

No. 23-35543

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**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, ET AL.,

*Defendants-Appellant,*

AND

J.R. SIMPLOT COMPANY,

*Defendant-Intervenor-Appellant.*

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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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**SHOSHONE-BANNOCK TRIBES' RESPONSE TO APPELLANT'S  
PETITION FOR REHEARING EN BANC**

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## INTRODUCTION

In 2020, the U.S. Department of the Interior’s Bureau of Land Management (BLM) approved a land exchange (Exchange) with J.R. Simplot Company (Simplot). Op. 9. The Exchange was designed to provide land for Simplot to expand a phosphogypsum stack (gypstack), a mountain of hazardous waste coming from Simplot’s phosphate-processing facility (Don Plant), which is part of a Superfund site on and adjacent to the Shoshone-Bannock Tribes’ (Tribes) Fort Hall Reservation (Reservation). *Id.* 8-9; 1-FedER-9-10.<sup>1</sup> The Exchange moves land on which the Tribes exercised off-Reservation treaty rights into the hands of Simplot. Op. 13, 32. Simplot’s Don Plant and its gypstack have contaminated land, water, and air since the 1940s. 1-FedER-9-11.

The district court and, on interlocutory appeal, a divided Ninth Circuit panel held the Exchange was unlawful because: (1) it violated the site-specific Act of June 6, 1900, 31 Stat. 672 (1900 Act), which requires the United States to follow certain procedures when it disposes of land formerly within the Reservation, including the land at issue here; and (2) the 1900 Act was not repealed or superseded by the

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<sup>1</sup> Citations to filings in Federal Appellants’ Docket 23-35543 include “Fed” e.g., “FedER.” Those to Simplot’s filings in Docket 23-35544 include “Simplot.” The Tribes’ filings are the same in both dockets.

Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2743 (1976) (FLPMA), a general land law. Op. 12-36.<sup>2</sup>

Simplot petitions for panel rehearing, but without a separate argument supporting its request. Both appellants seek rehearing en banc claiming a “question[] of exceptional importance” under Fed. R. App. P. 40(b)(2)(D). Federal Appellants frame this question as “whether Congress’s adoption of uniform procedures for the disposal of public lands in FLPMA can be limited by an earlier statute.” Fed. Pet. 2. Simplot additionally claims the national importance of its fertilizer production. Simplot Pet. 21. But this case, while important to the Tribes, does not raise any exceptional questions; it follows long-standing principles of statutory construction and “is limited to this particular exchange.” Op. 34.

Simplot’s petition for rehearing en banc also relies on Fed. R. App. P. 40(b)(2)(B)-(C), alleging conflicts with a Supreme Court and a D.C. Circuit decision. However, Simplot misreads those decisions, ignores long-standing Supreme Court precedent, and attempts to manufacture a circuit split when Simplot previously argued this case raised a matter of first impression (and obtained certification from the district court on that basis). This case rests on a straightforward

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<sup>2</sup> Judge Bumatay dissented, writing that although the 1900 Act remains good law and despite its restrictions, it and FLPMA are “complementary grants of authority to dispose of land [so BLM] could follow either.” Op. 45; *see* Op. 37-60.

application of the law on statutory interpretation and does not warrant rehearing, either by the panel or en banc.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Simplot has pursued this Exchange for 30 years to expand its gypstack onto more land adjacent to the Reservation. Op. 8-9 & n.3. The Exchange, and resulting gypstack expansion, might be the cheapest but is not the only way for Simplot to dispose of its phosphogypsum waste. 1-FedER-42; 3-FedER-404; Tribes Answering Br. (Tribes Br.) 6.

The Exchange would perpetuate the legacy of contamination the Tribes have endured. The U.S. Environmental Protection Agency (EPA) detected contamination from the Don Plant and the gypstack—which contains arsenic, heavy metals, and radionuclides—as many as 40 years ago and listed it as part of a Superfund site in 1990. Tribes Br. 4-5. An initial attempt at an exchange ended because EPA’s decision specifying cleanup requirements was pending. *Shoshone-Bannock Tribes of the Fort Hall Rsrv. v. U.S. Dep’t of Interior*, No. 4:10-CV-004-BLW, 2011 WL 1743656, at \*3 (D. Idaho May 3, 2011 (Blackrock I)). Since the Superfund listing and continuing through today, Simplot has been subject to multiple consent orders to address violations at its facility under the Comprehensive Environmental Response, Compensation, and Liability Act, the Clean Air Act, and Idaho’s fluoride-in-forage standards. Tribes Br. 5-6. The gypstack has continued to contaminate air,

groundwater, soil, and vegetation on and around the site, including on the Reservation, and will do so long after the gypstack closes. *Id.*

The second iteration of the exchange was overturned in 2011 for failure to comply with the National Environmental Policy Act. Op. 9 n.3. The current Exchange was invalidated by the district court for failure to comply with the 1900 Act and other laws not addressed by the Opinion, including violations of FLPMA’s land-exchange requirements. *Id.* 11; 1-FedER-23-35. The district court requested briefing on remedy, but Simplot petitioned the court to certify an interlocutory appeal. The court obliged, finding “[t]he interplay between the 1900 Act and FLPMA was a controlling question of law,” Op. 11, and this appeal followed.

In August 2025, after merits briefing and supplemental briefing, a divided panel held the Exchange was unlawful because it failed to comply with the 1900 Act and FLPMA did not repeal or supersede that Act. *Id.* 12-36. Simplot petitioned for panel rehearing and rehearing en banc and Federal Appellants petitioned only for rehearing en banc.

### **PETITION STANDARDS**

Petitions for panel rehearing must state “with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended” and “argue in support of the petition.” Fed. R. App. P. 40(b)(1). “The purpose of petitions for rehearing, by and large, is to ensure that the panel properly considered all relevant

information in rendering its decision.” *Armster v. U.S. Dist. Court for Cent. Dist.*, 806 F.2d 1347, 1356 (9th Cir. 1986). They are “not a vehicle for a party to ‘study and reargue his case anew.’” *United States v. Mageno*, 786 F.3d 768, 775 (9th Cir. 2015) (citation omitted).

Rehearing en banc “is not favored and ordinarily will be allowed only if one of the criteria in Rule 40(b)(2)(A)-(D) is met.” Fed. R. App. P. 40(c); *Kipp v. Davis*, 986 F.3d 1281, 1285 (9th Cir. 2021) (Paez, J., concurring).

## ARGUMENT

### **I. Rehearing is Not Warranted Because the Panel Decision “Properly Considered All Relevant Information” and Applied Established Principles of Statutory Construction in Finding the Exchange was Barred.**

“The 1900 Act specifies categories of laws under which the ceded Fort Hall lands can be ‘disposed’ (. . . including by sale or exchange) to private parties.” Op. 6. Specifically, Section 5 of the 1900 Act mandates the 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; Op. 12.<sup>3</sup> As the Opinion explained, the word “only” made the listed laws exclusive, FLPMA is not such a law, and “the expansion of a phosphogypsum waste facility. . . is not a purpose that would be encompassed

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<sup>3</sup> Section 5 contains other limitations the Opinion did not address. Op. 12 n.7.

within [those] categories of laws.” Op. 12-13. Therefore, the Exchange was unlawful under the “plain text” of the 1900 Act. Op. 12.

The Opinion then addressed the impact of FLPMA on the 1900 Act. Relying on Supreme Court precedent on statutory interpretation, the Opinion held FLPMA “does not repeal or supersede the 1900 Act’s restrictions on disposal.” Op. 18; *id.* 18-30. When enacting FLPMA, Congress undertook an exhaustive review of public land laws and, in FLPMA, explicitly repealed hundreds of them. Op. 19, 23. Notably, FLPMA explicitly repealed the Act of May 19, 1926, ch. 337, 44 Stat. 566 (1926 Act), which addressed disposal of the Fort Hall ceded lands, but FLPMA did not repeal the 1900 Act. FLPMA § 703(a)(6), 90 Stat. at 2789.<sup>4</sup> FLPMA clearly states, moreover, “[n]othing in this Act shall be deemed to repeal any existing law by implication.” FLPMA § 701(f) (Note), 90 Stat. at 2786, consistent with the strong presumption against implied repeals. *See* Op. 10, 19-20 & n.9.

Further, the Opinion applied the related interpretive principle: “a statute dealing with a narrow, precise, and specific subject,” like the 1900 Act, “is not submerged by a later enacted statute covering a more generalized spectrum,” like FLPMA. Op. 23-24 (relying on *Radzanower v. Touche Ross & Co.*, 426 U.S. 148,

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<sup>4</sup> The 1926 Act was intended to apply the isolated tracts laws to the “ceded lands of the Fort Hall Indian Reservation,” as stated in the Act’s title and text, and it referred to “the law opening the lands to homestead entry,” namely, the 1900 Act. Congress therefore must have been aware of the 1900 Act but declined to repeal it. *See* Tribes Supp. Br. 5-6.

153 (1976), *Morton v. Mancari*, 417 U.S. 535, 550 (1974), and *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 663 (2007)).

Next, the Opinion held if any ambiguity exists as to whether FLPMA impliedly repealed or superseded the 1900 Act, it “must be resolved by the Indian canons of construction,” particularly the clear-statement canon, because treaty rights are at stake and any federal statute that abrogates tribal treaty rights must do so explicitly. Op. 30-33.

Finally, the Opinion rejected the dissent’s argument, Op. 48-49, that requiring a clear statement causes the 1900 Act to bind future Congresses who might seek to amend the 1900 Act or FLPMA. As the majority explained, the 1900 Act, as interpreted, does not bind future Congresses. Op. 34-35. Moreover, “the Supreme Court has long applied the clear statement canons at issue . . . without questioning their legitimacy in light of the anti-entrenchment . . . or any other principle.” *Id.* 36 (collecting citations).

For all these reasons, the Opinion correctly held the 1900 Act prohibited the Exchange and FLPMA does not alter this conclusion.

## **II. Appellants Do Not Meet the Rule 40 Standards for Rehearing.**

### **A. Appellants Do Not Meet the Standards for Rehearing En Banc.**

#### **1. Federal Appellants Merely Disagree with the Opinion, Which Does Not Justify Rehearing En Banc.**

Federal Appellants argue the Opinion raises a question of “exceptional importance,” Fed. Pet. 8, addressed *infra* Section II.A.4, but do not identify any other Rule 40(b)(2) standards to support their petition. Instead more than half their brief simply re-argues their case, claiming the Opinion “wrongly held” the 1900 Act barred the Exchange and advancing arguments the panel already considered and rejected. Fed. Pet. 8, 8-14. Disagreement with a panel decision without meeting the required standards is not sufficient to justify rehearing en banc. *Kipp*, 986 F.3d at 1285; *Mitchell v. JCG Indus.*, 753 F.3d 695, 699 (7th Cir. 2014) (Posner, J., concurring). In any event, Federal Appellants’ arguments are misguided.

First, Federal Appellants repeat their merits arguments that FLPMA governs this Exchange regardless of the 1900 Act and that subsequent statutes from the early 1900s addressing the Fort Hall ceded lands support this interpretation. Fed. Pet. 10; Fed. Br. 26-27. The Opinion rejected these arguments, and even the dissent agreed the 1900 Act remains good law, Op. 41. FLPMA listed all the laws it amended or repealed and the 1900 Act is absent from those lists. Op. 19; *supra* Section I. The subsequent statutes, by adding land disposal authorities for the Fort Hall ceded lands, demonstrate that Congress knew how to amend the 1900 Act when it wanted. Op. 21.

Second, Federal Appellants adopt Simplot’s and the dissent’s argument that FLPMA’s repeal of the 1926 Act showed Congress intended FLPMA to address

lands covered by the 1900 Act. Fed. Pet. 11; Simplot Pet. 17. Yet, as the Opinion noted, Congress's decision to repeal the 1926 Act (but not the 1900 Act) "is insufficient to demonstrate Congress's intent to wholly repeal the 1900 Act's disposal restrictions." Op. 22. Indeed, Federal Appellants previously stated "the repeal of the 1926 Act has no bearing on the issues in this case." Fed. Supp. Br. 1. Federal Appellants do not explain their about-face. They cannot, because this repeal "reinforces the narrowness of [the Section 5] restrictions by eliminating one disposal option." Op. 22.

Third, Federal Appellants argue the Exchange could proceed under FLPMA without considering the 1900 Act's restrictions because this "harmonize[s]" the statutes "to avoid any tension." Fed. Pet. 12 (citing *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055, 1058-59 (9th Cir. 1988)); Fed. Br. 26. The Opinion rejected this argument also, explaining the two statutes can be harmonized not by finding FLPMA superseded the 1900 Act but, consistent with *Morton*, 417 U.S. at 550-51, because they apply to different sets of land and so can co-exist. Op. 27. *Blackfeet* is inapposite because, unlike here, the later statute there did not nullify the restrictions of the earlier one. Op. 27-28.

Fourth, Federal Appellants again argue "FLPMA is the direct successor of the categories of disposal methods listed in Section 5, and the exchange may therefore proceed under the terms of the 1900 Act itself." Fed. Pet. 12; Fed. Br. 23-27. They

invoke the reference canon to claim FLPMA stands in for the list of disposal methods in Section 5. Fed. Pet. 13-14. The 1900 Act did not, however, list all the available public land disposal statutes available at the time but “only” the listed laws and, as the Opinion explains, FLPMA’s scope extends beyond those categories of public land laws, meaning FLPMA cannot be the modern “reference” for the list. Op. 13-15, 28-30.<sup>5</sup>

In sum, the panel correctly rejected Federal Appellants’ arguments, and Federal Appellants have provided no reason why an en banc panel need readdress them.

## **2. The Opinion is Consistent with Supreme Court Authority.**

Simplot argues under Rule 40(b)(2)(B) that the Opinion conflicts with three lines of Supreme Court precedent, but the Opinion explains why there is no such conflict, addressing all Simplot’s arguments in the process. Adopting Simplot’s arguments would contravene the plain language of the 1900 Act and FLPMA § 701(f) and would conflict with the Supreme Court cases the Opinion followed to guide its statutory interpretation.

First, Simplot claims the Opinion created “needless [statutory] conflict” rather than reconciling the 1900 Act and FLPMA. Simplot Pet. 2, 11 (citing) *Epic Sys.*

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<sup>5</sup> Judge Bumatay was skeptical of the reference canon-based arguments. Oral Argument at 03:09-04:34 (Nov. 21, 2024), <https://www.youtube.com/watch?v=TzHGlrly-zQ>. His dissent does not address them.

*Corp. v. Lewis*, 584 U.S. 497 (2018, and *Conn. Nat’l Bank v. Germain*, 503 U.S. 249 (1992)), Simplot Br. 38-39. As explained in Section I, Simplot’s idea of how to reconcile the statutes—by nullifying the 1900 Act—was rejected throughout the Opinion. FLPMA and the 1900 Act cannot be reconciled without ignoring the 1900 Act, and to ignore it violates the presumption against implied repeals, including the principle that a narrowly tailored statute cannot be implicitly subsumed by a later, more general one. *Nat’l Ass’n of Home Builders*, 551 U.S. at 663; *Radzanower*, 426 U.S. at 153; Op. 19, 23-25.

Second, Simplot argues the Opinion is irreconcilable with *Dorsey v. United States*, 567 U.S. 260 (2012), because the Opinion “invented” an “express-cross-reference rule” and “read the 1900 Act *itself* to foreclose future statutes (including FLPMA) from conferring additional disposal authority.” Simplot Pet. 14-15; Simplot Br. 33. The Opinion applied no such rule and instead examined the texts of the two statutes to determine their interaction, *supra* Section I. It followed clear-statement canons which the Supreme Court “has long applied,” Op. 36 (citing examples), to resolve any possible ambiguity. *Id.* 30-36. Likewise, when the Opinion noted certain post-1900 statutes “specifically refer” to ceded Fort Hall lands, it was examining indicia of congressional intent, not creating a rule for subsequent Congresses. *Id.* 21; *contra* Simplot Pet. 15-16. Finally, unlike the statute in *Dorsey*, which read literally would have imposed additional procedures on subsequent

Congresses to effectuate a repeal, the 1900 Act “does not contain any [such] language.” Op. 35. Nothing prohibits any Congress from amending the 1900 Act or FLPMA. *Id.*

Third, Simplot argues the Opinion conflicts with *Herrera v. Wyoming*, 587 U.S. 329 (2019), regarding when the Indian clear-statement canon applies. Simplot Pet. 16-17. As an initial matter, the Opinion did not base its holding on the Indian canons but used them to bolster its holding regarding the “plain meaning” of the 1900 Act (“only”) and FLPMA § 701(f) (no implied repeals), noting “plain meaning” is sufficient under *McGirt v. Oklahoma*, 591 U.S. 894, 916 (2020). Op. 16; *see* Fed. Pet. 7 (the Court “purported to bolster its conclusion by invoking [the canons].”). The canons are triggered if, “[a]t most, it is ambiguous as to whether FLPMA” impliedly repealed the 1900 Act. Op. 18. The Opinion appropriately bolstered its conclusions with the Indian clear-statement canon because tribal treaty rights were at stake. The 1900 Act limited the methods for removing the ceded lands from the public domain, which makes them unavailable for the exercise of treaty rights, whereas FLPMA would expand those options. Op. 32.<sup>6</sup>

*Herrera* supports the use of the Indian clear-statement canon here: “[d]espite the conditional nature of the Crow Tribe’s usufructuary rights [which depended on

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<sup>6</sup> Federal Appellants discount the Indian canons because “there is no abrogation and no ambiguity to be resolved.” Fed. Pet. 14 (citing the dissent, Op. 55-58). This argument is incorrect, as discussed in the text.

federal ownership and the land’s “unoccupied” status], the Court still looked to whether Congress had expressly abrogated those treaty rights.” Op. 32-33. Simplot claims *Herrera* does not apply, presumably because the Exchange took the ceded lands out of federal ownership. Simplot Pet. 16-17. Yet, *Herrera* applied the canon to all lands originally subject to the treaty, without addressing whether they were “unoccupied” and thus treaty-protected. *Herrera*, 587 U.S. at 345, 352. Likewise here, because the lands covered by the 1900 Act are subject to treaty rights, the Indian clear-statement canon applies. Op. 32. Moreover, even if the canon did not apply, other Indian canons of construction which the Opinion did not reach would “appear to further require that we construe the 1900 Act in the Tribes’ favor.” *Id.* 33 n.13.

### **3. There is No Circuit Split.**

Next, Simplot argues the Opinion conflicts with *National Coal Association v. Hodel*, 825 F.2d 523 (D.C. Cir. 1987). Simplot Pet. 18; Rule 40(b)(2)(C). *Hodel* does not control this case, and was addressed throughout briefing. Simplot Br. 44 (citing the lower court opinion in *Hodel* without its appellate history); Tribes Br. 36; Simplot Reply 11-12. Moreover, Simplot previously acknowledged the interaction between the 1900 Act and FLPMA is a matter of first impression, unlike the situation in *Hodel*. E.g., Simplot Pet. Interloc. Appeal 14, No. 23-80059, Dkt. No. 1-2

(quoting approvingly the district court’s finding that “the interplay between the 1900 Act and FLPMA is a legal question of first impression”).

The Opinion does not conflict with *Hodel* and no judge on the panel cited it. *Hodel* involves an attempt to block a federal land exchange by arguing the Mineral Leasing Act of 1920 (MLA), which prohibits an interstate carrier from acquiring federal coal lands, similarly prohibits an interstate carrier from acquiring such lands through a FLPMA exchange. 825 F.2d at 525-26. However, the MLA’s restriction on coal leasing contained an explicit exemption for FLPMA exchanges. *Id.* at 528 (“After adoption of FLPMA . . . , Congress evidently realized . . . the MLA could raise doubts about the Secretary’s authority to exchange coal lands under [FLPMA]. Accordingly, Congress in 1978 amended [the MLA] to except such exchanges explicitly.”). Therefore, the court rejected appellants’ arguments that the MLA was implicitly incorporated into FLPMA. *Id.* FLPMA contains no similar statement of superseding the 1900 Act; it contains the opposite, in § 701(f).

In its petition, Simplot again cites dicta from *Hodel* regarding the “implausibility” of a conflict between FLPMA and the MLA even without the explicit carveout discussed above. Simplot Pet. 18. Even if the statement were not dicta, *Hodel* explains why—in contrast to FLPMA and the 1900 Act—the two disposal schemes plausibly coexist: the MLA allows easier-to-execute cash purchases “hedged with [MLA] restrictions” and FLPMA requires a

“circumscribed,” “approximately equal value” exchange of lands, meaning “Congress could naturally have seen these two features as obviating any need to subject the exchanges to the MLA restriction.” 825 F.2d at 527-28. To apply the *Hodel* dicta here would (1) contravene *Hodel*’s holding rejecting an argument that one statute was implicitly incorporated into another, and (2) ignore the corresponding purposes of the *Hodel* statutes, which animated its dicta and does not exist here.

#### **4. There is No Question of Exceptional Importance.**

Finally, both Federal Appellants and Simplot claim this case presents a question of exceptional importance. Fed. Pet. 14-18; Simplot Pet. 19-22. While this case is very important to the Tribes, it addresses the interaction between FLPMA and one portion of one statute—1900 Act Section 5—involving only the Tribes’ ceded lands. A holding in the Tribes’ favor affects this Exchange only. Tellingly, Federal Appellants’ arguments about the ramifications of the Opinion are speculative. *See* Fed. Pet. 2 (opinion “could potentially call into question”), *id.* 8 (its reasoning “could potentially be applied to any number of other statutes”); *id.* (“potential ramifications”); *id.* 17 (“could be sweeping”). For several reasons, appellants have not met their burden under Rule 40(b)(2)(D).

First, Federal Appellants argue “exceptional importance” because BLM cannot currently dispose of the Fort Hall ceded lands. Fed. Pet. 15. Congress made

this choice, not the panel. The Opinion notes: “The Mining Law of 1872 is. . . in effect but is currently subject to a moratorium under a separate statute. . . . FLPMA also left in place the Desert Lands Act of 1877,” which applies to the ceded lands. Op. 10 n.6. However, as Amicus NCAI noted, BLM stated in the relevant resource management plan that none of the ceded lands is appropriate for disposal under the Desert Lands Act. NCAI Br. 35-36.

Second, both appellants claim the impact of this case extends to other statutes and situations, suggesting the Opinion will have seismic consequences. Fed. Pet. 16-17; Simplot Pet. 20. Those statutes, however, address different disposal regimes, *see* Simplot Br. Add. 30-64 (citing allegedly similar cession laws), not 1900 Act Section 5, meaning the Opinion would not impact those laws. Tribes Br. 37.<sup>7</sup> Moreover, the Opinion considered and addressed these speculative policy concerns: “[o]ur holding is limited to this particular exchange.” Op. 34.

Third, Simplot argues this appeal is of exceptional importance because it “threatens the domestic economy and the national interest.” Simplot Pet. 21.<sup>8</sup> These

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<sup>7</sup> Federal Appellants acknowledge the 1888 statute they highlight could be distinguished from the 1900 Act “in application.” Fed. Pet. 16. Critically, neither appellant mentions that FLPMA explicitly repealed various statutes regarding disposal of other tribes’ ceded lands. Tribes Br. 23 n.8.

<sup>8</sup> Simplot’s description of the purported economic and labor impacts of the Exchange accurately cite Judge Bumatay’s opinion, Simplot Pet. 21, but the 3,763 jobs figure is an estimate of the labor needed for construction of the new gypstack and cooling ponds, not permanent employment at the plant (386 full-time workers in 2017). 3-FedER-520, 396. Also, the cooling ponds are unlikely to be built on the exchanged

alarmist statements ignore the flexibility Simplot has demonstrated since it began proposing an exchange in the mid-1990s. In 1996, Simplot predicted its gypstack would close in eight to ten years, which did not occur. *Blackrock I* at \*4. Moreover, even if Simplot cannot expand the gypstack, Simplot can continue to operate its Don Plant by exploring alternative methods of waste disposal and contaminant reduction that do not further burden the Reservation, Tribal members, and local residents. 1-FedER-42; 3-FedER-404; Tribes Br. 6. It may be “inconvenient” for Appellants to undertake additional effort to facilitate the continued operation of the Don Plant, 1-FedER-22, but inconvenience should not allow Simplot to manufacture a crisis. Further, the Don Plant is not the only domestic source of fertilizer, nor do such considerations “overcome the 1900 Act’s plain meaning,” Op. 33.<sup>9</sup>

Finally, Federal Appellants state, “[u]nder the broadest understanding of the majority’s approach” it “impos[es] a heightened burden on a future Congress in its exercise of legislative power.” Fed Pet. 17 (referencing dissent). This argument misconstrues the Opinion’s holding, as discussed in Section II.A.2. This case does not present a question of exceptional importance, notwithstanding Simplot’s hyperbole; on the contrary, it is a straightforward application of settled law on

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lands, contrary to the original Exchange design. 3-FedER-356; 2-SimplotER-176-177.

<sup>9</sup> Simplot also acknowledges it could “curtail” rather than end production once waste storage capacity is reached. Simplot Pet. 6.

statutory construction. *Kipp*, 986 F.3d at 1285 (“the application of settled legal standards” does not “constitute[] an appropriate case for rehearing en banc.”)

**B. Simplot Does Not Meet the Standard for Panel Rehearing.**

Federal Appellants do not petition for panel rehearing and Simplot does not address the standard for panel rehearing in its Rule 40 Statement or anywhere in its petition. Simplot does not identify any “point of law or fact that . . . the Court . . . overlooked.” Fed. R. App. P. 40(b)(1). Instead, Simplot restates its merits arguments, but “[a] petition for rehearing is not a vehicle for a party to ‘study and reargue his case anew.’” *Mageno*, 786 F.3d at 775.

**CONCLUSION**

For all the reasons above, panel rehearing and rehearing en banc should be denied.

Date: January 13, 2026

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**CERTIFICATE OF COMPLIANCE**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**Form 11. Certificate of Compliance for Petitions for Rehearing/Responses**

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

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is *(select one)*:

Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words: 4171.**

*(Petitions and responses must not exceed 4,200 words)*

**OR**

In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

**Signature** /s/ Jill Elise Grant **Date** January 13, 2026