) Highest and best use means the most probable legal use of a property, based on market evidence as of the date of valuation, expressed in an appraiser's supported opinion.

. . . .

43 C.F.R. § 2201.6(b)

§ 2201.6 Value equalization; cash equalization waiver.

. . . .

(b) The combined amount of any cash equalization payment and/or the amount of adjustments agreed to as compensation for costs under §2201.1–3 of this part may not exceed 25 percent of the value of the Federal lands to be conveyed.

. . . .